

MINUTES
PUBLIC RECREATION ACCESS TASK FORCE
DRAFTING SUBCOMMITTEE

NOVEMBER 8, 2019

A public meeting of the Drafting Subcommittee of the Public Recreation Access Task Force was held on Monday, November 8, 2019 at 1:30 p.m. in House Committee Room 5, Ground Floor, Louisiana Capitol, Baton Rouge, Louisiana.

I. CALL TO ORDER

Blake Canfield called the meeting to order at 1:30 p.m.

II. ROLL CALL

Mr. Canfield then called the roll for purposes of establishing a quorum. The following full members of the drafting subcommittee of the task force were recorded as present:

Mr. Blake Canfield
Mr. David Cresson
Mr. Taylor Darden
Mr. John Lovett
Mr. Sean Robbins

No full members of the drafting subcommittee of the task force were absent.

Mr. Canfield announced that five (5) members of the drafting subcommittee of the task force were present and that a quorum was established.

III. APPROVAL OF THE MINUTES FOR THE OCTOBER 28, 2019 MEETING

A motion by **Mr. Darden** to approve the minutes for the October 28, 2019 the subcommittee meeting was approved unanimously.

IV. REVIEW OF, POSSIBLE REVISIONS TO, AND APPROVAL TO SUBMIT TO THE TASK FORCE THE COMPLETED PORTIONS OF THE DRAFT REPORT REQUIRED BY SCR 99 OF 2018

Review of the draft report was undertaken section by section. No discussion of the following sections occurred: the summary background, the problem, within the section on principles of Louisiana property law, the following subsections were not

discussed – seashore, natural non-navigable water bodies, manmade canals, and changes in navigability over time – , under the section on possible solutions there was no discussion of the following subsections – 2018 Sea Grant Study, the response of state representatives, and views of Louisiana CPRA –, and the following sections were just place-holders and so were not discussed – areas of apparent agreement, areas of apparent disagreement, solutions and recommendations.

The following sections of the draft report were discussed:

- A. Navigability on page 3: **Mr. Robbins** asked how the draft’s definition of navigability compares to the Coast Guard’s definition of navigability.
- B. Dual- claimed land on page 6: **Mr. Vorhoff** stated that in the last paragraph of page 6, LDNF should be changed to read LDNR.
- C. Louisiana Tort Immunity Statutes for permissive recreational access on page 7: **Mr. Vorhoff** noted that La. R.S. 9:2791 was amended in 2003 to add the portion that reads, “whether the hazardous condition or instrumentality causes the harm is one normally encounters in the true outdoors or when created by the placement of structures or conduct of commercial activities on the premises.” He continued that the *Cooper* opinion mentioned on the next page was issued in 2001, so the analysis in that opinion may be different based on the 2003 statutory amendment. **Mr. Lovett** stated that he plans to do more research on the tort immunity statutes. **Mr. Belton**, attorney representing the Louisiana Sportsmen’s Coalition, stated that the tort immunity statutes are an important element of a potential solution. He asked that while he realized that these statutes dealt with recreational access, whether there was any data or information on tort actions that may have been filed for commercial purposes such as commercial fishing and charter-boats and whether there was a distinction between someone making claims for injuries sustained while participating in these recreational activities and someone injured while conducting commercial activities. He wondered whether this was a loophole in the current tort immunity statutes that needed to be addressed. **Mr. Darden** stated that the impact of federal maritime law, which does not grant tort immunity, should be considered. He mentioned that he has had several clients that have been sued under federal maritime law. He stated he is unsure how to address it, because the state statutes cannot usurp the federal maritime laws. **Mr. Lovett** agreed that federal preemption issues should be addressed in the tort immunity portion. **Mr. Belton** wondered if it was an attempt to work around the state laws to find someone with deep pockets. For instance, he stated, that if it is a navigable waterway the state would likely be a defendant, which would require trial through judgment and then appropriations from the Legislature, as opposed to a private defendant. **Mr.**

Darden stated he did not recall the specifics in his past cases. He mentioned that 7-8 years ago he worked with the State on an agreement on riparian land attached to navigable water but the issue of what to do with the federal laws came up as to the State owned waterbottoms. **Mr. Lovett** mentioned that this may be further complicated when there is an accident involving old pipelines or wells drilled on private land that subsequently erodes into a navigable waterway. **Mr. Belton** stated that it would be beneficial if defense counsel for the land owners could provide a list of what in the law can be changed. That could provide guidance on what issues need to be addressed and what solutions could be made. Mr. Belton also stated he thinks it would be educational and there is no input from the trial bar in this process. From a political standpoint, that is an important issue. **Mr. Darden** stated that the trial bar is related to the immunity issue, which is separate from land owners. The land owners are seeking immunity provisions because land owners are being sued by the trial bar.

