INTERIOR BOARD OF INDIAN APPEALS

Valley Bank of Glasgow v. Director, Office of Indian Energy and Economic Development

49 IBIA 42 (04/03/2009)

Judicial review of this case:

Compromise settlement agreement, *Valley Bank of Glasgow v. Salazar*, CV-09-52-BLG-RFC (D. Mont. Oct. 18, 2010)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

VALLEY BANK OF GLASGOW,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 07-37-A
DIRECTOR, OFFICE OF INDIAN	)	
ENERGY AND ECONOMIC	)	
DEVELOPMENT,	)	
Appellee.	)	April 3, 2009

Appellant Valley Bank of Glasgow (Bank) appeals from the September 18, 2006, decision of the Director, Office of Indian Energy and Economic Development (Director; OIEED), Department of the Interior, in which the Director denied in its entirety the Bank's claim for loss on a loan for which the Bureau of Indian Affairs (BIA) had issued a loan guaranty certificate. We affirm the Director's decision on the grounds that the Bank materially breached the conditions of the guaranty when it failed to apply the borrower's income to pay down the guaranteed loan ahead of the Bank's unguaranteed operating loans to the borrower and that the Bank's material breach voided the guaranty. In addition, we conclude that even had the Bank's breach not voided the guaranty, the Director reasonably concluded that the Bank failed to carry out a timely and adequate liquidation of the borrower's collateral when it elected to liquidate, and that this failure is a basis to deny the claim for loss.

Background

Carl Payne, Sr., a member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, was in business as a cattle, wheat, and hay rancher/farmer on the Fort Peck Indian Reservation located in Montana. In May 2001, he sought a 15-year restructure or consolidation loan of $325,207 from the Bank to cover several existing loans.[1] In turn and pursuant to the Indian Financing Act, 25 U.S.C. §§ 1451 *et seq.*, the Bank applied to BIA for a guaranty on the loan to Payne in the amount of $325,000. The Bank agreed that

[1] The existing loans included a tractor loan ($10,197), truck loan ($14,928), livestock loan ($25,150), unidentified term loan ($159,347), and a 2000 operating loan ($115,585).

Payne's vehicles, machinery, and livestock would be pledged as collateral for the loan. At the time Payne applied for the restructured loan, the collateral was valued at $509,800.

On May 31, 2001, BIA agreed to guaranty the Bank's consolidation loan to Payne (BIA-guaranteed loan) up to 75% of loss of principal, accrued interest, and authorized charges, and issued Loan Guaranty Certificate No. G013D1C5601. It is undisputed that the guaranty included the following conditions:

– All income from the livestock and farming operation must be first applied to the loan guaranteed by [BIA].

– Collateral for the loan is all livestock, machinery and equipment, and crops.

See Letter from BIA to Bank, dated May 31, 2001.[2] BIA agreed to guaranty the loan for 15 years.

The loan agreement executed by the Bank and by Payne includes a payment priority schedule in which "[t]he first payment priority shall be to the annual payment scheduled on the BIA guarantee loan [and t]he second payment priority shall be to the annual operating loan." Loan Agreement at ¶ 13(A) & (B).[3] In addition to the loan agreement, Payne also executed a Promissory Note and Security Agreement (Promissory Note) for the BIA-guaranteed loan in which he agreed to make annual payments of $38,412.36 on or before December 31 for 15 years. A grace period of 30 days was included, the result of which would be to extended the due date to January 30 of each year. The Promissory Note also included the following cross-default provision: "I will be in default if any one or more of the following occur. * * * (D) **Failure of Condition or Term.** I fail to pay, or perform any condition or to keep any promise or covenant on this *or any debt or agreement I have with you*." Promissory Note, ¶ 10 (emphasis added). Finally, the Promissory Note confirmed that the loan was secured by all of Payne's equipment and all of his farm

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[2] The Loan Guaranty Certificate itself refers to "conditions of approval" attached as Exhibit A. Although the May 31 letter is not marked as "Exhibit A" to the Loan Guaranty Certificate, it nevertheless bears the same date as the Loan Guaranty Certificate and the Bank does not dispute that the conditions set forth in the May 31 letter were applicable to the loan guaranty.

[3] It appears that the operating loan is similar to a line of credit in that funding is available to the borrower to draw on as needed up to a preset limit. During the life of the loan, sums apparently can be borrowed and repaid several times.

products, including livestock and crops. *Id.*, ¶ 9(C). The BIA-guaranteed loan was opened on June 4, 2001 (designated by the Bank as loan no. 17428).

Also on June 4, 2001, the Bank opened an operating loan (designated as loan no. 17429) for Payne in the amount of $80,200, with a maturity date of December 31, 2001 (2001 operating loan). *See* Bank's Record at Tab 40 (Exhibit C to Tribal Court Complaint). The operating loan stated that it was secured by all of Payne's farm products, including livestock and crops, and government payments.

Payne drew advances and made payments throughout the second half of the year on his 2001 operating loan. According to the Bank's ledger records for this loan, Payne made payments totaling $111,266.82 toward the 2001 operating loan in 2001. Of these payments, the Bank notes that one payment of $42,114.52 in October 2001 came "from calves sold at Sidney Livestock." Comments, Valley Bank (Administrative Record at 364). No payments were posted in 2001 to the BIA-guaranteed loan. By the end of 2001, Payne had a remaining balance due of $18,227.09 on his operating loan.

On January 7, 2002, Payne's "PFC payment" of $7,596.00 was applied directly to the BIA-guaranteed loan.[4] *Id.* The Bank's notes reflect that on January 16, 2002, $30,866.36 was advanced from the operating loan to cover the balance due for 2001 on the guaranteed loan[5] and the Bank "agree[d] to extend the operating [loan] for another year . . . [in] the same amount of $80,000." *Id.*[6] No further payments on Payne's loans were made in 2002 until October, after the Bank wrote to Payne on October 1, 2002, and observed that "[s]ince August 15th, you have deposited $88,798.90 to your checking account. This amount would have paid off your last year['s] operating [loan], with money left over." The Bank then took $53,065.97 from Payne's checking account, which apparently came from the sale of grain, and applied it to the 2001 operating loan. On December 16, 2002, a second payment of $28,449.19 was applied to the 2001 operating loan from the sale of calves. On the same date, $38,412.36 was advanced from the 2001 operating loan to pay the 2002 annual payment on the BIA-guaranteed loan. At the end of 2002, the Bank's

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[4] The "PFC payment" is presumed to refer to "production flexibility contract" payments by the U.S. Department of Agriculture, a crop subsidy program for farmers. *See Sierra Club v. Glickman*, 156 F.3d 606, 611 (5th Cir. 1998).

