

SOUTH DAKOTA SOCIETY OF PROFESSIONAL LAND SURVEYORS

Title Insurance Overview

FEE SIMPLE

- Highest Degree of ownership of a property
- Fee simple owner has the bundle of rights associated with owning the property
- Fee simple owners are still subject to lessor estates in real property
 - Examples:
 - Mineral estates
 - Life estates
 - Leasehold interests
 - Convents and restrictions
 - Liens
 - Easements

SOUTH DAKOTA TITLE SEARCH SYSTEM

- Title plants in each county have to be examined and licensed by the South Dakota Abstractors' Board of Examiners
 - Each licensed plant has to have an exact copy of the entire set of records from the local Register of Deeds Office for that county ("plant law")
 - Each plant has one or more licensed abstractors who are the ones conducting the search and preparing the commitments and policies
- Each title company works closely with their local Register of Deeds, Clerk of Courts, Treasurer, and other County Officials when searching title
- Searches are conducted using the office title plant and the county records
- Everything works within South Dakota's race-notice recording system
 - Documents that are recorded first have priority, unless the party had actual notice of an instrument executed first, but recorded second

TITLE INSURANCE OVERVIEW

- Title insurance is the primary way of assuring title to land in South Dakota (and most other states) and has replaced attorney opinions and abstracts
 - Abstracts come from abstractors who summarize and list all instruments “affecting the title of the following described real estate” (think the search component)
 - Attorney opinions then describe what legal impact those numbered entries have regarding the ownership of the property (think the exam component)
- Title policies are insurance contracts which state that “the land referred to in this policy is described as follows” with the legal description and current vested ownership
 - Title policies, like other insurance contracts, contain a list of what are covered matters and what items are generally excluded from coverage along with what items are specific exclusions for this particular policy
 - Title commitment and policy contain the end result of the abstractor conducted search and examination of the chain of title

TITLE INSURANCE COMMITMENT

- Schedule A – the who, what, where, and how much
 - Effective date and time – when the search was through
 - Will not include items recorded or disclosed AFTER the date of the search
 - Need to get an updated commitment prior to closing to check for those items
 - Amount of coverage (both owner and lender)
 - Proposed insured (both owner and lender)
 - Estate being insured (fee simple, contract for deed, leasehold, etc.)
- Legal description
 - BE AWARE – TITLE COMPANIES USE DESIGNATIONS FOR COMMITMENT PURPOSES THAT OFTEN INCORRECTLY GET INCLUDED IN THE LEGAL DESCRIPTION – PARCEL 1 AND PARCEL 2 ISSUE

TITLE INSURANCE COMMITMENT (CONT)

- Schedule B – the Requirements and Exceptions
 - “A” – the gap coverage exception
 - General Exception – going to appear in all standard coverage commitments and policies (removed with extended coverage)(things that impact title but are off record)
 - Special Exceptions – exceptions because of issues with this particular piece of property (they are of record)
 - Real estate taxes, easements, prior mortgages and judgments, leases, other estates in real property
 - Most commitments will include a section called “Requirements” which list what steps need to be taken to remove certain special exceptions

THE BEST Abstract & Title Company EVER
AS AGENT FOR DAKOTA HOMESTEAD TITLE INSURANCE COMPANY

COMMITMENT FOR TITLE INSURANCE

SCHEDULE A

File Number: **CABH 90210**

1. Effective Date: **January 26, 2015 at 8:00 A.M.**
2. Policy or policies to be issued:
 - a. ALTA Owner's Policy (06-17-06) **Amount of Coverage: \$693,600.00**
 Standard Coverage Extended Coverage

Proposed Insured: **J. David Smith and Holly M. Smith**
 - b. ALTA Loan Policy (06-17-06) **Amount of Coverage: \$578,000.00**
 Standard Coverage Extended Coverage

Proposed Insured: **WELLS FARGO, N.A.**
 - c. **Amount of Coverage:**

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

FEE SIMPLE
4. Title to the **FEE SIMPLE** estate or interest in said land is at effective date hereof vested in:

Matthew Hart and Julian Hart, Husband and Wife
5. The land referred to in this Commitment is described as follows:

Lot One (1), Block two (2), Harmon Killebrew's Addition to the Town, now City, of Vermillion, Clay County, South Dakota, according to the recorded plat thereof.

Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company.

- A. Defects, liens, encumbrance, 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 for value of record the estate or interest or mortgage thereon covered by this Commitment.
- B. General Exceptions:
1. Rights or claims of parties in possession not shown by the public records.*
 2. Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey or inspection of the premises including, but not limited to, insufficient or impaired access or matters contradictory to any survey plat shown by the public records.*
 3. Easements, or claims of easements, not shown by the public records.*
 4. Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.*
 5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the public records.*
 6. Taxes or special assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records. Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.*
 7. Any Service, installation or connection charge for sewer, water or electricity.*
 8. Any right, title, or interest in any minerals, mineral rights, or related matters, including but not limited to oil, gas, coal, and other hydrocarbons.*

*Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 will not appear as printed exceptions on extended coverage policies, except as to such parts thereof which may be typed as a Special Exception.

- C. Special Exceptions:
1. **All Real Estate Taxes for the year 2015 and all subsequent years, which constitute an on-going lien against the insured property but are not yet due and payable. Real Estate Taxes for the year 2014 and all prior years are paid in full. Tax-parcel I.D. # 020000-95648-1530-10.**
 2. **Subject to all existing easements for utilities, both private and public, as created by and located in that certain plat of Harmon Killebrew's Addition to the Town, now City, of Vermillion, Clay County, South Dakota, according to the recorded plat thereof.**

3. **Subject to the Uniform Covenants and Restrictions of Harmon Killebrew's Addition dated September 22, 2007 and recorded October 17, 2007 in Book 77 of Misc. on pages 450-455 in the in the Office of the Register of Deeds of Clay County, South Dakota.**
4. **REAL ESTATE MORTGAGE from Matthew Hart and Julian Hart, Husband and Wife, to WEALTHCO LENDING, INC. in the principal amount of \$415,000.00, dated June 11, 2006 and recorded June 7, 2006 @ in Book 100 of Mortgages on Page 124 in the Office of the Register of Deeds of Clay County, South Dakota.**
5. **JUDGMENT (LIEN) against Matthew Hart and Julian Hart, jointly and severally, in favor of CitiBank Fast Cash and Credit in the principal amount of \$23,876.15 filed July 18, 2013 and docketed in Clay County, South Dakota on July 19, 2013 in connection with Clay County Civ. No. 2013-147B.**

ES ONLY

TITLE INSURANCE POLICIES

- The first couple of pages are the policy jacket – detail all of the standard terms of coverage and exclusions from coverage (things that are not insured) that are the same in every policy
 - Also details how disputes will be resolved, the obligations of the insured and the insurer, and other standard insurance contract provisions
- Schedule A looks similar to the commitment, but it has definitive information, not proposed
 - Effective date is typically going to be the recording date and time of the deed for the owner's policy and the mortgage for the lender's policy
- Schedule B contains exceptions to the insured title

TITLE SEARCHES AND NON-TITLE INSURANCE PRODUCTS

- Title companies and abstractors often will offer non-title insurance services too, including recorded searches and E&O reports (Error and Omission reports)
 - Searches and reports just list what is all of record for a particular piece of property
 - The searcher will sometimes include a copy of the various instruments in the chain with the search report (need to ask though)
 - Searches DO NOT INCLUDE DETERMINATION AS TO THE IMPACT OF WHAT EACH RECORDED INSTRUMENT HAS ON TITLE
 - That (and the lack of insurance coverage) is the primary difference between a title search and a title insurance commitment (which have abstractor and underwriter guidance as to what needs to be shown as specific exceptions)

RECORDING REQUIREMENTS

- SDCL 43-28-23 lays out the requirements for everything (except plats) to be recorded with the Register of Deeds Office
 - Paper size must be between 8.5" by 14" (max size) and 8.5" by 11" (min size)
 - Must be at least size 10-point font and in black ink (except for dates, signatures, acknowledgements can be in blue or black)
 - White paper only
 - Blank space at the top of the first page at least 3" down from the top (spot for recording information) for top margin and at least 1" margin on all other sides
 - Left side can be used for where to return the document to
 - Right side is for the ROD's use only
 - Right below that space is the title of the instrument
- Impact of not complying – document may not be recorded or may not be deemed to establish priority / provide constructive notice
- DON'T RELY ON JUST THE REGISTER OF DEEDS TO TELL YOU IT IS OKAY OR NOT
- Preparing Documents – need to include the name, address, and phone number of the preparer in the top left corner

