

VERSUS

DOCKET NO 87011-E

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

ST. MARTIN PARISH, LOUISIANA

**BAYOU BRIDGE PIPELINE, LLC’S BRIEF IN SUPPORT OF EXPROPRIATION
AND JUST COMPENSATION AND IN OPPOSITION TO TRESPASS CLAIM**

NOW INTO COURT, through undersigned counsel, comes Plaintiff Bayou Bridge Pipeline, LLC (“Bayou Bridge”), in accordance with the Agreed Scheduling Order, and submits this brief in support of its expropriation claim and just compensation for the taking, as well as in opposition of Defendants/Plaintiffs-in-Reconvention’s trespass claim—all to be heard and considered by the Court on November 27, 2018. As many issues overlap, Bayou Bridge incorporates by reference its *Brief as to Exceptions and Affirmative Defenses to be Considered by the Court on November 16, 2018*.

LAW AND ARGUMENT

1. BAYOU BRIDGE SERVES A PUBLIC AND NECESSARY PURPOSE IN ACCORDANCE WITH THE LOUISIANA CONSTITUTION.

As discussed in Bayou Bridge’s brief for the initial hearing, Louisiana law grants expropriation authority to common carriers, which are defined to include entities that are “engaged in the transportation of petroleum as public utilities and common carriers for hire” See La. R.S. § 19:2(8) (providing expropriation rights to “[a]ll persons included in the definition of common carrier pipelines as set forth in R.S. 45:251”); La. R.S. § 45:251(1) (defining common carrier). However, the inquiry into authority to expropriate does not end there. Article I, Section 4 of Louisiana’s Constitution provides that “[p]roperty 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.” La. Const. art. I, § 4 (emphasis supplied). Bayou Bridge directs the Court to the relevant interpretations of this constitutional provision, as well as the relevant testimony of its witnesses, to aid the Court in its determination of the existence of a

public and necessary purpose. *See also*, Brief filed by Louisiana Attorney General (filed Nov. 9, 2018).

a. Public Purpose

Many Louisiana courts have examined public purpose in the context of expropriation, but more recently, the Louisiana Supreme Court examined public purpose. In reviewing jurisprudence on the requirement, the Court concluded that a narrow reading of the public purpose requirement is inappropriate. *ExxonMobil Pipeline Co. v. Union Pacific R. Co.*, 2009-C-1629 (La. 3/16/10), 35 So. 3d 192, 197-99. “Rather, any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose.” *Id.* at 199 (quoting *Town of Vidalia v. Unopened Succession of Ruffin*, 95-CA-580 (La. App. 3 Cir. 10/4/95), 663 So.2d 315, 319). Louisiana courts have long recognized that oil and gas pipelines serve a public purpose:

“[T]he road and servitude do serve a public purpose in that they permit the pipeline company to maintain and inspect its pipeline, which redounds in benefits to the public at large.”¹

“We find despite any competitive advantage to [the pipeline owner], use of the pipeline to efficiently and economically transport oil to various refineries in the State benefits the public by increasing the availability of the oil and reducing costs to the consumer.”²

“Supplying natural gas to either private individuals through public utilities or directly to private industries is a sufficient public purpose for expropriation, regardless of how far removed the consumers are from the area of expropriation.”³

“The tremendous public benefits derived from the petroleum industry in the State of Louisiana are too well-known to warrant discussion. Perhaps no other resource is more important to the State's economy, and the public carrier pipelines which serve that industry are public utilities without which this all-important industry could not have been developed to its present significance. The public advantage resulting from an enlargement of the resources of the State, increasing available industrial energy and promoting the productive powers of a considerable number of citizens, was recognized by our Supreme Court as a contribution to the welfare and prosperity of the community, and was held to be sufficient proof of public purpose to justify the taking of private property by expropriation.”⁴

These decisions confirm the established principle that oil pipelines like Bayou Bridge serve the public purpose.

The Court will recall the testimony of Kevin Taliaferro, who explained that the pipeline will have an initial shipping capacity of 280,000 barrels per day with an overall design capacity

¹ *ExxonMobil Pipeline Co.* at 199.

² *Crooks v. Placid Ref. Co.*, 05-119 (La. App. 3 Cir 06/01/05), 903 So. 2d 1154, 1166.

³ *La. Res. Co. v. Greene*, 406 So. 2d 1360, 1364 (La. Ct. App. 1981).

