Tulane Institute
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RIGHTS, DUTIES, AND OPPORTUNITIES—COASTAL CONSERVATION, RESTORATION, AND PROTECTION IN A SHAPE-SHIFTING COAST

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I. INTRODUCTION

Few places can match the natural, cultural, and economic richness of coastal Louisiana or the fervor of those who love it and call it home. It is a cruel irony that few places have been so roughly handled in the pursuit of near-term gain, especially in the face of knowledge and options that could have yielded better results. Understanding how that happened and what might be done about it is at the heart of Louisiana's coastal restoration campaign. This requires a grounding in science, engineering, and the social and economic conditions that drive or constrain actions. It also calls for a grounding in laws, specifically those of the State of Louisiana, that govern the ownership, use, and management of the lands and waters of coastal Louisiana. The former is not the subject of this paper—the latter is.

Property law is one of society's most important "rules of the road." It prescribes who owns what, what they can do with it, and how one set of rights jives (or does not) with others. Most of the time, property law seems immutable, defining ownership and control across the years. That stability is important, but property law is less monolithic and static than it may initially appear.

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One's right to do what one wants with one's own property is not absolute, especially when the rights of others, such as neighbors or the government, are thrown into the mix. Nowhere is that truer than when the property in question involves water, especially where the interface between land and water is changing. That is particularly the case in places like coastal Louisiana, where the landscape is constantly transforming. To live, work, and plan in such places demands respect for property rights and for the possibility that those rights can change as the waters and lands shift. Coastal Louisiana has already transformed significantly since European colonizers brought their notions of property ownership and laws to North America. Rivers have changed course and land has been built; but mostly land has disappeared. Between the years 1932 and 2010, more than 1,800 square miles of what had been land became open water.[2] On the other hand, some areas, like the Atchafalaya River Basin, have seen land appear in what used to be open water. Titanic forces are reshaping the face and map of Louisiana, but that is not apparent from the descriptions in recorded deeds. For example, a boat might be anchored in a spot that used to be land and is still claimed as private property. One might also be surprised to learn how connected all of that is to the question of who owns subsurface mineral rights. This is the province of property law and water law.

II. BACKGROUND

Reading Louisiana law could easily lead one to believe that the state's waterways are made up of readily identifiable natural streams, lakes, and the sea. This is not the case. In that same vein, someone looking at a map of Louisiana might conclude that the names on the map reflect the legal status of the water bodies shown on it, but they would be mistaken: Catahoula Lake and Lake

[2] BRADY R. COUVILLION ET AL., U.S. GEOLOGICAL SURVEY, PAMPHLET TO ACCOMPANY SCIENTIFIC INVESTIGATIONS MAP 3164, LAND AREA CHANGE IN COASTAL LOUISIANA FROM 1932 TO 2010 4 fig. 2 (2011).

Pontchartrain, for example, are not lakes. And anyone who plans to navigate Louisiana's coastal waters based on most maps will find those maps are, at best, approximations of where land and water actually are at any given time. Any real understanding of the legal nature of the state's waters and the public and private rights concerning them must be tempered by a degree of uncertainty because, where they come together, land and water are changeable things.

Louisiana has always had a complicated relationship with land and water. When the State joined the Union in 1812, its boundaries included roughly 15 million acres of land, approximately half of which was covered by water at least part of the year.[3] The bulk of those wetlands were found in the state's coastal region, where the combined efforts of rivers, floods, tides, and storms had created a system of swamps, marshes, and estuaries covering nearly 7,000 square miles (or 4.5 million acres).[4] It would not be wrong to describe coastal Louisiana as more a process than a place, because even without human intervention, it is continually being built and destroyed by alluvial, riparian, littoral, and geologic forces. But humans, specifically European colonists and Euro-American settlers, did intervene and brought with them two concepts alien to the coastal land/waterscape, namely property ownership and hydrologic manipulation. These transformed the region and its stewardship, sowing the seeds of coastal collapse that threaten the state today. By 1928, it was already clear that Louisiana's coast was in trouble. Percy Viosca, a scientist working for the State, wrote in the journal *Ecology* that "[r]eclamation and flood control as practiced in Louisiana have been more or less a failure, destroying valuable natural resources without producing the permanent compensating benefits originally desired. Reclamation experts and real

[3] Percy Viosca, Jr., *Flood Control in the Mississippi Valley in Its Relation to Louisiana Fisheries*, 57 TRANS. AM. FISH. SOC. 49, 53 (1927).
[4] LOUISIANA COASTAL WETLANDS CONSERVATION AND RESTORATION TASK FORCE AND THE WETLANDS CONSERVATION AND RESTORATION AUTHORITY, COAST 2050: TOWARD A SUSTAINABLE COASTAL LOUISIANA 22 (1998).

estate promoters have been 'killing the goose that laid the golden egg.'"[5] His warnings went unheeded. Between 1932 and 2016 Louisiana's coastal wetlands had shrunk an additional 2000 square miles.[6]

But Viosca's words were not in vain, and his warnings are now treated with the seriousness they should have received at publication. In 1989, Louisiana, along with federal and private partners, began mapping out ambitious plans and programs to stem the ongoing collapse. They sought to reimagine and reengineer the ways Louisiana's coastal lands and waters are managed and how coastal communities might respond and adapt to the twin challenges of rising seas and sinking lands. Today, the Louisiana Coastal Protection and Restoration Authority (CPRA), an agency housed within the Governor's Office, leads that mission. CPRA oversees the development, implementation, and periodic updating of the State's Comprehensive Master Plan for Coastal Protection and Restoration. These are daunting tasks demanding the best of science, engineering, and public policy. Still, it will take more than that because all of the subject lands and waters were, and are, someone's property. Knowing who owns—or purports to own—what, and the rights and duties that accompany ownership, is vital to understanding what can be done for Louisiana's coast and who can do it. Answering those questions is no simple matter, and the answers can change as the coast changes; but if Louisiana's coast, people, and communities are to have a fighting chance, it is vital to understand how property law works in one of the most dynamic places on Earth.

[5] Percy Viosca, Jr., *Louisiana Wet Lands and the Value of Their Wild Life and Fishery Resources*, 9 ECOL. 216, 229 (1928).
[6] U.S. GEOLOGICAL SURVEY, *Louisiana's Changing Coastal Wetlands*, (July 12, 2017), https://www.usgs.gov/news/national-news-release/usgs-louisianas-rate-coastal-wetland-loss-continues-slow.

III. COMING TO TERMS

Before getting too deep into the laws and doctrines that govern land, water, and minerals in coastal Louisiana, it will be helpful to go over some of the important words and phrases that one encounters in these fields:

Accretion/Alluvion. The concept of land building by the deposition of sediments is called accretion or "alluvion" in Louisiana. Louisiana defines alluvion as land that forms "successively and imperceptibly" on the banks of a river or stream.[7] It does not matter if the river or stream is navigable. However, alluvion does not apply to the shores of lakes or the sea.[8] The new land benefits the owner of the land to which it adds. For example, in the case of accretion to a bank, the new land would belong to the bank owner. The owner of the bank owns the alluvion but must "leave public that portion of the bank which is required for the public use."[9] If alluvion forms along the property of several landowners, then the landowners divide the alluvion equally.[10] If land rises from open water, it belongs to the water bottom owner Presumably, the water bottom owner would also own any land that builds on a bank if it is "perceptible." Since much can turn on whether the accretion is perceptible or not, one might incorrectly expect there to be a clear test or definition for that term. In today's world, where instruments can detect minute changes, it might seem that all land change is "perceptible," but the prevailing view is that the changes must be detectible by a human observer at the time of the change.[11]

Arm of the Sea. This important—and confusing—term comes up in several ways in federal and state law, so it is essential to know how and when the term is used. The arm is an

[7] LA. CIV. CODE art. 499 (2022).
[8] LA. CIV. CODE art. 500 (2022).
[9] LA. CIV. CODE art. 499 (2022).
[10] LA. CIV. CODE art. 501 (2022).
[11] *See, e.g.*, State of Cal. *ex rel.* State Lands Comm'n v. U.S., 805 F.2d 857, 864-65 (9th Cir. 1986).

appendage of the body and, likewise, an arm of the sea is an appendage of the sea. But what are the limits and the reach of that appendage? The most accepted meaning is explained in Black's Law Dictionary as a "portion of a river or bay in which the tide ebbs and flows. It may extend as far into the interior as the water of the river is propelled backward by the tide."[12] This definition is found in federal admiralty law. [13] Additionally, the definitions arises in the "equal footing doctrine," which dictates the lands and waters (commonly called "sovereignty" or "public trust" lands and waters) that a state, including Louisiana, received in trust from the federal government at the time of statehood as incident thereto.[14]

Louisiana, on the other hand, uses the phrase but does not define "arm of the sea" in the Louisiana Civil Code, Revised Statutes, or Constitution; rather, it does so in jurisprudence. *Buras v. Salinovich* is generally regarded as the principal case in Louisiana law. In that case, the Louisiana Supreme Court developed a two-part test for determining whether a coastal body of water is an arm of the sea—and hence treated as a public thing.[15] The first requirement is that the body of water be in the immediate vicinity of the Gulf of Mexico (the Sea).[16] The second requirement is that there be a direct overflow of water from the Gulf of Mexico into the arm of the sea.[17] In practice this narrower than the standard definition because it is not tied to the ebb and flow of the tide. This is not surprising because at the time of the *Buras* decision, it was widely believed that public ownership was confined to the sea, seashore, and water bodies that were navigable in fact.

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[12] *Arm of the Sea*, *Black's Law Dictionary* (11th ed. 2019).
[13] *See, e.g.*, Peyroux v. Howard, 32 U.S. 324 (1833).
[14] Phillips Petroleum Co. v. Miss., 484 U.S. 469, 476 (1988).
[15] Buras v. Salinovich, 97 So. 748, 750 (La. 1923).
[16] *Id.*
[17] *Id.*

The U.S. Supreme Court's 1988 decision in *Phillips Petroleum v. Mississippi* changed that. The *Phillips* case addressed the issue of what lands and waters Mississippi had received in trust from the federal government when it joined the Union.[18] Those sovereignty lands are to be held in trust for the public and generally cannot be transferred into private hands. *Phillips* argued for a narrow *Buras*-like definition that was rejected by the Court.[19] The Court instead ruled that states received all lands beneath waters that were either navigable in fact or subject to the ebb and flow of the tide, explicitly adopting the ebb and flow rule for tidelands and effectively adopting the standard definition of arm of the sea for sovereignty lands purposes.[20] It is important to keep in mind that for some purposes, the determination of what waterbottoms and lands a state received in trust is made at the time of statehood, while for other purposes, such as the application of admiralty law, the determination is made as of the time the issue arises.[21] For still other purposes, state law and its definitions still hold sway. While *Buras* may not speak to what lands and waters comprise Louisiana's sovereignty lands, it is very relevant for lands and water bottoms that came into being after statehood. A glance at any map showing the dramatic changes in the State's land and water boundaries makes clear how important that is.[22]

Avulsion. Avulsion generally refers to displacement of land by a sudden change in the land-water interface. Legally, it is defined by Black's Law Dictionary as "the removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water."[23] While never using the term "avulsion," Louisiana's Civil Code embraces the concept in article 502, which discusses sudden

[18] *Phillips Petroleum Co.*, 484 U.S. at 472.
[19] *Id.* at 477.
[20] *Id.* at 479.
[21] *Id*.
[22] *See, e.g.* Brady R. COUVILLION ET. AL., LAND AREA CHANGE IN COASTAL LOUISIANA (1932 TO 2016): SCIENTIFIC INVESTIGATIONS MAP 3381, U.S. GEOLOGICAL SURVEY SCIENTIFIC INVESTIGATIONS (2017).
[23] The Law Dictionary (online), https://thelawdictionary.org/avulsion/ (last visited Jan. 23, 2023).

actions of water. According to article 502, if the sudden action of a river or stream "carries away an identifiable piece of land and unites it with other lands on the same or on the opposite bank," it does not change the ownership of the displaced tract and the owner of the separated piece of land may claim it within a year, or later if the owner of the bank with which the land united has not taken possession.[24] By definition, this concept does not apply to most of the forces reshaping coastal Louisiana.

