

Art. III, § 49

that would have increased the permissible property tax from 3¢ to 50¢. The amendment was defeated. No statute was enacted under the grant of power until 1957. (Tex. Rev. Civ. Stat. Ann. art. 2351a-6.) As of the end of 1972, there were six fire districts in existence.

Explanation

There is no constitutional necessity for this section. The legislature could authorize the creation of rural fire prevention districts as it has authorized the creation of mosquito control districts. (See Tex. Rev. Civ. Stat. Ann. art. 4477-2.) The real purpose of Section 48-d is to add 3¢ to the maximum property tax rate that may be imposed in a county. (See the *Introductory Comment* to Article VIII.)

Only recently does there appear to have been an official interpretation of this section. In 1975, the attorney general was requested to rule on the constitutionality of two subsections of the implementing statute cited in the preceding *History*. One subsection authorizes cooperative contracts with other government units; the other authorizes a fire district to maintain an ambulance service. The resulting opinion is one of many recent examples of generous interpretation of a constitutional provision that could easily be read as a restriction on legislative power. As noted, Section 48-d exists only as a device to create additional taxing power. Although the attorney general made no reference to this constitutional quirk, he read Section 48-d as if the words "fire prevention" were not there. By reliance on various general rules—e.g., there is a strong presumption of constitutionality, a legislature has all power not expressly or impliedly denied it—the attorney general, in effect, said that the legislature could let rural fire prevention districts do more than just deal with fires. It was as if the attorney general tied "fire prevention" to the power to levy a tax and excluded the words so far as the operating powers of the district were concerned. (Tex. Att'y Gen. Op. No. H-562 (1975).)

Comparative Analysis

No other state appears to have a comparable provision. Many states have fire districts, of course, but they are authorized by statute.

Author's Comment

Texas has many provisions designed to limit voting on financial issues to taxpaying voters. It is ironical that Section 48-d is not so limited. Perhaps the drafter of the amendment assumed that all of the residents of a rural fire district would be property taxpayers.

It is to be hoped that any constitutional revision will provide for a rational and realistic tax structure. In that event there will be no need for a Section 48-d. Under ordinary circumstances a legislature can provide for whatever fire fighting is necessary. No constitutional authorization is required.

Sec. 49. STATE DEBTS. No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue, shall never exceed in the aggregate at any one time two hundred thousand dollars.

History

The 1845 Constitution had a section much like Section 49 except that the maximum permissible amount of debt was only \$100,000 and any borrowing

Art. III, § 49

within that limit or for defense purposes required a two-thirds vote of each house. (Art. VII, Sec. 33.) The 1861 Constitution increased the maximum to \$500,000 but permitted unlimited debt above that amount provided that a specific dedicated tax sufficient to retire the debt was also enacted. The 1866 Constitution reverted to the 1845 wording. There were no restrictions on borrowing in the 1869 Constitution.

The issue of state debt was a matter of some debate in the 1875 Convention. The original committee proposal prohibited all debt except for defense purposes but proposed to limit that debt to \$500,000. There was objection that this was too strict. There was also a proposal to go back to the 1845 wording. Judge Reagan, one of the leaders of the convention, offered the debt provision recently adopted in Pennsylvania as a substitute, noting that he had used \$200,000 instead of the \$1,000,000 limit permitted in Pennsylvania. The substitute was accepted. (*Debates*, at 114-16.) On a subsequent occasion another effort was made to take the more restrictive approach originally proposed but the convention stuck by Judge Reagan's provision (*Debates*, at 264-67), which is Section 49. (See the upcoming *Comparative Analysis* for a discussion of the new Pennsylvania section.)

In 1913 an amendment was proposed which would have changed the \$200,000 limit to \$500,000 and which apparently would have given the legislature unlimited power to issue bonds to acquire land and to erect buildings to provide "a complete university of the first class" and to issue bonds for buildings for the penitentiary system and for "State institutions." (The amendment was so badly drafted that it is not clear what borrowing power was intended.) The amendment was defeated. In 1919 an amendment authorizing \$75,000,000 in highway bonds was defeated. The six lettered sections following Section 49 are, of course, "amendments" of the section. Sections 50b and 50b-1 of this article and Sections 17 and 18 of Article VII are also "amendments" of Section 49. There probably have been others. In 1933, for example, a section 51a was added to Article III authorizing so-called "bread bonds" for relief of the needy. This amendment disappeared in the revision of Section 51a adopted in 1945. (See *History of Sec. 51-a*.) Another example is a proposed amendment defeated in 1942. It would have authorized \$2 million in bonds for state office buildings. An interesting quirk in that proposal was that all bonds were to be held by the Permanent School Fund.

Explanation

Section 49 clearly prohibits the issuance of state bonds. One way to get around this prohibition is by constitutional amendment. This has been done a great many times. (For bond issue provisions still in the constitution, see the six lettered sections that follow; also Secs. 50b and 50b-1 of this article and Secs. 17 and 18 of Art. VII.) A second method is to issue bonds that are not secured by the full faith and credit of the state. This is normally done by creating an authority which operates something that is income producing. A turnpike authority is an example. It raises money by pledging revenue from highway tolls and concessions. If revenues are insufficient, the bondholders have no recourse against the state. The Texas Supreme Court has upheld this device. (*Texas Turnpike Authority v. Shepperd*, 154 Tex. 357, 279 S.W.2d 302 (1955).)

A variation is an agency which obtains its revenue from the state rather than from the public. A common device is an authority that floats bonds to acquire buildings which are then leased to the state for an amount of rent adequate to maintain the buildings, pay the interest, and retire the bonds. A Texas example is the National Guard Armory Board. It owns armories which are leased to the state. The package has to be put together carefully, however, in order to avoid the prohibition of Section 49. The principal gimmick is to enter into a new lease every

Art. III, § 49

two years. This coincides with the maximum appropriation period authorized by Section 6 of Article VIII. Thus, the state is not legally obligated beyond current appropriations. A longer commitment could be argued to be in violation of Section 49. The net result of all this is that realistically the state has floated bonds to pay for capital improvements but legally it has not. The device was upheld in *Texas National Guard Armory Board v. McCraw* (132 Tex. 613, 126 S.W.2d 627 (1939). See also Tex. Att'y Gen. Op. No. H-340 (1974).)

Section 49 does not outlaw all long-term contracts, however. For example, a contract was entered into with a publisher whereby Texas agreed to use a particular textbook for a period of five years and the publisher agreed to supply as many as were needed each year. Again, the contract was carefully worded to deny any obligation on the part of the state except to pay for the books actually ordered. In upholding the contract, the supreme court said that "Obligations that run current with revenues are not debts within the contemplation of the Constitution." (*Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 22, 262 S.W. 722, 725 (1924). See also *City of Big Spring v. Board of Control*, 404 S.W.2d 810 (Tex. 1966).)

Section 49 states that "no debt shall be created." This has produced a spate of cases in which the litigants and sometimes the courts have relied incorrectly on those words. For example, the supreme court once held that an appropriation to pay back rent on a leased armory was invalid because the "chits" previously given to the armory owner by the adjutant general represented an attempt to create a debt contrary to Section 49. (*Fort Worth Cavalry Club v. Sheppard*, 125 Tex. 339, 83 S.W.2d 660 (1935).) But since the chits had been given to the owner because the adjutant general's appropriation was exhausted, the real reason for invalidity had to be the absence of the "pre-existing law" required by Section 44 of this article. If there had been no other element of invalidity, the court would not have said that this was an attempt to create a debt. Every unpaid obligation of the state is a debt, but no one would argue that every state transaction must be an instantaneous bilateral transfer of money for goods or services. What lies behind these cases is not that the state is attempting to create a debt but that the state is attempting invalidly to create an obligation. (For additional examples see *State v. Ragland Clinic-Hospital*, 138 Tex. 393, 159 S.W.2d 105 (1942); *Kilpatrick v. Compensation Claim Board*, 259 S.W. 164 (Tex. Civ. App.—El Paso 1924, *no writ*); *State v. Elliott*, 212 S.W. 695 (Tex. Civ. App.—Galveston 1919, *writ ref'd*); *State v. Haldeman*, 163 S.W. 1020 (Tex. Civ. App.—Austin 1913, *writ ref'd*).)

