



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 8, 2024

The Honorable Constance Filley Johnson  
Victoria County Criminal District Attorney  
205 North Bridge, Suite 301  
Victoria, Texas 77901-8085

**Opinion No. KP-0459**

Re: Authority of a water control and improvement district to use surplus funds from its interest and sinking fund (RQ-0467-KP)

Dear Ms. Johnson:

On behalf of the Victoria County Water Control and Improvement District No. 2 (“District”), you seek our opinion on a matter concerning the District’s use of the moneys in its interest and sinking fund.<sup>1</sup>

You attach a letter from the District’s law firm explaining that the District was created under Texas Constitution article XVI, section 59, is subject to Water Code chapter 51, and is authorized to issue bonds and levy taxes for payment of issued bonds.<sup>2</sup> The letter further contends that while Water Code section 51.436 limits the types of expenditures a district can make from an interest and sinking fund,<sup>3</sup> Attorney General Opinion JM-142 concluded there was an additional authorized use where a water district had surplus moneys in its interest and sinking fund. *See* Marek Letter at 1–2. Having paid off its bond debt, the District similarly has surplus moneys in its interest and sinking fund and asks about “a potential use” of the surplus. *See id.* at 3–4.

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<sup>1</sup>*See* Letter from Honorable Constance Filley Johnson, Victoria Cnty. Crim. Dist. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (July 8, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0467KP.pdf> (“Request Letter”).

<sup>2</sup>*See* Letter from Robert E. McKnight, Jr., Marek, Griffin & Knaupp, to Off. of the Att’y Gen., Op. Comm. (June 14, 2022) (hereinafter “Marek Letter”), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0467KP.pdf>.

<sup>3</sup>An interest and sinking fund is an account consisting of revenue set aside to pay interest and principal on bonds or other debts as it matures. *See* 35 David B. Brooks, *Texas Practice Series, County and Special District Law* § 17.8.

### **Authority of a Water Control and Improvement District**

Texas Constitution article XVI, section 59, under which the District was created, provides that

[t]he Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment. All such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as may be prescribed by law. The Legislature shall also authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds and for the maintenance of such districts and improvements. Such indebtedness shall be a lien upon the property assessed for the payment thereof. The Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified voters of such district and the proposition adopted.

TEX. CONST. art. XVI, § 59(c). Operating under Water Code chapter 51, which governs water control and improvement districts, the District is authorized to issue and sell bonds to provide and maintain improvements necessary to achieve its purposes. *See* TEX. WATER CODE §§ 51.402 (authorizing article XVI, section 59 district to issue bonds), 51.432 (authorizing district to sell bonds); *see also id.* §§ 51.121 (setting out a district's purposes), 51.403 (limiting bond issuance or indebtedness to the amount authorized by the Constitution). Further, a water control and improvement district is authorized to levy taxes to secure payment of its bond indebtedness. *See id.* § 51.433 (requiring the board to levy a tax on all property inside the district "in a sufficient amount to redeem and discharge the bonds at maturity").

Chapter 51 requires a water control and improvement district to establish several different funds for specific purposes. *See, e.g., id.* §§ 51.351(a) (requiring a construction fund for the deposit of bond proceeds), 51.352(a) (requiring a maintenance fund for the maintenance, repair, and operation of the properties and plant), 51.353 (providing for an amortization and emergency fund). Relevant here, a water control and improvement district must have an interest and sinking ("I&S") fund to "include all taxes collected" under chapter 51. *Id.* § 51.436(a). Subsection 51.436(b) provides that money in the I&S fund "may be used only: (1) to pay principal and interest on the bonds; (2) to defray the expenses of assessing and collecting the taxes; and (3) to pay principal and interest due under a contract with the United States if bonds have not been deposited with the United States." *Id.* § 51.436(b); *see also id.* § 51.437 (authorizing certain investments of money in the I&S fund).

### **Attorney General Opinion JM-142**

Attorney General Opinion JM-142 involved a water control and improvement district with a surplus in its I&S fund. Tex. Att’y Gen. Op. No. JM-142 (1984). At issue in the opinion was the question whether the district could spend the surplus on any lawful purpose of the district. *See id.* at 2–3. After noting a lack of direct authority and after considering judicial opinions from other states where surplus moneys in an I&S fund could be expended only where the expenditure was specifically authorized by statute, the opinion rejected the proposition and concluded that surplus I&S moneys may be refunded to taxpayers. *Id.* at 7. It added “in the event that such refund is impracticable,” the “surplus levy may be transferred to the general maintenance fund.” *Id.* (citing *Morton v. Baker*, 494 S.W.2d 122 (Ark. 1973); *Lawrence v. Jones*, 313 S.W.2d 228 (Ark. 1958)) (noting that funds in the maintenance fund could be spent only as authorized by the Water Code).<sup>4</sup>

