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Water Law

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WATER LAW

by

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THIS article reviews judicial and legislative developments in the area of water law that occurred during the Survey period. The cases discussed address such topics as the Texas Open Beaches Act, water quality, governmental liability for public improvements, bridge construction on navigable waters, the administrative process and civil penalties, and condemnation and eminent domain.

I. CASE LAW

A. Texas Open Beaches Act

The most significant case law development during the Survey period occurred under the Texas Open Beaches Act.[1] Adopted in 1959, the Act enunciates the Texas public policy favoring unrestricted public access to beaches.[2] The Act contains measures that facilitate public access to both state owned wet sand areas and privately owned upland beaches that extend from the wet sand area to the vegetation line.[3] The Act expressly recognizes that the public may acquire an easement to use privately owned upland areas by dedication, prescription, or custom.[4] In addition the Act creates a presumption in favor of the existence of a public easement[5] in the area seaward of the vegetation line and provides ground rules for determining beach boundaries when the vegetation line is unclear[6] or has been artificially modified.[7]

Prior to 1986 the Act prompted only three appellate court decisions. *Seaway Co. v. Attorney General*[8] affirmed the public's right to an easement on

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1. TEX. NAT. RES. CODE ANN. §§ 61.011-.025 (Vernon 1978 & Supp. 1987).
2. *Id.* § 61.011.
3. *Id.* § 61.012.
4. *Id.* § 61.011.
5. *Id.* § 61.020.
6. *Id.* § 61.016.
7. *Id.* § 61.017.
8. 375 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ ref'd n.r.e.).

Galveston Island's East Beach on the basis of implied dedication and adverse possession. *Gulf Holding Corp. v. Brazoria County*[9] and *Moody v. White*[10] involved injunctions that required the removal of structures from the public beach.

The three cases decided by the courts of appeals under the Act in 1986, therefore, doubled the case law in the area. *Villa Nova Resort, Inc. v. State*[11] addressed the location of the public beach on South Padre Island. *Matcha v. Mattox*[12] and *Feinman v. State*[13] each arose from beach and vegetation line relocation on Galveston Island as a result of Hurricane Alicia in 1983.

In *Villa Nova* a resort hotel sought a declaratory judgment of its rights in a portion of its beachfront lot, located on the seaward side of its seawall, pursuant to section 61.019 of the Act. The provision authorizes a littoral owner[14] whose property rights are determined or affected by the Act to bring suit for a declaratory judgment against the state.[15] The court in *Villa Nova* addressed two issues: (1) whether a public easement existed to permit use of the beach without restriction by the upland owner; and (2) if a public easement did exist, the exact location of that easement.

Due to both natural conditions and commercial development, the location of the South Padre Island vegetation line is frequently difficult to identify. The court of appeals affirmed the trial court's finding that the line of vegetation was co-extensive with Villa Nova's existing seawall.[16] Since no clearly marked line of vegetation ran across the area in question, the court referred to section 61.016 of the Act to determine the location of the vegetation line. To ascertain the location of a vegetation line, section 61.016 requires a court to draw a line that will connect the nearest clearly marked lines of vegetation on each side of an unmarked area.[17] Applying the section 61.016 formula, the court of appeals found that evidence regarding the location of adjacent vegetation lines presented by two experts in the trial court was sufficient to support a finding that the existing seawall was generally co-extensive with a pre-existing line of sparse discontinuous vegetation.[18]

Relying on evidence presented in the trial court by fourteen witnesses concerning both their own use of the South Padre Island beaches and their observations of beach use by others, the court of appeals found that an

9. 497 S.W.2d 614 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).
10. 593 S.W.2d 372 (Tex. Civ. App.—Corpus Christi 1979, no writ).
11. 711 S.W.2d 120 (Tex. App.—Corpus Christi 1986, no writ).
12. 711 S.W.2d 95 (Tex. App.—Austin 1986, writ ref'd n.r.e.).
13. 717 S.W.2d 106 (Tex. App.—Houston [1st Dist.] 1986, no writ).
14. A "littoral owner" is the owner of land adjacent to the shore. TEX. NAT. RES. CODE ANN. § 61.001(4) (Vernon 1978).
15. *Id.* § 61.019.
16. 711 S.W.2d at 126.
17. TEX. NAT. RES. CODE ANN. § 61.016(a), (b) (Vernon 1978).
18. 711 S.W.2d at 127. Dr. Robert Morton, a research scientist at the University of Texas, utilized aerial photographs of South Padre Island taken in 1955 and 1962. Mr. Montemayor, a civil engineer and licensed land surveyor, prepared a plat using the methods set forth in § 61.016 of the Act. *Id.* at 126-27.

easement by prescription had been established.[19] The evidence demonstrated that the public had used the beaches of the entire island for various recreational purposes for more than ten years prior to the construction of Villa Nova. The court of appeals further ruled that evidence was sufficient to establish a right of use and easement by dedication.[20] The court considered Villa Nova's construction of the seawall, segregating the resort from the beach, sufficient to induce the public to believe that the owner intended to dedicate the area seaward of the wall to public use. The public's continued use of the seaward area following construction of the resort hotel and seawall evidenced the public's acceptance of the dedication. The court of appeals declined to address the trial court's finding of a public easement by custom.[21]

Finally, the court of appeals rejected Villa Nova's interpretation of sections 61.016 and 61.017 of the Act. Villa Nova maintained that a line 200 feet landward of mean low tide constitutes the landward boundary of an area subject to public easement where no clearly marked line of vegetation exists. The court of appeals agreed that if it were impossible to determine the location of any vegetation line, section 61.016(c) might indicate an easement boundary 200 feet inland of the low tide line.[22] Evidence presented in the trial court, however, did identify a sparse vegetation line, rendering section 61.016(c) inapplicable.[23] The court asserted that the 200-foot inland line described in section 61.017(b) applied only in instances in which the vegetation line was obliterated or artificially modified.[24] The court stated that the 200-foot line established the boundary of the public easement contingent upon a final court adjudication that established the line in another place.[25] According to the court of appeals, the trial court had correctly established the vegetation line in another place, at Villa Nova's existing seawall.[26]

The two other appellate court cases decided during the Survey period focused on the effect of sudden shifts in the vegetation line caused by a natural disaster. In *Matcha v. Mattox*[27] the Austin court of appeals affirmed the judgment of the trial court that prohibited Matcha from reconstructing and landscaping his Galveston beach house following Hurricane Alicia in August 1983. Hurricane damage moved the natural line of vegetation inland.

