

**SUBCHAPTER A. Basic Manual of Rules, Rates and
Forms for the Writing of Title Insurance
in the State of Texas
28 TAC §9.40**

**ORDER CORRECTING COMMISSIONER'S NO. 09-0650
NUNC PRO TUNC**

Upon the motion of the Commissioner of Insurance on this day came on for consideration the amendment *nunc pro tunc* of Commissioner's Order No. 09-0650, entitled "SUBCHAPTER A. Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas," as of the date of entry thereof. The Commissioner after due consideration finds and determines that the Commissioner's Order No. 09-0650 entered and dated August 12, 2009, contains a clerical error that requires correction. Item 3-MAR subsection C states in pertinent part that a "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 reference to (T-1) in Item 3-MAR was inadvertently included. The subsection should only have specified "Owner Policy" and the reference to (T-1) should have been omitted. The explanation concerning Item 3-MAR in the adoption provides that the Restrictions, Encroachments, Minerals Endorsement-Owner Policy (T-19.1) would be available for issuance in transactions involving residential and non-residential real property. The inclusion of (T-1) reduces the application of (T-19.1) to a very limited class of residential property transactions which is contrary and conflicting with the proposal and the adoption. The inclusion of (T-1) in Item 3-MAR was an inadvertent

error and produces a result that conflicts with the purpose of the revisions and is contrary to the stated purpose of the proposed language. In order to ensure that the Commissioner's Order correctly reflects the rule as adopted, Commissioner's Order No. 09-0650 has been amended *nunc pro tunc* to delete the reference to (T-1) in subsection C of Item 3-MAR.

IT IS THEREFORE ORDERED by the Commissioner of Insurance that the Commissioner's Order No. 09-0650 previously entered herein be amended *nunc pro tunc* as of the date of entry thereof, to read as follows:

**SUBCHAPTER A. Basic Manual of Rules, Rates and
Forms for the Writing of Title Insurance
in the State of Texas
28 TAC §9.40**

1. INTRODUCTION. The Commissioner of Insurance adopts new §9.40 concerning the adoption by reference of certain amendments to the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual). The adopted Basic Manual amendments address procedural rules, rates, and forms relating to mineral interests. The new section is adopted with one change to the proposed text published in the February 13, 2009 issue of the *Texas Register* (34 TexReg 964). The items adopted by reference include typographical corrections and other changes based on public comments. None of these changes, however, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

2. REASONED JUSTIFICATION. The amendments to the Basic Manual, which the adopted section adopts by reference, were considered at the public hearing on April 23, 2009, under Docket No. 2704. The adoption by reference of new rules and forms and the modification or replacement of currently existing rules and forms in the Basic Manual facilitate the administration and regulation of title insurance in this state. The adoption of this new section and the adoption by reference of new rules and forms and the modification or replacement of currently existing rules and forms in the Basic Manual is necessary because the Department became aware that despite a uniform premium and title insurance policy, coverage for mineral interests was being handled differently 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. This new section and the adoption by reference of new rules and forms and the modification or replacement of currently existing rules and forms in the Basic Manual clarify and standardize the rules and forms regulating the writing and the business of title insurance rules, rates, and forms that will ensure that the title insurance coverage for mineral interests, if any, will be uniformly handled throughout the state and across varying types of transactions.

The Commissioner investigated mineral coverage issues through a work group convened on May 22, 2008, that met with Department staff; and at a July 15, 2008 public hearing, Docket Number 2684. Additionally, a public meeting was held December 16, 2008. At the public meeting, the Texas Land Title Association presented

on behalf of industry and other concerned persons a *Minerals Agreed Resolution*. The *Minerals Agreed Resolution* consisted of eight documents, including a proposed amended consumer notice, and new and amended procedural rules, rate rules, and endorsement forms that were reported to the Commissioner to be the consensus agreement of the persons involved as a means to uniformly handle and provide title insurance coverage for mineral interests, if any, throughout the state and across varying types of transactions. The Department proposed these items based on an electronic copy of the *Minerals Agreed Resolution* that the Texas Land Title Association transmitted to the Department on December 15, 2008, to the entire title industry and public for formal consideration to be adopted as amendments to the Basic Manual. The proposal was published in the February 13, 2009 issue of the *Texas Register* (34 TexReg 964). It was later discovered that the electronic version differed in some respects from the paper discussed on December 16, 2008. None of these differences, however, materially altered issues raised in the proposal, introduced new subject matter, or affected persons other than those previously on notice under the February 13, 2009, proposal. The Commissioner held a public hearing on April 23, 2009, under Docket No. 2704 for this proposal.

The adoption of this new section and the adoption by reference of new rules and forms and the modification or replacement of currently existing rules and forms in the Basic Manual is separate from the additions or amendments proposed to the Basic Manual that were considered at the rulemaking phase of the 2008 Texas Title Insurance Biennial Public Hearing held on October 2, 2008, Docket Number 2690.

This adoption combines both rulemaking and ratemaking elements. The ratemaking element was not conducted as a contested case because the Insurance Code Chapter 40 does not specifically apply to proceedings under Chapter 2703, with the exception of the biennial hearings under the Insurance Code §2703.205. Interested persons submitted written comments, oral comments at the public hearing, or both. The comment period for both written and oral comments closed at the end of the public hearing.