[5] After the application of the "PFC" payment, the balance due on the BIA-guaranteed loan was $30,816.26.

[6] Ultimately, the Bank extended the 2001 Operating Loan through December 1, 2003.

ledgers showed that the BIA-guaranteed loan was current (insofar as the annual payments set by the Bank) but the operating loan reflected an end-of-year balance due of $70,830.74.

In February 2003, the Bank arranged for an independent appraiser to provide a valuation of Payne's vehicles, farm equipment, and livestock. The appraiser's report reflects that the vehicles and equipment had a fair market value of $309,000 and the livestock was valued at $163,000. Payne's records, on which the appraiser relied, reflected that his herd consisted of 150 bred cows, 7 breeding bulls, and 65 yearling heifers.

By June 2003, the 2001 operating loan was fully advanced. At that time, the Bank authorized a second operating loan (2003 operating loan) in the amount of $90,000.00 to Payne and his son "to get [Payne] off of the overdraft list and to get him through harvest. It was made very clear to [Payne] that *all of his income must be applied to this operating note*. Both Sr and Jr signed on this note so this is secured by all of Jr's cattle and equipment as well as Sr's." Bank's Memos, June 23, 2003 (Administrative Record at 361) (emphasis added).[7] By September 2003, the only payment made on any of Payne's three loans[8] with the Bank was a payment in July of $3,893.92, which came from the U.S. Department of Agriculture. The Bank then met with Payne in September 2003 and it was decided that Payne would need to abandon the ranching/farming business and liquidate his assets to pay off his loans. The Bank phoned BIA and relayed information concerning Payne's anticipated liquidation. In a letter dated September 10, 2003, to Payne, the Bank confirmed that Payne would begin the liquidation by selling his crops and cow herd in the fall, followed by an auction of his equipment and vehicles. The Bank stated that "[p]roceeds from the calf crop and wheat will first go toward paying off your operating notes here. From the cow herd we will pay off Carl Jr.'s note with the Montana Department of Agriculture and second to the BIA Guarantee [loan]." Letter from Bank to Payne, Sept. 10, 2003.

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[7] In June 2003, the Bank sought to have BIA (1) increase the guaranty on the BIA loan from 75% to 90%, (2) increase the total indebtedness on the original guaranteed loan to $371,000 "to refinance the existing term loan, refinance last year's operating loan of $70,000 and unidentified accounts payment of $15,400", and (3) separately guaranty a new operating loan for $100,000. Letter from BIA to Bank, June 20, 2003, at 1. BIA denied each of the Bank's requests based on its determination that the combined total debt to total assets ratio of Payne and his son would be 90%, if the new loan were granted.

[8] Payne now had three loans: The BIA-guaranteed loan, the 2001 operating loan, and the 2003 operating loan.

During the remainder of 2003, a total of $98,138.41 from the sale of calves and grain was applied to Payne's operating loans, which paid the 2003 operating loan in full and reduced the balance due on the 2001 operating loan. No payments were applied to the BIA-guaranteed loan. No auction or sale was held to liquidate Payne's equipment and vehicles or his remaining livestock.

On January 27, 2004, the Bank sent the first of two notices of default to BIA. The Bank identified the total amount of past due principal ($285,660.62) and interest ($19,111.87) as $304,772.49 and identified the date of default as December 31, 2003. Also on January 27, the Bank confirmed with Payne that he would be responsible for contacting an auctioneer and arranging for the auction of his vehicles and equipment in spring 2004. He was also to be responsible for selling his remaining livestock in the spring. On April 29, 2004, Payne sold some of his vehicles and equipment to his son for $36,500, which was $500 less than the fair market value that these items appraised for in February 2003. Some of Payne's cattle (104 cow/pairs[9] and 6 bulls) were sold at the same time to Payne's son, apparently for $102,100.[10] The total amount realized from the sale of assets, $138,600, was applied entirely to the BIA-guaranteed loan, which reduced the balance due to $166,172.49 plus any additional accrued interest. According to the Bank's notes, after the sale of livestock and equipment to his son, Payne still had "remaining collateral of approx[imately] 50 head of cattle worth $50,000 depending on if they are pairs or not. Also left is his [remaining] equipment and vehicles which have an appraised value of $209,700." Bank's Memos (Administrative Record at 362). The record is silent concerning any efforts by the Bank or by Payne to auction the rest of his equipment or sell his remaining livestock. The Bank reports that after the sale of some of the assets to Payne's son in April 2004, Payne became nonresponsive to inquiries from the Bank.

Thereafter, the Bank retained counsel to contact Payne concerning the remaining balances on his outstanding loans. Apparently, Payne declined to respond to the correspondence sent to him by the Bank's attorneys. In July 2004, the Bank filed an action in State court to seize the remaining collateral. *Valley Bank of Glasgow v. Payne*, No. DV 04-78 (17th Jud. Dist. Mont.). A default judgment was entered by the State court against

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[9] A "cow/pair" is a cow with calf. *See El Tejon Cattle Company v. San Diego County*, 252 Cal. App. 2d 449, 454 (1967).

[10] The Administrative Record contains a purported receipt for the sale of the livestock, but no amount of sale is entered. Similarly, in the records proffered by the Bank, its copy of the same receipt fails to include any amount of sale. No other receipt or evidence of sale appears in the record.

Payne on October 6, 2004, followed by a writ of execution. The Bank alleges that it was unable to serve the judgment on Payne because the Sheriff of Roosevelt County (Sheriff) said he lacked jurisdiction to carry out the writ on the Reservation where the collateral was located. The Bank does not state whether it sought the assistance of Tribal police in executing the State court writ.

