

# Pipelines and Abandonment: A Closer Look at Louisiana’s Laws of Servitude and Usufruct, Application to Pipeline Related Matters, and the Need for Definitive Precedent Regarding Abandonment

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I.	INTRODUCTION .....	67
II.	OIL AND GAS IN LOUISIANA .....	69
	A. <i>The History of Louisiana’s Oil and Gas Industry</i> .....	70
	B. <i>The Industry’s Entrenchment Today</i> .....	72
III.	PROPERTY PILLARS: PREDIAL SERVITUDES AND USUFRUCTS .....	73
	A. <i>Predial Servitude Explained</i> .....	74
	B. <i>Usufruct Explained</i> .....	76
IV.	A GRAY AREA IN LOUISIANA’S EX ANTE LEGAL SYSTEM? .....	80
	A. <i>Article 645 and the Laying of Uncertain Foundation</i> .....	80
V.	PIPELINE ABANDONMENT AND TERMINATION OF RIGHT OF USE: EVALUATING THE RULES OF PREDIAL SERVITUDES AND USUFRUCTS.....	81
	A. <i>Implications of Pipeline Interpretation</i> .....	81
	B. <i>Consequences of Consistent Predial Servitude Application</i> .....	81
VI.	CONCLUSION .....	83

## I. INTRODUCTION

In the wake of Norfolk Southern’s train derailment in early February 2023, a U.S. Senator made a *divine* observation. The train derailment, or rather the hazardous materials spilled, triggered environmental concern in

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and around East Palestine, Ohio.<sup>1</sup> Louisiana Senator John Kennedy, commenting on the health and safety concerns posed by the spillage of hazardous materials such as vinyl chloride and butyl acrylate, quipped, “[T]his is why God made pipelines.”<sup>2</sup> Although impractical due to the particular chemicals spilled by Norfolk and their inability to be transported by pipeline,<sup>3</sup> Senator Kennedy’s remark reflects the reality of what underpins oil and gas operations in Louisiana.

Providing jobs and economic benefits to Louisianians and the United States as a whole for over a century, the oil and gas industry faces immense pressure to pivot away from fossil fuels and toward renewable forms of energy like wind and solar.<sup>4</sup> Market forces, including federal and state legislation, aimed at reducing carbon emissions threaten the viability of every facet of today’s oil and gas operations.<sup>5</sup> In turn, a decline in use and scale of pipelines—the industry’s infrastructural backbone—warrants discussion of the legal implications of such a decline in Louisiana, which is home to roughly 125,000 miles of pipeline.<sup>6</sup> However, a meaningful questioning of Louisiana’s vast network of pipeline, in terms of the practicality of scale, asset value, or overall existence, is perhaps futile in light of today’s reality. The oil and gas industry is alive and well as fossil fuels continue to grease the wheels of world commerce.<sup>7</sup> At the time of this writing, the oil and gas industry in the United States is prospering like never before.<sup>8</sup> This Comment does not discuss whether, when, or how this prosperity will cease, but instead

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1. *East Palestine, Ohio Train Derailment Emergency Response*, EPA, <https://www.epa.gov/oh/east-palestine-ohio-train-derailment-emergency-response> (last updated Apr. 8, 2023).

2. Brandon Gage, *This is Why God Made Pipelines’: GOP Senator Gives Nonsensical Explanation of Ohio Train Derailment*, ALTERNET (Feb. 19, 2023), <https://www.alternet.org/why-god-made-pipelines-ohio/>.

3. *Id.*

4. Katherine Blunt et al., *Utilities Pursue Pipeline Sales as Natural-Gas Bans Catch On*, WALL ST. J. (Apr. 6, 2023), <https://www.wsj.com/articles/utilities-pursue-pipeline-sales-as-natural-gas-bans-catch-on-62a7ddd2>.

5. *Id.* (“As a result [of Inflation Reduction Act policies], utilities are beginning to grapple with the likelihood that parts of their gas systems risk becoming stranded assets, or facilities retire before they pay for themselves, as fewer homes and businesses rely on the networks of pipelines built to serve them.”)

6. *White Hat v. Landry*, 475 F. Supp. 3d 532, 538 (M.D. La. 2020).

7. See Collin Eaton et al., *Exxon Mobil Eyes Potential Megadeal with Shale Driller Pioneer*, WALL ST. J. (Apr. 7, 2023), <https://www.wsj.com/articles/exxon-mobil-eyes-potential-mega-deal-with-shale-driller-pioneer-c48a4747> (“Exxon’s strategy to lean primarily on its oil-and-gas assets, including its big U.S. refineries, proved lucrative last year. It banked a historic profit of \$55.7 billion, which made it one of America’s most prosperous companies in fiscal [year] 2022.”).

8. *Id.*

proceeds under an assumption of future decline, at least partially, in the scale and overall use of Louisiana's pipelines.

