

BAYOU BRIDGE PIPELINE, LLC

16TH JUDICIAL DISTRICT

VERSUS

DOCKET NO. 87011-E

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

ST. MARTIN PARISH

STATE OF LOUISIANA

FILED: _____

DEPUTY CLERK OF COURT

PRE-TRIAL MEMORANDUM
OF DEFENDANTS / PLAINTIFFS-IN-RECONVENTION
THEDA LARSON WRIGHT, PETER AASLESTAD, AND KATHERINE AASLESTAD
IN ADVANCE OF NOVEMBER 27, 2018 TRIAL
OF PUBLIC PURPOSE AND NECESSITY, COMPENSATION
AND RECONVENTIONAL DEMANDS

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NOW INTO COURT, through undersigned counsel, come Defendants and Plaintiffs-in-Reconvention Theda Larson Wright, Peter Aaslestad, and Katherine Aaslestad,¹ who provide this Pre-Trial Memorandum for the Court in advance of the trial set for **November 27, 2018**.

I. INTRODUCTION, PROCEDURAL POSTURE, AND BURDENS OF PROOF

This is an eminent domain case brought by Bayou Bridge Pipeline, LLC (“BBP”) against over 500 co-owners of the property the company seeks to expropriate in this matter.² Defendant landowners Theda Larson Wright, Peter Aaslestad, and Katherine Aaslestad, answered and excepted and filed reconventional demands for trespass, property damage, and unconstitutional takings and due process violations under the United States and Louisiana constitutions.

Trial is set for November 27, 2018, for this Court to determine:

- a) whether the expropriation is for a public purpose and necessity, and,
- b) if so, the matter of just compensation,

all in accordance with La. Const. Art. I, sec. 4(B)(4).

Additionally, the Court will conduct a trial of the landowners’ reconventional demands for:

- c) trespass;
- d) property damage;
- e) unconstitutional taking in violation of the Fifth Amendment to the United States Constitution;
- f) violation of due process under the Fifth Amendment to the United States Constitution;
- g) unconstitutional taking in violation of Art. I, sec. 4 of the Louisiana Constitution; and
- i) violation of due process under Art. I, sec. 2 of the Louisiana Constitution.

¹ To the extent the brief addresses claims made by Bayou Bridge Pipeline, LLC in its Petition for Expropriation, these arguments are additionally made on behalf of landowner Defendant Lauren Aaslestad Massey.

² In this matter bearing Docket No. 87011, there are 393 defendants in total including located, absentee and deceased defendants. On Friday, November 16, 2018, at the hearing on Defendant Landowners’ exceptions, the Court ordered that a separate expropriation case brought against 112 additional landowners of the same property at issue in 87011 be consolidated for trial. *See also, Bayou Bridge Pipeline, LLC., v. 38 Acres More or Less, Located in St. Martin Parish, Akers, et al*, Petition for Expropriation, Case No. 87235-E, 16th Judicial District Court, filed September 20, 2018, and consolidated with Docket No. 87011 on November 16, 2018.

At the trial, BBP bears the burden of proving that the expropriation is for a public and necessary purpose by a preponderance of the evidence, and if it succeeds on that, the amount of just compensation. *See Lafayette City-Par. Consol. Gov't v. Pers.*, 2012-0307 (La. 10/16/12, 4), 100 So.3d 293, 296. Whether the expropriator's purpose is public and necessary is a judicial determination that is reviewed for manifest error. *Id.*

Landowners, as Plaintiffs-in-Reconvention, bear the burden of proving trespass, property damage, constitutional violations, and damages by a preponderance of the evidence. *Landrum v. U.S. Fidelity & Guaranty Co.*, 175 So.2d 845, 847 (La. App. 3 Cir. 1965). Because in expropriation cases, the amount of just compensation should include any damages arising from trespass and/or property damage, the question of just compensation should be tried after the evidence on the claims for trespass and property damages. *See, e.g., Williams v. City of Baton Rouge*, 98-1981 (La. 4/13/99, 7), 731 So.2d 240, 246. *See also, Louisiana Res. Co. v. Greene*, 406 So.2d 1360, 1373 (La. Ct. App.1981), *writ denied*, 412 So.2d 84 (La.1982). It is therefore addressed at the end of this memorandum.

Defendants and Plaintiffs-in-Reconvention intend to call witnesses and put on evidence to demonstrate the expropriation is not in the public interest, or for a public purpose or necessity. Landowners will also demonstrate that Plaintiff committed a trespass and property damage on their property, and in the process also violated their rights to property and due process under the United States and Louisiana constitutions.

II. LAW AND ANALYSIS

*“The power of expropriation is fraught with the possibility of abuse and injustice and, accordingly must be strictly construed.”*³

A. Public Purpose and Necessity

Art. I, sec. 4(B)(4) of the Louisiana Constitution of 1974 requires 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.” The provision further provides that “whether the purpose is public and necessary shall be a judicial question.”

³ *Kimble v. Bd. of Comm'rs for Grand Prairie Levee Dist.*, 94-1134 (La.App. 4 Cir. 1/19/95, 2-3), 649 So.2d 1112, 1113, *writ denied*, 95-0405 (La. 4/7/95), 652 So.2d 1347, and *writ denied*, 95-0416 (La. 4/7/95), 652 So.2d 1347.

La. Const. art. I, sec. 4(B)(4). Art. I, sec. 4(B)(3) provides that “[n]either 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 a for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.” Art. I, sec. 4(B)(2) further provides that “public purpose” is to be limited to:

- (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.
 - (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.

The word “necessary” in art. I, sec. 4(B)(4) refers to the “necessity of the *purpose* for the expropriation, not the necessity for a specific location.” *Calcasieu-Cameron Hospital Service District v. Fontenot*, 629 So.2d 74, 79 (La. App. 3 Cir. 1993), *writ denied*, 94-0168 (La. 1994), 634 So.2d 854.

