

SUPERFICIARY RIGHTS IN INFRASTRUCTURE PROJECTS

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ABSTRACT

The purpose of this writing is to state the main superficiary rights for national as well as foreign investors, in infrastructure projects and which are classified as activities of public utility and social interest by the Colombian State.

Some of these superficiary rights are the well-known administrative easements, within which the mining, petroleum and electrical easements are highlighted. As well as some other superficiary rights that can be acquired by investors such as the Special Reserve Areas in wasteland properties and expropriations.

Key words: easements, right of way, expropriation, superficiary rights.

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LOS DERECHOS SUPERFICIARIOS EN LOS PROYECTOS DE INFRAESTRUCTURA

RESUMEN

El objetivo de este escrito es el poner de presente los principales derechos superficarios a que tienen acceso los inversionistas, tanto nacionales como extranjeros, en proyectos de infraestructura, y que son calificados como actividades de utilidad pública e interés por el Estado colombiano.

Algunos de estos derechos superficarios son las ya muy mencionadas servidumbres administrativas, dentro de las cuales se resaltan las servidumbres mineras, las petroleras y las eléctricas. Amén de algunos otros derechos superficarios que pueden ser adquiridos por los inversionistas como son las Zonas de Reserva Especial sobre bienes baldíos, y las expropiaciones.

***Palabras clave:** servidumbres, derecho de vía, expropiación, derechos superficarios.*

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1. MINING EASEMENT

1.1. Concept

These are legal easements established with the purpose of promoting and enabling the mining industry to explore and exploit mines as well as for the benefit of transformation, fusion, transport and shipment of minerals. Easements are exclusively for the public interest even though they are imposed to private individuals, as expressly provided by article 31st of the Mining Code.

In addition, the mining easements have the faculty to build, install and maintain the works and equipment necessary for the mining industry development. In the

exploration, development and exploitation stage, as many easements as necessary shall be imposed in order to develop such activities.

As a limitation of the domain right, the Mining Code in force in article 165 establishes the obligation for the beneficiary to grant a previous security and the payment of an indemnity in case of possible damages in easement premises.

Article 167 in the Mining Code establishes the obligation to give notice to the owners or occupants of the lands to be explored before starting works. The owners or settlers shall have the opportunity to request from the competent authority to set up a previous security for the exploiter guaranteeing the payment of damages which may be caused.

At the same time, miner shall obtain all permits and concessions as provided by law according to the nature and location or use of construction as provided in article 168 of the Mining Code.

1.2. Mining code background

The mining legislation was created during the Spanish conquest based on a Roman legislative influence adopted in the American territories since the times of colony and the first years of the Republic.

It is important to clarify that in the Roman legislation, at the beginning, accession was applied where the owner of ground was also the owner of subsoil and later on this principle was abolished as provided by Justinian.

The Spanish Crown always distinguished the ownership of ground in the mining premises; the Crown would just hand over scarce premises, since mines were always under its control and wealth and the beneficiary was obliged to pay a royalty.

The American colonies were ruled by the Spanish general laws about mines, without harm or damage to what had especially been stipulated for each province.

From 1216 on, with the promulgation of “The Twelve Items” (Las Doce Partitas), the domain of mines was granted to the king until 1384, when, through the Alcala System, the king recognizes the private ownership of some mines, keeping the domain of metal and salt mines.

Other systems such as Birbiesca, the old Regulations and the New Notebook Regulations tried to encourage mining by enabling private individuals to look for gold, silver and other metal mines in their lands, who in return would have to pay a

percentage of what was extracted. Finally the Crown decided to incorporate mines into their treasury once again.

The New Notebook Regulations were so significant that they derogated almost all the old ruling and regulated the awarding subject, set royalties to be paid to the Crown and explained the process for mining titling. Awarding granted a precarious ownership title. If mines were not exploited or royalties were not paid then title would be lost and under such circumstances, mines would automatically go back to the royal wealth.

The previously mentioned rules are part of the so called New Castilla Compilation and some years later of the Novísima Compilation.

The Indies laws were a statute which applied for certain regions, where they were mainly applied.

New Spain and Mexico Regulations are considered as the origin of the previous Mining Code in Colombia.

The Mining Regulations of New Spain were inspired in the idea that the Crown was the owner of mines because of their nature and origin; however, they can be awarded to private individuals by way of holder owners, transferring them and creating the possibility of inheriting them too. Finally there were two conditions to make concessions, contribution to the Crown with part of the production and the responsibility of exploiting mines otherwise they would have to be transferred back to the Crown¹.

The Mining Regulations of New Spain were inspired in the idea that the Crown was the owner of mines because of their nature and origin, therefore, they were inseparable from the royal treasury and only granted to private individuals.

In accordance with Constitution dated 1821, the Spanish mining laws continued in force, for not violating them, as well as the rest of laws issued by the government. This situation was extended up to 1829 when according to Decree by The Liberator dated October 24th; "*The mining regulations*" were issued in Quito adopting for the Great Colombia the Mining By-laws from New Spain.

These Mining Regulations included the Spanish principle about the Eminent Domain of the State over all organic substances and made them awardable in

1 ARCE ROJAS, DAVID. Subsoil ownership in Colombia. Bogotá: Article published in Universitas # 87 Managazine issued by the Legal Sciences Faculty in the Javeriana University. 1994, pp. 92-93.

order to promote this industry. Likewise, such regulations also established mining procedure standards, mechanisms to award a mine among other issues.

The Constitution dated 1858, which was basically a federalist constitution, left in the hands of the confederated States the ownership of most of the known mines, except for the ones reserved by the confederation.

On October 28th, 1873, the Treasury Code of the United States of Colombia was issued, clarifying that the republic reserves the domain of mines and coal deposits or any other metal or fertilizer found in the wastelands of the nation or in the lands which according to other different titles belong to the nation. Such mines were not understood as awarded or sold along with lands and were exploited on the account of the Republic.

In the Constitution dated 1886, when taking up again a centralist system and the Federation disappeared, the domain of mines went back to the hands of the Republic of Colombia as the owner, without prejudice to the rights constituted in favor of third parties. These rights referred to the mines of the states which had been granted to private individuals and that had not reverted on their favor and to the mines that during the federal period of time were attributed by accession to the superficiary owner.

A year later in 1887, Law 38 was issued adopting as permanent legislation, at a national level, the Mining Code of the Antioquia sovereign State, which had several modifications during the century and the last important reform took place in 2005 and such a reform establishes the current Mining Code (Law 685 dated 2001).

1.3. Requirements

The Mining Code has been very clear when stating in article fourth (4th) that no additional requirements will be demanded by the administrative authority or any other entity or individual, different from the requirements stated in such a code.

This article is of great importance since the mining easement is strongly linked to this activity and there are also legal conditions, prohibitions and requirements in order to constitute it, so the requirements would be as established in this Code.

This article was revised by the Constitutional Court and it has been declared as conditionally feasible. Such corporation stated the following: *“Just because of the charges analyzed and understanding that the expression “only” does not exclude the application of the requirements established in special laws which protect the*

historical, archeological or cultural heritage of the nation and of rights and goods constitutionally protected". (Sentence C-339 dated 2002).

In accordance with article 166 and the following articles, these are the indispensable requirements in order to exercise a mining easement:

1. Existence of a mining title (article 170 of the Mining Code). These easements can be exercised as soon as the concession contract for exploration activities and for construction, development, exploitation, stock, benefit and transformation works is signed, once the Program of Works is approved by the mining authority, and the environmental license is also approved.
2. To request approval from the authorities or individuals responsible for managing the areas and places excluded from the exploration and exploitation of mining activities in accordance with article 35.