### **District’s Surplus**

The District informs us that it “paid off all debt for which Interest and Sinking ad valorem taxes were assessed” during the 2019–20 fiscal year, but still had moneys in its I&S fund. Marek Letter at 3 (quoting Exhibit B at 29). The District believes the surplus resulted from the erroneous setting of the tax rate higher than necessary to retire the bond debt.<sup>5</sup> *See id.* The District explains that the surplus comprises two distinct amounts: (1) the money that existed as of the end of the 2020 fiscal year; and (2) additional money coming into the fund as a result of the tax levy in October of 2020 that taxpayers still paid. *Id.* In reliance on Opinion JM-142, the District undertook a fact-finding inquiry into the feasibility of a refund, concluding it was impracticable to refund the moneys in the first amount because of the difficulty of determining when the surplus accrued and to which specific taxpayers the surplus was attributable. *See id.* But the District concluded that it was practicable to refund the moneys in the second amount because the tax assessor-collector could furnish a list of taxpayers and their payments on the October 2020 levy. *Id.* The District later learned that the tax assessor-collector could not furnish a list of taxpayers and their 2020 payments. *Id.* It reconsidered the question of the practicability of a refund as to the second amount and determined that a refund of the second amount was also impracticable. *See id.* Then the District approved a transfer of a portion of the money from the two amounts to the general maintenance fund. *Id.*

Subsequently, the tax assessor-collector’s office informed the District that it could, after all, provide a list of the taxpayers who had paid and in what amounts and gave that list to the District in February of 2022. *Id.* at 4. But upon review of the list, the District’s two administrative employees determined that the list contained inconsistencies too numerous and significant to sort out when compared to the public records of tax payments. *Id.* Given the nature of the inconsistencies and the capacity of the two employees, the District contemplates reaffirming its

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<sup>4</sup>You do not ask us to reconsider or expand the options for disposing of surplus I&S moneys set forth in Opinion JM-142. *See generally* Marek Letter at 1–5. We note, however, that the reasoning in JM-142, issued over 50 years ago, was based solely on other states’ case law rather than on a plain text reading of the operative Texas statute. This office may in the future consider overruling or withdrawing Opinion JM-142 to the extent it is inconsistent with current Texas law or principles of statutory construction employed by modern Texas courts.

<sup>5</sup>You do not ask, and we do not opine on any issues regarding the miscalculation of taxes.

determination that a refund of the second amount is impracticable but inquired about an alternative use. *Id.* The District specifically asks whether it can “maintain the surplus in the I&S fund and use it to reduce the amount owed on a future issuance of bonds . . . without finding that a refund would be impracticable[.]” *Id.*

### Analysis

As a water control and improvement district created under the authority of article XVI, subsection 59(a) of the Texas Constitution, the District has only those powers expressly granted by statute or implied as an incident to its express powers. *See Franklin Cnty. Water Dist. v. Majors*, 476 S.W.2d 371, 373 (Tex. App.—Texarkana 1972, writ ref’d n.r.e.); *Harris Cnty. Water Control & Improvement Dist. No. 58 v. City of Houston*, 357 S.W.2d 789, 795 (Tex. App.—Houston 1962, writ ref’d n.r.e.). Irrespective of Opinion JM-142, neither article XVI, section 59 of the Texas Constitution nor Water Code chapter 51 authorize the District to expend surplus I&S fund moneys as it suggests. *See generally* TEX. CONST. art. XVI, § 59; TEX. WATER CODE §§ 51.001–.875. In particular, subsection 51.436(b) does not include the servicing of potential future bond indebtedness as an authorized use of moneys in an I&S fund. TEX. WATER CODE § 51.436(b). Additionally, Water Code chapter 49, which is generally applicable to all water districts, contains no provision authorizing such use of surplus I&S fund moneys. *See generally id.* §§ 49.001–.512. The Legislature knows how to authorize the expenditure of surplus moneys in an I&S fund, and it made no provision for an expenditure such as the District describes. *See, e.g.*, TEX. GOV’T CODE § 1471.028 (providing express authority to a county to expend surplus funds in an I&S fund); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 885 (Tex. 2000) (relying on principle of statutory construction that the Legislature knows how to enact laws effectuating its intent).

The Texas Supreme Court considered a similar surplus in a hospital district’s I&S fund and stated that the hospital district holds “in trust for the bondholders taxes levied specifically to retire certain bonded indebtedness” and that such funds could be used for no purpose other than “the retirement of that bonded indebtedness.” *Bexar Cnty. Hosp. Dist. v. Crosby*, 327 S.W.2d 445, 448 (Tex. 1959). Relying on the *Bexar County* opinion, prior opinions from this office concluded that “absent specific statutory authority to the contrary, mon[ey]s in an interest and sinking fund may be used for no other purpose than the one for which it was created.” Tex. Att’y Gen. Op. No. DM-66 (1991) at 4; *see also* Tex. Att’y Gen. Op. Nos. JH-1254 (1978) at 2, M-841 (1971) at 2. Accordingly, a court would likely conclude that a water control and improvement district may not spend surplus I&S moneys to reduce a future potential bond indebtedness. Moreover, while we generally do not determine facts in attorney general opinions, we encourage the District to reassess the feasibility of providing a refund of the surplus moneys to taxpayers.

**S U M M A R Y**

A court would likely conclude that a water control and improvement district may not use surplus moneys in its interest and sinking fund to reduce indebtedness related to a future potential bond issuance.

Moreover, while we generally do not determine facts in attorney general opinions, we encourage the District to reassess the feasibility of providing a refund of the surplus moneys to taxpayers.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON  
Attorney General of Texas

BRENT E. WEBSTER  
First Assistant Attorney General

LESLEY FRENCH  
Chief of Staff

D. FORREST BRUMBAUGH  
Deputy Attorney General for Legal Counsel

AUSTIN KINGHORN  
Chair, Opinion Committee

CHARLOTTE M. HARPER  
Assistant Attorney General