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ATTORNEY GENERAL OF TEXAS

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The Honorable Charles Perry
Chair, Committee on Water & Rural Affairs
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0283

Re: Authority of the Guadalupe-Blanco River Authority to impose fees or to by election establish a taxing district to fund the replacement, operation, and maintenance of dams (RQ-0310-KP)

Dear Senator Perry:

You ask about the ability of the Guadalupe-Blanco River Authority (the “Authority”) to collect fees or establish a taxing district by election to fund the replacement, operation, and maintenance of dams located at Lakes Placid, McQueeney, Meadow, Dunlap, Gonzales, and Wood.¹ As background, you explain that in 2016, “a spill gate at the dam that forms Lake Wood on the Guadalupe River system failed,” and the failure caused Lake Wood to drain. Request Letter at 1. In 2019, the dam that forms Lake Dunlap also failed, causing Lake Dunlap to drain. *Id.* The Authority “completed several engineering studies which indicated that the dams located at Lakes Dunlap, McQueeney, Placid, Meadow, and Gonzales would need to be reconstructed due to aging spill gate parts.” *Id.* Thus, you ask about the mechanisms available to the Authority to “adequately cover the associated costs.” *Id.*

Certain matters involving the failed dams along the Guadalupe River are the subject of pending litigation.² Owners of waterfront property located on the lakes have sued the Authority, alleging that the Authority’s decision to draw down lake levels constitutes an unconstitutional taking of their property. The pending litigation also questions whether the law imposes a duty on the Authority to replace, rebuild, and operate the dams. The longstanding policy of this office is to generally refrain from responding to legal questions that are the subject of pending litigation. *See* Tex. Att’y Gen. Op. Nos. GA-0502 (2007) at 3–4, MW-205 (1980) at 1, V-291 (1947) at 5–6. As a result, this opinion does not address any duty that the Authority may or may not possess regarding maintenance or repair of the dams, nor does it address any liability of the Authority for the dam failures or drawing down lake levels. Your specific questions ask about the funding

¹*See* Letter from Honorable Charles Perry, Chair, Senate Comm. on Water & Rural Affairs, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 26, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²*See Skonnord v. Guadalupe-Blanco River Auth.*, No. 19-2053-CV (25th Dist. Ct., Guadalupe Cty., Tex. Sept. 5, 2019); *Williams v. Guadalupe-Blanco River Auth.*, No. 19-2054-CV (25th Dist. Ct., Guadalupe Cty., Tex. Sept. 5, 2019).

mechanisms available to the Authority to replace, repair, or maintain the dams, issues not directly at issue in the pending litigation. We therefore limit this opinion to the methods by which the Authority may raise revenue.

You first ask whether the Authority may “establish and issue a fee for lakefront property owners in order to fund the replacement, operation, and maintenance of the dams located at Lakes Placid, McQueeney, Meadow, Dunlap, Gonzales, and Wood.” Request Letter at 3. The Authority’s enabling legislation expressly authorizes it to collect fees for services provided by the Authority:

The Board shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or *all other services* sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenues adequate . . . to pay all expenses necessary to the operation and maintenance and replacements and additions to the properties and facilities of the District

TEX. WATER AUX. LAWS art. 8280-106 [Act of May 22, 1975, 64th Leg., R.S., ch. 433, § 9, 1975 Tex. Gen. Laws 1149, 1153 (emphasis added)]. Thus, the Authority possesses express authority to charge a fee for any services that it elects to offer.

Damming the rivers under the Authority’s control allows it to provide benefits and services to multiple consumer groups in different ways. You ask specifically about a fee imposed on property owners whose land touches the water resource. *See* Request Letter at 3. A dam could potentially provide a service to property owners by maintaining set lake levels. Furthermore, governmental entities charging for services may reasonably classify consumers based on factors such as “the cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction.” *Gillam v. City of Fort Worth*, 287 S.W.2d 494, 497 (Tex. App.—Fort Worth 1956, writ ref’d n.r.e.). Property owners whose land abuts the water resource may receive a benefit different from and greater than other residents within the Authority’s jurisdiction such that it could justify a unique fee on those owners.

However, Texas courts recognize a distinction between fees and taxes, and the Authority may impose only the former. If the primary purpose of a fee is to raise revenue in excess of that reasonably needed for regulation, a court would likely consider the fee a tax, regardless of the name by which it is designated. *See Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997). The reasonableness of any fee imposed, and whether such fee is in fact a tax, would require a factual inquiry into the basis of the fee and is not an appropriate question for the opinion process. *See id.*; *see also Gillam*, 287 S.W.2d at 497 (“Whether differences in rates between classes of customers are to be made, and, if so, the amount of the differences, are legislative rather than judicial questions[.]”); *see also Black v. City of Killeen*, 78 S.W.3d 686, 699 (Tex. App.—Austin 2002, pet. denied) (stating that whether any specific fee is unreasonably discriminatory “is one of fact and must be decided on a case-by-case basis”). But as a general matter, the Authority may establish and impose a fee on lakefront property owners for unique

services those owners receive from the Authority, as long as the fee does not amount to a tax on those property owners.

You next ask whether the Authority may “establish a taxing district by election for those property owners whose land touches the water resource in order to fund the replacement, operation, and maintenance of the dams located at Lakes Placid, McQueeney, Meadow, Dunlap, Gonzales and Wood.” Request Letter at 3. The Authority’s enabling legislation prohibits it from levying or collecting a tax: “Nothing in this Act or in any other Act or law contained, however, shall be construed as authorizing the District to levy or collect taxes or assessments.” TEX. WATER AUX. LAWS art. 8280-106 [Act of May 22, 1975, 64th Leg., R.S., ch. 433, § 1, 1975 Tex. Gen. Laws 1149]. Given this prohibition, the Authority itself may not establish a taxing district to repair and maintain the dams.

