

SUPREME COURT OF LOUISIANA

NO.

BAYOU BRIDGE PIPELINE, LLC

Plaintiff/Petitioner

vs.

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

Defendants/Respondents

CIVIL PROCEEDING

**FROM THE RULING OF THE LOUISIANA THIRD CIRCUIT
COURT OF APPEAL, NO. 19-00565-CA**

**FROM THE 16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARTIN, CIVIL CASE NO. 87011-E
HONORABLE KEITH COMEAUX, PRESIDING**

**APPLICATION OF PETITIONER
BAYOU BRIDGE PIPELINE, LLC
FOR WRIT OF CERTIORARI**

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**SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET**

NO. _____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

BAYOU BRIDGE PIPELINE, LLC

VS.

38.00 ACRES, MORE OR LESS, LOCATED IN ST. MARTI

Applicant: Bayou Bridge Pipeline, LLC
Have there been any other filings in this
Court in this matter? Yes No

Are you seeking a Stay Order? no
Priority Treatment? no
If so you MUST complete & attach a Priority Form

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Pleading being filed: In proper person, In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

- Civil, Criminal, R.S. 46:1844 protection, Bar, Civil Juvenile, Criminal Juvenile, Other
 CINC, Termination, Surrender, Adoption, Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____

Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: 16TH JUDICIAL DISTRICT COURT, ST. MARTIN Docket Number: 87011-E

Judge and Section: JUDGE KEITH R.J. COMEAUX Date of Ruling/Judgment: 12/27/2018

APPELLATE COURT INFORMATION

Circuit: 3RD CIRCU Docket No. 19-00565-CA Action: MERITS RULING

Applicant in Appellate Court: _____ Filing Date: _____

Ruling Date: 05/11/2020 Panel of Judges: Hon. Cooks, Ezell, Perry, Gremillion, Savoie En Banc:

REHEARING INFORMATION

Applicant: _____ Date Filed: _____ Action on Rehearing: _____

Ruling Date: _____ Panel of Judges: _____ En Banc:

PRESENT STATUS

Pre-Trial, Hearing/Trial Scheduled date: _____, Trial in Progress, Post Trial

Is there a stay now in effect? _____ Has this pleading been filed simultaneously in any other court? _____

If so, explain briefly _____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

08/14/2020
DATE

/s/Michael B. Donald
SIGNATURE

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STATEMENT OF WRIT CONSIDERATIONS

The writ application of Plaintiff-Petitioner Bayou Bridge Pipeline, LLC (Bayou Bridge) arises out of a decision of the Third Circuit Court of Appeal in this successful expropriation proceeding for a servitude for the construction and operation of a common carrier interstate crude oil transmission pipeline and associated facilities. In particular, the writ application relates to the Third Circuit’s holding that granted the landowner defendants attorney’s fees and expert witness costs on their trespass and due-process-based reconventional demand pursuant to Louisiana Revised Statutes 13:5111, which allows an award of such fees only in proceedings: (a) “brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them,” and (b) “for compensation for the taking of property by the defendant.” La. R.S. 13:5111. Because neither of these two requirements is satisfied in the present case, the Third Circuit’s application of Section 13:5111 in the circumstances of this case is erroneous and should be reversed.

A. Bayou Bridge, a private entity with the power of expropriation, is not an agent of the State of Louisiana.

First, Bayou Bridge is not “the State of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them,” and the Third Circuit incorrectly held that “[a]t the time BBP violated the Defendants’ due process rights it acted as a private entity qualified as an agent of the government for purposes of La.R.S. 13:5111.” A prior version of a related statute, Louisiana Revised Statutes 19:201,¹ utilized nearly identical language regarding the award of attorney’s fees in unsuccessful expropriation actions, authorizing such awards in a “proceeding instituted by the State of Louisiana, a parish, a municipality or an agency of any of them vested with the power of expropriation.” La. R.S. 19:201 (1972). Construing that language, two courts of appeal (including the Third Circuit) held that attorney’s fees could **not** be awarded against a private pipeline entity under the statute’s plain language, as such entities are not “agents” of state government when expropriating property. *See Pipeline Tech. VI, LLC v. Ristroph*, 2007 CA 1210 (La. App. 1st Cir. 5/2/2008), 991 So. 2d 1, 4-5; *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So. 2d 4, 7 (La. App. 3d Cir. 1977).

¹ Section 13:5111 authorizes an attorney’s fee award in the context of inverse condemnation/taking claims, while Section 19:201 authorizes an attorney’s fee award in the context of unsuccessful or abandoned expropriation actions. Thus, both statutes address attorney’s fee awards in the context of actions involving entities with expropriation authority, just in slightly different procedural settings.

After those decisions, the Louisiana Legislature specifically amended Section 19:201 to allow attorney’s fees to be awarded against private expropriating entities in unsuccessful expropriation actions, substituting the phrase “any expropriating authority referred to in R.S. 19:2”² for the prior listing of state governmental expropriating authorities. La. R.S. 19:201 (current version as amended in 2012). However, the Legislature did not similarly amend Section 13:5111, which retains the listing of state governmental expropriating authorities. Thus, in construing Section 13:5111 to reach private expropriating entities, the Third Circuit’s ruling erroneously interprets Louisiana law and conflicts with the rulings of the courts in *Ristroph* and *Ledoux*.

The court of appeal’s holding that Bayou Bridge is an “agent” of the state has potentially far-reaching ramifications well beyond this action and the award of attorney’s fees under Section 13:5111. Landowners and pipeline protestors have already sued Bayou Bridge on a similar agency-type theory in other contexts, arguing that Bayou Bridge is: (a) an “instrumentality of the state” for the purpose of Louisiana’s public records laws (*see Atchafalaya Basinkeeper v. Bayou Bridge Pipeline LLC*, 2018-CA-0417 (La. App. 1st 2/22/19), 272 So. 3d 567),³ and (b) a “state actor” for the purpose of liability under 28 U.S.C. § 1983 (*see Spoon v. Bayou Bridge Pipeline LLC*, No. 3:19-cv-00516-SDD-EWD (M.D. La.)).⁴ Given these efforts, the court of appeal’s manifestly erroneous holding that Bayou Bridge “acted as an agent of the government” could potentially be used against Bayou Bridge and other private entities with expropriation power in other circumstances beyond the award of attorney’s fees in an action like this one.

B. Defendants’ claims were not for a taking.

Second, the present action does not involve a proceeding “for compensation for the taking of property by the defendant, other than through an expropriation proceeding.” Bayou Bridge brought the present action as an expropriation proceeding, and the trial court granted the expropriation of Defendants’ interests in a judgment affirmed by the court of appeal. Though Defendants reconvened to allege trespass and violations of their due process rights, they expressly stated that their claims were **not** for inverse condemnation, as noted by the Third

² Section 19:2 provides a listing of the entities with expropriation power in Louisiana.

³ Because the court of appeal dismissed the appeal on jurisdictional grounds, it did not reach the correctness of the trial court’s ruling that Bayou Bridge was not subject to the public records request.

⁴ The action, filed in 2019, remains pending. Bayou Bridge has filed a motion to dismiss the Section 1983 claim against it on the ground that it is not a “state actor,” but no ruling has been issued yet.

Circuit in its opinion. Decision at 23 n.13 (“we point out that Defendants went to great lengths in its pre-trial memorandum to advise the trial court that their reconventional demands were not to be considered as a claim for inverse condemnation.”)

However, by its plain terms, Section 13:5111 applies only to such takings/inverse condemnation/appropriation claims, as numerous courts—including this Court—have recognized. See *Estate of Patout v. City of New Iberia*, 98-C-0961 (La. 7/7/99), 738 So. 2d 544, 555; *Unlimited Horizons, LLC v. Parish of E. Baton Rouge*, 99-CA-0889 (La. App. 1st Cir. 5/12/00), 761 So. 2d 753, 758; *Gravolet v. Board of Comm’rs*, 95-CA-2477 (La. App. 4th Cir. 6/12/96), 676 So. 2d 199, 204; *Whipp v. Bayou Plaquemine Brule Drainage*, 476 So. 2d 1047 (La. App. 3d Cir. 1985). Thus, in construing Section 13:5111 to encompass a claim for “due process” damages rather than a taking, the Third Circuit’s ruling erroneously interprets Louisiana law and conflicts with the rulings of these courts.

C. Summary of writ grant considerations

Therefore, this case is worthy of supervisory review because it presents not one but two instances of: (1) erroneous interpretations or applications of Louisiana law; and/or (2) conflicting decisions. La. S. Ct. Rule X(1)(a).

ASSIGNMENT OF ERROR(S)

The court of appeal erred in awarding Defendants attorney's fees and expert witness costs pursuant to Louisiana Revised Statutes 13:5111 because:

- Bayou Bridge is not “the State of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them,” and
- the present action does not involve a proceeding “for compensation for the taking of property by the defendant, other than through an expropriation proceeding.”

STATEMENT OF THE CASE

Bayou Bridge brought the present action to expropriate a servitude for the construction, installation, and operation of an underground common carrier oil pipeline.⁵ Defendants—three out-of-state residents, each of whom owns an undivided interest of no more than 5/100's (.05803) of one percent of the 38-acre parcel at issue and was recruited by activist groups opposed to infrastructure development—answered, challenging the constitutionality of Louisiana's eminent domain scheme as applied to oil pipelines. They also filed exceptions of prematurity with their answer, claiming that Bayou Bridge failed to provide two Defendants with statutorily-required information prior to the expropriation petition. Finally, Defendants filed a reconventional demand seeking damages for trespass and violations of due process based upon Bayou Bridge's pre-expropriation commencement of construction on the property. The trial court rendered judgment authorizing the expropriation, rejecting Defendants' constitutionality challenge and prematurity exceptions, and awarding both just compensation for the expropriation and damages for trespass.

Defendants appealed, asserting four assignments of error. Specifically, they claimed that the trial court erred in: (1) denying their claim of unconstitutionality of the Louisiana eminent domain scheme; (2) failing to render judgment on the due process violation component of their reconventional demand; (3) denying their prematurity exceptions; and (4) rendering certain

⁵ The pipeline provides additional, much-needed transportation capacity to transport greater volumes of domestically-produced crude oil to existing Louisiana crude oil refineries, utilizing existing and operational infrastructure. In particular, the pipeline serves as a 162-mile connection between a terminal facility in Lake Charles, Louisiana, and the refining and marketing hub of St. James, Louisiana. The tract of property at issue in the present action is a 38-acre tract of uninhabited land in St. Martin Parish owned by nearly 900 heirs. Prior to filing the expropriation action, Bayou Bridge acquired more than 400 easements with respect to this tract, including the owners with the largest interest—the only owners to exercise possessory acts as to the property and who had consistently paid the property taxes since 1956. Bayou Bridge brought the present action as to the remaining interests (involving approximately 470 total heirs, each with a *de minimis* interest) with respect to whom it was unable to obtain a voluntary servitude agreement, most unlocatable and all without any connection with the land whatsoever.

evidentiary rulings relating to the exclusion and admission of expert testimony. Defendants did not appeal the propriety of the trial court's public purpose determination for the expropriation, the amount of compensation awarded for the expropriation, or the amount of damages awarded for the trespass.

A five-judge panel of the Third Circuit upheld all of the trial court's rulings except its failure to award damages on the due process violation alleged in Defendants' reconventional demand. As to that ruling, the majority⁶ held that despite the trial court's (unappealed) award of trespass damages,⁷ Defendants were also entitled to due process damages arising out of the same actions by Bayou Bridge—*i.e.*, the commencement of construction prior to an expropriation judgment covering Defendants' *de minimis* interests in the property. Decision at 25 (“When BBP consciously ordered construction to begin on this property prior to obtaining a judicial determination of the public and necessary purpose for the taking, it not only trampled Defendants' due process rights as landowners, it eviscerated the constitutional protections laid out to specifically protect those property rights.”) and 29 (“the trial court's failure to award damages for BBP's violation of Defendants' due process rights, a claim separate and apart from their award for trespass damages, constituted legal error.”) Though the trial court had awarded each Defendant only \$75 for trespass damages based upon the miniscule amount of their property interests and their lack of any connection to the property, the majority assessed Defendants' damages for this due process violation *res nova*, awarding each Defendant \$10,000 by focusing on the “deprivational conduct of the party who violated those due process rights.” *Id.* at 29.

Following this damage award, the court also awarded Defendants their attorney's fees and expert witness costs, ruling as follows:

the Defendants have prayed for an award of reasonable attorney fees and expert witness fees. At the time BBP violated the Defendants' due process rights it acted as a private entity qualified as an agent of the government for purposes of La.R.S.

⁶ Judge Ezell dissented from the majority's award of damages on the Defendants' due process claims because: (1) “the damages suffered by Defendants for Bayou Bridge's improper entry onto their property were for trespass alone,” and (2) “[b]ecause Defendants have not appealed the amount of those trespass damages, those amounts are final.” Decision (Ezell, J., dissenting).

⁷ Though no party raised the issue, the majority spent considerable time at the beginning of its decision explaining why it could not simply increase the amount of the trespass damages despite Defendants' failure to appeal that issue. In the end, the majority concluded that Defendants waived the issue by failing to appeal it. Decision at 9 (“we do not find that the adequacy of the quantum award, one that was purely discretionary with the trial court, falls within the parameters of the ‘interest of justice’ exceptions [to Uniform Court of Appeal Rule 1-3 requiring a specification of errors]. Accordingly, we do not find the adequacy of the trespass damage award is before us.”)

13:5111. *See Mongrue v. Monsanto Co.*, 249 F.3d 422 (5th Cir. 2001). As such, when it commenced pipeline construction on Defendants' property prior to the initiation of expropriation proceedings, it became liable to compensate Defendants for reasonable attorney fees and expert witness costs pursuant to the provisions of La.R.S. 13:5111. Because the record is incomplete with regard to these elements of costs, we remand this matter to the trial court for a hearing to determine those elements of cost.

Decision at 32.

Bayou Bridge timely files this writ application from the court of appeal's July 15, 2020 decision.

SUMMARY OF ARGUMENT

I. The Third Circuit's "agency" holding regarding Section 13:5111

Bayou Bridge is not "the State of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them," and the Third Circuit incorrectly held that "[a]t the time BBP violated the Defendants' due process rights it acted as a private entity qualified as an agent of the government for purposes of La.R.S. 13:5111." A prior version of Louisiana Revised Statutes 19:201 utilized nearly identical language regarding the award of attorney's fees in unsuccessful expropriation actions, authorizing such awards in a "proceeding instituted by the State of Louisiana, a parish, a municipality or an agency of any of them vested with the power of expropriation." La. R.S. 19:201 (1972). Construing that language, Louisiana courts of appeal uniformly held that attorney's fees could not be awarded against a private pipeline entity under the statute's plain language, as such entities are not "agents" of state government when expropriating property. *See Pipeline Tech. VI, LLC v. Ristroph*, 2007 CA 1210 (La. App. 1st Cir. 5/2/2008), 991 So. 2d 1, 4-5; *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So. 2d 4, 7 (La. App. 3d Cir. 1977).

After those decisions, the Louisiana Legislature specifically amended Section 19:201 to allow attorney's fees to be awarded against private expropriating entities in unsuccessful expropriation actions, substituting the phrase "any expropriating authority referred to in R.S. 19:2" for the prior listing of state governmental expropriating authorities. La. R.S. 19:201 (current version as amended in 2012). However, the Legislature did not similarly amend Section 13:5111, which retains the listing of state governmental expropriating authorities. The Third Circuit's holding ignores both the legislative history of this parallel statute with almost identical language to Section 13:5111 and the decisions of the courts of appeal construing the prior language of that statute.

II. The “taking” limitation of Section 13:5111

The present action does not involve a proceeding “for compensation for the taking of property by the defendant, other than through an expropriation proceeding.” Bayou Bridge brought the present action as an expropriation proceeding, and the trial court granted the expropriation of Defendants’ interests in a judgment affirmed by the Third Circuit in its decision. Though Defendants reconvened to allege trespass and violations of their due process rights, they expressly represented that their claims were not for inverse condemnation, as noted by the Third Circuit in its opinion. However, by its plain terms, Section 13:5111 applies only to such takings/inverse condemnation/appropriation claims, as numerous courts—including this Court—have recognized. *See Estate of Patout v. City of New Iberia*, 98-C-0961 (La. 7/7/99), 738 So. 2d 544, 555; *Unlimited Horizons, LLC v. Parish of E. Baton Rouge*, 99-CA-0889 (La. App. 1st Cir. 5/12/00), 761 So. 2d 753, 758; *Gravolet v. Board of Comm’rs*, 95-CA-2477 (La. App. 4th Cir. 6/12/96), 676 So. 2d 199, 204; *Whipp v. Bayou Plaquemine Brule Drainage*, 476 So. 2d 1047 (La. App. 3d Cir. 1985).