Following are the procedure requirements and best practices of the industry:

1. Give notice to owners or occupants of premises informing where the mining activity will be developed and to obtain a permit signed by owners of premises.
2. In case that no agreement is achieved between the parties, the easement "imposition" administrative process can be started. This process is a procedure to be followed before the administrative and judicial authorities in order to establish the cost of same, taking into account the guiding principles for damage indemnities, such as the arising damages and lost profits. (*Daño emergente y lucro cesante*) Procedure established in article 285 of the Mining Code.
3. To pay indemnity in case of harm or damage.

1.4. Security and indemnity

The owner of premises where prospecting works will be carried out shall be able to request a security insuring payment of damages that eventually may be caused. The Municipal Major is in charge of establishing the amount of such a security based on the rules and criteria indicated in Chapter XVIII of the Mining Code. The compensation for damages caused in this stage will be managed in the same way, but Major will follow provisions included in Chapter XXV.

Article 174 expressly mentions the way to guarantee and pay the damages caused. In case of the indemnities, the Mining Code establishes a procedure in article 184.

1.5. Restrictions for easement constitution

Following is a summary of such restrictions:

1. No mining easement shall be constituted in benefit of who is carrying out the occasional and transitory exploitation works.
2. No mining easements shall be constituted in the places excluded by the Mining Code for the development of mining activities, except for the respective authorizations granted by their beneficiaries and the corresponding administrative authorities. Such as:
 - a. The areas on which an express prohibition exists, located within the urban perimeter of the cities and towns and about which exist an authorization by the Municipal Council through the agreements adopted in accordance with the legal regulations of the municipal regimen.
 - b. In the areas occupied by rural constructions, including markets, gardens and plots attached, if a permit from the owner does not exist and it is hazardous for the health and integrity of the inhabitants.
 - c. In the areas defined as of special archeological, historical or cultural interest, except if authorized by the competent authority.
 - d. In the beaches, low tide areas and fluvial segments served by transport public companies, except if authorized by the competent authority.
 - e. In the areas occupied by a public work or attached to a public service or utility when the following requirements are not met:
 - A previous permission by the person in charge of the use and management of work or service;
 - That the rules applicable to the work or service are compatible with the mining activity to be carried out, and
 - That the mining exercise in such areas do not affect the stability of constructions and facilities in use for the work or service.
 - f. In the areas constituted as indigenous mining areas, unless the community authorities do not acquire the title according to their right to exploit them.
 - g. In the areas constituted as black community mining areas, unless the community authorities do not acquire the title according to their right to exploit them.
 - h. In the areas constituted as mixed mining areas, unless the community authorities do not acquire the title according to their right to exploit them.
 - i. In any other areas declared and delimited as areas for the protection and development of renewable natural resources or environment, unless an authorization by the respective environmental authority exists.

1.6 Procedure to constitute an easement

In accordance with the paragraph regarding the requirements necessary to constitute an easement, below we would like to put forward the strictly adjective part related issues.

- After acquisition of the mining title through a concession granted by the State and duly recorded in the mining register, the miner shall inform the owner of the premises where easement is to be constituted about the works and land extension required from his premises for the mining activity.
- Then the negotiation in which the miner and the holder of land try to reach a friendly agreement in regard with the amount to be paid in terms of indemnity since premises will be occupied, damages that may be caused due to the execution of Works, as well as for lost profits, shall start.
- If negotiation is successful, the easement is constituted and it is registered in the Real State Registration Folio, as provided in Decree 1250 dated 1970 and Decree 960 from the same year.

We should remember that the mining easement is of legal nature and as such operates irrespective of the premises owner's will. If no agreement is reached, easement shall be imposed by authority.

1.7. Types of mining easements

1.7.1. Occupation easement and use of lands. This is for the individual who has a mining title due to his activity, to occupy land areas that are strictly necessary to carry out the constructions, facilities, equipment, and works. Areas can be located within or out of the title area. In addition, title grants the faculties to carry out mining works according to the diverse modalities and extraction systems, as well as the faculties inherent in having access to the other easements.

1.7.2. Ventilation easement. In order to have enough ventilation in underground mines, different ventilation systems, pipes, tunnels, among others, may be built.

1.7.3. Communications and transit easement. It is the faculty to install their own communication systems and the appropriate means for personnel transit and for loading, transport, unloading and shipment of minerals. Such faculty may be inherent in surface occupation easement or it can be constituted in a separate way.

1.7.4. Shipment works easement. It is the faculty to build ports for the operation of ships or naval devices or for the occupation of beaches, low tide lands and marine waters, previously authorized by the naval authority.

1.7.5. Community and shared uses. Allowing the use by third parties of the works and facilities built or acquired by miner in order to exercise easements does not mean that they are public services.

1.7.6. Agreements about infrastructure. Third exploiters may agree on with miner the access to their external transport and shipment infrastructures as long as this access does not cause any difficulty to the operation of the miner owning of facility. In case that agreement is not reached, you can visit an arbitration court.

1.8. Mining easements regulation

The current regulation about mining easements is stated in Law 685 dated 2001. The following are the preferred applications of such a regulation :

The Mining Code contemplates a special regulation in terms of indemnities and securities in relation to the Civil Code since the mining exercise implies the execution of works that may cause damages to the owner of premises. This ruling is described in article 184 of the Mining Code.

The mining legislation has as a special characteristic the inexistence for the grantee of a real ownership right on mine, but a personal right to explore and exploit a natural resource granted by the State. For this reason, the easements constituted in favor of mining activities shall be included in the Mining Register². As well as the inclusion of mentioned premises in the Real State Registration Folio for the mining activity in accordance with the notary and register's office legislation, in relation with the occupation easement and use of lands.

The code ruled the community and shared uses of facilities built by miner, enabling the use of such facilities by others as long as the miner's operations are not affected. In addition, the Code allowed the access to built external transport and shipment facilities, but clarifying the law that those or these facilities will not become a public service or a utility.

This scheme is oriented for the use of infrastructure works built by the miner, by third parties, which can be considered as a significant progress of the mining legislation since it is an incentive for the community where this activity is developed since all inhabitants will benefit from the works being carried out in the region. It will generate benefits, such as a better access to the area through new roads, probably better sewer systems, lighting and communications, depending on the size of project in course.

On the other hand, in spite of the rights established in favor of the mining activity, it is important to remember that such rights shall be exercised without prejudice to the authorizations or permits to be requested from the respective environmental authority as provided for mining easements.

In other words, communities could benefit from access roads but not from certain electrical and telecommunications infrastructure.

2 VELÁSQUEZ-JARAMILLO, LUIS GUILLERMO, Goods 8th edition, Bogotá Temis Editorial, 2000, p. 269.

2. PETROLEUM EASEMENT

2.1. Origin and evolution of the petroleum easement

The first law that refers to oil is the rule dated 1829 in which The Liberator, Simón Bolívar, indicated us that land bitumen belonged to the nation, directly mentioning the oil; even though, in those times regulations for natural resources did not make any difference between mines and oils. At the end of that same century, Jorge Isaac, a poet from Valle del Cauca, obtained from the government a permit to look for and taste the coal resources of the Guajira desert and towards the south, the bituminous oozing of the Sinu Valley. We are referring to the facts occurred in 1889.

In century XX, we have Law 30 dated 1903, which considers the oil a mineral that belongs to the Nation and offers the opportunity to exploit it through contracts entered into with the executive area of the government and duly authorized by the Congress. It also establishes that rules regarding coal mines would also apply to oil deposits.

