Texas House of Representatives

Interim Report to the 70th Texas Legislature

Committee on Natural Resources
The Honorable Gib Lewis  
Speaker of the House of Representatives  

Members, Texas House of Representatives  
70th Texas Legislature  

Dear Mr. Speaker and Members:  

Transmitted herewith is the Report of the Natural Resources Committee which is to be submitted to the 70th Texas Legislature.  

Sincerely,  

Tom Craddick,  
Chairman
REPORT
OF THE
TEXAS HOUSE OF REPRESENTATIVES
NATURAL RESOURCES COMMITTEE

A REPORT TO THE
HOUSE OF REPRESENTATIVES
70TH TEXAS LEGISLATURE

TOM CRADDICK
CHAIRMAN

STAFF
WILLIAM S. ROSE
REPORT
OF THE
TEXAS HOUSE OF REPRESENTATIVES
NATURAL RESOURCES COMMITTEE

INTRODUCTION

At the commencement of the 69th Legislature, the Honorable Gib Lewis, Speaker of the Texas House of Representatives, appointed the House Committee on Natural Resources.

The Committee membership, as appointed, included nine members of the House of Representatives as follows: Tom Craddick of Midland, Chairman; Larry Don Shaw of Big Spring, Vice Chairman; Gerald Geistweidt of Mason, Vice Chairman of Budget and Oversight; J. W. ("Buck") Buchanan of Dumas, Jerry Clark of Buna, Kelly Godwin of Odessa, Jack Harris of Pearland, Ted Roberts of Corpus Christi, and Charles ("Chip") Staniswalis of Amarillo.

The Committee, during the interim, was assigned several charges by the Speaker. In order to undertake the charges effectively and efficiently, Chairman Craddick appointed the following subcommittees to study the charges shown below:

I. Water Finance Subcommittee:
   Chairman: Tom Craddick
   Members: Larry Don Shaw
             J. W. ("Buck") Buchanan
             Jerry Clark
             Gerald Geistweidt
             Kelly Godwin
             Charles ("Chip") Staniswalis
Charge: To study and analyze the effectiveness of techniques employed in promoting the constitutional propositions of HJR 6, and the concerns of the electorate when voting on major water legislation.

To study the effectiveness of the pilot agricultural loan program.

To study the effectiveness of the bond insurance program.

To study and recommend enabling legislation for an agricultural loan program if the Texas Agricultural Water Conservation Bonds proposed by HJR 6 are approved by the electorate.

To study the availability of measures to reduce reservoir construction costs to the state and in particular the advisability of enacting legislation to defease outstanding water development bonds.

II. Water Rights Subcommittee:

Chairman: Gerald Geistweitd

Members: Jack Harris
          Ted Roberts

Charge: To study the need for, and the provisions that should be included in, legislation requiring certification of water and waste analysts.

To study the availability of water for future appropriation in major basins of the state in light of the Texas Supreme Court's decision in No. C-1620.

To study the need to define "unappropriated water" and to amend other statutes pertaining to water rights.
Both subcommittees have completed their hearings and investigations and have issued their respective reports. All subcommittee reports have been adopted and approved by the Natural Resources Committee to be incorporated as the following final report for the entire Committee. The Committee findings and recommendations are found in the report. No findings or recommendations were made with respect to the Bond Insurance Program, because that program had barely commenced when this report became due.

Finally, the Committee wishes to extend its appreciation to Representative Ed Watson of Deer Park, the Texas Water Commission, the Texas Water Development Board, and the citizens who testified at our hearings for their time and complete cooperation with the Committee.
All sections of the following Report have been approved by the members of the Natural Resources Committee listed below:

Tom Craddick, Chairman
Larry Don Shaw, Vice Chairman
Gerald Geistweidt, Vice Chairman of Budget and Oversight
J. W. ("Buck") Buchanan
Jerry Clark
Kelly Godwin
Jack Harris
Ted Roberts
Charles ("Chip") Staniswalis
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CAMPAIGN FOR THE STATE WATER PACKAGE

A. BACKGROUND

The history of voter approved financing for water projects in Texas is one of early successes followed by relative failure.

Texas Water Development Bonds are used by our state to finance both water development and water quality projects. Because they are general obligations of the State, Texas Water Development Bonds cannot be issued without the approval of the State's electorate. Below is a chart showing the past successes and failures for propositions authorizing financing for water projects by the State.

1. Constitutional amendments approved by voters:

<table>
<thead>
<tr>
<th>Year of Election</th>
<th>Type of Bonds Approved</th>
<th>Amount</th>
<th>Tex. Const. art. III</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957</td>
<td>Water Development</td>
<td>$200 Million</td>
<td>$49-c</td>
</tr>
<tr>
<td>1962</td>
<td>Water Development</td>
<td>$200 Million</td>
<td>$49-d</td>
</tr>
<tr>
<td>1971</td>
<td>Water Quality</td>
<td>$100 Million</td>
<td>$49-d-1</td>
</tr>
<tr>
<td>1976</td>
<td>Water Quality</td>
<td>$100 Million</td>
<td>$49-d-1</td>
</tr>
</tbody>
</table>

