

RENZ D. JENNINGS
CHAIRMAN

MARCIA WEEKS
COMMISSIONER

CARL J. KUNASEK
COMMISSIONER



ARIZONA CORPORATION COMMISSION

JAMES MATTHEWS
EXECUTIVE SECRETARY

SECURITIES DIVISION
1300 West Washington
Third Floor
Phoenix, AZ 85007-2996
TELEPHONE: (602) 542-4242
FAX: (602) 542-3583

April 25, 1995

Fred Bunker Davis, Esq.
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186

RE: Gilpin County, Colorado, Certificates of Participation
A.R.S. § 44-1843(A)(1)

Dear Mr. Davis:

On the basis of the facts set forth in your letters of April 6, 1995, and October 17, 1994, and in reliance upon your opinion as counsel, the Securities Division will not recommend enforcement action for violation of the Securities Act of Arizona should the transaction take place as set forth in your letter.

As this position is premised upon the facts set forth in your letter, it should not be relied on for any other set of facts or by any other person. Please also note that this position applies only to the registration requirements of the Act; the anti-fraud provisions of the Act continue to be applicable.

Please be aware that dealer registration is required for securities exempt under A.R.S. § 44-1843(A)(1), as set forth in the provisions of A.A.C. R14-4-104(A)(5).

We have attached a photocopy of your letter. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Dee Harris".

DEE RIDDELL HARRIS
Director of Securities

KUTAK ROCK
A PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS
THE OMAHA BUILDING
1650 FARNAM STREET
OMAHA, NEBRASKA 68102-2186
402-346-6000
FACSIMILE 402-346-1148

ATLANTA
DENVER
KANSAS CITY
LITTLE ROCK
NEW YORK
OKLAHOMA CITY
PHOENIX
PITTSBURGH
WASHINGTON

April 6, 1995

Jean Barry, Esq.
Assistant General Counsel
Arizona Corporation Commission
Securities Division
1300 West Washington, 3rd Floor
Phoenix, Arizona 85007

Gilpin County, Colorado, Certificates of Participation
(Detention Facility Project) Series 1994
Your File No. S-0041967-EIDR

Dear Ms. Barry:

It is hard to report with particularity the evolution of our six criteria for treating certain certificates of participation ("COPs") in municipal obligations as exempt municipal securities. For your information, I enclose copies of my correspondence with the California Department of Corporations in June 1982 (the "San Juan Capistrano matter"), which is the first state interpretation on the subject known to me, and a copy of a Response To Petition For Declaratory Statement from the Florida Division of Securities dated June 11, 1986, which is useful because it references the authority for the federal position on COPs under the Securities Act of 1933. Since the time of the San Juan Capistrano matter, we have gradually built up an internal library of interpretations on the subject by the states. In all states except Nebraska and Oklahoma¹ we have received confirmation, in one form or another and on different deals with different facts, that it is proper to claim the governmental securities exemption at least for COPs that meet the criteria I sent you previously. In the process of obtaining those rulings I have spoken with many administrators and many securities lawyers, read a lot and failed to keep a good paper trail of the source of particular items.

Perhaps if I try to reassess the arguments surrounding COPs, I can indicate the reason for, if not the source of, each criterion. For this discussion I will assume a structure where a

¹ I am highly embarrassed to discover that we have received a letter from Arizona, your office, confirming an exemption for an offering of COPs. It was dated February 10, 1994, addressed to Sheila Hawes and related to City of Willets, Refunding Certificates of Participation (Willets Municipal Water System Improvement Project) Series 1994.

KUTAK ROCK

Jean Barry, Esq.
Assistant General Counsel
April 6, 1995
Page 2

bona fide governmental unit of the United States or one of the States thereof (the "Principal Obligor") enters into a commercial-type of lease, loan or sale agreement with a party (the "Straw") who (i) will supply the subject matter of the contract (the "Project") and then (ii) will assign its interest in that contract to a trustee. The trustee will execute and deliver COPs to an underwriter, who sells them to the public. The proceeds from the public sale finance the Project. In effect, a COPs structure is the inverse of an industrial development bond. In the former, a (usually) nongovernmental entity appears to be raising money for the benefit of a governmental unit and in the latter case a government raises money for the benefit of a nongovernmental business or charity. There are a lot of variations in the form that these deals take. That is why we use the criteria to screen deals.

