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WATER LAW

by

Douglas G. Caroom*

and

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THIS Article reviews judicial developments in the area of water law, as well as significant new rules promulgated by the Texas Water Commission during the Survey period.

I. JUDICIAL DEVELOPMENTS

A. Water Rights

During the last Survey period two courts of appeals decisions in water rights adjudication proceedings provided new developments in the area of water rights law. As anticipated,¹ the Texas Supreme Court declined to retreat to the uncertainty of a case-by-case judicial determination of equitable water rights in its first water rights decision of the Survey period, *In re Water Rights of the Brazos III Segment*.² The court held that equitable riparian water rights may no longer be granted through exercise of the judiciary's inherent equitable powers.³

Texas courts have recognized equitable water rights in only one prior instance: the court adjudication of water rights of the lower Rio Grande, initiated during the drought of the 1950s. In *State v. Hidalgo County Water Control & Improvement District No. 18*⁴ the court exercised its equitable powers to recognize water rights in the irrigators even though no adequate legal basis existed to support the irrigators' claim.⁵ Several unique circumstances combined to justify the creation of equitable water rights: (a) a previous Texas Supreme Court decision caused the unanticipated hardship upon valley irrigators;⁶ (b) the availability of surplus water on the Rio

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1. See Caroom & Johnson, *Water Law, Annual Survey of Texas Law*, 42 Sw. L.J. 439, 442 (1988).

2. 746 S.W.2d 207 (Tex. 1988) (hereinafter *Brazos III*).

3. *Id.* at 211.

4. 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

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

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

Grande to satisfy the irrigators' needs;⁷ and (c) the legislature's failure to provide guidance concerning the use of Falcon and Amistad water.⁸ The Texas Supreme Court in *Valmont Plantations v. State*⁹ previously established the rule that grants of land from civil law governments, prior to 1840, did not include an implied riparian right to irrigate.¹⁰ Prior to this decision, however, much of the lower valley's irrigated agriculture had depended upon implied civil law irrigation rights to justify the long established and good faith use of Rio Grande water.¹¹

In *Hidalgo County* the court noted the recent construction of the Amistad Reservoir and the Falcon Reservoir under the 1945 treaty between the United States and Mexico.¹² The reservoirs, built pursuant to the treaty, made available significant amounts of water in storage to satisfy the irrigators' needs. The federal government constructed these reservoirs at no expense to the state or other local parties. Given these available factors and the state's policy against waste of water, the court recognized a lesser, equitable right for valley irrigators who would otherwise have been deprived of rights by the *Valmont Plantations* decision.¹³

In prior administrative water rights adjudication proceedings, the Commission consistently took the position that it lacked a court's equitable powers and could not recognize equitable water rights for irrigators who claimed the rights on the basis of civil law land grants.¹⁴ A Texas court faced the issue of equitable water rights in at least one prior instance.¹⁵ In that case the court held that it was without authority to recognize an equitable water right absent the "unusual and extraordinary circumstances" that existed on the Rio Grande in *Hidalgo County*.¹⁶ The trial court in *Brazos III*, however, considered its own equitable powers sufficient to recognize equitable water rights.¹⁷ The court determined that a sufficient factual basis existed to support the landowners' claimed rights.¹⁸ The court of appeals agreed.¹⁹ Thus, the *Brazos III* decision represented the first subsequent recognition of equitable water rights since the *Hidalgo County* court created the doctrine.

In reversing the court of appeals, the Texas Supreme Court agreed with the Water Commission that the lower courts' decisions improperly created

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

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

9. 163 Tex. 381, 355 S.W.2d 502 (1962).

10. *Id.* at 382, 355 S.W.2d at 502-03. Grants under common law, from 1840 until July 1, 1895, conveyed a common law irrigation right. See Caroom & Elliott, *Water Rights Adjudication—Texas Style*, 44 TEX. B.J. 1183, 1186 (1981).

11. Caroom & Elliott, *supra* note 10, at 1186.

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

13. *Id.* at 744-48.

14. See Caroom & Elliott, *supra* note 10, at 1187.

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

16. *Id.* at 158.

17. 726 S.W.2d 214, 215 (Tex. App.—Waco 1987), *rev'd*, 746 S.W.2d 207 (Tex. 1988).

18. 726 S.W.2d at 215.

19. *Id.*

new water rights outside of those authorized by the Water Rights Adjudication Act (the Act).²⁰ Under the court's ruling, the precedent established in *Hidalgo County* will never again serve as a basis for judicial creation of water rights. The court stated that *Hidalgo County* is limited to the facts at issue in that case.²¹ Section 11.303(k) of the Act²² was considered to preclude the creation of new water rights by the courts after the effective date of the Act. Since Water Code section 11.322 extinguishes all water rights not recognized in the adjudication's final decree,²³ there appears to be no chance for the creation of additional equitable water rights in the future.

In *Brazos III* the Texas Supreme Court reaffirmed the criteria applicable to a determination of the existence of sovereign-granted water rights. The court stated that land grants made between 1840 and 1895 by the Republic or State of Texas convey an implied right to irrigate which passes under silent land grants by virtue of the state's adoption of the common law in 1840.²⁴ On the other hand, Spanish or Mexican land grants from 1823 to 1840 do not carry with them any implied rights of irrigation.²⁵ Owners of all Spanish and Mexican lands granted prior to 1840 must affirmatively show a grant of irrigation rights from the sovereign to claim a riparian right. Thus, the *Brazos III* court concluded that the claimants had no water rights because of their pre-1840 grants.²⁶

The Texas Supreme Court's second water rights decision of the Survey period, *Indianola Co. v. Texas Water Commission*,²⁷ is a per curiam opinion denying the petitioner's motion for rehearing on application for writ of error. The Corpus Christi court of appeals, in an opinion reported last Survey period, denied the Indianola Company's claimed water rights in Green Lake, determining that the waters of Green Lake were state waters, subject to appropriation only through the normal statutory procedures.²⁸ The appellate court's ruling hinged upon application of section 11.021(a) of the Water Code.²⁹ Since Green Lake was a natural lake and, therefore, within the

20. *Brazos III*, 746 S.W.2d 207, 209 (Tex. 1988); see TEX. WATER CODE ANN. §§ 11.301-341 (Vernon 1988).

