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WATER LAW

by

Douglas G. Caroom* and D'Ann Johnson**

THIS Article reviews judicial and legislative developments in the area of water law during the Survey period. Part I addresses judicial developments in water rights, flood liability, and utility liability. Part II surveys the changes in water policy implemented by the 70th Legislature.

I. JUDICIAL DEVELOPMENTS

A. Water Rights

Texas's water rights adjudication process, undertaken in 1969 pursuant to the Water Rights Adjudication Act (Adjudication Act),¹ has almost concluded. The Texas Water Commission (Commission) has conducted administrative hearings for virtually all major river basins.² During the Survey period judicial review of two adjudications provided new developments in the area of water rights.

In *In re Water Rights of the Brazos III Segment*³ the court of appeals in Waco considered the adjudication of water rights in that segment of the Brazos River Basin.⁴ The landowners appealed the Commissions' final determination that refused to recognize the landowners equitable water rights. The district court reversed the Commission's ruling. The Texas Court of Appeals in Waco affirmed the district court's ruling.⁵ The Texas Supreme Court granted writ on October 7, 1987,⁶ and will hear the oral arguments on January 6, 1988.

Texas courts have recognized equitable water rights in only one prior instance: the court adjudication of water rights of the lower Rio Grande, initi-

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1. TEX. WATER CODE ANN. §§ 11.301-.341 (Vernon 1972 & Supp. 1988). Unless otherwise noted, all statutory references are to the Texas Water Code. TEX. WATER CODE ANN. (Vernon 1972 & 1988 Supp.).

2. The Commission may initiate the adjudication process on its own motion. TEX. WATER CODE ANN. § 11.304(1) (Vernon Supp. 1988). The Commission will also hear and adjudicate disputes when it receives a petition. *Id.* § 11.304(2)-(3). The parties may appeal the Commission's determinations to the courts. *Id.* § 11.318.

3. 726 S.W.2d 214 (Tex. App.—Waco 1987, writ granted) [hereinafter *Brazos III*].

4. *Id.*

5. *Id.* at 216.

6. *In re Water Rights of Brazos III Segment*, 31 Tex. Sup. Ct. J. 3 (Oct. 10, 1987).

ated during the drought of the 1950's. In *State v. Hidalgo County Water Control and Improvement District No. 18*⁷ the court exercised its equitable powers to recognize water rights in irrigators even though no adequate legal basis existed to support the irrigators' claim.⁸ Several unique circumstances combined to justify creation of equitable water rights: (a) a previous Texas Supreme Court decision worked unanticipated hardship upon valley irrigators;⁹ (b) the availability of surplus water on the Rio Grande to satisfy the irrigators' needs;¹⁰ and (c) the legislature's failure to provide guidance concerning the use of Falcon and Amistad water.¹¹

In *Valmont Plantations v. State*¹² Texas Supreme Court held that grants of land from civil law governments, prior to 1840, did not include an implied riparian right to irrigate.¹³ Prior to this decision, however, much of the lower valley's irrigated agriculture had depended upon implied civil law irrigation rights to justify the long established and good faith use of Rio Grande water.¹⁴

In *Hidalgo County* the court also noted the recent construction of the Amistad Reservoir and the Falcon Reservoir under the 1945 treaty between the United States and Mexico.¹⁵ The reservoirs, which were built pursuant to the treaty, made available significant amounts of water in storage to satisfy the irrigators' needs. The federal government constructed these reservoirs at no expense to the state or other local parties. Given these available factors and the state's policy against waste of water, the court recognized a lesser equitable right for valley irrigators that would otherwise have been deprived of rights by the *Valmont Plantations* decision.¹⁶

In prior administrative water rights adjudication proceedings the Commission has consistently taken the position that it lacked a court's equitable powers and could not recognize equitable water rights for irrigators who claimed the rights on the basis of civil law land grants.¹⁷ A Texas court faced the issue of equitable water rights in at least one prior instance.¹⁸ In that case the court held that it was without authority to recognize an equitable water right absent the "unusual and extraordinary circumstances" that

7. 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

8. *Id.* at 749, 750, 755.

9. *Valmont Plantations v. State*, 163 Tex. 381, 355 S.W.2d 502 (1962). The *Hidalgo County* Court stated that the supreme court created uncertainty by the *Valmont Plantations* decision. 443 S.W.2d at 745.

10. *Hidalgo County*, 443 S.W.2d at 745.

11. *Id.* at 745. The Falcon and Amistad Reservoirs straddle the Rio Grande and store water to be divided in accordance with an agreement between United States and Mexico. *Id.* at 735-36.

12. 355 S.W.2d 502 (1962).

13. *Id.* at 502-03. Grants under common law, from 1840 until July 1, 1895, conveyed a common law irrigation right. See Caroom & Elliott, *Water Rights Adjudication—Texas Style*, 44 TEX. B.J. 1183, 1186 (1981).

14. Caroom & Elliot, *supra* note 13, at 1186.

15. *Hidalgo County*, 443 S.W.2d at 736.

16. *Id.* at 744-48.

