

Presented:
2008 Wind Energy Institute

February 19-20, 2008
Austin, TX

Land: Survey and Title Issues

Brent Stahl

Brent Stahl
Stahl, Bernal & Davies, L.L.P.
7320 N. Mopac, Suite 211
Austin, TX 78731

bstahl@sbaustinlaw.com
(512) 652-2946

TABLE OF CONTENTS

Introduction

Key Title and Survey Issues

A.	Checklists.....	1
B.	ALTA vs. Texas.....	1
C.	Format and Structure of the Pro Forma and Survey.....	2
D.	Common issues and practical solutions.....	3
	1. Oil and Gas Operations / Leases (Accommodation Doctrine).....	3
	2. “Wind Rights” reservation clauses.....	6
E.	Endorsements; Express Coverage; Insuring Around.....	7
	1. Leasehold Policy.....	7
	2. Amendment to Exception to Areas and Boundaries.....	7
	3. Access.....	7
	4. Contiguity.....	8
	5. Additional Insured.....	8
	6. Non-Imputation.....	8
	7. Restrictions, Encroachments, Minerals.....	8
	8. Insuring Around.....	8
	9. Express Coverage.....	9
F.	Joint Instructions to Surveyor; Certification language.....	10

Appendix

Sample Forms, Title Insurance Rule Excerpts, Selected Endorsements

A.	Title and Survey Issues Checklists.....	11
B.	Affidavit of Non-Production – Form.....	17
C.	Affidavit of Heirship - Form.....	19
D.	Waiver of Surface Rights - Clause.....	21
E.	Leasehold Policy - Endorsement.....	22
F.	Amendment to Exception to Areas and Boundaries - Endorsement.....	27
G.	Access - Endorsement.....	28
H.	Contiguity - Endorsement.....	29
I.	Additional Insured - Endorsement.....	30
J.	Non-Imputation - Endorsement.....	31
K.	Restrictions, Encroachments, Minerals - Endorsement.....	33
L.	“Insuring Around”.....	38
M.	Express Insurance – Encroachments, Defects, Liens.....	41
N.	Delivery of Pro Forma Policies and Promulgated Forms.....	43
O.	Title Insurance Premium Rate Charts.....	44
P.	Sample Joint Instructions to Surveyor (with Certification language).....	47

[2008 Note: While this paper was originally presented in February 2008, portions have been revised as of November 2008 to reflect recent new developments.]

WIND DEVELOPMENT: KEY SURVEY AND TITLE ISSUES

INTRODUCTION

In many respects wind energy finance transactions are similar to other commercial real estate lease transactions. Each transaction involves a lease, and related easement, title, survey and financing issues. Each transaction involves a deed of trust and related lien priority issues. Each wind energy lease includes many provisions which can be found in any long term ground lease. The energy generating nature of the underlying transaction does result in many unique lease provisions which are specific to the wind energy industry – things like production rent clauses, development and production term periods, and wind non-obstruction easements. What really distinguishes a wind deal, however, is that it often involves a volume of real estate instruments and related survey and title issues that is much greater than most typical real estate deals. It is not unusual to need 50, 60 or even more leases to assemble sufficient land for a viable commercial wind energy project. If 50 leases of 50 different tracts of land are involved in a deal, then the parties are in many respects closing 50 different deals at one time -- this is what makes wind deals challenging. Organization becomes imperative. Detailed early checklists are key to anticipating and addressing the issues necessary for a smooth closing of a wind energy transaction. Experienced real estate deal makers are fond of saying that the three most important things in a real estate deal are location, location, location. From a real estate lawyer's perspective, the three most important things in a wind energy real estate deal are checklists, checklists, checklists.¹

This paper does not include a detailed analysis, explanation or overview of all Texas title insurance and survey matters in general. Rather, it highlights and focuses discussion on two areas: (i) several common issues encountered in reviewing survey and title for wind energy transactions, and (ii) related issues that differentiate the real estate aspects of a wind energy transaction from a more typical commercial real estate transaction.

KEY TITLE AND SURVEY ISSUES

A. Checklists. A sample set of real estate checklists can be found in Appendix A. The initial checklist contains the common issues encountered in the real estate aspects of wind energy deals. But, with so many leases and easements in most wind deals, a single Master Checklist can quickly become unwieldy. Following the "Master Checklist" are a series of additional templates for tracking issues specific to each instrument and for issues specific to certain subtopics: title commitment review, oil and gas related drafting tasks, subordination agreement tasks, and lease/easement amendment issues. These additional subtopics are found in almost every wind deal. More detailed discussions of these items follow below.

B. ALTA vs. Texas.

TITLE POLICY. Out-of-state real estate practitioners are always surprised by their first Texas real estate transaction. Most states issue title insurance in conformance with standards established by the

¹ The author thanks Thomas Davies and David Sewell, attorneys with Stahl, Bernal & Davies, for their assistance in preparing portions of this paper.

American Land Title Association (ALTA). Texas, however, issues title insurance under standards established pursuant to Texas law as reflected in The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas -- administered by the Texas Department of Insurance. Texas does not permit alternative ALTA policies and title insurance must be accomplished in Texas with the available Texas policy forms. Entire papers have been written comparing Texas title insurance to ALTA practices, but this paper will simply focus on a few of the most common Texas title policy endorsements utilized in wind energy transactions.

The Texas Insurance Code places limits on the amount of insurance a particular title insurance company can provide, depending upon certain underwriting and qualification standards. The coverage amount for wind energy transaction title policies is often very large; it is not unusual for such policy coverage amounts to exceed one or two hundred million dollars. Practitioners should inquire early in the transaction process as to whether the chosen title company can write a policy in the amount the transaction requires. If such amount exceeds the particular limits of the selected company, coinsurance or reinsurance should be obtained.

The Texas title insurance rules, forms, and endorsements are easily accessible online at the following websites:

<http://www.tdi.state.tx.us/title/titleman.html> (Texas Department of Insurance)

<http://www.tlta.com> (Texas Land Title Association)

ALTA rules, forms and endorsements can be found online at the following location:

<http://www.alta.org> (American Land Title Association)

SURVEY. The decision on what type of survey to require in Texas wind energy transactions is largely driven by what has become a standard lender and tax equity investor requirement – an ALTA survey. Even though Texas is not an ALTA state when it comes to title policies, ALTA surveys meet the necessary requirements for issuance of Texas title policies. Because wind energy financing parties and their out-of-state counsel are often more familiar with ALTA survey formats, an ALTA survey is almost always required in a Texas wind energy transaction.

ALTA rules regarding an ALTA survey can be accessed online at the following website:

<http://www.alta.org/standards/standards.cfm> (American Land Title Association – Survey Standards).

C. Format and Structure of the Pro Forma and Survey.

When title companies initially produce title work in a commercial real estate deal, the title information is usually provided in the form of a Title Commitment. A Title Commitment is simply a promise to issue a title policy after closing in a form that is consistent with the Commitment. The actual policy to be issued is somewhat different in form than the Commitment. The volume of real estate instruments and tracts in a wind energy deal makes working from title commitments cumbersome – imagine 50 or 60 individual title commitments. Developers' and Lenders' counsel will most often prefer

to review title on a “Pro Forma” version of the actual title policy to be issued. Texas title insurance Rule P-52 permits title insurance companies to provide title work in a Pro Forma layout – i.e., in a format that mirrors what the actual title insurance policy will look like upon issuance after closing (see [Appendix M](#) to this paper).

When combining 50 or more leases/easements and 50 or more tracts into a single Pro Forma title policy draft, the parties to the transaction often end up with a document that is several hundred pages in length. In order to effectively review title work of this volume and efficiently provide title comments/objections to all parties, practitioners should insist on receiving the Pro Forma policy in a digital format on which comments can easily be shown in a “redlined” or marked format.

Efficient review of title work involving so many real estate tracts and instruments also requires coordination with the survey work that is expected on the project. A survey for 50 tracts will often be as long as 15 or 20 sheets. Practitioners can save countless hours of review time by ensuring that the Survey and title Pro Forma are structured similarly. For example, the order of real estate instruments in Schedule A of the title Pro Forma should be the same as the order of the Survey sheets. Any abbreviated references to landowners or headings should track similar references in the survey. Consistency between the surveyor and the title company in this regard requires early communication between the developer, surveyor, and the title company. It is also helpful to involve lender’s counsel at this stage in the transaction; with lender’s counsel’s consensus on the format of the Survey and title Pro Forma, the deed of trust schedules of mortgaged real estate rights can then be prepared in the same order and manner as the title and survey work. Real Estate 101 teaches that the Leases, the Easements, the Title Policy, the Survey and the Deed of Trust must be harmonized before closing – anticipating and planning for this requirement early in the transaction process is imperative when such large numbers of real estate documents and tracts are involved.

D. Common issues and practical solutions.

1. Oil and Gas Operations / Leases.

PROBLEM: Texas has become a very active market for wind energy deals. Because Texas has such a long history of oil and gas exploration and drilling, many wind projects are located in areas with abandoned oil and gas wells/equipment and old oil and gas leases of record against the subject real estate. Because mineral estate rights in Texas are superior to surface estate rights, wind project developers/operators, lenders and title companies struggle with the theoretical possibility that old, apparently abandoned oil and gas operations might be revived in a way that requires the wind project facilities to be relocated or terminated. Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967); Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980).

