

## **Preliminary Options for Establishing Recreational Servitudes for Aquatic Access over Private Water Bottoms**

Submitted by the Louisiana Sea Grant College Program  
in response to House Resolution 178 of the Louisiana Legislature

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## **I. Synopsis**

In recent years, there has been an escalating boundary conflict involving aquatic access in coastal Louisiana, primarily between private landowners and recreational fishermen. The origin of this conflict stems from the geophysical deterioration of the state's coastal zone and the associated legal, economic, and technological changes that have emerged in response to that crisis. In July 2017, the Louisiana Legislature directed Louisiana Sea Grant to study and make recommendations on the creation of public servitudes to facilitate increased recreational access in coastal waterways. A guiding principle imposed by the resolution was to limit the study focus to voluntary actions that would not impinge on individual property rights or impede commerce. This report provides a general overview of the context, history, and drivers of this issue; describes the process utilized for soliciting stakeholder input; and details economic and legal considerations for ten preliminary options that could be used to partially mitigate this conflict.

## **II. Context and Perspective**

This report describes the results of a fact-finding process conducted by the Louisiana Sea Grant College Program, as required by House Resolution (HR) 178, 2017 Regular Session of the Louisiana Legislature, to explore issues surrounding the public use of private waterways for recreational and commercial fishing.<sup>1</sup> Controversy and tensions have risen significantly in recent years as coastal sportsmen have been increasingly excluded from privately owned waterways due to the convergence of a variety of factors. The study resolution tasked Louisiana Sea Grant with determining what options, if any, exist for establishing voluntary public recreational servitudes for access to private waterways. The premise of the resolution is that such options would apply to water bottoms that are acknowledged by the state to be privately owned. Louisiana Sea Grant does not intend to address the issue of water bottoms that are the subject of ownership disputes between private landowners and the state, so called "dual claimed" lands, except to the extent that the existence of those disputed water bottoms gives rise to negative public perceptions about the rights of landowners and the state's protection of public trust resources.

The Louisiana Sea Grant College Program is a research, education and outreach organization and does not advocate for particular constituents or policies. The Sea Grant mission is to provide the best available information to constituents and policymakers to assist them in the wise and sustainable use of coastal resources. To that end, the options described in this report are neither endorsed nor recommended by Louisiana Sea Grant but are suggestions that stakeholders and policymakers can use in future discussions of possible solutions to the issue at hand. Options discussed in this report

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<sup>1</sup> See Appendix B for a full copy of H.R. 178, Reg. Sess. (La. 2017).

were derived primarily from meetings with primary stakeholder groups. Supplemental information was obtained from secondary sources, including legal statutes and precedents, published reports and public comments.

### **a. History of Coastal Property Issues and Management**

Louisiana's coastal waterways were historically fairly open to public navigation for various purposes, including recreational and commercial uses. The Swamplands Grants Acts of 1849 and 1850 made vast tracts of swamp and overflowed land available for private ownership.<sup>2</sup> However, the classification of lands as "swamp lands subject to tidal overflow" and "swamp and overflowed lands" was imprecise, and the process of putting the lands into private hands was inexact, leading to confusion over the ownership of some water bottoms overlying those lands.<sup>3</sup> The commercialization of the oyster fishing industry in the late 1800s and disputes over water bottom ownership brought to the state's attention the importance of coastal water bottoms and led to a series of legislative enactments loosely termed the "oyster statutes," which purported to assert state ownership in all coastal water bottoms that were not legitimately in private ownership. Those statutes and subsequent Louisiana Supreme Court and U.S. Supreme Court decisions caused considerable controversy between the State of Louisiana and private landowners and led to other legislative enactments, a constitutional amendment and numerous court cases attempting to sort out the boundaries between state and private water bottoms.<sup>4</sup> What remains is a coastal zone that is more than 80 percent privately owned with contested water bottoms in some areas and a growing concern that landowners are being allowed to prevent access to waters largely perceived to be in the public trust.

A distinction, however, must be made between natural navigable water bodies, publicly constructed waterways, and canals constructed with private funds on private land. The first two categories are almost always considered open to public access while the latter is only accessible to the public with permission of the landowner. Historically, many coastal landowners allowed the public to use their private canals for recreational purposes such as fishing, but that began to change in the 1970s.<sup>5</sup> Landowners began closing off canals to public access, and several disputes arose that eventually led to judicial decisions affirming the right of landowners to restrict access to private water bodies. Such rulings are common except in limited situations where private canals have altered the natural hydrology in an area to the extent that the canal assumed the

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<sup>2</sup> Swamplands Grants Act of 1849, 9 Stat. 352 (1849); Swamplands Grants Act of 1850, 9 Stat. 519 (1850).

<sup>3</sup> See JOHN L. MADDEN, *FEDERAL AND STATE LANDS IN LOUISIANA* (1973).

<sup>4</sup> See A.N. YIANNPOULOS, *LOUISIANA CIVIL LAW TREATISE* § 4:12 (5th ed. 2017); see also *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (2010); see also James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861 (1992).

<sup>5</sup> (forthcoming) Jason P. Theriot, *A History of Vermilion Corporation* (Lafayette: ULL Press, 2018).

function of naturally navigable waterways.<sup>6</sup> In 1974 the Louisiana Sea Grant Legal Program conducted a study entitled “Public Recreational Use of Privately Owned Lands” that examined several of the same issues outlined in this report.<sup>7</sup> It is unclear what the impetus behind the study was but it is reasonable to assume it grew out of many of the same issues between landowners and the public that we see today. The similarity is notable in that it reveals the intractability of the conflict and the limited options available to begin a satisfactory resolution of it.

### **b. Drivers of the Current Conflict**

The specific reasons for any individual landowner’s policies regarding public aquatic access are unclear, but there are several general factors that have likely contributed to an escalation of the current conflict. Without question, the underlying physical driver has been the region’s extensive crisis of coastal land loss. In the past century alone, coastal Louisiana has lost nearly 2,000 square miles of land, primarily due to hydrologic modification, navigation canals, nutrient and sediment starvation, sea level rise and subsidence. An even greater amount of coastal land could be lost in the next 50 years under the direst environmental and policy scenarios.<sup>8</sup> Given that the majority of this loss has occurred and will continue to occur on private lands, it is rational for property owners to seek options to secure their economic interests. Perhaps the largest economic threat is that of conversion of private coastal land to open water. This conversion can result in the loss of subsurface mineral rights in cases where private land becomes part of a navigable water bottom or an arm of the seabed. Exercising boundary control over areas that were once subaerial land may be seen as a way in which private landowners can continue to assert and maintain ownership, much in the same way as continuing to pay property taxes on open water areas.

As mineral revenues have played out in coastal areas, some owners have sought to partially replace lost income by monetizing additional types of surface-based activity. Surface acreage once limited to waterfowl hunting and fur trapping has been increasingly contracted for alligator harvesting (egg and adult), ecotourism, and various types of recreational and commercial fishing. In addition to providing additional sources of revenue, these new lease arrangements provide the added benefit of asserting the continued claim to private property boundaries even after the loss of subaerial land. The arrangements are also practical in the sense that lessees supplement the on-site monitoring of human activity. Given their financial stake, lessees are often the initiator of local enforcement actions in cases of actual or perceived incidents of trespassing. This

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<sup>6</sup> See *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (2010).

<sup>7</sup> J. Michael Robins, *Public Recreational Use of Privately-Owned Lands*, Sea Grant Legal Program (1974). Produced by Louisiana Sea Grant and archived in the Louisiana Sea Grant library.

<sup>8</sup> Coastal Protection and Restoration Authority of Louisiana. 2017. Louisiana’s Comprehensive Master Plan for a Sustainable Coast. Coastal Protection and Restoration Authority of Louisiana. Baton Rouge, LA.

agent-based approach to boundary monitoring relies heavily on the availability of valid property maps.

Compounding the challenge of boundary enforcement is a 2003 legislative change in which Louisiana became one of 22 states where private property is not required to be posted.<sup>9</sup> In more static landscapes such a policy can be mitigated through the use of technology. Hand-held mapping and geographic position system (GPS) devices can allow recreational users to access real-time information on their position relative to public and private lands. Such devices are less dependable, however, in a highly eroding coastal system where physical markers are increasingly unapparent and mapping updates are limited by agency resources. The net result for coastal Louisiana is an increasingly open aquatic landscape with no required boundary markers and a digital record that must constantly be updated to keep pace with rapidly changing landforms and the associated status of public versus private claims.

Changes in technology have also contributed to the coastal access conflict. The advent of shallow-water drive technologies (e.g. tunnel hulls, hydraulic jack plates, and air-cooled surface drive engines) have allowed boaters to enter areas that were formerly inaccessible. More quiet and affordable than airboats, these technologies are being used by a growing number of operators to gain aquatic access to privately owned waters, some of which have extremely shallow depths of one foot or less. Similarly, the growing popularity of human-powered fishing vessels has also added to the conflict. Kayaks are likewise capable of accessing areas of interior coastal marsh once inaccessible to conventional aquatic craft. Taken together, these advancements have afforded fishermen increased access to the interior marsh edge – an area of high abundance for many of the species targeted by recreational fishermen.

Nationwide, coastal fishermen are generally accustomed to going most places their boats will carry them in pursuit angling activities. This expectation is especially strong in Louisiana, with generations of families considering it a right to fish on any water they can reasonably navigate. While the “new regime” of limited aquatic access is an affront to many coastal anglers, land representatives assert that trespassing has become far more intrusive in the past decade and that some of these incidences have resulted in substantial property damage. Liability concerns may also be a significant driver of recent restrictions to public access over private water bottoms. Although there is law that purports to hold landowners harmless for injuries resulting from recreational use of private property<sup>10</sup>, research by Louisiana Sea Grant brings into question the extent of that protection. Indeed, in some cases claims from navigational hazards have been

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<sup>9</sup> Requirements for private property posting were removed from the criminal trespassing statute, LA. REV. STAT. § 14:63. Act 802, 2003 La. Acts 2615.

<sup>10</sup> See, e.g., LA. REV. STAT. § 9:2791 (2003); see also, e.g., LA. REV. STAT. § 9:2795 (2001).

awarded to recreational plaintiffs.<sup>11</sup> While such rulings are uncommon, the time and expense required to address recreational claims can be substantial and may be a partial driver of recent movements to further restrict public access.

Finally, most coastal landowners in Louisiana are good stewards of their property and seek to engage in sustainable use of natural resources by maintaining the biological and ecological integrity of their land. Likewise, most of the state's coastal sportsmen are environmentally conscious and understand the need for stewardship and husbandry of our natural resources. Achieving progress on the challenge of aquatic access requires an open process in which voluntary options are identified that strike a balance between the rights of coastal property owners and Louisiana's identity as a sportsman's paradise.

### **III. Scoping and Synthesis**

#### **a. Stakeholder Engagement Process**

HR 178 authorized Louisiana Sea Grant to "facilitate a study of the possible establishment of a voluntary public recreation servitude of use of certain waterways." Louisiana Sea Grant was asked to "focus on finding common ground among the various interested groups and individuals." In conducting this study, Louisiana Sea Grant first identified key stakeholder groups that would be affected by, or might participate in, any voluntary public recreation servitude program that may be created in the future. From a broad perspective, the following were identified as key stakeholder groups: coastal landowners, recreational fishermen, and certain state management agencies.

Louisiana Sea Grant identified potential representatives from the three groups based on their attendance at previous meetings on the issue, their public statements of their positions regarding the issue (fishermen), their status as major coastal property owners (landowners), and their regulatory responsibilities with respect to state lands and resources and enforcing the state's laws and regulations (state agencies). Invitations were extended to these individuals to participate in discussions of the public access

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<sup>11</sup> *Eschete v. Mecom*, 509 So. 2d 840 (La. App. 1 Cir. 1987). As the appellee and his brother were leaving a canal that is connected to the Intercoastal Waterway near Houma, Louisiana, their boat struck the submerged cribbing boards of an abandoned well in the canal. There were no signs or markers warning of the submerged well. Two oil companies had dredged the canal and placed the well there in search of minerals. The appellee was thrown from the boat and injured his back, requiring corrective surgery. Appellee filed a petition for damages for his injuries and the trial court held the oil companies liable for the appellee's injuries. On appeal, the Court of Appeal found that the canal was indeed an undeveloped, non-residential, or semi-rural area, but that the well cribbing was not the type of object to be normally encountered in the "true outdoors." As a result, the court affirmed the awarding of damages to the appellee, with the appellant oil companies not eligible for immunity under §§ 9:2791 and 9:2795. *Eschete v. Mecom*, 509 So. 2d 840 (La. App. 1 Cir. 1987).

issues. Sea Grant then conducted a series of separate meetings with the three stakeholder groups. Most but not all invitees participated in the meetings.

To provide a neutral setting, all group meetings were held at Louisiana Sea Grant offices on the Baton Rouge campus of Louisiana State University. The meetings were held as follows:

- Recreational Fishermen – August 9, 2017
- State Agencies – September 7, 2017
- Landowners – October 4, 2017

Each meeting followed a consistent agenda and covered the following topics:

- Overview of study resolution and clarification of mandate
- Structure of preliminary meetings
- Input from stakeholder attendees
- Major concerns
- Potential options for resolution
- Next steps

Following each meeting, minutes were assembled, organized, and distributed to attendees for review and any needed corrections. The final minutes for each group meeting are attached to this report as Appendix A (A1, A2, A3). These minutes represent summaries of the discussions and are not intended to be a verbatim transcript.

In drafting this report, Louisiana Sea Grant relied primarily on the discussions and options heard during each stakeholder meeting. Louisiana Sea Grant also drew from secondary sources where appropriate, including: public statutes, published articles, social media, and television and radio broadcasts.

HR 178 focused on public recreation. Louisiana Sea Grant identified recreational fishermen as the most heavily affected and involved in any potential creation of a voluntary public recreation servitude over waterways because this user group heavily uses public waterways for recreational purposes. For the sake of consistency, recreational users are referred to as “fishermen” in this document. This term is intended to collectively refer to all recreational “fisherpersons” regardless of gender.

#### **b. Working Assumptions for the Report**

*Voluntary options only* - In preparing this report, Louisiana Sea Grant relied on several working assumptions. First, as specifically called for in the resolution, only voluntary options were considered. No option proposed calls for, or assumes, that any



stakeholder group would be required to participate. Participation would be entirely voluntary and determined on a case-by-case basis by the stakeholders.

