



4900 Woodway Drive, Suite 650

Houston, TX 77056

Phone: 713-871-0005

Fax: 713-871-1358

Thomas E. Black, Jr., P. C.*

Calvin C. Mann, Jr., P. C.

Gregory S. Graham, P. C.

David F. Dulock

Diane M. Gleason

Benjamin R. Idziak **

Shawn P. Black **

Margaret A. Noles

Robert J. Brewer

Regina Uhl

* Also Licensed in Iowa, New York,
Washington and West Virginia

** Also Licensed in New York

October 28, 2009

To: Clients and Friends

From: David F. Dulock

Subject: New and Amended Mineral Interests Rules, Rates, and Endorsements by the Texas Department of Insurance, effective November 1, 2009

In the August 28, 2009 issue of the *Texas Register*, the Texas Department of Insurance (TDI) adopted new rules and endorsement forms and modified currently existing rules for mineral interests affecting Texas properties as part of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual). **These procedural rules, rates, and endorsement forms relating to mineral interests become effective November 1, 2009**, and are identified as follows: amended Texas Title Insurance Information page; new Procedural Rule P-5.1; amended Procedural Rule P-50; new Procedural Rule P-50.1; new Minerals and Surface Damage Endorsement Form T-19.2; new Minerals and Surface Damage Endorsement Form T-19.3; amended Rate Rule R-29; and new Rate Rule R-29.1.

The TDI adopted these new rules and endorsements and modified the currently existing rules relating to mineral interests because the TDI became aware that coverage for mineral interests has varied throughout the state depending on the type of transaction, location of the transaction, local historical custom, and even the type of abstract plant maintained by the title agent. According to the TDI, because of the variance in practice that has existed to date, these new rules and forms and the modification of currently existing rules are necessary to ensure that going forward title insurance coverage for mineral interests will be uniformly handled throughout the state and across varying types of transactions.

This memorandum addresses these rules and endorsements and consists of a summary of the new and modified rules and endorsement forms, identified by the item number assigned by the TDI; our comments, if any, for the particular item number summarized; our recommendations; and the text of each new or modified rule and endorsement adopted by the TDI, as follows:

Item 1-MAR: Amends the Texas Title Insurance Information page by adding information stating that: (i) the title insurance policy is not an abstract of title; (ii) the title insurance company is not obligated to determine the ownership of any mineral interests; (iii) mineral interests may not be covered by the policy; (iv) while the title insurance company may refuse to issue the policy without an exclusion or an exception as to minerals and mineral rights in the policy, optional endorsements are available for purchase; and (v) if a title policy is issued with an exclusion or exception to the minerals then neither the policy nor the optional endorsements insure title to the mineral rights.

Our Comment: This information page, in addition to other information, is intended to inform prospective insureds that they may obtain limited coverage for damages to the surface estate due to mineral interests excepted or excluded from the title insurance policy by the issuance of the new T-19.2 and T-19.3 endorsements or the issuance of the existing T-19 and T-19.1 endorsements, as applicable.

(page 1 of 10 pages)

Item 2-MAR: Adopts new Procedural Rule P-5.1 that: (i) defines “minerals”; (ii) states that a policy is not an abstract of title and that the title insurance company is not obligated to determine the ownership of any mineral interests; (iii) authorizes a title insurance company to insert into a policy or any other title insuring form a prescribed exception or a prescribed exclusion for minerals in either Schedule A or Schedule B respectively; and (iv) requires that the title insurance company, in that event, must issue the new T-19.2 or the T-19.3 endorsement, as applicable.

