

THE DUKE OF YORK RECORD. 73

(98)

By vertue of a warr. from Deale Court.

Laid out for Stephen Whitman a parcell of Land called Whitmans Choise scituated on the West side of Delaware Bay and on the South side of a Creeke called Deale Creeke Beginning at a marked white oake being the bounded tree of Anthony Eenloss standing on a point of woods and a branch on the Marshes of the said Deale Creeke and running from thence west South west One Degree westerly three hundred fifty and lower perches binding on the land of Anthony Eenloss to a bounded popular of the said Anthony Eenloss and John Kipshaven and from thence Northwest two hundred thirty and lower perches binding on the head line of the said John Kipshaven his Land to Patricks Creeke and from thence South Seaventy and eight perches to a bounded Hickarie of the Land the said Stephen Whitman purchased from John Siming and from thence South East binding on the said Land One hundred and fifty perches to a marked black oake & from thence Southwest binding on the said Land to a marked Corner Hickarie—Standing in the woods and from thence South East by East with a line of marked trees One hundred thirty and five perches to a Corner marked black oake standing in the woods and from thence with a line of marked trees North East by East thirty and five perches to a branch and then by several Courses binding on part of the said branch One hundred and twenty perches to the Course aforesaid and from thence Dito, North East by East fower hundred and thirteen perches with a line of marked trees and part binding on a branch to a marked white oake standing on a point of woods and on the marshes of the said Deale Creeke and then North North East to the first bounded white oake Containing and laid out for five hundred acres of Land.

June ye 6th A. 1681. Cornelis Verhoofe Surveyor.

At a Court held at Deale by the Kings Authority the 14th Feb.

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INTRODUCTION

This paper attempts to provide a brief overview of the different forms of land records found in the modern day United States. This paper was a result of discussions among PRIA members as to the use of Torrens Registration Systems in the United States and why its use was not more widespread. We hope that this paper in some part provides answers to that question.

Land is a major source of wealth in any society and because of its permanence and usefulness represents the most valuable asset of that society. Based upon the system of land tenure and recognized rights in land it can be useful to many different interests simultaneously. Its permanence makes it valuable and attractive to lenders as collateral for loans, and governments derive substantial revenues from real estate taxes and other land related transactions.

In order to inspire confidence the legal framework must provide effective, unequivocal enabling legislation establishing ownership rights in land and other real estate, protection against infringement of these rights, a permanent public record of these rights, and convenient methods for transferring these rights without undue involvement of the state.

This has been recognized for millennia. Consider, for example, the following passage from the Bible:

I took the deed of purchase... and gave this deed to Baruch...in the presence of my cousin...and of the witnesses who had signed the deed.... Thus says Yahweh of Hosts, the God of Israel: Take these deeds, this deed of the purchase which is sealed, and this deed which is open, and put them in an earthen vessel; that they may continue many days. For thus says Yahweh of Hosts, the God of Israel: Houses and fields and vineyards shall yet again be bought in this land¹.

This passage demonstrates that from the earliest history it has been vital to support transactions in land that formalities be followed to show the seriousness of the transaction, that it is the true intention of the parties, that the information regarding the transaction be open and public, and that there be permanence to the recordkeeping.

In ancient Rome the importance of the issue is highlighted by the festival the "Feast of Terminalia celebrated at the end of February. This was in honor of Terminus, the Roman god of boundaries. Each landowner would go out to the boundary of his holdings with wine and other gifts to the god and meet his neighbor there. They would celebrate the feast together, make good use of the strong wine, and in the process reconfirm their boundaries.

¹ Jeremiah, Chapter 32:11 *et seq.*

In medieval Europe to confirm a person's rights in land there would be a meeting between and seller and a buyer out on the land and some object, such as a stick or clod of earth was then passed from the seller to the buyer. As part of the process they would select one of the youngest members of the village, who would be in attendance, and at the end of the procedure they would give that person a good "box on the ear" so that they would remember the event of transfer their whole life. The clod of earth or stick then would often be kept in a prominent place in the dwelling of the buyer as evidence of their rights.

Maintenance of real estate records has long been recognized as a legitimate function of local governments in the United States. Throughout the history of the Republic those interested in engaging in land transactions have been concerned with acquiring the land rights from the proper parties pursuant to the required procedures-ensuring their rights against disputes. This paper examines the methods for maintaining title² information in the land records in the United States, why they are maintained as they are, the burdens and benefits of differing systems, and where the future might lie in continuing to give the public the access and service that it needs and demands.

BRIEF HISTORY OF LAND IN THE UNITED STATES OF AMERICA

The earliest non native settlers of the North American continent, mostly of European origin, came to the Americas for a variety of reasons which are well known, including to escape religious persecution, to escape poverty perpetuating taxation by greedy monarchs, on account of inheritance laws favoring primogenitor, which left non-first born siblings landless and without a means of support. Others arrived seeking opportunities in a vast continent where the land was relatively unoccupied and ready for the settlement of hard working immigrants. The perception that land was free to settlers who were willing to occupy and work the land was inconsistent with the early legal principles regarding title to land on the continent of North America.

Various sovereign countries had claim to the continent and the laws that related to their claims were those of the respective European countries. These included:

- Spain in Florida and the Southwest,

² The term 'title' refers to both a legal right as well as the evidence of title.



Figure 1: Spanish land holdings in the US 1562 (Source: National Archives II Univ. of Maryland)

- France east of the Mississippi and north of the Ohio,
- The Netherlands in the area surrounding what is present day New York,
- England along the eastern seaboard³, but claiming land that was also claimed by France,
- Russia in what is now the extreme northwest including Alaska.

³ The exact extent of the jurisdiction of each sovereign was ill-defined and often disputed. For example, although a Dutch company was operating at and near Manhattan, the territory was also claimed by Virginia pursuant to its charter.



Figure 2: History of foreign land holdings & claims in the USA. (Source: National Atlas)⁴

Title was originally vested in the British Crown or other sovereigns as listed above, having jurisdiction over the territory and it was incumbent on a person intending to settle a tract of land to obtain rights in the territory from the sovereign. In the original thirteen colonies this was accomplished by obtaining a charter for the land from the King. Familiarly, William Penn received a charter from Charles II for what is now Pennsylvania. The London Company received a charter to establish a settlement that became Virginia, and the Plymouth Company received a charter for what is present day Maine, but abandoned the settlement after one year. Later the pilgrims received a patent from the London Company for a settlement in New England near Cape Cod. King James had refused to give them a royal charter.

In the colonies that had been formed in the domains claimed by the Kingdom of Great Britain it was quite natural to establish governing subdivisions based upon that of the mother country. The example of Virginia offers a fair illustration for the history of the creation of counties. In densely populated England areas were divided into tithings (ten families), hundreds (hundred families), and shires. No tithing's were established in the colony of Virginia. Hundreds were established, but the division was purely territorial and had no reference to the number of families occupying the large unpopulated areas. Early on the administration of Virginia was divided into cities, boroughs, and hundreds, with the

⁴ There are a few known errors on this map including the use of the term Great Britain in "Treaty with Great Britain 1846".

General Assembly of the colony convening in Jamestown. By 1634 the colony was divided into eight large shires (counties) for administrative purposes⁵.

At first, in laying off a new county, the chief consideration was to bring all its extremities as near as possible to one common center. On the other hand, the chief consideration at a later period seems to have been to restrict the area of the proposed county to the valley of one great river, which would furnish to all the county's citizens convenient means of shipping, without their having to turn to any other great stream situated in an entirely different county. From a trading point of view, each county was thus made practically independent of its neighbors⁶.



Figure 3: Northampton County Courthouse one of the oldest land records offices in the United States, Eastville, Va.

The counties on the western frontier of Virginia originally extended indefinitely westward as did the colony itself. From the very beginning the size and shape of each county was a product of population,

⁵ "The names bestowed on the new shires were James City, Charles City, Elizabeth City, Henrico, Warwick River, Warrosquoick, Charles River, and Accomac. Each was divided into parishes, precincts or boroughs for the constables, and precincts or walks for surveyors of the highways". (Bruce 1910) p. 294.

⁶ (Bruce 1910) p. 295.

means of travel at the time the county was created⁷, trade, geography, and topography. The services provided by the county included the courts, both civil and criminal, maintenance of the stocks and pillories, the county jail, maintenance of the poor and sick, survey of town sites, levy of certain taxes assessed by the justices of the county court, vital records, and the land records.

As Jefferson explains in *Notes on the State of Virginia*:

Conveyances of land must be registered in the court of the county wherein they lie, or in the general court, or they are void, as to creditors and subsequent purchasers⁸.

Once the repository of vital and land records was established at the county level in the original colonies, the tradition migrated westward with the population and the creation of new states out of territories⁹.

It is fitting to quote Jefferson once again regarding the necessity of easy access to the public records. Note one of the grievances he set out in the Declaration of Independence:

The history of the present King of Great Britain is a history of repeated injuries and usurpations...

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

The accessibility of the public records has therefore always been a critical issue for the citizens of the United States.

After the War of Independence with the Kingdom of Great Britain (1776) the United States federal government continued to be vested with ownership until a proper patent from the federal government had been obtained. This is the reason that any title examination to a tract of land properly begins with finding a land patent for the tract in question.

⁷ Usually no more than the distance that could be reasonably covered by horseback from the outer limit of the county to the county seat.

⁸ (Jefferson 1984) p. 260.

⁹ "The recording of deeds in the United States can be traced back to 1641 in Massachusetts; in the Plymouth Colony to 1636; in Connecticut to 1639; in New Jersey to 1676, 1683, and 1698. It has been lately surmised, and perhaps proved, that the Pilgrim Fathers brought the happy idea of recording their conveyances from Holland. The first recording act in Virginia was passed in 1639...; in Pennsylvania, in 1715, by an act still in force. In New York the practice of acknowledging and recording deeds existed already under the Dutch government, and was continued by the Duke's Laws in 1665. The Maryland registry law of 1692 was in force till 1785. In North Carolina an act of 1715 made the registry of the deed a prerequisite for passing title. All the colonies had recording laws before the Revolution, and in the new states the recorder's office was one of the first institutions organized by the newcomers; in California, before any legal government. (PATTON ON TITLES 1957) vol. I, footnote 41, p. 11.

As the states attempted to govern post independence, it was recognized that the Articles of Confederation failed to adequately provide for a governing structure to deal with issues that no state was capable of addressing independently. It was never the intention that the states would give up their sovereignty, but a federal government was established by the Constitution in 1787 empowered to regulate interstate commerce, international dealings through treaty and other mechanisms, the common defense against international aggression, and taxation to provide for the common defense and general welfare of the United States. These principles are reflected in the sections of the Constitution setting out the powers of Congress, the President, the Federal Courts, and Article IV, that regulates the states with regard to these and other matters.

In order to become effective, the Constitution needed to be ratified by nine of the thirteen states, and during this process considerable concern was leveled that the federal government, envisioned in the Constitution, would greatly impose on the sovereignty and power of the states in contravention of the intention of the states and the people. Thus, many states conditionally ratified the Constitution calling for an explicit Bill of Rights to prevent misconstruction and abuse of power under the Constitution. James Madison introduced a bill to the first Congress. Amendment X states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The laws of real property were among those not delegated to the Federal Government of the United States, and were thus reserved to the states. That remains generally true to this day, and partly accounts for the states maintaining and regulating their own systems for maintaining real property records.

At the conclusion of the war for independence, the British relinquished the expansive area south of Canada and west to the Mississippi to the victors through the Treaty of Paris of 1783. The original states released their claims to this area and title became vested in the federal government. Settlers had long been making claims to these areas and the resulting settlements were mostly unplanned and disorganized. Squatters were numerous, descriptions of the claims chaotic, often referring to rocks, trees, courses of streams and other tenuous markers to set the boundaries, and land disputes were common. Congress passed the Land Ordinance of 1785 and the Northwest Territory Ordinance of 1787 and formed the Northwest Territory, providing a means for these territories to become states with all the rights of the original states based upon population growth.

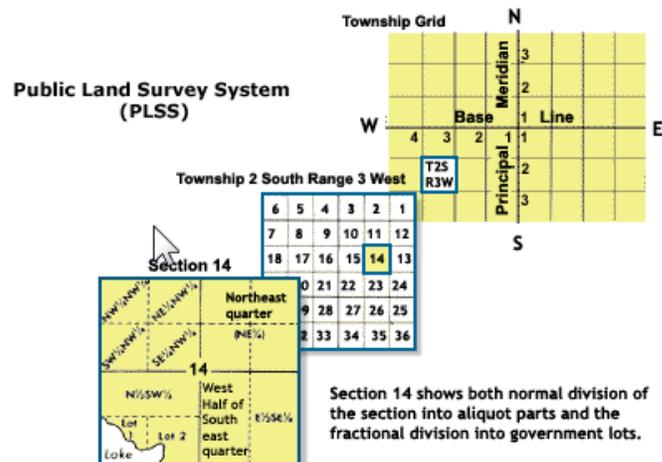
In 1812, Congress established the General Land Office (GLO) in the Department of Treasury to manage the lands in these states and established an orderly method for organizing and subdividing the land through the public land survey system (PLSS). Multiple laws were added to encourage and support the

settlement of these lands. In 1946, the GLO was merged with the Federal Grazing Service¹⁰ to create the modern day Bureau of Land Management found now within the Department of the Interior. The BLM's stated mission is

"to sustain the health, diversity and productivity of the public lands for the use and enjoyment of present and future generations."¹¹

The BLM is responsible for managing "approximately 253 million acres (1,023,855 km²) or one-eighth of the landmass of the country. It also manages 700 million acres (2,832,800 km²) of subsurface mineral estate underlying federal, state and private lands".¹²

The public land survey system, a brain child of Thomas Jefferson, divides the land into townships, each six miles by six miles, which are measured with respect to established meridians, and ranges which are measured in relation to established baselines, and then divides each township into thirty-six sections, each a mile square and numbered boustrophedonally¹³ beginning at the northeast corner of the



township and ending with Section 36¹⁴.