17. See Caroom & Elliott, *supra* note 13, at 1187.

18. *In re Water Rights of the Cibolo Creek Watershed*, 568 S.W.2d 155, 157-58 (Tex. Civ. App.—San Antonio 1978, no writ).

existed on the Rio Grande in *Hidalgo County*.¹⁹ The trial court in *Brazos III*, however, considered its own equitable powers sufficient to recognize equitable water rights.²⁰ The court determined that a sufficient factual basis existed to support the landowners' claimed rights.²¹ The court of appeals agreed.²² Thus, the *Brazos III* decision represents the first subsequent recognition of equitable water rights since the *Hidalgo County* court created the doctrine.

The *Brazos III* decision is troublesome, not because of its recognition of the judiciary's equitable authority, but because the court failed to recognize the truly unique circumstances existing on the Rio Grande and to exercise some restraint in the use of its equitable authority. As noted in the dissent, the *Valmont Plantation* ruling did not surprise Brazos River irrigators.²³ The Texas Supreme Court handed down *Valmont Plantation* in 1962, which was more than twenty-five years ago. The landowners had ample opportunity to obtain a permit through the normal statutory appropriation process.²⁴ Moreover, *Valmont Plantation* precluded the claim of good faith use during the Adjudication Act's test period of 1963-1967.²⁵ This fact, alone, would disqualify the landowners for equitable relief.²⁶

Only on the Rio Grande has the federal government constructed major reservoirs at its own expense, allocated the stored water usage to the state, and made available the reservoir's storage capacity without additional expense to the user. Normally one must obtain a water rights permit from the state for reservoir construction,²⁷ and the applicant must finance the construction himself. The United States Army Corps of Engineers may construct reservoirs without a state permit.²⁸ The water, however, in those reservoirs may not be used without both a state water right and a contract with the Corps to use the storage capacity.²⁹ Although the trial court found that the landowners have access to a large supply of water for irrigation because the Brazos River now has many dams,³⁰ that court overlooked a fundamental difference: a user must pay for stored water on the Brazos, while the federal government made the stored water on the Rio Grande available without additional cost.

The Commission argued that the district court erred in assigning a priority date for the equitable water rights. The *Brazos III* court held that the

19. *Id.* at 158.

20. *Brazos III*, 726 S.W.2d 214, 215 (Tex. App.—Waco 1987, writ granted).

21. *Id.*

22. *Id.*

23. *Id.* at 216 (Thomas, J., dissenting).

24. *Id.* at 217 (Thomas, J., dissenting).

25. *Id.* Pursuant to § 11.303(b) unrecorded rights, such as riparian irrigation rights, are to be quantified according to the maximum use that can be demonstrated during the years 1963-1967, inclusive. TEX. WATER CODE ANN. § 11.303(b) (Vernon Supp. 1988).

26. 726 S.W.2d 216-17.

27. See TEX. WATER CODE ANN. § 11.121 (Vernon Supp. 1988).

28. *Anderson v. Seeman*, 252 F.2d 321, 323-24 (5th Cir. 1958), *cert. denied* 358 U.S. 820 (1958).

29. 252 F.2d at 324.

30. 726 S.W.2d at 215.

trial court had properly set the priority at the date of the first beneficial use of water.³¹ The court also overruled the property owners' cross points that certain provisions of the Texas Water Code were unconstitutional and that they were entitled to rights to the water acquired through prescription.³²

The *Brazos III* decision represents a return to an ad hoc judicial determination of water rights that contradicts both the legislative intent underlying the Adjudication Act and the trend to merge riparian rights with the appropriative system. The Texas Supreme Court has announced its intention to review the issues presented by *Brazos III*. The supreme court may be hesitant to retreat to the uncertainty of a case-by-case judicial determination of equitable water rights because of its familiarity with both the benefits of the appropriative water rights system³³ and the goals of the Adjudication Act.³⁴

In *In re Water Rights of Lower Guadalupe River*³⁵ the court focused upon section 11.021(a)³⁶ to determine whether water in Green Lake was state owned or privately owned.³⁷ Green Lake is a natural depression, not fed by a creek or watercourse, that collects either rainfall run-off or waters from the Guadalupe River during periodic overflows. The waters of Green Lake, by definition, are state owned.

Indianola Company (Indianola) owner of land including the bed of Green Lake, advanced two arguments to support the conclusion that the waters of Green Lake were private waters and not state waters. First, Indianola claimed that it received title to the land underlying the lake from the state prior to the 1918 effective date of section 11.021(a)'s earliest statewide statutory predecessor.³⁸ Indianola, therefore, argued that the right to water that might collect upon the land was not reserved by the state, but passed to the grantee. Without addressing the legal significance of the argument the court held that Indianola's title related back to a 1928 sale that came after and was subject to the policy of section 11.021(a) announced in 1921.³⁹

Second, Indianola argued that section 11.021(a) did not apply to "surface

31. *Id.* at 216.

32. *Id.*

33. *Lower Colorado River Auth. v. Texas Dep't of Water Resources*, 689 S.W.2d 873, 881-82 (Tex. 1984).

34. *In re Water Rights of the Upper Guadalupe Segment*, 642 S.W.2d 438, 442 (Tex. 1982).

35. 730 S.W.2d 64 (Tex. App.—Corpus Christi 1987, no writ). This case is popularly known as the "Indianola Case."