ARGUMENT

Louisiana Revised Statutes 13:5111 provides, in pertinent part, that:

[a] court of Louisiana rendering judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding.

La. R.S. 13:5111(A). By its plain terms, Section 13:5111 allows an award of attorney’s fees⁸ only in proceedings: (a) “brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them,” and (b) “for compensation for the taking of property by the defendant.” La. R.S. 13:5111. Because neither of these two requirements is satisfied here, the court of appeal’s application of Section 13:5111 to the circumstances of this case is incorrect and should be reversed.

I. Bayou Bridge, a private entity with the power of expropriation, is not an agent of the State of Louisiana.

Apparently conceding that Bayou Bridge is not “the State of Louisiana, a parish, or municipality or other political subdivision,” the Third Circuit relied upon the “agent” language of

⁸ It should be noted that Section 13:5111 does not provide for expert witness fees at all, but rather merely attorney’s fees.

Section 13:5111 to render the statute applicable, holding that “[a]t the time BBP violated the Defendants’ due process rights it acted as a private entity qualified as an agent of the government for purposes of La.R.S. 13:5111.” Decision at 32. The court cited a single federal Fifth Circuit Court of Appeals decision (*Mongrue v. Monsanto Co.*, 249 F.3d 422 (5th Cir. 2001)) in support of this remarkable and wholly unprecedented holding.

Critically, the court ignored prior decisions of its own and other circuits construing nearly identical language in a similar statute. Specifically, a prior version of Louisiana Revised Statutes 19:201 authorized an award of attorney’s fees in the related context of unsuccessful expropriation actions, stating as follows:

A court of Louisiana having jurisdiction of **a proceeding instituted by the State of Louisiana, a parish, a municipality or an agency of any of them vested with the power of expropriation**, to acquire real property by expropriation, shall award the owner of any right, or title to, or interest in such real property such sum as will, in the opinion of the court, reimburse such owner for his reasonable attorney fees actually incurred because of the expropriation proceeding, if the final judgment is that the plaintiff cannot acquire the real property by expropriation or if the action is abandoned by the plaintiff.

La. R.S. 19:201 (1972) (emphasis added).⁹ Construing the bolded language, two courts of appeal (including the Third Circuit) held that attorney’s fees could **not** be awarded against a private pipeline entity under the statute’s plain language, as such entities are not “agents” of state government when expropriating property. See *Pipeline Tech. VI, LLC v. Ristroph*, 2007 CA 1210 (La. App. 1st Cir. 5/2/2008), 991 So. 2d 1, 4-5; *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So. 2d 4, 7 (La. App. 3d Cir. 1977).

In *Ledoux*, the Third Circuit held that “19:201 allows attorney fees under the specified conditions to an owner, *only* when the appropriating authority is the *State of Louisiana, a parish, a municipality or an agency of any of them.*” 347 So. 2d at 7 (emphasis in original). The court reasoned that

[t]he Legislature in enacting this section, for whatever reason, limited recovery of attorney fees to unsuccessful expropriation proceedings brought by the State, its political subdivisions and agencies. We are powerless to extend its provisions by analogy to expropriators not included within its scope. Private entities with the power to expropriate are not subject to the **penalty** set out in LSA-R.S. 19:201.

Id. (emphasis added).

In *Ristroph*, the First Circuit reached the same holding. There, the court distinguished the *Mongrue* decision that had been rendered by the United States Fifth Circuit after *Ledoux* was

⁹ The then-applicable statutory language is cited in full in *Pipeline Tech. VI, LLC v. Ristroph*, 2007 CA 1210 (La. App. 1st Cir. 5/2/08), 991 So. 2d 1, 3.

decided (and upon which the Third Circuit expressly relied in the present case), noting that the relevant “agency” language¹⁰ in *Mongrue* was: (1) “dicta”; (2) “taken out of context”; (3) “not about an individual’s right to attorney’s fees”; and (4) not decided by a Louisiana court. 991 So. 2d at 4. The court further noted that the “discussion of ‘agency’ or ‘agent’ was not the basis of the *Mongrue* holding,” then went on to reject the landowner’s argument of “agency” based upon the generic, common law meaning of the term given that the pipeline had no contract with the State and did not transact affairs on behalf of the state (or any of the other listed governmental bodies). *Id.* Finally, the court noted that the structure of the “expropriating authorities” statute, La. R.S. 19:2, itself implies that the various private entities with the power of expropriation are not state agents because those entities are described separate and apart from “the state” and its “political subdivisions.” *Id.* Therefore, for all of these reasons, the court agreed with the Third Circuit’s prior decision in *Ledoux*, holding that:

[a]s in *LeDoux*, the expropriating authority here is a private entity, and not the state, a parish, a municipality, or an agency of any of them; hence the provisions of La. R.S. 19:201 do not apply. We agree with the holding in *LeDoux*, and **no straining of the word “agency” can make the statute apply**. Therefore, we are powerless to extend to [the landowner] the attorney fees set forth in La.R.S. 19:201; [the pipeline company] does not fit within the statute.

Id. at 5 (emphasis added).

The *Ristroph* decision apparently did not go unnoticed by the Louisiana Legislature, which thereafter specifically amended Section 19:201 to allow attorney’s fees to be awarded against private expropriating entities in unsuccessful expropriation actions by substituting the phrase “any expropriating authority referred to in R.S. 19:2” in place of the prior listing of state governmental expropriating authorities. La. R.S. 19:201 (current version as amended in 2012). However, the Legislature did not similarly amend Section 13:5111, which retains the listing of state governmental expropriating authorities that was contained in the original version of Section 19:201. Clearly, the Legislature knew how to change the statutory language to capture private expropriating entities when it wanted to; it simply chose not to do so in the context of Section 13:5111 as it did in the amended version of Section 19:201.

The Third Circuit’s ruling in the present case ignores the statutory history of this parallel provision as well as the prior cases construing the virtually identical language of that provision,

¹⁰ In *Mongrue*, the federal court of appeals held that a private entity not statutorily authorized to expropriate property could not be liable for a “taking.” The court stated in dicta that “[f]or a private entity to qualify under Louisiana law as an agent of the government for the purposes of establishing liability for an unconstitutional taking, the entity must have been expressly delegated the power of eminent domain.” 249 F.3d at 429.

including the *Ledoux* decision rendered by a prior panel of its own circuit. Stated simply, there is no basis in Louisiana law to conclude that a private expropriating entity is an “agent” of the State of Louisiana for the purpose of Section 13:5111 (or any other purpose, for that matter), and the courts that addressed the issue in the virtually identical circumstances of Section 19:201 are directly contrary to the position taken by the Third Circuit in the present case.

It is important to note that the Third Circuit’s holding that Bayou Bridge is an “agent” of the state has potentially far-reaching ramifications well beyond this action and the award of attorney’s fees under Section 13:5111. For example, landowners and pipeline protestors have already sued Bayou Bridge on a similar agency-type theory in other contexts, arguing that Bayou Bridge is: (a) an “instrumentality of the state” for the purpose of Louisiana’s public records laws (*see Atchafalaya Basinkeeper v. Bayou Bridge Pipeline LLC*, 2018-CA-0417 (La. App. 1st 2/22/19), 272 So. 3d 567), and (b) a “state actor” for the purpose of liability under 28 U.S.C. § 1983 (*see Spoon v. Bayou Bridge Pipeline LLC*, No. 3:19-cv-00516-SDD-EWD (M.D. La.)). Given these efforts, the Third Circuit’s erroneous holding that Bayou Bridge “acted as an agent of the government” could potentially be used against Bayou Bridge and other private entities with expropriation power in other disparate circumstances besides the award of attorney’s fees in an action like this one. Consequently, Bayou Bridge respectfully requests that this Court grant its application for a writ of certiorari to take up this important issue and reverse the Third Circuit’s erroneous “agency” holding.

II. In any event, Defendants’ claims were not for a taking.

Wholly aside from the “agency” issue, the Third Circuit’s holding awarding attorney’s fees is also erroneous because the present action does not involve a proceeding “for compensation for the taking of property by the defendant, other than through an expropriation proceeding.” As discussed above, Bayou Bridge brought the present action as an expropriation proceeding, and the trial court granted the expropriation of Defendants’ interests in a judgment affirmed by the Third Circuit in the present appeal. Though Defendants reconvened to allege trespass and violations of their due process rights, they expressly represented that these reconventional claims were **not** for inverse condemnation. The Third Circuit noted as much in its decision:

In addressing this contention [that the trial court ‘mistakenly confused’ Defendants’ reconventional demands with other constitutional claims when awarding trespass damages], we point out that Defendants went to great lengths in [their] pre-trial memorandum to advise the trial court that their reconventional

demands were not to be considered as a claim for inverse condemnation. Defendants state: “An inverse condemnation proceeding would allow BBP to treat this violation as an inadvertent mix-up or administrative error, and essentially back-date an expropriation judgment it has not yet obtained[.]” Defendants made no argument to the trial court or before this court that this matter should have been considered a claim for inverse condemnation. Rather, Defendants frame their reconventional demand as a claim against BBP “for violations of due process and the right to property under the United States and Louisiana constitutions” and that they suffered damage “resulting from the company’s construction of the pipeline without full executable legal right to do so.”

Decision at 23 n.13.

However, despite noting that Defendants’ claims were admittedly **not** takings/inverse condemnation claims, the Third Circuit awarded attorney’s fees pursuant to Section 13:5111, which, by its plain terms, applies **only** to such takings/inverse condemnation/appropriation claims. Numerous courts, including this Court, have recognized this limited applicability of the statute. *See Estate of Patout v. City of New Iberia*, 98-C-0961 (La. 7/7/99), 738 So. 2d 544, 555 (holding that prescriptive period of La. R.S. 13:5111 does not apply where the plaintiff’s claims for city’s unauthorized dumping of trash on their property “cannot be characterized as actions for compensation for property taken by the state”); *Unlimited Horizons, LLC v. Parish of E. Baton Rouge*, 99-CA-0889 (La. App. 1st Cir. 5/12/00), 761 So. 2d 753, 758 (refusing to apply Section 13:5111 to a declaratory judgment claim regarding the propriety of the parish’s action in revoking a statutory right-of-way dedication and reasoning that “[w]e find the language of this statute to be clear and unambiguous that the three-year prescriptive period applies only to actions that seek compensation for property taken by a parish”); *Whipp v. Bayou Plaquemine Brule Drainage*, 476 So. 2d 1047 (La. App. 3d Cir. 1985) (attorney’s fees are not available under Section 13:5111 in action for damaging, but not taking, of property or appropriation by the state). *See also Gravolet v. Board of Comm’rs*, 95-CA-2477 (La. App. 4th Cir. 6/12/96), 676 So. 2d 199, 204 (stating that Section 13:5111 provides the standard for an attorney’s fee award in inverse condemnation cases); *Huckabay v. Red River Waterway Comm’n*, No. 27,113, 1995 La. App. LEXIS 3168, at *18 (La. App. 2d Cir. Nov. 22, 1995) (“As we have determined that a ‘taking’ occurred as the result of the Commission’s actions, we find that the trial court was correct in concluding that the Huckabays were entitled to an award for attorney fees.”). Thus, in construing Section 13:5111 to encompass a claim for “due process” damages rather than a taking, the Third Circuit’s ruling erroneously interprets Louisiana law and conflicts with the rulings of these courts. Bayou Bridge respectfully submits that a writ is warranted to address this issue as well and to reverse the Third Circuit’s erroneous award of attorney’s fees and expert

witness costs under Section 13:5111 with respect to a claim that undisputedly did **not** involve a taking.

CONCLUSION

Louisiana Revised Statutes 13:5111 allows an award of attorney’s fees only in proceedings: (a) “brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them,” and (b) “for compensation for the taking of property by the defendant.” La. R.S. 13:5111. Because Bayou Bridge is not an agent of the state and Defendants’ claim did not involve a “taking,” neither of these two requirements is satisfied in the present case. Thus, the court of appeal’s application of Section 13:5111 to the circumstances of this case should be reversed because it is erroneous and, particularly with respect to the “agency” holding, creates the potential for far-reaching ramifications in other statutory schemes.

Respectfully submitted,

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APPENDIX

1	Third Circuit's Decision	A-1
2	Trial Court's Reasons for Judgment and Judgment	A-2

A-1

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

CA 19-565

BAYOU BRIDGE PIPELINE, LLC

VERSUS

38.00 ACRES, MORE OR LESS, LOCATED

IN ST. MARTIN PARISH, ET AL.

**APPEAL FROM THE
SIXTEENTH JUDICIAL DISTRICT COURT
PARISH OF ST. MARTIN, NO. 87011
HONORABLE KEITH RAYNE JULES COMEAUX, DISTRICT JUDGE**

**JONATHAN W. PERRY
JUDGE**

Court composed of Sylvia R. Cooks, Billy Howard Ezell, Shannon J. Gremillion, D. Kent Savoie, and Jonathan W. Perry, Judges.

Ezell, J., dissents in part and assigns reasons.

**AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED
FOR DETERMINATION OF ATTORNEY FEES, EXPERT WITNESS FEES,
AND COURT COSTS.**

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PERRY, Judge.

Katherine Aaslestad, Peter Aaslestad, and Theda Larson Wright (hereinafter collectively referred to as “Defendants”) appeal the decision of the trial court denying their exception of prematurity, granting expropriation in favor of Bayou Bridge Pipeline, LLC¹ (hereinafter “BBP”), and denying their reconventional demand in which they sought damages for violations of their due process rights. For the following reasons, we hereby affirm the decision of the trial court, in part, reverse, in part, and remand to the trial court for determination of costs.

FACTS AND PROCEDURAL HISTORY

This matter centers on the construction of the Bayou Bridge Pipeline, a 162.5-mile crude oil pipeline running from the Clifton Ridge terminal in Lake Charles, Louisiana to a marketing hub in St. James, Louisiana; this is an extension of the pipeline Energy Transfer had previously built from Nederland, Texas to Lake Charles. After obtaining several federal and state environmental permits and certifications,² BBP began to acquire servitudes³ needed to build the pipeline, including the roughly thirty-eight acres that is the subject of this current litigation. BBP identified approximately 470 heirs to the title of the parcel, including Defendants. Nevertheless, prior to reaching servitude agreements with all individuals BBP recognized as having an ownership interest, BBP authorized

¹ BBP is a joint venture formed between Energy Transfer Partners (hereinafter “Energy Transfer”), which merged with Sunoco Logistics Partners, and Phillips 66 Partners, LP.

² BBP obtained Section 404 and 408 permits from the U.S. Corps of Engineers, a Coastal Use Permit from the Louisiana Department of Natural Resources Office of Coastal Management, a Water Quality Certification from the Louisiana Department of Environmental Quality, and a permit from the Bayou Lafourche Fresh Water District.

³ The servitudes consisted of a permanent right of way, as well as temporary rights of way, including a temporary access road and temporary workspace.

construction to begin in early 2018. During the summer of 2018, BBP entered Defendants' property, cleared trees, dug trenches, and began construction of the pipeline even though it lacked legal authority to do so. Thus, on July 27, 2018, prior to BBP's initiation of expropriation litigation, Peter Aaslestad, one of the Defendants, brought suit to enjoin BBP from illegally continuing its construction on the not-yet expropriated property. As a result of this injunction proceeding, BBP entered into a stipulated agreement in September 2018, to remain off the property as of September 10, 2018; however, by then pipeline construction was more than ninety percent complete.

On July 27, 2018, just after Peter Aaslestad filed his suit for injunctive relief, BBP initiated the expropriation litigation against those property owners with whom agreements could not be reached, such as Defendants, or who could not be located;⁴ BBP's petition for expropriation identifies 393 individuals made defendant.⁵ Defendants' answer to the expropriation included an affirmative defense alleging the Louisiana expropriation system was unconstitutional as it applied to oil pipelines, such as BBP. Further included in their answer were exceptions of prematurity, alleging BBP failed to properly provide two of Defendants with information required by La.R.S. 19:2.2. Defendants further filed a reconventional demand seeking damages for trespass, alleging BBP had illegally entered their property, as well as

⁴ Later, on September 20, 2018, BBP filed a second petition for expropriation naming approximately 115 additional defendants involved in this same 38-acre tract. The trial court consolidated these two matters for trial.