21. 746 S.W.2d at 210. The court stated, "we hold that *Hidalgo* is limited to those facts, and cannot again be used as authority for the equitable creation of water rights. To hold otherwise would destroy the benefits of the Water Rights Adjudication Act." *Id.*

22. TEX. WATER CODE ANN. § 11.303(k) (Vernon 1988). The section provides that "[n]othing in this section shall be construed to recognize any water right which did not exist before August 28, 1967." *Id.*

23. TEX. WATER CODE ANN. § 11.322(d) (Vernon 1988). Subsequently issued permits and uses for domestic and livestock purposes are excepted by this section. *Id.*

24. 746 S.W.2d at 209.

25. *Id.* The court rejected the dictum in *Motl v. Boyd*, 116 Tex. 82, 107-08, 286 S.W. 458, 467 (1926), which stated that Mexican land grants from 1823-1840 also conveyed implied rights. 746 S.W.2d at 209.

26. 746 S.W.2d at 209-10.

27. 749 S.W.2d 771 (Tex. 1988).

28. *In re Water Rights of Lower Guadalupe River*, 730 S.W.2d 64, 67 (Tex. App.—Corpus Christi 1987), writ *ref'd n.r.e. per curiam*, 749 S.W.2d 771 (Tex. 1988). For a detailed discussion of the *Indianola* situation, see Caroom & Johnson, *Water Law, Annual Survey of Texas Law*, 42 Sw. L.J. 439, 442 (1988).

29. TEX. WATER CODE ANN. § 11.021(a) (Vernon Supp. 1989). Section 11.021(a) provides:

scope of the provision, the court concluded that its waters were public.³⁰

A potentially broader application of the court of appeals decision results from the court's discussion of legal principles applicable to surface water, which is also frequently called diffused surface water. Surface waters or diffused surface waters are waters flowing across the surface of the land that have not yet reached a watercourse.³¹ Under *Turner v. Big Lake Oil Co.*³² surface waters are the property of the owner of the surface estate.³³ Upon entry into a watercourse they are legally transformed from private property to state waters.³⁴

Since Green Lake is a natural depression fed by surface water inflow or stranded flood flows from the Guadalupe River, the Indianola Company argued that its waters were the property of the landowner, available for use without state authorization. In overruling these arguments, the court of appeals previously ruled that surface waters may become state waters when collected in a depression, even though the depression may be unconnected to a watercourse.³⁵ Additionally, the appellate court construed the predecessor statute of section 11.021(a) as declaring surface waters on all land granted after 1921 to be retained as state property.³⁶

The Texas Supreme Court, in denying Indianola's application for writ of error, expressly indicated its disapproval of the lower court's two rulings on surface water.³⁷ Instead, the court simply ruled that lakes were within the scope of section 11.021(a). Green Lake is a lake; therefore, Green Lake contains state water.³⁸

It is difficult to reconcile the logic of the supreme court's conclusion that Green Lake contains state water with its apparent disapproval of the court of appeal's ruling that surface waters collected in a depression, unconnected to a watercourse, are state waters. The most likely explanation is that the supreme court is ready to apply the appellate court's rule to depressions that are large enough to be called lakes and is presently reluctant to commit to any further extension.

B. *Prevention of Underground Water Pollution*

The Railroad Commission has a duty to adopt rules to protect Texas surface and subsurface waters from pollution associated with oil and gas activi-

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

Id.

30. *Indianola*, 749 S.W.2d at 772.

31. See W. HUTCHINS, *THE TEXAS LAW OF WATER RIGHTS*, 515-16 (1961).

32. 128 Tex. 155, 96 S.W.2d 221 (1936).

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

34. *Id.*

35. *Lower Guadalupe River*, 730 S.W.2d at 67.

36. *Id.*

37. *Indianola*, 749 S.W.2d 771, 772 (Tex. 1988).

38. *Id.*

ties.³⁹ In *Railroad Commission v. Concerned Citizens to Protect the Edwards Aquifer*⁴⁰ the Austin court of appeals ruled, however, that the Railroad Commission is not required to adopt any such rules before considering an application for a permit to build an oil pipeline.⁴¹ Instead, the Commission could consider a permit application in a "contested-case" format prior to adoption of rules.⁴²

A group of concerned citizens opposed construction of a crude oil pipeline over a portion of the Edwards Aquifer in Hays County. They feared the pollution of the underground water supply. In opposing the Railroad Commission's issuance of a construction permit for the pipeline, the citizens urged the Commission to adopt rules to govern pipeline construction prior to considering permit applications on an ad hoc basis.