Notwithstanding the definite prohibition against going into debt and specific limitation of a deficit to \$200,000, the state has in fact run up a deficit as high as \$71,000,000. (See McCleskey, *The Government and Politics of Texas*, 3d ed., p. 287. See also the *History* of Sec. 49a of this article.) The \$200,000 limitation operates only as a limit on the governor's power to authorize expenditures in excess of amounts appropriated. (See Tex. Rev. Civ. Stat. Ann. art. 4351 (1966). See also the *Explanation* of Sec. 23-a of this article.) Section 49 is not effective if more money is appropriated than is actually taken in. In 1941, the court of civil appeals upheld a large appropriation against a taxpayer's allegation that Section 49 was violated because the general fund was \$27,000,000 in the red. (*King v. Sheppard*, 157 S.W.2d 682 (Tex. Civ. App.—Austin 1941, *writ ref'd w.o.m.*.) The court said that "no debt is created unless the appropriation is made or obligation is created in excess of the reasonably anticipated revenues for the year" (p. 685). This is the only way to read Section 49. Obviously, the government cannot grind to a halt while incoming revenues are used to wipe out the previous deficit. Section 49 prevents only the intentional creation of a debt.

Finally, it should be noted that Section 49 places no limit on incurring debt to

Art. III, § 49

“repel invasion, suppress insurrection, or defend the State in war.” The \$200,000 limitation applies only to casual deficiencies. No occasion has arisen requiring use of this limited power to incur unlimited debt and there is, therefore, no authoritative interpretation of this aspect of Section 49.

Comparative Analysis

Four states (Connecticut, New Hampshire, Tennessee, and Vermont) have no constitutional debt limitations. Two states (Delaware and Massachusetts) require an extraordinary legislative vote to incur ordinary, long-term debt—three-fourths in Delaware, two-thirds in Massachusetts. The new Illinois Constitution requires either a three-fifths vote in each house or approval by referendum. Maryland has no limitation but requires the enactment of a special tax to pay the interest and to retire the bonds within no more than 15 years.

Not quite half of the states join Texas in putting some sort of absolute limitation on the amount of state debt. Some states have a limitation similar to that of Texas, thus effectively limiting debt except by constitutional amendment. Many states have a limitation expressed as a percentage of taxable property in the state. At least two states tie the limitation to the size of the state budget. One of these is Pennsylvania, discussed below. Approximately a third of the states simply require approval by referendum but with no limit on the amount that may be so approved. A few of the states with absolute maximums require a referendum for any debt within the maximum.

In 1968, Pennsylvania repealed the provision which served as the model for Section 49. (See preceding *History*.) The new Pennsylvania provision (Art. VIII, Sec. 7) can be summarized thus:

- (1) There is no limit on debt incurred to suppress insurrection or cope with natural disasters.
- (2) Tax anticipation notes payable within a year from current revenues and refunding debt within the maturity period of the original debt are not limited.
- (3) Beyond (1) and (2) the state may incur debt in an aggregate amount not exceeding one and three-quarters times the average of revenues for the preceding five years.
- (4) Beyond (3) the state may incur debt if approved in a referendum. The legislature can provide, however, that such debt shall be counted as part of the amount permitted under (3).

One of the interesting developments in recent debt provisions is the treatment accorded revenue bonds. In the Pennsylvania provision just discussed, revenue bonds payable out of revenue received from the public or from leases of state property to local governments do not have to be counted as part of the permissible maximum debt, but revenue bonds payable out of revenue from leases to the state do have to be counted. Hawaii excepts revenue bonds in general from the constitutional limitation. (Art. VII, Sec. 3.) The new Illinois Constitution requires revenue bonds payable, “directly or indirectly, from tax revenue” to meet all the rules for incurring state debt—that is, passage by three-fifths of the members of each house or approval by referendum. (Art. IX, Sec. 9(a).)

The United States Constitution simply empowers congress to “borrow money on the credit of the United States.” The *Model State Constitution* provides:

No debt shall be contracted by or in behalf of this state unless such debt shall be authorized by law for projects or objects distinctly specified therein. (Sec. 7.01)

Author's Comment

This debt business is a frightful can of worms. There are a great many arguments, both theoretical and practical, on all sides of the subject. The first thing to note is that today and from now on the name of the game of government is "money." Notwithstanding periodic "taxpayer revolts," the trend is in the direction of an ever-increasing range of government services and a concomitant increase in the total tax take. From this it follows in theory that legislators and administrators need a maximum amount of flexibility in dealing with the fiscal needs of the state. Against this must be set the political reality that people both want government services and do not want to pay taxes. From this it follows that a legislator can satisfy both of these public wants by providing the services today and postponing payment therefor. Thus, with no limitations on incurring debt, legislators may be tempted to spend without taxing.

A second point is that state and local governments should distinguish between capital costs and current expenses. If it is ill-advised to saddle future taxpayers with the cost of today's government, it is equally ill-advised to saddle today's taxpayer with the full cost of a facility that will be enjoyed by taxpayers for 40 years into the future. From this it follows that most items with a useful life of a decade or more ought to be paid for by borrowing. But, it may be argued, with no restraints on borrowing, legislators and governors may develop "edifice complexes" and overbuild, saddling the future with unpaid-for white elephants. (It should be noted that the foregoing discussion is not applicable to the federal government. Federal fiscal policy includes manipulation of deficits to affect the economy as a whole, and in this context capital budgets and expense budgets become irrelevant.)

A third point is that constitutional restrictions on debt do not work. Bright money managers and their lawyers find ways to get around the restrictions. A case in point is that of the *National Guard Armory Board* discussed earlier. The more stringent the restrictions are, the more ingenious will be the devices to get around the restrictions. All of this is expensive. The cost of borrowing goes up as the risk increases. Remove the full faith and credit of the state and the risk of nonpayment increases.

A final point is that the referendum route is not a particularly sensible one. Whatever the bond issue to be voted upon, it is part of a larger picture that is not presented to the voters. Moreover, votes on bond issues may or may not be rational. All over the United States school budgets are voted down, not because voters are opposed to education but because the budgets are the only forum that voters have for expressing their "revolt" against taxes in general.

Out of all this, some conclusions can be drawn that are probably politically viable. First, the present method of restricting debt should be abandoned. Section 49 in effect provides only that the public shall participate in the decision-making process. This end can be served by requiring a referendum, thus avoiding constitutional amendments. Second, the referendum process, if preserved, ought not to be the exclusive method for borrowing. There should be some realistic amount that can be borrowed by legislative action without a referendum. Third, any debt limit in the constitution should be expressed not in dollars but in a relationship. The value of taxable property should not be used. It is no longer a good measure of wealth, income, or ability to pay. The Pennsylvania method of limiting debt to a multiple of state expenditures is a good one, for it relates capital needs to the level of goods and services provided. A measure that might be tried would be a percentage of the gross national product allocable to Texas. This would represent in today's economy the measure of ability to pay that property represented in an agricultural economy. Finally, some control over the use of

Art. III, § 49a

gimmicks to get around a debt limit ought to be included, but the strictures of the control should be proportional to the size of the debt limit. In other words, if it is made relatively easy to borrow needed money in a straightforward manner, the use of gimmicks should not be allowed, but if it is made relatively difficult to borrow money, gimmicks that are necessary to be able to operate the government should not be outlawed. In short, gimmicks should not be available to let the government look good or hide what it is doing but should be available if that is the only way to do what has to be done.

Whatever decision is made on debt limitations, it should be set forth in an article on revenue, not in the article on the legislature.

Sec. 49a. FINANCIAL STATEMENT AND ESTIMATE BY COMPTROLLER OF PUBLIC ACCOUNTS; LIMITATION OF APPROPRIATIONS; BONDS. It shall be the duty of the Comptroller of Public Accounts in advance of each Regular Session of the Legislature to prepare and submit to the Governor and to the Legislature upon its convening a statement under oath showing fully the financial condition of the State Treasury at the close of the last fiscal period and an estimate of the probable receipts and disbursements for the then current fiscal year. There shall also be contained in said statement an itemized estimate of the anticipated revenue based on the laws then in effect that will be received by and for the State from all sources showing the fund accounts to be credited during the succeeding biennium and said statement shall contain such other information as may be required by law. Supplemental statements shall be submitted at any Special Session of the Legislature and at such other times as may be necessary to show probable changes.

From and after January 1, 1945, save in the case of emergency and imperative public necessity and with a four-fifths vote of the total membership of each House, no appropriation in excess of the cash and anticipated revenue of the funds from which such appropriation is to be made shall be valid. From and after January 1, 1945, no bill containing an appropriation shall be considered as passed or be sent to the Governor for consideration until and unless the Comptroller of Public Accounts endorses his certificate thereon showing that the amount appropriated is within the amount estimated to be available in the affected funds. When the Comptroller finds an appropriation bill exceeds the estimated revenue he shall endorse such finding thereon and return to the House in which same originated. Such information shall be immediately made known to both the House of Representatives and the Senate and the necessary steps shall be taken to bring such appropriation to within the revenue, either by providing additional revenue or reducing the appropriation.

