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Insuring Native American Land: Special Issues and Considerations Part IV – Case Studies: Applying What We Have Learned

Webinar Series IV of IV

Speakers

Nancy Appleby, Appleby Law, PLLC

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Today's Topics

Case Studies:

- Residential
- Commercial Leasehold
- Energy Project



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RESIDENTIAL CASE STUDY



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The Scenario

- Sale of a single-family residence located inside the boundaries of an Indian Reservation
- Special underwriting considerations
 - Vesting of the property (*Part I* of Webinar Series)
 - Unrestricted fee
 - Access (*Part III* of Webinar Series)

Jurisdiction

- What law applies
 - Taxes or assessments
 - Mechanics' lien law
 - Tribal code
 - Subdivision of land
 - Policy coverage
 - ALTA 47 Series of Endorsements



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Change of Scenario

- Allotment Parcel (*Part I* of Webinar Series)
 - Subject to restrictions
 - Patent
 - Approval by federal government
 - Lift of restrictions

Allotment patent 25 year restriction

37100-10. 1.0.

1512.

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that

...with the provision that the title hereby acquired shall not be subject to the alienation, lease, incumbrance,but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restriction.

██████████^s heirs, the lands 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

██████████^s forever, with the provision that the title hereby acquired shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or **his** heirs, or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restriction. 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.



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Restricted Fee

- Certified Title Status Report (“TSR”)
 - Land Title Records Office (“LTRO”) (*Part III* of Webinar Series)
 - Tribal Jurisdiction
 - Tribal laws
 - Tribal regulations
 - Tribal judicial system

Change of Scenario

- Unrestricted fee in the Tribe
- Tribe conveying land to Tribal member under a Tribal housing program
 - Access
 - Jurisdiction
 - Indian Nonintercourse Act, 25 U.S.C. § 177 (*Part I of Webinar Series*)

Indian Nonintercourse Act 25 U.S.C. § 177

- Verified land is vested in unrestricted fee in the Tribe and not a Section 17 Corporation (*Part I* of Webinar Series)
 - Compliance with the Nonintercourse Act
 - Congressional Act
 - Ambiguity

LEASEHOLD CASE STUDY



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The Scenario

- Residential subdivision on Indian-owned trust land
- Master lease
 - Individual Indian landowner
 - Non-Indian developer
- Residential lots subleased to non-Indian homeowners
- Homeowner financing secured by subleasehold mortgage
- Lender requires title insurance to close



Federal Regulation on Indian Land Leasing

- The Rule: Native American trust and restricted land cannot be transferred unless permitted by federal law
- Applicable Federal Law
 - Indian Long-Term Leasing Act: 25 U.S.C. § 415
 - Surface leasing regulations: 25 C.F.R. Part 162
 - Requirements and restrictions
- Ensures that the federal government exercises its trust responsibility to protect and preserve Indian land

Take Away No. 1



Transfers of Indian trust land that do not comply with federal law and regulation at best are invalid, and at worst, void *ab initio*.

Notable Provisions in Our Scenario

• **Master Lease**

- *50-year term*
- *Automatic extension of 49 years*
- *Option to purchase leased land*
 - *10+ years after date of Master Lease*
 - *Fixed price of \$500/Lot or \$100,000 for entire property*



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What To Do?

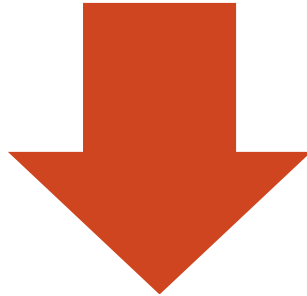
- Confirm
 - 1st: The individual landowner is in title
 - Patent (BLM)
 - Subsequent vesting (LTRO)
 - 2nd: The lease term is permitted by federal law
 - 25 U.S.C. § 415
 - 25 + 25 years
 - Exceptions
 - 3rd: Other provisions comply with federal law
 - 25 U.S.C. § 404 & 25 C.F.R. Part 152

In Our Scenario: Master Lease Violates Federal Law

- *Lease term exceeds federal limit*
 - **Result: Master Lease is invalid/void**
- *Sale Price was fixed regardless of fair market value*
 - Part 152 requires an appraisal be done to set fair market value before sale
 - **Result: Option is unenforceable**
- *Purchase option was granted to developer*
 - Part 152 requires Secretarial approval
 - Part 152 requires the Secretary to notify interested tribes and tribal members that the land is for sale
 - **Result: Option is unenforceable...Any sale based on the option is invalid**



Who Can Approve the Lease?



