



Energy Transactions: Dealing With Severed Mineral Interests

John Agle

Counsel, Energy Specialist
Stewart Energy Group



Disclaimer

This underwriting guideline represents my opinion as a professional and is based on my understanding of the coverage, developed over 25 years of serving the renewable energy industry. You should always confirm my understanding by communication with your underwriter. If there's a disagreement, that's not proof that I'm right or wrong, it just illustrates the point that reasonable minds differ. Trust your gut. If you feel you have a good coverage argument, present it. There's a decent chance your gut is right.

What's The Big Deal About Minerals?

- The technology spectrum and surface coverage
- Maybe it's NOT a big deal ... but if it is ...
- The failure of Accommodation
- Revisiting leverage in negotiations
- Nearly all lenders, investors, and developers want to shift mineral risk onto an insurance carrier ... it's cheap!!!!
- What's the coverage? Good ol' damage and removal costs ...
- ... and LITIGATION costs

A Detour To The Form Of Coverage

- The ALTA 35 Series ...
 - ... or whatever is available in that State
- Which form usually applies?
- The 35.3, because it identifies the present and FUTURE facilities
- The exception to the exception = Landco transactions
- A chronology-motivated acceptable modification (usually)
 - Improvement = electrical facility + severable improvements



The ALTA 35.3 – What's Covered?

a. "Improvement" means a building, structure located on the surface of the Land ... affixed to the Land at Date of Policy and that by law constitutes real property ...

b. "Future Improvement" means (an improvement) to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property ...

c. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by (insert name of architect or engineer) dated ____, last revised ____, designated as (insert name of project or project number) consisting of ____ sheets.

3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of an Improvement or a Future Improvement, 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 or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

The ALTA 35.3 – What's NOT Covered?

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. contamination, explosion, fire, flooding, vibration, fracturing, earthquake or subsidence;

[or]

b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances

[/; or

c. the exercise of the rights described in (an exception in Schedule B) or

c. the exercise of the rights described in NONE.



Determining If There's A Problem

- An adequate Scope of Work
 - Technology considerations
 - 100+ years and a review of the vesting deeds “back far enough”
 - “Back far enough” is geography-specific
- Reviewing the title report
 - Legal descriptions and Schedule B exceptions
 - The implications of the general mineral exception
 - When to throw a champagne party

The Underwriting Materials

- The Mineral Resource Report (MRR)
 - A picture is worth several million words
 - Adding a brief summary
- The Mineral Ownership Report (MOR)
 - Identifying the present ownership vs the record ownership
 - Percentage ownership per tract ... not the overall project
 - Leasehold interests (more to come)

The Underwriting Process

- Eliminating the risk legally
 - Waivers, consents, acquisitions, releases, co-developments, etc.
 - Adding a brief summary
- Economic infeasibility
 - O&G materials, affidavits, drill islands
 - Geology/remoteness reports
 - It's Big Boys' Poker
 - Playing the odds and ...
 - Applying the Laugh Test



How Much Mitigation Is Enough?

- Revisiting the technology implications
 - Wind, geothermal, battery, rooftop/carport solar
- Ground-mounted solar projects
 - The relative rights of fractional mineral owners
 - Limited individual leverage but collectively?
- Mineral “Opportunists”
 - The true risk of litigation
 - Another Laugh Test

Evaluating Mineral Leases

- Reviewing the terms of the document
 - Held by production, expired by its terms, etc?
- How old is “really old”?
- Reapplying the Laugh Test
- The value of Affidavits of Non-Production (AFPs)
 - Handing leverage to the lessee
 - When is an AFP from the landowner acceptable?

Other Considerations

- The Risk Pie
 - If the lender, investor, and title insurer won't eat it, guess who gets to wolf it down
- The critical role of Bad Facts
 - Extortion attempts and developing in an oil patch
- Is there a magic number to assure coverage?
 - Applying the facts ...
 - ... and sliding on the scale



Thank You.



Stewart Title Guaranty Company
Stewart Energy Group

John Agle
Counsel, Energy Specialist
stewart.com/commercial