*Property rights not disputed* - This report does not address land ownership or dual claimed lands. House Resolution 178 specifically asked Louisiana Sea Grant to assess “issues of temporary access to traverse private water bottoms without causing any transfer, or risk of transfer, of the owner’s property rights, including all surface and mineral rights and the non-interference with private commercial activity....” This report does not address disputed ownership of water bottoms or issues related to dual claimed lands except to the extent that the uncertainty of ownership negatively affects public perception of the state’s role in protecting public resources. Ownership issues will eventually have to be resolved by the state and private claimants on a case-by-case basis if public access issues are to be fully addressed, but HR 178 explicitly excludes property ownership issues from this study.

*Legal considerations* – To the extent possible, public statutes and legal precedents are referenced in the assessment of each option in an attempt to shed light on current policy and legal history. This information should be considered preliminary and for discussion purposes only. More comprehensive assessments and research would be required to examine the full range of legal and regulatory implications for any given option.

*Economic considerations* - It is worth noting that economic implications are clearly central to this conflict and that economic consequences could ultimately be estimated for measuring a wide range of tradeoffs for all possible options. The considerable time and resources required for such calculations, however, are beyond the scope of this report. Moreover, any economic disparities that may or may not exist would only serve to inform decision-making, but ultimately would not trump current law. For these reasons, this report is limited to a qualitative assessment of economic questions and considerations only.

*Neutrality of Sea Grant* - As previously stated, Louisiana Sea Grant is a neutral party and takes no position on the favorability of the following potential options. The resolution designates Louisiana Sea Grant as an “independent facilitator” for convening key stakeholder meetings in a neutral setting, in the hopes of finding common ground amongst the various parties.<sup>12</sup>

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<sup>12</sup> H.R. 178, Reg. Sess. (La. 2017).

#### **IV. Potential Options**

To fulfill the objectives of the resolution, Louisiana Sea Grant met with stakeholder groups to hear concerns and ideas from a variety of parties. The following is a concise summary of ten potential options that emerged during those discussions. The format includes a title and description of each option, a brief summary of stakeholder positions,<sup>13</sup> and a preliminary discussion of potential legal and economic considerations. Readers will note some redundancy between specific options, which is to be expected given the preliminary nature of this effort but also reflects the interconnectedness of several topics surrounding the issue. The options below are numbered for reference purposes only and no preference order is intended by the authors of this report.

##### **Option 1: Creative Leasing**

**Description:** Landowners would accept public funds in exchange for a leasing agreement with the state that allows the general public to have access to their lands under specific spatial and temporal conditions. Only landowners choosing to participate would be involved. Leasing of private property on Wildlife Management Areas could serve as a potential model for this arrangement.

**Stakeholders:** Landowners indicated that a new policy mechanism for creative leasing was unnecessary as they already have a wide range of leasing options available for negotiating arrangements with individuals, small groups, and public entities. They expressed concerns about the ability to realistically terminate public access (reversibility of expectations) upon the end of a lease because the public may then perceive the land as public access areas whether the lease is extended or not. In addition, a leasing agreement that allows public access to all may negatively affect the landowner's stewardship of the land because it will be harder to control the actions of additional users and the landowner will not be able to exclude undesirable users. Current lease arrangements allow landowners to contract with individuals and parties they believe would be the most responsible tenants. This capacity could be lost if access

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<sup>13</sup> As a reminder, Louisiana Sea Grant relied primarily on the discussions and options heard during each stakeholder meeting. The minutes from those discussions, which can be found in the Appendix A, are not verbatim. These minutes provide a summary of what was discussed, and small points in this document may not appear in the minutes, but rather are part of Louisiana Sea Grant's memory of the conversations. Louisiana Sea Grant also drew from secondary sources containing stakeholder viewpoints where appropriate, including: public statutes, published articles, social media, and television and radio broadcasts.

were given to the public at large. On the other hand, fishing representatives were very favorable of this approach as it may allow greater access to coastal waters without the cost of individual leasing fees. State agencies currently operate a similar approach through wildlife management areas that could possibly be extended to privately owned areas. However, this wildlife management area model was not extensively discussed during meetings with state agencies.

#### Discussion:

Louisiana Department of Wildlife and Fisheries (LDWF) is authorized to designate lands owned or acquired by the state as Wildlife Management Areas (WMAs), public hunting grounds, and refuges in order to regulate those areas. Statewide, LDWF manages more than 1.6 million acres of habitat through its network of WMAs and refuges, and Louisiana has title to the majority of the land in the WMAs and refuges along the coast. The current leasing program used for WMAs could serve as a potential model for this option, essentially creating a recreational fisheries management area for use by the public. This option has been described in stakeholder meetings as the “WMA-lite” option as it would borrow from the tenets of existing public management areas, but for fishing purposes only.

Under the current WMA approach, the Louisiana Wildlife and Fisheries Commission, with the approval of the governor, manages the surface property of both publicly owned and privately contracted lands. The public must first be notified of the establishment of an area as a designated WMA. Once the land is selected and published, suitable signs must be placed along the boundaries of the property to inform the public. The Commission then establishes all rules and regulations pertaining to public activities on the land. The public must maintain a Wild Louisiana Stamp, hunting license, or fishing license to use these areas. Managers of WMAs can implement restrictions for users, such as what types of vessels can access the property.

If a voluntary program based on the WMA model were created, the costs of public access would (in theory) need to equal or exceed the current stream of surface revenue obtained by a participating landowner. This minimum “reservation price” would vary by participant and be influenced by a given landowner’s concerns over two additional factors: the expected degree of public stewardship, and the potential irreversibility of public expectations. For these reasons, any creative leasing options that purport to follow the WMA model would require a thorough assessment of landowner reservation prices and the location and scale of any potential acreage to be made available. Perhaps the greatest challenge would be identifying a state funding mechanism to cover the costs of creative lease options. Potential sources of public funding for this option include check-off funds from recreational fishing license sales and/or specially levied fees that would permit access to designated areas. Any fees levied by the Louisiana Department

of Wildlife and Fisheries would require legislative approval under the state constitution.<sup>14</sup>

## **Option 2: Temporary Access for Special Events**

**Description:** This option would create some type of limited, temporary access for specific events, such as fishing tournaments. Participating landowners would agree to accept payments in exchange for allowing fishermen temporary access to private areas during special events.

**Stakeholders:** Fishing access advocates cite a number of incidents in which coastal anglers have been accosted and ticketed by local sheriffs for unknowingly trespassing on private waters. Some of these confrontations have occurred during regional and national fishing tournaments. The growing frequency of such incidents has been documented in state and national media and has led at least one major organization to forego the scheduling of future events in coastal Louisiana. Landowners have asserted that actual citations for trespassing are usually associated with the most blatant violations and that the extent of such incidents has been somewhat exaggerated by the press and social media.<sup>15</sup> They assert that compared to other coastal states, Louisiana continues to have a relatively large area of publicly accessible waterways that remain open for recreational fishing.<sup>16</sup>

### **Discussion:**

The economic impact of reduced tourism is a legitimate concern of recreational fishing dependent businesses in coastal Louisiana. Negative attention from the coastal access conflict could ultimately result in a reduction in recreational trips and an associated

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<sup>14</sup> The Wildlife and Fisheries Commission may offer recommendations for any fee changes. Recommendations are sent to the Louisiana State Legislature. However, the Legislature maintains the authority to then alter or deny to include any fee recommendations within a proposed bill. Telephone conversation with representatives of Louisiana Wildlife and Fisheries (Jan 25, 2018).

<sup>15</sup> While an increase in coastal citations for aquatic trespassing has been acknowledged by both fishermen and landowners, the actual number and trend of such citations has not been estimated. Such an assessment would require collection of detailed times series data from law enforcement offices in hundreds of coastal municipalities.

<sup>16</sup> In recent years, Louisiana has ranked 19th in the nation in licensed anglers, 5th in the nation in total water area, and 2nd in the nation in coastal water area. No data were available at the time of this study to determine the percentage of public versus private waters. Sources: US Fish and Wildlife Fishing License Reports, <https://wsfrprograms.fws.gov/subpages/licenseinfo/fishing.htm>; U.S. Census Bureau, unpublished data from the MAF/TIGER database, <https://www.census.gov/geo/reference/state-area.html> (last visited February 4, 2018).

reduction in expenditures for related goods and services (e.g. guiding, lodging, food service, fuel, ice, bait and tackle). While the economic implications of the current conflict have yet to be formally documented, existing studies do provide baseline information on the level of economic contribution (revenue and jobs) from recreational angling in coastal Louisiana.<sup>17</sup> In the case of fishing tournaments, economic impacts have been estimated through a variety of publicly and privately funded studies - although no specific estimates have measured tournament impacts specifically for Louisiana.<sup>18</sup>

In August 2017, representatives for the nation's largest fishing tournament series, the Bass Anglers Sportsman Society (B.A.S.S.), announced that they would no longer schedule tournaments in coastal Louisiana. This decision was reportedly due to boundary confusion and conflicts with landowners that occurred during recent B.A.S.S. sponsored events in the Sabine and Atchafalaya Basins. The world's premier bass fishing tournament, the Bassmasters Classic, has been held 47 times since its inception in 1971. Five of those annual events have occurred in Louisiana, and four of them were held within the state's coastal zone. The organization also sponsors numerous smaller tournaments throughout the year as part of the affiliated Bassmaster Elite Series, Bassmaster Open, and Bassmaster Women's circuit. Citing studies of B.A.S.S. events from other states, fishing access advocates claim this decision will cost local communities \$2.1 million for every Elite Series event and \$24 million for every Bassmaster Classic not held in state waters.<sup>19</sup>

Although the loss of tournament revenue could be substantial, it is important to reiterate that disparate economic impacts do not trump private property rights. Any option designed to facilitate temporary access to private waters during special events would need to be negotiated on an event-by-event basis. In theory, a given landowner's reservation price for participating would hinge on the same factors of the public leasing option (i.e. securing a payment that offsets surface revenues with additional premiums for damage and liability concerns and the potential irreversibility of public expectations). In the case of tournaments, however, the negotiated access would

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<sup>17</sup> U.S. Dept. of Commerce, *Fisheries Economics of the United States 2015*, ECONOMICS AND SOCIOCULTURAL STATUS AND TRENDS SERIES (2017), <https://www.fisheries.noaa.gov/resource/data/fisheries-economics-united-states-report-2015>; Michelle A. Savolainen et al., *Economic Impacts of the U.S. Gulf of Mexico Recreational For-Hire Fishing Industry*, 19:1 HUMAN DIMENSIONS OF WILDLIFE: AN INTERNATIONAL JOURNAL 72-87 (2014).

<sup>18</sup> Sherry Larkin et al., *The Economic Impact of the 2011 Florida BASS Federation Tournament to Osceola County and the Event's Economic Value to Participants*, University of Florida IFAS Extension Bulletin FE916 (2012), <http://edis.ifas.ufl.edu/fe916>.

<sup>19</sup> Steve Henry, *Bass Fishing Economic Impact Study*, State University of New York at Plattsburgh (2016), available at [https://www.researchgate.net/publication/293653159\\_2015\\_Bass\\_Fishing\\_Economic\\_Impact\\_Study](https://www.researchgate.net/publication/293653159_2015_Bass_Fishing_Economic_Impact_Study). Todd Masson, *Tournament anglers banned from Louisiana waters, BASS says*, NOLA.COM (August 11, 2017), [http://www.nola.com/outdoors/index.ssf/2017/08/tournament\\_anglers\\_banned\\_from.html](http://www.nola.com/outdoors/index.ssf/2017/08/tournament_anglers_banned_from.html).

ostensibly be for a smaller pool of event-affiliated anglers and would be contracted for a much shorter time span.<sup>20</sup> The limited pool of individuals afforded access under this option implies that compensation payments might need to come directly from the private sector (e.g. special fees levied by event organizers) or from local governments in the regions that benefit most from a particular event (e.g. incentive payments to local landowners).

### **Option 3: Public Acquisition of Land or Easements**

**Description:** Under this option, the state would acquire land or easements through voluntary transactions. Landowners not wishing to sell or donate would not be compelled to participate.

**Stakeholders:** To the extent that the program was entirely voluntary, stakeholders did not generally object to this approach.

**Discussion:**

This option is a straightforward land or easement (servitude) purchase or donation transaction between the state and willing landowners. Landowners not wishing to participate would not be compelled to do so; this is not an eminent domain approach. Therefore, this approach would not involve any legal issues beyond those involved in traditional land transactions between willing parties. Once the property was obtained by the state, the state would open the area to public access under specific management conditions.

There is some precedent for the voluntary purchase of land and easements by the state. Attempts have been made in the past to purchase important recreational areas and open those areas to the public. These efforts have been met with mixed results due to disputes over boundary delineations and property appraisal methods.

Elmer's Island is one example of the challenges to this approach. Good faith negotiations with the Elmer family to facilitate state purchase of approximately 1,200 acres of coastal marsh and barrier shoreline, primarily for the provision of recreational fishing opportunities to the general public, began in 2003.<sup>21</sup> After five years of ongoing but unsuccessful negotiations, the accreted shoreline adjacent to the Elmer's property was declared state property and the beachfront was opened as a public refuge area. The

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<sup>20</sup> While most fishing tournaments occur over a span of three days or less, pre-tournament scout fishing is very typical for a predetermined period prior to the event. This period might vary depending on the tournament.

<sup>21</sup> Rex H. Caffey et al., *Elmer's Island Coastal Preference Study*, Louisiana Sea Grant College Program (December 23, 2003), [http://www.lsu.edu/seagrantfish/pdfs/Elmers\\_report.pdf](http://www.lsu.edu/seagrantfish/pdfs/Elmers_report.pdf).

Louisiana Department of Transportation and Development and the Grand Isle Levee District would later purchase the remaining property surrounding the new refuge via expropriation. While this taking resulted in additional public access, it was predicated on the benefits of coastal protection associated with the Caminada Headland Barrier Shoreline Restoration Project.<sup>22</sup>

The White Lake Property, also known as the White Lake Wetlands Conservation Area (WLWCA) is located in Vermillion Parish.<sup>23</sup> It encompasses roughly 53,000 acres of freshwater marsh with nearly 19,000 acres of leased property. British Petroleum (BP) donated the White Lake Property to the state of Louisiana in 2002. Prior to this time, the property was owned and managed by BP, its predecessor, and other private oil companies. The Legislature gave LDWF the authority to manage the property in 2005 and set up a special account for the White Lake Property in the State Conservation Fund. The property has a birding and nature Trail open to the public during daylight hours; the staff schedule and coordinate public hunts, fishing lotteries, scientific research, and special events. The revenue generated through leasing and hosting public uses allows White Lake to fund its annual fiscal budget. Though this was a donation instead of a sale, it is an example of a land transfer resulting in public access.

