UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GREAT AMERICAN LIFE INSURANCE COMPANY,	)	
Plaintiff,	)	**No. 1:16-cv-00699-MRB**
v.	)	
	)	**Judge Michael R. Barrett**
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

EXHIBIT 1

INTERIOR BOARD OF INDIAN APPEALS

Great American Life Insurance Company v.
Principal Deputy Assistant Secretary - Indian Affairs

63 IBIA 98 (05/27/2016)

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

GREAT AMERICAN LIFE INSURANCE COMPANY, Appellant,	)	Order Affirming Decision
v.	)	Docket No. IBIA 14-115
PRINCIPAL DEPUTY ASSISTANT SECRETARY - INDIAN AFFAIRS, Appellee.	)	May 27, 2016

Great American Life Insurance Company (GALIC or Appellant) appealed to the Board of Indian Appeals (Board) from a June 17, 2014, decision (Decision) of the Principal Deputy Assistant Secretary - Indian Affairs (Principal Deputy), adopting and affirming a December 23, 2013, decision of the Acting Chief (Chief), Division of Capital Investment (DCI), Office of Indian Energy and Economic Development (IEED), denying Appellant's $20,043,618.67 claim for loss under Loan Guaranty Certificate No. G103D1A15101. The guaranty certificate was for 90% of the unpaid principal and interest due on a $22,519,638 loan (Loan) from Lower Brule Community Development Enterprise, LLC (Original Lender) to LBC Western Holdings, LLC (Borrower)—both of which are tribal corporations of the Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota—to complete the acquisition of Westrock Group, Inc., a New York financial services holding company, and its affiliates. Appellant purchased the Loan on April 2, 2012, and, after default events, submitted its claim for loss to DCI on June 19, 2013.

In her decision, the Chief concluded that Appellant, as the new "lender" responsible for servicing the original Loan, failed to maintain and produce documentation that the guaranty was in effect under 25 C.F.R. § 103.18(a). Specifically, the Chief concluded that Appellant failed to provide sufficient documentation that: (1) the Loan was ever made; (2) the Loan was ever funded; or (3) the funding, if it occurred, was spent in accordance with the conditions of the guaranty. The Chief also concluded that Appellant failed to demonstrate that it had transferred funds to the Original Lender when purchasing the Loan. Finally, the Chief concluded that Appellant did not meet the standard of care required of lenders. The Principal Deputy summarily affirmed the Chief's decision. On appeal, the Principal Deputy more narrowly argues that his Decision should be affirmed on the ground that Appellant did not maintain and produce sufficient documentation that the

Loan was funded. In the alternative, the Principal Deputy argues that Appellant did not meet its standard of care.

We affirm the Principal Deputy's decision. Pursuant to 25 C.F.R. § 103.39(a), all or part of a lender's claim for loss may be denied when the loan is not actually guaranteed as indicated in § 103.18(a), which requires, in addition to a signed guaranty certificate, that the loan "close and fund." Even if the Loan closed (which we do not decide), Appellant fails to meet its burden on appeal to show error in the Principal Deputy's conclusion that Appellant did not maintain and produce sufficient evidence that the Loan was funded. Because there is no guaranty if the Loan was not funded, and the Principal Deputy argues that Appellant's claim for loss should be denied on that ground, we need not reach any other grounds cited by DCI or the Principal Deputy for denying the claim.

Statutory and Regulatory Framework

I. Indian Loan Guaranties

The Indian Loan Guaranty, Insurance, and Interest Subsidy Program (Program) was established under the Indian Financing Act of 1974 (IFA), Pub. L. No. 93-262, as amended, 25 U.S.C. § 1451 *et seq*., and regulations at 25 C.F.R. Part 103. Loan guaranties are governed by Title II of the IFA (codified at §§ 1481-1499), which authorizes the Secretary of the Interior (Secretary) to guarantee 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.

DCI[1] may issue such a guaranty if, among other requirements, the borrower is a Federally recognized Indian tribe, an individual member of such a tribe, or a business that is at least 51% Indian owned. 25 C.F.R. §§ 103.6, 103.25, 103.44 (definitions of "Indian" and "Tribe"). In deciding whether to issue a loan guaranty, DCI will consider "compliance with [Part 103] and whether there is a reasonable prospect of loan repayment." 25 C.F.R. § 103.16(a); *see also* 25 U.S.C. § 1484. In doing so, DCI "*may* evaluate each loan application independently from the lender." 25 C.F.R. § 103.16(a) (emphasis added); *see also* 25 U.S.C. § 1484.

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[1] At all times relevant to this appeal, DCI administered the Program. *See* Secretarial Order 3296, "Implementation of Programs under the Indian Financing Act" (Jan. 8, 2010), as amended (Administrative Record (AR) 239). DCI is within IEED, which in turn is within the Office of the Assistant Secretary - Indian Affairs. The Program was originally administered by the Bureau of Indian Affairs (BIA), and the Part 103 regulations have not been amended to reflect that change—such as by replacing references to BIA with DCI.

DCI approves guaranty applications by issuing an approval letter, followed by the procedures in § 103.18. 25 C.F.R. § 103.16(b). Under § 103.18(a), a loan "is guaranteed under the Program when all of the following occur:"

> (1) [DCI] issues a signed loan guaranty certificate . . . ;
> (2) The loan closes and funds;
> (3) The lender pays [DCI] the applicable loan guaranty premium; and
> (4) The lender meets all of the conditions listed in the loan guaranty certificate.

25 C.F.R. § 103.18(a)(1)-(4).

All or part of a guaranteed loan may be transferred by sale or assignment to any person, with notice to DCI. *See* 25 U.S.C. § 1485(a)-(b); 25 C.F.R. §§ 103.28-.29. From the date of the transfer forward, only the person who is entitled to exercise the rights conferred by DCI's loan guaranty certificate will be "considered the lender for purposes of the Program." 25 C.F.R. §§ 103.28-.29. That person "must service the guaranteed loan and otherwise perform all of the duties required of the lender under the Program and the loan guaranty certificate." *Id.* § 103.29.

II. Claims for Loss

In the case of a borrower's "default," as defined in 25 C.F.R. § 103.44, the lender must notify the borrower as soon as possible, and it must notify DCI within 60 days of the default. *Id.* § 103.35(a) & (b). If the default remains uncured, then within 90 days of the default, the lender must notify DCI of its selected remedy: (1) a claim to DCI for the loss; (2) liquidation of all collateral securing the loan and then a claim for residual loss; or (3) a loan modification agreement with the borrower to permanently change the terms of the loan to cure the default. *Id.* § 103.36(d)(1)-(3). If the lender elects to make an immediate claim for loss, it must send the claim to DCI within 90 days of the default. *Id.* § 103.37(a)(1).

DCI may deny all or part of a lender's claim for loss under any of the circumstances set forth in § 103.39. They include:

> (a) The loan is not guaranteed . . . as indicated in § 103.18;
> (b) The guarantee . . . has become invalid under §§ 103.28, 103.29, or 103.36(e);[2]

[2] I.e., for failure to provide timely notice of a transfer under §§ 103.28 or 103.29, or of the selected remedy for a default under § 103.36(e).

> (c) The lender has not met the standard of care indicated in § 103.30;[3] [or]
> (e) The lender has otherwise failed in any material respect to follow the requirements of this part, and [DCI] can reasonably attribute some or all of the lender's loss to that failure.

25 C.F.R. § 103.39(a)-(c), (e).[4]

When a guaranteed loan has been transferred, DCI will not reduce or deny payment "solely on the basis of §[] 103.39(c) or (e)," if the lender making the claim for loss: (1) was transferred the loan before maturity and for value; (2) gave proper notice of the transfer to DCI; (3) had no involvement in or knowledge of the actions or circumstances that would have allowed DCI to reduce or deny payment to a previous lender; and (4) has not itself violated the standards set forth in § 103.39(c) or (e). *Id.* § 103.40(a)(1)-(4). As discussed *infra*, a claimant that meets all of the requirements of § 103.40 has sometimes been referred to as a "holder in due course."

Section 103.37 explains what a lender must do to collect payment under its loan guaranty certificate. After the lender submits its claim for loss under § 103.37(a)(1), DCI "may require further information, including without limitation copies of any documents the lender is to maintain under § 103.32 . . . , to help [DCI] evaluate the lender's claim for loss." *Id.* § 103.37(d). Under § 103.32, "the lender must maintain . . . all final loan documents, including those listed in § 103.17 (concerning documents required for loan closing)," *id.* § 103.32(b), and other specified documents, *see id.* § 103.32(a), (c)-(i) (describing other categories of documents that the lender must maintain). *See also id.* § 103.42(b) ("a lender must maintain records with respect to a particular loan" for a period of time after either the loan is repaid in full or it accepts payment on a claim for loss).

