

MINUTES

PUBLIC RECREATION ACCESS TASK FORCE

October 29, 2018

A public meeting of the Public Recreation Access Task Force was held on Monday, October 29, 2018 beginning at 1:30 p.m. in House Committee Room 5, Ground Floor, Louisiana Capitol, Baton Rouge, Louisiana.

I. CALL TO ORDER

Mr. Blake Canfield called the meeting to order at 1:35 p.m.

II. ROLL CALL

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

Sen. Bret Allain

Rep. Beryl Amedee

Mr. Mike Bengé

Mr. Rex Caffey

Mr. Blake Canfield

Mr. Daryl Carpenter

Sen. Norby Chabert (*left meeting at approximately 3:30 p.m.*)

Mr. David Cresson

Mr. Taylor Darden

Ms. Cynthia Duet

Mr. Cole Garrett

Mr. Joseph LeBlanc

Mr. John Lovett

Mr. Charlie Marshall

Mr. David Peterson

Mr. Lucas Ragusa

Mr. Sean Robbins

Mr. Jonathan Robillard

Mr. Jay Schexnayder

Mr. Jeff Schneider

Mr. Tony Simmons (*left meeting at approximately 3:00 p.m.*)

Mr. Harry Vorhoff

The following member of the task force was reported as absent:

Rep. Jack McFarland

Mr. Canfield announced that twenty-two (22) members of the task force were present and that a quorum was established.

III. APPROVAL OF MINUTES

A motion by **Rep. Amedee** to approve the minutes for the September 13, 2018 task force meeting was approved unanimously.

IV. PRESENTATIONS AND DISCUSSION ITEMS

a. Presentation by Sean Robbins, Louisiana Sportsmen's Coalition: **Mr. Sean Robbins**, task force member appointed by the Louisiana Sportsmen's Coalition, presented to the task force prepared remarks titled *Louisiana's Posted Paradise: Protecting public access to our tidally influenced waters*, which is attached as **Attachment A**. Following his presentation, questions from task force members were taken. A summary of these questions and resulting discussions are provided below.

i. **Rep. Amedee** asked Mr. Robbins to repeat the third item of the four points that he stated he believed sportsmen should be willing to concede for purposes of reaching a resolution on public access. **Mr. Robbins** repeated the four items, which are "1) we have no interest in disputing the ownership of mineral rights of the water bottoms, 2) we are willing to forfeit the right to sue if unintentional injury or property damage happens above an owned water bottom, 3) we are willing to accept liability for property damage we create above private water bottoms, 4) we are willing to not traverse certain areas during hunting seasons and in other special situations." **Rep. Amedee** requested the sources for jobs and economic statistics cited in his remarks. **Mr. Robbins** provided additional specific information and promised to provide links to Mr. Canfield with the source for the statistics.

ii. **Sen. Allain** following up on Mr. Robbins's statement that Act 998 of 1992, (which was passed in response to the U.S. Supreme Court decision in the *Phillips Petroleum vs. Mississippi* case) has impacted public access, noted that the act itself states that no provision of the act shall effect in any way public access or recreational uses, including fishing, regardless of whether such claim is based on existing law, use, custom, or jurisprudence. **Sen. Allain** asked, was it jurisprudence that Mr. Robbins believed has impacted public access? **Mr. Robbins** stated that he will defer to the legal experts on the issue. **Sen. Allain** stated it was not the intent of the Legislature to affect public access in Act 998 of 1992 based on what I just read. **Mr. Robbins** agreed, but it appears that what we are experiencing now seems to be an unintended consequence of that act. **Sen. Allain** asked if there are any other laws Mr. Robbins was aware of that have led to this issue? **Mr. Robbins**

stated that attorneys that have advised his group have cited Act 998 of 1992 as the one that transferred the mineral rights to private owners.

- iii. **Mr. Carpenter** asked whether the most recently held BASS Master Classic was in Maryland. **Mr. Robbins** stated that it was at Lake Hartwell in South Carolina. **Mr. Carpenter** stated he seemed to remember an article from South Carolina that stated that the Classic brought in well over \$30 million of economic impact during a one week event. **Mr. Robbins** stated he did not read that specific article but when it was last in New Orleans he remembered numbers within that range.
- iv. **Ms. Duet** following up on a statement by Mr. Carpenter that some bird watchers were cited for trespass, asked if Mr. Carpenter has specific information on those cases. **Mr. Robbins** stated that he was unaware of specific bird watchers being cited but he mentioned it in order to highlight that birdwatchers are a recreational group that could also potentially be impacted by trespass claims.
- v. **Mr. Garrett** asked whether Mr. Robbins was aware of whether it was by law or contract that Florida sportsmen were prohibited from access waters near blinds during duck hunting season. **Mr. Robbins** stated he believed it was by law, but he would look into it and get back to the task force.
- vi. **Sen. Chabert** following up on Mr. Robbins's statement that coastal restoration's major benefit was hurricane protection, stated that we are in a precarious situation. Just as Mr. Robbins cited all of the things that will be lost if coastal restoration doesn't occur, Sen. Chabert stated he was also interested in the restoration of private land where the private landowner is at the mercy of erosion. Yet, Sen. Chabert noted, Mr. Robbins also noted that private landowners will benefit from the restoration. Sen. Chabert stated there is some truth to all of these statements. He further hoped the task force can explore all of these issues and we can realize that there is going to have to be some give and take in order to find solutions to these issues; but especially as it concerns coastal restoration as I think that is probably the most complicated and most difficult aspect of all of this. **Mr. Robbins** stated that is why he used that example, as it was certainly something on which there would have to be give and take on both sides.
- vii. **Mr. Cresson** asked, regarding the waiver of liability mentioned in Mr. Robbins remarks, what the vehicle to accomplishing that was. Is it a statute, a contract, or something else? Do you know what other states use? **Mr. Robbins** stated that he wasn't sure if other state's had this same problem regarding liability because most other states own the water-bottoms. He continued when our board discusses the issue, we envision a law by which the legislature absolves private landowners of this liability. I believe there is already something in the law, so I'm not