For the purpose of financing the outstanding obligations of the General Revenue Fund of the State and placing its current accounts on a cash basis the Legislature of the State of Texas is hereby authorized to provide for the issuance, sale, and retirement of serial bonds, equal in principle to the total outstanding, valid, and approved obligations owing by said fund on September 1, 1943, provided such bonds shall not draw interest in excess of two (2) per cent per annum and shall mature within twenty (20) years from date.

History

It was noted in the *Explanation* of Section 49 that the prohibition against debt does not prevent deficits. Professor Edmund Miller pointed out in 1916 that Texas had had a floating debt in the form of outstanding warrants at the close of six fiscal years. These ranged from almost a quarter-million dollars in 1913 to over three-quarters of a million dollars in 1895 and 1904. (Miller, p. 359.) With the coming of the Great Depression, the deficit became an annual affair. The general revenue fund ended up in the red every fiscal year from 1931 through 1944. (See Smith,

Art. III, § 49a

“New Financial Procedures in Texas,” *State Government* (May 1947), pp. 144-45.) Section 49a was proposed in 1941 as a device designed to stop deficit financing. The amendment was adopted at the general election in 1942 by a vote of 96,418 to 72,816. Four other amendments voted upon at the same election were defeated.

Explanation

Texans say that their constitution embodies a “pay-as-you-go” philosophy. When applied to the prohibition on incurring debt, the expression is not wholly accurate. Section 49 means in effect that only the voters may put the state into debt. Section 49a is the embodiment of a “pay-as-you-go” philosophy. The section says, in effect, “Don’t spend more than your income; don’t slip into debt accidentally.”

Actually, Section 49 embodies the same philosophy so far as the legislature is concerned. That is, in order to reserve to the people the decision on whether to go into debt, Section 49 forbids a casual deficit of more than \$200,000. Section 49a is an attempt to force the legislature to obey the command of Section 49. It is this addition of an enforcement device that is evidence of devotion to “pay as you go.” (One may speculate, however, that the banks (see below) that had to hold unpaid warrants were the principal proponents of the amendment. Certainly a 56.9 percent majority for adoption of Section 49a is no landslide.)

Section 49a is a typical Texas wordy provision that could be boiled down to a simple limitation: “No appropriation bill may become law unless either (a) the Comptroller of Public Accounts certifies that anticipated revenues will be sufficient to cover the appropriation or (b) the legislature, in default of such certification, passes the appropriation bill by a vote of four-fifths of the membership of each house.” The first paragraph of Section 49a consists of procedural details designed to enable the legislature to know in advance how far it can go in appropriating money without increasing taxes and could have been left for statutory implementation. Likewise, many of the details in the second paragraph could have been left for statutory implementation.

In the short version above nothing is said about a “case of emergency and imperative public necessity.” There is no great harm in including those words as a matter of public relations. They are not likely to be of constitutional significance. The operative control is the extraordinary majority required to pass the bill. If such a majority can be mustered they will happily include in the bill whatever reasons the constitution requires. No court will second guess such a recitation, partly because the issue is more political than judicial and partly because once a court agreed to entertain the issue, no emergency appropriations bill thereafter would become “law” until the court ratified the existence of an emergency.

The third paragraph of the section is obsolete. The purpose was to facilitate moving to a “pay-as-you-go” basis by converting the existing deficit into 20-year bonds. The bonds were never issued. “Shortly after the amendment was passed, wartime economic conditions improved the solvency of the General Revenue Fund to such an extent that its outstanding obligations could be met exclusively on a cash basis.” (Anderson and McMillan, *Financing State Government in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1953), p. 134.)

There have been few problems of interpretation. Early on the attorney general warned that outstanding warrants from previous years would have to be counted as obligations to be paid out of available funds when the amendment became operative on January 1, 1945. (See Tex. Att’y Gen. Op. No. 0-5135 (1943).) He also ruled that a small appropriation of \$25,000 could not be spent because, probably inadvertently, no comptroller’s certification had been obtained. (See

Art. III, § 49a

Tex. Att'y Gen. Op. No. 0-6738 (1945).) He advised the legislature that any bill proposed to be passed by a four-fifths vote should recite the rubric of imperative necessity. (See Tex. Att'y Gen. Op. No. 0-6497 (1945).) He also advised the legislature that if it appropriated money for only one year instead of a biennium, the comptroller's certificate should be tailored to one year, not two. (See Tex. Att'y Gen. Op. No. M-66 (1967). Note that this question arises because of the detail in the first paragraph of the section. No such problem arises in the short version suggested above.)

It should be noted that Section 49a does not guarantee that there will be no deficit. Indeed, as noted in the *Explanation* of Section 49, there was a \$70 million deficit in 1961. The comptroller of public accounts has to make two estimates—the amount of receipts and the cost of government—well ahead of time. Neither estimate can be perfect. If either estimate runs the wrong way, a deficit can result. The practical solution to an “unconstitutional” deficit has been for banks to cash warrants but hold them until the treasurer can honor them. In return the state keeps appropriate amounts of special funds on deposit in cooperating banks. (See McCleskey, 4th ed., p. 285.)

Comparative Analysis

Several states have a “pay-as-you-go” provision, but only New Jersey relies on a comparable certification. There the governor provides it (Art. VIII, Sec. II, par. 2). The 1972 Montana Constitution simply states: “Appropriations by the legislature shall not exceed anticipated revenue.” (Art. VIII, Sec. 9.) The earlier Montana Constitution said much the same thing but took more than a hundred words to do so. Three other states have a provision like the old Montana section. The 1970 Illinois Constitution provides: “Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year.” (Art. VIII, Sec. 2(b).)

Michigan's 1964 Constitution has perhaps the most interesting provision: “No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes.” (Art. V, Sec. 20.)

Author's Comment

It is an instructive exercise in analysis of constitutional limitations to compare the effectiveness of the three provisions quoted above with Section 49a in preventing deficits. All except the Michigan provision are effective only as of the date of passing appropriations bills. Within that limited effectiveness there would appear on the surface to be distinctions. The Illinois provision is obviously not judicially enforceable unless perhaps the legislature goofs by failing to keep its estimates up. The Montana provision is an absolute prohibition, but again it seems unlikely that the courts could intervene unless somebody goofed. Section 49a is a bit tighter, for the person who certifies (the comptroller of public accounts) is not the person who makes the decisions to spend. (By the same token the comptroller has the power to create difficulties by underestimating revenues and overestimating program costs.) Nevertheless, there is no likely judicial review of the comptroller's certification. In short, all three provisions are unenforceable in the traditional American judicial way.

Art. III, § 49-b

This is true of the Michigan provision as well. Although the Michigan provision states that the governor "shall" reduce expenditures whenever "it appears" that revenues will fall short, it is unlikely that a court would entertain a complaint that the governor was failing to act. Nevertheless, the Michigan provision has an edge on the other three because it is operative throughout the spending period. In short, if followed by the governor and the legislative committees the Michigan provision guarantees adherence to the rule of "pay as you go."

Sec. 49-b. VETERANS' LAND PROGRAM. By virtue of prior Amendments to this Constitution, there has been created a governmental agency of the State of Texas performing governmental duties which has been designated the Veterans' Land Board. Said Board shall continue to function for the purposes specified in all of the prior Constitutional Amendments except as modified herein. Said Board shall be composed of the Commissioner of the General Land Office and two (2) citizens of the State of Texas, one (1) of whom shall be well versed in veterans' affairs and one (1) of whom shall be well versed in finances. One (1) such citizen member shall, with the advice and consent of the Senate, be appointed biennially by the Governor to serve for a term of four (4) years; but the members serving on said Board on the date of adoption hereof shall complete the terms to which they were appointed. In the event of the resignation or death of any such citizen member, the Governor shall appoint a replacement to serve for the unexpired portion of the term to which the deceased or resigning member had been appointed. The compensation for said citizen member shall be as is now or may hereafter be fixed by the Legislature; and each shall make bond in such amount as is now or may hereafter be prescribed by the Legislature.

The Commissioner of the General Land Office shall act as Chairman of said Board and shall be the administrator of the Veterans' Land Program under such terms and restrictions as are now or may hereafter be provided by law. In the absence or illness of said Commissioner, the Chief Clerk of the General Land Office shall be the Acting Chairman of said Board with the same duties and powers that said Commissioner would have if present.

