

MORTGAGE LENDING IN INDIAN COUNTRY

A look at tribal mortgage codes

May 25, 2021



AGENDA

- Available Home Loan Products in Indian Country
- The Loan Process
- Required Legal Infrastructure
 - Developing Mortgage Codes
 - Residential Leases
- Tribal Resources needed to make lending happen

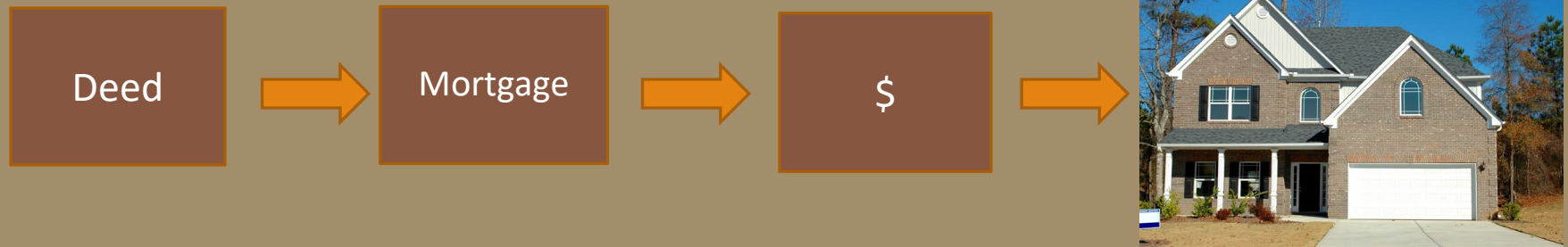
Survey of Participants

1. Makeup of participants - Tribes, TDHEs, lenders, other
2. Mortgage code?
3. Lending on tribal lands?
4. Hearth Tribes?
5. Tribal Land Department?

Available Home Loan Products in Indian Country

- HUD Section 184 Loan Program
- VA Native American Direct Loan Program
- USDA Loan Program
- BIA Indian Guaranteed Loan Program
- Conventional

The Mortgage Process outside Indian Country



State Laws Allow for Mortgage Lending

Real Property Laws

Mortgage laws make the mortgage the priority lien

Recording Laws

Foreclosure Laws

Eviction Laws



The Mortgage Process in Indian Country



Tribes are new to mortgaging (less than 30 years)

Prior to 1963 – homes built by families

1963 – HUD funded homes, some BIA-HIP

1980s – some VA and FHA homes

1996 – NAHASDA and Section 184

Lender Requirements

Lenders/fed agencies require the following before it will approve a loan on tribal trust lands:

1. Adoption of state mortgage laws or tribal mortgage law – providing for leasing, mortgaging, recording of the lease and mortgage, first priority, foreclosure, and eviction.
2. The form of residential lease it will give its tribal members
3. A resolution approving implementation of the federal agency's Program or MOA with federal agency
4. Certification from the Governor/Chairperson/President of the Tribe certifying that it has the necessary laws in place to implement the Program and that it will enforce those laws.
 1. Can be in MOA

Legal Infrastructure Required

STEP	DONE
Adoption of Mortgage Law	
Tribal Council resolution: approving implementation of Section 184 Program; or MOU with federal agency (HUD, VA, USDA)	
Certification from Tribal Governor/President/Chair (Sec. 184)	
Approval of residential lease form	

PURPOSE OF MORTGAGE CODES

To allow tribal members to take advantage of HUD's Section 184 Indian Home Loan Program and home loan programs established by other federal agencies such as the Veterans Administration Dept. and the U.S. Department of Agriculture, & conventional loans

The law should allow any tribal member to obtain a lease of tribal trust lands & mortgage the lease to obtain a home loan from any lender.

Tribal Mortgage Codes

- **Purpose** - The law should set forth the purpose of the law – to allow tribal members to obtain a lease and mortgage the lease for a home loan.
- **Land assignment** – Some tribal laws require a tribal member to obtain a land assignment in accordance with tribal laws.
- **Lease** - The law allows a tribal member to obtain a lease on top of, in place of, or without a land assignment. Most codes require Tribal Council approval of the lease.
- **Mortgage** - The law allows a tribal member to mortgage the lease to obtain a home loan.
 - Some tribes limit mortgaging only for home loan purposes, i.e., can't obtain equity loan or business loan.

