DAKOTA HOMESTEAD

AGENT EDUCATIONAL

FALL 2013

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Issues Presented by Divorce

Why do we want to know if someone is single, married, or divorced?

Several Reasons:

1. Homestead rights and what signatures are needed
2. Whether a divorce has changed priority ownership
3. Whether there is a judgment lien as a result of a property settlement in the divorce

Homestead Rights and Signatures Required

South Dakota law requires that the marital status of all individual grantors / borrowers be recited in ALL deeds and mortgages. If that person is married, then the deed / mortgage MUST include either: (1) the execution of the married grantor's spouse, or (2) a proper non-homestead recital.

Why? If the property at issue is homestead property (described in SDCL 43-31), then SDCL 43-31-17 requires that the conveyance or encumbrance of such homestead property is valid ONLY if signed or executed by both husband and wife on either the same or separate instruments. The need for both signatures applies regardless of if the property is owned solely by one of the two spouses or if it is owned jointly.

Even if the property to be conveyed or encumbered is NOT a married person's homestead property, the deed or mortgage still needs to disclose that fact via a proper non-homestead recital. Thus while there is not the need for both spouses to sign or execute the deed or mortgage, the non-homestead recital MUST be included with those documents.

Why is this an issue? Chris and I recently dealt with a case where a woman in another state signed all of her documents as a "single woman" when in fact she was married and her husband at the time neither signed nor executed any of the documents. While Title Standard 5-02 provides that:

> A recital in the body of a deed or in a certificate of acknowledgement, or both, that the grantor is single, a widow, a widower, unmarried or divorced, or that the grantors are husband and wife, may be relied upon as a sufficient indication of marital status without inquiry or further notice.

Dakota Homestead is still the one on the hook if it turns out SDCL 43-31-17 was not complied with.

When might this show up? The situation that comes to mind is where a person is in the process of getting a divorce or they have received a divorce, but the decree has not been signed and entered by the judge yet. While the individual may already think of themselves as no longer married, until the decree is actually signed by the judge, they are in fact still married. Thus the argument can at least be made that they need either a signature or execution by their soon-to-be ex-spouse on the deed / mortgage if the underling property is or is going to be their homestead property OR they need a non-homestead recital if the property is not their homestead property (which they would need even if they were already single).

What should we do? Just be aware of this issue. When someone indicates that they are divorced, make sure that there is an official decree (which should be done anyway to see if there is a judgment lien). If someone states that they are single, perhaps take the time to ask if they have ever been married. If they have, make sure they present evidence, like a signed divorced decree, which establishes that they are no longer married.

Divorce and Property Ownership

Typically when divorces occur there is a change in property ownership between the now ex-spouses. With that comes a variety of issues to be aware of as you get ready for closing. Below are some of the common ones to be particularly aware of.

Joint Tenancy and Divorce

While we have gone over this previously, it is always good to remember that when a husband and wife owned property as joint tenants, their divorce DOES NOT automatically sever the joint tenancy. The four unities of joint tenancy (unity of interest, title, time, and possession) remain unchanged just because the individuals are no longer married to one another. There is NO unity of marriage (that only exists for "tenancy by the entirety" which is not recognized in South Dakota).

Why this can be confusing is that typically in a divorce decree the judge orders a change in the ownership of real property. This change of granting ownership to one spouse or the other destroys the unities and severs the joint tenancy. Thus it is the change in ownership that ends the joint tenancy, not the divorce itself.

Divorce Decrees and Property Ownership

As was mentioned above, typically a divorce decree details how real property of the husband and wife is to be divided now that they are divorced. Typically this is going to be done by incorporating the stipulation and agreement that the husband and wife signed into the divorce decree. Thus it is important to examine all of the documents, including the decree and stipulation.

It is important to make sure that if a change in ownership of real property is ordered, that that change has been made and recorded. As more and more pro se divorces are being done each year, there is a greater chance that changes in ownership of property may not be properly recorded after divorces are

finalized. Make sure that changes in ownership are properly reflected both in the divorce documents and they are recorded with the register of deeds.

Another issue to be aware of is that sometimes there are temporary restraining orders or preliminary injunctions in place on one or both spouses to prevent them from conveying, alienating, or encumbering the marital property. If such an order or injunction is in place, the court MUST first lift the order before anything can be done with that property, regardless of one spouse having all the other necessary documents. As always, feel free to call either Chris or Eric if you encounter this situation.

Divorce and Judgment Liens

Sometimes in a divorce decree one party is ordered to pay the other party a lump sum payment for alimony, support, or as an equalization payment to balance out who gets what property. If there is a judgment for that money and it is stated in a FIXED, GROSS AMOUNT WHICH IS IMMEDIATELY DUE AND PAYABLE, it becomes a lien as an ordinary money judgment. Such judgments are supposed to be docketed like any other civil judgment. Remember, typically the stipulation and agreement the husband and wife agreed to is incorporated as part of the divorce decree and judgment, so you need to examine the stipulation along with the other documents.

It is important to remember that certain things in divorce decrees DO NOT become money judgments. Periodic payments for child support or alimony are not liens (though the court can later on impose a lien for unpaid child support).

Divorce and Closing

Just a reminder, even though a divorce decree or stipulation indicates that the non-closing spouse is to share in the proceeds from the sale of the property, it is not your job to insure that spouse gets paid. Unless you are paying off a lien, have been ordered by the court to disburse proceeds to a particular party, or have been ordered by the selling spouse to distribute proceeds in a particular manner, you are under NO OBLIGATION to ensure that other spouse gets paid. Similar to any other situation, you need written instructions from the owner / seller before you can distribute proceeds to another person.

Multiple Mortgage Situations and Problems

Anytime there are multiple mortgages and/or multiple properties at issue, it can be confusing as to how to address the particular needs of that situation. Should the multiple mortgage endorsement be used? Should there be one or two (or more) title policies? Below is a detailed look at what the Multiple Mortgage Endorsement covers (and does not cover) and what is the best option in some common situations.

Multiple Mortgage Endorsement

On the next page you will find a complete copy of Dakota Homestead's Multiple Mortgage Endorsement. Our endorsement is based off of the California Land Title Association (CLTA) Form 105.1. This endorsement is used when a lender wants to insure multiple mortgages on the SAME property. The purpose of this endorsement is to lay out the priorities as it relates to each mortgage. The endorsement provides which mortgage shall receive first priority and which shall receive second (and so-on if there are more than two mortgages being covered in this endorsement).

The key thing to look for with the Multiple Mortgage Endorsement is that the property encumbered by both mortgages IS THE SAME. The property needs to be the same for purposes of determining liability and policy limits, thus making certain what Dakota Homestead is insuring and from which property a possible claim could arise. If the property encumbered by each mortgage is different, then a claim arising from one property could trigger coverage for both properties under this one policy.

MULTIPLE MORTGAGES IN ONE POLICY ENDORSEMENT
(Rate = $100.00)

Issued by

DAKOTA HOMESTEAD
TITLE INSURANCE COMPANY

Attached to Policy No._____

Covered Risk number 10 on the second page of the policy is hereby deleted and there is substituted in lieu thereof the following:

"10 The priority of any lien or encumbrance over the lien of:

(a) the insured mortgage referred to in subparagraph (a) of paragraph 4 of Schedule A, or

(b) the insured mortgage referred to in subparagraph (b) of paragraph 4 of Schedule A, except the mortgage referred to in subparagraph (a) of paragraph 4 of Schedule A."

