INTERIOR BOARD OF INDIAN APPEALS

State Bank of Eagle Butte, South Dakota v. Director,
Office of Economic Development, Bureau of Indian Affairs

41 IBIA 43 (05/12/2005)

Related Board case:
33 IBIA 193

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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STATE BANK OF EAGLE BUTTE, SOUTH DAKOTA, Appellant,	:	Order Affirming Decision
v.	:	Docket No. IBIA 03-10-A
DIRECTOR, OFFICE OF ECONOMIC DEVELOPMENT, BUREAU OF INDIAN AFFAIRS, Appellee.	:	May 12, 2005

The State Bank of Eagle Butte, South Dakota, (Bank) appealed from an August 22, 2002, decision by the Director, Office of Economic Development, Bureau of Indian Affairs (Director; BIA), denying payment on BIA Loan Guaranty Certificate No. G992B1AO103, which had been issued to the Bank under BIA's loan guaranty program, 25 U.S.C. §§ 1481– 1512 and 25 C.F.R. Part 103 (2000). 1/ The Director denied payment on the ground that the Bank failed to comply with remedy election procedures required by 25 C.F.R. § 103.36, when the borrowers defaulted on the loan. For the reasons discussed below, the Board affirms the Director's decision.

Background

On April 22, 1998, the Bank requested a 90-percent loan guarantee from BIA for a $500,000 line of credit for future operating expenses to Peterson Trucking (Borrower), a business owned and operated by Brice and Allison Peterson, two members of the Cheyenne River Sioux Tribe (CRST). The Bank's application stated that the line of credit must be paid down to $5000 or lower each year by June 1st, with a maturity date on the loan of June 1, 2003.

1/ 25 C.F.R. Pt. 103 was revised in 2001, 66 Fed. Reg. 3861 (Jan. 17, 2001), but the earlier version of Pt. 103, codified in the 2000 edition of 25 C.F.R., applies to the loan guaranty involved in this appeal. All citations in this order to Pt. 103 are to the 2000 edition of 25 C.F.R.

On June 15, 1998, without waiting for BIA's approval, but after being told by a credit officer in the CRST Credit Office 2/ that BIA would approve the loan guaranty, the Bank executed a promissory note for the $500,000 loan to Borrower. The promissory note provides that the line of credit "MUST BE PAID DOWN EACH YEAR (JUNE 1ST OF EACH YEAR) to $5000.00."

On May 20, 1999, the Superintendent of the Cheyenne River Agency, BIA, approved a 90-percent loan guaranty to the Bank for the $500,000 loan. 3/ Loan Guaranty Certificate No. G992B1AO103 identifies the loan amount, percent of the loan guarantee, interest subsidy rate, and premium rate. It also recites the statutory and regulatory authority for the guaranty, but does not otherwise describe the terms and conditions of the promissory note between the Bank and Borrower.

On June 3, 1999, the Bank wrote to the CRST Credit Office, reporting that Borrower had failed to pay down the note to $5000 by the first of June as required, and requesting an "extension on this line of credit until October 1, 1999." The CRST Credit Office apparently forwarded the request to BIA, and in a letter dated June 18, 1999, the Superintendent concurred with the Bank's request. On July 23, 1999, the Bank and Borrower executed a "Single Payment Extension Agreement," allowing Borrower until October 1, 1999, to pay down the note. Bank's Opening Brief Ex. A at 47. The agreement also provided that "[a]ll terms, except those modified by the agreement, of the original note and the mortgage remain intact." Id. According to the Bank, Borrower made various principal and interest payments in

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2/ The CRST Credit Office operates under a contract with BIA to provide credit services, and apparently acted as a local contact for the Bank with respect to the loan guaranty. The CRST Credit Office is not, however, authorized to act on behalf of the Department of the Interior for the Loan Guaranty Program, see Director's Answer Brief at 6 n.7, and the Bank does not contend otherwise. See Bank's Opening Brief at 3 (Bank understood the Department's authorized representative to be the Superintendent).

3/ Earlier, on Nov. 9, 1998, the Director had denied the Bank's loan guarantee application for this loan, after reviewing the application and after obtaining additional information. The Bank then filed an appeal with the Board, but withdrew it, and the Board dismissed the appeal on Mar. 5, 1999. See State Bank of Eagle Butte v. Director, Office of Economic Development, 33 IBIA 193 (1999). In this appeal, the Director contends that the Superintendent's subsequent approval of the loan guaranty was not properly coordinated with the Director's office. The Director also now contends that due to a hiatus in delegations within BIA, the Superintendent lacked authority on May 20, 1999, to approve the loan guaranty, thus rendering it void *ab initio*. The Director's Aug. 22, 2002, decision did not address whether the Superintendent lacked authority at the time to approve the loan guaranty. The Board assumes, solely for purposes of deciding this appeal, that the Superintendent had such authority.