36. TEX. WATER CODE ANN. § 11.021(a) (Vernon Supp. 1988). Section 11.021(a) provides

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

Id. (emphasis added).

37. 730 S.W.2d at 65.

38. *Id.* See Irrigation Act of 1917, ch. 88, § 1, 1917 Tex. Gen. Laws 212.

39. 730 S.W.2d at 66. Although initially granted in 1918, title was forfeited due to non-payment and remained in the state until 1928 when the land was sold to Indianola's predecessor in title. *Id.*

water" or "diffused surface water."⁴⁰ The Indianola Company argued that the waters in Green Lake were surface waters. The Texas Supreme Court had announced in *Turner v. Big Lake Oil Co.*⁴¹ that under both civil and common law rainfall and surface water remain the property of the landowner until the water enters a natural watercourse to which riparian rights attach.⁴² The *Turner* court stated that a construction of section 11.021(a)'s predecessor statute that included surface water would have rendered the statute itself unconstitutional, at least in the case of lands granted prior to the statute's enactment in 1918.⁴³

The Indianola court stated that it would not apply *Turner* because the land grant in the Indianola case did not predate section 11.021(a)'s predecessor statute.⁴⁴ The court also stated that the diffused surface water rule applies only to such water prior to the time they come to rest in a natural depression.⁴⁵ The court also distinguished this case from *Republic Production Co. v. Collins*⁴⁶ because *Collins* dealt with artificially impounded surface water and not waters that accumulated naturally in a depression.⁴⁷

B. Littoral Property Rights

In *City of Port Isabel v. Missouri Pacific Railroad Co.*⁴⁸ the railroad and the city contested title to the submerged land along the Laguna Madre shoreline adjacent to Port Isabel. The district court ruled that the railroad owned the land, but the court of appeals reversed and recognized the city's title to all submerged land.⁴⁹ Missouri Pacific Railroad Company (Missouri Pacific) claimed title to the disputed property on the basis of an 1872 civil law grant. One of the boundary calls of the grant was "the meanders of Laguna Madre." The city claimed the same land on the basis of a 1913 act of the legislature that specifically authorized the sale of submerged lands to the city. The appellate court recognized the city's title in accordance with established rules of construction of littoral property grants.⁵⁰

The appellate court further ruled that Missouri Pacific could not support

40. *Id.* The two terms are equivalent. The Commission by rule defines "diffused surface water" as "water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes." (An essential characteristic of diffused water is that its flow is short-lived). Tex. Water Comm'n, TEX. ADMIN. CODE § 297.1 (Hart Information Systems Nov. 1, 1986).

41. 128 Tex. 155, 96 S.W.2d 221 (1936).

42. *Id.* at 169, 96 S.W.2d at 228.

43. *Id.*

44. 730 S.W.2d at 67.

45. *Id.*

46. 41 S.W.2d 100 (Tex. Civ. App.—Eastland 1931, writ dismissed).

47. 730 S.W.2d at 66.

48. 729 S.W.2d 939 (Tex. App.—Corpus Christi 1987, writ refused n.r.e.).

49. *Id.* at 946.

50. *Id.* at 942. Under civil or common law a grantee who takes to the shoreline obtains no title to submerged lands. *Luttes v. State*, 159 Tex. 500, 526-27, 324 S.W.2d 167, 184 (1958). Even if the shoreline moves it continues to represent the property boundary. *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976). Moreover, even if the boundary moves through erosion the upland owner loses title to submerged lands. *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644 (Tex. App.—Austin 1981, writ refused n.r.e.).

its claim by reference to the recognition of an easement in the submerged land in a prior judgment or adverse possession.⁵¹ Because Missouri Pacific had not used the property since its pier was destroyed by a hurricane in 1933, the court concluded that Missouri Pacific had abandoned any right that might have existed.⁵²

C. *Damage Due to Flooding*

Three Texas courts of appeals addressed the issue of liability for damages to the property of another caused by flooding. In the first case, *Satterwhite v. West Central Texas Municipal Water District*,⁵³ the lakewide property owners claimed that the Water District failed to open the lake's flood gates in a timely manner so as to prevent damage to their property. The property owners claimed a cause of the delay was an inoperable emergency generator. The court found no evidence that the emergency generator was impaired.⁵⁴ The court upheld the summary judgment in favor of the Water District, because landowners purchased the property subject to a flood easement, and damage had been confined within that easement.⁵⁵ The court stated that it could not impose liability on the Water District unless the plaintiffs proved negligence or willful damage.⁵⁶ The court could find no negligence in the district's operation of its flood gates.⁵⁷

The next two cases involved claims arising under section 11.086.⁵⁸ In *Bily v. Omni Equities, Inc.*⁵⁹ the property owner (Bily) joined a cause of action for nuisance with a claim based on section 11.086 against Omni Equities, Inc. (Omni), a development company. The placement of fill dirt on the developer's property, adjacent to Bily's property, caused water to backup into Bily's property. The jury awarded Bily both actual and punitive damages. The trial court entered judgment in favor of Bily, but disallowed the punitive damages.

In 1978 when Bily built his home, the adjacent property was platted as reserve acreage. Omni purchased the adjoining property in 1984 and replatted it. In 1985 Bily informed Omni that the fill dirt placed on its property was causing water to back up into his backyard. Omni refused to remedy the situation even after a court had granted a temporary injunction ordering Omni to dig a ditch so that Bily's property would drain.