ACKNOWLEDGMENTS

- Serves two purposes – proves identity of the executioner and it is required for recording some instruments (deeds, mortgages, etc.)
 - Lack of an acknowledgment can prevent an instrument from providing constructive notice of its content
- Acknowledgment is taken by a notary public (or other authorized office) – they affix their seal and sign the acknowledgement block
- SDCL 18-4 and 18-5 contain specific requirements for acknowledgments along with standard forms that can be used
- Be sure to use the appropriate acknowledgment block for the person signing the instrument (CAPACITY)
 - Individual or married couple compared to one for when an officer or trustee is signing on behalf of an entity

ACKNOWLEDGMENTS – PRACTICE TIPS

- Incorrect acknowledgments are some of the most common issues we see from recorded documents
- Biggest acknowledgment issue – use of individual acknowledgments for all situations
 - An individual acknowledgment CANNOT be used when the property is owned by:
 - LLC
 - Corporation
 - Trust
 - Partnership
 - Estate for Deceased Prior Owner
 - Cannot be used if an attorney-in-fact is signing for someone using a power of attorney

POWER OF ATTORNEY DOCUMENTS

- Often when a party who needs to sign an instrument cannot physically sign the deed (whether because of incapacity or just not being around) an Attorney in Fact signs on their behalf
- That only works if the Power of Attorney specifically grants the Attorney in Fact the ability to take the specific action, it is still valid and in effect, AND it is recorded with the Register of Deed's office
 - Power of Attorney document needs to be signed, attested, acknowledgement, and certified as covered in SDCL 43-25-1 and 44-8-2 (basically the same as any deed)
 - Attorney in Fact ONLY has the powers specifically listed and provided for them in the Power of Attorney
- DOES NOT WORK TO GIVE OR ALLOW SOMEONE ELSE TO ACT ON YOUR BEHALF AS THE TRUSTEE, PARTNER, CORPORATE AGENT, OR OTHER ROLES UNLESS THE ENTITY DOCUMENTS ALLOW FOR SUCH A STEP
 - I.E., Chris Moran, as Attorney in Fact for Eric Hanson, Trustee of the Eric Hanson Trust (happens more often than you would think)
- Deed should still identify the principal and the Attorney in Fact as part of the signature block and the acknowledgment (do not just include the Attorney in Fact's name and signature)
 - From our example above, it would be "Eric Hanson, by Chris Moran, his attorney in fact" for the signature line and "before me personally appeared Chris Moran, attorney in fact for Eric Hanson" in the acknowledgment

TYPES OF DEEDS

- Warranty Deed – Provides the greatest protection to the grantees (operative phase of conveyance “Warrant”)
- Grant Deed / Special Warranty Deed - Very rarely used (post-foreclosure or straw-owners)
- Quitclaim Deed - Provides the least amount of protection to grantees

DEED NAMES

- Trustees Deeds
- Personal Representative Deeds
- Contract for Deed
- Leases
- Transfer on Death Deeds
- Leases
- The conveyance language is what determines what type of deed it is – NOT THE TITLE
 - Just because it is called a “Warranty Deed” in the title doesn’t make it one when it uses “quit claims” as the operative conveyance language.
- Same thing applies to “Trust Deeds” or “PR Deeds”

EASEMENTS

- ▶ Two types of easements
 - ▶ Appurtenant Easement – created by the owner of one parcel of land for the benefit of another parcel (servient tenement and dominant tenement)
 - ▶ Runs with the land to successive owners of the dominant tenement
 - ▶ Automatically included and transferred when the dominant tenement's fee is passed
 - ▶ Examples are conservation easement or access easements
 - ▶ Easement in Gross – created by the owner of a parcel of land for the benefit of a specific individual
 - ▶ Does not run with the land and is limited to just the particular beneficial owner
 - ▶ Only transferred by express transfer language and is subject to restrictions in the easement grant as to whether it can be transferred at all
 - ▶ Typically used for utility easements
- ▶ **Watch out for merger**

