Energy Transactions: What’s a Crossing Agreement and When Is it Needed?

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Disclaimer

This underwriting guideline represents my opinion as a professional and is based on my understanding of the particular coverage, developed over 25 years of serving the renewable energy industry. You should always confirm my understanding by communication with your underwriter. If there's a disagreement, that's not proof that I'm right or wrong, it just illustrates the point that reasonable minds differ. Trust your gut. If you feel you have a good coverage argument, present it. There's a decent chance your gut is right.

The Energy Project Development Business Case

- The title report discloses the existence of various third-party rights recorded in the Public Record that affect the Land constituting the energy project, including any additional easements or other rights that support the facility. Likewise, the land survey or landowner may disclose other unrecorded rights that affect the Land.
- The developer, lender and investor want insurance over the right of any third-party to exercise those rights in such a way as to cause damage to the project improvements or compel removal/relocation of the facilities.

How is the Insurance Coverage Offered?

- Typically, the coverage comes in the form of the special ALTA 36.6 Energy Encroachment endorsement
- If the 36.6 is unavailable, sometimes it's possible to offer similar coverage by individual or collective affirmative language clauses in Schedule B of the policy

What are the Types of Risks to be Considered?

- Exclusive rights
- Non-exclusive rights
- Blanket rights
- Matters disclosed by survey
- Matters disclosed by the landowner or other means

What is a Crossing Agreement?

From the title insurer's perspective, a crossing agreement is a document that evidences the third-party's consent to the project and waives their right to object in the future

Substance over form … containment letters and other types of consent to the project

Executed by someone with obvious authority

The Principle of Negotiation Leverage

Negotiations imply a reciprocal desire … I want something from you, you want something from me

If negotiations can be avoided, it's better for the developer

Therefore, the question becomes when is it necessary to negotiate an agreement with the holder of third-party rights, and when is it not necessary?

In other words, when is Encroachment coverage available without negotiations, and when is it necessary …

… thereby handing leverage to the third-party that may result in development delays and monetary expenditures

Exclusive Easement Rights

How do you know? READ THE DOCUMENT. ☺

If the project facilities are crossing/encroaching on an exclusive right to use that portion of the Land, a Crossing Agreement or other form of written consent is necessary.

Non-Exclusive Easement Rights

If the third-party right is non-exclusive, it is subject to the reasonable right of others to use the same land

If the nature of proposed or existing project right denies reasonable access to the third-party, the title insurer will not provide the requested coverage (think about solar panels constructed over a non-exclusive pipeline)

If the two rights can physically exist on the same land, it is likely no crossing consent - and no negotiation - is required (think of an insured overhead transmission passing over a non-exclusive pipeline at right angles)

If the use and maintenance of our right might cause damage to the other use, further documentation would be needed to obtain the coverage; this might be consent documentation, construction drawings, etc.

Blamnket Easement Rights

- A blanket easement is one where the third-party encumbers or "blankets" the entire tract of land
- The presumption of reasonable use offset by the obligation to litigate
- Read the document carefully to determine if there are future limitations on the right to use
- The spectrum of "we can go anywhere forever" to "our rights expire if not used" or "once situated we promise to stay put"
- The requirement for written consent is based on the blanket right's location on the spectrum

Matters Disclosed by Survey

- Land surveys based on site visits often disclose rights not established in the Public Records
- Energy development deals are rarely in suburbia
- Was something missed? Look again!
- State law and fairness/equitable considerations
- Who will file a claim?

Matters Disclosed by the Landowner or Lessee

- Some matters are disclosed by communications with the landowner, often via the developer
- Depending on the nature of the right conveyed, crossing or encroachment consent may be required
- Many of these situations can be addressed by targeted clauses included in the Owner's Affidavit if an indemnity clause is included

Crossing Agreement Summary

Depending on the "strength" of the third-party right, some form of written consent to a physical crossing (aka encroachment) may be required to obtain title insurance coverage over the right of the third-party to compel removal/relocation of the energy facility

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Thank You.
Questions?

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