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A Survey of the Derogation of Property Rights and Damage to Production on Agricultural Land Burdened with Pipeline Servitudes

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A Survey of the Derogation Of Property Rights and Damage to Production on Agricultural Land Burdened with Pipeline Servitudes

*Karly Kyzar**

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INTRODUCTION

Soft pink and orange streaks paint the Louisiana sky above acres and acres of wispy Acadia Parish rice fields. The gentle sunrise combines with the morning dew to create the illusion of fields plated with gold, an indication that harvest is imminent. Passed down from father to son, this land is generational land. Families have endlessly toiled upon this earth to eke out sustenance and support their loved ones, aided by the rich Louisiana soil and stubborn Louisiana spirit. A farmer’s life is a brutal,

taxing existence, but the backbreaking labor becomes worthwhile when the crops ripen, and that harvest honey hue stretches as far as the eye can see . . .

Marring the center of the rice field is a 200-yard-wide gash cleaving through the entirety of the property. Where the tract of land meets the road, warning signposts and unsightly maintenance equipment indicate the presence of six underground pipelines, creating a stark contrast of ripening rice on one side and fallow, overgrown land interspersed with pipeline equipment on the other. The juxtaposition of nature's beauty and industrial interference is more than unsightly.

Mr. Sarver, owner and leaseholder of the aforementioned lands, has dealt with pipelines his entire life.¹ On multiple occasions, with the most recent in 2016 with the Bayou Bridge Pipeline, pipelines have been proposed and constructed across his farmland.² The pervasive impact of pipelines on his land has caused headaches and increased workloads for Sarver's already busy farming schedule.³

The problematic nature of pipelines stems in part from the manner in which they are constructed. Pipelines are typically placed underground, and the minimum burial depth calls for at least 2.5 feet of dirt to cover the oil or gas pipeline—assuming other factors such as drainage ditches, streams, or previously installed pipelines do not exist to necessitate deeper implantation of the pipeline.⁴ To reach this required depth, the pipeline company first removes any vegetation, trees, or crops from the surface of the land where the pipeline will be placed.⁵ Next, the soil is removed in

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1. Interview with Chris Lane Sarver, Acadia Parish Landowner and Leaseholder (Sept. 12, 2020).

2. *Id.*

3. *Id.*

4. *Pipelines - How Deeply Should They be Buried?*, CHAPMAN ENG'G (Feb. 8, 2016), <https://www.chapman.engineering/blog/2017/1/4/pipelines-how-deeply-should-they-be-buried> [<https://perma.cc/65YJ-2EC7>].

5. *Pipeline Construction: Step by Step Guide*, FRACTRACKER ALL., <https://www.fractracker.org/resources/oil-and-gas-101/pipeline-construction/> [<https://perma.cc/EGH7-ZQC9>] (last visited Aug. 22, 2021).

segregated layers, and a trench is dug deeply to house the pipeline.⁶ After the section of pipe is placed into the trench, the layers of soil are replaced in the order in which they were removed, and the land is returned to its original condition.⁷

In Mr. Sarver's experience, although the pipelines were installed using the procedure mentioned above, such precautionary measures still did not preclude the land from substantial alteration by the construction.⁸ Despite efforts to replace the soil layers without mixing, the topsoil inevitably combined with the unproductive lower layers of clay.⁹ According to Mr. Sarver, this mixing of soil layers decreased the crop yield for subsequent years until the soil regained its normal composition.¹⁰

Additionally, rice production is dependent upon perfectly flat and uniform land.¹¹ Although pipeline companies assert they return the land back to its original condition, Mr. Sarver's experience indicates otherwise. According to Mr. Sarver, after a "responsible" pipeline company came through his land, it took approximately three years for the land to be worked back to the perfect flat consistency ideal for rice growth and crawfish production.¹²

Mr. Sarver's final grievance was the lack of control he possessed over the portions of his land burdened by pipeline servitudes. To perform even the simplest of tasks like planting crops, building levees, or constructing fences on his property, Mr. Sarver is obligated to first contact the pipeline company and wait for a representative to physically oversee the activities conducted near the pipeline.¹³ Indeed, pipeline companies frequently send

6. Canadian Energy Pipeline Ass'n (CEPA), *How is a Pipeline Built?*, ABOUT PIPELINES, <https://www.aboutpipelines.com/en/pipeline-101/the-life-of-a-pipeline/building-a-pipeline/> [<https://perma.cc/B27R-36G8>] (last visited Aug. 24, 2021).

7. *Id.*

8. Interview with Chris Lane Sarver, *supra* note 1.

9. *Id.*

10. *Id.*

11. To achieve the ideal flat consistency, farmers utilize a technique referred to as laser grading. Laser grading "is the process of leveling a land surface to a desired gradient by cutting, filling, and smoothing the soil" to create an ultra smooth surface without significant high spots or dips. *Laser Grading Sports Fields*, SPORTS TURF MANAGERS ASS'N, <https://11luuvtufne6f2y33i1nvedi-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/Laser-Grading-FINAL.pdf> [<https://perma.cc/S8VX-6WDA>] (last visited Aug. 24, 2021).

