

YOU HAVE A PIPELINE -- BUT DO YOU HAVE A VALID RIGHT-OF-WAY FOR IT?



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Sure, you have a pipeline – but do you have the *right* to have that pipeline where it is and to use that pipeline the way you want to? Pipeline easements are typically obtained in one of two ways: through a stand-alone right-of-way grant or as part of an oil and gas lease. Although, grants of pipeline rights in leases pose some special problems, most of the issues discussed below apply to both stand-alone rights-of-way (what we will call here a “ROW”) and to leases. In either case, your rights will be limited to those described in your ROW or lease. However, just because your ROW or lease includes specific rights, that does not necessarily mean that you will actually have all of those rights. Your grantor or lessor can only grant the rights that he or she has – no matter what the lease or ROW says. A statement of greater rights in the ROW or lease will not be effective. Thus, there are two threshold questions for evaluating your pipeline rights: **What does the ROW or Lease say?** and **What rights did your grantor or lessor have to give?**

WHAT DOES YOUR LESSOR OR GRANTOR HAVE TO GIVE?

The question of what the lessor owns is most significant when the lease is from the owner of a severed mineral interest – that is, the owner of just the oil and gas. In that case, no matter what the grant says, the lessor can only convey rights in the surface that are implied from the ownership of the oil and gas.¹ If a lessor owns only a severed mineral interest, that lessor will have (and will be able to grant) *only* those rights in the surface that are reasonably necessary to develop the oil and gas estate.

A lessor who only owns the oil and gas cannot give you the right to use a pipeline to transport gas from other properties. Thus, if you plan to install a gathering line for multiple properties, your pipeline rights from an oil and gas owner (whether through a ROW or a lease) will not be sufficient. You will need to obtain a separate ROW from the surface owner for that multi-property pipeline.

Even if the oil and gas has not been severed from the surface knowing the title of your ROW grantor is still important. For example, if the grantor only owns a life estate (eg. a husband has left the property to his wife “for her life” and then to his children), that grantor cannot convey a permanent right-of-way.

¹ As with most things legal, there are exceptions. Sometimes, the severing document will grant the severed mineral owner specific additional rights to use the surface. In that case, the lessor would be able to grant those additional surface rights to you in the lease.

A stand-alone ROW will usually say that it is “permanent” or “perpetual.” However, a ROW grantor may insist on some termination of the ROW if it has not been used for a specific period of time. Even without such a provision, a court can declare your ROW to have been “abandoned” if you have not used the pipeline for a significant period.

HOW LONG WILL MY EASEMENT LAST?

One of the primary problems with pipeline rights contained in an oil and gas lease is that those rights will terminate when the lease terminates. Thus, any pipeline constructed pursuant to the lease will be vulnerable to a termination of the lease. This is particularly problematic if the pipeline is used for the benefit of other properties, such as a gathering line that collects gas from a number of leaseholds.

Drafters have attempted to address this problem by inserting provisions which purport to make the pipeline easement survive the termination of the lease. Sometimes the drafter simply describes the pipeline right of way as “permanent.” In other cases, drafters have been more direct, specifically stating that the pipeline right of way is intended to survive the termination of the lease. Still others have included a requirement that the lessor execute a separate right-of-way agreement.

Of course, if the lessor owns only a severed mineral interest, even the most explicit provision cannot make the pipeline rights survive the termination of the lease. That is because the owner of severed minerals only has the right to use the surface in connection with the development of those minerals.

WHAT IF MY LEASE OR ROW GRANTS THE RIGHT TO USE IT FOR OTHER PROPERTIES?

If the ROW or lease does allow the property to be used to transport gas from “other properties” (and your grantor or lessor has the right to make such a grant) the description of those “other properties” is very important. The use of terms such as “neighboring,” “adjacent,” “adjoining” or “controlled by Lessee” may create unintended limitations on the use of the pipelines constructed pursuant to the lease or ROW.

Each of these descriptions has its benefits and pitfalls. The terms “contiguous” and “adjoining” have been interpreted to imply a requirement that the benefited property actually border on or touch the property covered by the ROW or lease. On the other hand, descriptions such as “neighboring” are not quite so limiting, but they would preclude transporting gas from distant properties -- such as other counties or perhaps other watersheds.

Another issue arises when the other properties intended to be benefited by the pipeline are described as “owned by the lessee” or “leased by the lessee.” These limitations would prevent the pipeline from being used to transport gas produced by third parties.

HOW BIG IS MY RIGHT-OF-WAY AND WHAT CAN I DO ON IT?

Stand-alone pipeline ROWs and pipeline rights in leases are rarely specific about matters such as the width of the right-of-way, its location or the number of pipelines that may be installed on it. Those questions have frequently been left for courts to determine when a disagreement has arisen between the parties on those matters. Generally speaking, the overarching consideration for any court in making such a determination is whether the proposed use is reasonable and whether it is within the scope of the uses generally anticipated by the parties at the time the grant was made. With regard to the width of the right-of-way, courts have looked to such factors as the language of the grant, the circumstances surrounding the transaction, and what size right-of-

way is reasonably necessary to serve the purpose for which it was granted. The court may also look to past practices of the parties, such as the width to which the right-of-way had been cleared or marked in the past.

Similarly, a ROW or lease virtually never specifically describes the location of the pipeline or pipelines to be constructed. Such grants are subject to the general rule of law that the location of the right-of-way is established when the pipeline is constructed. After construction, it is limited to the place where it was installed. Thus, unless the lease or ROW specifically includes the right to relocate pipelines, you may not be able to move the pipeline without getting a separate right-of-way. That is why ROWs and leases frequently recite a litany of permitted activities such as the rights to “install, replace, relocate, and repair,” pipelines, to ensure that all of these activities are permissible. These same considerations may impact whether additional pipelines may be installed later in the same easement.

CAN I TRANSFER MY PIPELINE RIGHTS?

Stand-alone ROWs are generally freely transferable unless they state otherwise. While oil and gas leases themselves are generally freely transferable, some courts have held that the pipeline rights granted in an oil and gas lease cannot be transferred separately from the lease itself. Thus, a gathering system constructed pursuant to a right of way in a lease could not be transferred to a third party separate from the leases.

Whether your pipeline rights are sufficient depends on a number of factors, including the language of the documents, the rights owned by your grantor or lessor and what you are using the pipeline for. Paying attention to these issues prior to building your pipeline can save you a lot of headaches later on.²

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² This article is not intended to give legal advice, and you should consult your attorney about your specific case.