Batture. Under Louisiana law "batture" is the portion of a navigable riverbed that is uncovered by water at times of ordinary low water but covered by water at times of ordinary high water.[25] In most instances this will be the same as the "banks" of the river. Like river banks, batture can be privately owned but is subject to certain public uses. Specifically, the term is important because levee-related developments on batture lands do not trigger any governmental obligation to compensate the private riparian owner.[26]

Dereliction/Reliction. Dereliction (sometimes called reliction) refers to the expansion of land adjacent to a river or stream (i.e., running water) due to the receding of water. It is similar to accretion, except it occurs when water recedes "imperceptibly from a bank of a river or stream."[27] Unlike erosion, which may be sudden or slow, dereliction must be imperceptible.[28] Land formed by dereliction is owned by "[t]he owner of the land situated at the edge of the bank left dry[.]"[29] There is no right to alluvion or dereliction on the shore of the sea or of lakes.[30]

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[24] LA. CIV. CODE art. 502 (2022).
[25] *See, e.g.* DeSambourg v Bd. of Comm'rs, 608 So. 2d 1100, 1104 (La. App. 4th Cir 1992), *affirmed* 621 So. 2d 602 (La. 1993).
[26] For a more thorough discussion of batture lands and their significance see John Lovett, *Batture, Ordinary High Water and the Louisiana Levee Servitude*, 69 TUL. L. REV 561 (1994).
[27] LA. CIV. CODE art. 499 (2022).
[28] *Id.*
[29] *Id.*
[30] LA. CIV. CODE art. 500 (2022).

Erosion/Subsidence/Sea-Level Rise. These terms refer to processes by which land yields to water. In coastal Louisiana, these forces are often grouped together under the banner of "coastal erosion," though their causes and mechanics can be quite different. Erosion refers to the process by which the surface of the earth is worn away by the action of water, glaciers, winds, and waves. Subsidence is gradual settling or sudden sinking of the Earth's surface. In its broadest sense, sea-level rise is an increase in the level of the world's oceans, but in Louisiana, the term also includes relative sea level rise which describes the interaction of actual sea level and land elevation. This is important, as the land/water boundary is impacted by land subsidence and compaction as much as it is by the actual state of the Gulf of Mexico. None of these terms are defined legally in Louisiana.

Littoral. Littoral rights are rights of access and use related to lakes and coastal waters based on the ownership of land adjacent to lakes, bays, and coastal waters. Many states have merged riparian and littoral rights, at least on lakes, but Louisiana has not.[31]

Navigability. If one were to ask a roomful of strangers what the phrase "navigable water" means, everyone would likely answer that it has something to do with places boats can go. Ask a roomful of lawyers that same question and the answer would be confused looks and a request for more information. At least that would be the case if those lawyers knew their stuff. The development of the legal concept of navigability from Roman law and common law is a fascinating subject.[32] Navigability as a legal concept is central to the reach and application of federal and state

[31] This may have changed somewhat following the adoption of 2010 La. Acts 955. That Act created Louisiana Revised Statutes 30:961 dealing with cooperative endeavor agreements for surface water and defines "running water" to include state-owned lakes. On its face this suggests that riparian rights now apply to at least some lakes. However, because the Act was intended as a limited grant of authority to the State to enter into certain agreements for a finite period of time (initially two years), a better reading is to see it as just that—a limited grant of authority to the State to allow untraditional uses of State-controlled surface waters and not an expansion of private riparian rights.

[32] The underlying rationale of the navigability concept is of ancient origin. All recorded legal systems of the Western world, at least since Roman times, have recognized some sort of distinction between "private" and "public" water bodies. Historically, this distinction has served two different but related—and often confused—legal purposes. First, the distinction has served to determine whether public or private proprietary rights attach to the bed of a given

laws and to the boundaries between private and public rights. With so much hinging on what is and is not navigable, one might expect a precise and well-established legal meaning for the term. That is not the case, owing in no small part to the fact that such definitions are shaped mostly by dispute-driven jurisprudence. As a result, there are at least six ways the term is used legally that come into play in coastal Louisiana, not all of which actually have anything to do with boats.

1. **Navigability for Purposes of Commerce Clause Jurisdiction**. Navigability used to play a much more important role in understanding the jurisdictional boundaries of the Commerce Clause, but it is now mostly a matter of historical interest. At this point, it is safe to say that all naturally occurring water, even groundwater, is subject to federal regulation if Congress chooses to go that far. [33]
2. **Navigability for Statutory Interpretation Purposes.** Some statutes, such as the Clean Water Act, by their terms apply to "navigable waters." The U.S. Supreme Court has called this "navigation for regulatory authority."[34] As demonstrated by decades of dispute and litigation over the reach of the Clean Water Act, it is clear that the meaning of the term is subjective to interpretation and can be the subject of unending disagreement and dispute.[35]
3. **Navigability for Admiralty/Maritime Jurisdiction Purposes.** Admiralty/maritime law is a body of law that applies to nautical issues and private maritime disputes. Article III, Section 2 of the U.S. Constitution gives the federal courts jurisdiction over admiralty and

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water body. Secondly, it has served to allocate public and private usufructuary rights in the superjacent waters. History reveals that the concept of navigability has always been related in some manner to this public/private waters distinction. Navigability has not necessarily *been* the distinction, for history also reveals that navigable waters and public waters have never been coextensive concepts in the civil or common law. Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 516-17 (1975).

[33] The connection between Commerce Clause jurisdiction and navigability faded in a series of U.S. Supreme Court cases. *See, e.g.*, Sporhase v. Neb., *ex rel.* Douglas, 458 U.S. 941, (1982); Kaiser Aetna v. U.S., 444 U.S. 164 (1979); U.S. v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

[34] PPL Mont., LLC v. Mont., 565 U.S. 576, (2012).

[35] *See* Rapanos v. U.S., 547 U.S. 715 (2006).

maritime law disputes and, since the Judiciary Act of 1789, it has been the exclusive province of the federal courts. Admiralty jurisdiction is determined by the navigability of the waters from which a dispute arises. Initially that jurisdiction was confined to areas subject to tidal flows but now also includes waters that are nontidal but navigable in fact.[36]

4. **Navigability for Sovereign Title.** For purposes of determining what Louisiana received at the time of statehood, according to federal law, the "natural and ordinary condition of the water" at the time of statehood controls and whether the areas were navigable in fact or subject to the ebb and flow of the tide.[37] State law controls post-statehood determinations of what water and waterbottoms are public, private. or subject to both public and private rights.[38]
5. **Navigability for Navigation Servitude/Takings Compensation Purposes.**[39] This area of law speaks to legal servitudes, such as the federal navigation servitude, and marks the line between governmental actions that trigger a duty to compensate private property owners for restricting the use of their property and actions that do not. Navigability is determined at the time the issue arises and can extend beyond the navigable waterway to include unnavigable tributaries.[40]
6. **Navigability for Public Access Purposes.** The degree to which the public has access to surface waters and their lands (submerged or otherwise) is primarily a question of state law.[41] The legal meaning of "navigable" or "navigability" is not straightforward in

[36] *See* The Propeller Genesee Chief, 53 U.S. 443, 455 (1851) (expanding admiralty jurisdiction beyond tidal waters to waters that are navigable in fact. Prior to that, consistent with English law, admiralty jurisdiction was confined to waters subject to the ebb and flow of the tide—which included the Mississippi River at New Orleans.). Peyroux v. Howard, 32 U.S. 324 (1833).
[37] *See* PPL Mont., LLC, 565 U.S. 576 at 591-92 (2012); Okla. v. Tex., 258 U.S. 574, 591 (1922).
[38] *See* Phillips Petroleum Co. v. Miss., 484 U.S. 469, 483 (1988).
[39] *See generally* Kaiser Aetna v. U.S., 444 U.S. 164 (1979); Boone v. U.S., 944 F.2d 1489 (9th Cir. 1991).
[40] *See* U.S. v. Willow River Power Co., 324 U.S. 499 (1945).
[41] *Id.*

Louisiana. Because the Louisiana Civil Code and Louisiana statutory provisions do not define navigability, the task of determining whether a water body is navigable is often the job of the courts. At the least, Louisiana treats a body of water as navigable under the law if it is navigable in fact.[42] In practice that is more of slogan than a firm principle. The determination of navigability often turns on a highly fact specific inquiry, in which the court considers factors like the water body's depth, width, and location.[43] Often, but not always. Without reference to any Code article or statute, some courts have construed the term to exclude a water body not connected to other navigable waters (e.g., an isolated lake) and waters that have been navigated only recreationally.[44] The normal test is whether the water body is susceptible to commercial use, not just whether there is a history of actual use.

Recreational use is often excluded as a test of navigability, but that should be understood as conclusive since, at the least, there is often a commercial dimension to recreational uses. Similarly, the conclusion that isolated but otherwise usable waters cannot be navigable is not rooted in either commercial reality or in law. Indeed, the U.S. Supreme Court expressly rejected that limitation in the case of Great Salt Lake, a decision with application to Louisiana because it speaks to the waters and water bottoms states received upon their admission to the Union.[45] Beyond that, some areas subject to tidal influence may be deemed navigable as a matter of law due to the laws that governed which waters were turned over to Louisiana by the federal

[42] State *ex rel.* Guste v. Two O'Clock Bayou Land Co., 365 So. 2d 1174, 1777 (La. Ct. App. 1978).
[43] *Id.*
[44] Walker Lands, Inc. v. E. Carroll Parish Police Jury, p. 8 (La. App. 2 Cir. 4/14/04), 871 So. 2d 1258, 1265-66; Fitzsimmons v. Cassity, 172 So. 824 (La. Ct. App. 1937).
[45] Utah v. U.S., 403 U.S. 9, 10-11 (1971).

government when Louisiana became a state. Since no definitive survey of tidewaters/tidelands was made in connection with Louisiana's grant of statehood in 1812, this category of navigable waters is difficult to define. If that was not confusing enough, there is an ongoing debate as to whether and to what extent Louisiana retained the ebb and flow test for navigability as a feature of state law.