⁵ There were three groups of defendants: (A) located defendants (90 individuals); (B) deceased defendants with unopened successions (53); and (C) absentee defendants (250 individuals). Also made defendants were "any other persons claiming an interest in the property who Bayou Bridge has not been able to identify or locate."

damages for BBP's violations of due process prior to obtaining a judgment of expropriation.

The trial court dismissed the exceptions, finding sufficient service and a lack of prejudice to Defendants. In a hearing prior to trial of the expropriation action, the trial court further held that the eminent domain scheme established by the Louisiana Constitution adequately protected the due process and property rights of Louisiana landowners under both the State and Federal Constitutions. After a trial on the merits, the trial court ruled that the expropriation of land for a servitude to lay the pipeline served a public and necessary purpose and granted expropriation. Finally, the trial court found that, although BBP was entitled to a servitude to lay the pipeline, it had entered onto and disturbed Defendants' property prior to the time it had acquired the right to do so. As compensation for BBP's expropriation of this servitude to lay the pipeline, the trial court awarded each of the Defendants \$75.00. The trial court also determined that for BBP's trespass of approximately five months, each of the Defendants was entitled to an additional \$75.00 for trespass damages. The trial court's judgment contains no separate award for BBP's violation of Defendants' due process rights when BBP conducted months-long construction on the property prior to obtaining an order of expropriation.

On appeal, Defendants assert four assignments of error. They claim that the trial court erred in: (1) denying their affirmative defenses, asserting that Louisiana's granting of eminent domain to private oil pipeline companies violates U.S. and Louisiana Constitutions' due process and property rights protections;⁶ (2) failing to render judgment on certain aspects of their reconventional demands alleging

⁶ Defendants do not appeal the trial court's award of compensation for the expropriation of the land. Thus, that aspect of the judgment is final.

violations of their property and due process rights, despite the trial court finding BBP trespassed on their property; (3) denying their dilatory exceptions of prematurity, where BBP allegedly failed to comply with statutory prerequisites for expropriation; and (4) allowing impermissible evidence of economic development and incidental benefit to the public in determining whether the expropriation served a public and necessary purpose.

APPELLATE PRACTICE

From the outset, we note that an issue has arisen about whether this court should address the trial court's trespass damage award even though the Defendants failed to raise that issue as an assignment of error. For that reason, we will first address the need for appellate assignments of error in civil litigation and exceptions thereto.

Assignments of Error; an overview

Louisiana Code of Civil Procedure Article 2129 states:

An assignment of errors is not necessary in any appeal. Where the appellant designates only portions of the record as the record on appeal, he must serve with his designation a concise statement of the points on which he intends to rely, and the appeal shall be limited to those points.

Elaborating on La.Code Civ.P. art. 2129, the Official Revision Comment states:

The jurisprudence has construed Arts. 896 and 897, Code of Practice of 1870, to the effect that where the transcript is certified as containing all the testimony and the grounds for reversal are apparent from the face of the record, no assignment of errors is necessary. *Bossier v. Caradine*, 18 La. Ann. 261 (1866); *In re Fazende*, 35 La. Ann. 1145 (1883); *Havana American Co. v. Board of Assessors*, 105 La. 471, 29 So. 938 (1901).

In *Mayo v. Nissan Motor Corp. in U.S.A.*, 93-852 (La.App. 3 Cir. 6/22/94), 639 So.2d 773, 792, writ granted and remanded, 94-1978, 94-1990 (La. 11/1/94), 644 So.2d 661, Judge Culpepper (dissenting, in part) observed:

Code of Practice of 1970, Art. 896 provided that if the copy of the record brought up from the trial court was not certified by the clerk of the lower court as containing all of the testimony adduced, the supreme court would only judge the case on a statement of facts. Article 897 provided that an appellant who did not rely wholly or in part on a statement of facts, an exception to the judge's opinion, or a special verdict, but on an error of law appearing on the face of the record, would be allowed a period of ten days after the record was brought up to file a statement specifically alleging any errors. The Official Revision Comment under LSA-C.C.P. Art. 2129 indicates the jurisprudence under the old Code of Practice Articles construed them to mean that where the transcript is certified as containing all of the testimony and the grounds for reversal are apparent from the face of the record, no assignment of errors was necessary. This jurisprudence was simply codified in LSA-C.C.P. Art. 2129.

Moreover, La.Code Civ.P. art. 2164 and the Official Revision Comments thereunder state:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

Official Revision Comments

(a) The purpose of this article is to give the appellate court complete freedom to do justice on the record irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below. This article insures that the "theory of a case" doctrine, which has served to introduce the worst features of the common law writ system into Louisiana is not applicable to appeals under this Code. See Hubert, *The Theory of a Case in Louisiana*, 24 Tul.L.Rev. 66 (1949).

Nevertheless, Uniform Rules--Courts of Appeal, Rule 1-3 reads as follows:

The scope of review in all cases within the appellate and supervisory jurisdiction of the Courts of Appeal shall be as provided by LSA-Const. Art. 5, § 10(B), and as otherwise provided by law. The

Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.

Commenting further in his partial dissent in *Mayo* 639 So.2d at 792–93, a dissent that later persuaded the supreme court to remand the matter to the appellate court, Judge Culpepper stated:

In the general discussion of assignments of error, 5 Am.Jur.2d 99–116, Appeal and Error, Sec. 648, it is stated that the purpose of assignments of error is to advise the appellate court and the appellee of the errors by the trial court complained of, so that discussion may be limited. Some jurisdictions have a “strict rule” requiring an assignment of error as mandatory for appellate review. Other jurisdictions have a “liberal rule” allowing appellate review even though the assignment of error is inadequate or entirely lacking. In courts which have a liberal rule, the absence or insufficiency of an assignment of error is not jurisdictional and will not be cause to reject an issue unless the failure has prejudiced the appellee in some way.

.....

It is obvious that Louisiana follows the “liberal rule”. LSA–C.C.P. Art. 2129 quoted above, expressly provides an assignment of error is not necessary in any appeal, unless only a portion of the record has been designated for appeal. LSA–C.C.P. Art. 2164 allows the appellate court to render any judgment which is just, legal and proper upon the record on appeal, regardless of assignments of error. The only possible basis for excluding our review of the third party demand in the present case is Rule 1–3 of the Uniform Rules of the Courts of Appeal, and even that rule expressly provides that if the interest of justice requires it, the court of appeal should consider an issue as to which there was no assignment of error.

“Interest of justice” exception

The jurisprudence addressing the scope of the “interest of justice” exception referenced in La.Code Civ.P. art 2164 is scant. *Lonzo v. Lonzo*, 17-0549 (La.App. 4 Cir. 11/15/17), 231 So.3d 957. The fourth circuit then elaborated in *Lonzo*, 231 So.3d at 963, n. 8 (emphasis added):

See Maurello v. Dep’t of Health & Human Res., Office of Mgmt. & Fin., 510 So.2d 458, 460 (La. App. 1st Cir. 1987) (finding the exception applied “[b]ecause of the importance of assuring that Ms.

Maurello’s **fundamental constitutional due process rights** are met”); *Gauthier v. Harmony Const., LLC*, 13-269, pp. 8-9 (La. App. 5 Cir. 10/9/13), 128 So.3d 314, 319 (finding the “interest of justice” exception applied because the argument raised “**jurisdictional concerns**”); *Delo Reyes v. Liberty Mut. Fire Ins. Co.*, 08-0769, p. 5 (La. App. 4 Cir. 2/18/09), 9 So.3d 890, 893 (finding it was in the “interest of justice” to allow review of the issue of “whether the trial judge’s *ex parte communications* were in error” despite the appellants’ failure to object on the record); *Davis v. Recreation Dep’t*, 12-1273, p. 8 (La. App. 4 Cir. 1/30/13), 107 So.3d 1254, 1259 (applying the exception).

Summarizing the principles applied by federal courts in addressing a similar issue, the federal Fifth Circuit in *French v. Estelle*, 696 F.2d 318, 319–20 (5th Cir. 1982), stated:

It is well established that an appellate court is not precluded from considering an issue not properly raised below in a civil proceeding, if manifest injustice would otherwise result. In *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), the Supreme Court stated that a federal appellate court would certainly be justified in resolving an issue that was not passed on below “where the proper resolution [was] beyond any doubt ... or where ‘injustice might otherwise result.’ ” 428 U.S. at 121, 96 S.Ct. at 2877 (citations omitted). In *Empire Life Insurance Co. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972), we held that “it is well established that as a matter of discretion, an appellate court could pass upon issues not pressed before it or raised below where the ends of justice will best be served by doing so,” and that this court has a “duty to apply the correct law.” (citations omitted) (emphasis in original). See also *Thorton v. Schweiker*, 663 F.2d 1312, 1315 (5th Cir. 1981) (rule that court will not consider issue not raised below on appeal is not inflexible and gives way to prevent a miscarriage of justice); *Weingart v. Allen & O’Hara, Inc.*, 654 F.2d 1096, 1101 (5th Cir. 1981) (rule that appellate court will consider only errors of which appellant specifically complains is not inflexible); *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir. 1976) (rule requiring issues to be raised below “can give way when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice”).

Some specific applications of this exception are the following: a remand to allow the introduction of new evidence to prevent a miscarriage of justice, *Jackson v. Wal-Mart Properties, Inc.*, 443 So.2d 3, 4 (La.App. 3 Cir. 1983); “the trial court’s

refusal to grant a new trial in light of the facts disclosed by this record has produced a miscarriage of justice. The case must be remanded for the purpose of allowing defendant to present her defense to plaintiff's change of custody rule," *Bearden v. Bearden*, 393 So.2d 859, 861 (La. App. 2 Cir. 1981); "[g]iven the lifetime impact this litigation will have upon the parties involved, particularly the minor child, G.J.K, we find, in the interest of justice and judicial economy, that K.A. should be allowed the opportunity to amend his petition and appropriately challenge the constitutionality of La. C.C. art. 198 in the trial court," *Kinnett v. Kinnett*, 17-625 (La. App. 5 Cir. 3/23/18), 243 So.3d 745, 748; finding that the trial court "arbitrarily exercised the discretion vested in him by law in refusing to reopen the case or to grant a new trial, which was manifestly in the interest of justice," *Succession of Robinson*, 186 La. 389, 397-98, 172 So. 429, 431-32 (1936); finding a lower court's manifest error cannot serve to defeat appellant's right to have his evidence considered when there has not been a proffer and the District Court has refused to consider it without giving any reason therefore, compelled the appellate court, in the interest of justice, to remand the case to permit introduction of this evidence, *Tauzier v. Tauzier*, 405 So.2d 1309, 1311 (La.App. 4 Cir. 1981); "[b]ecause of the importance of assuring that Ms. Maurello's fundamental constitutional due process rights are met, we will entertain her challenge of the termination procedure used by DHHR," *Maurello v. Dep't of Health & Human Res., Office of Mgmt. & Fin.*, 510 So.2d 458, 460 (La. App.1 Cir.), writ denied, 514 So.2d 460 (La.1987).

In the present case, our review of the record shows that the Defendants urged the trial court to award damages for BBP's trespass. After reviewing the facts and the jurisprudence at a trial on the merits, the trial court awarded trespass damages of \$75.00 to each of the Appellants. Although the Defendants assign as error the trial

court's failure to compensate them for BBP's violation of their due process rights regardless of any other injury they may have suffered, in their assignments of error the Defendants do not raise the adequacy of the \$75.00 trespass damage award, and their brief never argues that the \$75.00 award should be increased. The question then arises whether we should nonetheless address the adequacy of the trespass damage award in the "interest of justice."

After considering this question, we find that the "interest of justice" exception is not without limitation. As the jurisprudence points out, that exception has been applied in various limited circumstances, for example: (a) when fundamental constitutional due process is involved; (b) when a jurisdictional concern is implicated; (c) when a trial judge may have had improper ex parte communication; (d) where the proper resolution of an issue is beyond a doubt or where injustice might occur; (e) when an incorrect law has been applied; and (f) when a pure question of law is involved and the failure to consider it would result in the miscarriage of justice. Utilizing those as guideposts, we do not find that the adequacy of the quantum award, one that was purely discretionary with the trial court, falls within the parameters of the "interest of justice" exception.⁷ Accordingly, we do not find the adequacy of the trespass damage award is before us.⁸

⁷ Should we have decided to reach the adequacy of the trespass award, based upon *Thompson v. Winn-Dixie Montgomery, Inc.*, 15-0477 (La. 10/14/15), 181 So.3d 656, we would have been required to give the parties notice of our *sua sponte* determination to provide them with an opportunity to be heard on the issue; failure to have done so would have been legal error. See also *Rombach v. State ex rel. Div. of Admin.*, 15-0619 (La. App. 1 Cir. 12/23/15), writ not considered *sub nom.* *Rombach v. State ex rel. Div. of Admin., Office of Risk Mgmt.*, 16-00214 (La. 4/4/16), 190 So.3d 1200 (holding that based upon *Thompson* and not wishing to commit legal error, the appellate court "directed the parties to show cause why the issue of whether plaintiff has stated a cause of action should not be addressed *sua sponte*" because this had not been an assignment of error).

⁸ Unlike the issue of trespass damages, we nonetheless find that in their assignments of error the Defendants do raise the issue that the trial court erred when it failed to award damages for BBP's violation of their property and due process rights.

CONSTITUTIONAL ISSUES

We first address Defendants' claims regarding the constitutionality of the Louisiana expropriation system. Defendants contend that by ceding expropriation power to a private oil pipeline company, Louisiana's eminent domain law abuses due process under both the United States and Louisiana Constitutions. Defendants issue a facial challenge to La.R.S. 19:2, La.R.S. 45:251, and La.Const. art. 1, § 4(B)(4).

A facial challenge is an attack on a statute itself as opposed to a particular application. *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 135 S. Ct. 2443 (2015). A facial challenge to a legislative act "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987).

An elementary principle of statutory construction in constitutional law holds that all statutory enactments are presumed to be constitutional. *Interstate Oil Pipe Line Co. v. Guilbeau*, 217 La. 160, 46 So.2d 113 (1950); *State on behalf of J.A.V.*, 558 So.2d 214 (La.1990). Unless the fundamental rights or privileges and immunities of a person are involved, a strong presumption exists that the legislature in adopting legislation has acted within its constitutional authority. *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384 (La.1988).

Polk v. Edwards, 626 So.2d 1128, 1132 (La.1993). The strength of this constitutional challenge is the central question we must decide in reviewing this case. We will first address Defendants' claims concerning the U.S. Constitution.

The United States Constitution

United States Constitution Amendment V provides that no person shall be “deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Defendants’ arguments concerning the alleged constitutional violation relies mainly on the private nondelegation doctrine, “a nook of Fourteenth Amendment law long recognized but seldom invoked.” *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 703 (5th Cir. 2017). Defendants claim that the Louisiana expropriation scheme provides oil pipeline companies with an unrestrained ability to restrict Louisiana landowner property rights. We disagree.

The right to expropriate is given to private owners and operators of pipelines as a common carrier of petroleum, petroleum products and petroleum by-products pursuant to La.R.S. 19:2(8)⁹ and La.R.S. 45:251.¹⁰ Expropriation of private property

⁹ Louisiana Revised Statutes 19.2(8) provides:

Expropriation by state or certain corporations and limited liability companies

Where a price cannot be agreed upon with the owner, any of the following may expropriate needed property:

....

(8) All persons included in the definition of common carrier pipelines as set forth in R.S. 45:251[.]

¹⁰ Louisiana Revised Statutes 45:251, provides:

As used in this Chapter, the following terms have the meaning ascribed to them in this Section, unless the context clearly indicates otherwise:

(1) "Common carrier" includes all persons engaged in the transportation of petroleum as public utilities and common carriers for hire; or which on proper showing may be legally held a common carrier from the nature of the business conducted, or from the manner in which such business is carried on.

(2) "Petroleum" means crude petroleum, crude petroleum products, distillate, condensate, liquefied petroleum gas, any hydrocarbon in a liquid state, any product in a liquid state which is derived in whole or in part from any hydrocarbon, and any

for a public purpose is authorized under La.Const. art. 1, § 4, which provides, in pertinent part (emphasis added):

Section 4. (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

(2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "public purpose" shall be limited to the following:

(a) A general public right to a definite use of the property.

(b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:

(i) Public buildings in which publicly funded services are administered, rendered, or provided.

(ii) Roads, bridges, waterways, access to public waters and lands, and other public transportation, access, and navigational systems available to the general public.

(iii) Drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally.

