1986

Water Law

John L. House

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
https://scholar.smu.edu/smulr/vol40/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 discusses judicial and legislative developments in the area of water law that occurred during the survey period. These developments bear upon such topics as appropriative rights, entitlements to land underlying water, the regulation and judicial review of water rates and services, water quality, conservation and development, and regional and multi-state planning. This Article also reviews the Texas Legislature's recent extensive revision of the organization and procedure of the Texas water agencies.

I. CASE LAW

A. The Meaning of "Unappropriated" Water

The Texas Supreme Court twice reheard Lower Colorado River Authority v. Texas Department of Water Resources, the "Stacy Dam" case, which the court had decided at the end of the previous survey period. In Stacy Dam, the Lower Colorado Municipal Water District applied to the now abolished Texas Department of Water Resources for a permit to construct a dam at the confluence of the Colorado and Concho Rivers. The proposed dam would have created a reservoir with a capacity of over 550,000 acre-feet of water that, if approved, would have served present and future water needs of a substantial part of West Texas.

Existing appropriators challenged the water district's permit application

---

* 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. 28 Tex. Sup. Ct. J. 87 (Nov. 17, 1984), op. withdrawn, 683 S.W.2d 357 (Tex.), op. withdrawn, 689 S.W.2d 873 (Tex. 1985).


4. The Stacy Dam project had been planned in the 1960s and was urged forward by succeeding local entities that attempted to procure federal funding necessary for its development. The federal government, however, declined to participate, and local support waned. The project remained dormant until the municipal district filed its permit application on February 21, 1978.

5. These appropriators included the Lower Colorado River Authority, Garwood Irrigation Company, Lakeside Irrigation Company, and Lake Travis Improvement Association.
on the basis of section 11.134(b) of the Water Code, which provides that in order for a permit to issue sufficient unappropriated water must exist in the source of supply. The Department of Water Resources staff also opposed the issuance of the Stacy Dam permit. Relying in part on a computerized model that valued existing water rights at their maximum authorized amounts, the department concluded that only 3,120 acre-feet would be approvable.

The water district rebutted the department’s findings by introducing demographic projections and historical use data which demonstrated that the full amounts of existing rights would never be used. Invoking section 11.025 of the Code, the district argued that the scope of the rights of existing permittees is not the maximum amount shown on their permits but the amounts that they had actually put to beneficial use. The district argued that section 11.025 deems any unused amounts not appropriated and that such amounts are, therefore, approvable.

Persuaded by the water district’s position, the Texas Water Commission ruled that sufficient unappropriated water within the meaning of section 11.134(b)(2) existed and issued a permit allowing the water district to impound 554,340 acre-feet of water and appropriate 113,000 acre-feet annually from the river basin. The trial court upheld the commission’s order. The court of appeals affirmed, holding that the commission had acted correctly in determining the availability of unappropriated water upon the bases of prospective requirements and historical usage rather than upon existing permit levels.

The Supreme Court of Texas rejected the approach of the commission as embraced by the district and appellate courts and held that the department could not grant permits where the water could only be derived from an existing permittee’s supply. The supreme court looked to the legislative history of the Irrigation Acts of 1913 and 1917, which established the current permit system. The supreme court found that the central purpose of those Acts was to guard against overappropriation and thereby to provide the firm foundation for appropriative rights necessary to promote development of the state's water resources. The supreme court noted that Texas

---

7. Id. Section 11.134(b) has further substantive requirements. The proposed appropriation must: (1) seek to apply the water to a “beneficial use”; (2) not impair existing appropriative rights; and (3) not be detrimental to the public welfare. Id. § 11.134(b)(3).
8. Id. § 11.025.
9. Id.
11. 689 S.W.2d at 882.
14. 689 S.W.2d at 877. Prior to institution of the permit system, Texas used a filing system whereby parties claimed a right to appropriate water in the county in which the appropriation was to be made. The filing system was based on the “first in time, first in right” rule, but was unsupervised and left the enforcement of priorities to the courts. Thus, the system provided no assurance, especially to downstream parties, that the water would actually be avail-
Water Code section 11.146(e)\textsuperscript{15} provides that once granted under a permit water is not subject to further appropriation until the permit has been cancelled in whole or in part. The court reasoned that section 11.146(e) was consistent with the overall legislative purpose behind the 1913 and 1917 Acts and amendments\textsuperscript{16} and was not inconsistent with section 11.025, which limits the scope of the appropriative right to the amount of water that can be used beneficially.\textsuperscript{17} The supreme court resolved the apparent contradiction between sections 11.025 and 11.146(e) by finding that one purpose of the section 11.025 beneficial use limitation was to determine priority in times of scarcity.\textsuperscript{18} The supreme court also found its construction of the meaning of unappropriated water to be consistent with prior court decisions and agency practices and, therefore, set aside the water district’s permit.\textsuperscript{19}

On rehearing the supreme court decided to remand the case to the Texas Water Commission, as authorized by section 19(e)(4) of the Administrative Procedure and Texas Register Act.\textsuperscript{20} The remand provides a solution that is much more equitable to the water district than the supreme court’s earlier rendered judgment\textsuperscript{21} because it preserves the priority established by the water district’s 1978 application. Furthermore, the remand allows the commission the opportunity to seek the cancellation of the unused rights under existing filings and permits simultaneously with its review of the district’s application.

By prohibiting double permitting, the \textit{Stacy Dam} decision protects the individual entitlements of existing permittees and thus confirms the integrity of the permit system. If the commission’s approach had been followed, an existing permittee would have been obligated to relitigate the scope of his allotment in every subsequent application hearing concerning the source of supply. Moreover, the previous uncertainties of the certified filing system would have been revisited in that no permittee could be assured that water considered appropriable would actually be available. In practical terms, however, the restriction of future allotments of water to that amount available in excess of total existing permit maximums means that in many circumstances applicants will likely be turned away although the amount that they requested is not actually being used. Thus, in order for the permit system to accommodate both existing permittees and applicants, the commission must diligently perform its responsibilities to return unused water into the source of supply through the statutory cancellation process.\textsuperscript{22}

\begin{thebibliography}{99}
\bibitem{15} TEX. WATER CODE ANN. § 11.146(e) (Vernon Pam. Supp. 1986).
\bibitem{16} \textit{Id.}
\bibitem{17} \textit{Id.}
\bibitem{18} \textit{Id.}
\bibitem{19} \textit{Id.} at 880-82.
\bibitem{20} \textit{Id.} at 883 (opinion on motion for rehearing). TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e)(4) (Vernon Supp. 1986) authorizes remand when the court finds that the agency’s finding contained error of law.
\bibitem{21} 689 S.W.2d at 882.
\bibitem{22} \textit{See} TEX. WATER CODE ANN. §§ 11.171, .186 (Vernon Pam. Supp. 1986).
\end{thebibliography}
B. The "Duty of Water" Standard and the Perfection of Water Rights

In re Contests of City of Eagle Pass to Adjudication of Water Rights\(^2\) arose out of the same final determination of the Texas Water Rights Commission with respect to the appropriative rights to the Middle Rio Grande as did the City of Laredo case reported in last year's annual survey.\(^24\) The City of Eagle Pass challenged the commission's determination of two certified filings held by the city. The commission determined that the city's perfected rights were substantially less than the face amount of its certified filings. The commission's findings were affirmed in large part by the district court, and the city appealed.\(^25\)

One of the certified filings from which the city derived its water rights had been the subject of a cancellation proceeding before the commission's predecessor in 1961. The agency, not aware that the city held a partial interest in the water rights, had cancelled the certified filing without the city's knowledge or participation. Two years later, upon learning of the city's interest, the agency had partially reinstated the filing under the name of the city. Eagle Pass asked the court of appeals: (1) to find that the commission's predecessor had exceeded its authority in the 1963 order; and (2) to recognize the city's claim to a greater amount of water. Although the court of appeals stated that the agency's 1963 procedure had probably been erroneous, it overruled the city's motion on the basis that since the city had failed to make a timely appeal the 1963 order had become final and was not subject to collateral attack.\(^26\)

