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Title Insurance & Native American Lands: An Introduction

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Today's Topics

- ☐ Federal Trust Responsibility
- ☐ Sovereignty and Sovereign Immunity from Suit
- ☐ Indian Land Titles
- ☐ Searching and Recording
- ☐ Access



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Federally Recognized Tribes

- There are currently 573 federally recognized tribes eligible to receive services from the United States Bureau of Indian Affairs.
- Most recent list posted in the Federal Register by the BIA on February 1, 2019.

1. FEDERAL TRUST RESPONSIBILITY



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Federal Trust Responsibility

- *Cherokee v. Georgia* (1831): tribes are “domestic dependent nations” who, in exchange for ceding their land obtained promises, from the U.S., of protection.
- U.S. has a fiduciary obligation to Indian tribes defined by federal statutes, regulations and jurisprudence.

Federal Trust Responsibility

- Requires U.S. to uphold the rights reserved or granted to tribes and individual Native Americans by treaties, statutes and executive orders, including
 - Management of tribal trust assets.
 - Protection of tribal interests.
 - Oversight approval of transactions.

Federal Trust Responsibility

- Title records to Indian Lands are owned by the U.S.
- Ambiguities will be interpreted in favor of the tribe.

Federal Trust Responsibility

Practice Tip:

As trustee, the U.S. is not neutral when it comes to Indian country. It has many responsibilities to tribes under federal law, including review of transactions in which Indian-owned land is involved. Failing to obtain requisite federal approval is fatal. Know when federal approval is required and insist that it is duly and properly obtained and evidenced on documents.

2. SOVEREIGN IMMUNITY FROM SUIT



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Sovereignty

- Sovereignty (general definition): supreme legal authority.
- Sovereignty (federal Indian law): while denied “full” sovereignty as independent nations, tribes have authority over their relations among themselves.

Sovereignty

- Treaties are valid.
- Tribes are “dependent sovereign nations,” distinct self-governing political entities.
 - *Worcester v. Georgia* (1832): tribes have a right of self-government notwithstanding that tribes are “dependent” on the U.S.
- Tribes have inherent sovereign rights, e.g. power to determine form of government; power to make and enforce laws; power to govern members; power to tax; power to determine conditions for membership; power to exclude; power to regulate property; immunity from unconsented suit.

Sovereignty

- State law does not apply to tribal Indians or Indian reservations, unless Congress provides otherwise (e.g. P.L. 280, granting California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska jurisdiction over tribes and their members).
- State and local law applies to tribes when they conduct business outside tribal lands.

Sovereignty

- However, conducting business outside tribal lands does not constitute a waiver of tribes' immunity from suit.

Sovereignty

Recap:

Tribes possess the inherent powers of any sovereign government, except to the extent that such powers are limited or qualified by federal law [treaties, agreements, Acts of Congress, judicial decisions].

Sovereign Immunity from Suit

- General Principles
 - Tribe is immune from suit absent an enforceable waiver by Congress or the tribe.
 - Sovereign immunity extends to tribal officials.
 - Contracting alone does not waive sovereign immunity.
 - Constituent documents may require that the waiver take a certain form and include certain language.

Sovereign Immunity from Suit

- General Principles (cont.)
 - Waivers are narrowly construed.
 - Waivers are construed against the non-tribal counterparty.
 - May limit remedies or resources available to satisfy a judgment.
 - Tribal business entities may have sovereign immunity, but do not have the power or authority to waive the tribe's immunity from suit.

Sovereign Immunity from Suit

- Waiver by tribe should
 - Be express and unambiguous.
 - Describe clearly any limitation on remedies and assets available to satisfy any judgment.
 - Consent to jurisdiction.
 - Consent to a choice of law.
 - Address enforcement of judgments.

Sovereign Immunity from Suit

- Section 17 corporations and entities created by tribes are generally immune from suit.
 - Examine charter and bylaws, or other formation documents.
 - “Sue and be sued” clauses are not likely to be an enforceable waiver of immunity.
- Business entities formed under State law may be immune from suit.
 - “Subordinate economic entity” test.
 - Fact-intensive analysis.

Sovereign Immunity from Suit

- Why do title companies care about tribal immunity from suit?
 - Enforceability of insured instruments (e.g. lease, leasehold mortgage).
 - Subrogation.