SOLUTION: The mineral estate issue can be addressed in three ways. *First*, title companies will provide insurance against old oil and gas operations / leases if the landlords to the wind leases can confirm that oil and gas operations have ceased long enough for the underlying oil and gas lease to terminate by its terms. This assurance to the title company is provided by obtaining affidavits of non-production from the landowners. An example of the State Bar of Texas Affidavit of Non-Production can be found in [Appendix B](#) to these materials. *Second*, title companies will provide insurance against old oil and gas operations / leases if the oil and gas operators sign a Waiver of Surface Rights Agreement or a Non-Interference Agreement. An oil

and gas operator might be willing to sign a Waiver of Surface Rights Agreement in instances where its operations do not require the surface of the wind energy project and only required the minerals underneath the surface (e.g., where the oil can be extracted from a pool on adjacent land or where it can be accessed by slant drilling originating on adjacent land). A sample clause for a surface rights waiver agreement can be found in Appendix D to this paper. A non-interference agreement entails a situation where oil and gas operations must continue on the same land as the wind energy project, but the oil and gas operator is willing to agree that it will not disturb the planned wind energy operations. While a Non-Interference Agreement is a theoretical solution to concerns about superior mineral estate rights on tracts with active oil and gas production, such agreements are difficult to obtain. If Affidavits of Non-Production cannot be obtained because oil and gas operations are active and if the oil and gas operator will not provide a surface rights waiver or non-interference agreement, a *third* solution to the otherwise superior mineral estate concern lies in Texas case law. Wind energy project participants can gain a certain level of legal protection even in situations where oil and gas operations are active and not terminated; such protection can be gleaned from a legal precedent in Texas known as the *Accommodation Doctrine*. See Getty Oil Company v. Jones, 470 S.W.2d 618 (Tex. 1971).

Because the Accommodation Doctrine is often so important to a wind energy project's rights, a short analysis of this doctrine is provided below; background on the rights of the mineral estate are provided first in order to understand the need for the Accommodation Doctrine. Secondly, the analysis examines rights of surface owners independent of the Accommodation Doctrine. And third, we look at how the Accommodation has actually been applied.

Mineral Estate Rights in Texas. Mineral parties have the right to use as much of the surface, subsurface and adjacent airspace of the land as reasonably necessary to enjoy the mineral estate, but such right must be exercised with "due regard" to the rights of the surface parties. Getty Oil v. Jones, 470 S.W.2d at 621; Humble Oil v. Williams, 420 S.W.2d at 134. These rights over the surface estate have been described by the Texas Supreme Court as an "appurtenance" and a "mineral easement" over the surface of the land. Harris v. Currie, 176 S.W.2d 302, 305 (Tex. 1943); Empire Gas & Fuel Co. v. Texas, 47 S.W.2d 265, 268 (Tex. 1932) (defining the "mineral easement" to be "the necessary right to use the surface of the earth in the enjoyment of the mineral estate"). If a surface party does not explicitly grant the mineral easement to the mineral party, then the grant of the mineral easement is implied. Id. Without the mineral easement, Texas courts have noted that the rights in the mineral estate would be "wholly worthless." Harris, 176 S.W.2d at 305. Surface parties and mineral parties may alter, restrict or eliminate the legal rights granted under the mineral easement by written agreement. Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362, 363 (Tex. 1957); Atlantic Refining Co. v. Bright & Schiff, 321 S.W.2d 167, 168, 169 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (this is the line of cases allowing benefits to be obtained from Waiver of Surface Rights Agreements or Non-interference Agreements).

Rights of Surface Estate in Texas. Although the mineral estate is dominant, surface parties may still use the surface of the land. Surface owners and their lessees have identical rights with regard to the mineral estate, except as such rights are limited in the surface lease. Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 650 (Tex. Civ. App.—Eastland 1953, no writ). The rights of the surface party and the mineral party are "reciprocal and distinct," and if either party

“exceeds [his] rights he becomes a trespasser.” Brown v. Lundell, 344 S.W.2d 863, 866 (Tex. 1961). Surface parties may continue to use the surface of the land in any manner that is not inconsistent with the mineral party’s use of its estate. Atlantic Refining, 321 S.W.2d at 169. A surface party is not prohibited from a certain activity merely because it might diminish the value of the minerals under the land. Id. In order for a mineral party to prohibit a certain activity by a surface party, the mineral party must show that, at that specific moment time, the use interferes with the reasonable exercise of its rights. Id.

The mineral easement is not an unfettered right to the use of the surface. Mineral parties may only use the surface as is reasonable necessary and must exercise due regard toward the surface parties. Apart from claims for breach of a written agreement, Texas courts have created two causes of action by surface parties against mineral parties that may result in the award of damages or an injunction. Under these causes of action, the surface party must prove that either (1) the mineral party exercised its rights in a negligent or intentionally wrongful manner or (2) the mineral party used more of the surface of the land than was reasonably necessary. Reading & Bates Offshore Drilling Co. v. Jergenson, 453 S.W.2d 853, 855 (Tex. Civ. App.—Eastland 1970, writ ref’d n.r.e).

Accommodation Doctrine in Texas. In some cases, Texas courts provide special protection for surface uses that pre-exist mineral uses under the accommodation doctrine. In Getty Oil Company v. Jones in 1971, the Texas Supreme Court interpreted the “with due regard” language of the mineral easement as adopting the accommodation doctrine. See also Tarrant County Water Control and Improvement District Number One v. Haupt, Inc., 854 S.W.2d 909, 910-11 (Tex. 1993) (holding that the right of accommodation applies to government-owned land). Under the accommodation doctrine, where there is an existing use by a surface party which would be impaired or precluded by a mineral party’s activities, and where there is an industry-established alternative practice reasonably available to the mineral party that would not impair or preclude the existing surface activity, the mineral party may be required to use the alternative practice. Getty Oil v. Jones, 470 S.W.2d at 622. This is true even if the mineral parties’ rights predated the rights of the surface party (i.e., the doctrine focuses on the timing of the uses and not when the parties obtained their rights). The surface party carries the burden of proving both, (i) the impairment or preclusion of its existing use and (ii) the availability of a reasonable alternative to the mineral party. Id. at 623. If the surface party is unable to prove both facts, the accommodation doctrine will not apply and the mineral party will be able to use as much of the surface as reasonably necessary even if a surface party’s preexisting use is precluded or impaired.

In Getty Oil v. Jones, Jones owned the fee simple title to certain land, and Getty Oil was an oil and gas lessee on the land. Getty Oil’s lease predated Jones’ purchase of the fee simple surface estate. At the time of Jones’ purchase in 1955, Getty Oil had already drilled some wells on the land. In 1963, Jones installed a self-propelled circular irrigation system to irrigate his cotton crops. In 1967, Getty Oil drilled two additional wells that produced but needed pumps to create flow. Getty Oil began installing two beam pumps that were each at least thirteen feet tall. The pumps would have restricted the movement of Jones’ irrigation system because it maintained only a seven foot clearance. Jones sued for damages and an injunction to prevent Getty Oil from installing the pumps.

At trial, Jones had the burden of proving his existing use of the surface to grow cotton was impaired or precluded by Getty Oil's pumps. Jones also had the burden of proving that Getty Oil had other reasonable alternatives to the beam pumps. Jones proved to the satisfaction of the jury and the Court that the self-propelled irrigation system represented the only reasonable method by which he could profitably grow cotton on the land. Jones also introduced evidence that Getty Oil had two alternatives to the beam pumps it intended to install—Getty Oil could use hydraulic pumps that were much shorter and would not impede the irrigation system, or Getty could dig cellars into the ground so that beam pumps would not extend more than seven feet above the surface. The hydraulic pumps would cost less than \$5000 more than the beam pumps. Installing the beam pumps in cellars would have cost less than \$12,000 more than installing the pumps on the surface. The Court held that the doctrine of accommodation applied because these two alternatives were reasonable alternatives despite their added expense, the use of the beam pumps was not reasonably necessary to the extraction of oil, and the use of the beam pumps violated Getty Oil's obligations to exercise its rights with due regard to the surface owner. Id.

Recent Texas case law has even made it clear that directional drilling can be considered a reasonable, industry-established alternative requiring the mineral estate holder to accommodate a surface use. Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118 (Tex. App.--Waco 2006, no pet. h.). (the Genco case involved an existing ash disposal landfill; the mineral operator was required to directionally drill from an area adjacent to the landfill in order to avoid making portions of the existing landfill unusable for ash waste disposal).

Concluding Thoughts on Oil and Gas Operations / Leases. The mineral estate is the dominant estate in land in Texas, and parties with mineral rights benefit from an easement over the surface of the land. Activities of the mineral parties that interfere with surface activities can be limited by a written agreement or by proving that the mineral party is negligently or intentionally injuring the surface party or is using more of the surface than is reasonably necessary. Surface uses that pre-exist mineral uses have a right of accommodation if the surface use would be impaired or precluded by the mineral use and the mineral party has reasonable alternatives to its use.

2. "Wind Rights" reservation clauses.

PROBLEM: Texas has seen an increase in wind energy development activity and Landowners have begun to take notice and consider carefully how they can benefit from the wind energy industry. In the last several years many landowners, when selling or conveying their land, have begun to craft deed reservation clauses reserving certain rights relating to wind energy. The content of these wind rights reservation clauses varies, but they are somewhat akin to oil and gas royalty clauses. Two problems result when a lease or easement tract is subject to a prior "wind rights" reservation clause. First, Texas law is not settled in this area and therefore the exact meaning of the subject reservation language is not always clear. Second, the form of the reservation clause often does not match the categories of revenue and variety of permitted uses often present in typical wind energy lease/easement instruments.

SOLUTION: Real estate practitioners have been forced to develop creative drafting solutions to deal with "wind rights" reservation clauses. If both the fee simple owner and the "wind rights"

owner become parties to the lease or easement, then uncertainty surrounding future court interpretations of wind rights reservations is removed by mutual written agreement. Making the “wind rights” holder a party to the landowner’s lease/easement, provides complete contractual sign-off on the underlying permitted uses and on which party is to receive each category of revenues under the lease/easement.

E. Endorsements; Express Coverage; Insuring Around. The Appendix to these materials contains several examples of Texas title insurance endorsements or special coverage that are available in Texas and commonly required in wind energy related title policies. In addition to the actual sample form of endorsement, the Appendix also includes related rate and procedural rules promulgated by the Texas Board of Insurance. All such endorsement forms and rules can also be found at the websites indicated in Section B of this paper. Below is a discussion of the most common endorsement and coverage issues encountered in Texas wind energy transactions.

1. Leasehold Policy (Appendix E). Almost all Texas wind energy transactions involve lease rights, rather than fee simple real estate rights. In this instance, developers and lenders should require, and title insurance companies will provide, title insurance policies with the T-4 (owner) and T-5 (mortgagee) endorsements.

