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Encumbering Trust Assets – It's Easier than You Think

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Sponsors:



Kaiser Permanente
Fund at East Bay
Community Foundation



Tamalpais Trust
Fund of RSF
Social Finance



Disclaimer

I am an attorney, but I'm not necessarily your attorney. Always consult your legal counsel about your specific organization and situation.



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Learning Objectives

01

Understand
what trust
assets are

02

Understand
how to
encumber trust
assets

03

Understand
how to
foreclose on
trust assets

04

Understand the
opportunity for
mortgaging
trust assets



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Definitions

- “Indian” – Term of art from Federal Indian Law
- “Indian Trust Land” = “Trust Land/Asset”
- Title Status Report (“TSR”) – a document showing the recorded title information trust property



Understanding Indian Trust Assets



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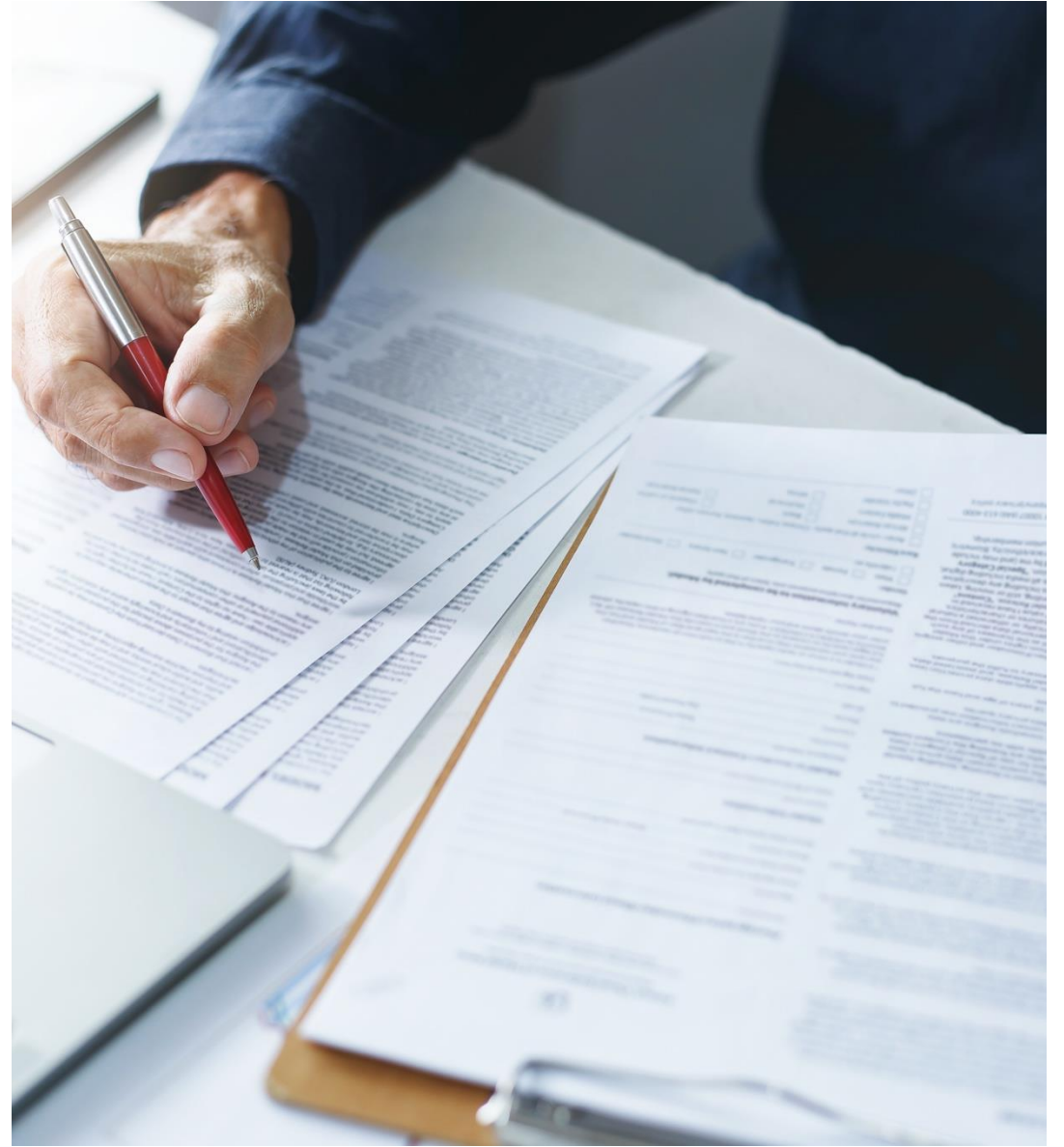
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What is a trust?