July, September and October, 1999, and on November 3, 1999, paid down the loan balance to zero. Bank's Opening Brief at 3.

The following year, on June 5, 2000, the Bank again wrote to the CRST Credit Office, and again reported that Borrower had failed to pay down the note to $5000 by June 1, as required by the promissory note. 4/ The Bank's letter asked the CRST Credit Office, "[p]lease let [us] know what you would want [us] to do on this matter." June 5, 2000, Letter from Bank to CRST Credit Office. The record does not indicate that either the CRST Credit Office or BIA responded to the Bank's request for guidance. On July 19, 2000, however, at the request of the CRST Credit Office, the Bank sent payment histories on the loan to the BIA Aberdeen Area (now Great Plains Regional) Credit Office. On September 7, 2000, the Bank wrote to the Superintendent, informing him that the operating line of credit for Borrower had not been reduced to $5000 by June 1. The Bank reported a current balance on the line of credit of $407,367.96, and requested "concurrence from [BIA] to continue with the operating line, even though it was not reduced as we had hoped." Sept. 7, 2000, Letter from Bank to Superintendent. On September 12, 2000, the Superintendent responded and "concurre[d] with [the Bank's] request." Sept. 12, 2000, Letter from Superintendent to Bank. In his response, the Superintendent stated that "[t]he * * * Bank * * * and the Agency Credit Officer had requested that the balance be reduced to $5,000.00 or less each year and that all interest be paid annually. This is a good practice to follow, but is not a condition of the commitment order." Id.

On January 10, 2001, the Bank wrote to the CRST Credit Office that the Bank had heard Borrower might be operating under a different name, but had not confirmed the information. The Bank stated that "it appears that there may be a problem and something should be done," and further stated: "We are wondering how we should best proceed so that the guarantee is maintained." Bank's Opening Brief Ex. A at 33.

Borrower again failed to pay down the line of credit to $5000 or less by June 1, 2001. See Oct. 3, 2001, Letter from Bank to Borrower (no reduction on loan for past year). On August 15, 2001, the Bank wrote to the Superintendent, to "notify [the Superintendent] of the default" of the loan to Borrower. The letter provided the current principal and accrued interest balances on the loan. The letter does not identify a specific date of default, but states that "some terms of the loan have not been adhered to including annual reductions in the revolving line of credit." Aug. 15, 2001, Letter from Bank to Superintendent. The letter requested "an extension of 90 days to attempt to restructure the credit on a performing basis before the bank would initiate collection actions." Id. BIA did not respond to the Bank's request.

4/ The Bank's letter misstates the deadline as June 5th, rather than June 1st, but the mistake is not relevant.

According to the Bank, on October 2, 2001, BIA Area Credit Office representative Stacey Johnson telephoned the Bank about the loan. The Bank contends that during the course of that conversation, Johnson expressed concerns about the loan, but stated that the loan guaranty would still be "in place" because of the Superintendent's September 12, 2000, letter concurring in the Bank's September 7, 2000, request to continue the line of credit. According to the Bank, in follow-up conversations in mid-November, Johnson directed the Bank to call the loan. Bank's Opening Brief at 5. On November 29, 2001, after correspondence and a meeting with Borrower, the Bank notified Borrower that it was accelerating the loan maturity, on the grounds that "the bank had not received principal reductions required by the loan and there appear to be no immediate prospects to return the loan to a performing status." Nov. 29, 2001, Letter from Bank to Borrower.

On March 1, 2002, the Bank wrote a formal notice-of-default letter to the Superintendent, "pursuant to 25 CFR 103.36, and [] intended to supplement the various previous notices given to you and other BIA representatives." Mar. 1, 2002, Letter from Bank to Superintendent. The Bank's letter provided the amount of principal and interest due as of March 1, 2002, totaling $493,791.95, and informed the Superintendent that the Bank had accelerated the entire amount due on the note. The Bank's letter also "further notif[ied] [BIA] that [the Bank] elects to, and does hereby, make demand for payment of the guaranteed percentage of the current balance of the loan, pursuant to 25 CFR 103.36(b)." Id.

