

# Pipelines, Eminent Domain, and Damages to the Remainder: A Texas Lawsuit Trilogy

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## Abstract

Damage to the remainder in a partial taking is a key issue in litigation pertaining to eminent domain and condemnation for pipeline easements. In Texas, the topic has gained attention in part because of three recent cases in which juries awarded significant damages to the landowners. Such awards are an important financial issue for the pipeline industry. This article describes the strategies used by the legal teams and appraisers for both sides to determine damages to the remainder. The article also highlights a number of legal issues that arose in the cases. The insights provided by these three cases should benefit appraisers and lawyers working with both landowners and pipeline companies.

## Introduction

Three recent pipeline cases in Texas resulted in landowners receiving significant awards for damages to the remainder. These cases illustrate appraisal methods and courtroom strategies employed by the lawyers and appraisers on both sides of this type of lawsuit. In all three cases, appraisers for the pipeline companies (the condemners) testified that the pipelines caused no damage to the remaining property. The appraisers for the landowners (condemnees) came to very different conclusions and found substantial damage to the remainder. The three cases presented here offer insights into how landowners and their legal teams present evidence related to damages and on what bases pipeline companies challenged these awards in the appellate courts.<sup>1</sup>

States have delegated the power of eminent domain to common carrier oil and gas pipelines.<sup>2</sup> “Eminent domain is the right of government to take, or condemn, a property from the property owner for the good of the general public. . . . When taking a property, the [condemnor] is obliged to pay *just compensation*.”<sup>3</sup> In the case of a partial acquisition, where only part of a property is taken under the power of eminent domain, estimating just compensation can be a challenge.

Two rules for measuring just compensation are applied in different jurisdictions: the *before and after rule* and the *value plus damage rule*. The before and after (federal) rule is a valuation method used in federal cases as well as in some states. Generally, the before and after rule says that just compensation is the value of the property before the taking minus the value after the taking. The alternative rule, the value plus dam-

1. The authors are not attorneys, and this article does not offer any legal opinions. The article only reports information that appears in case transcripts and court decisions.

2. The threshold for proof of common carrier status is very low in Texas. For the statutory definition of *common carrier*, see <http://bit.ly/TXdefinition>.

3. Randall Bell, *Real Estate Damages: An Analysis of Detrimental Conditions* (Chicago: Appraisal Institute, 1999), 84.

age (state) rule, requires that the property owner be paid fair market value for the piece of property taken plus severance damages for the remaining piece of land. This rule is best applied when a small piece of land is taken and a larger piece of land remains.<sup>4</sup> This is frequently the circumstance in a pipeline eminent domain case.

Eminent domain laws in Texas and most other states allow for the pipeline company to acquire an easement through condemnation in the event the property owner refuses to accept the final offer made by the pipeline company. For eminent domain to proceed, a special commission convenes to determine a dollar amount of just compensation. Both parties have an opportunity to present evidence. The commission renders a decision. When the condemnor pays the specified dollar amount to the landowner, title to the easement passes and pipeline construction begins. If the landowner does not accept the payment, the pipeline company can pay the required amount into the registry of the court and title to the property passes. Either party may appeal the commission's finding. A court and jury will hear the appeal and possibly award more or less money.

A review of the literature on pipelines and eminent domain litigation reveals a seminal legal article by attorney Laura A. Hanley. Hanley recommends that parties to pipeline negotiations seek the advice of experienced legal counsel, even in the earliest stages, because the procedures and strategies in negotiations between pipeline companies and landowners are of tremendous importance.<sup>5</sup>

A review of previous research pertaining to diminution in value caused by pipelines focuses on how proximity to underground pipelines may or may not affect home prices.<sup>6</sup> However, studying the effects of pipelines on the value of nearby residences has little relevance to estimating the

damage to the remainder to large tracts of land encumbered by a pipeline.

This article presents summaries of three pipeline cases in Texas to illustrate how just compensation issues are addressed in such cases and the methods used to determine the value of the permanent easement, the value of a temporary workspace land easement to allow for the construction of the pipeline, and the value of any diminution in value of the remaining property.

### *Case 1: Peregrine Pipeline Co. v. Eagle Ford Land Partners*

The case of *Peregrine Pipeline Co. v. Eagle Ford Land Partners*<sup>7</sup> involves a taking that occurred on November 8, 2007, when Peregrine Pipeline (Peregrine) acquired by condemnation a pipeline easement on land that was owned by Eagle Ford Land Partners (Eagle Ford). The pipeline easement is 20 feet wide and 6,413 feet long, located along the boundary of a 400-acre tract of land in Mansfield, Texas. The property has approximately one mile of frontage on US Route 287, and most of the pipeline runs parallel with, or in close proximity to, the road. The acquisition price proposed by the special commission was \$79,979, which the landowners rejected. The charge to the jury was to determine the value to assign to (1) the 20-foot wide permanent easement, (2) the 30-foot temporary construction work space, and (3) the damage, if any, to the remainder of the 400-acre tract. The trial court judgment was handed down on March 20, 2014.

