

Mortgage Lending in Indian Country

Bureau of Indian Affairs
Western Regional Office
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Tribal Trust Land - Lease and Leasehold Mortgage

- Since Tribal Land is generally not alienable, there is no general Authority for Mortgages on Tribal Title – Tribal Land may, however, be leased under Statutes which generally allow Long-Term Leases for Residential Purposes, subject to BIA Approval
- Tribes with IRA Charters may lease without BIA Approval, but only for Terms up to 25 Years (thus limiting the use of “Charter Leases” for Residential Purposes)
- Certain Tribes have been granted exceptions from the standard BIA Approval Requirement, by Special Legislation, but only for Leases made in accordance with BIA-Approved Regulations (see, e.g., the Navajo Leasing Act of 2000)

Allotted Trust Land - Lease and Leasehold Mortgage

- A 1940 Act (codified at 25 U.S.C. 380 and implemented at 25 CFR 162.601) authorizes BIA to grant a Lease on behalf of all Owners after a Three-Month Notice/Negotiation Period, so long as the Land is not being used by any of the Owners
- 25 CFR 162.605 allows BIA to join in a “Majority-Negotiated” Lease on behalf of Minors and Undetermined Heirs/Devisees, but not on behalf of Non-Consenting Adults – This Authority should be viewed as having been superseded by ILCA 2000
- ILCA 2000 (25 U.S.C. 2218) authorizes BIA Approval of Negotiated Leases, with the Consent of the Requisite Percentage of Ownership (ranging from Majority Consent to 90% Agreement, depending on the Number of Owners) – Some Notice to Non-Consenting Owners will be required, but may be less than 90 Days

Allotted Trust Land – Mortgage on Title (no Lease)

- Beneficial Title to Allotments can be mortgaged (usually by a Sole Owner, since all Owners must consent) under a 1956 Act which allows Foreclosure under Tribal Law (or, where there is no applicable Tribal Law, under State Law), and permits Tribal and Individual Indian Purchasers at Foreclosure to retain Title in Trust Status – Fractional Interests owned by Non-Indians in Fee Status must generally be partitioned (a lengthy and expensive Process, even where feasible) or separately mortgaged
- Applicable Regulations (but no Standards of Review) are found at 25 CFR 152.34, but Recent Concern within BIA over Potential Loss of Trust Land has resulted in Restrictions on Delegated Authorities and Uncertainty about the Lack of Standards
- BIA's Central Office has drafted (but not yet formally adopted/issued) Standards which would require BIA "Underwriting," Loan-to-Value Consideration, and a formal Acknowledgment by the Borrower of Potential Foreclosure Remedies

BIA Responsibilities

- BIA Land Titles and Records Offices (LTRO's) – located at some but not all of the BIA's Regional Offices - must record Title and Encumbrance Documents and issue Certified Title Status Reports (uncertified TSR's obtained from either BIA or LTRO may not reflect all current Title/Encumbrance Documents, due to recording Backlogs)
- BIA must generally approve Leases, Leasehold Mortgages, Lease Assignments (cf. Loan/Mortgage Assignments, which do not need BIA Approval), and Mortgages on Title, under Statutes/Regulations – Where the Lease requires, BIA must also approve Subleases and Sublease Assignments/Mortgages
- Most BIA Agencies have been delegated Approval Authority for Residential Leases and Leasehold Mortgages, but Mortgages on Title must generally be approved at the Regional Office Level - Approval Authority remains with BIA even where Processing is handled by a Tribe under a Self-Determination Contract or Self-Governance Compact, and Documents approved by Officials without properly delegated Authority may be voidable

Current Leasing Regulations

- As part of the BIA's overall Trust Reform Initiative begun in 2000, 25 CFR Part 162 is being revised to include a Self-Contained Subpart C on Residential Leases – Until Subpart C is finalized, such Leases are covered by the “old” Rules now re-numbered and found in Subpart F on “Non-Agricultural” Leases
- Subpart F includes the “old” Rule from the 1960's allowing Leases which secure Federally-Insured/Guaranteed Loans to be made assignable without BIA Approval (both Pre- and Post- Foreclosure), but inadvertently omits the “old” Rule expressly recognizing the Right to make Cancellation contingent on Lender or Federal Agency Consent
- Proposed Rules were published in the Federal Register on February 10, 2004, to add a new Subpart C on Residential Leases, defined to include individual Homesites and Public Housing Projects (but not Privately-Financed Residential Developments) – Proposed Rules may be published again, based not on 2004 Comments but rather on the Basis of the Inclusion of Part 162 in the next Phase of the Trust Reform Initiative, set to start in the fall of 2007

Proposed Leasing Regulations

- The 2004 Proposed Rule would have formally established a 30-day mandatory Time Frame for Review of Residential Leases, from the time the Lease and all required Supporting Documents are submitted for Approval
- The Proposed Rule would have also generally allowed Cash-Out Re-Financings and Residential Subletting without Approval, and better defined the “Best Interest” Standard of Review
- The Proposed Rule would have also limited/eliminated the Use of the “Grant Authority” for Residential Leases, and expressly required that Leases approved under ILCA 2000 provide for the Payment of Market Rent to Non-Consenting Owners

