

# LSU Journal of Energy Law and Resources

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Volume 10  
Issue 1 *Winter 2022*

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5-5-2022

## Decommissioning of Onshore Oil and Gas Pipelines and Related Gathering and Flow Lines

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### Repository Citation

M. Taylor Darden and Elizabeth Griffin, *Decommissioning of Onshore Oil and Gas Pipelines and Related Gathering and Flow Lines*, 10 LSU J. of Energy L. & Resources (2022)

Available at: <https://digitalcommons.law.lsu.edu/jelr/vol10/iss1/8>

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# Decommissioning of Onshore Oil and Gas Pipelines and Related Gathering and Flow Lines

*M. Taylor Darden and Elizabeth Griffin\**

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## INTRODUCTION

Over 190,000 miles of petroleum pipelines traverse the United States (“U.S.”), providing a safe, efficient, and reliable underground network of steel to transport the petroleum and natural gas products we need to fuel our homes, cars, and businesses.<sup>1</sup> Of that number, Louisiana boasts approximately 50,000 miles of crude oil and natural gas pipelines within its borders.<sup>2</sup> This integrated system of pipelines crosses nearly every major highway, railroad, and navigable waterway in Louisiana, with the greatest concentration of pipelines located in the 19 parishes closest to major oil and gas producing areas in the Gulf of Mexico. Crude oil pipelines service the state’s 18 oil refineries, which account for roughly one-fifth of the nation’s total refining capacity.<sup>3</sup> Natural gas lines provide necessary feedstock<sup>4</sup> to petrochemical, chemical, and electric co-generation plants located along the lower Mississippi River’s industrial corridor, essentially the equivalent of Germany’s Ruhr Valley.<sup>5</sup> This vast web of intrastate and

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1. Lori LeBlanc, *Pipelines Safely Transport La. Oil and Gas Globally*, BIC MAG. (Sept. 8, 2020, 12:55 PM), <https://www.bicmagazine.com/industry/pipelines/lmoga-pipelines-safely-transport-la-oil-and-gas/> [https://perma.cc/73U7-U7R]; *Where Are the Pipelines*, AM. PETROL. INST., <https://www.api.org/oil-and-natural-gas/wells-to-consumer/transporting-oil-natural-gas/pipeline/where-are-the-pipelines> [https://perma.cc/L6Y3-TP2C] (last visited Sept. 24, 2021).

2. *Pipeline Operations Program*, OFF. OF CONSERVATION, LA. DEP’T NAT. RES., <http://www.dnr.louisiana.gov/index.cfm/page/150#:~:text=Louisiana's%20integrated%20system%20of%20pipelines,to%2050%2C000%20miles%20of%20pipelines> [https://perma.cc/TTR7-QEH6] (last visited Sept. 24, 2021).

3. See LA. GEOLOGICAL SURV., LOUISIANA PETROLEUM INDUSTRY FACTS 3 (2000), [https://www.lsu.edu/lgs/publications/products/Free\\_publications/La-oil-gas-facts.pdf](https://www.lsu.edu/lgs/publications/products/Free_publications/La-oil-gas-facts.pdf) [https://perma.cc/DP7N-DLKW].

4. “Feed” or “Feedstock” refers to crude oil or other hydrocarbons that are the basic materials for a refining or manufacturing process. R. D. LANGENKAMP, HANDBOOK OF OIL INDUSTRY TERMS AND PHRASES 59 (PPC Books ed., 2d ed. 1977).

5. The Ruhr Valley is a major industrial and mining region in Germany. It contains one of the world’s largest coalfields, producing the bulk of Germany’s coal. Steel production and diversified chemical manufacturing constitute the other basic industries of the region, which is served by an extensive inland-waterway system and one of Europe’s densest railway networks. *Ruhr*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Ruhr> [https://perma.cc/LDX4-9A BT] (last visited Oct. 6, 2021).

interstate pipelines is supported by thousands of miles of flow and gathering lines, which move crude oil and gas from the wellhead to facilities for separation and temporary storage. Thereafter, crude oil is transported to refineries located both in Louisiana and along the Mississippi corridor of the U.S., while produced natural gas is delivered to other midstream pipelines or direct to end users.

What happens when pipelines are no longer useful, are taken out of service, or are simply abandoned by their owners? What are the rights and obligations of pipeline owners vis-à-vis their assets when the pipeline no longer serves a useful economic purpose? What are the rights of landowners whose lands are burdened by these metallic highways of underground commerce? Must landowners continue to suffer from the perpetual and permanent existence of pipelines on their property after they are taken out of service? Do landowners have the right to demand their removal or, at the very least, seek additional compensation if the pipeline remains *in situ* after abandonment? Who bears responsibility for loss, damage, or injury when a pipeline lays dormant and unused in the ground but later becomes exposed due to weather conditions, soil subsidence, or forces of shifting ground and gravity? This Article will address these and other questions posed by Louisiana's aging network of pipelines.

## I. THE SERVITUDE

### A. *Personal or Predial*

The right to construct, own, and operate a pipeline which traverses another's land is typically granted under a conventional servitude that is either personal or predial in nature.

#### 1. *Personal*

A personal servitude is a charge on the thing for the benefit of a person and, as applied to a pipeline, can also be referred to as a "right of use."<sup>6</sup> A "right of use" confers upon a person a specified use of an estate less than full enjoyment, and the specified use can only be of the kind that may be established by predial servitude.<sup>7</sup> These personal servitudes are transferable unless prohibited by law or by the agreement that created them.<sup>8</sup> However, because of their personal nature, these servitudes are not heritable unless the law specifically provides or the contract creating them

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6. LA. CIV. CODE arts. 533, 534 (2020).

7. *Id.* arts. 639, 640.

8. *Id.* art. 643.

grants that right.<sup>9</sup> A right of use conveys with it all rights contemplated or necessary to its enjoyment at the time of its creation, as well as all “rights that may later become necessary, provided that a greater burden is not imposed on the property unless otherwise stipulated in the title.”<sup>10</sup>

## 2. *Predial*

A predial servitude, on the other hand, “is a charge on a servient estate for the benefit of a dominant estate.”<sup>11</sup> A predial servitude is inseparable from the dominant estate and passes with it.<sup>12</sup> The right to use a predial servitude cannot be alienated, leased, or encumbered separate from the dominant estate, and the right continues as a charge upon the servient estate when ownership transfers.<sup>13</sup>

## B. *Prescription*

Both personal and predial servitudes are extinguished by the ten-year prescription of nonuse.<sup>14</sup> Although prescriptive periods cannot be lengthened as a matter of public policy,<sup>15</sup> the Louisiana Supreme Court has held that “such periods may be shortened upon agreement of the parties.”<sup>16</sup>

The prescription of nonuse begins to run from the date of the servitude’s last use.<sup>17</sup> Louisiana law unambiguously provides: “[t]he use of a right that is only accessory to the servitude is not use of the servitude.”<sup>18</sup> Use of a servitude sufficient to trigger an interruption in prescription requires one to “use it in the manner contemplated by the

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9. *Id.* art. 644.

