



PIPELINE RIGHTS OF WAY IN LOUISIANA

A particular approach to acquisition

BY GERALD F. SLATTERY, JR.

An expanded version of this article was published in Volume VI, Issue No. 1 (Fall 2017) of the Journal of Energy Law and Resources, a student-run journal of LSU Law School. The full article is available in the Monocle Digital Library on IRWA University and is a staple in our C230: Oil/Gas Land Basics & Related Surface Rights Issues.

In Louisiana, pipeline companies can approach the acquisition of rights of way methodically. Louisiana's statutes set forth a fairly straightforward procedure for the acquisition of rights of way, showing a preference for negotiation rather than litigation, and providing for relatively quick decision-making by the courts if expropriation litigation does become necessary.

Expropriation Powers

The power of a pipeline company to expropriate private property derives from the eminent domain powers of the sovereign—the State of Louisiana. Because pipeline companies are deemed by law to serve a public purpose, they may exercise the sovereign's right to take private property in order to accomplish a public purpose, provided that the owner of the property taken is compensated fairly. According to article I, section 4 of the 1974 Louisiana Constitution, it is required that the owner of expropriated property be compensated “to the full extent of his loss.” According to the Louisiana Supreme Court, this means that the owner “should be put in as good a position pecuniarily as he would have been had his property not been taken.” The procedure a pipeline company must follow when exercising its legal authority to expropriate, as well as how disputes regarding the exercise of that authority and the payment of compensation are resolved, are addressed in detail in Louisiana statutes.

“ IF THE
LANDOWNER OR
THEIR COUNSEL
UNDERSTANDS
THIS RULE OF
VALUATION,
THE LIKELIHOOD
OF ACQUIRING
THE PROPERTY
BY AGREEMENT
RATHER THAN
BY LITIGATION IS
ENHANCED.

”

Expropriation Procedure

Title 19 of the Louisiana Revised Statutes, entitled “Expropriation,” sets forth the steps that a pipeline company must follow as it proceeds toward acquiring a right of way. The statutes in Title 19 require that the pipeline company provide an appraisal and other information to the landowner, make an offer for the property and provide information about the landowner’s and the company’s legal rights. The statutes obviously are intended to encourage the acquisition of the right of way by means of an agreement, so that a lawsuit will not be necessary.

If a lawsuit does become necessary, issues such as the pipeline company’s authority to expropriate, whether the proposed taking will serve a public purpose, and whether the taking is necessary will be decided by the judge, not by a jury. The only issue that may be determined by a jury is the compensation to be paid to the landowner, which cannot include any enhancement of the value of the property attributable to the proposed taking. The trial of an expropriation proceeding is heard by preference over other matters on the court’s docket, and is required to be conducted with the greatest possible dispatch.

Valuation Principles

When the pipeline company sends its appraisal of the property to the landowner, it must inform the landowner which methodology the appraiser employed—market, cost or income approach—and must make an offer to purchase the property, in a specific amount not less than the lowest appraisal or evaluation. In *Exxon Pipeline Co. v. Hill*, 788 So.2d 1154 (La. 2001), the Louisiana Supreme Court explained the different appraisal techniques: the market approach derives the value of the property by examining sales of comparable properties; the cost approach derives value by estimating the replacement

cost of any improvements, deducting estimated depreciation, and adding the market value of the land; and the income approach derives value by processing anticipated net income to calculate the amount of capital that would produce the net income. The court stated that it prefers the market approach because it is, in most cases, likely to produce more accurate results.

The fair market value of the property must be determined, and this concept in turn is related to another concept, “highest and best use.” Generally, the highest and best use of a property is the most profitable use to which it can be put by reason of its location, topography and adaptability. This sets the value for which the landowner is entitled to be paid and, very importantly, it is presumed to be the current use of the property. The burden of proving that the highest and best use of the property is different from its current use is on the landowner, not the pipeline company.

The legal presumption that the current use of a property is its highest and best use makes sense. The presumption is based on the reasonable premise that the landowner, acting in their self-interest, is using the land in the most profitable way. Additionally, the presumption prevents courts from wandering into speculation when determining the value of expropriated property. If the landowner or their counsel understands this rule of valuation, the likelihood of acquiring the property by agreement rather than by litigation is enhanced.