2. Amendment to Exception to Areas and Boundaries (Appendix F). The standard Item 2 of the exceptions to title contained in Schedule B of a Texas title insurance policy contains the following language: “Any discrepancies, conflicts or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.” By paying an extra 15% premium and provided the title company has received a final acceptable survey, such language can be amended to except only as to “Shortages in area.” While such coverage (also known as Survey Deletion coverage) is frequently not purchased in commercial real estate transactions, wind energy project operators should strongly consider paying the extra premium for Survey Deletion coverage in the leasehold owners’ title policy. Wind energy transactions almost always involve assembling numerous large tracts of land and the survey of the various tracts becomes very important to the various parties’ comfort level with the project boundaries and internal access parameters. If there are oversights or mistakes in the survey regarding boundaries or encroachments or gaps, most project owners would typically prefer to resolve such issues under a title insurance claim involving a large nationally underwritten title policy. Title insurance claims involving boundary, encroachment, gap and overlapping issues can only be made effectively if the project owner has purchased the Survey Deletion coverage by paying the extra 15% title insurance premium.

3. Access (Appendix G). Confirming access to public roads is an important aspect of any real estate deal, but is even more important in a typical wind energy deal because the subject real property tracts are so often located in rural areas with more limited public road access. It is therefore important that the surveyor confirm access in the survey. And it is equally important that the title policy cover access related issues. Such coverage can be obtained in the title policy with T-23 Access Endorsements by paying a nominal \$100 endorsement premium. Practitioners should consider requiring such endorsements to specifically list all public roads to which the surveyor certifies the project has access.

4. Contiguity (Appendix H). A typical wind energy project requires many roads and collection lines to access and connect its turbines and substations. Confirming that the overall project is completely or mostly contiguous becomes very important. This issue should be covered in part by the surveyor's certification language (see Appendix O) and in part by a Form T-25 Access Endorsement to the title insurance policy. This coverage is particularly important in addressing any damages that arise from unknown gaps, strips or gores that remain internal to the project and are discovered after closing. Such coverage can be obtained in the title policy upon the title company receiving an acceptable survey and by paying a nominal \$100 endorsement premium.

5. Additional Insured (Appendix I). Some parties to real estate transactions who are not the direct owners of the subject real estate rights want to be named as an additional insured (an example would be the parent company affiliate or a tax equity investor owning what is typically a single project operating company). Special coverage for owners of the project company can easily be obtained with a Form T-26 endorsement, but at cost equal to 10% of the Basic Premium cost.

6. Non-Imputation (Appendix J). The tax equity investor parties to a wind energy deal are not typically involved in much of the day-to-day development activities of the underlying transaction. As more passive investors, such parties will want to be able to make applicable title insurance claims even if the underlying project company is restricted in making such claims because of some sort of prior operating information/knowledge. Special coverage for such passive tax equity investors can be obtained with a Form T-24 endorsement, at cost equal to 5% of the Basic Premium cost.

7. Restrictions, Encroachments, Minerals (Appendix K). Certain categories of oil and gas issues in wind energy transactions can also be addressed through the purchase of a T-19 (Mortgagee) or T-19.1 (Owner) Endorsement for coverage relating to "Restrictions, Encroachments, Minerals." These endorsements also come with a cost -- 10% of the Basic Premium cost on a Mortgagee's policy and 15% on an Owner's policy. The relevant portion of this endorsement states that it provides coverage against,

"Damage to *existing* [improvements ... / buildings]: ... [r]esulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B." (emphasis added)

Whether the T-19 or T-19.1 Endorsement is worthwhile depends in part on when it is obtained. If such endorsement is obtained at construction loan closing before improvements are made to create the wind energy project, then the endorsement does not seem to have much value because it only provides coverage for improvements that are "existing" at the time the endorsement is issued. But, if the endorsement is obtained after construction is complete, then the coverage does seem to be more meaningful in that it would apply to the completed improvements. [2008 Note: This endorsement was revised in 2008 by the Texas Department of Insurance and it now provides better coverage for *future* improvements.]

8. Insuring Around (Appendix L). Some title coverage issues that arise after reviewing recorded documents and survey do not necessarily fit neatly into a curative task or an available

endorsement. This situation is most commonly encountered when an instrument of record purports to be a lien on the subject property, but some legal issue leads the underwriter to conclude that the lien is invalid. Excerpts of the relevant language of Procedural Rule P-11 state the following:

"Insuring Around" shall not be construed as prohibiting the issuer of a title insurance policy or binder from issuing a policy or binder without taking exception to a specific lien, or liens, of record when sound underwriting standards and practices would not otherwise prohibit such issuance. Specifically, but not limited to, the term "insuring around" shall not include the issuance of a title insurance policy or binder under the following circumstances:

- (1) Where liens securing obligations which, though not released of record, have been discharged to the satisfaction of the title insurance company or agent, and the title insurance company or agent has evidence in its file that the lien has been paid in full;
- (2) Where funds are in escrow to pay same, and a recordable release is forthcoming and will be filed for record in the ordinary course of business;
- (3) Where liens, in the opinion of counsel, are barred by the statute of limitation;

....”

Rule P-11 goes on to specify several other instances in which apparent liens of record may be insured around by the title company if sufficient underwriting criteria are met (see [Appendix K](#)).

9. Express Coverage (Appendix M). Still other title coverage issues may arise after reviewing recorded documents and the survey that are not lien issues and hence cannot be “insured around.” In instances involving possible defects or encroachments that the title insurance company determines it can insure against, the title policy may include “express coverage” against such items. Excerpts of the relevant language of Procedural Rule P-39 state:

“(a) Encroachments. If Company amends its Area and Boundary Exception, pursuant to Procedural [Rule P-2](#), it may except, pursuant to Procedural [Rule P-5](#), to those matters shown on the survey that it deems to cause a possible defect in title. The Company may, if it deems the risk insurable as to encroachments, add the following language after the exception: "Company insures the insured against loss, if any, sustained by the insured under the terms of this Policy by reason of a final, non-appealable judgment of a court of competent jurisdiction that orders the removal of this improvement because it encroaches over or into _____. Company agrees to provide defense to the insured in accordance with the terms of this Policy if suit is brought against the insured to require the removal of this improvement because it encroaches as herein stated.”

“(b) **Possible Defects.** If Company determines that a title matter may cause a possible defect in title, it may except, pursuant to Procedural Rule P-5, to the matter in Schedule B, and, if it determines that the risk is insurable, it may add the following language after the exception: "Company insures the Insured against loss, if any, sustained by the insured under the terms of this Policy by reason of a final, non-appealable judgment of a court of competent jurisdiction that divests the Insured of its interest as Insured because of this right, claim, or interest. Company agrees to provide defense to the Insured in accordance with the terms of this Policy if suit is brought against the Insured to divest the Insured of its interests as Insured because of this right, claim, or interest.”

F. Joint Instructions to Surveyor; Certification language. Wind Developers should consider coordinating instructions to surveyors at the outset of the survey work for the project. Such early involvement can help assure a smoother agreed process for title and survey review. In instances where the lenders' counsel is involved before the survey is prepared, joint instructions from the developer's counsel and lender's are sometimes provided to the surveyor to specify the required scope of the survey work and the required certification language. A sample of such joint instructions is provided in these materials as Appendix O.

APPENDIX

Sample Forms, Title Insurance Rule Excerpts and Selected Endorsements

A. Title and Survey Issues Checklists

MASTER CHECKLIST

<u>Project</u>	REAL ESTATE CHECKLIST		Date:
<i>TASK</i>	<i>RESP. PARTY</i>	<i>COMMENTS</i>	<i>STATUS</i>
1. Owner's/Mortgagee's Pro Forma policy of title insurance		-Express insurance – Utility/Other Easements -Express insurance – Oil/Gas/Coal Leases -Personal Property Coverage? Express Insurance on this? -Endorsements -Coverage Amount -NPAs -SAs	
2. Schedule of Leases and Legal Descriptions			
3. Joint Closing Instruction Letter to Title Company			
4. Subordination Agreements --BOP Contractor --Turbine Supplier			
5. Mechanic's Lien Coverage		-Endorsement available? -Indemnity required?	
6. Survey		- metes and bounds - certification - final	
7. Schedule of Permitted Title Exceptions			
8. Real Estate Opinion			
9. Regulatory Opinion			
10. [Environmental Opinion]		[if required]	
11. Subordination Agreements -Landowner Mortgages		-FHA Liens? -Other Special Lien Issues?	
12. Lease Clean Up Issues		-Option Exercise Instrument -Amendments -Joinder of Spouse? Others? -Title/Survey related items -Gaps/additional easements? -Evidence of Authority (Trusts/Entities)	
13. Oil, Gas and Coal Issues		--Coal Lease issues? -Endorsements? -Express coverage?	

