

Title Insurance and Native American Lands

Presented by:

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- **Title Insurance**
- **Title Status Reports vs. Title Commitments**
- **LTRO Regulations**
- **Access**
- **Jurisdiction**
- **Sovereign Immunity**
- **Authority**
- **Non-Intercourse Act**
- **Transactions**

- **A policy of title insurance is a contract of indemnity that provides the named Insured with coverage against loss or damage by reason of those covered risks outlined in the policy, subject to the terms, conditions, exceptions and exclusions in the policy.**
- **The policy provides coverage related to real property interests.**
 - Fee, leasehold, easement

ALTA – American Land Title Association

- Industry trade organization
- **ALTA Owner's and Loan Policies**
- **CLTA Owner's and Loan Policies**
- **Endorsements**
- **Guarantee Products**
- **Closing Protection Letters**
- **ALTA forms can be found at www.alta.org.**

Most current version is the 2021 ALTA Owner's Policy.

Contains 10 Covered Risks

Examples of Covered Risks*:

- Title being vested other than as stated in the policy.
- Loss resulting from specified defects, liens, or encumbrance on the title.
- Unmarketable Title.
- No right of access to and from the land.

***See 2021 ALTA Owner's Policy of Title Insurance for full list of Covered Risks.**

ALTA OWNER'S POLICY OF TITLE INSURANCE
issued by
BLANK TITLE INSURANCE COMPANY

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 17.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, [Blank Title Insurance Company], a [Blank] corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
 - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.

Most current version is the 2021 ALTA Loan Policy.

Contains 14 Covered Risks

Examples of Covered Risks*:

- The invalidity or unenforceability of the lien of the Insured Mortgage upon the title.
- The lack of priority of the lien of the Insured Mortgage upon the Title as security for the Indebtedness over any other lien or encumbrance on the Title.

*See 2021 ALTA Loan Policy of Title Insurance for full list of Covered Risks.

ALTA LOAN POLICY OF TITLE INSURANCE
issued by
BLANK TITLE INSURANCE COMPANY

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 16.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, [Blank Title Insurance Company], a [Blank] corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
 - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.

- **Endorsements add additional coverage to the policy for matters not already included within the policy jacket.**
- **Each endorsement must be approved by the title company prior to issuance.**
- **Complex endorsements are more commonly issued in commercial transactions.**

Why do you need title insurance?

- **Lenders require their borrowers to provide them with a policy as a condition of granting the loan.**
- **Buyers require the seller to provide them with a policy as a condition of purchase.**
- **Attorneys who are retained for the purpose of litigation involving real property need a title guarantee product identifying who has an interest in the land.**
 - Interest can include lien, leasehold or easement interest.



HUD 184 Loans secured by land held in trust or restricted fee for the borrower.

- If the property is owned in unrestricted fee, a loan policy will typically be requested.

Fee to Trust Transfers

- 25 CFR Part 151 as amended May 16, 2016 deletes the requirement that applicants for fee to trust transfers furnish the USA with a title insurance policy.
- Other forms of title documentation are accepted.

Fee to Trust Transfers

- After the transfer has been approved and the property is transferred into the United States of America in Trust for the tribe, if a policy is required an ALTA U.S. Policy of Title Insurance is issued.
- 25 C.F.R. 151 was modified in 2016 to delete requirement that applicants furnish the United States with a title insurance policy.
- Revised regulations instead require applicants furnish a deed evidencing their ownership of the land or a written contract for sale or statement from the current owner that the applicant will have ownership.
- Additionally, applicants must submit either a current title commitment or the title policy issued when the applicant or current owner acquired the land and an abstract of title from the date on which the interest was acquired by the current owner or application to the current date.



Benefits of Title Insurance

- **In addition to paying claims under policies, the title insurance industry cleans up and maintains the accuracy of the public records.**
- **Accurate legal descriptions and boundary line surveys (which are required in order to provide some forms of coverage) aid in identifying discrepancies between property lines that must be resolved to maintain a clear chain of ownership.**



- **Title records for trust land or restricted fee land are maintained in the BIA Land Title Records Office (LTRO).**
 - These records are not accessible to the public.
- **Title records for unrestricted fee land are maintained in local Clerk and Recorder's Office.**
 - These records are accessible to the public.
- **Additional title records maintained by a tribe.**
 - If they exist, they are generally not accessible to the public. May result in policy exception.

