

AC/DC Key Concerns for Commercial Energy Transactions

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It is rumored that on June 10, 1752, Benjamin Franklin attached a key to the string of a kite and went outside during a storm, flying kite in hand, to see if the key would draw an electrical charge. Historians are divided on the precise date, or if this event actually occurred, nonetheless, it is how the story goes... Whether or not historians can agree on this event, I think one thing that we can all agree on is that Energy has come a long way since Ben's kite flying days!



A "key on the string of a kite" refers to the famous experiment conducted by Benjamin Franklin, where he attached a metal key to the string of a kite flown during a thunderstorm to prove that lightning is a form of electricity; when the kite got struck by lightning, the electrical charge would travel down the wet string and accumulate on the key, allowing Franklin to observe a spark when he brought his knuckle near it.



Minerals

Initial Questions to Ask When Discussing Mineral Coverage on a Renewable Project

Where is the project located?

- Is it in states with high mineral activity, whether it be oil and gas or mining? (e.g. Texas, Illinois, Pennsylvania)



Initial Questions to Ask When Discussing Mineral Coverage on a Renewable Project

What type of project is being insured?

- Solar, wind, battery or some combination
 - The type of project can have a significant impact on our analysis. For instance, our mineral analysis is very different between wind projects and large utility-scale solar projects. Why?
 - Although wind projects typically cover much larger areas, the improvements (the turbines) only impact small areas and do not preclude many types of mineral production.
 - On the other hand, utility-scale solar projects completely blanket large contiguous areas of land and make it difficult for mineral production such as surface mining and drilling of oil and gas wells.

Initial Questions to Ask When Discussing Mineral Coverage on a Renewable Project

How large is the footprint of the project?

- Smaller projects typically require less analysis as they have a smaller impact on potential mineral activity. A 3-acre battery site is much different than a 2,000-acre solar site.



Initial Questions to Ask When Discussing Mineral Coverage on a Renewable Project

Does title reflect any mineral severances and/or mineral leases?

- We need to confirm whether the examiner identified any severances, whether by conveyance or reservation, found in title.
- We also need to confirm how far back the title search went. In some states, reservations may have been made in patents or as early as the mid-1800's in deeds.

Initial Questions to Ask When Discussing Mineral Coverage on a Renewable Project

Does the developer have a survey and/or site layout?

- Our coverage is tied to the project site layout. As a result, we need to have a clear understanding of where the improvements will be located and how much land will be covered by the improvements.

What next?

Request what we call a mineral resource report (aka MRR)

- These show high level view of mineral activity in the area of the project, including pipelines which may not always show up in title.
 - The MRR identifies past and current well locations, mining sites, pipelines, and other information.
- Several vendors provide similar products and are relatively cheap.

What next?

Check MRR for any activity within 3-mile radius of the project

- Are there any wells within the radius? If so, are they old or are they currently active?
- At this point, may need to check other resources for additional information.

What next?

Request mineral/leasehold ownership reports (MORs/LORs) if necessary

- Difference between an MOR and MRR
 - MORs/LORs reflect ownership of the mineral estate. These reports should also confirm whether there is active mineral activity such as oil and gas drilling and mining.
 - If there is active drilling or mining, the reports should confirm who owns those rights whether by lease or otherwise.
 - This is important because agreements from those parties may be necessary.

Common Issues

What are considered “minerals”
in the particular jurisdiction?



Common Issues

Offsite wells and mines might impact project area

- Examples: offsite well holds larger leased area where no wells appear, offsite mineshaft on adjacent property



Common Issues

Sand/gravel pits in the area

- Are these considered minerals? Who owns the rights?



How do we address the risk based on what we've found from the above?

Surface waivers from mineral owners

- In many states, the mineral estate is dominant. As a result, the mineral owner has the right to reasonably use the surface to access those mineral rights.
 - Why?
 - Without that right, the mineral estate would be worthless. Public policy wants to encourage development of resources.

How do we address the risk based on what we've found from the above?

Joint surface use agreements from mineral operators

- If there is active oil and gas production or mining, we will need some sort of agreement from the mineral operators that confirms they will not interfere with the insured project.
- These agreements can vary quite a bit, but we want to make sure the mineral operator won't claim the right to use the surface where the project improvements are located.

How do we address the risk based on what we've found from the above?

Releases or affidavits of non-production/non-development

- If there are existing mineral leases, we need to confirm that they are no longer in effect.
- The best way to do this is to get a release from the owner of the lease(s). However, this is often difficult because the lease may be old, the original or subsequent lessee no longer exists, the lessee refused to sign a release, etc.
- Alternatively, we can request affidavits of non-production/non-development that confirm there has been no production or development

Other Useful Information When Reviewing

Department of Natural Resources websites (production data, GIS maps, etc.)

