

AGUA CALIENTE BAND OF CAHUILLA INDIANS



February 8, 2021

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action - Indian Affairs (RACA)
U.S. Department of the Interior
1849 C Street NW, Mail Stop 4660
Washington, DC 20240

RE: Proposed Amendment to 25 CFR Part 150 (RIN 1076-AF56)

Dear Ms. Appel:

The Agua Caliente Band of Cahuilla Indians (the “**Tribe**”) respectfully submits these comments on the proposed rule to modernize the current regulations governing the Land Title and Records Office (the “**LTRO**”), 85 Fed. Reg. 79965-72 (December 11, 2020) (the “**Proposed Rule**”).

Since time immemorial, the Tribe has occupied the Coachella Valley and the lands that now comprise the cities of Palm Springs, Cathedral City, and Rancho Mirage. Executive Orders of Presidents Grant and Hayes of May 15, 1876 and September 29, 1877 established the Agua Caliente Indian Reservation (the “**Reservation**”) in a checkerboard fashion by reserving for the Tribe and its members all of the even numbered sections in three townships. With some exceptions, the United States granted the Southern Pacific Railroad the odd numbered sections in these townships. The Southern Pacific Railroad retained the necessary rights-of-way for its operations and sold the bulk of its remaining land grant to non-Indians, who over time, formed the three cities of Palm Springs, Cathedral City, and Rancho Mirage whose boundaries cross both the even and odd numbered sections in the three townships. As a result, the territorial and jurisdictional boundaries of the Tribe and the cities of Palm Springs, Cathedral City, and Rancho Mirage overlap and are coextensive.

Pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 5301 *et seq.*) (“**ISDEA**”), the Tribe has entered into a contract with the Bureau of Indian Affairs (the “**Bureau**”) to maintain the record of title for all Indian lands on and adjacent to the Reservation. Approximately 25,700 acres of land are held in trust for the Tribe or its members on and off the Reservation. Within the Reservation boundaries, approximately 4,300 acres of land are held in trust by the United States for the benefit of the Tribe and approximately 17,600 acres of land are held in trust by the United States for the benefit of individual allottees. Beyond the Reservation boundaries, approximately 3,800 acres of land are held in trust by the United States for the benefit of the Tribe.

To put this in perspective, the Tribal administered Land Title and Records Office (the “**Tribal LTRO**”) handles the record of title for half the western portion of the Coachella Valley -



Elizabeth Appel
February 8, 2021
Page 2 of 6

an area with significant public and private investment that includes the cities of Palm Springs, Cathedral City, and Rancho Mirage. For this reason, the Tribal LTRO provides a critically important role in the development of the Reservation. The Tribe and its members need a reliable and functioning depository of title documents to encourage public and private investment in Indian lands. The Tribe's hope is that the Proposed Rule will create internal efficiencies, engender confidence and more reliance on the record of title for Indian lands, and provide more clarity to the general public regarding the function of the LTRO. To this end, please accept the Tribe's comments on the following sections of the Proposed Rule.

§ 150.3 May Tribes administer this part on LTRO's behalf?

In Section 150.3 of the Proposed Rule, the Bureau proposes to clarify when tribes may administer the LTRO program. The Proposed Rule states as follows:

A Tribe may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.) to administer on LTRO's behalf any portion of this part that is not an *inherently Federal function*.

(Emphasis added.) To provide further clarity, the Tribe recommends that the Bureau define what constitutes an "inherently Federal function" in Section 150.3 by adding a reference to 25 U.S.C. § 5361 (6). The term "inherently Federal function" is defined at paragraph (6) of section 5361 of the ISDEA as follows:

The term "inherent Federal function" means a Federal function that may not legally be delegated to an Indian Tribe.

The Tribe recommends that the Bureau revise Section 150.3 to read as follows:

A Tribe may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.) to administer on LTRO's behalf any portion of this part that is not an inherently Federal function, **as this term is defined in 25 U.S.C. § 5361 (6).**

§ 150.105 Are Certain LTRO Offices responsible for certain geographic areas?