19. *Id.* An easement by prescription is obtained by proving the elements of adverse possession: "(1) possession of the land; (2) use or enjoyment of it; (3) an adverse or hostile claim; (4) an inclusive dominion over the area and appropriation of it for public use and benefit; and, (5) for more than the ten year statutory period." *Id.* at 127 (citing Moody v. White, 593 S.W.2d 372, 377 (Tex. Civ. App.—Corpus Christi 1979, no writ)).

20. 711 S.W.2d at 128. "The elements of implied dedication are: (1) the landowner induced the belief that he intended to dedicate the area in question to public use; (2) the landowner was competent to do so, i.e., had fee simple title; (3) the public relied on the acts of the landowner and will be served by the dedication; and (4) there was an offer and acceptance of the dedication." *Id.* (citing Lindner v. Hill, 691 S.W.2d 590, 592 (Tex. 1985)).

21. 711 S.W.2d at 128.

22. *Id.*

23. *Id.* at 129-30.

24. *Id.* at 129.

25. *Id.* (quoting TEX. NAT. RES. CODE ANN. § 61.017(b) (Vernon 1978)).

26. *Id.* at 129.

27. 711 S.W.2d 95 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

As a result, Matcha's dwelling, previously inland from the vegetation line, was located seaward of the natural line of vegetation. The attorney general asserted that the public's common law right of use and easement moved inland with the vegetation line, thus rendering Matcha's home an illegal obstruction of the public easement.

The appellate court's decision is significant in three regards. First, *Matcha* was the first case expressly to recognize a public easement by custom under the Open Beaches Act.[28] Second, it recognized a rolling or migrating easement that follows relocation of the shoreline or vegetation line or both.[29] Finally, the court of appeals ruled that a prior judgment identifying the location of a public easement does not preclude the possibility of subsequent relocation under the doctrine of changed circumstances.[30]

Although the trial court recognized the public's right of use upon the bases of dedication, prescription, and custom, the court of appeals affirmed solely upon the basis of custom. The court of appeals recognized that the doctrine of easement by custom was an established concept in Texas courts.[31] Pursuant to the easement by custom theory, the court found sufficient proof existed to support the trial court's conclusion that the public had acquired an easement over the beach by custom.[32]

In affirming the trial court's conclusion that the public had acquired an easement that migrated with the landward and seaward movement of the beaches, the court of appeals noted that the law has often recognized the concept of migrating property rights in situations involving land bordering on a body of water.[33] For example, the line between the state's submerged property and private beach front property is marked by the line at mean high tide, a transitory boundary that moves landward or seaward as the beach moves.[34] Similarly, erosion and accretion along a river may create migrating easements[35] and property lines.[36] A significant factor in the court's decision was the particular compatibility of a migrating public easement with the doctrine of custom.[37] The public use, which established the custom, must fluctuate with a movement of the beach. The court stated that

28. *Id.* at 99.
29. *Id.* at 99-100.
30. *Id.* at 100.
31. *Id.* at 98-99. The court mentioned two cases in which the doctrine had been acknowledged and approved although the cases were disposed of on other grounds. *Id.* City of Galveston v. Menard, 23 Tex. 349, 408 (1859); Moody v. White, 593 S.W.2d 372, 379 (Tex. Civ. App.—Corpus Christi 1979, no writ).
32. 711 S.W.2d at 99. The evidence included a passage from DYER, THE EARLY HISTORY OF TEXAS 59 (1916), in which it was noted that the public had used Galveston's beaches for travel as early as 1836, as well as the testimony and recollections of various witnesses in Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ ref'd n.r.e.).
33. 711 S.W.2d at 99.
34. *Id.*; *see also* State v. Balli, 144 Tex. 195, 274, 190 S.W.2d 71, 100 (1944); City of Corpus Christi v. Davis, 622 S.W.2d 640, 642 (Tex. App.—Austin 1981, writ ref'd n.r.e.).
35. *See* Nonken v. Bexar County, 221 S.W.2d 370, 374 (Tex. Civ. App.—San Antonio 1949, writ ref'd n.r.e.).
36. 711 S.W.2d at 99.
37. *Id.* at 100.

to require an easement to be fixed in place while the beach moves could result in a submerged easement or one left far inland, either of which would be useless to the public. Applying static property concepts to this situation, therefore, would totally defeat the purposes of such an easement.[38]

Finally, the court overruled Matcha's allegation of res judicata based on prior Open Beaches Act litigation. Reasoning that vegetation lines are constantly changing, the court of appeals applied the doctrine of changed circumstances to resolve the res judicata issue. Under the doctrine, the court determined that matters subject to change like the location of a vegetation line cannot be finally adjudicated, but are always open to relitigation.[39]

On facts similar to *Matcha*, the Houston court of appeals in *Feinman v. State*[40] affirmed the trial court's finding that the public had acquired by implied dedication an easement in Galveston's West Beach. The court of appeals also ruled that the easement was a rolling easement that moved with the vegetation line, and that the line of vegetation had moved inward following Hurricane Alicia. Feinman had sought a declaration from the trial court that the pre-Alicia vegetation line continued to establish the landward boundary of the public's easement. The court of appeals upheld the trial court's finding that the concept of a rolling or migratory easement is consistent with, and implicit in, the Open Beaches Act.[41]

