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Memorandum Concerning Legal Issues Emanating from the Arizona Power Authority Public Information and Comment Draft Plan for Hoover Power Allocation Post-2017
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In our analysis of the draft Plan, we have attempted to flag in our other comments issues that need to be further discussed. In this paper we will discuss legal issues that have been treated in the draft Plan and our views on them.

The Red Book

We have reread the Red Book from 1985 once again in detail. It is our view that this is a historic document that contains a record not only of the allocation decisions made by the Commission at that time but of other decisions of a legal nature that were necessary antecedents to the Commission's ultimate allocation decisions. Thus, discussing whether the Red Book is a longstanding administrative interpretation of law is misplaced. It is not the Red Book that carries that distinction. It is the several necessary decisions made by the Commission and memorialized in the Red Book that constitute longstanding administrative interpretations of law.

For instance, the Red Book announces the intent of the Commission to allocate Hoover B on a withdrawable basis. The authority to prescribe that condition is not found in Title 45. In order to legally underpin the authority to condition the allocation in that fashion, statutory authority within Title 45 must exist that supports imposing that qualification. We would submit that the explicit command in A.R.S. Section 45-2508(B) to sell power at wholesale "upon such terms and conditions, as shall be determined by the authority to be necessary or advisable to effectuate the purposes of this article" could provide that legal underpinning. The Red Book does not explain. However, the principle of longstanding administrative interpretation supports that action.

This principle, among other authorities, also provides the legal underpinning for contracting with the Central Arizona Water Conservation District. Without belaboring the other theories that support that contracting authority, such contract was entered into after the allocation decision memorialized in the Red Book. Here again, this principle is the perfect rationale for accepting the fact that the Authority had to find implied statutory authority to enter into such a contract because there is no specific directive in the State Water and Power Plan to do so.

Likewise, the 1982 amendments to the State Water and Power Plan specifically added "electric cooperative" within the definition of public utility, thus making it clear that the Authority could contract for Hoover B with an electric cooperative. Laws 1982, Chapter 63, Section 3. Since the statutory addition did not make a distinction between a G&T and a distribution cooperative, and the Authority did make an allocation to the Arizona Electric Power Cooperative, a G&T, then

it had to have interpreted its mandate as allowing that allocation and contracting to go forward.[1] And the theory of longstanding administrative interpretation supports the conclusion that an allocation to the G&T on behalf of its distribution cooperatives and their Arizona customers is lawful.

Finally, we come to the issue of eligibility for Hoover B and the very direct statement on pages 23 and 24 of the draft Plan that the prior legal interpretation of the statutes on eligibility was erroneous. The discussion admits that the Authority made an interpretation of eligibility in 1985. It therefore admits that it made an interpretation of the law, specifically the limited authority to contract under A.R.S. Section 45-1708(B). Since a determination of the meaning of that statute and the specific provision in it was actually made and was made in 1985, it is by definition, a longstanding administrative interpretation. *Bridgestone Retail Tire Operations v. Industrial Com'n of Arizona*, 227 Ariz. 453, 455, 258 P.3d 271, 273 (App. 2011) – 20 year interpretation.

The draft Plan proposes to overturn that interpretation. Its excuse is "additional analysis in the intervening years, and taking into account other provisions of the state water and power plan". The draft Plan concludes that the prior interpretation was "inaccurate". The draft Plan further states that the prior interpretation is not "appropriate or applicable". Then the draft Plan makes a comparison of general contracting authority in A.R.S. Section 45-1710 to that of the admittedly more restrictive language in A.R.S. Section 45-1708(B). The draft Plan admits that general authority is just that, general authority to contract recited in A.R.S. Section 45-1710. To reconcile what the draft Plan declares to be a conflict between the statutes, it interprets Section 45-1708(B) to be merely providing "terms" for contracts and not a preference for contractors.

Clearly, the draft Plan seeks to change a longstanding interpretation of law, which an agency administering a statute may do. Judicial review in Arizona of agency interpretations of law the agency administers has long included at least some deference to those interpretations. *Haggard v. Industrial Commission*, 71 Ariz. 91, 100, 223 P. 915, 921 (1950). But judicial deference to an agency's interpretation of law it administers, now often called *Chevron* deference (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) has its limits.[2] Where an agency seeks to overturn its longstanding interpretation, it must provide a significantly more reasoned basis for doing so than it needed to in the initial effort to interpret the statute. *Flagstaff Medical Center, Inc. v. Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992). *Chevron* deference is much less likely to be accorded an agency in this situation than in its initial effort to interpret a statute it administers. *Southwest Center for Biological Diversity v. Babbitt*, 980 F.Supp. 1080 (D.Ariz. 1997); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987).