sure if we need to clarify the existing law or expand it, but we are willing to concede that. **Mr. Charlie Marshall** mentioned that there are statutes on liability protection and that he plans to comment on them in his presentation later in the meeting.

- b. Presentation by Chris Macaluso, Theodore Roosevelt Conservation Partnership: **Mr. Chris Macaluso** with the Theodore Roosevelt Conservation Partnership was unable to present due to illness. His presentation will be rescheduled for a future meeting.
- c. Presentation by Josh Kaywood, Backcountry Hunters & Anglers: **Mr. Josh Kaywood** with Backcountry Hunters & Anglers presented prepared remarks to the task force on the issue of public access to waters in Louisiana, which is attached as **Attachment B**. Following his presentation, questions from task force members were taken. A summary of these questions and resulting discussions are provided below.
 - i. **Mr. David Cresson** stated that he was intrigued by the comparison with Montana and Wyoming, the restrictive compared to more liberal access. He asked what is the reason for the more restrictive access in Wyoming? Is it private property and points of access? **Mr. Kaywood** stated he could certainly provide more information, but he believes it has more to do with laws on navigability and access.
 - ii. **Mr. Mike Benge** asked whether the \$23 million Mr. Kaywood quoted for out of state license sales in Louisiana is that from 2007? **Mr. Kaywood** responded yes. **Mr. Benge** asked whether it would surprise Mr. Kaywood if he told him that in 2017 there were 266,369 non-resident fishing licenses sold in Louisiana? And since we have all of this negative publicity due to this water access issue, that number should be going down right? Mr. Benge continued by asking whether it would surprise Mr. Kaywood that that's not the case. Louisiana had approximately \$280,000 non-resident fishing licenses sold in 2018. So, Mr. Benge continued, Louisiana isn't losing money hand over fist as some would have us believe. **Mr. Kaywood** stated it didn't surprise him. People are still lining up to fish in Louisiana. **Mr. Benge** agreed, stating that it's probably because there are lots of places to fish in Louisiana and lots of success. Mr. Benge stated that if you go to my facebook page you'll see 15-20 guys that went out this morning, both out of state anglers and local anglers, and we'll have a dock-full of fish.
 - iii. **Mr. Carpenter** responding to Mr. Benge's point, can you restate what you just quoted regarding the \$23 million in license sales? That was how much was made off the out-of-state license sales, not the number of licenses, correct? **Mr. Kaywood** stated that that was correct. **Mr. Carpenter** stated that the way Mr. Benge manages his property and runs things, I think we both agree his is a model of the right way to do things. Mr. Carpenter continued that based on a brief conversation you and I

have had and I must preface this statement with the fact that this is based on an initial review and that we haven't been able to dig into this in greater detail, but, we've looked at both Lafourche and Terrebonne Parishes where they don't run things the same way as Delacroix Corporation and we see a down trend from 1,200-1,500 out of state license sales to about three years later those sales have dropped to as low as 50? **Mr. Kaywood** stated that those trends seemed accurate. **Mr. Carpenter** stated that it varies from area to area based on how trespass laws are enforced. I would ask that Mr. Cole Garrett look into and confirm this and also to look into the general trend for licenses. **Mr. Garrett** stated that it can be difficult because you have so many privileges. You have your basic fishing licenses, but you also have lifetime licenses and combo licenses that complicate any attempt at determining trends. As a general rule we average about 700,000 fishermen combined in the state and that has been pretty consistent.

iv. **Sen. Chabert** commented that in terms of Terrebonne and Lafourche Parishes you are dealing with a unique situation. Those areas are the epicenter of coastal land loss and so you do see a greater effort by private landowners trying to deny access to their property. You also see a large increase in night boat anglers. So, I wouldn't dispute you've seen that type of interaction in Terrebonne Parish.