Figure 4: An example of the PLSS System (source: National Atlas)

¹⁰ Created to implement the Taylor Grazing Act which managed the leasing of public land for grazing purposes.

¹¹ BLM Website

¹² Ibid

¹³ "alternately from right to left and from left to right, like the course of the plough in successive furrows..." Oxford English Dictionary on-line version.

¹⁴ Title examiners and surveyors rarely "see" Sections that are exactly a mile square, for the surveyors who conducted the surveys were allowed certain tolerances in surveying wilderness territories with magnetic compasses, running lines over extremely long distances. Right angles at section corners are non-existent for the same and other reasons. In northern Minnesota where there was surface iron the magnetic compasses could not be relied upon, and lakes that should have been meandered (25 acres or larger) were often completely missed in the winter, because they had been frozen over. Despite the ability with modern survey equipment - and the desire of some county surveyors - to "reset" the square miles into true square miles the U.S. Supreme Court has ruled that what was done is done and that governments have no right to "regularize" the sections.

The public land survey system covers most of the land in the United States and:

"Over the past two centuries, almost 1.5 billion acres have been surveyed into townships and sections. The BLM is the Federal Government's official record keeper for over 200 years' worth of cadastral survey records and plats. In addition, BLM is still completing numerous new surveys each year, mostly in Alaska, as well as conducting resurveys to restore obliterated or lost original survey corner¹⁵.

Different Methods of Managing Land Records in the United States

The general understanding is that the word "cadastre" arises from the Latin word designating the territorial taxation of the Roman provinces¹⁶. A land record system used as a mechanism for collecting real estate taxes is referred to as a "fiscal cadastre", since it relates to the State treasury. Gradually, and mostly over the last century, the use of these cadastres or the creation of new ones were introduced to keep track of the technical attributes of territorial land inventories¹⁷, as well as to track the legal rights and responsibilities of both the private and public sectors engaging in real estate transactions.

A form of cadastre is the so called "legal cadastres" – or land or title registries - which have developed to support legal principles that provide incentives for persons to publicly record or register their real estate rights. These cadastres continue to evolve or arise anew to aid a wide range of land management and land administration systems. The combination of some or all of these land records maintained by governments has given rise to the concept of "multi-purpose cadastres". In 1982 the US National Academies of Science published a lengthy document on why a US multi-purpose cadastre¹⁸ is needed.

¹⁵ (National Atlas 2009). Note that consistent with the U.S. Supreme Court decision noted above the objective of restoring obliterated or lost monuments in the PLSS is to find where they were originally placed.

¹⁶ From the late Latin *capitastrum*, a register of the poll tax, and the Greek κατάστιχον [*katastikhon*], a list or register, from κατά στίχον [*kata stikhon*], literally, "down the line" in the sense of "line by line." Wikipedia and Encyclopedia Britannica Online July 2007.

¹⁷ Such as planning, legal, fiscal and geodetic.

¹⁸ See "Procedures and Standards for a Multipurpose Cadastre Panel on a Multipurpose Cadastre Committee on Geodesy Commission on Physical Sciences, Mathematics, and Resources National Research Council NATIONAL ACADEMY PRESS Washington, D.C.1983

This modern cadastre concept¹⁹, is largely playing out today in the United States. It is often posited that Title Registration systems are more successful because they are better at realizing the concept of a multipurpose cadastre. Title registry systems which are generally deployed at a national level probably realize significant efficiency and integration gains over the pre dominant land systems of the United States due to the institutional fragmentation of the US which maintains land information at the County/City level. Since 2001 the US is aggressively pursuing the concept of a National Spatial Data Infrastructure (NSDI), which has implications for homeland security and has led to an improving awareness of the need to invest in integrating land information nationwide. Specifically there is:

- Increased spatial referencing of land data,
- Increased abstraction as people-land relationships become less tangible and land is treated as a marketable commodity,
- Increased sophistication in supporting technologies, in particular positioning, mapping and information systems technologies,
- Integration of a wider variety of data – from fiscal to legal to environmental,
- Increased concern with environmental data and information to support the protection of valuable resources such as soil, rivers, agricultural land,
- Increased perception of the value of information as a basic resource and security need – moving from data processing systems to information systems and
- A wider range of users – from single purpose to dual purpose to multipurpose systems.
- Emergence of LIS networks where different institutions maintain their own LIS but have the capability to communicate and exchange data with other LIS in the network.

Systems worldwide that regard title rights in real estate are broadly of two types: 1) a system of recording the transactions - often known as deeds and 2) registration of the title itself. In the United States the predominant form is the deeds registration system but there is still use of a form of title registration as well. Figure 5 illustrates graphically this difference.

¹⁹ Barnes (1989)

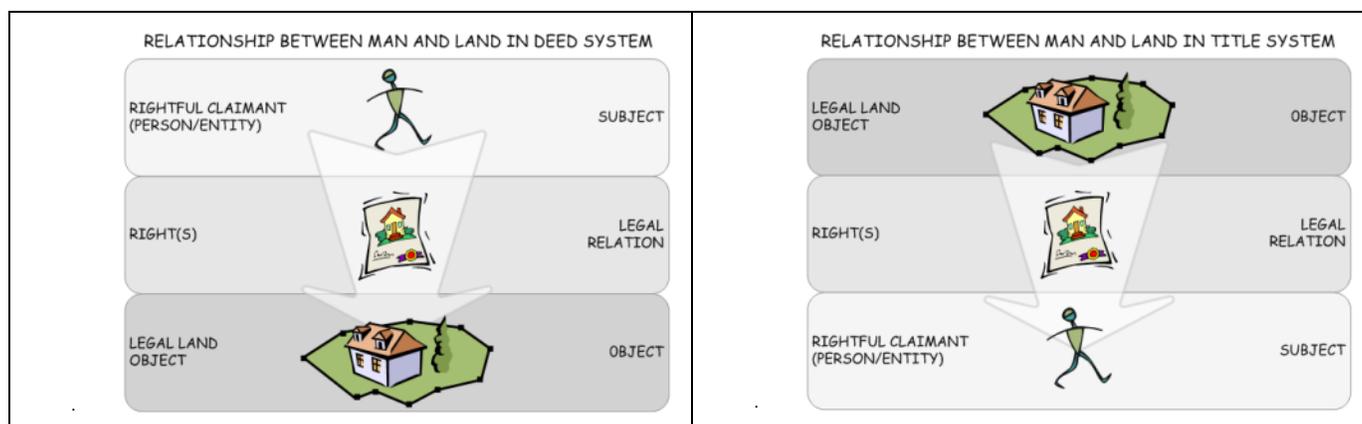


Figure 5: Difference between a Deeds and Title System (after Hansen 1995)

In tracing the evolution of the modern cadastre concept²⁰, the following trends are identified:

- Increased spatial referencing of land data and information – a geodetic reference framework is commonly recognized as the only means of accurately integrating different types or layers of information in a digital environment.
- Increased abstraction as people-land relationships become less tangible and land is treated as a marketable commodity.
- Increased sophistication in supporting technologies, in particular positioning, mapping and information systems technologies.
- Integration of a wider variety of data – from fiscal to legal to environmental.
- Increased concern with environmental data and information to support the protection of valuable resources such as soil, rivers, agricultural land and in Egypt – antiquities.
- Increased perception of the value of information as a basic resource – moving from data processing systems to information systems.
- Wider range of users – from single purpose to dual purpose to multipurpose systems.
- Emergence of Land Information Systems (LIS) networks where different institutions²¹ maintain their own LIS but have the capability to communicate and exchange data with other LIS in the network.

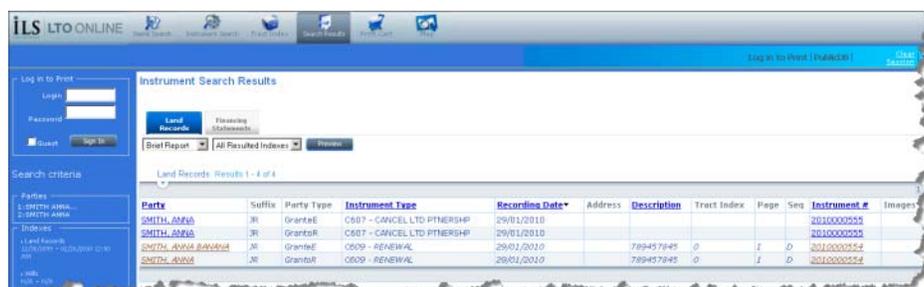
A system of recording the transactions only provides that the documents relating to real estate are recorded in chronological order and found for a particular tract by the use of indices either set up by name or by parcel. In recording systems such as are found in the United States, no assessment is made by the government at the time of recording as to the validity or sufficiency of the documents recorded. Anyone interested in determining the status of title at any given time is relegated to examining all of

²⁰ Barnes (1989)

²¹ Such as the Tax Assessors, Public Works, Planning and Zoning, GIS, and others.

the documents over the history of transactions for the parcel in order to form his/her own opinion as to the state of the title²².

One of the responsibilities of an office maintaining deeds and other documents affecting land title is to index the records, in order to find those transactions relevant to the title to a specific land transaction. The index or indices allow one to search the registry and find all the documents necessary to assess the status of title. Without an index the real estate records are virtually irrelevant. A corollary is that the better the indexing, the more useful the records.



Land records offices index the registered documents either by the name of the parties to a transaction or by the parcel (property) involved²³. Searching for the relevant documents when

they are indexed according to the parcel is much easier than searching by name, and where name indices are set up according to year, finding the relevant documents is much more difficult than searching according to the names of parties set up in a general alphabetical index.

²² Often statutes of limitations limit the length of the necessary search for certain types of rights.

²³ In other countries that have used and use deeds systems deed numbers referenced to a folio and further to a name index are used as the main search mechanism. These systems are mostly searched by the deed number itself.

Instrument Search Results

Land Records | Results 16 - 19 of 19

Party	Suffix	Party Type	Instrument Type	Recording Date	Address	Description	Tract Index	Page	Seq	Instrument #	Images
SMITH, AARON C		Grantor	M400 - MORTGAGE	4/1/1997	4916 N GLEN ELM DR.	GLEN ELM EXT'D NE 1/4 SEC 21-9-8E LOT 69 (EXC N 1' THEREOF) (95-10937)	115	335	A	1997009327	4
SMITH, AARON C		Grantor	M400 - MORTGAGE	5/22/1995	4916 N GLEN ELM DR.	GLEN ELM EXT'D NE 1/4 SEC 21-9-8E LOT 69 (EXC N 1' THEREOF) (95-10937)	115	335	A	1995010930	6
SMITH, AARON C		Grantee	D300 - WARRANTY DEED	5/22/1995	4916 N GLEN ELM DR.	GLEN ELM EXT'D NE 1/4 SEC 21-9-8E LOT 69 (EXC N 1' THEREOF) (95-10937)	115	335	A	1995010937	2
SMITH, LOIS T		Grantee	R220 - RELEASE MORTGAGE	6/8/1987	601 E CORRINGTON AVE	FORREST PARK ADD NE 1/4 SEC 33-9-8E W 100' LOT 11 (96-21328)	71	505	A	1987012386	1

Parcel Identification Number (0427200007)

Parent	Child	Type	Effective Year	Change Date	Complete
0427200005	0427200007	N	1999	1/24/2000 12:00:00 AM	
0427200007	0427200010	C	2009	6/11/2008 12:00:00 AM	Y

In the eastern part of the United States (the original 13 colonies) the predominant form of index is one based upon the names of the parties to an instrument. As a transaction is recorded the name of the grantor, mortgagor or other granting party is indexed according to the first letter of the surname on the appropriate page of the index with a cross reference to the document number, the other party or parties to the transaction, the property description, dates and other information that the law requires. The name of the grantee is customarily entered in the same index or a separate index cross-referencing the name of the grantor and other relevant information.

A party purchasing real estate locates the name of the seller in the name index as grantee, then locates seller's seller as grantee, and so forth, back a specific period of time, as established by law, or until a so-called root of title (land patent, Crown land etc.) is arrived at. The examiner also notes any documents for which the person was a grantor during the time period between the person's acquisition of the property and the person's conveyance out. In this manner the searcher locates any mortgages, servitudes and other rights less than ownership which may affect the property²⁴. The

²⁴ in the US the manner in which the search is conducted depends largely on how the name index is set up. Where there are grantor and grantee indices, the examiner starts with the present owner, finds the person's name in the grantee index, then finds the name of the grantor in the document in the grantee index and runs the chain back. Then the examiner searches each person's name in the grantor index for period where the person was owner to locate mortgages, leases etc. Where there is only one name index it is important that the examiner find the present person listed as a grantee, then find

examiner should also find any cases where a person in the chain has conveyed the property multiple times.

