Washington Land Title Association

For Land's Sake

Issue No. 13

August 2020

President's Message

Sean Holland

A year ago, as I prepared to take over the presidency of the Washington Land Title Association, dealing with a global pandemic was the furthest thing from my mind. JP Kissling had done a great job as the 2018-2019 president. Looking ahead to 2019-2020, I thought I could generally stay the course and focus on the legislative and regulatory challenges our association would be facing.

For the first six months things went pretty much as expected. The Legislative Committee Co-Chairs, Megan Powell and Bill Ronhaar, engaged with the Department of Licensing as it began to consider regulations to implement the remote online notarization statute. When the legislative session began I worked with Megan and Bill to advance the WLTA's bill to adopt the Uniform Electronic Transactions Act, to amend a wage lien bill to be more consistent with existing law, and to keep a data privacy bill from imposing onerous requirements on the land title industry.

The end of the legislative session, which had turned out pretty well for the WLTA, arrived during the week of March 9. That same week brought the WLTA's quarterly meeting and the Governor's first order closing schools in Washington. When the board met on March 9, our last in person meeting until who knows when, I was still thinking that COVID-19 would be an issue for the next few weeks, or even months, but I hadn't grasped just how much it would upend everything for the indeterminate future. On George Peters' recommendation the board voted to look into postponing the PNW Land Title Convention. Later that week, like so many other folks, I started working from home.

Thanks to George's foresight, the WLTA was able to postpone the convention and the fall education seminars into 2021. The early action to postpone protected the WLTA from serious financial risk.

Within two weeks of our March meeting the Governor was issuing his first proclamation putting RON into effect on a temporary basis. Within days the Department of Licensing had adopted emergency regulations. The WLTA has repeatedly requested that the RON proclamations have been renewed, and so far the legislative leadership and the Governor have obliged. We're now on the sixth extension and, with just one more should be able to keep using RON until our statute goes into permanent effect on October 1.

During the year we saw the retirement of longtime board members Gretchen Valentine and Jack Lancaster. Stu Halsan, our lobbyist for many years, also retired. I thank them all for their service to the WLTA and wish them long, happy, and healthy retirements.

I am grateful to the many folks who either joined the board or took on a committee assignment for the first time this year. The WLTA is fortunate to have so many people who are willing to devote their time and energy towards the issues that affect the title industry.

Many of my predecessors have signed off their messages with some variant of "see you at the convention." I hope we don't have to wait until the summer of 2021 to once again meet in person. It has been an honor serving as your president.

Inside This Issue

WLTA IN THE YEAR OF THE PANDEMIC

George Peters, Executive Director

The title industry has been dealing with the ramifications of the COVID 19 pandemic along with the entire real estate market. The officers, Board members and Committees of the Washington Land Title Association have been active and effective during this time in looking out for the interests of its members, in addition to everything else that those individuals deal with on a daily basis. While their contributions are always valuable and appreciated, this has been especially true in the last few months.

A major concern was the ability to conduct closings with remote notarization of documents. While Washington State was scheduled to officially adopt procedures in October, the WLTA was active in making sure that the State established emergency rules to implement them earlier and continued to make sure that those rules were regularly extended.

Other major issues facing the WLTA related to existing obligations that had to be addressed. They included the tri-state Convention for Washington, Oregon and Idaho, and the two fall education seminars.

The convention was to be hosted by Washington State this year, but of course that was not possible. The WLTA has successfully arranged to postpone the event for two years, holding it in 2022 instead. The venue, Semiahmoo Resort in Blaine, was willing and able to accommodate our needs with no negative financial impact on the Association. In the meantime, the next convention will be hosted by Idaho in 2021 at Coeur d'Alene Resort. You will be getting information about that as the date draws near.

Both the Spokane Convention Center and Lynnwood Convention Center were also able to work with us to re-schedule those seminars for the spring of 2021. We expect to be able to deliver exceptional programs in keeping with the successes of the past.

