

TITLE ALERT

Title Alert 2016-01A

**May 23, 2016
PA - STANDARD**

Access Through Native American Lands

Replaces and Supersedes: Title Alert 2016-01 issued February 16, 2016

Purpose: To provide guidance and establish standard procedures for transactions in which access to and from the Land¹ requires crossing Native American Land ("NAL"). For the purposes of this Title Alert, NAL is defined as land that is:

- a) held in trust by the United States for an individual Native American, Native American tribe, band, pueblo, other group of Native Americans, or an entity owned and controlled by a Native American tribe ("Tribal Entity") (whether inside or outside an Indian reservation);
- b) contained within an Indian reservation and owned in restricted fee by an individual Native American, a Native American tribe, band, pueblo, other group of Native Americans, or a Tribal Entity; or
- c) owned in unrestricted fee by a Native American tribe, band, pueblo, other group of Native Americans, or a Tribal Entity (whether inside or outside an Indian reservation).

Background: Insuring access across NAL requires a thorough review of the documents that create (or will create) access for the Land. During the course of your examination of the Land and review of the documents in question, remember the following general principles:

- A valid easement or right of way is required to cross NAL. Do not rely solely upon a road or highway's designation as "county" or "state" to insure access if the road or highway is on NAL.
- Many of these access easements and rights of way are for a term of years. Be certain to check for expiration of these grants.
- When the NAL in question is owned in unrestricted fee by a Native American tribe or Tribal Entity, the easement or other right of way must be granted by the Native American tribe or Tribal Entity that owns the NAL. Moreover, a special analysis is necessary as to the application of the Nonintercourse Act, 25 U.S.C. § 177.
- When the NAL in question is owned in restricted fee or held in trust by the United States of America, the easement or right of way must be granted by the Department of the Interior (either acting directly or through the Bureau of Indian Affairs) pursuant to 25 U.S.C. § 323-328 and 25 C.F.R. § 169, et seq. In addition, the individual Native American, Native American Tribe, or Tribal Entity must consent to the grant.
- Be certain that the access easement or right of way benefits or will benefit your Insured as owner of the Land. An easement or right of way for access over NAL owned in restricted fee or held in trust may be assigned to a new grantee, but only if certain regulatory requirements as set forth in 25 C.F.R. § 169.207 are satisfied.

¹Capitalized terms not otherwise defined in this Communication have the same meaning as set forth in the ALTA 2006 policies.

Standard: If access to the Land requires crossing NAL, you must consult with Ohio Bar Title Insurance Company/Penn Attorneys. If there is no satisfactory easement or right of way, an exception for the lack of a right of access to and from the Land must be included in the policy (and any commitment or preliminary report).

Before contacting us, be prepared to discuss the following:

- the ownership status of the NAL over which the right of access is to be insured;
- prior grants or assignments of easements or rights of way benefitting the Land to be insured, if any, including evidence of the authority of the granting entity to have made the grant;
- the constituent documents of the Native American tribe or Tribal Entity involved, including its statutes and bylaws; and
- whether the Company has previously issued a policy relative to the Land without taking an exception for the lack of a right of access.

If you have any questions, please feel free to contact us.

Note: Under the Approved Attorney system, the scope of our relationship is limited to the functions of underwriting and the issuance of title insurance policies on your behalf and does not include closing or escrow services. We sometimes provide information and recommendations with regard to your closing or escrow business as a courtesy to you. Moreover, some communications, depending on whether noncompliance could impact on liability under our policies or closing protection letters, should be considered directives. This Advisory is being provided to you with those considerations in mind.

WARNING: This Underwriting Communication is intended solely for the employees of Penn Attorneys/Ohio Bar Title Insurance Company and its Approved Attorneys, and is not to be distributed to third parties, and any reliance by any other person or entity is unauthorized. This Underwriting Communication is intended solely for the purpose of underwriting policies of Ohio Bar Title Insurance Company.

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