Practice 9F: Title Investigation and Recording

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SOURCE
Land Trust Alliance

ABOUT THIS PRACTICE
This guidance covers Practice 9F, which includes three elements:

1. ● Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire
   ● a. Update the title at or just prior to closing

2. ● Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property's important conservation values

3. ● Promptly record land and conservation easement transaction documents at the appropriate records office

● Accreditation indicator element | ■ Terrafirma enrollment prerequisite | ▲ Required for both

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Title investigation

Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire

a. Update the title at or just prior to closing

Why is title investigation important?

Title investigation is essential to ensure that the land or conservation easement is what the land trust expects it to be.

With thorough title investigation, a land trust will know:

- Who owns the property and, therefore, who the land trust must work with to complete the donation or purchase (including, for purposes of Practice 10C4, understanding the membership of any pass-through entities, such as LLCs or corporations)
- The correct legal description of the property
- Encumbrances on the property (for example, liens, mortgages, mineral or other leases, water rights) (See Practice 9F2 below)
- Any matter that must be addressed before the donation or sale is completed, including matters that are of concern to funders

If a land trust accepts a deed, whether for a fee property or easement, without proper title investigation, such a deed may:

- Not be effective or valid
- Encumber the wrong property
- Encumber only a partial interest in the property
- Be subject to encumbrances that threaten the permanence of the land’s protection
- Be subject to mortgages, mineral reservations, tax liens or judgments or other restrictions that prevent deductibility or may jeopardize the property’s permanent protection
- Be subject to easements, use agreements, covenants or other encumbrances that are inconsistent with the conservation purposes of the easement
- Lead to expensive title disputes and a diversion of resources
Definition of Title

Title is the legal means by which someone proves they own a piece of land or an interest in land. Title can be defined as the rights of ownership of real estate recognized and protected by law. These rights include the:

- Right of possession
- Right to control the property within the framework of the law
- Right of enjoyment (that is, to use the property in any legal manner)
- Right of exclusion (to keep others from entering or using the property)
- Right of disposition (to sell, will, transfer or otherwise dispose of or encumber the property)

Traditionally, real property is described as a bundle of legal rights. A holder of the entire bundle of rights is said to own the property in fee simple. Some rights in the bundle may be severed from the entire bundle of rights. Examples of rights that may not run with the titleholder of the property — rights that a separate party may own or control — include:

- Easements
- Rights-of-way
- Mineral rights
- Water rights
- Timber rights
- Restrictive covenants
- Life estates
- Rights of lien holders, such as tax liens, judgments and the like
- Conservation easements

Because the rights of ownership can be separated and individually transferred, this concept is often described as a “bundle of sticks,” the sticks symbolizing individual rights that can be separated from the whole.

When someone acquires an interest in land, a document of the acquisition is usually recorded, which means placing a document on file with a designated local public official, usually the recorder of deeds, registrar or register of deeds. Recorded documents are considered to be placed on open notice to the general public. While the specific instruments used to document ownership of one of the sticks listed above may vary, they usually include deeds, mortgages (whether or not in the form of deeds of trust), leases (usually longer term varieties), easements and court orders and other instruments affecting the title to real estate.

Title work due diligence

Land trusts often use the term title work when talking about due diligence for title investigation. “Make sure you order the title work early.” “Land trusts must review title work.” But what does this term mean? It can mean any number of ways to investigate and review title, including through abstracts, title reports, title commitments and title insurance.

It is important to remember that while a knowledgeable land protection specialist might glean a good deal of information from searching the
county records, this effort should not replace the professional investigation of a title company or an attorney. Title can be conveyed in a variety of ways; simply searching the recorded deeds at the courthouse is not an adequate investigation of title. After investigating title, it is critical that the land trust evaluate the information and address any issues accordingly. See Practice 9F2 below for more information.

**Types of Title Investigation**

**Title Insurance**

*Land Trust Standards and Practices* does not require title insurance, but it is recommended, particularly for land or conservation easement purchases. Some organizations always purchase title insurance for land acquisitions and generally for conservation easements. The importance of title insurance varies depending on what interests the land trust holds and what it paid for them. If the land trust does not obtain title insurance for conservation easements, it should encourage the property owner to carry their own title insurance to protect potential title problems.