- D. Principles of Constitutional Law on pages 9-10: **Mr. Lovett** stated in the last paragraph of that section, it should be noted that there is no constitutional or statutory prohibition on a transfer of privately owned water bodies or any other land from a private land owner to the state in which the state reserves the minerals to the private land owner. Mr. Lovett cites other provisions that say “the state, a political subdivision of the state, or the United States, purchases or otherwise acquires land in Louisiana, and allows the land owner to reserve them in their own rights, those mineral rights are considered to be imprescriptible, the LLA proposal was seeking an imprescriptible permanent mineral right, so if the state alienating them, if the land owner transfers ownership and reserves minerals, the state can guarantee imprescriptible mineral rights. **Mr. Canfield** stated that, according to previous discussions, it depends on the land owner, because **Mr. Marshall** asked if **Mr. Darden’s** proposal would include the ability for outright donation of the surface to the state. **Mr. Belton** stated that in his experience with the state, if the state acquires property there is a notion of establishing imprescriptible mineral ownership, which has been viewed as a valuable thing for land owners that engage in these interactions. Mr. Belton stated the law stated that if the state decided to sell the property back, the original land owners had a right of first refusal on getting the property back. He continues that it seemed to be a balanced deal. Mr. Belton stated there may be circumstances where a land owner may choose to donate his property. Unfortunately, in this process, the jurisprudence and laws passed go back to the ownership issue. On behalf of his client, the issue of ownership is not pertinent. Ownership has a tendency to cast winners and losers; however, that is not the goal. The current law and current jurisprudence can serve as a guide. The more frequently traveled paths involve donations and expropriation. To address the access issue, he

continued, may require a new path. **Mr. Canfield**, asking for clarification, stated so it is more about creating a right of recreational access within certain parameters, but not addressing ownership of the water way or water bottom. **Mr. Belton** responded that the two problems with fighting for ownership are (1) expensive and complicated litigation taking years to develop and time to build up money in the concursus accounts to cover the cost of litigation for both sides and (2) attorneys and expert witnesses are very expensive. Mr. Belton stated he thinks that it is the attorney general and land offices job to dispute ownership. **Mr. Simmons** stated that his understanding is that, if in fact an agreement is reached with the state, then the minerals could be held by a land owner and be imprescriptible, thereby separating those minerals from the land itself. **Mr. Canfield** stated that it would be a donation, or the state would somehow acquire it from the land owner, the surface rights, but that donation would reserve the mineral rights to the original land owner, the person making donation or sale, then those mineral rights would be imprescriptible. **Mr. Simmons** asked if it is conceivable that there would be something sellable to the surface by the original land owner, or is the landowner giving up all of the rights to the surface. **Mr. Darden** stated that in a donation you can donate or reserve the minerals in perpetuity, so that if the dry land is donated to the state and subsequently becomes navigable, and is then owned by the state, would that servitude be reunited with owner to where it would prescribe. **Mr. Canfield** asked if the question is whether the imprescriptible nature goes away if there is erosion and a claim is being made by the state. **Mr. Darden** stated that he does not know how to divorce the access issue from ownership, Mr. Darden views the two as linked. It is the ownership of the property itself that gives the owner the right to control access. He was unsure how you can figure a new path forward, without addressing the ownership issue. If it belongs to the state, the state has the right to grant public access. If it is private property, the owner has a similar right to deny access, he concluded. **Mr. Belton** stated that there was a Constitutional Amendment passed in the 1990's that allowed the state to enter into these agreements if it was part of a coastal restoration project. The reason that provision was necessary is because, if a land owner decided to donate and reserves the minerals, what happened with LL&E at Isles Dernieres, is LL&E wanted to donate and reserve the minerals out to the 1921 survey plat. In the 1990's, Isles Dernieres had eroded significantly, the Mineral Board and the Attorney General's office felt strongly that with the proximity to the coast, the attorneys of the state felt that those minerals had already vested in the state. The state and LL&E could not avail themselves of that donation provision that was already in the law. Article 7 Section 14 says the state cannot give away anything of economic value, once it already has it. A special recognition was made dealing with these coastal restoration projects that