d. Presentation by Taylor Darden, Louisiana Landowners Association: **Mr. Taylor Darden**, task force member appointed by the Louisiana Landowners Association, presented a power point presentation to the task force titled *Water Bottoms: Private Property and Public Access*, which is attached as **Attachment C**. Following his presentation, questions from task force members were taken. A summary of these questions and resulting discussions are provided below.

i. **Sen. Allain** asked Mr. Darden to help him understand Act 998 of 1992, the *Phillips* case and the Louisiana State Law Institute reports cited in the act. What did the court determine in *Phillips*? **Mr. Darden** stated that *Phillips* was a property title case involving areas overflowed by the tides where the riparian owner was claiming ownership of that property and the State of Mississippi contested stating that they had title up to where the ebb and flow went. The U.S. Supreme Court stated that Mississippi took title to those lands when it came into the union under the public trust doctrine and therefore Mississippi was not able to alienate that property and so title to that property came back to the state of Mississippi. **Sen. Allain** stated that as I read earlier, Act 998 of 1992 states that nothing therein shall affect any right of public access to navigable waterways or lands regardless of whether such right is based on existing law, customary use, or jurisprudence. He asked Mr. Darden to comment. **Mr. Darden** stated that the portion of the act read by Sen. Allain was a declaration by the Legislature that Louisiana law is

different than Mississippi's and therefore the outcome in *Phillips* doesn't apply to Louisiana because the ebb and flow lands never made it into Louisiana's ownership under the public trust doctrine. So, Mr. Darden continued, if Louisiana owned that property it could be alienated because it was not part of navigable water-bottoms and therefore the property was capable of alienation. **Sen. Allain** then mentioned that there is all of this dual claimed property, so what do we do when there is money to fight over? **Mr. Darden** replied that the oil companies will lease both with the private property owner and the State, and so if there is production then the oil company will determine what the highest royalty burden is and place that money into the registry of the court and file a concursus petition naming the state and the private property owners until either the Court determines who owns the property or, and this is more likely; there is a settlement between the state and the private property owners as to allocation of the oil and gas production where ownership is not resolved. A decision by a court is the only authority that can recognize title. **Sen. Allain** asked whether in that situation there would be a claim for compensation as a taking if land erodes and becomes navigable in fact. **Mr. Darden** replied that it would be further complicated as to whether the property was properly transferred to the private landowner to begin with and if so and it later erodes, the landowner could make a claim for the value of the property and production. **Sen. Allain** stated that he assumes that would not be the State's position; he asked wouldn't they argue that since it is a water-bottom of a naturally navigable body of water, they own it outright? **Mr. Darden** responded yes, but that position is based upon non-navigable waterways becoming navigable naturally, but what if it becomes navigable due to act of man. Currently there is a case pending in the Louisiana 3rd Circuit, the *Crooks* case where ownership of minerals under Catahoula Lake is in dispute between the state and several private landowners. In that case the District Court determined that Catahoula Lake was actually a river that was flooded into a lake by the Jonesville Dam. So the implications of this suit are relatively significant and we are awaiting a decision from the appellate court. **Sen Allain** asked about man-made canals? **Mr. Darden** said courts have said those are private if it is made by private owners and that the federal navigational servitude he mentioned in his presentation does not apply. **Sen. Allain** asked about a situation where the State or local government seized or took over for public access a privately dredged canal for a public need? **Mr. Darden** stated that would be treated just like any other eminent domain case where the government would have to pay fair market value to the full extent of the owner's loss if the government can show a public and necessary purpose.

- ii. **Mr. John Lovett** asked, assuming concession on all of the issues that Mr. Robbins stated the sportsmen are willing to concede and assuming

we could add that recreational public access would have no bearing on determining ownership of disputed property, what would be the real harm in allowing public access for these recreational purposes subject to them not interfering with privacy or not interfering with hunting during hunting season? **Mr. Darden** replied that you will have taken away a significant stick from the bundle of the private landowner's property rights, which is the right to control access. Additionally of the four items Mr. Robbins mentioned he was willing to concede, his agreement to not claim ownership is not giving away anything as he would have no right to claim ownership to begin with, his agreement not to sue for damage done to their property when accessing water on private property is already included in statute somewhat. The item Mr. Robbins mentioned that interested me was his willingness to pay for damages that they cause. But Mr. Darden stated he wondered how to monitor such damage agreements to pay for damages? Are we talking about having a permit system so that I know when you are out there? If so, that's what we call a lease. The lease includes provisions covering damage to property and grants the person access, which I as private landowner control. But since we're talking about doing this over the entire coast, frankly there are some landowners who just don't want the public coming onto their property. **Mr. Lovett** responded, I can see that desire to deny public access as to enclosed waterbodies or on land, but I have difficulty seeing what is a landowner's interest in preventing access on property that is becoming increasingly wet and increasingly open and subject to the territorial sea where it is very hard to distinguish private property from open water. **Mr. Darden** stated that I agree with you there, but I don't think the battle front is there. I think, at least in my observation and memory, in the open waters private landowners are not monitoring, the problem is in the backwaters, with members of the public going into the canals and going into the little nooks and crannies, because the damage being done to the marsh has the ability to expedite land loss. That is why landowners are adamant about being able to control access. **Mr. Lovett** moving to a different issue stated, I've read that quote from Prof. Yiannapoulos that Mr. Darden mentioned in his presentation and to flesh out his argument a bit, Prof. Yiannapoulos was saying, if you own property with some non-navigable waterway on it, you took that property with some knowledge that you were acquiring that property with some risk that it could erode and become subject to public access as a navigable waterway over time. Further, he notes that there are all types of private property ownership that is subject to such limitations. He gives the example of the *Dallas vs. Farrington* case¹, which is also concerns an access dispute. In that case the court recognized that if you own land adjoining an enclosed estate, then your land is subject to a servitude or right of way allowing gratuitous passage to that estate. Do you think that is a strong argument against the takings claim you raise? **Mr. Darden** responded, I think it is an argument and I don't know how you come down on it. My fear is making some general rule, because you first have to determine navigability and whether it is navigable today or

