

## Chapter 14

# Old Right-of-Way, New Pipe: The Right to Enlarge Pipelines and Related Equipment

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### § 14.01. Introduction.

The potential of increased natural gas production in the Ohio-Pennsylvania-West Virginia region from the Marcellus Shale and the Utica Shale cannot be fully realized until the increased production can be transported to market. Although an extensive network of pipelines and other facilities utilized to transport natural gas throughout the Appalachian region has been developed over many years, substantial upgrades and

improvements to the existing network are necessary in order to handle the expected increased volume and pressure associated with shale gas production. In most cases, the gas company does not own the land through which the pipelines run, but merely owns a non-possessory right to use another party's land for the limited purpose of transporting the gas.<sup>1</sup>

In the Appalachian Region, many of the pipeline rights-of-way in use today were created in the early stages of oil and gas development. The physical boundaries of the right-of-way are not usually described by surveyed metes and bounds. Often, the granting instruments do not even mention the scope of permissible activities such as replacement of pipe, installation of additional pipe, expansion of pipeline capacity, or the addition of other necessary equipment such as drips, valves, fittings, meters and regulators. Easement owners may seek to add capacity and equipment to enhance operations. Easement owners may also seek to remove trees or structures in order to inspect, maintain and safeguard the integrity of a pipeline in accordance with modern safety regulations and practices. Landowners often object to such activities, particularly where such activities have never been undertaken previously or involve obstructions which have been allowed to remain in place without objection by the easement owner for a substantial period of time. It is not surprising that disputes over proposed improvements to existing pipeline rights-of-way that have been utilized for decades without change or incident occur. Resolution of these disputes requires a determination of whether the complained of activity is permitted under an original grant in which the rights of the grantee are often not well defined.

In attempting to determine the width of an easement which was not set forth in a 1907 pipeline right-of-way agreement, an Ohio Court addressed whether an easement owner could remove trees in a wider area than previously cleared to allow for aerial inspection. The court stated:

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<sup>1</sup> Mark D. Bingham, "Access and Rights-of-Way: Overcoming the Difficulty in the Details," 40C *Rocky Mtn. Min. L. Special Inst.* 11, pt. I (Jan. 1996); C.S. Patrinelis, Annotation, "Correlative Rights of Dominant and Servient Owners in Right of Way for Pipeline," 28 *A.L.R.2d* 626, §§ 2, 3 (1953 & Supp.).

Aeronautics was in its infancy. The Wright Brothers had flown at Kitty Hawk only three (3) years before. In fact, it is doubtful if either party involved in the original easements had ever seen an airplane. Aerial inspection could not have been contemplated. . . . The trenches for pipeline laid in 1907 were probably dug with picks and shovels.<sup>2</sup>

In another case involving the determination of the width of an easement for a pipeline installed in 1916, an Ohio Appellate Court judge offered the following observations in a concurring opinion:

Today, of course, no one would grant an easement as broad as the one at issue here. The courts and the parties, however, are bound to follow the terms of the easement as originally granted and to construe it as the original parties intended. The current landowners took their property subject to what the prior landowners in 1916 would have deemed acceptable. Even though what the current landowners regard as acceptable is much more restrictive, they can no more rewrite history than this court can rewrite the terms of the easement.<sup>3</sup>

This chapter explores whether and to what extent the provisions contained in old pipeline right-of-way grants and reservations may be utilized to upgrade and increase the capacity of the existing pipeline network in light of the expected increased volume and pressure associated with shale gas production in the Appalachian Region.

## § 14.02. Background Principles and Terms.

### [1] — Easements and Rights-of-Way, Generally.

An easement is the nonpossessory right to make some use of another's property, often in a certain manner and/or for a certain purpose.<sup>4</sup> An

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<sup>2</sup> Ashland Pipe Line Co. v. Donald J. Lett, 90-LW-1424, CA-942 (Ohio Ct. App. 5th D., Ashland, April 11, 1990).

<sup>3</sup> Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC, 740 N.E.2d 328 (Ohio 2001).

<sup>4</sup> See 28A C.J.S. *Easements* § 1 (Westlaw database updated Mar. 2013); *accord* Riverwatch Condo. Owners Ass'n v. Restoration Dev. Corp., 980 A.2d 674, 686 (Pa. Commw.