DCI will pay the lender the guaranteed portion of the claim for loss "to the extent the claim is based upon reasonably sufficient evidence of the loss and compliance with the

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[3] Under § 103.30, a lender must service a guaranteed loan in a "commercially reasonable manner, in accordance with standards and procedures adopted by prudent lenders in the BIA region in which the borrower's business is located, and in accordance with [Part 103]." 25 C.F.R. § 103.30. In particular, lenders must "[t]ake reasonable precautions to assure that loan proceeds are used as specified . . . ." *Id.* § 103.30(b). Lenders must also "[o]therwise seek 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 [DCI] loan guaranty." *Id.* § 103.30(m).

[4] Subsection 103.39(d) involves a claim for residual loss, presented after the lender has attempted to liquidate loan collateral, and thus is not relevant to this case.

requirements of [Part 103]." *Id.* § 103.37(e). DCI will render a decision "within 90 days of receiving all information it requires to properly evaluate the loss." *Id.*

Factual and Procedural Background

I. Application for the Loan Guaranty

The Original Lender—Lower Brule Community Development Enterprise, LLC (LBCDE)—was formed in September 2009 as a wholly owned subsidiary of the Lower Brule Corporation (LBC). LBCDE Certificate of Formation (AR 34); LBCDE Guaranty Application, Dec. 16, 2009, at 1 (First Application) (AR 3). LBC is a Federally chartered tribal corporation formed in 2007 under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, and wholly owned by the Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota (Tribe). The Tribe's aim for LBCDE was to make "small loans on the reservation . . . [and] act as a non-bank lender for larger projects by funneling outside capital into Indian Country." First Application at 1.

The Borrower—LBC Western Holdings, LLC (LBC Western Holdings)—was formed in April 2008 as a wholly owned subsidiary of LBC Capital Markets, LLC (LBC Capital Markets), which in turn is a wholly owned subsidiary of LBC. LBC Western Holdings Certificate of Formation (AR 22); LBCDE Guaranty Application, June 1, 2010, at Table "Company Overview" (Final Application) (AR 27).[5]

On or about the same day that LBCDE was formed, on September 9, 2009, the Tribe announced its acquisition of Westrock Group, Inc. (Westrock Group), a New York-based financial services holding company, and its subsidiaries.[6] *See* News Releases (AR 2). Westrock Group and its subsidiaries were to continue day-to-day operations and form a Tribal Advisory Services Group to provide financial advisory services to the Tribe and other tribes across the country. *See id.* Previously, in June 2008, LBC, through LBC Capital Markets, LBC Western Holdings, and in turn LBC Western (the actual "Purchaser"), had agreed to purchase all of the issued and outstanding stock of Westrock Group for approximately $14.5 million, using a mix of cash and promissory notes. First Application

[5] While not shown in the final application's Company Overview, as discussed *infra*, LBC Western Holdings has a wholly owned subsidiary, LBC Western, Inc. (LBC Western).

[6] At times, Westrock Group's subsidiaries are referred to as affiliates. For purposes of our decision, we use the terms interchangeably.

at 3; Stock Purchase Agreement, June 16, 2008 (copy of first page) (AR 4).[7] But before the planned payment for the stock, in March 2009, the stock purchase agreement was amended to temporarily exchange stock for promissory notes alone until LBC could obtain a Federal loan guaranty. *See* First Application at 3 ("The parties contemplated that LBC or its subsidiary would qualify for a federally guaranteed loan to complete the acquisition."). Most or all of the owners of the three classes of Westrock Group stock agreed to exchange their stock for promissory notes, and the entire purchase price was reduced to promissory notes totaling $12,300,484. *See* Supplement No. 1 to Stock Purchase Agreement, Mar. 27, 2009 (copy of first page) (AR 4).

On December 16, 2009, LBCDE[8] submitted an incomplete request to DCI for a loan guaranty, based on a $14.5 million loan application from LBC Western Holdings for the acquisition of all of the issued and outstanding stock of Westrock Group. First Application at 1-2. Several months later, LBCDE submitted a revised guaranty application for a $22,519,638 loan. LBCDE Guaranty Application, Apr. 14, 2010 (AR 13).

In its final application for a guaranty, submitted on June 11, 2010, LBCDE requested a 90% guaranty based on a $22,519,638 loan application from LBC Western Holdings. Final Application at 1, 6 (unnumbered). The stated purpose of the loan (Loan) was for LBC Western Holdings to complete the acquisition of Westrock Group and its affiliates, and to perform on the Westrock Group business plan, with the primary collateral for the Loan being the Westrock Group stock held by LBC Western Holdings.[9] *Id.* at 4, 6, 9 (unnumbered). The application includes a June 1, 2010, letter and a June 5, 2010, credit memo from LBCDE, describing its valuation of the stock collateral. *Id.* at 6-8

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[7] In response to requests by DCI for information regarding Appellant's claim for loss, Appellant stated that it could not produce a copy of certain documents, including the stock purchase agreement and related agreements consummating the acquisition of Westrock Group. *See* Letter from Michelle Gitlitz Courtney, Blank Rome, LLP, to Andrew Caulum, Solicitor's Office, Dec. 11, 2013, Exhibit (Ex.) A at 5-6 (AR 382). Thus, our historical account of this and other aspects of the case is incomplete.

[8] Within days of LBCDE's formation, the Tribe transferred its portfolio of several micro loans to LBCDE, and as of September 15, 2009, LBCDE held $1,079,000 in outstanding loans and a cash reserve of about $100,000. *See* LBCDE Draft Private Placement Memorandum, October 2010, at 9 (Draft PPM) (AR 71). A year later, as of October 2010, LBCDE had "engaged in no material business other than acquiring the asset portfolio of the tribe." *Id.* at 14.

[9] Like the stock purchase agreement, the draft PPM states that LBC Western Holdings' subsidiary, LBC Western, held Westrock Group. *See* Draft PPM at 13.

(unnumbered). Based on a projection of Westrock Group's earnings through 2014, the "stock appreciation rights" were valued at $23,088,836. *Id.* at 7 (unnumbered). The Loan total was calculated as a percentage of (i.e., the cost to buy out) the stock appreciation rights, combined with refinancing of debt, closing costs, a loan service fee, and a DCI premium. *Id.* at 11 (unnumbered). The guaranty application also includes a June 1, 2010, loan commitment letter from LBCDE, giving an anticipated Loan closing date of August 1, 2010. *Id.* at 31 (unnumbered). LBCDE conditioned the closing of the Loan on its receipt of a 90% Federal loan guaranty and Westrock Group raising $3 million in "promissory notes" or a "bond," "in second position behind the [DCI] Guaranteed Loan," to roll out the Tribal Advisory Services Group (to be led by Gavin Clarkson and Rodney Dennis Ickes[10]), and other business groups. *Id.* at 10, 12, 17, 32 (unnumbered).

II. Approval of the Guaranty and Closing of the Loan

On or about June 24, 2010, the then-chief of DCI, Philip Viles (Chief Viles), approved LBCDE's final application for a 90% guaranty on the Loan. *See* Loan Guaranty Agreement, June 24, 2010 (AR 35);[11] Loan Guaranty Certificate No. G103D1A1501, June 24, 2010 (AR 37); Conditions of Approval, June 25, 2010 (AR 41).[12] After DCI issued the loan guaranty certificate, representatives of LBCDE and LBC Western Holdings provided DCI with limited information regarding their efforts to locate investors "for the capital infusion into [LBCDE] that will fund the loan."[13] *E.g.*, Email from Clarkson to Viles, July 21, 2010 (AR 45).

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[10] Clarkson and Ickes were central figures in the Loan and guaranty, and each apparently acted for LBCDE at times and LBC Western Holdings at times. *See* Guaranty Loan Administrative Information (AR 44); Email from Ickes to Shannon Loeve, DCI, June 26, 2013 (AR 335); Email from Ickes to Loeve, July 24, 2013 (AR 351); Chart of Affiliate Relationships (AR 355); *see also Seaport Loan Prods., LLC v. Lower Brule Cmty. Dev. Enter. LLC*, 2013 N.Y. Misc. LEXIS 4859, at *4, *7 (N.Y. Sup. Ct. Oct. 22, 2013).

[11] This agreement was apparently signed by LBCDE on October 28, 2010. *See* Email from Viles to Ickes, Oct. 28, 2010 (AR 84); Email from Ickes to Viles, Oct. 28, 2010 (AR 88).

[12] The Conditions of Approval marked "superseded" is the final version. *See* Email from Viles to Ickes, Oct. 28, 2010 (AR 81). The Conditions of Approval confirms that the "Loan documents must require the Borrower to use the Loan only to complete its acquisition of Westrock Group and its affiliates and to perform on the Westrock business plan." Conditions of Approval ¶ 2.

