

BAYOU BRIDGE PIPELINE, LLC
VERSUS

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

FILED: _____

16TH JUDICIAL DISTRICT
DOCKET NO. 87011-E

ST. MARTIN PARISH

STATE OF LOUISIANA

DEPUTY CLERK OF COURT

PRE-TRIAL MEMORANDUM
OF DEFENDANTS / PLAINTIFFS IN RECONVENTION
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I. Introduction, Procedural Posture, and Burdens of Proof

After it was sued to enjoin its trespass and unauthorized construction on Defendants' property,¹ Bayou Bridge Pipeline, LLC, ("BBP") brought this expropriation action. Defendant landowners Theda Larson Wright, Peter Aaslestad, and Katherine Aaslestad ("landowners") answered and counterclaimed for trespass, property damage, and for unconstitutional takings and violations of due process under the United States and Louisiana constitutions.

These landowners also asserted the affirmative defenses that the State's delegation of the power of eminent domain to oil pipeline companies violates the United States and Louisiana constitutions, as does the delegation of that power to private entities generally. Landowners also filed the following peremptory and dilatory exceptions:

- 1) Peremptory exception of no right of action on grounds that BBP is not an entity to which the law grants the remedy sought in this matter;
- 2) Peremptory exception of nonjoinder of a Party on the grounds that BBP failed to join indispensable parties;
- 3) Dilatory exception of vagueness or ambiguity in the petition on the grounds that BBP failed to adequately plead the public and necessary purpose of the pipeline;
- 4) Dilatory exceptions of prematurity on the grounds that
 - a) the company did not carry out all of the statutory requirements mandated by La. R.S. 19:2.2 prior to bringing this action;
 - b) BBP did not undertake good faith efforts to identify, locate, and negotiate with all landowners and prematurely and improperly asked the Court to appoint an attorney to stand in for them; and
 - c) permits necessary for portions of the pipeline are subject to pending litigation, and it is possible the company may not obtain them which would nullify the need for the expropriation, in addition to filing a series of exceptions and affirmative defenses.

BBP filed exceptions to three of the landowners' counterclaims, claiming that their federal takings and due process claims are premature and/or preempted, and that their state due process claim is preempted.

¹ See *Aaslestad v Bayou Bridge Pipeline, LLC*, Docket No. 87010, in the 16th Judicial District Court, Div. C ("injunction proceeding"). The matter was filed on July 27, 2018. After Mr. Aaslestad sought a temporary restraining order based upon evidence the company was still constructing its pipeline on the property after he filed the case, BBP entered into a stipulated agreement wherein it agreed to the terms sought in the preliminary injunction and that it would not enter the property as of September 10, 2018. See Exhibit A annexed to landowners' answers and reconventional demands.

The hearing on the affirmative defenses and exceptions is set for Nov. 16, 2018; the trial on the merits of the expropriation case and the reconventional demands is set for Nov. 27, 2018.

With regard to the burden of proof, Defendant landowners bear the burden of proof for affirmative defenses. *Fin & Feather, LLC v. Plaquemines Par. Gov't*, 2016-0256 (La. App. 4 Cir. 9/28/16, 9), 202 So.3d 1028, 1034. With regard to the dilatory and peremptory exceptions, each mover bears the burden of proof. *Bayou Orthotic & Prosthetics Ctr., L.L.C. v. Morris Bart, L.L.C.*, 17-557 (La. App. 5 Cir. 3/28/18, 4), 243 So.3d 1276, 1280 (prematurity); *Boes Iron Works, Inc. v. M.D. Descant, Inc.*, 2014-0270 (La. App. 1 Cir. 9/19/14), 154 So.3d 555 (peremptory). Appellate review of an order sustaining these exceptions is usually manifest error, but when resolution of an exception involves a question of law, review is *de novo*. *Bayou Orthotic, supra*; *Boes, supra*.

At the hearing on the affirmative defenses and exceptions, landowners intend to argue the affirmative defenses on the law. As to their exceptions, they intend to put forward certified public records, documents obtained from plaintiff in discovery, and/or the pleadings.

II. Affirmative Defenses: Violations of the United States and Louisiana Constitutions

A. There Is a Complete Void in Louisiana Law and Regulation with Regard to the Siting of Oil Pipelines, Route Selection and the Exercise of Eminent Domain.

“The power of expropriation is fraught with the possibility of abuse and injustice and, accordingly must be strictly construed.” *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 1347.² The danger of injustice is heightened when the expropriator is an economically self-interested private corporation lacking certification, authorization, or oversight by state agencies, and unaccountable to the electorate or subject to checks and balances of government in exercising alleged rights to take private property.

² See also *Exxonmobil v. Union Pacific*, 35 So.3d 192, 197 (La. 2010) (“Expropriation laws are special and exceptional in character, in derogation of common rights, and as such, must be strictly construed” citing *United Gas Pipe Line Company v. Blanchard*, 149 So.2d 615 (La.App.1 Cir.), *writ denied*, 244 La. 135, 150 So.2d 590 (1963)).

Under the current legal and regulatory scheme in Louisiana, the fundamental right to property is not adequately protected by due process because self-interested, and unaccountable private oil pipeline companies can come into the State, self-designate as common carriers for hire, unilaterally decide on their own routes, and begin taking private property without any certification or oversight from any federal or state agency. In some instances, they can even construct their pipelines without having to obtain any approval, certification, or authorization from any state or federal agency before doing so, if those pipelines don't run through land subject to regulation and oversight by such agencies.

If landowners along this route choose to avoid the expense, inconvenience, and uphill battle of attempting to defend their rights in expropriation proceedings brought by large and well-resourced corporations then there is never a determination from any public entity, whether executive or judicial, that the pipeline is for a public and necessary purpose, that the compensation paid is just, that it is being pursued by an entity authorized by law to do so, or even that the corporation meets basic standards of safety and fitness to undertake such an environmentally risky project.

The jurisprudence confirms that landowners rarely prevail in defending against such expropriations: Out of 115 cases surveyed between 1943 and 2011, landowners were successful in defeating the expropriation in only three.¹ And that is only those cases where landowners actually attempted to litigate their rights under the expropriation statute, which is likely only a fraction of landowners impacted by expropriations by private companies. BBP's pipeline project is a case in point: Out of hundreds of properties along its 162.5-mile route involving thousands of landowners in eleven parishes, the company has only had to obtain judgments of expropriations in eight other cases.³ In the instant matter alone, the company was unable to

³ *Bayou Bridge Pipeline, LLC v. 80.53 acres, more or less, located in St. Martin Parish; Amelia Carlin Benny, et al.*, 16th JDC, Docket No. 86965, Div. F (Sept. 11, 2018) (includes "Default Defendants"); *Bayou Bridge Pipeline, LLC v. Allen Broussard, et al.*, 16th JDC, Docket No. 86289, Div. E (April 30, 2018) (includes "Default Defendants"); *Bayou Bridge Pipeline, LLC v. 31.51 Acres, more or less, located in St. Martin Parish; Brenda Burns, et al.*, 16th JDC, Docket No. 86877, Div. F (Aug. 27, 2018) (includes "Default Defendants"); *Bayou Bridge Pipeline, LLC v. 20.59 acres, more or less, located in Jefferson Davis Parish; Deborah v. Chappuis, et al.*, 31st JDC, Docket No. C-85-18 (May 29, 2018) (includes "Default Defendants"); *Bayou Bridge Pipeline, LLC v. 25.00 acres, more or less, located in Calcasieu Parish; Fitzhugh Elder, III, et al.*, 14th JDC, Docket No. 2017-003882 (April 4, 2018); *Bayou Bridge Pipeline,*

conclude easement agreements with over 390 owners of the property, 53 of whom were located and apparently served with process, but who failed to defend themselves in the expropriation.⁴

