

Tribal Sovereignty and Lending in Indian Country

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Sovereignty and Its Effects - Lynn Slade
The Forum and The Law - Walter Stern
Taxation in Indian Country - Tim Van Valen
Federal Financial Incentives - Bill Scott
Bond Financing - Duane Brown
Federal Financing Incentives - Meg Meister

Tribal Sovereignty and Lending in Indian Country

- **What is tribal sovereignty and how can it affect lending transactions?**
- **How do you evaluate enforceability in Indian country transactions?**
- **Where will disputes be resolved and whose law will apply?**
- **Are there unexpected taxation issues?**
- **Are there incentives for financing in Indian Country?**

Sovereignty and Its Effects - Lynn Slade

Sovereignty and Its Effects

- **What is tribal sovereignty and how does it impact lending?**

Defining Tribal Sovereignty

- Tribes and Pueblo are "Domestic Dependent Nations"
- Tribes and Pueblos retain some sovereign powers
- Immunity from suit, like States and United States
- Governmental Powers
- Tribes and Pueblos are subject to over-riding federal power

The Changing Federal Vision of Tribes and Sovereignty

- Treaty Period
- "Assimilation" Periods
- Indian Reorganization Act Period
- Self-Determination Period
- Rehnquist Court

Federal Approval of Contracts

- US/Tribe relationship akin to trustee-beneficiary relationship
- Contracts "that encumber tribal lands" for a 7+ year period must be approved by BIA
- Gaming management contracts must be approved by NIGC
- Statutory approvals required; can require environmental reviews and affect timing of transaction
- Effect of inadequate review
- Interpretation of contract ambiguities to favor tribes
- Agreements voidable without valid approval
- Federal approval of mortgages of tribal lands leased under 25 U.S.C. § 415
- Trend towards providing tribes with authority to avoid Secretarial approval

Tribal Regulatory and Taxing Jurisdiction

- Tribes have inherent power over members

- Tribes generally lack power over non-members unless
 - The non-member enters into a consensual relationship
 - Impact on fundamental health, welfare, and political integrity
 - Activity on “tribal lands”
- Tribes have no criminal jurisdiction over non-Indians
- Tribal jurisdiction over non-Indians can cover broad areas
 - Commercial law
 - Tort damages
 - Environmental regulation
 - Employment regulation
 - Court jurisdiction
 - Taxing power

Re-examining Sovereignty in an Era of Change

- The evolving vision of the tribe
- The changing role of BIA
- The effect of tribal competence and success
 - Variations among Tribes or Pueblos

Who are the Key Players

- Tribes (*i.e.*, Navajo Nation, Jicarilla, Mescalero) or Pueblos (*e.g.*, Pueblos of Sandia, Santa Ana, and Isleta)
 - Governor/President
 - Council
 - Business Managers
- Tribal or Pueblo-owned corporations
- Transactions with individual Indians

- **Private business entities contracting with Tribe or Pueblo**
- **Federal trustee: Interior Department/ Bureau of Indian Affairs**
- **Transactions with individual Indians**
- **Determine who need to be involved on a case-by-case basis**

Self-Determination and the Lender

- **New structures for transactions based on a partnership model**
 - **Joint venture**
 - **Management contracts**
- **Creative approaches to addressing sovereignty issues**

Sovereignty and Its Effects

- **Questions?**

Enforceability in Indian Country

- **With Whom Are You Contracting and How Can You Maximize Enforceability?**

Enforceability in Indian Country Transactions

- **Identity and attributes of contracting party**
- **Necessary contractual approvals**
- **Waiver of immunity from suit and stipulations to effective remedies**

Identity and Attributes of Contracting Party

- **Indian Tribe or Pueblo**
 - **IRA Section 16 Tribe: Tribal Constitution will govern authority to execute documents and define necessary tribal approvals**
 - **Non-IRA Tribe: Tribal laws, ordinances, resolutions, codes, customs, traditions and history will govern authority to execute documents and define necessary tribal approvals**
- **Federally Chartered Corporation**
 - **IRA Section 17 empowers the Secretary of the Interior to issue a federal charter of incorporation for a tribal business entity**

- **Tribally Chartered Entity**

- Tribal laws, ordinances, resolutions, codes, customs, traditions, and history will govern authority to execute documents and define necessary tribal approvals