(iv) Parks, convention centers, museums, historical buildings and recreational facilities generally open to the public.

mixture or mixtures thereof; provided, however, that such term shall not include methanol synthetically produced from coal, lignite, or petroleum coke.

(3) "Pipe line" includes the real estate, rights of way, pipe in line, telephone and telegraph lines or other communication systems, tank facilities as herein designated, and necessary for the proper conduct of its business as a common carrier, all fixtures, equipment and personal property of every kind owned, controlled, operated, used or managed, in connection with, or to facilitate the transportation, distribution and delivery of petroleum through lines constructed of pipe.

(v) *Public utilities for the benefit of the public generally.*

(vi) Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.

(c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.

(3) Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.

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

As previously noted, BBP is a common carrier pipeline company as defined in La.R.S. 45:251. “All pipe lines through which petroleum is conveyed from one point in this state to another point in the state are declared to be common carriers as defined in R.S. 45:251 and are placed under the control of and subject to regulation by the Louisiana Public Service Commission.” La.R.S. 45:252. Thus, La.R.S. 45:254 grants BBP the authority to expropriate private property under specific circumstances. Louisiana Revised Statutes 45:254 provides, in pertinent part:

All persons included in the definition of common carrier pipe lines as set forth in R.S. 45:251 have the right of expropriation with authority to expropriate private property under the state expropriation laws for use in its common carrier pipe line business, and have the right to lay, maintain and operate pipe lines, together with telegraph and telephone lines necessary and incident to the operation of these pipe lines, over private property thus expropriated, and have the further right to lay, maintain and operate pipe lines along, across, over and under any navigable stream or public highway, street, bridge or other public place, and also have the authority, under the right of expropriation herein conferred, to cross railroads, street railways, and other common carrier pipe lines by expropriating property necessary for the crossing under the expropriation laws of this state.

Thus, La.Const. art. 1, § 4, La.R.S. 19:2(8), and La.R.S. 45:254 grant BBP the power to expropriate private property for a public and necessary purpose.

Defendants cite *Boerschig*, 872 F.3d 701, for the proposition that under the private nondelegation doctrine, “a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties’ discretion.” While we agree with Defendants that *Boerschig* is relevant to this matter, we find that it stands in stark contrast to their arguments here.

Under the Texas law challenged in *Boerschig*, an expropriation proceeding begins with a state district court appointing special commissioners who assess the value of the property. *See City of Tyler v. Beck*, 196 S.W.3d 784 (Tex. 2006). After the commissioners award the value of the property, but *prior to judicial review*, the expropriating authority can take control of the property. TEX. PROP. CODE § 21.021(a). If objections to the commissioners’ award are filed, only then is a case opened in state court. *Tyler*, 196 S.W.3d at 784. It is during that judicial phase when the landowner may challenge the expropriating authority’s finding of a public necessity. *See Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559 (Texas Ct. App.—San Antonio, 1998).

In *Boerschig*, the landowner asserted that Texas’s eminent domain regime violated the Due Process Clause, not only because of its broad delegation of power to private entities, but also because it failed to provide for a *predeprivation* hearing. We note that Louisiana’s expropriation scheme allows for a judicial determination of whether the purpose of the taking is “public and necessary” *prior* to the taking,

rather than review of a taking after the fact,¹¹ as in the Texas statutes above. La.Const. art. 1, § 4.

The U.S. Fifth Circuit ultimately upheld the Texas law at issue, finding it did not run afoul of the private nondelegation doctrine, as “[i]t impose[d] a standard to guide the pipeline companies—that the taking is necessary for ‘public use’—and provides judicial review of that determination that prevents the company from having the final say.” *Boerschig*, 872 F.3d at 708. “The existence of a standard like the one Texas has for exercising eminent domain has prevented courts from finding that a delegation to private parties involves the unfettered discretion that violates due process.” *Id.* Those standards coupled with judicial review, even after-the-fact judicial review as deferential as existed under Texas law in that matter,¹² were enough to prevent the Texas expropriation laws from violating the Fifth Amendment.

When we apply *Boerschig* to Louisiana’s expropriation scheme it shows that Louisiana law, like the Texas law there, does not run afoul of the U.S. Fifth and Fourteenth Amendments, as it sets out appropriate standards to guide expropriating authorities and the courts, as well as providing for judicial review. Those standards are clearly set out in La.Const. art. 1, § 4, which requires that any taking be for a public and necessary purpose. Additionally, the standards set out by La.Const. art. 1, § 4 closely mirror the “public use” standard upheld in *Boerschig*. Furthermore, in addition to the standards delineated in the Louisiana Constitution, La.R.S. 19:2--9:16 provide notice requirements and set forth substantive and procedural rights

¹¹ That BBP entered the property prior to having a judicial determination, a fact it admits, becomes pertinent later in this opinion as we address the Defendants’ due process claim.

¹² As discussed in *Boerschig*, 872 F.3d at 708–09 (quoting *Anderson*, 985 S.W.2d at 565), the Texas “state court does not determine ‘public use’ or ‘necessity’ as an original matter, but only reviews the pipeline’s decision for either ‘fraud, bad faith, abuse of discretion, or arbitrary or capricious action’” during the judicial review phase, after the taking of the property.

designed to substantially protect landowners' rights and to further ensure due process prior to a taking.

These standards combined with judicial review, as provided for by La.Const. art. 1, § 4, prevent BBP from having the unrestrained ability to restrict citizen's property rights and prevent this court from finding that the delegation to private parties under Louisiana expropriation law involves "unfettered discretion that violates due process." *Boerschig*, 872 F.3d at 708. *See also Gen. Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1455 (2d Cir. 1991).

The judicial review of expropriation is further cemented by La.R.S. 19:8, which lays the framework for the process of judicial review of a challenged expropriation and additionally serves to protect a landowner's right to challenge expropriation. "[T]he ability of the property owners to receive a judicial adjudication of the right to condemn private property through a collateral proceeding sufficiently protects their interest in the property sought to be condemned." *Joiner*, 380 F.Supp. 754, 772 (N.D. Tex. 1974), *aff'd sub nom. Joiner v. City of Dallas, Texas*, 419 U.S. 1042, 95 S. Ct. 614 (1974). In fact, as Louisiana law provides for judicial review to determine if a taking is for a public and necessary purpose *prior* to a taking, it provides more protection for landowners than the Texas's "quick take" system upheld in *Boerschig*.

Accordingly, we find the Louisiana expropriation system for oil pipelines does not violate the U.S. Constitution, as Defendants are afforded due process of law as well as just compensation.

The Louisiana Constitution

We now turn to Defendants' assertion that the Louisiana eminent domain scheme violates rights to property and due process guaranteed in the Louisiana Constitution.

Rather than running contrary to the Louisiana Constitution, it is the Constitution itself that grants private entities authority to expropriate for public and necessary purposes, with just compensation, and subject to judicial review. La.Const. art. 1, § 4(B)(4). Having found there is no valid federal constitutional question concerning the expropriation scheme set up under La.Const. art. 1, § 4, no question can be raised as to constitutionality of that state constitutional provision. *Fullilove v. United States Cas. Co. of New York*, 129 So.2d 816 (La.App. 2 Cir. 1961).

[B]eing a constitutional provision, it removes from discussion or consideration any question as to whether it would violate any constitutional provisions or prohibitions, such as might have been the case if the amendment were a legislative enactment. Had it been a statute, then the question might have been posed whether it contravened . . . the Constitution. . . . Being a constitutional provision, which is the supreme law, it overrides the Legislature, and all decrees, ordinances, rules and regulations of creatures of the Constitution. Since it is a constitutional provision, no question can arise as to its constitutionality in a case such as this where no federal questions are involved and where no guarantees of the United States Constitution have been invaded.

Id. at 821.

Having found above that La.Const. art. 1, § 4 and La.R.S. 19:2–19:16 sufficiently protect due process and property rights of landowners under the federal Constitution, we cannot find that the Louisiana expropriation regime violates the very constitution that first established that framework. Defendants' assignment of error is without merit.

Public and Necessary Purpose: Evidentiary Issues

Next, Defendants claim that the trial court erred in allowing what they allege was impermissible evidence concerning economic development in the determination of whether the pipeline served a public and necessary purpose, a prerequisite to BBP's expropriation action as a private company. In addition, Defendants further contend that the trial court erred when it determined the public and necessary prerequisite without allowing them to present their evidence concerning various adverse impacts of the pipeline.

Louisiana Code of Evidence Article 103 provides, in pertinent part:

A. Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Ruling admitting evidence. When the ruling is one admitting evidence, a timely objection or motion to admonish the jury to limit or disregard appears of record, stating the specific ground of objection; or

(2) Ruling excluding evidence. When the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel.

The trial court is vested with vast discretion in connection with the admissibility of evidence. *Bridgers v. Southwest Louisiana Hosp. Ass'n*, 99-520 (La.App. 3 Cir. 11/3/99), 746 So.2d 731, *writ denied*, 99-3402 (La. 2/18/00), 754 So.2d 965. It will not be reversed absent an abuse of that discretion. *Maddox v. Omni Drilling Corp.*, 96-1673 (La.App. 3 Cir. 8/6/97), 698 So.2d 1022, *writs denied*, 97-2766, 97-2767 (La. 1/30/98), 709 So.2d 706.

Prior to trial, Defendants filed a motion *in limine*, seeking to exclude evidence BBP intended to offer of economic benefits of oil and petroleum products generally. In ruling in Defendants' favor, the trial court stated, "I will not consider any tax revenue or economic development, but I will allow [BBP] to present evidence of the

public benefit and the public purpose.” During trial, David Dismukes, BBP’s expert economist with expertise in the area of energy infrastructure and development and regional economic impacts, testified about three particulars, namely: (1) whether the increased diversity of supply of crude oil as a result of the pipeline would lower consumer prices; (2) how greater crude oil transportation alternatives increase Louisiana refinery competitiveness; and (3) how pipelines create new consumer opportunities.

From the outset, our reading of the record shows Defendants failed to object to Dismukes’s testimony about the second and third items noted above. As reiterated in *Williams v. SIF Consultants of Louisiana, Inc.*, 13–972, p. 9 (La.App. 3 Cir. 2/26/14), 133 So.3d 707, 715:

“The general rule is that a rule of evidence not invoked is waived, and, hence, a failure to object to evidence waives the objection to its admissibility.” *Ratcliff v. Normand*, 01-1658, pp. 6–7 (La.App. 3 Cir. 6/5/02), 819 So.2d 434, 439. “To preserve an evidentiary issue for appellate review, it is essential that the complaining party enter a contemporaneous objection to the evidence or testimony, and state the reasons for the objection.” *LaHaye v. Allstate Ins. Co.*, 570 So.2d 460, 466 (La.App. 3 Cir.1990), *writ denied*, 575 So.2d 391 (La.1991) (citing *Pitts v. Bailes*, 551 So.2d 1363 (La.App. 3 Cir.), *writs denied*, 553 So.2d 860 (La.1989), 556 So.2d 1262 (La.1990)).

Defendants’ failure to timely object to those two particular items of evidence constitutes a waiver to their admissibility.

As to Defendants’ objection to Dismukes’s testimony regarding the effect of the pipeline on consumer prices, the trial court denied Defendants’ objection. In doing so, the trial court stated, “That’s not the economic impact to the state. It’s a public benefit, so I’m going to allow it.”

Louisiana Constitution Article 1, § 4(B)(3) states: “Neither economic development, enhancement of tax revenue, or any incidental benefit to the public

shall be considered in determining whether the taking or damaging of property is for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.” Defendants allege that the trial court allowed testimony they contend focused on economic development and incidental benefit to the public as prohibited by the Constitution. We disagree. Although La.Const. art. 1, § 4(B)(3) prohibits evidence of economic development in the assessment of “public purpose,” it does not exclude evidence of the economic benefits of the proposed expropriation.

Moreover, even if the admission of this single item of evidence was erroneous, such error does not require a reversal of the trial court’s determination that this project met the public purpose requirement for this expropriation. We observe that this testimony did not affect a substantial right of the Defendants; this is particularly so considering the other unobjected to testimony which related to the pipeline’s public benefits.

Defendants next assert that the trial court found a public and necessary purpose for the pipeline without having any evidence concerning the actual shippers or customers of the pipeline. As the record reflects, the trial court sustained BBP’s objection to this testimony, finding it not relevant to the public and necessary purpose issue before it.

From the outset, we observe that a long line of Louisiana cases has upheld transportation of oil via pipeline as serving a public purpose. *See Dixie Pipeline Co. v. Barry*, 227 So.2d 1, 7 (La.App. 3 Cir. 1969), *writ refused*, 255 La. 145, 229 So.2d 731 (1970), in which this court found a public purpose where a plant produced propane from the raw stream it received from area producers and where “the effect of the new line will be to transport large quantities of propane gas from the plant to

a large market in several states.” Likewise, in *Louisiana Resources Co. v. Greene*, 406 So.2d 1360, 1364 (La.App. 3 Cir. 1981), writ denied, 412 So.2d 84 (La.1982), this court 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.” Rather, “[t]he pipeline serves a public purpose merely by placing more natural gas in the stream of commerce.” *Id.*

Given the long line of cases finding a public and necessary purpose for oil pipelines, the Louisiana Supreme Court in *ExxonMobil Pipeline Co. v. Union Pac. R. Co.*, 09-1629, p. 11 (La. 3/16/10), 35 So.3d 192, 199 (quoting *Town of Vidalia v. Unopened Succession of Ruffin*, 95-580, p. 7 (La.App. 3 Cir. 10/4/95), 663 So.2d 315, 319), noted that “any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose.” In reaching this determination, even without identification of the end users to whom delivery of the petroleum products was made, the *ExxonMobil* court ruled that a public and necessary purpose for the oil pipeline existed. In light of this jurisprudence, we find the trial court did not abuse its discretion when it excluded Defendants’ query into the shippers and customers.

Finally, we turn to Defendants’ contention that the trial court erred when it failed to allow their evidence concerning allegedly adverse impacts of the pipeline. Their objection comes in two forms: (1) the trial court’s refusal to allow them to question Dismukes about the negative impacts of pipelines; and (2) curtailing the testimony of Scott Eustis, their wetland’s expert, about the negative environmental impact of pipelines in Louisiana.

As to Defendants’ examination of Dismukes, the record reveals two aspects of this issue. Initially, the record shows the trial court allowed Defendants, at least

to a certain degree, to address Dismukes about the question of whether pipelines have an impact on the coastal land loss. However, the trial court disallowed Defendants pursuit of questioning as to the negative impact of pipelines, whether environmental or economic.

In *Clay v. Int'l Harvester Co.*, 95-1572 (La.App. 3 Cir. 5/8/96), 674 So.2d 398, this court recognized that whether expert testimony may be received, the witness must be qualified to express an expert opinion. As we examine this aspect, we find the trial court did not abuse its discretion. First, BBP tendered Dismukes as an expert economist, not an environmental expert. We feel the environmental impact was beyond the qualifications of Dismukes. Second, Defendants attempted to bypass Dismukes's expertise when they sought testimony from him in a manner which would have related environmental testimony to the issue of the economic detriment of the pipeline vis-à-vis possible environmental impact and coastal land loss to the state. In sustaining BBP's objection to this line of questioning, the trial court reminded Defendants that should it allow such testimony, which it was not precluding, such questioning would open the door for BBP to ask further questions about the economic benefit of the pipeline, a subject it had earlier disallowed in Defendants' pre-trial motion in limine. Ultimately, Defendants chose not to pursue its line of inquiry on the pipeline's potential economic detriment. Against that backdrop, we cannot say the trial court abused its discretion in making this evidentiary ruling.

Defendants next contend the trial court erred when it prevented their wetlands expert, Scott Eustis, from testifying about the negative environmental impact of pipelines in Louisiana and in limiting his testimony to the specific parcel of land at issue in this expropriation proceeding. We find this error has not been preserved for

appellate review. Contrary to the requirements of La.Code Evid. art. 103(A)(2) to specify what substance of the excluded testimony was excluded and made known to the trial court, Defendants, without any particularity, have only vaguely stated their objection to this ruling. Notwithstanding, our review of the record shows that the trial court allowed, often over BBP's objection, Mr. Eustis to testify extensively about the environmental impacts of the proposed pipeline. As such, we find Defendants have failed to show that the exclusion of any environmental harm testimony adversely affected their substantial rights as required by La.Code Evid. art. 103(A).

Defendants' assignment of error is without merit.

