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## Regulation, Application, Expropriation, Oh My! Exploring Louisiana Pipeline Expropriation Law and the Reforms Needed to Fully Protect Property Owners' Rights

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# **Regulation, Application, Expropriation, Oh My! Exploring Louisiana Pipeline Expropriation Law and the Reforms Needed to Fully Protect Property Owners' Rights**

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## INTRODUCTION

Oil is an everyday part of American life, but puzzlingly, the colossal network of pipelines used for its transport is not. The United States hosts the largest network of energy pipelines in the world with over 2.4 million miles of pipe. However, that network is largely unseen, as much of it is

buried beneath the ground.<sup>1</sup> This extensive network is necessary because Louisiana's per capita energy consumption ranks among the highest in the nation, second only to Texas.<sup>2</sup> Additionally, Louisiana is among the top three states receiving crude oil, which is imported into several ports daily. One of these ports is the Louisiana Offshore Oil Port (LOOP), the nation's first and only deep-water oil port.<sup>3</sup> The LOOP receives between one and two million barrels per day and is the single largest point of entry for waterborne crude oil shipped into the United States.<sup>4</sup>

While Louisiana is home to two of the four storage sites that make up the U.S. Strategic Petroleum Reserve,<sup>5</sup> most of Louisiana's refined petroleum products flow out of the state.<sup>6</sup> One of the nation's largest refined petroleum product pipelines, the 3,100-mile Plantation Pipeline Network (PPN), begins near Baton Rouge, Louisiana, transports products through several southern states, and ultimately ends near Washington, D.C., servicing several metropolitan areas and airports along the way.<sup>7</sup> The PPN supplies most of the South with motor gasoline, jet fuel, diesel, and biodiesel.<sup>8</sup> The Plantation Pipe Line Company (PPL), operated by Kinder Morgan,<sup>9</sup> holds easements, or written agreements, with landowners that allow them to operate and maintain the pipelines through the owner's private property.<sup>10</sup> The process by which Kinder Morgan, a private

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1. *Where are Liquids Pipelines Located?*, PIPELINE 101, <https://www.pipeline101.org/where-are-pipelines-located> [<https://perma.cc/GEB6-RLJ8>] (last visited July 13, 2019).

2. *Louisiana State Energy Profile: Overview*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/print.php?sid=LA> [<https://perma.cc/9ST7-8YRE>] (last updated Feb. 15, 2018).

3. *Louisiana State Energy Profile: Petroleum*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/print.php?sid=LA> [<https://perma.cc/LDY8-VLEM>] (last updated Feb. 15, 2018).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Kinder Morgan is one of the largest energy infrastructure companies in North America. It owns an interest in or operate approximately 84,000 miles of pipelines and 157 terminals and have approximately 11,000 employees. *About Us, Corporate Profile*, KINDER MORGAN, [https://www.kindermorgan.com/pages/about\\_us](https://www.kindermorgan.com/pages/about_us) [<https://perma.cc/7YG7-SM4Y>] (last visited July 20, 2019).

10. *Products Pipelines: Right of Way*, KINDER MORGAN, [https://www.kindermorgan.com/pages/business/products\\_pipelines/plantation\\_rightofway.aspx](https://www.kindermorgan.com/pages/business/products_pipelines/plantation_rightofway.aspx) [<https://perma.cc/6RG3-7EL6>] (last visited July 20, 2019).

company, and other energy infrastructure companies, garnered these agreements with private landowners is called expropriation.

Before the Louisiana Supreme Court's decision in *ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*,<sup>11</sup> state law required that an expropriating authority prove that the expropriation of property was both needed and necessary.<sup>12</sup> This means that a necessary and public purpose warranted the expropriation and that the taken land was actually needed to serve that purpose. As the law now stands, all that the expropriator, or the company intending to expropriate land, must prove is a public and necessary purpose for the expropriation by a preponderance of the evidence.<sup>13</sup> The necessity of the land taken for the expropriation itself, both the location and extent, is within the discretion of the pipeline company.

Once an expropriation is approved, in order to fight the expropriation, a landowner must prove either that the expropriation does not serve a public purpose, that it is not necessary, or that the pipeline company abused its discretion by acting in bad faith.<sup>14</sup> This shifts the responsibility for ensuring that an expropriating authority acts in accordance with the law onto the landowner, instead of the pipeline company. That burden shift is not in line with the legislative intent inherent in the language of Louisiana Revised Statutes section 19:2(8) and Louisiana Revised Statutes section 45:254.<sup>15</sup> Instead, the burden should be on the pipeline company, through a preliminary permitting process, to show three things: (1) a public and necessary purpose for the expropriation; (2) the proposed property—both location and extent—is both necessary and needed; and also that (3) the addition of a pipeline would not unduly harm Louisiana's environment or existing pipeline system.

Part I of this Comment addresses the history, statutory authorization, and procedure for expropriating property. Part I also addresses the property owner's rights and remedies. Part II discusses the prominent issues in expropriation case law: what constitutes a public and necessary purpose; how necessity as to land and location is determined and regulated; and the shifting burden of proof for both the landowner and the expropriating authority. Part III analyzes other states' laws governing

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11. *ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So. 3d 192, 203 (La. 2010) (Knoll, J., dissenting).

12. *See id.*

13. *Id.*

14. *Id.*

15. *See id.* "By the clear and unambiguous language of this statutory law the property to be expropriated must be both needed and necessary, and the party upon whom the burden to establish both the need and necessity of the property should logically be the expropriator."

expropriation, the requirements they place on expropriating authorities and common carriers, and the reforms they have made. Finally, Part IV proposes a framework to better balance expropriations for public use and the deprivation of property owners' constitutional right to property in the future. This Comment suggests a solution similar to Georgia's statutory framework to determine whether an expropriation, and the intended property to be taken, serve a public, necessary purpose, without undue delay, and ensure that landowners' liberty interests at stake are properly protected.

## I. BACKGROUND

In the United States, the right to own, maintain, and control one's own private property is a fundamental one.<sup>16</sup> Therefore, both federal and state constitutional provisions provide the basic framework for the legal structure relevant to this Comment. The Fifth Amendment of the United States Constitution, which is made applicable to the states through the Fourteenth Amendment, provides that “[n]o person shall be deprived of life, liberty, or property without due process; nor shall private property be taken or public use without just compensation.”<sup>17</sup> The legal confines that once theoretically protected landowners from unconstitutional takings have been broadened as the definition of what qualifies as a “public use” has expanded, allowing pipeline companies more freedom when expropriating private property.<sup>18</sup>

There are two standards generally used by district courts for determining what qualifies as a public use: the “use by the public” test, which is a narrower view, and the “public benefit” test, which is more broad.<sup>19</sup> The “use by the public” test defines public use as any legitimate public purpose or public advantage, such as public ownership or access.<sup>20</sup> “Public benefit” includes things such as redistributing concentrated land and promoting economic development.<sup>21</sup>

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16. U.S. CONST. amend. V.

17. See *St. Bernard Port, Harbor, & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 239 So. 3d 243, 250 (La. 2018) (quoting U.S. CONST. amend. V).

18. Natalie Jensen, *Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation*, 29 FORDHAM ENVTL. L. REV. 320, 325 (2017).

19. Cavarrio Carter, *System Check: Balancing Texas's Need for Natural Resources Exploration with Texas Landowner Rights in Light of Texas Rice Land Partners v. Denbury Green Pipeline-Texas*, 2 LSU J. ENERGY L. & RESOURCES 309, 311 (2014) (citing 2A-7 NICHOLS ON EMINENT DOMAIN § 7:02[2]-[3]).