In addition to the lack of a clear definition, the topic of navigability is murky for other reasons. As discussed above, the waters and bottoms of navigable waterways are typically public things that are subject to public use under Louisiana Civil Code article 450. However, there are exceptions to this rule. For example, a canal built with private funds and situated on private land is a private thing even if it is navigable in fact.[46] Additionally, the navigability or non-navigability status of a water body might not remain consistent over time. The simple fact is that anyone looking for clarity and certainty about public and private rights in Louisiana's coast is looking for something that does not currently exist. That is all the more reason to take those rights seriously and to be respectful of the claims asserted by others. Private and public rights can shift with time and a changing land/waterscape. Public and private rights can coexist in the same place and time. No right is so absolute as to preclude the possibility that it may be subject to other rights or limitations.

Riparian. Riparian rights are those rights to use and access running waters associated with the ownership of tracts of land adjacent to running waters. A riparian is a person with legal rights to access and use running waters based on the ownership of riparian estates.[47]

[46] Vaughn v. Vermilion Corp., 444 U.S. 206, 208-09 (1979).
[47] The Law Dictionary (online), https://thelawdictionary.org/riparian-rights/ (last visited Jan. 23, 2023).

Seashore. Louisiana defines the seashore as that "space of land over which the waters of the sea spread in highest tide during the winter season."[48] Implicit in this definition is the need for a regular, recurring survey of tidal influence across the coast that would track the dynamic line between water and land and between public and private lands. The need may be implicit, but no such survey exists. Instead, Louisiana leaves it to the courts dealing with episodic disputes to resolve questions about where the seashore is based on cobbled-together records.[49] Chaotic as that approach is, it has yielded some importance guidance. For example, we know the "seashore" can migrate due to accretion or land loss[50] and that not all lands subject to tidal overflow are seashore due to a distinction between tidal reach and the spread of seawater.[51] But even in the latter scenario from *Buras v. Salinovich*, the Louisiana Supreme Court's decision is couched in supposition and circular reasoning, as its own language reveals:

> It has never heretofore been supposed that the definition [of seashore] in Article 451 of the Civil Code was intended to include in the term 'that space of land over which the waters of the sea spread in the highest water during the winter season,' any and all land that is subject to tidal overflow, however remote from the 'seashore,' as it is generally understood.[52]

The Court's conclusion may well be entirely correct, but its holding that a legal interpretation of seashore that has "never heretofore been supposed" and that is contrary to the "generally understood" meaning of the term highlights the difference in Louisiana's more restrictive civil code definition of the seashore and the broader concept of Louisiana's sovereignty lands including all those covered by the ebb and flow of the tide per *Phillips*. This difference between codal seashore in Louisiana and sovereignty lands under federal law may explain why there is

[48] LA. CIV. CODE art. 451 (2022).
[49] *See, e.g.*, Riceland Petroleum Co. v. N. Am. Land Co., 2003-241 (La. App. 3 Cir. 2/18/04), 869 So. 2d 894 (2004).
[50] *Id.*
[51] Buras v. Salinovich, 154 La. 495, 97 So. 748, 750 (La. 1923).
[52] *Id.* at 500.

more jurisprudence deciding what it is not than what it is, and even then, the analysis of seashore is often combined with a discussion of whether the area in question is an "arm of the sea." At the least, Code article 451 definition covers the Gulf coast and the lakes, bays, and sounds along the coast.[53]

IV. PROPERTY AND WATER LAW IN COASTAL LOUISIANA

The lands and waters of coastal Louisiana have a way of attracting the attention of a variety of people with diverse interests and agendas. Fishers, hunters, profiteers, poets, planners, seekers of knowledge, and people just looking to build a life or be left alone can be found in Louisiana. Unsurprisingly, they do not always see eye-to-eye about how to use and manage the coastal lands and waters they all use, a fact that often brings the law, specifically property and water law, into play to sort things out. These disputes are anything but academic and the outcome can determine who holds the rights to subsurface minerals; who can restrict access to waters and lands; what lands are on local tax rolls; and where people can navigate, hunt, and fish commercially or recreationally.

Property and water law as they relate to coastal Louisiana offer more of a grab-bag of laws than a discrete, thought out, well-organized field. Accordingly, it may be easier to think of the intersection of Louisiana water law and property law as a mosaic with the tiles being made up of pieces of federal and state law.[54]

a. Federal Law and Coastal Louisiana

Over time, federal laws and programs have come to play a greater and greater role in the planning and management of Louisiana's coastal lands, waters, and natural resources. While those

[53] *Id.*

[54] The rights and sovereignty of Native Americans are an increasingly important part of water and property governance nationwide. Presently, they are not a significant source of law in Louisiana but that could well change in the future as tribes in Louisiana's coastal region and along its rivers seek greater autonomy.

things may be vitally important, such as the Clean Water Act and the Endangered Species Act, many of them are beyond the scope of this paper because they do not deal with the creating or defining rights in property or water. Instead, this paper will focus on the federal laws which deal with how and when water-related rights and duties were created and to what public uses they are subject.

i. Sovereignty Lands and the Public Trust Doctrine

Under federal law, the public trust doctrine is a construct for determining the nature and extent of state land ownership, particularly with respect to navigable waters and water bottoms that states received upon their entry into the Union, and the rights and duties that go with that ownership. This dynamic and often poorly understood doctrine is an extension of the common and civil law approaches to holding navigable waters and their water bottoms in trust for the people. In the case of the federal government, it held the lands and waters in trust for future states (and apparently current citizens) unless some international duty or public exigency required otherwise.[55] With respect to the states, it speaks to the ownership of the navigable waters and water bottoms as of the time they entered the Union. Thereafter, its contours are matters of state law.[56]

Essentially, the doctrine dictates that the sovereign holds navigable waters and submerged lands under and up to the high-water mark of navigable waters in trust for the public's use in navigation, fishing, sheltering, and the like. Lands and waters held in trust are not capable of private ownership, at least not in ways incompatible with their public trust uses.[57] For purposes of determining what navigable waters and water bottoms Louisiana received in trust purely upon

[55] Shively v. Bowlby, 152 U.S. 1, 49 (1894).
[56] This point was clarified in PPL Montana LLC v. Montana, 565 U.S. 576, 604 (2012).
[57] *See* Boone v. U.S., 944 F.2d 1489 (1991).

statehood, it is clear that it obtained all waters (and their beds) that were then navigable in fact or subject to the ebb and flow of the tide.[58] What it has done with them since has been a matter of contention in Louisiana. Following the U.S. Supreme Court's landmark decision in *Phillips* in 1988, the Louisiana Legislature attempted to "quiet title" to tidal water bottoms included in prior property transfers from the State to private landholders by holding that Louisiana had never held those lands in trust.[59] The effectiveness of that act has not been tested, and it is not easily squared with the Louisiana Supreme Court's pre-*Phillips* decision in *Gulf Oil Corporation. v. State Mineral Board*.[60] In *Gulf Oil Corporation*, the Louisiana Supreme Court found that a public trust existed in the beds of navigable waters (which it may not have thought of as extending to ebb and flow lands), making the beds inalienable.[61] Indeed, the Louisiana Supreme Court said that "at the very least (if at all possible) (a)ny alienation or grant of title to navigable waters must be express and specific and is never implied or presumed from general language in a grant or statute."[62] However, this was referring to the period before the alienation of water bottoms became expressly prohibited under Louisiana's Constitution in 1921. This holding does not mean that private rights can never be granted in such waters (were that true there would be few riparian rights), but those rights cannot supplant public rights and are subordinate to them.[63]

ii. Swamp Lands

Sovereignty lands make up only a portion of the lands transferred by the federal government to the State. An even larger conveyance occurred thanks to the Swamp Lands Grant

[58] *See* Phillips Petroleum Co. v. Miss., 484 U.S. 469 (1988).
[59] La. R.S. § 9:1115.1(B).
[60] 317 So. 2d 576 (La. 1975) (on rehearing).
[61] The Court grounded this finding in the U.S. Supreme Court's seminal public trust case, *Illinois Central*. Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892); *see also Gulf Oil Corp.*, 317 So. 2d at 589.
[62] *Gulf Oil Corp.*, 317 So. 2d at 589, (Summers, J., dissenting) (quoting Cal. Co. v. Price, 74 So. 2d 1, 21 (1953) (Hawthorne, J., dissenting)).
[63] *See, e.g.*, Boone v. U.S., 944 F.2d 1489 (1991); Glass v. Goeckel, 703 N.W.2d 58 (Mich. 2005).

Acts of 1849 and 1850. Unlike the transfer of navigable waters and water bottoms that came with statehood, the Swamp Lands Acts transferred vast tracts of wet but unnavigable lands to the State with the specific intention that those lands would be sold and the proceeds used for levee building and drainage projects. In practice, the line between what Louisiana received as swamp lands and what was received as sovereignty lands has been disputed in individual cases.

iii. Federal Navigation Servitude

The navigation servitude is a "property-ish" concept rooted in the Commerce Clause, albeit of unclear parentage.[64] It is a dominant servitude over navigable waters that runs in favor of the federal government. Under this servitude, the United States may restrict or regulate the use of navigable waters and submerged lands in the public interest without triggering the obligation to compensate persons whose private rights are negatively affected. In other words, the navigation servitude delineates a zone of activity in which the federal government may act without compensating private persons for injury (i.e., it is not taking anything but rather acting pursuant to its servitude). In short, private rights, such as riparian rights, are subordinate to this servitude.[65] It is important to note that this servitude only applies to waters that are or were naturally navigable in fact. This is a narrower notion of navigability than that which comes into play when discussing the regulatory reach of Congress under the Commerce Clause.[66]

b. Louisiana Law and the Coast

While federal law provides essential guide rails for determining the nature and extent of public and private rights in coastal Louisiana, it is Louisiana's own laws that do most of the heavy lifting. The state laws are drawn from numerous sources including the Louisiana Constitution,

[64] *See Boone*, 944 F.2d at 1494.
[65] U.S. v. Willow River Power Co., 324 U.S. 499, 509 (1945).
[66] Kaiser Aetna v. U.S., 444 U.S. 164, 172-74 (1979).

Civil Code, Revised Statutes, Mineral Code, and jurisprudence. These laws, indeed any system of laws, would have a hard time dealing with what is happening in coastal Louisiana today where natural and human driven factors are constantly reshaping the land/waterscape.

To a person flying over the islands, waters, and wetlands that make up so much of coastal Louisiana, the distinction between land and water might seem easily ascertainable. Distinguishing between public and private property is another matter. To understand who has rights to use and control water and water bottoms, there are a few things to get straight upfront, including: (1) What sort of "thing" is at issue? (2) Is it public or private property (or some combination of both)? And (3) Even if it is private, is it subject to some public rights or use? These questions are related, but distinct, and are the points of departure for understanding the laws that govern Louisiana's coast.

i. What sort of "Thing" is it?

In Louisiana, as in most places, the threshold question about property is what sort of "thing" it is. Louisiana law divides property into three categories: common things, public things, and private things. These categories are foundational to whether the thing is even susceptible of ownership, especially private ownership. Beyond these categories, Louisiana further distinguishes between corporeals (tangible things) and incorporeals (intangible things) and between movables and immovables.[67] For the most part, this paper will focus on public and private things that are corporeal and immovable.