Adopted Item 7-MAR considered amending an existing rate in Rate Rule R-29. The Insurance Code §2703.202(a) requires the Commissioner to hold a public hearing before the Commissioner may change a premium rate that has been previously fixed by the Commissioner. Similarly, adopted Item 8-MAR adds new Rate Rule R-29.1. Pursuant to the Insurance Code §2703.201, the Commissioner can fix a premium rate following reasonable notice and opportunity for a hearing being afforded to title insurance companies, title insurance agents, and the public. The Insurance Code §2703.206 authorizes the Commissioner to order a public hearing to consider adoption of premium rates and other matters relating to regulating the business of title insurance as the Commissioner determines necessary or proper. Additionally, the Department received a request from Sierra Title Guaranty Company to hold a public hearing for the purpose of considering amending the existing rate in Rate Rule R-29 under the Insurance Code §2703.202(b).

The adopted new section has been changed to adjust the proposed effective date of the amendments to the Basic Manual. The date of November 1, 2009, was

selected to allow approximately 60 days time for the industry to prepare for the implementation of the new rules, forms, and rates. The items adopted by reference as amendments to the Basic Manual are identified by the item number used in the April 23, 2009 hearing. Additionally, in response to comments, the Department has made the following non-substantive changes to the items adopted by reference:

Item 1-MAR – The Department has amended the last sentence in the new paragraph concerning *Minerals and Mineral Rights* to add the following language: “If the title insurer issues the title insurance policy with an exclusion or exception to minerals and mineral rights,....” This change clarifies that the coverage statement in the Texas Title Insurance Information form refers only to the particular situation discussed in that paragraph and not to Texas title insurance policies generally.

Item 2-MAR – The Department has corrected a typographical error in new Procedural Rule P-5.1. As proposed P-5.1 had a section B, but no section A was designated. The Department has inserted “A.” before the first sentence of the first paragraph that begins “As used by this rule....”

Item 3-MAR – This Item differed between the electronic version submitted to the Department on December 15, 2008 and the paper version discussed at the December 16, 2008 public meeting. The Department has amended Item 3-MAR to reflect the change in the December 16, 2008 version by removing from P-50(C) the existing language “on land which is not residential real property.” Removal of this language provides that the Restrictions, Encroachments, Minerals Endorsement-Owner Policy (T-19.1) will be available for issuance in transactions involving residential real property as well as for transactions involving non-residential real property. Currently, as contained in the Basic Manual, the T-19.1 Endorsement is only available for issuance in transactions involving non-residential real property.

Item 4-MAR – The Department has amended new Procedural Rule P-50.1 concerning the use of the *Minerals and Surface Damage Endorsement* in conjunction with Loan and Owner policies issued on described residential and improved or intended to be improved real property (Form T-19.2) and Loan and Owner policies issued on other types of real property not described for use with Form T-19.2 (Form T-19.3.). Paragraph 4 of new Procedural Rule P-50.1 is amended by inserting the word “or” between the references to paragraphs 1 and 2 in paragraph 4. This change clarifies that dual endorsements would be issued, (i.e. both a T-19.2 and a T-19.3), when the parcels of real property involved in the transaction are the types described in either paragraphs 1 and 3 or are the types described in paragraphs 2 and 3. Both paragraphs

1 and 2 pertain only to the T-19.1 endorsement. Additionally, there are amendments that change "Owner's Policy" to "Owner Policy" to conform the rule to the proper name of the policy.

Item 5-MAR – The Department has amended the new *Minerals and Surface Damage Endorsement* Form T-19.2 providing coverage for damage to improvements on the Land due to mineral exploration or development for use under Procedural Rule P50.1 in conjunction with Loan and Owner policies. The reference "Applies to Parcel(s)" is added to the second line of the endorsement to designate the specific parcels of real estate that are covered by that endorsement where there are multiple parcels of real estate involved in the transaction.

Item 6-MAR – The Department has amended the new *Minerals and Surface Damage Endorsement* Form T-19.3 providing coverage for damage to permanent buildings on the land due to mineral exploration or development for use under Procedural Rule P50.1 in conjunction with Loan and Owner policies. The reference "Applies to Parcel(s)" is added to the second line of the endorsement to designate the specific parcels of real estate that are covered by that endorsement where there are multiple parcels of real estate involved in the transaction.

Item 7-MAR – This Item differed between the electronic version submitted to the Department on December 15, 2008, and the paper version discussed at the December 16, 2008 public meeting. The Department has amended Item 7-MAR to reflect the changes in the December 16, 2008 version. The Department amends Rate Rule R-29 and raises 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. The Department adds new paragraph C to Rate Rule R-29 to provide a new Rate Rule when the Restrictions, Encroachments, Minerals Endorsement – Owner policy (T-19.1) is issued in a transaction involving residential real property. Currently existing paragraph C in Rate Rule R-29 is redesignated as paragraph D and the language "on land which is not residential real property" is added to the paragraph to specify that the Rate Rule in paragraph D applies only to transactions involving non-residential real property. These changes are necessary to provide a Rate Rule when the Restrictions, Encroachments, Minerals Endorsement – Owner policy (T-19.1) is issued in a transaction involving residential real property and to reflect the increases in the minimum premium for the issuance of Form T-19 and Form T-19.1.