In normal times, the Association also holds an annual meeting of its members, typically held at the same time as the convention. Cancelling or postponing it would normally not pose a significant issue. However, while the Bylaws provide for either of those situations, the language also presumed that election of officers for the upcoming year would be done only at an in-person annual meeting. Thus, the WLTA was able to adopt amendments that allowed for the nomination and election of officers without the need for a live meeting. That election has now been conducted by a vote of the WLTA's Underwriter and Agent members. The officers for the 2020-2021 year are:

Paul Hofmann
President

Chris Rollins
Vice President

Congratulations to Paul and Chris! A challenging year lies ahead, and the WLTA is lucky to have such leadership. They, along with the Board members and Committee chairs who work throughout the year furthering the cause of the title industry, will be up to the task.

The transition of leadership will happen at a virtual Board meeting in August. Normally, WLTA members are able to express gratitude and appreciation for the work of all officers, directors, committees and members who contributed to the Association's success over the past year at the annual convention. So, take a minute to do so – feel free to let them know how you feel.

Sean Holland, President
Paul Hofmann, Vice President

The WLTA continues to strive to provide support to its members, and the membership can in turn be thankful for the contributions by many. Members are always encouraged to reach out to the WLTA's leadership and let them know how they are doing and discuss issues that face the Association.

SEMINARS

WLTA Education Seminars & LPO Information

By Gerry Guerin, Chair

Education Committee

Due to COVID 19 the annual WLTA education seminars have been moved to spring 2021. The current schedule is:

Saturday, April 17, 2021 – Lynnwood Convention Center

Saturday, May 15, 2021 – Spokane Convention Center

FOR LPOs: The WSBA has changed the MCLE requirements for attorneys and LPOs – if your reporting year is 2020 (2018-2020 reporting period) you have until December 31, 2021, to earn credits and until February 1, 2022 to report them.

The next reporting period will be shortened to two years (2022-2023).

See *https://www.wsba.org/for-legal-professionals/mcle*

The WSBA is offering a couple of options for free CLE that are available to all licensees:

WSBA Legal Lunchbox. Free 1.5 hours every month. Most months live listening only (hard for LPOs). **August** and **December** have on-demand listening. Please find that information here:

https://www.wsba.org/for-legal-professionals/wsba-cle/!egal-lunchbox.

WASHINGTON TITLE PROFESSIONAL

Maureen Pfaff, Chair

Washington Title Professional Committee

The Washington Land Title Association salutes the following ten individuals who have earned the Washington Title Professional designation. Kathy Backstrom, Dwight Bickel, Lori Bullard, J.P. Kissling, Sean Holland, Kevin Howes, Maureen Pfaff, Bill Ronhaar, Marian Scott and Michelle Taylor.

The objectives of the program are to recognize those individuals who continue to educate themselves and others on current title and escrow matters; promote and maintain high standards in the title insurance profession; promote pride in the title insurance profession and establish education standards for the title insurance profession.

Earning the WTP designation gives the recipient a boost on the road to also earning the National Title Professional designation from the American Land Title Association. Lori Bullard, Maureen Pfaff and Bill Ronhaar have all earned their NTP designations in addition to the WTP.

If you are interested in learning more about the WTP program and how to qualify for the designation, please go to the WLTA website, www.washingtonlandtitle.com, where you will find information and the application.

WLTA SPOTLIGHT ON NEWEST MEMBERS

Deana Slater — *Membership Committee*

The Washington Land Title Association has welcomed several new members in the last few years, and others have changed names. You can find all our members in our directories located at http://washingtonlandtitle.com/.

Aegis Land Title Group
Capital Title
Common Street Consulting
Equity Title
Horizon Title Group
Modus Title & Escrow
PRE Law Group, Derek Matthews
TitleOne
Vista Title

WHO WE ARE

The Washington Land Title Association (WLTA) is a non-profit association composed of trade professionals that promote high quality land title evidencing and title insurance services in the State of Washington. Formed in 1905, membership is composed of national title insurance underwriters, independent agents and professional affiliate members and vendors from related fields of endeavor. The WLTA is governed by an Executive Committee from its membership, including the elected positions of President and Vice President, the Immediate Past President, and Chairs of the Agents and Legislative Committees.

We actively promote sound and ethical business practices; provide educational opportunities for our membership in all areas of title evidencing and insurance and facilitate effective communication within our industry, and with our affiliated real estate professionals such as Realtors®, the escrow industry, attorneys, surveyors and the lending community, and the Office of the Insurance Commissioner.