BBP's pipeline project also illustrates another serious problem with the sequencing of the current scheme, which is that it puts the cart (the pipeline company's unilateral determinations) before the horse (judicial determination or some of kind of approval or authorization by the state). Here, BBP decided on its route, began approaching landowners along that route for easements or rights of way, and began constructing its 162.5-mile pipeline, before all the necessary easements or expropriation judgments for property all along the route had been obtained. (And in fact, it constructed the pipeline on the property at issue in this matter before obtaining necessary agreements and expropriation judgments; and before permits have been finalized).

If a landowner along the route decides to resist the taking and defend their property rights, the pipeline may already be substantially complete. If the holdout landowner prevails, other landowners who made the calculation not to fight the expropriation are harmed because they have property subject to a pipeline servitude, and possibly even a finished pipeline running through their property. In this matter, BBP's heavy-handedness can have the effect of forcing the state's and landowners' hands and runs the danger of acquiescence to the *fait accompli* without having a reasoned and thorough consideration on the front end as to whether this pipeline company is fit to pursue this project, if the project is in the public's best interest, and for a public and necessary purpose.

LLC v. 80.00 acres, more or less, located in Calcasieu Parish; Houssiere Interest, LLC, et al., 14th JDC, Docket No. 2018-675, Div. G (May 3, 2018) (includes "Default Defendants"); *Bayou Bridge Pipeline, LLC v. 1.82 acres, more or less, located in Vermilion Parish; Unopened Succession of Rupert Carroll Perry, et al.*, 15th JDC, Docket No. 103422, Div. F (Feb. 5, 2018); *Bayou Bridge Pipeline v. 1.00 acre, more or less, located in Jefferson Davis Parish; Unopened Succession of Rosalie Vital, et al.*, 31st JDC, Docket No. C-588-17, (Nov. 21, 2017) (includes "Default Defendants").

⁴ In its Petition for Expropriation, BBP names over 390 defendants, including 89 "located" defendants, 251 "absentee" defendants, and 53 "deceased" defendants. As of Oct. 29, 2018, BBP has filed Motions for Entry of Preliminary Default against 53 defendant landowners in this suit.

- ***The Delegation of the Sovereign Power of Eminent Domain to Private Entities and the Common Carrier Regulatory Scheme.***

Article I, sec. 4(B)(4) of the Louisiana Constitution of 1974 allows takings of property by private entities authorized by law to expropriate for a “public and necessary purpose and with just compensation paid to the owner.” La. Const. Art. 1, sec. 4(B)(4). Pursuant to La. R.S. 45:251, “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 business conducted, or from the manner in which such business is carried on” are included in the definition of “common carrier.” La. R.S. 45:254 further declares that such common carriers have the power of eminent domain:

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.

La. R.S. 45:254.

The expropriation statute set out in Title 19 of the Louisiana Revised Statutes includes common carriers as defined in La. R.S. 45:251 among the entities that may file an expropriation suit if unable to reach agreement with the owner “as to compensation.” La. R.S. 19:2 and 19:2(8). Title 19 contains a series of mandatory requirements, procedures, and notices the expropriating entity must undertake before commencing litigation against a landowner. By its terms, the statute triggers litigation where the parties have been not able to reach agreement on the compensation amount, assuming that the other prerequisites have been met or not subject to challenge.

While the question of whether a given expropriation is for a public and necessary purpose is supposed to be a judicial determination, per La. Const. Art. I, sec. 4(B)(4), such assessments only arise after the statutory prerequisites to judicial action have failed – i.e. when unable to

reach agreement “as to compensation” – and in those rare instances where landowners opt to take their chances in expedited expropriation proceedings.⁵ There is no preliminary assessment – not even a minimal certification – of the company as a common carrier, its route, or the greenlight to exercise eminent domain on the front end in the event such situations do not make their way to court. In short, whether inter or intra-state, they do not need Louisiana’s permission before running their pipeline through this state.

This is in contrast to other types of entities that fall into the category of common carriers under Louisiana law, and which are required to undergo some form of certification process to be designated as such. For example, gas pipeline companies must undergo different types of certification depending on whether they are interstate or intrastate. If interstate, they are subject to the provisions of the Natural Gas Act and must at least obtain a certificate of public convenience and necessity prior to exercising eminent domain. *See* 15 U.S.C. §717f(c) and (h).⁶ If intrastate, gas pipeline companies are subject to the provisions of the Natural Resources and Energy Act of 1973 and must obtain a certificate of transportation from the Office of Conservation in the Department of Natural Resources before being authorized to expropriate private property. La. R.S. 30:554(A)(1)-(2). The issuance of any certificate must be preceded by a public hearing and a determination by the commissioner that “it is or will be in the present or future public interest to do so.” *Id.*⁷ However, if a company has previously been issued a

⁵ These matters are tried by preference and as such do not readily allow for landowners to engage in full discovery, juxtapose timelines, etc.

⁶ “Siting” of a pipeline generally involves approval of the route and location of the pipeline. The siting of interstate natural gas pipelines is overseen by the Federal Energy Regulatory Commission (FERC) through a centralized federal approval process. Alternatively, the siting of interstate crude oil pipelines is dependent upon the approval processes, if any, designated by the states in which the pipeline will cross.

⁷ Because the finding of public purpose and necessity is supposed to be a judicial function, per La. Const. art. I, sec. 4(B)(4), the filing of the certificate is not conclusive on the issue of the right to expropriate the property in question. *See Louisiana Res. Co. v. Greene*, 406 So.2d 1360, 1365 (La. Ct. App.1981), writ denied, 412 So.2d 84 (La.1982). Even where there is front-end assessment prior to exercise of eminent domain such as for gas pipelines, courts in Louisiana have found that the acquisition of a certificate is not sufficient enough to show public purpose and necessity to satisfy the Louisiana Constitution (in other words, this is the floor and Louisiana has required an additional step). *See, e.g., Tenneco v. Harold Stream Investment Trust*, 394 So.2d 744, 748 (La. App. 3d Cir. 2/4/81) (“The filing of a Certificate of Public Convenience and Necessity in an expropriation proceeding is not conclusive on the issue of the right to expropriate the property in question.”).

certificate of transportation by the commission, that certificate continues to remain valid and in force and they would not need to obtain authorization prior to commencing new pipeline projects. *Id.*

In the context of motor carriers, the Louisiana Public Service Commission requires all motor carriers to obtain a common carrier certificate only after submitting a written application, providing public notice, conducting a hearing and finding that the applicant is fit to receive a certificate *before* operating in the state. La. R.S. 45:164(A). To obtain a common carrier certificate, the applicant must prove its fitness before an administrative law judge or hearing officer by showing, among other things, that the applicant is financially able to provide the transportation in a safe and efficient manner, that it has or is capable of acquiring all additional authorizations from regulatory authorities for the transportation purpose and that the applicant has safety protocols to provide for safe and efficient transportation. La. R.S. 45:164(B)(1)-(5).

