

3. Publication

The final method of publicizing the sale is the publication in a newspaper of “general circulation” in the county where the property is located. In Ada County, for instance, that includes the Idaho Business Review and the Idaho Statesman.

The Notice of Trustee’s Sale is published once per week for four weeks and the publication must be completed at least 30 days prior to the sale date.

The newspaper will provide an affidavit showing the actual publication and the dates on which it ran.

4. Affidavits.

Each of the three methods of publicizing the sale, mailing, posting/serving and publication, must be memorialized by an affidavit of the person completing the task setting forth what was done. These affidavits then must be recorded at least 20 days prior to sale.

In addition, the lender and trustee must execute an affidavit of compliance with I.C. § 45-1506C if the property is the borrower’s primary residence.

Examples of Affidavits of mailing, posting/service, publication and compliance with I.C. § 45-1506C are set forth in pages A29 through A36 of the Appendix.

H. THE RIGHT TO REINSTATE

Under Idaho Code § 45-1506(12), the borrower, or any recorded junior interest holder, has the absolute right to “reinstate” the loan for a certain period of time. If the borrower pays all past due payments, late charges, as well as the foreclosure fees and costs, and any advances made for insurance or taxes, then the loan is “reinstated” and the foreclosure must be stopped.

The borrower has this right for 115 days after the recording of the notice of default (if a non-judicial foreclosure) or up to the entry of the decree of foreclosure (see judicial foreclosures below).

This is important because most promissory notes contain an “acceleration clause” that states that if a default occurs, the entire amount of the obligation becomes due. Because the right to reinstate is granted by Idaho law, a lender must allow the borrower to cure the default during the 115 day time frame, regardless of a provision in the note stating otherwise.

I. HOW THE SALE IS CONDUCTED

Most sales conducted at title companies occur in their lobbies or in conference rooms. In smaller counties, they are sometimes held on the county courthouse steps. Often, the title company will ask people attending the sale to sign in and state whether they are just observing or intend to bid.

If someone intends to bid, the trustee will “prequalify” them. In order to bid, one must have available funds at the sale (personal checks or promises to pay later are not acceptable). The bidders must have either cash or a certified check made payable to the trustee in the maximum amount they intend to bid. The trustee will typically prequalify bidders in private so that the other participants do not know what the maximum bid of that participant will be.

At the time and place for the sale, the trustee will “cry” the sale. This involves reading what is known as the “Trustee’s Call” which sets forth the interest being foreclosed, who the original grantors were, who the beneficiary is and the legal description of the property (essentially the same information contained in the Notice of Trustee’s Sale). The Trustee then opens up the sale for bids in a general auction fashion.

The first bid is a credit bid by the beneficiary. This means that the beneficiary can bid up to the entire amount they are owed without providing cash. Anyone else then wishing to bid may do so. From here, the process is much like any other auction, with the bidding continuing until no one wishes to bid higher. The final high bid is then the “winner.”

If the beneficiary entered an initial credit bid below what they are owed (see discussion on deficiencies below), they may continue to raise their credit bid up to the amount owed. If they wish to exceed that amount, then they must tender cash or certified funds for the amount in excess of their credit amount. All other bidders must immediately tender cash or certified funds for the full amount they have bid. In some instances, the title company will allow a second position or other junior creditor to tender cash or certified funds to cover the first position obligation and then bid credit up to the amount of their obligation. This requires a pre-arrangement with the title company and fewer and fewer title companies are willing to allow junior lienholders to bid in credit.

The exact procedures for the bidding is not spelled out in the code and most are actually just title company policies. One should always check with the title company crying the sale for the specific requirements.

Once the sale is completed, the trustee obtains the funds from the successful bidder. If no one but the beneficiary bids, then no funds are exchanged.

The trustee will then issue a "Trustee's Deed" to the successful bidder. This is the document that passes title from the former owner to the winning bidder. An example of Trustee's Deed is set forth in pages A37 through A38 of the Appendix.

If a third party is the successful bidder, then the trustee will be required to disburse the funds in the following order:

- (1) First to the expenses of the sale, including trustee fees and reasonable attorney fees.
- (2) The obligation that brought about the foreclosure sale, up to the full amount owed.
- (3) To any subsequent liens that have been recorded, in the order of their recording.
- (4) To the grantor of the deed of trust.