3. INDIAN LAND TITLES



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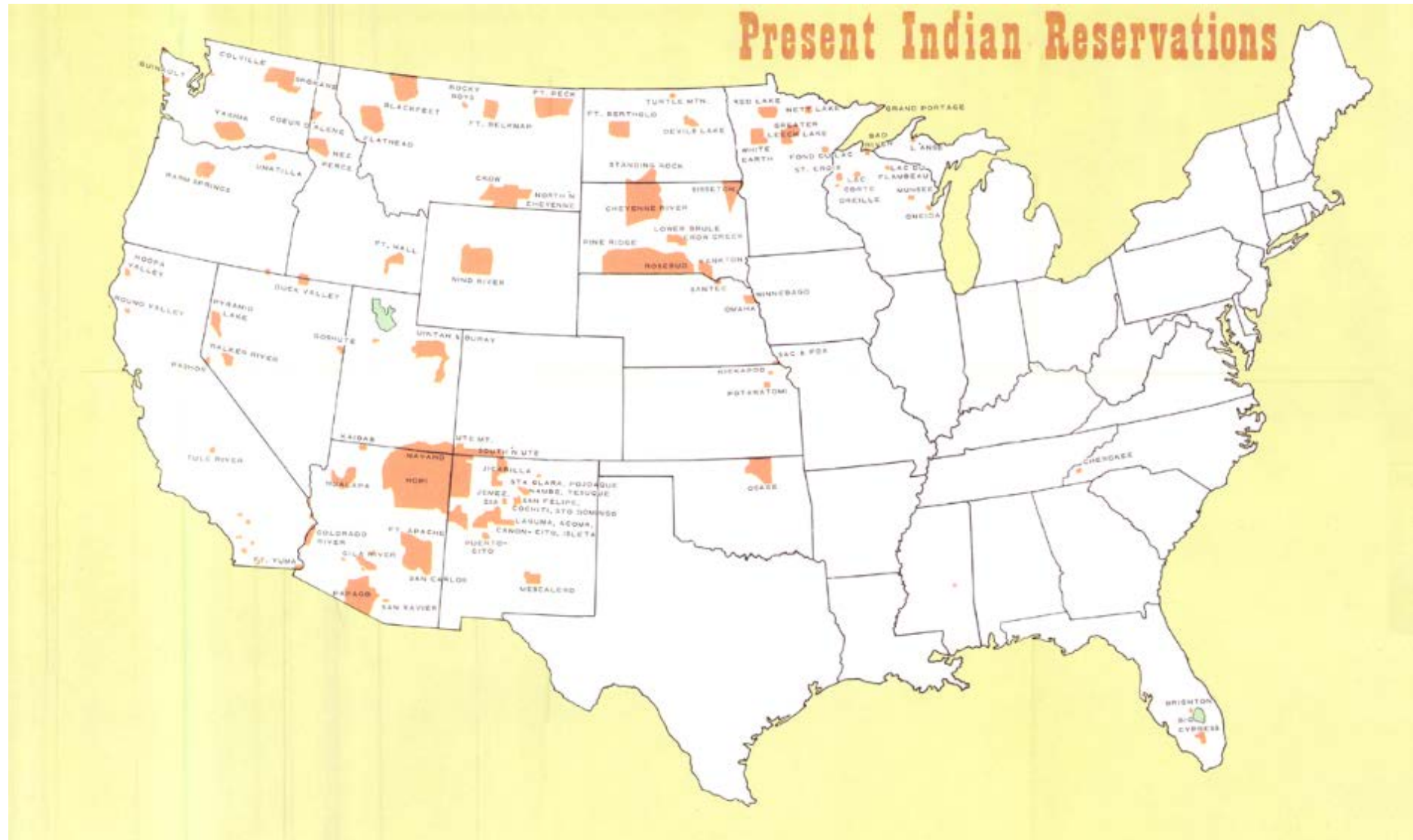
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Land Claims by Tribe

1. TREATY OF GREENVILLE WITH CHIPPEWA, DELAWARE, EEL RIVER, KASKASKIA, KICKAPOO, MIAMI, OTTAWA, PIANKSHAW, POTAWATOMI, WEA, WYANDOT
2. DELAWARE, EEL RIVER, MIAMI, POTAWATOMI, WEA
3. DELAWARE, EEL RIVER, MIAMI, POTAWATOMI
4. DELAWARE, EEL RIVER, KICKAPOO, MIAMI, POTAWATOMI
5. TREATY OF PRAIRIE DU CHIEN WITH SAG, FOX, SIOUX, OMAHA, IOWA, OTO, MISSOURI
6. CHIPPEWA, DELAWARE, MUNSEE, OTTAWA, POTAWATOMI, SHANNEE, WYANDOT
7. OTTAWA, CHIPPEWA, POTAWATOMI (REFERS TO DARK STRIPES)
8. GROS VENTRE, PEGAN, BLOOD, BLACKFEET, RIVER CROW



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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 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

Indian Land Titles

- Allotted Land
 - General Allotment Act of 1887 (Dawes Act).
 - Indian Reorganization Act of 1934 (25 U.S.C. § 461).
 - Impact of the allotment policy.
 - Fractionalization of ownership.
 - 90 million + acres of land passed out of Indian ownership, most of which had been reserved by tribes in treaties.
 - Allotted Land is often referred to as land held in “restricted fee” due to the restrictions on alienation without federal approval.