The Veterans' Land Board may provide for, issue and sell not to exceed Five Hundred Million Dollars (\$500,000,000) in bonds or obligations of the State of Texas for the purpose of creating a fund to be known as the Veterans' Land Fund, Four Hundred Million Dollars (\$400,000,000) of which have heretofore been issued and sold. Such bonds or obligations shall be sold for not less than par value and accrued interest; shall be issued in such forms, denominations, and upon such terms as are now or may hereafter be provided by law; shall be issued and sold at such times, at such places, and in such installments as may be determined by said Board; and shall bear a rate or rates of interest as may be fixed by said Board but the weighted average annual interest rate, as that phrase is commonly and ordinarily used and understood in the municipal bond market, of all the bonds issued and sold in any installment of any bonds may not exceed the rate specified in Section 65 of this Article. All bonds or obligations issued and sold hereunder shall, after execution by the Board, approval by the Attorney General of Texas, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchaser or purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas; and all bonds heretofore issued and sold by said Board are hereby in all respects validated and declared to be general obligations of the State of Texas. In order to prevent default in the payment of principal or interest on any such bonds, the Legislature shall appropriate a sufficient amount to pay the same.

In the sale of any such bonds or obligations, a preferential right of purchase shall be given to the administrators of the various Teacher Retirement Funds, the Permanent University Funds, and the Permanent School Funds.

Said Veterans' Land Fund shall consist of any lands heretofore or hereafter purchased by said Board, until the sale price therefor, together with any interest and penalties due, have been received by said Board (although nothing herein shall be

Art. III, § 49-b

construed to prevent said Board from accepting full payment for a portion of any tract), and of the moneys attributable to any bonds heretofore, or hereafter issued and sold by said Board which moneys so attributable shall include but shall not be limited to the proceeds from the issuance and sale of such bonds; the moneys received from the sale or resale of any lands, or rights therein, purchased with such proceeds; the moneys received from the sale or resale of any lands, or rights therein, purchased with other moneys attributable to such bonds; the interest and penalties received from the sale or resale of such lands, or rights therein; the bonuses, income, rents, royalties, and any other pecuniary benefit received by said Board from any such lands; sums received by way of indemnity or forfeiture for the failure of any bidder for the purchase of any such bonds to comply with his bid and accept and pay for such bonds or for the failure of any bidder for the purchase of any lands comprising a part of said Fund to comply with his bid and accept and pay for any such lands; and interest received from investments of any such moneys. The principal and interest on the bonds heretofore and hereafter issued by said Board shall be paid out of the moneys of said Fund in conformance with the Constitutional provisions authorizing such bonds; but the moneys of said Fund which are not immediately committed to the payment of principal and interest on such bonds, the purchase of lands as herein provided, or the payment of expenses as herein provided may be invested in bonds or obligations of the United States until such funds are needed for such purposes.

All moneys comprising a part of said Fund and not expended for the purposes herein provided shall be a part of said Fund until there are sufficient moneys therein to retire fully all of the bonds heretofore or hereafter issued and sold by said Board, at which time all such moneys remaining in said Fund, except such portion thereof as may be necessary to retire all such bonds which portion shall be set aside and retained in said Fund for the purpose of retiring all such bonds, shall be deposited to the credit of the General Revenue Fund to be appropriated to such purposes as may be prescribed by law. All moneys becoming a part of said Fund thereafter shall likewise be deposited to the credit of the General Revenue Fund.

When a Division of said Fund (each Division consisting of the moneys attributable to the bonds issued and sold pursuant to a single Constitutional authorization and the lands purchased therewith) contains sufficient moneys to retire all of the bonds secured by such Division, the moneys thereof, except such portion as may be needed to retire all of the bonds secured by such Division which portion shall be set aside and remain a part of such Division for the purpose of retiring all such bonds, may be used for the purpose of paying the principal and the interest thereon, together with the expenses herein authorized, of any other bonds heretofore or hereafter issued and sold by said Board. Such use shall be a matter for the discretion and direction of said Board; but there may be no such use of any such moneys contrary to rights of any holder of any of the bonds issued and sold by said Board or violative of any contract to which said Board is a party.

The Veterans' Land Fund shall be used by said Board for the purpose of purchasing lands situated in the State of Texas owned by the United States or any governmental agency thereof, owned by the Texas Prison System or any other governmental agency of the State of Texas, or owned by any person, firm, or corporation. All lands thus purchased shall be acquired at the lowest price obtainable, to be paid for in cash, and shall be a part of said Fund. All lands heretofore or hereafter purchased and comprising a part of said Fund are hereby declared to be held for a governmental purpose, although the individual purchasers thereof shall be subject to taxation to the same extent and in the same manner as are purchasers of lands dedicated to the Permanent Free Public School Fund.

The lands of the Veterans' Land Fund shall be sold by said Board in such quantities, on such terms, at such prices, at such rates of interest and under such rules and regulations as are now or may hereafter be provided by law to veterans who served not less than ninety (90) continuous days, unless sooner discharged by reason of a service-connected disability, on active duty in the Army, Navy, Air Force, Coast Guard or Marine Corps of the United States after September 16, 1940 and who, upon the date of filing his or her application to purchase any such land is a citizen of the United States, is a bona fide resident of the State of Texas, and has not been

Art. III, § 49-b

dishonorably discharged from any branch of the Armed Forces above-named and who at the time of his or her enlistment, induction, commissioning, or drafting was a bona fide resident of the State of Texas, or who has resided in Texas at least five (5) years prior to the date of filing his or her application, and provided that in the event of the death of an eligible Texas Veteran after the veteran has filed with the Board an application and contract of sale to purchase through the Board the tract selected by him or her and before the purchase has been completed, then the surviving spouse may complete the transaction. The foregoing notwithstanding, any lands in the Veterans' Land Fund which have been first offered for sale to veterans and which have not been sold may be sold or resold to such purchasers, in such quantities, and on such terms, and at such prices and rates of interest, and under such rules and regulations as are now or may hereafter be provided by law.

Said Veterans' Land Fund, to the extent of the moneys attributable to any bonds hereafter issued and sold by said Board may be used by said Board, as is now or may hereafter be provided by law, for the purpose of paying the expenses of surveying, monumenting, road construction, legal fees, recordation fees, advertising and other like costs necessary or incidental to the purchase and sale, or resale, or any lands purchased with any of the moneys attributable to such additional bonds, such expenses to be added to the price of such lands when sold, or resold, by said Board; for the purpose of paying the expenses of issuing, selling, and delivering any such additional bonds; and for the purpose of meeting the expenses of paying the interest or principal due or to become due on any such additional bonds.

All of the moneys attributable to any series of bonds hereafter issued and sold by said Board (a 'series of bonds' being all of the bonds issued and sold in a single transaction as a single installment of bonds) may be used for the purchase of lands as herein provided, to be sold as herein provided, for a period ending eight (8) years after the date of sale of such series of bonds; provided, however, that so much of such moneys as may be necessary to pay interest on bonds hereafter issued and sold shall be set aside for that purpose in accordance with the resolution adopted by said Board authorizing the issuance and sale of such series of bonds. After such eight (8) year period, all of such moneys shall be set aside for the retirement of any bonds hereafter issued and sold and to pay interest thereon, together with any expenses as provided herein, in accordance with the resolution or resolutions authorizing the issuance and sale of such additional bonds, until there are sufficient moneys to retire all of the bonds hereafter issued and sold, at which time all such moneys then remaining a part of said Veterans' Land Fund and thereafter becoming a part of said Fund shall be governed as elsewhere provided herein.

This Amendment being intended only to establish a basic framework and not to be a comprehensive treatment of the Veterans' Land Program, there is hereby reposed in the Legislature full power to implement and effectuate the design and objects of this Amendment, including the power to delegate such duties, responsibilities, functions, and authority to the Veterans' Land Board as it believes necessary.

Should the Legislature enact any enabling laws in anticipation of this Amendment, no such law shall be void by reason of its anticipatory nature.

This Amendment shall become effective upon its adoption.

History

In the 19th century the custom in the United States was to reward veterans with grants of land from the public domain. In the 20th century this inexpensive approach has not been available. (Grants of public domain were inexpensive only in the sense that no taxes had to be raised.) After World War I many states granted cash bonuses to veterans; after World War II, most states again took the bonus route. The legislature considered a Texas bonus but rejected it, obviously because of an estimated cost of half a billion dollars. (See *The Texas Constitutional Amendments of 1960* (Austin: Institute of Public Affairs, The University of Texas, 1960), p. 18.)

Section 49-b was adopted in November 1946, but no implementing statute was

Art. III, § 49-b

enacted until 1949. Almost immediately thereafter, the amendment parade began. There were successful amendments in 1951, 1956, 1960, 1962, and 1967. Amendments were turned down in 1963 and 1965. The current section was adopted in 1973.

