

9/13/2018 9:30 a.m.

Comments by Cheston Hill

Good morning. My name is Cheston Hill. I work for the Louisiana State Land Office and I manage the Titles and Surveys Section. I want to discuss the history and development of our inventory of State claimed water bodies. I also want to discuss some long standing policy of our office and the reasons for many of the dual claims depicted in our GIS database, and maybe try to touch on some law and policy issues that we're discussing with the Attorney General's office.

In 2004, 5 and 6, the Legislature issued a number of Senate Concurrent Resolutions directing the State Land Office to create a Statewide inventory of State-owned water bottoms, and make this inventory available to the public. This severely nuanced and difficult directive was obeyed to the best of our ability by the creation of a Geographic Information System, or GIS, database, and the development of a GIS mapping layer which, subject to a disclaimer, can be selected on an interactive map accessible online and overlain with aerial photography and other informational mapping layers maintained by the Department of Natural Resources. There was one catch: the GIS mapping layer developed by the State Land Office was not able to show State-owned water bodies unless they had been adjudicated to be State-owned by a court of law. Instead, it was developed as a State-claimed inventory. Please allow me to explain.

On April 30th of 1812 when the United States Congress created the State of Louisiana, it declared that it shall be created on an equal footing with the other States that were already a part of the Union. The United States Congress declared, as a condition upon which Louisiana was incorporated into the Union, the river Mississippi, and the navigable rivers and waters leading into it, and into the Gulf of Mexico, shall be common highways, and forever free. We call navigability as of the date of this declaration historical navigability, and our office strives to identify those waterways that could be historically navigable for the purpose of inventorying the claims of the State to such waterways pursuant to this condition of Statehood and our Legislative directive. Please understand, however, that, due to erosion, subsidence and sea level rise over the course of over 200 years, the waterways on the coast have grown and become more intricate and interconnected, and our office also strives to identify and inventory the claims of the State to these natural navigable water bodies as they have grown and changed over time. Let me stress this does not decide ownership, only claims for which the State Land Office has readily available evidence or has obtained evidence clearly supporting the State's ownership. Let me also stress that the State's claims reflect a limited opinion of this office based on internal guidance documents to allow a consistent method of review Statewide using in-house historical records and other information held at the State Land Office. This was the only financially viable way to fulfill our directive to inventory all State owned water bottoms Statewide. It is important to understand that the State Land Office's initial reviews and subsequent claims based on these records are limited by the Louisiana Constitution – the State cannot alienate naturally navigable water bottoms. The Louisiana Constitution prohibits the State from alienating naturally navigable water bottoms, so the State necessarily and in perpetuity reserves the right to seek a judicial determination of State ownership on any water body no matter what our decision on claims have been in the past, because we know we cannot possibly confirm that we have at hand when making the decision all possible pieces of evidence in existence relative to the question of navigability of every water body in every part of the State.

Several things warrant explanation. Let me explain the reasons for many of the dual claimed water bodies depicted in our GIS database and how the State Land Office operates to determine State claims and the valid dual claims to be reflected in our GIS database, particularly in coastal areas. The explanation begins with the original U.S. Government public land surveys which we call township plats because they typically cover a 36 square mile area known as a township. These United States surveys were on a township by township contract basis with U.S. deputy surveyors in the 1800s who were paid by the chain and link, these were actual 66' metal chains made of 100 links each that were required to be held tight, level and plum over every piece of land surveyed.. When doing these surveys, Federal Deputy surveyors were expected to use their own judgement to identify navigable rivers and streams and were instructed to record certain observations and measurements of them. They were instructed to record certain observations and measurements of lakes and ponds of sufficient size and depth to justify the expense. Various versions of these instructions were issued en masse to the deputy surveyors in general circulars at different times, such as the General Instructions of 1815, of 1831, and of 1855. Other circulars for General Instructions for certain States have been issued at different times and often special instructions were issued directly to specific deputy surveyors for certain survey contracts covering particular areas, directing them to take certain actions relative to surveying some of these areas based on their own judgement regarding the value of the land compared to the expense of the survey work – with regard to the coast, and the vast areas of marsh land that is often extremely difficult to walk on foot, this often resulted in unsurveyed or partially unsurveyed townships comprised of lands which were viewed in the 1800s as waste land, unfit for settlement and cultivation. For example, special instructions have been issued for surveys on the coast in the 1800s which made clear that “nothing herein contained shall require the survey of waste or useless lands” and that the surveyor “will not be paid for sectionizing lands entirely unfit for settlement and cultivation”. Clearly the opinion of the value of pristine coastal wilderness has changed over time, as today such lands are not considered waste or useless. Nevertheless, often in coastal areas, the value of the land in the 1800s did not justify the expense that would have been borne by the US Government to survey the entire 36 square mile township, so the extent to which navigable waters may have traversed these unsurveyed areas was not documented. Unfortunately, vast swaths of these unsurveyed areas on the coast were viewed as swamp lands within the meaning of the Federal swamp land grants, selected by the State as swamp lands and approved by the Federal Government, and subsequently acquired, to the extent they were susceptible of being acquired, by private persons who purchased them from the State, presumably prospectors and investors. It is the extent to which they were susceptible of being acquired by private persons that is not clear because these transactions occurred, in large part, without the benefit of a survey, and any natural navigable water bodies which traversed these unsurveyed areas were inalienable by the State and insusceptible of private ownership. The State considers those sales null and void insofar as they purport to convey navigable waters.