Process Overview – Problem Areas

- Division of Duties – Responsible offices in BIA alone may include LTRO, EQS, Cultural Resources, Realty, Credit, and Appraisals (now within OST), with TAAMS Title Data still being corrected/updated and Reorganization of BIA Realty's support Programs ongoing
- Supporting Documents – Some (but not all) Requests must be supported by Title Status Reports (“TSR’s”), Evidence of NEPA/NHPA Compliance, Consents/Resolutions, Appraisal, Bond, Survey Plat, and Lease and Loan Documents/Applications, with Regional/Agency Variability and Document Assembly Work split among Borrower, Lender, Tribe, and BIA
- Legal Framework - Unique Requirements for specific Loan Programs and Lenders, Regulations and Policies in Flux, Lack of Standardization, Tribal Variability and Uncertainty as to Governing Law

Streamlining the Process – TSR's and Endorsements

- In September 2005, BIA's Central Office issued a Policy Memo intended to eliminate the Need for multiple TSR's (to support Lease/Loan Approvals and Loan Closings, respectively), by authorizing the BIA to issue Endorsements listing Documents approved/recorded after the Date of a previously-certified TSR
- In July 2006, the Central Office modified the Policy, replacing the Endorsement Form and requiring that the Agency list all of the Encumbrances on the "last" certified TSR, in addition to subsequent Actions to remove "old" Documents or record "new" Ones
- The new Policy purportedly allows for the Use of the Endorsement Form in conjunction with any certified TSR less than one Year old, but it also contemplates that every new Loan Transaction will be supported by one (and only one) newly-certified TSR - In February 1999, BIA's Central Office established a 30-Day Goal for the Issuance of Home-Loan-Related TSR's, but that Time Frame may not always be achievable (meaning where a certified TSR is needed it should be requested as early as possible in the Process)

Process Overview – Lease and Leasehold Mortgage

- On Tribal Land, Lessee applies to Tribe for Lease, with NEPA/NHPA Compliance, Resolution, and Survey/Description (and possibly Documentation as to Availability of Access/Utilities) generally required before submittal of Lease to BIA for Approval; On Allotted Land, Lessee seeks Homesite Lease from Co-Owners/Owners, with BIA assisting in obtaining Owner Consents, determining Market Rent (where not waived by the Owners), and documenting NEPA/NHPA Compliance and Survey/Description (and possibly Documentation as to Availability of Access/Utilities)
- Even if a certified TSR is not required by BIA for Lease Approval, the Lessee or Tribe should request one - through the Agency - as soon as possible (if a certified TSR will be needed to support the Loan Transaction to follow), and in any case no later than when the Approved Lease is submitted to the LTRO for Recording
- Upon application for Loan/Mortgage by Lessee, the Lender or Title Company should obtain/request a certified TSR or an Endorsement showing the Lease of Record, with no additional supporting Documents required if already provided in support of the Lease – When the Leasehold Mortgage is approved, the BIA should record immediately at the LTRO and issue an Endorsement showing the Leasehold Mortgage of Record; Parties to the Leasehold Mortgage are responsible for recording in the County Records, if necessary

Process Overview – Mortgage on Title

- Prior to or upon application for Loan/Mortgage by Owner, BIA should be requested to assist in determining Market Value and documenting NEPA/NHPA Compliance, Survey/Description (if only a portion of the Allotment is being mortgaged), and possibly Documentation as to Availability of Access/Utilities
- Since a certified TSR will generally be required for Mortgage Approval, the Lender or Title Company should request one - through the Agency - immediately upon Receipt of the Loan Application; When the executed Mortgage is submitted for Approval, BIA should be provided with the other Loan Documents/Applications and the Credit Reports/Reviews obtained or completed by the Lender (cf. the Leasehold Mortgage Process)
- When the Mortgage on Title is approved, the BIA should record immediately at the LTRO and obtain a certified TSR or issue an Endorsement showing the Mortgage of Record; Parties to the Mortgage are responsible for recording in County Records, if necessary

Supporting Documents - NEPA/NHPA Compliance

- BIA's Grant/Approval of Leases and Mortgages (including Mortgages on Title) is subject to a Categorical Exclusion under NEPA only if no Change in Use is Planned and there is a Previous NEPA Document on file (e.g., a Re-Financing) – The September 2005 Policy Memo issued by BIA's Central Office confirmed that NEPA Documents prepared by other Federal Agencies in connection with the same Transaction can be relied on as the Basis for a Categorical Exclusion for a BIA Approval in a Lease or Loan Transaction
- Unlike HUD, BIA does not have a streamlined NEPA Documentation Process for Individual Homesite Leases, meaning that a full Environmental Assessment (with Archaeological Consultation/Survey to document NHPA Compliance) is generally required wherever New Construction is involved, unless a lesser Document prepared by HUD or some other Agency can be relied upon
- Privately-Financed Residential Development Leases have been found to be void for lack of Proper NEPA Compliance, so Lender Due Diligence will require sufficient Documentation

