



---

January 1985

## Water Law

John L. House

---

### Recommended Citation

John L. House, *Water Law*, 39 Sw L.J. 361 (1985)  
<https://scholar.smu.edu/smulr/vol39/iss1/15>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# WATER LAW

by

John L. House\*

This Article will address the more important developments in the Texas law of waters during the past year.<sup>1</sup> Because of the limited activity of the second called session of the 68th Legislature, the only significant developments in Texas water law during the survey period occurred in the judicial and administrative areas. Apart from a few issues, this Article will not discuss federal regulation of water resources, environmental law, or public utilities regulation.

## I. CASE LAW

### A. *Municipal Regulation of Water Rates*

Two cases during the survey period dealt with the authority of a municipality to regulate retail water rates. In each case a municipality tested the extent of its authority against the more general authority of the Public Utilities Commission (PUC) under the Public Utilities Regulatory Act (PURA).<sup>2</sup> In *Village of Lakeway v. Lakeway Municipal Utility District No. 1*<sup>3</sup> the Austin court of appeals reviewed the district court's summary judgment declaring void and unenforceable certain ordinances passed by the Village of Lakeway's Board of Commissioners. The ordinances prohibited any seller of potable water from charging village customers rates in excess of a certain prescribed ceiling. The ordinances also prohibited the disconnection of services to customers within the village for failure to pay excess rates and made the violation of any of the ordinances a misdemeanor.

The village claimed the authority to set water rates on three grounds. First, the village claimed such authority as part of the statutory authority of general law cities to provide water to residents and to create, regulate, and establish public wells, pumps and cisterns, hydrants, and reservoirs.<sup>4</sup> Second, the village claimed authority through the legislative grant of power to

---

\* B.A., Texas Tech University; M.A., University of Southern California; J.D., University of Texas at Austin. Attorney at Law, Kilgore & Kilgore, Dallas, Texas.

1. Texas water law historically has focused on public and private rights to water from still bodies and moving courses, both surface and subsurface. The chief concerns have been the appropriation, detention, collection, diversion, and other uses of water for such purposes as navigation, irrigation, consumption, recreation, flood control, and electricity generation. The protection of water bodies and sources from pollution and the purification or rehabilitation of polluted waters have also been significant concerns of the state and federal governments.

2. TEX. REV. CIV. STAT. ANN. art. 1446 (Vernon 1963).

3. 657 S.W.2d 912 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

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

city alderman to control the streets, alleys, and other public places within the corporate limits.<sup>5</sup> Third, the village invoked the regulatory power granted to municipalities over public utility rates within their jurisdiction as set out in sections 17(a) and 22 of the PURA.<sup>6</sup> In affirming the summary judgment of the district court, the court of appeals ruled that neither the statute providing that general law cities may create and regulate their own water system<sup>7</sup> nor the statute empowering aldermen with exclusive control over public places<sup>8</sup> grants a general law city authority to set retail water rates to be charged by a utility district for services rendered within the city's jurisdiction.<sup>9</sup> The court also rejected the village's claims of authority based on sections 17(a) and 22 of PURA, holding that political subdivisions are exempt from a municipality's utility regulation powers under the Act.<sup>10</sup>

The argument for municipal authority to regulate retail water rates based on section 17(a) of PURA was also successfully invoked in *City of Hardin v. Hardin Water Supply Corp.*<sup>11</sup> In *City of Hardin* the Beaumont court of appeals reviewed an ordinance passed by the City of Hardin that was analogous to the ordinances in *Village of Lakeway*. Hardin likewise asserted jurisdiction to regulate water rates within its boundaries based upon section 17(a) of PURA. The court of appeals, however, concluded that the legislature had intended that municipalities rather than the PUC regulate the rates of water supply corporations within their municipal boundaries.<sup>12</sup> The Supreme Court of Texas reversed, holding that a municipality has no inherent authority to set water rates<sup>13</sup> and that water supply corporations are excluded from the regulatory authority over public utilities granted to municipalities in PURA.<sup>14</sup>

The *Village of Lakeway* and *City of Hardin* decisions delineate more clearly the boundary between municipal and PUC authority in the regulation of retail water rates under PURA. Water districts and water supply corporations should now be able to set retail rates confidently, without fear of being subject to the dual jurisdiction of the PUC and the local governments of municipalities to which they provide services.

---

5. *Id.* art. 1146, § 2.

6. *Id.* art. 1446, §§ 17(a), 22 (Vernon Supp. 1985).

7. *Id.* art. 1015, § 30 (Vernon 1963).

8. *Id.* art. 1146, § 2.

9. 657 S.W.2d at 914-15.

