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OPINION COMMITTEE

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Texas House of Representatives
Committee on Business & Industry

FILE # ML-47724-15

I.D. # 47724

April 20, 2015

Hon. Ken Paxton
Texas Attorney General
P.O. Box 12548
Austin, TX 78711-2548

RQ-0021-KP

Dear General Paxton:

I respectfully submit a request for an Attorney General's Opinion as Chairman of the House Committee on Business and Industry regarding the financing of Port Isabel-San Benito Navigation District efforts to maintain, operate, improve, build, and dredge various port facilities belonging to the navigation district.

I have enclosed a letter of opinion request as well as other background material provided by the Port Isabel-San Benito Navigation District's counsel. The navigation district is located in my legislative district.

As always, thank you for your assistance and consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "René O. Oliveira".

Rene O. Oliveira
Chairman

House Committee on Business and Industry

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April 17, 2015

Hon. Ken Paxton
Texas Attorney-General
P.O. Box 12548
Austin, Texas 78711-2548

SENT BY EMAIL
("michael.gray@house.state.tx.us")

RE: Request By The Texas House Committee
On Business & Industry For A Texas
Attorney-General's Opinion Regarding
The Financing Of Port Isabel-San
Benito Navigation District (PISBND)
Efforts To Maintain, Operate,
Improve, Build & Dredge Various
(PISBND) Port Facilities

Texas Attorney-General Paxton:

I serve as corporate counsel to the Port Isabel-San Benito Navigation District (hereafter "PISBND"), which was established as an Article III, Section 52 (of the Texas Constitution) Navigation District, under the predecessor statute to Tex. Water Code Ann. § 61.001, et seq. (Vernon 2004; Vernon Supp. 2014) (Article III, Section 52 Navigation Districts), which was converted, under the predecessor statute to Tex. Water Code Ann. § 63.039 (Vernon 2004) (Conversion Of District), years ago (in 1939), to a Self-Liquidating Navigation District, under (what is now) Tex. Water Code Ann. § 63.001, et seq. (Vernon 2004; Vernon Supp. 2014) (Self-Liquidating Navigation Districts).

It should be noted that the aforesaid "conversion" was confirmed and ratified by the PISBND Navigation & Canal Commission (the "Commission"), in 1985, in a PISBND Resolution, a copy of which is attached (as Item 4).

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In the last several months, the PISBND Port Director (General Manager) has been considering different avenues to provide for the financing of dredging in and near the District, which is located in Port Isabel, Cameron County, Texas, near the Gulf of Mexico, the Brownsville Ship Channel and the Intracoastal Waterway, which has been (traditionally) maintained by the U.S. Government, by and through the U.S. Army Corps of Engineers, but, as of late, the funding has been significantly reduced.

Moreover, this financing involves, in addition to dredging, upgrading docks and roads, the construction of additional docks, the maintenance of the Port, the operation of the Port, making improvements to the Port, and possibly constructing different buildings or facilities at the Port.

In connection with the financing of the said items set forth above, I was asked to review the ability of PISBND to utilize a Maintenance and Operation Tax, under Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), to finance the said projects; as corporate counsel, I prepared and provided a Memorandum Of Law and discussed (with the Port Commissioners, at a later Commission Meeting) these matters.

After I advised the Port Commission about these matters, I was advised, by the PISBND Port Director (General Manager), that the Port Commission wanted to have this "financing," for the various Port projects, reviewed (and "confirmed") by the Texas Attorney-General's office, in regard to certain propositions that were discussed with the Port's Commissioners, Director (General Manager) and corporate counsel, as to whether those propositions were consonant with applicable Texas law.

Understanding that Tex. Gov't Code Ann. § 402.042 (Vernon Supp. 2014) (Questions of Public Interest and Official Duties) (Vernon Supp. 2014) limits who can present the Texas Attorney-General with a request for an Attorney-General's Opinion, I made contact with our local State Representative, the Honorable Rene O. Oliveira, Jr., who is the Chairman of the (Texas) House Committee On Business & Industry, through his "legislative liaison," and they agreed to present this request for an Attorney-General's Opinion, in accordance with the foregoing statute.