Cont. – Tribal Mortgage Codes

First Priority - The law gives the mortgage first priority over any other liens that might exist on the leasehold.

Recording - The law provides for recording of the lease and mortgage.

Foreclosure & Eviction - The law allows the lender to foreclose on the home if the borrower doesn't make payments on the loan as required; and upon obtaining a judgment, to evict the borrower, if necessary.

Components of a Tribal Mortgage Code

- ✓ Jurisdiction - Gives Tribal Courts exclusive jurisdiction over all foreclosure actions on tribal lands. Post April 2016, HUD requiring concurrent federal jurisdiction.

- ✓ Land assignments – (Not required but may include) Sets forth the tribal laws under which a tribal member can obtain a land assignment. The law should state who can give or cancel land assignments.

- ✓ Exempt lands - Some tribes prohibit the obtaining of a lease on certain sites.

- ✓ Pre-foreclosure notices – May require notice to the borrower, Tribe and TDHE prior to foreclosure.
 - During this time, the borrower may cure the default, assign the loan to another borrower or the Tribe or TDHE may take over the loan
 - Tribe may impose other lender requirements to work with defaulting borrower
 - Also during this time, the Tribe or TDHE may work with the borrower regarding the default

Components of a Tribal Mortgage Code – Cont.

Assumption of loan – may allow Tribe the option to assume loan prior to filing of foreclosure proceedings, during foreclosure proceedings and after foreclosure.

Foreclosure – allows HUD or lender to foreclose on home; allows borrower to dismiss foreclosure action if he cures default and pays all costs incurred by lender in filing the suit.

Components of a Tribal Mortgage Code – Cont.

- ✓ Right of redemption after foreclosure - allows borrower one final opportunity to cure default after judgment.
- ✓ Limited waiver of sovereign immunity – This provision is applicable only if the Tribe decides to take over the loan and does not carry out the obligations of the loan – to pay the monthly payments. Allows lender to ask Tribal Court to make Tribe make monthly payments.

The Residential Lease

- ✓ A possessory interest in the land
- ✓ Differs from land assignment – has specific terms & conditions
- ✓ BIA regulations at 25 CFR Part 162 apply (Hearth provisions are similar)
- ✓ All federal agencies must approve lease form
- ✓ Provides for applicable federal & tribal law to be applied to govern the lease.
- ✓ Should allow for assignment of the lease by lessee (the borrower) before foreclosure.
- ✓ Should allow for subleasing and assignment without further tribal and BIA approval

Issues w/ residential leases

Check against the most updated BIA leasing regulations (2012)

Who will approve at the tribal level? (Put this in your mortgage code or leasing law)

If default, will tribe allow for subleasing to non tribal member?

Will lease extinguish land assignment?

WHO WILL ADMINISTER MORTGAGE LENDING WITHIN THE TRIBE?

- Tribe/TDHE needs to decide the following:
 - Where will tribal members go or who will they contact if they are interested in obtaining a home loan mortgage or to find a lender.
 - Who will coordinate the process between a prospective lender and prospective borrower.
 - Who will coordinate/provide homebuyer education.
 - Who will coordinate the survey process
 - Who will do the EA
 - Who will prepare the residential lease and coordinate the approvals of the lease and mortgage from the tribe and BIA.
 - Who will coordinate the infrastructure (utilities, sanitation, water)
 - Will there be down payment assistance? Where will it come from?
 - IHBG
 - ICDBG
 - Other
 - Who will coordinate the recordings with BIA and the Realty Office.

Issues with TSR

Make sure lease and mortgage show up on TSR

STEPS TO OBTAINING LOAN

Example: Section 184 Home Loan Program

1. Tribal member obtains residential lease on a land assignment or on a subdivision lot. A survey of the land is required.
 2. Tribal member applies for a home loan from a bank.
 3. If Bank approves loan, tribal member signs promissory note and leasehold mortgage.
 4. Home is built.
 5. Tribal member begins making monthly payments on loan and pays for 15-30 years
- (flowchart in sample documents)

Section 184 - HUD GUARANTEES THE LOAN

HUD guarantees the loan made by the Bank.