20. *Id.*

21. *Id.*

The United States Supreme Court extends great deference to state courts and legislatures regarding public use.<sup>22</sup> Long ago, the Court rejected any literal requirement that condemned property be put into use for the general public, providing that “[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.”<sup>23</sup> Under the current law, “a taking satisfies the constitutional public use requirement if it advances a ‘conceivable public purpose,’ regardless of whether it succeeds in realizing that purpose.”<sup>24</sup>

Article 1, Section 4 of the Louisiana Constitution provides that every person has the right to acquire, own, use, control, and dispose of property that shall not be taken or damaged except for public purposes and with just compensation.<sup>25</sup> Therefore, any expropriation, or taking of private land for public use, must be for a public purpose and upon just compensation.<sup>26</sup> Louisiana citizens, through ratifying constitutional provisions, have indicated their interest in limiting the situations in which private property can be expropriated, requiring not just a public purpose, but a “public *and* necessary purpose.”<sup>27</sup>

The Louisiana Constitution defines public purpose similarly to the “public use test,” as either a general public right to a definite use of the property or continuous public ownership of the property dedicated to one or more of the enumerated uses, one of which is public utilities for the benefit of the public generally.<sup>28</sup> In 2006, after the Supreme Court’s decision in *Kelo v. City of New London*,<sup>29</sup> Louisiana amended state constitutional takings provisions, limiting the definition of public purpose. This limited definition stated that neither economic development, enhancement of tax revenue, nor any incidental public benefit shall be

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22. 13 POWELL ON REAL PROPERTY § 79F.03, at 6 (Michael Allan Wolf ed., 2000).

23. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (citing *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923)).

24. 13 POWELL ON REAL PROPERTY § 79F.03, at 8 (Michael Allan Wood ed., 2000) (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42 (1984)).

25. LA. CONST. art. 1, § 4(B)(1).

26. *St. Bernard Port, Harbor, & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 239 So. 3d 243, 250 (La. 2018).

27. *See id.* at 255–56 (Weimer, J., dissenting) (citing LA. CONST. art. 1, § 4 (B) (1974)) (emphasis added).

28. LA. CONST. art. 1 § 4 (B)(2)(v).

29. 545 U.S. 469 (2005).

considered when determining whether the taking or damaging of private property serves a public purpose.<sup>30</sup>

### A. *The Process of Expropriating Private Land in Louisiana*

The term expropriation originally denoted a voluntary surrender of rights or claims.<sup>31</sup> In that sense, it was the opposite of appropriation, which denotes selecting, devoting, or setting apart land for a particular purpose.<sup>32</sup> However, over time, the meaning of expropriation has shifted, imported from its use in foreign jurisprudence. This means that expropriation is no longer a voluntary surrender, but rather is synonymous with the exercise of the power of eminent domain.<sup>33</sup> Eminent domain is defined as “the inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking.”<sup>34</sup>

In Louisiana, the state power to expropriate is extended, through legislation, to companies who serve a public purpose, including those who are defined as “common carriers.”<sup>35</sup> In order to expropriate property, a pipeline company must qualify as a common carrier. A common carrier is defined in this context as “all pipeline entities through which petroleum is conveyed from one point in the state to another.”<sup>36</sup> To register as a common carrier, a pipeline company must file an application with the Louisiana Public Service Commission. It must include information about the carrier’s name, its organizational structure identifying ownership of the pipeline system, the pipeline system name, the pipeline system map, and the regulatory contact information.<sup>37</sup> This application must also include information regarding the party responsible for maintaining the carrier’s

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30. 13 POWELL ON REAL PROPERTY § 79F.03, 30 (citing LA. CONST. art. 1 § 4 (B)(3)).

31. *Expropriation*, LAW DICTIONARY, <https://thelawdictionary.org/expropriation/> [<https://perma.cc/44ZS-N4NJ>] (last visited July 13, 2019).

32. *Appropriation*, LAW DICTIONARY, <https://thelawdictionary.org/appropriation-of-land/> [<https://perma.cc/QD4C-KZ98>] (last visited July 13, 2019).

33. *Eminent Domain*, LAW DICTIONARY, <https://thelawdictionary.org/expropriation/> [<https://perma.cc/V9G8-7QVJ>] (last visited July 13, 2019).

34. Amanda Buffington Niles, *Eminent Domain and Pipelines in Texas: It’s as Easy as 1, 2, 3 – Common Carriers, Gas Utilities, and Gas Corporations*, 16 TEX. WESLEYAN L. REV. 271, 274 (2010) (citing *Eminent Domain*, BLACK’S LAW DICTIONARY (3d pocket ed. 2006)).

35. LA. REV. STAT. § 45:251 (2018).

36. *Id.* § 45:252.

37. LA. PUB. SERV. COMM’N., GEN. ORDER R-33390, RULES APPLICABLE TO COMMON CARRIER PETROLEUM PIPELINES (Mar. 9, 2015), § 1.

compliance with Commission orders, a statement of rates, rules affecting the jurisdictional transportation rates or services provided, the effective date of the tariff, and the type(s) of commodities being transported through the pipeline.<sup>38</sup> Finally, they must pay a \$200 registration fee.<sup>39</sup> Once a pipeline company has been registered and approved as a common carrier, they have the power to expropriate land, either through a settlement with a landowner or an expropriation proceeding.

Before filing an expropriation suit, an entity with the authority to expropriate must attempt, in good faith, to reach a settlement with the property owner.<sup>40</sup> This includes, but is not limited to, providing the owner of the property with an appraisal of the property to be taken, an offer of compensation for a specified amount, and a letter detailing the basis on which the expropriating authority exercises its power, including the purpose, terms, and conditions of the acquisition.<sup>41</sup> If a settlement cannot be reached or if the owner is unknown, the expropriating authority may file a petition to expropriate in the parish where the property is located, detailing the purposes of the expropriation, describing the necessity of the property and the proposed improvements, and listing the owner's name, if known.<sup>42</sup> Lastly, the petition must include a request that the property be adjudicated to the expropriating authority and the owner paid just compensation.<sup>43</sup>

At trial, the pipeline company must prove: (1) they are authorized to expropriate private property; (2) the property will be used for a public purpose; (3) it is necessary that the property be expropriated; and (4) demonstrate the amount the pipeline company will pay the landowner, including the value of the property taken, the decrease—if any—in the value of the remaining property, and compensation for any other damages.<sup>44</sup>

### *B. Louisiana Landowner's Rights and Remedies*

Some landowners acquiesce to an expropriation in order to receive compensation for land they may not otherwise be able to sell, especially if

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38. *Id.* at § 3(A).

39. *Id.* at § 9.

40. LA. REV. STAT. § 19:2.

41. *Id.* § 19:2.2.

42. *Id.* § 19:2.1.

43. *Id.*

44. Gerald F. Slattery, Jr., *Pipeline Right of Way Expansion in Louisiana*, 6 LSU J. ENERGY L. & RESOURCES 93, 104 (2017) (citing LA. REV. STAT. § 19:2.2 (2017)).

the land is not fit for residential use or is too close to existing pipelines pathways. However, if a landowner wishes to fight an expropriation of their land, must either show: (1) that the entity attempting to expropriate does not have the authority to do so; (2) the pipeline company did not engage in good faith pre-suit negotiations; or (3) that the expropriating authority acted arbitrarily, capriciously, or otherwise in bad faith.<sup>45</sup> It is not required that negotiations be concluded or that the initial offer made for the property be increased. However, an expropriation suit may be dismissed as premature if the expropriator has not first, in good faith, negotiated with and been refused by the landowner.<sup>46</sup>

Occasionally, a situation occurs where a pipeline company has already taken possession of privately-owned property without consent, and in those cases, landowners may sue to have the company evicted and receive compensatory damages.<sup>47</sup> However, the St. Julien Doctrine, a jurisprudential rule now codified as Louisiana Revised Statutes section 19:14, is implicated when a landowner observes construction occurring, allows the construction to continue by verbally or implicitly consenting, and then later attempts to sue for damages in addition to the property value because the property was never officially expropriated. The St. Julien Doctrine provides that an expropriating authority may acquire a servitude over the land of another without expropriation if the landowner consents or acquiesces in the pipeline's construction<sup>48</sup> or other construction activities conducted on the land by the expropriating authority.