The question of public purpose and necessity must take into account the worsening environmental and land loss crises in Louisiana and the role pipelines have played in hastening the crises. Since the first long-distance oil pipeline in Louisiana was built in 1909 to transport crude oil from Caddo Parish to Baton Rouge refineries,⁴ there are now over 70,000 miles of gas and oil pipelines in Louisiana, according to the Pipeline and Hazardous Materials Safety

⁴ See Deborah Dardis, *Louisiana’s Oil: Understanding the Environmental and Economic Impact*, Southeastern Louisiana University, 2010, <https://www2.southeastern.edu/orgs/oilspill/history.html>.

Administration (PHMSA).⁵ It is now undeniable that the spread of pipeline infrastructure through the state over the past century has taken a heavy toll and has contributed to the problem of coastal land loss, flooding concerns, and in some cases irreversible harm to the Atchafalaya Basin. That is not the Landowners in this action, or even tree-hugging environmentalists stating these facts. The state of Louisiana, through state agencies and even the Louisiana Legislature have acknowledged these facts.

The pipeline is not necessary when weighed against the crises in Louisiana. The effect of pipelines in the Atchafalaya Basin, where the property subject to this litigation is located, has long been documented. According to the Atchafalaya Basin Floodway System State Master Plan published in 1998, pipelines “hastened” an already “expedited change in the environmental character of the Basin” because they “altered the flow of water to areas in the Basin, thus interfering with the watering and dewatering cycle.”⁶ According to Louisiana’s 2017 *Comprehensive Master Plan for a Sustainable Coast*, a plan prepared by the Coastal Protection and Restoration Authority and adopted by the Louisiana legislature, “[d]redging canals for energy exploration and *pipelines* provided our nation with critical energy supplies, but these activities also took a toll on the landscape, altering wetland hydrology and leading to land loss.”⁷ According to the 2017 Master Plan, 2,250 square miles of coastline “could be lost if we take no additional action over the next 50 years.” *Id.*

Moreover, the Louisiana Legislature has found that “Louisiana is subject to greater exposure to a major oil spill disaster than any other state” because of the “large volumes of stored oil, numerous production platforms and miles of *pipelines*, large numbers of inland barges, and heavy tanker traffic...” *See* La. R.S. 30:2452(A) (emphasis added). Additionally, the

⁵ Approximate amount of mileage taken from data gathered from website of Pipeline and Hazardous Materials Safety Administration, <https://www.phmsa.dot.gov/>. The Louisiana Department of Natural Resources estimates mileage of pipelines to be close to 50,000 miles. *See* <http://www.dnr.louisiana.gov/index.cfm/page/150>.

⁶ Report to Governor Mike Foster and the Louisiana Legislature: Atchafalaya Basin Floodway System, State of Louisiana, State Master Plan, 1998, at 6-1, *available at* http://www.dnr.louisiana.gov/assets/docs/Atchafalaya_Basin/StateMasterPlan.pdf. *See also*, Louisiana Department of Natural Resources, FY 2018 Annual Plan, Atchafalaya Basin Program, Supplement, *available at* http://www.dnr.louisiana.gov/assets/OCM/ABP/2018_Plan/Supplemental_Narrative.pdf.

⁷ Coastal Protection and Restoration Authority, *Louisiana’s Comprehensive Master Plan for a Sustainable Coast*, 2017, at ES-6, *available at* http://coastal.la.gov/wp-content/uploads/2017/04/2017-Coastal-Master-Plan-Web-Single-Page_CFinal-with-Effective-Date-06092017.pdf. *See also*,

Legislature has noted the particular vulnerability of Louisiana's "nearshore and wetland environments" which allow "deep penetration of oil into the state's estuaries" and "vast expanses of Louisiana's soft unconsolidated marshes" would "soak up large amounts of oil" in the event of a spill. La. R.S. 30:2452(B). In the wake of these growing environmental crises, and the threats posed to the public health and safety of our communities, it is both appropriate and necessary for courts to consider all aspects of the public interest in determining the public purpose and necessity of a private pipeline project. Should the Atchafalaya Basin continue to fill with sediments, lose its storm-buffering cypress swamps, and our coastal and inland wetlands continue to erode, subside, and degrade, the threats posed to our public health and safety, our communities and neighbor, will continue to grow in the face of increasingly severe weather events and flooding.

The pipeline also does not serve a public purpose. In 2006, in the wake of the United States Supreme Court's controversial ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005), the people of Louisiana voted to amend the Constitution to explicitly prohibit "economic development, enhancement of tax revenue, and incidental benefit to the public" from considerations as to whether takings or damage to private property are for a public purpose. La. Const. Art. I, Sec. 4(B)(3); *See also*, Op. Att'y Gen. No. 07-0157 (Oct. 15, 2009) (in drafting the amendments the "...Louisiana Legislature expressly intended to create a constitutional protection for property owners in opposition to the decision handed down by the United States Supreme Court in [*Kelo*].").

In *Kelo*, the Supreme Court "gave the City of New London the ability to take private property and reallocate it to a non-public entity for the primary purpose of economic development," thereby affirming economic development as a public use. Op. Att'y Gen. No. 07-0157, *supra*. The *Kelo* decision was controversial and triggered a backlash in states across the country and a quick reaction in the Louisiana Legislature. The year after *Kelo*, the Louisiana Legislature proposed to amend the Constitution in 2006 to "narrow the scope of eminent domain authority in the state by providing more rigorous regulations on takings as well as providing a clear definition for the term 'public purpose.'" *Id.* In doing so, the Legislature (affirmed by

Louisiana voters) “effectively overruled all prior Louisiana jurisprudence created under the former constitutional provision.” *Id.*

In another expropriation case before this Court, BBP’s justifications for this pipeline have centered on the purported economic impacts, enhancement of tax revenues, and incidental benefit to the public – precisely the considerations prohibited by the Louisiana Constitution. *See Bayou Bridge Pipeline, LLC v. 250 acres, more or less, in St. Martin Parish, et al.*, 16th Judicial District Court, Docket No. 86298, Div. E, Transcript of Proceeding Held on April 18, 2018 before the Hon. Keith Comeaux, at pp. 10-13.