		-waivers? -release/termination instruments? -Non Production Affidavits	
14. Lease/Easement Estoppels		-Lender? -Tax Equity?	
15. State Highway Access/Crossing Permits		-collection line crossings -transmission line crossings -driveways and aprons	
16. County Permits/Letters		-collection line crossings -transmission line crossings -driveways and aprons -no zoning letter or compliance letter -road crossings -no construction/development permit letter or compliance letter	
17. Other Crossing Permits		-Railroads -Federal Highways -Pipelines -Other Utility lines/Easements	
18. Interconnect Site		-Sale of Land to Interconnect Co. -Applicable Easements	
19. PPA Provider/ Hedge Provider		-2 nd Lien Issues? -Mortgage/Deed of Trust? -Mortgagee's Title Policy?	
20. O&M Site		-Land Purchase? -Lease? -Contiguity? -Data Access?	
[reserved]			
[reserved]			
21. Co-Tenancy Agt.		-Shared Facilities? -Shared Easements? -Agreement -Memo of Agreement	
22. State/Local Government Permits Schedule		-Obtained -To be Obtained	
23. Flood Plain Permits		-Insurance Issues	
[reserved]			
[reserved]			
24. Tax Abatements		--Local --State	
25. CRP Issues (Conservation Reserve Program)		- received damages estimates - final damages letter to come after construction complete	
26. Sales Tax Permits, Exemptions, Sale for resale certificates			
27. Mortgages/ Deeds of Trust and UCCs			

Post Construction Loan Closing Matters			
--RECEIPT OF TITLE POLICY			
A. Owners' Title Policy - Down Date		--Construction Completion Down Date Endorsements -- --Other Down Date Endorsements --As built easement tracts on T-Line Easements; amended exhibits to easements with owners for as built tract?	
B. Remaining crossings agreements			
C. Additional "Mortgagees"		- Notice to land owners if applicable - Tax equity as additional "Mortgagee" - [PPA provider or Hedge Provider as additional mortgagee if applicable]	
D. CRP Authority Final Letter		- final damages	
E. Final as built construction damages payments to landowners		-Additional Estoppels	
F. Payoff and release of construction loan/lien		-bills paid affidavits -lien waivers from BOP -Release of lien from lender and UCC-3 termination statements	
G. Tax Equity Funding		-Title Policy Bring-Down -Estoppels? -Opinion letter bring-downs -Final As Built Survey	

TITLE COMMITMENT CHECKLIST

Lease/Easement # / GF #	Lease (L)/ Easement (E)	LAND-OWNER	TITLE COMMITMENT SCHEDULE	TASK/ISSUE/ COMMENTS	RESP. PARTIES	STATUS
Lease 1 GF #	L		A	Do record title owners in policy & instrument signers match?		
				Does legal in policy match legal in instrument?		
				Is type of estate labeled correctly?		
				Are description and recording information for instrument correct?		
		B				
		C				
Tract 2 GF #	E		A	Do record title owners in policy & instrument signers match?		
				Does legal in policy match legal in instrument?		
				Is type of estate labeled correctly?		
				Are description and recording information for instrument correct?		
		B				
		C				

SUBORDINATION AGREEMENT CHECKLIST

LEASE #/ GF #	LAND-OWNER	Exception Number (Sch B or C, __)	LIEN HOLDER	LIEN RECORDING INFO (INCL. COUNTY)	CURRENT STATUS	RESP PARTY	NEED RE-LEASE OF LIEN?
1							
2							
3							

OIL AND GAS LEASE CHECKLIST

LEASE #	LANDOWNER	Exception # (B, __)	LESSEE/ RECORDING INFORMATION	PRODUCTION (Y/N?)	TASKS	CURRENT STATUS
1						
2						
3						

LEASE/EASEMENT -- TITLE CLEAN-UP/ AMENDMENT ISSUES

LEASE #/GF #	Issue	Task(s)	Responsible Party	Resolution
1				
2				
3				

B. Affidavit of Non-Production (State Bar Form)

Date:

Oil and Gas Lease

Date:

Lessor:

Lessee:

Property:

Term of the lease: **[[number]** years/**[other term as specified in the lease]** and as long thereafter as oil, gas, or other minerals are produced.

Owner:

[Buyer:]

[Lienholder:]

[Lessee:]

Owner on oath swears that the following statements are true and are within the personal knowledge of Owner:

Owner owns the Property. The Property **[include if applicable: , together with other real estate,]** was subject to the Oil and Gas Lease.

No drilling operations were begun during the term of the lease. No oil, gas, or any other mineral has previously been produced from the Property during the term of the lease. No oil, gas, or other mineral is now being produced from the Property.

Comment [1]: Select one of the following.

Drilling operations were conducted during the term of the lease, but no oil, gas, or any other mineral has previously been produced from the Property during the term of the lease. No oil, gas, or other mineral is now being produced from the Property.

Comment [2]: Or

Drilling operations were conducted during the term of the lease. Oil, gas, or other minerals have previously been produced from the Property during the term of the lease, but no oil, gas, or other mineral is now being produced from the Property.

Comment [3]: Or

Comment [4]: Continue with the following.

This affidavit is to establish of record that the Oil and Gas Lease expired by its terms on **[date]**.

This affidavit is made for [Buyer to rely on in buying the Property/Lienholder to rely on in making a loan against the Property/Lessee to rely on in leasing the Property].

Comment [5]: Include the following if applicable.

Comment [6]: Continue with the following.

[Name of owner]

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

Notary Public, State of Texas

C. Affidavit of Heirship (State Bar Form)

Date:

Decedent:

Property:

[First] Spouse:

[Second Spouse:]

Affiant:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My name is **[name of affiant]**, and I live at **[address]**. I am personally familiar with the family and marital history of **[name of decedent]** (Decedent), and I have personal knowledge of the facts stated in this affidavit.

2. I knew Decedent from **[date]** until **[date]**. Decedent died on **[date]**. Decedent's place of death was **[place of death]**. At the time of Decedent's death, Decedent's residence was **[address]**.

3. Decedent's marital history was as follows: **[describe marital history and, if the decedent's spouse is deceased, specify the date and place of the spouse's death]**.

4. Decedent had the following children: **[specify name, birth date, name of other parent, and current address of child or date of death of child and descendants of deceased child, as applicable, for each child]**.

5. Decedent did not have or adopt any other children and did not take any other children into Decedent's home or raise any other children, except: **[specify name[s] of child[ren] or state "none"]**.

6. Decedent's mother was: **[specify name, birth date, and current address or date of death of mother, as applicable]**.

7. Decedent's father was: **[specify name, birth date, and current address or date of death of father, as applicable]**.

Comment [7]: Include the following if the decedent was not survived by descendants.

Comment [8]: Include the following if the decedent was not survived by descendants or by both mother and father.

8. Decedent had the following siblings: **[specify name, birth date, and current address or date of death of each sibling and parents of each sibling and descendants of each deceased sibling, as applicable, or state "none"]**.

Comment [9]: Include the following if applicable.

9. The following persons have knowledge regarding Decedent, the identities of Decedent's children, if any, and parents or siblings, if any: **[specify names of persons with knowledge or state "none"]**.

Comment [10]: Continue with the following.

10. Decedent died without leaving a written will. **[Modify statement if the decedent left a written will.]**

11. There has been no administration of Decedent's estate. **[Modify statement if there has been administration of the decedent's estate.]**

12. Decedent left no debts that are unpaid, except: **[specify debts or state "none"]**.

13. There are no unpaid estate or inheritance taxes, except: **[specify unpaid taxes or state "none"]**.

14. To the best of my knowledge, Decedent owned an interest in the following real property: **[specify real property in which the decedent owned an interest or state "none"]**.

Comment [11]: Include the following if applicable.

15. The following were the heirs of Decedent: **[specify names of heirs]**.

Comment [12]: Continue with the following.

16. **[Include additional information as appropriate, such as size of the decedent's estate.]**

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by
[name of affiant].

Notary Public, State of Texas

D. Waiver of Surface Rights (State Bar Form)

Grantor waives and conveys to Grantee the right of ingress and egress to and from the surface of the Property relating to the portion of the mineral estate owned by Grantor.

Nothing herein, however, restricts or prohibits the pooling or unitization of the portion of the mineral estate owned by Grantor with land other than the Property; or the exploration or production of the oil, gas, and other minerals by means of wells that are drilled or mines that open on land other than the Property but enter or bottom under the Property, provided that these operations in no manner interfere with the surface or subsurface support of any improvements constructed or to be constructed on the Property.

E. LEASEHOLD POLICY - ENDORSEMENT

(T-4)(Owner)

Leasehold Owner Policy Endorsement T-4
ENDORSEMENT ATTACHED TO AND MADE A PART
OF POLICY OF TITLE INSURANCE
SERIAL NUMBER
ISSUED BY

_____ TITLE INSURANCE COMPANY
HEREIN CALLED THE COMPANY

File No. _____

Attached to and made a part of

Title Insurance Company Owner Policy Number
_____, dated the _____ day of
_____, 20__.

1. As used in this endorsement, the following terms shall mean:
 - a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case, as a result of a matter covered by this policy.
 - b. "Lease": the lease agreement described in Schedule A.
 - c. "Leasehold Estate": the right of possession for the Lease Term.
 - d. "Lease Term": the duration of the Leasehold Estate, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.
 - e. "Personal Property": chattels located on the land and property which, because of their character and manner of affixation to the land, can be severed from the land without causing appreciable damage to themselves or to the land to which they are affixed.
 - f. "Remaining Lease Term": the portion of the Lease Term remaining after the insured has been Evicted as a result of a matter covered by this policy.
 - g. "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the land by the Lease that have been built at the insured's expense or in which the insured has an interest greater than the right to possession during the Lease Term.

2. The provisions of subsection (b) of Section 7 of the Conditions and Stipulations shall not apply to any Leasehold Estate covered by this policy.

3. Valuation of Estate or Interest Insured

If, in computing loss or damage, it becomes necessary to value the estates or interests of the insured as the result of a covered matter that results in an Eviction, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The insured claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.

4. Additional items of loss covered by this endorsement:

If the insured is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the insured, but not to the extent that the same are included in the valuation of the estates or interests insured by this policy.

a. The reasonable cost of removing and relocating any Personal Property that the insured has the right to remove and relocate, situated on the land at the time of Eviction, the cost of transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation.

b. Rent or damages for use and occupancy of the land prior to the Eviction which the insured as owner of the Leasehold Estate is obligated to pay to any person having paramount title to that of the lessor in the Lease.

c. The amount of rent that, by the terms of the Lease, the insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the insured has been Evicted.

d. The fair market value, at the time of the Eviction, of the estate or interest of the insured in any lease or sublease made by the insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

e. Damages that the insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease made by the insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements caused by the Eviction.

f. Reasonable costs incurred by the insured to secure a replacement leasehold equivalent to the Leasehold Estate.

g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction.

Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, landscaping costs and fees, costs and interest on loans for the acquisition and construction.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____

(T-5)(Mortgagee)

Leasehold Mortgagee Policy Endorsement T-5

ENDORSEMENT ATTACHED TO AND MADE A PART
OF MORTGAGEE'S POLICY OF TITLE INSURANCE
SERIAL NUMBER
ISSUED BY
_____ TITLE INSURANCE COMPANY
HEREIN CALLED THE COMPANY

File No. _____

Attached to and made a part of

_____ Title Insurance
Company Mortgagee Policy Number _____, dated the
_____ day of _____, 20____.

1. As used in this endorsement, the following terms shall mean:
 - a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case, as a result of a matter covered by this policy.
 - b. "Lease": the lease agreement described in Schedule A.
 - c. "Leasehold Estate": the right of possession for the Lease Term.

d. "Lease Term": the duration of the Leasehold Estate, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.

e. "Personal Property": chattels located on the land and property which, because of their character and manner of affixation to the land, can be severed from the land without causing appreciable damage to themselves or to the land to which they are affixed.

f. "Remaining Lease Term": the portion of the Lease Term remaining after the insured has been Evicted as a result of a matter covered by this policy.

g. "Tenant": the tenant under the Lease and, after acquisition of all or any part of the estate or interest in the land described in Schedule A in accordance with the provisions of Section 2(a) of the Conditions and Stipulations of this policy, the insured claimant.

h. "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the land by the Lease that have been built at the insured's expense or in which the insured has an interest greater than the right to possession during the Lease Term.

2. Valuation of Estate or Interest Insured

If, in computing loss or damage, it becomes necessary to value the estates or interests insured by this policy as the result of a covered matter that results in an Eviction of the Tenant, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The insured claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.

3. Additional items of loss covered by this endorsement:

If the insured acquires all or any part of the estate or interest in the land described in Schedule A in accordance with the provisions of Section 2(a) of the Conditions and Stipulations of this policy and thereafter is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the insured, but not to the extent that the same are included in the valuation of the estates or interests insured by this policy.

a. The reasonable cost of removing and relocating any Personal Property that the insured has the right to remove and relocate, situated on the land at the time of Eviction, the cost of transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation.

b. Rent or damages for use and occupancy of the land prior to the Eviction which the insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

c. The amount of rent that, by the terms of the Lease, the insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and

Tenant Leasehold Improvements from which the insured has been Evicted.

d. The fair market value, at the time of the Eviction, of the estate or interest of the insured in any lease or sublease made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

e. Damages that the insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements caused by the Eviction.

f. Reasonable costs incurred by the insured to secure a replacement leasehold equivalent to the Leasehold Estate.

g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, and landscaping costs.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____

F. AMENDMENT TO EXCEPTION TO AREAS AND BOUNDARIES

(P-2)

a. General Instructions

In either an Owner or Mortgagee Policy, when the Insured desires to have amended the exception as to area and boundaries, (i.e. Item 2 of Schedule B) to delete all save "shortages in area", a title insurance company may accept an existing real property survey and not require a new survey when providing area and boundary coverage if the title insurance company is willing to accept evidence of an existing real property survey, and an affidavit verifying the existing survey, notwithstanding the age of the survey or the identity of the person for whom the survey was prepared. If the transaction involves Residential Real Property, the affidavit verifying the existing survey shall be the Form T-47 Residential Real Property Affidavit. The policy to be issued shall cover the same land as described in the evidence of the existing real property survey. The Company may, if it considers the additional hazard insurable, amend such exception (the Company may waive the requirement of a survey in connection with the issuance of its Mortgagee Policy insuring the lien on a condominium unit), by indicating same in Schedule B of the policy or by endorsement as provided herein upon payment of the premium prescribed in R-16 in the case of an Owner Policy. The survey must be acceptable to the Company.

....

R-16 - Amendment of Exception as to Area, Boundaries, etc.----

Applicable only as provided in Rules P-2 and P-8.a.(2) - the Exception as to area and boundaries, etc., may be amended in an Owner or Mortgagee Policy upon the payment of an additional premium (in the case only of an Owner Policy) therefore equivalent to (1) 15% of the Basic Rate in an Owner Policy (T-1), or (2) 5% of the Basic Rate in a Residential Owner Policy of Title Insurance - One-to-Four Family Residences (Form T-1R), with a minimum premium of \$20.00.

G. ACCESS ENDORSEMENT

(T-23)

Attached to Policy No.

Issued by

BLANK TITLE INSURANCE COMPANY

HEREIN CALLED COMPANY

The Company insures against loss or damage sustained by the insured if, at Date of Policy: (i) the land does not abut and have both actual vehicular and pedestrian access to and from [insert name of single street, road, or highway] (the "Street"), or (ii) the Street is not physically open.

This endorsement is made a part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

P-54 - ACCESS ENDORSEMENT (T-23)

A Company may issue its Access Endorsement (T-23) on or after the date Rate Rule R-30 is effective to a Mortgagee Policy (T-2) or Owner Policy (T-1) on land which contains improvements and which is not residential real property, if its underwriting requirements are met and if it is paid the premium, if any, prescribed in Rate Rule R-30. The Company may add any exception to the endorsement that it considers, in its sole discretion, to be appropriate. The Company shall delete any insuring provision or portion thereof if it does not consider that risk acceptable. Any insured matter covered in the Access Endorsement (T-23) may be insured only by the use of this endorsement. A Company may not issue its Access Endorsement (T-23) on residential real property.

R-30 - PREMIUM FOR ACCESS ENDORSEMENT (T-23)

When the Access Endorsement (T-23) is issued with a Mortgagee Policy of Title Insurance (T-2) or Owner Policy (T-1) in accordance with Rule P-54, the premium for the Access Endorsement (T-23) shall be \$100 for each policy.

H. CONTIGUITY ENDORSEMENT

(T-25)

Attached to Policy No.

Issued by

BLANK TITLE INSURANCE COMPANY

HEREIN CALLED THE COMPANY

The Company hereby insures against loss or damage sustained by the insured by reason of:

(1) the failure [of the _____ boundary line of Parcel A] of the land to be contiguous to [the _____ boundary line of Parcel B] [for more than two parcels, continue as follows: "; of [the _____ boundary line of Parcel B] of the land to be contiguous to [the _____ boundary line of Parcel C]" and so on until all contiguous parcels described in the policy have been accounted for]; or

(2) the presence of any gaps, strips or gores separating any of the contiguous boundary lines described above.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

P-56 - CONTIGUITY ENDORSEMENT (T-25)

A Company may issue its Contiguity Endorsement (T-25) on or after the date that Rate Rule R-32 is effective to a concurrently issued Mortgagee Policy (T-2) or Owner Policy (T-1) on land which is not residential real property; if title to each tract described in the Contiguity Endorsement (T-25) is insured by the policy; if the Company receives a survey acceptable to it; if its underwriting requirements are met and if it is paid the premium, if any, prescribed in Rate Rule R-32. The Company may add any exception to the endorsement that it considers, in its sole discretion, to be appropriate. Any matter covered in the Contiguity Endorsement (T-25) may be insured only by the use of this endorsement. A Company may not issue its Contiguity Endorsement (T-25) on residential real property.

R-32 - PREMIUM FOR CONTIGUITY ENDORSEMENT (T-25)

When the Contiguity Endorsement (T-25) is issued with a Mortgagee Policy of Title Insurance (T-2) or Owner Policy (T-1) in accordance with Rule P-56, the premium for the Contiguity Endorsement (T-25) shall be \$100 for each policy.

I. ADDITIONAL INSURED ENDORSEMENT

(T-26)

Attached to and Made a Part of
Policy No. _____
Issued by

BLANK TITLE INSURANCE COMPANY

The policy is hereby amended by adding as a named insured therein:

This endorsement does not extend the coverage of the policy to any later date than Date of Policy, nor does it impose any liability on the Company for loss or damage resulting from (1) failure of such added insured to acquire an insurable estate or interest in the land, or (2) any defect, lien or encumbrance attaching by reason of the acquisition of an estate or interest in the land by such added insured.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

P-57 - ADDITIONAL INSURED ENDORSEMENT (T-26)

A Company may issue its Additional Insured Endorsement (T-26) on or after the date that Rate Rule R-33 is effective to an Owner Policy by naming a person as an additional insured in the endorsement, if (1) its underwriting requirements are met, (2) it is paid the premium, if any, prescribed in Rate Rule R-33, and (3) the additional insured is (a) the trustee or successor trustee of a Living Trust to whom the insured transfers the title after Policy Date, and/or the beneficiaries of the Living Trust, or (b) any partner, member or stockholder that acquires the interests of the other owners of the insured in accordance with the terms and provisions of a written agreement in effect at Date of Policy, or (c) a family partnership or family corporation solely composed of or owned by members of the insured's family and the insured. Any matter covered in the Additional Insured Endorsement (T-26) may be insured only by the use of this endorsement.

R-33 - PREMIUM FOR ADDITIONAL INSURED ENDORSEMENT (T-26)

When the Additional Insured Endorsement (T-26) is issued with an Owner Policy in accordance with Rule P-57, the premium for the Additional Insured Endorsement (T-26) shall be 10% of the Basic Rate for each policy provided that the minimum premium shall be not less than \$25.00.

J. NON-IMPUTATION ENDORSEMENT

(T-24)

NON-IMPUTATION ENDORSEMENT (T-24)

Attached to and Forming a Part of _____ Policy of Title Insurance
No. _____

Issued by
BLANK TITLE INSURANCE COMPANY
HEREIN THE COMPANY

The Company hereby agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or knowledge, as of Date of Policy, of

[identify exiting or contributing partner(s) of the insured partnership entity, member(s) or manager(s) of the insured limited liability company entity, or officer(s) and/or director(s) of the insured corporate entity],

whether or not imputed to the insured by operation of law, but only to the extent that **[identify the "incoming" partners, members or shareholders]**

acquired its interest in the insured as a purchaser for value without actual knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

This endorsement is made a part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all the terms and provisions of the policy and of any prior endorsements.

R-31 PREMIUM FOR NON-IMPUTATION ENDORSEMENT (T-24).

When the Non-Imputation Endorsement (T-24) is issued with an Owner Policy (T-1) in accordance with Rule P-55, the premium for the Non-Imputation Endorsement (T-24) shall be 5% of the Basic Rate for each policy provided that the minimum premium shall be not less than \$25.00.