When one considers the scale of engagement and the potential for conflicts between public and private interests in Louisiana's effort to save its coast, it is apparent that the division between common, public, and private things is the most important starting point. According to Louisiana Civil Code article 449, common things include the air and the high seas, which cannot be owned

[67] LA. CIV. CODE art. 448 (2022).

by anyone because they are to be freely used by everyone.[68] Louisiana Civil Code article 450 defines public things as "owned by the state or its political subdivisions in their capacity as public persons."[69] That article further provides examples of public things belonging to the state, including "running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore."[70] Like common things, public things are subject to public use.[71] In contrast, "[p]rivate things are owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons."[72] Relevant to this discussion, private things include the banks of "navigable rivers or streams," though these are subject to public use.[73] On navigable rivers and streams, the bank is the land lying between the ordinary low and the ordinary high stage of the water.[74] Also categorized as private things are the beds or bottoms of inland, non-navigable water bodies.[75]

The word "navigable" appears frequently in Louisiana law and, as seen in the above categories, is important in determining whether a particular area is public, private or private subject to certain public uses. But partly because there is no clear definition of "navigable," as previously discussed, the concept is not straightforward. The same is true for the term "territorial sea," which is also not defined in the Louisiana Civil Code, so the federal definition must be presumed to be the operative one. Federal law defines the territorial sea of the United States as the twelve-mile-wide band of water measured from the mean low water line along the coast.[76] The baseline is determined

[68] LA. CIV. CODE art. 449 (2022).
[69] LA. CIV. CODE art. 450 (2022).
[70] *Id.*; *see also* LA. CIV. CODE art. 451 (2022) (defining the seashore as "the space of land over which the waters of the sea spread in the highest tide during the winter season."). It is worth noting that this list of public things apparently not exhaustive since the listed items are cited as examples of public things.
[71] LA. CIV. CODE art. 452 (2022).
[72] LA. CIV. CODE art. 453 (2022).
[73] LA. CIV. CODE art. 456 (2022).
[74] *Id.*
[75] *See* LA. CIV. CODE art. 506 (2022); La. R.S. § 9:1115.2.
[76] 33 C.F.R. § 2.22 (2022).

according to principles contained in the Convention on the Territorial Sea and the Contiguous Zone and the United Nations Convention on the Law of the Seas.[77]

ii. Ownership of Water

Once one knows that a piece of property is capable of ownership, the next question is whether it is owned for the benefit of the public or as private property (which even then be subject to certain public uses). This is where the distinction between public things and private things is critical. It is important to note that the distinction is not between governmental and nongovernmental ownership. Rather, public things are "owned" by the state for the benefit of the public in a trust-like capacity, but private things can also be governmentally owned as is the case when the state buys pencils, cars, or parcels of land that do not include navigable waters. Where water or water bottoms are concerned, the line between public and private things can be hard to discern. Even when it is discernable, the classification is subject to change depending on the water's movement. As a frame of reference, it is helpful to start by asking what sort of water resource is at issue. Is it tidally influenced? Is it navigable? Is it a river, stream, or lake? Is it the sea or an arm of the sea? Is it open water or a wetland? Was it naturally or artificially created? Coastal Louisiana has all of these features; and while they may be component parts of the same ecosystem, the law's treatment of them can vary.

Navigable Waters. These waters can be comprised of any number of water bodies: the open sea (e.g., the Gulf of Mexico); arms of the sea; areas that were amenable to commercial navigation or subject to tidal influence on April 30, 1812; or areas that became amenable to commercial navigation after April 30, 1812.[78] They can be streams, rivers, lakes, or coastal bays.

[77] Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention of the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 31363.
[78] April 30, 1812, represents the date of Louisiana's admission to statehood in the United States.

The purpose and nature of a waterway's navigability determine the parameters of public and private ownership and rights. As noted earlier, navigable waters are public things and are generally inalienable by the state.[79] That is true even if they are part of an otherwise private tract of land. This was made clear in the case of *Gulf Oil Corp. v. Mineral Board*.[80] That case involved the ownership of navigable waters that seemed to be included within the bounds of property that had been conveyed into private hands. The Louisiana Supreme Court ruled that despite the description of the property in the deed, it could not, as a matter of law, have transferred the navigable waters and waterbottoms because those were never the State's to convey.[81]

Tidal Waters. The question of tidal influence is determinative of the extent of sovereignty lands received into public trust at the time of statehood, irrespective of whether those tidal waters were in fact navigable by vessels.[82] These areas are considered navigable as a matter of law. Clearly, the issue of tidal influence is an important factor in determining navigability, but it is not necessarily a deciding one (other than for admiralty/maritime law purposes), especially with respect to areas that become tidal after statehood.

Rivers and Streams. All waters in running rivers and streams are public things, regardless of their navigability. Navigability, however, determines whether the banks and beds can be privately owned.[83] The bottoms of "navigable rivers or streams" are public things; but the banks can be privately owned while being subject to certain public uses, particularly those linked to traditional public activities, such as boating, hunting, and fishing.[84] On navigable rivers and streams, the bank is the land lying between the ordinary low and the ordinary high stage of the

[79] *See* Gulf Oil Corp. v. State Min. Bd., 317 So. 2d 576 (La. 1975).
[80] *Id.*
[81] *Id.*
[82] *See* Phillips Petroleum Co. v. Miss., 484 U.S. 469, 481 (1988).
[83] *See* LA. CIV. CODE art. 506 (2022); La. R.S. § 9:1115.2.
[84] LA. CIV. CODE art. 456 (2022).

water.[85] The previously-discussed doctrines of alluvion, dereliction, and avulsion apply to all running waters, regardless of their navigability. Owning land that adjoins or is bisected by running water comes with its benefits. Even though the water remains a public thing, owners of "riparian" tracts have privileges of use not shared by the general public.[86] These riparian rights are predial natural servitudes attached to the riparian tracts, which suggests that a riparian owner can only exercise riparian rights in ways that do not injure another riparian owner.[87] These rights of use are not well explained in the Louisiana Civil Code or Revised Statutes but are best understood as special or *sui generis* rights that are part and parcel of ownership of riparian estate.[88]

iii. Land: Who Owns It, Who Can Use It.

By and large, private land ownership is a matter of having a deed or title document that supports the claim of having the right to exclude others. That is mostly true in coastal Louisiana, too, but public and private rights here are never as simple as words printed on paper or just going where the water lets you go. This caveat cannot be stressed enough. Many disagreements and disputes in coastal Louisiana stem from uncertainty over where the public may go and what constitutes private property from which the public may be excluded. That is an incomplete lens with which to view the coast because the fundamental question is not just what the public may access, but what is public versus private property and what private property is subject to public access and use. Vast tracts of coastal Louisiana are, on paper and tax rolls, private property even though they are covered by open water. Is that water navigable? Was it navigable when the private estate was created? Are all public uses of private lands unlawful or are some protected? The fact

[85] *Id.*
[86] LA. CIV. CODE arts. 657-658 (2022).
[87] LA. CIV. CODE arts. 646-654; *see also* James Klebba, *Legal and Institutional Analysis of Louisiana's Water Laws with Relationship to the Water Laws of other States and the Federal Government*, *Vol.* 1, p. 7-10 (1983).
[88] *Id.* at n. 25 (citing 4 Yiannopoulas, Louisiana Civil Law Treatise, § 22 (2d. Ed. 1983)).

is, the facts matter in coastal areas, and no one should assume that words on a deed or the depth/width of a waterway is the final word on who owns it or what their rights are. For example, some clearly boatable waterways are canals built on private property with private funds that can still be treated as private property from which the public can be excluded.[89] It may be impossible to accurately know the precise status of a given water body from the pilot-house of a boat or the corner office of a law firm, so a degree of mutual respect and consideration for the possible rights and interests of others is always a good thing to exercise.

While the Louisiana Constitution protects private property, it also guards the property of the State, whether that property is a private or public thing. For example, the Constitution prohibits the state from donating "property[] or things of value of the state or of any political subdivision" except as otherwise provided in the Constitution.[90] More particularly, Article IX, Section 3 reads:

> The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.[91]

Additionally, the fact that a land title may have been issued that included navigable water bottoms within its bounds does not immunize that conveyance from challenge. Simply put, if the state had no power to transfer the property, then no title to the water bottom was conveyed.[92] The importance of that principle is buttressed by the link between surface land rights (including water bottoms) and mineral rights. The Louisiana Constitution protects the mineral rights of the state by declaring, in pertinent part:

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[89] *See* Vaughn v. Vermilion Corp., 444 U.S. 209 (1979); Dardar v. Lafourche Realty Co., 985 F.2d 824 (1993).
[90] LA. CONST. art. VII, § 14 (1974).
[91] LA. CONST. art. IX, § 3 (1974).
[92] *See* Gulf Oil Corp. v. State Min. Bd., 317 So. 2d 576 (La. 1975).

> A) Reservation of Mineral Rights. The mineral rights on property sold by the state shall be reserved, except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes. The mineral rights on land, contiguous to and abutting navigable water bottoms reclaimed by the state through the implementation and construction of coastal restoration projects shall be reserved, except when the state and the landowner having the right to reclaim or recover the land have agreed to the disposition of mineral rights, in accordance with the conditions and procedures provided by law.
>
> (B) Prescription. Lands and mineral interests of the state, of a school board, or of a levee district shall not be lost by prescription except as authorized in Paragraph C.[93]

It is important to note at this point that, despite these prohibitions against alienating public waters and water bottoms, certain conveyances are allowed, such as oyster and mineral leases, riparian rights, and public water utility authorizations.

c. Mineral Rights

The aim of this paper is to provide guidance about the interplay of property and water law in coastal Louisiana, but it is not possible to understand or resolve many of the conflicts that arise there without understanding the relationship between land and water bottom ownership and the right to explore for subsurface minerals like oil and natural gas. Much of the contention surrounding competing property rights claims on the coast stems from the fact that coastal property is potentially the source of lucrative mineral rights. One context in which this has been evident occurs when a non-navigable area becomes navigable due to erosion, subsidence, or sea-level rise. The law is unclear whether the newly navigable water body remains the property of the riparian private landowner or becomes the public property of the State per Louisiana Civil Code article 450. However, the law does address the ownership of the mineral rights located on the newly navigable water body. In 1952, the Louisiana Legislature passed Louisiana Revised Statutes

[93] LA. CONST. art. IX § 4(c) concerns certain lands in Terrebonne Parish.