No useful purpose would be served by detailing the differences among the nine versions. In general, there was a steady increase in the amount of bonds authorized—from \$25 million to \$500 million; in the maximum interest rate that the bonds could bear—from 3 percent to a “weighted average annual interest rate, as that phrase is commonly and ordinarily understood in the bond market,” not to exceed the rate specified in Section 65 of this article; and in the coverage of veterans—from “Texas veterans” of World War II to veterans who served “after September 16, 1940.” The section also increased in length—from about 600 words to about 2,000 words.

Explanation

As the quoted description of a weighted average interest rate demonstrates, Section 49-b is written for, and probably by, bond attorneys. Much of the detail is constitutionally irrelevant except in the sense that changes in detail necessitate constitutional amendment. As was said concerning the 1963 amendment that failed: “The amendment is quite lengthy and, though much of it might appropriately be termed legislation by constitutional amendment, these sections are no more than an extension of the typical Texas constitutional trend.” (Howard and Henry, “The Texas Constitutional Amendments of 1963,” *Public Affairs Comment* (September 1963): 3.)

The essentials of Section 49-b are (1) that it authorizes the issuance of full-faith and credit bonds in the amount of \$500 million, (2) that the proceeds are to be used to purchase land for resale to veterans, (3) that the program is to be administered by a three-member board chaired by the commissioner of the general land office, and (4) that any profit from the operation of the program goes into the state’s general fund.

The principal implication of Section 49-b is that the program is to be self-liquidating at no cost to the taxpayer. The Texas Legislative Council in its analysis of the 1973 proposed constitutional amendments noted that the bonds and obligations under Section 49-b “have never been an expense for which tax money has been used.” (“9 Proposed Constitutional Amendments Analyzed,” 1973, p. 24.) In its 1967 analysis the council stated that the “program is without cost to the taxpayer.” (“6 Proposed Constitutional Amendments Analyzed,” 1967, p. 12.) The more precise statement in 1973 probably reflects the fact that the taxpayers pay for the operation of the General Land Office, which administers the veterans’ land program.

This \$500 million land program may cost the taxpayers almost nothing; it also affects relatively few veterans. As of the end of 1970 only 42,257 veterans had purchased land. (*Texas Almanac: 1972-73*, p. 607.) This is a minute percentage of eligible veterans.

Comparative Analysis

About ten states have a constitutional provision authorizing a veterans’ bonus. In some cases this may have been required to get around a grants and loans prohibition. Two other states have a provision authorizing a bond issue for the acquisition of land for resale; one state authorizes appropriations for veterans’ housing. Many states may have issued bonds for either a bonus or land acquisition but without having to amend their constitutions.

Art. III, § 49-c

Author's Comment

The only reason for Section 49-b is the prohibition against incurring debt. The very existence of the section with its many amendments increasing the amount of authorized bonds plus Sections 49-c, 49-d, 49-d-1, 49-e, 50b, and 50b-1 is proof enough that Section 49 should be changed to permit debt to be incurred without a constitutional amendment.

Granted that Section 49-b was necessary in the first place, there was no need to include legislative detail. The original section could have read: "The legislature is authorized to incur debt not to exceed \$25,000,000 in order to provide by law for the purchase of land to be sold to veterans of the armed forces." A second sentence could have obviated future amendments: "The legislature may increase the amount of such debt if the increase is approved in a referendum held in accordance with the requirements of Article XVII, Section 1."

There is one paragraph of legislative detail in Section 49-b that not only is unnecessary but, one would hope, is ignored. This is the "preferential right of purchase" granted to the various state permanent funds. It is ridiculous for those funds to hold tax-exempt securities. The interest rate is low partly because people offset the low interest by saving on their income taxes. Since the state funds pay no income taxes there is an unjustifiable net income loss in holding bonds that carry an artificially low yield.

Sec. 49-c. TEXAS WATER DEVELOPMENT BOARD; BOND ISSUE; TEXAS WATER DEVELOPMENT FUND. There is hereby created as an agency of the State of Texas the Texas Water Development Board to exercise such powers as necessary under this provision together with such other duties and restrictions as may be prescribed by law. The qualifications, compensation, and number of members of said Board shall be determined by law. They shall be appointed by the Governor with the advice and consent of the Senate in the manner and for such terms as may be prescribed by law.

The Texas Water Development Board shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed One Hundred Million Dollars (\$100,000,000). The Legislature of Texas, upon two-thirds (2/3) vote of the elected Members of each House, may authorize the Board to issue additional bonds in an amount not exceeding One Hundred Million Dollars (\$100,000,000). The bonds authorized herein or permitted to be authorized by the Legislature shall be called "Texas Water Development Bonds," shall be executed in such form, denominations and upon such terms as may be prescribed by law, provided, however, that the bonds shall not bear more than four percent (4%) interest per annum; they may be issued in such installments as the Board finds feasible and practical in accomplishing the purpose set forth herein.

All moneys received from the sale of State bonds shall be deposited in a fund hereby created in the State Treasury to be known as the Texas Water Development Fund to be administered (without further appropriation) by the Texas Water Development Board in such manner as prescribed by law.

Such funds shall be used only for the purpose of aiding or making funds available upon such terms and conditions as the Legislature may prescribe, to the various political subdivisions or bodies politic and corporate of the State of Texas including river authorities, conservation and reclamation districts and districts created or organized or authorized to be created or organized under Article XVI, Section 59 or Article III, Section 52, of this Constitution, interstate compact commissions to which the State of Texas is a party and municipal corporations, in the conservation and development of the water resources of this State, including the control, storing and preservation of its storm and flood waters and the waters of its rivers and streams, for all useful and lawful purposes by the acquisition, improvement, extension, or

Art. III, § 49-c

construction of dams, reservoirs and other water storage projects, including any system necessary for the transportation of water from storage to points of treatment and/or distribution, including facilities for transporting water therefrom to wholesale purchasers, or for any one or more of such purposes or methods.

Any or all financial assistance as provided herein shall be repaid with interest upon such terms, conditions and manner of repayment as may be provided by law.

While any of the bonds authorized by this provision or while any of the bonds that may be authorized by the Legislature under this provision, or any interest on any of such bonds, is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount which is sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the sinking fund at the close of the prior fiscal year.

The Legislature may provide for the investment of moneys available in the Texas Water Development Fund, and the interest and sinking funds established for the payment of bonds issued by the Texas Water Development Board. Income from such investment shall be used for the purposes prescribed by the Legislature. The Legislature may also make appropriations from the General Revenue Fund for paying administrative expenses of the Board.

From the moneys received by the Texas Water Development Board as repayment of principal for financial assistance or as interest thereon, there shall be deposited in the interest and sinking fund for the bonds authorized by this Section sufficient moneys to pay the interest and principal to become due during the ensuing year and sufficient to establish and maintain a reserve in said fund equal to the average annual principal and interest requirements on all outstanding bonds issued under this Section. If any year prior to December 31, 1982 moneys are received in excess of the foregoing requirements then such excess shall be deposited to the Texas Water Development Fund, and may be used for administrative expenses of the Board and for the same purposes and upon the same terms and conditions prescribed for the proceeds derived from the sale of such State bonds. No grant of financial assistance shall be made under the provisions of this Section after December 31, 1982, and all moneys thereafter received as repayment of principal for financial assistance or as interest thereon shall be deposited in the interest and sinking fund for the State bonds; except that such amount as may be required to meet the administrative expenses of the Board may be annually set aside; and provided, that after all State bonds have been fully paid with interest, or after there are on deposit in the interest and sinking fund sufficient moneys to pay all future maturities of principal and interest, additional moneys so received shall be deposited to the General Revenue Fund.

All bonds issued hereunder shall after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such acts shall not be void by reason of their anticipatory nature.

History

The relentless drought that gripped the state from 1950 through 1956 painfully reminded Texans that the state's welfare is vitally dependent upon adequate water resources and provided the impetus for the adoption of Section 49-c in 1957. Prior to adoption of this section there had been several unsuccessful attempts to allow more active state government participation in the water conservation business, a policy that had had some support even before the drought.

In 1949 a proposed amendment that would have empowered the state to lend its credit up to \$200 million for development of water supply projects was squelched in the senate. Two years later an Interim Water Code Committee

Art. III, § 49-c

reported that construction of necessary dams, reservoirs, and other water projects could not be accomplished by many local political subdivisions without state financial assistance; the committee recommended two amendments that would have enabled the state to underwrite water projects by guaranteeing one-third of the bonded indebtedness created by a local authority. These proposals, as well as a similar joint resolution offered again in 1953, failed to secure the required legislative support.