- Trusts are made up of four basic parts:
 - The trust itself
 - Trustee(s)
 - Beneficiary(ies)
 - Trust Corpus
- Indian Trust Lands utilize the same basic principles as any other trust (e.g. family trust)



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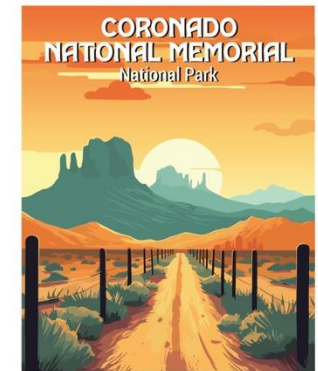
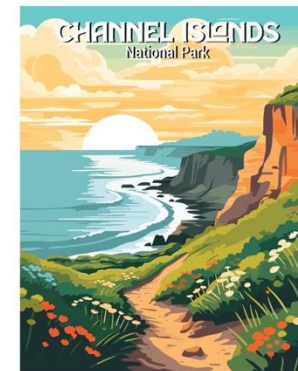
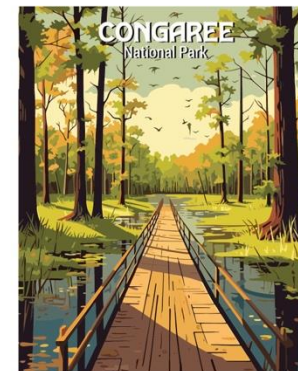
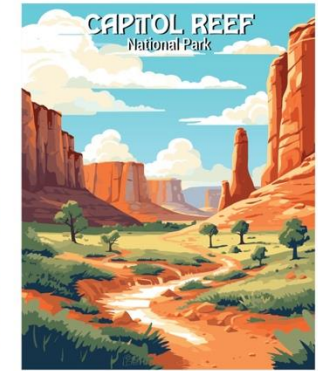
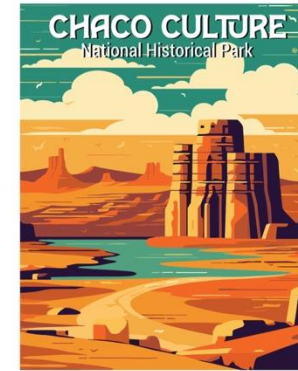
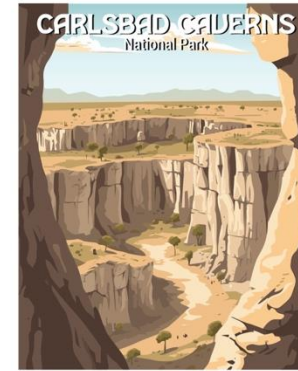
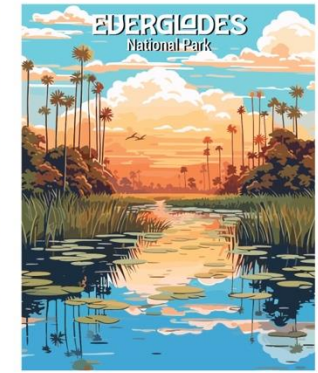
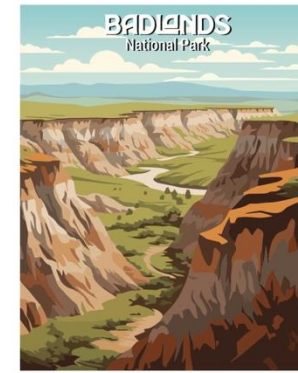
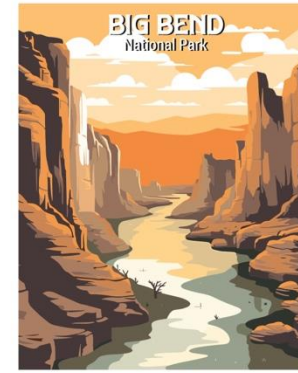
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Federal Government as Trust and Trustee

- National Parks, National Forests and other public lands are held in trust for the benefit of the public
- Military bases are public lands set aside for a specific purpose
- The Federal Government implements law and code to manage Federal Lands