9:1151 to address this precise situation. As amended in 2001, Louisiana Revised Statutes 9:1151 is now typically referred to as the "Freeze Statute," and it states:

> In all cases where a change occurs in the ownership of land or water bottoms as a result of the action of a navigable stream, bay, lake, sea, or arm of the sea, in the change of its course, bed, or bottom, or as a result of accretion, dereliction, erosion, subsidence, or other condition resulting from the action of a navigable stream, bay, lake, sea, or arm of the sea, the new owner of such lands or water bottoms, including the state of Louisiana, shall take the same subject to and encumbered with any oil, gas, or mineral lease covering and affecting such lands or water bottoms, and subject to the mineral and royalty rights of the lessors in such lease, their heirs, successors, and assigns; the right of the lessee or owners of such lease and the right of the mineral and royalty owners thereunder shall be in no manner abrogated or affected by such change in ownership. [94]

The statute has a few important provisions that merit extra attention. For one, some commentators suggest that based on the text, the statute only applies to natural, not artificial, changes to an area, i.e., those stemming from "accretion, dereliction, erosion, subsidence, or other condition."[95] That reading seems overly narrow for several reasons, including the actual wording of the statute. Secondly, Louisiana Revised Statute 9:1151 is applicable solely to mineral leases that were already in existence at the time of the change. Lastly, there need not be actual mineral production from the leased land in order for Louisiana Revised Statutes 9:1151 to apply, but the normal rules of lease maintenance and termination otherwise do.[96]

For example, in *Plaquemines Parish Government v. State*, the State of Louisiana transferred a particular tract of land to the Buras Levee District, and the District subsequently granted a mineral lease on the land.[97] Eventually, the waters of the Gulf of Mexico covered the land, at which time the mineral lease was still in effect. At trial, there was a genuine issue of fact

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[94] The 2001 amendment to Louisiana Revised Statute 9:1151 added "sea, or arm of the sea" and "erosion" and "subsidence" as conditions that can result in a change in ownership of land or water bottoms.
[95] REPORT OF THE PUBLIC RECREATION ACCESS TASK FORCE TO THE LOUISIANA LEGISLATURE 23 (2020) [hereinafter *Task Force Report*].
[96] Cities Serv. Oil & Gas Corp. v. State, 574 So. 2d 455, 463 (La. App. 2 Cir. 1991).
[97] 2001-1027, p. 1 (La. App. 4 Cir. 4/10/02), 826 So. 2d 14, 17.

as to the causation of the inundation. The State filed a motion for summary judgment, or, in the alternative, motion in limine, seeking a declaration that Louisiana Revised Statutes 9:1151 did not apply to the facts and circumstances of the case. The trial court denied the State's motions, and the Court of Appeal affirmed that denial. In its opinion, the Louisiana Fourth Circuit Court of Appeal explained: "Because there is no evidence as to exactly how [the tract] came to be covered by the open waters of the Gulf of Mexico, the trial court was correct in denying the State's motion for summary judgment, and in the alternative, its motion in limine."[98]

Another issue that has arisen in the context of land rights and coastal restoration is the right to mineral exploration. That is, a private landowner might not have an incentive to undertake restoration work or pay for restoration due to the considerable expense of the undertaking. The landowner might not have evidence of minerals underneath the land but still desires to keep the mineral rights in case mineral discovery occurs in the future. At the same time, the private landowner might resist granting access to the State to perform restoration projects out of concern that doing so will jeopardize the mineral rights attached to the existing land, as well as to either land that will be created or eroded land that will be restored.[99] As discussed previously, the Louisiana Civil Code provides that alluvion belongs to the owner of the bank of a river or stream, while there is no right to alluvion that forms on the shore of the sea or of lakes.[100] However, the U.S. Supreme Court has explained that "lands reclaimed or suddenly formed by artificial process with public money or under public authority, though in a river, do not qualify as alluvion, and the language of the Code requiring that the accretions be formed 'successively and imperceptibly' to

[98] *See also id.*
[99] Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S. U. L. REV. 149, 154, 168-69 (1999).
[100] LA. CIV. CODE arts. 499-500 (2002).

soil on the shore has been strictly construed."[101] Moreover, the Louisiana Civil Code states that "[t]here is no right to alluvion or dereliction on the shore of the sea or of lakes."[102]

Until 1995, the Louisiana Constitution prohibited the State from alienating state mineral rights.[103] However, in that year, recognizing that the aforementioned prohibition and the mineral rights issue had the potential to threaten the coastal restoration program, the Louisiana Legislature passed 1995 La. Acts 1332, Section 1, which contained a proposal to amend the Louisiana Constitution to allow the State to divest itself of mineral rights associated with emergent land in order that coastal restoration projects may proceed. That amendment, which voters approved, became effective on November 23, 1995, and it supplemented Article IX, Section 4(A) of the Louisiana Constitution with the following language:

> The mineral rights on land, contiguous to and abutting navigable water bottoms reclaimed by the state through the implementation and construction of coastal restoration projects shall be reserved, except when the state and the landowner having the right to reclaim or recover the land have agreed to the disposition of mineral rights, in accordance with the conditions and procedures provided by law.[104]

Following the above constitutional amendment, Louisiana Revised Statutes 41:1702, which governs the reclamation of lands, was correspondingly amended. The current version of that statute reads, in pertinent part:

> To facilitate the development, design, and implementation of integrated coastal protection projects, including hurricane protection and flood control, pursuant to R.S. 49:214.1 et seq., the executive director of the Coastal Protection and Restoration Authority, after consultation with other state agencies, including the Department of Natural Resources and the State Land Office, may enter into agreements with owners of land contiguous to and abutting navigable water bottoms belonging to the state who have the right to reclaim or recover such land, including all oil and gas mineral rights, as provided in Subsection B of this Section,

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[101] Esso Standard Oil Co. v. Jones, 98 So. 2d 236, 246 (La. 1957) (on rehearing).
[102] LA. CIV. CODE art. 500 (2022).
[103] Prior to an amendment in 1995, LA. CONST. art. IX, § 4(A) read: "The mineral rights on property sold by the state shall be reserved, except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes."
[104] LA. CONST. art. IX, § 4(a) (1974).

> which agreements may establish in such owner the perpetual, transferrable ownership of all subsurface mineral rights to the then existing coast or shore line. Such agreements may also provide for a limited or perpetual alienation or transfer, in whole or in part, to such owner of subsurface mineral rights owned by the state relating to the emergent lands that emerge from waterbottoms that are subject to such owner's right of reclamation in exchange for the owner's compromise of his ownership and reclamation rights within such area and for such time as the executive director deems appropriate and in further exchange for the owner's agreement to allow his existing property to be utilized in connection with the project to the extent deemed necessary by the executive director.[105]

In conjunction, the amended versions of Article IX, Section 4 of the Louisiana Constitution and Louisiana Revised Statutes 41:1702 allow the State to sever mineral rights from surface rights on lands that have been rebuilt or restored in favor of the owner of the contiguous land. The aim of this legislation was to lessen the tension between mineral landowners, especially those claiming submerged lands, and the State's efforts to conserve and restore its coast by allowing the establishment of consensual mineral boundaries that would not be impacted by future land loss or coastal restoration efforts.

There has been a lot of interest recently in the possibility of underground CO_2 storage in Louisiana. The topic raises sophisticated oil and gas and property questions beyond the scope of this paper which deal primarily with surface rights. Landowners in coastal Louisiana should be aware of these potential issues and seek further information if they develop an interest in that possibility.

d. Dual-Claimed Lands

The phrase "dual-claimed lands" refers to areas where public versus private ownership is unclear. This uncertainty may be due to changes in navigability, such as where a previously non-navigable water body has become navigable.[106] The phrase "dual-claimed lands" may also refer

[105] La. R.S. § 41:1702(D)(2)(a)(i).
[106] *Task Force Report, supra* note 95, at 24.

to certain lands that the State transferred in the nineteenth or early twentieth centuries.[107] While intentional at the time, the State may now claim that these transfers were invalid and unconstitutional because the lands constituted the beds of navigable water bodies, which Article IX of the Louisiana Constitution prohibits the State from alienating.[108] Recently, the Louisiana State Land Office has created a statewide inventory of state-owned water bottoms and a list of land or water bottoms that are claimed to be owned by the State some of which are also claimed as private lands (i.e., dual-claimed lands).[109] Discussing the concept of dual-claimed lands, leading Louisiana scholar A.N. Yiannopoulos posited that any person who owns property in Louisiana does so at the risk that it could become a navigable water body and thus a public thing owned by the state by virtue of operation of Louisiana Civil Code article 450.[110] Another Louisiana property law scholar, Lee Hargrave, likewise concluded that the area would become property of the state and analogized the situation to other changes in water bodies, such as dereliction and the expansion of water bodies.[111]

To resolve dual-claimed lands disputes, one option for the State of Louisiana to explore is to fix the boundary. The civil code defines "boundary" as "the line of separation between contiguous lands" and "boundary marker" as "a natural or artificial object that marks on the ground the line of separation of contiguous lands."[112] If a boundary is uncertain or disputed, like those in the case of dual-claimed lands, then fixing the boundary requires a determination of the line of

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[107] *Id.*
[108] *See* LA. CONST. art. IX, §3 (1974) (stating, in pertinent part, that "[t]he legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body[.]").
[109] *Task Force Report*, *supra* note 95, at 24.
[110] Yiannopoulos, 2 Louisiana Civil Law Treatise: Property § 4.2.
[111] Lee Hargrave, *"Statutory" and "Horatory" Provisions of the Louisiana Constitution of 1974*, 43 LA. L. REV. 647, 660-63 (1983). As discussed above, LA. CIV. CODE art. 499 (2022) explains that dereliction occurs when water recedes imperceptibly from a bank of a river or stream. The owner of the land situated at the edge of the bank left dry owns the dereliction.
[112] LA. CIV. CODE art. 784 (2022).

separation between contiguous lands.[113] An owner, one who possesses as an owner, a usufructuary,[114] or a lessee has an imprescriptible right to compel the fixing of a boundary.[115] The boundary can be fixed either judicially or extra-judicially.[116] In a judicial boundary fixing procedure, the presiding court will fix the boundaries according to the ownership of the parties; according to limits established by possession if neither party can prove ownership; according to title if both parties rely on titles; or according to prescription if a party proves acquisitive prescription.[117] In judicial boundary fixing, the costs are taxed in accordance with Louisiana's Code of Civil Procedure.[118] Alternatively, the boundary can be fixed extra-judicially if the parties determine in a written agreement the line of separation between their lands with or without reference to markers on the ground.[119] The written agreement of the parties has the same effect as a compromise.[120] When the boundary is fixed extra-judicially, then the costs are divided equally between the adjoining owners if there is no agreement to the contrary.[121] Thus, to fix the boundaries concerning dual-claimed lands requires either that the State and a private landowner come to an agreement or that the State engage in the time, expense, effort, and unpredictability of litigation. These scenarios present the possibility of delay, expense, and uncertainty for Louisiana when time, money, and certainty are of the essence for saving the coast.

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[113] LA. CIV. CODE art. 785 (2022).
[114] Louisiana Civil Code Article 535 defines usufruct as "a real right of limited duration on the property of another" and explains that "[t]he features of the right vary with the nature of the things subject to it as consumables or nonconsumables." It is a type of personal servitude. The usufructuary is the one who has the right and enjoyment of the usufruct. La. C.C. arts. 786 and 787.
[115] La. R.S. §§ 41:1131 and 1132.
[116] LA. CIV. CODE art. 789 (2022).
[117] LA. CIV. CODE arts. 789, 792, 793, 794 (2022). According to Louisiana Civil Code art. 794, "[i]f a party and his ancestors in title possessed for thirty years without interruption, within visible bounds, more land than their title called for, the boundary shall be fixed along these bounds." This stems from Louisiana Civil Code art. 3486, which states that "[o]wnership and other real rights in immovables may be acquired by the prescription of thirty years without the need of just title or possession in good faith."
[118] LA. CIV. CODE. arts. 789-790 (2022).
[119] LA. CIV. CODE art. 789 (2022).
[120] LA. CIV. CODE art. 795 (2022).
[121] LA. CIV. CODE art. 790 (2022).