Alternatively, Feinman argued that Hurricane Alicia had obliterated the vegetation line. He claimed, therefore, that the court must reconstruct the vegetation line using the methods set out in section 61.016 of the Act. The court of appeals rejected Feinman's argument and affirmed the trial court's conclusion that, rather than being obliterated, the line of vegetation had move landward following the hurricane.[42]

B. Water Quality

In *Jackson County Vacuum Truck Service, Inc. v. Lavaca-Navidad River Authority*[43] the Corpus Christi court of appeals recognized that the inspection authority of local governments under Chapter 26 of the Texas Water Code extends to facilities involved in oil and gas production, even though the Railroad Commission of Texas (TRRC) is given exclusive regulatory authority over such facilities by Texas Water Code section 26.131.[44]

The Jackson County Vacuum Truck Service (the company) operated an injection well in Jackson County that disposed of salt water produced during oil and gas drilling operations. The Lavaca-Navidad River Authority (LNRA), a local governmental agency with jurisdiction over Jackson County, attempted to enter land that the company owned to inspect for

38. *Id.*
39. *Id.* (citing Franklin v. Rainey, 556 S.W.2d 583, 585 (Tex. Civ. App.—Dallas 1977, no writ)).
40. 717 S.W.2d 106 (Tex. App.—Houston [1st Dist.] 1986, no writ).
41. *Id.* at 111.
42. *Id.* at 114.
43. 701 S.W.2d 12 (Tex. App.—Corpus Christi 1985, writ ref'd).
44. *See* TEX. WATER CODE ANN. § 26.131 (Vernon Pam. Supp. 1987).

water pollution. The company denied LNRA access to the property. LNRA subsequently brought suit seeking a declaratory judgment of its right to enter and inspect the company's land and civil penalities for denial of access. The Texas Department of Water Resources (TDWR) intervened on the side of LNRA.

Provisions in the Texas Water Code grant TDWR and local government authorities the right to enter and inspect private land for possible water pollution. TDWR's inspection authority is set forth in section 26.014 of the Water Code.[45] Identical inspection authority for local governments is set forth in Water Code section 26.173(a).[46]

The court of appeals found the company's argument that section 26.131 of the Water Code delegates sole responsibility for monitoring water quality on oil and gas lands to TRRC inconsistent with the remainder of chapter 26 of the Water Code.[47] Instead, the court adopted the position advanced by TRRC in its amicus curiae brief.[48] Under the TRRC interpretation of the Water Code, TRRC, LNRA, and TDWR have concurrent authority to inspect private and public lands, including oil and gas lands, for water pollution. Concurrent agency jurisdiction ceases, however, if upon inspection TDWR or a local government authority determines that water pollution is a result of the production of oil, gas, or other geothermal resources. Once such a determination is made, TDWR and local government authorities must yield to the enforcement authority of TRRC.[49]

In addition, the company contested the authority of LNRA to bring suit to recover civil penalties for denial of access. The court rejected the company's argument, stating that it would be absurd for the legislature to grant local governments a right to enter and inspect land without any means to enforce that right.[50] Accordingly, the court ruled that the authority of local governments to bring suit under section 26.124 for violation of the Water Code provisions includes the right to bring suit for violation of their statutory right to enter and inspect property.[51]

On September 17, 1986, the Dallas court of appeals withdrew its opinion issued January 1, 1986, in *City of Lucas v. North Texas Municipal Utility District* and substituted a new opinion.[52] The court of appeals reversed the trial court judgment and remanded the case for further proceedings. Arising in the context of a regional sewage treatment project, the case is of fundamental importance for many intergovernmental regulatory relationships.

The North Texas Municipal Water District and four cities[53] sought to construct and operate a wastewater treatment project on a 403-acre tract of

45. *Id.* § 26.014.
46. *Id.* § 26.173(a).
47. 701 S.W.2d at 13.
48. *Id.* at 14.
49. *See* TEX. WATER CODE ANN. § 26.131 (Vernon Pam. Supp. 1987).
50. 701 S.W.2d at 14.
51. *Id.*
52. No. 05-85-00399-CV (Tex. App.—Dallas, Sept. 17, 1986, writ requested) (not yet reported).
53. The four cities were the cities of Plano, Richardson, Allen, and McKinney, Texas.

land in Collin County. Although the tract was located partially within the corporate limits of the city of Lucas and partly within the city's extraterritorial jurisdiction, the main treatment plant was to be built on 75 acres located wholly within the city's extraterritorial jurisdiction.[54] The wastewater treatment plan provided that sewage be brought into the plant through 60-inch interceptor lines that would pass through the city's corporate limits.

The city sued to enjoin the water district from constructing and operating the plant without obtaining consent from the city or complying with applicable city ordinances. The trial court rendered judgment against the city, ruling that the water district's enabling legislation[55] (the District Act) permitted the water district to construct and operate sewage treatment facilities without regard to the city's ordinances or its consent.[56] The court of appeals reversed the judgment of the trial court and remanded the cause for further proceedings.[57]

The court of appeals first addressed the construction of the District Act. The District Act authorizes the water district to construct and operate sewage treatment facilities[58] and provides that the District Act is controlling in the event of any conflict or inconsistency between the District Act and other provisions of law.[59] The court held that reasonable regulations designed to promote the health and safety of the city's residents rather than to prevent the construction and operation of the treatment plant were consistent with the District Act.[60] As a result, the water district was compelled to comply with applicable city ordinances.[61] In contrast, the court refused to require the water district to obtain city consent prior to the construction and operation of the plant, deeming such a prerequisite in conflict with the provisions of the District Act.[62]

The city argued that article 1015 of the civil statutes[63] and section 26 .177(b)(5) of the Water Code[64] granted it authority to regulate activities within the city's extraterritorial jurisdiction. The court conceded that article 1015 authorized the city to adopt ordinances designed to protect the public water supply, but ruled that the provision was inapplicable to the instant case because the city had no public water supply.[65] The court similarly

54. No. 05-85-00399-CV, slip op. at 2 n.1. The extraterritorial jurisdiction of the city of Lucas consists of all the contiguous unincorporated areas, not a part of any other city within one-half mile of the corporate limits of the city. TEX. REV. CIV. STAT. ANN. art. 970a, § 3.A(1) (Vernon 1963).

