PRESENTATION TO THE SR 99 TASK FORCE COMMITTEE ON BEHALF OF THE LOUISIANA OIL AND GAS ASSOCIATION AND LOUISIANA MIDCONTINENT OIL AND GAS ASSOCIATION

OCTOBER 29, 2018

I.

Introduction

This presentation is made on behalf of the Louisiana Oil and Gas Association, known as LOGA, and Louisiana Midcontinent Oil and Gas Association, known as LMOGA (collectively, the "Associations").

Both of the Associations promote and represent the interests of their respective members in regard to a broad spectrum of matters related to Louisiana's oil and gas industry. Their combined memberships include operators involved in the exploration and production of oil and gas, and sectors providing services to those operational related activities, such as refining, transportation and marketing. That combined membership also includes firms engaged in the fields of law, engineering, environment, financing and governmental relations.

An important part of the representation provided by the Associations relates to identifying and addressing proposed legislative action that would affect membership activities in Louisiana's oil and gas industry. They both recognize that the SR 99 Task Force's legislative charge to evaluate and make recommendations to the Legislature on the issue of public access to running waters for recreational use is significant to many of their membership, and both Associations are grateful to have a representative voice on the Task Force.

II.

Discussion

A. Legal Principles Applicable to Running Water

The Task Force membership has previously heard thorough presentations by representatives of both the State of Louisiana ("State") and The Louisiana Landowners Association ("LLA") of important matters of Louisiana law bearing upon the ownership of water bottoms, and the implications of that ownership on public access to running water within those water bottoms. This presentation will not duplicate the subject matter of those presentations, except to say in a summary fashion that both the State and the LLA appear to be in agreement that public access to "running" waters depends on who owns the water bed containing the running waters: if the State owns the bed, then the public has the right to access those running waters, but if the bed is privately owned, then the private owner controls such access. (See *Buckskin Hunting Club v. 453731Bayard*, 868 So. 2d 266; 2004 La. App. LEXIS 431; *Dardar v. Lafourche Realty Co.*, 985 F.2d 824; 1993 U.S. App. LEXIS 4606; and *Parm v. Shumate*, 513 F. 3d 135; 2007 U.S. App. LEXIS 29948, discussing the concept of running water under Louisiana law, and recognizing that there is no right of public access to running water on privately owned property without landowner consent).

B. Conflicting Ownership Claims - Dual Claimed Water Bottoms

Ownership of water bottoms, however, can be uncertain in certain circumstances, particularly as to the so-called dual claimed water bottoms which stretch across much of coastal Louisiana. Those dual claimed water bottoms are typically covered by a privately held title, and they are also identified by the State on State Land Office water bottom mapping as being a possible subject of a claim of ownership by the State. Mr. Robillard, in his presentation to the

Committee on behalf of the State Land Office, acknowledged that the characterization of State claimed water bottoms on that mapping does not represent a determination of State ownership of those water bottoms. In situations of such uncertainty, mineral operators typically acquire a mineral lease from the private title holder and take a "protective" mineral lease from the State as to its claimed ownership.

The Associations do not believe that a State claim to possible ownership of water bottoms covered by a privately held title supports any right of public access to the running water covering those water bottoms unless and until ownership of the same is adjudicated to the State by final and unappeable judgment of a court. The State, in its presentation, appeared to be in agreement with that point of view.

The Associations are also aware that The Louisiana Land and Exploration Company LLC, a major landowner holding title to thousands of acres in coastal Louisiana of such dual claimed water bottoms mentioned above, consented to public access to much of that dual claimed water bottom acreage for recreational use for purposes of fishing, shrimping and crabbing. That consent, however, was given subject to the protection of the so-called recreational use immunity statutes more fully discussed below.

C. Standing to Confer Public Access Consent

Based on the foregoing, it appears that any right of public access to running water in a privately titled water feature requires the consent of the private owner. The Louisiana Land and Exploration Company's consent to such access mentioned above was given by its letter addressed to the State Land Office; that consent is shown by legend information on that Office's water bottom mapping.

A mineral lessee usually would have no control over its landowner/lessor consenting to such access, as mineral leases typically grant the lessee the right only to use the leased premises for exploration and production related purposes; any other use by the lessee could constitute a breach of the lease. All other use purposes not granted to the mineral lessee would belong to the landowner/lessor, either to be exercised by it or being subject to the landowner's grant of such rights to others.

D. Application and Effect of Louisiana's Correlative Rights Doctrine

The Associations are aware that existing Louisiana law affords some protection to their members in circumstances where a landowner grants mineral related use rights to its property to one party, and also grants use rights as to that same property to someone else for a different purpose. The circumstance of two different people holding use rights of the same property for different purposes usually provokes the application of Louisiana's doctrine of correlative rights.