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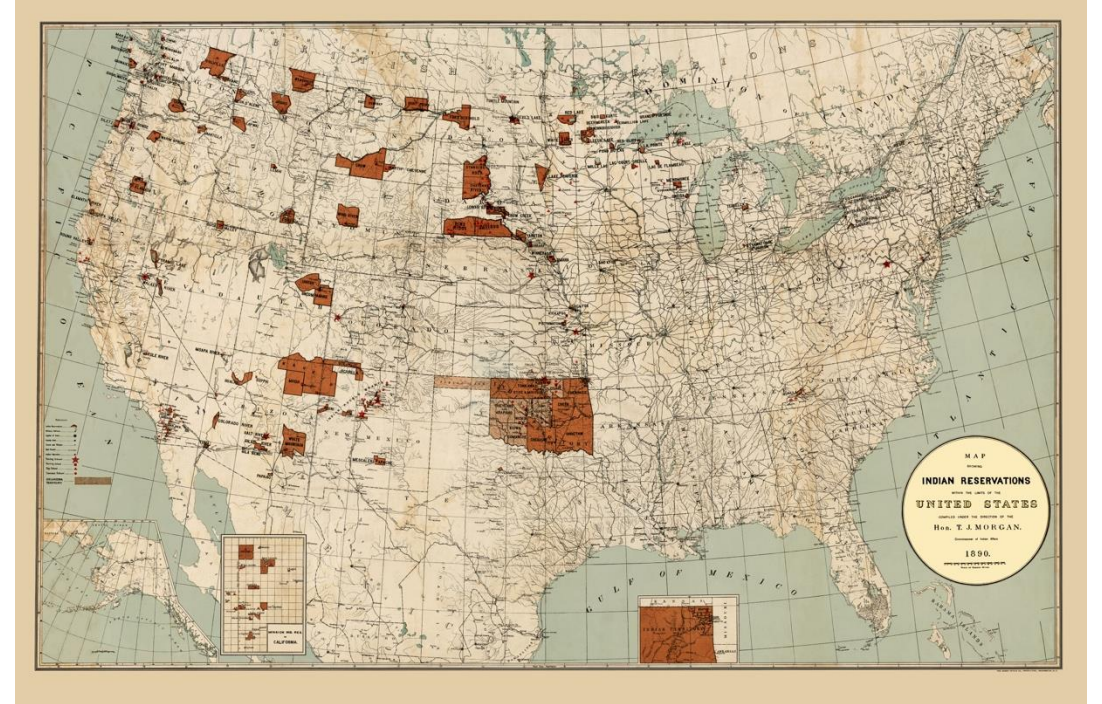
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History of Allotments

- Eras of Indian Law and Policy
 - Treaty Making 1778 -1871
 - Removal Era 1830 – 1850
 - Reservation System Era 1850 – 1891
 - **The Allotment and Assimilation Era 1887 -1934**
 - Reorganization Policy 1934 – 1953
 - Termination Era 1953-1968
 - Self-Determination Era 1968 – 1994
 - Self-Governance 1994 - present



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Real Property Rights & Interests

Types of Real Property Interests/Assets

- Land
- Buildings/Structures
- Fixtures
- Natural Resources
- Water

Rights in Real Property

- Use
- Enjoyment
- Disposal
- Exclusion



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Property Rights in Trust Assets



Secretary of Interior must
approve alienation
(sale/transfer)



Some legislation limits
use/development of Federal
Land



Individuals and tribes are still
landowners with the same
rights and interests as non-
Indian landowners



Trust assets include the
property interests, rights and
income derived from those
rights and interests

IIM Accounts

Leaseholds

Allotments



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Encumbering/Mortgaging Trust Assets



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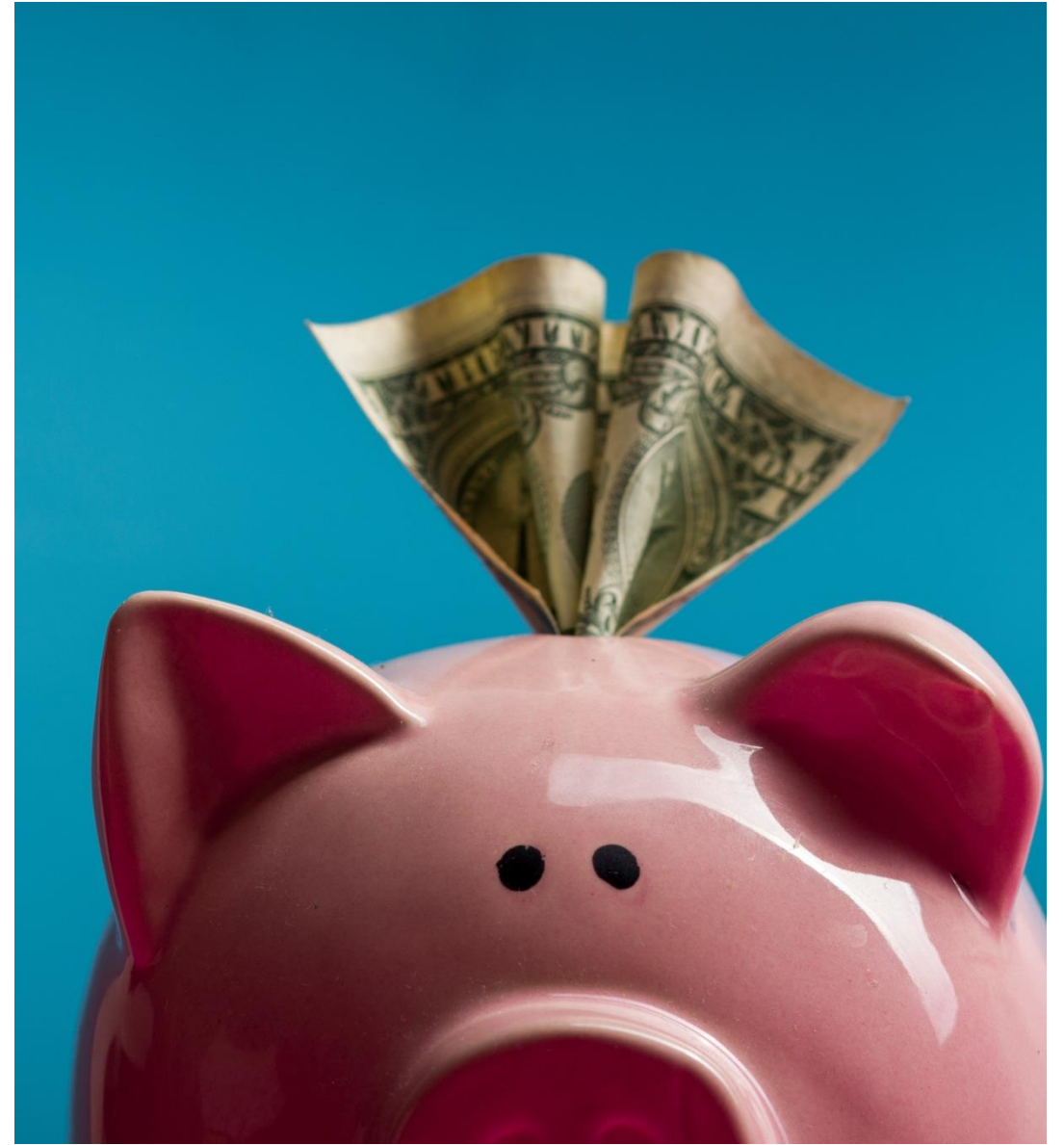
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IIM Accounts – What are they