Except where used in this endorsement, the term "mortgage" wherever used in said policy shall be construed as referring to both of the mortgages described in paragraphs 4(a) and 4(b) of Schedule A.

Section 11 of the Conditions is hereby amended by the addition of the following:

"Loss under this policy shall be payable first to the insured owner of the indebtedness secured by the mortgage shown in subparagraph (a) of paragraph 4 of Schedule A, and if such ownership vests in more than one, payment shall be made ratably as their respective interests may appear, and thereafter, any loss shall be payable to the owner of the indebtedness secured by the mortgage shown in subparagraph (b) of paragraph 4 of Schedule A, and if more than one, then to such insured ratably as their respective interests may appear."

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.

By: _____
Authorized Signature

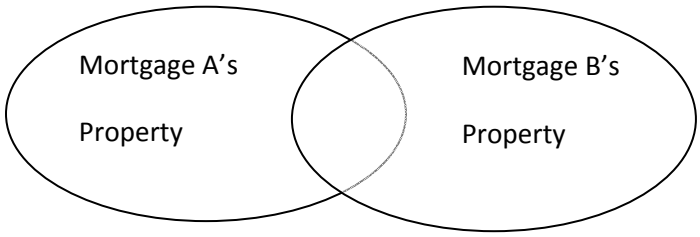
Dated _____

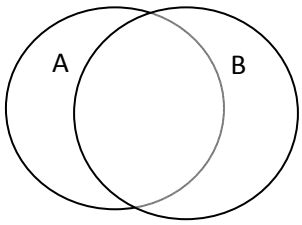
Multiple Properties with Multiple Mortgages

What the Multiple Mortgage Endorsement is not designed to deal with is the situation where there are different pieces of property with multiple mortgages on them that do NOT all encumber the SAME property. In such a situation the preferred approach is to issue two separate title policies, one for each different piece of land.

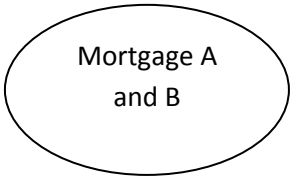
The reason for this is that when the mortgages are covering less than the exact same pieces of land, a claim which may only arise under one of the mortgages, now is insured by the policy such that it could give rise to a claim under a completely unrelated mortgage because of our title policy. The risks that could give rise to a claim are unique to EACH individual piece of property. When the property is the same legal description for both mortgages, then there is no additional risk that a defect related to only one mortgage is going to trigger coverage for another mortgage.

Think of it like a Venn diagram (see below). While the amount of overlapping property can vary greatly, the end result is still the same; the two mortgages are not covering exactly the same property.





The Multiple Mortgage Endorsement only works when the mortgages cover ALL of the same property.



Additionally, all of the forms Dakota Homestead has put together contemplate the mortgage or mortgages covering the same property in one policy. Insuring multiple pieces of property with mortgages covering different amounts of that property in one policy would require many carefully considered modifications and changes to our pre-existing forms. Unlike the situation where there are multiple mortgages, but the same piece of property, it is not as simple as adding just one endorsement to the standard policy. The end result is that we would have to create a new and distinct policy for just that transaction. That is why Dakota Homestead's preference is to issue separate policies anytime there are multiple pieces of property with multiple mortgages not covering the exact same property in each.

Multiple Properties and One Mortgage

The other situation to consider is what to do when there are multiple pieces of property and only one mortgage. Here we are not worried about how to list the priorities between multiple mortgages and how the coverage of each mortgage intersects with the other. What we are concerned about is making sure that we have properly described which parts of the properties are covered by the mortgage and which are not. For the situation where the single mortgages covers ALL of the properties, treat it like you usually do.

Where the mortgage is NOT encumbering ALL of the properties, then additional care is needed. While the decision to require a survey is always up to each individual agent's discretion, this is one of those situations where it is probably time to require a survey prior to closing. This is because we want to be sure that there is an accurate legal description for what the mortgage does and does not apply to.

Indirect Access Easements and Insuring Them

While most pieces of property are adjacent to a public right-of-way (like a highway, road, or street), it is still common to see pieces of property where the sole source of access to and from it is secured by an appurtenant access easement. In those situations it is important to consider how that access easement: (1) is described and listed in a standard coverage policy; (2) protects the properties right of legal access; (3) when it should be specifically insured; and (4) how to specifically insure it.

Indirect Access Easements and Standard Coverage Policies

Dakota Homestead's standard policy insuring provision #4 insures against "Lack of a right of access to and from the land[.]" This provision insures that there is access to the property from a public right-of-way. This basic coverage only insures a GENERAL right of access and that the there will be some type of legal access to the property. It does NOT insure a particular grant of access, like a specific recorded access easement.

The reason is that so long as there is access to the property, the standard coverage policy provisions do not care what that type of access is. We are not concerned with the quantity or quality of that access, so long as it provides "access to and from the land[.]" In most cases, that access is provided by the property abutting a public right-of-way, as they have a separate property right that grants them access to and from the highway, street, road, etc. distinct from any general public right to access the property.

When dealing with landlocked property though, there is no abutter's right of access. This is because landlocked property by definition shares no common boundary with the public right-of-way. Typically to provide access to the landlocked piece of property, an appurtenant access easement is granted over one or more of the surrounding properties (servient estate) to the landlocked property (dominant estate). In that situation with a standard coverage policy, you just need to list this access easement as an

exception on Schedule B, like you would any other easements. Doing that still means that the landlocked owner still has access with that easement. If something were to cause that easement to become ineffective, it would be Dakota Homestead's job to either reestablish that easement or find a suitable alternative to provide access.

When dealing with an access easement it is especially important to examine the recorded documents to insure that a valid easement exists. Like all other easements, it must be validly created. To be validly created it may be marked and noted on a plat and granted by the terms of the plat's owner's certificate, granted by separate recorded instrument, or created by some other method. While it is possible that an access easement may arise by a statutory right, like a prescriptive easement or through the use of a condemnation process, you need to contact Chris or Eric if you think such a situation exists.

Indirect Access Endorsement

The alternative to just listing the access easement on the Schedule B exceptions is to provide an Indirect Access Endorsement. On the pages that follow are some examples of Indirect Access Endorsements. Each accomplishes the same goal: insuring a specific access easement. Such an endorsement provides greater coverage than just standard insuring provision # 4 because it ensures that THAT particular access easement will be there to access the landlocked property.

When issuing an Indirect Access Endorsement, it is important to follow the same steps you would when insuring any appurtenant easement. First, you need to examine the written instrument that created the easement. This includes making sure that it has been properly executed by all of the necessary parties at the time it was created. Additionally, make sure that the easement is actually appurtenant (since this is dealing with granting access over another piece of property this should be the case). Next, make sure that the easement has a stated purpose (likely access / ingress / egress) in the grant. Check to see if the grant contains anything with regards to exclusivity, use restrictions, or any other restrictive language. Be sure that the easement has been properly acknowledged and recorded.

Additionally, your title search has to include both the dominant estate and also the servient estate (where the easement is located). Be aware of things like who was the owner of each estate at the time the easement was created. All defects, liens, and encumbrances affecting the servient estate that were not satisfied, released, or subordinated AT THE TIME THE EASEMENT WAS CREATED MUST be shown as exceptions affecting the servient estate.

All of that is to say that you are basically insuring two different pieces of property, the landlocked estate and also the servient estate where the easement is located. As such, the title policy has to be crystal clear in its exceptions such that a defect in the servient estate is not going to lead to a claim by a non-defective landlocked property.

