U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

November 19, 1993

Honorable John Hannah, Jr.
Secretary of State of Texas
Elections Division
P. O. Box 12060
Austin, Texas 78711

Dear Mr. Secretary:

This refers to Chapter 626 (1993) which provides for the elected board of directors of the Edwards Underground Water District to be replaced by an appointed board of directors of the Edwards Aquifer Authority in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your responses to our request for additional information on September 20, November 12, and November 15, 1993.

We have carefully considered the information you have provided, as well as information and comments from other interested persons. The state has explained that Chapter 626 was adopted as its response to the violations of the Endangered Species Act, 16 U.S.C. 1536 and 1538, found by the federal court in Sierra Club v. Lujan, 91-CA-069, (W.D. Texas, order dated February 1, 1993). Our review of this legislation under Section 5, however, is limited solely to those aspects that relate to voting. Specifically, the proposed dissolution of the elected twelve-member board that manages a portion of the Edwards Aquifer and its replacement by an appointed board is a change affecting voting within the meaning of Section 5. Presley v. Etowah County Commission, 112 S.Ct. 820 (1992); Allen v. State Board of Elections, 393 U.S. 544 (1969); Procedures for the Administration of Section 5, 28 C.F.R. 51.13. Under Section 5, the Attorney General is required to determine whether the state has sustained its burden of showing that this change is free of the proscribed discriminatory purpose or effect. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. It is with these standards in mind that we have reviewed and analyzed the submitted voting change.

The Edwards Underground Water District includes Bexar, Comal and Hays Counties. According to the 1990 Census, it has a total population of 1,261,098 persons, of whom 48.7 percent are Hispanic. The Hispanic share of the voting age population of the water district is 44.5 percent. Almost 94 percent of the total population in the water district is located in Bexar County. The water district is governed by a twelve-member board of directors with six members elected from Bexar County (four from single-member districts and two at-large) and three members elected at large in Comal County and three members elected at large in Hays County. Two of the single-member districts in Bexar County have Hispanic majorities in voting age population.

The single-member district component of the system in Bexar County is a recent development, having been first implemented in 1989. It appears to have been adopted as a direct response to successful litigation under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, relating to the use of a purely at-large system for the election of the San Antonio River Authority. Leal v. San Antonio River Authority, et al., C.A. No. SA85-CA2988 (1987). Prior to the use of single-member districts, no Hispanic person had ever served on the board of directors of the water district. As a result of the change to the existing method of election, Hispanic voters consistently have been able to elect representatives of their choice to the two single-member districts with Hispanic majorities. It remains the case, however, that Hispanic voters have been unable to elect representatives of their choice to any of the six seats outside of Bexar County. In this regard, we are aware that there is a pending federal court challenge to the existing water district election system on one-person, one-vote grounds under the Fourteenth Amendment and Hispanic vote dilution grounds under Section 2. Williams v. Edwards Underground Water District, C.A. No. SA92- CA0144, (W.D. Texas).

The state proposes to replace the Edwards Underground Water District and its elected board with a nine-member appointed board that would regulate and administer the Edwards Aquifer. The appointed body would have authority over a larger geographic area than the existing water district, as it includes Medina and Uvalde Counties and portions of other counties not in the water district. However, this expansion does not significantly alter the population since nearly 87 percent of the population in this larger geographic area still is in Bexar County.

Under the proposed system of appointment, three appointees would be selected from the areas west of Bexar County, three appointees would be selected from the areas east of Bexar County, and three appointees would be selected from Bexar County. A variety of different elected or appointed bodies would make the

respective appointments. At this time, none of the bodies responsible for making the appointments have a Hispanic majority among the selecting officials, and only the appointing bodies within Bexar County have any substantial Hispanic representation. Thus, it appears that Hispanic voters will have considerably less influence over the selection of members of the governing body of the Edwards Aquifer through the choices of the appointing authorities than they currently have under the direct-election system for the water district.

We recognize that the state, faced with the environmental concerns underscored by the federal court's determinations in the Sierra Club litigation, had to ensure that a governmental body would have the appropriate powers and the mandate to manage the use of the Edwards Aquifer. The state, however, has not suggested that it was directed by the court ruling in the Sierra Club litigation to dissolve the existing elected governing board for the water district or to change the method of selecting the governing body. Indeed, during the legislative process, consideration was given to alternatives, including utilizing an elected body or a combination of an elected and appointed body to address the environmental concerns. Hispanic legislators in both the House and the Senate proffered proposals that would have continued the state's current practice of using an elected body in the water management system for the Edwards Aquifer. Instead, the state chose to eliminate the elected body for the water district entirely and replace it with an appointed one. While we recognize that, in creating the appointive system, the state sought to assure some minority representation on the Bexar County appointed delegation, under federal law this is not an adequate substitute for existing electoral rights.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5, 28 C.F.R. 51.52. The existence of some legitimate, nondiscriminatory reasons for the voting change does not satisfy this burden. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); City of Rome v. United States, 446 U.S. 156, 172 (1980); Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). Our review leads us to conclude that the state has not shown that its interest in managing the Edwards Aquifer, including the allocation of water among the various kinds of users, required eliminating the election of members to the governing body. Nor can we say that the state has met its burden of showing that, in these circumstances, the change from an elected to an appointed board will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change insofar as it replaces the previously elected governing body with an appointed board.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither a discriminatory purpose nor effect. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the dissolution of the Edwards Underground Water District with an elected governing body and its replacement by the Edwards Aquifer Authority with an appointed board continues to be legally unenforceable. See Clark v. Roemer, 111 S. Ct. 2096 (1991); 28 C.F.R. 51.10.

We believe that the state can develop a system for managing the Edwards Aquifer in an environmentally-sound manner that would satisfy the requirements of the Voting Rights Act. Should the state decide to seek to adopt a new system, our staff stands ready to discuss further the nature of our concerns with the electoral impact of the submitted change. If a new system is adopted and administrative review under Section 5 is sought, we are prepared to respond on an expedited basis.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that the State of Texas plans to take concerning this matter. If you have any questions, you should call Delora L. Kennebrew, a Deputy Chief in the Voting Section (202-307-3718).

Since the Section 5 status of the dissolution of the Edwards Underground Water District and the creation of the Edwards Aquifer Authority has been placed at issue in the Sierra Club v. Lujan case, we are providing a copy of this case letter to the court and counsel of record in that case.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

cc: Honorable Lucius D. Bunton, III
Senior United States District Judge

Counsel of Record