I was born at a time when people were still farming and everybody had large gardens and we ate directly from the gardens, and life in general was fairly happy. If you were looking from the outside into our communities, you would maybe see that our communities were impoverished - meaning that we didn’t have a lot of material things. But we had a lot of other things. And one of the things that we did have was good healthy food, good healthy water, and so forth, which is very different from what we see today.

Clayton Brascoupe, Traditional Native American Farmers Association
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Given the evolving nature of online information, please note that the links provided to websites were accurate as of October, 2012 but cannot be guaranteed accurate in the future.

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# The Business of Indian Agriculture

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MODULE 5: Land Use and Management

Participant Guide

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The Business of Indian Agriculture

MODULE 5:  Land Use and Management

Lessons

This module covers the following lessons:

- Introduction to Native American Land Use and Management.
- Knowing Your Land.
- Understanding Land Transactions and Rights.
- Understanding Indian Land Regulations and Processes.
LESSON 1: Introduction to Native American Land Use and Management.

Lesson Topics
This lesson covers the following topics:

- Historical and traditional examples of Native American Land Use and Management.
- Basic Considerations of Native American Land Use and Management.
- Respecting Cultural and Sacred Sites.

Learning Objectives
Upon completion of this lesson, participants will:

- Understand the history and traditions of land use and management for the local tribal community.
- Understand the basic principles of Native American land use and management.
- Understand the importance and strategies for respecting cultural and sacred sites.

Definitions

Whole farm planning: a process that takes a holistic view of the farm and incorporates the various needs of the agribusiness, the farm family, the community, and the environment into a single integrated management plan.
TOPIC 1: Historical and traditional examples of Native American Land Use and Management.

Learning Outcome: Students will understand the history and traditions of land use and management for the local tribal community.

- Native Americans have had a long and close relationship with the land. This history and relationship is important to know because it forms the basis of many of the Native American land use and management issues that are faced today.
  - Contrary to some stereotypes of Native Americans who left no mark on the land, tribal communities used sophisticated natural resource, land use, and land management techniques to make best use of their environment.
  - While it is difficult to generalize across all tribes, some basic traditional Native American land use and management principles could be described as:
    - Land use and management practices were developed from experience gained through long periods of careful observation, trial and error.
    - Land use and management practices strive for maximum sustained yield instead of maximum production.
    - Land use and management practices respect the balance and connection between the natural and spiritual worlds.
  - From the nineteenth century to today, rapid changes in how land is used and managed have taken place as a result of human settlement, treaties and other agreements, federal laws and policies, economic factors, technological advances, environmental concerns and many other factors.
  - Each tribe has its own unique history and traditions associated with its land use and management. The particular land use and management issues will depend on the land’s geology; the climate; the wildlife and plant life; the economic opportunities; the cultural, social and spiritual considerations; and more.
TOPIC 2: Basic Considerations of Native American Land Use and Management.

Learning Outcome: Students will understand the basic considerations of Native land use and management.

- Whether you already own land, are inheriting land, are purchasing or leasing land—land use and management is a major consideration for your agribusiness.
  - How you use and manage your land will determine, in large ways, the success of your agribusiness.
  - Just because the land has “always” been used and managed a certain way, does not mean that you shouldn’t consider the basic questions about how the land can be best used and managed now.
    - For example, changes over time in agricultural technologies, plant and animal breeding, the economy, land planning and zoning policies, and even the climate can change the way the land can be best used and managed.

- There are many factors that influence how agricultural land is used and managed.
  - The physical and natural properties of the land play an important role in determining how the land is used and managed. The soil types, climate, and terrain help determine what agricultural crops and livestock can be supported.
    - For example, one reason that about two-thirds of Montana agricultural land is grazed is that there is not enough rainfall to support crops.
  - The types of crop varieties and/or livestock breeds that are available and suitable for the land also help determine land use and management.
  - The agricultural technologies and production techniques that are available to the land manager are also important. Remember that while some advanced technologies or techniques might exist, they might be too expensive or impractical for your agribusiness.
  - The agricultural marketplace also determines what can be economically sustained by the land. For example, the land might support the growth of a particular crop, but if that crop is not economically valuable, then it is not a good use for an agribusiness. (Of course, they may be other good non-economical reasons for growing particular crops).
Land planning and zoning policies passed by local governments play a role in how land can be used and managed. These policies are often the result of different values and interests in the community.

Finally, remember that farming and ranching is often much more than just raising crops and livestock. Farm and ranch operations may include firewood production, feed manufacturing, agri-tourism, fruit/vegetable stands, slaughterhouses, retail sales, and other agriculture-related activities. These other potential uses need to be factored into a land use and management plan.

One of your first steps in land use and management planning is to assess the land in terms of its agricultural potential. There are several land assessment tools, and you should consult with your local agricultural experts (such as USDA’s Natural Resource Conservation Service—NRCS) for the best tool for you.

One popular assessment tool is the Agricultural Land Evaluation and Site Assessment (LESA) system, which helps to determine the quality of land for agricultural uses, and assesses land for its agricultural economic potential.

- The LESA system was developed by USDA’s NRCS and can be used by local planners, landholders, developers, and government officials to make land use decisions.
- For example, the NRCS in Montana adopted a Statewide LESA System in 2003. The Statewide LESA System is used to rank and prioritize proposals for the Farm and Ranch Lands Protection Program (FRPP) in Montana.

The next step is to become familiar with the local land planning and zoning policies that affect your land. There may be laws and regulations associated with city, county, state, and tribal governmental entities.

- If your land is Indian trust land or within Indian reservation boundaries, then there may be additional regulatory considerations (see Lesson 4: Understanding Indian Land Regulations, for more details). Additionally, there may be cultural and/or spiritual considerations (see next topic).

Another important consideration in land use and management is conservation. Most farmers and ranchers understand and appreciate the need to protect their natural resources so that the land will continue to support their livelihood, as well as support healthy families and communities.

- There are a range of conservation practices and programs that have been developed to assist the farmer and rancher in managing natural resources in a sustainable way.
Many of these conservation practices and programs have been implemented in local areas to test their effectiveness.

USDA’s NRCS offers several conservation assistance programs, such as:

- The Conservation Technical Assistance (CTA) program provides land users with conservation technology and delivery systems that help reduce soil erosion, improve water quality, protect fish and wildlife habitat, and improve the long-term sustainability of the land.

- Conservation Innovation Grants (CIG) is a voluntary program that helps to stimulate the development and adoption of innovative conservation practices and technologies that work with agricultural production.

- The Conservation Stewardship Program (CSP) is a voluntary conservation program that offers payments to producers who maintain a high level of conservation on their land and who agree to adopt higher levels of stewardship. Eligible lands include cropland, pastureland, rangeland and non-industrial forestland.

- The Environmental Quality Incentives Program (EQIP) provides financial and technical assistance to farmers, ranchers, and non-industrial private forest land owners who have challenges to soil, water, and air quality; wildlife habitat; surface and groundwater conservation; energy conservation; and related natural resources on their land.

- The Conservation of Private Grazing Land (CPGL) initiative provides technical and educational assistance to people who own private grazing lands. The technical assistance supports managing grazing land more effectively; protecting soil from erosion; conserving water; providing habitat for wildlife; and sustaining forage and grazing plants.

USDA’s Farm Service Agency (FSA) also administers the Conservation Reserve Program (CRP), which is a voluntary program for agricultural landowners who can receive annual rental payments and cost-share assistance to establish long-term, resource conserving covers on eligible farmland.

- FSA also administers the Conservation Reserve Enhancement Program (CREP), which is a voluntary land retirement program that helps agricultural producers protect environmentally sensitive land, decrease erosion, restore wildlife habitat, and safeguard ground and surface water.

Tribal conservation districts have been formed to support tribal efforts to provide for the use, protection, conservation and restoration of reservation lands. Tribal conservation districts provide assistance to land owners/users and managers in the conservation and smart use of land and natural resources.
They also help coordination between tribal governments, tribal natural resource managers, NRCS, and other federal, state, local and private entities.

As an example, there are three tribal conservation districts working with NRCS in Montana, functioning alongside the 58 conservation districts that are organized under state law.

- In addition to the tribal conservation districts, the Tribal Conservation Issues Committee in Montana functions as a tribal conservation advisory council to the NRCS State Conservationist. The committee is made up of tribal representatives from each reservation, as well as tribal conservation district representatives.

Whole farm planning is a process that takes a holistic view of the farm and incorporates the various needs of the agribusiness, the farm family, the community, and the environment into a single integrated management plan.

- While the whole farm planning model is an excellent tool to use in the business planning phase, it is introduced in this lesson as a method for land use planning and management.

- Whole farm planning was developed, in part, as a response to the limitations of the single-purpose farm plans that often created conflicting priorities for farm families.
  - For example, some farms might have had an aggressive crop management strategy that created problems for its soil conservation goals.
  - Or, a farm might have had an agribusiness plan that demanded longer working hours, which conflicted with its family’s values and priorities of spending more time together.

- The point is that the agribusiness operator should not view natural resources and land use as separate from the other priorities of the business, family, and community. Lesson 3-4: Financial and Strategic Planning discusses whole farm planning in more detail.
TOPIC 3: Respecting Cultural and Sacred Sites.

Learning Outcome: Students will gain an appreciation and understanding for the need to respect cultural and sacred sites in land use and management.

- As mentioned earlier in this lesson, Native Americans have a deep historical relationship to the land in this country that involves a balance between the physical and spiritual worlds.
  - Many of the creation stories of Native American tribes tell how the people originated from the earth and the landscape. In some cases, these stories involve specific locations.
  - Over time, many sites on the land took on special significance because important historical, cultural, and/or spiritual events took place there.
  - The spiritual and/or cultural meanings of these Native American sites are just as important as the sites of spiritual significance held by other religions and cultures around the world.
    - In many societies, churches, mosques, synagogues, and cemeteries are considered as sacred sites, as should Native American sites.
  - Sacred sites can be viewed as part of the guarantee of freedom of religion that is established in the First Amendment to the U.S. Constitution.
  - The American Indian Religious Freedom Act (AIRFA) of 1978 states that it is the “policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise... traditional religions... including but not limited to access to sites...”

- For the agribusiness land owner or lease holder, showing respect for Native American cultural and sacred sites can mean several things from a practical standpoint:
  - First, remember that whole farm planning balances family, environmental and community goals with your business productions goals. Your community or social goals should include being a good neighbor and living in harmony with your community’s values. Maintaining good tribal relations is not only the right thing to do, it’s good for business too.
  - Next, learn about the potential for sacred and cultural sites on your land. Because the locations of many sacred sites are kept confidential to discourage desecration, this may be a sensitive task. Your first step should be to consult with the local tribes.
    - Many tribes have Cultural Preservation Offices or Tribal Historic
Preservation Offices that research, map and manage cultural and sacred sites.

- If the tribe does not have cultural or historic offices, then consult with the tribal lands management department or a similar tribal entity.

✔ If there are cultural and/or sacred sites on your land, then consider the following:

- First, if the site is not already widely known, keep the location of the site confidential. Making its location public will only encourage unwelcome attention for both you and the tribe.

- Second, learn more about the cultural/spiritual history and meaning of the site. You may be surprised and excited to learn about the importance of the location to the history of the tribe. Gaining knowledge about the site will help you have respect for it, as well as provide a better base for your decisions about the site.

- Third, do not desecrate the site by removing objects or altering the site. Taking pictures or making drawings may not be acceptable. Check with the local tribal cultural expert if you have any questions.
  - If the site is located within productive agricultural land, then consider changing your farm practices to work around that specific location.

- Fourth, to the extent possible, do not deny access to those who have spiritual/cultural reasons for visiting the site. Work with visitors to accommodate their spiritual/cultural practices. Often times, visits need to occur during specific times of the year.

- Finally, work with the tribe to develop a “co-management” plan for the site that ensures that both your interests and the tribe’s interests are protected, and that there is a set of policies and procedures in place for dealing with issues that may come up.
References


The Business of Indian Agriculture

MODULE 5: Land Use and Management

LESSON 2: Knowing Your Land.

Lesson Topics
This lesson covers the following topics:

- Natural Properties and Appropriate Agricultural Uses of Land.
- Land Demarcation, Mapping, and Surveying.
- Sustainable Agricultural Management Practices.