¹ 490 So.2d 265 (La. 1986).

- historically. It is complex and I don't know that there is a general solution to that.
- iii. **Rep. Amedee** asked what is the source for the statistic Mr. Darden provided that 5.3 million acres are available for public fishing? **Mr. Darden** stated that he would have to get that information. **Rep. Amedee** continued by asking whether that was simply a number or whether there were maps that backed up the statistic? **Mr. Darden** replied that he would have to get that information. **Rep. Amedee** asked whether there was a state law allowing a member of the public to enter onto private property if they shot a bird that fell on that property? **Mr. Darden** stated that he was unaware of any such law.
 - iv. **Mr. Cresson** stated that in his job he hears more about disputes over access to open water than about members of the public wishing to access gated canals. So, he continued, is that the low hanging fruit, then? Can we come up with reasonable solutions to the issues associated with open water areas where people can't even tell they are on dual claimed or private property? Do you see an opportunity there? **Mr. Darden**, personally – not as a representative of LLA, yes, I think that is the low hanging fruit along with mapping. We could ask Jonathan [Robillard] or Harry [Vorhoff] about state mapping. That may be an area where we can find solutions. **Mr. Cresson** stated that it has always struck him that perhaps we should approach our task on a scenario by scenario basis instead of one large generalized proposal. He stated his opinion that he believed this was the problem with the legislation from this past session. **Mr. Darden** stated, I think that from LLA's member's perspective there is concern that if that is the low hanging fruit that can be resolved, then the question is where do you draw the line. As I think the battle is further inland, and those are the rights we want to most vociferously protect.
 - v. **Mr. Harry Vorhoff** stated that he wanted to circle back to Sen. Allain's questions regarding Act 998 of 1992 and make clear that the act states that *Phillips* case does not re-invest Louisiana with ownership, but it also states that it did not divest Louisiana of ownership either. So this Act didn't really do anything either way. I don't see how either the State or a landowner could hang their hat on this statute to support a claim of ownership. **Mr. Darden** stated that he agreed. **Mr. Vorhoff** stated that with respect to the ebb and flow of the tide not determining ownership, I did want to point out a major caveat from that statement – namely ebb and flow determines shore and that by its very nature creates State ownership. **Mr. Darden** stated that the Civil Code states that the seashore is the maximum area covered by the high tide during the winter months and I would agree with that. If you have property, the shoreline is ever increasing, but you do have that question of whether you are divesting a private owner of property and therefore they are entitled to compensation and that is still a question to be answered. **Mr. Vorhoff** replied that when you undertake a takings analysis you start with determining what is the property right alleged to have been affected and if the

property right is subject to limitations such as Professor Lovett mentioned then it wouldn't necessarily be a taking. Finally, concerning the case on Catahoula Lake, the legal question is whether Catahoula Lake is a lake or a river. It is not really an accretion question or a man-made erosion question.

- vi. **Sean Robbins** stated, to clarify on the four points I mentioned we would be willing to concede, I want to make it clear that we raised those four points, because those were issues that people were telling us caused the loss of public access. Those four items are by no means an exclusive list of matters we would be willing to discuss or consider. Next, I wanted to question the statistic of 5.3 million acres of available public fishing areas. Fish move in and out of certain areas and if people cannot access the areas the fish are in, then it really doesn't matter if I can fish the areas where the fish are not. As far as economic impact, people are not going to buy that expensive boat or outboard motor if they cannot get to where the fish are at. So, just keep in mind that just because there are 5.3 million acres of publicly accessible waters doesn't mean they are all conducive to recreational fishing. **Mr. Robbins** asked **Mr. Darden** on a different topic, whether he believed that gates should not be makeshift and should be properly marked and lit? **Mr. Darden** stated I'm not an expert, but if there are regulations on construction, marking, and lighting of gates in private canals then those should be followed. **Mr. Robbins** clarified that he was asking about gates in navigable waterways. **Mr. Darden** stated he was talking about gates in private canals, because that's where a landowner has a right to block access. **Mr. Robbins** said that he was talking about canals that were navigable in fact and whether those gates should be properly marked and lit to prevent injury. **Mr. Darden** stated that it's beyond the scope of his expertise. **Mr. Robbins** asked the chairman whether we can find out what the coast guard regulations are. **Mr. Blake Canfield** stated he can look into it.
- vii. **Mr. Carpenter** stated that in **Mr. Darden's** presentations we continuously hear about water bottoms and ownership and dual claimed lands. The Louisiana's Sportsmen's Coalition is not interested in the water bottoms, we are simply looking at access. You mentioned the man-made canals and that a court has already decided the issue of access there, but state law also says that the State cannot give up anything of value without remuneration. In the scenario where a private landowner dredges a private canal to where the only thing separating the private canal is a levee and the landowner then fills that canal with the public waters, the public fish, the public crab, etc., and then the landowner claims it all to be private. To me that seems like the State is giving up something that is public without remuneration. Do you know if that has