With regard to intrastate oil pipelines, La. R.S. 45:254 places intrastate oil pipelines under the control of and subject to regulation by the Louisiana Public Service Commission. However, the commission does not have any regulations or rules, comparable to those for motor carriers, requiring oil pipelines to demonstrate their fitness to run pipelines through the state, nor to obtain any kind of certificate of transportation or other authorization prior to exercising eminent domain.

The state regulatory void combines with the federal regulatory gap to create a vacuum when it comes to oil pipelines. For *interstate* oil pipelines, unlike interstate gas pipelines, there is no centralized federal approval process, and no federal agency that certifies interstate oil pipeline companies prior to their exercise of eminent domain and construction of their pipelines – and even those provisions have been heavily criticized as not affording enough due process to protect property rights. *Appalachian Voices, et al. v. FERC*, No. 17-1271, *Corrected Brief Amicus Curiae of Niskanen Ctr In Support of Petitioners* (D.C.Cir. 2018) (On Petition for Review of Orders of the Federal Energy Regulatory Commission, 161 FERC ¶ 61,043 (Oct. 13, 2017) and 163 FERC ¶ 61,197 (June 15, 2018)). *See also*, Ga. Code Ann. §§ 22-3-82(a), 22-3-83 (state transportation agency and environmental agency approval required prior to exercise of eminent domain power); Neb. Rev. Stat. Ann. §§ 57-1101; 57-1405(1) (major oil pipelines must obtain

approval from public utility commission or governor prior to exercising eminent domain); Ia. Code §§ 479B.1; 479B.4; 479B.16 (must acquire permit from Iowa Utilities Board prior to exercising eminent domain).

As a result, there is a complete void in regulation of oil pipeline companies, including the siting of oil pipelines and their exercise of eminent domain in Louisiana. No federal or state agency is tasked with looking at their safety record or conducting any kind of hearing or inquiry into their proposed projects and routes, the potential risks to landowners' properties, surrounding environment and ecosystems prior to their exercise of eminent domain and taking private property for their pipeline in Louisiana. Without some oversight on the front end for the siting of an oil pipeline project, the judicial determination on the back end comes as too little, too late.

On the back end, in those far fewer cases where landowners have chosen to resist such takings, the expedited expropriation proceedings disadvantage landowners and make it difficult for them to fully defend their rights. As an initial matter, the cases are to be tried "by preference" and "conducted with the greatest possible dispatch." La. R.S. 19:8(A)(1). Upon the filing of an expropriation case, the trial court is to set the time of trial for not less than 60 days from the filing of the suit. La. R.S. 19:5(A). However, if a defendant timely files an answer, exception, or other responsive pleading challenging any issue other than compensation, the court is to set the matter for hearing within 30 days after filing of the pleading, and the court must render a decision within 5 days after the case is submitted, though the time periods may be extended for good cause. La. R.S. 19:8(A)(2).

The accelerated pace of these proceedings means defendant landowners are not assured of fully engaging in discovery, with 30-day response times for interrogatories, production of documents, and admissions, or of addressing or resolving discovery disputes, taking depositions, etc. *See generally* La. C.C.P. arts. 1422-1467.

With regard to oil pipelines in particular, the process is completely lacking in oversight on the front end, and the procedures intended to facilitate judicial review of expropriations by private entities come too late in the process. And, given their accelerated treatment, further disadvantage landowners and cannot make up for or offset the early lack of oversight to which most landowners are subjected.

B. The Current Legal Scheme Constitutes a Sweeping and Impermissible Delegation of State Power to Private Entities That Violates the Fifth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution provides that “private property shall not be taken for public use, without just compensation” and that “[n]o person... shall be deprived of life, liberty, or property, without due process of law...” Rooted in the Due Process Clause of the Fifth Amendment, the private non-delegation doctrine holds that when “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.’” *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 708 (5th Cir. 2017). The U.S. Supreme Court has “consistently concluded the delegation of coercive power to private parties can raise [...] due process concerns.” *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 31 (D.C. Cir.2016).

Cases applying the non-delegation doctrine “stand for the proposition that 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.” *Boerschig, supra*, citing *Gen. Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1455 (2d Cir.1991). *See also Ass'n of Am. Railroads, supra* at 32, citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S.Ct. 855, 873, 80 L.Ed. 1160 (1936) (due process “is violated when a self-interested entity is intrusted with the power to regulate the business... of a competitor”).

In *Boerschig*, the court determined that the landowner was not likely to succeed in his challenge to the Texas eminent domain scheme under the private non-delegation doctrine, but the Texas scheme involved a situation where “courts have determined that a corporation operating a gas pipeline has the power of eminent domain if it devotes its private property and resources to public service and allows itself to be publicly regulated.” *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d at 703. For intrastate oil pipelines, the Public Service Commission has failed altogether in its duty regulate petroleum pipelines.⁸

⁸ The Louisiana Public Service Commission (LPSC) has sole jurisdiction for utility regulation at the state level with jurisdiction over all publicly-owned utilities as well as intrastate transportation services including motor carriers and pipelines. The LPSC is by law required to regulate common carriers and public utilities and to adopt and enforce “reasonable rules,

Under the legal and regulatory scheme in Louisiana, oil pipeline companies are given unfettered discretion to decide to build a pipeline, decide on which route it will take, and begin expropriating private property without any certification or oversight by any state agency, for a project that is environmentally hazardous.

These are significant and weighty decisions that can have a substantial and long-term impact on landowners' rights, communities in Louisiana, the environment and ecosystems, made by companies whose economic self-interest is undeniable. BBP is a case in point because it has said as much in separate judicial proceedings, i.e. asserting that it is not a quasi-public corporation owing any duty to the public but 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."⁹

Moreover, as noted above, the entire legal and regulatory regime fails to adequately provide due process as a general matter with respect to all private expropriators, inasmuch as the expropriation procedures do not require any kind of certification or approval before commencing expropriation and the expedited, late-stage judicial proceedings do not align with the discovery time periods, to the disadvantage of landowners. The fact that gas pipelines are regulated and required to obtain certificates of transportation prior to exercising eminent domain is due to the provisions of a separate law; the fact that common carrier motor carriers are required to apply for a certificate and prove their fitness is due to separate regulatory framework. These procedures are incidental too, and not required by, Louisiana's expropriation laws.

Oil and gas pipelines are big, significant projects that can have far-reaching effects, pose serious risks to property, to people, and to the environment. The power of eminent domain for projects like this should not be handed over to companies that have an economic self-interest baked in to the determination as to whether such projects are "necessary"; and if it is, the state

regulations and procedures necessary for the discharge of its duties." La. Const. art. IV, § 21. Despite the LPSC's constitutional mandate to regulate all common carriers, it regulates the siting of neither inter nor intrastate oil pipelines. No federal or state authority oversees the designation of common carrier petroleum pipelines claiming authority to expropriate in Louisiana.

