MINUTES

PUBLIC RECREATION ACCESS TASK FORCE

January 7, 2020

A public meeting of the Public Recreation Access Task Force was held on Tuesday, January 7, 2020 beginning at 1:30 p.m. in House Committee Room 5, Ground Floor, Louisiana Capitol, Baton Rouge, Louisiana.

I. CALL TO ORDER

Mr. Blake Canfield called the meeting to order at 1:32 p.m.

II. ROLL CALL

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

Sen. Bret Allain
Rep. Beryl Amedee
Mr. Mike Benge
Mr. Rex Caffey
Mr. Blake Canfield
Mr. Daryl Carpenter
Sen. Norby Chabert
Mr. David Cresson
Mr. Taylor Darden
Ms. Cynthia Duet
Mr. Cole Garrett
Mr. Joseph LeBlanc
Mr. John Lovett
Mr. Charlie Marshall
Rep. Jack McFarland
Mr. David Peterson
Mr. Lucas Ragusa
Mr. Sean Robbins
Mr. Cheston Hill
Mr. Jay Schexnayder
Mr. Tony Simmons
Mr. Harry Vorhoff

The following members of the task force were marked as absent:

Mr. Jeff Schneider

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

III. APPROVAL OF MINUTES FOR DECEMBER 19, 2019 MEETING

A motion by **Mr. Tony Simmons** to approve the minutes for the December 19, 2019 task force meeting was approved unanimously.

IV. PRESENTATIONS AND DISCUSSION ITEMS

1. Report of the Drafting Subcommittee of the Public Recreation Access Task Force, review and discussion of the most recent draft of the legislative report and any proposed revisions: **Mr. Canfield** stated the main items for consideration is a review of the latest draft version of the Task Force's Report to the Legislature, marked Draft 5.0. Mr. Canfield stated he wanted to allow Mr. Lovett to discuss changes made to the report since the last meeting. The deadline for us to submit the report to the Legislature is February 1st; therefore, he said, that any substantive changes to the report will need to be brought to Mr. Lovett by the end of the week in order to meet the deadline.
    a. **Mr. Lovett** stated that the changes he worked on since the last meeting start on page 21, where he added a short new discussion on the subject of who benefits from the tort immunity statute, which Mr. Marshall suggested he look into. Mr. Lovett stated that he did more research and the paragraph on page 21 at the end of the discussion of tort immunity statute does reveal that there is some kind of uncertainty and ambiguity about derivative right holders that has now been included. Mr. Lovett stated that his conclusion is hopefully not too problematic, it states "clarification or expansion of the categories of right holders entitled to immunity under the statutes could be an important piece of any comprehensive reform legislation" and explain why that is. The footnotes give a little bit more detail about how those statutes have been applied and some tough cases. Mr. Lovett stated he also worked on the last 10 pages of the report. Mr. Lovett stated that he was able to explain the combination proposal with the help of Mr. Hill's contribution and the material from other state agencies. The Combination proposal is in subsection 8 on pg. 41, it is a detailed proposal, he stated some state actors may have slightly different ideas on how that can work. For the first proposal, which is by LLA, the content is not changed, but the state responses to that proposal are now more organized. In the final discussion of the pathways, which is a condensed version of the proposals, the headings were changed to help clarify. He stated that he has not changed anything about shared values. Mr. Lovett stated he suggests a discussion on whether or not the committee should suggest one more shared value, which could be "we do not want to impose obligations on the state without identifying a source of revenue that the state can use to pay for that responsibility" in other words we do not support any kind of unfunded mandate, Mr. Lovett stated that he thinks that is a theme that he has heard and that the committee might agree on. In other words, that the committee doesn't want to leave the state with serious management responsibilities for land that it acquires ownership of or

that it acquires some other responsibilities for unless the committee is confident that there's going to be a source of revenue to pay for that and maybe it's important for policymakers to consider.

b. **Mr. Canfield** asked if there are any comments or questions thoughts on that being added as a shared value.
    i. **Representative Amedee** stated she would like to see it added and spelled out in that way because any legislative proposal that would come from the recommendations of the task force that includes a hefty fiscal note doesn't seem likely to pass. Representative Amedee stated that she thinks it is necessary. **Ms. Duet** stated that she suggests that any bill that would have obvious fiscal issues would have a substantial fiscal note so you would have to discuss it either way. **Mr. Darden** stated that he shares those concerns. Mr. Darden stated that he understands what Mr. Lovett is trying to accomplish but he is not sure whether it can be commented upon without appropriate detail. **Mr. Marshall** stated he understands the concept, but it may be too dogmatic to say the committee can't do it, if it is going to increase the fiscal burden. Mr. Marshall suggests the word to use is "minimize." **Mr. Lovett** responded that the suggestion could be that the committee wants to minimize as much as possible additional fiscal responsibilities to the state, but it does not mean the committee does not want to go forward with some particular pathway. Mr. Lovett stated he is comfortable with that **Mr. Canfield** stated that how Mr. Darden stated it is probably correct, it goes toward how we are going to fund the proposals and what the additional costs are going to be. The funding and costs are discussed in a bit more detail in specific proposals, but it is obviously up for debate. **Senator Allain** stated that if there is a clear benefit that has a minimum cost, he believes the Legislature would sign on. Senator Allain stated everything is relative, if there is a clear benefit to the citizenry or state, he believes that needs to be discussed. Senator Allain asked how we define the cost if we are considering the constitutional amendment that was passed out before, it could be a slippery slope that he thinks needs to be decided by the Legislature. **Mr. Canfield** responded that based on Senator Allain's statement it sounds that this value needs to be worded as a consideration of costs and benefits. **Mr. Hill** stated that in regards to the combination proposal, there is a discussion about further exploration being needed to determine the feasibility of the idea of the surface revenue is unknowable at this point, maybe the landowners would be able to provide some figures. Mr. Hill stated that the loss of mineral revenue is unknowable to a certain extent. The recommendations will have to be explored as they are being implemented. **Mr. Canfield** stated that having heard everything, the committee may want to see a draft before we can say if it should be added, the specifics are very important. **Senator Chabert** stated that it is important to remember that nothing we say here is binding and they're all recommendations and the legislature in its infinite wisdom at the end of the day is going to decide what gets appropriated and what is not going to get appropriated. Senator Chabert stated that he thinks it is a moot point for the committee to say we don't want to create