In mid-December 2004, the Bank filed a second action, this time in Tribal court, to recover the collateral. *Valley Bank of Glasgow v. Payne*, No. 04-12-348 (Fort Peck Tribal Court). After a trial, the Tribal court entered judgment in favor of the Bank on March 15, 2005, for $177,187.12 on the BIA-guaranteed loan and $73,350.09 on the 2001 operating loan. The Tribal court also ordered the foreclosure of the property securing the two loans. The Bank subsequently obtained a writ of execution from Tribal court, authorizing the Sheriff to seize and sell the collateral. According to the notes of the Bank, the Sheriff reported in September 2005 that the remaining vehicles and equipment were "junk" and that Payne informed him that all of the cattle belonged to his son. Bank's Narrative for Carl Payne, Sr., July 19, 2006 (Administrative Record at 273);[11] *see also* Bank's Memos, Dec. 13, 2004 (Administrative Record at 362) (Payne's son "stated that the calves that Carl Sr. had were branded with Carl Jr's brand."). In December 2005, the Sheriff also reportedly informed the Bank that he could not "pick up the collateral" and suggested that the Bank engage "the [T]ribal police or hire a private party." *Id*. In January 2006, the Sheriff informed the Bank that "he had a new plan on picking up Payne's collateral." *Id*. However, the Bank had "submitted the paperwork to [T]ribal court for someone else to pick up the collateral," and therefore apparently declined the Sheriff's assistance. *Id*.

The Bank then contacted two individuals on separate occasions to recover the collateral. The first individual apparently did not attempt to go out to Payne's property to inspect or seize the collateral and only spoke to Payne by phone in January 2006; the second individual reportedly "found some of the equipment scattered all over" in April 2006. *Id*. The second individual later returned to Payne's property on or about April 27, 2006, and took photographs,[12] but reported that Payne was not cooperative and the individual "[did] not feel comfortable going back to collect on the judgment. He suggested [that the Bank] obtain a Native American individual or company to seize the equipment. He also suggested that they be escorted by [T]ribal police." *Id*. (Administrative Record at 274). According to the invoice records of the Bank's attorneys, it appears that an attempt

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[11] The Bank's notes also reflect that, according to Payne's "most recent financial statement . . ., he has 124 cows." *Id*.

[12] No photographs appear in the record.

was made by the law firm to contact the Tribal police in May 2006 but the record does not reflect the results of that contact. No further information appears in the record concerning any efforts to collect the collateral.

BIA received a second notice of default from the Bank on June 1, 2006, which reflects application of the proceeds from the sale of livestock and machinery to Payne's son. In this notice, the Bank now claimed past due principal and interest on the BIA-guaranteed loan in the aggregate amount of $205,050.87.[13] On July 31, 2006, the Bank filed a Claim of Loss with BIA for the default on Payne's guaranteed loan. The Bank identified the date of default as December 31, 2003, and identified the unpaid principal as $170,539.58, unpaid interest as $26,603.01, and attorney fees as $8,080.78 for a total claimed loss of $205,223.37. The claim amount sought by the Bank on the guaranty was 75% of the claimed loss, or $153,917.53. Neither the Administrative Record nor the Bank's own records reflect that it sent a written notice electing remedies to BIA, as required by 25 C.F.R. § 103.36(d), nor do the parties' records reflect that BIA waived the requirement of notice, *see id.* § 103.36(e).

The Acting Rocky Mountain Regional Director (Regional Director), BIA, evaluated the Bank's claim and recommended to the OIEED that $54,899.39 be paid on the guaranty. The Regional Director determined that 75% of the past due principal would be $127,094.69, from which it subtracted $83,521 that had been applied to Payne's 2001 operating loan instead of to the BIA-guaranteed loan.[14] The Regional Director recommended payment of the claimed attorney fees and 75% of the accrued interest. The Regional Director further observed that the Bank had paid itself on the two operating loans prior to posting payments to the BIA-guaranteed loan, and suggested that the Bank took an unreasonable amount of time to liquidate the collateral once it realized that Payne was unable to pay his loans. The Regional Director did not explain to what extent, if any, these factors had been considered in making her recommendation.

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[13] The Administrative Record provided by the Director does not contain a copy of the second Notice of Default. However, a copy was provided by the Bank and BIA refers to this Notice of Default in its acknowledgment letter to the Bank dated June 21, 2006.

[14] BIA transposed two numbers in its calculation: 75% of the past due principal of $170,539.58 is $127,904.69 instead of $127,094.69. As a result, BIA likely intended to recommend that $55,709.39 be paid to the Bank on the guaranty instead of $54,899.39 ($127,904.69 – $127,094.69 = $810; 54,899.39 + 810 = 55,709.39).

In his decision of September 18, 2006, the Director denied the Bank's claim in its entirety. The Director found that the Bank violated the terms and conditions of the guaranty, which resulted in the claimed losses. First, the Director found that the Bank consistently had applied payments first to Payne's operating loans, rather than first making the annual payment on the guaranteed loan, and then improperly allowed Payne to draw down on the operating loan to make his annual payment on the guaranteed loan. Second, the Director found that the Bank improperly allowed Payne to handle the liquidation of the pledged collateral rather than liquidating the collateral itself. Third, the Director observed that the residual collateral (after deducting the proceeds from the sale of livestock, vehicles, and machinery to Payne's son in April 2004) had an appraised value of $209,700, which the Bank should have liquidated and the funds from which should have covered most, if not all, of the remaining balance of the guaranteed loan. Fourth, the Director determined that the Bank had failed to perform required annual inspections of the collateral and, moreover, noted that the Bank's own notes reported, without any followup investigation, the possible fraudulent conversion of some of Payne's livestock and crops. Fifth, the Director pointed out that the Bank loaned Payne another $90,000 shortly before determining that Payne needed to liquidate his assets and then applied Payne's subsequent income to pay off this loan instead of using the funds to pay down the BIA-guaranteed loan. As a result of the above deficiencies, the Director concluded that the "errors in judgment and breaches of applicable provisions governing BIA's loan guaranty certificate are sufficiently grave to make it impossible for us to determine that any portion of the [Bank's] claim for loss was unavoidable." Decision, Sept. 18, 2006, at 4. The Decision included instructions for appealing to the Board.

This appeal followed. On May 18, 2007, after the Board requested briefing on its jurisdiction to decide the appeal, the Assistant Secretary – Indian Affairs referred the Bank's appeal to the Board for decision pursuant to 43 C.F.R. § 4.330(a).[15] The parties each briefed the merits.

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[15] BIA's Office of Economic Development was subsumed within a new Office of Indian Energy and Economic Development, which is located within the Office of the Assistant Secretary – Indian Affairs (Assistant Secretary). The Director is a subordinate official to the Deputy Assistant Secretary – Policy and Economic Development, thus raising a question whether the Board would have jurisdiction over a decision by the Director in the absence of a referral by the Assistant Secretary. *See* Order, Apr. 5, 2007; *cf.* 25 C.F.R. § 2.4(e).