The Elmer's Island and White Lake acquisitions represent two cases in which voluntary attempts to acquire coastal property for recreation has met with different results. Yet these examples reflect relatively small parcels of terrestrial acreage with some elements of aquatic access. Short of any large-scale donations of coastal property, it is unlikely that property acquisitions will be a cost-effective means for addressing the coast-wide scale of the aquatic access conflict.

A variation on this approach involves the purchase of public easements by the state from willing landowners. In this instance, landowners would retain title to the property but would be granting a public servitude to the state, allowing fishermen aquatic access to their property. Such easements could be either time-bound (e.g. 20 years, 30 years) or in perpetuity. Similar programs in the Farm Bill such as the Wetlands Reserve Program<sup>24</sup> and the Conservation Reserve Program<sup>25</sup> have contracted millions of acres of private land nationwide for the provision of public goods (e.g. water quality, wildlife habitat, flood storage). While these Farm Bill programs do not allow for public

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<sup>22</sup> S. Beaux Jones, *After Nearly a Decade, Elmer's Island Reopens to the Public*, Sea Grant LCL 91 (December 2009), [http://www.laseagrant.org/wp-content/uploads/lcl\\_91.pdf](http://www.laseagrant.org/wp-content/uploads/lcl_91.pdf); Louisiana Department of Wildlife and Fisheries, *Elmer's Island Refuge Management Plan* (Dec. 15, 2016), p. 4, available at [http://www.wlf.louisiana.gov/sites/default/files/pdf/refuge/32508-elmers-island-wildlife-refuge/elmers\\_island\\_management\\_plan\\_final.pdf](http://www.wlf.louisiana.gov/sites/default/files/pdf/refuge/32508-elmers-island-wildlife-refuge/elmers_island_management_plan_final.pdf).

<sup>23</sup> LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES, WHITE LAKE CONSERVATIONS AREA, <http://www.wlf.louisiana.gov/refuge/white-lake-wetlands-conservations-area>, (last visited Jan 25, 2018).

<sup>24</sup> See 7 C.F.R. §§ 1467.1 et seq. (2018).

<sup>25</sup> See 7 C.F.R. §§ 1410.1 et seq. (2015).

recreational access, they represent easement models that could potentially be used to facilitate aquatic access. In economic terms, the mechanics of an easement are similar to the public leasing option and would likewise require a substantial source of public funding for implementation. This option has potential overlap with Option 5, Tax Incentives, and Option 8, Decoupling of Mineral Rights. Please see those options for more information.

#### **Option 4: Liability Protection**

**Description:** The state would provide private landowners additional liability protections in exchange for allowing public access onto their properties.

**Stakeholders:** Landowners expressed varied concerns about potential lawsuits resulting from public injuries occurring on their land. While some felt that the Recreational Use Statute<sup>26</sup> provided adequate protection, others feared potential lawsuits from accidents occurring on their property, regardless of fault. Fishermen expressed no concerns about liability. State agencies did not express an opinion on this issue but did suggest that a change in tort law might be opposed by other interest groups.

**Discussion:**

Landowners that allow public access for recreational purposes have some legal protections under the Louisiana Recreational Use Statute.<sup>27</sup> Under this law, property owners are protected from liability resulting from any injury to person or property caused by any defect in the land, whether it is naturally occurring or man-made. Courts have generally ruled objects, even man-made ones, to be part of the “true outdoors” if they are generally found in nature. Louisiana courts have ruled submerged water control structures and concrete survey markers to be objects typically found in the true outdoors.<sup>28 29</sup> However, courts have also deemed a submerged well cribbing not to qualify.<sup>30</sup> What sorts of objects are typical of the “true outdoors” are determined by fact finders on a case-by-case basis.

Additionally, this liability protection is limited when the property owner knows of a hazard and fails to warn the public of the hazard. A failure to warn against an obstacle or object that could cause harm will likely incur liability on the part of the landowner, especially if the landowner has previous knowledge of said object. Failing to warn

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<sup>26</sup> LA. REV. STAT. § 9:2795 (2001).

<sup>27</sup> *Id.*

<sup>28</sup> *Kieff v. La. Land & Expl. Co.*, 99-2947 (La. App. 4 Cir. 01/24/01); 779 So. 2d 85.

<sup>29</sup> *Verdin v. La. Land & Expl. Co.*, 96-1815 (La. App. 4 Cir. 03/12/97); 693 So. 2d 162.

<sup>30</sup> *Eschete v. Mecom*, 509 So. 2d 840 (La. App. 1 Cir. 1987).



against a known obstacle in a waterway amounts to a “willful and malicious failure to warn against a dangerous condition, use, structure, or activity” and is afforded no immunity under Louisiana’s Recreational Use Statute.<sup>31</sup> Louisiana courts consistently rule against landowners that fail to give warning of known obstacles. Landowners may warn of known obstacles by posting signage or identifiable markers in the area warning of the danger. Failing to give such a warning would make a landowner much more vulnerable to liability for an accident that occurs.<sup>32</sup>

Landowners that allow persons onto their land for commercial purposes (such as fishing leaseholders) are not protected by the Louisiana Recreational Use Statute.<sup>33</sup> This option would require a change in the law to clarify and provide additional liability protection to landowners that allow public access to their water bottoms. From a landowner perspective, allowing increased public access in exchange for reduced liability is an economic decision that would depend on a number of factors, including: the current and future extent of navigation obstructions for a given tract, the expected transaction costs for addressing legal claims, and the degree of indemnity offered under any negotiated option.

#### **Option 5: Tax Incentives**

**Description:** The state would offer a lower tax rate to landowners that chose to allow public access on their land.

**Stakeholders:** Landowners and fishermen were open to this option, though it was unclear if this would be sufficient to persuade landowners to open their land to the public. State agencies raised the issue of local government concerns regarding impacts to the local tax base.

**Discussion:**

There are a variety of means for offering tax benefits and incentives to private landowners who offer their land for public use. Some states offer specific use related breaks on property taxes or landowners can take advantage of federal income tax breaks such as the Land Conservation Tax. For example, Alaska allows privately owned land to be exempt from taxation if the land has a donated easement to a government body for purposes of “scenic, conservation, or public recreation use.”<sup>34</sup> Montana recently enacted a tax credit program that allows for private landowners to enroll in the Montana public access program titled “Unlocking Public Lands Program,” which

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<sup>31</sup> LA. REV. STAT. § 9:2795 (2001).

<sup>32</sup> *Price v. Exxon Corp.*, 95-0392 (La. App. 1 Cir. 11/09/95); 664 So. 2d 1273.

<sup>33</sup> LA. REV. STAT. § 9:2795 (2001).

<sup>34</sup> ALASKA STAT. § 29.45.050 (2017).

provides limited public access across private lands in exchange for fixed annual tax credits.<sup>35</sup> States participating in the Voluntary Public Access and Habitat Incentive Program (VPA-HIP) may offer landowners financial incentives through tax breaks for opening their land to licensed hunters.<sup>36</sup>

A private landowner can voluntarily donate an easement on their land to a land trust or government agency and receive a tax benefit on their federal income taxes through the Land Conservation Tax, which was enacted in 2006 and made permanent by Congress in 2015. By donating an easement, they are ensuring long-term protection while foregoing the right to many near-term activities. The donation permanently limits the uses of the land in order to properly conserve it. The easement runs with the land and cannot be undone through sale or donation. In addition to qualifying as a charitable tax deduction for federal income tax purposes, the landowner also benefits through an increase in the deduction a donor can take for donating a conservation easement. That deduction goes from 30 percent to 50 percent of their annual income. Landowners also get an extended carry-forward period that goes from five years to 15 years. An example would be a landowner earning \$50,000 a year who donates a conservation easement worth \$1 million will be able to deduct \$25,000 a year (50 percent of their income) and these deductions apply for 15 years so they will receive \$400,000 in deductions. It is important to note that one cannot deduct more than the fair market value of the gift.<sup>37</sup>

Primary concerns from agency stakeholders centered on impacts to local government tax revenues. According to the Louisiana Tax Commission, more than 3.7 million acres of marsh were subject to state and local taxes in 2016.<sup>38</sup> The Louisiana Tax Code assesses

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<sup>35</sup> See MONT. CODE ANN. 87-1-294 (2016); see also MONTANA FISH, WILDLIFE & PARKS, UNLOCKING PUBLIC LANDS PROGRAM OVERVIEW, <http://fwp.mt.gov/hunting/hunterAccess/unlockingPublicLands/> (last visited January 25, 2018).

<sup>36</sup> 7 C.F.R. §§ 1455.1 et seq. (2015). The VPA-HIP is housed under the National Resources Conservation Service (NRCS). As of 2015, 33 states and one Native American Tribe have programs that provide for public hunting on private lands. The NRCS invested \$20 million in 15 states in 2015 (Natural Resource Conservation Service, “2015 VPA-HIP Grantees,” USDA.gov, <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=nrcseprd388655>). Land that is part of the VPA-HIP program is leased annually by the state, which then allows the land to be open to licensed hunters; landowners maintain control and care over their property. Financial incentives range from the money per acre leases, tax breaks, discounted hunting licenses, and reduced legal liability through corresponding state legislation. For example, the Michigan legislature passed Act 451, which states, “No cause of action shall arise for injuries to persons hunting on lands leased under HAP unless the injuries were caused by gross negligence or willful and wanton misconduct of owner, tenant, or lessee.” (Michigan Department of Natural Resources, “Attention Landowners! Payments for You, Land for Hunters: A financial opportunity that helps preserve Michigan’s hunting heritage,” Michigan.gov, [http://www.michigan.gov/dnr/0,4570,7-153-10363\\_10913\\_58762-263759--,00.html](http://www.michigan.gov/dnr/0,4570,7-153-10363_10913_58762-263759--,00.html)).

<sup>37</sup> Land Trust Alliance, *Using the Conservation Tax Incentive* (2016), p. 2, available at <https://www.landtrustalliance.org/issues-action/take-action/tax-incentives>.

<sup>38</sup> Annual Report, Louisiana Tax Commission (2016), available at [http://www.latax.state.la.us/Menu\\_AnnualReports/UploadedFiles/2016%20LOUISIANA%20TAX%20COMMISSION%20ANNUAL%20REPORT.pdf](http://www.latax.state.la.us/Menu_AnnualReports/UploadedFiles/2016%20LOUISIANA%20TAX%20COMMISSION%20ANNUAL%20REPORT.pdf).

these properties through a usage-value scheme that taxes at lower rates per acre at higher salinities (e.g. fresh marsh: \$7, brackish marsh: \$6, salt marsh: \$5).<sup>39</sup>

In some parishes, up to 80 percent of coastal marshes are owned by large landowners, and the revenue impacts to those parishes could be a substantial roadblock for implementation of tax-based incentive options. Additional revenue from fishing activities and related sales might offset some of the tax revenue lost, but the effect would be variable from parish to parish and would require detailed economic examination. One recommendation from the stakeholders on how to provide revenue to replace lost property tax was to include an additional charge on the purchase of fishing licenses that would be directed to local governments. Further consultation with state, parish and local governments would be needed to fully vet this option.

#### **Option 6: Acquisitive Prescription Limitations**

**Description:** Explore changes to Louisiana law to prohibit members of the public from acquiring a servitude of passage over private land on which the landowner allows public access. This option would address a concern of landowners that the public could acquire permanent right of passage over private property if they allow fisherman to traverse their lands.

**Stakeholders:** Some landowners expressed concerns that allowing public use of their private lands could lead to a servitude of passage over time. Other landowners were less concerned about this happening. Fishermen did not object to this option. This option was not discussed in detail with state agencies.

**Discussion:**

Under Louisiana law, a servitude of passage over private property can be acquired by acquisitive prescription of ten years for good faith or 30 years for bad faith.<sup>40</sup> Thus, a dominant estate can acquire a right of passage over a servient estate by traversing over

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<sup>39</sup> Ryan M. Seidemann & Catherine D. Susman, *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*, 17 J. ENVTL. L. & LITIG. 441 (2002).

<sup>40</sup> See LA. CIV. CODE art. 3475 (1983); see also LA. CIV. CODE art. 3486 (1983). Good faith can be defined, for the purposes of acquisitive prescription, as a reasonable belief, in the light of objective considerations, that one is the owner of the thing one possesses. See LA. CIV. CODE art 3480. Bad faith can be defined, for the purposes of acquisitive prescription, as proof the possessor knew or should have known that they are not the true owner of the thing they are possessing. See LA. CIV. CODE art. 3481.

the servient estate for ten or 30 years.<sup>41</sup> The passage could be either over land or water and need not be continuous.<sup>42</sup> It is unclear what rights of passage the general public, as opposed to a dominant estate, could acquire over private property, but courts have held that private landowners can evict trespassers from private navigation channels. The Louisiana State Constitution does allow “the public, represented by local government subdivisions, may acquire servitudes of way by prescription in the manner prescribed by law.”<sup>43</sup> Changes in the civil code could make it more difficult to acquire servitude of passage over water, for instance classifying it as a non-apparent servitude.

There are a number of questions related to acquisitive prescription that would need to be examined to determine whether this option is necessary. These questions include: whether or not the general public can acquire a servitude for recreational activities over private land when they do not own a dominant estate?; could a right of passage or use be acquired by the public on private land by implied dedication?; and whether the constitutional provision addressing public rights of way could be extended to recreational fishing activities in private waterways? The authors view the resolution of the questions related to this option as an intermediate step that could be required to facilitate many of the other options considered in this report.

It is unclear how important this issue may be to landowners compared to other concerns but changing the law could give some assurance to landowners and would appear to have little impact on other stakeholders. Further research would be necessary to fully parse the issue.

#### **Option 7:      Boundary Fixing**

**Description:** The state would reach an agreement with private landowners to fix private/public property lines in exchange for increased public access for recreational fishing. Boundary fixing could be for a set period of time or in perpetuity and would focus solely on water bottoms.

**Stakeholders:** Landowners expressed interest in further exploration of this concept. The fishermen did not express any particular concerns about this issue. State agencies wanted to be clear that the state would not be giving away state property without a commensurate return in the form of public benefits.