- Accounts that **ONLY** hold income derived from trust assets
- Managed by the Bureau of Trust Funds Administration (formerly Office of the Special Trustee for American Indians)



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IIM Accounts – Why Encumber them?

- Some tribes distribute per capita payments to IIM Account
- Regular source of income for some individuals
- If property approved by BIA, they are relatively easy to collect



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IIM Accounts – How to Encumber them?

Encumbering IIM Accounts – Submit to BIA

- Submit a request for approving encumbrance PRIOR to closing
- Request includes:
 - Draft Loan Documents
 - Signed Statement from Borrower allowing Lender to Release Information to BIA and that Borrower Agrees to Utilize the IIM Account as Collateral
 - Purpose of Loan

Foreclosing on IIM Accounts – Submit to BTFA

- Contract that secures the IIM Account as collateral
- Copy of BIA's approval of encumbrance
- Proof of default
- Certified copy of the original assignment of IIM income signed, dated and notarized by Borrower



Leasehold Mortgages

– What are they

- Generally, mortgages that use leases as collateral
- Leasehold mortgages are not unique to trust lands



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Leasehold Mortgage Processing – Initial Steps

- Identify the BIA Region and Agency that serve the property
- Request a copy of a Certified TSR from BIA
- Request a copy of the approved lease from the Borrower
- Review lease and TSR



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Leasehold Mortgage Processing – Complete and Submit Application to BIA

- Leasehold Mortgage Lender Checklist
- Copy of approved lease
- Copy of certified TSR
- Original mortgage documents
- Legal Description
- Original or certified copy of promissory note
- Consents or notices (if applicable)
- Program Rider (if applicable)
- Release or Satisfaction (if applicable)



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Leasehold Mortgage Processing – BIA Processing

- BIA may request missing or additional information
- BIA must render a decision twenty days after receiving a COMPLETE application
- After sending notice of approval to Lender, BIA will record within four (4) days



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Trust Land Mortgages – What are they

- Loans secured by trust lands
- All landowners must be applicants/borrowers



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Land Mortgage Processing – Complete and Submit Initial Trust Land Mortgage Application

- Initial steps are the same of Leasehold Mortgage
- Application process is two steps
 - Submission of drafts
 - Submission of executed documents
- BIA prefers digital submissions
- Initial Application Documents
 - Copy of loan application and credit memo
 - Appraisal
 - Commitment letter
 - Unsigned mortgage documents
 - Release of Information from Borrower
 - Legal Description
 - Certified TSR
 - Site plan/survey (if applicable)
 - Rights of way to property (if applicable)



Land Mortgage Processing – Execute and Submit Final Documents

- After approving the Initial Mortgage Application, BIA will send a Commitment to Approve Letter
- Only close after receiving BIA's Commitment Letter
- Submit the following documents to BIA for Recording
 - Original, signed Mortgage Mortgage/Deed of Trust
 - Certified copy of Promissory Note
 - Riders
 - BIA Disclosure Statement
 - Release and satisfaction (only if refinancing an existing loan)
 - Request for updated certified TSR that notes the Mortgage



Mortgage Processing – How to Read a TSR

United States Department of the Interior
Bureau of Indian Affairs
Title Status Report

Requestor: [REDACTED]

<u>Land Area</u>	<u>Land Area Name</u>	<u>Tract</u>	<u>ber</u>	<u>LTRO</u>	<u>Region</u>	<u>Agency</u>	<u>Resources</u>
181	COEUR D'ALENE	[REDACTED]		PORTLAND, OR	NORTHWEST REGIONAL OFFICE	COEUR D'ALENE	Both

Original Allottee: MARGARET SKULLNAH
See Appendix A for Land Legal Descriptions

Title Status

Tract 181 [REDACTED] is held by the United States of America in trust for the land owner(s) with trust interests [REDACTED] by the land owner(s) with restricted interests and/or fee simple interests, as listed in Appendix "B" attached to and incorporated in this Title Status Report.

