



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**JOHN BEN SHEPPERD  
ATTORNEY GENERAL**

March 6, 1947

Honorable Victor C. Marshall  
Executive Director  
Texas State Soil Conservation Board  
2nd Floor, First State Bank Building  
Temple, Texas

Opinion No. V-69

Re: May the San Jacinto Soil Conservation District contract with the San Jacinto River Conservation and Reclamation District to hold said Reclamation District harmless from liability, resulting from the negligent use of equipment and the negligent acts of employees operating such equipment, during the time that such equipment and employees are on loan from the San Jacinto River Conservation and Reclamation District but are under the control of the San Jacinto Soil Conservation District?

Dear Sir:

The question presented in your letter of January 25, 1947, is whether the Board of Supervisors of the San Jacinto Soil Conservation District may, under the "State Soil Conservation Law", Article 165a-4, V.A.C.S., contract with the San Jacinto River Conservation and Reclamation District, as follows:

"Second Party agrees to hold harmless and indemnify First Party from any liabilities for damages or negligence, or for any act of the operator or employees used in operating such equipment or material while same is under the direction of Second Party, and until it is returned to First Party."

The quoted provision is found in Paragraph 5 of the proposed contract between the two districts, which was attached to your letter and is returned herewith. For convenience, the San Jacinto Soil Conservation District will be hereinafter referred to as "Conservation District" and the San Jacinto River Conservation and Reclamation District will be hereinafter referred to as "Reclamation District".

The equipment and materials referred to in the quoted section are not identified by the contract, but it is assumed that such equipment and material consists of bulldozers, graders and other machines of a type usually used in road work. Your file indicates that the Conservation District is presently using a maintainer furnished by the Reclamation District for terracing and drainage work.

The question may be stated in more general terms, as follows:

May one State agency contract with another State agency to assume tortious liability resulting from the negligent use of equipment and the negligent acts of the employees in operating such equipment during the time that such equipment and employees are under the control and direction of the borrowing agency.

The solution of the problem presented requires an understanding of the nature and of the powers and duties of the State agencies involved.

The San Jacinto Soil Conservation District was created under Article 165a-4, V.A.C.S., Acts 1939, p. 7, as amended Acts 1941, p. 491, and known as the "State Soil Conservation Law". A Soil Conservation District formed under this Act "shall constitute a governmental division of this State and a Public body corporate and politic exercising public powers"; with power to carry out preventive and control measures through engineering operations, methods of cultivation, growing of vegetation, changes in use of land; to enter into agreements with any agency, governmental or otherwise, in the carrying on of erosion control and prevention operations; to purchase, improve and dispose of real and personal property; to make available to landowners engineering machinery and equipment, fertilizer and seeds; to construct buildings; to purchase or otherwise take over Federal soil erosion projects; to sue

and be sued in the name of the district; to make and execute contracts or other instruments necessary or convenient to the exercise of its powers. The power to levy taxes is specifically withheld. A district is required to obtain from the Secretary of State a certificate of organization, and when this is accomplished, "the district shall constitute a governmental subdivision of the State and a public body corporate and politic." Upon dissolution, the District is required to obtain a certificate to that effect from the Secretary of State. The creation of a district, its projects and its dissolution is at the will of the landowners within the district expressed through elections.

The San Jacinto River Conservation and Reclamation District was created by Acts of 1937; 45th Leg., House Bill 832, copied in V.A.C.S., Vol. 21, beginning at page 617, and the various amendments thereto, beginning at page 148, Pocket Part, V.A.C.S., Vol. 21, all initiated under the constitutional authority granted in Article 16, Sec. 59 of the Constitution of Texas, under which Constitutional amendment the districts "shall be governmental agencies and bodies politic and corporate with such powers of government and the authority to execute such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law"; the purposes of such districts are taken from the Constitution and are stated in the Act to be, "the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid, and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other land needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State." Districts are granted broad powers in the Act and in addition are granted the same powers conferred upon Water Control and Improvement Districts by Chapter 25, Acts 1925 (Article 7880-1 to 147c 6, inclusive, V.A.C.S.), and under these grants such districts may contract generally in furtherance of their purposes; acquire by purchase, condemnation or other means lands and rights of way; sue and be sued in the name of the district; levy taxes; issue bonds; sell water, water connections, power, electric energy, and other services furnished or supplied

by the district; and although the districts may not mortgage or otherwise encumber their property and have only limited right of sale of such property, they may contribute to the construction of any improvement by any similar district the construction of which shall contribute to their benefit; and, to a limited extent, the district is dependent on the will of the landowners residing therein, as expressed at elections.