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This letter will provide you with a thorough background about this matter, and will contain three legal questions, for your consideration, primarily to confirm that PISBND is following the applicable law, and that PISBND is acting in accordance with the statutes governing PISBND as to financing the said Port projects.

* * *

PISBND, as a Self-Liquidating Navigation District, operates under Tex. Water Code Ann. § 63.001, et seq. (Vernon 2004; Vernon Supp. 2014) (Self-Liquidating Navigation Districts), which has two Subchapters, Subchapter E (General Fiscal Provisions) and Subchapter G (Tax Provisions), which address certain financing mechanisms for PISBND.

Tex. Water Code Ann. § 63.221, et seq. (Vernon 2004) (Subchapter E. General Fiscal Provisions) provides for the use of bonds (which is not intended for PISBND financing), a construction and maintenance fund, creating debt, and borrowing money, which does not address ad valorem property taxation.

Tex. Water Code Ann. § 63.281, et seq. (Vernon 2004) (Subchapter G. Tax Provisions) provides for a Bond Tax (which is not relevant to this discussion) and a Maintenance and Operation Tax (which is very relevant to this discussion). See Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax) (which is addressed below). There are a few other statutes in that subchapter, but they are not relevant to this inquiry.

Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax) provides that:

"(a) With the approval of the electors of the district, the commission may levy and have assessed and collected for the maintenance, operation, and upkeep of the district and its improvements an annual tax of not more than 20 cents on the \$100 valuation on all taxable property in the district."

"(b) The proposition to approve the tax provided in Subsection [a] of this section may be voted on ... at a separate election to be held in the manner provided for elections held under ... this chapter [as has been updated, if not superseded, by the Texas Election Code]."

"(c) The ballots for the election shall be printed to provide for voting for or against the [following] proposition: 'The levy of a tax of not more than 20 cents on the \$100 valuation for maintenance, operation, and upkeep of the district and its improvements.'" Tex. Water Code Ann. § 63.282 (Vernon 2004). See Black's Law Dictionary 610 (Rev. 4th ed. 1968) ("Elector. A duly qualified voter; ... ; a constituent. One who elects or has the right of choice, or who has the right to vote for ... the adoption of any measure.").

* * *

There is a Subchapter H in Chapter 63 of the Texas Water Code that addresses "Assessments"; however, it appears that all of those statutes have been "transferred to" and "superseded" by the Texas Tax Code, particularly the portions of the Tax Code that address (in great detail) ad valorem property tax assessments and collection, which is handled by the Cameron County Appraisal District (as to the tax assessments) and Cameron County, etc. (as to the tax collections). See Tex. Water Code Ann. § 63.321, et seq. (Subchapter H. Assessments).

The foregoing statutes are still set forth in the Texas Water Code, indicating that the said statutes, particularly Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), are in full force and effect.

It should be noted that a similar statute exists, for all types of water districts. See Tex. Water Code Ann. § 49.107 (Vernon 2008) (Operation and Maintenance Tax). See also Tex. Water Code Ann. § 49.002 (a) (Vernon 2008) (Applicability) ("... this chapter [49] applies to all general and special law [water] districts to the extent that the provisions of this chapter does not directly conflict with a provision in any other chapter of this code In the event of such conflict, the specific provisions in such other chapter ... shall control.") (as such, Chapter 63 of the Texas Water Code will control this matter, and not Chapter 49).

* * *

In accordance with the foregoing statutes, PISBND can utilize ad valorem property taxes to cover "maintenance and operation"

costs, the costs of dredging, the normal operations of PISBND, the maintenance of the Port and the construction of (new) improvements.

Under Chapter 63 of the Texas Water Code, all that would be required for PISBND to establish a "maintenance and operation" tax would be to have conducted an election, which would allow for the adoption of a proposed \$.06/\$100.00 (valuation) tax upon all property located in the District (PISBND).

In any event, the only ad valorem (property) tax statute that affects or governs PISBND is Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax) (which is addressed and set forth above).

The said statute, Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), is only applicable to Chapter 63 (of the Texas Water Code) Navigation Districts, such as PISBND.