The title to Tract 181 [REDACTED] -C is current, complete, correct, and without defect. Ownership is in unity and interests are [REDACTED] in the following title status: trust.

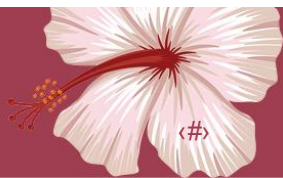
The tract ownership is encumbered by the title documents which have been approved by a properly delegated Federal official and are required to be recorded by law, regulation, or Bureau policy as listed on Appendix "C" attached to and incorporated in this Title Status Report.

See Appendix D for all other documents that are required to be recorded by law, regulation or Bureau policy.

No Tract Notes or Coded Remarks for this tract.

This report does not cover encroachments nor any other rights that might be disclosed by a physical inspection of the premises, nor questions of location or boundary that an accurate survey may disclose. This Report also does not cover encumbrances, including but not limited to irrigation charges, unpaid claims, not filed or recorded in this Land Titles and Records Office. This report does not state the current ownership of the interests owned in fee simple but states the ownership at the time the interest ceased to be held in trust or restricted ownership status.

This Title Status Report is a true and correct report of the status of title to the real estate described herein according to the official land records recorded and maintained in this office.



How to Read a TSR Cont.

Appendix "A"													
<u>Land Area</u>		<u>Land Area Name</u>		<u>Trac Number</u>		<u>LTRO</u>		<u>Region</u>		<u>Agency</u>		<u>Resources</u>	
181		COEUR D'ALENE		[REDACTED] -C		PORTLAND, OR		NORTHWEST		COEUR D'ALENE		Both	
										REGIONAL OFFICE			
Land Legal Descriptions													
<u>Sec ion</u>		<u>To nship</u>		<u>R nge</u>		<u>State</u>		<u>County</u>		<u>Meridian</u>		<u>Legal Description</u>	
[REDACTED]		00.00N		00.00W		IDAHO		BENEWAH		Boise		LOT 0 [REDACTED]	
EXCL CO		& OIL											
										[REDACTED] MORE			
										TOTAL TRACT ACRES: [REDACTED]			

Appendix "B"

Land Area	Land Area Name	Trac	Number	LTRO	Region	Agency	Resources				
181	COEUR D'ALENE		-C	PORTLAND, OR	NORTHWEST	COEUR D'ALENE	Both				
REGIONAL OFFICE											
Effective Ownership as of 11/19/2004											
----- OWNER -----					--- DOCUMENT ---		NAME ACQUIRED	FRACTION	AGGR SHARE	AGGREGATE	
Tribe & Code	ID No. /	Indian / NonIndian	Title	Interest*	Class	Type	Number	SURNAME / FIRST NAME	AS ACQUIRED	CONVERTED TO LCD	DECIMAL
181		Indian	Trust	All	Deed-TS	SPEC AUT		MELICK	1	1	
COEUR D'ALENE									1		1 1.0000000000
- ID											

* "All" means the equitable beneficial interest and the legal title interest merged together.

IN TRUST:	1	1 1.0000000000
IN RESTRICTED FEE:	0	1 .0000000000
IN FEE:	0	1 .0000000000
IN TOTAL:	1	1 1.0000000000

* "All" means the equitable beneficial interest and the legal title interest merged together.



How to Read a TSR Cont.

Appendix "C"						
Land Area	Land Area Name	Trac Number	LTRO	Region	Agency	Resources
181	COEUR D'ALENE	█ -C	PORTLAND, OR	NORTHWEST REGIONAL OFFICE	COEUR D'ALENE	Both

Ownership of Tract 181 █ -C is encumbered by the following:

NO REALTY DOCUMENTS FOUND

Type of Encumbrance

Encumbrance	Encumbrance Holder	Expiration	Document	Description and Explanation
CERTIFICATE OF SURVEY	BUREAU OF LAND MANAGEMENT UNITED STATES DEPARTMENT OF THE INTERIOR		█	█
RIGHTS OF WAY	█	PERPETUAL	█	█

Appendix "D"						
Land Area	Land Area Name	Trac Number	LTRO	Region	Agency	Resources
181	COEUR D'ALENE	█ -C	PORTLAND, OR	NORTHWEST REGIONAL OFFICE	COEUR D'ALENE	Both

