Indian Affairs Committee Meeting – Friday July 27
Comments of Autumn Monteau – General Counsel, NM Indian Affairs Department.
Re: Bond Proceeds Expenditures for Capital and Tribal Infrastructure Project Fund Projects

- The State of New Mexico finances certain capital projects through the issuance of severance tax bonds. These bonds can be either tax-exempt or taxable. Tax-exempt status remains throughout the life of the bonds, but this status can be lost if certain applicable federal laws do not remain satisfied.
- Per Bond Counsel: Under federal law, tax-exempt bond proceeds may only be used for capital projects, not operating expenses (This applies to TIF and Capital Outlay projects).
- Under state law (The Severance Tax Bonding Act, §7-27-10.1)- the 5% of the estimated bonding capacity that goes to the TIF projects- those severance tax bond funds may only be used for "direct project costs." This language is specifically included in the provision related to the TIF's standing appropriation of funds. Taxable bond proceeds may be used for any project allowed under the TIF Act, but only the "direct costs" of that project.
- Thus, "Operating expenses" and "Indirect expenses" can not be reimbursed with STB funds (This applies to TIF and Capital Outlay projects) whether the proceeds are tax-exempt or taxable, and this basic principle is stated in the State regulations in the Bond Disbursement Rule (NMAC 2.61.6).
- Specific Example: <u>Master Planning</u> - Per Bond Counsel: We have looked at the issue of whether master plans may be funded using STBs. Planning with tax-exempt bond proceeds is only acceptable if it is linked to a particular capital project. Again, this is because tax-exempt bond proceeds may only be used for capital projects and master planning is not a capital project in itself.
- The STB authorization in the Severance Tax Bonding Act (§7-27-10.1) allows STBs to be used for all "tribal infrastructure projects," as defined in the Tribal Infrastructure Act. So, because planning is allowable under the Tribal Infrastructure Act, <u>taxable</u> STB proceeds may be used for that purpose.
- Keep in mind that the standing TIF appropriation of the 5% bonding capacity is new this year and does not allow for indirect project costs. Thus, taxable bond proceeds may be used for any project under the TIF Act (even master planning), but only the direct costs of that project.
- So, it is the Severance Tax Bonding Act that prohibits the use of bond proceeds for "indirect" project costs. This is not something that SBOF can waive, nor is it related to the bond disbursement rule – it is a statutory requirement.
- Specific Example: <u>Reimbursement of Payments to Tribal Employees</u>. NMAC 2.61.6.8(G)(6) prohibits the use of bond proceeds to pay for operating expenses (e.g. salaries and in-house labor). This Rule does not, however, prohibit the use of bond proceeds to pay for temporary employees who are hired solely for the purpose of working on the project that is being paid for with bond proceeds. So there must be a certification that constitutes sufficient documentation that the tribe/nation/pueblo has:
    - The employee has been hired to work solely on one or more capital projects;
    - The employee is not being paid by any funds other than those directly related to the capital project;
    - The employee is not employed by the tribe in any other capacity; and
    - The salary for the employee is capitalized into the cost of the project.

- It becomes a fact-specific inquiry whether particular expenses, such as “equipment” proposed to be purchased for a given project, is a direct or an indirect project cost.
- Specific Example: <u>Reimbursement of Payment for Equipment</u>
- Typically, reimbursement for equipment that does not become a permanent part of the project being paid for with Severance Tax Bond proceeds is not an allowable expense. If it is of a depletable nature or can be used for another project becoming an “asset”, those are things DFA will look at. DFA/IAD agree that there are projects which require the use of equipment (such as generators) and that there are circumstances under which reimbursement of those expenses would be allowable (i.e, reimbursement of the cost of leasing the generator or renting the generator).
- Our Intergovernmental Agreements contain a Bond Project Clause where the Grantee acknowledges that all Board of Finance conditions must be satisfied and that the Agreement is subject to the Bond Disbursement Rule.