

**PIPELINE RIGHT OF WAY EXPROPRIATION
IN LOUISIANA**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BASIC PRINCIPLES OF EXPROPRIATION	2
A. What is Expropriation, and Who Can Do It?	2
B. Constitutional and Statutory Bases for Expropriation	2
1. United States and Louisiana Constitutions	2
2. Louisiana Revised Statutes 19:1 Et Seq.....	4
3. Louisiana Revised Statutes 45:251 Et Seq.....	7
III. EXPROPRIATION PROCEDURE, FROM OFFER TO JUDGMENT	8
A. Appraisal and Offer to Landowner: “Highest and Best Use”	8
B. Before Filing the Petition.....	12
C. Trial of an Expropriation Case.....	14
1. Authority to Expropriate, Public Purpose and Necessity of Taking.....	14
2. Landowner’s Compensation: Value of Property Expropriated, Severance Damages and Other Damages	18
3. The Judgment: Adjudication of Property, Award of Compensation, and Perhaps Attorney’s Fees.....	23
D. Appeals	26
IV. THE <u>ST. JULIEN</u> DOCTRINE	26
V. CONCLUSION.....	30

PIPELINE RIGHT OF WAY EXPROPRIATION IN LOUISIANA

Gerald F. Slattery, Jr.¹

I. INTRODUCTION

In Louisiana, the power to expropriate private property for a public use, which is one of the incidents of the state's sovereignty, has been granted to pipeline companies that transport natural gas and liquid petroleum products under circumstances deemed to serve a public purpose. The pipeline companies may exercise this power only in consonance with constitutional principles striking a balance between the public good and individual rights, and only in compliance with procedural requirements that effectuate and protect those principles.

This paper discusses the power of expropriation of rights of way that pipeline companies in Louisiana may exercise. The paper first addresses the concept of expropriation, the competing principles that it implicates, and the statutes that allow pipeline companies to expropriate property. It then discusses the procedures that must be followed and the substantive issues that must be decided in expropriation proceedings. These issues include the authority to expropriate; the public purpose and the necessity of the proposed taking; the landowner's compensation, which includes taking damages, severance damages and other damages; and judgments and appeals. The goal of this paper is to provide the reader with a basic understanding of the principles of expropriation by pipeline companies and how the power of expropriation may be exercised.

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A 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.

II. BASIC PRINCIPLES OF EXPROPRIATION

A. What Is Expropriation, and Who Can Do It?

Under Louisiana law, “[t]he term ‘expropriation’ . . . is practically synonymous with the term ‘eminent domain.’ Expropriation means the right to take private property for public purpose and utility upon the payment first of just compensation.”² According to the Louisiana Fourth Circuit Court of Appeal, the right of a government to expropriate private property inheres in the very nature of government.³ Such a power of course does not inhere in private corporations, but by statute a government may extend its power of expropriation to certain private corporations that serve a public purpose.

In Louisiana, companies deemed to serve a public purpose include those engaged in “the piping and marketing of natural gas for the purpose of supplying the public with natural gas”⁴ and “common carrier pipe lines,” meaning those “engaged in the transportation of petroleum as public utilities and common carriers for hire.”⁵ These pipeline companies have the power to expropriate private property for use in the conduct of their business. The limits on this power are set forth in Louisiana’s constitution and statutes, as interpreted and applied by Louisiana courts.

B. Constitutional and Statutory Bases for Expropriation

1. United States and Louisiana Constitutions

The premise that the sovereign has power to expropriate privately owned property for

² *Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 200 So. 2d 428, 433 (La. App. 4th Cir.), writ refused, 203 So.2d 86 (La. 1967) (“no error of law”) (emphasis added). “Eminent domain” means “a right of a government to take private property for public use by virtue of the superior dominion of the sovereign power over all lands within its jurisdiction.” Webster’s Ninth New Collegiate Dictionary (1983) (emphasis added).

³ *Tennessee Gas*, note 2 above, at 433.

⁴ La. R.S. 19:2(5).

⁵ La. R.S. 45:251(1).

public purposes, and that that power is inherently limited by the rights of the individual, is recognized in general terms in the Fifth Amendment to the United States Constitution: “. . . nor shall private property be taken for public use without just compensation.”⁶ The power and the limits on its exercise have been addressed in a more detailed fashion in the 1921 and 1974 Constitutions of Louisiana. The 1921 Louisiana Constitution stated: “No person shall be deprived of life, liberty or property, except by due process of the law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid.”⁷

The 1974 Louisiana Constitution went into yet further detail, including replacing the concept of “just and adequate compensation,” which might have been subject to a stingy interpretation, with compensation to the owner “to the full extent of his loss”:

(A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

. . . .

(B)(4) Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.

(B)(5) In every expropriation or action to take property . . . a party has the right to trial by jury to determine whether the compensation is just, and the owner shall be compensated to the full extent of his loss. Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.⁸

⁶ U.S. Const. amend. 5.

⁷ La. Const. (1921), art. I, sec. 5 (emphasis added).

⁸ La. Const. (1974), art. I, sec. 4(A), (B)(4), (5) (emphasis added).

The 1974 Louisiana Constitution thus establishes that a private entity may not expropriate property unless it is “authorized by law” to do so; that the taking must be for a purpose that is both “public” and “necessary”; that the judge, not the jury, shall determine whether the purpose of the taking is public and necessary; and that a jury may determine the amount needed to compensate the owner of the expropriated property “to the full extent of his loss.” According to the Louisiana Supreme Court, “to the full extent of his loss” means that the owner “should be ‘put in as good a position pecuniarily as he would have been had his property not been taken.’ ”⁹ The procedure for the exercise of the legal authority to expropriate, and the resolution of disputes about that authority and the public purpose for a proposed taking, the necessity of the taking, and the compensation due the owner of expropriated property, are addressed in detail in Louisiana statutes.

2. Louisiana Revised Statutes 19:1 Et Seq.

Title 19 of the Louisiana Revised Statutes (entitled “Expropriation”) includes Part I (“General Provisions”) consisting of sections 1 through 16. These statutes set forth the steps that a private company with the power to expropriate must follow when it exercises that power. In the main the statutes are evenhanded, striking a balance between the power the expropriating entity needs in order to serve a public good and the private property rights of the individual. But the procedural requirements the statutes impose on the expropriating entity reveal a certain wariness toward the power to expropriate. That is a change from the communitarian, almost socialist approach in the distant precursor to the statutes, former article 2626 of the 1870 Louisiana Civil

⁹ State Dep’t of Highways v. Bitterwolf, 415 So.2d 196, 199 (La. 1982) (citation and internal quotations omitted), quoted in Coleman v. Chevron Pipe Line Co., 673 So.2d 291, 297 (La. App. 4th Cir.), writ refused, 681 So.2d 1259 (La. 1996) (emphasis added).