- These websites will often have GIS maps you can use to confirm general location of wells and/or mines.
- Additionally, these websites may provide insight as to whether the wells or mines remain open and active

Other Useful Information When Reviewing

Pipeline GIS Maps such as National Pipeline Mapping System (NPMS)

- This mapping system shows interstate pipeline locations and may reveal pipelines that were not picked up or found in title.

Endorsements to Address Mineral Risks

These endorsements give coverage based on a mineral owner's right to use the surface.



Endorsements to Address Mineral Risks

ALTA states: ALTA 35 series and 36.9

- Paragraph 3 of the ALTA 35.3 states:
 - 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.

Endorsements to Address Mineral Risks

Texas: T-19s

- The T-19.4 states:
 - The Company insures the insured against loss which the insured shall sustain by reason of damage to, enforced removal, or alteration of any Severable Improvements 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 coal, lignite, oil, gas or other minerals or any other subsurface substances excepted from the description of the Land, excepted or excluded on Schedule A, Item 2, or excepted in Schedule B.

Non-Imputation In the Energy World

ALTA 2021 Owner's Policy

Non-Imputation Endorsements can be issued to the ALTA 2021 Owner's Policy (or ALTA 2006 Owner's Policy where issued); and to the Texas T-1 Owner's Policy.

- Pertains to Limited Liability Company; Partnership; Corporation.
 - In Energy, most common is a Limited Liability Company ("LLC") which is what will be discussed in this Webinar.

What is imputed knowledge?

The knowledge legally attributed to a party because of his/her position or relationship with or responsibility for another party.



Knowledge defined in the 2021 ALTA Owner's Policy Jacket?

“Knowledge” or “Known”: Actual knowledge or actual notice, but not constructive notice imparted by the Public Records.



Knowledge defined in the Texas T-1 Owner's Policy Jacket

- "Knowledge" or "Known": actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.
 - The word 'actual' is not defined in the ALTA or the TX T-1 Owner's Policy, but the legal definition of 'actual' means: Something that is real or exists in fact (as opposed to theoretical or possible).
 - Knowledge can only be imputed once; As soon as the party becomes a member of the LLC/entity, they become a knowledge party. Thus, coverage in the endorsements ties to Knowledge as of Date of Policy.

When is Non-Imputation coverage applicable?

When there is an incoming member to the Title Owning LLC by sale or transfer of all or a portion of existing member/s interest in the LLC.

- We see this when an energy developer is selling the project to another energy developer. Land is not conveyed to another entity, rather, the member/s of the LLC will sell 100% of its membership interest to the purchasing developer. This is commonly known as a “MIPA” transaction.
 - 100% transfer = ALTA 15-06 Endorsement
- We also see it in energy when there is an incoming investor (usually a Tax Equity investor), and a portion of the membership interest is transferred to the new Investor.
 - Partial transfer = 15.1-06 (typical); 15.2 could also be issued.
- What endorsements provide Non-Imputation coverage? ALTA 15-06 (Full Equity Transfer), 15.1-06 (Additional Insured); and 15.2-06 (Partial Equity Transfer); Texas T-24 [Rule P-55]

How does non-imputation coverage benefit the Insured?

For purposes of paying a loss, the party acquiring the membership interest is treated as though they were a bona-fide purchaser for value even though there is not a transfer of Title, thus the bona-fide purchaser doctrine is not applicable.

- All four non-imputation endorsements “The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage....”

How does non-imputation coverage benefit the Insured?

What are Exclusions from Coverage 3(a), 3(b) and 3(e) in the 2021 ALTA Owner's Policy?

3. Any defect, lien, encumbrance, adverse claim, or other matter:

a. created, suffered, assumed, or agreed to by the Insured Claimant;

b. not Known to the Company, not recorded in the Public Records at the Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;

c. resulting in no loss or damage to the Insured Claimant;

d. attaching or created subsequent to the Date of Policy (Exclusion 3.d. does not modify or limit the coverage provided under

Covered Risk 9 or 10); or

e. resulting in loss or damage that would not have been sustained if consideration sufficient to qualify the Insured named in Schedule A as a bona fide purchaser had been given for the Title at the Date of Policy.

How does non-imputation coverage benefit the Insured?

What are Exclusions from Coverage 3(a), 3(b) and 3(c) in the Texas T-1 Owner's Policy?

