Battles on the Bayou: A Summary of Preliminary Options for Establishing Recreational Servitudes for Aquatic Access over Private Water Bottoms

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Melissa Daigle,* Morgan Rogers,** and Niki Pace***

TABLE OF CONTENTS

Introduction................................................................. 454
I. A Rising Conflict in Coastal Access.............................. 454
   A. History of Coastal Property Issues and Management ... 456
   B. Drivers of the Current Conflict............................... 457
   C. An Example of the Conflict................................. 459
II. The Study ............................................................... 461
    A. Stakeholder Engagement Process......................... 461
    B. Potential Options ............................................ 462
       1. Creative Leasing.......................................... 462
       2. Temporary Access for Special Events............... 463
       3. Public Acquisition of Land or Easements........... 463
       4. Liability Protection.................................... 464
       5. Tax Incentives........................................... 464
       6. Acquisitive Prescription Limitations............... 465
       7. Boundary Fixing......................................... 466
       8. Decoupling of Mineral Rights.......................... 466
       9. Incentivizing Access via Coastal Restoration...... 466
       10. Increased Frequency, Quality and Capacity of Mapping .............................................. 467
III. Next Steps .................................................................. 468

Conclusion........................................................................ 472

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INTRODUCTION

This Article will focus on the increasing problems surrounding public access and outline Louisiana Sea Grant’s report. This will be achieved by first discussing the history of coastal property issues and management, followed with an example that demonstrates the tensions and confusion surrounding this current conflict. Next, the Article will discuss the stakeholder process and subsequent options as provided by the 2018 Sea Grant Report. Finally, this Article will discuss the current status of access, including steps that various state agencies and the Louisiana Legislature are taking in order to address this issue.

I. A RISING CONFLICT IN COASTAL ACCESS

Due to the deltaic\(^1\) nature of Louisiana’s coast, property is continuously in flux. Much of the state’s coastal land was built up over thousands of years through the process of riverine flooding\(^2\) and lost as land subsided and eroded due to natural and man-made causes.\(^3\) These processes do not easily lend themselves to the traditional ideas of boundary lines and property ownership. Consequently, Louisiana’s changing coastal landscape has eroded traditional coastal land and water boundaries.\(^4\) In some cases, land has eroded to such an extent that it joins with or expands to large, pre-existing areas of water that either already were accessible via watercraft or become accessible to watercraft as a result of erosion; these

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1. The Louisiana coast formed over thousands of years through a process by which the Mississippi River grew land through an active delta. When the active delta reached a point that made it unsustainable, the river would shift course, abandoning that delta and creating a new one. The abandoned delta would begin the process of subsiding and eroding, while the active delta would expand. During the past 7,000 years, there have been six active deltas that span across the entire eastern side of the state. The currently active delta, the “Bird Foot” delta, has been active for approximately 550 years.

2. Riverine flooding occurs when a river overtops its banks and floods the surrounding land, which is often referred to as the floodplain. In the lower segments of the Mississippi River, excessive rainfall or snowmelt upstream usually causes this flooding.


4. Id.
changing conditions have led to disputes over what waterways are considered public and private. Specifically, tensions have risen between recreational anglers and coastal landowners due to questions related to ownership of the waterbottom and access to the water—resources—above. While this dispute is not new, recent emphasis on coastal protection and restoration projects is bringing it to the forefront again.

In July 2017, Louisiana Sea Grant was directed by the Louisiana Legislature, through House Resolution 178, to “find common ground among various interested groups and individuals” in an effort to address the “rising problems of the public’s use of submerged lands and the conflicts with the owners of private property.” In response, Louisiana Sea Grant conducted a preliminary study to determine what options, if any, existed for establishing voluntary public recreational servitudes for access to private waterways. The Legislative report prepared by Louisiana Sea Grant, Preliminary Options for Establishing Recreational Servitudes for Aquatic Access over Private Water Bottoms, was published on March 1, 2018. The report highlighted the specific process used for stakeholder’s input and provided an overview of the economic and legal considerations related to ten preliminary and voluntary options that were generated from stakeholder and researcher input.