Secretary of the Interior

↓ delegates to ↓

Assistant Secretary
Bureau of Indian Affairs

↓ re-delegates to ↓

Director
Bureau of Indian Affairs

↓ re-delegates to ↓

Regional Directors

↓ re-delegates to ↓

Agency Superintendents

↓ may delegate to ↓

Acting Superintendents

***In Our Scenario:
Master Lease Not Approved by Secretary
Result:
Master Lease Is Void.***

- The BIA signatory must have actual, properly delegated authority to sign on behalf of the Secretary.
- Superintendent exceeded his approval authority.

Take Away No. 2

- Become familiar with applicable federal law, regulation and delegation of Secretarial authority
 - Leasing
 - 25 U.S.C. § 415
 - 25 C.F.R. Part 162
 - Sale of Allotted Land
 - 25 U.S.C. § 405
 - 25 C.F.R. Part 152

Take Away Nos. 3 & 4

- Review every lease of Indian land with these statutes and regulations in mind.
- Questions? Consult internally. Do not rely on advice from BIA.



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Stay Tuned...

Assigning and mortgaging grants of
leases and ROWs over Indian land:
Orlando



A Bit More on Jurisdiction

- *In Our Scenario: Interpretation and enforcement of the mortgage are governed by the law of the jurisdiction in which the mortgaged property is located*
 - Implications of *McGirt v. Oklahoma*
 - ALTA Series 47 Endorsements



ENERGY PROJECT CASE STUDY



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Energy Project Hypothetical



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Energy Project Hypothetical

- Wind energy developer (proposed insured)
- Wind farm and transmission line
- Land held in trust for tribe by the federal government
- Owner Policy -- \$500 million
- Loan Policy -- \$500 million
- Lease for wind farm
- Easement for transmission line

The BIG Issues Presented

- LTRO records search
- Tribal Authority/Sovereign Immunity
- Trust land means that Dept. of Interior BIA will have to approve and execute documents
- Leasing and easement regulations in play

BIA Land Title Records Office (“LTRO”)

- Federal records office for all documents affecting title to lands held in trust or restricted status
- Part of the Division of Land Titles and Records, responsible for reporting status of title in Native American of title to Native American trust and restricted lands
- Geographic scope

LTRO Offices

For Indian Land Located in the Following Region	Go to the LTRO at the Following Location
Alaska	Anchorage, AK
Eastern	Anadarko, OK
Eastern Oklahoma (includes the Osage and Miami Agency)*	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

Title Status Report (“TSR”)

- A Title Status Report (“TSR”) will disclose all documents affecting title to Native American lands held in trust or restricted status
 - Uncertified
 - Certified
- Can only be obtained from the LTRO
- Timing is KEY
 - Not searchable by general public
 - TSR must be requested
 - Prepared by LTRO examiner

Sample Certified TSR

United States Department of the Interior
Bureau of Indian Affairs
Title Status Report

Report Certification Time and Date: 09/25/2020 03:10:14 PM

Requestor: LHOLMES Date/Time: 09/29/2020 11:26:43

<u>Land Area</u>	<u>Land Area Name</u>	<u>Tract Number</u>	<u>LTRO</u>	<u>Region</u>	<u>Agency</u>	<u>Resources</u>
[REDACTED]	[REDACTED]	T	SOUTHWEST	SOUTHWEST REGIONAL OFFICE	SOUTHERN PUEBLO AGENCY	Both

Original Allottee:

See Appendix A for Land Legal Descriptions

Title Status

Managed Tract 705 T is held by the United States of America in trust for the land owner(s) with trust interests and/or by the land owner(s) with restricted interests and/or fee simple interests, as listed in Appendix "B" attached to and incorporated in this Title Status Report.

The title to Managed Tract 705 T is current, complete, correct, and without defect. Ownership is in unity and interests are owned in the following title status: restricted.

The tract ownership is encumbered by the title documents which have been approved by a properly delegated Federal official and are required to be recorded by law, regulation, or Bureau policy as listed on Appendix "C" attached to and incorporated in this Title Status Report.

See Appendix D for all other documents that are required to be recorded by law, regulation or Bureau policy.

See Appendix E for Tract Notes and/or Coded Remarks.

This report does not cover encroachments nor any other rights that might be disclosed by a physical inspection of the premises, nor questions of location or boundary that an accurate survey may disclose. This Report also does not cover encumbrances, including but not limited to irrigation charges, unpaid claims, not filed or recorded in this Land Titles and Records Office. This report does not state the current ownership of the interests owned in fee simple but states the ownership at the time the interest ceased to be held in trust or restricted ownership status.