However, the property owners with land abutting the drained lakes have considered the creation of water districts for the purpose of funding the needed repairs.³ Article 16, section 59 of the Texas Constitution permits the creation of water districts for the control, storing, preservation, and distribution of rivers and streams for irrigation, power, and all other useful purposes. TEX. CONST. art. XVI, § 59(a), (b). Pursuant to that authority, the Legislature, through chapter 51 of the Water Code, authorized the creation of water control and improvement districts for many different purposes, including “the control, storage, preservation, and distribution of its water and floodwater and the water of its rivers and streams for irrigation, power, and all other useful purposes” TEX. WATER CODE § 51.121(b)(1). A majority of property owners within a proposed district may file a petition requesting its creation. *Id.* § 51.013(a). Depending on whether the proposed district is included within one county or multiple counties, either the county commissioners court or the Commission on Environmental Quality (“the Commission”) considers whether to order creation of the district. *See id.* § 51.016 (“Commissioners Court or Commission to Consider Creation of District”); *see also id.* § 51.001(5) (defining “Commission”).⁴

The Legislature authorized water control and improvement districts to provide for the “control, storage, preservation, and distribution of its water and floodwater and the water of its rivers and streams for irrigation, power, and all other useful purposes.” *Id.* § 51.121(b)(1). Such districts may also “construct all works and improvements necessary . . . to supply water for municipal uses, domestic uses, power and commercial uses, and all other beneficial uses or controls.” *Id.* § 51.125(6). In performing these functions, a district may “purchase, construct, acquire, own, operate, maintain, repair, improve, or extend inside and outside its boundaries any and all land, works, improvements, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation.” *Id.* § 49.211(b). And it “may contract with a person or any public or private entity for the joint construction, financing, ownership, and operation of any

³*See* Darren Dunn, *Lake Dunlap may be saved; GBRA, PLDA reach agreement to repair Lake Dunlap Dam*, SEGUIN TODAY, Oct. 11, 2019, available at <https://seguintoday.com/2019/10/11/lake-dunlap-may-be-saved-gbra-plda-reach-agreement-to-repair-lake-dunlap-dam/>; Brief from Stacey A. Steinbach, Assistant Gen. Manager, Tex. Water Conservation Ass’n, to Honorable Ken Paxton, Tex. Att’y Gen. at 6 (Oct. 30, 2019) (on file with the Op. Comm.).

⁴*See also* Act of May 28, 2001, 77th Leg., R.S., ch. 965, § 18.01, 2001 Tex. Gen. Laws 1933, 1985 (renaming the Texas Natural Resources Commission the Texas Commission on Environmental Quality).

works, improvements, facilities, plants, equipment, and appliances necessary to accomplish any purpose or function permitted by a district.” *Id.* § 49.213(a). Furthermore, a contract entered into by a district may provide that it “will make payment under the contract from proceeds from the sale of notes or bonds, from taxes, or from any other income of the district.” *Id.* § 49.108(a). Such a contract requires a contract election and voter approval by a majority of the voters at an election held for that purpose and may additionally require approval by the Texas Commission on Environmental Quality. *Id.* § 49.108(b), (e). Pursuant to this authority, property owners could, with voter approval, establish a water control improvement district with taxing authority to raise revenue to fund repair of the dams. *Id.* § 51.011.

Furthermore, if approved by the voters, the water control improvement district could contract with the Authority to improve the dams under contract terms agreed to between the Authority and the district. While the Authority does not have the power to tax, it does possess the power to “control, store and preserve, within or adjoining its boundaries . . . , the waters of any rivers and streams . . . , for all useful purposes, and to use, distribute and sell the same, within [its] boundaries . . . , for any such purposes[.]” TEX. WATER AUX. LAWS art. 8280-106 [Act of May 22, 1975, 64th Leg., R.S., ch. 433, § 2(a), 1975 Tex. Gen. Laws 1149, 1150 (emphasis added)]. It may contract “for, or in connection with . . . the construction, acquisition, ownership, financing, operation, maintenance, sale, . . . or other use or disposition of any facilities[.]” *Id.* § 2(v) at 1152. And it may participate with other districts, like a water control and improvement district, in performing those functions. *See id.* § 2(w).

If a water control improvement district conveyed tax revenue to the Authority to improve the dams, the district would need to include safeguards in its contract to prevent concerns that the transfer amounts to an impermissible lending of credit under article III, section 52 of the Texas Constitution. *See* TEX. CONST. art. III, § 52(a). The Texas Supreme Court emphasized that a political subdivision’s transfer of funds to another entity must include “sufficient control over the expenditure” to ensure that it accomplishes a public purpose of the political subdivision. *See Tex. Mun. League Intergov’tl Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 384 (Tex. 2002) (setting out three-part test to evaluate expenditure under article III, section 52(a)).

S U M M A R Y

The Guadalupe-Blanco River Authority may establish and impose a fee on property owners whose land abuts the water resources controlled by the Authority for the unique services those landowners receive from the Authority, as long as the fee does not amount to a tax on those property owners.

The Authority's enabling legislation prohibits it from levying or collecting a tax. Thus, the Authority itself may not establish a taxing district to repair and maintain the dams. However, property owners may, with the requisite approval, establish a water control improvement district with taxing authority to raise revenue to fund repair of the dams. The district may contract with the Authority to perform repairs, and it may pay for the repairs using tax proceeds, provided the district imposes controls to ensure the funds are used for a public purpose of the district.

Very truly yours,



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