Moreover, BBP is not an entity entitled to take or damage property under the art. 1, sec. 4(B)(4). In “order to prevail, the entity seeking a servitude must establish itself as a public or quasi public body with powers of expropriation and it must establish the construction of a facility in the public interest or for a public and necessary purpose.” *Crooks v. Placid Refining Co.*, 903 So. 2d 1154, 1162 (La. App. 3d. Cir. 6/1/05) (another pipeline expropriation case where the court describes common carriers and “private entit[ies]” upon which Article 1, §4 of the Louisiana Constitution of 1974 confers the power of expropriation as “public or quasi public corporations”).

Yet BBP has asserted in separate, unrelated legal proceedings that it is not a quasi-public corporation owing any duty to the public and is instead a “private, for-profit entity” that is “not operating its pipeline business pursuant to any delegation or contract with the state, but rather as a private, for-profit business.” *See* Original Appellee Brief of Bayou Bridge Pipeline, LLC, in *Atchafalaya Basinkeeper et al v. Bayou Bridge Pipeline, LLC*, No. 2018-CA-0417 (La. App. 1st Cir. 6/21/18), at p. 15, annexed as Exhibit A to Landowners’ November 16, 2018, Pre-Trial Memorandum. The Third Circuit Court of Appeal has held that when a private, “cooperative, non-profit corporation, operated for the benefit of particular individuals, i.e., its members and customers, not the public generally,” its property damage, caused by wastewater discharge, did not serve the public and was not for a public purpose. *See, Dugas v. Bayou Teche Water Works, Inc.*, 2013-890 (La. App. 3 Cir. 2/12/14, 8), 153 So.3d 1071, 1076-77, writ denied, 2014-0534 (La. 5/16/14), 139 So.3d 1026.

Scott Eustis, a wetlands specialist and Community Science Director, at the Gulf Restoration Network will testify to his work monitoring and reporting on conditions in the Atchafalaya Basin, including reporting on violations to federal and state agencies for pipeline projects. Eustis will testify to his work incorporating the state of Louisiana's master plans for protecting and restoring the coast, as well as plans and efforts at protecting and restoring the Atchafalaya Basin, and the impacts that pipelines, including the Bayou Bridge Pipeline, have had on the area.

Landowners Theda Larson Wright, Peter Aaslestad and Katherine Aaslestad will testify as to their understanding and concerns about the effects of pipelines on the Basin and in Louisiana, and their public interest motivations for defending against the expropriation, as is their right to right to do so. *See, e.g., Louisiana Res. Co. v. Greene*, 406 So.2d 1360, 1371 (La. Ct. App.1981), *writ denied*, 412 So.2d 84 (La.1982) (landowners should not be discouraged in their fundamental right "to test an expropriation on all points or issues which may arise").

B. Trespass

Trespass is an unlawful physical invasion of the property of another. *Whitlock v. Fifth Louisiana Dist. Levee Bd.*, 164 So.3d 310, 316 (La. App. 2 Cir. 4/15/15) ("A trespasser is one who goes upon another's property without his consent."), *citing 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; *Barrilleaux v. NPC, Inc.*, 704 So.2d 449, 451 (La. App. 1 Cir. 12/29/97); *M & A Farms, Ltd. V. Town of Ville Platte*, 422 So.2d 708, 711 (La. App. 3 Cir. 1982). Here, Bayou Bridge entered onto the property, cleared trees, and laid its pipeline on the property without consent of all owners or any adjudicated authority to do so.

In order to determine whether property rights have been "taken" for purposes of an inverse condemnation proceeding, Louisiana courts must, 1) determine if a right with respect to a thing or an object has been affected; 2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and 3) determine whether the taking or damaging is for a public purpose under Art. 1, Sec. 4. *Williams v. City of Baton Rouge*, 98-1981 (La. 4/13/99, 7), 731 So.2d 240, 246. However, when the trespasser acts in bad faith, it is liable in tort for trespass and "all the resultant damages under Article 2315." *Id.*

at 248 (holding that in addition to property damages, plaintiffs were also entitled to general damages, and mental anguish damages). In *Williams*, the Louisiana Supreme Court held that the City of Baton Rouge was a bad faith trespasser because it did not fail to undertake expropriation proceedings “through oversight or lack of foresight,” or as a result of a “good faith error,” but, knowing it did not have legal authority and that it needed a court order to enter onto the property, “took the matter into their own hands” and did so anyway. *Id.* at 247. That made it liable for trespass and damages beyond the compensation that would have been due the landowner in an inverse condemnation proceeding.

Likewise, BBP did not trespass upon the property at issue in this proceeding and construct its pipeline through “oversight or lack of foresight” or as a result of “good faith error.” It knew it lacked agreements or judgments of expropriation with hundreds of landowners and that one of them was actively seeking to enjoin their trespass in court. Instead they took matters “into their own hands,” continued to enter upon the property and laid the pipe in the ground even after an injunction proceeding was filed against them.

Louisiana Law on Servitudes

First, despite having acquired some easement agreements from landowners of this parcel, Louisiana law requires consent from all owners of a parcel prior to execution of a servitude.⁸ It is well established that co-owners “are owners par mi et par tout, of part and of the whole, and no co-owner has the exclusive right to any determinate part of the common property.” *Sun Oil Co. v. State Mineral Bd.*, 92 So. 2d 583, 586, 231 La. 689 (La. 1956); *see also Gulf Refining Co. v. Carroll*, 145 La. 299, 82 So. 277 (La. 1919); LSA-C.C. art. 480 (“Two or more persons are co-owners when they own the same thing in indivision, with each having an undivided share in the thing.”). Thus, while “[a] co-owner may freely lease, alienate, or encumber *his share* of the thing held in indivision,” he cannot encumber more than his interest without consent of all co-owners. La. Civ. Code art. 805.