- **State Chartered Entity**

- Corporate documents and state law will govern authority to execute and necessary corporate approvals
- Charter will govern authority to execute documents and define necessary corporate approvals

- **Individual Tribal Member**

Necessary Contractual Approvals

- **25 U.S.C. § 81: Mandates that all contracts that “encumber Indian lands for a period of 7 years or more” must be approved by the Secretary of the Interior**
 - Contracts that “do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of 7 years or more” are not covered by § 81
 - Secretary must comply with the requirements of the National Environmental Policy Act before approval of a contract
- **Indian Gaming Regulatory Act mandates that the National Indian Gaming Commission approve all management agreements and collateral agreements between outside companies and Tribes for gaming operations**

Due Diligence and the Waiver of Sovereign Immunity

- **As sovereigns, Indian tribes are immune from suit without their consent**
 - Immunity applies when the tribe is acting in governmental or business capacity on or off the reservation
 - Immunity may apply to tribally-owned corporation
- **Tribal officials may be immune from suit if acting in official capacity**
- **Tribally chartered enterprises may be immune depending on whether tribal assets are involved in the entity’s operations, extent of control of the entity by the tribal government, the authority of the entity to act on behalf of the tribe, and other factors**
 - If the entity’s charter contains a “sue and be sued” clause, verify that the provision is valid under tribal law
- **The charter for a Section 17 corporation may contain a sue and be sued clause which waives immunity**

- Assets may be limited
- Corporation cannot pledge tribal assets
- Judgments against the corporation cannot be satisfied out of tribal assets
- State chartered entities likely are not cloaked with immunity
 - Assets may be limited
 - Entity likely cannot pledge tribal assets
 - Awards against the entity likely cannot be satisfied out of tribal assets
- Individual members are not protected by immunity
- Congress or Tribe or Pueblo may waive the immunity from suit
 - Waiver must be in writing and must be clear and unequivocal
 - Waiver may be broad or limited to particular subject or particular tribunal
 - Waiver should be tailored to work for the choice of forum and enforcement provisions provided in the agreements

The Forum and The Law - Walter Stern

Subjects Lawyers Love and

Bankers Ha...

Will Learn to Love

The Forum and the Law

- Where Will Disputes Be Resolved, Whose Law Will Apply and Other Issues?

Disclaimer

- “We fall short of presenting all, or even a goodly part, of the news each day that a citizen would need to intelligently exercise his franchise in this democracy. So as he depends more and more on us, presumably the depth of knowledge of the average man is diminished. This clearly can lead to a disaster in democracy.” - Walter Cronkite

The Choices: Forum for Dispute Resolution

- Federal Court
- State Court

- **Tribal/Pueblo Court**
- **Alternative Dispute Resolution; Arbitration**

One View of the Appropriate Forum

- **“. . .Not for \$5 Million, Not for \$500 Million...[should we waive any attribute of sovereignty]” - Representative of Navajo Nation**

The Forum for Dispute Resolution

- **Federal Courts:**
 - **Courts of limited jurisdiction, limited to cases involving:**
 - **Diversity of citizenship**
 - **Federal questions**

Federal Court Jurisdiction

- **Diversity of Citizenship:**
 - **Permits suits between citizens of different states**
 - **Indian tribes or Pueblos are not considered citizens of any state**
 - **Tribal corporations may be citizens of a state depending on how and where they are incorporated**
 - **\$75,000 minimum amount in dispute**
- **Federal Question**
 - **Dispute is resolved by reference to federal laws, treaties or the Constitution; “arising under” federal law**
 - **No \$75,000 requirement**
 - **Most contracts with tribes or Pueblos likely do not “arise under” federal law**
- **Summary:**
 - **Unless arrangement is with a corporate or similar entity organized under the laws of a state, diversity jurisdiction will not be present**
 - **Generally, contract disputes will not “arise under” federal law**

- Federal court jurisdiction likely will not be available, even if the contract provides for federal jurisdiction

Exhaustion of Tribal Remedies

- *National Farmers Union Ins. Cos. v. Crow Tribe of Indians (1985)*:
 - Deference to policy supporting tribal self-government and self-determination
 - Permit tribal/Pueblo court to determine its judicial authority first
 - Orderly administration of justice
 - Several exceptions exist
 - Federal court review may be available later
 - Scope of federal review is uncertain

