

Comparisons and Underwriting Guidelines for ALTA 9s, 28s and 34

Dwight Bickel

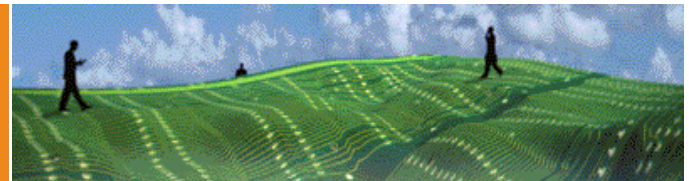
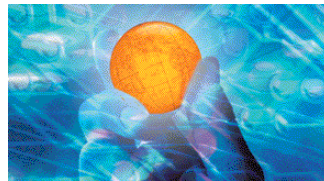


Lynnwood, Washington

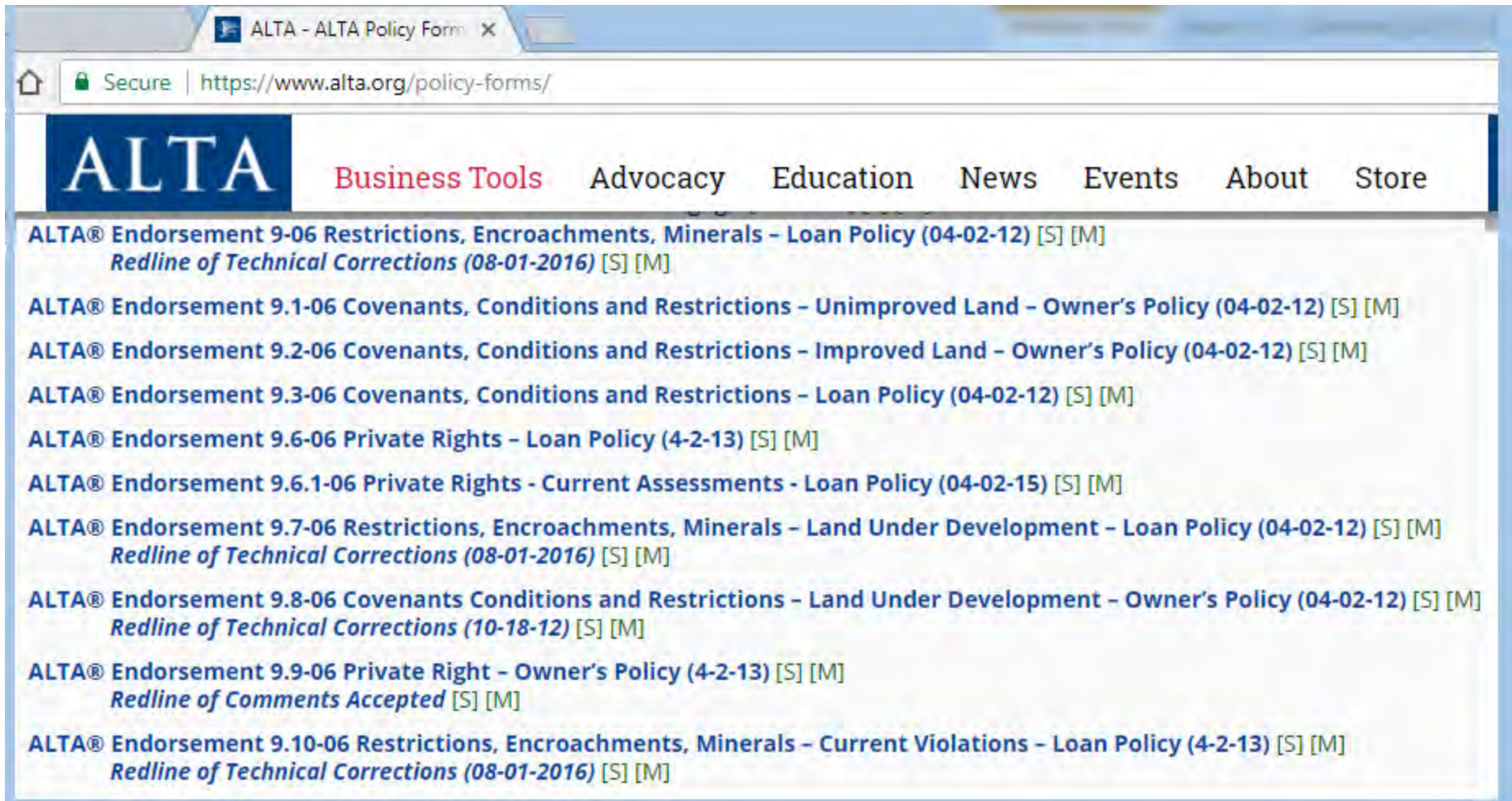
October 14, 2017

Outline for Today's Discussion:

- **DIFFERENCES BETWEEN THE 9 SERIES ENDORSEMENTS**
- **DIFFERENCES BETWEEN THE 28 SERIES ENDORSEMENTS**
- **UNDERWRITING GUIDELINES FOR THE 34 IDENTIFIED RISK ENDORSEMENT**

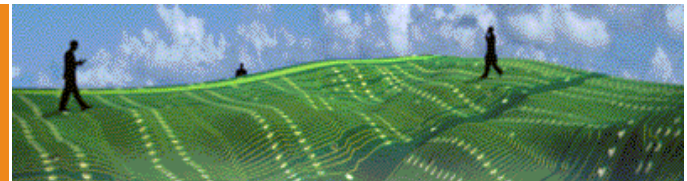
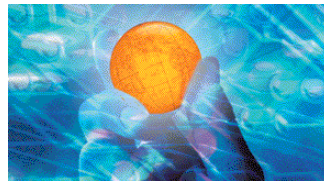


Differences between the ten ALTA 9 Series Endorsements



The screenshot shows a web browser window with the URL <https://www.alta.org/policy-forms/>. The page features the ALTA logo and a navigation menu with links for Business Tools, Advocacy, Education, News, Events, About, and Store. Below the navigation, there is a list of ten ALTA 9 Series Endorsements, each with a title, date, and links for [S] and [M].

- ALTA® Endorsement 9-06 Restrictions, Encroachments, Minerals – Loan Policy (04-02-12) [S] [M]
Redline of Technical Corrections (08-01-2016) [S] [M]
- ALTA® Endorsement 9.1-06 Covenants, Conditions and Restrictions – Unimproved Land – Owner’s Policy (04-02-12) [S] [M]
- ALTA® Endorsement 9.2-06 Covenants, Conditions and Restrictions – Improved Land – Owner’s Policy (04-02-12) [S] [M]
- ALTA® Endorsement 9.3-06 Covenants, Conditions and Restrictions – Loan Policy (04-02-12) [S] [M]
- ALTA® Endorsement 9.6-06 Private Rights – Loan Policy (4-2-13) [S] [M]
- ALTA® Endorsement 9.6.1-06 Private Rights - Current Assessments - Loan Policy (04-02-15) [S] [M]
- ALTA® Endorsement 9.7-06 Restrictions, Encroachments, Minerals – Land Under Development – Loan Policy (04-02-12) [S] [M]
Redline of Technical Corrections (08-01-2016) [S] [M]
- ALTA® Endorsement 9.8-06 Covenants Conditions and Restrictions – Land Under Development – Owner’s Policy (04-02-12) [S] [M]
Redline of Technical Corrections (10-18-12) [S] [M]
- ALTA® Endorsement 9.9-06 Private Right – Owner’s Policy (4-2-13) [S] [M]
Redline of Comments Accepted [S] [M]
- ALTA® Endorsement 9.10-06 Restrictions, Encroachments, Minerals – Current Violations – Loan Policy (4-2-13) [S] [M]
Redline of Technical Corrections (08-01-2016) [S] [M]



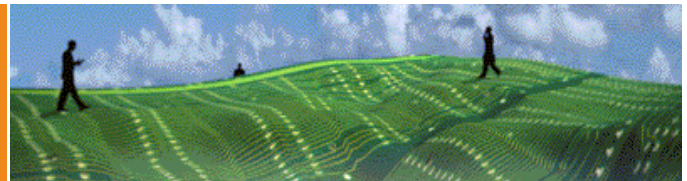
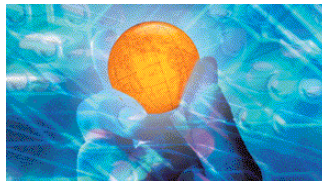
Differences between the ALTA 9 Series Endorsements

9 **restrictions**, **encroachments**, **minerals** - loan

For decades prior to 2012, the “comprehensive” endorsement included coverage related to **restrictions**, **encroachments** and **minerals**. Regarding covenants, it contained the phrase that there were no private rights *unless shown on Schedule B*.

In 2006, during development of the 2006 basic policies, versions were adopted for owners too:

9.1, 9.2, 9.3, 9.4 and 9.5 were all owner forms that included **restrictions**, **encroachments**, and **minerals**.

