



# Energy Midstream Land Issues

**This webcast will begin promptly at 12:00 PM Eastern**

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# Today's Presenters



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# 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 entirety
  - 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

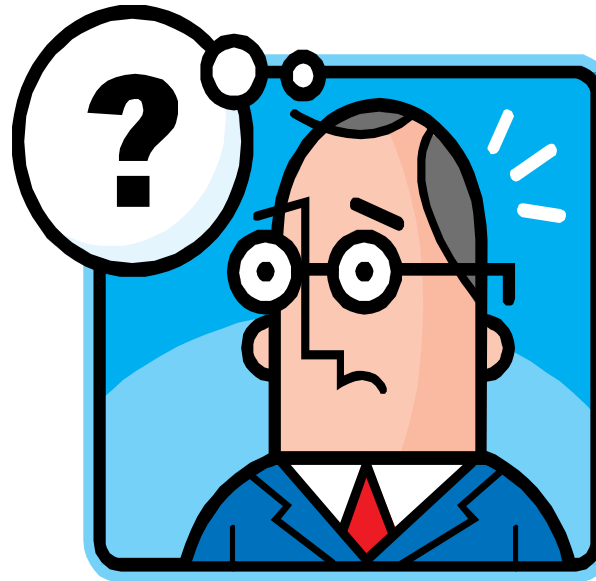


# How Courts Read Easements

- 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



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# *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!*

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