In addition to the tedious mechanism for tracing the title through names, there is difficulty in establishing identity when there are variations in the name. This can occur where a middle name is used in one document and not in another, where initials (middle, first, or both) are used in one document and not in the corresponding instrument, where a nickname is used, where there is a variation in spelling, or indeed where a woman comes into title under her maiden name, marries, and then conveys out with her married name.

It must also be noted that there are certain records that affect title that may be found in other name indexes or other registries. Examples might include wills, marriage, death and other vital statistics registries, judgment dockets, court registries, powers of attorney, and perhaps others²⁵. These registries must also be searched, at least for the period after a person comes into title and before the person conveys out²⁶.

Once a so-called chain of title is constructed using this technique the examiner is in a position to render an opinion as to the record owner and any outstanding encumbrances. In constructing this chain of title the examiner diagrams the chain²⁷. The mechanics of doing so are far less convenient and efficient for a title searcher than searching for documents by parcel.

Parcel Based Deeds Recording

Many jurisdictions in the United States require, or at least allow, indices arranged by parcel²⁸ - that is the geographic location and depiction of the property. Properties are identified in a map (often called

his grantor as a grantee, and so on. This is always tedious and where there are not proper cross-indices of the parties to a transaction, the examiner must look at each document to find the relevant information.

²⁵ The types of other registries or public records which must be searched depend upon the specific legislation of the jurisdiction and might include such items as fixture filings, tax liens, bankruptcies, corporate name changes, mergers, dissolutions and the like,

²⁶ In US jurisdictions using name indices there is usually a body of law regarding whether or not a searcher must search for conveyances by a person before he or she comes into title, or must search for records by a person after they have conveyed out. A discussion of this topic is outside the scope of this paper.

²⁷ The detail contained in the diagram differs from title examiner to title examiner. Some make elaborate diagrams containing copious notes. The author divided a sheet of paper in half vertically and ran the chain of ownership on the left side of the paper, and noted the encumbrances on the right side of the paper using minimal notes. For all encumbrances and note defects in title an open carrot was placed next to the document. If the matter was resolved later in the examination the carrot was closed with a vertical line. At the end of the examination all documents still marked with an open carrot were noted in the title opinion. Only minimal notes were taken, since the actual documents needed to be examined for relevant information during the time period defined by law.

²⁸ Here it should be noted that in the United States most of the States west of the original thirteen colonies have parcel based indices (either required or permissible) as well as name indices. All private indices (i.e. those set up by title insurance companies) are parcel based; so-called title plants, though they may create and maintain name indices, too.

a tax map or an index map) for the County or City and when a transaction is recorded at minimum the document number is linked to the parcel index for the particular property. Such indices often list additional information such as the type of document, the names of the parties, the date of the transaction, and the date of recording. Where an index is kept according to the parcel the process of title examination is greatly simplified. In this case indexing by geography provides significant improvements to the speed, efficacy, and access to land records. A search for a particular parcel in the parcel index, in general, should only turn up the title information for that one parcel²⁹.

A title search using a parcel index is more efficient than using a name index, because all the documents affecting the parcel, including encumbrances, can be identified without searching names of parties according to procedures as outlined above. Note that a parcel index avoids the problem presented by name indices regarding variations in names. Thus, many jurisdictions either allow or require that parcel or tract indices be maintained in the recorder's office³⁰. A parcel index also allows a searcher to find documents that are outside the chain of title, i.e. conveyances before one came into title or after one has conveyed out, This allows an examiner to identify potentially conflicting documents that cannot be easily found using a name index. Anyone interested in determining the status of title is relegated to examining all of the documents over the history of transactions for the parcel in order to form his/her own opinion as to the state of the title³¹.

Moreover, modern technology allows an electronic search for all the documents based upon the number assigned to a parcel in the cadastral index. Often such indices are arranged in such a fashion that the chain of title can be observed in the index at a glance. If appropriate information associated with the document, such as recording date and names of grantors and grantees, are displayed, the searcher may be able to anticipate any gaps in the chain or other potential problems in advance of reviewing each document. A parcel based index will not assist in making more accurate searches or title opinions, but simplifies the search for the relevant documents. The title examiner must still examine the contents of each relevant document to ascertain the legal status of the title.

One of the major benefits of a parcel based index is that when certain actions are brought for clearing titles a search and examination of titles can be conducted to identify potential claimants and give them

²⁹ There will be descriptions in documents that are vague enough that it will not be possible to index them to a specific parcel. In such situations it is the practice to index the document to the parcels that may be affected and it will be up to the title examiner to either determine what specific parcel was intended in the document, or to raise an appropriate question in the title opinion.

³⁰ In Minnesota, for example, the statutes require that name indices be maintained, but allow for the creation of parcel indices. All counties have created parcels indices, and no sane title examiner uses the name indices for creating a chain of title. This has led some attorneys to opine that only documents found using the name indices give constructive notice to subsequent purchasers. See Holl, Jr., Justin T., "Title Examination after *Weber v. Eisentrager*," Minnesota Real Estate Law Journal (Butterworth, Sept./Oct. 1993).

³¹ Often statutes of limitations limit the length of the necessary search for certain types of rights.

notice of the proceeding. This is a basic requirement of due process. The present name index does not allow this, because where only a name index is available to locate documents, one needs a name to start with, but the due process goal is to find unknown persons who are necessary parties³² to the title clearing action. Only a parcel index can satisfy this purpose.

However, after years of transactions for a particular parcel of real estate, the determination of ownership and valid encumbrances, such as mortgages and leases, becomes an extremely complicated task which requires the services of well trained specialist lawyers and title experts, entails time-consuming record searching with much duplication of effort, and results in real expense to those interested in current title information.

³² A party whose rights or interest in the property will be affected by the ultimate judgment and, therefore, must be joined in the case and properly service with process to be bound by the ultimate determination of the court.

Title Registration Systems

A title registration system, supported by appropriate legislation, provides a legal framework, which calls for a certificate of title created, maintained by the government and guaranteeing³³ the ownership information contained in a certificate of title. The certificate of title establishes with certainty the ownership of a parcel of land, free from all claims and encumbrances, except those noted as memorials on the certificate of title. Again title registration creates title to land from the event of registration, not from the execution of the document to be registered. The system provides simpler mechanisms for transfer and creation of interests, title verification, and subsequent title searches by people interested in finding out who owns what interests in the land.

Examination of the certificate of title alone is all that is necessary to determine the status of ownership of the property, and any leases, mortgages, restrictions, easements and other encumbrances affecting the real estate. On transfer of ownership a new certificate of title is created and no terminated encumbrances are carried forward to the new certificate of title, but all those which continue in existence are. The old certificate of title is cancelled and archived. Thus, the status of ownership of a parcel can be determined from the certificate of title at any time and at a glance.

Property Certificate
 Nº 200579588001

Date/Date printed: 10/11/2009 12:30
 Registration Office: Valencia
 Department: Valencia
 Property Nº: 000000004

Property section

Type:	Land Parcel
Location n.º:	02001001001000000
Lot Area:	0 (0,0) Hect
Use Type:	Residential (Urban Use, Enclosed, not covered with orange roof)
Administrative situation:	Urban
Status:	Urban
Registered Property Nº:	000000004
Cancelled:	Parcel is included on Urban Use Register Certificate

Ownership

Owner	Contact address	Source of title
State of Valencia	Palacio de Justicia nº 1, Edificio 100, Valencia	Registered on 10/11/2009 under Nº 000000004
Date of birth: 00/00/0000	In accordance with article 100 of the Urban Use Register Act	Documented by Mortgage Nº 000000004, dated 10/11/2009
City: Valencia	Phone: 900 000 000	Registered on 10/11/2009 under Nº 000000004
Citizenship: Valenciana	E-mail: info@palaciojusticia.es	Document by Urban Registry Act & Transfer to Civil Registry Act Nº 000000004, dated on 10/11/2009
Parents' names:	Address: 000000000, Valencia	
Date of birth: 00/00/0000	In accordance with article 100 of the Urban Use Register Act	
Sex: M	Phone: 900 000 000	
Citizenship: Valenciana	E-mail: info@palaciojusticia.es	

Transactions section

Property is subject to the encumbrances shown by the following memorials and to the following rights and encumbrances:

Type	Memorial	Description
Mortgage	De 10/11/2009 12:30 Nº 000000004	Documented by Mortgage Agreement Nº 000000004, dated on 10/11/2009, by Valencia City Commercial Bank
	State: registered	Mortgage: Valencia City Commercial Bank
Certificate of Lien	De 10/11/2009 12:30 Nº 000000004	Documented by Mortgage Nº 000000004, dated on 10/11/2009
	State: registered	Amount: Valencia City Commercial Bank
Transfer by Sale	De 10/11/2009 12:30 Nº 000000004	Documented by Urban Registry Act & Transfer to Civil Registry Act Nº 000000004, dated on 10/11/2009
	State: registered	Transfer: Valencia City Commercial Bank
Release	De 10/11/2009 12:30 Nº 000000004	Documented by Valencia City Commercial Bank, dated on 10/11/2009
	State: registered	Release: Valencia City Commercial Bank
Title Registration	De 10/11/2009 12:30 Nº 000000004	Documented by Urban Registry Act & Transfer to Civil Registry Act Nº 000000004, dated on 10/11/2009
	State: registered	Transfer: Valencia City Commercial Bank

Registrar of Titles: _____ / José Romera

Property Certificate Nº 200579588001
 Printed on: 10/11/2009 12:30 Page 5 from 6

Figure 6: An example of a Certificate of Title

The key element of a title registration system, and the most essential, is to provide for a current certificate of title, which includes all rights in real estate, and which is immediately available to those interested in title information ancillary to sale, lease and mortgage transactions. In some jurisdictions this certificate of title is not simply evidence of the title, it is the title itself. The certificate of title is generally organized³⁴ so that there is a declaration of the current owner, followed by a list of restrictions that encumber all real estate, followed by a list of the parcel specific encumbrances set out as memorials in the order of the date of registration.

There are major advantages to maintaining the information in such a form:

³³ This is one form of potential guarantee others include guarantee of boundaries themselves. The existence of a title guarantee in the form of an indemnity fund backed by the state largely removes the need for title insurance. Title insurance is commonly found in deed recording environments but is also found in high value title registration environments where “gap” insurance products are often prevalent.

³⁴ The so called Mirror Principle is the principle that the register – the certificate of title represents all rights and restrictions for that property.

- The Certificate of Title itself discloses all the information a person needs to ascertain the extent of risk in engaging in transactions,
- The certificate of title protects against rights not disclosed on its face,
- Many different types of encumbrances can be part of the same transaction and this is readily apparent if they are listed chronologically together on the same Certificate of Title,
- The chronological priority of the rights is readily apparent from the Certificate of Title,
- The development stages of a commercial project are readily apparent visually from such a Certificate of Title eliminating the need to search separate registers and compare dates,
- Costly duplication of examination by expensive professionals is eliminated, because there is no chain of title to search,
- Certificates of Title are elegant and simple to understand lending a high degree of transparency to the system.

Specialists that have used both a recording system and title registration system agree that title registration systems are easier to use after first registration. For complicated transactions recording systems may be more expedient, but one runs the risk that an attorney examining title at a later date will find an objectionable defect somewhere in the title history. There is no legally significant title history for registration systems (the Curtain Principle).

Who was Torrens?

The form of title registration system that is found in former English Colonies is the type originally introduced by Sir Robert Richard Torrens, appointed colonial treasurer and registrar-general for South Australia in 1852 and now often referred to as Torrens. He advocated for conveyancing reform and first published an outline of a Torrens bill in October of 1856 and as member of the House of Assembly introduced a bill in 1857, which finally passed both Houses and was adopted as law on January 28, 1858.

The system gained its popularity in Australia as a direct response to antagonism towards lawyers, extravagant deeds conveyancing costs and complexity of the deeds process. *Its implementation included a substantial deregulation of the processes of conveyancing, removing the monopoly of lawyers and creating a less trained, but perfectly able, group of professionals who charged less for conveyancing.* The process of using land registration to reform conveyancing is little understood, but very obvious. A well designed registration system should be simple enough for the public to understand and use without the need for lawyers.

The success of the Torrens system lay in its ability to generate public confidence. The two elements in this process were its **simplicity** – everyone could understand it, and its **risk distribution** – everyone was protected: a person either got the land or, if there was fraud or defect caused by the registration process, compensation.

It is often reported that he devised his system of registration, based upon his familiarity with ship registration, having been the collector of customs for South Australia. However, there is evidence that “that the development of registration of title to land was not Torrens's achievement alone but the culmination of an evolutionary process”³⁵. Torrens had advocated for the law “for in South Australia titles were in an unsatisfactory state and, as he put it, land was no longer 'the luxury of the few', therefore 'thorough land reform ... [was] essentially 'the people's question'”³⁶. The main features of the system were that title to land and real estate passed upon registration, rather than on the execution of a deed of conveyance, and that a registered title is indefeasible, absent fraud by a grantee and is guaranteed by the state. The system has been adopted in many countries of the British Commonwealth including the United States. The Torrens system is not the only type of registration system, and in jurisdictions where it has been adopted, it has been greatly amended over the years. Thus, it is perhaps better to refer to similar systems as simply “title registration systems”, without, however, forgetting the influence and early advocacy by Sir Robert Torrens.