* * *

The said statute (§ 63.282) does not require the approval of anyone, such as the Cameron County Commissioners Court, with the sole exception of the voters that reside in the District (PISBND); also, while the tax at issue could be as high as a \$.20/\$100.00 valuation as to all PISBND property, only a \$.06/\$100.00 valuation as to all PISBND property would be sought by PISBND, to insure that PISBND would have adequate funding for (as appropriate) the construction, dredging, maintenance and operation needs at the Port, which could also involve a reduction in the tax rate, as advisable, over the years, to provide sufficient funds for PISBND maintenance and operation needs in the future.

Obviously, the proposed (or estimated) tax would be very small (at a six cents per one-hundred dollars valuation), so it would have been relatively easy to obtain voter approval of a tax which seeks to collect a minute amount of money from the various property owners in the PISBND, in light of the minimal funding that would be collected to finance the construction, dredging, maintenance and operation needs of PISBND.

That is to say, the prior adoption of an ad valorem property tax for PISBND was not rejected, as it was presented as a small yet necessary tax to maintain, operate, upgrade and improve the Port Of Port Isabel - San Benito.

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It has been confirmed that this tax was previously adopted (in late 1935) by PISBND, and the voters, eliminating the need for an election (at this time or any time) to implement this tax, for the reason that this tax was already approved and adopted (many years ago).

In substantiation of the said "confirmation" of a prior election, for PISBND to have an ad valorem property tax, attached to this letter (as Item 1) is a copy of an 01-14-1969 Resolution of the PISBND Navigation & Canal Commission, confirming that PISBND did collect ad valorem property taxes through foreclosures and subsequent sales; attached to this Memorandum (as Item 2) is a copy of the Minutes of a 09-28-1935 Navigation & Canal Commission Meeting, which also confirms the original adoption of a PISBND ad valorem tax.

Attached to this letter (as Item 3) is a copy of the 05-12-1976 Navigation & Canal Commission Meeting Minutes, which confirms the existence of a "ten cents" tax on real property in the PISBND, which was to be collected by Cameron County, Texas.

Also attached to this letter (as Item 4) is a copy of an 11-13-1985 Resolution of the PISBND Navigation & Canal Commission, confirming the 1939 decision to convert PISBND into a Self-Liquidating Navigation District, and indicating the desire to "ratify" the prior "conversion" of PISBND to a Self-Liquidating Navigation District; this action is amplified by an attachment to this letter (as Item 5), which are PISBND Commission Meeting Minutes of 11-27-1985, which confirms that a Public Hearing was conducted by the PISBND Commission regarding the adoption of Chapter 63 of the Texas Water Code, to enable PISBND to become a Self-Liquidating Navigation District.

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In order to begin the process of the adoption of the proposed ad valorem property tax for PISBND, it would have been necessary (otherwise) that the election date for PISBND would have to be set, as soon as possible, under the Texas Election Code, on a "uniform election date," which would probably be the "second Saturday in May in an odd-numbered year." See Tex. Election Code Ann. § 41.001 (a) (Vernon Supp. 2014) (Uniform Election Dates) (in conjunction with

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the Cameron County Elections Office) (which again, as to PISBND, is now a moot issue).

After the date of the election that otherwise would have been set, if the proposition was approved by the PISBND voters (and property owners), it would have been necessary for PISBND to contract with Cameron County to collect the taxes for PISBND, in accordance with Tex. Tax Code Ann. § 6.22 (c) (Vernon 2008) (Assessor And Collector for Other Taxing Units), and Tex. Tax Code Ann. § 6.23 (a) (Vernon 2008) (Duties of Assessor and Collector), and further, to contract with the Cameron County Appraisal District to assess and value the real property within the boundaries of the PISBND, in accordance with Tex. Tax Code Ann. § 6.06 (d) - (h) (Vernon 2008) (Appraisal District Budget and Financing). See Tex. Tax Code Ann. § 6.24 (Vernon 2008) (Contracts for Assessment and Collection) (augmenting the prior statutes).

