

COLORADO BAR ASSOCIATION:
REAL ESTATE SECTION TOPICAL LUNCH

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Title Examinations: the Good, the Bad and the Ugly
Or
What you don't know definitely can hurt you.

Julie Waggener Esq.
Waggener & Foster LLP
600 S. Cherry St, Suite 217
Denver, CO 80246
jwaggener@wflfp.com
303/322-0236

What is title review¹?

Title review is probably the most important, and overlooked, responsibility in a property purchase. Title review is basically **identifying legal issues, impediments or problems with property and investigating them to discern if and how they may affect the property and your client's uses and enjoyment of the Property going forward.** Keeping your clients informed is critical to enroll them in the process, and to get them (and often their broker) to understand what is objectionable, what it means potentially to their deal, and then identifying it timely for the Seller hopefully to "correct" the issues in order to allow the buyer to close.

In standard form contract, see paragraph 8 for rights to review, calendar the date for objection and if your client authorizes it, disapprove. In other (non-standard form) contracts, title review is usually included, though takes many forms. This review applies to commercial or residential title properties. Commercial title departments are usually more used to dealing with objections than residential, but stick by your guns with working through issues, even on residential. Seller is the person with whom the cure responsibility lies, not with title company; however, most sellers and listing brokers just assume and expect that title companies are responsible for, and will fix the problems. Sellers and listing brokers frequently don't appreciate that title issues which buyers identify need resolving in order to permit buyer to close or, if the contract so specifies, buyer can cancel the contract.

¹ **A REQUEST:** This is a brief summary of highlights of a very comprehensive and important topic for buyers of real estate. If you represent real estate brokers (commercial or residential, this applies to all transactions), please continue to advise them of the importance of recommending legal title review for their buyers, just like they recommend inspections, radon tests, and the like.

Title review is a form of due diligence, looking into the matters which may be recorded against the title of the property your client will be buying. Since real estate usually is the biggest investment in a buyer's life, a buyer will want title to be "clear" or at least satisfactory before the client buys. Such adverse title interests can include, for instance, fences and encroachments (and other matters) shown by survey, easements for utilities, easements for paths, ditches, drainage areas, lines (like sewer lines), which often can run under or through the property (even if not built) and can interfere with your later construction or development (or resale) of the property. Other examples are roads, paths or driveway interests, sometimes not built or used, for which a third party may have rights to use your property. Sometimes that party could be a neighbor, a utility company, or a governmental entity. There are many issues that come up in title review, and typically an initial review of the title insurance commitment, and the accompanying documents, will reveal if there is going to be extensive further due diligence needed, or perhaps just an explanation to you as the buyer of what you are buying.

Why do title review?

When your buyer later becomes the seller, and hires someone knowledgeable real estate counsel to review title, they may be sorry that they didn't do a thorough title review.

Have you ever:

- a) put the title commitment in the file and never looked at it before closing? or
- b) even if you looked at it, you didn't understand what it said? Or, if you did understand it, did your buyer still accept the title defects when they bought?

Those defects, whether know or unknown, have a nasty way of getting in the way of a future buyer buying the Property, or creating clouds or additional costs to (future) buyer that the future buyers wants seller (your buyer now) to absorb. Your buyers now who do not do title review, or ignore it (or your warnings about same) are assuming risks of lost or delayed sales, and possible costs, including litigation costs and value reductions, if they don't get title looked at and matters solved before they buy.

Slower and "down" markets like today frequently reveal the ugly underbelly of problem titles that were not examined, or accepted, in the fast markets. Now frequently they can't sell until they are cured.

Basic steps for title review:

1. Contract: Get copy of Contract and see when Title objection deadline is. If standard form, know rights under Section 8. If not standard form, read title objection rights carefully. Often, your buyer has no rights to object, just right to "receive documents" and then has to accept everything as a "permitted exception". Not good for buyer. Get that

language changed in contract if you get the chance. Tickle objection timing and get extensions if necessary. Don't let it pass without doing the title review and discussing it with your Buyer.

