Bulletin

SLS2014011

Date: August 19, 2014

To: All Issuing Offices

RE: **UNDERWRITING - Indian Lands - Review and Update**

Dear Associates:

This bulletin will review and update guidelines, litigation, requirements, and exceptions for Indian land transactions.

GUIDELINES

The following Indian land guidelines are available from a Senior Underwriter:

Fee Simple Land. Land being purchased, sold, or mortgaged by Tribes and Tribal Entities.

Fee-to-Trust Transactions. Land owned in fee simple by a Tribe or an individual for which application has been made to Interior to take the land into trust for the Tribe or the individual.

Tribal Trust Land. Land held in trust by the U.S. for a tribe being leased, or leased and then mortgaged by the lessee.

Allotment. Land, often a fractional interest, held in trust by the U.S. for an individual, being leased, or mortgaged. These guidelines are also appropriate for lands held as Restricted Fee interests.

MISCELLANEOUS CASES

1. *Carcieri v. Salazar*, 555 U.S. 379 (U.S. 2009).

This case requires that in order for there to be a valid fee-to-trust transfer, the subject tribe must have been "under Federal jurisdiction" in 1934, which was the year the Indian Reorganization Act was enacted. This act authorized the Sec. of the Interior to acquire land and hold it in trust for Indians. "Indian" was defined as persons who are members of a "recognized tribe now under Federal jurisdiction".

Accordingly, the following requirement must be included in any fee-to-trust transaction commitment and policy:

REQUIREMENT: Furnish to the Company documentation, satisfactory to the Company, reflecting that the subject Tribe was "under Federal jurisdiction" in 1934.

And, the following exception must be included in any policy for fee-to-trust transfer, in the event acceptable documentation per the above requirement is not received:

EXCEPTION: Any consequence resulting from a claim that the subject Tribe was not "under Federal jurisdiction" in 1934.

The requirement and exception must be considered for any tribal trust land taken into trust after 2008.

2. *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc.* U.S.D.C - The District of Utah, Central Division. 2012 U.S. Dist. LEXIS 147538. 10/12/12

In 2000, the Bureau of Indian Affairs ("BIA") voided a lease 5 years after it was signed by OMG, the Shivwits Paiute Band, and approved by a BIA field representative. The lease was for 25 years, with option for another 25 years. The BIA field representative had authority to approve only 10-year business leases.

REQUIREMENT: The Company must be furnished the delegation memo or memos that clearly trace and document to the Company's satisfaction the delegation of authority from the Secretary of the Interior to the specific BIA representative (or class of representatives) signing the subject transaction documents.

If the required delegation information is not received, then an exception must be included in the policy, substantially as follows:

EXCEPTION: Terms, conditions, and limitations on the authority of the BIA representative executing the Interior Department approval, including a lack of authority to sign the subject transaction documents.

3. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*. 132 S. Ct 1877 (U.S. 2012).

This case applied a 6 year statute of limitation to challenges of fee-to-trust transactions under the Administrative Procedures Act, rather than the 30 day period provided for appealing fee-to-trust decisions under 25 CFR Part 2. As a result, the following exception must be included in all fee-to-trust commitments and policies:

EXCEPTION: Any challenges to the Secretary of the Interior's decision to take the subject land into trust within 6 years of either (1) the date of the Secretary's decision or (2) the recording of the conveyance to the U.S. as Trustee, whichever is later.

Please note that this case has been rejected by the Ninth Circuit; see Big Lagoon case below.

4. *Big Lagoon Rancheria v. California*. 2014 U.S. App. LEXIS 1093 (9th Cir. Jan 21, 2014).

The Ninth Circuit, applying the holding in Carcieri v. Salazar (see above) and after reviewing the tribe's history, concluded that the Rancheria was not under federal jurisdiction in 1934. Consequently, the court held that the BIA lacked authority to take the parcel of land at issue into Trust. It is noteworthy that the BIA took the parcel of land into trust in 1994, and the State and the Rancheria were negotiating about using the land as a casino since 1998. This court rejected the argument that the challenge to the "Indian lands" status was time barred under the Administrative Procedure Act's six-year statute of limitations. Note the Patchak decision immediately above. The Big Lagoon Rancheria decision may cause uncertainty for tribes, developers and title insurers because this decision, if it stands, allows challenges to past BIA decisions, without any statute of limitations.

GUIDELINE: If the subject land is within the 9th Circuit, and there is any question whether the tribe was under federal jurisdiction in 1934, and the land was taken into trust under the fee-to-trust process, the following exception must be included in any commitment or policy:

EXCEPTION: Any challenges to the Secretary of the Interior's decision to take the subject land into trust.

SOVEREIGN IMMUNITY CASES

1. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

A sovereign's waiver of immunity "cannot be implied but must be unequivocally expressed".

Santa Clara Pueblo, 436 at 64.

Congressional abrogation of a tribe's sovereign immunity cannot be implied from the structure or purpose of a federal statute.

2. *Oklahoma Tax Comm. V. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

"Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."

3. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751 (1998).

A tribal entity signed a promissory note on behalf of tribe to purchase stock from a corporation. There was not an express waiver of sovereign immunity. The tribe defaulted. The corporation sued. The tribe asserted sovereign immunity from suit. The Supreme Court held for the tribe. Sovereign immunity applies to commercial as well as governmental tribal activity. It also applies to tribal activity beyond as well as within Indian Country.

