



RECEIVED

FEB - 7 1996

Opinion Committee

**THE TEXAS STATE UNIVERSITY SYSTEM**

333 Guadalupe • William P. Hobby Building  
Tower III, Suite 810 • Austin, Texas 78701-3942  
Telephone: (512) 463-1808  
FAX: (512) 463-1816

**RQ 912**  
# ML-38607-96  
38607

January 30, 1996

**REGENTS**

- Jane C. Monday  
*Huntsville, Chairman*
- Becky R. Espino  
*Fort Stockton, Vice Chairman*
- William L. Cunningham  
*San Marcos, Past Chairman*
- Thomas M. Moeller  
*Beaumont*
- Elizabeth T. Nash  
*San Marcos*
- Pollyanna A. Stephens  
*San Angelo*
- Macedonio Villarreal  
*Sugar Land*
- Craig H. Vittitor  
*Hartlingen*
- Ray Zapata  
*San Angelo*
- CHANCELLOR**  
Lamar G. Urbanovsky  
*Austin*

The Honorable Dan Morales  
Attorney General of the State of Texas  
Office of the Attorney General  
P.O. Box 12548  
Capitol Station  
Austin, Texas 78711-2548

Dear General Morales:

The Seventy-third Texas Legislature (1993) provided a source of funding for Southwest Texas State University to purchase 90.42 acres adjoining its campus in San Marcos. The property consisted of Spring Lake, the headwaters of the San Marcos River, a nine hole golf course, a theme park, two restaurants, a small hotel, and a conference building. In its October 1, 1993 application to the Texas Higher Education Coordinating Board (see Attachment "A"), the University represented that acquisition of the property would "provide needed conference and workshop space" and would benefit the University's Edwards Aquifer Research and Data Center and "our highly regarded aquatic biology and anthropology programs" by providing "valuable hands-on experience for our students." In addition, acquisition would allow the University to "ensure preservation of the unique ecosystem at the springs, which is home to a variety of rare and endangered species of plant and animal life." The University's stated plan was to shift, systematically, the "nature and character of the property . . . from an entertainment focus to an educational focus" and "to more fully develop the area's educational potential."

On December 31, 1993, the University entered into a management agreement with its campus food service provider in which the provider was to operate the amusement park, golf course, hotel and restaurants for a fee. In short, the provider received a fee in exchange for providing a service. A copy of this service agreement is enclosed as Attachment "B." This agreement and the continued operation of the facility did not constitute a transfer of a leasehold interest or any other legal interest in the property. Complete ownership resided in the University, and profits

Attorney General Dan Morales  
January 30, 1996  
Page 2

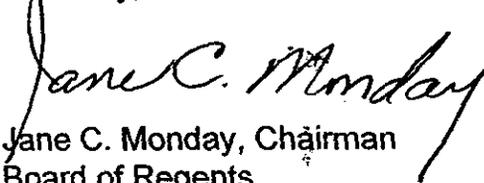
were to inure to the University, which agreed to bear any losses. During this time and in 1995, the University continued to hold varied educational and other University-related functions on the property, including a Native American festival and numerous internal conferences and miscellaneous business meetings, including several Board of Regents meetings, as well as varied academic and course-related activities.

We would note that in a February 1996 draft report, the Office of State Auditor cited the University's payment of property taxes (at the rate of approximately \$100,000 per year), stating that the University and System office were seeking a "legal determination as to the necessity and appropriateness of paying these taxes. We encourage this effort."

To our knowledge, the only state authorization for the payment of ad valorem taxes is the legislative appropriation to the Comptroller of Public Accounts to pay county taxes on permanent university fund lands.

At all times during its ownership of the property, the property served a public purpose and was held or dedicated for the support, maintenance, or benefit of Southwest Texas State University. Despite the transfer of the property from private to public ownership, the University voluntarily continued to pay ad valorem taxes on it. Local taxing authorities are now requesting payment of 1995 taxes. The Board of Regents requests your opinion whether or not this property is presently subject to ad valorem taxes under section 11.11 of the Tax Code. We would appreciate your expeditious resolution of this important issue, on which we would appreciate the opportunity more fully to brief you and your staff at the appropriate time.