Sometimes title problems occur that could not be found in the public records or are inadvertently missed in the title search process. To help protect a land trust in these events, many obtain an owner’s policy of title insurance to insure them against the most unforeseen problems when they acquire conservation easements or fee-owned land. Owner’s title insurance, called an owner’s policy, is usually issued in the amount of the real estate purchase (or its value, if a donation). It is purchased for a one-time fee at closing and lasts for as long as someone (or a successor) has an interest in the property. Only an owner’s policy fully protects the land trust should a covered title problem arise that was not discovered during the title search. Possible hidden title problems can include:

- Errors or omissions in deeds
- Mistakes in examining records
- Forgery
- Mortgage holder fraud, forgery or false information
- Undisclosed heirs
- Potential boundary issues if not excepted from coverage

An owner’s policy provides assurance that a title company will stand behind the land trust—monetarily and with legal defense, if needed—if a covered title problem arises after the land trust acquires land or a conservation easement. The title company will help pay valid claims and cover the costs of defending an attack on the title. Receiving an owner’s policy is not an automatic part of the closing process, and it is paid for by different parties (the buyer or seller) in different parts of the country.

**Title Commitment**

A title commitment is a temporary contract providing for the issuance of a permanent title insurance policy when certain conditions are met. The purpose of a commitment is to give the prospective insured client (for example, the purchaser, donee, lessee or lender) information and assurance that if they proceed to closing and the requirements of the commitment are met, the title company will issue a title insurance policy (containing the exceptions identified in the commitment). In short, the title company commits to insure the title of the property, as described within the commitment itself. A title commitment is also known as a title insurance commitment, preliminary title report or title binder.

A land trust orders a title commitment to determine ownership, encumbrances, liens, easements, property description, whether property or other taxes applicable to the property are current and so on. A title commitment will also usually require that an entity take certain actions
before insuring title conveyed by that entity to ensure the person acting on behalf of the entity has the legal ability to complete the transaction. Such information can be valuable to a land trust working with a corporation, trust, limited liability company, partnership or other entity acting as grantor. Usually the land trust’s attorney will review the title commitment (or title report) as part of the due diligence for a land or conservation easement acquisition. Any questionable items, those that negatively affect the conservation values of the property or those that would prohibit the land trust from acquiring the land or easement should be addressed at this stage (see Practice 9F2). While a title report will contain much the same information as a title commitment, it may be organized differently and will not lead to title insurance. Once any title issues have been resolved, the title company will update the title commitment with a new date, time and revised commitment number and will write the title policy to accurately reflect all conditions of title at the date of closing.

Typically, the title company rolls the fee for producing a title commitment into the cost for the title insurance, which is generally based on the land's appraised value or purchase price. Some land trusts order title commitments with no intention of ultimately securing title insurance in order to complete their title work due diligence. Because title companies generally do not charge for commitments, it will not be long before a land trust that only orders commitments finds it is no longer able to get title companies to work with the organization. Land trusts have found ways to engage title companies as partners by explaining why they may need a title commitment, but not title insurance, and have found creative ways to compensate title companies for their time in producing a commitment. Some land trusts negotiate a fixed fee for a commitment, while some agree to buy the minimum amount of title insurance offered by a company, which may be as little as a $10,000 policy at a cost of $300 to the land trust. Who pays for the title policy is largely jurisdictional and is always negotiable.

Title Reports

Some title companies are willing to produce a report of title for a set fee. The title company does the same background work to investigate title as they do to write a title commitment. The title report determines the name of the owner of record, liens, exceptions to title and so on. However, the report provides no commitment to insure title. Title reports are sometimes called reference commitments or title searches. Payment for a title report is usually due at the time the title company produces the report.

Title reports can serve a land trust well in the right circumstances. A land trust can order a title report to gain information on a high priority parcel of land or to obtain an early indication as to whether a potential conservation easement donor has a mortgage on the property. It is a cost-effective way to determine ownership and encumbrances. However, a title report provides no protection for errors or omissions (unless negligence of duty was involved), so if the land trust chooses to acquire the property, it should consider ordering a title commitment to obtain title insurance. Further, a title report will not contain the requirements necessary to close and insure a transaction as a title commitment does. Therefore, a land trust will have to work with its attorney to determine what additional steps might be necessary to ensure that the grantor is authorized to sign the conveyance documents and to address any other details necessary to make sure the property interest is properly conveyed, subject only to the exceptions the land trust is willing to accept on the property.