This means that if the tribal member defaults, HUD may pay off the Bank and the Bank will transfer the loan to HUD.

HUD will then attempt to collect payments from the tribal member

And work with the Tribe and its TDHE to either find another qualified tribal member or have the Tribe or the TDHE take over the loan.

What happens if the borrower defaults on payments?

If borrower does not make delinquent payments, Bank notifies borrower, TDHE (sometimes) and Tribe.

- Tribe (or TDHE) may assume loan (called right of 1st refusal)
- But tribe may also work with borrower

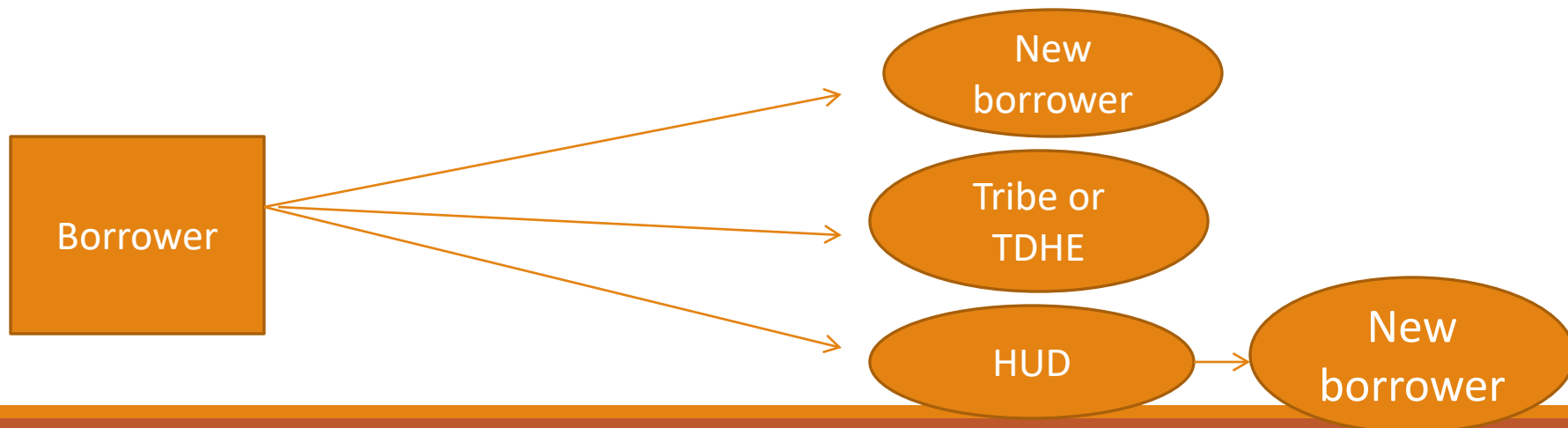
Bank may assign the mortgage to HUD (if Section 184).

If borrower doesn't cure default & no assumption, Bank will foreclose

- Complaint for Foreclosure

Borrower Default

- The borrower may agree to have another borrower take over the loan and agree to assign the lease to the new borrower; or
- The Tribe or TDHE may take over the loan and find another borrower to purchase the home; or
- HUD will foreclose on the home and sell the home to another tribal member.

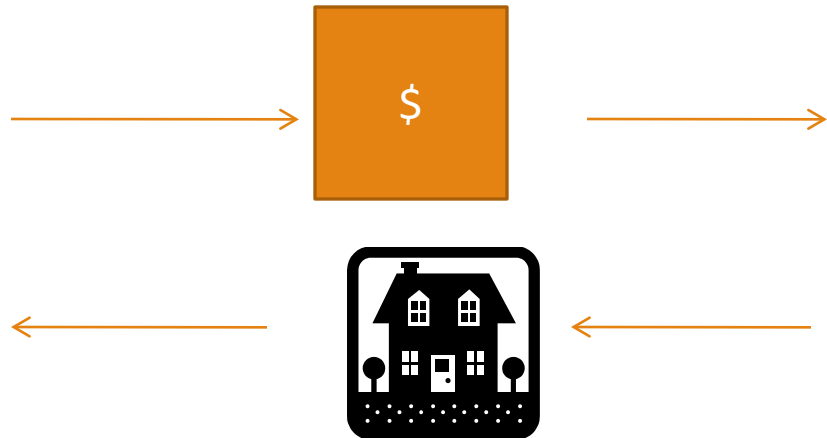


What happens if the Tribe or TDHE wants to take over the loan?