In *St. Julien v. Morgan L. & T.R. Co.*,<sup>49</sup> the case from which the doctrine arose, the plaintiff's father granted a right of way to a railroad company who began construction on the property and then became insolvent.<sup>50</sup> The defendant then acquired the property and the plaintiff allowed them to continue the previous construction after becoming the owner of the land.<sup>51</sup> Later, the plaintiff brought suit seeking recognition of his ownership of the land and requesting rent for the land used.<sup>52</sup> The court held that because the plaintiff permitted the use of his land, he could not

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45. *Red River Waterway Comm'n v. Fredericks*, 566 So. 2d 79, 83 (La. 1990).

46. *Dixie Pipeline Co. v. Barry*, 227 So. 2d 1, 7 (La. Ct. App. 3d Cir. 1969).

47. *Crooks v. Placid Ref. Co.*, 903 So. 2d 1154, 1162 (La. Ct. App. 3d Cir. 2005).

48. Sarah Savoia Vance, *Property – Expropriation – Demise and Resurrection of the St. Julien Doctrine*, 51 TUL. L. REV. 375, 375 (1977).

49. 35 La. Ann. 924 (1883).

50. *Id.* at 925.

51. *Id.*

52. *Id.* at 926.

later reclaim it free from the servitude he permitted,<sup>53</sup> nor could he treat the railroad as a tenant or demand damages for trespass.<sup>54</sup> The plaintiff's remedies were limited to a claim for the value of the land used and severance damages.<sup>55</sup>

Essentially, the St. Julien Doctrine is an exception to statutory expropriation procedures, allowing the creation of servitudes by estoppel<sup>56</sup> or "unopposed use and occupancy" by a corporation with the power of expropriation.<sup>57</sup> This is because when a landowner consents or acquiesces to the pipeline construction, it is presumed that he waived his right to receive just compensation *prior* to the taking. The landowner is then only entitled to bring an action to determine whether the taking was for a public and necessary purpose and to determine just compensation as of the time of the taking of the property.<sup>58</sup> The action proceeds as if the expropriating authority had filed a petition for expropriation prior to construction as required.<sup>59</sup> However, if the landowner does not give consent and appropriately contests the construction as it occurs, the St. Julien Doctrine does not apply, and the landowner may sue for damages from trespass.<sup>60</sup>

In *Bourgeois v. Louisiana State Gas Corp.*, the court found that the plaintiff did not consent to the pipeline construction where he both verbally and physically attempted to stop the defendants.<sup>61</sup> In *Bourgeois*, Louisiana State Gas Corporation and the Department of Transportation and Development attempted to build a pipeline on a highway right of way after *Bourgeois*, the landowner, told them they were on his private property and tried to block their trucks from entering to begin construction.<sup>62</sup> However, the pipeline was constructed against the landowner's wishes and the pipeline company argued that *Bourgeois* did not adequately contest the construction.<sup>63</sup> The court found that he did not consent and therefore was owed damages for trespass because the St.

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53. *Id.*

54. *Id.*

55. *Id.*

56. Vance, *supra* note 48.

57. Lake, Inc. v. La. Power & Light Co., 330 So. 2d 914, 915 (La. 1976).

58. LA. REV. STAT. § 19:14(B) (2018).

59. *Id.*

60. *Bourgeois v. La. State Gas Corp.*, 836 So. 2d 693 (La. Ct. App. 5th Cir. 2003), *writ denied*, 843 So. 2d 407 (La. 2003).

61. *Id.* at 696.

62. *Id.* at 694.

63. *Id.*

Julien doctrine did not apply, holding that consent is a prerequisite for the doctrine.<sup>64</sup>

Two years after *Bourgeois* was decided, in *Crooks v. Placid Ref. Co.*, the court again focused on consent as a prerequisite to the application of the St. Julien doctrine, stating that absent consent or acquiescence, proof of a public benefit would not be enough to defeat an action for trespass.<sup>65</sup> Additionally, the court provided that the public has no interest in a completed public improvement, which should cause the rights of the landowner to be disregarded.<sup>66</sup> As such, the court in *Crooks* articulated the principle that while expropriating property for a public and necessary purpose may be beneficial to the public, no public benefit is gained if private entities are allowed to take a landowner's property without sufficient process, highlighting the need for adequate protection for landowners against unnecessary or improper takings.

## II. THE MAJOR ADJUDICATED ISSUES IN LOUISIANA EXPROPRIATION CASE LAW

In the struggle to balance the need to protect landowners' rights and the interests of pipeline companies in expropriating property, many legal issues have arisen. The major issues adjudicated in Louisiana expropriation cases are: what qualifies as a necessary and public purpose, how need is interpreted and decided, and what constitutes bad faith. Pursuant to constitutional provisions, the question of whether the purpose of the expropriation is public and necessary should be left up to a judicial determination.<sup>67</sup> Once the purpose of the expropriation is determined to be both public and necessary, determining the necessity of the land taken for the proposed expropriation, meaning both the extent and location, is within the discretion of the pipeline company. Unless the landowner fighting the expropriation can show that the pipeline company acted in bad faith in some way, that discretion is not regulated. This places a large burden on the landowner fighting expropriation to show bad faith or abuse of discretion. Otherwise, the pipeline's company's determination of necessity will not be disturbed by the courts.

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64. *Id.* at 696.

65. *Crooks v. Placid Ref. Co.*, 903 So. 2d 1154, 1158 (La. Ct. App. 3d Cir. 2005).

66. *Id.* (citing MILLS ON EMINENT DOMAIN § 140).

67. LA. CONST. art. 1 § 4(B)(4).

*A. Public and Necessary Purpose*

In order to expropriate land, a public and necessary purpose is required. However, Louisiana courts have struggled to define the threshold for what qualifies a public and necessary enough purpose to permit expropriation. In *Louisiana Resources Co. v. Greene*, the Louisiana Third Circuit Court of Appeal held that the public does not need to be supplied gas directly from the pipeline for which expropriation is sought to qualify as a public purpose,<sup>68</sup> rather, by merely placing natural gas into the stream of commerce, the pipeline is serving a public purpose.<sup>69</sup> In *Greene*, appellant landowners argued that Louisiana Resources Company (LRC) failed to show a necessary and public purpose because the pipeline was merely selling gas to gas transmission companies in parishes outside of the expropriation area.<sup>70</sup> The court found that many parish public utilities received the oil and distributed it to private individuals, in addition to private industries.<sup>71</sup> The court provided that “[s]upplying natural gas to either private individuals through public utilities or directly to private industries is a sufficient public purpose for expropriation, regardless of how far removed the consumers are from the area of expropriation.”<sup>72</sup> The court’s reasoning seems to allow a much more attenuated connection to the public than is envisioned in Louisiana’s expropriation provisions, which specifically prohibit “any incidental benefit to the public [from being considered] in determining whether the taking or damaging of property is for a public purpose.”<sup>73</sup>

In *ExxonMobil Pipeline Co. v. Union Pacific R.R. Co.*, Exxon sought to expropriate land from Union Pacific’s property to place two private, restricted-access, at-grade crossings over Union Pacific’s tracks in order to complete a road that would aid in accessing, inspecting, and maintaining one of Exxon’s valves.<sup>74</sup> While federal regulations require bi-yearly inspections with a mechanical inspection every five years, and Exxon’s internal regulations require monthly inspections, employees of Exxon performed the requisite monthly and bi-yearly inspections by merely

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68. *La. Res. Co. v. Greene*, 406 So. 2d 1360, 1364 (La. Ct. App. 3d Cir. 1981), *writ denied*, 412 So. 2d 84 (La. 1982).

69. *Id.*

70. *Id.* at 1363.

