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ARIZONA ATTORNEY GENERAL

DEPARTMENT OF LAW OPINION NO. 71-37 (R-86)

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REQUESTED BY: WILLIAM N. PRICE  
State Highway Engineer  
Arizona Highway Department

QUESTION: Does Chapter 51 of the Laws of 1971 (House Bill 10) result in an unlawful diversion of moneys of the highway fund in violation of Article 9, Section 14, of the Arizona Constitution, insofar as the Highway Department is required initially to bear all expenses incurred while participating in search or rescue missions?

ANSWER: No.

Chapter 51 of the Laws of 1971 (House Bill 10) was signed into law by the Governor on April 12, 1971. The bill is entitled "AN ACT RELATING TO DISASTER PREPAREDNESS, SEARCH OR RESCUE; ETC." and repeals Title 26, Chapter 2, Arizona Revised Statutes, which related to Civil Defense.

The Act basically provides for participation by various state agencies and political subdivisions of the state in search or rescue missions and other emergency activities. Participation by the State Highway Department is provided for in A.R.S. § 18-109.B, subparagraph 4, which vests the State Highway Director with the power and duty to:

"4. Prescribe procedures for use of department personnel, facilities, equipment, supplies and other resources in assisting search or rescue operations on request of the state director of emergency services."

The Act also contains comprehensive provisions governing the payment of expenses incurred by state agencies and political subdivisions participating in search or rescue and

other emergency activities. These provisions, which will be discussed in detail later in the opinion, basically set forth the conditions for reimbursing participating state agencies and political subdivisions for incurred expenses.

The Act further establishes the Division of Emergency Services as a state agency within the Governor's office to coordinate emergency services rendered by the various participating state agencies and political subdivisions. Among the powers of the Director of Emergency Services is that of promulgating rules and regulations to implement the Act, A.R.S. § 35-192.01. Pursuant to this rule-making power, the Director has promulgated Search or Rescue Rules and Regulations, which were adopted and filed with the Secretary of State on September 7, 1971. Part 6 of the Rules relates to reimbursement of a department of the state for operational expenses. Paragraph 6.01 thereof provides:

"Expenses incurred as a result of participation in search or rescue missions may be initially borne by the respective state department. Reimbursement to such departments will be governed by Sec. 35-192.01B and Civil Defense Administrative Order Number 21. Claims should be submitted within 21 calendar days after the close or suspension of the mission. Described herein are eligible and ineligible items. Determination on additional items will be made within the framework of this guidance."

The narrow problem presented herein is whether the provisions of the Act relating to financing and payment of search or rescue mission expenses, as read in conjunction with the foregoing rule, require the Highway Department to divert highway funds in violation of existing constitutional and statutory provisions limiting the expenditure of highway funds.

These limitations, which are summarized below, have been discussed at length in several previous Attorney General opinions in various contexts. See Attorney General Opinions No. 66-22-L, No. 67-21, No. 69-4 and No. 69-14.

The basic limitation attached to the expenditure of highway funds is contained in Article 9, Section 14, of the Arizona Constitution, which provides:

"§ 14. Use and distribution of vehicle, user, and gasoline and diesel tax receipts

"Section 14. No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, shall be expended for other than highway and street purposes including the cost of administering the state highway system and the laws creating such fees, excises, or license taxes, statutory refunds and adjustments provided by law, payment of principal and interest on highway and street bonds and obligations, expenses of state enforcement of traffic laws and state administration of traffic safety programs, payment of costs of publication and distribution of Arizona highways magazine, state costs of construction, reconstruction, maintenance or repair of public highways, streets or bridges, costs of rights of way acquisitions and expenses related thereto, roadside development, and for distribution to counties, incorporated cities and towns to be used by them solely for highway and street purposes including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development, of county, city and town roads, streets, and bridges and payment of principal and interest on highway and street bonds. As long as the total highway user revenues derived equals or exceeds the total derived in the fiscal year

ending June 30, 1970, the state and any county shall not receive from such revenues for the use of each and for distribution to cities and towns, fewer dollars than were received and distributed in such fiscal year. This section shall not apply to moneys derived from the automobile license tax imposed under section 11 of article IX of the Constitution of Arizona. All moneys collected in accordance with this section shall be distributed as provided by law." (As amended, election Nov. 3, 1970.)

This provision has been implemented by our Legislature in A.R.S. § 18-131 which creates the "state highway fund" and places all highway users revenue and taxes in the fund, and further by A.R.S. § 18-132 which expressly limits Highway Commission expenditures from the highway fund to a "budget law" and enumerates the highway purposes for which the highway fund may be used.

In recognizing and emphasizing the limitations attached to the expenditure of moneys from the state highway fund, as set forth in the foregoing provisions, our Supreme Court, in Arizona State Highway Commission v. Nelson, 105 Ariz. 76, 459 P.2d 509 (1969), recently stated:

". . . [I]t is important to emphasize that it was the voters themselves who created the State Highway Fund in 1952, irrevocably earmarking certain motor vehicle taxes and fees for highway uses only and specifically providing for their expenditure for 'highway obligations.' The State Highway Fund is not available for general state appropriations. \* \* \*"

It seems clear that search or rescue operations do not come within the purview of the specified highway purposes contained in the above constitutional and statutory provisions, and that the expenditure of highway funds for search or rescue operations would clearly constitute an unlawful diversion of highway funds.