Omni's defense centered on the developer's compliance with city ordi-

51. 729 S.W.2d at 945.

52. *Id.* at 945-46.

53. 737 S.W.2d 98 (Tex. App.—Eastland 1987, no writ).

54. *Id.* at 101.

55. *Id.* at 99.

56. *Id.* at 100.

57. *Id.* at 101.

58. TEX. WATER CODE ANN. § 11.086(a) (Vernon Supp. 1988). Section 11.086 provides in part that "[n]o person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded." *Id.*

59. 731 S.W.2d 606 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

nances.⁶⁰ Omni argued that the city's requirements for drainage and grade of lots supersede the obligations imposed by the Water Code and common law.⁶¹ Omni relied on article 1016 of the revised statutes, which gave exclusive control over drainage and the grade of premises, among others, to the city.⁶² The court rejected Omni's argument because Omni could have complied with both section 11.086 and city ordinances.⁶³

The court emphasized the long established and fundamental nature of the right that Bily claimed.⁶⁴ In *Miller v. Letzerich*⁶⁵ the Texas Supreme Court held that the Texas Constitution protects property owner's right to drain water off his property.⁶⁶ The court of appeal further held that Bily's statutory cause of action under section 11.086 did not preclude other suits based on common law.⁶⁷ The court also held that the statutory action did not require a finding of negligence.⁶⁸ The court identified the elements of a cause of action under section 11.086 as: 1) a diversion or impoundment of surface water; 2) the diversion being the cause of the damages claimed; and 3) property of the plaintiff landowner suffered the damages claimed.⁶⁹ The court held that it could uphold Omni's tort liability under either the common law theory of nuisance or the statutory theory propounded in section 11.086.⁷⁰ The court reinstated the jury's award of punitive damages because Omni was aware of the flooding problem and took no steps to remedy the problem it had created.⁷¹

In *Mitchell v. Blomdahl*⁷² the court appeared to contradict *Bily*. As in *Bily*, Blomdahl, the property owner, purchased residential property adjacent to an undeveloped lot owned by Mitchell, a developer. Mitchell's subsequent actions on an adjacent tract blocked the drainage water from Blomdahl's lot and the resultant flood damaged Blomdahl's property. The *Mitchell* court, however, ruled that there was no action under section 11.086.⁷³

The critical distinction between the two cases lies in the source of the water that caused the flood damage. In *Bily* the apparent source of water was natural drainage.⁷⁴ In *Mitchell* the majority of the subdivision naturally drained in a southeasterly direction across Blomdahl's lot in the southeastern corner and onto Mitchell's undeveloped property just below Blomdahl's.

60. *Id.* at 609.

61. *Id.*

62. TEX. REV. CIV. STAT. ANN. art. 1016 (Vernon Supp. 1987).

63. 731 S.W.2d at 611.

64. *Id.* at 610 (quoting *Miller v. Letzerich*, 121 Tex. 248, 255-26, 49 S.W.2d 404, 408 (1932)).

65. 121 Tex. 248, 49 S.W.2d 404 (1932).

66. *Id.* at 255-56, 49 S.W.2d at 408.

67. 731 S.W.2d at 610.

68. *Id.* at 611.

69. *Id.* (quoting *Kraft v. Langford*, 565 S.W.2d 223, 229 (Tex. 1978)).

70. *Id.* at 612.

71. *Id.* at 613.

72. 730 S.W.2d 971 (Tex. App.—Austin 1987, no writ).

73. *Id.* at 795.

74. *Id.* at 794-95.

The construction of the subdivision, however, altered the drainage. Drainage ditches and culverts had been installed to drain the subdivision more rapidly. As a result Mitchell's lot received water at approximately ten times the natural drainage flow. When Mitchell began dumping fill on his property to divert the drainage, flooding of Blomdahl's began. Furthermore Blomdahl submitted his cause solely upon section 11.086. The *Mitchell* court considered the relationship of section 11.086 to natural flow of surface waters and ruled the statutory prohibition inapplicable to Mitchell's situation.⁷⁵ The court pointed to the fact that construction of the subdivision drainage system had altered the flow so that it no longer qualified as natural flow.⁷⁶ Other cases involving modification of natural flows, by road and ditch construction and parking lot construction, have recognized the lower property owner's right to protect himself against drainage in amounts greater than the natural flow.⁷⁷

The *Mitchell* decision is troublesome in two aspects. First, the result appears inequitable in that the court permitted Mitchell, the developer who installed the subdivision drainage system, to take subsequently unilateral action to modify that drainage system diverting water onto one of his lots, which was already purchased, without incurring liability. The court attributes this result to Blomdahl's decision to rely only upon section 11.086 for his cause of action and not to submit an issue on estoppel.⁷⁸ Justice Gammage, in his dissenting opinion, would have denied Mitchell's defense under section 11.086.⁷⁹ Justice Gammage stated that the defense based on modifications of natural flow, which would remove the cause from section 11.086, would be available if the modifications were accomplished by a third party and not by the defendant who would otherwise benefit from the action unjustly.⁸⁰ Second, the court used the phrase "untouched and undirected by the hands of man."⁸¹ Few locations statewide can satisfy this criteria if a court applies such criteria literally. A court must exercise reasonable judgment in applying this standard, otherwise this judicially created exception to section 11.086 will swallow the basic rule announced by the statute.