10. *Id.* art. 642.

11. *Id.* art. 646.

12. *Id.* art. 650.

13. *Id.*

14. *See id.* arts. 621, 645, 621, 753, 3443; RONALD J. SCALISE, JR, PROPERTY § 10:14, in 2 LOUISIANA CIVIL LAW TREATISE (5th ed. 2021).

15. *See, e.g.*, LA. CIV. CODE. art. 3471.

16. *La. Health Serv. & Indem. Co. v. McNamara*, 561 So. 2d 712, 719 (La. 1990); *see Ashland Oil Co. v. Palo Alto, Inc.*, 615 So. 2d 971, 972 (La. Ct. App. 1993) (finding it permissible for the parties to shorten the prescriptive period of nonuse for a pipeline servitude).

17. LA. CIV. CODE art. 754.

18. *Id.* art. 761.

grant or reservation.”<sup>19</sup> A comment to article 761 explains what is meant by a right only “accessory” to a servitude with the following example:

Thus, if one who has the servitude of drawing water from the well of his neighbor passes over the servient estate and goes to the well without drawing any water during the period required for prescription, he will lose the servitude because the passage is merely accessory to the right of drawing water.<sup>20</sup>

An “accessory” right to a servitude is a right necessary or incidental to the servitude’s purpose.<sup>21</sup> In the example above provided by the comments to article 761, the purpose of the servitude was to draw water.<sup>22</sup> In the case of petroleum pipelines, the purpose of the servitude is to transport hydrocarbons.<sup>23</sup> Thus, regular “maintenance” of a pipeline does not constitute a “use” of the servitude sufficient to interrupt the running of prescription.<sup>24</sup> Similarly, leaving stagnated natural gas in a segment of the pipeline should also not be enough to constitute a “use” of the servitude sufficient to interrupt prescription. Even though the gas may be pressurized, stagnant gas is not flowing through the pipeline. The purpose of a pipeline servitude—whether personal or predial in nature—is the *transportation* of petroleum or petroleum-based products.<sup>25</sup> Therefore, because leaving stagnant hydrocarbons in a pipeline, pressurized or not, is only incidental to the pipeline’s main purpose of transporting the product, that “use” of the servitude is not sufficient to interrupt prescription.

*Ashland Oil* is instructive on this point.<sup>26</sup> In *Ashland Oil*, the parties agreed to a 12-month prescriptive period for the pipeline servitude.<sup>27</sup> The

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19. *Cont’l Grp., Inc. v. Allison*, 404 So. 2d 428, 437 (La. 1981) (quoting *La. Petrol. Co. v. Broussard*, 135 So. 1, 2 (1931)).

20. LA. CIV. CODE ANN. art. 761 cmt. b (2021).

21. LA. CIV. CODE art. 743.

22. *See* LA. CIV. CODE ANN. art. 761 cmt. b.

23. *See id.*; *see also* *Gilfoil v. Greenspon*, 216 So. 2d 829, 831 (La. Ct. App. 1968).

24. *See, e.g., Ashland Oil Co. v. Palo Alto, Inc.*, 615 So. 2d 971, 974 (La. Ct. App. 1993) (finding that pipeline owners did not “use” the pipeline within the meaning of the servitude so as to interrupt prescription by maintaining the pipeline and occasionally running carbon dioxide through it).

25. *See Gilfoil*, 216 So. 2d at 831 (La. Ct. App. 1968) (finding that the obvious purpose of a pipeline servitude was for the *transportation* of hydrocarbons and that the use of accessory rights related to docking facilities and electric transmission lines did not interrupt prescription).

26. *See Ashland Oil Co.*, 615 So. 2d 971.

27. *Id.* at 972.

pipeline was only in use for a brief time, after which it was closed off and pressurized with nitrogen to prevent corrosion during its nonuse.<sup>28</sup> However, in a strategic attempt to legally “use” the servitude and thus avoid the running of prescription, every 11.5 months the servitude owner ran carbon dioxide through the line and vented it into the atmosphere.<sup>29</sup> In addition, the servitude owner also visually inspected the route of the right of way for encroachments or potentially disruptive activities occurring on or near the pipeline.<sup>30</sup>

The *Ashland Oil* court rejected the servitude owner’s argument that these acts were sufficient to interrupt prescription, finding such actions were a “‘mere gesture by the [pipeline] owners to preserve a servitude,’ which practice has been repudiated in our law.”<sup>31</sup> Citing the well-established rule that “use” of a servitude sufficient to interrupt the prescription of nonuse must be made “in the manner contemplated by the grant of the servitude,” the court concluded that simply running carbon dioxide through a pipeline to be vented into the air did not constitute a “use” of that pipeline.<sup>32</sup> Here, the grant of the servitude contemplated that the pipeline be used to transport carbon dioxide from one location to the other.<sup>33</sup>

Once the pipeline owner’s right of use terminates, whether by contract or by operation of law, questions often arise regarding (i) the ownership of the pipeline, (ii) the landowner’s right to demand either the pipeline’s removal or compensation for its continued presence on the land, (iii) the pipeline owner’s obligation to comply with regulatory requirements in the removal of the pipeline, (iv) the pipeline owner’s potential mitigation obligations if its removal causes damage to protected wetlands, and (v) the apportionment of future liabilities arising from the pipeline’s continued existence on the servient property.

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28. *Id.*

29. *Id.*

30. *Id.* at 973.

31. *Id.* at 974 (quoting *Lynn v. Harrington*, 192 So. 517, 518 (La. 1939)).

32. *Id.* at 973 (citing *Cont’l Grp., Inc. v. Allison*, 404 So. 2d 428, 437–38 (La. 1981); *Lynn*, 192 So. at 518; *La. Petrol. Co. v. Broussard*, 135 So. 1, 2 (1931)).

33. *Id.* at 974.