ever been challenged? **Mr. Darden** stated that it had not been challenged to his knowledge.

- viii. **Sen. Bret Allain** stated that from the landowner's side I hear a lot of people who say they believe that they have to deny access to protect private ownership of their property. Is that the case? **Mr. Darden** stated that allowing someone to access or traverse their property won't lead to a loss of ownership of that property. If someone, however, comes onto solid ground that you own and they then possess it they can, after the appropriate time has passed, claim ownership to your property. **Sen. Allain** so, chasing off an angler shows ownership? **Mr. Darden** yes, denying access is a right of ownership. **Sen. Allain** stated that a lot of the public access disputes come down to people denying access to protect what they own and fearing that if they don't do it, they will lose ownership of their property. If we can solve the mineral rights disputes, we can solve a lot of these problems. On the recreational fishermen side, a lot of anglers complain about being chased off or denied access to open waters. I've also heard stories of armed lessees chasing off people who are just out fishing with their families. **Sen. Allain** stated he didn't think any landowner would approve of their lessee acting that way. Another point of concern is that a lot of these areas are also dual claimed. And speaking with State Lands these properties aren't adjudicated but are handled in settlement. **Mr. Darden** stated that there are some dual claimed property disputes that have been adjudicated and pointed that Delacroix Corp. successfully proved that their property was privately owned as the State failed to prove navigability. **Mr. Bengé** listed the cases where Delacroix had successfully adjudicated property disputes with the state. He mentioned: *Sinclair Oil & Gas vs. Delacroix Corp., et al.*,² *Delacroix Corp. vs. Jones-O'Brien Inc., et al.*,³ and *ARCLA Exploration Co. vs. Delacroix Corp.*⁴ **Mr. Bengé** stated that the problem is that these cases take a long time and a lot of money to fight. The state method of operation is to change attorneys and to continue the suits for years. These cases arise 10 or 12 years after the well ceases operations just due to the nature of the cases and the way the State operates. **Mr. Bengé** stated that the state doesn't want to go to court and their method of operation is to try to force you to make a settlement. We did settle one case with them on a water bottom suit some 12 years after the well ceased. The real tragedy, **Mr. Bengé** said, is that the mom and pop landowners who own 80 acres cannot afford to fight the State. **Sen. Allain** asked why can't we settle dual claimed water-bottom disputes by settling them up front in exchange for public access? **Mr. Darden**

² No. 5251,5252 (La. App. 4th Cir., 1973), 285 So.2d 845.

³ No. 91-CA-0859 (La. App. 4th Cir., 1992), 597 So. 2d 65.

⁴ 650 So.2d 777 (La. App. 4th Cir., 1995).

commented that the state's position is that they cannot give up a thing of value without compensation. **Sen. Allain** asked whether changing this position would take a change of statute or constitution. **Mr. Darden** stated that it would take a change to the constitution. The constitution prohibits the alienation of navigable water-bottoms. **Sen. Allain** asked whether there could be some other mechanism to settle these up front in exchange for access. **Mr. Darden** stated that the state believes it cannot alienate navigable water-bottoms. **Sen. Allain** asked whether it could be called something other than alienation. Because, he said, he thinks that this is something most landowners would be willing to consider. He stated that he didn't want the public having access to his dead end canal that goes to his hunting and fishing camp, but most of the open waters aren't a problem. **Mr. Darden** agreed but believed it would take a constitutional amendment to allow for such a solution based on the state's position.