- **The LTRO will produce a Title Status Report (TSR) identifying the vesting and encumbrances on title.**
- **A title company will produce a Title Commitment identifying the vesting and encumbrances on title.**
 - The Title Commitment will also identify requirements that the proposed Insured must fulfill prior to issuance of the final title policy.

Sample TSR

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

Report Certification Time and Date: 09/02/2020 03:22:41 PM

Requestor: [REDACTED] Date/Time: 09/03/2020 11:16:22

<u>Land Area</u>	<u>Land Area Name</u>	<u>Tract Number</u>	<u>LTRQ</u>	<u>Region</u>	<u>Agency</u>	<u>Resources</u>
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Original Allottee: [REDACTED]

See Appendix A for Land Legal Descriptions

Title Status

Tract [REDACTED] 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 Tract [REDACTED] is current, complete, correct, and without defect. Ownership is in unity and interests are owned in the following title status: trust.

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.

No Tract Notes or Coded Remarks for this tract.

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.

[REDACTED]

Manager, Land Titles and Records



Sample Title Commitment

 Schedule A	ALTA Commitment for Title Insurance ISSUED BY First American Title Insurance Company File No:
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Transaction Identification Data for reference only:

Issuing Agent: First American Title Insurance Company

Issuing Office:

Issuing Office File No.:

Issuing Office's ALTA® Registry ID:

Commitment No.:

Property Address: Revision No.:

SCHEDULE A

1. Commitment Date:
2. Policies to be issued:
 - (A) ALTA Owner's Policy (6-17-06)
Proposed Insured:
Proposed Policy Amount: \$ Premium: \$ Tax: \$
 - (B) ALTA Loan Policy (6-17-06)
Proposed Insured:
Proposed Policy Amount: \$ Premium: \$ Tax: \$
3. The estate or interest in the Land described or referred to in this Commitment is
Fee Simple
4. The Title is, at the Commitment Date, vested in: G
5. The Land is described as follows:

See Exhibit "A" attached hereto and made a part hereof



Potential Challenges:

- People who are not aware of the requirement to file title records in the LTRO may simply record them in the local Clerk and Recorder's Office.
- It may be more difficult or time consuming to obtain a copy of a document referenced on a Title Status Report.
- Staffing, resources and competitive influences may differ between the two sources, resulting in varying delivery turn times.