What is "Torrens Registration"

There are three basic Torrens principles that ensure simplicity of the system.³⁷ These are:

- Mirror – the interests in the land are mirrored by what appears on the title register only
- Curtain – interests behind the title do not affect the owner
- Guarantee – the registration system provides a guarantee, in some systems sourced out of state revenue, and in others out of a fund built up from reserves from fees charged for registration.

The core legal aspect of a title registration system is that the purchaser of property under a title registration system can rely fully on the register, without the need for looking at the underlying documents in the so-called chain of title - the so called curtain principle. However, all existing title registration systems have overriding interests, which still call for additional searches in other registers and certainly also for a field inspection of the property. Examples of possible overriding interests are, liens, claims or rights arising under the laws of the United States, which the state cannot require be registered, public rights of way, real estate taxes, utility easements, certain types of actual possession, and some leases. The extent and variety of overriding interests are a matter of statutory law and are usually set out with specificity in the title registration legislation. It is important to note that overriding interests in effect compromise the title registration system and should be kept to a minimum in the title registration legislation.

³⁵ (Whalen 2006)

³⁶ *Id.*

³⁷ Theo Ruoff, *An Englishman Looks at the Torrens System*

Not all registration systems have a certificate of title, but Torrens type registration systems do. This is a page or folium in the registry that unambiguously identifies the property by legal description, states the name of the owner(s), and lists all currently valid encumbrances affecting the property.

The certificate of title discloses all the information a person needs to ascertain the extent of risk in engaging in transactions. This makes examination of title quite simple. One needs only find the certificate of title for a parcel by referencing the property identifying number. The status of title is immediately ascertainable without constructing a chain of title.

The certificate of title protects against rights not disclosed on its face. This is the so-called curtain guarantee, which must be provided for in the title registration legislation. The law would explicitly state that persons take title free and clear of all unregistered rights which do not appear on the certificate of title.

The chronological priority of the rights is readily apparent from the Certificate of Title, and costly duplication of examination by expensive professionals is eliminated, because there is no chain of title to search. This is a societal savings because an examination of title for a parcel is only completed once, i.e. for the initial adjudication, and thereafter the title remains “adjudicated” title by virtue of the in-depth examination of each transaction by the government specialists. Note that there is a trade off here in that it is easier for parties to the transaction to ascertain the status of title, but it is more expensive per transaction for the government.

In a Torrens registry the onus is on the government to examine the sufficiency of documents and maintain a registry that accurately reflects the current status of title. This requires a significant effort by skilled employees of the registrar of title office, and indeed entails much more work than the cursory review of a document performed by a county recorder for a registration of documents system. This would include the authenticity of any conveyance of ownership and the review of all encumbrances. There are also inherent delays for the time consuming review of the documents for legal sufficiency to create a new certificate of title. Since examination is performed by the government the system is usually not sensitive to market needs. In the private sector necessity dictates a title search and examination can be completed in a day or two. The time and procedural burden that arises where there is a registration system is one of the major criticisms of the system. Academics have concluded that:

On the whole, it is doubtful that Torrens has a bright future in America. In several respects it is theoretically superior to the recording system, but the latter is strongly supported by a network of title insurers and attorneys whose livelihood would be jeopardized by any radical change. The criticisms of Torrens are valid enough; slow and expensive original registration, indemnity funds of

doubtful adequacy, and gaps in the conclusiveness of the certificate. In areas having few registered parcels consumers, lenders and real estate brokers find the system unfamiliar, confusing, irritating, and error-prone³⁸.

Why did Torrens enter the US

The idea of moving from recording systems to registration systems in the United States took hold in the last decade of the nineteenth century. The first jurisdiction to adopt Torrens type registration was Illinois in 1895. It has been stated that:

"It may be noted that there have been peculiar reasons for the interest of Illinois and Chicago. The great fire of 1872 (sic) with its destruction of records, had reduced conditions practically to the primitive basis of a newly settling country. The only real estate records that had escaped the fire were in the possession of the Chicago Title Insurance Company. Certain insurances involving great values and large possible constructions of ownership antagonized public opinion. This led to the demand for the Torrens Law which followed³⁹."

The enactment of a registration law in Illinois was followed closely by the enactment in California, Massachusetts, Colorado, Minnesota, Washington, Ohio, and New York⁴⁰.

The adoption in each of these states was virulently opposed by conveyancing attorneys and title insurance companies. Legal attacks on Constitutional grounds were common, and successful in some instances. Gradually, however, the registration systems were accepted, and have been successful in some jurisdictions, such as Massachusetts and Minnesota. In other jurisdictions there has been less success. A leading primer on property rights points out that "more than twenty states had Torrens statutes at one time, but most have been repealed"⁴¹.

Where can Torrens now be found in the USA?

Eight states currently utilize Torrens land registration systems⁴². The implementations range from statewide to a handful of counties within a state⁴³. States with active Torrens registration include Minnesota, Massachusetts, Colorado, Georgia, Hawaii, North Carolina, Ohio, and Washington. The U.S. Territories of Puerto Rico and Guam also utilize Torrens systems to some degree.

³⁸ (Stoebuck and Whitman 2000) p. 929

³⁹ (Cameron 1915) p. 17.

⁴⁰ *Id.* at 17-18.

⁴¹ (Stoebuck and Whitman 2000) p. 924.

⁴² Ernst Publishing

⁴³ For example Ohio has 88 counties but only 11 have active Torrens.

Additionally, New York and Illinois previously utilized Torrens systems. Suffolk County was the last New York county to have active Torrens certificates. All certificates were to be delivered to the County Clerk for recording on or before January 1, 2000. From January 1997 to December 1999 adverse instruments were allowed. Voluntary instruments were disallowed on January 1, 1997.



Figure 7: Map showing States using Torrens⁴⁴

In Illinois where Torrens was first implemented in response to the Great Chicago Fire of 1871, the use of the Torrens system began to decline during the 1930s. By then, 60 years of public records were available to private insurance companies, who competed vigorously with the Torrens system. In view of the declining use of the Torrens system, in January 1992 the Illinois legislature began the process of phasing it out.

⁴⁴ Source: Ernst Publishing, 2010

In the US counties with the most pronounced use or former use of Torrens, it appears that either there was a large triggering event or the land records had become convoluted through centuries of use concomitant with many transactions. In the former case the triggering event allowed a reasonably significant number of properties to be entered into the register at the same time. This was the case in Cook County where the Great Chicago Fire destroyed all of the municipal records and copies of the land records were provided en masse from Chicago Title Insurance.

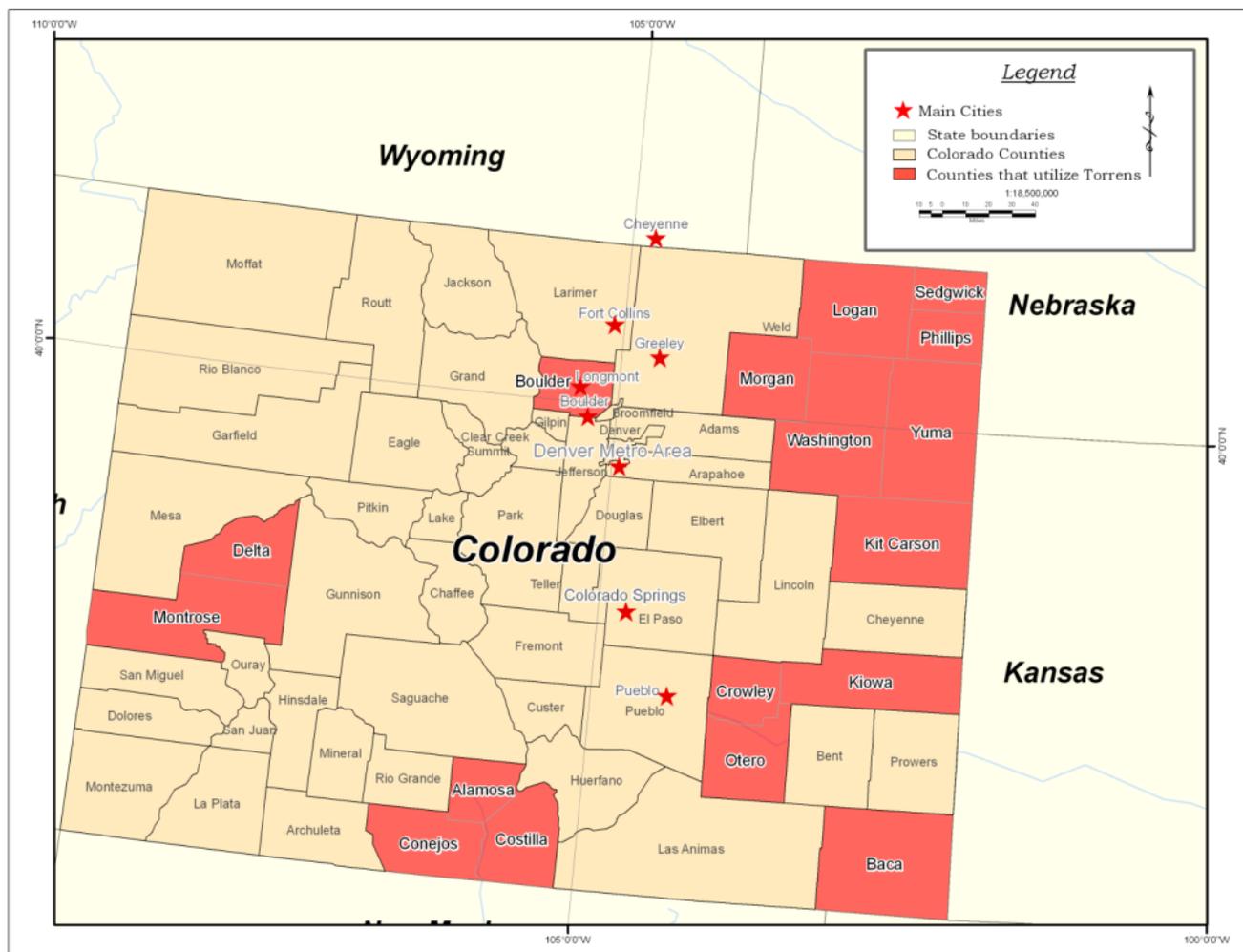


Figure 8: Counties in the State of Colorado using Torrens

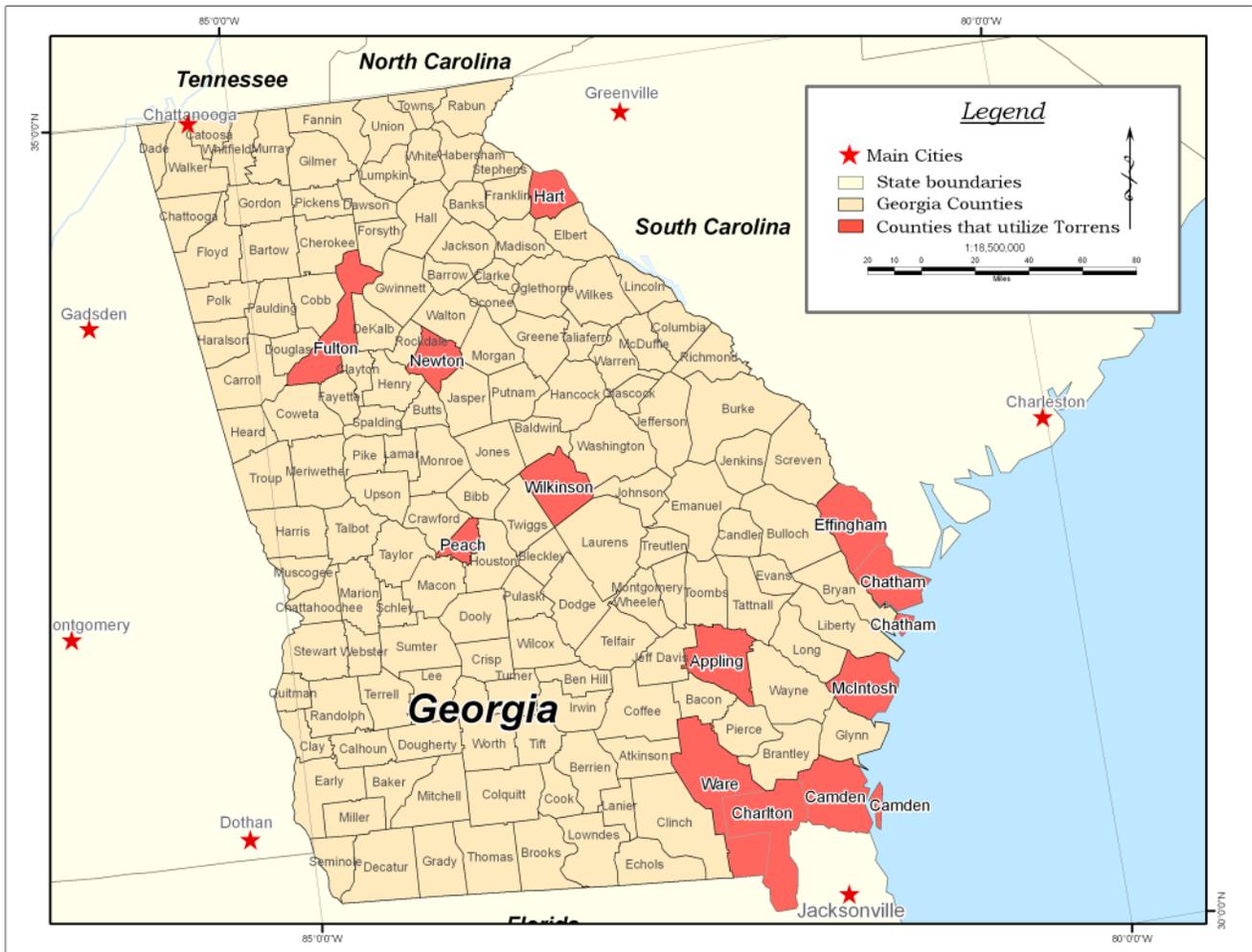


Figure 9: State of Georgia Torrens counties.