Later on, Law 110 dated 1912 replaced the Treasury Code dated 1873. It classified hydrocarbons deposits as awardable mines, since it gave a State treasury nature to the oil discovered in wastelands and in lands awarded after October 28th, 1873, without prejudice to the rights acquired. This idea was considered an absurd thing and one year later, in 1913, such a law was derogated by Law 75.

From that time on, a more independent treatment apart from the mines regimen is intended for the oil regimen. Thanks to progresses of those times and to discoveries found, the oil legislation was modernized by Law 120 dated 1919. This law was considered as the first law specially issued for the oil industry, establishing that the word hydrocarbons would include all the mineral oil deposits and formations, bitumen, waxes, asphalts, resins, fossils, and natural gases. In addition, the radioactive substances are also mentioned.

For the first time, a territorial division was made, at a national level, of the zones considered with the highest hydrocarbon potentials and the first rules applicable to the concession contracts were set up.

It also stated the hydrocarbon exploitation industry and the construction of pipelines as a public utility. It also created the pipeline easements, which are very important for this article. In addition, it abolishes the need of approval by the Congress for signing hydrocarbon exploitation contracts.

In 1931 with law 37 issued by the Congress, a harmonic ruling for hydrocarbons was obtained, but in relation to the subsoil ownership, respecting the ownership of oil by private individuals.

Five years later, in 1936, Law 160 was issued making some modifications to the previous law, especially regarding the subject about private ownership of oil. In article 10 of Law 160 / 36, it is mentioned that the oil found in lands that had legally been granted to private individuals and that were out of the nation treasury before October 28th, 1873 and had not been recovered by the Nation due to legal causes such as nullity, caducity, resolution, among others, is of private property. The oils legally awarded are a private property during the time that Law 110 dated 1912 above mentioned was in force³.

Here is what for many authors is called the diabolic test that consists of the obligation to prove the oil private ownership by a title issued before October 28th, 1873 or in case that such a title did not exist, the official public documents issued by the competent authority proving its existence. In most cases, the private individuals can not prove their ownership of hydrocarbons.

At this point, it is important to clarify that the specific subject about oil easements takes as a pattern the regulations for mining easements from the Mining Code, not the current Mining Code but Law 38 dated 1887. However, the institutions ruling the mining easements in those times and later on in Decree 2655 dated 1988 are practically the same that the Mining Code establishes today (Law 685 dated 2001). These regulations are applied in a subsidiary way, since there are no special regulations about it.

Decree 805 dated 1947 was initially established for the mining industry, regarding the occupation of wastelands, occupied by settlers or the wastelands belonging to a private individual, in the exercise of mining nature activities. According to this decree, the obligation to give notice, pay indemnities, etc. was confirmed.

Today this Decree is applicable to the oil industry, without prejudice to the modifications made by Decree 1886 dated 1954.

Decree 1886 dated 1954 has rules enabling a permanent or transitory occupation, when an agreement with the owner or occupant has not been reached in regard with the cost of occupation and the value for the damages that may be caused.

3 ARCE-ROJAS, DAVID. *Op. cit.*, pp. 97-101.

This Decree is independent from the Petroleum Code, but it is very useful for the constitution of oil right of ways and for such a reason it shall be applied in a harmonic way with the above mentioned Code.

Since then development of the oil legislation has continued its course, but not in terms of easements and the modifications that this issue has suffered has been through decrees tangentially dealing with related aspects.

As you can see, through this description of the petroleum regulations, at the beginning there was a legislation that framed the mining activities and the oil industry in only one legal regulation and from 1919 on the oil activity is treated independently.

Regarding the oil right of ways, the model established by the Mining Code in this matter was adopted without having significant modifications since 1887. For this reason, the two industries, the mining and the oil industries, can not be fully unlinked, at least in terms of easements, where the oil easements find their root in the mining easements.

2.2. Concept

Its concept is not found as such in any regulation, therefore, it is necessary to elaborate and extract its definition, based on the legal and constitutional regulations in force previously mentioned.

In this way, in virtue of article 897 under the Civil Code, it is a legal easement since it has been stated as a public utility by articles 4th and 9th of the Petroleum Code and it can be established by the oil company, irrespective of the private individual's will, if required by the public use or national interest. On the other hand, its constitutional grounds are in articles 58, 80, 332 and 334.

In accordance with such legal basis, it could be said that it is a legal easement, in virtue of which it is constituted regardless the premises owner's will, whether it is in a coercitive way by the competent authority or by mutual agreement between the parties. A fair indemnity shall be included to cover the damages caused which shall last until completion of the hydrocarbon exploitation activities with the purpose of providing convenience and the necessary means in order to have access, transportation and to execute works as required for the exercise of the oil activity and any other complementary activities.

2.3. Procedure to constitute an easement

The first of the mechanisms generally used is the direct negotiation with the owner of premises where easement shall be built.

- With the exploration and exploitation contract, or the notice about the construction of an oil facility, or the concession contract for a public pipeline, the oil industrialist shall give notice to the premises owner about the works and land extension required from his premises in order to develop such an oil activity.
- Then the negotiation in which the oil industrialist and the holder of land try to reach a friendly agreement in regard with the amount to be paid in terms of indemnity since premises will be occupied and damages may be caused due to the execution of works, as well as for lost profits shall start.
- If negotiation is successful, the easement is constituted and it is included in the Real State Registration Folio, as provided by Decree 1250 dated 1970 and Decree 960 from the same year.

We should remember that the oil easement is a legal easement that as such operates irrespective of the premises owner's will. If no agreement is reached, easement shall be imposed by authority.

The Petroleum Code establishes the faculty to construct easements in favor of the oil industry including easements for pipelines, pump stations and any other dependencies, but it does not have an own procedure, since it just refers to the pertaining procedures of the Mining Code.

2.4. Imposition of easement

The procedure to be followed by the oil industrialist in order to have access to premises when there is no agreement can vary if dealing with a public or private individual.

In practice, when dealing with permanent occupations, it is convenient to establish easement with all its legal formalities; in other words, by a public deed and inclusion in the public instrument register office if agreement is reached, or if it is by imposition through the respective judicial way.

In such a way that if the oil industrialist is a private individual and he requires doing it through judicial channels, he shall use the procedure established for permanent or transitory occupations in Decree 1886 dated 1954, having in mind that it is a judicial procedure but not a judicial proceedings. In other words, no

legal dispute exists about the easement right existence, since it exists according to the Law. This procedure is a barely definition of the indemnity values. In fact, that is the purpose of the judicial procedure. For some authors, this procedure is not subject to nullities or to any proceedings.

If dealing with a public right individual, he can follow the procedure established in article 111 of Decree 222 dated 1983, which states the immediate imposition of a provisional easement and the indemnity value through legal experts appointed by the Judge and the definite easement with which the trial ends in order to be included in the Real State Registration Folio.

It is important to note that this ruling may not be used by *Empresa Colombiana de Petroleos* in the near future since such a company will change from a State corporation by stocks, which assimilates to the industrial and commercial corporations, to a mixed economy national corporation due to the sell of the 20% of the equity to the private sector. When the above mentioned situation occurs, Ecopetrol shall not be able to follow this ruling since the scope of article 1st in Decree 222 dated 1983 do not apply to mixed economy corporations.

The subject regarding the domiciliary networks to transport gas is ruled by Law 142 dated 1994, about domiciliary utilities. This law defined the distribution of combustible gas as an essential utility. Such definition can be found in articles 174 to 176 of such a law, where exclusive service areas are established for domiciliary gas, since it is of social interest and in order to achieve the rational use of resource.