55. Act of Apr. 20, 1951, ch. 62, 1951 Tex. Gen. Laws 96, *amended by* Act of Apr. 30, 1975, ch. 90, 1975 Tex. Gen. Laws 238.

56. *Id.* § 27(a).

57. No. 05-85-00399-CV, slip op. at 27.

58. Act of Apr. 30, 1975, ch. 90, § 27(a), 1975 Tex. Gen. Laws 238.

59. *Id.* § 27(*l*) at 24.

60. No. 05-85-00399-CV, slip op. at 8.

61. *See* LUCAS, TEX., CODE §§ 3-11 to -17, 6-25, 8-1 to -22, 9-1 to -6 (1985).

62. No. 05-85-00399-CV, slip op. at 9.

63. TEX. REV. CIV. STAT. ANN. art. 1015, § 30 (Vernon 1963).

64. TEX. WATER CODE ANN. § 26.177(b)(5) (Vernon Pam. Supp. 1987).

65. On December 19, 1986, the Dallas court of appeals issued a supplemental opinion in *City of Lucas*. No. 05-85-0039-CV (Tex. App.—Dallas, Dec. 19, 1986). The court agreed to reconsider its ruling interpreting TEX. REV. CIV. STAT. ANN. art. 1015 (Vernon 1963). The

dismissed the applicability of section 26.177(b)(5) of the Water Code. Section 26.177(b)(5) authorizes a city to enact pollution control ordinances that are enforceable within both its corporate limits and its extraterritorial jurisdiction. City ordinances adopted pursuant to section 26.177(b)(5) must seek to control water pollution derived from generalized discharges of waste and not traceable to a specific source.[66] Since the water district's wastewater treatment plant constituted a specific source of water pollution, the court ruled that section 26.177(b)(5) of the Water Code was inapplicable.[67]

The court agreed with the city that article 970a[68] authorizes the city to extend the applicability of its subdivision control ordinances to its extraterritorial jurisdiction. The court found that the 75-acre sewage treatment plant construction site would lie wholly within the city's extraterritorial jurisdiction. The court further found that the water district planned to fence in the plant and to supply utilities to the plant.[69] Relying on the standard for subdivision of property proposed by the Corpus Christi court of appeals,[70] the court determined that by earmarking a tract of land for development and by physically fencing off a portion of that land, the water district had subdivided that portion of its property located within the city's extraterritorial jurisdiction.[71] As a result the court of appeals held that the water district was subject to the city's subdivision control ordinances.[72]

In *Helbing v. Texas Department of Water Resources*[73] a rancher appealed an agency order authorizing the discharge of treated sewage into a West Texas draw. Both the district and appellate courts affirmed the agency action. Helbing challenged the Water Commission's determination that the wastewater discharges would comply with receiving water quality standards,[74] and would not degrade the quality of state waters. Although the case presented potentially troubling issues concerning the application of water quality standards to a normally dry watercourse, the court declined to confront such issues directly. Instead it admitted that many Water Commis-

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court found that, when a city enters into a contract with a district to supply water to the city's residents, that water constitutes a public water supply. No. 05-85-0039-CV, slip op. at 9 (citing TEX. REV. CIV. STAT. ANN. art. 1109e (Vernon Pam. Supp. 1987)). In this case, because the city had such a contract with the water district, the court found that article 1015 was applicable. *Id.* Accordingly, the court authorized the city to apply regulations designed to protect the city's water supply to its extra-territorial jurisdiction. The court enumerated those ordinances and sections of the city's code that it found unenforceable against the water district as a matter of law. *Id.* at 4-5, 7-8, 13. Generally, the court found that any ordinances or sections that attempt to limit the water district's right to construct or maintain the plant, rather than to regulate the manner of such construction and operation, would be enforceable as a matter of law. *Id.* at 4.

66. No. 05-85-00399-CV, slip op. at 12.

67. *Id.*

68. TEX. REV. CIV. STAT. ANN. art. 970a, § 4 (Vernon 1963).

69. No. 05-85-00399-CV, slip op. at 13-14.

70. City of Weslaco v. Carpenter, 694 S.W.2d 601, 603 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

71. No. 05-85-00399-CV, slip op. at 14.

72. *Id.* at 12-13.

73. 713 S.W.2d 134 (Tex. App.—Austin 1986, no writ).

74. Tx. Water Dev. Bd., 31 TEX. ADMIN. CODE §§ 333.11-.21 (Apr. 1, 1985) (Area Water Quality Management).

sion regulations are inappropriate when "applied to the gullies and arroyos in the dry and stony lands of West Texas,"[75] and dealt with Helbing's complaint concerning the degradation of water quality as a substantial evidence question.

Helbing asserted a second argument that nothing in the Commission record demonstrated that the discharge permit complied with the federal "anti-backsliding" requirement.[76] The court of appeals held that the language of the regulation clearly applied only to permit renewals and thus was inapplicable in this case in which the discharge permit was issued for a new treatment plant at a new location and was not a renewal of a previous permit.[77]

A recent suit under the Texas Solid Waste Disposal Act[78] will have direct bearing upon suits for civil penalties for water quality violations under Chapter 26 of the Texas Water Code.[79] In *State v. city of Greenville*[80] the State of Texas appealed a judgment in which the trial court assessed less than the minimum statutory penalty against the city of Greenville for the city's failure to provide an adequate final cover at its municipal solid waste disposal site. The Dallas court of appeals reversed the trial court's judgment, which imposed a $5,000 fine on the city, and substituted its judgment assessing the city a fine of $100 per day of violation, or $141,900, the minimum fine provided by the statute.