an unfunded mandate because you're not here to say this is how you should pay for this or this needs to be paid for, you just really are saying here are the issues because even when the recommendations of this commission are looked at by whichever legislators decide to actually draft the legislation are just going to use this as a framework. **Mr. Lovett** stated that he thinks almost all the proposals try to take into consideration the effect on the State from a fiscal perspective. Mr. Lovett stated that he believes everyone is making a good faith effort to do that, it's hard to know which will come closest to minimizing to the greatest extent possible this cost but everyone is trying. Mr. Lovett stated that's why, as he was reflecting, it is a shared value because everyone wants to try to achieve that if possible, no one wants to intentionally create a big cost for the state it cannot pay for.

c. **Mr. Marshall** stated that in the decoupling of surface and minerals, in the disadvantages section on page 36, the statement is made that the negative effect of the ability of local taxing authorities to provide public services, Mr. Marshall stated perhaps this statement could be softened with an expression, perhaps in a footnote, that any enabling legislation could consider the possibility of a donating landowner continuing to pay property tax on the donating property even though the mineral rights are decoupled and reserved, it seems in the context of what would be gained in a cost/benefit analysis. Mr. Marshall stated he is not suggesting the committee positively recommend it but include it as a possibility.
d. **Mr. Marshall** stated his next substantive comment is on the public things and natural navigable water bodies section found on page 6. The lead-in of the 1st paragraph mentions that the civil code defines running water and the water and bottoms of natural navigable water bottoms as public things owned by the state. Mr. Marshall stated that is not his understanding of the law. Mr. Marshall stated he believes Article 450 uses the water of natural navigable waters as an example of a public thing, but it doesn't assume that every natural navigable water bottom is a public thing. For instance, you may have a non-navigable water bottom that is privately owned that become a public water bottom. Mr. Marshall stated the way it is addressed in the report suggests that if it is navigable in fact, then the state owns it. Mr. Marshall stated that he would like to see the language revised to more closely track the language of Civil Code Article 450, which says public things are owned by the state and then gives examples of public things, that include waters and bottoms of naturally navigable waters and bottoms, without the committee making law that does not currently exist. Mr. Lovett stated he will quote the Civil Code and that on page 12 the dispute over what happens when there are changes in navigability over time is included.
e. **Representative Amedee** stated that she recommends a word change for Section B on "The Problem," the second paragraph on page 4, line 5, it says "and global climate change resulting in sea level rise," she would like to see it simply say "and sea level rise." Additionally, she would like to change the phrase, "encouraging visitors from other states" to read, "encouraging visitors from out of state;" this is found on page 5, second to last paragraph.
f. In the section covering natural navigable water bodies, **Mr. Darden** stated he suggests changing the word located five lines up, last word, "adjoining" to "the riparian" in order

to be consistent with the use of the [Civil} Code. Mr. Darden also notes that throughout the draft some pages are justified paragraphs and other pages are not so Mr. Darden would suggest one or the other.

g. **Mr. Robbins** stated that he believes the committee has established in Louisiana's Civil Code "navigable" is not defined, so he would like to revisit whether or not the Task Force needs to define "navigable" for the purpose of this report. **Mr. Canfield** stated that there is case law defining navigability and the presentation Mr. Vorhoff made on what those cases state but that there is no statutory definition of navigability as it deals with either ownership or accessibility by the public. **Mr. Carpenter** stated that he would like to second what Mr. Robbins stated. Mr. Carpenter stated that in several places navigable waters is mentioned, but when you leave something undefined and allow it to be defined in Court can lead to confusion. As Mr. Davis stated in our last meeting, there are six different definitions in Louisiana law on navigability. Therefore, he suggests a definition of navigability would be a good recommendation. **Representative Amedee** stated there are a few issues with having a "navigable waterways" definition. One, is in the body of this report, it sometimes would be better if we could distinguish as we go through the report whether we're referring to the legal definition which apparently doesn't really exist or the practical definition which the general public expects would be basically if you can float a boat on it it's navigable, just for the sake of a clear understanding of our use of the word in the report and how were using it. Representative Amedee stated a second problem would be whether or not this body wants to recommend a specific definition of navigability or whether the Task Force simply wants to recommend that the legislature make such a definition. **Mr. Lovett** stated he is sympathetic to the desire to have a definition and to agree on one definition of navigability. Mr. Lovett stated, however that he believes that to attempt a definition in this report would really be deciding outcomes. He stated he believes it is clearly a job for the Legislature and he would be hesitant to offer a new definition in this report. Mr. Lovett stated he could understand highlighting the issue and to say some people want a definition but he is not sure everyone does because we have had this flexible definition of navigability for a long period of time, that would be a major change in Louisiana law. Mr. Lovett stated that there are other definitions in the civil code that the committee may want to suggest that don't have such broad impacts, such as the definition of "seashore" something more specific that might be a little more manageable than navigability. **Mr. Darden** stated that Louisiana has definitions of navigability that have been accepted for 200+ years. Mr. Darden stated the point is that if you have a definition, it still has to be applied to the particular facts of a case. Mr. Darden stated he thinks the definitions the courts have applied over the years allow for flexibility in decisions based on the particular facts of a case. **Mr. Marshall** stated that just a simple example may prove the complexity of the issue, you could have a landlocked lake that is 50 ft. deep, it wouldn't be navigable in law because it is landlocked because navigability implies that the water body is a highway of potential Commerce and any landlocked feature is not. if we were to attempt to Define navigability you would have to get into every aspect of the case law that addresses facts and circumstances to come up with a definition that is consistent with applicable law which we could not do. **Representative Amedee** asked where in the report a discussion