2. Constitutional amendments that failed:

<table>
<thead>
<tr>
<th>Year of Election</th>
<th>Issue That Failed</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1969</td>
<td>Water Development Bonds</td>
<td>$3.5 Billion</td>
</tr>
<tr>
<td>1976</td>
<td>Water Development Bonds</td>
<td>$400 Million</td>
</tr>
<tr>
<td>1981</td>
<td>Proposition 4</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(a) 1/2 revenue surplus for water funds</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) $500 million state guaranty of local political sub-division bonds</td>
<td></td>
</tr>
</tbody>
</table>
B. ELECTION RESULTS

On November 5, 1985, the voters of Texas overwhelmingly approved Proposition 1 (74%-26%) authorizing the issuance of $980 million worth of Texas Water Development Bonds as well as a water bond guaranty program by which the State could guarantee up to 500 million dollars in local bonds to finance water projects. Additionally, the voters overwhelmingly approved Proposition 2 (70%-30%) authorizing an additional $200 million in bonds for agricultural water conservation purposes.

The Committee on Natural Resources was charged as follows:

"To study and analyze the effectiveness of techniques employed in promoting the constitutional propositions of H.J.R. 6 and the concerns of the electorate when voting on major legislation."

C. CONCERNS OF THE ELECTORATE

Propositions 1 and 2 were both proposed by one joint resolution, H.J.R. 6 by Craddick, which was passed by the 69th Legislature, Regular Session. During the 69th Legislature's Regular Session H.B. 2 by Craddick was approved by both houses of the Legislature but its becoming law was conditioned upon the voters' approval of Proposition 1. While H.B. 2 provided the enabling legislation for the financing proposals of Proposition 1, it also provided comprehensive water legislation in many other areas of water concerns, including water conservation;
flood protection; water quality protection; agricultural water conservation; safeguards for bays and estuaries, instream uses, and fish and wildlife habitat; and groundwater protection. As a result, Proposition 1 and Proposition 2 presented a comprehensive water proposal to the Texas electorate that addressed effectively many of the major water concerns of every part of our State. This to a great extent explains why Proposition 1 passed in 226 of the 254 counties while Proposition 2 passed in 217 counties. Most of the counties where these propositions failed were in the Coastal Bend area (where there was concern over bays and estuaries protection) and East Texas (where there may have been concern about transportation of water from East Texas to less water rich areas of the State).

In great part, the success of Propositions 1 and 2 is found in the fact that the water package addressed concerns statewide; it had "something for everyone."

D. CAMPAIGN TECHNIQUES

The campaign to promote the passage of Propositions 1 and 2 projected a strong image of unity among state political leaders and people knowledgeable about water matters. The united stance of the Governor, Lt. Governor and Speaker of the House was buttressed by the support of other candidates for high state political office.
The official responsibility of disseminating information and promoting Propositions 1 and 2 was assumed by the Water For Texas's Future Committee that raised funds for advertising and media costs. The Water for Texas's Future Committee, with John Fainter serving as Treasurer, coordinated and financed an educational campaign by community leaders, including a speakers bureau to speak to local groups.

With almost half the vote expected to come from Houston, Dallas, and San Antonio, these three cities were targeted for an extensive advertising campaign. Support was solicited from the news media, with the result that almost every major newspaper in Texas endorsed both propositions.

On a local level significant efforts to educate the public were made by the Houston Chamber of Commerce, West Texas Chamber of Commerce, High Plains Underground Water Conservation District No. 1, the office of the County Judge of El Paso County, the Greater San Antonio Chamber of Commerce, the Texas Society of Professional Engineers, the Boating Trades Association of Texas, the Trinity Improvement Association in Dallas and the Texas Farm Bureau.

Organized opposition to either of the propositions was confined to a few organizations.

E. NATURAL CONDITIONS

In the summer of 1984 Texas experienced a long, hot dry spell that caused several communities to become concerned about the adequacy of their water supplies. Water rationing
was ordered in some of these communities, including the City of Austin, heightening citizen awareness of water problems and perhaps making them more inclined to support a long-range water program.

F. CONCLUSION

In summary, (1) a broad legislative package addressing statewide concerns, (2) unusually hot conditions in the summer of 1984, (3) an effective, unified effort by state and local leaders (with little organized opposition) and (4) broad widespread media support resulted in the overwhelming passage of Propositions 1 and 2 on November 5, 1985. The final results for these propositions were as follows:

<table>
<thead>
<tr>
<th>Proposition</th>
<th>Votes For</th>
<th>Votes Against</th>
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</thead>
<tbody>
<tr>
<td>Proposition 1</td>
<td>705,878</td>
<td>251,031</td>
</tr>
<tr>
<td>Proposition 2</td>
<td>651,699</td>
<td>284,552</td>
</tr>
</tbody>
</table>

II. AGRICULTURAL WATER CONSERVATION

A. PILOT LOAN PROGRAM

Texas agriculture through irrigation uses approximately 71% of all the water used annually in the State with much of the water used being groundwater. Because of this substantial use of water by agriculture, it has generally been believed that agricultural conservation should be greatly encouraged.