The civil penalty provision of the Solid Waste Disposal Act provides that any person who violates the Act or a rule of the Department of Health "is subject to a civil penalty of not less than $100.00 nor more than $25,000.00 for each act of violation and for each day of violation, as the court may deem proper . . . ."[81] The court of appeals held that "is subject to," as used in section 8(a)(2), is mandatory language and that the legislature intended every violator to pay a civil penalty within the range stated in the statute.[82] The court further held that the phrase "as the court may deem proper" grants a court the discretion to determine the amount of penalty to be assessed within the range given, not the discretion to determine whether to assess the fine at all.[83]

C. Governmental Liability

1. Sewage Treatment Plant Operation

In Texas the operation of a sewage treatment plant is a governmental

75. 713 S.W.2d at 135 n.1.

76. *Id.* at 137; *see* 40 C.F.R. § 122.44 (*l*) (1). The federal provision requires that renewed or reissued National Pollutant Discharge Elimination System (NPDES) permits contain conditions at least as stringent as the conditions contained in the previous permit. *Id.*

77. 713 S.W.2d at 137.

78. TEX. REV. CIV. STAT. ANN. art. 4477-7 (Vernon 1976 & Supp. 1987).

79. TEX. WATER CODE ANN. §§ 26.122, .123 (Vernon Pam. Supp. 1987) (civil penalty of not less than $50 nor more than $10,000 may be assessed per violation per day).

80. No. 05-86-00352-CV (Tex. App.—Dallas, Sept. 30, 1986, writ requested) (not yet reported).

81. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8(a)(2) (Vernon Supp. 1987).

82. No. 05-86-00352-CV, slip op. at 26.

83. *Id.* at 27.

function.[84] Consequently, municipalities are exempt from damages caused through negligent operation of sewage treatment facilities.[85] Municipalities, however, may not damage downstream property owners with impunity. The Texas Constitution prevents the taking or damaging of property for public use without compensation.[86] During the Survey period two different appellate courts had to grapple with this conflict and reached similar conclusions. Under slightly different theories, each court concluded that operation of a municipality's sewage treatment plant had, over time, caused sufficient damage to the downstream property owner to amount to a taking that required compensation.

In *City of Uvalde v. Crow*[87] the owner of a greyhound breeding facility sued the city of Uvalde to recover damage caused by contaminated water from the city's sewage treatment plant. Crow alleged that several of his dogs had died after exposure to the polluted water. The trial court found for Crow, and the Texarkana court of appeals affirmed. The court held that the city was liable under the so-called nuisance exception to the governmental immunity rule found in article I, section 17, of the Texas Constitution.[88]

To be considered a nuisance, a condition must unlawfully invade the property or rights of others in some manner that is inherent in the thing or condition itself and does not arise merely from its negligent or improper use.[89] The court cited several cases for the proposition that a city-owned plant that emits smoke or odors, or dumps polluted water or refuse onto another's land, is a nuisance.[90] Accordingly, the court found that the evidence presented to the trial court was legally sufficient to support a finding of nuisance rather than negligence.[91]

The Tyler court of appeals handled a similar suit in *Abbott v. City of Kaufman*.[92] The appellate court rejected the trial court's conclusion that, because the construction and operation of a sewage treatment plant is a governmental function, the city was immune from liability. The landowners

84. Gotcher v. City of Farmersville, 137 Tex. 12, 14, 151 S.W.2d 565, 566 (1941).

85. City of Texarkana v. Taylor, 490 S.W.2d 191, 192 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

86. *See* TEX. CONST. art. I, § 17. "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." *Id.*

87. 713 S.W.2d 154 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

88. TEX. CONST. art. I, § 17.

89. 713 S.W.2d at 156 (citing Gotcher v. City of Farmersville, 137 Tex. 12, 14-15, 151 S.W.2d 565, 566 (1941); Stein v. Highland Park I.S.D., 540 S.W.2d 551, 553 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.)).

90. *See, e.g.*, City of Abilene v. Downs, 367 S.W.2d 153, 159 (Tex. 1963) (obnoxious fumes from city sewage disposal plant constitutes a nuisance) (contains comprehensive discussion of case law in this area); City of Fort Worth v. Crawford, 74 Tex. 404, 406, 12 S.W. 52, 54 (1889) (city's disposal of garbage and dead animals on private farm land constitute a nuisance); City of Abilene v. Bailey, 345 S.W.2d 540, 544 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.) (nuisance found where odors and insects cast on adjoining land by city-owned sewage disposal plant caused reduction in property value).

91. 713 S.W.2d at 157. Ironically, reliance on the nuisance doctrine, while excluding negligence, forces the court to impose liability for the nonnegligent operation of the sewage plant, while considering negligent operation protected by governmental immunity.

92. 717 S.W.2d 927 (Tex. App.—Tyler 1986, no writ).

alleged that the persistent flooding of their lands with sewage had created a nuisance resulting in a taking of their property without compensation in violation of article I, section 17, of the Texas Constitution.[93] The court accepted the plaintiff's theory of the case and summarily rejected the city's argument that any damage must have been due to negligent plant operation. The court observed that the "nature and persistence of the city's acts . . . [were] fully as consistent with intentional conduct as with negligence."[94] The opinion provides a good summary of prior cases in the area.