What does all of this mean?

The end result is that we have to be aware of what we are and are not covering with regards to access easements. Anytime there is an access easement, it must be listed on the Schedule B exceptions. Even without an Indirect Access Endorsement, standard coverage provision # 4 still is going to insure that the property is insured with some form of access to and from it. If for some reason a party wants extra-protection and wants to insure THAT particular access easement, then we must use an Indirect Access Endorsement and go through the additional steps that came with insuring an additional piece of property and that the party pays for that added risk and coverage that goes with it.

What we don't want to do or see happen is policies issued where the access easement is included as part of the legal description and listed as covered property under Schedule A without an Indirect Access Easement. This is because the policy holder is getting all of the benefits of an Indirect Access Easement (and more importantly Dakota Homestead is taking on that associated risk) without having to pay the associated premium.

The other issue that we have received some questions about is whether or not the access easement should be included in the legal description. If we are NOT issuing an Indirect Access Easement it should NOT appear in the legal description. For the reasons discussed above, if we are not specifically insuring that piece of property, it should not be in the legal description. It should only be listed in the Schedule B exceptions. If we ARE insuring the access easement, the best practice is just to list it as part of Schedule A. While the end result with regards to our liability is still the same if we are insuring that easement anyways, it is likely easier for the property searches going forward to list each separate piece of property separately. That legal description is what is going to be used to search in the future and it could throw things off to go from what was just the landlocked property as the legal description to now including this easement as part of the same description.

ACCESS (APPURTENANT EASEMENT) ENDORSEMENT
(Rate = $25.00)

Issued by

DAKOTA HOMESTEAD
TITLE INSURANCE COMPANY

Attached to Policy No._____

The Company hereby insures access from the public road known as _____
to the property being insured via the appurtenant easement described in paragraph (4) of Schedule A.

This endorsement is made a part of the policy and is subject to all 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.

By_____
Authorized Signature

Dated_____

ACCESS (APPURTENANT EASEMENT) ENDORSEMENT
(Rate = $25.00)

Issued by

DAKOTA HOMESTEAD
TITLE INSURANCE COMPANY

Attached to Policy No._____

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified [as Parcel _____] in Schedule A (the "Easement") does not provide that portion of the Land identified [as Parcel _____] in Schedule A both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

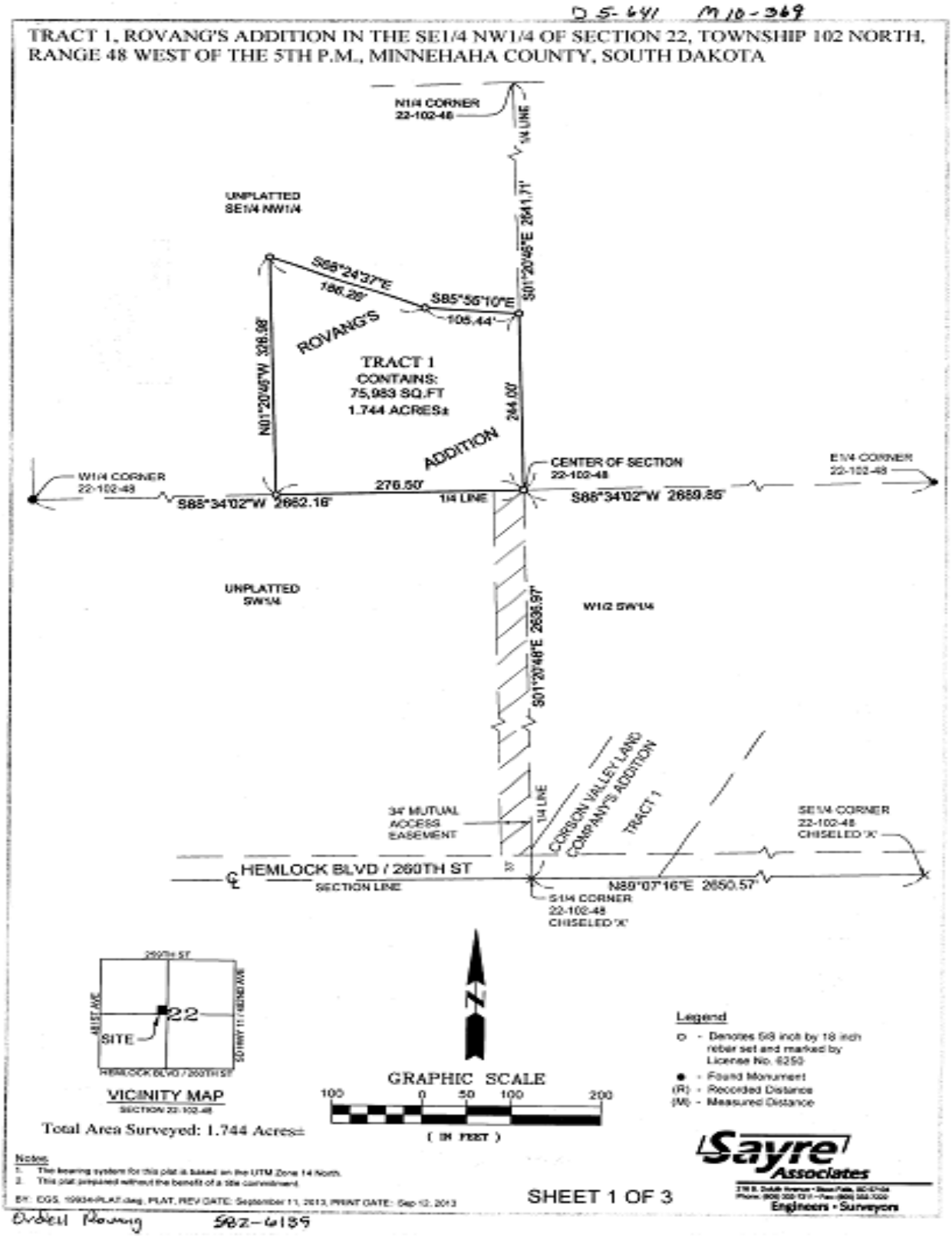
This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy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

By: _____

Authorized Signature

Dated:_____

Example of Indirect-Access Survey



Signing Closing Documents

In recent years the amount of documents lenders have been requiring closing agents to sign as part of the closing has continued to grow. This includes various supplemental loan closing instructions and attempts to get agents to agree to all encompassing master closing instructions. These various instructions often consist of numerous pages of boiler-plate language and legalese that make it difficult and time-consuming to read through. While most of the instructions deal with what you already are doing in every closing, the end result of these closing instructions is that much of the lender's liability is being shifted onto closing agents, making these instructions of critical importance to you.

Where we have seen issues

In just over the last month Dakota Homestead has received two separate "claims" from Wells Fargo stating that its specific closing instructions were not followed as manufactured home titles were not eliminated properly. We say "claims" because it is Dakota Homestead's position that this are not "claims" in the typical sense as they do not arise from the title policy, but rather arise from the closing instructions.