Item 8-MAR – The Department adds 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.

3. HOW THE SECTION WILL FUNCTION. New §9.40 (relating to Procedural Rules, Rates, and Forms Relating to Mineral Interests) in addition to the material adopted by reference under §9.1 (relating to the Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in the State of Texas) adopts by reference an 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 Department has created a brief summary of the substance of each item adopted and included that summary in this adoption as follows:

Item 1-MAR – Adoption of an amended Texas Title Insurance Information page that adds information stating the title insurance policy is not intended to be an abstract of title; that the Title Insurance Company is not obligated to determine the ownership of any mineral interests; a general statement that 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; a statement that 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; and updated references to the Department.

Item 2-MAR – Adoption of new Procedural Rule P-5.1 authorizing a 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.

Item 3-MAR – Adoption of an amendment to 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 removing the distinction between the use of a Form T-19 with respect to residential and non-residential property, eliminating language concerning receipt of premium, and conforming the policy names.

Item 4-MAR – Adoption of new Procedural Rule P-50.1 concerning the use of the *Minerals and Surface Damage Endorsement* in conjunction with Loan and Owner policies issued on described residential and improved or intended to be improved real

property (Form T-19.2) and Loan and Owner policies issued on other types of real property not described for use with Form T-19.2 (Form T-19.3.).

Item 5-MAR – Adoption of 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. Form T-19.2 is for use under Procedural Rule P-50.1 in conjunction with Loan and Owner policies.

Item 6-MAR – Adoption of 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. Form T-19.3 is for use under Procedural Rule P-50.1 in conjunction with Loan and Owner policies.

Item 7-MAR – Adoption of an amendment to Rate Rule R-29 that raises 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. Additionally, an amendment to Rate Rule R-29 specifies that on residential real property when the Restrictions, Encroachments, Minerals Endorsement - Owner Policy (Form T-19.1) is issued 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. An additional amendment to Rate Rule R-29 specifies that on nonresidential real property when the Restrictions, Encroachments, Minerals Endorsement - Owner Policy (Form T-19.1) is issued the premium shall be 15% of the Basic Rate for a single issue policy or 10% of the Basic Rate if an amendment to area and boundaries is also purchased. The amendments also remove references to procedures and forms that should be evident from Procedural Rule P-50.

Item 8-MAR – Adoption of 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.

The Department has filed a copy of each of the adopted items with the Secretary of State's *Texas Register* Section. Persons desiring copies of the adopted items may obtain them from the Office of the Chief Clerk, Texas Department of Insurance, 333

Guadalupe Street, Austin, Texas, 78701-3938. To request copies, please contact Sylvia Gutierrez at 512/463-6327.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General

Comment: One commenter requests that the Department allow an additional thirty days for submission of written comments.

Agency Response: The initial period for written comments was set at 60 days from publication of the proposal as required under the Insurance Code §2703.207. Further extension of this period was not deemed necessary.

Comment: A commenter notes that his research suggests that the people who actually have a problem related to mineral coverage are the minority; however, for those that do have a problem the consequences can be very severe. The commenter states that in Texas's unified rate and policy structure it is the Commissioner's job to see how big the problem is statewide, as the new section and manual rule changes set up a work charge rate to apply it to everybody in the state.

Agency Response: The Department agrees that because the new section and manual rule changes affect all title insurance policyholders and companies, it is important to evaluate the scope of the problem under the current system. The collaborative effort and participation of the various parties involved in creating the new section and manual rule changes resulted in an evaluation of the mineral coverage issue on a statewide level.

Comment: One commenter requests that the wording “guarantees good and indefeasible title” be removed from the title policy for residential real estate. The commenter believes that the language “guarantees good and indefeasible title” is misleading in light of the changes in mineral interest coverage made by the new section and manual rule changes.

Agency Response: This issue is not a subject of the adoption. While this issue may be tangentially related to this proposal, the issue has not actually received proper notice to be considered in this adoption.

General (opposition-title insurance companies should continue listing exceptions)

Comment: Some commenters note that the title industry is required to itemize the original severance of an oil, gas or mineral interest, and that it is not an undue burden to require title insurance issuers to continue listing these exceptions in the title insurance policy.

Agency Response: The Department disagrees that the use of exceptions has proved adequate, as the practice has not been applied consistently throughout the state.

Comment: Several commenters noted that the title industry is not reducing the basic premium in exchange for the authorization to issue a general exclusion of mineral interests and that the fees for the new endorsements are merely an attempt to gain additional premium.

Agency Response: The basic rate for a title insurance policy is not a subject being considered in this new section.

With respect to the new coverages, they have on their face some risk component not covered in a title insurance policy and the hearing testimony clearly indicated that a cost would be associated with training staff and issuing the proposed forms.

However, the Department agrees that little direct evidence of the actuarial risk and cost associated with these new products has been presented. Because the products are new and associated pricing is based on an agreement of the parties involved in negotiating this proposal, the Department has determined that the pricing structure should be allowed on a temporary basis with an expiration date of January 1, 2013, unless otherwise addressed in an earlier proceeding.