The first criterion is subsumed in my statement of facts: unless a party in the transaction can claim the Arizona §44-1843(A)(1) exemption for its general obligations, you can not get out of the gate. You need to start with a municipality in order to end with a municipal security.

Further analysis of COPs involves two principal issues, which somewhat overlap: issuer status and fractionalization. As to the issuer question, because the Straw initially holds the Principal Obligor's contract, and the municipal obligation initially runs to the Straw, it can be argued that the Straw is creating a security from the municipal obligation. The counter to that position is that if the Straw assigns away all of its right, title and interest in and to the contract from the outset, does not receive and never retains any economic interest in the Project, and has no liability to assignees of the contract for any payments pursuant to the contract, then the Principal Obligor's obligation to pay flows through unchanged to the holders of the assigned contract. A trustee under a municipal bond-type of indenture is interposed between the Principal Obligor and the Straw to make sure that the Straw really is out of the loop and that the rights of the assignees (the COPs holders) are protected. The trustee in its representative capacity (or the holders directly) can exercise the rights of the COP holders against the municipality. Criteria ## 2, 3 and 4 are our reminders to ascertain that the deal under analysis fits this pattern on the "issuer" question.

Another heavy argument for treating the municipality as the issuer is that the COPs are treated as municipal securities for federal income tax purposes. It is only because the COPs are deemed to be a municipal obligation that interest on them is exempt from federal income taxes.

"Fractionalization" is the issue that rises from the definition that says "any interest in a security is itself a security." A typical case for the conventional analysis of this question might be as follows. If A acquires an issued and outstanding bond of "Smith County", deposits it in trust with his local bank and sells COPs in 85% of the principal of the bond to B and COPs in

KUTAK ROCK

Jean Barry, Esq.
Assistant General Counsel
April 6, 1995
Page 3

70% of the interest on the bond to C, then A has sold one new security to B and another to C. His retained interest in the residue of the trust can be seen as a third security. The obligation of "Smith County" did not flow through unchanged to the ultimate holders. Each participant, A, B and C, has a different interest than the others and none has the same interest represented by the whole original "Smith County" bond. A's actions with respect to the bond were not contemplated by or in the original documents establishing "Smith County's" obligations to bond holders. "Smith County" has no connection with A and has no obligation to see that A fulfills his promises to the assignees.

In the COPs model that we use for testing prospective offerings, however, unrelated third parties do not create "fractions" in the security after creation of the original municipal obligation. The whole transaction, including the contract between the Principal Obligor and the Straw, the assignment of the contract to the trustee and the issuance of the COPs backed by the contract, is part of a single plan of financing for the Principal Obligor that is linked and interrelated. The municipality that is deemed to be the issuer of the COPs knows about and facilitates issuance of the COPs, executes the necessary documents in the expectation that the assignment and COPs issuance will occur and otherwise overtly or implicitly acknowledges, at a minimum, that it does object to the fractionalization of the interests in its obligation to the Straw.²

As I mentioned on the telephone, municipalities in California have had problems from nonfinancing COPs constructed from standard commercial municipal leases and installment sales contracts. These are third party transactions, structured after the initial obligation was created, without the knowledge or consent of the obligated municipality. But rather than attack such COPs on the ground that they are not valid municipal obligations, California added §25403 to the Corporate Securities Law of 1968, which merely made it unlawful to sell such a security in California unless prior written consent to such sale is obtained from the Principal Obligor. The provision since has been moved from the Corporate Securities Law to the Government Code, Division 6, Title 1, Chapter 13.

So, to be sure the "fractionalization" issue will not bite, Criteria ## 2 and 3 make us check whether the Straw has passed through its whole interest in the underlying contract.

² To be fair, we have not represented public sellers of "third party COPs" that have been created without the assistance (or at least the knowledge) of the municipal obligor. There are such securities in the marketplace and I presume therefore that their sponsors have resolved the "fractionalization" question without need of the municipal obligor's participation, explicit or implicit, in the creation of the COPs. I am not familiar with the reasoning supporting that position. Because we have not had to face that issue, we continue to rely during our internal analysis upon the easy test: "Was the municipal obligor involved in the creation of the COPs?". This may be a higher standard than required.