Of special importance is the work of our Legislative Committee, which continuously monitors the legislative process in order to propose, promote and support legislation that meets the high professional standards of the Association, and to actively oppose legislation that does not. Our political action committee, TITAC, supports legislators who work for these same standards. The WLTA also encourages participation in the American Land Title Association's Title Action Network (TAN, **http://www.titleactionnetwork.com/**).

The WLTA supports its members and other real estate professionals by offering annual title and escrow educational seminars, which provide superior opportunities to learn from the most qualified title, escrow and legal professionals in the industry. These seminars also provide regular and liability credits for Limited Practice Officers. In addition, it maintains an Examiners Manual exclusively for its members.

Members also participate in other active committees, including those reporting on judicial cases, following Indian affairs and maintaining liaison with the Office of the Insurance Commissioner.

The exclusive rights given to members include:

- the right to access and use the Examiners Manual
- communication regarding proposed legislation during the legislative session
- the right to be listed in the WLTA directory
- the right to receive the Newsletter ***For Land's Sake***
- the right to attend seminars and the convention at reduced member rates
- an opportunity to network with other industry professionals to discuss industry topics and future changes
- an opportunity for your staff to earn the newest title designation in Washington, as a **Washington Title Professional**.

LEGISLATIVE REPORT

2020 Legislative Session

By Megan Powell and Bill Ronhaar, Legislative Committee Co-Chairs

During the 2020 Washington legislative session the WLTA Legislative Committee was primarily focused on three bills.

SB6028 – Uniform Electronic Transactions Act

This bill adopts UETA for use in the state of Washington, replacing the rarely utilized Electronic Authentication Act that was repealed by the Legislature in 2019.

The passage of UETA was the biggest priority for the WLTA Legislative Committee this session. The bill passed and became effective June 11, 2020.

SB6281 – Washington Privacy Act

The second bill is the Washington version of a data privacy bill that passed in California in 2019. The final version of the bill applied to legal entities conducting business in Washington or producing products or services targeted to Washington residents, and:

1. Controlling or processing personal data of 100,000 or more consumers during a calendar year; or
2. Deriving 50 percent of gross revenue from the sale of personal data and processing or controlling personal date of 25,000 or more consumers.

Bill Ronhaar and Megan Powell are the Co-Chairs of the WLTA Legislative Committee

The act excluded state agencies, local governments, tribes, municipal corporations, personal data regulated by certain federal and state laws, or data maintained for employment records purpose. The WLTA recommended modifications to the bill, but ultimately it died in committee. It is anticipated that some version of this bill will be reintroduced in the 2021 session.

SB6053 – Establishing Wage Liens

The final bill attempted to create a statutory wage lien for claims on unpaid wages. It also created procedures for establishing, foreclosing, extinguishing and prioritizing wage liens. The WLTA recommended modifications to the bill, particularly as it pertains to the process for foreclosing the wage liens. This bill also died in committee but will be monitored for potential reintroduction in the 2021 session.

Other Bills

Other bills that were watched by the Legislative Committee this session and ultimately passed are:

HB2230 - Taxation of Federally Recognized Indian Tribes (effective June 11, 2020),

HB2405 – Commercial Property Assessed Clean Energy & Resilience (effective June 11, 2020)

SB 6280 – Use of Facial Recognition Services (effective July 1, 2021)

HB2295 – Enforcement of Small Claims Court Judgments (effective June 11,

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2020)
HB 2474 – Sales Commissions (effective June 11, 2020)
SB6287 – Guardianships & Conservatorships (effective January 1, 2022)

The Legislative Committee also spent a significant amount of time focused on **SB5641** which passed in the 2019 legislative session. This bill authorizes remote online notarization in the state of Washington, effective October 1, 2020. As a result of the COVID-19 pandemic and the resulting State of Emergency, Governor Inslee issued a Proclamation effectively "suspending" the provision of SB5641 that makes it effective October 1, 2020. This proclamation has been extended several times with approval of the Legislature.