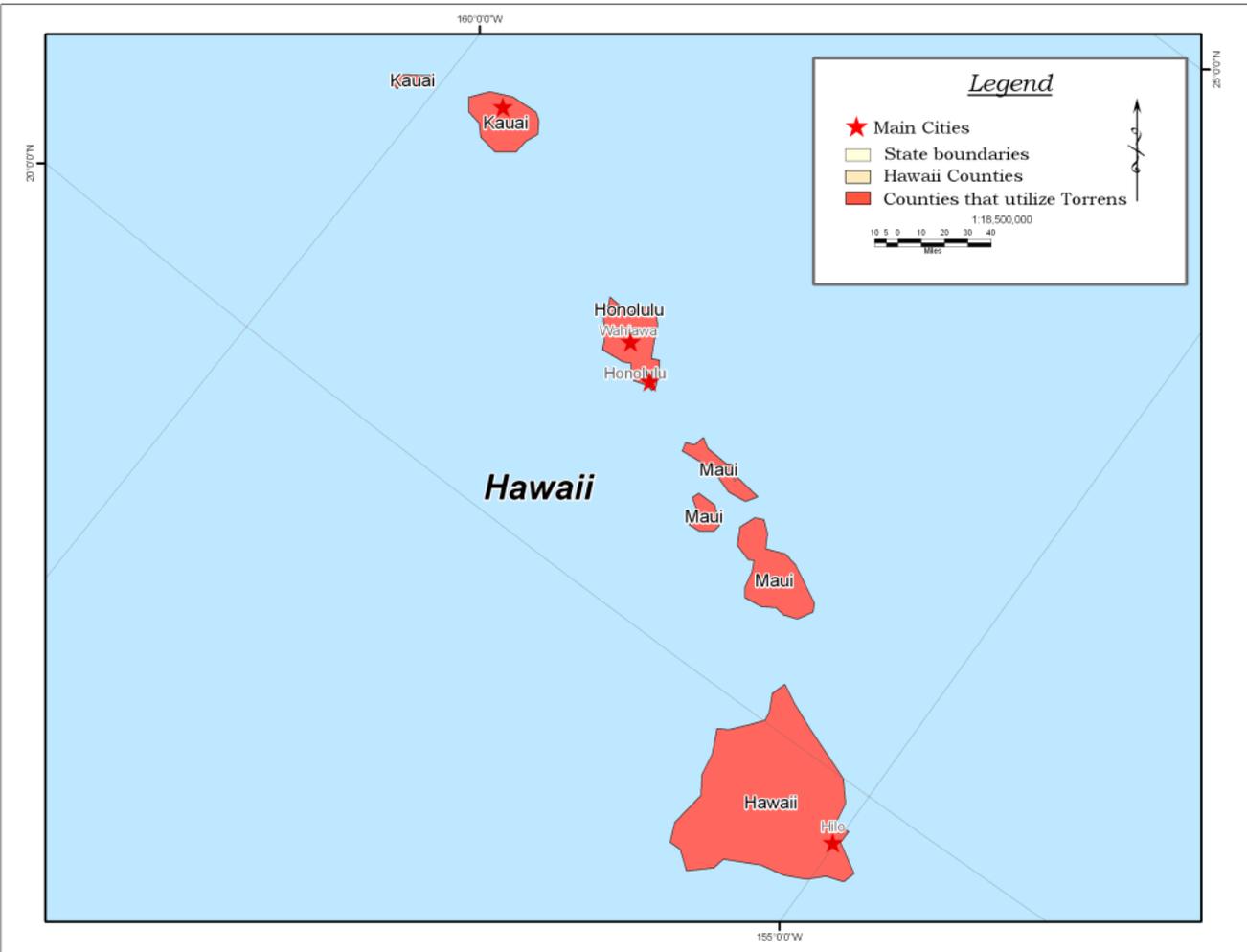


Figure 10: State of Hawaii Torrens

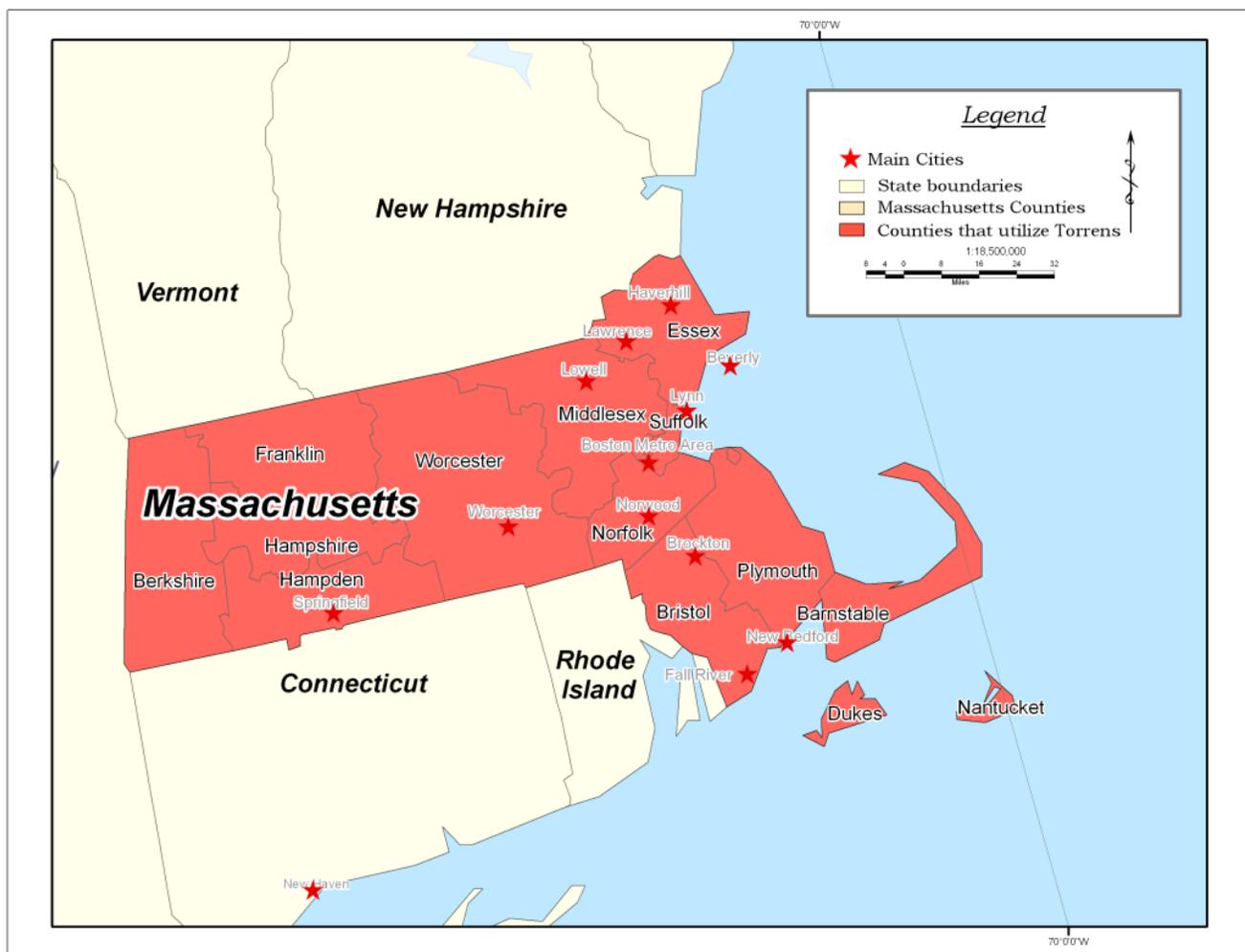


Figure 11: State of Massachusetts Torrens counties

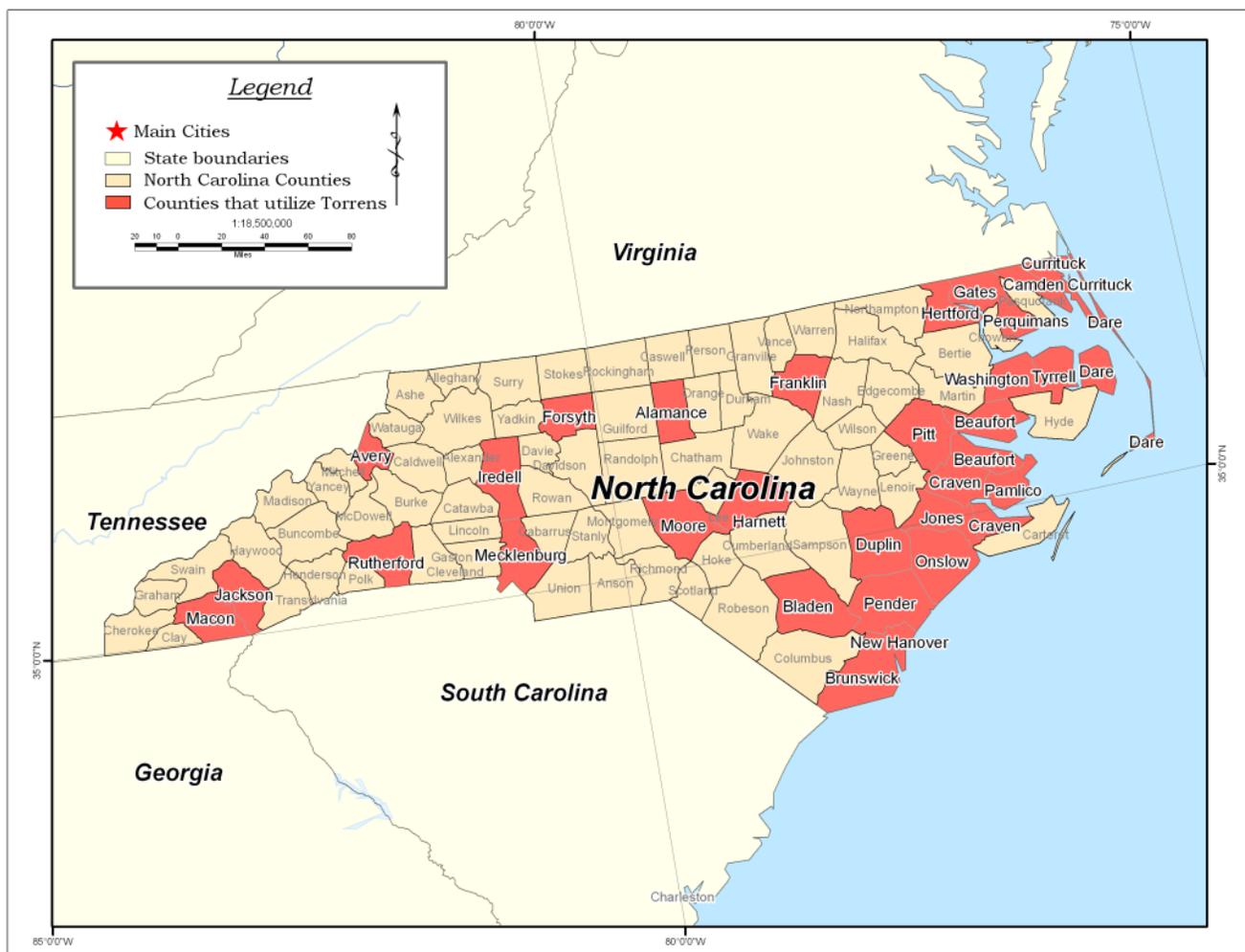


Figure 12: North Carolina Torrens counties

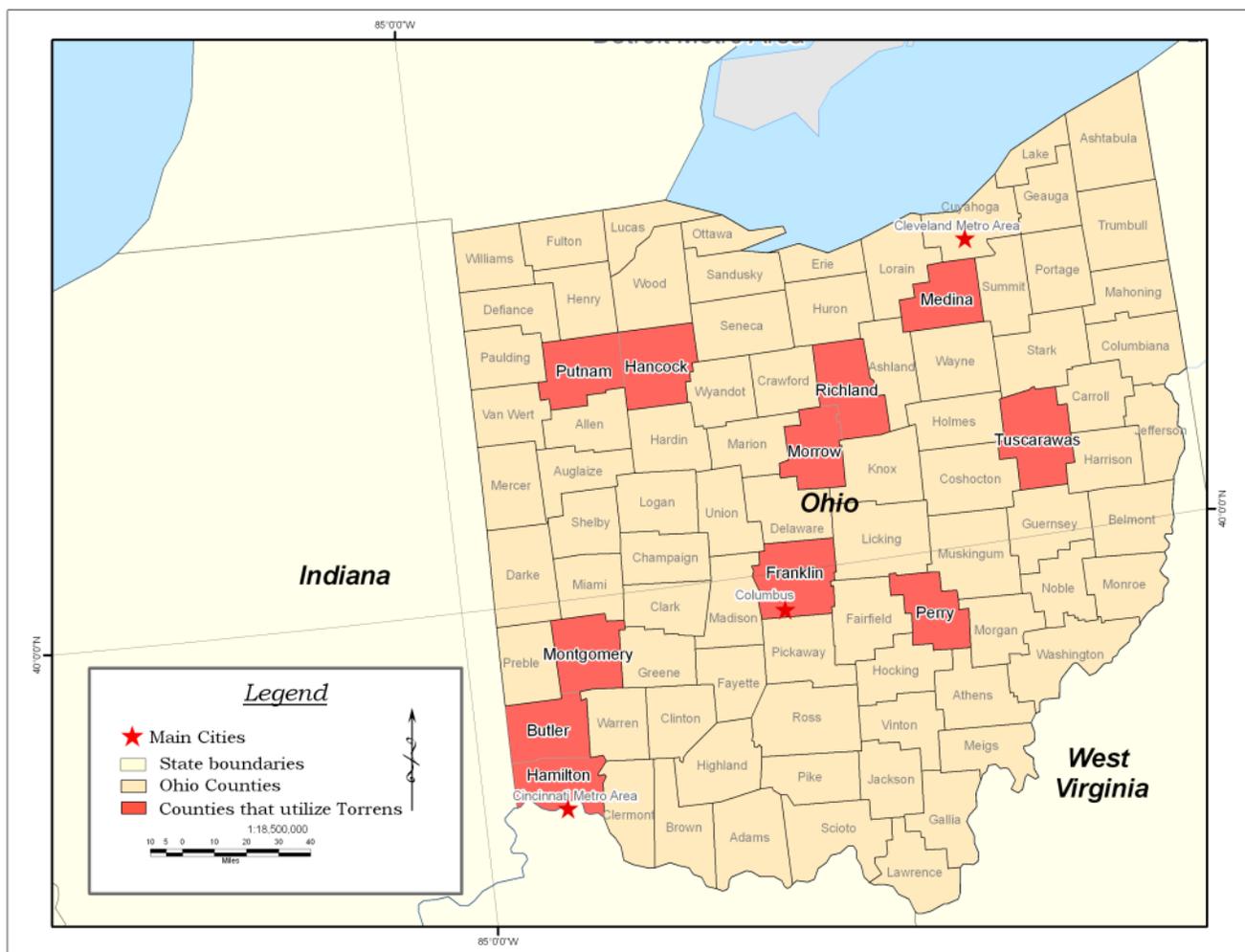


Figure 13: State of Ohio Torrens Counties

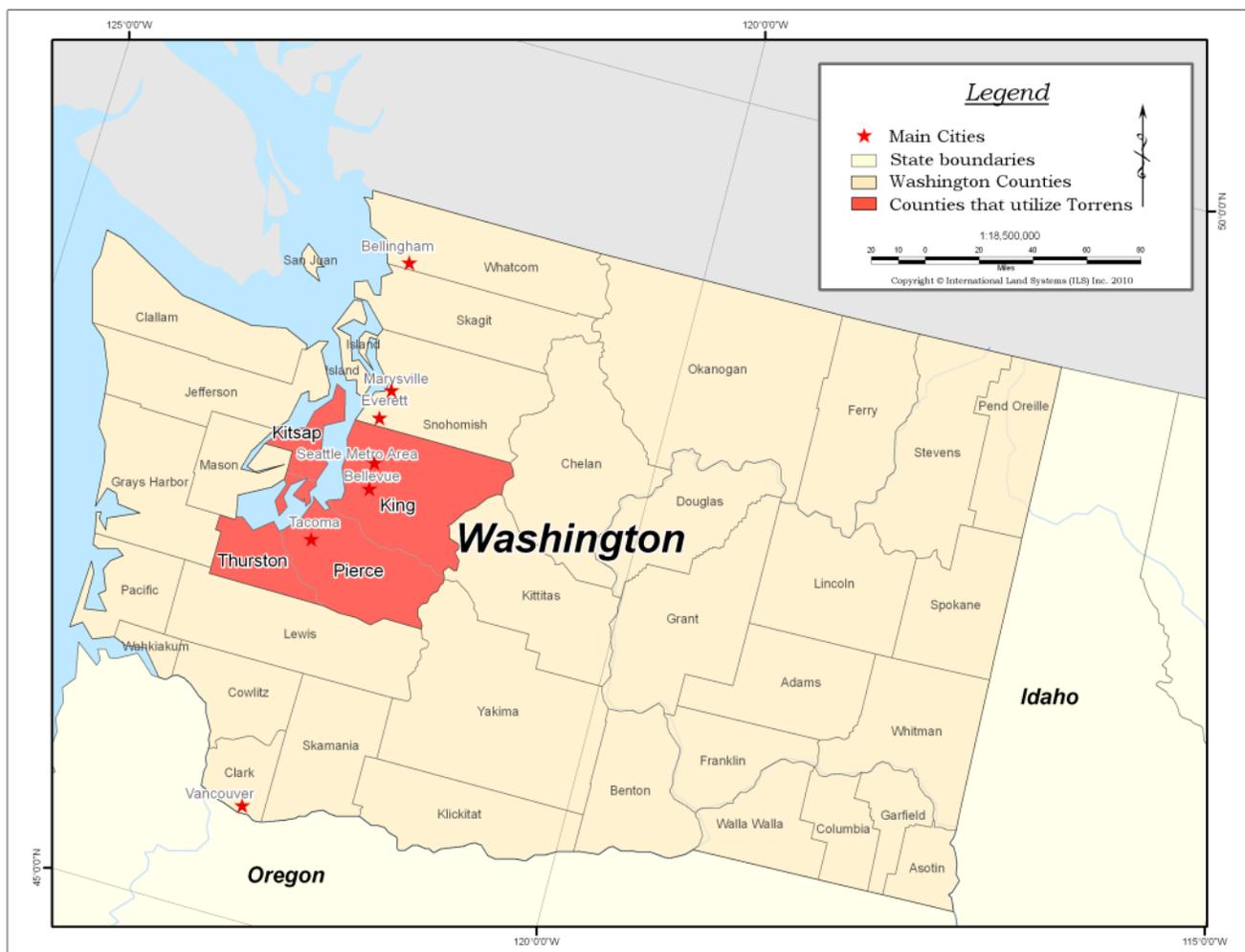


Figure 14: State of Washington Torrens counties

MINNESOTA: TORRENS IN DAILY USE (MONACELLI)

In 1901, special legislation in Minnesota authorized the Torrens Title System in three of the state's most populous counties as an alternative to the more traditional Abstract Document Recording System. Over the past century, Torrens has expanded considerably in Minnesota, and today both titling processes are used in 84⁴⁵ of its 87 counties, with Torrens accounting for up to one third of existing property parcels in the largest counties such as Hennepin.

One of the original Torrens users in the state was St. Louis County. The event that triggered the acceptance of the Torrens process is believed to have been a mineral boom in the county's Iron Range. With so many mines operating in close proximity, encroachments were a major problem and accurately establishing boundary lines was critical. Also many of the owners were absentee and feared that squatters could acquire rights and through the Torrens system the property could be demarcated and the title indefeasible. Torrens registration was considered the most effective solution, and its adoption became wide spread in the county thereafter.

Torrens remains popular in the state for the same reason it was introduced more than 100 years ago – it's a straightforward and easier titling process that is safer and more secure for the property owner than the Abstract recording system.

The need for a simpler alternative to Abstract Titling in Minnesota grew out of the increasing complexity of real estate transactions. As properties were bought, sold, willed and sub-divided – often with many parties involved in a single transaction – mistakes and problems began to cloud titles. An improperly filed property document or a defect in the property itself could put a blemish on the Abstract Title that might disrupt the smooth conveyance of ownership or call the legal ownership rights into question in the future.

The Abstract process, of course, allows the owner to initiate a quiet title action by court order, but the end result is merely an evidence of title that is subject to recourse and re-interpretation by title companies and real estate attorneys at some point in the future. The Torrens System, on the other hand, enables the interested party to register a property by following an adjudicated title process that gives all parties a window of opportunity to make their respective cases. Once the Torrens process is properly completed and ownership is decided, there is no recourse. The title is registered in the name of the owner with a legal description, and the new source title is created.

The Minnesota Torrens Process

In Minnesota, the Torrens adjudication process is carried out under the supervision of the District Court. The titling process under Torrens typically involves six to seven steps and can usually be completed in three to six months at a cost of \$500 -- \$1,000 plus attorney's fees to the owner. The steps are as follows:

⁴⁵ Although many of these counties have ten or fewer properties in the Torrens Register, only a few counties have more than 10% of all properties within the Torrens Register.

Application – A property owner wishing to register a property or record new parcel boundaries files an application with the District Court together with the abstract of title.

Property Survey – Registration of boundaries is optional when registering the title. If the applicant chooses to do so, the registered surveyor performs an official survey of the property, sets judicial monuments on the ground and files the survey in the court file.

Examination of Title – The Examiner of Titles is an officer of the court. The Examiner will review the abstract of title pertaining to the property to ensure there is no question over ownership. Of critical importance since an actual certificate of title will be issued, the examiner makes absolutely certain the legal description of the boundaries is clear. The parcel boundaries must close on all ends without gaps or overlaps. If there is a problem with the legal description, the Examiner may call for a property survey by a registered land surveyor.

Defects and Encumbrances Cited – The Examiner reviews the claims brought before the court and studies whatever legal facts are available. Following the review, the Examiner issues a report citing any defects found in the title, encumbrances--mortgages, easements, etc.-- that must be preserved and identifying defendants -- those who have, or may have had interests in the property--who must be served notice.

