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## ARTICLES

### **“JUST COMPENSATION” OR JUST A WINDFALL? DO SALES OF PIPELINE SERVITUDES PROVIDE VALID, RELIABLE COMPARABLES FOR DETERMINATION OF JUST COMPENSATION IN PIPELINE EXPROPRIATION?**

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A representative of a pipeline company approaches a landowner to negotiate the right to install a pipeline on the landowner's property. The representative tells the landowner that his company is a common carrier pipeline company with the right to expropriate, but would prefer to come to an amicable agreement.

The representative explains that the servitude proposed across the landowner's property will encumber approximately one acre of land. The representative explains that recent property sales indicate that land similar to the landowner's property typically sells for about \$5,000.00 an acre. Nevertheless, the pipeline company offers the landowner \$10,000.00 for the servitude to install and operate a pipeline on his

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property.

“I appreciate you coming by,” responds the landowner, “but that simply is not going to be enough money. You see a different pipeline company put a pipeline on my property last year and paid me \$20,000.00 for a similar servitude. That’s what I expect you to pay me.”

“But, sir, all that my company is required to pay you for is the loss you sustain by this servitude, not what someone else has paid you. All you get is what the courts in this state call ‘just compensation’,” says the representative.

Who is correct—the landowner or the pipeline company representative? This Article answers that question by explaining the limited circumstances under which it is appropriate to rely on sales of similar pipeline servitudes to determine just compensation in a pipeline expropriation case. First, this Article will explain general principles of just compensation. Second, it will discuss the limited circumstances under which it is appropriate to rely on similar sales of pipeline servitudes to expropriating entities to determine just compensation. Third, the Article will discuss the flaws of relying on sales of servitudes to non-expropriating entities to determine just compensation.

### I. The Basics of Just Compensation

Under certain circumstances involving public purpose and necessity, private entities have the power to expropriate needed property<sup>1</sup> upon payment of “just compensation.”<sup>2</sup>

The statutory authority for the determination of just compensation is two-fold. Louisiana Revised Statute section 19:9 provides:

A. In estimating the value of the property to be expropriated, the basis of assessment shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work.

B. The owner shall be compensated to the full extent of his loss. The court shall include in its consideration the difference

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1. Typically, in pipeline expropriations, a servitude is sought rather than full ownership.  
2. See LA. REV. STAT. ANN. §§ 19:1–14 (West 1979 & Supp. 1999).

between the rate of interest of any existing mortgage on an owner-occupied residence and the prevailing rate of interest required to secure a mortgage on another owner-occupied residence of equal value.<sup>3</sup>

Louisiana Constitution Article I, Section 4 provides, in pertinent part, that “[p]roperty shall not be taken or damaged by any private entity authorized by law to expropriate, except . . . with just compensation paid to the owner. . . . In every expropriation . . . the owner shall be compensated to the full extent of his loss.”<sup>4</sup>

“Full extent of the [landowner’s] loss” is synonymous with “just compensation.”<sup>5</sup> An award of just compensation should give the landowner the equivalent, in money, of his loss.<sup>6</sup> It should put the landowner “in as good a position pecuniarily as he would have been had his property not been taken.”<sup>7</sup> The goal is to make the landowner whole, not rich.<sup>8</sup>

Decades of Louisiana jurisprudence direct the fact finder to look at the value of the landowner’s entire property before the proposed taking and the value of the landowner’s entire property after the taking.<sup>9</sup> The difference between these two values is “just compensation” and consists of two components: 1) the fair market value of the land actually taken, and 2) any severance damages<sup>10</sup> sustained by the remainder of the property.<sup>11</sup> These two components of “just compensation” represent the pecuniary loss sustained by the landowner as a result of the proposed taking.

Both the expropriating entity and the landowner typically establish

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3. LA. REV. STAT. ANN. § 19:9 (West Supp. 1999).

4. LA. CONST. art. I, § 4.

5. *Id.*

6. *See State Dep’t of Transp. & Dev. v. Estate of Clark*, 432 So. 2d 405, 408 (La. App. 1st Cir. 1983).

7. *Marathon Pipe Line Co. v. Pitcher*, 368 So. 2d 994, 998 (La. 1979); *State Dep’t of Highways v. Ragusa*, 99 So. 2d 20, 21 (La. 1958).

8. “In expropriation proceedings, 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.” *Coleman v. Chevron Pipeline Co.*, 673 So. 2d 291, 298 (La. App. 4th Cir. 1996) (citing *U.S. v. Chandler–Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913)).