**Discussion:**

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<sup>41</sup> The servient estate bears the charge of the right of servitude, while the dominant estate benefits from the servitude. *See* LA. CIV. CODE art. 646; *see also* LA. CIV. CODE arts. 647 and 650. Meaning, in this case, the owner of the servient estate allows the owner of the dominant estate the right of passage across the land.

<sup>42</sup> *See* LA. CIV. CODE art. 689 (2012).

<sup>43</sup> LA. CONST. art. VI, § 24.

This option would require establishing a permanent or long-term property boundary (e.g. 99 years) between the state and private landowners on a case-by-case basis that would remain effective even after land loss results in property becoming navigable water bottom. In exchange for setting the permanent or long-term property boundary, the state would gain a right of public access across the negotiated tract for the purposes of public recreation via aquatic access. This option could provide landowners with an effective means of securing a majority of their economic interest in coastal properties located in areas highly vulnerable to land loss. The landowners would essentially agree to forego the control of certain surface rights (the right to exclude the public from accessing waterways) but maintain other surface rights (duck leasing, etc.) and continue to own subsurface mineral rights on areas that would otherwise become state property.

From the landowners' perspective, participation in such an option would hinge on trade off calculations between the amounts of surface revenue to be lost for a given tract, the estimated future value of subsurface reserves, and any associated reductions in property taxes and recreational liability afforded under such arrangements. From the state's perspective, feasibility would hinge on the level of expected public benefits from increased recreational access (i.e. tourism expenditures) versus the loss of future mineral revenues from dual claimed lands and other areas that might ultimately transition into the public domain associated with the erosion of subaerial land.

The legality of this option would likely be subject to restrictions in the Louisiana Constitution, which dictate the donation of public property.<sup>44</sup> While some exceptions do exist, state property cannot be donated without a commensurate return in the form of public benefits or other value to the state.

#### **Option 8: Decoupling of Mineral Rights**

**Description:** Landowners would retain ownership of mineral rights while the surface rights would transfer to the state. Many states decouple the ownership of surface and mineral rights. This would not apply to dual claimed lands.

**Stakeholders:** Landowners expressed interest in some mechanism to clarify mineral rights ownership. Fishermen were not opposed to considering this option. State agencies stressed that Louisiana law does not currently allow decoupling (but there have been some exceptions in the past - that set prior precedent).

**Discussion:**

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<sup>44</sup> LA. CONST. art. VII, § 14.

Private landowners could donate land that is highly vulnerable to subsidence and erosion to the state with the option of preserving their mineral rights. This could be particularly appealing on high-risk lands. However, this would require a change in Louisiana law, as this is not currently allowed in Louisiana except in limited coastal restoration situations.<sup>45</sup>

Courts in states other than Louisiana have generally held that mineral rights may be severed, or “decoupled,” from surface rights. This means that the right to explore for and extract natural resources from beneath the surface of the land may be owned by a party other than the party that is the owner of the surface estate. It should be noted, however, that the severance of mineral rights preserves the right of the mineral owner or mineral lessee to explore for and develop the minerals. Generally, these include:

1. The right to use and occupy the surface of the land for purposes reasonably necessary to develop and operate the lease,
2. The right to use and occupy the surface of the land at locations reasonably necessary to develop and operate the lease, and
3. The right to use and consume the surface or its products in oil and gas operations.

One example of the complexity associated with decoupling of mineral rights is the Isles Dernieres Barrier Islands Refuge. This refuge consists of four barrier islands in the Isles Dernieres chain; Wine, Trinity/East, Whiskey, and Raccoon islands.<sup>46</sup> As of 1993, the state was sponsoring studies for restoration of Isles Dernieres, but the property was still privately owned by Louisiana Land & Exploration Company (LL&E).<sup>47</sup> LL&E objected to the state’s restoration project and delayed the project by refusing the state access to the non-eroded portion of the property, which the state had planned to use as a staging ground for the project.<sup>48</sup> LL&E was concerned that it would not be able to legally reclaim the land and corresponding mineral rights once the restoration project was complete.<sup>49</sup> Louisiana Department of Natural Resources (DNR) began negotiations with LL&E that eventually led to a proposed compromise that LL&E would give up its surface rights in exchange for mineral rights on the islands and reclaimed land.<sup>50</sup> The Louisiana Attorney General determined that this violated Article IX, Section 4 of the Louisiana Constitution,

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<sup>45</sup> LA. CONST. art. IX, § 3.

<sup>46</sup> Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S.U. L. REV. 149, 176-177 (2000); see also Office of Coastal Management, State of Louisiana Department of Natural Resources, *The Louisiana Land and Exploration Company Donates the Isles Dernieres Chain of Islands to the State of Louisiana* (1997), available at <http://www.dnr.louisiana.gov/index.cfm/newsroom/detail/103>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 170-71.; LA R.S. 41:1701 et. seq.

<sup>50</sup> *Id.* at 173.

which required reservation of all state mineral rights.<sup>51</sup> In October of 1995, Louisiana voters approved an amendment to the constitution that allowed the state to negotiate severance of mineral rights from surface rights when the state rebuilds land lost through erosion.<sup>52</sup> Two years later, the state finalized an agreement with LL&E regarding the restoration of Isles Dernieres.<sup>53</sup>

The Tulane Institute on Water Resources Law & Policy has conducted research in the area of using public-private partnerships to fund coastal restoration. Under this concept, a large landowner could donate land rights in areas where coastal restoration projects are taking place in exchange for mineral rights. This could be a model for a similar program based on access for fishermen.<sup>54</sup> In economic terms, the decoupling option is similar to the tradeoffs associated with boundary fixing, with some specific differences. The principal difference is that a participating landowner is completely or partially divested of any surface ownership, with only limited rights of access provided for mineral exploration and production.

#### **Option 9: Incentivizing Access via Coastal Restoration**

**Description:** Under this scenario, evaluation criteria would be added to the review of proposed restoration projects receiving state and federal funding. Projects taking place on private lands that offer an element of public

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 175.

<sup>53</sup> *Id.* at 176. LL&E donated and transferred to the State all of its ownership of Isles Dernieres, subject to the following conditions: LL&E reserved all oil, gas and mineral rights to extant lands along with the rights to access the property as needed to exercise those mineral rights. LL&E's rights to the property terminate 99 years from the date the property completely erodes and becomes part of the seabed. LL&E acquired 50% of the subsurface mineral rights relating to any emergent lands from water bottoms between the present shoreline and the 1955 shoreline, along with a servitude of use of the surface of any emergent lands to exercise mineral rights. If production is established prior to subsequent erosion of emergent land, it will continue to be shared equally between LL&E and the State for as long as production continues. If emergent land erodes prior to production, ownership of all mineral rights and mineral production vests in the State. The State can exercise all rights prior to the emergence of any restored land, including grants of servitudes and mineral leases, and LL&E will have no claim for compensation. *Id.* at 176-177.

<sup>54</sup> Mark S. Davis & N. Dean Boyer, *Financing the Future III: Financing Options for Coastal Protection and Restoration in Louisiana*, TUL. INST. OF WATER RES. L. & POLICY (January 18, 2017), available at <http://www.tulanewater.org/papers>. This report goes into detail about how these public-private partnerships could beneficially impact restoration: "Louisiana law allows the state to negotiate and fix mineral boundaries in cases in which surface rights are transferred to the state or other 'qualified conservation organization' to support the state's coastal conservation, protection, and restoration plans. This could allow private landowners to gain something of very real value by donating surface rights as allowed by law: Mineral rights of greater certainty and durability while relieving them of some of the costs of maintaining and managing the lands." See Appendix C for additional information.

access would be afforded additional scoring priority in the selection process.

**Stakeholders:** Fishing representatives emphasized that most coastal restoration efforts in Louisiana use public funds to restore private land. The benefits of these projects include a range of ecosystem services that accrue to the public at large (e.g. fish and wildlife habitat restoration and storm surge attenuation); however, few if any of these projects allow on-site access for the purposes of recreation. Furthermore, they pointed out that a significant portion of the funding for such projects has historically come from excise taxes on recreational fishing expenditures. This option was not discussed in the stakeholder meeting with coastal landowners, although landowner representatives have expressed a willingness to consider this option in at least one other public venue.<sup>55</sup>

**Discussion:**

The longest running coastal restoration program in Louisiana is the Coastal Wetlands Planning, Protection, and Restoration Act (CWPPRA). Since 1991, the CWPPRA program has coordinated an annual selection process through which numerous project ideas are nominated by local, state, and federal partners. These nominees compete for an annual budget ranging from \$30 million to \$80 million, derived from a combination of state funds and federal excise taxes on recreational sporting equipment.<sup>56</sup> The final roster of projects selected each year is referred to as the Priority Project List (PPL), and 209 projects have been selected under this process since the program's inception. There are numerous criteria that affect a nominated project's chance for advancement to the annual PPL of candidate projects, including: technical feasibility, habitat provision, costs efficacy, and local support.

The CWPPRA program was one of several initiatives subsumed in 2006 with the establishment of the Louisiana Coastal Protection and Restoration Authority (CPRA). The Authority is tasked with overseeing all protection and restoration activities in the state and is charged with the development and implementation of a comprehensive, five-year Coastal Master Plan. Previous Coastal Master Plans were released by CPRA in 2007 and 2012. The most current plan was released in 2017 and calls for nearly \$50 billion in coastal project expenditures.

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<sup>55</sup> *Louisiana: Sportsman's Paradise or Problem?* (LPB television broadcast Nov. 22, 2017), available at [www.lpb.org/index.php/publicsquare/topic/11\\_17\\_-\\_louisiana\\_sportsmans\\_paradise\\_or\\_problem/](http://www.lpb.org/index.php/publicsquare/topic/11_17_-_louisiana_sportsmans_paradise_or_problem/).

<sup>56</sup> Federal funding for the Coastal Wetlands Planning, Protection and Restoration Act is provided primarily through excise taxes procured on recreational fishing equipment as authorized under the Sport Fish Restoration and Boating Trust Fund.



The CPRA and CWPPRA programs differ in many regards when it comes to the scale and assessment of individual projects, but they do share some similarities. Prioritization in each program is informed by a comparative review of the expected benefits and costs of numerous projects. Benefit criteria are multifaceted and dynamic, having evolved over time in response to changing program objectives and new information on restoration efficacy. And while each program relies exclusively on public funds for restoration, a substantial portion of construction expenditures go towards projects implemented on private lands. Finally, easements in each program are negotiated, but typically not purchased, and neither program currently utilizes voluntary mechanisms to facilitate public access within project boundaries on private lands.

Under this option, the prioritization approaches under CWPPRA and CPRA could possibly be modified to reflect some level of priority for those projects that include an element of public access. The mechanics of such a criterion would likely require considerable input and guidance, but if successful, the ultimate result would be to provide a marginal advantage to those projects in which the property owner(s) voluntarily agreed to grant some type of recreational servitude in exchange for restoration of their private land. Prior precedent exists for this approach. The 2014 Farm Bill incorporated numerous mechanisms by which public access to private land was incentivized through competitive grants and other funding programs. The Voluntary Public Access and Habitat Incentive Program authorizes state and tribal governments to give financial incentives to owners of private land that voluntarily make that land available for recreational activities like hunting and fishing.

Although development of this option would not require the identification of additional public funds, its implementation could substantially influence the manner in which existing restoration funds are allocated. The actual funding available to CWPPRA and CPRA is substantially lower than the estimated billions of dollars needed to address the state's coastal crisis. Public access as a selection factor is a novel option, but the greater challenge involves identifying the appropriate weighting for such a criterion in relation to numerous other project objectives competing for limited funding.

**Option 10: Increased Frequency, Quality, and Capacity of Mapping**

**Description:** This option would allocate additional resources for the improvement of coastal boundary maps, reducing confusion about public/private boundaries. Maps provided by the Office of State Lands would be updated more frequently and made available in formats easily accessible to fishermen.

**Stakeholders:** Landowners were supportive of increased mapping capabilities with some reservations, including technological limitations of satellite imagery

and LIDAR, concerns over surveyor methods, and the speed of changes to the landscape. Landowners also expressed concerns about the institutional capacity of the Office of State Lands, given recent retirements of senior personnel. Representatives of the Office of State Lands indicated that the comprehensive revisions of all coastal boundaries would be very difficult given the personnel and resources currently available. Fishermen were very supportive of any measures that would clarify and improve coastal boundary maps, but understood the lack of capacity currently available at the Office of State Lands.

#### Discussion:

The Office of State Lands (OSL) “is responsible for the identification, the administration, and the management of state public lands and water bottoms.” The goal of the OSL is “insure the highest economic return and the maximum public use possible” of state lands. Senate Resolution 115 of the 2006 Regular Session directs the OSL to provide the public with “information on the inventory of state water bottoms, including access to any maps or interactive programs showing public lands or water bottoms.” This resolution was passed in reaction to Senate Concurrent Resolutions 24 and 25 of the 2004 Regular Session, which requested the governor to support policies that ensure the public’s right to access and use naturally navigable water bodies, as well as requesting adequate funding to complete an inventory of state water bottoms.

From 2004 to 2017, the Office contracted with the United States Geological Survey (USGS) National Wetland Research Center to supplement the workforce needed to fulfill this mandate. The work involved a number of objectives, including: documenting the historic (1812) and current navigability of all state water bodies and public trust waterways; documenting boundary changes in waterway location that could impact ownership status (e.g. accretion, erosion, submergence, and avulsion); and analyzing the impacts of anthropogenic alterations on state waterways (e.g. channel realignments, bank stabilization projects, construction of locks and dams).

As a result of this initiative, the OSL currently has two sets of maps that show areas that are dual claimed. One shows limited areas (300,000 acres) that are claimed by both the state and private individuals and is available both in the office and through OSL’s online GIS portal. The other map shows the full extent of dual claimed land (700,000 acres) and can be viewed at the OSL offices. It can also be viewed online if the user has a certain level of expertise and is aware of the relevant identifiers.

The OSL has done a considerable amount of work with available resources (it has been historically underfunded), especially given the nature of a continuously shifting coastal landscape and limitations in technology. Additionally, maps that currently are made available through the OSL include a disclaimer that they are not to be relied upon as

evidence of legal title to property or ownership. The state has taken the unofficial position that the public enters dual claimed lands “at their own risk.”<sup>57</sup> Both the state and landowners noted that satellite imagery/LIDAR does not always show an accurate depiction of land and water areas. This can be because of limitations in technology, the speed of changes in the landscape, and the water level fluctuations possible during certain weather events. Some stakeholders pointed out that even when surveyors are sent to view an area in person, a lack of understanding of coastal processes can lead to inaccurate data reflected on the map.