P-55. NON-IMPUTATION ENDORSEMENT (T-24)

A Company may issue its Non-Imputation Endorsement (T-24) on or after the date that Rate Rule R-31 is effective to a concurrently issued Owner Policy (T-1) on land which is not residential real property, if its underwriting requirements are met and if it is paid the premium, if any, prescribed in Rate Rule R-31. The Company may add any exception to the endorsement that it considers, in its sole discretion, to be appropriate. Any matter covered in the Non-Imputation Endorsement (T-24) may be insured only by the use of this endorsement. A Company may not issue its Non-Imputation Endorsement (T-24) on residential real property.

K. RESTRICTIONS, ENCROACHMENTS, MINERALS ENDORSEMENT

(T-19) (Mortgagee)

Restrictions, Encroachments, Minerals Endorsement (T-19)

**ENDORSEMENT
Attached to Policy No.**

**Issued by
*BLANK TITLE INSURANCE COMPANY***

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following:
 - a. Covenants, conditions, or restrictions under which the lien of the Insured Mortgage can be divested, subordinated, or extinguished or its validity, priority, or enforceability impaired.
 - b. Unless expressly excepted in Schedule B
 - i. Present violations on the Land of any enforceable covenants, conditions, or restrictions, or existing improvements on the Land that violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
 - ii. Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land that, in addition, (A) establishes an easement on the Land, (B) provides a lien for liquidated damages, (C) provides for a private charge or assessment, (D) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.
 - iii. Any encroachment of existing improvements located on the Land onto adjoining land or any encroachment onto the Land of existing improvements located on adjoining land.
 - iv. Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - v. Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records.
2. Any future violation on the Land of any existing covenants, conditions, or restrictions occurring prior to the acquisition of Title by the Insured, provided the violation results in:
 - a. invalidity, loss of priority, or unenforceability of the lien of the Insured Mortgage;
or
 - b. loss of Title if the Insured shall acquire Title in satisfaction of the Indebtedness.
3. Damage to existing improvements, including lawns, shrubbery, or trees, located or encroaching on that portion of the Land subject to any easement excepted in Schedule

B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.

4. Damage to improvements, including lawns, shrubbery, or trees, located on the Land on or after Date of Policy resulting from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.
5. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.
6. Any final court order or judgment denying the right to maintain any existing improvements on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they do not include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.b.i. and 6, the words "covenants, conditions, or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not excepted in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

RESTRICTIONS, ENCROACHMENTS, MINERALS ENDORSEMENT

(T-19.1) (Owner)

Restrictions, Encroachments, Minerals Endorsement – Owner Policy (T-19.1)

ENDORSEMENT
Attached to Policy No.
Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B:
 - a. Present violations on the Land of any enforceable covenants, conditions, or restrictions, or any existing improvements on the Land that violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
 - b. Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land that, in addition, (i) establishes an easement on the Land, (ii) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant, or (iii) provides a right of reentry, possibility of reverter, or right of forfeiture because of violations on the Land of any enforceable covenants, conditions, or restrictions.
 - c. Any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land.
 - d. Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - e. Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records.
2. Damage to existing buildings that are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.
3. Damage to improvements (excluding lawns, shrubbery, or trees) located on the Land on or after Date of Policy resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.
4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment, other than fences, landscaping, or driveways, excepted in Schedule B.
5. Any final court order or judgment denying the right to maintain any existing building on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they do not include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.a. and 5, the words "covenants, conditions, or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not excepted in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous

endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

P-50. Restrictions, encroachments, minerals endorsement. A. A Company may issue its Restrictions, Encroachments, Minerals Endorsement ([T-19](#)) to a Mortgagee Policy ([T-2](#)) on residential real property, if its underwriting requirements are met and if it is paid the premium prescribed in Sub-Section A. of Rate Rule [R-29](#). The Company shall delete any insuring provision if it does not consider that risk acceptable. Any insured matter covered in the Restrictions, Encroachments, Minerals Endorsement (T-19) may be insured only by the use of this Restrictions, Encroachments, Minerals Endorsement (T-19).

B. A Company may issue its Restrictions, Encroachments, Minerals Endorsement (T-19) to a Mortgagee Policy ([T-2](#)) on land which is not residential real property, if its underwriting requirements are met and if it is paid the premium prescribed in Sub-Section B. of Rate Rule [R-29](#). The Company shall delete any insuring provision if it does not consider that risk acceptable. Any insured matter covered in the Restrictions, Encroachments, Minerals Endorsement ([T-19](#)) may be insured only by the use of this Restrictions, Encroachments, Minerals Endorsement ([T-19](#)).

C. A Company may issue its Restrictions, Encroachments, Minerals Endorsement –

Owner Policy (T-19.1) on or after the date that Rate Rule R-29 is amended effective to an Owner Policy (T-1) on land which is not residential real property, if its underwriting requirements are met and if it is paid the premium, if any, prescribed in Sub-Section C. of Rate Rule R-29. The Company shall delete any insuring provision if it does not consider that risk acceptable. Any insured matter covered in the Restrictions, Encroachments, Minerals Endorsement – Owner Policy (T-19.1) may be insured only by the use of this Restrictions, Encroachments, Minerals Endorsement – Owner Policy (T-19.1).

R-29. PREMIUM FOR RESTRICTIONS, ENCROACHMENTS, MINERALS ENDORSEMENT (T-19) and PREMIUM FOR RESTRICTIONS, ENCROACHMENTS, MINERALS ENDORSEMENT OWNER POLICY (T-19.1)

- A. When the Restrictions, Encroachments, Minerals Endorsement (T-19) is issued with a Mortgagee Policy of Title Insurance (T-2) on residential real property in accordance with Rule P-50, the premium for the Restrictions, Encroachments, Minerals Endorsement (T-19) shall be 5% of the Basic Rate for a single issue policy provided that the minimum premium shall be not less than \$25.00.
- B. When the Restrictions, Encroachments, Minerals Endorsement (T-19) is issued with a Mortgagee Policy of Title Insurance (T-2) on land which is not residential real property, in accordance with Rule P-50, the premium for the Restrictions, Encroachments, Minerals Endorsement (T-19) shall be 10% of the Basic Rate for a single issue policy provided that the minimum premium shall be not less than \$25.00.
- C. When the Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1) is issued with an Owner Policy of Title Insurance (T-1) on land which is not residential real property, in accordance with Rule P-50, the premium for the Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1) shall be 15% of the Basic Rate for a single issue policy or shall be 10% of the Basic Rate for a single issue policy if an amendment of exception to area and boundaries pursuant to Procedural Rule P-2 or Procedural Rule P-8.a.(2) is also purchased in accord with Rate Rule R-16. In either event, the minimum premium shall be not less than \$25.00. A Company may not issue its Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1) on residential real property.

L. INSURING AROUND

(P-11)

Article 9.08 of the Texas Title Insurance Act - 1967, defines "Insuring Around" as follows:

" 'Insuring Around' is defined as the willful issuance of a title binder or title insurance policy showing no outstanding enforceable recorded liens while the Title Insurance Company knows that in fact a lien or liens are of record against the real property, and shall be prohibited, except under circumstances as the commissioner under his or her rulemaking powers shall approve. A title insurance company knows that an outstanding enforceable recorded matter exists if it determines that the matter is valid and enforceable based on the examination of the title pursuant to which the title binder or title insurance policy is issued. In its discretion, the title insurance company may determine the insurability of title and those matters which it considers to be insurable under the title binder or title insurance policy; provided, however, that insuring around enforceable recorded liens shall be prohibited except as allowed by regulation."

Pursuant to the authority and instruction given the commissioner by the Legislature as above stated, the commissioner hereby sets forth the following rule to be followed by all title insurance companies and title insurance agents in complying with such Article 9.08, viz.:

a. "Willful issuance" shall be defined as the issuance of a title insurance policy or binder with intent to conceal information by suppressing or withholding title information, the consequence of which could result in a monetary loss either to the title insurance company or to the Insured under the policy or binder.

b. "Insuring Around" shall not be construed as prohibiting the issuer of a title insurance policy or binder from issuing a policy or binder without taking exception to a specific lien, or liens, of record when sound underwriting standards and practices would not otherwise prohibit such issuance. Specifically, but not limited to, the term "insuring around" shall not include the issuance of a title insurance policy or binder under the following circumstances:

- (2) Where liens securing obligations which, though not released of record, have been discharged to the satisfaction of the title insurance company or agent, and the title insurance company or agent has evidence in its file that the lien has been paid in full;
- (3) Where funds are in escrow to pay same, and a recordable release is forthcoming and will be filed for record in the ordinary course of business;
- (4) Where liens, in the opinion of counsel, are barred by the statute of limitation;

- (5) Where liens are inchoate and sufficient indemnity executed by a financial institution regulated by State or Federal Government, such as a bank, savings and loan association, life insurance company or surety company has been delivered to, and accepted by, the title insurance company, or where sufficient funds have been deposited with the title insurance company or its agent to assure the ultimate payment and release of record of the liens; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its file;
- (6) Where sufficient indemnity executed by a financial institution regulated by State or Federal Government, such as a bank, savings and loan association, life insurance company or surety company is delivered to, and accepted by, the title insurance company, or where sufficient funds have been deposited with the title insurance company or its agent to protect against mechanic's liens by affidavits which are being contested or disputed; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its files;
- (7) Where a title insurance company has previously issued a policy without taking exception to a specific lien and is called upon to issue a new policy and is already obligated under such prior policy, and will not increase its liability or exposure to the lien by the issuance of such new policy; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its files;
- (8) Where a title insurance company has erred as in (6) above, and another title insurance company discovers the error in preparing to make a subsequent issuance, the second title insurance company may rely upon an indemnity agreement and/or an agreement to defend by the first company, and insure against such lien; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its files;
- (9) When issuing a Mortgagee Policy insuring the validity and priority of a lien, the issuer shall not be required to itemize liens and leases that affect the title to the estate or interest, which are subordinate to the lien insured, either by express subordination or by operation of law, unless requested to do so in writing by the insured in which case paragraph 4 of Schedule B may be deleted, and the subordinate lien(s) and lease(s) shall be excepted in Schedule B and the Company may insure therein such lien(s) and lease(s) are subordinate; however, when issuing a Mortgagee's Title Policy Binder on Interim Construction Loan, the Company shall be required to show all subordinate liens in Schedule B-Part 2 of said binder, but a statement may be made therein that such lien(s) is subordinate. When insuring that a lien or lease is subordinate to the lien of the insured mortgage, the Company shall state: "Company insures the insured against loss, if any, sustained by the

insured under the terms of the Policy if this item is not subordinate to the lien of the insured mortgage."

