Washington Land Title Association

For Land's Sake

Issue No. 15—*2nd Edition* July 2022 (*REV Edition*)

President's Message

Chris Rollins

Whenever I'm discussing Title insurance there's always one thought that comes to mind: the only constant is change. This has been the case every year from when I first stumbled into this industry thirty-eight years ago and remains the same today. Back when my hair was dark and I was learning how to examine property records, a very smart and respected industry leader by the name of Chester "Chet" Wainhouse made a profound prediction. The future that Chet described left me wondering if I made the right choice by hitching my star to this industry. Chet described the day where orders would be placed with computers that processed title reports and sent them out without anyone ever touching them. The thought of this bleak future made me wonder if my days were numbered. What I found out however is that with innovation comes opportunity. This has never been more the case than what we as an industry experienced over the last couple years. The pandemic accelerated change at a breakneck pace. We went from discussing the abstract concept of remotely notarizing signatures to witnessing its full implementation on a national basis.

The Washington Land Title Association has been far from immune to these seismic changes. We went from being fully remote to the emergence of a hybrid system that allows all our members to be more fully engaged in our processes and to have their voices heard. The ability of our committees to meet, share ideas and implement change has never been better.

My term as President of this fine association has been an honor. It has given me the opportunity to see just how fortunate we are to have so many dedicated professionals in our family of companies. I wish to extend a heartfelt thank you to each one of you and a special thank you to George Peters. George has been the glue that year over year keeps us all pulling together to meet our common goals. As I pass the baton to Meri Hamre, I know that we could not be in better hands.

In closing I would like to say, with change we grow, challenge, and extend ourselves. I foresee a future for our industry that's so bright, I gotta wear shades.

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NOTE: This revised edition is to correct the Judiciary Report entry shown on Page 12.

SEMINARS

Washington Title Professional

By Maureen Pfaff

WTP Committee, Maureen Pfaff, Chair

The WLTA encourages all members to look at the Washington Title Professional program launched in 2018. 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.

Ten people have earned the WTP designation so far. The roster of WTP designees as of July 2022 includes the following individuals: Kathy Backstrom, Dwight Bickel, Lori Bullard, J.P. Kissling, Sean Holland, Kevin Howes, Maureen Pfaff, Bill Ronhaar, Marian Scott and Michelle Taylor.

Earning the WTP designation is a requirement for those interested in earning the National Title Professional designation from the American Land Title Association. Lori Bullard, Maureen Pfaff and Bill Ronhaar have all earned the NTP designation in addition to the WTP.

The Washington Land Title Association recognizes these land title professionals who have demonstrated the knowledge, experience and dedication essential to the safe and efficient transfer of real property. Congratulations to the Washington Title Professionals!

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

Invest in Your Career

Stand out, Earn Your NTP Today!

The American Land Title Association's National Title Professional (NTP) designation is a versatile tool, serving as a measure of personal achievement. ALTA's professional acknowledgement affirms these experts are powerhouses of knowledge, experience and dedication essential to the title industry.

Now celebrating its 10th anniversary, the NTP designation provides evidence of your industry proficiency as well as your commitment to professional development. It represents your achievement of excellence and enhances your status in the industry and among your colleagues! Other tangible benefits include:

- Individual recognition in ALTA publications and website
- Discounts on ALTA meetings
- Special benefits and recognition at ALTA meetings and select State Land Title Association events
- Right to use the NTP designation and logo in your business publications, website and correspondence, including marketing efforts; resume; and networking activities

To apply for the NTP designation, you must meet several individual, licensing and training prerequisites. Once all prerequisites are met, you must earn a minimum of 100 NTP points to qualify for consideration. Points can be earned in many areas, including industry experience, education and training as well as involvement with ALTA, your State Land Title Association and other professional organizations. All applications are reviewed by the NTP Council, a group of up to nine designees appointed by ALTA's Board of Governors.

Stand out from the crowd and start earning your NTP designation today! For more information on the program, visit www.alta.org/ntp.

WLTA SPOTLIGHT ON NEWEST MEMBERS

Deana Slater — *Membership Committee*

New members joined the Washington Land Title Association in the last year. You can find all our members in our directories located at http://washingtonlandtitle.com/.

Access Home Closing
Agents National Title Insurance
Endpoint Title & Escrow
InspectHOA
Lagerlof Firm
Notary Cam
Vanport Escrow & 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 is at **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

2022 Legislative Session

By Sean Holland and JP Kissling, Legislative Committee Co-Chairs

In odd years the Washington legislature is in session for 105 days. In even years, like 2022, it's a short session, just 60 days. Fewer days, fewer bills, less work, both for the legislature and for the WLTA's Legislative Committee, right? Not exactly. This year it felt like twice the work in half the time. On the other hand we did have the benefit of this being the second year of the 2021-2022 session. Bills considered, but not passing in 2021, were generally re-filed in 2022. For at least some of this year's bills we already had a bill review at hand from the 2021 session.

The 2022 session opened on January 10, beginning with a massive first day drop of pre-filed bills. A daily blizzard of new bills followed. Ultimately 1,642 bills would be filed by the end of the session on March 10. The Legislative Committee focused on identifying those bills with implications for the title industry specifically as well as bills affecting real estate transactions in general. We wound up tracking 84 bills.

Co-chair JP Kissling was our screener-in-chief, reviewing the daily drop of new bills to identify those meriting further analysis by a member of the committee. The purpose of the in-depth review was to determine a bill's impact on the members of the WLTA and recommend a course of action: support, oppose, or monitor.

The work of the Legislative Committee is truly a team effort. About a dozen members of the committee contributed by reviewing one or more bills. Maureen Pfaff took on the role as unofficial vice chair, assisting the co-chairs with tracking bills and coordinating the committee's work. We are extremely fortunate to have Carrie Tellefson as the WLTA's lobbyist. This was our second year working with Carrie.

Highlights of the session follow. The effective date of all bills that passed was June 9, 2022, the default date of 90 days after the end of the session, unless otherwise noted.