In both cases the instructions at issue were Wells Fargo's "MANUFACTURED HOME AND LAND SUPPLEMENTAL CLOSING INSTRUCTIONS." In both cases the relevant instruction stated:

> Paragraph 12 of the Affixation Affidavit must be completed as follows:
>
> 12. A Homeowner shall initial only one of the following lines, as it applies to title to the Home:
>
> . . .
>
> ☐ The certificate of title to the Home ☐ shall be ☐ has been eliminated as required by applicable law.
>
> *The homeowner must initial this box if the Loan is to finance a first retail sale, subsequent sale, or refinancing of a home in a title surrender ("Conversion") state. If title has not been eliminated or*

> *surrendered prior to closing, place an "X" in the check box preceding the words "shall be." If title has been eliminated or surrendered prior to closing, place an "X" in the check box preceding the words "has been eliminated."*
>
> . . .

Comes from MANUFACTURED HOME AND LAND SUPPLEMENTAL CLOSING INSTRUCTIONS, PAGE 2 of 3.

Additionally, the MANUFACTURED HOME AND LAND SUPPLEMENTAL CLOSING INSTRUCTIONS provides under TITLE INSURANCE:

> We require an ALTA 7 endorsement (manufactured housing) or equivalent to be issued with the final policy. We require a supplement or written statement from a title officer prior to closing the Loan to confirm that an ALTA 7 will be included in the final policy.

In at least one of the two cases, not only was an ALTA 7 endorsement not included as part of title policy, but there was a specific exception to a manufactured home placed or to be placed on the property.

Why it matters

While these differences and requirements that seem unrelated or counter-to the rest of the transaction could be attributed to the lenders using standard form instructions that do not fit each and every transaction, it is the last part of the instructions that makes it a big deal for closing agents. Typically these instructions contain wording prior to the agent's signature like:

> By signing below, the Closing Agent acknowledges receipt and acceptance of the Closing Instructions. The settlement of the Loan constitutes the Closing Agent's agreement to comply with these Closing Instructions.

OR

> By closing this mortgage loan, you agree to comply with all applicable federal, state and municipal laws, ordinances and regulations and you acknowledge your warranty and responsibility to comply with all the requirements and instructions set forth in these closing instructions regardless of whether or not you execute the acknowledgement contained herein.

> THE UNDERSIGNED AGREES TO COMPLY WITH ALL LENDER'S INSTRUCTIONS STATED HEREIN. THE UNDERSIGNED ALSO ACKNOWLEDGES HIS/HER RESPONSIBILITY FOR FAILURE TO COMPLY WITH THE INSTRUCTIONS STATED HEREIN.

Language taken from Wells Fargo's MANUFACTURED HOME AND LAND SUPPLEMENTAL CLOSING INSTRUCTIONS and SUPPLEMENTAL LOAN CLOSING INSTRUCTIONS.

The net result of clauses like that in closing instructions is that you, the closing agent, are accepting responsibility and liability if something in the instructions was not complied with or followed through. Even in cases where the instruction makes no sense or does not line up with what has previously been discussed and agreed to prior to closing, the language of the closing instructions seems to indicate that if they are not complied with, it is the agent's problem.

Closing Instructions and Closing Protection Letters

A copy of Dakota Homestead's standard Closing Protection Letter [CPL] is found just a little bit ahead in the handout. Our standard CPL puts Dakota Homestead on the hook to reimburse the lender for problems arising out of the closing. Specifically, the CPL makes Dakota Homestead liable for losses arising out of:

> Failure of the Agent to comply with LENDER's written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document specific ally required by LENDER, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that LENDER's instructions require a determination of the validity, enforceability or the effectiveness of the other document[.]

Standard CPL, Clause 1, page 1.

The key language there is “comply with LENDER’s written closing instructions.” The CPL ties the title insurance policy issued by Dakota Homestead to any issues that arise out closing. While Dakota Homestead would not usually be on the hook for any closing issues, because of the CPL, we now are. Thus it is critical that you understand and follow through with all of the closing instructions for both your sake and for ours.

What can we do?

The bad part of this situation is that party in the toughest spot with all of this is you, the agent. If you do not agree to the lender’s terms, they will likely get someone else to do the closing and you lose out on that business. There are several things you can do though to help protect yourself as much as possible

First, you MUST carefully read through each and every page of the closing instructions you are provided. While the language may look the same in each, it is important to make sure you understand completely what you are being asked to do in EACH closing. It might be a good idea to write down on a separate piece of paper as you go through a quick list of what is being asked of you, so that you have an easier guide to look at during the closing compared to the jargon-filled forms lenders are providing you.

Additionally, if you come across an instruction or condition that you are unsure about or do not believe you should or could comply with, you have options. You can always contact the lender to ask for clarification. If you are going to sign the closing instructions and you have not completed some part of it, write alongside that specific instruction explaining why you did not follow it, sign or initial it, and put the date. You may want to cross-out or highlight that particular instruction so it is clear which one you are referring too. While this may not prevent the lender from going forward with a “claim” it is a significantly better option than the alternative (doing nothing).

Speaking of the alternative, whatever you do, DON’T JUST SIGN THE FORM WITHOUT READING IT. By signing the closing instructions you are stating that you have completed all of those

requirements, even if you did not. According to the terms of the instructions, you are now responsible for those items not being completed.

The same rationale applies if lenders are asking you to sign master closing instructions or other documents that purport to control all closings. Do NOT sign any of them until you take the time to read through them carefully so that you understand what it is you are agreeing to and if you are actually able to comply with the requirements.

OTHER CLOSING TOPICS

Changing HUD Statements after closing

It has come up that some lenders are asking agents to go in and change the HUD-1 statement after the closing. The situation seems to be that when there is going to be two immediate assignments after closing, the lender is wanting only one assignment fee shown on the HUD-1 statement that the purchaser receives. The lender is then asking the agent to go back in later and add the second assignment recording fee to the HUD-1 and take the difference out of the lender's balance.

Should agents do that? NO. While it can just be classified as shifting figures around on just the lender's side, it still doesn't change the fact that the HUD-1 is being changed without the purchaser's knowledge or approval. Further, this does not appear to be fixing a clerical mistake or error, it is adding an additional recording fee to the HUD-1 that was not there when closing acquired and the documents were signed. If the lender wants to avoid having two recording fees on the HUD-1, they can send a check to the closing agent's trust account and the amount of the second recording can come out of there.

Cutoff Hours at Banks and Closing (Discussion Item)

In Brookings while most of the banks have a cutoff time of 4:00 pm (fairly common practice), First Bank and Trust has a cutoff time of 5:30. As you could imagine, this runs the risk of problems with late-afternoon closings where the check has been handed out to the sellers, and they go to deposit their check at First Bank and Trust, but that amount has not been posted yet to the closing office account, as it was deposited after 4:00 pm at a different bank. Any thoughts?

DAKOTA HOMESTEAD
TITLE INSURANCE COMPANY

11/04/2013

CPL Number: SD-9313662-CPL-SEMINAR

Wells Fargo Bank, N.A.
123 41st Street
Sioux Falls, SD 57107

RE: Closing Protection Letter for mortgage closing relative to:

Borrower:	Janel & Alan Van Ruler
File Number:	CPL-Seminar
Loan Number:	1234 test
Property Address:	415 N. Fuller Ave., Montrose, SD 57048

Dear Wells Fargo Bank, N.A.:

Dakota Homestead Title Insurance Company ("DHTIC") is pleased to provide Wells Fargo Bank, N.A. protection in connection with the closing of its real estate mortgage bearing Loan Number: 1234 test by AAA Title Company, 111 2nd Street, Somewhere, SD 57000 (the "Agent"), an issuing agent of DHTIC, provided a title insurance policy of DHTIC will be issued following the closing of and in regard to the subject transaction described above.

