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Jason P. Theriot

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INTRODUCTION

Canals are common features in south Louisiana. Many of these navigable waterways are privately owned. There are, perhaps, as many of these man-made waterbodies as there are natural ones along the Louisiana Gulf Coast. Some of them are well defined; others have eroded into open water with only the remnant spoil bank remaining to mark the canal's original location. With so much of the region's traditional way of life tied to the coastal landscape, canals have, from time to time, become the subject of controversy.[1] The centuries-old dispute over public access into these private waterways is part of the legacy of Louisiana canals.

∗ A version of this article first appeared as Chapter Five in *Great Game Paradise: A History of Vermilion Corporation*, with permission from UL Press. Historical sources used to write this article originated in the Vermilion Corporation's company archives that have sense been donated to the Center for Louisiana Studies at the University of Louisiana, Lafayette. Permission is required to access this unprocessed collection.

∗∗ The author is an independent historian.

1. *See* JASON P. THERIOT, AMERICAN ENERGY, IMPERILED COAST: OIL AND GAS DEVELOPMENT IN LOUISIANA'S WETLANDS (2014); Tyler Priest & Jason P. Theriot, *Who Destroyed the Marsh?: Oil Field Canals, Coastal Ecology, and the*

For much of the last century, fishermen, both recreational and commercial, enjoyed considerable access to the vast coastal waterways of Louisiana, including areas under private domain. In the 1970s and 1980s, private landowners, who own up to 80% of the coastal lands, began restricting public access to these artificial waterways for various reasons: to control poaching and trespassing; to limit liability; to provide unfettered access for their lessees; to install water control systems to combat saltwater intrusion; and to minimize boat traffic that contributes to coastal erosion and marsh loss.[2] As the fight to protect and preserve marshlands has continued over the decades, coastal sportsmen have been increasingly prohibited from entering and fishing in these privately owned, navigable waterbodies. The results of this ongoing issue have created a public policy dilemma that the State of Louisiana has struggled to resolve.

All contested legal issues have a starting point: a doctrine, a statute, or a precedent-setting court decision to form the basis for a policy discussion. In the case of private ownership over private canals and water bottoms, the courts have been clear on paramount private property ownership of canals: a private canal built with private funds is a private thing, irrespective of the canal's navigability.[3] There are, however, still some contested areas, complexities, and legal theories surrounding this issue that have been challenged with little change in the overall outcomes. In recent years, the debate over public access to private waterbodies has reached a fever pitch.[4] Sportsmen have complained about, and lobbied against, restricted access to fishing grounds that were once open to the public but have since been closed off. Some of these submerged areas are dual claimed, where both the state and private entities claim title to the contested water bottoms. The

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Debate over Louisiana's Shrinking Wetlands, *in* LOUISIANA LEGACIES: READINGS IN THE HISTORY OF THE PELICAN STATE 331 (Janet Allured & Michael S. Martin eds., 2013); Oliver A. Houck, *The Reckoning: Oil and Gas Development in the Louisiana Coastal Zone*, 28 TUL. ENV'T. L.BJ. 185 (2015); COALITION TO RESTORE COASTAL LOUISIANA, COASTAL LOUISIANA: HERE TODAY AND GONE TOMORROW?: A CITIZENS' PROGRAM FOR SAVING THE MISSISSIPPI RIVER DELTA REGION TO PROTECT ITS HERITAGE, ECONOMY, AND ENVIRONMENT (1989), https://www.crcl.org/resources [https://perma.cc/3Y27-B3F4].

2. Jacques Mestayer, Comment, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 LA. L. REV. 889, 897 (2016).

3. *See* Ilhenny v. Broussard, 135 So. 669 (La. 1931); Nat'l Audubon Soc'y v. White, 302 So. 2d 660 (La. Ct. App. 3d Cir. 1974).

4. *See* Joe Macaluso, *Public water access major issue for legislative action*, ACADIANA ADVOCATE (Mar. 31, 2018, 7:00 PM), https://www.theadvocate.com/acadiana/sports/article_3ad9ea40-335d-11e8-a706-97fb3ecc868a.html [https://perma.cc/8N9G-CRWY].

potential for costly litigation to resolve the legal claims on these submerged lands has perpetuated the dual-claim policy of the state. Navigating through the legal maze of what is private, what is public, and what are dual-claim water bottoms within a rapidly disappearing coastal landscape has only compounded the problem.

While efforts to find a compromise continue, it is important to understand the issue in its proper historical context. One of the seminal cases in this debate, *Vermilion Corp. v. Vaughn*, dealt with many of these questions decades ago and eventually made its way to the U.S. Supreme Court.[5] This landmark case had far-reaching implications for landowners in Louisiana and throughout the country, and added another layer to a longstanding, ongoing controversy over public access to private waterways.

