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# Insuring Native American Land: Special Issues and Considerations Part I

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**Webinar Series I of IV**

August 26, 2020 Moderator Cindy Guanell First American Title Insurance Company

# Speakers

**Sean Holland**

Fidelity National Title Group

**Paul Cozzi**

Fidelity National Title Group

**Branden G. Allen**

Old Republic National Title Insurance Company



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# Today's Topics

- **Vesting - Ownership of Land**
- **Indian Non-Intercourse Act – 25 U.S.C. Section 177**
- **Section 17 Corporations**



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# VESTING

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# Definitions & Vesting Variations

- Indian Country – 18 U.S.C. § 1151
- Reservation
- Allotted Land
- Tribal Trust Land
- Individual Trust Land
- Fee-to-Trust Transfers
- Restricted Fee Land
- Fee (Individual & Tribal)

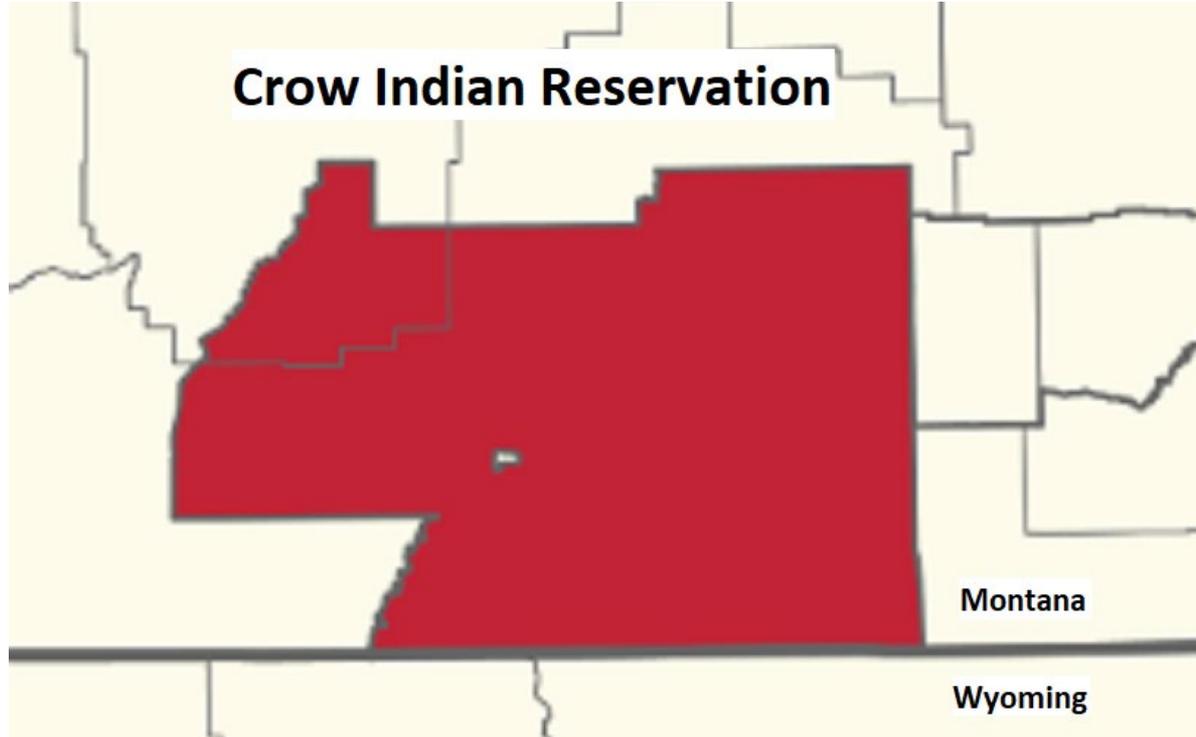
# Indian Land Titles

- Indian Country (18 U.S.C. § 1151)
  - All land within the limits of any Indian reservation under the jurisdiction of the United State government, notwithstanding the issuance of any patent, including rights-of-way running through the reservation.
  - All dependent Indian communities within the borders of the U.S., whether within the original or subsequently acquired territory thereof.
  - All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