If a DHTIC policy of title insurance has been requested to be issued in connection with this specified transaction, DHTIC will reimburse Wells Fargo Bank, N.A. for any loss of settlement funds transmitted to the Agent for Wells Fargo Bank, N.A.'s account, provided the aggregate of all funds Wells Fargo Bank, N.A. transmitted to Agent for the subject transaction described above does not exceed $200,000.00 and provided the loss arises out of:

1. Failure of the Agent to comply with Wells Fargo Bank, N.A.'s written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document specifically required by Wells Fargo Bank, N.A., but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that Wells Fargo Bank, N.A.'s instructions require a determination of the validity, enforceability or the effectiveness of the other document, or

2. Fraud, dishonesty or negligence of the Agent in handling Wells Fargo Bank, N.A.'s funds or documents in connection with such closings to the extent such fraud, dishonesty or negligence relates to the status of the title to said interest in land or to the validity, enforceability, and priority of the lien of said mortgage on said interest in land.

The assurance given in this letter shall not be considered to cover any instructions provided by Wells Fargo Bank, N.A. which seek to impose any liability on DHTIC in connection with any "Consumer Credit Protection," "Truth in Lending," or similar law or for any obligations imposed upon a mortgage lender by Public Law 93-533; nor shall this letter cover any direction by Wells Fargo Bank, N.A. to make a determination as to the need for Flood Insurance; nor shall this letter include insurance to Wells Fargo Bank, N.A. for proper disbursement of construction loan proceeds unless specific written approval has been previously obtained from DHTIC.

Conditions & Exclusions:

1. DHTIC will not be liable to **Wells Fargo Bank, N.A.** for loss arising out of:

   A. Failure of the Agent to comply with **Wells Fargo Bank, N.A.'s** closing instructions which require title insurance protection inconsistent with that set forth in the title insurance commitment issued by DHTIC. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in said commitment shall not be deemed to be inconsistent.

   B. Loss or impairment of **Wells Fargo Bank, N.A.'s** funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except such shall result from failure of the Agent to comply with **Wells Fargo Bank, N.A.'s** written closing instructions to deposit the funds in a bank which **Wells Fargo Bank, N.A.** designated by name.

   C. Defects, liens, encumbrances or other matters in connection with the subject transaction described above if it is a purchase, lease or loan transaction except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with **Wells Fargo Bank, N.A.'s** closing instructions.

   D. Fraud, dishonesty or negligence of **Wells Fargo Bank, N.A.'s** employee, agent, attorney or broker.

   E. **Wells Fargo Bank, N.A.'s** settlement or release of any claim without the written consent of DHTIC.

   F. Any matters created, suffered, assumed or agreed to by or known to **Wells Fargo Bank, N.A.**.

2. When DHTIC shall have reimbursed **Wells Fargo Bank, N.A.** pursuant to this letter, it shall be subrogated to all rights and remedies which **Wells Fargo Bank, N.A.** would have had against any person or property had it not been so reimbursed; Liability of DHTIC for such reimbursement shall be reduced to the extent that **Wells Fargo Bank, N.A.** has knowingly and voluntarily impaired the value of such right of subrogation.

3. The Agent is DHTIC's agent only for the limited purpose of issuing title insurance policies. The Agent is not DHTIC's agent for the purpose of providing other closing or settlement services. DHTIC's liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of DHTIC for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Agent, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect DHTIC's liability with respect to its title insurance commitments or policies.

4. Claims shall be made promptly to DHTIC at its principal office at 315 S. Phillips Ave., Sioux Falls, SD 57104. When the failure to give prompt notice shall prejudice DHTIC, then DHTIC's liability shall be reduced to the extent of such prejudice. DHTIC is not liable for a loss if the written notice is not received within one year from the date of the closing.

   This coverage extends to your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage involved in the above-described real estate transaction. Any previous closing protection letter or similar agreement is hereby cancelled with respect to the subject transaction described above.

DAKOTA HOMESTEAD TITLE INSURANCE COMPANY

Janel Van Ruler
President

cc: **AAA Title Company**
111 2nd Street
Somewhere, SD 57000

Issues with “Mortgage" Surveys

Just last week we received a question from Jean Cremer over at Turner County Title dealing with an alley running through a lot. The initial mortgage survey/inspection that was done in March 2010 shows the alley at the rear of the property running through the last 8’ of the 150’ property. You can see this on the next page of the handout. Looking at the original plat (located a little further back in the handout, along with an enhanced image of the same) shows that the two properties are 300’ long, including the alley between them. It would appear that the survey was correct because some portion of the alley, which runs between the two lots, was on the property at issue. Thus we told Jean that the alley had to be shown as an exception as it is an easement for a public right-of-way over the property.

While that was going on, the lender got a second mortgage survey/ inspection by a different surveyor (found in the handout) that shows the alley outside of the 150’ of the lot. Everything was pretty much the same, except for the alley being shifted completely outside the lot line. While the lender wanted to use this second survey to show that there was no need for the alley exception, based on the information we had from the first survey and the original plat, we still required the exception.

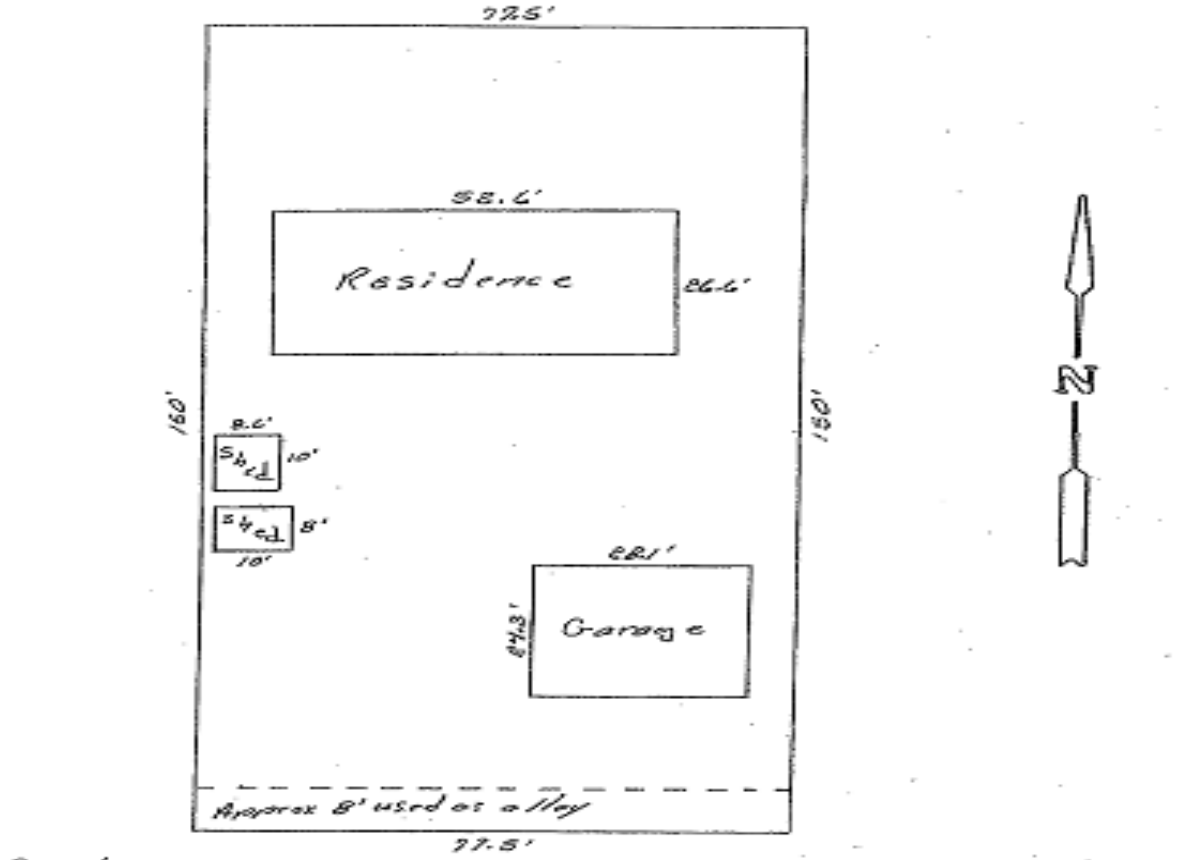
What does this mean?