Code,¹⁰ which came close to suggesting that the individual owns property only at the sufferance of the government:

The first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses under the protection of the laws, any particular property, is tacitly subjected to the obligation of yielding it to the community, wherever it becomes necessary for the general use.¹¹

Section 1 of Title 19 expansively defines the property that is subject to expropriation, as meaning “immovable property, including servitudes and other rights in or to immovable property.”¹² Section 2 in relevant part grants to natural gas pipeline companies the power to expropriate¹³ and, by reference to section 251 of Title 45, grants the same power to pipeline companies transporting “petroleum” (generally meaning any liquid hydrocarbon) as common carriers.¹⁴

Section 2.1 of Title 19 addresses where to file a petition for expropriation, and what the petition must include.¹⁵ Section 2.2 shows the solicitude of Louisiana law for a person whose property might be expropriated. It sets forth detailed requirements that the expropriating entity must satisfy before it files a lawsuit. These include providing an appraisal and other information to the landowner, making an offer for the property, providing information about the landowner’s and the expropriating entity’s legal rights, and, not less than thirty days before filing a suit, providing a letter identifying the purpose for the proposed acquisition and the compensation to be

¹⁰ Act 841 of 1993 repealed former article 2626 of the Louisiana Civil Code of 1870, and redesignated it as La. R.S. 9:3176. In turn, that statute was repealed by Act 702 of 2012, which also amended several statutes in Part I of Title 19 of the Revised Statutes.

¹¹ Former La. Civ. Code art. 2626 (1870), quoted in Tennessee Gas, note 2 above, 200 So.2d at 433 (referring to former article 2626 as “the sound legal principle[,] so well stated. . .”).

¹² La. R.S. 19:1.

¹³ Id. sec. 2(5).

¹⁴ Id. sec. 2(8). See text at notes 25-26 below.

¹⁵ Id. sec. 2.1.

paid, and including copies of all appraisals and detailed information about the location and boundaries of the property at issue.¹⁶

Section 4 of Title 19, consistent with Article I, Section 4 of the Louisiana Constitution, allows juries to determine compensation, with all other issues, such as authority to expropriate, public purpose, and necessity, to be decided by the judge.¹⁷ Section 8 commands that “[e]xpropriation suits shall be tried by preference and shall be conducted with the greatest possible dispatch.”¹⁸ To that end, if the property owner challenges any issue other than compensation, all such issues must be set for hearing within thirty days of the challenge, and the court must make a decision within five days thereafter. And if the expropriating authority wins on those issues, the compensation trial, subject to being extended for good cause shown, will be conducted within forty-five days thereafter.¹⁹

Section 9 of Title 19 deals with the compensation owed to the owner of expropriated property. It takes a sound approach toward valuation by not allowing any consideration, positive or negative, of the effect on value of the proposed post-expropriation use of the property: “[T]he basis of compensation shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any general or specific benefits derived by the owner from the contemplated improvement or work.”²⁰ Having thus cautioned against inflated or deflated valuations, the statute repeats the constitutional mandate that “[t]he defendant shall be compensated to the full extent of his loss.”²¹

¹⁶ Id. sec. 2.2.

¹⁷ Id. sec. 4.

¹⁸ Id. sec. 8A(1) (emphasis added).

¹⁹ Id. sec. 8A(2).

²⁰ Id. sec. 9A (emphasis added).

²¹ Id. sec. 9B. See 1974 La. Const. art. I, sec. 4(B)(5) (“[T]he owner shall be compensated to the full extent of his loss.”).

Section 12 of Title 19 authorizes, but does not require, an order that the property owner pay the costs of the proceedings if the final award in the expropriation proceeding is equal to or less than what the expropriating authority had earlier offered.²² And Section 13 allows only devolutive appeals from expropriation judgments, which appeals may include “[t]he whole of the judgment,” meaning both the judge-tried issues and the jury-tried issue of compensation.²³ Section 14 of Title 19, in relevant part, addresses the issue of a nongovernmental expropriating entity, such as a pipeline company, in good faith taking possession of a landowner’s property and constructing facilities upon it with the consent or the acquiescence of the owner. In such a circumstance, the owner is deemed to have waived his right to have received compensation prior to the taking, but he may file suit to determine “whether the taking was for a public and necessary purpose and for just compensation . . . as of the time of the taking of the property. . . .”²⁴

3. Louisiana Revised Statutes 45:251 Et Seq.

Title 19, section 2(5) of the Revised Statutes endows natural gas pipeline companies with expropriating powers. Part I (entitled “Petroleum Pipe Lines”) of Chapter 5 (“Pipe Lines”) of Title 45 (“Public Utilities and Carriers”) does the same for pipeline companies that are “common carriers” of “petroleum.”²⁵ Section 251 of Title 45 defines those terms and the term “pipe line” expansively, and section 254 provides that such “common carrier pipe lines” shall “have the right of expropriation with authority to expropriate private property under the state expropriation laws for use in [their] common carrier pipe line business. . . .”²⁶

²² Id. sec. 12.

²³ Id. sec. 13.

²⁴ Id. sec. 14B. This statute derives from the St. Julien doctrine, based on St. Julien v. Morgan L. & T. R. Co., 35 La. Ann. 924 (La. 1883). See text at notes 103-118 below.

²⁵ La. R.S. 45:251.

²⁶ Id. sec. 254.

III. EXPROPRIATION PROCEDURE, FROM OFFER TO JUDGMENT

A. Appraisal and Offer to Landowner: “Highest and Best Use”

A pipeline company that needs a right of way across a landowner’s property must first appraise the landowner’s property and inform the landowner who performed the appraisal, the value of the property according to the appraisal, and which methodology the appraiser employed (market, cost or income approach).²⁷ Then the pipeline company must make an offer to the landowner, in “a specific amount not less than the lowest appraisal or evaluation.”²⁸

In Exxon Pipeline Co. v. Hill,²⁹ the Louisiana Supreme Court recognized “three generally accepted appraisal techniques: (1) the market approach; (2) the cost approach; and (3) the income approach.” The court explained the different techniques and stated its preference:

Under the market approach, the appraiser considers the market value estimate which is predicated upon prices in actual market transactions and current listings, i.e. comparable sales. The cost approach method requires the appraiser to derive the value of the property by estimating the replacement or reproduction cost of the improvements; deducting therefrom the estimated depreciation; and then adding the market value of the land, if any. Finally, in utilizing the income approach, the appraiser uses an appraisal technique in which the anticipated net income is processed to indicate the capital amount of the investment which produces the net income.

