Title Investigation and Subordination Policy

Utah Open Lands (UOL) investigates title of each property for which it intends to acquire either fee title or an easement to ensure it is negotiating with the legal owner(s), confirm the accurate legal description, and to uncover liens, mortgages, mineral or other leases, water rights and/or other encumbrances or matters of record that may affect the transaction. Mortgages, liens and other encumbrances that could result in extinguishment of the easement, adverse impacts to property ownership, or significantly undermine the important conservation values on the property are discharged or properly subordinated to the easement.

Before UOL commits to acquiring land or easements, it makes sure there are no title problems that could undermine the conservation values of the property or unacceptably restrict its use. UOL needs to know who owns the property and who has any interest in it; the status of property tax payments; whether there are liens, mortgages or other financial encumbrances; whether there are easements and rights-of-way; the status of water rights; and whether there are other claims, encumbrances or conditions that impair title. UOL must evaluate which of these "exceptions" to title may compromise its ability to protect the property and address them accordingly. This evaluation must be documented in the project file.

Title Investigation Requirements

UOL shall obtain a professional title investigation for every transaction, conducted by a qualified title company or attorney. Acceptable forms include a title commitment, title insurance policy, title report, attorney title opinion, or title abstract. Ownership and Encumbrance (O&E) reports alone are not sufficient.

Invoices, correspondence, internal memoranda, or meeting minutes alone are not sufficient documentation of title investigation; however, copies of qualifying title documentation (such as title commitments, policies, or reports) may be accepted from nonprofit or government partners, provided UOL independently reviews and retains such documentation.

Final Title Update. For every fee title acquisition and conservation easement transaction, UOL shall obtain a final title investigation update from a qualified title company or attorney no earlier than 30 days before closing. The final update shall be reviewed to identify any changes, newly recorded instruments, liens, mortgages, encumbrances, or other matters that could affect ownership, the validity or priority of the conservation easement, or the conservation values of the property. Any such matters shall be appropriately addressed before or at closing.

Major Title Considerations

Legal ownership of the property

For a transaction to be valid, all parties with an interest in the property rights to be acquired must be parties to the transaction. Determine whether a property's mineral rights are separately owned. Any uncertainty about who has rightful ownership needs to be thoroughly researched and, in most cases, cleared up before UOL completes the transaction. UOL shall also confirm that all parties have legal authority to convey the interest.

Liens, mortgages or other financial encumbrances

Financial encumbrances on the property may affect the owner's ability and willingness to sell, and the price s/he is willing to accept.

Encumbrances may include mortgages or deeds of trust; tax liens, which may include unpaid federal income, estate or gift taxes, unpaid state inheritance taxes or local property tax; or judgment liens that allow creditors to be paid by the seizing and sale of the debtor's property. For conservation easements, it is essential to discover any mortgages on the property;

mortgages must be subordinated to the easement for the easement to be considered perpetual and therefore deductible from federal income tax.

All liens, mortgages, and financial encumbrances must be appropriately addressed at or prior to closing for fee acquisitions. Unpaid property taxes must be brought current prior to closing.

Subordination

Accepting an easement on a property subject to a pre-existing mortgage is a special problem. If the lender ever forecloses on the mortgage and takes title to the property, the easement may be extinguished. The only solution is to have the lender subordinate its rights in the property to the rights of the easement holder. That means that in the event of a foreclosure, the easement will not be extinguished. UOL will not accept an easement on mortgaged property unless the holder of the mortgage agrees to subordinate.

Subordination agreements must be recorded prior to or contemporaneously with the conservation easement.

Subordination is a *requirement* when the easement is a donation and the donor wishes to deduct the gift. The IRS regulations state:

> 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 rights of the qualified organization to enforce the conservation purposes of the gift in perpetuity. (*See Treasury Regulation Section 1.170 (A)-14(g)(2)).*

Exercise of such rights may impair the conservation values of the property. If so, UOL may need to condition the pending transaction on the removal of such impediments. If not, UOL needs to incorporate the potential activities associated with the exercise of these rights into the easement provisions or land management plan.

