



American Land
Title Association

Protect your property rights

Insuring Native American Land: Special Issues and Considerations Part III – Authority, Recording, and Access

Webinar Series III of IV

Speakers

Moderator:

Megan Powell, First American Title Insurance Company

Speakers:

Chad Hansen, First National Title Insurance Company

Dawn Lewallen, First American Title Insurance Company

Orlando Lucero, FNF Family of Companies



American Land
Title Association

Protect your property rights

Today's Topics

1. Authority

2. Recording

3. Access



American Land
Title Association

Protect your property rights

AUTHORITY



American Land
Title Association

Protect your property rights

Tribes as Sovereigns

- Treaty Clause (US Constitution, Art. II, Sec. 2, cl. 2)
- Commerce Clause (US Constitution, Art. I, Sec. 8, cl. 3)
“to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”
- *Cherokee Nation v. Georgia*, 30 US 1
“a distinct political society, separated from others, capable of managing its own affairs and governing itself”

Tribal Authority

- Constitution

Usually chief executive (Chair or President)

Usually a tribal council, or Board of Directors

May have a Judiciary

- May have a legal code

- Navajo Nation Code (<http://www.nnols.org/navajo-nation-code.aspx>)

- Cherokee Nation Tribal Code

- <https://attorneygeneral.cherokee.org/tribal-code>)



American Land
Title Association

Protect your property rights

Unincorporated Entity

- Documentation needed:

- Tribal Constitution, code, or resolution creating entity

- Resolution by the Tribe to perform the desired action

- Resolution by the Tribe of authority to sign

- May need BIA approval for contract or encumbrance longer than certain time frames

Political Subdivision

- Documents needed:
 - Tribal Constitution, law, or resolution creating entity
 - Entity Resolution to perform the desired action
 - Entity Resolution of authority to sign
 - May need BIA approval for contract or encumbrance longer than certain time frames

Tribally Chartered Corporation

- Documents needed:
 - Tribal Constitution, law, or resolution (verify authority to create corporations)
 - Charter or Certificate of Organization or Articles of Incorporation
 - If owned in whole or part by the Tribe, Tribal approval of the Articles
 - Bylaws of the Corporation
 - Corporate Resolution to perform desired action
 - Corporate Resolution of authority to Sign
 - May need BIA approval for certain contracts and encumbrances

Section 17 Corporation

- Documents needed:
 - BIA approval of the Charter of Incorporation
 - Tribal ratification of the Charter
 - Evidence of the Tribal asset transfer to the Corporation
 - Tribal Resolution
 - May need BIA ?????
 - Deed
 - Corporate Resolution to perform desired action
 - Corporate Resolution of authority to Sign
 - May need BIA approval for certain contracts and encumbrances

State Law Entities

- Documents needed:
 - Certificate of Incorporation or Organization
 - Certificate of Good Standing
 - Bylaws of the Corporation or Operating Agreement if an LLC
 - Corporate Resolution to perform desired action
 - Corporate Resolution of authority to Sign
 - May need BIA approval for certain contracts and encumbrances

Trust Lands

- Trustee is US via self-imposed fiduciary obligation (see *Cherokee Nation v. Georgia*)
- Congress is the ultimate authority/trustee
- Delegated to Secretary of the Interior
- Secretary has further delegated to Bureau of Indian Affairs and BIA Staff
- Local BIA staff often has authority to make a decision regarding taking fee land into trust

Fee to Trust

- Fee To Trust
 - A. Application from Tribe (no prescribed form)
 - B. Available to both Tribes and individual Indians
 - C. Notice of Decision from Regional Director or Superintendent
 - D. Can appeal within 6 years after public notice

Trust Lands

- *Carcieri v. Salazar*, 555 U.S. 379
 - Tribe must be under federal jurisdiction in 1934
- *County of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012 (9th Cir. 2017)
 - Separates “recognized” and “under federal jurisdiction”
 - Could be under federal jurisdiction in 1934 but not recognized until recently
- Attempts at legislative fixes have been unsuccessful to date

Other Statutory Limitations

- Tribes may lease lands for certain purposes and limited periods of time per statute
- Exceeding those time periods violates the authority given by Congress and will invalidate the lease
- *Kizer v. PTP, Inc.*, 2017 U.S. Dist. LEXIS 182591

Federal Authority

- Congress has delegated authority to the Secretary of the Interior (25 USC 5103)
- Further delegations of authority are found in:
Dept. of Interior Departmental Manual
(<https://www.doi.gov/elips/browse>)
and
Bureau of Indian Affairs Manual
(<https://www.bia.gov/policy-forms/manual>)

Federal Authority

- Example of Chain of Delegation of Authority

ACCEPTANCE OF CONVEYANCE

United States Department of the Interior Bureau of Indian Affairs Pursuant to 25 U.S.C. § 465 and the Record Of Decision of the Regional Director, _____ Region, Bureau of Indian Affairs, dated _____, the undersigned hereby accepts into trust for the benefit of the _____ on behalf of the United States of America, land conveyed by this deed located in _____, [County, State], a certain piece or parcel of land, known as [insert description], situated at [insert location] previously recorded in the [insert recordation info] in Vol. ____, Page ____.