12. Interview with Chris Lane Sarver, *supra* note 1.

13. *Id.*; *see also* Tex. Gas Transmission Corp. v. Soileau, 251 So. 2d 104, 109 (La. Ct. App. 1971) (validating that landowners are prohibited from constructing any structures or digging ditches across a pipeline right of way).

pamphlets in the mail outlining these requirements to remind landowners of their land use limitations.¹⁴ Pipelines under agricultural land such as Mr. Sarver's not only create a substantial burden in requiring more labor to produce a smaller-than-average crop yield upon the pipeline right of way ("ROW") land, but also the pipeline servitude constitutes a dismemberment of his property rights on land that has been in his family for generations.¹⁵

Although the Declaration of Independence espouses the idea that Americans are entitled to "life, liberty, and the pursuit of happiness,"¹⁶ the original philosophical sentiment declared by English philosopher John Locke stipulates that "life, liberty, and *property*" are the inalienable and fundamental natural rights of mankind.¹⁷ Throughout Western history, property has been the primary marker of success, wealth, and prosperity in society. In modern times, wealth accumulation is no longer so inextricably tied to ownership of corporeal immovables such as tracts of land; however, ownership of property remains an integral feature of American culture. Property ownership is a fundamental American right protected by our Constitution, and the landowner's right to exclude is one of the most essential elements in the bundle of rights of individual property ownership.¹⁸ Pipeline servitudes—especially those imposed upon unwilling landowners—place severe limitations on the rights of landowners and their ability to use their land with the potential to span decades or even lifetimes.¹⁹ The public policy rationale for this derogation

14. Interview with Chris Lane Sarver, *supra* note 1.

15. *Id.*

16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

17. See generally John Locke, *The Project Gutenberg EBook of Second Treatise of Government* (2010), <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm> [<https://perma.cc/9SAQ-CYTP>] (last updated Sept. 5, 2017) (emphasis added).

18. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting); *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–80 (1979); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 667 (1999); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Byrd v. United States*, 138 S. Ct. 1518, 1522 (2018).

19. Pipeline servitudes typically last as long as the pipeline remains in use to transport oil or gas. However, some courts have further expanded this time frame and held that pipeline servitudes created pursuant to and as a result of the expropriating power of a governmental authority are not subject to a term. See,

of property rights is one of common good: the detriment to the landowner is balanced against the benefits provided by pipelines to the collective whole of society—namely, the efficient transportation of energy in the form of natural gas, crude oil, and other petrochemical substances.

However, the moral high ground of contributing to the “common good” is an insufficient remedy for the dismemberment of ownership forced upon landowners whose lands are unwillingly burdened by pipeline servitudes.²⁰ In cases of expropriation of land by common carrier pipelines, the pipeline company is constitutionally required to provide “just compensation” to the landowner.²¹ However, courts have defined such compensation as the “market value of the expropriated land,” which is not necessarily the full extent of both the present and future damages inflicted by the presence of the pipeline.²² Future damages are especially prevalent for landowners who use their lands for agricultural purposes such as growing crops. And yet, farmers receive no compensation for the additional, prospective damages after the installation of a pipeline.²³ Under the expansive compensation standard in the Louisiana Constitution, the Louisiana jurisprudence should award compensation for future damages stemming from decreased crop productivity due to pipeline activity on agricultural lands.

This Comment aims to highlight the unjust jurisprudence that presents an insufficient remedy available to landowners when a pipeline is constructed across active agricultural land. Part I of this Comment will begin with a general overview of the legal process pipeline companies undertake to build pipelines which, in some cases, occurs without the consent of the landowner. This section will also focus on the concepts of expropriation, just compensation, and severance damages. Part II of this

e.g., Enter. TE Prods. Pipeline Co. v. Avila, No. 16-207, 2016 WL 6495978, at *8 (La. Ct. App. Nov. 2, 2016).

20. “Dismemberment of ownership” is a civil law phrase that indicates the owner of a thing does not enjoy full and encompassing ownership of the thing in question. *See* A.N. YIANNPOULOS, PROPERTY, in 2 LOUISIANA CIVIL LAW TREATISE § 9:17 (5th ed. 2020).

21. CMS Trunkline Gas Co. v. State *ex rel.* Dept. of Transp. & Dev., 980 So. 2d 849, 853 (La. Ct. App. 2008) (“Property shall not be taken or damaged by the state or its political subdivision except for public purposes and with just compensation.” (quoting LA. CONST. art. 1, § 4(B)(1))).

22. ANR Pipeline Co. v. Succession of Bailey, 558 So. 2d 689, 691 (La. Ct. App. 1990).

23. *See generally* Tex. Gas Transmission Corp. v. Fuselier, 133 So. 2d 828 (La. Ct. App. 1961); Columbia Gulf Transmission Co. v. C. J. Grayson, Inc., 232 So. 2d 150 (La. Ct. App. 1970).

Comment will explore why just compensation as provided in the Louisiana jurisprudence is ultimately an inadequate remedy, particularly for agricultural landowners, due to the commonly occurring possibility of prospective damages spanning into the future after a pipeline is placed into the ground. A presentation of the current and consistent Louisiana jurisprudence ruling that future damages are not compensable due to their “speculative” nature and classification as “double compensation” will be explored in detail. Part III of this Comment will examine potential solutions by proposing ways to expand recognition of “future damages” as a viable theory of recovery when damage by pipelines exceeds the damage originally contemplated by “just compensation.” One solution stems from a plain reading of the Louisiana Constitution, which has been ignored by Louisiana jurisprudence. A second solution proposes a change in the law, namely the prescriptive period available for landowners to bring damages actions against expropriating authorities.

I. HOW DO PIPELINE COMPANIES GET AWAY WITH TAKING PEOPLE’S LAND?

Despite widespread global traction in the pursuit of cleaner energy, traditional “fossil fuels” still rule the energy industry. In a state with a robust energy sector like Louisiana, fossil fuels and pipelines carry these products abound and together form a subsurface labyrinth spanning throughout the entire state.²⁴ As a result, Louisiana is one of the major hotspots for oil and gas pipelines in North America.²⁵ The Louisiana Department of Natural Resources estimates that the state contains approximately 50,000 miles of underground pipelines intersecting every major highway, railroad, and navigable waterway in the state.²⁶ Agricultural land, comprising nearly a third of the total land in the state of Louisiana, is frequently in the path through which a newly constructed pipeline takes.²⁷ Typically, when a pipeline traverses an area, the company

24. Wendy Fan, *An Introduction to Oil and Gas Pipelines*, FRACTRACKER ALL. (June 14, 2016), <https://www.fractracker.org/2016/06/introduction-oil-gas-pipelines/> [<https://perma.cc/ACP2-XYEB>].