This just goes to show how much value these “mortgage surveys/inspections” really have. As their disclaimers or notes point out, they really are just the result of a visual inspection of the property and have nowhere close the accuracy and value that a boundary survey would have. Thus when you are preparing the title work, use them, but don’t rely on them to ignore an issue with the property if you have knowledge of a potential encumbrance or easement from prior surveys, plats, or visual inspections.

2010 Survey of Property

MORTGAGE INSPECTION

LOT 1 AND THE WEST 12.5 FEET OF LOT 2, BLOCK 3 COLMAN'S 1ST. ADDITION TO THE CITY CENTERVILLE AND THE EAST 15 FEET OF OUTLOT 2 OF THE CITY OF CENTERVILLE, TURNER COUNTY, SOUTH DAKOTA



Scale: 1" = 20' 531 Lincoln St. Clayton

I THE UNDERSIGNED, A REGISTERED LAND SURVEYOR, IN AND FOR THE STATE OF SOUTH DAKOTA, DO HEREBY CERTIFY THAT THE ABOVE MORTGAGE INSPECTION WAS PERFORMED BY ME.

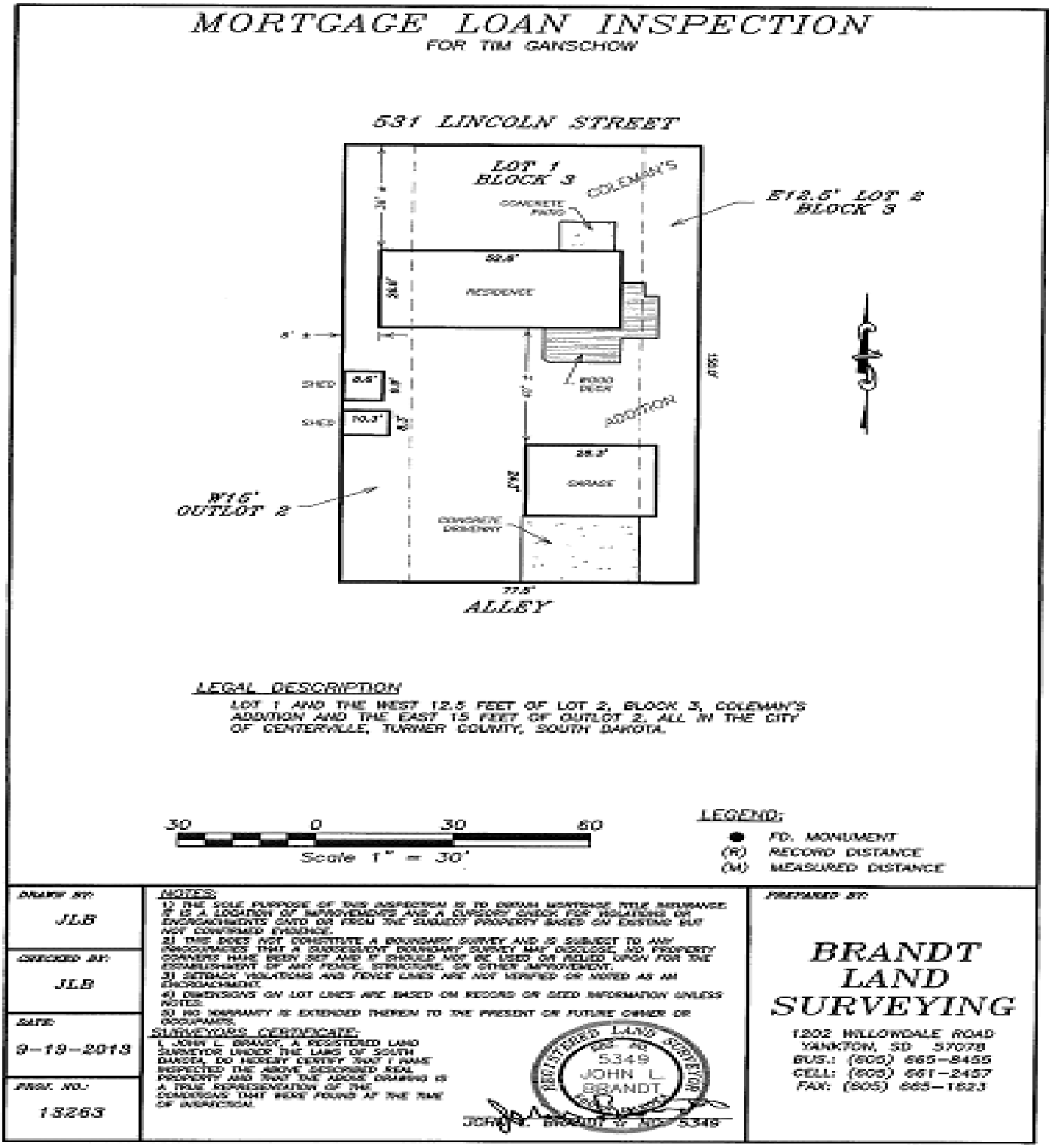
THIS IS A LOCATION OF IMPROVEMENTS AND A CURSORY CHECK FOR VIOLATIONS OR ENCROACHMENTS ONTO OR FROM THE SUBJECT PROPERTY BASED ON EXISTING BUT NOT CONFIRMED EVIDENCE. THIS DOES NOT CONSTITUTE A BOUNDARY SURVEY AND IS SUBJECT TO ANY INACCURACIES THAT A SUBSEQUENT BOUNDARY SURVEY MAY DISCLOSE. THE MEASUREMENTS SHOWN SHOULD NOT BE USED OR RELIED UPON FOR THE ESTABLISHMENT OF ANY FENCE, STRUCTURE OR OTHER IMPROVEMENT. NO WARRANTY OF ANY KIND IS EXTENDED THEREIN TO THE PRESENT OR FUTURE OWNER

DATED THIS 14TH. DAY OF MARCH, 2010.