- (10) In instances where federal estate taxes and state inheritance taxes have not been paid, but the title insurance company:
 - (a) Examines a balance sheet of the estate and determines that the estate will have no difficulty in paying its estate and inheritance taxes, and the title insurance company takes an indemnity from responsible persons protecting itself against loss due to unpaid estate and inheritance taxes, or
 - (b) Requires sufficient money or other securities to pay estate and inheritance taxes to be left in escrow with it pending payment of such taxes, or pending the receipt of waivers of lien from the taxing authority or authorities, or
 - (c) Examines the balance sheet of the estate and determines the estate will have no difficulty in paying its inheritance and estate taxes, and the title insurance company obtains a letter from a responsible person agreeing to see that such taxes are paid out of the assets of the estate.

M. EXPRESS INSURANCE

P-39. Express Insurance.

(a) **Encroachments.** If Company amends its Area and Boundary Exception, pursuant to Procedural Rule P-2, it may except, pursuant to Procedural Rule P-5, to those matters shown on the survey that it deems to cause a possible defect in title. The Company may, if it deems the risk insurable as to encroachments, add the following language after the exception:

"Company insures the insured against loss, if any, sustained by the insured under the terms of this Policy by reason of a final, non-appealable judgment of a court of competent jurisdiction that orders the removal of this improvement because it encroaches over or into _____. Company agrees to provide defense to the insured in accordance with the terms of this Policy if suit is brought against the insured to require the removal of this improvement because it encroaches as herein stated."

(b) **Possible Defects.** If Company determines that a title matter may cause a possible defect in title, it may except, pursuant to Procedural Rule P-5, to the matter in Schedule B, and, if it determines that the risk is insurable, it may add the following language after the exception:

"Company insures the Insured against loss, if any, sustained by the insured under the terms of this Policy by reason of a final, non-appealable judgment of a court of competent jurisdiction that divests the Insured of its interest as Insured because of this right, claim, or interest. Company agrees to provide defense to the Insured in accordance with the terms of this Policy if suit is brought against the Insured to divest the Insured of its interests as Insured because of this right, claim, or interest."

or

"Company insures the Insured against loss, if any, sustained by the insured under the terms of this Policy by reason of the enforcement of said rights as to the land. Company agrees to provide defense to the Insured in accordance with the terms of this Policy if suit is brought against the Insured to enforce said rights as to the land."

(c) **Liens.**

(1) If Company intends to provide insurance against an enforceable lien, it shall comply with P-11. If Company then determines to issue without exception to lien pursuant to P-11b(1), (4), (5), (6), (7), it may show the lien in Schedule B of the Policy and then may state:

"Exception No. _____ is hereby deleted. Company provides insurance as to said lien in accordance with the terms of this Policy."

(2) If Company then determines to issue with exception to the lien after otherwise complying with P-11, it may, pursuant to Procedural Rule P-5, show the lien in Schedule B and may state one of the following:

(a) If the Lien may only be foreclosed judicially:

"Company insures the Insured against loss, if any, sustained by the insured under the terms of this Policy by reason of a final, non-appealable

judgment of a court of competent jurisdiction that orders foreclosure of said lien on the land. Company agrees to provide defense to the Insured in accordance with the terms of this Policy if suit is brought against the insured to foreclose said lien on the land."

or

(b) If the lien may be foreclosed nonjudicially:

"Company insures the Insured against loss, if any, sustained by the insured under the terms of this Policy by reason of a foreclosure of said lien on the land. Company agrees to provide defense to the Insured in accordance with the terms of this Policy if suit is brought against the insured to foreclose said lien on the land and to take action in accordance with the terms of the policy if the holder of the lien commences a foreclosure action based on said lien."

The provisions of this Rule shall not modify or diminish the requirements of P-11.

N. DELIVERY OF PRO FORMA POLICIES AND PROMULGATED FORMS

(P-52)

1. For purposes of this rule, a "pro forma policy" is an Owner or Mortgagee Policy prepared prior to payment for, issuance and delivery of the policy, with completed Schedules A and B, showing the proposed insured, the amount of insurance, the exceptions that are proposed to be placed in the final policy to be issued, and the name of the title insurance company and title insurance agent.

2. A Company may not prepare and deliver to a proposed insured for review a proforma policy unless (a) the land is not residential real property and the proposed amount of insurance is \$500,000 or more, and (b) each page of the completed Schedules A and B conspicuously states "This is a Pro Forma Policy furnished to or on behalf of the party proposed to be insured for discussion only. It does not reflect the present status of title and is not a commitment to insure the estate or interest as shown herein, nor does it evidence the willingness of the Company to provide any coverage shown herein. Any such commitment must be an express written undertaking issued on the appropriate forms of the Company."

3. A Company may provide a proposed insured with a copy of any promulgated title insurance form, or a foreign language translation of such form. Any translation must conform to the following conditions: (a) the translation must not be misleading, (b) an English copy of the promulgated form also must be furnished, and (c) the translation must include the following conspicuous provision at the top of the first page in both English and the language into which the form has been translated: "This translation of (name of promulgated form) is furnished to you in order to assist you in understanding its terms. This translation is not an official form promulgated by the Texas Department of Insurance. It is not a report or opinion of title, an agreement to insure, or a representation of the insurance you may receive. If this translation conflicts with the form promulgated by the Texas Department of Insurance, the promulgated form will control in all respects."

O. TITLE INSURANCE PREMIUM RATE CHARTS

a. TEXAS TITLE INSURANCE PREMIUM RATES

(1) EFFECTIVE FEBRUARY 1, 2007

Policies Up To And Including	Basic Premium	Policies Up To And Including	Basic Premium	Policies Up To And	Basic Premium	Policies Up To And Including	Basic Premium
\$10,000	\$229	\$32,500	\$383	\$55,000	\$536	\$77,500	\$690
10,500	233	33,000	386	55,500	539	78,000	694
11,000	235	33,500	390	56,000	544	78,500	698
11,500	239	34,000	393	56,500	547	79,000	702
12,000	243	34,500	397	57,000	550	79,500	703
12,500	246	35,000	400	57,500	554	80,000	707
13,000	250	35,500	404	58,000	558	80,500	711
13,500	254	36,000	407	58,500	560	81,000	715
14,000	257	36,500	410	59,000	564	81,500	717
14,500	260	37,000	413	59,500	567	82,000	721
15,000	262	37,500	417	60,000	571	82,500	725
15,500	266	38,000	421	60,500	575	83,000	729
16,000	270	38,500	425	61,000	578	83,500	731
16,500	274	39,000	427	61,500	581	84,000	734
17,000	277	39,500	431	62,000	585	84,500	739
17,500	281	40,000	434	62,500	589	85,000	742
18,000	285	40,500	438	63,000	591	85,500	745
18,500	287	41,000	440	63,500	594	86,000	748
19,000	290	41,500	445	64,000	598	86,500	752
19,500	293	42,000	448	64,500	602	87,000	756
20,000	298	42,500	452	65,000	605	87,500	759
20,500	301	43,000	454	65,500	608	88,000	762
21,000	305	43,500	458	66,000	612	88,500	766
21,500	308	44,000	461	66,500	617	89,000	770
22,000	312	44,500	465	67,000	620	89,500	772
22,500	315	45,000	469	67,500	621	90,000	775
23,000	318	45,500	472	68,000	625	90,500	779
23,500	321	46,000	475	68,500	629	91,000	783
24,000	325	46,500	479	69,000	632	91,500	787
24,500	328	47,000	481	69,500	635	92,000	789
25,000	332	47,500	485	70,000	640	92,500	793
25,500	335	48,000	489	70,500	644	93,000	797

26,000	339	48,500	493	71,000	647	93,500	801
26,500	342	49,000	496	71,500	649	94,000	802
27,000	345	49,500	499	72,000	652	94,500	806
27,500	348	50,000	503	72,500	656	95,000	811
28,000	352	50,500	506	73,000	660	95,500	814
28,500	355	51,000	508	73,500	663	96,000	816
29,000	359	51,500	512	74,000	667	96,500	820
29,500	362	52,000	516	74,500	671	97,000	824
30,000	366	52,500	520	75,000	674	97,500	828
30,500	369	53,000	523	75,500	676	98,000	830
31,000	373	53,500	527	76,000	680	98,500	834
31,500	376	54,000	530	76,500	683	99,000	838
32,000	379	54,500	533	77,000	687	99,500	841
						100,000	843

Premiums shall be calculated as follows for policies in excess of \$100,000:	
<p>1. For policies of \$100,001 - \$1,000,000</p> <p>Basic Premium</p> <p>(1) Subtract \$100,000 from policy amount.</p> <p>(2) Multiply result in 1.(1) by \$.00534 and round to nearest whole dollar.</p> <p>(3) Add \$843 to result in 1.(2).</p> <p>2. For Policies of \$1,000,001 - \$5,000,000</p> <p>Basic Premium</p> <p>(1) Subtract \$1,000,000 from policy amount.</p>	<p>4. For policies of \$15,000,001 - \$25,000,000</p> <p>Basic Premium</p> <p>(1) Subtract \$15,000,000 from policy amount.</p> <p>(2) Multiply result in 4.(1) by \$.00257 and round to nearest whole dollar.</p> <p>(3) Add \$59,409 to result in 4.(2)</p> <p>5. For policies in excess of \$25,000,000</p> <p>Basic Premium</p> <p>(1) Subtract \$25,000,000 from policy amount.</p>