⁴ *Tex. Pipe Line Co. v. Stein*, 190 So. 2d 244, 251 (La. Ct. App. 1966), *rev'd on other grounds*, (citing *Calcasieu & So. Ry. v. Bel*, 69 So. 2d 40 (1953)).

of 480,000 barrels per day of crude oil. That capacity will address the dramatic increases in local production of crude oil that has greatly expanded the need to transport domestically-produced crude oil to important oil refineries like those in and around Lake Charles and St. James, Louisiana. It will connect these two important petroleum-refining hubs in the State of Louisiana to the sizeable petroleum hub in Southeast Texas, thereby increasing the capacity to deliver varying mixes of heavy and light, domestically-produced crude oil to the Louisiana refining facilities. Thus Mr. Taliaferro's testimony supported this Court's finding that Bayou Bridge satisfies the constitutional test for a public purpose in the State of Louisiana.

b. Necessary Purpose

When determining "necessary purpose" in the context of expropriation, "the word 'necessary' refers to the necessity of the *purpose* for the expropriation, not the necessity for a specific location." *Calcasieu-Cameron Hospital Service District v. Fontenot*, 628 So.2d 75, 79 (La. App. 3d Cir. 1993), writ denied, 94-0168 (La. 3/18/94), 634 So.2d 854; *see also Exxon Mobil*, 35 So.3d at 200 (same). That is, the expropriation "acreage taken must be reasonably necessary for the accomplishment of the proposed project." *Acadian Gas Pipeline Sys. V. Bourgeois*, 04-578 (La. App. 5 Cir. 11/30/04); 890 So. 2d 634, 641. As the Louisiana Supreme Court stated in *ExxonMobil*, "[t]he criteria to be considered by the expropriator in determining the location and extent of the property to be expropriated includes factors such as costs, environmental impact, long range area planning, and safety considerations." *Exxon Mobil*, 35 So.3d at 200 (citing *Red River Waterway Comm'n*, 566 So.2d 79, 83 (La. 1990)).

In a challenge to the necessity of a taking, "the landowner must prove that the legislatively-authorized expropriator exercised 'its large discretion' arbitrarily, capriciously, or in bad faith." *Id.* "The standard is whether the expropriator, in selecting the location and extent of the property to be expropriated, acted in bad faith or so capriciously or arbitrarily that its action was without an adequate determining principle or was unreasoned. Thus, the landowner attacking the taking must show that the expropriator exercised its large discretion without consideration or adjustment with reference to principles, circumstances or significance." *Red River Waterway Comm'n*, 566 So. 2d at 83 (citations omitted). Finally, "[o]nce public necessity is established, the extent and the location of property to be expropriated are within the sound discretion of the expropriation authority and determination of same will not be disturbed by the

courts if made in good faith.” *Coleman v. Chevron Pipe Line Co.*, 94-1773 (La. App. 4 Cir 04/24/96), 673 So. 2d 291, 296. (citation omitted).

The evidence presented to the Court demonstrates that Bayou Bridge considered all necessary criteria in the selection of the route for its pipeline. In his testimony, Mr. Taliaferro explained that Bayou Bridge determined the size of the pipeline based on the number of shippers that committed during the open season. After fifteen months of reviewing and assessing the route possibilities, Bayou Bridge arrived at the current configuration through eleven Parishes in Louisiana. Bayou Bridge carefully considered the location of the pipeline based on its technical experience, regulatory requirements, and sound engineering principles 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 in commerce, and other regulatory requirements.

To the extent possible, Bayou Bridge routed the pipeline to avoid new “greenfield” construction by paralleling existing infrastructure. Similarly, Bayou Bridge attempted to locate the pipe near property lines to minimize the impact to landowners, while also attempting to avoid heavily populated areas and limit the impact of the project to the Louisiana Coastal Zone. Moreover, Bayou Bridge has only sought from landowners permanent easements sufficiently wide enough to construct and operate its pipeline. Likewise here, Bayou Bridge only seeks a right of way reasonably necessary for the purpose of the expropriation. Thus, Bayou Bridge’s pipeline route is reasonable and made in good faith and therefore satisfies “necessary purpose” requirements under Louisiana law.

c. Reconsideration of environmental impacts is inappropriate

Based on discovery and Defendants’ representations to this Court about their witnesses, it is apparent that Defendants intend to have this Court step into the shoes of various federal and state administrative agencies and re-adjudicate matters already determined by those agencies, *i.e.*, environmental impacts in the Basin. Not only have those matters already been extensively reviewed and adjudicated by the proper administrative agencies with the appropriate expertise to decide such matters but, in addition, federal and state courts have further evaluated the very same challenges Defendants’ lawyers want to re-argue to this Court and have decided against Defendants’ lawyers. As set forth herein, a court is required to assess the constitutionality of the exercise of eminent domain by a private entity. That means a public purpose – which *decades* of