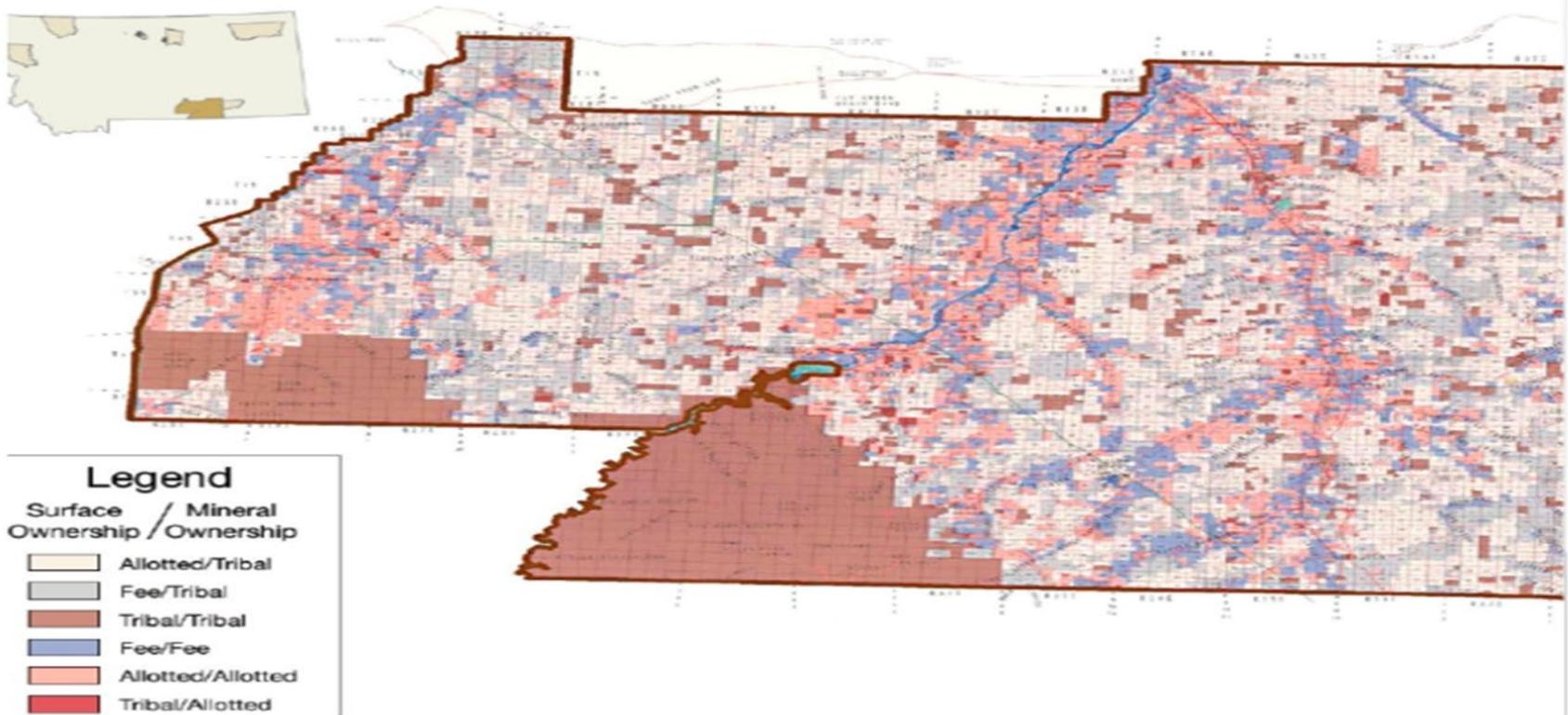
# Indian Land Titles

- Reservation
  - An area designated as such by treaty, statute or Presidential proclamation.
  - Historically, comprised of land a tribe reserved for itself when it relinquished other land areas to the U.S. through treaties.
  - Many tribal lands, including land held in trust by the U.S., do not have “reservation” status.
  - Under federal law, the distinction between reservation and trust land is immaterial for purposes of determining whether land is Indian Country.

# Reservation Land – All One Status?



# It May Be a Checkerboard



# Reservation vs. Off Reservation Vesting

- Reservation
  - Restricted fee held by the tribe.
  - Restricted fee held by an individual Native American.
  - Land held in trust by the U.S. for an individual Native American.
  - Land held in trust by the U.S. for a tribe.
  - Unrestricted fee ownership.
- Off Reservation
  - Land held in trust by the U.S. for an individual Native American.
  - Land held in trust by the U.S. for a tribe.
  - Unrestricted fee ownership.

# Tribal Property

- Held in common for benefit of all tribal members.
- Neither public property of the United States nor property of individual Native Americans.
- Includes:
  - Restricted fee held by a tribe – on reservation.
  - Land held in trust by the U.S. for a tribe – on or off reservation.
  - Unrestricted fee ownership – on or off reservation.

