REPORT of the PUBLIC RECREATION ACCESS TASK FORCE

to the

LOUISIANA LEGISLATURE

Pursuant to SCR 99 of the 2018 Regular Legislative Session

JANUARY 31, 2020

Public Recreation Access Task Force:

Sen. R. Bret Allain (La. Senate)
Rep. Beryl Amedée (La. House of Rep's)
Mr. R. Michael Benge (Landowner – East of the Atchafalaya River)
Mr. Rex Caffey (La. Sea Grant Program)
Mr. J. Blake Canfield – *Chair* (La. Dept. of Natural Resources)
Mr. Daryl Carpenter (La. Sportsmen's Coalition)
Sen. Norby Charbert (La. Senate)
Mr. David Cresson (Coastal Conservation Assoc. of La.)
Mr. Taylor Darden (La. Landowners Assoc.)
Ms. Cynthia Duet (Environmental interests – The Nature Conservancy and Audubon of La.)
Mr. Cole Garrett (La. Dept. of Wildlife & Fisheries)
Mr. Cheston Hill[1] (State Land Office)
Mr. Joseph LeBlanc (Sportsman at large)
Mr. John Lovett (La. State Law Institute)
Mr. Chares Marshall (La. Oil and Gas Ass'n & La. Mid-Continent Oil and Gas Ass'n)
Rep. Jack McFarland (La. House of Rep's)
Mr. David Peterson (Governor's Exec. Assist. for Coastal Activities)
Mr. Lucas Ragusa (La. Sportsmen's Coalition)
Mr. Sean Robbins (La. Sporstmen's Coalition)
Mr. Jonathan Robillard (State Land Office)
Mr. Jay Schexnayder (Sportsman at large)
Mr. Jeff Schneider (Sportsman at large)
Mr. Anthony Simmons (Landowner – West of the Atchafalaya River)
Mr. Harry Vorhoff (Attorney General's Office)

Alternate Members:

Mr. Richard Fisher (La. Sportsmen's Coalition)
Mr. Paul Frey (La. Landowners Assoc.)
Mr. Duncan Kemp (La. Dept. of Wildlife & Fisheries)
Rep. Blake Miguez (La. House of Rep's)
Mr. Nolan Reynerson (Coastal Conservation Assoc. of La.)
Mr. Ryan Seidemann (Attorney General's Office)
Mr. Ryan Vivian (Governor's Exec. Assist. for Coastal Activities)
Sen. Rick Ward (La. Senate)
Mr. James Wilkins (La. Sea Grant Program)

Drafting Subcommittee:

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

[1] Replaced Jonathan Robillard on December 3, 2019.

REPORT OF PUBLIC RECREATION ACCESS TASK FORCE

Table of Contents

A. Executive Summary

This executive summary provides a brief overview of the principal parts of this report. First, it summarizes the legislative source of the Public Recreation Access Task Force (the Task Force), the environmental phenomena and background legal principles surrounding public recreational access to waterways in Louisiana, and the impact of these environmental and legal factors on recreational access and recreational tourism in coastal areas. (Parts B, C, E, F, and G). Second, it articulates a number of shared *Louisiana Coastal Values* that should shape decision making in the future. (Part D). Finally, it presents the seven specific pathways forward, which the Task Force has distilled from the numerous options and recommendations received, that the Task Force offers for the Legislature and other decision makers to consider (Parts H and I).

1. Background: Changing Landscapes and Complex Law

The Louisiana Legislature established this Task Force in the summer of 2018 and assigned it the tasks of studying the conditions, needs and issues related to public access on the navigable waters of Louisiana and making policy recommendations to address this subject. Over the course of 17 months, the Task Force held 12 public meetings and 4 public meetings of its drafting subcommittee. It heard testimony from 27 individuals and received 17 reports and presentations from state agencies, local governments, non-governmental groups, landowners, area experts, and members of the general public.

Much of the confusion about public access to waterways in coastal Louisiana stems from the fact that the physical landscape of Louisiana's coastal parishes has experienced—and is continuing to experience—significant change. Major portions of coastal parishes that once consisted of dry land or land covered by non-navigable water bodies (primarily swampland and marshland) have in recent years increasingly become submerged beneath the waters of the Gulf of Mexico, its bays, and its estuaries. These water bodies are increasingly navigable in fact.

This change in the physical condition of coastal areas in Louisiana interacts with a complex body of Louisiana property and constitutional law. Louisiana property law draws a clear distinction between a navigable water body and a non-navigable water body and between the bottoms or beds of a navigable water body and a non-navigable water body. It defines the seashore quite narrowly. It recognizes that a canal, constructed with private funds on private land, can be a privately owned thing despite its navigability in fact.

Louisiana property law, however, is not clear about the effect of changes in navigability over time. Although one Louisiana statute provides some measure of security for existing mineral interests when changes in the physical environment occur that lead to changes in ownership of land or water bottoms, neither Louisiana law nor federal constitutional law provides a clear answer to the question of who owns the bed or bottom of a formerly non-navigable water body that has become navigable in fact as a result of factors such as erosion, subsidence or sea-level rise or whether just compensation is owed

to landowners if a change in title is recognized. Louisiana law provides even less guidance when changes in navigability may have origins in human action. When mineral interests are at stake, all of this uncertainty has led the state and private landowners to enter into complex agreements applicable to a category of land known as "dual-claimed land."

The Louisiana Constitution is also relevant. It imposes clear restrictions on the ability of the state of Louisiana to alienate the bed of a navigable water body. It requires the state to reserve mineral interests when it sells property to a private person. It also generally prohibits the state from donating things of value unless the constitution otherwise authorizes such a donation.

Louisiana trespass law does not provide any statutory protection for recreational sportsmen and does not require posting of land claimed as private. At the same time, Louisiana's tort immunity statutes provide relatively strong, but perhaps not complete, immunity from liability for landowners when they open up their land for recreational access on a non-profit basis to others.

Recreational sportsmen and other persons interested in public access over land covered by water in coastal areas face significant challenges. Sportsmen and others interested in accessing water often cannot tell whether their boats or vessels are floating on (a) a navigable water body whose water bottoms are owned by the state, (b) a non-navigable water body whose water bottoms are owned by a private landowner, or (c) a water body that might have been formerly non-navigable but now is navigable and whose water bottoms would thus qualify as "dual-claimed land." Recreational tourism has also suffered because of this uncertainty.

2. Shared Values

After listening to the many thoughtful comments and presentations offered by stakeholders, members of the public, and members of the Task Force itself, the Task Force has come to appreciate that Louisiana residents share a number of fundamental values relevant to its mission. The Task Force believes those shared values—*Louisiana Coastal Values*—about land, recreation, the environment, and government should shape the work of the Louisiana legislature and all decision makers going forward as they evaluate the alternative pathways forward presented at the conclusion of this report. Those six values, articulated more fully in Part D of the Report, can be summarized succinctly.

Preserve Our Coast and the Natural Environment: Everyone in Louisiana shares an interest in preserving our working coast, and the natural and manmade resources that comprise it. If Louisiana fails to reduce the rate of coastal land loss and fails to restore wetlands in crucial areas, all of our economic livelihoods will be diminished, our physical safety will be increasingly at risk, and our traditions of outdoor recreation will suffer. Any pathway that decision makers pursue should contribute to preserving our coast and natural resources.

Respect Private Property Rights and Investments in Land: All members of the Task Force agree that private property rights of landowners in Louisiana should be respected, particularly when landowners have invested in and actively maintained their land.

Preserve and Enhance Local Tax Base to Support Vital Public Services: Any solution to the problems addressed by this report should, to the extent possible, minimize reductions in the local property tax base of coastal parishes and, to the extent possible, preserve and enhance this and other sources of revenue for local government.

Preserve Culture of Outdoor Recreation: Outdoor recreation in Louisiana includes fishing, hunting, boating, and simply being in nature. For countless Louisiana residents, enjoying the outdoors, and particularly using the state's myriad waterways for boating and fishing, is an essential part of life. Any solution to the problems addressed in this report should seek to preserve and enhance the culture of outdoor recreation in Louisiana.

Encourage and Develop the Recreational Economy: Any pathway that the legislature or the executive branch considers implementing should seek to bolster the contribution of outdoor recreation to Louisiana's economy, both by encouraging Louisiana residents to purchase products and services related to outdoor recreation and by encouraging visitors from out-of-state to bring their recreational tourism dollars to Louisiana.

Minimize Fiscal Burden on the State. The Task Force appreciates the importance of minimizing the fiscal impact of any solutions considered. Although it does not believe that any pathway forward must be revenue neutral, the Task Force nevertheless recognizes that decision makers should evaluate all of the specific recommendations and pathways forward described in Parts H and I of the Report with the goal of seeking to minimize, to the extent possible, any additional fiscal cost to the state.

3. Options and Recommendations Received and Alternative Pathways Forward

The second half of this report is broken down into two parts. Part H reviews in considerable detail the options presented and specific recommendations received by the Task Force over the course of the past 17 months. Part H presents those options and recommendations largely in the chronological order they were received because many of the recommendations built on earlier options and presentations. Part H also presents many of the responses to and concerns raised by the recommendations as they emerged during the course of Task Force meetings.

Part I distills the options and recommendations described in Part H (and the responses and concerns raised) into seven primary pathways forward that the Legislature and other decision makers should consider. Part I also describes what it believes would be the consequences of taking no action in response to this report. The Task Force does

not endorse any single pathway over another and does not rank or prioritize the pathways. Indeed, the Task Force recognizes that an ideal solution to the problem of recreational and public access to waterways in Louisiana may involve implementation of a number of the alternative pathways. Although the seven primary pathways forward articulated more fully in Part I would all require greater elaboration through negotiation, legislation, or regulation, their essence can be summarized as follows:

1. Permanent Boundary Settlements: The first major pathway forward is based on a proposal offered by the Louisiana Landowners Association (LLA). This pathway involves encouraging voluntary, permanent, two-party boundary settlements between private landowners and the state of Louisiana. These private boundary settlements would resolve once and for all issues of disputed ownership of water bottoms between private landowners and the state and any mineral rights attributable to that ownership and to other water bottoms that are not currently subject to dual claims. Because such settlements could entail a potential alienation of navigable water bottoms or a potential donation of a thing of value to a private person, a constitutional amendment would likely be necessary. (A draft Constitutional Amendment is attached as Exhibit E to this report.) In exchange for receiving recognition of title to contested water bottoms, participating landowners would grant permanent public access servitudes over the water bottoms and thus guarantee public access to sportsmen and others. The precise scope and nature of the access servitudes would be subject to negotiation and perhaps state regulation.

2. Donation and Severance: The second major pathway forward may be suitable in other areas of our coast where private landowners have less of an interest in maintaining title to lands that are increasingly becoming submerged beneath water and where the only significant interest is in mineral rights. Under this pathway, a landowner would donate surface ownership of a particular tract of land to the state and would reserve its mineral rights in perpetuity, along with some assurance of reasonable access to the surface for mineral exploration and production. The landowner, however, would also enter into a long-term agreement with the state to share any mineral revenue that is ultimately derived from mineral production on the land on some proportional basis. This kind of arrangement would not only resolve disputes about submerged land that is presently dual-claimed but could also apply to land that is not yet subject to dual claims but could become so in the future, notwithstanding any changes to the physical characteristics of the donated land.

This pathway would not require the state to alienate any water bottoms that it owns or claims to own but instead would involve donations of all ownership of the surface to the state with a reservation of mineral interests in favor of the donating landowner. In areas covered by these types of voluntary transfers of surface ownership, members of the public would gain access to all waterways by virtue of state title to the water bottoms. To address concerns related to the effects of such transfers of ownership on the local tax base and the likelihood of increased state management costs when it becomes the owner of the surface in affected areas, donation and severance agreements

between the state and private landowners could include mineral revenue sharing agreements and payments in lieu of taxes (PILOTs) to local governments. (To the extent the state alienates potential or existing claims to navigable water bottoms or mineral rights under a donation and severance agreement, the proposed constitutional amendment offered in conjunction with the first pathway is designed to provide constitutional authority for such an agreement as well.)

3. Act 626 Agreements (Three-Party Agreements): The third pathway forward involves agreements that resemble the two-party donation and reservation of mineral interest agreements described above, but in these a private landowner, the state acting in its capacity as the steward of the public trust in the environment and navigable water bodies, and another party, most likely a non-profit conservation organization or land trust, would enter into a three-party agreement. Pursuant to this kind of agreement, a private landowner would first transfer title of disputed water bottoms or even undisputed marshland or wetlands to the non-profit conservation organization or land trust and would reserve mineral interests in those water bottoms or lands. Second, a conservation endowment would be established with funds contributed by the private landowner, by other private philanthropists, or by the state, and this would provide revenue to pay for land management expenses and to make payments in lieu of taxes (PILOTs) to local governments.

4. Expand Recreational Access; Create a Right of Responsible Access over Lands Subject to Ebb and Flow of the Tide: The next pathway that decision makers could follow to resolve the conflict between recreational sportsmen and private landowners that own non-navigable water bodies (marsh lands and swamp lands) or navigable ones (private canals) or that claim the right to exclude the public from navigable water bodies whose water bottoms constitute dual-claimed lands would not involve any transfer of ownership of the surface or reservation of mineral rights. Instead, it would involve a redefinition of the law of trespass to allow specified forms of recreational access over waterbodies that are subject to the ebb and flow of the tide. This pathway would not affect title to land or water bottoms, would not affect the local property tax base in coastal parishes, and would not require a constitutional amendment. It would, however, require landowners and recreational sportsmen to build a new kind of relationship based on trust, mutual accommodation, collaboration, and insistence upon correlative responsibilities—responsible recreational access taking and responsible land management that takes into account recreational interests. This pathway could be combined with strengthened landowner tort immunity.

Landowners may argue that any imposition of recreational access rights as a matter of state law is a violation of their property rights, and in particular their right to exclude, and thus might challenge an imposition of recreational access by asserting takings claims under the state or federal constitution. Consequently, decision makers may instead seek to create structures or opportunities for landowners and recreational sportsmen to experiment over the medium term with arrangements that might build trust,

produce more recreational access, and lead to a new kind of relationship based on responsible recreational access taking and responsible land management.

5. Re-introduce Affirmative Defenses to Trespass Law; Require More Posting: Another pathway that could ameliorate the uncertainty faced by members of the public engaged in recreational activities on water in our coastal areas would involve requiring private landowners that seek to exclude the public from water bottoms to take further action to signal their intent to exclude such as posting marsh land or water bottoms as private or erecting fences or other barriers. To this end, the legislature could reestablish some of the affirmative defenses found in Louisiana's criminal trespass statute prior to its revision in 2003, and, in particular, it could require that landowners post land or utilize some kind of boundary markers in order to enforce the criminal trespass laws on uncultivated, undeveloped land in general or, more particularly, on marsh land or water bottoms covered by water bodies that are navigable in fact or subject to the ebb and flow of the tide but which may be privately owned. Such legislation would not affect the local property tax base.

6. Tie Favorable Use-Value Taxation to Recreational Access: One more pathway to enhance recreational access to water bottoms that are now privately owned or claimed and yet covered by water would be to link the relatively low, use-value ad valorem taxation rates for bona fide marshlands in Louisiana to a requirement that landowners provide some form of recreational access to such water bottoms.

7. Combination Proposal – A Recommendation by State Agency Representatives: In light of concerns raised by state agency representatives about the first two pathways, some of these representatives have offered a seventh pathway forward that seeks to combine elements of several of the pathways and that could involve either two-party or three-party agreements. The linchpin of the state's Combination Proposal is the establishment of a *Subtidal and Intertidal Zone* ("SAIZ"), defined as an area of land covered with water and accessible by a floating vessel, regardless of legal findings of "navigability," that is (a) submerged beneath subtidal and intertidal waters, and (b) lying between the emergent land (the land/water interface) and the historical shoreline boundary. The inland boundary of this SAIZ would run with erosion. The primary distinction between the Donation and Severance Proposal (Pathway 2) and this pathway is that with this approach the landowner would retain ownership of all existing and emergent land, essentially excluding emergent land from the entire process, transferring and relinquishing its claims only to land covered by water within the SAIZ, in exchange for a perpetual mineral reservation within its record title boundaries out to a historical shoreline. (To the extent the state alienates potential or existing claims to water bottoms or mineral rights under an agreement established pursuant to the Combination Proposal, the proposed constitutional amendment offered in conjunction with the first pathway could be modified to address this pathway as well.)

To address challenges faced by recreational users in identifying areas where property owners have opted out of this kind of agreement, this pathway envisions that for

those areas where property owners have opted out of allowing access in the SAIZ, owners would be required to place some sort of posting on the ground and register the areas with the State (thus allowing creation of a publicly-accessible map) or otherwise be subject to water-borne recreational public access. This aspect of the pathway would essentially recreate immunity from trespass in a manner similar to that which existed prior to the 2003 amendments to Louisiana's criminal trespass statute, but only as to SAIZ areas where landowners have registered as opting-out.

Finally, all private landowner surface contracts and the accompanying revenues from the SAIZ would transfer to the state and these sources of revenue could be dedicated in part to local government and in part to cover the costs to the state for administrative and land management responsibilities. Landowner representatives have expressed that such a transfer of surface contracts may make these agreements less attractive to some landowners.

The Task Force reiterates that all of these pathways are alternative solutions and that it does not endorse any single pathway over another or rank them in terms of priority or preference.

Future with No Action: The Legislature and other policy makers should consider the possible consequences of taking no action in response to the challenges addressed in this report. As marshland and water bottoms that once lay beneath non-navigable water bodies come to lie increasingly below navigable water bodies, disputed claims of ownership of dual-claimed land will continue to lead to uncertainty and expense, recreational sportsmen will continue to be confused about where they can enjoy long-cherished customs of outdoor recreation, and the recreational tourism economy will continue to suffer.

B. SCR 99 Summary Background

This report is submitted to the Legislature by the Public Recreation Access Task Force (the "Task Force") pursuant to Senate Concurrent Resolution No. 99 of the 2018 Regular Legislative Session ("SCR 99"). See Exhibit A. The Task Force consists of 23 members from varied backgrounds and representing a wide group of interests.[1] SCR 99 charged the Task Force with studying "the conditions, needs, and issues relative to potential recreation access on the navigable waters of the state" and to make "concrete

[1] Members of the task force represent the following organizations, state officials, legislative branches, and state agencies: The Louisiana Sportsmen's Coalition. The Coastal Conservation Association of Louisiana, the Louisiana Landowner's Association, the Louisiana Oil and Gas Association, the Louisiana Mid-Continent Oil and Gas Association, the Louisiana Sea Grant College Program, the Louisiana State Law Institute, the Louisiana Senate, the Louisiana House of Representatives, The Louisiana Department of Natural Resources, the Louisiana Department of Wildlife and Fisheries, the Nature Conservancy and the Louisiana Audubon Society, the Louisiana Attorney General, the Louisiana State Land Office, the Governor's Executive Assistant for Coastal Activities. Three members of the task force are sportsman appointed by the Governor. Two members are landowners appointed by the Governor. Exhibit A, SCR No. 99 (1)-(17).

policy recommendations to the legislature in order to address the issue of public access on the navigable waters of the state."[2]

The Louisiana legislature passed SCR 99 at a time of renewed interest in the issues surrounding recreational access on Louisiana's waters and coastal marshland. In the years immediately prior to the adoption of SCR 99 in the 2018 Legislative Session, several bills and resolutions were introduced in Louisiana's Legislature.[3] Additionally, in accordance with House Resolution 178 of the 2017 Legislative Session, the Louisiana Sea Grant College Program issued a report titled Preliminary Options for Establishing Recreational Servitudes for Aquatic Access over Private Water Bottoms. In the 2019 Legislative Session, several bills were filed concerning issues related to recreational access over Louisiana's coastal marshland and waterways.[4]

This report is the result of approximately 17 months of work by the Task Force following 12 public meetings of the whole Task Force and 4 meetings of its drafting subcommittee, the testimony of 27 individuals, the submission of 17 reports/presentations, and the involvement of representatives of non-governmental groups, industry, landowners, area experts, and the general public. See Exhibits B.1 – B.16 and C.1 – C.17.

