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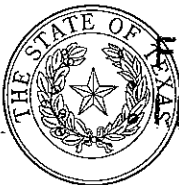
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OPINION COMMITTEE



FILE # ML-46537-10
FD. # 46537

Natural Resources Committee

Monday, July 26, 2010

RQ-0904-GA

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: Request for an Attorney General's Opinion Regarding the Transfer of Certain Assets to an Individual or Other Entity under Chapter 36, Texas Water Code; Section 52(a), Article III, Texas Constitution; and Chapters 171 and 176, Texas Local Government Code.

Dear General Abbott:

I respectfully request an Attorney General Opinion concerning the ability of the Sandy Land Underground Water Conservation District ("District") to transfer assets acquired under the District's Seeding Operations and Atmospheric Research ("SOAR") program to an individual or other entity that will continue to carry out the purposes of the SOAR program.

The legislature created the District in 1989.¹ The District operates under Chapter 36, Water Code, and the District's enabling legislation. The District's boundaries are coextensive with those of Yoakum County² and it is bounded on the west by the state of New Mexico and by Cochran, Terry, and Gaines Counties, Texas, on the north, east, and south, respectively. The District office is located in Plains, Texas.

The District's mission is to develop, promote, and implement management strategies for groundwater conservation, preservation, protection, and recharge and for the prevention of waste of groundwater.³ The District created the SOAR program to enhance precipitation in the area. Although the state provided sponsoring groups with partial funding for cloud seeding projects from 1997 through 2004 to facilitate the purchase of hardware such as specially equipped aircraft and ground-based radar systems, no state funds were available for the biennium that ended August 31, 2009, for any cloud seeding operations, and today there are no state funds available

¹ Chapter 673 (S.B. 1777), Acts of the 71st Legislature, Regular Session, 1989; never amended; not yet codified.

² *Id.* at Section 3.

³ <http://sandylandwater.com/about.html>.

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for future cloud seeding projects.⁴ The District's main objectives for the SOAR program are to achieve water conservation and aquifer recharge through the enhancement of precipitation under weather modification services and to provide atmospheric technology research. The SOAR program conducts research on precipitation processes, atmospheric aerosol interactions, and the improvement of cloud seeding. The District has developed certain products and outfitted an aircraft for cloud seeding to advance the District's goals related to the SOAR program. The District provides SOAR services to areas outside the District under contract.

While the District has the authority to conduct cloud seeding programs such as SOAR in accordance with Sections 36.0015, 36.107, and 36.1071(a)(7) of the Water Code, the District Board of Directors ("Board") is considering focusing on its more traditional groundwater management and regulatory functions. To this end, the District would like the SOAR program to continue to provide the important functions and research that benefit the District without the program continuing to operate under the management of the District. The District prefers that the SOAR program be taken over by an individual or other entity that will essentially carry on the program's work so that the District can continue to benefit from program data gathering, research, and cloud seeding functions.

The initial question is whether the District may transfer some of the SOAR program assets to an individual or other entity that would assume responsibility for carrying out the program. The District currently owns various assets related to the SOAR program, including cash, aircraft, and other equipment. Granting the separate entity some operating capital or assets will help ensure that the SOAR program can continue to provide the benefits within the District and will allow the SOAR program to thrive. Section 36.158, Water Code, a general law applicable to the District, appears to authorize the District to make a loan or grant of assets for purposes of carrying out the SOAR program, as long as the loan or grant is approved by the board:

A district may make or accept grants, gratuities, advances, or loans in any form to or from any source approved by the board, including any governmental entity, and may enter into contracts, agreements, and covenants in connection with grants, gratuities, advances, or loans that the board considers appropriate.

The District believes that the transfer of SOAR program assets to an individual or other entity would not violate Section 52(a), Article III, Texas Constitution, the pertinent part of which prohibits the lending of public credit:

Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or

⁴ <http://www.license.state.tx.us/weather/summary.htm> (accessed June 4, 2010).

to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. . . .

In *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*,⁵ the self-insured risk pool sought to have declared unconstitutional the statutes mandating that workers' compensation carriers pay unclaimed death benefits into the Subsequent Injury Fund and the rules implementing that mandate. The Risk Pool argued that the mandate required it to pay public money to the Fund for transfer to individuals in violation of Section 52(a), Article III, Texas Constitution.

