

Securing the Future by Researching the Past

Brenda R. Haskins*

ABSTRACT

This work describes the experiences of three families with land-related legal problems. The three families include a Latina/o family in Texas, an African American family in North Carolina and a Native American family in Wisconsin. All three have been affected by fractionated ownership of property and the lack of access to the legal system for an adequate remedy.

The paper then highlights the hands-on title search training offered by the Land Law and Tenure Security (LLTS) extern program, the students' activities on behalf of these families, and the need for law schools to provide such opportunities for students and a means to assist families. The title searches--and students' ability to do them effectively--play prominently in the stories. In the case of the African American family, they discovered that of a 300+ acre farm purchased by their great grandfather after the civil war, only 10 acres remains in the family. The rest is part of Fort Bragg in North Carolina. The 10 acre parcel is completely landlocked.

The families in Texas have been struggling with fractionated ownership of an informal subdivision along the border with Mexico. The case involves families of limited means living in two countries. The owners/developers of a subdivision died intestate and the resulting probate action has been going on for years while the legal services attorneys and our students struggle to find heirs and provide notice.

The Oneida Indian Tribe of Wisconsin came to Wisconsin from northern New York. They purchased land from the Menominee Nation and the Ho-Chunk Nation. They have seen their land base shrink by Treaty and be further decimated by Federal Indian policy. Now, the Tribe is thriving financially, but is still struggling to regain their land base and thus increase jurisdiction and exercise sovereignty. This case involves an extern sent to help his Tribe. He was given the task of researching the title history of a parcel. His search led him to his own family, where his grandmother was descended from the original allottee.

All three stories highlight the importance of a thorough title search and the need for access to legal services. All three families have limited means and have benefited from access to the student legal externs trained in title searches and property law.

* Associate Researcher, Department of Rural Sociology, Land Tenure Center, University of Wisconsin-Madison. Director of Land Law and Tenure Security Extern Program. Thanks to Jane Larson, Jess Gilbert and Marsha Cannon

Reconnecting with family heritage in North Carolina

Touring Ammie Jenkins' family farm, I feel the presence of her great grandfather. As a freed slave, he had purchased over 300 acres of farmland.¹ We drive up a trail to the front of the house that in years past brought neighbors to visit or relatives with news from the city. Walking among the ruins, Ammie tells story after story of the people, the times, and the place. The stories convey love and pride for her great grandparents as she brings the ruins life. I see her great grandfather bent over and working in the fields as Ammie describes how he acquired and worked the land, providing shelter, food, and a legacy for his children.

Warmth and emotion well up as Ammie's great grandmother cooks on the crumbling stove in the summer kitchen or warms herself over the stone remains of the big fireplace. Trees now grow in the middle of the building footprint and small animals burrow for shelter in the foundation.

Ammie speaks with pride of her great grandfather's purchase of this property. As a former slave, he was considered property himself, forbidden to own real estate. After emancipation, he worked hard and purchased the property. His land is adjacent to an estate once owned by the Rockefellers.

A short walk away is Ammie's family home. The ghosts at this home bring affection as well as pain to her words. She recounts with joy the warmth of her father, mother and six younger siblings playing, laughing, and working in the home and fields. Suddenly, a memory clouds her joy and she talks about her siblings cowering in the parlor while neighbors approach the house, demanding that they leave after her father's untimely death at age 37. The ghosts of her mother and younger siblings reluctantly leave their home and shelter for an unknown future. Her mother chose to keep her family safe, but the price was the home and land they all loved.

Today there are new ghosts on the property. The United States Army is the current tenant. A trip to the register of deeds office has confirmed that 10 acres of her great grandfather's 300-acre farm still belong to the family. The Army never acquired this acreage. However Uncle Sam owns thousands of acres all around, including the Rockefeller estate. When Ammie is allowed on the property to spend time with her relatives, she must overcome distractions like a Humvee of soldiers driving on the old trail and a C130 flying very low overhead.

Ammie has been able to reconnect with her family's heritage because a title search showed that she and her family were the rightful owners of these 10 acres. Would she feel the same connection to her family if she couldn't walk on the property? Probably not. Standing on the same ground where her great grandfather stood and surveyed his land is very powerful.

The Army is conducting a new offensive against owners of land adjacent to the base, demanding development restrictions in the name of 'Homeland Security'. These development restrictions will interfere with

¹ My thanks to Ammie for sharing her family home and history with me and my family on a beautiful summer day.

property division and limit uses of the property.

