



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

1275 WEST WASHINGTON, PHOENIX 85007-2926

MAIN PHONE : 542-5025

TELECOPIER : 542-4085

GRANT WOODS
ATTORNEY GENERAL

August 7, 1997

Mr. Ronald E. Flanigan
Department of Emergency and Military Affairs
Office of Audit and Analysis
5636 East McDowell Road
Phoenix, Arizona 85008-3495

Re: I97-009 (R96-053)

Dear Mr. Flanigan:

You have asked (a) when liabilities are "incurred" under declarations of emergency pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 35-192, and (b) whether monies authorized by a declaration made pursuant to A.R.S. § 35-192 but not expended in one fiscal year may be carried over to the following fiscal year. We find that for the purposes of A.R.S. § 35-192, liabilities are "incurred" not upon the declaration of an emergency, but rather when a legal obligation to make payment arises pursuant to the Arizona Revised Statutes and the relevant contract language. We also find that aggregate liabilities totaling \$4 million -- and only \$4 million -- may be incurred in any given fiscal year pursuant to A.R.S. § 35-192.

Background

The Division of Emergency Management, Department of Emergency and Military Affairs, is charged with preparing for and coordinating those emergency management activities that may be required to reduce the impact of disaster on persons and property, and to coordinate, through the Governor, the cooperative effort of all governmental agencies to alleviate suffering and loss resulting from disaster. A.R.S. § 26-305(B),(C). Pursuant to A.R.S. § 35-192, the Governor may declare an emergency and authorize specific liabilities and expenses to be incurred and paid from unrestricted general fund monies.

The statutes impose the following additional limitations on incurring liabilities:

1. No liability for any contingency or an emergency may be incurred without the approval of the governor or the adjutant general of the Department of Emergency and Military Affairs. A.R.S. § 26-303(H).

2. Liabilities exceeding two hundred thousand dollars in any single contingency or emergency may not be incurred without consent of a majority of the members of the State Emergency Council.
3. The aggregate amount of all liabilities may not exceed four million dollars in any July 1 through June 30 fiscal year.

See A.R.S. § 35-192(F)(1),(2),(3).

Your opinion request asks us to analyze the practical effects of these subsections when a declaration of emergency and authorization to incur liabilities are issued in one fiscal year and remain open into the next fiscal year.

Analysis

We must first determine the meaning of "incur specific liabilities and expenses" as used in A.R.S. § 35-192. The statutes do not define "incur liabilities," but the question has previously been addressed. In 1970, the Attorney General issued a formal opinion interpreting the term "incur liabilities," the reasoning of which is helpful here. The Opinion states that "one incurs an obligation within the meaning of A.R.S. § 35-190 at the time services are rendered or goods are provided, and not when one is presented with the bill or in fact makes payment." Ariz. Att'y Gen. Op. 70-18. This conclusion was based on *Descro Corp. v. United States*, 55 F.2d 411, 413 (Del. 1932), which held that "expenses are not incurred unless there has arisen a legal obligation to pay them" The Opinion also relied on *Hermitage Health and Life Ins. Co. v. Cagle*, 420 S.W.2d 591, 593 (Tenn. App. 1967), in which the court stated, "We believe the word 'incur' means 'to become liable for' and does not mean to actually 'pay for'" The declaration of an emergency under A.R.S. § 35-192 is simply an authorization to spend a certain amount of money on a particular emergency situation. Until goods or services are purchased pursuant to that declaration, no liability is "incurred."¹ The declaration of emergency itself therefore clearly does not incur a liability.

¹ Having established that the declaration of an emergency is not a liability incurred, some guidance may be needed regarding when a liability is incurred. Section 35-181.01(A), A.R.S., provides that "All claims against the state for obligations authorized, required or permitted to be incurred by any state officer or agency shall be paid in accordance with procedures prescribed by the director of the department of administration. The director may prescribe procedures for prepayment for goods or services if it is the industry standard or if it is in the best interests of this state to prepay." Section 35-101, A.R.S., defines "claim" as "a demand against the state for payment for either: (a) Goods delivered or, in the case of highway construction, goods or facilities to be delivered by the federal government [or] (b) Services performed." Reading these statutes together, we believe that a liability is incurred at the time when a claim can be made. Pursuant to A.R.S. § 35-101, a claim can be made (and therefore liability is incurred) upon the delivery of goods or performance of services. If the Director of the Department of Administration authorizes prepayment according to A.R.S. § 35-181.01(A), liability can be incurred prior to the delivery of goods or performance of services.