Public Notice – The court directs service by summons to the defendants named in the Examiner’s Report. Defendants that cannot be found and any “unknown” defendants are served by publication. If claims are made, they are usually presented by attorneys who state the case on behalf of their clients.

Title Contested – If registration of the title is contested and the Examiner cannot find a legally acceptable conclusion to the disagreement, the parties have the right to go to court. The case is handed over to the District Court, which then determines ownership. The process is repeated before a judge who listens to the arguments of the attorneys, reviews the evidence and ultimately hands down a final ruling that determines whether the applicant may register title to the property.

Title Issued – If there is no contest to ownership of the property or a final ruling has been handed down by the courts, the new Torrens Certificate of Title is issued and held in the Registrar’s office and a paper copy or duplicate is given to the owner. The certificate is indexed by owner’s name and by legal description. It contains the complete ownership information, boundary description and recitals of abstract encumbrances that followed the title into Torrens on the front side. On the reverse are memorials that detail the existence of a mortgage and land easements that are recorded after registration. Complete information regarding the mortgage lender, date and amount are listed on the-memorials.

As stated at the outset, what makes Torrens titling so attractive to the land owner is the safety and security that arise from knowing it is difficult to challenge a title once it has been issued and the short appeal period has expired. Once property is registered in Torrens, it remains registered. Subsequent owners enjoy the fruits of the initial registration.

Under the Torrens system, subsequent transfer of property ownership can only be accomplished by a deed, court order or certificate from the Examiner of Titles. Submission of these documents generates the cancellation of the current certificate and issuance of a new one in the new owner's name. Information about mortgages, easements and other less than fee interests are memorialized on the certificate of title. When they are released or satisfied, the documents accomplishing this are also memorialized. Upon the next cancellation of the certificate, released or satisfied interests are not carried to the new certificate.

If the Registrar makes a mistake during the Torrens registration process or subsequent transactions, Minnesota has established procedures to provide compensation from a fund of last resort for losses. Mistakes are rare and often involve the filing of liens during the adjudication process. This can result in the lien being listed ahead of the mortgage, incorrectly giving the lien holder, instead of the mortgage company, first rights to the property.

As long as the slighted party can prove that monetary damages have occurred, they have the right to sue the state's Torrens Assurance Fund. A fee of \$1.50 is applied to every Torrens transaction and paid into this fund from which successful claims are paid as determined by the Court.

Minnesota Torrens: Pros and Cons

By far, the most important benefit of the Torrens system is peace of mind for the property owner. In addition to being immune from future legal interpretation, Torrens titles are not subject to claims of adverse repossession. The squatter who's been camped out on a property for 10 years or the next door neighbor who built their fence across the property line has no rights to possess the land in question -- as they can under the Abstract titling system -- because the Torrens legal description has been legally established.

In Minnesota today, owners of abstract property have a choice between the Torrens and Abstract titling systems. Many choose to register in Torrens, especially in complicated land deals pertaining to housing developments, hotels, condominiums and shopping malls. Developers find that they can clear title to the property just once and do not need to repeat the same title work over and over each time they sell a lot. The appeal is the straightforward, concise nature of the Torrens document, which vastly simplifies title research.

Another advantage of Torrens in St. Louis County is the automation of the process, which makes the experience relatively painless for property owners and Recorder's staff alike. The county developed an Automated Torrens System and used the computerized Torrens titling system from Edmonton, Alberta, Canada, as a model to automate the process. With copies of all certificates archived and indexed in electronic form, administration of the process, especially uncontested titling is straight forward.

The state favors Torrens as well. In areas where there is a combination of Torrens and Abstract lot titles, property owners may apply to switch to Torrens using a fast and inexpensive process known as Chapter 508A.

