STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by JANET NAPOLITANO ATTORNEY GENERAL December 20, 2001	No. I01-023 (R01-033) Re: Water Infrastructure Finance Authority Loans to Indian Tribes

TO: Greg Swartz, Executive Director
Water Infrastructure Finance Authority of Arizona

Questions Presented

You have asked the following questions regarding the requirements in Arizona Revised Statutes ("A.R.S.") §§ 49-1225(B)(4) and -1245(B)(4) for loans to Indian tribes from the Water Infrastructure Finance Authority ("WIFA"):[1]

(1) The statutes provide that an Indian tribe or tribal entity with control over a revenue source dedicated to repayment of the loan from WIFA must be "subject to suit by the attorney general to enforce the loan contract." Does this requirement mandate that such entities be subject to suit in state court, or does it permit them to be subject to suit in federal or tribal court instead?

(2) Alternatively, the statutes require that assets used to secure a loan to Indian tribes be

[1] Because the provisions in A.R.S. § 49-1225(B)(4) and -1245(B)(4) are identical, this Opinion will refer to them collectively as "the statutes."

"subject to execution by the attorney general" in the event of the tribe's default "without the waiver

of any claim of sovereign immunity by the tribe." Does this alternative require that the State hold any assets used to secure the loan in a custodial account that the State controls, or does it permit any third party that is mutually agreeable to WIFA and the tribe to hold the assets?

Summary Answer

(1) The statutes do not require that an Indian tribe or tribal entity be subject to suit in a particular court. The Attorney General has the authority to sue a tribe or tribal entity in federal, state, or tribal court to enforce a loan contract as long as the tribe or tribal entity has waived its immunity from suit.

(2) The statutes permit an Indian tribe to obtain a loan from WIFA without waiving its immunity from suit if the Attorney General is able to sue someone other than the tribe, if necessary, to obtain the assets used to secure the loan in the event of the tribe's default. Under this alternative, any third party that is mutually agreeable to WIFA and the tribe may hold the assets, as long as the assets are irrevocably placed with the third party and the third party is subject to suit by the Attorney General to obtain the assets in the event of the tribe's default.

Background

WIFA administers the clean water and the drinking water revolving funds. *See* A.R.S. §§ 49-1203(B), -1222(A), -1242(A). These funds were established in accordance with the federal Water Pollution Control and Safe Drinking Water Acts, which provide the states with grants to assist them in initiating and administering such funds. *See* 33 U.S.C. § 1381; 42 U.S.C. § 300j-12; A.R.S. § 49-1201(4), (10). Political subdivisions of the State and Indian tribes may apply to WIFA for loans from the funds to finance water quality facilities and projects. A.R.S. §§ 49-1224(A), -1243(A)(1). The Attorney General has the authority to take the actions necessary to enforce the loan

contracts and to achieve repayment of the loans that WIFA makes. A.R.S. §§ 49-1226, -1246. Loans from both funds to Indian tribes must be structured in one of two ways pursuant to A.R.S. §§ 49-1225(B)(4) and -1245(B)(4):

> A loan under this section:
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> . . . .
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> To an Indian tribe shall either be conditioned on the establishment of a dedicated revenue source under the control of a tribally chartered corporation, or any other tribal entity that is subject to suit by the attorney general to enforce the loan contract, *or* be secured by assets that, in the event of default of the loan contract, are subject to execution by the attorney general without the waiver of any claim of sovereign immunity by the tribe.

(Emphasis added.)