The city introduced oral testimony that all of the face amount of its second filing had been put to use and claimed that its rights to the total amount shown on the filing had been perfected under sections 11.025 and 11.026 of the Water Code.\(^27\) The commission, however, reviewed water use reports from the period, which seemed to indicate that much less than the face amount of the filing had actually been used. On that basis the commission concluded that the city had perfected a lesser amount. In reaching its determination the commission referred to the common law "duty of water" standard\(^28\) and applied a three acre-foot duty to determine the amount of water perfected under the permit. The district court affirmed, finding that the

---

23. 680 S.W.2d 853 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
24. In re Contests of City of Laredo to Adjudication of Water Rights, 675 S.W.2d 257 (Tex. App.—Austin 1984, writ ref'd n.r.e.). In City of Laredo the court of appeals declined to accept the pueblo water rights doctrine in Texas. Id. at 270; see House, 1985 Annual Survey, supra note 2, at 367, 369-70.
25. 680 S.W.2d at 854.
26. Id. at 856. In its reinstatement proceeding the commission's predecessor apparently exceeded the limitation of its statutorily conferred powers. See Nueces County Water Control & Improvement Dist. v. Texas Water Rights Comm'n, 481 S.W.2d 924, 930 (Tex. Civ. App.—Austin, 1972, writ ref'd n.r.e.).
28. "Duty of water" refers to a measure applied to determine the minimum quantity of water necessary to achieve maximum results when applied to a specific use. The Eagle Pass court cited with emphasis the following definition:

It is that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such
commission's use of the three acre-foot duty was reasonable.\textsuperscript{29} The city appealed, complaining that application of the duty of water standard to determine beneficial use is appropriate only when little or no evidence of past use is available. The city argued that in all other situations the Texas Water Code requires consideration of the actual amount used.

The appellate court affirmed the district court without squarely addressing the appropriateness of the application of the duty of water standard.\textsuperscript{30} The appellate court found, in light of the conflicting evidence presented, that even under the city's own theory application of the duty of water concept was not impermissible.\textsuperscript{31} Moreover, the appellate court held that the judgment was sustainable without reliance on duty of water.\textsuperscript{32} In reaching the latter conclusion the appellate court emphasized that the beneficial use requirement of section 11.025\textsuperscript{33} of the Water Code demands consideration of not only whether the actual amount appropriated was used but also whether such use was beneficial.\textsuperscript{34} After having recognized the duty of water concept, the court curiously failed either to determine the scope of that concept's application in Texas or, more importantly, to identify it with or distinguish it from the beneficial use concept contained in the Water Code.

C. Title to Bed of Man-Made Watercourse

In \textit{Selkirk Island Corp. v. Standley}\textsuperscript{35} the Corpus Christi court of appeals addressed the ownership of title to a certain stretch of bed underlying a man-made portion of the Colorado River. The bed and riverfront lots of both appellant and appellees could be traced back to a common source of title. In 1960 the common owner granted to Matagorda County a perpetual easement for the construction, maintenance, and improvement of a man-made course for the Colorado River. In 1969 and 1970 by warranty and subsequent correction deed the common owner conveyed to the appellees' predecessor in title tracts abutting the west side of the river. The warranty deed described the property in metes and bounds, but contained course and distance calls meandering the west bank of the river. The correction deed stated that the earlier deed was in error wherever the course and distance calls failed to include the shoreline. The appellant received its conveyance in 1971, subsequent to the conveyance to the appellees' predecessor. Originally

\footnotesize{period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon.}

\textsuperscript{29} 680 S.W.2d at 857 (quoting Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629, 634 (1954)). The duty of water standard had been applied or at least referred to in two earlier Texas cases. Hidalgo and Cameron Counties Water Control & Improvement Dist. No. 9 v. Starley, 373 S.W.2d 731, 732 (Tex. 1964); State v. Starley, 413 S.W.2d 451, 459 n.15 (Tex. Civ. App.—Corpus Christi 1967, no writ).

\textsuperscript{30} Id. at 857.

\textsuperscript{31} Id. at 857-58.

\textsuperscript{32} Id.

\textsuperscript{33} Id. at 858.

\textsuperscript{34} Id.

\textsuperscript{35} \textsc{Tex. Water Code Ann.} \textsection 11.025 (Vernon Pam. Supp. 1986). “Beneficial use” is defined in \textit{id.} \textsection 11.002(5).

\textsuperscript{36} 680 S.W.2d at 858.

\textsuperscript{37} 683 S.W.2d 793 (Tex. App.—Corpus Christi 1984, no writ).
the tract conveyed to appellant had included the land subject to the county's easement. The appellant's deed, however, recited that it was "subject to" the prior conveyances to the county and the appellees' predecessor.36

The appellant challenged the appellees' construction of piers on the riverbed, claiming fee title to all of the riverbed underlying the county's right-of-way tracts. The appellees, however, argued that they held title to the west half of the riverbed by virtue of the conveyance of land abutting a stream. Alternatively, the appellees argued that the appellant had no rights to control the construction of piers on a navigable stream over which only the State of Texas has authority. The trial court granted the appellees' summary judgment motion, finding in part that the state owned the riverbed.37

The appellate court affirmed the lower court's summary judgment, ruling that when a private party conveys title to land abutting a stream, navigable or not, the transfer simultaneously conveys title to one-half of the streambed, subject to any rights held by the state.38 The court of appeals concluded that the deeds to the appellees' predecessor had transferred title to the west half of the riverbed prior to the conveyance to appellant of its tract.39 The court of appeals disagreed, however, with the appellees' contention and the lower court's conclusion of law that the state owned the riverbed.40 The appellate court reasoned that the riverbed had originally been privately owned, that no evidence had been introduced showing that the state had ever acquired fee title to the right-of-way tract, and that submergence of land does not destroy title.41 Nevertheless, since the appellate court had found specific grounds supporting the trial court's summary judgment, it determined that the lower court's conclusion as to the state's ownership was harmless error.42

The Selkirk court would have been forced to reach the opposite result if the appellant had received its conveyance prior to the deed to the appellees' predecessor or if the appellees' tracts had derived from a separate grantor. In such circumstances, the principle of Coastal Industrial Water Authority v. York,43 that submergence of land does not affect title, should control over the more general rule of Strayhorn v. Jones,44 that title to land abutting a stream includes one-half of the bed underlying the stream subject to any rights of the state. Otherwise, the intolerable result would obtain that a landowner diverting a stream along the boundary of his neighbor would be deemed by the diversion to have surrendered to his neighbor title to the land underlying that portion of the new stream abutting his neighbor's property.

36. Id. at 794.
37. See id. at 796.
38. Id. (citing Strayhorn v. Jones, 157 Tex. 136, 151, 300 S.W.2d 623, 634 (1957); Moore v. Ashbrook, 197 S.W.2d 516, 518 (Tex. Civ. App.—San Antonio 1946, writ ref'd)).
39. 683 S.W.2d at 795.
40. Id. at 796. The appellees cited Tex. PARKS & WILD. CODE ANN. § 1.011(c) (Vernon 1976), which provides that all beds and bottoms of public waters are property of the state.
41. Id. (quoting Coastal Indus. Water Auth. v. York, 532 S.W.2d 949, 953 (Tex. 1976)).
42. 683 S.W.2d at 796.
43. 532 S.W.2d 949, 953 (Tex. 1976).
44. 300 S.W.2d 623, 634 (Tex. 1957).
D. Judicial Review of Rates of Unregulated Utilities

Davis v. Bartonville Water Supply Corp.\(^\text{45}\) raised the question of judicial authority to review rates set by a water supply corporation. In Bartonville a group of developers and builders challenged a certain “tap fee”\(^\text{46}\) charged by the appellee water supply corporation on the ground that the application of the fee was discriminatory. The appellants argued that, to the extent that the tap fee exceeded actual installation charges, it operated to stabilize low rates for old users at the expense of new users.