In the 68th Legislature, Regular Session, a proposal originated in the Senate that would have authorized the issuance of tax exempt State bonds to fund low interest agricultural loans for the purpose of financing the conversion by agriculture to methods and equipment (i.e., irrigation)
that used water more efficiently. The proposal depended upon the State's being able to loan money at very low and attractive rates to farmers. While the proposal appeared meritorious in its goal, the proposed mechanics of using local governmental entities and/or financial institutions as local lenders that would share equally with the State the burden of any loan defaults was sometimes criticized as "unrealistic", because it was believed (1) that the local governments and financial institutions would not want to participate in a program that required them to be lenders and bear some of the financial responsibility for loan defaults, and (2) that the "total cost" of the loan to the farmer, after all governmental and lender charges were imposed, would not be much more favorable than a commercial loan and therefore would provide little incentive to agriculture to borrow money under the program—especially during present times when farmers are generally experiencing substantial financial problems.

In the 69th Legislature, Regular Session, the State Water Package (H.J.R. 6 by Craddick and H.B. 2 by Craddick) addressed agricultural water conservation with two major programs. The first program, to be funded by legislative appropriations and a transfer of $10 million from the Water Assistance Fund, financed programs for research, education, demonstration and technical assistance as well as equipment purchases (TEX. WATER CODE ANN. §§ 15.431-15.436; §§ 15.471-15.473).
The second agricultural program was a pilot loan program, to be funded by a transfer of up to five million dollars from the Water Assistance Fund, and that in many respects followed the proposal originating in the Texas Senate in the 68th Legislature. (TEX. WATER CODE ANN. §§ 15.531-15.543) Under this program the Texas Water Development Board will make loans during only fiscal years 1986 and 1987 to soil and water conservation districts and groundwater districts ("lender") which in turn would loan the money to the borrower (ordinarily a farmer) for the following:

(1) capital equipment or materials composing an irrigation water delivery and application mechanism;

(2) capital equipment or materials required for physical conversion of an existing irrigation water delivery and application system to an approved system; and

(3) associated labor, preparation, and installation costs (TEX. WATER CODE ANN. § 15.537).

Under the pilot loan program the lender may charge a borrower up to 2-1/2% of a loan to cover loan fees and other administrative charges of the lender (§ 15.535). The lender is responsible for implementing foreclosure proceedings in the event of a default by the borrower (§ 15.538), and the State will assume and pay 50% of any default (§ 15.539).

The Natural Resources Committee received a charge "to study the effectiveness of the pilot agricultural loan program."

The Texas Water Development Board has made a strong effort to implement this program. In this regard prior to adopting rules for the pilot loan program (§ 15.541), the
Board consulted with U.S.D.A.-Soil Conservation Service, the Texas State Soil and Water Conservation Board, the High Plains Underground Water Conservation District No. 1, and the Texas Department of Agriculture. After soliciting the comments of 41 parties and subsequently publishing proposed rules in the Texas Register and holding a public hearing, rules for the pilot loan program were adopted at the March 20, 1986 meeting of the Texas Water Development Board.

The rules provide for:

1. a one-time lender service charge of 2 1/2%;
2. limitations on the kinds of equipment and practices eligible for loans to irrigation and water delivery applications;
3. use of loan funds for existing irrigated land (but do not place restrictions on the use of water conserved by installation of eligible equipment or practices); and
4. detailed reports from lenders on the effectiveness of the program.

Following publication of the adopted rules in the Texas Register on April 1, 1986, the rules became effective on April 16, 1986.

A concerted effort has been made by the Texas Water Development Board to inform the public of the loan program. The Texas Water Development Board, Texas Department of Agriculture, and the Texas Agricultural Extension Service issued press releases and sent letters to the public stating
that the program had been approved. Further, the Board's staff provided information and copies of the loan program rules to five local governmental districts, the U. S. Department of Agriculture, Soil Conservation Service, the Texas State Soil and Water Conservation Board and 29 individuals who made inquiries.

To date, the results of the pilot loan program have been somewhat disappointing. Only one district, the High Plains Underground Water Conservation District No. 1, has applied to become a lender under the program. On May 15, 1986, the District's loan application for $1,000,000 (the maximum amount permitted under Board rules) was approved by the Texas Water Development Board.

After consulting with their local residents, three other groundwater districts have chosen not to participate in the program. No soil and water conservation districts have chosen to participate. Some of the prominent reasons given for non-participation by these governmental entities in the pilot loan program are as follows:

1. lack of borrower interest in the program;
2. negative comments by district constituents about district involvement in a loan program;
3. potential problems with the administration of the program;
4. the districts' liability for 50% of any loan losses;
5. lack of district experience with loan administration;
6. lack of financial ability by small soil and water conservation districts to assume default liability; and

7. the belief that the statutory maximum for a service charge (2-1/2% of loan amount) is inadequate to pay the total costs of loan administration.

As of this date, insufficient information is available to determine whether a pilot loan program will be successful, but it appears that some of the concerns expressed in the 68th Legislature about this kind of program may have been justified.

The Committee will continue to monitor the pilot loan program and awaits with interest the reports of the Texas Water Development Board required to be submitted by January 1, 1987 and January 1, 1989 (TEX. WATER CODE ANN. § 15.542). The Board has indicated that these reports will include an analysis of actual participation in the program and estimates of the amount of water conserved as a result of program loans.