COVENANTS AND RESTRICTIONS

- PRIVATE ZONING
- Phrase “covenants, conditions and restrictions” is often used to describe the various limitations on the use of land imposed in deeds and other instruments
 - Commonly found in deeds from the owner of a specific subdivision of land or in a master deed or instrument which encumbers all of the parcels in that subdivision
- Restrictions on the use of the property that run with the land
- Breach of them can result in actions for damages or injunctions to restrain or stop the violation
- Can be terminated by the joinder of ALL persons with an interest in the property
 - General plan restrictions terminate after 25-years from the date of declaration

COMMON TITLE ISSUES – HOMESTEAD / MARITAL STATUS

- SDCL 43-31-17 requires the signature of both spouses (regardless of whether both are in title) on all conveyances and encumbrances of homestead property
 - Failure to get both to sign off on the conveyance or encumbrance of homestead means that it is VOID
- **This is an “either or” situation:**
 - **If the property IS homestead property – both spouses have to sign the instrument**
 - **If the property IS NOT homestead property – then only those in title to the property need to sign the instrument**
- There is no such thing as a “homestead waiver” for purposes of escaping the signature requirement

COMMON TITLE ISSUES – CORRECTING DOCUMENTS

- Some defects will fix themselves with the passage of time (defective acknowledgments or name variations cured after 10-years; omission of marital status or official seal cured after 20-years)
- Affidavits can be used in those limited circumstances (Title Standard 7-09) to cure non-marital defects
- **Material defects must be cured by properly recording an instrument that is freshly signed, executed, and acknowledged by the relevant parties**
 - **Does not work to just record a copy of the prior instrument**
- Corrective instruments should properly reference the prior instrument they are fixing by its name and recording information

ADVERSE POSSESSION

- Big idea – adverse possession is something that gets talked about way more than it actually applies – very rarely going to be seen
- New 2023 South Dakota Supreme Court case (*Fuoss v. Dahlke Family LTD Partnership and Rodney L. Mann*, 2023 S.D. 3) goes through the key ideas of adverse possession
 - Case shows one of the key issues with adverse possession – it is very, very fact specific
- Fuoss and the prior owners of his property had made use of real estate to the west of his property (Section 10) located in the NE $\frac{1}{4}$ of Section 9
 - Bull Creek in Jones County runs between the property at the northern edge and then runs SE cutting Section 10 into an east and west portion
 - In the 1940s, one prior owner, Ludwig Dahlke, owned both pieces and sold Section 10

ADVERSE POSSESSION – CON'T

- In the 1960s, the northern fence line that ran along Bull Creek was moved to the west side of Bull Creek into Section 9 for convenience and to prevent fence damage and verbal permission was granted
 - New fence was connected to that portion of Section 10 that was west of Bull Creek further south and resulted in a 1 to 1.5 acre triangle of Section 9 that was enclosed
- Later on, verbal permission was granted to install a different gate in Section 9
- 1996 sale of Section 10 allegedly contained a disclosure to the buyer that the use of the Section 9 property was permissive as part of a gentlemen's agreement
 - "No Trespassing" sign was added during this time, but was not to assert ownership according to the prior owner, but was to keep unauthorized hunters off of Section 10
- Fuoss purchased the property in 2003 and believed he owned the disputed property – deed was only for Section 10, not Section 9
- Issues arose in 2016 when the Section 9 owners placed a locked gate along the way to the disputed property

ADVERSE POSSESSION – CON'T

- Adverse Possession statutes are found in SDCL 15-3
 - SDCL 15-3-7 – In every action for recovery of real property or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other party shall be deemed to have been under and in subordination to the legal title, ***unless it appear that such premises have been held and possessed adversely to such legal title for twenty years*** before the commencement of such action.
 - SDCL 15-3-12 – Where it shall appear that there has been an actual continued occupation of premises ***under a claim of title exclusive of any other right***, but not founded upon a written instrument, or a judgment, or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.
- Some key cases:
 - *Gangle v. Spiry*, 2018 S.D. 55
 - *Underhill v. Mattson*, 2016 S.D. 69
 - *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29