2. *Damage Due to Flooding*

In *Abbott v. City of Princeton*[95] the Dallas court of appeals denied municipal immunity for the taking or damaging of property as a result of flooding due to street construction.[96] The city of Princeton raised an expired statute of limitations as one of its primary defenses. According to facts alleged, flooding began more than ten years prior to the litigation. Since a cause of action for permanent damages to the land due to flooding accrued with the first actionable injury and expired two years thereafter, the court denied recovery for permanent damages.[97] The court ruled that the Abbotts, however, could recover for those temporary injuries incurred due to sporadic flooding contingent upon an irregular force such as rain that occurred within two years prior to filing suit.[98] The court further ruled that limitations did not bar the plaintiff's suit to abate a continuing nuisance.[99]

Abbott raised a claim under section 11.086(a) of the Texas Water Code, which prevents any person from diverting the natural flow of surface water in a manner that damages another's property.[100] The city asserted that section 11.086(a) was inapplicable, citing a prior case that held a city was not a person within the meaning of the predecessor statute to section 11.086(a).[101] Recognizing that the water control statutes have since been codified, the court of appeals reached a contrary conclusion.[102] The Code Construction Act[103] defines the word "person" to include a "government or governmental subdivision or agency."[104] The court concluded, therefore, that municipalities were necessarily within the scope of section 11.086(a) of the Water Code.[105]

Finally, the city contended that, because the plaintiff's property value had

93. *See id.* at 930-32.
94. *Id.* at 930.
95. 721 S.W.2d 872 (Tex. App.—Dallas 1986, writ requested).
96. *Id.* at 874.
97. *Id.* at 875 (citing Bayouth v. Lion Club Oil Co., 671 S.W.2d 867, 868 (Tex. 1984)).
98. *Id.*
99. *Id.*
100. TEX. WATER CODE ANN. § 11.086(a) (Vernon Pam. Supp. 1987).
101. 721 S.W.2d at 875-76 (citing City of Houston v. Renault, 431 S.W.2d 322, 324 (Tex. 1968)).
102. *Id.* at 876.
103. *See* TEX. GOV'T CODE ANN. §§ 311.001-.0032 (Vernon Pam. 1987).
104. *Id.* § 311.005(2).
105. 721 S.W.2d at 876.

appreciated during the period at issue, Abbott had sustained no damage.[106] The court rejected the city's argument, holding that an appreciation in value of the land over a period of time does not preclude the possibility that the city reduced the land value below what it would have been absent such acts.[107]

D. Navigable Waters/Bridges

In *Trice v. State*[108] the State of Texas sued to remove a bridge constructed across the Brazos River without its permission. Pursuant to Natural Resources Code section 11.077,[109] the state alleged that it owned the bed and bottom of the river and that, because the bridge obstructed river navigation, the bridge constituted " a trespass, a purpresture, and a public nuisance."[110] Trice, the bridge's builder, responded that he had constructed the bridge under the authority of a general permit issued by the Army Corps of Engineers, and, therefore, the supremacy clause of the U.S. Constitution[111] had preempted the state's regulatory scheme and eliminated the need for Trice to obtain state permission.

The district court entered judgment in favor of the state, ordering Trice to remove the bridge, restore the bed and bottom of the river, pay damages for the value of sand and gravel that had been removed, and pay the state's attorney's fees. The Waco court of appeals affirmed.[112] In overruling Trice's venue objections, the court of appeals found that the suit fell within the ambit of section 11.077 of the Natural Resources Code, as a suit concerning state land "occupied, or claimed adversely to the state."[113] The injunctive aspect of the suit, therefore, did not govern venue.[114]

Trice claimed an affirmative right to build his bridge under the "nationwide permit" that the Corps of Engineers had issued pursuant to section 404 of the Clean Water Act, to authorize the discharge of dredged or fill material into the navigable waters of the United States.[115] The court of appeals held that Trice could not rely on the permit and that the Clean Water Act neither expressly nor impliedly authorizes the Corps of Engineers to grant permits

106. *Id.*

107. *Id.*

108. 712 S.W.2d 842 (Tex. App.—Waco 1986, writ ref'd n.r.e.).

109. TEX. NAT. RES. CODE ANN. § 11.077 (Vernon 1978).

110. 712 S.W.2d at 844. "A 'purpresture' is an encroachment upon public rights and easements or the appropriation to private use of that which belongs to the public." *Id.* at 844 n.2 (citing Hill Farm, Inc. v. Hill County, 436 S.W.2d 320, 321 (Tex. 1969)).

111. U.S. CONST. art. VI, cl. 2.

112. 712 S.W.2d at 853.

113. TEX. NAT. RES. CODE ANN. § 11.077 (Vernon 1978).

114. *See* TEX. CIV. PRAC. & REM. CODE § 65.023 (Vernon 1986). Trice contended that the suit was primarily one for injunctive relief so that article 4656, currently § 65.023, controlled venue. According to Trice, therefore, the suit could be heard in the county of his domicile rather than the county in which the land was located, as required by § 11.078 of the Natural Resources Code.

115. 712 S.W.2d at 847. The Clean Water Act is codified at 33 U.S.C.A. § 1344 (West 1986).

for the construction of bridges.[116]

The court similarly rejected Trice's contention that the supremacy clause nullified the state's authority regarding navigable waters. The court indicated that reconciling state and federal regulatory schemes is more appropriate than construing a conflict between them.[117] Under the federal regulatory scheme an individual may erect a bridge across a river after obtaining the proper permit. According to the court, however, the existence of the federal scheme does not mandate that the state establish a similar permit scheme. Rather, the federal regulatory scheme can be reasonably interpreted to make bridge construction contingent upon concurrent or joint assent on the part of the state.[118]

The court also held that the state was entitled to a directed verdict on the issue of whether Trice's bridge constituted a purpresture.[119] The court reasoned that, because Trice built a structure that occupied a river bed and bottom on land owned by the state without receiving permission from the state to do so, the builder had erected a purpresture.[120]

The court of appeals rejected the state's contempt action arising from Trice's use of the bridge during the pendency of the appeal. Since the trial court's temporary injunction expired upon the trial court's entry of judgment rather than upon final resolution of the suit, the injunction did not provide a basis for contempt during the appeal.[121]