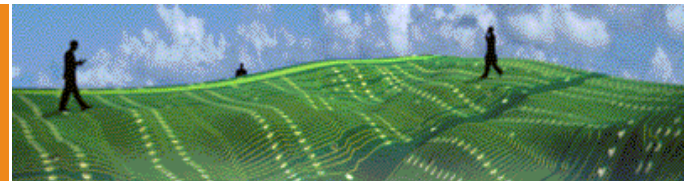
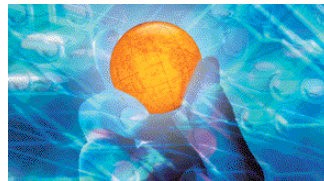


Differences between the ALTA 9 Series Endorsements

9 **restrictions**, **encroachments**, **minerals** - loan (10-6-2006)

For decades prior to 2012, the “comprehensive” endorsement included coverage related to **restrictions**, **encroachments** and **minerals**. Regarding covenants, it contained the phrase that there were no private rights *unless shown on Schedule B*.

The *Nationwide v Commonwealth* decision in 2009 prompted revisions to the endorsement. New endorsements were revised for the **9s to be for CCRs**, **the 28s to be for encroachments** and **the 35s to be for mineral rights**.



Differences between the ALTA 9 Series Endorsements

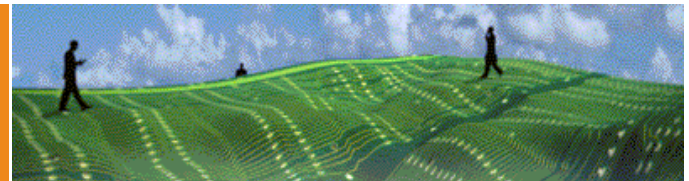
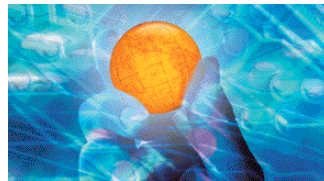
Amended 4/2/12, the “old” 9 for loan policies retained all three coverage types. The committee expected that would be used only for residential lenders and expected commercial policies would only include the 9.3, plus the applicable 28 and 35.

- 9 **restrictions, encroachments, minerals**
- loan (4/2/12; 8/1/16)

ALTA also adopted the “replacement” 9s that provide **coverage against CCR issues only**:

- 9.1 **CCR** - owner unimproved (4/2/12)
- 9.2 **CCR** - owner improved (4/2/12)
- 9.3 **CCR** – loan (4/2/12)

2006 versions of 9.4 and 9.5 for owners were withdrawn.



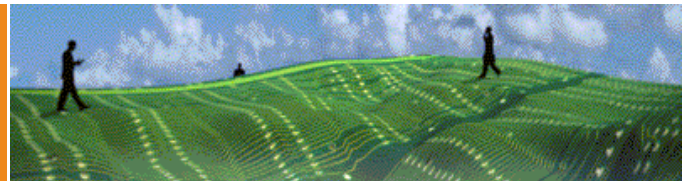
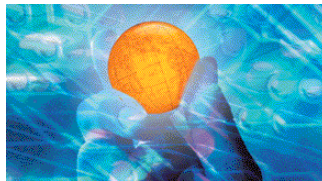
Differences between the ALTA 9 Series Endorsements

Also in 2012, ALTA adopted the “**land under development**” 9s that provide the 9 and 9.1 coverage for future plans:

9.7 **restrictions, encroachments, minerals**

- land under development - loan (4/2/12; 8/1/16)

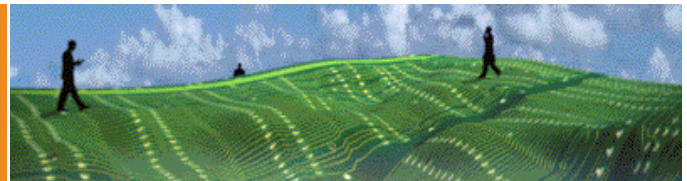
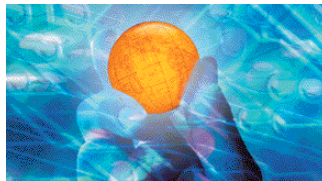
9.8 **CCR** - land under development - owner (4/2/12; 10/18/12)



Differences between the ALTA 9 Series Endorsements

In 2013, ALTA adopted the “private rights” 9s to provide coverage, when underwriting guidelines allowed, for this coverage missing from the basic 9s:

- 9.6 private rights - loan (4/2/13)
- 9.9 private rights - owner (4/2/13)

