

BAYOU BRIDGE PIPELINE, LLC

16TH JUDICIAL DISTRICT COURT

VERSUS

DOCKET NO 87011-E

**38.00 ACRES, MORE OR LESS, LOCATED
IN ST. MARTIN PARISH; BARRY SCOTT
CARLINE *ET AL.***

ST. MARTIN PARISH, LOUISIANA

BAYOU BRIDGE PIPELINE, LLC

16TH JUDICIAL DISTRICT COURT

VERSUS

DOCKET NO. 87235E

**38.00 ACRES, MORE OR LESS, LOCATED
IN ST. MARTIN PARISH; ANNE
DELAHOUSSAY AKERS, ET AL.**

ST. MARTIN PARISH, LOUISIANA

BAYOU BRIDGE PIPELINE, LLC'S POST-TRIAL BRIEF

NOW INTO COURT, through undersigned counsel, comes Plaintiff Bayou Bridge Pipeline, LLC (“Bayou Bridge”), and provides this Court with the following Post-Trial Brief.

I. THE ELEMENTS OF BAYOU BRIDGE’S EXPROPRIATION CLAIM

The Court has already determined that Bayou Bridge is a common carrier for hire with the statutory right to expropriate. *See* Order Denying Defs’ Exceptions and Constitutional Challenges, ¶1. The Court has also already determined that Bayou Bridge satisfied the statutory prerequisites to file this expropriation action. *See id.*, ¶2. The two issues remaining for the Court’s determination are whether Bayou Bridge is exercising its legislatively-granted right to expropriate for a public and necessary purpose and what compensation is due to the Defendants.

The “public and necessary purpose” test is broken down into three separate inquiries: (1) does the pipeline serve a public purpose, (2) is the expropriation reasonably necessary to achieve that public purpose, and (3) did the pipeline consider costs, environmental impacts, long range area planning, and safety when selecting the location and extent of the property to be expropriated. *See ExxonMobil Pipeline Co. v. Union Pacific Railroad Co.*, No. 2009-C 1629 (La. 03/16/10), 35 So. 3d 192, 199-200; *Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot*, No. 93-148 (La. App. 3 Cir. 11/03/93), 628 So. 2d 75, 78. These three prongs are discussed in further detail below.

The test for “just compensation” is the fair market value of the property including any damages resulting from the expropriation. *Exxon Pipeline Co. v. Hill*, No. 00-C2535 c/w 00-C-2559 (La. 05/15/01), 788 So. 2d 1154.

II. PUBLIC PURPOSE

A. Public Purpose: The Pipeline Delivers Petroleum Products to End Users Which Redounds in Benefits to the Public at Large

In 2010, the Louisiana Supreme Court answered the public purpose inquiry in *ExxonMobil Pipeline at 199*: a pipeline, such as Bayou Bridge, that “**delivers petroleum products to end users . . . redounds in benefits to the public at large.**” In making that assessment, the Court relied on several cases from the Third Circuit Court of Appeals, including:

- *Dixie Pipeline Co. v. Barry*, 227 So.2d 1 (La. App. 3d Cir. 1969), *writ refused*, 255 La. 145, 229 So.2d 731 (1970), in which the Third Circuit acknowledged that a proposed pipeline would connect a privately owned plant with the proposed expropriator's pipeline, but nonetheless found a public purpose where the plant produced propane from the raw stream it received from area producers and where “the effect of the pipeline will be to transport large quantities of propane gas from the plant to a large market in several states.” *Id.* at 7.
- *Louisiana Resources v. Greene*, 406 So.2d 1360 (La. App. 3d Cir. 1981), *writ denied*, 412 So. 2d 84 (La. 1982), [in which] the Third Circuit held that “[t]he public need not be supplied gas directly from the pipeline for which expropriation is sought for [] the expropriation to meet the test of public purpose.” *Id.* at 1364. Rather, “[t]he pipeline serves a public purpose merely by placing more natural gas in the stream of commerce.” *Id.* (emphasis supplied).