C. The Problem

The current controversy regarding recreational access to submerged land and water bodies in the coastal area of Louisiana has its origins in changes to our physical environment and in specific provisions of Louisiana law. As all members of the Task Force recognize, the physical landscape of Louisiana's coastal parishes has experienced—and is continuing to experience—significant change. Major portions of coastal parishes that once consisted of dry land or land covered by non-navigable water bodies (primarily swampland and marshland) have in recent years increasingly become submerged beneath the waters of the Gulf of Mexico, its bays, and its estuaries, and these water bodies are increasingly navigable in fact.

Scientists have identified many causes for the loss of coastal wetlands and increasing submergence of land below deep water in Louisiana. These causes include natural subsidence, sediment starvation resulting from the construction of levees along the Mississippi River and its distributaries, erosion caused by salt-water intrusion in canals, depletion of underground oil and gas reserves, and sea level rise. This report does not take a position on the causes of coastal erosion and land loss in Louisiana or on the engineering and scientific solutions that may exist.

---

[2] SCR No. 99 (1)-(17).

[3] 2017 Regular Legislative Session: HR 178; 2018 Regular Legislative Session: Act 318, HB 391 and HCR 60.

[4] 2019 Regular Legislative Session: HB 231, HB 270, and HB 315.

Instead, this report confronts the legal and public policy dilemmas created for private landowners, the State of Louisiana, and recreational sportsmen and other users who seek access to coastal land and water bodies in Louisiana. The controversy surrounding recreational access rights to coastal land and water bodies in Louisiana cannot be understood without consideration of a number of principles of Louisiana property law and constitutional law. Before consideration of those background principles, the Task Force believes that decision makers must recognize a number of shared values that the Task Force has identified through the course of its work.

D. Shared Values

The Task Force has received comments and heard presentations from many stakeholders, members of the public, and many members of the Task Force itself. Throughout this work, Task Force members have come to appreciate that Louisiana residents share a number of fundamental values relevant to the Task Force's mission. A statement of those shared values—what we would call *Louisiana Coastal Values*—about land, recreation and the environment will aid in evaluating the proposals that have been received by the Task Force and help decision makers weigh the alternative pathways that are described at the conclusion of this report. We believe six crucial shared values must be kept in mind by all decision makers, whether they are members of the Legislature or officials in the executive branch, as they consider the potential pathways forward.

Preserve Our Coast and the Natural Environment: Everyone in Louisiana shares an interest in preserving our working coast, and the natural and manmade resources that comprise it. If Louisiana fails to reduce the rate of coastal land loss and fails to restore wetlands in crucial areas, all of our economic livelihoods will be diminished, our physical safety will be increasingly at risk, and our traditions of outdoor recreation will suffer. Any pathway that decision makers pursue should contribute to preserving our coast and natural resources.

Respect Private Property Rights and Investments in Land: All members of the Task Force agree that private property rights of landowners in Louisiana should be respected, particularly when landowners have invested in and actively maintained their land. When private landowners, whether natural persons or private legal entities, acquire land, and mineral rights associated with that land, and when landowners invest in that land and work to maintain it, Louisiana law should respect that investment and that labor. Any solution to the problems presented by coastal erosion, submerging land and rising sea levels and the challenges faced by recreational sportsmen to continue their traditions of fishing, hunting, and enjoying the outdoors must respect landowners' legitimate interests in managing the use of their land and in the development of mineral rights associated with that land.

Preserve and Enhance Local Tax Base to Support Vital Public Services: The Task Force recognizes that local governments at the parish and municipal level in Louisiana deliver vital services to the public, including law enforcement, response to fire

and natural disasters, the protection of public health, safety and welfare, levee protection, and the education of our children. The ability of local governments to deliver these services depends in large part on preserving and enhancing the local ad valorem property tax base. Any solution to the problems addressed by this report should, to the extent possible, minimize reductions in the local property tax base of coastal parishes. Any solution should, to the extent possible, seek to preserve and enhance this and other sources of revenue for local government.

Preserve Culture of Outdoor Recreation: Throughout its public hearings, the Task Force has been reminded time and again about the importance of outdoor recreation to the people of coastal Louisiana. Outdoor recreation includes fishing, hunting, boating, and simply being in nature. For countless Louisiana residents, enjoying the outdoors, and particularly using the state's myriad waterways for boating and fishing, is an essential part of life. This Task Force would not exist but for the universally recognized value of outdoor recreation in Louisiana.

Encourage and Develop the Recreational Economy: As the result of many presentations and public comments, the Task Force has learned that outdoor recreation is not just a matter of individual interest but that it contributes to the economies of our coastal parishes and the State. Any pathway that the legislature or the executive branch considers implementing should seek to bolster the contribution of outdoor recreation to the economy, both by encouraging Louisiana residents to purchase products and services related to outdoor recreation and by encouraging visitors from out-of-state to bring their recreational tourism dollars to Louisiana and stimulate economic activity here.

Minimize Fiscal Burden on the State: Representatives of the state agencies, legislators, and others who have provided comments to the Task Force have stressed the importance of minimizing the fiscal impact of any pathway that decision makers choose to follow. The potential fiscal impact to the State of many of the pathways described below have two components: (1) accounting for potential lost mineral revenue; and (2) the cost of requiring state agencies to administer new access regimes that may result from the pathways. Many of the proponents of the recommendations described in Part G of this Report have, in good faith, crafted their proposals with these considerations in mind. The Task Force does not believe that any pathway forward must be revenue neutral or have no impact on the public fisc. However, the Task Force believes that decision makers should evaluate the recommendations in Part H and the specific pathways forward described in Part I with the goal of seeking to minimize, to the extent possible, any additional fiscal cost to the State. The Task Force recognizes that if any potential pathway forward is not properly resourced, it may fail to accomplish its objectives.

Keeping these six shared Louisiana values in mind will be essential for decision makers as they review the background principles of Louisiana property and constitutional law described in the following section, as they consider the recommendations received by the Task Force, and as they evaluate the pathways forward described at the conclusion of this report.

E. Background Principles of Louisiana Property Law

1. Public Things, Private Things, and Natural Navigable Water Bodies

In Louisiana, things are divided into three broad categories: common, public and private things. La. Civ. Code art. 448. Common things consist of just two subcategories—the air and high seas—and cannot be owned by anyone. La. Civ. Code art. 449. Public things are owned by the state or its political subdivisions in their capacity as public persons. La. Civ. Code. art. 450. Article 450 of the Louisiana Civil Code describes two categories of public things, those that belong to the state and those that belong to political subdivisions. For purposes of this report, the second paragraph of Article 450 is crucial. It provides: "Public things that belong to the state are such as running waters, waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore." Id.

Article 452 of the Civil Code is also relevant to this report. It specifies that "[p]ublic things and common things are subject to public use in accordance with applicable laws and regulations. Everyone has the right to fish in the rivers, ports, roadsteads and harbors, and the rights to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets and the like, provided that he does not cause injury to the property of adjoining owners." La. Civ. Code art. 452. Articles 450 and 452 of the Louisiana Civil Code thus seem to grant broad public access rights for activities like fishing on water bodies in Louisiana.

However, other provisions of the Louisiana Civil Code, certain Louisiana statutes, and a number of judicial decisions narrow the scope of public access to water bodies in Louisiana. Most important, as the following sections will demonstrate, the beds or bottoms of natural, *non-navigable* water bodies as well as the beds or bottoms of canals built with private funds on private land are *not* classified as public things but are instead classified as "private things," the residual category of things under Louisiana law. In Louisiana, "[p]rivate things are owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons." La. Civ. Code art. 453. As the following sections explain, if a particular tract of land covered by some amount of water can be classified as "seashore" or the bottom of a "natural, navigable water body," the land may be a public thing owned by the state. If the land is classified as the bed of a *non-navigable* water body or of a canal, it may be a private thing. As sections 7 and 8 explain below, if a natural water body that was originally non-navigable becomes navigable, complex legal issues about the ownership of the underlying land and the mineral rights attached to that land emerge.

2. Seashore

"Seashore" in Louisiana is defined by the Civil Code as "the space of land over which the waters of the sea spread in the highest tide during the winter season." La. Civ. Code art. 451. Louisiana courts have interpreted this definition narrowly, insisting that the geographic reach of the seashore only extends to land near the open coast that is "directly overflown by the tides" and not merely indirectly influenced by some tidal

overflow. *Buras v. Salinovich*, 97 So. 748, 750 (La. 1923); *Morgan Nagodish*, 40 La. Ann. 246, 3 So. 636 (1888); A.N. Yiannopoulos, *Five Babes Lost in the Tide, A Saga of Land Titles in Two States*: Phillips Petroleum Co. v. Mississippi, 62 Tul. L. Rev. 1357, 1363 (1988). For a detailed discussion of these and other judicial decisions attempting to apply the Civil Code definition of seashore to various water bodies, see James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861, 875-882 (1992). Although state ownership extends beyond the seashore to "arms of the sea," that is, a body of water, such as Lake Pontchartrain, that is in the vicinity of the open Gulf and is *directly overflowed by the tides,* Yiannopoulos, 62 Tul. L. Rev. at 1363, land which is only subject to *indirect tidal overflow and is physically remote* from the open sea is not classified as seashore or as an arm of the sea and thus is potentially subject to private ownership. Accordingly, members of the public do not currently have the right to fish or engage in other recreational activities on such land relying on Article 452 of the Civil Code.

As numerous speakers and presentations noted to the Task Force, other states employ different rules to address questions of public access to water bodies adjacent to or connected with the sea or large water bodies. Notably, other coastal states allow some forms of public access (hunting, fishing, bathing, etc.) to coastal land covered by water subject to the ebb and flow of the tides relying on the common law public trust doctrine even when those states have chosen to give dominion over tidelands to private property owners. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 795-799, n. 12 (1988); James M. Klebba, *Water Rights and Water Policy in Louisiana: Laissez Faire Riparianism, Market Based Approaches, or a New Managerialism*, 53 La. L. Rev. 1779, 1810-11 (1993) (acknowledging jurisdictions which uphold rules allowing activities such as boating, canoeing, or rafting "even on non-navigable portions of seas whose bottoms and banks are privately owned").

3. Natural, Non-Navigable Water Bodies

The Louisiana Civil Code and Louisiana statutes clearly provide that *the beds* of inland, *non-navigable* water bodies are private things and thus may be owned by the State in its private capacity, a political subdivision of the State, or a private person and are, therefore, not inherently subject to public use. La. Civ. Code art. 506, La. Rev. Stat. 9:1115.2. In other words, naturally occurring inland ponds, swamp lands, shallow swales, and small streams, which are non-navigable in fact, are private things that can be purchased, sold, donated and lost by acquisitive prescription, just like any other privately owned land. Louisiana and federal courts have held that the mere fact that running water is contained in or passes through one of these non-navigable water bodies, such as a stream or pond, does not give members of the public a right to cross that private land on which that water body is located to gain access to the running water for activities such as fishing. *Buckskin Hunting Club v. Bayard*, 868 So.2d 266, 274 (La. App. 3 Cir. 2004) (presence of running water in private canal does not create public rights); *Parm v. Shumate*, 513 F.3d 135, 145 (5th Cir. 2007) (running water in nonnavigable lake does not create public rights).

4. *Phillips Petroleum* and the Public Trust Doctrine

Although the decision of the United States Supreme Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791 (1988) was narrow in scope and concerned water bottoms located in Mississippi, its impact on Louisiana nonnavigable water bottoms that are influenced by the ebb and flow of the tide has been debated for many years. In the *Phillips Petroleum* decision, the Court held that 42 acres of inland nonnavigable water bottoms underneath a bayou and eleven small streams that were subject to the ebb and flow of the tide because they were adjacent to and tributaries of the Jourdan River, a navigable stream flowing into the Gulf of Mexico, were owned by the State of Mississippi because, under the Equal Footing Doctrine, title to these lands "passed to the State of Mississippi upon its entrance into the Union." *Phillips Petroleum*, 108 S.Ct. at 795. Because the State of Mississippi had never relinquished ownership of those water bottoms, ownership of the water bottoms (and related mineral rights) remained with the State. Id. at 799 (noting that the Mississippi Supreme Court had held that, under Mississippi state law, "the State's ownership of these lands could not be lost via adverse possession, laches, or any other equitable doctrine").

In *Phillips Petroleum*, the Court acknowledged that some of its previous decisions had expanded the scope of the public trust doctrine to correspond with the reach of federal admiralty jurisdiction and thus encompass inland navigable water bodies, such as the Great Lakes and the nation's great arterial rivers, yet it explained that these decisions did *not limit* the reach of the public trust doctrine *or state ownership of lands* acquired under the Equal Footing Doctrine to navigable water bodies or navigable water bottoms. Id. at 796-97. For a brief history of the disposition and legal status of tidal lands that passed to the State of Louisiana upon its entry into the union in 1812 in light of *Phillips Petroleum*, see A.N. Yiannopoulos, *Five Babes Lost in the Tide, A Saga of Land Titles in Two States*: Phillips Petroleum Co. v. Mississippi, 62 Tul. L. Rev. 1357, 1359-63 (1988).

Professor Yiannopoulos' views of the ultimate impact of *Phillips Petroleum* are somewhat elusive.[5] After a detailed review of relevant portions of the Louisiana Civil

---

[5] On one hand, Professor Yiannopoulos declared:

> *Phillips Petroleum* appears to leave the Louisiana law governing sea, seashore, and inland nonnavigable water bodies unaffected. These are owned by the state in its capacity as a public person under the civil law equivalent of the public trust doctrine. Under the equal footing doctrine, Louisiana received lands affected by the tides up to the mean high water mark; however, under *its own law*, Louisiana retained ownership only up to the highest water mark during the winter season. Thus, in Louisiana, in contrast with Mississippi, a strip of land defined landward by the ordinary high water mark of the year and seaward of the highest water mark during the winter season may belong to the private owners.

Id. at 1369-70 (emphasis in original). On the other hand, he observed that:

> The impact of *Phillips Petroleum* in Louisiana, if any, will be limited to land titles under inland nonnavigable water bodies that are subject to the ebb and flow of the tide. Under *Phillips Petroleum*, such water bodies were conveyed to

Code, statutes, and Louisiana judicial decisions, he concluded that "the water bottoms involved in Louisiana decisions [marshland] were not similar to those involved in *Phillips Petroleum* [land beneath a small bayou and eleven small drainage streams], and one may plausibly assert that the question of the ownership of the kind of lands that were involved in *Phillips Petroleum* would be *res nova* in Louisiana." Id. at 1371. *See also* Id. at 1369, n. 53 (commenting on distinction between Louisiana decisions and *Phillips*). What is more, Professor Yiannopoulos suggested that "even if these [Louisiana] cases were indistinguishable, they may be overruled with retroactive effect and water bottoms may be recovered from persons claiming ownership under federal or state patents." Id. Thus, he concluded, "the same result as in *Phillips Petroleum* could be reached under Louisiana law," meaning that the State of Louisiana could, in theory perhaps, successfully assert ownership of such land and claim the related mineral rights. Id. at 1372.

Other detailed analyses of the reach of the public trust doctrine to nonnavigable water bodies that are affected by the ebb and flow of the tide and the impact of the *Phillips Petroleum* decision have reached conflicting conclusions. For instance, one co-authored study concluded that "it is arguable that Louisiana's public trust doctrine extends geographically today to the waters and bottoms of nonnavigable tidelands." James G. Wilkins and Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861, 900 (1992).

Another study undertaken by the Louisiana State Law Institute reached the opposite conclusion. Lawrence E. Donahue, Jr. and Patrick G. Tracy, Jr., Phillips Petroleum Co. v. Mississippi: *The Louisiana State Law Institutes' Advisory Opinion Relative to Non-Navigable Water Bottoms*, 53 La. L. Rev. 35 (1992). The authors of that study first observed that nonnavigable water bottoms, even if subject to the ebb and flow of the tide, "have been consistently recognized to be private things susceptible of private ownership, except to the extent that special statutes, such as Oyster Statutes, have prohibited their alienation by the State." Id. at 68. The authors then noted that "the legislative and jurisprudential history in this State does not reflect a public policy position recognizing public trust limitations upon, or precluding private ownership rights in, water bottoms affected by the ebb and flow of the tide acquired by Louisiana by the right of

---

> Louisiana as public trust lands under the equal footing doctrine, but whether these lands are owned by the state or by private persons is to be determined by state law. The State of Mississippi was able to demonstrate that it has, since its admission into the Union in 1817, claimed ownership of all water bodies within its borders that are affected by the tides. *Louisiana may be able to carry the same burden. Louisiana legislation, the Civil Code, and the special statutes may be properly interpreted to give the public trust the same scope as under* Phillips Petroleum *with respect to the inland nonnavigable water bodies that are subject to the ebb and flow of the tide.*

Id. at 1370 (emphasis added).

sovereignty under the *Phillips* decision." Id. at 70-71. This study finally concluded that "with respect to 'Phillips lands' (i.e., lands not covered by navigable waters including the sea and its shore but which are lands subject to being covered by water from the influence of the tide), which previously have been alienated by the state under laws existing at the time of such alienation, the U.S. Supreme Court's *Phillips* decision does not reinvest the State of Louisiana with any ownership of such lands." Id. at 78.

In 1992, shortly after publication of the Louisiana State Law Institute advisory opinion noted above, the Louisiana legislature passed La. Act No. 991 (1992), which enshrined into statute the Law Institute's interpretation of the *Phillips Petroleum* decision. In pertinent part, that act provides:

> B. Consistent with the Louisiana State Law Institute Advisory Legal Opinion Relative to Non-navigable Water Bottoms to the Louisiana Legislature on or about January 31, 1992, the legislature hereby finds that as to lands not covered by navigable waters including the sea and its shore, which are subject to being covered by water from the influence of the tide and which have been alienated under laws existing at the time of such alienation, the Phillips decision neither reinvests the state, or a political subdivision thereof, with any ownership of such lands nor does the state, or a political subdivision thereof, acquire any new ownership of such property.
>
> C. It is the intent of the legislature by the enactment of this Part to codify and confirm the law of Louisiana as heretofore interpreted by the courts thereof without change and without divesting the state, its agencies, or its political subdivisions of the ownership or rights as to any immovable property and without affecting the provisions of the state Oyster Statutes passed by the legislature since 1886. Furthermore, it is the intent of the legislature by the enactment of this Part that no provision herein shall be interpreted to create, enlarge, restrict, terminate, or affect in any way any right or claim to public access and use of such lands, including but not limited to navigation, crawfishing, shellfishing, and other fishing, regardless of whether such claim is based on existing law, custom and usage, or jurisprudence.