Section 150.105 of the Proposed Rule provides in pertinent part that "LTRO offices may assist in maintaining the record of title for Indian land not under their assigned geographic area as needed." The Tribe recommends that the Bureau provide additional clarity on (i) what it means for a non-assigned LTRO office to assist on an as-needed basis in maintaining the record of title



Elizabeth Appel
February 8, 2021
Page 3 of 6

for Indian lands; and (ii) the process by which a non-assigned LTRO office may provide as-needed assistance. The Proposed Rule does not specify or provide any example of the types of functions or services that a non-assigned LTRO office may provide in order to assist. The Tribe suspects that a non-assigned LTRO office may provide any of the services enumerated in Section 150.103 of the Proposed Rule. However, the Tribe recommends that the Bureau provide further clarification on this point.

The Tribe also recommends that the Bureau establish a standardized process by which a non-assigned LTRO office provides as-needed assistance. If the Bureau desires to authorize the maintenance of the record of title by multiple LTRO offices, the Tribe strongly recommends that these efforts be coordinated pursuant to a uniform process between the various LTRO offices to avoid duplication of effort and mistakes in the actual record. There is value in an assigned LTRO office maintaining ultimate control of the record of title for Indian lands within its assigned geographic area. Assigned LTRO offices have institutional knowledge and are more familiar with the specific title peculiarities unique to their assigned geographic area. This is especially important when a LTRO office is tasked with certifying land status or a title document. For this reason, the Tribe recommends that the Proposed Rule specify that a non-assigned LTRO office only assist on an as-needed basis in maintaining the record of title for Indian lands not under its assigned geographic area if (i) the regional office with supervision over the assigned LTRO office determines that the assistance of a non-assigned LTRO office for a certain transaction is warranted; (ii) the assigned LTRO office is first notified of the assistance and the scope of the assistance by the regional office; (iii) the assigned LTRO office provides its prior consent; and (iv) both LTRO offices subsequently coordinate on the as-needed assistance to ensure the proper maintenance and accuracy of the record of title.

In addition, the Tribe recommends that the Bureau address whether a tribe that has contracted with the Bureau to maintain the record of title for Indian lands located on its reservation may also carry out this function for Indian lands located within another reservation or geographic area. The Bureau explained during the consultation that one of its goals is to allow the allocation of workloads among the LTRO offices for efficiency. If a tribal LTRO office has the capacity to carry out the LTRO function for another tribe or geographic area and is willing to do so, then the Tribe believes the Bureau should support this effort to give tribes “the full opportunity to develop leadership skills” and “an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.” Granting tribes more responsibility not only builds tribal communities and expertise but it allows the Bureau to more efficiently allocate workloads among tribal and non-tribal LTRO offices so that these offices are responsive to their stakeholders in a timely manner.

§ 150.201 What is recorded in the record of title?

Section 150.201 of the Proposed Rule requires that a LTRO office record all title documents in the record of title and clarifies that title documents may include documents that do



Elizabeth Appel
February 8, 2021
Page 4 of 6

not necessarily require Secretarial approval. Section 150.201 lists the title documents that do not require Secretarial approval in paragraphs (1) through (6). Paragraph (6) provides that “subleasehold mortgages under 25 CFR 162.009 must be recorded.” The Tribe supports the Bureau’s effort to require the recordation of title documents not requiring Secretarial approval if those documents affect title. More specifically, the requirement that a LTRO office record all subleasehold mortgages ensures that a creditor is officially on record as holding a security interest in the subleasehold. Since LTRO offices record subleases, it makes sense that any document that affects title to the subleasehold should also be recorded. This ensures that the record of title is accurate, complete, and up to date. Recordation also allows creditors to have confidence that their security interests are properly documented. And confidence in the official record of title makes Indian lands more marketable for public and private investment. Notwithstanding the benefits of maintaining a more robust record of title, the new requirement will constrain current staffing and resources for LTRO offices that handle a significant number of residential and commercial real estate leases and without additional federal funding, it may not be feasible for many of these offices to carry out this new mandate unless there is a budget increase commensurate with the newly added recordation mandate. Requiring the recordation of subleasehold mortgages and other instruments that affect or encumber subleaseholds would triple the number of instruments that the Tribal LTRO records and maintains on the Tribe’s Reservation.

§ 150.202 Must I check with any other government office to find title documents for Indian land?