The water supply corporation challenged the jurisdiction of the trial court to review its rates. In support of its jurisdictional argument, the water supply corporation emphasized that, although a water supply corporation is included within the definition of a public utility in that portion of the Public Utility Regulatory Act (PURA)\(^\text{47}\) governing the issuance of certificates of convenience and necessity,\(^\text{48}\) it is not so defined in that portion of PURA concerning the authority of the Public Utility Commission (PUC) to regulate utility rates and services.\(^\text{49}\) The water supply corporation argued that since no agency possessed the authority to regulate it for rate purposes, its rates could not be challenged in the courts.\(^\text{50}\) The water supply corporation further argued that the tap fee was neither unreasonable nor discriminatory. The trial court granted the water supply corporation a directed verdict, finding that the appellants had no legal authority to challenge the tap fee in the courts.

The court of appeals affirmed the trial court’s finding that the fee was not unreasonable or discriminatory.\(^\text{51}\) The court of appeals pointed to undisputed evidence that showed that the tap fee charged had always been in excess of actual costs, and that the same fee was charged to all applicants regardless of whether they were new or old users and regardless of the users’ location.\(^\text{52}\) The appellate court also found that the appellants had failed to introduce sufficient evidence of unreasonableness.\(^\text{53}\)

The appellate court, however, disagreed with the trial court’s conclusion that the water supply corporation’s rates could not be judicially reviewed,\(^\text{54}\) invoking State v. Southwestern Bell Telephone Co.\(^\text{55}\) In Southwestern Bell the Supreme Court of Texas had articulated a distinction between rate regula-

45. 678 S.W.2d 297 (Tex. App.—Fort Worth 1984, no writ).
46. A “tap fee” is a fee charged by the water supply corporation to all water users for water connections.
47. TEX. REV. CIV. STAT. ANN. art. 1446(c) (Vernon Supp. 1986).
48. Id. art. 1446(c), § 49(b).
49. Id. art. 1446(c), § 3(e).
50. The essence of the argument is that rate setting or the revision of rates set by public utilities is not a judicial but a legislative or administrative function, and that the courts must, therefore, refrain from regulating public utilities under the principle of separation of powers. See State v. Southwestern Bell Tel. Co., 523 S.W.2d 67, 69 (Tex. Civ. App.—Austin), modified and aff’d, 526 S.W.2d 526 (Tex. 1975).
51. 678 S.W.2d at 298.
52. Id. at 299.
53. Id.
54. Id. at 298-99.
55. 526 S.W.2d 526 (Tex. 1975).
tion and judicial review of due process and equal protection concerns involving a public utility’s rate and services. The supreme court had held that judicial review did not violate the separation of powers doctrine.\textsuperscript{56} Adopting the principles of \textit{Southwestern Bell}, the \textit{Bartonville} court reformed the judgment of the trial court to reflect the water supply corporation’s obligation to set reasonable, nondiscriminatory charges and the authority of the courts to enforce that obligation.\textsuperscript{57}

The \textit{Bartonville} decision somewhat compensates for the current regulatory void involving the rates and services of water supply corporations that the Texas Supreme Court exposed in \textit{City of Harden v. Water Supply Corp.},\textsuperscript{58} decided during the previous survey period. A recent change in the Texas Water Code further contributes to curing that regulatory vacuum. The amended code allows ratepayers of a nonprofit water supply corporation to petition the Texas Water Commission to assume regulatory jurisdiction over the water supply corporation with respect to water rates and services.\textsuperscript{59}

\section{II. Legislative Enactments and Constitutional Amendments}

The activity of the Sixty-Ninth Texas Legislature, Regular Session, concerning water was extensive. Acts included the passage of a comprehensive Texas water package to encourage surface and ground water conservation and to promote development, the complete reorganization of the Texas water agencies, and the restructuring of water regulation. This section of this Article provides a brief overview of these developments.

\subsection{A. Reorganization of Texas Water Agencies}

The most significant component of the legislative reorganization of the major Texas water agencies was the abolition of the Texas Department of Water Resources and the redistribution of its administrative functions between the Texas Water Commission and the Texas Water Development Board.\textsuperscript{60} The Texas Water Commission is given general jurisdiction over water and water rights issues, including water rights permits, water rights adjudication, and the cancellation and enforcement of water rights.\textsuperscript{61} The commission’s jurisdiction also extends to districts created under article III, section 52(b)(1) and (2), and article XVI, section 59 of the Texas Constitu-

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{56} \textit{Id.} at 529-30. The \textit{Southwestern Bell} court found that a public or private utility that is granted a monopoly has an obligation not to discriminate in its charges or services. \textit{Id.} at 529. The court reasoned that such an obligation would be meaningless without the existence of judicial redress for a violation of that duty. \textit{Id.}
\item\textsuperscript{57} 678 S.W.2d at 300.
\item\textsuperscript{58} 671 S.W.2d 505 (Tex. 1984). For a discussion of the \textit{City of Harden} decision, see House, 1985 \textit{Annual Survey}, supra note 2, at 362-63.
\item\textsuperscript{59} \textit{TEX. WATER CODE ANN.} \textsection{13.044} (Vernon Pam. Supp. 1986). The commission will assume rate and services jurisdiction if the petition is signed by five percent of the rate payers, or, if the water supply corporation has more than 100 customers, by 100 ratepayers. \textit{Id. See infra} notes 85-115 and accompanying text (discussion of legislative changes to water utility regulation).
\item\textsuperscript{60} \textit{TEX. WATER CODE ANN.} \textsection{5.013(b)} (Vernon Pam. Supp. 1986).
\item\textsuperscript{61} \textit{Id.} \textsection{5.013(a)(1)}.
\end{itemize}
\end{footnotesize}
The commission further governs: the state’s water quality program; the construction, maintenance, and removal of dams; the state’s coastal oil and hazardous spill prevention and control program; the state’s program concerning underground water, water wells, and drilled and mined shafts; the national flood insurance program; the state’s program relating to inactive hazardous substance, pollutant, and contaminant disposal facilities; and a portion of the state’s injection well program. Finally, the commission has authority over the state’s weather modification program, the determination of feasibility of certain federal projects, regional waste disposal, solid waste disposal, and the state’s new water rate program.

The Texas Water Development Board remains the principal state agency responsible for water planning and administration of water development. The board’s general duties and responsibilities include the development of a state-wide water plan, administration of the water assistance and water financing programs, and numerous other areas specifically assigned by statute. The affairs of the Texas Water Development Board will be managed by an executive administrator appointed by the board. The executive administrator, in turn, appoints the development fund manager who will assist the board in administering the state water assistance program, the Texas water development bond program, and other water financing programs.

The commission now oversees several areas formerly within the jurisdiction of the board. The commission now governs the use of flowing natural streams by appropriators for the conveyance of stored or conserved waters. The commission also supervises the construction of diversion facilities, divides the state into water divisions for the purpose of administering adjudicated water rights, reviews federal water projects for the governor, has authority along with the railroad commission to enter property and examine records to ensure compliance with rules, regulations, and permits concerning injection and disposal wells, and has the sole authority to set water quality standards for all water in the state.

62. Id. § 5.013(a)(2); see Tex. Const. art. III, § 52(b), art. XVI, § 59. Such districts include water improvement and conservation and reclamation districts.
64. Id. § 5.013(a)(4), (5), (11), (12), (14).
65. Id. § 6.011.
66. Id. § 6.012(a). All rights, powers, duties, and functions previously delegated to the Texas Department of Water Resources that have not been expressly assigned to the board are vested in the commission. Id. §§ 5.013(b), 6.012(b). Note that the 1985 Texas Legislature added two chapters 6 to the Texas Water Code. Thus, the sections of the Code governing the Texas Water Development Board are numbered the same as sections governing the Multi-state Water Resources Planning Commission.
67. Id. § 6.181.
70. Id. § 11.145.
71. Id. § 11.325.
72. Id. § 12.051.
73. Id. §§ 27.071-072.
74. Id. § 26.023. The wholesale agency reorganization and reassignment of jurisdiction between the Texas Water Commission and the Texas Water Development Board will likely
The office of executive director, formerly the executive branch of the Texas Department of Water Resources, has now been subsumed under the commission and performs most of the commission's executive and administrative functions. The executive director monitors permit and license compliance and prosecutes noncompliance through a mandatory enforcement hearing. It is also the executive director's function to appear at all hearings and present information developed by, or the position of, the commission, to negotiate and enter into contracts with the United States, other states, and political subdivisions, and to collect fees prescribed by the department. The legislative reorganization also created two new offices within the commission: the office of public interest is responsible for environmental quality and consumer protection, and the office of hearing examiners is responsible for hiring qualified attorneys as hearing examiners.