[T]he ‘market approach,’ or the use of comparable sales in the vicinity of the land sought to be expropriated, is the primary tool of analysis of fair market value because it is, in most cases, likely to produce more accurate results.³⁰

The Supreme Court in Hill further explained the term “fair market value,” and how it relates to another concept, “highest and best use”:

²⁷ La. R.S. 19:2.2A(1)(a)-(c). The statute actually speaks of an “appraisal or evaluation,” but the better practice by far is to commission a formal appraisal by a state-licensed appraiser.

²⁸ Id. sec. 2.2A(2).

²⁹ 788 So.2d 1154 (La. 2001).

³⁰ Id. at 1162-63 (citations omitted; emphasis added).

Fair market value has consistently been defined as the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote or contrary to law. . . . [C]onsideration is to be given to the most profitable use to which the land can be put by reason of its location, topography, and adaptability. . . . This theory, of taking the latter factors into consideration, is commonly known as the ‘highest and best use’ doctrine.³¹

Elaborating on “highest and best use,” the Supreme Court explained that the concept is informed by several factors: market demand; proximity to areas “already developed in a compatible manner with the intended use”; economic development; development plans of businesses and individuals; scarcity of land available for the intended use; negotiations with other prospective buyers, and whether they made offers; and the use of the property at the time of the taking.³² The Supreme Court then articulated an important presumption that applies in expropriation lawsuits, and identified which party has the burden of overcoming the presumption: “[T]he current use of the property is presumed to be the highest and best use and the burden of overcoming that presumption by proving the existence of a different highest and best use based upon a potential, future use is on the landowner.”³³

In Hill, the Supreme Court consolidated for oral argument two cases that had been decided by the First Circuit Court of Appeal. In both cases the appellate court had approved the conclusion by the landowners’ appraiser (the same person both times) that the “highest and best use” for the expropriated properties was as pipeline corridors, valued on a per-rod rather than a per-acre basis. The Supreme Court found two principal flaws in the landowners’ appraiser’s reasoning. First, his evaluations incorporated the post-expropriation use of the properties, enhancing value in violation of the rule that “the value of land is fixed with reference to the loss sustained by the owner, not as

³¹ Id. at 1160 (citations omitted; emphasis added).

³² Id.

³³ Id. (emphasis added).

enhanced by the purpose for which it was taken.”³⁴ Second, although the appraiser utilized the market approach, apparently he considered only pipeline servitude comparables, notwithstanding his admission in his report that there was almost no data supporting them:

[C]ompensation [in recorded pipeline servitude conveyances] is usually recorded as being \$10 or \$100 and other valuable consideration almost without exception and some servitude documents include a confidentially [sic] clause (or have some on the side). As a consequence, there is no readily available source regarding the going market price for pipeline right-of-ways at any given point in time. Experience indicates that the pipeline companies will not furnish the data when asked, and most individuals will not divulge the price paid because of the confidentially [sic] agreement.³⁵

The Supreme Court duly concluded that the First Circuit had erred in relying on the method used by the landowners’ appraiser. It reversed and reinstated the trial court’s award in one of the cases, and reversed and remanded the other case to the trial court “for a determination of the proper value of compensation due to the [landowner], consistent with this opinion.”³⁶

From the perspective of both the landowner and the pipeline company, the highest and best use of the property is the whole point: It “sets the expropriation value of the land.”³⁷ The caveat by the Louisiana Supreme Court in Hill that the highest and best use of the property is presumed to be its current use³⁸ is very important. The presumption is sound because it is based on the reasonable premise that the landowner in his 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. That seems to have happened in Faustina Pipe

³⁴ Id. at 1161 (emphasis added), citing United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

³⁵ 788 So. 2d at 1163 n.12 (emphasis added).

³⁶ Id. at 1165.

³⁷ Faustina Pipe Line Co. v. Hebert, 469 So. 2d 483, 487 (La. App. 3d Cir.), writ refused, 474 So. 2d 1295 (La. 1985) (emphasis added).

³⁸ See text at note 33 above.

Line Co. v. Hebert,³⁹ which preceded the Louisiana Supreme Court’s decision in Hill by sixteen years.

In Faustina the Third Circuit Court of Appeal defined highest and best use by reference not to the current use of the land, but rather to some “reasonably prospective” use: “[T]he ‘highest and best use’ of a tract of land is the most favorable (or highest-priced) use of that land that is reasonably prospective. The use may not be merely speculative, but must be shown to be reasonably likely to occur in the not-too-distant future.”⁴⁰ Having defined the concept as meaning a possible and not an actual use, the Third Circuit then ruminated on the issues that a trial court applying it would have to face. At least to the author, the Third Circuit’s explanation demonstrates why its definition of highest and best use is unworkable:

This somewhat nebulous legal standard presents several issues of fact to the trial judge. Is the proposed use reasonably suited to the land? Is the use merely speculative, or reasonably likely to occur? Is the time in which the proposed use is reasonably likely to occur within the not-too-distant future, or in the too-distant future?⁴¹

The context in which this airy pronouncement was made was a case where the landowner’s appraiser had opined that the highest and best use of the landowner’s forty-acre soybean tract was really residential homesites. These would require access, the appraiser testified, which in turn would require encasement of the pipeline underneath at least one (imagined) residential street crossing.⁴² The trial court accepted all of this testimony and awarded taking damages, severance damages (“a diminution in the value of the landowner’s remaining, unexpropriated property caused by the taking of the expropriated property”⁴³) and encasement costs, all based upon the

³⁹ Id.

⁴⁰ Id. at 487 (citations omitted; emphasis added).

⁴¹ Id. (emphasis by the court).

⁴² Id. at 489.

⁴³ Id. at 488.

hypothetical use of the property as residential homesites.

The Third Circuit affirmed, and the Supreme Court denied the pipeline company's petition for a writ of certiorari, over the dissents of Justices Dennis and Blanche. Justice Blanche would have granted the writ on the issue of severance damages, and pointedly stated that "encasement costs of a pipeline under unplanned streets in an imaginary subdivision [are] speculative."⁴⁴ In the author's view, in light of the Louisiana Supreme Court's decision in Hill the Third Circuit's opinion in Hebert is not good law and should not be relied upon.

B. Before Filing the Petition

Assuming that the information and the offer provided to the landowner pursuant to the mandate of Revised Statutes 19:2.2A have not induced the landowner to convey his property to the pipeline company, the pipeline company has yet more statutorily required steps to complete before it may file suit. Not more than thirty days after its offer, the company must send to the landowner a formal notice containing seven statements:

- (i) that the landowner is entitled to receive just compensation to the fullest extent allowed by law;
- (ii) that his property may be expropriated only by an entity authorized by law to do so;
- (iii) that the landowner is entitled to receive a written appraisal or evaluation of the amount of compensation due him;
- (iv) identifying the website of the pipeline company, on which the landowner can read the relevant expropriation statutes;

⁴⁴ Faustina Pipe Line Co. v. Hebert, 474 So.2d 1295 (La. 1985) (denying application for writ of certiorari) (Blanche, J., dissenting).