La. Rev. Stat. § 9:1115.1

5. Navigability

Many members of the public assume that a water body is navigable as a matter of law if a person can access that water body in a vessel of some kind.[6] Unfortunately, Louisiana law is more complicated and does not use a simple definition of this sort. In fact, neither the Louisiana Civil Code nor any Louisiana statute provides a definition of

[6] Many individuals who have offered comments to the Task Force have reiterated some version of the commonly held idea that a water body is navigable if "you can float a boat on it."

navigability. Instead, this characteristic of a water body has been defined by Louisiana courts. Generally, Louisiana courts have employed a test of navigability that focuses on whether the water body is capable of sustaining commerce in its natural or ordinary condition, without regard to man-made constructions. *State ex rel Guste v. Two O'Clock Bayou Land Co., Inc.*, 365 So.2d 1174, 1777-78 (La. App. 3 Cir. 1978); *Trahan v. Teleflex, Inc.*, 922 So.2d 718, 720-22 (La. App. 3 Cir. 2006); *Ramsey River Road Property Owners Association, Inc. v. Reeves,* 396 So.2d 873, 876 (La. 1981). The specific factors courts will consider in determining whether a particular water body is navigable in fact, and thus, generally speaking, navigable at law, include the water body's depth, width and location. *Two O'Clock Bayou*, 365 So. 2d at 1777; *Trahan*, 922 So.2d at 720 (quoting *Naquin v. Louisiana Power & Light Co.*, 98-2270, n. 4 (La. App. 1 Cir. 3/31/00), 768 So.2d 605).

When they refer to location, courts appear to be concerned with the water body's connectivity to other navigable water bodies; that is, whether a person can use the water body to travel someplace else. *Compare Trahan*, 922 So.2d at 720-22 (holding that a portion of English Bayou near Lake Charles is a navigable water body in part because it was possible to navigate from that portion of the bayou all the way to the Gulf of Mexico); *with Walker Lands, Inc. v. East Carroll Parish Police Jury*, 871 So.2d 1258, 1265–66 (La. App. 2 Cir. 2004) (holding that Gassoway Lake in Northeast Louisiana was not navigable because it was not directly connected to any other navigable body of water and only received water through a narrow drainage ditch that flowed from the Mississippi River). Determinations of navigability are often highly fact specific. *See e.g., Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249, 250-51 (1906) (holding that Irish Bayou is an arm of the sea, navigable, and not susceptible of private ownership as it is "a safe harbor, and has received stormtossed boats and afforded them ample protection . . . a large indentation on the coast of the lake and is in that light highly useful" but that Irish Lagoon, Branch Bayou, Little Irish Bayou are not navigable because they are always clogged and difficult to access in a pirogue and cannot sustain commercial trade); *Furie Petroleum, LLC v. SWEPI, LP*, 53,113 (La. 1 Cir. 11/20/2019), 2019 WL 6130683 (affirming trial court determination that a portion of Bayou Dolet in De Soto Parish was not a navigable water body in 1812).

In a completely different context, the United States Supreme Court addressed the scope of "navigable waters" and "the waters of the United States" for purposes of interpreting the Clean Water Act, 33 U.S.C. § 1362(7), in *United States v. Rapanos*, 547 U.S. 715 (2006). However, as none of the four opinions offered by the justices garnered a majority of the Court, lower courts have continued to struggle in defining "waters of the United States." For a recent discussion of the challenge of interpreting *Rapanos* and of recent agency rules promulgated in the context of the Clean Water Act, see Wade Foster, *Parsing Rapanos*, Harvard Environmental Law Review (April 7, 2018), available at https://harvardelr.com/2018/04/07/2642/.

Further complicating matters, federal courts use a still different definition of navigability for purposes of defining the scope of admiralty jurisdiction. According to the leading treatise, "[t]he modern formulation of the test of admiralty navigability may be stated as follows: a waterway is navigable for admiralty jurisdiction purposes, if it presently supports *interstate* commercial activity, or, if in its present condition, it is capable of supporting *interstate* commercial activity." Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3.3, at 148 (6th ed. 2018) (emphasis added).

For a detailed discussion of how other states address the relationship between the concept of navigability and the question of non-consumptive use of water, including recreational use of waters that might not constitute a navigable water body under traditional tests, see Richard R. Powell, 9 *Powell on Real Property, The Law of Water*, § 65-11[1]-[3] (2002). Reviewing recent developments, Powell makes two relevant observations. First, this authority notes that "in more recent years, a growing number of jurisdictions have rejected, at least in part, the traditional rule of 'public title' as the basis for the public right [of access to water]." Id. at § 65-11[3][a]. Further, this treatise observes that:

> some jurisdictions have departed from the "title test" approach and have held that public access should be based on the capacity of the water body to accommodate such use. Others have modified the applicable definition of navigability to include recreational use or have eliminated the threat of criminal prosecution for trespass for those who use "private" waters for recreational purposes.

Id. *See also* Id. § 65-11[3][b] (discussing various approaches to broad state definitions of navigability). Were Louisiana to move in this direction, it would represent a significant change in Louisiana law.

To summarize, when a water body is navigable in Louisiana, as that term is interpreted by Louisiana courts, the water body is usually a public thing subject to public use. However, it is important to realize that not every navigable water body is a public thing. An important exception involves canals.

6. Canals

One important wrinkle of Louisiana property law that affects the conflict over recreational access in coastal areas of Louisiana concerns man-made canals. A number of Louisiana judicial decisions have held that a canal, built entirely with private funds on private lands, is a private thing, even though the canal may be navigable in fact. *See e.g., Ilhenny v. Broussard*, 135 So. 669 (La. 1931); *National Audubon Society v. White*, 302 So.2d 680 (La. App. 3 Cir. 1974); *Vermillion Corp. v. Vaughn*, 356 So.2d 551 (La. App. 3 Cir. 1978); *affirmed in part, vacated in part, Vaughn v. Vermillion Corp.*, 444 U.S. 206, 100 S.Ct. 399 (1979); *People for Open Waters, Inc. v. Estate of Gray*, 643 So.2d 415 (La. App. 3 Cir. 1994); *Buckskin Hunting Club v. Bayard*, 866 So.2d 266, 273–75 (La. App. 3 Cir. 2004). There is United States Supreme Court authority supporting the proposition

that a man-made water body created by *altering, improving or destroying* an existing natural navigable water body can be burdened by a federal navigational servitude and thus would be subject to public use for purposes of navigation without any requirement of paying just compensation to the landowner that created the man-made water body. *Vaughn v. Vermillion Corp.*, 444 U.S. 206, 208 (1979). However, as of this time, there are no reported decisions in Louisiana in which litigants have been able to marshal the scientific evidence necessary to prove sufficient diversion and destruction of a natural navigable water body to warrant subjecting a privately built canal or other artificial water body to the federal navigational servitude. *See e.g., Buckskin Hunting Club v. Bayard*, 868 So.2d 266, 274-75 (La. App. 3 Cir. 2004) (denying plaintiff's claim under the diversion and destruction theory of *Vaughn* on the basis of insufficient expert testimony).

A relatively recent decision of the Louisiana Supreme Court has also held that even a long history of apparently permissive use of a privately built and owned canal by members of the public does not result in an implied dedication to public use absent clear and unmistakable evidence of an intent on the part of the landowner to dedicate the canal to public use and on the part of the public to accept the dedication. *Cenac v. Public Access Water Rights Association*, 851 So.2d 1006 (La. 2003).

7. Changes in Navigability over Time

As is evident by now, classification of a water body as navigable or non-navigable has many important consequences in Louisiana law. Navigability determines whether the bed of a natural water body is classified as a public thing under Article 450 or as a private thing under Article 506 of the Louisiana Civil Code and Louisiana Revised Statute 9:1115.2. Navigability also determines whether a water body is subject to public use under Article 452 of the Civil Code. If a particular water body was navigable in 1812 (the year Louisiana became a state), and the water body continues to be navigable today, the bed or bottom of that water body always was, and continues to be, a public thing. A.N. YIANNOPOULOS, 2 LOUISIANA CIVIL LAW TREATISE: PROPERTY § 4.2 (5th ed. 2015). Similarly, if a water body was non-navigable in 1812 and remains non-navigable today, the bed or bottom of that water body was, and still is, a private thing, even though the running water found in the water body is a public thing. *Id.* When the navigability status of a water body changes over time, however, the legal situation is more complicated. Two possibilities exist.

First, a water body that was navigable in 1812 might become non-navigable in subsequent years. In that case, at the moment the water body ceases to be navigable, the bed or bottom ceases to be a public thing and becomes a private thing that belongs to the state in its private capacity and is potentially alienable. *Id.* Although this scenario is certainly possible, it is not the primary problem faced by the Task Force.

The more common, and more problematic, issue arises when a water body that was originally non-navigable in 1812 subsequently becomes navigable as the result of some natural phenomenon or as a result of artificial works. One leading Louisiana legal scholar, the late A.N. Yiannopoulos, observed that a literal reading of Article 450 of the

Civil Code leads to the conclusion that "a body of water, which, though non-navigable in 1812, subsequently became navigable by operation of natural forces, is a public thing." YIANNOPOULOS, *supra*, § 4.2. Professor Yiannopoulos also noted that this literal application of Article 450 could give rise to an argument that the landowner has suffered an unconstitutional taking of property without just compensation under both the United States and Louisiana constitutions. *Id.* Professor Yiannopoulos also acknowledged a counter argument to this possibility based on the premise that any person who acquires land in Louisiana, particularly land encompassing a non-navigable water body or marshland near the coast, does so subject to Article 450 and thus, in effect, has been on notice that the underlying land or water bottom could become a public thing owned by the state if the water body ever became navigable. *Id.*

The source that Professor Yiannopoulos cited for this latter interpretation is commentary by another distinguished Louisiana property law scholar who was heavily involved in the drafting and adoption of the Louisiana Constitution of 1974. Lee Hargrave, *"Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 LA. L. REV. 647, 660-63 (1983). Professor Hargrave summed up *his* views in the following terms:

> Conversely, if a nonnavigable stream becomes navigable, it would cease to be susceptible of private ownership and would become property of the state. The argument that such a change in ownership may be a taking without due process . . . probably falls because such a loss is not caused by the state itself. Rather, the loss is part of the natural changes in water bodies. Indeed, if this is a taking without due process, the entrenched institution of loss of land by dereliction and by natural expansion of water bodies to cover more area should be equally unconstitutional.

Id. at 661. Both lines of argument—the claim that application of Article 450 to the bottoms of formerly nonnavigable water bodies or dry lands would amount to a taking and the claim that Article 450 always burdened such lands and thus no taking results—are only applicable to *natural changes* of water bodies. The consensus seems to be that changes in the status of land and water bodies resulting from artificial works should be analyzed in light of principles of delictual liability and *not* Article 450 of the Civil Code. *Id.*; YIANNOPOULOS, *supra*, § 4.2.[7]

---

[7] There is a dearth of case law on this question. One intermediate appellate court decision that was brought to the attention of the Task Force supports the Hargrave-Yiannopoulous view that when previously dry land or non-navigable marshland becomes submerged beneath a navigable water body, the land or water bottom becomes property of the state by virtue of its inherent sovereignty. *State v. Scott*, 185 So.2d 877 (La. App. 1 Cir. 1996). Louisiana case law is clear that when land adjacent to a navigable lake becomes submerged beneath the lake as a result of subsidence or erosion, that land becomes property of the State. *Miami Corp v. State*, 186 La. 784, 173 So. 315, 322-27 (1936). In neither case, though, was the question of whether an uncompensated taking of private property raised. It should also be noted that, under the law of

Several recent student comments published in Louisiana law reviews agree with the Hargrave-Yiannopoulos view that all previously dry land, swampland, marshland or dry land that featured a non-navigable water body of some sort and that has become submerged beneath a navigable water body as a result of natural forces either after Louisiana became a state in 1812 or after alienation by the state is now, as matter of law, a public thing owned by the state. Jacques Mestayer, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 La. L. Rev. 889 (2016); Anais M. Jaccard, *Article 450 to the Rescue: How the Louisiana Civil Code Promotes and Prevents Comprehensive Coastal Restoration*, 93 Tul. L. Rev. 681 (2019). Of course, these are only persuasive authority and not binding on any court.

The problem of sorting out the competing property rights claims of the state and private owners of land beneath formerly non-navigable water bodies that may now be navigable in fact and law is primarily one that occurs in the coastal zone of Louisiana. Although it is possible that this phenomenon can arise in other areas of the state and could lead to confusion about property rights and recreational access, the Task Force has focused its attention on competing property claims and access rights in the coastal areas of the state.

8. The Freeze Statute (La. Rev. Stat. 9:1151)

Suppose the second, Hargrave-Yiannopoulos hypothesis about the effect of changing navigability described above is correct. In that case, a previously non-navigable water bottom inundated as a result of erosion, subsidence and sea-level rise to such a degree that it is now covered by a navigable water body would be a public thing, subject to state ownership. Does this mean that the private land owner has lost all mineral rights associated with that water bottom? The Louisiana legislature addressed this question with special legislation, originally enacted in 1952, amended in 2001, and now commonly known as the "Freeze Statute." That statute provides as follows:

> *In all cases where a change occurs in the ownership of land or water bottoms as a result of* the action of a navigable stream, bay, lake, sea, or arm of the sea, in the change of its course, bed, or bottom, or as a result of accretion, dereliction, *erosion, subsidence, or other condition resulting from the action of a navigable stream, bay, lake, sea, or arm of the sea, the new owner of such lands or water bottoms, including the state of Louisiana, shall take the same subject to and encumbered with any oil, gas, or mineral lease covering and affecting such lands or water bottoms, and subject to the mineral and royalty rights of the lessors in such lease, their heirs, successors, and assigns*; the right of the lessee or owners of

---

accession, when new land forms along the bank of a river or stream as the result of accretion or dereliction, that new land belongs to the riparian owner. La. Civ. Code art. 499. A landowner who owns land adjacent to the shore of the sea or a lake, however, does not have a right to alluvion or dereliction. La. Civ. Code art. 500.

such lease and the right of the mineral and royalty owners thereunder shall be in no manner abrogated or affected by such change in ownership.

La. Rev. Stat. 9:1151 (1952, amended 2001) (emphasis added).

On one hand, the scope of this statute is broad. It addresses not only water bottoms of formerly non-navigable water bodies but also formerly dry lands subsequently inundated to such a degree that they now underlie a navigable water body. The 2001 amendments broadened the statute's reach by adding references to "erosion" and "subsidence" and to the "sea or arm of the sea" in response to the phenomenon of coastal erosion and wetland loss in coastal Louisiana. On the other hand, the statute only addresses the consequences of natural, not artificial, changes to water bodies resulting from course changes or from "accretion, dereliction, erosion, subsidence, or other condition."

The basic purpose of the statute is clear. When natural forces cause a non-navigable water body to become navigable or cause formerly dry land to be inundated to the extent that it now forms a navigable water body, changes in ownership of the underlying water bottoms are anticipated, including a transfer of ownership to the State of Louisiana. At the same time, however, the statute preserves the rights of parties to an *existing mineral lease*, including those of mineral lessors and lessees, and mineral royalty owners other than the surface owners.

The statute thus reflects the practical fact that once previous swamp land or dry land becomes inundated to such a degree that it now forms a navigable water body, mineral rights are likely the primary concern of the original landowner. From the perspective of a private landowner, the crucial limitation of the Freeze Statute is that it only protects rights connected with a mineral lease that *was in effect at the time of change of ownership*. The Freeze Statute does not offer any protection to a landowner whose land has been inundated and transformed into a navigable water body when the land *was not leased for mineral development or when separate mineral rights had not been previously established in the land. See Cities Service Oil and Gas Corp. v. State*, 574 So.2d 455, 463 (La. App. 2 Cir. 1991) (in case involving change of course of Red River, court held that the Freeze Statute is only applicable if a change of ownership occurs and a mineral lease is in effect covering lands or water bottoms at issue, but noting that mineral production from leased land is not required for the mineral lease protection to be effective, and also noting that the Freeze Statute does not establish imprescriptible mineral rights). For a more recent decision applying the Freeze Statute and a related statute, La. Rev. Stat. § 1152 (1984), see *Plaquemines Parish Government v. State*, 826 So.2d 14, 21-22 (La. App. 4 Cir. 2002) (holding that trial court was correct in applying Freeze Statute to tract of land that became inundated under the open waters of the Gulf of Mexico, and also holding, under La. Rev. Stat. § 1152, the mineral rights of parish government, the successor to a local levee district, were retained as long as a mineral lease granted in 1938 was still in effect at time of change of ownership resulting from erosion and subsidence).

9. Dual-Claimed Land

A great deal of legal ambiguity results from the potential application of Article 450 to recently submerged coastal marshland and to land covered by previously non-navigable, natural water bodies that may be navigable in fact today. Further ambiguity results from "transfers" of lands that occurred in the nineteenth or early twentieth century (technically severance of land from State ownership) that current private landowners claim were valid transfers of non-navigable water bottoms but that the State considers to have been null and void, unconstitutional transfers of navigable water bottoms.[8] Consequently, a private land owner and the State of Louisiana may both have arguable claims of title or ownership to the same water bottoms, resulting in a category of land or water bottoms known among those who deal with such land as "dual-claimed land."

In recent years, the State Land Office has established a statewide inventory of state-owned water bottoms and of land or water bottoms *claimed* to be owned by the State. As explained by the submission of Blake Canfield, Louisiana Department of Natural Resources (LDNR), the State Mineral and Energy Board is authorized to administer the State's proprietary interests in minerals, including its rights to lease public land or water bottoms for oil, gas, and mineral development. La. Rev. Stat. 30:124(B). See Exhibit C.12 at 2. Practically speaking, prospective oil and gas lessees often lease mineral rights from both the State and private landowners when both claim ownership of an area. Often, royalties due under these leases are placed in escrow until the dispute is resolved.[9]

The process of negotiating settlements between the State and private landowners involves several steps. First, when the lands or water bottoms are subject to dual claims and implicate mineral production, the Louisiana Department of Natural Resources coordinates with the Louisiana Attorney General's Office and the State Land Office to make a recommendation to the State Mineral and Energy Board regarding possible litigation or settlement. Settlements are often reached to avoid the cost and uncertainty associated with litigation. Consequently, most settlements do not decide the boundaries between State and privately owned land or water bottoms. Instead, settlements allocate specific percentages of past and future mineral production to both the State and private landowners for a discernable period of time. As most settlements are entered into on the basis of the State Mineral and Energy Board's legislative directive to manage the State's minerals for proprietary purposes and its interest in maximizing revenue for the State in light of potential risks, costs, and benefits, most settlements do not currently address

---

[8] For a discussion of the constitutional limits upon the state's ability to transfer the beds of navigable water bodies, La. Const. Art. IX, § 3 (1974), see Part F below.

[9] Another complication that arises in these disputes is that many areas included in nineteenth century patents from the State were not yet surveyed at the time of severance from state ownership. Accordingly, the State often takes the position that while a particular patent was not wholly invalid, it may be invalid as to waterways that were navigable in 1812 or the time of severance. In other words, nonnavigable marshland was potentially transferable, but navigable water bottoms were not. See Remarks of Cheston Hill to PRATF, Sep. 13, 2018, Exhibit C.2 at 2.

issues such as public access. See Blake Canfield, *Settlement of Mineral Disputes on Dual Claimed Water bottoms,* Presentation to PRATF, April 2, 2019, Exhibit C.12 at 4.