General (opposition-minerals have always been considered part of the realty)

Comment: A commenter opposes the new section and manual rule changes, stating that minerals have always been considered part of the realty in Texas and that title insurance policies are already intended to insure the surface and subsurface estate.

Agency Response: The Department agrees that title insurance policies insure the property described in Schedule A of the Title Insurance Policy. This may include both the surface and subsurface estate before consideration of any exceptions or exclusions.

The Department, however, has become aware that the practice of listing the insured property in Schedule A, or the process of determining exceptions and exclusions has varied throughout the state based on local custom and the adequacy of

title records. Because of the variance in practice, it is the Department's position that new rules, rates, and forms are necessary to ensure that title transactions are precisely and clearly reflected in the title insurance policy.

General (opposition-no consumer protection)

Comment: A commenter states concern that the consumer is not being protected and has to suffer because many title companies did not conduct proper searches.

Agency Response: The new section and manual rule changes do not address coverage under any existing policy of title insurance.

As to future policies, the Department disagrees that the new section and manual rule changes do not protect consumers. The amendments to the Texas Title Insurance Information page notify the consumer that minerals and mineral rights may not be covered by the title policy. Additionally, the variance in practices is now addressed by creating uniform exception and exclusion language. When a company uses this language, it also must issue one or more applicable endorsements pursuant to Procedural Rule P-50.1 upon the consumer's request. These mandatory endorsements favor the consumer, particularly in those situations when a title company would not otherwise have offered such coverage.

General (support)

Comment: Several commenters support the new section and manual rule changes in their entirety and emphasize that the new section and manual rule changes should be

considered a package deal, as they were negotiated by many different parties. A commenter notes that the new section and manual rule changes reflect a collaborative effort of the title industry, the TDI, OPIC, real estate attorneys, and other contributors, and that as a result of this collaboration the new section and manual rule changes are a reasonable compromise and would be beneficial to consumers. Another commenter notes that the new section and manual rule changes address many concerns, including protecting the use of residential homeowners' and small commercial users' surface rights and the improvements thereon, providing protection for a lesser cost, protecting mortgage lenders, permitting continued operation of small and rural title companies while still allowing title companies that have sovereign plants to market that availability, and permitting title insurance for many transactions where title insurance might not otherwise be available. Another commenter believes that the new section and manual rule changes represent a good compromise, considering consumers are often not bargaining for mineral rights and therefore should not all have to pay for such coverage.

Agency Response: The Department appreciates the collaborative efforts of the parties that negotiated this new section and manual rule changes and recognizes from the comments that while each component may have its proponents and opponents, the new section and manual rule changes as a whole does reflect the bartered agreement of the group.

General (cost)

Comment: A commenter notes that the new section and manual rule changes are a good solution, but that they will require significant education for agents, and such training will incur significant expense.

Agency Response: The Department appreciates the collaborative efforts of the parties that negotiated this new section and manual rule changes and recognizes from the comments that while each component may have its proponents and opponents, the new section and manual rule changes as a whole does reflect the bartered agreement of the group. The Department acknowledges that agents will need training which will incur additional costs. These costs were considered when the premiums for the new endorsements were established.

Item 1-MAR

Comment: One commenter opposes the language in Item 1-MAR, which states, "Neither this policy, nor the optional endorsements, insure that the purchaser has title to the mineral rights related to the surface estate." The commenter believes the statement is misleading because (1) it conflicts with another statement in the form that states, "MINERALS AND MINERAL RIGHTS may not be covered by the Policy;" and (2) the use of proposed P-5.1 by the title company is optional, and therefore it is possible that the title company could elect not to use one of the mineral carve out provisions of P-5.1. In the event the title company elects not to use one of the mineral carve out provisions in P-5.1, the title policy will under the Covered Risks section of the policy insure the mineral estate not excepted to on Schedule B. The commenter recommends that the

proposed language be amended to read as follows: “This policy and the optional endorsements may not ensure that the purchaser has title to the mineral rights related to the surface estate.”

Agency Response: The Department agrees that if the title company does not use an exclusion or exception under P-5.1, the sentence in Item 1-MAR beginning with the words “Neither this policy...” could be inaccurate. The phrase “this policy” was meant to describe only a policy with an exclusion or exception as to minerals and mineral rights, not all policies. The Department declines to use the commenter’s recommended language, as it implies that under some circumstances optional endorsements may insure that the purchaser has title to the mineral rights. The optional endorsements provide coverage for damage to buildings and improvements on the surface of the land and do not insure title to the mineral rights. However, the Department clarifies the sentence, “Neither this policy, nor the optional endorsements, ensure that the purchaser has title to the mineral rights related to the surface estate” by amending the sentence to state the following: “If the title insurer issues the title insurance policy with an exclusion or exception to minerals and mineral rights.”

Comment: A commenter notes that the disclosures in the Texas Title Insurance Information form which include that (1) mineral and mineral rights may not be covered by a title policy and (2) optional endorsements may be available are significant and important disclosures.

Agency Response: The Department appreciates the comment and agrees that these are significant and important disclosures.