The willingness of a title company to produce a title report varies from company to company and state to state. Developing a good relationship with title companies in your region may make them willing to help the land trust with challenging projects or tight timelines. Title companies are also usually willing to conduct additional research at the client’s request, although this additional research will add to the cost of the report. Use the title company as a partner and seek its guidance; in some cases, it is just as cost effective to obtain a title commitment as it is a title report.

Title Opinion

Many land trusts rely on a title opinion, which is the written opinion of an attorney, based on the attorney’s title search into a property. It
describes the current ownership rights in the property and encumbrances, as well as the actions that must be taken to make the stated ownership rights marketable, to protect the conservation values and to ensure the easement will not be extinguished.

Abstracts

Abstracting is the process of making notes or abbreviating the chain of title from the public record or the title plant (the compilation of real property records). The purpose of an abstract is to discover, assemble and examine all documents that create a link in the chain of title. Missing links are noted, and a detective search begins to find them.

Title companies utilize abstracts to define the chain of title. Title examiners use the information in abstracts to write title insurance commitments and title insurance policies. While abstracts provide great information and can help in assurance of title, they do not provide protection for a landowner or potential owner. In addition, it is sometimes difficult to find an attorney who is willing to create a title abstract, and those who are available can be very expensive. For these reasons, title investigation in most states is conducted using title reports and title commitments.

Ownership and Encumbrance (O&E) Report

Some title companies offer a product known as an ownership and encumbrance report, which provides exactly what its name suggests: information on the owner of record of a parcel of land and any financial liens (mortgage, deed of trust, mechanic’s lien and so forth) affecting such land. An O&E report does not provide sufficient information to permit adequate title due diligence because it does not reveal any of the recorded documents that may negatively affect a land trust’s ability to protect the land’s conservation values, such as oil and gas leases, easements and rights-of-way affecting the property, reclamation orders, covenants and similar encumbrances.

For accreditation, a land trust can document title investigation with title insurance, a title commitment, a title report, a title opinion or a title abstract, so long as a title company or attorney prepares it. An O&E report is not sufficient for accreditation. The title investigation needs to identify ownership and encumbrances, such as mortgages, severed mineral rights, severed water rights, tax liens or judgments, easements, use agreements, covenants or other restrictions.

If the title investigation includes a general exception for the investigation of rights that would impact the conservation values, a land trust will need to separately document how it addressed those rights. For example, some title commitments have a general exception for the investigation of mineral rights. This exception can either mean the title company included mineral rights in its investigation but cannot guarantee them or it can mean the mineral rights were not part of the title investigation. Because of this, a land trust needs to evaluate such exceptions and assess the risk that the minerals were potentially severed. If the risk is high that the title investigation excluded mineral rights and there is a high risk of severed mineral rights, the land trust will need to take additional action to address this risk (see Practice 9F2 below). Similarly, if water rights are excluded from the title investigation but they are essential to maintaining the conservation values, then the land trust needs to document these water rights in a separate document, such as a due diligence report, deed or the baseline documentation report.

Timing of the investigation

Early in the process: It is important to investigate the title as early as possible in the acquisition process — often title is not vested as people (even the owners) think it is. Knowing about problems early in the acquisition can give the parties involved time to cure any defects or change in whose name title is held. Starting the title investigation process early is particularly important when timing is tight, such as when a donor
wants to close in a certain calendar year. Many transactions have been slowed down or even halted due to unresolved title issues. Inaccurate legal descriptions, mortgages or other forms of debt, mineral interests and other ownership legalities are some of the quite common issues that can delay or prevent closing of a transaction.

Update at or just prior to closing: If the land trust conducted its initial title investigation early in the transaction process, it must have a professional title company or attorney update the title at or just prior to closing (preferably within 30 days) to ensure no additional encumbrances have been placed on the property since the initial title investigation. A land trust could find itself in a difficult situation if a landowner secured a mortgage after the initial investigation and before closing, which could have been addressed if the title was updated or brought current as close to the closing as possible.

For accreditation, a land trust can provide a title update from a title company or attorney through an updated title report or title commitment, a title insurance policy, a written communication from an attorney or title examiner that the investigation was brought current at closing or written escrow or closing instructions requiring that the title investigation be brought current at closing. The title update needs to be completed within 30 days prior to closing.