- The Tribe and TDHE will always be given the first opportunity to purchase the home. This is called the first right of refusal.
- This opportunity may be taken as provided in the mortgage code:
 - Upon notice by the Lender or HUD that the borrower is more than 60 days in default of his/her loan;
 - Before foreclosure proceedings;
 - During foreclosure proceedings;
 - After a court order is issued awarding the home to the lender.

Can the Defaulting Borrower get his Home Back?

YES, depending on the mortgage code, a borrower may cure his default at any time before, during or after foreclosure, by paying the delinquent amount, any late fees, and the lender's reasonable costs of bringing suit.

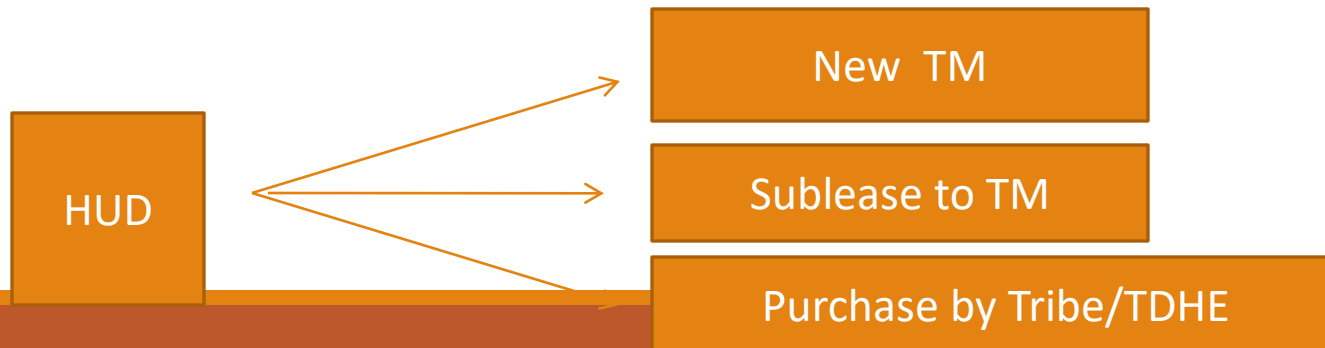


What happens if HUD gets the Home?

HUD will be required to find another tribal member to purchase the home.

The home may be subleased for up to one year at a time until a borrower is found.

Or the Tribe or TDHE may sublease or purchase the home.



WHAT DOES FORECLOSURE MEAN?

- ❑ Foreclosure – an option of last resort if a borrower is unable to cure his default.
- ❑ Foreclosure is the legal process of a lender filing an action in Tribal Court against a defaulting borrower asking the court to award the home to the lender. After foreclosure the lender will sell the home to another eligible tribal member.

WILL THE TRIBE LOSE THE LAND IF A BORROWER DEFAULTS ON LOAN?

- ❑ No, the Tribe never risks losing the land.
- ❑ A tribal member who defaults on a loan risks losing his/her residential lease. However, there are many opportunities available to a borrower to cure a default before foreclosure.

Lenders don't want the home

- It's too expensive
- The market is small
- Lenders aren't in the real estate business
- An unsold home is lost revenue

Sample Mortgage Codes & Other Docs

Mortgage Code – pre April 2016

Mortgage Code – post April 2016

Sample Residential Lease (HEARTH tribe)

Sample Residential Lease (non HEARTH tribe)

Sample MOUs with USDA, VA, Fannie Mae

Sample Tribal Council Resolution Approving MOUs

Sample Tribal Council Resolution Authorizing Implementation of Section 184 Program

Sample Certification Letter (Section 184)

Sample flow chart of loan & default process

Disclaimer:

Sample documents do not
constitute legal advice

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