Discussion

We affirm the Director's decision. First, we conclude that the Bank materially breached a condition of the loan guaranty when it failed to give first payment priority to the BIA-guaranteed loan, thus voiding the guaranty. Second, that the Director reasonably concluded that the Bank failed to pursue liquidation expeditiously or completely, as required by 25 U.S.C. § 1492 and 25 C.F.R. § 103.37(a)(2) & (c)(2). Each of these bases provided an independent ground for the Director to deny the Bank's claim in its entirety.[16]

A. Standard of Review

Appellant bears the burden of showing error in the Director's decision. *Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007). We will affirm where the Director's decision is in accordance with the law, supported by substantial evidence, and is not otherwise arbitrary or capricious. *Id*. However, we review questions of law and the sufficiency of the evidence de novo. *LeCompte v. Acting Great Plains Regional Director*, 45 IBIA 135, 142 (2007).

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[16] During preliminary proceedings, the Bank claimed that this appeal was inexcusably delayed by the time it took the Director to submit the Administrative Record (nearly 5 months) and to respond to the Board's order for briefing on its jurisdiction to decide the Bank's appeal (nearly 6 months). The Bank filed motions requesting, in effect, a default decision in its favor due to the Director's delay, and requesting that the Board accept the Bank's proffered record as the record on appeal. The Board denied the Bank's motion for "default judgment." *See* Order, Aug. 23, 2007. In its opening brief, the Bank "renews its 'objection' to BIA's unexplained, unreasonable, unlawful, and costly delays." Opening Brief at 5. The Board declines to reconsider its denial of the Bank's motion for a "default" decision in its favor.

The Bank also moved the Board to accept the Bank's record in lieu of an administrative record from the Director. The contents of the Director's Administrative Record, for purposes of an appeal to the Board, are defined by the regulations. *See* 43 C.F.R. § 4.335; *cf*. 5 U.S.C. § 706. Therefore, the Board denies the Bank's motion to accept its "record" in lieu of the record provided by the Director. However, to the extent that the Bank moves to have the documents in its "record" accepted and considered as part of the Board's record in this appeal, the motion is not opposed and is granted.

B. Statutory and Regulatory Framework for BIA's Loan Guaranty Program

BIA's loan guaranty program is part of the Indian Financing Act of 1974 (Act), Pub. L. No. 93-262, Section 1, 25 U.S.C. §§ 1451 *et seq*. Among other things, Title II of the Act, governing loan guaranties and insurance, authorizes the Secretary of the Interior (Secretary) to guaranty up to 90% of the unpaid principal and interest due on loans to Indian entities or individuals "[i]n order to provide access to private money sources which otherwise would not be available." 25 U.S.C. § 1481; *see also United National Bank v. U.S. Dept. of the Interior*, 54 F. Supp. 2d 1309, 1311 (S.D. Fla. 1998). If a claim is submitted on a guaranteed loan and the Secretary determines that the lender has suffered a loss, the Secretary "shall reimburse the lender . . . [p]rovided . . . [t]hat before any reimbursement is made, all reasonable collection efforts . . . have been exhausted by the lender, and the security for the loan shall have been liquidated to the extent feasible, and the proceeds applied on the debt." 25 U.S.C. § 1492.

The regulations adopted by the Secretary set forth in detail the standard of care expected of lenders who obtain loan guaranties from BIA. 25 C.F.R. § 103.30. In particular, section 103.30 requires the lender to "[p]romptly notify the borrower in writing of any material breach by the borrower of the terms of its loan," *id.* § 103.30(k), and "to avoid and mitigate any potential loss arising from the loan, using at least that level of care the lender would use if it did not have a BIA loan guaranty," *id*. § 103.30(m). When the lender determines that the borrower is in default, it must send a written notice of default as soon as possible thereafter to the borrower. *Id*. § 103.35. If the default remains uncured, the lender must send BIA written notice of the default within 60 days of its written notice to the borrower, *id*. § 103.35(b), and written notice by certified mail within 90 days of the default of its selection of one of three possible remedies, *id*. § 103.36(d). The lender's options are to: (1) submit a claim to BIA for its loss; (2) liquidate all collateral securing the loan; or (3) modify the terms of the loan, subject to BIA's approval. *Id*. Failure by the lender to provide written notice to BIA of its election of remedies within 90 calendar days of the default "will invalidate BIA's loan guaranty certificate" unless the provision is waived by BIA. *Id*. § 103.36(e).

If the lender elects to liquidate the borrower's collateral, the lender "must vigorously pursue all reasonable methods of collection concerning the loan collateral before submitting a claim for its residual loss, [including g]ather[ing] and dispos[ing] of all personal property pledged as collateral under the loan, in accordance with applicable law." *Id.* § 103.37(c)(2); *see also id.* § 103.37(a)(2) ("The lender must perform collateral liquidation as expeditiously and thoroughly as is reasonably possible, within the standards established by this part."). Payment on the guaranty will occur "to the extent the claim is based upon reasonably sufficient evidence of the loss and compliance with the requirements of this part." *Id.* § 103.37(e). Denial, in whole or in part, of a claim for loss may be made when, inter alia, the lender fails to meet the standard of care set forth in 25 C.F.R. § 103.30 or, with respect to liquidation, "(1) has not made a reasonable effort to liquidate all security for the loan; or (2) has taken an unreasonable amount of time to complete its liquidation efforts, the probable consequence of which has been to reduce overall prospects of recovery. . . ." *Id.* § 103.39(c), (d); *see also id.* § 103.30 ("BIA may reduce or eliminate entirely the amount payable under its guaranty . . . to the extent BIA can reasonably attribute the loss to the lender's failure.").

C. The Bank's Claim for Payment on the BIA Loan Guaranty[17]

1. Conditions of the Guaranty

The Bank does not dispute that one condition of the loan guaranty was that Payne's income from his livestock and farming operations must be applied first to the annual payment due on his guaranteed loan. Notwithstanding this requirement, it is clear from the Bank's own documents for Payne's loans that the income earned by Payne from his livestock and farming operations consistently was applied first to the operating loans that the Bank extended to Payne *after* securing the BIA guaranty on the loan consolidating Payne's outstanding debts, which included a past unpaid operating loan. We conclude that the Bank's failure to apply Payne's income *first* to the BIA-guaranteed loan materially breached a condition of the loan guaranty and voided the guaranty. The consequences of the Bank's breach of the condition were not insignificant because it effectively masked Payne's true financial picture and led the Bank to extend and even increase Payne's indebtedness, which put the BIA-guaranteed loan at greater risk of loss.