# Individual Native American Property

- No vested interest in tribal property, unless some designated interest has been set aside for the individual.
- Treaties and cases refer to land held “in common.” That does not mean as tenants in common.
- Types
  - Restricted fee held by an individual Native American.
  - Land held in trust by the U.S. for an individual Native American.
  - Unrestricted fee ownership.
  - Location: restricted on reservation only, others on or off.

# Tribal Trust Land

- Tribal Trust Land
  - Legal title held by the U.S. in trust for a tribe.
  - Beneficial title held by the tribe in its capacity as a governmental entity.
    - Land that was never allotted and remains in tribal hands.
    - Land that was set aside, acquired, or reacquired by the tribe and conveyed to the U.S. in trust for the tribe.

# Fee-to-Trust Transfers – Tribal or Individual

- Fee-to-Trust Transfers
  - Tribes and individual Indians are eligible.
  - Application to the U.S. and processing pursuant to 25 U.S.C. § 465 and 25 C.F.R. § 151.
  - Acceptance of legal title by U.S. generally is discretionary.
    - Discretionary acquisition vs. Mandatory acquisition.
  - 25 C.F.R. § 151.13 modified in 2016.
  - ALTA U.S. Policy form issued when insuring fee to trust transfers.
  - Completed by entering record with BIA Land Title Records Office.  
There may be no corresponding document entered in the county records.

# Fee-to-Trust Transfer



200406010367 3 PGS  
06-01-2004 12:18pm \$21.00  
PIERCE COUNTY, WASHINGTON

WHEN RECORDED RETURN TO  
PUYALLUP TRIBE OF INDIANS  
1850 ALEXANDER AVENUE  
FACDMA, WASHINGTON 98421

## Taxpayer Details

**Taxpayer Name** USA TRUST

**Mailing Address** EMERALD QUEEN CASINO  
5700 PACIFIC HWY E FL 3  
FIFE, WA  
98424-2515



CHICAGO TITLE INSURANCE COMPANY

STATUTORY WARRANTY DEED

4295788

Dated: MAY 27, 2004

4297514

THE GRANTOR

QUAD ASSOCIATES, A WASHINGTON PARTNERSHIP, AND MICHAEL A. TUCCI AND MARY JO TUCCI,  
HUSBAND AND WIFE

for and in consideration of  
TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION

CHICAGO TITLE JUN 01 2004

in hand paid, conveys and warrants to  
PUYALLUP TRIBE OF INDIANS, A FEDERALLY RECOGNIZED INDIAN TRIBE



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# BIA 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.
  - Similar to county records offices in that they have a geographic scope.
  - LTROs are part of the Division of Land Titles and Records, which is responsible for reporting the status of title to Indian Trust and restricted lands (25 C.F.R. § 150.3).
- Cannot be searched. Instead a Title Status Report must be requested.
- LTRO ceases to maintain records on land for which restrictions are lifted or trust status is terminated.

# Tribal Fee Land

- Tribal Fee Land
  - Fee title held by the tribe.
  - Land that has been acquired or reacquired by the tribe.
  - Has not been conveyed to the U.S. to be held in trust.
  - Not subject to an express restriction on alienation.
  - Not clear whether alienation is restricted by the Non-Intercourse Act.
  - Not included in the database maintained by the BIA LTRO.

# Individual Property: Allotments

- General Allotment Act of 1887 (Dawes Act).
  - Allottees to receive patent, land to be held in trust for 25 years.
  - Allotted Land is often referred to as land held in “restricted fee” due to the restrictions on alienation without federal approval.
  - At the end of the trust period, allottee to receive fee patent. Land thereafter freely alienable, subject to local taxes, conveyances recorded with county not LTRO.

# Individual Property: Allotments

- Impact of the allotment policy.
  - Fractionalization of ownership – 1,200+ owners one WI parcel.
  - 90 million + acres of land passed out of Native ownership, most of which had been reserved by tribes in treaties.
  - Was thought to diminish boundaries of the tribes' reservations until U.S. Supreme Court *McGirt v. Oklahoma* decision in July 2020.



# Individual Property: Allotments

- Indian Reorganization Act of 1934 (25 U.S.C. § 461).
  - Officially ended policy of allotting tribal holdings.
  - Extended the 25 year trust term indefinitely so that allotments held in trust continue in trust status.
  - By 2012 approximately 11 million acres still held as allotments.
- Individual allottee may apply to remove restriction.
  - Secretary of the Interior has no duty to approve and may decline when removal of restrictions would adversely affect tribe or individual Native Americans.