Our Comment: (1) New Procedural Rule P-5.1 gives the title insurance company, and not the insured, the right to choose which exception or exclusion for minerals will be inserted into the policy once the title insurance company has decided to generally exclude or except to minerals under new Procedural Rule P-5.1. Since lenders are accustomed to seeing in Schedule A, item 2 only the designation “fee simple” without qualification, lenders who are concerned about the salability of an insured loan because the language and location of the mineral exclusion in Schedule A, item 2 may cause their investor(s) to question the quality of title being insured, should ask the title insurance company to place the exception or exclusion for minerals permitted by P-5.1 in Schedule B. There is no guarantee, however, that the title insurance company will comply with this request. (2) New Procedural Rule P-5.1 places the burden on the insured to request one or more of the applicable new mineral coverage endorsements (T-19.2 and T-19.3) in the event the title insurance company elects to except or exclude minerals from coverage.

Item 3-MAR: Amends Procedural Rule P-50 concerning the use of the *Restrictions, Encroachments, Minerals Endorsement* with Loan and Owner policies (Forms T-19 or T-19.1 respectively) by: (i) removing from sections P-50A and B the distinction between the use of the T-19 with respect to residential and non-residential property; (ii) removing the existing language “on land which is not residential real property” from section P-50C so that the T-19.1 may be issued in transactions involving residential real property as well as for transactions involving non-residential real property (prior to this amendment, the T-19.1 was only available for issuance in transactions involving non-residential real property); (iii) making reference to the new mineral endorsements T-19.2 and T-19.3 and new Procedural Rule P-5.1; and (iv) eliminating language concerning receipt of premium.

Our Comment: If the T-19.2 and T-19.3 endorsements, as applicable, are not issued, the coverage regarding minerals in the T-19 and T-19.1 would continue as long as this coverage was not deleted due to presenting an unacceptable risk, as permitted by Procedural Rule P-50.

Item 4-MAR: Adopts new Procedural Rule P-50.1: (1) concerning the use of the new *Minerals and Surface Damage Endorsement* (T-19.2) in conjunction with Loan and Owner policies issued (i) on real property of one acre or less improved or intended to be improved for 1-to-4 family residential use and, (ii) on real property improved or intended to be improved for office, industrial, retail, mixed-use retail/residential, or multifamily use; (2) concerning the use of the new *Minerals and Surface Damage Endorsement* (T-19.3) in conjunction with Loan and Owner policies issued on other types of real property not described in (1)(i) and (ii) above; and (3) providing that dual endorsements must be issued (*i.e.*, both T-19.2 and T-19.3) when the parcels of real property involved in the transaction are a combination of the types described in (1)(i) or (1)(ii), and (2) above.

Our Comment: (1) New Procedural Rule P-50.1 places the burden on the insured to request one or more of the applicable endorsements (T-19.2 and T-19.3) in the event the title insurance company elects to exclude minerals from coverage under Procedural Rule P-5.1. (2) New Procedural Rule P-50.1 does not permit the issuance of the T-19.2 endorsement for 1-to-4 residential property that exceeds one acre. In this instance, in order to obtain mineral coverage, the insured should request the title insurance company to issue the T-19.3. (See also the **Our Comment** section under Item 6-MAR below for additional information.)

Item 5-MAR: Adopts the new *Minerals and Surface Damage Endorsement* Form T-19.2 that insures against loss (excluding loss occasioned by subsidence) sustained by reason of damage to improvements (excluding lawns, shrubbery, or trees) located on the land on or after the date of the policy resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted or excluded in the policy pursuant to Procedural Rule P-50.1.

Our Comment: (1) When issued as endorsements to the same policy, the mineral coverage in the T-19.2 endorsement replaces the mineral coverage in the existing T-19 and T-19.1 endorsements. The remaining coverages in the T-19 and T-19.1 endorsements are unaffected by the T-19.2 endorsement. Therefore, when the T-19.2 endorsement is issued, the lender and owner should also require that the T-19 and T-19.1 endorsements be issued. (2) Procedural Rule 50.1 provides that the T-19.2 must be issued only if requested by the insured. A comparison of the mineral coverage in the T-19 and T-19.2 shows that the mineral coverage in the T-19 is broader (*i.e.*, unlike the mineral coverage in the T-19.2, the T-19 includes coverage for damage to lawns, shrubbery and trees; does not exclude coverage for damage based on subsidence; and does not limit the surface right causing the damage to a right existing at the policy date). For these reasons, some lenders may decide that it is more beneficial not to request the T-19.2 and rely only on the mineral coverage in paragraph 4 of the T-19. This would be unwise, because while Procedural Rule P-50.1 requires the issuance of the T-19.2 only if requested, and does not permit any deletions in coverage, Procedural Rule P-50 permits the title insurance company to delete any insuring provision in the T-19 the title insurance company considers as an unacceptable risk. Certainly, in the above instance, title insurance companies will avail themselves of this option and delete paragraph 4 from the T-19, leaving the lender with no mineral coverage.