⁸ Note that, although BBP obtained a Clean Water Act §404 permit from the U.S. Army Corps of Engineers on Dec. 14, 2017, that is the subject of ongoing litigation, authority granted pursuant to the permit is limited and expressly provides that it “does not grant any property rights or exclusive privileges” and it “does not authorize any injury to the property or rights of others.” USACE, Permit No. MVN-2015-02295-WII, at 2, Special Conditions No. 2, “Limits of this authorization.”

A servitude, easement, or right of way is an interest in real property less than full ownership thereof. While a personal servitude is a charge on the property for the benefit of a person, a predial servitude is a charge on a servient estate for the benefit of a dominant estate of a different owner. LSA-C.C. arts. 534, 639, 646. Irrespective of whether a court considers a pipeline right of way to be a personal right of use or predial servitude, the classification is practically immaterial as a right of use servitude is regulated by the rules governing predial servitudes. LSA-C.C. art. 645. *See Sasol N. Am., Inc., v. Bolton*, 103 So.3d 1267, 1269 (La. App. 3rd Cir. 12/5/12); *Enterprise Te Prods. Pipeline Co. v. Avila*, 16-207, 4, 8 (La. App. 3rd Cir. 11/2/16), 2016 WL 6495978 (wherein the courts consider pipeline rights of way to be personal servitudes granting a limited right of use on a parcel. Court nevertheless finds that pipeline servitudes “are subject to the rules that govern predial servitudes.”). *But see El Paso Field Service, Inc. v. Minvielle*, 867 So.2d 120, 125 (La. App. 3rd Cir. 3/3/04) (finding the pipeline’s grant of right of way to be a conventional predial servitude).

With respect to the establishment and execution of a servitude on an estate owned in indivision between co-owners, a predial servitude can be established only with the consent of *all* co-owners. LSA-C.C. art. 714. (emphasis added). Therefore, “[w]hen a co-owner purports to establish a servitude on the entire estate, the contract is not null; but, its execution is suspended until the consent of all co-owners is obtained. *Id.* Moreover, “[w]hen a co-owner has consented to the establishment of a predial servitude on his undivided part only, the consent of the other co-owners is not required, but the exercise of the servitude is suspended until his divided part is determined at the termination of the state of indivision.” LSA-C.C. art. 716. Thus, the dominant estate or beneficiary of the servitude cannot exercise rights granted pursuant to the servitude until all owners in interest consent.⁹

⁹ It is important to note that the St. Julien Doctrine codified at La. R.S. 19:14 is inapplicable to the present facts. The St. Julien doctrine requires consent or acquiescence by the landowner to the taking of the property without expropriation proceedings. *See Bourgeois v. Louisiana State Gas Corp.*, 836 So.2d 693, 696 (La. App. 5 Cir. 1/28/03); *Vial v. So. Central Bell Telephone Co.*, 423 So.2d 1233, 1237-38 (La. App. 5 Cir. 1982); *but see, Concha Chemical Pipeline v. Schwing*, 835 So.2d 543 (La. App. 1 Cir. 9/27/02) (finding that the landowner’s awareness and failure to object during construction of the pipeline evidenced his acquiescence in the construction and use of the pipeline such that the St. Julien doctrine applied). In the present case, landowner Peter Aaslestad initiated an action to enjoin construction on the property absent full consent and authorization by the company. Thus, he timely protested the pipeline construction. Moreover, in the present action, Peter Aaslestad, Katherine Aaslestad, Lauren Aaslestad Massey, and Theda Larson Wright filed answers and objections to the expropriation action, further indicating their opposition to the taking and rendering La. R.S. 19:14 inapplicable to the present facts. Moreover, in *Bourgeois*, the court upheld the trial court’s finding that the landowner’s consent was a prerequisite to construction,

BBP does not have an executable servitude across the property for its pipeline project. Despite having obtained consent through easement agreements from some of the property's co-owners, as alleged in its Petition for Expropriation, Defendant has failed to acquire through conventional agreement or a final judgement by expropriation and payment of fair compensation the consent of co-owners Theda Larson Wright, Peter Aaslestad, Katherine Aaslestad, and a number of additional co-owners of interest in the Property. Only after Mr. Aaslestad filed a suit to enjoin construction on the Property did BBP commence this action to expropriate, which demonstrates that even the company is aware that it did not have the requisite permissions and rights to enter onto and perform construction-related activities upon the Property. *See Peter K. Aaslestad v. Bayou Bridge Pipeline, LLC*, 16th JDC, 87010-C.

Governing Statutory Authority

La. R.S. 45:251, *et seq.* governs common carrier petroleum pipelines generally, while the state expropriation laws at La. R.S. 19:1, *et seq.* prescribe applicable procedures for expropriation of private property for use by a common carrier petroleum pipeline. *See also* La. R.S. 45:254. Nothing within these titles authorizes a private company claiming common carrier status to enter and construct on property held in indivision without consent of all co-owners. In fact, the expropriation statute precludes entitlement to the property rights sought prior to a final judgment and payment to the owner.