Learning Objectives
Upon completion of this lesson, participants will:

- Understand the process of determining the natural properties and appropriate agricultural uses of land.
- Understand the process of land demarcation, mapping, and surveying.
- Understand the importance and strategies for sustainable agricultural management practices.
Definitions

**Fee simple land ownership:** typically the most complete or absolute form of land ownership, which provides the owner full rights to sell or pass land to another by will or inheritance.

**Indian trust land ownership:** based on the General Allotment Act of 1887, which transferred legal title of Indian lands to the federal government. Indian nations and landowners retain “beneficial use” of the lands, which means they can use and earn income from the land and transfer ownership interests to their heirs.

**Macroclimates:** weather and long-term patterns that occur on a regional scale and include such things as typical weather fronts and storm patterns, prevailing winds, seasonal temperatures and daylight changes.

**Microclimates:** weather patterns that are affected by factors in your local land area and include influences such as hillsides, shelter belts, tree shade patterns, frost pockets, and water ways.

**Organic agriculture:** an ecological production management system that promotes and enhances biodiversity, biological cycles, and soil biological activity. It is based on minimal use of off-farm inputs and on management practices that restore, maintain, or enhance ecological harmony. The primary goal of organic agriculture is to optimize the health and productivity of interdependent communities of soil life, plants, animals and people (from the USDA National Organic Standards Board—NOSB).

**Public Land Survey System (PLSS):** a survey system that subdivides and describes public land in the United States. All public lands are subject to this rectangular system of surveys, which is regulated by the U.S. Department of the Interior, Bureau of Land Management (BLM).

**Sustainable agriculture:** an integrated system of plant and animal production practices having a site-specific application that will, over the long term: satisfy human food and fiber needs; enhance environmental quality and the natural resource base upon which the agricultural economy depends; make the most efficient use of nonrenewable resources and on-farm resources and integrate, where appropriate, natural biological cycles and controls; sustain the economic viability of farm operations; and enhance the quality of life for farmers and society as a whole (from the 1990 Farm Bill).
TOPIC 1: Natural Properties and Appropriate Agricultural Uses of Land.

Learning Outcome: Students will understand the process of determining the natural properties and appropriate agricultural uses of land.

➢ Agriculture can be thought of as the controlled management of living organisms (primarily plants and animals) to produce food, fiber, and other products for human use.
  ✓ The inputs to the agricultural endeavor are physical, chemical, biological and climatic “ingredients” that include such things as:
    ▪ Soils (physical and chemical inputs)
    ▪ Moisture
    ▪ Sun (heat and light)
    ▪ Plants, animals, and biological organisms

➢ Land is often loosely defined as some physical territory or property, but in an agricultural sense, land encompasses all of the natural elements that interact with land to potentially support an agricultural use.
  ✓ It includes the soils’ chemical and physical properties, the terrain, and the way that climate has an effect on the land.
  ✓ It includes the plants, animals and organisms that live on the land.
  ✓ Although we don’t focus on this factor in this lesson, it also includes the human dimension that includes population impacts and planning and zoning policies.

➢ The first step in making the best use of your land is to know its basic properties: physical, chemical, biological, and climatic.
  ✓ Let’s start with your soil. Think of your soils as the basic building block for your agricultural operation. Before deciding upon your operation (or even acquiring the land), you should consider what the soils will support.
    ▪ Knowing your soil type includes knowing about its structure and texture (for example, sand, loam, clay, and organic matter), its depth, its drainage characteristics, its slope, and its suitability for various agricultural or building uses.
    ▪ Fortunately, most of this information has been gathered throughout the
U.S. through soil surveys, is documented in soil survey maps, and is easily accessed.

- There is an excellent Web-based resource, the Web Soil Survey (WSS), that provides soil data and information produced by the National Cooperative Soil Survey. It is operated by the USDA NRCS and provides information on the soils and ratings and suitability of various uses.

- If you cannot use the WSS, you can simply contact your local NRCS office and ask for the soil survey description for your land area.

- The next step in knowing your soil (assuming that it is suitable for your agricultural plans) is to learn about its specific potential agricultural productivity in terms of its properties such as its pH (relative acidity), its fertility (nutrients such as nitrogen, phosphorus, potassium, etc.), its water holding capacity, and so forth. A soil test is the next important step in this process of learning about your soils.

- Most soil tests will report on the basic properties and nutrients of the soil, but you should tailor your soil test with your specific agricultural plans in mind. For example, some tree crops may require additional soil tests.

- Contact your local extension office or the NRCS office to find out how to have a local soil test conducted.

- Remember that the soils can change in even relatively small land areas, so be sure to take soil samples wherever you think the soils will vary.

Next, it’s time to consider the climate. Climate generally consists of influences from sunlight, temperature, precipitation, and wind. There are two scales of climate to consider: macroclimate and microclimate.

- Macroclimates are those weather and long-term patterns that occur on a regional scale and include such things as typical weather fronts and storm patterns, prevailing winds, seasonal temperatures and daylight changes.

- Macroclimate data about your land might include its USDA Plant Hardiness Zone rating, its frost-free days (including first and last frost dates), and annual rainfall. All these data are easily accessible and are based on large sets of historical data.

- Microclimates are weather patterns that are affected by factors in your local land area and include influences such as hillsides, shelter belts, tree shade patterns, frost pockets, and water ways. These microclimates are also important to know.
Microclimate data about your land might vary considerably from the macroclimate data that you found. The best way to gather microclimate data is to carefully record weather patterns on your land and build up your own database.

- If possible, you might want to interview a previous landowner, and nearby neighbors to learn about local microclimate weather patterns.

Next, it’s time to consider the biological profile of your land. What plants, animals, insects, and microorganisms does the land currently support? Answers to these questions will provide strong signals as to the appropriate use and management strategies for the land.

- What plant life currently exists on your land? If the land is already in agricultural use, the current cropping patterns can provide you with valuable data in terms of productivity (including yield, water use, nutrient uptake, etc.), pest and weed concerns, appropriate tillage and soil conservation practices, and so forth.

  - On the other hand, if the land is not in agricultural production, then the current plant community will show what natural processes have selected.

  - While you may be able to alter the landscape to meet some agricultural needs, the greater the alteration from its natural state, the more intensive will be the management effort and the potential challenges.

    - For example, if the natural plant community is described as semi-arid shortgrass prairie, then growing rice is not going to be a good fit.

- What animal life is present on the land? Consider how the current animal population can affect agricultural operations, and in turn, how agricultural operations will affect animal life.

  - For example, wildlife can present both opportunities and challenges to the agricultural operation.

    - Some wildlife provides opportunities for recreational activities (and tourism revenue) such as hunting and bird-watching.

    - Other wildlife (sometimes called nuisance wildlife) can represent challenges to an agricultural operation (for example, prairie dogs, deer, birds, etc.).

  - To the extent possible, working with the land’s wildlife, instead of against it, will make agricultural management easier.
The soil’s biology is another important consideration. The organisms living in the soil are critical to soil quality, affecting the soil’s structure, which in turn affects soil erosion and water availability.

- Soil microorganisms can protect crops from pests and diseases, and they are central to decomposition and nutrient cycling, which influence plant growth.
- There are three main types of soil biology testing: population analysis, biological activity, and indirect indicators. Check with your Extension specialist for details on how to have a test performed.

Finally, a biological assessment can be conducted that provides general information on the potential presence of endangered species or sensitive habitats on the land. While endangered species or sensitive habitat is often viewed as an unwelcome challenge to agricultural operations, it is better to be forewarned than to be surprised.

**TOPIC 2: Land Demarcation, Mapping, and Surveying.**

**Learning Outcome:** Students will understand the process of land demarcation, mapping, and surveying.

- Perhaps the most fundamental question concerning the ownership of a parcel of land is its demarcation—where exactly is it, and how much land is there? First, you need to know where to look for the legal description of the land.
  - A deed must describe with reasonable certainty the land that is being identified, but the description does not require technical terms to be used. Land boundaries can be identified in property deeds by plat locations, in latitude and longitude degrees, as distances from known locations, or in other ways.
  - Typically if you are a non-Indian landowner or an Indian landowner with fee simple land, your county’s Recorder of Deeds Office will record and maintain for permanent record all documents related to real estate. Your deed will give you the legal description of the land but a surveyor is needed to use this information to precisely locate your property lines, and find or place stakes or other markers.
    - Fee simple land ownership is typically the most complete or absolute form of land ownership, which provides the owner full rights to sell or pass land to another by will or inheritance.
    - Indian trust land ownership is based on the General Allotment Act
of 1887, which transferred legal title of Indian lands to the federal government. Indian nations and landowners retain “beneficial use” of the lands, which means they can use and earn income from the land and transfer ownership interests to their heirs.

For Indian landowners who own land in trust, the Bureau of Indian Affairs (BIA) and more recently, the Office of the Special Trustee for American Indians (OST) is responsible for recording, storing and providing access to information about how much land you own and where it is located. As mentioned above, a surveyor is needed to physically locate the property boundaries.

- The BIA and OST use the Public Land Survey System (PLSS) to subdivide and describe public land in the United States. All public lands are subject to this rectangular system of surveys, which is regulated by the U.S. Department of the Interior, Bureau of Land Management (BLM).
- The local tribal Land office or department is the first place to contact, as they typically provide information on land issues and services for residential, agricultural, and commercial owners of tribal lands.

Land demarcation becomes more complicated when dealing with indigenous landholdings that are commonly held by the tribe.

- For example, under Navajo common law, grazing rights are a land use right held by families, but they are not considered as individual land ownership. Individuals ordinarily confine their use and occupancy to an area of land inhabited by their ancestors, and this area is typically defined by natural markers (such as trees, streams, boulders, etc.).
- Although indigenous land demarcation methods are certainly valid, they may lack the precision to establish U.S. legal property rights, or to access certain farm and conservation assistance programs.
- If you are a communal tribal land user, your best course of action is to consult with your local tribal land office and the local USDA Service Center.

Land mapping is a critical tool in knowing and managing your land. Fortunately, detailed maps and mapping systems are available for most areas within the U.S., and accessing these maps and map systems is easier than ever. There are many different types of maps and mapping systems used for many different purposes.

- First, it is important to remember how points on earth are precisely located. Points on earth are located using a variety of coordinate systems.
  - The most common coordinate system today is latitude and longitude.
The Prime Meridian (passing north/south through Greenwich, England) and the Equator are the reference grids used to define latitude and longitude. To locate points, longitude and latitude is measured in degrees (°), minutes (’), and seconds (“).

- For example, the city of Helena, Montana, is located at 46°35′44.9″N 112°1′37.31″W. That means 46 degrees, 35 minutes, and 44.9 seconds north of the equator, and 112 degrees, 1 minute and 37.31 seconds west of the prime meridian.

Another less common but important coordinate system is the Universal Transverse Mercator (UTM) system. Unlike the latitude and longitude system, the UTM is a true rectangular grid system used specifically for maps. With the UTM system, the entire earth is divided into rectangular-shaped zones identified by a unique column (1-60). UTM points are measured as the grid column, an easting (meters east of the west grid boundary), and a northing (meters north of the equator).

- For example, Helena, Montana, is located at 12 42133 5160761. That means it is in zone column 12, and is 42,133 meters east of the zone boundary, and 5,150,761 meters north of the equator.

- Note that there is a more precise form of UTM which uses grid row letters to locate points. In this case, the row letter follows the column, as in 12T, and the northing is the meters north of the south grid boundary.

The PLSS, which is used on public lands and Indian reservations, uses a grid of 6-mile-square townships. Townships are divided into 36 one-mile-square sections. Sections can be subdivided into quarter sections or quarter-quarter sections. A marker is usually placed at each section corner.

- PLSS surveys all have a starting point, and townships grids are established in all directions from the starting point. The line that runs north/south through the starting point is called the Principal Meridian. There are 37 named Principal Meridians that indicate which PLSS survey is being used. The line running east/west through the starting point is called a base line.

- PLSS areas are identified by township, range, and sections. Townships identify the grid location north or south of the baseline, and ranges identify the grid east or west of the Principal Meridian. Sections are the 36 one-mile-square areas.
  - For example, a township might be identified as Township
5 North, Range 3 West. That means it is in the 5th row of townships north of a baseline, and in the 3rd column of townships west of a Principal Meridian.

- A legal land description includes the State, Principal Meridian name, Township and Range designations with directions, section number (and quarter fractions of sections). For example, South Dakota, Black Hills Meridian T7N, R2W, sec5, means the 5th section in township 7 rows north of a baseline and range 2 columns west of a Principal Meridian, of the Black Hills survey in South Dakota.