(v) offering to provide, upon request, a copy of the expropriation statutes upon which the pipeline company relies;

(vi) identifying (including name, website and telephone number) the agency responsible for regulating the pipeline company; and

(vii) that the landowner may hire an agent or attorney to negotiate with the pipeline company, and an attorney to represent the landowner in any legal proceedings concerning the expropriation.⁴⁵

After sending the notice, the pipeline company has more to do before it can file suit. Not less than thirty days prior to filing a petition for expropriation, the pipeline company must send the landowner a letter by certified mail containing or attaching another seven items of information:

(i) the basis upon which the pipeline company intends to exercise its power to expropriate;

(ii) the purpose, terms and conditions of the proposed property acquisition;

(iii) the compensation the pipeline company proposes to pay;

(iv) complete copies of all appraisals of the subject property;

(v) a “plat of survey signed by a Louisiana licensed surveyor” showing the location and boundaries of the property to be acquired;

(vi) a description and the proposed location of any above-ground facilities to be constructed on the property; and

(vii) a statement of the “considerations for the proposed route or area to be acquired.”⁴⁶

⁴⁵ La. R.S. 19:2.2B(1)-(7).

⁴⁶ Id. subsec. C(1)-(7).

Will all of this information included in all of these overtures to the landowner result in a deal? It is the obvious intent of the statute that this happen, so that a court proceeding will not be required. But if the pipeline company and the landowner still cannot agree, the pipeline company may file its lawsuit and go to trial.

C. Trial of an Expropriation Case

1. Authority to Expropriate, Public Purpose, and Necessity of Taking

An expropriation lawsuit typically⁴⁷ is filed by the expropriating entity—the pipeline company—against the landowner. The pipeline company’s petition “shall contain a statement of the purposes for which the property is to be expropriated, describing the property necessary therefor with a plan of the same, a description of the improvements thereon, if any, and the name of the owner if known,” and “shall conclude with a prayer that the property be adjudicated to the plaintiff with just compensation paid to the owner. . . .”⁴⁸

As the plaintiff, the pipeline company must prove that (i) it is authorized by statute to expropriate private property; (ii) the property it intends to expropriate will be used for a public purpose; (iii) it is necessary that the property be expropriated;⁴⁹ 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 remaining property, and for any other damages. The legal authority of pipeline companies to expropriate property is found in section 2.5 of Title 19 of the Revised Statutes (for natural gas pipelines) and in section 254 of Title 45 (for “petroleum” (broadly defined in section 251) pipelines). The expropriation power granted by these statutes is not limited to intrastate companies:

⁴⁷ Sometimes the landowner, not the pipeline company, is the plaintiff. See text at notes 67-68 below.

⁴⁸ La. R.S. 19:2.1A(2), (3).

⁴⁹ Unless there is “an express stipulation by the parties” as to these three issues. *Id.* sec. 8E.

Because Collins' pipeline begins in Louisiana and terminates in Mississippi it is regulated by the Interstate Commerce Commission rather than by the Louisiana Public Service Commission. However, this does not preclude Collins from expropriating under the authority of R.S. 45:251, 254 because 45:251 includes 'all persons engaged in the transportation of petroleum' and does not restrict 'persons' to intrastate carriers.⁵⁰

Will the proposed taking actually serve a public purpose? Or, in other words, will the pipeline company be acting as "common carrier" when it transports product through the proposed pipeline? Louisiana courts have not taken a rigid approach when they analyze this question. For example, when the Louisiana Fourth Circuit Court of Appeal addressed the issue, it relied upon a United States Supreme Court case where the pipeline company was held to be acting as a common carrier—hence serving a public purpose—notwithstanding that it was the sole owner of the oil being transported through its pipeline: "While Champlin technically is transporting its own oil, manufacturing processes have been completed; the oil is not being moved for Champlin's own use. These interstate facilities are operated to put its finished products in the market in interstate commerce at the greatest economic advantage."⁵¹

The courts' broad understanding of "public purpose" means that a relatively short pipeline segment, carrying natural gas or petroleum perhaps only from one privately owned location to another, may nonetheless be held to serve a public purpose, and its owner held to be a common carrier with powers of expropriation, if the pipeline segment is integrated into a larger system of pipelines. In Crooks v. Placid Refining Co.,⁵² landowners questioned whether a pipeline that had traversed their property had in fact been used for a public purpose. The Louisiana Third Circuit

⁵⁰ Collins Pipeline Co. v. New Orleans East, Inc., 250 So.2d 29, 33 (La. App. 4th Cir. 1971), citing Dixie Pipeline Co. v. Barry, 227 So.2d 1 (La. App. 3d Cir. 1969), writ refused, 229 So.2d 731 (La. 1970).

⁵¹ Champlin Refining Co. v. United States, 329 U.S. 29, 34 (1946) (emphasis added), quoted in Collins, note 50 above, 250 So.2d at 33.

⁵² 903 So.2d 1154 (La. App. 3d Cir. 2005), writ refused, 920 So.2d 242 (La. 2006).

Court of Appeal noted that the pipeline segment “was part of a system linking over four hundred miles of pipelines used to collect, transport, and deliver crude oil, produced from over three hundred wells and operated by fifty different operators, to a central facility in Searcy, Louisiana.”⁵³ Rejecting the landowners’ contention, the court continued: “The Louisiana jurisprudence has not defined ‘public purpose’ so narrowly. . . . Rather, any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose.”⁵⁴

Similarly, in ExxonMobil Pipeline Co. v. Union Pacific R.R. Co.,⁵⁵ a pipeline company sought to expropriate property in order to construct a private, at-grade crossing over railroad tracks. The railroad argued that the crossing could not be expropriated, because only the pipeline company, not the public, would ever use it. Both the trial court and the court of appeal agreed with the railroad and denied expropriation. But the Louisiana Supreme Court reversed, because the crossing would help the pipeline company serve its larger public purpose:

While actual public use of the servitude may play a role in the appropriate case in determining whether the expropriation serves a public purpose, we do not read the constitutional provision and the statutes . . . as restricting expropriating real estate to that on which the pipeline itself is placed, nor do we interpret these provisions and the jurisprudence as requiring direct public use as the sole factor in determining whether the expropriated property will serve a public purpose.⁵⁶

A corporation that has the power to expropriate property for a public purpose wears the mantle of the public interest. It holds this power almost as a trustee,⁵⁷ and cannot exercise it unless

⁵³ 903 So.2d at 1156 (emphasis added).