The WLTA recognizes the need for accessibility to remote online notarization in order to keep our consumers safe and healthy. It is the goal of the Legislative Committee to continue to lobby for an extension of the Proclamation through October 1, 2020 when the bill is fully effective. As part of this effort, the Legislative Committee has provided feedback to the Washington Department of Licensing on both emergency and proposed permanent regulations. WLTA President Sean Holland consistently reached out on behalf of the WLTA to those members of the Legislature responsible for approving each extension.

WLTA Lobbyist
Stu Halsan

The WLTA Legislative Committee wishes to thank Stu Halsan for his many years of hard work representing the Association as our contract lobbyist. Stu began his well-deserved retirement this April.

Carrie Tellefson

The Committee is also pleased to announce the retention of Carrie Tellefson of the firm Miller Malone & Tellefson, PS Inc. as the new lobbyist for the Association, starting October 1, 2020. Carrie has a history of lobbying in support of the interest of the WLTA and their member companies. She was instrumental in assisting with the passage of the bill authorizing a rating organization in Washington state in 2018.

JUDICIARY REPORT

Ashley Callahan, Judiciary Committee Chair

Breach of Warranties and Survey Exception

***Hayley v. Hume, et al.* – 10 Wash.App.2nd 484 (2019)**

Hayley purchased property from Hume in 2005 via statutory warranty deed. Hayley wanted to expand his driveway onto the northerly neighbor's property based on an easement Hayley believed he enjoyed. This easement was granted in 1979 and abandoned in 2001. Hume agreed to abandon the easement because the burdened landowner wanted to make improvements desirable to Hume. The improvements were finished in 2004.

Hayley sued Hume for breach of warranty when the northerly neighbor refused Hayley's demand to enforce the easement. By the time Hayley filed the lawsuit, more than 6 years had passed since conveyance in 2005. Hayley argued that the statute of limitations should not apply to bar enforcement of the present covenants of warranty (seisen, right to convey, no encumbrances) because the abandonment of the easement was not apparent until 2012, when Hayley learned about Hume's agreement to abandon the easement from the northerly neighbor. The Court said no. At the time of conveyance, Hume did not have an easement right to convey. The present warranties were breached at conveyance. Since Hayley did not file suit until 11 years later, his claims were time-barred.

Regarding the future covenants of warranty (quiet possession and defense) the Court asked whether a reasonable person would be put on notice of the neighbor's claim to that land. Here, the Court held that at the time of conveyance in 2005, the easement area was clearly not being used for ingress and egress. A reasonable person would have been on notice that the easement area was not used for its intended purpose. Since the neighbor possessed the easement area to the exclusion of Hayley at the time of conveyance, Hayley's claim for breach of warranty of quiet possession was triggered in 2005 and was therefore time-barred. Because Hayley's tender of defense did not comply with certain requirements, the Court held that it was ineffective.

Hayley also tendered a claim to his title insurance company. The insurer denied defense and indemnity for Hayley's lawsuit based on the survey exception. Hayley sued the title insurer alleging bad faith and CPA violations. The title insurer counterclaimed seeking an order that it owned no duty to defend. The trial court dismissed the claim against the title insurer and Hayley appealed.

The appellate court held that the title insurer "properly rejected Hayley's tender of defense because general exception 3 in its title policy applied to the [underlying dispute]." The survey exception excepts from coverage matters which would be disclosed by an accurate survey or inspection of the premises. An ALTA or National Society of Professional Surveyors (NSPS) survey, had one been performed in 2005, would have

1) disclosed a recorded easement from 1979,
2) disclosed evidence of the burdened landowner's possession of land that was once the easement,
3) noted that 1979 easement was not observable in 2005,
4) noted that the land was being used in 2005 by someone other than Hume, and
5) disclosed that a stream ran through the middle of the easement area.

Thus, a survey in 2005 would have shown that the condition of the area subject of the easement was inconsistent with the easement Hayley believed he was acquiring. Loss associated with Hayley's easement claim was excepted and the claim properly denied. The title insurer had no duty to defend Hayley in the lawsuit.