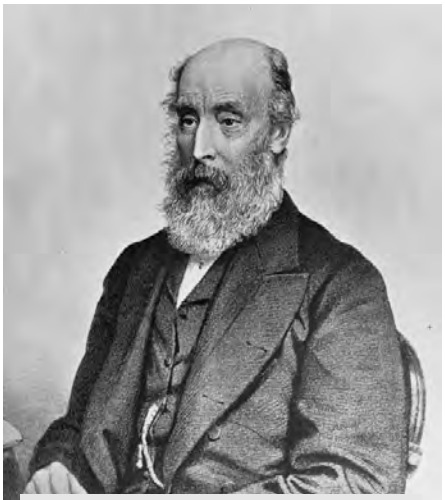
HB 1376 – Elimination of Registered Land (Torrens System)

Passed

Only about 4,000 properties in five Washington counties are in the registered land system. Statewide there are about 3,100,000 properties. Properties in the public land title records system maintained by the county auditors outnumber those in the registered land system about 775 to 1. The purpose of House Bill 1376 was to repeal the statutes pertaining to registered land and place all properties in Washington under one system of land title records. The bill was introduced in the 2021 session. The bill passed the House and the applicable Senate committee but failed to get a Senate floor vote in the waning hours of the 2021 session.

The bill was reintroduced in 2022. The primary supporters of the bill were the county auditors. But the WLTA also engaged, offering testimony in support of the bill in committee hearings in both the House and the Senate. This time the bill passed. By December 1, 2022, the registrar of titles in counties with registered land must send each owner of registered land notice that the system has been discontinued and that the owner's land will cease to be registered on July 1, 2023. An owner may opt to withdraw their land, without charge, from the system before July 1, 2023. After that date any remaining registered land will be transferred to the regular recording system.

The bill will not affect any rights in real property. But by eliminating the registered land system it will save property owners the time and expense of registering changes to title. It will be of particular benefit in eliminating scenarios where decades of uninsured transactions involving registered land have been recorded with the county auditor and not registered, thus requiring quiet title litigation to make the title insurable.



Sir Robert Richard Torrens

HB 1850 – Protecting and Enforcing Foundational Data Privacy Rights

Did not Pass

SB 5062 - Management, Oversight, and Use of Data

Did not Pass

Every session since 2019 has seen data privacy bills introduced in both the House and the Senate. SB 5062, reintroduced from the 2021 session, was the fourth iteration of a bill first introduced in 2019.

The WLTA has been actively advo-

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cating for its concerns on the House and Senate bills in all of those sessions. Our efforts have focused on three primary areas. First, each bill has included exemptions for various types of personal data that are already subject to protections under existing law. The escrow operations of the WLTA's members are already subject to the federal Gramm-Leach-Bliley Act. The WLTA has repeatedly stressed that whatever bill is ultimately passed should contain a Gramm-Leach-Bliley

exception. This year both SB 5062 and HB 1850 had such an exception.

The second area of concern has been that public records should not become subject to personal data protections if acquired by private parties. The WLTA's concern was that the law might impose new requirements for land title records and court documents used by its members. Privacy requirements for documents that are copies of public records would impose additional burdens on WLTA members, without providing any benefit to the public since these types of documents are freely available at auditor offices and county courthouses. Prior year versions of House bills did impose such burdens. But by 2022 both the House and Senate bills exempted "publicly available information" from the requirements in their respective bills.

The WLTA's third concern has been that the bills should have some threshold, below which the bills' requirements would not take effect. Such a threshold has been part of all of the recent Senate bills. But prior versions of House bills had no threshold, potentially subjecting a business to the full extent of those bills' requirements for the first file handled that contained covered data. By 2022 both House and Senate bills had a threshold of 100,000 personal consumer files per year.

There's no telling when the legislature will finally pass a data privacy bill. But over the years that the WLTA has been engaged, competing versions in the House and Senate have moved towards favorable positions on the issues that matter most to the WLTA. There is reason to be optimistic that when a data privacy bill eventually passes it will contain the features for which the WLTA has been advocating.

House Bill 1793 - Electric Vehicle Charging Stations in Common Interest Communities
Passed

HB 1793 added provisions relating to electric vehicle charging stations (EVCS) the Uniform Common Interest Ownership Act, the Homeowner's Association Act, the Condominium Act, and the Horizontal Property Regimes Act. No community operating under any of these acts may adopt or enforce any provision prohibiting the installa-

tion or use of an EVCS within the boundaries of a unit or designated parking space. Reasonable restrictions on installation are permitted. The section of the bill causing concern related to treatment of an EVCS if the unit was sold. As originally drafted, the bill would have permitted the seller to remove all equipment associated with the EVCS, including the high voltage wiring from the circuit panel to the EVCS which would lie outside the unit. Under general principles of real property law such wiring would be considered a fixture and not be removable. The Legislative Committee offered an amendment to the bill that would have clarified that (a) only equipment removable without damage to property owned by others which could be

removed and (b) removable equipment would not be real property in any form, including fixture law. The final bill incorporated the first principle, but not the second, which faced opposition from the Realtors® .

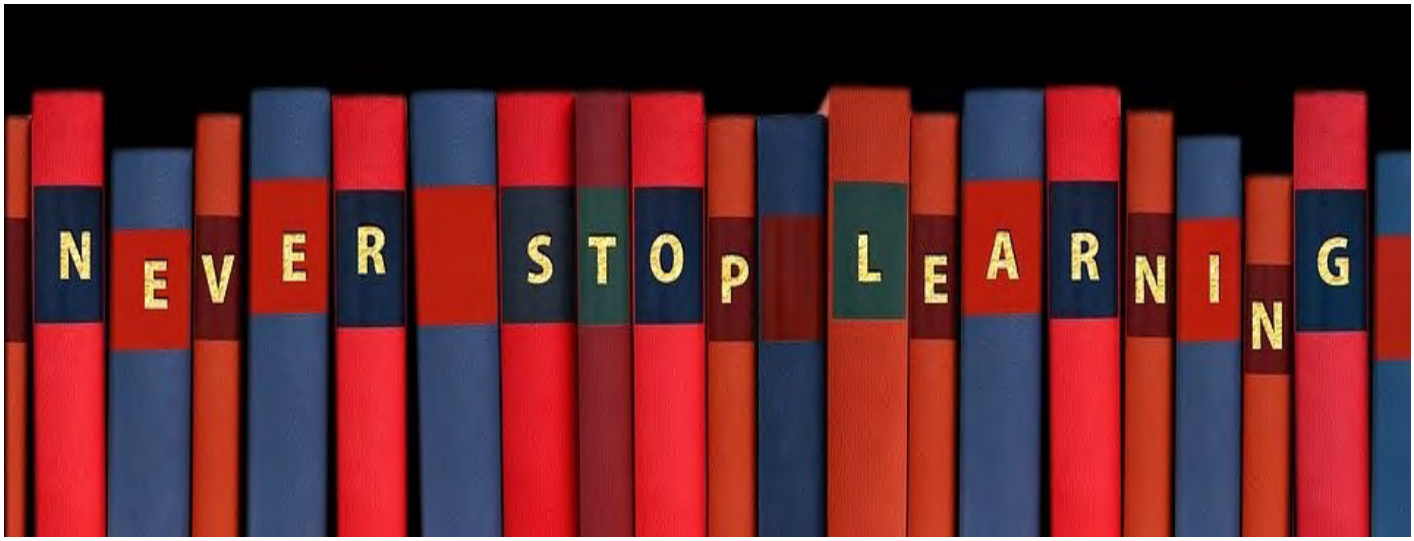
House Bill 2072 – Classification of Manufactured Homes as Real Property
Did not Pass