10. Trespass under Louisiana Law; No Exception for Recreational Access

Trespass is defined in two ways in Louisiana. First, for purposes of a civil action seeking monetary damages or injunctive relief, Louisiana courts consistently define a civil trespass as "an unlawful physical invasion of the property or possession of another person." *Lacombe v. Carter*, 975 So.2d 687, 689 (La. App. 3 Cir. 2008); *Griffin v. Abshire*, 878 So.2d 750, 757-58 (La. App. 3 Cir. 2004). Importantly, a plaintiff in a civil trespass action need not show a perfect title to state a cause of action; indeed, defects in the plaintiff's title are not a defense to a trespass action. *Lacombe*, 975 So.2d at 689. Once a plaintiff in a trespass action has established ownership or possession of the land at issue, the plaintiff need only prove damage "based on the result or consequences of an injury flowing from the act of trespass." *Lacombe*, 975 So.2d at 689 (quoting *Griffin*, 778 So.2d at 757). A person wronged by a civil trespass is not limited to direct economic damages but may also recover "general damages suffered, including mental and physical pain, anguish, distress, and inconvenience." *Lacombe*, 975 So.2d at 690.

Trespass is also defined as matter of criminal law in Louisiana. Louisiana Revised Statute § 14:63, which forms part of Louisiana's criminal code, provides, in pertinent part, that:

> B. No person shall enter upon immovable property owned by another without express, legal or implied authorization . . . [omitting new subsections dealing with drones]
>
> C. No person shall remain in or upon property, movable or immovable, owned by another without express, legal, or implied authorization . . . [omitting new subsections dealing with drones]
>
> D. It shall be an affirmative defense to a prosecution for a violation of Subsection A, B or C of this Section, that the accused had express, legal or implied authority to be in the movable or on the immovable property.

Subsection E of this statute provides that "the following persons may enter or remain upon the structure, watercraft, movable or immovable property, of another:"

> (1) A duly commissioned law enforcement officer in the performance of his duties.
>
> (2) Any firefighter, whether or not a member of a volunteer or other fire department, and any employee or agent of the Louisiana Department of Agriculture and Forestry engaged in locating and suppressing a fire.

(3) Emergency medical personnel engaged in the rendering of medical assistance to an individual.

(4) Any federal, state or local government employee, public utility employee or agent engaged in suppressing or dealing with an emergency that presents an imminent danger to human safety or health or to the environment.

(5) Any federal, state or local government employee, public utility employee or agent in the performance of his duties when otherwise authorized by law to enter or remain on immovable or movable property.

(6) Any person authorized by a court of law to enter or remain on immovable property.

(7) Any person exercising the mere right of passage to an enclosed estate, as otherwise provided by law.

These categories of persons thus have absolute immunity from criminal liability for trespass.

Several more categories of persons are authorized "to enter or remain upon immovable property of another, unless specifically forbidden to do so by the owner or other person with authority, either orally or in writing." La. Rev. Stat. § 14:63(F). These categories of persons, who have a qualified, but not absolute, right of entry, include:

(1) A professional land surveyor or his authorized personnel, engaged in the "Practice of Land Surveying", as defined in R.S. 37:682.

(2) A person, affiliate, employee, agent or contractor of any business which is regulated by the Louisiana Public Service Commission or by a local franchising authority or the Federal Communication Commission under the Cable Reregulation Act of 1992 or of a municipal or public utility, while acting in the course and scope of his employment or agency relating to the operation, repair, or maintenance of a facility, servitude or any property located on the immovable property which belongs to such a business.

(3) Any person making a delivery, soliciting, selling any product or service, conducting a survey or poll, a real estate licensee or other person who has a legitimate reason for making a delivery, conducting business or communicating with the owner, lessee, custodian or a resident of the immovable property, and who, immediately upon entry, seeks to make the delivery, to conduct business or to conduct the communication.

(4) An employee of the owner, lessee or custodian of the immovable property while performing his duties, functions and responsibilities in the course and scope of his employment.

(5) The owner of domestic livestock or his employees or agents while in the process of retrieving his domestic livestock that have escaped from an area fenced to retain such domestic livestock.

(6) The owner of a domestic animal while in the sole process of merely retrieving his domestic animal from immovable property and not having a firearm or other weapon on his person.

(7) Any candidate for political office or any person working on behalf of a candidate for a political office.

(8) The owner or occupant of a watercraft or vessel traveling in salt water engaged in any lawful purpose for the purpose of retrieval of his property or for obtaining assistance in an emergency situation.

La. Rev. Stat. § 14:63(F). Recreational sportsmen are not identified in either class of persons enjoying absolute or qualified immunity from criminal liability under this statute.

Putting aside recreational fishing, it should be remembered that Louisiana courts have recognized since the 1920s that licensed hunters do not have a legal right to gain access to uncultivated and unfenced land. *Buras v. Salinovich*, 154 La. 495, 97 So. 748 (La. 1923). This rule, however, was not always dominant in the United States. In the early nineteenth century, many states, particularly in the South, followed the rule that hunting on uncultivated and unfenced land was generally permissible. A similar rule allowed owners of domestic animals like cattle and pigs to graze their animals on the uncultivated and unfenced lands of others. The rationale behind these rules was that if a landowner wanted its land to be completely off-limits for hunting and grazing, it was up to that owner to fence it in. This practice enabled small, subsistence farmers to enhance their income and food sources by hunting and grazing their animals on the millions of acres of uncultivated and unfenced land in the United States at the time. Over the course of the second half of the nineteenth century, this "open grange" or "open range" approach, allowing public access to private land, was gradually superseded by statutes allowing landowners to "enclose" uncultivated and unfenced land by merely posting signs. For more on the historical context of the open grange, see generally Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMPLE L. REV. 665 (2011); Brian Sawers, *The Right to Exclude after Emancipation: A Quantitative Study* (Jan. 16, 2012) at https://www.researchgate.net/publication/228165303_The_Right_to_Exclude_after_Emancipation_A_Quantitative_Study; ERIC FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 29–57 (2007).

Prior to the amendment of Louisiana's criminal trespass statute in 2003, La. Rev. Stat. § 14:63 was structured somewhat differently. The pre-2003 statute provided a number of affirmative defenses for persons who entered immovable property of another person. Most pertinent for this report was subsection (C)(2), which provided: "It shall be an affirmative defense to a prosecution pursuant to Subsection (B)(2) to show that property was not adequately posted in accordance with Subsections D or E or F of this Section." Subsections D, E, and F provided detailed rules about posting marks and signs on different kinds of property. See generally La. Act No. 802 (2003).

11. Louisiana Tort Immunity Statutes for Permissive Recreational Access

Two Louisiana statutes provide relatively broad tort immunity for landowners and certain derivative use right holders who make their land available for recreational use. La. Rev. Stat. § 9:2791 (1964, amended 1989, 2003) and La. Rev. Stat. 9:2795 (1975, amended 1986, 1989, 1995, 1996, 2001). These two statutes, collectively referred to as the Recreational Use Statutes (RUS) address the same subject and were adopted to encourage landowners and other right holders to open up land on a *non-profit basis* for recreational access. Courts have held that these two statutes must be interpreted *in pari materia*. *Verdin v. Louisiana Land and Exploration Co.*, 693 So.2d 162, 165 (La. App. 4 Cir. 1997). However, when there is a conflict between the two statutes, the Louisiana Supreme Court has instructed that the latter statute, Section 2795, which provides a more expansive form of immunity, must be considered as controlling. *Richard v. Hall*, 874 So.2d 131, 151 (La. 2004).

The first statute, La. Rev. Stat. 9:2791,[10] essentially provides that a landowner, lessee, or occupant that does not use its property primarily for commercial recreational purposes does not owe a duty of care to, or assume responsibility for, or incur any liability towards a recreational invitee. Historically, courts have held that in order for a landowner to claim immunity under the statute:

---

[10] The statue provides in pertinent part:

> An owner, lessee, or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, camping, hiking, sightseeing, or boating or to give warning of any hazardous conditions, use of, structure, or activities on such premises to persons entering for such purposes, whether the hazardous condition or instrumentality causing the harm is one normally encountered in the true outdoors or one created by the placement of structures or conduct of commercial activities on the premises. *If such an owner, lessee, or occupant gives permission to another to enter the premises for such recreational purposes he does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to persons or property caused by any act of person to whom permission is granted.*

La. Rev. Stat. § 9:2791(A) (emphasis added).

(1) The land upon which the injury occurs must be undeveloped, nonresidential and rural or semi-rural.

(2) The injury itself must be the result of a recreation that can be pursued in the "true outdoors."

(3) The injury-causing instrumentality must be of the type normally encountered in the "true outdoors" and not of the type usually found in someone's back yard.

Cooper v. Cooper, 786 So.2d 240, 244 (La. App. 2 Cir. 5/9/01). Recent decisions, however, have emphasized that the essential test for application of the amended version of the statute focuses on the second prong of the historical test, i.e., whether the alleged injury is the result of a recreational activity that can be pursued in the true outdoors.

The second statute, La. Rev. Stat. § 9:2795, is similarly designed to provide "an owner of land, [defined broadly to include "a possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises"] with immunity from liability for injuries sustained on their property, absent a willful or malicious failure to warn against a dangerous condition, use, structure, or activity."[11]

There is a significant amount of reported case law interpreting and applying these statues. In a few instances, courts have held that landowners, or other defendants related to landowners, were not immune from suit for injuries sustained by invitees, but these

---

[11] The pertinent part of the statute provides:

> B. (1) *Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity,* an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:
> (a) Extend any assurance that the premises are safe for any purposes.
> (b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.
> (c) Incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring or man-made.
> (2) The provisions of this Subsection shall apply to owners of commercial recreational developments or facilities for injury to persons or property arising out of the commercial recreational activity permitted at the recreational development or facility that occurs on land which does not comprise the commercial recreational development or facility and over which the owner has no control when the recreational activity commences, occurs, or terminates on the commercial recreational development or facility.

La. R.S. § 9:2795 (B) (1) & (2) (emphasis added). The broad definition of an "owner," which roughly corresponds with La. Rev. Stat. § 9:2791, but which confusingly employs common law terminology alien to Louisiana property law, is found in La. Rev. Stat. § 9:2795(A)(2).

involve extremely narrow and unusual circumstances. *See e.g., Cooper v. Brownlow*, 491 So.2d 693, 695 (La. App. 5 Cir. 1986) (holding levee district not immune from liability for fireworks injuries sustained by a boy attending a bonfire on levee supervised by levee district); *Reed v. Employee Mutual Co.*, 741 So.2d 1285, 1289 (La. App. 2 Cir. 1999) (holding treasurer of hunting club was not immune from suit for injuries sustained as a result of plaintiff falling from a deer stand even though hunting club, as lessee, was immune from liability).

Broadly speaking, however, these statues have protected landowners from liability in most cases. *See, e.g., Verdin v. Louisiana Land and Exploration Co.*, 693 So.2d 162, 170-71 (La. App. 4 Cir. 1997) (no landowner liability for boaters injured when their flat bottom skiff hit concrete survey marker in marshy area while they were returning from a fishing trip); *Dowdle v. State*, 272 So. 3d 77 (La. App. 3 Cir. 2019) (State not liable for bicyclist injured when trying to stop to avoid a large pothole on State park road); *Doyle v. Lonesome Development, LLC*, 254 So. 3d 714 (La. App. 1 Cir. 2018) (member of homeowners' association not liable for child's injuries when rotten tree branch fell on him while playing soccer in common area of residential subdivision). That said, there may well be ways to strengthen landowner immunity for recreational access under these statues.[12]

One particular avenue for reform, suggested by landowner representatives during Task Force deliberations, would be to clarify the categories of derivative right holders, other than an "owner," "lessee," or "occupant," that are entitled to immunity under the statutes. The first statute, La. Rev. Stat. § 9:2791, provides immunity for "an owner, lessee, or occupant." The second, somewhat broader statute, La. Rev. Stat. § 9:2795, provides immunity for an "owner," a term which is defined to include "a possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises." Although appellate court decisions have addressed whether a particular oral agreement gave rise to a "lease," and whether an officer of a hunting club entitled to use land was an "occupant" for purposes of claiming immunity under the statutes,[13] it is not clear whether a mineral

---

[12] In addition to these immunity statutes, La. R.S. § 49:214.6.10.C grants immunity to owners of land when they provide property interests for coastal projects at no cost to the state. The statute provides immunity for premises liability, loss, damage, or injury to third parties resulting or caused by construction, operation or maintenance of the project.

[13] *Compare Richard v. Hall*, 874 So.2d 131, 141-46 (La. 2004) (holding that oral agreement whereby owner of commercial recreational development gave an employer hunting rights for a fixed consideration was a lease, rather than a personal servitude of right of use, and thus employer qualified as "lessee" under Recreational Use Immunity Statutes), *with Reed v. Employers Mutual Casualty Co.*, 741 So.2d 1285, 1288-89 (La. App. 2 Cir. 1999), *writ denied*, 752 So.2d 864, (2000) (holding that an "occupant" is a person who, in his own name, has the right to control the premises, *i.e.*," to make land and water areas available to the public for recreational purposes," and that hunting club officer and member was not an "occupant" entitled to immunity under Recreational Immunity Statutes because, although he signed lease as mandatory for hunting club and as member had right to hunt on the premises, he did not have the right to make land and water available to public for recreational use).

lessee or mineral servitude holder would be granted immunity under these statutes. Clarification of or expansion of the categories of right holders entitled to immunity under these statutes could be an important piece of any comprehensive reform legislation addressing recreational access to water bottoms in the coastal zone.

As noted below, none of the stakeholders who made presentations to this Task Force oppose amendments to these statutes that could have this effect. Another possible avenue for reform would be for the Legislature to ask the Louisiana State Law Institute to study this subject and propose legislation that would consolidate the two existing recreational use statutes into a single statute which would in turn be easier to interpret and use and would be more consistent with Louisiana civil law concepts and terminology.

F. Background Principles of Louisiana Constitutional Law

Several fundamental principles of Louisiana constitutional law also have a significant impact on the recreational access conflicts—and the potential solutions to those conflicts—addressed by this report. First, and most important, Article IX, Section 3 of the Louisiana Constitution flatly prohibits the Louisiana legislature from alienating or authorizing the alienation of the bed of a navigable water body except for purposes of reclamation by the riparian landowner to recover land lost through erosion. La. Const. Art. IX, § 3 (1974). The full text of this important constitutional provision states:

> The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.

Although this constitutional prohibition is not implicated when the state and a private landowner enter a settlement with respect to dual claimed water bottoms that allocate mineral production for a set time period, it is not clear whether a settlement between the State and a private landowner with respect to such water bottoms that purports to establish ownership boundaries and permanent mineral rights would violate Article IX, § 3.

In addition, Article IX, Section 4 of the Louisiana Constitution is also potentially relevant to the issues addressed in this report. This section requires the State to reserve mineral rights on property "sold" to a private party.[14] A 1995 amendment to this part of

[14] The pertinent part of this constitutional text states:

> (A) Reservation of Mineral Rights. The mineral rights on property sold by the state shall be reserved, except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes. The mineral rights on land, contiguous to and abutting navigable water bottoms reclaimed by the state through the implementation and construction of coastal

the Constitution, which was introduced and adopted to clear the way for the settlement of a dispute between the State and a private landowner over the status of property rights on a barrier island, clarified that "[t]he mineral rights on land contiguous to and abutting navigable water bottoms reclaimed by the state through the implementation and construction of coastal restoration projects shall be reserved, except when the state and landowner having the right to reclaim or recover the land have agreed to the disposition of mineral rights in accordance with the conditions and procedures provided by law." La. Const. Art. 9, § 4.

The Louisiana Supreme Court has held reservations of mineral interests to landowner-vendors under Article IX, Section 4 to be automatic in any transfers of State land after 1921. *See Lewis vs. State*, 156 So.2d 431, 434 (La. 1963). The Louisiana Supreme Court, however, has also recognized that the State can acknowledge the ownership of a disputing landowner with respect to a particular tract of land without a reservation of mineral rights as part of a good faith compromise of competing claims to that land and that such an acknowledgment without reservation of mineral rights does not run afoul of Article IX, Section 3. *See American Lung Assoc. vs. State Mineral Board*, 507 So.2d 184, 189-191 (La. 1984); *see also Plaquemines Parish Gov't v. Getty Oil Co.*, 95-C-2452 (La. 5/21/96), 673 So.2d 1002.[15]

It should be noted that there is no constitutional or statutory prohibition on a transfer of privately owned water bottoms or any other land *from a private land owner to the State* in which the State reserves mineral rights to the private landowner. Indeed, other provisions of Louisiana law declare that when the State of Louisiana, a political subdivision of the State, or the United States purchases or otherwise acquires land in Louisiana and expressly reserves the mineral rights to the landowner, those mineral rights are automatically considered to be imprescriptible (i.e. prescription of nonuse is suspended as long as title to the land remains with "the acquiring authority"), unless a mineral right subject to prescription has already been established over the land at the time it is acquired by an acquiring authority. La. Rev. Stat. 31:149(B),(D).

> restoration projects shall be reserved, except when the state and the landowner having the right to reclaim or recover the land have agreed to the disposition of mineral rights, in accordance with the conditions and procedures provided by law.
>
> (B) Prescription. Lands and mineral interests of the state, of a school board, or of a levee district shall not be lost by prescription except as authorized in Paragraph C.La. Const. Art. IX, § 4.

[15] In *American Lung*, the Louisiana Supreme Court was closely divided, with one justice noting that placing an agreement for the transfer of land "in the guise of a compromise did not take the conveyance outside the constitutional prohibition against the sale of state mineral rights" and that "Louisiana's constitutional prohibition manifests a strong public policy against alienation of the state's mineral resources." *American Lung*, 507 So.2d at 913 (Watson, J. dissenting).

Another potentially relevant provision of the Louisiana Constitution prohibits the state from donating, unless otherwise authorized by the Constitution, property or any "things of value" to any person, association or corporation. La. Const. Art. VII, § 14 (1974). In other words, the State cannot transfer property or a thing of value to another person without the expectation of receiving in exchange something of equal or greater value. Whether this provision may apply to boundary agreements over dual claimed water bottoms would depend on the specific facts involved. See Exhibit C.12 at 7.[16]

G. Impact of Current Uncertainty Respecting Water bottoms on Recreational Sportsmen and Recreational Tourism

The Task Force has received a considerable amount of testimony from individuals involved in outdoor recreation and representatives of organizations that support outdoor recreation, recreational fishing, and boating. This testimony presents a number of common themes. First, sportsmen often have difficulty determining the boundary in any particular location between a state-owned or state-claimed navigable water body or water bottom, where sportsmen enjoy or may enjoy a legal right of public use, and a privately owned or privately claimed non-navigable water body or bottom, where they do not or may not enjoy such use rights. Further, in some areas, privately owned or privately claimed water bottoms are posted as private property, yet in other similarly owned or claimed areas, these lands are not posted. The task force has also received testimony indicating that in some cases recreational sportsmen have been threatened with arrest for criminal trespass. Many speakers, organizational leaders and members of the public warned about economic losses that can result from diminished (or the perceived diminishment) of public recreational access to waterways in coastal Louisiana. Others addressed the negative impact on intergenerational traditions of recreational access.

Several speakers discussed the economic benefits associated with recreational fishing in Louisiana. According to the Louisiana's Sportsmen's Coalition, a report by the American Sportfishing Association observes that Louisiana recreational fishing creates an economic output of $1.5 billion annually.[17] According to the same source, the National Oceanic and Atmospheric Administration estimates that Louisiana recreational fishing accounts for 15,000 jobs.[18] The Louisiana Sportsmen's Coalition also cites Stan Mathes, tourism director for Plaquemines Parish, who estimates that each out-of-state angler who

---

[16] The determination of whether a boundary agreement, or any agreement between the state and a private person for that matter, violates Article VII, Section 14 of the Louisiana Constitution is a fact specific inquiry and would likely turn on considerations similar to those outlined in relevant case law. *See, e.g., Board of Directors of Indus. Development Bd. Of City of Gonzales, Louisiana, Inc., v. All Taxpayers, Property Owners, Citizens of City of Gonzales, et al*, 938 So.2d 11, 24-27 (La. 2006) (finding that terms of tax increment financing scheme to facilitate a private retail development were not gratuitous and thus the project did not include a loan or donation of public funds to a private retailer in violation of Article VII, Section 14.A.).