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the Insured Claimant;

(b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;

(c) resulting in no loss or damage to the Insured Claimant;

(d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or

(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

Forms of Non-Imputation Endorsements: ALTA 15-06, 15.1-06, and 15.2-06; Texas T24

ALTA 15-06 Endorsement [Fully Equity Transfer-100% of membership interest being purchased; Requires the Insured to sign the endorsement]:

- Can be issued when 100% of the membership interest in the Title-owning entity is transferred from one or more parties to one or more parties.

Example: John and Jane are the members of 100% interest in J & J LLC. Fred is purchasing John's and Jane's membership interest in LLC; John and Jane will therefore transfer all of their interest, comprising 100% of the membership interest in the LLC to Fred. The ALTA 15 endorsement will provide non-imputation coverage to Fred for John's and Jane's knowledge that would be imputed, by operation of law) [Example can also be applied to entity transferring membership interest to another entity]

Endorsement language:

The Company 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, provided **[identify the "incoming" partners, members, or shareholders]** acquired the Insured as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

Forms of Non-Imputation Endorsements: ALTA 15-06, 15.1-06, and 15.2-06; Texas T24

ALTA 15.1-06 Endorsement [Additional Insured-Less than 100% interest being purchased; some or all of existing members to remain; Requires the insured to sign the endorsement)

- Can be issued when less than 100% of the membership interest in the Title-Owning entity is transferred from one or more parties to one or more parties.

Example: John, Jane, Tom, and Sally each own 25% membership interest in JJTS LLC. John is going to sell/transfer 12.5% of his 25% membership interest to David. John, Jane, Tom, and Sally will all still be members of LLC, but now David will be a member too. David would be the Additional Insured, and the knowledge parties are John, Jane, Tom, and Sally. [Example can also be applied to entity transferring membership interest to another entity]

Endorsement language:

For purposes of the coverage provided by this endorsement, [identify the "incoming" partner, member or shareholder] **(Additional Insured-the incoming member)** is added as an Insured under the policy. By execution below, the Insured named in Schedule A acknowledges that any payment made under this endorsement shall reduce the Amount of Insurance as provided in Section 10 of the Conditions.

The Company 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, as applicable, the existing and/or exiting 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 Additional Insured by operation of law, to the extent of the percentage interest in the Insured acquired by Additional Insured as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

Forms of Non-Imputation Endorsements: ALTA 15-06, 15.1-06, and 15.2-06; Texas T24

ALTA 15.2 Endorsement [Partial Equity Transfer, Requires Insured to sign the endorsement]

- Not requested in Energy Transactions, as a rule, therefore not being discussed in detail in this Webinar
- Can be issued when less than 100% of the membership interest in the Title-Ownning entity is transferred from one or more parties to one or more parties and the incoming member/partner will be obtaining their own Owner's Policy in which they are the named Insured/s.

Forms of Non-Imputation Endorsements: ALTA 15-06, 15.1-06, and 15.2-06; Texas T24

TEXAS T-24 Endorsement [Full Equity Transfer]

- Can be issued when 100% of the membership interest in the Title-owning entity is transferred from one or more persons to one or more persons

Example: John and Jane are the members of 100% interest in J & J LLC. Fred is purchasing John's and Jane's membership interest in LLC; John and Jane will therefore transfer all of their interest, comprising 100% of the membership interest in the LLC to Fred. The ALTA 15 endorsement will provide non-imputation coverage to Fred for John's and Jane's knowledge that would be imputed, by operation of law)

Endorsement Language:

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.

What information is required to underwrite issuance of these endorsements

Non-Imputation Affidavit from the individuals whose knowledge, action or inaction is covered by the endorsement (called “Knowledge Party/ies”); If the Knowledge Party is an entity, the Affidavit needs to be executed by a person who has knowledge of the matters represented in that the Non-Imputation Affidavit.

- Not one specific ‘set in stone’ form, but Affidavit will ask for the following basic representations in the language used by the Title Insurer:
 - The knowledge party represents that it has no knowledge of and has not done anything to create any: Defect, lien, encumbrance, transfer of interest, constructive trust, other equity in, or other matter affecting the land not disclosed in the Commitment (“adverse interests”), nor do they have any knowledge of any such adverse interests not disclosed in the Commitment, EXCEPT FOR the following matters:

What information is required to underwrite issuance of these endorsements

- Organizational Flow Charts showing the structure of ownership in the Entity before the transfer; and Organizational Flow Charts showing what the structure of the ownership in the Entity will be once the membership transfer occurs
- Indemnity from outgoing parties – The non-imputation endorsement includes indemnification from the knowledge party in favor of the Title Insurer.
- Financial Statement-To determine that the Indemnitor in the Non-Imputation Affidavit has the financial ability to be able to support the indemnity.