The Commission gave notice that it would conduct a hearing on All American Pipeline Company's application for a permit to build an oil pipeline. The citizens' group unsuccessfully urged the Commission to delay the hearing until the Commission could conduct a formal rulemaking proceeding to adopt rules to protect the surface and subsurface waters of Texas from pipeline pollution. The citizens' group then brought suit to enjoin the Railroad Commission from hearing the permit application. The district court temporarily enjoined the Commission's permit adjudication and held that the Commission must first adopt rules under section 5 of the Administrative Procedure and Texas Register Act.⁴³

The court of appeals reversed the district court's order and dissolved the temporary injunction.⁴⁴ The court ruled that unless mandated by statute, an agency's choice of proceeding by general rule or by ad hoc adjudication lies in the informed discretion of the agency.⁴⁵ Even though the pertinent statutory authority⁴⁶ required the agency to adopt and enforce rules and allowed the agency to issue permits to prevent surface and subsurface water pollution, the statute imposed no requirement on the timing of adoption of the rules.⁴⁷ Consequently, the court ruled, the Commission acted within its discretion by considering the permit application without first conducting formal rulemaking.⁴⁸ For this reason the district court had no authority to enjoin the agency from hearing the application.⁴⁹

39. TEX. NAT. RES. CODE ANN. § 91.101(2)(F) (Vernon Supp. 1989) provides in part:

To prevent pollution of surface water or subsurface water in the state, the commission shall adopt and enforce rules and orders and may issue permits relating to: . . .

(2)(F) activities associated with the . . . transportation of . . . oil. . . .

Id.

40. 741 S.W.2d 602 (Tex. App.—Austin 1987, writ *dism'd w.o.j.*).

41. *Id.* at 603.

42. *Id.* at 602.

43. *Id.* at 604. TEX. RIV. CIV. STAT. ANN. art. 6252-13a, § 5 (Vernon Supp. 1989) sets out the procedure for the adoption of rules.

44. 741 S.W.2d at 604.

45. *Id.*

46. TEX. REV. CIV. STAT. ANN. § 91.101 (Vernon Supp. 1989).

47. 741 S.W.2d at 604.

48. *Id.*

49. *Id.*

C. Water Utility Regulation

Statutory notice requirements for rate increases do not apply to municipally owned utilities. In *City of Tawakoni v. Williams*⁵⁰ the court determined that the notice requirements for rate increases in section 43 of the Public Utility Regulatory Act (PURA)⁵¹ were not applicable to a municipally owned public utility.⁵² Prior to March 1, 1986, the Public Utility Commission had ratemaking jurisdiction over water and wastewater utilities.⁵³ Although PURA has had no application to water or wastewater utilities since March 1, 1986, the court's opinion appears equally applicable to the counterpart provisions of the Water Code.⁵⁴

West Tawakoni is a general law municipality that owns and operates a water and wastewater utility. The city adopted an ordinance raising its water and sewer rates. Williams and other citizens brought an action to enjoin the city from enforcing the ordinance. The trial court granted the residents' partial summary judgment because the city failed to comply with the notice requirements of section 43(a) of PURA.⁵⁵ On appeal from the trial court's judgment making the partial summary judgment its final judgment, the city contended that section 43(a) was not applicable to a municipality. The court of appeals agreed with the city for three reasons.⁵⁶

First, the court noted that section 43(a) applies when a utility proposes to make changes in its rates.⁵⁷ The term "utility," however, as defined in sec-

50. 742 S.W.2d 489 (Tex. App.—Dallas 1987, writ denied).

51. TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon Supp. 1989).

52. 742 S.W.2d at 490.

53. See Historical Note in TEX. WATER CODE ANN. § 13.001 (Vernon 1988). Water and wastewater utility regulatory authority is currently exercised by the Texas Water Commission. *Id.*

54. *Tawakoni*, 742 S.W.2d at 491. Section 13.187 is the counterpart section of the Water Code. *Id.*

55. TEX. REV. CIV. STAT. ANN. art. 1446c, § 43(a) (Vernon Supp. 1989):

No utility may make changes in its rates except by filing a statement of intent with the regulatory authority having original jurisdiction at least 35 days prior to the effective date of the proposed change. The statement of intent shall include proposed revisions of tariffs and schedules and a statement specifying in detail each proposed change, the effect the proposed change is expected to have on the revenues of the company, the classes and numbers of utility consumers affected, and such other information as may be required by the regulatory authority's rules and regulations. A copy of the statement of intent shall be mailed or delivered to the appropriate officer of each affected municipality, and notice shall be given by publication in conspicuous form and place of a notice to the public of such proposed change once in each week for four successive weeks prior to the effective date of the proposed change in a newspaper having general circulation in each county containing territory affected by the proposed change, and by mail to such other affected persons as may be required by the regulatory authority's rules and regulations. Provided, however, nothing in this subsection shall apply to a water or sewer utility that:

- (1) has fewer than 150 customers; and
- (2) is not a member of a group filing a consolidated tax return; and
- (3) is not under common control of ownership with another water or sewer utility.

56. 742 S.W.2d at 491.

57. *Id.* at 492.

tion 3(c) of PURA expressly excludes municipally owned utilities.⁵⁸ Thus, the court concluded that section 43(a) does not literally apply to municipalities because a municipally owned utility is not a utility as defined by PURA.⁵⁹

Second, the court pointed out that the legislative history of PURA and the context in which section 43(a) arises indicate that section 43(a) was not intended to apply to municipally owned utilities.⁶⁰ PURA does not give the Public Utility Commission jurisdiction over the rates of a municipally owned water or wastewater utility. Since PURA exempts these municipally owned utilities, the court concluded that it is also likely that PURA's procedures for regulating the adoption of a rate increase (*i.e.*, section 43) were not intended to apply to municipalities.⁶¹

Third, the court held that an unreasonable construction of the law would result if section 43(a) were applied to municipally owned utilities.⁶² For example, if section 43 applies to municipally owned utilities, the utility would have to file a statement of intent with itself, convince itself that good cause exists for a rate increase, and provide itself with notice and a written statement of its decision. The court concluded that such an unreasonable result made little sense.⁶³