Period of time covered by the investigation

Ownership of land changes over time, and those acquiring land must have knowledge of who owned the land for a certain number of years in order to ensure that their acquisition is valid and cannot be contested. A history of how title passed from one owner to the next is called a chain. The chain of title for every piece of land in this country begins with ownership by some country (the United States, England, France, Spain, Mexico or Russia). The first conveyance of title from a certain nation or state to another entity (including a private individual) begins a chain of title. How far back a land trust needs to look into a chain of title depends on many factors: the nature of the transaction; the likelihood of past uses affecting the conservation values of the land; state laws governing recording and re-recording (marketable title acts); title search custom and practice for your area; the degree of risk a land trust is willing to assume; and the land trust's general knowledge of the area. In consultation with your attorney, follow general procedures, but each deal may require more investigation.

In some areas of the country, it is common for a title company to go back a certain number of years, say 30, 40 or 50 (for example, in Michigan there is a 40-year marketable title act, so title companies tend to only go back 40 years). Furthermore, if a land trust is completing a project cooperatively with a government agency, the agency may require a complete chain of title for its review or a 50-year chain of title. For example, the US Environmental Protection Agency’s All Appropriate Inquiries (AAI) rule requires an environmental professional’s review of the chain of title, often as far back as 40 years.

Land trusts should go back as far as they deem necessary to satisfy themselves of good title, but always in compliance with state law.

Transfers from other organizations

Land trusts should investigate title as part of their due diligence when accepting the transfer of land or conservation easements from an affiliate or other conservation entity.
For accreditation, a land trust will need documentation of how it investigated title when accepting the transfer of land or a conservation easement. The documentation can be a full title investigation, a copy of the conservation partner’s past title investigation, along with evidence the title investigation was brought current within 30 days prior to closing, or a statement of how the land trust assessed and addressed title risks. This risk assessment can include evaluating the title information from the conservation partner or conducting additional title investigation.

If the land trust works with partners, the land trust still needs to complete its own due diligence to safeguard the assets it will hold and meet the accreditation requirements by obtaining and reviewing the title investigation and title update before closing. If a partner completes the title investigation and/or title update, the land trust needs to receive and review the partner’s title documentation on its own behalf before closing and retain a copy of the documentation.

**PRACTICE ELEMENT 9F2**

**Evaluating title exceptions**

Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property’s important conservation values.

**Evaluating title**

Once the title investigation is complete (see Practice 9F1 above), a land trust needs to evaluate the information it received and decide on next steps, which usually includes a review by an attorney and communication with the title company about questions or changes.

1. Every title work due diligence review should include the following steps:
2. Land trust personnel (whether staff or a board member for all-volunteer land trusts) review and understand the title commitment or report
3. Land trust attorney reviews and understands the title commitment or report
4. Questions or changes regarding the title commitment or report are sent to the title company or attorney for change or clarification

Because the land trust often orders the title work, it is best if the land trust personnel responsible for the acquisition take the first look at the title report or commitment, reading the entire document and all exceptions to title listed in the report or commitment. They can then ask the land trust attorney to answer specific questions or confusing issues raised by the results of the investigation. The land trust’s attorney will review the title work more thoroughly and should not only evaluate all exceptions to ensure that the title is good and that the land trust’s conservation goals can be accomplished, but also to ensure that the exceptions listed are accurate (they actually apply to the particular property in question) and to confirm that the land trust documents reflect the name of the record owner and legal description accurately.
Legal issues affecting title

It is nearly unheard of for a parcel of real estate to be conveyed wholly, with no defect to title. A defect is any item affecting the fee title ownership of a property. So, although the term has a negative connotation in most contexts, not every title defect is problematic. Title defects are also known as exceptions. That is, the fee title being conveyed is the complete ownership of the bundle of rights, except for those defects identified in the deed, in the title policy or through the title investigation (such as a utility easement, mortgage or mining lease). Title practitioners have identified somewhere between 30 and 60 different types of potential title defects. Nevertheless, all defects are not equal and not always fatal (cause a complete loss of title to the property).

Every situation is unique, so land trusts must read the title commitment (or report) and all title documents, including all of the exceptions to title. Unless you know the details of the exception to title, you cannot make an informed decision about whether your land trust will need to address the matter. Keep the back-up documentation for each exception (they will not be reproduced in the title policy) and store these documents in accordance with your land trust's recordkeeping policy.

Have the documents reviewed by an attorney early in the transaction — definitely before closing — so that any problems can be addressed. If you are obtaining a title insurance policy, items listed in the title commitment (such as exceptions) will be in the policy, so the time to fix any problems is during the title commitment phase (due diligence phase), before closing.