This provision implicitly recognizes that Indian tribes possess sovereign immunity as a matter of federal law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). While Congress can diminish this immunity, the states cannot. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890-91 (1986) (recognizing that Indian tribes possess a "quasi-sovereign" status that is subject to plenary federal control and definition, but is not subject to diminution by the states). Consequently, an Indian tribe is subject to suit only if Congress has authorized the suit or the tribe has waived its immunity. *Mfg. Techs.*, 523 U.S. at 754. Absent such a congressional authorization or tribal waiver, Arizona's Attorney General cannot sue a tribe or tribal entity in any court—state, federal, or tribal. *See Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 560, 703 P.2d 502, 504 (App. 1985) (recognizing that since one of the primary purposes of tribal sovereign immunity "is to protect tribal trust property from encumbrances, it must necessarily mean freedom from suit regardless of where the suit is brought") (citation omitted). Congress did not abrogate tribal sovereign immunity in connection with either the Water Pollution Control or the

Safe Drinking Water Act. *See* 33 U.S.C. §§ 1251-1387; 42 U.S.C. §§ 300f through 300j-26. Any discussion of a tribe or tribal entity being subject to suit by the Attorney General under A.R.S. §§ 49-1225(B)(4) or -1245(B)(4) therefore presupposes that the tribe or tribal entity has waived its immunity from suit.

Analysis

I. Sections 49-1225(B)(4) and -1245(B)(4) Do Not Require that Tribes or Tribal Entities Be Subject to Suit by the Attorney General in State Court.

A. The Legislature Did Not Intend the Identically Worded Predecessor of A.R.S. §§ 49-1225(B)(4) and -1245(B)(4) to Require that Tribes or Tribal Entities Be Subject to Suit by the Attorney General in State Court.

The primary goal of statutory construction is to give effect to the Legislature's intent. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). A statute's language is the best indicator of that intent. *Hosp. Corp. of Northwest, Inc. v. Ariz. Dep't of Health Servs*., 195 Ariz. 383, 384, 988 P.2d 168, 169 (App. 1999). The Legislature specified that a tribe or tribal entity with control over a revenue source dedicated to repayment of the loan must be "subject to suit by the attorney general" to enforce the loan contract. A.R.S. §§ 49-1225(B)(4), -1245(B)(4). The Legislature did not specify whether the tribe or tribal entity must be subject to suit in state court.

If a statute's language does not disclose the Legislature's intent with respect to a particular question, other factors—including the statute's context, history, subject matter, effects, and purpose—may be examined to ascertain legislative intent. *Blum v. State*, 171 Ariz. 201, 205, 829 P.2d 1247, 1251 (App. 1992). An examination of a predecessor statute may also provide information that, while not controlling, may be helpful in determining the originally intended scope of a statutory provision. *Reber v. Chandler High Sch. Dist. No. 202*, 13 Ariz. App. 133, 138, 474 P.2d 852, 857 (1970). Such a predecessor statute exists here.

In 1989, the Legislature enacted A.R.S. §§ 49-371 through -381, which established the wastewater treatment revolving fund. 1989 Ariz. Sess. Laws ch. 280, § 5. This statutory scheme was the predecessor to the scheme that currently governs the clean water and the drinking water revolving funds. As originally enacted, political subdivisions of the State could apply for loans to finance wastewater treatment projects. *See id*. The Legislature amended the statutes in 1991 to permit Indian tribes to apply for such loans as well. *See* 1991 Ariz. Sess. Laws ch. 161, §§ 1- 4. In doing so, it added former A.R.S. § 49-375(E)(6).[2] *See id.* § 4. The wording of that provision was identical to the current wording of A.R.S. §§ 49-1225(B)(4) and -1245(B)(4).

The Legislature arrived at the wording of former A.R.S. § 49-375(E)(6) after it rejected the language originally proposed because representatives of Indian tribes objected to it. The revision process provides helpful insight into the Legislature's intent in enacting the provision's "subject to suit by the attorney general" clause. *See State v. Barnard*, 126 Ariz. 110, 112, 612 P.2d 1073, 1075 (App. 1980) ("Successive drafts of the same act are instructive in determining the intent of the legislature, as the substitution or elimination of provisions necessarily involves an element of intent by the drafters."). As introduced in House Bill 2243, the provision read:

> A loan under this section:
> . . . .
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> In the case of a loan to an Indian tribe, shall be secured by a first lien on property, a guaranty, a bond or such other security enforceable *in the courts of this State* as the board [of directors of the wastewater management authority] deems sufficient to ensure repayment of the loan. This paragraph shall not be construed to require an Indian tribe to waive any claim of sovereign immunity, provided that adequate security is otherwise provided.