2. **Title Commitment:** It is important that you get the title commitment, and review all requirements and Schedules (usually A, B-1 (Requirements) and B-2 (Exceptions)).

a. **Schedule A (Cmtmt -1)** shows the description of the real estate to be insured by the title policy, and therefore usually sets up what is going to be conveyed in the deed (even if the Contract differs, which it frequently does) – if there are matters revealed in the exceptions that in fact are “extra” rights that your client needs conveyed, such as an easement right appurtenant to the property (access road?), then get that added to Schedule A as an additional estate to convey in the deed. *²

b. Is the Legal description a metes and bounds description? (Beware of illegal subdivision issues, pre- May 1972, and see Subdivision law CRS 30-28-110(4).)

c. **Review Vesting Deed:** Does the Vesting Deed description into the Seller match the description of the Schedule A description in this title commitment? If not, why not? Does it match the Contract?

3. Look at **Schedule B-1(Cmtmt-2)** requirements—They can tell you many things about the current status of title with the Seller and what the Seller needs to do before closing:

a. What is the DOT principal balance * --and other important information about seller.

b. Is the Seller an heir with an estate not properly closed that needs correcting? (These may affect timing of purchase of your buyer.)

4. Look at **Schedule B-2 (Cmtmt-3-4)** exceptions: First review and print them out and then diagram them.

a. Always print and review any plat * or surveys carefully.

b. Are there documents in the chain to which exception is taken which themselves contain conditions, restrictions etc*. Don't be fooled by these. Get copies and review and diagram them as well.

i. Ex: “Deed dated January 10, 1967 at Book 20, page 43 and matters described therein” The “matters” described therein may well be reference to an older deed containing a reservation for a 100 foot wide

² * Asterisks appearing in this outline denote areas in attached title commitment where illustration of this concept appears

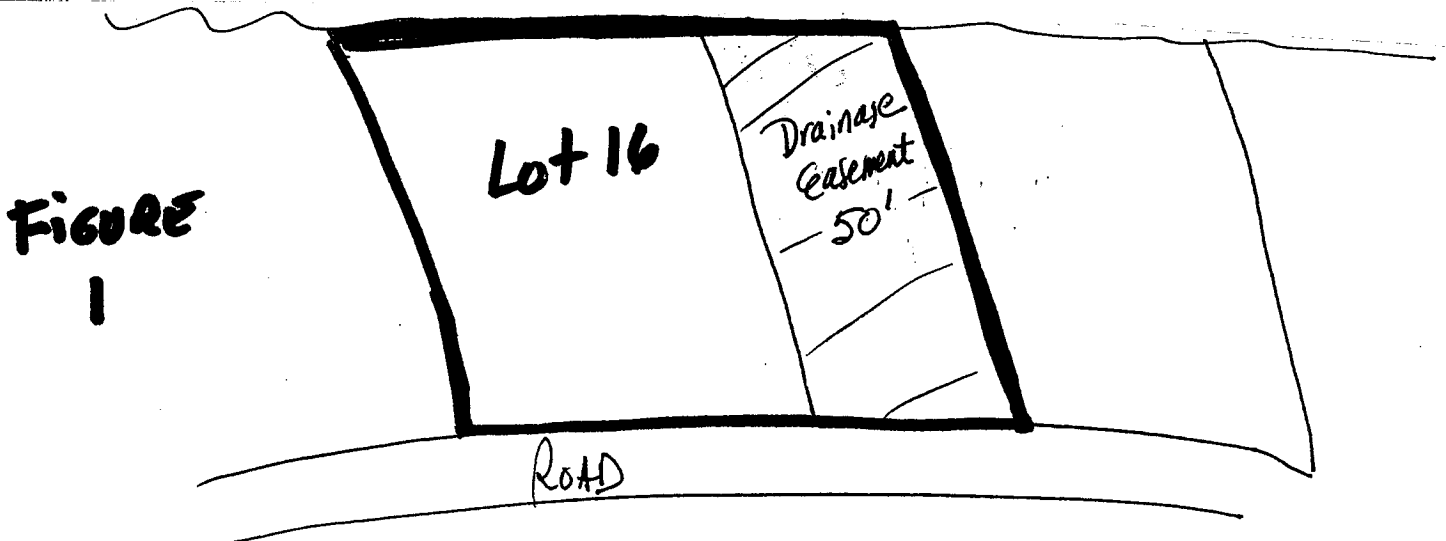
roadway across the property that interferes completely with your buyer's future development.