In 2003, Louisiana eliminated the requirement that private land be posted for the purposes of its criminal trespass statute.<sup>58</sup> This has created confusion among private landowners as to the steps necessary to protect their land.<sup>59</sup> Other states have established specific requirements regarding posting of private fishing areas. For example, Vermont allows private landowners to restrict fishing on their private property by posting notices conspicuously on the banks or shores of the waters and by providing written notice to the Fish and Wildlife Commissioner.<sup>60</sup> In New York, landowners may prohibit fishing on their property by posting signs including the name and address of the owner and containing the word “posted” or a warning of the consequences for entering without consent of the person or organization that posted the land.<sup>61</sup>

While better mapping would be beneficial to all parties involved, it would not in and of itself provide additional public access for fishermen and does not increase access outright. It would, however, potentially provide better clarification of ownership claims related to coastal property and possibly lead to fewer trespassing disputes. In pursuing this option, the OSL might benefit from partnerships with other agencies that are invested heavily in GIS. Until recently, the OSL had an active contract with the USGS to supplement the substantial workforce needed to delineate public and private water bottoms. The CPRA is another agency that could be a logical partner, given their reliance on OSL cartography for implementation of the State Coastal Master Plan. Like USGS, the CPRA also maintains an internal cadre of experts in GIS and remote sensing. Given the magnitude of challenges associated boundary delineation, the OSL would likely benefit from continued and new partnerships with USGS, CPRA, or other entities with the capacity for spatial analysis.

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<sup>57</sup> Email from Ryan Seidemann, Assistant Attorney General, Louisiana Dept. of Justice, (January 19, 2018 32:25 PM, on file with the author).

<sup>58</sup> Act 802, 2003 La. Acts 2615.

<sup>59</sup> Coastal landowners representatives stated that signs posting their property are often removed by members of the public.

<sup>60</sup> VT. STAT. tit. 10, §§ 4139, 4141 (2017).

<sup>61</sup> N.Y. CLS ECL §§ 11-2111, 11-21113 (2017).

## V. Summary and Conclusions

The challenge of increasing public recreational opportunities in Louisiana is complicated by a variety of complex factors that are unique to the state's coastal zone. The region's unparalleled crisis of coastal land loss has been the principal driver of an escalating aquatic access conflict, primarily between private landowners and recreational fishermen. In responding to the land loss crisis, landowners have attempted to secure their economic interests through the expansion of new and existing strategies for generating surface lease revenues, reiterating property boundaries, and limiting liability. Such strategies have resulted in a growing number of negative encounters with recreational fishermen, due primarily to historical expectations of access and new disputes over waterways perceived to be in the public domain. This conflict has been further exacerbated by advancements in vessel draft technology, changes in land posting requirements, and digital mapping efforts that have struggled to keep pace with a rapidly changing physical and legal landscape.

In July 2017, Louisiana Sea Grant was charged by the Louisiana Legislature to serve as a neutral facilitator in the identification of options for addressing this conflict. A guiding principle imposed by HR 178 was to limit the study focus to voluntary options that would not impinge on individual property rights or impede commerce. In an effort to characterize stakeholder positions and identify areas of common ground, Louisiana Sea Grant convened separate scoping meetings with recreational fishing representatives, private landowners, and representatives of the Office of State Lands and the Attorney General's office.

After a thorough assessment of stakeholder input and a review of relevant secondary information, ten options emerged as potential mechanisms for addressing the aquatic access conflict. Those options included: 1) creative leasing arrangements; 2) temporary access for special events; 3) public acquisition of land or easements; 4) liability protection measures; 5) tax incentives; 6) limitations to acquisitive prescription; 7) boundary fixing; 8) decoupling of mineral rights; 9) incentivizing access via restoration funding and, 10) increasing the frequency, quality and capacity of coastal mapping.

As a neutral party, Louisiana Sea Grant does not officially endorse or oppose any of these options nor any specific outcomes associated with resolution of this conflict. Moreover, the legal and economic observations provided throughout this report should be considered preliminary only. More comprehensive assessments will invariably be required to fully examine any one of the options identified here. Nevertheless, HR 178 does instruct Louisiana Sea Grant to include in its written report ... "findings and recommendations." Given that specific charge, we offer the following observations as general guidance for future discussions.

- *Public funding requirements* - Substantial amounts of public funding will likely be required to implement many of the options identified in this report. Creative leasing, public acquisition of land or easements, tax incentives, boundary fixing, and mineral decoupling are all examples of options in which potentially large amounts of new or existing funding would need to be identified and/or redirected to finance incentive payments or to offset public revenue losses from reduced taxes or mineral revenues.
- *Challenges of boundary fixing/decoupling mineral rights* - Of all the options discussed, landowner representatives seem to be most interested in the potential for negotiations associated with boundary fixing and decoupling of mineral rights in exchange for allowing public access. Given the implications for this option on dual claimed lands and the ownership of future water bottoms, this option could be subject to restrictions in the Louisiana Constitution, which dictate the donation of public property.
- *Acquisitive Prescription Uncertainties* - There was an unclear effect of acquisitive prescription laws on landowner attitudes toward public access to private water bottoms. Some landowners expressed concern with the possibility that servitudes of passage over private land could be acquired by members of the public while others did not consider it to be an issue. Further legal research should be conducted to examine the relevance of this issue as a mechanistic barrier to landowner acceptance of public access options on their property.
- *Comprehensive economic assessments* - Any targeted assessments intended to further explore the costs and benefits of a given option will need to be comprehensive and inclusive of the economic tradeoffs to all public and private stakeholders. Objective analyses would require detailed financial inquiry at a number of levels, including: gauging the extent of interest for specific options among a larger sample of existing landowners; estimating a range of reservations prices as a function of surface revenues and risk; identifying the location and suitability of available tracts of property; projecting costs for varying levels of contract scale and terms; estimating revenue offsets for tax and boundary related options; and estimating net changes in tourism revenue expected under various conditions. Any compelling or disparate economic findings from such analyses would merely serve to inform decision-makers on the impacts of a specific option but would not supersede current laws protecting private property.
- *Small scale approaches* - Given the challenges of implementing potentially expensive and complicated options on a coast wide basis, small scale approaches could prove useful for evaluating a given option or combination of options. Similar to adaptive management approaches, demonstration projects are

frequently used to examine and refine the commercial viability of new technologies and policies. In the case of coastal access, pilot projects could prove informative if implemented in targeted areas with relevant attributes (e.g. areas with high incidents of stakeholder conflict; cooperative landowner(s) with private tracts adjacent to public waters; and, a minimum temporal and spatial scale to allow for meaningful evaluation of program efficacy).

- *Engaging additional partners* – Some of the options emerging from this study (temporary access for special events; decoupling of mineral rights) present the possibility of using funding from the private sector and/or nonprofit organizations. To the extent possible, the business and non-profit sector should be engaged in future discussion of aquatic access challenges in the Louisiana coastal zone. A variety of novel transactions mechanisms warrant consideration, including event specific activity or access fees for special events and the role land trusts and public-private partnerships in the case of decoupled mineral rights.
- *Budget neutral alternatives* – At least three options represent the potential for improving recreational access opportunities without the need for additional public funds. Reducing landowner liability, limiting the ability of public acquisition of land rights through prescription, and incentivizing access via coastal restoration are all examples in which policy changes could be examined and ultimately implemented at the individual or programmatic levels in exchange for a range of public access easements or servitudes.
- *Resolution of dual claimed lands* - There are large areas of coastal water bottoms for which the ownership is contested between the state of Louisiana and private landowners. These water bottoms have been designated by the Office of State Lands as “dual-claimed” lands. The resolution of these ownership disputes depends on litigating complex facts and law on a case-by-case or tract-by-tract basis. While the emphasis of this report is on voluntary incentives for allowing public access to acknowledged private land, the existence of dual claimed lands has an impact on the issue. The state has taken the unofficial policy position that the public enters dual claimed lands “at their own risk” with respect to the crime of trespassing. Fishermen have expressed frustration with this ambiguity and feel the state has abrogated its responsibility to protect public trust resources from the claims of private parties. As discussed above, the state lacks resources to resolve all property ownership disputes but eventual resolution will be a necessary step towards addressing public access issues.
- *Increased capacity for mapping* - The most agreed upon initiative amongst all stakeholders was the need to improve the quality, frequency, and public accessibility of coastal boundary mapping. This translates to increasing the human and financial capacity of the Office of State Lands. There is a clear need

for more accurate field-based verification of coastal zone landforms and the boundaries that delineate public versus private lands and water bottoms. This need is especially important given the escalation of the aquatic access conflict in coastal Louisiana and the lack of public posting requirements.

## **VI. Acknowledgments**

This report was developed by faculty and staff of the Louisiana Sea Grant College Program at Louisiana State University. The authors appreciate the considerable time and effort provided by the private and public sector representatives who participated in lengthy scoping meetings, reviewed meeting minutes, and provided follow-up information on a wide range of issues related to coastal aquatic access. Special thanks also goes to Louisiana Sea Grant Executive Director Robert Twilley for programmatic guidance and for review and comment on the draft report. The following individuals also provided valuable support via research, review and revision: Roy Kron, Louisiana Sea Grant Director of Communications, and Louisiana Sea Grant Law and Policy Program legal interns Adrienne Wood, Elizabeth Garcia, and Connor Fagan.

**APPENDIX A-1:  
Recreational Fishermen Meeting Minutes**



**Meeting Minutes**  
Coastal Access Study Resolution  
Preliminary meetings with stakeholder groups  
Fishermen’s Meeting - August 9, 2017, 2 pm. LA Sea Grant Conference Room

Present:

Daryl Carpenter, Louisiana Charter Boat Association  
Sean Robbins, Louisiana Sportsman Coalition  
Anthony Bouquoi, Louisiana Sportsman Coalition  
Robert Twilley, Louisiana Sea Grant  
Rex Caffey, Louisiana Sea Grant  
Jim Wilkins, Louisiana Sea Grant  
Niki Pace, Louisiana Sea Grant  
Morgan Ducote, Sea Grant Intern  
Adrienne Wood, Sea Grant Intern

**1. Introduction and overview of study resolution and clarification of mandate**

In June of 2017, the Louisiana Legislature unanimously passed of a study resolution (HLS 17RS-298) that “directs Louisiana Sea Grant to facilitate the study of and make recommendations for the creation of a voluntary public recreation servitude of use of waterway.” Jim Wilkins, director of the Louisiana Sea Grant Law and Policy Program (LSGLPP) began the meeting by stating the role of Louisiana Sea Grant was not to advocate for any particular position on this issue, but rather to serve as a neutral facilitator in examining and documenting legal and economic options. Executive Director Robert Twilley reiterated this approach in saying that Sea Grant is charged not with an outcome, but rather a process. This process begins with preliminary meetings with stakeholder groups and state agencies. The purpose of these meetings is to conduct an assessment of the issues and identify areas of potential common ground if any. Sea Grant will compile notes from the meetings and develop a synthesis report of the outcomes. The Louisiana Legislature has requested this report by February 2018. If it is determined that there is no consensus, then Sea Grant will report “no recommendations” to the Legislature.

**2. Summary of Comments by Fishing Representatives**

Representatives of the sport fishing community stated that they have been denied access waterways for navigation and fishing based on the assertion that the water bottoms are privately owned. In many instances, it is impossible or very difficult to determine from the location or geographical features of the waterway that it is privately owned rather than a navigable, and therefore publically owned, waterway. According to one fisherman, attorneys have conceded that the water itself is a public resource and belongs to the public. Therefore, we must find a way to appease the

landowners and make sure they understand we only want access to the water and have no claims to land ownership, mineral rights, or any other claim that is not related to water access itself. The fishermen stated that in years past landowners have allowed the public to navigate and fish in waterways they claim as their private property, but they are seeing more and more conflicts over coastal access and questions about what is actually public and what is private and what activity is legal or illegal. There was/is very poor information on what is public, private, disputed areas, or shared boundaries. Also, the types of leases on coastal lands, once mostly for duck hunting, have increased in recent years to include leases for alligator hunting, fishing, shrimping, crabbing, and bait trapping.

In a number of incidents landowners or their representatives, typically lessees, have accosted fishermen and evicted them. In other incidents local law enforcement officers have arrested fishermen for trespassing. One fisherman is embroiled in a lawsuit with a landowner. One person was threatened with a ticket for fishing on the side of the road off Highway 1 and wading out to make a cast in deeper water. In addition, a fisherman stated that there is a specified distance from the centerline of any public roadway in which the property is public. In this instance, the fisherman believes he was within that distance and the deputy was not aware of the law. This leads to further inconsistency in law enforcement on this issue. In many cases, it is not clear that the fishermen are indeed on private property, and it is not clear that law enforcement officers or the landowner representatives really know the boundaries between public and private property. The Office of State Lands and LDWF have made it clear that the onus for knowing property boundaries is on the individual, not the landowner, in regard to public or private land.

The fishing representatives stated that they are willing to make concessions in order to mollify landowner concerns over issues such as liability and acquisitive prescription. The fishermen argued that publicly funded coastal restoration projects benefiting private land should also generate public benefits such as access to restored land and aquatic resources. One fisherman noted that any public resources used by LDWF on these so-called "private waterways" should be considered compensation and the public should be granted something in return. The fishermen advocated for access to the waterways. Examples of public monies spent on the private waterways include control of invasive species. They also stated that the economic impact of sport fishing is very substantial from the sale of equipment, fuel, lodging and other support services and that this economic activity is being lost as coastal access diminishes. The American Sportfishing Association conducted a study on the economics of recreational fishing. That study covered the sixth congressional districts of Louisiana. <http://asafishing.org/facts-figures/studies-and-surveys/congressional-district-fishing-impacts/> More recently, the largest national tournament hosting organization, the Bass Anglers Sportsman Society (BASS), voted not to return to coastal Louisiana until the

coastal access issues could be somewhat resolved.

[www.nola.com/outdoors/index.ssf/2017/08/tournament\\_anglers\\_banned\\_from.html](http://www.nola.com/outdoors/index.ssf/2017/08/tournament_anglers_banned_from.html)

According to the fishermen, the economic impact of sport fishing on the economy of Louisiana is significant. The 2017 Bassmaster Classic was held in Houston, Texas, on Lake Conroe. Officials estimate the event has averaged more than 102,000 in attendance over the past five years and officials at host cities have reported an economic impact from the event ranging from \$22 million to nearly \$24 million per event during that time, according to BASS. Louisiana has hosted this event six times in the last 17 years. That is more than any other state, but this has come to an end until the public access issue can be resolved.

