

BSEE Finally Allows Pipeline ROWs To Be Co-Owned

AUTHORS: C. Peck Hayne Jr., Cynthia A. Nicholson, Peggy M. Welsh
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Are you pining for the cheery days of yore when regulations made at least some business sense? Happy days are here again, at least for BSEE's new policy on ownership of pipeline rights-of-way (ROW) on the outer continental shelf (OCS). After years of refusing to recognize multiple owners of a pipeline ROW, the Bureau of Safety and Environmental Enforcement (BSEE) has just advised that it will now allow a pipeline ROW to be assigned to more than one party with a single operator to be designated to act on behalf of the co-owners.

Historically, BSEE's predecessor, the Minerals Management Service (MMS), had permitted a pipeline ROW on the OCS to have multiple co-owners. Many years ago, however, the MMS adopted an internal policy that it would no longer approve assignments for co-owners. And—until now—BSEE has continued that policy.

That policy seemed entirely misplaced, as it ignored the realities of business on the OCS. Frequently (if not more often than not), developments on the OCS have multiple co-owners. Joint venturers who co-own an oil and gas lease almost universally agree to share among themselves not only production revenues from the lease, but also the related costs and expenses. Because production facilities on the OCS are not near refineries or other end users of such production, pipelines are an absolute necessity for OCS production. But under this old policy, only one party would be recognized as the owner of a pipeline ROW on the OCS, even if multiple parties were responsible for paying for any pipeline facilities on the ROW.

This old policy caused multiple problems. On the one hand, without a government-recognized ownership interest in a ROW, a party who nonetheless was obligated to pay for a portion of the costs and expenses for such ROW would have to concoct a set of contractual provisions that would do Rube Goldberg proud. But even then, it was uncertain how effective those contractual efforts would be. For example, if such a “non-owner” co-owner attempted to mortgage its “non-owner” interest, how would foreclosure work? What exactly could a marshal seize and sell if the “non-owner” owner defaulted on its financing? On the other hand, any equally daunting set of

contractual arrangements would be needed to protect a “non-owner” owner in the event that the BSEE-recognized owner sought to mortgage (or otherwise encumber) its ROW interest—which, per BSEE, was 100%. Nor did this policy serve the public: by recognizing only a single owner, BSEE effectively limited the possible number of parties it could pursue to enforce decommissioning obligations for a ROW or if there was ever a spill from a pipeline on the ROW. Thus, for example, if the BSEE-recognized owner went belly up and its bonds to the government were not sufficient to satisfy a clean-up obligation, BSEE would have had difficulty pursuing any “non-owner” owners for any payment or contribution.

By its NTL No. 2017-N04 issued effective August 18, 2017, BSEE has now finally come to its senses to cure these self-inflicted problems. BSEE will now, once again, allow a pipeline ROW to be assigned to more than a single party. Thus, government-recognized ownership in a pipeline ROW on the OCS may now, once again, mirror the parties’ actual economic interests in the ROW. Of course, as 30 C.F.R. § 250.1701(b) has long recognized, co-owners of a pipeline ROW will be jointly and severally (or, as we Louisiana lawyers would say, solidarily) liable for meeting the related decommissioning obligations. [The new NTL is silent whether there can be separate co-ownership for each pipeline segment authorized under a single ROW; fortunately, however, that should not be a big concern, as it has been decades since multiple pipeline segments were designated under a single ROW.] On the flip side, BSEE will now require that a single party be designated as the “operator” for a pipeline ROW—at least when there are two or more co-owners. Identifying an operator won’t relieve the pipeline ROW holders of any responsibility for the ROW. If an operator defaults, the pipeline ROW holders are still responsible for complying with the ROW grant and applicable law, regulations and orders. While 30 C.F.R. § 550.147(c) is express and clear that an operator under a **lease** is jointly and severally liable with the lessee(s) for various regulations relating to the lease, there is no comparable express regulation for operators of ROWs. Although the new NTL states that BSEE may disqualify a pipeline ROW operator or revoke its identification as an operator for a ROW if its performance is “unacceptable,” the new NTL never expressly states that a ROW operator who is not also a holder of the ROW may itself be liable (jointly, severally or otherwise) for any decommissioning or other obligations for the ROW.

So if you have an interest in a pipeline ROW where BSEE lists someone else as the sole owner or if BSEE recognizes you as the sole owner of a ROW that, as a contractual matter is co-owned by two or more parties, you should consider whether now to file an appropriate assignment with BSEE so that the ownership of record mirrors the parties’ contractual arrangements. But pay attention to the details: for example, if the owner of record granted a mortgage on the ROW (or

even just on its rights under the ROW), you might want to obtain appropriate partial releases from the mortgage holder. Co-ownership of ROWs of course raises many of the same issues that occur with co-ownership of leases. But we're better for the new scheme: letting the parties have the flexibility to determine what works best for them is almost always far superior than a one-choice-is-all-you-get approach to government regulation.

If you have any questions about pipeline ROWs or other issues on the OCS, give us a call.