Crossings

What do we look for on crossings?

- We review the survey to identify where the proposed improvements will be located in relation to existing encumbrances such as easements, roads, pipelines, and other parties' improvements.
- We check to see if there are encroachments
 - If so, what are the encroachments? For instance, is it an overhead line encroaching onto an underground easement?
 - Do the improvements encroach onto land outside of the leased area?

What do we look for on crossings?

- What do the documents say?
 - Are the previously existing encumbrances blanket in nature or do they have a specific location?
 - Are the previously existing encumbrances exclusive or non-exclusive?



What do we look for on crossings?

- How does a developer address these crossings?
 - Crossing agreements
 - Letters of no objection
 - Consents
 - Licenses
 - Something else?



Coverage under the ALTA 36.6

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

- 3(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;

Coverage under the ALTA 36.6

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

- 3(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;

Coverage under the ALTA 36.6

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

- 3(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

Coverage under the ALTA 36.6

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

- 3(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

Coverage under the ALTA 36.6

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

- 3(e): The coverage of Sections 3.c. and 3.d. shall not apply to the encroachments listed in Exceptions(s) ____ of Schedule B.

Affirmative coverage in Texas

Any right of any holder of the Easements described in Schedule B, Exceptions _____ to (1) force the relocation or removal of, or (2) interfere with the use of, or (3) prevent the right of access to or ingress or egress from, existing improvements, or future improvements to be constructed on or affixed to the Land, in the locations according to the Plans shown on the Survey, site and elevation plan or other depictions or drawings prepared by _____ and certified by _____, last revised _____, Job No. _____ (the “Survey”). 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.

Mechanic's Lien Coverage in Energy Transactions

What is Mechanic's Lien coverage?

Policy coverage that insures the lien of the lender's insured Mortgage/Deed of Trust has priority over, or is senior to, an inchoate mechanic's lien—even if the state's statute says it does not have priority.

- a. What is an inchoate mechanic's lien? It is a mechanic's lien that has not yet recorded, but the claimant has a legal right to perfect its lien right by recording or filing a mechanic's lien resulting from work contracted for, started, or materials delivered before the Date of Policy.
 - i. The lien right pre-dates the Policy and once that right is perfected by the recording/filing of the mechanic's lien, the lien attaches to and becomes an encumbrance on the insured Land.
 - ii. The recording of the ML allows the claimant a legal avenue to foreclose on the property in the event the claimant is not paid within a statutory amount of time.

What is Mechanic's Lien coverage?

- b. Each state has specific statutes and it is necessary when underwriting mechanic's lien risks to speak with a state underwriter to understand the statutes, safeguards and risks involved.
 - i. Examples:
 - a. Colorado: Priority for the project begins with the first pencil (designs, plans, maps, specifications, architect and anyone who has rendered a service).
 - b. California: First material delivered constitutes a break in priority and a break by one is a break for all (Includes grading, porta potty; fence or work truck for any purpose).
 - c. Florida: Recording of a Notice of Commencement determines priority.
 - d. Texas: Title Policy does not insure inchoate mechanic's Liens

ALTA 2021 Loan Policy:

Mechanic's lien coverage is provided via Covered Risk 11a.

Reads as follows:

11. The lack of priority of the lien of the Insured Mortgage upon the Title:

- a. as security for each advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for service, labor, material, or equipment arising from construction of an improvement or work related to the Land when the improvement or work is:
 - i. contracted for or commenced on or before the Date of Policy; or
 - ii. contracted for, commenced, or continued after the Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on the Date of Policy to advance.

ALTA 2021 Loan Policy:

Mechanic's lien coverage is provided via Covered Risk 11a.

- Instead of providing mechanic's lien coverage to the lender in the full amount of the loan at the time the Policy is issued, Title Insurers want to provide mechanic's lien coverage incrementally and in the amount the lender has actually disbursed from construction loan proceeds.
 - Construction loan funds are typically disbursed once a month, however, a lender can make disbursements of loan funds more, or less, often depending on the project and the terms of the loan agreement.

ALTA 2021 Loan Policy:

Mechanic's lien coverage is provided via Covered Risk 11a.

- Covered Risk 11a, is 'taken away' with the issuance of either the ALTA 32; 32.1; or 32.2 Endorsement.
 - Endorsements state: "Covered Risk 11.a. of this policy is deleted."
 - Coverage given back incrementally by issuance of the ALTA 33 Endorsement issued for each construction draw (disbursement of loan funds).
 - With each ALTA 33 issued, the Aggregate amount of insurance for mechanic's lien coverage is increased in accordance with the amount of loan funds actually disbursed by the lender.