I. LEGAL CHALLENGES TO PUBLIC ACCESS TO PRIVATE CANALS

A. McIlhenny Canal—the Beginning

Lower Vermilion Parish has been at the center of this legal debate for nearly a century. Canal construction began in this region in the 1910s and 1920s, primarily to open up the vast untapped marshland to commercial trapping and to gain access to hunting grounds, camps, and the communities along the high ridges, primarily Chenier au Tigre.[6] Edward Avery McIlhenny, of Tabasco pepper sauce notoriety, was a key player in developing this isolated marshland for commercial and recreational use and for wildlife conservation. His achievements as a leading conservationist and naturalist had few rivals at the time. Known as the father of conservation in Louisiana, McIlhenny founded the first wildlife refuges for waterfowl in the United States. But McIlhenny also had an affinity for duck hunting, and as an owner of several thousands of acres of prime duck marsh, he understood the importance of maintaining control over access into these wild areas, including nearby wildlife sanctuaries. For generations, locals had almost unlimited use of this "Great Game Paradise" for subsistence living activities such as trapping, fishing, hunting alligators, and transporting cattle.[7] The creation of refuges and private hunting grounds restricted access to the general public and offered

5. Vermilion Corp. v. Vaughn, 356 So. 2d 551 (La. Ct. App. 3d Cir. 1978), *aff'd in part*, *vacated in part*, 444 U.S. 206 (1979).

6. FRANK A. KNAPP, JR., A HISTORY OF VERMILION CORPORATION AND ITS PREDECESSORS (1991).

7. JASON P. THERIOT, GREAT GAME PARADISE: A HISTORY OF VERMILION CORPORATION (2018).

passage only to a select few. Over the decades, the relationship between the private landowners and the locals who wanted continued access through the growing canal system remained tenuous at best.[8]

The first legal dispute over public access to private canals in this region occurred in 1929 with *Ilhenny v. Broussard*.[9] McIlhenny sued defendant Broussard to enjoin him from using the so-called "McIlhenny Canal" to transport cattle by barge to and from the Broussard property near the coast via Vermilion Bay. Broussard claimed that the artificial channel, originally dug in 1912, diverted the flow of water from the adjacent natural waterway, thereby making the natural route impassable. As a recourse, the defendant asserted his right to use the canal, even though a private one, because he was deprived of the use of the natural channel. On appeal by the defense, the Louisiana Supreme Court affirmed the lower court's decision in favor of the plaintiff, stating that the evidence did not support the claim that the man-made canal in any way altered the natural waterway. "But be that as it may," wrote Justice John St. Paul, "we do not think this gives defendant the right to use plaintiff's private canal" under any circumstances.[10] The question of access to a private canal that had impaired, or diverted waters from, a natural stream would resurface again many decades later in *Vermilion Corp. v. Vaughn*.[11]

Litigation over public use of the McIlhenny Canal returned to the courts in the early 1970s. This time the National Audubon Society, which assumed control over the McIlhenny Canal and the adjacent Paul J. Rainey Wildlife Sanctuary, brought suit in 1972 against Joseph White and his son to stop them from using the private canal.[12] The defendants had used the canal for many years to transport cattle and produce from their property on Chenier au Tigre. Audubon rescinded that permission and notified the defendants in writing of such action. When the defendants continued to use the canal, Audubon filed an injunction to stop them. Audubon argued that the wildlife sanctuary could not be operated successfully if it permitted the general public to use its private canals, and that for that reason the organization had constantly limited the use of the McIlhenny Canal to persons whom they felt had legitimate business interests that justified the issuance of permits to them. Audubon felt compelled to deny

8. For a historical treatment of E.A. McIlhenny's role in developing the wildlife refuge complex in south Louisiana, see *id.* 1–27.

9. Ilhenny v. Broussard, 135 So. 669 (La. 1931). It is likely that the filing clerk for this original case erred in the spelling of McIlhenny's name.

10. *Id.* at 670.

11. *Vermilion Corp.*, 356 So. 2d 551.

12. Nat'l Audubon Soc'y v. White, 302 So. 2d 660 (La. Ct. App. 3d Cir. 1974).

access to the defendants, first because authorities caught the son, Eldridge White, violating game laws near the refuge, and second because the father falsely represented to others that he had the right to grant them permission to use the canal. The defendants claimed that the canal was a public canal and a navigable waterway, which entitled them to use of the canal without permission. But the court of appeal sided with the National Audubon Society, and ruled that the theory of public access to running waters of the state, as codified in Louisiana Civil Code article 450, does not apply to a private canal. The court agreed with Professor A. N. Yiannopoulos, author of three volumes of the *Louisiana Civil Law Treatise*, who wrote in the 1970s that "[a] privately owned canal, though navigable in fact, may not be subject to public use, for the same reasons that a private road, though used by commercial traffic, may not be subject to public use."[13] This statement would be cited repeatedly over the ensuing years in various legal opinions related to public access to private canals.

B. Vermilion's Injunction

Beginning in the 1940s, the marshland in lower Vermilion experienced intense oil and gas development that necessitated the expansion of the canal system to facilitate drilling and production operations. Still, the marsh interior remained relatively isolated from the surrounding coastal bays and the Gulf of Mexico. All of that changed in the late 1960s with the construction of the Freshwater Bayou Channel by the Army Corps of Engineers.[14] Within a few years, the marshes adjacent to the newly opened deep water channel, as predicted, began to deteriorate. As a result, an ecosystem that was historically fresh marsh transitioned into a tidal estuary of Vermilion Bay. The channel cut right through the heart of 125,000 acres of privately owned and well-managed marshland.[15]

Vermilion Corporation, which opposed the channel project, held a 99-year surface lease on that entire tract of marsh. Covering nearly 190 square miles, the Vermilion leasehold represents one of the largest contiguous private landholdings of wetlands in coastal Louisiana.[16] As more saltwater invaded the marsh interior from the channel, more shrimp migrated into the canal system. It did not take long for commercial fishermen, equipped with Lafitte skiffs and butterfly nets, to move in and harvest the abundant