Mortgages and Other Liens

Examining mortgages and other liens that are exceptions to title is important for two primary reasons. First, if the land trust is purchasing or accepting a donation of the fee interest in the land or purchasing a conservation easement (whether for fair market value or at a bargain sale price), it should instruct the title company to pay off any loans, mortgages or liens from sale proceeds or from funds provided by the landowner at closing and record a release or discharge. Doing so removes the clouds from the title and releases both parties from such monetary obligations so that these encumbrances do not appear in the final title insurance policy (if the land trust acquires title insurance for the project) and, for fee interest acquisitions, ensures that the land trust is not financially liable for the debt.

Second, if a landowner is granting a conservation easement on their land, the land trust must make sure that the property is not subject to an outstanding mortgage. If there is a mortgage, the landowner must pay off the mortgage or the mortgagee must subordinate its interest in the loan to that of the conservation easement prior to closing. If the mortgage is not subordinated or released, the conservation easement may be extinguished if the lender forecloses on the property. In the case of a donated conservation easement where the donor intends to seek a charitable deduction for federal income tax purposes, subordination is required by federal law. Treasury regulation §1170A-14(g)(2) states, in part, “no deduction will be permitted . . . for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity.”

A mortgage subordination means that a lender can still foreclose on a property, but that the conservation easement will remain in effect. A mortgage subordination agreement can take many forms, ranging from a single paragraph to a four-page document, but it must at least contain the language set forth in the preceding paragraph as required by the Treasury regulations. Some land trusts attach the mortgage subordination as an exhibit to the conservation easement. Other land trusts record the easement and mortgage subordination simultaneously; usually the subordination is recorded immediately prior to the conservation easement document thereby effectively removing the encumbrance from record before the conveyance of the easement interest. A separate mortgage subordination document can be more
attractive to the parties because a lender only has to review and sign the subordination document, rather than the entire easement, and can do so before the easement closing.

The landowner should be responsible for “cleaning” the title by paying off debts or securing the subordination agreement. It is important to start the process as early as possible because it can take some time for the lender to sign the agreement. Often, the land trust has to get involved to explain the conservation easement to a bank or its attorneys or to provide a sample subordination form for signature. Land trusts and their attorneys must review the subordination to ensure it satisfies the Treasury regulations and must ensure that the representative signing on behalf of the lender is authorized to do so. This may require the bank to provide a certificate of authority along with or within the subordination agreement. One Colorado land trust helped a landowner secure a subordination agreement by mailing the lender’s attorney a copy of the Treasury regulations and highlighting the pertinent language. Once the attorney understood that the law requires the agreement and specific language, he gave a green light to his client, the lender, to sign the document. Most lenders are willing to sign subordination agreements, as long as the appraised value of the land subject to the mortgage remains high enough to satisfy their lending requirements after the conservation easement is placed on the property.

For accreditation, a land trust needs to address mortgages by recording a mortgage subordination agreement before or contemporaneous to the conservation easement deed or having the mortgage discharged at or prior to closing.

Unpaid property taxes may result in a sale of the property by a public trustee or other local government official in order to secure money to pay the taxes, and this public sale may result in the extinguishment of a conservation easement. If your state has not addressed this situation legislatively, your land trust should refuse to accept the easement until the property taxes for the property have been paid to the closing date.

Mechanic’s liens are liens created by state law that seek to guarantee payment for contracted services rendered to a particular piece of real property. The list of service providers permitted to file mechanic’s liens against land is broad and usually includes surveyors, contractors and architects. Until the debt is paid and the lien released, the landowner does not have clear title to the land. If the landowner does not pay off the lien, the holder of the lien may foreclose on it, which may extinguish a conservation easement placed on the property after the lien. Therefore, a land trust must address any mechanic’s lien that appears in a property’s chain of title by requiring the landowner to pay off the lien and secure a satisfaction of lien or release from the lien holder, which is then recorded in the real property records prior to other transactional documentation.

Mineral Rights

Knowing the status and ownership of mineral rights is important in any acquisition. Although a title company’s willingness to investigate title and ensure mineral rights ownership varies from location to location, a land trust must determine whether the surface owner holds the mineral rights or whether they have been severed from the property. Often, owners of subsurface mineral rights have the right to use the surface of the land in order to extract minerals. Such rights can pose obvious problems for conservation transactions. Title companies may charge additional fees to investigate mineral rights ownership or there may be an alternative title agency that specializes in title insurance for mineral rights, or the land trust may have to hire a qualified expert, such as an attorney specializing in mining law or a geologist to research the status of mineral rights. If some or all of the mineral rights have been severed from a property, a surface use agreement, which may or may not appear in the public records, may have been completed by the fee interest and mineral owners and should be reviewed by a land trust during its title work due diligence.
Although it is sometimes difficult to obtain mineral information from a title commitment or report, there are a few places to begin investigation:

- Ask the landowner about the status of minerals. Have the minerals been leased?
- Is there mining activity in the area?
- What information does a geologist have about mining in the area?