***Reported by* Ashley Callahan**

Members of the Judiciary Committee are Ashley Callahan, Chair, and Erin Stines, Craig Trummel and Sean Holland

Homestead Interest

***Umpqua Bank v Imelda Hamilton et al.*, 464 P.3d 1201 (Wash App Div 1)**

Ten Bridges acquired a quit claim deed from Imelda Hamilton, in consideration of $5000, one month after the judicial foreclosure sale yielded a $93,000 surplus on the Hamilton home. Ten

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Bridges attempted to secure the surplus proceeds and was denied. Ten Bridges appealed.

Examination of the chain reveals a deed in 1996 with James Hamilton, as his separate estate, as grantee. His spouse, Imelda Hamilton, quit claimed to James. The chain was unchanged until 2006 when Umpqua recorded a deed of trust with "James D. Hamilton and Imelda R Hamilton, husband and wife, vested as follows: James D Hamilton as his separate estate," as the grantor. In 2009 FC Bloxom recorded a $42,000 judgment from a Perishable Agricultural Commodities Act claim against the Hamiltons. Ledlow recorded $54,000 in transcribed foreign judgments against the title.

James Hamilton passed away in 2012. In 2014, Imelda Hamilton executed and recorded a deed stating, "**Imelda R Hamilton**, a single person and surviving spouse and sole heir at law of **James D Hamilton** (…) deceased for in consideration of ***GIFT WITHOUT DEBT pursuant to WAC 458.-61A-201***, conveys and quit claims to **Imelda R. Hamilton**, grantee," (emphasis in original).

Umpqua recorded a lis pendens in December of 2016. Service was on Imelda Hamilton, the junior lien holders and the Estate of James Hamilton (apparently a transcendent process server). The trial court authorized Service by Publication, against the "heirs and devisees of James Hamilton, deceased." Bloxom entered into a stipulated Agreement on Priority with Umpqua, accepting a subordinate position.

FC Bloxom was the successful bidder at the Sale. FC Bloxom and Ledlow both made claims to the surplus $93,000 after the sale, pursuant to RCW 6.21.110 (5). The deed referenced a surplus of funds resulting from the Sale, in the amount of approximately $93,000, stating "Grantee will attempt to secure the full amount entirely for its own benefit."

Despite contact from FC Bloxom, Ten Bridges did not appear in the action to disburse surplus funds. Instead, three months after the Agreed Order to Distribute Funds was entered, Ten Bridges moved the trial court to vacate it under CR 60(b). The trial court denied Ten Bridges motion and Ten Bridges appealed.

Ten Bridges argued the homestead interest of Hamilton "fixed her interest in the [surplus] funds" and the deed from Imelda transferred that interest in the funds. The court, reviewing the WA constitution, the Homestead Act (RCW Ch 6.23) and case law, found the act of conveying real property extinguished all homestead rights. Such extinguishment acted to cut off any claim to the surplus funds. The court stated "We do not see how allowing a homesteader to sell their rights to surplus proceeds of potentially $125,000, here in exchange for $5,000, helps promote the Homestead Act's purpose."

Ten Bridges also unsuccessfully argued it was entitled to Notice of the surplus funds hearing. RCW 6.21.110(5)(b) requires notice "to all who had interest at the time of the sale, and any other party who entered appearance in the proceeding." The court held Ten Bridges was without an interest at the time of the sale and did not qualify under the doctrine of substantial compliance as appearing in the action.

Reported by **Craig Trummel**

Claim for Clams Triggers Duty to Defend

Robbins v. Mason County Title Insurance Company, **195 Wash.2d 618 (2020)**

The nine Native American tribes that signed the 1854 Treaty of Medicine Creek relinquished lands in what was then the Washington Territory, subject to the right to take fish. Court decisions held the right to fish included the right to harvest shellfish from natural beds. In 1978 Leslie and Harlene Robbins purchased property in Mason County that included tidelands with Manila clam beds. In 2015 a

shellfish harvester working for the Robbins notified the Squaxin Island Tribe that he intended to harvest clams from the Robbins' property and that the beds on the property were artificial. In response, the tribe contended that the beds were natural and expressed the intent to enter the Robbins' property and harvest clams pursuant to their treaty rights.

