

## Draft Pending Adoption

Attachment –  
NAIC/Consumer Liaison Committee  
3/15/24

Draft: 3/28/24

NAIC/American Indian and Alaska Native Liaison Committee  
Phoenix, Arizona  
March 17, 2024

The NAIC/American Indian and Alaska Native Liaison Committee met in Phoenix, AZ, March 17, 2024. The following Liaison Committee members participated: Glen Mulready, Chair (OK); Lori K. Wing-Heier and Heather Carpenter (AK); Barbara D. Richardson represented by Catherine O’Neil (AZ); Dean L. Cameron represented by Shannon Hohl (ID); Chlora Lindley-Myers represented by Jo LeDuc (MO); Mike Causey represented by Angela Hatchell (NC); Jon Godfread represented by John Arnold and Santana Edison (ND); Alice T. Kane (NM); Scott Kipper (NV); Andrew R. Stolfi represented by TK Keen (OR); Larry D. Deiter represented by Frank Marnell (SD); Jon Pike represented by Ryan Jubber (UT); Mike Kreidler represented by Todd Dixon (WA); Nathan Houdek represented by Timothy Cornelius (WI); and Jeff Rude (WY). Also participating was: (AK); Christina Miller (DE).

### 1. Adopted its 2023 Fall National Meeting Minutes

Director Wing-Heier made a motion, seconded by Commissioner Kreidler, to adopt the Liaison Committee’s (see *NAIC Proceedings – Fall 2023, American Indian and Alaska Native Liaison Committee*) minutes. The motion passed unanimously.

### 2. Heard a Presentation from First American Title Insurance Company on Requests by the Title Insurance Industry for Sovereign Immunity Waivers from Native American Tribes

Megan Powell (First American Title Insurance Company), chair of the Native American Lands Workgroup for the American Land Title Association (ALTA), said there are currently 574 tribes listed in the Federal Register published by the Bureau of Indian Affairs (BIA) that the U.S. federal government recognizes. Of those tribes, 347 are within the contiguous 48 states, and 227 are in Alaska. Powell said that non-recognized tribes can petition for federal recognition under 25 CFR Part 83, which requires a review by the Office of Federal Acknowledgement (OFA) within the U.S. Department of the Interior and uses anthropological, genealogical, and historical research methods to evaluate petitions. Powell said each federally recognized tribe is an independent sovereign nation that has a government-to-government relationship with the U.S. with inherent tribal powers, including the ability to form their own government, create their own laws, regulate land use, and create their own tribal court system. As sovereign nations, Powell said tribes enjoy the benefit of sovereign immunity. This means they cannot be made a party to a lawsuit filed in state or federal court without their consent provided through a waiver of their sovereign immunity.

Powell said title insurance policies are contracts between the insurer and the insured, so when a title policy is issued to a Native American tribe as the insured, the title insurance company asks the tribe to waive its sovereign immunity for that contract. Powell said the conditions section of the title insurance policy states, “This policy together with all endorsements, if any, issued by the Company, is the entire policy and contract between the Insured and the Company.” Powell said through their execution of an ALTA 48 Tribal Waivers and Consents Endorsement promulgated in 2022, the tribe waives sovereign immunity; waives exhaustion of defenses in tribal court; and consents to jurisdiction and venue in state and federal court. Powell said a sovereign immunity waiver is also required from an entity that is owned or controlled by the tribe, even if it was not organized under tribal law. This is because the tribal entity could be a limited liability company (LLC) and may claim that it is an extension

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of the tribe, and therefore entitled to the benefit of the tribe's sovereign immunity. Powell said a tribe cannot be sued in state or federal court unless it waives its sovereign immunity.