⁹ BBP's Brief in Opposition to Appeal, in *Atchafalaya Basinkeeper, et al, v. Bayou Bridge Pipeline, LLC*, No. 18-CA-0417, La. App. 1 June 21, 2018, annexed hereto as Appendix A.

must require much more of such entities prior to allowing them to exercise such a weighty and important power over the rights of landowners.

C. The Void in Oversight Violates the Rights to Property and Due Process Protected by the Louisiana Constitution.

Article I, sec. 2 of the Louisiana Constitution provides that “[n]o person shall be deprived of life, liberty, or property, except by due process of law.” Article I, sec. 4 provides that “[e]very person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property” and that the “right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.” The right to property and due process were “designed to protect citizens against arbitrary or unauthorized governmental takings.” *Gray v. State Through Dept. of Highways*, App. 3 Cir.1966, 191 So.2d 802, writ refused 250 La. 22, 193 So.2d 529, writ issued 250 La. 27, 193 So.2d 531, affirmed as amended 250 La. 1045, 202 So.2d 24. The constitutional provisions providing that private property shall not be taken except for public purposes and *after* just and adequate compensation is paid were “designed to protect and preserve right of private ownership of property, to prevent the arbitrary taking of private property without prior payment of just compensation by or on behalf of an all powerful government, whether that governing authority be local, state or national.” *Louisiana Power & Light Co. v. Lasseigne*, App. 4 Cir.1969, 220 So.2d 462, writ issued 254 La. 277, 223 So.2d 407, writ issued 254 La. 279, 223 So.2d 407, reversed on other grounds 255 La. 579, 232 So.2d 278.

The situation is even more stark and troubling when it comes to oil pipeline companies. Even an “all powerful government” is deemed accountable to the people and subject to checks and balances. Private oil pipeline companies in Louisiana are not accountable to the people or subject to checks and balances, and they have an economic self-interest built into their decisions about these projects. While intrastate pipelines are ostensibly placed under the control of and subject to regulation by the Louisiana Public Service Commission, pursuant to La. R.S. 45:252, they are theoretically subject to oversight, but the Public Service Commission has completely failed in its duty to regulate such pipelines in this regard.

“Procedural due process” concerns the means or processes used by the State to effect the deprivation of a fundamental right or property interest. *Johnson v. Motiva Enterprises LLC*,

App. 5 Cir.2013, 128 So.3d 483, 13-305 (La. App. 5 Cir. 10/30/13), writ denied 132 So.3d 966, 2013-2791 (La. 2/14/14). Although a state may establish certain statutory procedural safeguards to protect property rights, the safeguards may still be judged insufficient to guard the particular property interest at risk. *Hewitt v. Lafayette City-Par. Consol. Gov't*, 2017-45 (La. App. 3 Cir. 4/4/18, 9), 243 So.3d 79, 86, *reh'g denied* (May 16, 2018), *writ denied*, 2018-0980 (La. 10/8/18).

The current legal and regulatory scheme for oil pipelines in Louisiana does not adequately protect against arbitrary or unauthorized government takings and amounts to a violation of the rights to property and due process of landowners.

III. Landowners' Exceptions to BBP's Petition for Expropriation

As set out above, the landowners contest the constitutionality of the delegation and exercise of the power of eminent domain to private corporations like BBP. Without waiving their affirmative defenses, and if the delegation and exercise of the power is upheld as constitutional by this Court, these landowners filed the following exceptions on September 12, 2018, and incorporate them below.

Expropriation laws and proceedings are in derogation of a common right to own property and must be strictly construed and highly scrutinized; every step in the proceeding must insure that the landowner is at all times afforded protection against the power of the taker. *Texas Gas Transmission Corp. v. Soileau*, 251 So.2d 104, 107 (La. App. 3 Cir. 6/22/71). Expropriation statutes “are to be construed strictly *against* the expropriator and *liberally* for the property owner” because they are in “derogation of the common right to own property.” *Louisiana Interstate Gas Corp. v. Gulf Outlet Lands, Inc.*, 542 So. 2d 705, 706 (La. App. 4 Cir. 1989) (emphasis added) and *Southern Natural Gas Co. v. Poland*, App. 2 Cir.1981, 406 So.2d 657, *writ denied* 412 So.2d 86, *certiorari denied* 103 S.Ct. 75, 459 U.S. 833, 74 L.Ed.2d 73.

A. Peremptory Exception of No Right of Action

Pursuant to La. Code of Civ. Proc. Art. 927(A)(6), landowners assert the peremptory exception of no right of action on the grounds that BBP has claimed in other legal proceedings a status that does not entitle it to the remedy it seeks here. An exception of no right of action determines “whether the plaintiff belongs to the particular class to which the law grants a remedy for the particular harm alleged.” *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 96-1010,

p. 4 (La. App. 1st Cir. 3/27/97), 691 So.2d 751, 754, *writ denied*, 97-1066 (La. 6/13/97), 695 So.2d 982; *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission*, 94-2015, p. 4 (La. 11/30/94), 646 So.2d 885, 888. Article 931 of the Louisiana Code of Civil Procedure permits the introduction of evidence to support or controvert an exception of no right of action.

Common carriers having the power to expropriate private property have long been considered “quasi-public corporations” because they have powers of a “public nature” and “owe a duty to the public.” *State ex rel. Coco v. Riverside Irr. Co.*, 76 So. 216, 218 (1917) (“A quasi public corporation may be said to be a private corporation which has given to it certain powers of a public nature, such, for instance, as the power of eminent domain, in order to enable it to discharge its duties for the public benefit, in which respect it differs from an ordinary private corporation.”). 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 hereto as Exhibit A. As if underscoring this assertion, billionaire CEO Kelcy Warren of Energy Transfer Partners, which owns 60 percent of the BBP venture, has suggested that “running pipelines is easy” and that even “a monkey could make money in this business.”¹⁰

¹⁰ *According to ETP CEO, Running Pipelines Is Easy*, Seeking Alpha, Aug. 5, 2018, available at <https://seekingalpha.com/article/4195083-according-etp-ceo-running-pipelines-easy>.

If taken at its own words, BBP is not a quasi-public corporation common carrier working in the public interest to serve and fulfill a public purpose and necessity, and therefore not a proper party to bring an expropriation suit necessitating that the matter should be dismissed with prejudice.

B. Dilatory Exception of Vagueness and Ambiguity in the Petition

If BBP is allowed to bring this action because the Court finds it to be a common carrier with standing to commence expropriation proceedings, then pursuant to La. Code of Civ. Proc. Art. 926(A)(5), landowners assert the dilatory exception of vagueness or ambiguity in the petition as to the question of the public and necessary purpose of the expropriation sought. The purpose of the exception is to require plaintiff to furnish the nature of the facts to be proved in order to enable a defendant to prepare her defense. *Texas Gas Transmission Corp. v. Soileau*, 251 So.2d 104, 107 (La. App. 3 Cir. 6/22/71) (sustaining an exception of vagueness as to pipeline company's allegations of public and necessary purpose).