Touching on Louisiana's oil and gas history and acknowledging the prominent role the industry plays in the state today lends perspective to an analysis of the legal principles surrounding pipelines. Spanning both contract and property law, the legal framework guiding a pipeline's crossing of a given tract of land is typically that of servitude.<sup>9</sup> Specifically, as held by Louisiana state courts, pipelines are to be treated as *predial* servitudes.<sup>10</sup> This *predial* distinction carries with it a specific set of rules governing the rights and obligations of both parties to the servitude: operator of the pipeline and landowner of the tract on which that pipeline crosses. This Comment explores whether, in light of the defining principles of predial servitudes, a *predial* distinction is reasonable.

Next, this Comment asks whether Article 645 of Louisiana's Civil Code lays the foundation for state courts to choose between a predial servitude and another legal doctrine, usufruct, on a case-by-case basis.<sup>11</sup> After an in-depth look at usufructs, this Comment discusses whether the doctrine's rules provide a more suitable legal framework when applied to pipeline related agreements. Focusing on abandonment, this Comment compares usufructs to predial servitudes. Applied to pipelines, usufructs and predial servitudes involve the right to operate. Again, assuming the circumstance where Louisiana's pipeline network has experienced an operational decline, this Comment then highlights the need for definitive precedent regarding pipeline abandonment. Whether an economic relic, environmental abscess, or a combination of both, pipelines and their abandonment present a legal issue best interpreted using the rules of usufruct.

## II. OIL AND GAS IN LOUISIANA

Concentrated primarily in the nineteen parishes on or near the Gulf Coast, Louisiana's borders contain close to 50,000 miles of pipeline dedicated to the transport of oil and gas.<sup>12</sup> This extensive network, running across private and public lands alike, allows for the transport of oil and

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9. M. Taylor Darden & Elizabeth Griffin, *Decommissioning of Onshore Oil and Gas Pipelines and Related Gathering and Flow Lines*, 10 LSU J. ENERGY L. & RES. 96, 97 (2022).

10. *See* Enter. TE Prods. Pipeline Co., LLC v. Avila, No. 16-207, 2016 La. App. Unpub. LEXIS 441, at \*9 (La. App. 3 Cir. Nov. 2, 2016).

11. LA. CIV. CODE art. 645 (1976).

12. *Pipeline Operations Program*, OFF. OF CONSERVATION, LA. DEPT. NAT. RES., <https://www.dnr.louisiana.gov/index.cfm/page/150#:~:text=Louisiana's%20> (last visited Apr. 7, 2023).

gas from one point to the next. These points vary in purpose within the oil and gas industry's value chain, making Louisiana's pipelines critical infrastructure for upstream, midstream, and downstream operations.<sup>13</sup> Connecting offshore production facilities to onshore processing and refining plants in and around Louisiana, pipelines make possible the significant contribution that drilling operations in the Gulf of Mexico make to U.S. oil and gas production.<sup>14</sup> Home to many petrochemical plants and refineries, Louisiana plays a crucial role in the downstream segment as well.<sup>15</sup> Traveling interstate and intrastate, products like gasoline, diesel, and jet fuel make their way from these plants to the end-consumer via pipeline.<sup>16</sup> Essential to every facet of oil and gas operations, Louisiana's substantial network of pipeline is inextricably linked to the state's economy both historically and presently.

#### A. *The History of Louisiana's Oil and Gas Industry*

Providing jobs, economic growth, and government revenue for over a century, Louisiana's oil and gas industry began to take shape in September of 1901 when the state's first well was drilled near the town of Jennings.<sup>17</sup> By 1905, an oil rush was afoot in Louisiana as wells scattered across the state.<sup>18</sup> From prairies to marshes, bayous, lakes, and bays, Louisiana was rich with petroleum.<sup>19</sup> Crude oil was carried from the Shreveport area to a Baton Rouge refinery through the state's first pipeline in 1910.<sup>20</sup> The nation's offshore drilling industry was born one mile from

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13. *Louisiana State Energy Profile*, U.S. ENERGY INFO. ADMIN. (May 19, 2022), <https://www.eia.gov/state/print.php?sid=LA>; see *Infographic: Downstream, Midstream, and Upstream*, AM. FUEL & PETROCHEMICAL MFRS. (Aug. 5, 2021), <https://www.afpm.org/newsroom/infographic/infographic-downstream-midstream-and-upstream> (explaining that "upstream" operations refer to activities involving exploration and production of oil and gas resources, "midstream" operations refer to the transportation, storage, and processing these resources between upstream and downstream operations, and "downstream" operations refer to activities involving refining and processing of oil and gas resources into finished products available to consumers).

14. *Crude Oil Production*, U.S. ENERGY INFO. ADMIN. (Mar. 31, 2022), [https://www.eia.gov/dnav/pet/PET\\_CRD\\_CRPDN\\_ADC\\_MBBLPD\\_M.htm](https://www.eia.gov/dnav/pet/PET_CRD_CRPDN_ADC_MBBLPD_M.htm).

15. *Louisiana State Energy Profile*, *supra* note 13.

16. *Infographic: Downstream, Midstream, and Upstream*, *supra* note 13.