HB 2072 would have addressed the long standing issue of manufactured homes being personal property until they are de-titled, at least for newly sold homes. The bill provided that in sales of a new manufactured home by a manufacturer or dealer after January 1, 2023, the home would be real property when affixed to a permanent foundation on land owned by the homeowner. The bill did not manage to get a committee hearing this year. Legislation on this issue would remove a major source of claims, at least with respect to new manufactured homes. The Legislative Committee will be prepared to present its concerns and suggestions if a similar bill is introduced in a future session.

WLTA Education Seminars

By Gerry Guerin, Co-Chair

Education Committee, Gerry Guerin and Michelle Taylor, Co-Chairs



Our education seminars went off without a hitch! It was so great to finally be able to host our yearly seminars after a two-year hiatus.

- Thank you to my co-chair Michelle Taylor for all of her help organizing, prepping and speaking.
- Thank you to our gracious group of talent, who presented.
- Thank you to our facilities for hosting us and keeping us all well fed.
- Thank you to George for all of his organizing and event planning and.

Lastly, thank you to all of our attendees. It was great to get to see a bunch of familiar faces and great to get to meet a few new faces as well. I've heard a lot of great feedback and everyone really seemed to enjoy the many topics we had to offer. We will continue to go through our feedback comments from attendees to ensure that we host an even better set of seminars in 2023!

Thanks to everyone for again supporting WLTA Education Committee and we hope to see you all at the PNW convention in July!

JUDICIARY REPORT

Ashley Callahan, Judiciary Committee Chair

INSURANCE FAIR CONDUCT ACT (IFCA) AND DAMAGES

***Beasley v. GEICO General Insurance Company*, 508 P.3d 212 (2022)**

This case addressed the question of whether noneconomic damages such as emotional distress or pain and suffering are recoverable as "actual damage" in an Insurance Fair Conduct Act (IFCA) claim against an insurer.

IFCA is a stand-alone claim that may be made against an insurer who unreasonably denies a claim for coverage or payment of benefits under an insurance policy. RCW 48.30.015. Relief under the statute includes treble damages and attorney's fees. An IFCA claim is typically made against an insurer along with breach of contract, bad faith, and violation of CPA claims. Breach of contract and CPA violation claims generally do not allow for noneconomic damages. A bad faith claim may allow for noneconomic damages, but does not allow them to be trebled. This case hold that noneconomic damages are recoverable under an IFCA claim and that they may be trebled.

LIEN PRIORITY FOR ADVANCES

***In the Matter of the General Receivership of EM Property Holdings, LLC*, WA Supreme Court Case No. 100066-9 (June 16, 2022)**

This case concerns the lien priority of future advances made by a lender to a borrower under a deed of trust. If the loan is a construction loan, the future advances – whether obligatory or optional – have priority over intervening lienholders under RCW 60.04.226. If the loan is not a construction loan, the priority of future advances over intervening lienholders depends on whether the advance is obligatory or optional. If obligatory, the future advance has priority. If optional, the future advance does not have priority over subsequent deeds of trust that come before the optional advances are distributed.

SURVEY EXCEPTION APPLICATION

***Watson v. Old Republic National Title Company*, 2021 WL 4724200 – unpublished (October 11, 2021)**

The Watsons obtained a survey in 2015 showing that a structure on their neighbors' property encroached onto their property. The neighbors sued the Watsons to quiet title. The Watsons tendered defense to Old Republic Title. The Watsons had a standard owner's policy, which provided coverage for

2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from: … (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete survey of the Land….

Schedule B contained a "survey exception" that provided as follows:

This policy does not insure against loss or damage, and [Old Republic Title] will not pay costs, attorneys' fees or expenses that arise by reason of … encroachments, or questions of location, boundary and/or area which an accurate survey may disclose.

The Watsons did not obtain a survey of their property before they purchased it. The Watsons filed a lawsuit against Old Republic Title for breach of contract in failing to defend. The Watsons focused on the difference between encroachments that *would* be disclosed by a survey and encroachments that *may* be disclosed by a survey. *Would* occupies a definitional space different than *may* and, at the very least, the policy is ambiguous. The trial court granted Old Republic Title's summary judgment motion and the Watsons appealed.

The appellate court affirmed holding that the Watson's 2015 survey disclosed the encroachment subject of the claim. The Watsons did not dispute survey's accuracy. The encroachment was therefore the type which an accurate survey may dis-

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

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close. The exception eliminated coverage. The court also said that the Watsons' argument that *would* and *may* are mutually exclusive or that *would* is broader than *may* was "not reasonable." Finally, the appellate court rejected the Watsons' argument that an insurer cannot use a "subject to" clause to completely eliminate a category of coverage. The Watsons had no authority to support that theory and the court relied on the policy language that makes the covered risks subject to the exceptions, exclusions, and conditions in the policy.

ADVERSE POSSESSION
***Paul and Ann Michel, et al. v. City of Seattle, et al.*, 438 P.3d 522 (2021)**

Homeowners brought claims for adverse possession, quiet title, prescriptive easement, trespass and conversion relating to disputed property previously deeded to railway company and eventually conveyed to City of Seattle. City brought claims for adverse possession. Trial court granted title to homeowners and the appellate court reversed.

The case involves a tract of land in Shoreline used by the City for utility services (Seattle City Light), a portion of which is inside of the homeowners' fences. In 2018, the City sent letters to the homeowners demanding fence removal. The homeowners did not remove the fencing so the City did. The homeowners sued. The trial court held that the City adversely possessed most of the disputed tract except for the land inside of the fences. It said that the City did not hold the tract of land in a government capacity so was not shielded by RCW 7.28.090 (cannot adversely possess land held by the government for a public purpose).

The appellate court disagreed and held that the City had maintained a continuous physical presence on the tract since 1951, including the land inside the homeowners' fences because it had actual possession (dominion consistent with true owner) and exercised exclusive control (maintained power poles and electrical distribution lines) over that land. The homeowners could not adversely possess a portion of the City's land because RCW 7.28.090, construed broadly, does not distinguish between "proprietary" and "governmental" uses when it comes to "public purpose".

