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The Honorable John Hays
State Senator
Chairman, Senate Committee on
Health, Welfare, Aging and
Environment
State Capitol - Senate Wing
Phoenix, Arizona 85007

The Honorable William A. Mundell
State Representative
Chairman, House Committee on
Environment
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I89-085 (R89-126)

Dear Senator Hays and Representative Mundell:

You requested our opinion regarding the constitutionality of funding a state assurance fund for underground gasoline storage tanks through a state fuel license tax. Specifically, you asked whether Ariz. Const. art. IX, § 14 would prohibit the use of license taxes collected under A.R.S. § 28-1501 as a revenue source for the support of such a fund. Our opinion is that the proposed legislation would violate the requirement of Art. IX, § 14, that fuel taxes be used only for highway and street purposes.

Laws 1989 (1st Reg. Sess.), Ch. 201, § 7 amended A.R.S. § 49-1006 to require owners and operators of underground gasoline storage tanks to submit proof of financial responsibility to the Arizona Department of Environmental Quality in accordance with regulations to be adopted pursuant to 42 U.S.C. § 6991b(d). Since the enactment of that bill, the

Environmental Protection Agency (EPA) has issued the referenced regulations. 53 Fed. Reg. 43, 370 to 43,382 (1988) (to be codified at 40 C.F.R. part 280). Pursuant to those regulations, tank owners or operators of petroleum underground storage tanks must produce evidence of financial responsibility in the minimum amount of one million dollars per occurrence to cover costs of environmental cleanup and third-party property and personal injury damages for releases of petroleum contaminants from their tanks.

The Legislature anticipated that the EPA regulations might require insurance beyond the reach of marketers. Laws 1989 (1st Reg. Sess.), Ch. 201, § 13 established an advisory committee on financial responsibility to make recommendations on:

The advisability and feasibility of establishing a state fund to operate as a financial responsibility mechanism. The advisory committee shall consider in detail how such a state fund could be funded in an equitable and fiscally sound manner.

Id. at E (2).

The advisory committee has determined that a state assurance fund should be established to provide the proof of responsibility required under the EPA regulations. The regulations permit the use of such a trust fund as evidence of financial responsibility. 53 Fed. Reg. 43, 378 (1988) (to be codified 40 C.F.R. § 280.102). The Committee proposes to recommend that a license tax on vehicle fuel be used as a revenue source for the state assurance fund.

You asked whether funding the assurance program with revenues from a fuel license tax would violate Ariz. Const. art. IX, § 14, which states:

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 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.

In construing the quoted section, we are bound by the following principles:

The governing principle of constitutional construction is to ascertain and give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it. County of Apache v. Southwest Lumber Mills, Inc., 92 Ariz. 323, 376 P.2d 854 (1962); State ex rel. Morrison v. Nabours, 79 Ariz. 240, 286 P.2d 752 (1955). Extrinsic

evidence may be used to show the intent when the provision is not clear upon its face. Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P.2d 652 (1962). We may consider the interpretation in light of the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil sought to be remedied. Ruth v. Industrial Commission, 107 Ariz. 572, 490 P.2d 828 (1971); State ex rel. Morrison v. Nabours, supra.

McElhaney Cattle Co. v. Smith, 132 Ariz. 286, 289-290, 645 P.2d 801, 804-805 (1982).

We conclude that the term "highway and street purposes" precludes the use of fuel license tax revenues to establish a state assurance fund for proof of financial responsibility of owners or operators of petroleum underground storage tanks.^{1/}

The meaning of the limitation for highway and street purposes is found within the constitutional provision. The general term "highway and street purposes" in art. IX, § 14 is followed by a number of specifically permitted uses, none of which could be construed to permit use of fuel tax revenues for cleanup and protection of groundwater. These specific terms serve to explain and limit the meaning given by the framers to the term "highway and street purposes". See City of Phoenix v. Superior Court, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984) ("specific statutory provisions will usually control over those that are general."); Southern Pacific Co. v. State Corporation Commission, 39 Ariz. 1, 10-11, 3 P.2d 518, 522 (1931) ("Associated words explain and limit each other."). This conclusion is further supported by the history of art. IX § 14.

^{1/}We also note that this opinion is consistent with prior opinions of this office. In Ariz. Att'y Gen. Op. No. 71-37 we stated that "an expenditure of highway funds for search or rescue operations would clearly constitute an unlawful diversion of highway funds." By contrast, in Ariz. Att'y Gen. Op. 184-087 we stated that highway user revenues could be used to construct county buildings so long as the duties of the employees using the buildings related directly to highway construction or maintenance.

Art. IX, § 14 was approved by the voters in 1952, and was amended in 1970 to provide for distribution of highway funds pursuant to statute. See Historical Note to Ariz. Const. art. IX, § 14, Vol. 1A Ariz. Rev. Stat. Ann. (West 1984). In construing the purpose for adopting the constitutional provision and its amendment, we may refer to ballots and publicity pamphlets distributed by the Secretary of State prior to the election approving the amendment. See, e.g., Laos v. Arnold, 141 Ariz. 46, 685 P.2d 111 (1984); McElhaney Cattle Company v. Smith, 132 Ariz. 286, 645 P.2d 801 (1982); American Bus Lines, Inc. v. Arizona Corporation Commission, 129 Ariz. 595, 633 P.2d 404 (1981).

We have reviewed the publicity pamphlets for both the 1952 version of art. IX, § 14 and its 1970 amendment. The pamphlets emphasize that the proposed constitutional amendment would ensure that the highway user taxes will be used only for public highways.

The 1952 publicity pamphlet referred to the proposal as "The Better Roads Amendment" and was particularly derogatory of those who proposed that highway user taxes be used for anything other than road construction or maintenance.

PUBLIC POLICY IN ARIZONA has consistently opposed diversion although there have been CONSTANT THREATS TO HIGHWAY FUNDS in bills introduced from time to time in the legislature.

* * *

THE VERY SORT OF PEOPLE who, years ago, did not want to pay for needed highways out of general funds of the state, and so devised the gas tax, now look longingly at the highway fund and all too often bring pressures in the legislature to appropriate these revenues to other than highways.

Initiative and Referendum Publicity Pamphlets, 1952-1970, Arizona Secretary of State (1973) (capitalization in original). The 1952 pamphlet also stressed that federal highway funding would be jeopardized if fuel taxes were not devoted exclusively to highways.

In the 1970 pamphlet the League of Arizona Cities and Towns stressed that the 1970 proposal would not alter the protections of the 1952 amendment because "gasoline and diesel tax moneys must continue to be used solely for street and highway purposes." Id., 1970 pamphlet at 20.

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The Supreme Court of Alabama had occasion to consider this issue in a question posed by the Alabama House of Representatives. The question was whether Alabama could constitutionally use fuel tax revenues to fund a Groundwater Protection Trust Fund for cleanup and payment of claims caused by leaking underground fuel storage tanks. The Alabama Supreme Court held that Ala. Const. art. XCIII limited the use of fuel tax revenues to certain specified costs of construction and maintenance of public highways and that protection of groundwater was therefore not a permitted use of fuel taxes or fees. In Re Opinion of the Justices No. 325, 511 So. 2d 505, 511-512 (Ala. 1987).

Given the language and history of Art. IX, § 14 we conclude that fuel license taxes may not be used to fund the assurance program because the program does not relate directly to public highways or streets. We emphasize, however, that art. IX, § 14 applies only to the use of the specific taxes named therein. Nothing in art. IX, § 14 prevents the use of other revenues for the assurance fund.

Sincerely,



BOB CORBIN
Attorney General

BC:MPM:LPF:clp:bl