- Quarter sections are designated by the quadrants SW1/4, NW1/4, SE1/4 and NE1/4, and quarter-quarter sections are designated by using two quarter section designations together, as in SW1/4 NE1/4 SEC 5, which means the southwest quarter-quarter of the northeast quarter of section 5.

✓ Mapping is especially useful to farmers and ranchers in planning their operations and managing their land. Boundary maps are good for locating any easements or land-use restrictions. Field maps can help in managing and coordinating crop and livestock operations. Farm maps should include buildings and facilities, water ways, fence lines, and any sensitive ecological areas.

✓ To develop a farm map, you need to create a base map using an existing aerial or topographic or other type of map, and then customize it for your needs.
  - Perhaps the most accessible and easily understood mapping system is Google Earth. Simply go to [www.google.com/earth](http://www.google.com/earth), download the latest version, and then enter your address or an address of a nearby location. Then, use the navigation tools to locate your exact area of interest.
    - Once you have located your area, there is a customized map feature that can be especially useful for farmers and ranchers. This free mapping service allows you to identify specific areas of your land for particular purposes, and then save it and share it by e-mail or Web posting.
  - Another easily used mapping system is also from Google. Many people have used Google Maps ([http://maps.google.com](http://maps.google.com)) to help find their way from Point A to Point B, but it also has a customized map feature. You can e-mail your customized map’s link to anyone, with instructions for field or range work such as applying fertilizer, spraying for weeds, or fixing fence.
  - Still another Web-based tool is Terra Server ([http://www.terraserver](http://www.terraserver)).
There are many other Web-based and computer tools that can be purchased that allow the farmer and rancher to create their own custom maps of their land.

Next, add your unique farm features, such as property lines, fence lines, road, water ways, other important natural features (valleys, cliffs, etc.), homes, farm buildings and storage facilities, and so forth.

You may consider using map layers to separate your features into categories such as boundaries, water ways and natural features, buildings and facilities, cropping or planting, livestock and range, soils, and more.

- Map layers are supported by computer GIS (Geographic Information System) programs, but can easily be created by drawings on transparency film that lay on top of the base map.

Land surveying is a highly skilled profession and should only be needed when precise (and perhaps legally valid) land positions are required. Legally, a person must be licensed as a surveyor to establish a property line.

- Surveying may only need to be once when the land is initially bought or developed, or it may be needed at times when construction or development projects require surveying.

- Two types of surveying are most commonly used: boundary surveys (establishing property lines) and construction surveys (controlling elevation, position, dimensions, and configuration of construction).

- There are other types of surveying, such as land classification surveys and soil surveys. These surveys have usually been done and there’s probably no reason to survey again.

- You should only work with a trusted and licensed surveyor to handle your surveying needs. They can guide you through the surveying process and ensure that your land is accurately and legally described.
TOPIC 3: Sustainable Agricultural Management Practices.

**Learning Outcome:** Students will gain an understanding of the importance and strategies for sustainable agricultural management practices.

- An important consideration in land use and management is the sustainability of agricultural practices. Few people would say that preserving the farm and its natural resources for future generations is not a worthwhile effort.
  - Unfortunately, “sustainability” has sometimes become a controversial issue, as the word has been used by a few people as a way to judge others.
  - A more constructive way to discuss sustainability is in terms of the practical benefits (and costs) to an agricultural operation, to the environment, and to future generations of farmers, ranchers and consumers.
  - The term “sustainable agriculture” has been used in various ways, and in this lesson its definition (from the 1990 Farm Bill) is: “an integrated system of plant and animal production practices having a site-specific application that will, over the long term:
    - satisfy human food and fiber needs;
    - enhance environmental quality and the natural resource base upon which the agricultural economy depends;
    - make the most efficient use of nonrenewable resources and on-farm resources and integrate, where appropriate, natural biological cycles and controls;
    - sustain the economic viability of farm operations; and
    - enhance the quality of life for farmers and society as a whole.”
  - In practice, sustainable agriculture means doing things such as:
    - rotating crops to help prevent weeds, disease, insect and other pest problems;
    - using alternative sources of soil nitrogen;
    - reducing soil erosion;
    - reducing water contamination by agricultural chemicals;
    - controlling pests with strategies that are not harmful to natural systems, farmers, their neighbors, or consumers;
    - increasing mechanical/biological weed control;
- using soil and water conservation practices;
- using animal and green manures; and
- using inputs in a way that poses no significant hazard to man, animals, or the environment.

✓ Of course, there are costs and benefits associated with every agricultural practice, sustainable or not.

- For example, adopting a low- or no-tillage practice may mean added costs for weed control and new machinery, but also benefits of fuel cost savings and reduced soil erosion.
- Costs and benefits should be evaluated in both the short-term and the long-term.
  - For example, some no-till short-term costs (such as increased weed control) could produce larger long-term benefits (conserving productive, irreplaceable soil).
  - Likewise, some no-till short-term benefits (such as reducing fuel use) could produce larger long-term costs (ongoing pest and disease problems).

➢ A good resource to help you evaluate your opportunities for more sustainable practices is USDA’s Sustainable Agriculture Research & Education (SARE: http://www.sare.org/) program. SARE is organized by regions, with each region providing its own assistance programs.

✓ For example, the SARE Western Region offers several assistance programs:

- **Research and Education Grants:** These grants involve scientists and producers who use interdisciplinary approaches to address sustainable agriculture issues.

- **Producer Grants:** These are one- to three-year grants that are conducted by agricultural producers with support and guidance from a technical advisor. Producers typically use these grants to conduct on-site experiments that can improve their operations and the environment and can be shared with other producers. Grants may also focus on marketing and organic production.

- **Professional + Producer Grants:** These grants are similar to the Producer Grants except instead of a producer serving as the project coordinator, an agricultural professional (such as a Cooperative Extension educator or NRCS professional) coordinates the project. The farmer or rancher serves as the project advisor.
The Learning Center: This Website is a one-stop source to find newsletters, books, videos, top project reports, fact sheets and more about sustainable agriculture. It can be found at: http://www.westernsare.org/Learning-Center.

Organic agriculture is often mentioned in the same discussion as sustainable agriculture. Like sustainable agriculture, organic agriculture has its vocal supporters and skeptics. And also like sustainable agriculture, the word’s use and definition are varied.

- In this lesson, organic agriculture is defined (from the USDA National Organic Standards Board—NOSB), as:

  an ecological production management system that promotes and enhances biodiversity, biological cycles, and soil biological activity. It is based on minimal use of off-farm inputs and on management practices that restore, maintain, or enhance ecological harmony. The primary goal of organic agriculture is to optimize the health and productivity of interdependent communities of soil life, plants, animals and people.

- “Organic” has also come to mean a marketing label that tells the consumer that products have been produced using certified organic methods. USDA administers a National Organic Program which manages organic certification and labeling (see: http://www.ams.usda.gov/AMSv1.0/nop).

- Adapting organic agricultural practices should be considered in a similar fashion as adopting sustainable agricultural practices. It should be evaluated for the specific farm or ranch operation based on a careful consideration of costs and benefits, in both the short- and long-term.

- It is important to note that, while sustainable and organic agricultural practices often go hand-in-hand, they are not strictly speaking the same thing. There can be organic practices that are not considered sustainable, and there can be sustainable practices that are not organic.

More recently, the “local food” movement has been a part of the sustainable agriculture discussion. As before, there is no consensus on the definition and use of the term “local foods.”

- Generally speaking, local foods are produced within some relatively close geographic area, and their production is considered as a way to strengthen local food systems which provides local economic benefits, reduces transportation and shipping costs, and strengthens a community’s resilience against potential disruptions in the food supply chain. Promoting the consumption of seasonal foods is also considered part of local food principles.
Similar to organic and sustainable agriculture, local food does not necessarily mean sustainable agriculture, or visa versa.

“Whole farm planning” is another term that is often used along with a discussion on sustainable agriculture.

- Whole farm planning complements sustainable agriculture because it involves a holistic view of the farm and incorporates the perspectives of different stakeholders (for example, family members and the community).
- As such, whole farm planning is a good way with which to evaluate the adoption of sustainable agricultural practices.

To conclude, sustainable agriculture is not a “one size fits all” deal. Each farm and ranch operation is unique, and any sustainable practices will need to be a good fit with the situation.

- Rather than viewing sustainable agriculture as a goal to achieve (like dieting to lose weight), it should be viewed as a way of living and working (like eating more healthy and exercising more often).
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The Business of Indian Agriculture

MODULE 5: Land Use and Management

LESSON 3: Understanding Land Transactions and Rights.

Lesson Topics
This lesson covers the following topics:

- General Considerations of Land Transactions.

Learning Objectives
Upon completion of this lesson, participants will:

- Understand the general considerations of land leasing and renting, purchasing and selling, and estate planning.
- Gain basic knowledge of water rights, mineral rights, easements, and rights of ways.

Definitions

Easement: the right to use another person’s property for a specific purpose. Easements can be specific to a part of the property or applied generally to the entire property. Easements can be bought and sold.

Right of way: a special type of easement that gives someone the right to travel through a property owned by someone else.
TOPIC 1: General Considerations of Land Transactions.

Learning Outcome: Students will understand the general considerations of land leasing and renting, purchasing and selling, and estate planning.

- Land transactions are a basic part of doing business for many agribusinesses, especially for land-intensive farming and ranching operations. For most of us, land is the largest and most valuable business and personal asset that we will ever manage. There are several common types of land transactions:
  - You lease/rent land to others, or you lease/rent land from others.
  - You buy land, or you sell it.
  - You inherit land from your family, or you bequeath it to your family.

In each of these situations, you assume a legal role with a set of financial and contractual rights, obligations and responsibilities. It is critical that you understand the legal aspects of land transactions so that you can protect your interests and fulfill your obligations.

- This lesson will help you understand the general considerations of land transactions. However, this lesson does not represent any legal opinion or advice. You should always consult with a professional legal and/or real estate advisor before conducting any land transactions.

- Leasing or renting land can be an effective strategy for managing your agribusiness.
  - Renting is typically a month-to-month agreement, while leasing is an agreement set for a fixed term, usually in years.
  - Leasing or renting your land can generate steady sources of income from land that is not currently being used by the business.
  - Leasing or renting land from someone else can give your business access to land that it does not currently have, and can avoid large amounts of debt and fixed assets that land ownership usually involves.
  - Leasing or renting land assumes that you have made the careful decision to lease/rent instead of buy or sell land.
The decision to buy vs. rent land should include budget projections on the costs, returns, and cash flows of both options. Also, market conditions can change, so include “best case” scenarios vs. “worst case” scenarios for each option.

Land prices, whether rental or purchase, should ultimately be based on the agricultural productivity of the land, market supply and demand, and interest rates.

Long-term planning is necessary to decide if shorter-term leasing/renting of land is the right decision for the business. Leasing land always has the risk that a lease may not be renewed for some reason.

In tribal settings, leasing Indian trust land requires special considerations and processes that are discussed in the next lesson, 5-4: Understanding Indian Land Regulations.

There are several common types of leases: cash, crop-share, and flexible cash agreements.

- Cash leases/rents are the simplest and most common arrangement. They set a cash lease/rent price for the use of land, usually in dollars per acre each month or each year.
  - The tenant pays all of the production costs (but not property taxes and insurance) and provides the labor.
  - The landlord can place restrictions on how the land is used. For example, they may say that particular crops are not grown, certain herbicides or pesticides are not applied, or that certain soil conservation practices be maintained.

- Crop-share leases/rents can be structured in a variety of ways and, as the name implies, the costs and profits of crops are shared among the tenant and landlord.
  - Typically, both tenant and landlord share a set percentage of the production costs and the profits.
  - The landlord usually receives a higher percentage of the income because they assume more risk with market prices and yield, and more production costs and capital.
  - The tenant receives less profit because they assume less risk, costs, and capital.
  - The actual share percentages are negotiated depending on the levels of risk, cost and capital that the tenant and landlord assume.
Flexible cash leases/rents are structured so that landlords and tenants share more risk together.

- Lease/rent prices are set by a base price and adjustments are made according to rising or falling market prices and yield.
  - For example, a base lease/rent price is first set with a base market price and a base yield amount.
  - The lease/rent price is then adjusted at the end of the season according to market prices and yields that are above or below the base amounts.
  - Higher prices or higher yields raise the lease/rent price, while lower prices or lower yields reduce the lease/rent price.
  - A minimum and maximum cap will usually be set on the lease/rent price to protect both parties in case of extreme seasons.
  - Some farming areas set leases/rents based on a percentage of gross revenue, which is influenced by both price and yield.