Cleaning up a mess in Texas

On Sept 28, 1965, Jose and Cipriana Trevino acquired 7.3 acres of land in the West Addition to Sharyland, Hidalgo County. The next day, on Sept. 29, 1965, Jose transferred his interest to Cipriana.² Sometime after October 1965, Jose began selling small residential lots within the parcel. While there are 38 total lots, it is unclear how many he eventually sold. At some point the roads were paved and the subdivision has electricity, but there is no sewer and water.

In 1985, Cipriana died intestate. She was survived by Jose and many children and grandchildren. In 1990, Jose executed an “Affidavit of Heirship” stating that Cipriana had 12 children, five of whom survived her and were still alive in 1990. Three of the children who predeceased Cipriana, had lived into adulthood and had grandchildren.

In 1999, there is an amended Affidavit by a granddaughter that states that three of the children are now living and names 91 grandchildren who may have an interest in the property.

In January 1995, Jose Trevino died. While there are rumors that he left a will, none has been located. According to the laws of intestacy, under Texas Probate Code §38(b)(1), Jose inherited a 1/3 life estate in the land when his wife died intestate. The remaining 2/3 went to her issue. Also, Cipriana’s children who predeceased her also died intestate, their share was divided as follows: 1/3 life estate to their surviving spouse and the remainder to their issue. Thus, since Jose only received a life estate, that interest died when he died. It is not necessary to separately track his heirs.

When Jose sold the lots, the subdivision wasn’t platted. There were three rows of home sites and buyers built anywhere and everywhere. The problems are worse in the first row, but all were a mess. As part of the litigation the property has been surveyed, and all have agreed to property boundaries, some giving up a foot or two and others having to tear down and move buildings.

Texas RioGrande Legal Aid represents the purchasers of the parcels. But not all of the purchasers, because many are also Trevino descendants. TRLA believes that all of the Trevino heirs have been served notice of the lawsuit, but there has been a new development—also involving a death. The attorney representing the descendant’s passed away late last year. He was serving pro bono and it is unclear who will step in to take his place.

To move forward and give the purchasers deeds, there are a couple of remaining issues to sort out. There are outstanding taxes owed. The court needs to identify someone to service the promissory notes that will be issued. Someone has to collect the payments but because they’ll be low interest notes, there is low interest in servicing them.

² My thanks to Veronica Rodriguez, Colonias Project Director at Texas RioGrande Legal Aid, who provided the summary of court action to date.

Over the years, several of our externs have worked on this project. Myrna Gonzalez was responsible for providing notice to most of the heirs, but Tusantu (Tutu) Nañi is the extern that residents remember best. He is a fluent Spanish speaker from colonial Africa who gained his clients trust with his charm, wit and ability to speak their language

Forward in Wisconsin

Bill Cornelius worked for his tribe, the Oneida Nation of Wisconsin during the summer of 2003³. He was assigned to research a parcel that the tribe was looking to develop. As he began his search, he realized that his grandmother was an allottee on that parcel.

Before coming to Wisconsin in the 1820's the Oneida Nation was one of the Six Nations of the Great Iroquois Confederacy.⁴ Collectively, they held millions of acres of land in the northeast. As a Nation, they were self-sufficient with an economy that provided for the well-being of all members. As the US became colonized and pressure from white settlers increased, tribal economies and traditional forms of government deteriorated.

This pressure resulted in the loss of nearly 5.5 million acres of land to the state of New York through treaties through the end of the eighteenth century.

In the 1820's, to preserve sovereignty and autonomy, part of the Oneida Nation began moving to 5 million acres of land in Wisconsin. This land was purchased from the Menominee Nation and the Winnebago Nation (now Ho-Chunk Nation). In 1838, the United States government reduced the reservation area to 65,000 acres.

During the next 100 years, US Federal Indian policy led to the decimation of tribal lands. Particularly catastrophic was the Allotment Act of 1887 that allotted lands to individual Indian tribal members. Ownership of these allotments has transferred out of member hands through fraud, deceit and ignorance until only a few hundred acres remained. Along with a diminished land base, comes a diminished capacity to remain an independent, sovereign nation.⁵

³ Thanks to Bill for sharing his summer activities, and to Becky Webster, Land Management Attorney, Oneida Tribes of Wisconsin.