5. Id.
6. Id.
8. Louisiana Sea Grant (LSG), based at Louisiana State University, was established in 1968 and is part of the National Sea Grant Program, a network made up of thirty-four programs located in each of the coastal and Great Lake states and Puerto Rico. LSG promotes stewardship of the state’s coastal resources through a combination of research, education, and outreach. The LSG Law & Policy Program provides timely, relevant, and unbiased legal information and services for the many users of Louisiana’s coastal lands and waters. LSG is known for being a neutral broker, able to facilitate difficult conversations between differing interests.
10. Id.
11. LA. SEA GRANT, supra note 3. This report was truly a team effort of all authors, which includes James Wilkins, Niki Pace, Melissa Daigle, Rex Caffey, Michael Heaton, Morgan Ducote, and Kameron Whitmeyer.
12. Id.
A. History of Coastal Property Issues and Management

Historically, Louisiana’s coastal waterways were fairly open to public navigation. This included both recreational and commercial uses. In 1849 and 1850, the Swamplands Grants Act allowed for federally-owned tracts of overflow and swamp land to be classified as a private thing, allowing for private ownership. However, confusion led to an inexact process of “putting lands into private hands,” which in turn created uncertainty regarding ownership of water bottoms. This confusion, between the State and private landowners, stemmed from an imprecise classification of “lands as ‘swamp lands subject to tidal overflow’ and ‘swamp and overflowed lands.’”

The commercialization of the oyster fishing industry in the late 1800s brought the importance of coastal water bottoms to the State’s attention. This led to a series of legislative enactments known as the “oyster statutes.” These statutes declared that all coastal water bottoms that were not legitimately privately owned were considered owned by the State itself. Currently, the coastal zone is more than 80% privately owned; this, in addition to the fact that there are areas where private ownership is contested, is driving the rising concern that landowners are preventing access to waters perceived to be in the public trust.

13. Id.
14. Id. Louisiana is known for its renowned recreational hunting and fishing. Extracting industries such as oil and gas are also significant users of Louisiana waterways.
15. SWAMPLANDS GRANTS ACT OF 1849, 9 STAT. 352 (1849); SWAMPLANDS GRANTS ACT OF 1850, 9 STAT. 519 (1850).
17. Id.
18. LA. SEA GRANT, supra note 3, at 3.
20. See La Act 18 §§ 1-2 (1870), La Act 106 §§ 1-2 (1886), La Act 110 §§ 1-2 (1892), La Act 121 §§ 1-2 (1896), La Act 153 §§ 1-2 (1902), La Act 52 §§ 1-2 (1904), La Act 178 § 10 (1906), La Act 167 § 7 (1908), La Act 291 § 22 (1908), La Act 189 § 1-3 (1910), La Act 54 § 1-3 (1914), La Act 139 § 2 (1924), La Act 876 § 3 (R.S. 56:3) (1985). See also Wilkins & Wascom, supra note 19.
21. Id.
B. Drivers of the Current Conflict

While there are likely multiple reasons the conflict over water bottoms is becoming more intense, it is indisputable that the underlying physical driver is the pervasive extent of coastal land loss.\textsuperscript{22} Louisiana has lost approximately 2,000 square miles of land in the past century.\textsuperscript{23} This loss of land is chiefly due to navigation canals, hydrologic modification,\textsuperscript{24} sea level rise and subsidence, and nutrient and sediment starvation.\textsuperscript{25} Because of the large extent of private ownership of coastal areas, much of this loss is occurring on private lands. In response, property owners are seeking options to secure their economic interests in the property, whether that property is still land or already part of the water bottom.\textsuperscript{26} The largest economic threat is the conversion of private coastal land into open water.\textsuperscript{27} This conversion, especially in cases where “private land becomes part of a navigable water bottom or an arm of the sea bed,” results in the loss of not only surface rights, but also the subsurface mineral rights.\textsuperscript{28}

Traditionally, income generated from private coastal property focused on mineral revenue, the loss of which is a major concern to coastal property owners.\textsuperscript{29} However, coastal landowners are more frequently leasing out areas of their property for activities such as private fishing leases (commercial and recreational), private oyster leases (including conventional and alternative oyster culture), and hunting.\textsuperscript{30} Not only do these leases generate an additional revenue stream, but they also help maintain continuous reinforcement of property lines, even as the land erodes.\textsuperscript{31}

Advancements in technology and changes to the law have further caused boundary confusion.\textsuperscript{32} Sportsmen can utilize GPS devices to access real-time information relative to public and private lands.\textsuperscript{33} However, those devices are not dependable in a highly eroding coastal system where

\begin{itemize}
\item \textsuperscript{22} L.A. SEA GRANT, supra note 3, at 4.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Modifications to waterbodies that occur as land is developed and waterbodies are used for recreation, travel and drinking water.
\item \textsuperscript{25} L.A. SEA GRANT, supra note 3, at 4.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id. at 5.
\item \textsuperscript{33} Id.
\end{itemize}
physical markers are increasingly unapparent, mapping updates are limited by a lack of agency resources, and areas of land are subject to dual claims by both the state and private landowners.34

