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OFFICE OF THE  
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R76-118

BRUCE E. BABBITT  
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*McDougal*

July 13, 1976

76-219

Honorable Ed Sawyer  
State Senator  
State Capitol, Senate Wing  
Phoenix, Arizona 85007

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ARIZONA ATTORNEY GENERAL

Dear Senator Sawyer:

In essence your letter of March 5, 1976 posed the following question:

Is the State obligated to pay money from funds appropriated by the Legislature to the State Department of Health for allocation as state grants to political subdivisions or other eligible applicants of the state for construction of water pollution control facilities where grant agreements had been made prior to the enacted reversion date of June 30, 1974, or should the money revert to the state general fund as prescribed in the appropriation act?

The question posed is one of first impression in this State. It is of tremendous importance, in that it affects future expenditures by the Legislature of like appropriations. The proper operation of fiscal procedures in public finances is of paramount importance to the State of Arizona. In this connection it must be kept in mind that the State is on a cash rather than an accrual system of accounting.

The appropriation in question was made by Laws 1972, Chapter 196, May 24, 1972, to the Department of Health to provide certain matching funds for the construction of water pollution control facilities. By Laws 1973, Chapter 20, March 23, 1973, the original (1972) act was amended by deletion of certain words, as indicated hereinafter by underlining:



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Section 1. Appropriation; purpose

The sum of one million five hundred thousand dollars is appropriated to the state department of health to become immediately available for allocation as state grants to match contributions required of political subdivisions or other eligible applicants of the state in the construction of water pollution control facilities, under the grant program provided in the Federal Water Pollution Control Act (33 USC 466, et seq.).

Sec. 2. Exemption, reversion of funds

The appropriation made by this act is exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations, except that any funds thereof remaining unexpended and unencumbered at the close of June 30, 1974 shall revert to the state general fund.

Sec. 3. Emergency

To preserve the public peace, health and safety it is necessary that the act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

(Effective March 23, 1973)

The appropriation was also made available for the then coming fiscal year of 1973-1974. Laws 1973, Chapter 184, effective May 16, 1973, provided in part:

Section 1. Subject to applicable laws, the sums or sources of revenue herein set forth are appropriated for the fiscal year beginning July 1, 1973, for the purpose and objects herein specified:

\* \* \*

Subdivision 26. Department of Health

\* \* \*

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Environmental health services

\* \* \*

Water pollution treatment facility  
[\$]1,500,000.00

\* \* \*

Sec. 2. For the purpose of this act "\*" means this appropriation is exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing appropriations.

The purpose of the water pollution treatment facility appropriation in Chapter 184 of Laws 1973 is not indicated in the appropriation itself; however, the related material in the Executive Budget Request and the Joint Legislative Budget Committee recommendation provide the background information which the Legislature is presumed to have had in mind when making this appropriation. These references clearly establish that the appropriations for "water pollution treatment facility" in Chapter 184, subdivision 26, was for the same purpose as the appropriation made by Chapter 20, Laws 1973.

It is to be noted that the "\*" referred to by Laws 1973, Chapter 184, Section 2, does not appear in conjunction with the \$1,500,000 appropriation to the Department of Health. Therefore, this indicated that the appropriation was subject to the lapsing provisions of A.R.S. § 35-190. However, the later amendment by Laws 1973, Chapter 20, (effective March 23, 1973) specifically provided that the appropriation was exempt from the provisions of A.R.S. § 35-190, relating to lapsing of appropriations, and further provided that any funds thereof remaining unexpended and unencumbered at the close of June 30, 1974 would revert to the State General Fund. Therefore, the lapsing provisions of A.R.S. § 35-190 have no application to the appropriation under consideration, and such appropriation is controlled by the specific legislative enactment that any funds remaining unexpended or unencumbered at the close of the fiscal year ending June 30, 1974 would revert to the State General Fund.

It has been held that appropriation bills are passed for the support of the state government, and are not legislative acts changing the substantive or general laws of the State. Carr v. Frohmiller, 47 Ariz. 430, 56 P.2d 644 (1936); Arizona Constitution, Art. 4, Pt. 2, § 13. See also State v. Ash, 53 Ariz. 197, 87 P.2d 270 (1939).

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The \$1,500,000 was appropriated to the Department of Health, not to be used directly by the Department but rather to be channeled through and allocated by the Department to those political subdivisions or other eligible applicants who qualified to construct water pollution control facilities. The Department of Health was to determine the exact amount of money which was to be granted to the various applicants and then would submit to the applicant a "Grant Agreement" which could be accepted or rejected by the applicant. The Grant Agreement consisted of three parts: (1) General Information, (2) Approved Budget, and (3) Offer and Acceptance. The Office and Acceptance reads as follows:

THIS GRANT AGREEMENT is subject to applicable Arizona State Department of Health and U.S. Environmental Protection Agency statutory provisions, grant regulations, guidelines and the provisions of this agreement. The grantee organization also agrees that funds awarded will be used solely for the purposes of the project as approved.