71. *Id.*

72. *Id.* at 1364.

73. LA. CONST. art 1, § 4 (B)(3).

74. *ExxonMobil Pipeline Co. v. Union Pac. R.R.*, 35 So. 3d 192, 193 (La. 2010).

walking to the site with hand tools.<sup>75</sup> Although the inspection mandated every five years would require additional, heavy equipment, the district court found that Exxon had met this obligation for the last twenty-eight years, using heavy machinery or equipment equivalent or greater in weight than what would be needed, without the additional roadway for which they sued to expropriate land.<sup>76</sup>

The appellate court affirmed the district court's finding that ExxonMobil failed to show a public purpose because the right of the public to use the servitude was prohibited by Exxon itself. The court noted that there must be a general public right to a definite use of the property in order to show public purpose.<sup>77</sup> Additionally, because the employees were able to perform the mandatory inspections without the use of the proposed road, the necessity of the expropriation was not shown.<sup>78</sup> However, the Supreme Court of Louisiana reversed the lower courts, concluding that complying with federal inspection regulations satisfied the necessity requirement. The Court allowed Exxon to expropriate land including the railroad crossing, reasoning that "[a]ny allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose."<sup>79</sup> Therefore, the Court determined Exxon's expropriation satisfied both a necessary and public purpose.

In the past, the burden of proving necessity of the purpose required to expropriate was much higher. *United Gas Pipe Line Co. v. Blanchard* exemplifies that higher burden. In that case, the pipeline company attempting to expropriate had only one committed customer and one prospective customer.<sup>80</sup> There was already a pipeline in the area that was fully capable of serving everyone, meaning that another pipeline was unnecessary.<sup>81</sup> There were also no witnesses from other possible customers showing contracts underway with United Gas or a need for another pipeline.<sup>82</sup> The court found that "it was merely stated that the purpose of the line was for public use without clarifying or elaborating upon what the use was, and without in any way showing there would be

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75. *Id.* at 204.

76. *Id.* at 193.

77. *Id.* at 195.

78. *Id.* at 204 (Knoll, J., dissenting).

79. *Id.* at 199 (quoting *Town of Vidalia v. Unopened Succession of Ruffin*, 663 So. 2d 315, 319 (La. Ct. App. 3d Cir. 1995)).

80. *United Gas Pipe Line Co. v. Blanchard*, 149 So. 2d 615, 620 (La. Ct. App. 1st Cir. 1963).

81. *Id.*

82. *Id.* at 621.

any other use for the line than to serve the two plants.”<sup>83</sup> Therefore, the court did not allow United Gas Pipe Line Company to expropriate the private land because, while the pipeline may have served a public purpose by transporting oil to customers, it was not necessary since that area was already being served.<sup>84</sup>

### *B. Necessity as to Extent and Location*

While the necessity of a proposed taking is part of the pipeline company’s burden of proof at trial, it is not a heavy burden, because the necessity required at trial relates only to the *purpose* of the expropriation, not the specific location.<sup>85</sup> After a judicial determination of an adequate public and necessary purpose for an expropriation, Louisiana courts defer to decisions made by the pipeline company about the extent and location of the property needed to serve the expropriation’s purpose and will not disturb those determinations unless made in bad faith.<sup>86</sup> Although the amount of land taken must be “reasonably necessary” for the purpose of the expropriation, it is not required to show actual, immediate, or impending necessity of the land taken for the expropriation.<sup>87</sup> This makes it extremely difficult for landowners to contest the determinations of necessity made by pipeline companies.

*Faustina Pipe Line Co. v. Levert-St. John, Inc.*<sup>88</sup> illustrates the difficulties a landowner faces in trying to challenge the necessity of the actual land taken. The landowner in *Faustina* argued that although the pipeline was to be built for a public and necessary purpose, *Faustina* did not show necessity in the pipeline’s projected route. Because of this, the landowner proposed another option that would not infringe on their land.<sup>89</sup> The court found the testimony from Delancy, who surveyed, mapped, and selected the proposed route, proved that a different route would have been overly difficult and would upset too many surrounding areas.<sup>90</sup> The court stated that, included in the necessity test are determinations of location,

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83. *Id.* at 620.

84. *Id.*

85. Slattery, *supra* note 44, at 107 (quoting *Coleman v. Chevron Pipeline Co.*, 673 So. 2d 291, 296–97 (La. Ct. App. 4th Cir. 1996)).

86. *Id.*

87. *Coleman v. Chevron Pipeline Co.*, 673 So. 2d 291, 297 (La. Ct. App. 4th Cir. 1996) (citing *City of New Orleans v. Moeglich*, 126 So. 675, 677 (La. 1930)).

88. *Faustina Pipe Line Co. v. Levert-St. John, Inc.*, 463 So. 2d 964 (La. Ct. App. 3d Cir. 1985).

89. *Id.* at 968.

90. *Id.*

depth, and size of the permanent right of way,<sup>91</sup> and “[e]vidence that another route is feasible is not sufficient to show that the grantee’s selection constitutes bad faith, oppression, or abuse of power.”<sup>92</sup> Thus, while the court does not ordinarily disturb a pipeline company’s discretionary selection of the amount of land needed and the actual location of the land expropriated, arguably, if a landowner can show the pipeline company acted in bad faith when they exercised their discretion, the court can interfere.

### *C. Bad Faith and Abuse of Discretion*

In order to fight an expropriation of their land, a landowner must show that either the purpose of the expropriation is not both public and necessary or that the pipeline company abused its discretion. A landowner may show “abuse of discretion by showing the expropriator acted in bad faith, without adequate determining principles or without reason, or by demonstrating that the [pipeline company] acted without *considering* and weighing the relevant criteria, including the availability of alternate routes, cost, environmental factors, long-range area planning, and safety considerations.”<sup>93</sup> Otherwise, once an adequate purpose for the expropriation is established, absent a showing by the landowner of bad faith on the part of the pipeline company, determining the extent and location of the property to be expropriated is within the pipeline company’s discretion.<sup>94</sup>

Justice Knoll, in her dissent in *ExxonMobil*, notes that “in light of the derogatory nature of expropriation, the burden should never shift from the expropriator to the landowner until the expropriator has demonstrated it acted in good faith, with adequate determining principles, and with reason.”<sup>95</sup> The requirement that a landowner must prove abuse of discretion by the pipeline company does not reflect a proper balance between the landowner’s constitutional right to property and a common carrier pipeline’s statutory authority to expropriate property.<sup>96</sup>

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91. *Id.*

92. *Id.* at 969.

93. *Recreation & Park Comm. v. C&S Dev., Inc.*, 714 So. 2d 706, 707 (La. 1998) (emphasis added).

94. *Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot*, 628 So. 2d 75, 78 (La. Ct. App. 3d Cir. 1993).

95. *See ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So. 3d 192, 204 (La. 2010) (Knoll, J., dissenting).

96. *Id.* at 203.

The burden shifting that Justice Knoll discussed is illustrated in *Southwestern Electric Power Co. v. Conger*.<sup>97</sup> In that case, Southwestern Electric Power Company (SWEPCO) met the burden of necessity because there was a gas shortage in the area and they could not convert their factory to coal, so the only way to supply gas was through an additional pipeline.<sup>98</sup> However, the court maintained the high burden of proving bad faith on the landowner, stating that “[i]t is not enough for [the landowner] to simply point out alternate routes to the court, he must show that SWEPCO abused its discretion, not simply used it.”<sup>99</sup> Further, the court held that the availability of alternate routes is of no concern, provided that “the location selected fulfills the needs and requirements of the expropriator, meets the standards prescribed by sound engineering and economic practices, is neither arbitrarily nor capriciously chosen, and does not constitute an abuse of the discretionary right of selection.”<sup>100</sup>

As previously mentioned, the court in *Faustina* likewise found that the existence of another feasible route is not enough to show bad faith on the part of the pipeline company.<sup>101</sup> Additionally, the court made clear that while the absence of negotiations may equate to bad faith, negotiations do not have to result in a settlement to be in good faith.<sup>102</sup> Because the pipeline company had several phone calls and meetings with the landowner, made numerous offers, and exchanged correspondence about the pipeline with the landowner, the court found evidence of good faith negotiations even though no settlement was reached.<sup>103</sup>

The low threshold for negotiations could allow a pipeline company to purportedly negotiate in good faith with no actual intention of reaching a settlement, and if their offer is refused by the landowner, sue for expropriation. This would force the landowner to either prove that they acted in bad faith, assuming that the other expropriation requirements are met, or be required to give up their land. Effectively, the landowner is

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97. *Southwestern Elec. Power Co. v. Conger*, 307 So. 2d 380 (La. Ct. App. 2d Cir. 1975).