This is not just a coastal issue, but a statewide issue that the fishermen are trying to address. For example, there was a ruling on access to the river batture (see Tulane Law review circa 1995). The fishermen reiterated that they are not contesting ownership but are interested in finding common ground that would increase access and reduce landowner liability through some sort of cooperative agreements.

The Sea Grant legal staff wondered if part of the landowners' concerns was the possibility of losing property rights through the legal mechanism of acquisitive prescription where a servitude or right of passage could be acquired by members of the public who are not challenged in their use waterways for decades. The fishermen stated that they had no intention of acquiring rights in public property and would support any legal changes or contractual instruments that protect landowner rights.

### **3. Options for moving forward**

The state should commit to equipping the Office of State Lands with the human and technological capacity needed to provide up-to-date information on coastal boundaries. The mapping of private and public boundaries has to be readily available and accurate for any resolutions going forward. There is a need for consistency in enforcement of property boundary laws across all coastal jurisdictions (local, parish, and state enforcement agencies). This group intends to engage the law enforcement community toward the end of the preliminary discussions and once again after any voluntary cooperative options are in place.

### **4. Next Steps**

The group agreed that draft minutes from the meeting would be circulated internally and eventually become part of the formal record. The next meetings to be scheduled by Louisiana Sea Grant will be with the State Attorney General's Office, the State Land Office, and a meeting with coastal landowners.

**APPENDIX A-2:  
State Agencies Meeting Minutes**

**Meeting Minutes**  
Coastal Access Study Resolution  
Preliminary meetings with stakeholder groups  
State Agencies – September 7, 2017, 10 AM. LA Sea Grant Conference Room

Attendees:

Ryan Seidemann, State Attorney General's Office  
Sean Porter, Office of State Lands  
Harry Vorhoff, State Attorney General's Office  
Jonathan Robillard, Office of State Lands  
Cheston Hill, Office of State Lands  
Les Rosso, Office of State Lands  
Robert Twilley, Louisiana Sea Grant  
Jim Wilkins, Louisiana Sea Grant  
Rex Caffey, Louisiana Sea Grant  
Niki Pace, Louisiana Sea Grant  
Morgan Ducote, Louisiana Sea Grant Intern

**Overview of Study Resolution and Clarification of Mandate**

In June of 2017, the Louisiana Legislature unanimously passed of a study resolution (HLS 17RS-298) that “directs Louisiana Sea Grant to facilitate the study of and make recommendations for the creation of a voluntary public recreation servitude of use of waterway(s).” Jim Wilkins, director of the Louisiana Sea Grant Law and Policy Program (LSGLPP) began the meeting by stating the role of Louisiana Sea Grant was not to advocate for any particular position on this issue, but rather to serve as a neutral facilitator in examining and documenting legal and economic options. Executive Director Robert Twilley reiterated this approach in saying that Sea Grant is charged not with an outcome, but rather a process. This process begins with preliminary meetings with stakeholder groups and state agencies. The purpose of these meetings is to conduct an assessment of the issues and identify areas of potential common ground if any. Sea Grant will compile notes from the meetings and develop a synthesis report of the outcomes. The Louisiana Legislature has requested this report by February 2018. If it is determined that there is no consensus, then Sea Grant will report “no recommendations” to the Legislature.

## Discussion from State Agencies

- *Mineral Rights Issue*

If the premise of the study is to assume it only applies to areas that have been acknowledged to be in private ownership and focus on incentives to voluntarily open them up for private access, then there is not a conflict from the state's position. However, there is a constitutional prohibition against state agencies alienating minerals. If an area is state property, mineral ownership is in the state. When mineral issues arise in the context of disputed water bottom (surface) ownership, the state has the authority to negotiate sharing of mineral revenues with willing adverse claimants. In contested areas disputes between property claimants and members of the public seeking access, the state does not see that allowing access would be a mineral rights issue. The State has always assumed that landowner liability is a concern and is not convinced that potential loss of minerals rights is an issue in denying public access.

The state does not believe that they possess the authority to negotiate a permanent severance of mineral rights from surface rights in favor of a private party because of public policy based on the constitutional prohibition on alienation of state property. The key issue in alienating state property is whether the state receives equal value in return, which is the basis for cooperative endeavor agreements. However, they think that other options are available such as negotiating mineral splits on disputed water bottoms that have a terminus.

### *Liability Issue*

Currently, landowners believe that they are held harmless from liability for injuries incurred by the public engaging in recreational activity on their property. However, legally we are not sure they are completely covered and released from liability. Is there room to improve?

Hypothetically, yes there is room to improve and could be considered an easy fix. However, legislatively it would be an issue of getting it through. It was noted that a law change to further limit liability would be opposed by the state bar association.

- *Economic Value Determination*

There is currently research being conducted on the economic value of coastal lands and water bottoms for hunting and shellfish leasing and other natural resource uses. The question is whether income from

those uses would be equaled or exceeded by incentives to open up land to public access. In an environment of vanishing coastal land, the highest economic value may be in exclusive hunting and fishing leases. Some landowners are charging \$2,500 for a fishing lease.

Would voluntary servitudes be difficult to cancel once the public has been using private water bottoms? Would the public consider the area open even though the agreement was terminated? This could be a concern for landowners.

- *Property Taxes*

The idea of tax relief in exchange for allowing public access was discussed. The issue of tax revenue lost by local governments in parishes like Cameron and Terrebonne where 80 percent of property is owned by large landowners could be a major roadblock. This could potentially be resolved if there is additional revenue from fishermen to offset loss of tax revenue to parishes. There could possibly be a funding mechanism that redistributed an additional charge on the purchase of fishing licenses to the local governments. This solution would not alter ownership of properties but may be an economic incentive to encourage landowners to provide public access on a voluntary basis.

- *Surface and Subsurface Right*

It is important to landowners to maintain surface and, with them, the attached subsurface rights. Although the current market for oil and gas revenues is lower than historic levels, the value could rise in the future. Therefore, landowners want to preserve the rights to those minerals in the future.

- *Dual Claimed Lands and Erosion Areas*

When ownership of water bottoms is contested between the state and private parties, the designation of an area as “Dual Claimed Lands” is simply a temporary identifier or an interim classification until the ownership dispute between the state and private landowners can be decided on a case by case basis in a court of law. The suits are typically settled in terms of the geographical extent of the area and surface and mineral ownership thereof. Releasing the state’s claim to a dual claimed area is largely subjective based on a number of factors such as GIS imagery, historical navigability and navigability in fact. When the state

does release its claim to an area a public notice is issued that they do not contest title.

Everyone agrees that privately constructed canals on private property are private water bottoms except in very limited situations as described in the U.S. Supreme Court case *Vaughn v. Vermillion Corporation*.

Mapping ownership claims is largely subjective. The GIS imagery provided on the state lands maps acts as a notice but provides a disclaimer that the imagery does not settle title. A lot of conflicts and disputes arise when lands start eroding. These areas are more challenging to map and identify as public lands. The state maintains, and the law seems to support, that when land erodes or subsides into open navigable water/sea bottom the areas are then state owned public trust water bottoms. Landowners challenge the state's position that the transfer of ownership from private to public happens by operation of law simply because navigable water bottoms cannot be privately owned. Landowners assert that each area in question must be adjudicated either administratively or by a court of law. Currently, there is an attempt to come up with parcel-by-parcel fieldwork to determine if an area has become public water bottoms.

In erosive environments where areas will eventually be parts of navigable water bottoms, without dispute, litigating ownership when the status is not yet clear could result in an adverse decision that would be permanent.

Another concern arises with erosion areas that landowners want to be classified as dual claimed but also want to limit public access. The Office of State Lands GIS maps showing public water bottoms and dual claimed water bottoms shows the public areas in blue and the contested (dual claimed) areas in red. There is an issue in terms of which GIS mapping information the public is allowed to see. According to Office of State Lands representatives, landowners have requested an additional GIS layer that shows privately claimed land where public access is allowed. There are two maps, one that is made public on the Office of State Lands website and one that can only be viewed at the agency's office. The website version has much less area designated as dual claimed (red) (300,000 acres) than the in-office version (700,000 acres). Thus, there are 400,000 acres designated on the in-house map as "owned by adjoining landowner but access is allowed." It was later revised as "dual claimed but publically accessible." However, the public has to come to



the land office to determine exactly what property is dual claimed unless they know specific identifiers needed to find this information online. Additionally, landowners are not required to post their property so there can be some confusion by the public as to which water bottoms are private.

The concept of navigability as a requisite for state ownership can be difficult to define. The classification of a water body as navigable in fact as distinguished from navigable in law has been addressed in the riverine context. Courts have not been willing to rule areas to be publicly accessible for fishing purposes just because they are “wet” if there is not sufficient connectivity to navigable water bodies to say that the water body in dispute has eroded into it. An example would be interior ponds that form in the marsh that are historically land locked in their natural state (do not have an open connection to a navigable water body, except perhaps by a private, man-made canal). The only documentation for these ponds is 1930s USGS topographical surveys. If the interior ponds, by eroding and subsiding into themselves, become larger and eventually become closer (and often actually connected by interspersed breaks in the marsh) to a nearby navigable stream that the public is allowed to navigate some people are inclined to “break through” the marsh separating the pond from the stream with various newer style motors causing damage to the marsh and entering into private water bottoms (or simply enter through the private canals). These ponds will eventually naturally erode into open waters if current land loss patterns continue. When eroded areas become connected to navigable bayous or other navigable water bodies people begin entering and fishing and there is a legal basis for claiming the area as a public water bottom because it is then part of a navigable waterway. However, landowners want to continue to assert ownership and post the area that was formerly their land with poles to stop people from entering. In some instances, people fishing in these areas are arrested for trespassing. Because of the complex geography, hydrology and historical context these water bottoms must be evaluated on a case-by-case basis but funding for such work has been very limited. The main directive in the access issue should be focused on areas like this.

Criteria for navigability is generally defined as 16-foot Johnboat with two or three people in it that can navigate at low tide with a 25-50 horsepower engine. This is an on the ground determination.

There was a question regarding how many of the trespassing cases have been on dual claimed water bottoms and how many in interior areas. The answer was not available.

The AG and state agencies stated that the concept of culpability for coastal land loss is affecting the application of the Public Trust Doctrine with regards to eroded land that becomes navigable water bottoms. Under current law title to such property passes to the state but that transfer is now being challenged by landowners on the grounds that the state's actions in physically altering the coastal landscape (permitting dredging of canals, erecting water control structures, etc.) have caused, at least partially, the land loss such that it amounts to a government taking of private property with the state owing just compensation to landowners. Causation is the major issue here in trying to establish a "but for" causation of the damage. In such a dynamic system as coastal Louisiana, it is very difficult to determine which specific actions cause land loss on each specific piece of property. Experts are unable to establish "but for" causation in these cases.

The question was posed: "Is the state willing to risk losing all claims to land by challenging private landowner's ability to issue private leases on dual claimed lands?" In response, someone suggested exploring whether private property owners are willing to share revenues from leases on dual claimed lands with the state. Or in lieu of sharing revenue with the state, would private landowners consider granting public access on these contested areas. Would that be adequate compensation to the state? There did not appear to be an easy fix to this issue.

**Issue that was unclear from the discussion:**

When areas are designated as Dual Claimed what is the private claimant's right to issue private leases for recreational purposes and to exclude the public?

- *Coastal Restoration Effects on Public Access*

The question was posed as to what effect state funded coastal restoration projects could have on public access issues. Should publically funded restoration of private water bottoms attach any right of public access to the restored area? The consensus was that it does not, but projects benefitting private land might be ranked with landowners willing to grant public access receiving priority in the project queue. It was also noted that some members of the public have stated they do not support publically funded coastal restoration on private land where the landowner does not allow public access. The Office of State Lands is not consulted when CPRA plans coastal restoration projects, but they are notified when the projects are conducted. The Office of State Lands treats artificially filled water bottoms as still being water bottoms. The

1995 Isle Derniere Island restoration project was discussed as an example of the state negotiating with private landowners to exchange mineral rights for surface rights and public access.

- *Land Title In terms of Sale*

The question was posed regarding land sales between private parties in the coastal area whether the state could intervene to assert a state property interest in protecting public access. The agency representatives said that the state does not typically intervene because there is usually no warranty for coastal property and dual claimed areas would still be burdened with the state's claim.

One attendee stated that the state is prohibited from settling title out of court. In support of this statement, the individual referenced this case: *American Lung Association of Louisiana, Inc. v. State Mineral Board* (507 So.2d 184) (1987). A reading of the American Lung Association case does not seem to directly stand for the proposition that the state cannot settle title disputes outside the courts.

- *Historical input*

The public access to waterways issue goes back to at least the 1930s and 1940s. In the 1970s, the issue of public access to private waterways reached a crescendo when the case of *Vaughn et al v. Vermilion Corporation* made it to the U.S. Supreme Court. The court ruled that a private canal built with private funding was not open to the public. However, it left open the question of public use of a private canal if the private canal impeded or altered a natural waterway. The issue rose again in the 1980s with the development of "Marsh Management Plans" on privately owned coastal marshlands. The installation of water control structures for marsh restoration on private lands throughout coastal Louisiana created a firestorm of controversy from local fishermen over historical public access to these same areas. In the mid-1980s, for example, LL&E submitted a permit for 92 such structures in Terrebonne Parish that blocked public access to fishing and shrimping areas traditionally used by the public. This caused a major upset amongst the fishing communities and made front-page headlines. Historical documents, including committee hearings tapes available in the archives, may offer insights into how political leaders and stakeholders debated these problems and reached compromise throughout the decades. As in the past, the main landowner concern today is bank erosion due to boat traffic.