The Robbins submitted a claim to their title insurer, Mason County Title Insurance Company. The insurer denied the claim. Although there was no litigation between the tribe and the Robbins, the Robbins filed suit against Mason County Title, alleging that it had breached the duty to defend. The insurer responded that the tribe's right to harvest shellfish was an easement not appearing in the public records and therefore subject to the policy's exceptions. The trial court held that the exception applied and granted summary judgment to Mason County Title. The Robbins appealed and the Washington Court of Appeals reversed. The Washington Supreme Court accepted review and affirmed the Court of Appeals. Ruling that the insurer had breached the duty to defend and acted in bad faith, the Supreme Court remanded the case to the trial court to consider the insurer's affirmative defenses.

The Washington Supreme Court

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held that the policy's exception for "public or private easements not disclosed by the public records" did not apply to the Robbins' claim because the tribe's shellfish harvesting right was a profit. The key issue was whether profits are a type of easement or a different type of servitude. In a 2010 decision the court had defined a profit as "the right to sever and to remove some substance from the land." In the same case it had defined an easement as "a right to enter and use property for a specified purpose." The court cited decisions referring to treaty fishing rights as "a servitude, or easement" and as "an easement, or *profit à prendre*." It also quoted the *Restatement* definition of a profit as "an easement that confers the right to enter and remove timber, minerals, oil, gas, game or other substances from land in the possession of another." Other authorities indicated that profits and easements are distinct types of servitudes. The court determined that Washington law was unclear "as to the interplay of profits and easements." Because the uncertainty in the law had to be resolved in favor of the insured, the court held that the policy exception for "easements" did not apply. The Robbins' claim was covered by the policy. The court's decision that Mason County Title had breached the duty to defend even though no litigation had been commenced against the insureds was based upon the language used in the 1970s-era Washington Land Title Association policy form. The policy required the insurer to defend against "all demands and legal proceedings." The court held that the tribe's letter to the Robbins asserting a right to harvest shellfish on their property was a "demand" triggering the duty to defend.

Because Washington law does not clearly classify profits as a type of easement, a general exception for easements not shown by the public records may not apply to a claim based upon a profit. The possible sources of claims include Native American treaty rights and any other rights burdening the insured's property that a court might characterize as profits.

The court's decision that the duty to defend could arise from a third party demand without need for litigation may sound alarming, but it is not an issue under current ALTA policy forms. The ALTA owner's and loan policies limit the duty to defend to the context of "litigation." The homeowner's policy limits it to "legal action."

***Reported by* Sean Holland**

Lis Pendens—Action Must Affect Title

***Han v. Cartano*, No. 37360-6-III, 2020 WL 3258467 (Wash. Ct. App. June 16, 2020)**

In June of 2020, Washington Court of Appeals, Division III filed an unpublished decision centering on whether the trial court erred in releasing a lis pendens. On appeal, the court agreed with the trial court and held the lis pendens was correctly removed because the plaintiff sued for money damages and not for an interest in real property.

The parties' dispute stems from a written agreement to purchase real property for $425,000. Plaintiff disputes the intention to sell the property to defendants and contends the parties' true agreement was a verbal agreement to loan $350,000. Under the verbal loan agreement, plaintiff was to unofficially continue owning the property, receive rents and maintain the right to attempt to sell the property within 90 days. If after 90 days plaintiff did not find a buyer, defendant could sell the property and keep $400,000 of the purchase price.

Despite the alleged verbal loan agreement, plaintiff signed a statutory warranty deed conveying the property to the defendants. The deed was recorded with the county auditor and the settlement statement prepared by the title company identified the sales price as $350,000 and not the $425,000 stated in the purchase and sale agreement.

The lawsuit was initiated after defendants found a buyer and had a pending sale for $549,000. Plaintiff was concerned defendants would keep the entirety of the sale proceeds in violation of the verbal loan agreement. Plaintiff did not seek to enjoin the sale and plaintiff did not allege that defendants lacked any authority to sell the property. Rather, plaintiff's sole claim to part of the sale proceeds. In connection with her case, plaintiff filed and recorded a lis pendens.

Defendants moved the court to release the lis pendens so their sale could be completed. Over plaintiff's objection, the lis pendens was released. The trial court found there was no evidence contradicting the execution of the statutory warranty deed. Plaintiff appealed.