Section 150.202 of the Proposed Rule explains that due diligence may require examination of other Federal, State, and local records. The Tribe believes this statement is unclear and distorts the role that LTRO offices play in maintaining the official record of title for Indian lands. Instead of merely explaining that individuals should examine other records of title as part of the due diligence process, the Tribe recommends that the Bureau explain that LTRO offices are the only official source for title documents and reports affecting Indian lands. Further explanation is important because over time there is the real possibility that records of title in different title plants may contain inconsistent, inaccurate, and duplicative title records. Inconsistent, inaccurate, and duplicative title records cause confusion and create risk for the Indian landowner and the Bureau. It is important to convey to the public that it can rely on the LTRO record of title as accurate and up to date, and the official source of all matters that affect or encumber Indian lands. The Tribe believes this level of specificity is required to eliminate the misconception that the record of title for all lands, including Indian lands, is maintained at the state or local level. The Tribe recommends that the Bureau revise Section 150.202 to read as follows:

In certain circumstances, due diligence may require examination of other Federal, State, and local records of title.

However, the LTRO is designated as the only official source of title documents and reports relating to Indian



Elizabeth Appel
February 8, 2021
Page 5 of 6

land unless otherwise specified in Federal statute or regulation.

§ 150.304 Where do I request copies of title documents or reports from the LTRO?

Section 150.304 of the Proposed Rule explains that certain individuals (as set forth in Section 150.303 of the Proposed Rule) may request copies of title documents or reports at “any Region or Agency office with access to the record of title, regardless of geographic location.” Since only certain individuals are entitled to receive copies of title documents and reports concerning Indian lands, there is the possibility that ineligible individuals may engage in forum shopping to evade proper identification as an owner of an interest in Indian lands. Assigned LTRO offices are in a better position to make this determination since they are routinely in contact with the owners of Indian lands. For this reason, the Tribe recommends that the Bureau strengthen its access requirements by requiring that all requests for title documents and reports be made at the assigned LTRO office. The assigned LTRO office can either respond to the request or authorize assistance from a non-assigned LTRO office. If a non-assigned LTRO office is authorized to respond to the request, then prior to the non-assigned LTRO office providing a title document or report to the requestor, the office should record the date of the request, the name and date of birth of the requestor, and the title document or report requested, and provide this information to the assigned LTRO office electronically or through written notice.

§ 150.306 Will I be charged a fee for obtaining copies of records?

Section 150.306 of the Proposed Rule states that a LTRO office may charge eligible individuals fees to cover the costs to review, prepare, and process title documents, Title Status Reports, and land status maps. Section 150.306 also provides that the fees shall be at the rates established for Freedom of Information Act (5 U.S.C. § 552) (“**FOIA**”) requests set forth in 43 CFR part 2, Appendix A. It is important to note, however, that the Department of the Interior has not updated the FOIA fee schedule set forth at 43 CFR part 2, Appendix A since 2012. The Bureau’s proposal to use the FOIA fee schedule set forth in Appendix A is problematic for two reasons.

First, Interior has not updated its FOIA fee schedule since 2012. (77 Fed. Reg. 76914 (December 31, 2012)). As a result, the fees enumerated in Appendix A do not accurately reflect the current direct costs (*i.e.*, costs to search, duplicate, and review title documents and reports) that LTRO offices incur in 2021 since the enumerated fees are not indexed to the Consumer Price Index (CPI) published by the Bureau of Labor Statistics (or some other index). Second, the fees enumerated in Appendix A are not representative of the geographical differences in direct costs. Arguably, labor costs and the costs to operate a LTRO office in one location can be dramatically different than in another location. The FOIA provides that “[f]ee schedules shall provide for the



Elizabeth Appel
February 8, 2021
Page 6 of 6

recovery of only the direct costs of search, duplication, or review.” (5 U.S.C. § 552 (a)(4)(A)(iv).) In order for LTRO offices to recover the direct costs to search, duplicate, and review title documents and reports, it is imperative that fees more accurately reflect these costs. Otherwise, LTRO offices would be forced to offer services well beyond their funded capacity. For this reason, the Tribe recommends that the Bureau authorize LTRO offices to develop their own unique fee schedule, which is indexed to CPI and accounts for geographical differences, so that fees are more representative of the true direct costs that LTRO offices incur to search, duplicate, and review title documents and reports.

Thank you for considering our comments. We appreciate the Bureau’s effort to modernize current regulations governing the LTRO.

Should you have any questions or require additional information, please feel free to contact Rahsaan J. Tilford, Deputy General Counsel, at rtilford@aguacaliente.net.

Sincerely yours,

John T. Plata,
General Counsel
Agua Caliente Band of Cahuilla Indians