**APPENDIX A-3:  
Landowners Meeting Minutes**

**Meeting Minutes**  
Coastal Access Study Resolution  
Preliminary meetings with stakeholder groups  
Landowners – October 4<sup>th</sup>, 2017, 10 AM. LA Sea Grant Conference Room

Attendees:

Tim Allen, Apache Corporation  
Kevin Hayes, Louisiana Landowners Association  
Phil Precht, Conoco Phillips  
Paul Frey, Louisiana Landowners Association  
Greg Linscombe, Continental Land and Fur  
William O’Neal, Castex  
Judge Edwards, Retired Vermillion Corp. land manager  
Rudy Sparks, Williams Incorporated  
George Strain, Continental Land and Fur  
Amanda Phillips, Wisner Donation  
Robert Twilley, Louisiana Sea Grant  
Jim Wilkins, Louisiana Sea Grant  
Rex Caffey, Louisiana Sea Grant  
Melissa Daigle, Louisiana Sea Grant  
Niki Pace, Louisiana Sea Grant  
Mark Shirley, Louisiana Sea Grant  
Adrienne Wood, Louisiana Sea Grant Intern  
Jason Theriot, Historian

**Overview of Study Resolution and Clarification of Mandate**

In June of 2017, the Louisiana Legislature unanimously passed of a study resolution (HLS 17RS-298) that “directs Louisiana Sea Grant to facilitate the study of and make recommendations for the creation of a voluntary public recreation servitude of use of waterway.” Jim Wilkins, director of the Louisiana Sea Grant Law and Policy Program (LSGLPP) began the meeting by stating the role of Louisiana Sea Grant was not to advocate for any particular position on this issue, but rather to serve as a neutral facilitator in examining and documenting legal and economic options. Executive Director Robert Twilley reiterated this approach in saying that Sea Grant is charged not with an outcome, but rather a process. This process begins with preliminary meetings with stakeholder groups and state agencies. The purpose of these meetings is to conduct an assessment of the issues and identify areas of potential common ground, if any. Sea Grant will compile notes from the meetings and develop a synthesis report of the outcomes. The Louisiana Legislature has requested this report by February 2018. If it is determined that there is no consensus, then Sea Grant will report “no recommendations” to the Legislature.

### **Discussion from Landowner Representatives**

Recreational fishing interests and other groups desire an incentive driven agreement that allows a public access servitude for certain privately-owned water bottom areas. All of the landowner representatives questioned the need for establishing any sort of voluntary servitude that would allow public use of private property. Their position is that the current practice of private landowners issuing leases to individuals and groups serves the purpose of allowing public use of private property. Landowners can derive significant income from leasing their land for sporting and commercial harvest of natural resources and some do not believe that a high enough economic incentive will resolve the issue. The economic component of leasing private land is a major component of landowner attitudes but not the only consideration. Landowners wondered why there was a need for the resolution since all or most the land is already leased?

The other major factor is the ability to protect property and natural resources, which are routinely damaged by the public for various purposes and by various means. Damage to land and natural resources by public users is not unique to coastal Louisiana or the state, though it may be particularly egregious here due to the condition of our coastal wetlands, nor is it unique to private property. Such misuse often happens on public lands such as parks, national forests, etc. There is a certain element of the public that intentionally mistreats land and natural resources. The phenomenon may be due to ignorance or some misplaced disdain for private property owners or government. Whatever the cause, it is a serious problem and difficult to address. Landowners see their ability to limit public access to their property as an effective method of preventing damage to land and natural resources. If a landowner owns an interior marsh, they do not want the public to have access that would lead to the destruction of the marsh. Some landowners stated that the state should give up its ability to restrict use of public property for conservation and management purposes if the landowners have to do the same. Public lands managed by state and federal agencies have restrictions and regulations in order to conserve and manage the property just as private landowners do on their lands.

The landowners noted that their leasing contracts effectively open their waters to the lessees year-round which is not the case for public access to state-owned land thus making private land more accessible to sporting than the state-owned land. One landowner asserted that there are ample areas and opportunities for the public to engage in fishing, hunting and other sporting activities on public land. While no data were provided to determine the percentage of public versus private waters, statistics were provided indicating that Louisiana is ranked nineteenth in the nation in licensed anglers, fifth in the nation in total water area, and second in the nation in coastal water

area.<sup>62</sup> Another issue that should be addressed is liability. Some landowners believe that current law is sufficient to protect them for liability for injuries to people using their land, but other landowners are not convinced.

### 1. *Incentives*

The landowners questioned what incentives there would be to get rid of decades old leases for hunting and recreational and commercial fishing and instead allow public access. Landowners do not want to lose the economic benefits of leasing their land to private entities willing to pay for the exclusive right to use private property. They argue that a voluntary lease is an option that can be pursued now to satisfy all landowners and resource users. Potential incentives discussed were property tax relief, boundary fixing for mineral rights purposes/ disaggregation of surface and subsurface rights, better liability protection.

### 2. *Damage to coastal wetlands and habitats*

Landowners are concerned about the destruction of interior marshes by the use of shallow drive technologies (surface drives) used for pushing through shallow waterways and vegetated wetlands causing serious damage to those resources despite the availability of nearby waterways open to the public. These activities destroy benthic habitat, marshes and other vegetated wetlands. The advent of trophy fishing has made things worse and created dramatic disrespect for property rights. There needs to be supervision by those who have ownership rights because they have the greatest incentive to protect the land they own. There needs to be clear delineation of what people can and cannot do on privately owned land. One possibility is to conduct greater education and outreach to improve public understanding and awareness about the importance of protecting Louisiana's coastal resources that not only benefit everyone but is directly linked to sustaining the very resources, fishing and other activities, that people who want access to waterways are pursuing.

It is further contended that the true problem is that the boating public does not know what is open to the public and that they maintain a blatant disregard for private landowner rights. The landowners proposed increased funding for mapping of public/private property boundaries. A possible solution is an electronic map of public waters that can be accessed on handheld GPS devices. It is also proposed that the Legislature should enforce stricter

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<sup>62</sup> Sources: US Fish and Wildlife National Fishing License Reports, <https://wsfrprograms.fws.gov/subpages/licenseinfo/fishing.htm>; U.S. Census Bureau, unpublished data from the MAF/TIGER database, <https://www.census.gov/geo/reference/state-area.html> (last visited February 4, 2018).

trespassing laws on private water. Louisiana has the highest rate of conversion from land to water, which makes everything more complicated. The appearances are changing due water, which makes it difficult to map. Our coastal edge is moving, which is where the public takes their boats and thus drives the nature of the problem. Landowners stated that any map revisions should be vetted with landowners prior to being made available to the public. The landowners contend that the objective is to hang on. The marshes are fragile, and they need to be able to control their lessees and property. If they open it up, they cannot control hundreds of boats. If the marsh cannot be protected, it will affect everyone. It will affect fishing. Their objective is to protect their water bodies' lake and marsh, so it can be productive.

### 3. *Social Media*

The misinformation circulating social media is worsening the issue. For example, it is being circulated through social media that Louisiana is running out of places to fish. However, as stated above, landowners believe that Louisiana is ranked number four in terms of public access to water. They think public attitudes are due to a of lack of caring rather than a matter of misinformation.

### 4. *Canals*

The public wants to use canals on private land for passage and fishing. Most canals are privately owned, and the landowners are concerned about public use for a number of reasons. One is that increased use can eventually lead to commercial activity and another is that increased use of canals will cause more edge erosion and also raises the issue of increased liability.

### 5. *Creeping Commercialization*

The landowners are particularly concerned with the commercial sector. People are starting to use the canal access for oyster barges and other commercial uses in the marshes. Originally, access was supposed to be for recreational use. How do you stop commercial fishermen from coming in after allowing use by recreational fishermen? The experience with crawfishing in the Atchafalaya Basin is an example. One landowner had a gratuitous lease on his land for a wildlife management area that he revoked but he is still having trouble with public trespassing. Their wildlife management area is still showing up on maps so the public thinks they can still use it.

### 6. *Enforcement*

Some landowners maintained that most people are not confused about where they are and know that they are trespassing. They also stated that people are going too fast in their boats when they trespass, and some are taking their registration numbers off their boats because they know they are violating the



law. The sheriffs and the DA's are reluctant to enforce trespass claims despite laws that clearly prohibit trespassing because they do not want to get embroiled in such issues with their constituents. Why should the sheriff arrest people when the DA won't prosecute? The sheriff and the DA are succumbing to mob rule and the laws are being ignored. The landowners are feeling powerless to protect their property interests.

## 7. *Stakeholder Groups*

- a. Fishing tournaments
- b. The people who know the law but choose to ignore it
- c. The general public who do not know the law
- d. The commercial sector
- e. Private landowners
- f. The state of Louisiana

## 8. *Mapping*

Landowners contend that there should be an important distinction between marsh and open water. The land office is currently unilaterally drawing lines that will demonstrate what is and is not available to the public. Landowners also expressed their opinion that when land erodes or subsides into a navigable water bottom it does not automatically become publicly owned but requires documentation, through surveys or other methods and adjudication by a court of law.

It is mentioned that a previous resolution was introduced to increase the capacity of the Office of State Lands because there were not enough employees working there. Could something like this be used to improve current issues with the land office? Generally, the group maintains that the maps created by this office are not helpful. The Office of State Lands has lost experienced people and is in need of help. There used to be a professional land surveyor manning that office and that isn't the case anymore but now they don't have enough money for a surveyor. The Office of State Lands staff used to understand riparian boundaries and now that isn't the case. Would CPRA resources help in this mapping issue? Clear mapping of boundaries would help the goal of coastal restoration and the public access issue. The CPRA has taken the cheap way out by acquiring a servitude from the landowners and they are having to give them that for restoration purposes. Private landowners don't mind or charge CPRA for doing coastal restoration projects.

### 9. *WAVE Application*

This application could be a potential tool to help the commercial fishing industry to understand boundaries. It is important to discuss how marshes are a nursery ground for fisheries. The importance of limiting access as a tool for protecting estuaries should be emphasized.

### 10. *Acquisitive Prescription*

It is maintained that due to good records and leasing, acquisitive prescription is not a problem.

### **Possible Next Steps**

1. Boater education for boundaries
2. Landowners question the value of future meetings with other stakeholder groups
3. Education about conservation of the marsh is vitally important.
4. For educational purposes: A comparison of Louisiana prior to man versus Louisiana today

### **Final Thoughts**

1. Landowners seem interested in the possibility of the state allowing landowners to retain at least some mineral rights when their land becomes part of a navigable state-owned water bottom in exchange for surface rights and access rights on certain water bottoms claimed as private water bottoms and acknowledged so by the state and on so-called dual claimed water bottoms. How this would be accomplished was not discussed in detail but could require legal/constitutional changes and/or Cooperative Endeavor Agreements.
2. Landowners contend that social media is lending to mob rule and some members of the public are not obeying the laws.

**Appendix B:  
House Resolution 178**

2017 Regular Session

HOUSE RESOLUTION NO. 178

BY REPRESENTATIVES GISCLAIR AND GAROFALO

A RESOLUTION

To authorize and direct Louisiana Sea Grant to facilitate a study of the possible establishment of a voluntary public recreation servitude of use of certain waterways.

WHEREAS, Louisiana, and particularly its coastline, is home to some of the most sought-after hunting, fishing, and nature-viewing opportunities in the world; and

WHEREAS, in many cases along this state's coastline, there are no roads or highways allowing the public to access and enjoy these activities; therefore, the public must rely on the waterways for access; and

WHEREAS, the coastal regions are subject to both public and private ownership, and due to the constantly changing nature of the coastline, many boundaries delineating the ownership of state and private properties have either disappeared or have become indistinguishable, particularly where property has become submerged; and

WHEREAS, in many cases the State Land Office has classified the submerged lands as claimed by the state and the adjoining landowner causing additional confusion for those persons attempting to hunt, fish, or partake in other outdoor recreational activities, or for those who are simply attempting to traverse a body of water to an area clearly open to the public; and

WHEREAS, as a partial remedy to the rising problems of the public's use of submerged lands and the conflicts with the owners of private property, it may be helpful to create a statutory framework establishing a voluntary public recreation servitude of use of certain waterways; and

WHEREAS, a voluntary public recreation servitude of use of waterways would be a servitude whereby the property owner's interests and title to the property are protected, possibly including limiting the liability of the owner, in return for the owner allowing public access to the property for the enjoyment of various recreational activities; and

WHEREAS, since the creation and ongoing management of a voluntary public recreation servitude of use of waterways would involve a detailed analysis of many issues of liability and protection of ownership, it would be beneficial to have input from various interested groups and parties familiar with the laws and the activities contemplated with the implementation of a voluntary public recreation servitude of use of waterways; and

WHEREAS, the Louisiana Sea Grant program has a long history of providing accurate, timely legal research on topics affecting the use, conservation, and management of Louisiana's coastal environment and resources; and

WHEREAS, with the input and advice from representatives of other interested organizations, groups, and individuals, including the State Land Office, the Department of Wildlife and Fisheries, the attorney general, the Coastal Protection and Restoration Authority, the Department of Natural Resources, the Louisiana Landowner's Association, the Coastal Conservation Association, the Louisiana Sportsman's Coalition, the Louisiana Mid-Continent Oil and Gas Association, the Louisiana Oil and Gas Association, the Police Jury Association, and other groups and stakeholders, Louisiana Sea Grant, acting as an independent facilitator, could recommend legislation to create a voluntary public recreation servitude of use of waterways to the House Committee on Natural Resources and Environment and the House Committee on Civil Law and Procedure; and

WHEREAS, in facilitating the research, Louisiana Sea Grant should focus on finding common ground among the various interested groups and individuals on issues of temporary access to traverse private water bottoms without causing any transfer, or risk of transfer, of the owner's property rights, including all surface and mineral rights and the non-interference with private commercial activity; and

WHEREAS, this research should also include a determination of the availability of federal funding for the research, projects, and incentives to those parties entering into a voluntary public recreation servitude of use of waterways.

THEREFORE, BE IT RESOLVED that the House of Representatives of the Legislature of Louisiana does hereby authorize and direct Louisiana Sea Grant to act as an independent facilitator for a study of the possible establishment of a voluntary public recreation servitude of use of certain waterways.

BE IT FURTHER RESOLVED that a written report of its progress, including its findings and recommendations, if any, be submitted to the House Committee on Natural Resources and Environment and the House Committee on Civil Law and Procedure no later than February 1, 2018.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the executive director of Louisiana Sea Grant, Robert R. Twilley, Ph.D.

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SPEAKER OF THE HOUSE OF REPRESENTATIVES

**Appendix C:  
Financing the Future**

## VI. PUBLIC-PRIVATE PARTNERSHIPS

Experts often tout public-private partnerships (P3s) as an underutilized tool with great potential to help fund climate adaptation and infrastructure resilience.<sup>275</sup> P3s are not a new concept, they've been used in any number of instances where public need and private opportunity have coincided including toll roads, utilities, railroads, and even the "Eads Jetties" at the mouth of the Mississippi River. The common thread is that private participation allows the public partner to avoid or minimize its financial exposure. In return, the private partner gets a revenue stream to secure return on investment or, less commonly, owns an asset of importance to the private partner.