HB 2243, 40th Legis., 1st Reg. Sess. (1991) (as introduced) (emphasis added).

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[2]In 1995, this paragraph was renumbered as 49-375(E)(5). *See* 1995 Ariz. Sess. Laws Ch. 8, § 7.

During the Senate's consideration of the bill, representatives of Indian tribes objected to the requirement that disputes be resolved "in the courts of this State" on the ground that it infringed upon the tribes' sovereignty. *Minutes of Senate Committee on Environment*, 40th Legis., 1st Reg. Sess. 4 (March 27, 1991). In accordance with their request that any disputes between a tribe and the State concerning a wastewater treatment loan agreement be resolved in a neutral forum, the bill's sponsor proposed an amendment that substituted "the United States District Court for the District of Arizona" for "the courts of this State." *Id.* The Legislature did not pass that amendment, but instead passed one that replaced the entire provision with language identical to the current language of A.R.S. §§ 49-1225(B)(4) and -1245(B)(4). *See* 1991 Ariz. Sess. Laws ch. 161, § 4 (adding former A.R.S. § 49-375(E)(6)). That language, which did not require that a tribe or tribal entity be "subject to suit by the attorney general" in any specific court, was described as being acceptable to the Inter-Tribal Council of Arizona and other tribal representatives.[3] *Minutes of Senate Committee on Environment,* 40th Legis., 1st Reg. Sess. 2 (April 3, 1991). Thus, the Legislature did not intend to require tribes or tribal entities to submit to state court jurisdiction as a condition of receiving wastewater treatment loans. Although the Legislature altered the prior scheme's scope in many ways, it did not alter the provision that currently appears at A.R.S. §§ 49-1225(B)(4) and -1245(B)(4). Consequently, the statutory requirement that a tribe or tribal entity be "subject to suit

[3] In 1997, the Legislature established the Greater Arizona Development Authority Revolving Fund. 1997 Ariz. Sess. Laws ch. 208, § 1. In doing so, it enacted a provision that is essentially identical to former A.R.S. § 49-375(E)(6). *Id.* The Senator who proposed the provision, which became A.R.S. § 41-1554.06(D)(6)(b), noted that it was modeled after former A.R.S. § 49-375(E)(6). *Minutes of Senate Committee on Commerce and Economic Development*, 43rd Legis., 1st Reg. Sess. 3 (January 23, 1997). In 1998, the Legislature included an identical provision, A.R.S. § 28-7676(H)(6), in the statutes that established the highway expansion and extension loan program fund. 1998 Ariz. Sess. Laws ch. 263, § 7 (codified as A.R.S. § 28-7676(H)(6)).

by the attorney general" will be satisfied as long as the tribe or tribal entity is subject to suit in *some* court—be it federal, state, or tribal.

B. The Attorney General Has the Authority to Sue a Tribe or Tribal Entity in Federal or Tribal Court to Enforce a WIFA Loan Contract.

The statutes that govern the Attorney General's authority do not require a different conclusion. In addition to broad general authority to initiate proceedings the Attorney General deems necessary and appropriate to collect debts owed to the State, A.R.S. § 41-191.04, the Attorney General has specific authority to enforce the loan contracts and to achieve repayment of the loans made by WIFA, A.R.S. §§ 49-1226, -1246. The Attorney General also has specific authority to represent the State in any action in a federal court, A.R.S. § 41-193(A)(3), as well as the authority to retain counsel to collect any debt owed to the State. A.R.S. § 41-191(E). These statutes permit the Attorney General to sue a tribe or tribal entity in federal or tribal court to enforce a WIFA loan contract.[4]

C. Jurisdictional Factors May Prevent the Attorney General from Suing Tribes or Tribal Entities in Federal or Tribal Court.

