Energy Midstream Land Issues

This webcast will begin promptly at 12:00 PM Eastern

FOLLOW STEPTOE & JOHNSON ON TWITTER:
@Steptoe_Johnson

ALSO FIND US ON: http://www.linkedin.com/companies/216795

© 2018 Steptoe & Johnson PLLC. All Rights Reserved.
Today’s Presenters

Bridget D. Furbee
Bridgeport, WV
304-933-8117
bridget.furbee@steptoe-johnson.com

Andrew S. Graham
Morgantown, WV
304-598-8161
andrew.graham@steptoe-johnson.com
Today’s Menu

• Have we acquired enough rights to carry out our midstream plan?
• Did we acquire our rights from the correct party?
• What if our plan conflicts with someone else’s plans for the same land?
• How will a court treat our rights if a dispute arises?
PROPER CREATION AND EXECUTION OF EASEMENTS
What is an Easement and Why Do We Use It?

• An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.

• Easements present a more economical way of securing the necessary property rights than acquiring the land in fee simple.
Searching for the Proper Grantor

• Ordinarily, an easement is granted by the surface owner
• But, how do you determine who is the surface owner?
  – Rely on property tax records?
  – Limited title search (40-60 years)?
  – Certified title back to common time of mineral severances?
  – Search back to patent?
Are All Surface Owners the Same?

• Single individual owner
  – Does marital status matter?

• Co-owners
  – Tenants in common
  – Joint tenants with right of survivorship
  – Tenants by the entireties
  – Life tenants and remaindermen
    • You should obtain consent from all of the co-owners
Are All Surface Owners the Same?

• Business entity
  – Corporation
  – Limited liability company
  – Partnership
    • Who has authority to bind the entity?

• Others
  – Trusts
  – Churches
  – Government
  – Estates
Aren’t All Easements the Same?

• What are your plans for this parcel of land?
  – Just one line or do you want to be able to come back and add other lines or roads or surface facilities?
  – Specific plans should be specifically addressed in the easement
  – Easements are often read in light of circumstances surrounding time of grant
 Aren’t There Other Kinds of Easements?

• In addition to express easements (which is what companies use for midstream purposes), the law does recognize other kinds of easements:
  – Implied easement
  – Easement by necessity
  – Prescriptive easement

• No one wants a midstream system resting on anything but express easements, but, from time to time, it happens
  – Connection with other implied rights
Do Easements Last Forever?

• Yes and no
  – Unlike leases or licenses, easements can be used perpetually
  – But, easements can end under certain circumstances
    • Abandonment
    • Release
    • Merger of title
STRUCTURING THE ACQUISITION OF EASEMENTS
Typical Structure

• STEP 1: Landowner and company negotiate option for easement and basic easement with addendum
  – Option will not be recorded
  – How long should the option period be?
  – Consideration is offered for the option that is separate from ROW consideration
  – Form of easement may be attached to option
Typical Structure

• STEP 2: Company and landowner execute memorandum of option
  – Memo will be recorded
    • Creates constructive notice
  – Make sure that you can comply with statutory requirements for recording memo
Typical Structure

• STEP 3: If company determines that easement is needed on the landowner’s tract, then company will exercise option
Typical Structure

• STEP 4: Landowner and company execute easement and addendum that were negotiated in STEP 1
  – Addendum would contain the sensitive information neither party wants to share with the public
  – Consideration separate from option consideration
    • Also separate from damages compensation
Typical Structure

• STEP 5: Record the basic form easement
  – Why not record a memorandum of easement?
  – Declaration of consideration?
  – Transfer tax?

• STEP 6: Don’t record the addendum

• STEP 7: Unrecorded order of payment from company to landowner
COORDINATING YOUR RIGHTS WITH OTHER PROPERTY INTERESTS
Coordinating with Other Owners

• Surface
  – Should be covered in the easement
  – Keep in mind what the surface owner plans to do with the surface
    • Farming?
    • Timbering?
    • Hunting?
  – Will surface owner want to cross easement with heavy equipment?
Coordinating with Other Owners

• Minerals (coal, OG, others)
  – Review severance instrument, leases
  – Will you need to remove coal during construction phase?
  – Mitigate against subsidence v. purchase coal out right v. sterilization claim
  – Conflict with OG lessee pipeline rights?

• Lienholders
  – The elusive subordination agreement
Coordinating with Other Owners

• Other easement holders
  – Are any of the other easements exclusive?
    • Rare, but exclusive easements do exist
    • Non-exclusive—first in time, first in right
    • Is your easement changing the status quo?
  – Crossing agreements
    • Locating the existing pipeline
    • Engineering/technical specs
    • Monitoring/safety
    • Indemnification/insurance
HOW COURTS INTERPRET EASEMENTS
How Courts Read Easements

• Easements are governed by the same rules as other written agreements
  – Courts start with the language of the instrument to determine the parties’ intent
    • If plain and unambiguous, easement should not be subject to judicial construction and interpretation
  – The use of the easement is confined to the rights (and burdens) contemplated by the parties at the time of creation
How Courts Read Easements

• Courts will usually construe the easement in favor of the landowner and against the company
  – The company is usually the drafter of the easement agreement

• The easement holder cannot increase the burden of the landowner without the landowner’s consent
  – If you want flexibility in future uses, you need to write this into the easement
How Courts Read Easements

• Can the easement holder take advantage of improvements in technology?
  – Yes, so long as the easement is still used in a manner that is substantially the same as the original grant and its use does not substantially burden the landowner

• Under the common law, courts would imply a reasonable width for easements
  – But, this has been replaced by statutory requirements in some states
QUESTIONS?
Thank You

Bridget D. Furbee
Bridgeport, WV
304-933-8117
bridget.furbee@steptoe-johnson.com

Andrew S. Graham
Morgantown, WV
304-598-8161
andrew.graham@steptoe-johnson.com
Coming Up...

**Steptoe & Johnson Midstream Series**

- **June 13** - FERC and the Trump Administration/Regulatory Issues
- **July 11** - Eminent Domain

*Watch Your Inbox for Your Invitation!*
These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the authors and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.