On March 14, 2002, the Bank submitted a claim for loss to the Superintendent, requesting payment of $445,227.76. In response to a request on the claim-of-loss form for information concerning the earliest date of default and bases for default, the Bank wrote: "It is not possible to answer this question with one specific date." Instead, the Bank provided a narrative chronology of events and a description of correspondence concerning the loan. The Bank's narrative concluded: "Assuming the failure from year-to-year to pay down the balance of the Note is not a default, the 'earliest' default date would be November 29, 2001, when Lender accelerated the Note based on non-performance."

On August 22, 2002, the Director denied the Bank's claim entirely. For 1999, the Director assumed, without conceding, that Borrower's default had been cured by a timely BIA-approved extension. The Director found, however, that when Borrower did not pay down the loan by June 1, 2000, the Bank had failed to comply with 25 C.F.R. § 103.36(a), which requires lenders to take specified remedial action within 60 days of a default on a guaranteed loan. As a result, the Director concluded that under the regulations, the loan guaranty certificate "'cease[d] being in force or effect' on July 31, 2000." Director's Decision at 2 (quoting 25 C.F.R. § 103.36(a)).

The Director also found that in 2001, Borrower had again failed to pay down the loan to $5,000 by June 1, constituting a default. Although the Bank had notified BIA of the situation in its August 15, 2001, letter, the Director found that the Bank's notice came after the 60-day deadline had passed for taking required action under subsection 103.36(a). The Director concluded that this delay by itself would have caused the loan guaranty certificate to cease being in effect. In addition, because BIA had not responded to or approved the Bank's August 15, 2001, request for an extension, the Director found that the Bank had not taken action on the default as required by section 103.36(a) within the 60-day time period.

The Bank appealed the Director's decision to the Board, and filed an opening brief. The Director filed an answer brief, to which the Bank filed a reply. 5/

Discussion

The Bank contends that the Superintendent waived the Bank's obligations under the loan guaranty regulations, or that the Director should be estopped from contending otherwise, or that the Bank substantially complied with the regulations. We begin with the language of the regulations.

Section 103.1 of 25 C.F.R. defines "default" to include "failure of a borrower to: (1) Make scheduled payments on a loan when due, * * * or (3) Comply with the covenants, obligations, or other provisions of a loan agreement."

Section 103.36 sets forth the procedures applicable to situations of default on guaranteed loans, and provides in relevant part:

5/ The Bank moved to supplement the record with its complete loan file and with several affidavits. The Director objected to several of the affidavits on the grounds that they do not coincide with BIA's records or that they are irrelevant, hearsay, and of no probative value. Under the circumstances, in light of the Bank's waiver and estoppel arguments, the Board will grant the Bank's motion to supplement, so that it may fully consider the Bank's arguments and accompanying evidence.

The Director also moved to supplement the record with certain correspondence pertaining to the delegation of authority for BIA's loan guaranty program. See supra note 3. The Board grants the Director's motion, although given our assumption that the Superintendent had authority to approve the loan guaranty, this decision does not rely on the supplemental documents submitted by the Director.

> (a) Within 45 calendar days after the occurrence of a default, the lender shall notify the Commissioner [6/] by certified or registered mail showing the name of borrower, guaranty certificate number, amount of unpaid principal, amount of principal delinquent, amount of interest accrued and unpaid to date of notice, amount of interest delinquent at time of notice, and other failure of the borrower to comply with provisions of the loan agreement. <u>Within 60 calendar days after default on a loan, the lender shall proceed as prescribed in either paragraph (b), (c), or (d) of this section, unless an extension of time is requested by the lender and approved by the Commissioner.</u> The request for an extension shall explain the reason why a delay is necessary and the estimated date on which action will be initiated. <u>Failure of the lender to proceed with action within 60 calendar days or the date to which an extension is approved by the Commissioner shall cause the guaranty certificate to cease being in force or effect.</u> If the Commissioner is not notified of the failure of a borrower to make a scheduled payment or of other default within the required 45 calendar days, the Commissioner will proceed on the assumption that the scheduled payment was made and that the loan agreement is current and in good standing. The Commissioner will then decrease the amount of the guaranty pro rata by the amount of the due installment and the lender will have no further claim for guaranty as it applied to the installment, except for the interest subsidy on guaranteed loans which may be due.
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> (b) The lender may make written request that payment be made pursuant to the provisions of the guaranty certificate or guaranty agreement. * * *
>
> (c) The borrower and the lender may agree upon an extension of the repayment terms or other forbearance for the benefit of the borrower. * * * Agreements between a lender and a borrower shall be in writing and will require approval by the Commissioner.
>
> (d) The lender may advise the Commissioner in writing that suit or foreclosure is considered necessary and proceed to foreclosure and liquidation of all security interests. * * *.