To make the situation worse, a legislative change in 2003 removed prior requirements that mandated private property be posted.35 Furthermore, shallow-water drive technologies36 allow boaters to enter areas that were previously inaccessible, such as shallow areas or internal waterbodies.37 Kayaks, due to their ability to navigate shallow water, are capable of accessing areas of interior coastal marsh once inaccessible to conventional aquatic craft, or craft that cannot access or operate in shallow water.38 These advancements have afforded fishermen increased access to marsh edge, or an area of high abundance for many species that are targeted by recreational fishermen.39 Landowners, and their representatives, argue that trespassing has become far more intrusive in the past decade, and some incidents have resulted in substantial property damage.40 Landowner liability concerns can also be an important driver of recent restrictions to public access over private water bottoms.41

34. Id.
35. Act 802, 2003 La. Acts 2615. In a 2003 Regular Session, Senate Bill 98 amended and reenacted the criminal trespassing statute LA. REV. STAT. § 14:63. Specifically, SB 98, removed the property requirements to “place identifying paint marks on posts around the area to be posted . . . .” or “placing signs around the area to be posted.” SB 98 was enrolled into Act 802.
36. An aquatic craft that allows the user to operate the craft in very shallow water. Examples of shallow water technologies are: Aluminum Fishing Boats, Bass Boats, Flat Boats, Kayaks, Canoes, etc.
37. LA. SEA GRANT, supra note 3, at 5.
38. Id.
39. Id.
40. Id. There are several YouTube videos of surface drive motors being used to access very shallow areas of water, including areas that seem to contain more marsh grass than water. These motors can cut through marsh, disturbing sediment and ripping grasses out by the roots, increasing erosion problems in those areas. See, e.g., Metal Shark Boats, Metal Shark Introduces Swamp Shark All-Terrain Surface Drive, YOUTUBE (July 20, 2017), https://www.youtube.com/watch?v=ialMIfrANrA [https://perma.cc/EED8-56J6]. See also Shaun Rook, 2 18 17 Lake Bouef, YOUTUBE (Mar. 2, 2017), https://www.youtube.com/watch?v=8YLci17ZmgE&lc=z23vuluh3uytjyawh04t1aokgsrkwj5gmrkgppkwaxhrk0h00410.1524058439297328&feature=].
41. LA. SEA GRANT, supra note 3, at 5.
C. An Example of the Conflict

A Louisiana district court has recently decided a case involving trespass on private waterbodies. In this case, Daryl Carpenter, the owner of a fishing guide service, was guiding a family on a fishing trip on April 29, 2016. Carpenter navigated “through a series of ‘interconnected natural navigable waterways’” in order to fish at Golden Pond, which is located outside of Grand Isle Louisiana. During the fishing trip, Plaisance—who managed the land on which Golden Pond is located—advised Carpenter that he was trespassing on private property. In response, Carpenter left Golden Pond. On June 6, 2016, while driving home, two uniformed officers stopped and notified Carpenter that Plaisance had filed a complaint against him for trespassing. When Carpenter inquired as to the exact location of Plaisance’s property, the officer responded that he would be arrested “for trespassing if found on ‘any waters that the State Lands Map did not show as public.’” Carpenter, and his company Reel Screamers, filed suit on January 31, 2017, against the two officers, Castex Lafourche, LP, and their authorized agent, Plaisance. Carpenter argued that anglers are unable to discern which waters are public or private because the disclaimer on the State Lands Map states that “this information is intended to serve only as an initial reference for research and does not purport to provide evidence of legal title to property.” Carpenter alleged three different claims against the officers. The court issued its decision on March 23, 2018.