[13] At that time, LBCDE and LBC Western Holdings planned to escrow 10% of the total Loan, or $2,251,964, payable to the external capital provider if its investment into LBCDE

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When the Loan did not close by LBCDE's anticipated closing date of August 1, 2010, or the later 90-day regulatory deadline for closing,[14] Chief Viles extended the closing deadline to October 30, 2010. Letter from Viles to Clarkson, Sept. 29, 2010 (AR 64); *see also* Email from Viles to Clarkson, Sept. 9, 2010 (AR 57) (expressing surprise that the Loan would not close by the end of the Government's fiscal year, because "[t]he only contingency I saw in [the] commitment letter . . . was the $3 million bond" to roll out the Tribal Advisory Services Group).

Meanwhile, the Financial Industry Regulatory Authority (FINRA) provided Chief Viles with copies of "cease and desist" letters that it had issued to two Westrock Group subsidiaries, Westrock Advisors, Inc. (Westrock Advisors) and Monarch Financial Corporation of America (Monarch), on September 22 and 27, 2010, respectively. Letter from Thomas Kimbrell, FINRA, to Viles, Oct. 20, 2010 (AR 71) (attaching cease and desist letters); *see also* Letter from Viles to Kimbrell, Oct. 18, 2010 (AR 68). FINRA found that the subsidiaries had failed to demonstrate compliance with a Securities and Exchange Act rule requiring broker-dealers to maintain a certain level of net capital.

At the same time, Chief Viles also obtained a copy of LBCDE's October 2010 draft Private Placement Memorandum for funding the Loan through private third parties. *See* Draft PPM (AR 71). According to that document, as an "interim step" to obtaining third-party funding (or "Permanent Financing") for the Loan to LBC Western Holdings, LBCDE planned to "raise up to $5,687,500 in new funds under the protection of the [DCI] Guaranty . . . [and] to make available the same protection to existing holders of promissory notes issued by Westrock Group (and to a certain extent, those issued by [LBC Western])." Draft PPM at 4, 7. LBCDE planned to "issue debt that, in part, will replace securities previously issued by certain of its affiliates. In particular, it [would] substitute its debt with (i) debt issued by Westrock Group, (ii) certain debt issued by LBC West[ern], and (iii) certain Units issued by [LBC Western Holdings]." *Id.* at 19-20.

Chief Viles then sought reassurance from LBCDE and LBC Western Holdings that the Westrock Group stock was as "strong" collateral as when the guaranty was approved several months earlier. Email from Viles to Clarkson, Oct. 22, 2010 (AR 74). He noted that he was aware of the two FINRA cease and desist letters, and that Westrock Advisors

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was not returned as agreed, to further reduce financial risk to the capital provider. *See* Letter from Don Hunter, Westrock Group, to Ickes, July 28, 2010 (AR 48).

[14] Subsection 103.17(f) of 25 C.F.R. provides that, "[u]nless [DCI] indicates otherwise in writing, the lender must close a guaranteed or insured loan within 90 days of any approval provided under § 103.16."

was now "defunct." *Id.*; Email from Viles to Ickes and Clarkson, Oct. 22, 2010 (AR 75). Chief Viles stated that he would need to satisfy himself that he had "current information and that the borrower and the transaction still meet [DCI's] criteria[, f]oremost" being those in 25 C.F.R. § 103.16(a), which provides that DCI will approve or reject a loan guaranty application based on compliance with Part 103 and whether there is reasonable prospect of loan repayment.[15] AR 75.

LBCDE responded to Chief Viles's inquiries with an update of the projections contained in its June 5, 2010, credit memo. Letter from Ickes to Viles, Oct. 27, 2010, at 1 (AR 79); *see also* Letter from Ickes to Viles, Oct. 25, 2010 (AR 77); Emails between Viles and Ickes, Oct. 27, 2010 (AR 78); Letter from Ickes to Viles, Oct. 28, 2010 (AR 87). According to LBCDE, "shutting down Westrock Advisors has eliminated a significant cash drain on the enterprise and has actually improved the value of the collateral." AR 79 at 1. LBCDE estimated the present value of the enterprise at over $27 million. *Id.* at 1-2. LBCDE also stated that its plan for "capitalization of the loan is a combination of a cash infusion and refinancing of high coupon debt. While we expect to infuse $5.6 million (our 'target raise'), our arrangement with the escrow agent allows us to *break escrow at $3.0 million*." *Id.* at 1 (emphasis added).

On October 28, 2010, Chief Viles transmitted the Loan Guaranty Agreement to LBCDE for its signature. Email from Viles to Ickes (AR 84). That same day, he also "reaffirm[ed]" the Loan Guaranty Certificate and the Conditions of Approval. Email from Viles to Ickes and Clarkson, Oct. 28, 2010 (AR 91). Chief Viles specified that he was "relying on the documents and your assertions that the financial health of the Borrower and/or the financial strength of the transaction contemplated by our guarantee of June 24, 2010 remain strong enough for the transaction to be consummated." *Id.*

According to representations by LBCDE and LBC Western Holdings, the Loan closed on October 29, 2010. *See* Certification of Compliance with 25 C.F.R. § 103.17, Oct. 29, 2010 (AR 94) (enclosing Negotiable Promissory Note, Oct. 29, 2010, and Loan Agreement, Oct. 29, 2010); *see also* Security Agreement, Oct. 29, 2010 (AR 366, No. 14).[16] Although in this appeal the Principal Deputy disputes that a "traditional closing

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[15] Because Chief Viles had already approved LBCDE's guaranty application and issued the guaranty certificate, it is unclear on what authority Chief Viles purported to revisit that approval under § 103.16.

[16] AR 366 contains an October 31, 2013, letter from Appellant's counsel, listing 479 attached documents, provided in response to a request from DCI for additional documentation to review Appellant's claim for loss. Letter from Courtney to Loeve (AR 366). Although Appellant provided an index of the documents, the documents are not

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and funding ever took place as represented," Answer Brief (Br.), Sept. 25, 2015, at 4 n.6, we assume without deciding that the Loan "closed" on October 29, 2010.[17]

III. Funding of the Loan

The Loan Agreement executed on October 29, 2010, states that "funding under this Agreement and the [Negotiable Promissory] Note shall be done immediately after, and contingent upon, the closing of the [LBCDE Private Placement Memorandum]." Loan Agreement § 2.08 (AR 94). On November 27, 2010, LBCDE informed Chief Viles that the Loan would be funding on November 29, 2010. Email from Clarkson to Viles (AR 96). The record contains a Loan Guaranty and Revenue Participation Agreement, with an effective date of November 29, 2010, and given by LBC Capital Markets "to induce [LBCDE] to make" the Loan. Loan Guarantee and Revenue Participation Agreement (AR 366, No. 17). DCI received payment for the Loan premium on November 30, 2010. *See* Hand-Delivered Letter from Jaipat Jain to Viles, Nov. 30, 2010 (AR 99) (enclosing premium payment).

For over a year after the November 29, 2010, date on which LBCDE claimed that the Loan would be funded, Chief Viles received inquiries from a number of individuals—none of which included Appellant—seeking to inform their consideration of a possible purchase of all or part of the Loan. *See* Answer Br. at 7 & nn.10-11 (citing LBCDE's efforts to attract purchasers and contacts from potential purchasers). Several of the prospective purchasers asked pointed questions, including whether LBCDE had ever funded the original Loan. *See, e.g.*, Email from David Stein to Viles, Dec. 2, 2010 (AR 100) (questioning whether LBCDE was allowed under the Program to escrow 10% of the Loan); Email from Gary Millhollon to Viles, Jan. 4, 2011 (AR 104) (stating that there appeared to be "no lender in place," and questioning the financial projections); Email from Federick Petti to Viles, Aug. 8, 2011 (AR 143) (questioning "whether any third parties loan[ed] any money to [LBCDE] so that it could actually fund the loan"). Chief Viles apparently did not confirm whether or not he had knowledge of the Loan having funded.

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labeled in any way to correspond to the index and on appeal Appellant does not refer to the documents by their index numbers, instead generally citing AR 366. When citing to a document found in AR 366, we refer to the document's index number.

[17] We express no opinion on whether LBCDE complied with the closing requirements of 25 C.F.R. § 103.17, or whether Appellant has provided sufficient documentation to demonstrate such compliance. We also note that it is unclear whether $3 million was raised, before the "closing" as was required by LBCDE's loan commitment letter, to roll out the Tribal Advisory Services Group.

See Email from Viles to Petti, Aug. 8, 2011 (AR 143) (stating only that DCI did not concern itself with any outside funding LBCDE may have received). In May 2011, one of the prospective purchasers provided Chief Viles with the final Private Placement Memorandum that LBCDE had issued on October 25, 2010, with a stated closing date of November 15, 2010. Email from Petti to Viles, May 15, 2011 (enclosing LBCDE Private Placement Memorandum, Oct. 25, 2010 (Final PPM)) (AR 116).