10. *Id.* at 915. In so holding, the court approved the district court's finding that the utility district was a "political subdivision" as defined in PURA. *Id.*

11. 666 S.W.2d 354 (Tex. App.—Beaumont), *rev'd*, 671 S.W.2d 505 (Tex. 1984).

12. 666 S.W.2d at 355. The court's error can be traced to confusion over the meaning of § 3(c)(4) of PURA, TEX. REV. CIV. STAT. ANN. art. 1446c, § 3(c)(4) (Vernon Supp. 1984). The court mistakenly read this section as reinserting a water supply corporation within the municipality's purview. 666 S.W.2d at 354. The court's error was prompted by its apparent acceptance of the notion advanced by both counsel that prior to PURA the city would have had the requisite authority to set water rates inside its boundaries. *See id.*

13. *Hardin Water Supply Corp. v. City of Hardin*, 671 S.W.2d 505, 506 (Tex. 1984).

14. *Id.*

### B. Municipal Regulation of Waste Discharges

While municipal jurisdiction to set water rates was restricted by *Village of Lakeway* and *City of Hardin*, the authority of a municipality to regulate certain types of discharge into a watershed within its extraterritorial jurisdiction was reaffirmed in *City of Austin v. Jamail*.<sup>15</sup> An Austin ordinance required builders to obtain a site development permit prior to clearing land or commencing construction on a proposed site. The ordinance, conceived as a measure to control urban runoff, specified the permissible amount of preconstruction clearing, controlled the amount and slope of impervious surfaces, limited the depth of fill material, and set standards for building foundation and requirements for erosion control. The city sought to enforce the ordinance with respect to a construction project on land within the Lake Austin watershed but outside the Austin city limits. As a basis for its authority the city relied on section 26.177(b)(5) of the Texas Water Code, which imposes a regulatory duty upon cities to control nonspecific waste discharges, including that resulting from urban runoff from rainwater.<sup>16</sup> Section 26.177(b)(5) also permits a city to assert its authority within its extraterritorial jurisdiction.<sup>17</sup> Austin's five-mile statutory extraterritorial jurisdiction<sup>18</sup> encompassed the land in question. The district court held that the City of Austin lacked authority to enforce the ordinance outside its city limits.

In reversing the decision of the trial court, the Austin court of appeals distinguished *City of West Lake Hills v. Westwood Legal Defense Fund*,<sup>19</sup> upon which the builder relied for the proposition that section 26.177 conferred no regulatory authority whatsoever upon municipalities.<sup>20</sup> The court distinguished *West Lake Hills* on two grounds. First, the provisions of section 26.177 relied upon by West Lake Hills for its claim of authority to regulate the use of private sewage facilities within its extraterritorial jurisdiction are in direct conflict with other Water Code provisions vesting power to license such facilities in the Texas Water Commission.<sup>21</sup> Section 26.177(b)(5), on the other hand, does not conflict with the Commission's power. Consequently, the court of appeals concluded that the language in *West Lake Hills* that purported to define the scope of subsection (b)(5), which was not at issue in that case, was mere dicta.<sup>22</sup> Second, subsection (b)(5) calls for municipalities to execute the functions prescribed therein.<sup>23</sup>

---

15. 662 S.W.2d 779 (Tex. App.—Austin 1983, no writ).

16. TEX. WATER CODE ANN. § 26.177(b)(5) (Vernon Supp. 1985).

17. *Id.*

18. TEX. REV. CIV. STAT. ANN. art. 970a, § 3(A)(5) (Vernon 1963).

19. 598 S.W.2d 681 (Tex. Civ. App.—Waco 1980, no writ).

20. The *West Lake Hills* opinion expressed the view that § 26.177 conferred "information gathering functions only." *Id.* at 686.

21. 662 S.W.2d at 781. TEX. WATER CODE ANN. §§ 26.031, .032 (Vernon Supp. 1985) confer the authority to license private sewage treatment facilities upon the Texas Water Commission and permit the Commission to delegate this authority to cities and county commissioners.

22. 662 S.W.2d at 781.

