TFA Monthly Newsletter

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Revisiting Credit Agreement Basics

By David Howard

In addition to raising capital for tribes and providing strategic financial advice, TFA is often called in to assist tribal borrowers with amendments and restructurings when there has been a loan covenant with a bank. The impact of tripping a loan covenant can trigger an increase in the interest rate, amendment fees, legal fees, and worse, including stoppage of transfers or distributions to the tribal government. Tribal leaders are typically frustrated that they had not been made aware of these covenants and the potential consequences.

A standard loan agreement for a transaction can be over 150 pages long. In reviewing a recent loan agreement, we counted over 140 covenants with which the borrower must comply. Additionally, there were 35 covenants that the Tribe must abide by or risk full recourse to tribal assets. That's a lot a legal jargon to digest and understand.

There are three significant types of covenants: *Affirmative Covenants*… these are things the borrower promises that they *will* do; *Negative Covenants*…these are things the borrower agrees they *will not* do; and *Tribal Covenants*…these are important items the tribe (regardless of whether the tribe is the actual borrower or not) agrees they *will not* do. In this newsletter, we will focus on Tribal Covenants. We plan

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IN THE NEWS

For tribes, federal recognition opens doors, confers respect
11/13/22 – cdcgaming.com

Washington: Cowlitz Indian Tribe announces $2.5 million in grants to nonprofit
11/28/22 – cdcgaming.com

How Pandemic Aid Is Boosting a Seattle-Area Tribe - Native American communities are receiving $20 billion in federal relief. The Suquamish Tribe is putting its share toward affordable housing.
11/29/22 – bloomberg.com

Joe Biden pledges new commitments, respect for tribal nations - The president announced $135 million in federal money to relocate to safe ground tribal communities that face the impacts of climate-related environmental threats
11/30/22 – indiancountrytoday.com

Interior Department Announces New Partnerships and Offices to Leverage New Resources for Indian Country
11/30/22 – doi.gov

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to address additional covenant restrictions in future editions.

Tribal Covenants - In most tribal lending arrangements, the lender focuses on the specific tribal business with no recourse back to tribal assets. However, lenders require Tribal Covenants to protect them from the Tribe taking specific action to harm their loan or their collateral.

The section of a loan agreement or often a separate document that deals with tribal covenants can be called several things… Tribal Recourse, an Inducement Agreement or Tribal Agreement. Here are some examples of actions the Tribe would be prohibited from taking under these agreements:

- Imposing taxes or franchise fees that aren't otherwise permitted in the loan and that would impact the loan collateral
- Modifying or amending any of its ordinances (e.g. a Gaming Ordinance), laws or regulation that adversely impact the business economics of the borrower
- Pledging the assets of the borrower to another lender
- Enacting bankruptcy laws
- Scheduling a referendum of tribal members, or take any action to repeal authorizations, in an effort to void the loan documents
- Take any actions to divert the borrower's collateral from the lender

Note, these covenants can only be impacted by an affirmative action by the tribal council. These are typically all within the control of the tribe itself, not the result of circumstances of a business situation, and are steps that are taken which are adverse to the lender interests. The acts above are typically referred to as "bad boy" acts.

While not intentional on their part, in the past 25 plus years that our team has been working in Indian Country finance, we have seen several tribal councils pass resolutions and enact policies that inadvertently violated some of these tribal covenants. This could result in very significant consequences and trigger recourse to certain tribal assets – even if unintentional. Banks are generally agreeable to providing waivers for unintentional mistakes. However, it always requires their approval and the legal costs can be significant to remedy. It is best to be aware of the restrictions that your loan agreements place upon your business – and government – in order to stay in compliance.

As the banking environment is beginning to tighten, we feel it's important that tribal leaders and their designated counsel have a good working knowledge of the major covenants in their agreements and stay updated with the lender's requirements. TFA is always available to discuss these issues further.

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