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§ 9.01. Introduction.

In light of the proliferation of private and public land development
and the diminution of the American rural landscape, private easements
are perhaps some of the most valuable of a pipeline company’s assets.
With the expansion of the United States population and corresponding
sprawl of public and private construction, encroachments upon pipeline
easements have become an increasing problem for pipeline companies
charged by federal and state authorities with the safe operation and
maintenance of their often high-pressure pipelines. Encroachments on
pipeline easements—ranging from foliage to permanent construction within

1 The author would like to thank Kevin Abbott for his guidance and Nicolle Snyder
Bagnell for her assistance in preparing this chapter.
a right-of-way—threaten the safe operation and maintenance of pipelines by precluding proper monitoring and prohibiting essential access for maintenance and repair which is necessary to avoid a potentially catastrophic pipeline failure.

Given the gravity of the potential consequences resulting from unremedied encroachments, it is essential that pipeline companies take proactive measures to protect their private pipeline easements from all encroachments. This chapter will discuss some of the legal and practical issues involved in protecting private pipeline easements. Section 9.02 will examine how courts determine the exact scope of a company’s pipeline easement. Section 9.03 will discuss issues relating to pipeline easement protection litigation such as choosing both a forum and the appropriate form of the action. Finally, Section 9.04 will discuss some of the practical measures a company can take on a business level in order better to protect its pipeline easements.

§ 9.02. **Scope of the Pipeline Easement.**

In assessing an oil and gas company’s ability to protect its pipeline easement, it is important to first determine the scope of the easement. The extent and exact parameters of a private pipeline easement are predominately determined by the written conveyance document granting the easement.\(^2\) Easement and right-of-way agreements are construed pursuant to well-established contract principles.\(^3\) Where a conveyance instrument is unambiguous it is interpreted in conformance with its clear terms.\(^4\) If there is an ambiguity, the courts interpret the language of the


\(^3\) *See Scherger*, 575 N.W.2d at 580; Hamlin v. Pandapas, 90 S.E.2d 829, 833 (Va. 1956).

eadment in conformance with the intentions of the parties.\textsuperscript{5} Where the conveyance document is ambiguous, some courts also will construe the scope of the easement against the grantor.\textsuperscript{6}

Application of these familiar contract principles is well-illustrated by the body of case law determining the exact width of an easement where no specific width is specified in the conveyance document. Most courts addressing this issue begin with the general proposition that a grantee is afforded the ability to make “reasonable and necessary” use of the easement for the purpose for which it was created.\textsuperscript{7} A typical pipeline easement normally will grant the owner the right to place the pipelines within the easement and the corresponding rights to maintain and operate the pipelines.\textsuperscript{8} In maintaining and operating pipelines, pipeline operators

\textsuperscript{5} See, e.g., Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 924 (Pa. 1995).


\textsuperscript{7} See, e.g., Zettlemoyer, 657 A.2d at 924 (noting that the court “must determine if the grantee’s asserted use is a reasonable and necessary use in relation to the original purpose of the grant and within the intention of the original parties to the grant.”); Hoffman v. Smith, 310 S.E.2d 216, 220 (W. Va. 1983)(indicating where width of right-of-way is not specified, “the scope and purpose of the deed creating it, the situation and use of the property, and the intent of the parties will be considered, so as to provide a reasonable, safe and convenient way for the purposes for which it was intended.”); Roebuck v. Columbia Gas Transmission Corp., 386 N.E.2d 1363, 1368 (Ohio Ct. App. 1977)(“if an easement is not specifically defined, the rule is that its extent is only such as is reasonably necessary and convenient for the purpose for which it was created.”); Simeone v. Varloro, 152 A.173, 174 (N.J. App. 1930)(where width not specified by deed, “the law requires that it shall be of reasonable width to accomplish the purpose contemplated between the parties.”); Grafton v. Moir, 29 N.E. 974, 974 (N.Y. 1892)(right-of-way “need only be such as is reasonably necessary and convenient for the purpose for which it was created”).

\textsuperscript{8} See, e.g., Williams Pipeline Co. v. Allison & Alexander, Inc., 80 S.W.3d 829, 832 (W.D. Mo. 2002)(granting right to “lay, maintain, operate, re-lay and remove at any time a pipeline or pipelines . . . .”); Hobgood, 769 So. 2d at 842 (granting easement “to construct, maintain and operate pipe lines . . . .”); Jakobsen v. Colonial Pipeline Co., 397 S.E.2d 435, 436 (Ga. 1990)(easement granting right to “maintain, operate, alter, repair, remove and replace” pipelines).
are often constrained by extensive federal regulations relating to pipeline operation and safety. In keeping with the broad principle that a pipeline operator must be afforded the reasonable and necessary use of its easement and in light of the regulatory requirements imposed upon companies that own and operate pipelines, several courts have found that a 50-foot easement (25 feet on each side of the pipeline) is necessary and reasonable for the enjoyment of the conveyance.

The courts have differed, however, on the extent to which a history of “acquiescence” may alter the general rules applicable in analyzing the scope of a pipeline easement. In *Zettlemoyer v. Transcontinental Gas Pipeline Corp.*, the court gave very little weight to the gas company’s prior practice in enjoying its easement. In *Zettlemoyer*, the gas company had maintained a 100-foot easement on the subject property between 1958 and 1991. In 1991, however, the company cleared an additional 30 feet adjacent to the 100-foot right-of-way in order to allow its construction equipment to install a third pipeline. While the lower courts split on the issue, the Pennsylvania Supreme Court made clear that the company’s more than 30-year prior practice of limiting its easement to 100 feet did not preclude the clearing of an additional 30 feet where the additional

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9 For example, for those interstate gas pipeline companies regulated by the Federal Energy Regulatory Commission, the federal regulations promulgated pursuant to the Natural Gas Act, 15 U.S.C. §§ 717-717z, would be applicable. In addition, pipeline companies regulated by the Department of Transportation may need to comply with the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 201 et. seq., or the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101-60125. Moreover, state agencies have the ability to impose even stricter standards on intrastate pipeline operators. See 49 U.S.C. § 60105.


12 *Zettlemoyer*, 657 A.2d at 922.
footage was “reasonable and necessary” to effectuate the purpose of the grant.\textsuperscript{13} As explained by the court:

[W]e have repeatedly rejected a prophylactic rule that would limit the grant of an easement to the grantee’s subsequent agreement, use, and acquiescence. Instead, our cases hold that where an easement is ambiguous, the grantee shall have ‘reasonable and necessary’ use of the right of way within the purpose of the easement and the intentions of the original parties to the grant.\textsuperscript{14}

Several courts have adopted similar logic and have rejected landowner arguments that the pipeline company’s prior practices limit the scope of pipeline easements.\textsuperscript{15} At least one court, however, has looked much more favorably upon landowners’ reliance on a pipeline company’s acquiescence through prior use. In \textit{Ashland Pipe Line Co. v. Lett},\textsuperscript{16} both the trial and appellate courts embraced an acquiescence theory in holding that the pipeline company could not obtain a 50-foot right-of-way due to its prior practice of insisting solely on a 25-foot right-of-way. The pipeline company argued that more footage was required in order adequately to patrol its pipeline from the air and perform any necessary maintenance. The court rejected that argument in light of evidence that only a 25 foot right-of-

\textsuperscript{13} \textit{Id. at} 925.
\textsuperscript{14} \textit{Id. at} 926.
way had been cleared over the past 25 years.\textsuperscript{17} As \textit{Ashland} illustrates, some courts may be inclined to consider prior course of conduct by the pipeline company in determining the scope of an easement.\textsuperscript{18}

Courts have also held, however, that pipeline easements carry with them “implied rights” to maintain the pipelines in conformance with current federal regulations. In \textit{Avery v. Colonial Pipeline Co.},\textsuperscript{19} the court held that the pipeline company was permitted to begin removing trees from its pipeline easement even though there had been virtually no effort to keep the easements clear since 1940. Pursuant to the 1979 Hazardous Liquid Pipeline Safety Act,\textsuperscript{20} the pipeline company had been notified by the Office of Pipeline Safety that, in light of encroaching vegetation rendering aerial inspections ineffective in determining surface conditions on the right-of-way, the company likely was in violation of inspection requirements. Finding that the easement carried with it the “implied right” to take actions required by federal regulations, the court affirmed the trial

\begin{footnotes}
\textsuperscript{17} The \textit{Ashland} court relied heavily upon the fact that at the time of the conveyance in 1907, the parties could not have contemplated aerial surveys or repair with today’s large construction equipment. The court emphasized that the “reasonable necessary and convenient” standard must be construed “in light of the conditions and circumstances which existed at the time the easements were executed.” \textit{Ashland}, 1990 Ohio App. LEXIS 1587 at *11. This holding is at odds with authority presuming that advances in technology are contemplated in the grant of easements and construing easements to accommodate modern developments as long as the use remains consistent with the purposes for which the right was originally granted. See, e.g., 28A C.J.S. \textit{Easements}, Section 173 (1996); Hash v. Soinowski, 487 A.2d 32, 34 (Pa. Super. Ct. 1985); Boydstun Beach Ass’n v. Allen, 723 P.2d 914, 922 (Id. App. 1986). In addition, the Ohio Court of Appeals implicitly rejected this portion of \textit{Ashland} in \textit{Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC}, 740 N.E.2d 328, 336 (Ohio Ct. App. 2000), by holding that aerial surveys are a permissible use of the easement in keeping with the easement’s purpose.

\textsuperscript{18} See also \textit{Chevron}, 858 P.2d at 167 (holding that landowner’s additional fill on easement was reasonable in part due to company’s knowledge of landowner’s practice and failure to take any action to remove fill for approximately 10 years).

\textsuperscript{19} \textit{Avery v. Colonial Pipeline Co.}, 444 S.E.2d 363 (Ga. Ct. App. 1994).

\textsuperscript{20} 49 U.S.C. § 2001 et. seq.
\end{footnotes}
court’s ruling that the pipeline company was permitted to remove encroaching vegetation in order to comply with federal regulations.21

The scope of a pipeline easement, accordingly, first will be determined by the plain language of the conveyance document. If an ambiguity exists or the conveyance document is silent on a particular issue, the court must construe the instrument in accordance with the intentions of the parties and the purpose of the easement. A prior course of conduct and any applicable federal regulations might be considered by the court in this analysis. The court’s goal, however, should be to determine what use of the easement is reasonable and necessary in light of the purpose for which the easement was created.

§ 9.03. Litigation to Protect Pipeline Easements.

When an encroachment is discovered on a pipeline easement, unless there is an immediate threat to property or human life, the first step in resolving the issue is to contact the landowner to educate him as to the scope of the easement and the hazards of the encroachment. Often, once educated on these issues, landowners will voluntarily remove the encroachment. If the landowners refuse to cooperate or an imminent hazard is presented by the encroachment, legal action may be necessary. A decision then must be reached on where to sue and what type of suit to initiate.


Once a decision has been made to seek judicial intervention to protect the pipeline easement, one of the threshold issues that must be resolved is the forum in which to bring suit. While the suit should be brought in a

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21 See Avery, 444 S.E.2d at 364-65. See also Tishner, 699 N.E.2d at 738 (holding that “[a]n easement which grants the right to operate a natural gas pipeline must, if the easement is not to be wholly illusory, imply the right to operate the pipeline in accordance with applicable federal law”); Swango Homes Inc. v. Columbia Gas Transmission Corp., 806 F. Supp. 180, 185 (S.D. Ohio 1992)(same); Natural Gas Pipeline Co. of Am. v. Cox, 490 F. Supp. 452, 454 (E.D. Ark. 1980)(noting that pipeline operator has “the implied right to operate its line in accordance with applicable Federal regulations”).
venue in which the encroachment is located, the question of whether to proceed with the action in state or federal court may substantially impact the action.22

Because federal courts are courts of limited jurisdiction, a valid basis for federal jurisdiction must be asserted in order to maintain an action in federal court. In an action to protect a pipeline easement, a pipeline operator may be able to assert federal jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction) or 28 U.S.C. § 1331 (federal question jurisdiction). In order to maintain a suit pursuant to 28 U.S.C. § 1332, the parties must be citizens of different states and the amount in controversy must exceed $75,000 exclusive of interest and costs.23 While the citizenship requirement is fairly straightforward and easily determined, questions have arisen with respect to the amount in controversy requirement for cases where injunctive or declaratory relief is sought in relation to protecting a pipeline easement. The general rule is that in actions seeking declaratory or injunctive relief, the amount in controversy is measured by “the value of the object of the litigation.”24 While landowners have argued that the amount in controversy should be determined by the amount necessary to clear the easement, courts generally have found the amount in controversy to be satisfied in pipeline protection cases by examining such factors as 1) the costs of rerouting or removing the pipelines; 2) the costs of otherwise complying with federal regulations; and 3) the public safety issues inherent

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22 While the decision as to whether to sue in state or federal court may be informed by a number of factors specific to the action (such as the experience of the potential jurists in the two courts), landowners are often perceived to have an advantage in the local state court where they reside. In addition, a federal court may be more likely to consider compliance with federal safety regulations in rendering a decision. For these reasons, to the extent that a federal forum is available, a pipeline operator carefully should consider its options in pursuing suit in federal court.


in safely maintaining a high-pressure pipeline.\textsuperscript{25} In \textit{Swango Homes, Inc. v. Columbia Gas Transmission Corp.},\textsuperscript{26} for example, a pipeline company sought to enjoin a landowner from placing a shed within its pipeline right-of-way. In addressing the amount in controversy requirement, the court held:

From [the pipeline company’s] perspective, the object of this litigation is to protect its right to have the easement free from encroachments in order to be able to comply with federal regulations. In order to continue to operate [its pipeline], [the pipeline company] \textit{must} comply with the Natural Gas Pipeline Safety Act, the provisions of which are mandatory. If structures such as the [landowner’s] storage shed are erected within the easement, [the pipeline company] cannot legally operate the pipeline. Therefore, [the pipeline company’s] only option would be to shut down or move the pipeline. Shutting down the pipeline would cost [the company] $66,000 per day in revenue, while moving it would cost in excess of $100,000. In either event, the amount in controversy exceeds $50,000.\textsuperscript{27}

Based on this analysis, the court found that the amount in controversy requirement was satisfied for the purpose of exercising federal jurisdiction over the action.

As an alternative basis for federal jurisdiction, pipeline companies have had some success in invoking federal question jurisdiction pursuant to 28 U.S.C. Section 1331 in actions seeking protection of pipeline easements. Specifically, companies have argued that in light of pervasive federal regulations relating to pipeline facilities under both the Natural

\textsuperscript{27} \textit{Swango}, 806 F. Supp. at 184 (emphasis in original).
Gas Act and the Natural Gas Pipe Line Safety Act, actions relating to the protection of pipeline easements involve federal questions that afford federal courts jurisdiction. Some courts have exercised federal jurisdiction on this basis. In addition, where a pipeline company brought a declaratory judgment action seeking a declaration that use of a 50 foot right-of-way is not an unconstitutional taking, the court held that the exercise of federal jurisdiction was proper.

In addition to any federal court options, a pipeline company normally would have the option to proceed with its action in state court given that state courts are courts of general jurisdiction. When bringing an action in state court, state court rules and statutes should be consulted for specific pleading requirements relating to injunctive or declaratory relief.


Where the encroachment presents a substantial risk to the integrity of the pipeline and immediate relief is required, an action seeking a preliminary injunction may be warranted. Generally, preliminary injunctions may be sought in either state or federal courts. Preliminary injunction proceedings are often the most expedient method for obtaining relief in connection with an encroachment upon a pipeline easement. The pipeline company, however, should be aware that a bond is often required by the court to obtain a preliminary injunction.

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28 Courts have held that both the Natural Gas Act and the Natural Gas Pipe Line Safety Act completely preempt the fields in which they regulate. See, e.g., Algonquin LNG v. Loqa, 79 F. Supp. 2d 49 (D.R.I. 2000)(Natural Gas Act preemption); National Fuel Gas Supply Corp. v. Public Serv. Comm’n, 894 F.2d 571 (2d Cir. 1990)(Natural Gas Pipe Line Safety Act preemption); ANR Pipeline Co. v. Iowa State Commerce Comm’n, 828 F.2d 465 (8th Cir. 1987)(same).

29 See, e.g., Davis, 33 F. Supp. 2d at 641; Burke, 768 F. Supp. at 1170; see also Tarbuck, 845 F. Supp. at 308 n.13 (noting that court “may” have federal question jurisdiction but not reaching issue due to diversity jurisdiction); but see Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552 (4th Cir. 1999)(rejecting federal jurisdiction under the Natural Gas Act and Natural Gas Pipe Line Safety Act).

In order to establish entitlement to a preliminary injunction, a pipeline company must establish: (1) a substantial likelihood of success on the merits; (2) irreparable injury if an injunction does not issue; (3) no greater harm to the landowner if a preliminary injunction is granted; and (4) that the public interest favors the issuance of a preliminary injunction. This standard is equally applicable when courts are considering granting a temporary restraining order.

With respect to the likelihood of success on the merits, the threshold issue will be whether the encroachment substantially interferes with the reasonable and necessary use of the pipeline easement. Resolution of this issue will necessarily depend upon the nature of the encroachment and the scope of the easement. For purposes of a preliminary injunction


34 Potentially significant encroachments include structures constructed within the right-of-way, trees and other foliage which obstruct monitoring of the right-of-way, and construction activity within the right-of-way. Encroachments that have been the subject of litigation range from sheds within the easement to a racetrack built directly over the pipeline right-of-way. Compare Swango, 806 F. Supp. at 187 (enjoining maintenance of
hearing, a pipeline owner should be prepared to offer testimony as to the reasonable and necessary scope of the easement (including any state or federal regulations for the patrol or maintenance of the pipeline easement), the nature of the encroachment and how that encroachment is interfering with the reasonable and necessary use of the pipeline easement.\textsuperscript{35}

A pipeline operator must also show irreparable harm if the encroachment is not removed in order to obtain a preliminary injunction. For purposes of a preliminary injunction, “irreparable harm” is harm that cannot adequately be addressed by money damages.\textsuperscript{36} In actions to protect pipeline easements, irreparable harm may be shown through evidence that the encroachment will prevent adequate, federally-mandated inspections of pipelines which could result in (1) a complete pipeline failure creating a hazardous condition to the public and the environment; (2) a leak in the pipeline resulting in a substantial loss of oil or gas; and/

\begin{itemize}
\item storage shed within easement) with Mid-America Pipeline Co. v. Lario Enter., Inc., 942 F.2d 1519, 1530 (10th Cir. 1991)(mandating the removal of an asphalt race track above pipelines).
\item See generally, Jakobsen, 397 S.E.2d at 436-437 (company obtained permanent injunctive relief to allow trimming of trees obstructing easement by establishing federal regulations requiring pipeline patrol, that aerial inspections were necessary to patrol the easement and that trees and brush adjacent to the easement were precluding adequate aerial inspections).
\item See Board of Ed., Borough of Union Beach v. New Jersey Ed. Ass’n, 233 A.2d 84, 96 (N.J. Super. Ct. Ch. Div. 1967)(“Irreparable injury . . . means no more than injury that is material for which pecuniary damages would not afford adequate compensation.”); Republic Aviation Corp. v. Republic Lodge No. 1987, Int’l Ass’n of Machinists, 169 N.Y.S.2d 651, 667 (N.Y. Sup. Ct. 1957)(“An injury is irreparable when it cannot be adequately compensated in damages, or there is no certain pecuniary standard for the measurement of damages.”); AgriGeneral Co. v. Lightner, 711 N.E.2d 1037, 1042 (Ohio Ct. App. 1998)(“irreparable harm consists of the substantial threat of material injury that cannot be compensated with monetary damages”); West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295 (Pa. Super. Ct. 1999)(“An injury is regarded as ‘irreparable’ if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard”); Sanderlin v. Baxter, 76 Va. 299 (1882)(irreparable harm is “grievous . . . material . . . and not adequately reparable in damages”); Mullens Realty & Ins. Co. v. Klein, 102 S.E. 677, 680 (W. Va. 1920)(irreparable harm means “only a grievous or substantial injury, one not adequately compensable in damages”).
\end{itemize}
or (3) the imposition of civil or criminal penalties on the pipeline operator.\textsuperscript{37} As aptly summarized by one court:

[The pipeline company] must make weekly inspections of over 12,000 miles of pipeline for leaks, soil erosion and encroachments which could cause a rupture or explosion. Such inspection is required by the Federal Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671-1684 inclusive. An explosion not only could cause serious injury in the general vicinity of the leak, but it could also result in the loss of substantial quantities of valuable natural gas from the high-pressure lines.

[The pipeline company] further submitted evidence that aerial inspection is the only feasible means to patrol the lines. In order to facilitate such inspection, brush and trees must be cleared over the pipeline to a width of 66 feet, 33 feet on each side. Such a width is also necessary for the ingress and egress of repair vehicles.

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Such evidence sufficiently supports a conclusion that irreparable and virtually certain injury would result upon denial of the application for the injunction.\textsuperscript{38}

In addition, a pipeline operator must show that no greater harm will befall the landowners from the removal of the encroachment in order to obtain a preliminary injunction. In assessing this element, courts have

\textsuperscript{37} See, e.g., Bowers, 2002 WL 77409 at *4 (“An easement that allows for the proper maintenance and repair . . . is essential to protect the parties and public from irreparable injury . . .”); Tarbuck, 845 F. Supp. at 309 (finding irreparable injury where failure to comply with federal regulations could result in civil and criminal penalties); Giannaris, 818 F. Supp. at 760 (irreparable harm where failure to conduct proper inspections poses a danger to the public and runs afoul of federal regulations which impose civil and criminal penalties); Burke, 768 F. Supp. at 1171 (finding irreparable harm where there was a potential for serious injury and for gas to be cut off to customers during winter months).

been persuaded that little harm will result to landowners where the landowners had notice of the pipeline easement before purchasing the property or installing the encroachment.\(^\text{39}\) If the right-of-way agreement has been properly and publicly recorded, the pipeline owner should be able successfully to argue constructive notice of the pipeline easement. In addition, while the costs to remove the encroachment are normally assessed against the landowners, these costs have been deemed to be insignificant when measured against the corresponding costs and risks to the pipeline company.\(^\text{40}\)

Finally, in order to obtain a preliminary injunction, a pipeline owner must show that the issuance of the injunction would serve the public interest. In pipeline protection actions, this requirement is normally fulfilled by relying upon comprehensive federal policy and regulations relating to the safe operation and maintenance of pipelines. As explained by one court:

\[\text{[G]ranting injunctive relief will be in the public interest. Enjoining Defendants from impeding Plaintiff’s access to the pipelines will further the federally protected goal that gas lines be adequately tested and maintained. Moreover, an injunction will protect human life and the environment from the potential catastrophe that could result if the subject pipelines are not adequately maintained and inspected.}\(^\text{41}\)]

\(^{39}\) See, e.g., Giannaris, 818 F. Supp. at 760 (finding no injury to landowner where “when they purchased their property, they were well aware of [the] right-of-way traversing their land and so they were cognizant of the inconveniences this would entail”); Tarbuck, 845 F. Supp. at 309 (granting injunction where landowners knew of right-of-way and company guidelines on encroachments).

\(^{40}\) See Tarbuck, 845 F. Supp. at 309 (noting that cost to landowner is minimal compared to cost to pipeline company); Burke, 768 F. Supp. 1171-72 (harm to landowner outweighed by potential for severe bodily harm); see also Columbia Gas Transmission Corp. v. Adams, 646 N.E.2d 923 (C.P. Ohio 1994)(assessing costs for removal of encroachment against landowner).

The public interest in maintaining consistent gas service has also been cited as supporting a preliminary injunction in pipeline protection cases.\textsuperscript{42} In light of the significant public safety risks inherent in inadequate pipeline monitoring and maintenance, the public interest prong of the preliminary injunction analysis often is easily satisfied.

When seeking a preliminary injunction, because the proceedings are generally expedited, it is important for the pipeline company to compile the essential information as quickly as possible. In a successful preliminary injunction proceeding, the necessary evidence to prove the action often is gathered before any papers are filed with the court. If a preliminary injunction is necessary, the pipeline company must be committed to arranging for the cooperation, diligence and testimony of the proper witnesses familiar with the encroachment, the conveyance documents and any applicable federal or state regulations in an expedited fashion. Designation of witnesses familiar in these areas (to the extent possible) prior to the discovery of any encroachment may facilitate later efforts made by the company in connection with an actual preliminary injunction hearing.


Where the threatened harm from an encroachment is less immediate and the preliminary injunction standard difficult to satisfy given the facts of the case, a pipeline company may opt to obtain relief through the filing of an action seeking a declaratory judgment. A declaratory judgment action can normally be brought in either state or federal court assuming federal jurisdiction is available.\textsuperscript{43} Resolution of a declaratory judgment action may take substantially longer than the time period for obtaining a preliminary injunction. The advantages, however, include the elimination

\textsuperscript{42} See e.g., Burke, 768 F. Supp. at 1172 (relying upon interest in avoiding a cutoff of gas during winter months as support for the public interest portion of the preliminary injunction standard).

\textsuperscript{43} See infra § 9.03[1].
of the bond requirement and the heightened showing of irreparable harm necessary to obtain a preliminary injunction.

In a typical declaratory judgment action, a pipeline company would seek a judicial declaration as to the respective rights of the parties in relation to the pipeline easement. This type of declaratory judgment action might also include a separate claim for injunctive relief. In an action seeking strictly a declaration of the parties’ respective rights, in addition to its position on the merits, the pipeline company must establish only that the case presents an actual controversy ripe for adjudication. Where the pipeline company can establish the existence of the easement and an encroachment upon the easement, this requirement easily should be satisfied.

A declaratory judgment action, however, might also afford a pipeline company a creative means to obtain additional judicial determinations. In Columbia Gas Transmission Corp. v. Drain, for example, the pipeline company brought a declaratory judgment action seeking a judicial determination that its use of a 50-foot easement is not an unconstitutional taking under the Fourteenth Amendment of the United States Constitution. The United States Court of Appeals for the Fourth Circuit reversed the district court’s order dismissing the action for lack of subject matter jurisdiction. Reasoning that the district court would have possessed jurisdiction over a coercive action by the landowner asserting that the use of the 50-foot easement constituted an unconstitutional taking pursuant to 42 U.S.C. § 1983, the court remanded the action for an adjudication on the merits of the claim. As illustrated by Drain, the flexibility of a declaratory judgment action might be used by a pipeline company to its benefit in litigation to protect a pipeline easement.

46 The company had previously brought a declaratory judgment action pursuant to the Natural Gas Act and Natural Gas Pipeline Safety Act seeking a declaration that it was entitled to a 50-foot easement. That action was dismissed for lack of federal jurisdiction. See Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552 (4th Cir. 1999).
47 The court noted that because the pipeline company has the power of eminent domain pursuant to the Natural Gas Act, the company could be considered a “quasi-governmental
§ 9.04. **Practical Considerations.**

In light of the manner in which the courts have examined issues relating to pipeline easement protection, there are several practical steps a pipeline company can take to increase the likelihood that it will be able effectively to protect its pipeline easement. Specifically, developing uniform practices and procedures relating to encroachment detection, recordation, and landowner education may make protecting pipeline easements considerably less difficult.


As set forth previously, the extent to which a court will examine a pipeline company’s prior practices in acquiescing to pipeline encroachments is uncertain and may vary with various courts. The issue of prior practices can arise in pipeline protection litigation in the form of an argument with respect to prior practices taken regarding the easement in question or prior practices taken with respect to the company’s pipeline easements generally. The best defense against these attacks is to establish uniform practices with respect to encroachment detection and pipeline protection.

Initially, it would be important for a company to establish uniform guidelines for employees inspecting pipelines as to what constitutes an encroachment and what types of encroachments require immediate attention. In addition, a uniform reporting procedure whereby encroachments must be reported to designated personnel in the legal or other appropriate department may encourage more expeditious attention to the issues. Finally, uniform policies on how encroachments will be

entity for purpose of a § 1983 action.” *Drain*, 237 F.3d at 370 n.2. One of the risks of seeking a declaratory judgment on a Section 1983 claim, however, is the potential of exposing the company to increased damages in the form of attorneys’ fees.

48 See, e.g., *Ashland*, 1990 Ohio App. Lexis 1587 (considering prior practice with respect to the easement at issue); *Columbia Gas Transmission Corp. v. Large*, 619 N.E.2d 1215 (C.P. Ohio 1992) (where landowner argues that general past practices with respect to other easements along the pipeline at issue limit company’s easement).
dealt with after detection from a practical and legal standpoint may avoid inconsistencies that can be used against the company in future litigation.

The extent to which a company acts consistently and expeditiously in protecting its pipeline easements may affect its ability to obtain judicial relief in the event of encroachment litigation. While there is little a company can do to remedy historical past practices, developing and implementing uniform practices and procedures relating to encroachment detection and pipeline protection may help protect the company in the future should pipeline encroachment issues reach the stage of formal litigation.


In addition to establishing uniform practices and procedures with respect to encroachment detection, it may also prove to be a prudent business decision to develop uniform practices to inform landowners of pipeline easements and corresponding restrictions relating to encroachments. As an initial matter, all conveyance documents should be properly recorded within the landowners’ chain of title if not already so recorded. This will aid the company in arguing that the landowner had constructive notice of the easement. In addition, developing guidelines to be distributed to landowners when possible can help alleviate encroachment issues. If landowners know what to expect with respect to encroachments, they are less likely to expend significant sums on construction that will impair the company’s ability to use its right-of-way. These modest preventive measures taken at a business level could save substantial legal fees in connection with subsequent encroachment litigation.

49 See, e.g., Chevron, 858 P.2d at 166 (refusing to enjoin landowner from covering easement where the company warned landowner about practice but took no further action for several years).
§ 9.05. Conclusion.

While the ability of a pipeline company to protect its easements through judicial intervention will predominately turn on the language of the conveyance document as interpreted by the court in conformance with the intentions of the parties, uniform practices and procedures and a consistent program including diligent protection of pipeline easements may increase a pipeline company’s chances of receiving requested judicial relief when necessary. In addition, adequate communication with landowners and developers regarding the pipeline company’s encroachment expectations may go a long way to prevent costly pipeline easement litigation. When litigation is necessary, however, the pipeline company should be well prepared to offer evidence of the extent of its easement, the nature of the encroachment and how that encroachment is prohibiting the full exercise of the rights granted by the easement, including any impact the encroachment may be having on the pipeline company’s ability to comply with applicable federal and state regulatory requirements. When presented with strong evidence on these points, courts often have been willing to enter declaratory or injunctive relief in favor of pipeline operators in order to ensure the safe operation and maintenance of the operators’ pipelines.