- c. Beware the new "transfer fee covenants" coming to Colorado! These are being put in development documents requiring payment (sometimes for 99 years) to some third party (private parties sometimes) for some percent of the purchase price—and are required to be paid with each sale. These already are included in many HOA communities where the monies used for the benefit of the HOA. The newer versions we're seeing are paid to private parties, to create income stream (and potential security for the developers' lenders as well). This fee (1-3% of the purchase price) can seriously surprise and change the economic effects of a transaction at the last minute. (Stay tuned to your Real Estate Section Newsletters for more information about these).
 - d. Investigate and read all of the documents and items listed, no matter how innocuous they look!
 - i. Ex: "IREA Easement for utilities recorded at Book 32, page 16." * On examination, the easement document which says "easement for utilities within the property shown on Exhibit A attached hereto" has no Exhibit A attached. The terms of the easement are a cloud on the entire property until corrected, and the terms of the easement (frequently: "no improvements may be constructed within the easement") arguably apply to the entire property until corrected.
5. Recommend that buyers get a survey from a reputable surveyor—they are your and a buyer's best protection from surprises especially about matters that exist on the ground and which are not "visible" just by looking at the legal description and any documents recorded against title.
- i. Surveys can locate, on the ground and relative to your legal description, where various matters such as third party rights, easements etc. shown in B-2 actually sit on the ground
 - ii. They can show fencelines and encroachments that may affect your client's development or future use.
 - iii. They confirm, for instance, that the legal description as does/does not fall outside all improvements existing on the property, the setbacks are conforming (or not) , the property is contiguous with the neighbor's warehouse development (not encroaching), etc.
 - iv. If the title commitment takes exception to "matters on the survey", make the title company state exactly what "matters" it is taking exception to, so your buyer can know and accept them (or not).

6. Ask about your client's **intended use and future plans** for the property.
7. **Fully inform your client** about the risks and nature of the objections you have found, and document them in writing.
8. **Timely object** with Buyer's approval, (in writing, to the correct place per contract) including the list of title objections that you want corrected for your buyer.
9. **Follow up and confirm** with all concerned to be sure that your client's objections are, if and as possible, alleviated, insured over (if possible—get endorsements when you can and need them), indemnified, that deeds are correctly written and title insurance provides the greatest protection possible for the identified risks. If they aren't, be sure to confirm the risks assumed with your clients in writing.
10. Get **deed description and exceptions changed** before closing to allow only the agreed description and agreed exceptions. Quit claim any questionable rights?
11. **DISCUSSION EXAMPLES** (The bad and the ugly, primarily...):

a. **Figure 1:** (Drainage Easement)

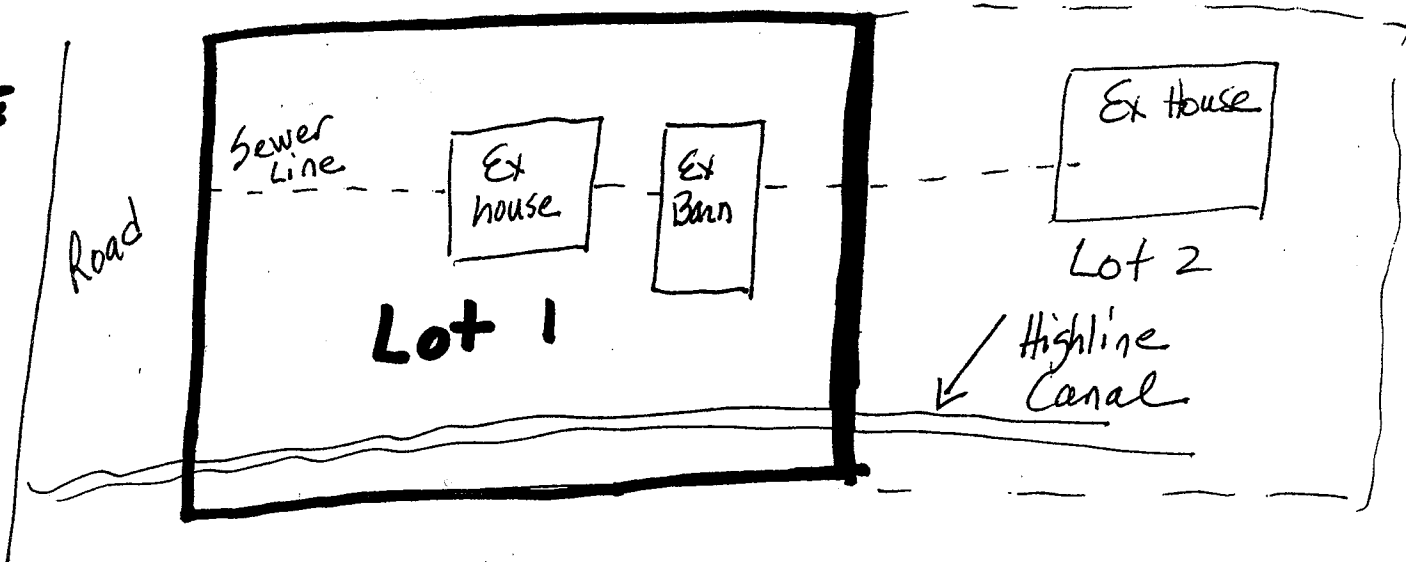
- i. "Owners of properties on which drainage easements are located shall have the sole responsibility and obligation to maintain and repair all facilities on said easements" (From Plat note - among many others)