Due to the issuance of survey instructions such as these, which resulted in unsurveyed areas and questionable severance from the public domain into private using estimated acreages, the long standing policy of our office in areas such as these, where townships were “unsurveyed”, their interior dimensions and features being estimated, is to refer instead to the early editions of the United States Geological Survey topographic quadrangles, and in particular to those editions that were the first to utilize aerial photography, because those are the most reliable. The earliest editions of the USGS topographic maps to utilize aerial photography in most areas are the Editions of the 1930s. For these

unsurveyed areas, our policy has always been to assume those waterways depicted on the 1930s quadrangles were there in 1812, the same assumption we make with the township surveys performed on the ground in the mid-1800s. However, ownership of many of these unsurveyed lands can be and is contested by persons holding State or Federal documents that purport to sever and sell naturally navigable water bottoms. In such instances of competing claims, ownership can only be decided by a court of law. For the most part, those are the areas that we have designated dual claimed in our GIS inventory and labeled "Claimed by the State and Adjoining Landowner".

Let me explain the State's position in this regard. If the State were to rely entirely on the historical governmental survey data available in unsurveyed or partially unsurveyed townships, a great disservice to the public trust could occur as a result of situations such as this and the resultant and very questionable sale of unsurveyed areas that, unknown to the State at the time of sale, included navigable waters. It has always been a strong public policy of this State that natural navigable water bodies are to be highways of commerce and forever free, inalienable by the State and insusceptible of private ownership, held in public trust for the citizens of Louisiana. This long standing public policy was finally codified in the Louisiana Constitution in 1921, and is now identified as Article 9, Section 3 of the current Louisiana Constitution, wherein the Legislature states as follows:

"The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. ...".

With regard to erosion, as well as subsidence and sea level rise: as Harry just discussed, Article 450 of the Louisiana Civil Code states that the waters and bottoms of natural navigable water bodies are defined as public things and belong to the people of the State. With the vast geomorphologic changes occurring on our coast due to erosion, subsidence and sea level rise, the difficulties inherent in determining the State's claim in accordance with the Louisiana Civil Code and Constitution are enormous, and involve identifying which water bodies of the expansive and rapidly growing interconnected network of bayous, lakes and bays on the coast should be claimed as navigable in fact today. We have traditionally relied on aerials for this, but these at times prove insufficient, and we have been increasing our surveyor's presence in the field for the purpose of field investigations and depth studies. With limited financial and personnel resources, vastly outmatched by the expansive coastal area of our State and its rapidly changing nature, the State Land Office strives to fulfill our duties with diligence and perseverance.

Currently, we are working together with the Attorney General's office on a number of complex law and policy issues. These issues relate to claiming and inventorying natural navigable water bodies in coastal areas that were not historically navigable, but appear to have become navigable naturally and to be currently navigable in fact.

Regardless of our work, however, this issue cannot be decided by us. No amount of identification and mapping of claimed waters will bring closure to this issue. Our office is charged with making claims and inventorying based on evidence available to us, not deciding ownership. Ownership can only be decided by a court of law.

Thank you for allowing me to speak, I appreciate your time and attention.