Prior to seating the jury, the attorneys met with the judge to establish certain ground rules for the trial. The attorneys cited rules of evidence to attempt to limit testimony that might

4. Ibid.

5. Laura A. Hanley, "Comment: Judicial Battles between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, But by How Much," *Houston Law Review* 37, no. 1 (Spring 2000): 125-173, available at <http://bit.ly/HanleyPipelines>.

6. See Louis Wilde, Christopher Loos, and Jack Williamson, "Pipelines and Property Values: An Eclectic Review of the Literature," *Journal of Real Estate Literature* 20, no. 2 (2014): 245-259; William N. Kinnard, Jr., Sue Ann Dickey, and Mary Beth Geckler, "Natural Gas Pipeline Impact on Residential Property Values: An Empirical Study of Two Market Areas," *Right of Way* (June/July 1994): 26-32; Barry A. Diskin, Jack P. Friedman, Spero Peppas, and Stephanie Peppas, "The Effect of Natural Gas Pipelines on Residential Value," *Right of Way* (January/February 2011): 24-27; and Michael A. McElveen, Brian E. Brown, and Charles M. Gibbons, "Natural Gas Pipelines and the Value of Nearby Homes: A Spatial Analysis" (paper presented at the 31st Annual Meeting of the American Real Estate Society, Sanibel Island, Florida, April 14-18, 2015).

7. The facts of this case are taken from the transcript of the jury trial tried in Johnson County, Texas. All values discussed in this case are based on the date of taking, November 8, 2007.

damage their case.<sup>8</sup> They invoked the rule prohibiting expert witnesses from being in the court to hear others testify. They also discussed the definitions of *market value* and *highest and best use* required by Texas case law as well as the use of subdivision analysis.

In condemnation suits, appraisers are expected to use comparable sales of acreage tracts, when available, to value undivided land that has subdivision as the highest and best use. Texas case law places limitations on consideration of a hypothetical subdivision, including forecasting of future sale prices of hypothetical lots; forecasting an absorption rate for the lots; deducting development, sales, and administrative expenses; and discounting the net cash flows back to the present to get a value for the whole tract. The courts in Texas have found that the comparison of hypothetical lots to a large tract of undeveloped land is too tenuous.<sup>9</sup>

Damage to the remainder is the critical issue in pipeline cases.<sup>10</sup> In *Peregrine Pipeline*, the landowner's claim was based on an assertion that the highest and best use of the property was for commercial development sometime in the reasonably probable foreseeable future and that the pipeline significantly and forevermore increases the cost of developing the property. The landowner claimed that this increased cost of development would reduce the market value of the land by 10%.

Eagle Ford argued that the controlling document was Peregrine's third amended petition

(petition and condemnation). That document gives the pipeline owner the right to prevent construction within the boundaries of the easement (20 feet by 6,413 feet), the right to remove any building, reservoir, or other structure, and the right to prevent any use that substantially conflicts, interferes, or is inconsistent with the pipeline company's use and enjoyment of the easement for purposes stated in the document.<sup>11</sup> According to the landowner's experts, Peregrine's rights would seriously impact the value of the remainder because those rights represent a loss of control and uncertainties, and affect the highest and best use of the remaining property. Eagle Ford argued that when such uncertainties exist, market participants pay less.<sup>12</sup>

Peregrine's counterargument was that there were multiple, previously existing pipelines on the property and an existing oil and gas production lease with full surface usage rights that made commercial development in the "reasonably probable foreseeable future" very unlikely. Peregrine's expert opined that the highest and best use of the property was for oil and gas production and to be held as an investment for possible development sometime beyond the reasonably probable foreseeable future. Consequently, Peregrine argued, the pipeline did not have a value impact on the remaining property.

The subject property was encumbered by an oil and gas lease to the EOG oil and gas company,<sup>13</sup> which had a special use permit with the

8. *Peregrine Pipeline v. Eagle Ford Land Partners* trial transcript, vol. 1.

9. In *Crosstex v. Button* (which will be discussed later in this article), Judge Dauphinot wrote, "Crosstex is correct that when the property being valued is undeveloped, one seeking to prove the value of such a tract of land may not show what the price of the lots would be if subdivided lots were selling, (*Willey*, 360 S.W.2d at 525). This kind of evidence fails for two reasons: such evidence—tends to cause the jury to value the land as lots, presumably at a higher market value (*Boswell v. Brazos Elec. Power Co-op., Inc.*), and the sales price of individual, improved lots does not meet the test of similarity (*Cannizzo*, also see *Sharboneau*). In other words, property that has been subdivided into lots is too dissimilar to undeveloped property, rendering a comparison too attenuated for the appraiser to make valid adjustments for the differences between the properties, and a jury might assign more value to an undeveloped property than its actual market value when presented with plans of hypothetical lots. Thus, a party who wants to establish the market value of an undeveloped tract of land may not do so by drawing up hypothetical plans of nonexistent subdivisions and then developing an opinion about the market value of the tract based on what those individual hypothetical lots could sell for (*Boswell*). A party may, however, testify about the adaptability of a particular property for use as a subdivision (*Boswell*).