Leasing/renting involves certain rights and liabilities for both the landlord and the tenant.

- Laws vary from tribe to tribe, and from state to state, so be sure to consult with a legal expert to understand your rights and liabilities in any lease/rental agreement.
- A written agreement, called a contract, is an essential part of the lease/rental arrangement.
  - It states in writing the terms of the agreement, and the rights and liabilities of the parties involved.
  - In the simplest case, it says that the landlord gives access to land to a tenant, in exchange for a tenant making cash payment to the landlord.
    - Additional conditions will often apply to the contract, including how the land can be used, how and when payments will be made, and what can happen if someone fails to fulfill his/her obligations.
  - Contracts are also important because they encourage the parties to talk and reach a mutual understanding before an agreement is made.
  - If there is a dispute or misunderstanding, the contract’s terms can be reviewed and then enforced.
  - In some states, oral agreements are considered valid, but they do not have the same power and clarity as a written contract. Even if a verbal agreement is made, a contract should still be written.
If someone fails to fulfill his/her obligations, then negligence has occurred and the injured party may hold the other party liable in court and force it to pay damages.

Even though securing a written contract is critical, the most important factor in deciding to enter into a lease/rental agreement is the trustworthiness and reputation of the other party. In other words, can you trust that person’s words and deeds?

There are many reasons why an agribusiness would want to purchase or sell land.

Strictly speaking from a business perspective, buying or selling land should be a financial decision that is based on the needs of the agribusiness, the land’s productivity, its market value, interest rates, cash flow considerations, and so forth.

Once the business need had been established, the simplest math looks to see if a buyer has enough money for a down payment and enough cash flow to make regular payments. Many of these considerations are similar to the ones needed in a buy vs. rent land decision.

However, land holds other non-financial characteristics and values for people, including cultural and family connections, environmental interests, and emotional and spiritual ties. These values are important to consider in any decision to buy or sell land.

Whole farm planning (discussed in Lesson 5-2: Knowing Your Land) includes all family members in the decision-making process, and they may have differing views of the land that should be taken into consideration before buying or selling land.

Finally, if the land under consideration is Indian Trust Land, then there is a set of administrative and regulatory issues which need to be taken into account, such as appraising the value of the land, applying for the sale of land, retaining mineral rights, and so forth. These matters will be discussed in more detail in Lesson 5-4: Understanding Indian Land Regulations.

When land values are high (a “seller’s market”) and the saleable agricultural land base is shrinking (for example, because of development or farm policies), buying land can be a difficult challenge. Despite the challenges, there are still many good opportunities on the market.

Assuming that you have made the financial analysis, weighed all of the criteria, and made the decision to purchase land, the first step is usually to secure credit.
The way in which you secure credit and the type of credit needed will depend on many factors, including the land’s purchase price, the financing agreements with the owner (discussed below), any co-signers you may have, collateral, and so forth.

At this stage, it is best to develop a number of credit options and, when appropriate, get pre-approval from lenders. This places you in a better bargaining position when negotiating a purchase.

If you are unable to secure credit through a traditional lender, USDA’s Farm Service Agency has several options for farmers and ranchers (see Lesson 2-5: Preparing for Credit and Assistance Applications for details).

The next step is to find land.

If you are lucky, you have already found property within your area though local contacts, or have time to wait for a property to go on the local market. Knowing the local area well, you already know the land’s characteristics including its productivity and market value.

For many beginning farmers and ranchers, finding land to purchase is much more work. Good farmland at a reasonable price is hard to find, and the location and characteristics of properties that are on the market are often unfamiliar to the buyer.

- “Doing your homework” is critical in assessing any land for sale. This includes evaluating the land for its agricultural productivity, the fairness of its sale price, any restrictions to its rights (for example, water rights) or title, or any easements, and so forth.

- Fortunately, there are organizations that provide referral or “match-making” services between prospective buyers and sellers of farmland. For example, Land Link Montana (http://www.landlinkmontana.org/landlinkmontana.html) is a service that tries to preserve farmland in Montana by connecting sellers with buyers.

- In any case, you should consult with trusted advisors who are familiar and skilled in land transactions in your area.

The next step is deciding how the land purchase agreement is to be structured. There are several common ways that land can be purchased.

- Lease-to-own is an attractive option when the buyer does not have the required down payment. There are two common types of lease-to-own agreements:

  - Lease with purchase option: the owner and tenant agree to a purchase price and a future date when the purchase will be executed. The tenant pays for this option, and then rent can be applied to a down payment.
o Lease with “right of first refusal”: the owner and tenant agree that the owner cannot sell the land to a third party without the tenant having an opportunity to match the third party offer and buy the land. This protects the tenant from having the land sold without a chance to purchase it, but it also means that the tenant has to have the capability to buy it.

- “Fee Title Purchase with Seller Financing” is another common type of agreement, where the owner finances the purchase and the buyer makes payments directly to the owner. This works well when there is a good relationship between the seller and buyer, and it is especially useful when transferring land between family members. Payments and collateral can be structured by the wishes of the parties, and brokerage fees can be avoided.

- “Fee Title Purchase with Agricultural Conservation Easement” is an agreement when the land owner wants to preserve the land as farmland, and so “donates” or “sells” the development rights to a non-profit or government agency that holds the rights and enforces the easement. This lowers the value of the land, which can make it more affordable to a beginning farmer or rancher looking to purchase land.

- A Traditional Agricultural Mortgage is similar to a traditional home mortgage, but is tailored for farm and rural properties. Agricultural mortgages may offer different options that include more flexible loan terms, loans that are transferable within the family, or repayment options that follow the seasonal cycles of the agribusiness.

✓ Executing a contract or note is the final step.

- Once both parties have agreed to the terms of the purchase, a contract is written and signed. The contract is considered executed when all terms are fulfilled.

- This is different from the actual transfer of ownership (through a title or deed) which, depending on how the purchase agreement has been structured, can take place soon after the contract is executed, or at some point in the future (for example, if the seller is financing, transfer of ownership will take place when the purchase price is paid in full).

- Contracts may contain contingencies that protect parties against various situations that would cause someone to withdraw from the contract.

- In every case, a contract should be reviewed by a legal and/or real estate expert to make sure that each party’s interests are protected.
If land values are low (a “buyer’s market”), and more agricultural land is on the market, selling land at a good price can be a challenge.

- The process of setting a good sale price is similar to determining a good buying price discussed earlier. A sale price should ultimately be based on the land’s market value plus any mark-ups or premiums that you feel are appropriate. It helps you if you can be patient and wait for a buyer who can meet or come close to your asking price.

- However, the sale price is often not the only factor in selling land. Assuming that you have made the decision to sell your land based on all the various considerations described earlier, an added thought is how you want the land to be used.

  - Many farm and ranch owners who have spent their lives establishing the farm or ranch want to keep in land in production agriculture. There are several strategies for preserving farmland.
    - First, as mentioned earlier, an owner can donate or sell their land as a conservation easement to protect the land from development.
    - Second, land linking programs and services can connect sellers with buyers who are interested in maintaining farming or ranching operations on the land.
    - Various farmland protection programs administered by the federal government, states, and municipalities may be available.
      - For example, the USDA NRCS Farm and Ranch Lands Protection Program is a cost-share program that helps with the purchase of development rights on farmland. Landowners apply with a sponsoring entity, which can be a state, municipality or land conservation group.

- Don’t forget about the tax implications of your sale. Tax liabilities can be significant if land values have risen substantially over the years. You can also reduce your tax liabilities if you donated or sold land as a conservation easement.

- Finding a suitable buyer will depend on market conditions in the local area, the attractiveness of the property, the sale price, how the property is advertised, the flexibility of financing, and other factors.

  - Land linking referral programs and services may be helpful in finding a suitable buyer, as discussed earlier.
Farm and ranch land brokers may be able to provide a network of potential buyers. Be aware that many of these listing networks are nationwide, so if you are not comfortable with “outsiders” or “city folks” buying your land, some brokers may not be a good fit for you.

Spreading the word through local and state agricultural networks may be helpful. For example, in Montana, the Montana Cattlemen’s Association or the Montana Grain Growers Association might be good networks.

Once you’ve found a good buyer, then the next steps generally follow the flow described earlier: structuring an appropriate purchase agreement, and then writing and executing a contract.

Remember, as stated before: be sure to have experts in legal matters and/or real estate transactions review your plans.

Inheriting land can be a planned transaction (hopefully) or an unplanned event.

There may be serious considerations related to land inheritance such as estate taxes, wills and trusts, and outstanding liens and debts.

For example, there have been unfortunate cases around the country where the beneficiaries of an unplanned land inheritance have had to sell some or all of the family land in order to pay the estate tax.

It’s important to remember that land is not the only asset subject to estate taxes—all farm and personal assets may be taxable.

In tribal settings, inheritance matters will probably differ from non-tribal jurisdictions, and they could also change from tribe to tribe. This will be discussed in more detail in Lesson 5-4: Understanding Indian Land Regulations.

Estate planning is a critical step in making land inheritance transactions as efficient as possible, with limited financial consequences to the beneficiaries.

A typical strategy involves gradually transferring assets to family members through annual gifts that fall within the tax exemption limit.

Having a will in place is also an important step in estate planning. A will is a legal document that tells a court how your assets should be distributed upon your death. Having a will in place greatly simplifies the probate process (validating the will and distributing assets).

Other strategies for managing assets include establishing trusts, joint ownership of assets, and using certain types of life insurance policies.

Land owners and potential beneficiaries should work with a trusted professional estate advisor to help with their estate planning. This is definitely not a “do it yourself” job.
Case Study: George and Gladys, the boys, and the land across the road.

George and Gladys’ farming operation in Montana had been in the family for generations. They own about 3,000 acres of farmland, which is mostly in winter wheat. They typically break just about even each year, but with wheat prices up, they have been doing better recently. Their sons, Josh and Brian, and their wives, want to start their own operations and have been looking for land. They currently live with George and Gladys and they all work on the farm together.

The farmer across the road, Frank, is getting ready to retire and recently decided to sell about 800 acres of his land. The land is good for wheat farming, and is next to George and Gladys’ land. It would make for a good start for the boys’ farming operation. Frank has been a good neighbor and has known George and his family for many years. He has offered to give George and Gladys the first opportunity to buy the land, and the price he is asking for is fair.

The idea of buying land for the boys has been mentioned a few times, but no one has done any serious planning. The offer to buy the land from Frank has taken everyone by surprise. Josh and Brian don’t have the assets or credit to even come close to making the purchase. George, Gladys, and the boys and their wives all sit down at the dinner table one evening to talk about buying the land.

George wonders aloud if their operation has the cash flow and credit to afford to purchase the land. Gladys asks if things are moving too fast, and if leasing land might be a better option, especially if wheat prices fall. Josh is talking about what types of purchase agreements would allow him and Brian to build equity and eventually own the land. Brian asks George and Gladys what their succession plans are when they retire and if they’ve thought about transferring some of the farm assets to the boys now. There are times where it seems like everyone is talking at once, and nothing is being solved.

Discussion questions:

What do you think should be the major considerations for George and Gladys in making a decision to purchase the land?

What do you think are some purchase options for the boys to eventually own the land?

What kind of estate planning should George and Gladys consider?

Learning Outcome: Students will gain basic knowledge of water rights, mineral rights, and easements and rights of ways.

- Owning land involves various “rights” that are associated with the land. Perhaps the most important of these rights for farming and ranching operations is water rights.
  - Not only is access to water critically important for farming and ranching operations, it affects the market value of the land.
  - Laws that protect water rights are complicated and can and do change over time. So, you must always keep an eye toward the future when thinking about water rights. Water rights can be a moving target.
    - Special rules and permitting may be in effect (or may be enacted) in areas where surface or groundwater is scarce or water quality is an issue.
    - Tribal lands are subject to federal water claims, which may compete with state and other jurisdictional water claims.
    - Rulings under the Endangered Species Act may affect water rights.
  - Competing interests can make water rights a very heated and confrontational issue. The best way to understand and protect your water rights is to consult with a legal expert.