Reconventional Demand

Defendants next claim that the trial court erred in failing to render judgment on their claim for constitutional violations of their property and due process rights suffered when BBP wrongly began pipeline construction on their property. This Defendants contend was in contravention of the explicit language in La.R.S. 19:8(A)(3) which entitles the expropriating authority to possess the property *only* after a judgment of expropriation has been granted. They claim the trial court "mistakenly confus[ed]" their reconventional demands with the constitutional issues discussed above when awarding trespass damages.¹³

¹³ In addressing this contention, we point out that Defendants went to great lengths in its pre-trial memorandum to advise the trial court that their reconventional demands were not to be considered as a claim for inverse condemnation. Defendants state: "An inverse condemnation proceeding would allow BBP to treat this violation as an inadvertent mix-up, or administrative error, and essentially back-date an expropriation judgment it has not yet obtained[.]" Defendants made no argument to the trial court or before this court that this matter should have been considered a claim for inverse condemnation. Rather, Defendants frame their reconventional demand as a claim against BBP "for violations of due process and the right to property under the United States and Louisiana constitutions" and that they suffered damage "resulting from the company's construction of the pipeline without full executable legal right to do so."

In opposition, BBP contends the trial court did not fail to render judgment on the Defendants' reconventional demand. To the contrary, BBP contends the trial court's award of \$75.00 to each defendant as trespass damages, a sum beyond the amount of just compensation damages, constitutes the damages they now assert were overlooked by the trial court.

To determine the merits of these opposing arguments, we must first examine the meaning of the term "cause of action." In *Everything on Wheels Subaru, Inc. v. Subaru S., Inc.*, 616 So.2d 1234, 1238 (La.1993) (footnotes omitted), our supreme court stated:

In *Trahan v. Liberty Mutual Insurance Company*, 314 So.2d 350, 353 (La.1975), this court defined cause of action as "an act by a defendant which gives a plaintiff a right to invoke judicial interference on his behalf." The court pointed out the difference between a demand, which is "the object of the suit," and a cause of action, which is "the state of facts which gives a party a right to judicially assert an action against the defendant." Thus, cause of action . . . means the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant.

A trespass is an unlawful physical invasion of the property or possession of another person. *Davis v. Culpepper*, 34,736 (La.App. 2 Cir. 7/11/01), 794 So.2d 68, writ denied, 01-2573 (La. 12/14/01), 804 So.2d 646. A trespasser is one who goes upon another's property without his consent. *Id.*

With regard to due process, it has long been established that "one may not be deprived of his rights, neither liberty nor property, without due process of law[.]" *Boddie v. Connecticut*, 401 U.S. 371, 375, 91 S. Ct. 780, 784 (1971). Both the Fourteenth Amendment to the United States Constitution and La.Const. art. 1, § 4 guarantee freedom from the deprivation of life, liberty, or property without due process of law, the crux of which is protection from arbitrary and unreasonable action. *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513 (1976). Likewise,

it is equally clear that “[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050 (1978).

More specifically, it has long been held that the due process clause “raises no impenetrable barrier to the taking of a person’s possessions[.]” *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994 (1972). In *Carey*, 435 U.S. at 259-60 (footnotes omitted), the court stated:

Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that “procedural due process rules are shaped by the risk of error inherent in the truth-finding process” *Mathews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). Such rules “minimize substantively unfair or mistaken deprivations of” life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin, supra*, 407 U.S., at 81, 92 S.Ct., at 1994.

Indeed, “a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.” *Carey*, 435 U.S. at 262.

Due process does not appear in a vacuum. Earlier in this opinion, we addressed Louisiana’s legislatively enacted expropriation scheme, including its notice requirements, and contrasted that to Texas’s procedure which authorizes quick-taking prior to a formal hearing to determine the public necessity for the taking. We then concluded, “Louisiana’s expropriation scheme allows for a judicial determination of whether the purpose of the taking is ‘public and necessary’ *prior* to the taking, rather than review of a taking after the fact, as in the Texas statutes above. La.Const. art. 1, § 4.” When BBP consciously ordered construction to begin on this property prior to obtaining a judicial determination of the public and

necessary purpose for that taking, it not only trampled Defendants' due process rights as landowners, it eviscerated the constitutional protections laid out to specifically protect those property rights. Therefore, we find the trial court committed legal error¹⁴ when it failed to compensate Defendants when BBP tread upon those constitutionally recognized rights.

Louisiana Civil Code Article 805 provides that the consent of all the co-owners is required for the lease, alienation, or encumbrance of the entire thing held in indivision. Louisiana Civil Code Article 804 provides that “[s]ubstantial alterations or improvements to the thing held in indivision may be undertaken only with the consent of all the co-owners.” Louisiana Civil Code Article 801 further provides that “[t]he use and management of the thing held in indivision is determined by agreement of all the co-owners.” Furthermore, La.R.S. 19:8(A)(3) provides that “the expropriating authority shall not be entitled to possession or ownership of the property until a final judgment has been rendered and payment has been made to the owner or paid into the registry of the Court except as may otherwise be stipulated by the parties.”

In the present case, Kevin Taliaferro, BBP's corporate representative and the Director of Right of Way, testified that construction crews entered the Defendants' property in the beginning of June 2018. In July of that same year, Peter Aaslestad, one of the defendants, filed suit to enjoin BBP from continuing construction on the property. On July 27, 2018, after being met with this suit to enjoin its construction activities on the property, BBP instituted an action for expropriation against the

¹⁴ “When a judgment is silent as to part of the relief requested, the judgment is deemed to have denied that relief.” *Duhon v. Lafayette Consol. Gov't*, 05-657, p. 11 (La.App. 3 Cir. 12/30/05), 918 So.2d 1114, 1120 (citing *Guaranty Bank & Trust Co. of Alexandria, La. v. Carter*, 394 So.2d 701 (La.App. 3 Cir.), writ denied, 399 So.2d 599 (La.1981)).

defendants and numerous others with whom BBP had not negotiated a servitude or whose whereabouts could not be determined. In a stipulated judgment on Aaslestad's suit for injunction, BBP agreed to remain off the property as of September 10, 2018; as the trial court stated, "the pipeline on the property in question was substantially completed by the middle of September, 2018[.]" The final judgment of the trial court on BBP's expropriation suit was not signed until December 18, 2018.

BBP unquestionably and admittedly entered and disrupted Defendants' land prior to the grant of expropriation by the trial court, in contravention of both Defendants' property rights and the explicit provisions of La.R.S. 19:8(A)(3). Thus, the record shows BBP cleared trees and dug on the property for months prior to the actual grant of their servitude when it legally gained the legal right to enter and disturb the property. "[W]hen private parties have the unrestrained ability to decide whether another citizen's property rights can be restricted, any resulting deprivation happens without 'process of law.'" *Boersching*, 872 F.3d at 708.

Nevertheless, BBP would have us limit our award because Defendants were out-of-state residents who had an *incredibly* minor ownership interest in the property;¹⁵ they had no contact with the land *at all*, save for one visit by two of the three Defendants to see the land just prior to trial and one Defendant had still never been to the land at issue at trial; and Defendants never paid taxes or tried to possess or maintain the property in any fashion. This we decline to do.

¹⁵ In its reasons for judgment, the trial court noted that Defendant Theda Larson Wright had an ownership interest in the property of 0.0000994%. Defendants Peter and Katherine Aaslestad had ownership interests of 0.0005803% each.

“Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property.” La.Const. art. 1, § 4. Moreover, La.Civ.Code art. 802 provides:

Except as otherwise provided in Article 801,^[16] a co-owner is entitled to use the thing held in indivision according to its destination, but he cannot prevent another co-owner from making such use of it. As against third persons, a co-owner has the right to use and enjoy the thing as if he were the sole owner.

As co-owners, Defendants’ due process rights were individually viable and as against BBP, a third-party, each were entitled to be recognized regardless of their co-ownership interest or residence. *In accord*, Kenneth M. Murchison, *Local Government Law*, 53 La.L.Rev. 823, 850 (1993) (footnotes omitted) (stating “the right to exclude others has been recognized as an essential attribute of the ownership of immovable property. When the government physically invades (or authorizes third parties to invade) real estate, a taking occurs even if the financial impact is minimal.”). Thus, regardless of BBP’s assertions of limitation, each Defendant was entitled to assert their constitutionally guaranteed due process rights against BBP’s expropriation action and contest BBP’s right to such an expropriation. As such, the due process rights established and specifically recognized in La.Const. art. 1, § 4 existed to protect Defendants’ property ownership rights, and BBP willfully, wantonly, and recklessly¹⁷ violated those rights.

¹⁶ Louisiana Civil Code Article 801, which is inapplicable here, provides that “[t]he use and management of the thing held in indivision is determined by agreement of all the co-owners.”

¹⁷ In *Cates v. Beauregard Elec. Coop., Inc.*, 316 So.2d 907, 916 (La.App. 3 Cir. 1975), *aff’d* 328 So.2d 367 (La.1976), the Louisiana supreme court stated:

The terms ‘willful’, ‘wanton’, and ‘reckless’ have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended. The usual meaning assigned to the terms is that the actor has intentionally done an act of

In the present case, the trial court's failure to award damages for BBP's violation of Defendants' due process rights, a claim separate and apart from their award for trespass damages, constituted legal error. When the trial court errs as a matter of law in its assessment of damages rather than abuses its "much discretion," an appellate court, if it can, must assess *res nova* the amount of damages appropriate under the circumstances. *Mart v. Hill*, 505 So.2d 1120, 1128 (La.1987).

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La.Civ.Code art. 2315. There is a general understanding that the purpose of a damage award is to restore the injured party, as closely as possible, to the position he occupied prior to the act which caused the damage. *Great American Surplus Lines Ins. Co. v. Bass*, 486 So.2d 789 (La.App. 1 Cir.), writ denied, 489 So.2d 245 (La.1986); *Langendorf v. Administrators of Tulane Educ. Fund*, 361 So.2d 905 (La.App. 4 Cir.), writs denied, 363 So.2d 1384 and 364 So.2d 120 (La.1978). However, as evidenced in the present case, no damage award for the violation of a due process right, one specifically guaranteed by our constitution and structured to protect owners of immovable property, can ever restore the injured party to their prior position. It is evident that any damage award must focus on the deprivational conduct of the party who violated those due process rights. In the present case, BBP's conduct clearly shows no fear of the consequences of trampling on property owner's constitutionally protected due process rights. Accordingly, any such damage award for these Defendants should be one which

unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.

communicates to BBP that it did not “have the unrestrained ability to decide whether another citizen’s property rights can be restricted” without due process of law. *Boersching*, 872 F.3d at 708.

Theda Larson Wright (hereafter “Ms. Wright”) testified in no uncertain terms that she did not want any part of a pipeline going over her property “[b]ecause that bit of land means a lot to our family. I mean, we feel our roots are there.” She further testified: “I was following a Facebook page and I saw the excavation and they had cleared the land and they were actually excavating. My sister and I were both very upset by that because we had not signed anything.” Pushing on, her attorney queried, “When you say it’s been stressing and you feel emotionally harmed, by what exactly?” Ms. Wright responded, “My family feels violated. You know, I was born in this country. I’m an American. I thought I had certain rights, and I don’t feel those were respected.”

Peter Aaslestad (hereafter “Mr. Aaslestad”) testified: “I felt that I was being pulled into a conflict. You know, if I chose to stand up for my rights, that I’d be pulling into a conflict that would be even more distressing to me.” He further explained that this was distressing to him “[b]ecause I’m a single individual and BBP is a billion-dollar company. Again, Energy Transfer Partners is a billion-dollar company. I felt I would not have the resources to fight for my rights.” Likewise, when his attorney asked him what his expectations were when he filed to enjoin BBP’s construction activities, Mr. Aaslestad stated:

I had all sorts of scenarios going through my mind, but what I hoped for was that they would follow the law and exit the property and stop construction. I did not expect to learn that in the time between when I filed the injunction and there was an injunction hearing that they would complete the construction. That was probably the most upsetting. For me it’s been a ramp up of stress. And the big jump up was on, I think it was the 10th or 11th of September when they signed papers saying, oh,

we agree not to enter the property, and it felt like a victory, only to learn that the reason that they're saying we won't enter the property is because they don't need to enter the property anymore except to do clean up under their idea. At that point I felt outsmarted. I felt defeated and terrified if I'm making the right decision to stick my neck out.

Katherine Aaslestad (hereafter "Ms. Aaslestad"), Mr. Aaslestad's sister, was asked by counsel how BBP's intrusion onto their property made her feel. She stated:

Well, it made me feel two things, off the top of my head. It made me feel, first of all, really depressed. Do property rights really not matter? We had been following this but we hadn't known there had been any kind—I was waiting for maybe some sort of determination that no, you don't matter, and we hadn't heard any of that. So I was really depressed that this could happen the way it's taken place without any kind of permission or any kind of resolution at the very least. So that was depressing. But I was also outraged because I believe very strongly in property rights. It's a key component of this country. It's a key component of every state I've ever lived in. It's a key component of Louisiana state law. It's a key component of the fricking Napoleonic code that came first.

In stark contrast to the Defendants' testimony, Mr. Taliaferro, BBP's director of rights-of-way, testified that although there were hundreds of landowners with a connection to the property who were named parties defendant in this expropriation, he nonetheless authorized construction to begin on this property even before expropriation proceedings began. On his authorization, construction began on this tract of land in the beginning of June 2018.¹⁸ Under questioning from the trial court Mr. Taliaferro agreed with the trial court's statement that in pipeline construction "time is money."

After reviewing the record, we find the Defendants proved they are entitled to damages for BBP's violation of the due process rights particularized in this state's

¹⁸ Scott Eustis, a wetlands expert with expertise in environment impacts, testified for the Defendants. Although he first saw no construction on this property when he made an airplane fly-over of this property in the Spring of 2018, he witnessed clearing of the property on June 26, 2018. On a later fly-over on August 30, 2018, he saw trenching and pipeline manipulation in a spoil bank on the property.

constitution. To decide otherwise would give entities such as BBP the unrestrained ability to decide whether another citizen's property rights can be restricted and makes a mockery of this state's carefully crafted laws of expropriation. Therefore, we award these Defendants each \$10,000.00 for BBP's violation of their due process rights.

In addition, the Defendants have prayed for an award of reasonable attorney fees and expert witness fees. At the time BBP violated the Defendants' due process rights it acted as a private entity qualified as an agent of the government for purposes of La.R.S. 13:5111. *See Mongrue v. Monsanto Co.*, 249 F.3d 422 (5th Cir. 2001). As such, when it commenced pipeline construction on Defendants' property prior to the initiation of expropriation proceedings, it became liable to compensate Defendants for reasonable attorney fees and expert witness costs pursuant to the provisions of La.R.S. 13:5111. Because the record is incomplete with regard to these elements of costs, we remand this matter to the trial court for a hearing to determine those elements of cost.

Prematurity

Defendants next claim that the trial court erred in denying their dilatory exceptions of prematurity, alleging that BBP failed to comply with the statutory notice requirements prior to beginning expropriation proceedings.

The dilatory exception of prematurity "questions whether the cause of action has matured to the point where it is ripe for judicial determination." *Williamson v. Hosp. Serv. Dist. No. 1 of Jefferson*, 04-451, p. 4 (La. 12/1/04), 888 So.2d 782, 785. "The burden of proving prematurity is on the exceptor." *Id.* "Prematurity is determined by the facts existing at the time suit is filed." *Sevier v. U.S. Fid. & Guar. Co.*, 497 So.2d 1380, 1382 (La.1986). We review a denial of an exception of

prematurity under the manifest error standard. *In re C.E.B.*, 14-428 (La.App. 3 Cir. 12/3/14), 161 So.3d 811, *writ denied*, 15-002 (La. 1/23/15), 159 So.3d 1060; *Jefferson Door Co. v. Cragmar Const., L.L.C.*, 11-1122 (La.App. 4 Cir. 1/25/12), 81 So.3d 1001, *writ denied*, 12-454 (La. 4/13/12), 85 So.3d 1250. Louisiana Revised Statutes 19:2 provides, in pertinent part:

Prior to filing an expropriation suit, an expropriating authority shall attempt in good faith to reach an agreement as to compensation with the owner of the property sought to be taken and comply with all of the requirements of R.S. 19:2.2. If unable to reach an agreement with the owner as to compensation, any of the following may expropriate needed property:

.....

(5) Any domestic or foreign corporation, limited liability company, or other legal entity created for, or engaged in, the piping and marketing of natural gas for the purpose of supplying the public with natural gas as a common carrier or contract carrier or any domestic or foreign corporation, limited liability company, or other legal entity which is or will be a natural gas company or an intrastate natural gas transporter as defined by federal or state law, composed entirely of such entities or composed of the wholly owned subsidiaries of such entities. As used in this Paragraph, “contract carrier” means any legal entity that transports natural gas for compensation or hire pursuant to special contract or agreement with unaffiliated third parties.

