

Granting John Cook permission to sue the Benbrook Water Authority

HCR 161 by Burnam (Davis)

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DIGEST: HCR 161 would have waived the Benbrook Water Authority’s (BWA) sovereign immunity in order to ensure the protection of the indemnification rights of John Cook, a key witness on behalf of BWA, in the lawsuit *Benbrook Water Authority v. Carter & Burgess, et al.* The BWA entered into a hold harmless and indemnity agreement with John Cook to indemnify him contractually against any legal liability or claim he could have faced as a consequence of his testimony in the lawsuit.

**GOVERNOR’S
REASON FOR
VETO:**

“House Concurrent Resolution No. 161 would allow the Benbrook Water Authority to waive its sovereign immunity from lawsuits by authorizing it to enter into a prospective agreement with a witness in a lawsuit. In this case, the authority would agree to indemnify the witness if the opposing party sued the witness regarding his testimony.

“Sovereign immunity protects government entities from lawsuits to prevent them from being treated as a ‘deep pocket’ in litigation, since any award is ultimately paid with taxpayer money. Sovereign immunity is waived by statute for certain types of lawsuits, including the Texas Tort Claims Act, but should be waived sparingly to protect Texas taxpayers from excessive litigation. Waivers granted by the legislature typically provide the right to sue the state for a specific legal and factual allegation, not the right to sue at a future date if some unanticipated event — in this case a lawsuit against a witness — should come to pass.

“Although the water authority board is well-intentioned in efforts to protect its witnesses from litigation, taxpayers should not be subject to agreements that pledge their money to back unspecified and open-ended protection of witnesses in lawsuits.

“I will only support waivers of sovereign immunity that define specific cases for which a governmental entity may be subject to suit and that cap the damage that taxpayer dollars would be required to cover. An agreement protecting a witness against unspecified potential lawsuits for an unspecified cause of action, with no cap on potential liability, is not a precedent Texas should set in the waiver of taxpayers’ sovereign immunity protection.”

RESPONSE: **Rep. Lon Burnam**, the bill’s author, had no comment on the veto.

Sen. Wendy Davis, the Senate sponsor, said: “I am extremely disappointed in the governor’s failure to sign HCR 161 into law, a piece of legislation which had near unanimous support from the Texas Legislature. Through his veto, the governor has denied the Benbrook Water Authority (BWA) the opportunity to benefit from expert testimony in legal proceedings to which it is currently a party.

“BWA, a governmental subdivision of the State of Texas, is currently in litigation with an engineering firm over the construction of an above ground storage tank built in 2002. The Texas Commission on Environmental Quality determined that the tank could not be put into use due to its alleged poor construction, and further determined that the risk of rupture of the tank posed a safety risk to the residents of the City of Benbrook. As a consequence, BWA was forced to spend over \$1 million to repair the storage tank defects and must spend at least another \$500,000 in order for the storage tank to be fully operational.

“A key witness for BWA, Mr. John Cook, has been threatened with litigation by the engineering firm that constructed the tank if he testifies on behalf of BWA. Because of this, Mr. Cook and BWA have entered into an indemnity agreement that indemnifies and holds Mr. Cook harmless if he is sued as a consequence of testifying to his knowledge of the tank defects. Mr. Cook is concerned about the enforceability of the indemnity agreement because BWA, as a governmental entity of the State of Texas, has sovereign immunity.

“To be certain of the enforceability of the indemnity agreement, BWA pursued HCR 161 to voluntarily waive its sovereign immunity so that Mr. Cook’s indemnification rights would be assured. This indemnification would free Mr. Cook from concern that his testimony might result in a suit for damages against him personally and would provide BWA with the expert testimony that it needs in order to prove its case against the engineering firm for improper design of the tank.

“HCR 161 would have ensured that the legal system worked properly and effectively. The governor’s failure to recognize the importance of this resolution for the citizens of Benbrook is short-sighted, at best. That the governor vetoed a resolution that would have provided assistance to a municipality in the district I represent to seek recompense for failed engineering work is unacceptable, and will ultimately cost the BWA and Texas taxpayers at least \$1.5 million.”