Date

Director, _____ Region

Pursuant to delegated authority of 209 DM 8, 230 DM 1 and 3 IAM 4



American Land
Title Association

Protect your property rights

Federal Authority

- *Commonwealth Land Title Insurance Company v. OMG Americas, Inc.*, 2012 WL 4856391 (lease void for lack of authority and NEPA issue)
- *Scott v. Acting Albuquerque Area Director*, 29 IBIA 61 (1996) (lease void for lack of authority and NEPA issue)

RECORDING



American Land
Title Association

Protect your property rights

BIA's Land Title Records Office (“LTRO”)

- An LTRO is a federal records office for all documents affecting title to lands held in trust or restricted status. (25 C.F.R. § 150)
- LTROs are part of the Division of Land Titles and Records, which is responsible for:
 - maintaining the Native American Land Record of Title;
 - examining and determining the completeness and accuracy of the records;
 - Certifying the findings of examination and reporting the status of title to Native American Trust and restricted lands. (25 C.F.R. § 150.3).
- Similar to county records offices in that each office records land title documents that are primarily within its designated geographic area.

BIA LAND TITLE RECORDS REGIONAL OFFICES



- Alaska Region
- Eastern Region
- Eastern Oklahoma Region
- Midwest Region
- Navajo Region
- Northwest Region
- Pacific Region
- Rocky Mountain Region
- Southern Plans Region
- Southwest Region
- Western Region

Current Physical Offices

Regional LTROs

- Alaska (Anchorage, AK)
- Eastern (Anadarko, OK)
- Eastern Oklahoma (Muskogee, OK)
- Great Plains (Aberdeen, SD)
- Midwest (Ashland, WI)
- Navajo (Albuquerque, NM)
- Northwest (Portland, OR)
- Pacific (Sacramento, CA)
- Rocky Mountain (Billings, MT)
- Southern Plains (Anadarko, OK)
- Southwest (Albuquerque, NM)
- Western (Albuquerque, NM)

Tribal LTROs

- Cherokee Nation of Oklahoma (Tahlequah, OK)
- Choctaw Nation of Oklahoma (Durant, OK)
- Muscogee (Creek) Nation (Okmulgee, OK)
- Colville (Nespelem, WA)
- Flathead (Pablo, MT)
- Morongo (Banning, CA)
- Agua Caliente (Palm Springs, CA)
- Salt River (Scottsdale, AZ)
- Soboba (Banning, CA)
- Cabazon (Banning, CA)

Title Status Report (“TSR”)

- If a parcel of land is vested in trust or restricted status, a Title Status Report (“TSR”) from the LTRO will disclose what has been filed in the LTRO against the property.
- A TSR can only be obtained from the LTRO.
 - Cannot be searched by the general public.
 - Instead a TSR must be requested.
 - It will be prepared by an examiner at the LTRO.
- Allow sufficient time for the LTRO to prepare and distribute the TSR prior to closing.

Recording Requirements

- If the property is vested in trust or restricted status, any document affecting title must be recorded in the LTRO pursuant to 25 C.F.R. § 150.
- Once property comes out of trust or restricted status into fee status, the LTRO no longer keeps records for that property.
- If examining property vested in trust or restricted status, it's a good idea to check both your local county records and LTRO.
- Documents affecting title to unrestricted fee land do not need to be recorded in the LTRO, even if the property is located within a reservation.

Overview of Proposed Revisions to 25 CFR Part 150

- **Proposes Section 150.3. May Tribes administer this part on LTRO's behalf?** This section authorizes a tribe to contract or compact to administer on LTRO's behalf any portion of this part that is not inherently Federal function.
- **Section 150.101. What is the purpose of the record of title?** This section states that the record of title provides the public with constructive notice that title documents exist.
- **Section 150.105. Are certain LTRO offices responsible for certain geographic areas?** This section provides that each LTRO is responsible for specific geographic area but other LTROs may assist in maintaining records for Native American lands, as needed.



American Land
Title Association

Protect your property rights

Overview of Proposed Revisions to 25 CFR Part 150

- **Section 150.201. What is recorded in the record of title?** This section adds that LTROs may maintain documents demonstrating the right of use, occupancy of certain Tribes to Native American and non- Native American land that are not title documents.
- **Section 150.205. What are the minimum requirements for recording a title document?** This section calls for “proper notarization or other acknowledgement of signatures of the parties” to documents.
- **Section 150.206. What actions will the LTRO take if it discovers a title defect?** This section states that if the LTRO discovers a title defect during the title examination, the LTRO will notify the originating office that recorded the document and request correction and notation in the record of title.



American Land
Title Association

Protect your property rights

ACCESS



American Land
Title Association

Protect your property rights

Insuring Access over Native Land

- Covered Risk 4: “No right of access to and from the Land”
 - Publicly dedicated road
 - Access easement
- What if the road crosses trust or restricted Native lands? What is the source of access?