17. Jason P. Theriot, *Oil and Gas Industry in Louisiana*, 64 PARISHES (Feb. 25, 2021), <https://64parishes.org/entry/oil-and-gas-industry-in-louisiana>.

18. *Id.*

19. *Id.*

20. *History of Oil & Gas in Louisiana and the Gulf Coast Region*, LA. DEPT. NAT. RES., [https://www.dnr.louisiana.gov/assets/TAD/education/BGGB/6/la\\_oil.html#:~:text=The%20oil%20and%20gas%20industry,the%20states%20total%20work%20force](https://www.dnr.louisiana.gov/assets/TAD/education/BGGB/6/la_oil.html#:~:text=The%20oil%20and%20gas%20industry,the%20states%20total%20work%20force) (last visited Mar. 31, 2023).

Louisiana's shores when the Texas Company drilled a well in 1934.<sup>21</sup> Exploration further offshore and deeper from the surface occurred off Louisiana's coast and into the Gulf of Mexico, revealing one of the most oil-rich basins in the world.

Offshore drilling stimulated Louisiana's economy in many ways for just as drilling platforms, deepwater ports, industrial plants, storage facilities, and pipeline needed to be built to accommodate the growing industry—so too did businesses specializing in drilling equipment, shipbuilding, marine transportation, tools, and fabrication need starting.<sup>22</sup> This need for specialization created the oilfield service industry, an industry that would become Louisiana's largest source of employment.<sup>23</sup> Toward the end of the 1970s, the Gulf Coast became the epicenter of the U.S.'s offshore oil and gas industry and firmly established Louisiana as a vital part of American energy.<sup>24</sup> Maintaining and arguably enlarging this status over the following decades featured the arrival of business entities from across the globe seeking proximity to the site of production for their refining operations.<sup>25</sup>

Produced off its coast then turned into finished products inside plants along its river, Louisiana came to play host to every facet of oil and gas operations.<sup>26</sup> Flowing through its thousands of miles, Louisiana's pipeline network and its vastness of scale came to reflect the synergy between downstream and upstream segments. As more synergy was to be had on the shores nearest one of the U.S.'s largest oil and gas producing regions, Louisiana's pipeline network swelled to an asset value of \$605 million by 1999.<sup>27</sup> Providing the critical link from offshore to onshore, Louisiana became the launching point for the oil and gas industry in being an integral part of what brought oil and gas produced in the Gulf of Mexico into the commercial market.

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21. *Id.*

22. Theriot, *supra* note 17.

23. *Id.*

24. *Id.*

25. See *Louisiana Petroleum Industry Facts*, LA. GEOLOGICAL SURV. 3 (2000), [https://www.lsu.edu/lgs/publications/products/Free\\_publications/La-oilgas-facts.pdf](https://www.lsu.edu/lgs/publications/products/Free_publications/La-oilgas-facts.pdf) (explaining that in 1999, Louisiana was home to eighteen operating refineries combining for a 2,616,190 barrel refining capacity equaled fifteen percent of the U.S.'s refining capacity).

26. *Id.* at 3, 5.

27. *Id.* at 5.

*B. The Industry's Entrenchment Today*

Today, Louisiana ranks second among states in the production of crude oil and third in the production of natural gas.<sup>28</sup> In 2019, the oil and gas industry accounted for 12.6 percent of Louisiana's total employment.<sup>29</sup> Contributing 16.8 percent of the state's total labor income, oil and gas workers in Louisiana earned \$25 billion in 2019.<sup>30</sup> Coming in at 23 percent, the industry accounts for almost a quarter of Louisiana's GDP in its 2019 contribution of \$59.2 billion.<sup>31</sup> Currently home to fifteen refineries, Louisiana still accounts for nearly one sixth of the U.S.'s refining capacity.<sup>32</sup> Boasting the only deepwater oil port in the country at the time of this writing, the Louisiana Offshore Oil Port (LOOP), Louisiana is home to the U.S.'s largest point of entry for waterborne crude oil helping place the state in the top ten of foreign crude importers.<sup>33</sup>

Natural gas production has grown significantly in recent years. Accounting for ten percent of U.S. production itself, Louisiana is home to the infrastructural and financial center of the North American natural gas market, Henry Hub.<sup>34</sup> The geographically central location combined with the interconnecting of nine interstate and four intrastate pipelines make Henry Hub, in the Vermillion Parish town of Erath, the most active natural gas market center on the continent.<sup>35</sup> Natural gas traveling through Henry Hub and elsewhere along Louisiana's pipeline network finds ease of export among three separate liquified natural gas (LNG) export terminals. In 2021, two of these terminals, Sabine Pass and Cameron LNG, handled thirty-eight percent of U.S. LNG exports.<sup>36</sup>

In short, Louisiana's wide network of pipeline remains critical infrastructure as its mileage facilitates a vital portion of U.S. midstream oil and gas activities. Mounting pressure to pivot away from oil and gas altogether, lessening the need for the very infrastructure built for its transport, shed light on the plausibility of a world in which operating a

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28. *Louisiana State Energy Profile*, *supra* note 13.