Indian Land Titles: 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 acquired or reacquired by the tribe and conveyed to the U.S. in trust for the tribe.

Indian Land Titles: Fee to Trust Transfers

- 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 U.S.C. § 151.
 - Acceptance of legal title by U.S. generally is discretionary.
 - Discretionary acquisition vs. Mandatory acquisition.
 - 25 U.S.C. § 151 modified in 2016.
 - ALTA U.S. Policy form issued when insuring fee to trust transfers.

Indian Land Titles: Individual Trust Land

- Individual Trust Land
 - Legal title held by U.S. in trust for individual Indian(s).
 - Beneficial title held by individual Indian(s).
 - Land allotted to an individual tribal member in trust, the trust status of which was never terminated.
 - Land acquired by the tribal member and conveyed to the U.S. in trust for the individual.

Indian Land Titles: 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 may be restricted by the Non-Intercourse Act.
 - Not included in the database maintained by the BIA LTRO.

Indian Land Titles: Individual Indian Fee Land

- Individual Indian 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.

Indian Land Titles: Surface Leases

- Surface Leases and Leasehold Mortgages
 - Long Term Leasing Act (25 U.S.C. § 415; 25 C.F.R. § 162).
 - Most prominent statutory authority for leasing on trust or restricted land.
 - Tribes and individual Indian may grant leases for public, religious, educational, recreational or business purposes, subject to the Secretary of the Interior's approval.
 - Typical term 25 years, plus 25 year extension. Some specifically identified tribes may lease up to 99 years.

Indian Land Titles: Surface Leases

- Surface Leases and Leasehold Mortgages (cont.)
 - Lease is invalid unless approved by the Secretary of the Interior
 - Secretarial consent does not cause the U.S. to be a party to the lease.
 - Federal approval of a lease or leasehold mortgage is a “major federal action” that triggers federal environmental protection laws (e.g. National Environmental Policy Act, National Historic Preservation Act).
 - Establishes procedures for obtaining Secretarial approval of leases, as well as administration and enforcement of leases.

Indian Land Titles: Surface Leases

- Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH) (HR 205, P.L. 112-151)
 - Amends portions of the Long Term Leasing Act.
 - Effect: Permits tribe to enter into surface leases WITHOUT Secretarial approval pursuant to tribal leasing regulations that have been approved by the Secretary.

Indian Land Titles: Surface Leases

- HEARTH Act (cont.)
 - Limitations
 - Business leases: 25 years plus two 25 year renewals.
 - Public, religious, educational, recreation or residential leases: up to 75 years.

Other Authority

- There are several other statutes authorizing leasing. Their applicability depends on the location, vesting and/or tribe involved.
 - Examples: Five Civilized Tribes (Cherokee, Chickasaw, Choctaw, Creek, Seminole) and Navajo Nation.
- Always be sure that you understand the statutory authority under which the lease is being entered into, and you are able to confirm compliance with the statute and the regulations for that statute.
 - Statutory authority should be contained in the original lease.

4. TITLE SEARCHES AND RECORDING



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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).

BIA Land Title Records Office (“LTRO”)

- All documents affecting title to “Indian land” must be recorded in the appropriate BIA LTRO (25 C.F.R. § 150).
- Process for submitting documents to the LTROs varies from region to region.

BIA Land Title Records Office

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)

BIA Land Title Records Regional Offices



BIA Land Title Records Office (“LTRO”)

- BIA’s land titles and records system: TAAMS
 - TAAMS: Trust Asset and Accounting Management System
- LTROs issue TSRs.
 - TSR: Title Status Report
- LTROs are regionally based.
 - 12 Regional LTROs.
 - 10 Tribal LTROs located on reservations.

Records Maintained by the LTRO

- If property is held in trust or restricted status, a Title Status Report from the regional or tribal LTRO will disclose what has been recorded in the LTRO against the property.
 - Some documents may also be recorded with the local clerk and recorder and available through a title company title plant.
- A Title Status Report must be obtained from the LTRO. It will be prepared by an employee at the LTRO.
- The LTRO may require that the Title Status Report be ordered by, and delivered to, the property owner.

Recording Requirements

- If the property is held in trust or restricted status, any document affecting title must be recorded in the Land Title Records office.
- Documents affecting title to fee land do NOT need to be recorded in the LTRO.
- Once property comes out of trust or restricted status into fee status, the LTRO no longer keeps records for that property.

5. ACCESS



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Rights of Way Over Indian Land

- 25 C.F.R. § 169 – Rights of Way over Indian Land
 - Affects land held in trust or restricted status, as well as BIA Land (land owned and administered by the BIA).
 - Generally easements are granted for a term of years. Once expired, easements must be re-established.
 - Easement rights may be assignable (requires landowner consent and BIA approval).