The final PPM is also referenced in later financial statements that LBCDE provided to DCI regarding LBC Western Holdings.[18] Unaudited 2010 financials state that LBC Western Holdings had a $22,519,638 long-term liability, presumably referring to the Loan. *See* Unaudited 2010 Financials, Feb. 14, 2011 (AR 131). But the audited 2010 financials state that only $15,021,497 was owed to LBCDE. *See* Audited 2010 Financials, June 15, 2011, at 2 (unnumbered) (AR 130).[19] The notes accompanying the 2010 audited financials discuss the final PPM, explaining that LBCDE issued it to replace certain notes and raise working capital. *Id.* at 12-13 (unnumbered). The total offering was approximately $5.6 million, and *$3,531,650 in new money* was raised. *Id.* at 13 (unnumbered). In addition, a number of Westrock Group and LBC Western Holdings notes were converted. *Id.* at 14 (unnumbered). As discussed further *infra*, Appellant asserts that the 2010 audited financials misstated the liabilities due to LBCDE at that time, and that this error was corrected in the 2011 audited financials. AR 382 at 2. As also discussed further *infra*, an April 2013 business restructuring proposal describes the final PPM and its proceeds, stating that LBCDE raised "$3.5M, by offering fully and partially guaranteed debt instruments backed by the Indian Loan Guaranty Program. Simultaneously, LBCDE lends the proceeds to LBC [Western Holdings] and receives a $22.5M note." Restructuring and Business Plan, April 2013, at 4 (AR 322).

In anticipation of transferring the Loan, in February 2012, LBCDE representatives prepared an affidavit, with typographical comments by Chief Viles and signed by Gavin Clarkson for LBCDE, globally attesting to adherence to loan guaranty conditions. *See* Email from Viles to Clarkson, Feb. 20, 2012 (AR 209) (attaching Viles's comments); Email from Clarkson to Viles, Feb. 23, 2012 (AR 227) (attaching final affidavit).

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[18] The Loan Agreement requires the Borrower to provide to the Lender, and the Conditions of Approval in turn requires the Lender to secure and provide to DCI, copies of annual audited financial statements. *See* Loan Agreement § 6.10(2) (AR 94); Conditions of Approval ¶ 7 (AR 41).

[19] In addition, the unaudited 2010 financials depict a business that was solvent while the audited 2010 financials show total liabilities exceeding total assets by over $26 million.

IV. Transfer of the Loan

On March 21, 2012, Appellant began inquiring with DCI regarding a possible transfer of the Loan, *see* Email from Marcie Landsburg, Blank Rome, LLP, to Viles (AR 250), and on April 5, 2012, Appellant provided notice to DCI that it had purchased the Loan on April 2, 2012, *see* Letter from Mark Muething, GALIC, to Viles at 1 (AR 262). Chief Viles acknowledged receipt of the transfer notice and stated that it "appear[ed] to be in order." Letter from Viles to Muething, Apr. 23, 2012 (AR 366, No. 19). The total purchase price was $22,368,035.51, but Appellant structured the transaction so that it would purchase the entire Loan and sell the non-guaranteed 10% portion back to LBCDE for $2,236,803.55. *See* Flow of Funds Agreement, Apr. 2, 2012, at 1 (AR 366, No. 9); Purchase and Sale Agreement, Apr. 2, 2012, at 1 (AR 366, No. 10); Subordinated, Last-Out Participation Agreement, Apr. 2, 2012, at 1 (AR 366, No. 11). In a letter subsequent to his acknowledgment of the transfer notice, Chief Viles stated that Appellant was "now the lender" under the guaranty and that DCI was "not aware of any information or circumstances which would render the Guaranty ineffective or non-compliant with . . . Part 103 as of the date hereof." Letter from Viles to Muething, May 29, 2012 (AR 366, No. 18).

In an email to counsel for Appellant discussing the wording of this letter prior to its finalization, Chief Viles wrote,

> I think you want me to say that the Loan Guaranty Certificate is still effective. I try never to confirm such things since the lender is in a better position to know that than I am. It's the lender who closes the loan and complies initially with the Conditions of Approval and the lender (or successor lender) who monitors the payments and insures continued compliance. So, I try to limit myself to saying '[the Department] doesn't have any information which would call the guarantee into question . . .' or similar.

Email from Viles to Landsburg, Apr. 30, 2012 (AR 268).

V. Default Events

After the transfer, Appellant and LBC Western Holdings failed to timely provide the 2011 annual audited financials.[20] *See* Letter from GALIC to DCI, Oct. 12, 2012, at 1 (First Notice of Selection of Remedy) (AR 298).

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[20] As a result, "default" events, as defined in 25 C.F.R. § 103.44, occurred. *See* Email from Landsburg to Viles, Oct. 11, 2012, at 1 (AR 297). After Appellant gave notice of the

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The 2011 audited financials were eventually delivered to Appellant, and in turn DCI. *See* Independent Public Accountant's Report, Aug. 28, 2012 (AR 292). The accounting firm announced an "adverse audit opinion," stating that because it had prepared the financial statements for LBC Western Holdings only, and had not prepared or consolidated the financial statements of its subsidiaries, the audited financial statements "do not present fairly the financial position of LBC Western Holdings . . . as of December 31, 2011." *Id.* at 1.

Counsel for Appellant informed Chief Viles that, based on information she received from LBC Western Holdings, the delay in providing the financials was due to impending bankruptcies of various LBC Western Holdings subsidiaries. Email from Landsburg to Viles, July 20, 2012, at 1 (AR 278). Westrock Advisors had previously filed a chapter 7 petition for liquidation, and LBC Western, Westrock Group, and Monarch Financial also intended to do so. *Id.*

On April 1, 2013, the event of default on which Appellant bases its claim for loss occurred when LBC Western Holdings failed to timely pay the March 2013 installment of principal and interest due.[21] Letter from GALIC to DCI, Apr. 23, 2013 (Second Notice of Event of Default) (AR 366, No. 250). In response to this default event, and its inability to meet future payment obligations, LBC Western Holdings submitted its restructuring plan to Chief Viles and Appellant. *See* Restructuring and Business Plan (AR 322). It proposed a 12-month deferral of payments (with interest to accrue and be added to the principal) during which time LBC Western Holdings would launch a 5-year business plan focusing on two new lines of business. *Id.* at 3-4. The restructuring plan also reveals that for approximately 1 year following the transfer of the Loan to Appellant in April 2012, LBCDE had advanced principal and interest payments totaling $1.9 million to Appellant on behalf of LBC Western Holdings.[22] *Id.* at 4; Answer Br. at 12-13; *see also* Email from

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defaults and its selected remedy, DCI approved an amendment to the Loan Agreement to waive these defaults. Letter from GALIC to DCI, Aug. 2, 2012 (First Notice of Event of Default) (AR 297); Letter from GALIC to LBC Western Holdings, July 31, 2012 (AR 297); First Notice of Selection of Remedy at 1-2; Amendment No. 3, Nov. 26, 2012 (AR 305).

[21] Although on appeal Appellant argues that LBC Western Holdings defaulted on the Loan primarily because of an Internal Revenue Service private letter ruling issued on April 9, 2013, *see* Reply Br., Oct. 30, 2015, at 25, in light of the ground on which we affirm the Decision, we need not explore the underlying cause(s) of the default.

[22] The parties did not address, and for that reason we do not decide, whether these circumstances provided additional grounds to deny Appellant's claim for loss. *See generally*
(continued…)

Clarkson to Joseph Haverkamp, Mar. 26, 2012 (AR 366, No. 128) ("LBCDE . . . will set up a 12 month [Principal and Interest] reserve."). LBCDE was unable to continue this extension of credit to LBC Western Holdings due to its "outstanding loans [and] notes receivable." Restructuring and Business Plan at 6. Specifically, LBCDE held a "10% participation in [Appellant's] note," amounting to $2.17 million, and another $3.21 million in "[l]oans [and] advances to repay notes, cover professional fees and other matters." *Id.*

VI. Claim for Loss

Appellant notified DCI and LBC Western Holdings of the April 1, 2013, default event. *See* Second Notice of Event of Default; Letter from GALIC to LBC Western Holdings, Apr. 12, 2013 (AR 329). Chief Viles retired from Federal service on May 4, 2013, and Shannon Loeve became the acting chief of DCI. Answer Br. at 13. LBC Western Holdings failed to make payments owed and, when the default remained uncured, on June 19, 2013, Appellant notified DCI that it had selected a remedy. Letter from GALIC to DCI (Second Notice of Selection of Remedy) (AR 329). Appellant apparently rejected the restructuring plan, notifying LBC Western Holdings that it had accelerated payment and declared the entire unpaid principal balance of the Loan immediately due and payable. *Id.* at 1; *see also* Letter from GALIC to LBC Western Holdings, June 19, 2013 (Notice of Acceleration) (AR 329). Concurrently, Appellant submitted a claim for loss (Claim) under the guaranty for $20,043,618.67. *See* Second Notice of Selection of Remedy at 2; Claim for Loss, June 19, 2013 (AR 329).