E. Condemnation and Eminent Domain

During the Survey period Texas courts of appeals defined the rights of municipalities and corporations to condemn property to facilitate the construction and maintenance of sewer systems. In *Ratcliff v. City of Keller*[122] the Fort Worth court of appeals affirmed the judgment of the district court denying a temporary injunction. The court of appeals held that a public improvement such as a storm sewer is a public use of the land, even though the sewer may serve a development owned by only one person.[123] The city, therefore, could legitimately exercise its eminent domain authority over Ratcliff's land for the construction of a storm sewer.[124]

In *Flores v. Military Highway Water Supply Corp.*[125] the Corpus Christi court of appeals clarified the authority of a water supply and sewer service corporation to condemn property for the purpose of constructing, maintaining, and operating a sewage disposal plant. The Military Highway Water Supply Corporation (MHWS) is a nonprofit corporation, organized under

116. 712 S.W.2d at 847.
117. *Id.* at 848.
118. *Id.*
119. *Id.* at 850. For a definition of purpresture see *supra* note 110.
120. 712 S.W.2d at 850 (citing Hill Farm, Inc. v. Hill County, 436 S.W.2d 320, 321 (Tex. 1969)).
121. *Id.* at 852-53.
122. 698 S.W.2d 262 (Tex. App.—Fort Worth 1985, no writ).
123. *Id.* at 263.
124. *Id.*
125. 714 S.W.2d 382 (Tex. App.—Corpus Christi 1986, no writ).

article 1434a of the Texas corporations statutes for the express purpose of supplying water for general farm and domestic uses.[126] MHWS argued that it had authority to condemn the Flores's property under either article 1434a or article 1439 of the civil statute.[127]

Article 1434a allows a corporation organized under its terms to exercise the right of eminent domain "to acquire rights-of-way."[128] The court of appeals held that, although article 1434a gave MHWS the right to acquire easements and land to create pipeline routes for water supply, the statute neither directly nor impliedly gave the corporation the power to condemn land in order to construct, maintain, and operate a sewage disposal plant.[129]

The court of appeals interpreted article 1439 of the civil statutes to give a corporation the power of eminent domain for the purposes of constructing or maintaining a sewer system in a city or town when the corporation builds and operates the sewer system with permission from the municipal government.[130] Accordingly, the court refused to allow MHWS to rely upon the statute to validate its operations in unincorporated areas. The court held, therefore, that MHWS had no authority to condemn right of way for sewage collection lines under either article 1439 or article 1434a.

F. Water Utility Service

Bay Ridge Utility District v. 4M Laundry[131] is an appeal from a judgment awarding damages of over one-half million dollars, attorney's fees, and permanent injunctve relief against Bay Ridge Utility District. The trial court rendered judgment on the bases of denial of civil rights, tortious business interference, and breach of contract. All three claims were related to the utility district's alleged discriminatory provision of utility services.

4M Laundry opened in 1981 as a washateria to serve private residents of the local subdivision. The municipal utility district that served the subdivision provided the water and sewer service. By the spring of 1983 the 4M Laundry owners converted the washateria into a commercial laundry. Following the conversion the utility district experienced sewage treatment difficulties due to the laundry's discharge and a twelve- to fifteen-fold increase in water consumption. Sewage treatment problems persisted despite the fact that 4M Laundry installed a pretreatment system for its wastewater discharge at the request of the utility district. The utility district subsequently notified 4M Laundry that it would limit its water supply and that it could no longer provide industrial waste treatment. 4M Laundry brought suit for injunctive relief to prevent the utility district from limiting 4M Laundry's water and sewer treatment supply. Three aspects of the case are significant for the purposes of this Survey; first, the potential civil rights liability associ-

126. TEX. REV. CIV. STAT. ANN. art. 1434a (Vernon 1980 & Supp. 1987).
127. *Id.* arts. 1434a, 1439.
128. *Id.* art. 1434a, § 4.
129. 714 S.W.2d at 384.
130. *Id.*
131. 717 S.W.2d 92 (Tex. App.—Houston [1st Dist.] 1986 writ ref'd n.r.e.).

ated with provision of water utility services; second, the degree of judicial deference due decisions of the utility district's governing body; finally, the standard of review that the court of appeals applies to rate orders that the utility district promulgates.

With regard to 4M Laundry's civil rights claim, the court of appeals first held that continuous service from a public utility established for the purpose of providing that service is clearly a right protected by 42 U.S.C. section 1983.[132] The court qualified the utility district's duty to provide services by noting that although a district is under a duty to serve its customers without discrimination, this duty does not give a customer the absolute right to unlimited service.[133] The court explained that the utility district has a greater duty to protect the entire system and its users by developing and enforcing uniform rules and if necessary to require pretreatment of wastewater prior to discharge to the system pursuant to Water Code section 26.176.[134] The appellate court agreed with the utility district that the trial court should have dismissed 4M Laundry's civil rights cause of action as frivolous.[135] 4M Laundry's failure to pay the undisputed portion of its water and sewer bill to the utility district caused it to forfeit its civil rights cause of action and opened the way for the utility district's counterclaim for attorney's fees.[136]

Exhibiting a fair degree of deference to utility district policy, the appellate court next ruled that the utility district's regulatory actions concerning 4M Laundry's sewage discharge were not unreasonable.[137] Since 4M Laundry produced the only industrial discharges in the utility district, the utility district could regulate 4M Laundry in a different fashion from residential customers, at least within the scope of authority granted by section 26.176.[138] The court of appeals further held that the trial court was not authorized to second guess the utility district's decision not to sell discounted bonds to finance an expansion of the sewage treatment plant.[139] Such judicial action would constitute interference with the legislative process.[140] In an interesting contrast to the *Ratcliff v. City of Keller of Keller* decision discussed above, the *Bay Ridge* court also considered the utility district's authority to condemn an easement for wastewater discharged by 4M Laundry.[141] The court of appeals ruled that, because the easement was only for the benefit of 4M Laundry and would be owned by 4M Laundry, its acquisition was not for a public purpose and so was not authorized under Water Code section

132. *Id.* at 98 (citing Limuel v. Southern Union Gas, 378 F. Supp. 964, 966 (W.D. Tex. 1974)).
133. *Id.* at 98-99.
134. *Id.*; TEX. WATER CODE ANN. § 26.176 (Vernon Pam. Supp. 1987).
135. 717 S.W.2d at 105.
136. *Id.*
137. *Id.* at 99.
138. *Id.*
139. *Id.*
140. *Id.*; *see* TEX. CONST. art. II, § 1.
141. 717 S.W.2d at 100-01. Under an interlocutory order before the trial court, the parties had apparently agreed that 4M Laundry or its successor would construct its own sewage treatment plant, and that the utility district would assist by acquiring the right of way for the plant's discharge route.