Sometimes the State does enter settlements with private landowners concerning dual-claimed lands.[122] This occurs when prospective oil and gas lessees seek to lease mineral rights from both the State and private landowners if both may claim ownership.[123] In response, the Louisiana Department of Natural Resources, the Louisiana Attorney General's Office, and the State Land Office make a recommendation to the State Mineral and Energy Board about whether to litigate or settle the matter.[124] Oftentimes, settlement is the preferable course of action due to the costs and risks of litigation.[125] If the State enters into these settlements, it is on the basis of the legislative directive to the State Mineral and Energy Board to manage the State's minerals and maximize the State's revenues.[126] Typically, most of these settlements do not resolve the boundary dispute or address other issues, such as access for restoration or public recreation access.[127] Rather, these settlements determine an allocation of past and future mineral production for the State and the private landowners for a fixed time period.[128] Thus, such settlements are not a resolution for dual-claimed lands disputes or of issues of providing access for restoration or access for the recreation of the general public.

Though the focus of this paper is mostly on individual property issues, the matter of dual-claimed lands elicits a broader community-level concern that is worth noting. Coastal communities should be aware that a change in ownership resulting from a formerly non-navigable area becoming navigable also results in a shift of the benefits and burdens of ownership. The likelihood is that submerged lands will not stay on the tax rolls of local governments because the submerged lands become public things under Louisiana Civil Code article 450, and public things

[122] *Task Force Report*, *supra* note 95, at 24.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 24-25.
[128] *Id.* at 24.

are not part of local tax bases. Coastal communities must be cognizant of and plan for this possibility because it will affect how they stay afloat financially.[129] New legislative and policy initiatives are likely necessary to provide the clarity and authority to allow public and private rights and duties to be aligned in ways that will allow for state and local governments and private property owners to protect their interests and viability.[130] With dual-claimed lands, the public versus private status of certain lands remains unknown. This uncertainty will persist in the future if coastal land loss continues, thus resulting in more dual-claimed lands where formerly non-navigable areas have become navigable water bodies. This ambiguity might serve as a foundational source of conflict between private property rights and coastal restoration interests. That is, if coastal restoration projects are slated for dual-claimed lands, then the project likely cannot move forward until the ownership issue is resolved. At the time of this writing, neither the process of judicially fixing boundaries nor settlement agreements have emerged as a real solution to the problem of dual-claimed lands.

e. Reclamation

As previously discussed, erosion, subsidence, and sea-level rise are some of the major threats to the Louisiana coast. These phenomena are problematic not only for the survival of the State in a general sense, but also individual private property interests because much of the coastal land in Louisiana is privately owned—or at least privately claimed. As lands become submerged, they can be considered "things of value" to the State because they constitute public property that is owned by the State in its public capacity. The Louisiana Constitution prohibits the State from transferring "things of value" per Article VII, Section 14, and from alienating or authorizing the alienation of the bed of a navigable water body per Article IX, Section 3. However, the latter

[129] *Id.*
[130] *Id.*

constitutional provision makes an important exception to these prohibitions. Specifically, Article IX, Section 3 explains:

> The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.[131]

Reclamation is the process by which a landowner or the State rebuilds land lost to erosion, subsidence, or sea-level rise. A word of caution about the reach of the reclamation statute: language matters when construing laws, and courts today increasingly take a linguistically strict approach to statutes. In this case, the wording of the reclamation statute varies from the language of Article IX in which it is rooted. Article IX specifically exempts only reclamation by riparians from its ban against alienating state water bottoms. As explained earlier, riparians are those owning estates adjacent to or bisected by running water. The reclamation statute clearly goes beyond riverine settings into coastal and littoral environments. As a policy matter, the reclamation statute makes abundant sense, but good sense and the law are not always on the same page.

If a private landowner loses land on the changing coast and wants to rebuild it, a potential avenue for the landowner to explore is reclamation. Louisiana Revised Statutes § 41:1702 governs reclamation by a private landowner. It provides, in pertinent part:

> Pursuant to the authority of Article IX, Section 3 of the Constitution of Louisiana, owners of land contiguous to and abutting navigable waters, bays, arms of the sea, the Gulf of Mexico, and navigable lakes belonging to the state shall have the right to reclaim or recover land, including all oil, gas, and mineral rights . . . lost through erosion, compaction, subsidence, or sea level rise occurring on and after July 1, 1921, in accordance with the procedures set forth in this Title for the fixing of boundaries by mutual consent and, also, those procedures applicable to contested boundaries.

[131] LA. CONST. art. IX, § 3 (1974).

. . . .

> [T]he words "reclamation" or "recovery of land" or "reclamation project" as used in this Section shall refer to the raising of land through filling or other physical works which elevate the surface of the theretofore submerged land as a minimum above the level of ordinary low water in the case of rivers or streams and above the level of ordinary high water in the case of bodies of water other than rivers and streams, to such heights as may be prescribed in regulations or forms adopted by the administrator of the State Land Office to ensure reasonably permanent existence of the reclaimed lands.[132]

The reclamation process cannot begin until the landowner applies for and receives permission from the State Land Office.[133] With an application for reclamation, the landowner must also supply to the State Land Office a deed of ownership or a certified map or plat of survey prepared by a professional land surveyor.[134] These materials must demonstrate the boundary between lands belonging to the State and those of riparian owners, and they must show the exact extent of land claimed to be lost through erosion, compaction,[135] subsidence, or sea-level rise.[136] The boundary demarcation is important, in part, because of the previously discussed confusion and contention surrounding dual-claimed lands, which are lands whose public versus private identity and ownership are unclear due to either changes in navigability or disputes regarding their transfer. Only after a definitive boundary is determined either by mutual consent or through the procedures applicable to contested boundaries[137] will the administrator of the State Land Office allow reclamation.[138]

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[132] La. R.S. § 41:1702(B)(1), (F).
[133] La. R.S. § 41:1702(C).
[134] *Id.*
[135] Compaction is the process of land settling to become more dense. It is similar to subsidence, or land sinking, but the geophysical processes involved are not the same. It is possible for compaction and subsidence to occur simultaneously.
[136] *Id.*
[137] La. R.S. § 41:1702(C), (D).
[138] For the laws concerning boundaries, see Louisiana Civil Code art. 784, *et seq.* and Louisiana Revised Statutes 41:1702(D).

Additionally, no less than sixty days prior to the issuance of a permit, the landowner must submit plans and specifications of the reclamation work for review and comment to the governing authority of the parish in which the proposed project is located, the Department of Transportation and Development, the Department of Wildlife and Fisheries, the Coastal Protection and Restoration Authority, and the Department of Natural Resources.[139] If the State Land Office issues a permit, it will be valid for no more than two years from the date of issuance.[140] Within sixty days of completion of the reclamation project, the landowner must submit to the State Land Office proof of the extent of the land area actually reclaimed.[141] The mat or plat submitted is then used to fix the boundary between the reclaimed land areas and any state water bottoms.[142] Any remaining or additional work cannot be performed unless and until the landowner completes the application process again.[143]

While the language of Louisiana Revised Statutes 41:1702 discusses the landowners' "right to reclaim or recover such land" and "reclamation rights[,]" one question that may come up in the context of restoration is whether the landowner has a vested or absolute right to perform restoration.[144] The statute explicitly states:

> No reclamation by a riparian landowner shall be permitted if, in the determination of the Department of Natural Resources, the State Land Office, the Coastal Protection and Restoration Authority, or the attorney general, such activity would unreasonably obstruct or hinder the navigability of any waters of the state or impose undue or unreasonable restraints on the state rights which have vested in such areas pursuant to Louisiana law, and to that extent the land area sought to be reclaimed may be limited.[145]

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[139] La. R.S. § 41:1702(D)(1).
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] La. R.S. § 41:1702(D)(2)(a)(i).
[145] La. R.S. § 41:1702(H).

The most persuasive view of the nature of the "reclamation right" is that restoration is neither an absolute nor a vested right. That is, because the landowner must undergo the discretionary permitting process before proceeding with reclamation, it should not be considered an irrevocable right vested in the landowner by the Louisiana Legislature because the relevant agencies may deny the permit.[146] Rather, it only becomes a vested right if and when the State grants a permit, and even those expire after two years.[147] If a landowner is dissatisfied with a decision made pursuant to Louisiana Revised Statutes 41:1702, the landowner can seek judicial review of the agency action.[148] Reclamation can be expensive, time-consuming, and may require continued maintenance. Given the potential reluctance of private landowners to expend time and money on restoration, the fact that private landowners own much of the coastal land presents a potential roadblock for Louisiana's coastal restoration plans.

To that end, the State can also perform reclamation. The bed of a navigable water body may generally be reclaimed only for public use.[149] Though the Louisiana Constitution and State codal provisions do not provide a clear definition for public use, the phrase "public use" is different from the phrase "public purpose." The term "public purpose" refers to the government's powers of eminent domain, which will be discussed further in the next section, while "public use" refers

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[146] Marc C. Hebert, *Coastal Restoration Under CWPPRA and Property Rights Issues*, 57 LA. L. REV. 1165, 1189 (1997).
[147] La. R.S. § 41:1702(D)(1); Hebert, *supra* note 146, at 1190.
[148] Specifically, subsection (I) states:

> Any person aggrieved either by a substantive agency decision made pursuant to the provisions of this Section, including interlocutory decisions relating to boundaries and determinations of areas reclaimed, or by a failure of the agency to render such decisions timely, may seek immediate judicial review of the agency action. Proceedings for review of decisions by the Department of Natural Resources, the Coastal Protection and Restoration Authority, or the State Land Office may be instituted by filing a petition in the Nineteenth Judicial District Court within thirty days after mailing of notice of the final decision by the administrator or secretary. Any party may request and be granted a trial de novo.

La. R.S. § 41:1702(I).
[149] LA. CONST. art. IX, § 3 (1974).

to "a use 'which confers some benefit or advantage to the public[.]'"[150] For example, in *Save Our Wetlands, Inc. v. Orleans Levee Board*, the dispute concerned the expansion of the New Orleans Lakefront Airport onto the water bottom of the adjoining Lake Pontchartrain.[151] On appeal, the Louisiana Fourth Circuit affirmed the trial court in concluding that "[t]he operation of an airport for the benefit of the public is clearly a public use."[152] Though the jurisprudence lacks examples, the likelihood is that reclamation for coastal restoration purposes would be upheld as constituting a public use. The conclusion that governmental coastal protection and restoration efforts afford public benefits is heavily bolstered by the provision in the reclamation statute allowing the state to acquire land from certain persons for the principal purpose of developing, designing, and implementing integrated coastal protection projects.[153] If a government entity performs restoration activities, then the State must adhere to the constitutional laws surrounding protections for private property. Such private property protections, as well as considerations for easing the financial and time burdens that they might impose on the government, are discussed in the following section.