VII. DCI's Requests for Additional Information and Appellant's Responses

DCI determined that additional information and documentation from Appellant was required "to properly evaluate" the Claim. Letter from Loeve to Muething, July 11, 2013 (First Request for Information) (AR 340). DCI's request was comprehensive, including 14 categories of documents with a greater number of subcategories. *Id.*, Attachment (Att.) at 1-5. This included documents that "the lender must maintain" under Part 103, such as "[a] complete and current history of all loan transactions, including dated disbursements, payments, adjustments, and notes describing all contacts with the borrower," 25 C.F.R § 103.32(e). First Request for Information, Att. at 1.

When Appellant did not respond after 45 days, DCI sent a follow-up letter stating that the 90-day timeframe under 25 C.F.R. § 103.37(e) for a decision on the Claim would

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25 C.F.R. §§ 103.34 (governing loan modifications), 103.36 (governing defaults, temporary forbearances, and precautionary advances).

not commence until DCI confirmed its receipt of the documentation it had requested Appellant to produce. Letter from Loeve to Muething, Aug. 26, 2013 (Second Request for Information) (AR 349). Through its attorneys, Appellant responded with a letter and a compact disc (CD) containing more than 3,000 pages of unindexed documents. *See* Letter from Landsburg to Loeve, Sept. 6, 2013 (AR 352).

On October 1, 2013, DCI notified Appellant that indexing Appellant's documents was taking an inordinate amount of DCI staff time and reiterated DCI's position that the 90-day period for a decision had not commenced. Letter from Loeve to Muething at 1 (AR 361). Thirty days later, Appellant's attorneys provided DCI with another CD indicating which documents were responsive to each specific DCI request. *See* Letter from Courtney to Loeve, Oct. 31, 2013 (AR 366).

DCI acknowledged its receipt of the second CD and advised Appellant that many of the documents it requested had not been provided. Letter from Caulum to Courtney, Nov. 14, 2013 (AR 374). DCI attached another lengthy list of outstanding documents. *Id.*, Att.

Appellant responded to DCI's November 14, 2013, letter with written responses to each of DCI's document requests. *See* AR 382 at 1 & Ex. A. The only additional documents provided by Appellant were a copy of the stock certificate issued by Westrock Group to LBC Western Holdings' subsidiary, LBC Western, together with a stock power executed in blank and signed by LBC Western. *Id.* at 1 & Att. (Westrock Group Stock Certificate, Dec. 29, 2010, and Stock Power, May 30, 2012). In its cover letter, Appellant described the funding of the Loan and the use of the proceeds thus:

> [T]he proceeds of the loan made to the Borrower by the Original Lender pursuant to the Loan Agreement, in the original principal amount of $22,519,638, were used by the Borrower in part to fund its working capital needs and to fund an interest reserve, but were used primarily to repay two types of indebtedness of the Borrower: (i) indebtedness owing by the Borrower to the former owners of Westrock, arising under promissory notes issued to them by the Borrower in consideration of the sale to the Borrower by such former owners of their equity interests in Westrock[;] and (ii) indebtedness owing by Westrock to various creditors, unrelated to the acquisition of debt described in clause (i) hereof.

Id. at 1-2. Appellant also stated that the 2010 audited financials erroneously showed a liability of $15,021,497 for the Loan, and that the 2011 audited financials accurately reflect a liability of $22,519,633 for the Loan, owing by LBC Western Holdings to LBCDE. *Id.* at 2.

VIII. Administrative Decisions Denying Appellant's Claim for Loss

On December 23, 2013, the acting chief of DCI (Chief) issued her decision denying Appellant's claim for loss "in its entirety because [Appellant] has not complied with the requirements of [Part 103]." Chief's Decision at 2 (AR 407). She concluded that Appellant "did not secure" and therefore "cannot produce even fundamental financial documents, such as those identified in . . . § 103.17(e), much less detailed loan history documents of the kind identified in . . . § 103.32." *Id.* at 1-2. The Chief found that, after reviewing the documents provided by Appellant, she could not confirm that: (1) the Loan "was ever made"; (2) the Loan "ever funded in accordance with . . . § 103.18(a)(2)"; (3) the "funding (if it occurred) was spent in accordance with the [L]oan guaranty conditions, as required by . . . § 103.18(a)(4)"; or (4) Appellant transferred funds to LBCDE in acquiring the Loan. *Id.* at 1.

She also found that, because Appellant secured from LBCDE the documents concerning the Loan guaranty itself but failed to secure the documents identified in § 103.17 and § 103.32, Appellant did not rely on LBC Western Holdings' ability to repay the Loan and instead relied "almost exclusively" on the guaranty for debt repayment. *Id.* at 1-2. For that reason, she found that Appellant did not meet the standard of care in § 103.30, specifically, that Appellant did not "seek 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 [Department of the Interior] loan guaranty." *Id.* (alteration in original) (quoting 25 C.F.R. § 103.30(m)).

The Chief closed by stating that there was insufficient evidence that all of the requirements in § 103.18(a) were satisfied for the Loan to be guaranteed. *See id.* at 2. Citing 25 C.F.R. § 103.31 ("What loan servicing requirements apply to [DCI]?"), she advised that it was not DCI's duty to uncover those problems for Appellant; it was Appellant's duty to "conduct sufficient due diligence to determine whether the loan was in existence and performing as intended." *Id.* She also stated that she could deny Appellant's claim for loss on other grounds if new facts emerge. *Id.*

Appellant timely appealed the Chief's decision to the Board. *See* Notice of Appeal, Jan. 24, 2014 (AR 409). After the Board ordered the parties to address a question of the Board's jurisdiction, it granted a request by the director of IEED to remand the Chief's decision and dismiss the appeal, without vacating the Chief's decision. *See Great American Life Insurance Company v. Acting Chief, Division of Capital Investment, IEED*, 58 IBIA 214 (2014).

On June 17, 2014, the Principal Deputy Assistant Secretary - Indian Affairs (Principal Deputy) summarily affirmed the Chief's decision. He stated, "I find that the

decision is supported by the record. Therefore, I adopt and affirm the decision." Principal Deputy's Decision (Decision) (AR 415).

Appellant appealed the Decision to the Board.[23] Notice of Appeal, June 27, 2014 (AR 416). Appellant filed an opening brief, the Principal Deputy filed an answer brief, and Appellant filed a reply brief.

Standard of Review

The Board reviews decisions concerning Indian Financing Act loan guarantees to determine if the decisions are in accordance with applicable law, are supported by the record, and are not arbitrary or capricious. *Valley Bank of Glasgow v. Director, Office of Indian Energy and Economic Development*, 49 IBIA 42, 50 (2009). The Board reviews questions of law and the sufficiency of evidence to support a decision *de novo*. *Id.* At all times, the burden remains with the appellant to show error in the decision. *State of Alaska v. Alaska Regional Director*, 49 IBIA 290, 292-93 (2009). This burden is not met by simple disagreement with the decision maker's reasoning nor is it adequate merely to allege error in the decision. *Id.* at 293. Appellant is presumed to have knowledge of duly promulgated regulations in its dealings with the Government, *see Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 212 (2006), and the Board has no authority to declare duly

[23] Appellant also objected to the administrative record. Appellant's Objections, Dec. 23, 2014. The Principal Deputy responded to Appellant's objections and provided a supplement to the record and a privilege log. Principal Deputy's Response to Appellant's Objections, Mar. 18, 2015. Appellant again challenged the record, and requested that the Board remand the matter to the Principal Deputy for the production of additional documents and supplementation of the privilege log. Appellant's Reply Regarding Objections, Apr. 6, 2015. By order of July 2, 2015, the Board concluded that Appellant had failed to demonstrate that the record was incomplete pursuant to 43 C.F.R. § 4.335(a). Order Reinstating Briefing at 1-2. The Board noted that, to the extent that Appellant's briefs on the merits may shed more light on its objections to the record, the Board was taking the objections under advisement. *Id.* at 2. In its merits briefs, Appellant generally "renews" its original objections to the record and requests that the Board refer the matter to an administrative law judge (ALJ) for a hearing "if it is to rely upon the facts in dispute." Reply Br. at 23. Based on the limited ground on which we affirm the Decision, we find no need to refer the case to an ALJ. In addition, as previously noted, the administrative record contains certain documents designated by the Principal Deputy as privileged, in whole or in part. The Principal Deputy does not seek to rely on the privileged information or documents in defending the Decision, and the Board has not reviewed or considered them.

promulgated regulations invalid, *First National Bank of Pawhuska v. Director, Office of Economic Development*, 35 IBIA 63, 69 (2000).