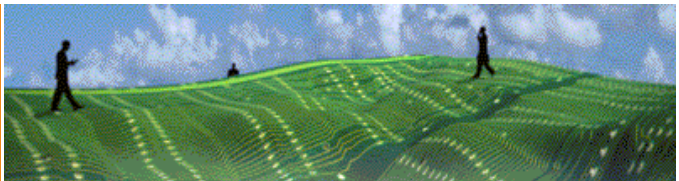
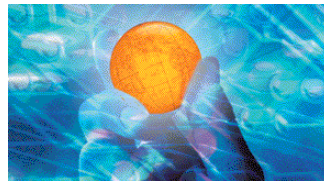


Differences between the ALTA 9 Series Endorsements

In 2013, ALTA adopted new forms to provide coverage not previously allowed, for this series of 9s:

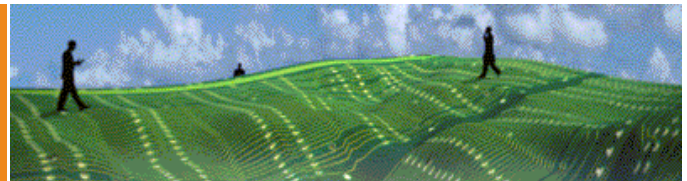
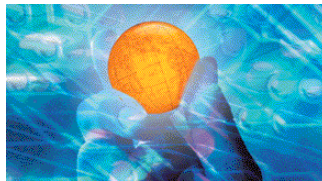
- 9.6 private
- 9.9 private

We finished discussing the differences between eight ALTA 9s, only two more to go... See, this isn't as hard as you expected!



First Chance to Win Raffle Tickets

- In 2013, the ALTA developed the ALTA 9.10 as an alternate to the “old” 9. It has only one simple difference.
- **Who can answer what is the difference between the new 9.10 and the old 9?**
- The ALTA developed an alternate version of the basic 9 for the loan policy, **limiting the coverage to violations of the covenants at the date of the policy:**



The new ALTA 9.10 replaces the old ALTA 9 for most residential transactions

In response to unexpected claims, the ALTA developed an alternate version of the basic 9 for the loan policy, limiting the coverage to violations of the covenants at the date of the policy:

9.10 restrictions, encroachments, minerals
- **current violations** - loan (4/2/13; 8/1/16)

This is an important change that should already have been implemented in your title company. If not, you should change your practices now.

For example, the Oregon Rating Organization withdrew the ALTA 9. Only the ALTA 9.10 can be given in response to that request.

The new ALTA 9.10 replaces the old ALTA 9 for most residential transactions

The basic 9 and 9.3 for lenders provides coverage to a lender if a covenant imposing assessment liens claims legal priority. Many states have new cases giving liens priority from the initial recording date, ***even if the dues are paid current to Date of Policy***. In WA, all condo dues have limited priority.

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

a. A **violation of a Covenant** that:

i. divests, **subordinates**, or extinguishes **the lien of the Insured Mortgage**,

ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or

iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

The new ALTA 9.10 replaces the old ALTA 9 for most residential transactions

- This is the only difference between the 9 and the 9.10:

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

- a. A violation **at Date of Policy** of a Covenant that:
 - i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
 - ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or
 - iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

Differences between the ALTA 9 Series Endorsements

In 2015, ALTA developed an alternate version of the 9.6 related to coverage against enforcement of private rights, in order to limit coverage against covenants that provide coverage against private assessments, covering only prior assessments:

9.6.1 **private rights** - current assessments (4/2/15)

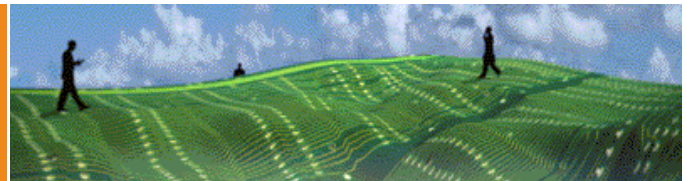
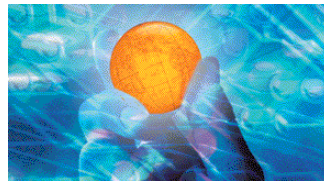
Just like the tiny but important change to the 9.10, the only change in the 9.6.1 is:

2. For purposes of this endorsement only:

(b) “Private Right” means:

(i) a private charge or assessment

due and payable at Date of Policy;



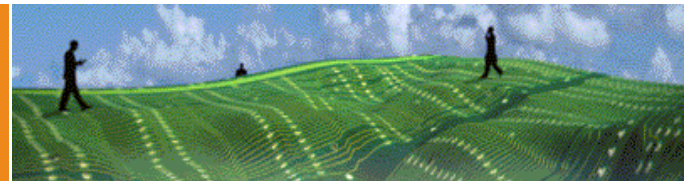
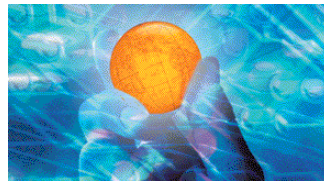
Differences between the ALTA 9 Series Endorsements