10. Hanley, "Judicial Battles between Pipeline Companies and Landowners."

11. *Peregrine Pipeline* trial transcript, vol. 1, at 174–177.

12. *Ibid.*, 179. Eagle Ford also argued that for development to occur on the remainder property, all utilities crossing the pipeline easement, including water lines, wastewater lines, storm sewer lines, drainage, and underground electrical, would have to be buried at least 8 feet 4 inches deep for a 6,413-foot length of land, *Ibid.* at 182.

13. EOG's predecessor company, Enron Oil and Gas Company, became independent from Enron Corporation in 1999 and changed its name to EOG Resources.

City of Mansfield, and EOG had designated a couple of well pad areas. The dominance of the mineral interest over the surface interest is a significant challenge for future commercial or mixed-use development.<sup>14</sup>

Eagle Ford offered the opinions of two valuation experts. Because of the pipelines and well sites that existed on the date of taking, Eagle Ford's first appraiser carved out four marketable tracts that he designated as separate economic units. The four tracts were 45 acres, 42 acres, 27 acres, and 98 acres, which totaled only 212 acres out of the 400-acre tract. He valued the tracts at \$2.00, \$2.00, \$1.70, and \$1.60 per square foot, respectively, with a combined value of the four economic units at \$16,400,000. This appraiser used paired sales in the area to support his adjustments for the existence of Peregrine's pipeline. The pairs indicated the difference between sales of property with a pipeline versus sales without a pipeline to be in the range of 34% to 45%. The appraiser said that the damage caused by Peregrine's pipeline varied from 5% to 25%, but the average damage was 10%. He concluded that Eagle Ford should be compensated \$219,126 for the 20-foot easement, \$63,464 for the temporary work space, and \$1,350,410 for damage to the remainder, resulting in total compensation of \$1,633,000.

The landowner's second appraiser valued the property as a 400-acre tract with a value of \$27,500 per acre for a total \$11,000,000. Her estimate of compensation for the easement taken was based on 90% of the fair market value of the land in the 20-foot easement, which was \$72,876. She valued the temporary work space rent at \$22,267 and damages (diminution in value) to the remainder at \$1,029,124. The opinion of the landowner's second appraiser was that total compensation should be \$1,124,276. The second appraiser, like the first, said that the remainder property was damaged by approximately 10%.

She used 24 paired sales to estimate the effects of a pipeline on the property. The paired sales indicated a 30% to 55% reduction in value in many cases, similar to what the first appraiser found. Also, like the first appraiser, she reduced the damages indicated by the paired sales to 10% because the subject already had multiple pipelines of varying sizes and lengths on it.

The second appraiser opined that the pipeline company's lack of published crossing requirements exacerbated complications and expense uncertainties regarding crossing Peregrine's pipeline easement with utilities, drainage, and roads.

Peregrine presented evidence to the jury noting that at the time of the taking the property was not vacant, and that there were multiple other easements, with pipelines, oil and gas wells, and well pads. The property was zoned PR (pre-development), not commercial. Peregrine also noted that the property had over a mile of frontage on US 287, but no frontage road along that highway. It also had no utilities, no storm sewer, no water, and no electricity. Peregrine pointed out that the property is subject to a Producers 88 lease, which gives EOG, the leaseholder, significant control over the surface. EOG had rights of ingress and egress as well as rights to drill wells, to build roads, access water, and lay pipelines to its wells. This lease is in force as long as the property produces oil or gas in paying quantities. When the property quits producing, the rights granted by the lease revert to the subsurface owner, which in this case is also the surface owner. Peregrine claimed that an additional pipeline would not have the negative impact the landowner claimed because oil and gas leases such as EOG's "are the death knell to future development."<sup>15</sup>

Peregrine's appraisal witness valued the whole 467.28 acres at \$26,500 per acre for a total value of \$12,382,920 before the taking.<sup>16</sup> (The area of the taking was 2.9445 acres, less than 1% of the

14. The Texas accommodation doctrine requires EOG to take into consideration and to accommodate where possible the landowner's plans for development. Peregrine argued that the point was not introduced during the discovery portion of the trial; therefore, the judge would not allow attorneys for the landowner to instruct the jury with regard to the accommodation doctrine during summation to the jury. *Peregrine Pipeline* trial transcript, vol. 1, at 188. For additional discussion of Texas's accommodation doctrine, see Judon Fambrough "Surface Tension: Accommodation of the Estates Doctrine," *Tierra Grande* 22, no. 2 (February 13, 2015): 20-23.