25. Bethel Afework et al., *Pipeline*, ENERGY EDUC., <https://energyeducation.ca/encyclopedia/Pipeline> [<https://perma.cc/76QK-RW5J>] (last updated Jan. 31, 2020).

26. *Pipeline Operations Program*, LA. DEP’T OF NAT. RES., OFF. OF CONSERVATION, <http://www.dnr.louisiana.gov/index.cfm/page/150> [<https://perma.cc/EE4B-T8HB>] (last visited Aug. 24, 2021).

27. See U.S. DEP’T OF AGRIC. NAT’L AGRIC. STAT. SERV., LOUISIANA CENSUS LAND AREA (2017), https://www.nass.usda.gov/Statistics_by_State/

negotiates an agreement with the landowner to appease both parties assigning a money value to the pipeline company's use of the land.²⁸ However, regardless of the landowner's desires or ideas about the worth of his property, under Louisiana law a company building a pipeline that enjoys the status of common or contract carrier is entitled to expropriate the land even if the two parties cannot reach an agreement.²⁹

While the landowner is entitled to just compensation for the loss of the land when expropriated by a common carrier such as a pipeline company, the landowner ultimately has no bargaining power to completely prohibit the pipeline's construction on his land if the pipeline company chooses that particular route. The landowner may either engage in negotiations with the pipeline representative to reach a settlement amount amenable to the pipeline company for the taking of the land or endure a lawsuit the landowner will undoubtedly lose. A sufficient understanding of this process requires basic knowledge of expropriation, just compensation, and severance damages.

A. Expropriation (Also Known as Thinly Veiled Eminent Domain)

Pursuant to the Takings Clause set out in the Fifth Amendment of the United States Constitution, private property shall not be taken by the government for a public purpose without just compensation.³⁰ The Takings Clause of the Constitution simultaneously protects and hinders property rights allowing the government to take whatever action desired but only so long as compensation is granted for the taking.³¹ Property is "taken" when a public authority acquires the right of ownership, a

Louisiana/Publications/Economic_and_Demographic_Releases/Census/lafarmonos.pdf [https://perma.cc/85TK-SCE5].

28. Pipeline companies are required by law to enter into good faith negotiations with the landowner before using the expropriation power. *See* LA. REV. STAT. § 19:2 (2020); *see also id.* § 19:2.2. However, the mere fact that the expropriating authority possesses this ability creates an imbalance of negotiating power between the company and the landowner.

29. Gregory Anding & Robert Dille, "Just Compensation" Or Just a Windfall? Do Sales of Pipeline Servitudes Provide Valid, Reliable Comparables for Determination of Just Compensation in Pipeline Expropriation?, 45 LOY. L. REV. 381 (1999).

30. U.S. CONST. amend. V.

31. *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

recognized dismemberment,³² or even a temporary deprivation of use.³³ The Fourteenth Amendment extends the Takings Clause to actions by state and local governments. State and local governments are also allowed to impose additional regulations so long as the regulations provide equal or greater protections to property.³⁴

In Louisiana, such a “taking” of private property for public use without the owner’s consent is called expropriation.³⁵ Defined simply, the legal concept of expropriation encompasses the taking of private property for public use so long as the taking “is for a public purpose and the owner receives ‘just compensation.’”³⁶ Property is considered “taken” when a private authority or government entity acquires either the right of ownership or one of its recognized dismemberments.³⁷ The Louisiana Constitution, while recognizing the rights of persons to acquire, control, and own property, explicitly provides for the possibility of expropriation stating: “Property shall not be taken or damaged by any private entity authorized by law to expropriate, *except for a public and necessary purpose and with just compensation paid to the owner*; in such proceedings, whether the purpose is public and necessary shall be a judicial question.”³⁸

In Louisiana, this power is delegable to administrative officers or other agencies of the sovereign as well as to public and private corporations so long as the entity is a common or contract carrier operating for a public

32. *Columbia Gulf Transmission Co. v. Hoyt*, 215 So. 2d 114, 120 (La. 1968).

33. *See First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987).

34. Bill Funk, *CPR Perspective: The Takings Clause of the Fifth Amendment*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/our-work/energy-environment/persptakings/> [<https://perma.cc/A4SP-QDRV>] (last visited Aug. 24, 2021); *Dolan v. City of Tigard*, 512 U.S. 374, 382–84 (1994).

35. Expropriation is the civil law equivalent of the common law term “*eminent domain*.”

36. FRANK L. MARAIST, *SPECIAL PROCEEDINGS, in 1A LOUISIANA CIVIL LAW TREATISE* § 9.9 (2020).

37. *Culotta v. Police Jury of Ascension Par.*, 316 So. 2d 463, 465 (La. Ct. App. 1975). A servitude is a type of dismemberment referenced here.

38. LA. CONST. art. 1, § 4(B)(4) (emphasis added). As early as 1905, the Louisiana Supreme Court recognized the importance of protecting property right, holding “the contingency to warrant expropriation must be evident and imperious, as the law decrees property too sacred and inviolable to sanction the expropriation of it, except it be necessary for public purposes. That the property of no man can be taken without his consent, beyond what is admitted by the public necessity.” *La. Ry. & Nav. Co. v. Xavier Realty*, 39 So. 1, 5 (1905) (citations omitted).

purpose.³⁹ Louisiana Revised Statutes section 19:2(5) provides that a common carrier entity with expropriating authority includes:

Any domestic or foreign corporation, limited liability company, or other legal entity created for, or engaged in, the piping and marketing of natural gas for the purpose of supplying the public with natural gas as a common carrier or contract carrier or any domestic or foreign corporation, limited liability company, or other legal entity which is or will be a natural gas company or an intrastate natural gas transporter as defined by federal or state law, composed entirely of such entities or composed of the wholly owned subsidiaries of such entities. As used in this Paragraph, “contract carrier” means any legal entity that transports natural gas for compensation or hire pursuant to special contract or agreement with unaffiliated third parties.⁴⁰