Next, you should ask the title company to provide documents from which you can determine whether minerals have been severed from the surface ownership (most of which should appear as exceptions in a title commitment or report, although leases are not always recorded), including:

- Federal and state patents
- Deeds that reserved mineral interests
- Deeds that granted mineral interests
- Oil and gas and other mineral leases

It is important that the land trust review any of these documents secured from the title company. If necessary, commission a geologist’s or mining engineer’s report to examine how likely, or unlikely, the development of the minerals might be. With this information, the land trust should be able to answer the following questions:

- Were any mineral rights reserved to the United States or the state?
- Were any mineral rights reserved or granted to a private owner? (Mineral interests can be wildly fractionated if the owner in a chain retained portions of mineral rights with each conveyance.)
- What types of minerals were reserved?
- How likely are such minerals to be found in commercially developable quantities on or under the land?
- If minerals have been severed, what is the likelihood of surface mining?
- What are the terms of any leases or surface use agreements?

There are a number of important reasons why the land trust must determine the mineral rights ownership and its specifics. In either a fee land or conservation easement acquisition, the land trust will want to know if it is in danger of having some, or all, of the conservation value of the property destroyed by a future mining operation. In a fee acquisition, if a land trust can determine that the minerals have not been severed, it can manage the property without worry. In both cases, if the minerals have been severed, a land trust must evaluate whether any mining activity can be conducted in a manner that is consistent with the preservation of the conservation values of the property. At a minimum, a land trust should document its risk assessment and rationale for actions taken or not taken.

In the case of conservation easement acquisitions by donation or a bargain sale in which the landowner plans to seek tax benefits, evaluating mineral rights ownership is imperative because any federal income tax deduction may be in jeopardy if minerals have been severed from the property or if the landowner retains the right to use surface mining methods of their unsevered mineral interests (see the Practical Pointer Easement donation disqualification for reserved rights of surface mining methods). In the case of severed mineral rights, the landowner will have to take appropriate measures to assure the land trust that even though the minerals have been partially or wholly severed, their development by surface mining methods is “so remote as to be negligible,” as stipulated in the Treasury regulations. In most cases, the landowner hires a qualified geologist to analyze the potential for surface mining. Even if the result of the analysis is the desired conclusion that “the possibility of surface mining is so remote as to be negligible,” a land trust should still review this remoteness letter to assure itself that
the letter addressed all issues related to the particular land in question and it is not qualified in some manner that might leave the door open to a mining operation that could harm the conservation values the land trust wishes to protect on the property.

Identifying the owners of mineral rights can be cumbersome, because mineral rights are often passed from generation to generation without any real knowledge or written documentation. A mineral right may have many joint owners, some who may have no knowledge of ownership. This fact became important to a land trust seeking to protect a large ranch when it found through its title due diligence that all of the mineral rights had been severed from the property. After further research, the land trust also found that the mineral rights were conveyed over a 50-year period to more than 350 different fractional owners. The organization tried for months, without success, to locate these owners in order to secure a subordination of their mineral interests to the conservation easement or to determine if they were willing to sell their interests. After conferring with its attorney and geologist, the land trust decided to proceed with the transaction, concluding that the risk of more than 350 people agreeing upon a single mineral development plan was remote. The state agency that provided funding for the project agreed with the land trust’s conclusion after performing its own due diligence, and the transaction proceeded.

For accreditation, a land trust needs to document how it addressed any severed mineral rights so that they do not significantly undermine the conservation values. Documentation can include a mineral remoteness report from a qualified geologist or similar professional, documentation that the severed rights have been reunited with the fee estate or a surface use agreement with the party that holds the mineral interests that has provisions to protect the conservation values.