⁴ Information summarized from the Official Website of the Sovereign Oneida Nation of Wisconsin See <http://www.oneidanation.org/>

⁵ The Oneida Nation's first step to reclaiming Reservation lands came in 1937 when 1,270 acres were bought back and placed in governmental trust for the tribe. This was three years after Congress had passed the Indian Reorganization Act, which affirmed the tribe's right to govern its own lands. Land reclamation proceeded very slowly for the next fifty years. Then, in the 1980's, three major developments catapulted the effort.

First, a 1985 Supreme Court ruling entitled all Oneida, collectively, to a 250,000 acre land claim in Central New York.

Second, a seven year lawsuit levied by two adjoining counties and the city of Green Bay challenging the jurisdiction of the Oneida Nation and its boundaries was thrown out of court. The action enabled the Oneidas to retain their sovereign right to regulate their lands.

Third, the passage of the Indian Gaming Regulatory Act in 1988 provided Indian Tribes in Wisconsin with an

Today the Oneida are a self-governing tribe and are continually developing innovative programs to increase their land base and thus their jurisdiction and ultimately tribal sovereignty. The goal of their 2020 program is to own 51% of the land within their reservation boundary. As of spring of 2005, they own almost 17,000 of the 64,000 acres.

Under their DREAM home program, the tribe purchases residential property within the reservation boundaries and sells only the home to a tribal member. The Tribe increases their jurisdiction over more land within the reservation boundary with every home purchased.

Their latest development is the creation of a tribal title shop where they will track the transfer of ownership of tribal property. At this point, they will not track the ownership transfers of non-tribal property, including that owned by tribal members.

The importance of land ownership

Lack of access to land and housing, insecure property rights, and the degradation of land resources are fundamental factors in social conflict and political instability. Certainty of property ownership and its associated responsibility can be the foundations of financial and political security. In many communities, however, laws related to private, public and common property are vague, undemocratic, and biased. Property records in the United States are incomplete or inaccurate, boundaries are disputed, and neighbor challenges neighbor for ownership of the land.

In the U.S., as well as in the world, a few privileged groups own much of the land, thereby limiting opportunities for the majority of the population. This denial of the basic human right of property ownership prevents much of the world's population from experiencing the accompanying benefits of ownership, increased political participation and power, accumulation of wealth, and increased awareness of cultural identity.

The questions surrounding land in all of these cases are more than legal, sociological and economic—they often strike at the very core of American values, the ability of hard-working citizens to own and improve their piece of land. The struggle in the U.S. is mirrored by the struggle abroad to strengthen tenure security as a basic human right of the world's indigenous and disenfranchised populations.

exclusive means of generating revenue. These revenues have enabled the Oneida to reacquire much reservation land. Today the tribe has reacquired nearly 25% of the original reservation. Today, Oneida land holdings are 16,689 acres in both Brown and Outagamie counties. Long-term goals of the Oneida include the purchase and recovery of all original reservation lands. http://www.oneidation.org/?page_id=24

Land Law and Tenure Security Extern Program

Since 1997, the Land Law and Tenure Security (LLTS) summer extern program,⁶ managed and coordinated through the Land Tenure Center at the University of Wisconsin-Madison and the UW Law School, has assisted hundreds of low-income rural residents with legal needs associated with one of their most prized possessions—land.

Working through nonprofit organizations, legal aid offices, and public interest law firms, some of the best and brightest law students in the U.S. have spent 10 weeks working with Native American, Latina/o, African American, and Appalachian communities to gain (or more often, re-gain) rights associated with land ownership. The eight-year-old LLTS program meets American Bar Association requirements as a clinical externship. It has been recognized by the Society of American Law Teachers which in 2001 awarded its Stuart and Ellen Filler Fellowship to a LLTS extern. In January 2001, the American Association of Law Schools recognized LLTS as a model clinical program for teaching, scholarship and service in pursuit of equal justice. A total of 69 students from 27 law schools across the country have participated in LLTS. See Appendix A.

Goals and benefits of the program

LLTS seeks both immediate impact for underserved populations through the 10-week externships, and sustainable long-term benefits for all those involved. During the summer externship, the efforts of a skilled law student catalyze individuals, communities, and organizations to creatively engage the legal system to obtain and protect their rights to land. At the same time, each student gains valuable real-world confirmation of the need for legal services in the public interest in rural parts of the U.S.