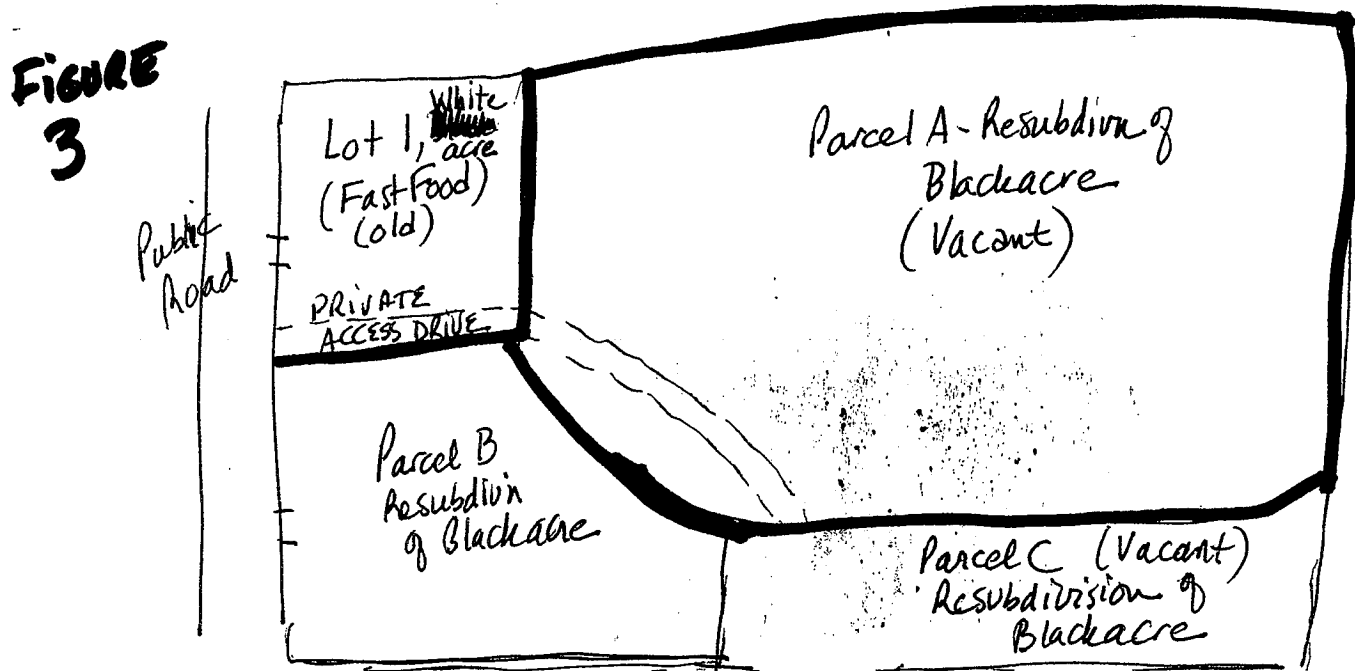
b. **Figure 2:** (Highline Canal etc.)

- i. Schedule A legal description: "Lot 1 except the Highline Canal as built".
- ii. Schedule B-2 exception: "Ordinance dated June 23, 1950 recorded at Book 25, page 101" (Ordinance creates easements for Lots in subdivision "in place")
 1. As of 1950, what was "in place"?
 2. Did it then apply to Lot 1 or is that a later line?
 3. What about the line going under Lot 1 (in the path of client's demo/reconstruction project) that also services Lot 2?

**FIGURE
2**



- c. **Figure 3** (Commercial- resubdivision): Property on Schedule A is described as "Parcel A, a Resubdivision of Blackacre".