State Court Jurisdiction

- Courts of general jurisdiction
- Traditionally, tribes and Pueblos are suspicious of state courts
- Likely that tribal/ Pueblo entity will not agree to state court jurisdiction for dispute resolution
- Even if the parties agree, there are unique limitations on the jurisdiction of state courts in the Indian law context
- United States Supreme Court decision in *Williams v. Lee (1959)*:
 - State courts lack jurisdiction over suits brought by non-Indians against Indians concerning matters arising in Indian country when such jurisdiction would infringe “on the right of reservation Indians to make their own laws and be governed by them”
- Impact or import of *Williams v. Lee* is uncertain today, but one must recognize the possible limitation

Tribal Court Jurisdiction

- “Generalizations are odious”
- Tribal courts are not courts of general jurisdiction, *Nevada v. Hicks (2001)*
- Traditionally, non-Indians have been as suspicious of tribal courts as Indians have been of state courts

- Many tribal and Pueblo courts only recently have asserted jurisdiction over non-members or non-Indians
- Some Pueblo courts remain as “traditional” courts, exercising jurisdiction only over disputes between members
- Pueblo of Santo Domingo situation: *Reano* (“the good, the bad...”)
- Even those Pueblo courts exercising jurisdiction over non-Indians lack much of a “track record”
- Some Pueblo courts are not dissociated from the Pueblo political structure; *e.g.*, appeals to the Pueblo Council
- Factors to Consider in Evaluating Whether to Use Tribal Courts to Resolve Disputes:
 - Structure of court system and relationship to the contracting party
 - Background and experience of the judges
 - Track record in resolving the types of disputes likely to arise
 - Rules of procedure and evidence
- Factors to Consider in Evaluating Whether to Use Tribal Courts to Resolve Disputes (cont.):
 - Availability of prior decisions
 - Authority to apply the parties’ choice of law

Alternative Dispute Resolution

- Pre-Dispute Good Faith Negotiation or Mediation
- Peacemaker (and Similar) Courts
- Arbitration

Arbitration

- Viewed by the parties as “neutral” forum
- Consent to arbitration may be a waiver of immunity
- Flexible; contract provision can be drafted to fit the needs of the parties
- Warning: Draft carefully to avoid battle over arbitrability of dispute and the proper arbitration procedure; consider www.adr.org as resource

- Still must face the need for confirmation or review of the arbitration decision by a court (“court of competent jurisdiction”)

Choice of Law

- What law is there? The primary choices are:
 - State
 - Tribal
 - Federal
- State Law:
 - Generally, well developed and understood
 - Relatively easy to find
 - Stable and predictable
- Tribal Law:
 - Generally, not well developed or understood
 - Not easy to find
 - Not easy to predict
 - May not be written, *e.g.*, custom and practice
 - Navajo Nation Code: best-developed tribal commercial code

The Forum and the Law

- “The secret of getting ahead is getting started. The secret of getting started is breaking your complex, overwhelming tasks into small manageable tasks, and then starting on the first one.” - Mark Twain

General Recommendations

- Measures to Address Some of the Issues We Have Discussed
- Understand cultural differences and each side’s goals and perspectives
- Carefully review all applicable federal, tribal, state and local laws, regulations, and policies
- Confirm the identity and status of the entity with whom you are dealing

- Carefully review all applicable governing documents
- Obtain an appropriate waiver or immunity from suit
- Obtain a waiver on any potential exhaustion of tribal remedies requirement (potential trap for the unwary)
- Obtain all necessary federal and tribal contractual approvals
- Include choice of law, choice of forum and dispute resolution provisions in contract documents
 - Address collateralization, perfection of liens, foreclosure procedures and other similar issues as part of the choice of law provisions
 - If it is important, spell it out; ambiguities favor the Tribe/Pueblo

The Forum and the Law Applied: Review of Lousy Contract Terms

- “Applicant agrees, consents and submits to the non-exclusive jurisdiction of any state or federal court located in the...state.... Applicant waives any right to transfer or change the venue of any litigation filed in such courts.”
- Comments:
 - Enforcement is problematic; parties cannot confer jurisdiction
 - Applicant can file suit in Pueblo court
- “...all suits will be brought in **Bernalillo County, New Mexico**”
- Comment:
 - If a tribe or Pueblo were located in that county, the suit could be brought in Tribal/Pueblo court
- “Applicant agrees to pay interest of __% or the highest *rate permitted by law*, whichever is less....”
- Comments
 - Whose law
 - Does tribal or Pueblo law permit *any* interest

The Forum and the Law: Final Thought

- Don’t Believe Everything You Hear:
 - Example: “Employment is not important.”