[17] Louisiana's Sportsmen's Coalition, *Louisiana's Posted Paradise: Protecting Public Access to our Tidally-influenced Waters*, Presentation to PRATF, Oct. 29, 2018, Exhibit C.3, at 4.

[18] Exhibit C.3, at 4.

travels to his parish spends between $1,000 and $2,000 over the course of a weekend.[19] According to a representative of Backcountry Hunters & Anglers, non-resident anglers (including both fresh and saltwater anglers) account for retail sales of $246,578,288 and an overall economic impact of $394,057,860.[20] The same representative also reported his understanding that Louisiana's Tourism Sector is the second largest revenue generator behind food and beverage, stating that non-resident fishing licenses generated over $23 million in tax revenue alone according to a 2007 survey.[21]

Some presenters cited concerns that access issues may impact economic investment decisions for companies catering to recreational hunting and fishing. Tom Rosenbaur, Director of Marketing for Orvis, reportedly described the impact of uncertainty about public recreational access in Louisiana on investment decisions in the following terms:

> Louisiana has historically been an important market for Orvis, and as such, Orvis has heavily invested in Louisiana with a retail store in Baton Rouge, an endorsed lodge and two endorsed guide services as well. Louisiana is the epicenter of fishing for big redfish in shallow water, and as a result has become an important destination to our customers from around the world. Louisiana is a growing market for the Orvis brand, however the developing public access issues give us pause as we begin to think about our market strategies for the future. It is undeniable that more access for sportsmen positively correlates to stronger engagement by the public and thus healthier markets for the outdoors industry.[22]

Similarly, a representative of Backcountry Hunters & Anglers, reported this statement from YETI, an outdoor recreation supply company:

> YETI was founded in Austin, Texas in 2006 with an emphasis for providing durable coolers for hunters and anglers. Our roots quickly spread throughout the southeast. Louisiana is home to a high density of YETI consumers, most of which are outdoorsman. They rely on our products to keep them comfortable from the harsh elements. Limiting access in Louisiana's public waterways can, and will have, a negative impact on YETI's business. We encourage our consumers to enjoy the wild places, and stand for increasing public access to those wild places.[23]

The Task Force also received testimony indicating that because of the uncertainty regarding recreational access to water bodies in Louisiana, some major organizations that host large fishing tournaments, such as those hosted by B.A.S.S., have declined to host

---

[19] Exhibit C.3, at 4.
[20] Remarks of Josh Kaywood, Backcountry Hunters & Anglers, Oct. 29, 2018 PRATF, Exhibit C.4, at 1.
[21] Exhibit C.4, at 2.
[22] Exhibit C.4, at 2.
[23] Exhibit C.4, at 2-3.

events in Louisiana, leading to a loss of economic activity and sales tax revenue for the State. Gene Gilliland, Conservation Director of B.A.S.S. addressed this issue at the February 19, 2019 Task Force meeting.[24] In his presentation, Mr. Gilliland quoted B.A.S.S. Tournament Director, Trip Weldon, on the reasoning behind the organization's decision to not host tournaments in parts of Louisiana:

> In two previous Elite Series tournaments, and one Bassmaster Open, out of Orange [Texas], Louisiana's unusual laws governing access to navigable waters have created conflict and confusion among anglers. Due to the grey areas in Louisiana Delta/Tidal waters that could create an uneven playing field, the 2018 Elite event in Orange will be restricted to Texas waters only. Similar problems exist in the Atchafalaya Basin area of south-central Louisiana, a large portion of which is privately owned. B.A.S.S. has also decided not to schedule professional tournaments in that area until and unless the public access issues are resolved.[25]

Mr. Gilliland stated that each Elite Series tournament produces an economic impact of approximately $2.5 million and each Open Series event results in an economic impact of approximately $ 2.1 million.[26] Some estimates of economic impact are far greater. For instance, the Bassmaster Classic held in Shreveport, Louisiana in 2012 along with the associated Bassmaster Classic Outdoors Expo presented by Dick's Sporting Goods attracted approximately 137,700 visitors and had an estimated impact of $27 million according to an economist at LSU-Shreveport.[27]

Chris Macaluso, Marine Fisheries Director for the Theodore Roosevelt Conservation Partnership, addressed the following policy impacts associated with the 2011 Bassmaster Classic held in New Orleans:

> We know that B.A.S.S. has decided that this conflict is not something they want affecting their tournaments. While some have been dismissive of that decision, I am very disappointed. Not only because of the lost tens of millions that a Bassmaster Classic brings, but because I firmly believe that having the classic in New Orleans in 2011 had a tremendous impact on us passing the RESTORE Act in Congress and reassuring the rest of the nation that our fisheries were open for business and our state had survived the oil spill and was recovering from Hurricanes Katrina, Rita, Gustav and Ike.
>
> B.A.S.S. contemplated not coming to New Orleans for that classic, about 6 months after the Macondo well had been capped, because of the

[24] Remarks of Gene Gilliand, *Guaranteeing a Level Playing Field – the B.A.S.S. Perspective,* to PRATF, Feb. 19, 2019, Exhibit C.9.
[25] Exhibit C.9, at 6.
[26] Exhibit C.9, at 20.
[27] Exhibit C.9, at 23.

perception that we were covered in oil. Turns out, it was arguably the best Bassmaster Classic in history. The largest stringer ever landed in a classic, and caught in the mouth of the Davis Pond Diversion, by the way. That Classic gave sportsmen's groups the opportunity to talk to media across the country and to the largest boat and tackle makers in the world to convince them that our state was okay, that people should come here to fish but also that Congress needed to direct oil spill penalties back to our state to help restore and protect the coast. Hundreds of outdoor businesses and thousands of individuals from across the country signed a letter to Congress urging passage of the Restore Act at that Classic and the one the next year in Shreveport. I firmly believe that support helped the Restore Act pass and helped assure people Louisiana was worth coming to."[28]

Several speakers informed the Task Force that they are concerned about the impact that limitations on public access may have on local industries associated with recreational fishing, such as boat and motor manufacturers and retailers, as well as bait shops, gas stations, and boat launches. Richard Cantrelle, an interested member of the public, cited approximately $2 billion annually generated by recreational fishermen.[29] Sean Robbins, a member of the Task Force appointed by the Louisiana Sportsmen's Coalition, stated that people will not buy the expensive outboard motors or boats for recreational fishing if they cannot get to where the fish are.[30] Charles Thibodeaux, an interested member of the public, questioned who would support businesses associated with recreational fishing if public access is denied. Mr. Thibodeaux noted that a boat suitable for competitive fishing can cost up to $80,000 and that the gas, oil, and bait needed for each trip can get quite expensive. He stated that some recreational fishermen cannot afford to also pay for a private fishing lease on top of these expenses.[31] Randy Moertle, manager of Clovelly Farms, challenged this contention stating that the leases he grants only cost $33 per month and that his lessees are not all wealthy doctors and lawyers, but are just as often plant workers and welders. He further outlined the work he does to upkeep the roads, boat launch and habitat in the private area of Clovelly Farms and stated that the leases were passed down from one generation to the next and that these lessees want to keep things how they are because they have access to areas with fewer people, there is less littering and the roads and docks are kept up.[32]

Finally, many speakers mentioned the cultural and non-pecuniary benefits of recreational fishing that may be negatively impacted if broader public access is not allowed. The Louisiana Sportsmen's Coalition pointed to the generations of Louisianans who have enjoyed the outdoor opportunities unique to Louisiana and the pride felt in

[28] Remarks of Chris Macaluso, to PRATF, April 2, 2019, Exhibit C.7, at 2
[29] Minutes, April 2, 2019 PRATF Meeting, Exhibit B.5, at 11.
[30] Minutes, Oct. 29, 2018 PRATF Meeting, Exhibit B.2, at 9.
[31] Exhibit B.5, at 11-12.
[32] Exhibit B.5, at 13.

passing along this way of life to future generations.[33] Richard Cantrelle, stated that he was no longer fighting for more recreational access for himself but stated that he was concerned for his children and grandchildren, who may not get to fish like he and his father and grandfather did.[34] John Daniel, an interested member of the public, spoke of the great value he places on fishing with his children and grandchildren and asked the Task Force what types of values the State is promoting when it restricts recreational fishing. He stated that how the State responds to this report will determine values we leave for our children and grandchildren.[35]

H. Recommendations Received by Task Force

1. Sea Grant Study, H.R. 178 (2017)

As a result of a 2017 Louisiana House of Representatives resolution, the Louisiana Sea Grant College Program studied the issue of recreational access to privately owned water bottoms and offered a number of preliminary options in 2018. See Exhibit I. Among those options, Sea Grant study participants suggested that: (1) The State could pay private landowners and acquire ownership of recreational access servitudes; (2) the State could strengthen landowner immunity from tort suits in exchange for allowing recreational access to private water bottoms; (3) the State could give private landowners tax incentives to grant recreational access to privately owned water bottoms; (4) the State could ameliorate the problem of uncertain boundaries between private water bottoms and public water bottoms by improving mapping; and (5) the State and private landowners could be encouraged to reach voluntary agreements to fix boundaries between public and private lands or water bottoms in exchange for increased public access for recreational fishing.[36] Additional options include: (6) creative leasing agreements with the State; (7) temporary access rights for special events like large fishing tournaments; (8) acquisitive prescription limitations; (9) decoupling of mineral rights from surface ownership for lands other than dual claimed land; and (10) incentivizing the grant of access rights by adding new evaluation criteria to coastal restoration projects.[37]

A number of the options outlined by the Sea Grant study resemble specific recommendations received by the Task Force, and thus the Sea Grant study helped spark some of the creative solutions recommended to the Task Force.

---

[33] See Louisiana's Sportsmen's Coalition, *Louisiana's Posted Paradise: Protecting public access to our tidally-influenced waters*, Presentation to PRATF, Oct. 29, 2018, Exhibit C.3, at 2.
[34] Minutes, Feb. 19, 2019, PRATF Meeting, Exhibit B.4, at 9.
[35] *Id.*
[36] The private boundary fixing option is detailed at pages 19-20 of the Sea Grant report, Exhibit D.
[37] The decoupling of mineral rights option is discussed at pages 20-22 of the Sea Grant report, Exhibit D.

2. Allow Permanent Boundary Settlements in Exchange for Permanent Recreational Servitude (Louisiana Landowners Association) (Permanent Boundary Settlement Proposal)

Building on elements of the 2018 Sea Grant study, the Louisiana Landowners Association (LLA) has offered a proposal that hinges in part on a proposed constitutional amendment which would allow the State Land Office to alienate state "claimed" bottoms by entering into voluntary boundary agreements with private, riparian landowners.[38] These agreements would in turn lead to permanent boundary settlements. [39] This proposal for permanent boundary settlements would most commonly apply to dual-claimed land but it could, in theory, apply to land that is not currently dual claimed, i.e., to land that is now unquestionably dry land or land covered by a non-navigable water body but that may become submerged beneath navigable waters in the future. The primary benefit to be gained by the State and recreational sportsmen resulting from this proposal would be that landowners would donate a permanent access servitude applicable to the lands or water bottoms retained as privately owned property within the parameters of the permanent boundary settlement.

a. ***Primary Features***: The LLA proposal contains a number of specific features. First, the boundary agreements that the constitutional amendment would foster would depend on the voluntary participation of landowners and the state. Second, the boundary determinations would be based on original "GLO" maps or some other competent evidence of boundary at the time the privately owned lands were severed from state ownership. Third, when it comes time to resolve boundary disputes, the state would bear the burden of proving navigability in 1812 and at the time of severance. Fourth, both the state and private landowners would relinquish their respective "claims" to land located on opposite sides of the agreed boundary. Fifth, *and crucially*, in exchange for final settlement of boundaries, landowners would grant a permanent right of use or servitude for recreational fishing and boating access whose parameters would be subject to negotiation and subsequent state regulation.[40] Sixth, the landowners would receive

---

[38] See Draft Constitutional Amendment proposed by Taylor Darden, Exhibit E.

[39] Taylor Darden, *Private Property and Public Access; A Possible Solution*, Presentation to PRATF, April 2, 2019, Exhibit C.13.

[40] An important question is the precise scope of this recreational access servitude granted by landowners in exchange for a permanent boundary settlement. Would the servitude provide access only for individuals engaged in personal recreational activities or would it provide access to persons who engage in a commercial activity related to recreational access enjoyed by others, such as charter boat operators and tour operators? Other jurisdictions that have faced this question in the context of recreational access legislation have included commercial or for-profit activity as an authorized recreational use as long as the particular use would be allowed if carried on other than for a commercial purpose or on a for-profit basis. Land Reform (Scotland) Act, 2003 (A.S.P. 2) § 13(c), discussed in John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act of 2003*, 89 NEB. L. REV. 739, 786 (2011). The most important point for purposes of consideration is that the scope of the access servitude would initially be subject to negotiation between the private landowners and the state. The state might also have a role in establishing

strengthened tort immunity for claims arising out of the public's right of use occurring on water bottoms allocated to the landowner. Finally, areas covered by the new right of use or servitude for recreational access would be managed like other wildlife management areas in the state by the Louisiana Department of Wildlife and Fisheries (LDWF). This state agency would regulate when the servitude areas can be accessed and the types and sizes of vessels the public would be permitted to use to access these areas. Further, permits and licenses, regulated by LDWF, would be required to access the servitude areas.

b. ***Advantages***: There are several advantages to this proposal. One potentially significant advantage concerns the elimination of uncertainty regarding boundaries between state owned water bottoms and privately owned water bottoms in those areas where agreement is reached. As explained above, that uncertainty stems from the highly fact-intensive inquiry into navigability in fact mandated by Louisiana case law and by the complex questions of title and constitutional law surrounding water bottoms in Louisiana. Once voluntary boundary agreements have been reached under the LLA proposed process, both the state and landowners would have stability of title. A second major advantage of the LLA proposal is that recreational users, including sportsmen, would acquire recreational access to areas currently not available to them. Third, the State Land Office could, in theory, issue definitive maps, with GPS coordinates, demarcating the boundary between state owned land and water bottoms and privately owned land and water bottoms, and it could then specify where public access is permitted. Next, although landowners currently enjoy a significant measure of tort immunity under state law, recreational use immunity statutes could be strengthened to provide even stronger immunity. Another potential benefit of this proposal is that it might encourage large coastal landowners to participate even more in coastal restoration projects sponsored by the Louisiana Coastal Protection and Restoration Authority (CPRA). Finally, if the permitting and licensing requirement is established and made operational, the LDWF could, in theory, obtain compensation for its increased management responsibilities through the permitting and licensing fees it collects from sportsmen for access to the newly opened areas.

c. ***Challenge of a Constitutional Amendment***: There are several potential disadvantages or obstacles to the Permanent Boundary Settlement Proposal that the LLA would probably acknowledge and that others have pointed out during Task Force meetings. First, the LLA proposal requires a constitutional amendment. Despite the political hurdles that would face a constitutional amendment, the Task Force has reviewed and made recommendations with respect to a draft amendment proposed by the LLA that could serve as the basis for further legislative action. See Exhibit J.

d. ***State Concern – Lengthy Implementation Process***: Second, the Permanent Boundary Settlement Proposal would require the State to make individualized

---

regulations addressing such issues as the size of vessels, conservation limits on fishing in servitude areas, and protection of fragile ecosystems.

determinations to relinquish claims of title to lands or previously non-navigable water bottoms that are now submerged beneath water bodies that are navigable in fact. The significant consequences of these determinations will likely create implementation concerns for whichever state entity or entities are tasked with reviewing particular proposals and determining whether to enter into agreements and negotiating those agreements. With current levels of staffing and funding, it may take several years or longer to implement this proposal if large numbers of landowners indicate an interest in participating in such agreements. Such a time delay may be unpalatable for interested parties. As discussed below, however, there may be ways to expedite necessary surveys and state reviews.[41]

e. ***State Concern - Loss of Mineral Revenues***: Representatives of various state agencies acknowledge that the state and local governments may also be reluctant to relinquish claims to dual claimed lands due to potential losses in mineral revenue.[42] Based solely on a review of settlements of dual claimed property over the previous five years, state officials report that the state and parishes may stand to lose approximately $5 million in mineral revenue annually.[43] As geological knowledge and new hydrocarbon drilling and exploration technology can always make mineral rights attached to these lands more valuable in the future than they currently appear, the state and local governments could grow more uneasy as time passes.

---

[41] There are potentially significant practical challenges in determining the water-land boundary at the time of Louisiana's statehood. For instance, according to one State agency representative, the official GLO Township Surveys should only be used in areas of surveyed severance. Boundary determinations for areas of un-surveyed severance should rely on the USGS Quadrangle maps. Further, the Louisiana Association of Professional Engineers and Land Surveyors (LAPELS) should become more involved and possibly establish new rules/regulations. Upon further discussion with LAPELS, SLO can develop a fiscal note which would consider mapping, boundary agreements, title research/review, etc.

[42] Pursuant to R.S. 30:145 the Parish in which mineral production occurs is entitled to 1/10th of royalties accruing to State owned or public lands and water bottoms.

[43] As it is unknown what percentage of dual-claim private owners will decide to seek a boundary agreement, the potential loss is unknowable. This uncertainty is compounded by the uncertainty of future oil, gas and condensate prices, future investment decisions of private companies, and the impact of the Freeze Statute on existing private leases and future production. Additionally, the estimated $5 million annual lost revenue only includes back payments for dual-claimed settlements at the time and in the year in which a claim is settled. It does not account for post-settlement production. Based on the fact that electronic payment information is received by the State on a lease or unit basis as opposed to on the basis of "disputed tracts," there is no way currently to easily estimate the amount of subsequent production attributable to property that was once previously dual claimed. It is also unclear how dual-claimed areas previously settled or adjudicated are to be handled under this proposal. If the State is to give up mineral income it is currently entitled to receive pursuant to such agreements or judgments, then the potential fiscal impact would obviously rise. Finally, what areas the state may have a claim to in the future is dependent on future changes to the natural environment caused by erosion and subsidence, factors which are uncertain.

f. State *Concern – Mapping and Boundary Enforcement*: Another concern voiced by various state officials regarding the Permanent Boundary Settlement Proposal is that as more and more coastal land becomes subject to subsidence, erosion, and sea level rise, the ability of the State Land Office (SLO) to map settled boundaries and the ability of all parties to enforce these boundaries could be called into question. Moreover, delineating areas covered by these permanent boundary agreements in a way that members of the public can observe, such as through the creation of a deliverable format compatible with a portable GPS unit, would likely be accompanied by additional costs to the State. According to the SLO, the mapping of State claimed water bottoms in 2005 cost the State approximately $2.1 million. The SLO estimates that making this type of mapping compatible with mobile GPS units will be considerable.

g. State Concern – Patchwork of Accessibility and Marooned Waterways: The voluntary nature of the proposed agreements may result in a situation in which a patchwork of areas accessible for recreation are adjacent to and intermixed with inaccessible areas. Thus, certain areas where access is allowed may still, for all practical purposes, remain inaccessible because they are surrounded by areas not covered by boundary agreements. This potential is heightened by the fact that the proposal does not require any affirmative step be taken by landowners to deny access. When land surrounding areas subject to boundary agreements is owned by absentee owners or by multiple co-owners as a result of successions, the recreational access servitudes produced under the permanent boundary settlement proposal could be enclosed or blocked off by neighboring owners unintentionally. All of this could pose a difficult challenge for the average recreational user in determining where access is possible even after permanent boundary settlements are achieved.

h. *State Concern – Management Costs*: Another potential concern relates to the cost attributable to the state in managing the newly available access areas. Although it has been argued that some new revenue might be generated through the issuance of new recreational access permits and fees, it is possible that this new revenue would be insufficient to offset the actual management costs that LDWF would have to absorb, particularly if the tracts of navigable water bottoms are quite large. Currently, anyone with a Louisiana fishing license has access to LDWF Wildlife Management Areas. Thus, to generate additional revenue to manage areas covered under these proposed agreements, the state would have to offer license holders something different than access to a traditionally managed LDWF property. The manpower required to provide exclusive access to large areas of South Louisiana in a manner sufficient to justify someone purchasing a new permit or paying a new fee would likely be cost prohibitive. Furthermore, a two-tiered license system would seem to contradict LDWF's goal to enhance public access to wildlife and fisheries resources.