98. *Id.* at 382.

99. *Id.* (quoting *Southwestern Elec. Power Co. v. Conger*, 254 So. 2d 98, 100 (La. Ct. App. 2d Cir. 1971)).

100. *Southwestern Elec. Power Co. v. Conger*, 307 So. 2d 380, 383 (La. Ct. App. 2d Cir. 1975) (quoting *Cent. La. Elec. Co. v. Brooks*, 201 So. 2d 679 (La. Ct. App. 3d Cir. 1967)).

101. *Calcasieu-Cameron Hosp. Serv. Dist. v. Fontenot*, 628 So. 2d 75, 78 (La. Ct. App. 3d Cir. 1993).

102. *Id.*

103. *Faustina Pipe Line Co. v. Levert-St. John, Inc.*, 463 So. 2d 964, 967 (La. Ct. App. 3d Cir. 1985).

somewhat pushed into accepting the pipeline company's offer or risk facing costly litigation. Combined with the fact that demonstrating the existence of another practical, sufficient route is not enough to show bad faith, the landowner is at a disadvantage if the expropriation reaches trial.

Additionally, because a pipeline company must only *consider* the criteria relevant to selecting the site to be expropriated, including alternate routes, safety, and environmental considerations, and costs,<sup>104</sup> it would seem that even a cursory consideration, without any intent to find an equitable solution for both parties, would satisfy the court. That cursory consideration alone would preclude a landowner from demonstrating bad faith on the part of the pipeline. Furthermore, because suspensive appeals are not available in expropriation proceedings, a pipeline can continue to be built while litigation is ongoing.<sup>105</sup> As such, a landowner is at an even greater disadvantage if a proposed expropriation reaches trial because the burden on them to fight the expropriation is discouragingly high and the construction on their land can continue while litigation is pending. This means that while they would be compensated, they may be forced to give up the land where a pipeline has already been placed in the interest of efficiency and curtailing even more damage caused by removal.

### III. THE EXPROPRIATION LAWS AND REFORMS OF OTHER STATES PROVIDING INSIGHT TO LOUISIANA

Louisiana is not the only state struggling to balance the interests of private landowners and pipeline companies with expropriation power. Although each state has different economic and environmental concerns, looking to states with conditions similar to Louisiana can be helpful to navigate legal reform in the area of public utility expropriation.

#### A. Texas

Texas is an illustrative example of the struggles that states have faced in determining how to classify common carriers and extend the power of expropriation to them. The Texas Constitution states that “[n]o person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.”<sup>106</sup> In 1915, Texas first recognized pipeline companies as public service corporations charged with a public use and subject to public

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104. *Recreation & Park Comm. v. C&S Dev., Inc.*, 714 So. 2d 706, 707 (La. 1998).

105. LA. REV. STAT. § 19:13 (1975).

106. TEX. CONST. art. 1, § 17.

regulation.<sup>107</sup> In 1917, the Legislature declared pipeline companies to be common carriers, and in 1919, they were given the right of eminent domain.<sup>108</sup>

The Texas Natural Resources Code lists seven possible classifications for the common carrier designation.<sup>109</sup> Before *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*,<sup>110</sup> once a pipeline company filed with the Texas Railroad Commission (TRC) as a common carrier in one of the seven listed categories and agreed to be subject to the duties and obligations mandated by the TRC, it was able to bypass a judicial determination of common carrier status.<sup>111</sup> This is because courts merely did a cursory check to establish that the pipeline company was a designated common carrier as declared by the TRC, rather than evaluating their common carrier status themselves.<sup>112</sup> “In sum, once the pipeline company subject[ed] itself to the TRC as a common carrier, the pipeline company ha[d] essentially unreviewable authority to condemn land.”<sup>113</sup> The TRC required pipeline companies to file a T-4 form, which asked questions such as the following: who the owner and the operator of the pipeline are, what kind of fluid will be transported, how to classify the pipeline.<sup>114</sup> A spokeswoman for the TRC stated that, as recently as 2010, the commission has never denied a T-4 permit.<sup>115</sup>

When examined all together, the process by which the legislature determined which entities were delegated eminent domain power, determinations which were essentially unreviewable by the courts, combined with the fact that the definitions of the entities given eminent domain power were incredibly broad and incorporated most oil and gas companies, it is clear that a landowner attempting to challenge a common carrier was greatly disadvantaged.<sup>116</sup> Texas courts admittedly had adopted

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107. Niles, *supra* note 34, at 277 (citing *Humble Pipeline Co. v. State*, 2 S.W.2d 1018, 1019 (Tex. App. 1928)).

108. *Id.*

109. *Id.* at 280.

110. *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, LTD.*, 510 S.W.3d 909, 914 (Tex. 2017).

111. Niles, *supra* note 34, at 282.

112. *Id.*

113. *Id.* at 283.

114. *Id.* at 288 (citing R.R. COMM’N OF TEXAS, APPLICATION OF PERMIT TO OPERATE A PIPELINE IN TEXAS 2016, <https://www.rrc.state.tx.us/media/32492/2016-fillable-combo-t4-ps8000a-for-liquids.pdf> [<https://perma.cc/KTL4-CKC5>]).

115. *Id.*

116. *Id.* at 288.

a broad view of “public use.”<sup>117</sup> Although they had acknowledged that the statutes granting eminent domain should be strictly construed in favor of the landowner, they continually failed to do so.<sup>118</sup>

The 2012 decision in *Denbury Green* was a landmark one, wherein the Texas Supreme Court ruled that more was required of a pipeline company to prove common carrier status. That decision was a reaction to the “rubber stamp policy of the TRC, which approved all pipelines without a thorough review to ensure they fit within the state’s definition of common carrier.”<sup>119</sup> Before the ruling in *Denbury Green*, in order to receive a common carrier permit, the applicant need only place an “x” in a box indicating it will operate as a common carrier and agree to subject itself to TRC regulations.<sup>120</sup> *Denbury Green* reported itself as a common carrier, and without investigation or adversarial testing, obtained a permit within a few days.<sup>121</sup>

In *Denbury Green*, the court held that pipeline owners do not obtain the right to condemn private property merely by checking the correct boxes on a T-4 application filed with the TRC and that a landowner can challenge in court whether the proposed pipeline truly serves the public.<sup>122</sup> Additionally, the court stated that “[p]rivate property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form,<sup>123</sup> concluding that the Texas Constitution demands far more.”<sup>124</sup>

The court declared that a pipeline must serve the public and cannot be built only for the builder’s exclusive use.<sup>125</sup> Ultimately, in order for a pipeline company to qualify as a common carrier, “a reasonable

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117. *Id.* at 278 (citing *Coastal States Gas Producing Co. v. Pate*, 158 Tex. 171, 174, 309 S.W.2d 828, 833 (Tex. 1958)).

118. *Id.*

119. Jensen, *supra* note 18, at 333 (quoting Thomas J. Forestier, Jamie Lavergne Bryan, & Larence M. “Trey” Lansford III, *Feature: What’s in the Pipeline?* 79 TEX. B.J. 218, 219 (2016)).