As a general rule, the State and its political subdivisions are not liable in tort while performing acts in the public interest, unless some statute specifically authorizes such liability. If this rule applies to the contracting State agencies under discussion, the contractual provision may serve no useful purpose.

The law in Texas on this subject seems to be that where districts similar to those involved here are performing a governmental or public function, they will not be liable in tort, but where the function is proprietary and private, then liability follows.

Under the authority laid down in Jones vs. Jefferson County Drainage District (T.C.A.), 139 S.W. (2) 861, writ ref., Peters vs. Matagorda County Drainage District No. 1, (T.C.A.) 146 S. W. (2) 779, writ ref., and Hodge vs. Lower Colorado River Authority (T.C.A.), 163 S. W. (2) 855, it is difficult to conceive of a situation in which either the Reclamation District or the Conservation District would be liable for the torts of their agents and employees. In each of the above cited cases, the District involved was created by statute for the purposes and under the authority expressed in Sec. 59, Article 16, of the Constitution. In the Jones case, the employee of the drainage district was injured by being thrown from an automobile while being transported to work by an agent of the District. In the Peters case, the employee was injured by the premature explosion of a charge of dynamite discharged by a fellow employee on a drainage work being done by the District. In the Hodge case, the employee was injured in the course of his employment in the construction of the dam across the Colorado River at Austin.

From the wording of the contractual provision under consideration, it is believed that the type

of injuries anticipated by the contracting districts are similar to the injuries described in the cases referred to.

In declaring drainage districts not liable in tort, the following language was used in Jones vs. Jefferson County Drainage District (supra):

"Drainage districts created under the provisions of Chapter 7 of Title 128, Art. 8097, V.C.S., enacted under authority of Art. 16, Sec. 59a, of the State Constitution, Vernon's Ann. St., are political subdivisions of the state of the same nature and stand upon exactly the same footing as counties, or precincts, or any of the other political subdivisions of the state. Harris County Drainage District No. 12 v. City of Houston, Tex. Com. App., 35 S. W. (2) 118; Wharton County Drainage District No. 1 v. Higbee, Tex. Civ. App., 149 S. W. 381; American Surety Co. v. Hidalgo County, Tex. Civ. App., 283 S.W. 267, writ of error refused; Parker v. Harris County Drainage District, Tex. Civ. App., 148 S.W. 351; Harris County v. Gerhart, 115 Tex. 449, 283 S. W. 139; Nussbaum v. Bell County, 97 Tex. 86, 76 S.W. 430; Braun v. Trustees of Victoria Independent School District, Tex. Civ. App., 114 S. W. (2) 947; 15 Tex. Jur. 722.

"In the Gerhart Case, supra, our Supreme Court held (115 Tex. 449, 283 S.W. 140): 'It is well established that at common law counties as a rule are not liable for injuries resulting from the negligence of their officers or agents, and no recovery can be had in damages unless liability be created by statute. Heigel v. Wichita County, 84 Tex. 392, 19 S.W. 562, 31 Am. St. Rep. 63; Nussbaum v. Bell County, 97 Tex. 86, 76 S.W. 430.'

"Since drainage districts are of the same nature and stand upon the same footing as counties, and since counties are not liable for injuries resulting from the negligence of their officers or agents, it logi-

cally follows that drainage districts, likewise, are not liable for injuries resulting from the negligence of their officers or agents."