The court emphasized that its decision that section 43(a) does not apply to municipally owned utilities does not mean that municipalities may adopt rate increases without public notice.⁶⁴ The court noted that at the time of its decision, the Open Meetings Act⁶⁵ required the subject matter of every meeting of a municipal governing body to be posted continuously for at least seventy-two hours before the meeting, except in emergencies (when notice must be posted for a minimum of two hours).⁶⁶ Thus, the court concluded no problem existed with the public being notified under the Open Meetings Act of a municipally owned utility's water and sewer rate increase.⁶⁷

D. Municipal Liability

1. Damage Due to Flooding

A municipality may be liable for flood damage due to negligent mainte-

58. TEX. REV. CIV. STAT. ANN. art. 1446c, § 3(c), (Vernon Supp. 1989). Section 3(c) provides in part:

The term "public utility" or "utility", when used in this Act, includes any person, corporation, river authority, cooperative corporation, or any combination thereof, *other than a municipal corporation* or a water supply or sewer service corporation, or their lessees, trustees, and receivers, now or hereafter owning or operating for compensation in this state equipment or facilities

Id. (emphasis added).

59. 742 S.W.2d at 492.

60. *Id.*

61. *Id.* at 493.

62. *Id.* at 494.

63. *Id.* at 493-94.

64. *Id.* at 494.

65. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A(a), (h) (Vernon Supp. 1989).

66. 742 S.W.2d at 494-95.

67. *Tawakoni*, 742 S.W.2d at 495.

nance of drainage ditches, but not for approval of the subdivision plans that resulted in increased run-off that led to the flooding. In *City of Watauga v. Taylor*⁶⁸ a jury awarded property owners damages for injury to their real and personal property.⁶⁹ The owners also received damages for mental anguish, resulting from the flooding of their house. Drainage ditches maintained by the city bordered the home. The court of appeals denied a portion of the award for mental anguish and declared that the property owners were not entitled to attorney's fees.⁷⁰

The Taylors' house sat on a lot bordered by drainage ditches and adjacent to a bridge that crossed a drainage ditch upstream from the lot. The Federal Insurance Administration designated the area to be within a 100-year storm flood hazard area. Three years after the Taylors bought their home, the city approved a plat for a new residential development. This new addition covered 230 acres on both sides of the drainage ditch upstream from where the Taylors lived. As a result of the subdivision, the volume of flood water under 100-year flood conditions tripled, and considerably exceeded both the capacity of the bridge and the channel.

In 1981 the Taylors' home suffered extensive flood damage following a heavy rainstorm. In 1985 a rainstorm caused erosion along a drainage ditch adjacent to the house. In addition, the foundation, floor and walls of the house began to show cracking.

The Taylors sued the city in 1983. They alleged that the construction of the Sunnybrook Addition resulted in a substantial increase and diversion in the flow of surface water from the subdivision onto the homeowners' property. The Taylors alleged that the city breached its duty by allowing construction of the bridge, approving the subdivision plats, failing to build drainage improvements downstream from the subdivision, and failing to adequately maintain the drainage easement.

Relying upon the Texas Supreme Court's decision in *City of Round Rock v. Smith*,⁷¹ the court held that the city could not be liable for approving the subdivision plat because plat approval is a governmental function subject to governmental immunity.⁷² The court determined that a city which plans and builds drainage improvements acts with quasi-judicial police power.⁷³ Consequently, the Taylors had no cause of action in this regard because police power is a function within the arena of governmental immunity.⁷⁴ The court noted that the city could be liable for negligent construction or maintenance of a storm sewer because acts such as these were ministerial acts that a private contractor could perform.⁷⁵

The court further determined that no evidence existed to support a finding

68. 752 S.W.2d 199 (Tex. App.—Fort Worth 1988, no writ).

69. *Id.* at 201.

70. *Id.* at 206.

71. 687 S.W.2d 300, 303 (Tex. 1985).

72. *Watauga*, 752 S.W.2d at 202.

73. *Id.*

74. *Id.*

75. *Id.* (citing *City of Round Rock*, 687 S.W.2d at 303).

that the city was negligent in initially constructing the bridge.⁷⁶ The court stated that the issue of whether the city was negligent in failing to remove the bridge turned on whether the city was negligent in failing to provide sufficient drainage.⁷⁷ Since drainage improvements are a subject of governmental immunity, the Taylors could not recover on the theory that the city was negligent in allowing the bridge to remain.

The city admitted that the maintenance of the drainage ditch easement was a proprietary function and not the subject of governmental immunity.⁷⁸ Nevertheless, the city claimed that the evidence was insufficient to support a judgment for personal damages that occurred prior to 1985, the year the city failed to prevent erosion along the sides of the drainage embankment. The court disagreed, finding sufficient evidence to conclude that the city was negligent in the maintenance of the drainage easement prior to 1985.⁷⁹

The court determined that insufficient evidence existed to support a damage award of mental anguish⁸⁰ for Mr. Taylor. It, however, did find sufficient evidence that Mrs. Taylor suffered mental anguish associated with the city's failure to maintain the drainage ditch.⁸¹ Finally, the court denied an award for attorney's fees because such fees are not recoverable in a tort action.⁸²

2. Broken Water Mains

The doctrine of *res ipsa loquitur* may apply to breaks in water utility transmission lines. In *City of Fort Worth v. Holland*⁸³ the jury awarded Mr. Holland damages for injury to his property that resulted when water from a broken water main cascaded onto his residence.⁸⁴ Holland relied on the doctrine of *res ipsa loquitur* to prove the city's negligence. Although it acknowledged the applicability of the doctrine to broken water lines, the court of appeals reversed the judgment and remanded the case for a new trial.⁸⁵ The court found that the evidence was insufficient to establish that the break might not have ordinarily occurred in the absence of negligence.⁸⁶

On its appeal the city challenged the relevancy of testimony and documen-

76. *Id.* at 203.