No Contracts to list for Appendix D

No Encumbrances to list for Appendix D



Mortgage Processing – Other Considerations

- Single family homesites (including homsites, outbuildings, utilities, and driveways) that are less than five acres are generally categorically excluded from requiring an Environmental Assessment or Environmental Impact Statement
- Carefully review all documents to make sure terms match across all submitted documents
- Appraisals do not require approval from the Appraisal and Valuation Office



Foreclosure

Leasehold

- Reservations approved for HUD 184 meet minimum standards for foreclosure codes
- Most tribes use same/similar codes

Trust Land

- Tribal courts must use state law if the tribal code does not address foreclosure on trust land
- Upon foreclosure, BIA issues a fee simple patent



Mortgaging – Loan Guarantees

HUD 184

- Residential loans
- Becoming a HUD 184 Lender is relatively difficult for CDFIs
- Often requires demonstrating that a lending organization already has a residential loan portfolio

BIA GLIP

- Business/commercial loans
- Relatively simple to obtain approval and includes Native CDFIs
 - Regularly engage in making loans
 - Capable of evaluating and servicing loans
 - “Otherwise acceptable”



Tribal Foreclosure Law Review

Foreclosing in Indian Country – What, like, it's hard?



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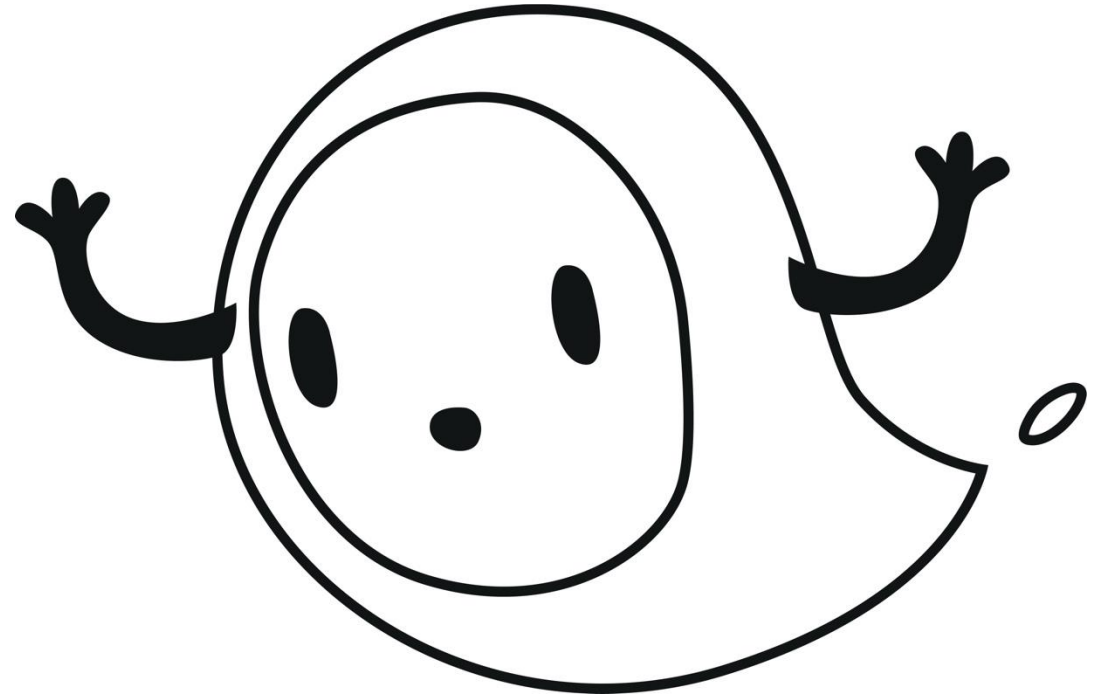
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Foreclosure – The Boogeyman that prevents investment

- Aren't tribal laws all different?
- Isn't it hard to practice in tribal courts?
- Who would even buy a trust interest at foreclosure?
- Isn't the collateral worthless without a guarantee?