However, since the PISBND ad valorem tax election was conducted many years ago, all that is required, at this time, after the appropriate Resolution of the PISBND is approved and adopted, is to enter into the referenced contracts with the Cameron County Tax Assessor-Collector, on behalf of Cameron County, so that Cameron County can collect the real property taxes for PISBND, and with the Cameron County Chief Appraiser, on behalf of the Cameron County Appraisal District, so that the Cameron County Appraisal District can assess and value the real property within the boundaries of PISBND (which it is already doing), with Cameron County, et al.'s tax collection attorneys collecting unpaid taxes, fees and charges from delinquent property owners in the PISBND.

* * *

Once the PISBND Commission reinstates the ad valorem property tax in the PISBND, with a Resolution, and adopts the appropriate tax rate (e.g., .06/\$100.00 valuation), all that remains would be the two contracts addressed above, in order to enhance PISBND revenues, for the various reasons set forth above.

It would be necessary to have an Agenda Item, after the questions to the Texas Attorney-General's office are addressed, at a future PISBND Commission Meeting, to discuss the reactivation of the ad valorem property tax in PISBND, at the tax rate of \$.06/\$100.00 valuation, by including the same in the Agenda for the relevant meeting.

* * *

Having explained above that PISBND is considering the reactivation of the ad valorem property tax in the District, for the reasons indicated, the PISBND Commission has asked me, as corporate counsel, to have the proposed tax reactivation reviewed by the Texas Attorney-General's office's Opinion Committee, to confirm that PISBND's position(s) in this matter conforms to any pertinent laws, which fundamentally involve the following three (3) questions, which will be answered below and supported by relevant legal authorities.

* * *

The three questions (I, II & III) are as follows:

I.

A.

As PISBND was formed in 1928-1929 and had an election at that time to allow for taxation (by and through a tax levy), which continued (at different rates) until 1976, and, on or about June 8, 1939, the PISBND Port Commission chose to convert the (originally designated) Article III, Section 52 Navigation District to a Self-Liquidating Navigation District, under Tex. Water Code Ann. § 63.039 (Vernon 2004) (Conversion of District), when that conversion was completed, was the election, to adopt a tax levy, on December 29, 1928, under (the predecessor to) Tex. Water Code Ann. § 61.236 (Vernon 2004) (Tax Levy), sufficient to "carry over" that tax levy to PISBND, after it had converted to a Self-Liquidating District?

B.

The answer to the foregoing question is addressed in Tex. Water Code Ann. § 63.044 (Vernon 2004) (Effect of Conversion) ("If the finding of the commission is favorable to the resolution, the commissioners shall have the same right, power and authority to act under the provisions of this chapter [63] adopted by the resolution as if the district had originally come within the scope of this chapter."). See Tex. Water Code Ann. § 63.039 (Vernon 2004) (Conversion of District) ("Any navigation district organized under the provisions of Article XVI, Section 59, of the Texas Constitution, or Article III, Section 52, of the Texas

Constitution, and not originally within the scope of this chapter, may be converted into a self-liquidating district operating under this chapter in the manner provided in Sections 63.040-63.044 of this code.").

C.

Therefore, as a tax levy had been previously authorized by the voters, in 1928-1929, when PISBND was already operating as an Article III, Section 52 Navigation District, when PISBND converted (in 1939) to a Self-Liquidating Navigation District, while PISBND became (by conversion) a Self-Liquidating Navigation District, all prior acts of PISBND continued, although the tax statute at issue for PISBND is now Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax).

II.

A.

As a Self-Liquidating Navigation District, operating under Chapter 63 of the Texas Water Code (Self-Liquidating Navigation Districts), PISBND has the authority to levy a Maintenance & Operation Tax for PISBND, under Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), in order to maintain, operate and "upkeep" the District and its improvements; does this grant of authority allow the relevant (tax) funds to be used for new construction projects, such as building a new dock or a new warehouse, as well as "new" (virgin land) dredging of a Port Channel and also providing "maintenance" dredging for existing waterways in PISBND?

B.