29. *New Analysis: Louisiana-Made Natural Gas and Oil Drives U.S. Economic Recovery, Strengthens All Industries*, AM. PETROLEUM INST., <https://www.api.org/news-policy-and-issues/news/2021/07/20/louisiana-pwc> (last visited Apr. 7, 2023).

30. *Id.*

31. *Id.*

32. *Louisiana State Energy Profile*, *supra* note 13.

33. *Id.*

34. *Id.*

35. *See About the Henry Hub*, HENRY HUB, <https://henryhub.enlink.com/about-the-henry-hub/> (last visited Mar. 30, 2023).

36. *Louisiana State Energy Profile*, *supra* note 13.

given pipeline might become economically impractical.<sup>37</sup> Any championing of natural gas, either as a viable alternative to crude oil and its derivations or a bridge to a full transition to renewables energy, is not immune to risk of environmental harm.<sup>38</sup> While the breach of a pipeline transporting crude oil would involve contamination, breach of pipeline transporting natural gas would likely involve an explosion.

Geopolitical strife, pricing autonomy, and location of plentiful reserves have made the United States a dominant presence in the global energy industry's natural gas sector.<sup>39</sup> The United States' recently established position as a leading exporter of LNG works to maintain Louisiana and its pipeline network as a launching point of critical importance.<sup>40</sup> As crude oil produced in the Gulf of Mexico launches into U.S. markets through Louisiana, LNG produced at sites across the United States launch out of Louisiana and into foreign markets.<sup>41</sup> Despite entrenchment in terms of asset value and foreseeable use, legal implications flowing from a decline in use and scale of Louisiana's pipeline network as it pertains to crude oil raises important questions regarding how state courts and Louisiana's Civil Code consider the rights and obligations of a pipeline agreement's stakeholders.

### III. PROPERTY PILLARS: PREDIAL SERVITUDES AND USUFRUCTS

Predicated on predictability, Louisiana's legal system is defined by a comprehensive set of rules called the Civil Code. Covering property, torts, familial matters, and contracts, the Civil Code is *ex ante* in nature, and differentiates Louisiana's legal system from the *ex post* systems of every other state.<sup>42</sup> Through codification of rules, the Civil Code seeks to anticipate legal issues and provide a clear framework for their resolution.

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37. Blunt, *supra* note 4.

38. See *Natural Gas Pipeline and Infrastructure Explosions Nationwide*, GREEN AM. MAG., <https://www.greenamerica.org/natural-gas-pipeline-and-infrastructure-explosions-nationwide> (last visited Nov. 27, 2023) (explaining that gas companies reported thirty-five explosions and thirty-two ignitions at their transmission pipelines from 2010 to 2016).

39. Stephen Stapczynski, *US Surges to Top of LNG Exporter Ranks on Breakneck Growth*, BLOOMBERG (Jan. 2, 2023), <https://www.bloomberg.com/news/articles/2023-01-03/us-surges-to-top-of-lng-exporter-ranks-on-breakneck-growth#xj4y7vzkg>.

40. *Louisiana State Energy Profile*, *supra* note 13.

41. *Id.*

42. See J.R. TRAHAN, *An Elementary Treatise of Civil Law in Louisiana Vol. I: An Introduction to Louisiana's Civil Law*, [https://www.laed.uscourts.gov/sites/default/files/200th/cle/civil\\_law\\_in\\_louisiana.pdf](https://www.laed.uscourts.gov/sites/default/files/200th/cle/civil_law_in_louisiana.pdf) (providing an in-depth historical account of the origins of Louisiana's Civil Code).

Two hallmarks of the Civil Code's provision of clarity, predictability, and issue resolution frameworks are *predial servitudes* and *usufructs*.

A. *Predial Servitude Explained*

The Civil Code stipulates two different types of servitude: personal servitudes and predial servitudes.<sup>43</sup> A personal servitude is defined as a charge on a thing for the benefit of a person and falls into one of three categories: usufruct, habitation, or rights of use.<sup>44</sup> The category governing the charge on a thing, such as a tract of land, which confers a benefit, such as the construction and operation of a pipeline, to another thing or person is most often *right of use*. A "right of use" confers upon a person a specified use of an estate less than full enjoyment.<sup>45</sup> However, blurring the line between a property rights-related agreement being classified as predial or personal is the caveat that the benefit conferred by a right of use must be one capable of establishment by predial servitude.<sup>46</sup>

While rights of use characterize the deal frameworks surrounding most pipeline agreements in Louisiana, state courts confronted with an agreement lacking clarity and specificity as to the rights and obligations of a pipeline operator and landowner have applied the legal framework of predial servitudes.<sup>47</sup> Specifically, a predial servitude in the context of a pipeline running across a tract of land casts the tract's landowner as the "servient estate" who has a charge laid on their land for the benefit of a pipeline operating "dominant estate."<sup>48</sup> Once classified as a predial servitude, the Civil Code denotes various rights and obligations governing the relationship between dominant and servient estates. As the dominant estate, a pipeline operator has the right to "conduct work" that is necessary for the use and preservation of the pipeline.<sup>49</sup> Read differently, a pipeline operator is not *obligated* to perform repairs necessary for the use and preservation of the pipeline.