- Former Representative of Navajo Nation,
- where unemployment runs in the
- neighborhood of 57%

Taxation In Indian Country - Tim Van Valen

Indian Country Tax Issues

- Tribal taxation
- State and Local taxation
- Federal taxation
- Indian Country tax issues are driven by federal Indian law
 - Tribal sovereignty
 - Federal statutory pre-emption
 - Territorial/Geographical component to tax issues
 - Politics

Key Questions to Consider in Indian Country Tax Analysis

- Where?
- Who?
- How?

Tribal Jurisdiction to Tax in Indian Country

- Where?
 - “An Indian tribe’s sovereign power to tax-whatever its derivation-reaches no further than tribal land”
 - Activities on non-Indian fee lands within reservations and pueblos are not subject to Indian taxing jurisdiction
- Who?
 - Tribal members, entities and businesses on *tribal* lands
 - Often not fully exercised

- Non-Indians engaging in activities on *tribal* lands

- Conduct with effect on political integrity, economic security, health or welfare of a tribe

- Consensual relationship

- “Commercial dealings, contracts, leases or other arrangements”

- Tribe must have a nexus or relationship with the non-Indian consensual relationship at issue

- How?

- Very carefully

- Each tribe different

- Plan ahead to minimize tax impacts

- Document the transactions well to identify who does what where

- Keep the documents for at least 7 years.

Tribal Authority to Tax in Indian Country

- Sales/gross receipts taxes

- Business activity tax

- Severance taxes

- Property tax

- Possessory interest tax

State Authority to Tax in Indian Country

- Some non-Indian activities on Indian lands

- Non-Indian to non-Indian transactions are taxable by State

- Non-Indian property interests taxable by state

- Potential for dual taxation by State and tribes

- Non-Indian to Indian transaction on not taxable by state if:

- Sale occurs on tribal land

- **Sale to member of tribe, tribal entity or tribal business**
- **Rule applies to goods or services (at least in New Mexico)**
- **Indian transactions, activities and property off of tribal lands are subject to state and local taxation**
- **Be careful with non-taxability assumptions if there is an off-reservation/pueblo component to a transaction**
- **Those who contractor with federal agencies for work on tribal lands are generally subject to state taxation**
 - **Exemption from taxation generally limited to transactions with tribe or tribal entity**
 - **Limited exception for contractors under some federal programs closely related to pervasive federal interest**

New Mexico Gross Receipts Tax

- **Generally applies to a seller's receipts from a sale of services, goods and leasing in New Mexico**
- **Can not be imposed on tribes, tribal entities or tribal members for transactions on Indian lands**
- **Statutes provide ability to eliminate double taxation on transactional taxes for some pueblos**
 - **Santa Clara, Isleta, Laguna, Nambe, Sandia and Santa Ana**
 - **Requires reciprocity**
- **Coal sales from Navajo lands**
- **Construction specific deductions**
 - **Receipts from sale of construction materials to contractor for project on tribal lands**
 - **Does not require completed project be taxable**
 - **Requires Type 6 NTTC**
 - **Need to document well for audit**

New Mexico Compensating Tax

- **Generally applies to commercial use of property in New Mexico purchased outside of New Mexico and thus not subject to gross receipts tax**
- **Does not apply to fixtures on Indian lands**

- **Interesting question as to whether it applies to off-reservation/pueblo use of property purchased on Indian lands free from gross receipts tax**

New Mexico Personal Income Tax

- **Does not apply to income of tribal members, living on tribal land for employment on tribal land**

