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December 15, 1981

INTERAGENCY

Harry G. Kelley, Director
Industrial Commission of Arizona
1601 West Jefferson
Phoenix, Arizona 85007

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ARIZONA ATTORNEY GENERAL

Re: I81-132 (R81-169)

Dear Mr. Kelley:

In your letter of November 18, 1981, you asked the following questions:

May the Director of the Industrial Commission of Arizona draw warrants against the Special Fund created by A.R.S. § 23-1065 in order to acquire real property and to construct a building or other improvements on the real property as may be necessary to house, contain, furnish, equip and maintain offices and space for departmental and operational facilities of the Commission?

May the Director of the Industrial Commission of Arizona draw warrants against the Special Fund created by A.R.S. § 23-1065 in order to pay those costs reasonably necessary for the fulfillment of the investment in real property and building construction, such as newspaper publication, appraisal, architectural, engineering, construction, outside professional attorney, title company, insurance, governmental fees, court costs, real property maintenance and such other costs, real property maintenance and such other costs related to investment activities of the Special Fund?

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A.R.S. § 23-1065 provides for the establishment of a Special Fund supported primarily from an assessment of 1-1/2% on all premiums received by the State Compensation Fund and private insurance carriers and an assessment against self-insured employers. These premiums are payable during each calendar year and are to be no more than is necessary to keep the Special Fund actuarially sound. There is also paid into the Special Fund by the State Compensation Fund, private insurance carriers or self-insured employers, one thousand one hundred fifty dollars for each industrial death where there is no dependent. The Special Fund also consists of investments and investment yields acquired by the use of monies in the Fund and any surplus credited to the Administrative Fund.

The monies placed within the Special Fund are limited in their purpose. Subsections A, B and C of A.R.S. § 23-1065 empower the Commission to expend funds from the Special Fund in defending and paying apportionment claims brought by self-insured employers or insurance carriers against the Special Fund. Further benefits in the form of compensation are provided for in A.R.S. § 23-907. This section specifically authorized the Special Fund to make payments directly to injured workmen on compensable claims, in those cases where an employer has not acquired workmen's compensation insurance and is not self-insured.

In these situations, the Special Fund serves as an insurance fund for uninsured employers and employees.

In Ariz. Atty. Gen. Op. I79-091, which dealt with the application of the Arizona Constitution, Article IX, Section 17, as implemented by A.R.S. § 41-562 to sources of revenue of the State of Arizona, the Attorney General characterized the benefits payable from the Special Fund as being for an insurance purpose and as funds for the State's own use. The funds are trust funds for the benefit of employees and employers. A copy of the opinion is attached for your reference.

A.R.S. § 41-732.B.1 provides, in pertinent part, that the Assistant Director for Finance shall "draw all warrants upon the Treasury for money, except in cases otherwise expressly provided by law." Further control of expenditures from the Treasury is granted to the Division of Finance by

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A.R.S. § 35-181.02 as follows:

A. The Assistant Director for Finance shall audit, adjust and settle the amount of claims against the State payable out of funds of the State, except claims expressly required or permitted by law to be audited and settled by some other officer. (Emphasis added)

However, payments from the Special Fund are an exception to the general rule regarding expenditure controls of the Department of Administration. The monies in the Special Fund are not for the State's own use but a trust fund for an insurance purpose. A.R.S. § 23-1065 and A.R.S. § 23-907 expressly authorize direct payments from the Special Fund for benefits and A.R.S. § 23-1065 further expressly authorizes the investment of the monies of the Fund in stocks, bonds, notes and real property. They are not appropriated funds. A.R.S. § 23-1065.G expressly provides for the Auditor General to audit the Special Fund:

G. The commission shall request the auditor general to make an annual audit of the special award fund, and shall also cause an annual actuarial study of the fund to be made by a qualified actuary who is a member of the society of actuaries. The actuary shall make specific recommendations for maintaining the fund on a sound actuarial basis. The audit report and the actuarial study shall be completed on or before September 1.

Since the monies in the Special Fund are not "funds of the State" within the meaning of A.R.S. § 35-181.02 they are not subject to the authority of the Assistant Director of Finance to "audit, adjust and settle the amount of claims . . .".

Further support for this position can be found in A.R.S. § 28-1081. This section establishes the Administrative Fund of the Industrial Commission and further provides that "vouchers or claims prepared for any purpose, other than for payment of benefits, shall be processed as prescribed by A.R.S. § 35-181.01. . .". §35-181.01 states that claims against the State "shall be paid in accordance with procedures prescribed

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by the Assistant Director for the Division of Finance". Inasmuch as benefit claims are only paid out of the Special Fund and not the Administrative Fund, the exemption under A.R.S. § 23-1081 is consistent with an interpretation that monies in the Special Fund are not funds of the State. Moreover, the exemption clearly falls within the exception in A.R.S. § 35-181.02 that the Assistant Director for Finance shall settle claims "except claims expressly required by law to be audited and settle by some other officer."