To be considered a common carrier, and thus possess the power to expropriate, these pipeline companies must have been expressly delegated eminent domain authority by the state government.⁴¹ In the case of expropriation for pipelines, the pipeline companies do not require full ownership; rather the pipeline is granted a ROW, or predial servitude, upon land which still remains under ownership of the original landowner.⁴² However, although the landowner still maintains title to the land, the activities of the pipeline company and the pipeline itself burdens the landowner’s ability to enjoy their land. The expropriating authority is required to justly compensate the landowner for this infringement upon the enjoyment of ownership.⁴³

39. *Tenn. Gas Transmission Co. v. Violet Trapping Co.*, 176 So. 2d 425, 438 (La. 1965).

40. LA. REV. STAT. § 19:2(5) (2020).

41. *See Mongrue v. Monsanto Co.*, 249 F.3d 422 (La. 2001).

42. *Rose v. Tenn. Gas Pipeline Co.*, 508 F.3d 773, 776 (5th Cir. 2007). A “servitude” under Louisiana law is the civil law equivalent of the common law “easement.”

43. The rights of expropriation are exercised by filing suit in the parish where the property to be expropriated is situated. Any claims for damage to the owner caused by the expropriation of property is subject to a two year prescription that commences on the date the property was actually occupied and used for the purposes of expropriation. LA. REV. STAT. § 19:2.1(A)(1), (B) (2020).

B. “Just” Compensation

Just compensation, which is the second prong of expropriation, is also constitutionally stipulated. Jurisprudence recognizes that even when an expropriation is a partial taking the expropriation still relegates the landowner’s ownership rights to a secondary position requiring compensation.⁴⁴ Both the United States (“U.S.”) and the Louisiana Constitution provide guidance as to what constitutes “just compensation.” The Fifth Amendment of the U.S. Constitution contains a provision commonly referred to as the “Takings Clause,” which places the condition of compensation on the government in the event of a taking of private property.⁴⁵ Generally, just compensation under the Fifth Amendment is measured by the market value of the property at the time of the taking.⁴⁶ However, the compensation requirement of the Fifth Amendment is not equivalent to “full compensation.”⁴⁷ Under the Takings Clause, all circumstances must be considered to balance the interests of the owner whose property is taken and the public that ultimately must pay the bill.⁴⁸

The Louisiana Constitution, however, expands the scope of “just compensation” beyond what is provided for in the Fifth Amendment. According to the Louisiana Constitution:

In every expropriation or action to take property pursuant to the provisions of this Section, a party has the right to trial by jury to determine whether the compensation is just, and the owner shall be compensated to the full extent of his loss. Except as otherwise provided in this Constitution, *the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.*⁴⁹

44. *Sw. La. Elec. Membership Corp. v. Simon*, 207 So. 2d 546, 553 (La. Ct. App. 1967).

45. 29A C.J.S. *Eminent Domain* § 67 (2021).

46. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *Horne v. Dep’t of Agric.*, 576 U.S. 350, 369 (2015).

47. *United States v. Norwood*, 602 F.3d 830, 834 (7th Cir. 2010).

48. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

49. LA. CONST. art. 1, § 4(B)(5) (emphasis added).

This constitutional provision has been interpreted by Louisiana case law to include compensation for all aspects of the landowner's loss and is not solely confined to the loss of the land itself.⁵⁰

Furthermore, a subsequent provision of the Louisiana Constitution, when read *in pari materia* with Louisiana Constitution article 1, section 4(B)(5), bolsters the position that the Louisiana Constitution provides greater repayment within the scope of just compensation than does the U.S. Constitution. Article 1 of the Louisiana Constitution provides that the general "Louisiana standard" for appropriation or expropriation does not apply for levee and levee drainage purposes, coastal wetlands restoration activities, or federal and non-federal hurricane protection projects.⁵¹ Rather, the compensation for those circumstances shall not exceed the compensation required by the Fifth Amendment of the Constitution.⁵² Based upon this exception, a plain-reading interpretation of this provision indicates that for "normal circumstances" of expropriation the just compensation standard exceeds that of the standard required by the Fifth Amendment Takings Clause.

Case law supports this plain language reading of the Louisiana Constitution. The Louisiana First Circuit Court of Appeal held in *South Lafourche Levee District v. Jarreau* that:

[I]t is readily apparent that every statutory and constitutional reference regarding the proper measure of 'just compensation' for property taken or damaged pursuant to a permanent levee servitude for a hurricane protection project . . . has been legislatively restricted and shall not exceed that which is required by the Fifth Amendment. The compensation required by the Fifth Amendment is the fair market value of the property at the time of the taking for public use. Damages for economic and business losses are not recoverable as just compensation for the taking.⁵³

The First Circuit's holding indicates that the absolute minimum compensation a landowner is entitled to is fair market value dictated by

50. *Exxon Pipeline Co. v. LeBlanc*, 763 So. 2d 128, 132–33 (La. Ct. App. 2000), *writ denied*, 775 So. 2d 448 (La. 2000); *Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll. v. 1732 Canal St., L.L.C.*, 133 So. 3d 109, 113 (La. Ct. App. 2014); *Orleans Par. Sch. v. Montegut, Inc.*, 255 So. 2d 613, 614 (La. Ct. App. 1971).

51. LA. CONST. art. 1, § 4(E)–(G).

52. *Id.* § 4(G).

53. *S. Lafourche Levee Dist. v. Jarreau*, 192 So. 3d 214, 224 (La. Ct. App. 2016), *writ granted*, 204 So. 3d 998, *and writ granted*, 205 So. 3d 919, *and aff'd in part, rev'd in part*, 217 So. 3d 298.

the Fifth Amendment. However, this implies that normal expropriations not involving restoration or hurricane protection projects require a heightened level of just compensation in Louisiana that could, *a contrario sensu*, extend to economic and business losses.