The answer to the foregoing question is addressed in Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), as well as the Texas Code Construction Act, which is set forth in Tex. Gov't Code Ann. § 311.001, et seq. (Vernon 2013) (Code Construction Act). See Tex. Gov't Code Ann. § 311.021 (Vernon 2013) (Intention in Enactment of Statutes) ("In enacting a statute, it is presumed that: [1] compliance with the constitutions of this state and the United States is intended; [2] the entire statute is intended to be effective; [3] a just and reasonable result is intended; [4] a result feasible of execution is intended; and [5]

public interest is favored over any private interest.") (it appears that the "maintenance and operation tax" statute conforms to the requirements of the Code Construction Act).

C.

Therefore, under the clear wording of Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), the maintenance and operation tax revenues may be utilized for the "maintenance, operation, and upkeep of the district and its improvements. . . ." Id. at (a), as well as the "maintenance, operation, and upkeep of the district and its improvements," Id. at (c); taking into account the definition of the word "Construct," See Black's Law Dictionary 386 (Rev. 4th ed. 1968) ("Construct. To build; erect; put together; make ready for use. . . . 'Construct' is distinguishable from 'maintain,' which means to keep up, to keep from change, to preserve. . . . Under a broad interpretation, however, 'construct' may be synonymous with maintain, repair, or improve. . . ."), it appears that dredging involves both maintenance and upkeep of the Port, and that construction (which is "synonymous" with maintaining, repairing or improving) at the Port is (well) within the parameters of the said statute, Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), such that the said tax funds can be used for new (Port) construction projects, such as dredging and constructing new buildings or a new dock.

III.

A.

As a Self-Liquidating District, operating under Chapter 63 of the Texas Water Code (Self-Liquidating Districts), PISBND has the authority to levy a Maintenance & Operation Tax for PISBND, under Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), in order to maintain, operate and upkeep the District and its improvements; does this grant of authority require PISBND to obtain the permission of the Cameron County Commissioners Court to "set or authorize" that tax?

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B.

The answer to the foregoing question is (again) addressed in Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), which provides, in pertinent part, that:

"(a) With the approval of the electors of the district, the [Port] commission may levy and have assessed and collected for the maintenance, operation, and upkeep of the district and its improvements an annual tax of not more than 20 cents on the \$100 valuation on all taxable property in the district."

* * *

C.

Therefore, under the clear wording of Tex. Water Code Ann. § 63.282 (Vernon 2004) (Maintenance and Operation Tax), as the "electors" (voters) approved of the said maintenance and operation tax in 1929, in accordance with a predecessor statute to the said statute, and there being no reference in that (1971) statute (§ 63.282) to the (Cameron) County Commissioners Court, it appears that this statute, as written, overcomes the need for approval of anyone, such as the Cameron County Commissioners Court, with the sole exception of the voters that reside(d) in the District (PISBND), indicating that the Cameron County Commissioners Court has no such authority over PISBND.

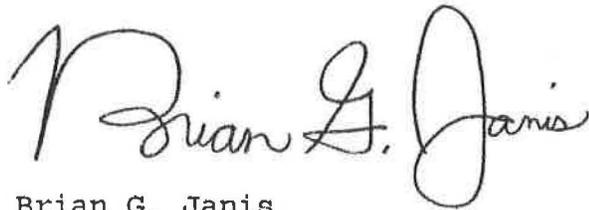
* * *

I respectfully request that your office confirm that the foregoing points of law are correct, as explained (and set forth) above, to enable the PISBND Navigation & Canal Commission to proceed with utilizing legally authorized financing mechanisms (i.e., the maintenance and operation tax) to provide for the maintenance, operation and upkeep of the District and its improvements, as well as repairing the same and providing dredging of Port channels and the like, as mentioned above.

Should you have any questions, or require further information, please contact me. I look forward to hearing from you. Thank you for your courtesies.

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Sincerely,

A handwritten signature in black ink that reads "Brian G. Janis". The signature is written in a cursive style with a large, looped initial "B".

Brian G. Janis
PISBND Corporate Counsel

BGJ/mo
enc.

cc: Hon. Rene O. Oliveira, Jr. SENT BY EMAIL
Texas State Representative/ (michael.gray@house.state.tx.us)
District 37
(c/o Tony Gray)

Mr. Steven B. Bearden SENT BY EMAIL
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