Brief History of New Mexico's Pueblos



Brief History of New Mexico's Pueblos

- Aboriginal title
- Spanish recognition
- Mexican recognition
- Nonintercourse Act
- Pueblo Lands Act of 1924

The New Mexico Experience



The New Mexico Experience



American Land
Title Association

Protect your property rights

. . . And into the Modern Day

- December 6, 2013 – on behalf of Pueblo of San Ildefonso BIA sends letter to Santa Fe County asserting that six “county” roads trespass onto pueblo lands, as there is no evidence of any easement in favor of the County

The Effect of that Letter

- Created uncertainty about insurability of access in title policies where access provided by disputed road
- Politicians got involved
- NM Department of Insurance got involved
- NM Land Title Association got involved

. . . And at last a Settlement

- Four pueblos participated in settlement with Santa Fe County and Dept. of Interior:
 - San Ildefonso
 - Pojoaque
 - Nambe
 - Tesuque

Terms of the Settlement

- Santa Fe County paid consideration
- Timeframes for SFC to submit formal ROW applications under 25 CFR Part 169
- Interim steps, such as surveys
- ROW for 99 years, with automatic renewal for another 99
- Promise to keep roads open to public

Obtaining a ROW over Indian Land - 25 CFR Part 169

- Regulation substantially updated effective 4/21/2016
- Uniform framework for granting rights of way (ROW) over Indian land
- Flexibility in favor of Indian landowners who must consent
- Indians can negotiate terms and conditions of consent

ROW Application

- Applicant
- Tract
- Purpose of ROW
- Duration
- Ownership of permanent improvements

ROW Application

- Legal description
- Map of location
- Bonds, insurance or security
- Record that notice been given
- Consent
- Valuation (if applicable)

ROW Application

- If applicant an entity, evidence that:
 - Representative has authority
 - ROW enforceable against entity
 - Good standing
- Environmental/Archeological reports
- Statement from tribe that in conformance with tribal law

Consent Requirements

- Tribe
- Individual native landowners
- No consent required, if:
 - Owners too numerous
 - Grant will cause no substantial injury
 - Landowners will be adequately compensated
 - BIS provides required advance 60 day notice



American Land
Title Association

Protect your property rights

Compensation Requirements

- As negotiated by the tribe
 - Tribal authorization expressly stating:
 - Tribe has agreed to compensation amount
 - Waives valuation
 - Acceptance of amount/waiver of valuation in tribe's best interest
- Fair Market Value, with valuation per 25 CFR Part 169.114, subject to tribe's determination on compensation

Process for BIA to grant ROW

- Best interest of the Indian landowners
 - Confirm application complete
 - Potential adverse compacts
 - Modifications or mitigations
- Once application complete, BIA grants or denies ROW within 60 days
 - Will grant ROW unless compelling reason to deny
 - Deference to Indian landowner's determination

What ROW Grant Contains

- Conditions of the consent document
- Authorized uses
- Whether assignment permitted and if so, whether additional consent required
- Where mortgaging permitted and if so, whether additional consent required
- Ownership of permanent improvements

What ROW Grant Contains

- Construction/maintenance obligations
- Location of ROW
- Duration
 - 20 years for initial term for oil and gas purposes
 - 50 years for initial term and renewals for all other purposes

Renewal

- Initial/Renewal terms do not exceed maximum term
- Automatic renewal or option to renew
- Affidavit of no change
- Initial term has not yet ended
- No uncured violations
- Consent, if needed
- Record renewal with LTRO

Assignment

- Grantee may assign
 - With consent, unless consent not required
 - With BIA approval, unless:
 - Original ROW expressly permits assignment without BIA approval AND
 - Assignee and grantee provide copy of assignment/supporting documents to BIA for recording within 30 days of assignment

Mortgage

- Grantee may mortgage
 - If grant expressly permits mortgage
 - Meets the applicable consent requirements, unless grant permits mortgaging without consent
 - BIA must approve the mortgage

Recording in LTRO

- ROW must be recorded in LTRO with jurisdiction over affected land. Also record in County?
- BIA will record
- Assignments that do not require BIA approval must be provided to BIA and BIA will record
- Tribe must record:
 - ROW for tribal utility
 - Special acts of Congress

QUESTIONS?

COMMUNICATIONS@ALTA.ORG



American Land
Title Association

Protect your property rights

ALTA NATIVE AMERICAN LANDS WEBINAR SERIES

PART I – VESTING; NON-INTERCOURSE ACT; SECTION 17 CORPORATIONS

PART II – LEASING – SEPTEMBER 16, 2020

PART III – AUTHORITY; RECORDING; ACCESS – Q2 2021

PART IV – CASE STUDY; APPLYING WHAT WE'VE LEARNED – Q3 2021

RECORDINGS AVAILABLE AT [ALTA.ORG/WEBINARS](https://alta.org/webinars)



American Land
Title Association

Protect your property rights