This Title Status Report is a true and correct report of the status of title to the real estate described herein according to the official land records recorded and maintained in this office.

Dawn DeLoach

Acting Manager

Basic Structure of Transaction

- Leasehold Estate – 99-year term
- Easement Estate – 99-year term, plus option to renew for 99 yrs.
- Deed of Trust secured by both estates
- Regular issues of validity and enforceability of insured estates
- BIA authority vis-à-vis the tribe



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Leasehold

- Leases and Easements are not under the same regulations – both approved by BIA
- Leasing regulations specifically deal with WSR leases
- Each has to be evaluated separately, even if both estates insured in same policy
- Here the lease is with a tribe that can have a lease not to exceed 99 years (otherwise 25 + 25 years)
 - Easement can be extended for additional 99 years

Easement

- Agreement between tribe and developer
- Tribal resolution authorizing agreement
- BIA Grant of Easement
 - Incorporates tribal agreement
- Term
 - As agreed by tribe
- Other terms and conditions

Tribal Agreement

- Negotiated with developer
- Similar in form to typical commercial easement agreement
- Terms and conditions will become part of Grant of Easement

Tribal Authority

- Understand tribal laws
 - Constitution
 - Other laws

Tribal Resolution

WHEREAS, the [tribe] and [developer] negotiated and reached agreement regarding the terms and conditions for a Grant of Easement for 150 kV electric transmission line and associated facilities around the ‘[tribe] . . . , which agreement was signed by the [tribe] and [developer] . . .(‘the ROW Agreement’’);

WHEREAS, pursuant to the ROW Agreement the [tribe] has consented to the Secretary of the Interior, in accordance with 25 U.S.C. Sections 323-328 and 25 C.F.R. Part 169, granting [developer] a Grant of Easement

Tribal Resolution

NOW, THEREFORE, BE IT RESOLVED that the Tribal Council hereby approves the form of the Grant of Easement and does hereby authorize the appropriate BIA office to execute same . . .

CERTIFICATION

The undersigned do hereby certify that the foregoing Resolution was passed at a duly called meeting of the Tribal Council of the [tribe], held on _____, at which time a quorum was present, with 6 voting for, 0 opposing, and 0 abstaining.



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Sovereign Immunity

- Limited waivers of sovereign immunity

Limited Waiver of Sovereign Immunity by the [tribe]. The [tribe] irrevocably agrees, to the extent that it has or hereafter may acquire any right of immunity against [developer], any Permitted Mortgagee or any of their respective successors and assigns . . . the [tribe] expressly, unconditionally and irrevocably waives any such immunity for itself, its agencies and Affiliates, and its officials acting in their official capacities, and consents and submits to the jurisdiction of the courts as set forth below. . .

BIA Authority

- BIA acts on behalf of Secretary of the Department of the Interior
- Agency Superintendent
- Redelegation Orders

IN WITNESS WHEREOF, Grantor, pursuant to the delegated authority found in 209 DM 8, 230 DM 1, and 3 IAM 4 and supplements thereto (or applicable delegation of authority), hereby grants and executes this Grant of Right-of-Way on this



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BIA Authority

DEPARTMENTAL MANUAL		TRANSMITTAL SHEET	
PART	SUBJECT	RELEASE NUMBER	
See below	ORGANIZATION/DELEGATION	3569 Through	
FOR FURTHER INFORMATION, CONTACT	Assistant Secretary - Indian Affairs	3589	
Office of Planning and	Special Trustee for American Indians	DATE	APR 21 2003
Performance Management	Bureau of Indian Affairs		

EXPLANATION OF MATERIAL TRANSMITTED:

This Departmental Manual (DM) release updates the organization and delegation chapters for the Assistant Secretary - Indian Affairs (AS/IA), the Special Trustee for American Indians (OST), and the Bureau of Indian Affairs (BIA) as follows:

OFFICE OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS

- 109 DM 8 - Revised to describe the AS/IA responsibilities under the new organization.
- 209 DM 8 - Updated to reflect authorities delegated to the AS/IA under the new organization.
- 110 DM 8 - New chapter describing the new organization for the Office of the AS/IA (incorporates Secretary's Order 3214 and Amendments 1-3, including realigning under the AS/IA some former BIA functions previously described in 130 DM 4, 9, and 10).

BIA Authority

Limitations on Authorities that are Redelegated.