23. TEX. WATER CODE ANN. § 26.177(b)(5) (Vernon Supp. 1985).

The court of appeals, therefore, reasoned that by the use of the term "execute" in subsection (b)(5), the legislature must have intended to confer enforcement powers on cities to control waste discharges within the city's extraterritorial jurisdiction.<sup>24</sup>

C. *Administrative Authority to Compel the Provision of Water Services*

The authority of state administrative agencies to compel water suppliers to provide services was tested in two cases during the survey period. In *Lake Country Estates, Inc. v. Texas Department of Water Resources*<sup>25</sup> a developer sought an order from the Texas Water Commission to require Tarrant County Municipal District No. 1 to provide water and sewer services on a seventy/thirty basis, with the utility district bearing seventy percent of the cost and the developer thirty percent. Under previous directors, the utility district had provided services to the developer on that percentage basis. The current board initially revised the ratio to fifty/fifty and ultimately increased it to 100% for the developer. The developer challenged the legality of the cost-basis amendments, alleging that the board's actions were arbitrary, capricious, and intentionally injurious. The Water Commission decided that it lacked the authority to grant the relief sought by the developer but made findings of fact and conclusions of law that were adverse to the developer's position.<sup>26</sup> The developer appealed unsuccessfully to the district court, challenging both the authority of the Commission to make such findings and conclusions and the substance of the particular findings and conclusions reached by the court. The court of appeals affirmed the take-nothing judgment of the district court.<sup>27</sup> The appellate court approved the Commission's assessment that the Commission lacked the authority to grant the relief originally sought by the developer and held that the Commission did have power under section 12.081 of the Water Code<sup>28</sup> to make the complained-of findings and conclusions.<sup>29</sup>

The *Lake Country Estates* decision clarifies the Water Commission's section 12.081 powers that were examined in an earlier dispute between the same parties, *Lake Country Estates, Inc. v. Toman*.<sup>30</sup> Reading the two cases together makes clear that not only are such findings of fact and conclusions of law within the Commission's power, but also complaints regarding the actions of a utility district system are within the Commission's primary juris-

---

24. 662 S.W.2d at 782-83.

25. 659 S.W.2d 479 (Tex. App.—Waco 1983, no writ).

26. The Water Commission found as fact that the board's actions were not arbitrary, capricious, unreasonable, or discriminatory and that the district had made no representations to the developer as to the services it would provide. The Commission concluded as matters of law that the developer's due process and equal protection rights had not been violated and that for the Commission to substitute its own judgment for the business judgment of the board would be improper.

27. 659 S.W.2d at 482.

28. TEX. WATER CODE ANN. § 12.081 (Vernon Supp. 1985) provides that all constitutional water districts are under the continuing right of supervision of the Texas Department of Water Resources, of which the Water Commission is a judicial branch.

29. 659 S.W.2d at 482.

30. 624 S.W.2d 677 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.).

diction.<sup>31</sup> Although *Lake Country Estates* reaffirmed the conclusion in the *Toman* case that the Commission lacks jurisdiction to grant affirmative relief,<sup>32</sup> the case illustrates that all such complainants must first bring their cases before the Commission.

The court in *Lake Country Estates* also held that the Water Commission could neither compel a utility district to provide service nor set rates for a utility district.<sup>33</sup> This decision may be contrasted with an earlier decision in *Texas Water Commission v. City of Dallas*,<sup>34</sup> which held that the Commission has the authority to compel a municipal water supplier, absent a contract, to provide services outside its corporate limits and to fix reasonable rates for the services rendered.<sup>35</sup> During the survey period, *City of Dallas v. Texas Water Rights Commission*<sup>36</sup> involved an appeal of the district court's decision upon remand from the original *City of Dallas* case.

The importance of the second *City of Dallas* case is not so much the establishment or reaffirmance of the Commission's authority, but the discretion that the Commission will have in rehearing a case on remand. In the second *City of Dallas* case the city complained of the trial court's direction to the Commission to consider all points on appeal. The city argued that the trial court had an obligation to give guidance to the Commission by limiting the issues to be decided on remand. The Austin court of appeals determined not only that the district court was not required to limit the scope of the remand, but that the appellate court should not make legal conclusions pertaining to the proceeding and should review only the correctness of the action taken by the lower court.<sup>37</sup> The court of appeals reasoned that it would be inefficient for it to resolve the complicated legal questions that the city had raised.<sup>38</sup> The court of appeals emphasized that the court could merely give instructions to the Commission and that the Commission might arrive at conclusions different from those it had reached the first time even without instructions from the court of appeals.<sup>39</sup> Moreover, the court of appeals pointed out that the Commission's second order could be reviewed again and that the time and resources it expended in deciding those issues could prove to have been wasted.<sup>40</sup> The appellate court thus decided simply to affirm the judgment of the trial court and return the proceeding to the Commission.<sup>41</sup> The court further held that rate-making determinations by the Commission are final and subject to appeal.<sup>42</sup> Consequently, the district court was not

---

31. *Id.* at 680-81.

32. In *Toman* the court found that the department lacked power to grant monetary damages. *Id.* at 681. *Lake Country Estates* held that the department lacked authority to grant specific performance. 659 S.W.2d at 481.

33. 659 S.W.2d at 480, 482.

34. 591 S.W.2d 609 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

35. *Id.* at 611.