INSTALLMENT DEBT IN BANKRUPTCY
***Copper Creek (Marysville) Homeowners Association v. Wilmington Savings Fund Society, et al.*, 2022 WL 152492 (January 18, 2022)**

NOTE: This opinion was withdrawn on reconsideration and a substitution opinion is not available yet. 2022 WL 1110510 (April 11, 2022). The case is in front of the Washington Supreme Court on the issue of whether Division One's opinion below conflicts with Washington Supreme Court precedent regarding the statute of limitations for mortgages.

On January 18, 2022, Division One of the Washington Court of Appeals published a blistering opinion addressing the legacy of the *Edmundson* case (194 Wn. App 920, 378 P.3d 272 (2016). The court cited multiple federal district courts who mistook the holding in Edmondson as well as multiple Washington appellate court decisions as contrary, including the August 2021 Division One unpublished opinion in *Luv v West Coast Servicing Inc*., (No 81991-7-I https://www.courts.wa.gov/opinions/pdf/819917.pdf) stating in footnote, "The outcome of [Luv] opinion is contrary to the outcome here." The opinion also provides a great discussion on Edmondson and the interplay between bankruptcy, the statute of limitations and the Servicemembers Credit Relief Act.

The facts:

- 2007: the Kurtzes purchased residential property, obtained an installment loan from CTX Mortgage, secured by a deed of trust. Mr. Kurtz was active duty in the military at the time of the loan and at least through 2020. The property was in a HOA called Copper Creek with annual dues. Ultimately, Wilmington Savings and Selene Finance were successor beneficiary. The court identifies them as Selene/Wilmington.
- In 2008, the Kurtzes separated and Mrs. Kurtz moved out of the property.
- 2008 or 2009: the Kurtzes failed to make monthly mortgage payments
- February 2010: Ms. Kurtz filed a Chapter 7 bankruptcy.
- June 2010: the debt was discharged in the bankruptcy as to Ms. Kurtz and the BK case was closed June 18, 2010.
- July 2010: the Kurtzes failed to pay HOA assessments.
- March 2011: Mr. Kurtz filed a Chapter 7 bankruptcy.
- July 13, 2011: the debt was discharged in the bankruptcy as to Mr. Kurtz, and his case BK closed on July 18, 2011.
- November 2018: the HOA recorded a lien for unpaid assessments and commenced a judicial foreclosure. It did not seek to foreclose or otherwise impair the DOT because the DOT was senior. A receiver was appointed via agreed order with Kurtz to take possession and repair the proper-

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ty.

- After repairs completed, on October 30, 2019: the trustee on the Selene/Wilmington DOT issued a Notice of Trustee's Sale to Copper Creek.
- February 2020: Copper Creek asserted enforcement of the Wilimington/Selene DoT lien against the property was barred by the 6 year statute of limitations.
- June 2020: Copper Creek/HOA obtained title to the property through a deed in lieu of foreclosure from the Kurtzes.
- In the ensuing litigation, Copper Creek moved to dismiss the foreclosure initiated by Selene/Wilmington and to quiet title in Copper Creek free of the lien. Copper Creek prevailed in the trial court.
- There was no evidence Selene/Wilmington ever accelerated the entire debt

Copper Creek's trial victory was overturned by the Court of Appeals. The court's opinion states the following:

> "The trial court concluded that Selene/Wilmington was precluded from enforcing its deed of trust by the statute of limitations. It reached this conclusion by relying on *Edmundson* for the proposition that the statute of limitations runs against enforcement of a deed of trust from *the date of the last payment due prior to the debtor's discharge in bankruptcy*. This was error. *Edmundson* did not establish such a rule. No Washington Supreme Court case has established such a rule. It is not the law in Washington. The federal cases, which are the source of that interpretation of *Edmundson*, are in error. To the extent that unpublished state appellate cases have repeated the federal interpretation, they are also in error." (emphasis added)

The Court meticulously went through the facts and legal analysis of *Edmondson*, detailing how in an installment debt, the 6 year statute of limitations set forth in RCW 4.16.04(1) runs from each missed installment. A bankruptcy discharge does not, by itself, accelerate the entire debt. The discharge may relieve the debtor from the debt, but because the lien remains and may be enforced in an *in rem* action, the statute of limitations accrued in each future installment as it became due. The court states "the [bankruptcy] discharge left intact the lender's option to enforce the debt against the property in rem." In other words, the lien created by a deed of trust remained a valid encumbrance. Even if the installment note provides for automatic acceleration, default alone does not accelerate. Instead, the law requires "affirmative action that is clear, unequivocal, and effectively notifies the borrower of the acceleration," stated the court, citing *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 434, 382 P.3d 1 (2016).

Copper Creek also provides guidance on two other interesting issues. First, due to Mr. Kurtz's status as an active duty service member, the case also provides insight on how the Servicemembers Credit Relief Act (SCRA) interacts with the SOL. The court stated the bk discharge ended Mr. Kurtz's personal liability for the debt (terms of the note). Once that personal liability ended, the protections of the SCRA ended and the SOL could begin on those past missed payments. Second, the court reminds readers about the effect of a bk stay in footnote 6 on page 9 of the opinion. Notably, a bk stay does not toll a SOL, rather the stay only prevents action by creditors to collect or enforce. If a SOL expires during the stay, bk law provides for a 30 day window after the stay is lifted to file an action.

Copper Creek, for Division One, makes it clear - a bankruptcy discharge does not trigger the six year clock on the whole debt. If a title person is confronted with this argument, evidence of borrower getting notice of acceleration must be presented. This case may cause a change from past perspectives influenced by those cases that misinterpreted *Edmundson*.

But wait there's more – On February 7, 2022, Division One released the unpublished Opinion, *Merritt v, USAA*, No. 82162-8-1, citing with approval Copper Creek. Merritt unsuccessfully argued the bankruptcy discharge triggered the SOL on their loans and lost their quiet title action against USAA. The court noted the Merritt's argument was based on erroneous reading of *Edmundson*. The court said it adhered to its analysis in *Copper Creek*, indicating the lack of acceleration by USAA meant each unpaid installment after the bk discharge accrued its own statute of limitations. https://www.courts.wa.gov/opinions/pdf/821628.pdf

LEGAL DESCRIPTION

Tsigereda Teklu v. Djamshid Setayesh, 21 Wash.App.2d 161 (2022)

Setayesh owned property in Lynnwood, Washington. In October, 2015, he entered into a lease agreement, purchase and sale agreement, and option to purchase agreement with Teklu. The

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documents gave Teklu a 5-year lease with option to purchase. The purchase and sale agreement described the property as "Tax Parcel No. 27041700100700 (Snohomish County), 6416 180th Street SW Lynnwood, Washington, 98037." The agreement also stated that the legal description was attached as "Exhibit A" but there was no Exhibit A attached.