ExxonMobil Pipeline, 35 So. 3d at 199.¹ Indeed, the testimony at the exceptions hearing and the trial in this matter demonstrates why the Louisiana Supreme Court and the Third Circuit have consistently held that a common carrier pipeline providing for the transport of petroleum from Point A to Point B serves a public purpose.

¹ See also *Crooks v. Placid Ref. Co.*, 05-119 (La. App. 3 Cir 06/01/05), 903 So. 2d 1154, 1166 (“We find despite any competitive advantage to [the pipeline owner], use of the pipeline to efficiently and economically transport oil to various refineries in the State benefits the public by increasing the availability of the oil and reducing costs to the consumer.”); *La. Res. Co. v. Greene*, 406 So. 2d 1360, 1364 (La. Ct. App. 1981) (“Supplying natural gas to either private individuals through public utilities or directly to private industries is a sufficient public purpose for expropriation, regardless of how far removed the consumers are from the area of expropriation.”); *Tex. Pipe Line Co. v. Stein*, 190 So. 2d 244, 251 (La. Ct. App. 1966), *rev’d on other grounds*, 202 So. 2d 266 (“The tremendous public benefits derived from the petroleum industry in the State of Louisiana are too well-known to warrant discussion. Perhaps no other resource is more important to the State's economy, and the public carrier pipelines which serve that industry are public utilities without which this all-important industry could not have been developed to its present significance. The public advantage resulting from an enlargement of the resources of the State, increasing available industrial energy and promoting the productive powers of a considerable number of citizens, was recognized by our Supreme Court as a contribution to the welfare and prosperity of the community, and was held to be sufficient proof of public purpose to justify the taking of private property by expropriation.”).

Dr. David Dismukes with the LSU Center for Energy Studies testified that Bayou Bridge will serve an important energy infrastructure public need by moving burgeoning oil production in the Permian Basin in Texas to Louisiana's currently under-utilized refineries in St. James.² He testified that Bayou Bridge will allow for diversification of petroleum products in St. James that will support downstream petrochemical industries in St. James. As he explained, these petrochemical industries produce plastic products that are essential to the everyday life of Louisianans such as blood bags for hospitals and plastic milk jugs.

Dr. Dismukes also testified about the importance of Bayou Bridge in the context of oil disruption events. He testified that providing an avenue for transportation of crude oil from the Permian Basin to St. James is important to the maintenance of supply when Gulf of Mexico supply is disrupted due to hurricanes or other events. Bayou Bridge's transport of domestic crude oil production is also important to supporting our national security interest of energy independence.

While Dr. Dismukes agreed that other crude oil pipelines exist in Louisiana, he explained that as a transportation company, Bayou Bridge would have conducted an "open season"³ to gauge the market need for this particular transportation avenue from Lake Charles to St. James. Indeed, Bayou Bridge's Director of Right of Way, Kevin Taliaferro, testified that Bayou Bridge conducted such an open season. As Mr. Taliaferro testified, it was the shipping commitments Bayou Bridge received from the open season that (1) led Bayou Bridge to the conclusion that a pipeline from Lake Charles to St. James was needed and (2) determined the size of the Bayou Bridge pipeline.

B. Environmental Impacts Are Assessed Under the Necessity Prong, Not the Public Purpose Prong

Louisiana jurisprudence has only considered the "environmental impacts" of an infrastructure project such as Bayou Bridge as a factor under the *necessity prong* of the public and necessary test as discussed below. Bayou Bridge has been unable to identify a single case in which

² Dr. Dismukes' report was entered into evidence as Exhibit 28. Although the Court granted Defendants' motion *in limine* in part by disallowing testimony regarding tax revenue to the State and job creation, Dr. Dismukes testified regarding several portions of his report that evidence other significant public purpose aspects of Bayou Bridge. In particular, Bayou Bridge directs the Court to pages 5, 10-12 of Exhibit 28.

³ Mr. Taliaferro and Dr. Dismukes explained that the term "open season" refers to the process whereby the commercial need for an infrastructure project is assessed openly in the commercial market place. The open season is a period of time when all those who may be interested in contracting for the transport of crude oil are notified by the pipeline company about a potential pipeline project and given equal consideration to bid on various types of transportation services to be provided by that pipeline. As a result of the open season, interested shippers enter into agreements for transportation commitments.

the appellate court analyzed environmental impacts under the *public purpose* prong of the public and necessary test, nor have Defendants cited any such case.