Although the Attorney General has the authority to sue a tribe or tribal entity in federal or tribal court to enforce a WIFA loan contract, jurisdictional factors may prevent the Attorney General from doing so. This is true even where the tribe or tribal entity has waived its immunity from suit. Parties cannot confer subject matter jurisdiction on a court by consent. *Lamb v. Superior Court*, 127 Ariz. 400, 403, 621 P.2d 906, 909 (1980). In most cases, a federal court would not have diversity jurisdiction under 28 U.S.C. § 1332 over a suit by the State of Arizona against an Arizona tribe or

[4]Of course, the Attorney General has the discretion to determine what legal action is appropriate to collect a debt owed to the State in any specific situation. *See* A.R.S. § 41-191.04 (Attorney General authority to bring actions to collect debts).

tribal entity. *See Gaines v. Ski Apache*, 8 F.3d 726, 729-30 (10th Cir. 1993). Moreover, most suits arising out of loan agreements between the State and a tribe or tribal entity would not present a federal question basis for federal court jurisdiction under 28 U.S.C. § 1331. *See Gila River Indian Cmty. v. Henningson, Durham & Richardson,* 626 F.2d 708 (9th Cir. 1980). Jurisdictional barriers might also hamper the Attorney General from suing a tribe or tribal entity in some tribal courts. Therefore, in entering into a WIFA loan contract with a tribe or tribal entity, care must be taken to ensure that the designated court actually has jurisdiction to enforce the contract.[5] These jurisdictional issues should be assessed for each transaction.

II. The Assets Used to Secure a Tribe's WIFA Loan Need Not Be Placed in a Custodial Account that the State Controls.

The statutes also permit a loan from WIFA to an Indian tribe to be "secured by assets, that in the event of default of the loan contract, are subject to execution by the attorney general without the waiver of any claim of sovereign immunity by the tribe." A.R.S. §§ 49-1225(B)(4), -1245 (B)(4). The Legislature did not specify that the secured assets must be held in a custodial account that is under the State's control. As previously noted, the legislative history of former A.R.S. § 49-375(E)(5), while not controlling, may be helpful in ascertaining the Legislature's original intent concerning the provision's scope.

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[5] Other complex issues that need to be considered in entering into loan agreements with Indian tribes are beyond this Opinion's scope. The following authorities may provide useful information. Mark A. Jarboe, *The Gaming Industry on American Indian Lands: Financing and Development Issues*, Practicing Law Institute, Corporate Law and Practice Course Handbook Series (1994); Heidi L. McNeil, *Doing Business in Indian Country*, Practicing Law Institute, Corporate Law and Practice Course Handbook Series (1994); Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 Hamline L. Rev. 417 (1994); Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 Wm. & Mary L. Rev. 539 (1997); William V. Vetter, *Doing Business With Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169 (1994); David B. Jordan, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Their Relationships With Indian Tribes After Kiowa Tribe v. Manufacturing Technologies, Inc.*, 52 Okla. L. Rev. 489 (1999); Michael O'Connell, *Business Transactions With Tribal Governments in Arizona*, Ariz. Att'y, January, 1998, at 27.

As originally proposed, the provision only established one method of securing wastewater treatment loans to tribes: such loans were to be "secured by a first lien on property, a guaranty, a bond or such other security enforceable in the courts of this State as the board [of directors of the wastewater management authority] deems sufficient to ensure repayment of the loan." H.B 2243, 40th Legis., 1st Reg. Sess. (1991) (as introduced). The proposed language also stated that an Indian tribe would not be required to waive its immunity, "provided that adequate security [was] otherwise provided." *Id.* Although the Legislature totally revised the proposed language, the two concerns that the language reflected—that the tribes not be required to waive their sovereign rights to obtain loans and that the loans be adequately secured in the event of default—remained constant throughout the revision process. *See Minutes of Senate Committee on Environment*, 40th Legis., 1st Reg. Sess. 4-6 (March 27, 1991); *Minutes of Senate Committee on Environment*, 40th Legis., 1st Reg. Sess. 2 (April 3, 1991); Arizona State Senate Staff, 40th Legis., 1st Reg. Sess., Revised Fact Sheet for HB 2243 (April 8, 1991) (noting that the legislation required that loans to tribes be sufficiently secured to cover any default and that it did not require tribes to waive any claim of sovereign immunity as long as they provided adequate security).

