Energy Transactions:

How To Consider, Document & Insure Encroachment Risks

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Disclaimer

This underwriting guideline represents my opinion as a professional and is based on my understanding of the particular coverage, developed over 25 years of serving the renewable energy industry. You should always confirm my understanding by communication with your underwriter.

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Encroachment Risk … What Is It?

- The right of a third-party to force removal or relocation of the energy facility, or to cause damage to the facility in the exercising of those rights.

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Encroachment Risk … What's Covered Under the Policy of Title Insurance?

- Damage to the energy facility resulting from an exercise of rights held by a third-party
- Removal/relocation costs associated with an exercise of rights held by a third-party
- Litigation costs (often the biggest factor!)

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Who Wants the Coverage?

- Lenders, investors …
- … and the developer!

How Is Encroachment Risk Insured?

- The ALTA 36 Energy Set of endorsements
- The ALTA 36.6 Energy Encroachment endorsement
- Avoiding duplicative coverage

36.6 Energy Encroachment Endorsement – Pt 1

a. “Electricity Facility” means an electricity generating facility that may include one or more of the following: (all the stuff that comprises an energy projects, located on the Land at Date of Policy or to be built or constructed on the Land in the locations according to the Plans, that by law constitutes real property.

b. “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. (This nearly always an ALTA Survey w/ the site plan superimposed.)

c. “Severable Improvement” means property affixed to the Land at Date of Policy or to be affixed to the Land in the locations according to the Plans, that would constitute an Electricity Facility but for its characterization as personal property, and that by law does not constitute real property because (a) of its character and manner of attachment to the Land and (b) the property can be severed from the Land without causing material damage to the property or to the Land.

36.6 Energy Encroachment Endorsement – Pt 2

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

WHAT TYPE OF ENCROACHMENT?

a. An encroachment of any Electricity Facility or Severable Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
b. An encroachment of an improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;

WHAT'S COVERED?

c. Enforced removal of any Electricity Facility or Severable Improvement, as a result of an encroachment by the Electricity Facility or Severable Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Electricity Facility or Severable Improvement; [or]
d. Damage to any Electricity Facility or Severable Improvement that is located on or encroaches onto that portion of the Land subject to an 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 [; or]

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36.6 Energy Encroachment Endorsement – Pt 3

WHAT'S **NOT** COVERED?

3e. The coverage of Sections 3.c. and 3.d. shall not apply to the encroachments listed in Exception(s) ________________ of Schedule B].

- The Magic NONE.
- Don't delete 3e, modify it.

The Encroachment Underwriting Process – Pt 1

- Removing the general survey exception …
- … and REPLACING it with a special survey exception.
- “The following matters based on a review of the (identified ALTA Survey w/ site plan superimposed):”
- Off-record matters
- Deleting exceptions to title
- Include the kitchen sink
- Documenting the review

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The Encroachment Underwriting Process – Pt 2

- Include “what’s left” on line 3e of the 36.6 endorsement
- Eliminate the excepted items as risks are resolved
- The role of the surveyor
- Crossing agreements (the subject of a separate webinar)
- Owner’s/Lessee’s Affidavits
- Achieving the Magic NONE

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Special Considerations

- The rights of use and maintenance … do they still exist? Is there a rational claims scenario?
- What if the third-party rights are not an easement? Are modifications legal?
- If the 36.6 or an equivalent is available, other forms are NOT available.