We next must determine the effect of the statutes when a declaration of emergency spans more than one fiscal year. Declarations of emergency that survive the end of a fiscal year are common, particularly declarations of emergency for wildfires.² We do not see any limitation or direction in the statute that would require that all declarations of emergency terminate at the end of a fiscal year. In fact, because of the inherent nature of an emergency, the most practical and reasonable construction of the statute is the opposite: that the emergency declaration continues in effect until terminated, or until the emergency ceases. We believe that the Governor and State Emergency Council have the authority to issue a declaration of emergency that survives the end of a fiscal year. The ability to incur liabilities, however, is always limited by the \$4 million per fiscal year cap included in the statute.³ For example, if \$3 million is spent in one fiscal year on Emergency A (for which \$4 million was authorized) and the declaration of Emergency A is still in effect in the next fiscal year, another \$1 million can be spent on Emergency A in the second fiscal year **so long as** the \$4 million aggregate limit for the second fiscal year has not yet been exhausted. The \$1 million excess would not carry over into the second fiscal year and allow an aggregate of \$5 million to be spent.⁴ The language in A.R.S. § 35-192(F)(3) is unambiguous and imposes a limit of \$4 million on the incurring of liabilities under all

² Fire season is at its peak around June 30, the end of the State's fiscal year. However, since 1990, the fighting of wildfires has been funded primarily through A.R.S. § 37-623.02(D)(1), which permits expending up to \$2 million in any fiscal year. Only after the funding authorized by this statute is exhausted may wildfire suppression be funded through A.R.S. § 35-192.

³ This "cap" is required by the Arizona Constitution, which provides that "No money shall be paid out of the state treasury, except in the manner provided by law." Ariz. Const. art. IX, § 5. The Arizona Supreme Court has interpreted this provision as meaning that money may be paid from the State treasury only when the constitution or the Legislature has made an appropriation authorizing the payment and that the money appropriated may be used only for the purposes specified by the appropriation. Ariz. Att'y Gen. Op. 188-075 (citing *Cockrill v. Jordan*, 72 Ariz. 318, 235 P.2d 1009 (1951); *McDougall v. Frohmiller*, 61 Ariz. 395, 150 P.2d 89 (1944); *Webb v. Frohmiller*, 52 Ariz. 128, 79 P.2d 510 (1938); *Proctor v. Hunt*, 43 Ariz. 198, 29 P.2d 1058 (1934)). The Supreme Court has also defined an "appropriation" as "the setting aside from the public revenue of a **certain sum** of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." *Hunt v. Callaghan*, 32 Ariz. 235, 239, 257 P. 648, 649 (1927) (emphasis supplied). To be valid, an act making an appropriation must fix a **maximum limit** on the amount that may be expended pursuant to the appropriation. Ariz. Att'y Gen. Op. 188-075 (citing *Eide v. Frohmiller*, 70 Ariz. 128, 216 P.2d 726 (1950); *Cockrill v. Jordan*; *Crane v. Frohmiller*, 45 Ariz. 490, 45 P.2d 955 (1935) (emphasis supplied)). In enacting A.R.S. § 35-192, the Legislature "appropriated" the certain sum of \$4 million per fiscal year to be expended as the Governor and Emergency Council deem necessary to address emergency situations. Interpreting the statute to allow an aggregate of more than \$4 million per fiscal year to be expended would circumvent established law and would call into question the validity of the appropriation.

⁴ This conclusion is consistent with Ariz. Att'y Gen. Op. 70-18, in which the Attorney General concluded that attendance at a conference which continued through parts of two fiscal years required the submission of two sets of travel claims. The Attorney General explained that "appropriations for a given fiscal year may be expended only for goods and services provided during that fiscal year, and that appropriations for a subsequent fiscal year may be expended only for goods and services provided during the subsequent fiscal year, and that two travel claims are necessary in order properly to apportion monies from the two fiscal years."

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outstanding declarations of emergency in a given fiscal year. *See State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983) ("it is a basic tenet of statutory construction that where the statutory language is unambiguous, that language must ordinarily be regarded as conclusive").

Conclusion

In summation, liabilities are incurred when a legal obligation to make payment arises, and not necessarily when an emergency is declared or a contract is entered. A declaration of emergency can span more than one fiscal year, but the first \$4 million of liabilities incurred under all open emergency declarations in a given fiscal year exhausts the power of the Department of Emergency and Military Affairs to incur liabilities in that fiscal year under A.R.S. § 35-192. To spend in excess of \$4 million per fiscal year, an appropriation by the Legislature would be necessary.

Sincerely,



Grant Woods
Attorney General