Sincerely,

  
Jane C. Monday, Chairman  
Board of Regents

cc: Members, Board of Regents  
President Jerome H. Supple  
Local Taxing Authorities

## MANAGEMENT AGREEMENT

This agreement is between Professional Food-Service Management, Inc. (PFM) and the Board of Regents, Texas State University System, acting on behalf of Southwest Texas State University (SWT) regarding PFM's management of SWT's property described in a Real Estate Contract dated effective November 1, 1993 between Southwest Texas State University, Aquarena Springs Corporation, and May Springs Ltd. The real and personal property descriptions found in that contract are incorporated into this agreement by reference, and this property is referred to as the "facility."

### 1. PFM's Management Services

1.01. PFM will manage and operate the facility, including the hotel, the catering and conference center, the golf course, rides, amusements, attractions, restaurants (including Pepper's at the Falls) and all other activities and functions located on the facility beginning January 2, 1994 and during the term of this agreement.

1.02. PFM will operate the facility with integrity and in a professional manner to earn a high level of community acceptance. PFM will comply with all laws, regulations, and other legal requirements that apply to the facility.

1.03. In providing its services, PFM will, at the sole expense of the facility:

- a. purchase and pay for all services, materials, equipment, licenses, permits, food, and supplies used in operating the facility. PFM will offer and sell only high quality food and products at reasonable prices;
- b. hire, train and pay all personnel, including paying their salaries, fringe benefits, payroll taxes, and workers' compensation insurance;
- c. pay for all utilities, including electricity, gas, water, and removal of waste and refuse;
- d. collect and pay federal, state, and local sales taxes and property taxes on the facility;
- e. subject to the limitations of the operating budget established, maintain and keep equipment, buildings, facilities, water, and grounds in a clean, healthful state of repair. A first-year budget of at least \$214,000.00 to cover maintenance and repair of equipment, buildings, and facilities will be established. Equipment or parts that cost less than \$1,000.00 each will be paid from the operating budget and be reflected as a cost of operations of the facility. SWT will pay for equipment or parts that cost \$1,000.00 or more from its other funds and capitalize them on the university's records. SWT may also make capital expenditures in excess of the total amount budgeted from its available funds;

- f. obtain and maintain insurance on the facility, and its equipment, including fire and extended coverage, and boiler insurance in amounts at least equal to the agreed replacement value of the facility and equipment. PFM will also obtain and maintain liability insurance, insuring both PFM and SWT against all claims arising from PFM's use of the facility, its equipment, or the condition of the facility. The limits of the liability insurance policy will be not less than \$500,000 for injuries to or death of any one person, \$1,000,000 for any one accident or disaster, and \$100,000 for property damaged or destroyed. All insurance policies will name both parties as insured parties and PFM will provide SWT a copy of each policy;
- g. prior to January 2, 1994, conduct an inventory (jointly with SWT) of all items for resale and consumable supplies to be used in the course of business;
- h. act as SWT's fiscal agent in the operation of the facility, and as fiscal agent maintain separate accounts and records for the facility's operations, including separate bank accounts at SWT's depository bank. These records will be separate from PFM's food service operations on SWT's campus and will satisfy SWT's requirements for financial reporting. As long as separate records are kept, PFM may purchase food and supplies at cost from PFM's food service operations on SWT's campus and need not pay SWT the commission for food sold at the facility that it pays for food sold on SWT's campus;
- i. make its records available upon request to SWT's representatives and to representatives of the State Auditor. By the 25th day of each month PFM will furnish SWT a detailed statement of all receipts and disbursements covering activity for the preceding month. All sales and other receipts as well as invoices will be maintained on site at the facility and available for inspection by SWT's representatives. Additionally, by the 25th day of September each year, PFM will furnish a cumulative detailed statement of receipts and disbursements for the preceding 12 months as well as a balance sheet as of August 31. By the first day of November each year, PFM will furnish SWT an annual financial report for the fiscal year beginning September 1 and ending August 31 prepared by a certified public accountant and based on the accountant's examination of the facility's records. PFM will pay for the accountant's services as an expense of the facility;
- j. enter into contracts and leases regarding the facility with the understanding that PFM may not subcontract or sublease the operations of any part of the facility without SWT's prior written approval. Contracts and leases extending beyond the term of this agreement also require SWT's prior written approval; and
- k. advertise and market the facility by use of appropriate means of communication.