Accordingly, while Bayou Bridge agrees that the case law provides that environmental impacts may be considered in the context of location of the expropriation—as the overwhelming evidence establishes Bayou Bridge so considered—the case law does not support the “balancing” analysis Defendants contend the Court should perform under the public purpose prong.

C. Even if the Court Considered Environmental Impacts Under the Public Purpose Prong, the Court Should Accept the U.S. Army Corps of Engineers, Louisiana Department of Natural Resources, and Louisiana Department of Environmental Quality Assessments of Those Issues

The Court properly declined to re-adjudicate the environmental impacts thoroughly assessed and vetted over the course of two years by the relevant state and federal agencies with expertise in these matters. As the evidence demonstrated, not only did the U.S. Army Corps of Engineers (“Corps”), the Louisiana Department of Natural Resources (“LDNR”), and the Louisiana Department of Environmental Quality (“LDEQ”) review, assess, and permit the Bayou Bridge Pipeline, but these agencies did so *after having considered all of the very same issues and complaints* Defendants sought to re-litigate in this proceeding.

But that is not even the full extent of the state and federal bodies that have previously analyzed and rejected Defendants’ position because the organizations providing legal counsel to Defendants also challenged the permits issued to Bayou Bridge in state and federal courts throughout the past year, again raising these same issues and complaints. These challenges have been unsuccessful, and no court has invalidated any of the environmental permits issued to Bayou Bridge. This expropriation is not a forum for these organizations to continue their permit challenges. *See, e.g., So. Nat. Gas Co. v. Poland*, 406 So. 2d 657, 661-62 (La. App. 2 Cir. 1981) (holding that a commissioner’s order may only be challenged in a proceeding against the commissioner and may not be collaterally attacked in an expropriation proceeding; also holding that the “findings and orders of public administrative agencies may be considered as evidence in a judicial proceeding for the purpose of determining public and necessary purpose.”).

In support, Bayou Bridge directs the Court to the following exhibits introduced at the exceptions hearing and trial:

Ex. No.	Exhibit
BBP 4	Corps – 404 Public Notice
BBP 5	Corps – 408 Public Notice
BBP 6	Corps – 408 Environmental Assessment
BBP 7	Corps – 408 Finding of No Significant Impact (“FONSI”)
BBP 8	Corps – 404 Environmental Assessment with FONSI
BBP 9	Corps – 408 Permit
BBP 10	Corps – 404 Permit
BBP 11	LDNR – Basis of Decision for Coastal Use Permit
BBP 12	LDNR – Coastal Use Permit
BBP 15	LDEQ – Water Quality Certification
BBP 16	Bayou Lafourche Permit

III. NECESSARY PURPOSE

A. Necessary Purpose First Inquiry: Amount of Land and Nature of Acreage Reasonably Necessary for Accomplishment of the Project

The necessity prong asks whether “[t]he amount of land and the nature of the acreage taken [is] reasonably necessary for the accomplishment of the proposed project.” *Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot*, No. 93-148 (La. App. 3 Cir. 11/03/93), 628 So. 2d 75, 78. This inquiry is not concerned with the necessity of any specific location, but rather is asking whether the legislatively-authorized expropriator is seeking to expropriate the amount of land and rights that are reasonably necessary to accomplish its public purpose project. *See id.*; *see also ExxonMobil Pipeline*, 35 So. 3d at 199-200.

Here, the testimony of Mr. Taliaferro at the exceptions hearing and trial conclusively established that Bayou Bridge met this prong. Bayou Bridge is expropriating a 50-foot wide permanent easement, which allows it the minimum width necessary to ensure adequate distance from the co-located Enterprise pipeline just south of the Bayou Bridge pipeline on this tract in addition to the ability to ensure necessary access to maintain and ensure the integrity of the pipeline in the future. Bayou Bridge is also expropriating minimal *temporary* work space that will automatically revert back to the landowners six months following the pipeline’s in-service date, or earlier if use of the space is no longer needed. *See* Pet. for Expropriation ¶12 and Ex. BBP 17. In fact, the evidence shows Bayou Bridge even *reduced* the amount of temporary workspace for this particular tract by 0.2 acres when it was able to do so.⁴ Moreover, working in conjunction with the Corps, Bayou Bridge agreed to maintain and permanently clear only 30 feet of its 50-foot right-of-way in the future. Thus, while a 50-foot permanent right of way is necessary to ensure safe