The government is entitled to, and did, set reasonable conditions in return for its guaranty of Payne's loan. *See, e.g., American Bank of San Antonio v. United States*, 633 F.2d 543, 545-46 (Ct. Cl. 1980) (government may set reasonable terms and conditions for participation in insured loan program). When a lender fails to honor these conditions, the government may deny payment on the insured or guaranteed loan. *Id.*; *First Interstate Bank of Idaho v. Small Business Administration*, 868 F.2d 340, 348 (9th Cir. 1989). According to

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[17] In his Answer Brief, the Director concedes that the Bank complied with the requirement of conducting annual site inspections and, therefore, no longer argues that noncompliance with this requirement is a basis for denying payment on the loan guaranty. Therefore, we comment no further on this ground.

the Restatement (Second) of Contracts, five factors are "significant" in determining whether a breach is material and will thus excuse performance, in this case, by the guarantor:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981); *see First Interstate Bank of Idaho*, 868 F.2d at 343.

During 2001, the Bank's records reflect that Payne earned $42,704.04 from his livestock operation. From this income, a minimum of $38,412.36 was required to be applied first to the annual payment due on the BIA-guaranteed loan. The Bank failed to do so.[18] In fact, no payment was applied to the BIA-guaranteed loan until January 2002, when

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[18] The loan guaranty condition states that "all" income from Payne's livestock and farming operations must be applied first to the BIA-guaranteed loan, and the Director notes that the condition was incorporated into a requirement in Payne's loan documents with the Bank: "First payment priority shall be to the annual payment [on the BIA-guaranteed loan]." Answer Brief at 3. In the Director's Decision of September 18, 2006, he states that the Bank "should have made certain that livestock and farming income in an amount equal to at least the annual payment due on [the BIA-guaranteed loan] was paid before the annual December 31 due date, or else held aside for payment on that date," Decision at 1, thus suggesting that the Bank need only have applied income equal to the annual payment and no more. In his brief before the Board, however, the Director states that the first payment priority was *not* limited to the amount necessary to satisfy the annual payment obligation, but that *all* income from Payne's livestock and farming operations must be applied to the guaranteed loan regardless of whether the annual payment amount set by the Bank had been met for the year. *See id.* at 28. The loan condition does state that *all* income must be applied to the BIA-guaranteed loan and the reason for this provision may well be rooted in the unpredictable nature of farming, which can endure years of drought followed by years of bumper crops. *But cf.* 25 C.F.R. § 103.44 ("default" means "[t]he borrower's failure to (continued...)

Payne borrowed from the operating loan to make his payment on the BIA-guaranteed loan.[19] Similarly, in 2002, the Bank's records reflect that Payne earned $53,065.97 from his farming operations, which, again, was applied not to the BIA-guaranteed loan but to Payne's 2001 operating loan. Although the annual payment ultimately was posted to the BIA-guaranteed loan in December 2002, the source of the funds came not from Payne's income but came, again, as an advance from his operating loan.

The Bank's failure to allocate Payne's income first to the payment on his BIA-guaranteed loan is not insignificant. It is evident that the 2001 operating loan was not paid in full by the December 31, 2001, maturity date and, thus, was in default in the amount of $18,227.09 (or 23% of the principal) as of January 1, 2002. Although this default should have triggered the cross-default provision in the Promissory Note for the BIA-guaranteed loan, the Bank agreed instead to *extend* the due date on the operating loan for another two years and did not take into account the lack of payment on the BIA-guaranteed loan because the loan agreement afforded Payne a 30-day grace period. During that 30-day grace period, Payne made his payment on the BIA-guaranteed loan with an advance from the operating loan that he had "paid down" before its due date at the end of 2001. Had the Bank properly credited payment to the BIA-guaranteed loan in 2001 as it was obligated to do, the 2001 operating loan would have had a balance due of $56,639.46 (or 71% of the principal) at the end of 2001.[20] Such evidence should have prompted the Bank to find Payne in default on his 2001 operating loan and in cross-default on the BIA-guaranteed loan pursuant to the cross-default provision (¶ 10(D)) in Payne's Promissory Note for the BIA-guaranteed loan.

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[18](...continued)
make a *scheduled loan payment* when it is due." (Emphasis added.)). We need not decide whether *all* of the income from Payne's livestock and farming operations must be applied to the BIA-guaranteed loan or whether payments may be apportioned over the course of the life of the loan because it is evident from the record that the Bank consistently failed to apply *any* of Payne's income to the BIA-guaranteed loan.

[19] The Bank did not declare the BIA-guaranteed loan in default at the end of 2001 presumably because the Bank's loan agreement with Payne provided a 30-day "grace period" for the annual payment. Therefore, the January 2002 payment would have been considered timely by the Bank.

[20] We calculate $56,639.46 by adding the payment due to BIA ($38,412.37) and the amount outstanding on December 31, 2001, on the 2001 operating loan ($18,227.09).

Therefore, we conclude that the Bank's failure to apply Payne's income first to the BIA-guaranteed loan is a clear breach of the conditions of the guaranty. The Bank's misapplication of Payne's income, in effect, allowed the Bank to ignore Payne's mounting financial difficulties and to avoid the cross-default provision in the BIA-guaranteed loan. The cross-default condition appears standard in the Bank's agricultural loans — it appears in the promissory notes for both the 2001 operating loan and in the BIA-guaranteed loan — and, thus, is part of the Bank's own standard for issuing such loans.[21] Consequently, the Director could reasonably conclude that the Bank not only violated a condition of the guaranty but also failed to "us[e] at least that level of care the lender would use if it did not have a BIA loan guaranty," 25 C.F.R. § 103.30(m), i.e., to declare Payne in default on both loans by virtue of his delinquency on the 2001 operating loan. As the Director observed, had the Bank done so, the overall loss may well have been reduced.

Applying the factors of Restatement (Second) of Contracts § 241 to the facts before us, we are compelled to find a material breach by the Bank. As to the first factor, we find that BIA's expectation was twofold: (1) that Payne, an Indian borrower, would be able to obtain a loan that might otherwise be unavailable to him; and (2) that the Bank would service the guaranteed loan in accordance with the stated conditions of the loan and in the same manner as the Bank would service its unguaranteed loans. It cannot reasonably be disputed that the first expectation was met. However, the second expectation was not. The Bank placed its unguaranteed loans ahead of the guaranteed loan for repayment in direct violation of the conditions to which it had agreed in return for the guaranty.