15. *Peregrine Pipeline* trial transcript, vol. 1, at 207.

16. Peregrine's appraiser was the only one to value the whole 467.28 acres, which included 57.28 acres of industrial property covered by a separate tax-ID number and a 10-acre EOG well pad.

**Exhibit 1** *Peregrine Pipeline v. Eagle Ford Land Partners*, Summary of the Expert Testimony and Jury Award

	Eagle Ford Land Appraiser 1	Eagle Ford Land Appraiser 2	Peregrine Pipeline Appraiser	Jury Award
Part taken, permanent easement (\$)	219,126	72,876	58,522	219,126
Temporary work space easement (\$)	63,464	22,267	No opinion	63,464
Damage to remainder (\$)	1,350,410	1,029,124	0	1,350,410
Total compensation (\$)	1,633,000	1,124,276	58,522	1,633,000

total acreage.) The appraiser's estimate of just compensation for the permanent easement was based on 2.9445 acres times \$26,500 per acre times 75%, which equals \$58,522.

Peregrine's appraiser testified that there was no damage to the remainder based his analysis of paired sales. He stated that the highest and best use was "hold as an investment for future development," reasoning that the land was already very encumbered by oil and gas surface activity. Other impediments to development included lack of commercial zoning, insufficient population to warrant development, and lack of sewer. According to Peregrine's appraiser, between \$500,000 and \$1.5 million dollars, including a lift station, would be needed to bring sewer services to the site.

Eagle Ford's rebuttal witness was a civil engineer specializing in site and land development projects. His assignment was to rebut statements made by Peregrine's appraiser that the pipeline caused no damage to the remainder of the property. The engineer's testimony centered on his opinion that there would be significant additional cost to develop the property because of the presence of this pipeline.

The jury awarded Eagle Ford \$219,126 for the permanent easement, \$63,464 for the temporary work space easement, and \$1,350,410 for damages to the remainder. The award was exactly the same as Eagle Ford's first appraiser's damage estimates, which was the highest damage estimate of the three appraisers. The jury did not accept Peregrine's argument that its

pipeline had zero impact on the value of the remaining land and accepted Eagle Ford's expert testimony that the pipeline damaged the remainder by approximately 10%. Peregrine appealed the decision and the appellate court's decision is still pending.

### Case 2: *Crosstex DC Gathering Co. v. Button*

A natural gas provider, Crosstex DC Gathering (Crosstex), was unable to reach an agreement with landowners (collectively, the Buttons) to purchase a permanent easement to lay a gas pipeline across 52.09 acres of undeveloped land located in Copper Canyon in Denton County, Texas.<sup>17</sup> Crosstex exercised its eminent domain power and filed a condemnation suit for a permanent pipeline easement and a temporary construction easement. The special commissioners awarded \$44,955 as just compensation for the easement, which the Buttons rejected. The trial proceeded to determine the amount of money due the Buttons for (1) the taking of the permanent easement, (2) a temporary construction easement, and (3) damages, if any, to the remainder of the property as a result of the easement. In 2011, the decision of a Denton County jury was in favor of the landowners. The court awarded the Buttons \$794,798.99, including \$124,530.96 for the permanent easement, \$4,300 for the temporary easement, and \$665,968.03 for damage to the remainder.

17. *Crosstex DC Gathering Co. v. Button*, Court of Appeals, Second District of Texas, Fort Worth, No. 02-11-00067-CV, from the probate Court of Denton County (Ed-2007-00402), January 24, 2013, opinion by Justice Lee Ann Dauphinot. The facts of this case were taken from the opinion written by the Court of Appeals, Second District of Texas, Fort Worth, on January 24, 2013.

Crosstex appealed the jury's decision to the court of appeals based on certain objections to the statements of the Buttons' two witnesses. At the original trial, the Buttons produced two expert witnesses, a civil engineer and an expert appraiser. According to Crosstex, their testimony was not legally and factually sufficient to support the jury's decision. In January 2013, the appellate court affirmed the jury decision.

The engineer for the Buttons testified that Crosstex's requirements and restrictions on the landowners' use would add complexity and cost to any type of development. Thus, any potential developer of the remainder property would face the possibility of restrictions on landscaping, fencing, driveways, parking lots, and other paving over the easement, and would have to consider what kind of development could work on the property with those kinds of restrictions. He also discussed the added cost of bringing utilities across the easement, which would require encasing the utilities in steel sleeves the width of the easement. The engineer's testimony was not limited to any particular kind of development. Instead, he testified as to how the restrictions would or would not add complications for development of any kind.<sup>18</sup> The engineer further testified that in his experience it could be difficult to work with pipeline companies.