Because the LLA proposal gives the landowner complete ownership of both surface and mineral rights within the designated boundary, the LLA proposal does not provide any way to incentivize greater access or compensate the State for regulating

access and management of natural resources. As discussed in greater detail below, consideration of mineral production splits or some type of tax on the mineral servitude/rights reserved to the landowner over currently eroded areas may provide this type of flexibility, while also providing an option for funding of state administration and management.

i. ***State Concern – Public Policy as to Public Use of the Sea, Arms of the Sea and Naturally Navigable Waterways:*** Louisiana law has consistently demonstrated a strong public policy for protecting public use of its territorial seas, arms of the sea, and naturally navigable waterways. Current Louisiana Constitution article IX, § 3, Civil Code Articles 450 and 452 and their precursors, as well as other statutory enactments demonstrate this policy to promote public use of naturally navigable waterways for public purposes such as commerce, fishing, and transportation. Whatever disputes exist as to other submerged lands, the State's interest in protecting public use of its territorial seas, arms of the sea, and naturally navigable waterways is strong. With continued erosion and subsidence of coastal lands into the open sea, arms of the sea, and navigable waterways, the proposed transfer of surface ownership to private parties poses a potential challenge to this strong state interest and may conflict with federal interests in navigation and commerce.

j. ***State Concern - Competing Water Uses***: Drawing a perpetual boundary as to both mineral and surface rights in exchange for granting a permanent servitude for recreational access creates potential challenges for competing water uses, especially in the event of significant-to-total erosion of the surrounding or adjacent land. For instance, if the surrounding or adjacent land completely erodes into a navigable waterway, substantial burdens to other user groups, such as commercial fishing and water transport, may materialize. Additional confusion can also arise for parties seeking pipeline or utility rights of way across open navigable waterways over time as different pipeline servitude agreements may impose different and perhaps conflicting operation, maintenance, and decommissioning requirements. These challenges will additionally be borne by whichever state agencies are required to govern access to these areas.

k. ***CPRA Concerns***: Another major concern, in light of ongoing coastal erosion, is that a long, drawn-out process of permanent boundary fixing could slow down CPRA's ability to acquire the property rights necessary to construct integrated coastal protection projects. CPRA made a comprehensive presentation to the Task Force.[44] To avoid having to resolve conflicts between private landowners and the State, CPRA currently obtains servitudes and/or rights of use from both the private landowners and State Land Office for access to water bottoms subject to dual claims. Just like oil and gas companies who are interested in acquiring mineral leases for dual-claimed water bottoms, CPRA's

[44] David Peterson, *Integrated Coastal Protection Land Rights Acquisition,* Presentation to PRATF, Feb. 19, 2019, Exhibit C.10.

practice of obtaining property interests from both private landowners and the State prevents disputes from delaying coastal restoration projects.

For the majority of its projects, CPRA acquires a servitude from private landowners that allows it to conduct surveys, gather information needed for engineering and design, construct projects, and operate, monitor, and manage projects and limits the private landowner to activities which are not inconsistent with the purposes of the project. Such servitudes are almost always given to CPRA at no cost as landowners understand they are giving up valuable property rights, *i.e.*, a servitude to the state, in exchange for activities and projects that may protect their property from future erosion or degradation. This consideration (or quid pro quo) exchanged for the servitude benefits both the public and the landowner. While this is a valuable exchange, it results in no monetary costs to the project and allows more public funds to be utilized for construction of integrated coastal protection projects. This arrangement relative to integrated coastal projects has allowed the State, first through DNR and now through CPRA, to move forward with critical projects through cooperation with private landowners, who own the vast majority of coastal property.

Current Louisiana law provides that no rights are created in the public with respect to private lands or waters utilized, enhanced, created or otherwise affected by activities of any governmental agency, local, state, or federal, or any person contracting with same for the performance of any activities, funded in whole or in part, by expenditures from the Coastal Protection and Restoration Trust Fund or expenditures of federal dollars. La. Rev. Stat. § 49:214.5.5. Additionally, as access rights are related to issues of private versus public ownership, which cannot be changed simply by expenditure of public funds on integrated coastal protection projects, CPRA has not sought to require private landowners to allow public access in exchange for participation in coastal restoration projects.

CPRA is not opposed to statutory amendments that would allow it to negotiate access rights as part of its acquisition of servitudes for restoration projects or that would enable it to provide incentives for landowners to grant such rights to the public as part of project servitudes. Those incentives could include limitations of liability or tax incentives. However, CPRA does not believe a mandatory requirement that all CPRA project servitudes require public access would serve the interest of moving projects forward in an expeditious manner. A mandatory requirement could put CPRA projects at odds with traditional land uses and views of private property owners and could upset longstanding cooperation between CPRA and private landowners.

1. ***Sportsmen's Concern - Inapplicability to Private Canals***: Another limitation of the private boundary settlement proposal voiced by recreational sportsmen is that this proposal is unlikely to address concerns about access to private canals. From the LLA's perspective, of course, this limitation is likely a feature, not a bug, of its proposal as the LLA has made it clear that it has no interest in adjusting property rights or access rights to private canals except through voluntary agreements.

m. Concerns about Ecologically Fragile Areas: Both the LLA and recreational sportsmen acknowledge that the scope of a recreational servitude established under any boundary agreement pursuant to this proposal could be modified to address concerns raised by landowners or conservation organizations about ecologically fragile wetlands. Thus, for example, certain lands within an area designated by a boundary agreement could be excluded entirely from recreational access to protect fragile ecosystems. Further, regulations and rules could be enacted to address the size, draft, and horsepower of vessels that could be used by boaters and sportsmen in accessing water bottoms and waterways subject to the recreational access servitude established pursuant to these permanent boundary settlements.

3. Expand Recreational Access Rights to Reach All Water Bottoms Covered by Ebb and Flow of the Tide; Require Responsible Access (Ebb and Flow Proposal)

The Louisiana Sportsmen Coalition (LaSC) has responded to the proposal made by LLA with a statement of its own views and with a set of its own proposals. First, the LaSC would like to see a broader solution than the one proposed by LLA. The LaSC interprets the LLA's proposal as primarily offering recreational access on "dual-claimed land," which it views as insufficient in scope because access to these lands would provide only modest benefits to saltwater fishermen and no benefit at all to freshwater fishermen. As noted above, however, the LLA views its proposal as potentially broader in scope, applying not only to dual-claimed land but also to land that is currently dry or covered by non-navigable water bodies.

Further, the LaSC notes that Act 998 of 1992, which enacted La. Rev. Stat. § 9:1115.1 in response to the decision of the Supreme Court of the United States in *Phillips Petroleum Co. v. Mississippi*, 108 S.Ct. 791 (1988), declared, by its own terms, that the act should not be interpreted "to create, enlarge, restrict, terminate or affect in any way any right or claim to public access and use of such lands, including but not limited to navigation, crawfishing, shellfishing and other fishing, regardless of whether such claim is based on existing law, custom and usage, or jurisprudence." Implicit in this observation is the proposition that sportsmen enjoyed some customary or legally sanctioned access and use of lands that were covered by non-navigable water bodies and reached by the ebb and flow of the tides prior to the Supreme Court decision in *Phillips Petroleum* and the enactment of La. Rev. Stat. § 9:1115.1. The LLA and private landowners in the coastal zone of Louisiana would no doubt challenge this proposition.

A second major prong of the LaSC proposal and response concerns canals dredged on private lands with private funds. The LaSC notes that by digging canals to make oil and gas exploration and production easier, private landowners and oil and gas companies effectively invited a public resource onto private land to create infrastructure that served private ends. The LaSC contends that, in many cases, the dredging of these private canals altered the hydrology of natural waterways by increasing the volume and velocity of tidal flows, contributed to erosion and land loss, and finally caused naturally navigable water bodies to become non-navigable. In essence, the LaSC argues that the

factual scenario that the U.S. Supreme Court has recognized as potentially justifying a grant of a federal navigational servitude in *Vaughn v. Vermillion Corp.*, 444 U.S. 206, 208 (1979), has in fact come to pass in many places. As noted above, however, no Louisiana court or federal district or circuit court addressing a claim based in Louisiana has yet to recognize a *Vaughn* "diversion and destruction" claim in a particular case.

Returning to their own ideal solution, LaSC would like the legislature to expand recreational access rights, presumably through either a constitutional amendment, amendment of Articles 450, 451 or 452 of the Civil Code, or by alteration or amendment of revised statutes addressing trespass or other subjects. The goal of such legislation would be to guarantee public recreational access to all *surface* waters that *ebb and flow with the tide.* In essence, south of I-10, recreational access would be granted to most natural waterways, to many canals, and to all marsh and open water. Recreational access would not apply to landlocked lakes, farm ponds, private ponds or lakes, *i.e.*, non-navigable water bodies that are entirely enclosed and not connected to another navigable water body.

Borrowing from a presentation about recreational access land reform legislation in the United Kingdom made by the representative of the Louisiana State Law Institute,[45] the LaSC proposes that this right of recreational access should be subject to the condition that it is exercised responsibly. To that end, the LaSC proposes that recreational access takers who do not act responsibly should be subject to sanction, with an escalating series of fines and punishments, including fines, temporary loss of access privileges, and, in the most severe cases, permanent loss of access privileges.

Further, the LaSC concedes that certain wildlife sanctuaries and management areas could be excluded from recreational access if the LDWF determines this is necessary in the public interest. The LaSC also supports any legislation that (1) clarifies that recreational access does not give rise to claims of acquisitive prescription, (2) strengthens landowner tort immunity in the context of recreational access, and (3) establishes a funding mechanism for LDWF management of areas that would be newly opened to recreational access.

To sum up, although the LaSC takes no position on how to resolve disputes over "dual-claimed land," it does not object to the permanent boundary settlement dispute procedure recommended by the LLA proposal,[46] and would, in fact, support the

---

[45] John A. Lovett, *Recreational Access Rights: A View from Abroad*, Presentation to Public Recreation Access Task Force, April 2, 2019, Exhibit C.11. That presentation was based in large part on John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 Neb. L. Rev. 739 (2011); John A. Lovett, *The Right to Exclude Meets the Right of Responsible Access: Scotland's Bold Experiment in Public Access Legislation*, 26, No. 2, Probate and Property 52 (March/April 2012).

[46] The LaSC recommends, however, that the responsibility of posting property as privately owned land in coastal areas subject to tidal influence should fall on the landowner. The LaSC fears that any proposed legislation that places a significant mapping burden on the State would be

stabilization of mineral rights that would result from the implementation of the LLA proposal. Its basic position, however, is that a solution to the problem of recreational access to waterways of Louisiana needs to go further than the LLA proposal and needs to have a wider scope.

a. ***Advantages***: The principal advantage of the LaSC proposal is its ease of administration. There would be no need for time-consuming and expensive mapping by the State Land Office that might become outdated or difficult to use as further wetland loss occurs. Another advantage would be that Louisiana sheriffs would no longer be forced to make difficult decisions about whether recreational sportsmen are committing criminal trespass. There would be no additional management by state agencies no loss of revenue by the state or parishes under this proposal. Finally, large, national outdoor recreation advocacy groups would once again encourage recreation focused tourism in the State and national fishing tournaments would return to Louisiana.

b. ***Disadvantages***: The principal disadvantage of the LaSC proposal is that some landowners (or at least those represented by the LLA) would see it as a violation of their right to exclude non-owners from land that is still subject to their assertion of valid title. The landowners' claim of title is based on the assertion that at the time of severance from the State the property at issue was either dry or only covered by nonnavigable water bodies because, by constitutional prohibition, the State was prevented from alienating navigable water bottoms.[47] Landowners, as represented by LLA, would be reluctant to give up their "right to exclude" with respect to large swaths of land, even dual-claimed land, unless they obtain something significant in return—a guarantee of stability of title and mineral rights landward of any final voluntary boundary settlement.

4. Decoupling Land and Minerals: Donation of Surface and Perpetual Severance of Mineral Rights (Donation and Severance Proposal)

A modification of the LLA proposal has been offered by the Task Force representative appointed by Louisiana Oil and Gas Association/Mid Continent Oil and Gas Association. This proposal relies on a "donation and reservation of minerals" model rather than a "boundary settlement and servitude" model as proposed by LLA. Under this proposal, a landowner would donate surface ownership of a particular tract of land to the state and would reserve its mineral rights in perpetuity, along with some assurance of reasonable access to the surface for mineral exploration and production. The landowner, however, would also enter into a long-term agreement with the state to share any mineral revenue that is ultimately derived from mineral production on the land on some proportional basis.

a. ***Advantages***. The primary advantage of this proposal is that it "decouples" mineral rights from surface ownership. This has several "downstream" benefits. First, it would decrease the likelihood that issues involving mineral exploitation would impact

---

accompanied by a significant fiscal note, which could detract from enactability. Thus, the LaSC believes responsibility for demarcating boundaries should remain with private landowners.

[47] Exhibit C.5, at 5-7.

surface uses. Second, when the state acquires ownership of the surface, it would be free to grant recreational access to lands or water bottoms as it deems appropriate. This kind of donation with a reservation of mineral rights and shared mineral revenue stream would thus give sportsmen broad access to places where they want to fish and the ability to travel on many water bodies that are practically navigable but not currently open for access, and it would give the state a potential revenue stream for managing the newly acquired state lands and water bottoms through both a split in mineral production and surface leasing. This kind of arrangement would not only resolve disputes about submerged land that is presently dual-claimed but could also apply to land that is not yet subject to dual claims but could become so in the future. To reiterate, under this proposal, the landowner would not have to grant any kind of recreational servitude because the state would acquire ownership of the surface.

b. ***Disadvantages***. There are three potential disadvantages of this model. First, after title to the affected water bottoms and lands was permanently transferred to the State, the local tax base in the parish where the immovable property was located would undoubtedly be diminished to some extent. This could negatively affect the ability of parish governments and other local taxing authorities to provide public services.[48] Second, once title to the surface was transferred to the state, there would be no landowner (local or otherwise) with an interest in supporting coastal restoration projects. The state could lose potential partners in its effort to restore and save portions of our working coast. Third, if mineral production never occurs on the affected water bottoms or land, or if the mineral revenues prove to be modest, the income stream flowing to the state to manage the newly acquired lands might be insufficient to cover the actual costs of land management.

In any event, the Legislature and other decision makers should consider whether any specific enabling legislation, including constitutional amendments, would be required to allow the state (or any of its agencies) to acquire land under such a donation and reservation of minerals arrangement. As with the permanent boundary settlement proposal, a constitutional amendment may be required for the state to alienate its potential or existing claims to water bottoms or mineral rights to dual claimed lands or other lands subject to a donation and severance agreement. The draft constitutional amendment offered in conjunction with the permanent boundary settlement proposal is designed to provide authority for this kind of agreement as well. See Ex. E.

5. Use Value Taxation Proposal

One Task Force member who represents recreational sportsmen has also suggested that the Task Force consider the effect of "use value" taxation on privately owned marshlands. In essence, this proposal would tie continued application of the relatively light use value tax status for marshland and nonnavigable water bottoms to

[48] However, a landowner who donates the surface and reserves minerals under this proposal could also agree to make Payments in Lieu of Taxes (PILOTs) for some period of time to offset any diminution in the local ad valorem property tax base.

recreational access rights. If a landowner allows recreational access to its land, it would continue to qualify for the existing relatively light use value tax rate. If a landowner "opts out" of recreational access, then the applicable tax rate would increase by some percentage or would be determined by some alternative method of valuation. The recreational access qualification could be attached to the statutory definition of bona fide marsh land found in La. Rev. Stat. § 47:2302, could provide for ingress and egress to the qualified marsh land from navigable water bodies or some form of public access, and could also require some hydrological connection to navigable water bodies.

The provisions of law that are relevant to this proposal include:

La. Const. Art. 7, § 18(C), which provides that "[b]ona fide agricultural, horticultural, marsh, and timber lands, as defined by general law, shall be assessed for tax purposes at ten percent of use value rather than fair market value;"

La. Const. Art. 7, § 18(D), which directs each assessor to "determine the use value of the property which is to be assessed under the provisions of Paragraph (C) [above];"

La. Rev. Stat. § 47:2301, which provides that "[u]se value of bona fide marsh lands is the highest value of such land for the sole purpose of continuing the traditional use of marsh lands for hunting, fishing, trapping or various types of aquaculture by a prudent manager of marsh lands. Use value of such land shall be so established without reference to any other criteria of value, particularly, but not as a limitation, without reference to fair market value or value to the public in general;"

La. Rev. Stat. § 47:2302.C, which defines "bona fide marsh land" as "wetland other than bona fide agricultural, horticultural or timber land;"

La. Rev. Stat. § 47:2303.A, which conditions use value status for the categories mentioned above on the parcel of land being at least three acres in size and having produced an "average gross annual income of at least two thousand dollars in one or more of the designated classifications for the four preceding years;" and

La. Rev. Stat. § 47:2307.B.(1), which requires assessors, "in determining the use value of [marsh land]" to "utilize the use value table prepared by the Louisiana Tax Commission, or its successor which shall be applied uniformly statewide."

The remainder of La. Rev. Stat. § 47:2307.B specifies factors that the Louisiana Tax Commission must consider in establishing the use value for bona fide marsh land:

(a) Classification of the marshland as either freshwater, brackish, or saltwater marshland.
(b) The income that may be produced within each class.
(c) Income derived from the traditional use of such marshland, as such uses are enumerated in R.S. 47:2301.

(d) Physical and economic risks attendant thereto.
(e) Prevailing interest rates.
(f) Liquidity of investments.
(g) Federal and state regulatory authority governing use of such marshland."

La. Rev. Stat. § 47:2307.B(3)(a)-(g). For detailed information on the Assessed Value Per Acre of Marshland By Class (West Zone and East Zone), see Chapter 17, § 2717 (UV - 13-14) (2016).[49]

The advantage of this proposal is that it could encourage landowners to make more land open for recreational access and would not impose any additional financial burden on the State or local parish tax collection authorities. To the extent some owners of bona fide marsh land opt out, local parish tax collection authorities could receive additional tax revenue.

After discussions with a representative of the Louisiana Tax Commission (LTC), the Task Force member who has provided this proposal reports that the LTC does ratify the use value tax rate for bona fide marsh land every four years. However, the LTC representative was not able to provide the Task Force member with any information about which state agency provides information that enables the LTC to establish that rate or how the LTC determines what "traditional uses," referenced in La. Rev. Stat. § 47:2301, are considered or how these uses are determined.

