

The Model Tribal Secured Transactions Act

*Building Foundations for Commerce
in Indian Country*

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Agenda

- ❑ Barriers to Credit in Indian Country
- ❑ What Secured Transactions Laws Are
- ❑ Why Secured Transactions Laws are Important
- ❑ Secured Transactions Laws in the U.S.
- ❑ Current State of Secured Transactions Laws in Indian Country
- ❑ ULC Model Tribal Secured Transactions Act (MTA) Initiative
- ❑ Other Needs



Barriers to Credit in Indian Country

- Many contributing factors
- Differ from Tribe to Tribe and case-by-case
- Some commonly cited key contributors:
 - Shortage of lending institutions servicing Indian Country or willing to lend in Indian Country
 - Poor credit scores
 - Lack of banking experience
 - Mistrust of tribal courts
 - **Inadequate tribal laws to protect creditors (and debtors) OR lack of awareness about existing tribal laws**



What Secured Transactions Laws Are

- Two general types of secured lending
 - Real property (land or things attached to land) as collateral – **mortgage lending**
 - Personal property (everything other than real property) as collateral – **secured transactions lending**

What Secured Transactions Laws Are

- Personal property
 - “Movable” property (equipment, inventory, cut crops and timber, livestock, minerals/gas/oil removed from the ground, etc.)
 - Financial instruments or similar documents (cash, deposit accounts, investment securities, letters of credit, documents of title, etc.)
 - Other “intangibles” (licences, copyrights, patents, trademarks, etc.)
 - Fixtures – have attributes of both personal and real property



What Secured Transactions Laws Are

- What is a secured transactions law?
 - **Set of rules** that govern the lender-borrower (creditor-debtor) transactions
 - **Using personal property as collateral** to secure the loan or other extension of credit
 - **By agreement** between the parties (as opposed to liens arising as a matter of law or by judicial order)



What Secured Transactions Laws Are

- The rules determine:
 - When and how a creditor gets a security interest (lien) in the debtor's collateral
 - A creditor's rights in relation to third parties that may also have a legal interest in the same property (i.e., trustee in bankruptcy, other creditors)
 - Remedies available to the creditor if the debtor defaults
 - Protections for the debtor to ensure remedies are fair and fairly administered



Why Secured Transactions Laws are Important

- Most, if not all, free market economies around the world have secured transactions laws of some sort to facilitate the flow of credit
- Developing and in-transition nations have made adoption of secured transactions laws a priority for economic development purposes

Secured Transactions Laws in the U.S.

- Uniform Commercial Code (UCC) Article 9 (supplemented by other laws, i.e., certificate of title laws, FAA registration requirements for aircraft)
- UCC was drafted by the Uniform Law Commission (ULC) during the 1940s and 1950s – has been adopted fairly uniformly by all 50 states and the territories
- Reason for this effort?
 - Non-uniformity among state commercial laws was impeding “cross-border” commerce, thus hampering economic development “post-WW II”
 - Fear by states of federal legislative intervention/preemption if states did not act to address the non-uniformity issue



Secured Transactions Laws in the U.S.

- Substantial uniformity among the states' laws, including those governing secured lending, permits ease of transactions across state lines, enabling efficient “cross border” commerce

Secured Transactions Laws in Indian Country Today

- ❑ Many Tribes have no secured transactions laws – state law is the default when a transaction occurs (boilerplate contract language)
- ❑ Some have comprehensive secured transactions laws
- ❑ Some have adopted the model UCC Article 9
- ❑ Some have adopted Article 9 as enacted by the state in which the Tribe is located
- ❑ Some have adopted by resolution either the model version or the state version for single transactions
- ❑ Some have only components, such as collection codes governing repossession, or pared-down versions
- ❑ Some have adopted “pre-revision” model tribal Article 9 (i.e., MT Model Tribal Code - 1997)



NCCUSL MTA Initiative

- ❑ ULC Committee on Liaison with American Indian Tribes and Nations
- ❑ Drafting committee comprised of more than a dozen commissioners, including several that worked on 1999 revisions to Article 9 (adopted by all states), representatives from ten Tribes, other advisors with experience in Indian Country legal/development issues
- ❑ Drafting effort took four years; completed in August 2005

NCCUSL MTA Initiative

- MTA is largely based on revised Article 9, with key components of Articles 1, 2 and 8 (where UCC Article 9 incorporates provisions from these Articles by reference)
- Purpose: to draft a “stand-alone” code that will, if other Articles are subsequently adopted, still harmonize (or blend) with those Articles



NCCUSL MTA Initiative

- MTA was drafted for ease of use by lenders and other creditors – familiarity with the rules
- Intended to help reduce “cross-border” transaction concerns



NCCUSL MTA Initiative

- Special considerations in the MTA:
 - No affect on sovereign immunity
 - “Fixtures” attached to trust land
 - Possible exemptions from covered property
 - Consumer protections – limitation on choice of law
 - Manufactured homes – interim financing
 - Coordination with other Tribal law
 - Tribal customs and traditions
 - Treatment of self-help remedies
 - Choice of law and venue issues
 - Implication of tribal liens



NCCUSL MTA Initiative

□ Benefits

- Significant code development cost savings
- Revision benefit – can take advantage of ULC revision efforts
- Reduces “incorporation by reference” of other state law
- Implementation Guide
- Comprehensive Tribal judicial training



NCCUSL MTA Initiative

- Implementation Guide
 - Plain language commentary for all code provisions
 - Enactment guidance for tribal legislative bodies
 - Optional provisions with explanations
 - UCC filing system options explained
 - Educational tool for tribal attorneys and judges, economic and business development staff, lenders

Other Needs

- UCC Lien Filing System – Options:
 - Tribe develops and manages its own system
 - Tribal consortium filing system
 - State system – agency relationship
- Trusted “enforcement” of the law – independent court systems; trained judiciary
- Publication of laws and decisions



Other Needs

- Training for Tribal Judiciary, Legal Counsel
 - ULC has developed a comprehensive training curriculum for the MTA in partnership with the Tribal Judicial Institute, U of ND School of Law)
 - 1st regional training to be held in Denver on March 21-22
- Awareness Training for Lenders
 - FRB Mpls has developed a “local post-enactment workshop” for lenders in communities serving Tribes that have enacted

Where to Find the MTA and Related Materials

- www.nccusl.org
 - Go to “Final Acts and Legislation”
 - Click on “Model Tribal Secured Transactions Act *read more . . .*”
 - The Act, Implementation Guide, amendments, and the Montana–Crow Nation UCC Filing System Compact may be downloaded and printed



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