Who grants the easement?

- When the land is owned in unrestricted fee by a tribe or tribal entity, the easement must be granted by the tribe or tribal entity that owns the property.
 - Subject to the Nonintercourse Act 25 U.S.C. § 177.
- When the land is owned in restricted fee or held in trust by the U.S. the easement must be granted by the Department of the Interior (acting directly or through the BIA).
 - The individual Native American or tribe must consent to the grant.

Access Through Reservation Land

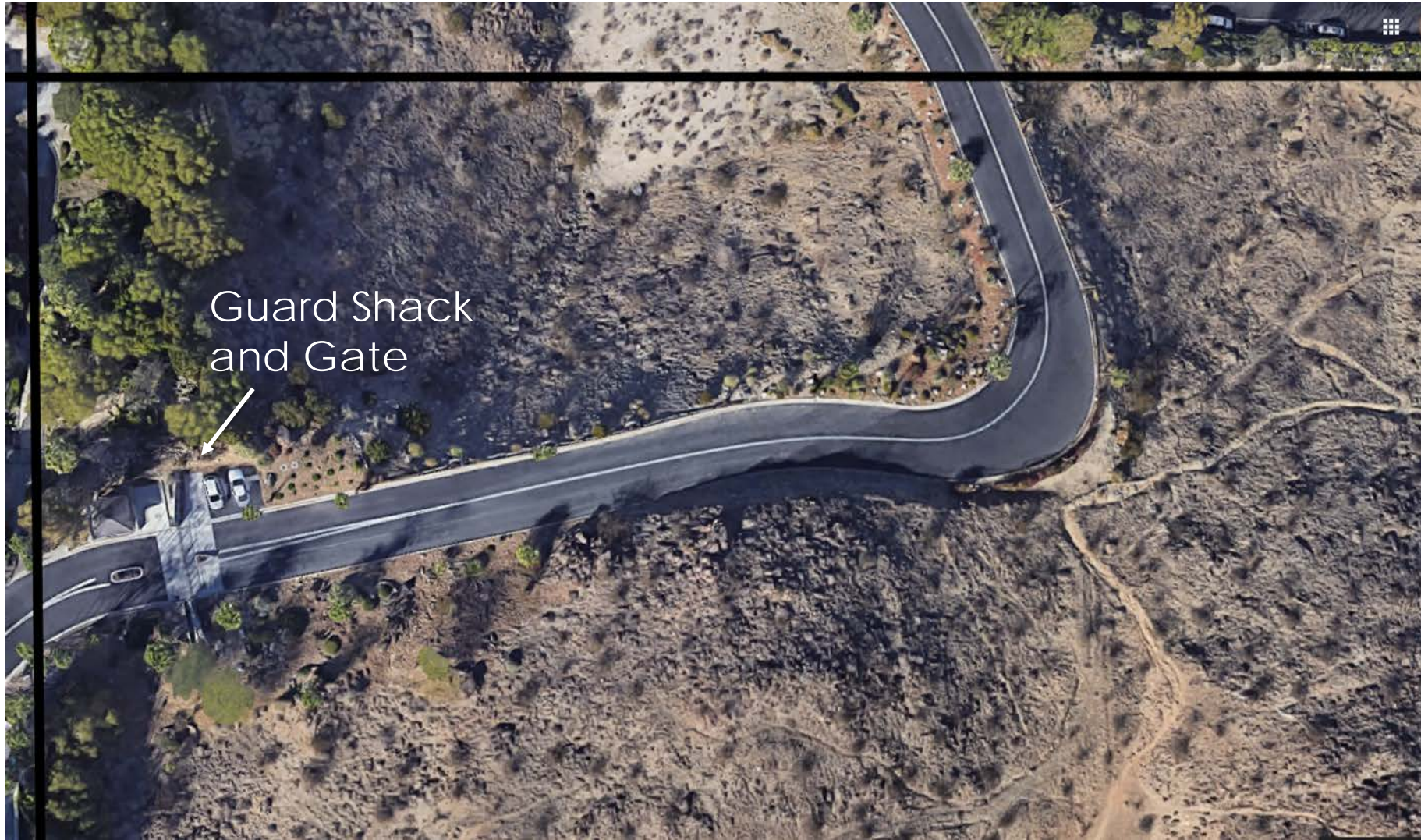
- Proper right of way documentation should be identified for any land inside the reservation. A valid easement is required.
 - You cannot assume that the designation of a road as a “county road” or a “state highway” means access is properly established.
 - Access rights cannot be obtained through prescriptive easement rights or adverse possession.
 - Access via one roadway can be in and out of reservation land.
- Checkerboard Reservations
 - Dawes Act of 1887

Checkerboard Access Issues

Example: Agua Caliente Reservation









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QUESTIONS?



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