In response to the water problem, the legislature created the Water Resources Committee in 1953. Again it was recommended that the state provide local agencies with financial assistance to develop water projects. The committee's plan would have permitted issuance of up to \$100 million in state obligations, which were to be repaid from the loan repayments by local authorities as well as the levy of a state ad valorem tax. The tax feature prevented the measure from gaining the necessary legislative support, so the 1957 resolution deleted the tax measure and provided instead for "automatic" appropriations from the state treasury in the event loan repayments were insufficient to meet debt service requirements. This self-executing appropriations provision was apparently included on the advice of investment counselors in order to secure the highest possible bond ratings and, hence, the lowest possible interest rate on water bonds sold. (See 2 *Constitutional Revision*, p. 257.)

Explanation

Like Section 49-b, this section (together with companion Sections 49-d, and 49-d-1) is an exception to the general prohibition against state debt, enabling the state, through an administrative arm, the Texas Water Development Board, to make loans to local governments sponsoring water resource "conservation and development" projects. This section establishes the board as a state agency and creates the Texas Water Development Fund, authorizes the sale of up to \$200 million in general obligation bonds to finance the water projects, and prescribes the uses to which the fund may be put.

Thus far the courts have had no occasion to interpret this section or Sections 49-d and 49-d-1, although the attorney general has written a few opinions on the subject. This is not to say that these sections are models of constitutional drafting; on the contrary, they provide a good example of how not to draft a constitution. The drafting was influenced in large part by bond attorneys who, meticulous as usual, tend to use more words than necessary. This practice can create problems in that in constitutional drafting prolixity often leads to ambiguity. To illustrate, in defining the authorized uses of the Water Development Fund, Section 49-c reads:

Such fund shall be used only for the purpose of aiding or making funds available . . . in the conservation and development of the water resources of this State, including the control, storing and preservation of its storm and flood waters . . . or for any one or more of such purposes or methods.

In practice Section 49-c has been read rather restrictively insofar as the purpose of the fund and its authorized uses were concerned; the language after "including" seems to have been taken as definitive rather than descriptive of the stated general purpose to conserve and develop the state's water resources. This is evident from the wording of the 1962 and 1966 water fund amendments (*i.e.*, Section 49-d) referring to "additional purposes" for which water bond proceeds may be used. Whether or not the general purpose of "conservation and development of the water resources of this State" would have subsumed the "additional purposes" authorized by Section 49-d or encompassed other kinds of water projects authorized by statute, the issue is now largely academic, since Section 49-c and subsequently

Art. III, § 49-c

adopted Sections 49-d and 49-d-1 taken together appear to authorize financial assistance for just about any conceivable water improvement project.

In recent years, however, a controversy has developed over whether Sections 49-c and 49-d prohibit use of the Water Development Fund to finance interstate water transfers. These sections do not expressly prohibit that use. Language in the third paragraph of Section 49-c (*i.e.*, "Such fund shall be used only for the purpose of . . . making funds available . . . in the conservation and development of the water resources of this State. . . .") might be construed to impose such a limitation. But the second paragraph of Section 49-d, which authorizes construction of *any* waterworks system for the transportation of water by the federal government, the state, or an interstate compact commission, leads to the opposite conclusion. The unsuccessful 1969 Texas Water Plan amendment (see the *History* of Sec. 49-d-1) included a provision that would have permitted use of the fund "in addition [to the uses permitted under Sections 49-c and 49-d-1] . . . for the purposes of developing water resources and facilities for the State of Texas, both within . . . and without the State of Texas." Whether this express authorization for interstate waterworks was included because it was thought necessary or simply out of caution is not clear. Should the Water Development Board attempt to use the fund for an interstate water transport project, the question will likely end up in court.

The idea that the Water Development Fund may not be used for a purpose that is not specifically authorized by Sections 49-c, 49-d, or 49-d-1 is reinforced by a 1969 attorney general opinion. Section 49-c provides that the "fund shall be used only for the purposes of aiding or making funds available . . . to the various political subdivisions. . . ." Ruling that the Water Development Board may not make a commitment to buy a political subdivision's bonds in the future, subject to later availability of money in the Water Development Fund, the opinion states that Section 49-c does not "contain any provision which would authorize the Board to enter into an executory contract to commit itself to purchase bonds from a third party or to purchase a political subdivision's refunding bonds." (Tex. Att'y Gen. Op. No. M-634 (1970).)

The composition, authority, and responsibility of the Water Development Board, as well as water bond and development fund regulations, are prescribed by Chapter 11 of the Water Code. The board also has established its own rules and regulations to guide the administration of the loan assistance program.

The Water Development Fund is not a revolving fund in the sense that new bonds may be issued as the old ones are retired. To put it another way, the prescribed maximum applies to the amount of bonds that may be issued, not to the amount of bonds that may continue to be outstanding. Section 11.202 of the Water Code states, however, that the fund "is a special revolving fund in the state treasury." This refers to the eighth paragraph of Section 49-c, which permits money received in excess of yearly debt-service requirements to be plowed back into the fund. (With respect to the 1982 cutoff date for financial assistance also contained in that paragraph, see the *Explanation* of Sec. 49-d-1.) But in actual practice there has been no excess revenue; fiscal years 1967-1975 saw debt-service expenses exceed revenues by an average of \$2.9 million a year. Deficits for the next five years are expected to run even higher.

As of August 31, 1974, the Water Development Fund, including water quality enhancement funds from bond sales under Section 49-d-1, had assets totaling over \$211 million. Since 1957 slightly over \$100 million in loans have been made or committed under Sections 49-c and 49-d. (Texas Water Development Board, *Annual Financial Report: 1973-74*, (Austin, 1974), secs. I and V.) About \$221 million in obligations (this includes contracts as well as bonds; see the *Explanation* of Sec. 49-d) have been sold or contracted under these two sections.

Art. III, § 49-d

In addition to expanding authorized uses of the Water Development Fund, Sections 49-d and 49-d-1 subsequently raised the bond ceiling and interest rate limitations and eliminated the 1982 loan assistance termination date contained in the eighth paragraph of this section.

Comparative Analysis

Although many states might sell bonds to finance water improvement projects, very few state constitutions contain special provisions authorizing water bonds. The Florida Constitution authorizes air and water pollution bonds but does not establish a special state agency or constitutional fund for the purpose and imposes no ceiling on the amount of bonds that can be floated. Two other states, Oklahoma and Oregon, simply permit the state to incur debt or pledge credit to develop conservation and power facilities.

No other state was found to provide for a water development agency although Hawaii authorizes the legislature to create administrative boards and commissions to manage the state's natural resources. Wyoming provides for a state water "engineer" appointed by the governor with senate confirmation for a six-year term. The *Model State Constitution* has nothing comparable.

Author's Comment

While water development and conservation projects are costly, they are also vital, and most provide long-term benefits to the state; accordingly, it is generally prudent to finance these projects with long-term borrowing. However, even if the general debt limitation (Art. III, Sec. 49) remains unchanged, there is no reason to burden the constitution with the profuse statutory detail included in Sections 49-c, 49-d, and 49-d-1. Financial administration can be facilitated by eliminating the Water Development Fund, one of the newer additions to a growing family of constitutionally established special funds. Actually, the section need say little more than that the legislature may authorize by law the issuance of bonds in an amount not to exceed that needed solely for the purposes of developing and conserving the state's water resources. The referendum mechanism could be employed to provide for periodic increases in the debt ceiling without amendment. (See the *Author's Comment* on Sec. 49-b of this article.)

"[N]o resource is more vital to the economy or has wider ramifications for all other resources and industries than water." (John T. Thompson, *Public Administration of Water Resources in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1960), p. 1.) And it is the Water Development Board's job "to assure that the present and future water requirements of the people of Texas are met." (Texas Water Development Board, *Annual Report: 1971-72* (Austin, 1973), p. 1.) To carry out its crucial assignment the board functions as a regulatory service, and developmental agency. One may question whether the present selection process (*i.e.*, members are appointed by the governor with the advice and consent of the senate), which is similar to the manner in which several federal regulatory bodies are constituted (*e.g.*, the Federal Communications Commission), is the one best calculated to achieve the desired results. The key question is, of course, how independent of the executive and legislative branches should the board be?

Sec. 49-d. ACQUISITION AND DEVELOPMENT OF WATER STORAGE FACILITIES; FILTRATION, TREATMENT AND TRANSPORTATION OF WATER; ENLARGEMENT OF RESERVOIRS. It is hereby declared to be the

Art. III, § 49-d

policy of the State of Texas to encourage the optimum development of the limited number of feasible sites available for the construction or enlargement of dams and reservoirs for conservation of the public waters of the state, which waters are held in trust for the use and benefit of the public. The proceeds from the sale of the additional bonds authorized hereunder deposited in the Texas Water Development Fund and the proceeds of bonds previously authorized by Article III, Section 49-c of this Constitution, may be used by the Texas Water Development Board, under such provisions as the Legislature may prescribe by General Law, including the requirement of a permit for storage or beneficial use, for the additional purposes of acquiring and developing storage facilities, and any system or works necessary for the filtration, treatment and transportation of water from storage to points of treatment, filtration and/or distribution, including facilities for transporting water therefrom to wholesale purchasers, or for any one or more of such purposes or methods; provided, however, the Texas Water Development Fund or any other state fund provided for water development, transmission, transfer or filtration shall not be used to finance any project which contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonably foreseeable future water requirements for the next ensuing fifty-year period within the river basin of origin, except on a temporary, interim basis.