77. The court noted that "[a] city which undertakes to provide drainage has no duty to provide facilities adequate for all floods that may reasonably be anticipated." *Id.* (citing *Norman & Schaen, Inc. v. City of Dallas*, 536 S.W.2d 428, 430 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.)).

78. *Id.*

79. *Id.* The court cited the testimony of a city consultant who stated that "a continuing program is necessary to maintain earthen channels [drainage ditches] to clear vegetation and debris, correct erosion." *Id.* Maintenance problems with the drainage ditches existed prior to the 1985 erosion. *Id.*

80. *Id.* at 204 (citing *Moore v. Lillebo*, 722 S.W.2d 683, 688 (Tex. 1986) (definition of mental anguish as "emotional pain, torment, and suffering")).

81. *Id.*

82. *Id.* at 205; see TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1986) (limiting awards to costs and reasonable and necessary attorney's fees).

83. 748 S.W.2d 112 (Tex. App.—Fort Worth 1988, writ denied).

84. *Id.* at 113.

85. *Id.* at 113-14.

86. *Id.* at 115.

tary evidence of other water main breaks in the neighborhood. The city, however, failed to preserve its challenge for appellate review.⁸⁷ Nevertheless, the court determined that the evidence was relevant to Holland's proof that the city had not exercised ordinary care because it had actual notice of other main failures.⁸⁸

The city also argued that the *res ipsa loquitur* doctrine should not apply to this type of incident. In overruling this point the court distinguished this case from *City of Houston v. Church*.⁸⁹ In distinguishing *Church* the court noted that, unlike *Holland*, the doctrine of *res ipsa loquitur* was not applicable because Mr. Church did not have the character of evidence⁹⁰ to support a reasonable inference that the city was negligent in causing or permitting a water main leak to occur.⁹¹ Moreover, the court emphasized that in *Harmon v. Sohio Pipeline Co.*⁹² the Texas Supreme Court applied *res ipsa loquitur* to a similar situation involving an oil pipeline.⁹³

Finally, the city argued no evidence and insufficient evidence to support the jury's finding of negligence and proximate cause. The court overruled the no evidence point.⁹⁴ Nevertheless, the court agreed that the evidence was insufficient to support the jury's finding of negligence.⁹⁵ The court concluded that it would be manifestly unjust to allow Holland to rely on the *res ipsa loquitur* doctrine to avoid the burden of proving the city's negligence, as he repeatedly failed to inquire of relevant matters⁹⁶ from testifying witnesses. Because the evidence at trial did not provide a reasonable basis for determining that the water main causing Holland's loss would not have ordinarily occurred but for the city's negligence, the court reversed the judgment of the trial court and remanded the cause for a new trial.⁹⁷

87. *Id.* at 113. The city failed to timely object to offers of testimony and documentary evidence of other breaks. *Id.*

88. *Id.*

89. 554 S.W.2d 242 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

90. The court noted two factors controlling the application of the doctrine: "(1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to be under the defendant's management and control." 748 S.W.2d at 114 (citing *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 251 (Tex. 1974)).

91. *Id.* In *Church* the plaintiff sought to recover for damages resulting from a water main break and subsequent leak that occurred under his building. In dictum the court sustained Houston's liability based upon a trespass theory. 554 S.W.2d at 246.

92. 623 S.W.2d 314, 315 (Tex. 1984).

93. *Holland*, 748 S.W.2d at 114.

94. *Id.* at 115.

95. *Id.*

96. The only expert who testified repeatedly asserted his belief that the break resulted from a factor other than negligence, such as corrosion. Appellees offered no evidence of the standard applicable to maintenance of water mains or their life expectancy under the conditions evident in the neighborhood. Moreover, they did not attempt to prove the age of the water main, or provide information about how the neighboring broken water mains interconnected. Additionally, appellees did not attempt to establish the distance between the neighboring broken water mains. *Id.*

97. *Id.* at 116.

E. Municipal Utility Districts

A property owner's suit against a municipal utility district for refusal to annex his property may state a cause of action for denial of equal protection. It does not, however, violate voting rights or due process rights of the property owner.

In *Mahone v. Addicks Utility District*⁹⁸ the federal district court dismissed with prejudice a landowner's antitrust and civil rights claims against the Addicks Utility District (the District) for failure to state a claim.⁹⁹ The Fifth Circuit held that the district court correctly dismissed with prejudice the antitrust claim and all of the civil rights claims except the claim based on equal protection.¹⁰⁰ The appeals court remanded the equal protection claim for further consideration because it could not determine that the allegations failed to state a claim of denial of equal protection.¹⁰¹

In 1977 the District¹⁰² exercised its annexation power¹⁰³ to add a 147-acre tract of land to the District. By adding this tract, the District completely encircled twenty acres of unannexed, undeveloped property near the District's geographic center. In 1982 Mahone, the owner of the twenty-acre tract, applied to the District for annexation.¹⁰⁴ The District's board of directors continually rejected Mahone's applications. The board then informed Mahone that before they would consider annexation Mahone would have to present to the board an expensive development plan. As far as Mahone could ascertain, the board had not required any other petitioner for annexation to submit costly plans at such an early stage in the annexation process. Mahone also claimed that persons close to the District attempted to solicit illegal payments to certain developers whose land was already included in the District. Finally, the District apparently furnished municipal services to a tract located farther from the District's physical plant than Mahone's property. Additionally, the owner of this tract had applied for services after Mahone.