Supporting Documents – Owner Consent

- Mortgages on Title must be granted by all of the Owners (if more than one), subject to BIA Approval, but Leases may be approved without the Consent of the “Minority” Owners (under ILCA 2000), with Market Rent payable to all Owners who do not expressly waive – Under ILCA 2000, BIA may also consent on behalf of Undetermined Heirs/Devises and Owners whose Whereabouts are Unknown, and count those Interests toward the Requisite Percentage
- Where a Lease requires Owner Consent to any Sublease, Assignment, or Mortgage, it may also authorize one or more of the Owners (or BIA) to give such Consent – In the Absence of such an Authorization, Owner Consent to such Actions is needed to the same extent as required for the Original Lease
- Tribal Leases must be supported by Tribal Resolutions, and all Tribal/Individual Consents should reference the Key Lease Terms and expressly acknowledge any Intent to waive Market Rent

Other Supporting Documents - Leases

- Under the 2004 Proposed Rule, Appraisals would not be required where Tribal Land is being leased at Nominal Rent, and streamlined Valuation Methods could be used to determine the Market Rent on Allotted Land - BIA does not need to review the Lender's Appraisal/Evaluation supporting a Home Loan and Leasehold Mortgage (even though it may give some Value to the Mortgagor's Leasehold Interest)
- Bond and Administrative Fee Requirements are subject to Case-by-Case Waiver, with Waivers of these Requirements being standard for Nominal Rent Residential Leases
- Leases of Properties described by Metes and Bounds or Lot Number must be supported by a Survey Plat, and Utilities/Access Documentation is generally not required but may be advisable prior to Grant/Approval and Recording by BIA

Standard of Review - Leases

- Under NAHASDA (enacted 1996), the Maximum Lease Term is generally 50 Years, but may be longer if the Reservation has 99-Year Statutory Authority (as generally reflected in amendments to the Long-Term Leasing Act of 1955) – Only one Renewal Period is allowed for Leases (cf. Subleases), within the Maximum Term
- Tribes can lease for Residential Purposes to Tribal Members and Housing Authorities at Nominal Rent, so long as the Land has no Higher and Better Use (and even then, so long as the Tribe documents how the Lease would serve its Best Interest) - Individual Indians can lease at Nominal Rent to Members of their Immediate Family, but such Leases should be made adjustable to Market Rent upon Assignment to (or upon Purchase at Foreclosure by) a Non-Family-Member
- BIA must generally satisfy itself that the “Five Factors” in the Long-Term Leasing Act have been adequately addressed (usually through the NEPA Process) – Other Lease Requirements should be met when using the “One-Stop” Tribal Lease Form, as accepted by BIA’s Central Office in March 2001, with Instructions to expedite the Processing of Leases in that Form (the February 1999 Directive from Central Office having previously established a 30-Day Time Frame for Review as a Goal)

Standard of Review – Leasehold Mortgages

- Current Regulations suggest that Leasehold Interests may only be mortgaged to secure Construction Loans, but Guidance has allowed Mortgages in connection with Resale or Re-Financing
- The Proposed Rule would allow Home Equity or Debt Consolidation Loans to be secured with Leasehold Mortgages, while requiring that Mortgages identify the applicable Foreclosure Law
- The Proposed Rule would also require Consideration of the extent to which the Owner's Rights or Remedies under the Lease would be adversely affected by the Mortgage, and formalize/mandate the 30-Day Time Frame for both Lease and Mortgage Review

Standard of Review – Mortgages on Title

- Informal Guidance from BIA's Central Office would allow Mortgages on Title for essentially any Purpose, with review required by both BIA Realty and Credit Personnel within Mandatory Time Frames
- The Informal Guidance would require an Appraisal/Evaluation and "Reasonable" Loan-to-Value Ratios, for Review/Verification by BIA Realty Personnel – An Appraisal by OST Appraisers would not necessarily be required to support the Mortgage, but would be needed if the Mortgaged Property is later sold, with Market Value then being required and the Pool of Eligible Purchasers (and Assumability of the Mortgage) possibly also being limited
- Informal Guidance would also require Review of other Loan Documents, Income Verification, Credit Review, and Detailed Consideration of Repayment Capability, all by BIA (Realty or Credit) Personnel

Special Rules – Cancellations, Assignments and Subleases

- Current Regulations do not expressly allow Cancellation Actions to be made contingent on Lender or Federal Agency Consent, as the “old” Part 162 did (prior to 2001), but Leases and Leasehold Mortgages which include such Requirements may still be approved
- Current Regulations generally allow Lease Assignments only with Owner Consent and BIA Approval (cf. Subleases, which do not need such Consent or Approval unless the Master Lease so requires), but Leases which secure Federally-Insured/Guaranteed Loans may be made assignable without Consent or Approval, and Lease Assignments resulting from Foreclosure are not generally subject to Consent or Approval
- The 2004 Proposed Rule would have established new Standards of Review for Subleases and Lease Assignments, while requiring that Nominal Rent Leases that are assigned or sublet to non-tribal/family-members be adjusted to Market Rent at the time of the Assignment or Sublease