25 C.F.R. § 103.36 (emphasis added).

There can be no doubt that Borrower's failure to pay down the line of credit by June 1 in 1999, 2000, and 2001, constituted a "default," as defined by 25 C.F.R. § 103.1. The

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6/ "Commissioner" is defined to mean "the Commissioner of Indian Affairs or his authorized representative." 25 C.F.R. § 103.1.

promissory note clearly required Borrower to pay down the line of credit to $5,000 or less by June 1 of each year. Each year when it failed to do so, it failed to "[m]ake [a] scheduled payment[] * * * when due," and failed to "[c]omply with the covenants, obligations, or other provisions of a loan agreement," 25 C.F.R. § 103.1, thus squarely falling within the definition of "default."

As described above, in the event of a default, subsection 103.36(a) requires a lender to notify the Commissioner of the default within 45 calendar days by certified or registered mail, and to provide certain specific information. Within 60 calendar days after default, unless an extension has been granted, the lender must take one of three actions: make a written request to BIA for payment pursuant to the provisions of the guaranty, id. § 103.36(b); reach a written, BIA-approved agreement with the borrower for an extension of the repayment or other forbearance, id. § 103.36(c); or advise BIA in writing that suit or foreclosure is considered necessary and proceed to foreclosure and liquidation of all security interests, id. § 103.36(d).

In 2000, 7/ when Borrower did not pay down the note by June 1, the Bank failed to take any of the three available remedial actions within 60 days of the default. Even assuming that the Bank's September 7, 2000, letter to the Superintendent could be construed as a request for an extension of the 60-day time period, it came too late — well after the 60-day time period had expired. As quoted earlier, subsection 103.36(a) provides that "[f]ailure of the lender to proceed with action within 60 calendar days or the date to which an extension is approved by the Commissioner shall cause the guaranty certificate to cease being in force or effect." Therefore, if the regulations are applied, the Bank's loan guaranty ceased being in force or effect on July 31, 2000 — 60 days after Borrower's default on the promissory note.

Similarly, in 2001, when Borrower again defaulted, the Bank again failed to comply with the requirements of section 103.36 within 60 days of the date of default. The Bank's August 15, 2001, letter to the Superintendent, giving notice of the default and requesting an extension, would have been too late to prevent termination of the guaranty, even if the guaranty had still been in effect in 2001. In addition, as the Director noted, BIA did not send a response to the Bank's letter or concur in the requested extension. Therefore, if the regulations are applied, and if the guaranty was still in effect after 2000, the Bank did not take timely and necessary action in 2001 to prevent the guaranty certificate from terminating.

7/ As noted earlier, for the year 1999, the Director was willing to assume for purposes of his decision that the Superintendent's June 18, 1999, concurrence in the Bank's requested extension satisfied the requirements of subsection 103.36(c), and therefore cured the default. That issue is not before the Board.

The Bank contends, however, that the Superintendent's September 12, 2000, letter either waived the loan's annual pay-down requirement as a condition of the loan guaranty, or the Superintendent's letter so misled the Bank that BIA should be estopped from applying section 103.36 to the Bank. 8/ In either case, according to the Bank, it was excused from the lender obligations imposed by section 103.36 in the event of a default on a guaranteed loan.

As described above, on September 7, 2000, the Bank requested "concurrence from [BIA] to continue with the operating line" of credit, despite Borrower's failure to comply with the pay-down requirement in the promissory note. On September 12, 2000, the Superintendent "concurre[d] with [the Bank's] request." In that letter, the Superintendent stated: "The State Bank of Eagle Butte and the Agency Credit Officer had requested that the balance be reduced to $5,000.00 or less each year and that all interest be paid annually. This is good practice to follow, but is not a condition of the commitment order." Sept. 12, 2000, Letter from Superintendent to Bank. 9/

Based on this response, the Bank contends that the Superintendent waived and eliminated the pay-down requirement "as a material element of [the] Bank's obligation to BIA under the [Loan] Guarantee," and that the Bank's "only obligation at that point was to give BIA notice of any other material breach of the terms of the Note." Bank's Opening Brief at 21.