In his final amended complaint, Mahone alleged that the defendants had acted in conspiracy, under color of state law, and in violation of the Civil Rights Act of 1871,¹⁰⁵ thereby violating both his federal and constitutional rights. Mahone alleged violations of his voting rights, as well as his due process and equal protection rights. He also charged the defendants with a violation of antitrust laws. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

98. 836 F.2d 921 (5th Cir. 1988).

99. *Id.* at 923.

100. *Id.*

101. *Id.* at 926.

102. Chapter 54 of the Water Code governs the creation of municipal utility districts. See TEX. WATER CODE ANN. §§ 54.001-738 (Vernon 1972 & Supp. 1989).

103. Section 54.211 provides that a district may acquire land necessary for the purposes provided in chapter 54. *Id.* § 54.211.

104. "The owner or owners of land contiguous to the district or otherwise may file with the board a petition requesting that there be included in the district the land described in the petition" *Id.* § 54.711.

105. 42 U.S.C. § 1983 (1982).

The court asserted that the Constitution does not forbid a district from excluding land, even if the effect of the exclusion is to divest the excluded landowner of his right to vote in district elections, unless the gerrymandering is racially or politically motivated.¹⁰⁶ Since Mahone's voting rights claim did not assert gerrymandering or contain an equal protection analysis, he failed to state a cognizable claim.¹⁰⁷

Mahone next contended that the District's hearing on his annexation petition denied him procedural due process, since he did not receive the opportunity to present or cross-examine witnesses. Mahone claimed that this lack of due process deprived him of a property interest¹⁰⁸ that arises as a result of section 54.233¹⁰⁹ of the Water Code. Mahone argued that section 54.233 establishes a policy requiring individual utility districts to provide utilities to lands area-wide. According to Mahone, the area-wide waste treatment policy demonstrates his entitlement to both utilities and annexation. The court disagreed, finding that the requirements of section 54.233 do not mandate area-wide annexation, but instead act as a guiding principle for each district to follow in making its annexation decision.¹¹⁰ The court further reasoned that the express words of section 54.714¹¹¹ give the utility district discretionary power to annex land.¹¹² Mahone's desire to have his land annexed amounted to a mere expectation rather than a legitimate claim of entitlement. Since he failed to allege a property interest, his claim was properly dismissed.¹¹³

In the final component of the civil rights claim, Mahone asserted that he

106. *Mahone*, 836 F.2d at 928; *see also* *Jimenez v. Hidalgo County Water Improvement Dist. No. 2*, 68 F.R.D. 668, 674 (S.D. Tex. 1975) (no constitutional violation even assuming exclusion from district for political reasons), *aff'd mem.*, 424 U.S. 950 (1976).

107. 836 F.2d at 928.

108. In order to succeed on a due process claim one must show a deprivation of a property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) (right to some kind of hearing paramount when protected interests implicated, but procedural due process does not protect infinite range of interests).

109. TEX. WATER CODE ANN. § 54.233 (Vernon 1972). Section 54.233 provides:

The powers and duties conferred on the district are granted subject to the policy of the state to encourage the development and use of integrated area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state, it being an objective of the policy to avoid the economic burden to the people and the impact on the quality of the water in the state which resulted from the construction and operation of numerous small waste collection, treatment, and disposal facilities to serve an area when an integrated area-wide waste collection, treatment, and disposal system for the area can be reasonably provided.

Id.

110. 836 F.2d at 931.

111. TEX. WATER CODE ANN. § 54.714 (Vernon 1972). Section 54.714 provides in part:

(a) The board shall hear and consider the petition and *may add* to the district the land described in the petition if it is considered to be to the advantage of the district and if the water, sewer, and drainage system and other improvements of the district are sufficient or will be sufficient to supply the added land without injuring land already in the district.

Id. (emphasis added).

112. 836 F.2d at 931.

113. *Id.*

received uneven treatment by the District in the application¹¹⁴ of its annexation procedures and therefore was denied the equal protection of the laws.¹¹⁵ The court determined that for equal protection analysis, Mahone's complaint alleged two separate classifications.¹¹⁶ The first classification created by the District's development plan rule divides into two groups landowners who desire to be annexed into the District.¹¹⁷ The first group constitutes those required to file plans before start of annexation proceedings.¹¹⁸ The second group consists of those who are not required to file their plans until later in the annexation process.¹¹⁹ The second classification resulting from the District's annexation decision also consists of two groups: those who pay money to developers and those who do not.¹²⁰

Next, the court noted that a challenged governmental action is presumed valid and must be sustained if the classification drawn by the action is rationally related to a legitimate state interest.¹²¹ Here, only the pleadings were before the court for its consideration of a conceivable legitimate purpose to support the classifications. Rather than determine whether any hypothetical legitimate bases for the classifications existed, the court remanded for further explanation by the trial court and the parties.¹²²

The court dismissed the antitrust claim because Mahone failed to allege that he had suffered an anticompetitive injury as a result of the defendants' alleged antitrust violation.¹²³ Finally, the court stated that if the trial court determined on remand that Mahone's equal protection claim was unsuccessful, the district court should dismiss with prejudice only Mahone's federal claims, thus allowing him to bring his state-related causes of action in state court in the future.¹²⁴

F. Lakeside Easement

In *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*¹²⁵ the Yacht Club sought injunctive relief and a declaratory judgment to construe whether a lakeside easement was only for the purpose of ingress and egress to Lake Travis, or if the easement provided Lakeside Launches the right to anchor and float a commercial boat dock on the lake.