THOMAS LYNN WEEK
REGISTERED LAND SURVEYOR
REG. NO. 2912

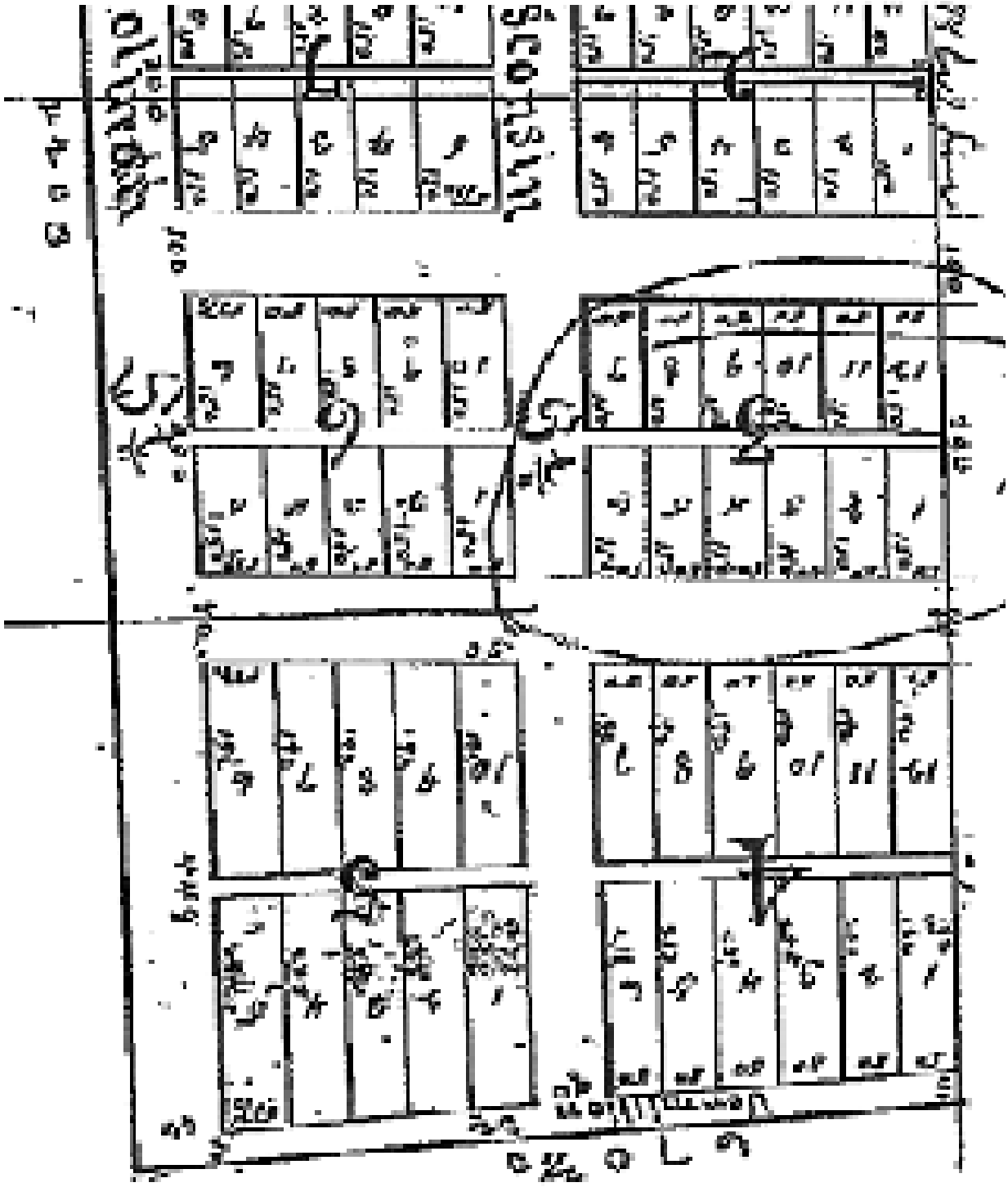
REG. PROFESSIONAL ENGINEER & LAND SURVEYOR
REG. NO. 2912
THOMAS LYNN WEEK
SOUTH DAKOTA

2013 Survey of Property



Original Plat Survey

Original Plat Survey (Enhanced)



MINERAL INTERESTS

IN GENERAL.

The fee simple ownership of land includes ownership of the subsurface estate, which estate includes all minerals contained therein, if any. A mineral estate will likely include the interest in and to any or all of the following: coal, oil, gas, sand, clay, gravel, limestone or any other commercial substance, metallic ores of any kind, precious and semi-precious stones and metals and any radioactive materials.

Minerals are subject to the same rights of ownership, possession, and alienation as any other interest in real property. And, like other such real estate interests contained in one's purported conveyance of a fee simple interest in land, the mineral estate, too, will be conveyed to the Grantee unless an exception or reservation of the minerals is stated in the deed and provided the mineral estate is (still) held by the Grantor at the time of the conveyance.

Accordingly, a mineral estate may be "severed" (removed) from the fee simple estate, which creates a lesser mineral interest estate in the land to that of the greater fee simple estate in the same land. A mineral estate may be created, and severance may occur, via direct conveyance of the minerals to a 3rd party other than the fee owner (a grant) or via a mineral estate reservation in a patent or deed that conveys fee simple title (a reservation or exception).

Please be advised that unless otherwise specifically excepted in the instrument that creates the mineral estate following severance, the mineral estate is deemed to include all operational powers necessary for the owner to enjoy the mineral estate (mine and produce the minerals), including but not limited to an express or implied access easement to the minerals across the surface estate.

TITLE INSURANCE CONSIDERATIONS.

First, and as we all are well aware, minerals are all the rage these days – especially in certain SD counties, perhaps yours? So please take heed of this discussion.

And, as anyone who attended attorney Dwight Gubbrud's lecture on "SD Mineral Title Points" in Pierre last January knows, a severed mineral estate generally, let alone establishing who owns a severed mineral estate, is a hectic and complex endeavor that requires competent legal expertise to resolve, if at all.

Candidly speaking and given the practical and legal complexities involved, we are not in a position to insure ownership of a purported severed mineral estate (or to offer any opinions relative thereto). Any requests for such insurance should be refused. As an alternative, and still short of offering any opinion as to ownership of a purported severed mineral estate, a title search or non-title insurance product that simple reports / provides recorded documents that convey, reserve or otherwise reference minerals in a property's chain of title may be provided. Legal opinions regarding ownership of a severed mineral estate should NOT be offered in any case.

SCHEDULE B:

Please be advised that *unless excepted from coverage in Schedule B*, a title insurance policy may cover and insure the mineral estate of the fee simple owner / lender described in Schedule A (no uniform policy exclusion or term excluding minerals exists).

As you know, all Commitments and standard coverage Policies (need to contain) the following General Exceptions from Policy coverage (the two (2) relevant General Exceptions regarding minerals, are shown in **bold font)**:

B. General Exceptions:

1. Rights or claims of parties in possession not shown by the public records.*
2. Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey or inspection of the premises including, but not limited to, insufficient or impaired access or matters contradictory to any survey plat shown by the public records.*
3. Easements, or claims of easements, not shown by the public records.*
4. Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.*
5. **(a) Unpatented mining claims: (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the public records.***
6. Taxes or special assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records. Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.*
7. Any Service, installation or connection charge for sewer, water or electricity.*
8. **Any right, title, or interest in any minerals, mineral rights, or related matters, including but not limited to oil, gas, coal, and other hydrocarbons.***

Likely, a standard coverage Policy, which contains the above General Exceptions, would not cover mineral issues regarding the Property. Said another way, claims made regarding mineral interests and issues could reasonably be denied based upon the above General Exceptions if contained in the Policy.

However, not all issued Policies are standard coverage (i.e., "extended coverage" = Policy does not contain the General Exceptions from coverage), and regardless of the inclusion of the General Exceptions in a Policy or not, standard and prudent practice would dictate that any grant or reservation of a mineral right or interest found in the insured property's chain of title (including the Patent) must be shown as a Special Exception in Schedule B.