The Offer and Acceptance would then be signed and dated by the Award Official of the Arizona State Department of Health, and also by the party by and on behalf of the designated grantee organization.

The appropriation in question is different from most other appropriations in that the money appropriated by the Legislature was to be offered to certain political subdivisions or other eligible applicants as State grants. Therefore, the question arises as to what effect a grant of money by the State has upon the money appropriated for such a grant. Is such money to be treated as other appropriations? Or does something happen as a matter of law which takes grant funds out of the normal class of other appropriations?

The law is well established in regard to grants made by a State. In Fletcher v. Peck, 6 Cranch [10 U.S.] 87, 3 L.Ed. 162 (1810), the United States Supreme Court stated:

\* \* \* Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing,\* \* \* A contract executed is one in which the object

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of contract is performed; and this, says Blackstone, differs in nothing from a grant. \* \* \* A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

6 Cranch at 136.

Compacts lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They are the wellsprings of business, trade and commerce. Without them society as we know it could not go on. The Constitution of the United States wisely protects this interest, public and private, from invasion by State laws. It declares that "No State shall \* \* \* pass any \* \* \* law impairing the obligation of contract." Art. 1, Sec. 10. Our own State has similar constitutional prohibition. Art. 2, Sec. 25, Arizona Constitution provides:

No \* \* \* law impairing the obligation of a contract shall ever be enacted.

In Fletcher v. Peck, supra, Chief Justice John Marshall, also said:

The legislature of Georgia could not revoke a grant once executed. It had no right to declare the law void; that is the exercise of a judicial, not a legislative function. It is the province of the judiciary to say what the law is, or what it was. The legislature can only say what it shall be.

The legislature was forbidden by the Constitution of the United States to pass any law impairing the obligation of contract. A grant is a contract executed, and it creates also an implied executory

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contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant.

6 Cranch at 123.

And Justice Johnson in a concurring opinion in Fletcher v. Peck, said at page 143:

I do not hesitate to declare that a state does not possess the power of revoking its own grants.

Nine years later the United States Supreme Court had occasion to rule again upon the question of grants. In Trustees of Dartmouth College v. Woodward, 4 Wheat. [17 U.S.] 518, 4 L.Ed. 629 (1819), it was said that the ingredients of a contract are parties, consent, consideration and obligation. The question decided in that case has ever after been considered as finally settled in American law. The same doctrine has been often reaffirmed in later cases. The Court held that:

In case of a new charter of grant to an existing corporation, it may accept or reject it as it pleases. It may accept such part of the grant as it chooses, and reject the rest. In the very nature of things, a charter cannot be forced upon anybody. No one can be compelled to accept a grant; and without acceptance the grant is necessarily void. It cannot be pretended that the legislature, as successor to the king in this part of his prerogative, has any power to revoke, vacate, or alter this charter.

4 Wheat. at 560.

In regard to the consideration involved in a grant, the Court further held at 4 Wheat, p. 638:

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant.

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Justice Story, in a concurring opinion in Dartmouth College, supra, stated, beginning at p.682:

In the case of Fletcher v. Peck [6 Cranch 87], this Court laid down its exposition of the word "contract" in this clause [clause of the United States Constitution prohibiting the states from passing any law impairing the obligation of contracts] in the following manner: "A contract is a compact between two or more parties [etc., as hereinbefore cited from Fletcher v. Peck, supra]. A party is always estopped by his own grant." This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a state under a legislative act. It determines, in the most unequivocal manner, that the grant of a state is a contract within the cause of the Constitution now in question, and that it implies a contract not to re-assume the rights granted.

\* \* \*

It must be admitted that mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and the Constitution certainly did not mean to create any new obligations, or give any new efficacy to nude pacts.

\* \* \*

Now, when a contract has once passed, bona fide, into grant, neither the king or any private person, who may be the grantor, can recall the grant of the property, although the conveyance may have been purely voluntary. A gift, completely executed, is irrevocable. The property conveyed by it becomes, as against the donor, the absolute property of the donee; and no such subsequent change of intention of the donor can change the rights of the donee.

\* \* \*

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Was it ever imagined that land, voluntarily granted to any person by a state, was liable to be resumed at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but in a country like ours, where thousands of land titles had their origin in gratuitous grant of the states, it would go far to shake the foundations of the best settled estates.

\* \* \*

. . . [W]hen the grant was complete, and accepted by the grantees, it involved a contract that the grantees should hold, and the grantor should not re-assume the grant, as much as if it had been founded on the most valuable consideration. . . .