about problematic and sometimes conflicting definitions of navigable waterways is. She asked whether the committee explained that Federal definitions focus on commerce alone and whereas the state focus is not? Representative Amedee stated she is concerned about her fellow legislators who are going to receive the report without having had the opportunity to participate in this ongoing conversation, so they may be completely unaware that we have issues with varying definitions of navigable. **Mr. Lovett** responded that in section D5 of the report there is a discussion of navigability. Mr. Lovett stated that the difference between state and federal law is not as big as you think. The state courts and the federal courts generally focus on the ability of a water body to sustain commerce. The state has a number of factors to look at, for example the depth, width, and location; but we always are asking whether or not the water body in its natural condition, putting aside man-made obstructions, is capable of sustaining commerce. Mr. Lovett stated the only difference from the Federal definition is that the federal definition is worried about interstate commerce. **Mr. Marshall** stated that in his experience, both the state and federal laws define navigability for purposes of regulation, which is different from navigability defined for purposes of ownership, which is more of a state issue. Mr. Marshall stated he does not have a problem with putting something in the report that comments on the varying ways in which navigability is defined, but for purposes of ownership I would be very hesitant and reluctant to try to define navigability for Louisiana state law purposes there is existing law that we do not need to change it. **Mr. Robbins** asked if there is an opportunity to make a distinction between navigability for public access versus navigability for ownership just for the purpose of this report**. Mr. Canfield** stated that he remembers when Mr. [Emory] Belton speaking earlier on distinguishing the ownership issue from the accessibility issue so that would be somewhat in keeping with the points he was making. **Mr. Marshall** stated that traditionally, access is an accessory right to ownership so you have to have ownership in the state in order for there to be public access, so if you try to define public access in some way that's divested from an ownership concept you would be running afoul of existing law. **Mr. Lovett** stated that if the committee focuses too much on trying to make navigability work, we will be missing our opportunity. The problem of recreational access can be dealt with whether or not a water body is navigable. If it is a true navigable water body and it is a natural navigable water body, then we know who owns it and that access is guaranteed. Mr. Lovett stated that the big problem is non-navigable water bodies that have the capacity to provide some recreational benefits to members of the public, but the landowners own those right now. The owner can give access to another person Louisiana law, it’s called a servitude so the owner can grant someone else access for a specific purpose and retain ownership and that's a completely comfortable legal idea and so I think that's why so many of the proposals focus on either a grant of a servitude with retained ownership or some mechanism for transferring ownership of these non-navigable tidelands. These are water bodies where you might be able to float a boat but they do not meet the definition of navigability. **Mr. Marshall** stated he agrees with Mr. Lovett and the proposals that are suggested by this report essentially finesse the issue because it's all based on consent and agreement and it doesn't matter whether the water is navigable or not as long as an agreement is reached between the landowner and the state

on any of those paths navigability really becomes irrelevant because the access is part of that agreement, that to Mr. Marshall is an excellent way to approach the issue. **Mr. Darden** stated that because the focus of this committee has been to shift away from who owns the water bottom and therefore who has access to that water bottom, to drawing a compromise area, to draw a line in the sand saying on this side of the line the public has access regardless of navigability or future navigability. **Mr. Peterson** stated he understands what Representative Amedee was talking about because the Legislators reading the report may not completely understand that navigability does not necessarily determine access, its ownership that determines access and so whether something's navigable or not does not necessarily equate to access. Mr. Peterson stated that he suggests simplifying the language. Mr. Peterson stated that if the committee starts changing terms or defining navigability, that affects ownership rights of parties that may make some kind of law change a taking. Some owners are going to claim there's some kind of taking of their ownership right because it already exists.

h. **Mr. Hill** stated that the combination proposal tries to get away from that navigability concept in a voluntary way by incorporating aspects of the reintroduction of defenses to trespass, the compromise area as defined in these agreements could be used on a Statewide basis and it basically applies to areas subject to the ebb and flow of the land, so basically tideland. It applies areas that you have to be able to access without damaging the emergent land by a floating vessel, and in those areas if landowners decide they don't want that type of access then they can post their property and that posting requirement would be limited to only those coastal waters. **Mr. Lovett** stated that on page 46 at the end of the discussion of the combination proposal, some representatives on the task force would also support adopting a similar posting requirement for basically the entire coastal zone, in other words any land that was subject to the ebb and flow of the tide and that met the other criteria for the compromise area would be subject to access unless the landowner posted it as private, so that is a change in the law but it's an interesting idea. Mr. Lovett wanted to flag it because if it's something that not everyone accepts he will note that, but he is unsure how strongly people feel about this idea but it's a way to get a kind of more universal solution without working out the detailed agreement for specific parcels of land under any of the models that we have here. Mr. Lovett asked if that was Mr. Hill’s idea. Mr. Hill responded that yes it is and in response to some concerns that some state representative had about a patchwork of accessible and inaccessible areas due to the voluntary nature that we might have people that want to opt into this and they're completely surrounded by people who want to opt out and you simply can't get to these areas; therefore, the value of access is completely negated by that enclosed estate sort of aspect of that agreement. In order to get aside from that, if this were applied to the entire coast that only met the definition of these accessible areas as a matter of fact and we reinstituted the affirmative defenses to trespass which is constitutional, and was the law until 2003 and prior, then that might allow us to solve this issue for the entire coast after a sunset period that expired in those who did not opt out or maybe absentee landowners who live in Switzerland and just don't know anything about this and then their land would be open to access, only for recreational purposes and only insofar as it fits the definition of the compromise area. **Representative Amedee** stated that finding one-size-fits-all