On appeal, Crosstex made two complaints about the engineer's testimony: (1) the engineer's testimony was no evidence of damages because it was purely hypothetical and speculative, and (2) the engineer's testimony related only to a theory of compensation for impaired (but not substantially impaired) access to the property, which is not compensable under Texas law.

The court of appeals decided the engineer's testimony was not based on a hypothetical subdivision, but was based on the added cost to any developmental use of the land. Moreover, it observed, Texas courts have ruled that "a party who wants to establish the market value of an undeveloped tract of land may not do so draw-

ing up hypothetical plans of nonexistent subdivisions and then developing an opinion about the market value for the tract based on what those individual hypothetical lots could sell for."<sup>19</sup> In essence, the court decided that the engineer's testimony was that a developer/buyer would pay less for a tract of land encumbered by a pipeline than he or she would for an identical tract that was unencumbered by a pipeline.<sup>20</sup>

As to a claim by Crosstex that the engineer's testimony only related to impaired access to the land, the court ruled that the engineer did not claim impaired access nor even that crossing the pipeline was the only route of access. However, he did state that crossing the pipeline with a driveway would be made costly and may limit options for development, which affects the market value of the remainder. The court ruled that that part of the engineer's testimony was admissible.<sup>21</sup>

The Buttons' appraiser testified to her opinion of value for the remainder of the 52 acres before and after the taking of the easement. The appraiser stated that in her opinion the highest and best use was for mixed-use residential and commercial. The subject property included 25.83 acres zoned commercial. The remaining 26.26 acres were currently zoned residential, but she had reason to believe that this property could be upzoned to commercial.

The appraiser for the landowners applied a four-step process to estimate damages:

1. The appraiser relied on personal experience in subdivision development and on general costs estimated from the testimony given by the landowners' engineer witness, which did not include a hypothetical subdivision or detailed cost. She considered the cost of the pipeline crossing regulations that require a 24-inch clearance, usually below, and a 35-inch minimum cover for the pipeline, and special or unique pavement in the area of the pipeline and weight limits. Also considered was the fact that this particular taking left 1.14 acres across the front

18. *Ibid.*

19. *Crosstex* court quoting *Boswell v. Brazos Elec. Power Co-op., Inc.*, 910 S.W. 2d 593, 601 (Tex. App., Fort Worth 1995, *writ denied*).

20. The court opinion in *Crosstex* is rich in discussion of case law pertaining to permissible testimony regarding the diminution in value to the remainder.

21. *Ibid.* In Texas, a condemnee cannot be compensated for reduced access to the land; therefore, testimony on that issue would have been irrelevant.



- of the property stranded and of little or no use in a development of any design. As a crosscheck, she considered the value of the stranded land.
2. The appraiser interviewed market participants, including brokers, sellers, and buyers, using a survey process that included pertinent scenarios and inquired about their experience with properties impacted by similar pipeline encumbrances. The results indicated a range of 5% to 25% impact.
  3. The appraiser conducted a paired sales study, first by looking at nine sales that were not impacted by a pipeline and estimating the effect on six of the sites of adding a hypothetical pipeline easement considering location, size of easement, and rights taken. The work papers contain other pairs not included in the report. The study indicated that the impact for each of the nine sales would be between 10% and 25%.
  4. Finally, two true after-pipeline sales with gas pipelines and similar highest and best uses were considered. These sales helped establish a third indicator of value after the take.

The jury gave significant weight to the testimony of Buttons' appraiser in awarding \$124,530.96 for the easement, \$4,300 for the temporary work space, and \$665,968.03 in damages to the remainder.

Crosstex appealed the trial court decision with regard to the appraiser's testimony, claiming that (1) the appraiser's reliance on the engineer's testimony undermined the appraiser's testimony, (2) the analysis improperly assumed a change in use and zoning unsupported by evidence, and (3) the comparative sales analysis was unreliable and irrelevant.<sup>22</sup>

Prior to addressing Crosstex's complaints regarding the appraiser, the court of appeals had concluded that testimony by the engineer was not irrelevant and unreliable. Although not clear that the appraiser had used the engineer's report, the court ruled that the appraiser's use of that report in considering limitations on the use of

the property, current and in the future, in estimating what a willing buyer might pay for the property, was not improper.<sup>23</sup>

Pertaining to the appraiser's assumed change in zoning, the court noted that of the approximately 52 acres, one 26.26-acre tract was zoned residential and a 25.83-acre tract was zoned commercial. The appraiser's estimate of the present market value, based on a future sale, assumed a high probability that the 26.26 acres could be upzoned from residential to commercial and that the highest and best use was mixed-use residential and commercial. Crosstex contended that the appraiser "assumed a change in the use and zoning of the property in order to inflate the calculation of damages to the remainder and that the gap between the evidence presented at trial and her highest and best use assumption was so great as to make her conclusions no evidence."<sup>24</sup> The court cited extensive case law in saying that the appraiser's assumptions regarding zoning, and the effect that had on the value conclusions, was not unreasonable, thus ruling against Crosstex.