The only downside to the Torrens option in Minnesota is the cost of maintaining two separate automated property title databases, one for Torrens and the other for Abstracts. Not only are the systems expensive to maintain, but each county must also make sure the Recorder's personnel are trained in operating both titling systems.

In conclusion, the Torrens titling system offers more benefits to Minnesota land owners because the title it generates is easy to follow, secure and immune from future challenges and interpretation. Minnesota has no plans to abandon the dual use of Torrens and Abstract; public reaction would be too high. Real estate transactions are much more complicated today than in the past. It is much easier to transfer title and memorialize multiple certificates utilizing an electronic automated Torrens system compared to the older, paper based Torrens book and page system. Torrens title does offer unique benefits and each state would have to examine their need for incorporation of a Torrens registration system.

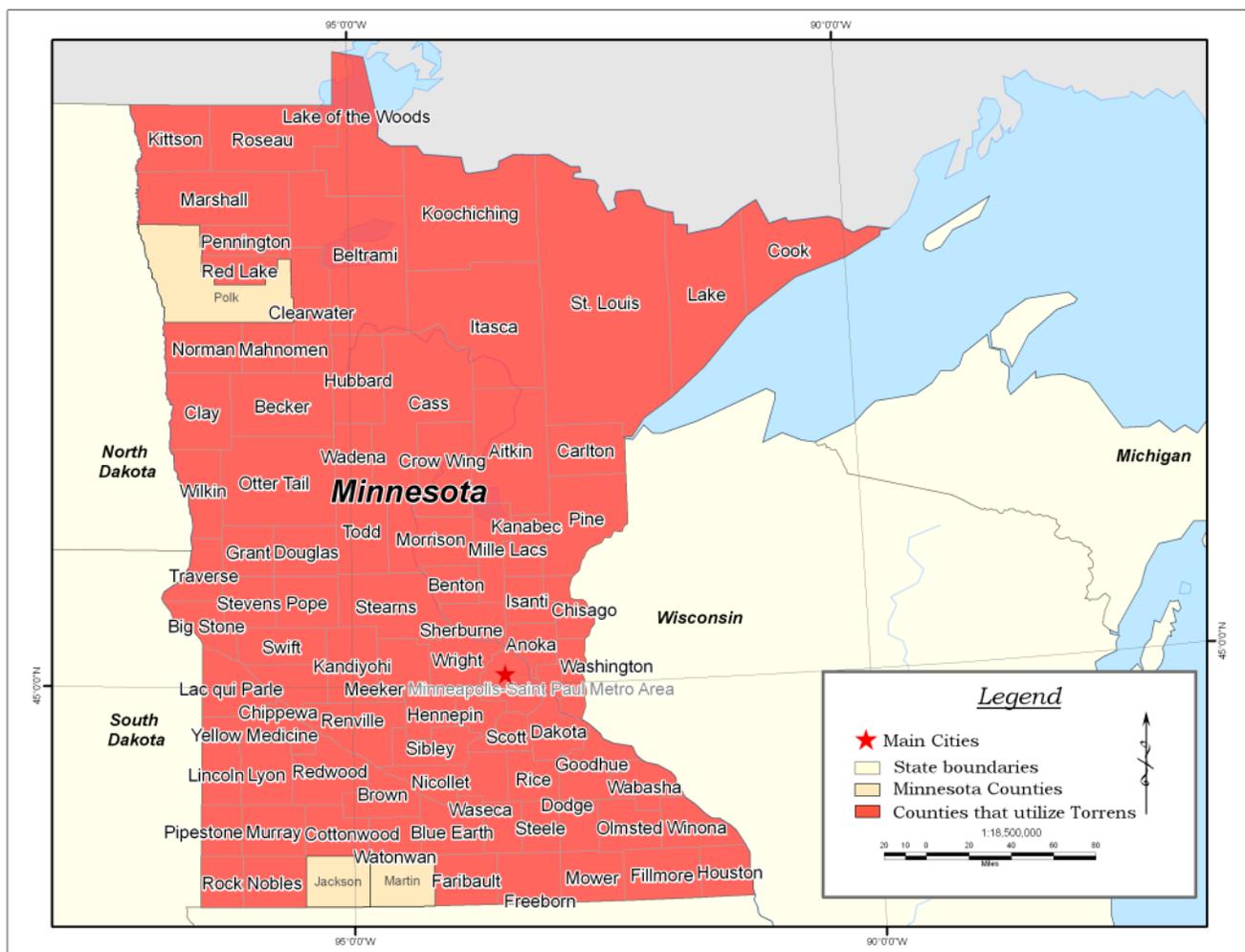


Figure 15: Minnesota Counties using Torrens

RECORDING VERSUS REGISTRATION - WHICH ONE IS BETTER FOR THE UNITED STATES?

A significant difference between a registration of records system and a title registration system is that with the registration of records system the onus is on the private sector to search the records by parcel in preparation for examining title and rendering an opinion as to the status of title. A title registration system, on the other hand, places the burden and expense of initial adjudication and the subsequent maintenance of current title status directly on the government⁴⁶. Each certificate of title is the result of an examination by government officials, usually lawyers, of conveyancing documents to insure that the granting party in a submitted document is, in fact, the owner of the property, that the document is sufficient under the law to convey the property, and that the document has been properly executed and authenticated⁴⁷. This requires significant personnel resources and skilled intervention on the part of the registrar of title office for all transactions. Indeed title registration entails much more governmental effort than the cursory review of a document for a registration of documents system.

This leads to one of the primary complaints about title registration systems. Because they require an intense bureaucratic intervention, it takes much longer for documents to be accepted for registration in a registration of titles system, than it does using a registration of records system. Because the registrar's office is not particularly sensitive to market forces, the inherent delays of the time consuming review of the documents for legal sufficiency by the registrar's office can be an unacceptable burden for those engaged in transactions. On the other hand, for the registration of records system, where the examination of title is completed by private representatives of the parties to the transaction, market forces are a factor, and where necessary, the attorneys can complete the examination of title and the closing on a transaction, based upon the needs and expectations of the client, in a very short period of time⁴⁸.

Deeds systems can be converted to title registration systems as is happening in the United Kingdom at present⁴⁹. There are two methods of conversion usually employed. One a sporadic approach where upon certain transactions "trigger" the property in question which is then adjudicated and moved into

⁴⁶ Under a registration system, technically there is no search and examination of title, once there has been an adjudication, since a certificate of title exists that shows the owner and all encumbrances on the face of the certificate of title. Those documents, with a few exceptions, that appear on the face of the certificate of title are the only documents that affect title.

⁴⁷ The more complicated the transaction the more time it takes. Transactions involving death, divorce, bankruptcy, trusts, and conveyancing by many types of legal entities require a significant amount of legal work to determine the sufficiency of the conveyance. This can require not only reviewing the documentation supporting the conveyance, but may require an investigation into facts such as subject matter and personal jurisdiction of the court in a divorce or probate case, that proper procedures have been followed in a bankruptcy case, or that corporate formalities have been followed where a grantor is a body corporate. These latter cases can vary widely depending upon the statutory provisions establishing the body corporate.

⁴⁸ This is especially true where the chain of title that must be examined is limited to a relatively short period of time by Marketable Title statutes.

⁴⁹ More than 30% of all land in England and Wales is not registered. Registration is voluntary but encouraged and in initial cases discounted. (source HMLR web site, January 2010).

the title register. Another is the systematic movement of districts of properties from deeds to title starting with a significant campaign of public education and outreach, followed by field investigations (i.e. surveys, interviews, claims processing) property by property, publication periods, and a final adjudication of the rights of the current purported right holder.

Although there is a large group of academics, practitioners, and others that have touted the Torrens system and its efficiencies once there has been initial registration, it has failed to gain much support in the United States, largely because the recording systems meet the needs of the market and its costs for duplication of creating chains of title and examination of title have been reduced by the creation of private title plants, and the availability of title insurance. In all jurisdictions where it has been successful it has been voluntary and used largely as an alternative to quiet title actions to clear known or perceived defects in title.

Registration is superior to quieting title in a court action, because it is carried out by experts, has a very short statute of limitations where the conclusions of law can be attacked, and carries with it the indefeasibility of title. It is also used for very large tracts of land that will be subdivided, so that abstracts of title will not have to be provided for each subdivided parcel, giving countless lawyers the opportunity to examine title and perhaps challenge the title.

The success in jurisdictions such as Minnesota are the result of personalities in the examiner of titles office (Patton) that are sensitive to the requirements of the market, and it should be noted that the statutes have been amended significantly and often over time to reduce the bureaucracy required in initial and subsequent registration.

Hennepin County in Minnesota is a good example of a far sighted Examiner of Title (Patton) who took Great Depression era tax forfeiture properties in the county and placed them into the Torrens Register. This provided a reasonably large amount of land into the register at one time - and a triggering event that provided for early economies of scale. According to the current registrar of titles in Hennepin County this has been added to with new developments in downtown Minneapolis in the 1960's and 1970's when developers found the land they wanted to develop under "cloud" and decided it would be simpler and cheaper to have the property enter the Torrens Register rather than conduct a Quieting of Titles action. To this day Hennepin County continues to add tax forfeiture property into the Torrens register and it is now estimated that almost 50% of the properties in the County are in the Torrens register.

In the northern counties of Minnesota - notably St Louis County the triggering event was the development of mineral interests in the Iron Range. It is suspected that many of the mine owners did not want to live in the harsh climes and wanted to protect against adverse possession by many of the

workers and others. The mining firms in an effort to protect their interests from each other also had reason to register their claims and prevent future land issues.

A few early Minnesota communities were also registered in Torrens before they were developed. The “model” community of Morgan Park (named after J.P. Morgan, the founder of U.S. Steel) in the western part of Duluth is an example. The nearby community of Gary (after Elbert Gary the first president of U.S. Steel) and the Iron Range city of Buhl were all registered before being developed. Decades later in the late 1950's, the Erie Mining Company followed that example and registered all of their holdings in St. Louis and neighboring Lake counties before building the cities of Hoyt Lake and Silver Bay⁵⁰.

⁵⁰ Cathy Racek, Deputy Registrar of Titles, St Louis County, Minnesota

ROLE OF INSURANCE IN TORRENS VERSUS DEEDS SYSTEMS

In the US, private insurance backs up a deeds registration system and the verifications of title provided by abstractors and lawyers. The insurance is conducted through private title companies who add additional protection (apart from the indemnity insurance and bonds carried by the professionals) for purchasers and lenders by providing title services and opinions and who are insured by state authorized insurance companies. The contract indemnifies the buyer or lender from any insured loss if the title fails for a defect prior to the date of the policy. A new policy must be issued for each transaction. In many states, the government sets the premium. Some states set their own title insurance forms. Others rely on the forms of the American Land Title Association.

The insurance generally covers the policy holder against loss or damage and attorney's fees and expenses that the insured may become obligated to pay by reason of-

- Title to the estate or interest being vested otherwise than stated in the policy, subject to stated exclusions
- Any defect in, lien or encumbrance on the title
- Non-marketability of the title
- Lack of right of access to and from the land.

The exact terms of cover vary from state to state and the particular company. The insurance is negotiated by a buyer or mortgagee at the time of the transaction and attracts a fee for cover for each separate transaction. Usually there are two types of insurance, lenders and owners. These are usually issued simultaneously because most buyers finance their purchase with a mortgage. The lender's insurance premium is then nominal. In the context of the USA, title insurance does support a very strong and active property market.

In Torrens systems, the state provides a guarantee or assurance (very narrowly defined) of title and pays damages to people who lose their land through the operation of the system. There is no magic in the terminology of "insurance" or "assurance" – they both connote an opportunity by an individual who loses an interest in land to receive the value of that interest as compensation from a fund.

In many Torrens schemes, the insurance system has been successful in providing psychological security with little in the way of real outlay. The theory behind the insurance system was enticement of people to move their old law titles into title registration which reversed the operation of the forgery rules. Under old law no owner could ever lose their land in the event of a forgery: *nemo dat quod non habet* – a person who did not have a title could not give a title. The very point of title registration was that the owner should lose their land if someone acquired registration in good faith through a third party forgery or fraud. Registration passed title of itself, whatever the nature of the defects in the

instrument, provided the new owner was not tainted with the fraud.⁵¹ Hence the system included a compensation opportunity for the deregistered owner if he or she did not contribute to the fraud.

BACKGROUND OF TITLE INSURANCE IN THE UNITED STATES (Ewan)

As set forth above, deed recording/registration has been used in the United States for hundreds of years. For most of its usage, especially in the original thirteen colonies, the grantor/grantee indexing system has served well. The historical reasons for this are (1) property was infrequently transferred; (2) when property was transferred, it was transferred in large tracts of several (if not hundreds of) acres; and (3) there were relatively few landowners with which the system had to contend. Additionally, in the early years of the country, mortgages were rare, and the term “refinance” had not yet even been thought of. All of this meant that ownership of real property could be adequately tracked by a simple grantor/grantee name index.

As the US economy developed and population increased, land ownership interests became more complex as parcels were sub divided multiple times, increasing numbers of owners became involved, and more interests on the properties developed. As a result, the land records could no longer be readily deciphered by lay persons, and specialized talents were developed by the regular users of the public land records systems. These persons were and are today known by several names, such as “title searcher,” “title examiner,” and “conveyancer.”