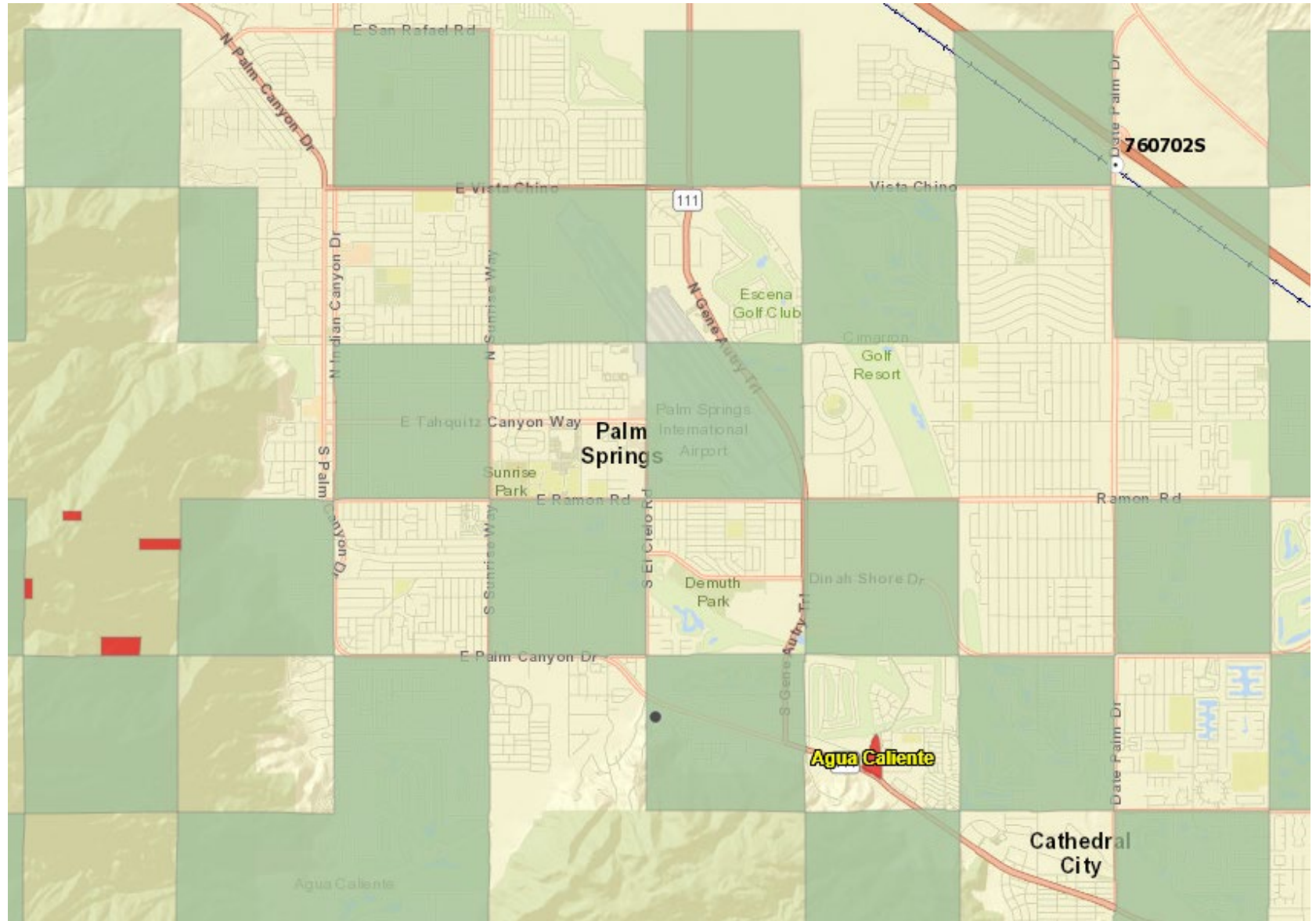
25 CFR Part 150 – Revised 8-16-2021

- **Section 150.203 Who may submit a title document for recording?**
 - Documents cannot be submitted directly to the LTRO for recording. They must be submitted to the Agency, Region or the Office of Hearings and Appeals within the Dept of the Interior (OHA) to be further submitted to the LTRO.
- **Section 150.303 Who may request and receive copies of title documents in the record of title or reports from the LTRO without filing a Freedom of Information Act request?**
 - Title companies, lenders and government agencies are entitled to access to the appropriate title documents and TSRs. However, title companies should make these requests to BIA agency realty staff.

Covered Risk: No right of access to and from the land.

- Access issues across tribal lands are prevalent.
- Recent examples:
 - Lac du Flambeau (WI)
 - New Mexico Pueblos
- If access route crosses land held in trust or restricted status, we must confirm compliance with 25 C.F.R. Part 169 (Rights of Way Over Indian Land).
- Checkerboard vesting can create a scenario where “public” roads traverse in and out of trust or restricted fee lands.

Checkerboard Vesting & Access



- **It is important for a title insurer to understand what law applies to the land described in the policy in order to properly underwrite the risk being assumed.**
- **Examples:**
 - Mechanics' lien law
 - Foreclosure law
 - Zoning laws & regulations
 - Subdivision laws & regulations

- **Trust and restricted fee land.**
 - Tribal jurisdiction.
- **Unrestricted fee land inside a reservation.**
 - It depends. Different tribes take different approaches.
 - *Montana v. United States* could have an impact.
- **Ambiguity could result in a compact or MOU between the tribe and a state or local government.**

MEMORANDUM OF UNDERSTANDING BETWEEN THE TULALIP TRIBES AND SNOHOMISH COUNTY ESTABLISHING PROCESS FOR COORDINATED LONG-RANGE PLANNING & INFORMATION SHARING

This Memorandum of Understanding (“MOU”) is made by and between the Tulalip Tribes, a federally recognized Indian tribe, and Snohomish County, a political subdivision of the State of Washington. The Tulalip Tribes and Snohomish County (collectively referred to as “Parties” or “governments”) hereby acknowledge and agree as follows:

7. The Tulalip Tribes and Snohomish County do not agree on governmental jurisdiction over land use within the exterior boundaries on the Tulalip Reservation. The Tulalip Tribes asserts land use regulatory jurisdiction over all lands within the exterior boundaries of the Tulalip Reservation, regardless of ownership type. Snohomish County asserts land use regulatory jurisdiction for deeded lands held in fee simple title owned by non-Tulalip tribal members lying within the exterior boundaries of the Tulalip Indian Reservation. The Tulalip Tribes and Snohomish County have separate comprehensive land use planning codes, plans and programs. These separate land use planning schemes and jurisdictional conflicts have undermined comprehensive land use planning on the Tulalip Reservation to the detriment of all.
8. Without either party conceding its position with regard to land use planning jurisdiction, the Tulalip Tribes and Snohomish County have determined it is in each Party’s interest to enter into this MOU to create a cooperative comprehensive planning framework to reduce conflicts and facilitate more effective and consistent land use planning within the Tulalip Reservation for the benefit of all Tulalip Reservation residents.

Regulation of Non-Indians on fee land within the reservation

- First consider treaties or federal statutes that may affirm/vest jurisdiction.
- If none, presumption is against tribal regulatory authority unless:
 1. The non-Indian has consensual relations with the tribe or its members through commercial dealing, contracts, leases or other arrangements; or
 2. A non-Indian's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The application of either 1 or 2 is referred to as the “Montana Exception”.

- **Old versions of ALTA Policy Forms uses phrases like “the law of the jurisdiction where the land is located”.**
- **Originally intended to mean state jurisdiction.**
- **However, this could imply tribal jurisdiction.**
- **Policy forms have been clarified to say, “the law of the state where the land is located”.**

ALTA 26 Subdivision Endorsement

Old Language:

“The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land to constitute a lawfully created parcel according to the subdivision statutes and local subdivision ordinances applicable to the Land”.

Current Language:

“The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land to constitute a lawfully created parcel according to the **State subdivision statutes** and the subdivision ordinances of the **county or municipality of the State** applicable to the Land.”

Limitation of coverage does not change the fact that there may be an applicable tribal ordinance.



Obstacles for Title Insurers in Tribal Court

- 574 federally recognized tribes means many different tribal courts applying different tribal laws.
- Title industry understands state laws and our industry has always relied on them.
- Title industry lacks experience and knowledge pertaining to tribal court rules and precedents.
- There is a lack of tribal case law interpreting title insurance policy forms.
- A lack of certainty increases risk for policyholders and shareholders.

Sovereign Immunity

- **Tribes are sovereign nations that possess inherent powers of self-government.**
- **A tribe cannot be sued in federal, state or tribal court unless they waive their sovereign immunity.**
- **When may a title company request a waiver of sovereign immunity from the tribe?**
 - When a tribe or a tribal entity is the named Insured in the policy.
 - When the tribe or tribal entity is contracting with the Insured (e.g. lease, mortgage, etc.)
- **Why does the title company request the waiver?**



- **What is the process for approving a waiver?**
 - If it requires a tribal council meeting, try to have this discussion with the title company early in the transaction.
- **What should the waiver say?**
 - Be express and unambiguous.
 - Consent to jurisdiction.
 - Consent to a choice of law.
 - Consent to a venue.
 - Clearly identify any limitation on remedies and assets available to satisfy a judgment.
 - Address enforcement of judgments.

Mass Bay Insurance Co v. Tulalip Tribes

- Tribe sued by a sub-contractor for negligence and breach of warranty.
- Tribe tendered their claims for defense and indemnity to their insurer (Massachusetts Bay).
- Insurer accepted the claim subject to a reservation of rights, which included a right to seek a court ruling determining whether the Insurer owed any defense or coverage obligation under the insurance policy.
- Insurer filed an action seeking a judicial determination that they did not owe a defense or indemnity obligation.



