

# UNDERSTANDING AND ADDRESSING REAL PROPERTY INTERESTS FOR SUCCESSFUL SITE PROTECTION & FINANCIAL ASSURANCES



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# Huntington District



- Most Civil Works Projects of any Corps District:

- 35 Dams
- 29 Local Protection Projects
- 9 Locks & Dams
- 25 Federal Levees

- Maintain Navigation on:
  - 311 Ohio River Miles
  - 90 Kanawha River Miles
  - 9 Big Sandy River Miles
  - 2 ½ Elk River Miles

Average Age of Projects	
Flood Risk Management	64 years
Navigation	67 years

- 9 River Basins
- 45,000 square miles
- 413,000 acres of Project Managed Real Estate
- 1020 employees (as of Feb 2020)

## Basic requirement for site protection

“...mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate.”

*33 CFR 332.7(a)(1)*

# Site protection may be provided through:

- Conservation easements
- Other restrictive covenants
- Title transfer
- Multiple party agreements
- Conservation Land Use Agreements
- Federal facility management plans/integrated natural resources management plans
- Federal legislation

# Rule Language

- “ ...consider relevant **legal constraints** on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection...” “

*33 CFR 332.7(a)(1)*

# Real Estate Law 101

- Title – the legal right to control and dispose of property
- Deed – written instrument conveying ownership of an interest in real property
- Recording – the process of depositing a written record of an interest in land with the relevant authority (recorder)
- Chain of title – ownership history of a piece of land
- First in time, first in right – a previously-recorded interest in real property has priority over an interest recorded later in time
  - Interests can be unrecorded, but recorded interests have priority



# Conservation Easement v. Deed Restriction

**Conservation Easement**: binding agreement between a landowner (**Grantor**) and another entity (**Grantee/Holder**) that permanently limits uses of the land in order to protect natural resources.

**Deed Restriction (Declaration of Restrictive Covenants)**: written, recorded promise by the landowner that limits or prohibit certain uses of the land, which “runs with the land” to heirs and subsequent owners

# Pros and Cons of Conservation Easements:

Pros	Potential Concerns
More secure form of protection than other mechanisms	Allows owner to retain many property rights
Holder monitors condition of the property	Easement holders may cease to exist
Holder <u>may</u> assume responsibility for managing resources	Holders may choose not to enforce easement
Holder has right to enforce the easement against owner	Holders may have insufficient funds to monitor & enforce during “lean” years
Easement remains even though property owner changes	State law may limit duration
Allows owner to retain many rights	Doesn't restrict activities on adjacent lands

# Pros and Cons of Deed Restrictions:

Advantages	Concerns
“Runs with the land” (in perpetuity) regardless of ownership. Subsequent owners must comply.	No third-party holder to determine owner compliance
No requirement for a third-party holder	Agencies may not have the resources to monitor site
	Some states may <u>not</u> recognize deed restrictions or limit their duration
	Owner may be able to petition court to remove deed restrictions
	Can be terminated if the original purpose of the covenant is lost
	Doesn't restrict activities on adjacent lands

# What do you need to know about land before accepting it as mitigation property?

- Who owns it?
- Does the owner have good title?
- Does the owner have title insurance?
- Who else has an interest in the land?
- Is the land protected already?



# Interests in land

- Ownership
- Easements
- Rights-of-Way
- Lien Holders
- Property that passes by probate
- Leases, rights



# How do you find out about other interests in the land?

**Title Report, &/or  
Property assessment & warranty  
address whether there are :**

- Outstanding mineral rights?
- Outstanding timber rights?
- Easements, rights-of-way, mortgages, liens?
- Water rights affecting the property?
- Is the property subject to any uses not of record?



# When to request this information?

- Consider requiring:
  - submittal of title report and map identifying encumbrances with prospectus
  - Property assessment/warranty at draft or final instrument
  - Updated title report and title insurance prior to final instrument
- No point in proceeding until issues that conflict with site protection requirements are resolved
- What about permittee-responsible mitigation?

# Priority of Interests

- Will the Site Protection Instrument be given **PRIORITY** over recorded Property Interests?
- Generally depends on when interest was recorded
- 1<sup>st</sup> in Time, 1<sup>st</sup> in Right



# FORECLOSURE

- If property is used as collateral and borrower defaults on the loan, financial institution can foreclose on the property.
- If the site protection instrument was recorded after the deed to secure the debt, it could be wiped out.

**How can this be prevented?**

# Subordination Agreement

Provides more assurance that the site will withstand adverse actions.

Gives conservation interest primacy over other interests

Consider subordination provision in site protection document, but can be done separately

# Consent and Subordination

The undersigned (Lender) beneficiary under a Deed to Secure Debt (dated) and recorded in (Deed Book) and (Pages) in the (County, State) records, for itself, its successors and assigns, consents to the foregoing (easement/covenant).

Lender agrees that, upon recordation of the (document) the **provisions of the (document) shall run with the land** which serves as security for the debt evidenced by the Security Deed and further agrees **that any foreclosure or enforcement or any other remedy available to Lender will not render void or otherwise impair the validity of the (easement, covenant).**

The undersigned acknowledges that it has received and reviewed a copy of the (document and exhibits).

## Why would an interest holder agree to subordinate its interest to a conservation interest?

- The resources on site cannot be impacted without authorization.
- The property may not diminish substantially in value.
- A lender wants to lend money and have the mitigation banker succeed (and pay interest)



# SEVERED INTERESTS – INCOMPATIBLE USES

- Severed Rights Very Common with Coal, Oil & Gas in Appalachia
- Owner (Grantor) – can only restrict the interests they own
- KY: Consent to Conservation Easement from Mineral Owners
- WV: Other interest not impaired by CE without Consent
- Mining an Incompatible Use
- Options?

# Potential approaches to other interests

- Subordination
- Discrete entry points
- Remoteness determination
- No surface occupancy agreement
- Alternate mitigation



# EXTINGUISH INCOMPATIBLE RIGHTS

- IF SPONSOR IS FEE SIMPLE OWNER
- MEANING ALL SURFACE AND SUBSURFACE RIGHTS ARE OWNED (TIMBER, MINERALS, OIL & GAS)
- SPECIFY THAT ALL SUCH RIGHTS ARE EXTINGUISHED IN CE
- IF NOT FEE SIMPLE OWNERSHIP – REMOTENESS REPORTS

# CE Language Example

“To require that all mineral, air and water rights as Grantee deems necessary to preserve and protect the biological resources and Conservation Values of the Bank Property shall remain a part of and be put to beneficial use upon the Bank Property, consistent with the purposes of this Conservation Easement.”

# CE Language Example

## Prohibited Uses.

Any activity on or use of the Bank Property that is inconsistent with the purposes of this Conservation Easement is prohibited. Without limiting the generality of the foregoing, the following uses and activities by Grantor, Grantor's agents, and third parties are expressly prohibited:

- Filling, dumping, excavating, draining, dredging, **mining**, drilling, **removing or exploring for or extracting minerals**, loam, soil, sand, gravel, rock or other material on or below the surface of the Bank Property, or granting or authorizing surface entry for any of these purposes.

# REMOTENESS REPORTS

- Is Likelihood of Disturbance of Bank Acreage Low?
- Useful to Understand All interests – Success Reasonable?
- Summary of ownership of all Outstanding Subsurface Rights
- Status of all Outstanding Subsurface Rights:
  - Resource Mined Out?
  - Non-Existent?
  - Not Economically Viable



# Proposed Mitigation Bank - Remoteness

- Timber has not been severed (*will be extinguished with Conservation Easement*)
- Coal has not been severed (*will be extinguished with Conservation Easement*)
- Oil and Gas has been severed (*analysis in Section 5.1*)
- One (1) pipeline right-of-way (*will not be included in Project Area*)
- Two (2) power distribution line easements (*will not be included in Project Area*)
- One (1) water line right-of-way (*PSD has agreed to abandonment*)

# POST BANK ISSUES?

- CAN SPONSOR CONVEY SUBSURFACE RIGHTS
- WOULD CONVEYANCE BE COVERED IN 60 DAY NOTICE TO AMEND PER 33 CFR 332.7(a)(3)?
- DOES CE RESTRICT USE OF MINERAL ESTATE?
- CAN OTHER ESTATE OWNERS USE THEIR INTERESTS IN A MANNER NOT ADVERSE TO BANK?
- WITHDRAW LAND USED FOR OTHER PURPOSES FROM CREDIT PRODUCING PROPERTY?

## 33 CFR 332.7(a)(3)

The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, **including transfer of title to, or establishment of any other legal claims over,** the compensatory mitigation site.

# SUMMARY

- Long Term Site Protection is Requirement of Rule
- Available Restrictions on Land Vary by State
- Detailed Title Report Essential – RE Character Investigated Early
- Evaluation of All Ownership Interests Needed to Assess Site Viability
- Certain Interests are Commonly Severed – Timber, Minerals, Oil & Gas
- Incompatible Severed Interests can be Acquired/Extinguished
- Remoteness Reports Can provide Options for Site Success
- Address incompatible estates in CE