Item 6-MAR: - Adopts the new *Minerals and Surface Damage Endorsement* Form T-19.3 that insures against loss (excluding loss occasioned by subsidence) sustained by reason of damage to permanent buildings located on the land on or after the date of the policy resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted or excluded in the policy pursuant to Procedural Rule P-50.1.

Our Comment: (1) Note the difference in mineral coverage between the T-19.3 and the T-19.2. The T-19.3 only covers loss due to damage to permanent buildings while the T-19.2 covers loss due to damage to improvements (which provides greater coverage). The reason for this difference in coverage is that the T-19.3 will usually be issued to cover 1-to-4 residential property that exceeds one acre or other acreage tracts, including farm and ranch land, and the intent is to limit coverage only to permanent buildings, such as residences, barns and other buildings, and not to ancillary improvements such as fences, wells, windmills, etc. (2) When issued as endorsements to the

same policy and insuring the same land, the mineral coverage in the T-19.3 endorsement replaces the mineral coverage in the existing T-19 and T-19.1 endorsements. The remaining coverages in the T-19 and T-19.1 endorsements are unaffected by the T-19.3 endorsement. Therefore, when the T-19.3 endorsement is issued, the lender and owner should also require that the T-19 and T-19.1 endorsements be issued for the same land. (3) Procedural Rule 50.1 provides that the T-19.3 must be issued only if requested by the insured. A comparison of the mineral coverage in the T-19 and T-19.3 shows that the mineral coverage in the T-19 is broader (*i.e.*, unlike the mineral coverage in the T-19.3, the T-19 covers improvements (not just permanent buildings), including lawns, shrubbery and trees; does not exclude coverage for damage based on subsidence; and does not limit the surface right causing the damage to a right existing at the policy date). For these reasons, some lenders may decide that it is more beneficial not to request the T-19.3 and rely only on the mineral coverage in paragraph 4 of the T-19. This would be unwise, because while Procedural Rule P-50.1 requires the issuance of the T-19.3 only if requested, and does not permit any deletions in coverage, Procedural Rule P-50 permits the title insurance company to delete any insuring provision in the T-19 the title insurance company considers as an unacceptable risk. Certainly, in the above instance, title insurance companies will avail themselves of this option and delete paragraph 4 from the T-19, leaving the lender with no mineral coverage.

Item 7-MAR: - Amends Rate Rule R-29 to: (i) raise the minimum premium for the issuance of the *Restrictions, Encroachments, Minerals Endorsement* (Form T-19) and the *Restrictions, Encroachments, Minerals Endorsement - Owner Policy* (Form T-19.1) from \$25.00 to \$50.00; (ii) redesignate existing paragraph C, which applies only to transactions involving non-residential real property, as paragraph D, and delete the last sentence prohibiting the issuance of the T-19.1 on residential real property; (iii) add new paragraph C to provide a new Rate Rule when the T-19.1 is issued on residential real property and to specify that when the T-19.1 is issued on residential real property, the premium shall be 10% of the Basic Rate for a single issue policy or 5% of the Basic Rate if an amendment to area and boundaries is also purchased; and (iv) remove references to procedures and forms that are evident from Procedural Rule P-50.

Item 8-MAR: - Adopts new Rate Rule R-29.1 that fixes the premium for the issuance of the *Minerals and Surface Damage Endorsement* (Forms T-19.2 and T-19.3) at \$50.00.