C. Severance Damages

Where just compensation refers to compensation for the part of a landowner's property taken by the expropriating authority, "severance damages" are those damages that flow from the partial expropriation of a tract of land and are defined by "the difference between the value of the remaining property before and after the taking."⁵⁴ Severance damages are intended to compensate for the "diminution in market value of the remainder of the parent tract caused by expropriation."⁵⁵ For severance damages to be recoverable, damages must be reasonably prospective and not so remote or anticipated as to be speculative.⁵⁶ While severance damages are a component of the expropriation process, severance damages would not be applicable as a mechanism for compensation for decreased crop productivity.

II. MONEY FOR THE "FAIR MARKET VALUE" OF THE LAND IS NOT CONSTITUTIONALLY OR STATUTORILY SUFFICIENT TO COMPENSATE FOR THE FULL EXTENT OF THE LOSS OF THE PRODUCTION OF THE LAND UNDER LOUISIANA'S BROAD DEFINITION OF JUST COMPENSATION

To say that fair market value is an insufficient remedy, one must first define the meaning of "fair market value." Fair market value for expropriated land is determined at the time of the institution of the expropriation suit and examines the land's "best and highest use."⁵⁷ The term "best and highest use" is defined as "the reasonably probable and legal use of property that is physically possible, appropriately supported,

54. State, Dep't of Transp. & Dev. v. Munson, 169 So. 3d 426, 433–34 (La. Ct. App. 2015) (citing State, Dep't of Transp. & Dev. v. Restructure Partners, L.L.C., 985 So. 2d 212, 221 (La. Ct. App. 2008), *writ denied*, 992 So. 2d 937 (2008)).

55. Trunkline Gas Co. v. Verzwylt, 196 So. 2d 58, 59 (La. Ct. App. 1967) (citing Tex. Pipe Line Co. v. Barbe, 85 So. 2d 260 (La. 1955)).

56. United Gas Pipe Line Co. v. New Orleans Terminal Co., 156 So. 2d 297, 305 (La. Ct. App. 1963) (citing La. Highway Comm'n v. Lasseigne, 148 So. 672, 673 (La. 1933)).

57. Trunkline Gas Co., 196 So. 2d at 59 (citing Barbe, 85 So. 2d at 260).

financially feasible, and results in the highest value.”⁵⁸ When the expropriation is only a partial taking, the compensation provided is the fair market value of the owner’s entire interest minus the fair market value of the interest remaining to the owner after the taking.⁵⁹

If farmers are receiving fair market value for the land and the landowner can still use that land to a certain extent, why is there a problem at all? Would further compensation not result in the landowner receiving double compensation and thus a windfall? The answer stems from the broad scope of Louisiana’s constitutional provision allowing the landowner to be compensated for expropriation beyond just the market value of the land taken. The Louisiana Constitution provides that the court must provide remedies that encompass the *full extent* of the landowner’s loss.⁶⁰ The fair market value received by the landowner is a portion of the compensation for the pipeline servitude. However, the Louisiana Constitution’s provision on just compensation is designed to encompass additional damages, inconveniences, and hardships suffered by the landowner as a result of the pipeline’s presence on his property. Indeed, the owner of the condemned or damaged property must be compensated beyond the market value of the property and severance damages; rather, the landowner must be compensated for all aspects of the loss and “placed in as good a position pecuniarily as he enjoyed prior to taking.”⁶¹ Yet, the courts do not recognize decreased future crop productivity in subsequent years as a compensable form of loss despite farmer testimony and scientific sources providing convincing evidence that pipeline construction harms soil quality. As justification for denying such a remedy, courts have stated that compensation for this claim is too speculative and would constitute “double compensation.”

58. 1 CIV. ACTIONS AGAINST THE U.S. § 4:33 (2021).

59. *Id.* § 4:35. While one mechanism of appraising fair market value is to examine comparable sales, the Louisiana jurisprudence recognizes that “a sale made to the condemning authority under the threat of expropriation is not a willing seller transaction and is therefore not controlling as a comparable sale,” although it may be considered in determining value. *Par. of E. Baton Rouge v. Edwards*, 119 So. 2d 175, 176 (La. Ct. App. 1960) (citing *Orleans Par. Sch. Bd. v. Paternostro*, 107 So. 2d 451, 453 (La. 1958)).

60. *St. Charles Land Co. II v. City of New Orleans ex rel. New Orleans Aviation Bd.*, 167 So. 3d 128, 136 (La. Ct. App. 2014), *writ granted*, 171 So. 3d 268 (2015) (citing *Exxon Pipeline Co. v. Hill*, 788 So. 2d 1154, 1159 (La. 2001) (quoting LA. CONST. art. 1, § 4(B)(5)) (emphasis added)).

61. *Roman Cath. Church of Archdiocese of New Orleans v. La. Gas Serv. Co.*, 618 So. 2d 874 (La. 1993); *Marathon Pipe Line Co. v. Pitcher*, 368 So. 2d 994 (La. 1979); *Ark. La. Gas Co. v. Marbury*, 268 So. 2d 323 (La. Ct. App. 1972).