120. Nicholas Laurent & Christopher Oddo, *Pipe(line) Dreams Post Denbury-Green*, 48 ST. MARY’S L.J. 699, 701 (2017).

121. *Id.*

122. Carter, *supra* note 19, at 323 (citing *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.2d 192, 195, *reh’g denied*, 381 S.W.3d 465 (Tex. 2012)).

123. The T-4 form has since been revised and is now three pages.

124. Laurent & Oddo, *supra* note 120 (quoting TEX. NAT. RES. CODE ANN. § 111.002(6)).

125. Carter, *supra* note 19, at 324 (2014) (citing *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.2d 192, 200, *reh’g denied*, 381 S.W.3d 465 (Tex. 2012)).

probability must exist that [their] pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.”<sup>126</sup>

This “reasonable probability” standard, while clearer, is still speculative because it considers even possible future service to the public and may be overinclusive due to its broad language. Although it gives the landowners an important new power, the ability to challenge the decisions of the TRC,<sup>127</sup> there is still a heavy burden on a landowner to show that a company never intends to operate the pipeline they are expropriating land for as a public pipeline if they are going to overcome the post-Denbury requirement of public service. The landowners in *Denbury Green* were able to do so because Denbury Green published on their website that they intended their pipeline to function privately, never publicly, despite registering as common carriers.<sup>128</sup> In most cases, a pipeline company would not do so.

### *B. Arkansas*

Similar to Texas and Louisiana, the common carrier requirements in Arkansas are very broad and include most pipeline companies, even if they are private. In addition, Arkansas case law illustrates the struggle to determine a sufficient public purpose, a struggle that Louisiana also faces. Arkansas law provides that all pipeline companies operating in the state, except those operated for conveying natural gas for public utility service, are declared common carriers and are given the right of eminent domain by virtue of that declaration.<sup>129</sup> Arkansas law provides a property owner’s “bill of rights,” which contains provisions such as the following: a property owner is entitled to receive just compensation; private property may only be taken for public use; private property may only be taken by an entity authorized to use the power of eminent domain; a property owner has the right to receive reasonable notice of an entity’s interest in taking the owner’s private property; an entity shall make a written good faith offer before initiating a condemnation proceeding; and a property owner has the right to hire an attorney to represent them and negotiate with the entity on their behalf; among other provisions.<sup>130</sup>

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126. *Id.*

127. *Id.*

128. *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909, 914 (Tex. 2016).

129. ARK. CODE ANN. § 23-15-101 (2018).

130. *Id.* § 18-15-103.

If the entity exercising eminent domain cannot reach an agreement with a landowner, they may file a petition in the circuit court of the county where the property is located.<sup>131</sup> The purpose of the petition is to have the property and the damages for the right-of-way assessed, giving the property owner at least ten days' notice in writing of the time and place where the petition will be heard.<sup>132</sup> When the court has assessed the damages for the right-of-way, the entity must pay the damages within thirty days of the judgment. After payment, the entity may enter upon, use, and have the right-of-way over the lands forever.<sup>133</sup>

Although the Arkansas Constitution provides that private property shall not be taken, damaged, or appropriated for public use without just compensation,<sup>134</sup> the issue of defining public use has plagued Arkansas federal courts.<sup>135</sup> Arkansas courts have said that neither a common carrier's status as a private company, nor a lack of users who could utilize the taking are controlling factors in the assessment of a public purpose.<sup>136</sup> Instead, because a common carrier is required to serve the public, an entity's classification as a common carrier ensures the public has a right to use, categorizing the use as public.<sup>137</sup> This circular logic makes it extremely difficult for a landowner to challenge the public purpose of a taking by a common carrier.

In *Linder v. Arkansas Midstream Gas Servs. Corp.*, Midstream unsuccessfully attempted to negotiate with the Linders in order to take a right-of-way for a gas gathering pipeline.<sup>138</sup> Midstream filed suit and was granted a right of way.<sup>139</sup> The Linders challenged Midstream's common carrier status, arguing that the taking was for a private, rather than public, use.<sup>140</sup> The Court held that "it makes no difference that only 'a collection of a few individuals' will be able to use the pipeline because a taking's status as public or private is determined by the extent of the public's right

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131. *Id.* § 18-15-1202.

132. *Id.*

133. *Id.* § 18-15-1205.

134. ARK. CONST. art. II, § 22.

135. Malcolm N. Means, *Private Pipeline, Public Use?: Linder v. Arkansas Midstream Gas Services Corp., Smith v. Arkansas Midstream Gas Services Corp., and Arkansas's Eminent Domain Jurisprudence*, 64 ARK. L. REV. 809, 811 (2011).

136. *Id.* at 839.

137. *Id.*

138. *Id.* at 812–13.

139. *Id.*

140. *Id.* at 813.

to use it, not the extent to which that right is exercised.”<sup>141</sup> If members of the public have the right to use the right-of-way, it is subject to condemnation, whether the public actually makes use of it.<sup>142</sup>

Likewise, in *Smith v. Arkansas Midstream Gas Servs. Corp.*,<sup>143</sup> Midstream failed to negotiate an agreement with the Smiths and subsequently filed suit to expropriate their land.<sup>144</sup> Similar to *Linder*, the Smiths argued that Midstream did not have the authority to exercise eminent domain because they were seeking to acquire the property for private rather than public use.<sup>145</sup> The Court held that Midstream’s pipeline was available to multiple natural gas producers, and their status as a common carrier meant the public would have an equal right to use the pipeline.<sup>146</sup>

Arkansas courts draw a distinction between takings by common carriers and takings by other entities and reason that because common carriers are required to give access to the public any exercise of eminent domain by those entities is considered public.<sup>147</sup> Thus, “[a] landowner will be unlikely to succeed in attacking a company’s status as a common carrier, since both Midstream cases ruled that common carrier status can exist even if any public use is speculative or theoretical.”<sup>148</sup> As such, if all pipelines are declared common carriers and all takings by common carriers are presumed to serve a public purpose, landowners in Arkansas are greatly disadvantaged in expropriation proceedings.

### C. Georgia

The Georgia Legislature first gave pipeline companies the power of eminent domain in 1943 to provide for the transport of oil and gas during wartime.<sup>149</sup> Pipeline companies continued to enjoy a largely “unfettered” power of eminent domain until the law was reformed in 1995.<sup>150</sup> Georgia

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141. *Linder v. Arkansas Midstream Gas Servs. Corp.*, 362 S.W.3d 889, 897 (Ark. 2010).

142. *Id.*

143. *Smith v. Arkansas Midstream Gas Servs. Corp.*, 377 S.W.3d 199 (Ark. 2010).

144. Means, *supra* note 135, at 815.

145. *Id.*

146. *Id.* at 816 (citing *Smith v. Ark. Midstream Gas Servs. Corp.*, 377 S.W.3d 199 (Ark. 2010)).

147. *Id.* at 828.

148. *Id.* at 833.

149. Julie A. Beberman, *Exercise of Power of Eminent Domain for Special Purposes: Provide Restrictions on Use of Eminent Domain Power by Petroleum Pipeline Companies*, 12 GA. ST. U. L. REV. 184, 185 (1995).