9. *See, e.g., State Dep’t of Transp. & Dev. v. Taylor*, 461 So. 2d 1282, 1283 (La. App. 3d Cir. 1985).

10. To determine if any severance damages are warranted, the trier of fact compares the value of the property *not* taken prior to expropriation and the value of that property after the expropriation. *See id.* The difference, if any, is known as severance damages. *See id.*

11. *See State Dep’t of Transp. & Dev. v. Mayet*, 521 So. 2d 671, 672 (La. App. 1st Cir. 1988).

before and after fair market values of the property through testimony of real estate appraisers. The most reliable and approved method for determining the fair market value of immovable property is to consider sales of similar property in the vicinity, adjusting them to compensate for their good and bad features with regard to the subject property.<sup>12</sup> These sales are referred to as “comparables” in appraisal jargon. The fair market value of property taken is the price which would be agreed upon between a willing and informed buyer and a willing and informed seller under usual and ordinary circumstances.<sup>13</sup>

It is rare in property appraisal to find a sale identical in every respect to the property being appraised. The ideal situation would be a tract of land, recently sold, identical in size, shape, features, and adjacent to the tract of land being appraised. Because a perfect comparable is rare, appraisers must often make adjustments to the sale prices they gather to account for these factors. Using these comparables, the appraiser determines the value of the landowner’s property before and after the proposed servitude to arrive at just compensation.

## II. Sales of Servitudes to Expropriating Entities as Comparables

A pipeline company with the right of expropriation will often pay a landowner in excess of “just compensation” if a conventional servitude is granted. Landowners sometimes expect the same inflated compensation from future pipeline companies seeking servitudes across their property and will rely on the amounts paid by previous companies as “comparables” for determining “just compensation.” However, the weight of the jurisprudence dictates that only in limited circumstances can these “comparables” be used.<sup>14</sup>

The Louisiana Third Circuit Court of Appeal jurisprudence on this issue is the most developed<sup>15</sup> and holds that use of servitude transactions

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12. *See id.*

13. *See* State Dep’t of Highways v. Hayward, 150 So. 2d 6, 8 (La. 1963).

14. *See infra* text accompanying note 46.

15. *See infra* text accompanying notes 25–26 and 37–39 for a discussion of how the First and Fourth Circuits have addressed this issue. The Second and Fifth Circuits have not yet addressed this issue.

are appropriate only in the absence of other comparable sales of land.<sup>16</sup> In particular, *Gulf States Utilities Co. v. Norman* provides an excellent example of what constitutes an “absence of other comparable sales of land.”<sup>17</sup> In *Norman*, the real estate appraisers were unable to locate any recent comparable land sale.<sup>18</sup> One appraiser noted that there were no comparable land sales for thirty or forty years because property in the area did not change hands often.<sup>19</sup> Finding no comparable land sales, the court relied upon pipeline servitude sales, noting that they were “the only recent sales of comparable property used by any of the experts in estimating the value of the property taken.”<sup>20</sup>

In *Columbia Gulf Transmission Co. v. Rosteet*, the trial judge adopted the opinions of the landowner’s expert, stating:

[T]he only real comparable which we should seek in this situation is sales of right of ways for similar uses, and I must add under similar situations. I say that for this reason. We do not have here a landowner with land in an untouched, pristine state. In fact, it has a pipeline on it already. In dealing at arm’s length with the pipeline company the land owner here offers not just a distance between two points which must be traversed, but he offers a piece of land which has on it a length of pipe installed and functional, which connects the rest of the pipeline, and this cannot be ignored in determining the value of the taking.<sup>21</sup>

The Third Circuit reversed, stating:

We disagree with the reasoning of the trial judge. The jurisprudence of this state is to the contrary. We recently addressed this issue . . . . “The trial court erred in its determination that the highest and

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16. See *Louisiana Resources Co. v. Greene*, 406 So. 2d 1360, 1368 (La. App. 3d Cir. 1981); *Columbia Gulf Transmission Co. v. Rosteet*, 389 So. 2d 778, 779 (La. App. 3d Cir. 1980); *Louisiana Intrastate Gas Corp. v. Edwards*, 343 So. 2d 1166, 1168 (La. App. 3d Cir. 1977); *Michigan Wis. Pipeline Co. v. Fruge*, 227 So. 2d 606, 610 (La. App. 3d Cir. 1969); *Gulf States Utils. Co. v. Norman*, 183 So. 2d 421, 426 (La. App. 3d Cir. 1966).