36. 674 S.W.2d 900 (Tex. App.—Austin 1984, no writ).

37. *Id.* at 903-04.

38. *Id.* at 904.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 905.

obliged to dismiss the appeal but could reverse the Commission's order and remand to the Commission for redetermination of the water rates.<sup>43</sup>

*D. The Meaning of "Unappropriated Water" as Pertinent to the Permit Process*

During the survey period the Supreme Court of Texas decided an important case that established procedural limits upon the Texas Department of Water Resources' permit authority. In *Lower Colorado River Authority v. Texas Department of Water Resources*<sup>44</sup> the river authority contested a permit issued by the Texas Water Commission to the Lower Colorado Municipal Water District allowing the impoundment of 113,000 acre feet of water from the Colorado River. The Water Code allows the Commission to grant a permit to an applicant for the appropriation of state water only if, among other requirements, "unappropriated water is available in the source of supply."<sup>45</sup> The court of appeals had ruled that, although existing appropriation permits completely exhausted the recorded water level, the Commission could find that unappropriated water was in the river because historical usage statistics indicated that permit levels had not been, and would not likely be, fully used.<sup>46</sup> In support of the Commission's authority, the water district invoked language in section 11.025 of the Water Code,<sup>47</sup> which indicates that water not being put to beneficial use is to be considered "not appropriated."<sup>48</sup> Consequently, the water district reasoned, unused flow from the Colorado River is unappropriated water available for other uses for which a permit may be granted.

The Texas Supreme Court rejected this argument, holding that, for the purpose of Commission action upon a permit application, "unappropriated water" means the amount of water in excess of the recorded levels of all existing uncanceled permits and filings.<sup>49</sup> The supreme court cited section 11.146(e) of the Water Code,<sup>50</sup> which provides that when a permit has been issued for the use of water, new appropriation may not be authorized until the permit has been wholly or partially cancelled.<sup>51</sup> The supreme court held that the legislature intended section 11.146(e) to bear upon the definition of "unappropriated water."<sup>52</sup> The supreme court, therefore, ruled that the Commission had no authority to grant a permit to appropriate water when such water would invariably affect an existing downstream permittee's rights.<sup>53</sup>

---

43. *Id.*

44. 28 Tex. Sup. Ct. J. 87 (Nov. 17, 1984), *judgmt withdrawn*, 28 Tex. Sup. Ct. J. 187 (Jan. 12, 1985) (holding that remand, rather than reversal, was required).

45. TEX. WATER CODE ANN. § 11.134(b)(2) (Vernon Supp. 1985).

46. 28 Tex. Sup. Ct. J. at 87.

47. TEX. WATER CODE ANN. § 11.025 (Vernon Supp. 1985).

48. *Id.*

49. 28 Tex. Sup. Ct. J. at 88.

50. TEX. WATER CODE ANN. § 11.146(e) (Vernon Supp. 1985).

51. *Id.*

52. 28 Tex. Sup. Ct. J. at 90.

53. *Id.* at 93.

The court recognized that the water district and the Commission had another course of action: the full or partial cancellation of previous permits for failure to put the water to beneficial use.<sup>54</sup> *Lower Colorado River Authority*, therefore, in essence provides a measure of due process protection for existing permittees. Existing permittees' rights may still be abrogated by the Commission in favor of new permittees, but only upon the criteria and pursuant to procedures established in subchapter E.<sup>55</sup> The decision thus avoids considerable uncertainty with respect to entitlements that would have resulted from the court of appeals decision without imposing substantial limitations on the Commission's authority to issue water use permits.

### E. Entitlements to Water by Virtue of Spanish or Mexican Grants

The two most significant cases decided during the survey period examined claims to water based upon title to land traced to grants from previous sovereigns. Pursuant to a provision of the Texas Constitution of 1836 and the Treaty of Guadalupe Hidalgo between the United States and Mexico, title to lands granted in Texas prior to the adoption of the common law of England on January 20, 1840, is controlled by the law of the granting sovereign at the time the grants were made.<sup>56</sup> Such law has been incorporated into the decisional law of Texas.<sup>57</sup> Since *Motl v. Boyd*<sup>58</sup> Texas courts have grappled with the formidable challenge in terms of legal and historical scholarship presented by the problem of ascertaining water rights under public and private grants as determined by the laws of Mexico, New Spain, and Spain. The two survey cases, *In Re the Adjudication of the Water Rights in the Medina River Watershed*<sup>59</sup> and *In Re the Contests of the City of Laredo*,<sup>60</sup> represent the most recent attempts to apply the conclusions and scholarly approach of the San Antonio court of appeals in the leading case *State v. Valmont Plantations*<sup>61</sup> to particular problems in the area of water rights.