First, Carpenter argued that the officers’ actions on June 6, 2016, evidenced “a custom, culture, and practice with the Lafourche Parish Sheriff’s Department of discrimination against commercial fishermen in favor of landowners and water bottoms claimants.” The U.S. District Court for the Eastern District of Louisiana dismissed this claim under

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43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id. at *2.
50. A person who fishes with a rod and line.
51. Carpenter, 2018 WL 1453201 at *2.
52. Id.
53. Id.
Federal Rule of Civil Procedure 12(b)(6), or failure to state a claim upon which relief can be granted.54 Second, Carpenter alleged that the officers’ conduct demonstrated a restraint on interstate trade in violation of the Sherman Act.55 However, the court dismissed this claim as well because the plaintiff did not sufficiently allege any of the necessary elements for such a claim.56 Lastly, Carpenter unsuccessfully asserted general maritime tort and negligent claims against the officers “based upon the fact that ‘To date Plaintiffs have received no response from . . . SHERIFF WEBRE’ regarding the correspondence Carpenter directed to Sheriff Webre ‘in an effort to ascertain the parameters of SGT. PREVOST’s admonition and threats of arrest.’”57 The court dismissed the general maritime tort and negligence claims because Carpenter did not demonstrate that any interaction with the defendant officers took place on navigable waters, and thus the claims were outside the court’s jurisdiction.58

Carpenter alleged two different claims against Plaisance. First, Carpenter contended that the Castex defendants permitted others to use waterways, which created and promoted an unfair competitive edge.59 However, the court dismissed the claim under Federal Rule of Civil Procedure 12(b)(6).60 Second, Carpenter contended that Plaisance “conspired [with the Sheriff Defendants] under color of state law to deprive Plaintiffs of their rights, privileges and immunities.”61 The court dismissed this claim because the complaint itself did not maintain any evidence suggesting that Plaisance agreed to conspire with the officers.62

Carpenter appealed the district court’s holding. However, on June 20, 2018, the Fifth Circuit Court of Appeals dismissed the appeal.63 While this case was not successful for the plaintiff, it serves as a real-world example of how the issues related to fishing in coastal areas are coming to a head. In an interview with The Advocate, Carpenter expressed that he had been

54. Id. at *24.
55. Id. at *15. The Sherman Act is a federal statute that prohibits activities that restrict interstate commerce and competition in the marketplace. See 15 U.S.C. § 1-38.
56. Carpenter, 2018 WL 1453201 at *16.
57. Id. at *17.
58. Id.
59. Id. at *2.
60. Id. at *24.
61. Id. at *2.
62. Id. at *23.
fighting this issue aggressively for the past five years. In an effort to continue to campaign for his fellow fishers, Carpenter sits on the board of Louisiana’s Sportsmen’s Coalition and is a member of the Public Recreation Task Force. Louisiana Sportsmen’s Coalition is a non-profit organization dedicated to protecting public access to Louisiana’s waterways. The Public Recreation Task Force was created through Senate Concurrent Resolution No. 99 on May 18, 2018, and is discussed in more detail later in this Article. However, anglers were not the only ones who had a stake in this conflict; landowners have also been fighting this issue. In another interview with *Louisiana Sportsman*, Mike Benge, owner of a Louisiana land-holding company, stated, “Landowners who don’t have as much land as I do, and who depend on whatever income they can generate from their property to continue to maintain (it) or pay the taxes and hold onto what little bit they have, that’s their right.” Additionally, in expressing the fundamental nature of owning property Benge said, “people are exercising their rights, and these rights were guaranteed by the Constitution of the United States.”

II. THE STUDY

Under House Resolution 178, Louisiana Sea Grant was authorized to “facilitate a study of the possible establishment of a voluntary public recreation servitude of use of certain waterways.” Additionally, Sea Grant encouraged a “focus on finding common ground among the various interested groups and individuals.”

A. Stakeholder Engagement Process

In conducting its study, Sea Grant identified key stakeholder groups, such as: (1) coastal landowners; (2) recreational fishermen; and (3) certain


65. *Id.*


68. Masson, *supra* note 64.

69. *Id.*


71. *Id.*
A series of separate meetings with each stakeholder group was held at the Louisiana Sea Grant offices on the Baton Rouge campus of Louisiana State University. The meetings followed a consistent agenda covering: (1) an overview of study resolutions and a clarification of mandate; (2) the structure of preliminary meetings; (3) input from stakeholder attendees; (4) major concerns; (5) potential options for resolution; and (6) next steps. After each meeting, Louisiana Sea Grant assembled the minutes and distributed them to the stakeholder attendees for review and corrections. The discussion and options presented during each meeting were heavily relied on in the production of the final report.

B. Potential Options

In hearing the concerns and ideas of each stakeholder group, ten potential options emerged from the discussions. Louisiana Sea Grant does not officially endorse or oppose any of these options, nor does it endorse any specific outcome. There is no preferred order of the options listed below, and the full report contains more details for each option.