Crosstex also complained that the appraiser's comparative sales analysis was unreliable and irrelevant because (1) it failed to include one nearby sale Crosstex deemed to be comparable; (2) it included one sale that Crosstex deemed incomparable; and (3) it included blended square foot prices for residential and commercial land in arriving at an estimated value of the whole 52-acre property.<sup>25</sup>

The court of appeals ruled that the Buttons' appraiser had valid reasons to exclude the land sale in question and found no case law holding that an opinion on market value is unreliable because it does not include a comparable sale in the immediate vicinity of the subject property. The court also noted that there is no requirement to include all sales in an analysis. Finally, regarding the blended price (residential and commercial) per square foot, the appraiser explained that she could not value part of the property at one price per square foot and the other at a different price, resulting in two tracts of land, and add their values together to obtain a single price. She

22. *Crosstex*.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*

**Exhibit 2** *Crosstex v. Button*, Summary of Awards

	Trial Court Judgment	Appellate Court Decision
Part taken, permanent easement (\$)	124,530.96	124,530.96
Temporary work space easement (\$)	4,300.00	4,300.00
Damage to remainder (\$)	665,968.03	665,968.03
Total compensation (\$)	794,798.99	794,798.99

could, however, use the two prices per square foot to arrive at a single, blended price per square foot that she believed would reflect what a willing buyer would pay for the whole 52 acres. The court agreed. Having overruled Crosstex's two issues, the court affirmed the trial court's judgment of \$794,788.99.<sup>26</sup>

**Case 3: LaSalle Pipeline, LP v. Donnell Lands, LP**

In 2009, LaSalle Pipeline (LaSalle) filed an eminent domain action to acquire a permanent right-of-way easement and a temporary work space easement across two tracts of land owned by Donnell Lands (Donnell) in McMullen County, Texas. This case differs from the previous two cases in that it deals with large ranchland acreage, over 8,000 acres of land, with a highest and best use of recreation and agriculture. No claim was made that a pipeline would hinder future development and no reference to the potential or possibility of future development. The only claim was that buyers would pay less for this type of land when it is encumbered by a pipeline, resulting in damage to the remainder.

Special commissioners assessed damages against LaSalle in the amount of \$226,055. Donnell objected to the commissioners' award. As a result, a lawsuit ensued.<sup>27</sup>

The pipeline was built. It is a 52-mile long, 16-inch natural gas line, part of which runs across two tracts of land owned by Donnell. The first tract is 8,034 acres. The permanent easement on

that tract takes in 15.95 acres and is 4.4 miles long. The second tract is 46 acres, with a 0.97 acre permanent easement that is 1,400 feet long.

Each party called two witnesses at trial. Donnell called an appraiser and James Donnell Jr., as witnesses. LaSalle called as witnesses a real estate appraiser and one of its employees in charge of acquiring easements.

Donnell's appraiser explained to the jury that appraisal "has to do with interpreting what buyers and sellers are doing in the market place." He presented data for five comparable sales in McMullen County and the adjoining Webb County.

Sale No.	County	Acreage	Price per Acre (\$)	No. of Pipelines
1	McMullen	2,284	1,900	0
2	McMullen	4,743	1,700	3
3	McMullen	3,102	1,525	2
4	Webb	3,310	1,738	0
5	Webb	4,655	1,375	1

The appraiser explained that Webb County had a number of similarities to McMullen County. In both counties the land was used for recreation and agriculture. He testified that he had spoken to a person involved in both Webb County sales. The appraiser claimed that the market participant said he sold Comparable Sale 5 for less per acre because it had a pipeline and paid more for Comparable Sale 4 because it had no pipeline. The appraiser stated that the compa-

26. Ibid.

27. The case was tried by a jury in McMullen County. Information on this case comes from the opinion by Justice Karen Angelini in *LaSalle Pipeline v. Donnell Lands, LP*, Court of Appeals, Fourth Court of Appeals District of Texas, San Antonio, Delivered and Filed December 15, 2010. Available at <http://caselaw.findlaw.com/tx-court-of-appeals/1548842.html>.



rable sales data reflected a 20% diminution in value, at least part of which, in his opinion, was attributable to the pipeline.

Before the Donnell appraiser gave his opinion about the damages to the remainder of the tracts, LaSalle's counsel objected, stating that the appraiser lacked "foundation to render an opinion on damages to the remainder based on the analysis he's done." Despite LaSalle's objection, Donnell's appraiser was allowed to testify about the diminution in value to the remainder of the tracts.