B. TEXAS AGRICULTURAL WATER CONSERVATION BONDS

As a result of the approval of Proposition 2 on November 5, 1985, Section 50-d was added to Article III of the Texas Constitution, allowing the Legislature upon a two-thirds vote, to authorize the Texas Water Development Board to issue and sell up to $200 million in Agricultural Water Conservation Bonds.
The Committee was charged "to study and recommend enabling legislation for an agricultural loan program if the Texas Agricultural Water Conservation Bonds proposed by H.J.R. 6 are approved by the electorate."

Section 50-d is written broadly so that the Legislature has great flexibility in the type of program it wishes to fund with the bond proceeds.

At the time of this writing the results of the pilot loan program are inconclusive. If the pilot loan program proves successful, enabling legislation for establishing a similar program on a major scale could be enacted.

At this time the sale of state bonds to make loans to private agriculture interests is threatened by existing federal tax laws that will make such bonds non-tax exempt. Without the benefit of the tax-exempt interest rate for state bonds, lending rates would probably be too high to serve as an incentive for agricultural interests to borrow money for conservation purposes.

Further, with commercial lending rates now falling and with lower commercial rates in effect now than when Proposition 2 was approved, it may be that a state loan program will not be sufficiently attractive to encourage the borrowing of money for agricultural conservation. Should Agricultural Water Conservation Bonds be used to fund a loan program, the following aspects of the loan program should be scrutinized.
closely before enabling legislation is passed:

(1) who should bear ultimate liability for a loan default;

(2) what should the administrative charge for the loan be;

(3) what entity(ies) can most effectively serve as lender?

If Agricultural Water Conservation Bonds are not used to finance the loan program, options for use of the bonds become substantially restricted. Any program adopted would have to be financially self-supporting; otherwise there would probably be a draw upon the General Revenue Fund to pay the debt service of the State's bond issue--a burden the State is not in the position to bear.

The Committee at this time is unable to recommend enabling legislation, because the results of the pilot loan program are not known. If a loan program proves to be infeasible, the Legislature may need to authorize the use of proceeds from sale of Agricultural Water Conservation Bonds to fund conventional water projects in areas in which the economy is dominated by agriculture with agricultural interests in the benefitted area either encouraged or required to adopt strong water conservation measures.

By the provisions of Section 50-d, Agricultural Water Conservation Bonds may not be issued or sold after November 5, 1989.
This subject matter should continue to be studied through the interim session of the 70th Legislature. Enabling legislation, if any, should be enacted by the 71st Legislative Session.
III. REDUCTION OF RESERVOIR COSTS AND DEFEASANCE OF STATE BONDS

The Committee received the following charge:

"To study the availability of measures to reduce reservoir costs to the State and in particular the advisability of enacting legislation to defease outstanding water development bonds."

A. REDUCTION OF RESERVOIR CONSTRUCTION COSTS

Land acquisition costs ordinarily constitute a significant portion of the total costs of reservoir construction. For recent projects, these costs have ranged from thirteen percent to sixty-one percent of the total costs of the project. If the costs of land acquisition could be substantially reduced, it would result in a significant savings to the citizens of our State.

Some have suggested that condemnation of reservoir sites many years in advance of need would reduce land costs. Additionally, it was suggested that condemnation costs could be limited if an easement were imposed on reservoir sites preventing expensive structures and facilities from being constructed on the property so that the cost to the condemning authority at the time of condemnation of the fee simple would not be enhanced due to the construction of new and expensive improvements on the property. Both suggestions would require substantial financial risks by the State because they are based on speculation that a reservoir would eventually be built. Additionally, both would require state bond
proceeds to be used for many years in advance of any return on the investment, so that funds to meet the debt service on the state bonds would have to be drawn from another source and as a last resort perhaps the general revenue fund.

B. DEFEASANCE OF OUTSTANDING BONDS

In the 69th Legislature, Regular Session, H.B. 2465 by Craddick and H.B. 2466 by Craddick were introduced that would allow the defeasance of outstanding Texas Water Development Bonds. These bills were not enacted in the 69th Legislature Regular Session.

H.B. 2465 and 2466, when considered together, would authorize the creation of the Texas Water Finance Authority ("Authority") which would issue and sell triple A rated, tax exempt, revenue bonds. The bond sale proceeds would be used to purchase the securities of political subdivisions ("loan portfolio") held by the Texas Water Development Board in exchange for monies loaned by the Texas Water Development Board. The income stream derived from the loan portfolio would be used to pay the debt service on the revenue bonds which will be over collateralized at 105 percent as well as be insured by an insurance policy.

The staff of the Texas Water Development Board would continue to monitor the loan portfolio. All tasks of the Authority would be performed by the Texas Water Development Board staff, so that no additional personnel would be required.
The funds ("funds") received by the Texas Water Development Board from the sale of its loan portfolio will be used for two purposes. First, all general obligation debt of the State issued by the Texas Water Development Board for the construction of water and sewer projects will be defeased by placing the funds in an irrevocable trust used to purchase federal securities timed to mature with, and used to retire, the outstanding Texas Water Development Bonds. If this program is implemented, it is estimated that 20% of the State's general obligation debt will be defeased with a beneficial impact on all future issues of the State.

Second, the remainder of the funds ("available funds") received by the Board will be cash to the Board to be used for the purposes authorized by the Constitution in Article III, Sections 49-c, 49-d and 49-d-1 without any corresponding debt service attached. The amount of available funds will depend greatly (1) on market conditions and (2) the extent to which the Board chooses to defease its obligations under its contract with the federal government and the Lavaca Navidad River Authority in connection with the Palmetto Bend project.