⁶ The structure of the program is as follows:

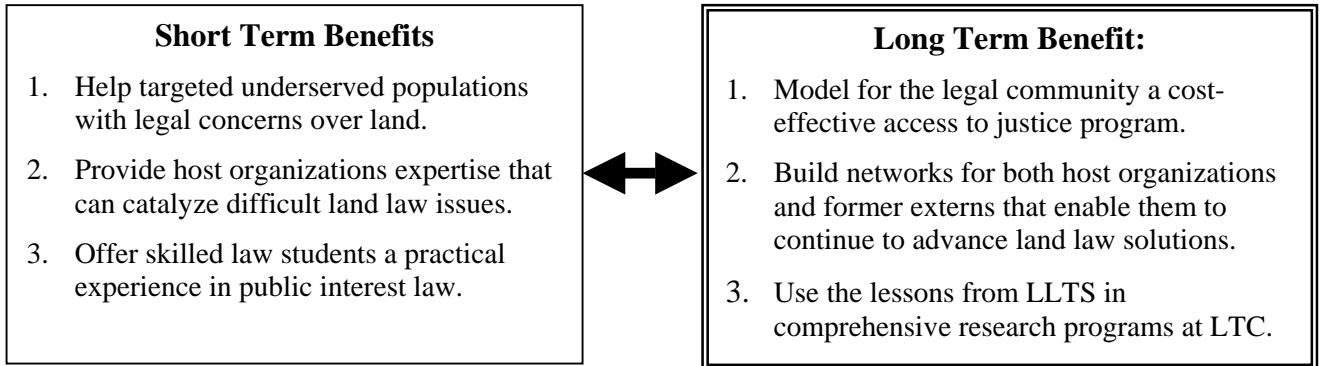
1. LTC recruits law students during the fall through a rigorous application process;
2. Site supervisors outline a scope of activities for the summer externship;
3. Accepted student externs, their future site supervisors, and various land law experts are part of a 3-day orientation at UW;
4. Externs complete a 10-week field experience under the supervision of LTC and their site supervisors; and
5. Externs may complete a final project in conjunction with their own law school.

As shown in the diagram below, LLTS offers an array of benefits to all individuals and organizations involved:

- Individuals served through LLTS gain resolution to often long-standing questions. Examples include clear title to land, better procedures in court, and estate planning.
- Partner organizations find that the externs provide much needed research expertise and often catalyze land and resource issues through the externship.
- Law students get intense practical experience in public interest law, thus reinforcing their interest and commitment to becoming one of a cadre of legal professionals interested in land law issues.⁷
- LTC and universities benefit through better understanding of land law issues that can be incorporated into long-term research and teaching programs.

In managing the LLTS extern program, LTC and the UW Law School also hope to create a model for organizations interested in other areas of public interest law—for example, elder law and impact on the family farm, or urban law and questions concerning tenancy.

⁷ The LLTS program has been a catalyst for numerous direction changes for many of our students. In 2002, two UW Law School students who had been summer externs were awarded prestigious 4-year fellowships to continue their work in public interest law. Carlos Becera was awarded the Fried Frank/Mexican-American Legal Defense and Education Fund Fellowship. Jenigh Garrett was awarded the Fried Frank/NAACP Fellowship. 2003 extern, Wesley Addington, is an Equal Justice Works fellow at his extern site, Appalachian Citizens Law Center. In 2005, UW law students, Jessica Shoemaker (2004) and Samantha Kading (2004) were awarded Skadden, Arps, Meagher fellowships. Jessica will work with Native American agricultural issues at FLAG, Inc. and Samantha will work at LTC and provide community education and estate planning to members of Wisconsin's 11 Native American tribes.



Now, after LLTS's eighth year, a network focused on land law in the public interest has begun to grow. Over the coming years, LLTS will enhance and firmly establish the network through both formal and informal channels.

As valuable as the work of externs is to low-income communities, there is an ever-increasing need for sustained action and research on land law problems, and LTC is developing its capacity and contacts to be at the forefront of such activities.

Host sites

African American communities

Fractionated heirship property is a concern for African American landowners. For generations, landowners have died intestate leaving property interests distributed among many descendants. Unscrupulous individuals have targeted one interest holder and forced the sale of an entire farm. Usually the buyer at such a forced sale is not a family member and the family loses the farm. African American farm families need legal services to help retain their traditional homesteads. Externs have been assigned to the Federation of Southern Cooperatives (Georgia), Georgia Legal Services, Land Loss Protection Program (North Carolina), Penn Center (South Carolina), and Sandhills Family Heritage Foundation (North Carolina).