- i. Exception: "Except matters shown on Plat" *.

1. Which "Plat"?

- a. Plat of original "Blackacre", before the resubdivision? (that original "Blackacre" subdivision is not mentioned in the title commitment, but it is mentioned in the Resubdivision plat, so get the original Blackacre Plat too and review it--- it may contain things not shown on the Resubdivision Plat, and yet not "cancelled" in the resubdivision.)
- b. Plat of "Resubdivision of Blackacre"?
- c. Check to see if there are "layer cake covenants" that don't undo the earlier covenants. Did the old Blackacre have covenants that are inconsistent with, or cause concern for your buyer's intended use vis a vis new Resubdivision covenants?

2. Which “matters” are shown?

- a. No public road access to Parcel A
- b. Private access drive shown – what do notes say? Width? Use? Restrictions?
- c. Can Parcel C use it too? If so, for what?
- d. If Parcels A and C are vacant, and the drive is not a designated width on the maps, what then?
- e. If Lot 1 was not part of the Blackacre subdivision (it’s “Whiteacre”), did it ever consent to the private access drive shown to Parcel A? Is there an easement recorded benefitting Parcel A on Lot 1? If not, then what?

ii. “Except Easement dated January 5 ,1984 recorded at Book 390, page 456”). What if Lot 1 did grant an easement for access on the private road to Parcel A and C, and (you’ve now pulled and read it) it says that:

- a. Lot 1 reserves the right to terminate it if the easement is not serviced by “Grantee” of Parcel A or C (which is the developer, not the Owners’ Association for A , B and c); or
- b. Lot 1 says that it has a right to terminate if Parcels A or C ever use the properties for the sale of drugs or alcohol (and your buyer wants to put in a Walgreens, or medical marijuana dispensary?)

d. **Other illustrations:**

i. “Sterilizing” interests (the 900 pound gorillas):

- 1. Utility and recreational (equestrian, snowmobile trails etc) easements
- 2. Cell sites and towers

3. Building/planning/zoning and use restrictions

4. Ditches or other use rights

5. Billboard “licenses”

ii. Roads (platted and unbuilt, undedicated, unaccepted...)

12. Title Insurance –the panacea?

- a. Among many other things, title policies do not cover zoning, planning, subdivision, or matters “assumed, know or agreed to” by the insured.
- b. Know the “exclusions, conditions, exceptions and stipulations”
- c. Don’t lose oversight of the objection/resolution process to the title company without understanding the “fixes” being proposed.
- d. Supervise the preparation of the deed!

13. Conclusion

ATTACHMENT – TITLE COMMITMENT (SAMPLE) 4 PAGES

ALTA RESIDENTIAL COMMITMENT

Our Order No. [REDACTED]

Schedule A

Cust. Ref.:

Property Address:
[REDACTED]

1. Effective Date: July 31, 2009 at 5:00 P.M.

2. Policy to be Issued, and Proposed Insured:

Owner's Extended Coverage Policy - 1987 Rev
(For Single Family Residence)

Proposed Insured:
[REDACTED]

625,000 *

3. The estate or interest in the land described or referred to in this Commitment and covered herein is:

A Fee Simple

4. Title to the estate or interest covered herein is at the effective date hereof vested in:

[REDACTED]

5. The Land referred to in this Commitment is described as follows:

~~Blackacre~~
LOT 45, [REDACTED] FILING NO. 4 FIRST AMENDMENT, COUNTY OF [REDACTED] STATE OF COLORADO.

... together with ...

*
← Add additional rights here (easements etc)

Schedule A

(* = see materials)

Cont-1

ALTA RESIDENTIAL COMMITMENT

Schedule B-1

(Requirements)

Our Order No. [REDACTED]

The following are the requirements to be complied with:

Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.

Proper instrument(s) creating the estate or interest to be insured must be executed and duly filed for record, to-wit:

1. RELEASE OF DEED OF TRUST DATED JUNE 20, 2007 FROM [REDACTED] TO THE PUBLIC TRUSTEE OF [REDACTED] COUNTY FOR THE USE OF [REDACTED] TO SECURE THE SUM OF \$652,000.00 RECORDED JULY 03, 2007, UNDER RECEPTION NO. [REDACTED]

Short sale! *

2. WARRANTY DEED FROM [REDACTED] AND [REDACTED] CONVEYING SUBJECT PROPERTY.

NOTE: ALL PARTIES WILL BE REQUIRED TO SIGN A FINAL AFFIDAVIT AND AGREEMENT AT CLOSING.