In extending this rule to conservation and reclamation districts and in reviewing the law relating to this matter, it is stated in Hodge v. Lower Colorado River Authority (supra):

"Appellee was created as a conservation and reclamation district under and by virtue of Chap. 7, Acts 4th Called Session of the 43rd Legislature, Vernon's Ann. Civ. St. following article 8197f, and under authority of Sec. 59(a), Art. 16 of the Constitution of Texas, Vernon's Ann. St. \* \* \* The building of the Austin dam was, in keeping with the legislative act creating the Authority, and so far as appellee was concerned, not purely for the purpose of generating electric power for the City of Austin; but was one of the authorized methods adopted by appellee to conserve and utilize a natural resource of the State for hydroelectric power for a public use. The building of the dam as a step in the conservation of a natural resource is an entirely different matter from a particular sale of the power subsequently to be generated by it after its completion. In the former, regardless of the latter, the district acted in a governmental capacity for a public purpose, one in which all the public, and not merely the inhabitants of the City of Austin, were interested.

" \* \* \* such districts, created under Sec. 59(a) of Art. 16 of the Constitution, 'are political subdivisions of the state of the same nature and stand upon exactly the same footing as counties, or precincts, or any of the other political subdivisions of the state'; and consequently are immune from liability for torts of their agents and employees. Since all of such districts,--and several different kinds are so authorized,--created under this section of the Constitution are all designed to effectuate the same

objectives, that is, the conservation and utilization of the natural resources of the state in which all the public are interested, they must all logically fall into the same category on the question of immunity from liability for torts."

And in construing the effect of Section 59, Article 16, of the Constitution, it is said, by way of dictum, in Hidalgo County Water Control and Improvement District No. 1 vs. Gannaway (T.C.A.), 13 S. W. (2) 204, writ ref.:

"Was it intended in those declarations (Art. 16, Sec. 59) by the framers of the constitutional provision to lift such corporations, therein authorized, from the status universally occupied by purely local public organizations, and give them the preferred status of municipalities exercising 'public rights' and performing 'public duties,' with all the exemptions accorded such municipalities by the common law? If this was not the purpose of those declarations, then none other is conceivable, and they have no effectual significance. It seems to the writer that the constitutional declarations must have been made in view of the inhibition against exemption from the common-law liability and of the decisions of our Supreme Court giving effect to the common-law rule applicable to municipalities exercising functions other than those essentially public in character, and were intended to protect the districts therein provided for against the operation of that rule."

The trend in Texas as evidenced by the foregoing opinions indicates that the Districts here involved will be liable for few acts of negligence resulting in personal injury. Therefore, little necessity is seen for the contractual provision under consideration. If, however, a contractual provision of the nature sought is still desired, no reason is known by this department why such a provision may not be included.

We believe the law with reference to public contracts is correctly stated in Donnelly on Public Con-

tracts, Section 3, dealing with implied powers, as follows:

"Public bodies authorized to do a particular act have with respect to such act the power to make all contracts which natural persons might make. They have all the powers possessed by natural persons, as respects their contracts except where they are expressly, or by implication, restricted."

Although we have not been called upon to express an opinion on the ability of the districts to contract with respect to the cooperative matters expressed in the contract, being called on only with respect to such contract as relates to paragraph 5, nevertheless, we interpret the acts creating these districts as giving them the power to make such contracts. The power to contract with reference to the matters set out in paragraph 5 of said contract is incidental to and may be implied from the parent contract, the implication being that in order to avail itself of valuable machinery and the operation thereof, for the furtherance of its public purposes, the Conservation District may properly agree to the provision in question. The matter is one of trade, customary in dealings between private individuals and corporations, and no restriction is known which would place the districts here involved in a different position. The inclusion of the provision in the contract will not create liability to third parties where none exists under the law.

It is the opinion of this department that the contractual provision in question may serve no useful purpose, but that no reason exists prohibiting the parties so contracting if they so desire.

#### SUMMARY

A Soil Conservation District may contract with a Water Reclamation and Conservation District to hold harmless such water Reclamation and Conservation District from liability resulting from the negligent use of equipment, and the negligent acts of employees in operating such equipment, during the time that such equipment and employees

are on loan from the Water Reclamation and Conservation District, but are under the control and direction of the Soil Conservation District; however, under existing law with reference to such liability, little need is seen for such a provision.

Yours very truly

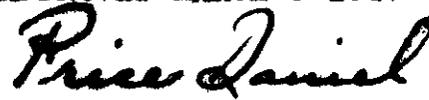
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APPROVED  
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APPROVED MARCH 6 1947

  
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