8/ In its opening brief, the Bank contended that the Superintendent's letter could also be construed in either of two additional ways: (1) the pay-down requirement was not a "material" provision of the promissory note, so that Borrower's failure to make the payment was not a default; or (2) the Superintendent agreed to modify the promissory note to eliminate the pay-down requirement entirely. The Director's Answer Brief effectively refuted each of these contentions by pointing out that aside from the final pay-off at maturity, the annual pay-down was the only scheduled payment requirement, and clearly was material to the promissory note; and that BIA has no authority to unilaterally modify a promissory note. These two proffered constructions of the Superintendent's letter are also inconsistent with the Bank's own subsequent actions: On Aug. 15, 2001, it sent BIA a notice of "default," and on Nov. 29, 2001, it accelerated the loan, which could only have been justified if Borrower was in default on the note. In its reply brief, the Bank concedes that there was no modification of the promissory note by the parties to eliminate the pay-down requirement, and does not pursue these arguments further.

9/ The Bank apparently interprets the Superintendent's reference to the "commitment order" as referring to the Loan Guaranty Certificate, possibly in combination with the Bank's Loan Guaranty Agreement with BIA, rather than as referring to the promissory note. For purposes of deciding this appeal, we assume that interpretation is correct.

The Bank's argument must be construed as contending that the Superintendent waived the regulations, because the Loan Guaranty Certificate itself contains no separate terms or conditions, as between BIA and the Bank, regarding Borrower's obligations. Instead, it simply refers to the applicable regulations, which in turn define "default" in terms of a borrower's obligations to a lender. Similarly, the Bank's Loan Guaranty Agreement, under which the Bank participates in BIA's loan guaranty program, incorporates the applicable regulations. 10/ Because the regulations define "default" with reference to a borrower's obligations toward a lender, and not with reference to BIA's relationship with the lender, the only means by which the Bank could have been relieved of its obligation to comply with section 103.36 would have been for the regulations themselves to have been waived. Therefore, although the Bank does not always articulate its argument clearly, it must be contending that the Superintendent waived the regulations, or else its argument would be irrelevant.

The Superintendent, however, had no authority to waive the regulations. The Board takes official notice of 230 Departmental Manual (DM) 3.2C. See 43 C.F.R. § 4.24(b). During the time periods relevant to this case, 230 DM 3.2C expressly provided that the authority of the Assistant Secretary - Indian Affairs delegated to BIA Area (now Regional) Directors did "not include authority * * * to waive any provisions of the Code of Federal Regulations," with an exception not relevant here. 11/ A delegation to the Superintendent to exercise the Commissioner's authority to *administer* the loan guaranty regulations is distinct from a delegation of authority to *waive* those regulations. The Superintendent did not have authority to waive the regulations. Therefore, even if the Superintendent intended to waive the requirements of section 103.36, he had no authority to do so.

In addition, even if the Superintendent had such authority, the record does not support a finding of intent for the open-ended waiver that the Bank now urges the Board to accept. The Bank's September 7, 2000, request does not ask for an open-ended waiver of the pay-down requirement, to eliminate it entirely as a condition of the loan guaranty. The Bank's request to "continue with the operating line of credit" might reasonably be construed as asking for

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10/ The record does not contain an executed copy of the Bank's Loan Guaranty Agreement with BIA, but the Bank's loan file contains a blank copy of the standard form agreement. See Bank's Opening Brief Ex. A at 588.

11/ 230 DM Ch. 3 was removed from the Departmental Manual in 2003, and the updated delegation for the Director, Bureau of Indian Affairs is contained in 230 DM 1 (Apr. 21, 2003).

another extension, as was done in 1999. 12/ It does not, however, request that the Superintendent completely waive the regulatory definition of "default" and the requirements of section 103.36 for the duration of the loan, with respect to the annual pay-down requirement. The Bank contends that after the Superintendent "waived" the pay-down requirement for purposes of the loan guaranty, the Bank still had an obligation to notify BIA of "any other material breach." Bank's Opening Brief at 21. What that could have been, however, is difficult to imagine, given that Borrower's only obligation prior to maturity of the 5-year loan was the annual pay-down requirement. Furthermore, even the Bank did not construe the Superintendent's "concurrence" in its September 7, 2000, request as providing such an open-ended waiver. Otherwise, the Bank would not have written its August 15, 2001, notice-of-default and request-for-extension letter to BIA, because there would have been no "default" under the loan guaranty at that time and no extension would have been necessary.