definition of navigability to put into state law is fun to think about but not necessarily practical and really isn't necessary to solve the problem that this task force is looking into which is accessibility. In order to really solve accessibility issues in most situations, you would need to disconnect the surface, the water above the water bottom. **Mr. Marshall** stated that he is concerned about the opt in and opt out approach because you have major landowners in coastal Louisiana and as the law presently exists you presume to know where you are, but if you don't opt into these agreements, then your property is open to public access. That puts a tremendous burden on large landowners of coastal properties to post and that was one of the key factors in getting the law changed in 2003 because it was an almost prohibitive expense to do posting on very large amounts of acreage. Mr. Marshall stated that he believes that maybe it ought to be in reverse that unless a landowner opts in then it's going to be status quo to avoid that. **Mr. Darden** stated that reestablishing posting on the reverse side makes sense. If you're opting in do you want to allow Public Access into those areas then post it and allow the public, let them know that access is welcome here. But for those large landowners who choose not to opt in, why should the economic burden be imposed upon them to post vast areas and how many postings are going to be necessary. Mr. Darden stated that he agrees with Mr. Marshall that if you go the Opt in route and identify those areas that are opted-in then the public is welcome to, not the other way around. **Mr. Hill** stated that flipping it that way would do nothing to solve the patchwork problem with people who decide not to participate in this. It defeats the entire idea. In this combination proposal we understand the reason in 2003 why it was repealed because it's cost prohibitive to continue to maintain those posting. As we were saying in the last task force meeting the idea involves the state stepping up in a way they could come with the fiscal note it could be quite expensive, but to maintain a record of the postings in our GIS database. One layer of the GIS database is called the Atchafalaya boat launches layers and it had pictures of every single boat launch with a little data set about whether or not they were public or private four lanes, two lanes, or one lane or gravel and things like that, and it might include expansions for data storage for the Department of Natural Resources to maintain such a layer and it might involve some extra expenses for GIS Personnel. The idea there is to try and mitigate the problem of fishermen removing those postings by keeping a registry in the state's GIS database and it would also introduce some form of authority to the far reaches of the coastal marshes where landowners might put signs and fisherman might question whether or not the signs are legitimate. Under this new concept, they'd be able to check the website and see if it's registered and thereby mitigate some of those challenges. To flip it and do it only for people who opt in would have no effect as to the concerns relative to people opting out and creating a patchwork of areas that you might have a landowner that opts in that can't be accessed because he's completely surrounded by land owners who opted out. **Mr. Robbins** stated his concern with vast posting is that it indicates that there may be some landowners that would not opt-in. **Mr. Caffey** stated that you could point out both sides concern and options for this, the burden for this is not to come to a complete consensus on how that language should be. Mr. Caffey stated he believes the final recommendation is where that's really more important this is just covering the bases in the various opinions on either side. Mr. Caffey stated he would suggest discussing the

challenges and the pros and the cons. **Mr. Lovett** stated he believes the opt-out idea has a has a lot of value in an area that is subject to a voluntary compromise because there might be a special area within a parallelogram that's defined by an agreement or where a landowner does want to restrict access for some specific reason, for example there are some ecologically sensitive areas or there's a particular small parcel that has value. Mr. Lovett stated he tried to describe it on page 45 and the top of page 46, but his concern is that this idea has raised here needs to be listed as a separate proposal, and report that it is a controversial proposal. Mr. Lovett stated that an opt-out rule may make sense in an area that's broadly defined as a compromise area. **Mr. Canfield** stated that it is definitely one situation where it could be useful is if you have an area within property that has an agreement, but they want to limit access in a subset of that area. One of the benefits from having it be more broadly applied across the coast, is that the confusion of fishermen who do not know if they are on private or public property would be resolved. **Mr. Hill** stated the sunset period idea is intended to address the issue of a patchwork statewide. Mr. Hill stated he thinks amending the affirmative defenses to the trespass section to apply only to the compromise area lands as defined in the combination proposal might be a way to do that. **Mr. Darden** stated he does not understand why if the state listed on its GIS program that this is open area, how that offends what you are proposing. If you do have an enclave were you have a landowner who wants to participate and everybody around it doesn't and then state would have any interest in it. If the land owner chooses to have people come into his property by voluntary agreement, then a posting should be required by default. **Mr. Lovett** stated that he proposes moving it to Section 3, the discussion of Section 3 is a Sportsman's proposal. **Mr. Hill** responded to Mr. Darden's comment that if it is not shown as a voluntary agreement area they can't go. Mr. Hill stated that takes us back to the question of navigability we are trying to avoid that we were discussing earlier. The state will still claim those waters and when they're not posted, you'll still have this area where people may or may not try to enforce their private rights to that property, so that's the idea behind opt out and the sunset period to try to avoid that. **Mr. Carpenter** stated one of the arguments landowners give is the upkeep and posting of the signs, there is a motivation for them if they want to have it posted to have it signed; however, if you reverse it the other way then with one of these proposals they can secure their mineral rights, the sign saying hey Public welcome here, but if the sign is taken down then at that point the landowner or state has no incentive to replace that sign. Mr. Carpenter stated that he mentioned it to Mr. Darden that he is concerned about is if the landowners get to secure their mineral rights in exchange for Public Access but then if we're going to see a situation where some of these properties are going to be subdivided in choice areas, the only way in a dynamic situation along and on the water where often times you end up in areas where you didn't intend to end up, the only way for you to know where you're at is an affirmative posting. **Mr. Marshall** stated that if you impose costs on landowners to keep people out, the proposal is not going to go anywhere with the major landowners. Mr. Marshall stated that he thinks the combination proposal has a lot of merit because the major Coastal landowners are going to be keenly interested in a combination proposal that does not force posting but allows them to enter into agreements with a welcome sign. Mr. Hill stated the original version of affirmative defenses to trespass is already its own