Teklu exercised the option to purchase. Setayesh refused to sell. Teklu filed a lawsuit for specific performance. Setayesh defended by saying that the purchase and sale agreement was unenforceable for failure to contain an adequate legal description, i.e., tax parcel number only. Teklu's successful motion for summary judgment was vacated after reconsideration. Another round of cross summary judgment motions occurred and Teklu won. Setayesh appealed.

The appellate court affirmed the trial court's order stating that reference to a tax parcel number and to the county in a purchase and sale agreement

> *…refers a person of ordinary intelligence to the tax assessor's records, here, the Snohomish County property account summary, including an abbreviated legal description and sales history table. And that abbreviated legal description, coupled with the list of documents pertaining to the six most recent sales of the property, refers a person of ordinary intelligence to the Snohomish County auditor's official records, including the six most recent deeds each containing a complete legal description.*

While reference to a tax parcel number and county will satisfy the statute of frauds (contract will be enforceable), the court confirmed the best practice of expressly citing the complete legal description in the agreement or expressly incorporate by reference an attached document containing the complete legal description.

ERRONEOUS NON-JUDICIAL FORECLOSURE

***Dalton M, LLC v. North Cascade Trustee Services, Inc. et al.*, 504 P.3d 834 (2022)**

> *We must reverse the superior court's judgment in favor of Dalton M on the slander of title claim because the bank's darkening of the land title did not interfere with any pending sale by Dalton M. We still affirm an attorney fees award, however, because of the equitable exception to the American rule that generally denies an aware of attorney's fees to the prevailing party. In a case of first impression, we hold that fees can be awarded for the prelitigation bad faith of a party that entails a refusal to honor a valid claim, thereby forcing the plaintiff to file suit to rectify the problem.*

In 2006, the Flecks obtained a loan on two parcels: 9008 (improved) and 0402 (vacant) from Greenpoint Mortgage. The deed of trust described the property in one combined legal description with one common address. The Flecks failed to pay property taxes on the vacant parcel and the Faulkes purchased it in 2012. The Flecks therefore no longer owned a portion of the bank's security. MERS assigned the 2006 deed of trust to U.S. Bank. The assignment contained the same combined legal description. U.S. Bank appointed Ocwen as its loan servicer. In 2013, the Faulkes transferred parcel 0402 (the vacant parcel they purchased at a tax foreclosure sale) to Dalton M LLC.

Fleck defaulted on his 2006 loan and in 2014, Ocwen ordered a title policy in preparation to commence foreclosure proceedings on the property defined in the legal description, *i.e.*, both parcels. The title report contained the tax deed to the Faulkes for the vacant parcel. In 2016, after the assignment was corrected, U.S. Bank recommended foreclosure proceedings on both parcels, despite evidence in Ocwen's files regarding ownership of parcel 0402. U.S. Bank signed a substitution of trustee appointing North Cascade Trustee Services as trustee to conduct the foreclosure. Notices were sent to Dalton M LLC and the Flecks at the address for the house existing on the improved parcel. The property reverted and a trustee's deed in U.S. Bank's name was recorded in 2016.

The Faulkes found out that U.S. Bank was selling his parcel 0402 from an online real estate site. In early 2017, Faulkes contacted North Cascade Trustee Services and the bank's counsel, Robinson Tait. Ocwen indicated it would initiate a title claim and U.S. Bank attorneys said it would hire a surveyor to create a new legal description. No evidence was produced that either circumstance occurred. Nothing happened for over eight months. Faulkes hired counsel.

In February, 2018, Dalton M filed suit to quiet title alleging slander of title, unjust enrichment, and Consumer Protection Act violations. U.S. Bank denied that Dalton M should receive quiet title to parcel 0402. At a bench trial in December of 2019, U.S. Bank conceded that Dalton M owned parcel 0402. The court held that U.S. Bank acted in bad faith in claiming ownership of parcel 0402 given the information contained in its agent's files. Both parties appealed. The appellate court requested briefing on whether Dalton M should be granted attorney's fees on equitable grounds.

The appellate court held that U.S. Bank's maliciously published a claim of ownership to parcel 0402 which would support Dalton M's slander of title claim (except no pending sale or purchase was harmed). As a result of U.S. Bank's prelitigation bad faith refusal to recognize Dalton M's ownership claim and forcing it to file suit, the court supported an aware of attorneys' fees to Dalton M based on eq-

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uity and as a matter of first impression.

Judge Fearing's concurring opinion is worth noting, as partially set forth below.

> Fearing. J. (Concurring opinion)
>
> ¶131 The bad faith conduct of U.S. Bank falls into the category of what pundits Joanne Doroshow, Steven DuPuis. Ben Pickup, and Libby Mitchell all label as the action of a company "too big to care." When a customer attempts to solve a dispute with a financial institution, insurance company, cable television company, rental car company, airline, manufacturer, cell phone company, managed care entity, or other megacorporation, the customer encounters headwinds. if not insurmountable obstacles.
>
> ***
>
> ¶139 More pressing problems plague the American judicial system. Still, the "too big to care" phenomenon troubles the judicial system by leading to lawsuits when the rare customer has the stamina and resources to right a wrong. Courts can play a role in limiting this bane by imposing fees and costs of litigation on the "too big to care" company when it fails to timely and fairly resolve a legitimate claim.

RESTRICTIVE COVENANTS

***Alex May v. Spokane County, et al.*, 506 P.3d 1230 (2022)**

This is the Washington Supreme Court's decision in the *May v. Spokane County* case regarding racially restrictive covenants in the public record. The homeowner (May) filed suit to void and physically remove a racially restrictive covenant from his chain of title and from the public records. The trial court and Court of Appeals concluded that the statute at issue did not allow for the physical removal of the covenant, but allows for an order voiding the covenant to be filed with the title. Meanwhile, in 2021, the legislature amended the statute to clarify the procedure to void the covenant. In a unanimous decision, the


The Evening Star

REALTY COVENANTS RULED UNENFORCEABLE

House Committee Backs Draft, 20 Die, 160 Hurt 28 to 5, After Hearing Forrestal; As Windstorms Floor Action Likely Next Week Sweep 7 States

Truman Selects Howard Bruce As Deputy to Hoffman in ECA

High Court Bars Action in State Or U.S. Courts

Court remanded the case to the trial court to correct the record under the new procedure.