D. Utility Liability

In *City of Abilene v. Smithwick*⁸² the city of Abilene appealed from a jury verdict awarding over \$100,000 to the Smithwicks for damages resulting from the flow of raw sewage from the city sewer main into their home. The Smithwicks claimed the damages to their house as an unconstitutional taking of property by the city under article I, section 17, of the Texas Constitu-

75. *Id.* at 793.

76. *Id.*

77. See *Bunch v. Thomas*, 121 Tex. 225, 231, 49 S.W.2d 421, 424 (1932) (road and ditch construction); *Higgins v. Spear*, 118 Tex. 310, 313, 15 S.W.2d 1010, 1011 (1929) (parking lot construction).

78. 730 S.W.2d at 795.

79. *Id.* at 796 (Gammage, J., dissenting).

80. *Id.*

81. *Id.* at 792 (citing *Bunch*, 121 Tex. at 229, 49 S.W.2d at 423).

82. 721 S.W.2d 949 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).

tion and as a result of the negligent operation of the sewer system on the part of the city. In 1977 the Smithwicks connected their house to the city's sanitary sewer system. The city issued a permit for the connection and inspected the construction of the sewer line linking the house to the sewer main. Following the completion of the line during periods of heavy rainfall, raw sewage flowed underneath the house and backed up into the house and in the backyard. Smithwick moved from the house in 1982 and filed suit shortly thereafter.

The city asserted a defense on the basis that the statute of limitations had run. The court of appeals held that a cause of action for permanent damage to property must commence within two years after the cause of action accrues.⁸³ This cause of action accrued when the Smithwicks first discovered the injury to their property.⁸⁴ Because the first injury occurred in 1977, the statute of limitations barred a suit filed five years later in 1982.⁸⁵ The Smithwicks argued that the city could not assert the limitations defense because they delayed in bringing the suit in reliance upon the city's unsuccessful attempts to correct the problem. The court held that the Smithwicks waived estoppel because they had not affirmatively pled that issue in the trial court.⁸⁶

The court also held that the Smithwicks could not recover under the taking cause of action because the city's actions did not amount to an intentional taking, especially since the jury found the city to be negligent.⁸⁷ Negligence is not an intentional action. The court also noted that the plaintiffs did not assert a claim for recovery under a nuisance theory.⁸⁸ The court, therefore, did not rule on this issue.

In *City of Lucas v. North Texas Municipal Utility District*⁸⁹ the city sued to enjoin the North Texas Municipal Water District (the District) from constructing and operating a wastewater treatment project inside the city's extraterritorial jurisdiction without the city's consent and without compliance with city ordinances. In this substituted opinion, the court held that the city could not require the District to obtain consent from the city in order to

83. *Id.* at 952 (quoting *Bayouth v. Lion Oil*, 671 S.W.2d 867, 868 (Tex. 1984)).

84. *Id.*

85. *Id.* See TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958), *recodified at* TEX. CIV. PRAC. & REM. CODE § 16.003 (Vernon 1986).

86. 721 S.W.2d at 952.

87. *Id.* at 951-52.

88. *Id.* at 951, n.2. The Texas Supreme Court has recognized that proof of a nuisance might also allow a plaintiff to recover under TEX. CONST. art. 1, § 17. *Steele v. City of Houston*, 603 S.W.2d at 791; *City of Abilene v. Downs*, 367 S.W.2d 153, 158 (Tex. 1963). In the two cases from the last survey period concerning damages from sewage the landowners prevailed on the nuisance theory that the respective courts held to be taking under the Texas Constitution. *City of Uvalde v. Crow*, 713 S.W.2d 154, 156-57 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.); *Abbott v. City of Kaufman*, 717 S.W.2d 927, 932 (Tex. App.—Tyler 1986, writ dism'd); see *Caroom & Fero*, *Water Law*, 41 Sw. L.J. 365, 374-75 (1987). The Smithwicks, however, neither pled nor proved that theory of recovery.

89. 724 S.W.2d 811 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). This is a supplemental opinion. The last Survey article discussed the initial slip opinion. *Caroom & Fero*, *supra* note 88, at 370-72.

construct and operate the plant.⁹⁰ The court also held that the District, however, must comply with reasonable city regulations aimed to promote the health and safety of the city's residents.⁹¹

The court supplemented this opinion in order to enumerate those city ordinances that were unenforceable against the District as a matter of law.⁹² The court held that the District Act overruled ordinances that provided for the assessment of criminal penalties and fines against the District.⁹³ Likewise, the city could not enforce other ordinances requiring fees and bonds from the District that would directly interfere with the District's ability to accomplish its goals.⁹⁴

The court settled the applicability of article 1015 of Texas Revised Civil Statutes.⁹⁵ The court initially held that the city could not use this statute because it had no public water supply.⁹⁶ The court, however, held that it would consider the city's water supply, purchased from the District, as public water supply.⁹⁷ The city, therefore, could have extended the ordinances that protect the water supply under article 1015 to the city's extraterritorial jurisdiction.⁹⁸ The court remanded the cause for further proceedings consistent with the supplemental opinion and the prior substituted opinion.⁹⁹

E. Interstate Waters

In *Texas v. New Mexico*¹⁰⁰ the United States Supreme Court addressed the interstate dispute over Pecos River water allocations that began 13 years ago. The issues revolved around enforcement of the Pecos River Compact (The Compact). The Compact did not require New Mexico to deliver a definite quantity of water to Texas. Instead the Compact adopted an ambiguous standard.¹⁰¹ The dispute arose as a result of this imprecision.