Louisiana law have determined public utilities like pipelines satisfy – and necessity. It is only under the “necessity” prong that any evidence of environmental consideration is properly before the Court: “The criteria to be considered by the expropriator in determining the location and extent of the property to be expropriated includes factors such as costs, environmental impact, long range area planning, and safety considerations.” *Exxon Mobil*, 35 So.3d at 200. And, even then, the Court is merely applying an *arbitrary, capricious, bad faith* standard to the large discretion given to the expropriator in selection of location and extent of the expropriation—*i.e.*, did the “legislatively-authorized expropriator exercise ‘its large discretion’ arbitrarily, capriciously, or in bad faith.” *Id.* This is exactly what the Louisiana Supreme Court re-affirmed in *ExxonMobil* just eight years ago.

In his brief, the Louisiana Attorney General likewise regarded this as the appropriate inquiry. In recognition of this guidance, Bayou Bridge considered the appropriate criteria and chose its route in good faith.

Given this clear authority, the Court would run afoul of the *ExxonMobil* Court’s directive with respect to both the evidence it is to consider and the standard it is required to apply if it were to reinvent the wheel and reconsider—whole cloth, as Defendants’ lawyers will request at the hearing—environmental assessments made over the course of two years and after scrutiny by federal and state agencies, much of which Mr. Taliaferro discussed in the context of Defendants’ exceptions related to the Corps and Coastal Use permits on November 16, 2018. Defendants are not permitted to utilize this proceeding as a second opportunity to challenge Bayou Bridge’s permits. *See, e.g., So. Nat. Gas Co. v. Poland*, 406 So. 2d 657, 661-62 (La. App. 2 Cir. 1981) (distinguishing between a challenge to a Louisiana Commissioner of Conservation order and an expropriation matter). Therefore, in accordance with the standards set forth herein, the Court should not entertain Defendants’ demand that it reassess the multitude of findings of various expert administrative agencies.

2. BAYOU BRIDGE WILL PAY JUST COMPENSATION FOR THE EASEMENT.

a. Standards under Louisiana Law

Under the Fifth Amendment of the U.S. Constitution, private property may not be taken for a public purpose without “just compensation.” The Louisiana Constitution similarly provides that a property owner shall be paid “just compensation” which shall compensate the owner “to the full extent of the loss.” La. Const. Ann. art. I, § 4; *see also Exxon Pipeline Co. v. Hill*, 2000-

2535 (La. 5/15/01), 788 So.2d 1154, 1159–60. Louisiana Revised Statute 19:9 provides the following guidance:

In determining the value of the property to be expropriated, and any damages caused to the defendant by the expropriation, the basis of compensation shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any general or specific benefits derived by the owner from the contemplated improvement or work.

La. R.S. 19:9(A). An expropriation proceeding “determines” the fair market value of the land taken “based on the value the land had at the time of the expropriation” *West Jefferson Levee Dist. v. Coast Quality*, 93-1718 (La. 5/23/94), 640 So.2d 1258, 1280 (emphasis supplied). To determine fair market value, courts consider the “highest and best use” of the property, which is the most profitable use to which the land can be put by reason of its location, topography, and adaptability, but excluding uses that are speculative, remote or contrary to law. *Hill*, 788 So.2d at 1160.

“It is well established that the current use of the property is presumed to be the highest and best use.” *Id.* The landowner bears the “burden of overcoming that presumption by proving the existence of a different highest and best use based on a potential, future use.” *Id.* “[P]ossible uses which are so speculative and which would require the concurrence of so many extrinsic conditions and happenings as to have no perceptible effect upon the present market value should be excluded from consideration. . . . The owner’s plans or hopes for the future should be held completely irrelevant, being more often illusory than real.” *Coast Quality*, 640 So.2d at 1274 (citing *Parish of Iberia v. Cook*, No. 44837 (La. 12/14/59), 116 So. 2d 491, 496-97; *see also State, Through Dep’t. of Hwys v. Monsur*, No. 3725 (La. App. 3 Cir. 2/7/72), 258 So.2d 162, 166.

b. Bayou Bridge’s Expert’s Opinion is Reasonable and Reliable

At the hearing on November 27, 2018, Bayou Bridge will present the testimony of its expert appraiser with JLL Valuation and Advisory Services, LLC, who will testify that the subject tract is approximately 38 acres and appraised at \$700 per acre. The property’s current use is as recreational land and has no access to a public roadway. Bayou Bridge’s expert will testify that this use is considered the highest and best use of the property. He will testify that the appraised value of the easement rights sought by Bayou Bridge is \$871. But, Bayou Bridge has already reached conventional agreements with more than 400 individuals claiming some interest in this Property. Thus, given the over 400 easements already acquired by Bayou Bridge and

Defendants' possible combined remaining interest in the Property, the amount of just compensation due to the Defendants for the servitude is minimal.