- 9 restrictions, **encroachments**, minerals - loan (4/2/12; 8/1/16)
- 9.10 restrictions, **encroachments**, minerals - loan
- **current violations** (4/2/13; 8/1/16)

- 9.1 CCR - owner unimproved (4/2/12)
- 9.2 CCR - owner improved (4/2/12)
- 9.3 CCR - loan (4/2/12)

- 9.6 private rights - loan (4/2/13)
- 9.6.1 private rights - loan - **current assessments** (4/2/15)
- 9.9 private rights - owner (4/2/13)

- 9.7 restrictions, **encroachments**, minerals
- **land under development** - loan (4/2/12; 8/1/16)
- 9.8 CCR - **land under development** - owner (4/2/12; 10/18/12)



Any Questions?

The second section is about the ALTA 28 series that provide coverage related to location of improvements over easements and boundaries.



TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

- All policy forms automatically give broad coverage against the risk of encroachments.

Owner's Covered Risk 2(c): Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

- **All policy forms automatically give broad coverage against the risk of encroachments.**

Homeowner's Covered Risk 1:

Someone else owns an interest in Your Title.

That applies to insure against the adverse possession claim of a neighbor that their encroachment onto the Insured property has matured into ownership:

Homeowner's Covered Risk 28: Your neighbor builds any structures after the Policy Date -- other than boundary walls or fences -- which encroach onto the Land.

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

- **All policy forms automatically give broad coverage against the risk of encroachments.**

Homeowner's Covered Risk 21: You are forced to remove Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

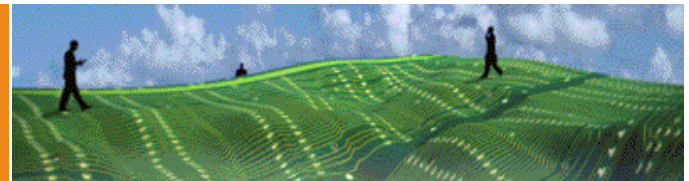
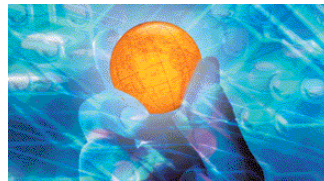
Differences between the ALTA 28 Series Endorsements

- 28 **Easement** - damage or enforced removal (2/3/10)
[Only due to exercise of an easement]

- 28.1 Encroachments - **boundaries** and **easements** (4/2/12)

- 28.2 Encroachments - **boundaries** and **easements**
- described improvements (4/2/13)

- 28.3 Encroachments - **boundaries** and **easements**
- described improvements
and land under development (4/2/15; 12/1/16)



TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

Two things to look at to compare the encroachment coverage between the policies and between the endorsements:

1. What is the definition of **Improvements**?
2. Is coverage **removed if an encroachment is identified** in the survey exception?

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

The Covered Risk for encroachment coverage of the 2006 policies applies only to: **“affixed improvements that by law constitute real property.”**

The Covered Risks for encroachment coverage of the Homeowner’s Policy applies only to: **“Structures”**

The ALTA 9, 9.3, 9.7 and 9.10 all define Improvements to include more than the policies and more than the 28s:””

“Improvement” means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

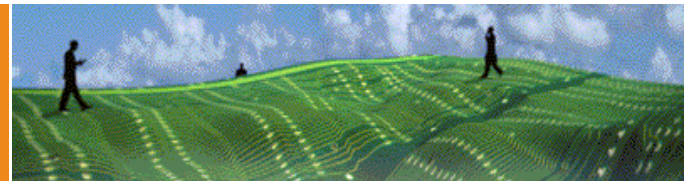
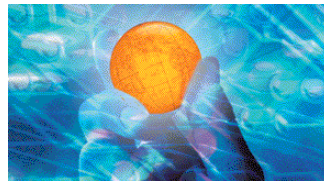
Differences between the ALTA 28 Series Endorsements

28: an existing building located on the Land

28.1: “Improvement” means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.

The 28 and 28.1 definition of Improvements is less than the 9 series [9, 9.3, 9.7 and 9.10]:

“Improvement” means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.



TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

The ALTA 28.2 has the same insuring provisions as the 28 and 28.1.
But the 28.2 lets us define the improvements that are covered:

28.2: For purposes of this endorsement only, “Improvement” means **each improvement** on the Land or adjoining land at Date of Policy, **itemized below:**

Example: All buildings, parking areas and signs, but not sidewalks, shrubbery or trees.