1. Creative Leasing

The option of creative leasing consists of a voluntary lease agreement with the State in which the general public would have access to the land specified under certain restrictions, such as time(s) of day access is allowed or types of vessels allowed to enter the area. This option could look to the Louisiana Department of Wildlife and Fisheries Wildlife Management Areas for a model upon which the leasing program could be based. Under the current Wildlife Management Area Approach, the Louisiana Wildlife and Fisheries Commission manages the surface property of public and privately owned land. The public must first be notified of an establishment of a Wildlife Management Area and suitable

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72. LA. SEA GRANT, supra note 3, at 6.
73. Id. at 7.
74. Id.
75. Id.
76. Id.
77. Id. at 9.
78. Id.
79. Id.
80. Id. at 10.
81. Id.
signs must be placed along the boundaries of the property to inform the public. If a voluntary program, based upon this model, was created, the “costs of public access would (in theory) need to equal or exceed the current stream of surface revenue obtained by a participating landowner.” Thus, if a creative leasing option following the Wildlife Management Area model is established, then a thorough assessment of “landowner reservation prices and the location and scale of any potential acreage to be made available.”

2. Temporary Access for Special Events

The temporary access option would create some type of limited, temporary access for specific events, especially targeting access during activities such as fishing tournaments. For example, in August 2017, representatives for the Bass Angler Sportsman Society announced that they would no longer schedule tournaments in coastal Louisiana, reportedly due to boundary confusion and conflicts during past events. This option would provide an outlet to address the loss of large-scale tournaments and sportsmen events that bring tourism and related revenue into the state.

3. Public Acquisition of Land or Easements

Under one of the most straightforward options, the state would acquire land or easements through voluntary transactions such as easement (servitude) purchase or donation transactions. Landowners who do not want to sell or donate land would not be compelled to participate. This approach would not involve any legal issues, outside of those involved in traditional land transactions.

82. Id.
83. Id.
84. Id.
85. Id. at 11.
86. Id.
87. Id. at 12.
88. Id. at 13.
89. Id.
90. Id.
91. Id.
4. Liability Protection

During the stakeholder meetings, landowners expressed concern about the potential of liability for personal injury of boaters located on their private property. Under this option, the State would provide private landowners additional liability protections in exchange for allowing public access onto their properties. The Louisiana Recreational Use Statute protects property owners from liability resulting from any injury to person or property caused by any defect in the land, whether it be naturally occurring or man-made.

However, a property owner’s liability protection is limited if the property owner knows of the hazard and fails to warn the public. According to the Louisiana Recreational Use Statute, failing to warn against a known obstacle in a waterway is considered “willful and malicious failure to warn against a dangerous condition, use, structure, or activity.” Furthermore, landowners that allow individuals onto their property for commercial purposes are not protected by the Louisiana Recreational Use Statute. Some landowners voiced an interest in seeing their liability protections expanded in exchange for granting public access.

5. Tax Incentives

One downside to claiming ownership of eroded areas is that landowners will pay property taxes to the full extent of the property that they claim they own. Under this option, the State would offer a lower tax rate to landowners that choose to allow public access on their land.

\[92. \text{Id. at 15.}\]
\[93. \text{Id.}\]
\[94. \text{Id.}\]
\[95. \text{LA. REV. STAT. § 9:2795 (2001). Louisiana courts have ruled that submerged water control structures and concrete survey markers are considered objects typically found in the true outdoors, but that submerged well cribbing does not qualify as objects typically found in the true outdoors. See Kieff v. La. Land & Expl. Co., 779 So. 2d 85 (La. Ct. App. 4th Cir. 2001); see also Verdin v. La. Land & Expl. Co., 693 So. 2d 162 (La. Ct. App. 4th Cir. 1997); see also Eschete v. Mecom, 509 So. 2d 840 (La. Ct. App. 1st Cir. 1987).}\]
\[96. \text{LA. SEA GRANT, supra note 3, at 16.}\]
\[97. \text{LA. REV. STAT. § 9:2795 (2001).}\]
\[98. \text{Id.}\]
\[99. \text{LA. SEA GRANT, supra note 3, at 15.}\]
\[100. \text{Id. at 16.}\]
\[101. \text{Id.}\]
Agency stakeholders expressed concerns about how this option would impact local government tax revenues. 102 In some parishes, large landowners own up to 80% of coastal marshes, 103 and the revenue impacts to those parishes could be a barrier to implementation of tax-based incentive options. 104 Further consultation with parish and local governments in conjunction with the state would be necessary to fully assess this option. 105