B. Regulation

1. The Permit Process.

The Sixty-Ninth Texas Legislature elaborated on the procedure for notice and hearings on regular applications and applications submitted by appropriators who are exempt under section 11.142 to use stored water for purposes other than domestic or livestock use. A hearing is only required if requested within thirty days after the date that proper notice is given. In considering applications for permits to store, take, or divert more than 5,000 acre-feet of water per year, the commission is now required to assess the effects, if any, of such use upon fish and wildlife habitats and water quality. A new permit exemption of one acre-foot per twenty-four hour period has been made available to petroleum drillers and producers using water from the Gulf of Mexico.

2. Utility Regulation.

a. Water Rates and Services. The Sixty-Ninth Legislature enacted a comprehensive system for the regulation of water rates and services. What

lead to some conflicts and confusion over jurisdiction. To allay those problems, the legislature directed both the commission and the board to develop memoranda of understanding to clarify and provide for their respective duties, responsibilities, and functions that have not been expressly assigned to either entity. Id. § 6.104; see id. § 5.105.

75. See id. § 5.108.
76. Id. § 5.117.
77. Id. § 5.228.
78. Id. § 5.229.
79. Id. § 5.235.
80. Id. § 5.271.
81. Id. § 5.311. The office of hearing examiners is expressly excluded from the control of the executive director. Id.
82. Id. §§ 11.132(d), 11.143(d). The commission must give notice to each downstream party who has filed a claim or appropriation by first class mail, and the applicant must also publish notice in a newspaper that is regularly published or circulated in the area thirty days before the commission will take any action. Id.
83. Id. §§ 11.149-150.
84. Id. § 11.142(b).
was formerly the PUC's authority to regulate water and sewer utilities has been conferred upon the Texas Water Commission. Regulation of water rates and services is essentially bifurcated. The commission has regulatory authority over the business of every water and sewer utility that is neither operated nor regulated by a municipality. Municipalities, on the other hand, have exclusive, original jurisdiction over water and sewer utility rates, operations, and services within their corporate limits. Any time after September 1, 1987, however, any municipality may surrender its original jurisdiction to the commission either by ordinance or after having held a municipal election on the question of surrender. Any municipality that has surrendered its jurisdiction to the commission may reinstate the authority of its governing body at any time by vote of the electorate. Nonprofit water supply corporations, the rates and services of which are currently unregulated by any agency, will fall under the authority of the commission upon the election of a sufficient number of the corporation's ratepayers.

Rates and services of water and sewer utilities must conform to certain standards and be set according to certain formulae. Services must be safe, adequate, efficient, and reasonable; rates must be just and reasonable and may not be unreasonably preferential, prejudicial, or discriminatory. The regulatory authority, whether it be a municipality or the commission, has the power to fix the overall revenues of the utility, and in so doing may not prescribe a rate that will yield more than a fair return on the utility's invested capital. The regulatory authority will allow existing rates to continue if the rates are reasonable and not in violation of existing law; otherwise, the authority must set new maximum or minimum rates for the transgressing utility. A utility may not change its rates except by filing a statement of intent with the regulatory authority at least thirty-five days before the effective date of the proposed change, with notice by publication. If the proposed change is not a major change, the regulatory author-

85. Id. §§ 13.041(a), .043.
86. Id. § 13.042(a). Nevertheless, the commission has exclusive appellate jurisdiction to review orders and ordinances of municipalities concerning water rates and services. Id. § 13.042(d).
87. Id. § 13.042(b). An election on the question of commission jurisdiction must be held if the municipal governing body receives a petition that is signed by the lesser of 20,000 or ten percent of the qualified voters voting in the last preceding general election. Id.
88. Id. § 13.042(c).
89. Id. § 13.044. Upon the petition of the lesser of five percent or 100 rate payers of a nonprofit water supply corporation, the commission will assume jurisdiction over its rates and services. Id.
90. Id. § 13.139.
91. Id. § 13.182.
92. Id. §§ 13.183-184. "Invested capital" is defined as "the actual money cost or the actual money value of any consideration paid, other than money, of the property at the time it shall have been dedicated to public use, whether by the utility that is the present owner or by a predecessor, less depreciation." Id. § 13.185.
93. Id. § 13.186.
94. Id. § 13.187(a). A utility that has fewer than 150 customers, is not a member of a group filing a consolidated tax return, and is not under common control or ownership with another water or sewer utility, is exempt from the public statement of intent requirement. An exempt utility may change its rates by filing a statement of change with the commission. If
ity may allow the utility to put the change into effect prior to the end of the thirty-five day period.\textsuperscript{95} During that period, however, the change will be subject to suspension by the authority if found improper.\textsuperscript{96} If an affected person files a complaint, the regulatory authority will, or may on its own motion, hold a hearing within thirty days of the effective date of the change to determine the propriety of the proposed change.\textsuperscript{97} Rates for areas not within a municipality may not exceed 115 percent of the average of all rates for similar services of all municipalities served by the same utility within the same county.\textsuperscript{98}

To facilitate regulation, every utility is required to file with the proper regulatory authority schedules showing all the rates subject to that authority's original or appellate jurisdiction.\textsuperscript{99} The regulatory authority has the power to inspect the business records of the utility, may compel production of documents, and may take deposition testimony concerning the business of the utility.\textsuperscript{100} The commission has the authority to require that any utility report to it under oath concerning its operations.\textsuperscript{101} Municipalities regulating utility rates and services within their jurisdiction are permitted to engage rate consultants and other qualified experts, and to charge the reasonable fees of such consultants to the regulated utilities.\textsuperscript{102} Finally, the legislature has set standards for record-keeping and accounting procedures to be followed by all water and sewer utilities.\textsuperscript{103}

\textit{b. Certificates of Convenience and Necessity.} The legislature has conferred upon the Texas Water Commission the jurisdiction formerly lodged in the PUC over the issuance of certificates of convenience and necessity (CCNs) to water and sewer utilities.\textsuperscript{104} Water and sewer utilities are prohibited from rendering service directly or indirectly to the public unless they have first obtained a CCN from the commission.\textsuperscript{105} The commission has discretion over all prospective applications,\textsuperscript{106} but is required to issue certificates to utilities providing service on September 1, 1985, and to persons or entities who were engaged in the construction or improvement of an existing facility as of that date.\textsuperscript{107} A CCN is not required for extensions of service by a utility within territory already served by the utility under an existing CCN,
or into contiguous territory already served by it and not falling under the CCN of another utility. CCNs are obtained by application followed by notice and, if requested, a hearing. Public utilities with contingent or future rights or privileges to obtain a water franchise or permit may apply to the commission for a preliminary order declaring that upon obtainment of the franchise or permit the commission will issue the desired CCN.

Utilities have the statutory obligation to render continuous and adequate service and may discontinue, reduce, or impair service only for nonpayment, nonuse, or other similar reasons. If the commission finds that service in a defined area is inadequate or substantially inferior to service in a comparable area, it may order the servicing facility to provide reasonable specified improvements in its service. A utility's transfer of a CCN and the sale of its assets or merger with another utility are also subject to commission approval. The legislature imposed an initial assessment of one-sixth of one percent of gross receipts on each public utility under the commission's jurisdiction. This assessment is intended to cover all costs borne by the commission in regulating public utilities, and the commission may adjust the rate of assessment as needed for that purpose.