V. TAKINGS AND DAMAGES LAWS

One problem that may arise in the context of coastal restoration involves the fact that restoration projects may sometimes require the government to impinge on private property rights. In fact, the Louisiana Legislature acknowledges this likelihood in Louisiana Revised Statutes 214.5.5., which is titled "Private property and public rights" and states, in pertinent part: "Recognizing that a substantial majority of the coastal lands in Louisiana are privately owned, it is anticipated that a significant portion of the integrated coastal protection projects funded through the Coastal Protection and Restoration Fund either will occur on or in some manner affect private

[150] *Hebert*, *supra* note 146, at 1185 (quoting *Public Use*, *Black's Law Dictionary* (6th ed. 1990)).
[151] 368 So. 2d 1210 (La. Ct. App. 1979).
[152] *Id.* at 1213.
[153] La. R.S. § 41:1702(D)(2)(a)(ii).

property."[154] In this regard, both the U.S. Constitution and the Louisiana Constitution protect the right to private property.

Specifically, the Fifth Amendment of the U.S. Constitution declares that no person shall "be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[155] The former provision, known as the "due process clause," refers to the fair procedures afforded in the administration of justice; and the latter provision, known as the "takings clause," pertains to limits on the government's powers of eminent domain.[156] Eminent domain refers to the right of a government or its agent to expropriate private property for public use, with payment of compensation. By virtue of the Fourteenth Amendment,[157] the Fifth Amendment is applicable to the States.[158] As the text of the takings clause evidences, private property may be taken via the federal government's eminent domain power if it is for a public use and if just compensation is paid to the owner. The statutory provision does not define "public use," and the determination of what constitutes a "public use" occurs on a case-by-case basis. The U.S. Supreme Court has, however, expressed a preference for legislative deference, explaining that the court's "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[159] Moreover, "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and

[154] La. R.S. § 214.5.5.
[155] U.S. CONST. amend. V.
[156] Eminent domain is analogous to the civil law concept of expropriation, which laws are followed in Louisiana and are discussed in more detail below. *See* La. R.S. § 19:2, *et seq*.
[157] U.S. Const. amend. XIV, § 1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
[158] *See, e.g.* Penn Central Transportation Co. v. New York City, 438 US 104, 122 (1978).
[159] Kelo v. City of New London, 545 U.S. 469, 483 (2005).

the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[160] Concerning just compensation, the U.S. Supreme Court typically uses fair market value as a guide, though not as an absolute or exclusive evaluation method.[161] The U.S. Supreme Court has explained that the constitutional requirement of just compensation derives from both basic equitable principles of fairness and technical concepts of property law.[162]

Analogous to the federal government's powers of eminent domain, expropriation is the civil law process by which the State of Louisiana, a parish, a municipality, a political subdivision, any one of their respective agencies, or an approved expropriator legislatively takes or damages private property.[163] If an expropriation destroys a major portion of the property's value or renders the property permanently non-usable for its only purpose, this type of expropriation constitutes a taking under Louisiana's Constitution.[164] Property is considered "damaged" if the expropriation diminishes the value of the property.[165]

Louisiana's laws of expropriation are located in Louisiana Revised Statutes 19:2, *et seq.*, with section 19:2.2 outlining the expropriation process.[166] These laws of expropriation necessarily

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[160] *Id*. at 15.
[161] U.S. v. Fuller, 409 U.S. 488, 490 (1973) (quoting U.S. v. Va. Elec. & Power Co., 365 U.S. 624, (1961) (citing U.S. v. Miller, 317 U.S. 369, (1943))).
[162] *Fuller*, 409 U.S. at 490 (citing U.S. v. Commodities Trading Corp., 339 U.S. 121, 124 (1950)).
[163] Some non-governmental entities may be authorized by law to expropriate. Examples of legislatively authorized expropriators include entities created for, or engaged in, the construction of railroads, toll roads, or navigation canals; entities created for, or engaged in, the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage; and entities created for the purpose of, or engaged in, transmitting intelligence by telegraph or telephone. *See* La. R.S. § 19:2. However, LA. CONST. art. I, § 4(B)(4) places limitations on this authorization, providing: "Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question." Louisiana's laws of expropriation are analogous to the previously discussed federal laws of eminent domain.
[164] State, Dep't of Soc. Servs. v. City of New Orleans, 95-1757, p. 6 (La. App. 4 Cir. 5/29/96), 676 So. 2d 149, 153-54; s*ee also* Avenal v. State, Dep't. of Nat. Res., 2001-0843, p. 5-6 (La. App. 4 Cir. 10/15/03), 858 So. 2d 697, 702, *reversed*, 2003-3521 (La. 10/19/04), 886 So. 2d 1085.
[165] Dep't of Transp. and Dev. v. Motiva Enters., LLC, 19-32, p. 7 (La. App. 5 Cir. 10/2/19), 279 So. 3d 1076, 1081.
[166] If an expropriating entity takes or damages private property without an expropriation proceeding, such that compensation has not been paid, then the affected private property owner has a procedural remedy via an action for inverse condemnation. Crooks v. Dep't of Nat. Res., 2019-0160, p. 10 (La. 1/29/20), 340 So. 3d 574, 581. The private property owner has three years from the date of such taking within which to bring a claim for compensation.

comply with the protections for private property that are built into the Louisiana Constitution. Similar to its federal due process counterpart, Article I, Section 2 of the Louisiana Constitution states that "[n]o person shall be deprived of . . . property, except by due process of law."[167] Louisiana also has an analog to the federal takings clause in Article I, Section 4, which provides, in pertinent part:

> (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> (B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.[168]

Generally, under Louisiana law, an expropriating entity has leeway in its decision whether to expropriate, with the judicial branch merely overseeing the proceedings regarding the amount of compensation paid to the property owner whose property is expropriated.[169] A property owner may contest the necessity of an expropriation, but the property owner must prove by clear and convincing evidence that the expropriating entity was arbitrary, capricious, and in bad faith.[170] In determining whether an expropriation occurred and whether it was constitutional, the Louisiana Supreme Court has adopted a three-prong analysis, which first asks whether a person's legal right with respect to a thing or an object has been affected.[171] The second prong questions whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense.[172] Under

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La. R.S. § 13:5111. If immovable private property, such as land, is damaged rather than taken, then the private property owner has one year to bring a damages suit. LA. CIV. CODE art. 3493 (2020). That one-year prescriptive period commences when the owner acquired, or should have acquired, knowledge of the damage.

[167] LA. CONST. art. I, § 2 (1974).

[168] Note that this section of the constitution does not apply to the appropriation of property for levee and levee drainage purposes. LA. CONST. art. I, § 4(E). Those actions are governed by Louisiana Revised Statutes 38:351, *et seq*.

[169] *See* New Orleans Redevelopment Authority v. Burgess, 2008-1020, p. 7-8 (La. App. 4 Cir. 7/8/09), 16 So. 3d 569, 575.

[170] State v. Clark, 94-598, p. 9-10 (La. App. 3 Cir. 2/21/96), 670 So. 2d 493, 499.

[171] State through Dep't. of Transp. and Dev. v. Chambers Inv. Co., 595 So. 2d 598, 603 (La. 1992).

[172] *Id.*

the third and final prong, the court looks at whether the taking or damaging is for a public purpose under the Louisiana Constitution.[173]

Louisiana Constitution Article 1, Section 4(B)(2)(a-c) specifies that in addition to a threat to public health or safety, "public purpose" is limited to "[a] general public right to a definite use of the property" and "[c]ontinuous public ownership of property dedicated to" enumerated "objectives and uses."[174] As pertinent to this discussion of the interaction of property rights and coastal restoration, some of those enumerated "objectives and uses" are: waterways; access to public waters and lands; drainage; flood control; levees; and coastal and navigational protection and reclamation for the benefit of the public generally.[175] Thus, if the State of Louisiana, a parish, a municipality, a political subdivision, any one of their respective agencies, or an approved expropriator must expropriate private property for coastal restoration, the action is likely to stand even if challenged in court. With judicial deference, the expropriation will be upheld as long as the government can prove that the expropriation was for a public purpose (i.e., reclamation) and as long as the private landowner cannot demonstrate that the expropriator acted arbitrarily, capriciously, or in bad faith.

The Louisiana Legislature has helped to expedite the expropriation process by transferring expropriation power directly to the State's lead restoration entity, CPRA. CPRA's expropriation power is found in Louisiana Revised Statutes 49:214.61, which states, in pertinent part:

> A. When the Coastal Protection and Restoration Authority cannot amicably acquire property in the coastal zone needed for barrier island preservation, restoration, or creation for coastal wetlands purposes, it may acquire the same by expropriation and may acquire the property prior to judgment in the trial court as provided in this Part.

[173] *Id.* (citing W. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 4 (1977)).
[174] LA. CONST. art. I, §4(B)(2)(a-b).
[175] *Id.* at § 4(B)(2)(b)(ii)(iii).

> B. At least thirty days prior to filing a petition for expropriation, the department must notify the owner or owners by certified mail, return receipt requested, of its intention to expropriate the property pursuant to this Part. The letter of notification must also inform the owner that if, within thirty days after being served with the notice of suit, he does not object in writing to the taking on the ground that it is not within the coastal zone or necessary for barrier island preservation, restoration, or creation for coastal wetlands purposes, he will waive all defenses to the taking except claims for recognition of the ownership of subsurface mineral rights. A copy of this Part must be enclosed with the letter of notification.
>
> C. Except as otherwise provided in this Part, such expropriation by the department shall be conducted in the manner that the Department of Transportation and Development may expropriate property for highway purposes, as set forth in R.S. 48:441 through 460.[176]

This power is analogous to the ability of port authorities and levee boards to execute "quick takings"[177] and mirrors some elements of levee district appropriations under codal servitudes that are discussed in more detail below.[178] Granting the expropriation ability to CPRA ensures progress and continued restoration efforts.[179]

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[176] In Louisiana Revised Statutes 49:214.61(D)(3), the Louisiana Legislature defined property in a very narrow way:

> "Property" means the servitude of use, easement or right-of-way over, through, along and across immovable property necessary to establish, maintain or operate a project for barrier island preservation, restoration, or creation for coastal wetlands purposes, including rights of ingress and egress to public or private areas on which such projects are being established, maintained or operated. The term "property" shall not include, and the department shall not be entitled to acquire pursuant to the provisions of this Part, ownership of the surface or subsurface of any immovable property, including, without limitation, mineral rights.

In other words, CPRA cannot expropriate an actual ownership interest in the land itself, only a right of access and use. The language of the statute leaves little doubt that this is to prevent the state from acquiring mineral rights that may be linked to the ownership of the land.
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[177] La. R.S. § 19:141; § 38:354.

[178] In *South Lafourche Levee Dist. v. Jarreau*, the Louisiana Supreme Court explained the difference between an appropriation and an expropriation: "Appropriation, as opposed to expropriation, is carried out by a resolution of the appropriating authority, without the need for a judicial proceeding. Furthermore, '[a]ppropriation involves the taking of a servitude, whereas expropriation may involve the taking of ownership.'" 16-0788 (La. 3/31/17), 217 So. 3d 298, 305 (citing Richardson & Bass v. Bd. of Levee Comm'rs, 77 So. 2d 32 (1954)) (quoting 2 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE (PROPERTY) 190 n. 20 (3d ed. 1991)).