There does exist an obligation for dominant estates to use a servitude in the least damaging way possible in regards to the "use and

43. LA. CIV. CODE art. 533 (1976).

44. *Id.* art. 534.

45. *Id.* art. 639.

46. *Id.* art. 640.

47. Enter. TE Prods. Pipeline Co., LLC v. Avila, No. 16-207, 2016 La. App. Unpub. LEXIS 441, (La. App. 3 Cir. Nov. 2, 2016) ("Right of use is governed by the rules governing usufructs and predial servitudes."); *see also* LA. CIV. CODE ANN. art. 645 cmt. b (1976) (explaining that rights of use under Civil Code Art. 639 are real rights of enjoyment and are to be governed by the rules pertaining to both predial and personal servitudes).

48. LA. CIV. CODE art. 646 (1976).

49. *Id.* art. 744.



preservation” right allowing a dominant estate entry onto the servient counterpart.<sup>50</sup> A servient estate cannot diminish or make more inconvenient the use of the servitude by the dominant estate, but can move the location of the servitude provided they pay for the relocation to an equally convenient location.<sup>51</sup> Nonetheless, there exists an imbalance of power between servient and dominant estates when it comes to predial servitude termination. Termination, already an arduous process due to a predial servitude’s design of running with the land, is accomplished by a servient estate only by abandonment. A servient landowner can terminate a predial servitude enjoyed by a pipeline only by abandonment of the estate as a whole or the part where the servitude is exercised.<sup>52</sup> On the other hand, a dominant estate seeking termination need only renounce their use of a predial servitude through expressing that renunciation in writing.<sup>53</sup>

In addition to abandonment and renunciation, predial servitudes can be extinguished via prescription by nonuse of the servitude for a period of ten years.<sup>54</sup> Like abandonment, the Civil Code’s framework governing termination for nonuse can be construed as more favorable to a dominant estate due to the evidentiary standard involved—absent constant surveillance, it is a lot easier to prove use compared to a lack thereof.<sup>55</sup> Further, how apparent can the commencement of the ten year prescriptive period be in proving nonuse of underground? In the event a court finds that a predial servitude exists in a situation involving a pipeline operator’s use of only one of several pipelines crossing a servient landowner’s property (i.e., four pipelines are not in use), a court is likely to find a level of partial use sufficient to deny any servient landowner’s attempt at termination by prescription.<sup>56</sup> A comment to Article 759, which defines partial use, explains that the “mode” of exercise accounts for servitude use more so than the “area” subject to a servitude.<sup>57</sup>

When a servitude is well documented through existence of a contract stipulating existence and extent of use, state courts can hold a pipeline operator accountable in requiring operation of the pipeline(s) use to be more than a “mere gesture” considering the use intended by parties at the

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50. *Id.* art. 745.

51. *Id.* art. 748.

52. *Id.* art. 770.

53. *Id.* art. 771.

54. *Id.* art. 753.

55. *Id.* art. 764.

56. *Id.* art. 759.

57. LA. CIV. CODE ANN. art. 759 cmt. b (1976).

time of servitude creation.<sup>58</sup> In *Ashland Oil v. Palo Alto, Inc.*, Louisiana's First Circuit Court of Appeals determined a shot of carbon dioxide intended to ward off prescription failed in doing so because this "mere gesture" fell well short of the gas's transport stipulated in the servitude contract.<sup>59</sup> A utility company having a servitude to transmit electricity by way of power line failed to fight off termination by prescription when it could only point to the trimming of trees necessary to maintain the power lines.<sup>60</sup> Failing to transmit electricity, which describes the servitude that benefitted the company's powerlines, made the accessory right of tree trimming meaningless.<sup>61</sup> Therefore, state courts do not consider whether a servitude goes without legitimate use due to economic conditions when deliberating prescription by nonuse of a predial servitude.

The default rules governing the rights and obligations of dominant and servient estates party to a predial servitude can be seen as more favorable in the case of a pipeline operator wanting to counter a servient-landowner's extinguishment of the servitude. While current state court precedent will likely classify a pipeline agreement with no evidence of a contract, or one silent on key specifics regarding the pipeline's extent and use, servient landowners are not necessarily without hope. Finding oneself pegged into the default rules of predial servitudes, a servient landowner can count on a core tenet of the Civil Code evident in Article 730: doubt surrounding the "existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate."<sup>62</sup> Also of note in situations where a contract establishing a predial servitude is silent as to extent and manner of use, intentions of the parties will be determined in light of the servitude's overarching purpose.<sup>63</sup>

### B. *Usufruct Explained*

Usufructs are another type of servitude underpinning property rights in Louisiana. Capable of establishment by contract, a usufruct is a real right of limited duration on the property of another.<sup>64</sup> Defined by whether the property encumbered is a consumable or nonconsumable, usufructs create a dynamic similar to a predial servitude labeling a dominant and

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58. *Ashland Oil v. Palo Alto, Inc.*, 615 So. 2d 971, 974 (La. Ct. App. 1993).