allowed LL&E to reserve the minerals out to the 1921 boundary. Other areas of the state that are not subject to coastal restoration, face the 1921 plat issue and what is currently owned by the state. He stated it is not undoable. Mr. Belton asked if you are in the coastal zone and they dredge a canal, the Intercostal was built in the 1930s, that prompted the oil and gas development in that area because it enabled access. So if a canal was dredged in 1940, that was 25 feet wide, but through natural processes and erosion, now that canal is 150 feet wide, is there any question as to the status of the ownership or right of access to the public on that eroded portion outside of that original 25-foot width. Mr. Belton stated that he asks that because of the natural processes issue and the effect it would have. **Mr. Darden** stated he is not certain of an answer. The argument can be made soundly that it was originally dug as a private canal, the erosion was not a naturally occurring but a result of wave wake, which may be considered an intervening act of man, how do you allow public access in this circumstance. **Mr. Belton** stated that because there is no law to address the issue, the possibility may exist that a right of public access to that eroded and original 25-foot could be recognized without addressing the ownership. Mr. Belton asked if that will create something that is right of public access, but it is short of ownership. **Mr. Peterson** stated the special provision for Coastal projects should be added to the Principles of Louisiana Constitutional Law

- E. Louisiana Trespass Statutes, no exception for recreational access on page 7: **Mr. Lovett** stated that there are exceptions to Louisiana trespass statutes for activities that are as a matter of law, in a literal sense, a physical intrusion in someone's space, the law declares it not to be an unlawful intrusion, so it is not considered trespass. There are instances in the law that recognizes non-owners have the right to come onto private property. Trespass itself is defined by statute and changes over time. **Mr. Cresson** asked if Mr. Lovett could expand on examples of things that are excluded on trespassing on private property. **Mr. Lovett** stated there is an expansive list of classes of instances, some are absolute and some are conditional. The land owner has to specifically exclude those categories of people, unless they are specifically excluded there is a right to access private property for that purpose. Examples included: officials, EMS, utility inspectors, neighbors retrieving an animal. Mr. Lovett stated he could include Civil Code article 64 in the report, which lists the exceptions to trespass. **Mr. Peterson** suggested that the distinction needs to be made between the civil trespass and the criminal trespass. **Mr. Belton** stated that the trespass law was changed in 2003 to its current form because the Landowners Association felt that they needed a change to the law because people were tearing down no trespass signs. The practical issue is that everyone knows that if you stand on a piece of land, someone owns it. If it is not yours, it is someone

else's. Mr. Belton stated that he can see where there concern about the notion of people being able to trespass on their property because they didn't have a sign up. However, with water ways it is a different story particularly with the status of our law with issues of seashore and navigability. Dry land trespass is one thing, waterborne trespass is different. **Mr. Robbins** stated there is a Wildlife and Fisheries title 56: 8 (103) "defines private water as preventing the ingress and egress of fish life from public waters." Mr. Robbins stated that this statue contradicts what Mr. Darden says about ownership, there are several contradicting laws. Mr. Robbins stated by ensuring all civil code is consistent can help clear-up contradictions. **Mr. Kemp** stated he will look into title 56: 8 (103). **Mr. Cresson** stated that the cases where people, knowingly or unknowingly, are approached in an aggressive manner or threatened. Mr. Cresson stated he is unsure if it can be included in the report, but he believes everyone agrees that should not occur, regardless of circumstances.

- F. Impact of Recreational Tourism on page 10: **Mr. Robbins** stated that when the economic impact will be included, he would be happy to provide any information Mr. Lovett needed. **Mr. Lovett** responded that yes, he would welcome any help to gather any pertinent information.
- G. **Mr. Lovett** stated that he will suggest in the solutions and recommendations that, in addition to legal solutions, we should recommend non-legal solutions. Mr. Lovett performed research on recreational access in Scotland, and they spent time prior to writing new legislation, they worked towards getting landowners and those interested in recreation access together to meet and find common ground and enter voluntary agreements trying out voluntary access regimes. That may be an option, if we cannot solve every legal issue, the state invests in pilot programs to encourage land owners to participate in access programs, which build trust. This makes writing legislation easier because there is experience in what is needed. **Mr. Belton** stated that his non-legal recommendation would be an advisory committee, "clearing house," with various representatives to address controversial issues.
- H. Louisiana Landowner's Proposal: **Mr. H. Vorhoff** asked Mr. Darden for clarification for when it says that it would be "voluntary participation of land owners," is that correct, or was Mr. Darden considering adding in voluntary participation of the state as well. Can the state opt in or opt out of these proposed agreements? **Mr. Darden** responded that his proposal is that the state must be a willing participant in the process or it does not work. **Mr. Cresson** asked that because the response states "only applies to dual claimed land" he asked for clarification if that is true, could a land owner, where it is not in dispute, also volunteer his/her property for this program.