⁴ This is evident by comparing Mr. Melville’s report at Joint Exhibit 1, which incorrectly relies on an earlier plat identifying 0.88 and 1.16 acres of temporary work space. The temporary work space was reduced as evidenced by BBP Ex. 17 to 0.88 and 0.96 acres in April 2017.

distances between the co-located pipelines and to ensure adequate access for maintenance and integrity purpose, Bayou Bridge will only continue to clear 30 feet in the future. *See* BBP Ex. 6, p. 56.

Thus, the amount of land taken—3.59 acres total—and the nature of the acreage—only 1.75 acres permanent with 1.84 acres merely temporary and reverting back to the landowners automatically—demonstrate that Bayou Bridge met the requirements of the necessity prong. *See* Exhibit 17.⁵

B. Necessary Purpose Second Inquiry: Was Route Selection Arbitrary, Capricious, or in Bad Faith—Burden Shifts to Defendants

Having established that Bayou Bridge met the requirements of the necessary purpose prong, the Louisiana Supreme Court in *ExxonMobil* explained that Bayou Bridge will be afforded wide discretion in determining the extent and location of property to be expropriated. *ExxonMobil Pipeline*, 35 So. 3d at 200. When this is challenged by the landowner, the burden shifts and “the *landowner must prove* that the legislatively-authorized expropriator exercised ‘its large discretion’ *arbitrarily, capriciously, or in bad faith.*” *Id.* (emphasis supplied) (quoting *Red River Waterway Com’n v. Fredericks*, 566 So. 2d 79, 83 (La. 1990)). Defendants have not met this burden.

Defendants could never meet this burden because every inch of Bayou Bridge’s route across this tract was closely scrutinized and directed by the Corps. The Louisiana Supreme Court explained in *ExxonMobil* that “[t]he criteria to be considered by the expropriator in determining the location and extent of the property to be expropriated includes factors such as costs, environmental impact, long range area planning, and safety considerations.” *Id.* The extensive evidence related to the Corps permits in this case demonstrates that Bayou Bridge considered all of those factors and that the Corps exercised a great degree of control over Bayou Bridge’s pipeline location and route through this area and this tract in particular. *See* BBP Exs 4-10. These exhibits and the testimony of Mr. Taliaferro also demonstrated the alternatives routes considered by Bayou Bridge and why they were inferior to the route selected by Bayou Bridge. *See* BBP Ex. 6, 9-15.

Moreover, Defendants failed in their efforts to demonstrate that Bayou Bridge was not in compliance with its Corps permit on this property. The testimony of Bayou Bridge’s Michael Aubele and BBP Exhibit 40⁶ established that Bayou Bridge constructed its pipeline on average 7

⁵ There is no evidence whatsoever that Bayou Bridge used more than 3.59 acres or that Bayou Bridge went outside of the footprint outlined on this exhibit.

⁶ Admitted under seal.

to 10 feet under the Enterprise pipeline spoil bank, thereby minimizing new disturbances to the land and complying with the permit requirement to be four feet below natural grade in this area.

IV. COMPENSATION

A. Land and Timber

Whether the Court views the damages to Defendants under the standard of expropriation, inverse condemnation, tort, or due process, the result is the same: the Defendants are entitled to the fair market value of the land expropriated and any damages associated therewith. Using the calculation of Defendants' individual interest by Philip Asprodites in BBP Exhibit 33, David Dominy calculated the damages to Defendants at trial as follows:

Table 1: Fair Market Value Computation

<p><u>Theda Larson Wright</u> 0.0000994 (interest⁷) x \$871 (appraised value⁸) = \$0.09 (rounded up)</p> <p><u>Peter K. Aaslestad</u> 0.0005803 (interest) x \$871 (appraised value) = \$0.51 (rounded up)</p> <p><u>Katherine Aaslestad</u> 0.0005803 (interest) x \$871 (appraised value) = \$0.51 (rounded up)</p>