proposal in the report and it's just a recommendation. As Mr. Lovett suggested taking it out of the combination proposal and making it clear that the combination proposal is going to be by voluntary agreements, if the Legislature wanted to combine the aspect of affirmative defenses later on its own, but **Mr. Hill** stated he is fine taking that aspect out of the combination proposal. Mr. Hill stated affirmative defenses for trespass may be something the Legislature wanted to consider.

i. **Mr. Darden** stated that in the discussion of manmade canals and the discussion of navigability it is if a private canal built with private funds on private property creates a canal that is navigable by definition then that would open it up to access, but in the discussion in the *Vermilion* case, the *Aetna* case, which are the Supreme Court cases, supporting the proposition that a man-made water body created by altering or improving or destroying any previously existing natural or navigable water body can be effected by federal navigation servitude and that is subject to public use, the law is also clear that federal navigation servitudes do not give rise to recreational use. The navigation servitude allows transit from point A to point B, and it would not be used for recreational activities such as fishing. **Mr. Lovett** agreed that navigational servitudes do not include fishing, Mr. Lovett stated he did try to address that on page 46 in the section on the Rights for Canal's separately from the other proposals because the other proposals may not solve the canal problem and if the state really wants to provide recreational access to a private man-made canal, the state should try to acquire the right by purchasing it, the owner granting servitude or the state could exercise expropriation and then it would be a public use, it would be no problem with the constitutionality. However, the simple solution and if there is a small bottle neck on a private canal that is causing a lot of problems then the state should try to acquire it. Mr. Robbins stated that from a fisherman's perspective, private canals are very important in Louisiana estuary depending on the time of year fish migrate back and forth from cooler moving water, moving out of natural waterways that are flowing into these private canals. The economic impact of the state, any recreational person is going to want to follow the fish wherever they are. **Senator Allain** stated that on his property he voluntarily allows people to use those canals for recreation, he suggested giving consideration to the landowner regardless of the mineral rights. The landowner still has rights to limit use at a future date. Senator Allain stated that is where he would have a problem with the sunset portion that was suggested because if a landowner opts-in, but can never opt out, then Senator Allain stated that he would never opt in. Mr. Hill stated that it's important to stress the voluntary nature of the combination proposal as it was written, the idea about the affirmative defenses section and sunset period is that just because you have opted-in doesn't mean that you couldn't opt out. If you opt out your property, you could opt in at any point in time. The voluntary nature of the proposal is important to stress, how the issue of when you opt-in some of your property and opt-out as to other parts of your property and then later decide to opt out additional portions of your property that you've already opted into, that could become an issue with the mineral reservation that has already occurred. Senator Allain stated that he would want to opt out if a problem later arises. **Mr. Hill** stated that if you don't opt in, you can post your property in the future that don't become a problem. Mr. Hill stated then those canals would be the same as land and would not be

included in this proposal, unless you participated in a donation It could be explicitly written in there, excepting private canals. It's not what the compromise area is contemplating natural.

j. **Mr. Canfield** stated the next section to review is the Freeze statute on page 13. **Mr. Darden** stated on page 13 the footnote is dealing previous section, Mr. Darden suggests adding another sentence stating that in neither case was the question of convincible taking raised.

k. **Mr. Marshall** stated the section on the freeze statue preserving the mineral rights for as long as the lease is in effect may need some changes. The underlying assumption is that the state has become the owner of that water Bottom by operation of law and prescription is not the issue, then, it's just the existence of the lease and when the lease expires that mineral rights revert to the state. **Mr. Darden** stated he does not think the statement is accurate. **Mr. Lovett** stated he will consult with experts in mineral rights and get back to you on that.

l. The next portion of the report reviewed was section 11 on page 19 on Louisiana Tort Immunity Statute for permissive recreational access and the added section towards the end of page 21 on the definition of owner as used in those statutes and perhaps broadening that definition. **Mr. Marshall** stated that he is not sure why there are two statutes at all, shouldn't we recommend that they consolidate them into one statute. **Mr. Lovett** responded that where there is a conflict the court looks at the second for clarification. **Mr. Emory Belton**, representing the Sportsman's Coalition, stated that the House or Senate civil law committees could look at and request a review by the State Law Institute to come up with a proposed change. There is a process in place, the law institute is on standby to review things such as this.