2.5. Features

2.5.1. It is of public interest: Based on the fact that the oil easement can not be understood in the same sense as the civil easement, the difference is basically because the first one is constituted between the owner of premises and the oil industrialist for public utility and social interest reasons as provided by article 4° in the Petroleum Code

2.5.2. Legal: In spite of the discussions held about if the oil easement nature is only legal or if it is a legal and voluntary hybrid since agreements among private individuals, the owners of premises and the oil businessmen, exist; the oil easement nature is legal based on the principles for public utility and social interest issues. Imposition of such easement does not depend on the will of the owner or occupant of premises but on the law empire.

2.5.3. Its purpose is the oil industry development: The purpose of this easement is to achieve that the owner of premises allows that seismic, well drilling, gas

and pipeline construction to be carried out in such premises as well allowing the necessary transit resulting of the oil and its derivates exploration and exploitation.

Presence of a beneficiary: Another particularity of this oil easement is the inexistence of dominant premises as such, but the presence of a beneficiary, which in terms of oil easements is the industry.

2.5.4. It is a limitation to the domain right: The petroleum easement is not an encumbrance as the premises easement is considered in the Civil Code, the oil easement is really a limitation to a domain right or property.

2.5.5. It is inseparable: Additionally, the oil easement is inseparable from the premises, to which it passively belongs to, even if the owner of same changes. The new owners shall respect the conditions under which such easement was created.

2.5.6. It is indivisible: It is also indivisible since it shall be understood that premises integrity will remain and that their extension shall not be limited by the new owners of premises.

2.5.7. It is out of the commerce: As long as the oil easement nature is legal, it is not subject to negotiations of any kind in front of an imposition of premises, since it is of public interest.

2.5.8. It is continuous: It is continuous since it is permanently exercised, with no time interruptions and especially because its goal is the oil and its derivates continuous transportation.

2.5.9. It is positive: It is positive since the owner of easement premises has the obligation to allow doing anything related to carrying out the oil activity in premises, with the purpose of exercising such an easement.

2.5.10. It is apparent: It is apparent since it can be observed by men and it is at sight of men or because the signposting used indicates its existence.

2.6. Petroleum easement modality

The oil easement is made up of different categories or modalities of easements exercised to contribute with the oil industry development.

Based on this idea, several classifications for easements may be created depending on the different criteria.

2.6.1. For the time of easement: This criterion provides two possibilities: That easements are transitory or permanent, taking advantage of provisions stated in Decree 1886 dated 1954 in article 5th according to the nature of works to be developed.

2.6.1.1. Permanent easements: The following easements shall be understood as permanent:

- Easements for pipelines
- Easements for roads construction
- Easements for camps and buildings for offices.
- Easements for installing drilling and similar equipment.

When dealing with this kind of works which imply a permanent occupation, an indemnity shall be paid only once and shall protect premises during the time that the oil explorer or exploiter occupies premises. This indemnity shall cover all damages.

2.6.1.2. Transitory easements: The following works shall be understood as transitory:

- The execution of surface exploration works with geophysical equipment.
- Pipeline courses
- Road routes

This type of works implies fence destruction, construction of penetration paths, superficial excavations and any other analogous works. For such reason, indemnity shall be in force for periods up to six months.

Regarding damage valuations for permanent as well as for transitory easements, provisions of Decree 805 dated 1947 shall be applied along with the modifications made by Decree 1886 dated 1954 and Decree 1420 dated 1998.

2.6.2. Due to the use given to them: This classification corresponds to the diverse types of easements:

2.6.2.1. Easement of occupation and of use of premises: It has a broad sense since this easement gives the explorer or exploiter the faculty to occupy the land areas that are necessary to exercise the oil activity. It includes all kind of activities such as construction, equipment installation, building of networks, etc. Practically,

it can be affirmed that this easement is enough in order to develop the explorer or exploiter tasks.

2.6.2.2. Easement for aqueduct: Its purpose is to take advantage of the industrial use of waters and streams of public or private use, with the limitations provided by law.

2.6.2.3. Easement for transit: As indicated by its name, this easement consists of allowing the access of machinery as well as the personnel required for execution of work to the encumbered premises.

Generally it is constituted from the public road to the work sites and their facilities, entitling the additional right of constructing, maintaining, using the works, facilities and equipment that are technically and economically advisable for the efficient transit operation of personnel and things according to the size of the project.

2.6.2.4. Easement for pipeline: The pipeline easement or right of way is especially established to favor the oil industry.

The pipeline is one of the most used means to transport oil from the well where it is extracted to the shipment terminal or to the refinery where it shall be processed.

The pipeline easement includes enough land for pump stations, pipeline, docks, tankers, and submarine and sub fluvial pipes according to article 9° in the Petroleum Code.

According to article 45 in the Petroleum Code, pipelines can be of two types: for public or private use.

For private use:

These are built by the oil producer companies for their own use and their affiliate exclusive use, whether it is oil from national concessions or oil known as private property.

These are built by two or more non-affiliated companies for the benefit of their respective exploitations, if the jointly pipeline construction is justified according to the government, due to economical reasons that exploiters and the country shall benefit from.

For public use:

All the remaining pipelines are for public use. These are considered as transportation public companies and the government has the right of preference to transport all its oil.

Pipelines can be directly built by the government or by a contract signed by the government and any individual with the technical and financial capacity to build it. The route of pipeline shall be the most environmentally favorable and shall generate stability to such facilities in terms of functional integrity.

The above mentioned difference between public and private pipelines is only to establish who shall build it and who shall be the user of pipeline. But at no moment we can affirm that exist public and private easements. The oil easement is only one and its nature is legal regardless of the type of pipeline.

2.6.3. For the oil activity development: This classification is based on the stages developed in order to carry out the oil activity. Such stages are the exploration, drilling, production, transportation, refining and distribution of the hydrocarbons extracted from wells.

2.6.3.1. Seismic exploration: Seismic is an exploration method through which waves are generated by explosive detonations or non-explosive sources that penetrate the subsoil and are reflected or refracted in order to find out the composition of the subsoil layers by means of geophones.

This is the initial stage of any oil project, where the construction of easements is necessary in order to develop such a stage. They are transitory while the paths or seismic lines are opened in order to carry out the respective study.⁴

2.6.3.2. Drilling: There are two types of drillings, the exploratory drilling and the drilling of development wells. For such a reason, it is necessary to build easements for the construction of drilling platforms or drilling islands, works which in the oil language are called locations, as well as for the construction of access roads. In other words, it is required to establish Occupation and Transit easements. The drilling easements are permanent.

2.6.3.3. Production: This stage has three phases, an early production system, and construction of collection stations and in pump stations.

4 ARCE-ROJAS, DAVID. Environmental Law in the oil activity. Article published in *Vniversitas* # 85 magazine issued by the Legal Sciences Faculty. Bogotá: Javeriana University Publications, 1994, p. 74.

As you can see, it is a task that implies a significant charge for premises to be encumbrances with easements in this stage, in addition to the risk of installing in premises facilities that have a cost higher than the original cost of premises. If taking into account the principle those accessories has the same luck as the main item, the risk that the owner of premises may become the owner of facilities exists. For that reason, in some cases it is preferred to acquire the ownership right directly on premises or to expropriate them, such as the case of construction of collection and storage stations.

2.6.3.4. Transport: The immediate step after discovery and exploitation of an oil field is the transfer of oil to the refining stations or to the shipment terminals with the purpose of being exported. For this reason, it is necessary to build pipelines. The natural gas is transported under identical circumstances, but pipes have the name of gas lines.

Here easements affect in a more clear way premises for a pretty long period while pipes are underground, but we can affirm that an easement with permanent transit shall be built since maintenance works shall be carried out for pipelines.