6. Acquisitive Prescription Limitations 106

During the stakeholder meetings, some landowners expressed concern that by allowing public access, they may face loss of their property through acquisitive prescription of passage. 107 This option would explore changes to Louisiana law that would prohibit members of the public from acquiring a servitude of passage over private land on which the landowner allows public access. 108 According to Louisiana law, a servitude of passage over private property can be acquired through acquisitive prescription over thirty years for bad faith or over ten years for good faith. 109 Passage could be either over land or water and does not need to be continuous. 110 However, there are a number of questions about acquisitive prescription that must first be examined in order to determine if this option is viable, such as if the general public can even acquire a servitude for recreational activities over private land if they do not own a dominant estate. 111

102. Id. at 17.
103. Id. at 18.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. LA. CIV. CODE art. 3475 (1983); see also LA. CIV. CODE art. 3486 (1983). Good faith can be defined, for the purposes of acquisitive prescription, as a reasonable belief, in the light of objective considerations, that one is the owner of the thing one possesses. See also LA. CIV. CODE art. 3480 (1983). Bad faith can be defined, for the purposes of acquisitive prescription, as proof that the possessor knew or should have known that they are not the true owner of the thing they are possessing. See also LA. CIV. CODE art. 3481 (1983).
110. LA. CIV. CODE art. 689 (2012).
111. LA. SEA GRANT, supra note 3, at 19. Louisiana Sea Grant was under a time constraint for the report, and while ideas for future research were generated, we did not have time to look into each facet of every option in detail. For acquisitive prescription, several questions still need to be answered, including: (1) Can the general public acquire a servitude for recreational activities over private
7. Boundary Fixing

Under this option, the State, through agreements with private landowners, would fix private and public property lines in exchange for increased public access for recreational fishing. This would require establishing a long-term or permanent property boundary between private landowners and the State. The property boundaries would be determined on a case-by-case basis and would remain effective even after the property, as a result of land loss, becomes a navigable water bottom.

8. Decoupling of Mineral Rights

Under this option, landowners would have ownership of mineral rights under water bottoms, and the surface rights would transfer to the State. Currently, this is not allowed in Louisiana except in limited coastal restoration situations, thus this option would require a change in the law. Courts in other states have held that mineral rights may be severed or “decoupled” from surface rights. This severance of mineral rights conserves the mineral owner’s right, or mineral lessee’s right, to explore and develop the minerals.

9. Incentivizing Access via Coastal Restoration

Under this option, criteria would be added to the review process of proposed restoration projects that receive state and federal funding. Projects on private lands that would offer some element of public access (for example, access to private or dual-claimed waterways for recreational

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112. Id.
113. Id.
114. Id. at 20.
115. Id.
116. Id.
117. Id.
118. Id. at 21.
119. Id.
120. Id.
121. Id. at 22.
122. Id.
fishing) would be granted scoring priority in the selection process.\textsuperscript{123} Both of the two major restoration programs/groups currently operating in the state—Coastal Wetlands Planning, Protection, and Restoration Act and the Louisiana Coastal Protection and Restoration Authority—use a similar comparative review process that examines the expected benefits and costs of projects when determining which projects are selected to move forward.\textsuperscript{124} The availability of private landowner-agreed upon public access could serve to increase the potential of a project moving forward, whether as a direct line in the project scoring matrix or as an additional consideration.\textsuperscript{125} Additionally, easements in both “programs are negotiated, but typically not purchased, and neither program utilizes voluntary mechanisms to facilitate public access within project boundaries on public lands.”\textsuperscript{126} The approaches under both programs could be modified to reflect a level of priority for projects that include an element of public access.\textsuperscript{127}

10. Increased Frequency, Quality and Capacity of Mapping\textsuperscript{128}

Lastly, this option would budget additional resources for the improvement of coastal boundary maps, reducing confusion about public and private boundaries, and could be done in conjunction with any of the other options listed above.\textsuperscript{129} Maps provided by the Office of State Lands could be updated more frequently and made available in more formats that are easily accessible to fishermen.\textsuperscript{130} The Office of State Lands “is responsible for the identification, the administration, and the management of state public lands and water bottoms” but has been historically underfunded and cannot keep pace with the rate of changes to the coastal landscape.\textsuperscript{131} While better mapping would be beneficial, it alone would

\textsuperscript{123. Id. at 22–23.}
\textsuperscript{124. Id. at 24. The programs differ in many regards in terms of scale and assessment of individual projects. But they both maintain some similarities. Prioritization for each program is informed by a comparative review of the expected benefits and costs of numerous projects. Each program relies exclusively on public funds for restoration, as substantial portion of construction expenditures go toward projects implemented on private lands. Lastly, easements in each program are negotiated, but not typically purchased.}
\textsuperscript{125. Id.}
\textsuperscript{126. Id.}
\textsuperscript{127. Id.}
\textsuperscript{128. Id.}
\textsuperscript{129. Id.}
\textsuperscript{130. Id.}
\textsuperscript{131. Id. at 25.}
not provide additional public access for fishermen and does not increase public access to the general public. However, it could provide better clarification of ownership claims related to coastal property and lead to fewer trespassing disputes.