Colonias

Mexican-U.S. border communities, called *colonias*, have been created and have expanded without many of the legal protections and infrastructure amenities that are common throughout the US. For example, Texas had no zoning laws in unincorporated areas.

Colonias sprang up in areas without subdivision regulations.⁸ Legal surveys, registration of deeds, and other procedures were thus neglected by unscrupulous developers and unknowing landowners. Developers conducted negotiations for the sale of property in Spanish, but provided the contract for deeds⁹ in English. The purchasers were not told of their obligation to pay real estate taxes or the high interest rates. Governments were not required to ensure that certain basic services such as paved streets, electricity, water and sewers were provided. Externs have worked with Community Resource Group, an Arkansas-based nonprofit, on their projects in Starr County, Texas, and Texas Rural Legal Aid (now Texas Rio Grande Legal Aid). During summer 2005, an extern will work with Proyecto Azteca and South Texas Civil Rights Project in San Juan, Texas.

Native American communities

Native American nations exercise their sovereignty and legal jurisdiction over lands controlled and managed by the tribes and their members. Not only does increased tribal lands equal increased sovereignty, but land and culture are intrinsically linked in Native American communities. Federal policies toward Native Americans have decimated native land holdings, in particular the General Allotment Act of 1887 led to the loss of 90 million acres of native land. It also led to the fractionation of land that remained in individual hands because of the provisions of sale without permission of the Secretary of the Department of the Interior. Past externs have worked at the Department of the Interior, Office of Hearings and Appeals offices in Albuquerque, NM and Bismarck, ND, White Earth Nation, White Earth, MN, Ho-Chunk Nation, Black River Falls, WI, Oneida Tribe of Indians of Wisconsin, Oneida, WI, Bad River Band of the Lake Superior Tribe of Chippewa Indians, Odanah, WI, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac du Flambeau, WI, Sokoagon Chippewa Community of the Mole Lake Band of Chippewa. A complete list of host sites appears in Appendix B.

⁸ Subdivision laws came into effect in 1995 covering an area 150 miles wide along the border. When *colonia* development leap-frogged over this buffer, the laws were expanded to cover the entire state.

⁹ In contract for deed transactions, the seller maintains title. If the purchaser misses a payment, the seller may take possession of the parcel as well as any improvements that the purchaser may have built upon it. Sellers are often willing to “resell” to the purchasers, but at an inflated price because of the presence of the improvements.

Title search – the key to resolving land issues

Extern duties, while all land-related, vary from site to site and year to year. Each site supervisor determines the tasks that may include, production of legal memoranda, drafting of real estate and estate planning documents, research to support litigation and policy development, organization and facilitation of community workshops, and conducting title searches. One activity that almost every extern undertakes is title search.

Title searches are labor intensive, often tedious and punctuated with moments of delight as you find the document you need. Our students provide the hours of labor necessary to find the documents, reconstruct the history and support—or not—the client's rights to the property. Often what the students find is that the client is indeed correct, but the Statute of Limitations precludes pursuing a remedy. Even if the action would be timely, a remedy might very well be closed to them because the cost of pursuing justice is more than the value of the property. (i.e. the court fight might cost \$10,000 and the value of the person's interest is only \$8,000)

However, when dealing with land, especially property that has been in a family for generations, people do not always behave as the 'reasonable person' as in Economics 101. The value of the land includes the monetary value, but it also includes the spiritual and psychological value.

The title search shows who owned the land, whether they had a mortgage and if the mortgages were paid off and subsequently released, or perhaps assigned to another party. Perhaps work done on the property triggered a mechanic's lien. Perhaps the landowner fell on hard times as evidenced by tax liens, money judgments, bankruptcies or divorce.

Documents vary from state to state, but Wisconsin's documents to transfer title include: Guardianships, Conservatorships, Trust, divorce, corporation, partnership, sheriff's deed, personal representative's deed, warranty deed, special warranty deed, quit claim deed. Those signifying an encumbrance on title include money judgments, construction liens, mortgages, land contract, Federal tax lien, and property tax lien. Others include lis pendens, power of attorney, life estate, condominium declaration.