The Committee recommends legislation that would authorize defeasance but only at a time when market conditions would result in a substantial amount of funds becoming immediately available to the Board.
IV. THE NEED TO ENACT LEGISLATION IN LIGHT OF
LOWER COLORADO RIVER AUTHORITY V. TEXAS
DEPARTMENT OF WATER RESOURCES (STACY
DAM DECISION)

During the Interim Session of the 69th Texas Legislature
the Natural Resources Committee was charged:

1. to study the availability of water for future
   appropriation in major basins of the state in
   light of the Texas Supreme Court's decision in
   Lower Colorado River Authority v. Texas Department
   of Water Resources; and

2. to study the need to define "unappropriated water"
   and to amend other statutes pertaining to water
   rights.

A similar charge had been given to the Natural Resources
Committee in the previous interim session after the Austin
Court of Appeals had ruled on the matter. Because the Texas
Supreme Court had agreed to hear the case but did not issue
a decision until just before the commencement of the Regular
Session, 69th Texas Legislature, the Committee neither
studied nor issued a report on this matter during the previous
interim session.

On November 14, 1984, the Texas Supreme Court issued
its opinion in Lower Colorado River Authority v. Texas
Department of Water Resources, 689 S.W.2d 873 (Tex. 1984),
also known as the "Stacy Dam Decision." Although this
decision quickly has become a landmark case in water law,
its holding with respect to existing Texas water statutes
may portend significant problems for the state in the future.
A. BACKGROUND OF THE STACY DAM DECISION

Pursuant to an application submitted by the Colorado River Municipal Water District ("District"), the Texas Water Commission ("Commission") granted a permit authorizing the construction of a 550,000 acre-feet reservoir on the Colorado River (approximately 24 miles southeast of Ballinger, Texas) and the annual use of 113,000 acre-feet of water for municipal, industrial and domestic uses. A primary issue before the Commission was whether sufficient water was available to grant the permit without impairing downstream rights owners. Contestants against the issuance of the permit relied on a Texas Department of Water Resources computer model that showed only 3,120 acre-feet of water was available on a firm yield basis when the face value of existing certified and permitted water rights were used for determining the amount of water rights already in existence. The District took the position that sufficient water was available if the Commission considered as available that water that had previously been permitted but was not being used and was not projected to be used at a later date. The Commission found that sufficient unappropriated water was available to issue the permit.

Issuance of the Stacy Dam permit was appealed by the Lower Colorado River Authority as well as others. A Travis County District Court upheld the permit as did the Austin Court of Appeals 638 S.W.2d 557 (Tex. Civ. App.--Austin 1982). At issue was the meaning of "unappropriated water" as found in TEX. WATER CODE ANN. § 11.134. TEX. WATER CODE
ANN. § 11.134 authorized the Commission to grant an application only if, among other things, "unappropriated water is available in the source of supply." But the Texas statutes do not define "unappropriated water." During the Stacy proceedings, the parties differed on the definition that should be employed, and some parties may have even shifted their positions on the definition as the case proceeded through the administrative and judicial processes.

The Austin Court of Appeals thoroughly reviewed the basic statutes pertaining to the concept of appropriation, accepted on their face the provisions of TEX. WATER CODE ANN. §§ 11.025, 11.026, and 11.029, considered them pari materia, and concluded that:

...the holder of an appropriated right is limited not only to the exact quantity or volume stated in the certified filing or permit which evidences his right, but is also limited to the quantity or volume which is economically necessary for the purposes stated in the permit [at page 563].

Still, further, the Court of Appeals elaborated:

...a permit is no more than evidence of a right to acquire another right, the right to use whatever quantity of water the holder may require for beneficial use [at page 563].

Under the Court of Appeals interpretation,

...the term 'unappropriated water' must be construed as meaning that quantity of water not required for an authorized purpose by the economic necessity for all downstream holders of appropriative rights [at page 567].

Stating that the Court of Appeals had overlooked certain legislative history and had misinterpreted some of the statutes used to reach that court's decision, the Texas Supreme Court concluded that:

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'unappropriated water' means the amount of water
remaining after taking into account all existing
uncancelled permits and filings valued at their recorded
levels [at page 874].

Accordingly, the Supreme Court held that the Commission has
to consider permits at their full "face value" and cannot
"double permit," that is, grant the right to the same water
to more than one party.

The Supreme Court found that it was the Legislature's
intention when enacting the 1913 Irrigation Act (Section
11.134's predecessor) to prevent the overappropriation of
the State's streams and to provide certainty to water rights
once acquired. Further, the Supreme Court stated if water
rights were not used or needed, the Commission could cancel
all or part of an appropriative right under the cancellation
statutes (TEX. WATER CODE ANN. §§ 11.171 - 11.186). "Only
after sufficient cancellations have freed that water from
its commitment may the Department again grant a permit to
appropriate it [at page 882]."

B. ISSUES RAISED BY STACY DAM DECISION

Whether or not one agrees with the Supreme Court's
decision in the Stacy Dam case, the holding of that case is
current law and raises the question whether the Legislature
should amend our statutes to modify or change the law. At
least two major issues are raised when making this determination:

1. Should statutory changes be made to give
   the Texas Water Commission more latitude when
determining whether and to what extent to issue a
   permit?
2. should our cancellation statutes be amended to make the cancellation procedure more effective?