This stage is very special because it requires the construction of oil easements since pipeline goes across premises and easements shall be for the exclusive use of the oil industry.

2.6.3.5. Refining: In this stage no oil easements are built as the refining process is being carried out at special places where the oil is being distilled and is going through chemical processes to extract part of the components it has?

The refinery is usually built in premises acquired by the oil company. For this reason, the domain right is not limited to other individuals as it happens with easements.

2.6.3.6. Distribution: In this stage, easements are built so that gas lines and pipelines or any other lines can go across premises until they reach the supplying plants, maintenance stations, *City Gates* or pressure reducing stations and are distributed to the cities consuming gas.

In regard with oil, there is no distribution as such, since the oil gets to the refineries or to the shipment terminals in order to be exported. Gasoline, one of its derivatives, is sent through lines to the collection center in charge of its distribution. We can affirm that no oil easement for oil distribution exist as such.

2.7. Petroleum and mining easements in wastelands of the Nation

The wastelands in accordance with the Civil Code in article 675 are properties which are located within the national territory and do not have an owner and the main feature is that no private ownership has been exercised on them.

Law 200 dated 1936 have three criteria about these wastelands to define them:

- 1) *all lands that have not been subject to a private ownership belong to the nation and it constitutes a wasteland.*
- 2) *Some of these lands are to be awarded by the nation to private individuals and others constitute a national reserve.*
- 3) *From 1822 on, private individuals could not acquire a private domain on wastelands by prescription or acquisitive prescription*⁵.

But the significance of Law 200 dated 1936 is incalculable, since it is not exclusively limited to establish the criteria to determine whether premises are or are not wastelands. This law also establishes a presumption, "the economical exploited rural premises were not wastelands", which gives the possibility to occupants of nation's lands who are economically exploiting the ground by carrying out activities such as cattle, crops or plantations of an economical importance, to be considered as owners of premises.

In order to consolidate this situation, such individuals shall request an awarding title, as provided by law so that the government issues a title certificate if no legal inconvenience exists.

The awarding title or certificate by the State provides the judicial sentence that proves that property was acquired by prescription in the event that wastelands are occupied. This title shall be registered in the public instruments registrar's office in order to prove ownership of land.

In spite of the State offers the wastelands to private individuals, some of such lands are reserved and, therefore, are not awardable. We are very interested in this part according to this writing and further it will be discussed in more detail.

Law 200 dated 1936 are of great value since it rules the matter about rural premises in Colombia. This law is subsequently complemented in some items by Law 160 dated 1994, regardless that the latter is autonomous.

5 VALENCIA-ZEA, ARTURO y ORTIZ-MONSALVE, ÁLVARO. Civil Law, Real Rights. Book II. 10th. Ed. Bogotá: Editorial Temis Editorial, 1996, p. 257.

In a special way, article 96 in the Petroleum Code grants the right to the oil exploiters of the superficiary use to exercise pipeline easements in an area of 30 meters on each side of the main line, sub-lines and the connection lines in the premises belonging to the nation, as well as the necessary areas for the facilities and storage of pipeline accessories, such as buildings, pump stations, shipment areas, etc.

Let's take a look at Law 160 dated 1994⁶ in more detail.

This law has as one of its regular purposes the occupation and use of wastelands. For this purpose, the Instituto Colombiano de Reforma Agraria (Incora), which today is called the Instituto Colombiano de Desarrollo Rural (Incoder) and that is also modified by this law, is in charge of administrating wastelands of the nation and awarding, entering into contracts, constituting reserves, co financing with territorial entities titling programs of wastelands, among others. (art. 12)

Law 160 dated 1994 considers in article 67, paragraph, that wastelands adjacent to national parks, wastelands located within a radio of 5 kilometers, around the areas where mining and oil resources are being exploited, wastelands selected by public entities to carry out road plans or any other plan of same significance for the social and economical development of the country or of the region, which construction can increase the price of the land due to factors different from its economical exploitation, whatever wastelands constituting a territorial reserve of the State and any other wastelands shall not be awardable as provided by law.

At the same time, article 75 of same law establishes the possibility that Incoder constitutes reserves in wastelands in favor of public right entities for the execution of high interest national projects such as the projects related to the mining and oil resources exploitation or any other projects of equal significance such as the activities stated by law as public utility and of social interest and the activities carried out with the purpose of preventing settlements in the areas adjacent to the zones where natural resources exploitation and exploration are carried out, due to public order or to protect the national economy interests in the latter event.

Recently, Incoder ruled a reserve request in favor of the industry and public utility activities, by issuing Agreement 109, dated May 3rd, 2007. The purpose of

6 It is to point out that on this days the Congress of the Republic is debating the bill No.- 210/07 Lower Camera, 030/06 High Camera, " By which is ruling the Development Rural Bylaws, and is reformed the Colombian Institute for Rural Development —Incoder— and are dictated other dispositions", which in the article 179 Derogate the law 160 of 994.

mentioned agreement is to rule the constitution of reserves in favor of public law entities on wastelands, as well as the removal of lands subject to such a regimen.

This recent agreement rules that the beneficiaries of a special reserve constitution in wastelands are the public law entities requiring premises for the execution of high interest national projects such as the projects related to the mining resources exploitation or any other projects of equal significance in order to establish utilities or to develop the activities stated by law as public utility and social interest activities or in order to prevent settlements in the areas adjacent to the zones where mining or oil exploitations and explorations are carried out or due to public order or to protect the national economy interests. Activities such as mining, oil and electrical transmission activities.

It is very important to take into account that the places where indigenous or Afro Colombian communities are ancestrally settled or places which are their habitat and those lands constituting a State Territorial Reserve or in case of goods for the public use are not considered as wasteland reserves.

The petition to request constitution of a reserve in wastelands for the strictly purposes as provided in articles 75 of Law 160 and article 123 of Law 418 dated 1997, shall be formulated in writing and addressed to the Incoder General Manager.

This request shall be delivered at any of the Incoder's offices established in the national territory. The following documents and information shall be attached to the request:

1. The name of entity and its legal representative with documents supporting the respective creation and possession.
2. The name of premises with specifications regarding their geographic location.
3. Premises registration number, if possible.
4. Statement affirming that the premises to be reserved are wastelands and that are not a State Territorial Reserve, are not a community savannah, nor a strategic ecosystem or an area of special handling.
5. The name and address of neighbors of premises at each one of the cardinal points.
6. The respective map in accordance with the technical requirements established by Incoder in Resolution 1216 dated 2005.
7. Feasibility study for the execution of high interest national projects such as mining resources exploitation and exploration, indicating the areas adjacent to the exploration and exploitation sites.

8. Feasibility study for the execution of high interest national projects such as establishing utilities or developing the activities stated by law as activities of public utility and social interest.
9. Permit for the construction of infrastructure works addressed to install and equip the respective utility or to develop the activity stated by law as an activity of public utility and social interest.
10. Environmental license or favorable concept issued by the competent environmental authority as required by project.
11. Payment of the amount established for procedure expenses.

As you can observe, there are two mechanisms such as the oil and mining industry which end up as beneficiaries since Incoder:

- Will not award the adjacent areas, 5 kilometers around the area where mining resources are being exploited, as a reserve that safeguards the public order and economical interests.
- Will establish reserve areas for future explorations and exploitations of natural resources since such resources are of public utility and social interest.

Subsequently, Law 418 dated 1997 was issued, which validity was extended by Law 598 dated 1999 that contains provisions regulating this matter and developing Law 160 dated 1994.

Articles 123 through 130 establish that Incoder shall take into account in each case the specific circumstances of public order in the region when delimiting and marking the areas adjacent to the oil exploitations. For this purpose, the Interior Ministry and any other public entity interested in the constitution of territorial reserves shall be listened to first of all.