The court explained that Section 52(a) prohibits the legislature from requiring gratuitous transfers by political subdivisions to individuals, associations, or corporations. A political subdivision's transfer of public assets is not "gratuitous" if the political subdivision receives return consideration. Moreover, Section 52(a) does not prohibit transfers to individuals, corporations, or associations if the statute requiring the transfer: (1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return.⁶

The court reiterated the three-part test that determines whether a statute accomplishes a public purpose consistent with Section 52(a):

Specifically, the Legislature must: (1) ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit.⁷

After holding that the transfer of funds from the Risk Pool to the Fund was a transaction subject to Section 52(a), the court held that the transfer was not a gratuitous grant of public money in violation of Section 52(a) "because the Risk Pool's member cities receive consideration from the Fund, and the provisions serve a legitimate public purpose with a clear public benefit."⁸

The purpose of Section 52(a) is to prevent the gratuitous payment of public funds for private use.⁹ This constitutional provision does not, however, invalidate expenditures that incidentally benefit a private party or interest if the expenditure is made for the direct

⁵ 74 S.W.3d 377 (Tex. 2002).

⁶ *Id.* at 383.

⁷ *Id.* at 384.

⁸ *Id.* at 386.

⁹ *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928); *Brazoria County v. Perry*, 537 S.W.2d 89, 90-91 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *Harris County v. Dowlearn*, 489 S.W.2d 140, 144 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

accomplishment of a legitimate public purpose.¹⁰ A payment is not considered a gratuitous transfer of public funds if there is return consideration received for the payment.¹¹ Accordingly, the Texas Supreme Court provides that the transfer of funds for a public purpose, with a clear public benefit received in return, does not violate the constitutional provision against the lending of public credit.¹² A grant or loan of credit to a private entity violates the constitution only if the grant or loan serves no public purpose or if sufficient controls are not attached to the expenditure to ensure that the public purpose will be accomplished.¹³ While it may be possible to provide adequate controls without a contract, the ordinary and most prudent method of establishing such adequate controls is by entering into a contract.¹⁴ Whether an expenditure meets the constitutional requirements is first determined by the governing body making the expenditure.¹⁵

No case law or attorney general opinions have been found that address the specific question of whether cloud seeding serves a public purpose and provides a public benefit. Nonetheless, an examination of this state's constitution and statutes indicates that cloud seeding is considered to provide a public benefit worthy of financial support from the state.

In 1917, Section 59, Article XVI, Texas Constitution, was adopted to provide for the creation of districts dedicated to the conservation and preservation of the state's natural resources. Chapter 36, Water Code, which provides for the creation of groundwater conservation districts, is one result.¹⁶ Section 301.057, Texas Agriculture Code, authorizes the Texas Department of Licensing and Regulation to enter into cooperative agreements "with any private or public agencies for conducting weather modification or cloud seeding." The legislature provided about \$11.7 million for cloud seeding programs in the latter half of the 1990s and until funds were exhausted in 2004. Certainly, successful enhancement of precipitation reduces the public need to rely on groundwater and provides an essential element for life itself. A district program to assist in managing drought conditions and conserving water similarly serves a public purpose.

¹⁰ *Barrington v. Cokinos*, 338 S.W.2d 133, 140 (Tex. 1960); Op. Tex. Att'y Gen. No. JC-0011 (1999).

¹¹ *Tex. Mun. League Intergovernmental Risk Pool*, 74 S.W.3d at 383.

¹² *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995).

¹³ Op. Tex. Att'y Gen. No. JC-0080 (1999); Op. Tex. Att'y Gen. No. JC-011 (1999).

¹⁴ Tex. Att'y Gen. LO-96-035.

¹⁵ Op. Tex. Att'y Gen. No. GA-0553 (2007).

¹⁶ See Sec. 36.0015, Water Code.

Although the preceding authorities suggest that the district may transfer assets, conflict of interest statutes within the Local Government Code impose certain requirements on the parties to the transfer. The District contemplates that, if the SOAR program is transferred, it is feasible that the continued success of the program may be enhanced by one or more of the District's current or former employees, officers, or directors that have worked on and have experience with the SOAR program becoming the transferee, or becoming employees, officers, or directors of an entity that is the transferee.

A director of a groundwater conservation district is subject to the conflict of interest provisions under Section 36.058, Water Code, which requires compliance with Chapter 171, Local Government Code. Common law is preempted.¹⁷ Chapter 171 provides that a director must file an affidavit disclosing the nature and extent of any substantial interest the director has in an entity to which assets will be transferred and must abstain from participating in any vote or decision relating to the transfer if the vote or decision would have a special economic impact on the entity.¹⁸ Thus, if the District proposed a transfer of assets to a District director or an entity in which a director had a substantial interest, the director would also need to comply with these and any other conditions set forth in Chapter 171, Local Government Code.