New Mexico Corporate Income Tax

- **Intergovernmental business tax credit**
 - **Business activities of a new (post –7/1/97) facility on Indian lands of a “manufacturer or processor” or a “grower”**
 - **50% of lesser of all tribal taxes imposed on “income” or 50% of taxpayer’s New Mexico corporate income tax from new business on Indian lands**
 - **Apportionment formula tied to capital investment and payroll for businesses with New Mexico activity on and off of Indian lands**

New Mexico Property Tax

- **Does not apply to Indian lands and property on Indian land**
- **Applies to non-Indian property on Indian land**
- **Applies to non-Indian leasehold interest on Indian land**

Federal Corporate Income Tax

- **Accelerated depreciation provisions currently in effect for property placed in service before 12/31/04**
 - **Generally applies to property primarily used on Indian lands for conduct of a trade or business**
 - **Applies to some Tribal infrastructure related property located off of Tribal lands**
- **Indian Employment Credit**
 - **20% of the excess, if any, of the sum of qualified wages and health insurance costs in any taxable year over the sum of such amounts incurred by the employer in calendar year 1993**
 - **Capped at \$20,000 per employee**
 - **Does not apply to wages and benefits of an employee who has more than \$30,000 in wages paid by employer**

Indian Country Tax Tips

- **Organize and document transaction with tax issues in mind**
- **Think ahead:**
 - **Where does transaction occur?**
 - **Where does delivery occur?**
 - **Who is the buyer?**
 - **Who is the seller?**
- **Work with tribes and pueblos, suppliers, subcontractors and buyers**
- **Dot the “I’s” and cross the “T’s”**

Federal Financial Incentives - Bill Scott

Accelerated Depreciation, 26 U.S.C. § 168(j)(4)

- **“Qualified Indian reservation property” – property “used by the tax payer predominantly in the active conduct of a trade or business within an Indian reservation”**
- **“Qualified infrastructure property” – property which “(i) benefits the tribal infrastructure, (ii) is available to the general public, (iii) is placed in service in connection with the tax payer’s active conduct of a trade or business within an Indian reservation.” Examples: roads, power lines, water systems, railroad spurs, and communication facilities**
- **Excludes property outside an Indian reservation “on a regular basis” and property “placed in service for purposes of conducting or housing” gaming**
- **Currently slated to expire in December 2004**

Tax Credits for Employers of Indians on Indian Lands, 26 U.S.C. § 45

- **A current year business tax credit in “an amount equal to 20% of the excess (if any) of (1) the sum of (A) the qualified wages paid or incurred during such taxable year, plus (B) qualified employee health insurance costs paid or incurred during such taxable year, over (2) the sum of the qualified wages and qualified employee health insurance costs . . . which were paid or incurred by the employer (or any predecessor) during calendar year 1993”**
- **Currently slated to expire in December 2004**
- **Employee must:**
 - **be an enrolled member or the spouse of an enrolled member of an Indian tribe**

- perform “substantially all” of their services in a “trade or business” within an Indian reservation
- must have a “principle place of abode” on or near the reservation while performing such services
- Excludes:
 - employees who are 5-percent or more owners or are engaged in gaming
 - receive wages in excess of \$30,000 (adjusted for inflation)

Indian Employment, Training and Related Services, 25 U.S.C. § 3401, et seq

- Provides a mechanism for a private company to garner a minimum of two years of service from an employee, while only paying for one year of wages plus training costs

Proposed Indian Reservation Jobs and Investment Act of 2001 (H.R. 177 and S. 558)

- Would provide a tax credit for qualified investment in “qualified Indian reservation property”
 - reservation personal property, new reservation construction property, or reservation infrastructure investment
- Excludes gaming facilities
- The amount of the credit available would be adjusted according to the unemployment rate on the applicable Indian reservation

HUBZones Program, Small Business Reauthorization Act, 15 U.S.C. § 632

- Provides assistance and preference in the receipt of federal procurement contracts.
- Lands within “Indian country” may be included within the definition of a “historically underutilized business zone”
- A small business concern can be one “that is owned in part by one or more tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments”
- Must certify:
 - That not less than 35% of the employees reside within a HUBZone, and that the business will attempt to maintain this percentage throughout the course of any federal contract awarded
 - With regard to subcontracts, that 50% of the personnel costs will be expended for its own employees or employees of another HUBZone small business concern, and that 50% of the manufacturing costs for supplies will be incurred in a HUBZone

Energy Resource Development on Indian Reservations, 25 U.S.C. § 3500 et seq.