Nor is it necessary that the consideration should be a benefit to the grantor. It is sufficient if it import damage or loss, or forbearance of benefit, or any act done, or to be done, on the part of the grantee. . . .

As soon as it is in esse [in existence], and the franchises and property become vested and executed in it, the grant is just as much an executed contract as if its prior existence had been established for a century. . . .

The truth is, that the government has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation for special uses. It cannot recall its own endowments granted to any hospital, or college, or city, or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration through the means of equitable tribunals, in cases where there would otherwise be a failure of justice.

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This doctrine concerning grants has not changed one iota with the passage of time. See Blagge v. Miles, 3 F. Cas. No. 1,479 (1841); State v. Jersey City, 31 N.J. Law 575; 86 Am. D. 270 (1865); Trustees of Brookhaven v. Smith, 98 App. Div. 212, 90 N.Y.S. 646 (1904); Farrington v. Tennessee, 95 U.S. 679, 24 L.Ed. 558 (1878); State of Illinois v. Illinois Cent. R. Co., 33 F. 721 (1888); Downs v. United States, 113 F. 144, 51 C.C.A. 100 (1902), affirmed, 187 U.S. 496 (1903); Birmingham Waterworks Co. v. City of Birmingham, 211 F. 497 (1913), City of Portland v. Public Service Commission of Oregon, 89 Or. 325, 173 P. 1178 (1918); Ellerson v. Grove, 44 F.2d 493, 496 (1930); Anderson-Tully Co. v. Murphree, 153 F.2d 874, 880 (1946).

Since the lapsing provisions of A.R.S. § 35-190 have no application to the appropriation in question, it is necessary to look at the specific legislative enactment as to when or how funds might revert to the State General Fund. The reversion provision states: ". . . [A]ny funds thereof remaining unexpended or unencumbered at the close of June 30, 1974, shall revert to the state general fund." Further, it is necessary to determine at what point in time such funds would be expended or encumbered so as to take them out of the reversion mandate of the legislative act. Obviously, such expenditure or encumbrance must have occurred prior to June 30, 1974 to escape reversion of the funds to the State General Fund.

The word "unexpended", as held in Norman v. Central Kentucky Lunatic Asylum, 92 Ky. 10, 16, 17 S.W. 150 (1891), as used in Gen. St. C73, § 21, as amended by Act March 20, 1876, § 1, providing that the commissioners of the lunatic asylums shall report to the State Auditor any "unexpended balance" in their hands, means undisposed of. The Court said that one of the meanings given by all lexicographers of "expend" is "to dispose of", and where the board had exercised the power which they possessed, and had set apart the money then on hand for a specific purpose, it was no longer unexpended, within the fair meaning of the statute.

The word "unencumbered", as held in City of Crown Point, Lake County v. Henderlong Lumber Co., 137 Ind. App. 662, 206 N.E.2d 890, 896 (1965), means free of any charge, burden, or encumbrance of financial obligations, mortgages, or liens for satisfaction to which the holder thereof could look to. The word "encumber" as defined in Webster's Seventh New Collegiate Dictionary, 1970 Edition, says: "1. to weigh down: burden, overburden; 2. \* \* \* 3. to burden with debts, mortgages, or other legal claims."

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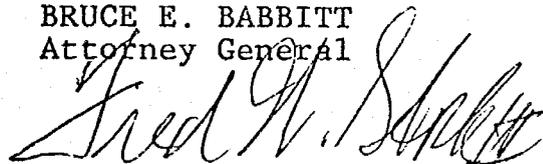
Therefore, it is the opinion of this office that the funds of the appropriation in question remained both unexpended and unencumbered until such time-prior to June 30, 1974 as Grant Agreements were accepted and signed by the various political subdivisions and other eligible applicants. However, upon the signing of such Grant Agreements, the funds became a State grant to the various eligible agencies and were removed from the special legislative reversion mandate, and the State of Arizona could not thereafter revoke its own grants, even though construction had not begun on the various water pollution control facilities or the money had not in fact been expended or paid out by the various grantees.

However, it is our further conclusion that if the construction is abandoned or the funds are used by the various eligible agencies for projects other than those agreed upon, then the terms of the Grant Agreement will have been broken and the State may then take legal steps necessary to recover for the General Fund the funds conveyed by the grant.

An examination of each Grant Agreement is necessary to determine whether the Agreement was signed prior to June 30, 1974. If in fact an Agreement was signed subsequent to June 30, 1974, then those funds proffered in such agreement, and any other funds remaining unexpended or unencumbered after such date, must revert to the State General Fund as provided by the special legislative reversion mandate in Chapter 196, § 2 (Laws 1972).

Sincerely,

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Attorney General



FRED W. STORK, III  
Assistant Attorney General

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