The above-quoted statements in the draft Plan are merely conclusory. Such conclusory statements do not "clearly set forth the grounds for its departure from prior norms." *Western States Petroleum Ass'n v. E.P.A.*, 87 F.3d 280, 284 (9th Cir. 1996).[3] Additionally, the comparison between the two statutes is just plain error as we will discuss below.

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[1] Since a G&T is a single entity, even though it supplies multiple distribution cooperatives, it is then not subject to the proposed criterion of not accepting joint applications.

[2] While we refer primarily to federal precedent because there is so much more of it, it is relevant here. Judicial review of agency action starts with the state standard of judicial review, A.R.S. Section 12-910, substantively identical to its federal counterpart, 5 U.S.C. Section 706.

[3] See also *Ariz. Elec. Power Corp., Inc. v. United States*, 816 F.2d 1366, 1374 (9th Cir. 1987) – discretion does not permit arbitrary treatment.

Of course, if the ultimate decision of the Authority is not to allocate Hoover power to cities, towns or other entities not providing electric service, then, for our purposes, the decision to not employ the theory of longstanding administrative interpretation of law has no impact on this particular issue. However, to the extent that the Authority exposes itself to legal attack by not employing this shield, it is of considerable concern. It is settled law in Arizona that legal interpretations by an administrative agency done in a quasi judicial action are reviewed de novo by a reviewing court. *Arizona Health Care Cost Containment System Administration v. Carondelet Health System*, 188 Ariz. 266, 269 (App. 1996); *Eshelman v. Blubaum*, 114 Ariz. 376, 378 (App. 1977). By rejecting longstanding interpretation of law as a construct, the Authority subjects its ultimate decision to review on a de novo basis as to every legal issue raised in the process. The opportunity for a reviewing court to accord the Authority the state equivalent of *Chevron* deference slips away. Seminal issues concerning eligibility and priority or preference and other issues concerning contract authority and preemption expose the decision to a much broader attack than accepting the shield of longstanding administrative interpretation and moving forward with it. To the extent that we have concerns about the adequacy of the Commission's process and the adequacy of the record to be developed in it, we are concerned that the Authority is risking the possibility of a successful challenge to its decision on some of these issues that would be significantly better defended by adopting the interpretations from 1985.

D-1 Contract

The issue that concerns us, that is not addressed in the draft plan, is what happens when the Authority is presented with an allocation of D-1by Western given to an entity with which the Authority has no statutory authority to contract. The risk of that happening as to Indian communities has been removed by the 2011 Act. The risk of it happening as to other entities that might be considered preference entities under federal law but are not in a position to qualify under Arizona law remains. Again, this may be an issue that goes away if no such allocation results from the federal process. We flag it here because it will only have to be faced if the situation arises upon the final allocations that Western must make by the end of this year. We will not go further on this for now and hope the issue goes away but it is an unresolved issue that the Authority should explore on its own.

Hoover B Eligibility

We have addressed above the fact that the Authority acknowledges in this white paper that it made an interpretation of law in 1985 concerning Hoover B eligibility and excluded cities, towns and other entities that are not providing electric service from contracting for Hoover B. The paper seeks to overturn that interpretation with some conclusory statements that do not rise to the level of explanation necessary to support such a change and by a comparison of A.R.S. Section 45-1708(B) to that of A.R.S. Section 45-1710.

As we stated before, not only does the document not provide sufficient justification to meet the standard of review for such a significant shift in interpreting the law, it is just plain wrong. First, A.R.S. Section 45-1710 was included in the original State Water and Power Plan legislated in 1967. So was A.R.S. Section 45-1708. However, as noted in the Red Book, the legislature amended the State Water and Power Plan in 1982. The sections of that amendment were aimed solely and specifically at the Arizona Power Authority and at the range of projects it was authorized to construct or participate in. They included amending Section 45-1708 but not

Section 45-1710. It is clear that the legislature was positioning the Arizona Power Authority for what would be the Hoover Power Plant Act of 1984 and the non-federal financing of the Hoover uprating project that followed.

Most specifically, A.R.S. Section 45-1708(B) was quadrupled in size in 1982. It went from two sentences to a rather significant paragraph which contains a specific direction that

> "Any public utility providing electrical service and any district organized to provide electrical service may enter into such contracts with the authority for the sale and transmission of power and energy by which such public utility or district is obligated to make payments in amounts which shall be sufficient to enable the authority to meet all its costs allocable thereto, including interest and principal payments, whether at maturity or upon sinking fund or other mandatory redemption, for its bonds or notes, reasonable reserves for debt service, operation and maintenance expenses and amounts to pay for renewals, replacements and improvements and to meet the requirements of any rate covenant with respect to debt service coverage and any other amount required for reserves or other purposes, all as shall be provided in the resolution, trust indenture or other security instrument of the authority;"

The remaining addition to this section is of similar ilk in that it is totally focused on the ability of the Authority to issue bonds to carry out the purposes of the article and specifying the terms of the contracts for the power from the uprating project or the modification project (which was never built) that these two types of entities may execute.