150. *Id.*

law provides that “any corporation engaged in constructing, running, or operating pipelines in this state as a common carrier in interstate or intrastate commerce for the transportation of petroleum and petroleum products shall have the right of eminent domain.”<sup>151</sup> Any property or interest condemned pursuant to that section is deemed to have been condemned for a public purpose.<sup>152</sup> Before reforming the law in 1995, all pipeline companies were deemed common carriers and therefore all land seized by pipeline companies was presumed to be for a public purpose.<sup>153</sup> The process of determining public purpose involved no public involvement, nor any federal or state oversight.<sup>154</sup>

In 1994, the General Assembly enacted a one-year moratorium on the exercise of eminent domain and established a study committee made up of thirteen members to propose new legislation based on a review of the effects of petroleum pipelines and the legal mechanisms which can be used to restrict the siting of pipelines to protect natural resources.<sup>155</sup> The committee communicated with the public about their concerns, learned about pipeline operations, safety procedures, and the effect of pipelines on Georgia’s economy.<sup>156</sup> The committee also assessed the potential environmental impacts of a pipeline and studied other states and their procedures for eminent domain.<sup>157</sup> The committee found that six states did not grant eminent domain powers to common carriers at all.<sup>158</sup> Fifteen states, including Louisiana, required some type of approval by state agencies.<sup>159</sup> Two states, including Arkansas, required public comment on the proposed pipeline route.<sup>160</sup> The remaining states, including Texas and Alabama, had laws resembling Georgia’s then existing laws.<sup>161</sup>

The committee then proposed new legislation that landowners, pipeline companies, regulatory agencies, and environmental groups all supported. The bill passed unopposed.<sup>162</sup> Under the new legislation, in order to exercise the power of eminent domain, a pipeline company must

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151. *Id.* at 186 (quoting 1981 Ga. Laws 789 (formerly found at O.G.C.A. § 22-3-80(a) (1982)).

152. *Id.*

153. *Id.* at 186.

154. *Id.*

155. *Id.* at 188–89.

156. *Id.* at 189–90.

157. *Id.*

158. *Id.* at 190.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 191.

notify a landowner before any expropriation action can be taken.<sup>163</sup> This notice must include specific language in order to educate landowners about the eminent domain process, including their rights and responsibilities. After notifying a landowner, but before exercising eminent domain, a pipeline company must obtain a “certificate of public convenience” from the Georgia Department of Transportation (DOT) who must conduct a public hearing and approve or deny the permit within ninety days; otherwise, the certificate is legally approved.<sup>164</sup> Additionally, the pipeline company must secure a permit from the Department of Natural Resources (DNR), which is again time limited and must be approved or denied within 120 days of the notification of the landowner, otherwise it is automatically approved.<sup>165</sup> If the DNR permit decision is appealed, the judge must issue a decision within 120 days of the filing of the petition.<sup>166</sup>

The 1995 statute institutes more oversight by the Department of Transportation and the Department of Natural Resources, includes the general public in decision making, and fairly compensates the landowner for property acquired and any other property “unreasonably impacted,” all while avoiding undue delays on pipeline companies.<sup>167</sup> The legislation grants restricted and conditional rights to pipeline companies to exercise the power of eminent domain to acquire property for the construction, reconstruction, operation, and maintenance of new pipelines operating as common carriers.<sup>168</sup> However, it does not restrict or limit the exercise of eminent domain when the property is needed to maintain existing pipelines or relocate pipelines due to the “exercise of legal rights of a third party.”<sup>169</sup>

In 2017, the Georgia General Assembly revised their eminent domain laws again, adding to the provisions put in place by the 1995 reform. After July 1, 2017, *any* construction of a new pipeline or an extension must have a permit from the Environmental Protection Division (EPD) of the Department of Natural Resources.<sup>170</sup> This permit is required regardless of whether the pipeline company intends to exercise eminent domain.<sup>171</sup> In addition, an application to the EPD must include proof of notice to all landowners whose property is within 1,000 feet of the route of the

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163. *Id.* at 192.

164. *Id.* at 193.

165. *Id.* at 194–95.

166. *Id.* at 195.

167. *Id.* at 194–95.

168. *Id.* at 191.

169. *Id.* at 191–92.

170. GA. CODE ANN. § 22-3-82 (2018).

171. *Id.* § 12-17-2.

proposed pipeline.<sup>172</sup> In making the decision as to whether a permit will be granted, the director of the EPD will consider the following: any undue hazards to the environment and natural resources of the state; public comment; alternative routes for the proposed pipeline, and other factors that the director finds reasonable.<sup>173</sup>

Consistent with the 1995 reform, the 2017 amendment reaffirms that a pipeline company must also apply for a certificate of public convenience and necessity from the commissioner of transportation, unless they do not intend to use the power of eminent domain to acquire property or are exercising the power of eminent domain to perform maintenance on an already existing pipeline.<sup>174</sup> An application for a certificate of public convenience must include a description of the public convenience and necessity that support the proposed location of the route of the new pipeline.<sup>175</sup>

In deciding whether to grant the certificate of public convenience, the commissioner will consider many factors;<sup>176</sup> however, the applicant bears the burden of proving the necessity of the proposed pipeline.<sup>177</sup> The new legislation also enables a landowner to appeal the issuance of a permit by the Department of Transportation where previously only appeals based on the denial of a permit, presumably from pipeline companies, was allowed.<sup>178</sup>

#### *D. Comparing Louisiana to Texas, Arkansas, and Georgia*

Comparatively, Louisiana's current law falls somewhere between Georgia and Texas. While Louisiana requires a judicial finding of both necessity and public purpose,<sup>179</sup> Texas requires no such showing of

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172. *Id.* § 12-17-3.

173. *Id.* § 12-17-4.

174. *Id.* § 22-3-82.

175. *Id.* § 22-3-83.

176. Factors such as: whether existing pipelines are adequate to meet the reasonable public needs; the volume of demand for petroleum and whether the anticipated future demand can support the already existing pipeline systems as well as the pipeline proposed by the applicant; the adequacy of the supply of petroleum to serve the public; and any other factors that the commissioner may find reasonable. *Id.* § 22-3-83.

177. *Id.*

178. Mary Landers, *Georgia Lawmakers Pass Compromise Bill*, SAVANNAH NOW (Mar. 31, 2017, 8:49 PM), <https://www.savannahnow.com/news/2017-03-31/georgia-lawmakers-pass-compromise-pipeline-bill> [<https://perma.cc/7L5B-AQL7>].

179. LA. CONST. art. 1 § 4(B)(4).

necessity.<sup>180</sup> Additionally, while both Louisiana and Texas require pipeline companies to register as common carriers, unlike Arkansas, the process to qualify as a common carrier in Louisiana is not straightforward. Finally, the presumption that a proposed expropriation by a common carrier automatically serves a necessary and public purpose by virtue of the pipeline company's common carrier status, adhered to explicitly in Arkansas and implicitly in both Louisiana and Texas, is almost completely contradicted by Georgia's required oversight from the Department of Transportation, the Department of Natural Resources, and the inclusion of the community in public hearings. As such, considering similar modifications to the ones applied by Georgia's legislature in 1995 and 2017 could be beneficial for both Louisiana's pipeline companies and private landowners.

#### IV. THE APPLICATION OF GEORGIA'S STATUTORY EMINENT DOMAIN FRAMEWORK TO LOUISIANA LAW

An application of Georgia's procedural reforms to Louisiana's already existing statutory guidelines would enhance the structure already in place, encouraging clarity in the expropriation process and better informing landowners of their rights and the recourse available to them. Additionally, this procedural application would aid in protecting Louisiana's natural resources and already existing pipeline and distribution systems, while not unfairly increasing the time and requirements already involved in expropriation proceedings on pipeline companies.

Louisiana already requires pipeline companies to register with the Louisiana Public Service Commission in order to be approved as common carriers. Although this registration process involves some level of regulatory oversight, the registration approval criteria—as well as statistics on application denial rates—is unavailable to the public. Additionally, similar to the framework in place in Georgia, Louisiana law already requires pipeline companies to engage in good faith negotiations with a landowner and to provide notice of their intent to expropriate prior to instituting an expropriation suit.

Although these provisions are useful and require more than some of our neighboring states, there are many areas where Louisiana's expropriation law could benefit from reform. The two-step permitting process required in Georgia would be incredibly beneficial to Louisiana's landowners. It would also benefit the pipeline and distribution infrastructure already in place, because if an area is already adequately

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180. TEX. CONST. art. 1 § 17.

serviced or would be harmfully impacted, a pipeline company likely could not obtain the required permits.