## II. OWNERSHIP AND THE CONSEQUENCES FLOWING FROM TERMINATION OF THE SERVITUDE OR ABANDONMENT OF THE PIPELINE

### A. Louisiana Civil Code Article 493—Who Owns the Pipeline?

Absent contrary contractual language, a pipeline owner has no independent, general duty to remove a pipeline when its use or occupancy rights terminate. After the servitude or right of use terminates, the pipeline owner retains ownership of the pipeline and is subject to Louisiana Civil Code article 493 regarding its future disposition. While buildings, other constructions permanently attached to the ground, and plantings made on the land of another with the landowner's consent belong to the individual who made them, such improvements typically belong to the owner of the ground when they are made without the landowner's consent.<sup>34</sup> Ownership of assets as significant as pipelines is typically covered either by a separate right of way (servitude) agreement or a mineral lease. In either case, the contract may or may not provide for the disposition of these assets when the owner no longer enjoys a contractual right to have them located on land belonging to another. If the contract is silent, then upon termination of those rights, Louisiana Civil Code article 493 provides default rules applicable to ownership of these assets and the right to have them removed:

When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within ninety days after written demand, the owner of the land may, after the ninetieth day from the date of mailing the written demand, appropriate ownership of the improvements by providing an additional written notice by certified mail, and upon receipt of the certified mail by the owner of the improvements, the owner of the land obtains ownership of the improvements and owes nothing to the owner of the improvements. Until such time as the owner of the land appropriates the improvements, the improvements shall remain the property of he who made them and he shall be solely responsible for any harm caused by the improvements.<sup>35</sup>

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34. See LA. CIV. CODE art. 493 (2020).

35. *Id.* For the rules applicable to attachments, additions, or other improvements made to a leased premises, see LA. CIV. CODE art. 2695.



The Louisiana Supreme Court has considered whether plaintiff-landowners could recover monetary damages for the cost of removing a pipeline from their property.<sup>36</sup> In *Guzzetta v. Texas Pipe Line Co.*, the pipeline was placed on the plaintiff-landowners' property in 1955 by the defendant-pipeline company pursuant to a servitude granted either by the plaintiffs or their ancestors in title.<sup>37</sup> In 1982, the pipeline company discontinued its use of the pipeline but did not remove it from the plaintiffs' property.<sup>38</sup> In accordance with Louisiana Civil Code article 493, the plaintiffs demanded the defendant remove the pipeline, but the defendant failed to do so within 90 days of the plaintiffs' demand.<sup>39</sup> The Court denied the plaintiffs' request for damages for the costs of removing the pipeline because it could not conclude that the servitude had indeed terminated.<sup>40</sup> However, the Court opined that "assuming as correct plaintiffs' allegation that the servitude agreement has terminated . . . Louisiana law provides that ownership of an abandoned pipeline reverts to the owner of the land if the [servitude] owners refuse to remove it within ninety days of demand."<sup>41</sup>

This *Guzzetta* decision created numerous problems, particularly for landowners who do not want the liabilities associated with ownership of an improvement, like a pipeline, or simply want the improvement removed following the extinguishment of the right to keep such improvement on the land. To clarify the respective rights and obligations of both the landowner and the owner of the improvement, the legislature passed Act No. 715 in 2003, which overruled the *Guzzetta* holding that title to the improvement automatically vested in the landowner 90 days after demand and termination of the original contract granting the right to occupy.<sup>42</sup> This alone, however, was not sufficient to resolve continued confusion over the meaning of Act 715 and its application to article 493. As a result, during the legislature's 2004 Regular Session, it adopted House Concurrent Resolution No. 306 to clarify its intent in passing Act 715.<sup>43</sup> The legislature specifically declared its intent to overrule the decisions in

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36. See *Guzzetta v. Tex. Pipe Line Co.*, 485 So. 2d 508 (La. 1986).

37. *Id.* at 509.

38. *Id.*

39. *Id.* at 510.

40. *Id.* at 511.

41. *Id.* at 510–11 (citing LA. CIV. CODE art. 493; A.N. Yiannopoulos, *Extinction of Predial Servitudes*, 56 TUL. L. REV. 1285, 1298 n.88 (1982); *Breaux v. Rimmer & Garrett, Inc.*, 320 So. 2d 214 (La. Ct. App. 1975)).

42. Act No. 715, 2003 La. Acts 2422.

43. See H.R. Con. Res. 306, 2004 Leg., Reg. Sess. (La. 2004).

*Guzzetta v. Texas Pipe Line Co.*,<sup>44</sup> *Melerine v. State*,<sup>45</sup> and *Anderson v. Tenneco Oil Co.*<sup>46</sup> to the extent they “held that the provisions of Civil Code Article 493 bestowed ownership of improvements, as a matter of law, on the owner of land on which the improvements had been made by another merely with his consent without a specific claim to ownership of the improvements by the landowner.”<sup>47</sup> To that end, the Louisiana Legislature declared the Resolution to be procedural and interpretative, allowing retroactive application.<sup>48</sup>

Thus, while ownership of an abandoned improvement does not automatically transfer to the landowner 90 days after termination of the servitude or right to use another’s land and demand for its removal, *Guzzetta*, as applied to article 493, remains good law for the procedure landowners must follow should they wish to acquire such ownership.

Article 493’s application is adequate for situations where the landowner actually wants to acquire ownership of the improvement. Problems arise, however, when neither the landowner nor the owner of the improvement wants to own the asset upon termination of the servitude. In those cases, the landowner should either be able to compel its removal or claim the cost of removal as damages. However, the current position of the law is not so clearly defined, particularly where the improvement (e.g., a pipeline) is constructed with the consent of the landowner, but that consent is later withdrawn due to termination or expiration of the servitude.<sup>49</sup> And, if not careful, the landowner may find himself an inadvertent successor owner of the improvement if he takes “possession” of the abandoned improvement and demonstrates an intent to own it

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44. *Guzzetta*, 485 So. 2d at 509.

45. *Melerine v. State*, 773 So. 2d 831 (La. Ct. App. 2000).

46. *Anderson v. Tenneco Oil Co.*, 826 So. 2d 1143 (La. Ct. App. 2002).

47. H.R. Con. Res. 306.

48. *See id.*

49. See, for example, *W & T Offshore, L.L.C. v. Tex. Brine Corp.*, 250 So. 3d 970, 975 (La. Ct. App. 2018), *writ granted*, 253 So. 3d 788 (La. 2018), *aff’d in part, rev’d in part sub nom. W&T Offshore, L.L.C. v. Tex. Brine Corp.*, 319 So. 3d 822, 823 (La. 2019), where the Louisiana Supreme Court dismissed the landowner’s claims for damages and injunctive relief, finding that the servitude in question gave the pipeline company permission to construct a replacement pipeline on the premises even though the replacement was built at a location different from the original. Damages or injunctive relief, however, are still available where the improvement is built on the land of another without the owner’s consent. For damages, see *Britt Builders, Inc. v. Brister*, 618 So. 2d 899, 903 (La. Ct. App. 1993), and *Beacham v. Hardy Outdoor Advert., Inc.*, 520 So. 2d 1086, 1091 (La. Ct. App. 1987). For injunctive relief, see *Harris v. Pierce*, 73 So. 2d 330, 333 (La. Ct. App. 1954).

pursuant to Louisiana Civil Code article 3418, which provides: “One who takes possession of an abandoned thing with the intent to own it acquires ownership by occupancy. A thing is abandoned when its owner relinquishes possession with the intent to give up ownership.”