As to the second factor, the Bank concedes that there is no reasonable likelihood of compensation for BIA because the collateral that was pledged as security for the guaranteed loan no longer remains available. With respect to the third factor, the Bank would bear very little of the consequences of Payne's default because it applied payments to his unguaranteed operating loans with the Bank instead of to the BIA-guaranteed loan and because the Bank would recover, if BIA paid the guaranty, 75% of the loss of principal and interest on the BIA-guaranteed loan.[22] Regarding the fourth factor, the Bank has not offered to resume liquidation efforts or provide any assurances that the loan can be repaid. Finally, as to the fifth factor, we find that the Bank put its own interests (in securing and paying down its unguaranteed loans to Payne) ahead of the BIA-guaranteed loan, which directly conflicted

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[21] The record does not include, and the parties have not provided us with, a copy of the promissory note for the 2003 operating loan.

[22] After the Bank instructed Payne to liquidate in September 2003, the Bank applied liquidation proceeds of $98,138.41 to Payne's operating loans rather than to the BIA-guaranteed loan.

with the conditions of the guaranty and which we conclude failed to comport with standards of good faith and fair dealing.

The Bank seemingly treated the BIA guaranty as "free money" that would be paid back to the Bank (less 25% of the loss) and, thus, the Bank continued to lend to Payne as if the guaranty were an asset, unaccompanied by clear obligations. While the guaranty program exists to encourage private lenders, such as the Bank, to extend loans that they might otherwise decline, there is still the requirement and expectation that the borrower will succeed despite the risks associated with the loan and that the loan will be repaid. Certainly, the requirement of applying the income from Payne's ranching and farming business to pay down the guaranteed loan furthers the expectation that the loan will be repaid. Similarly, because not all endeavors ultimately will be successful, the guaranty requires that the loan be secured by collateral, which is intended to reduce, if not entirely cover, any loss. What the guaranty is not intended to be is "free money."

The Bank argues that the Director's understanding of the payments posted to the 2001 operating loan and the BIA-guaranteed loan is erroneous. The Bank maintains that the payment due in 2001 on the guaranteed loan was made in two installments in January 2002 from "the proceeds of farming operations." Opening Brief at 5. While the Bank is correct that payments were posted to the guaranteed loan in January 2002, the Bank's unsupported assertions concerning the source of the payments are directly contradicted by its own records. These records reflect that one payment came from a Federal government subsidy program for farmers, while the other payment was posted as an advance from the 2001 operating loan. With respect to the payment due in 2002, the Bank represents that the "payment [was] received from [the] sale of livestock and applied to the operating loan and then transferred to the term loan on the same day the funds were received." *Id.* at 6. Again, the Bank's assertion is not supported by the record. According to the Bank's records, the Bank received two payments from Payne's farming/ranching business in 2002: one in October 2002 in the amount of $53,065.97 and one in December 2002 of $28,449.19. Both payments were applied directly to the 2001 operating loan. On December 16, 2002, the same date on which the $28,449.19 payment was posted to the 2001 operating loan, the Bank's notes reflect that payment on the guaranteed loan "was taken from [Payne's] operating [loan]" and the Bank's ledger account for the 2001 operating loan reflects an "advance" of $38,412.36.[23]

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[23] If, in fact, a payment had been misapplied to the operating loan, the Bank should have backed out the payment completely from the operating loan and then posted it (instead of "transferring" it) as a purposeful, direct payment on the BIA-guaranteed loan. Doing so would have preserved an accurate financial picture of Payne's business and would have complied with the terms of the guaranteed loan. Instead, by posting the payment to the
(continued...)

In its reply brief, the Bank argues that if it had applied Payne's income to the BIA-guaranteed loan ahead of the operating loan, the Bank would have been in breach of its promissory note with Payne, which established a payment date on the loan of December 31 of each year. Therefore, according to the Bank, it could not apply Payne's income to the BIA-guaranteed loan any earlier than the end of the year. We are not persuaded. The payment due date did not preclude an early payment, and the first payment priority clearly meant that when Payne made a loan payment to the Bank from the income from his ranching and farming operations, the payment must *first* be applied to the BIA-guaranteed loan. If the Bank created inconsistent obligations in its loan operating agreement with Payne, that is no defense to its breach of the terms of its guaranty with BIA. The Bank knew that its agreement with BIA required it to apply Payne's income *first* to the BIA-guaranteed loan. Moreover, in complete disregard for its obligation on the BIA-guaranteed loan, the Bank instructed Payne in 2003 "that all of his income must be applied to this [new] operating note" and secured the new note by all of Payne's "cattle and equipment" that already was pledged as security for the BIA-guaranteed loan. Letter from Bank to Payne, June 23, 2003.

The Bank further argues without support that "the 'payment priority' does not require the Bank to apply any income received at any time by [Payne] to the 'annual payment' on the BIA guaranteed loan." Reply Brief at 3. Again, the Bank errs. One of the conditions of BIA's loan guaranty requires "*all income* from [Payne's] livestock and farming operation [to] be *first* applied to the loan guaranteed by [BIA]." Letter from BIA to Bank, May 31, 2001, at 3 (emphasis added). Thus, the Bank's obligation was to apply any income from Payne's ranching and farming operations *first* to his BIA-guaranteed loan at least up to the amount of his annual payment. The Bank failed to do so.[24]

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[23](...continued)
operating loan and then making an advance on the operating loan to pay the BIA-guaranteed loan, the Bank created a fictional, compromised record of Payne paying down his loans and failed to adhere to the terms of the loan guaranty.

[24] The Director found that the Bank's practice of utilizing advances from Payne's 2001 operating loan to cover Payne's payments on his long-term loan "is both an unsound lending practice and beyond the reasonably anticipated uses to which an operating loan is traditionally put." Director's Decision at 2. If the Director is utilizing "unsound lending practice" to refer to established practices in the banking industry, the record is devoid of support for these determinations. However, to the extent that the Director is characterizing the Bank's practice of permitting one loan to be used to pay down another loan as "unsound" as a matter of prudence, we agree with the Director. Especially where, as here, payments are being made to an operating loan, giving the appearance of paying it down,
(continued...)

Finally, in 2003, no funds were paid against the BIA-guaranteed loan despite at least $98,138.41 in income from Payne's efforts to liquidate his assets at the end of 2003. Instead, these funds were applied to Payne's two outstanding operating loans, which listed Payne's equipment and livestock as security even though the same equipment and livestock previously had been committed entirely as security for the BIA-guaranteed loan.