Article I, sec. 4(B)(4) of the Louisiana Constitution of 1974 requires that any taking by a private entity be for a public and necessary purpose only, and, further, that "whether the purpose is public and necessary shall be a judicial question." BBP's allegations as to the necessity of the pipeline are simply conclusory statements and so vague and ambiguous as to be meaningless. At paragraph 9 of the petition, BBP simply states that "the Pipeline is in the public interest and necessity." It makes no mention whatsoever of public purpose and provides no factual allegations to support public purpose or necessity even absent the mention. In *Texas Gas Transmission Corp. v. Soileau*, the Third Circuit Court of Appeal held that a landowner's exception of vagueness was properly sustained when the expropriation petition failed to allege why or for what purpose the gas pipeline was to be constructed, why it was necessary for public purposes, the location of gas reserves, where reserves were to be transported, etc., despite the fact that the gas pipeline had obtained and pled the fact of a certificate of public convenience and necessity from the federal regulator. 251 So.2d at 107. Similarly, BBP does not include any allegations as to where the crude oil it will transport originates, where it is ultimately destined, whether it is intended for export or domestic use, nor any other indication of why or how it fulfills a public purpose and is necessary.

The burden of proving the right and necessity of a taking rests with the plaintiff in an expropriation case. *Interstate Oil Pipe Line Company v. Friedman*, 137 So.2d 700 (La. App. 3 Cir. 1962). As the Third Circuit has held, that necessarily means that a “plaintiff’s petition must allege sufficient facts to apprise defendants of all the elements of its claim to allow defendants to properly prepare their defense.” *Texas Gas Transmission Corp*, 251 So.2d at 107. In the face of ever-increasing recognition that pipelines have contributed to damaging the Atchafalaya Basin and to the crisis of coastal erosion in Louisiana, and amid concerns about flooding, land loss, and other forms of environmental degradation, the questions of public necessity and purpose must take into account these concerns.¹¹ Would-be takers must be required to plead and prove why new projects intended to expand infrastructure to *increase* the flow of crude oil through pipelines, especially through sensitive wetlands and terrain, are necessary, in the public interest, and how they serve a public purpose.

As a result of the vagueness and ambiguity in BBP’s pleading as it relates to the public and necessary purpose of its taking, landowners are unable to adequately prepare their defense against the expropriation and the petition must be dismissed.

C. Peremptory Exception of Nonjoinder of Party

“They would have a due process argument, Your Honor. If we did not properly notify them and they showed that we were not diligent in our efforts to contact them, then they would have due process challenge.”

- Counsel for Bayou Bridge,
in Separate Expropriation Proceeding¹²

BBP did not undertake thorough, good faith efforts to identify, locate, and negotiate with all owners of the property and as a result has failed to name indispensable parties.

¹¹ See e.g., Atchafalaya Basin Floodway System Louisiana Project, State Master Plan, U.S. Army Corps of Engineers, 1998, at 3-2 and 6-1 (noting that pipeline construction has contributed to the disruption of waterflow in the Basin); Louisiana’s Comprehensive Master Plan for a Sustainable Coast, 2012, Coastal Protection and Restoration Authority of Louisiana, at 18 (noting the toll that dredging canals for oil and gas pipelines have taken on the landscape, weakening marshes and allowing salt water to spread higher into coastal basins).

¹² *Bayou Bridge Pipeline, LLC v. 250 acres, more or less, in St. Martin Parish, et al.*, 16th JDC, Docket No. 86298, Div. E, Transcript of Proceeding Held on April 30, 2018 before the Hon. Keith Comeaux, at pg. 25, lines 24-29, Lisa M. DeCourt (Official Court Reporter) (discussing the post-judgment remedy for absentee defendants in expropriation action).

The Aaslestads file this peremptory exception because their sister, Karen Aaslestad-Aubouy, who is also a co-owner of this property and who was not named either among the purportedly “absentee defendants” or otherwise as a party to this proceeding.

Defendant Larson Wright also files this peremptory exception she has two nieces, Elizabeth A. Read and Janet Read Gordon, who are daughters of her deceased sister Jo Lyndal Larson Read, and who, upon information and belief, have an interest in the property at issue in this action as well through inheritance. *See* Affidavit of Theda Larson Wright, annexed to Memorandum of Law in Support of Exceptions, filed September 12, 2018, at ¶¶ 11-13.

If this matter is allowed to proceed through to an expropriation judgment, it will unquestionably alter the unnamed owners’ rights. *See Tennessee Gas Transmission Co. v. Derouen*, 239 La. 467, 471 (La. 1960) (reversing and remanding a trial court’s denial of defendant’s exception of lack of indispensable parties). Moreover, “[i]t is elementary that every party who may be affected by a decree must be made a party to a suit, because no one should be condemned without a hearing.” *Id.* at 471-472 citing *Heirs of Burney v. Ludeling*, 41 La. Ann. 627, 6 So. 248, 251 (La. 1889); *Jamison v. Superior Oil Co.*, 220 La. 923, 57 So.2d 896 (La. 1952); *Ashbey v. Ashbey*, 41 La. Ann. 138, 5 So. 546 (La. 1889); *Taylor v. Dunn*, 233 La. 617, 97 So.2d 415 (La. 1957). This is so critical that when “an appellate court notices the absence of indispensable parties to a suit on appeal, the appropriate remedy is to set aside the judgment and remand the matter for joinder of the absent parties and retrial.” *Suire v. Oleum Operating Co.*, 2017-117 (La.App. 3 Cir. 11/2/17, 17), 235 So.3d 1215, 1228–29, *reh’g denied* (Jan. 10, 2018), *writ denied*, 2018-0279 (La. 4/6/18), 239 So.3d 827, *and writ denied*, 2018-0271 (La. 4/6/18), 240 So.3d 184.

The matter should be dismissed and BBP should be required to undertake diligent efforts, following reliable and accepted practices, to locate and negotiate with all landowners, following the statutory requirements prior to initiating suit.

D. Dilatory Exception of Prematurity

Landowners assert the dilatory exception of prematurity on the grounds that i) the company failed to carry out all of the statutory prerequisites with respect to the Aasletads prior to commencing this proceeding; ii) the permits required for the project are still being challenged in

court and it is uncertain whether the pipeline will ultimately obtain them and thus whether this expropriation is necessary.

The function of the dilatory exception of prematurity is to allow a party to raise the issue that a judicial cause of action has not come into existence because some prerequisite condition has not been fulfilled. *Bayou Orthotic & Prosthetics Ctr., L.L.C. v. Morris Bart, L.L.C.*, 17-557 (La. App. 5 Cir. 3/28/18), 243 So.3d 1276. That is precisely the case in this matter in the following ways.