Requiring pipeline companies to obtain a permit from the Louisiana Department of Natural Resources would not only allow for regulatory oversight regarding the effects of the proposed pipeline on Louisiana's natural resources and environment but it would also facilitate public input as to what concerns are pertinent to Louisiana citizens as a whole through the public hearings required in the permitting process. Additionally, mandating notice to landowners whose property falls within 1,000 feet of the proposed pipeline route, rather than solely the owner of the land subject to the taking, would broaden the scope of public involvement in the permit granting process. Greater public input would allow the director of the DNR to hear from landowners who are affected by the pipeline and may otherwise have not been allowed involvement in the process. Although 1,000 feet may seem like an arbitrary figure,<sup>181</sup> it is logical in the sense that an oil leak or major maintenance issue will likely affect more than just the owner of the land where the pipeline exists. Although involving the public through hearings and sufficient notice does not always result in a fairer process, it certainly allows for more clarity and encourages both pipeline companies and regulatory agencies to work to ensure that a landowner's constitutional right to property is not improperly divested.

Instituting a requirement of a Certificate of Public Convenience and Necessity from the Louisiana Department of Transportation and Development (DOTD) would be an immense improvement to the current regulatory system implemented by the Louisiana Public Service Commission. If a pipeline company registered as a common carrier intends to expropriate private property in Louisiana, requiring them to show public purpose and necessity to obtain a certificate using many of the same factors used in Georgia<sup>182</sup> would significantly reduce the burden on the landowner to fight an expropriation. If the pipeline company cannot carry the burden of proving necessity in order to obtain a permit from the DOTD, then the landowner will likely never face the proposed expropriation in the first place.

As it stands now, the language of Article 1 Section 4 of the Louisiana Constitution states that the question of a public and necessary purpose

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181. One thousand feet is the requirement for notice to surrounding landowners in Georgia pursuant to Ga. Code Ann. § 12-17-3.

182. See Georgia factors such as: whether existing pipelines are adequate to meet the reasonable public needs; the volume of demand for petroleum and whether the anticipated future demand can support the already existing pipeline systems as well as the pipeline proposed by the applicant; and the adequacy of the supply of petroleum to serve the public.

shall be a judicial one.<sup>183</sup> Introducing the requirement of a Certificate of Public Convenience and Necessity from the Department of Transportation and Development would initially delegate that power to a state agency. However, because the permitting and certification process is appealable if denied and a pipeline company must have judicial approval to expropriate, the permits would just be preliminary determinations. Further, the court would maintain final control over evaluating the purpose for the expropriation itself. This would allow an unbiased third party to weigh all of the factors at play from the perspective of both the pipeline company and the landowner and make the best decision on necessity according to the facts at hand.<sup>184</sup> Once the pipeline company obtained the required documentation, along with the requirements already in place, such as notice to the landowner and good faith negotiations, they could sue to expropriate the land and the court could make the final determination as to whether the purpose of the expropriation is, in fact, both public and necessary.

Both the Department of Transportation and Development and the Department of Natural Resources already have divisions in place that could evaluate applications and administer the permits required. The DOTD has a “right-of-way permits” office, which manages permits for construction of other utilities such as sewage, waterworks, and fiber optics services.<sup>185</sup> The Department of Natural Resources has a pipeline division that oversees with pipeline safety and operations.<sup>186</sup>

Additionally, the Louisiana Public Service Commission (LPSC), which processes common carrier permits, already administers Certificates of Public Convenience and Necessity to electric transmission facilities

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183. LA. CONST. art. 1, § 4 (B)(4).

184. A pipeline operations program already exists as a subdivision of the pipeline division of the department of natural resources. The program regulates the construction, acquisition, abandonment, and interconnection of pipelines. *See State of Louisiana Department of Natural Resources, Office of Conservation, PIPELINE OPERATIONS* <http://www.dnr.louisiana.gov/index.cfm/page/150> [https://perma.cc/JR8R-EN8D] (last visited July 13, 2019).

185. *Right-of-Way Permits*, LA. DEP’T OF TRANSP. & DEV., [http://wwwsp.dotd.la.gov/Inside\\_LaDOTD/Divisions/Engineering/Road\\_Design/Right-of-Way/Pages/default.aspx](http://wwwsp.dotd.la.gov/Inside_LaDOTD/Divisions/Engineering/Road_Design/Right-of-Way/Pages/default.aspx) [https://perma.cc/L2VN-KKTN] (last visited July 13, 2019).

186. *Office of Conservation Pipeline Division*, LA. DEP’T. OF NAT. RESOURCES, [http://wwwsp.dotd.la.gov/Inside\\_LaDOTD/Divisions/Engineering/Road\\_Design/Right-of-Way/Pages/default.aspx](http://wwwsp.dotd.la.gov/Inside_LaDOTD/Divisions/Engineering/Road_Design/Right-of-Way/Pages/default.aspx) [https://perma.cc/9E57-8DKB] (last visited July 13, 2019).

prior to an expropriation.<sup>187</sup> The LPSC mandates these certificates because unless a landowner challenges an expropriation, a judicial inquiry into whether an electric utility actually complied with statutory requirements is not permitted.<sup>188</sup>

As cited in the LPSC General Order authorizing these certificates, both Arkansas and Texas require a Certificate of Public Convenience for electric transmission facilities with Arkansas also requiring a Certificate of Environmental Compatibility.<sup>189</sup> If these certification processes already occur for electric transmission facilities, it would seem that they would be successful in addressing the similar concerns of landowners in the field of pipeline expropriation. Furthermore, the benefits of incorporating these permits for pipeline companies, as Georgia has done, would far outweigh the bureaucratic burden of doing so, as the departments needed to evaluate the permits already exist and do so for other utilities.

Implementing these reforms would strike a better balance between a landowner's constitutional property rights and a pipeline company's interest in expropriating land. If, as in Georgia, the permit and certificate were required to be approved or denied within 90 to 120 days or were otherwise automatically issued,<sup>190</sup> the pipeline company intending to expropriate land would not be unduly burdened. In fact, the pipeline company is already statutorily required to meet these prerequisites before an expropriation could take place. Instead, the permit and certification process would ensure that the burden would be on the pipeline company to affirmatively prove that they meet all of the required criteria, rather than placing the burden on the landowner to show that they do not once the expropriation process has already begun.

#### CONCLUSION

It is a well-established legal principle that because expropriation derogates from the right of individuals to own property, the law governing expropriation proceedings should be strictly construed against the

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187. *In re: Determination As To Whether The Commission Should Issue A General Order Asserting Jurisdiction Over The Certification of Utility Transmission Projects and the Determination of Whether Those Projects Are In The Public Interest*, La. Pub. Serv. Comm'n. Gen. Order R-26018 (Sept. 18, 2013).

188. *Id.* § V, 5.

189. *Id.* § VI, 6–7.

190. Beberman, *supra* note 149, at 193.

expropriating authority.<sup>191</sup> However, this oft referenced principle is not always upheld in practice. Introducing more oversight into the expropriation process already adhered to in Louisiana would strike the proper balance between the state's economic interest in oil and gas while protecting the liberty interests at stake for landowners. Incorporating a two-step permit process would better preserve Louisiana's environment and natural resources, protect the already existing pipeline and distribution infrastructure, and encourage and facilitate pipeline expansion and growth where needed. These reforms could be implemented without placing an undue burden on pipeline companies or putting a landowner at a disadvantage in an expropriation suit.

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191. See *St. Bernard Port, Harbor, & Terminal Dist. v. Violet Dock Port, Inc., LLC.*, 239 So. 3d 243, 265 (La. 2018), (Guidry, J., dissenting) (quoting *State v. Estate of Davis*, 572 So. 2d 39, 42 (La. 1990)).

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