Under such provisions as the Legislature may prescribe by General Law the Texas Water Development Fund may be used for the conservation and development of water for useful purposes by construction or reconstruction or enlargement of reservoirs constructed or to be constructed or enlarged within the State of Texas or on any stream constituting a boundary of the State of Texas, together with any system or works necessary for the filtration, treatment and/or transportation of water, by any one or more of the following governmental agencies: by the United States of America or any agency, department or instrumentality thereof; by the State of Texas or any agency, department or instrumentality thereof; by political subdivisions or bodies politic and corporate of the state; by interstate compact commissions to which the State of Texas is a party; and by municipal corporations. The Legislature shall provide terms and conditions under which the Texas Water Development Board may sell, transfer or lease, in whole or in part, any reservoir and associated system or works which the Texas Water Development Board has financed in whole or in part.

Under such provisions as the Legislature may prescribe by General Law, the Texas Water Development Board may also execute long-term contracts with the United States or any of its agencies for the acquisition and development of storage facilities in reservoirs constructed or to be constructed by the Federal Government. Such contracts when executed shall constitute general obligations of the State of Texas in the same manner and with the same effect as state bonds issued under the authority of the preceding Section 49-c of this Constitution, and the provisions in said Section 49-c with respect to payment of principal and interest on state bonds issued shall likewise apply with respect to payment of principal and interest required to be paid by such contracts. If storage facilities are acquired for a term of years, such contracts shall contain provisions for renewal that will protect the state's investment.

The aggregate of the bonds authorized hereunder shall not exceed \$200,000,000 and shall be in addition to the aggregate of the bonds previously authorized by said Section 49-c of Article III of this Constitution. The Legislature upon two-thirds (2/3) vote of the elected members of each House, may authorize the Board to issue all or any portion of such \$200,000,000 in additional bonds herein authorized.

The Legislature shall provide terms and conditions for the Texas Water Development Board to sell, transfer or lease, in whole or in part, any acquired storage facilities or the right to use such storage facilities together with any associated system or works necessary for the filtration, treatment or transportation of water at a price not less than the direct cost of the Board in acquiring same; and the legislature may provide terms and conditions for the Board to sell any unappropriated public waters of the state that might be stored in such facilities. As a prerequisite to the purchase of such storage or water, the applicant therefor shall have secured a valid permit from the Texas Water Commission or its successor authorizing the acquisition of such storage facilities or the water impounded therein. The money received from any sale, transfer or lease of

storage facilities or associated system or works shall be used to pay principal and interest on state bonds issued or contractual obligations incurred by the Texas Water Development Board, provided that when moneys are sufficient to pay the full amount of indebtedness then outstanding and the full amount of interest to accrue thereon, any further sums received from the sale, transfer or lease of such storage facilities or associated system or works may be used for the acquisition of additional storage facilities or associated system or works or for providing financial assistance as authorized by said Section 49-c. Money received from the sale of water, which shall include standby service, may be used for the operation and maintenance of acquired facilities, and for the payment of principal and interest on debt incurred.

Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment, such Acts shall not be void by reason of their anticipatory character.

History

Growing concern over the adequacy of the state's water storage system led to the adoption of Section 49-d in 1962. (See Bedichek, *The Texas Constitutional Amendments of 1962* (Austin: Institute of Public Affairs, The University of Texas, 1962), pp. 35-36.) This section was actually an amendment of Section 49-c that granted the Water Development Board explicit powers to meet anticipated water storage needs: (1) to acquire necessary rights-of-way for construction or enlargement of water storage facilities in reservoirs, (2) to execute long-term contracts with federal agencies to provide adequate storage capacity in reservoirs built or to be built by the federal government, and (3) to sell or lease water storage facilities and "unappropriated public waters" owned by the state. Under the 1962 provision, action in each of these three areas also required approval of the Board of Water Engineers, and the aggregate debt ceiling was maintained at the Section 49-c limit of \$200 million.

The 1966 amendment to this section made several changes. The requirement of approval of Water Development Board actions by the Board of Water Engineers was omitted, except that a permit issued by a successor agency, the Texas Water Commission (now the Texas Water Rights Commission), was still required as a prerequisite to purchase water or storage facilities from the state. Authorization to develop water filtration and treatment systems was added, and the bond ceiling was increased by \$200 million, with issuance of any of these additional bonds requiring approval of two-thirds of the legislature.

A salient feature of the 1966 amendment was the inclusion of a 50-year limitation applicable to state financing of transbasin water transportation projects. Widespread media discussion of the Texas Basins Project generated apprehension among water-wealthy East Texans that led to the adoption of this measure. Termed by many who favored transbasin planning as the "50-year lockup," the provision was adopted to ensure originating areas sufficient water to meet their anticipated needs for a 50-year period following the decision to finance a transbasin water project with state funds. (See Johnson and Knippa, "Transbasin Diversion of Water," 43 *Texas L. Rev.* 1035, 1050-51 (1965).)

Explanation

The two major state water agencies were reorganized by the legislature in 1965 in order to place full responsibility for planning and financing water projects in the Texas Water Development Board and limit the authority of the Texas Water Commission, renamed the Texas Water Rights Commission, essentially to the adjudication of water rights. The board was specifically directed to prepare a "comprehensive state water plan" (Water Code sec. 11.101. See the *History* of Sec. 49-d-1 concerning the constitutional amendment to implement this plan.), but

Art. III, § 49-d

the law required the plan to respect basin-of-origin water needs for 50 years in much the same language as the 50-year limitation of Section 49-d. (Water Code sec. 11.102.) Whether these two provisions create an absolute preference in favor of intrabasin needs, regardless of the importance or urgency of the needs of other regions, is unclear, though a literal reading leaves the impression that they do.

The 50-year limitations can be harmonized with established policies of Texas water law according to Professor Corwin Johnson, a noted water law authority. Priorities for water use are established by law (Water Code sec. 5.024), and Professor Johnson suggested that the 50-year provisions be construed as granting a preference for the basin of origin only when the anticipated intrabasin uses have a priority at least as high as the proposed out-of-basin uses. (Johnson and Knippa, p. 1052.) In construing a provision that prohibits interwatershed diversions of water "to the prejudice of any person or property situated within the watershed [of origin] (Water Code sec. 5.085 (a)), the Texas Supreme Court indicated that it is not inclined to interpret provisions designed to protect originating areas as granting *absolute* preferences. Citing Johnson and Knippa, the court said that in determining whether to grant a permit for transbasin diversion under Water Code section 5.085, the Water Rights Commission should balance the proposed diversion's "detriments" against its "benefits" and deny the permit only if the former "outweighed" the latter (*San Antonio v. Texas Water Commission*, 407 S.W.2d 752, 759 (Tex. 1966).)

Regardless of whether the supreme court will balance out-of-basin water needs against those of the basin of origin in resolving disputes arising under the 50-year limitation of Section 49-d, the Water Development Board has a considerable amount of discretion in making the critical decisions required under this provision. Judgments can reasonably differ as to the water needs of a region 50 years into the future; it is also difficult to predict with confidence how much water from various sources will be available to a region 50 years later. (See Johnson and Knippa, p. 1052.) Since the board's decisions in this area probably will be tested under the "substantial evidence rule," the severity of the impact of the 50-year limitations could well depend on the manner in which the board does its job.

The third paragraph of this section, authorizing "long-term contracts" with the federal government, was included to get around the two-year appropriation limitation of Article VIII, Section 6. It is not entirely clear whether the clause "Such contracts . . . constitute general obligations . . . in the same manner and with the same effect as bonds issued under . . . Section 49-c . . ." means that the amount of debt incurred under these contracts must be included in calculating the \$400 million maximum amount of bonds authorized under this section and Section 49-c. The unsuccessful 1969 Texas Water Plan amendment (see the *History* of Sec. 49-d-1) contained a paragraph almost identical to this provision except that it included explicit language to the effect that principal payments committed under these contracts constituted part of the aggregate amount of authorized debt. This inconsistency, no doubt, was unintentional but is another illustration of the kind of nearsighted drafting that characterizes these debt sections. The Water Development Board interprets this provision to require contractual obligations to be included in the aggregate authorized debt, which is consistent with the strict construction usually given debt-authorizing provisions. (See generally the *Explanation* of Sec. 49-c.)