In *Breaux v. Rimmer & Garrett, Inc.*, the plaintiff-landowners granted a right of way to a pipeline company to “lay, maintain, operate[,] and remove a pipeline” on the plaintiff’s property in 1934.<sup>50</sup> In 1967, the plaintiff-landowners also granted a servitude to the Department of Highways to build a road across his property, which included the land subject to the 1934 pipeline right of way.<sup>51</sup> In 1974, the Department of Highways entered into a subsequent contract with the defendant to construct a paved highway on the acquired property.<sup>52</sup> The contract also provided that the defendant should remove the pipeline located on the property pursuant to the 1934 right of way.<sup>53</sup> At that time, the pipeline remained unused for approximately 17 years, and the servitude under which the pipeline was built expired by the ten-year prescription of nonuse.<sup>54</sup> Plaintiff-landowners filed suit against the defendant, not for possession of the pipeline, but for the market value of the pipeline at the time of its removal.<sup>55</sup>

At trial, the evidence demonstrated that the pipeline had not been used for roughly 17 years, and its abandonment was not seriously contested.<sup>56</sup> The Louisiana Third Circuit Court of Appeal agreed with the lower court’s judgment that the plaintiff-landowners were the owners of the pipeline.<sup>57</sup> It noted, however, that plaintiff-landowners “did not become the owners of the pipe by the mere extinguishment of the servitude.”<sup>58</sup> Rather, they became owners of the pipe by operation of Louisiana Civil Code article 3418.<sup>59</sup> The *Breaux* court reasoned that although there was no provision in the 1934 servitude agreement regarding how long the grantee had to remove the pipeline from plaintiff’s property, a reasonable time should be

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50. *Breaux v. Rimmer & Garrett, Inc.*, 320 So. 2d 214, 216 (La. Ct. App. 1975).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.*

57. *Id.* at 217.

58. *See id.*

59. *Id.* *Breaux* was based on former Louisiana Civil Code article 3421, which was reenacted without substantive change as Louisiana Civil Code article 3418.

applied.<sup>60</sup> Considering the 1934 grantee made no effort to recover the pipeline within the seven years following expiration of the servitude, the court concluded that any “reasonable time” to exercise the right to remove had long expired, and the plaintiff-landowners’ subsequent “possession” of the pipeline after its abandonment vested the landowners with ownership.<sup>61</sup> The court concluded that the defendant-contractor who removed the pipeline without the plaintiff-landowners’ permission was liable to them for the value of the pipe removed.<sup>62</sup>

Applying Louisiana Civil Code articles 493 and 3418 *in pari materia* as well as the jurisprudential applications in *Guzzetta* and *Breaux*, when a pipeline right of way or other agreement is silent as to whether the pipeline must be removed at the end of the agreement, article 493 applies. The owner of the pipeline (or any improvement authorized by the servitude) has the right to remove it at his expense subject to the obligation to restore the surface.<sup>63</sup> If he fails to remove the improvement, the landowner is given several options. First, he can demand in writing that the owner of the improvement remove it within 90 days of the demand.<sup>64</sup> If the owner fails or refuses to comply, the landowner can acquire ownership of the improvement by providing the owner additional written notice of his intent to do so. This notice must be given by certified mail and is effective upon receipt by the owner.<sup>65</sup> Article 493 presumes the owner of the improvement has abandoned it to the landowner, and therefore no compensation is due him by the landowner.<sup>66</sup> Alternatively, the landowner can choose to do nothing, in which case the original owner of the improvement retains ownership and all liability for any harm or damage caused by the improvement’s presence on the landowner’s property.<sup>67</sup>

But, what if the landowner does not want to acquire ownership of the improvement and does not want to suffer its existence on his land in perpetuity? Article 493 does not directly address this question and contains no explicit provision allowing the landowner to force the removal of the improvement at the expense of its owner.<sup>68</sup> However, because article 493

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60. *See id.*

61. *Id.*

62. *See id.* at 218.

63. LA. CIV. CODE art. 493 (2020).

64. *Id.*

65. *Id.*

66. *See* LA. CIV. CODE arts. 493, 3418.

67. *See* LA. CIV. CODE art. 493.

68. *See id.* Whether article 493 can be interpreted to provide a remedy for landowners burdened with abandoned improvements on their property that actually diminish the value is questioned by some commentators but is beyond

is interpreted together with other provisions of the Civil Code in accordance with civilian methodology, “ownership is presumed to be free of all burdens, legal or physical, and a landowner has the right to demand the removal of any structure that encroaches upon his property.”<sup>69</sup> This notion is “a faculty inherent in the right of ownership,”<sup>70</sup> meaning Louisiana Civil Code article 493 “does not preclude the application of other civilian equitable remedies whose elements are met.”<sup>71</sup>

## II. REGULATIONS GOVERNING PIPELINE REMOVAL

### A. State Regulations Applicable to Intrastate Pipelines

#### 1. Louisiana Coastal Use Permit Regulations

The Louisiana Office of Coastal Management (“OCM”) regulates pipeline removal when the pipeline is subject to a Coastal Use Permit (“CUP”).<sup>72</sup> CUP provisions provide the procedure for “removal of up to 10,000 linear feet of pipeline in vegetated wetlands, spoil banks, and open water areas.”<sup>73</sup> Under these permits, pipelines must be removed within 120 days of their abandonment unless deferring removal of the pipeline would be in accordance with the public interest, and the permittee agrees to retain liability for the pipeline.<sup>74</sup> The OCM does not prescribe a blanket

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the scope of this paper. *See, e.g.*, Symeon Symeonides, *Property*, 47 LA. L. REV. 429, 449 (1986); Stephanie Chiasson Toups, *Still A Pile of Cans of Worms: The Law of Artificial Accession in Relation to Immovables*, 51 LOY. L. REV. 1023 (2005); Brad R. Resweber, Comment, *Opening the Can of Worms and Putting Them Back in: An Analysis of New Louisiana Civil Code Article 2695*, 67 LA. L. REV. 571 (2007).