13. A. N. Yiannopoulos, *Private Law: Property*, 33 LA. L. REV. 172, 173 (1973).

14. For a historical treatment of the Freshwater Bayou Channel controversy, see THERIOT, *supra* note 7, at 71–91.

15. *Id.*

16. *Id.*

shrimp that migrated into and out of the newly formed estuary.[17] To the fishermen, the existing private canal system, known locally as the "Humble Canal," connected with the government-constructed Freshwater Bayou Channel and, therefore, should be considered a navigable public waterway, even if the private canals were on private land. Vermilion Corporation, a private land management firm with historical ties to the marshland and waterways in question, pushed back against the commercial fishermen with legal injunctions to halt the persistent trespassing into its private domain. The local fishermen in turn challenged the notion of public access to private waterways, thereby setting the stage for the historic legal battle in *Vermilion Corp. v. Vaughn*.

Norman Vaughn, a native of Pecan Island, a small coastal community located in lower Vermilion Parish, was the first commercial fisherman to challenge the law and the company's legal authority to control access to its private canals. In 1975, company wardens issued four citations to Vaughn for trawling[18] for shrimp with a butterfly net in the Humble Canal without permission. When additional violations occurred, the company filed a civil injunction order to stop Vaughn from entering the canals. Word began to spread that some of the fishermen and other Pecan Islanders objected to the legal principle that private canals were off limits to the public even though the canals were navigable in fact. To some locals, the marshes and waterways south of Pecan Island represented their ancestral "backyard," where for generations many families lived off the wildlife harvested from the vast wetlands. The fact that the Humble Canal connected to the deep water navigation channel only emboldened the fishermen's determination to gain access into this private domain, irrespective of the numerous "No Trespassing" signs that lined the entrance to the canal system. The general manager of Vermilion Corporation made note of this pending legal matter in his annual report to the company's board of directors: "While the shrimping has been on a small scale with a few boats involved, they seem determined to push the issue that the canals are public rather than private and the situation could get out of control in the future, without positive action on our part."[19]

After modest attempts to settle the injunction suit out of court failed, Vaughn and his attorneys petitioned to have the case moved to federal district court, believing that it involved a question of navigability under

17. A Lafitte skiff is a shallow-draft, mono-hull wooden boat that is designed for commercial fishing operations using large nets. Butterfly nets are specifically designed fishing nets that are attached to a metal box frame and that extend off the sides of a shrimping vessel.

18. Trawling simply means pulling a net behind a vessel to catch shrimp.

19. THERIOT, *supra* note 7, at 98.

U.S. law. In their pleading, Vaughn's attorneys argued that the canal system in question was in fact navigable, and, as such, constituted navigable waters of the United States. They claimed that the *Vermilion* suit sought to prevent a U.S. citizen from using navigable waters and therefore should be heard by a federal judge.[20]

Meanwhile, authorities issued two other fishermen, Larry Broussard and Freddie Broussard, separate citations for trespassing on multiple occasions in Vermilion's canals. When Vermilion filed an injunction against the Broussard brothers, the brothers joined forces with Vaughn and his legal representatives. The Vaughn and Broussard suits were combined for the counter-petition filed in March 1977 in U.S. District Court for the Western District of Louisiana against Vermilion, seeking to enjoin the proceedings brought by the company in the 15th Judicial District Court for Vermilion Parish. As a navigable waterway of the United States, the Humble Canal essentially belonged to the public, Vaughn's lawyers asserted. Vermilion opposed the removal to federal court and filed a motion to remand the case to state court. The federal judge agreed with Vermilion's pleading (without giving a specific reason) and sent the case back down to the 15th Judicial District Court of Lafayette.

In its petition for filing the injunctions against the fishermen, Vermilion explained that the defendants had trespassed on its leased lands, despite the fact that said lands are private property posted with signs reading, "No Trespassing, Vermilion Corporation." All canals in question had been built by Vermilion, its predecessors, or its lessees going back many decades. The petition claimed that the defendants' actions directly and indirectly encouraged others to trespass and engage in commercial fishing in the plaintiff's private canals. Vermilion claimed damages of $2,500 from each of the three defendants.

While the initial suit was meant to prevent locals from entering the private canals without a permit, the larger goal of the litigation was to preserve the company's rights to manage and conserve its surface lease—and the abundant wildlife that the wetlands supported. The company derived its annual revenue almost entirely from selling permits for hunting and trapping. Maintaining its exclusive domain over the property and protecting its most valuable asset—the marsh interior—was paramount. The arguments for public access into private waterways posed a potential dilemma for Vermilion and a real threat to private landowners in Louisiana and across the country. The stakes rose even higher when the federal

20. Vaughn v. Vermilion Corp., 1977. No. 761349 (15th Judicial District, Parish of Vermilion, La.).

government later intervened to address the broader legal question of what constitutes navigable waters of the United States.

C. Navigable Waters of the United States

As the *Vermilion* case wound its way through the court system, a central question emerged: Can a private party exercise ownership over navigable waters of the United States if private funds developed those waterways on private property, even if the private waterway is connected to a public, navigable waterbody? The Vaughn group consistently argued for the notion that these canals, primarily the Humble Canal system, were subject to a public right of access by virtue of the navigation servitude. The canals had always been subject to tidal fluctuations, the Vaughn team claimed, and thus formed parts of the navigable waters of the United States. Not to be outdone, Vermilion turned to the court's decision in *National Audubon Society v. White* to cast doubt on the defendants' legal strategy.