C. AVAILABILITY OF WATER IN THE FUTURE FOR APPROPRIATION UNDER STACY DAM DECISION

In order to decide the above issues, it is necessary to determine what impact the Stacy Dam Decision will have on the granting of future appropriative rights.

When evaluating applications for permits, the Texas Water Commission (1) assumes that existing water rights have been and will be fully exercised each year and (2) (at least for permits not involving storage) evaluates all natural hydrologic conditions that have occurred for (approximately) the prior forty years. The Commission's methodology is consistent with the Stacy Dam Decision.

Generally applications for a permit fall into one of two categories:

(1) those involving storage to develop a reliable supply of water (generally required for municipal and industrial uses), and

(2) direct diversion, or run of the river, applications which do not contemplate storage (generally employed for uses such as irrigation).

The first category would include all of the reservoirs projected to be needed in the future under the Texas Water Plan as well as many smaller projects.
D. TEXAS WATER PLAN PROJECTS

Testimony received from the Texas Water Development Board indicated that of 44 Texas Water Plan projects scheduled before year 2030, at least 24 would not be impacted by the Stacy Decision, because permits had already been granted or sufficient unappropriated water would probably exist at the time of permit issuance. However, the firm yield of at least 17 other reservoirs could be reduced, some significantly, if all paper rights were honored. Because of the unavailability of computer models, projections for projects in the Red, Sulphur, Cypress Creek, Sabine and Neches Basins cannot be made at this time.

In summary, while the Stacy Dam Decision should not have a significant impact on most of the reservoirs projected to be needed through the year 2030, it could still significantly impact a substantial number of these projects.

E. IMPACT ON OTHER USERS

The great majority of permit applications are for direct diversion or run of the river projects where little or no storage is to be used. Testimony from both the Texas Water Development Board and Texas Water Commission indicated that the Stacy Dam Decision could have a significant impact on decisions on many of the permit applications for these projects. In the future, many of these permits could not be issued under the rationale of the Stacy Dam Decision. In the past
the Texas Water Commission has used at least two devices to issue permits when unappropriated water, within the meaning of the Stacy Dam Decision, was not always available. For most run of the river projects, if water was available most of the time but not 100% of the time, the Commission ordinarily imposed a stream flow restriction in the permit to protect senior rights holders. If water was not perpetually available, but would be available for some years until senior water rights were fully exercised, a permit for a term of years (term permit) has often been issued.

F. TERM PERMITS

In the past term permits have been issued to applicants when the stream was fully appropriated on paper but when it was apparent that not all the rights authorized would be fully exercised in the immediate future. Issuance of term permits has been an administrative invention, not expressly authorized by statute, but employed to maximize the use of the state's water resources.

Term permits have been criticized. Some state that holders of term permits (1) rely too heavily on this temporary right and (2) believe, unjustifiably, that they (the term permit holder) will automatically reacquire the right to use the water after the term expires. Others take the position that those being issued term permits should be required to purchase water instead from an existing rightholder, preferably an entity that has made a substantial investment and incurred
substantial debt to develop a reservoir site to optimum size and needs all available water sales revenues to retire the debt.

The legality of the issuance of term permits has been put into doubt by the Stacy Dam Decision wherein the Supreme Court held that "double permitting" was unlawful under our current statutes. Under the same rationale, and although not directly addressed in the Supreme Court's decision, even the practice of issuing permits (term or perpetual) with stream flow restrictions to protect senior rights holders might be questioned.

G. FORFEITURE STATUTES

Three procedures may be found in our statutes that result in the involuntary termination of an appropriative right.

The first procedure is the abandonment statute TEX. WATER CODE ANN. § 11.030 (Vernon Supp. 1986) which provides for the forfeiture of a water right if the right is willfully abandoned during any three successive years. Because clear and satisfactory evidence is required to prove intent to abandon*, the burden is a difficult one. It is believed that the State has never successfully employed this statute to obtain an involuntary termination of a water right.

*City of Corpus Christi v. Nueces County Water Control and Improvement District No. 3, 540 S.W.2d 357 (Tex. Civ. App.--Austin 1976, writ ref'd. n.r.e.)
The second procedure is found in TEX. WATER CODE ANN. § 11.146 (Vernon Supp. 1986) which provides for cancellation of an appropriative water right when the permit holder fails to develop diligently the related project. This statute has been rarely used, because proof of diligence on the part of the permit holder is readily established by filing applications for extension of time to complete the project.

The third procedure is found in Subchapter E of Chapter 11 of the Water Code, Sections 11.171 - 11.186, and provides for the cancellation in whole or in part of a permit, certified filing or certificate of adjudication to the extent not used during the ten consecutive years immediately preceding the cancellation proceedings. If no use at all of the water rights has been made during the preceding ten years, initiation of the cancellation proceedings is mandatory. If only part of the water right has been used, then initiation of the proceedings is discretionary with the Commission and before partial cancellation occurs the Commission, in addition to finding ten years non-use, must find that

(2) the [right] holder has not used reasonable diligence in applying the unused portion of the water to an authorized beneficial use; and

(3) the [right] holder has not been justified in the nonuse or does not then have a bona fide intention of putting the unused water to an authorized beneficial use within a reasonable time after the hearing. TEX. WATER CODE ANN. § 11.182.
As a practical matter relatively few water rights have been cancelled under this third procedure,* and because of the several requirements that have to be met at least partial cancellation is easily avoided by the right holder. Avoidance of partial cancellation is justifiable in many instances, particularly when large projects have been built to optimum size in advance of future needs and when substantial indebtedness has been incurred to build these projects and debt retirement is dependent upon the eventual sale of all water appropriated for the project. For the same reason initiation of total cancellation proceedings even with ten years nonuse should be discretionary with the Commission and reasonable criteria for avoidance of total cancellation should be incorporated into the total cancellation statute.