If the title investigation includes a general exception for the investigation of mineral rights, a land trust needs to evaluate the exception and assess the risk that the minerals were potentially severed. For example, a title commitment with a general exception for the investigation of mineral rights can either mean the title company included mineral rights in its investigation but cannot guarantee them or it can mean the mineral rights were not part of the title investigation. If the risk is high that the title investigation excluded mineral rights and there is a high risk of severed mineral rights, the land trust will need to take additional action to address this risk. The land trust will need to obtain a mineral remoteness report or further investigate or address the minerals.

### Other Encumbrances

Other encumbrances that the land trust will need to evaluate include the following:

**Easements and rights-of-way.** Existing easements are often overlooked or ignored, and while they often do not affect a land trust’s ability to conserve the land, they can, at times, cause serious problems. It is not enough to acknowledge, for example, that a utility easement exists. The land trust must read the easement itself to determine where the easement is located, the extent of rights that were granted, terms of the easement, if applicable, and so on. Then, the land trust should consider the impact of the easement on the conservation values and the land trust’s goals for the project and document its findings.

- **Timber rights.** A land trust should thoroughly investigate whether a third party (such as a commercial logger or neighbor) has the right to harvest timber on a potential conservation property. Such rights do not often appear in title work except, sometimes, in the case of older deeds reserving the right to the grantor to complete a timber harvest. A conversation with the landowner about this topic is likely the best way to make this determination.

- **Water rights.** Water rights also generally do not appear in title commitments or title reports; in fact, most title insurance policies will specifically exclude coverage of water rights. So how does a land trust investigate title to water rights, if the rights are important to protecting the conservation values on a particular piece of property? Land trusts in the West can check the records of the particular state agencies tasked with overseeing water rights. In the eastern parts of the country, water rights do not (yet) rise to the same level of concern as they often do in the West, but may become more important as water resources become a limiting factor to human use of land...
or as climate change affects water supplies. Land trusts should analyze the impact of water rights on the conversation values of a property and document their findings appropriately. For more information, see Land Trusts and Water: Strategies and Resources for Addressing Water in Western Land Conservation.

- **Leases.** Recorded leases could affect ownership of property, and a land trust must consider them on a case-by-case basis. In many instances, the entire lease will not appear of record; instead, there may simply be a notice that a lease affects the property. In such cases, you need to obtain a copy of the full lease from the landowner for review.

- **Life estates.** For fee acquisitions, it is important to know the status of any life estate and evaluate how it might affect the protection of a property, its fair market value, its public use as a preserve and the general desirability of the property for acquisition. Many land trusts have successfully completed transactions by granting a landowner a life estate, thereby often lowering the property’s value and project costs.

- **Contract interests.** There may be exceptions to title from recorded contracts with other individuals, such as land contracts or rights of first refusal. The land trust should read these documents and understand their implications and potential impact on the project.

- **Covenants or restrictions.** Some exceptions to title are listed as covenants or restrictions (for example, restrictions that protect a scenic view, require a buffer or limit the size of outbuildings). While some land trusts may never see such an exception if they only deal with vacant land, land trusts in more urban or developed areas may see these exceptions more frequently.

A land trust should retain documentation that it analyzed the risks related to these encumbrances and what actions it took to ensure that the encumbrance would not affect the organization’s interest in the land or the protection of the conservation values. This is most often documented in project selection forms, project descriptions provided to committees or the board, committee or board meeting minutes, attorney correspondence or in a memo to the project file.

For accreditation, a land trust needs to document how encumbrances are addressed so that they will not result in extinguishment of the conservation easement or significantly undermine the conservation values. Documentation can include a memo to the file with an analysis of how substantial access easements or rights-of-way could impact the project, a written release of timber rights, water rights due diligence reports or release of a right-of-first-refusal.

**PRACTICE ELEMENT 9F3**

**Recording land and easement transactions**

Promptly record land and conservation easement transaction documents at the appropriate records office.

**Why is it important?**

If a document such as an option, purchase agreement, grant deed, conservation easement or survey is not recorded, there is no public notice or legal record of the transaction. Consequently, a title search of the property does not reveal the contract, conveyance or encumbrance, and the transaction can be legally entangled, even nullified, by documents subsequently recorded by other parties. For example:

- If a conservation easement is not recorded, as evidenced by a recorded deed, the new owners may not be bound by the conservation easement when the property changes hands. The recording of their deed takes precedence over the unrecorded conservation easement.
• If an option agreement is not recorded, an unscrupulous owner could sell or option the property to someone else.
• If a grant deed is not recorded, creditors of the former owner could file claims against the property.

What is recording?