Mr. Darden stated that the genesis began with “dual claim,” but if a Constitutional amendment is passed and the state and the adjacent land owner can come to an agreement of where a boundary should be set, whether it is dual claimed or not, does not make a difference if you come to an agreement. The proposal eliminates dual claim, if you have a boundary that is set, whether it is dual claim or not goes away, the boundary becomes the demarcation of ownership. **Mr. Lovett** stated that even if it is not currently subject to dual claim land, but the landowner anticipates it become subject to dual claim land in the future, this process could be used. **Mr. Darden** stated that yes, Louisiana has a dynamic coastline and what is the boundary today, can be different in 10 years. The simplicity in the proposal is intended. It applies to what is currently dual claim, what is not dual claim, anything that the state can come to an agreement on, for which the land owner may come in return for which he gives a limited right of public access over that land. As that boundary moves inward, that right of public servitude goes with it. That ownership and boundary line does not move with it.

- I. Use value taxation and proposals: **Mr. Canfield** stated that he will retrieve the notes from the General Counsel from the Assessor’s Association, the regulations covering the Use Value, and will reach out to Mr. Carpenter to codify what his proposal was. **Mr. S. Robbins** stated that in the argument of having marshland taxed at use value, rather than face value, may already be a tax incentive.
- J. Additional discussion of trespass laws: **Mr. Kemp** stated that R.S. 56:8(103) focuses on aquaculture, not access issues, for instance R.S. 56:411 uses “privately owned waters as part of the containment of aqua cultured species.” **Mr. Canfield** clarified that this was the statute Mr. Robinson had mentioned earlier as a possible definition of navigability to use, but Mr. Kemp is saying it was a definition used for aquaculture. **Mr. Belton** stated there is a problem determining the qualifications for who will enforce access restrictions on the water, the most concerning instances involve the private property land owners or lessees, armed or unarmed, approaching people, who are knowingly or unknowingly trespassing, in a threatening fashion. He stated he understands land owners have offered a toll-free number, but it seems that if laws are proactively enforced, the person doing the enforcing needs some recognized authority to do so. **Mr. Canfield** stated that it would be possible to address in the criminal trespass section of report the issue of enforcement by lessees. Mr. Canfield asked if Mr. Belton could draft that to include in the proposed section. **Mr. Darden** stated that private property owners have the right to secure and manage their own property. Mr. Darden stated he does not understand how you legislate or provide for it. Mr. Darden said it may abridge other rights and impose an additional layer on property owners that is unreasonable. **Mr. Belton** stated

that it would create a potential process to address the issue of the public being approached. Mr. Belton stated he understands land owners desire to control their own property, but this would be a way to formalize the process. **Mr. Canfield** stated that the report could first set out the concern, then discuss the proposal, and then include a discussion on what affect that has on 2nd amendment rights and private property rights. **Mr. Belton** stated that the issue on dry land is not the same as the issue on water. As complicated as Louisiana laws on navigability are, and with a history of custom and usage, to abruptly start changing laws; it needs to be handled differently. **Mr. Canfield** stated that writing that and presenting it to the Task Force would be helpful.