Louisiana Revised Statutes 19:2.2 provides, in pertinent part:

A. Before exercising the rights of expropriation provided by R.S. 19:2, any expropriating authority referred to in R.S. 19:2 shall comply with the following:

(1) Provide the owner whose property is to be taken with the following information from its appraisal or evaluation as to the amount of compensation due the owner for the full extent of his loss:

(a) The name, address, and qualifications of the person or persons preparing the appraisal or evaluation.

(b) The amount of compensation estimated in the appraisal or evaluation.

(c) A description of the methodology used in the appraisal or evaluation.

(2) Offer to compensate the owner a specific amount not less than the lowest appraisal or evaluation.

B. Not more than thirty days after making an offer to acquire an interest in property, if no agreement has been reached with the property owner, each expropriating authority identified in R.S. 19.2, other than the state or its political corporations or subdivisions, shall provide to the property owner a notice that includes all of the following:

(1) A statement that the property owner is entitled to receive just compensation for the property to be acquired to the fullest extent allowed by law.

(2) A statement that the property may be expropriated only by an authority authorized by law to do so.

(3) A statement that the property owner is entitled to receive from the expropriating authority a written appraisal or evaluation of the amount of compensation due.

(4) A statement identifying the website of the expropriating authority where the property owner can read the expropriation statutes upon which the expropriating authority relies or a copy of the expropriation statutes upon which the expropriating authority relies.

(5) A statement offering to provide upon request of the property owner a copy of the expropriation statutes upon which the expropriating authority relies.

(6) A statement identifying an agency responsible for regulating the expropriating authority, including the name, website, and telephone number of the agency.

(7) A statement that the property owner may hire an agent or attorney to negotiate with the expropriating authority and an attorney to represent the property owner in any legal proceedings involving the expropriation.

Ms. Wright

Ms. Wright claims that she was not “provided” with the appraisal information required by La.R.S. 19:2.2(A)(1), rendering BBP’s expropriation action premature, despite the fact she was clearly sent the information. We disagree.

Ms. Wright concedes that BBP sent the disputed appraisal information to her at her residence. When the post office could not deliver the parcel containing the

information to a “secure location,” it left her a notice of the attempted delivery, indicating it could be picked up at the post office. Tracking information for the parcel indicated that it remained at the post office, ready to be picked up by Ms. Wright, for weeks before being returned to BBP. The trial court held that BBP satisfied its requirements in sending the information.

Due Process cases have never required actual notice but require only efforts “be ‘reasonably calculated’ to apprise a party of the pendency of [an] action.” *Dusenbery v. United States*, 534 U.S. 161, 170, 122 S. Ct. 694, 701 (2002). Notice mailed, but not actually received, has been held to be sufficient in Louisiana expropriation cases. *Thomas v. New Orleans Redevelopment Auth.*, 04-1964 (La.App. 4 Cir. 10/6/06), 942 So.2d 1163. We find that BBP made reasonable efforts in sending Ms. Wright the required information, as it sent the appraisal to an address where she had received both prior and subsequent mailings without issue. Further, it was Ms. Wright’s own actions in failing to retrieve the parcel, despite knowing it was waiting for her, that caused notice to be difficult, if not impossible, for the particular information at issue. Under the particular facts of this case, we can find no manifest error in the trial court’s determination that the information was provided as required, even though Ms. Wright did not receive it.

Mr. Aaslestad

Mr. Aaslestad claims that BBP failed to properly provide him with notice under La.R.S. 19:2.2(B), subsections (4)–(7), in particular. The parts of La.R.S. 19:2.2(B) at issue require that a property owner receive notice of the expropriating authority’s website where the property owner can read the expropriation statutes, a statement offering to provide the property owner a copy of the expropriation statutes upon which the expropriating authority relies, a statement identifying an agency

responsible for regulating the expropriating authority, and a statement that the property owner may hire an agent or attorney to negotiate with the expropriating authority. Such notice is to be provided “[n]ot more than thirty days after making an offer to acquire an interest in property, if no agreement has been reached with the property owner.” *Id.*

Louisiana Revised Statutes 19:2.2(B), as currently written, went into effect January 1, 2017. However, BBP made its initial offer to Mr. Aaslestad for the property in December 2016, prior to the law taking effect. If an act creates a new obligation where no such obligation existed before, the act is substantive. *River Cities Constr. Co., Inc. v. Barnard & Burk, Inc.*, 444 So.2d 1260 (La.App. 1 Cir. 1983), *writs denied*, 446 So.2d 1223, 1226 (La.1984). In the absence of contrary legislative expression, substantive laws apply prospectively only. La.Civ.Code art. 6. “‘Substantive laws,’ for purposes of determining whether a law should be applied retroactively, are those which establish new rules, rights, and duties, or change existing ones.” *Brown v. Schwegmann*, 07-210, p. 6 (La.App. 4 Cir. 7/30/08), 990 So.2d 1282, 1286. As the changes to La.R.S. 19:2.2 created new, additional obligations for BBP, we find they are to be applied prospectively only. Thus, the disputed information was not required to be given when the initial offer was made in 2016.

Additionally, we can find no error in the trial court’s finding that the lack of said information did not prejudice Mr. Aaslestad. He was obviously aware of his right to retain counsel to negotiate or deal with BBP, as displayed by the current litigation. Said counsel was obviously well versed in the expropriation statutes at issue. Finally, when pressed at the hearing on the exception, Mr. Aaslestad could not identify any way in which he was prejudiced by the lack of the “missing”

information, or any way in which that information would have changed his defense of this case. The trial court did not commit manifest error in denying the exceptions of prematurity.

For the above reasons, the decision of the trial court is hereby affirmed, in part, and reversed, in part. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of Katherine Aaslestad, Peter Aaslestad, and Theda Larson Wright and against Bayou Bridge Pipeline, LLC, in the sum of \$10,000.00 each, together with legal interest thereon, as well as attorney fees and expert witness costs to be determined by the trial court on remand.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED FOR DETERMINATION OF ATTORNEY FEES, EXPERT WITNESS FEES, AND COURT COSTS.

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

19-565

BAYOU BRIDGE PIPELINE, LLC

VERSUS

**38.00 ACRES, MORE OR LESS, LOCATED IN ST. MARTIN PARISH, ET
AL.**

Ezell, J., dissents in part and assigns reasons.

I respectfully dissent from the majority opinion's finding that the trial court erred in not awarding Defendants damages for alleged violations of their due process rights by Bayou Bridge, suffered when Bayou Bridge wrongly entered their property. Rather, I believe that the damages suffered by Defendants for Bayou Bridge's improper entry onto their property were for trespass alone.

A trespass is an unlawful physical invasion of the property or possession of another person. *Davis v. Culpepper*, 34,736 (La.App. 2 Cir. 7/11/01), 794 So.2d 68, writ denied, 01-2573 (La. 12/14/01), 804 So.2d 646. A trespasser is one who goes upon another's property without his consent. *Id.* Bayou Bridge unquestionably and admittedly entered and disrupted Defendants' land prior to the grant of expropriation by the trial court. Bayou Bridge cleared trees and dug on the property for roughly five months prior to the actual grant of their servitude, when it legally gained the right to enter and disturb the property. However, contrary to Defendants' assertions, this violation was not an infringement of Defendants' due process or other constitutional rights. Rather, entry onto the property prior to gaining the right to do so constituted a trespass. As noted by the majority, the Louisiana procedure for expropriation is constitutional and Bayou Bridge followed that procedure, though obviously far later than it should have.

In brief, Defendants cite *Belgarde v. City of Natchitoches*, 156 So.2d 132 (La.App. 3 Cir. 1963), wherein the defendant municipality constructed three streets through a thirteen-acre tract owned by the plaintiff landowner without securing her consent and without instituting expropriation proceedings *at all*. Besides the fact that *Belgarde* involved a municipality that built on the plaintiff's land without *any* expropriation proceedings, unlike the case at hand, the court in *Belgarde* awarded damages specifically *for trespass*. That court noted that the plaintiff there testified she was angered by the municipality constructing the streets through her property in her absence and without her consent, much as the Defendants here. However, the *Belgarde* court stated that the "type of damages resulting from an illegal trespass onto a landowner's property is regarded under Louisiana jurisprudence as compensatory damages to which the landowner is entitled for the violation of a recognized property right *through the trespass*." *Id.* at 134 (emphasis added).

Likewise, Defendants cite *Williams v. City of Baton Rouge*, 98-1981, 98-2024, p. 9 (La. 4/13/99), 731 So.2d 240, 248, for the proposition that trespassers who act in bad faith are subject to "all the resultant damages under [La.Civ.Code art.] 2315." I do not disagree with that premise, but feel that the facts of that case likewise bolster the trial court's decision to award trespass damages alone.

There, the City/Parish again failed to institute an expropriation proceeding all together, unlike Bayou Bridge here, then argued that its entry onto the landowners' property without permission did not result in a trespass, but only entitled the plaintiffs to inverse condemnation damages. The court there disagreed, stating:

Because the City/Parish's action was unlawful, their entrance onto plaintiffs' land *constitutes a trespass* which resulted in damage to plaintiffs' property. "Justice, reason, and the principle of full reparation of La. C.C. art 2315 require that, where an individual's property is damaged unlawfully by a tortfeasor for no good reason, the owner be compensated at least as fully as when his property is damaged by the state for a public purpose." *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So.2d 874, 876 (La.1993). The landowner must be compensated not merely with the

market value of property taken and severance damage to his remainder, but must be compensated to the full extent of his loss and placed in as good a position pecuniarily as he enjoyed prior to the taking. *Id.*; *State Through Dept. of Highways v. Constant*, 369 So.2d 699 (La.1979).

Williams, 731 So.2d at 249 (emphasis added). I agree with the court in *Williams* that unlawful entry onto another's property constitutes a trespass and that damages must follow. Here, Bayou Bridge admitted the trespass and the trial court awarded such damages.

The trial court awarded damages for that trespass based on thorough and sound reasons for judgment. Though the awards are indeed small, the trial court awarded minimal damages for trespass because Defendants were out-of-state residents who had an *incredibly* minor ownership interest in the property. In its reasons for judgment, the trial court noted that Defendant Theda Larson Wright had an ownership interest in the property of 0.0000994%. Defendants Peter and Katherine Aaslestad had ownership interests of 0.0005803% each.¹ Defendants had no contact with the land *at all*, save for one visit by two of the three Defendants to see the land just prior to trial. One Defendant had still never been to the land at issue at trial. Defendants never paid taxes or tried to possess or maintain the property in any fashion. Likewise, the trial court disregarded Defendants' claims of mental anguish due to lack of proof. Because Defendants have not appealed the amount of those trespass damages, those amounts are final.

Though I sympathize with Defendants' desire to discourage Bayou Bridge or other pipeline companies from entering property prior to actually having the right to do so, the amount of the trespass damages is not before this court in a manner in which we can alter them, as noted by the majority. I cannot find that the trial court erred in awarding damages for trespass only in this matter, where only damages for

¹ The unchallenged just compensation for the land alone was determined to be \$0.09 for Mrs. Larson Wright and \$0.51 for the Aaslestads. Including treble damages for timber, the total just compensation for the property was found to be \$0.91 for Mrs. Larson Wright and \$6.64 for the Aaslestads.

trespass were awarded in the cases cited by Defendants, especially considering the expropriating authorities in those cited cases did not undertake any expropriation proceedings whatsoever. Here, Bayou Bridge did eventually complete proper expropriation proceedings here, though far too late by their own admission.

While Defendants stress that the reasons Bayou Bridge entered their property was for financial gain and expediency, the reasons behind the trespass, even if committed in bad faith, do not change the nature of the violation. The violation Bayou Bridge committed is trespass alone, especially when Bayou Bridge did ultimately institute a proper expropriation action. Had Defendants actually appealed the amount of trespass damages, I would have no problem in increasing that award to discourage bad faith behavior as exhibited by Bayou Bridge here. However, I can not find a constitutional violation where I believe only trespass was committed in order to do so. I agree with the majority in all other respects.

A-2

BAYOU BRIDGE PIPELINE, LLC

16TH JUDICIAL DISTRICT COURT

VS. DOCKET NO. 87011

PARISH OF ST. MARTIN

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

STATE OF LOUISIANA

FILE

REASONS FOR JUDGMENT

This matter came before the Court for trial of an expropriation matter along with the defendant's trespass claim that was heard by the Court on November 27-November 29, 2018. On November 16, 2018, the Court heard various exceptions to the claim for expropriation by Bayou Bridge Pipeline, LLC. The Court ruled on these exceptions, including constitutional challenges to the proceedings by the defendants/landowners and denied these exceptions and tests of constitutionality filed by the defendants, Theda Larson Wright, Peter K. Aaslestad and Katherine Aaslestad (hereinafter referred to as Landowners). The rulings on those exceptions and constitutional issues are the law of the case and will not be revisited by this Court in these Reasons. The issues before the Court on November 27, 2018 were the right of Bayou Bridge to expropriate property as a public and necessary purpose in accordance with the Louisiana Constitution and Title 19 of the Louisiana Revised Statutes, and if public and necessary, then what compensation is just compensation to be paid to the Landowners for this expropriation. See La. R.S. 19:2 and La. Const. Art. 1 Sec. 4.

The Landowners, Theda Larson Wright, Peter K. Aaslestad and Katherine Aaslestad, filed Claims in Reconvention for trespass, property damage, the unconstitutional taking in violation of the Fifth Amendment, a violation of due process under the Fifth Amendment of the United States Constitution and the unconstitutional taking and due process in violation of Article 1 Section 4 and Article 1 Section 2 of the Louisiana Constitution. As referenced above, the constitutional issues have been ruled upon and will not be discussed here.

The factual background of this case is as follows: In 2016, Energy Transfer Partners conducted an "open season" or survey of its clients to determine the reasonableness and feasibility of a pipeline from Lake Charles, Louisiana to St. James hub in Louisiana. Energy Transfer had previously built a pipeline from Nederland, Texas to Lake Charles, Louisiana in order to provide crude oil transportation to Louisiana refineries at or near Lake Charles, Louisiana from Nederland, Texas, a hub for both pipeline infusion of oil and also tanker infusion

of oil. Energy Transfer determined through its client responses that a pipeline was in fact feasible and commenced the work necessary to build a pipeline from Lake Charles, Louisiana to St. James, Louisiana. It determined the proper path and size of the pipeline and commenced obtaining permits and public hearings concerning the feasibility of the pipeline. All necessary permitting and location of the pipeline was established and permits were obtained from all necessary governmental agencies.

It is clear from the record that Bayou Bridge Pipeline, LLC, the entity used by Energy Transfer to obtain right of way pipelines in this matter, did title examination work on the 38 acres more or less located in St. Martin Parish. It was discovered by Bayou Bridge Pipeline, LLC that over 400 owners of the property existed in its chain of title. Negotiations occurred and were established by Bayou Bridge Pipeline, LLC with all the record owners that Bayou Bridge Pipeline could obtain through its search of the public records in St. Martin Parish. Numerous rights of way were obtained from hundreds of owners of the 38 acres more or less, but others were either not located or refused to sign right of way agreements with Bayou Bridge Pipeline, LLC. Landowners herein fit into the latter category and oppose the pipeline and refuse to sign right of way agreements on this particular tract.

On July 27, 2018, Bayou Bridge Pipeline, LLC filed the instant action for expropriation against numerous landowners of the 38 acres of land including the defendants in this proceeding. Bayou Bridge Pipeline alleged that it needed to construct a 24 inch pipeline to transport oil from Lake Charles, Louisiana to St. James, Louisiana. Bayou Bridge also alleged that it was a common carrier within the meaning of La. R.S. 45:251 (1) and that it was engaged in the transportation of petroleum as a public utility common carrier for hire. It further stated that Louisiana law grants it the authority to expropriate property as a common carrier pursuant to La. R.S. 19:2 (8) and that the pipeline is in the public interest and a necessity. Bayou Bridge also alleged that it determined the overall route of the pipeline and identified the proper right of ways necessary for its installation. Bayou Bridge stated that it selected the current route that was used in this particular case based on technical experience and sound engineering principles after considering a number of factors including environmental impacts or damages, possible alternative routes, cultural impacts or damages, minimal crop interference and minimal interference with property in commerce.