Recording is the process of placing a document on file with a designated local public official for public notice. Deeds are recorded in the office of the recorder of deeds, registrar or register of deeds in the county or municipality where a property is located. The recording of a deed consists of having it transcribed into the proper book and indexed. Documents filed with the recorder are considered to be placed on open notice to the general public.

Claims against property usually are given priority on the basis of the time and date they were recorded, with the most preferred claim going to the earliest one recorded, the next claim going to the next one recorded and so on. This type of notice is called constructive notice or legal notice. The effect of recording a document is to give constructive notice to all the world of the content of any instrument or document filed for the record.

Recording documents

Recording should happen immediately upon execution of the pertinent documents, but no more than one week following the date of the last signature. For land trusts that use a title company to close transactions, the title company delivers the document to the appropriate governmental office for recording. The land trust must be very clear in its written closing instructions to the title company that the property deed or conservation easement be recorded in the same year as the date signed.

If a donor of land or a conservation easement is planning to claim a tax deduction, it is important to understand when the transaction is deemed complete in order to substantiate the timing of the gift. For gifts of fee land, the conveyance is deemed complete (the gift has been made), when the donor delivers the deed to the donee for recording (without recording having yet occurred). However, in the case of conservation easements, the gift is only deemed complete when the conservation easement has actually been recorded or there is documentation of delivery to the recording office. The reasoning is that the easement must be permanent and enforceable to be a valid contribution for federal income tax purposes and it would not be enforceable if not recorded. This distinction can become important in year-end donations of conservation easements. Land trusts should be wary of waiting until the last minute to accept and record easements because they should be recorded in the same year the gift was made.

For accreditation, conservation easements and fee title deeds need to be submitted for recording within a week after the final signatures. Generally, the documentation provided in the accreditation application is the signed deed with the dated recording stamp. However, a land trust can provide documentation of when the delivery was made to the recording office if the recording office delayed the formal recording.

Order of Recording
Generally, the closing documents that should be recorded first represent the resolution of any title issues, such as releases, discharges or subordination of debt, clarification of ownership or other resolved issues. Next is the deed of conveyance for fee land acquisitions (whether donated or purchased) or for conservation easement transactions, the conservation easement deed. There may be exhibits to the deed or conservation easement to record, as well as any certificates of authority or legal existence (for corporate entities). The attorney or recorder should record the documents in the order dictated by the title resolution and with the knowledge of the land trust.

The original documents, with the recording stamps, should be returned to the land trust and kept as part of the permanent file (see Practice 902). Recording may seem like a formality, a minor step at the end of a long process. It is not. Land trusts should be sure recording is done and done immediately.

**Re-recording conservation easements**

While recording a deed of conveyance or deed of easement is considered a basic transaction step, it is also important to know if your jurisdiction requires re-recording of deeds and easements in order to ensure their perpetual status. Due to marketable title acts and recording acts adopted in some states, certain interests in land must be re-recorded at the end of a given period — usually 30 years — in order for the interest to remain valid. In these cases, recording becomes an ongoing due diligence responsibility for a land trust, and it should make sure that its calendar systems and recordkeeping provide for reminders of when easements need to be re-recorded.
Explore related resources

DUE DILIGENCE • PRACTICE 9F: TITLE INVESTIGATION AND RECORDING

Learn Practice Element 9F1: Title Investigation
2018 • UPDATED MARCH 5, 2020 • LAND TRUST ALLIANCE

Land Trust Standards and Practices, Practice 9F: Title Investigation and Recording, includes three elements. This module addresses the first element, 9F1.

VIEW COURSE (/resources/learn/explore/learn-practice-element-9f1-title-investigation#content)
Learn Practice Element 9F3: Recording Land and Easement Transactions

Land Trust Standards and Practices, Practice 9F: Title Investigation and Recording, includes three elements. This module addresses the third element, 9F3.

VIEW COURSE (/resources/learn/explore/learn-practice-element-9f3-recording-land-and-easement#content)
Learn Practice Element 9F2: Evaluating Title Exceptions

Land Trust Standards and Practices, Practice 9F: Title Investigation and Recording, includes three elements. This module addresses the second element, 9F2.

VIEW COURSE (/resources/learn/explore/learn-practice-element-9f2-evaluating-title-exceptions#content)
Title Investigation

Ownership of land changes, and those purchasing land must have knowledge of who owned the land to ensure that their purchase is valid and cannot be contested. This document provides an overview of title, various types of deeds and ownership, title insurance and its importance and legal descriptions.