III. NEXT STEPS

Due to the nature of Louisiana Sea Grant’s mission—unbiased, neutral outreach, education, and research—they do not “advocate for particular constituents or policies.” Sea Grant’s mission is the following:

The Sea Grant Mission is to provide the best available information to constituents and policymakers to assist them in the wise and sustainable use of coastal resources. To that end, the options described in this report are neither endorsed nor recommended by Louisiana Sea Grant, but rather are suggestions that stakeholders and policy makers can use in future discussions of possible solutions to the issue at hand.

Currently, the Louisiana Legislature and state agencies are in the process of considering the suggested potential options to further examine the issues mentioned above, though: (1) the enactment of Coastal Mineral Agreements; (2) the Public Recreation Access Task Force; and (3) House Bill No. 40.

The option that garnered the most interest from the landowner group is the decoupling of surface and mineral rights. This option, if available to landowners, would be a voluntary way for landowners to greatly reduce their liability and responsibility for the surface land and water, while maintaining the revenue source from current or future mineral extraction. A model for how a severance program might work can be seen in the new severance regulations related to coastal restoration projects.

In November 2019, the Office of the Governor and the Coastal Protection and Restoration Authority (CPRA) promulgated Chapter 2, Coastal Mineral Agreements, of Title 43, Part XXXI of the Louisiana

132. Id. at 26.
133. Id.
134. Id. at 2.
135. Id.
Administrative Code. This chapter of the Administrative Code enables the Executive Director of the CPRA to enter into voluntary coastal mineral agreements with landowners to obtain real property rights specifically to “facilitate that the development, design, or implementation of plans or projects for coastal conservation, restoration, protection, or management, including hurricane protection or flood control.” The Executive Director can enter into such an agreement with “any person who owns land contiguous to and abutting navigable water bottoms, the territorial sea, and the seashore belonging to the State and who has the right to reclaim eroded land, in order to facilitate an integrated coastal protection project.” The Executive Director can also enter into said agreement for the acquisition of land for the purpose of “facilitating an integrated coastal protection project” or a restoration project.

There are two types of agreements available for the CPRA to use. Under both agreements, the State can obtain ownership, servitudes, or any other interest on the existing land that may affect an “integrated coastal protection project.” In exchange for entering into a voluntary coastal mineral agreement, the Executive Director can establish “perpetual transferrable ownership” of all subsurface mineral rights to the land.

137. LA. ADMIN. CODE tit. 43, § 201 (2019). This chapter is current through rules published in Louisiana Register Vol. 45, No. 11, November 20, 2019.
138. Id.
139. Id.
140. Id.
141. LA. ADMIN. CODE tit. 43, § 207 (2019). See also LA. ADMIN. CODE tit. 43, § 209 (2019). Type 1 agreements are agreements that facilitate integrated coastal protection projects. The director enters into this agreement with an owner when the director determines: (1) the project is an integrated coastal project which “would likely be facilitated by acquiring ownership of, servitudes over, and/or other interests in existing land owned by the owner holding reclamation rights; and/or that an integrated coastal protection project would likely be facilitated by acquiring any rights in eroded land claimed by an owner holding reclamation rights.”; or (2) the person contracting with the state maintains marketable title to the property. Type 2 agreements are entered through acquisitions. The director enters into this agreement with an owner when the director determines: (1) that an integrated coastal protection project would likely be facilitated by acquisition of the land from the owner; (2) the principal purpose for entering into such an agreement would be to facilitate an integrated coastal protection project by the state, its political subdivisions, or federal agencies; (3) the owner hold marketable title to the property or property rights; (4) the presence of an acquiring authority.
143. LA. ADMIN. CODE tit. 43, § 205 (2019).
This means that unless an agreement states otherwise, any person with transferable ownership of subsurface mineral rights will have a servitude to use the surface land for the extraction of the minerals.\textsuperscript{144} However, “no such right may be exercised so as to impair contravene, and/or interfere with the integrity, features, and/or purpose of any integrated coastal protection project.”\textsuperscript{145}

As the State moves forward with allowing severance in the case of restoration projects, one could see how a similar program for coastal access for recreational fishing could generate benefits for residents and tourists of the State. These benefits include increased revenue for local businesses who sell gear and supplies to fishermen who visit the state; increased sales tax revenue from said purchases; increased access to fish, and thereby food to eat, for the fishermen; and increased opportunities for recreational activities for individuals and families, to name a few.