Lakeside Launches acquired property whose lower boundary line was the 670-foot-contour line of Lake Travis. The Austin Yacht Club owned the

114. Mahone accepted the Water Code's criteria for annexation. See *supra* note 111.

115. Equal protection of the law requires not only that laws be equal on their face, but also that they be executed so as not to deny equal protection. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369-74 (1886).

116. 836 F.2d at 932.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 933.

121. *Id.*

122. *Id.* at 935-38.

123. *Id.* at 939. The court characterized Mahone's antitrust action as a private civil suit brought pursuant to section 4 of the Clayton Act. See 15 U.S.C.A. § 15 (West Supp. 1988).

124. 836 F.2d at 940.

125. 750 S.W.2d 868 (Tex. App.—Austin 1988, writ denied).

property below the 670-foot-contour line as well as a private sailing facility adjoining Lakeside's property. Included in Lakeside's chain of title was an easement and right-of-way over and across all of the land lying between the 670-foot-contour line and the waters of Lake Travis.¹²⁶ Lakeside interpreted this easement to convey the right to cross below the 670-foot-contour line as well as the right to anchor and float a commercial boat dock below the line. Predecessors in interest had floated docks out over the line when the lake level dropped and had constructed a concrete boat ramp that extended below the 670-foot-contour line.¹²⁷

At trial the jury found that the Yacht Club was estopped from denying Lakeside's easement to anchor and float docks below the 670-foot-contour line. The trial court granted the Yacht Club's judgment *non obstante verdicto* and held as a matter of law that the easement was only for the purpose of ingress and egress.

On appeal Lakeside argued that the easement grant was ambiguous and required parol evidence as to the intent of the parties to show that the scope of the easement included the right to anchor and float docks below the 670-foot-contour line. Additionally, Lakeside argued that the jury correctly found that the Yacht Club was estopped to deny the right of Lakeside to use the easement for the purpose in controversy, since the Yacht Club's predecessor in interest failed to object to the floating docks. The Austin court of appeals overruled Lakeside's two points of error and affirmed the trial court's judgment.¹²⁸

The appellate court determined that the grant of the easement was not ambiguous.¹²⁹ As a matter of law, an easement and right-of-way clearly grants only a right of ingress and egress and implies only those rights reasonably necessary for fair enjoyment of the easement. Parol evidence was not admissible to show the meaning of the grant.¹³⁰ The court next determined that in order to have an easement by estoppel one must show that the Yacht Club's predecessor in interest had represented to Lakeside's predecessor in interest that the easement included the right to anchor and float a commercial boat dock below the 670-foot-contour line.¹³¹ The court found no evidence to support a finding that a representation had been made that the easement included the right in controversy.¹³² The Yacht Club's predecessor never represented to Lakeside or its predecessor that commercial docks

126. The easement was static irrespective of any variances in the water level that may occur from time to time.

127. The predecessors in interest would move their floating docks out into the lake, presumably to float over land below the 670-foot-contour line.

128. 750 S.W.2d at 873. The court also sustained the Club's crosspoint that insufficient evidence existed to support the jury's finding of easement by estoppel.

129. *Id.* at 870-71.

130. *Id.* at 871.

131. *Id.* The court pointed out that "[t]he basic elements of easement by estoppel are: (1) a representation communicated to a promisee; (2) the communication is believed; and (3) reliance on the communication." *Id.* (citing *Storms v. Tuck*, 579 S.W.2d 447, 451 (Tex. 1979)).

132. *Id.* at 872.

anchored to the bottom below the 670-foot-contour line were a permissible use of the easement.

II. WATER COMMISSION RULES

In addition to caselaw, rulemaking by the Texas Water Commission provided another source of significant legal developments in water law during the Survey period. The Commission adopted new rules regulating watermaster operations. Also, the Commission adopted amendments of existing rules on surface water standards, which will have significant impact on future wastewater discharge permits.

A. Watermaster Operations

The Commission's adopted watermaster program will allow administration of water rights, now that the water rights adjudication procedure has been completed.¹³³ Section 11.325 of the Water Code authorizes the Commission to divide the state into water divisions for the purpose of administering adjudicated water rights.¹³⁴ Pursuant to section 11.326¹³⁵ the Commission may appoint a watermaster to administer water rights in a given water division or group of water divisions.¹³⁶ The Commission ordered the formation of the South Texas Water Division, consisting of the San Antonio, Guadalupe, and Nueces River basins, along with the adjacent coastal basins.¹³⁷ The Commission also adopted rules of statewide applicability providing standards and procedures for the watermaster operation.¹³⁸ The significance of these rules consists in their potential application to other water divisions and watermaster operations that may be created by Commission order in the future.

When water is abundant, the watermaster serves primarily a recordkeeping function. Most uses are metered, with the watermaster maintaining a record of the diversion and use of water by each owner of a water right who diverts or impounds water.¹³⁹ Each water right owner must submit declarations of intent to divert or release water to the watermaster prior to taking such action.¹⁴⁰ After the diversion or release, or after impoundment by a reservoir owner, the water right owner must notify the watermaster of the amount of water actually impounded, diverted, or released.¹⁴¹ The watermaster uses these reports to ensure that a proper allocation of water in

133. Prior to this time the State's only watermaster operation was on the Rio Grande, a program implemented by the Commission following the court adjudication of water rights. See *State v. Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

134. TEX. WATER CODE ANN. § 11.325 (Vernon 1988).

135. *Id.* § 11.326.

136. Tex. Water Comm'n, 13 Tex. Reg. 3639 (1988) (prop. amend. to be codified at 31 TEX. ADMIN. CODE § 304.3).

137. Tex. Water Comm'n, 13 Tex. Reg. 3639 (1988).

138. *Id.* at 3639-40.