KUTAK ROCK

Jean Barry, Esq.
Assistant General Counsel
April 6, 1995
Page 4

Criterion 5 requires us to make certain that there is no splitting of the interests after original creation, that the COPs are part of a financing transaction and that the Straw's participation is only to aid and assist the Principal Obligor. Finally, Criterion 6 is our reminder to check for fingerprints, the evidence that the Principal Obligor knows about and consents to the transaction.³

The foregoing explanation and justification of the working criteria make it clear that they are evolutionary, not strictly analytical, and can stand some revision for clarity. But collectively, they work reasonably well.

To apply the criteria to the facts of the current case, I would support the claim of the Gilpin County Detention Facility COPs to be *bona fide* exempt municipal securities as follows. For Criterion #1, the answer is on page 21 of the Preliminary Official Statement heretofore forwarded to you (extra copy enclosed) (the "POS"). There, under the caption "County Powers" it clearly describes the county as a political subdivision of the State of Colorado with an enumeration of its powers. As to Criterion #2, the Straw's lack of interest in the transaction is described on page 12 of the POS under the caption "The Corporation's Limited Liability" where it is clear that the Straw will neither profit from, nor supply profit to, the transaction. Criterion #3 is satisfied by reference to the description under the caption "SECURITY FOR THE CERTIFICATES" on page 19 of the POS. However, for further support, I also would check out the granting clause of the trust indenture. Enclosed is a copy of the Mortgage and Indenture of Trust Dated as of October 15, 1994, of which the granting clause on pages 2 and 3 gives away all of the Straw's essential interests in the transaction. Criterion #4 can be satisfied in the same reference as Criterion #2 above. The POS generally, and particularly in "SOURCES AND USES OF FUNDS" and "THE PROJECT" on page 8, discloses that the proceeds from sale of the COPs will be used to construct the Project and that the County's lease payments are designed to pay debt service on the COPs. The COPs are the financing device adopted by the County to advance a County project, from the very beginning of the Project. Finally, in this case, there is no doubt of the Principal Obligor's involvement with the COPs. One does not need to search for fingerprints; on page 51 of the POS, under the caption "*Voter Approval of the Lease and the Series 1994 Certificates*", is described how the question of issuance of the COPs was submitted to a vote of the electorate in the County and approved. Nobody is trying after the fact to turn a County contract into a security without the County's knowledge and consent. So the subject COPs clearly fit within all of the criteria.

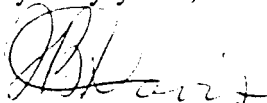
³ As noted above, this Criterion may be stricter than necessary.

KUTAK ROCK

Jean Barry, Esq.
Assistant General Counsel
April 6, 1995
Page 5

For the foregoing reasons, we request confirmation of the availability of the exemption in §44-1843(A)(1) of the Arizona Revised Statutes, as amended, for an underwritten offering of the subject Certificates of Participation.

Very truly yours,



Fred Bunker Davis

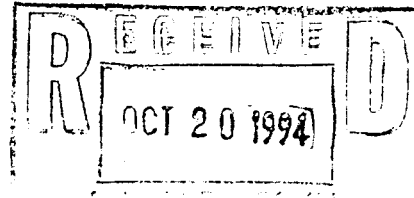
Enclosures (4)

KUTAK ROCK
A PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS
THE OMAHA BUILDING
1650 FARNAM STREET
OMAHA, NEBRASKA 68102-2186
402-346-6000
FACSIMILE 402-346-1148

ATLANTA
BATON ROUGE
DENVER
KANSAS CITY
LITTLE ROCK
LOS ANGELES
NEW YORK
OKLAHOMA CITY
PHOENIX
PITTSBURGH
WASHINGTON

October 17, 1994

Mr. Dee R. Harris
Director
Arizona Corporation Commission
Securities Division
1300 West Washington, 3rd Floor
Phoenix, Arizona 85007



Gilpin County, Colorado, Certificates of Participation
(Detention Facility Project) Series 1994

Dear Mr. Harris:

We request confirmation that the exemption provided by § 44-1843(A)(1) of the Arizona Revised Statutes, as amended (the "Act") is available for a proposed offering of the captioned Certificates of Participation. We enclose for your information a draft of the Preliminary Official Statement with respect to the offering and our check for \$200.00 in payment of the fee required by § 44-1861(L) of the Act.

