

Louisiana law and pipeline expropriations¹

By D'Ann R. Penner; Veron, Bice, Palermo & Wilson, LLC; Lake Charles, Louisiana

Landowners confronted by pipeline company representatives seeking a discount for perpetual pipeline servitude across their land should know that Louisiana courts understand that “[t]he power of expropriation is fraught with the possibility of abuse and injustice . . .”² According to time-honored Louisiana constitutional and statutory law, when private property is expropriated for public use, “the owner shall be compensated to the full extent of his loss.”³

This calculation must be based on market information, fairness principles, and common sense.⁴ To do otherwise would be to risk transferring the surplus from the landowner to the expropriator with negligible, if any, benefit to the public at large.⁵

In 2012, the Louisiana Legislature passed Act 702, which codified threshold requirements that must be complied with before a would-be expropriator can file an expropriation suit.⁶ La. R.S. 19:2:2 sets forth the mandatory checklist of pre-suit requirements.

Any landowner seeking to protect his family from being taken advantage of by pipeline companies threatening to devalue the landowner’s property in perpetuity for less than the fair market value of the right-of-way’s worth should familiarize himself with these requirements.⁷

First, a pipeline expropriator has to enter into good-faith negotiations with all of the co-owners of the desired property. It cannot choose the family’s least sophisticated person as a proxy for all.⁸ Even before Act 702 was enacted, the courts dismissed expropriation suits as premature when pipeline companies failed to conduct good-faith negotiations with all of the property’s



D'Ann Penner

co-owners for a pipeline right-of-way agreement.⁹

It is prudent for landowners to document and preserve any miscommunications by agents of pipeline companies. Likewise, having a witness present at any meetings with right-of-way agents will minimize the likelihood of a future court interpreting misrepresentations as a good-faith negotiation.

Second, in the wake of Act 702, a would-be pipeline expropriator’s list of pre-suit duties now includes a pre-suit offer backed up by a good-faith property appraisal.¹⁰ This appraisal must be mailed to the landowners thirty days before an expropriation suit can be filed.¹¹

The obvious purpose of this new statutory step is to require the would-be expropriator to exhaust every possible avenue to reach a fair agreement with the landowner before filing a lawsuit to devalue the property against the landowner’s will.

Landowners should review the appraisal sent to them with a critical, knowledgeable eye. Appraisers working for expropriators are paid to tell a “story” that favors the expropriators.

If their appraisals favor the pipeline companies substantially enough, the companies are more likely to rehire them for a future pipeline project.

If the appraisal cannot meet the minimum requirements for reliability under article 702 of the Code of Evidence, however, it cannot satisfy the pre-suit requirements of La. R.S. 19:2:2(B)(4).

Landowners should review the appraisal sent to them with a critical, knowledgeable eye.

The law requires appraisers to conduct appraisals in accordance with professional standards.¹² Nationally, the Uniform Standards of Appraisal Practice (USPAP) is the generally accepted standard for professional appraisal practice.¹³ Courts throughout the country have acknowledged that compliance with USPAP is a reasonable basis for determining the reliability of an appraiser's methods.¹⁴

The Louisiana Supreme Court in *Exxon Pipeline Co. v. Hill* stressed that "there is no artificial formula by which alone [just] compensation may be determined."¹⁵ The expropriator will bear the burden of proving that the methodology employed by its appraiser under the facts of the landowner's properties is generally accepted in the relevant appraiser community.¹⁶

The trial court, especially in the event of a bench trial, has "wide discretion" in determining the reliability of an expert and his opinions.¹⁷

To survive a *Daubert* challenge, an appraisal cannot be based on speculation or be permeated with bias in favor of the pipeline company.¹⁸ Thus, a landowner should compare the evidence available in the public records about his own property with the conclusions drawn by the appraiser.

If the appraiser has relied exclusively on evidence from agents paid by the pipeline company, it may be possible to prove bias at a *Daubert* challenge of the appraiser. If the appraiser is not from the landowner's region, he may be out of touch with market trends and land values in the region.

The characteristics of the "comparable properties" listed in the appraisal may be completely dissimilar to the characteristics of the landowner's property.

Likewise, if the appraiser cut corners, he may not have distinguished between permanent pipeline servitudes and renewable pipeline servitudes burdening a landowner's property.

A renewable pipeline servitude is an income-generating, value-adding enhancement to a property because it provides recurring streams of income over decades. They are rental payments according to the terms of a consensual agreement for the privilege of using the choice location of the

landowner's property to transport the product to market.

Renewable-term servitudes on "vacant" land are like the sale of vacant land with a leased cell-tower site or a billboard site. The interest in the leased site would necessarily pass with the property upon transfer of title and thus allow the transferee to collect all future income and rents from the leased site.¹⁹

If the matter goes to trial, the attorney may need evidence of the skill of the landowners' negotiators to show the consistent role of the family's skill in negotiating consensual pipeline right-of-way agreements with a variety of pipeline companies.

A perpetual servitude, by contrast, is a liability that decreases the property's value.