# Allotment Patent Issued 1907

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said **Boatah-bah-cosh-ekash, or Coyote Looks Up,**

the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law: Provided, That the President of the United States may, in his discretion, extend said period.



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# Fee Patent For Portion of Same Land Issued 1931

1409782  
3097-27. I. O.

482-Crow Reservation.

4-1042-R.

## The United States of America,

Do all to whom these presents shall come, Greeting:

WHEREAS, it appears from evidence on file in the General Land Office, that the Secretary of the Interior has approved the sale of land included in the allotment of Coyote Looks Up; that payments under said sale have been completed and that the claimant, Jessie M. Spear, purchaser, is entitled to a patent in fee for said land, to wit:

The northeast quarter and the east half of the northwest quarter of Section twenty-one in Township eight south of Range thirty-two east of the Principal Meridian, Montana, containing two hundred forty acres, according to the Official Plat of the Survey of the said Land, on file in the General Land Office:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, **Herbert Hoover**,

President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the TWENTY-SIXTH day of MARCH in the year of our Lord one thousand nine hundred and THIRTY-ONE and of the Independence of the United States the one hundred and FIFTY-FIFTH

By the President:

*Herbert Hoover*  
By *Keefe C. Neely* Secretary

*Emma C. Wilson*  
Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 1045152



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WHEREAS, it appears from evidence on file in the General Land Office, that the Secretary of the Interior has approved the sale of land included in the allotment of Coyote Looks Up; that payments under said sale have been completed and that the claimant, Jessie M. Spear, purchaser, is entitled to a patent in fee for said land, to wit:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

# Individual Native American Fee Land

- Individual Native American Fee Land
  - Fee title held by one or more individual tribal members.
  - Land that was allotted to an individual tribal member in trust, the trust status of which has been terminated.
  - Land that has been acquired in fee by a tribal member, has not been conveyed by the individual to the U.S. to be held in trust for the individual.
  - No federal limitation on the conveyance or encumbrance of individual fee land.
  - Not included in the database maintained by the BIA LTRO.

# Unrestricted Fee – Non-Native Ownership

- Land within reservations – held in unrestricted fee by persons who are not Native Americans
  - Land for which the trust or restricted fee status had been terminated and conveyed to non-Native ownership.
  - No federal limitation on the conveyance or encumbrance of individual fee land.
  - Not included in the database maintained by the BIA LTRO.

# INDIAN NON-INTERCOURSE ACT

## 25 U.S.C. SECTION 177

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# Indian Non Intercourse Act, 25 U.S.C. § 177

The Indian Non Intercourse Act, 25 U.S.C. § 177, which addresses purchases or grants **from Indian tribes**, provides, in pertinent part:

*“No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution...”*

# Indian Non Intercourse Act, 25 U.S.C. § 177

The Regulation thereunder:

**25 CFR § 152.22 Secretarial approval necessary to convey individual-owned trust or restricted lands or land owned by a tribe.**

...

(b) Tribal lands. Lands held in trust by the United States for an Indian tribe, lands owned by a tribe with Federal restrictions against alienation and **any other land owned by an Indian tribe** may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary. (See [25 U.S.C. 177.](#))

# Indian Non Intercourse Act, 25 U.S.C. § 177

- First enacted in 1790 by the first U.S. Congress.
- Amended and extended in 1793, 1796, 1799, 1802 and 1834.
- Given its present form in 1875

# Indian Non Intercourse Act, 25 U.S.C. § 177

- **Underlying Legal Basis of the INIA – Aboriginal Title and the Doctrine of Preemption**
  - Aboriginal Title consists of a tribe's right to possession of its land subject to the preemptive right of the sovereign to acquire the land if and when the tribe decided to sell
  - The Doctrine of Preemption basically is the discovering nation, by virtue of its discovery, obtained dominion and sovereignty over the land discovered. The Indian tribes, as native occupiers, continued to hold the right of possession, but subject to the sovereignty of the discovering nation. And the discovering nation — the sovereign — had the exclusive right to acquire the interests of the tribe in the land if and when the tribe decided to part with it

# Roots of the Indian Non Intercourse Act

II. *Be it enacted, by the governor, Council and Burgesses of this present general assembly, ...*, That it shall not be lawful for an Indian king, or any other of the said tributary Indians whatsoever, to bargain and sell, or demise to any person or persons, other than to some of their own nation, or their posterity in fee, for life, or for years, the lands laid out and appropriated for the use of the said Indians, or any part or parcel thereof, or to bargain and sell, as aforesaid, any other land whatsoever, now actually possessed, or justly claimed and pretended to by the said Indians, or any of them, ... and that every bargain, sale, or demise hereafter made, contrary to this act, as aforesaid, shall be and is hereby declared to be null and void, to all intents, constructions, and purposes whatsoever.