139. *Id.* at 3643.

140. *Id.*

141. *Id.*

the water division is taking place. During periods of water shortage the watermaster may cancel or modify a water right owner's declaration of intent to divert or release water.¹⁴² In addition, the watermaster may order reservoir owners to pass through reservoir inflows to the extent necessary to honor senior downstream water rights.¹⁴³

Each watermaster has the power to pursue an enforcement action when a violation of the Water Code, the terms of a water right, or a Commission order or rule occurs.¹⁴⁴ Under the enforcement powers, a watermaster may refuse to recognize a declaration of intent,¹⁴⁵ may lock headgates or pumping facilities,¹⁴⁶ or seek a hearing before the Commission culminating with the issuance of an order, which, if violated, may result in a legal action by the attorney general.¹⁴⁷

In order to finance the administrative costs of the program, each holder of a water right is assessed a charge.¹⁴⁸ Assessments are based on a formula that includes factors such as category of use, income needed to meet the budget, and the total number of accounts in each water division.¹⁴⁹

B. Surface Water Quality Standards

The Water Commission must set water quality standards for the water in the state and may amend these standards as it sees fit.¹⁵⁰ Before the Commission will approve an application for a wastewater discharge permit, it must ensure compliance with the water quality standards as set forth in its rules. Each state must perform a triennial review of existing water quality standards and submit any revisions to the United States Environmental Protection Agency for approval.¹⁵¹ In response to this federal statutory requirement, the Texas Water Commission issued its revised Surface Water Quality Standards during the Survey period.¹⁵²

One significant change adopted by the new rules applies to intermittent and unclassified stream policy. In the new rule, intermittent streams (defined as streams with zero flow for at least one week during most years¹⁵³) and unclassified streams are required to maintain a twenty-four-hour mean dissolved oxygen concentration of 3.0 mg/l unless this level of protection is not technologically achievable with advanced treatment.¹⁵⁴ This policy re-

142. *Id.* at 3643.

143. *Id.*

144. *Id.* at 3644.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 3644-45.

149. *Id.* at 3645.

150. TEX. WATER CODE ANN. § 26.023 (Vernon 1988).

151. See 33 U.S.C.A. §§ 1251-1387 (West Supp. 1988).

152. Tex. Water Comm'n, 13 Tex. Reg. 1776 (1988) (amending 31 TEX. ADMIN. CODE §§ 307.1-307.10).

153. Tex. Water Comm'n, 31 TEX. ADMIN. CODE § 307.3(a)(18).

154. *Id.* § 307.4(j).

flects a move for more adequate protection of the state's unclassified water bodies.

The Commission also revised the section of general criteria,¹⁵⁵ applicable to all new permits, by including provisions for reviewing aquatic life use determinations for permit actions,¹⁵⁶ and by establishing a limit on fecal coliform criterion of 200 colonies per 100 milliliters for unclassified water bodies.¹⁵⁷ Additionally, the Commission added a new section on toxic material.¹⁵⁸ The section includes statewide limits for thirty substances¹⁵⁹ as well as discharge biomonitoring requirements¹⁶⁰ for preventing adverse impacts of toxic materials on fish, wildlife, and drinking water supplies.

The Commission updated its antidegradation policy¹⁶¹ by adding definite procedures that must be followed for the issuance or amendment of any discharge permit as required by federal regulations.¹⁶² Public notices of permit applications will state whether degradation of existing uses and water quality is an anticipated issue.¹⁶³ Only after full intergovernmental coordination and public participation may the Texas Water Commissioners determine that economic and social development is important enough to allow a significant degradation of water quality.¹⁶⁴

The amended rules also contain new calculations of criteria and upgraded uses for specific stream segments.¹⁶⁵ Segment revisions include seventeen additional segments that have been designated or subdivided resulting from reservoir construction, subdivision of existing segments, and new segment selection.¹⁶⁶ The Commission upgraded thirty-eight segments to contact recreation and four segments to exceptional quality aquatic habitat.¹⁶⁷ Additionally, the Commission designated two segments for aquifer protection.¹⁶⁸ The Commission did not downgrade uses in any segment.¹⁶⁹ Consequently, the reclassification better reflects existing segment water quality conditions.

155. *Id.* § 307.4.

156. *Id.* § 307.4(h).

157. *Id.* § 307.4(k).

158. *Id.* § 307.6.

159. *Id.* § 307.6(c)(1).

160. *Id.* § 307.6(d).

161. *Id.* § 307.5.

162. *Id.* § 307.5(c).

163. *Id.* § 307.5(c)(4).

164. *Id.* § 307.5(c)(5).

165. *Id.* § 307.10(1).

166. *Id.* Segment description revisions are adopted for the upper boundary of Segment 1244-Brushy Creek, the lower boundary of Segment 1245-Upper Oyster Creek, and the boundary between Segment 1601-Lavaca River Tidal and Segment 1602-Lavaca River Above Tidal. Segment 1603-Navidad River Below Lake Texana has been changed to Navidad River Tidal. Segment 1226-North Bosque River has been designated as a public water supply. *Id.*

167. *Id.* Aquatic life use subcategory designations have been elevated from high aquatic life habitat to exceptional aquatic life habitat for Segment 1806-Guadalupe River Above Canyon Lake, Segment 1813-Upper Blanco River, Segment 1905-Medina River Above Medina Lake, and Segment 2113-Upper Frio River. *Id.*

168. *Id.* Segments 1427-Onion Creek and 1430-Barton Creek have been designated for aquifer protection. *Id.*

169. *Id.*