⁵⁴ Id. at 1165, quoting Town of Vidalia v. The Unopened Succession of Ruffin, 663 So.2d 315, 319 (La. App. 3d Cir. 1995) (emphasis added). See Texas Pipe Line Co. v. Stein, 190 So.2d 244, 250 (La. App. 4th Cir. 1966), rev’d on other grounds, 202 So.2d 266 (La. 1967) (“‘actual public’ use is not the criteria [sic: criterion] by which public purpose is determined”).

⁵⁵ 35 So.3d 192 (La. 2010).

⁵⁶ Id. at 197 (emphasis added).

⁵⁷ But not quite. A trustee is prohibited from acting in his own self-interest, see La. R.S. 9:2082 (“A trustee shall administer the trust property solely in the interest of the beneficiary.”), while a corporation exercising its expropriation power acts both in its self-interest and in the public interest.

doing so serves the public interest. That is the rationale underlying the court's holding in Tennessee Gas Transmission Co. v. Violet Trapping Co.,⁵⁸ a decision with an unusual fact pattern that demonstrates the strength of a pipeline company's power of expropriation.

In Tennessee Gas, a pipeline company filed an expropriation lawsuit to obtain a right of way for a high-pressure gas line. The pipeline company prevailed at trial, but while the landowner's appeal was pending, it settled with the landowner and obtained a contractual right of way. The agreement settling the lawsuit and granting the right of way anticipated the need for a second pipeline, and the landowner and the pipeline company agreed that "the second line to be constructed will be laid in the same canal as the first line."⁵⁹

Six years later the pipeline company was ready to construct the second pipeline, but its engineers believed that it should be laid in a separate canal. In the ensuing second expropriation lawsuit for another right of way, the landowner argued that the pipeline company could not prove the necessity for a second right of way, because it had earlier agreed that the second pipeline would be laid in the same canal as the first. The Fourth Circuit Court of Appeal framed the question before it as follows:

[T]he question is whether the plaintiff by the agreement contracted away its right of future expropriation of an additional right-of-way in the event sound engineering principles should then indicate it to be a better of plan of construction. . . . The uncontradicted opinions of the engineers are that it should be laid in an entirely separate canal. However, aside from the question of engineering principles, there is an important legal question to be considered—whether such an agreement is enforceable against the public interest.⁶⁰

For the Fourth Circuit, it was easy to answer this question:

⁵⁸ Note 2 above.

⁵⁹ 200 So.2d at 433 (emphasis added).

⁶⁰ Id. (emphasis added).

[A] public utility, which enjoys the right of expropriation by virtue of its serving public purposes, cannot contract away that right granted to it by law for the public benefit. . . . [The pipeline company] did not and could not contract away its power of expropriation. It may take, according to law and for a just compensation first paid, additional land of defendant for the construction of its new pipeline, irrespective of the agreement. . . .⁶¹

The necessity of a proposed taking, like the public purpose for same, is part of the pipeline company's burden of proof at trial. This is not a very heavy burden, however, because "necessity" relates to "the necessity of the purpose for the expropriation not the necessity for a specific location."⁶² And if the necessity of the purpose for the expropriation has been proved, Louisiana courts will tend to defer to the decisions by the pipeline company about the extent and location of the property to be expropriated:

Once public necessity is established, the extent and the location of property to be expropriated are within the sound discretion of the expropriation authority and determination of same will not be disturbed by the courts if made in good faith. . . . The amount of land and the nature of the acreage taken must be reasonably necessary for purpose of the expropriation, but it is not necessary 'to show actual, immediate, and impending necessity for the expropriation.'⁶³

2. Landowner's Compensation: Value of Property Expropriated, Severance Damages and Other Damages

A landowner whose property is taken must be compensated for all of the damages he has sustained: the value of the property taken; the diminution if any in the value of his remaining

⁶¹ Id. (emphasis added).

⁶² Coleman v. Chevron Pipe Line Co., 673 So.2d 291, 296 (La. App. 4th Cir. 1996) (emphasis added and by the court), citing Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot, 628 So.2d 75, 78 (La. App. 3d Cir. 1993), writ refused, 634 So.2d 854 (La. 1994).

⁶³ Coleman, 673 So.2d at 296-97 (emphasis added and by the court), quoting City of New Orleans v. Moeglich, 126 So. 675, 677 (La. 1930). See United Gas Pipe Line Co. v. New Orleans Terminal Co., 156 So.2d 297, 302 (La. App. 4th Cir. 1963), writ refused, 159 So.2d 284 (La. 1964) ("no error of law") ("[I]n the location of rights-of-way considerable discretion is vested in the expropriating authorities and the courts will not disturb or interfere with the exercise thereof in the absence of fraud, bad faith, or conduct or practices amounting to an abuse of the privilege.") (internal citation omitted).

property, attributable to the taking or to the use of the taken property; and other damages if any. Louisiana Intrastate Gas Corp. v. Girouard⁶⁴ contains a straightforward analysis by the Louisiana Third Circuit Court of Appeal of these types of damages. The court decided the compensation owed to the landowners for (i) the taking of a permanent right of way and temporary servitudes for work space in order to lay the pipelines, (ii) severance damages, based upon the landowners' appraisal expert's testimony that "there is a definite public fear of living near a pipeline . . . and the presence of one will decrease the sale value of adjoining property for residential purposes,"⁶⁵ and (iii) additional claimed damages for loss of crawfish crops, bulkheading in order to prevent washouts where a pipeline crossed a bayou, and sodding.

The most important principle in the valuation of property to be taken in expropriation proceedings 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."⁶⁶ This principle was implicated in St. Charles Land Company II, L.L.C. v. City of New Orleans,⁶⁷ an "inverse condemnation" case, so called because the landowners sued the City of New Orleans through its expropriating authority, the New Orleans Aviation Board (which owns and operates the New Orleans International Airport), alleging that their property had been taken without proper expropriation proceedings and without just compensation. The Aviation Board had earlier purchased a tract of land from the plaintiffs, but had occupied an additional eight acres that were not included in the sale,⁶⁸ on which it was constructing the extension of runway. The landowners sought compensation for the taking,

⁶⁴ 336 So.2d 1042 (La. App. 3d Cir. 1973).

⁶⁵ Id. at 1046.

⁶⁶ Exxon Pipeline Co. v. Hill, note 29 above, 788 So.2d at 1161 (emphasis added), citing United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

⁶⁷ 167 So.3d 128 (La. App. 5th Cir. 2014), writ granted, 171 So.3d 268 (La. 2015).

⁶⁸ The Aviation Board and the property owners believed that the additional eight acres had been included in the act of sale until they discovered otherwise forty-eight years later. 167 So.3d at 133.

and attorney's fees and costs.