- **Requires the Secretary of Energy to**
 - **Establish and implement a demonstration program to assist Indian tribes in pursuing energy self-sufficiency and to promote the development of a vertically integrated energy industry on Indian reservations**
 - **Provide development grants to Indian tribes or joint ventures which are 51 percent or more controlled by an Indian tribe to help tribes obtain managerial and technical capability to develop the energy resources on Indian reservations**
- **Provide grants, not to exceed 50% of the project costs, for vertical integration projects including projects involving solar and wind energy, oil refineries, the generation and transmission of electricity, hydroelectricity, cogeneration, natural gas distribution, and “clean, innovative uses of coal”**
- **“The Secretary may grant financial assistance to Indian tribal governments, or private sector persons working in cooperation with Indian tribal governments, to carry out projects to evaluate the feasibility of, develop options for, and encourage the adoption of energy efficiency and renewable energy projects on Indian reservations.”**

Energy Policy Act of 2002 (H.R. 4)

- **Would establish a loan guaranty program for loans made to Indian tribes for energy development, including the planning and construction of generating stations and transmission and delivery facilities**
- **Would provide a federal purchase preference be given to energy resources produced by organizations partly or wholly controlled by tribal governments**
- **Would permit Indian tribes to grant leases for energy facilities and for rights-of-way for pipelines and transmission lines serving an electric generation, transmission or distribution facility located on tribal land, or a facility that processes or refines energy resources developed on tribal lands without the prior approval of the Secretary of the Interior if the lease or rights-of-way are executed under regulations developed by the tribe and approved by the Secretary.**

Native American Business Development Trade Promotion and Tourism Act of 2000, 25 U.S.C. § 4301 et seq

- **“To promote private investment in the economies of Indian tribes and to encourage the sustainable development of resources of Indian tribes and Indian-owned businesses”**
- **Office of Native American Business Development coordinates federal programs for business and economic development assistance to Indians, and runs new export and trade promotion tourism demonstration project programs under the Act**
- **“Indian-owned business” means an entity organized for the conduct of trade or commerce with respect to which at least 50% of the property interests of the entity are owned by Indians or Indian tribes**

Indian Revolving Loan Fund, 25 U.S.C. § 1461 et seq.

- Established “to provide credit that is not available from private money markets, or to supplement funds from private lenders”
- Loans may be made for any purpose which promotes the economic development” of individual Indian borrower or Indian organization and its members
- Loans may be made in certain circumstances to finance “economic enterprises,” which are defined to have at least 51 percent Indian ownership.
- Not presently funded and may not be funded in the future.

Bond Financing - Duane Brown

Indian Tribal Government Tax Status Act, 26 U.S.C. § 7871

- Allows qualifying Indian tribal governments to issue tax exempt debt under Internal Revenue Code rules similar to those for state governments, cities, counties and other governmental agencies
- Two types of tax-exempt bonds permitted
 - Governmental purpose bonds
 - Private activity bonds for certain tribally owned manufacturing facilities
- Governmental Purpose Bonds
 - May be issued “only if such obligation is part of an issue substantially all of the proceeds of which are to be used in the exercise of any essential governmental function.”
 - Essential governmental function “shall not include any function which is not customarily performed by State and local governments with general taxing powers.”
- Governmental Purpose Bonds
 - Schools
 - Libraries
 - Tribal administrative buildings
 - Jails
 - Parks
 - Convention facilities
 - Housing projects owned by the tribe

- **Private Activity Bonds**

- Tribal government must issue the bonds
- 95% or more of net proceeds must be used to finance a manufacturing facility
- Tribal government must own and operate facility
- Facility must be located on land which has been held in trust for the benefit of the tribe for at least 5 years immediately preceding bond issuance
- Must satisfy a detailed annual employment and wage test

- **Tribal government must issue bonds**

- **Tribe must own and operate the facility**

- **Facility must be located on land which has been held in trust for the benefit of the tribe for at least 5 years immediately preceding the issuance of the bonds**

- **Employment/wage requirement:**

- “as of the close of each calendar year . . . , the aggregate face amount of all outstanding tax-exempt private activity bonds issued to provide financing for the . . . facility is not more than 20 times greater than the aggregate wages . . . paid during the preceding calendar year to individuals (who are enrolled members of the Indian tribe of the issuer or the spouse of any such member) for services rendered” at such facility

Federal Financing Incentives - Meg Meister

Indian Financing Act of 1974

- **Loan Guaranty and Insurance Program**

Administered through BIA Offices

- **Local Contact:**

- Jerry Ryburn
- Bureau of Indian Affairs
- Plaza Maya Building, Suite 103
- 346-7581

Who is an Eligible Borrower?