- Water laws in the Western U.S. generally follow the prior appropriation doctrine.
  - The prior appropriation doctrine says that no one can own the water in a stream, but everyone has a right to it for beneficial use. Thus, strictly speaking, water rights are not connected to land ownership.
  - Water is allocated from its first use from the source and that person is called the “senior appropriator,” who has the first priority permit for water use. The general rule is, “first in time, first in line.” “Junior appropriators” of those people with water rights established after the senior appropriator.
  - Each state has its own system for water administration. For example, in Montana, water rights are administered by the Department of Natural Resources and Conservation’s Water Right Bureau (http://dnrc.mt.gov/wrd/water_rts/). The bureau is responsible for administering the Montana Water Use Act, which manages the acquiring of new water rights and the changing of existing water rights.
Some areas, called “basin closures,” have been closed to new appropriations because they have been highly appropriated. Other areas have been designated as, “Controlled Ground Water Areas,” where water supply and/or quality have become issues.

Native American water rights are determined by a set of principles called Winters rights (named after the precedent setting case Winters v. United States). They specify that Congress has the right to reserve water for federal lands, including Indian reservations, and when Congress establishes a reservation, it is implied that the reservation has the right to water sources within or bordering the reservation.

- Additionally, water rights on the reservation are reserved as of the date of the reservation’s creation. Water users with earlier appropriation dates take precedence, but those with later dates are subordinate to the reservation’s water rights.

- Finally, the amount of water reserved for Indian use is the amount necessary to irrigate all the irrigable land on the reservation. Rights to water are not lost through non-use of the water, and all of these rights apply both to surface water and to groundwater.

- Special implementations or compacts may exist in some states. For example, in Montana, a special commission, the Reserved Water Rights Compact Commission, represents the state in negotiating compacts with Montana’s Indian tribes regarding the settlement of water rights claims (for more information, see: http://dnrc.mt.gov/rwccc/).

- You should consult with your tribal natural resources department for specific questions about water rights within the reservation’s boundaries.

Mineral rights is another important right associated with land. It is the right to mine or use any of the minerals below the surface of the property. It is important to note that mineral rights are sometimes separated from the ownership of the surface estate.

- Although mineral rights do not directly affect farming and ranching operations in the way that water rights do, they can have a big affect on the value of the land and its potential use.

- Mineral rights can be purchased, sold, and leased.
  - Be sure you know about the mineral rights of land that you are considering buying. You may be surprised to find that someone other than the seller owns the mineral rights.
For example, most Montanans actually live on “split estates” where one person owns the surface estate while another person owns the mineral rights.

Farmers and ranchers who own the surface estate can often be in conflict with mining interests who own the mineral rights and might conduct mining operations on the land without permission or even advance notice.

- For Indian lands, a Bureau of Indian Affairs (BIA) land sale application may not include an option for the seller to retain the mineral rights. If you want to retain your mineral rights, be sure to do so, even if it’s not mentioned in the application.
- If you are not sure whether you want to retain your mineral rights, hire a geologist to survey the land and advise you regarding the potential value of the rights.
- In some parts of the country, oil and gas exploration has dramatically affected the value of mineral rights and surface land. In some cases, oil and gas companies are offering land owners what seems like extravagant prices for their land and mineral rights.
  - Be careful about accepting these offers without first consulting with a financial advisor and legal experts. You may find that the prices being offered are actually much lower than the expected return in oil or gas royalties.

An easement is the right to use another person’s property for a specific purpose. It can be specific to a part of the property or be generally applied to the entire property. Easements can be bought and sold.

- There are many types of easements and some may affect the value of a property.
  - For example, an easement may give a power or pipeline company a right to build power or pipe lines across a property, which may lower its value.
  - As discussed earlier, donating or selling a conservation easement (the right to development) can also lower the value of the land, but it is usually used as a strategy to preserve farmland.

- An easement can apply to a property, or to an individual or a business.
  - In the case of a property, the easement becomes part of the deed and is transferred when sold.
  - With individuals or businesses, the easement remains in effect until an expiration date or event or death of the beneficiary.
✓ Just because an easement is not currently being used, does not mean that it will not in the future. Be aware of the potential for an easement to be used and what that will mean to your land and agribusiness.

➢ A right of way is a special type of easement that gives someone the right to travel through a property owned by someone else.

✓ As with all easements, right of ways can affect the value of the land and, for that portion of the property, its agricultural use. You should carefully study the current and potential future use of any rights of ways on your property.

✓ Rights of ways are typically applied, and granted, for access roads (or trails) that must cross through private (or state) property to reach some desired destination.

✓ In some cases, the use of eminent domain by states or municipalities to acquire rights of way across private property has been exercised, and can be extremely controversial.

  ▪ However, the use of eminent domain is not available on Indian Trust lands (except in rare instances and through a Federal court), and so negotiations and settlements must be made with tribes and individuals holding an interest in the trust land.

  ▪ Tribal governments have the right to consent to rights of ways when deemed necessary for the public good.
References


The Business of Indian Agriculture

MODULE 5: Land Use and Management

LESSON 4: Understanding Indian Land Regulations and Processes.

Lesson Topics

This lesson covers the following topics:

- Understanding Indian Trust Accounts.
- Appraising the Value of Indian trust land.
- Selling Indian trust land.
- Exchanging and Consolidating Indian trust land.
- Leasing Indian trust land.
- Rights of Way.
- Trust-to-Fee Transfers.
- Fee-to-Trust Transfers.
- Writing a Will involving Indian trust land.
- Gift Deeds.

Learning Objectives

Upon completion of this lesson, participants will:

- Understand the various Indian Trust accounts, reports and statements that are maintained and distributed by the BIA that provide valuable information to the Indian land owner.
- Gain basic knowledge of appraising Indian Trust land, including important considerations and the steps in the process.
- Understand the process and regulations involved in the sale of Indian Trust land.
- Understand the process and regulations involved in the exchange and consolidation of Indian Trust land.
- Understand the process and regulations involved in the leasing of Indian Trust land.
- Understand the process and regulations involved in rights of way agreements.
- Understand the process and regulations involved in trust-to-fee land transfers.
- Understand the process and regulations involved in fee-to-trust land transfers.
- Understand the considerations involved in writing a will that involves Indian Trust land.
- Understand the process and regulations involved in gift deeds.
Definitions

**Allotted Land:** Reservation land the federal government distributed to individual Indians, generally in 40-, 80-, and 160-acre parcels.

**Allottee:** An individual who owns an undivided interest in a parcel of allotted land.

**Checker-boarding:** Lands within reservation boundaries that may be in a variety of types of ownership—tribal, individual Indian, non-Indian, as well as a mix of trust and fee lands. The pattern of mixed ownership resembles a checkerboard.

**Fee Simple (Fee Land):** Land ownership status in which the owner holds title to and control of the property. The owner may make decisions about land use or sell the land without government oversight.

**Patents-in-Fee:** The “patent” is the title deed by which the federal government conveys or transfers land to people. “In fee” refers to the fee simple ownership in land. The term “patent-in-fee” describes the title document issued by the U.S. Federal Government to terminate the trust created by the trust patent issued to the allottee. The patent-in-fee operates to vest fee simple ownership in an allottee or their heirs.

**Probate:** The process by which property is transferred from a deceased property owner to his or her heirs and/or beneficiaries. The Office of Hearings and Appeals (OHA) is responsible for the probate of trust property owned by deceased Native Americans and examines federal law, federal regulations, tribal law, and state law to determine the heirs and/or beneficiaries, the validity of wills, and the validity of claims.

**Rights of way:** a special type of easement that gives someone the right to travel through a property owned by someone else.

**Trust Land:** Land owned either by an individual Indian or a tribe, the title to which is held in trust by the federal government. Most trust land is within reservation boundaries, but trust land can also be off-reservation, or outside the boundaries of an Indian reservation.

**Undivided Interest:** A share of the ownership interest in a parcel of trust land. The number of interests grows with the division among heirs of these interests according to federal or tribal law.
TOPIC 1: Understanding Indian Trust Accounts.

Note that most of the material is reproduced and adapted from the Indian Land Tenure Foundation, with their permission and all due credit.

Learning Outcome: Students will gain an understanding the various Indian Trust accounts, reports and statements that are maintained and distributed by the BIA that provide valuable information to the Indian land owner.

- At a minimum, all Indian landowners should know how much land they own, where their land is located, how much their share is worth, and how that land is being used and by whom.
  - As part of its trust responsibility, the Bureau of Indian Affairs (BIA) and, more recently, the Office of the Special Trustee for American Indians (OST; http://www.ost.doi.gov/), is responsible for recording, storing and providing access to this information.
  - There are a number of accounts, reports and statements that are maintained and distributed by the BIA that provide valuable information to the Indian land owner.

- The Individual Trust Interest Report (ITI) is one of the most important documents for an Indian trust land owner to understand.
  - It contains essential information about a landowner’s trust land (surface estate) and mineral (mineral rights) holdings.
    - For example, it lists the location and size of a trust land allotment, the allottee’s share of undivided interests in an allotment, and how much that share is worth.
  - The ITI lists all of the allottee’s holdings in every allotment where he or she has inherited an interest. If a person has inherited a lot of interests, the ITI can be several pages long, and it is often unclear where one allotment ends and another begins.
    - It’s important for landowners to understand the separate allotments if they are considering selling, exchanging or gift deeding some of their interests.
  - The ITI report is generated at the regional BIA Land Titles and Records Office (http://www.bia.gov/WhoWeAre/BIA/OTS/DLTR/index.htm) and mailed to landowners on a quarterly basis.
A copy of the ITI is required for most land-related applications, such as land consolidations and exchanges, transferring land from fee to trust status and gift deeds.

A copy of the ITI can be requested through the local or regional BIA realty office or through OST. In order to request a copy of the ITI, a landowner will need to provide his or her tribal enrollment number.

The reader of the report will need to know the Public Land Survey System (PLSS) to understand where the allotted land is located. The PLSS was discussed in Lesson 5-2: Knowing Your Land.

Individual Indian Monies (IIM) accounts are managed by OST. The IIM Statement of Account contains important information about an individual Indian account holder’s income and expenses from the use or sale of a trust asset such as agricultural or grazing leases, coal production, timber harvesting, or oil and gas leases.

- The IIM Statement of Account funds listed on the account statement can also come from a per capita payment or from proceeds from an estate account following a probate.
- All IIM account funds are invested in government securities and earn interest until they are disbursed.
- IIM account statements are mailed to account holders on a quarterly basis along with a List of Real Property Assets. However, if the account has a very low balance and does not have any activity for an 18 month period, the beneficiary will receive a statement only once a year.
- There are three different types of IIM accounts: unrestricted, restricted and estate.
  - Most adults have unrestricted accounts in which funds are disbursed to the account holder whenever the account balance reaches $15 or more, unless the account holder requests otherwise or has direct deposit.
  - An account may be restricted if there is a claim pending against the account (such as for child support); if a current address is not on file (in other words, the beneficiary is on the Whereabouts Unknown list); or if the account holder is a minor. Restricted account funds are disbursed in accordance with a BIA-approved disbursement plan.
  - Estate accounts are established when OST receives notice that an account holder is deceased. Estate accounts remain open, earning income, until the probate process is completed and assets are distributed.
The OST’s Trust Beneficiary Call Center (http://www.doi.gov/ost/information/individual/callcenter.html) is the best place to start if you have a question about your IIM account or account statement.

- The List of Real Property Assets provides a quick snapshot of pertinent information about all of an IIM account holder’s trust land holdings.
  - Information is divided into two sections which describe first the trust land holdings, and then the various encumbrances (leases, easements, rights of way, etc.) that are held on those lands.
  - Landowners can learn a lot about what they own by looking at this form, including the amount of undivided interest they own in each parcel of land, the type of ownership they hold, existing leases on the land, what the leases are for, and when they are due to expire.
  - Landowners who plan to negotiate a new lease agreement or who are considering new land use options for the property should review this information carefully.
  - This form is mailed to IIM account holders on a quarterly basis along with the IIM Statement of Account. Accounts with low balances and minimal activity will receive a statement only once a year.