1.04. The parties are acting as independent contractors in this arrangement. Neither party will be an employee of the other, and neither party will have any claim or right arising from employee status. PFM has discretion to determine the manner in which it performs its services, but notwithstanding SWT retains the right to exercise final judgment with respect to the ultimate performance of this agreement providing that the parties shall have agreed upon objective standards by which such performance shall be measured. This agreement does not create a partnership, joint venture, or other arrangement that would make one party liable for the acts or omissions of the other.

1.05. During the term of this agreement, SWT has the exclusive right:

- a. to close any part of the facility or any attraction as SWT deems advisable; or
- b. to sell or dispose of all or any part of the facility or any attraction as SWT deems advisable.

1.06. PFM shall contribute up to \$50,000 for a long-term plan for the facility. This amount is a contribution and not considered an expense of operating the facility. The long-term plan will focus on SWT's goal for the construction and operation of a hotel and conference center on the property.

1.07. PFM shall charge only direct expenses to the operation of the facility. Overhead or administrative support costs provided from a centralized location and servicing other entities in addition to the facility must be recovered by PFM from within the management fee described in section 2. SWT recognizes the value added to the operation of the facility and the economies achieved by these centralized support services such as accounting, payroll, human resource administration, purchasing, legal services and executive management. SWT pledges to take these additional costs into consideration when setting the management fee described in section 2.

1.08. PFM shall use its best efforts in managing the facility in accordance with: (1) this agreement, (2) written instructions that SWT may provide that are consistent with this agreement, and (3) sound management policies. PFM will use its highest professional skills to provide SWT with the maximum economic return consistent with the principles of proper management.

1.09. PFM will not illegally discriminate against any person, employee or applicant for employment.

1.10. PFM will not enter into any agreements with Aquarena Springs Corporation unless SWT gives its prior written approval.

## 2. Management Fee

2.01. Subject to the limitations in section 2.02, each year SWT will pay PFM a management fee equal to \$250,000.00 plus:

- a. 2% of annual net sales between \$1.00 and \$5,000,000.00; and

- b. 7% of annual net sales exceeding \$5,000,000.00.

2.02. However, notwithstanding section 2.01 above, the maximum fee SWT will pay will not exceed \$500,000.00 in the initial contract year. The fee structure in 2.01 and the maximum fee will be negotiated as part of the annual budget process. As a part of the budget process, each year the parties will estimate the annual management fee and SWT will pay 1/12 of that estimated amount each month. The parties will adjust the amount at the end of the 12th month to reflect accurate payments of the annual management fee due. For the period January 2, 1994 through August 31, 1994, the parties will estimate the management fee for the first eight month period and SWT will pay 1/8 of that estimated amount each month. At the end of August, 1994, the amount will be adjusted to reflect accurate payments of the management fee. Thereafter, the terms above describing the annual management fee will apply.

2.03 "Net sales" means receipts from all retail sales from all business conducted on the property by PFM and others, whether such sales are evidenced by check, credit, charge account, exchange, or otherwise. The term includes:

- a. amounts received from the sale of merchandise, food, or services sold or performed in, on, or from the facility, whether such orders are filled from the facility or elsewhere;
- b. to the extent allowed by law, proceeds or commissions received from automatic vending and other machines operated in or on the facility;
- c. to the extent allowed by law, proceeds or commissions received from the operation of public telephones in or on the facility; and
- d. proceeds from the sale of merchandise or services based on orders solicited or taken from, in, or on the facility, to be delivered or performed away from the facility or from sources outside the facility.

2.04. The term "net sales" does not include:

- a. credits, discounts, and refunds made to customers for merchandise returned or exchanged or for services performed unsatisfactorily;
- b. credits and amounts paid to customers in settlement of claims for loss or damage to merchandise; or
- c. sales, use, value added, or gross receipts taxes imposed by any federal, state, municipal or other governmental authority directly on the sales and collected from customers, provided that the amount of the tax is added to the selling price or absorbed in that price and paid to the governmental authority.