A portion of the decisions states as follows:

> Alex May sought a declaratory action under former RCW 49.60.227 (2006) to have a racially restrictive covenant voided and physically removed from the title to his property and from the public records. Both the trial court and the Court of Appeals concluded that the statute at issue does not allow the physical removal of the covenant from the title but, instead allows only for an order voiding the covenant to be filed with the title. In the interim, the legislature amended RCW 49.60.227, clarifying the procedure under which these covenants are struck and eliminated.[1] *See* Laws of 2021, ch. 256.
>
> We hold that the interim amendments in Laws of 2021, chapter 256, section 4 apply, and therefore we need not address the statute under which May initially sought to have the covenants removed. Accordingly, we remand to the trial court for relief under Laws of 2021, chapter 256, section 4.

PUBLIC RECORD

***Munden v. Stewart Title Guaranty Company*, 8 F.4th 1040 (9th Cir. case applying Idaho law - 2021)**

This case involves property located in Idaho and a dispute over the definition of "public record" as set forth in the 2006 ALTA owners and loan title policies. The Munden's (the insureds') property contains Garden Creek Road which, pursuant to a 2006 Bannock County ordinance, was closed to all motor vehicles except snowmobile traffic December – April. In 2019, Bannock County amended the ordinance and eliminated the winter closure. Shortly after, the Mundens filed an action in Idaho state court seeking injunctive relief against Bannock County for its actions affecting the Munden's use of their property. During a hearing, Bannock County asserted that Garden Creek Road had been listed as a public road on Idaho Dept of Transportation maps showing public roads since 1958, that under Idaho Code Section 40-202 Garden Creek Road had been a public highway since 1963, and that the Mundens purchased their property subject to the roads of record.

The Mundens tendered a claim to their title companies, Fidelity and Stewart. The claims were denied in part because the title policies excepted coverage for loss or damage associated with matters not shown in the public record. The Mundens filed suit and the district court agreed with the title companies stating that the Mundens had not established the existence of a "public record." The Mundens appealed.

The 9th Circuit, applying Idaho law, held that because Idaho Code 40-22 requires County Commissioners to either record its interest in the roadway to provide constructive notice or update the official map, the act of updating the official map must also provide constructive notice. Therefore, it was reasonable to interpret "public records" to include the Bannock County "official" road map created in 1958 which contained Garden Creed Road. The title companies'

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position that the map was not a public record was improper.

In Washington State, we have *Ellingsen v. Franklin County* wherein a county's road easement, recorded in the office of the county engineer, is not a "public record" providing constructive notice. The county engineer's office is not the county recorder's office where matters filed therein provide constructive notice (and are therefore a "public record" under a title insurance policy). Moreover, the statute under which Franklin County acquired its road easement did not require that the interest be recorded in the auditor's office (unlike Idaho Code 40-22) and did not state that the county engineer's office provided constructive notice.

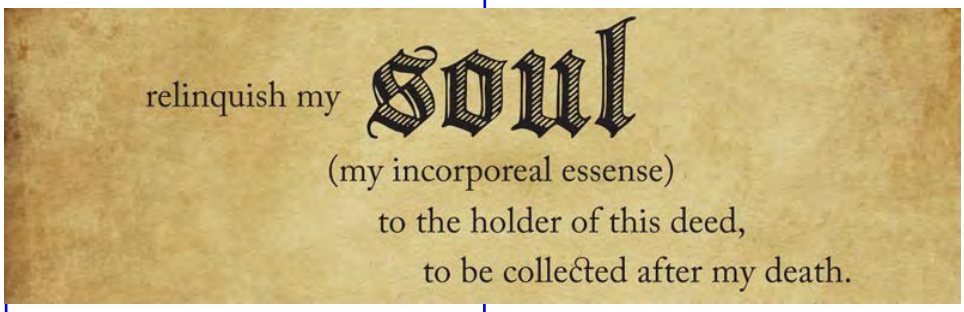
Even though the *Ellingsen* case may minimize *Munden's* effect, if any, on the Washington State title industry, *Munden v. Stewart Title Guaranty Company* is a reminder that title searches matter and the definition of "public record" is subject to judicial interpretation.

LIEN AVOICANCE IN BANKRUPTCY

***In Re Leonard Hutchinson*, 15 F.4th 1229 (9th Cir. 2021)**

The trustee in a Chapter 7 bankruptcy tried to avoid the debtors' $162,000 IRS lien for unpaid taxes, interest, and penalties against the debtors' residence. The Bankruptcy Appellate Panel held that the debtors may not avoid the tax lien, even if that lien was avoided by the trustee. The Court relied on a prior 9th Circuit case called *DeMarah v. U.S.* wherein "exempt property remains subject to a tax lien, notice of which is properly filed" and "any property exempted from the estate remains subject to tax liens."

This case underscores the importance of not removing a tax lien from a commitment despite what a customer or the customer's attorney may try to argue.



ESCROW AND OREGON'S RICO ACT

***Willms v. AmeriTitle, Inc.*, 314 Or. App. 687 (2021)**

A correction is owed regarding the first and last paragraphs of this case summary:

On appeal from Deschutes County Circuit Court Case No. 13-CV-0719, the Oregon Court of Appeals reversed a $3.75 million jury verdict against AmeriTitle for (Oregon) RICO Act violations involving an escrow dispute. The ORICO judgment was reversed because the trial court erred in applying a six-year statute of limitation period to the ORICO claim instead of the statutory five-year period for civil ORICO claims. However, the court of appeals upheld the jury's finding that the requisite "pattern of racketeering activity" existed within a single escrow transaction. In so holding, the court of appeals stated that it was not bound by two federal cases from the U.S. District Court for the District of Oregon that held otherwise.

On May 9, 2013, Plaintiffs W. Willms and Dolly G. Willms filed a lawsuit against AmeriTitle, Inc. in Deschutes County Circuit Court, for, among other things, fraud and violations of Oregon's anti-racketeering law based on the actions of a former AmeriTitle escrow officer. The escrow at issue in the case opened on November 6, 2006, and closed October 30, 2007.

By all accounts, the Willms had made a $500,000 loan to Rowe Sanderson III one month prior to Mr. Sanderson's sale to La Pine Village. The Willms and Mr. Sanderson had entered into a security agreement but no documents were recorded against the subject property evidencing the loan. The Willms were not party to the escrow and AmeriTitle argued it followed all written instructions of the escrow principals. The Willms later discovered the property had been sold and because they had not been paid through the closing argued AmeriTitle was responsible for failing to disburse funds.