Discussion

I. Summary

In his answer brief, the Principal Deputy focuses on two grounds for denying Appellant's claim for loss that were described in the Chief's decision. He argues that, in response to DCI's requests for information to review the Claim, Appellant failed to produce sufficient documentation that LBCDE funded the Loan to LBC Western Holdings. Therefore, he contends, the guaranty cannot be considered effective under 25 C.F.R. § 103.18(a)(2), and the denial of the Claim can be affirmed on that basis alone. Answer Br. at 1-2, 27. In the alternative, if the guaranty became effective, the Principal Deputy argues that Appellant did not reasonably attempt to mitigate any potential loss arising from the Loan, using at least the level of care a lender would use if it had no guaranty, in accordance with § 103.30(m). *Id.*

We affirm the Decision on the ground that Appellant shows no error in the Principal Deputy's conclusion that Appellant failed to provide sufficient documentation that the Loan had funded and therefore the Loan is not guaranteed pursuant to § 103.18(a)(2), which is a sufficient basis for denying payment on the Claim under § 103.39(a).

First, we reject Appellant's argument that, as a "secondary lender," it was entitled under the Indian Financing Act and 25 C.F.R. Part 103 to rely on the guaranty certificate, without regard to whether the Loan was funded. Appellant's argument is contrary to the statute and the regulations. As the "lender" responsible for "servicing" the Loan under the regulations, Appellant was required to secure and maintain documentation that the Loan was funded, and to provide that information in support of its Claim.

Next, we reject Appellant's argument that DCI's issuance of the guaranty certificate, together with its acceptance of the premium payment, acknowledgment of the transfer, and other actions or statements, preclude DCI from refusing to pay Appellant's claim for loss under theories of estoppel and assumption of the risk. Appellant fails to recognize that the proper servicing and documentation of the Loan was Appellant's responsibility, not that of DCI.

Finally, we conclude that Appellant fails to meet its burden on appeal to show error in the Principal Deputy's conclusion that Appellant did not maintain and produce sufficient evidence to demonstrate that the Loan was funded. Neither the documents that Appellant produced or cited for DCI, nor those that it cites on appeal, suffice to demonstrate that the

Loan was ever funded; in fact, we see no error in the Principal Deputy's finding that the record tends to show that the Loan was never fully funded.[24] Because our affirmance on this ground is sufficient to affirm the Decision to deny Appellant's claim for loss, we need not and do not decide whether the Decision may be affirmed on a number of other possible grounds.

II. DCI's Issuance of the Guaranty Certificate Does Not Relieve Appellant of Its Burden to Produce Evidence Showing That the Loan Was Funded

Appellant's leading argument on appeal is that, for Appellant as a secondary lender, DCI's issuance of the guaranty certificate establishes as a matter of law that the Loan was funded and the guaranty is effective. The plain terms of the Indian Financing Act and 25 C.F.R. Part 103 provide otherwise.

A. The IFA Authorizes the Secretary to Deny Claims for Loss by Secondary Lenders

Appellant argues that when a guaranteed loan is transferred, the secondary lender is afforded "specific protection" under the IFA, and that Appellant has erroneously been held to the standard of care applicable to an original lender. Opening Br., Aug. 14, 2015, at 13. Appellant relies in part on 25 U.S.C. § 1485 ("Sale or assignment of loans and underlying security"), subsection (c)(1) ("The full faith and credit of the United States is pledged to the payment of all loan guarantees . . . made under this subchapter . . . .") and subsection (c)(2) ("*Except as provided in regulations in effect on the date on which a loan is made*, the validity of a guarantee or insurance of a loan under this subchapter shall be incontestable." (emphasis added)). *See* Opening Br. at 13, 39; Reply Br. at 6.

But as the italicized language makes clear, the "validity" of a guaranty can be contested to the extent provided in 25 C.F.R. Part 103. And § 1485(c)(2) makes no distinction in this regard between an original lender and a secondary lender. We are not persuaded that Congress, in sanctioning transfers of guaranteed loans under § 1485, intended to preclude the Secretary from requiring a secondary lender, when making a claim for loss, to demonstrate that the original loan was actually funded and the guaranty is effective.

Appellant also relies on 25 U.S.C. § 1494, which provides that:

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[24] Appellant does not contend that the guaranty became effective for some lesser amount, based on partial funding of the Loan.

> Any evidence of guaranty or insurance issued by the Secretary shall be *conclusive evidence of the eligibility of the loan for guaranty* or insurance under the provisions of this chapter [25 U.S.C. § 1451 *et seq.*] and the amount of such guaranty or insurance: *Provided*, That nothing in this section shall preclude the Secretary from establishing, as against the original lender, defenses based on fraud or material misrepresentation or bar him from establishing, by regulations in force at the date of such issuance or disbursement, whichever is the earlier, partial defenses to the amount payable on the guaranty or insurance.

25 U.S.C. § 1494 (first emphasis added); *see* Opening Br. at 13-14, 40; Reply Br. at 6-8.

We do not dispute that DCI's issuance of the guaranty is conclusive evidence of the *eligibility* of the Loan for the guaranty. Appellant conflates the issue of eligibility with the issue of whether the guaranty ever became valid and effective. And we affirm the Decision not based on any ineligibility of the Loan for the guaranty (nor based on any ineligibility of the Borrower or the Original Lender[25]); we affirm based on Appellant's failure to maintain and produce sufficient evidence that the Loan was funded.[26]

B. Part 103 Requires Appellant as a Secondary Lender to Produce Evidence Showing That the Loan Was Funded

Appellant's argument is also contrary to the plain terms of Part 103.[27] Section 103.39 lists the circumstances under which DCI may refuse to pay all or part of a "lender's"

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[25] On appeal, the Principal Deputy questioned whether LBCDE was an eligible lender under 25 C.F.R. § 103.10(a)(1). *See* Answer Br. at 6.

[26] Even if the language emphasized above in § 1494 were construed to mean "conclusive evidence of the guaranty," then under the "*Provided*" clause, the Secretary may establish through regulations, as against the original lender *and* subsequent purchasers of the loan, partial defenses to the amount payable on the guaranty. *See* 25 U.S.C. § 1494. Thus, under either reading, § 1494 does not preclude the Principal Deputy from refusing to pay Appellant's claim for loss.

[27] Appellant argues that the Department cannot promulgate regulations that supersede Appellant's "statutory right" as a secondary lender to rely on DCI's issuance of the guaranty certificate. Opening Br. at 14; Reply Br. at 18. To the extent that Appellant challenges the Part 103 regulations, the Board lacks authority to declare a duly promulgated Departmental regulation invalid. *See First National Bank of Pawhuska*, 35 IBIA at 69. Nor would the

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claim for loss, without making any distinction between an original lender and a secondary lender. As relevant here, DCI may refuse to pay when "[t]he loan is not guaranteed . . . as indicated in § 103.18." 25 C.F.R. § 103.39(a). Section § 103.18 in turn provides that a loan "is guaranteed under the Program when" DCI issues a signed loan guaranty certificate, *id.* § 103.18(a)(1), *and* several other requirements are satisfied—including that the loan "closes *and* funds," *id.* § 103.18(a)(2) (emphasis added). Thus, and as discussed further *infra*, the issuance of a loan guaranty certificate does not consummate the guaranty as Appellant contends.

On the date of the transfer of the Loan, Appellant became the "lender" and was required to "service the guaranteed loan and otherwise perform all of the duties required of the lender under the Program and the loan guaranty certificate." *Id.* § 103.29; *see also* Opening Br. at 6, 43 (acknowledging that Appellant "is the lender under the Loan Guaranty Certificate" and "the servicer of the Loan"). This included the responsibility for maintaining the documents that "the lender must maintain" under 25 C.F.R. § 103.32, including, as relevant to whether the original Loan funded, a "complete and current history of all loan transactions, including dated disbursements, payments, adjustments, and notes describing all contacts with the borrower." *Id.* § 103.32(e). In addition, Appellant was required under 25 C.F.R. § 103.37(d) to provide "without limitation . . . any documents the lender is to maintain under § 103.32 . . . to help [DCI] evaluate the lender's claim for loss." *See also id.* § 103.42(b) (requiring the "lender" to maintain records regarding the loan for a period of time after loan repayment or a claim for loss). These requirements, directly or indirectly, placed the burden on Appellant, as the lender, to produce sufficient evidence that the Loan was funded (and thus the guaranty could be effective if all other requirements were met). *See id.* § 103.37(e) (providing that DCI will pay the lender the guaranteed portion of the claim for loss "to the extent the claim is based upon reasonably sufficient evidence of the loss and compliance with the requirements of [Part 103]," and that DCI will render a decision within 90 days of "receiving all information it requires to properly evaluate the loss"). These requirements apply to "lenders"; there is no exception for secondary lenders.

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Board exercise such authority in this case, because Appellant's statutory argument is plainly unsound.

