

Enforcing The Open Easement

by Steven L. Dykema and William A. Horn

Steven Dykema and William Horn are partners in the Grand Rapids, Michigan law firm of Mika, Meyers, Beckett & Jones. The authors represented the easement holder in the civil litigation discussed in this article. Both authors are members of IRWA Chapter 7 in Michigan. They are involved in representing clients in the acquisition, determination and enforcement of right-of-way interests.

Landowner: "Are you telling me that 25 years ago my great grandmother, rest her soul, agreed to let you put another pipeline on this property, right in the middle of my planned subdivision?"

R/W Agent: "Yes, Mr. Landowner, that's correct. I have a copy of the right-of-way agreement here for your inspection and I am here to pay you the consideration that you are entitled to under the agreement for this new line."

Landowner: "Is this agreement really enforceable?"

The answer in Michigan and many other states we have surveyed is, "Yes."

The "open" or "expansible" easement is commonly found in right-of-way agreements for pipelines, cables, wires or lines where the property owner grants the right to construct and maintain a pipeline or pipelines in return for the grantee's (pipeline company) promise to pay a set amount per additional pipeline. These agreements frequently also require the grantee to: pay for damages to crops, timber, livestock and improvements sustained by reason of the construction of the line; repair fences and drainage systems cut or disturbed; construct cross-overs over the trench; provide temporary gates during construction, etc.

These open easements usually define the entire tract over which the

pipeline will cross without specifically locating the easement, and provide that additional pipelines will be constructed as nearly parallel to and as close as practicable to the first pipeline.

These open easements have come under attack in the courts on a number of grounds including:

- The agreement is void or unenforceable because the agreement fails to specify the bounds or parameters of the right-of-way
- The agreement creates only a one-pipeline easement and option to purchase additional easements
- There is a failure of consideration and to enforce the agreement would be unconscionable
- Laches

Great Lakes Gas Transmission Pipeline Company (hereinafter "Great Lakes") recently completed several looping projects in the Upper and Lower Peninsulas of Michigan where it was successful in enforcing its open multiple-line, right-of-way agreements both at the trial court level and the appellate court level in the Michigan courts against these types of claims.

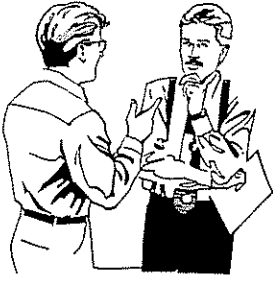
Under the terms of Great Lakes' standard 1967 right-of-way agreements, Great Lakes was given the right to construct and maintain "a pipeline or pipelines" in return for its promises to pay a set amount (usually \$1 per rod) for each additional pipeline, and to undertake various measures to minimize the inconvenience and cover the damages caused by its operations. Great Lakes constructed its first 36-inch gas transmission pipeline under this agreement in 1968. In 1987-1990, Great Lakes decided to lay a second pipeline (loop) across many of the properties over which it had an open easement and tendered more than double (an

amount roughly equivalent to the expanded easement fee value) the amount owed under the agreement to the respective property owners. As to those property owners who declined this offer, Great Lakes filed suit in the circuit courts of the counties in which the property was located seeking a judicial declaration that the easement remained in force and affirming Great Lakes' right to construct a second 36-inch diameter pipeline. Great Lakes was successful in all of its lawsuits in obtaining a favorable judgment from the court where it was unable to settle the litigation.

The objection most frequently encountered by Great Lakes was that the language of the right-of-way grant was ambiguous as to the exact location of the right of way, and therefore was void and unenforceable. The Michigan Court of Appeals in *Great Lakes vs. Untalan* and *Great Lakes vs. MacDonald* upheld Great Lakes' right-of-way agreement against claims of ambiguity, holding that the agreements were not ambiguous and were enforceable. Great Lakes relied on the decision of the Michigan Supreme Court in *Johnston vs. Michigan Consolidated Gas Company* where the right of way contained similar type language. Case law from other jurisdictions is in agreement.

The defense of failure of consideration was raised in several of these cases, and basically resolved itself into the question of the fairness of the terms of the original right-of-way agreement. The Court in *MacDonald* rejected this argument stating:

"There is no indication that the terms of the agreement were so grossly unfair at the time as to require that the agreement be declared void. Plaintiff agreed to pay \$159 for the installation of each pipeline, to assume the obligation to compensate defen-



dants for property damage caused during construction, and to undertake measures to minimize interference with the use and enjoyment of the land.”

Similarly, in *Untalan*, the property owners argued that the agreement was unconscionable in that they would receive only \$152 for each additional pipeline constructed, and that the second pipeline was constructed 20 years after the first. The Court of Appeals held that the agreement’s terms were substantially reasonable and must therefore be enforced and concluded:

“Defendants’ complaint is essentially that over the 20 years since it was entered into, the original contract, which provided for only \$152 per pipeline, has developed into a bad bargain. This court has no authority to change the terms of the contract simply because it might feel that it was an unwise contract for a party to have entered into.”

In *MacDonald*, the landowner specifically contended that the right-of-way agreement did not give Great Lakes a continuing, vested right to install a second pipeline, but merely created an option exercisable only within a reasonable time and only against the signatories of the agreement. Therefore, since the current landowners were not signatories to the agreement, they contended the option could not be exercised against them as the current owners.

In *MacDonald*, the Court found that the agreement provides that the right of way continued in force as long as any facility installed is used or remains on the land, and that this was a vested interest as opposed to an option. Further, the Court found that the conditions did not involve the death of the signatories or a delay by

EASEMENT PROVISIONS

The Great Lakes’ agreement provides in pertinent part: For and in consideration of the sum of [\$159.00] in hand paid, receipt of which is hereby acknowledged, [defendants’ predecessors] ... hereby bargain, grant, convey, and warrant unto [plaintiff], its successors and assigns, ... an easement and right of way to survey, clear and excavate for, lay, construct, operate, inspect, maintain, protect, repair, replace, alter, change the size of, or remove a pipeline or pipelines and appurtenances for the transportation of gas and other substances which can be transported through a pipeline, along a route to be selected by Grantee [plaintiff], over and through [defendants’ property] with the right of ingress and egress to and from said right of way, ... to have and to hold said right of way unto Grantee, its successors and assigns, until said easement is exercised and so long thereafter as any facility installed hereunder is used or remains on said land. Should more than one pipeline be installed under this agreement, Grantee shall pay the same consideration as above expressed for each such additional pipeline and appurtenances. Such additional pipelines shall be laid as nearly parallel and as close as practicable to the first pipeline installed hereunder.

The rights herein granted may be assigned in whole or in part. All rights, privileges and obligations created by this instrument shall inure to the benefit of, and be binding upon, the heirs, devisees, administrators, executors, successors and assigns of the parties hereto. [Author’s emphasis added.]


Great Lakes also agreed to minimize the interference with the landowners’ use of the property by providing gates and paths across any trenches and to make the landowners whole for damages to crops, timber, livestock and improvements.

the easement holder in exercising any of the rights granted and was enforceable against the current owners.

The defense of laches was also raised in *MacDonald*. Laches is an equitable defense to a claim that may be invoked when a delay in bringing a claim prejudices the other party. The landowners contended that they were prejudiced by the fact that Great Lakes did not exercise its rights to install an additional pipeline between the time of the laying of the original pipeline in 1968 and 1990. The Court held that this could not properly be called a delay in that Great Lakes had continued to enjoy the right to build additional pipelines without regard to the passage of time. The fact that Great Lakes did not bring a suit to quiet title until 1990 did not reflect a culpable delay on its part because the proposed activity was expressly agreed to in the instrument creating the easement.

CONCLUSION

Although the open right-of-way agreement is surviving legal chal-

lenges in Michigan and elsewhere, it would be well in drafting new agreements to consider the challenges that have been raised. Specific issues raised in these challenges may stem from landowner concerns which can be anticipated and addressed by including appropriate language in the agreement. Adding other provisions to new agreements can also help in the defense of the validity of multiple-line easements. 

1. *Great Lakes Gas Transmission Co. vs. Untalan*, No. 122483 (June 21, 1990) an unpublished opinion.
2. *Great Lakes Gas Transmission Company vs. MacDonald*, 193 Mich App 571 (1992). The *MacDonald* decision is a published decision which means that it is binding not only on the lower circuit courts but also on other panels of the Michigan Court of Appeals.
3. *Johnston vs. Michigan Consolidated Gas Company*, 337 Mich 572 (1953).
4. See *Baker vs. Tennessee Gas Transmission Co.*, 250 SW2d 566 (Tenn., 1952); *Kleinheider vs. Phillips Pipe Line Co.*, 391 F Supp 159 (ED Mo., 1975); *Ashcot. Inc. vs. Texas Eastern Transmission Corporation*, 129 So2d 405 (Miss 1961); *Phillips Petroleum Co. vs. Lovell*, 392 SW2d 748 (Tex. 1965).