- ix. **Ms. Cynthia Duet** stated that the idea of attacking this matter on a scenario by scenario basis is very intriguing to me. One of the things her organization has done with partners in the scientific community is to assessment of Freshwater Bayou and the GIWW (Gulf Intracoastal Waterway) as they tend to expand and erode and compare them to similar constructions created at the same time period. The question I feel we do not have a good feel for is what percentage of erosion of these canals and private property would be assessed to anglers and recreational users. Ms. Duet continued that it's almost as big a technical question as the question of who is to blame for coastal land loss. I would like for us to look for case studies or papers on this issue for the task force to study. Maybe CPRA or the Water Institute scientists could provide some information. Because when I hear that anglers are willing to cover the costs of damage to private land, I'm interested in seeing what amount and percentage would be allocated to recreational fishermen over time in interior waterways over time. I think Bayou La Loutre may be a good example as the close of MRGO (Mississippi River-Gulf Outlet) made it a point used by many for access to where they want to go. Mardi Gras Pass may be another good example. I want this task force to be thinking of places that can help us answer this question. She stated that she will certainly help looking for those examples. Ms. Duet asked whether Mr. Darden had seen any cases that mimic this? **Mr. Darden** responded that he had not, but just considering the difficulty of allocating causation he felt it would be difficult to ascertain. Mr. Darden stated that he had a case over damage to a pipeline canal due to failure to maintain a levee; and the question was did the failure result from failure to maintain the canal levee or was it the passage of hurricanes over time. Ultimately, we decided to look at the

current condition and follow up every five years and address it that way. The difficulty is considering the myriad of influences we have on these canals. Mr. Darden stated he appreciated where Ms. Duet was coming from but he didn't know that the issue of determining damage caused by public access was workable. **Ms. Duet** stated she agreed it would be difficult, but if we are trying to avoid addressing issues like resolving disputes to dual claimed property, then we need to be thinking about this.

Sen Allain stated just to clarify my statements, those areas that either the State or the landowner believes would be geologically damaged by public access, then those areas should be restricted. I know of a location owned by the McIlhenny. He stated that he was more thinking about areas where the landowner was willing to open up their property to public access they should be able to settle that. **Ms. Duet** stated that she agreed with Sen. Allain, but a statement by Mr. Cresson gave her the idea. She stated that while she planned to bring this issue to the task force later, the law already recognizes certain areas and sanctuaries as being exempted in Title 56 of the Louisiana Revised Statutes. Her organization's property is included in Title 56, which restricts fishing in her organization's sanctuary. **Sen. Allain** stated that the State already is able to restrict where appropriate. **Ms. Duet** stated she was still interested in the task force thinking about and finding examples that could help regarding damage attributable to recreational boat access.

- x. **Mr. Garrett** stated that I hear a lot of people that argue that the waters are a public thing and therefore if you can float it it's a public thing open for public use based on Civil Code Art. 450. But I have not heard much about Civil Code Art. 451 which deals with private things subject to public use. What are your thoughts about this? The law recognizes the use of the banks of a public waterway for mooring of vessels and drying of nets. It seems that Louisiana recognized that private things can be subject to certain uses by members of the public. It is similar to the federal servitudes that allow for commerce over private waterbottoms. What is your thinking regarding using something similar on this issue? **Mr. Darden** responded that the public's use of banks is limited to navigation and drying nets; so, to that extent he didn't think it offers a solution to this situation.
- xi. **Mr. Robbins** asked Mr. Darden to clarify an earlier comment regarding ownership requiring title and/or possession; he asked what determines whether it requires the "and" or the "or"? **Mr. Darden** stated that if you have an unbroken line of succession of title back to the sovereign, then your ownership is absolute and you don't need to rely on possession. But in many situations there is a break in the title and so you have to either rely on 10 years possession with title or 30 years of possession

with no title. You have to possess to the extent of the area you are claiming ownership. **Mr. Robbins** asked whether if the State recognized title to dual claimed property would that mean that landowners would no longer block access to retain possession and ownership of the minerals. **Mr. Darden** stated that if the State recognized title then there would be no dispute and the property would be private. But I think you are mixing apples and oranges a bit, because the right to gate a private canal comes from the canal being private in the first place, which gives the landowner the authority to deny access. That doesn't really have anything to do with the State recognizing title. **Mr. Robbins** stated he was trying to connect this to Sen. Allain's comments that if the State settled up front then the landowners would grant access. So, if the State did settle and reaffirm title, then would that open up access? **Mr. Darden** stated that if it is not a bed or bottom of a navigable waterway then it is private and subject to being sold or settled. It is only navigable waterways the state cannot alienate.

- xii. **Mr. John Lovett** asked how often does the freeze statute resolve disputes between the landowner and the State? **Mr. Darden** explained to the task force that this statute allows the private landowner, who leased the property for minerals, to retain the minerals even if the State claims ownership of the surface due to erosion into a navigable waterway, so long as oil and gas production maintains the mineral lease. **Mr. Lovett** asked, shouldn't that solve the problem? Because if you are protecting the most valuable right the landowner has, shouldn't that get rid of the concerns for public access? **Mr. Darden** [recording unintelligible]. **Mr. Lovett** asked if we know the types of landowners owning the most property in the areas where this erosion is taking place? [recording unintelligible] **Mr. Canfield** stated he could ask Mr. Vorhoff to look at concusus cases and see if from those cases this information could help determine the size and types of entities involved. **Mr. Lovett** stated he was trying to determine what is the paradigm involved and asked Mr. Darden if he had any idea based on the makeup of his association's membership about the average size of landowners involved? **Mr. Darden** stated we do have records and historical records and some of the members are large and some smaller.
- xiii. **Mr. Carpenter** asked whether as part of mineral leases the landowners guaranteed title. **Mr. Darden** replied that he doesn't recommend his clients do that because it is not a risk he's willing to take on. **Mr. Carpenter** stated that so on the one end you have landowners not willing to guarantee title and yet you have members of the public getting stuck with criminal records for alleged trespass on private property? If we've got these areas that are so fluid that landowners are not guaranteeing title maybe we should look into how Joe Blow can just