The Supreme Court held that the Compact was a contract and should be interpreted like any contract.¹⁰² New Mexico, therefore, was not relieved from performance even though New Mexico believed that it had acted in good faith.¹⁰³ In order to compensate for past delivery shortfalls of 340,010 acre-feet, a Master ordered New Mexico to deliver an additional 34,010

90. 724 S.W.2d at 816.

91. *Id.*

92. *Id.* at 821. The court based its decision on the Act of April 20, 1951, ch. 62, 1951 Tex. Gen. Laws 96, as amended by Act of April 30, 1975 ch. 90, § 27, 1975 Tex. Gen. Laws 238. This Act is generally known as the District Act.

93. 724 S.W.2d at 822.

94. *Id.*

95. *Id.* at 823, *see* TEX. REV. CIV. STAT. ANN. art. 1015, § 30 (Vernon 1963).

96. 724 S.W.2d at 823.

97. *Id.*

98. *Id.*

99. *Id.* at 824.

100. 107 S. Ct. 2279, 96 L. Ed. 2d 105 (1987).

101. *Id.* at 2284, 96 L. Ed. 2d at 112. The Compact provides in part: "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." *Id.*

102. *Id.* at 2283, 96 L. Ed. 2d at 111.

103. *Id.* at 2283-84, 96 L. Ed. 2d at 114.

acre-feet of water annually to Texas for ten years. The Court held that the Master was correct in addressing compensation, but the Court also remanded the case for further proceedings to evaluate the feasibility and desirability of monetary compensation by New Mexico in lieu of additional water deliveries.¹⁰⁴

The Court did approve the appointment of a River Master to make future annual calculations of delivery requirements under the apportionment formula.¹⁰⁵ This approval marked the Court's departure from its prior position against appointment of agents or masters in interstate disputes.¹⁰⁶ The Court agreed to the appointment here because of the Compact Commission's composition, since both Texas and New Mexico had one vote.¹⁰⁷ The Court cited the need to create some mechanism to overcome the states' natural propensity to disagree over compact delivery requirements.¹⁰⁸

II. LEGISLATIVE DEVELOPMENTS

The Seventieth Legislature adopted several statutory modifications and considered some significant environmental quality issues. The legislature did not give water issues, as a whole, the attention the Sixty-Ninth Legislature gave when it passed a comprehensive water package.¹⁰⁹ Some of the legislative initiatives follow.

A. Water Rights

The legislature added sections 11.1351 and 11.1381 to the Water Code.¹¹⁰ The legislature codified two long established practices of the Texas Water Commission in issuing water rights permits in these two sections. Section 11.1351 authorizes the Commission to apply stream flow restrictions to diversions made pursuant to new permits in order to ensure that the new diversions will not impair the water supply available for existing senior rights.¹¹¹ Section 11.1381 authorizes the Commission to issue term permits.¹¹² In *Lower Colorado River Authority v. Texas Department of Water Resources*¹¹³ the Texas Supreme Court questioned the Commission's long-standing practice of issuing term permits.¹¹⁴ The court required the Commission to consider existing water permits at their full face value, prohibiting the grant of the same water to more than one party.¹¹⁵ The new provision

104. *Id.* at 284-86, 96 L. Ed. 2d at 115-17.

105. *Id.* at 2287, 96 L. Ed. 2d at 117.

106. *Vermont v. New York*, 417 U.S. 270, 275 (1974) (per curiam) (court rarely appoints River Master).

107. 107 S. Ct. at 2286, 96 L. Ed. 2d at 117.

108. *Id.* at 2287, 96 L. Ed. 2d at 117.

109. For a discussion of the amendments adopted by the Sixty-Ninth Legislature, see Caroom & Fero, *supra* note 88, at 380-81; House, *Water Law*, 40 Sw. L.J. 375, 382-400 (1986).

110. See TEX. WATER CODE ANN. §§ 11.1351, 11.1381 (Vernon Supp. 1988).

111. *Id.* § 11.1351 (Vernon Supp. 1988).

112. *Id.* § 11.1381 (Vernon Supp. 1988).

113. 689 S.W.2d 873 (Tex. 1984).

114. *Id.* at 880-82.