Although the Supreme Court in the Stacy Dam Decision suggests that more water could be made available for appropriation through use of the forfeiture statutes, two of the statutes** have rarely been used and a third procedure has not in the past made available significant quantities of water.*** Testimony received from the Texas Water Commission indicated that cancellation proceedings on a stream segment approach should be delayed until after certificates of adjudication are at

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*The Committee recognizes that some cancellation has occurred as a result of adjudication proceedings.

**TEX. WATER CODE ANN. § 11.030 and § 11.146

***TEX. WATER CODE ANN. § 11.171 - 11.186
least ten years old. The Committee believes that shortening the time of non-use from ten years to five years should make the cancellation statutes more effective with exemptions provided for large projects that require long periods of time for financing and construction.

**H. PRIOR LEGISLATIVE RESPONSE**

The Stacy Dam Decision was issued shortly before the convening of the 69th Texas Legislature in Regular Session. Several bills in response to the Stacy Dam Decision were introduced in the 69th Texas Legislature Regular Session*, but none were enacted when legislators agreed that more time was needed to study and reflect upon this matter during the interim.

**I. CONCLUSION**

It is the Committee's opinion that the law as pronounced by the Texas Supreme Court in the Stacy Dam Decision should be revised at least to authorize term permits.

In recommending a change in law the Committee is cognizant that water rights issued by the Commission must have integrity. The Committee is well aware of the investment required to build major water projects and the sizable indebtedness that ordinarily is incurred by the sponsoring governmental entity when a major project is constructed. Ordinarily, a substantial portion of the money to repay the indebtedness, for which the repayment period may be as long as 50 years,

*H.B.'s 1386, 2074 and 2217 by Craddick and S.B. 1144 by Montford.*

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must come from water sales. Appropriative rights granted for such projects must be reliable, including for those projects that have been built to optimum capacity in order to satisfy future needs and beyond immediate needs. Similarly, permit holders of appropriative rights in smaller amounts often have made a relatively substantial investment in reliance upon the water rights granted to them, and their appropriative rights must be sound as well. The issuance of term permits should not jeopardize these investments.

The Committee is also aware that Texas and its water picture is constantly changing from both the supply and demand sides and will continue to change in the future. The amount of rainfall in the various regions of Texas changes annually. Reservoir yields change over time. Not all the water rights in every basin are fully exercised and, as a practical matter, many millions of acre-feet of fresh water flow into the Gulf of Mexico from Texas river basins* every year. Use of water by rights holders varies from year to year, sometimes dramatically, and will do so in the future due to such factors as the weather, future cancellations of appropriative rights, crop prices and the demand for agricultural products, the need for industrial products and other fluctuations in the economy. Further, changes in our state's hydrology can be foreseen with the encouragement of conservation practices; stricter water quality standards and

*some of which is required for protection of bays and estuaries, instream uses and fish and wildlife habitat
greater enforcement of those standards; regional planning; protection of instream uses, fish and wildlife habitat and bays and estuaries; and the possible movement away from our state's current economic bases of oil and agriculture. If anything is certain, it is that our state's hydrological picture will in the future be changing. An inflexible law as pronounced by the Supreme Court in the Stacy Dam Decision, even when allowing for cancellation, is not able to take these changes into account and allow in the future for the maximum utilization of this state's most precious resource, water. A rigid law to be applied statewide is not in the best interests of the State where conditions will vary widely within the stream segments throughout our state and when even those conditions will change with time. The Texas Water Commission is in the best position to evaluate applications and stream and environmental conditions on a case-by-case basis and to determine whether additional water rights may be issued on a temporary basis without impairing the integrity of existing rights and the environment. The issuance of term permits would provide for the efficient utilization of our water resources. With respect to protection of prior right holders, senior rights will continue under the protection of the general rule of first in time are first in right, which is statutorily recognized in TEX. WATER CODE ANN. § 11.027. Further, the Committee believes that the environment is adequately protected by our existing statutes such as TEX. WATER CODE ANN. § 11.147 which requires Commission consideration
of environmental concerns when making decisions on applications for permits.

If the Texas Water Commission believes the applicant should purchase its water from a project sponsor, it can deny the issuance of a term permit. Further, in order to provide notice to the term permit applicant that his rights under a term permit are limited, the application form for a permit should make it clear that the holder of a term permit cannot necessarily expect his permit to in effect be renewed.

J. RECOMMENDATIONS:

Accordingly, the Committee makes the following legislative recommendations:

TEX. WATER CODE:

1. Term permits should be statutorily authorized but only when they do not jeopardize (1) the financial commitments made for water projects built to develop optimally the water resources of the area and (2) senior rights reasonably expected to be exercised.