17. *Norman*, 183 So. 2d at 428. Although *Norman* is not a pipeline case, it is the first in a series of Third Circuit decisions addressing the use of servitude sales as comparables.

18. See *id.* at 424–25.

19. See *id.* at 425.

20. See *Norman*, 183 So. 2d at 426–28. Although not specifically identified as additional prerequisites for the use of pipeline sales as comparables, *Norman* noted that the experts actually relied on the servitude transactions as comparables and that the comparables used were “a series of transactions [to] indicate a general market value of the property rather than merely a special value to a particular taker in a single transaction.” *Id.* at 426, 431.

21. *Rosteet*, 389 So. 2d at 779.

best use of the property taken was for pipeline rights-of-way purposes. The jurisprudence of this State is to the contrary.”<sup>22</sup>

The *Edwards* court rejected valuation based on sales of similar servitudes, stating “[a]mple comparable sales were available . . . to show the fair market value of the property.”<sup>23</sup> The court in *Louisiana Resources Co. v. Greene* also rejected the landowner’s contention that sales of other pipeline rights-of-way should be used when comparable land sales exist.<sup>24</sup>

The First Circuit addressed this issue in *ANR Pipeline Co. v. Succession of Bailey*.<sup>25</sup> Following the Third Circuit, the *ANR Pipeline* court recognized the “general rule” that “where other comparable sales are available to show the fair market value of land expropriated, comparable sales of similar servitudes to expropriating authorities are not controlling.”<sup>26</sup> It does not, however, appear that the *ANR* court made a finding of “an absence of comparable land sales” as required by the Third Circuit rule it followed.<sup>27</sup> As such, the court may have omitted an essential step in the analysis of just compensation.

These authors stress the importance of the Third Circuit’s requirement that there be a finding that no comparable land sales exist prior to relying on servitude sales to determine value. It is important to keep in mind that the use of comparable sales of any kind is but a tool to determine the full extent of the landowner’s loss. On this, all courts agree.<sup>28</sup> The ultimate objective is to determine the extent of the landowner’s loss.

The Third Circuit undoubtedly realized that sales of servitudes to expropriating authorities do not give the most accurate indication of the value of the underlying land, and thus, the loss sustained by the landowner.<sup>29</sup> As such, the court severely restricted the circumstances under which these transactions could be used. These authors will attempt to explain why sales of servitudes are suspect when used for valuation purposes.

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22. *Id.* (quoting *Edwards*, 343 So. 2d at 1168).

23. *Edwards*, 343 So. 2d at 1168.

24. *See Greene*, 406 So. 2d at 1367.

25. 558 So. 2d 689 (La. App. 1st Cir. 1990).

26. *Id.* at 691 (citing *Norman*, 183 So. 2d at 428).

27. *See id.*; *see also Fruge*, 227 So. 2d at 610.

28. *See Norman*, 183 So. 2d at 426 (summarizing then current Louisiana jurisprudence); *see also, e.g., Succession of Theriot v. Southern Pac. Transp. Co.*, 560 So. 2d 861 (La. App. 3d Cir. 1990).

29. *See Edwards*, 343 So. 2d at 1168.

As a practical matter, information on servitude sales may be difficult for a real estate appraiser to gather. Typically, servitude grants filed in the conveyance records contain a recitation of only nominal consideration, rather than the actual amount paid. Thus, determination of actual value may require that the landowners be contacted, which can be difficult.

Additionally, pipeline companies with the authority to expropriate may pay a landowner more than that landowner would otherwise receive under traditional definitions of “just compensation.” Several factors can influence the amount a landowner is ultimately paid for a conventional servitude. The value of the land within the servitude may be only one of many factors.<sup>30</sup>

First, the price paid may include compensation for severance damages. The pipeline company will usually pay a landowner a lump sum price for a servitude across his property without designating the various components of that price. If a portion of the landowner’s property not encumbered by the servitude is diminished in value, a significant portion of the price may be for severance damages.

Second, the price paid for a conventional servitude may contain a portion attributable to good will. Negotiations for a conventional servitude with the threat of expropriation are often contentious. The expropriating entity may pay a premium to the landowner, who knows the entity can “take” the land if needed, to make granting the servitude more palatable. Additionally, the authority may pay all landowners along the servitude route the same price per acre even though their land may have different values. This also promotes good will as the authority is not favoring one landowner over another or having to explain differences in price.