It is also clear from the rule contained in Paragraph 6.01, supra, that all expenses incurred by the Highway Department as a result of its participation in search or rescue missions are initially incurred against the highway fund. The lawfulness of the initial incurrence of the subject search or rescue expenses against the highway fund therefore hinges upon the adequacy of the provisions of the Act governing subsequent reimbursement of such expenses from the general fund. These provisions are found in A.R.S. §§ 26-313, 35-192 and 35-192.01, as amended.

A.R.S. § 26-313 generally provides for reimbursement to state agencies for funds expended for various emergency activities, including search or rescue missions, as follows:

"Reimbursement to any state agency for state funds expended in the performance of any and all activities as set forth in this chapter shall be made in accordance with § 35-192."

A.R.S. § 35-192, subsections A and B specifically authorize the Governor, in the event of certain described types of disasters and after declaring an emergency, to incur liabilities for specific types of disasters and provides that such liabilities shall be paid as claims against the state from the general fund.

Subsection C of A.R.S. § 35-192 expressly authorizes the incurrence of liabilities, payable as claims against the general fund, for search or rescue missions:

"C. When authorized by the governor, specific liabilities and expenses provided for in this section may be incurred against and be paid as claims against the state from the general fund to meet contingencies and emergencies arising from search or rescue operations conducted pursuant to § 11-251.02, subsection C of § 11-441 or § 26-306 subject to the limitations provided in § 35-192.01."

Subsection F goes on to set forth the limitations attached to the incurrence of liabilities provided for under A.R.S. § 35-192:

"F. All liabilities incurred under the provisions of this section shall be subject to the following limitations:

"1. No liability shall be incurred against the fund without the approval of the governor for each contingency or emergency.

"2. Incurring of liabilities in excess of fifty thousand dollars in any single contingency or emergency shall not be made without consent of a majority of the members of the state emergency council.

"3. The aggregate amount of all liabilities incurred under the provisions of this section shall not exceed seven hundred fifty thousand dollars in any twelve-month period.

"4. Obligation of funds under the provisions of this section may be made only when one or more of the following conditions exist:

"(a) No appropriation is available to meet the contingency or emergency.

"(b) An appropriation is insufficient to meet the contingency or emergency.

"(c) Federal funds available for such contingency or emergency require the use of state funds or other public funds."

A.R.S. § 35-192.01 sets forth the procedures to be followed by state agencies and political subdivisions seeking reimbursement of expenses incurred for search and rescue

operations in excess of sums regularly appropriated to such agencies and political subdivisions. Subsection B thereof provides:

"A department of the state which expends funds for search or rescue operations in an amount in excess of that provided for in the regular appropriation and when directed to do so by the governor or state director of emergency services may apply for reimbursement of such excess expenditures to the state director of emergency services under the provisions of § 35-192."

There is no regular appropriation of funds to the Highway Department for expenses incurred as a result of its participation in search or rescue missions, and, accordingly, under the above-quoted subsection, all expenditures incurred by the Highway Department as a result of its participation would clearly be "excess" expenditures within the meaning of Subsection B of A.R.S. § 35-192.01.

The concept of an emergency fund to be used upon authorization of the Governor for various contingencies and emergencies, as contained in the foregoing subsections of A.R.S. § 35-192, as amended by Chapter 51, dates back to 1922. See Laws of 1922, Chapter 35, Section 10, page 174. Since that time, our Supreme Court has consistently construed these predecessor statutes to A.R.S. § 35-192, as amended by Chapter 51, as establishing an appropriation of funds from the general fund to be used for paying expenses incurred in connection with certain defined emergencies and contingencies after the Governor has declared an emergency and authorized incurrence of the expenses. LeFebvre v. Callaghan, 33 Ariz. 197, 263 P. 589 (1928); Crane v. Frohmiller, 45 Ariz. 490, 45 P.2d 955 (1935); Prideaux v. Frohmiller, 47 Ariz. 347, 56 P.2d 628 (1936).

In Attorney General Opinion No. 64-19 this office had occasion to comment upon A.R.S. § 35-192, the predecessor to § 35-192 as amended by Chapter 51, and characterized it as being:

"\* \* \* in the nature of a continuing appropriation and is specific as to the maximum amount that may be expended per emergency, thereby satisfying one of the limitations enunciated in Crane [v. Frohmiller], supra, \* \* \*.

"In view of the foregoing, it is the opinion of this office that if monies are available in the general fund, A.R.S. Section 35-192 provides for a continuing appropriation from the general fund of up to thirty thousand dollars per emergency for a series of emergencies, with power vested in the Governor to determine the existence of an emergency and to authorize the incurring of liabilities and expenses under the aforementioned statutes."

The above characterizations of A.R.S. § 35-192, made by both our Supreme Court and this office, as establishing a continuing appropriation of funds from the general fund are likewise applicable to A.R.S. § 35-192, as amended by Chapter 51 of the Laws of 1971.

It therefore follows under the complex scheme of financing contemplated by Chapter 51 and Paragraph 6.01 of the Rules, supra, that although all expenses incurred by the Highway Department as a result of its participation in search and rescue missions are initially incurred against the highway fund, such expenses, when incurred in strict conformance to the conditions prescribed by the Act, are ultimately reimbursable in full with sums appropriated from the general fund.

It is therefore our opinion that Chapter 51 does not require the Highway Department, as a result of its participation in search and rescue missions, to divert highway funds

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in violation of Article 9, Section 14 of the Arizona Constitution, so long as monies are available in the general fund to reimburse the highway fund at the time obligations are incurred against the highway fund.

Respectfully submitted,

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by F.S.

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