m. **Mr. Canfield** stated that the next section to review is on page 23, on impact of current uncertainty respecting water bottoms on recreational sportsman recreational tourism. **Mr. Robbins** asked if this is the appropriate section for the decision that charter boat fisherman should be included as recreational fishermen for purposes of the proposals. **Mr. Canfield** stated he is not sure. He asked if instead it should be included in the section that discusses proposals of recreational access. **Mr. Lovett** stated on pg. 28, footnote 31 it addresses the scope of a recreational servitude that would result from one of the voluntary agreements and it explains that other jurisdictions have included charter boat captains within the scope of recreational access because they are engaged in recreational activity. Mr. Lovett stated he could repeat the footnote in other areas. **Mr. Darden** stated that the landowner's proposal is not trying to delineate between recreational and commercial, the landowner's proposal would welcome access by all, their concern is unregulated access and as long as we have protections over times when access is granted over the types of vessels that are used, weather there may be certain areas that are prohibited, then the Landowner's Proposal is broad enough to include both recreational and commercial. **Mr. Canfield** stated that including that the proposal is not prohibiting charter boat captains would be helpful, subject to the limitations of all users. **Mr. Darden** stated that some confusion may have arisen from the word recreational access, what he uses to mean public access. **Mr. Lovett** stated the word "limited" is used in places. Maybe it should just say "regulated" instead and we could add in that

recreational fishing and boating would include use by charter boat captains. **Mr. Marshall** stated that the immunity statutes look at recreational use from the standpoint of the protected land owner in other derivative right owners, whether it is a pure recreational user or a commercial user who is fishing, the landowner and derivative right user still has immunity. He would circulate suggested language for consideration.

n. **Mr. Canfield** stated the next section is the Sea Grant study. To clarify, the Sea Grant study was not the body of the recommendations in that report**. Mr. Caffey** stated that he wanted to reiterate that they wanted it to be phrased "preliminary options."

o. **Mr. Marshall** asked if they should make comments on the proposed constitutional amendment. **Mr. Canfield** stated that this is the appropriate time to discuss that. **Mr. Lovett** stated the committee should consider the wording they want to use to describe the nature of the servitude. **Mr. Canfield** stated if the committee proposes several pathways, they may need to broaden the constitutional amendment proposal to encapsulate them all. **Mr. Lovett** stated that a question to think about under the donation and Severance model or the combination model, where there is a transfer of surface rights to non-navigable tidelands, are all members in agreement that we need a constitutional amendment? **Mr. Hill** stated that under Mr. Marshall's proposal, you would only need a Constitutional Amendment to allow for the alienation of minerals pursuant to these arguments. We only have a draft of the alienation of navigable waters but the alienation of manmade waters you need under Mr. Darden's proposal because he's envisioning a permanently fixed boundary at a historical shoreline, at the private side of which there would be private ownership and it is that type of navigable water that he is envisioning private ownership over. The combination proposal is envisioning only one Constitutional Amendment and avoiding the surface ownership of navigable waters by private and avoiding the need for a constitutional amendment that allows the state to alienate navigable waters. **Mr. Lovett** stated he would invite anyone who wants to try drafting a more limited Amendment for the donation and severance model or the combination model that only deals with minerals **Mr. Darden** stated that he is not sure he is comfortable not having the protection of a constitutional amendment with respect to the donation because there you are effectively dealing with mineral rights and the argument could be made that that is a divestiture of a state mineral rights if it agrees to a percentage with a landowner. Mr. Darden stated that the amendment should be broad enough to apply to all of these. **Mr. Vorhoff** stated that he agrees with Mr. Marshall with the constitutional amendments or the draft that we come up with would need to be useful for Mr. Darden's proposal and Mr. Marshall's proposal. In both proposals it is the same historical shoreline being contemplated. **Mr. Darden** stated that the draft was broad enough to cover all of it. Mr., Darden stated his only question with the draft is towards the end of it, it talked about not affecting recreational rights provided such recreation is for public use, he stated that he does not understand that limitation because the reclamation right under the Constitution is not limited. It is the right the landowner has to reclaim any property that has been lost through erosion or subsidence. **Mr. Lovett** stated that he will have to defer to Mr. Darden because it does subject the property to a perpetual reservation of minerals regardless of the present future navigability of the water bottom donated, it does seem pretty broad. **Mr. Darden** stated that a possible explanation is that the existing recreational right has

an exception at the very end where it says except as provided in this section which is a broad right of reclamation the bed of a navigable water bottom may be reclaimed only for public use. It seems to have slipped into this not as an exception but as a statement of the effect of the reclamation. Mr. Darden stated that he thinks that statement should come out in the proposed draft, provided such reclamations for public use. **Mr. Hill** stated that this Constitutional Amendment may negate the need for traditional reclamations, establishing surface and mineral ownership regardless of navigability, if they were to desire to raise the land, build the land up above the water level, they would have the right to do so or they would have the right to leave it as navigable waterways. With this Constitutional Amendment, traditional reclamation is outdated. **Mr. Darden** stated it's been on the books forever and the committee does not need to complicate the process. **Mr. Hill** stated there is also a possible concern of fairness with people who have gone through the reclamation process in the past and no longer have to now under this new rule. **Mr. Darden** stated that he drafted, the current provision of alienation of water Bottoms in Article 9 Section 3, the last sentence is a combination of two points, the current last sentence of Section 3 says "except as provided in the section the bed of a navigable water body may be reclaimed only for public purpose." Mr. Darden stated that he revised that to state "the section shall not impair the right of reclamation by the riparian owner to recover the bed of a navigable water body and any land loss through erosion provided such reclamation is for public use." He stated he would not mind changing that to purpose and then it also doesn't limit the right of the state to lease land for mineral purposes. **Mr. Marshall** stated that all he thinks Mr. Darden needs to do is refer to the existing constitutional provision provided in Article 9 Section 3. **Mr. Peterson** stated that one significant issue is this last sentence changes the right of reclamation, there is no right of reclamation unless the Legislature grants it. The last sentence "except for the purpose of reclamation by the riparian owner" and so the Legislature has to create that by Statute that's the whole Reclamation process, it does not grant a right, it grants the Legislature the authority to grant that right which means you have to go through that process. He is concerned about taking out the "except for" language and then combining in this section "shall not impair the right of reclamation" language. It gives you a right of reclamation without any kind of statutory and legislative action and that's a significant change in the law. Mr. Peterson stated that he thinks it is best to leave the old language, take out the right of reclamation sentence and have it go back to reading "this section shall not affect or impair leasing of state land to water bottoms for minerals other purposes." The language about entering an agreement is needed, but not giving a right of reclamation that is beyond what is already in the constitution. **Mr. Vorhoff** stated that he agrees with Mr. Peterson, to keep the existing last sentence because that means the state cannot reclaim from a public person. With the respect to the limited right of recreational access, taking out recreational to allow for a broader freedom and then modifying the term "limited" to allow constitutionally for a full right of access. Perhaps a negotiated right of access to leave it up to the parties, up to the state and up to the landowner to determine the extent of whether it is limited or complete, let that be a negotiated part**.** **Mr. Lovett** suggested a negotiated permanent right of public access. **Mr. Marshall** stated it seems that all you want to do is to say that you're not impairing the existing law,