Whatever misleading statements the Superintendent's September 12, 2000, letter contained — and it clearly contained some — his statement that he was "in concurrence with [the Bank's] request as stated in [the Bank's] letter of September 7, 2000" cannot reasonably be construed as intended to provide an open-ended waiver of the regulations with respect to Borrower's pay-down requirement, thus relieving the Bank of any obligations under section 103.36 when Borrower annually defaulted on the requirement in the promissory note. Even if the Superintendent had waiver authority, his September 12, 2000, letter did not effectuate a waiver.

The Bank's estoppel argument is equally unconvincing. As a threshold matter, as the Director argues, it is extremely doubtful that estoppel would ever lie against the Federal government in a case such as this. See Director's Answer Brief at 21-25 (citing Office of Personnel Management v. Richmond, 496 U.S. 414, 420, 422-23, 434 (1990)); see Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); see also Thompson v. Acting

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12/ We understand why the Bank would not, at this point, want to construe its request as one for an unspecified extension of time to allow Borrower to cure the default. First, its request came after the 60-day time period had expired. Nowhere do the regulations authorize BIA to grant an extension to the 60-day period *after* the time period has already expired and the guaranty has terminated. Whatever "concurrence" the Superintendent purported to give in his Sept. 12, 2000, response, it could not have revived the loan guaranty pursuant to any provisions found in the regulations. Accord Marquette Bank N.A. v. Acting Director, Office of Economic Development, 35 IBIA 161, 172 n.11 (2000) (holding that failure to comply with the 60-day time period terminated the loan guaranty certificate, and therefore it was unnecessary for Board to address whether subsequent action by appellant and BIA constituted an extension or waiver of the regulatory time periods). Second, unlike what happened in 1999, the Bank never executed a modification of the promissory note with Borrower to extend the repayment terms and cure the default.

Northwest Regional Director, 40 IBIA 216, 228 (2004) ("extremely difficult, if possible at all, to establish estoppel against the Government"). Even if, as the Bank argues, Richmond does not as a matter of law preclude all estoppel claims against the Federal government involving public funds, this case does not present facts that conceivably might warrant an exception. Indeed, the facts in Merrill arguably were more favorable toward estoppel. In that case, the Federally-insured farmer did not have actual knowledge of the applicable regulations and had directly been told that his entire crop was insured. In the present case, the Bank does not deny that it had actual notice of the regulations — it even refers to the "usual 60 day time period," Bank's Opening Brief at 9. It simply chose to disregard them. And the Superintendent's representations, made in the context of "concurring" with the Bank's request, which itself made no mention of waiving the regulations, hardly constitutes the type of representation that was made in Merrill.

In addition, the Bank has not shown that the traditional elements for estoppel exist in this case. The four traditional elements of estoppel are: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must reasonably rely on the former's conduct to his injury. See First National Bank of Gordon v. Acting Deputy Commissioner of Indian Affairs, 37 IBIA 101, 109 (2002).

In the present case, both the Superintendent and the Bank knew the same relevant facts — both knew the express terms of the promissory note, and both knew or should have known the explicit regulatory requirements and consequences when a lender fails to comply. The Superintendent may have been complicit — after the fact — in the Bank's disregard for the regulations. But the evidence of complicity in this case must be distinguished from any representations from the Superintendent that he had delegated authority from the Secretary to waive the applicable regulations, or that he intended to do so, notwithstanding the fact that the loan guaranty had already ceased being in force or effect, by operation of law.

Even if the Superintendent's letter could be construed as making such representations, it was not reasonable for the Bank to rely on them. By the time the Bank wrote to the Superintendent on September 7, 2000, and the Superintendent responded on September 12, 2000, the 60-day time period in section 103.36(a) had already expired, and the loan guaranty certificate was void. The Bank cannot reasonably contend that it withheld remedial action in the 60-day time period in 2000 based on a letter sent by the Superintendent after that period had expired.

Once the 60-day time period had elapsed in 2000, the Bank clearly was on notice that the guaranty certificate had ceased being in force or effect. For the Bank to then believe that a BIA Superintendent, with no basis in 25 C.F.R. Part 103, could simply waive the effect of the regulations, resurrect the loan guaranty, and excuse the Bank from further obligations with respect to the pay-down requirement in the note, was not reasonable. And even assuming that the Superintendent intended to represent to the Bank that he did not intend to enforce certain provisions of 103.36, which is distinct from a waiver of the regulations themselves, the plain language of subsection 103.36(a) provides that a lender's failure to comply with the 60-day action requirement automatically renders the guaranty certificate void, taking the enforcement issue out of the hands of the Superintendent. The regulations do not say, for example, that when a lender fails to comply with the 60-day requirement to elect a remedy, the Commissioner "may" take action or even "shall" take action to *cancel* the guaranty. Rather, they say that the "*[f]ailure of the lender * * * shall cause* the guaranty certificate to cease being in force or effect." 25 C.F.R. § 103.36(a) (emphasis added). "Nothing more is needed." Marquette Bank, N.A., 35 IBIA at 173.