Our Recommendations: *When mineral interests are excepted or excluded from the policy pursuant to P-5.1, we recommend that the insured require the issuance of the T-19.2 or T-19.3 endorsement, as applicable, and always require issuance of the T-19 or T-19.1, as applicable.*

<p>This Legislative Update is intended to provide accurate and authoritative information in regard to the subject matter covered, but no representations or warranty of the accuracy or reliability of the content of this information are made or implied. Opinions expressed in this memorandum are those of the author alone. In publishing this information, neither the author nor the law firm of Black, Mann & Graham L.L.P. are engaged in rendering legal, accounting, or other professional services. While this information concerns legal and regulatory matters, it is not legal advice and its use creates no attorney-client relationship or any other basis for reliance on the information. Readers should not place reliance on this information alone, but should seek independent legal advice regarding the law applicable to matters of interest or concern to them. The law firm of Black, Mann & Graham L.L.P. expressly disclaims any obligation to keep the content of this information current or free of errors.</p>
--

Attachments: Items 1 through 8-MAR

Item 1-MAR

TEXAS TITLE INSURANCE INFORMATION

<p>Title insurance insures you against loss resulting from certain risks to your title.</p>	<p>El seguro de título le asegura en relación a pérdidas resultantes de ciertos riesgos que pueden afectar el título de su propiedad.</p>
<p>The commitment for Title Insurance is the title insurance company's promise to issue the title insurance policy. The commitment is a legal document. You should review it carefully to completely understand it before your closing date.</p>	<p>El Compromiso para Seguro de Título es la promesa de la compañía aseguradora de títulos de emitir la póliza de seguro de título. El Compromiso es un documento legal. Usted debe leerlo cuidadosamente y endenterlo complemente antes de la fecha para finalizar su transacción.</p>

Your Commitment of Title insurance is a legal contract between you and us. The Commitment is not an opinion or report of your title. It is a contract to issue you a policy subject to the Commitment's terms and requirements.

Before issuing a Commitment for Title insurance (the Commitment) or a Title Insurance Policy (the Policy), the title insurance Company (the Company) determines whether the title is insurable. This determination has already been made. Part of that determination involves the Company's decision to insure the title except for certain risks that will not be covered by the Policy. Some of these risks are listed in Schedule B of the attached Commitment as Exceptions. Other risks are stated in the Policy as Exclusions. These risks will not be covered by the Policy. The Policy is not an abstract of title nor does a Company have an obligation to determine the ownership of any mineral interest.

--MINERALS AND MINERAL RIGHTS may not be covered by the Policy. The Company may be unwilling to insure title unless there is an exclusion or an exception as to Minerals and Mineral Rights in the Policy. Optional endorsements insuring certain risks involving minerals, and the use of improvements (excluding lawns, shrubbery and trees) and permanent buildings may be available for purchase. If the title insurer issues the title policy with an exclusion or exception to the minerals and mineral rights, neither this Policy, nor the optional endorsements, ensure that the purchaser has title to the mineral rights related to the surface estate.

Another part of the determination involves whether the promise to insure is conditioned upon certain requirements being met. Schedule C of the Commitment lists these requirements that must be satisfied or the Company will refuse to cover them. You may want to discuss any matters shown in Schedules B and C of the Commitment with an attorney. These matters will affect your title and your use of the land.

When your policy is issued, the coverage will be limited by the Policy's Exceptions, Exclusions and Conditions, defined below.

---EXCEPTIONS are title risks that a Policy generally covers but does not cover in a particular instance. Exceptions are shown on Schedule B or discussed in Schedule C of the Commitment. They can also be added if you do not comply with the Conditions section of the Commitment. When the policy is issued, all Exceptions will be on Schedule B of the Policy.

---EXCLUSIONS are title risks that a Policy generally does not cover. Exclusions are contained in the Policy but not shown or discussed in the Commitment.