While legal precedent held that a private canal built with private funds is a private thing and not accessible to the public even though the canal may be a navigable waterway of the United States, Vaughn's lawyers continued to promote the theory of impairment. Borrowing from the defense in the case of *Ilhenny v. Broussard*, the Vaughn team argued that a natural waterway, the original Freshwater Bayou, had become non-navigable as a result of building the man-made canal system. In light of that argument, the question became whether a private citizen is owed a servitude on a private canal that impaired or destroyed a natural waterway system. Vaughn's attorneys tested this theory throughout the life of the case, which bounced from state court to federal court and back again over the course of seven years.

In March 1977, the 15th Judicial District Court heard the case. The Vaughn team still held firmly to the notion that the canals were navigable and therefore subject to a "paramount right of use for and on behalf of the public and citizens of the United States and are not subject to private ownership or control."[21] Representatives of Vermilion gave depositions stating that the private canals had been under the continuous possession and supervision of the company and its predecessors going back to the 1920s. Only those given permission, such as hunters, trappers, and oil companies, were permitted to travel these waterways. The company had

21. Letter from Charles Sonnier, Gen. Couns., Vermilion Corp., to John Donohue, Vice-President and Gen. Manager, Vermilion Corp. (Mar. 21, 1977) (on file with University of Louisiana at Lafayette, Center for Louisiana Studies).

posted many "No Trespassing" signs throughout the property to illustrate Vermilion's control over these waterways. But Vaughn's lawyers used the depositions to paint a picture that the canal system was unitary and open with connections to a broader network of public waterways, including smaller bayous, the Intracoastal Waterway, the Freshwater Bayou Channel, and the Gulf of Mexico. The natural bayous within the region, which connected to the man-made canals, were once highways of commerce used to transport mail, cattle, and people in and out of Pecan Island. Furthermore, the defendants opposed the motion for summary judgment filed by Vermilion and claimed that the construction of Humble Canal "impaired or interrupted the navigability of an already existing natural waterway."[22]

Vermilion's legal team requested summary judgment, stating that no genuine issue of material fact existed in the case. The only real question in the plaintiff's mind was the legal question of ownership and rights. Vermilion pointed to the court's previous ruling in *National Audubon Society v. White*.[23] Despite the defendants' claim that the construction of the canals impaired an existing natural system, the district court judge granted summary judgment to Vermilion, confirming that "the canal 'was constructed on private property, with private funds and always maintained as a private waterway, and defendants have no right to use it.'"[24] The decision reinstated the issuance of permanent injunctions against Vaughn and the Broussards for trespassing.

Vaughn's lawyers appealed the decision to the Louisiana Third Circuit Court of Appeal. In their plea, the defendants claimed that the trial court erred in two ways: (1) by finding that there was no genuine issue of material fact, and (2) by finding that the Humble Canal system constituted a private system under dominion of Vermilion and Humble/Exxon. The defendants also claimed that the company's predecessors impaired the navigability of natural waterways, specifically the old Freshwater Bayou, which had historically been used by locals as a highway of commerce. Essentially, they argued that the construction of the Humble Canal in the 1940s and 1950s caused the natural Freshwater Bayou to silt up, or fill in with sediment, and become impassible. No mention was made, however, of the destructive impact from the federally constructed deep water

22. Minute Entry, Vermilion Corp. v. Vaughn, 15th Judicial District (June 7, 1977) (on file with University of Louisiana at Lafayette, Center for Louisiana Studies).

23. Nat'l Audubon Soc'y v. White, 302 So. 2d 660 (La. Ct. App. 3d Cir. 1974).

24. *Id.* at 662.

channel along the original path of Freshwater Bayou in the late 1960s.[25] The defense's appeal stated that the judge in the previous decision, and the judge in *National Audubon Society v. White*, erred. But the appellate court ruled in favor of Vermilion, affirming summary judgment.

The defense team then appealed to the Louisiana Supreme Court to review the case. While both sides waited for a response on the review, the trespassing in Vermilion's canals continued. Company officials issued additional legal notices to locals for trespassing in the canals, indicating that perhaps the fishermen were testing the waters of the ongoing legal battle.

Although the Louisiana Supreme Court denied the writ to review the *Vermilion Corp.* case, the Vaughn team still had one alternative recourse to pursue.

D. U.S. Supreme Court Review

What started as a simple trespassing case wound up all the way to the U.S. Supreme Court. The high Court agreed to hear the case in tandem with a high-profile case from Hawaii involving the federal government and a private marina.[26] Although the main thrust of the argument remained centered on the question of public rights to private waterways, the Vaughn team broadened its new theory that the construction of the Humble Canal impaired the natural navigable waterways and that, therefore, the fishermen should have unlimited access to the artificial waterways. Vermilion responded by expanding its legal team and calling on the Louisiana landowner community for support to fend off a damaging, adverse ruling against private property rights. There was a lot riding on the outcome of this case, and every landowner, including state agencies controlling wildlife refuges, had a stake in the outcome.