3. Environmental Protection.

a. Water Quality. The Texas Water Commission administers the state's water quality program. Owners and operators of sewage treatment plants must hold a valid certificate of competency issued by the commission, and such permittees may only employ treatment operators holding valid certificates of competency. A certificate of competency may be suspended or revoked by the commission upon a finding that the holder of the certificate violated a discharge permit. The certificate may not be revoked, however, if the facility's operation was impaired by the refusal of the permittee to authorize necessary expenditures or if the violation stemmed from faulty design of the treatment facility.

In considering the issuance, amendment, or renewal of a permit to discharge an effluent comprised primarily of sewage or municipal waste, the commission is now required to consider prior adjudicated decisions that address the past performance and compliance of the applicant and its operator with the terms of any permit, order, or with state law governing waste dis-

108. Id. § 13.243.
109. Id. §§ 13.244, .246.
110. Id. § 13.249.
111. Id. § 13.250.
112. Id. § 13.253.
113. Id. §§ 13.251, .301, .302.
114. Id. § 13.451.
115. Id.
116. Id. § 26.011.
117. Id. § 26.0301(a), (b).
118. Id. § 26.0301(c), (d).
119. Id. § 26.0301(d).
charge treatment and disposal. The commission must also consider the potential effect of the discharge upon parks, playgrounds, or schoolyards within one mile of the point of discharge.

The legislature also amended the code section governing temporary orders and authorizations to discharge waste or pollutants, including untreated or partially treated waste water, into or adjacent to water. New, stricter requirements for obtaining temporary orders were added, while the requirements of the old subsection governing issuance of temporary orders have been adopted to address emergency situations. The executive director may issue an authorization to discharge untreated waste water on an expedited basis if he determines that the discharge is unavoidable to make necessary and unforeseen repairs to the facility or to prevent loss of life, serious injury, severe property damage, or severe economic loss; that no feasible alternatives to the discharge exist; and that the discharge will not cause significant hazard or damage to human life or property. A subsequent hearing on the propriety of the emergency authorization must be held no later than ten days after issuance of the authorization. In situations that do not require expedited consideration, facilities seeking temporary authority to discharge untreated or partially treated waste water must file with the commission a sworn application containing certain prescribed information. After reviewing the application, the commission may issue emergency orders immediately or following notice and a hearing.

Recent legislative changes have augmented the commission's ability to deal with hazardous spills. The executive director has the authority to solicit the assistance of local governments, the federal government, other state agencies, and independent spill clean-up experts. More importantly, the state now has a cause of action for recovery of an amount up to $5,000,000 against any party responsible for a spill. The cause of action arises out of the party's statutory duty to abate and remove the discharge, subject to the control of the federal on-scene coordinator. The state's right to recover is independent of actual expenditure of funds to clean up the spill. If the responsible party fails to discharge his statutory clean-up duties after reasonable notice has been given by the executive director, then he may be liable to the state for twice the costs incurred in cleaning up the spill.

In addition to the damage remedy for hazardous spills, the legislature also

120. Id. § 26.0281.
121. Id. § 26.030.
122. Id. § 26.0191.
123. Id. § 26.0191(f).
124. Id.
125. Id.
126. Id. § 26.0191(b).
127. Id. § 26.0191(c).
128. Id. § 26.264(e).
129. Id. § 26.265(d).
130. Id. § 26.266(a).
131. Id. § 26.265(e).
132. Id. § 26.265(g).
empowered the commission to assess an administrative penalty of up to $10,000 per day for any violation of a permit, order, rule, or law pertaining to water quality. In assessing the penalty the commission must consider the nature of the prohibited acts, with emphasis on public health and safety, and the impact of the violation on streams and reservoirs, riparian property owners, and water users. With respect to the alleged violator, the commission must consider the history and extent of previous violations, the culpability of the perpetrator, any good faith showing, the economic gain to the violator, and the penalty amount necessary to deter future violations. Any party so charged is entitled to written notice, and, if the person does not consent to the penalty, to a hearing. Furthermore, in order to encourage compliance with water quality standards, the commission will make available to the public on a regular basis the results of inspections and investigations it conducts concerning water quality, and will establish a procedure by which members of the public may obtain such information by written request.

b. Injection and Disposal Wells. The regulation of injection wells and disposal wells continues to be split between the Texas Water Commission and the Railroad Commission of Texas. As of September 1, 1985, the railroad commission has jurisdiction over the issuance of permits for injection wells used in brine mining, but permits previously issued by the water commission before September 1, 1985, continue to be effective. The railroad commission continues to have exclusive responsibility for the control and disposition of waste resulting from the drilling of injection water source wells. In addition, the railroad commission has authority over the control of waste from oil and gas disposal and injection wells and regulates injection wells used in the in situ recovery of tar sands. Nevertheless, when the railroad commission receives a permit application for an injection well or a well to be used for enhanced recovery of oil, the railroad commission has a duty to supply the water commission with a copy of the application. The water commission must examine the application and submit to the railroad commission written comments regarding the use of fresh water under the permit and any anticipated problems. The railroad commission will consider the information provided by the water commission in determining whether or not to grant the permit.

133. Id. § 26.136(a), (b).
134. Id. § 26.136(c)(1), (2).
135. Id. § 26.136(c)(3).
136. Id. § 26.136(e).
137. Id. § 26.0151(a)(1).
138. Id. § 26.0151(b).
139. Id. § 27.036.
140. Id. § 26.131(a)(1)(A).
141. Id. §§ 27.031, .035.
142. Id. § 27.0511(b).
143. Id.
144. Id. § 27.0511(c).
The Texas Water Commission has the authority to impose an administrative penalty for any violations of a permit, order, approval, or law pertaining to injection or disposal wells under its jurisdiction. The administrative penalty, the guidelines for its assessment, and the procedural safeguards accorded to the party on which it is imposed are identical to those concerning water quality violations. Besides regulating injection wells generally, the water commission has exclusive jurisdiction over the use of injection wells for the disposal of hazardous wastes.

c. Bays and Estuaries. When the commission issues a permit to store, take, or divert water in an area that is within 200 river miles of the coast, it is now required, to the extent practicable, to include in the permit any conditions necessary to maintain beneficial inflows to any affected bay and estuary system. The commission must send a copy of any application for a permit to the Texas Parks and Wildlife Department, which is entitled to be a party in any hearing on an application for a permit. The commission may suspend the permit conditions relating to beneficial inflows if it finds that an emergency exists, but prior to any suspension the commission must give the parks and wildlife department written notice and an opportunity to comment on the proposed suspension.

The Texas Parks and Wildlife Department and the Texas Water Commission have joint responsibility in cooperation with other appropriate governmental agencies to establish and maintain a bay and estuary data collection program to provide information for water resources planning and management. Finally, five percent of the annual firm yield of water in any reservoirs and associated works constructed with state financial participation that lie within 200 river miles from the coast will be appropriated to the parks and wildlife department for use in making releases to bays and estuaries and for instream uses. All operating and maintenance costs for such appropriated water will be paid by the project owners.

145. Id. § 27.1015(a).
146. See supra notes 133-36 and accompanying text.
148. Id. § 11.147(b). “Beneficial inflows” is defined as a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary system that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.
149. Id. § 11.147(a). In determining the permit conditions the commission must consider the need for periodic inflows to supply nutrients and modify salinity, the ecology and productivity of the affected bay and estuary system, the expected effects upon public welfare, the quantity of water requested, the proposed use, and the potential effect on instream uses and water quality. Id. § 11.147(c).
150. Id. § 11.147(f).
151. Id. § 11.148.
152. Id. § 11.149(a).
153. Id. § 15.3041(a).
154. Id. § 15.3041(e).
d. Fish and Wildlife. In considering applications for a permit to store, take, or divert water in excess of 5,000 acre-feet per year, the commission is now required to assess the effects of the permit on fish and wildlife habitats. Moreover, the Texas Parks and Wildlife Department has the authority to bring suit for violation of water quality permits, orders, rules, or laws affecting aquatic life or wildlife. In addition to injunctive relief or civil penalties, the parks and wildlife department is now entitled to recover damages for injuries to certain categories of aquatic life or wildlife. The department must deposit any recovery for damages in the game, fish, and water safety fund and use them to replenish or enhance the injured resources.