- i. *The company failed to carry out all of the statutory prerequisites with respect to the landowners prior to commencing this proceeding.*

Louisiana law requires that private expropriating authorities follow very clear steps prior to commencing an expropriation proceeding. La. R.S. 19:2.2(A). These procedures are set out at La. R.S. 19:2.2 and require, among other things, that a landowner be provided notice detailing that he/she is entitled to certain information regarding the property to be acquired. *See, e.g.*, La. R.S. 19:2.2(B)(1)-(7). Because expropriation laws and proceedings are in derogation of a common right to own property, they must be strictly construed and highly scrutinized; every step in the proceeding must insure that the landowner is at all times afforded protection against the power of the taker. *Texas Gas Transmission Corp., supra.*

The company skipped several of these important steps with respect to these landowners. *See e.g.* Affidavit of Theda Larson Wright, annexed as Ex. A to her Memorandum of Law in Support of her Exceptions, Sept. 12, 2018 (“Larson Wright Affidavit”). For instance, Larson Wright does not recall ever receiving an appraisal from the company. *Id.* at ¶ 4. The only documents or correspondence Larson Wright recalls receiving from the company were an offer to compensate her in an amount of \$150, copies of Louisiana statutes and a proposed easement agreement, and then the complaint and summons. *Id.*

BBP’s discovery responses confirm Larson Wright’s recollection. A USPS tracking document produced by BBP in response to Larson Wright’s discovery requests, confirms that she never received the appraisal documents from the company. BBP Discovery Response, BBP0001943-1949. The company offered no documentation to indicate that they attempted to deliver that information to her again. Moreover, BBP’s failure to deliver these documents to

Larson Wright was not a result of her being difficult to find or to deliver to as she accepted delivery of and received documents the company sent to her subsequently, including the final offer, and citation and process when BBP initiated this suit. *Id.*

Thus, BBP did not comply with key requirements set out in La. R.S. 19:2.2 when it brought this expropriation proceeding against Larson Wright, including the requirements to provide her with information about the appraisal as required by La. R.S. 19:2.2(A)(1)(a-c), complete copies of any and all appraisals of the subject property previously obtained by the expropriating authority as required by La. R.S. 19:2.2(B)(4), and a statement by the entity of considerations for the proposed route or area to be acquired pursuant to La. R.S. 19:2.2(C)(7).

The company also skipped important steps with respect to the Aaslestads. For instance, the Aaslestads do not recall ever receiving a notice letter from the company in accordance with La. R.S. 19:2.2(B)(1)-(7). In particular, the Aaslestads' final offer letter from the company, which was their last received correspondence with the company, failed to include a statement identifying the website or copies of expropriation statutes relied upon; an offer to provide copies of the expropriation statutes; a statement identifying the agency(ies) responsible for regulating the expropriation authority; or a statement noting that the owner may hire an attorney to negotiate or represent in proceedings. *See* La. R.S. 19:2.2(B)(4)-(7). The company did not produce any documentation in discovery confirming that this notice was sent to them in response to requests for such.

Here, BBP skipped key steps the law requires of a condemnor prior to commencing expropriation proceedings – steps that are intended to be part of the pre-litigation negotiation process and to protect the rights and interests of property owners in possible takings by powerful expropriating entities. Exceptions of prematurity on the grounds that a condemnor failed to negotiate in good faith prior to commencing the lawsuit are waived if not filed at the time that other declinatory and dilatory exceptions are filed. *See Texas Gas Transmission Corp. v. Pierce*, 192 So.2d 561 (La. App. 3 Cir. 12/1/66). An expropriation suit may be dismissed as premature if the condemnor has not first negotiated with and been refused by the landowner. *Id. See also, City of Thibodeaux v. Hillman*, 464 So.2d 370, 372 (La. App. 1st Cir. 1985).

Thus, BBP did not comply with key requirements set out in La. R.S. 19:2.2 when it brought this expropriation proceeding against these landowners and the matter must be dismissed.

- ii. *Permits authorizing the pipeline project for which BBP seeks this expropriation are still being challenged in court and it is possible the permits may be overturned which would nullify its need for the expropriation.*

The expropriation proceeding is premature in light of ongoing court challenges to the permits authorizing construction of the pipeline project across wetlands and within the Coastal Zone. Two trial courts – one federal and one state – have issued rulings calling into question the validity of the permits for the project issued by federal and state agencies.

On May 31, 2017, members of a community impacted by the pipeline project and advocacy organizations petitioned the 23rd Judicial District Court to declare the Louisiana Department of Natural Resources’ (“LDNR”) permit to BBP to be invalid under Coastal Use Guidelines and in violation of its duty as a public trustee. *See Pastor Harry Joseph, Sr., et al. v. Secretary, Louisiana Department of Natural Resources*, 2017-38, 163-E, 23rd JDC, May 31, 2017. On April 30, 2018, Judge Alvin Turner, Jr. issued his Reasons for Judgment ruling in favor of Petitioners and finding that LDNR violated the Coastal Use Guidelines in issuing the permit to BBP to construct its pipeline in the Coastal Zone. *See Reasons for Judgment, Pastor Harry Joseph Sr., et al. v. Secretary, Louisiana Department of Natural Resources*, 2017-38, 163-E, 23rd JDC, April 30, 2018. In particular, the court ordered LDNR to require BBP “to develop effective environmental protection and emergency or contingency plans relative to evacuation in the event of a spill or other disaster . . . PRIOR to the continued issuance of said permit.” *Id.* at 4 (emphasis in original).

On May 15, 2018, the court entered a final Judgment in the matter consistent with its April 30, 2018, ruling in favor of Petitioners and against LDNR and BBP, as intervenor, and remanded the matter back to LDNR for further proceedings consistent with the court’s ruling. *See Judgment, Pastor Harry Joseph Sr., et al. v. Secretary, Louisiana Department of Natural Resources*, 2017-38, 163-E, 23rd JDC, May 15, 2018. However, BBP filed a suspensive appeal and has continued to construct in the Coastal Zone. The matter is pending before the Louisiana Fifth Circuit Court of Appeal.

Additionally, a number of environmental advocacy organizations filed suit on January 11, 2018, in federal district court in the Middle District of Louisiana challenging the federal permit granted by the U.S. Army Corps of Engineers (“the Corps”) to BBP in December 2017 authorizing construction across the Atchafalaya Basin’s wetlands. *See Atchafalaya Basinkeeper, et al. v. U.S. Army Corps of Eng’rs*, No. 3:18-CV-23 (M.D. La. 2018). Plaintiffs successfully petitioned the court to issue a preliminary injunction in the matter enjoining all construction in the Basin pending resolution on the merits of the case, with the court finding a likelihood plaintiffs would prevail on the merits and a preliminary injunction was warranted to prevent irreparable harm. *See Ruling and Order*, filed 02/23/18 in *Atchafalaya Basinkeeper, et al. v. U.S. Army Corps of Eng’rs*, No. 3:18-CV-23 (M.D. La. 2018), 310 F.Supp. 3d 707. However, on appeal, a divided panel on the Fifth Circuit overturned the preliminary injunction and remanded the matter back to the district court for a trial on the merits of the challenge to the permit. *Atchafalaya Basinkeeper v. United States Army Corps of Engineers*, 894 F.3d 692 (5th Cir. 2018). The matter is currently pending before the district court for resolution of the merits of Plaintiffs’ claims that the Corps inappropriately issued the federal permits to BBP in contravention of the Clean Water Act and the National Environmental Policy Act.

The dilatory exception of prematurity “questions whether the cause of action has matured to the point where it is ripe for judicial determination, because an action will be deemed premature when it is brought before the right to enforce it has accrued.” *See Berry v. Volunteers of Am., Inc.*, 08-184 (La. App. 5 Cir. 9/16/08), 996 So.2d 299, 301 (portion of plaintiffs’ suit against parish was subject to dismissal on exception of prematurity where parish had not yet rezoned property, and landowners had not yet applied for a building permit).