59. *Id.*

60. *Broomfield v. La. Power & Light Co.*, 623 So. 2d 1376, 1379 (La. Ct. App. 1993).

61. *Id.*

62. LA. CIV. CODE art. 730 (1977).

63. *Id.* art. 749.

64. *Id.* art. 535.

servient estate.<sup>65</sup> Referred to as a “perfect usufruct,” a usufruct over a nonconsumable thing such as land grants the *usufructuary* the right to possess and derive “utility, profits, and advantages” that the land might produce, but with an obligation to preserve the “substance” of the land.<sup>66</sup> A landowner is perfectly capable of coming to an agreement with an individual or entity seeking to construct and operate a pipeline over his or her tract of land. Said landowner would then become the party *burdened* by the usufruct, making them the “naked owner” and the pipeline operator their usufructuary.

In this scenario, a pipeline operator subject to the obligations of a usufructuary must construct and use a pipeline subject to a “prudent administrator” standard.<sup>67</sup> In line with this duty, a pipeline operating usufructuary would be responsible for maintaining the integrity of the pipeline as well as the upkeep of the part of land over which the usufruct exists. The pipeline operator would be answerable to the landowner, naked owner, for any “losses” resulting from their “fraud, default, or neglect” in their requisite exercise of the same diligence that an attentive and careful man exercises in their own affairs.<sup>68</sup> In the pipeline operating context, this prudent administrator on part of the usufructuary would translate into a foreseeably high level of safety precautions, environmental damage mitigation policies, and perhaps a robust pipeline breach response protocol.

A pipeline operating usufructuary would be responsible for ordinary repairs and maintenance costs associated with the pipeline.<sup>69</sup> The Civil Code’s bifurcated repair framework, established in Article 577 whereby a usufructuary is responsible for ordinary repairs while a naked owner is responsible for extraordinary repairs, likely would not hinder a landowner agreeing to a usufruct allowing pipeline construction and operation.<sup>70</sup> Any “extraordinary” repair required by a pipeline would likely escape the naked owner’s responsibility and become that of the usufructuary. Defined as a repair that amounts to a “reconstruction of the whole or of a substantial part of the *property subject to the usufruct*,” any serious repair required by a pipeline that fits the first part of this definition would likely fall short of meeting the implied meaning of the second part as property

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65. *Id.*

66. *Id.* art. 539.

67. LA. CIV. CODE ANN. art. 557 cmt. c (1976).

68. LA. CIV. CODE art. 576.

69. *Id.* art. 577.

70. *Id.* arts. 577, 578.

subject to the usufruct agreement.<sup>71</sup> Theoretically, the land over which the pipeline runs would constitute the property subject to the usufruct, with the pipeline itself consequently construed as an approved alteration thereof. In fact, if a pipeline operating usufructuary wants to make an improvement or alteration on the property subject to usufruct, he or she must get written permission of the naked owner.<sup>72</sup> Additionally, any improvement or repair must be undertaken at the expense of the usufructuary and approached subject to the standard of a prudent administrator.<sup>73</sup> Therefore, a landowner in this scenario has two separate layers of legal protection in his or her approval or disapproval of a pipeline operator altering or improving their pipeline in any capacity.

Of particular note to Louisiana pipelines is Article 577 and its explicit declaration that repair(s) required by property subject to a usufruct that arise from damage caused by a hurricane, or other *force majeure*, fall squarely under the responsibility of the usufructuary.<sup>74</sup> When it comes to the rights of a landowner in having a say in the existence and operation of a pipeline on his or her property, the naked ownership status of usufructs arguably entails a position of authority. In fact, the naked owner may compel the usufructuary to make any repairs for which they are responsible.<sup>75</sup> No reciprocal right of repair exists for usufructuaries as they may not compel a naked owner to make extraordinary repairs, an already difficult threshold to meet.<sup>76</sup> Tax responsibility is stipulated in Article 584's definition of periodic charges and requires a usufructuary to pay any periodic charges associated with the land subject to the usufruct.<sup>77</sup> A naked owner allowing a pipeline could theoretically negotiate royalties from the oil and gas transported across their property on top of receiving property taxes proportional to the land subject to a pipeline's usufruct.

In addition to the duty of preserving the "substance" of the land made explicit in Article 539, Article 568 disallows a usufructuary from disposing of "nonconsumable" things unless the right to do so has been expressly granted by the naked owner.<sup>78</sup> In the event a pipeline operator stands to increase profitability by removing the existing pipeline and replacing it with a new pipeline, the naked owner would first need to

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71. *Id.* (emphasis added).

72. *Id.* art. 558.

73. *Id.* arts. 558, 577.

74. *Id.* art. 577.

75. *Id.* art. 579.

76. *Id.* arts. 578, 579.