<p>(2) Multiply result in 2.(1) by \$.00439 and round to nearest whole dollar.</p> <p>(3) Add \$5,649 to result in 2.(2).</p> <p>3. For policies of \$5,000,001 - \$15,000,000</p> <p>Basic Premium</p> <p>(1) Subtract \$5,000,000 from policy amount.</p> <p>(2) Multiply result in 3.(1) by \$.00362 and round to nearest whole dollar.</p> <p>(3) Add \$23,209 to result in 3.(2).</p>	<p>(2) Multiply result in 5.(1) by \$.00154 and</p> <p>(ii) round to nearest whole dollar.</p> <p>(3) Add \$85,109 to result in 5.(2).</p>
--	---

P. JOINT INSTRUCTIONS TO SURVEYOR AND CERTIFICATION LANGUAGE

[Date]

[Surveyor]

RE: Joint Instruction Letter for Completion of ALTA Survey for _____ (“Project Company”) in _____ County, Texas (the “Project”)

Dear _____:

You have been retained by Project Company to provide the ALTA survey for the Project. This letter will set forth the requirements for the completion of the survey and is being jointly provided by the undersigned as counsel for the Project Company and _____ (“Collateral Agent”) for the lenders, respectively. In addition to your usual and customary practices and certifications, please provide or comply with the following:

1. The map or plat and the survey on which it is based shall be made, and shall be certified to be, in accordance with “Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys,” jointly established and adopted by ALTA, ACSM and NSPS in 2005, and should include items 1, 2, 3, 4, 6, 7(a), 8, 10, 11(a), 13, 16, and 18 (and as further specified below) of Table A thereof. Please also state that pursuant to the accuracy standards as adopted by ALTA, NSPS and ACSM and in effect on the date of this certification, you certify that the positional uncertainties resulting from the survey measurement made on the survey do not exceed the allowable positional tolerance.
2. Locate and show on survey all proposed improvements of the Project, including wind turbine generators, overhead transmission lines, access routes, underground distribution/collection cable routes, underground communication system routes, substations, operations and maintenance buildings, parking lots, laydown areas, and related improvements and state these are shown and that the boundary perimeter within which all improvements and proposed improvements are located is shown on survey. Please state that the sites of the Wind Turbine Generators are as specified in the Determinations of No Hazard issued by the Federal Aviation Administration.
3. Locate any overhead transmission lines and state they are shown on the survey. Also please note the location of access routes, underground

distribution/collection cable routes, and underground communication system routes, pipeline routes, and state that they are shown on survey.

4. Locate and show on survey any and all water, electricity, gas, telephone and sanitary sewer companies serving the site and state these are shown on survey. Please also state which were visible as providing services on the site and which were not visibly serving the site. Please contact TEXAS ONE CALL for a locate request for buried utilities in the specific areas in _____ County, Texas, that comprise the Project and set out such call was made and the confirmation number obtained. Also contact DIG-TESS for a locate request for buried utilities in the specific areas in _____ County, Texas, and set out such call was made and the confirmation number obtained. Any information obtained will need to be shown. Any and all above-ground utility lines will need to be shown (except service drops to residences, service drops for agricultural uses, and service drops to oil well pump jacks).
5. Please contact the County Commissioners of _____ County, Texas, and determine whether or not there are any safety buffer zones, setback requirements or building setback requirements affecting the improvements or proposed improvements and set out findings in your certification notes.
6. Please state that, except as shown, the proposed improvements do not encroach on or interfere with adjacent property or existing recorded easements, recorded or as otherwise shown on the survey or other similar rights, recorded or as otherwise shown on the survey (whether on, above or below ground), and that there are no gaps, gores, projections, protrusions, or other survey defects, except as shown on the survey.
7. Set out that the site is internally contiguous without break, gap or interruption.
8. State whether or not there are any special earthquake hazard zones affecting the site. Please set out and show on survey any special flood hazard areas inundated by 100-year floods affecting the improvements and proposed improvements. Also please reference any floor insurance rate maps used.
9. Include descriptions of any monuments found or set.
10. State that the ALTA/ACSM Table A items listed, together with the locations of the existing improvements, which are being covered by the ALTA/ACSM accuracy standards, are for the Boundary Perimeter, and for the areas within a CORRIDOR around the improvements and proposed improvements as shown therein.
11. Please state the said CORRIDORS around the improvements and proposed improvements are: a) a [_____] radius], centered on the Turbine locations; b) a [_____] wide strip, lying [_____] on both sides of the centerline of the access

routes, and proposed access routes; and c) a [____' wide strip, lying ____'] on both sides of the centerline of the overhead transmission lien and proposed overhead transmission line.

12. Set out that any additional existing improvements shown are based on Aerial Topographic Mapping provided by AEROMETRIC, Inc., Fort Collins, Colorado.
13. Please state whether or not there is any evidence within the said CORRIDORS that the area was used as a solid waste dump, sump or sanitary landfill.
14. Also, please state that, except as shown, your investigation of said CORRIDORS did or did not disclose any evidence of development, drilling, mining, production, or related activities with respect to oil, gas or other mineral resources.
15. Set out on the survey the location of any existing, producing, or unplugged oil and gas well on the Premises or any location of a oil and gas well being drilled or that has been staked for drilling.
16. Attach to and make part of the survey a certification, signed and sealed by you and certifying those matters as set forth and substantially in the form as follows:

“To: [Project Company], _____ as Administrative Agent and as Collateral Agent, for and on behalf of the lenders [_____ and _____], [_____ tax equity investors], [Title Company], their affiliates, successors and assigns.

The undersigned Registered Professional Land Surveyor (the “Surveyor”) hereby certifies that on the ____ day of _____, 200__:

(a) this plat of survey and the property description set forth hereon are true and correct and prepared from an actual on-the-ground survey of the real property (the “Property”) shown hereon and correctly shows:

(i) the boundaries and areas of the Property and the size, location, and type of buildings and improvements thereon and the distance therefrom to the nearest facing exterior property lines of the Property and to any buildings and improvements located within ____ feet of the Property;

(ii) the location of all rights-of-way, easements, and any other matters of record which have been disclosed within the hereon referenced Title Commitment (or of which I have knowledge or have been advised, whether or not of record) affecting the Property with applicable recording information;

(iii) the flood zone designation (with proper annotation based on Federal Flood Insurance Rate Maps or the state or local equivalent, by sealed map location and graphic plotting only);

(iv) all roads and roadways located on or providing access to the Property; and

(v) all other significant items on the Property;

(b) such survey was conducted by the Surveyor, or under his/her supervision;

(c) all monuments shown hereon actually exist, and the location, size, and type of material thereof are correctly shown;

(d) the information, courses, and distances shown hereon are correct, and the title lines and lines of actual possession are the same, except as shown;

(e) except as may be shown hereon, there are no encroachments onto the Property or on rights-of-way or easements appurtenant to the Property or protrusions therefrom, there are no visible easements or rights-of-way on the Property and there are no party walls, visible discrepancies, conflicts, shortages in area, or boundary line conflicts;

(f) except as shown hereon, no part of the Property is located in a 100-year flood plain, in an identified flood-prone area or area of special flood hazard as defined by any governmental authority having jurisdiction over the Property, or in the flood way of any body of water;

(g) the Property does not serve any adjoining property for drainage, utilities, or ingress or egress, except as shown hereon; and

(h) this survey is made in accordance and complies with the standards of the "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys," jointly established and adopted by ALTA, ACSM and NSPS in 2005, including items 1, 2, 3, 4, 6, 7(a), 8, 10, 11(a), 13, 16, and 18 of Table A thereof, and pursuant to the accuracy standards as adopted by ALTA, NSPS and ACSM and in effect on the date of this certification, the positional uncertainties resulting from the survey measurement made on the survey do not exceed the allowable positional tolerance.

(i) all proposed improvements of the Project, including wind turbine generators, meteorological towers, overhead transmission lines, access routes, underground distribution/collection cable routes, underground communication system routes, substations, operations and maintenance buildings, parking lots, laydown areas, and related improvements are shown on the survey, and the sites of the wind turbine generators and meteorological towers, as staked, are as specified in the Determinations of No Hazard issued by the Federal Aviation Administration.

(j) any existing overhead transmission lines, access routes, underground distribution/collection cable routes, and underground communication system routes, and pipeline routes, are shown on survey.

(k) any and all water, electricity, gas, telephone and sanitary sewer companies serving the site are shown on survey, and those that are visible as providing services on the site and which were not visibly serving the site are noted.

(l) I have contacted TEXAS ONE CALL for a locate request for buried utilities in the specific areas in _____ County, Texas, that comprise the Project and the confirmation number obtained for such call is _____. I have also contact DIG-TESS for a locate request for buried utilities in the specific areas in _____ County, Texas, and the confirmation number for such call is _____. All information obtained from such call is shown on the survey.

(m) I have contacted the County Commissioners of _____ County, Texas, and there are no safety buffer zones, setback requirements or building setback requirements affecting the improvements or proposed improvements.

(n) CORRIDORS around the improvements and proposed improvements are: a) a [____' radius], centered on the Turbine locations; b) a [____' wide strip, lying ____'] on both sides of the centerline of the access routes, and proposed access routes; and c) a [____' wide strip, lying ____'] on both sides of the centerline of the overhead transmission line and proposed overhead transmission line. There is no evidence within the said CORRIDORS that the area was used (i) as a solid waste dump, sump or sanitary landfill, or did not disclose any evidence of development, drilling, mining, production, or related activities with respect to oil, gas or other mineral resources [Or identify on such survey such activity or condition].

(o) The survey reflects the location of any existing, producing, or unplugged oil and gas well on the Premises or any location of an oil and gas well being drilled or that has been staked for drilling on the Premises.

(p) Any additional or existing improvements shown are based on Aerial Topographic Mapping provided by [AEROMETRIC, Inc., Fort Collins, Colorado.]

(q) The Premises are internally contiguous without break, gap or interruption.

 (Signature of Surveyor)
Registered Public Surveyor
Registration No. _____
(Name, address, telephone number and job number of
Surveyor)”

Very truly yours,