Pursuant to the expropriation statute, which must be strictly construed, an “expropriating authority *shall* not be entitled to possession or ownership of the property until final judgment has been rendered *and* payment has been made to the owner or paid into the registry of the court.” La. R.S. 19:8(A)(3); *Tenneco, Inc. v. Harold Steam Inv. Trust*, 394 So.2d 744, 749 (La. App. 3 Cir. 1981), *citing Texas Gas Transmission Corp. v. Soileau*, 251 So.2d 104 (La. App. 3 Cir. 1971) (“An expropriation proceeding is in derogation of the common right to own property. The laws attendant thereto and in furtherance thereof must be strictly construed. Each step in the

and that despite the company's acquisition of certain permits for construction, it did not act in good faith when it constructed on the property without consent of the landowner. *See Bourgeois*, 836 So.2d at 695-696. *See also, Adcock v. Marshall Exploration, Inc.*, 434 So.2d 471, 474 (La. App. 2 Cir. 6/6/83) (“the parties' negotiations regarding the right of way agreement has never resulted in a written or oral agreement and . . . activities on [the] property in connection with the pipeline right of way amounted to a trespass.”) *citing Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978).

proceeding must be carefully scrutinized.”); *Exxonmobil Pipeline Co. v. Union Pacific Railroad Co.*, 35 So.3d 192, 197 (La. 2010), citing *United Gas Pipe Line Co. v. Blanchard*, 149 So.2d 615 (La. App. 1 Cir.), writ denied, 244 La. 135, 150 So.2d 590 (1963) (“Expropriation laws are special and exceptional in character, in derogation of common rights, and as such, must be strictly construed.”). The statute also provides that only upon “[p]ayment by the plaintiff to the owner of the compensation fixed in the final judgement to be due or the deposit thereof in the registry of the court for the benefit of the persons entitled thereto entitles the plaintiff to the property rights described in the judgment of expropriation.” La. R.S. 19:10.

Here, BBP’s own representative, Kevin Taliaferro, testified at a hearing on exceptions that he authorized construction crews to begin clearing trees and constructing on the property in early 2018 before they had completed easement agreements with all property owners. Taliaferro further testified that construction on the property at issue in this litigation is now complete. BBP alleged in its expropriation petition that it had completed easement agreements with approximately 350 landowners but had 393 additional landowners included as defendants in the case. In a separate case filed subsequent to Landowners’ answers and exceptions in this matter, BBP named an additional 112 defendants who are co-owners of the same property. Thus, over 500 co-owners had not consent to BBP’s entry upon and construction on the property which was well underway by the time it filed these expropriation proceedings.

Scott Eustis will also testify as to his observations of the Plaintiff’s activities on the property, which he witnessed during monitoring overflights of the pipeline route. Eustis will also testify as to his observations of the construction activities and location of the pipeline on the property.

Landowners Theda Larson Wright and Peter and Katherine Aaslestad will testify that they never gave consent or permission for the company to enter on to the property and begin construction. Peter Aaslestad will testify that he brought a case to enjoin BBP’s trespass and construction when he learned of their presence on the property.

However, BBP has entered onto the property, a fact that is undisputed. BBP’s corporate representative and the Director of Right-of-Way at one of BBP’s (joint venture) owners, Energy Transfer Partners, Kevin Taliaferro testified that he gave the construction team the go ahead to

begin construction on the property as early as January 2018. Furthermore, as confirmed by personal observations during a monitoring overflight on June 28, 2018, Scott Eustis observed that the trees within the BBP right-of-way crossing the subject Property had been cleared. *See* Eustis Affidavit at ¶ 19 and accompanying photo exhibits, Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order, *Peter K. Aaslestad v. Bayou Bridge Pipeline, LLC*, 16th JDC, 87010-C. During a subsequent monitoring overflight on August 30, 2018, Mr. Eustis observed indications of active construction on the Property. *Id.* at ¶¶ 25-28. Mr. Eustis observed heavy machinery north-west of the described curb in the pipeline right-of-way, and a flooded pipeline trench in the right-of-way that was not observed in his previous monitoring overflight in June. *Id.* Mr. Eustis' observations, coupled with Mr. Taliaferro's admissions, confirm that the pipeline has been laid on the Property. In the absence of full owner consent and an expropriation judgment entitling BBP to the property right (servitude) it seeks, BBP's conduct and the installation of the pipeline which remains on the Property amounts to a continuing trespass.¹⁰

BBP's Bad Faith, Continuing Trespass

BBP is a bad faith trespasser and is liable for all the resultant damages. *See Williams v. City of Baton Rouge*, 98-1981, pg. 9 (La. 4/13/99), 731 So.2d 240, 247-248. In *Bd. of Supervisors of La. State University and Agricultural and Mechanical College v. Villavaso*, the appellate court upheld the trial court's factual finding of bad faith trespass where the expropriating authority entered onto the property and removed items and graded the property with dirt notwithstanding the fact that the expropriator lacked title authorizing the entry. 183 So.2d at 767.

The present facts are similar to a case in which the landowner did not live on the property, and refused to consent to the company's clearing on the property but thereafter the

¹⁰ Note that it is not a requirement that other co-owners join the suit for trespass. Louisiana Civil Code articles 800, 801 and 802 provide that "a co-owner has neither a right to exclusive use nor a right to dispose of the thing without the consent of his co-owners. However, as against third persons, a co-owner has the right to use and enjoy the thing as if he were its sole owner. For example, a co-owner may alone take all the necessary steps for the preservation of the property, including the institution of suits against trespassers or usurpers." Comments to LAS-C.C. art. 802. (emphasis added); *see also Whitlock v. Fifth Louisiana Dist. Levee Bd.*, 164 So.3d 310, 318 (La. App. 2 Cir. 4/15/15) (where the plaintiff co-owner sought to enjoin defendant from trespassing on his property, the court found that "[the landowner] has the right to protect his property rights, without regard to what the other co-owners want to do with their interests. He need not join other co-owners in his suit to enforce his own rights as landowner.").

company entered and cleared trees and topsoil without authorization and in spite of expressed objections from the landowner. *Turner v. Southern Excavation, Inc.*, 322 So.2d 326, 328 (La. App. 2 Cir. 1975). “Defendant’s trespass continued over her objection for several months and it was necessary for plaintiff to employ counsel, file suit, and obtain an injunction before the trespass was halted.” *Id.* at 329. The court found the trespass to be “deliberate, willful, wanton, illegal and forcible. It was done without an vestige of legal right and in legal and moral bad faith.” *Id.* Similarly, despite repeated notice of its wrongful conduct, BBP continued to construct on the property.