Depending on the outcome of these proceedings, the pipeline may ultimately not obtain the permits needed and the company would be unable to traverse key areas in the state, including the Atchafalaya Basin, as well as through the coastal zone where the planned end-point of the pipeline is located in the low-income, minority, industry-saturated community of St. James. Such rulings would render the expropriations sought here unnecessary.

IV. Landowners' Opposition to BBP's Exceptions to Their Reconventional Demands: This Is Not an Inverse Condemnation Case.

As set out above, the landowners contest the constitutionality of the delegation and exercise of the power of eminent domain to private corporations like BBP. If the delegation and exercise of the power is upheld as constitutional by this Court, these landowners have brought counterclaims against the company for violations of due process and the right to property under the United States and Louisiana constitutions, arising out of its trespass and damage to their property resulting from the company's construction of its pipeline without full executable legal rights to do so.

BBP wants to obscure its flagrant trespass and knowingly premature and unlawful construction on the property by casting this as an inverse condemnation proceeding. 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, but which it assumes is a foregone conclusion, though it is vigorously contested by these landowners. But BBP was on notice at a minimum as a result of an injunction proceeding commenced by landowner Peter Aaslestad on July 27, 2018, that it did not have his permission or consent to be on the property. And, as it turned out and as evidenced in its petition for expropriation in this matter – which was filed after Aaslestad's injunction suit – BBP also did not have easement agreements with several hundred other landowners at the time.

Even so, knowing it lacked easement agreements with hundreds of property owners, and in the face of an injunction proceeding, BBP continued to enter onto the property and construct its pipeline, and only agreed to leave the property and not return once Aaslestad moved for an emergency temporary restraining order based on evidence the company was still constructing on the property.

Unfortunately, at that point, the pipeline was already in the ground, as confirmed by BBP's counsel in a telephonic hearing with this Court on October 25, 2018.

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. *See also, Faulk v. Union Pac. Railroad Co.*, (La. 2015) *citing Avenal v. State*, 03-3521 (La. 10/19/04), 886 So.2d 1085, 1103-04, *cert. denied*, 544 U.S. 1049, 125 S.Ct. 2305, 161 L.Ed. 2d 1090 (2005) (inverse condemnation action affords a procedural remedy to a property owner *seeking compensation* for a taking against a government or private entity *with the authority to expropriate* where no expropriation has commenced); *State, Dept. of Transp. and Development v. Chambers Investment Co.*, 595 So.2d 598, 602 (La. 1992).

Landowners vigorously challenge in this proceeding the notion that BBP’s pipeline is for a public purpose and that its counterclaims are essentially inverse condemnation claims. Even if this court ultimately finds that there is a public purpose for the taking, BBP was a bad-faith

trespasser and is liable to landowners in tort beyond the compensation that may be awarded in an inverse condemnation action.

A. Takings and Due Process Claims under the U.S. Constitution

BBP cites to a number of cases brought in *federal* courts involving takings and due process claims against municipal, parish, or state agencies to suggest that landowners' constitutional counterclaims in this matter are preempted and/or premature. However, in those cases, the *federal* courts abstained from adjudicating those cases on the basis that they were unripe, and in order to give deference to *state* procedures, including inverse condemnation actions available under state law. The abstention is prudential in nature and other federal courts have found reason to adjudicate such claims anyway, particularly where state proceedings likely would not fully compensate property owners for the rights violations. *See, e.g., Archbold-Garrett v. New Orleans_City*, 893 F.3d 318 (5th Cir.2018). Indeed, even the cases BBP cites do not suggest otherwise. *See, e.g., Liberty Mut. Ins. Co. v. Louisiana Dep't of Ins.*, 62 F.3d 115, 117 (5th Cir.1995); *Tucker v. Par. of St. Bernard*, CIV.A. 09-8003, 2010 WL 3283093, at *3 (E.D. La. Aug. 17, 2010).

The cases BBP cites to are wholly inapplicable to the constitutional counterclaims in this matter which are brought by the landowners in *state* court, in defense against a state expropriation suit brought against them, utilizing the state procedures available to them and to which the federal courts defer. This court is well-placed to determine whether unlawful takings and violations of due process under the U.S. Constitution have occurred, and to consider those claims alongside the trespass and property damage claims and determine whether the requisites of inverse condemnation proceedings have been met.

B. Takings and Due Process Claims under the Louisiana Constitution

Likewise, BBP's attempt to dismiss landowners' counterclaim for violation of due process under Art. I, sec. 2 of the Louisiana Constitution should be overruled. First, BBP assumes that an expropriation judgment in its favor is a foregone conclusion, which it is not, or should not be, and that all that remains to be determined is the award of compensation.

The upshot of BBP's position is that because landowners brought counterclaims against BBP for violating their rights to due process in taking and damaging their property, BBP cannot

be held accountable for violating their rights to due process in the course of doing so. That is a contorted application of the one case it cites, which does not in any way suggest that expropriating authorities are shielded from liability for violating due process rights of property owners who exercise their right to redress those violations. In *Jamie Land Co., Inc. v. Touchstone*, the plaintiff objected to the Louisiana Tax Commission's cancellation of the sale of its tax deed without notice as a due process violation in an action it brought to quiet title, when the initial sale was an absolute nullity to begin with. 2006-2057 (La. App. 1 Cir. 6/8/07, 8), 965 So.2d 873, 877. The court did not find that Land's due process rights were violated in that context but found that in any event it pursued the remedy available to it. *Id.*

Here, the evidence will show that the landowners were entitled to due process before their property was taken and damaged, and that they were not afforded this process. 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.").

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.

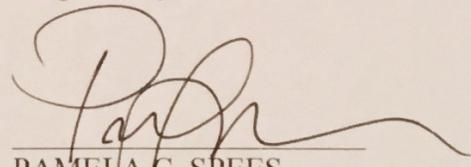
V. CONCLUSION

As set out above, the law and evidence at the hearing on the landowners' affirmative defenses and exceptions, and opposition to BBP's exceptions will demonstrate that:

- 1) The delegation to and exercise of the power of eminent domain by private companies, in particular, oil pipeline companies, violates the Fifth Amendment to the United States Constitution as an impermissible delegation of state power to private entities (Private Non-Delegation Doctrine);
- 2) The delegation to and exercise of the power of eminent domain by private oil companies, and other entities, violates the rights to due process and property in the Louisiana Constitution;
- 3) If the court finds that the delegation of the power of eminent domain to private entities passes constitutional muster, BBP's exceptions of prematurity and peremption to the landowners' constitutional claims must be overruled.
- 4) With regard to the preemptory exception of no right of action filed by landowners, if the court finds that the delegation and exercise of the power of eminent domain to BBP is constitutional, then landowners will show that BBP is not an entity to which the law grants the remedy it seeks;
- 5) Landowners will also show that BBP failed to name indispensable parties to this litigation and their preemptory exception should be sustained; and
- 6) With regard to the dilatory exceptions of prematurity, landowners will show that a) BBP did not complete the mandated procedures at La. R.S. 19:2.2 with respect to landowners, b) BBP did not adequately search for "absentee defendants" prior to bringing this proceeding; and c) BBP is pursuing these expropriations prematurely as permits required for construction of the pipeline in jurisdictional wetlands and the coastal zone are the subject of ongoing litigation.