In *Gulf States Utils. Co. v. Norman*, the Louisiana Third Circuit Court of Appeal reversed the trial court for failing to take into consideration the voluntary sales of servitudes to expropriating authorities as evidence of value.²⁰

If even one of the pre-suit requirements is not met, then a court will have to grant the landowner's exception of prematurity for the pipeline company's failure to comply with all of the threshold requirements of La. R.S. 19:2:2. In the event of an unsuccessful expropriation suit, the pipeline company may be liable to the landowner for his attorney's fees, litigation expenses, and expert witness fees under La. R.S. 19:201.²¹

As the First Circuit Court of Appeal acknowledged in *Town of Walker*, "[t]he legislature has recognized that the filing and eventual dismissal of an expropriation suit can cause a monetary loss to the property owner in the form of attorney's fees."²² The purpose of Section 201 is to prevent the saddling of landowners with unconstitutional expenses brought about by a would-be expropriator's abuse of the landowner's constitutional rights.

Since the enactment of Act 702, Louisiana law now includes more powerful safeguards to protect landowners' property rights.

Endnotes

1. This is the second part of a two-part article. The first part, published in the February issue, was an outline of Louisiana law on pipeline trespasses.

2. *Kimble v. Board of Com'rs for Grand Prairie Levee Dist.*, 94-CA-1134 (La.App. 4 Cir. 1/19/95), 649 So.2d 1112, 1113.
3. La. R.S. 19:9 and Louisiana Constitution Article I, Section 4.
4. See, e.g., *Sandrock v. St. Bernard Parish Gov't*, 14-1019 (La.App. 4 Cir. 5/27/15), p. 3, 171 So.3d 1039, 1045; *United States v. Fuller*, 409 U.S. 488, 490 (1973); *State, Dept. of Transp. and Development v. Dietrich*, 555 So.2d 1355 (La. 1990); *City of Phoenix v. Wilson*, 21 P.3d 388, 394-95 (Ariz. 2001).
5. See Epstein, Richard A. *Takings: Private Property and the Power of Eminent Domain*, (1985), p.164.
6. La. R.S. 19:2:2(A).
7. O'Malley, K, et al., *Federal Jury Practice and Instructions §154.31* (5th ed., 2001) (defining fair market value as "the amount a willing buyer would have paid a willing seller in an arms-length transaction with both parties being fully informed concerning all of the advantages and disadvantages of the property, and with neither acting under any compulsion to buy or sell").
8. LSA-Constitution, Art. 1, § 2; La C.C.P. art. 1091; *City of Shreveport v. Kansas City, S & G Railroad Company*, 181 La. 458, 159 So.715 (1935); *Heirs of Burney v. Ludeling*, 41 La. Ann. 627, 6 So. 248, 251.
9. *City of Thibodaux v. Hillman*, 464 So.2d 370 (La.App. 1 Cir. 1985); *Dixie Pipeline Co. v. Barry*, 227 So.2d 1 (La.App. 3 Cir. 1969); *Central La. Electric Co. v. Brooks*, 201 So.2d 679 (La.App. 3 Cir. 1967); *Texas Gas Transmission Corp. v. Pierce*, 192 So.2d 561 (La.App. 3 Cir. 1966).
10. See La. R.S. 19:2:2(B)(4).
11. See La. R.S. 19:2:2(B).
12. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).
13. See *Hess v. Wells Fargo Bank, N.A.*, 2013 WL 791494, at *5 n.6 (N.D. Cal. Mar. 4, 2013). The most useful USPAP rules to consider when critiquing a pipeline company's appraisal are Standards Rules 1-2(e)(iv), 1-3(b), 1-4(c)(iv), 1-5(b), and 2-2(a)(viii).
14. See, e.g., *F.D.I.C. v. Hoyle*, 2012 WL 4049808, at *5 (E.D.N.Y. Aug. 2, 2012), report and recommendation adopted, 2012 WL 4049950 (E.D.N.Y. Sept. 13, 2012).
15. *Exxon Pipeline Co. V. Hill*, 788 So.2d 1154, 1162 (La. 2001).
16. See, generally, *Boudreaux v. Bollinger Shipyard*, 2015-1345 (La.App. 4 Cir. 6/22/2016), 2016 WL 3421537.
17. See *Johnson v. Melton*, 03-1132 (La. App. 4 Cir. 2/4/04), pp. 5-7, 867 So.2d 804, 808-809 (citation omitted).
18. *Wingfield v. State, DOTD*, 2001-2668 (La.App. 1 Cir. 11/8/02), p. 9, 835 So.2d 785, 796; *Maddox v. Omni Drilling Corp.*, 96-01673 (La.App. 3 Cir. 8/6/97), p. 9, 698 So.2d 1022, 1027 (internal quotations omitted).
19. See La. Civ. Code art. 650; *Coguenhem v. Trosclair*, 137 La. 985, 991, 69 So.800, 802 (1915).
20. *Gulf States Utils. Co. V. Norman*, 183 So.2d 421, 426 (La.App. 3 Cir. 1966).
21. See, e.g., *Wingfield v. State*, 03-1740 (La.App. 1 Cir. 1/14/2004), 879 So.2d 766; *Arrington v. Galen-Med, Inc.*, 02-0784 (La.App. 3 Cir. 2/5/2003); 839 So.2d 429, 432; *Town of Krotz Springs v. Weinstein* (La. App. 3 Cir. 1981); 401 So.2d 664, 667.
22. *Town of Walker v. Stafford*, 01-2188 (La. App. 1 Cir. 2002), p. 5, 833 So.2d 349, 352.

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