The Third Circuit court in *Coastal Transmission Corp.* found the trespasser to be in moral bad faith where the utility entered onto the property without any legal right or title, without investigating to see whether it had a servitude to the land upon which it constructed its pipeline. *Coastal Transmission Corp. v. Lejeune*, 148 So.2d 111, 114 (La. App. 3 Cir. 1962). Similarly, in the instant case, BBP entered onto the property made the subject of this suit without legal right or title obtained through consensual agreement with all owners or an expropriation judgment.

Additionally, the *Coastal Transmission Corp.* court found the company’s trespass to be willful and reckless where “it continued to construct and it complied its pipeline across the defendant’s land, even after defendant landowner had through her attorney informed the company of its trespass.” *Id.* at 115. The material facts at issue in the present case present an even more egregious disregard for the landowners’ rights than were present in the *Coastal Transmission Corp* case. In the present case, in addition to the admission that BBP knew it lacked total consent from all owners of the property, BBP was put on notice of its unlawful entry and construction when landowner Peter Aaslestad filed suit in the 16th Judicial District seeking to enjoin construction on the property. *Peter K. Aaslestad v. Bayou Bridge Pipeline, LLC*, 16th JDC, 87010-C. Despite obtaining this notice at the outset of that case wherein counsel for Peter Aaslestad sent by email a courtesy copy to counsel for BBP, attaching the landowner’s Petition, Motion for Preliminary Injunction, and accompanying Memorandum of Law in Support, BBP continued to construct on the property. Armed with the knowledge that a co-owner of the parcel was appealing to the court to enjoin construction on his property without full authorization, the

company continued to construct. BBP's conduct in continuing to trespass and construct on the property after receiving multiple notifications of its unlawful conduct is indicative of its reckless and willful behavior sufficient to support a finding of a moral bad faith trespass.

Furthermore, BBP's unlawful conduct amounts to a continuing trespass on the property for which successive damages are available. "A continuous trespass is a continuous tort; one where multiple acts of trespass have occurred and continue to occur; where the tortious conduct is ongoing, this gives rise to successive damages." *Hogg v. Chevron USA, Inc.*, 45 So.3d 991, 1003 (La. 2010). Courts have found a continuous trespass in cases where the "operating cause of the injury" is a continuous one. *Id.* at 1004; *see also Estate of Partout v. City of New Iberia*, 01-0151 (La. App. 3 Cir. 4/3/02), 813 So.2d 1248, *writ denied*, 02-1172, 02-1231 (La. 6/21/02), 819 So.2d 335, 336 (finding the continued presence of garbage on property to be a continuing trespass).

At present, the injury-producing conduct includes the unlawful entry and construction of a 24" pipeline on the property, a pipeline which remains on the property to date. "A continuing trespass occurs where the defendant erects a structure or places an object upon the land of the plaintiff and fails to remove it. The trespass continues as long as the offending object remains on the premises. *M & A Farm, Ltd.*, 422 So.2d at 711-12; *Vial v. So. Central Bell Telephone Co.*, 423 So.2d 1233, 1236 (La. App. 5 Cir. 1982) (finding a continuing trespass where "the conduits and manholes, mistakenly placed outside the servitude, continued to illegally occupy appellant's property at least until the date of trial."). Furthermore, the *Vial* court found "(p)ertinent to the quantum award, the telephone company's illegal actions constitute a continuing trespass which continues as long as the offending objects remain on the premises." 423 So.2d at 1238.

As long as the pipeline, the offending object, remains on the property, the trespass continues. In *Tujague v. Atmos Energy Corp.*, the landowner brought an action for trespass for the installation of a six-inch natural gas pipeline on his property without his consent. 05-2733, 442 F.Supp.2d 321 (E.D. La. 2006). The court found that the defendant owed the landowner a duty not to trespass on his property, and that it breached this duty when it installed a pipeline on his property without permission. *Id.* at 325. Further, in distinguishing prior cases addressing the

continuing tort theory, the court found the trespass to be a continuing tort that did not cease until the pipeline and debris were removed from the property. *Id.*

C. Unconstitutional Taking, Fifth Amendment to the United States Constitution

If the Court finds that BBP is authorized to expropriate, Plaintiffs-in-Reconvention have also counterclaimed for unlawful takings under the United States Constitution. The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, 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.” *See S. Lafourche Levee Dist. v. Jarreau*, 16-788 (La. 3/31/17), 217 So.3d 290, 305.

Private entities expressly delegated the power of eminent domain under Louisiana law qualify as an agent of the government for purposes of establishing constitutional liability for a taking. *See Mongrue v. Monsanto*, 249 F.3d 422 (5th Cir. 2001). If the court determines, BBP was authorized by law to expropriate the property and that the expropriation was for a public and necessary purpose, then BBP should be held liable under the United States constitution for an unlawful taking.

D. Unconstitutional Taking, Art. I, Sec. 4, Louisiana Constitution of 1974

In order to determine whether property rights have been “taken” under La. Const. Art. 1 § 4, which provides that 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, the court must determine (1) if a property right has been affected; (2) whether the property has been taken or damaged in a constitutional sense; and (3) whether the taking is for a public purpose under art. I, sec. 4. *Anderson v. Bossier Par. Police Jury*, 45, 639 (La. App. 2 Cir. 12/15/10, 25–26), 56 So.3d 275, 287.

Here, if the Court finds that the taking is for a public purpose, then BBP should be held liable for a taking in violation of the Louisiana Constitution.