Rights-of-way or other easements

UOL must review the underlying documents for all recorded easements and assess their impact on conservation values.

Title searches reveal rights-of-way and other easements that are written directly into recorded deeds or contracts. The owner may have forgotten about such easements, or may not consider them relevant to the transaction, but UOL needs to know of their existence. The owners of adjacent properties may have legal rights to water, road access or utility hook-ups, or even options to buy portions of the property.

Some types of easements may not show up in a title search: **Implied easements**—easements that are legally judged to exist although they are not written down (such as the use of an access road across another property to reach a landlocked parcel); and **Prescriptive easements**, in which continuous and open use of a path, beach or other area for a certain period of time creates a claim of right. UOL will try to discover such easements through its property inspection.

Title Searches and Title Insurance

UOL investigates title using one or more of the acceptable forms of title investigation listed above.

UOL shall not substitute internal staff research for a professional title investigation. Title investigations must be conducted

by a qualified title company or attorney. UOL staff may review, analyze, and document the results of the professional title investigation, and may conduct supplemental research as directed by legal counsel or the title company, but such staff research shall not constitute or replace the required professional title investigation..

Obtain title insurance for all fee acquisitions and when appropriate for conservation easements, typically in the amount of the fair market value of the interest acquired.

Obtain Title Insurance for all purchases. The importance of title insurance varies depending on what interests UOL holds and what it paid for them. Regardless of other considerations, UOL obtains a title report and/or insurance in the following circumstances:

- **Land or easements purchased.** If UOL is investing significant resources in the deal, it must protect its investment with a title search and the purchase of title insurance.

- **Land conveyed to another party by warranty deed.** If UOL intends to reconvey land to a buyer by warranty deed, UOL will be guaranteeing its title against all defects or limitations to its title not expressly stated, and to defend that property against lawful claims by any parties. UOL obtains title insurance, which will protect against any defects that are not apparent in a title search, such as a recorded but incorrectly indexed deed or lien.

- **Land owned by UOL, whether purchased or donated.** A title search may reveal the existence of past owners or uses of the property that indicate the possible existence of hazardous wastes on the property; for example, ownership by a chemical reclamation company. Since UOL must demonstrate "due diligence" in order to avoid liability for the existence of hazardous wastes, a professional title report will be one step in showing that UOL made a thorough investigation before it acquired fee title. UOL will have title insurance for any property in which it invests significant time or money for management.

- **Mineral Rights.** UOL must determine whether mineral rights are severed and evaluate the likelihood of surface disturbance. If mineral rights are severed, UOL shall document risk and mitigation, which may include a mineral remoteness report, surface use agreement, or other due diligence. Transactions may proceed only if risks are adequately addressed or determined to be negligible.

UOL encourages the property owner of a donated conservation easement to carry his own title insurance.

Importance of site inspections

Site inspections are required to identify potential unrecorded rights or uses. As important as title investigations are, the information contained in a title report is no substitute for examining the property on the ground. Someone may have unrecorded rights of use or possession that can be revealed only by site inspections and discussions with people familiar with the property. Possession and continual use may count as notice of rights just as if the possessor or user had recorded them. If UOL learns of possession or use of the property that is not in the title report, it should find out from the people involved what rights they believe they have.

Recording Requirements

UOL shall ensure all deeds, conservation easements, and related documents are recorded within one week of final signatures.

Recording shall occur in the proper order:

1. Title-clearing documents (releases, subordinations)
2. Deed or conservation easement
3. Supporting documents

For tax-deductible easements, recording must occur in the same calendar year as execution.

Partner Transactions

When working with partners or accepting transferred interests, UOL must independently review title documentation, ensure it is current within 30 days of closing, and retain copies in its records.