As Mr. Dominy explained, the value of the timber on this tract is not marketable because of the location. Mr. Dominy testified that the mobilization of a timber harvesting operation as to this 3.59 acres was not feasible because logistics as to this waterborne property would be difficult. He concluded that the logistical costs associated with trucking and barging necessary equipment to harvest and extricate the timber on the right of way at issue would far exceed the value of the timber harvested. Thus, the timber is not marketable, and a separate assessment of timber damages is improper. The proper measure is to use comparable properties with similar stands of timber, as Mr. Dominy did in his appraisal at BBP Exhibit 30.

Nevertheless, Mr. Dominy considered the per acre "merchantable value" of the timber put forth by Defendants' expert witness Mr. Melville. Using the highest possible value assigned by Mr. Melville,⁹ \$794.70 per acre across the entire right of way, Mr. Dominy calculated the damages to Defendants as follows:

⁷ BBP Exhibit 33.

⁸ BBP Exhibit 30.

⁹ The issues of proof with respect to Mr. Melville's opinion are numerous. First, Mr. Melville opines on merchantable value, which is not market value and therefore not relevant. Second, Mr.

Table 2: Best Case Scenario Timber Damages Computation

<p><u>Theda Larson Wright</u> 0.0000994 (interest¹⁰) x \$2,854.05 (highest value¹¹) = \$0.28 (rounded up)</p> <p><u>Peter K. Aaslestad</u> 0.0005803 (interest) x \$2,854.05 (highest value) = \$1.66 (rounded up)</p> <p><u>Katherine Aaslestad</u> 0.0005803 (interest) x \$2,854.05 (highest value) = \$1.66 (rounded up)</p>
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Therefore, as Mr. Dominy testified, the total value of the land and timber on a *best-case scenario* given these Defendants' interest in the property is as set forth in Table 3.

Table 3: Best Case Scenario Total Just Compensation

<p><u>Theda Larson Wright</u> \$0.09 (land) + \$0.28 (timber) = \$0.37</p> <p><u>Peter K. Aaslestad</u> \$0.51 (land) + \$1.66 (timber) = \$2.17</p> <p><u>Katherine Aaslestad</u> \$0.51 (land) + \$1.66 (timber) = \$2.17</p>

B. Timber Statute Does Not Apply

On November 20, 2018, for the first time in their pre-hearing brief, Defendants purported to make a claim for damages under Louisiana Revised Statute § 3.4278.1. This statute is a separate cause of action that was not pled by Defendants in their reconventional demands and therefore is not properly before the Court.

Moreover, the statute does not apply here. Courts interpreting this statute have started with the premise that (1) the statute is penal in nature and therefore must be strictly construed; and (2) the legislative purpose behind the statute is to protect those with interests in trees from loggers who enter their property to harvest timber illegally. *See Loutre Land & Timber Co. v. Roberts,*

Melville does not account for the costs of harvesting and removal of the timber, which is required under Louisiana law. *Otwell v. Diversified Timber Servs.*, 04-924 (La. App. 3 Cir. 01/26/05), 896 So. 2d 222, 228. Third, Mr. Melville does not calculate the number of acres of trees that were on-spoil versus off-spoil. There is absolutely no way to tie his per acre numbers to the parcel in question. Moreover, while making a distinction in his report between the value per acre of on-spoil versus off-spoil trees, Mr. Melville's report does indicate what portion of the acreage was part of the already-cleared preexisting right of way for the co-located Enterprise pipeline. The result is that Mr. Melville failed to provide a final calculation to the Court representing his conclusion as to the timber damages. *See* Joint Exhibit 1.

¹⁰ BBP Exhibit 33.

¹¹ Joint Exhibit 1.

No. 45, 355-CA (La. App. 2 Cir. 07/27/11), 72 So. 3d 403, 407-408 (citing *Sullivan v. Wallace*, 10-0388 (La. 11/30/10), 51 So. 3d 702).