Therefore, we conclude that the record amply supports the Director's determination that the Bank failed to first apply income from Payne's ranching/farming business to the BIA-guaranteed loan, and that the Bank's failure to do so constitutes a breach of a condition of the guaranty, thereby voiding the guaranty.[25]

2. Liquidation

In September 2003, Payne met with the Bank and together they apparently concluded that Payne would be unable to make his loan payments and that Payne should

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[24](...continued)
and then borrowing against it simultaneously or shortly thereafter for the purpose of paying down another loan, a façade of financial health is created that does not inure to the benefit of the borrower, the lender, or the guarantor.

[25] It would also appear that the loan guaranty was invalidated by the Bank's failure to notify BIA in writing of its election of remedies within 90 days of its notice of default to Payne, as required by 25 C.F.R. § 103.36(e). First, the Bank failed to send Payne prompt notice of the default, as required by 25 C.F.R. § 103.35(a). The Bank determined in January 2004 that Payne was in default when he failed to make any payment on his BIA-guaranteed loan in 2003. According to the record, formal notice of default did not issue to Payne until April 22, 2004. An undated letter from the Bank received by BIA on April 29, 2004, advised BIA that the default letter had been sent to Payne, and the Bank was "not sure what will happen next." The Administrative Record includes an unsigned and unconformed copy of the July 29, 2004, State court complaint initiating the foreclosure action but no formal notice to BIA of the Bank's election of remedies under 25 C.F.R. § 103.36(d).

In order for the guaranty to remain valid, the Bank was required to notify BIA within 90 days *of the default* of its selection of one of the three remedies in 25 C.F.R. § 103.36(d). *See* 25 C.F.R. § 103.44 (definition of "default"). Therefore, the Bank was required to act promptly in notifying Payne in writing of his delinquency *and*, within 90 days thereafter, to elect its remedy under section 103.36(d), i.e., at the latest, by April 2004. Of course, the default should have been identified as early as December 31, 2001: If payments had been properly credited that year, Payne would have been current on his BIA-guaranteed loan but delinquent on his operating loan, which would have triggered the cross-default provision in his BIA-guaranteed loan.

commence liquidation of his ranching/farming business. The Bank also telephoned BIA to inform BIA that Payne intended to liquidate these assets to pay his debts. *See* Letter from BIA to Bank, Sept. 5, 2003.[26] Therefore, once the Bank elected to pursue liquidation, it was then obligated to apply the proceeds from the sale of collateral to the BIA-guaranteed loan and to "vigorously pursue all reasonable methods of collection concerning the loan collateral before submitting a claim for its residual loss (if any) to BIA." 25 C.F.R. § 103.37(c). We conclude that the Director correctly determined that the Bank failed to do so for several reasons.

First, the Bank failed to apply the proceeds from the 2003 liquidation sale — $98,138.41 from the sale of grain and livestock — to the BIA-guaranteed loan and applied them instead to pay off the 2003 operating loan and pay down the 2001 operating loan.[27] Second, Payne sold some of his livestock and equipment to his son in April 2004. From this sale, $138,600 was applied to the balance of the BIA-guaranteed loan. Although the proceeds from the sale of the equipment would appear to have been commercially reasonable — only $500 less than the latest appraised market value for this equipment — there is no evidence in the record that supports the amount paid for the livestock, let alone any basis for determining whether the sale was commercially reasonable. Third, when the Bank learned from both Payne and his son in December 2004 that the son had applied his brand to Payne's remaining livestock, the Bank took no action to investigate whether another sale had taken place or to recover the livestock from the son.

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[26] The Bank also inquired whether the proceeds from the liquidation could be applied to Payne's operating loans. BIA responded by identifying the collateral for the BIA-guaranteed loan. Any funds from the sale of assets *not* identified as collateral for the BIA-guaranteed loan could presumably be applied to Payne's operating loans.

[27] It appears that the Bank may have believed that as long as it had not issued a written notice of default to Payne on the BIA-guaranteed loan, the Bank would not be required to apply the fruits of Payne's liquidation first to the guaranteed loan, but rather could apply them to his operating loans. The Bank does not pursue such an argument before the Board, which, in any event, would be erroneous. First, all of Payne's assets had been pledged as collateral for the BIA-guaranteed loan. To the extent these assets were also proposed to collateralize the operating loans, the BIA-guaranteed loan had a priority right to those assets. Second, there is nothing in the Indian Financing Act or in the regulations that requires the Bank to issue a formal notice of default to the borrower prior to commencing liquidation, where, as here, the borrower and the Bank both agree that liquidation is appropriate. However, once liquidation commenced, the Bank was required to apply the proceeds to the BIA-guaranteed loan ahead of its other loans.

Finally, after the April 2004 sale of assets, the Bank failed to liquidate the balance of Payne's collateral. Although the Bank successfully pursued two foreclosure actions against Payne, it ultimately abandoned its enforcement efforts. The Bank first pursued a foreclosure action in State court despite knowledge that the collateral was located on the Reservation, which would potentially raise enforcement issues.

After first obtaining a favorable judgment in State court, the Bank then pursued a successful action in Tribal court in March 2005. After securing a judgment from the Tribal court, the Bank enlisted the assistance of the Sheriff to enforce the judgment. When the Sheriff located some of the collateral in October 2005, the Bank told the Sheriff "that we will wait until all collateral is located before we proceed." Narrative (Administrative Record at 273). Therefore, the Bank deliberately permitted collateral to remain in Payne's possession rather than collect it. In December 2005, someone notified the Bank that the Sheriff "cannot pick up the collateral." *Id*. However, in January 2006, the Sheriff informed the Bank that "he had a new plan on picking up Payne's collateral." *Id*. The Bank declined the Sheriff's offer, deciding instead to use the services of two private individuals, neither of whom was successful. Finally, in May 2006, after the last individual suggested that the Bank obtain the assistance of the Tribal police, the Bank instead abandoned all collection efforts and submitted its claim for loss to BIA.[28] On this record, the Director could reasonably conclude that the Bank could have liquidated the collateral remaining after the sale of livestock and equipment in April 2004, which "should presumably have covered all, or at least most, of the outstanding balance of [the BIA-guaranteed loan]." Decision, Sept. 18, 2006, at 2.