The value of visiting the Register of Deeds office

Law school professors encourage students to “tell the story” whenever reciting the facts of the case at hand. The facts include answering the questions: who, what, where, when, how. In a property case, the answers to these questions tell the story of who owned the property, what rights they owned, where the property is located, when the parcel was purchased, when it was sold, and, how the owners acquired the property. Most students will spend time during the summer in the county Register of Deeds (or registrar or other name?) office conducting a title search. They’ll be looking to tell the story. The answers to these questions should be in the records in order for this transaction to satisfy the requirements of the Statute of Frauds.

It is labor intensive and thus expensive to look into a property matter. Most LLTS host site clients have limited resources yet deeply value and want to keep their connection to the land. A common desire expressed by clients is to leave the land to their children. If these landowners have to pay an attorney or paralegal to do the search, the bill for services could easily cost more than the property is worth. When LLTS law students do the search, it lowers the cost for the landowner.

Prior to each summer’s externships, we conduct a three-day orientation on the University of Wisconsin-Madison campus. During the orientation, externs tour a nearby county Register of Deeds office to experience a title search, see the indices, see the books, look at documents, search the records, and become accustomed to following the leads. We present a series of multiple-step exercise for the students to follow. In these exercise, they must find the previous Grantor, or find the next Grantee. They can look at the legal description to see whether or not the property description has changed. Has someone divided the farm? Was it for a child to build a house? Was acreage sold to satisfy a debt? The trip takes away some of their anxiety. Thus, they will be able to confidently conduct a search when they get to their site.

Things they might not teach you in law school

Client-confidentiality issue when visiting Register of Deeds

The students are also warned about the problems of sharing too much information with the staff. There is a question of maintaining client-confidentiality. The staff can be very

helpful if you're unfamiliar with the office layout, or stuck in a search. But they're also very nosy. It is not uncommon for the staff to volunteer that someone else was just looking at that parcel or come over here and look at this map and you'll see where so and so was looking. So the students are advised to offer little, but listen carefully.

During orientation, we have a workshop on Professional Responsibility (PR). Many of our students are 1Ls and have not yet had an ethics course, so this is their introduction to the concept. Even our 2Ls who may have had it, benefit from a PR course tailored to their summer experience.

What land records actually look and feel like

Because they're not taught about the ROD's office in property class—and they haven't had a real estate transactions course, they're overwhelmed by the wealth and complexity of land records. Searching titles is a practical, hands-on skill acquired in person and honed by practice. Furthermore, most of the RODs offices in the counties where we work have only paper records, or more recently turned to computerized records. Going to a high tech records office allows you to search in a sterile environment by parcel id to retrieve the applicable documents. It has a much different flavor when you go into the vault to search the big, heavy, dusty indices and books.

A successful search may depend on the clarity of the clerk's penmanship. A sloppy hand will add frustration and time as you try to decipher the recorder's handwriting. Even if the hand is legible it is a tedious search as the index is organized by small bits of the alphabet and then recorded in chronological order rather than completely in alpha order. Or making the discovery that a family involved in many lawsuits will have their own page in the index because of the sheer number of entries.

The importance of drafting and filing accurate, clearly written legal documents

Transfer of a deed from seller to buyer (Grantor to Grantee) purports to transfer ownership of property. This is not the only step in the transaction. We need the offer and acceptance and delivery of the document to be sure, but we also need the document to be recorded in

the county government office charged with recording documents affecting property. This tells the rest of the world that the property has transferred from A to B.

In Wisconsin, this is the Register of Deeds Office. Some tribes, including the Oneida Nation recognize the power of land ownership and the implications for sovereignty are developing their own register of deeds offices. Sometimes even a properly recorded deed does not guarantee that the property transfer is legal. The seller or transferor of property can only sell or transfer the rights that he or she possesses. A search of the property records will tell if the seller owns the property and has the authority to sell the property without defects. Defects can include liens or encumbrances on the property. The search must extend back in time long enough to satisfy state statute. It may include the patent from the Federal government or it may include the development of a brand new subdivision from a cornfield.

Prospective buyers should complete a title search which will show how the rights of this Grantee stack up against other Grantees. Has this seller already sold the property to another family? If they recorded, it will show up. Did the seller already sell the oil and gas or development rights to another party, thereby minimizing the value to this purchaser?

The complex situations encountered in real life

This section is still under construction!

Discussion of each of the three examples highlighting the students' work on behalf of the clients in each of the three examples.