The controversy in *Medina River Watershed* concerned the rights of a landowner to appropriate water from a nonperennial stream crossing his land. The landowner filed a claim with the Texas Water Commission, as

54. *Id.* Title 2, subchapter E of the Water Code authorizes full and partial cancellation and determines the requisites and procedures for such actions. TEX. WATER CODE ANN. §§ 11.171-.186 (Vernon Supp. 1985).

55. TEX. WATER CODE ANN. §§ 11.171-.186 (Vernon Supp. 1985).

56. B. DOBKINS, *THE SPANISH ELEMENT IN TEXAS WATER LAW* 27, 131 (1959); see *Miller v. Letzerich*, 121 Tex. 248, 253-54, 49 S.W.2d 404, 407-08 (1932).

57. *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962).

58. 116 Tex. 82, 286 S.W. 458 (1932). Although the *Motl* court made a valiant attempt at determining title to water by virtue of grants by the governments of Mexico and the State of Coahuila y Texas, many of the conclusions it reached must be viewed as decidedly incorrect in light of subsequent research. *State v. Valmont Plantations*, 346 S.W.2d 853, 856 (Tex. Civ. App.—San Antonio 1961), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962); see B. DOBKINS, *supra* note 56, at 141-43; White & Wilson, *The Flow and Underflow of Motl v. Boyd: The Problem*, 9 Sw. L.J. 1, 9, 26 (1955).

59. 670 S.W.2d 250 (Tex. 1984).

60. 675 S.W.2d 257 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

61. 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962).



required by section 11.303 of the Water Rights Adjudication Act.<sup>62</sup> The landowner sought to impound 300 acre feet of water in a reservoir built on Medio Creek and to divert 518 acre feet for purposes of irrigation. Under the Water Rights Adjudication Act, all claims to water rights not evidenced by permits granted by the Commission or by filing under the 1913 Irrigation Act<sup>63</sup> are limited to the maximum amount of water beneficially used in any one year between 1963 and 1967.<sup>64</sup> Applying that limitation, the Commission ruled that the landowner could divert only 89.15 acre feet and was foreclosed from impounding any water.<sup>65</sup> The landowner challenged the Commission's decision in district court, claiming all water by virtue of title derived from the original 1833 land grant from the Mexican State of Coahuila y Texas to the landowner's earliest predecessor in title. The crucial question was whether the 1833 grant included rights to appropriate the water from the creek for irrigation and other related purposes. The state argued that the grant was silent and that under the rule of *Valmont Plantations* Mexican grants did not carry implied grants of riparian rights to water for irrigation.<sup>66</sup> The landowner argued that the *Valmont Plantations* decision applied to perennial streams, which were public, not nonperennial streams, which by their nature were private under Spanish law. The district court found for the landowner, and the court of appeals affirmed.<sup>67</sup> The appellate court's ruling also relied upon the holding of *McCurdy v. Morgan*<sup>68</sup> to the effect that the bed of a nonperennial stream was the property of the adjacent landowner.<sup>69</sup>

The supreme court found no Mexican law to settle the point. Following the approach used in the *Valmont Plantations* opinion, the supreme court retreated to the historical precedents of Mexican law, the law of New Spain and peninsular Spain. The court determined that although a distinction between public and private streams had existed in peninsular Spain, that distinction had not been carried over into New Spain.<sup>70</sup> Moreover, the supreme court reemphasized the *Valmont Plantations* principle that in New Spain the king held title to all land and water except when the king himself or his duly appointed viceroys or other functionaries had expressly conveyed rights to others.<sup>71</sup> Since the 1833 grant was silent as to water rights to the stream, and since no irrigation rights to a public stream could be implied, the supreme court concluded that the 1833 grant conveyed no title to the waters of the stream.<sup>72</sup> The Texas Supreme Court, therefore, reversed the judg-

---

62. TEX. WATER CODE ANN. § 11.303 (Vernon Supp. 1985).

63. Irrigation Act of 1913, ch. 177, 1913 Tex. Gen. Laws 358; see TEX. WATER CODE ANN. § 11.303(a)(iii) (Vernon Supp. 1985).

64. TEX. WATER CODE ANN. § 11.303 (Vernon Supp. 1985).

65. 670 S.W.2d at 251.

66. See 346 S.W.2d at 874.

67. 645 S.W.2d 596 (Tex. App.—San Antonio, 1982) *rev'd*, 670 S.W.2d 250 (Tex. 1984).

68. 265 S.W.2d 269 (Tex. Civ. App.—San Antonio 1954, writ *ref'd*).

69. 645 S.W.2d at 605.

70. 670 S.W.2d at 253-54.