Item 2-MAR

Comment: A commenter recommends that proposed P-5.1 be amended to permit the insured the right to choose which option will be inserted into the Policy once the title company has decided to generally exclude or specifically except to minerals under new Procedural Rule P-5.1. The commenter suggests the following language: "Subject to the right of the Insured to choose the exception or the exclusion for minerals as provided below, a Company may insert into a Policy or any other title insuring form the language described in either A.1 or A.2 below:" The commenter recommends this change because the language and location of the A.1 option may cause some investors to question the quality of title being insured since they are accustomed to seeing only the designation "fee simple" without qualification.

Agency Response: The Department declines to make the change. The insured is not under any obligation to accept a title policy and can bargain accordingly. The sophisticated consumer who has a preference between A.1 or A.2 can ask for that from the title insurer.

Comment: Some commenters note a typographical error in proposed P-5.1. There is a section B, but no section A is designated.

Agency Response: The Department agrees that section A should be designated and has inserted "A." before the first sentence of the first paragraph that begins "As used by this rule...."

Item 2-MAR and 4-MAR (If Company applies P-5.1 the Company must offer the surface damage endorsements.)

Comment: One commenter requests that the language in Item 2-MAR be changed to require the title insurer to offer the endorsements to the insured, rather than requiring the insured to request the endorsement. The commenter recommends that new Procedural Rule P-5.1B be changed to read: "When the language described in P-5.1 A(1) or (A)(2) above is inserted, the Company **shall** offer the insured all of the applicable endorsements in Procedural Rule P-50-1."

Additionally, the commenter recommends changes in Item 4-MAR (Procedural P-50.1) as follows:

(i) P-50.1(1) be changed to read: "As to real property of one acre or less improved or intended to be improved for one-to four family residential use, the Company **shall** offer to the insured its Minerals and Surface Damage Endorsement (T-19.2) to an Owner or Loan Policy."

(ii) P-50.1(2) be changed to read: "As to real property improved or intended to be improved for office, retail, mixed use retail/residential, or multifamily purposes, the Company **shall** offer to the insured its Minerals and Surface Damage Endorsement (T-19.2) to an Owner or Loan Policy."

(iii) P-50.1(3) be changed to read: "As to other real property, the Company **shall** offer to the insured its Minerals and Surface Damage Endorsement (T-19.3) to an Owner or Loan Policy."

(iv) P-50.1(4) be changed to read: “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, 2, or 3, the Company **shall** offer to the insured for each parcel the applicable Minerals and Surface Damage Endorsement (T-19.2 or T-19.3) to an Owner or Loan Policy.”

The commenter notes that currently P-5.1 places the burden on the insured to request one or more of the applicable endorsements in the event the title insurer elects to exclude minerals from coverage. The recommended language shifts the burden to the title insurer to offer the applicable endorsements and the commenter believes that this change is appropriate since most insureds would not know that they have the right to request an endorsement. Furthermore, the commenter notes that this change is appropriate since it is the title insurer that is electing to exclude minerals from coverage, not the insured.

Agency Response: The Department disagrees that there should be a requirement for title insurers to offer the optional endorsements when minerals are excluded from coverage. The Department notes that in the Texas Title Insurance Information form in the paragraph titled “Minerals and Minerals Rights” the second sentence states “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.” Since the Texas Title Insurance Information form is provided to each purchaser of title insurance, the Department has ascertained that the information

in the form provides sufficient notice to the purchaser that the optional endorsements are available for purchase and therefore a mandatory offer is not necessary.

Item 3-MAR

Comment: A commenter notes that the first paragraph of proposed amended P-50 recognizes that coverage regarding minerals is provided by the T-19 and T-19.1 endorsements in stating that “[a]ny insured matter covered in the ...Endorsement T-19 or T-19.1 may be insured only by the use of these endorsements,” but it is not clear from the first paragraph of proposed amended P-50 if the coverage regarding minerals in paragraph 4 of the T-19 and paragraph 3 of the T-19.1 endorsements will continue even if the T-19.2 or T-19.3 endorsements are not used in a particular transaction.

Agency Response: The Department disagrees that the language is unclear. The language states 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.” If T-19.2 or T-19.3 endorsements are not used, coverage regarding minerals in T-19 and T-19.1 would continue as long as the provisions were not deleted due to presenting an unacceptable risk.

Comment: A commenter notes that the amendments to Procedural Rule P-50 submitted to the Commissioner on December 16, 2008, differ slightly from the version of the amendments to the Procedural Rule published as Agenda Item 3-MAR. The commenter submitted an updated version of Procedural Rule P-50 to reflect the version presented at the December 16, 2008 public meeting.

Agency Response: The Department agrees that Item 3-MAR differed from the electronic version submitted to the Department on December 15, 2008, and the paper version discussed at the December 16, 2008 public meeting. The Department has amended Item 3-MAR to reflect the change in the December 16, 2008 version by removing from P-50(C) the existing language “on land which is not residential real property.” Removal of this language provides that the Restrictions, Encroachments, Minerals Endorsement-Owner Policy (T-19.1) will be available for issuance in transactions involving residential real property as well as for transactions involving non-residential real property. Currently, as contained in the Basic Manual, the T-19.1 Endorsement is only available for issuance in transactions involving non-residential real estate. The Department has reviewed the differences in the proposals and found them to be non-substantive. The updated version was the version considered at the April 23, 2009, public hearing by agreement of the parties.