That doctrine requires that each user holding use rights to the same property for different purposes respect the rights held by other user, must not unreasonably interfere with each other's ability to exercise its use rights. (See Louisiana Mineral Code article 11 A.; La. R.S. 31:11 A, providing the owner of land burdened by a mineral right, like a mineral lease, and the owner of the mineral right, such as a lessee, being required to exercise their respective rights with "reasonable regard for the those of the other").

Presumably, where a landowner consents to access for recreational use, that consent would be viewed as conferring a right of use in the nature of a servitude of use exercised by the public users. As such, the application of the doctrine of correlative rights should be viewed to apply between the public user and others holding rights to use the same landowner property. While that doctrine is helpful in protecting use rights under landowner granted agreements, what

is an unreasonable interference under its application can be a matter of dispute that leads to and requires judicial determination.

E. Application and Effect of Louisiana's Recreational Use Immunity Statutes

Louisiana law also provides protection to certain property interest holders in circumstances where a landowner consents to public access to water features covered by its title for public recreational use, as The Louisiana Land and Exploration Company LLC has done. That law, known as the recreational use immunity statutes, is contained in La. R.S. 9:2791 (enacted in 1964, and amended thereafter) and La. R.S. 9:2795 (enacted in 1975, and also amended thereafter). Those statutes have similar content for the most part and provide as follows:

R.S. 9:2791 A provides that an owner, lessee, or occupant of premises (defined as lands, roads, waters water courses, private ways and buildings, structures, machinery or equipment thereon) owes no duty of care to keep such premises safe for entry or use by others for specifically defined recreational purposes, including fishing, or to give warning of any hazardous conditions, use of, structures or activities on such premises to persons entering for such recreational purposes. It further provides that if such owner, lessee or occupant gives permission to enter the premises for such recreational purposes, it does not thereby give any assurance that the premises are safe for such purposes, nor does it constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of person to whom permission is granted.

R.S. 9:2795, after defining "Land" (to include, among other things, water and water courses, buildings, structures, and machinery or equipment when attached to realty), "Owner" (as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises")

and "Recreational purposes" (by a non-exclusive list of broad activities, including fishing), provides that except for a willful or malicious failure to warn against a dangerous condition, use structures or activity, an "owner of land" [note that this is not a defined term] who permits any person to use premises for recreational purposes: (i) does not extend any assurance that the premises are safe for any purpose, (ii) does not constitute such person the legal status of an invitee or licensee to whom a duty of care is owed, or (iii) incur liability for any injury to person or property caused by any defect in the land, regardless of whether naturally occurring or man-made.

There are some inconsistencies in the two statutes, several of which were characterized as conflicts and resolved by the Louisiana Supreme Court in its decision in *Richard v. Hall,* 874 So2d 131, 2004 La. LEXIS 1331. There, in resolving those conflicts under consideration, the Court held that both statutes are to be read and interpreted together, with 9:2795 legislatively repealing all portions of 9:2791 in conflict with 9:2795.

The Associations believe that these two immunity statutes are important to the issue of consent to public access to private property for recreational use, and it is also important that the immunity effect of such consent be clearly expressed by their terms. Notwithstanding the above mentioned *Hall* decision, they believe that there is still a potential for confusion in the application and immunity effect of these two statutes, particularly in respect to a strict construction of them required by law as indicated in that decision, as discussed below.

F. Potential Issues With the Application and Effect of the Recreational Use Indemnity Statutes

1.

Who is An Owner Entitled to Immunity?

The Associations note that R.S. 9:2791, which does not define "owner", speaks in terms of the "owner, lessee, or occupant" giving permission for recreational use, and not having any duty of care to keep premises safe for entry and use and deriving immunity (i.e., not assuming responsibility or incurring liability for injury to person or property caused by any act of person to whom permission is granted.

The Associations also note that R.S. 9:2795, which does define "owner" as the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises, only speaks in terms of the "owner of land", which is not a defined term, giving such permission for recreational use, not having any duty of care to keep premises safe for entry and use and deriving immunity, *i.e.*, not incurring liability for any injury to person or property caused by any defect in the land, regardless of whether naturally occurring or man-made.

As mentioned above, the landowner most likely will be the only one who is in the position of consenting to public access to its property for recreational use purposes. It is somewhat interpretative under the strict construction requirement indicated by the *Hall* case, and its holding that 9:2795 legislatively overrules "conflicts" between 9:2971 and 9:2795, as to how the statutory immunity benefit of the two statutes might be judicially interpreted and applied as to those holding use rights acquired from a landowner - *i.e.*, as a matter of interpretation of inconsistencies in both statues, or by a strict construction of "conflicts" with 9:2795 trumping "conflicts" in 9:2791.

That above-mentioned interpretative situation for the derivative benefit of the application of the immunity statutes is a matter of concern to the Associations in the context of landowner consent to public access for recreational use of water features involved in the operational activities of their members.

2.

Is a Holder of Servitude Rights an Owner?