The Willms initially proceeded to

(Continued on page 13)

Calendar Events

Don't forget to mark your calendar for next year:
The WLTA will have two educational seminars in the FALL of 2023 with MCLE and WTP credit hours.
Dates TBD

Then Idaho will host the Pacific Northwest Land Title Convention, at the Coeur d'Alene Resort in Coeur d'Alene. Title and escrow professionals from Washington, Oregon and Idaho, as well as vendors serving the industry, will meet again.
August 9-13, 2023

We want to see you there!

(Continued from page 12)
file a claim against Sanderson, although Sanderson was in bankruptcy. Plaintiffs also sued the buyer for return of $500,000 plus interest and obtained a default judgment of over $721,000 but they were not apparently successful in recovering any of this money from La Pine Village. On May 9, 2013, plaintiffs filed this lawsuit against AmeriTitle.

The complaint at the time of trial alleged one claim for fraud and one claim for various violations of ORICO. While there were a variety of arguments against application of Oregon's RICO Act, some of the court reasoning is as follows:

> The issue before us is whether multiple incidents of racketeering activity can constitute a "[p]attern of racketeering activity" under ORS 166.715(4), even if those incidents occurred within a single escrow transaction that damaged two victims. As we discuss below, we conclude that it can. The issue is again one of statutory interpretation for which we apply our usual methodology. See *Gaines*, 346 Or at 171-72. We start with the text in the context of the statute. Id. ORS 166.715(4) defines a "[p]attern of racketeering activity" and provides, in relevant part: " 'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents, provided at least one of such incidents occurred after November 1, 1981, and that the last of such incidents occurred within five years after a prior incident of racketeering activity." We note a few significant aspects of that text within the overall statute. **First, a pattern does not require proof of a long string of incidents; just "two incidents of racketeering activity" are necessary. Second, those two incidents can have, as is the case here, "the same *** victims," or be "interrelated by distinguishing characteristics, including a nexus to the same enterprise," among other characteristics. Third, the incidents may not be "isolated incidents."** That particular phrase does not require proof of continuity of the incidents or any particular temporal element. *Computer Concepts, Inc. v. Brandt*, 310 Or 706, 721, 801 P2d 800 (1990); see also *Penuel v. Titan/Value Equities Group*, 127 Or App 195, 205, 872 P2d 28, rev den, 319 Or 150 (1994) misdemeanor.

Notably, the Oregon Land Title Association filed an amicus brief in support of AmeriTitle and against the application of ORICO in this context. While OTIRO and AmeriTitle were unsuccessful in convincing the appellate court that there was no "pattern of racketeering activity" under ORICO, the court reversed the trial court's $3 million judgment and $750,000 punitive damage award against AmeriTitle on the ORICO claim. The fact that a single escrow transaction can give rise to a "pattern of racketeering activity" under ORICO is the part of this case that gives rise for caution.

DISTRESSED PROPERTY CONVEYANCES ACT

***Mora v. MacGilvary, Trudell, LLC, et. al.*, 19 Wash.App.2d 260 (2021)**

This is a case about a distressed homeowner being swindled out of her home by a predatory homebuyer. In 2015 property owner MacGilvary faced foreclosure for years of unpaid property taxes on her mobile home in Renton. In October of 2015 Wayne Seminoff, agent of Trudel LLC, approached MacGilvary and offered to pay the $20,000 in back taxes, pay off another $5,000 lien, and give MacGilvary $15,000 in exchange for title to the property. MacGilvary could stay in the home rent-free for 6 months, and after that could stay "forever" for $600 per month. MacGilvary would also avoid the foreclosure. Trudel provided a hand-written offer on a slip of paper with some of the terms of the transaction.

In December of 2015 MacGilvary signed a quit claim deed and took the money. A year later in late 2016 MacGilvary had trouble paying the rent, and eventually quit paying. Trudel continued to assure MacGilvray she could stay in the home. In August of 2017 Trudel sold the property to Mora, a good faith homebuyer, for $120,000.

In February of 2019 Mora filed a quiet title action. MacGilvary filed a cross claim alleging Trudel violated the Distressed Property Conveyances Act (DPCA), which protects distressed homeowners against equity skimming and other fraudulent and predatory property schemes, and also alleged that Trudel also violated the Consumer Protection Act (CPA), which protects against unfair or deceptive acts in commerce.

In May of 2020 the trial court found that Trudel violated the DPCA and CPA. Trudel appealed. The appellate court found the company had systematically contacted multiple distressed homeowners, including MacGilvary, and qualified as a "distressed home consultant" under the DPCA. The appeals court also found the sale was a "distressed home conveyance", and therefore Trudel had a fiduciary duty to MacGilvary, as well as several other obligations involving documentation, notice, formatting, signature, copies, and disclosure requirements which it failed to perform. The scrap of paper Trudel provided to MacGilvary was inadequate to meet these extensive procedural requirements.

The court continued to comment on the DPCA and how Trudel violated nearly every provision of it and affirmed that Trudel acted in bad faith. Violations of the DPCA are also regarded as violations of the CPA under precedent, so Trudel also violated the CPA. The appeals court remanded the case to the trial court to determine fees and expenses in favor of MacGilvary, including up to $100,000 in exemplary damages under the DPCA against the LLC, Lisa Seminoff, and Wayne Seminoff.

This case reminds title insurers to be mindful when insuring distressed property conveyances because of greater regulatory scrutiny and the risk that title may be attacked.

Native American Affairs Report

Megan Powell, Native American Affairs Committee Chair

The Evolution of McGirt

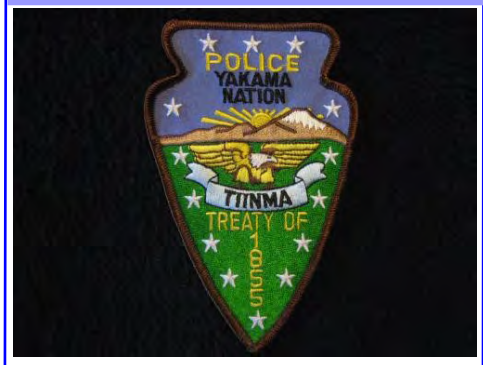
This article supplements the articles that appeared in the 2020 WLTA newsletter entitled The Impact of McGirt v. State of Oklahoma and the 2021 WLTA newsletter entitled McGirt v. State of Oklahoma: Latest Developments

The release of the *McGirt v. State of Oklahoma* decision by the Supreme Court of the United States ("SCOTUS") in July of 2020 sent a shock wave through the country by affirming that most of the eastern half of the state of Oklahoma is comprised of Native American reservation land. The opinion authored by Justice Gorsuch clarified that reservation boundaries established by treaties between tribes and the US government cannot be disestablished by anyone except Congress.