It also gives the opportunity of handing over the reserved wastelands to entities in charge of the oil and mining activity on a loan or rent basis. These public entities or Incoder shall be able to acquire by means of a direct negotiation or expropriation with indemnity, the premises, improvements and rights of the private individuals located in the areas adjacent to the exploration or exploitation in course.

This legal tool is of interest for the natural resources exploitation industry since as the companies can not request the awarding as owners of a wasteland area because their core business is not the economical exploitation of land and they can not obtain administrative easements agreed on with the State in wasteland premises, since they can not be seized, prescribed or transferred; Incoder establishes alternate possibilities in order to use such wasteland premises which are reserved for the exploration and exploitation of natural resources.

3. ELECTRICAL EASEMENT

3.1. Legal and constitutional basis

As all those plans, projects and works for generation, transmission and distribution of electrical power have been stated of public utility by Law 56 dated 1981, the right provided in article 58 of the Political Constitution starts fully operating which guarantees and insures the general interest, positioning it on top of the private interests, as mentioned throughout this writing.

At the same time, Law 142 dated 1994 (law about domiciliary utilities) in article 56 states that all those works carried out for the development and execution of works to supply public services are of public utility.

On the other hand, article 57 of such a law expressly states all those activities that the entity is entitled to carry out in the required private premises in order to develop its purposes. Among them we have the following activities: To pass through premises belonging to other people, by air, underground or superficial means, the necessary lines, cables or pipes; to temporarily occupy the areas required from these premises; to remove the crops and all kind of obstacles found in such premises; to transit, to carry out works and to safeguard them, among others.

In turn, regarding electrical power easements, article 25 in Law 142 dated 1994, Decree 2811 dated 1974, Law 80 dated 1993 and Decree 22 dated 1983 establish that such easements are of public utility.

These and other provisions of Law 142 dated 1994, Law 56 dated 1981, in agreement with Decree 222 dated 1983 and Decree 2580 dated 1985, are the main applicable ruling for the constitution of electrical easements, which are described as follows:

3.2. Concept and features

3.2.1. It is a legal easement. Since they exist by law and they are imposed irrespective of the premises owner's will.

3.2.2. It is public. As stated by Law 142 dated 1994 and Law 56 dated 1981. On the other hand, its intention is to supply a utility to the community, today considered as a first need service.

3.2.3. It constitutes a domain limitation. It grants to the public entity the faculty to pass through the affected premises, by air, underground or surface means, the

transmission and distribution of the electrical fluid, to occupy the areas involved in easement, to transit the same, to carry out works, to safeguard, preserve and maintain them and to use any other necessary means in order to execute and manage the construction of generation stations, interconnection lines, the transmission and supply of the electrical power distribution utility. (Art. 25 in Law 56 dated 981).

3.3. Procedure for constitution

First of all, the corporation that has carried out project and ordered its execution has to carry out previous negotiations with the owners of premises where an easement is to be constituted and in case that no agreement is reached, has to carry out the initiation of an easement imposition process.

In order to develop this process, the rules included in books 1 and 2 of the Code of Civil Procedure and the provisions stated in Law 56 dated 1981 shall be applied.

On the other hand, in this kind of easements is typical the fact that they can be imposed by the regulating commissions and also by the territorial entities and the Nation as long as they have the responsibility for supplying this service. (Law 142 dated 1994 article 118).

3.4. Extinction of the electrical easement

The electrical easement is extinguished by the reasons provided in article 120 of Law 142 dated 1994. Following are such reasons:

1. Because of the foreseen causes included in the Civil Code.
2. Because of stopping its use for two years.
3. If the premises where easement is are in such conditions that it is not possible to use them during the same period of time.
4. Because of prescription of same term.
5. Because of deterioration as referred to in article 66 of the Administrative Contentious Code, if coming from an administrative act.

4. INDEMNITIES OF EASEMENTS

Indemnity is made up of two items: the arising damage and the lost profits, as provided in the Colombian Civil Code, article 1614.

“Arising damage and lost profit. Arising damage is understood as the damage or loss resulting from not complying or having imperfectly complying with obligation,

or having delayed its compliance. And lost profit as the profit or benefit which is not reported since obligation has not been fully complied with or has imperfectly been complied with or its compliance has been delayed”.

In Colombia a methodology has been developed in order to assess the mining, oil and electrical easements not only by the companies but in general by the entities dedicated to practice such valuations.

Currently with Decree 1420 dated 1998, this task can be executed with more severity. Even though this Decree has not been issued for easements, it is issued for assessing premises. For this reason, these easements may benefit from this regulation.

Today the State corporations, *Ecopetrol* for hydrocarbons, *Ingeominas* for mines and the electrical regulators, as well as the private corporations that are carrying out these activities have a similar process addressed by Decree 1420 dated 1998, for the valuations of premises with the purpose of buying them or constituting easements and payment of indemnities, but these industries, in the private as well as in the public sector, share this common philosophy: Justice and Equity

As an example, *Ecopetrol* states it in the following way:

“The justice principle is understood as a monetary retribution proportional to the real affectations in premises caused by the operation and constructions carried out in such premises. On the other hand, the equity principle has to do with the fact that, irrespective of the economical, cultural and religious levels of owners, under the same circumstances (physical features of lands, commercial value, affectation level, etc.); they will receive in proportion to the affected area the same amount of money as indemnity”⁷.

In order to calculate indemnity, according to the two mentioned principles, the real affectation reported by premises shall be taken into account.

On the other hand, the private companies have a very clear philosophy of land negotiation, which can be summarized in the following criteria:

- To develop all the tasks tending to efficiently carry out the construction and maintenance of facilities.
- To pay the damages and to negotiate easements at commercial prices within their budget.

⁷ SANABRIA, HÉCTOR. Methodological Criterion for Easement Indemnities. This document is filed by Arce Rojas Consultores S.A. Bogotá, 1998. 14 p.

- A fair price is paid in order to compensate the damages caused by the constitution of easements in a determined area keeping the balance. They are ruled by the equity principle, in such a way that the owners or holders feel duly compensated.
- To maintain good relations with the owners of premises in order to avoid conflicts that can have repercussions during development of works.

The indemnity amount is according to the commercial value of premises and for this purpose corporations turn to the promotion and agricultural credits of valuations in the region and to the average production in order to establish the minimum and maximum ranges to be paid for damages and easements.

As you can see, the amounts paid for easements are indemnifying. In other words, they do not increase, without just cause, the equity of owners of premises.

During the last years, the problem was to establish a unique criterion of valuation, which started to be developed since 1983 when the Homogenous Physical Zones criterion was adopted with the purpose of implementing massive valuations. This criterion is currently developed by Decree 1420 dated 1998 and it is adopted in any or other way by all the entities involved in this task. This ruling has the purpose of pointing out the rules, procedures, parameters and criteria for carrying out valuations by which the commercial value of premises shall be determined for the execution of the following events: Acquisition of premises by obligatory transfer, by voluntary transfer or by a judicial expropriation process, among others.

Let's remember that this Decree is not contemplated for easements, but the same objective criteria can be applied to them. For this reason, it is important to define what a valuation is and how to set prices in a land valuation as well as the procedures and methodologies used in this task.

The valuation has the purpose of determining the amount of a fair indemnity to cover the damages that may be caused due to the occupation or imposition of the mining, oil or electrical easement. This indemnity shall include the arising damage and the lost profits in such a way that, after the integral repair, the owner's conditions are the same or in a great part are as if such events have not occurred.