The Bank's inconsistent collection efforts resulted in the loss of substantial collateral. In September 2003 when the Bank instructed Payne to liquidate, Payne should have had collateral consisting of 222 bred cows, bulls, and yearling heifers, 19 vehicles and trailers, and 28 items of machinery and equipment that collectively appraised 7 months earlier for $472,000. Of this amount, the Bank applied only $138,600 to the BIA-guaranteed loan. The Director reasonably concluded that the Bank's failure resulted in a significant loss of collateral and significantly reduced "overall prospects of recovery." 25 C.F.R. § 103.39(d)(2); *see also* Opening Brief at 11 ("[T]he Bank has little doubt that some or a

[28] Although the record reflects that the Bank attempted to contact Tribal police in May 2006 to obtain police escort to collect the collateral, the record contains no explanation of whether the Bank actually spoke with Tribal police and, if so, what response or information was provided by the Tribal police. The Bank also does not explain why it chose not to follow up with the Sheriff, who had a "new plan" for collecting the collateral.

great deal of the collateral that [existed] as of early 2004 has now either disappeared, been destroyed or otherwise sold.").

The Bank argues that the appraiser determined the value of the collateral based on "the highest price at which a willing buyer [would] purchase from a willing seller," and that a "recovery of fifty percent (50%) of the [appraised] value would have been an excellent result." Answer Brief at 8. The Bank offers no evidentiary support for the latter conclusion. The Bank thus implies that the Director's conclusion — that there was ample residual collateral to cover "all, or at least most, of the outstanding balance" of the BIA-guaranteed loan — was unreasonable. Decision, Sept. 18, 2006, at 2. On this issue, the Bank correctly observes that the appraiser employed the "highest market standard" in conducting his appraisal, and we note that he explicitly exempted that situation where a "party is acting under compulsion." Appraisal by Wade S. Engstrom, Feb. 24, 2003, at 3. Notwithstanding these caveats, the Director was entitled to rely on the appraisal report produced by the Bank in determining whether the Bank's liquidation efforts were reasonable. Moreover, we note that Payne's son paid close to 100% of the appraised value for the truck and machinery that he purchased from his father, which supports the Director's determination that liquidation of Payne's assets should have covered "all, or at least most, of the outstanding balance" on the guaranteed loan. Decision, Sept. 18, 2006, at 2. We therefore conclude that the Bank did not meet its burden of showing that, at best, liquidation might have netted 50% of the appraised value of Payne's assets.

Even assuming that the 50% recovery were supported, this amount apparently would have been sufficient to cover 100% of the loan balance had the Bank properly applied the 2003 liquidation proceeds to the BIA-guaranteed loan. According to the Bank, the outstanding balance of the guaranteed loan was $170,539.58, after deducting the sale of livestock and equipment to Payne's son in April 2004. Had this amount been reduced further by the 2003 liquidation proceeds of $98,138.41, the outstanding balance on the BIA-guaranteed loan would have then been $72,401.17, which is only 31% of the 2003 appraised value of the residual collateral or approximately $238,167.[29] Put another way, assuming liquidation of the remaining collateral yielded 50% of the appraised value, the

[29] After subtracting the 2003 liquidation proceeds and the 2004 sale of livestock and equipment to the son, the remaining collateral was valued at approximately $238,167 ($472,000 less the $233,833 proceeds from the 2003 and 2004 liquidations).

Bank would have realized $119,083.50 and paid off the BIA-guaranteed loan, including most likely any accrued interest and fees.[30]

Finally, the Bank argues that "despite repeated requests, BIA and tribal officials have not been willing to assist the Bank in attempting to find any collateral which may still be available." Opening Brief at 11. The Bank cites to no authority that requires either BIA or the Tribe to assist the Bank. To the contrary, the terms of the guaranty as well as applicable regulations hold BIA harmless. *See* 25 C.F.R. § 103.31; Loan Guaranty Agreement, ¶ 8 ("BIA bears no responsibility for any failure of the Lender to comply with Program Terms or any applicable Conditions of Approval, regardless of the circumstances.").[31]

We conclude that the record amply supports the Director's findings concerning the Bank's liquidation process. First, we conclude that the Bank should have held Payne in default in January 2002, at which time the collateral likely would have been valued at the same amount as, if not more than, it was at the time of its appraisal in February 2003 and, thus, the loss, if any, would be substantially minimized. Second, once the Bank elected to pursue liquidation, it was obligated to move expeditiously and reasonably to liquidate the collateral for the loan. Third, once Payne began liquidating his assets in 2003, the Bank applied the proceeds not to the guaranteed loan, but to Payne's operating loans. Fourth, the Bank failed to show that the sale of livestock to Payne's son in April 2004 was commercially reasonable. Fifth, and notwithstanding foreclosure judgments from two courts, the Bank abandoned efforts to collect the collateral. Therefore, we conclude that the record supports the Director's conclusions that the Bank failed to carry out a timely and

[30] The Bank also argues that the Director erred in faulting the Bank for permitting Payne, in lieu of the Bank, to liquidate his assets. The Bank argues that, in its experience, a better recovery is achieved when the borrower liquidates his assets rather than the Bank. While the Bank offers no evidence in support of its assertion, we also find that record is devoid of support for the Director's assertion that "[p]lacing a defaulted debtor in charge of liquidating his own assets is an unsound lending practice." Decision, Sept. 18, 2006, at 2. Again, we cannot determine whether the Director is referring to a set of norms for sound or unsound lending practices. We need not resolve this issue, however, as we find ample support in the record to conclude that the Bank failed to vigorously or thoroughly liquidate Payne's collateral notwithstanding the prudence of placing Payne in charge of the liquidation.

[31] The Bank's own evidence belies its claim that the Tribe did not provide any assistance: The Tribal court issued judgment in the Bank's favor on its foreclosure action.

adequate liquidation of Payne's assets and that the compound errors are such that it is not reasonably possible to determine whether any portion of the guaranty is due.

D. Summary

The record amply supports the Director's findings that the Bank failed to apply income from Payne's farming and livestock operations first to the BIA-guaranteed loan and then to the Bank's non-guaranteed loans to Payne. This failure constitutes a material breach of the conditions of the loan guaranty and voids the guaranty. Alternatively, we agree with the Director that the Bank failed to vigorously or thoroughly conduct liquidation efforts and, because of the multiple errors in the conduct of the liquidation, it cannot be determined to any reasonable degree whether any loss would nevertheless have been realized on the BIA-guaranteed loan and, if so, in what amount. Therefore, we affirm the decision of the Director to deny payment on BIA Loan Guaranty Certificate No. G013D1C5601.[32]

Conclusion

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 September 18, 2006, decision of the Director, Office of Indian Energy and Economic Development.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

[32] Given our conclusion that no payment is due on the loan guaranty certificate, we do not reach the parties' arguments concerning the calculation of interest.