A. General

- 1. The authorities identified in 209 DM 8.2, 209 DM 8.4B, and 230 DM 1.3 and 1.5, are Exceptions to General Delegations and are not delegated to RDs.**
- 2. Authority to award and administer Self-Determination contracts and grants to Indian Tribes and Tribal organizations will be redelegated only to employees who are certified under the Awarding Official Certification System (AOCS).**
- 3. Authority to approve "leasehold mortgages" as defined in 25 CFR 162, and "rights of way mortgages" as defined in 25 CFR 169, may be redelegated only to the Agency Superintendent level.**
- 4. Authority to approve the acquisition of on-reservation land for non-gaming purposes is redelegated only to the RD level.**
- 5. Authority to approve BIA Agency fires costing up to \$5 (five) million dollars may be redelegated only to the Agency Superintendent level.**

20-04, Issued: 10/31/19

Replaces #15-31 Issued: 10/23/15



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Assignment

- Power to assign or mortgage
- Current or future consent requirements

ASSIGNMENT. (25 CFR 169.207). This Grant may be assigned by Grantee without the consent of the [tribe] or approval of BIA, and without additional compensation, in accordance with, and subject to, Article VIII of the Agreement, provided that the Grantee and assignee provide a copy of the assignment and supporting documents will be sent to BIA for recording in the LTRO with thirty (30) days of the assignment.

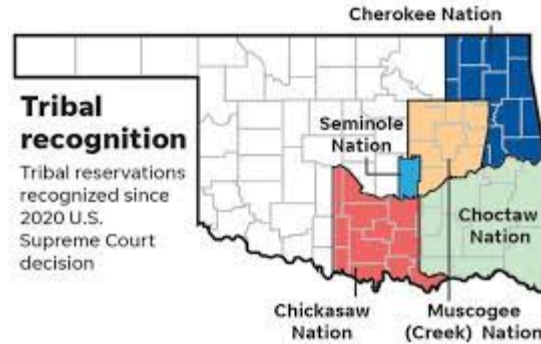
Mortgage

- Power to mortgage
- Current or future consent requirements

MORTGAGE. (25 CFR 169.210). This Grant may be mortgaged by Grantee without the consent of the [tribe] or approval of BIA and without additional compensation, in accordance with, and subject to, Article VIII of the Agreement. A copy of the mortgage and supporting documents will be sent to BIA for recording in the LTRO with thirty (30) days.

Applicable Law

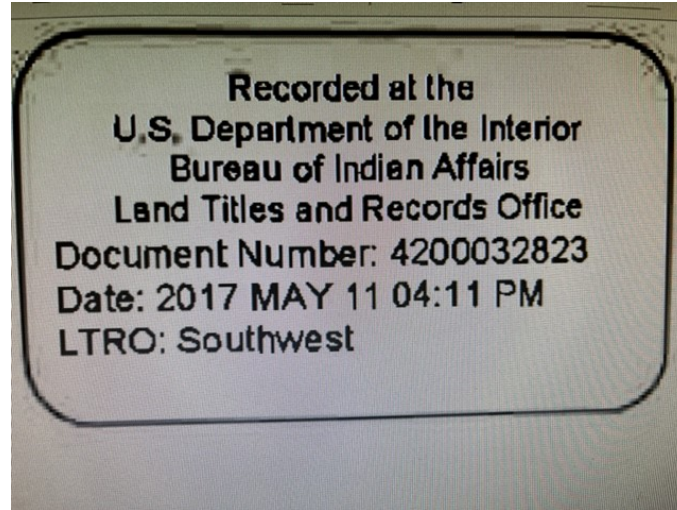
- *McGirt v. Oklahoma*, No. 18-9526 (7/9/20)



- Which tribal laws may apply, if any?

Recording Insured Interests

- Record in LTRO



- DOWNDATING
- Record in county records too?

In Summary . . .

- Creation of insured interest(s)
- No applicable tribal law
- Waivers of sovereign immunity
- Terms and conditions of insured instruments as exceptions
- Future consents/approvals
- Proper recording in LTRO

QUESTIONS?

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NATIVE AMERICAN LAND WEBINAR SERIES

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

CINDY GUANELL
SEAN HOLLAND
PAUL COZZI
BRANDEN ALLEN

PART II – LEASING

ORLANDO LUCERO
SAM SHIEL
CINDY GUANELL
ROLF LINDBERG



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NATIVE AMERICAN LAND WEBINAR SERIES

PART III – AUTHORITY; RECORDING; ACCESS

ORLANDO LUCERO
DAWN LEWALLEN
CHAD HANSEN
MEGAN POWELL

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

NANCY APPLEBY
CINDY GUANELL
ORLANDO LUCERO
MEGAN POWELL

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