Date: November 9, 2018

Respectfully submitted,



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ⁱ *The cases surveyed include Tenneco, Inc. v. Harold Stream Inv. Tr.*, 394 So. 2d 744 (La. App. 3 Cir. 1981); *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So. 2d 4 (La. App. 3 Cir. 1977), writ refused, 350 So. 2d 901 (La. 1977); *United Gas Pipe Line Co. v. Blanchard*, 149 So. 2d 615 (La. App. 1 Cir. 1963) writ refused, 244 La. 135, 150 So. 2d 590 (La. 1963) (wherein the landowners were successful in defending against expropriation actions). *But see, Acadian Gas Pipeline Sys. v. Nunley*, 46,648 (La. App. 2 Cir. 11/2/11), 77 So. 3d 457, writ denied, 2011-2680 (La. 2/10/12), 80 So. 3d 487; *ExxonMobil Pipeline Co. v. Union Pac. R. Co.*, 2008-2347 (La. App. 1 Cir. 5/13/09), 15 So. 3d 246, writ granted sub nom. *Exxonmobil Pipeline Co. v. Union Pac. R.R. Co.*, 2009-1629 (La. 10/30/09), 21 So. 3d 269, and rev'd sub nom. *Exxon Mobil Pipeline Co. v. Union Pac. R. Co.*, 2009-1629 (La. 3/16/10), 35 So. 3d 192; *Crooks v. Placid Ref. Co.*, 2005-119 (La. App. 3 Cir. 6/1/05), 903 So. 2d 1154, writ denied, 2005-1756 (La. 1/13/06), 920 So. 2d 242; *Acadian Gas Pipeline Sys. v. Bourgeois*, 04-578 (La. App. 5 Cir. 11/30/04), 890 So. 2d 634, writ denied, 2004-3203 (La. 3/11/05), 896 So. 2d 69; *Concha Chem. Pipeline v. Schwing*, 2001-2093 (La. App. 1 Cir. 9/27/02), 835 So. 2d 543; *Exxon Pipeline Co. v. Hill*, 1999-0073 (La. App. 1 Cir. 6/23/00), 763 So. 2d 144, writ granted, 2000-2535 (La. 11/27/00), 774 So. 2d 986, and rev'd, 2000-2535 (La. 5/15/01), 788 So. 2d 1154; *Exxon Pipeline Co. v. LeBlanc*, 1999-1437 (La. App. 1 Cir. 6/23/00), 763 So. 2d 128, writ denied, 2000-2556 (La. 11/27/00), 775 So. 2d 448; *Coleman v. Chevron Pipe Line Co.*, 94-1773 (La. App. 4 Cir. 4/24/96), 673 So. 2d 291, writ denied, 96-1784 (La. 11/1/96), 681 So. 2d 1259; *Trans Louisiana Gas Co. v. Heard*, 629 So. 2d 500 (La. App. 3 Cir. 1993); *Grady Roper Drilling Contractor v. Transcon. Gas Pipeline Co.*, 586 So. 2d 707 (La. App. 3 Cir. 1991), writ denied, 590 So. 2d 592 (La. 1992); *ANR Pipeline Co. v. Succession of Bailey*, 558 So. 2d 689 (La. App. 1 Cir. 1990); *Louisiana Intrastate Gas Corp. v. Gulf Outlet Lands, Inc.*, 542 So. 2d 705 (La. App. 4 Cir. 1989); *Campbell v. Louisiana Intrastate Gas Corp.*, 528 So. 2d 626 (La. App. 2 Cir. 1988); *Faustina Pipe Line Co. v. Romero*, 499 So. 2d 1009 (La. App. 3 Cir. 1986); *Louisiana Intrastate Gas Corp. v. Olinde*, 489 So. 2d 1075 (La. App. 1 Cir. 1986); *Michigan Wisconsin Pipeline Co. v. Hebert*, 488 So. 2d 754 (La. App. 3 Cir. 1986), writ denied sub nom. *Michigan Wisconsin Pipe Line Co. v. Hebert*, 493 So. 2d 636 (La. 1986); *Faustina Pipe Line Co. v. Hebert*, 469 So. 2d 483 (La. App. 3 Cir. 1985); *Faustina Pipe Line Co. v. Levert-St. John, Inc.*, 463 So. 2d 964 (La. App. 3 Cir. 1985), writ denied, 466 So. 2d 1301 (La. 1985); *Faustina Pipe Line Co. v. Bernard*, 458 So. 2d 981 (La. App. 3 Cir. 1984), writ denied, 462 So. 2d 1249 (La. 1985); *Shell Pipe Line Corp. v. Sarver*, 442 So. 2d 884 (La. App. 3 Cir. 1983), writ denied, 446 So. 2d 319 (La. 1984); *Transcon. Gas Pipe Line Corp. v. Terrell*, 416 So. 2d 571 (La. App. 1 Cir. 1982), writ denied, 421 So. 2d 249 (La. 1982); *Trunkline Gas Co. v. Bell*, 413 So. 2d 346 (La. App. 3 Cir. 1982); *United Gas Pipe Line Co. v. Becnel*, 417 So. 2d 1198 (La. App. 4 Cir. 1982), writ denied, 421 So. 2d 1124 (La. 1982); *Louisiana Res. Co. v. Greene*, 406 So. 2d 1360 (La. App. 3 Cir. 1981), writ denied, 412 So. 2d 84 (La. 1982); *S. Nat. Gas Co. v. Poland*, 406 So. 2d 657 (La. App. 2 Cir. 1981), writ denied, 412 So. 2d 86 (La. 1982); *Columbia Gulf Transmission Co. v. Rosteet*, 389 So. 2d 778 (La. App. 3 Cir. 1980), writ denied, 394 So. 2d 617 (La. 1980); *Louisiana Res. Co. v. Langlinsais*, 383 So. 2d 1356 (La. App. 3 Cir. 1980); *Louisiana Gas Purchasing Corp. v. Sincox*, 368 So. 2d 816 (La. App. 2 Cir. 1979); *Marathon Pipe Line Co. v. Pitcher*, 361 So. 2d 314 (La. App. 1 Cir. 1978), writ granted sub nom. *Marathon Pipeline Co. v. Pitcher*, 362 So. 2d 787 (La. 1978), and rev'd, 368 So. 2d 994 (La. 1979); *Louisiana Intrastate Gas Corp. v. Edwards*, 343 So. 2d 1166 (La. App. 3 Cir. 1977), writ denied, 345 So. 2d 904 (La. 1977); *Louisiana Intrastate Gas Corp. v. McIntire*, 349 So. 2d 1331 (La. App. 1 Cir. 1977); *Louisiana Res. Co. v. Stream*, 351 So. 2d 517 (La. App. 3 Cir. 1977), writ granted sub nom. *Louisiana Res. Co. v. Stream.*, 353 So. 2d 1047 (La. 1978), and writ recalled sub nom. *Louisiana Res. Co. v.*

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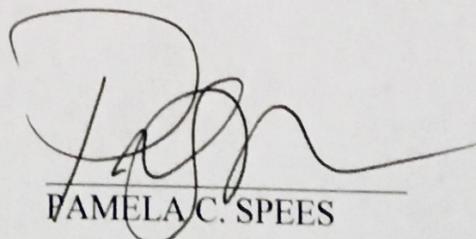
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