*Laws of Virginia, October 1705 – 4<sup>th</sup> Anne.*

# Special Relationship – Tribes and Federal Gov't

- Special relationship between Indian tribes and Federal government predates formation of United States.
- Proclamation of 1763 declared certain lands to be “under domination and control” of the crown “for the use of the... Indians”
- Sovereignty over the land, and the right of preemption as to Indian lands, moved from the English Crown to the U.S. government following Independence and the Revolution.

# Special Relationship – Tribes and Federal Gov't

- *Johnson v. M'Intosh* (1823): federal government has ultimate title” and tribes have title of occupancy”
  - Ultimate title is not ownership. It is right of preemption.
  - Title of occupancy includes full and exclusive possession.
- *Cherokee v. Georgia* (1831): tribes are “domestic dependent nations” who, in exchange for ceding their land obtained promises from the U.S. of protection.

# Special Relationship – Tribes and Federal Gov't

- General Allotment Act of 1887 (Dawes Act) – first statute to use “trust” to describe U.S. holding of land, in this case for allottees.
- Indian Reorganization Act of 1934 – authorizes Secretary of Interior to take land “in trust” for tribes and individuals.

# Restraint on Alienation

- The Non-Intercourse Act, these cases, the Dawes Act and Indian Reorganization Act are counter to the common presumption that land titles are freely alienable.

# Indian Non Intercourse Act, 25 U.S.C. § 177

- The first Congress enacted the first version of the INIA the year after the adoption of the Constitution,
- This confirmed the federal government's position as to the successor to the Crown as holder of the right of preemption and its control over the acquisition of lands from the tribes.

# Indian Non Intercourse Act, 25 U.S.C. § 177

Confusion as to Applicability.

- Divergence as to the scope and reach of the INIA between judicial and congressional and administrative authorities.
- 19<sup>th</sup> century Attorney General opinions, the legislative history, occasional Congressional findings and the Department of the Interior regulations lead to the conclusion that the INIA applies to tribal fee lands just as it does to any other tribal lands.

# Indian Non Intercourse Act, 25 U.S.C. § 177

Confusion as to Applicability.

- A number of tribes desiring to sell or encumber their tribal fee lands have sought and obtained Congressional authorization to do so through legislation.
- The legislative history of those acts generally makes little reference to the court decisions but simply refers to the plain wording of the INIA.

# Indian Non Intercourse Act, 25 U.S.C. § 177

## Confusion as to Applicability

- Some federal and state cases hold that, once land has been patented and placed in the public domain, the acquisition of that land by a tribe does not render it subject to the Act,
- However none of those cases refer to the Congressional findings or the legislative history of the various acts authorizing the sale or encumbrance of tribal fee lands, nor the Attorney General opinions or the Interior Department regulations.
- Other cases support a broader application of the Act, but did not lead to an invalidation of any transfer (and those cases did not discuss the Congressional or Administrative authorities).



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## **Indian Non Intercourse Act, 25 U.S.C. § 177**

Bottom Line: There is no exception in the Act or the Regulation there under, 25 C.F.R. 152.22, for fee lands.

# Indian Non Intercourse Act, 25 U.S.C. § 177

This confusion creates issues insuring such conveyances of title.  
It impacts at least two Covered Risks:

- 2.(a) (ii) failure of any person or Entity to have authorized a transfer of conveyance; and
- 3. Unmarketable Title

# Indian Non Intercourse Act, 25 U.S.C. § 177

What to do?

The ALTA NALC encourages clarifying the scope of the NIA through legislation; and,

Although it has been difficult to focus Congress's attention on 25 USC 177 in the immediate and current political climate, we will continue the committee's efforts.

# Indian Non Intercourse Act, 25 U.S.C. § 177

For the present, each title Insurance underwriter makes their own determination on how to deal with the Non Intercourse Act.

# SECTION 17 CORPORATIONS

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# THE INDIAN REORGANIZATION ACT OF 1934



# WHAT A SECTION 17 CORPORATION IS



# SETUP AND ADVANTAGES





# QUESTIONS?

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**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**



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