The Louisiana Legislature is of considering the suggested potential options through the Public Recreation Access Task Force.\textsuperscript{146} This task force was charged with studying the “conditions, needs and issues relative to potential public recreation access on the navigable waters of the state.”\textsuperscript{147} Louisiana Sea Grant serves as a non-voting member of this task force.\textsuperscript{148} Through the course of 16 public meetings, the Public Recreation Task Force generated a report, which was sent to the Legislature for consideration on January 31, 2020.\textsuperscript{149}

The report highlighted the Task Force’s opinions, recommendations received, and alternative pathways.\textsuperscript{150} In both the Louisiana Sea Grant Report and the Public Access Task Force report, decoupling of mineral rights and landowner liability were heavily discussed and focused upon.\textsuperscript{151}

\begin{flushleft}
144. Id.
145. Id.
147. Id.
148. Id.
151. Id. See also LA. SEA GRANT, supra note 3, at 2.
\end{flushleft}
The Task Force created the following options: (1) permanent boundary settlements; (2) donation and severance; (3) Act 626 Agreements (three-party agreements); (4) expansion of recreational access; (5) creation of a right of responsible access over lands subject to Ebb and Flow of the Tide; (6) re-introduction of affirmative defenses to trespass law and require more posting; (7) tying favorable use-value taxation to recreational access; and (8) a combination proposal, which was recommended by state agencies’ representatives on the Task Force.\footnote{Id.} In addition, the Task Force emphasized that the Legislature, or other policy makers, should consider the possible consequences of taking no action in response to this report.\footnote{Id.}

The authors wish to note that testimony was taken during the task force meetings regarding ownership of shallow tide lands.\footnote{See id. at 14. See also Public Recreation Access Task Force - SCR 99 of 2018, supra note 149.} Assertions were made by landowners that Louisiana has never possessed or owned sovereign land due to judicial interpretations of the definition of “Sea shore” in the Civil Code.\footnote{Id. See Buras v. Salinovich, 97 So. 748, 750 (La. 1923). See Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 795–99 (1988). See also LA. CIV. CODE art. 451 (1978).} However, many prominent legal scholars would disagree with that assertion, and the issue of shallow tide land ownership has yet to be decided.\footnote{A.N. YIANNOPOLOUS, LOUISIANA CIVIL TREATIES § 4:11 (5th ed. 2017); see Vaughn v. Vermillion Corp., 444 U.S. 206 (2010); see also Wilkins & Wascom, supra note 19.} There are arguments that Louisiana still owns most or a large portion of shallow tide lands.\footnote{Id.}

Additionally, on February 5, 2020, Representative Mack pre-filed House Bill No. 40 to be considered in the Louisiana Legislature 2020 regular session.\footnote{HB40 by Representative Sherman Q. Mack, supra note 136.} House Bill 40 requires “that agreements between an acquiring agency and a landowner for integrated coastal protection projects ensure public recreational access to waterways in the reclaimed lands.”\footnote{Id.} Current law authorizes an acquiring authority to enter into such agreements.\footnote{Id.} However, this proposed House bill requires that the agreement contain a provision that ensures the public has access to the waterways, especially for navigation, boating, and recreational fishing.\footnote{Id.}
It will be interesting to see how this bill moves forward when the session opens.

CONCLUSION

As stated above, Louisiana Sea Grant had a tight deadline to conduct research, collect stakeholder input, and compile the report. All ten options have additional economic and legal considerations that should be thoroughly examined if the State were to decide to move forward with any option in particular. Additionally, the State could consider performing pilot tests of certain options, or a combination of options, prior to creating a state-wide program, especially given the possibility that an option might not be effective across the entire coast. This dispute about water access is not new and has resulted in confusion and conflict. As per House Resolution 178, Sea Grant facilitated the finding of common ground amongst stakeholders in order to generate their report.  

162. On behalf of Louisiana Sea Grant, the authors would like to thank both the public and private sector representatives and stakeholders for their participation and effort in the creation of this report.