ADVERSE POSSESSION –CON'T

- 4 Elements of an Adverse Possession Case – *Underhill*, 2016 S.D. 69, ¶ 11
 - 1. An occupation that is
 - 2. Open and notorious,
 - 3. continuous for the statutory period, and
 - 4. under a claim of title exclusive of any other right
 - Hostile possession rule – usually the most important factor in an adverse possession case
 - Key Idea – a possessor’s use cannot be considered hostile where it is permissive – *Gangle*, 2018 S.D. 55, ¶ 18
- Idea is that the claimant has to have possessed and occupied the property in such a way as to give the actual owner notice of the claimed possession and put the owner on notice to the invasion of their property rights – *Gangle*, 2018 S.D. 55, ¶ 13

ADVERSE POSSESSION – CON'T

- Permissive Use
 - Permission to use property continues and survives the passage of time or changes in ownership – needs to have a purposeful effort to change the permissive use
- Boundaries and Permissive Use
 - Key idea is concern of acquiescence to a boundary when there has been permitted use
 - “the mere fact that a landowner allows his neighbor to occupy or use part of his land does not automatically fix the boundary between them or give the neighbor a right to use or to take the property in perpetuity” – *Summit, Inc.*, 2000 S.D. 29, ¶ 27
- “Simply put, where a party possesses another’s land with permission and holds no pretense of ownership, there can be no claim of adverse possession. Regarding permissive use in this way allows property owners the ability to grant permission for the use of their land for indefinite periods of time, should they choose to do so, without the fear that they will be judicially divested of their property.” – *Fuoss*, 2023 S.D. 3, ¶ 28

ADVERSE POSSESSION – CON'T

- Tacking – the legal theory that allows for time period requirements to be met by adding the current owner's length of time to that of prior owners, where applicable
 - For adverse possession cases – the prior owners had to also be adversely possession the property
 - Cannot tack on prior owners too if they were not adversely possession the property
- Doctrine of Acquiescence
 - “The doctrine of acquiescence gives an evidentiary presumption as to the element of hostility and applies even though the occupancy occurred due to the ignorance, inadvertence, or mistake, and without an intention to claim the lands of another” – *Summit, Inc.*, 2000 S.D. 29, ¶ 22
 - Acquiescence is based on implied or passive consent, not explicit consent

ADVERSE POSSESSION – CONT

- Importance of Surveys
 - One of the smaller claims was that the original property line was not the correct property line (a claim that an older fence was already set west of Bull Creek)
 - The Supreme Court pointed out “we observe that determining whether this narrow sliver of property actually exists and if so, where it is located is not possible with this record. Neither party obtained a survey, and there is no definitive evidence that could be used to orient a preexisting, old fence to the correct property line. But more problematic is the fact that there is no separate evidence of adverse possession relating to the area bounded by an old fence – only that the fence existed.” *Fuoss*, 2023 S.D. 3, ¶ 43
 - Footnote 2 of the *Fuoss* opinion provides – “The exact location of the property line is unknown. A township plat map contained in the record depicts a standard straight-line grid pattern dividing the township into thirty-six sections and purports to split Sections 9 and 10 down the middle of the northernmost portion of Bull Creek. Witness testimony varied on the precise location of the property line, with some suggesting the middle of Bull Creek and others estimating it was some distance east of there. Neither party obtained a survey.”

PRESCRIPTIVE EASEMENT

- Similar idea to adverse possession
 - An easement is judicially created in favor of the dominant estate against the servient estate because of the need of the servient estate and prior use of the easement area
- “A claimant for a prescriptive easement must show ‘an open, continued, and unmolested use of the land in the possession of another for the statutory period of 20 years.’” *Fuoss*, 2023 S.D. 3, ¶ 49
 - Use has to be hostile (not permissive)
- This came up in the *Fuoss* case because access to the disputed area was across a hay yard in Section 9
 - The Section 10 owners were prior to 2016 allowed to use and go across the hay yard

QUESTIONS

- Please feel free to contact Eric Hanson at Dakota Homestead Title Insurance Company with any questions regarding potential title insurance issues
 - Phone: 605-336-0388
 - Email: eric@dakotahomestead.com
- Please feel free to contact Sabrina Meierhenry at Land Title Guaranty Company with any title or closing questions
 - Phone: 605-336-1095
 - Email: smeierhenry@landtitleguaranty.com