71. *Id.* at 253.

72. *Id.* at 254.

ments of the district and appellate courts.<sup>73</sup>

The central question addressed in *City of Laredo* was whether the successor cities of Spanish pueblos were granted special priority appropriative rights over private and subsequent municipal claimants under what has been termed the "pueblo water rights doctrine."<sup>74</sup> Although this issue had been addressed previously by the courts of California and New Mexico, it was one of first impression for Texas courts. Under California law, each pueblo established under the laws of New Spain or Mexico possesses a paramount right to appropriate and distribute waters to administer to the needs of the pueblo inhabitants.<sup>75</sup> The pueblo water right supercedes the rights of private individuals and pueblos established by subsequent grants.<sup>76</sup> Furthermore, as the needs of the city expands, so do the rights and powers necessary to administer to the needs of the inhabitants,<sup>77</sup> though the paramount rights of expanded or successor cities are limited to the water needs of the inhabitants of the area in which the old pueblo was located.<sup>78</sup> Moreover, the pueblo water rights encompass not only the stream to which the old pueblo was riparian but also all tributaries.<sup>79</sup> In addition to California, New Mexico also has adopted the pueblo water rights doctrine.<sup>80</sup>

The City of Laredo contended that it was the successor to a pueblo established by the Spanish crown in 1767. The city argued that the grant that the pueblo received entitled the city to appropriate all the water from the Middle Rio Grande Basin, including all contributing Texas tributaries. Both the Texas Water Commission and the district court denied the city's claim.<sup>81</sup> The Austin court of appeals affirmed the decision of the trial court, refusing generally to recognize the validity of the pueblo water rights doctrine in Texas and holding particularly that the City of Laredo possessed no such rights.<sup>82</sup> The court of appeals based its decision on the fact that the act of the General Visita of 1767 that granted all land and water rights to the City of Laredo did not expressly grant powers analogous to pueblo water rights to the pueblo of Laredo.<sup>83</sup> Moreover, the court of appeals, having examined the most significant texts of Spanish and New Spanish law, *Las Siete Partidas* and the *Recopilación de Leyes de los Reynos de Las Indias*, respectively, and the works of a few commentators, could find no basis for the principle that Spanish pueblos possessed paramount water rights.<sup>84</sup> The court of appeals noted that the Spanish commentator relied on by the city, Joaquin

---

73. *Id.* at 255.

74. 675 S.W.2d at 259.

75. *Id.*

76. *Id.*; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585 (1899).

77. *City of Los Angeles v. City of Glendale*, 23 Cal. 2d 68, 142 P.2d 289 (1943); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 601, 57 P. 585, 600 (1899).

78. *City of Los Angeles v. City of Glendale*, 23 Cal. 2d 68, 142 P.2d 289 (1943); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 601, 57 P. 585, 600 (1899).

79. 675 S.W.2d at 268.

80. See *Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1963).

81. 675 S.W.2d at 258.

82. *Id.* at 270.

83. *Id.* at 266.

84. *Id.*

Eschriche, was discredited in *Valmont Plantations* for improperly including elements from the Napoleonic Code in treatises on Spanish and Mexican law.<sup>85</sup> Finally, the opinion underscored the criticism of one noted commentator<sup>86</sup> that the California pueblo water rights doctrine arose from a presumption created in *Lux v. Haggin*,<sup>87</sup> an early California water rights case.<sup>88</sup>

The *Medina River Watershed* and *City of Laredo* decisions have continued the admirable trend that began with *Valmont Plantations* in approaching questions of Mexican and Spanish law in a thorough and scholarly manner.<sup>89</sup> These decisions have clarified particular points of law and expanded the body of knowledge on which courts may rely in settling future disputes. Yet there are problems with both decisions, particularly the *City of Laredo* opinion. *Valmont Plantations* broke ground not only for its admirable methodology, but also for breaking through the veneer of Anglo-American legal principles that had been superimposed upon Spanish and Mexican law in such decisions as *Motl v. Boyd*.<sup>90</sup> *Valmont Plantations* showed convincingly that the water rights system of the previous sovereigns was not riparian in nature.<sup>91</sup> Nevertheless, *Medina River Watershed* and *City of Laredo* overlooked this insight and reintroduced riparian concepts into the analysis. As a result, the nature and extent of private water rights in New Spain and Mexico, and the manner in which private rights differed from public water rights, remains unclear. Moreover, the *City of Laredo* court may have erred in denying categorically the existence of pueblo water rights: at least one commentator believes that pueblo rights had been firmly established in Spain for centuries and were present in New Spain as well.<sup>92</sup>

---

85. *Id.* at 267 (citing *State v. Valmont Plantations*, 346 S.W.2d 853, 867-69 (Tex. Civ. App.—San Antonio 1961), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962)).