Two aspects of the statute both demonstrate why number 2 in the foregoing paragraph is correct and, additionally, why the statute doesn't apply here. First, the statute does not apply to trees that are not marketable. See *Loutre Land & Timber*, 72 So. 3d at 408 (statute did not apply to trees "destroyed" because they did not have a fair market value). As Mr. Dominy testified, the trees on the property are not marketable. Moreover, Defendants have submitted no evidence to establish market value. Their expert speaks only of "merchantable value" (presumably because he understands there is no "market value"). But his "merchantable value" fails to account for the costs associated with harvesting and removal and is therefore another reason Defendants' claim fails. *Otwell v. Diversified Timber Servs.*, 04-924 (La. App. 3 Cir. 01/26/05), 896 So. 2d 222, 228 (finding that "the trial court erred in not considering the costs of logging and hauling in setting the fair market value of the timber removed").

Second, section 3.4278.1 expressly does not apply to the clearing of a right of way: "The provisions of this Section shall not apply to the clearing and maintenance of rights of way" La. R.S. §3.4278.1(E). The clearing of right of way by Bayou Bridge, including the removal of any trees, is expressly excluded from the penal statute referenced by Defendants.

Finally, the enhancement of damages and availability of attorneys' fees under this penal statute based on bad faith also does not apply here, even if the statute did apply (which it does not). As the evidence demonstrates, Bayou Bridge had acquired more than 400 easements, including from the owners with the largest interest and who had consistently paid the property taxes since 1956. Bayou Bridge continued to work toward acquiring easements from de minimis interest holders and working toward expropriation proceedings. At the same time, Bayou Bridge was obligated by its permit to construct under the push/pull construction process that started one mile before this tract and continued three miles after it. Moreover, Defendants, who represent only one-tenth of one percent of the interest on this tract failed to demonstrate that the requisite 20% of the ownership objected to Bayou Bridge's pipeline operations. Finally, Defendants submitted no evidence of any attorneys' fees incurred or owed to their counsel, therefore defeating any recovery. See *Rhodes v. Collier*, 41 So. 2d 669, 673 (1949) ("It is the well-settled jurisprudence that, even in cases where attorneys' fees are allowed, absence of proof that the fees have actually been paid, or an obligation incurred to pay, defeats recovery.").

C. Mental Anguish and Inconvenience

Defendants also failed to demonstrate entitlement to mental anguish and/or inconvenience damages. Defendants had no connection to this property that would justify mental anguish damages. They did not live on the property. They had never used the property. They had never set foot on the property before this litigation. They did not know where the property was in the Basin until Bayou Bridge contacted them. They never paid taxes on the property. Until this litigation, they didn't know the individuals who paid taxes on the property. They never did anything to maintain the property.

Bayou Bridge did not offer this evidence to be critical of Defendants. This evidence simply demonstrates that Defendants do not possess the requisite connection to the property at issue to entitle them to an award of mental anguish damages under Louisiana law. *See Williams v. City of Baton Rouge*, 98-1981 (La. 04/13/99), 731 So. 2d 240, 248 (affirming lower court's determination that heirs who had no connection to land were not entitled to mental anguish damages). Not only did they not establish the requisite connection to the property, but the Defendants offered no evidence upon which this Court could make a determination as to any outward manifestation of injury or as to a particular amount of mental anguish damages.

As to inconvenience, Defendants' only proffered evidence of inconvenience was their testimony related to the inconvenience of this litigation. That is not type of inconvenience damages available under any body of law. Defendants were many states away from any construction on the property. They were not exposed to noise or dust, they were not required to move out of their home or to take alternative routes around construction. Those types of damages may be compensable under Louisiana law, but damages related to inconvenience for litigation are not.


V. CONCLUSION

Bayou Bridge has established that it is exercising its legislative authority to expropriate for a public and necessary purpose. Further, Bayou Bridge has demonstrated that its proposal of **\$75** to each Defendant more than adequately compensates them for any and all damages they claim in this litigation.

Date: November 30, 2018

RESPECTFULLY SUBMITTED,

Jones Walker L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, a true and correct copy of the foregoing has been forwarded to Defendants in this matter via US postal mail and/or email as follows:

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