2. Application forms for term permits or that could lead to the issuance of a term permit should contain a notice that a term permit holder, after expiration of the permit, has no automatic right to renew the permit.

3. Stream flow restrictions in permits and other means of insuring the priority of senior right holders should be statutorily authorized.
4. Procedures should be established to allow the Texas Water Commission to implement quickly, on an as needed basis, an economical and effective water master system for each basin or any segment thereof to ensure the protection of the priorities in favor of senior rights holders.

5. With respect to the cancellation statute (TEX. WATER CODE ANN. §§ 11.171 - 11.186):

   a. the ten year period of non-use should be reduced to a five year period with exceptions provided for large projects that require long periods of time for financing and construction, and

   b. initiation of the total cancellation procedure should be discretionary with the Texas Water Commission with due regard to be given to the optimum and efficient development of reservoir sites and protection of the investments in projects, and reasonable criteria for avoidance of total cancellation should be incorporated in the total cancellation statutes.
V. CERTIFICATION PROGRAM FOR ANALYSTS OF WATER, WASTE AND SOLID WASTE

During the 69th Texas Legislature Regular Session, Representative Ed Watson of Deer Park introduced H.B. 1496 pertaining to the certification of water and waste analysts. H.B. 1496 would have required all analyses of water, waste or solid waste submitted to a government agency to be prepared and certified by certified analysts. The bill further established a state certification program, providing that the Texas Department of Water Resources would adopt rules establishing the requirements and procedures for certification of analysts and governing the making of analyses submitted to government agencies. H.B. 1496 was referred to the House Natural Resources Committee during the Regular Session but no action was taken on the bill by the Committee. Subsequently, the Committee received an interim charge "to study the need for and the provisions that should be included in, legislation requiring certification of water and waste analysts."

Pursuant to the above charge and with the extensive cooperation of Representative Ed Watson and his staff a public hearing was held in Deer Park to solicit views from both the public and private sector.

A. Does a Substantial Problem Exist?

Among those who favored a certification program were representatives of the Texas Water Commission who stated that inaccurate laboratory data could lead to the misreporting of poor quality effluent and undeserved citations and penalties.
Additionally, inferior laboratory work could leave undetected poor quality effluent. The Commission representatives stated that while its current inspection program has led to improvement in the quality of data produced by many laboratories, there is no current documentation of laboratory areas of poor quality or accreditation for those labs producing quality data. When it appears that a laboratory does not make an effort to improve, and manifests problems generating quality data, the Commission staff has recommended that the agency no longer accept data from the lab. The Commission representatives noted that this does not help the public which is probably not informed about problems in these labs.

From an actual experience standpoint, few problems resulting from a lack of a certification program were cited by the Texas Water Commission representatives. Additionally, the Texas Department of Health took the position in writing that "From the viewpoint of the environmental programs under the jurisdiction of the Texas Department of Health no problems have been experienced because of the lack of a certification program for water and waste analysts. Therefore, we find difficulty in supporting the need for legislation."

One major reason stated by those who favored the legislation was that it would allow them to hold themselves out to the public as "certified."
B. Who Would Be Certified?

There was no consensus among the persons testifying whether a certification program should certify individual technicians, laboratories or both. While some believed a certification program should focus on the individual technician because the individual technician had ultimate responsibility in performing an analysis, others stated that it was more appropriate to certify a laboratory program taking into consideration not only the lab staff and their qualifications but also available equipment, quality control measures, and other factors contributing to the reliability of a laboratory analysis.

It does not appear that all laboratories and analysts want to be certified. Some sought exemptions, and one source stated that only about 25% of the analysts wanted to be certified.

C. What Would Be Entailed?

A state certification program would probably require the adoption of rules by the agency of jurisdiction, the establishment of minimum educational and experience requirements for individuals and the institution of a testing program. Certification of laboratories would require periodic inspections and quality control checks. An additional procedure, including hearings, would probably have to be established to allow for the suspension or revocation of certificates.
D. Costs of a State Program

Subsequent to the public hearing on the matter costs to the state were projected on an annual basis by the Texas Water Commission as follows:

<table>
<thead>
<tr>
<th>Entity Certified</th>
<th>Annual Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Certification of Labs only (Assumes 1660 labs with 553 certified per year)</td>
<td>$ 235,045</td>
</tr>
<tr>
<td>2. Certification of Analysts only (Assumes 23,400 analysts with 4,680 certified per year)</td>
<td>1,093,331</td>
</tr>
<tr>
<td>3. Certification of Labs and Analysts</td>
<td>1,296,646</td>
</tr>
</tbody>
</table>

E. Alternative to State Certification

A possible alternative to a Certification Program conducted by the State is one conducted by one or more private non-profit organizations supported by those industries and private sector businesses which they certify. If a government agency believes there is a need for certification, it can by rule require certification by such a non-profit organization that has been approved by an agency.

F. Conclusion

Given the small number of actual problems experienced by our State to date and the substantial cost that would be involved in a comprehensive state certification program (the costs of which would have to be borne by either the State, those certified, or both) the Committee declines to recommend at this time legislation requiring certification of analysts
or laboratories submitting analyses of water, waste or solid waste to a government agency, but believes such legislation has some merit and might be required at some time in the future.