E. Violation of Due Process, Fifth Amendment to the U.S. Constitution

A procedural due process violation is actionable and compensable without regard to any other injury. *See also, Archbold-Garrett v. New Orleans City*, 893 F.3d at 322 citing *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978) (“Because the right to

procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions ... the denial of procedural due process should be actionable for nominal damages without proof of actual injury.”).

F. Violation of Due Process, Art. I, Sec. 2, of the Louisiana Constitution

The very nature of the expropriation action mandates, at a minimum, some degree of process prior to the taking. In the instant case, because BBP entered onto and began construction on the property prior obtaining the right to expropriation through final judgment in an action to expropriate, it deprived the landowners of an opportunity to be heard prior to the deprivation of their constitutionally protected, fundamental right to property. *See Fields v. State through Dept. of Public Safety and Corrections*, 714 So.2d 1244, 1251 (La. 1998) (“Generally, before a person is deprived of a protected interest, he must be afforded some kind of hearing.”). And while courts have recognized circumstances in which a valid governmental interest justifies a prompt, post-deprivation hearing, these are allowed in only “extraordinary” or “truly unusual” situations. *Id.* Here, the taking is significant, involving material alterations to, and destruction of, private property, by a private company alleging a right to expropriate, meanwhile disavowing any public or quasi public status.

Moreover, unlike the Louisiana Constitution's provision on equal protection, which is distinct from that provided in the Fourteenth Amendment to the Federal Constitution, the guarantee of due process does not vary from the federal provision. *Thomas v. New Orleans Redevelopment Auth.*, 2004-1964 (La.App. 4 Cir. 10/6/06), 942 So.2d 1163. A procedural due process violation is therefore actionable and compensable without regard to any other injury. *See also, Archbold-Garrett v. New Orleans City*, 893 F.3d at 322 citing *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978)

G. Just Compensation and Damages

Landowners in expropriation suits shall be compensated to the full extent of his loss, which “shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred because of the expropriation.” La. Const. Art. I, §4(B)(5); *Bd. of Supervisors of La. State University and Agricultural and Mechanical College v. Villavaso*, 183 So.3d 757, 763 (La. App. 4 Cir.

12/23/15). In addition to property damages resulting from the expropriation, “when the expropriating authority is considered a bad faith trespasser, it can be liable for resultant damages under article 2315.” *Bd. of Supervisors of La. State University and Agricultural and Mechanical College*, 183 So.3d at 767, citing *Williams*, 731 at 248; *State, Through Dept. of Highways v. Ellender*, 379 So.2d 1069 (La. 1980). In an expropriation proceeding, “a trial judge’s factual determinations as to value of property and entitlement to any other types of damages will not be disturbed on review in the absence of manifest error.” *Enterprise Te Products Pipeline Co. v. Avila*, 16-207, at 7 (La. App. 3 Cir. 11/2/16), quoting *W. Jefferson Levee Dist. V. Coast Quality Const. Corp.*, 640 So.2d 1258, 1277 (La. 1994).

In cases of “deliberate, forcible trespass for ‘invasion of property rights’ and ‘mental anguish’ or the like” or in circumstances of illegal and deliberate violation of property rights, courts have affirmed awards for the wrongful and forceful invasion of the inherent property rights, for mental anguish, humiliation, and embarrassment. *Turner*, 322 So.2d at 329-330, citing *Loeblich v. Garnier*, 113 So.2d 95 (La. App. 1 Cir. 1959). Louisiana landowners are entitled to compensatory damages “for the violation of his constitutional property right to be free of unlawful trespasses upon his land, whether by the municipality or by private person.” *Belgarde v. City of Natchitoches*, 156 So. 2d 132 (La. App. 3. Cir. 1963); *Williams*, 731 at 250 (“This Court has specifically recognized the right of one wronged by trespass upon his property to recover general damages including damages for mental anguish. *Ard v. Samedan Oil Corp.*, 483 So.2d 925 (La. 1986).”); *Booth*, 851 So.2d at 3 (“Damages are recoverable for unconsented activities performed on the property of another, based on physical property damage, invasion of privacy, inconvenience, and mental and physical suffering.”).

There exists “no hard and fast rule for measuring damages in a case of willful and wanton trespass and destruction of private property.” *Turner*, 322 So.2d at 330. Rather, courts “must adopt an approach in each case that will do substantial justice between the parties.” *Id.*, citing *East v. Pan American Petroleum Corp.*, 168 So.2d 426 (La. App. 3d Cir. 1964); *City of New Orleans v. Shreveport Oil Co.*, 170 La. 432, 128 So. 35 (1930). The movant must prove damages by a preponderance of the evidence by either direct or circumstantial evidence. *Booth v. Madison*

River Communications, Inc., 851 So.2d 1185, at 4 (La. App. 1 Cir. 6/27/03). However, in the case of a trespass providing a legal right and an entitlement to full indemnification for the damages caused, where the damages cannot be exactly estimated, “the court has reasonable discretion to assess the same based upon all of the facts and circumstances.” *Id.*¹¹ The trier of fact is afforded great discretion in the assessment and award of damages, which will not be disturbed absent a finding of a clear abuse of discretion. *Williams*, 731 So.2d at 249. “Where there is a legal right to recovery but the damages cannot be exactly estimated, the courts have reasonable discretion to assess some damages based upon all of the facts and circumstances.” *Mathews*, 82 So.2d at 488, citing *Versai Management, Inc. v. Monticello Forest Products Corp.*, 479 So.2d 477 (La. App. 1 Cir. 1985).

Therefore, in the instant case, the landowners are not limited to an expropriation action, but are entitled to seek damages for BBP’s tortious conduct, including treble damages for timber trespass, and other resultant damages under Article 2315 attributable to BBP’s bad faith trespass. *See Mathews v. Steib*, 82 So.3d 483, 485 (La. App. 1 Cir. 12/15/11); *Williams v. City of Baton Rouge*, 731 So.2d 240, 248 (La. 1999).

