TFA
Monthly Newsletter

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What is a "Bad Boy"?
Hint… It's not the high school kid smoking in the boys' room that your mother warned you about…

by Kristi Jackson

As a tribe works through the financing documents for just about any loan – one of the most often asked questions is "are my tribal assets at risk"? If something doesn't go quite as planned, what does the lender get?

What we hear most often is that the loan is "non-recourse" to the general accounts and assets of the tribe. If the borrower is a business enterprise of the tribe, the loans are typically set up so that they only look to that particular business for repayment. If that business is unable to pay its debt, the lenders can only look to that particular business to recoup their loan.

Is that it? Is it always the case that a non-recourse loan will never reach into the other tribal assets? Answer is… NO. Not if you've committed a "Bad Boy Act" (a/k/a Tribal Covenants). If a tribal borrower commits certain "Bad Boy Acts" the loan may indeed become a full recourse obligation of the tribe.

A "Bad Boy" act is something that is well within the control of the tribe, and is not forced upon the tribe as parent of a borrower. Instead, these are actions that put the borrower entity in a materially adverse position – and where they are typically knowingly wrongfully committed. Here are a few examples:

1. *Cause the land to be not held in trust* – clearly a problem if the

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IN THE NEWS

Above: Jeff Heimann and Bill Crader from TFA attended the AIGA Expo at the Talking Stick Resort in Scottsdale, AZ last week.

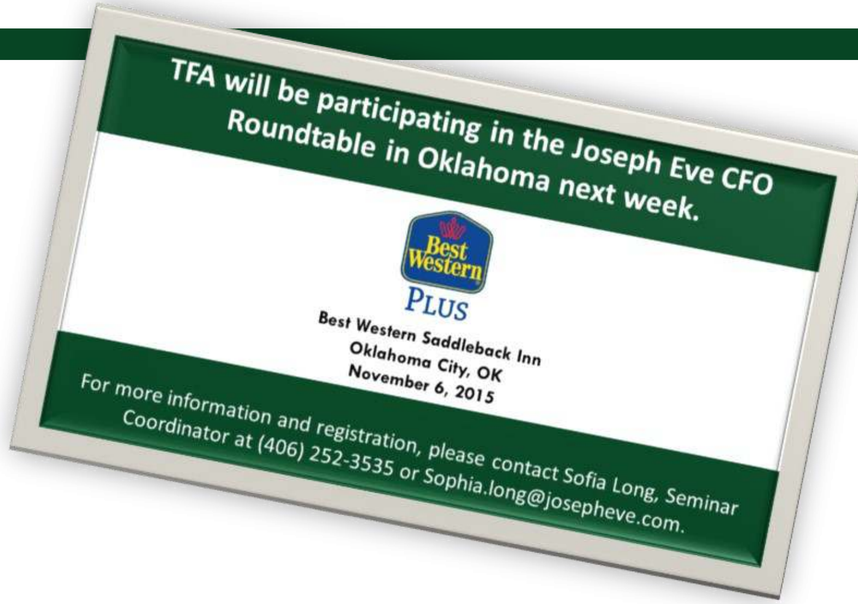
Santee Sioux Assert Tribal Sovereignty, Open First Marijuana Resort
10/06/15 – ICTMN.com

Where to Stash Cannabis Cash? Tribal Nations Make Big to Bank It
10/11/15 – Bloomberg.com

Pauma Band Wins Dispute over $36.2M in Gaming Compact Overpayments
10/26/15 – Indianz.com

Blackjack Deadline Looms in Seminole Tribe's Florida Casinos
10/28/15 – WFLA.com

NIGC Approves Alabama-Coushatta Tribe of Texas' Class II Gaming Ordinance
10/28/15 – TylerCountyBooster.com



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business is a casino and the only way gaming can legally occur is on trust land. The BIA will not take land out of trust – this would be an action by the tribe to remove the land from trust.

2. *Comingle assets* of the borrower entity with other accounts/assets of the tribe – in this case, assets of a "non-recourse" loan are pledged to support that debt. If a borrower takes the assets (cash or other) and mixes them with other accounts or tribal entities, the lender loses the accounting for that collateral. Assets must be kept separately.
3. *Establish a bankruptcy law* to allow relief from repaying the obligation – while it is unclear currently whether US bankruptcy laws apply to tribes, if a tribe were to enact a bankruptcy law and then attempt to avoid its obligations, this creates a worst possible outcome for lenders.
4. *Amend a material document to have a materially negative affect on the business* (like a gaming compact)
5. *Fail to be a federally recognized tribe* – obviously…
6. *Impose taxes* on the borrower's business which are over and above reasonable levels imposed by local jurisdictions – most credit agreements permit a tribe to levy a tax on the customers of a tribal business (like a sales tax or a hotel occupancy tax).
7. Take an action to *repeal the resolution authorizing the debt borrowing* – this can also include having a referendum vote take place (outside of the tribal council's control but which happens regardless).
8. Direct the business enterprise to *make tribal distributions that are in direct violation* of that enterprise's loan documents.

These are nearly all avoidable acts. The best time to avoid a loan becoming recourse to your tribal assets is during the structuring and negotiation of the loan at the outset. While most provisions are standard, be aware of your obligations and limitations. These recourse outcomes can be avoided – they are within your control.

TRIBAL FINANCIAL ADVISORS
INCORPORATED

TFA
400 Continental Boulevard
Suite 320
El Segundo, CA 90245
tribaladvisors.com

KRISTI JACKSON
VICE CHAIR and CEO
310.341.2335
kjackson@tribaladvisors.com

DAVID HOWARD
PRESIDENT
310.341.2795
dhoward@tribaladvisors.com

JEFF HEIMANN
MANAGING DIRECTOR
310.341.2518
jheimann@tribaladvisors.com

WILLIAM CRADER
MANAGING DIRECTOR
310.341.2336
wcrader@tribaladvisors.com

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