69. A.N. YIANNOPOULOS & RONALD J. SCALISE, JR., *PROPERTY*, in 2 LOUISIANA CIVIL LAW TREATISE § 7:13 (5th ed. 2021).

70. *Id.*

71. *Id.* (quoting *Brankline v. Capuano*, 656 So. 2d 1 (La. Ct. App. 1995) (addressing a building erected by a precarious possessor) (citing *Beacham v. Hardy Outdoor Advert., Inc.*, 520 So. 2d 1086 (La. Ct. App. 1987)); *see also* H.R. Con. Res. 306, 2004 Leg., Reg. Sess. (La. 2004).

72. *See Office of Coastal Management – General Permits*, LA. DEP’T OF NAT. RES., [www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=728](http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=728) [<https://perma.cc/W7VW-F6SC>] (last visited Sept. 24, 2021).

73. *See id.*

74. *See infra* note 93. Query whether the state and permittee should (must) also seek landowner consent to abandon these lines in place? Also, if the lines are to remain, is the landowner entitled to be compensated for the permittee’s perpetual right to maintain its lines on the landowner’s property?

requirement for pipeline removal. Instead, removal is analyzed on a case-by-case basis from an environmental standpoint. Pipelines installed prior to 1980, however, are outside the purview of the OCM's regulations because such pipelines were established prior to the implementation of the CUP process.<sup>75</sup> Moreover, while abandonment of pipelines in place<sup>76</sup> may be considered as a viable option, such abandonment is only allowed if the OCM determines that removal would not be in accord with the public interest.<sup>77</sup> Such cases may include circumstances where the pipeline might have a possible future use, where its removal would conflict with other activities, or where there are other reasons that suggest abandonment in place would better serve the public interest.<sup>78</sup> In cases where abandonment in place is allowed, the permittee remains liable for the pipeline and must adhere to the OCM's rules and regulations governing temporary pipeline abandonment.<sup>79</sup>

## 2. Commissioner of Conservation Regulations

Outside the wetlands, banks, and open water areas regulated by the CUP, Louisiana's oil and gas pipelines are governed by the Commissioner of Conservation (the "Commissioner").<sup>80</sup> The Commissioner regulates the removal of abandoned or out-of-service *buried* intrastate pipelines.<sup>81</sup> Typically, upon the extinction of a pipeline servitude, the statute requires

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75. The Coastal Use Permit program began in August 1980. Lines installed after 1980 were determined to be exempt based on the exemption given to "use or activity [that] was lawfully commenced or established prior to the implementation of the coastal use permit process." LA. ADMIN. CODE tit. 43, pt. 1, § 723(B)(8)(a) (2020).

76. An abandonment-in-place strategy generally refers to the practice of leaving an "inactive" pipeline in the area where it was installed after it has served its purpose. *See Pipeline Decommissioning Process in Oil and Gas*, NIGEN, <https://nigen.com/pipeline-decommissioning-process-in-oil-and-gas/#:~:text=What%20is%20Pipeline%20Abandonment%20in,it%20has%20served%20its%20purpose> [<https://perma.cc/MR9V-8P5T>] (last visited Nov. 12, 2021).

77. This determination is made during the CUP application process, which is required to abandon a pipeline in place. *See generally Office of Coastal Management – General Permits*, *supra* note 72.

78. *See generally id.*

79. *See id.*

80. *See* LA. REV. STAT. § 30:4 (2020); *La. Env't Action Network v. Welsh*, 224 So. 3d 383, 387 (La. Ct. App. 2017) ("The Commissioner's power to regulate the state's oil and gas resources is an exercise of constitutionally protected police powers, which may not be abridged.").

81. *See* LA. REV. STAT. § 30:4(D)(1)(b).

the pipeline's owner to remove any pipeline-related objects located above the mudline<sup>82</sup> that could potentially interfere with other uses of state waters or water bottoms, including uses such as navigation or fishing.<sup>83</sup> On the other hand, section (c) of the same statute requires the owner of an active, *exposed* intrastate pipeline to choose one of three courses of action: (1) rebury the pipeline to its original depth to the extent feasible; (2) remove the pipeline; or (3) install and maintain adequate marking for the duration of the pipeline in accordance with the rules and regulations of the U.S. Coast Guard, Army Corps of Engineers, and Office of Conservation.<sup>84</sup> The appropriate remedial course of action will then be determined by the Commissioner after a public hearing considering environmental and other relevant issues.<sup>85</sup>

#### *B. Federal Regulations Applicable to Interstate Pipelines*

Removal of interstate pipelines is regulated by the Federal Energy Regulatory Commission (FERC). FERC is vested with exclusive authority to regulate all activities concerning interstate natural gas pipelines, including the construction, operation, and abandonment of such pipelines.<sup>86</sup> FERC regulates interstate transportation of natural gas "in the public interest,"<sup>87</sup> and its approval is required before abandoning or removing natural gas pipelines.<sup>88</sup> Notably, FERC cannot grant approval to abandon or remove a pipeline without first finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."<sup>89</sup> In making its determination, FERC will consider "environmental concerns, . . . [including] issues of soil preservation and land restoration" under the National Environmental Policy Act.<sup>90</sup> For example, although the FERC Order approving

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82. The "mudline" is the bed or bottom of the sea, lake, river, or stream; it is the interface between a body of water and the earth. R.D. LANGENKAMP, HANDBOOK OF OIL INDUSTRY TERMS AND PHRASES 107 (2d ed. 1977).

83. See LA. REV. STAT. § 30:4(D)(1)(b).

84. See *id.* § 30:4(D)(1)(c).

85. *Id.*

86. See 15 U.S.C. § 717f.

87. *Id.* §§ 717(a)–(b), 717f(a).

88. *Id.* § 717f(b).

89. *Id.*; *Terrebonne Par. Sch. Bd. v. Koch Gateway Pipeline Co.*, 769 So. 2d 1178, 1179 (La. 2000) (Calogero, P., concurring).

90. *N. Nat. Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 822 (8th Cir. 2004); see also 15 U.S.C. § 717n(b)(1) ("[FERC] shall act as the lead agency for the purposes

abandonment in *Tennessee Gas Pipeline Co.* allowed the abandonment of three pipelines crossing the Mississippi River, the Order also required compliance with environmental conditions such as restoring wetlands to their pre-construction condition and implementing erosion and sediment mitigation measures.<sup>91</sup>

### III. SURFACE RESTORATION AND DECOMMISSIONING OBLIGATIONS

#### A. Surface Restoration and Mitigation Requirements

Under Louisiana Civil Code article 493, the pipeline owner has an “obligation to restore the property to its former condition.” Depending on the individual pipeline and the circumstances surrounding its construction, different removal and decommissioning obligations may apply.