Item 4-MAR

Comment: One commenter notes that the first paragraph of proposed P-50.1 recognizes that coverage regarding minerals is already provided by the T-19 and T-19.1 endorsements in stating that “coverage regarding minerals may be insured by the use of the T-19 or T-19.1 endorsements,” but it is not clear from the first paragraph of proposed P-50.1 if the coverage regarding minerals in paragraph 4 of the T-19 and paragraph 3 of the T-19.1 endorsements will be deleted when the T-19.2 and/or T-19.3 endorsements are used. In this regard, the commenter notes that the proposed T-19.2 and T-19.3 endorsements state, “To the extent a provision of ...a previous endorsement

is inconsistent with an express provision of this endorsement, this endorsement controls.”

Agency Response: The Department agrees that the T-19.2 and/or T-19.3 endorsement provisions would control if there were any inconsistencies with a policy provision or a previous endorsement.

Comment: A commenter recommends the proposed T-19.2 endorsement not be approved. However, if it is approved, the commenter suggests that the acreage limitation in paragraph 1 of proposed P-50.1 be expanded to 10 acres to meet the 10-acre homestead limitation for urban homesteads set out in Article XVI, Section 51, of the Texas Constitution; otherwise, on urban and suburban homesteads that exceed one acre, the more limited coverage of proposed T-19.3 would apply under paragraph 3 of proposed P-50.1

Agency Response: The Department does not agree with the recommendation to disapprove proposed T-19.2. The language of T-19.2 was part of a collaborative effort by the title industry, real estate attorneys, and other contributors to ensure that title transactions in Texas are precisely and clearly reflected in the title insurance policy. If T-19.2 were disapproved it would destroy the integrity of the consensus that was negotiated by the parties. The Department declines to expand the acreage limitation in paragraph 1. Notice of this issue was not provided in the proposal and therefore it may not be considered in this adoption.

Comment: A commenter suggests amending paragraph 4 of Agenda Item 4-MAR by inserting the word “or” between the references to paragraphs 1 and 2 in paragraph 4.

This change is intended to clarify that dual endorsements would be issued, i.e., both a T-19.2 and a T-19.3, when the parcels of real property involved in the transaction are the types described in either paragraphs 1 and 3 or are the types described in paragraphs 2 and 3. The commenter states that both paragraphs 1 and 2 deal only with the T-19.2 endorsement.

Agency Response: The Department agrees and has inserted the word "or" between the references to paragraphs 1 and 2 in paragraph 4 for clarification. However, a title insurer is still required to issue a T-19.2 that covers each and every multiple parcel of real property, even if those multiple parcels consist only of real property described in paragraphs 1 and 2. The T-19.2 endorsement shall include a list of each parcel. This change is consistent with the addition of a reference to the second line of the endorsement in Agenda Item 5-MAR to designate which parcels of real property are covered by that particular endorsement where there are multiple parcels of real property involved in the transaction.

Item 5-MAR

Comment: A commenter notes that the proposed T-19.2 endorsement does not appear to provide any new coverage. The commenter notes that in comparing the coverage in paragraph 4 of the T-19 endorsement with the coverage in the proposed T-19.2 endorsement, it is apparent that the coverage in paragraph 4 of the T-19 endorsement is greater than the coverage in the proposed T-19.2 endorsement, and that the coverage in paragraph 3 of the T-19.1 endorsement is the same as the

coverage in the proposed T-19.2 endorsement. The commenter recommends that the T-19.2 endorsement not be approved, in which case proposed 28 TAC §9.40, P-50.1 would need to be amended, and R-29.1A should not be approved.

Agency Response: The Department disagrees. Although T-19.2 excludes coverage for lawns, shrubbery, or trees (unlike Paragraph 4 of T-19), T-19 does not explicitly include the extraction or development of coal, lignite, oil, and gas. Further, under P-50, a company may only issue a T-19 endorsement on a Loan Policy. Under P-50, the Company is also required to delete any insuring provision under T-19 if it does not consider that risk acceptable. Thus, paragraph 4 of T-19 and paragraph 3 of T-19.1 could potentially be deleted, whereas T-19.2 and T-19.3 are **required** if minerals are excepted or excluded and the insured requests the endorsement and pays the \$50 premium.

Comment: A commenter suggests adding a reference to the second line of the Minerals and Surface Damage Endorsement (T-19.2) in Agenda Item 5-MAR to designate which parcels of real property are covered by that particular endorsement where there are multiple parcels of real property involved in the transaction.

Agency Response: The Department agrees and has made the recommended change by adding "; Applies to Parcel(s)" after the second line of the endorsement.

Comment: A commenter opposes this endorsement, but requests that if the T-19.2 endorsement is adopted, it be amended to cover surface damage or diminution in value, whichever is the greater of the two. The commenter states that this language would cover diminution in value due to horizontal drilling or the laying of pipeline on a property.

The commenter also requests that lawns, shrubbery, and trees not be excluded from coverage for surface damage.

Agency Response: The Department disagrees that diminution in value should be evaluated or included in a title policy. Marketability is not accounted for in the actuarial data for title insurance. The Department also disagrees that lawns, shrubbery, and trees should be included in coverage for surface damage. The exclusion of lawns, shrubbery, and trees was a factor in determining what the premium should be for T-19.2.