NOTE re Reservations in Federal and State Patents. Where title to property devolves from the federal or state government and the title examination of a chain of title commences with a patent issued by the federal and/or state government, special care should be exercised to determine whether any such patent contains any provision reserving to the government / Grantor any or all the minerals from the land being conveyed. If such a reservation is present in the Patent, *or any*

other reservation for that matter is present, an appropriate exception for the reservation must be shown in Schedule B of all Commitments and Policies.

Further, an exception in regard to reserved / severed minerals or mineral rights should never be omitted from the Policy (unless a proper judicial action has been undertaken and completed to satisfy the exception).

Any reserved / severed mineral right or interest appearing in the insured property's chain of title should be shown in the Commitment and Policy in the same manner as it is described (verbatim) in the instrument that purports to grant or reserving it. You should not to alter, change, modify, explain, or clarify the language of the grant or reservation. A typical special exception for a mineral grant or reservation appearing in the insured Property's title would read:

> **Reservation (Grant) of (an undivided _____ interest in) the coal, oil, gas and other minerals underlying said land contained in the (type of instrument where interest is found) dated _____ recorded on _____ in Volume _____, Page _____, _____ County Records including all rights and easements thereunder by the holder of said interest in the mineral estate or by any party claiming by, through or under said holder.**

Once a reserved / severed mineral right or interest is shown as an exception in the Commitment and Policy, it is unnecessary to trace the title any further. You should state that fact like this immediately under the above exception:

> **No examination was made under the mineral estate purportedly created under the above recorded instrument.**

MINERAL ENDORSEMENTS.

Certain endorsements contain reference to and specific coverage for certain mineral issues (see for example DH's "Mineral Rights" endorsement or the ALTA 9 endorsement series dubbed "Restrictions, Encroachments and Minerals").

However, such mineral endorsements do NOT (and should not) provide affirmative insurance that the insured (or anyone else) owns the mineral estate (or that the insured mortgage encumbers the mineral estate).

Rather, such mineral endorsements insure the insured owner or lender against loss or damage to the surface estate resulting from mining / operation rights of the purported mineral estate holder as excepted and described in Schedule B of the Policy.

For example, the substantive part of DH's "Mineral Rights" endorsement reads:

> **Notwithstanding Item No. ____ of Schedule B, the Company hereby insures the Insured against loss or damage which the Insured shall sustain by reason of the entry of any final order, judgment or decree by a court of competent jurisdiction holding that any person or party, other than the fee owner of the surface estate, has the right to explore for, mine or remove, any and all minerals and ores upon, in or under without making compensation for actual loss or damage to the fee owner of the surface estate.**

And, for example, the substantive part of ALTA 9 endorsement reads:

3. Damage to existing improvements, including lawns, shrubbery, or trees:

b. 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.

In connection with the substance of the mineral endorsements as detailed above, SD law does provide for surface owners to be justly compensated by mineral estate owners for injury to surface owners' persons or property and interference with the use of their property occasioned by mineral, oil and gas exploration and development by the mineral estate owners.

STATE OF SOUTH DAKOTA MINERAL RESERVATIONS.

STATE PATENTS:

As alluded to previously, minerals were often reserved in state Patents. Only a review of the relevant Patents will disclose such reservations and appropriate exception must be taken to any such reservations.

SOUTH DAKOTA CONSTITUTION AND CODE:

Pursuant to Article VIII, § 19, of the South Dakota Constitution:

"All gas, coal, oil and mineral rights, and any other rights as specified by law, to or in public lands, are reserved for the state …"

And, SDCL 5-2-12 provides:

Mineral reservation in leases and conveyances of state land. All sales, leases, and conveyances of lands belonging to the State of South Dakota or to which it may now or hereafter be entitled, including all common school, public buildings, and endowment lands, shall be subject to and contain a reservation to the State of South Dakota of all deposits of coal, ores, metals, and other minerals, asphaltum, oil, gas, geothermal resources, and other like substance in such lands, together with the right to prospect for, mine, and remove the same upon rendering compensation to the owner or lessee for all damages that may be caused by such prospecting or removal. The reserved deposits shall be disposed of only in the manner expressly provided by law.

Therefore, as a matter of law, minerals are reserved by the State of SD even without an express reservation of minerals in a deed of conveyance from the State.

CURRENT DAKOTA HOMESTEAD REQUEST FOR POLICY APPROVAL

Submit by Email

REQUEST FOR POLICY APPROVAL

Email to policyapproval@dakotahomestead.com or Fax to 605-336-5649; Must attach copy of Commitment!

AGENCY: _____

FILE NUMBER: _____

Pursuant to the Issuing Agency Agreement and Dakota Homestead's practices and procedures, request is hereby made for approval to issue the following form of title insurance:

____ Owner's Policy, $_____, Endorsements: _____ | Ext. Cov. ☐ Yes ☐ No

Proposed Insured _____

____ Loan Policy, $_____, Endorsements: _____ | Ext. Cov. ☐ Yes ☐ No

Proposed Insured _____

_____ Policy, $_____, Endorsements: _____ | Ext. Cov. ☐ Yes ☐ No

Proposed Insured _____

ALL OF THE FOLLOWING QUESTIONS MUST BE ANSWERED:

1. Are any previous or prior title policies used as a start? Yes☐ No☐
   If competitor's policy, competitor name: _____;
   Date of Prior Policy _____ Amount of Liability _____
2. Length of title search: _____
3. Condition of Land. ☐ Unimproved (i.e. bare land, ag land, etc.) ☐ Improved (i.e. residential, commercial)
   ☐ Construction (i.e. new construction on the current premises)
   Describe existing or proposed improvements _____
4. This transaction involves: ☐ Sale, ☐ Lease, ☐ Construction Loan, ☐ Refinance, ☐ Purchase Price Loan
5. Will mechanic's lien coverage be required? Yes ☐ No ☐
6. Will we be able to obtain priority? Yes☐ No ☐
7. Are there wetlands, lakes or rivers on the property? Yes ☐ No☐
8. Do current underwriting practices require that an inspection or survey be made? Yes☐ No☐
9. Did the survey inspection disclose any problems? Yes☐ No☐ N/A☐
10. Is there access to **ALL** parcels? Yes☐ No☐
11. Are any matters being eliminated or written over in reliance on an Indemnity Agreement? Yes☐ No☐
12. **Are any matters being eliminated or written over without proper documentation?** Yes☐ No☐
13. Are the priorities of any liens involved being altered by Subordination Agreement? Yes ☐ No☐
14. Has this title been turned down by another underwriter? Yes☐ No☐
15. Special risks, affirmative coverages or other considerations: _____

(If the answer to *any* questions other than *nos.4, 5, and 7* is "*yes*," please explain and provide documents if necessary.)

By:_____ Date:_____

****

The above request is approved, subject to: _____

DAKOTA HOMESTEAD TITLE INSURANCE COMPANY

By:_____ Date:_____

GENERAL INSTRUCTIONS, REQUIREMENTS AND TERMS OF APPROVAL:

1. All requests for approval must be accompanied by a Report or Commitment (together with all supplements or amendments thereto) relative to the proposed transaction and should include a plat showing subject land.
2. Approval for issuance of the herein described title insurance is subject to the terms hereof and the provisions of the underwriting contract. Such approval in no way alters the liability of the parties as set forth in the underwriting contract as to the losses or claims arising out of issuance of such title insurances.

REQUEST FOR POLICY APPROVAL