77. *Id.* art. 584.

78. *Id.* art. 568.

approve. Pipelines are nonconsumable things and are therefore permitted to be disposed of by a usufructuary only in the event of dilapidation, decay, or wear.<sup>79</sup> This disposal is subject to the prudent administrator standard as well.<sup>80</sup> The language of Articles 539 and 568 make the case for any exit by a pipeline operator usufructuary involving the removal of pipeline(s) requiring some level of land restoration. In other words, being legally bound by the words “preserve,” and “prudent administrator” (in acts of disposal) do not foreseeably permit a pipeline company from leaving intact the scars of pipeline construction and operation. Article 601 gives the usufructuary the right to remove all improvements he or she has made, but subjects said right to yet another explicit mentioning of a usufructuary’s obligation to restore the property to its former condition.<sup>81</sup>

Death of the usufructuary is one way to terminate a usufruct, but what if the usufructuary is a midstream oil and gas company? A usufruct can be established in favor of any juridical person such that business entities like partnerships and corporations can be deemed a usufructuary.<sup>82</sup> Seemingly tailored to the cyclicity of the oil and gas industry, Article 608 makes clear that a merger, conversion, or consolidation involving a corporate usufructuary does not constitute “death” so as to terminate that entity’s usufruct.<sup>83</sup> Nevertheless, Article 608 delineates a maximum duration of thirty years for any usufruct irrespective of whether the usufructuary is a corporate entity.<sup>84</sup> Indeed, consolidated ownership of a given piece of property facilitates that property’s *presence* in the stream of commerce—a lack of which is accounted for by Article 621 and termination by prescription of nonuse.<sup>85</sup> Termination of a usufruct by prescription of nonuse works in manner not unlike the termination of a predial servitude. The same ten-year period stipulates the amount of time for which a usufructuary failing to exercise their usufructuary rights forfeits those rights thereby terminating the usufruct.<sup>86</sup>

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79. *Id.*

80. *Id.*

81. *Id.* art. 601.

82. *Id.* art. 608.

83. *Id.*

84. *Id.*

85. *Id.* art. 621.

86. *Id.*

## IV. A GRAY AREA IN LOUISIANA'S EX ANTE LEGAL SYSTEM?

A. *Article 645 and the Laying of Uncertain Foundation*

A dispute involving a pipeline related right of use in which the agreement creating the right of use lacks sufficiently clear terms to indicate a definitive intention by parties to create a usufruct or predial servitude can find guidance in Article 645: "A right of use is regulated by application of the rules governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a right of use servitude."<sup>87</sup> A court could turn to Article 645 and the rather limited guidance it provides and apply the facts of the situation at hand. Contrary to the spirit of Louisiana's Civil Code and its ability to anticipate a given legal issue, Article 645 instructs a court to pick and choose between the default rules of either usufruct or predial servitude in situations where a contract is silent on key terms pertaining to the right of use, or nonexistent altogether.

Absent a title, contract, or written record of payment, a court would investigate into how the facts at hand reflect the intentions of the parties. Article 645 presents workability to courts interpreting a right of use agreement lacking specifics. In a seminal case illustrating this notion, *United States Daughters of 1812-Chalmette Chapter v. Louisiana Department of Culture, Recreation, & Tourism*, the Louisiana Supreme Court looked at language showing an agreement denoting a group's right of use of the first floor of a French Quarter building.<sup>88</sup> Finding that the group exercised the right of use in the form of running a museum for which they sold tickets, the court reasoned that the right of use resembled a usufruct.<sup>89</sup> The tickets yielded profits illustrative of a key right belonging to a usufructuary: entitlement to the "fruits" of the thing subject to usufruct.<sup>90</sup> In *Daughters of 1812*, profit generated by the charging of admittance to the space subject to the parties' original right of use agreement, the museum, aided the court in finding usufruct the appropriate interpretation—a usufruct extinguished by the Civil Code's barring existence in perpetuity.<sup>91</sup>

This case is indicative of what a court might expect when faced with a set of facts involving a landowner seeking removal of a pipeline and the

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87. *Id.* art. 645.

88. *U.S. Daughters of 1812-Chalmette Chapter v. La. Dep't of Culture, Recreation, & Tourism* 404 So. 2d 941, 941 (La. 1981).

89. *Id.* at 943.

90. LA. CIV. CODE art. 550.

91. *Daughters of 1812*, 404 So. 2d at 943-44.

attendant, unclear and ambiguous, right of use asserted by its operator. Unlike the seminal case above, Article 645 may prove not as easy to apply to a litany of pipeline related disputes. There may not be ticket sales to point to, and instead total silence as to facts resembling characteristics of either usufruct or predial servitude. A pipeline operator may show use reflective of a predial servitude in running a pipeline in a manner least inconvenient to the landowner part of the time, but otherwise behave as if a prudent administrator akin to usufructuaries. Questions abound surrounding what can come into Louisiana courts as it pertains to pipeline disputes—most of which will presumably involve a landowner seeking termination of the right of use along with removal of the pipeline.