For example, when a pipeline permit is granted pursuant to a CUP, the pipeline must “be disposed of in accordance with applicable federal and state regulations and guidelines, and the pipeline trench shall be completely backfilled.”<sup>92</sup> After backfilling the trench, the affected area must then be “restored to as near pre-project condition as possible.”<sup>93</sup> Moreover, even when the pipeline permit is not granted in connection with a CUP, certain activities are considered uses of state and local concern and therefore are also subject to the CUP permitting requirements. Examples of such activities occur when: (i) dredging is necessary for access to the site; (ii) excavation is required to expose existing flowlines for cutting, capping, and abandoning in place; or (iii) removal of existing structures is

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of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969.”)

91. See *Tennessee Gas Pipeline Co.*, 127 F.E.R.C. ¶ 62,127 (2009).

92. OFF. OF COASTAL MGMT., LA. DEP’T OF NAT. RES., COASTAL USE PERMIT – GENERAL PERMIT-6 (GP-6) 8 (2019), [http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current\\_Documents/GP06\\_2019.pdf](http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current_Documents/GP06_2019.pdf) [https://perma.cc/8N2B-3J3M]. The trench must be backfilled in accordance with Special Condition I, which requires that “[m]aterial dredged from the trenches shall be temporarily stockpiled adjacent to the trenches. Stockpiled material in open water shall be clearly marked, and the markers shall be maintained, to minimize any possible hazard to navigation. Trenches shall be backfilled upon successful testing of the pipeline; however, all trenches shall be backfilled within thirty (30) days of initiation.” *Id.*

93. OFF. OF COASTAL MGMT., LA. DEP’T OF NAT. RES., COASTAL USE PERMIT – GENERAL PERMIT-14 (GP-14) 8 (2017) [hereinafter GP-14], [http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current\\_Documents/GP14\\_2017.pdf](http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current_Documents/GP14_2017.pdf) [https://perma.cc/9RUT-5BUW].



required.<sup>94</sup> Failure to remove the pipeline pursuant to the OCM's authority constitutes a violation of Louisiana's mitigation requirements.<sup>95</sup>

Mitigation is required in the CUP program for activities affecting wetlands in Louisiana's coastal zone.<sup>96</sup> Louisiana Revised Statutes section 49:214.41 sets forth regulations requiring wetland mitigation in appropriate cases. When determining the extent of mitigation needed in a particular case, factors such as the societal and economic value of the proposed activity, ecological values impacted by the proposed activity, availability of methods for avoiding or minimizing the impact associated with the proposed activity, and the availability of methods for restoring the site impacted by the proposed activity are all considered.<sup>97</sup> Nevertheless, mitigation must be at a level sufficient to replace or provide a substitute for the ecological value of the wetlands lost as a result of each permitted activity, unless the permit applicant demonstrates both that mitigation would render the proposed activity impractical and that such activity fully serves the public interest.<sup>98</sup>

Louisiana Revised Statutes section 49:214.41(A)(1) goes further to define compensatory mitigation as a "replacement, substitution, enhancement, or protection of ecological values to offset anticipated losses of those values caused by a [coastal use] permitted activity." This compensation is a subset of mitigation and broadly includes all actions taken by a permittee to avoid, minimize, restore, and compensate for ecological values lost through a permitted activity.<sup>99</sup>

Compensatory mitigation may also be required by the Army Corps of Engineers for adverse impacts to wetlands, streams, and other aquatic resources.<sup>100</sup> Compensatory mitigation encourages mitigation via a "watershed approach" and promotes the use of function or condition assessments to determine appropriate mitigation for unavoidable impacts on aquatic resources.<sup>101</sup> A "watershed" is a land area that drains to a

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94. See *Frequently Asked Questions*, LA. DEP'T OF NAT. RES., <http://www.dnr.louisiana.gov/index.cfm/page/1387> [<https://perma.cc/DZ7B-DGEJ>] (last visited Oct. 6, 2021); see also LA. ADMIN. CODE. tit. 43, pt. 1, § 723(A)(2) (2020) (providing "uses of state or local concern" subject to the permit requirement).

95. See *Frequently Asked Questions*, *supra* note 94; see also LA. ADMIN. CODE. tit. 43, pt. 1, § 723.

96. See LA. REV. STAT. § 49:214.41 (2020).

97. *Id.* § 49:214.41(B).

98. See *id.* § 49:214.41(C).

99. See *id.* § 49:214.41(A)(3).

100. See 33 C.F.R. § 332.3(c) (2020).

101. See *id.* § 332.2.

common waterway such as a wetland.<sup>102</sup> Accordingly, a “watershed approach” refers to the process for making decisions regarding compensatory mitigation that support the sustainability or improvement of aquatic resources in a watershed.<sup>103</sup> The approach involves consideration of a watershed’s needs and how locations and types of compensatory mitigation projects address those needs.<sup>104</sup> A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by certain activities.<sup>105</sup> The watershed approach may involve considering landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts on the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements.<sup>106</sup> Methods of compensatory mitigation include restoration,<sup>107</sup> establishment,<sup>108</sup> enhancement,<sup>109</sup> and preservation.<sup>110</sup>

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. “Restoration means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource.” *Id.*

108. “Establishment (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.” *Id.*

109. “Enhancement means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.” *Id.*

110. “Preservation means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.” *Id.*

### *B. Louisiana Pipeline Decommissioning and Abandonment Procedures*

The Louisiana Office of Conservation prescribes specific removal requirements for decommissioned pipelines.<sup>111</sup> After a pipeline has been decommissioned, the pipeline owner “must remove all equipment, including, but not limited to, facilities, turbines, support structures, pipeline, and cables” and must also restore the site.<sup>112</sup> Within 60 days, the pipeline owner must submit a written report to the Office of Conservation summarizing the removal activities, including the date such activities were completed and a description of any mitigation measures taken.<sup>113</sup>

Louisiana has also adopted the U.S. Department of Transportation’s “Pipeline and Hazardous Materials Safety Administration” procedure for the formal abandonment of both oil and natural gas pipelines.<sup>114</sup> Under these procedures, “[e]ach pipeline abandoned in place must be disconnected from all sources and supplies of gas; purged of gas; [and] in the case of offshore pipelines, filled with water or inert materials; and sealed at the ends.”<sup>115</sup>

## IV. A LITTLE LAGNIAPPE

### *A. The Peculiar Case of W&T Offshore, L.L.C. v. Texas Brine Corporation*

In *W&T Offshore*, the Louisiana Supreme Court confirmed in June of 2019 a Louisiana First Circuit Court of Appeal judgment that, absent explicit limitation, pipeline owners have broad rights under a pipeline servitude, including the right to relocate and replace the original pipeline with a larger diameter pipe if necessary for the enjoyment of the servitude.<sup>116</sup>

Plaintiff, W&T Offshore, L.L.C. (W&T), filed suit against defendant, Texas Brine Corporation (Texas Brine), seeking injunctive relief to prevent the defendant from constructing a second, replacement brine

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111. See LA. ADMIN. CODE tit. 43, pt. 5, §§ 965–968 (2020).