Appellant further argues that under Federal common law it was a "holder in due course" and had no duty to inquire into the validity of the guaranty. Opening Br. at 36-40; Reply Br. at 16-18. Because, as discussed below, Appellant's duties as a secondary lender are set forth in 25 C.F.R. Part 103, we do not look to Federal common law for guidance. *See Marquette Bank, N.A. v. Acting Director, Office of Economic Development*, 35 IBIA 161, 173 (2000).

Appellant argues that it is a "holder in due course" under § 103.40,[28] and that DCI is prevented from refusing to pay its Claim for any failure of the original Loan to fund. Opening Br. at 26-31; Reply Br. at 16-18. While, as explained above, § 103.39 makes no distinction between an original lender and a secondary lender, 25 C.F.R. § 103.40 provides special rules applicable to a lender who received the loan through a transfer. *See* 25 C.F.R. § 103.40(a)(1).

Section 103.40 would prohibit DCI from reducing or denying payment "solely on the basis" that the original lender failed to meet the standards set forth in § 103.39(c) or (e), when the secondary lender did not itself violate those standards (among other requirements). *Id.* § 103.40(a). In this case, whether or not LBCDE failed to meet the standards in § 103.39(c) or (e) is beside the point. DCI's refusal to pay is based on Appellant's failure to meet its burden, as the current lender under Part 103, to provide sufficient evidence that the Loan was funded. Thus, § 103.40 does not help Appellant.

III. Appellant Is Not Otherwise Relieved of Its Burden to Produce Evidence Showing That the Loan Was Funded

Appellant next argues that, in addition to the issuance of the guaranty certificate, DCI's acceptance of the premium payment, acknowledgment of the transfer, and other actions and statements (or non-disclosures) preclude DCI from refusing to pay Appellant's claim for loss. Appellant appears to rely on theories of estoppel and assumption of the risk. For example, Appellant argues:

> [DCI] is required to determine that '[t]he loan does fund' pursuant to 25 C.F.R. § 103.18(a)(2). Consequently, [DCI's] issuance of the Loan Guaranty Certificate is evidence that [DCI], itself, possessed proof of Loan funding at the time of origination. . . . [DCI] is responsible for the due diligence of the Guaranty and is estopped from arguing that the Loan did not

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[28] In an email exchange occurring prior to Appellant's involvement in the Loan, an acting chief within the Department described § 103.40 for Chief Viles as "essentially adopt[ing] the 'holder in due course' concept," and opined on the industry standard of care applicable to a secondary lender. Email from David Johnson to Viles, June 13, 2011 (AR 128); Email from Johnson to Viles, June 15, 2011 (AR 129). *See also* Email from Johnson to Clarkson, June 13, 2011 (AR 132) (discussing DCI's possible recourse against LBCDE as the seller). Appellant does not contend, much less show, that it relied on that correspondence when it purchased the Loan, *see* Opening Br. at 26-28, Reply Br. at 23, and that correspondence does not amend the regulations and does not have the force and effect of law.

> fund after it reviewed the terms and conditions and finally issued the Guaranty.
>
> [DCI] also accepted a premium check which is evidence that the Loan was funded. . . . When [DCI] accepted the premium payment, it accepted the risk of the Loan and acknowledged that the contact was complete including funding of the Loan. . . .
>
> Finally, [DCI] affirmatively represented in writing that all of the conditions were in order for the Loan and Guaranty to be assigned. [DCI] also represented it was not aware of any information or circumstances which would render the Guaranty ineffective. These acknowledgments could not have been offered in the absence of evidence to [DCI] that the transaction was also funded. [DCI's] direct representation to [Appellant] that the Loan and Guaranty were in compliance with all relevant regulations was an inducement to consummate the transaction.

Opening Br. at 20-21 (citations to AR omitted); *see also* Reply Br. at 9, 11, 15-16, 19 (arguing that DCI is subject to "equitable estoppel" and "assumed the risk"). *But cf.* Reply Br. at 17 ("[Appellant's] claim is not based on a theory of estoppel but rather on the legal meaning and concept of a guaranty.").

Whatever the precise legal theory, or theories, on which Appellant relies, Appellant's assertions confuse the Program procedures, the lender's duties, and facts in the administrative record that cannot genuinely be disputed. We are not convinced that DCI is legally or equitably precluded from denying Appellant's claim for loss.

As we have explained, a loan is not actually guaranteed until all of the conditions in § 103.18(a) are met. *See* 25 C.F.R. § 103.18(a)(1)-(4). Appellant's argument that DCI must have determined that the Loan funded, before it issued the guaranty certificate, is both factually and legally erroneous. DCI issued the guaranty certificate in June 2010, months before the purported closing, the purported funding, and the payment of the premium, and thus DCI could not have verified that the Loan funded before it issued the guaranty certificate. The premium check itself is proof of payment and nothing more.

Moreover, under Part 103, the lender, and not DCI, has the duty of verifying and maintaining documentation of a loan. In deciding whether to issue a loan guaranty, DCI will consider "compliance with [Part 103] and whether there is a reasonable prospect of loan repayment." 25 C.F.R. § 103.16(a); *see also* 25 U.S.C. § 1484. But in doing so, DCI "may," and thus is not required to, evaluate an application independently from the original lender. 25 C.F.R. § 103.16(a); 25 U.S.C. § 1484 (same); *see also United National Bank v.*

Acting Eastern Area Director, 30 IBIA 272, 277 (1997) (holding that, under an earlier version of the regulation, 25 C.F.R. § 103.15(c) (1997), BIA was not required to conduct an independent review of the application, and the lender had a duty to verify information presented to BIA). Once a lender extends a loan for which DCI has issued a guaranty, DCI "has no responsibility for decisions concerning it," except for, e.g., any approvals required under Part 103 and any decisions reserved to DCI under conditions of the guaranty certificate. *Id.* § 103.31(a)-(b); *see also* Loan Guaranty Agreement ¶ 8 (AR 35) ("[DCI] bears no responsibility for any failure of the Lender to comply with Program Terms or any applicable Conditions of Approval, regardless of the circumstances."). Thus, DCI had no duty to verify that the Loan funded.

With respect to Appellant's argument that DCI otherwise represented that the Loan had funded and the guaranty was in effect at the time of the Loan's transfer to Appellant, the "evidence" it cites either does not support or contradicts its argument. Appellant relies in part on a letter that its attorneys drafted for Chief Viles's signature, which would have acknowledged that the "Loan Agreement and the related instruments, agreements and documents continue to be effective and in compliance with . . . Part 103," Opening Br. at 19 (quoting Draft Letter by GALIC (AR 267)), but Chief Viles declined to sign it. He explained,

> I try never to confirm such things since the lender is in a better position to know that than I am. It's the lender who closes the loan and complies initially with the Conditions of Approval and the lender (or successor lender) who monitors the payments and insures continued compliance.

Email from Viles to Landsburg (AR 268). Chief Viles subsequently acknowledged for Appellant only that DCI was "not aware of any information or circumstances which would render the Guaranty ineffective or non-compliant with [Part 103] as of the date hereof." AR 366, No. 18. Appellant has not shown that Chief Viles represented, by act or omission, that the Loan had funded (much less that the guaranty was in effect) at the time of transfer. Moreover, because these communications occurred *after* Appellant purchased the Loan on April 2, 2012, they could not have "induce[d] [Appellant] to consummate the transaction," as Appellant now contends. Opening Br. at 21. Nor is Chief Viles's written "acknowledg[ment] of receipt" of Appellant's transfer notice, in which he added that the "transfer notice appears to be in order," AR 366, No. 18, evidence of anything more than that.

In several prior cases the Board was urged to relieve a lender of its responsibilities under the regulations, such as by estoppel. In those cases, as here, the appellant failed to recognize that the proper servicing and documentation of the loan was the appellant's responsibility, even if the agency had been imprudent. *See First National Bank of Pawhuska*,

35 IBIA at 71; *United National Bank*, 30 IBIA at 275-78; *Guardian Life Insurance Company of America v. Acting Anadarko Area Director*, 22 IBIA 104, 122-24 (1992); *see also Flynn*, 42 IBIA at 212 ("it is extremely difficult, if possible at all, to establish estoppel against the Government" (citation and internal quotation marks omitted)). Moreover, there is an element of risk in every loan guaranty. While the Program "helps borrowers secure conventional financing" by means of helping lenders "*reduce*" risks on loans they make, 25 C.F.R. § 103.2 (emphasis added), in deciding to guaranty a loan, DCI does not assume the risk and responsibilities that the regulations place on the lender. *See United National Bank*, 30 IBIA at 278; *Guardian Life Insurance Company*, 22 IBIA at 123. We are not convinced in this case that, under any of the theories advanced by Appellant, it was relieved of its burden to produce evidence showing that the Loan was funded.

IV. Appellant Has Not Met Its Burden to Produce Evidence Showing That the Loan Was Funded

Appellant contends that the administrative record "contains clear evidence of the Loan closing and funding." Opening Br. at 20. We affirm the Principal Deputy' decision that Appellant failed to maintain and produce sufficient evidence that the Loan was funded; on appeal, Appellant fails to show that the Principal Deputy erred. *See State of Alaska*, 49 IBIA at 293 ("[T]he burden remains at all times with the appellant to show error in the . . . decision.").