V. PIPELINE ABANDONMENT AND TERMINATION OF RIGHT OF USE:  
EVALUATING THE RULES OF PREDIAL SERVITUDES AND USUFRUCTS

A. *Implications of Pipeline Interpretation*

A situation in which Louisiana courts are increasingly presiding over pipeline disputes centered around a right of use risks showing the inability of Article 645 to effectively resolve these issues in a consistent manner. At stake are preservation and restoration of Louisiana's coast, how the law treats business entities, and basic preservation of Louisianians' property rights.<sup>92</sup> The scales of power between stakeholders in these disputes can tip primarily on whether a court's ruling involves either the application of usufruct or predial servitude rules on abandonment and termination. Letting ambiguous right of use agreements governing pipelines remain ambiguous and subject to Article 645 is a better alternative than continuing to interpret said agreements as predial servitudes. Therefore, the advent of definitive precedent casting pipeline right of use agreements as usufructs is in Louisiana's best interest.

B. *Consequences of Consistent Predial Servitude Application*

A pipeline operator with adequate legal representation already knows the power of written, specific, all-encompassing servitude agreements spelling out a right of use over a sliver of private land. Leasing the land would be ineffective in conforming to the typically large financial time horizons of the oil and gas industry. A lease is only good against the

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92. *Id.* ("If the right of use claimed by plaintiff in this case is permitted to continue for the duration of plaintiff's corporate existence (which may be perpetual), then the contractual provision will effectively take the ground floor of the Jackson House out of commerce indefinitely and perhaps perpetually.").

pipeline operator and the lessor at that moment in time.<sup>93</sup> If successful in attaining a personal servitude for their right of use, a pipeline operator has a real right enforceable against anyone. If this personal servitude can be categorized as predial, then that right of use is said to run with the land.<sup>94</sup> Therefore, the very reasoning cautioned against in *Daughters of 1812* could become reality in a pipeline right of use agreement's uncertain terms being retrofitted into the default rules of predial servitudes.

Allowing a midstream oil and gas company to encumber a piece of land, however small in size, for what might be the perpetual existence of said company as defined by its corporate existence contravenes a core principle of how the Civil Code has built the framework governing property rights. The default rules governing predial servitudes lack an equivalent to Article 608, which limits a usufruct in favor of a corporation to thirty years before both usufructuary and naked owner bilaterally agree on its renewal.<sup>95</sup> A pipeline featuring no legal recourse in prompting its removal can plausibly remove a property from the stream of commerce. There may come a time when pipelines are environmentally askance to a point in which a landowner's inability to remove oil and gas pipeline from his or her property encumbers the landowner's rights of use, enjoyment, and disposal. A farmer, whose land is encumbered by a predial servitude, could face constraints beyond the parcel directly affected by the servitude being unable to contribute to cultivation. Not only could that same farmer's otherwise unaffected parcel be rendered useless as to cultivation due to health concerns regarding foods sourced *near* pipeline, but his or her prospects of selling the parcel could diminish as potential buyers are deterred by the pipeline's encumbrance.

A landowner burdened by the encumbrances of a pipeline has little recourse in the event he or she seeks to extinguish a right of use classified as a predial servitude. While the dominant estate is free to extinguish the agreement by renunciation at practically any time they choose, a servient landowner must abandon the entirety of the property subject to the servitude.<sup>96</sup> Abandonment by a servient landowner amounts to a ceding, to the dominant estate, of his or her land in its entirety. Regulation of a pipeline operator's stewardship in terms of his or her impact on the servient landowner and their property would be set at a low bar in that use within predial servitude rules simply require a "least possible damage"

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93. LA. CIV. CODE art. 2707.

94. *Id.* art. 708.

95. *Id.* art. 608.

96. *Id.* art. 770.



2024]

*PIPELINES AND ABANDONMENT*

83

standard.<sup>97</sup> This standard could open the door for courts holding dominant estates to no standard at all so long as they present at least one slightly more burdensome alternative they opted not to pursue. The ramifications of pipeline agreements being consistently interpreted as predial servitudes in the event of ambiguity would imbue an asymmetric power dynamic heavily disfavoring the legal protections of a servient landowner.

## VI. CONCLUSION

In the event of significant ambiguity regarding a pipeline, rights of use, and a dispute between pipeline operator and attendant landowner, the rules of usufruct undoubtedly provide enhanced bargaining power for a landowner seeking pipeline removal. Arguably to an inappropriate extent, but a usufruct application approach would serve to counter an already losing battle. Touched on above, a pipeline operator with decent legal representation can be very effective in attaching as much contractual strength onto rights and obligations that favor a lasting right of use. Tact regarding contract formation aside, which side is more likely to have access to counsel in matters discussed in this writing? The average Louisiana landowner has an extensive codification of his or her rights and remedies regarding property of any sort spelled out in the Civil Code. A consistent application of predial servitude rules in situations involving ambiguous pipeline right of use agreements threatens the sanctity of those rights.

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97. *Id.* art. 745.