Burden of Proof at Trial

If the pipeline company cannot reach an agreement with the landowner and must file suit to expropriate the property, it will have the burden to prove (i) that it is authorized by statute to expropriate private property, (ii) that the property it

intends to expropriate will be used for a public purpose, (iii) that it is necessary that the property be expropriated and (iv) the amounts the pipeline company proposes to pay the landowner for the value of the property taken, for the decrease (if any) in the value of the landowner's remaining property, and for any other damages.

The legal authority of pipeline companies to expropriate property is found in Title 19 of the Louisiana Revised Statutes, for natural gas pipelines, and in Title 45, for "petroleum" (broadly defined) pipelines. Federally regulated interstate pipeline companies also have powers of expropriation. On the question whether the proposed taking will serve a public purpose—in other words, whether the pipeline company will be acting as a "common carrier" when it transports product through the proposed pipeline—Louisiana courts have not taken a rigid approach. Even a relatively short pipeline segment, integrated into a larger system of pipelines, can be held to serve a public purpose if it is part of a larger system resulting in advantages to the public at large.

The necessity of the proposed taking relates to the necessity of the expropriation itself, not the necessity of a specific location. If the pipeline company proves that expropriation is necessary to accomplish a public purpose, Louisiana courts will tend to defer to its decisions about the extent and location of the property to be taken. So a "not in my backyard" defense alone is not likely to succeed.

The all-important issue of compensation requires a determination of the value of the property that will be taken (taking damages), as well as the diminution, if any, in the value of the landowner's remaining property caused by the taking or the use of the taken property (severance damages) and any other

damages. For taking damages, the most important valuation principle is that "the value of land is fixed with reference to the loss sustained by the owner, not as enhanced by the purpose for which it was taken," as emphasized by the Louisiana Supreme Court in the Exxon Pipeline Co. v. Hill decision.

Severance damages—another component of the compensation owed to a landowner whose property has been expropriated—are defined as a diminution in the value of the landowner's remaining, unexpropriated property caused by the taking of the expropriated property or the use to which the expropriated property is put. As an example of severance damages in a specific context, one Louisiana court has recognized that "gasoline pipelines are dangerous and have the psychological effect of deterring prospective purchasers which has the effect of impairing the market value of the [remaining] property."

Post-Trial Issues

In expropriation lawsuits, as in other lawsuits, the judgment following trial may address attorney's fees and costs. If the pipeline company is successful, but the compensation awarded is higher than the best offer the pipeline company made before filing suit, the court may award reasonable attorney's fees to the landowner. Conversely, if the highest offer made by the pipeline company before the lawsuit is higher than the final compensation award, the defendant landowner is potentially liable not for the pipeline company's attorney's fees, but only for all or a portion of the costs of the expropriation proceedings.

To whom does the pipeline company pay the compensation that has been awarded? If a mortgage certificate on the affected property shows no mortgages, liens or encumbrances, the pipeline company pays the

landowner directly and becomes the owner of the adjudicated property rights. But if there are mortgages, liens or encumbrances of record, the pipeline company pays the compensation award into the registry of the court, so it can ultimately be distributed to the mortgagees and privilege holders according to their priority. In that event the adjudicated property passes to the pipeline company free and clear of all such encumbrances. And any appeal from the trial court's judgment will not delay the effect of judgment while the appeal is pending.

In Summary

Title 19 of the Revised Statutes, as elucidated by Louisiana courts, provides clear guidance to pipeline companies and allows expropriation, whether by agreement or by litigation, to be accomplished expeditiously. The statutes generally strike an appropriate balance between promoting the public purpose inherent in expropriation and protecting the property rights of the landowner. ☛



Gerald F. Slattery, Jr. is a shareholder in the New Orleans-based law firm of Slattery, Marino & Roberts. He represents corporations in the upstream and midstream sectors of the oil and gas industry, primarily in litigation matters. He has published on various aspects on oil, gas and mineral law, and has lectured at numerous energy industry-sponsored seminars and programs. He received a Juris Doctor degree from Tulane Law School in 1978, where he was a Senior Fellow and Managing Editor of the Tulane Law Review.