A. Dismemberment of Ownership Caused by a Pipeline Servitude

In the civilian system, the right of ownership carries three distinct subparts: *usus*, *fructus*, and *abusus*. These rights may be dismembered through the will of the owner or by operation of law.⁶² A predial servitude, such as a pipeline servitude, is one of such dismemberment of ownership conveying real rights of enjoyment and authority over the property to someone other than the landowner.⁶³ Servitudes give rise to incidental and correlative duties imposed on the owner of the immovables burdened with such servitudes.⁶⁴

B. Compensation for Today's Land . . . But What About Tomorrow's Crops?

Specifically related to expropriation of a servitude, the law demands payment of damages suffered by the landowner.⁶⁵ While Louisiana courts in expropriation litigation have allowed landowners compensation for crops currently planted and growing when destroyed by a pipeline,⁶⁶ they have also expressly held that compensation for decreased production in subsequent years does not warrant higher awards of loss.⁶⁷

Columbia Gulf Transmission Co. v. C. J. Grayson, Inc., a case that determined proper valuation of expropriated land, a natural gas company sought a 75 foot construction servitude and 30 foot permanent servitude over the defendant's cotton fields, and an appeal ensued to determine the appropriate compensation amount.⁶⁸ Among other damages, the defendant sought damages for the loss of approximately bales of cotton caused by a decrease in fertility of the soil for the next three years.⁶⁹ The court refused to award this item of damage due to the harm being *too speculative* to constitute a basis for a damage award.⁷⁰

62. *Richard v. Hall*, 874 So. 2d 131, 144 (La. 2004).

63. *Id.* at 144–45; A.N. YIANOPOULOS, *PREDIAL SERVITUDES*, in 4 LOUISIANA CIVIL LAW TREATISE § 6:30 (4th ed. 2020).

64. *Id.* § 1:1.

65. *Humble Pipe Line Co. v. Wm. T. Burton Indus., Inc.*, 217 So. 2d 188, 193 (La. 1968).

66. *See, e.g., La. Res. Co. v. Langlinais*, 383 So. 2d 1356 (La. Ct. App. 1980).

67. *See Tex. Gas Transmission Corp. v. Fuselier*, 133 So. 2d 828, 834 (La. Ct. App. 1961).

68. *Columbia Gulf Transmission Co. v. C. J. Grayson, Inc.*, 232 So. 2d 150, 152 (La. Ct. App. 1970).

69. *Id.* at 156.

70. *Id.* (emphasis added). Although the court found future decreased productivity of crops to be too speculative, other courts have awarded

In *Texas Gas Transmission Corp. v. Fuselier*, the defendant-landowner appealed the amount provided to compensate him for the taking of a 50-foot-wide ROW through the middle of his rice field.⁷¹ While the defendant was entitled to compensation for that current year's releveling, the loss of value of remaining land, and the loss for current crawfish and rice crops, the court specifically refused to recognize the loss of rice productivity and pasture located within the ROW for a period of three to six years after the completion of the pipeline.⁷² The court refused to award damages for the future loss of productivity opining that such an award would constitute double recovery due to the anticipated loss by increasing the market value award for the land.⁷³ The court increased the award per acre from \$120 to \$200 for 2.45 acres of ROW for a total increase of \$196.⁷⁴ Unfortunately, this amount was not even close to covering the amount the experts stipulated as damages at trial, which was estimated to be \$1,344 in losses suffered to crop production over the next three years.⁷⁵

Focusing on the double compensation criticism in *Fuselier*, the court stipulated that, where the cost of restoration has been covered by an allowance for the reduced value, the court cannot award any separate compensation.⁷⁶ The court lumped decreased future productivity as part of the valuation of the land and believed compensation for both would constitute double compensation. According to article 463 of the Louisiana Civil Code, “[b]uildings, other constructions permanently attached to the ground, standing timber, and *unharvested crops* or ungathered fruits of trees, are component parts of a tract of land when they belong to the owner of the ground.”⁷⁷ Typically, the land along with its component parts comprise the market value of a tract of land. Indisputably, unharvested crops presently growing on a tract of land would be encompassed with the

compensation for other types of future damages. *See* *Rose v. Tenn. Gas Pipeline Co.*, 508 F.3d 773, 775 (5th Cir. 2007) (explaining that the plaintiff “retained the right to seek damages for future erosion” of a canal from the activities of a pipeline company); *see also* *Sid-Mar's Rest. & Lounge, Inc. v. State ex rel. Governor*, 182 So. 3d 390, 393 (La. Ct. App. 2015) (finding future economic damages for loss of business of a restaurant and lounge were appropriate as just compensation); *see also* *State, Dep't of Transp. & Dev. v. Dietrich*, 555 So. 2d 1355, 1359–60 (La. 1990) (holding that future damage to slaughterhouse and cattle-raising operations were appropriate for four years after the date of the trial).

71. *Fuselier*, 133 So. 2d at 830.

72. *Id.* at 834.

73. *Id.* at 834–35.

74. *Id.*

75. *Id.* at 830.

76. *Id.* at 834.

77. LA. CIV. CODE art. 463 (2020) (emphasis added).

fair market valuation of the tract of land. However, compensation for a decrease in productive capability of a tract of land is an entirely different harm suffered by a landowner because there is no unharvested crop yet in existence. Reading article 463 *ad verbum*, the legislature did not intend future crops to be part of a tract of land; rather, the legislature intended for crops presently growing yet unharvested to be part of a tract of land. Future crops, as in crops not yet in existence, should not be part of the market valuation and should instead fall into a separate category. The harm suffered by years of lower crop yield is not to the land itself but to the farmer's business and economic situation, putting the landowner in a worse pecuniary position than he started. Compensation for decreased productivity and reduced business profits should not be considered double compensation. The only issue raised by the jurisprudence left to address then is the criticism that the award of such damages would be too speculative.

C. Soil Science and Pipelines

For decades, courts have refused to grant additional damages for the loss of productivity and fertility suffered by agricultural lands burdened by pipeline servitudes. Pipeline companies argue that they employ highly qualified personnel to ensure appropriate practices, topsoil salvage, topsoil/subsoil segregation, replacement of soil to the trench line, and de-compaction throughout the process.⁷⁸ Pipeline companies assert that they restore the land back to its original condition. However, scientific research and case studies present convincing evidence that the installation of a pipeline causes substantial and long-term damage to the composition of the soil, hindering the agricultural production capacity of the land. Studies from across the globe have explored such impacts of pipelines upon soil quality.