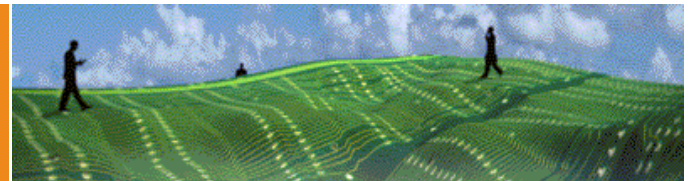
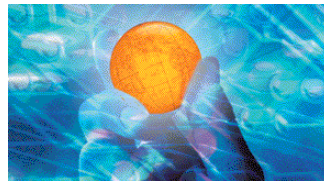
Example: The improvement described in paragraph [#] as encroaching onto the adjoining land.

Differences between the ALTA 28 Series Endorsements

28.3: (a) “Improvement” means a **building, structure, or paved area, including any road, walkway, parking area, driveway, or curb** located on the surface of the Land or the surface of adjoining land at Date of Policy that by law constitutes real property.

(b) “Future Improvement” means **any of the following to be constructed** on the Land after Date of Policy in the locations according to the Plans and that by law constitutes real property:

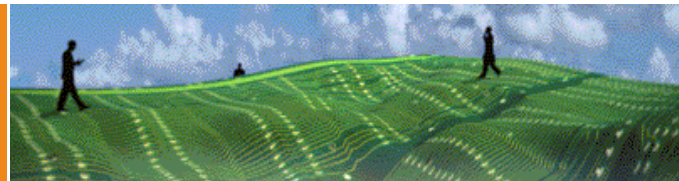
- (i) a **building**;
- (ii) a **structure**; or
- (iii) a **paved area**, including any road, walkway, parking area, driveway, or curb.



Second Chance to Win Raffle Tickets

- We become aware that the trees planted by the seller on the boundary extend outside of the Land onto the neighbor's property. **We show that encroachment in Schedule B. The loan policy includes the ALTA 9 endorsement.**
- If the neighbor gets a court order requiring removal of the trees, does the ALTA 9 require reimbursement of lender's costs?

Oh yes, the ALTA 9 defines "Improvements" **including lawn, shrubbery and trees.** Its enforced removal coverage applies **even if the encroachment is an exception in Schedule B.** The ALTA 28.1 would NOT.



TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

- Most endorsements provide limited coverage against damages due to an encroachment, but no coverage if the survey exception “identifies the encroachment”.
- Most endorsements will provide enforced removal coverage even if the survey exception identifies an encroachment.

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

Most of the 9, 9.7 & 9.10 encroachment coverage is removed if there is an exception that identifies the encroachment:

The Company insures against loss or damage sustained by reason of:

a. An encroachment of:

- i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
- ii. 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 otherwise insured against in Sections 4.a.i. or 4.a.ii.;

But enforced removal coverage is not removed:

- b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B;

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

The ALTA 28.1 in par. 3 a, b, c and d: insures against loss or damage sustained by the Insured by reason of:

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

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

- The 28.1, 28.2 and 28.3 also provide enforced removal coverage that is not limited by the survey exception:

The ALTA 28.1 in par. 3 a, b, c and d: insures against loss or damage sustained by the Insured by reason of:

c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the 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 Improvement; or

d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

The ALTA 28.1, 28.2 and 28.3 have the following that allows us to remove the enforced removal coverage for a specific survey issue. Or, choose not to remove that coverage!

Sections 3.c. and 3.d. of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B: _____

By stating NONE here, we can give "affirmative coverage" against enforced removal for known improvements.

Using the 28.2, we can choose to describe an improvement that is not a building, and even give enforced removal coverage.

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

The ALTA 28.1, 28.2 and 28.3 have the following that allows us to remove the enforced removal coverage for a specific survey issue. Or, choose not to remove that coverage!

Sections 3.c. and 3.d. of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B: _____

If a survey has many issues shown, and we are willing to provide enforced removal coverage for all EXCEPT ONE, use this part to describe that subparagraph:

"the encroachment of the covered parking into the PUD power easement described in exception paragraph 5 (e)."

Any Questions?

The third section is about wisely using the ALTA 34 endorsement to provide coverage against carefully-described risks.