Shortly after the Louisiana Supreme Court denied a review of the case, Vermilion and the Vaughn group began settlement talks. Vermilion offered to drop the demand for damages but wanted to keep the permanent injunction in place if the Vaughn group agreed to withdraw its petition from the U.S. Supreme Court. Vaughn's lawyers boldly counteroffered, stating that their clients wanted a written contract with the company for

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25. No mention was made of either the natural buildup of sediment and mudflats all along the coastal boundary of the property or the waterways that resulted from westward moving currents from the Atchafalaya River. *See* R.J. Russell & H. V. Howe, *Cheniers of Southwestern Louisiana*, 25.3 GEOGRAPHICAL REV. 449 (1935); JAMES P. MORGAN ET AL., OCCURRENCE AND DEVELOPMENT OF MUDFLATS ALONG THE WESTERN LOUISIANA COAST (1953).

26. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

exclusive shrimping rights in the canals, meaning they would be the only parties permitted to fish in the canals in exchange for giving Vermilion a percentage of the catch. Although Vermilion declined the initial counteroffer, it became obvious that the pending review of the case by the highest Court in the land could have serious implications for the company and private landowners. As Vaughn's lawyers warned Vermilion:

> My clients' counter-offer is premised on the common interest that they and the Vermilion Corporation have: If my clients win this case in the Supreme Court of the United States, both they and the Vermilion Corporation are going to suffer because my clients believe that if they do win, shrimpers, fisherm[e]n, trappers, hunters, poachers, and God knows what else will descend upon the canals en masse.[27]

Vermilion firmly believed that it had the law on its side and recognized that the law of Louisiana would have to be changed in order to obtain a different result. But as both sides prepared their responses to petition the U.S. Supreme Court for a review in late 1978, a new dynamic in the case emerged—the federal government asserted its interest in the issue of public access to private waterways.

In the case of *Kaiser Aetna v. United States*, a private company dredged and converted a lagoon in Hawaii into a private marina-style subdivision.[28] A lower court in the case ruled that by creating the marina, the private company opened the area to a navigable bay and the Pacific Ocean, thus making the private marina a navigable waterway of the United States and granting public access to the marina.[29] The United States Court of Appeals for the Ninth Circuit agreed with the district court that by creating the marina the private company opened the area to a navigable bay and the Pacific Ocean, thus making the private marina a navigable waterway of the United States and granting public access to the marina. The Ninth Circuit reversed the district court's holding that the navigational servitude did not require petitioners to grant the public access to the marina. The issue of public access to private waterways now had a broader national significance with two individual cases set to be heard before the U.S. Supreme Court. To Vermilion's surprise, the U.S. solicitor general

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27. Letter from John Hill, attorney for Vaughn et al., to Charles Sonnier, Gen. Couns., Vermilion Corp. (June 28, 1978) (on file with University of Louisiana at Lafayette, Center for Louisiana Studies), *quoted in* THERIOT, *supra* note 7.

28. *Kaiser Aetna*, 444 U.S. 164.

29. *Id.* at 168–69.

was invited to file a brief in the case expressing the views of the federal government on the matter.

When the U.S. Supreme Court agreed to review the Louisiana case in tandem with the Hawaii case, Vermilion expanded its efforts. The attorneys contacted other large landowners to inform them of the pending case and to seek support by submitting amicus briefs on Vermilion's behalf. "If the Supreme Court upholds the Ninth Circuit decision and *reverses the Louisiana holding*," Vermilion's lawyer wrote to one of the company's allies, the National Audubon Society, "our clients (including Audubon) will have enormous problems with poachers, unlimited commercial use for which they formerly received tolls, and the widening and washing out of existing and future canals due to boat traffic. Your organization will probably have similar problems."[30] Vermilion solicited briefs from other large private landowners in order to provide the high Court with an understanding of the magnitude of the canal infrastructure on private land in coastal Louisiana and the unintended consequences of granting public access to these private waterways.

The National Audubon Society, which owned and managed the Rainy Foundations' wildlife refuge adjacent to Vermilion's leasehold, became the plaintiff's most outspoken supporter. John "Frosty" Anderson, who represented the Audubon Society, wrote:

> The shrimpers represent a commercial interest invading what is essentially a wildlife sanctuary. Should they get away with this, formerly inviolate wildlife sanctuaries such as the Rainey and hundreds of others will be thrown open not only to commercial fishing, but to real estate developers whose clients can use the canals, water skiers, alligator poachers, public hunting, etc.[31]

Even the City of New Orleans, which owned and managed the Municipal Yacht Harbor, had an interest in the Supreme Court decision. Eleven landowners consented to writing amicus briefs with the Louisiana Landowners Association (LLA), agreeing to combine most of them into one collective written response. The LLA represented 500 landowners with numerous canals situated on property owned by its members. "Many of these waterways, including artificial canals, were constructed to provide access for mineral and timber operations, and for drainage, irrigation,

30. THERIOT, *supra* note 7, at 101.
31. *Id.* at 102.

reclamation, trapping and recreation activities," the LLA brief explained.[32] It continued:

> Petitioner's assertion that the private waterway which is the subject of this suit is subject to a public right of access and use will not pass Constitutional muster, for the result is tantamount to a confiscation of private property rights without compensation in violation of the 5th Amendment to the Constitution.[33]

Private canals were similar to private roads, the brief added, in that a private road on private property that connected to a public highway was subject to landowner rights. The decision of the lower court, the LLA concluded, was "eminently correct," and "as a matter of Louisiana law."[34]