Although Donnell's appraiser's paired sales data indicated land prices were 20% lower where a pipeline was present, he estimated that the north and northeast 4,100-acre portion of the 8,034-acre tract was damaged 10% and the smaller tract, 46 acres, was damaged 25%. In explaining the gap between the 10% damage applied to the 4,100 acres and the 20% lower price found in the sales with pipelines, the appraiser attributed only part of the difference to the existence of pipelines.

According to Donnell's appraiser, the landowner was entitled to total compensation in the amount of \$902,255, which included \$843,490 for diminution in value to the remainder of the two tracts and \$58,765 for the value of the easement taken. Neither witness for Donnell offered an estimate of the value of the temporary work space.

Next, LaSalle's appraiser testified. He opined that the existence of the pipeline did not diminish the market value of the remainder of the tracts in this case. LaSalle's appraiser testified that he used 15 sales in McMullen County, including some of the same comparable sales used by Donnell's appraiser. He also testified that he spoke to the buyer or seller in each sale, who all said the existence or absence of a pipeline did not affect the sale price. LaSalle's appraiser also looked at sales in Webb County and spoke to the same seller or buyer as Donnell's appraiser had. He claimed that the same individual said the existence or absence of a pipeline had no effect on the sale price of either property, which is contrary to the claim made by Donnell's appraiser. The LaSalle appraiser submitted his written appraisal, which relied only on sales in McMul-

len County. His conclusion was that the value of the land after the pipeline was installed was the same as before the pipeline, i.e., no diminution in value with zero damage to the remainder.

Finally, LaSalle's appraiser testified that the fair rental value of the temporary work space was \$5,984 for tract one and \$418 for tract two. Therefore, the total compensation for the temporary work space should be \$6,402.

The pipeline company's appraiser found fifteen comparable sales that show no diminution in value caused by the presence of a pipeline. The landowner's appraiser found five comparable sales that indicated significant damages to the remainder caused by pipelines. The jury found that the landowner was entitled to damages totaling \$658,689, which included \$34,533 for the permanent easements, \$19,206 for the temporary work-space easements, and \$604,950 for the diminution in value to the remainder of the tracts.<sup>28</sup>

LaSalle appealed the trial court's decision, complaining that the damages awarded were not supported by legally and factually sufficient evidence with regard to compensation for the temporary work space easements and damages to the remainder.

In its appeal, LaSalle also complained that two members of the jury were biased as a matter of law and that the trial court erred in denying LaSalle's juror challenges for cause. During jury selection, LaSalle objected to seating the two jurors, but LaSalle had used its peremptory strikes on two other potential jurors who had acknowledged before the trial that they leaned in favor of the landowners. Upon further questioning, both potential jurors said they believed they could base their decisions on the evidence and that they could be impartial. The appellate court concluded that the trial court did not err in denying LaSalle's challenges.

The appellate court in its lengthy decision cited approximately forty cases in explaining its ruling. The court explained that its standard of review would be to view the evidence in a light most favorable to the party for whom the verdict was rendered.<sup>29</sup> The court stated, "If any probative evidence supports the jury's findings, we must uphold the jury's verdict."<sup>30</sup>

28. *Ibid.*

29. *LaSalle* court citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex.2005).

30. *LaSalle* court citing *Exxon Corp. v. Garza*, 981 S.W.2d 415, 420 (Tex. App.-San Antonio 1998, *pet. denied*).

**Exhibit 3** *LaSalle Pipeline v. Donnell Lands*, Summary of the Expert Testimony and Awards

	Appraiser for LaSalle Pipeline	Appraiser for Donnell Lands	Trial Jury Award	Appellate Court Decision
Part taken, permanent easement (\$)	Not revealed in appellate opinion	58,765	34,533	34,533
Temporary work space easement (\$)	6,402	No value estimated	19,206	6,402
Damage to remainder (\$)	0	843,490	604,950	604,950
Total compensation (\$)	226,055*	902,255	658,689	645,885

\*Also the amount of damages awarded by the special commissioners.

The appraiser for the landowner had valued damages to the remainder at \$843,490. LaSalle's appraiser had told the jury there was no damage to the remainder. The jury awarded \$604,950 in damages to the remainder, which was well within the range of values testified to by the experts. The appellate court ruled the jury could choose any number from zero to \$843,490 in determining the damages award.