Gilpin County, Colorado, (the "County") is a county and political subdivision of the State of Colorado. It is constructing a new Justice Center complex, which will have a justice and administrative building, a parking area, a planned recreational area and a ballfield and related parking area on approximately 31.9 acres of land. The Justice Center portion of the site is approximately eight acres. Part of the Justice Center will be a detention facility. That facility, including the land upon which it is constructed and the equipment which it contains, will constitute the "Project" that the County will lease (pursuant to a Master Lease Purchase Agreement to be dated as of November 1, 1994) from Gilpin County Building Authority. Gilpin County Building Authority (the "Corporation") was incorporated as a Colorado nonprofit corporation for the purpose of facilitating County financings, including lease-purchase financings. No part of the Corporation's net earnings, income or assets will inure to the benefit of any private entity or person.

The Corporation will enter into the Lease with the County solely to facilitate the financing of the Project. Pursuant to a Mortgage and Indenture of Trust to be dated as of November 1, 1994, the Corporation will assign all of its rights, title and interest in the Lease (other than certain rights to payment or reimbursement of certain fees and expenses) to the

KUTAK ROCK

Mr. Dee R. Harris
October 17, 1994
Page 2

Trustee for the benefit of the Participants. The Corporation is not financially liable for, and will not make, any Lease payments. Holders of the Certificates will have no right to look to the Corporation for payment of any principal of or interest on the Certificates.

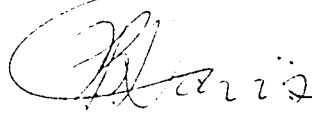
Net proceeds from sale of the Series 1994 Certificates will be used to finance acquisition and construction of the detention facility project. Execution of the Lease and issuance of the Series 1994 Certificates was authorized by a vote of the County's electorate on November 2, 1993.

The Certificates and the interest thereon are payable from Base Rentals under the Lease appropriated annually and paid by the County from any legally available funds of the County and certain investment earnings and reserves. (Under certain circumstances the Certificates may be payable from proceeds of sale of the Certificates and income from the investment thereof, net proceeds of certain insurance, performance bonds or condemnation awards, or from net proceeds received as a consequence of breaches of warranty or defaults under certain Project Contracts or net proceeds from leasing, liquidation or other disposition of the Leased Property.) Neither the Lease nor the Series 1994 Certificates constitutes a general obligation, indebtedness or multiple fiscal year direct or indirect debt of the County. It is expected that the interest portion of Base Rentals payable by the County will not be includable in gross income for federal income tax purposes and will be exempt from Colorado income tax.

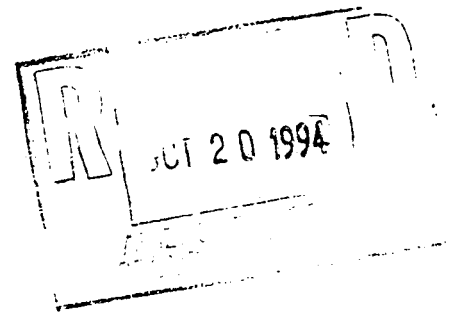
The Lease evidences an indebtedness of a governmental entity of a kind exempted by § 44-1843(A)(1) of the Act and not excluded from such exemption by § 44-1843.01 of the Act. When the interest and rights of the Corporation as the lessor to the County, including the obligation of the County to make payments under the Lease, have been assigned to the Trustee for the benefit of the holders of the Certificates of Participation, the Certificates will have the same character as the underlying Lease for purposes of the exemption in § 44-1843(A)(1). We would appreciate your confirmation of the availability of that exemption for an underwritten offering of these Certificates of Participation.

If you have any questions relating to this request, please feel free to call us at our expense.

Very truly yours,



Fred Bunker Davis



Enclosures