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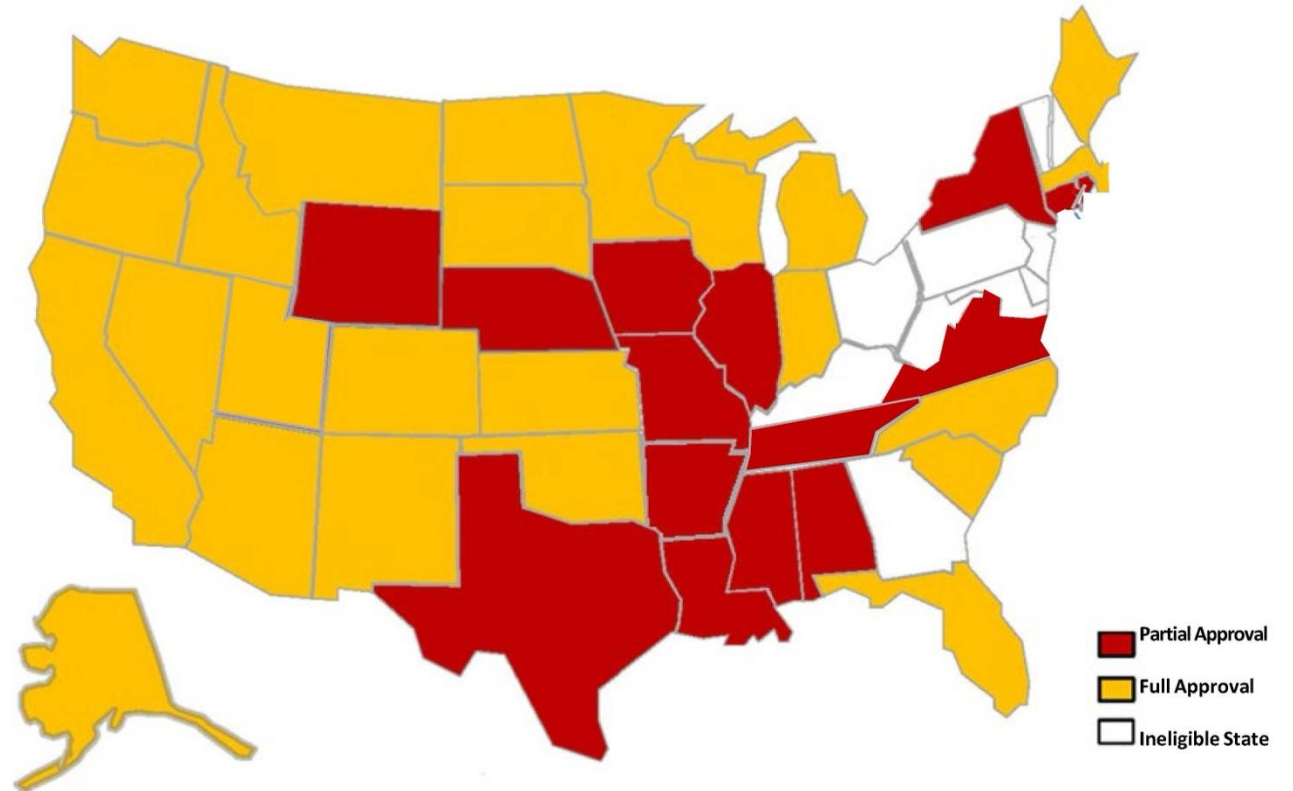
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Leasehold Mortgage Foreclosure

- Approved areas/reservations must have codes that meet minimum requirements including:
 - Eviction procedures
 - Courts of competent jurisdiction
 - Requirements that Tribes participate in loss mitigation
- Most Tribes use the HUD Model Lending Code



Section 184 Eligible Lending Areas



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Trust Land Mortgage Foreclosure

- Tribal Courts will use state law when there is no tribal foreclosure law
- Tribal codes may adopt state law for foreclosure



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25 USC 5135

- **(a)** The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the State or Territory in which the land is located. **For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land**, the United States shall not be a necessary party to the proceeding, and **any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land**. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.
- **(b)** In the event such land is acquired by an Indian or an Indian tribe, such land shall not be removed from trust or restricted status except upon application to the Secretary under existing law.



Review of Tribal Codes in the BIA's NW Region

- Can I get an attorney?
- Will the foreclosure process be difficult?
- Will I have marketable title after foreclosure?



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Tribal Code Review

Will I be able to get an attorney?

- Code Availability
 - 23/28 tribes of published their code online
 - 2/28 tribes of published portions of their code online
 - 2/28 have not published
- Attorney Admissions
 - 19/25 admit an attorney licensed in any state
 - 4/25 require a tribal bar exam

How hard will foreclosure be?

- Trust Land Mortgage Provisions
 - 16/28 tribes use state law by default or adoption
 - 10/28 tribes have unified foreclosure code (leasehold + trust land)
 - 2/28 tribes have land mortgage provisions in tribal code
- Limitations on Sales of Trust Lands at Foreclosure
 - 3/27 give tribe the right of first refusal
 - 3/27 require notice to tribe or limit buyers at foreclosure sale
 - 21/27 effectively have no restrictions



Empowering Native CDFIs to leverage trust assets for residential and commercial development



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To Guarantee or Not Guarantee