---CONDITIONS are additional provisions that qualify or limit you coverage. Conditions include your responsibilities and those of the Company. They are contained in the Policy but not shown or discussed in the Commitment. The Policy Conditions are not the same as the Commitment Conditions.

You can get a copy of the policy form approved by the Texas Department of Insurance by calling the Title Insurance Company at 1-800-_____ or by calling the title insurance agent that issued the Commitment. The Texas Department of Insurance may revise the policy form from time to time.

You can also get a brochure that explains the policy from the Texas Department of Insurance by calling 1-800-252-3439.

Before the Policy is issued, you may request changes in the Policy. Some of the changes to consider are:

---Request amendment of the "area and boundary" exception (Schedule B, paragraph 2). To get this amendment, you must furnish a survey and comply with other requirements of the Company. On the Owner Policy, you must pay an additional premium for the amendment. If the survey is acceptable to the Company and if the Company's other requirements are met, your Policy will insure you against loss because of discrepancies or conflicts in boundary lines, encroachments or protrusions, or overlapping of improvements. The Company may then decide not to insure against specific boundary or survey problems by making special exceptions in the Policy. Whether or not you request amendment of the "area and boundary" exception, you should determine whether you want to purchase and review a survey if a survey is not being provided to you.

---Allow the Company to add an exception to "rights of parties in possession." If you refuse this exception, the Company or the title insurance agent may inspect the property. The Company may except to and not insure you against the rights of specific persons, such as renters, adverse owners or easement holders who occupy the land. The Company may charge you for the inspection. If you want to make your own inspection, you must sign a Waiver of Inspection form and allow the Company to add this exception to your Policy.

The entire premium for a Policy must be paid when the Policy is issued. You will not owe any additional premiums unless you want to increase your coverage at a later date and the Company agrees to add an Increased Value Endorsement.

Item 2-MAR

P-5.1. Exception or Exclusion Regarding Minerals

A. As used by this rule, minerals means coal, lignite, oil, gas and other minerals in, under and that may be produced from the Land, together with all rights, privileges, and immunities relating thereto. The Policy is not an abstract of title nor does a Company have an obligation to determine the ownership of any mineral interest. A Company may insert into a Policy or any other title insuring form an exception or an exclusion for minerals as provided below:

1. On Schedule A, Item 2:

“subject to, and the Company does not insure title to, and excepts from the description of the Land, coal, lignite, oil, gas and other minerals in, under and that may be produced from the Land, together with all rights, privileges, and immunities relating thereto.”; or

2. On Schedule B:

“All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto, appearing in the Public Records whether listed in Schedule B or not. There may be leases, grants, exceptions or reservations of mineral interest that are not listed.”

B. When the language described in either A.1 or A.2 above is inserted, the Company upon request by the insured **must** issue one or more of the applicable endorsements as provided in Procedural rule P-50.1.

Item 3-MAR

P-50. Restrictions, Encroachments, Minerals Endorsement (T-19) and, Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1),

A. Any insured matter covered in the Restrictions, Encroachments, Minerals Endorsement T-19 or T-19.1 may be insured only by the use of these endorsements, except that coverage regarding minerals may be insured by the use of the T-19.2 or T-19.3 endorsements as provided in P-50.1.

B. A Company may issue its Restrictions, Encroachments, Minerals Endorsement (T-19) to a Loan Policy (T-2), if its underwriting requirements are met. The Company shall delete any insuring provision if it does not consider that risk acceptable.

C. A Company may issue its Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1) to an Owner Policy (T-1) if its underwriting requirements are met. The Company shall delete any insuring provision if it does not consider that risk acceptable.