The Task Force representative responsible for this proposal has also suggested amendment of the criminal trespass statute, La. Rev. Stat. § 63:14, to require any portion of bona fide marsh land that the owner elects to keep off limits to the public be posted with signage to indicate the tax bill number issued by the parish. The rationale for this requirement is to preserve the privacy of the property owner/tax payer while still allowing tax authorities to confirm that the property owner is paying the higher tax rate on the portion of the property excluded from recreational access. It should be noted that other members of the Task Force, including Senator R.L. "Bret" Allain, oppose any change to the Use Value taxation regime, particularly as it pertains to agricultural lands.

6. Act 626 Model (Three-Party Agreement Proposal)

Mark Davis, Director of the Tulane Institute on Water Resources Law and Policy, made a presentation to the Task Force that outlines another possible solution to the problem of recreational access on water bottoms located in coastal parishes. His proposal is largely based on a framework that was first introduced into Louisiana law by La. Act 626 (2006), which amended La. Rev. Stat. § 41:1702. That statute has, in turn, been amended a number of times since 2006. Act 626, as Davis explains, was enacted to

[49] Available at: http://www.latax.state.la.us/Menu_RulesRegulations/Rules%20and%20Regs%20Changes/RULES.UV.pdf

facilitate donations of surface rights to coastal lands in exchange for fixed mineral rights and commitments from conservation oriented landowners and outside philanthropic donors to support local property tax bases and conservation-oriented land management of the donated lands. A primary objective of the 2006 legislation was to facilitate transactions similar to a 1997 compromise transaction between the State of Louisiana and Louisiana Land and Exploration Company that permitted the restoration of Isle Derniers in Terrebonne Parish. For details of that compromise and other similar transactions, see Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S.U. L. Rev. 149, 167-79 (2000).

Act 626 of 2006 specifically gave the State authority to enter into "mineral boundary agreements" in which surface rights in coastal lands are transferred to the state or a state-designated "acquiring authority," as defined by La. Rev. Stat. 31:149, for the purpose of facilitating the development, design and implementation of coastal restoration, protection or management plans by the state. The act called on the state to promulgate rules to guide any transactions undertaken under this authority. Those rules have now been approved under Louisiana's Administrative Procedures Act and are final as of November 2019. See LAC 43:XXXI.Chapter 2.

Although the agreements anticipated by Act 626 were not primarily focused on the question of public recreational access, both that act and subsequent versions of the relevant statute contemplate that the rules promulgated by the state to facilitate such transactions will consider:

> the nature, extent, and conditions of public access to and use of the surface lands and waters that will be permitted by the acquiring authority on the land and water bottom acquired, including for navigation, boating, commercial and recreational fishing, hunting, trapping, nature observation and study, and other traditional activities that are consistent with the principal purposes of the acquisition.

La. Rev. Stat. § 41:1702.D(2)(a)(iii).

Two other features of this regime are notable. First, an "acquiring authority" under this statutory regime is defined by La. Rev. Stat. § 31:149, a section of the Mineral Code, to mean either the United States, the state of Louisiana, a political subdivision of the United States or the state of Louisiana, or a non-profit, charitable organization recognized under Section 501(C)(3) and 170 of the Internal Revenue Code, and that is certified by the Secretary of the Louisiana Department of Natural Resources to be a state or national land conservation organization. La. Rev. Stat. § 31:149.A. This is crucial because it introduces the possibility of a third party, other than the State or the current private owner, as a designated owner and custodian of donated water bottoms.

Second, if an agreement authorized pursuant to this statute "is in the form of, or constitutes part of, an act of donation of immovable property to the state, acceptance by the state of such property shall be subject to the requirements of R.S. § 41:151 or its

successor". La. Rev. Stat. § 41:1702.D(2)(iv). This means that the state's Commissioner of Administration will have the ability to evaluate an offer of donation to determine whether acceptance is in the best interest of the state and that the House Committee on Natural Resources and Environment and the Senate Committee on Natural Resources will have an opportunity to review and approve any proposed donation. La. Rev. Stat. § 41:151.A and C. If a constitutional amendment is required for the state to alienate mineral rights to dual-claimed lands or other lands subject to an Act 626 three-party agreement, the constitutional amendment proposed in conjunction the permanent boundary settlement proposal may provide the necessary authority or could serve as a model and be revised to cover such an agreement. See Ex. E.

7. Wildlife Sanctuaries and Wetlands Conservation

The Task Force member who represents environmental interests of the state, appointed with the concurrence of the Nature Conservancy and the Louisiana Audubon Society, has drawn the attention of the Task Force to various types of wildlife and game preserves, refuges, parks, or sanctuaries that exist in Louisiana's coastal area and that provide protections for coastal and estuarine environments that support populations of fish and game. These areas are primarily public and generally allow for public use for certain activities while limiting wildlife take or harvest. These public areas are typically managed by the Louisiana Department of Wildlife and Fisheries, Louisiana Office of State Parks, or—in the case of federally-owned properties—the US Fish and Wildlife Service. Some examples include: The Rockefeller Wildlife Refuge; The State Wildlife Refuge; Fontainebleau State Park; Grand Isle State Park; Bayou Sauvage NWR; and Breton Island NWR.

As these properties are publicly held, and the rules that govern them are set by governmental entities and defined in Louisiana Revised Statutes (typically combined with departmental rule-making and policies) or in Federal law, a clear pathway exists for understanding allowable public access and activities, including, but not limited to, times of operations.

One example of a property that maintains sanctuary status in Louisiana and is listed in state statute is the privately held Paul J. Rainey Wildlife Sanctuary, located in coastal Vermilion Parish. This unique, one hundred year old sanctuary enjoys extraordinary protections associated with its operation. This sanctuary is described in Title 56 of Louisiana Revised Statutes, and the rules governing the allowable uses of the property are defined in the Louisiana Administrative Code, see LAC 76:III.323(B). The Wildlife and Fisheries Commission set the rules for its use, following strict guidelines that were written into the Act of Donation in the 1930s.

The Rainey Sanctuary, operated through an endowment and other donations, is ecologically significant. It is a place where birds, fish and wildlife may live unmolested by human activity. There are a variety of reasons the benefactors of this property believed that it was important to dedicate this land to ecological preservation in perpetuity and their foresight has resulted in a truly pristine natural coastal area. Since this particular

sanctuary has an identity in the body of public law, its sanctity should be protected specifically through exemption in the event that new legislation surrounding access of private waterways comes under consideration.

Furthermore, the Task Force could recommend use of a similar pathway to that used for the Rainey Sanctuary if other like-minded conservationists who own property in the coastal area decide to follow that model and create their own sanctuaries or nature preserves. Just as with the Rainey Sanctuary, the Wildlife and Fisheries Commission can define rules for use and operation of other refuges and other properties managed by LDWF. Moreover, the staff at the Department of Wildlife and Fisheries is well-equipped to draft criteria for refuges, sanctuaries and preserves based on their expertise.

In sum, nature preserves, while uncommon, can create an even more dynamic landscape in our coastal area. When legislation is under consideration for future boating and fishing access on private property, the legislature should make clear that, if and when a property has achieved a designation of sanctuary or preserve under LDWF guidelines, there is a pathway for including that new natural area into Title 56. Whether there is a need to protect a rare and sensitive habitat on our coast, or simply a landowner with strong conservative goals, any new access legislation should provide for sanctuaries and refuges.

It should be noted that the Louisiana Conservation Servitude Act, La. Rev. Stat.§ 9:1272 et seq., already allows for the establishment of conservation servitudes on privately owned land that run with the land and that are enforceable by governmental bodies or conservation organizations.

8. Combination Proposal – A Recommendation by State Agency Representatives

As discussed previously and below, both the Permanent Boundary Settlement Proposal and the Donation and Severance Proposal have some limitations, especially from the perspective of the state. Another option that decision makers should consider has been recommended by several representatives of the state agencies who serve on the Task Force. This proposal would combine elements of the Permanent Boundary Settlement Proposal and the Donation and Severance Proposal as well as concepts introduced in the Act 626 Proposal and aspects of the proposal to re-introduce affirmative defenses to trespass law. It would also address landowners' concerns regarding tort liability and the shared concern regarding the impact to local government tax bases resulting from the possible re-categorization of taxable property to tax exempt status.

A major concern expressed about the Permanent Boundary Settlement Proposal is its inequity, at least as perceived by representatives of state agencies. Under this proposal, the state could lose substantial mineral revenues and lose potential surface revenues from oyster leases, rights of way, or other surface operations, and in exchange it would only receive a recreational fishing access servitude burdened by restrictive limitations imposed by landowners. In addition, requiring the state to manage such a servitude area, and

enforce such restrictions, would impose substantial costs on LDWF. Although the LLA has suggested that such costs could be funded by levying additional fees on the recreating public in the form of new permits, it is unclear that the public or the legislature would accept any additional fees beyond those required for a basic Louisiana fishing license. Instituting an exclusive access policy, to the point of requiring additional permits or fees on these properties, could be cost prohibitive to the state and would also contradict LDWF's mission to enhance public access to wildlife and fisheries resources. Finally, the Permanent Boundary Settlement Proposal does not respond to landowners' demand for stronger tort immunity over their surface estate. It is anticipated that landowners will continue to pressure the state to support legislation that achieves this long-term goal.

The only tangible monetary benefit to the state with the Permanent Boundary Settlement Proposal is that the local parish property tax base remains in place. However, this benefit is offset by the diminution of the state mineral revenue dedicated to the parish governments from state mineral leases. Added to this is the concern raised by commercial and recreational fishermen that the Permanent Boundary Settlement Proposal is too limited and may lead to a patchwork of accessible and inaccessible waterways that are no less difficult to navigate than the ones they face today.

Due to these concerns, representatives of various State agencies presented a combination proposal intended to incentivize voluntary participation by landowners, achieve greater clarity as to surface ownership and accessibility for the public, identify alternative revenue streams for the State and Parishes, and continue the strong public policy that the State's territorial seas, arms of the sea, and other naturally navigable waterways are subject to public use. The combination proposal envisions voluntary agreements similar to those proposed by the Permanent Boundary Settlement Proposal, but it introduces conceptual changes that restore equity to the settlements from the perspective of state agency representatives. The Combination Proposal involves two core ideas. First, legislation would define an area designated as the *Subtidal and Intertidal Zone*. Second, legislation would allow the state and a landowner to enter into a voluntary agreement whereby the landowner transfers and relinquishes to the state all claims it has or may have to the surface estate of the Subtidal and Intertidal Zone within its record title boundary, in exchange for a perpetual mineral reservation in favor of the landowner as to the Subtidal and Intertidal Zone within its record title boundary, which extends out to a permanently fixed historical shoreline.

The proposal envisions the private landowner and the state reaching an agreement as to particular areas within the landowner's recorded boundary that would be specifically excluded from the effect of the agreement. By this process, the landowner could exclude an area it deems important for environmental, personal, or other reasons, such as a private canal, interior marshland, or a permanent structure like a residence or camp. This would allow the landowner to continue to claim a right to deny access in such an area, but consequently they would not receive the benefit of settling mineral and

surface rights in that area. A landowner and the state would be free to subsequently amend the agreements to include previously excluded areas, but there would be no assurance that such an amendment would be agreed to in the future.

Under the Combination Proposal, the Subtidal and Intertidal Zone ("SAIZ") could be defined as *an area of land covered with water and accessible by a floating vessel, regardless of legal findings of navigability that is (a) submerged beneath subtidal and intertidal waters and (b) lying between the emergent land (the land/water interface) and the historical shoreline boundary*. Such a definition allows landowners the option of retaining full ownership of existing or emergent land, essentially excluding such land from the agreement. This is a significant difference distinguishing this proposal from the Donation and Severance proposal. The inland boundary of the SAIZ will expand and contract with land erosion and restoration, regardless of legal navigability. In other words, the SAIZ will expand and contract along with the land/water interface.[50] Any agreement reached under the SAIZ eliminates the difficult task of ascertaining navigability under the current legal definitions.

Under this approach, landowners would still reserve the mineral rights as to the SAIZ and would retain sufficient surface rights as necessary for the exercise of their mineral rights. On the other hand, all private landowner surface contracts (and the accompanying revenues) derived from the SAIZ, including oyster leases, rights of way, and other surface leases (applicable to assets such as mooring sites, platforms, campsites, etc.), would be transferred to the state and a state agency would administer them. Such a transfer could provide the state with a source of revenue that could be dedicated in part to local governments as Payments in Lieu of Taxes (PILOTs) and could also be used to cover the state's costs associated with land management.[51]

As indicated above, parishes also receive a percentage of state mineral income attributable to production from state property situated within their boundaries under La.

---

[50] This approach most likely comes with the caveat that there be no significant damage from vessel traffic to the bed and bottom or the emergent land/vegetation (such as by surface drives, aka "mud motors," or air boats).

[51] It should be noted that surface revenue amounts will need to be ascertained as they may far exceed the lost tax bases, in which case local governments would receive a percentage of surface revenue equal to what they lose in taxes. Alternatively, the surface revenue amounts may be less than the lost tax base, in which case local governments would get whatever is left over after the State's administrative percentage. This kind of formula would at least soften the blow to parish governments resulting from the transfer of land to public ownership. Landowners may be able to provide us with their surface revenue figures to assist in ascertaining the feasibility of this feature of the proposal. State Land Office policy currently prohibits the State from entering into exclusive hunting and fishing leases. If the state agency tasked with managing properties covered under this proposal were to be governed by a similar policy, the State could allow such private leases transferred to the State to run their terms but would not renew the leases upon expiration.

Const. Art. VII, § 4 and La. Rev. Stat. § 30:145. Because this income could be jeopardized through the implementation of these SAIZ agreements, landowners and the State could also negotiate a small percentage of the mineral interest to be retained by the state in the form of an overriding mineral royalty which could be dedicated to the parishes where the land is situated. Given the benefits that landowners could gain by elimination of tort liability and relief from local property taxes with respect to the SAIZ, such a mineral split may be reasonable and attractive.

A perpetual mineral reservation to the landowners within the SAIZ comprises a significant offer on the part of the state and is recommended in the spirit of reaching a compromise with the proponents of the Permanent Boundary Settlement Proposal. It achieves more than just stability of title as to minerals, which could be achieved by setting permanent mineral boundaries at their current locations, regardless of future erosion. This proposal goes further. By accepting the possibility of setting a permanent mineral boundary at a historical location, one that could be far seaward of the current location, this proposal restores to landowners certain mineral rights they have arguably lost by virtue of coastal erosion, subsidence and sea level rise. This proposal is also consistent with the strong state public policy of assuring that naturally navigable waterways remain subject to public use while also achieving greater clarity of title as to surface rights and uses, because the need for ascertaining navigability as the land erodes is removed and replaced by the simpler determination of the easily observable land/water interface. An agreement reached under this approach promises permanent clarity as to surface operations such as oyster leasing, barge mooring, commercial fishing, commercial water transport, and pipeline, utility and other rights of way in the SAIZ. It also provides clarity to the average fisherman, and increases tort immunity for landowners relative to water borne activity. Importantly, this approach provides a way to continue to support local governments while also funding the State's administrative land management responsibilities.

It is worth noting that this approach also provides a greater incentive to landowners to cooperate with CPRA, as the inland boundary of the SAIZ, which will be owned by the state, will run with the erosion pursuant to these voluntary agreements, regardless of legal findings of navigability. Surface rights and the potential economic benefits flowing from surface ownership would be tied to the continued existence of emerged land, land which would not be subject to the SAIZ. As an additional incentive, provisions could be incorporated into this proposal which provide that title to any land built by CPRA projects over the SAIZ will vest in the mineral owner, restoring them to surface and mineral ownership, subject only to those limitations identified as necessary for project maintenance and performance. Due to potentially unpalatable property tax aspects, this could be incorporated as an option available to landowners, rather than an automatic feature.

With regard to the historical shoreline boundary, it should be borne in mind that, inevitably, this aspect will be subject to negotiations. With so many un-surveyed areas in our coastal parishes, it is the long-standing policy of the Louisiana Office of State Lands to claim waterways based on historical editions of the United States Geological Survey topographic maps in the absence of on the ground survey records by the U.S. General Land Office. This policy is traditionally met with opposition by landowners. The negotiations relative to the historical shoreline boundary will center on the question of which rivers, bayous, lagoons, lakes and bays appearing on historical maps in un-surveyed areas should be recognized as state-owned for purposes of identifying the historical shoreline boundary. Many areas are intricately scattered with land and water on those historical topographic maps. Nevertheless, these boundary issues can be negotiated and should not bar landowners or the state from consideration of this approach as a possible solution.

The Donation and Severance Proposal offers promise as an option under this Combination Proposal. A landowner could, in theory, donate or relinquish, not just the surface of water bottoms, or lands "subject to water" (the SAIZ), but also the entire surface interest of the landowner's holdings, i.e., *existing dry land, undisputed marshland or wetlands, emergent land, or disputed water bottoms*, in exchange for a mineral revenue split covering all areas out to the historical shoreline. This mineral split would likely be negotiated based on the percentages of land versus water appearing in particularly defined area blocks on historical maps.[52] The nature of such negotiations, including the lack of a need for a boundary agreement, will likely make them far more expeditious than the negotiations accompanying the Permanent Boundary Settlement Proposal. It should be noted that the blow to parish government tax bases may again be partially offset by surface revenues and a portion of the mineral split. The same surface revenue dedication scheme could be instituted to attempt to provide PILOTs to local parishes and to cover the State's administrative land management costs.[53] Such a settlement could also provide the same tort immunity benefits to the landowner mentioned earlier, while CPRA would now have carte blanche authority over the property needed for its projects.[54]

Elements of the Act 626 model could also be included in this Combination Proposal approach. Certain geographic or environmental characteristics, landowner preferences, liability concerns, or imbalances between management costs and surface revenues could lead to situations where either the State is reluctant to accept a donation or a landowner prefers more complex property management practices or sanctuary-type limitations than the State wishes to manage. In such situations, a third party conservation

---

[52] This aspect will need to be explored further to confirm.

[53] As previously stated, landowners may be able to provide surface revenue figures to assist in ascertaining feasibility.

[54] The agreements will need to include language in this regard, which may need to be negotiated, specifically relative to conflicts with mineral exploration.

organization could receive a donation or relinquishment of land covered by water in the SAIZ, or even dry land or uncontested marshland or swampland. Additionally, such organizations could play the role of a proprietor undertaking wetland protection and mitigation projects that are not funded directly by the state or federal government. In such cases, a landowner and the State could negotiate a mineral revenue sharing agreement with an appropriate share of revenue to be dedicated to funding such projects managed by the third party conservation organization.

If a constitutional amendment is required for the state to alienate its potential or existing claims to water bottoms or mineral rights to dual claimed lands or other lands subject to an agreement established pursuant to the Combination Proposal in the SAIZ, the draft constitutional amendment offered in conjunction with the permanent boundary settlement proposal may provide the necessary authority or could serve as a model and be revised to cover such an agreement. See Ex. E.

Trespass Law and Opt-Outs: This Combination Proposal also utilizes the SAIZ concept in an effort to recognize the rights of those landowners who may wish to opt-out entirely or opt-out of a compromise in specified locations within a broader SAIZ agreement area while minimizing the problem of a patchwork of accessible and inaccessible areas that would be difficult to navigate for fishermen. This could be achieved by incorporating a limited reintroduction of affirmative defenses to trespass law applicable to waterways meeting the definition of the SAIZ where landowners seek to opt-out, either by completely opting out of entering into any agreement or only opting out as to a specified subarea within the boundaries of a voluntary agreement and preserving private ownership claims and the status quo as to those submerged lands or water bottoms.