Before title insurance, buyers in real estate transactions bore sole responsibility for ensuring the validity of the title held by the seller. While searchers, examiners, or conveyancers may have been used in the process, if the title to a given tract of land were later deemed invalid or found to be fraudulent, the buyer lost his or her investment.

Additionally, the buyer may have more at stake than the investment alone. If the buyer’s title were to be attacked, the buyer would also have to bear the expense of paying for his or her attorney to defend that attack. So onerous could this be that one case is illustrative. Question: Why did Abraham Lincoln wind up living in Illinois? Answer: Because his father (Thomas Lincoln) was the defendant in a land title claim in Kentucky where Abraham was born. Rather than pay to defend against the claim, Thomas moved his entire family to Indiana (and then later to Illinois).

It was through the misstep of a single conveyancer on a single transaction that title insurance was born in the US. As with the development of the Torrens registration system, title insurance is a relatively “new” development, the first policy being written in 1876 in Philadelphia, PA.

In 1868, *Watson v. Muirhead*⁵² was heard by the Pennsylvania Supreme Court. Muirhead (plaintiff) lost his investment in a real estate transaction as the result of a prior judgment lien on

⁵¹ Subject to the doctrine of deferred indefeasibility which operates in some schemes and which corrects the defect on the next registration of a dealing made for value and in good faith.

the property. Watson, a conveyancer, (defendant) had actually discovered the judgment lien during his examination of the title prior to the sale, but told Muirhead the title was clear. Watson based his statement that the title was clear upon his lawyer's (incorrect) determination that the judgment lien was not valid.

The Pennsylvania Supreme Court ruled that Watson was not liable for mistakes based on a professional's (the lawyer's) opinion. As a result of this case, in 1874 the Pennsylvania legislature passed an act allowing for the incorporation of title insurance companies.

WHAT IS TITLE INSURANCE?

Title insurance is a contract of indemnity that covers the insured person against loss or damage arising out of existing title defects or encumbrances other than those specifically excepted in the policy. Unlike Torrens, a title insurance policy is not a guarantee that the insured's title will never be challenged or attacked, nor is a title insurance policy a guarantee that any such challenge or attack can be successfully defended. The policy provides that the insurer will undertake to defend the challenge or attack (at the insurer's expense), and if the defense is unsuccessful, the insurer will indemnify the insured against loss up to the policy liability amount.

While the "standard" title insurance policies in use in the US today exclude from coverage events after the date of the policy (since they insure against *existing* defects or encumbrances), modern "extended" or "enhanced" coverage policies also include protection for certain post-closing events, such as forgery of the insured owner's signature on a deed or mortgage.

Unlike other forms of insurance, the title insurance premium is payable once, at the settlement of acquisition of the property. The policy continues in effect for so long as the insured has an interest in the insured property. The operational principle of title insurance is that, although there may be potential problems in the title being insured, most of these will be identified through the normal search and examination of the public records. Hence, the insurance model of title insurance is the "risk elimination" model rather than the "risk assumption" model of most other forms of insurance.

TORRENS AND TITLE INSURANCE

If the Torrens System provides State assurance as to title, why would we need title insurance? The reason for this state of affairs is that the two are not exclusive: each has its weaknesses, and the two systems can complement each other nicely. An examination of the meshing of the two constructs reveals how and why they can coexist.

To promote ease of transactions, the Torrens System in essence reverses some of the property rules of common law conveyancing. Rather than the public record being evidence of title, a

⁵² 57 Pa. 151 (1868)

purchaser for value (and, in some Torrens jurisdictions, a gratuitous transferee) obtains upon registration a title that cannot be impugned on the ground that the seller's title was defective, or that the conveyance from the seller to the purchaser was invalid for any reason. In other words, the registration in the Torrens system IS the title to the property specified.

So what happens when an errant title registration has been issued (for whatever reason – negligence on the part of the Registrar, fraud, etc.)? Ostensibly, the fact that the title has been registered means that the registered title IS the title which cannot be attacked or otherwise impugned. But what of the “true owner”?

The Torrens System compensates the “true owner” for the loss of his or her property right pursuant to the rule of unassailability of title. The concept under the Torrens System is that a person is to have either his or her interest in the land or adequate monetary compensation therefore. Thus, most of the Torrens Systems would compensate the “true owner” for the loss of the property due to the errant registration of the property in another's name.

This, of course, begs the question of how the “true owner” would recover from the Torrens fund. In many, if not most, Torrens jurisdictions, the “true owner” would have to commence a legal proceeding of some magnitude (some jurisdictions allow administrative proceedings; others require a full-blown lawsuit) against the fund or the administrator of the fund to effectuate payment from the fund.

FIRST RESORT OR LAST RESORT?

The trend of recent legislative changes in many Torrens jurisdictions has been to restrict rather than to extend right to compensation from the Torrens fund. Governments have become increasingly unwilling to indemnify for losses caused wholly or partly by the fraud or negligence of agents and professionals acting for the claimant. So, to further complicate matters, some jurisdictions, as a prerequisite to commencing the legal proceeding, also require the claimant to pursue all others who are or may be responsible for the loss or error before allowing the claimant to commence the action against the fund. The Torrens fund is a fund of “last resort” for the claimant – he or she only receives compensation from the fund when all other avenues have been exhausted.

In contrast, a title insurance policy is a policy of “first resort,” since the insured (claimant) need not sue anybody else who may be at fault. Provided the claim is valid and within the terms of the policy, the title insurer is obligated to either remedy the situation or pay the insured his or her damages occasioned by the claim. Through operation of subrogation, once the insurer has paid the insured, the insurer receives the rights the insured had vis-à-vis the claim. It is then up to the insurer whether to pursue any other person who may be at fault.

THE DUTY TO DEFEND

Another stark contrast between the compensation model utilized by the Torrens System and that utilized by title insurers is what is known as the Duty to Defend. Under the Torrens fund system, a successful claimant is entitled to compensation only for the loss of the claimant's interest in the registered property. Thus, if the claimant had to pursue others as a prerequisite to commencing the compensation action, the costs associated with that pursuit must be borne by the claimant. Additionally, the costs associated with actually making the claim against the fund would also have to be borne by the claimant. In both cases, the claimant would not be entitled to reimbursement from the fund, since the guaranty is only to pay for the loss of the interest in the property, not for costs associated with the recovery.

Under a title insurance policy, in addition to indemnity for the actual loss of the insured, the insurer undertakes to cover the costs, legal fees and expenses it incurs in defending the insured's title. The costs incurred by the insurer in defending the insured's title do not reduce the amount of the indemnity for loss payable under the policy. Thus, the insurer may actually expend substantially more than the policy limit on a claim, since the costs associated with defense or attempting to remedy the defect are always in addition to the indemnity amount afforded by the policy coverage.

THE REGISTRATION GAP

In deed registration/recording systems, title insurance products often insure "the gap" – this being the amount of time between what is presently ascertainable in the public records and the actual recording (and concomitant public notice thereof) of the documents, such as a deed and mortgage, submitted for the insured transaction. "The gap" is composed of two smaller components: (1) the difference in time from a document's arrival at the recorder's office and "today's" date (i.e. what documents might I not be able to locate because of this delay); and (2) the difference in time from "today's" date until the documents being submitted are actually on record (i.e. how long will it be before the present transaction will be visible to the world).

In this respect, the deed registration/recording system closely parallels the Torrens system. Since a Torrens registration is effective only upon issuance of that registration, and not the submission of the transactional documents, Torrens has an inherent "registration gap." Just as in the deed registration/recording system, there is a period of time between the acquisition of a property right, and the actual registration of that right, and this "registration gap" is one area where title insurance can compensate for a loss occasioned by another registration "trumping" the insured transaction.

POST ACQUISITION RISKS

“The Torrens system of registered title ... is not a system of registration of title but a system of title by registration.”⁵³ Once an instrument is registered, then title conferred by that instrument is effected. This means that registration of an instrument which, because of some factor that may otherwise have a nullifying effect (e.g. a forgery) confers an indefeasible title.

Indefeasibility of title is one of the hallmarks of the Torrens system. The various Torrens systems handle the concept of indefeasibility by subscribing to one of two schools of thought: (1) deferred indefeasibility; and (2) immediate indefeasibility.

Under the rule of deferred indefeasibility, registered owners (“true owners”) deprived of their interest by the registration of a forged or otherwise void instrument are entitled to be restored to the register. While this appears to be the right thing to do, what about others who have relied on the register to their detriment? They, arguably, would have a claim against the Torrens fund for their loss, but at least the “true owner” has his or her property back.

The countervailing school of thought is that of immediate indefeasibility, which most closely parallels the quote above: once an instrument is registered, that is where the title is.

It appears that, of the jurisdictions subscribing to the deferred indefeasibility school, there is a shift towards immediate indefeasibility. While this shift improves the security of purchasers (and others relying on the register), it also serves to increase the risk that “true owners” may be deprived of their titles after registration through the wrongful act of another. Thus, the shift from deferred to immediate indefeasibility operates to shift risk of loss from the pre-acquisition to the post-acquisition stage.

The extension of the modern title insurance policies to cover post-acquisition risks makes title insurance more attractive to holders of Torrens titles. Modern “extended” or “enhanced” policies contain provisions insuring the named insured against future forgery of a document of title concerning the insured property. Here, as with “the gap” problem above, title insurance can be brought to bear on analogous problems in both the Torrens system and the deed registration/recording system by affording coverage to the insured against certain post-acquisition risks such as forgery.

⁵³ *Breskvar v Wall*, (Australia 1971) 126 CLR 376 at 385-386.

Conclusions

"Unquestionable such a (deeds) system is doomed and real estate dealings are to be freed from the tergiversations⁵⁴ and the trickeries of the law. The chain of titles which is invoked for every transaction is, indeed, a chain of servitude which will be broken by popular demand and legislative enactment⁵⁵".

A reasonable person could therefore ask why has the statement above not come true in the US as predicted? To a large extent we hope that this paper has answered that.

To answer the question of why deeds and not Torrens has prevailed in the US and why once Torrens was in place in certain counties in the US did it not spread further, we argue that there are two essential underlying factors at play. That is the costs needed to establish and maintain the systems and the provision of assurance for each of the systems.

In the US the private sector led by the title industry has proven over time to be more adept at convincing the market of its ability to better meet the needs of the public and the industries that the land records service. It has done so through a variety of means not the least of which is keeping charges at a level that seem appropriate to most consumers. It has also shown the ability to adjust to the up and down cycles of the real estate markets by scaling resources to meet changing demand, and it has effectively raised the specter of overly intrusive Government involvement in the real estate market.

As deeds recording systems were already established in the USA long⁵⁶ before Torrens they have a natural economic and cultural advantage. This further adds to the potential costs and perceived negatives associated with moving to a Torrens system. We can argue that existing deeds systems (particularly those indexed by parcel) are financially superior than Torrens because they:

1. Are easier and cheaper to maintain as they require fewer and less well trained governmental personnel,
2. Do not require initial government led adjudication property by property,
3. Do not require government staff to decide on the validity of documents,
4. Do not expose government staff and offices to lawsuits, and
5. Do not require government to maintain assurance funds.

⁵⁴ The action of 'turning one's back on', i.e. forsaking, something in which one was previously engaged, interested, or concerned; desertion or abandonment of a cause, party, etc.; apostasy, renegation. Also with a and pl., an instance of this; an act of desertion or apostasy. Oxford English Dictionary On-line version.

⁵⁵ The Torrens System, p. 43. This was a prediction that recording systems would not survive and would be superseded by registration systems. The prediction has not come true.

⁵⁶ In the case of Virginia starting in the 1640's some 245 years before the appearance of Torrens in Cook County.

From another more technical perspective we might suggest that moving to a nationwide Torrens systems in the US might be better in the long run because it:

1. Provides a simpler and easier way to search and rely on the public land record,
2. Provides a better system for integrating land records into an overall information "whole" i.e. a National Spatial Data Infrastructure,
3. Provides for indefeasibility of title,
4. Removes confusion and the need for Quieting of Title in older land records,
5. Removes adverse possession,
6. Removes profit motives from the provision of information and advice, and
7. Provides a lower charge for registration and processing.

It is interesting to look at the reasons the United Kingdom's Land Registry department provides for its public to engage in land registration. These are:

- *"State-backed registration gives security of title, providing you better protection against claims of adverse possession.*
- *Registration gives you greater certainty and security about what you own. Once registered, you're in an ideal position if you decide to sell all or some of your property. Potential buyers increasingly expect land to be registered before buying.*
- *It simplifies conveyancing, making transactions easier and potentially less costly for all involved.*
- *Our experienced staff are on hand to guide you through the process.*
- *Saves money – up to a 25 per cent discount is available to all first time voluntary registration applicants."*

It is likely that Torrens based registration will not move further into the US due to the large costs required to transition from the deeds records to a title environment, and the cost and number of trained skilled government personnel that would be needed in more than 3,000 land recording offices throughout the country. It would also require a large triggering event to bring about economies of scale and realize a quicker return on investment.

Greater land information efficiencies and integration are being sought in recording and related local government offices in US, and are on the way to being realized through the use of technologies such as GIS, E-Recording, and standardized forms and interfaces. It is likely that this will continue to improve the access and efficacy of the land recording process in the United States but on an ad hoc basis.

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