Third, the pipeline project is often time sensitive. The quicker the project is completed, the sooner the pipeline can be in service, transporting product for the public and generating income for the expropriator. The expropriator may pay the landowner a premium to avoid protracted negotiations and/or time consuming litigation that would postpone the completion date of the project.

Fourth, the price paid to a landowner for a conventional servitude may include a premium to avoid litigation. Prosecution of an expropriation

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30. Other factors include severance damages, good will payments, expediency, avoidance of litigation, and others.

suit can be expensive. As with all lawsuits, it has a risk of failure. The pipeline company may pay more to avoid these added costs and prevent the possibility of an adverse judgment.

Finally, the price paid for a conventional servitude might include a host of negotiated items, including attorney's fees, a temporary servitude of varying duration for construction activities, and anticipated construction damages, just to name a few.

The price negotiated for a conventional servitude, if it can be ascertained, can be drastically inflated over the loss sustained by the landowner and, therefore, have no bearing on just compensation. If prices paid by expropriating entities for pipeline servitudes are used as comparables, they can only be accurately used if adjustments are made for the above factors. As a practical matter, these factors can only be determined through interviews with both parties to the transaction. Only after discounting for these extraneous factors might a sale of a pipeline servitude to an expropriating entity have some bearing on just compensation. To do so is extremely difficult and not particularly reliable. For these reasons, the jurisprudence of the Third Circuit correctly restricts the use of sales to expropriating entities as comparables.

### III. Sales of Servitudes to Non-Expropriating Entities as Comparables

While it may be appropriate under limited circumstances to rely on sales of servitudes to expropriating entities, these authors believe it is never appropriate to rely on sales of servitudes to non-expropriating entities. However, one Fourth Circuit decision allowed the use of sales to non-expropriating entities to determine just compensation owed by an expropriating entity.

In *Louisiana Intrastate Gas Corp. v. Gulf Outlet Lands, Inc.*,<sup>31</sup> the Fourth Circuit upheld the trial court's decision to award just compensation based upon the amounts paid for servitudes by a pipeline company that did not have the right to expropriate.<sup>32</sup> In *Gulf Outlet Lands*, Louisiana Intrastate Gas Corporation ("LIG"), a pipeline company with the right to expropriate, sought a pipeline servitude across the landowner's property.<sup>33</sup> The only issue tried was the amount of just compensation

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31. 542 So. 2d 705 (La. App. 4th Cir. 1989).

32. See *Gulf Outlet Lands*, 542 So. 2d at 706.

33. See *id.*

owed.<sup>34</sup> LIG appealed the amount awarded, arguing that just compensation should have been determined using comparable land sales rather than sales of pipeline rights-of-way.<sup>35</sup> It also argued that sales to non-expropriating entities should not have been used because “the purchaser was not a ‘willing buyer’ and may have been forced to pay above-market rates because it lacked the power to expropriate.”<sup>36</sup>

The Fourth Circuit recognized the well-settled principle that the most reliable and approved method for determining fair market value is to consider sales of comparable property.<sup>37</sup> The court also recognized that when comparables do not provide an accurate evaluation, the courts are free to use another method.<sup>38</sup> Nevertheless, without finding that there was an absence of comparable land sales, the Fourth Circuit concluded that the trial court did not err in using evidence of amounts paid for other pipeline servitudes and did not err in using sales to non-expropriating entities.<sup>39</sup>

It is the opinion of these authors that *Gulf Outlet Lands* departs from long-standing Louisiana jurisprudence without a basis for doing so. Some courts have recognized that acquisitions of pipeline rights-of-way by other expropriating entities may provide some evidence of value when there is an absence of available comparable land sales.<sup>40</sup> Those courts have done so only after finding that there was a lack of available comparable land sales.<sup>41</sup> No case since *Gulf Outlet Lands* has ever permitted the use of acquisitions by non-expropriating entities to determine just compensation for a servitude being taken by expropriating entities.<sup>42</sup>

At least one other court prior to *Gulf Outlet Lands* mentioned the use of sales to non-expropriating entities as a comparable for determining just compensation owed by an expropriating entity—the Third Circuit

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34. *See id.*

35. *See id.*

36. *See id.*

37. *Gulf Outlet Lands*, 542 So. 2d at 706.