Powell said if there is a need to clarify coverage obligations due to a coverage dispute under the policy (regardless of who the insured is), the insurer will typically accept coverage with a reservation of rights. Then it will file a declaratory relief action in state court asking the court to clarify coverage obligations under the policy, which requires naming the insured as a party in the litigation. Powell said if a tribe that has not consented to be sued in state court is named as a defendant in such an action, the tribe can file a motion asking to be dismissed from the litigation. Powell said the reasons why such cases are not litigated in tribal court include: 1) 574 federally recognized tribes means that many different tribal courts are applying different tribal laws; 2) title insurance policies (the defined terms within the policy, underwriting, and fee structure) are based on state real property laws; 3) the title industry lacks experience and knowledge pertaining to tribal court rules and precedents; 4) there is a lack of tribal case law interpreting title insurance policy forms; and 5) the lack of certainty increases risk for policyholders and shareholders.

If the tribe refuses to give a waiver, Powell said a title insurer may decline to insure without a waiver or may assume the risk of not having the ability to seek a judicial determination of coverage obligations. Powell said if the insurer truly believes the company does not have a coverage obligation, the company may deny the claim. The litigation pertaining to the coverage obligation would then have to be forced by the tribe as a plaintiff through a bad faith action. Powell said the tribe would have to provide its own defense of the title issue in dispute while it is being litigated. However, Powell said if the insurer has a waiver of sovereign immunity and accepts the claim without a reservation of rights, the company will provide a defense until the coverage obligation is clarified by the court. Sometimes, Powell said tribes are willing to consent to state courts for jurisdiction and venue but do not want to waive sovereign immunity, which still prevents the insurer from being able to file an action in state court.

Powell said the following potential modifications to the ALTA 48 Endorsement are being considered at this time that would add provisions to the policy to clarify that the waiver: 1) pertains to determining coverage obligations and establishing title as insured only; and 2) does not extend to any action for monetary damages against the tribe. Powell said there are other sovereign immunity waivers. Powell said if an entity, such as a lender in a mortgage or a lessee in a lease, that the tribe is contracting with (not the tribe) is the named insured in a policy, it is common to require that the document being insured contain a waiver of sovereign immunity. Powell said in these examples, the company would want to see a sovereign immunity waiver in the mortgage and in the lease. Powell said a title insurance policy insures the validity and enforceability of the document, creating the insured interest. Powell said if the insurer must litigate validity or enforceability on behalf of an insured, the insurer wants the litigation to take place in state or federal court.

Commissioner Mulready asked if such waivers are necessary on and off tribal reservations. Powell said waivers are necessary regardless of location due to the inherent rights of tribes. Commissioner Mulready asked if the endorsement has been filed in all states. Powell said the endorsement had been filed in some, but not all states. The filing process takes time, so the company is in the process of filing the endorsement and using an existing document the company already has in the interim. Commissioner Mulready said if someone goes to a casino, the person has to sign a waiver, so he asked why the title waivers are held as a separate document. Powell said ALTA had lots of policy forms that were updated in 2021 and that the choice of law should be state law and the venue should be the state. However, the company cannot assume a policy with waiver of sovereign immunity, so it was left out of the policy. Powell said *McGirt v. Oklahoma* brought attention to the issue, indicating that companies cannot unilaterally assign tribes to give waivers.

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Commissioner Mulready said that during his tribal coffees in Oklahoma, he heard that only certain title companies are asking for waivers of sovereign immunity. He asked if ALTA had received any pushback on it. Powell said each company decides whether to require it, and ALTA does. Commissioner Mulready asked why waivers apply not only to tribes, but also to policies owned or controlled by an LLC. Powell said waivers are required if an LLC is organized under a tribe or via a steering direction whereby Section 17 tribal corporations get a passive investor to finance affordable housing with an option to buy. Superintendent Kane said in a recent court case, the reservation of rights was upheld while a declaration is being filed.

### 3. Discussed the Results of the Committee Member Survey on Topics and 2024 Deliverables

Commissioner Mulready said two responses were received to the survey on topics and asked that Committee members continue to send their responses due to the limited time given for such activity. Commissioner Mulready said the responses received would be distributed to all Committee members.

### 4. Discussed Other Matters

Commissioner Mulready thanked NAIC consumer representatives for their research and comments in bringing forward issues concerning the improper marketing of health insurance plans to the attention of the Improper Marketing of Health Insurance (D) Working Group.

Having no further business, the NAIC/American Indian and Alaska Native Liaison Committee adjourned.

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