What Coverage is provided in the 32 series of endorsements?

- Each endorsement insures the validity and enforceability of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, which is the date of the ALTA 33 endorsements that are issued.
- Also insure the priority of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage.



What Coverage is provided in the 32 series of endorsements?

- Paragraph 3c of each sets forth the condition to insuring the priority of the Construction Loan Advance over mechanic's liens-bolded below.
 - 32-21 (Construction Loan-Broadest Coverage)
 - 3c: The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic's Lien, if notice of the Mechanic's Lien is not filed or recorded in the Public Records, **but only to the extent that the charges for the services, labor, materials, or equipment for which the Mechanic's Lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before the Date of Coverage.**
 - 32.1-21 (Direct Payment to claimant-Narrower coverage than the 32-21):
 - 3c. The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic's Lien, if notice of the Mechanic's Lien is not filed or recorded in the Public Records, **but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials, or equipment for which the Mechanic's Lien is claimed has been made by the Company or by the Insured with the Company's written approval.**
 - 32.2-21 (Direct Payment by Insured-Narrowest Coverage):
 - 3c. The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanic's Lien, if notice of the Mechanic's Lien is not filed or recorded in the Public Records, **but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials, or equipment for which the Mechanic's Lien is claimed has been made by the Insured or on the Insured's behalf on or before the Date of Coverage.**

Inchoate Mechanic's Lien Coverage

In Texas, we cannot offer any form of inchoate mechanic's lien coverage when the loan policy is issued.

- During construction, we can issue T-3 Endorsements as loan disbursements are made.
 - T-3 doesn't provide the priority coverage that the 32 series and 33 endorsements provide; but it does provide coverage over any recorded liens, including mechanic's liens.
- Once construction is completed and the statutory lien period of 180 days is over, we can delete the mechanic's lien exception when provided the following:
 - Final unconditional lien waiver from the EPC
 - Construction Complete Affidavit from the EPC confirming when final work on project was completed.
 - Title update

Inchoate Mechanic's Lien Coverage

- TX Loan Policy – Policy only insures to the extent of the amount actually disbursed but increases with each disbursement.
 - TDI P-8: Mechanic's lien exception with pending disbursement provision:
 - Exception States:
 - Any and all liens arising by reason of unpaid bills or claims for work performed or materials furnished in connection with improvements placed, or to be placed, upon the subject land. However, the Company does insure the Insured against loss, if any, sustained by the Insured under this Policy if such liens have been filed with the County Clerk of _____County, Texas, prior to the date hereof.

Pending disbursement of the full proceeds of the loan secured by the lien instrument set forth under Schedule A hereof, this policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made in good faith and without knowledge of any defects in, or objections to, the title up to the face amount of the policy. Nothing contained in this paragraph shall be construed as limiting any exception under Schedule B, or any printed provision of this policy.

Mechanic's Lien Coverage and Owner's Policy

- In energy transactions, mechanic's lien coverage is not generally provided to the Insured in an Owner's Policy because the Title Insurer would not want to cover mechanic's liens resulting from the Insured's own work.
 - Typical mechanic's lien exception in Schedule B of Owner's Policy:
 - Any lien or right to a lien, for services, labor, or material theretofore or hereafter furnished, imposed by law and not shown by the public records.



Things to consider when quantifying mechanic's lien risk:

- What Policy, or Policies are being issued?
- What party has contracted for the work? Is it our Insured? Or the landowner (lessor/seller)?
- What is the contract cost of the work?
- Has work started, or materials delivered before the Date of Policy?
- Property inspection immediately before closing to establish 'pristine priority.'
- What is the state's statute regarding claimant's priority?

What is typically requested by Title Insurer to underwrite ML coverage?

- Affidavit disclosing work.
- EPC contract.
- Sworn Statement from EPC contractor (general contractor); there may also be other contractors that will provide materials or perform work on the project.
- Mechanic's lien Indemnity satisfactory to Insurer from Parent and/or Project Entity.
- PIP Indemnity (Pay if Paid) from EPC and any other contractor that a Sworn Statement is requested from.
- Lien Waivers if work has already started (Conditional; Unconditional).
- Financial Statements.

What is typically requested by Title Insurer to underwrite ML coverage?

- Draw package to review when issuing ALTA 33 endorsements:
 - Pay applications from EPC and any other contractor.
 - Invoices
 - Conditional Lien Waivers for pay apps/invoices being paid from the draw (Title Insurer may have a minimum threshold)
 - Notice of Borrowing from Borrower
 - Next time-Unconditional Lien Waivers for the Condition waivers from previous draw
 - Title Update

Thank you. Questions?



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