86. Hutchins, *Pueblo Water Rights in the West*, 38 TEX. L. REV. 748, 758 (1960).

87. 69 Cal. 255, 4 P. 919 (1884).

88. 675 S.W.2d at 267-69.

89. The *City of Laredo* decision improved upon the methodology of *Valmont Plantations* by demonstrating that when peninsular Spanish law is unclear, recourse may be had to Roman law and particularly to the *Institutes of Justinian*. See 675 S.W.2d at 259.

90. 116 Tex. 82, 286 S.W. 458 (1932).

91. 346 S.W.2d at 859, 863.

92. B. DOBKINS, *supra* note 56, at 71-72, 90. For centuries most Spanish pueblos, as fortified centers against the Moors, were given specialized privileges by which they exercised control over adjoining lands. *Id.* at 71, 83. This author believes that the *City of Laredo* court relied too heavily upon the work of Davenport and Canales, who wrote with a definite bias towards the common law riparian system. See Davenport & Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 283, 302 (1956). Furthermore, the dismissal by the Austin court of appeals of the Spanish commentator Joaquin Eschriche because he had imported elements from the Napoleonic Code was too summary: the pueblo water rights doctrine was not such a borrowing. The court's dismissal of Eschriche is ironic because what Eschriche incorrectly mixed into his commentaries were riparian elements from the Napoleonic Code, elements heavily relied upon by Davenport and Canales.

Another problem with the *City of Laredo* opinion is that the parties to the litigation did not go far enough in their research of Spanish legal materials. The court was presented with only the central legal texts of peninsular Spain and New Spain, *Las Siete Partidas* and the *Recopilación de Leyes de los Reynos de las Indias*, respectively. Finding no mention of pueblo water rights in these legal texts satisfied the court that they never existed. Yet the rule is that all the law of the granting sovereign is controlling, not merely the law as reflected in the primary texts. 675 S.W.2d at 260. Besides the law of the central government in Spain, a strong system

## II. ADMINISTRATIVE RULES AND REGULATIONS

### A. Water Quality Standards

The Texas Water Development Board (TWDB) adopted amendments to the waste load evaluation standards for the Houston Ship Channel.<sup>93</sup> The amendments lower the water quality standards for dissolved oxygen in segment 1007 of the ship channel from 1.5mg./l to 1.0m./l, effectively relaxing the advanced treatment levels necessary to meet the previous standards.<sup>94</sup> The central rationale for relaxing the standards was cost savings for the parties responsible for complying with the standards.<sup>95</sup> An additional justification was that the amendments allow time for studies to develop less expensive alternatives.<sup>96</sup>

### B. Water Treatment Inspection Fee Program

The TWDB has adopted new rules and regulations establishing a waste treatment inspection fee program as recently required by the Texas Legislature.<sup>97</sup> The fee will be assessed at graduating rates from \$100 for no discharge permits to \$2,000 for permits allowing discharges exceeding 2.5 million gallons daily, calculated on a daily average flow.<sup>98</sup> The proceeds from fee collections will be used to finance the Texas Department of Water Resources' costs of inspecting waste treatment facilities and miscellaneous enforcement expenses.<sup>99</sup>

### C. Water Loan Assistance

The TWDB adopted an amendment to its rules changing the definition of "lending rate" as it pertains to financial assistance from the water loan assistance fund.<sup>100</sup> The change permits the TWDB to loan funds to political subdivisions to allow them to meet debt service obligations on bonds issued to finance water and sewer projects.<sup>101</sup> The amended rule also allows loan

---

of regional or local laws, developed from Moorish, Visigothic, and Roman law. B. DOBKINS, *supra* note 56, at 43-57, 63, 70-73. The local water law and customs, rooted in the principle that water was community property to be used subject to municipal rules and regulations, were often more familiar and of greater relevance to the community or pueblo than the king's law. *Id.* at 82-83.

93. Tex. Water Dev. Bd., 8 Tex. Reg. 5450 (1983), *adopted*, 9 Tex. Reg. 1480 (1984) (amending 31 TEX. ADMIN. CODE § 333.21 (Surface Water Quality Standards)).

94. 8 Tex. Reg. at 5450.

95. *Id.*

96. Hall, *New Water Load Evaluation for the Houston Ship Channel*, 14 STATE B. TEX. ENVTL. L.J. 9 (1984). This amendment is a change in TWDB policy from the positions taken with respect to Lake Austin and Lake Travis. In those instances discharges were banned while studies were carried out, whereas discharges into the ship channel will continue while studies are being conducted. *Id.*

97. See TEX. WATER CODE ANN. § 26.0291 (Vernon Supp. 1985).

98. Tex Water Dev. Bd., 8 Tex. Reg. 3670 (1983), *adopted*, 8 Tex. Reg. 5455 (1983) (codified at 31 TEX. ADMIN. CODE §§ 341.401-.407).