- The Individual Indian Monies (IIM) account is critically important to the management of your land holdings, and its information needs to be correct and current. There are also account preferences that need to be set up to ensure that the account meets your needs.
  - The IIM Instructions for Disbursement of Funds and Change of Address Form is used by the Office of the Special Trustee for American Indians (OST) to establish account preferences and update personal information, such as change of address or name, of IIM trust account holders.
    - IIM account holders who have moved or are no longer receiving quarterly statements, should contact OST right away to update their contact information to ensure there is no lapse in service.
    - The form can be accessed online on OST’s website (http://www.ost.doi.gov/) and returned to the OST Trust Beneficiary Call Center offices in Albuquerque, New Mexico. Beneficiaries can also call the Trust Beneficiary Call Center, 888-678-6836, to update their account information over the phone.
    - To process the request, Call Center staff require the caller to provide at least two of the following pieces of information:
- Social security number
- Date of birth
- Last address of record
- IIM account number
- Approximate date and amount of the last disbursement

Make sure that your status on the IIM account is not “Whereabouts Unknown.”

✓ Many people believe the BIA and OST will always know where they are. They won’t. People end up on the “Whereabouts Unknown” list for several reasons.
  - For example, when a person dies without a will, his or her assets may go to his or her living heirs. Many times those heirs are not living in the same area, and no one knows where they are.
  - Often people move and forget to notify the BIA or OST, especially if they don’t have an active account when they move.

✓ According to recent data, there are more than 102,000 individuals on the OST’s Whereabouts Unknown list with $66 million in trust assets in their accounts. That’s a lot of unclaimed Indian money!

✓ To help locate these individuals, OST posts the Whereabouts Unknown list on its website and circulates it at regional trust beneficiary meetings.

✓ There are three actions you can take to help OST locate people who are on its “Whereabouts Unknown” list:
  - Go to OST’s website and click on the link “Is OST Holding Money for You?” to see a list of people on the Whereabouts Unknown list.
  - Fill out the Instructions for Disbursement of Funds and Change of Address form found on OST’s website and return it to the OST’s central offices in Albuquerque, New Mexico.
  - Call OST’s toll-free hotline, 888-678-6836, to update your contact information and to speak to an OST representative.
TOPIC 2: Appraising the Value of Indian trust land.

Learning Outcome: Students will gain basic knowledge of appraising Indian trust land, including important considerations and the steps in the process.

- Ever since Indian lands were allotted and placed under the federal trust system, the BIA has regulated and controlled nearly every aspect of Indian land and asset management.
  - All land-related transactions—such as leases, land exchanges, sales, and gift deeds—must follow a strict federal protocol and require the Secretary of Interior’s approval.
  - Some of these federal regulations are detailed in the Code of Federal Regulations (CFR), but many of them are just administrative procedures that have been developed over time and have no real practical purpose or grounding in federal law.
    - The processes have become so complex and convoluted that only BIA staff, whose internal procedural manuals continue to expand, could possibly process an application or request.
    - Increasingly, tribes are compacting out many realty functions from the BIA through Public Law 93-638 contracts. However, even compact tribes have to follow the federal guidelines and, ultimately, acquire the Secretary’s approval.

- Appraising the value of Indian trust land is almost always required for any land-related transaction.
  - Nearly all applications for land-related transactions require the landowner to provide additional documentation regarding the land. In addition to an appraisal, this often includes an ITI report, the legal land description, a survey or plat map of the land, and sometimes an environmental assessment or review of the property.
  - Appraisals are used to determine the fair market value for Indian trust land and resources. While requirements may vary from region to region, appraisals are generally required for land sales, land exchanges, land consolidations, gift deeds, rights of way and leases.
However, an appraisal of value does not necessarily determine the actual price. In a land sale or lease, for example, a landowner may choose to negotiate for more than the appraised value. In most cases, especially when the tribe is the buyer, the landowner sells for the appraised value.

For allotments held in undivided interests, an appraisal is completed based on the value of the entire allotment and then divided by the percentage of interest held.

For example, if the value of an entire 160 acre allotment is $10,000 and an individual’s ownership interest is 1/10, the appraised value of his or her land would be $1,000.

In general, an appraisal is considered valid for one year, although this depends on how fast the land values are changing.

If an appraisal is requested on behalf of multiple co-owners of an allotment within a year’s time, only one appraisal would be required to determine the value of that allotment. This allows the BIA to cut down on the number of appraisals it pays for.

There are several steps in the appraisal process that the landowner needs to know.

To request an appraisal, the appropriate BIA realty office or tribal land office will send a request for appraisal services to the OST.

The appraisal request identifies specific items to be addressed in the appraisal, such as: the transaction type (lease, sale exchange, right of way, etc.), property type (agricultural, residential, commercial, industrial, recreational, etc.), and whether there are utilities present and what kind.

If there are no problems with the request, OST will forward the request either to an in-house appraiser or to a contract appraiser.

When a contractor receives an appraisal request, he or she must prepare a statement of work and submit it to OST for consideration.

Once a contract for the appraisal is awarded, the appraiser can begin the appraisal process, which he or she is required to complete within 90 days.

When the appraisal is complete, the appraiser submits it to the Office of Appraisal Services (OAS) which is overseen by OST, for review and final approval.
Appraisals of Indian land must comply with certain standards, but because every piece of property is unique, there is no one form or format used by all appraisers.

- All appraisers working or contracting for OST are required to follow the Uniform Standards of Professional Appraisal Practice (USPAP) and are required to be certified general appraisers.

- However, the content of each appraisal varies, sometimes dramatically, based on multiple factors, such as whether the land or property is residential, commercial or agricultural, where it is located, the condition of existing structures, and the determined valued of comparable properties in the area.

  - In some regions, such as the Great Plains, the BIA realty office or tribal land office does not automatically send the landowner a copy of the full appraisal when it is completed. Instead, a letter is sent to the landowner with the estimation of value that was determined.

  - In other regions and area offices, such as the Minnesota Agency in the Midwest Region, the entire appraisal is sent to the landowner upon completion.

  - Either way, the landowner always has the right to review the full appraisal upon request.

- In most cases, appraisals are accurate and relevant. However, if a landowner is not satisfied with the appraisal, the individual or tribe can seek another appraisal.

- Depending on whether the appraisal is completed by an in-house appraiser or outsourced to a contractor, it can take anywhere from 160 to 190 days to receive an appraisal once the request has been made.

  - There are several factors that can affect this timeline, such as geographic isolation of the property or a unique natural resource, that require the appraiser to spend more time acquiring data or information to support an opinion of value.

  - Other factors can decrease the timeline. For example, in some areas (such as the Great Plains) multi-year appraisal contracts are used.

    - These reduce the amount of time it takes to get an appraisal completed by eliminating the need to advertise and award a separate contract for each appraisal.
This also eliminates the need to develop a statement of work for each contract and have it reviewed.

- The BIA is required to pay for all appraisals of Indian trust land, even if the cost of the appraisal is greater than the value of the land. The only exception is in the case of a right of way, when the person or company seeking the right of way has to foot the bill.

TOPIC 3: Selling Indian trust land.

Learning Outcome: Students will gain basic understanding of the process and regulations involved in the sale of Indian trust land.

- As discussed in Lesson 5-3: Understanding Land Transactions and Rights, there are a number of good reasons why a landowner may want to sell their land. One very important reason for selling land pertains specifically to Indian trust land: to consolidate trust lands and reduce fractionation.
  
  ✓ As a consequence of the General Allotment Act of 1887, Indian trust lands have over time become severally fractionated and checker-boarded, which has rendered the land far less productive than would otherwise be possible.

  ✓ For over a century, Indian families have seen valuable land resources diminish as fractionated ownership increases with each passing generation.

  ✓ During the Allotment Era (1887-1934), reservation land was divided up and allotted to individual tribal members.

    - When an allottee died, title ownership was divided up amongst all of the heirs, but the land itself was not physically divided. As such, each Indian heir received an undivided interest in the land.

    - Now, as each generation passes on, the number of owners grows exponentially, which has resulted in the highly fractionated ownership of much of Indian land today.
The Claims Settlement Act of 2010 authorized approval of the $3.4 billion Indian Trust Settlement, which allocates $1.9 billion to the Indian Trust Land Consolidation Fund for the purchase of individual trust land undivided interests.

- The Claims Settlement Act of 2010 settled the Cobell class action lawsuit against the U.S. government, which claimed that it had incorrectly accounted for Indian trust assets.
- Undivided interests purchased through the program will be returned to the tribe with the goal of reducing fractionation and consolidating the tribal land base.
- Once the process and procedures for purchasing the trust land have been determined, Indian landowners across Indian Country will be contacted by the overseeing agency—likely the BIA—and invited to sell their individual ownerships interests in fractionated parcels.
- Consolidating trust lands and reducing fractionation are definitely good things. At the same time, individual landowners should carefully consider any decision to sell their lands.
  - There may be other options, such as a gift conveyance or partition, that would accomplish the same goals, but in a way that allows the landowner or his or her family to keep control of the assets.

Most trust land sold on the reservation is purchased by the tribe. According to federal regulations, the tribe has first right of refusal for all trust land sales.

- If a landowner wants to sell to someone other than the tribe, he or she may have to provide evidence to the BIA or tribal realty department that an attempt to sell to the tribe first has been made but the tribe did not want to buy the land.
- The seller will also have to acquire consent of a majority of the co-ownership in the allotment in order to sell his or her interests to someone who is not already a co-owner.
- After the Application for the Sale of Indian Land and supporting documents (such as the ITI Report, survey and plat map, Cobell Notice and Waiver and Confirmation of Consultation) are submitted to either the tribal land office or BIA realty office, a request for appraisal will be submitted.
- Once the appraisal is completed, it will be sent to the landowner with a copy of the deed for sale. The landowner can either accept the appraised value for the land or try to negotiate for more. The BIA is obligated to support the landowner in these negotiations, regardless of the asking price.
If a satisfactory deal cannot be reached between both parties, the landowner can choose to not sell the land at that point. The land is not sold until the deed is signed.

If a deal is reached, the deed will be signed by both parties and the money for the sale will be dispersed to the landowner’s IIM account.

Some reports have stated that a land sale process in the Great Plains Region takes anywhere from one to three months, depending on the complexity of the sale and how many owners are involved. Other reports from the Midwest Region claim that six to eight months would be possible, but considered very fast.

- Changes to the system resulting from the Cobell lawsuit may improve transparency but might decrease efficiency and so some processes may now take quite a bit longer.

**TOPIC 4: Exchanging and Consolidating Indian trust land.**

**Learning Outcome:** Students will gain basic understanding of the process and regulations involved in the exchange and consolidation of Indian trust land.

- Land exchanges are one of the most important tools that individuals have in overcoming the challenges of fractionated ownership.
  - A land exchange allows landowners to consolidate their multiple undivided interests so that they can either gain a larger share of an allotment or an entire tract of land.
  - The more interest a landowner has in a tract of land, the more control he or she has over land use decisions, such as building a home, farming, ranching, leasing or starting a business.
  - An Application for Exchange of Indian Land usually has to be approved by both the BIA and the tribal government and is subject to the terms in the Code of Federal Regulations, 25 CFR 151.7 and 151.10.

  - 25 CFR 151.7 states that the acquisition of a fractional land interest by an individual Indian or a tribe in trust status can be approved by the Secretary only if certain conditions are met, such as:
    - the buyer already owns a fractional interest in the same parcel of land; or
o the interest being acquired by the buyer is in fee status; or

o the buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than the fair market value; or

o there is a specific law which grants to the buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or

o the owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

- 25 CFR 151.10 states that upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. Comments will be considered by the Secretary in his decision to approve the land exchange.

- Tribal regulations on exchangeable and non-exchangeable land may vary from reservation to reservation. As such, the form for land exchanges will also vary somewhat, depending upon each tribe’s land use priorities and plans.

- It should also be noted that land exchanges may not be possible on all reservations.

> Landowners interested in applying for a land exchange should first obtain and read a copy of their ITI Report to determine the lands that can be exchanged.

- The next step is to visit either the tribal land office or BIA realty office to find out what lands can be acquired in the exchange.

- Not all tribal land is available for exchange. Some of the lands that are generally not available include:
  
  - Areas around towns
  - Park and recreation areas
  - Commercial and industrial areas
  - Historical and religious sites
  - Archaeological sites
  - Potential tourist attraction sites
o Timber reserve lands
o Large consolidated tracts

✓ Landowners who are exchanging for land in an allotment where they are not already a co-owner will need to acquire the consent of all of the owners in the allotment. (The BIA can provide names and contact information for all of the owners.)

  ▪ When contacting the other owners, it is important to make them aware that if their undivided interest is not part of the exchange, the size of their interest and the income they receive will not be affected by the exchange.

  ▪ Ultimately, this is a good deal for everyone because the fewer owners there are, the easier it is to do anything with the land.