The term 'public-private partnership' eludes any single definition, as the concept can morph to fit the audience and opportunity. Most parties agree on a loose definition of P3 as a "legally binding contract between a public-sector entity and a private company where the partners agree to share some portion of the risks and rewards inherent in a project."<sup>276</sup> The allocation of risk and cost varies; ideally, risks are borne by the party that can manage them most efficiently, at the lowest cost.<sup>277</sup> P3s can include the design, finance, construction, operation, and/or maintenance of infrastructure, but the public sector usually maintains ownership of the asset.<sup>278</sup> In those cases, the environmental risks and the risk of catastrophic loss are generally borne by the public.

Contracts are broken down into "pure" P3s, where the main source of revenue for the private partner comes from payments made by the government ("availability payments system"), and concessions, where user-charges are levied by private partners on those receiving the services ("user fee system").<sup>279</sup> In an availability payments system, the government sponsor collects revenue from users and makes fixed, recurring payments to the private entity provided the asset maintains the contracted quality standards.<sup>280</sup> This places the risks substantially on the government because the payments do not change relative to use.<sup>281</sup> Under the user fee system, the private sector acquires more of the risk for the investment.<sup>282</sup> Revenue sharing clauses have also become common in P3 contracts. These projects are structured as a middle ground between user fees or availability-payments system. Revenue sharing projects collect user fees, but the government and private entity share the revenue, splitting the risk.<sup>283</sup> Traditionally, municipal bonds have been the dominant form of infrastructure financing for local government, and P3 has been an underutilized tool. Private

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<sup>63</sup> Mark S. Davis & N. Dean Boyer, *Financing the Future III: Financing Options for Coastal Protection and Restoration in Louisiana*, TUL. INST. OF WATER RES. L. & POLICY (January 18, 2017). Excerpt of pp 36-49.



equity investors have heightened their interest in P3s in part because of the potential to lock in revenue streams during a period of historically low-interest rates. In the context of adaptation to climate change, as discussed above, municipal bonds are a limited funding option. “The municipal bond market would have to multiply several times to assume the potential costs of adaptation.”<sup>294</sup> In recent years, the use of P3s has increased, in part due to the limitations of municipal bonds. Changes in the tax code have also helped increase the popularity of P3s. In 1997, the IRS changed the way interest on bonds is taxed. Under the new rule, bonds that fund public works projects operated or maintained by private companies remain tax exempt as long as the contracts are limited to a twenty-year period and the private partner does not share in net proceeds.<sup>295</sup> The new rule effectively eliminated the tax advantage that public entities had to manage their own water resources rather than contracting out to a private company.<sup>296</sup> P3s are not suitable for all projects, but Louisiana can learn from other regions and craft best practices to take full advantage of P3 as one of many available tools. P3s could be especially effective for localized/municipal-level projects like the Greater New Orleans Urban Water Plan, a plan that is not included in the Master Plan, but is nonetheless essential to the way New Orleans manages flood risk, and essential to fulfilling the “multiple lines of defense” concept at the heart of the Master Plan.

At the end of the day, the lack of significant revenue streams tied to coastal restoration and protection projects could be a significant limiting factor on revenue-driven P3s. That does not mean coastal Louisiana is without P3 opportunities. Indeed, coastal Louisiana offers a powerful opportunity for P3s that have asset preservation and cost avoidance as organizing principles. Specifically, there is an opportunity for donations of land rights to further coastal protection and restoration in exchange for more clearly defined and enduring mineral rights. The reasons for this are legalistic, but not hard to understand. Louisiana law, generally, does not allow permanent severance of mineral rights and surface rights.<sup>297</sup> That is the main reason much of coastal Louisiana is owned by companies in the business of finding and extracting valuable minerals like oil and natural gas. Owning wetlands is the key to owning the wealth beneath them.

The State of Louisiana owns the land beneath its navigable waters, and by extension, the minerals beneath those lands.<sup>298</sup> In coastal Louisiana, due to subsidence, erosion, and sea level rise, private lands and minerals can become state lands and minerals as land yields to water. Louisiana law allows the state to negotiate and fix mineral boundaries in cases in which surface rights are transferred to the state or other “qualified conservation organization” to support the state’s coastal conservation, protection, and restoration plans.<sup>299</sup> This could allow private landowners to gain something of very real value by donating surface rights as allowed by law: Mineral rights of greater certainty and

durability while relieving them of some of the costs of maintaining and managing the lands.

Coastal conservation, protection, and restoration inevitably involves public and private rights. Federal cost estimates of coastal restoration efforts have pegged the real estate costs of coastal restoration work at roughly 20% of the program costs.<sup>300</sup> Under normal federal project cost-sharing rules, the non-federal sponsor – in this case the State of Louisiana – is responsible for these costs. Any arrangement that could allow the state to acquire those rights without expending cash could reduce the financing burden substantially.

Individual coastal restoration projects have used this latter type of P3 but not on a systemic basis, largely because the State's Coastal Master Plans were, until recently, not really implementation plans. Another reason was uncertainty about the State's ability to do larger scale deals under its current laws. Fortunately, a recent opinion from the Louisiana Attorney General reinforces the legality of this approach, making the P3 option much more viable and attractive.<sup>301</sup> None of this is to suggest that negotiating and finalizing these deals would be a simple or formulaic matter. These complex transactions require thought, care and potentially the clearance of additional legal and policy hurdles.

In a political and social climate where privatization is lauded for its economic efficiency, public-private partnerships make a lot of sense. Public entities should proceed with caution, however, as they pursue private partners for infrastructure projects, particularly those that involve our natural resources. Transparency, stakeholder engagement (especially public input), and equitable sharing of risks are common features of successful P3s. Weaker agreements are marked by the heavy-handed private influence that overwhelms public priorities. Privatization of public infrastructure, to any degree, requires balancing the public and private interests. Proper risk allocation is the key to not only increasing investor interest in P3s but also ensuring their success for taxpayers, the environment, and human health. The most effective P3 for a given project will depend on the project type, local needs and priorities, and the public entity's credit rating and capital costs..."

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<sup>275</sup> See, e.g. Andrew Deye, US Infrastructure Public-Private Partnerships: Ready for Takeoff? (Harvard University, Kennedy School Review 2015).

<sup>276</sup> Patrick Sabol & Robert Puentes, Private Capital, Public Good: Drivers of Successful Infrastructure Public-Private Partnerships (BROOKINGS INSTITUTE, December 2014).

<sup>277</sup> Najja Bracey & Sonia Moldovan, Public-Private-Partnerships: Risks to the Public and Private Sector, 6th Global Conference on Business and Economics (Oct. 2006).

<sup>278</sup> US Dept. of the Treasury, Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing, 4

<sup>279</sup> Sabol & Puentes

<sup>280</sup> Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests (U.S. Dep't Treas., Office Econ. Pol., April 2015).

<sup>281</sup> Id.

<sup>282</sup> Id. A good example of pre-recession P3 investment is the Indiana Toll Road, a \$3.8 billion lease of a 157-mile road. This project is now undergoing heavy restructuring under Chapter 11 bankruptcy. Id.

<sup>283</sup> Id.

<sup>294</sup> Jonathan Rosenbloom, Funding Adaptation, 47 J. Marshall L. Rev. 657, 675 (2013)

<sup>295</sup> Id.

<sup>296</sup> National Research Council, Privatization of Water Services in the United States: An Assessment of Issues and Experience (2002).

<sup>297</sup> See, e.g. Horton v. Mobley, 578 So. 2d 977, 983 (La. Ct. App., 1991).

<sup>298</sup> La.C.C. Art. 450; A.N. Yiannopoulos, Property, 2 Louisiana Civil Law Treatise § 65.

<sup>299</sup> La. R.S. 31:149

<sup>300</sup> US Army Corps of Engineers, Louisiana Coastal Area (LCA) Ecosystem Restoration Study (Nov. 2004). Total real estate costs estimated at \$385,370,000, total program costs estimated at \$1,995,981,000.

$\$385,370,000/\$1,995,981,000 = 0.193; 19.3\%$ .

<sup>301</sup> Louisiana Attorney General Opinion 15-0134

**Appendix D:**  
**Frequently Asked Questions about the Report**

## **Preliminary Options for Establishing Recreational Servitudes for Aquatic Access over Private Water Bottoms**

### **Frequently Asked Questions**

#### **1. What is Louisiana Sea Grant?**

Louisiana Sea Grant, based at Louisiana State University, is part of the National Sea Grant Program, a network made up of 33 programs located in each of the coastal and Great Lakes states and Puerto Rico. Modeled after the Land Grant College system, Louisiana Sea Grant was established in 1968 and is mandated to provide research, extension, and teaching to address major marine and coastal challenges. For additional information, see: <http://www.laseagrant.org/about/>

#### **2. What is this coastal access conflict all about?**

In recent years, there has been a growing dispute in Louisiana regarding navigation in coastal waters. This conflict has been primarily between private landowners and recreational fishermen, and it involves disputes over what water areas are considered private and what water areas are open for public access. The region's coastal land loss crisis has been a principal driver of this conflict. In response to this crisis, landowners have sought out various means for expanding surface revenues, reiterating property boundaries, and limiting liability. These actions have resulted in a growing number of negative encounters with recreational fishermen, due primarily to historical expectations of aquatic access and new disputes over waterways perceived to be in the public domain. As a result of these and other factors, there has been a substantial increase in the number of local law enforcement actions related to aquatic trespassing over private water bottoms.

#### **3. What is the difference between public and “private waters”?**

There is a legal distinction between natural navigable water bodies, publicly constructed waterways, and canals or ponds constructed with private funds on private land. The first two categories are almost always considered open to public access while the latter is only accessible to the public with permission of the landowner.

#### **4. Who commissioned this study and who is the intended audience?**

In July 2017, the Louisiana Legislature unanimously approved a study resolution (HR 178) that directed Louisiana Sea Grant to study and make recommendations on the creation of public servitudes to facilitate increased recreational access in coastal waterways. The intended audience of the report is the Louisiana Legislature.

**5. What guidance did the Legislature provide for preparing the report?**

The main guidance imposed by the resolution was that the study and report would focus on voluntary actions only that would not impinge on individual property rights or impede commerce.

**6. Was funding provided for the study?**

No. The report was developed in-house by faculty and staff supported by the Louisiana Sea Grant College Program at Louisiana State University.

**7. What was the process used to develop the report?**

Louisiana Sea Grant identified potential representatives from three distinct stakeholder groups: Fishermen, Landowners and State Agencies. Invitations were extended to these individuals to participate in discussions of the public access issues. Sea Grant then conducted a series of separate meetings with the three stakeholder groups. To provide a neutral setting, all group meetings were held at Louisiana Sea Grant offices on the Baton Rouge campus of Louisiana State University. The meetings were held as follows:

- Recreational Fishermen – Aug. 9, 2017
- State Agencies – Sept. 7, 2017
- Landowners – Oct. 4, 2017

Each meeting followed a consistent agenda and covered the following topics:

- Overview of study resolution and clarification of mandate
- Structure of preliminary meetings
- Input from stakeholder attendees
- Major concerns
- Potential options for resolution
- Next steps

Following each meeting, minutes were assembled, organized, and distributed to attendees for review and any needed corrections. In drafting this report, Louisiana Sea Grant relied primarily on the discussions and options heard during each stakeholder meeting. Louisiana Sea Grant also drew from secondary sources where appropriate, including: public statutes, published articles, social media, and television and radio broadcasts. After a thorough assessment of stakeholder input and a review of relevant secondary information, ten options emerged as potential mechanisms for addressing the aquatic access conflict.

**8. What are the general findings of the study?**

This report provides the Louisiana Legislature with a general overview of the context, history, and drivers of this conflict; describes the process utilized for soliciting stakeholder input; and details economic and legal considerations for ten preliminary options that could be used to partially mitigate this conflict. Those options included: 1) creative leasing arrangements; 2) temporary access for special events; 3) public acquisition of land or easements; 4) liability protection measures; 5) tax incentives; 6) limitations to acquisitive prescription; 7) boundary fixing; 8) decoupling of mineral rights; 9) incentivizing access via restoration funding; and, 10) increasing the frequency, quality and capacity of coastal mapping.

**9. Does Louisiana Sea Grant favor a particular option or resolution to this conflict?**

No. As a neutral party, Louisiana Sea Grant does not endorse or oppose any of the preliminary options nor any specific outcomes associated with resolution of this conflict.

**10. Does the report recommend changes in property rights?**

No. A guiding principle imposed by HR 178 was to limit the study focus to voluntary options that would not impinge on individual property rights or impede commerce.

**11. Is Louisiana Sea Grant advocating for specific changes to any laws, regulations, or policy?**

No. For each option listed in the report, there is a description of the opportunity and a general overview of various stakeholder opinions. A discussion section is also provided to examine the possible mechanics of a given option and the relevant legal and economic considerations that would likely be needed if the option were to be implemented.

**12. Does the report estimate the economic impacts for various options?**

No. While economic implications are central to this conflict, the time and resources required for an objective calculation of all public and private tradeoffs is beyond the scope of this study. This report is limited to a qualitative assessment of economic questions and considerations only.

**13. How many incidents of aquatic trespassing have occurred in regards to this issue?**

Unknown. While an increase in coastal citations for aquatic trespassing has been acknowledged by both fishermen and landowners, the actual number and trend of such citations has not been calculated. Developing such an estimate would require collection of detailed times series data from law enforcement offices in more than 100 coastal municipalities.

**14. What is the next step in resolving the coastal access conflict?**

As previously noted, Louisiana Sea Grant has a science-based mandate to provide objective information to support decision-making. In that sense, we can help identify options (descriptive role), but we cannot endorse or oppose specific options or outcomes (prescriptive role). Future input and guidance on this issue would therefore need to come from the Louisiana Legislature and might involve a number of possibilities, including: no action, convening exploratory subcommittees, sponsoring demonstration trials, or pursuing legislation to facilitate one or more incentive-based options.

**15. Will the report be available to the public?**

Yes. A final version of the report will be presented to the Legislature in February 2018 and a copy will be publicly available at the following website:

<http://www.laseagrant.org/sglegal/publications/other/>