which is in Section 9-3 and there are a many statutes that deal with Reclamation under 9-3. **Mr. Belton** does not think it needs to get into public use, it just needs to say it does not impair or limit rights under Article 9 Section 3 as it exists. **Mr. Darden** stated that his intent was not to change the existing law but to add to it. He has no problem revising that last section to say "affect or impair the leasing of State lands from water bottoms from mineral development," and delete all reference to reclamation so the existing body of law stays the same. **Mr. Hill** stated it must stay in because then you are saying this section shall not prevent it, that's the exception. **Mr. Darden** stated that one sentence allows the fixing of a boundary on a negotiated basis for public access, then you delete any reference to the reclamation, but you preserve the right to lease. **Mr. Hill** stated he wants to make sure everyone is in agreement that this proposed amendment is sufficient and article 9 section 4 would not also need to be amended, which is the specific provision on alienation of minerals. **Mr. Lovett** stated that his understanding is that it may not be implicated, because it requires the state to reserve mineral rights on property sold to a private party and that's not really what's happening here. Mr. Lovett stated that he was not sure and that he will defer. He stated he wanted to make sure that there are no conflicts there. Whether or not these are sales, it's arguable that the word donated is a misnomer these in some cases maybe not actual true donations; therefore, article 9 section 4 may need to be reviewed. Mr. Lovett stated that in Mr. [Mark] Davis's presentation he explained that there was an amendment to article 4 in 1995 to make way for the settlement of the Isle Dernière dispute, then that was really why this additional language was added, clarifying that mineral rights on land contiguous to and abutting navigable water bottoms reclaimed by the State through coastal restoration projects will be reserved except when the state and private land owner having the right to reclaim recovered land agree to the disposition of minerals. That was part of Mr. Davis' presentation, that was a road map for where we're going off of. **Mr. Peterson** stated that is correct that the change in section 4 was to allow essentially for alienation and it was to cover those eroded areas, the dual claim lands, and the barrier islands. You could have agreements and those agreements essentially allow the State to acquire existing lands but in exchange for that you could enter into agreements with the landowner such that you would grant them the mineral rights to those reclaimed lands that were, at the time, waterbottoms and so allow a partial alienation of waterbottoms in that it allows you to alienate the mineral rights but not the waterbottoms. From that standpoint, this allows for the mineral right alienation, but it may not fully allow for donations of property and some things further. Mr. Peterson stated that he does not think article 9 section 4 needs to be amended. **Mr. Vorhoff** stated that since the current provision allows for transfer of mineral rights to the private owner, the current constitutional provision does not provide for it currently. Currently you have to reclaim in order to split up the minerals and you might need to modify that to allow for a situation where there is no reclamation. You can modify the language in Section 3 to cover the mineral rights in those situations and you won't have to also modify section 4. **Mr. Belton** stated that the change to Constitution Article 9 Section 4 took place in 1995, that was the Isle Dernière project, the amendment to Revised Statute 41:1705 does reference article 9 Section 3 of the Constitution specifically so however that article reads

will directly impact R.S. 41:1705, and that deals with exactly how the reclamation process is done.

p. **Mr. Canfield** stated that the next section to review was section 4 on decoupling land and minerals on page 35. **Mr. Marshall** stated he made a comment on Part B on page 36 about the suggestion of some mention of the possibility of amending the ad valorem tax statute earlier. **Mr. Lovett** stated the comment was that there was some provision that would allow a landowner to keep paying ad valorem property taxes even though they've donated. **Mr. Darden** stated that he thought that the best way you can do that is in the middle of that paragraph.

q. **Mr. Canfield** stated that the next section to review was on page 36 use value taxation proposal. Mr. Darden asked whether on the second line of that section, where it says to provide for public access to qualified marshland from navigable water bodies or should it include some other form of Public Access. Mr. Lovett stated he will try to revise it for clarification.

r. **Mr. Canfield** stated that the next section to review is the Act 626 model, which begins on page 38. **Mr. Vorhoff** stated that in the second paragraph, second line he suggests adding "which surface rights in coastal lands are transferred to this state or a designated acquiring authority." The last paragraph on page 38, Act 626 of 2006, which specifically gave the state authority to enter into mineral boundary agreements, he recommended inserting "in which surface rights in coastal lands are transferred to the state or a designated acquiring authority."