The Ramos Investment Company, which owned and maintained extensive swampland and canals in the Atchafalaya Basin, contributed a separate brief. "[I]t seems clear that the partnership's holdings will be directly affected by the decision of this Honorable Court on the issue of unrestricted public access to and use of such waterways," the Ramos brief stated.[35] The company would no doubt be overburdened by maintaining and policing the canals if open to the public. "It would be virtually impossible to prevent indiscriminate trespassing and poaching, with their concomitant deleterious effect on the marsh and swamp ecosystems."[36]

Even the State of Louisiana sided with Vermilion, arguing that wildlife refuges could be negatively impacted by an adverse decision from the Supreme Court. Vermilion's lawyers discussed the matter with Allan Ensminger, longtime administrator at the Louisiana Department of Wildlife and Fisheries and game refuge manager. At Ensminger's request, the agency's legal counsel filed an amicus brief that explained its position against public access to private waterways. The agency owned and managed roughly 400,000 acres of marshland on which were located many miles of private canals. The Rockefeller Wildlife Refuge, for example, had over 175 miles of canals. Several of these canals had been blocked off with earthen dams built when oil companies abandoned the well sites. These

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32. Brief for the Louisiana Landowners Ass'n, Inc. as Amicus Curiae Supporting Respondents at 3, Vaughn v. Vermilion Corp., 444 U.S. 206 (1979) (No. 77-1819).

33. *Id.* at 18.

34. *Id.*

35. Brief for Ramos Inv. Co. as Amicus Curiae Supporting Respondents at 2, *Vaughn*, 444 U.S. 206 (No. 77-1819).

36. Brief for the Louisiana Landowners Ass'n, Inc., *supra* note 32, at 4.

dams and weirs[37] maintained water levels in the marshes and minimized saltwater intrusion into the marsh interior. It was critical that managers tightly control access into and out of the canals and marshes of the refuges. "The loss of control over the use of these canals would be extremely detrimental to both fish and game management programs," Peter Duffy, attorney for the Department, stated in a brief submitted to the high Court.[38] "[U]nfett[er]ed public access and use will render law enforcement impossible, the end result of which will be no practical protection to the animals and fish, the habitat, the trapper, the hunter, or the fisherman."[39]

The most conclusive arguments came from the Audubon Society, which managed the 26,000-acre Paul J. Rainey Wildlife Sanctuary in lower Vermilion Parish. Over the years a network of roughly 75 miles of canals had been excavated for access to the marshland and to promote nature conservancy. Audubon's canal system interconnected with Vermilion's eastern canal system via the McIlhenny Canal.[40] An adverse ruling in this case would reverse the protection afforded Audubon's sanctuary in *National Audubon Society v. White*. "Louisiana's present system works," the Audubon brief declared.[41] "It has accomplished Louisiana's purposes for over a century. There's no compelling reason to change it."[42] With respect to the petitioners' claim that the Humble Canal system caused the original Freshwater Bayou to silt up and become impaired, Audubon debunked that allegation and pointed to the real demise of the natural bayou system: "[A]ll questions concerning any possible effect on Freshwater Bayou by Vermilion's canal system were rendered moot by the action of the Corps of Engineers," and by the levee and spoil bank built that totally "obliterated the portion of Freshwater Bayou lying east of the Freshwater Bayou Canal."[43] In light of such facts, "it serves no useful purpose to pursue the question of what effect Vermilion's canal system may or may not have had on Freshwater Bayou."[44] Aside from the added problem of hiring additional wardens to patrol the canals for public access, there would also be a larger problem of

37. A weir is a wooden structure that uses slats to regulate the flow of water into and out of a marshy area or waterbody.

38. Brief for the La. Dep't of Wildlife & Fisheries as Amicus Curiae Supporting Respondents at 4, *Vaugh*, 444 U.S. 206 (No. 77-1819).

39. *Id.* at 6–7.

40. Brief for the Nat'l Audubon Soc'y as Amicus Curiae Supporting Respondents at 8, *Vaughn*, 444 U.S. 206 (No. 77-1819).

41. *Id.*

42. *Id.*

43. *Id.* at 10–11.

44. Brief for the Nat'l Audubon Soc'y, *supra* note 40, at 11.

increased bank erosion from the numerous local fishermen who would no doubt invade the sanctuary's canal system armed with butterfly nets designed to scoop up all marine life in their path.

In October 1979, the Supreme Court heard oral arguments from Vermilion and the Vaughn group on the private canal issue. The case boiled down to two main questions for review. First, whether the destruction or impairment of natural navigable waterways through the building of artificial, navigable canals entitles citizens to navigate freely upon the resulting artificial waterways and, second, whether public citizens have the right to use a private canal if that canal is connected to a natural navigable waterway. The U.S. solicitor general essentially agreed with Vaughn's lawyers that "[p]ublic navigation on all navigable waters is a historic right."[45] The fact that the canals were built with private funds on private property primarily for fur trapping and oil and gas development was insignificant, in the solicitor general's opinion: "Our constitutional scheme places the navigable waters of the United States, and the public servitude which attaches to them, in the care of the nation. It is not for the State of Louisiana to purport to carve out exceptions."[46] The Vermilion team countered by stating that the siltation of the natural waterways was primarily the result of westward moving currents from the Atchafalaya River. Likewise, the navigability of the original Freshwater Bayou was destroyed when the Army Corps of Engineers re-routed it to build the deep water channel. Furthermore, to the issue of the navigability of the canal system, Vermilion's lawyers argued that the defendants did not seek to use the canal system for navigability, but for their own commercial purposes and financial gain.