Legislative provisions could establish a sunset period within which landowners must opt-in or opt-out. If a landowner chooses to opt-out (or does not affirmatively elect to opt-in) and thus preserves a private ownership claim of the surface in a waterway meeting the definition of a SAIZ, that submerged land would be subject to water-borne recreational access unless the landowner who opts-out posts its property meeting the definition of a SAIZ and notifies the appropriate State agency of the posting.[55] In effect, this amounts to a reintroduction of the affirmative defenses to trespass law, applicable only to waterways that fit the definition of a SAIZ.[56]

---

[55] Strengthened tort immunity provisions can be incorporated into this combination concept relative to opt-outs to protect property owners from liability arising from granting this type of access.

[56] It should be highlighted that posting/marking would not be required to bring trespass charges against non-recreational users, such as commercial fishermen, loggers, pipeline companies, etc., in opt out areas or on land.

This proposal suggests accompanying this reintroduction of affirmative defenses with some strengthening provisions that benefit everyone. Posting of opt-out properties could take place with buoys, signs, markers, lights, and/or reflectors, etc., and then registering the posted locations with the appropriate State agency by providing the State with Global Positioning System (GPS) coordinates and pictures of those postings so they can be mapped in the State's Geographic Information System (GIS) database. This should mitigate the problem of fishermen removing posts or signs because removal or damaging of postings will be useless if they are registered in a State database and registration of the postings will itself establish greater state authority in the area. If a fisherman sees a sign, he can check the state website to confirm that the sign is legitimate.[57] For an example of a similar public access issue in another state, and how that state's legislature addressed the issue, please refer to the attached Exhibit F (South Dakota Open Waters Compromise, 2017 Special Session House Bill 1001 - Senate).[58]

An opt-out deadline would help prevent public access to waterways subject to an agreement from being blocked by the mere inaction of a neighboring landowner. It would also provide greater clarity to the public as to what is publically accessible upon the expiration of the sunset period.

9. Acquisition of Access Rights for Canals

In the absence of specific factual scenarios that are difficult to prove, Louisiana courts are likely to continue to declare private canals built on private land with private funds as private things. In some cases, access to canals may be acquired by application of the Permanent Boundary Settlement Proposal, the Donation and Severance Proposal, the Act 626 Model, and even the Combination Proposal. However, in some situations, private canals will simply fall outside of areas subject to the types of agreements these proposals contemplate. In such cases, and when the use of certain canals provide substantial value to the public as highways of commerce and access to other public navigable water bodies or voluntary agreement areas, the State could simply identify them and seek to acquire access for the public by purchasing the surface rights to the canals or entering into long-term leases with landowners. If voluntary transfers cannot be completed, the State could, as a last option, possibly consider expropriating those portions of canals that are essential for recreational access subject to satisfying all constitutional requirements for expropriation. After the completion of voluntary or involuntary acquisition of access rights, the relevant portions of those canals could be mapped in the State's GIS database for public reference.

---

[57] It may be worth noting here that this limited measure of reintroducing affirmative defenses to trespass law could be viable as an independent solution, or possibly a stop-gap measure (if no agreements can be reached relative to the other alternative pathways/proposals), by incorporating these posting registration concepts into the reintroduction of affirmative defenses. This may involve a fiscal note for the State agency(s) who would be responsible for maintaining the registry and GIS database.

[58] For additional information, also see the South Dakota Game, Fish & Parks webpage on Nonmeandered Waters: https://gfp.sd.gov/nonmeandered-waters/

I. Alternative Pathways

This section attempts to distill the various proposals and recommendations received by the Task Force over the past 17 months into seven (7) distinct alternative pathways that Louisiana decision makers in both the Legislature and the executive branch can consider and describes a path of no action. The Task Force observes that these pathways are not exclusive to one another. The Task Force does not endorse one pathway over any other and does not rank the pathways in order of priority or preference. Rather, the Task Force acknowledges that an ideal response to the problem of public recreation access on our changing coast may well involve experiments with many, if not all, of the pathways described below. In some coastal areas, some pathways may prove more fruitful than others.

1. Permanent Boundary Settlements

The first major pathway forward would be based on the proposal offered by the Louisiana Landowners Association (LLA). This pathway involves encouraging voluntary, permanent two-party boundary settlements between the private landowners and the state of Louisiana. These private boundary settlements would resolve once and for all issues of disputed ownership of water bottoms between private landowners and the state and any mineral rights attributable to that ownership and to other water bottoms that are not currently subject to dual claims. Because such settlements could entail a potential alienation of navigable water bottoms or a potential donation of a thing of value to a private person, constitutional amendments may be necessary, particularly with respect to La. Const. Art. IX, § 3 (prohibition on alienation of navigable water bottoms except for reclamation), La. Const. Art. IX, § 4 ("The mineral rights on property sold by the state shall be reserved . . . . The mineral rights on land, contiguous to and abutting navigable water bottoms reclaimed by the state through the implementation of and construction of coastal restoration projects shall be reserved . . . . "), and La. Const. Art. VII, § 14 (prohibiting donation of things of value). In exchange for receiving recognition of title to contested water bottoms, the landowners would grant permanent recreational access servitudes over the water bottoms.

In these types of settlements, private landowners would remain responsible for payment of local property taxes with respect to the water bottoms over which they obtain title, but the State would largely become responsible for management of the recreational access servitude. These types of settlements may be desirable in specific areas where landowners have a particularly strong interest in asserting a claim of title and where recreational sportsmen have a keen interest in gaining more secure access rights and where any increased costs to the state in terms of management can be kept to a minimum. For instance, these types of settlements could be quite useful to resolve disputes about access to private canals or particular natural water bodies that are subject to dual claims and where public access is particularly important.

2. Donation and Severance

The second major pathway forward may be suitable in other areas of our coast where private landowners have less of an interest in maintaining title to water bottoms that are increasingly becoming submerged beneath water and where the only significant interest is in mineral rights. Under this pathway, a landowner would donate surface ownership of a particular tract of land to the state and would reserve its mineral rights in perpetuity, along with some assurance of reasonable access to the surface for mineral exploration and production. The landowner, however, would also enter into a long-term agreement with the state to share any mineral revenue that is ultimately derived from mineral production on the land on some proportional basis. This kind of arrangement would not only resolve disputes about submerged land that is presently dual-claimed but could also apply to land that is not yet subject to dual claims but could become so in the future, notwithstanding any changes to the physical characteristics of the donated land. This pathway would not require the state to alienate any water bottoms that it owns or claims to own but instead involve donations of all ownership of the surface with a reservation of mineral interests in favor of the donating landowner.

Three crucial issues would need to be resolved in these kind of donations and reservations. First, because ownership or title to the land would transfer from private hands to the state, the local property tax base would, inevitably, be diminished to some degree. Second, the state would likely shoulder the burden of increased land management costs and potential increased liability if it acquires ownership of large amounts of land and water bottoms. Third, the parties to these acts of donations, the private landowners and the state, would need to spell out carefully what surface rights the mineral interest holders would retain for purposes of exploration or production. Because of advances in technology such as horizontal drilling and the existence of prior drilling sites, it may be quite possible to reach agreements that both minimize interference with recreational access and protect reasonable opportunities for mineral exploration and drilling.

These types of agreements may be particularly useful where landowners have much less interest in maintaining control of the surface or title to land and where the state is interested in acquiring title and shouldering the attendant management responsibilities. As with pathway 1, a constitutional amendment may be required to smooth the way for the state to alienate its potential claims to mineral rights to dual claimed lands or other lands subject to a donation and severance agreement. The proposed constitutional amendment offered in conjunction with pathway 1 is designed to provide the necessary constitutional authority for such an agreement. See Ex. E.

3. Act 626 Agreements (Three-Party Agreements)

The third pathway forward involves agreements that resemble the two party donation and reservation of mineral interest agreements described above but that add several other features that could make them attractive in some situations. Under these agreements, a private landowner, the state acting in its capacity as the steward of the public trust in the environment and navigable water bodies, and another party, most likely

a non-profit conservation organization or land trust, would enter into a three-party agreement. Pursuant to this kind of agreement, a private landowner would first transfer title of disputed water bottoms or even undisputed marshland or wetlands to the non-profit conservation organization or land trust and would reserve mineral interests in those water bottoms or lands. Second, a conservation endowment would be established with funds contributed by the private landowner, by other private philanthropists, or by the state. This endowment would provide revenue on an annual basis to pay for land management expenses and to make payments in lieu of taxes (PILOTs) to local taxing authorities to replace lost revenue as the land would now be owned by a tax-exempt charitable entity.

As with the second pathway, the private landowners, the state, and non-profit entities would have to give careful consideration to the question of access for mineral exploration and production and the need to minimize disruption to public recreation and to minimize interference with conservation goals. Yet these kinds of negotiations can certainly be undertaken.

In addition, these kinds of agreements can be reached without the need for any constitutional amendment. Indeed, specific statutory authority exists under the reclamation statute, La. Rev. Stat. § 41:1702 (as amended by La. Act 626 (2006), and subsequent acts), and detailed rules regulating such agreements have been adopted by the state. See LAC 43:XXXI.Chapter 2.

4. Expand Recreational Access; Create Scottish Style Right of Responsible Access over Lands Subject to Ebb and Flow of the Tide

The next pathway that decision makers could follow to resolve the conflict between recreational sportsmen and private landowners that own nonnavigable water bodies (marsh lands and swamp lands) or navigable ones (private canals) or that claim the right to exclude the public from navigable water bodies whose water bottoms are also subject to ownership claims by the state (dual-claimed lands) would not involve any transfer of ownership of the surface or reservation of mineral rights. Instead, it would involve a redefinition of the law of trespass to allow specified forms of recreational access over waterbodies that are subject to the ebb and flow of the tide.

This pathway would not affect title to land, would not affect the local property tax base in coastal parishes, and would not require a constitutional amendment. It would, however, require landowners and recreational sportsmen to build a new kind of relationship based on trust, mutual accommodation, collaboration and insistence upon correlative responsibilities—responsible recreational access taking and responsible land management that takes into account recreational interests. Other countries where outdoor recreation is an important social and cultural value have managed to foster these kind of

relationships.[59] Whether both landowners and recreational sportsmen in Louisiana are interested in or could forge this kind of relationship is an open question.

Landowners will likely argue that any imposition of recreational access rights as a matter of state law is a violation of their property rights, and in particular their right to exclude. Consequently, decision makers may instead seek to create structures or opportunities for landowners and recreational sportsmen to experiment over the medium term with arrangements that might build trust, produce more recreational access, and lead to a new kind of relationship based on responsible recreational access taking and responsible land management.

5. Re-introduce Affirmative Defenses to Trespass Law; Require More Posting

Another limited measure that could ameliorate the uncertainty faced by members of the public engaged in recreational activities on water in our coastal areas would involve requiring private landowners that seek to exclude the public from water bottoms to take further action to signal their intent to exclude such as posting marsh land or water bottoms as private or erecting fences or other barriers. To this end, the legislature could reestablish some of the affirmative defenses found in the criminal trespass statute, La. Rev. Stat § 14:63, before the passage of La. Act. No. 802 (2003). In particular, the legislature could require, just as Louisiana law provided prior to 2003, that landowners post land or utilize some kind of boundary markers in order to enforce the criminal trespass laws on uncultivated, undeveloped land in general or, more particularly, on marsh land or water bottoms covered by water bodies that are navigable in fact but which may be privately owned. Such legislation would certainly be constitutional. After all, it was part of Louisiana law as recently as 16 years ago. Such legislation would also not affect the local property tax base. It could help lure some recreational tourism back to the state. Of course, landowners might argue that signs and postings are only effective if they remain in place and that requiring constant posting and reposting of signs could be expensive.

As noted above and below in the discussion in the Combination Proposal, a variation of this approach could involve reintroduction of affirmative defenses only in those portions of coastal areas of Louisiana that meet the definition of the Subtidal and Intertidal Zone ("SAIZ"). Further, a sunset (or sunrise) provision could be used to give landowners a fixed period of time within which to take advantage of the opportunity to reach permanent agreements with the state under pathways 1, 2, 3, or 7, or to opt-out entirely by posting such areas as private.[60]

---

[59] See generally John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 Neb. L. Rev. 739 (2011); John A. Lovett, *The Right to Exclude Meets the Right of Responsible Access: Scotland's Bold Experiment in Public Access Legislation*, 26, No. 2, Probate and Property 52 (March/April 2012).

[60] Another issue raised by members of the Task Force and the public associated with landowners' blocking privately claimed waterways, including private canals, is the safety concern associated

6. Tie Favorable Use Value Taxation to Recreational Access

One more pathway to enhance recreational access to water bottoms that are now privately owned or claimed and yet covered by water would be to link the relatively low use value ad valorem taxation rates for bona fide marshlands in Louisiana to a requirement that landowners provide some form of recreational access to such water bottoms.

7. Combination Proposal – A Recommendation by State Agency Representatives

Some of the comments by State agency representatives suggest an additional alternative; one that combines aspects of the others. Some of the primary concerns raised by representatives of state agencies center around ensuring the promotion of several of our shared values: namely, preserving our coast and the natural environment; preserving and enhancing the local tax base to support vital public services; preserving the culture of outdoor recreation; and encouraging the recreational economy. A combination alternative seeks to promote these shared values while still respecting private property rights and investments in land. The combination alternative would be voluntary and could work under either a two-party or a three-party arrangement as described above.

This alternative would begin with identifying the areal extent covered by one of these combination agreements. This Subtidal and Intertidal Zone ("SAIZ") would be defined as that area of land covered with water and accessible by a floating vessel, regardless of legal findings of "navigability," that is (a) submerged beneath subtidal and intertidal waters and (b) lying between the emergent land (the land/water interface) and the historical shoreline boundary. The inland boundary of this SAIZ would run with erosion (again, regardless of navigability). The primary distinction between the Donation and Severance Proposal (Pathway 2) and this pathway is that with this approach the landowner would retain ownership of all existing and emergent land, essentially excluding emergent land from the entire process, transferring and relinquishing its claims to land covered by water within the SAIZ, in exchange for a perpetual mineral reservation within its record title boundaries out to a historical shoreline.

One advantage to this proposal for landowners is that it would eliminate or at least substantially lessen landowner concerns as to tort liability, as the state would now own the surface of all water bottoms within the designated SAIZ. Second, all private

---

with gates and markers being placed in and over waterways. Several members of the public testified that the number of gates and other objects blocking canals and privately claimed waterways has recently increased. The potential for some markers to pose a hazard may increase as higher water surrounds gates, markers, and signs initially installed on or near land. A reintroduction of posting requirements as proposed by some task force members could increase the number of structures associated with markings and postings located in and surrounding navigable waterways. Some members of the task force propose creation of new guidelines, where current Coast Guard requirements are inapplicable, to require that all gates and other markers in and over Louisiana's waterways be properly marked and lit so as to be visible at all times of day and night and in all weather conditions.

landowner surface contracts and the accompanying revenues from the SAIZ would transfer to the state and these sources of revenue could be dedicated in part to local government and in part to cover the costs to the state for administrative and land management responsibilities. As mentioned earlier, in addition to a loss in property taxes, the parishes stand to lose their share of minerals from state-owned water-bottoms, so this alternative approach would allow for the negotiation of a small percentage of the mineral interest to be retained for the parish in which the property is located. An additional incentive for integrated coastal restoration and protection projects could be negotiated under this alternative allowing for surface and mineral rights in emerging lands to vest in the private landowner, subject only to those rights identified by CPRA as necessary for it to reserve for coastal restoration purposes.

To address the difficulty that would be faced by recreational users in identifying areas where property owners have opted out of this kind of agreement (or within any of the areas affected by the other proposed pathways), the Combination Proposal envisions that for those areas where property owners have opted out, owners will have to place some sort of posting on the ground and register the areas with the State, allowing a map to be made accessible to the public, or be subject to water-borne recreational public access. This would essentially recreate immunity from trespass similar to what existed prior to the change to the posting requirements, but only as to SAIZ areas registered as opting-out.

This alternative pathway can also include donations with reservation of minerals (Pathway 2) out to the historic boundary, pursuant to a negotiated mineral revenue sharing agreements including some form of PILOT to reimburse parishes for diminution of local property tax bases. Finally, Act 626 Three- Party Agreements (Pathway 3) could also fold into the Combination Alternative for those situations where either the donating party seeks unique limitations on access or use that make management by the state more difficult or where the state otherwise does not wish to take on full ownership. Again, either a negotiated mineral revenue sharing agreement or PILOT could be included to offset Parish tax loss. Any access limitations under this scenario would need to be posted and registered. As with pathway 1, a constitutional amendment may be required to smooth the way for the state to alienate its potential claims to mineral rights to dual claimed lands or other lands subject to an agreement established under the combination proposal. The proposed constitutional amendment offered in conjunction with pathway 1 may provide the necessary authority or could serve as a model and be revised to cover such an agreement. See Ex. E.

J. Future with No Action

Finally, the Task Force notes that decision makers in Louisiana must consider the consequences of taking no action to address the conflicts raised in the report. Regardless of what action, if any, is taken, it is clear that more and more land that was once a nonnavigable water bottom owned by private landowners will become submerged beneath the open waters of the Gulf of Mexico and that, in some locations, land that was

once previously dry will become at least partially submerged by water bodies that may not be navigable in law but will be subject to the ebb and flow of the tide. In either situation, the right of private landowners to exclude members of the public from seeking recreational access will prove increasingly difficult to enforce. Recreational sportsmen will continue to be frustrated in their pursuit of customs and traditions that form an indelible part of the Louisiana way of life. Recreational tourism will also likely continue to suffer and fail to realize its potential for generating economic activity as long as uncertainty about recreational access is unresolved.

In due course, some landowners may even decide to relinquish their claims to ownership of water bottoms on dual claimed land. They might reach this conclusion, despite arguable claims of title, because the value of mineral rights attached to water bottoms diminishes as the availability of and demand for alternative sources of energy reduces demand for mineral production on the water bottoms. The landowners may then reason that the cumulative costs of paying ad valorem property taxes, maintaining insurance, and paying for other management expenses exceeds the benefits of maintaining any claim of title.

If this scenario comes to pass, recreational access rights would certainly widen as title to the water bottoms will transfer to the state subject to the Freeze Statute. However, local property tax revenues will decline proportionally, and the state will face the challenge of managing these water bottoms without any additional source of revenue.

K. Conclusion

Now is the time for Louisiana to take action to resolve conflicts over recreational access to waterways, water bottoms, and waterborne resources in our state. Private landowners today are interested in supporting the state's coastal restoration projects and in securing certainty with respect to mineral interests in areas that are subject to claims of public ownership by the state. The state itself is interested in securing certainty with respect to its mineral interests and in securing a steady stream of revenues to support maintenance of our fragile coast and to support its mission of protecting natural resources and managing those resources for all Louisiana residents. Recreational sportsmen respect the interests of private landowners who have invested in their land but also seek to gain secure and responsible access to waterways and water bottoms that have long been an integral part of communities for generations.

This report reviews key principles of Louisiana property law and constitutional law that make solving the problem of recreational access on our changing coast a significant challenge. It articulates six shared values that should guide legislative and policy decisions in the future. It reviews the many useful and imaginative proposals and presentations that have been made by members of the public and by constituencies represented by members of the Task Force. Finally, it offers seven distinct and potentially complimentary pathways forward that the legislature and policy makers should consider adopting and implementing.