Defendants have not tendered an expert to contradict the testimony of Bayou Bridge's expert. In sum, Bayou Bridge's expert's opinion is reasonable, reliable, and based on competent facts and data, and therefore should be accepted by the Court in reaching its determination of just compensation due to Defendants for the easement rights sought by Bayou Bridge in this proceeding.

3. DEFENDANTS/PLAINTIFFS-IN-RECONVENTION'S TRESPASS CLAIM EITHER FAILS OR IS OF NO MOMENT.

As Plaintiffs-in-Reconvention, Defendants have asserted a trespass claim against Bayou Bridge; however, they cannot satisfy their burden to establish such a claim. In a recent decision, one Louisiana appellate court defined a civil trespass and the "pivotal" issue necessary to prove it:

A civil trespass is defined as the unlawful physical invasion of the property or possession of another. In an action for trespass, title to the land is the pivotal issue. Thus, a plaintiff who brings a trespass action bears the burden of proving his ownership.

Chauvin v. Shell Oil Co., 16-609 (La. App. 5 Cir 10/25/17), 231 So. 3d 903, 907 (citations omitted). Before the Court needs to evaluate whether or not Bayou Bridge's actions constituted a trespass, Defendants/Plaintiffs-in-Reconvention must first establish ownership of the property involved. Despite hundreds of hours of work, Bayou Bridge cannot conclusively determine ownership of this uninhabited 38-acre tract of swampland. In acquiring easements on this property, Bayou Bridge has been over-inclusive, even obtaining easements from people that likely have no interest in the property. In addition, Bayou Bridge has treated documents in the St. Martin Parish public records as legitimate and correct transfers with accurate ownership allocations, even when evidence clearly indicates that there are errors. This simply reflects a practice of casting a wide net to ensure that all ownership is accounted for.

However, Defendants/Plaintiffs-in-Reconvention cannot simply rely on Bayou Bridge's practice as evidence of ownership. In arriving at its determination of Defendants' ownership amounting to less than one-tenth of one percent, Bayou Bridge relied on a 1978 Judgment allocating interests in this property. However, that judgment has multiple errors that have resulted in inaccurate ownership, missing heirs, and at least one unaccounted-for tax sale that predated the judgment. Defendants/Plaintiffs-in-Reconvention have not even bothered in tracing

ownership back to that point, instead providing only a few documents that post-date that judgment. Moreover, the transfer documents provided by Defendants/Plaintiffs-in-Reconvention are not themselves accurate. Defendants/Plaintiffs-in-Reconvention must at least satisfy the burden of proving ownership, which they have heretofore not done or even attempted to do. With a title as convoluted as exists with this property, it is not sufficient for Defendants/Plaintiffs-in-Reconvention to present those deeds/judgments that purport to transfer an interest directly to them. Thus, Bayou Bridge asserts that Defendants/Plaintiffs-in-Reconvention must be held to establish their ownership, which is their burden.

Assuming that Defendants/Plaintiffs-in-Reconvention can conclusively demonstrate ownership, Bayou Bridge asserts that a claim for inverse condemnation is the appropriate claim. "Under Louisiana law, the action for inverse condemnation 'provides a procedural remedy to a property owner seeking compensation for land already taken or damaged.'" *Tucker*, 2010 U.S. Dist. LEXIS at *6-8 (citing *Louisiana, through Dept. of Transp. & Dev. v. Chambers*, No. 91-C-1202 (La. 1992), 595 So.2d 598, 602). Although cast as a trespass, Defendants/Plaintiffs-in-Reconvention essentially allege a claim for inverse condemnation in which they seek relief pursuant to Article I, Section 4 of the Louisiana Constitution. It is this provision of the Louisiana Constitution that gives rise to the inverse condemnation claim. *See State ex rel. Dept't of Highways v. Ellender*, 391 So.2d 1234, 1237 (La. Ct. App. 1980) (inverse condemnation based on La. Const. of 1921, art. I, §2 (now La. Const. art. I, §4)).