4. *C & L Enterprises, Inc., Petitioner v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

Tribe signed a contract for installation of a roof on commercial building on off-reservation, non-trust land. Contact proposed by the tribe contained arbitration clause. Before start of work, tribe contracted with second contractor. Original contactor sued. Supreme Court found a waiver of sovereign immunity in arbitration clause of contract, which provided for enforcement in any court having jurisdiction; held for contractor.

5. *Allen v. Gold Country Casino*, 464 F.3d 1044 (ninth Cir. 2006).

Tribal immunity attaches to entities operating as "arms of the tribe".

6. *Burlington Northern & Santa Fe Railway v. Vaughn*, 509 F. 3d 1085 (ninth Cir. 2007).

Tribal officials are entitled to the immunity of the tribe when acting in their official capacities and within the scope of their authority.

7. *Cook v. Avi Casino Enterprises*, 504 F.3d 718 (ninth Cir. 2008).

Tribal employees are entitled to the immunity of the tribe when acting within the scope of the employment.

8. *Swanda Brothers, Inc., and Oklahoma Corporation, Plaintiff, vs. Chasco Constructors, LTD., L.L.P, a Texas limited partnership, Defendant, v. Kiowa Casino Operations Authority* (Case No. CIV-08-199-D. U.S. District Court for the Western District of Oklahoma. 2010 U.S. Dist. LEXIS 30699).

KCOA officers signed a construction contract, which contained a Limited Waiver of Sovereign Immunity. Disputes arose about construction and payments. Contactor sued. KCOA asserted the waiver was invalid because the individuals who signed the contract were not authorized to waive tribal immunity.

9. *Wells Fargo Bank, N.A. v. Lake of Torches Economic Development Corporation*, seventh Circuit Ct. of Appeals, No 10-2069, 2011.

Suit to enforce trust indenture, which was security for $50 million in bonds. Tribal entity defaulted on payments. Bondholders relied on tribal memo stating bond documents did not require National Indian Gaming Commission approval. There was a partial waiver of sovereign immunity but Court held NIGC approval required. Case dismissed by U.S. District Court. Wells Fargo appealed. Seventh Circuit remanded to determine if transactional documents evinced intent to waive sovereign immunity.

10. *StoreVisions, Inc. v. Omaha Tribe of Neb*., 281 Neb 238, 795 N. W.2d 271, 2011 Neb. LEXIS 24 (Neb. 2011).

A waiver of sovereign immunity was signed by the Tribal Council Chairman and Vice Chairman, and in the presence of five of the seven members of the Tribe's Tribal Council. When a dispute resulted in litigation, the Tribe claimed the waiver was not authorized. The Omaha Tribe's constitution and bylaws are silent as to the method of waiving sovereign immunity. The Tribe claimed that officers have only those powers delegated to them by the tribal council and there was no such delegation. The Supreme Court of Nebraska held the waiver was enforceable under the law of principal and agent and the doctrine of apparent authority.

11. *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1148 (10th Cir. 2012).

A limited liability corporation organized under state law, which was wholly owned by a tribal corporation that was itself wholly owned and regulated by a tribe, cannot share in the tribe's immunity from suit.

12. *Michigan v. Bay Mills Indian Community et al*. U.S. Supreme Court. 572 U.S. ____ (2014).

The U.S. Supreme Court on May 27 re-affirmed its 1998 holding in *Kiowa Tribe v. Manufacturing Technologies, Inc* . 523 U.S. 751 (1998) that tribal sovereign immunity extends to tribes' governmental and commercial activities, both on reservation and off reservation. The Court affirmed the Sixth Circuit's decision that the waiver of sovereign immunity for suits to enjoin gaming on Indian lands in violation of a tribe's gaming compact or contract with a state provided by the Indian Gaming Regulatory Act, did not apply to tribal gaming on non-Indian lands. Further, the State was barred by the doctrine of sovereign immunity from suing the Tribe directly for damages. (See summary of the Kiowa case above).

NOTE: To be enforceable, a waiver must designate a court (Federal, state, or tribal) for litigation.

<u>ACCESS ISSUES</u>

Unique access issues may be presented in cases of insuring land located on reservation or land held in trust for a tribe or tribal member for both loan policies and owner policies. Tribal members may have a right to enter the reservation but non-Indian entities and individuals leasing from a tribe or allotment owners may have to consider obtaining an easement from the tribe and approved by the BIA in order to have a right of access, unless they have access and are contiguous to a federal, state, or county roadway.

Another access problem may arise when insuring fee simple land owned by a non-Indian that is surrounded by reservation or trust land as in the case of "checker-board reservations". Unless

the insured land is contiguous to and has access to a federal, state, or county roadway, an easement must be obtained from the tribe and approved by the BIA.

INSURING INDIAN LANDS IS AN EXTRAHZARDOUS RISK AND MUST BE APPROVED BY A SENIOR UNDERWRITER.

If you have any questions relating to this or other bulletins, please contact a Stewart Title Guaranty Company underwriter.

For on-line viewing of this and other bulletins, please log onto http://vuwriter.com.

References

Bulletins Replaced: None.
SLS00180 Native Americans/Indians: Title Insurance, Leasehold Loans, etc. - UPDATE
SLS201400x - UNDERWRITING - Indian Lands, The HEARTH ACT
Underwriting Manual:
9.08 Indian Titles
1.12 Access, Right of
Exceptions Manual:
NAA Native Americans
ACC Access
Forms: None.