The only unstipulated issue at trial was the compensation owed to the landowners, so the only witnesses were real estate appraisal experts and a wetlands permitting expert. Compensation depended on the valuation of the property, which at the time of the taking was unimproved, unprotected wetlands and a canal bottom.⁶⁹ That was the condition in which the Aviation Board's expert valued the property:

[The expert] explained that he valued the property in the condition it was in at the time of appropriation, which was partially a canal bottom and partially unimproved wetlands. In determining the highest and best use of the property, [he] ignored the adjoining public project for which it was being purchased. Rather, he determined the highest and best use of the land in the context of the general market place and without any consideration of the airport's influence on the property.⁷⁰

The landowners' experts, on the other hand, "valued the property as a key parcel needed for complete assemblage of the airport complex," resulting in valuations more than fifty times higher than the Aviation Board's expert's valuation.⁷¹ The discrepancy was primarily attributable to whether the property should be valued as undeveloped and outside levee protection, as the Aviation Board's expert had done, or as "high and dry," as the landowners' experts had done:

[The landowner's experts] explained that they valued the property as 'high and dry' because regardless of whether [the Aviation Board] had ever expanded the runway and constructed a levee, the property would have nonetheless been protected by a levee under the federal levee project, or the Lake Pontchartrain Hurricane Protection Plan.⁷²

The trial court found the testimony of the Aviation Board's expert more credible, and valued the property in its condition at the time of the taking, as unimproved, unprotected wetlands

⁶⁹ Id. at 134.

⁷⁰ Id. at 133.

⁷¹ Id. at 132-33.

⁷² Id. at 134.

and a canal bottom. On appeal, the Louisiana Fifth Circuit Court of Appeal discussed the concepts of “full extent of loss,”⁷³ fair market value, and highest and best use. The court duly cited the principle that “[t]he current use of the property is presumed to be the highest and best use,”⁷⁴ but concluded that the landowners had rebutted the presumption with their “expert testimony that the property would have been protected by the anticipated federal levee system regardless of the runway expansion project.”⁷⁵ It therefore amended the trial court’s judgment by increasing the compensation award to account for the “high and dry” valuation by the landowners’ experts.⁷⁶

The Fifth Circuit’s conclusion in St. Charles Land Co. is problematic. One of the landowners’ appraisal experts had testified that the anticipated federal levee system was “well-known in the real estate market in 1987.”⁷⁷ But by the date for the valuation of the property twenty-three years later in 2010, and by the time of the appeal twenty-seven years later in 2014, the federal levee system was still anticipated and had not yet been built. Because so much time had passed, it seems the Fifth Circuit should have regarded the unbuilt federal levee system as hypothetical rather than anticipated. The Louisiana Supreme Court may have been disturbed by the Fifth Circuit’s ruling, because it granted the Aviation Board’s petition for a writ of certiorari.⁷⁸ Apparently the parties settled when that happened, because it was the last event in the history of the case.

Severance damages are another component of the compensation owed to a landowner whose property has been expropriated. They are defined as “a diminution in the value of the landowner’s remaining, unexpropriated property caused by the taking of the expropriated property

⁷³ See La. Const. art. I, sec. 4(B)(5) (“[T]he owner shall be compensated to the full extent of his loss.”).

⁷⁴ 167 So.3d at 136, citing Hill, note 29 above, 788 So.2d at 1160.

⁷⁵ Id. at 137.

⁷⁶ Id. at 139.

⁷⁷ Id. at 137.

⁷⁸ St. Charles Land Co. II, L.L.C. v. City of New Orleans, 171 So.3d 268 (La. 2015).

or the use to which the expropriated property is put.”⁷⁹ The Third Circuit Court of Appeal in Faustina gave a good example of such damages:

[W]hen a portion of a homeowner’s front yard is expropriated to widen a road, not only must the taker compensate for the acquired land, but . . . the taker must also pay the homeowner for any diminution in the value of his or her homesite that occurs because a smaller lot is in fact less marketable or because the presence of a wider road (with prospective heavier traffic) in itself lowers the value of the remaining property.⁸⁰

Takings by pipeline companies may give rise to unique concerns that justify severance damages, at least where residential property is close to the expropriated tract, “because the primary cause of a gas pipeline’s diminution of the value of contiguous residential property is the threat of leaks and explosions. . . .”⁸¹ Whether this threat is real or imagined is beside the point:

[G]asoline pipelines are dangerous and have the psychological effect of deterring prospective purchasers which has the effect of impairing the market value of the property. . . . Evidence that there is no real danger or reason to fear any danger is virtually irrelevant and has no force against the fact that the fear exists and is unavoidable. The fear of danger in some cases is as bad as the danger itself—it is a condition—not a theory.⁸²

For nonresidential property, the severance damages issues arising from expropriation for a pipeline are different. The taking may interfere with or thwart development plans for commercial or industrial property, as in Louisiana Intrastate Gas Corp. v. Gulf Outlet Lands, Inc.,⁸³ or may disrupt the efficiency of mechanized farming operations on agricultural property, as in Columbia Gulf Transmission Co. v. C. J. Grayson, Inc.⁸⁴ The cases show that severance damages, as well

⁷⁹ Faustina, note 37 above, 469 So.2d at 488.

⁸⁰ Id. (emphasis added).

⁸¹ Id.

⁸² Collins, note 50 above, 250 So.2d at 37-38 (citations omitted; emphasis added).

⁸³ 542 So.2d 705, 707 (La. App. 4th Cir. 1989) (citing pipeline’s interference with access of remaining property to public highway and improvements for marine, commercial and industrial uses).

⁸⁴ 232 So.2d 150, 155 (La. App. 2d Cir. 1970) (citing “serious disruption of an efficient mechanized farming operation”).

as taking damages, will be affected by what the court decides is the highest and best use of the landowner's property.

3. The Judgment: Adjudication of Property, Award of Compensation, and Perhaps Attorney's Fees

A pipeline company that is successful in an expropriation lawsuit is entitled to a judgment recognizing its ownership interest in the expropriated property. Depending on the evidence and the relief the pipeline company prayed for in its petition, the judgment may award a servitude, which will give the pipeline company only the right to use the land and not the actual ownership of it, or actual title to the property. In Louisiana Land and Exploration Co. v. Parish of Jefferson,⁸⁵ the court was asked to construe three judgments in prior expropriation proceedings, in order to determine whether they had adjudicated to Jefferson Parish only servitudes or full ownership of three tracts on which a canal was situated.

The court reproduced in its opinion the decretal portions of the three judgments that had been rendered in favor of Jefferson Parish more than twenty years earlier. One of the judgments “recogniz[ed] the Parish of Jefferson . . . as having the full ownership of the following described property. . . .”⁸⁶ The other judgments lacked this “full ownership” language, and used the words “right of way” in their property descriptions, although their award of damages to the landowners referred to “the land above described, acquired by the plaintiff. . . .”⁸⁷ Construing the judgments, the court held emphatically that these were distinctions without a difference. According to the court, “there is not a single word or passage that even remotely suggests that these judgments merely awarded a servitude to the Parish,” and the term “right of way” did not “designate the res

⁸⁵ 59 F. Supp. 260 (E.D. La. 1945).