come up and claim ownership and call the cops? **Mr. Darden** stated he never advises his clients to warrant title in a mineral lease and the fact that we don't warrant title doesn't mean our claim to ownership of the property is any less. That's a risk the oil companies should take. **Mr. Carpenter** responded that in a mineral lease we are just talking about money, yet in the situation where someone is alleged to be trespassing we have people being threatened to lose their clearances because they work at a federal prison simply because they were fishing on a wide open body of water and got ticketed for trespassing; and now they have a criminal record. But if you're unwilling to guarantee title for mineral leases, then why are we putting people under threat of criminal prosecution? Mr. Carpenter then stated, in response to some of the concerns raised by Ms. Duet, the last time any type of access bill was brought it was planned to be amended so that the bill recognized and protected refuges, areas of scientific study and areas like the McIlhenny property. I don't think that's a sticking point from the sportsmen's side. We are fully willing to carve those places out of any access bill.

- e. Presentation by Charlie Marshall, LOGA/LMOGA: **Mr. Charlie Marshall** presented prepared remarks to the task force titled *Presentation to the SR 99 Task Force Committee on behalf of the Louisiana Oil and Gas Association and Louisiana Midcontinent Oil and Gas Association*, which is attached as **Attachment D**. Following his presentation, questions from task force members were taken. A summary of these questions and resulting discussions are provided below.
 - i. **Rep. Amedee** asked for more information on Mr. Marshall's statement that the State couldn't alienate mineral rights under the Constitution **Mr. Marshall** stated there is a clear obstacle to the State settling mineral ownership disputes as opposed to trying them in court. He stated that the constitutional provision prohibiting alienation of minerals was more on point than the separate provision prohibiting the State from donating anything owned by the State to a private party. **Rep. Amedee** asked whether litigation involving damage to recreational boats or personal injury due to accessing privately claimed waterways was common. **Mr. Marshall** responded that yes the revised statutes show that there have been numerous cases involving the immunity statutes and these statutes have been amended many times to plug holes in the immunity it provides. For instance, pilings were not originally included under the immunity protection because they were not naturally occurring, but are now covered since that amendment. **Mr. Marshall** went on to state that he also wanted to mention before he forgot that if federal maritime law was implicated then these immunity statutes do not apply because these statutes are a state creation and do not cover liability under federal law. In determining the application of maritime law, the courts generally

look to whether the water involved is a privately owned waterbody that is not an artery of commercial navigation. If that is the case then the court doesn't apply maritime law. On the flip side when the court makes that finding then in effect they are concluding it is a state owned water bottom. So a landowner needs to be somewhat cautious in seeking this judicial analysis because they may be putting their ownership on the examining table as to whether that water bottom is state owned or privately owned and covered by the landowner's title. **Rep. Amedee** stated that in the case where maritime law does apply there is a greater question as to whether the water bottom can be privately owned in the first place, isn't there? **Mr. Marshall** agreed, that would be addressed by the court as part of the liability determination and whether the liability immunity statutes apply. [recording unintelligible]. **Rep. Amedee** asked whether there was a list of how many acres members of LOGA and LMOGA own. **Mr. Marshall** noted that one must keep in mind that the members operate under derivative rights from the landowner. They are typically mineral lessees or under a surface use agreement. Some may own property, but the focus of their interest is primarily derivative of the landowner. **Rep. Amedee** asked whether Mr. Marshall's client was also a member of Louisiana Landowners Association. **Mr. Marshall** stated that his client the Louisiana Land and Exploration Company is not currently a member. It was, but it is not now.

- ii. **Sen. Allain** [recording unintelligible] asked whether there was a third immunity bill passed under Governor Foster covering a situation where if you didn't give permission and someone went on your property you had immunity? [recording unintelligible] Because if someone sues me don't I have to claim that they are trespassing? I'm in the situation where I don't affirmatively give permission but I don't physically put up gates to bar access. **Mr. Marshall** stated he believes the way the statute reads is that if you suffer access by a member of the public onto your property and you don't object to it, you should have the benefit of the immunity statute as a landowner. **Sen. Allain** stated that this issue may be another thing we need to clear up in those statutes.
 - iii. **Mr. Carpenter** asked, following up on a question by Rep. Amedee regarding the number of lawsuits for damage or personal injury by members of the public accessing privately claimed water bottoms, whether there had only been several of these cases? **Mr. Marshall** stated there have been more than several; there have been many. **Mr. Carpenter** asked if he had any idea how many over the past 10 years. [recording unintelligible]
- f. Discussion of information requested at September 13, 2018 meeting:

- i. **Mr. Canfield** stated that David Peterson had mentioned creation of a compilation of papers or studies that could be of interest to the group. **Mr. Canfield** stated he would look at the documents referenced in the Louisiana Sea Grant report and pull those out into a list form as a starting point. Likewise he stated he would look at the documents from the last meeting that were handed out or discussed and he would add onto the list in that fashion.
- ii. **Rep. Amedee** specifically requested whether someone from LED could present on benefits to the State from events like fishing tournaments. **Mr. Canfield** agreed to reach out to LED and to the Lt. Governor's office to see if they would have similar information.
- iii. **Mr. Carpenter** stated he would like to have a presentation from someone with the tax commission on the submerged acreage being charged a use tax. I've been unable to find what constitutes the use, who reports the use and who audits the use. I would be interested in a report on that. **Mr. Canfield** offered to reach out to find someone who could present on that. **Mr. Carpenter** suggested either reaching out to the Tax Commission or to Lafourche Parish Tax Assessor. **Sen. Allain** mentioned for purposes of an agricultural use tax it is established that if you tax on the value of the property instead of the commodity you would decrease the acreage in cultivation. The use value is established on the value of the commodity.
- iv. **Rep. Amedee** stated she is still requesting for someone to present on the most accurate maps for recreational users to know where to go and where to avoid before they get on the water. Can someone present on that. **Mr. Canfield** perhaps we could discuss the existing maps with Mr. Robillard and Mr. Garrett. **Rep. Amedee** stated that if these maps are not good for legal purposes then why do we have them? I don't want to have to spend a week at the courthouse researching title prior to taking my family fishing. **Mr. Canfield** stated he understood the frustration but also understood the limitation that only a court could determine property ownership in the case of a dispute. He agreed to reach out to State Lands and look for other options.
- v. **Ms. Duet** requested numbers on how many individuals have received a criminal charge for trespassing associated with accessing navigable waterways. She mentioned it would be a longer term project as such information would need to be requested from the Sheriff's office of the coastal parishes. Perhaps we can pick a tournament such as B.A.S.S. and focus on the area surrounding that. **Mr. Canfield** mentioned that he was unsure how best to request that information but agreed to look into it. **Sen. Allain** mentioned getting the Sheriff's and DA's associations to come forward and discuss how they enforce trespass. Perhaps we should seek more uniformity in how these matters are handled.

- vi. **Mr. Cresson** asked about an AG's opinion mentioned at the last meeting, perhaps dealing with HB 391. **Mr. Vohoff** stated there is a pending opinion on the public's rights when water goes over private lands and that opinion is currently being drafted.
- g. Discussion of Next Task Force Meeting – Scheduling and Agenda Items:
 - i. **Mr. Canfield** mentioned for scheduling purposes to look at a date during the last week of November or the first two weeks of December. As for future agenda items, in addition to what we've just discussed, I'll reach back to Chris Macaluso to reschedule. I've spoken with Mr. Benge and Mr. Simmons to see if they can present on their experiences as landowners. I've spoken with CPRA presenting on their work on property acquisition issues and projects. Also, I've been asked to reach out to the Mayor of Morgan City, B.A.S.S. I've also discussed having a presentation from Sea Grant after we hear from all of the members. No other suggestions were provided

V. PUBLIC COMMENTS

Mr. Aaron LaRose, president of Bayou Coast Kayak Fishing Club, addressed the task force stating that his group had 500 active members. He represents a small niche of recreational fishermen that have different concerns and issues. His members don't have motors and so the concerns raised of damage to property or erosion from wake don't apply to his members. The areas that his members fish have to be closer to a launch or marina due to a lack of a motor. On average a kayak travels approximately 1-2 miles from the launch. I haven't had a run in with a private landowner, but my biggest concern is because I have a limited area of access is that if this continues to grow as an issue my ability to recreationally fish will start to be infringed upon or become much smaller. The lands that I fish have to be close to a road or highway and if those waterways become blocked off, I can't fish. I am excited to see this task force come together to look for a solution. My membership and I felt that HB 391 as it was written needed to be changed, because each landowner or area is different and different types of property may need to be treated differently. We look forward to hearing where compromises are possible. I think one area of improvement that is needed are maps. I don't know what areas are private and what are public, so good reliable maps are needed. Also knowing who owns the property would be helpful, so we know who to contact. We don't know if when someone comes up to us and says they own property whether they are being honest. So, having someone to contact to check ownership claims would be helpful to recreational fishermen. Lastly, as to enforcement of these matters, who is protecting the recreational fishermen? As a Kayak fisherman, what am I hurting? I am not after your minerals. If you're issue is you don't want me catching the fish, then be honest. It's not the law, but at least tell me.

VI. CONSIDERATION OF ANY OTHER MATTERS THAT MAY COME BEFORE THE TASK FORCE

No other matters were brought before the task force.

VII. ADJOURNMENT

Sen. Allain moved that the task force adjourn its meeting. This motion was approved unanimously and the meeting adjourned at 4:58 p.m.