[179] Discussed in more detail below, appropriations in accordance with the servitudes of LA. CIV. CODE art. 665 were historically limited to riparian properties, and since 2006 have also extended to properties on alignments approved by the U.S. Army Corps of Engineers for hurricane protection levees. These spatial limitations make appropriations less relevant to CPRA's coastal efforts. However, the hurricane protection expansion, in conjunction with the trend of bringing riparian and littoral legal regimes more into alignment (discussed *supra* note 8 and accompanying text), suggests the possibility of expanding servitudes and therefore appropriations to littoral properties in the future. Until

Even if an expropriating entity follows the laws of expropriation in performance restoration and the action is upheld in court, another potential problem is that expropriation requires compensation, which further increases the costs of restoration. Concerning just compensation, Louisiana Constitution Article I, Section 4(B)(2)(2) (emphasis added) states:

> In every expropriation or action to take property pursuant to the provisions of this Section, a party has the right to trial by jury to determine whether the compensation is just, and the owner shall be *compensated to the full extent of his loss*. Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.[180]

In discussing the phrase "just compensation" under the Louisiana Constitution, the Louisiana Supreme Court has further explained:

> The phrase "compensated to the full extent of his loss" was a change in the law when it was added to the 1974 Constitution. It broadened the measure of damages in expropriation cases by requiring that an owner be compensated not only for the fair market value of the property taken and severance damages to the remainder, but also to be placed in an equivalent financial position to that which he enjoyed before the taking. Full compensation pursuant to the 1974 Constitution included things like inconvenience and loss of profits from the takings of business premises so that landowners were compensated for their loss, not merely the loss of their land.[181]

Thus, because compensation under the Louisiana Constitution accounts for more than just fair market value, it can be higher than what a private landowner would receive under the U.S. Constitution.

Per Louisiana Civil Code article 665, lands along navigable rivers and on levee alignments approved by the U.S. Army Corps of Engineers are burdened by a predial servitude for the

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such a time, expropriations—including "quick taking" abilities—play a greater role in coastal protection and restoration efforts.

[180] LA. CONST. art. I, §4(B)(2)(2).

[181] S. Lafourche Levee Dist. v. Jarreau, 2016-0788 (La. 3/31/17), 217 So. 3d 298, 306 (citing W. Jefferson Levee Dist. v. Coast Quality Construction Corp., 93-1718, p. 13, 640 So. 2d 1258, 1271 n.20 (La. 1994)).

construction and maintenance of levees, which can eliminate some of the costs and procedural barriers to coastal projects.[182] However, the scope of appropriations is limited both in space and purpose. First, appropriations under the levee servitude are only proper when the land in question fronted a navigable river at the time the property was separated from the public domain.[183] It is inconsequential whether the land presently fronts a navigable river.[184] Moreover, the levee must be intended to prevent flooding brought on by the navigable river to which the servitude attaches.[185] For example, in *A. K. Roy v. Board of Commissioners for the Pontchartrain Levee District*, the Louisiana Supreme Court invalidated an appropriation where the property was riparian to the Mississippi River but the proposed levee was intended to protect against flood waters from Lake Pontchartrain.[186] Notably, both of these limitations were expanded in 2006 when the Louisiana Legislature amended the Louisiana Constitution and Civil Code article 665 to permit appropriations for hurricane protection levees. Now, the State is not obligated to use the expropriation process for "property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees."[187]

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[182] Louisiana Civil Code article 665 provides:

> Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works. Such servitudes also exist on property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees.
>
> All that relates to this kind of servitude is determined by laws or particular regulations.

[183] DeSambourg v. Bd. of Comm'rs for Grand Prairie Levee Dist., 621 So. 2d 602, 607 (La. 1993).
[184] Jeanette Lumber & Shingle Co. v. Bd. of Comm'rs for Atchafalaya Basin Levee Dist., 187 So. 2d 715, 719 (La. 1966).
[185] *DeSambourg*, 621 So. 2d at 607.
[186] 111 So. 2d 765, 768 (1959).
[187] LA. CIV. CODE art. 665.

Appropriations of lands are compensated with "fair market value to the full extent of the loss"—the same measure as for expropriations.[188] However, while this compensation level for expropriations is derived from Louisiana Constitution Article I, Section 4, appropriations for levees are explicitly excluded.[189] This is permissible without violating the due process protections of the Fifth and Fourteenth Amendments because appropriations are an exercise of the State's police powers, not eminent domain.[190] Instead, compensation requirements for levee appropriations are controlled by Louisiana Revised Statutes 38:301.[191] That is, it is simply the will of the Legislature and not constitutional mandates that explain why the compensation framework for appropriations mirrors expropriations, albeit with one notable exception: batture.

Batture can generally be thought of as the alluvial land that develops along rivers. Although state laws now generally require compensation for appropriations, the Louisiana Legislature and judiciary have always maintained an exception for batture—even the U.S. Supreme Court has consistently upheld this exception.[192] Although the Louisiana Constitution and Revised Statutes both exempt batture from compensation requirements upon appropriation, neither provides a definition for the term, leaving this responsibility to the courts. The courts have offered several definitions over the years based on the etymology of the word;[193] the physical

[188] La. R.S. § 38:301; LA. CONST. art. I, § 4(B)(5).
[189] LA. CONST. art. I, § 4(E).
[190] Peart v. Meeker, 12 So. 490, 490 (La. 1893).
[191] La. R.S. § 38:301(C)(1)(a).
[192] *See, e.g.*, General Box Co. v. U.S., 351 U.S. 159, 160 (1956); Eldridge v. Tezevant, 160 U.S. 452, 468 (1896).
[193] Morgan v. Livingston, 6 Mart.(o.s.) 19, 216 (La. 1819) (wherein the Louisiana Supreme Court explained that batture's "etymology is from the verb batter, to beat: because a batture is beaten by the water. In its grammatical sense, as a technical word, and we believe, in common parlance, it is then an elevation of the bed of a river, under the surface of the water, since it is rising towards it.").

origin and composition of the land;[194] and the land's relationship to water levels.[195] The prevailing definition, as it applies to Louisiana Civil Code article 665, is "that part of the river bed which is uncovered at the time of low water but is covered annually at the time of ordinary high water."[196]

If the flooding and changing of water bodies muddles property classifications, trying to prevent the same does little to provide clarity. In particular, the construction of levees is complicated by, and in turn complicates, how we conceptualize riparian properties and the rights of use and ownership that attach to them. For example, batture is defined as a part of the river bed, which suggests State ownership. Yet, appropriation is necessary for levee construction on batture because courts have held that batture is susceptible to private ownership.[197] However, only the portion of the batture that is not "necessary for public use" may be reclaimed.[198] Furthermore, the construction of a levee can transform a property's classification. For example, according to Louisiana Civil Code article 456, the banks of navigable rivers, defined first as "the land lying between the ordinary low and the ordinary high stage of the water" (which sounds a lot like batture), are private things subject to public use.[199] But, where a levee is constructed in proximity to the water, the levee forms the boundary of the river bank.[200] Suddenly, the land between the ordinary high stage of the water and the outer base of the levee, which previously was only available for private use, is subject to public use. Furthermore, while the levee itself is subject to

[194] P & G, LLC v. Shingle Point, LLC, 2018-0748, p. 4 (La. App. 4 Cir. 05/15/19), 273 So. 3d 371, 374 ("Batture refers to lands of alluvial origin formed by imperceptible deposits of material – it has the same meaning as accretion."); Morgan v. Livingston, 6 Mart.(o.s.) 19, 216 (La. 1819) ("Batture is . . . a bottom of sand, stone or rock mixed together, and rising towards the surface of the water.").
[195] Boyce Cottonseed Oil Mfg. Co. v. Bd. of Comm'rs of Red River, Atchafalaya & Bayou Boeuf Levee Dist., 107 So. 506, 508 (1925).
[196] *Id.* For a definition of "ordinary high water," *see* DeSambourg v. Board of Comm'rs for Grand Prairie Levee Dist., 621 So. 2d 602, 611-12 (La. 1993).
[197] *Id.* at 610.
[198] Heirs of Leonard v. City of Baton Rouge, 4 So. 241, 242 (La. 1886).
[199] LA. CIV. CODE art. 456.
[200] *Id.*

public use and maintained by the State, it remains a private thing, owned either by the State in its private capacity (in the case of expropriations), or by the riparian proprietor (in the case of appropriations because the act of appropriation does not transfer title but only right of use).

Seemingly recognizing the importance of coastal restoration and potentially high costs surrounding it, the Louisiana Constitution further states that "the legislature may place limitations on the extent of recovery for the taking of, or loss or damage to, property rights affected by coastal wetlands conservation, management, preservation, enhancement, creation, or restoration activities."[201] Taking advantage of this constitutional provision, the Louisiana Legislature passed the language found in Louisiana Revised Statutes 214.5.6, which provides, in pertinent part:

> A. The full police power of the state shall be exercised to address the rapid, ongoing, and catastrophic loss of coastal Louisiana, and in order to devote the maximum resources of the state to meet this immediate and compelling public necessity, compensation to be paid for property taken for public purposes related to coastal wetlands conservation, management, preservation, enhancement, creation, or restoration shall only be paid by the state or its political subdivisions as provided in this Section.
>
> B. Compensation paid for the taking of, including loss or damage to, property rights affected by coastal wetlands conservation, management, preservation, enhancement, creation, or restoration activities shall be governed by and strictly limited to the amount and circumstances required by the Fifth Amendment of the Constitution of the United States of America.[202]

By operation of Louisiana Revised Statutes 214.5.6, an owner of private property taken or damaged for use in coastal restoration projects is no longer entitled to just compensation to the full extent of his loss as is normally required by Louisiana Constitution Article I, Section 4(B)(2) and

[201] LA. CONST. art. I, §4(F).
[202] Note that the legislature initially enacted this provision as Louisiana Revised Statutes 49:214.52 via 2004 La. Acts 633; but it was re-designated as 49:214.61 pursuant to the statutory revision authority of the Louisiana State Law Institute. Pursuant to the same authority, another section, enacted as Louisiana Revised Statutes 49:214.61 by 2004 La. Acts 633 was re-designated as 49:214.70.

as discussed above.[203] Rather, the private property owner is only entitled to the amount required by the Fifth Amendment, which is a fair market valuation of the property at the time of the expropriation a discussed above. Thus, the Louisiana Legislature has at least eased the financial burden on restoration entities surrounding the compensation requirement of expropriation.

VI. CONCLUSION

It may be fair to say that the only two constants in coastal Louisiana are changes to the land/water interface and conflicts over the implications of those changes. It is important to remember that there are different rules that may apply to land/water interfaces affected both by navigability and whether the water involved is flowing water or waters of the sea. Moreover, the land/water interface is dynamic and likely to change, with results that will be influenced by those same factors. Public and private rights often hang in the balance. Changes and conflicts may be inevitable, but at least the latter can be made less acrimonious and less random with a better understanding of the issues. Helping to achieve that outcome is the hope of this paper. A coast that is better understood can be more properly managed for all; and understanding the mosaic of public and private rights and duties must be part of that.

[203] Sewell v. Sewerage & Water Bd. of New Orleans, 2018-0996, p. 17 (La. App. 4 Cir. 5/29/19), 2019 WL 2305673, at *8 (citing S. Lafourche Levee Dist. v. Jarreau, 16-0788, p. 11 (La. 3/31/17), 217 So.3d 298, 306, cert. denied, —— U.S. ——, 138 S.Ct. 381, 199 L.Ed. 2d 279 (2017)).