The predominant criterion ruled and developed by Decree 1420 dated 1998 not always is the criterion adopted by the exploiting companies in preliminary negotiations. However, this Decree develops the methodological criteria to carry out valuations of premises, trying to generate the highest level of reliability and certainty that the values set by expert opinions are the appropriate and correspond

to a fair amount of money. In the case of easements it would be the amount of the indemnity to be paid by the mining or oil industrialist, among others, to compensate the damages caused as a consequence of the occupations to be carried out in private premises that are required to develop and to execute the proper activities.

This decree is the one used by the Instituto Geográfico Agustín Codazzi, which has the highest acceptance and is practically the only one applicable to the auxiliary experts of justice within the easement process. Mentioned rule give rise to the homogenizing of the areas for valuation, with the purpose of establishing the real value of premises and the land areas in which occupation is required.

4.1. Criteria for indemnity valuation

a. According to the affectation level: A first aspect to take into account is establishing if affectations with works are transitory or permanent.

This criterion directly limits the owner's usufruct in premises from which one of the greatest domain limitations comes from. This is what the indemnity payment mainly pretends to compensate. In this way, we can observe that the valuation setting up the indemnity amount may vary depending on the damage or eventual and prolonged damage caused by works.

b. According to the value and price of premises. This criterion is directly associated with the land features according to the affectation areas. It is specifically about the premises.

It is not the same to carry out a valuation of a determined extension of lands in a rural or urban area, of fertile or unproductive lands, or dedicated to one or another agricultural or cattle use. Generally these are the uses given to the premises located in rural areas or whatever destination is given to those located in the urban areas.

The value of land, which could be said, is the importance represented by its existence in a determined place. For example, in the coffee area, the value of fertile lands would be the fact that such premises allow cultivation of coffee, generating an economical growth in the area and in the income of cultivators.

The price of lands, could be said, is directly related to the amount of money that shall be commercially paid to a person interested in acquiring such lands, which due to its location, own characteristics and improvements carried out in such premises make them more appreciated in economical terms. A different thing would be if they were unfertile lands, following the previous example, that would

not allow growing coffee plants, then, in this case, the commercial cost of lands would be a minimum price.

In synthesis, the higher or lower valuation and price (cost) of premises, vary in accordance with the uses given or to be given, their location and features to make them or not economically exploitable.

c. Income. The income factor in order to determine the indemnity value is related to the marginal incomes generated by the productive process and that represent the economical benefits for owners of premises.

Being the land a production factor, it generates economical incomes for the owners working the land. In this case, an amount satisfying the loss of future economical incomes coming from production or land productive potentiality shall be also included in the fair indemnity to be paid by exploiters due to the occupation of premises, as a consequence from not being possible to exploit them since premises have been occupied.

d. According to the improvements carried out. This criterion is directly established by Decree 805 dated 1947, as follows:

1. The human work and the expenses used to adapt land for its use; (labor force and infrastructure costs);
2. The commercial value, when valuation was carried out, of buildings, plantations, fences, irrigation ditches, roads, and any other useful works, including in regard with sowings, the yield expected from pending harvests; (Lost profits);
3. The higher effective value that land has acquired with the effort of the holder, and valuation;
4. The commercial value of the land surface that grantee is going to occupy in the mining exploitation.

e. According to the physical homogeneous zones. A physical homogeneous zone is the geographical space of a region with similar characteristics in terms of grounds, waters, cliffs, thermal floors, roads, use, economical purpose, or any other variables allowing differentiating this area from the adjacent areas and having the same incomes and consequently establishing the same price.

This criterion allows determining the valuation of land masses with similar characteristics and that are within the same zone. In this way, it is easier to know the commercial price of a determined land area, since its commercial price would have already been established and it would be the same assigned to the whole area, unless such a land has special features making it different from the other part of the area.

This massive valuation methodology given the existence of the zones denominated as physical homogeneous zones, practiced by the Instituto Geográfico Agustín Codazzi, is the one used to set up a commercial value of the affected area or place of project. Mentioned methodology is carried out on such a place, taking into account for the final opinion, the different variables for this method which shall ultimately determine the own characteristics of land and its true commercial value.

f. According to the variable of the area in particular. The characteristics of each one of these variables are: The use which can be urban, industrial, commercial or recreational, as defined by the POT⁸ of each municipality. The fragile ecosystem zones, exploited areas with trees of deep root, areas with an affectation higher than 70%, all of them are considered as total affectation.

There are other areas with a medium or intermedium affectation level where the private premises, the land potential value and pending issues, which are the affectation caused by works carried out in addition to the core activity of project, are taken as interaction variables⁹.

Based on the analysis results of these four variables (Use, private property, potential value and pending issues), the land characteristics and the commercial value are defined and they will be taken into account for valuation and for establishing the indemnity value of the damages that may be caused in case that premises are occupied.

This criterion looks for the real value of premises looking at it in a context within the areas that may have the same valuation; however, analyzing premises independently. In order to establish the indemnity amount, it is important to know the real affectation level of premises. The affectation level refers to the usufruct possibility that the owner has in regard with the land to be taxed.

In this paragraph, we can highlight the creation of a technical and objective criterion in order to know the fair value of the indemnities being applied by the mining, oil and electrical industry, auxiliary sciences and by the Instituto Geográfico Agustín Codazzi. It will enable valuation of damages and the cost of easement.

⁸ Plan de ordenamiento Territorial —POT— Territorial Order Plan

⁹ SANABRIA. *Op. cit.*

5. REGISTRATIONS AND PUBLICITY OF EASEMENTS

5.1. Concept

In the Colombian legal system, the theory of title and the means of acquiring property to acquire and constitute the easement real right predominate. Solemnity not allowing ignorance by the parties carrying out the legal business.

The title constituting an easement can be: Ministered by law, by a legal act, by a legal fact, by destination of a family parent and by judicial statement. They operate depending on the particular case.

The means of acquiring property are: Occupation, accession, tradition, succession, prescription.

Now, the legitimating title and the means of acquiring property are materialized by a public deed and the inclusion in the premises registration folio before the Public Instrument Register Office, respectively. Under penalty of no legal effects will be generated and that the easement real right exercise will not be affected.

5.2. Legal basis

The Civil Code, Decree 1250 dated 1970 and Decree 960 dated 1970 establishes the general solemnities that any real right requires to be legally valid. In addition, solemnities are found in the legislation of each industry (mining, oil and electrical industry), but formalities required by the rules aforementioned shall be followed since they are the gender and, the other, the kind.

The civil system (article 760) indicates that the easement right tradition shall be carried out by a public deed and shall be duly registered. Likewise, Decree 960 dated 1970 article 12 mentions that all acts and disposition contracts or premises encumbrance shall be stated in a public deed. Finally Decree 1250 dated 1970 in article 2 expresses that any act, contract, judicial, administrative or arbitration providence implying the constitution, declaration, clarification, awarding, modification, limitation, taxing, guaranteeing, transfer or extinction of domain or any other main real right or accessory on premises are subject to be registered. In the same way, article 43 states that none of the titles or instruments subject to registration shall have a probative merit, if not registered in the respective office. While article 44 states that no title or instrument subject to registration shall have effects in terms of third parties, but from the date on which it is registered.

Decree 1250 dated 1970 main purpose is to carry out the individual registration of each one of the premises. Such a record shall include the legal history from the moment of acquisition of premises on. Encumbrances of premises, transfers of premises, real rights constitutions, limitations and preventative annotations, physical features, locations and any other legal management that the law requires to be of public knowledge shall also be included in mentioned record.