A 2014 Chinese study examined disturbances to the physical-chemical properties of soil at three separate sites after a pipeline was installed in order to track recovery time for the soil to regain its pre-pipeline composition.⁷⁹ The results of the study revealed that the bulk of the adverse effects were contained within the ROW area.⁸⁰ Additionally, the

78. Aaron DeJoia, *Pipelines and Agriculture Can Work Together*, NAT. GAS NOW (Sept. 30, 2016), <https://naturalgasnow.org/pipelines-agriculture-can-work-together/> [https://perma.cc/EB2G-8AUC].

79. Peng Shi et al., *The Effects of Pipeline Construction Disturbance on Soil Properties and Restoration Cycle*, ENV'T MONITORING & ASSESSMENT 186(3), 1825–35 (2014).

80. *Id.*

topography of the land affected the level of initial disturbance with flat areas suffering greater initial disturbance than sites with hilly topographical features.⁸¹ After two years, the soil had not returned to its normal composition, indicating that the area was still recovering. However, after six years the soil's composition depicted the area was close to 100% normal composition, indicative of full recovery.⁸²

A Canadian study conducted in the 1980s provided an early link between pipeline installation and adverse effects upon the soil.⁸³ The scientists involved studied the ROWs on natural gas pipelines at three different sites and analyzed the soil for particle size distribution, bulk density, pH, electrical conductivity, ion composition, and organic matter content.⁸⁴ The scientists recorded chemical changes such as reduced organic matter and increased salts on the surface, which would decrease plant yields from crops planted in the area.⁸⁵ Based on their research, the scientists estimated that the time needed to restore the lost organic matter would be 50 years.⁸⁶

Assuming the results of these studies are reliable, the scientific research indicates that pipeline installation has a deleterious effect upon the soil. The shortest time period indicated for full soil recovery was six years after the installation of a pipeline.⁸⁷ Six years of lower crop yields, even if only in the pipeline ROW, is a fiscally significant harm suffered by agricultural landowners for which compensation should be provided; and yet, the courts have declined to provide compensation for this loss.

III. EXPAND THE SCOPE OF FUTURE DAMAGES IN THE LOUISIANA JURISPRUDENCE

The solution to this problem is relatively simple. When pipelines come through agricultural land, courts should allow landowners to recover for the decreased production of their crops on the pipeline ROW. This solution is fully supported by a plain textual reading of Louisiana legislation.⁸⁸

81. *Id.*

82. *Id.*

83. M.A. Naeth, W. B. McGill, & A. W. Bailey, *Persistence of Changes in Selected Soil Chemical and Physical Properties after Pipeline Installation in Solonchic Native Rangeland*, 67 CAN. J. SOIL SCI. 747, 747–63 (1987).

84. *Id.*

85. *Id.*

86. *Id.*

87. Peng Shi et al., *supra* note 79.

88. See LA. CONST. art. 1, § 4(B)(4).

The consistent and precedential refusal of Louisiana courts to grant compensation for damages to a crop's future production is especially questionable when accounting for the burden of proof in expropriation suits. Due to the derogation of the rights of the property owner from expropriation, expropriation statutes must be construed liberally in favor of the property owner and strictly against the expropriating authority.⁸⁹ In relation to the parameters of just compensation from an expropriating authority, the Louisiana Constitution explicitly provides that just compensation should encompass the full extent of a landowner's loss, including all costs of relocation, inconvenience, and damages suffered by the landowner.⁹⁰ The Louisiana Civil Code provides that "when a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."⁹¹ Drastically lower crop yields due to a decrease in soil productivity is surely a form of economic damage suffered by these farmers that should be compensable under this provision and addressed separately from market valuation. The jurisprudence, in creating a legal precedent that does not allow for these future crop damages, seems to signal a judicial misinterpretation of the legislative provisions governing just compensation.

The benefit of Louisiana's civil law tradition is that the common law concept of *stare decisis*—in which a court is bound to make decisions based upon case precedent—is not a binding legal principle in Louisiana.⁹² Rather, Louisiana judges independently examine and interpret the factual circumstances of individual cases and apply the relevant legislation to come to the most equitable interpretation of the law. Indeed, an illustrative quote from the Louisiana Supreme Court states that "[i]n Louisiana, this court has never hesitated to overrule a line of decisions...when greater harm would result from perpetuating the error rather than from correcting

89. *S. Nat. Gas Co. v. Poland*, 406 So. 2d 657 (La. Ct. App. 1981); *Tenneco, Inc. v. Harold Stream Inv. Trust*, 394 So. 2d 744 (La. Ct. App. 1981); *S. Nat. Gas Co. v. Poland*, 384 So. 2d 528 (La. Ct. App. 1980); *Tex. Gas Transmission Corp. v. Soileau*, 251 So. 2d 104 (La. Ct. App. 1971); *Calcasieu & S. Ry. Co. v. Witte*, 71 So. 2d 854 (La. 1954).

90. LA. CONST. art. 1, § 4(B)(5).

91. LA. CIV. CODE art. 9 (2020).

92. Louisiana instead follows a concept called *jurisprudence constante* in which three courts must come to the same conclusion on a particular area of the law for there to be any precedential value. However, Louisiana courts still are willing to overrule cases even in areas of the law substantiated by *jurisprudence constante*.

it.”⁹³ Thus, while case law is “invaluable as previous interpretation of the broad standard...[it] is nevertheless secondary information.”⁹⁴ The only caveat to the general rule is that “[i]n a civilian system, especially amidst the extraordinary development of contemporary legislative action, the highest court has the mission of guarding and regulating the unity and regularity of the interpretation of law.”⁹⁵ Ideally, Louisiana courts should use judicial discretion to truly delve into the facts of the case before their court to reach an equitable decision limited only by any guiding decisions rendered by the Louisiana Supreme Court.