Similarly, an officer of a local government entity entering into certain contracts must comply with disclosure requirements under Chapter 176, Local Government Code,¹⁹ and a person who has a business relationship with the entity and has an employment or other business relationship with an officer of the entity must file a conflict of interest questionnaire with the records administrator of the local entity.²⁰ Chapter 176 applies to a person or the person's agent who contracts or seeks to contract for the sale or purchase of property, goods, or services with a local governmental entity.²¹ A "person" includes a partnership, corporation, or other legal entity.²² A "local governmental entity" includes all political subdivisions, including a conservation district.²³ The disclosure requirements under Chapter 176 for both the officers of the local governmental entity and the person who seeks to contract with the local governmental entity are thoroughly discussed in Op. Tex. Att'y Gen. No. GA-0446 (2006). Therefore, if the District proposed a transfer of assets to a District officer or an entity in which a District officer

¹⁷ Sec. 171.007, Local Government Code.

¹⁸ Sec. 171.004, Local Government Code; Op. Tex. Att'y Gen. No. GA-0784 (2010).

¹⁹ See Op. Tex. Att'y Gen. No. GA-0446 (2006), citing Chapter 1014 (H.B. 914), Acts of the 79th Legislature, Regular Session, 2005; see also *Hearings on H.B. 914 Before the Senate Comm. on State Affairs*, 79th Legislature, Regular Session (May 19, 2005) (statement of Senator Tommy Williams) ("[I]t's imperative that taxpayers have access to information on details about who is entering into contracts with local governmental entities. House Bill 914 seeks to improve the transparency by allowing taxpayers to be informed as to which local government officials have a connection to vendors . . . who conduct business with local governmental entities.").

²⁰ Sec. 176.006(a), Local Government Code.

²¹ *Id.*; see also Sec. 176.001(1-d) and 176.002(a), Local Government Code.

²² Sec. 311.005(2), Government Code; Op. Tex. Att'y Gen. No. GA-0446 (2006).

²³ Sec. 176.001(3), Local Government Code.

had a discloseable interest, all such parties to the transfer would also need to comply with the disclosure requirements and any other conditions set forth in Chapter 176, Local Government Code.

In light of the authority provided by Section 36.158, Water Code, and the authorities' interpretations of Section 52(a), Article III, Texas Constitution, it appears that if the board complies with the conflict of interest provisions under Chapters 171 and 176, Texas Local Government Code, the District may transfer both the responsibilities of the SOAR program and assets from the SOAR account to an individual or other entity to continue the work of the SOAR program. The District could then enter into a contract with the entity under which the entity, as consideration for the assets provided by the District, would provide precipitation enhancement service to the District along with collected research data that will be useful to the District. Such a contract would seem to provide adequate controls on any transfer of SOAR program assets. In addition, the parties subject to the contract would need to comply with any applicable conflict of interest and disclosure requirements. As a result, the District's actions would comport with the preceding authorities as discussed and applied in that the transfer of SOAR assets to the entity would be for a public purpose, the District would receive a clear public benefit in return, the contract would provide sufficient controls to ensure that the public purpose will be accomplished, and the transfer of assets to certain individuals or other entity promotes transparency and openness in local government.

Questions presented:

Accordingly, the District requests your interpretation and guidance concerning the meaning and applicability of Chapter 36, Texas Water Code; Section 52(a), Article III, Texas Constitution; and Chapters 171 and 176, Texas Local Government Code, in this context. Specifically, the District seeks guidance on the following questions:

- 1) May the District transfer assets from its SOAR program to an individual or other entity whose purpose is to provide cloud seeding operations?
- 2) If the District may transfer assets from its SOAR program to an individual or other entity, under what circumstances and conditions? Particularly,
 - a. whether the District may grant or sell SOAR program assets to an individual or entity through a contract if it serves a public benefit and a benefit to the District;
 - b. whether it matters if the individual or other entity serves a nonprofit or for-profit purpose;
 - c. whether, in the case of a for-profit purpose, the type of entity matters;

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- d. whether cloud seeding serves a public purpose and provides a public benefit;
- e. whether, assuming the District, its directors, officers, and employees, and the transferee comply with any and all applicable conflict of interest and disclosure requirements of Chapters 171 and 176, Local Government Code, a current or former director, officer, or employee of the District with SOAR program experience may be the transferee, or a director, officer, or employee of the an entity that is the transferee?

Thank you for your time and attention to this matter. Please let me know if I can provide any additional information or further assistance.

Very truly yours,



Allan B. Ritter, Chair
House Committee on Natural Resources

cc: Mr. Don Parrish, Board President, Sandy Land Underground Water Conservation District
Mr. Gary Walker, General Manager, Sandy Land Underground Water Conservation District
The Honorable Kel Seliger, Texas Senate
The Honorable Delwin Jones, Texas House of Representatives
The Honorable Jim Barron, Yoakum County Judge