It is extremely rare that any funds are distributed to the borrower, though it does happen on occasion.

Following the issuance of the Trustee's Deed, the winning bidder becomes the owner of the property and the former owner has no right to get the property back. The sale is final (barring some challenge that it was improperly conducted).

An example is probably in order:

1. ABC Bank holds a first position deed of trust for \$80,000.00
2. Wells Fargo Bank holds a second position deed of trust for \$25,000.00
3. Owner defaults on ABC obligation and a trustee sale is scheduled.
4. On the date of the sale, ABC bids \$80,000.00 in credit, Wells Fargo bids a total of \$90,000.00 and a third party, Buyer, bids \$100,000.00.
5. Buyer becomes the owner and the proceeds are distributed as follows:

Total Received	
Distributions:	\$ 100,000.00
Trustee's Fees/Costs	3,000.00
ABC Bank	80,000.00
Wells Fargo	17,000.00
Owner	0.00

J. REDEMPTION UNDER NON-JUDICIAL FORECLOSURES

Once a sale is held, there is no right for the former owner or any junior lienholders to redeem the property except the Internal Revenue Service. By enacting a special federal law, if the I.R.S. holds a tax lien on the property for federal taxes due, the I.R.S. can redeem the property within 120 days from the date of the sale. The only way to remove such a right is to get the I.R.S. to release its right. I have tried, unsuccessfully to do so in the past. If an I.R.S. lien shows up on a title report, it is best to assume the property will not be resellable for 120 days from the date of the sale. A copy of 26 U.S.C. §7425 is included in the Appendix at pages A102 through A104.

K. A NOTE ON PRIORITY AND MECHANIC'S LIENS

There are some things that even the most cautious cannot avoid. Under the Idaho mechanic's lien statutes (Idaho Code § 45-500 et seq.), a mechanic's lien for labor, services or materials can be filed against the property improved if payment is not made. Unfortunately, the priority date of such a lien is not the date the lien is recorded, as it would be with any other type of lien, but is the day that the work actually commenced. It is possible, therefore, that even after a foreclosure sale a mechanic's lien might arise that asserts priority ahead of a deed of trust and would not appear on a title report. The only sign of such danger would be a lot of work being done on the property prior to the foreclosure sale. If there is significant construction being conducted on a property prior to foreclosure, a buyer may want to consider purchasing an extended coverage policy to mitigate the risk.

L. TIME FRAMES

The entire process, from the referral to the sale date, can be accomplished in about 125 days if the trustee were trying to get it done as quickly as possible. Typically, however, it takes about 140 to 160 days from referral to sale date.

If the sale is postponed (see below), a bankruptcy occurs, or a forbearance agreement is entered into, the sale can conceivably take much longer.

M. POSTPONEMENTS

For a variety of reasons, the beneficiary requesting a trustee's sale may wish to postpone the sale. For the sale of property that is NOT the primary residence of the borrower, the only requirement to postpone is that the trustee must announce the postponed sale date and time at the original sale date. Hence, if someone does not show up to the original sale date, they are unlikely to know if the sale has been postponed. The only way to discover if a sale has been postponed is to call the trustee and ask.

For properties that are the primary residence of the borrower², the sale may be postponed but the trustee must send notice of the rescheduled sale date in the same manner (certified mail) and to the same persons who originally received the Notice of Trustee's Sale. This notice must be mailed at least 14 days prior to the new sale date.

Under the Idaho Code, a sale cannot be postponed more than 30 days from the original sale time. However, at the postponed sale date, the sale may again be postponed for up to an additional 30 days. This process may continue indefinitely, with a new postponement being announced each time. There currently is no limit on the number of postponements that can be strung together. For primary residence borrowers, a new 14-day notice would have to be sent for each rescheduled sale. See Appendix A39 for an example of a Notice of Postponed Trustee's Sale.

²The method of determining whether a property is a borrower's "primary residence" is set forth in I.C. §45-1506C(1)—whether a homestead tax exemption has been claimed during the year. This exception also only applies to federally or state regulated lenders.