Bayou Bridge further stated that the route crossed the property in question, and it sought to expropriate a 50 foot right of way permanent servitude for the installation, construction and maintenance of the pipeline right of way. It also sought to expropriate a temporary right of way and servitude needed for the construction of the right of way as additional temporary work space outlined on the map attached to the petition. The temporary right of way would be from the commencement of construction until six months after the pipeline is placed into service. Bayou Bridge further alleged that if Bayou Bridge completed its use of the temporary access road and/or work space prior to the expiration of the six month period then the temporary access road and the temporary work space shall immediately terminate.

The Court heard the testimony of Kevin Taliaferro, an employee of Bayou Bridge Pipeline, LLC. He testified in the November 16 hearing and also in the present hearing that the public purpose of the pipeline is to produce products to end users which benefit the public at large. This pipeline was to be constructed from Lake Charles, Louisiana to St. James, Louisiana. He explained that the St. James hub feeds numerous refineries along the Mississippi River corridor of refineries which provide many products to Louisiana, the United States and the world. He has previously testified also that the pipeline would stabilize the market commodity produced and generated to the St. James hub by connecting it to the Nederland and Lake Charles hubs. This would stabilize the oil to be delivered to the refineries along the Mississippi River corridor. It would also have a positive effect upon the consumers in that whenever there is competition for production of certain products, it usually stabilizes the price on commodities.

Testimony of Dr. David Dismukes with the LSU Center for Energy Studies corroborated the testimony of Mr. Taliaferro and explained that there was increased oil production in the Permian Basin of west Texas. This oil could be piped to the Nederland hub into the St. James hub that currently supplies the Mississippi River refining corridor with its products. He testified that Bayou Bridge will allow for diversification of these products in St. James and will support the petrochemical industries along the Mississippi River through the St. James hub. Dr. Dismukes further explained that the petrochemical industry along the Mississippi River uses byproducts from the refining of petroleum products and makes numerous products for consumers and industry. These include blood bags for hospitals and plastic milk jugs used in everyday life by Louisianans, Americans and others throughout the world.

Dr. Dismukes also testified as to the importance that Bayou Bridge Pipeline would have on a constant stream of product by making Louisiana energy independent of foreign oil or tanker transportation of oil. He testified that providing transportation of crude oil from the Permian Basin to St. James is important to maintain a steady supply to the refining capacity along the Mississippi River in spite of any disruption from political upheaval in foreign countries to hurricanes in the Gulf of Mexico. Dr. Dismukes agreed that other crude oil pipelines exist in Louisiana, but Bayou Bridge has conducted an open season (evaluation from its clients) to gauge the market need for this particular transportation avenue from Lake Charles to St. James which concluded that a pipeline was needed and determined the size of the pipeline. The Court further notes that the defendants failed to call any witnesses to challenge the public purpose of the pipeline and minimally cross examined these witnesses concerning the public purpose of the pipeline. Therefore, the Court finds that the public purpose of the pipeline is satisfied by the testimony of these two individuals.

The next item that Bayou Bridge must prove is a necessary purpose for the expropriation. Bayou Bridge argues that the word necessary refers to the necessity of the purpose for the expropriation rather than the necessity for a specific location. It argues that the expropriation acreage must be reasonably necessary for the accomplishment of the proposed project. The Louisiana Supreme Court stated that the criteria to be considered by the expropriator in determining the location and extent of the property to be expropriated includes factors such as cost, environmental impact, long range area planning and safety considerations. ExxonMobil Pipeline Co. v. Union Pacific R. Co., 2009-C-1629 (La. 3/16/10), 35 So.3d 192. ExxonMobil, supra, stated that a landowner must prove that the expropriator has abused its discretion arbitrarily, capriciously or in bad faith in order to be successful in a challenge of the necessity of the taking. Kevin Taliaferro testified at both the November 16 hearing and the November 27 hearing that Bayou Bridge determined the size of the pipeline based on the numerous shippers that committed during the open season and determined that a 24 inch pipeline was the proper size to be constructed. Bayou Bridge further carefully considered location of the pipeline based on technical experience, regulatory requirements and sound engineering principles. Only after considering a number of factors including public safety, environmental impacts or damages, possible alternative routes, cultural impacts or damages, minimal crop interference, minimal interference with property and commerce and other regulatory requirements was the site chosen.

It should be noted that Bayou Bridge Pipeline routed the pipeline to avoid new green field construction by paralleling this pipeline to an existing infrastructure. Similarly Bayou Bridge attempted to locate the pipeline near property lines to minimize the impact to landowners while attempting to avoid heavily populated areas and limit the impact of the project to the Louisiana Coastal Zone. On this particular piece of property, Bayou Bridge located its pipeline next to an existing pipeline, and the right of way is adjacent to the existing pipeline right of way.

The landowners presented the testimony of Scott Eustis to rebut the necessity of the pipeline. Mr. Eustis was qualified as a wetlands expert. He indicated that he is very familiar with the 38 acre tract in question. He testified that the old pipeline (ie. the Enterprise Pipeline) had been placed on the property in question improperly by producing elevated spoils that created a "levee type" obstruction on this property which obstructed water flow in the Buffalo Cove area of the Atchafalaya Basin. He also testified that because the Bayou Bridge Pipeline was layed incorrectly in the spoils of the Enterprise Pipeline, the "levee or dam" effect was more pronounced and would impede the flow even more. He testified under cross examination that he opposed the Bayou Bridge Pipeline at all permitting applications because of this issue but to no avail. The permits were granted over his objections. Additionally, Mr. Eustis indicated he had filed complaints with the Army Corps of Engineers concerning the misplacement of the Bayou Bridge Pipeline within the spoils of the Enterprise Pipeline. Landowners failed to bring any testimony as to the actual location of the pipeline, and Bayou Bridge offered plats as to the location of its pipeline adjacent to the Enterprise Pipeline. Mr. Eustis produced no evidence that he used metal detectors or other instrumentation to locate the exact location of the Bayou Bridge Pipeline in relation to the spoils or the actual Enterprise Pipeline.

Bayou Bridge called Michael Aubele who is their environmental compliance manager for the pipeline. Mr. Aubele testified that the pipeline is not laid within the spoils of the Enterprise Pipeline and produced engineering sheets of the depth of the pipeline on the tract in question. This engineering plat shows the depth of the pipeline in relation to the grade of the land. The permits obtained by Bayou Bridge require the depth of the pipeline to be at least 4 feet below the grade of the land. The engineering plat produced by Mr. Aubele shows that throughout the tract of the Bayou Bridge Pipeline through the 38 acres in question, a depth of at least 4 feet was maintained between the grade of the land surface and the top of the Bayou Bridge Pipeline. (See BBP Exhibit 40) Bayou Bridge offered the exact location of the pipeline on the plat entered into

evidence. (See BBP Exhibit 17 and Exhibit 30) The Court accepts the plat as prepared by Bayou Bridge and not the self-serving unscientifically corroborated testimony of Mr. Eustis. Mr. Aubele also testified that, if the Army Corps of Engineers or other governmental agency finds problems or noncompliance with the requirements of the permit, then Bayou Bridge is required to and will remedy these problems or noncompliance issues to the requirements mandated by the Army Corps of Engineers.

The Court notes that the defendants would want the Court to supplant the findings of the various agencies that permitted this project. All the permits have been introduced into evidence, and the findings of those permitting agencies and the expertise of those permitting agencies should be considered by the Court, but the Court should not supplant the well thought and well researched opinions of the various agencies that permitted this project. Therefore, the Court finds that the proper permitting has been done, and that the public purpose and necessity has been proven by Bayou Bridge Pipeline, LLC. The Court finds that the testimony of Mr. Eustis and the mere allegations by the defendants of the adverse effects of the pipeline do not overcome Bayou Bridge's proof that the necessity for the expropriation has been met. Therefore, the Court finds that the public purpose and necessity of the pipeline have been proven by Bayou Bridge Pipeline, LLC.

The next issue for the Court to determine is the amount of damages for the taking pursuant to the expropriation. In determining the amount of damages to be awarded to the defendants/landowners, the Court has considered that Bayou Bridge is expropriating a 50 foot wide permanent easement which allows it the minimum width necessary to ensure adequate distance from the existing Enterprise Pipeline just south of the Bayou Bridge Pipeline and necessary access and maintenance to maintain the integrity of its pipeline in the future. There is also a minimal temporary work area that will automatically revert to the landowners six months following the pipeline's end service date or earlier if the space is no longer needed. The temporary work space in this particular case is 1.84 acres, and the permanent pipeline work space to be expropriated is 1.75 acres.

Bayou Bridge Pipeline introduced a calculation in a joint stipulation with defendants of the calculation of the interest of Theda Larson Wright, Peter K. Aaslestad and Katherine Aaslestad in Bayou Bridge Exhibit #33 that was calculated by Philip Asprodites. The interest of Theda Larson Wright was 0.0000994. The interests of Peter K. Aaslestad and Katherine

Aaslestad were 0.0005803 each. The Court accepts this undisputed document as the proper calculation of the interests of these parties.

David Dominy testified as a real estate expert to determine the value of the land that was taken in this expropriation proceeding. He testified that the land is classified in its best use as recreational area and will be classified as recreational area in the future. He indicated that the pipeline will not affect the recreational use of the property once the pipeline is laid and in use. He further testified that the value of timber on this tract is not marketable because of the location, and the mobilization to harvest 3.59 acres of timber is not reasonable. David Dominy calculated the damages for the fair market value computation of the acreage lost in both the temporary and the permanent right of ways appraised at \$871. (see BBP Exhibit 30) The Court has accepted and copied the fair market value computation of the total loss for the three defendants as outlined by Bayou Bridge in its brief as follows:

Table 1: Fair Market Value Computation

<p><u>Theda Larson Wright</u> 0.0000994 (interest) x \$871 (appraised value) = \$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>

Although Mr. David Dominy testified that the timber valuation is not marketable, the Court finds that the loss of timber in this particular matter is compensable by the taking pursuant to the expropriation and eminent domain factors. Therefore, the Court finds the timber damage computation as follows.

Table 2: Best Case Scenario Timber Damages Computation

<p><u>Theda Larson Wright</u> 0.0000994 (interest) x \$2854.05 (highest value) = \$0.28 (rounded up)</p> <p><u>Peter K. Aaslestad</u> 0.0005803 (interest) x \$2854.05 (highest value) = \$1.66 (rounded up)</p> <p><u>Katherine Aaslestad</u> 0.0005803 (interest) x \$2854.05 (highest value) = \$1.66 (rounded up)</p>

The total value of the land and timber in the best case scenario given the defendant's interest in this property according to David Dominy is set forth as below.

Therefore, the total compensation due the defendants is as follows.

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>

The defendants have claimed that treble damages are due for the removal of the trees in this particular case. The merchantable value of the trees that were removed according to the testimony and report presented by the defendants is \$2854.05. Plaintiff, Bayou Bridge, argues that this should not be the market value or compensatory damage value of the trees. The Court agrees with Bayou Bridge that the fair market value of the tract is zero due to the nonmarketability of the tract. However, even if the Court would accept the position of the landowners that they are due treble damages for the loss of the trees, Bayou Bridge has offered a tender that would more than adequately compensate them for this loss. If the Court trebled the damages for the trees, then the landowners would be entitled as follows:

Table 4: Treble Timber Damages

<p><u>Theda Larson Wright</u> \$0.28 x 3 = \$0.84</p>
<p><u>Peter K. Aaslestad</u> \$1.66 x 3 = \$4.98</p>
<p><u>Katherine Aaslestad</u> \$1.66 x 3 = \$4.98</p>

Therefore, even if the Court were to find and award treble damages for the trees, the total award would be as follows:

Table 5: Total Award with Trebled Damages

<p><u>Theda Larson Wright</u> \$0.09 (fair market for right of way) + \$0.84 (treble damages for trees) = \$0.91</p>
<p><u>Peter K. Aaslestad</u> \$1.66 (right of way compensation) + 4.98 (treble damages for trees) = \$6.64</p>
<p><u>Katherine Aaslestad</u> \$1.66 (right of way compensation) + 4.98 (treble damages for trees) = \$6.64</p>

Bayou Bridge had previously tendered to each of the defendants the sum of \$75 to pay for their interest in the right of way. The Court will award the sum of \$75 to each of the three plaintiffs for their interest in the right of way pursuant to the expropriation filed by Bayou Bridge Pipeline. This is the highest offer made to these defendant landowners pursuant to La. R.S. 19:2 et seq. and far exceeds the amount due the landowners according to the evidence presented.

The last issue to be determined by the Court is that of trespass as claimed by the defendants. The Court has considered the issue of criminal trespass. Bayou Bridge Pipeline, LLC instituted these legal proceedings for expropriation in July 27, 2018. The Court heard testimony from Scott Eustis that the pipeline work on this tract had commenced in July of 2018 and that pipeline activity was ongoing on the property in August of 2018 as viewed by Mr. Eustis from aerial observations. The Court notes that Bayou Bridge at that particular time had numerous right of ways from various owners in ownership interests in the property in question. However, a large number of landowners were either absent, deceased or heirs of deceased landowners or had not executed proper right of ways. The expropriation proceedings were to cure these issues. This Court also finds that the pipeline on the property in question was substantially completed by the middle of September 2018, some 2 months prior to the hearings on this case.

The Court has considered the claim of trespass in light of the recent case of W & T Offshore LLC v Texas Brine Corporation, 250 So.3d 970 (La App 1st Cir. 2018). Writs by the Louisiana Supreme Court have been granted. This Court is not aware of any action taken by the Supreme Court. Therefore, the Court will consider W & T Offshore LLC, supra in its analysis. The landowners in this case argue that Bayou Bridge should not have constructed the pipeline

without consent of all the co-owners of the property. In W & T Offshore LLC, supra, the Court noted that “Louisiana Civil Code Article 805 provides that consent of all the co-owners is required for the lease, alienation or encumbrance of the entire thing held in indivision. *Id.* Louisiana Civil Code Article 804 provides that substantial alteration or improvements to the thing held in indivision may be undertaken only with the consent of all the co-owners. Louisiana Civil Code Article 801 provides that the use and management of the thing held in indivision is determined by agreement of all the co-owners.”

The Court notes that La. R.S. 19:8 (A)(3) states that “the expropriating authority shall not be entitled to possession or ownership of the property until a final judgment has been rendered and payment has been made to the owner or paid into the registry of the Court except as may otherwise be stipulated by the parties.” Therefore, it is clear under Louisiana law that the Aaslestads’ and Ms. Wright’s consents were required to the granting of the right of way to Bayou Bridge or expropriation judgments obtained as to their interests prior to the construction of the pipeline on this property. The facts show that this was not done; therefore, the claim for trespass is valid by the defendants.

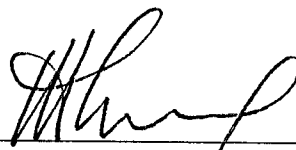
Trespass is defined as an unlawful physical invasion of the property or possession of another. Davis v. Culpepper. 794 So.2d 68, 75 (La App 2nd Cir. 2001), writ denied 804 So.2d 646 A trespasser is one who goes upon another’s property without his consent. *Id.* A person damaged by trespass is entitled to full indemnification. *Id.* This Court finds that Theda Larson Wright, Peter K. Aaslestad and Katherine Aaslestad have a trespass claim against Bayou Bridge Pipeline, LLC for the unauthorized construction of the pipeline on their property because they, as co-owners, did not consent to the construction prior to the commencement of the pipeline. However, while there is a legal right for recovery, the Court must assess the damages to the defendants to determine the proper remedy in this particular case. The Court notes that a judgment against all the balance of the co-owners has been effectuated through the proceedings either on November 16, 2018 or as a result of these proceedings on November 27. The only remaining co-owners that have claims that have not been resolved by judgment of expropriation or through obtaining consensual right of way are Theda Larson Wright, Peter K. Aaslestad and Katherine Aaslestad. The Court finds that their total ownership interest is very minor compared to the ownership interests of the other numerous landowners. Additionally, all the defendants testified that they had very little contact with the property. The Aaslesteds testified that they had

never been on the property prior to November 25, 2018, and Ms. Wright testified that she had never been on the property. Parties indicated that they had never leased the property and had not paid any taxes on the property. The parties further testified they made no effort to possess the property as owner other than filing legal documentations in the chain of title. The Court notes that although all the defendants claim some mental anguish for this property, no party has sought medical attention and all the defendants are self-admitted advocates against pipelines. The Court is vested with the task of determining what are the damages for the trespass prior to the expropriation judgment. The Court finds that an award of \$75 each for the trespass of the approximately 5 months of activity on the property prior to the final expropriation is just damages to the defendants based on their ownership interests. Therefore, the Court will award a total to Theda Larson Wright, Peter K. Aaslestad and Katherine Aaslestad the sum of \$150 each as compensation and damages pursuant to the claims fostered by them.