Underwriting Guidelines for the ALTA 34 Identified Risk Endorsement

- Adopted 8-01-11 and not amended (yet).
- Allows the title company to design customized “affirmative coverage” against a particular risk, but with important limitations on policy liability:

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

a. **A final order or decree enforcing the Identified Risk** in favor of an adverse party; or

Underwriting Guidelines for the ALTA 34 Identified Risk Endorsement

- Adopted 8-01-11 and not amended (yet).
- Allows the title company to design customized “affirmative coverage” against a particular risk, but with important limitations on policy liability:
 2. The Company insures against loss or damage sustained by the Insured by reason of:
 - b. **The release** of a prospective purchaser or lessee of the Title or lender on the Title **from the obligation to purchase**, lease, or lend as a result of the Identified Risk, **but only if**
 - i. there is a contractual condition requiring the delivery of marketable title, and
 - ii. **neither the Company nor any other title insurance company is willing to insure over the Identified Risk** with the same conditions as in this endorsement.

Underwriting Guidelines for the ALTA 34 Identified Risk Endorsement

- Adopted 8-01-11.
- Allows the title company to design customized “affirmative coverage” against a particular risk, but with important limitations on policy liability:
 3. **The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of the Title** by reason of the Identified Risk insured against by Paragraph 2 of this endorsement, but only to the extent provided in the Conditions.

Underwriting Guidelines for the ALTA 34 Identified Risk Endorsement

As used in this endorsement “Identified Risk” means: *[insert description of the title defect, restriction encumbrance or other matter]* described in Exception _____ of Schedule B.

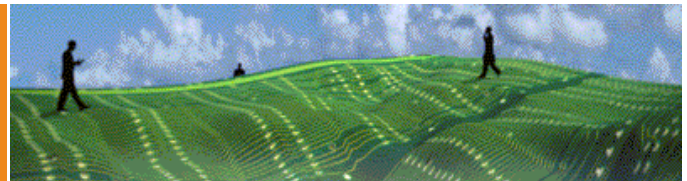
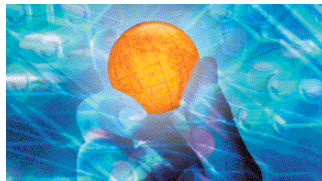
- The ALTA Forms Committee presumed the title officers would fill in the blank to **describe the risk** that the endorsement would insure against.
- Unfortunately, the practices quickly went in the wrong direction:

“Identified Risk” means: _____
described in Exception Paragraph 4

Third Chance to Win Raffle Tickets

- Our title report in par 4 shows the neighbor's fence is onto the insured Land. We want to provide affirmative coverage to the owner, so we issue the ALTA 34 describing the risk simply as "paragraph 4."
- If the neighbor wins an adverse possession lawsuit, does the ALTA 34 obligate the title company to pay loss of the value of the land?

Oh yes! As written, the ALTA 34 insures against any consequence of enforcement.



Underwriting Guidelines for the ALTA 34 Identified Risk Endorsement

As used in this endorsement “Identified Risk” means: [*insert description of the title defect, restriction encumbrance or other matter*] described in Exception _____ of Schedule B.

- **The new 34.1 (adopted five days ago) will be much more clear how to fill in the blanks:**

For purposes of this endorsement only, the following terms mean:

- a. “Identified Exception”: Exception **4** of Schedule B.
- b. “Identified Risk”: [**Insert the potential consequence caused by the Identified Exception (e.g., enforcement of a covenant or foreclosure of a lien)**].

TITLE POLICY COVERAGE AGAINST ENCROACHMENT RISKS

It is usually not appropriate to provide ALTA 34 coverage against all types of loss related to every survey or location matter identified in the typical survey exception. Using that paragraph number gives unintended broad coverage!

However, there are particular encroachment-type issues where the title company might be willing to provide SPECIFIC coverage:

For example:

The costs to remove the landscaping and rockery retaining wall now on the west boundary if the neighbor on that shared boundary initiates legal action to require removal.

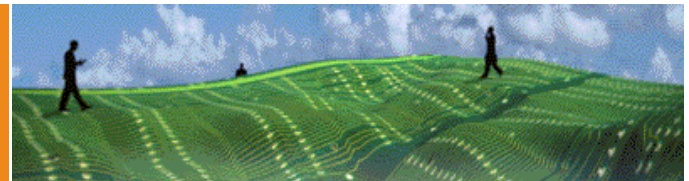
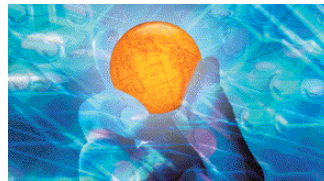
Examples of Identified Risks:

- **For a Judgment/Claim of Lien/Assessment:**

- A judicial decision allowing execution of the Judgment described in exception paragraph 4 by a sale of the Land
- Commencement of a legal action seeking foreclosure of the Claim of Lien described in exception paragraph 4
- A final decree of foreclosure and order of sale of the Land arising out of the Claim of Lien described in exception paragraph 4

- **For an easement burden:**

- A final Judgment enforcing a claim by the parties holding the rights of easement described in exception paragraph 4 that the easement prevents the Insured from also using the easement area for the purpose of access to the Land.