✓ Once all of the signatures are collected (unless the exchange is for tribal land or land where the landowner is already a co-owner) the application is submitted to the tribal land office or BIA realty office.

✓ They will submit the application to the BIA area office, along with a Title Status Report (TSR) and other documentation, and request an appraisal to determine the value of the properties.

  ▪ It should be noted that even if equal amounts of land are being exchanged (in other words, 1/16 for 1/16) they may not be equal in value. Occasionally, landowners will have to pay some amount of money (in cash) to make up the difference.

✓ If the application is approved, the BIA realty office will make the necessary changes to the land ownership files. These changes will appear on the landowners ownership documents such as the ITI Report and the IIM Statement of Account.

✓ Because of the multiple levels of approval and processing, land exchanges can take a long time to complete.

  ▪ For example, according to a recent study, the average time required to complete a land exchange on the Pine Ridge Indian Reservation is 4.5 years.
TOPIC 5: Leasing Indian trust land.

**Learning Outcome:** Students will gain basic understanding of the process and regulations involved in the leasing of Indian trust land.

- Today, only one-third of Indian land used for agriculture is leased to Indian people. The rest is leased to non-Indians under a federal leasing system.
  - Unfortunately, this system has a history of being biased toward non-Indian farmers and ranchers and has not always ensured that Indian landowners are receiving a fair price for the use of their lands.

- With very few exceptions, an Application to Lease Indian Trust Land (residential, business, agricultural, and mineral/gas) must go through the BIA and be approved by the Secretary of the Interior.
  - Even tribes that have compacted to provide their own realty services must follow federal regulations and ultimately have all leases go through the BIA for approval.
  - Stipulations established in federal law also require written consent from a majority of the undivided interest holders in an allotment for a lease to be approved (see “Landowner Consent Requirements“ below).
    - According to federal regulations, in order to acquire majority consent for a lease, the Secretary can provide consent on behalf of some groups of landowners, such as minors, those whose whereabouts are unknown, and certain heirs of an estate. As a result, some leasing decisions are made without the knowledge and full consent of all landowners.

- Whether it is an Indian or non-Indian person seeking to lease Indian trust land, the process is the same. An application to lease must be submitted to the appropriate BIA realty office, including the required landowner consent.
  - Upon written request, the BIA will provide the lessee (the person seeking to lease the land) with a list of the landowners’ names and addresses to acquire necessary consent.
  - When a lease is about to expire (about 13 months before the lease ends) the BIA sends landowners a notice explaining what they need to do to lease their land along with an appraised value for the land.
✓ Landowners have 90 days to negotiate a new lease on their own. If they fail to do so, the land will remain in the federal leasing system and the bidding process will begin automatically.

✓ “Bid sheets” listing Indian lands available to be leased will be posted in newspapers, post offices, and other public places.

✓ In order to bid on land, potential lessees must submit a sealed (not public) bid to the BIA. The highest bids are selected and the lease agreement is drafted.

✓ After the lessee signs the lease, it is sent to tribal realty or the agency for approval. The superintendent approves the lease, and then it is sent to the Land Titles and Records Office for recording.

✓ Landowners are sent a copy of the lease once the process is completed.

✓ Once a lease is approved, lease payments are submitted to the BIA, processed by OST, and deposited into IIM accounts for disbursement to individual landowners and tribes. These payments will be shown on the IIM Statement of Account.

✓ Once a completed application has been submitted, it could take anywhere from a few months to more than a year for a lease to be approved.

➢ Lease agreements are usually negotiated by the BIA on behalf of the landowners, but landowners can and should have a say in the terms of the lease agreement, including the type of use, the length of the lease, and the amount to be paid.

✓ When landowners receive letters requesting consent to lease their lands, they should read these carefully and ask questions before signing anything.

  ▪ Local landowner associations or tribal land offices can be a good resource for information on leasing.

  ▪ In addition, the IIM Statement of Account and List of Real Property Assets both list detailed information about any leases held on a trust account holder’s lands, including when those leases expire.

  ▪ This is a good place to start for individuals who would like to learn more about how their lands are currently being managed and would like to take a more proactive role in future lease negotiations.

✓ Remember that an Indian landowner who owns fractional interests in trust property must also obtain permission for a lease for any specified use of the land from a majority of the total landownership.

  ▪ The specific consent requirements are as follows:
    o 90 percent of the ownership, if there are five or fewer owners.
- 80 percent of the ownership, if there are between six and ten owners.
- 60 percent of the ownership, if there are between eleven and nineteen owners.
- A simple majority (more than 50 percent of the ownership), if there are twenty or more owners.

- Tribal consent is not required for the BIA to approve a lease on trust land where the tribe owns a minority interest and minimum consent has been obtained.

- As with any other lessee, the Indian interest holder must pay his or her co-owners at least fair market value for this use, unless the other owners have waived their right to receive rental income.

- Waiving the right to receive rental income is relatively common among families where there are only a few owners in the allotment.

- Some landowners who take the first steps to find out more about their lands can experience resistance from BIA realty staff.

  - For example, landowners have complained of being told that the Privacy Act prevents them from being able to obtain the names and addresses of other co-owners. This is not true.

  - If you are the co-owner in an allotment you have the right to receive contact information for all of the other owners.

  - You also have the right to review the current lease agreement for your land, and to negotiate your own lease under the terms you and your co-owners choose.
TOPIC 6: Rights of Way.

Learning Outcome: Students will gain basic understanding of the process and regulations involved in rights of way agreements.

- As discussed in Lesson 5-3: Understanding Land Transactions and Rights, rights of way are agreements allowing one person or entity to cross property that is owned by another party. Examples of rights of way include public and private roads, pipelines, power lines and railroad tracks.

- Ever since the General Allotment Act of 1887, which transferred the title and oversight of all reservation land to the federal government, thousands of rights of way have been granted across Indian land.
  - The permissions granted by rights of way vary quite a bit, ranging from perpetual easements for transportation or communication routes to short-duration rights of way for construction or servicing of sites.
  - Some rights of way affect one allotment or parcel of tribal land while others cross hundreds of allotments and involve thousands of individual Indian trust land owners, including the tribes.

- Requesting and receiving rights of way is a very complex process requiring extensive documentation and reporting. Individuals or companies requesting a right of way across Indian land must comply with all federal regulations and procedures as detailed in Code of Federal Regulations 25 CFR 169.
  - The tribe and Indian landowners must sign a Consent of Landowners to Grant Right of Way before any right of way across Indian land can be granted.
  - Landowners will be notified of any right of way requests. Initial notification will seek a landowner’s permission to enter the land for survey and mapping purposes.
  - An appraisal of the land will also be requested. In most cases, the appraisal is paid for by the party seeking the right of way.
    - The appraisal provides an opinion of the land’s value and it is used to negotiate the terms and conditions of the right of way, including “just compensation” to the property owner.
• Just compensation is measured as the difference between the value of the entire property before the taking and the value of the remainder after the taking.
• Severance damages may also figure into the calculation if there is a decrease in the value of the remainder related to the activities.
• Landowners are encouraged to accompany the appraiser during the inspection of the property.
• If a landowner or tribe does not agree with the appraisal’s findings, another appraisal can be requested, but it would be up to the property owner to pay for any additional appraisals.

➢ Before approving a right of way, tribes and landowners should extensively research existing rights of way across their lands as well as the company or entity seeking the right of way.
  ✓ During the negotiation process, landowners should clearly communicate their bottom line financially and in caring for land.
  ✓ Tribal governments should clarify policy considerations such as those regarding taxation, environmental and other land regulations and restrictions, and community needs regarding the utility.
  ✓ When negotiating a right of way, landowners should do the following:
    ▪ Compile a list of all right of way documentation related to their lands.
    ▪ Obtain copies of current rates and agreements that have already been negotiated on the right of way with the tribe and other trust land owners.
    ▪ Be aware of the availability of third party condemnation for individual Indian-owned land, which could take all or some part of the land from the landowner.
    ▪ Gather information and data on the acquiring party. What do they want? How far will they be willing to go for the right of way?
    ▪ Share all information collected with other undivided interest holders of the land.
    ▪ Create a journal of every communication, writing down to whom they spoke, the subject of the discussion, and when the discussion took place. Whenever possible, they should include a third party in the discussions and record that person’s name as well.
  ✓ When granting a right of way, tribes and landowners should insist on setting a time limit as part of the terms.
According to the federal laws governing rights of way, unless a time limit is part of the governing document, the right of way will be granted perpetually by default.

TOPIC 7: Trust-to-Fee Transfers.

Learning Outcome: Students will gain basic understanding of the process and regulations involved in trust-to-fee land transfers.

- Trust-to-fee transfers, also known as fee patents or patents-in-fee, have a long and sometimes painful history among many Indian people and tribes.
  - In 1906, the Burke Act was passed, which authorized the Secretary of the Interior to decide whether an Indian person was “competent” to manage his or her lands.
    - If he or she was deemed “competent,” the Secretary could take the land out of trust in a “forced fee patent” making the land taxable and available to be sold.
    - The Secretary of the Interior was authorized to do this with or without the knowledge and/or against the wishes of the allottee.
    - Thus, some Indian people during the early 20th century, including many Indian soldiers away fighting in WWI, ended up having their land sold in tax foreclosure auctions because they owed taxes on land they thought was still in trust.
  - More recently, some Indian landowners have had concerns that they would not be able to pass their trust land on to a non-Indian spouse or child who does not have the degree of blood quantum required by the tribe for enrollment.
    - In some cases, these landowners have chosen to transfer their trust lands to fee status so they could safely keep their lands in their family.
      - However, there are other options—such as writing a will that includes a life estate for family members.
      - Although trust land cannot be gifted or passed on to a non-Indian, non-Indians (such as a spouse) can be granted a life estate that allows them to live on and earn income from the land throughout their lives.
Landowners can also choose to grant themselves a life estate as part of a gift conveyance or will.

- With a life estate, everyone’s needs can be met and the land can remain in trust status.

The Application for Patent-in-Fee was last updated in 1955—over a half-a-century ago—though it is still the standard form used by the BIA to process a trust-to-fee transfer.

- Like some other BIA forms, it includes inappropriate questions about marital status, income, and use or proposed use of the land.
- Compared to the amount of information and documentation required to put land back into trust (in a fee-to-trust transfer), transferring land from trust-to-fee is relatively simple and fast.
- While there was a time when a trust-to-fee transfer could take as little as three weeks, today it generally takes somewhere between three to six months, largely due to the appraisal required.
- Congressional approval is required to dispose of tribal land, though it’s rare for a tribe to transfer land from trust to fee status.

Before making the decision to transfer land from trust to fee, it is important to consider what happens when Indian land goes out of trust status. The following are some of the consequences to consider:

- The land becomes taxable.
- The land can easily be sold or transferred to a non-Indian.
- Checker-boarding on the reservation increases.
- The tribe loses jurisdiction over the land, diminishing tribal control and sovereignty.
- In most instances, the land becomes subjected to county zoning and land use codes.
- Federal programs for trust lands are no longer accessible.
- It’s very hard to return the land to trust status again in the future.
TOPIC 8: Fee-to-Trust Transfers.

Learning Outcome: Students will gain basic understanding of the process and regulations involved in fee-to-trust land transfers.

- Having fee simple lands transferred into federal trust status is a powerful tool for making reservations whole and protecting Indian lands for future generations.
  - When lands are held in “fee simple”, the owner holds title to, and has full control over, the property and also pays property taxes. The owner of fee simple land can make decisions about land use and/or sell the land without government oversight.
    - Many reservations have both fee land and trust land within their boundaries, creating a “checker-board” land ownership pattern that weakens tribal jurisdiction and threatens tribal sovereignty.
  - When fee lands are returned to trust, Indian nations and people begin to eliminate the checker-board pattern of trust and fee lands and regain control of lands on the reservation.
  - Trust lands are protected from sale or default to non-Indians, are free from county taxation and are within tribal jurisdiction.
  - Having lands in trust status also allows individual Indian landowners and tribes to take advantage of federal programs restricted to trust lands, such as opportunities for business development, housing, environmental and cultural protection.