C. Conservation and Development

1. Conservation Promotion.

The Texas Water Commission has been charged with the responsibility to administer the law so as to promote the judicious use and maximum conservation of water. Nevertheless, the Texas Water Development Board plays an equally important role in implementing conservation measures. During the survey period the Texas Legislature amended the Water Code to promote conservation of water through a variety of means.

a. Water Conservation Plans. In order to be granted a permit by the commission to use, store, or divert water, an applicant must now provide evidence that he will use reasonable diligence to avoid waste and achieve water conservation. The legislature has also adopted indirect financial incentives to encourage the adoption of water conservation plans. Applicants for water loan assistance under chapter 15 and for financial assistance provided to political subdivisions under chapter 17 of the Texas Water Code will be required in most cases to adopt a plan of water conservation before the board may grant the application or provide any funds to the applicant. The suggested elements of the conservation plan are restrictions on discretionary water uses, plumbing code standards in new building construction, retrofit programs for existing buildings, educational programs, universal metering, conservation-oriented water rate structures, drought

154. Id. § 11.149.
155. Id. § 26.124(b).
156. Id.
157. Id.
158. Id. § 5.120.
159. See id. § 6.012.
160. "Conservation" is defined in the Water Code as the development of water resources; and those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses. Id. § 11.002(a).
161. Id. § 11.134(b)(4).
162. Id. §§ 15.106, 17.125.
contingency plans, and distribution system leak detection and repair. An applicant will be exempt from the requirement to adopt a water conservation plan if the board determines that an emergency exists, the amount of financial assistance requested is $500,000 or less, or the applicant demonstrates that the program will not be reasonably necessary. The board is required to establish an educational and technical assistance program to assist in the development of water conservation plans. Finally, the water commission may also require an applicant for water appropriation permits to formulate and submit a water conservation plan similar to that required by the board of applicants for loan assistance and financial assistance.

b. Underground Water Conservation Districts. In an effort to facilitate better management of underground reservoirs, the legislature relaxed the geographical limitations of underground water conservation districts. The former requirement of section 52.023 of the Texas Water Code that a proposed district's boundaries be coterminous with boundaries of an underground reservoir or a subdivision of an underground reservoir has been eliminated. Underground water conservation districts may now include all or part of one or more political subdivisions, districts, cities, or counties. The commission may designate underground water management areas, the boundaries of which may vary but will generally coincide with the boundaries of an underground water reservoir or subdivision thereof. The underground water management areas will be managed by appropriate underground water conservation districts.

The legislature also expanded the powers of underground water conservation districts. Districts may provide necessary facilities for the purchase, sale, transportation, and distribution of water. They may purchase, sell, transport, and distribute surface and underground water. They may now exercise the power of eminent domain, but not for the purpose of acquiring water or water rights.

The duties of underground water conservation districts have also been expanded. The exercise of some formerly discretionary powers has become mandatory. Underground water conservation districts must require water well drillers and operators to keep records of the drilling, equipping, and completion of wells and of the production and use of ground water. The districts now must require that persons drilling water wells keep and file

163. Id. §§ 15.106(b), 17.125(b).
164. Id. §§ 15.106(c), 17.125(c).
165. Id. §§ 15.106(d), 17.125(d).
166. Id. § 11.1271.
167. See id. § 52.023 (Vernon 1972).
168. Id. § 52.024 (Vernon Supp. 1986).
169. Id. § 52.023.
170. Id. § 52.155(5).
171. Id. § 52.156.
172. Id. § 52.157.
173. Id. § 52.164.
with the district accurate drillers' logs. The districts must also require permits for drilling, equipping, completing, or altering the size of wells in order to conserve ground water, prevent waste, lessen interference between wells, and minimize drawdown of the reservoir. Moreover, whereas prior to the 1985 amendments only wells capable of producing 100,000 gallons per day were within the districts' jurisdiction, now their jurisdiction extends to wells capable of producing 25,000 gallons or more per day.

New legislation regulating the finances of underground water conservation districts was adopted. Districts must be operated on a fiscal year basis, must have an audit prepared annually, and must allow open inspection of the audit and other district records. The board of directors of the district must prepare and approve an annual budget composed of certain statutorily required elements. The district may not spend any money for expenses not included in the annual budget. The district's board of directors, however, is authorized to invest and reinvest district funds in direct or indirect obligations of federal, state, and local political entities, or in certificates of deposit of state or national banks or savings and loan associations within the state.

The most significant development with respect to underground water districts pertains to the creation of districts in critical areas. Recognizing that underground water conservation districts are currently the best vehicles for realizing the state's water conservation goals, the legislature has provided for the creation of districts in areas that the Texas Water Commission has monitored and determined will face critical shortages within the forthcoming twenty-year period. The commission will establish procedures to monitor the underground water in the state, will identify critical areas, and will create and appoint a regional management advisory committee to assist in it evaluating information on the underground water resources in the area.

After identifying a critical area, the commission will call for the prepara-

174. Id. § 52.165.
175. Id. § 52.166.
176. Id. § 52.168. Districts may not require permits for the drilling of: (1) wells that will not produce more than 25,000 gallons of underground water a day; (2) wells that will supply only the domestic needs of ten or fewer households; (3) wells used to provide water for feeding livestock and poultry connected with farming, ranching, or dairy enterprises; (4) wells used to supply water for hydrocarbon production activities; or (5) jet wells used for domestic needs. Id. § 52.170.
177. Id. §§ 52.251-.253.
178. Id. § 52.254. The budget must contain a complete financial statement showing the district's outstanding obligations, the amount of cash on hand, the amount of money received in the previous year, the amount of new money available in the coming year, the balances expected at the end of the year, the estimated revenues and balances available to cover the budget, and the estimated tax rate required. Id.
179. Id. § 52.257.
180. Id. § 52.260.
181. Id. §§ 52.051-.053. Note that the sections of the Texas Water Code pertaining to underground conservation districts call for the "department" to perform the required agency functions. Given the legislature's abolition of the Texas Department of Water Resources, the author is assuming that the Texas Water Commission will take charge of these functions.
182. Id. § 52.053(a), (b), (d).
tion of a report for the purpose of determining whether a particular area should be designated as a critical area and whether the creation of a district should be recommended. If the report calls for the creation of a district, a hearing will be held in the area at which local officials and citizens will have the opportunity to exchange information with the commission. After the hearing the commission may issue an order designating the area as a critical area and delineating its boundaries.

Upon designation of a critical area for which the creation of a district is suggested, another hearing will be held to determine the feasibility and necessity of establishing a district to solve the problems of the designated critical area. At the conclusion of the hearing, if the commission finds on the basis of statutorily defined criteria that a district should be created, it will issue an order proposing the creation of a district and calling for an election within the boundaries of the proposed district to determine if the district will be created. If the majority of the votes cast at the election favor the creation of a district, the temporary board appointed by the commission to govern the district prior to its approval by the voters shall declare the district created. At an election to create a district the ballot may also include propositions for the issuance of bonds and the levy of taxes.

If the commission finds it appropriate, instead of issuing an order proposing the creation of a new district, it may issue an order recommending that the designated critical area be added to an existing district. In such a case separate elections will be held in the existing district and within the critical area, and if a majority of the voters in both the existing district and the designated critical area approve, the newly-designated critical area will be added to the existing district. If state-owned land is located within a critical area, the state agency that has management and control over that land may elect by written agreement with the commission and the newly created or previously existing district to include the state-owned land in the district. If the state agency does not so agree, it must establish its own underground water management plan for the conservation, protection, and prevention of waste of the ground water on the land. Although the Water Code provisions governing the designation of critical areas and creation of corresponding districts apply generally throughout Texas, certain specified existing districts are exempt.