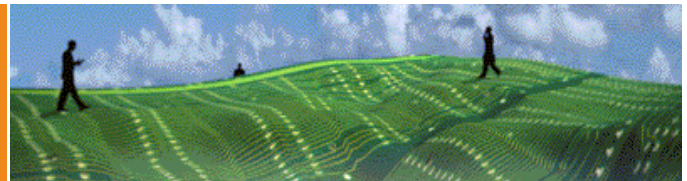
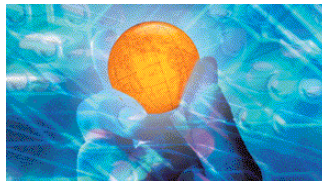
Examples of Identified Risks:

- **For a pending legal action:**

- A final Judgment arising out of the legal action described in exception paragraph 4 that determines any other person has any rights as an owner of any portion of the Land
- A final Judgment arising out of the legal action described in exception paragraph 4 by the Homeowner's Association claiming a lien for unpaid assessments against the Land for any amount due prior to the Date of Policy

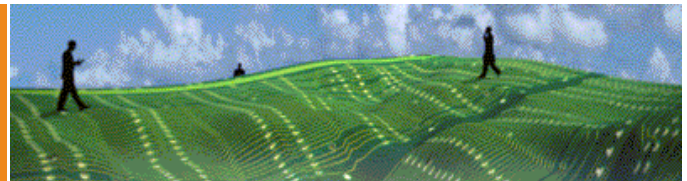
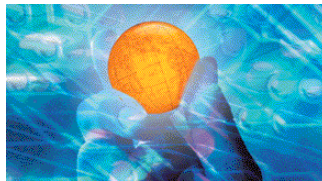
- **For an old contract without a fulfillment deed:**

- Any claim that there is any remaining indebtedness due pursuant to the Real Estate Contract described in exception paragraph 4 , or any claim that the lack of a recorded fulfillment deed causes the Title to the Land to be Unmarketable.



Last Chance to Win Raffle Tickets

- Our title report in par 4 shows “Possible encroachment of the fence on the westerly boundary onto the adjoining Land.”
- We want to provide some affirmative coverage using the ALTA 34.
- Who will propose **how to describe the “Identified Risk”** to protect against loss due to litigation, but not protect against loss of the land value due to adverse possession?



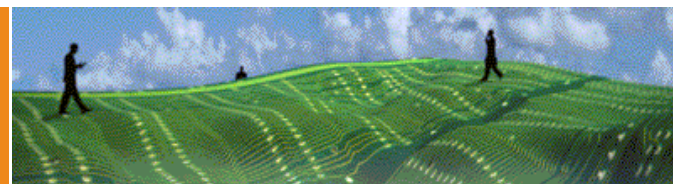
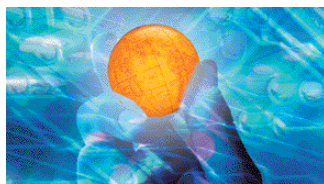
Last Chance to Win Raffle Tickets

- Who will propose **how to describe the “Identified Risk”** to protect against loss due to litigation, but not protect against loss of the land value due to adverse possession?

As used in this endorsement “Identified Risk” means: *[insert description of the title defect, restriction encumbrance or other matter]*

described in Exception 4 of Schedule B.

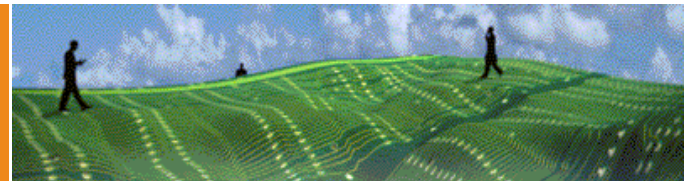
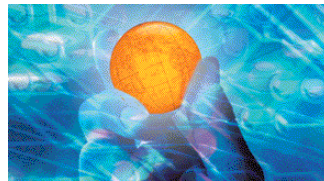
[4. Possible encroachment of the fence on the westerly boundary onto the adjoining Land.]



Last Chance to Win Raffle Tickets

As used in this endorsement “Identified Risk” means: **Costs** incurred by the Insured to remove the fence. The Identified Risk does not include damages for loss of the improvement or for loss of land described in Exception 4 of Schedule B.

[4. Possible encroachment of the fence on the westerly boundary onto the adjoining Land.]



Any Questions?