In deciding the issue of whether the trial court improperly released the lis pendens, the court provides a careful review of Washington's lis pendens statutes found at RCW 4.28.320 and RCW 4.28.328. The court points out that a "lis pendens" is an "instrument having the effect of clouding the title to real property." RCW 4.28.328(1)(a). The purpose of which is to give constructive notice to third parties that the title may be clouded. RCW 4.28.320. Specifically, the court highlights language in RCW 4.28.328 which sets out the requirement that a lis pendens only be filed in actions that affect title to real property:

> (2) A claimant in an action ***not affecting the title to real property*** against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens. (emphasis added)

The court then turns to the Washington's quiet title statute, RCW

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Native American Affairs Report

Megan Powell, Native American Affairs Committee Chair

The Impact of McGirt v. State of Oklahoma

The Supreme Court of the United States ("SCOTUS") issued an opinion in *McGirt v. State of Oklahoma* on July 9, 2020. The precursor to this case was *Sharp v. Murphy*, however, SCOTUS delayed issuing a ruling in that case because Justice Gorsuch had recused himself due to prior involvement in the lower courts, resulting in an anticipated 4-4 deadlock. These two cases essentially address the same legal issues, but Justice Gorsuch had no conflict with the *McGirt* case. Consequently, SCOTUS was able to rely on the *McGirt* decision to issue a subsequent, consistent opinion in *Sharp v. Murphy*.

Both *Sharp v. Murphy* and *McGirt*

v. Oklahoma involved individuals enrolled as a member in federally recognized tribe who had been convicted of a crime in Oklahoma. Patrick Murphy was an enrolled member of the Muscogee (Creek) Nation (the "Tribe") and Jimcy McGrit was an enrolled member of the Seminole Nation. Both Murphy and McGirt asserted that because they had committed their crimes within an Indian reservation they should not have been tried in state court due to a lack of jurisdiction, but should have been tried in federal court under the federal Major Crimes Act. The State of Oklahoma in turn asserted that the Muscogee (Creek) Reservation had been disestablished by Congress many years ago during the allotment era.

In the *McGirt* case, the court ruled that the Muscogee (Creek) Reservation was established by an 1833 treaty between the Tribe and the United States, and while the boundaries of the reservation were slightly modified by a subsequent 1866 treaty, the reservation was never disestablished. The Tribe was not awarded any land in fee as a result of the decision, however, regardless of who holds the fee ownership the properties are now located inside an Indian reservation. The Muscogee (Creek) Reservation includes about three million acres in eastern Oklahoma, including most of the city of Tulsa.

Native Americans who have been convicted of a crime that occurred on reservation land in state court may choose to rely on *McGirt* to challenge the jurisdictional basis of their state court convictions, at the risk of obtaining a new trial in federal court that results in even more severe sentencing. However, the relevant impact for the title industry is the confirmation that what has for many years *not* been treated as reservation land is now considered to be exactly that. As a result, the Tribe may potentially assert legislative and judicial jurisdiction over lands within the reservation. This change could likely impact the underwriting of coverages provided by a title insurance policy and endorsements, particularly those coverages that rely on an evaluation of applicable laws law (e.g. zoning, subdivision, doing business, foreclosure, taxation, etc.)

The SCOTUS ruling clearly resolves any question about establishment of the Muscogee (Creek) Reservation. However, there are four other large tribes in Oklahoma who anticipate similar treatment of their historical reservation lands. These tribes are the Cherokee, Chickasaw, Choctaw and Seminole Nations. Confirming all five tribes' reservations would mean that approximately nineteen million acres of land covering the eastern half of Oklahoma lie within reservations.

The impact of *McGirt* ruling extends beyond Oklahoma. Any tribe embroiled in a dispute pertaining to tribal jurisdiction and/or reservation boundaries may ask the court to consider the precedent established in *McGirt*.

YAKIMA NATION

In December of 2018 the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") filed a lawsuit in United States District Court for the Eastern District of Washington seeking an injunction against Klickitat County prohibiting them from arresting and prosecuting tribal members for crimes that occur on a 121,000 acre parcel of land referred to as "Tract D". The tribe contends that Tract D is part of their reservation pursuant to their 1855 treaty with the federal government.