112. See *id.* § 967.

113. *Id.* § 968(A)(1)–(2).

114. See 49 C.F.R. § 192.727; LA. ADMIN. CODE tit. 43, pt. 13, § 2927.

115. 49 C.F.R. § 192.727(b); LA. ADMIN. CODE tit. 43, pt. 13, § 2927(B).

116. See *W&T Offshore, L.L.C. v. Tex. Brine Corp.*, 319 So. 3d 822 (La. 2019); see also *W & T Offshore, L.L.C. v. Tex. Brine Corp.*, 250 So. 3d 970, 979–80 (La. Ct. App. 2018), *writ granted*, 253 So. 3d 788 (La. 2018), *aff’d in part, rev’d in part sub nom. W&T Offshore, L.L.C. v. Tex. Brine Corp.*, 319 So. 3d 822 (La. 2019).

pipeline eight feet from the existing brine pipeline which was being taken out of service.<sup>117</sup> Texas Brine claimed the right of replacement from the terms of a 1979 lease between the parties, which included a personal servitude of right of use to construct and maintain a pipeline on the leased premises for the transportation of brine.<sup>118</sup> While the lease granted Texas Brine a pipeline right of way, it was silent as to both the specific location of the right of way on the leased premises and the diameter of the pipeline it was authorized to construct.<sup>119</sup> Due to this lack of specificity, Texas Brine argued that the lease's right of way allowed the construction of a larger diameter replacement line along a parallel route next to the original pipeline's path.<sup>120</sup>

Texas Brine claimed it had the right to construct the replacement pipeline under Louisiana Civil Code article 642 because doing so was necessary for its enjoyment of the personal servitude of right of use.<sup>121</sup> The trial court agreed and the Louisiana First Circuit Court affirmed, finding that under article 642 replacement of the existing pipeline had been contemplated by the parties when the servitude was originally created.<sup>122</sup> The Louisiana First Circuit concluded that, under article 642, the servitude included any rights that may become necessary for the enjoyment of the servitude—including construction of a new, separate, and larger pipeline at a different location than the original.<sup>123</sup>

The Louisiana First Circuit also found that Texas Brine failed to secure W&T's consent before constructing the replacement pipeline on the

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117. *See W & T Offshore*, 250 So. 3d at 974.

118. *Id.* at 977.

119. *Id.*

120. *See id.* The original pipeline was 14 inches in diameter and 6.7 miles long. The new replacement pipeline was 18 inches in diameter and approximately 7 miles long. *Id.* at 974. As noted, the new right of way's path was located eight feet to the side of the original pipeline's route. *Id.* at 973. The lease and right of way grant were silent as to the precise location of the right of way and the maximum diameter of the pipe Texas Brine was permitted to install. *Id.* at 979.

121. *Id.* at 977. Louisiana Civil Code article 642 provides: "A right of use includes the rights contemplated or necessary to enjoyment at the time of its creation as well as rights that may later become necessary, provided that a greater burden is not imposed on the property unless otherwise stipulated in the title."

122. *W & T Offshore*, 250 So. 3d at 977, 979. The court specifically noted the corrosive nature of brine and the short estimated useful life of the pipeline. *Id.* at 978.

123. *Id.* at 979.

leased premises,<sup>124</sup> which is required by Louisiana Civil Code articles 801, 804, and 805.<sup>125</sup> Thus, the court held that Texas Brine had committed a civil trespass for which it was liable to W&T in damages as well as an additional amount owed to W&T for expansion of the servitude.<sup>126</sup>

On writ of certiorari, the Louisiana Supreme Court reversed the Louisiana First Circuit's trespass holding but affirmed its judgment in all other respects.<sup>127</sup> In a peculiar passage, the Court emphasized that its holding was "limited to the precise and narrow facts before the [C]ourt and should not be interpreted expansively beyond the specific factual confines presented."<sup>128</sup> Justice Weimer dissented from this "expansive interpretation" of the servitude agreement, arguing the explicit language of the lease limited Texas Brine to "a pipeline" on a single portion of the property.<sup>129</sup> Therefore, in his opinion, Texas Brine did not have the right to replace, change the size of, move, or remove the original pipeline.<sup>130</sup>

#### *B. Some Practical Considerations for Drafting Pipeline Servitudes*

The Louisiana Supreme Court's "expansive interpretation" of the servitude agreement in *W&T Offshore* highlights the importance of using specific, explicit language in servitude agreements. As evidenced in *W&T Offshore*, the failure to address specific issues in a servitude agreement

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124. *Id.* at 980. W&T owned an undivided 23.66% interest in the land subject to the servitude. *Id.* at 973. While its co-owners had granted Texas Brine the right to construct the new line, W&T refused to give its consent. *Id.* at 974.

125. *Id.* at 980. Louisiana Civil Code article 801 provides: "The use and management of the thing held in indivision is determined by agreement of all the co-owners." Louisiana Civil Code article 804 provides, in relevant part: "Substantial alterations or substantial improvements to the thing held in indivision may be undertaken only with the consent of all the co-owners." Louisiana Civil Code article 805 similarly provides in part: "The consent of all the co-owners is required for the lease, alienation, or encumbrance of the entire thing held in indivision."

126. *W & T Offshore*, 250 So. 3d at 980–81.

127. *See* *W&T Offshore, L.L.C. v. Tex. Brine Corp.*, 319 So. 3d 822, 823 (La. 2019).

128. *Id.*

129. *Id.* at 836 (Weimer, J., dissenting).

130. *See id.* In a final curious twist, the Louisiana Supreme Court granted rehearing of the case. *See* *W&T Offshore, L.L.C. v. Tex. Brine Corp.*, 280 So. 3d 605 (La. 2019). However, following receipt of the parties' briefs, the Court recalled its Order "as improvidently granted" and denied the rehearing application. *See* *W & T Offshore, L.L.C. v. Tex. Brine Corp.*, Nos. 2018-C-00950, 2018-C-00956, 2020 WL 508660, at \*1 (La. Jan. 29, 2020).

such as the location of the pipeline on the property, the pipeline's maximum allowed diameter, the width of the right of way, and the number of lines allowed in the right-of-way area could result in an unintended expansion of authority.