In addition, on receiving the Superintendent's September 12, 2000, letter, the Bank clearly knew that it had done more than simply "request" that the balance be reduced each year to $5,000 or less, and knew that the pay-down requirement was more than simply "good practice to follow" — it was an express condition of the promissory note. The Bank specifically represented to BIA in its loan guaranty application that the pay-down requirement was a condition of the loan. For the Bank to now contend that it was misled by the Superintendent's letter to believe that it had been relieved of any further obligation to comply with the regulations when Borrower defaulted on the pay-down requirement, is simply not convincing. Undoubtedly, several BIA officials made misleading or even flatly incorrect statements, in suggesting that the Superintendent's September 12, 2000, letter kept the loan guaranty in place. But in light of the clear language of the regulations, it would not have been reasonable for the Bank to have accepted those statements or acted on them.

Similarly, in 2001, the Bank waited until well after the 60-day time period had expired to send BIA a notice-of-default and request-for-extension letter. The fact that the Bank requested an "extension" in 2001 itself undermines the Bank's estoppel argument with respect to the purported representation in the Superintendent's September 12, 2000, letter. And, of course, the Bank cites no representation from BIA during the 60-day time period in 2001 that would have induced it to refrain from electing a remedial action, as required by the regulations.

The Board concludes that the Bank has not established even the traditional elements of estoppel, leaving aside the hurdle it would face to establish estoppel against the Federal government.

The Bank next contends that even if it did not "strictly comply" with the regulations, it substantially complied, because "[t]hroughout the history of this Loan, BIA representatives have been kept apprised of its status." Bank's Opening Brief at 19. 13/ The Bank cites several judicial cases in which courts have excused failures to comply with procedural, technical, or notice requirements based on a doctrine of substantial compliance. The Bank suggests that the Board has never addressed whether the substantial compliance doctrine applies to notices of default for BIA-guaranteed loans under 25 C.F.R. Part 103.

The Board has had several occasions to address the failure by a lender to adhere to the requirements of subsection 103.36(a). The Board may not have used the terminology "substantial compliance" in its previous decisions involving BIA loan guaranties, but those decisions make clear that the Board has not accepted prior arguments which, in effect, asked the Board to apply a doctrine of substantial compliance. For example, the Board rejected a lender's argument that keeping BIA informed about the status of a loan through regular reports, which included events of default, constitutes notice under 25 C.F.R. § 103.36(a), when the specific requirements of that subsection were not followed. Security State Bank v. Director, Office of Economic Development, 33 IBIA 225, 237 (1999). And in Marquette Bank, N.A., 35 IBIA at 173, the Board also rejected a lender's argument that its failure to meet the time periods prescribed by subsection 103.36(a) was *de minimis* and excusable, unless BIA could show that it had been prejudiced. See also First National Bank of Gordon, 37 IBIA at 105-08 (default occurs when borrower first fails to make a payment due, not when lender subsequently declares default or makes a remedy election).

None of the judicial decisions discussed by the Bank on the doctrine of substantial compliance involve 25 C.F.R. Part 103, and the Board sees no reason under the facts of this case to consider applying the doctrine here. The Bank repeatedly characterizes subsection 103.36(a) as a simple notice-of-default provision, and then argues that each year it gave BIA — directly or through the CRST Credit Office — actual notice of Borrower's failure to pay down the note by June 1. Subsection 103.36(a) clearly requires notice of default, but it requires more than that. It requires specific formalities and specific information, and of greater importance for this case, it requires specific action by the lender to elect one of three remedies within the prescribed time period. As the Director points out, the procedures in subsection 103.36(a) are not difficult or time-consuming. Director's Answer Brief at 32. A general notice of a default, unaccompanied by a timely election of remedies, can hardly be deemed substantial compliance with the regulatory requirements. None of the Bank's letters to the CRST Credit Office or to BIA in 2000 and 2001 come close to complying with the straightforward and easily-understood specific requirements of 25 C.F.R. § 103.36.