Considering the lack of Louisiana Supreme Court jurisprudence, trial and appellate courts can and should use their discretionary power to independently examine the text of the Louisiana Constitution and Revised Statutes, aided by available scientific research, to decide such cases in a manner that truly compensates a landowner for the full extent of his loss.

In the alternative, if courts believe that an upfront award of future damages for decreased crop productivity is too speculative, a more concrete solution is also possible: an expansion of the prescriptive period. Currently, the owner of expropriated land only has a two year window from the time the expropriator commences operations on the land to bring suit against the expropriator for damages.⁹⁶ Two years is an insufficient amount of time for a landowner to generate a record of crop damages. From the time the pipeline company engages the landowners in the path of the pipeline to preparation of the site to actual installation of the pipeline, the full process of building a pipeline takes years.⁹⁷ Based on this timeline, it is possible that a farmer would not even have time for one growing season to show concrete evidence of the decrease of production on the pipeline ROW before the prescriptive period lapses.

A more equitable prescriptive period for damage claims against expropriating authorities would be six years from the cessation of the pipeline work upon the tract of land with interest available from the time of each harvest of the damaged crops. The proposed change would be threefold. First, the commencement of the running of prescription would

93. *Miami Corp. v. State*, 173 So. 315, 320 (La. 1936).

94. *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1334 (La. 1978).

95. *Bergeron v. Bergeron*, 492 So. 2d 1193, 1199 (La. 1986).

96. Any claims for damage to the owner caused by the expropriation of property is subject to a two year prescription that commences on the date the property was actually occupied and used for the purposes of expropriation. LA. REV. STAT. § 19:2.1(A)(1), (B) (2020).

97. *How Long Does It Take to Build a Pipeline?*, ABOUT PIPELINES, <https://www.aboutpipelines.com/pipeline-101/the-life-of-a-pipeline/building-a-pipeline/> [https://perma.cc/VFP2-RS4Q] (last visited Aug. 24, 2021).

begin at the completion of the pipeline construction rather than the time the expropriator begins operations on the land. As mentioned previously, the construction of a pipeline is a lengthy process. If the prescriptive period began once the pipeline work on the tract of land was completed, the landowner would not run into the issue of slow pipeline construction cutting into the prescriptive period.

Second, a prescriptive period of six years instead of two would provide ample time for the landowner to engage in multiple growing cycles and harvests to determine whether a decrease in production actually occurred. If a landowner could present actual proof, such as the harvest yields pre-pipeline and post-pipeline for the acreage along the pipeline ROW, a court would not be able to reject these damages as “too speculative.” Six years would be a reasonable period based on evidence provided in the soil studies. According to one study, approximately six years are required for the soil to return to its pre-pipeline composition.⁹⁸ Thus, if the prescriptive period was extended to six years, the landowner could accumulate and subsequently present six years’ worth of harvest data depicting the decreased crop yields suffered on the pipeline ROW.

Third, the award of interest would compensate the landowner for the time elapsed between the initial damages and when the landowner would actually receive compensation after going through the settlement process or litigation. Interest would begin to accrue from the time of each crop harvest starting with the first crop harvested after the pipeline installation. For example, consider a pipeline installed in 2020; the first crop would be harvested in 2021, which is when interest on the 2021 crop damages would begin to accrue. A second crop would be harvested in 2022, which is when interest on the 2022 crop damages would begin to accrue. A third crop would be harvested in 2023, which is when interest on the 2023 crop damages would begin to accrue, etc.

A potential drawback to this solution would be the increase in litigation required to bring forth these claims of damages against the pipeline companies. The goal of new law is to make reciprocal rights and duties of parties clearer rather than increase the need for litigation. To incentivize the parties to avoid litigation, the losing party should be required to pay the attorney’s fees of the opposing party. Not only would this prevent a landowner from initiating bogus claims, but also this rule would incentivize the expropriating authority to engage in extrajudicial settlement with the landowner.

While Louisiana courts could simply decide to break from unjust precedent and provide future damages for decreased crop yields on

98. Peng Shi et al., *supra* note 79.

agricultural lands burdened with pipeline servitudes, a more uniform solution would be to alter the prescriptive period to six years commencing from the time of completion of the pipeline on the tract of land. This would provide landowners ample time to accumulate relevant harvest data to prove the damages suffered so that they may be justly compensated for the full extent of the loss suffered by the expropriation.

CONCLUSION

The aspiration of this Comment is to provide persuasive authority to judges rendering decisions on just compensation in future expropriation proceedings. While the Louisiana Constitution and the Revised Statutes provide for broad and encompassing measures of compensation to landowners whose lands are expropriated by pipeline companies—compensation beyond merely the value of the land itself—the courts have refused to grant damages for decreased production of future crops.

While the decisions regarding this topic are dated and the judges believed these types of damage were too speculative in the past, recent scientific studies and testimonials, such as the testimony offered by Mr. Sarver, provide convincing evidence that soil composition is substantially harmed by the implantation of pipelines into the earth. When a harm exists that is caused by a pipeline, the landowner should be entitled to compensation to make the landowner whole and maintain his previous pecuniary position.⁹⁹ The problem of this inequity in the Louisiana jurisprudence has an easy solution: Louisiana judges, in the spirit of justice, could simply forgo the unjust precedent created and choose to follow a more equitable path in the future. In the alternative, if the appeal of precedent is too persuasive, the law governing the prescriptive period for damages actions against expropriating authorities should be extended to six years from the completion of the pipeline work upon the tract of land. This would provide landowners ample time to accumulate the data necessary to prove the decreased crop yields suffered on the pipeline ROW.

Because the Louisiana Constitution provides such an expansive standard for compensation, the landowner should actually receive compensation for all harms suffered, including decreased productivity of their crop yields.

99. *Bd. of Supervisors of La. State Univ. & Agr. & Mech. Coll. v. 1732 Canal St.*, L.L.C., 133 So. 3d 109, 131 (La. Ct. App. 2014).