183. Id. § 52.053(c), (f), (i).
184. Id. § 52.053(i).
185. Id. § 52.053(k).
186. Id. §§ 52.053(m), .054(a), .055(a).
187. Id. § 52.056(b).
188. Id. § 52.058(f).
189. Id. § 52.059.
190. Id. § 52.060(a).
191. Id. § 52.060(a), (g).
192. Id. § 52.063.
193. Id.
194. Id. § 52.062.
c. Regional Plan Implementation Agencies and Districts. Municipalities may request the creation of a regional plan implementation agency for the purpose of facilitating the implementation of area-wide systematic solutions to water, waste disposal, drainage, and other water problems. Such an agency may be created only by special petition filed with the commission signed by or on behalf of the fee simple owner or owners of fifty percent or more of the surface area of the land within the boundaries of the proposed agency. The agency must also be approved by the governing body of each city having extraterritorial jurisdiction over land within the boundaries of the proposed agency. Such an agency will be considered equal to a municipal utility district, and will have certain eminent domain powers.

The legislature has authorized the creation of regional districts for water, sanitary sewer, and waste-water drainage purposes in counties with or bordering counties with a population of at least 2.2 million. The code provides that such a district may be created for a variety of specific purposes related to the detention, transportation, sale, drainage, or treatment of water or waste water.

The governing bodies of municipal districts, cities, or counties within whose jurisdiction the district is proposed to be created or landowners of 2,000 or more contiguous acres may petition the Texas Water Commission to create a regional district. If the commission finds that the petition meets the statutory requirements and that a regional district would benefit the territory included within it, the commission will issue an order granting the petition for creation.

d. Multi-State Water Resources Planning Commission. The legislature has also adopted provisions for the establishment of the Multi-State Water Resources Planning Commission. The purpose of the planning commission is to study the water needs of the region comprised of Texas and its neighboring states after the year 2000. The commission is empowered and also obligated to initiate discussions with the governments of neighboring states and Mexico. The commission will also designate areas of the state in which present and future water supply is not sufficient to meet future requirements and to make recommendations to the governor to solve those

---

195. Id. § 54.037.
196. Id. § 54.037(b).
197. Id.
198. Id. § 54.037(e), (f).
199. Id. § 50.451(a) (Vernon Pam. Supp. 1986).
200. Id. § 50.454.
201. Id. § 50.453.
202. Id. § 50.458. See id. §§ 50.456-.457 (listing requirements for creation of regional districts).
203. Id. §§ 6.001-.056. Note that the sections of the Texas Water Code concerning the Multi-State Water Resources Planning Commission are numbered the same as sections pertaining to the Texas Water Development Board because the legislature added, apparently inadvertently, two chapters designated as “Chapter 6” to the Code.
204. Id. § 6.051.
205. Id. §§ 6.051(b), .052.
Finally, the commission is empowered to negotiate contracts with other states addressing such issues as ground water problems related to aquifers that underly other states as well as Texas.  

2. Financial Assistance.

a. Water Loan Assistance. By amendment to the Texas Constitution passed by the voters on November 5, 1985, the Texas Water Development Board was authorized to issue an additional $980,000,000 in Texas water development bonds for the following purposes: (1) $190,000,000 for water supply lines or facility acquisitions by the state; (2) $190,000,000 for water treatment; (3) $200,000,000 for flood control; and (4) $400,000,000 for state acquisition of facilities for storage, treatment, and transmission of water and waste water. The proceeds from the sale of the new issue of water development bonds will go to the Texas water development fund. A second constitutional amendment authorizes the legislature to create special funds in the state treasury for use in water conservation, water development, water quality enhancement, flood control, drainage, subsidence control, recharge, chloride control, agricultural soil and water conservation, desalinization, and other purposes. Money in any special fund created by the legislature for such purposes will be available only to cities, counties, special governmental districts and authorities, and other political subdivisions within the state. Also by constitutional amendment, the Texas Water Development Board was authorized to issue up to $200,000,000 in Texas agricultural water conservation bonds.

The Texas Water Development Board may make loans from the water loan assistance fund to political subdivisions for the construction, acquisition, improvement, or enlargement of projects pertaining to water conservation, water development, water quality enhancement, nonstructural and structural flood control, drainage, project recreation lands, revenue-generating recreational improvements, subsidence control, recharge, chloride control, and desalinization. Loans may be made to successful applicants in a variety of ways, including: (1) contracts or agreements providing for the payment of the principal or interest, or both, on bonds or other obligations issued by the political subdivision; (2) contracts for providing the political subdivision's share of any federal cost-sharing program; or (3) contracts for the purchase of bonds or other obligations issued by the political subdivision.

---

206. Id. §§ 6.053-.055.
207. Id. § 6.056.
208. TEX. CONST. art. III, § 49-d-2(a).
209. Id. § 49-d-2(c).
210. Id. § 49-d-3(a).
211. Id. Water supply corporations are now eligible for financial assistance and facility acquisition programs. Id. § 49-d-5. Accordingly, the definition of political subdivision in the Texas Water Code now includes water supply corporations. TEX. WATER CODE ANN. §§ 15.001(4), 16.001(7), 17.001(6) (Vernon Pam. Supp. 1986).
212. TEX. CONST. art. III, § 50-d.
213. TEX. WATER CODE ANN. § 15.102 (Vernon Pam. Supp. 1986); see id. § 15.001(4).
for the purpose of completely or partially financing a water project.\textsuperscript{214} If
money is not available in the fund to provide assistance to successful applicants, the board will submit with its biennial budget request to the legislative budget board a list of all approved projects.\textsuperscript{215} As money becomes available in the loan fund, the board will deliver the funds under the approved applications.\textsuperscript{216} All loans of financial assistance to a political subdivision must be repaid to the board according to the terms and conditions established by the board.\textsuperscript{217}

\textit{b. Water Bond Insurance Program.} A water bond insurance program, authorized by constitutional amendment, was implemented by the legislature during the survey period.\textsuperscript{218} Under the program the state may pledge its general credit up to an amount not to exceed $250,000,000 in support of bonds and other obligations issued by qualifying political subdivisions.\textsuperscript{219} The legislature designated the Texas Water Development Board as the agency to administer the program\textsuperscript{220} by accepting applications for bond insurance.\textsuperscript{221} In reviewing an application the board must consider the purpose for issuance of the bonds, the financial ability of the issuer, the risk to the state, and the needs of the area to be served by the project as well as the benefit that the project is likely to provide.\textsuperscript{222} After notice and a hearing, the board may approve the application if it finds that the project serves the public interest, that the issuer will most likely be able to meet its obligations under the bonds, and that the applicant possesses the necessary water right.\textsuperscript{223} The board has the opportunity further to encourage conservation by requiring applicants that it finds are not using water efficiently to develop a conservation plan.\textsuperscript{224} The board may also establish an educational and technical assistance program to assist political subdivisions in developing such conservation plans.\textsuperscript{225}