13/ In somewhat equivocating fashion, the Bank "admit[s] that to the extent the various failures of the Borrower to make the June 1 Pay-downs are 'defaults,' Bank did not strictly comply with the notice requirements set out in 25 CFR 103.36." Bank's Reply Brief at 13.

The Bank also appears to be contending that its request for guidance somehow excused it from its obligations or tolled the 60-day time period, and that BIA had an obligation to give it "guidance" before it could be required to comply. See, e.g., Bank's Opening Brief at 4 (Bank wrote its September 7, 2000, letter to the Superintendent "[b]ecause there was no response to the [earlier] request for guidance"); id. at 18 (Bank wrote to BIA in January 2001, and "asked for guidance," but "[t]here was no reply.").

BIA had no legal obligation to respond to the Bank's requests for guidance, and its failure to respond does not excuse the Bank from complying with the regulations. The Bank had all the "guidance" it needed in 25 C.F.R. § 103.36, and it was the Bank's responsibility to familiarize itself with those requirements. Guardian Life Insurance Co. v. Acting Anadarko Area Director, 22 IBIA 104, 124 n.24 (1992) (citing Merrill, supra). As the Board stated in Security State Bank:

> Clearly * * * the regulation places the obligation squarely on the lender to give the required notice. Nothing in the regulation suggests that a lender's responsibility to give notice of default may be shifted to BIA. Therefore, to the extent the Bank may be contending that it was not required to file a notice of default until advised to do so by BIA, the Board rejects that contention.

33 IBIA at 237. The same principle applies with respect to the Bank's obligation to elect one of the three remedial actions within the prescribed time period.

We conclude that even if circumstances might exist under which "substantial compliance" might excuse a failure to strictly comply with the requirements of 25 C.F.R. § 103.36, those circumstances do not exist in the present case. 14/

The Bank moved for an evidentiary hearing in this matter, to support its estoppel argument. The Bank contends that an evidentiary hearing is particularly necessary "given the apparent confusion within BIA concerning the authority of various agency officials to approve guarantee applications or modification requests" and given certain allegations in the Director's brief concerning the Bank's conduct in relation to the loan guaranty application. Bank's Reply

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14/ In a footnote in its reply brief, for the first time, the Bank suggests that its failure to comply with subsection 103.36(a)'s 45-day notice-of-default requirement means that the guaranty was not "void," but the amount of the guaranty merely reduced by the amount that was due. Normally, the Board will not consider arguments raised for the first time in a reply brief. See, e.g., Hunter v. Acting Navajo Regional Director, 40 IBIA 61, 68 n.5 (2004). We see no reason to make an exception here, although we note that the Bank's argument appears premised on treating subsection 103.36(a) as limited to providing a notice of default, and ignores the express language concerning the 60-day election of remedies requirement.

Brief at 2 (footnote omitted). The Board has already assumed, for purposes of this appeal, that the Superintendent had the delegated authority to approve the loan guaranty certificate in 1999 and to exercise the Commissioner's authority to administer the loan guaranty at all times relevant to this appeal. We have also held, however, that authority to administer the program is distinct from authority to waive the regulations, and have taken official notice of the Departmental Manual to address the latter issue. In addition, the Director's contentions about the Bank's conduct during the loan guaranty application process are not relevant for purposes of the Board's disposition of this appeal. Therefore, an evidentiary hearing would serve no purpose, and the Board denies the Bank's motion. 15/

In summary, the Board rejects the Bank's arguments that the Superintendent waived or modified the loan guaranty agreement — i.e., waived the regulations — with respect to the pay-down requirement and the Bank's obligations under 25 C.F.R. § 103.36, or that the Director is estopped from asserting otherwise. The Board also rejects the Bank's arguments that the Director's decision should be reversed based on a doctrine of "substantial compliance" with section 103.36.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Director's August 22, 2002, decision denying payment on BIA Loan Guaranty Certificate No. G992B1AO103.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Anita Vogt
Senior Administrative Judge

15/ The Bank also moves to strike from the Director's answer brief a specific statement "to the extent that it was intended to cast aspersions on the character of [the] Bank's officers and employees." Bank's Reply Brief at 4. While it may have been advisable for the Director not to have included the statement that the Bank finds objectionable, particularly in light of its lack of relevance to the specific issues to be decided in this appeal, we do not think the statement rises to the level of "scandalous, abusive or improper language" that warrants being stricken from the Director's brief. See Schleper v. Ford Motor Co., 585 F.2d 1367, 1372 (1978), cited in Bank's Reply Brief at 4.