In its appeal, LaSalle also claimed that Donnell's appraiser had a gap in the data and he used sales outside of the vicinity, i.e., sales in a county different from the subject's, when in fact there were sales in the same county that were not used. The appellate court held that the gap between Donnell's appraiser's data and his opinion was not so great as to invalidate his opinion because (1) the opinion he offered (10% and 25% damage) was in close proximity to the 20% damage that his data showed, (2) he offered an explanation for why there was a difference between his data and his conclusion (saying that the difference was only partially due to the pipeline), and (3) the jury's award was substantially below the appraiser's total damage estimates.<sup>31</sup>

The appellate court ruled that the jury had legally and factually sufficient evidence to award Donnell all but \$12,804 of the original award. In its written opinion, the appellate

court found that evidence did not support the \$19,206 awarded for the temporary work space easements and reduced that part of the award by \$12,804 to \$6,402 because that was the only amount testified to during trial. The appellate court affirmed the modified jury decision at \$645,885, which was the trial court award less \$12,804.

### Summary and Conclusions: Major Issues Addressed and Debated in the Cases

In the three pipeline eminent domain cases presented here, juries awarded the landowners significant damages to the remainder in a partial taking.<sup>32</sup> In two of the cases, *Crosstex v. Button* and *LaSalle Pipeline v. Donnell Lands*, the decisions have been affirmed by the appellate courts. The Supreme Court of Texas declined to hear the cases, so these appellate decisions are final and are part of Texas case law. The *Peregrine Pipeline v. Eagle Ford Land Partners* decision is being appealed and the final outcome remains to be seen. Many of the issues argued in the trial court had been addressed in previous cases relied upon by the appellate courts.<sup>33</sup>

There were many important appraisal issues addressed, debated, and appealed in the three

31. TexasEminentDomainLawyer.com, *LaSalle Pipeline, LP v. Donnell Lands LP*, November 30, 2013, <http://bit.ly/LasallePipeline>.

32. An anonymous reviewer offered the following observation: "Each of these cases occurred at a time when there was a concerted effort on the part of several groups in Texas and around the country to stop both pipelines and fracking. This may have had an impact on the outcomes of these cases as each was decided by a local jury."

33. As reported in a transcript of the *Peregrine* case and the two appellate court decisions.

cases presented. A partial list of the issues discussed and highlighted include the following:

- Measuring just compensation, the federal rule (value before the taking minus the value after the taking), and the state rule (value of the part taken and diminution in the value of the remainder)
- Damage to the remainder
- Highest and best use
- Reasonably probable foreseeable future highest and best use as well as how far in the future is reasonable
- Hypothetical subdivisions, limitations on the use of hypothetical subdivision analysis to value large undeveloped tracts of land
- Increased cost to develop land encumbered by pipelines
- Paired sales analysis as applied to damage to the remainder cause by pipelines
- Separate economic units used to value a large tract of developable land
- Comparable sales outside of the immediate area
- Omission of a nearby sale in the analysis
- Blended price per square foot (residential and commercial)

- Gaps between the data and the appraiser's opinion of value
- Impaired access as not compensable in Texas
- Change in property use and zoning
- Rural agricultural and recreational land damaged by pipelines.

In all three cases, the appraisers for the land-owners found paired sales indicating large percentage differences between land encumbered by pipelines and unencumbered land. The paired differences ranged from 5% to 55%. In almost every case, the appraiser's estimate of damage to the remainder was 10%.<sup>34</sup>

In all the cases, basic appraisal issues arose regarding the expert's choice of comparables, the highest and best use, and witness credibility. Overall, the credibility of the testimony is what the court is most likely to rely on in rendering a decision. Since appraisal is both an art and a science, expert witness credibility will sway the court decision, including which comparables should be considered relevant. This will be grounded in development of the opinion of the appraised property's highest and best use—for both the part taken and the remainder.

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34. The one exception is a small tract that was a part of Donnell Lands property; there the damage was 25%.

## Additional Resources

Suggested by the Y. T. and Louise Lee Lum Library

### American Gas Association—Knowledge Center

<https://www.aga.org/knowledgecenter>

### American Petroleum Institute, “Understanding Natural Gas Markets”

<http://www.api.org/oil-and-natural-gas/energy-primers/natural-gas-markets>

### Appraisal Institute

- **Education**

<http://www.appraisalinstitute.org/education/>

- *Complex Litigation Appraisal Case Studies*
- *Condemnation Appraising: Principles and Applications*
- *Eminent Domain and Condemnation*

- **Lum Library External Information Sources [Login required]**

- Information Files—Appraisal practice/expert testimony
- Information Files—Oil and gas properties

- **Publications**

<http://www.appraisalinstitute.org/store/books-and-ebooks/all-books/>

- *Applications in Litigation Valuation: A Pragmatist's Guide*
- *Real Estate Damages*, 3rd edition
- *Real Estate Valuation in Litigation*, 2nd edition

### MineralWise—Oil and Gas Leases

<http://www.mineralweb.com/oil-gas-lease-forms/>

### US Energy Information Administration—Natural Gas

<https://www.eia.gov/naturalgas/>