



# THE POWER OF CHANGE

Under Mexico's new energy reforms, the right of way process is getting an overhaul

BY GUILLERMO MANNING

**In December 2013, Mexican President Enrique Peña Nieto signed a package of laws that will serve as a rule book for comprehensive energy reform designed to lure billions of dollars in investment to the country's ailing oil, gas and electricity sectors. The acquisition of right of way in Mexico has historically been an element of both grievance and dissatisfaction between the affected landowners and the owners of energy projects. Both parties have faced issues related to surface occupation or access to the project facilities. With the recent passage of energy reforms, it has become more important than ever to strengthen the legal contracts that govern right of way acquisitions and the construction of energy projects.**

When it comes to the field of hydrocarbons, whether we are talking about extraction, refining, imports, distribution, transport or storage, pipelines are the most suitable, safe, cheap and effective transportation system. In Mexico, these systems must have governmental authorization, which could come in the form of an agreement, a permit or a concession, depending on the case. In this sense, rights of way issues tend to be one of the most important material elements for the implementation of energy infrastructure projects. The reason is obvious—with no land base, the project simply cannot be implemented.

### Old and New Laws

Prior to the energy reforms, right of way acquisitions were regulated in accordance with local law. That meant that each state through which the transportation system passed could apply different local legislation. This situation regularly opened the door to a variety of legal interpretations that would complicate and hinder the overall right of way acquisition process. The Federal Civil Code of 1928, which previously served as the basis of the individual state civil codes, did not address right of way implications for the affected property owners. In those days, power and oil industries were being developed and the legislation aimed to support its growth. The 1928 Code and similar state civil codes stipulated that legal easements of public interest were to be governed by special regulations of the regulated subject matter. The result of this provision was that right of way practitioners were forced to refer to specific laws that had gaps and imprecisions. Those special regulations provided that the occupation of land, whether private property or communal, should prevail since it was in a public utility interest. Those laws didn't set forth the specific mechanisms as to how to establish easements and other occupation legal figures. However, with the recent implementation of energy reforms, which opened up the national energy market to private investment, the federal government is taking steps to fix these omissions and inaccuracies.

The first breakthrough resulting from these energy reforms is a clearer definition of which jurisdiction applies to hydrocarbons, including real estate rights. By jurisdiction, we must understand the exclusive right to construe, implement and enforce the applicable law. In this regard, Article 95 of the Hydrocarbons Law that passed in 2014 specifically emphasizes that this industry falls exclusively under federal jurisdiction, and accordingly, only the federal government can dictate the technical provisions and regulation framework in this area. This provision effectively neutralized the confusing negative interference of the various state laws and state judges regarding real estate rights.

### Respecting Local Cultures

A large number of different indigenous ethnic groups live within Mexico, and they all live according to their own beliefs, practices and traditions. These communities would often protest

infrastructure projects, arguing that they interfered with their practices and customs, and invaded their ceremonial areas. In addition, Mexico still has a large number of people living in poverty who are particularly vulnerable to the type of disruption that occurs with the implementation of energy projects.

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Dealing sensitively with these socio-economic concerns would frequently cause delays in the acquisition process and/or execution work, resulting in additional costs and causing projects to go over budget. This is why the new energy reform laws also call for social impact studies to be conducted prior to the acquisition process. This allows us to detect in advance those sensitive regions whose economic status could be a problem not only for the acquisition of rights of way, but also eventually for the execution of the work. In some cases, even if we had obtained approval from the property owners, larger social protest can still hinder a project. This is why it has become essential to prepare a social impact assessment.

### Fair Compensation

People affected by the development of certain energy infrastructure projects have claimed that compensation or payment related to right of way acquisition has been insufficient. Prior to the new laws, once a company obtained a master appraisal indicating land value and compensation of non-land assets, the property executors or managers would be advised to lower the purchase price well below the appraised value. Not surprisingly, this practice caused a number of protests that obstructed construction as a way to pressure companies to renegotiate compensation. To avoid these situations, the new Hydrocarbon

Law stipulates that the minimum value offered for the acquisition of rights must be the market value based on an appraisal produced either by a government agency for appraisal and management of national assets (INDAABIN) or expert appraisers with a postgraduate diploma in valuation that are INDAABIN-approved. This practice establishes guidelines for setting standard criteria for prices and avoids wildly fluctuating valuations and abuses to vulnerable populations. This measure is intended to resolve the claims of unfair compensation and also allows projects to move forward without protest, costly delays or civil law actions on grounds of the vulnerability of one of the involved parties.

### Protecting All Parties

Another result of the energy reform is the requirement of judicial approval on all legal contracts. This may be done through Civil District Judges when the contract is held with the owner of private property, or before a Unitary Agrarian Magistrate, when the affected pieces of land are from an “ejido,” which is a rural agrarian community. It is important to bear in mind that in Mexico, there are various kinds of land tenure. Just like the rest of the world, we have private property rights where the landowner can do whatever they want with their land. In this situation, the landowner has the right to enter into contracts with no interference and does not need authorization from third parties.

A common type of land tenure is called social property, which occurs when the State gives land to a specific community for their own use. This land belongs to the entire community, or ejido, though parcels or plots of lands that can be assigned to its members for individual utilization, but only under certain restrictive rules.

Under these rules, an “ejidatario” (owner of an ejido parcel) cannot sell their parcel until the ejido unanimously accepts the transition of the communal property into private property. However, while still under the community ownership, an ejidatario can legally allow the occupation of the land, but only for a period that does not exceed 30 years. This is because these agrarian communities are considered a vulnerable group that can easily fall under exploitation, and therefore require special legal protection.

Because of the judicial qualification requirement, we can better ensure that the required contractual elements are followed and that all parties will be justly compensated according to fair market value. Judicial review also certifies that vulnerable groups have been consulted, and that the contract does not contain burdensome, abusive or confusing clauses. After analyzing the contract, the judge declares it “res judicata.” This means that it has full force and is not subject to an ordinary appeal. This determination of res judicata gives the project developer the security of having a sound legal title. This legal title is valid against any claim, regardless of whether the claim comes from the former landowner or from a third party.

### The Foundation of Development

With the new energy reforms and updated laws governing the right of way acquisition process for energy projects, having a solid legal contract prepared by a skilled eminent domain attorney is more important than ever. While many different types of right of way acquisition professionals are involved in any project, the legal contract is what allows project developers to obtain a public deed and move forward with their projects in a fair and legal manner. The contract is the foundation that will allow a developer to build or construct on a piece of land. More importantly, it will serve as the basis for obtaining government permits or construction authorizations, as well as be the background documentation for project financing. It is fair to conclude that, at the end of the road, right of way and land acquisition in Mexico hinges on the legal aspects. ☘



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