In the end, the U.S. Supreme Court ruled in Vermilion's favor on the second question and affirmed the opinion of the Louisiana Third Circuit Court of Appeal, holding that the mere fact of navigability does not confer upon the public a general right of use under the Commerce Clause of the Constitution of the United States.[47] The Court's decision in *Kaiser Aetna v. United States* largely influenced the opinion in the *Vermilion* case. The Court noted, however, that there appeared to be a factual dispute concerning the first question about impairment of a natural waterway by an artificial one. If it could be proven that the construction of a private canal diverted or destroyed a natural navigable waterway, then that evidence could be used as a defense to a claim of trespass. The Court

45. Brief for the United States as Amicus Curiae Supporting Petitioners at 4, *Vaughn*, 444 U.S. 206 (No. 77-1819).

46. *Id.* at 34.

47. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

remanded this first question about impairment back to the lower court for further review. The Supreme Court victory for Vermilion was a welcomed one, but somewhat bittersweet, as the high Court essentially left an opening for the defense to continue pursuing the case. After four long years of litigation, *Vermilion Corp. v. Vaughn* appeared to have new life.

E. Denouement

Following the historic decision from the Supreme Court, the *Vermilion* case bounced around from one state court to the next without gaining a resolution. The debate centered around the theory that the diversion or impairment of a natural waterway by a man-made canal entitled the public to a substituted right of access to that artificial waterway. But proving that the Humble Canal destroyed or impaired the original Freshwater Bayou would be difficult, if not impossible, considering the complete remaking of the marshland and water bottoms that resulted from the construction of the federal navigation channel in the late 1960s. The Louisiana Third Circuit Court of Appeal rendered its decision on the impairment issue and rejected the defendants' claims of rights to use an artificial canal as a substitute for a natural one.[48] In 1981, the Louisiana Supreme Court reversed that ruling, stating that there was a material dispute in the matter of impairment.[49]

By 1982, with both sides facing a return to the trial court to continue the exhausting legal fight, the parties appeared ready to finally settle. Vaughn's lawyers proposed to keep Vermilion's injunction on record, and for the locals to recognize the company's control of the canal system together with Vermilion's right to regulate, control, possess, and use the canal system. In turn, Vermilion would grant a shrimping permit to Vaughn and the Broussards, with the same privileges afforded to all of the other permittees. Additionally, Vermilion would drop all damage claims. Each party could claim a win: Vermilion would have on record its dominion over the canals, and the locals would have access to shrimp in the canals. In September, the parties signed a memorandum of understanding that ended the prolonged court battle. The general manager of Vermilion issued fishing permits to each of the men. The suit was dropped, and life went on.

Nearly four decades later, Charles Sonnier, still general counsel to and director of Vermilion, summarized the landmark case:

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48. Vermilion Corp. v. Vaughn, 387 So. 2d 698, 702 (La. Ct. App. 3d Cir. 1980).

49. Vermilion Corp. v. Vaughn, 397 So. 2d 490, 494 (La. 1981).

> We went back to the idea that maybe we ought to go ahead and grant permits to these people for the right to use our canals, and therefore continue our dominion over the property, which was what was done, and to this day, that's what takes place. We grant permits to shrimpers to shrimp in our canals, we grant permits to fishermen who want to fish in our canals, and we still maintain and enforce the right to patrol our own canals because the law has been established by the United States Supreme Court that it is a private thing built on private property with private funds.[50]

In essence, the entire case came down to locals wanting to exploit the fisheries in the company's canals, and Vermilion wanting to secure control over its private waterways. Both sides achieved their respective goals through an enduring legal battle that stretched from the state courts to the U.S. Supreme Court and back again. The saga brought to light the precarious nature of maintaining private property rights over the public's desire for waterway access, particularly in areas where private channels and public waterbodies intersect. The timing of the historic case also lent itself to various issues that began to emerge in coastal Louisiana in the early 1980s, including regulations on coastal zone management, coastal land loss, and programs for marsh management.

II. COASTAL LOUISIANA IMPLICATIONS FOR *VERMILION CORP. V. VAUGHN*

Beginning in the 1980s, landowners in coastal Louisiana carried out elaborate and expensive marsh management plans designed to maintain water quality and salinity levels to prevent fragile wetlands from eroding away. Governmental agencies supported these novel restorative measures and granted permits for such work. Components of these plans included the construction of water control structures, weirs, and levees. Landowners blocked off previously open canals with gates and signs in order to keep tight control over access into these management areas. Fishermen all across coastal Louisiana suddenly found their traditional fishing grounds cut off.

A case involving public access to the Tideland Canal, a private waterway in Lafourche Parish in the late 1980s, paved the way for the renewed debate between fishermen and landowners. In *Dardar v. Lafourche Realty Co.*, commercial fishermen sued a landowner who denied them access to a private canal that had been used by the public for

50. Interview with Charles Sonnier, Gen. Couns., Vermilion Corp., in Abbeville, La. (May 8, 2016).

decades.[51] The state's attorney general intervened on the fishermen's behalf, asserting the state's claim to the navigable waterbody as a public trust.[52] In applying the *Kaiser Aetna* and *Vaughn* decisions to *Dardar*, the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's decision in favor of the landowner and held that construction of the Tidewater Canal did not impair preexisting navigable waterways.