Damages for Timber

BBP’s clearing of trees on the property without consent of the landowners violates Louisiana’s “timber trespass” statute. *Mathews v. Steib*, 82 So.3d 483, 485 (La. App. 1 Cir. 12/15/11). Louisiana Revised Statute 3:4278.1 prohibits any person from cutting, destroying or removing any trees on the land of another without consent. La. R.S. 3:4278.1(A)(1). The statute further prohibits any co-owner from destroying trees without consent of the other co-owners. *Id.* at (A)(2). The statute provides a penalty scheme contingent upon whether the violation was willful and intentional or committed in good faith. *Id.* at (B)-(D). In the event of a willful and intentional violation, the perpetrator is liable to the owner for “civil damages in the amount of three times the fair market value of the trees cut, felled, destroyed, removed or diverted, plus reasonable attorney fees and costs.” *Id.* at (B).

¹¹ Note also that damages are recoverable “even though the tort-feasor acts in good faith.” *Booth*, 851 So.2d at 4.

Timber appraiser Brandon Melville will testify that he visited the site and attempted to assess as accurately as possible the value of timber cleared by the company without the landowners' permission. Because the timber had already been cleared Melville's ability to assess the true value of the destroyed trees was limited. Melville's assessment, however, was made while clearly noting the difficulties and obstacles in obtaining a figure for the actual value.

Under the timber trespass statute, the value assessed by Melville should be trebled. *See also Turner*, at 329 (discussing the award of damages for property, including cut/destroyed trees, and right to recover damages done to the aesthetic value of the property where neither replacement costs nor the diminution in fair market value could reasonably be used to determine the amount to be awarded).

Plaintiffs-in-Reconvention landowners are entitled to treble damages in the amount of three times the fair market value of the trees cleared from the property, and reasonable attorneys' fees. *See Mathews*, 82 So.3d at 487-88. Moreover, the "timber trespass" statute "does not preclude recovery for other elements of damage suffered by the owner of an immovable as a result of trespass such as 'reforestation costs, diminished aesthetic value, loss of growth value, restoration of the land surface, general damages for trespass, and mental anguish.'" *Mathews*, 82 So.2d at 488, citing *Callison v. Livingston Timber, Inc.*, 02-1323, p. 3 (La. App. 1 Cir. 5/9/03), 849 So.2d 649, 652. Thus, in addition to any amount recoverable under the "timber trespass" statute at La. R.S. 3:4278.1, damages are recoverable for additional costs and injuries.

Mental Anguish Damages

Courts have awarded damages for mental anguish in cases involving property damage. *See e.g., Williams*, 731 So.2d at 252; *Turner v. Southern Excavation, Inc.*, 332 So.2d 326 (La. App. 2 Cir. 1975). The district court in such circumstances "has great, even vast discretion in fixing damages awards for emotional distress due to property damage." *Bd. of Supervisors of La. State University and Agricultural and Mechanical College*, 183 So.3d at 768. The awards for such cases generally range from \$100.00 to \$35,000.00 depending on the particularities of any given case. *Williams*, 731 So.2d at 252.

In *Bd. of Supervisors of La. State University and Agricultural and Mechanical College v. Villavaso*, the appellate court upheld the trial court's finding that the landowner suffered "mental

anguish as a proximate cause and/or consequence of the impermissible trespass” and an award of mental anguish damages for approximately ten (10) days of trespass based on his degree of connection to the property and display of emotional trauma as a result of the trespass. 183 So.3d 767 (noting that the court on appeal reduced the award of damages for mental anguish from \$50,000.00 to \$15,000.00, finding that the landowner’s posture was distinguishable from the Class I *Williams* plaintiffs who lived on the property), citing *Williams*, 731 So.2d at 251.

In the instant matter, BBP entered onto the property on or before June 28, 2018, and the impermissible trespass continues as pipeline has been laid and remains on the property. At a minimum, the trespass has been occurring for at least five months.

Moreover, courts have recognized the right of property owners to recover damages to property beyond findings of pecuniary or market value of the property. *Turner*, 322 So.2d at 328-29 (wherein the court found it difficult to separate property damage and damages resulting from mental anguish and or aesthetic losses).

Property Damage

Courts have awarded property damages in addition to award of compensation for the value of the land taken in an expropriation or inverse condemnation action. *See Williams*, 731 So.2d at 249 (affirming an award of \$56,000 in property damages comprised of \$16,067 for the value of the land taken in the 300 foot servitude).

In *Booth*, the appellate court failed to find evidence of physical property damage to support an award of damages. 851 So.2d at 5-6. There, the court found this issue moot upon “removal of the conduit and restoration of the property” where “the condition of the property, as of the date of trial, was the same as it was prior to the construction.” 851 So.2d at 5-6. This is clearly distinguishable from the instant case where the pipeline remains on the property such that the condition of the property is not the same as it was prior to construction. *See also, Williams*, 731 So.2d at 249 (awarding damages for the costs of curing damage to the property).

Defendant landowners will testify as to the harms they have suffered as a result of Plaintiff’s bad faith trespass and property damage.

III. CONCLUSION

Wherefore, after due proceedings had, Defendants and Plaintiffs-in-Reconvention pray that this court enter judgment in their favor and against Plaintiff, and enter an award for damages commensurate with the harms caused by Plaintiff's intentional acts undertaken in bad faith.

Date: November 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been transmitted via electronic means to all known parties of record this 20th day of November 2018 by email to the following counsel of record:

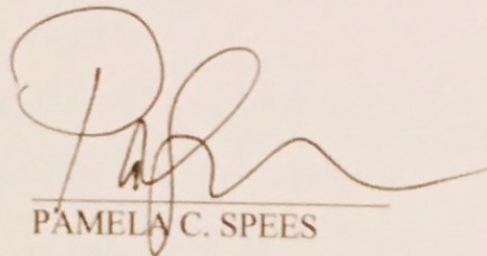
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