The precedent established by this opinion proved to be a launching pad for litigation involving tribes all over the country who allege that their reservation lands have been improperly diminished or disestablished.

One of those cases involves the Confederated Tribes and Bands of the Yakama Nation in Washington ("Yakama Nation"). As reported in the prior referenced articles, the tribe's reservation boundary dispute pre-dated the *McGirt* decision; their litigation with Klickitat County commenced in 2018. However, the tribe was quick to call the appellate court's attention to *McGirt* as additional support for their boundary claim. In June of 2021 the U.S. Court of Appeals for the Ninth Circuit found in favor of the tribe by affirming the lower court's decision. Klickitat County appealed the decision to SCOTUS, who declined to review the case in April of 2022, leaving intact the circuit court decision. As a result, the Yakama Nation's reservation boundary is affirmed to be that which was recognized by the tribe at the commencement of the litigation in 2018.

The State of Oklahoma has filed over 30 petitions with SCOTUS asking that *McGirt* be overturned. The state asserts that the case has resulted in a chaotic flurry of appeals rooted in a challenge to jurisdiction by hundreds of individuals who were prosecuted for crimes on reservation land. Additionally, there are disputes pertaining to the payment



of income tax by Native Americans working on reservation land, and jurisdiction over surface mining and reclamation of abandoned mines on reservation land.

SCOTUS declined to hear three cases questioning whether McGirt applies retroactively to cases in which a final verdict was already reached. As a result, a current Oklahoma Court of Criminal Appeals ruling that the decision is not retroactive remains intact.

In fact, SCOTUS has declined all petitions submitted by the state except one pertaining to *Oklahoma v. Victor Manual Castro-Huerta*. This is a child neglect case that occurred on a reservation involving a perpetrator who is not Native American and a victim who is. The perpetrator argued that the federal government has exclusive jurisdiction to prosecute him. Under the *McGirt* decision the state would not have jurisdiction to prosecute the defendant, the case would in fact be subject to federal jurisdiction.

SCOTUS agreed to review the case, however, they did not agree to review whether *McGirt* should be overturned. Instead, they agreed to consider the following question: Does the federal government have exclusive jurisdiction to prosecute crimes committed by non-Native Americans against Native Americans on reservation land, or do the federal government and the states have concurrent jurisdiction to prosecute those crimes?

On June 29, 2022 SCOTUS released their opinion, holding that the federal government and the states have concurrent jurisdiction to prosecute crimes committed by non-Native Americans against Native Americans on reservation land.

While the Attorney General for the state of Oklahoma is celebrating this decision, the title industry must be cautious about applying it in a civil jurisdictional context. The opinion does not override jurisdictional compacts between tribes and state or local governments, nor does it override the regulatory jurisdictional considerations set forth in *Montana v. United States*. Title insurance policies and endorsements provide a variety of coverages for land use matters such as zoning compliance and subdivision law compliance. Additionally, coverage for issues such as mechanics' lien risk and lien priority, which are rooted in state law, may be requested for policies issued insuring property located on reservation land.

It is not safe to assume that under *Huerta* the laws of the state and local government apply to reservation lands. When insuring land located within a Native American reservation work with your underwriter to determine whether tribal law may be applicable, and if so, what their underwriting guidelines are.

TITAC of WASHINGTON

A Political Action Committee of the Land Title Insurance Industry

WLTA Members and Title Industry Associates

We are back! TITAC of Washington is excited to be back at the annual title convention. As the only Political Action Committee that supports the title industry, we look forward to hosting several fundraising events for you this weekend.

All the surrounding state PAC's will be hosting a joint 50/50 raffle through out the weekend. The winning numbers will be announced Friday night at the banquet. We will also be hosting a joint silent auction at the banquet with unique items for all types of interests.

We look forward to seeing everyone and your participation where possible.

Thank YOU

Chairperson
Kris Weidenbach,
253-312-3606
kris.weidenbach@ctt.com

TITAC of Washington,
4004 50th Ave NE
Seattle, WA 98105
Attn: Kris Weidenbach

TITLE ACTION NETWORK

Maureen Pfaff, Chair TAN

Title Action Network 2022

Our state has joined many others in making Remote Online Notary legal, but use of RON is still largely limited to cash transactions. Lenders are faced with a patchwork of varying state rules and no guarantee of reciprocity among states so there is limited adoption of the technology for use in transactions involving loans at this time. The best avenue for moving this technology forward will be passing the SECURE Notarization Act which will make RON legal in all 50 states with national minimum standards for its use and provide certainty for the interstate recognition of RON. As of June, the SECURE Notarization Act has more than 100 cosponsors in the House of Representatives as well as eight cosponsors in the Senate.

Members of TAN have been sending messages to their members of Congress and the Senate encouraging them to sign on and support the SECURE Notarization Act. If you are a member of TAN, please be on the lookout for calls to action and take a couple of minutes to respond. If you aren't a member of TAN or haven't seen any of these calls to action please read on to learn how to join or renew your membership.

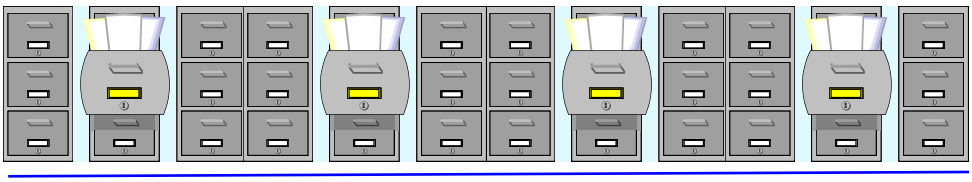
TAN membership is FREE and it only takes two minutes to sign up at www.alta.org/TAN . If you don't remember your ALTA login or don't have one, you can use the following link to sign up for TAN without signing in to the ALTA website:

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.

Washington Land Title Association
http://wltaonline.org
PO Box 328, Lynnwood, WA 98046 (mail)
6817 208th St SW, #328, Lynnwood, WA 98036 (deliveries)
Contact: George Peters
206-437-5869 (Mobile)
206-260-4731 (Fax)
execdirector@wltaonline.org



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