Defendants/Plaintiffs-in-Reconvention balk at Bayou Bridge's assertions that their claim amounts to an inverse condemnation action. However, the end result is effectively the same. In an inverse condemnation claim, Bayou Bridge would be required to pay just compensation, as it would in an expropriation claim. If a trespass action could be proven, Defendants/Plaintiffs-in-Reconvention assert that they could be awarded damages in tort. *Williams v. City of Baton Rouge*, 98-1981 (La. 04/13/99), 731 So. 2d 240, 248 (holding a bad faith trespasser liable for damages under Louisiana Civil Code Article 2315). As the Court is aware, Louisiana Civil Code Article 2315 contains various damages, including those related to mental distress or anguish. Defendants/Plaintiffs-in-Reconvention have not pled any such injury, nor has there been any evidence of such injuries. Moreover, with such a remote and inconsequential connection to the property, Defendants/Plaintiffs-in-Reconvention would not be able to support such a claim. *See*,

e.g., Williams, 731 So. 2d at 251-52 (affirming lower court's determination that heirs who had no connection to land were not entitled to mental anguish damages).

Consequently, Defendants/Plaintiffs-in-Reconvention's trespass action should be dismissed, and damages should be determined via the expropriation action.

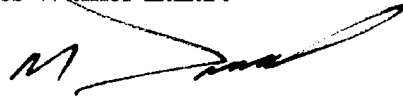
CONCLUSION

For the foregoing reasons and in light of the law and evidence presented by Bayou Bridge in hearings and with its briefing, Bayou Bridge requests that the Court enter an order, finding that (1) Bayou Bridge is a common carrier for hire and therefore possesses expropriating authority pursuant to Louisiana Revised Statutes Section 19:2 and 45:254; (2) Bayou Bridge is exercising its expropriating authority for a public and necessary purpose as required by the Louisiana Constitution; (3) Bayou Bridge has negotiated with landowners in good faith and otherwise complied with the requirements of Louisiana law; (4) setting the amount of just compensation due to Defendants in accordance with the testimony of Bayou Bridge's expert; and (5) granting Bayou Bridge the easement and servitude prayed for in the Petition for Expropriation on payment of just compensation determined by the Court.

Date: November 20, 2018

RESPECTFULLY SUBMITTED,

Jones Walker L.L.P.



MICHAEL B. DONALD (Bar No. 16891)
811 Main Street, Suite 2900
Houston, Texas 77002
Telephone No.: (713) 437-1800
Facsimile No.: (713) 437-1810
Email: mdonald@joneswalker.com

IAN A. MACDONALD (Bar No. 17664)
600 Jefferson Street, Suite 1600
Lafayette, Louisiana 70501
Telephone No.: (337) 593-7600
Facsimile No.: (337) 593-7748
Email: imacdonald@joneswalker.com

Attorneys for Bayou Bridge Pipeline, LLC

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2018, a true and correct copy of the foregoing has been forwarded to Defendants in this matter via first class mail, as follows:

Archie P. Joseph
707 Berard St.
P.O. Box 1283
Breaux Bridge, LA 70517

David M. Ellison, Jr
Ellison & Ellison, Jr.
336 Louisiana Ave.
Baton Rouge, LA 70802

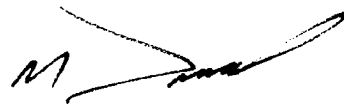
Pamela C. Spees
pspees@ccrjustice.org
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Misha L. Mitchell
basinkeeperlegal@gmail.com
Atchafalaya Basinkeeper
47 Mt. Laurel Ave.
Birmingham, AL 35242

William P. Quigley
quigley77@gmail.com
Loyola University College of Law
7214 St. Charles Ave.
New Orleans, LA 70118

Jeff Landry
Attorney General
Harry J. Vorhoff
Ryan M. Seidemann
P.O. Box 94005
Baton Rouge, LA 70804-9005

NAME ADDRESS	NAME ADDRESS	NAME ADDRESS
Guy Bruno, Jr. 1400 GlenHollow Lane Flower Mound, Tx 75028	Amelia Carlin Benny 391 Alston Cemetery Road Dequincy, LA 70633-6502	Leona Lasseigne Thibodeaux 1064 Saint Rita Hwy St. Martinville, LA 70582
James Theriot 7852 Hwy 10 Ethel, LA 70730	Fay Marie Broussard Rodriguez 4249 Wilson St. Groves, TX 77619	Virginia Laseigne Higginbotham 1048 Adley Loop Breaux Bridge, LA 70517-7611
James Thibeau 38240 Duplessis Rd Prairieville, LA 70769		



MICHAEL B. DONALD