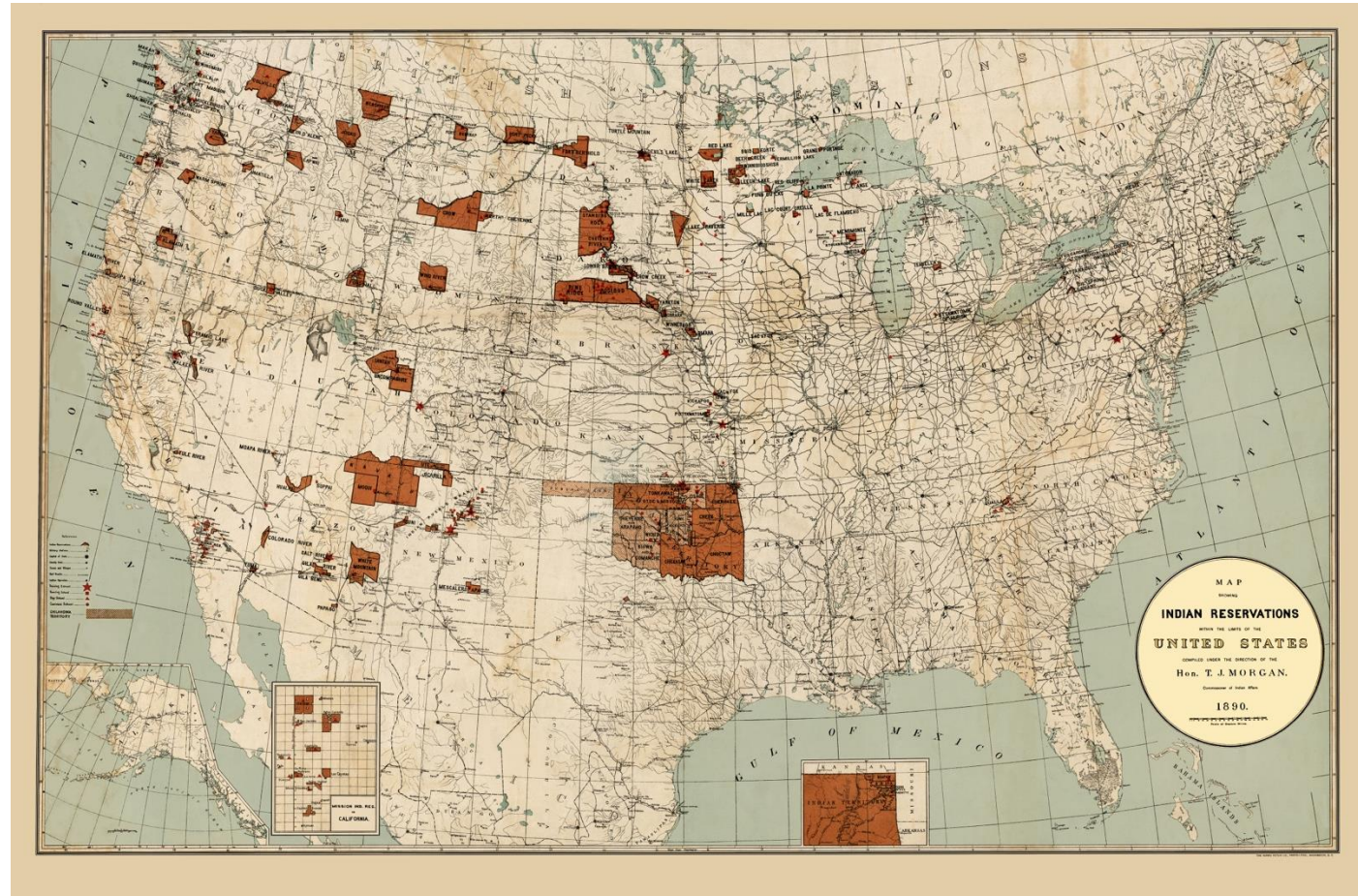
It is difficult or impossible for Native CDFIs to become HUD 184 Lenders without first having an existing residential mortgage portfolio



Native CDFIs do not need guaranteed loans to issue secure, stable loans



The Opportunity



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Key Takeaways

- Mortgaging and foreclosing on trust assets is a relatively straight-forward process
- Native CDFIs have a huge opportunity to expand mortgage lending in Indian Country
- Native CDFIs should be empowered to provide residential and commercial mortgage products in Indian Country



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Native CDFIs are the future of homeownership and business development in Indian Country



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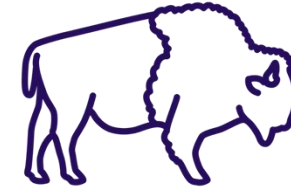
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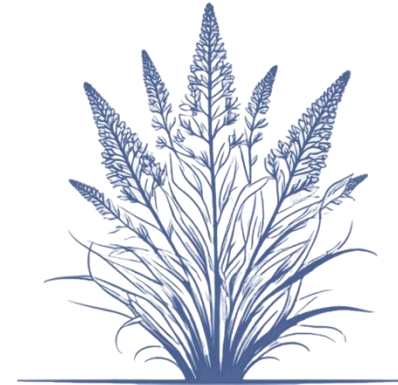
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Questions

- Contact
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 - Christine@sbcscs.services



Skullnah Legal Services
PLLC



SM'EM BUSINESS CONSULTING SERVICES, LLC



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