Klickitat County disagreed, claiming that the Act of December 21, 1904 diminished the reservation and Tract D lies outside the boundaries of the reservation. On August 28, 2019 the District Court issued an order affirming the reservation status of Tract D. The case is currently on appeal with the United States Court of Appeals for the Ninth Circuit. On

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(Continued from page 10) ***(Native American Affaires Report)***
July 14, 2020 the Confederated Tribes and Bands of the Yakama Nation submitted a letter to the United States Court of Appeals for the Ninth Circuit calling their attention to the McGirt decision. The letter concludes, "In other words, if a court does not find clear congressional intent to diminish or disestablish a reservation in the plain language of the statute or some textual ambiguity calling into question Congress's intent, the analysis ends and the reservation's boundaries survive". The letter and the attached copy of the *McGirt* decision were filed by the Clerk of Court in the docket for the Yakama Nation's case.

ONEIDA NATION

The United States Court of Appeals for the Seventh Circuit provided another example by invoking *McGirt* in their July 30, 2020 decision in *Oneida Nation v. Village of Hobart*. In 2016 the Village of Hobart in Wisconsin demanded that the Oneida Nation obtain a permit under a Village ordinance and submit to some of the Village's laws before the Nation could hold their Big Apple Fest. The Nation sued for declaratory and injunctive relief claiming that they are not required to submit to state or local law on the reservation. Like the State of Oklahoma in *McGirt*, the Village argued that the reservation was diminished when it went through the allotment process. The District Court ruled in favor of the Village, but the Court of Appeals reversed, citing *McGirt*.

BROAD IMPACT

The broad impact of the *McGirt* decision will continue to be felt on a national level. It is important to be mindful of this decision when analyzing any dispute involving a tribe over jurisdiction or reservation boundaries.

(Continued from page 9) ***(Legislative Report)***
7.28.120 to resolve the issue of whether plaintiff's claims here actually *affected the title to the subject property*. Pursuant to RCW 7.28.010, the person filing the claim must have a "valid subsisting interest in real property" as well as "a right to possession."

Ultimately, the court found that the plaintiff never sought to affect title to the subject property and the filing of the lis pendens was inconsistent with the defendant's rights to sell given that plaintiff had delivered to defendants a statutory warranty deed. Thus, the action itself did not include claims "affecting title to real property."

While the case itself if not necessarily groundbreaking, the case does provide a welcome summary of Washington's lis pendens and quiet title statutes. A lis pendens is not appropriate in every real estate litigation. ***Reported by*** **Erin Stines**

TITLE ACTION NETWORK

Maureen Pfaff, Chair TAN

Why should I join the Title Action Network?

The pandemic has created a whole new landscape of people working remotely and turned our face to face meetings of the past into video conferences today. TAN is more important than ever to help keep our industry connected and up to date on changes coming at us from both the national and state level. It is also our best avenue to advocate and promote the value of our industry from anywhere we happen to be.

TAN membership is FREE and it only takes two minutes to sign up at www.alta.org/TAN. If you don't remember your ALTA login or don't have one, you can use the following link to sign up for TAN without signing in to the ALTA website:

https://www.alta.org/tan/join-tan-form.cfm

If you joined TAN in the past, but haven't been an active member please be aware that TAN membership expires. TAN members can stay connected by opening TAN emails and taking actions. Each time a TAN member responds to a TAN alert, their membership auto-renews for another year! TAN members can also manually renew their membership by going to www.alta.org/tan and entering their ALTA login information.

TAN is not just for national issues…the Washington Land Title Association also uses TAN to alert our members to state legislation or events and activities we want everyone to be aware of.

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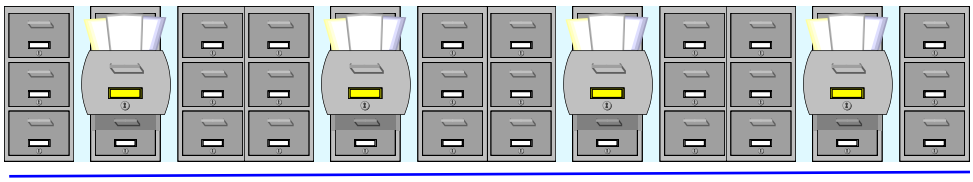

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