Comment: A commenter states that title insurance insures the title, not diminution in value to the title. Including diminution in value would change all of the actuarial data and would be inappropriate for title insurance.

The commenter also notes that the exclusion of lawns, shrubbery and trees was a part of the compromise package, and to change these exclusions may affect how other collaborators in the process feel about the rates that were set for the endorsements.

Agency Response: The Department agrees that marketability is not accounted for in the actuarial data for title insurance.

Item 6-MAR

Comment: A commenter suggests adding a reference to the second line of the Minerals and Surface Damage Endorsement (T-19.3) in Agenda Item 6-MAR to

designate which parcels of real property are covered by that particular endorsement where there are multiple parcels of real property involved in the transaction.

Agency Response: The Department agrees and has made the recommended change by adding "; Applies to Parcel(s) after the second line of the endorsement.

Item 7-MAR

Comment: A commenter notes that the amendments to Rate Rule R-29 submitted to the Commissioner on December 16, 2008, differ slightly from the version of the amendments to the Procedural Rule published as Agenda Item 7-MAR. The commenter submitted an updated version of Rate Rule R-29 to reflect the version presented at the December 16, 2008 public meeting.

Agency Response: The Department noted that for Item 7-MAR there was a difference between the electronic version submitted to the Department on December 15, 2008, and the paper version discussed at the December 16, 2008 public meeting. The Department has amended Item 7-MAR to reflect the changes in the December 16, 2008 version. The Department amends Rate Rule R-29 and raises 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. The Department adds new paragraph C to Rate Rule R-29 to provide a new Rate Rule when the Restrictions, Encroachments, Minerals Endorsement – Owner policy (T-19.1) is issued in a transaction involving residential real property. Currently existing paragraph C in Rate Rule R-29 is redesignated as

paragraph D and the language “on land which is not residential real property” is added to the paragraph to specify that the Rate Rule in paragraph D applies only to transactions involving non-residential real property. These changes are necessary to provide a Rate Rule when the Restrictions, Encroachments, Minerals Endorsement – Owner policy (T-19.1) is issued in a transaction involving residential real property and to reflect the increases in the minimum premium for the issuance of Form T-19 and Form T-19.1. The Department has reviewed the differences in the proposals and found them to be non-substantive. The updated version was the version considered at the April 23, 2009, public hearing by agreement of the parties.

Comment: A commenter notes that there is no apparent change in coverage or expense of T-19 & T-19.1, and therefore the change in the minimum premium from \$25 to \$50 is unwarranted.

Agency Response: The change is made to better reflect the additional administrative costs that will be incurred, particularly those entailed in the education of staff regarding the new processes involved and ensuring that these are followed. It is important to recognize that the premium increase is only being approved until January 1, 2013, at which time the costs associated with the endorsements can be reviewed and reevaluated.

Comment: A commenter believes the change of the minimum premium for T-19 and T-19.1 from \$25 to \$50 is reasonable.

Agency Response: The Department appreciates the comment.

Item 8-MAR

Comment: Several commenters believe the \$50 minimum premium charge is reasonable. A commenter notes that since mineral searches have not historically been included in the rate base, those savings have been passed onto the consumer. If consumers are mainly interested in the surface estate, they can get protection against damage to that estate for \$50. These endorsements offer consumers an inexpensive way to protect their surface estate. If mineral searches were required to protect the integrity of the surface estate, it might cost an extra \$2,000 per policy. These endorsements offer a significantly less costly alternative. Another commenter believes that the \$50 minimum premium charge is extremely reasonable, especially considering all of the extra labor it will take to offer and explain the endorsements. Another commenter states that the initial cost of administering the new endorsements and new rules is going to far exceed the \$50 per policy premium, as a lot of training will be necessary to educate agents, their staff, title searches, title examiners, and the lending community on the use of the new endorsements. Another commenter notes that the charges for the proposed endorsements are comparable to similar endorsements in other states, citing several rates from other states offering comparable coverage. Another commenter notes that the \$50 is conservatively low for the endorsements, considering there is no data for the risks and the cost is already shown to be substantial due to the need for training people.

Agency Response: The need for the charge is primarily based on the additional administrative costs that will be incurred, particularly those entailed in the education of

staff regarding the new processes involved and ensuring that these are followed. It is important to recognize that the charge is only being approved until January 1, 2013, at which time the costs associated with the endorsements can be reviewed and reevaluated.

Comment: A commenter believes that the \$50 minimum premium for endorsements 19.2 and 19.3 is not reasonable, referencing Form 2-TR which has similar coverage. The commenter gives a hypothetical example of a \$1000 policy with a loss component of 4% which equal \$40. As this basic rate (\$40) is applicable to Form 2-TR plus all other coverages under the policy, the commenter does not believe \$50 in additional premium for the 19.2 and 19.3 endorsements is warranted.

Agency Response: The need for the charge is primarily based on the additional administrative costs that will be incurred, particularly those entailed in the education of staff regarding the new processes involved and ensuring that these are followed. The charge has little to do with any claims that might arise. It is important to recognize that the charge is only being approved until January 1, 2013, at which time the costs associated with the endorsements can be reviewed and reevaluated.