A. Appellant's Response to DCI Did Not Show That the Loan Was Funded

Initially, DCI requested from Appellant—as must be maintained by the "lender" under 25 C.F.R. § 103.32(e)—"[a] complete and current history of all loan transactions, including dated disbursements, payments, adjustments, and notes describing all contacts with the borrower." First Request for Information, Att. at 1 (AR 340). DCI more specifically requested "[d]ocumentation of how the loan was capitalized" and "[d]ocumentation of all disbursements such as cancelled check, wire transfer to borrower[']s account or escrow agent, and borrower's bank account statement showing deposits." *Id.*, Att. at 1-2. DCI also requested documentation that the Loan proceeds allegedly paid to LBC Western Holdings were used to acquire Westrock Group and its subsidiaries, including the stock purchase agreement and any subsequent agreements "consummating the acquisition," and documentation evidencing the "financing [of] the purchase." *Id.* at 2.

In response to these requests, Appellant cited the final PPM, financial statements of LBC Western Holdings as the Borrower, and documentation regarding purported payments on the Loan "by the Borrower," including for the 12-month period immediately

after Appellant acquired the Loan on April 2, 2012. AR 382, Ex. A at 2 (unnumbered).[29] Appellant acknowledged that it did not obtain the stock purchase agreement (and other documents), asserting that it purchased the Loan years later. *See id.*, Ex. A at 4 (unnumbered). Appellant enclosed a stock certificate as evidence regarding LBC Western Holdings' ownership of Westrock Group. *See id.*

On appeal, Appellant continues to rely on the final PPM as the source of the funds that LBCDE "would" or "planned to" lend LBC Western Holdings. Reply Br. at 16, 19, 22. The Principal Deputy argues that DCI had asked for evidence showing the transfer of funds from LBCDE to LBC Western Holdings (and in turn from LBC Western Holdings to pay for business-related expenses the funds were to discharge), but that Appellant provided no "independently verifiable documents." Answer Br. at 4 n.6, 16. Appellant fails to show error by the Principal Deputy. Appellant did not produce canceled checks, wire transfer receipts, or bank account statements as evidence of the approximately $3.5 million cash deposit to LBC Western Holdings resulting from the PPM,[30] much less did it provide such evidence to show how LBC Western Holdings used the funds that it supposedly received.

Appellant also continues to assert on appeal, without citing evidence, that LBC Western Holdings paid monthly principal and interest on the Loan. *See* Opening Br. at 22. But contrary to Appellant's initial response to DCI, according to the April 2013 restructuring plan, *LBCDE* either made or financed LBC Western Holdings' monthly principal and interest payments to Appellant for approximately 1 year immediately after Appellant acquired the Loan, until LBCDE could no longer afford to do so and Appellant declared an uncured default. *See* Restructuring and Business Plan (AR 322); Email from Haverkamp to Viles, Apr. 12, 2013 (AR 323). Appellant fails to show error in the Principal Deputy's finding that there is no reliable evidence that LBC Western Holdings ever made payments on the Loan.[31] *See* Opening Br. at 22; Answer Br. at 16 n.32.

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[29] This document is not consecutively numbered.

[30] The Securities and Exchange Commission provided DCI with copies of executed subscription agreements for LBCDE's note offering, including copies of attached checks written out to LBCDE. *See* Subscription Agreements (AR 396-404).

[31] On appeal, Appellant argues that it is "entitled to the full amount of the Guaranty in the amount of $20,267,674," Opening Br. at 1—which would reflect the maximum guaranty as if no principal had been paid on the Loan (i.e., a 90% guaranty on the original Loan amount equates to $20,267,674). While we assume that this was inadvertent error, because any DCI guaranty is only for a percentage of the *unpaid* principal and accrued interest due

(continued…)

Appellant further maintains that LBC Western Holdings' 2010 and 2011 audited financial statements, considered together, "accurately reflect the liability" as including the Loan. Opening Br. at 20. However, the 2010 audited financial statements identified a liability of only $15,021,497. 2010 Audited Financials at 2 (unnumbered) (AR 130). And, the auditor issued an "adverse audit opinion" on the 2011 audited financial statements, stating that he had not prepared or consolidated the financial statements of LBC Western Holdings' subsidiaries and that "the financial statements . . . do not present fairly the financial position of LBC Western Holdings, LLC as of December 31, 2011." Independent Public Accountant's Report at 1-2 (AR 292). Appellant does not show error in the Principal Deputy's finding that the financial statements "tend to refute" that the Loan was ever funded. Answer Br. at 10, 27.

Finally, the December 29, 2010, stock certificate showing that LBC Western owned shares of Class B common stock is not proof that the Loan funded. LBC Western is not the actual "Borrower" and on appeal Appellant does not dispute the Principal Deputy's position that the stock certificate is not signed by anyone known as an independent, authorized official of Westrock Group. *See* Answer Br. at 17.

B. Appellant's "Primary Evidence" on Appeal Does Not Show That the Loan Was Funded

On appeal, Appellant cites other documentation as its "primary evidence" that the Loan funded, including (1) the Negotiable Promissory Note (AR 94), (2) the Loan Agreement (AR 94), and (3) the Security Agreement (AR 366, No. 14), each dated October 29, 2010. Opening Br. at 20. But while these documents are evidence that the Loan may have closed, a loan must "close and fund" in order for a guaranty to be effective. 25 C.F.R. § 103.18(a)(2). These documents, which predate the purported funding of the Loan by a month, do not show that the Loan actually funded.

Appellant now makes the dubious assertion that "[*c*]*ash* in the amount of $22,519,638 flowed from LBCDE to LBC Western on November 30, 2010." Opening Br. at 4 (emphasis added). Appellant cites a 2010 fourth quarter report from LBCDE, which states that LBC Western Holdings had an opening balance on that date for the total Loan amount. *Id.* (citing LBC Western Holdings 2010 Q4 Report, Dec. 31, 2010 (AR 106)). The report does not state, much less prove, that it was a cash transaction, which of course

(…continued)
on a loan, 25 C.F.R. § 103.6(a), it does highlight Appellant's failure to support its actual claim for loss with information and evidence.

would contradict what is known about the transaction, including that the final PPM raised only approximately $3.5 million in cash.

Further, Appellant argues that its own purchase of the Loan is evidence that the original Loan was funded. *Id.* at 22. But as the Principal Deputy recognizes, the "arrangement" of that purchase, in which Appellant purchased the entire Loan and sold 10% back to LBCDE, calls into further doubt whether the original Loan was ever fully funded. Answer Br. at 5-6. The Principal Deputy argues that the Loan did not fully fund if LBCDE placed 10% of the Loan in escrow, out of the hands of LBC Western Holdings, in an effort to eliminate Appellant's risk of loss, beyond the 90% guaranty. *Id.* at 6. Perhaps tellingly, Appellant does not address this issue in its reply brief. *See* Reply Br. at 22 (describing the questionable "arrangement" as the PPM, rather than the agreement between Appellant and LBCDE).[32]

Lastly, in its reply brief, Appellant challenges the Principal Deputy's statement that Appellant had not provided any "independently verifiable documents" to show that the Loan was funded, arguing that "it is wrong as a matter of undisputed facts in the record." Reply Br. at 25. Appellant cites several documents without explanation. Apart from the documents that we have already discussed, none of the cited documents, e.g., LBCDE's representations to DCI that Westrock Group stock was valuable and that the funding would occur in November 2010, contradicts the Principal Deputy's statement.

For the foregoing reasons, we conclude that Appellant has not met its burden on appeal to show error in the Principal Deputy's decision concerning the purported funding of the Loan. And, because there is no guaranty if the Loan was not funded, and the Principal Deputy argues that Appellant's claim for loss should be denied on that ground, we need not reach any other possible grounds for denying the Claim.

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[32] We also note that, when the Loan was sold to Appellant, "it appears that the Loan proceeds were disbursed primarily to redeem the $12,803,803 Class A notes, some of which were held by members of LBCDE's board, and to pay various other fees and expenses, including legal and consulting fees for Ickes and Clarkson." *Seaport Loan Prods.*, 2013 N.Y. Misc. LEXIS 4859, at *11; *see also* AR 382, Ex. A at 14 (unnumbered) (Appellant told DCI that "[t]here is no documentation relating to the capital infusion; however, Gavin Clarkson of LBC informed counsel for [Appellant] that the capital infusion occurred."). Thus, as the Principal Deputy found, it is questionable whether LBC Western Holdings ever had control of funds approximating the original Loan amount.

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, for the reasons stated herein, the June 17, 2014, decision of the Principal Deputy Assistant Secretary - Indian Affairs.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge