



# NEW PIPELINES AND PRIOR EASEMENTS

Handling pipeline easements in jeopardy

BY RANDALL BELL AND MICHAEL TACHOVSKY

Pipelines are an essential part of the infrastructure used for millennia for the distribution of water. With the modernization of society and demand for certain products, pipelines have been designed for additional purposes, including oil, natural gas, slurry, wastewater and utility lines. Existing pipelines are typically held as part of an easement agreement between a landowner and a pipeline company. Generally, a pipeline easement gives the easement holder the right to build and maintain a pipeline on a landowner's property. However, it does not give the easement holder ownership of the land—only the right to use it for the purposes specified within the contractual agreement.

New pipelines are being installed today, but many existing pipelines are also aging. As pipelines get older, they can deteriorate and market demands may change. When this occurs, the holder of such a pipeline easement might repair, replace or abandon the pipeline. In these instances, the easement

being held may be in jeopardy. As David Howell wrote in “The Search for Abandoned Pipelines,” which was published in the September/October 2007 issue of *Right of Way Magazine*, some contracts state that easements are terminated or lost when not used or maintained correctly.

## Pipeline Jeopardy

In cases where an easement is not correctly used or maintained, abandonment issues can arise and an easement may no longer exist. There are two factors to consider: contractual statements and appearance of intent.

In contracts, terms are typically set forth. For instance, if there is a deviation from a right of way agreement for a single segment on the land, the contract may state that portions of that pipeline could revert to the landowner, jeopardizing the entire easement. As Howell writes in “The Search for Abandoned Pipelines,” the same occurs with the ownership of the pipe in the right of way, which may go to the landowner and can be considered as a fixture.

With intent or appearance of intent, operators frequently overlook the complete and proper maintenance of a pipeline without checking or adhering to the right of way agreement. Howell explains that the intent may include many factors, such as whether a line is idled or abandoned, length and time the line has been idled or abandoned, whether the pipeline is maintained, whether the pipeline is shown as an easement or asset, whether the pipeline has idled or abandoned the facilities at either end, whether the condition of the pipeline is such that returning it to service is cost-prohibitive and whether the company has released or abandoned segments of the easement.

The factors of abandonment do not have to play out across the entire easement to render the easement lost, as issues with just one portion may

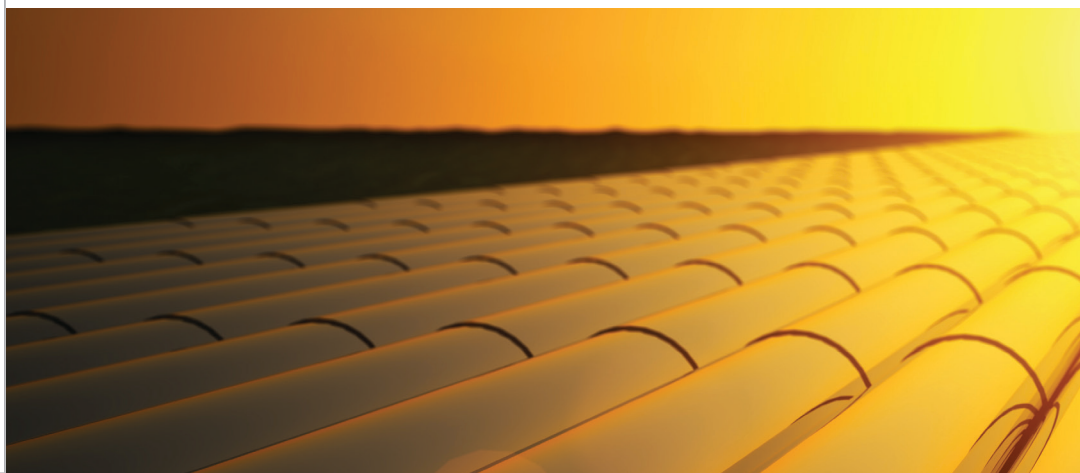
render the entire pipeline system unusable. To navigate around this issue, easement holders may choose to reroute, even slightly, the parts of the pipeline that were abandoned. In these instances, the rerouting of the pipeline may constitute a new easement over the portion of the reroute or across the entire pipeline easement. The same may occur when portions of a pipeline are not appropriately maintained.

## Appraising Pipeline Easements

The valuation problem for appraisers is not whether the easement still exists, as this issue is often determined by other parties and made an assumption of the report. Accordingly, the appraiser may be required to determine the damages to the remainder (or severance damages). As Laura A. Hanley explains in “Judicial Battles Between Pipeline Companies and Landowners: It’s Not Necessarily Who Wins, but by How Much,” in pipeline cases, damages to the remainder are a critical issue, and whether an easement exists or not, an appraiser must still consider such damages. To achieve this, an appraiser must assume that in the before condition, no easement exists. In the November/December 2012 issue of *Right of Way Magazine*, Kurt Kielisch explained in “Rails-to-Trails Property Rights: So Whose Right is it Anyway?” that

this concept is similar to a rails-to-trails project, wherein the before condition, the property is valued as having exercised its reversionary rights of the old railroad right of way and has no such easement burdening the property.

According to Ohio State University’s “Understanding and Negotiating Pipeline Easements,” the appraiser should be aware of any proposed or existing provisions and ask for clarity whenever needed. Some include the location of the pipeline, pipeline depth, width of the easement, construction rights, construction timeline, construction standards, crossing ditches or surface water, impacts on woodlands and timber, impacts on drainage, impacts on fencing and gates, impacts on other improvements, construction of associated structures or facilities, substances permitted in the pipeline, number of pipelines, pipeline pressure, indemnification, access to the pipeline for inspection, signage and markers, landowner’s rights of use, abatement of an easement, disputes, as well as problems, assignment rights and amendments to the easement, warranting title, payment provisions and taxation on pipeline easement payments. While there are numerous potential provisions, and all should be considered, not every provision is relevant to the appraisal process. As for relevant provisions, an appraiser may have to consider whether there is an impact to value. As outlined in the Appraisal Institute’s “Real Property Valuation in Condemnation,” it is



impossible to develop an all-inclusive list of the potential damages that could accrue to property in partial taking cases; however, appropriate techniques should be used to quantify such impacts, if any, with supporting market data.

There are numerous techniques an appraiser can utilize to measure impacts resulting from a pipeline easement. Some of those techniques include paired sales, sale/resale, regression, case studies, surveys and literature reviews. A property owner has the right to collect on impacts that occur as “just compensation,” and an appraiser must assist in determining the appropriate just compensation. There are two primary rules for measuring just compensation in different jurisdictions: the before and after (federal) rule and the value plus damage (state) rule. The before and after rule generally says that just compensation is the value of the property before the taking minus the value after the taking. On the other hand, the value plus damage rule requires the property owner to be paid fair market value for the piece of property taken plus severance damages for the remaining portion of land. As the Appraisal Institute published in “Real Estate Damages, 3<sup>rd</sup> Edition,” this rule is best applied in partial takings when a small piece of land is taken, and a larger portion of land remains, which is often the circumstance in pipeline eminent domain cases.

Throughout the United States, there is ongoing opposition to pipeline and other infrastructure projects that historically were permitted and built with little notoriety or conflict (this is further explained by Seale and Bethel in “Pipeline Proximity: The Truth About the Impact on Value,” published in the May/June 2015 issue of Right of Way Magazine). Pipeline easements may result in a decline in property value, even when a former pipeline easement existed because market perceptions have changed. Furthermore, Allen J. Angers writes in The Appraisal Journal’s “Valuation of Pipeline Servitudes,” after original construction is completed or the pipeline has been installed, the company rights of an affirmative nature experience a decline and subsequent damages to the surface due to any emergency or change in operations, damaging or interfering with the owner’s use of the surface (except for items expressly prohibited) require additional reimbursement to the landowner. This can be a significant issue. Some research indicates that when comparing properties encumbered with an oil pipeline easement to otherwise similar properties without the easement encumbrance, damages to the remainder range from 5% to 55%, with estimates typically around 10%, as described in The Appraisal Journal’s “Pipelines, Eminent Domain, and Damages to the Remainder: A Texas Lawsuit Trilogy” by Lipscomb and Kimball.

## Conclusion

Cases involving prior or existing pipeline easements do not justify a simplistic assumption that damages to the remainder do not exist. When a portion of a pipeline is not used or maintained properly, the entire easement may be lost. As a result, any new easement may have to be negotiated or acquired through eminent domain with all the property owners impacted by the easement. In such cases, appraisers cannot look at the historical easement and simply

assume that such rights still exist, but must carefully research this issue. When appropriate, appraisers may need to base their appraisals on the assumption that the easement does not exist in the before condition. In these cases, the appraiser not only determines the value of the easement itself but also any damages to the remainder, which may be significant. ☺



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