- **Individual Indian**
- **Tribe/ Pueblo**
- **Entity 51% owned by either Indian, Tribe or Pueblo**
- **Borrower must have 20% equity interest in business immediately after loan is made**
- **Can't otherwise qualify for financing without program**

Who is an Eligible Lender?

- **Regularly makes loans**
- **Capable of evaluating and servicing loans**
- **Otherwise acceptable to BIA**
- **BUT NOT**
- **Agency or instrumentality of federal government**
- **Lender that borrows from federal government to make loans (except borrowing from federal reserve)**
- **Lender that does not include interest on loans in gross income for purposes of Ch.1 Title 26 of US Code**
- **Lender who originates loans but does not hold loans**

How Does the Program Work?

- **Guaranty- up to 90% of unpaid principal and interest due**
- **Insurance- reimburse for losses up to 15% of the aggregate of all such loans from a lender (limit 90% of the loss of any one loan)**
- **Obtain prior approval as a lender by entering into agreement with the BIA**

Cost

- **Guaranty- 2% of guaranteed principal amount**
- **Insurance- 1% of insured principal amount**

BIA Submission for a Loan Guaranty

- **Indication of need and minimum guaranty lender will accept**

- Copy of loan file

BIA Submission for Insurance

- No prior approval required for loans up to \$100,000, except if a portion of an insured loan package for one borrower greater than \$100,000
- If loan greater than \$100,000, must submit an application and all of the same information as for loan guaranty

Prohibited Loan Terms

- No “points”, loan origination fees
- Can charge annual servicing fee so long as not included in principal of loan and does not bear interest
- No third party charges, except legal fees, broker commissions, inspections, title insurance, key man insurance, and others
- No term beyond 30 years
- No payments less frequent than annually
- No default interest rate
- No late fee, except after 30 days if not more than 5% of the late installment without bearing interest
- No insecurity clause
- No restrictions on sale of collateral
- No general assignment of tribal trust income

Closing Requirements

- Notice to BIA 5 business days before closing
- Title and lien searches
- Recent appraisal
- Compliance with laws
- Flood zone certification

Interest Subsidy

- BIA subsidy of interest payments for borrowers whose earnings are below industry norms
- Lender makes initial determination and applies for subsidy

Loan Transfer

- Partial Transfer- eligible lender must service loan and own at least 10% of interest in guaranteed loan
- Total Transfer of guaranteed loan- 30 days notice
- Total Transfer of insured loan- only by merger and surviving entity must become approved lender

Loan Servicing Requirements

- Verify loan application information
- Reasonably assure use of loan proceeds
- Require auto payment
- Require title in borrower's name
- Reasonably assure borrower keeps current on taxes, insurance, and compliance with laws
- Reasonably assure compliance with construction contracts
- Promptly notify in writing of breach

Modification of Loan

- Generally will need BIA approval

Default

- Send written notice to Borrower and BIA
- Can grant temporary forbearance, but need BIA approval

Getting Paid

- Send notice to BIA within 90 days of default of following options:
- Under a guaranty, making a claim
- Under insurance or guaranty, going to liquidate collateral, then make a claim,
- Going to modify loan

Indian Country Transaction Checklist

- **Waiver of sovereign immunity**
- **Waiver of exhaustion of tribal remedies**
- **Consent to jurisdiction/arbitration**
- **Choice of law**
- **Security interests in collateral**
- **Perfection of liens**
- **Special employment provisions**
- **Special tax provisions**
- **Tribal and federal approvals, as necessary**
- **Opinion of borrower's counsel**

Tribal Sovereignty and Lending in Indian Country

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