### 3. Working Capital Account

3.01. SWT agrees to establish a working capital account in the initial amount of \$500,000.00, to be drawn upon by PFM to cover operating cash shortfall. Funds will be disbursed as needed by SWT upon receipt of a monthly operating report for the facility prepared by PFM. It is anticipated that the working capital account shall be replenished as a priority from net sales and/or profits generated during profitable months. The parties agree that reimbursement of the working capital account shall, after the payment of necessary operating expenses and fees attributable to the overall management of the facilities, represent a primary objective.

### 4. SWT's Management Expectations

4.01. Part of the parties' financial expectations are based on SWT's participating and use of the facility for meetings, functions, conferences, and lodging. SWT agrees to market use of the facility to its faculty, staff, students, alumni, and visitors. However, SWT reserves the right to conduct classes and research activities and hold functions as it sees fit on the facility without PFM's approval. SWT agrees to coordinate all such activities with PFM.

4.02. SWT shall have the right to approve PFM's director of the facility and the director can remain in the position as long as acceptable to PFM and SWT.

### 5. Term

5.01. This agreement will begin on January 2, 1994, and will continue for five years from that date, except that SWT may terminate this agreement without cause or penalty at the end of three years from that date. To terminate this agreement, SWT must give PFM 90 days prior written notice by certified mail of its intent to terminate. However, SWT anticipates renewing this agreement upon satisfactory performance by PFM.

5.02. In addition, either SWT or PFM may terminate this agreement by giving the other written notice by certified mail of its intent to terminate at least 90 days before the annual anniversary of the beginning of this agreement. However, the party seeking to terminate must have good cause for termination under this section, must set forth its cause in writing to the other party, must cite this section of the agreement, and must allow the other party 90 days to cure deficiencies before giving notice of termination.

### 6. General Provisions

6.01. The parties will construe this agreement under the laws of the State of Texas and will perform all their obligations in Hays County, Texas.

6.02. This is the only agreement of the parties respecting this subject, and it supersedes any prior written or oral agreements between the parties regarding this subject. Neither party may assign its rights or obligations under this agreement without the prior written consent of the other.

6.03. The parties may not amend this agreement except in writing, dated after the date of this agreement and signed by each party's representative, including the authorized officer of the Board of Regents.

6.04. Neither party is required to perform its obligations under this agreement if prevented from doing so by acts of God, restrictions by governmental authority, weather, or any other cause not reasonably within the control of the parties.

6.05. This agreement binds, and inures to the benefit of, the parties and their respective legal representatives, successors, and assigns, where permitted by this agreement.

6.06. If any of this agreement's provisions is held to be illegal, invalid, or unenforceable, that holding will not affect any other provision of this agreement. The parties will construe the agreement as if the illegal, invalid, or unenforceable provision had never been contained in this agreement.

Dated this 31st day of December, 1993.

ATTEST:

Professional Food-Service  
Management, Inc.

Maudie E. Pande, Asst. Sec.  
Secretary

Lawrence A. Pande, Jr.  
Lawrence A. Pande, Jr., Principal

Seal (if incorporated)

Examined, Approved, and Recommended:

Jerome H. Supple  
Jerome H. Supple  
President

Southwest Texas State University

ATTEST:

Daniel S. Ouellette  
Daniel S. Ouellette  
Chairman, Local Committee

Lamar G. Urbanovsky  
Lamar G. Urbanovsky  
Chancellor,  
The Texas State University System

Thomas R. Kowalski  
Thomas R. Kowalski  
Chairman, Board of Regents  
The Texas State University System

**REAL PROPERTY APPLICATION**  
**TEXAS HIGHER EDUCATION COORDINATING BOARD**  
*(Refer to Guidelines for Real Property Application on reverse side to complete this form)*