Money received from the sale or lease of storage facilities by the board under the fifth paragraph of this section may not be used for purposes other than retiring the outstanding debt until a sum sufficient to pay "the full amount of indebtedness" has been accumulated. Note that this differs from the eighth paragraph of Section 49-c, which frees money received in excess of yearly debt-service require-

Art. III, § 49-d-1

ments for use in the board's financial assistance programs. (See the *Explanation* of Sec. 49-c.)

Comparative Analysis

No other state constitution has a provision analogous to the 50-year limitation contained in Section 49-d. For further discussion, see the *Comparative Analysis* of Section 49-c.

Author's Comment

Even without the 50-year limitation, good planning would take into consideration the needs of originating areas. As indicated in the *Explanation*, the impact of this provision on the course of water development is still uncertain but could be severe. Certainly the constitution is no place to attempt to regulate something as speculative as a region's water needs and resources 50 years into the future. (For further discussion see the *Author's Comment* on Sec. 49-c.)

Sec. 49-d-1. ADDITIONAL TEXAS WATER DEVELOPMENT BONDS. (a) The Texas Water Development Board shall upon direction of the Texas Water Quality Board, or any successor agency designated by the Legislature, issue additional Texas Water Development Bonds up to an additional aggregate principal amount of One Hundred Million Dollars (\$100,000,000) to provide grants, loans, or any combination of grants and loans for water quality enhancement purposes as established by the Legislature. The Texas Water Quality Board or any successor agency designated by the Legislature may make such grants and loans to political subdivisions or bodies politic and corporate of the State of Texas, including municipal corporations, river authorities, conservation and reclamation districts, and districts created or organized or authorized to be created or organized under Article XVI, Section 59, or Article III, Section 52, of this Constitution, State agencies, and interstate agencies and compact commissions to which the State of Texas is a party, and upon such terms and conditions as the Legislature may authorize by general law. The bonds shall be issued for such terms, in such denominations, form and installments, and upon such conditions as the Legislature may authorize.

(b) The proceeds from the sale of such bonds shall be deposited in the Texas Water Development Fund to be invested and administered as prescribed by law.

(c) The bonds authorized in this Section 49-d-1 and all bonds authorized by Sections 49-c and 49-d of Article III shall bear interest at not more than 6% per annum and mature as the Texas Water Development Board shall prescribe, subject to the limitations as may be imposed by the Legislature.

(d) The Texas Water Development Fund shall be used for the purposes heretofore permitted by, and subject to the limitations in Sections 49-c, 49-d and 49-d-1; provided, however, that the financial assistance may be made pursuant to the provisions of Sections 49-c, 49-d and 49-d-1 subject only to the availability of funds and without regard to the provisions in Section 49-c that such financial assistance shall terminate after December 31, 1982.

(e) Texas Water Development Bonds are secured by the general credit of the State and shall after Approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

(f) Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be void by reason of their anticipatory character.

Art. III, § 49d-1

History

The first attempt to add a Section 49-d-1 to the constitution was the unsuccessful 1969 Texas Water Plan amendment. That amendment was designed to implement a comprehensive statewide water plan developed by the Water Development Board pursuant to the Texas Water Development Board Act (chapter 11, subch. D, Water Code). The main purpose of the amendment, of course, was to authorize long-term state debt to finance the water plan—\$3.5 billion in additional water development bonds and contracts. The amendment also would have explicitly authorized use of the Water Development Fund for interstate water projects (see the *Explanation* of Sec. 49-c), eliminated the 4 percent bond interest ceiling, and eliminated the 1982 termination date for financial assistance prescribed in Section 49-c.

Present Section 49-d-1 was added in 1971 to facilitate the undertaking of water quality enhancement projects by local governments. Prior to the adoption of this section local governments in Texas could receive federal assistance of up to only 30 percent of the cost of water waste, sewer, and disposal projects, with the balance necessarily financed locally. Section 49-d-1 added a third partner, the State of Texas, bringing these projects within the financial reach of many more Texas communities.

Explanation

Like Section 49-d, this section amends Section 49-c, authorizing the Water Development Board to issue an additional \$100 million in water development bonds, “upon direction of the Texas Water Quality Board,” to finance loans and grants “for water quality enhancement purposes” as established by the legislature. These bonds are sometimes called “clean water bonds” to distinguish them from Sections 49-c and 49-d bonds. The assistance program is administered under chapter 21, subch. I, of the Water Code.

Subsection (b) of this section merely restates the third paragraph of Section 49-c. Subsection (c) establishes the permissible maximum interest rate on water development bonds at 6 percent (see also *Explanation* of Sec. 65 of this article). Subsection (d) eliminates the 1982 financial assistance termination date imposed by Section 49-c, though in a rather confusing fashion. The first clause of Subsection (d), ending at the semicolon, as drafted states only what would otherwise be true without the clause. What the drafters probably had in mind was something like: “The 1982 termination date prescribed by Section 49-c is repealed, but no other provisions of Sections 49-c and 49-d concerning the Water Development Fund are changed by this amendment.” The second clause of Subsection (d) is interpreted by the Water Development Board to repeal the last sentence of the eighth paragraph of Section 49-c in its entirety. This is a fair construction, since that part of the sentence following the 1982 financial assistance cutoff date is a “winding-down” provision designed to liquidate the assistance program after 1982.

As of August 31, 1974, about \$37.5 million of the assets of the Water Development Fund constituted water quality enhancement funds, and on that date almost \$31 million in water quality enhancement loans had been made. (Texas Water Development Board, *Annual Financial Report: 1973-1974* (Austin, 1974), Secs. I and VII.) To date some \$45 million in bonds have been issued under this section.

Comparative Analysis

See the *Comparative Analysis* of Article III, Section 49-c.

Art. III, § 49-e

Author's Comment

See the *Author's Comment* on Article III, Section 49-c.

Sec. 49-e. TEXAS PARK DEVELOPMENT FUND. The Parks and Wildlife Department, or its successor vested with the powers, duties, and authority which deals with the operation, maintenance, and improvement of State Parks, shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed Seventy-Five Million Dollars (\$75,000,000). The bonds authorized herein shall be called "Texas Park Development Bonds," shall be executed in such form, denominations, and upon such terms as may be prescribed by law, provided, however, that the bonds shall bear a rate or rates of interest as may be fixed by the Parks and Wildlife Department or its successor, but the weighted average annual interest rate, as that phrase is commonly and ordinarily used and understood in the municipal bond market, of all the bonds issued and sold in any installment of any bonds, shall not exceed four and one-half percent (4 1/2%) interest per annum; they may be issued in such installments as said Parks and Wildlife Department, or its said successor, finds feasible and practical in accomplishing the purpose set forth herein.

All moneys received from the sale of said bonds shall be deposited in a fund hereby created with the State Treasurer to be known as the Texas Park Development Fund to be administered (without further appropriation) by the said Parks and Wildlife Department, or its said successor, in such manner as prescribed by law.

Such fund shall be used by said Parks and Wildlife Department, or its said successor, under such provisions as the Legislature may prescribe by general law, for the purposes of acquiring lands from the United States, or any governmental agency thereof, from any governmental agency of the State of Texas, or from any person, firm, or corporation, for State Park Sites and for developing said sites as State Parks.

While any of the bonds authorized by this provision, or any interest on any such bonds, is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount which is sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the interest and sinking fund at the close of the prior fiscal year, which includes any receipts derived during the prior fiscal year by said Parks and Wildlife Department, or its said successor, from admission charges to State Parks, as the Legislature may prescribe by general law.

The Legislature may provide for the investment of moneys available in the Texas Park Development Fund and the interest and sinking fund established for the payment of bonds issued by said Parks and Wildlife Department, or its said successor. Income from such investment shall be used for the purposes prescribed by the Legislature.

From the moneys received by said Parks and Wildlife Department, or its said successor, from the sale of the bonds issued hereunder, there shall be deposited in the interest and sinking fund for the bonds authorized by this section sufficient moneys to pay the interest to become due during the State fiscal year in which the bonds were issued. After all bonds have been fully paid with interest, or after there are on deposit in the interest and sinking fund sufficient moneys to pay all future maturities of principal and interest, additional moneys received from admission charges to State Parks shall be deposited to the State Parks Fund, or any successor fund which may be established by the Legislature as a depository for Park revenue earned by said Parks and Wildlife Department, or its said successor.

All bonds issued hereunder shall after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be void by reason of their anticipatory nature.