The Associations are also concerned by a potential problem in the application of these two statutes in circumstances where mineral operators take a servitude from a landowner or mineral right owner in connection with their operations, and the landowner consents to public access to water features within the servitude premises for recreational use. As noted above, the *Hall* decision states that the two statutes are to be "strictly construed," because they are in derogation of "common or natural rights" (*Hall*, at p.37). While 9:2791 mentions an "owner, lessee or occupant of premises, and 9:2795 defines "owner" to include a possessor of a fee interest, a lessee, an occupant, (Louisiana law only addresses "occupancy" in the context of one taking possession of a corporeal movable that is owned by no one; Civil Code article 3412) or person in control of the premises, neither statute makes any express mention of either a servitude or a holder of servitude rights.

Servitudes and leases are governed by different legal principles under Louisiana law. A servitude, which can be either predial (a burden on one estate for the benefit of another estate), or personal (usually a personal right of use), is an incorporeal real right that effects a partial dismemberment of ownership of the property burdened by the servitude. A lease, on the other hand, does not effect a dismemberment of ownership; it represents only a personal, and not a

real, right of use. Servitude rights are often acquired by mineral operators, examples being pipeline rights of way, canal use permits, access permits and mineral servitudes, among others.

While the immunity statutes' reference to an "occupant" and a "person in control of the premises" suggests the inclusion of a servitude right holder, it is possible that a court could conclude, based on a strict construction of the two immunity statutes, that an "occupant" or "a person in control of the premises" means someone other than a servitude holder. The effect of such a construction would place a servitude right holder, predial or personal, outside the ambit of any immunity protection afforded by those statutes.

The Associations therefore believe that any recommendation of this Committee to the Legislature related to consensual public access to privately owned water features containing running water for recreational use of the same should be accompanied by a request for legislative re-enactment of the substantive concepts of these two statutes into one comprehensive statute that clearly statues that the immunity provided under it in respect to landowner consensual public access to water features on private property for recreational use extends to the landowner, as well as lessees, servitude holders and all others holding any right of use or occupancy of the property involved in or affected by such consent.

G. Erosion Responsibility Related to Consensual Recreational Public Access

The Associations also have concern as to the possible effect of increased erosion of property resulting from landowner consent to public access for recreational use of water features covered by landowner agreements providing their members the right to operate in or use those water features in connection with mineral operations.

Vessel wave wash is a contributor to erosion in the sensitive marsh environment of coastal Louisiana. A significant increase in vessel traffic most likely would result from consent to public access for recreational use in areas that formerly were not open to such use.

Landowners have brought legal actions against mineral operators and those holding use rights in respect to their property claiming damages, including restoration costs, from those operators and users based on the alleged failure of the mineral operators to protect the landowners' adjacent property from becoming water bottoms as a consequence of erosion. In many circumstances, those named as defendants in such actions had transferred their interests in the landowner use agreements long before those actions were initiated. That situation complicates the determination of causation issues, and interjects confusion in assessing legal responsibility, if determined to exist in such actions.

The Associations therefore believe that any recommendation of this Committee to the Legislature related to consensual public access to privately owned water features containing running water for recreational use should also be accompanied by a request for legislative inclusion in a re-enactment of the immunity statutes in one comprehensive statute a provision stating that in circumstances where a landowner consents to public access for recreational use of water features on its property that are not then the subject of legal proceedings involving landowner claims related to erosion, immunity is extended to lessees, occupants, persons in control of premises and holders of servitude rights, real or personal, from responsibility or liability to the consenting landowner in respect to any erosion resulting from such public access.

H. Parish Authority Suits Seeking Back-Filling of Canals on Private Property

Certain Parish and levee and flood protection authorities have filed suits seeking relief as described in them on the basis of alleged violations of coastal use permits. That relief includes,

among other things, modifications to private property, which are numerous in the aggregate, even though the owners of that property are not involved in those suits, nor have they consented to such modifications. Hypothetically, these lawsuits could require the back-filling of canals on private land, which is typically either not required by the terms of the regulatory permit pursuant to which the canals were constructed on that private property, or not required at the time of the filing of those suits.

Notwithstanding the unconstitutional taking of private property rights without due process of law implication of such relief being granted by a court in those circumstances, such relief, if it were to be granted, would obviously deprive the public of the opportunity of attempting to acquire landowner consent to the use of such back-filled canals for recreational purposes where the landowners do not want such canals to be back-filled.

The Associations therefore believe that any recommendation of this Committee to the Legislature related to consensual public access to privately owned water bottom features containing running water for recreational use should also be accompanied by a request for legislative action in either adopting a new statute, or amending existing statutory law, providing that no relief for back-filling any privately owned canal can be granted in a judicial proceeding unless the record of such proceeding supports such canal back-filling by a preponderance of the evidence, and either the owner of the canal is a party to such proceeding and has consented to the back-filling, or such back-filling is required by the specific terms of the regulatory permit pursuant to which such canal was placed and constructed on such private property at the time of filing of such proceedings.

III.

Closing

Thank you for the opportunity to make this presentation.

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