+ Get and Review Vesting Deed *

Schedule B-1

Contat - 2

ALTA RESIDENTIAL COMMITMENT

Schedule B-2

(Exceptions)

Our Order No. [REDACTED]

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company:

1. Rights or claims of parties in possession not shown by the public records.
2. Easements, or claims of easements, not shown by the public records.
3. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, and any facts which a correct survey and inspection of the premises would disclose and which are not shown by the public records.
4. Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.
5. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereon covered by this Commitment.
6. Taxes and assessments not yet due or payable and special assessments not yet certified to the Treasurer's office.
7. Any unpaid taxes or assessments against said land.
8. Liens for unpaid water and sewer charges, if any.

Note: Standard Exceptions 1 through 4 will not appear on the Owner's Extended Coverage Policy and the specific coverages afforded by said policy will be substituted. If Land Title Guarantee Company conducts the closing of the transaction to be insured under this commitment, item 5 of the standard exceptions is hereby deleted. Upon proof of payment of prior years taxes, item 7 under Schedule B-2 will be deleted and item 6 will be amended to read: Taxes and assessments for the current year and subsequent years. Item 8 under Schedule B-2 will be deleted upon proof that the water and sewer charges are paid up to date. The Owner's Extended Coverage Policy (OEC) will automatically increase coverage by 10 percent on each of the five anniversaries of the policy date, at NO additional charge.

9. ANY TAX, LIEN, FEE, OR ASSESSMENT BY REASON OF INCLUSION OF SUBJECT PROPERTY IN THE [REDACTED] WATER AND SANITATION DISTRICT, AS EVIDENCED BY INSTRUMENT RECORDED SEPTEMBER 15, 1969, IN [REDACTED]

10. TERMS, CONDITIONS AND PROVISIONS OF AGREEMENT DATED JUNE 30, 1976 WITH [REDACTED] RECORDED [REDACTED] IN [REDACTED]

*

NOTE: ADDENDUM RECORDED [REDACTED] IN [REDACTED] AT [REDACTED]

11. RIGHT OF WAY EASEMENT AS GRANTED TO [REDACTED] IN INSTRUMENT RECORDED [REDACTED]

*

Schedule B-2 (1)

Contnt-3

ALTA RESIDENTIAL COMMITMENT

Schedule B-2

(Exceptions)

Our Order No. [REDACTED]

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company:

12. TERM, CONDITIONS AND PROVISIONS OF AGREEMENT WITH [REDACTED] AND ADDENDUM THERETO RECORDED [REDACTED] AT PAGE [REDACTED], PERTAINING TO RIGHT TO DRILL AN OPERATE WATER WELLS, STORAGE TANKS, SEWER AND WATER PIPELINES, ELECTRIC LINES AND OTHER PLANT EQUIPMENT AND RESERVIOR AND EASEMENTS.
13. [REDACTED]
14. RIGHT OF WAY EASEMENT AS GRANTED TO INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION IN INSTRUMENT RECORDED APRIL 06, 1994, IN BOOK [REDACTED] AT PAGE [REDACTED] *
15. EASEMENTS, CONDITIONS, COVENANTS, RESTRICTIONS, RESERVATIONS AND NOTES ON THE RECORDED PLAT. *
16. RESTRICTIVE COVENANTS, WHICH DO NOT CONTAIN A FORFEITURE OR REVERTER CLAUSE, BUT OMITTING ANY COVENANTS OR RESTRICTIONS, IF ANY, BASED UPON RACE, COLOR, RELIGION, SEX, SEXUAL ORIENTATION, FAMILIAL STATUS, MARITAL STATUS, DISABILITY, HANDICAP, NATIONAL ORIGIN, ANCESTRY, OR SOURCE OF INCOME, AS SET FORTH IN APPLICABLE STATE OR FEDERAL LAWS, EXCEPT TO THE EXTENT THAT SAID COVENANT OR RESTRICTION IS PERMITTED BY APPLICABLE LAW AS CONTAINED IN INSTRUMENT RECORDED MARCH 14, 1996, IN BOOK [REDACTED] AT PAGE [REDACTED] AND AS AMENDED IN INSTRUMENT RECORDED MARCH 14, 1996, IN BOOK [REDACTED] AT PAGE [REDACTED] * *

Schedule B-2 (2)

Contact-4