The Court also notes and finds the provisions of La. R.S. 19:12 are applicable in this case. It states "if the highest amount offered prior to the filing of the expropriation suit is equal to or more than the final award the Court may in its discretion order the defendant to pay all or a portion of the cost of the expropriation proceeding." Id. The Court in this case finds that the defendants were sent proper documentation pursuant to La. R.S. 19:2.2 and the final tender made to the defendants was that of \$75. Bayou Bridge has prevailed on its expropriation case pursuant to La. R.S. 19:12. However, the landowners have prevailed on their trespass claim. Therefore, this Court orders that each party will bear its own costs.

The Court orders the counsel for Bayou Bridge Pipeline, LLC to prepare a judgment to comply with these reasons and forward same to counsel for the defendants. Once counsel for the defendants and the plaintiff have agreed on a mutually accepted judgment, the Court will sign upon presentation by the counsel for Bayou Bridge Pipeline, LLC.

New Iberia, Louisiana this 6th day of December, 2018.

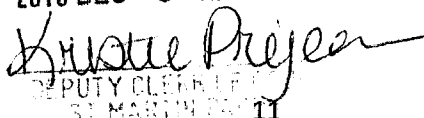


KEITH R. J. COMEAUX
DISTRICT JUDGE

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Please ^{notify} ~~serve~~ all counsel of records

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KRISTIE PREJEAN
DEPUTY CLERK
ST. MARTIN PARISH

and set for trial on the same date as this case. Accordingly, the Court hereby consolidates those
That case was filed subsequent to the above-captioned matter, and is pending before this Court

5. Karen A. Aubouy is a party defendant in *Bayou Bridge Pipeline, LLC v. Akers*.
defendants are therefore **DENIED**.

Defendants' exceptions related to Alberta Stevens, Judy Hernandez, and any other absentee
4. Defendants do not have standing to raise due process claims for other defendants.

subject to legal challenge is **DENIED**.
the United States Army Corps of Engineers and Louisiana Department of Natural Resources are

3. Defendants' dilatory exception of prematurity on the basis that permits granted by
is therefore **DENIED**.

Bridge failed to meet the statutory requirements prior to commencing the expropriation litigation
satisfied the requirement. Defendants' dilatory exception of prematurity on the basis that Bayou
Section 19:2.2(A), the Court finds that Bayou Bridge sent the appraisal information and therefore
provide such notice did not result in any prejudice. With respect to the appraisal information under
litigation, the Court finds that Section 19:2.2(C) is not a statutory prerequisite and any failure to
Bayou Bridge failed to meet the statutory prerequisites prior to commencing the expropriation
2. With respect to Defendants' dilatory exception of prematurity on the basis that

right of action is therefore **DENIED**.

term is defined by Louisiana Revised Statute 45:251. Defendants' peremptory exception of no
1. Bayou Bridge Pipeline, LLC ("Bayou Bridge") is a common carrier pipeline as that

otherwise fully advised in the premises, the Court finds as follows:
Having considered the pleadings, witness testimony, exhibits, and arguments of counsel, and being
and Katherine Aaslestad (a/k/a Katherine A. Lambertson) (collectively herein, "Defendants").
exceptions and affirmative defenses filed by Defendants Theda Larson Wright, Peter K. Aaslestad,
THIS MATTER came before the Court for hearing on November 16, 2018, on the

**ORDER DENYING DEFENDANTS EXCEPTIONS
AND CONSTITUTIONAL CHALLENGES**

ST. MARTIN PARISH, LOUISIANA

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

DOCKET NO. 087011-e

VERSUS

16TH JUDICIAL DISTRICT COURT

BAYOU BRIDGE PIPELINE, LLC

cases. Defendants' peremptory exception of Nonjoinder of a Party as to Ms. Aubouy is therefore **DENIED AS MOOT**.

6. Elizabeth A. Read and Janet Read Gordon are not indispensable parties to this proceeding. Defendants' peremptory exception of Nonjoinder of a Party as to Ms. Read and Ms. Gordon is therefore **DENIED**.

7. Defendants withdrew their exceptions for vagueness and ambiguity in the Petition for Expropriation.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant Theda Larson Wright's Dilatory and Peremptory Exceptions are **DENIED** in accordance with the foregoing and for the reasons orally stated by the Court at the hearing.


IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants Peter Aaslestad and Katherine Aaslestad's Dilatory and Peremptory Exceptions are **DENIED** in accordance with the foregoing and for the reasons orally stated by the Court at the hearing.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants' affirmative defenses challenging the constitutionality of Louisiana expropriation laws are **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this matter and the companion case of *Bayou Bridge Pipeline v. Akers, et al.*, Docket No. 87235E, also pending before this Court and set for trial on November 27, 2018, are hereby consolidated.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all court costs for the hearing on Defendants' exceptions and affirmative defenses shall be assessed to Defendants.

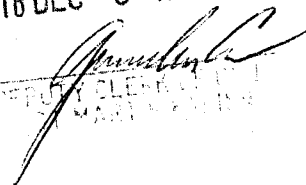
THUS DONE AND SIGNED, this 30 day of November, 2018, at St. Martinville, Louisiana.



HON. KEITH R.J. COMEAUX
DISTRICT COURT, 16TH JUDICIAL DISTRICT

See original Filed 11/27/18
and Signed by Judge Comeaux
on 11/27/18.

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FILE

BAYOU BRIDGE PIPELINE, LLC

16TH JUDICIAL DISTRICT COURT

VERSUS

DOCKET NO. 087011-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

FINAL JUDGMENT

THESE MATTERS came before the Court for hearing and trial on October, 23, 2018, November 16, 2018, and November 27, 2018. Having considered the pleadings, witness testimony, exhibits, and arguments of counsel, and being otherwise fully advised in the premises, the Court finds as follows:¹

1. The Court consolidated the cases of *Bayou Bridge Pipeline, LLC v. Carline*, Docket 087011 E, and *Bayou Bridge Pipeline, LLC v. Akers*, Docket 087235 E, for the purposes of trial and final judgment.

2. The Court entered a Final Judgment of Expropriation as to Certain Defendants on October 23, 2018 (the "October 23 Final Judgment"). The October 23 Final Judgment is incorporated in full in this Final Judgment but is amended to correct a scrivnor's error with respect to the property description, which description is hereby amended to read as follows:

That certain tract of land composed of 38 acre(s), more or less, located in the NE/4 of the SE/4 of Section 4, T11S, R9E, in St. Martin Parish, Louisiana, and being more particularly described in Book 784, Page 176, Instrument 186257 of the public records of said Parish.

¹ Defendants Theda Larson Wright, Peter Aaslestad, and Katherine Aaslestad objected to certain aspects of the form of this Final Judgment. Their objections, along with Bayou Bridge's correspondence on the issues, are attached hereto as Exhibit E.

3. The Court entered a Final Judgment of Expropriation as to Certain Defendants on November 27, 2018 (the “**November 27 Final Judgment**”). The November 27 Final Judgment is incorporated in full in this Final Judgment of Expropriation.

4. Pursuant to the orders entered by the Court on September 21, 2018, and October 23, 2018, Archie Joseph was appointed as Curator Ad Litem to represent the Defendants in the attached **Exhibit A** (the “**Absentee Defendants**”). Mr. Joseph fulfilled his duties as court-appointed attorney for the Absentee Defendants.

5. The Defendants in **Exhibit B** (referred to collectively herein as “**Default Defendants**”) did not answer or file other pleadings within the time prescribed by law or the Court. Bayou Bridge filed written motions for preliminary default with respect to the Default Defendants. The motions were granted and the preliminary defaults were entered in the minutes of the Court on November 19, 2018.

6. At the trial, Bayou Bridge confirmed these defaults by proof of its demand sufficient to establish a *prima facie* case through evidence admitted on the record. Bayou Bridge satisfied the requirements of Louisiana Code of Civil Procedure articles 1701 through 1703.

7. Three Defendants, Theda Larson Wright, Peter K. Aaslestad, and Katherine Aaslestad (a/k/a Katherine A. Lambertson), opposed the expropriation and brought reconventional demands for trespass, property damage, and violations of the right to property and due process under the United States and Louisiana constitutions, and presented evidence at the trial. These Defendants are referred to collectively herein as “**Defendants.**”

8. Following the November 16, 2018 exceptions hearing, the Court determined that Bayou Bridge is a common carrier pipeline as that term is defined by Louisiana Revised Statute 45:251. The Court denied Defendants’ constitutional affirmative defenses and peremptory and dilatory exceptions to the Petition in accordance with the reasons orally stated by the Court at the hearing. *See Order Denying Defendants’ Exceptions and Constitutional Challenges.* The Court’s findings at the November 16, 2018 hearing and its subsequent Order are incorporated in full in this Final Judgment.

9. Based on the evidence presented at trial and hearings, and as set forth in this Court’s Reasons for Judgment issued December 6, 2018, which are incorporated herein, the Court finds that a) Bayou Bridge’s expropriation is for a public and necessary purpose consistent with the requirements of the Louisiana Constitution; b) Bayou Bridge satisfied the statutory prerequisites

to file this expropriation; and c) Defendants stated a trespass claim against Bayou Bridge because Defendants, as co-owners of one-tenth of one percent interest, did not consent to the construction of the pipeline prior to Bayou Bridge's entry and commencement of construction of the pipeline on the property.

Based on the foregoing, and on the evidence presented at trial, it is hereby:

ORDERED, ADJUDGED, AND DECREED that a **FINAL DEFAULT JUDGMENT** in this action is rendered against the Default Defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to Louisiana Revised Statute 45:254, Bayou Bridge has a right to expropriate a servitude as depicted in **Exhibit C** across the property of Defendants, Absentee Defendants, and Default Defendants described as follows ("**Property**"):

That certain tract of land composed of 38 acre(s), more or less, located in the NE/4 of the SE/4 of Section 4, T11S, R9E, in St. Martin Parish, Louisiana, and being more particularly described in Book 784, Page 176, Instrument 186257 of the public records of said Parish.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Defendants and against Bayou Bridge for trespass, with damages assessed as set forth below in this Final Judgment;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that:

(a) There be judgment in favor of Bayou Bridge and against Defendants, Absentee Defendants, and Default Defendants granting to Bayou Bridge, upon the payment by Bayou Bridge into the registry of the Court the sums set forth in this Final Judgment as just compensation, the following right of way, servitude, and other rights:

Permanent Right of Way

A fifty foot (50') wide permanent and perpetual right of way and servitude (the "Permanent Right of Way") for the purpose of laying, constructing, maintaining, operating, altering, replacing, repairing, watering up, dewatering, changing the size of (with the same or smaller size pipeline), relocating within the Permanent Right of Way, abandoning and/or removing one (1) underground pipeline having a nominal diameter of twenty-four inches (24") or less, together with such above- or below-grade valves, fittings, meters, tie-overs, cathodic/corrosion protection, electrical interference mitigation, data acquisition and communications lines and devices, electric lines and devices, pipeline markers required by law, and other appurtenant facilities for the transmission of crude oil and all by-products and constituents thereof, under, upon, across, and through the

Property, which is more particularly described and shown in **Exhibit C**. The Permanent Right of Way described in **Exhibit C** will be used for purposes of establishing, laying, constructing, reconstructing, installing, realigning, modifying, replacing, improving, adding, altering, substituting, operating, maintaining, accessing, inspecting, patrolling, protecting, repairing, changing the size of, relocating and changing the route of, abandoning in place and removing at will, in whole or in part, the Pipeline, and any and all necessary or useful appurtenances thereto, in a manner consistent with applicable laws and regulations.

Bayou Bridge shall have the right to select the exact location of the Pipeline within the Permanent Right of Way. Bayou Bridge shall have the right to construct, maintain, and change slopes of cuts and fills to ensure proper lateral and subjacent support and drainage for the Pipeline. Bayou Bridge shall have the right to have a right of entry and access in, to, through, on, over, under, and across the Permanent Right of Way for all purposes necessary and at all times convenient and necessary to exercise the rights granted to it. To the extent practicable, such ingress and egress should be exercised over the Permanent Right of Way or such roads or ways as may exist at the time of each particular exercise of Bayou Bridge's rights hereunder. The Permanent Right of Way shall extend to and include contiguous public roads and ways to the full extent of Defendants' interest therein for the purpose of ingress and egress to the Permanent Right of Way.

Temporary Right of Way

Bayou Bridge is also granted a temporary right of way and servitude (the "Temporary Right of Way") needed during construction and shown on **Exhibit C**: temporary work space (the "Temporary Work Space") adjacent to and generally parallel with the Permanent Right of Way for construction, operation and maintenance of the Pipeline. Bayou Bridge is granted the Temporary Work Space for Bayou Bridge's exclusive use from the commencement of construction until six (6) months after the date the Pipeline is placed in service. However, if Bayou Bridge has completed its use of the Temporary Work Space prior to the expiration of the six (6) month period and so states in writing, then the Temporary Work Space shall immediately terminate.

Other Rights

Bayou Bridge shall have the right, from time to time, to clear the Permanent Right of Way, during the term thereof, of all trees, undergrowth, and other natural or manmade obstructions that, in Bayou Bridge's sole and absolute discretion, may injure or endanger the Pipeline, appliances, appurtenances, fixtures, and equipment or interfere with Bayou Bridge's access to, monitoring of,

or construction, maintenance, operation, repair, relocation, and/or replacement of same. In addition, Defendants, Absentee Defendants, and Default Defendants are prohibited from altering or changing the grade of, filling, and/or flooding the Permanent Right of Way without consulting with and obtaining approval of Bayou Bridge if such alterations or changes of grade may interfere with pipeline operations or integrity. Bayou Bridge shall have full right and authority to lease, sell, assign, transfer, and/or convey to others the Permanent Right of Way, servitude, interests, rights, and privileges sought here, in whole or in part, or to encumber the same.

(b) Defendants, Absentee Defendants, and Default Defendants reserve the right to cultivate or otherwise make use of the Property for other purposes in a manner that will not interfere with the enjoyment or use of the servitude rights and the rights of way granted to Bayou Bridge.

(c) The above-described rights of way and servitudes are granted to Bayou Bridge free and clear of all liens, privileges, and encumbrances upon the payment of just compensation.

(d) The Court determines that just compensation owed to Absentee Defendants and Default Defendants, collectively, for the rights herein granted to Bayou Bridge is the total sum of \$7,875.00. The Court's award exceeds the total valuation of the Permanent and Temporary Right of Way as appraised by a Louisiana licensed appraiser.

(e) The Court determines that the just compensation owed to Defendant Theda Larson Wright is **\$75.00** along with additional damages in the amount of **\$75.00**, based on her interest and lack of connectivity to the property. The Court's expropriation award exceeds Ms. Wright's proportionate share of the valuation of the Permanent and Temporary Right of Way as appraised by a Louisiana licensed appraiser.

(f) The Court determines that the just compensation owed to Defendant Peter K. Aaslestad is **\$75.00** along with additional damages in the amount of **\$75.00**, based on his interest and lack of connectivity to the property. The Court's expropriation award exceeds Mr. Aaslestad's proportionate share of the valuation of the Permanent and Temporary Right of Way as appraised by a Louisiana licensed appraiser.

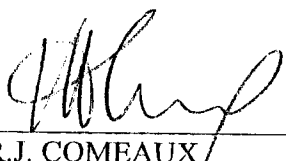
(g) The Court determines that the just compensation owed to Defendant Katherine Aaslestad is **\$75.00** along with additional damages in the amount of **\$75.00**, based on her interest and lack of connectivity to the property. The Court's expropriation award exceeds Ms. Aaslestad's

proportionate share of the valuation of the Permanent and Temporary Right of Way as appraised by a Louisiana licensed appraiser.

(h) The Court hereby authorizes Bayou Bridge to deposit the amount of just compensation into the registry of the Court. The Court further authorizes the release of these funds in accordance with its Order to Disburse Funds from the Court Registry attached as **Exhibit D** to this Final Judgment of Expropriation at Bayou Bridge's cost.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that each party is to bear its own costs with regard to the matters heard from November 27-29, 2018.

THUS DONE AND SIGNED, this 18 day of December, 2018, at St. Martinville, Louisiana.



HON. KEITH R.J. COMEAUX
DISTRICT COURT, 16TH JUDICIAL DISTRICT