**I. GENERAL INFORMATION**

<p>A. Institution  SOUTHWEST TEXAS STATE UNIVERSITY</p>	<p>B. Board date: _____                  Submission of this application and its required information must be received 60 days prior to the Board meeting date that the proposal will be considered.</p>
<p>C. Preliminary approval? _____ Or, final approval? <input checked="" type="checkbox"/> xx</p>	
<p>D. Date of governing board approval: August 4, 1993</p>	<p>E. Is this a purchase, lease or rental? purchase</p>
<p>E. Acquisition consistent with existing or proposed campus plan?  <input checked="" type="checkbox"/> xx Yes <input type="checkbox"/> No</p>	<p>F. Acquisition consistent with institution's role and scope? <input checked="" type="checkbox"/> xx Yes <input type="checkbox"/> No</p>
<p>G. Is the acquisition reported on the Master Plan 1 reporting form (MP1)? <input checked="" type="checkbox"/> xx Yes <input type="checkbox"/> No</p>	

**II. PROJECT INFORMATION**

A. Identify the location of the property and describe the acquisition or lease/rental. Not the legal description, but such items as its location related to campus, parcel(s), street address, and area in square feet:

Aquarena Springs, One Aquarena Springs Drive, San Marcos, Texas  
 90.42 acres adjoining the SWT Campus, consisting of Spring Lake, the headwaters of the San Marcos River, a nine-hole golf course, a theme park that includes an underwater theatre, two restaurants, a 24-room hotel, souvenir shop and a conference building.

B. Justify the need for the acquisition and explain its proposed use. (Attach additional pages as needed.)  
 Acquisition of the property will provide needed conference and workshop space, and would ensure preservation of the unique ecosystem at the springs, which is home to a variety of rare and endangered species of plant and animal life. The Edwards Aquifer Research and Data Center and our highly regarded aquatic biology and anthropology programs will benefit from the purchase to provide valuable hands-on experience for our students. Over the next several years, the nature and character of the property will be shifted from an entertainment focus to an educational focus. We anticipate constructing a larger conference center on the property. Interpretive areas dealing with the environment, ecology and anthropology of the area would be added to more fully develop the area's educational potential.

C. Map attached indicating location of the property?  xx Yes  No

D. List and describe the major costs involved, if any, such as: repair and rehabilitation, demolition, excavation, easement relocation, hazardous waste, asbestos abatement, handicap accessibility, etc. (Attach additional pages as needed.)

Any such costs would be paid from funds generated by the property.

Total estimated cost: \$ -0-

E. Are any improvements on the property that would be added to the facilities inventory?  Yes  xx No  
 Would the improvements require formula funding?  Yes  xx No  
 Estimated annual cost for operation and maintenance: \$ -0-  
 Total gross square feet of improvements to be added: -0-  
 Total assignable square feet of improvements to be added: -0-  
 Total educational and general square feet of improvements to be added: -0-

F. Is this acquisition so urgent or important that your institution is prepared to exercise the right of eminent domain?  
 Yes  xx No

**III. FINANCIAL INFORMATION**

A. Source of funds and amount	1) Tuition revenue bonds per HB 2058	\$ 7,000,000
	2)	\$
	3)	\$

Yes  No

### III. FINANCIAL INFORMATION

A. Source of funds and amount of each:	1) Tuition revenue bonds per HB 2058	\$ 7,000,000
	2)	\$
	3)	\$

B. Can the cost figure be released publicly?  Yes  No | C. Total cost: \$7,000,000

D. Two appraisal reports must be submitted with this application. At least one must meet one of the following requirements: *(indicate which requirement is met)*

- Member of the American Institute of Real Estate Appraisers (designated M.A.I. or R.M.).
- Senior member of the Society of Real Estate Appraiser (S.R.E.A. and S.R.A.).
- Senior member of the American Society of Appraisers with the professional designation in Real Estate.
- Senior member or appraiser-counselor of the National Association of Independent Fee Appraisers (designated I.F.A.S. or I.F.A.C.)

### IV. INSTITUTIONAL CONTACT

Name	William A. Nance	Phone (512 )	245-2244
Title	Vice President for Finance and Support Services	Date Submitted	October 1, 1993

Attach additional pages as needed to complete the application

ATTACHMENT A