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Opinion Committee

June 29, 1994

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I.D.# 27339

The Honorable Dan Morales
Attorney General of Texas
Office of the Attorney General
Price Daniel, Sr., Building
Austin, Texas

Dear General Morales:

This letter is to request your opinion on certain matters pertaining to the proper division of funds collected on behalf of the Public Free School Fund. The General Land Office receives, from time to time, inquiries from individuals who offer to provide information about the location of, or method of collecting, funds that are due to the Public Free School Fund. Often these individuals wish to condition their offer on entering into a contract with the State under the provisions of Section 403.0195 of the Texas Government Code. This statute, passed in 1991, provides for rewards of up to five percent of the amount recovered to those who provide information about uncollected amounts due to the State. It does not appear to have been the subject of any appellate decision or opinion of your Office. The current movement of State government toward privatization has apparently stirred broader awareness and interest in the reward statute, since the number of requests to enter into these contracts has increased over the last few months.

While not all of the requests would qualify those seeking contracts to recover under Section 403.0195, the continuing interest in this procedure raises a fundamental question with regard to the interaction of the statute and the constitutional provisions governing the Public Free School Fund and the two subsidiary funds of which it is composed, the Permanent School Fund and the Available School Fund.

The question for which this Office requires an answer is this:

> Can a reward, otherwise payable pursuant to a contract made in compliance with Section 403.0195 of the Government Code, be paid from funds that are collected for the Public Free School Fund ("the Fund")?

Garry Mauro
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Texas General Land Office

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The underlying issues that appear to require resolution in order to answer this question include:

> At what point do funds due to the Fund actually become a part of the Fund, i.e., when they are found to be owed to the Fund but not collected, at the time of collection, or upon deposit into the Treasury with directions to deposit them to the Fund or the appropriate subsidiary fund?
>
> If funds recovered are required by law to be deposited to the Permanent School Fund, is the payment of a reward under Section 403.0195 of the Government Code a use of funds from the Permanent School Fund for a purpose other than the support of the public schools?
>
> If the funds recovered are required by law to be deposited to the Available School Fund, is the payment of a reward under Section 403.0195 of the Government Code a use of funds from the Available School Fund for a purpose other than the support of the public schools or the "administration" of the Permanent School Fund?

Article 7 of the Constitution of 1876 established the Fund and controls its use. Article 7, Section 2, provides that the Fund is composed of "[a]ll funds, lands and other property heretofore set apart and appropriated for the support of public schools; ... and all sums of money that may come to the State from the sale of any portion of the same,...." Proceeds from the "sale" of lands from the Fund have long been considered to include revenue from the mineral and surface leases. See, *State v. Hatcher,* 115 Texas 332, 281 S.W. 192 (1926) (mineral revenue from University lands must be deposited to permanent, not available, university fund).

Article 7, Section 4, provides for the "sale" of lands "set apart" to the Fund and requires that unless used for the acquisition of additional lands for the Fund, that "the proceeds shall be invested by the treasurer...as prescribed by law." The use of the funds is prescribed by Article 7, Section 5, which allocates the Fund between the "permanent school fund" consisting of "[t]he principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund," and the "available school fund" consisting of "all the interest derivable therefrom and the taxes herein authorized and levied." Art. 7, Sec. 5(a), Tex. Const. (Vernon 1993).

Section 5(a) goes on to provide that "[e]xcept as provided by this section, no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever." Section 5(b) allows the permanent

school fund and its income to be used to guarantee certain school bonds; Section 5(c) allows appropriation of "part of the available school fund for administration of the permanent school fund" and the bond guarantee program; and Section 5(d) provides for the sale, exchange, and other management of the invested funds. Other than these three specific uses, there is no exception to the prohibition on the diversion of funds to "other purposes."

The reward statue provides that, upon recovery of any money or property by the State as a result of information provided pursuant to the statute, the contracted-for amount is placed in the Comptroller's operating fund, and the balance is deposited to the fund to which it is due. Sec. 403.0195(e), Tex. Gov't. Code Ann. (Vernon Supp. 1994). This is an "appropriation" of the funds. 72nd Leg., R.S., ch. 286, sec. 3, 1991 Tex. Gen. Laws 1191 at 1192.

Unless money recovered for the Public Free School Fund does not become a part of the Fund until it is actually deposited into it, it is difficult to reconcile the division of such money as provided by the reward statute with the constitutional directives set out above. Such a diversion could be made from the Permanent School Fund only by defining the purpose of the reward to be for the support of the public schools.

Although early cases hold that the Legislature may allow certain uses of the <u>lands</u> held by the Fund for purposes other than for the direct production of revenue for the Fund, these cases are best read as reconciling the conflict between the State's need both to encourage settlement and the need to obtain the greatest possible income for the Fund. *Imperial Irrigation Co. v. Jayne*, 104 Tex. 395, 138 S.W. 575 (1911) (Legislature may validly grant easements across public school lands for irrigation reservoirs and canals); *Texas Central Railway Co. v. Bowman*, 97 Tex. 417, 79 S.W. 295 (1904) (Grants of rights of way to railroads across public school lands held to be valid exercise of legislative authority.) In *Imperial Irrigation* and *Bowman* the Supreme Court emphasized the strength of the policies determining the uses with which the school land was being burdened and the relatively small impact (or indeed, the benefit to) of those uses on the value of the School Fund lands. There appear to be no similar cases in which the <u>proceeds</u> of the sale or lease of school lands has been allowed to be diverted and not placed in the permanent school fund. See, for example, *Lockhart v. A. W. Snyder & Co.*, 139 Tex. 411, 163 S.W.2d 385 (1942) (Contract for purchase of road improvement bonds by State Board of Education providing a premium to bidder held unenforceable.)

The bounties provided for by the Government Code might be considered to be part of the costs of the "administration" of the Permanent School Fund, and thus

payable out of any portion of a recovery allocated to the Available School Fund as provided by Article 7, Section 5(c). Depending on the nature of the recovery, interest accrued and collected as a part of the recovery would be allocated to the Available School Fund. However, the amount of the interest deposited to the Available School Fund might not be sufficient to pay the reward contemplated by a contract.

There appear to be neither cases nor opinions of your Office defining what expenditures from the Available School Fund are administrative expenses since the constitutional amendment allowing use of the available fund for this purpose was passed. (Opinions prior to that time appeared to limit strictly such uses. Op. Tex. Att'y Gen. No. V-147 (1947) (Payment of health insurance premiums for teachers is a "purpose other than the support of the public free schools."); Op. Tex. Att'y Gen. No. O-3541 (1941) (State Department of Education could not be funded from the available fund.). The Legislature has, however, since the addition of subsection (c) provided appropriations from the available fund for the management of the permanent fund. See, for example, 73rd Leg., R.S., ch. 1051, art. III, sec. 1 (at pp. III-8, 9), 1993 Vernon Tex. Sess. Law Serv. 4521 at 4990, 4991 (S.B.5); 71st Leg., 2nd C.S., ch. 19, art. III, sec. 1 (at pp. III-12, 15), 1991 Tex. Gen. Laws 365 at 787, 790 (H.B.1) (appropriations from available school fund for administrative and capital expenditures).

I look forward to receiving your opinion on this question of law.

Sincerely,

Garry Mauro

Garry Mauro
Texas Land Commissioner

GM/sck