Such a registration complies with a publicity task since the law requires that any legal acts in which premises are involved to be carried out with transparency and that the individual acquiring or constituting a real right on premises knows the limitations and liens they have or, on the other hand, that such an individual knows that premises are free of any legal problem because premises are a public order subject.

For this reason, third parties follow this registration procedure. This is the only existing safe, reliable and legal publicity means in order to know the legal circumstances of premises. What is not included in such records is not to be raised against a third party who has constituted in good faith a real right on premises.

5.3. Registration principles

The principles ruling the registration of public instruments are as follows:

1. **Rogation.** It is a petition for registration by submitting the title or document constituting a real right.
2. **Registration publicity.** Any person, owner or not owner, may request a copy of the premises registration folio.
3. **Public faith of registration.** It is the protection of the rights of who acquires premises based on registration.
4. **Registration as a constituent act.** It is the inclusion of the way acts were carried out to acquire or constitute real rights on premises by nature.
5. **Legality of document or instrument.** At the moment of registration, official shall examine and qualify document and registration folio in order to check if it is adjusted to the law, under penalty of being rejected.
6. **It is a successive tract.** Each registration act shall be a derivation of the previous one. Registration Priority, registration shall be carried out in the order of presentation. Legality, legality of every act registered is presumed.
7. **Specialty.** Only property by nature and the real rights constituted on it are included.

5.4. Validity requirements of registration

So that registration of a public instrument is valid the following is required:

- a. That the title or public instrument shall be submitted at the competent Public Instruments Registration Office.
- b. The Title or Public Instrument shall be submitted at any time, except for the exceptions according to the law.
- c. Submission of a title or a Public Instrument affecting the legal circumstances of premises.
- d. Registration request. This is configured with submission of title or Public Instrument.
- e. Immediate origin of title protecting the right to be registered. In other words, the title or Public Instrument only generates real rights on property.
- f. Origin Registrations. These registrations operate in the case of awarding wastelands and judicial sentences stating domain by acquisitive prescription.

5.5. From the Property Registration Folio

The registration file is a folio for a specific property. Its characteristic is to be a code or number complex indicating the internal order of each office and of the succession being settled.

Its duty is to register all those acts, contracts and judicial, administrative or arbitration providences that imply the constitution, declaration, clarification, awarding, modification, limitation, encumbrances, guaranteeing, transfer or extinction of domain or any other main real right or accessory on the properties, except for the cession of mortgage loans. They shall also include distinctive figures, the registrar's office, the Department or National Territory and the Municipality where premises are located and the Property Registration Number corresponding to premises within the respective municipality, the property features (if urban or rural premises), designating premises by their number or name and describing them by their borders, perimeter, and any other identification item that may be obtained. If a sketch or a property description exists, it shall be attached to folio as integral part of same. (articles. 2, 5 and 6 in Decree 1250 dated 1970).

5.6. Property registration folio structure

The property registration folio is made up of six (6) columns, each one, with specific registration duties, with the purpose of having order, clarity and uniformity in

process. Article Seventh 7th of Decree 1250 dated 1970 describes the structure and composition to be met by folio.

First Section. This section shall be used to register titles entailing acquisition ways, stating the act, contract or providence. You can find the following: Buying and selling (101), exchange (102), donation (103), judicial statement (110), property consolidation (114), awarding by expropriation (115), awarding of the mortgaged thing (117), mine titles (118), awarding by death (150), awarding of wastelands (170), judicial statement of possession (180), judicial statement of prescription as an exception (181), by accession to ground by judicial decree (191), among others.

Second Section. In this section the encumbrances or liens to be constituted on property are registered. Such as: Mortgage of property in usufruct (212), mortgage of mines (213), mortgage of future properties (216), agrarian securities (260), industrial securities (261), immobilization certificates (270), Registration of real properties (210), mortgages of pro indiviso right (211).

Third Section. In this section, the limitations and affectations of domain are registered. Such as: Usufruct (310), use (311), room (312), easements are registered depending on their classification. Active transit (320), active aqueduct (321), active black waters (322), passive transit (323), passive aqueduct (324), electrical power (326), air (327), light (328), etc., land physical divisions (330), oil easement (915), among others.

Fourth Section. This section is to include prevention measures which according to a judicial order are decreed on property and are ordered to be registered in folio. We can highlight the following: Personal action seizure of property (401), real action seizure of property (402), coactive jurisdiction seizures (403), and civil demands of real property (410), about universalities (411), separation of goods (420), prohibitions and valuations affecting transferability (430).

Fifth Section. In this section, the possession titles by public deed or judicial decision are registered. Such as: Rents (501) use on a loan basis (520), among others.

Sixth Section. This section includes the registration of titles with a fake tradition. The following can be highlighted: Transfer of things belonging to other people (601), transfer of incomplete right or without an own background: Sale of rights on shared possessions (601), sale of a real property having only the quota right (611), sales of improvements in lands belonging to other people with registration history (612), code (999) for other kind of registrations according to law.

6. EXPROPRIATIONS AS A SUPERFICIARY RIGHT IN THE MINING, PETROLEUM AND ELECTRICAL INDUSTRY

6.1. Common aspects. Regarding what we are trying to look for, we shall remember that in relation to these three sectors, the law has stated all those activities for development as activities of public utility. For this reason, if their execution is necessary it would not be a limitation to a domain, such as the case is with easements, but a transfer of the same to the hands of the State. In other words, regarding the expropriated lands their ownerships have been acquired.

Now, in regard with the procedure established in the Code of Civil Procedure, they are applicable in some way. This process does not look for authorizing or stating or not the expropriation, but it is in charge of the corresponding issues in order to comply with formalities and an indemnity for the damages that may be caused to the expropriated premises. Such statement is decreed by the executive.

6.2. Expropriation in the oil industry. The oil industrialist, a private or public individual, can do this since request is allowed and contemplated in the Petroleum Code as well as in the administrative ruling.

The Petroleum Code points out in article 4 that at the request of the legitimately interested party, the ministry shall be able to decree the expropriation, once this administrative act has been issued. About the expropriation proceedings that may take place, primarily the judges of the circuit where the respective property is located will be known and secondly the judicial district superior courts and their procedure shall be adjusted to the Judicial Code, following the steps described in article 84 of the same petroleum ruling.

6.3. Expropriation in the mining industry. It is linked to the public utility declaratory of all those activities for the exploration and exploitation of mines (article 13 of the Mining Code). Such procedure is ruled by article 286.

In terms of mining, the expropriable goods are the premises necessary for specific works or facilities duly individualized or all the works required for a mining project, as well as the rights constituted on such premises. In other words, when premises are transferred to the industry domain, they are free of any tax or domain limitation. The only limitation to exercise this process is the limitation pretended to be carried out about properties with a mining title.

The requirements that the expropriation request shall meet are indicated in article 189 of the Mining Code and, therefore, the judicial expropriation procedure shall be adapted to such a rule for proceedings.

6.4. Expropriation in the electrical sector. This procedure is ruled, in addition to the general provisions included in the Civil Code and Code of Civil Procedure (previously mentioned), by Law 42 dated 1994, through which domiciliary utilities regimen is established, Title IV, Chapter III and by Title VII Chapter III.

As in the mining and oil industries, the public utility declaratory operates for the development and execution of works to be carried out in order to supply public services, in virtue of which expropriation is expressly authorized whenever required.

As established in article 56 of Law 142 dated 1994, when stating that the execution of works in order to supply public services and the acquisition of sufficient spaces to guarantee protection of the respective facilities are of public utility and social interest. With both purposes, premises can be expropriated.

The territorial entities and the nation are competent in order to determine the need to expropriate, to give notice of appeal and follow up the required judicial proceedings.

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