



The Recovery of Attorney Fees and other Costs Incurred in Litigation with a Groundwater Conservation District

The Texas Water Code §36.066(g) and §36.102 currently grants groundwater conservation districts (GCDs) the ability to recover attorney's fees, costs for expert witnesses, and other costs incurred by the GCD in any suit to enforce its rules, in which the GCD prevails. Recently, there has been legislation proposed that would amend Ch. 36 to make the awarding of attorney fees discretionary and available to either prevailing party. **Texas Alliance of Groundwater Districts (TAGD) supports keeping the current language in §36.066(g) and §36.102, Water Code, but are willing to have discussions regarding this important issue.**

Background

During the 1995 codification of Chapter 52, now Chapter 36 of the Texas Water Code, there were many conversations regarding the legal costs incurred by GCDs. At that time, the Attorney General was asked to defend GCDs, as political subdivisions in the State of Texas and the regulatory arms of groundwater management. However, due to the high fiscal implications, a compromise was reached that created the provision currently in statute:

Texas Water Code §36.102: "If the district prevails in any suit to enforce its rules, the district may seek and the court shall grant against any person, in the same action, recovery of attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court."

Similar legislation relating to the recovery of attorney's fees failed to pass the Governor's desk last session. The veto declaration read:

"State agencies should be held accountable when they abuse their authority. There are many ways to accomplish that goal other than enticing trial lawyers to sue the taxpayers for damages. Senate Bill 813 is well-intended, but it subjects the State to the possibility of extensive financial liability.... Tax payer liability would be triggered any time a judge decides the State's action is "unreasonable", a vague and broad standard that varies with the eye of the beholder. The financial liability would be borne by the taxpayers, not the bureaucrats who caused the problem. The bill was inspired by legitimate concerns about regulatory overreach, but exposing the State fisc[ally] to limitless jury verdicts is not the right solution"

Considerations

- GCDs are the only groundwater regulatory entities, funded solely by local tax and or fee payers
- GCDs do not receive financial support from the State and are not defended by the Texas Attorney General in lawsuits, as the Texas Commission on Environmental Quality (TCEQ) is in its water regulation.

- As political subdivisions, GCDs must work to keep local taxes and or fees low. As such, they are typically funded to perform regulatory requirements and aquifer monitoring, and do not have budget allocated for litigation costs.
- GCDs are held accountable through various regulatory requirements and oversight by State Agencies.

Changes to the current provision raise several important considerations: (1) should parties suing a GCD be entitled to recovery of their attorney's fees; (2) if the GCD prevails, should the award of attorney's fees remain mandatory to reimburse the GCD, and (3) how might the financial responsibility of attorney's fees affect local management decisions?