115. *Id.* at 882.

eases the impact of that decision. The Commission may now issue permits for a term of years to authorize the use of state water upon which a senior water right has not been perfected. Presumably, the senior water right is protected up to its maximum prior beneficial use at the time the Commission considers the term permit.¹¹⁶ In this fashion the holder of the term permit may beneficially use water appropriated for the senior permit, but currently unutilized, without threatening future availability of water for the senior permit. Under section 11.1381 the legislature charged the Commission not to issue a term permit if: 1) the permit will make financial commitments for water projects in the area undesirable, or 2) the holder of the senior appropriative water right can demonstrate that the senior right holder cannot beneficially use the water if the permittee is also drawing on the supply.¹¹⁷ The legislature added an amendment to Water Code section 11.124 at the same time stating that the term permits are not automatically renewable on their expiration.¹¹⁸

The legislature also created a new, but limited, exemption from the requirement of permits for use of state water.¹¹⁹ This new exemption that allows a person who is engaged in mariculture operations to take state water from the Gulf of Mexico and its bays and arms without obtaining a permit is applicable only to salty or brackish water.¹²⁰ A person who claims this exemption must give notice to the Commission prior to the first appropriation and must report each additional appropriation of water.¹²¹ Although the exemption is automatic, the Commission may interrupt the appropriation, or reduce the amount appropriated, if the Commission determines that the withdrawal interferes with freshwater inflows to the extent that it reduces the natural productivity of bays and estuaries.¹²² The Commission, however, must first conduct a hearing on this issue.¹²³

The legislature also adopted subchapter I to chapter 11 of the Water Code.¹²⁴ Under these provisions the Commission may appoint a water master to administer water supplies or rivers that have not yet been adjudicated.¹²⁵ The new provisions fill a relatively small gap in the Commission's authority. Under section 11.326 the Commission already has the authority to appoint water masters on adjudicated segments.¹²⁶ Thus, the Commission may now appoint a master on any river in the state.

116. TEX. WATER CODE ANN. § 11.1381(c) (Vernon Supp. 1988).

117. *Id.* § 11.1381(b)-(c) (Vernon Supp. 1988).

118. *Id.* § 11.124(e) (Vernon Supp. 1988).

119. TEX. WATER CODE ANN. § 11.1421 (Vernon Supp. 1988).

120. *Id.* The provision defines "mariculture" to mean "the propagation and rearing of aquatic species . . . in a controlled environment using brackish or marine water." *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* §§ 11.451-.458 (Vernon Supp. 1988)

125. *Id.* § 11.453 (Vernon Supp. 1988).

126. *Id.* § 11.326 (Vernon 1972 & Supp. 1988).

B. Water Utilities

The Seventieth Legislature significantly increased the jurisdiction of the Water Commission to regulate the rates of water and sewer utilities under chapter 13 of the Water Code.¹²⁷ The legislature amended section 13.0431 to add to Commission jurisdiction the review of rates charged by (i) customer owned water supply corporations, (ii) utilities under the rate regulation of a municipality, (iii) municipally owned utilities in areas of service outside the city boundaries, and (iv) water and utility districts.¹²⁸ An appeal of the Commission must take place within sixty days of adoption of the new rate in a petition that bears the signatures of 10,000 ratepayers or ten percent of ratepayers.¹²⁹ The Commission then conducts a *de novo* rate proceeding.¹³⁰

Section 13.043 amendments also provide appellate jurisdiction for the Commission in two previously problematic areas. First, the Commission may hear an appeal by water or utility districts purchasing water or sewer service from another district, municipality, or utility.¹³¹ Second, the Commission may grant relief to entities attempting to obtain new service from water supply corporations from the costs of providing new service in excess of the reasonable standard membership fee.¹³²

The legislature also amended section 13.187 to modify the procedures by which utilities implement rate increases.¹³³ A utility may now begin charging new rates thirty days following delivery of a notice of the proposed rate change to ratepayers and the regulatory authority unless the regulatory authority disapproves.¹³⁴ The affected municipality or ratepayers may challenge the new rate within sixty days of the institution of the new rate.¹³⁵ The Commission may set interim rates or require the utility to put funds from the increase in escrow pending the Commission's decision.¹³⁶ From the utility's point of view, the more significant provision in this section states that the utility may not make a second rate increase during the twelve months following the filing of the initial statement of intent to change rates.¹³⁷

The legislature also gave additional force to Commission rules and orders by making provision for the enforcement of these rules and orders concerning utility service and rates.¹³⁸ The legislature added section 13.4151 to au-

127. Acts of June 1, 1987, ch. 539, 1987 Tex. Sess. Law Serv. 4310 (Vernon) (codified as amended in various sections of Chapter 13 of TEX. WATER CODE ANN. (Vernon Supp. 1988)).

128. *Id.* § 13.043 (Vernon Supp. 1988).

129. *Id.*

130. *Id.*

131. *Id.* § 13.043(f) (Vernon Supp. 1988).

132. *Id.* § 13.043(g) (Vernon Supp. 1988).

133. *Id.* § 13.187(a) (Vernon Supp. 1988).

134. *Id.*

135. *Id.* § 13.187(b) (Vernon Supp. 1988).

136. *Id.* § 13.187(c) (Vernon Supp. 1988).

137. *Id.* § 13.187(d) (Vernon Supp. 1988).