- K. Responsible access and enforcement of access limitations: **Mr. Simmons** stated that his main concern is the environment and fragile ecosystems, which he does not see addressed in the report. **Ms. Duet** stated that in the Task Force's creation in SCR 99, it clearly states that the representative nominated by TNC and the Audubon Society would address sensitive areas relevant to sanctuaries, preserves, and areas off limits to fishing. The ecosystem impact from man-made activities is very different than the natural processes of erosion. There is a question in regards to the recommendation, what are short-term issues and long-term issues. It is difficult to translate what damage would be caused by additional vehicle traffic on waterways. **Mr. Peterson** stated that the issue is if you allow more access, there will be erosion. Part of the package the group gives to the legislature could be that this is an issue and concern of the committee. **Mr. Canfield** suggested putting into writing that a concern land owners have is the potential additional impact from boat wake if access were to increase and the effects on erosion. **Ms. Duet** stated the recommendation needs to include an action that tries to resolve this concern. **Mr. Simmons** stated he is concerned with surface drive motors and destruction they can cause to submerged aquatic vegetation. It would be important to let legislators know that there is potential damage to very fragile environments. **Mr. Lovett** stated that may be a potential area of agreement for both sides because everyone is interested in conservation. The state would be the mediator and set some lands off limits. **Mr. Canfield** stated there is discussion within the proposals by Mr. Robbins and Mr. Darden on responsible access, or limitations on access that is ultimately allowed. **Mr. Lovett** stated he interprets this as an area of agreement. The State would be the mediator to set some land off limits. **Ms. Duet** stated that in title 56 there are definitions that are restrictive in the way land is used, many of the refuges, federal or state parks, they are vastly different in their permitted uses. This is on a case by case basis. **Mr. Kemp** stated that he will follow up next week and report back. He stated that, with regard to boat traffic, our mainstay concern is their ability to enforce a much larger area. **Mr. Darden** stated that the LLA

proposal is meant to be flexible to set the boundary and to determine how to fashion the public servitude, which will be on a case by case basis. The intent is to create the boundary then on a case by case, land owner by land owner, basis negotiate the specifics. **Mr. Belton** stated that having the government restrict access is more palatable to the public than the land owner unilaterally doing it on their own, even if they have the right to do so. The public has problems understanding why access is being restricted. Creating a formalized process to determine when, if, and how areas will be restricted will be important. He stated Mr. Darden's focus is on setting a boundary and setting ownership. He does not think it is necessary. He is concerned that this focus will not get us over this hurdle, politically. **Mr. Robbins** responded to Mr. Kemp and asked if the Wildlife and Fisheries Department is currently responsible for enforcing all such activities, on private and public land. Mr. Robbins asked if it would really be an increase in responsibility. **Mr. Kemp** responded generally, yes. Mr. Kemp stated that he understands it to be a substantial increase in the role and expectations of the department because although they have the ability to enforce laws on private property, doing so in this context would substantially increase their role and expectations. **Mr. Belton** stated that they would be adding the role of determining whether the fisherman should be there. **Mr. Kemp** stated that a suggestion could be increasing fees to cover the additional enforcement. **Mr. Robbins** stated they could consider increasing license fees to cover the fiscal note to cover additional enforcement. **Mr. Kemp** stated that he is unsure if fisherman would be willing to obtain additional licenses and permits and if they would fully cover expenses. **Mr. Canfield** stated that it is important that this is presented as an issue in the report; but the report should avoid attempting to create a fiscal note. **Mr. Belton** stated that the Land Office and CPRA would be a part of this. He wondered if the access issue was combined to some extent with the entire Coastal Restoration Plan, would there be federal funding. **Mr. Peterson** stated that there funding is for the projects. Mr. Peterson stated that they seek to avoid ownership and access concerns in order to minimize any technical and legal issues. CPRA is not an enforcement agency. **Ms. Duet** stated that she suggests that there is already a pathway to create private sanctuaries. Since there is a model, the committee should mimic that model for the future. Additionally, Ms. Duet stated that the level of specificity for recommendations does not have to be high. **Mr. Canfield** stated that the report could say this is what Wildlife and Fisheries does, this is what the proposal will change, and it may require additional funding. **Mr. Robbins** stated that there needs to be a section that proposals suggest common enforcement or more uniform enforcement.

V. ASSIGNMENT OF ANY NEW DRAFTING RESPONSIBILITIES FOR THE DRAFT REPORT REQUIRED BY SCR 99 OF 2018

Mr. Canfield stated there may not be enough time to complete a full re-draft of the draft report before the next task force meeting. Instead, he suggested, creating place holders in the draft report for new topics that need to be added and then presenting that draft to the Task Force. Mr. Canfield stated that he will revise the state comments, revise the written presentation from Charlie on changes to the immunity statute, send information on servitudes, and will collect information on the Use Value, and ensure Mr. Carpenter's proposal is worded correctly. Mr. Canfield stated the next Task Force meeting will be on November 18th. He stated that December 2nd may be the next potential sub-committee meeting. The following task force meeting will be mid to early December.

VI. PUBLIC COMMENT

There were no public comments.

VII. CONSIDERATION OF ANY OTHER MATTERS THAT MAY COME BEFORE THE SUBCOMMITTEE

There were no other matters that came before the subcommittee.

VIII. ADJOURNMENT

The meeting adjourned at 3:28 p.m.