- **Tribe filed a motion to dismiss for lack of subject matter jurisdiction based on:**
 1. The tribe is neither a foreign state nor a citizen of any state, which defeats diversity jurisdiction.
 2. The tribe never waived their sovereign immunity which deprives federal courts of subject matter jurisdiction over claims asserted against the tribe.
 3. The Plaintiff failed to exhaust tribal court remedies.
- **Plaintiffs voluntarily dismissed the tribe from the litigation.**

ALTA Tribal Waivers and Consents Endorsement

ALTA 48 Tribal Waivers and Consents Endorsement

Attached to Policy No. _____

Issued by

BLANK TITLE INSURANCE COMPANY

1. For purposes of this endorsement only, "Tribe" means (*insert exact name of the tribe as published in the Federal Register*).
2. Exclusively with regard to any action or proceeding arising out of or related to the policy, and not otherwise, the Tribe:
 - a. Waives any sovereign immunity from suit (and any defense based thereon); and
 - b. Waives any defense due to failure to exhaust remedies in the courts of the Tribe; and
 - c. Consents to jurisdiction in the federal courts of the United States of America and the courts of the state(s) where the Land is located [or: (*insert state*)]; and
 - d. Consents to venue in the federal courts of the United States of America and the courts of the state(s) where the Land is located [or: (*insert state*)].
3. Exclusively with regard to any action or proceeding arising out of or related to the policy, and not otherwise, if the Insured is an Entity in which the Tribe has an ownership interest, the Insured:
 - a. Waives any sovereign immunity from suit (and any defense based thereon) that the Insured may possess; and
 - b. Waives any defense due to failure to exhaust remedies in the courts of the Tribe that the Insured may possess; and
 - c. Consents to jurisdiction over the Insured in the federal courts of the United States of America and the courts of the state(s) where the Land is located [or: (*insert state*)]; and
 - d. Consents to venue for the Insured in the federal courts of the United States of America and the courts of the state(s) where the Land is located [or: (*insert state*)].

The Company reserves, as to any successor Insured, all rights and defenses that it would have against, and any waivers and consents by, any predecessor Insured.



First American
Title Guaranty Company

- When a member of a tribe or tribal entity is executing a document, we must have evidence of their authority to bind the tribe or tribal entity.
- Title insurance policies provide coverage for a defect in title resulting from lack of authority. This can result in substantial losses.
- Organizational documentation for the tribe or tribal entity will be requested in order to establish who has authority to act, and what limitations there are on that authority.

Leasing Authority

- When insuring a leasehold transaction involving trust or restricted land, there are federal limitations on the tribe's authority to enter into the lease.
- 25 U.S.C. 415(a – g) authorizes leasing of these lands for a specified number of years. These leases are often regulated by 25 C.F.R 162.
- Tribes may also have approved regulations specific to them under the HEARTH Act.
- There are several other federal statutes resulting from federal acts that provide leasing authority.
- Evidence of authority to lease the land should be provided, along with a copy of the lease, as early in the transaction as possible.



Indian Trade and Intercourse Act of 1790

- Federal act that restricts tribes from conveying, leasing or encumbering their land without congressional approval.
- Act has never been repealed, and there is ambiguity about its application on fee lands.
- There are court cases finding both ways, and tribes that take opposite stances.
- There is no US Supreme Court case on point.

Tribes who have recently secured a congressional act authorizing them to convey, lease or encumber their fee land.

- Oregon Tribal Economic Development Act (2018)
 - Confederated Tribes of Coos
 - Lower Umpqua
 - Siuslaw Indians
 - Confederated Tribes of the Grand Ronde Community of Oregon
 - Confederated Tribes of Siletz Indians of Oregon
 - Confederated Tribes of Warm Springs
 - Cow Creek Band of Umpqua Tribe of Indians
- Miami Tribe of Oklahoma – Congressional Act in 2016
- Fon du Lac Band of Lake Superior Chippewa Indians of Minnesota – Congressional Act in 2014

- **The title industry wants to be a good transactional partner and support economic development.**
- **It's important to address expectations early.**
 - If a TSR is needed, ensure it is ordered at the same time or prior to placing the order for title insurance.
 - Provide authority and leasing documentation early in the transaction.
 - If a waiver of sovereign immunity is requested and the tribe is willing to accommodate that request, be prepared to provide it prior to closing.
 - If the tribe wants to convey, lease or encumber land they own in fee, discuss concerns pertaining to the Nonintercourse Act early in the transaction.

Thank you.

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