The Special Fund is administered by the Director of the Industrial Commission subject to the authority of the Industrial Commission. A.R.S. § 23-1065.H. Payments of benefits from the Special Fund are made pursuant to awards of the Industrial Commission. A.R.S. §§ 23-907, 23-1065. These awards are judicial in nature and are entitled to finality if they are not timely protested as required by law. See A.R.S. §§ 23-941, 23-947, 23-951; Modern Industries, Inc. v. Industrial Commission, 115 Ariz. 551 (C.A.), 566 p.2d 699 (1977). Since claims against the Special Fund are "settled" by final awards of the Commission, they fall squarely within the exception set forth in A.R.S. § 35-181.02. When the awards become final, they are paid directly from the Special Fund by warrants drawn by the Industrial Commission against that special custodial account of the State Treasurer.

In connection with the investment of monies in the Special Fund, A.R.S. § 23-1065, Subsections A and G, require that the Special Fund be actuarially sound. To accomplish this purpose, the Legislature has authorized the investment and re-investment of surplus and reserves of the Fund. Subsections M and N. A.R.S. § 23-1065. This is accomplished through an investment committee established by A.R.S. § 23-1065.I. Pursuant to A.R.S. § 23-1065.H, the Director of the Industrial Commission, with the approval of the investment committee, may, in the course of his administration of the Special Fund, "acquire real property and acquire or construct a building or other improvements. . . for departmental and operational facilities of the Commission." In Subsection N of A.R.S. § 23-1065, the investment committee is authorized to do the following:

. . . Approve the investment in real property and improvements on real property to house and maintain offices of the Commission, including

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space for its departmental and operational facilities.

This subsection also states that title to any real estate or improvements on the real estate "vests in the Special Fund of the Commission, and the assets become part of the Funds as provided by this section." Under Subsection I, A.R.S. § 23-1065, the investment committee is responsible for the supervision of the investment activities of the Special Fund.

When the State Treasurer makes investments of trust funds on behalf of the State of Arizona, they are exempt from the authority and control of the Department of Administration, Division of Finance by A.R.S. § 35-327.H, which states as follows:

The investment of public monies as provided in this section is exempt from the provisions of A.R.S. § 35-142, Subsection B, A.R.S. §§ 35-154, 35-181.01, 35-181.02, 35-182 through 35-192, 35-192.01, 35-192.02, 35-193, 35-193.02 and 41-732.

Therefore, investment funds invested by the Treasurer, may be withdrawn from the Treasury without a warrant of the Department of Administration, Division of Finance (A.R.S. §§ 36-142.B and 41-732), and such funds are outside the audit, adjustment and settlement authority of the Assistant Director of Finance (A.R.S. § 36-181.02).

In like manner, investments of the monies of the Special Fund of the Industrial Commission of Arizona are made by warrants drawn by the Industrial Commission against that special custodial account of the State Treasurer.

A.R.S. § 23-1065 grants authority to the investment committee to establish investment policy. Subsection I, A.R.S. § 23-1065. Subsection O, A.R.S. § 23-1065, authorizes the investment committee to appoint a custodian to hold all or any portion of the investments owned by the Special Fund. The section further provides:

Except for investments held by a custodian or in the name of a nominee, all securities purchased pursuant to Subsection M of this

section shall promptly be deposited with the State Treasurer as custodian thereof, who shall collect the dividends, interest, and principal thereof and pay, when collected, into the special fund. The State Treasurer shall pay all vouchers drawn for the purchase of securities. The Director may sell any of the securities as he deems appropriate, if authorized by resolution of the investment committee, and the proceeds therefrom shall be payable to the State Treasurer for the account of the special fund upon delivery of the securities to the purchaser or his agent.

The clear intent of the above subsection is to place the authority to make investments of the Special Fund with the Industrial Commission. This parallel investment authority does not change the character of trust fund investment, but merely, places responsibility in a different governmental entity. As such, the exemption set forth in A.R.S. § 35-327.H would apply to investment activities of the Director of the Industrial Commission and the investment committee.

Based upon the foregoing, we conclude that benefit payments and investment of the reserves and surplus of the Special Fund are not subject to the requirements of A.R.S. §§ 35-142.B, 41-732, or the audit, adjustment and settlement authority of the Department of Administration, Division of Finance.

The clear language of A.R.S. § 23-1065 unequivocally authorizes the Director of the Industrial Commission with the approval of the Investment Committee, to acquire real property and construct a building thereon. Title to such real property vests in the Special Fund and becomes part of the Fund's assets. The acquisition and construction are investment activities of the Fund and also costs incurred and paid are investment costs in furtherance of the creation of assets of the Fund. Since the investment of monies of the Special Fund are exempt from expenditure controls hereinabove discussed relative to the Division of Finance and Treasurer and because, in our opinion, the intent of A.R.S. § 23-1065 is that the Director of the Industrial Commission may draw warrants against the Special Fund for the acquisition of real property and the construction of a building thereon as well as for all other associated costs reasonably related to the investment

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activities of the Special Fund, the answer to both questions is
"yes".

Sincerely,



BOB CORBIN
Attorney General

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