Great care should be taken to avoid *W&T Offshore*'s consequences by carefully crafting and drafting pipeline right-of-way agreements. In drafting such agreements, attorneys should consider the following issues:

- whether the servitude is meant to be personal or predial in nature;
  
- whether the area subject to the servitude has been specifically defined, including detailed survey plats showing its location on the land, the length, width, and size of the construction servitude area, and final "as-built" plats showing width and length of the servitude area;
  
- the purpose for which the servitude is granted, such as for the construction, maintenance, operation, repair, and replacement of a pipeline for the transportation of petroleum or petroleum products;
  
- how many pipelines are permitted in the servitude area;
  
- the maximum diameter allowed of the pipeline(s) permitted to be constructed within the servitude area;
  
- the product(s) allowed to be transported through the pipeline(s);
  
- the term of the servitude and length of time the servitude survives abandonment of the pipeline or discontinuance of the movement of product through the pipeline;
  
- triggering events to terminate the servitude, e.g., the servitude shall expire within 12 months of the grant if construction of a pipeline is not commenced within that period, and/or after 24 consecutive months without the actual transportation of product through the pipeline, i.e., 24 months of nonuse;
  
- whether the pipeline owner has the right to abandon in place or

whether the pipeline must be physically removed; and if removal is required, the extent to which the property must be restored (e.g., original condition at the time the servitude is granted or something less);

whether the agreement includes a provision for compensation in the event abandonment in place is permitted and a provision specifying who owns the pipeline following abandonment in place;

appropriate release and indemnity provisions for liabilities arising from the continued existence of the pipeline on the property;

requirements for perpetual, periodic monitoring of the pipeline right of way for subsidence and the lowering of migrating pipelines if abandonment in place is permitted;

a reserved right to acquire pipeline ownership in the future, without cost, should the landowner later wish to own the previously abandoned pipeline;

provision for on-site mitigation should mitigation be required following removal of the pipeline; and, finally

whether the agreement includes a provision for adequate insurance, including a time element pollution endorsement buy-back or its equivalent.<sup>131</sup>

These are just a few of the salient points which the drafter of a pipeline servitude should consider when preparing an agreement that could potentially burden property for generations.

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131. See David Dybdahl, *The Sudden and Accidental Pollution Coverage Myth*, INT'L RISK MGMT. INST. (IRMI) (June 2018), <https://www.irmi.com/articles/expert-commentary/the-sudden-and-accidental-pollution-coverage-myth> [<https://perma.cc/5STH-QSV2>] (“In a time-element-based endorsed exception to a pollution exclusion, covered damages arising from a pollution release that begins and ends within a discrete time frame, usually measured in hours, and is discovered and reported to the insurance company within a set time, usually measured in days, will not be excluded from coverage for bodily injury and property damage.”).

## CONCLUSION

Pipelines often remain in service for decades. At some point, however, their usefulness will inevitably cease due to economic, engineering, or structural factors. When that time comes, without specific guidelines in the parties' servitude agreement, questions will undoubtedly arise regarding the rights and duties of both the pipeline servitude holder and the property owner. Specifically, with respect to ownership of the pipeline, questions may arise regarding its continued presence on the property, the ability to abandon it in place, the right to compel its removal, and the restoration of the land it previously occupied. Many of these issues, however, can and should be addressed in a carefully drafted servitude or right-of-way agreement.

The decision to physically remove abandoned or out-of-service pipelines often implicates confusing, and sometimes contradictory, state (and for interstate lines, federal) regulations and guidelines governing their removal. For instance, the owner of a pipeline subject to a state CUP must remove the pipeline within 120 days of abandonment,<sup>132</sup> while other buried oil and gas pipeline owners are only required to remove pipeline "related object[s]" that appear above the mudline.<sup>133</sup> Decommissioned pipeline owners are obligated to remove all pipeline equipment,<sup>134</sup> whereas FERC-regulated pipeline owners must seek approval before engaging in removal activity.<sup>135</sup> Nevertheless, if any form of dredging or excavation is necessary to remove the pipeline, *all* pipeline owners are required to completely backfill and restore the property "to as near pre-project condition as possible."<sup>136</sup>

The OCM also sets forth restoration requirements for pipelines affecting wetlands in Louisiana's coastal zone, namely mitigation efforts to minimize the impacts the pipeline activity has on the state's ecological values.<sup>137</sup> The Army Corps of Engineers may also require the pipeline owner to engage in compensatory mitigation to restore, establish, enhance, or even preserve wetlands, streams, or other aquatic resources to offset unavoidable adverse impacts.<sup>138</sup> Otherwise, owners of decommissioned,

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132. See discussion *supra* Part II.A.1.

133. See LA. REV. STAT. § 30:4(D)(1)(b) (2020).

134. See discussion *supra* Part III.B; see also LA. ADMIN. CODE tit. 43, pt. 5, §§ 965–968 (2020).

135. See discussion *supra* Part II.B; see also 15 U.S.C. §§ 717, 717f.

136. See GP-14, *supra* note 93, at 8.

137. See discussion *supra* Part III.A; see also LA. REV. STAT. § 49:214.41.

138. See discussion *supra* Part III.A; see also 33 C.F.R. § 332.3(c) (2020).



abandoned, and other pipelines not burdening wetlands only have a general duty to restore the land.<sup>139</sup>

To protect their interests, landowners must ensure their servitude agreements contain specific provisions detailing the extent of the pipeline owner's right to use the land for the construction, operation, and maintenance of the pipeline. The agreements should also include an express provision regarding the pipeline owner's duty to restore the land upon abandonment or expiration of the right of use. As evidenced by *W&T Offshore*, when the servitude agreement is silent concerning a particular issue, the agreed upon terms may be given an "expansive interpretation" and thus afford pipeline owners broad rights.<sup>140</sup> As a protective measure, the servitude agreement should be carefully crafted to protect the parties' interests, not only in restoration, but in each aspect controlling or governing the pipeline owner's right to use the landowner's property.

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139. See discussion *supra* Part II.A; see also LA. CIV. CODE art. 493 (2020).

140. See *W & T Offshore, L.L.C. v. Tex. Brine Corp.*, 250 So. 3d 970 (La. Ct. App. 2018), *writ granted*, 253 So. 3d 788 (La. 2018), *aff'd in part, rev'd in part sub nom.* *W&T Offshore, L.L.C. v. Tex. Brine Corp.*, 319 So. 3d 822 (La. 2019).