138. *Id.* § 13.4151 (Vernon Supp. 1988).

thorize administrative penalties of up to \$500 per day.¹³⁹ Section 13.4151 administrative penalty provisions are very similar to those available to the Commission to enforce water quality provisions under section 26.136.¹⁴⁰

The legislature gave the Texas Water Commission authority to adopt rules governing the use of submeters in apartments and mobile home parks and the pass through of water utility costs in apartment houses with central system utilities.¹⁴¹ In either case the owner is not allowed to do more than pass through the actual cost paid for utility service.¹⁴² The legislature also enacted subchapter N to chapter 13 of the Texas Water Code.¹⁴³ This subchapter N, codified as sections 13.501-.503, authorizes certain local municipalities to enter privatization contracts for water and wastewater services.¹⁴⁴ The legislature placed two restrictions on a city's authority to enter into a privatization contract: 1) recommendation by the board of utility trustees, and 2) authorization by the governing body pursuant to an ordinance.¹⁴⁵ The Commission will not consider the entity providing service to the city under a privatization contract a public utility for regulatory purposes if the city adopts an ordinance electing not to treat the provider as a public utility.¹⁴⁶

C. Water Quality

Few water quality bills survived the Seventieth Legislature because of that legislature's predominate interest in budgetary matters. Significant legislation in this area included adoption of measures to regulate underground storage tanks, use of "greywater" systems, and appeals of municipal land use rulings under section 26.177.

The most significant legislation relating to water quality was the adoption of a program for regulating underground storage tanks.¹⁴⁷ The legislation enables the Texas Water Commission to set regulatory standards for the 120,000 existing, as well as new, underground storage tanks. The primary targets of the legislation are gasoline storage tanks that pose a threat to underground water supplies. The legislature, therefore, placed liquid petroleum products,¹⁴⁸ certain federally regulated nonhazardous substances,¹⁴⁹ and other substances designated by the Commission¹⁵⁰ under the Commission's regulation. The legislation brings Texas in line with a recent amend-

139. *Id.*

140. *See id.* § 26.136 (Vernon Supp. 1988).

141. TEX. WATER CODE ANN. §§ 13.503 & 13.512.

142. *Id.*

143. *Id.* §§ 13.501-.503 (Vernon Supp. 1988).

144. *Id.*

145. *Id.* § 13.502.

146. *Id.* § 13.503.

147. Act of May 28, 1987, ch. 277, 1987 Tex. Sess. Law Serv. 3194 (Vernon) (codified at TEX. WATER CODE ANN. §§ 26.341-.359 (Vernon Supp. 1988)).

148. TEX. WATER CODE ANN. § 26.343(a)(2) (Vernon Supp. 1988).

149. *Id.* § 26.343(a)(1); *see* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982).

150. TEX. WATER CODE ANN. § 26.343(a)(3) (Vernon Supp. 1988).

ment to the federal Resource Conservation and Recovery Act that requires the national implementation of an underground storage tank program, which will be administered by state and local governments.¹⁵¹

The Texas legislation requires registration of storage tanks that contain regulated substances and authorizes the Water Commission to adopt performance standards for tanks including design, construction, installation, leak detection, and compatibility standards.¹⁵² In addition, the legislation requires the reporting of any release.¹⁵³ The bill also requires the owner, operator, or the Commission to take appropriate corrective measures in response to a release¹⁵⁴ and allows the Commission to recover costs incurred in undertaking either corrective or enforcement action.¹⁵⁵

The legislature added section 26.0311 to the Water Code to develop standards for the discharge of "greywater."¹⁵⁶ Greywater is wastewater from clothes washing machines, showers, bathtubs, and sinks.¹⁵⁷ The Water Commission is charged with the duty to implement minimum standards for the use of greywater in irrigation and for other agricultural, domestic, commercial, and industrial purposes.¹⁵⁸ Some anticipate greywater use to provide an economically feasible water conservation technique that not only alleviates some demand for additional water supplies, but also reduces the volume of wastewater requiring treatment and discharge.¹⁵⁹

Finally, the Seventieth Legislature added section 26.177(c) largely in response to the opposition that the city of Austin received when it adopted land use controls under section 26.177.¹⁶⁰ Section 26.177 has provided the primary source of municipal authority to adopt land use regulations aimed at controlling pollution from nonpoint sources such as urban runoff.¹⁶¹ Subsection (c) establishes an appeal process for municipal pollution control actions taken under the authority of section 26.177 to the Texas Water Commission.¹⁶² The appeal process applies only to actions taken by the city outside the city limits, but within its extraterritorial jurisdiction.¹⁶³ The statute's standard of review provisions require the Commission to decide whether the city acted fairly in the action as well as whether the city will succeed in its attempt to control water quality.¹⁶⁴

151. 90 Stat. 2795 (1976).

152. TEX. WATER CODE ANN. §§ 26.346-.348 (Vernon Supp. 1988).

153. *Id.* § 26.349.

154. *Id.* § 26.351.

155. *Id.* § 26.355.

156. *Id.* § 26.0311.

157. *Id.*

158. *Id.*

159. See 35 TEX. WATER REP. NO. 30, May 7, 1987.

160. TEX. WATER CODE ANN. § 26.177(c) (Vernon Supp. 1988); see *City of Austin v. Jamail*, 662 S.W.2d 779, 782-83 (Tex. App.—Austin 1983, writ *dism'd*).

161. TEX. WATER CODE ANN. § 26.177 (Vernon Supp. 1988).

162. *Id.*

163. *Id.*

164. *Id.*