⁸⁶ Id. at 263-64 (emphasis added).

⁸⁷ Id. (emphasis added).

expropriated, but merely . . . indicate[d] points of reference from which the metes and bounds of the tract were set out.”⁸⁸

Of course the content of a judgment and not only its wording may be problematic. In Marathon Pipe Line Co. v. Pitcher,⁸⁹ a four-to-three decision by the Louisiana Supreme Court, the trial court held, and the court appeal affirmed, that the highest and best use of certain undeveloped property was as a residential subdivision. The installation of the pipeline would impede the construction of a necessary access road to the yet unbuilt subdivision. The solution of the courts below, on the suggestion of the pipeline company, was a conditional obligation of the pipeline company to encase the pipeline if and when the access road were ever built: “[I]n the event defendant, or her successor in title, constructs the street described hereinafter across plaintiff’s pipeline, and it is necessary for plaintiff’s pipeline to be encased or otherwise protected to permit construction of said street, such encasement or protection shall be accomplished at the expense of plaintiff. . . .”⁹⁰

For the Supreme Court the issue was whether this conditional obligation satisfied the constitutional requirement that a landowner whose property is expropriated “shall be compensated to the full extent of his loss.”⁹¹ The court held that it did not:

This diminution in value is not . . . compensated under the obligation imposed upon plaintiff by the Court of Appeal ‘in the event defendant, or her successors in title, construct the street.’ Such a contingency, which may or may not occur, is one the fulfillment of which requires that Marathon Pipe Line Company be in existence and be the owner of the pipeline when the obligation to encase becomes executory. This is so for there is no obligation imposed upon Marathon’s successors or assigns. Added to this uncertainty is a further condition that encasement will depend upon whether ‘it is necessary for plaintiff’s pipeline to be encased.’ This leaves open

⁸⁸ Id. at 265.

⁸⁹ 368 So.2d 994 (La. 1979).

⁹⁰ Id. at 995.

⁹¹ La. Const. art I, sec. 4(B)(5).

for future controversy and litigation the question whether encasement of the pipeline is then necessary.⁹²

The four-justice majority in Marathon accordingly held that the owner of expropriated property has not been compensated to the full extent of his loss “unless compensation is paid in money prior to the taking.”⁹³

Attorney’s fees may also be a component of the judgment in a expropriation proceeding. If the highest amount that the pipeline company offered prior to the lawsuit is less than the sum of the taking damages and severance damages awarded, the court in its discretion may award reasonable attorney’s fees to the landowner.⁹⁴ Conversely, if the highest offer made by the pipeline company before the lawsuit is higher than the final 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.”⁹⁵

When the pipeline company pays the adjudicated compensation to the landowner or into the court’s registry “for the benefit of the persons entitled thereto,” it is “entitle[d] . . . to the property rights described in the judgment of expropriation.”⁹⁶ The “persons entitled thereto” for whose benefit the deposit into the court’s registry is made may include the landowner’s mortgagees and privilege holders. In that event the adjudicated property passes to the pipeline company free and clear of all such encumbrances, and the money paid into the registry is distributed to the mortgagees and privilege holders according to their priority.⁹⁷

⁹² 368 So.2d at 996.

⁹³ Id. at 998 (emphasis added).

⁹⁴ La. R.S. 19:8A(3).

⁹⁵ Id. sec. 12.

⁹⁶ Id. sec. 10.

⁹⁷ Id. sec 11.

D. Appeals

Pursuant to the Louisiana Code of Civil Procedure a party aggrieved by a judgment may appeal in one of two ways: devolutively, in which circumstance the effect of the judgment is not suspended while the appeal is pending,⁹⁸ or suspensively, in which circumstance, provided the appellant has posted security, the effect of the judgment is suspended such that it may not be enforced while the appeal is pending.⁹⁹

Only devolutive appeals are allowed in expropriation cases. Section 13 of Title 19 of the Revised Statutes is emphatic about this: “No party to any expropriation proceeding shall be entitled to or granted a suspensive appeal from any order, judgment, or decree rendered in such proceeding, whether such order, judgment, or decree is on the merits, exceptions, or special pleas and defenses, or compensation, or any or all of them.”¹⁰⁰ But although the method of appealing is restricted, the range of issues about which an appellant can complain is not, because “[t]he whole of the judgment . . . shall be subject to the decision of the appellate court on review under a devolutive appeal”¹⁰¹

IV. THE ST. JULIEN DOCTRINE

It may happen that a pipeline company, in the mistaken but good-faith belief that it is entitled to do so, possesses and constructs facilities upon a landowner’s property, with the consent or acquiescence of the landowner. In such a circumstance the landowner thereafter may not treat the occupation and construction as a trespass, but “shall be entitled only to bring an action for

⁹⁸ See La. Code Civ. Pro. art. 2087.

⁹⁹ See *id.* art. 2124B.

¹⁰⁰ La. R.S. 19:13 (emphasis added).

¹⁰¹ *Id.* (emphasis added).

judicial determination of whether the taking was for a public and necessary purpose and for just compensation . . . as of the time of the taking of the property. . . .”¹⁰²

The principle underlying Section 14 of Title 19 of the Revised Statutes is referred to as the St. Julien doctrine, derived from the decision by the Louisiana Supreme Court in St. Julien v. Morgan L. & T. R. Co.¹⁰³ in 1883. In that case the defendant railroad company had entered onto the plaintiff’s land without permission and laid railroad tracks without purchasing or expropriating the property. According to the Supreme Court, the landowner had acquiesced in the action of the railroad, and had even encouraged it “by abstaining from any attempt to prevent it and [making] no complaint in a court of law of the injuries inflicted upon him until the defendant had expended large sums of money in completing its line.”¹⁰⁴

The landowner’s later suit was not welcomed by the Supreme Court, which held that such an owner, because of his acquiescence and encouragement, “shall not be permitted to reclaim his property free from the servitude he has permitted to be imposed upon it, but shall be restricted to his right of compensation.”¹⁰⁵ Many years later, the Louisiana First Circuit Court of Appeal explained the St. Julien court’s holding and its rationale:

The landowner could not later reject [sic: eject?] the occupant, but was relegated to an action for compensation and damages. The theoretical justification of St. Julien was the combined presumed consent of the owner of the land and the public interest. To avoid the needless waste and public inconvenience involved in removing expensive works, the court established the fiction that the owner had granted voluntarily what an expropriation suit otherwise would have compelled him to yield.¹⁰⁶

¹⁰² Id. sec. 14B.