99. 8 Tex. Reg. at 3672.

100. Tex. Water Dev. Bd., 8 Tex. Reg. 3181 (1983), *adopted*, 9 Tex. Reg. 282 (1984) (amending 31 TEX. ADMIN. CODE § 355.2).

101. 8 Tex. Reg. at 3181-82.

assistance to political subdivisions on a front-end basis to help finance large water or sewage projects.<sup>102</sup>

#### D. Water Rights Permits

A number of provisions were amended and new regulations adopted by the TWDB with respect to the water appropriation permit system. Permits authorized by section 11.142 of the Water Code<sup>103</sup> will be confined to use from reservoirs constructed on non-navigable streams.<sup>104</sup> Contractual permits for the use of water already authorized for the use of another person are no longer issued,<sup>105</sup> but suppliers of state water must apply for a contractual amendment based upon their contractual arrangements.<sup>106</sup> New regulations allow irrigation permits to be issued to lessees with consent of the landowner for a limited time but on a renewable basis.<sup>107</sup>

Notice and a hearing are required for temporary permits if a complaint has been made about the use proposed.<sup>108</sup> A prior hearing is mandatory for cancellation of a permit for failure to commence or complete construction.<sup>109</sup> New TWDB regulations have also extended the time limit for commencement of construction on direct diversion facilities from ninety days to two years, and the regulations grant the Texas Water Commission the authority to further extend the time limit.<sup>110</sup> The executive director of the Texas Department of Water Resources may except the requirements for written plans, inspection specifications, and construction requirements for dams and reservoirs if the physical conditions or size of the project makes the requirements unnecessary.<sup>111</sup> A new provision also provides emergency procedures for dam safety.<sup>112</sup> Finally, other TWDB regulatory amendments have changed the general requirements for permit applications.<sup>113</sup>

102. *Id.* at 3182.

103. TEX. WATER CODE ANN. § 11.142 (Vernon Supp. 1985). Section 11.142 deals with permits allowing impoundment of water for domestic and livestock purposes. *Id.*

104. Tex. Water Dev. Bd., 8 Tex. Reg. 5255 (1983), *adopted*, 9 Tex. Reg. 3461 (1984) (amending 31 TEX. ADMIN. CODE § 303.6).

105. Tex. Water Dev. Bd., 8 Tex. Reg. 5255 (1983), *adopted*, 9 Tex. Reg. 3461 (1984) (amending 31 TEX. ADMIN. CODE § 303.5).

106. Tex. Water Dev. Bd., 8 Tex. Reg. 5259 (1983), *adopted*, 9 Tex. Reg. 3462 (1984) (amending 31 TEX. ADMIN. CODE §§ 303.111-.113, .118-.120).

107. Tex. Water Dev. Bd., 8 Tex. Reg. 5258 (1983), *adopted*, 9 Tex. Reg. 3463 (1984) (codified at 31 TEX. ADMIN. CODE §§ 303.61-.62).

108. Tex. Water Dev. Bd., 9 Tex. Reg. 3464 (1984) (amending 31 TEX. ADMIN. CODE § 303.92).

109. Tex. Water Dev. Bd., 8 Tex. Reg. 5265 (1983), *adopted*, 9 Tex. Reg. 3467 (1984) (amending 31 TEX. ADMIN. CODE § 307.32).

110. Tex. Water Dev. Bd., 9 Tex. Reg. 3468 (1984) (codified at 31 TEX. ADMIN. CODE §§ 307.61-.63).

111. Tex. Water Dev. Bd., 8 Tex. Reg. 5269 (1983), *adopted*, 9 Tex. Reg. 3469 (1984) (amending 31 TEX. ADMIN. CODE § 309.4).

112. Tex. Water Dev. Bd., 8 Tex. Reg. 5269 (1983), *adopted*, 9 Tex. Reg. 3470 (1984) (codified at 31 TEX. ADMIN. CODE § 309.13).

113. Tex. Water Dev. Bd., 8 Tex. Reg. 5256 (1983), *adopted*, 9 Tex. Reg. 3463 (1984) (amending 31 TEX. ADMIN. CODE §§ 303.22, .25, .33-.34, .36-.37); Tex. Water Dev. Bd., 8 Tex. Reg. 5263 (1983), *adopted*, 9 Tex. Reg. 3465, 3466 (1984) (amending 31 TEX. ADMIN. CODE §§ 305.2, .23).