- Before submitting the Application for Trust Acquisition of Fee Land, the tribe or landowner should take time to gather all of the required information and discuss the application with the BIA realty or tribal land office staff.
  - It is important to make sure that the initial application is completed carefully, with special attention paid to the criteria required for the Secretary of the Interior to authorize a request as identified in 25 CFR 151.10 (on-reservation acquisitions).
    - The criteria for on-reservation trust land acquisitions, as specified in 25 CFR 151.10, include the following:
      - The existence of statutory authority for the acquisition and any limitations contained in such authority;
      - The need of the individual Indian or the tribe for additional land;
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- The purposes for which the land will be used;
- If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax roles;
- Jurisdictional problems and potential conflicts of land use which may arise;
- If the land to be acquired is in fee status, whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and
- The extent to which the applicant has provided information that allows the Secretary to comply with federal environmental policy and hazardous substances laws.

✔ Getting advice from other tribes or individuals who have been successful with fee-to-trust applications is also a good idea.

✔ When the application is submitted to the BIA, the tribe or landowner should have a copy made that is dated, stamped and initialed by the realty staff.
  - The realty staff will review the application and then submit it to the superintendent with a recommendation.
  - At this point, applicants should request a copy of the recommendation and make sure everything in the application is still accurate.

✔ Upon receipt of the application, the superintendent will notify the state and local governments who have regulatory jurisdiction over the land to be acquired.
  - These entities have 30 days to provide written comments as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments.
  - The applicant is provided with a copy of these written comments and is given a “reasonable time” in which to reply and/or request that the Secretary issue a decision.

✔ If everything goes smoothly, the land will be put into trust at this point. However, if the state protests, the application can go first to the Interior Board of Indian Appeals (IBIA) and ultimately end up in federal court.

✔ It is important to note that once the initial application has been submitted, applicants need to stay on top of the application’s whereabouts and status by making regular phone calls to the realty office to check in.
As a general rule, one week that someone is not contacted regarding the application is equal to one extra month added on to the overall time to process the application.

- Local and county governments will sometimes challenge fee-to-trust transfers because it could result in loss of tax revenue and jurisdiction.
  - In some cases, Indian nations have to be prepared to educate neighboring communities about the importance and benefits of restoring Indian lands to Indian control and trust status.
    - Some of the benefits include: economic development and jobs, new community amenities, and natural or cultural resource protection.
  - Individuals seeking to have fee lands transferred to trust status can also encounter resistance either from the tribe, the BIA, or other entities.
    - In general, the BIA gives priority to tribal over individual fee-to-trust transfers.
    - Attitudes toward individual fee-to-trust transfers can vary dramatically from one region or agency to the next, and, these attitudes can influence the process itself.
    - Landowners should fully understand their rights and responsibilities regarding fee-to-trust transfers and be prepared to advocate for their position every step of the way.

- Generally, the fee-to-trust process takes anywhere from 12 to 18 months.
  - Occasionally a transfer will take less time, such as eight or nine months, but this is rare and is usually due to extreme persistence on the part of the tribe or individual landowner who has submitted the request.
  - A request may also take much longer if the case is complicated by any number of factors. Diligence and persistent follow-up are important.
TOPIC 9: Writing a Will involving Indian trust land.

Learning Outcome: Students will gain basic understanding of the considerations involved in writing a will that involves Indian trust land.

- When Indian lands were allotted and the federal trust was established in the late 1800s, it’s not surprising that very few Indian people considered writing a will to protect their lands and assets when they passed on.
  - The state probate laws determining trust land inheritance divided up land ownership among all of the original allottee’s heirs into undivided interests.
  - With each passing generation, the undivided interests continued to be passed down to all heirs and the number of owners grew, and continues to grow exponentially, resulting in the highly fractionated ownership of much of Indian land today.
  - Many state probate laws passed ownership to the surviving spouse, even if he or she was non-Indian.
    - Because a non-Indian cannot hold trust land, this land lost its trust status, causing more land to go out of Indian control.

- In 2004, the American Indian Probate Reform Act (AIPRA) established a uniform federal probate code which applies to nearly all allotted reservations in the U.S.
  - It includes provisions meant to decrease fractionation by setting limits on who can inherit Indian trust land and allowing for the sale of small interests at probate.
    - Unfortunately, those provisions allow the federal government, rather than the landowner, to make decisions about the distribution of land and assets once the landowner is deceased.
  - AIPRA automatically applies to all Indian probates of trust land in the U.S. unless there is a tribal probate code in place or the landowner has a valid will.
  - Some of the key provisions of AIPRA include the following:
    - It does not apply if there is a tribal probate code in place or the decedent has a will. Otherwise, it applies to all trust land and assets.
    - It applies to those who died on or after June 20, 2006.
    - It allows only an “Indian” person to inherit or purchase trust land at probate. This includes: eligible heirs who meet AIPRA’s definition of “Indian,” a co-owner in the allotment, the tribe, and non-Indian children of lineal descent within two generations of the decedent.
Specifies that if the interests are five percent or greater:

- The spouse, Indian or non-Indian, receives a life estate, but does not inherit the interests.
- The interests pass equally first to eligible children, then grandchildren (if no children), then great-grandchildren (if no grandchildren, etc.), then surviving parents, then siblings, then the tribe, then co-owners, then to the Secretary of the Interior for sale.

If the interests are less than five percent:

- The spouse, Indian or non-Indian, receives a life estate only if he or she is living on the parcel at the time of the decedent’s death.
- The interests pass directly to the oldest eligible living child, grandchild or great-grandchild. This is known as the “single heir rule.”
- If none of the above heirs exist, the interests pass to the tribe, then co-owners, then to the Secretary of the Interior for sale.

Specifies that purchases at probate of interests less than five percent can occur without the consent of a surviving spouse and heirs.

- Amendments to the law state that only the tribe or Secretary can purchase interests without consent.
- Purchases at probate of interests greater than five percent require the consent of the surviving spouse and heirs.

✓ Under AIPRA, an “Indian” is a person who has the following characteristics:

- Is an enrolled tribal member of any federally recognized Indian tribe; or
- Is eligible to become enrolled in any federally recognized tribe; or
- Was an owner of an interest in trust or restricted land prior to October 27, 2004; or
- Meets the definition of “Indian” under the Indian Reorganization Act, meaning:
  - All persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and
  - All persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and
  - All other persons of one-half or more Indian blood. For the
purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

- In California, a person who owns any trust or restricted land in California.

- With a will, a landowner on Indian trust land can do the following:
  - Allow an Indian spouse to inherit trust land.
  - Transfer trust land to some individuals that are not considered eligible under AIPRA.
  - Choose to leave someone out of the will.
  - Actively protect trust land from further fractionation by leaving all of the interests in an allotment to one person.
  - Choose a life estate or joint tenancy with right of survivorship so that all family members can benefit from the land during their lifetimes.
  - Clarify wishes in regard to non-trust land and other personal property.
  - Make the probate process much easier for living family members.

- Landowners should prepare their wills with the help of an attorney who is familiar with AIPRA and with the probate and transference of Indian trust lands and assets.
  - There are legal service agencies throughout Indian Country who specialize in writing wills for Indian people. Most of these organizations can provide will writing services at a very low cost or sometimes free.
  - The attorney that helps prepare the will can provide a more detailed checklist of information needed and things to consider when writing a will. Some of the information requested will likely include:
    - Names and addresses of family members or other individuals to whom the property will be left.
    - List of personal property to be left and to whom.
    - Individual Trust Interest Report.
    - Individual Indian Monies Statement of Account.
    - Deeds for fee land (if any).
    - Mortgage and title documents for home and other property (if any).
In order to write a valid will, an individual must be at least 18 years of age and fully competent to manage his or her own affairs.

- The will must be signed by the person who is writing it and two witnesses who are not receiving anything from the will. Sometimes people will have a notary sign as well.
- An affidavit signed by the witnesses will also accompany the will. This document is to ensure that the legitimacy of the witness signatures is not questioned at probate if they are not able to attend.
- The sooner a will is prepared the better. Once a will is in place, it can always be legally amended or a new will can be written.
- It’s a good idea to review a will after major events such as a birth, death or marriage that may affect the will.

When a person dies without a will, the division of his or her estate to legal heirs is determined in a court proceeding called a probate hearing.

- For Indian people, this process is outlined in 25 CFR 15.4 (Acquisitions in trust of lands owned in fee by an Indian) and is overseen by the Office of Hearings and Appeals (OHA).
  - Because of the complexity of Indian estates, which have historically involved multiple heirs and interests in property across multiple jurisdictions, there has long been a backlog of Indian probates.
    - It is not uncommon for an heir to a deceased person’s estate to pass on before the original probate is resolved.
- When the BIA learns of an Indian trust landowner’s death, it prepares a probate package to submit to OHA for probate. The probate package includes the following:
  - Death certificate
  - Birth records
  - Marriage records
  - Divorce records
  - Adoption records
  - Statements of paternity or maternity
  - Names and addresses of potential heirs and beneficiaries
  - Wills
  - Creditor claims
- Name changes or aliases
- Inventory of trust property and any other relevant information

✓ When it sends the probate package, the BIA notifies interested parties, such as the potential heirs and beneficiaries, that the probate package has been sent and provides the address of the OHA office.
  - If possible, potential beneficiaries should request a copy of the probate package prior to the probate and try to learn as much as possible about the process and what to expect before the hearing.

✓ Once OHA receives the probate package, an initial probate hearing, or court proceeding, is set to determine the distribution of the estate. Notice of the hearing is posted and sent to interested parties at their last known address.

✓ The tribe is also notified if the record reveals that the tribe may have the option to purchase trust land interests during the probate.

✓ The probate process can be very confusing and frustrating, especially to someone unfamiliar with it. Very complex probates may require multiple hearings.

✓ Sometimes, decisions about the distribution of assets are made without full agreement of all interested parties or there are forced sales of trust land interests.

✓ Once a final order in the probate has been issued, a notice is sent to interested parties with a copy of the decision attached.
  - Any parties who disagree with the decision have 60 days to file a written petition for a re-hearing.
  - If there are no petitions filed within this 60-day period, the superintendent will initiate the distribution of the estate, which includes changing the land title records and distributing interests.

➢ A landowner can avoid a lengthy probate of his or her estate by doing the following:
  ✓ Having an updated, valid will that clearly states his or her intentions with respect to their land and assets.
  ✓ Gift deeding trust land during his or her lifetime to:
    - Family members
    - Co-owners of the allotment
    - The tribe
  ✓ Educating yourself about AIPRA and the tribe’s probate code (if it has one).
TOPIC 10: Gift Deeds.

Learning Outcome: Students will gain basic understanding of the process and regulations involved in gift deeds.

Gift deeds are one of the quickest and most simple tools available to Indian trust landowners to consolidate their lands and prevent further fractionation of their interests. (Land sales and exchanges, discussed in previous topics, are also good ways to consolidate and protect Indian trust lands.)

- Unlike writing a will, an attorney is not required to process the Application for Gift Deed of Indian Land, making it a viable option for those who do not have immediate access to legal services.
- It should be noted, however, that a will is always the best way to make sure land and assets are distributed in the manner that the individual chooses.

A gift deed (sometimes called a gift conveyance) provides a way for transferring land between individual Indians or between individual Indians and the tribe.

- This can be done through the following:
  - A gift deed, which transfers the title of property during the lifetime of the donor, or;
  - Through a gift conveyance with life estates retained, which means that the grantor can maintain land use, benefits and income from all or a portion the land until they die.

- A gift deed or gift conveyance with life estates keeps lands from being further divided, keeps lands out of the probate process, and allows the landowner to make sure that the land will be passed on without having to specifically include it in a will. (Currently regulations do allow for gift deeding trust lands to a non-Indian).
- However, the trust status of the land cannot be terminated for a period of five years after the Secretary of the Interior approves the conveyance.

When a gift deed application is first submitted, either to the tribal or BIA realty office, it must be signed by the grantor in front of a witness and/or notary and include the Cobell Notice and Waiver and Confirmation of Consultation (which are also required for a land sale).
Supporting documents, such as legal land description, survey or plat map, Title Status Report (TSR), Individual Trust Interest Report (ITI), and an appraisal, are also required to process the application.

As in a land sale, majority consent is required from the co-owners of the allotment to gift deed one’s shares to someone who is not a co-owner.

Once the application is complete, including the supporting documents, a deed showing the transfer of ownership is prepared and the application is sent to the BIA superintendent for approval.

If approved, the application is then routed to the Land Titles and Records Office for recording.

Similar to a land sale, the gift deed process can take anywhere from one to eight months or more, depending on the complexity of the application and procedural differences that vary from region to region.
References