Since then, at least two other cases have considered the impairment question. In *People for Open Waters, Inc. v. Estate of Gray* in 1994 and *Buckskin Hunting Club v. Bayard* in 2004, the Louisiana Third Circuit Court of Appeal essentially ruled that the sportsmen in both cases did not show by a preponderance of evidence that the construction of an artificial canal in any way diverted water from or altered a natural, navigable waterway.[53] The difficulty in demonstrating the validity of the impairment theory in court may lie in the fact that most of the private canals involved in these cases were dug many years ago, long before the advent of sophisticated mapping technology and environmental impact assessments. Perhaps even more ambiguous are the multiple factors, both man-made and natural, that have contributed to the alteration of the natural waterways in question. The increasing pace and scale of environmental change along coastal Louisiana will likely make the impairment theory even more difficult to prove in the future.

In recent years, recreational fishermen and captains of professional charter boats have reenergized the debate over public access to private canals. Once a fragmented group, these sportsmen have become well organized and active in the political process. Their voices are loud, and their concerns are real. As with previous generations, they want access to private waterways to fish. In addition, with the evolution of high-performance surface drive motors and lightweight boats, fishermen can now travel across extremely shallow areas to fish in spots that were nearly impossible to reach a generation ago. But determining what is private and what is public along a sinking coast has become difficult for fishermen, particularly when it comes to dual-claimed water bottoms. Landowners and their lessees have continued to assert control over private waterways with increased restrictions on public access through the use of gates and barriers.

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51. Dardar v. Lafourche Realty Co., 985 F.2d 824 (5th Cir. 1993).

52. The 1988 U.S. Supreme Court decision *Phillips Petroleum Co. v. Mississippi* likely influenced the state's decision to intervene and claim public owners of the water bottoms. 484 U.S. 469, 479–81 (1988).

53. People for Open Waters, Inc. v. Estate of Gray, 643 So. 2d 415, 417 (La. Ct. App. 3d Cir. 1994); Buckskin Hunting Club v. Bayard, 868 So. 2d 266 (La. Ct. App. 3d Cir. 2004).

Attempts at legislative remedies have tried to quell the flames of the ongoing debate between the landowning community and sportsmen with limited success.[54] The options for compromise posed by various mediators have been wide-ranging: from creating voluntary, public recreational servitudes to agreeing on permanent boundary settlements between the state and private landowners. While finding a solution could take many more years, a temporary pathway may involve similar accommodations made in settling *Vermilion Corp. v. Vaughn*. Fishermen paid a modest fee for rights to fish in the private waterways, and the owner of the canal system granted a fishing permit to them based on certain expectations. After a long, arduous legal battle, the company and the fishermen found a practical solution to their differences with a simple contract agreement. While "pay to play" may not be ideal for some sportsmen, others, particularly the guide services, may find this to be an acceptable option considering the advantages of access and the cost of lobbying and litigation.

CONCLUSION

The political, physical, and cultural landscape in south Louisiana has changed much since the landmark *Vermilion Corp.* case. Coastal restoration has become a priority for the state and for many landowners and large lessees who are committed to protecting what is left of their shrinking marshlands, often at their own expense. As the coastal erosion crisis worsens, the boundaries between what is a private waterway and what is public have become increasingly blurred. The growing litigious nature of society in general, along with the increase in tort litigation in Louisiana in particular, has pushed many private landowners to close off

54. *See* H. Res. 178, 2017 Leg., Reg. Sess. (La. 2017); JIM WILKINS ET AL., LOUISIANA SEA GRANT COLLEGE PROGRAM, PRELIMINARY OPTIONS FOR ESTABLISHING RECREATIONAL SERVITUDES FOR AQUATIC ACCESS OVER PRIVATE WATER BOTTOMS (2018), http://www.dnr.louisiana.gov/assets/Legal/PRATF/Dseagrant.pdf [https://perma.cc/NN9H-AW3V] (studying and recommending the establishment of voluntary public recreational servitudes on private lands); H.B. 391, 2018 Leg., Reg. Sess. (La. 2018) (establishing that running waters in the state under article 450 are owned by the state); S. Con. Res. 99, 2019 Leg., Reg. Sess. (La. 2019); PUBLIC RECREATION ACCESS TASK FORCE, REPORT OF THE PUBLIC RECREATION ACCESS TASK FORCE TO THE LOUISIANA LEGISLATURE PURSUANT TO SCR 99 OF THE 2018 REGULAR LEGISLATIVE SESSION (2020), http://www.dnr.louisiana.gov/assets/Legal/PublicRecAccessTFReport.pdf [https://perma.cc/3BT2-5U7A] (studying the issue and making policy recommendations to address the issue of public access to the navigable waters of the state).

all access into and out of their waterways. For all these reasons and more, the ability to find any common ground between competing interests has remained elusive. At the root of it all is tradition: people want to fish, and property owners and managers want to maintain their domains as they always have. A look back at the issues and outcomes of the *Vermilion Corp.* case—including its human dimensions and the ability of the parties to find a compromise after years of costly litigation—may offer some useful insight as to how to calm the waters of competing and contentious coastal uses.