s. **Mr. Canfield** stated the next section to review is on page 39 on the combination proposal beginning on page 41. **Mr. Hill** stated could possibly be a section D to the definition of "compromise area" added, "not comprising man-made Canals" because the compromise area is an area that under this proposal would become owned by the state and they would reserve mineral rights as that area. Man Made canals are fairly easy to identify on the ground and there is no ambiguity in the law about whether or not those are private except for certain specific factual scenarios where a court could determine they have taken the place of a natural navigable water body. Mr. Hill stated he thinks that those private canals should be excepted from those agreements as any other land because the purpose of this compromise area is to compromise on the question of navigability as to these natural water bodies are they navigable or not. It would be an easy fix to say not comprising man-made canals and by switching the affirmative defenses to trespass aspect of this proposal over to the alternative pathway it will make it more clear and the affirmative defenses to trespass could use this definition or something similar to make it clear what the affirmative defenses of trespass would be applying to. It would be reasonable to leave it as defined. The Combination proposal in the compromise area should except private canals in that compromised area definition. **Representative Amedee** asked if there is a legal definition of canal that says that it's man-made. **Mr. Hill** stated that no, he is not sure if there's anything more than just a common-sense knowledge of what a canal is. **Representative Amedee** stated that the general definition of canal says an artificial waterway, meaning it was man-made. **Mr. Hill** stated when we refer to canals there may be some ambiguity as to whether or not if it's straight and narrow is a natural water way. It is possible to specify. We may need to be redundant. **Mr. Robbins** asked if all natural

navigable waterways are already owned by the public and therefore accessible by the public. **Mr. Canfield** state there is disagreement about navigability in fact versus navigability in law and also if it was navigable at the time of either severance from the state or at the time of statehood in 1812. **Mr. Darden** responded to Representative Amedee and stated that landowners are only concerned with private canals and the code refers to private canals not man-made. **Mr. Robbins** asked whether Mr. Darden's proposal allows for access to private canals. **Mr. Darden** stated it does not allow for private access to private canals dredged on private property with private funds. **Mr. Lovett** stated that there already is a separate section on canals (Section 9), and the three options with canals one under the LLA proposal, in that case the landowner is keeping ownership of the canal, but if there was a private canal in that area recreational access servitude would apply to the canal because you were drawing a line in the land and saying there's going to be access here, but in your agreement you might want to carve out a particular canal and say no access here, it would be like an opt-out situation. Under the donation in Severance proposal, canals are dealt with most easily because the state becomes the owner of all the surface. Under the combination proposal the landowner to maintain minerals but the state becomes the owner of everything covered by water including canals and the quid pro quo is the landowner is relieving himself of liability for it towards property taxes and in a defined area maybe keeping dry land. This is where the opt out option may come into play when a landowner wanted to keep ownership of a canal they should specify what canal they want to keep private ownership of and that would be the clearest way. Mr. Lovett stated he could outline those options in section 9. **Mr. Hill** stated that is the simplest interpretation of how this proposal would work and trying to exclude private canals from the definition of the compromise could get quite complex. The solution to Senator Allain's concerns is to opt out as to any areas that you feel might need to be kept private and you can opt in indefinitely as to any areas of those that you wanted to. It would cause a problem if you opted in and later decided that you wanted to opt out at that area. The language of the voluntary agreements can be negotiated between the landowner and the state to provide for protections against any type of damaging activity to the emergent land that remains owned by the landowner. **Mr. Darden** stated that the LLA proposal excludes private canals, but it does not prevent the individual landowner who negotiates an arrangement with the state for the creation of a boundary for allowing that access. That's the flexibility that the LLA proposal has but the suggestion that the default is when you enter into the agreement you automatically have public access into these private water bodies is a big concern of the landowners. The damage that is caused by this open access into these private canals is what we are trying to preserve. The default is private, unless the landowner wants to open them up.

t. **Mr. Vorhoff** stated that on page 42, in respect to allowing private landowners whose land had eroded to then regain ownership of emergent land, it should be noted that this will be a change from the current regime. That would require a constitutional amendment. He also stated that the last sentence should read reclamation is for a public use.

u. **Senator Allain** asked to review #5 the use value taxation proposal on page 36, he strongly objects messing with the "use value" taxation for Agriculture, Horticulture, Marsh and Timberlands.

2. Discussion of next Task Force Meting –Scheduling and Agenda Items: **Mr. Canfield** asked the members to get with Mr. Lovett before the end of the week. The next task force meeting is the 21st of this month at 1:30 pm, the plan is for that to be the final meeting where we would be approving the report. **Mr. Marshall** asked if Mr. Lovett could give a red line version. **Mr. Lovett** stated he will do a redline version and a clean version. Mr. Lovett stated on the shared values his instructions are to include a short statement that the committee wants to minimize costs to the state, but not a rule that there cannot be additional costs.

V. PUBLIC COMMENT

Mr. Emory Belton stated that Mr. Lovett's work is a law review quality. This is an issue that is not going away and there is well founded concern from landowners. Mr. Belton stated that moving forward, if a favorable vote is reached to submit this report, then there will need to be a decision by this committee if they are unified in agreeing that there needs to be a constitutional amendment. The constitutional amendment will need enabling Legislation filed with it which will require administrative rules. The enabling legislation is the instrument to debate and review the cost to the state. The problem from a lobbying standpoint, it is naive to assume that if a fiscal note is attached to enabling legislation there is little chance that it would pass. The political reality is that we have a Republican majority and his observation is that Republican legislatures refuse to vote for fee increases. The state agencies are legally prohibited from lobbying, that is important because the more complicated it becomes the more Legislators are going to rely on agency experts, and they are extremely limited on what they can say and do.

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

No other matters were brought before the Task Force for its consideration.

VII. ADJOURNMENT

The meeting adjourned at 4:28 p.m.

*NOTE: These minutes were completed after the last meeting of the Public Recreation Access Task Force and were therefore not approved by the task force.