Item 4-MAR

P-50.1. Minerals and Surface Damage Endorsement (T-19.2), and Minerals and Surface Damage Endorsement (T-19.3)

Any insured matter covered in the Minerals and Surface Damage Endorsement T-19.2 or T-19.3 may be insured only by the use of these endorsements, except that coverage regarding minerals may be insured by the use of the T-19 or T-19.1 endorsements as provided in P-50. When the policy includes an exclusion or an exception regarding minerals as provided in Procedural Rule P-5.1:

1. As to real property of one acre or less improved or intended to be improved for one-to-four family residential use, the Company upon request by the insured **must** issue its Minerals and Surface Damage Endorsement (T-19.2) to an Owner or Loan Policy.
2. As to real property improved or intended to be improved for office, industrial, retail, mixed use retail/residential, or multifamily purposes, the Company upon request by the insured **must** issue its Minerals and Surface Damage Endorsement (T-19.2) to an Owner or Loan Policy.
3. As to other real property, the Company upon request by the insured **must** issue its Minerals and Surface Damage Endorsement (T-19.3) to an Owner or Loan Policy.
4. As to an Owner or Loan Policy covering multiple parcels of real property that consist of a combination of real property described in paragraphs **1 or 2**, and 3, the Company upon request by the insured **must** issue for each parcel the applicable Minerals and Surface Damage Endorsement (T-19.2 or T-19.3) to the Owner or Loan Policy.

Item 5-MAR

Minerals and Surface Damage Endorsement (T-19.2)

Attached to Policy No. _____; Applies to Parcel(s) _____

Issued by :

_____ TITLE INSURANCE COMPANY

Herein called the Company

The Company insures the insured against loss which the insured shall sustain by reason of damage to improvements (excluding lawns shrubbery, or trees) located on the Land on or after Date of Policy resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of coal, lignite, oil, gas or other minerals excepted or excluded on Schedule A, Item 2 or excepted in Schedule B. This endorsement does not insure against loss resulting from subsidence.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii)

extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

_____ TITLE INSURANCE COMPANY

By: _____
Authorized signatory

Item 6-MAR

Minerals and Surface Damage Endorsement (T-19.3)

Attached to Policy No. _____; Applies to Parcel(s) _____

Issued by :

_____ TITLE INSURANCE COMPANY

Herein called the Company

The Company insures the insured against loss which the insured shall sustain by reason of damage to permanent buildings 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 excepted or excluded on Schedule A, Item 2 or excepted in Schedule B. This endorsement does not insure against loss resulting from subsidence.

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

[Witness clause optional]

_____ TITLE INSURANCE COMPANY

By: _____
Authorized signatory

Item 7-MAR

R-29. Premium for Restrictions, Encroachments, Minerals Endorsement (T-19) and Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1)

A. When the Restrictions, Encroachments, Minerals Endorsement (T-19) is issued on residential real property in accordance with Rule P-50, the premium shall be 5% of the Basic Rate for a single issue policy provided that the minimum premium shall be not less than \$50.00.

B. When the Restrictions, Encroachments, Minerals Endorsement (T-19) is issued on land which is not residential real property, in accordance with Rule P-50, the premium shall be 10% of the Basic Rate for a single issue policy provided that the minimum premium shall be not less than \$50.00.

C. When the Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1) is issued on residential real property in accordance with Rule P-50, the premium shall be:

1. 10% of the Basic Rate for a single issue policy; or
2. 5% of the Basic Rate for a single issue policy if an amendment of the exception to area and boundaries is also purchased in accordance with Rate Rule R-16.

In either event, the minimum premium shall not be less than \$50.00

D. When the Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1) is issued on land which is not residential property, in accordance with Rule P-50, the premium shall be:

1. 15% of the Basic Rate for a single issue policy; or
2. 10% of the Basic Rate for a single issue policy if an amendment of the exception to area and boundaries is also purchased in accordance with Rate Rule R-16.

In either event, the minimum premium shall be not less than \$50.00

Item 8-MAR

R.29.1. Premium for Minerals and Surface Damage Endorsement (T-19.2), and Minerals and Surface Damage Endorsement (T-19.3)

A. When the Minerals and Surface Damage Endorsement (T-19.2) is issued in accordance with Rule P-50.1, the premium shall be \$50.00.

B. When the Minerals and Surface Damage Endorsement (T-19.3) is issued in accordance with Rule P-50.1, the premium shall be \$50.00.