The Red Book denotes that this subsequent modification is specific in its terms and conditions and therefore must be given effect over other prior general provisions of the State Water and Power Plan. The draft Plan does not address the concept of a subsequent amendment needing to be read *in pari materia* with existing law and given effect as to its plain meaning. *State v. Sweet*, 143 Ariz. 266, 270 (1985). Nor does the draft Plan address the concept of statutory interpretation that the particular controls the general. *City of Phoenix v. Superior Court In and For Maricopa County*, 139 Ariz. 175, 178 (1984). Finally, the draft Plan does not address the fact that the general authorities in A.R.S. Section 45-1710 apply to other projects and to both water and power. Thus, the latter statute is a general empowerment related to the overall plan whereas the 1982 amendment was a specific direction as to a specific portion of the plan. The Authority's ability to contract for power was not limited in the original State Water and Power Plan in 1967 to the Hoover modifications and the Hoover uprates. Specifically, the direction of subsection B of A.R.S. Section 45-2508 in its original form was extraordinarily broad and allowed the Power Authority even to sell power from the listed projects outside the State of Arizona. The 1982 amendment narrowed that target substantially both as to project marketing and as to qualified contractors, but just for the two projects, the Hoover modification project and the Hoover uprating project, the latter of which resulted in the creation of Hoover B. In sum, none of the standard provisions of statutory interpretation are discussed in the draft Plan let alone rationales for why their routine application should be avoided. If they were, the result would have to be different.

Finally, this attempt to change a prior legal interpretation contradicts the Authority's own regulations. The definition of preference in AAC R12-14-101(16) states that preference "means the priority of entitlement to Power according to A.R.S. Section 30-125 or A.R.S. Section 45-1708." The only place in A.R.S. Section 45-1708 in which a preference for contracting is

mentioned is in subsection B which contains the specific reference to public utilities providing electric service and districts authorized to do so as well as a caveat with regard to non-preference entities being able to purchase.

The draft Plan's analysis of eligibility for Hoover B is just plain wrong. The Authority would be well-served by falling back on the analysis made by its predecessor in 1985, which is not only correct but legally defensible as a longstanding administrative interpretation of the law the Authority is charged with administering.

Federal Preemption

The draft Plan contains a relatively short discussion of "general principles of federal preemption". It appears from the discussion, without analysis, that the draft Plan considers that the general principles apply to the Authority allocating D-2 as well as to Western allocating D-1. It states that the 2011 Act conditions for eligibility differ slightly based on whether Western is allocating D-1 or the Authority is allocating D-2. It does not elaborate.

Federal preemption is not assumed. Indeed, the general presumption is that federal preemption is not assumed. *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Com'n*, 206 Ariz. 399, 405 (App. 2003). It can come from a direct statement in federal legislation occupying the field and so stating. *Eastern*, 206 Ariz. at 405 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 222 (3d Cir. 2001)). It can come from an inference of occupying the field by the nature of the federal statute. *Id.* Or it can be concluded from the fact that a state action or statute is contrary to express federal law. *Id.*

Here, it is clear from the 2011Act that the sovereign authority of the State of Arizona to deal with its allocations of Hoover power have been intruded upon by a congressional mandate that Hoover D go to "new allottees". The Act also requires that new allottees be Arizona allottees but does not limit the use of D-2 power to the Boulder City Area Projects marketing area. Rather, it specifies "in the State of Arizona". We note that the federal marketing area extends beyond Arizona and that portions of Arizona are excluded. If there are other distinctions between D-1 and D-2, they are not articulated.

However, general principles of federal preemption can cover a number of other subjects such as what we have discussed as "double dipping" (the ability to get a D-1 allocation and a D-2 allocation as well). Assuming, for the sake of argument, that Western allows double dipping in its allocations of D-1 and California D-2, does that require Arizona to do the same? The Commission has no authority to allocate power outside the State of Arizona but the marketing area extends to entities outside. What effect will federal preemption have on D-1 allocations to Arizona "new allottees" in that regard? The federal criteria describe a minimum allocation of 100 kW and a maximum allocation of 3 megawatts. It is our understanding that the maximum allocation covers all of D. Does that apply to how D-2 is allocated by the Commission? Is the Commission obligated to accept the federal minimum and the federal maximum? Federal preference law defines eligibility for federal resources contracted directly with the United States in a broader fashion than either Title 30 or Title 45 do for the Commission. Is the Commission obligated in contracting for D-1 or allocating and contracting D-2 to include or accept the application of the federal preference law? Is it obligated to accept joint applications?

The consideration of federal preemption is, therefore, much more complicated than the draft Plan currently discusses, or that we have addressed. Further analysis clearly is advisable.