The Legislature ultimately established two alternative methods for securing loans to tribes. As discussed above, the first of these methods required that the tribal entity controlling the revenue source dedicated to repaying the loan be "subject to suit"—that is, to waive any claim of immunity. The second method did not require it to do so. *See* 1991 Ariz. Sess. Laws ch. 161, § 4 (adding former A.R.S. § 49-375(E)(6)). The second method required only that a tribe secure its loan with assets that were "subject to execution by the attorney general without the waiver any claim of sovereign immunity by the tribe." *Id.* Thus, the Legislature did not intend to require tribes to waive

their immunity from suit to satisfy this provision. By requiring that the assets be "subject to execution," however, the Legislature demonstrated that it did intend to require the tribes to create security arrangements that, if the tribes defaulted, would permit the Attorney General to sue *someone* to obtain a judgment and a writ of execution if that was necessary to reach the secured assets.[6]

Therefore, any security arrangement that irrevocably places the assets securing the tribe's WIFA loan with a third party and permits the Attorney General to sue the third party if that becomes necessary to reach the assets in the event of the tribe's default will satisfy the provision. Any third party that is mutually agreeable to WIFA and the tribe may hold the assets used to secure the tribe's WIFA loan as long as the arrangement under which the party holds the assets irrevocably places the assets with the third party and permits the Attorney General to sue the party instead of the tribe to reach the assets in the event of the tribe's default.[7]

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[6]A writ of execution is a form of judicial process that a court issues to enforce a judgment. *See* A.R.S. § 12-1551(A). The writ directs a sheriff or other county officer to seize a judgment debtor's property and to deliver it or the proceeds of its sale to the judgment creditor to satisfy the judgment debt. *See* A.R.S. § 12-1552. The entry of a valid judgment is a prerequisite to the issuance of a writ of execution. *See* A.R.S. § 12-1551(A); *Jackson v. Sears, Roebuck & Co*., 83 Ariz. 20, 315 P.2d 871 (1957).

[7]For example, a tribe could obtain a letter of credit. To do so, the tribe would irrevocably present a bank or other issuer of a letter of credit with assets sufficient to secure repayment of its WIFA loan in the event of its default. The issuer would agree to pay the Attorney General upon presentation of a demand. *See* A.R.S. § 47-5102. The issuer would become primarily liable to pay upon demand, and its liability would not depend upon a determination that the tribe actually was in default. *See* A.R.S. § 47-5103(D) and accompanying Uniform Commercial Code cmt. If the issuer wrongfully dishonored its obligation to pay upon presentation of a demand, the Attorney General could sue the issuer without suing the tribe. A.R.S. § 47-5111(A). An escrow arrangement could also be used. The tribe could irrevocably place assets sufficient to secure repayment of its WIFA loan with an escrow agent with instructions that the assets be turned over to the Attorney General in the event that the tribe defaulted on its loan payments. *See* A.R.S. § 6-801(4) (defining an "escrow"). An escrow agent has a fiduciary duty to act in strict accordance with the escrow agreement's terms and is liable for any damages caused by his or her failure to do so. *Tucson Title Ins. Co. v. D'Ascoli*, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963). If the escrow agent failed to turn the escrowed assets over to the Attorney General after the tribe defaulted upon its WIFA loan, the Attorney General could sue the agent. *See id.*

Conclusion

Pursuant to A.R.S. §§ 49-1225(B)(4) and -1245(B)(4), an Indian tribe or tribal entity with control over a revenue source dedicated to repayment of a WIFA loan must be subject to suit by the Attorney General in some court. Alternatively, a tribe and WIFA may have a third party that is mutually agreeable to WIFA and the tribe hold assets used to secure the WIFA loan. Under this alternative, the assets must be irrevocably placed with the third party, and the third party must be subject to suit by the Attorney General to obtain the assets in the event of the tribe's default.

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Janet Napolitano
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