56.119.[142] Finally, the court of appeals reversed the trial court finding rejecting the utility district's water and sewer rates.[143] Applying a substantial evidence standard of review, the court of appeals stipulated that the trial court could not change the utility district's rate formula simply because it found another formula more desirable.[144]

II. LEGISLATIVE DEVELOPMENTS

A. Sixty-Ninth Legislature's "Water Package"

The 69th Legislature adopted a comprehensive series of amendments to the Texas Water Code as part of House Bill 2, its overall water package.[145] As a compromise between the interests of environmental groups and water development promoters, the legislature made numerous progressive statutory modifications. The effectiveness of these changes, however, depended upon voter approval of additional bonds for water development and related purposes.

One thrust of the statutory package was increased emphasis on water conservation that is translated into specific measures designed to reduce consumption under both Water Development Board[146] and Water Commission programs.[147] In addition to conservation measures, the legislature also adopted statutory provisions pertaining to bays and estuaries and in-stream uses[148] and reserved water in future state reservoir projects for satisfying bay and estuary needs and in-stream uses.[149] Finally, House Bill 2 substantially

142. *Id.* at 101; TEX. WATER CODE ANN. § 56.119 (Vernon Supp. 1987).

143. 717 S.W.2d at 104.

144. *Id.*

145. For a discussion of the amendments adopted by the 69th Legislature see House, *Water Law, Annual Survey of Texas Law*, 40 SW.L.J. 391-400 (1986).

146. *See* TEX. WATER CODE ANN. § 15.103 (Vernon Pam. Supp. 1987) (applicant's to the Texas Water Development Board seeking financial assistance pursuant to the Water Loan Assistance Program must set forth details of water conservation program); *id.* § 15.106 (applicant's implementation of a water conservation program precondition to board approval of financial assistance); *id.* § 17.122 (political subdivision applicants to Texas Water Development Board for financial assistance to fund engineering projects designed to conserve and develop state water resources must set forth details of water conservation programs); *id.* § 17.125 (political subdivision applicant's adoption of a water conservation program precondition to board approval of financial assistance).

147. *See id.* § 11.1271 (Texas Water Commission may make issuance of state water use permits contingent upon applicant's formulation and submission of water conservation plan); *id.* § 11.134 (requires successful water use permit applicant to provide evidence that diligence will be used to avoid waste and achieve water conservation); *id.* § 11.037 (requires persons or associations engaged in conserving or supplying water to develop and publish rules regarding (1) method of supply; (2) use and distribution of water; and (3) water application and payment procedures).

148. *See id.* § 11.147 (requires Texas Water Commission to evaluate impact of issuance of permit to store, take, or divert water on bays and estuaries, instream uses of water, and fish and wildlife habitats); *id.* § 11.148 (provides for emergency suspension of permit conditions concerning beneficial inflows to affected bays and estuaries and instream uses); *id.* § 11.149 (requires Texas Parks and Wildlife Department and Texas Water Department to conduct bay and estuary data collection and analyses; requires Texas Water Commission to evaluate the impact of issuance of permit to store, take, or divert water in excess of 5,000 acre feet per year on fish and wildlife habitats).

149. *See id.* § 15.3041 (reservation and appropriation of five percent of annual firm yield of

revised the provisions of Texas Water Code chapter 52 related to the creation of underground water conservation districts, including the establishment of a mandated procedure within the Texas Water Commission to require consideration of underground districts in critical areas.[150] Voter approval of Proposition 1 in the November 1985 constitutional amendment election brought the foregoing House Bill 2 provisions into effect.

B. Sixty-Ninth Legislature, Third Called Session

During the special session called to address the state's financial situation, the legislature adopted two bills pertaining to water law. House Bill 59 amended Texas Water Code sections 11.173[151] and 11.178.[152] These provisions deal with cancellation of water rights for nonuse during a ten-year period. The House Bill 59 amendment inserts an exception for water rights on agricultural land that has been taken out of production due to the farmers' decision to participate in the Conservation Reserve Program authorized by the Food Security Act.[153] House Bill 46[154] expands the purposes of water supply corporations formed under article 1434a of the civil statutes.[155] As a result, water supply corporations are authorized to provide flood control and drainage systems for political subdivisions or private corporations and individuals,[156] and to enter into contracts with such entities for this purpose.[157]

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water in any reservoir to Texas Parks and Wildlife Department for release to bays and estuaries and for instream uses pursuant to the Texas Water Assistance Program); *id.* § 16.1331 (same; applicable to water development in Texas generally).

150. *Id.* §§ 52.023-.024 (Vernon Supp. 1987).

151. *Id.* § 11.173 (Vernon Pam. Supp. 1987).

152. *Id.* § 11.178.

153. Food Security Act of 1985, Pub. L. No. 99-198, §§ 1231-1236, 99 Stat. 1354, 1509-1514.

154. Act of Oct. 15, 1986, ch. 28, § 1, 1986 Tex. Sess. Law Serv. 678 (Vernon).

155. TEX. REV. CIV. STAT. ANN. art. 1434a (Vernon Supp. 1987).

156. *Id.* § 1.

157. *Id.* § 2.