Comment: A commenter states that the T-19.2 endorsement should be free, because title companies have known for years that the policies they have been writing in Texas have covered the minerals. The commenter believes that a massive exception that takes away coverage from all consumers of this state is not justified just because title companies may have ignored or worked around this coverage for so long.

Agency Response: The department disagrees because the title policies that were issued prior to the adoption of these rules will not be affected by these rules.

General (waiting period before closing)

Comment: A commenter believes that purchasers of title insurance should have a 20-day period prior to closing to review the title commitment. Additionally, the commenter believes that this 20-day period is necessary because consumers need to know well in advance of closing that their title policy is not covering mineral rights so that they have sufficient time to address this issue in another way, if they choose.

Agency Response: The Department declines to add a requirement that consumers must receive the title commitment 20 days prior to closing. Notice of this issue was not provided in the proposal and therefore it may not be considered in this adoption.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTION.

For With Changes: Texas Land Title Association and Fred J. Biel.

Against: Black, Mann, and Graham, L. L. P.; RLMarsh and Associates, Pakis, Giotes, Page, and Burleson, and Duckett, Bouligny, and Collins, L. L. P.

Against Item MAR-7 and MAR-8: Enforcement Division, Texas Department of Insurance.

6. STATUTORY AUTHORITY. The new section is adopted pursuant to the Insurance Code §§2551.003, 2703.151, 2703.152, 2703.201, 2703.202, 2703.206, 2703.207,

2703.208, and 36.001. Section 2551.003 authorizes the Commissioner to adopt and enforce rules that prescribe underwriting standards and practices on which a title insurance contract must be issued, that define risks that may not be assumed under a title insurance contract, including risks that may not be assumed because of the insolvency of the parties to the transaction, and that the Commissioner determines are necessary to accomplish the purposes Insurance Code Title 11, which concerns the regulation of title insurance. Section 2703.151 authorizes and requires the Commissioner to fix and promulgate the premium rates to be charged by a title insurance company or by a title insurance agent for title insurance policies or for other forms prescribed or approved by the Commissioner. Section 2703.152 authorizes and requires the Commissioner to consider all relevant income and expense information attributable to engaging in the business of title insurance in this state. Section 2703.201 requires that before a premium may be fixed and a rate may be charged, the Department must provide reasonable notice and a hearing must be afforded to title insurance companies, title insurance agents and the public. Section 2703.202(a) provides that the Commissioner can change a premium rate that has been previously fixed by the Commissioner following notice and a public hearing. Section 2703.202(b) provides that a title insurance company or the Office of Public Insurance Counsel, may request a hearing under Section 2703.202(a). Section 2703.206 authorizes the Commissioner to order a public hearing to consider adoption premium rates and other matters relating to regulating the business of title insurance as the commissioner determines necessary of proper. Section 2703.207 requires notice of a public hearing

under §§2703.201, 2703.202 and 2703.206 and of each item to be considered at the public hearing, must provide 60 days notice of the hearing and be sent directly to each title insurance company and title insurance agent and provided to the public in a manner that gives fair notice concerning the hearing. Section 2703.208 provides that an addition or amendment to *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* may be proposed or adopted by reference by publishing notice of the proposal or adoption by reference in the *Texas Register*. Notice of the proposal under Section 2703.208 must include a brief summary of the substance of the matter to be amended or added, and a statement that the full text of the matter is available for review in the Office of the Chief Clerk of the Department. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

7. TEXT.

§9.40. Procedural Rules, Rates and Forms Relating to Mineral Interests. In addition to material adopted by reference under §9.1 of this title (relating to Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas) the Texas Department of Insurance adopts by reference as part of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*: 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*

09-0760

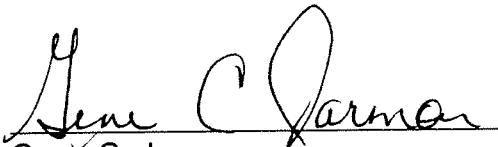
TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 9. Title Insurance

Adopted Section
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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; as amended effective November 1, 2009. This document is available from and on file at the Texas Department of Insurance, Title Division, Mail Code 106-2T, 333 Guadalupe Street, Austin, Texas 78701-3938.

CERTIFICATION. This agency hereby certifies that the adopted section has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on September 11, 2009.


Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance


IT IS THEREFORE THE ORDER of the Commissioner of Insurance that new §9.40 specified herein, concerning the adoption by reference of certain amendments to the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual), is adopted.

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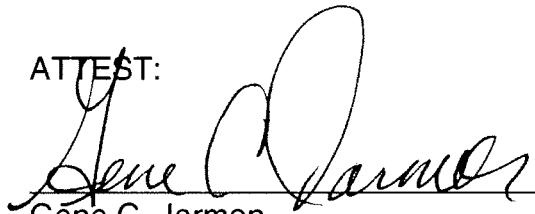
TITLE 28. INSURANCE
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AND IT IS SO ORDERED.


MIKE GEESLIN
COMMISSIONER OF INSURANCE

ATTEST:


Gene C. Jarmon
General Counsel and Chief Clerk

COMMISSIONER'S ORDER NO. **09-0760**
SEP 11 2009