Upon approval of an application the board will contract with the issuer to provide the desired insurance.\textsuperscript{226} For the insurance coverage to be effective, however, it must be approved by the attorney general and registered by the comptroller.\textsuperscript{227} After the bonds have been approved by the attorney general, registered by the comptroller, and paid by and delivered to the buyer, the bonds and coverage are valid and binding only to the extent that they fit

\begin{itemize}
\item \textsuperscript{214} \textit{Id.} § 15.107(a).
\item \textsuperscript{215} \textit{Id.} § 15.108(a).
\item \textsuperscript{216} \textit{Id.} § 15.109.
\item \textsuperscript{217} \textit{Id.} § 15.110.
\item \textsuperscript{218} \textit{TEX. CONST.} art. III, § 49-d-4; \textit{TEX. WATER CODE ANN.} § 15.202 (Vernon Pam. Supp. 1986).
\item \textsuperscript{219} \textit{TEX. CONST.} art. III, § 49-d-4.
\item \textsuperscript{220} \textit{TEX. WATER CODE ANN.} § 15.202(b) (Vernon Pam. Supp. 1986).
\item \textsuperscript{221} \textit{Id.} § 15.206.
\item \textsuperscript{222} \textit{Id.} § 15.207.
\item \textsuperscript{223} \textit{Id.} § 15.208(a).
\item \textsuperscript{224} \textit{Id.} § 15.208(b).
\item \textsuperscript{225} \textit{Id.} § 15.208(c).
\item \textsuperscript{226} \textit{Id.} § 15.209(a).
\item \textsuperscript{227} \textit{Id.} § 15.209(d).
\end{itemize}
within two statutory limitations.\textsuperscript{228} First, the total principal balance of all insurance coverage issued may not exceed two times the maximum dollar amount that the state is authorized by the constitution to pay.\textsuperscript{229} Second, the board is not authorized to approve more than $100,000,000 of insurance coverage in any fiscal year.\textsuperscript{230} These limitations may be changed only by a two-thirds vote of each house of the legislature.\textsuperscript{231} Unless the board expressly consents in writing, insurance will not extend to refunding bonds issued to replace bonds insured by the board.\textsuperscript{232}

c. \textit{Regional Facilities and Planning}. The board may now provide financial assistance to political subdivisions for the construction or acquisition of regional facilities.\textsuperscript{233} In passing on an application for financial assistance for regional facilities, the board will consider the needs of the area and the benefit of the project, the availability of revenue to the political subdivision for the ultimate repayment of the cost of the project, the relationship of the project to statewide water needs, and the relationship of the project to the state water plan.\textsuperscript{234} The board may also enter into contracts with political subdivisions to pay for all or part of the cost of developing regional facility plans.\textsuperscript{235} The procedure for obtaining regional facility planning funds requires written application to the board.\textsuperscript{236}

d. \textit{Flood Control Assistance Program}. Of the new issue of water development bonds authorized by Texas Constitution article III, section 49-d-2, $200,000,000 is dedicated to flood control assistance.\textsuperscript{237} The Texas Water Development Board will use those funds to provide loan assistance for the development of floodplain management plans and for structural and non-structural flood control projects.\textsuperscript{238} Approval of financial assistance under this program is solely discretionary, and the board is not required to provide applicants with a hearing.\textsuperscript{239} In reviewing applications for the flood control assistance, however, the board will consider the needs of the area to be served by the project, the benefits of the project, the availability of revenue to the political subdivision for ultimate repayment of the cost of the project, the capacity of the watershed to accommodate stormwater runoff, the impact of the project on watershed capacity, whether the project will affect the volume or rate of stormwater runoff into any channel in the watershed, the effect of the project on surface water elevations, the relationship of the project to any floodplain management plan, and the effect of the project on erosion and

\begin{itemize}
\item \textsuperscript{228} \textit{Id.} §§ 15.209(d), .210.
\item \textsuperscript{229} \textit{Id.} § 15.210(a).
\item \textsuperscript{230} \textit{Id.} § 15.210(b).
\item \textsuperscript{231} \textit{Id.} § 15.210(c).
\item \textsuperscript{232} \textit{Id.} § 15.213.
\item \textsuperscript{233} \textit{Id.} § 17.1251.
\item \textsuperscript{234} \textit{Id.} § 17.124(b).
\item \textsuperscript{235} \textit{Id.} § 15.406.
\item \textsuperscript{236} \textit{Id.} § 15.406(b).
\item \textsuperscript{237} TEX. CONST. art. III, § 49-d-2.
\item \textsuperscript{238} TEX. WATER CODE ANN. § 17.771 (Vernon Pam. Supp. 1986).
\item \textsuperscript{239} \textit{Id.} § 17.776(b), (c).
\end{itemize}
sediment control. Applicants whose applications are approved must follow certain requirements with respect to contracts for the construction project and must allow inspection of the project by the board.

e. Agricultural Soil and Water Conservation Program. During the survey period the legislature also created a special agricultural soil and water conservation fund to be used for technical assistance, research, education, and demonstration programs relating to agricultural water conservation, water utilization, desalinization, weather modification, production of native and low water-use plants and water efficient crops, brush control, and other specified purposes. Contributions to the fund will be derived from one-half of the earned interest on the principal in the agricultural trust fund and other legislative appropriations. The board may also grant monies from the agricultural soil and water conservation fund to certain underground water conservation districts and other water districts for the purpose of equipment used to measure and evaluate equipment used in irrigation from surface water or ground water. During state fiscal years 1986 and 1987 the board may also use the fund to make low interest loans to soil and water conservation or underground water conservation districts, which must use the funds, in turn, to make conservation loans to qualified borrowers. Soil and water conservation loans may be used to purchase and install capital equipment or materials that are part of new irrigation water delivery and application mechanisms or for the physical conversion of an existing irrigation water delivery and application system to an approved system. Under this special pilot low-interest loan program, the state guarantees the conservation district lender that in the event of default on the conservation loan it will assume fifty percent of the monies still due and payable.


The legislature's enactments concerning underground water conservation districts allows such districts to issue bonds and notes to finance district projects. Bonds and notes may be issued by a district to pay for various projects, including: the construction of dams; the drainage of lakes, draws, depressions, and creeks; the acquisition of land to facilitate dam construction and drainage; the installation of pumps and other equipment; and the construction or acquisition of facilities for the purchase, sale, transportation, and distribution of surface water and ground water. Both the form of bonds and notes and their manner of repayment must conform to specific

240. Id. § 17.775.
241. Id. §§ 17.787-.789.
242. Id. §§ 15.432, .434.
243. Id. §§ 15.431, .433.
244. Id. § 15.471.
245. Id. § 15.532.
246. Id. § 15.537.
247. Id. § 15.539.
248. Id. § 52.291 (Vernon Supp. 1986).
249. Id.
statutory requirements.\textsuperscript{250} Bonds and notes issued by an underground water conservation district must be approved by the attorney general and registered by the comptroller.\textsuperscript{251} If a district's bonds or notes are to be wholly or partially secured by taxes, they must also be authorized by a majority vote of the qualified voters of the district.\textsuperscript{252} The board of directors of the district may levy taxes annually to pay those bonds payable in whole or in part by taxes, but taxes levied may not exceed a rate of fifty cents on each one hundred dollars of assessed valuation.\textsuperscript{253} The district may also issue bonds to refund all or any part of its outstanding bonds or notes, including mature but unpaid interest coupons.\textsuperscript{254}

Other types of districts created pursuant to the Texas Water Code are also authorized to issue bonds. Municipal utility districts may issue bonds to finance district projects\textsuperscript{255} and may use bond proceeds to pay up to three years' interest on bonds and notes of the district.\textsuperscript{256} Municipal districts may not, however, issue bonds to pay for the development and maintenance of recreational facilities,\textsuperscript{257} despite the fact that the code encourages municipal districts to provide such facilities.\textsuperscript{258} Water control and improvement districts and levy improvement districts are authorized to issue bonds to finance district projects and to issue refunding bonds.\textsuperscript{259}

\begin{itemize}
\item \textsuperscript{250} Id. §§ 52.292, .295.
\item \textsuperscript{251} Id. § 52.297.
\item \textsuperscript{252} Id. § 52.294(a).
\item \textsuperscript{253} Id. § 52.351.
\item \textsuperscript{254} Id. § 52.298.
\item \textsuperscript{255} Id. § 54.501.
\item \textsuperscript{256} Id. § 54.521.
\item \textsuperscript{257} Id. § 54.774(a).
\item \textsuperscript{258} Id. §§ 54.771(a), .773.
\item \textsuperscript{259} Id. §§ 51.402, 51.438, 57.201, 57.2131. Levy improvement districts may only issue bonds after receiving the approval of a majority of the electors of the district. Id. § 57.201.
\end{itemize}