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November 12, 2015

Stephen M. Brophy, Chairman
Arizona Power Authority
1810 W. Adams Street
Phoenix, AZ 85007

Dear Chairman Brophy:

As a follow up to our meeting concerning the Arizona Power Authority's (APA) authority to hire outside counsel, our position is that the APA's authority is limited for the reasons discussed below.

Pursuant to A.R.S. § 41-192, the Attorney General is the legal advisor to the agencies of the State unless an express exemption permits a state agency to employ outside legal counsel. The APA is established by A.R.S. §§ 30-101– 228. These statutes set forth the APA's general powers and duties as they relate to the acquisition, utilization and encouragement of the development of electric power. The APA's position is that it is wholly exempt from representation by the Attorney General and that it has the authority to hire legal counsel for general legal matters, including day-to-day advice. In support of its position, the APA relies upon A.R.S. §§ 41-192.01 and 45-1709(5).¹ A.R.S. § 41-192.01 provides:

The Arizona power authority shall also be exempt from the provisions of this article to the extent that it may employ legal counsel to represent it before any federal agency and before any federal court and in matters incidental to any proceeding before any such federal agency or court.

A.R.S. § 45-1709 governs the general powers for the director of water resources and the APA solely *as they relate* to the State Water and Power Plan established by A.R.S. § 45-1703. A.R.S. § 45-1709(5) provides that the director of water resources and the APA may:

Retain and employ engineering, accounting, legal, financial and other private consultants on a contract basis for rendering professional and technical assistance and advice.

The language of these statutes is plain and unambiguous. Accordingly, if a statute's language is plain and unambiguous, courts interpret the language as written without resorting to other methods of statutory interpretation. *Mid Kansas Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128 (1991). In this case, A.R.S. § 41-192.01 permits the APA to employ non-AGO legal counsel for certain, express and limited purposes – to represent it before any federal agency and before any federal court and in matters incidental to any proceeding before any such federal agency or court. A.R.S. § 45-1709(5) permits the APA to contract with

¹ We have researched the legislative history relating to these statutes and have found nothing of significance relating to this matter.

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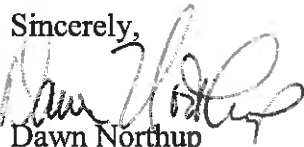
a legal consultant. A "consultant" is an independent businessperson who has a special field of expertise or skill, it is not a person who provides general day-to-day advice. Additionally, the legislative authority for the APA to contract with a legal consultant appears in A.R.S. § 45-1709, governing its duties concerning the State Water and Power Plan. That authority is limited to contracting with legal consultants for the limited purpose of providing professional and technical assistance and advice on specific matters relating to the State Water and Power Plan. It does not provide authority for a legal consultant to represent the APA concerning its general powers and duties as they relate to the acquisition, utilization and encouragement of the development of electric power under its enabling statutes set forth in A.R.S. §§ 30-101 – 228. Significantly, the enabling statutes in Title 30 do not provide any authority for the APA to hire or contract with legal counsel or consultants in any capacity, much less for day-to-day general advice matters.

Additionally, a comparison between the legislative authority given to the APA and the Arizona Department of Agriculture to hire/contract with outside legal counsel further supports the limited nature of the APA's authority. Specifically, the Arizona Department of Agriculture is expressly authorized by A.R.S. § 3-103(F) to hire legal counsel for general purposes:

The director may employ legal counsel to advise him, represent the department in connection with legal matters before other departments and agencies of this state and represent the department and this state in litigation concerning affairs of the department. Legal counsel is exempt from title 41, chapter 4, articles 5 and 6 relating to state service and serves at the pleasure of the director.

If the Legislature intended the APA to have general authority to employ legal counsel, it could have done so. Instead, the Legislature provided the APA with a limited ability to employ/contract with legal counsel for specific purposes. Despite recent efforts to expand the APA's authority to retain or employ legal counsel, no such legislative authority has been granted. Accordingly, it is our position that the APA's authority to employ/contract with legal counsel is limited to the purposes expressly authorized by the legislature and no such authority exists for it to hire legal counsel for general purposes.

Other than federal regulatory matters and legal services necessary to perform APA's duties relating to the State Water & Power Plan under Title 45, the APA should consult this Office for general day-to-day legal advice. You can direct your inquires to me at the email address above and I will insure it is assigned accordingly. I look forward to working with the APA and ensuring its legal needs are met.

Sincerely,

Dawn Northup
Chief Counsel
State Government Division

cc: Michael Bailey, AG/EXO
Rex Nowlan, AG/SGD/ACS
Eryn McCarthy, AG/SGD/ACS

DN:cj
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