¹⁰³ 35 La. Ann. 924 (La. 1883).

¹⁰⁴ Id. at 925, quoted in Cancienne v. Lafourche Parish Policy Jury, 423 So.2d 662, 665 (La. App. 1st Cir. 1982).

¹⁰⁵ 35 La. Ann. at 926.

¹⁰⁶ Cancienne, note 104 above, 423 So.2d at 667 (emphasis added). See Crooks, note 52 above, 903 So.2d at 1158 (“Absent consent or acquiescence, proof of public benefit would not be enough to defeat an action for trespass.”).

What became known as the St. Julien doctrine was reaffirmed and applied in many cases until 1976, when the Louisiana Supreme Court in Lake, Inc. v. Louisiana Power & Light Co.¹⁰⁷ abolished the doctrine, because the court believed that it sanctioned a method of creating servitudes contrary to the requirements of the Louisiana Civil Code, and that as a matter of policy it was no longer needed.¹⁰⁸ But the Louisiana legislature responded in the same year, in effect overruling Lake by enacting Revised Statutes Title 19, section 14. As the Cancienne court explained: “Therefore, the St. Julien Doctrine, created and perpetuated jurisprudentially until the Lake decision in 1976, now has been essentially reinstated legislatively through La. R.S. 19:14 to the status of positive law.”¹⁰⁹

According to the First Circuit in Cancienne, the St. Julien doctrine now codified in section 14 of Title 19 of the Revised Statutes requires (i) an expropriating authority which, (ii) acting in good faith and (iii) with the consent or acquiescence of the landowner, (iv) has constructed a facility that serves the public interest.¹¹⁰ Consent is not the same as acquiescence, as consent “is an act of reason, accompanied by deliberation by a reasonable person who has sufficient mental capacity to make an intelligent choice,” whereas acquiescence “is an act not deliberately intended to ratify a former transaction known to be voidable, but [which recognizes] the transaction and [is] intended, to some extent at least, to carry it into effect and to obtain or claim the benefits resulting therefrom.”¹¹¹ Whichever is the case, the original landowner’s consent or acquiescence will bind subsequent owners of the property.¹¹²

¹⁰⁷ 330 So.2d 914 (La. 1976).

¹⁰⁸ Cancienne, note 104 above, 423 So.2d at 666.

¹⁰⁹ Id. at 667.

¹¹⁰ Id. at 670.

¹¹¹ Id. at 673.

¹¹² Id. at 670, citing Rogers v. Louisiana Power & Light Co., 391 So.2d 30, 34 (La. App. 3d Cir. 1980).

How to prove whether an ancestor in title consented or acquiesced to works on the property of a landowner was addressed in Lonatro v. Orleans Levee District.¹¹³ In that case, following the flooding caused by Hurricane Katrina, the Orleans Levee District announced its intention to allow the United States Army Corps of Engineers to perform extensive work on a levee running alongside an important drainage canal in New Orleans. Fences, trees, and other obstructions along the foot of the levee would be removed, and strengthening and remediation, including “the building of structures and ‘deep soil mixing,’ a process using a giant mixer to dig up to depths of 40 to 80 feet into the ground,”¹¹⁴ would be performed. Because the foot of the levee abutted and overlapped the rear boundaries of certain residential properties, all of this work would be performed in the back yards of those properties. The landowners sued in order to obtain preliminary and permanent injunctions prohibiting the work.

Among the issues addressed by the court was whether the defendants had a servitude for the levee on the landowners’ properties under the St. Julien doctrine. The landowners argued that such a servitude could not exist because they had never consented to it, while the defendants argued that they did have a servitude because the landowners had acquiesced. The court said that both sides had missed the point: “The issue . . . is not whether these plaintiffs consented or acquiesced. It is whether the original landowners at the time of the levee construction consented or acquiesced. Where the owner at the time of the construction has consented or acquiesced, subsequent owners take the property subject to the servitude.”¹¹⁵

¹¹³ 809 F.Supp.2d 512 (E.D. La. 2011).

¹¹⁴ Id. at 514.

¹¹⁵ Id. at 519 (emphasis by the court and added), citing Weigand v. Asplundh Tree Experts, 577 So.2d 125, 127 (La. App. 1st Cir. 1991).

The Lonatro court characterized as a “crucial element” of the St. Julien doctrine that “either consent or acquiescence is sufficient.”¹¹⁶ It pored over the caselaw to determine how either is proved, and rejected the defendants’ argument that the mere existence of the levee on the plaintiffs’ property was sufficient to prove the previous owners’ acquiescence to a St. Julien servitude.¹¹⁷ Ultimately the court denied the defendants’ motion to dismiss, reasoning that the landowners’ complaint stated their claim sufficiently such that they could proceed with discovery.

V. CONCLUSION

As a pipeline company proceeds through the trial of an expropriation lawsuit, it will put on evidence to prove that it has the legal authority to expropriate property, that the property it intends to expropriate will be used for a public purpose, the accomplishment of which makes the expropriation necessary, and that the amount it proposes to pay will fully compensate the landowner for his loss, consistent with the “highest and best use” of the property.

On the first three of these elements of proof—authority, public purpose, and necessity—the pipeline company has an easy burden to carry. Pipeline companies have authority to expropriate property under section 2(5) of Title 19 of the Revised Statutes (for natural gas pipelines) or under section 254 of Title 45 (for “petroleum” pipelines). “Public purpose” has been broadly defined by Louisiana courts, which generally are satisfied with proof that a taking will in some way assist the pipeline to perform its function as a common carrier.¹¹⁸ And in considering whether the taking was necessary, Louisiana courts allow much discretion to pipeline companies, requiring only that the exercise of that discretion appear to be sound and in good faith.¹¹⁹

¹¹⁶ 809 F. Supp. 2d at 520 (emphasis by the court).

¹¹⁷ Id. at 521.

¹¹⁸ As in Crooks and ExxonMobil Pipeline Co., notes 52 and 55 above. See text at notes 52-61.

¹¹⁹ See Coleman, note 62 above, and note 63 and accompanying text.

On the fourth element of proof—compensation to the landowner—the pipeline company has the benefit of a presumption about valuation of the property, which is that the current use of the property is its highest and best use.¹²⁰ But valuation drives compensation, so the landowner will be motivated to try to overcome that presumption, by showing that some potential future use is actually the “highest and best,” as in Faustina,¹²¹ St. Charles Land Co.¹²² and Marathon.¹²³ The court’s determination of this issue will be important, because it will affect both the taking damages and severance damages.

¹²⁰ See text at notes 32-33 above.

¹²¹ Note 37 above; see text at notes 37-44.

¹²² Note 67 above; see text at notes 66-78.

¹²³ Note 89 above; see text at notes 89-93.