38. *See id.*

39. *See id.* at 707.

40. *See, e.g., supra* notes 14–20 and accompanying text.

41. *See supra* notes 19–21 and accompanying text. *But see supra* notes 26–28 and accompanying text (discussing *ANR Pipeline Co.*).

42. In fact, *Gulf Outlet Lands* has never been discussed by another court. Only one other court has ever even mentioned *Gulf Outlet Lands*, and that was in a string cite in a case not involving expropriation. *See* *Erich Sternberg Realty Co. v. Louisiana Tax Comm’n*, 560 So. 2d 868, 882 (La. App. 1st Cir. 1990).

case of *Gulf States Utilities Co. v. Norman*.<sup>43</sup> While *Norman* does mention that two of the four comparables offered by the landowner's appraiser were to non-expropriating authorities, it appears the court did not rely on those sales.<sup>44</sup> Throughout the opinion, the court recognized that sales of pipeline rights-of-way to other expropriating entities may be considered in determining value, although such a sale is not controlling; no mention was made of sales to non-expropriating authorities.<sup>45</sup> Finally, the court concluded that

[i]n accord with the jurisprudence, this court has in similar circumstances, especially in the absence of more reliable comparable transactions, approved the use of comparable sales of conveyances to expropriating authorities as an aid to determining the actual market value of property taken. We see no reason why we should not do so here.<sup>46</sup>

Accordingly, *Gulf Outlet Lands* stands alone as the only case in Louisiana jurisprudence that recognizes sales to non-expropriating authorities as comparables. *Gulf Outlet Lands* departed from Louisiana jurisprudence by using the purchase of a servitude by a non-expropriating entity as a comparable and by failing to find a lack of comparable land sales before erroneously relying on that purchase.<sup>47</sup>

The price paid by a non-expropriating entity is not a reliable measure of the true market value of the property. Without the right of expropriation, a company seeking to construct a pipeline on a landowner's property is at the mercy of the landowner. If the landowner refuses to grant the company a servitude, the company has no recourse. The company's only options are to offer more money, abandon the project, or choose a new route. Rarely will the company abandon the project. The selection of a new route around the problem landowner is not a likely alternative either. First, it could be very expensive. Second, it can result in a longer route with additional costs and may result in not using servitudes already purchased. Finally, the selection of a new route will likely substantially delay the scheduled start-up date and add to the

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43. 183 So. 2d 421, 426 (La. App. 3d Cir. 1966).

44. See *id.* at 429-30.

45. See *id.* at 427-28, 430.

46. *Id.* at 430 (emphasis added) (citations omitted).

47. See *Gulf Outlet Lands*, 542 So. 2d at 707.

financial loss.<sup>48</sup>

Thus, the only viable option for the company is to pay whatever the landowner demands. That amount represents the value to the non-expropriating company and not the loss sustained by the landowner.<sup>49</sup> Obviously, this amount clearly does not represent fair market value, and its use as a comparable to determine just compensation is of little or no value.<sup>50</sup>

#### IV. Conclusion

The Third Circuit has established that sales of pipeline servitudes can be considered as some evidence of just compensation after a finding that there are no comparable land sales available. Because of the suspect nature of servitude sales, these authors believe such a finding is an essential prerequisite. Even then, all of the factors that contributed to the price paid for the comparable servitude must be discounted to accurately reflect fair market value before determining just compensation. Because of the inherent unreliability of prices paid by non-expropriating entities, sales of servitudes to non-expropriating entities should not be used to assist in the determination of just compensation.

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48. Most pipeline projects must obtain certain permits. If the route changes, permits often must be amended. Depending on the location of the line, this process may involve the Corps of Engineers, Environmental Protection Agency, Department of Natural Resources, Department of Environmental Quality, United States Department of the Interior, Fish and Wildlife Services, State Department of Wildlife and Fisheries, Coastal Zone Management, and any parish or local bodies or agencies.

49. Therefore, its use to determine just compensation violates the principle that the value of land in expropriation proceedings be fixed with reference to the loss sustained by the owner, not as enhanced by the purpose for which it is taken. *See Coleman*, 673 So. 2d at 298.

50. This is in accord with the principle that "an isolated sale for a price seriously out of line with other comparable sales in the area must be viewed as having little value in fixing values and must be given little weight." *Gulf States Utils. Co. v. Hatcher*, 184 So. 2d 326, 329 (La. App. 1st Cir. 1966).