

MURKY WATERS: WHY LOUISIANA SHOULD CODIFY ITS SUBMERGED MARSHLANDS AS PRIVATE THINGS SUBJECT TO PUBLIC USE

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Comment

As Louisiana's law currently stands, the state is the only entity capable of owning the beds of "natural navigable water bodies." However, as Louisiana's coastal marshlands continue to erode, waters are inundating privately owned land, making once private lands the beds of "natural navigable water bodies." As a result, ownership of submerged privately owned lands transfers to the hands of the state. This ownership shift disrupts more than just the rights of the coastal landowners. Landowners who have lost claims to their inundated lands continue to exclude recreational and commercial fishermen from fishing those waters, and some parishes' sheriffs are enforcing the exclusions. Consequently, this impacts the vast amount of state revenue collected from Louisiana's fishing industry and the public's constitutionally protected freedom to fish. To resolve this issue in a manner that protects all parties, the state should codify these submerged marshlands as private things subject to public use, thereby reclassifying the land as private and returning it to the landowners with a limited right to exclude.

Introduction

*"I was out with some clients in an open body of water with flowing water through several entrances and . . . [which] covered [about] several hundred acres. A man that was paid to watch [the water] approached the boat, and insisted we were on private property. Six weeks later, a Lafourche Parish officer found me and told me I had trespassed."*¹

This statement from a charter fishing captain located in southeast Louisiana, who wishes to remain anonymous, illustrates a common experience among fishermen in the state, both recreational and commercial. The issue itself stems from a problem well-known to most Louisianans—coastal wetland loss. From 1932 to 2016, Louisiana lost nearly 2,000 square miles of coastal marshland at a rate thirty-two square miles per year.² This phenomenon continues today, and has serious legal consequences, due to the current state of the law.³ Prior to its inundation, much of this marshland belonged to private landowners as a result of the federal Swamp Land Act of 1850, which enabled the State of Louisiana to sell millions of acres of swampland (which was then above water) to private individuals.⁴ The state's large sale of swamplands pursuant to this Act resulted in private owners possessing roughly eighty percent of Louisiana's marshes, making them "private things" at the time of purchase.⁵ However, in Louisiana, by operation of law, the bottoms of natural navigable water bodies are classified as "public things" insusceptible of ownership by private individuals.⁶ As these once privately-owned marshlands become submerged, confusion has arisen as to whether they are automatically reclassified as public things, returning them to state ownership.

¹ Telephone Interview with Anonymous Charter Fishing Captain (Mar. 13, 2023). This Comment references a phone interview with an anonymous charter fishing captain conducted by the author. The author transcribed the interview during the phone call, and all quotes from the interview are taken from the author's transcription.

² Off. Comm'n & Publ'g, U.S. Geological Surv., *Louisiana's changing coastal wetlands*, USGS (July 12, 2017), <https://www.usgs.gov/news/national-news-release/usgs-louisianas-rate-coastal-wetland-loss-continues-slow>.

³ *See id.* "The losses are greatest in Louisiana, where about one-quarter of the state's wetlands – an area the size of Delaware – have been lost since the 1930s." *Id.*

⁴ *See Jim Wilkins et al., Sea Grant La., Preliminary Options for Establishing Recreational Servitudes for Aquatic Access Over Private Water Bottoms 3* (2018) (responding to H.R. Res. 178, La. Leg., Reg. Sess (La. 2018)).

⁵ *Id.*

⁶ LA. CIV. CODE ANN. art. 450.

While other articles have urged the state to formally declare ownership of the submerged marshlands,⁷ this Comment focuses on another solution that would quell the significant impact that the issue of these submerged marshlands have on recreational and commercial fishing in Louisiana.⁸ After all, the state's nickname is "Sportsman's Paradise."⁹ Public water bodies provide the setting for the recreational fishing industry in Louisiana, which results in roughly \$3 billion in economic output and supports 22,820 jobs in the state.¹⁰ In the year 2020 alone, the industry attracted 1.1 million documented anglers who, together, spent around \$2 billion while fishing in Louisiana.¹¹ But what happens when these anglers fish in waters that were once (recently) dry land? The lack of a clear answer to this question results in uncertainty for the landowners, the legislature, and the public. By operation of law, does the state own these beds? Would it not be fundamentally unjust to deprive these landowners of compensation if the state should decide to take the land? What action should the state take to remedy this situation? The state's ambiguity on the issue leaves landowners confused about what their rights are; the public confused about whether the "freedom" to fish actually protects anything; and the state confused about whether it's vital revenue from commercial and recreational fishing will diminish.

Part II of this Comment examines the development of Louisiana law regarding ownership and classification of things. Part III conducts a thorough balancing analysis to demonstrate the important considerations of the public, the state, and the landowners that the legislature must take into account when addressing this issue. Part IV proposes that Louisiana's legislature amend Civil Code article 456, codifying submerged marshlands as private things subject to public use. Part IV also highlights necessary amendments to other related laws and demonstrates why liability would be a nonissue in the event of such legislation.

I. Development of Louisiana Law Regarding Ownership of Things

In Louisiana, the basic principles of property law boil down to the Civil Code's division of things. The division of things governs how law treats certain pieces of property as well as what private landowners may own and may not own.¹² The Civil Code's articles discussing the division of things are found in Book II, Title I, Chapter I.¹³

A. Article 449 and the Division of Things

In Louisiana, the Civil Code divides things into three groups based on ownership: common things, public things, and private things.¹⁴ Article 449 defines common things as things that "may not be owned by anyone,"¹⁵ including the state.¹⁶ Article 453 defines private things as things "owned by individuals, other private persons, and *by the state or its political subdivisions in their capacity as private persons.*"¹⁷

⁷ See Michael C. Schimpf, *Le Deuxième Grand Dérangement: Expelling Louisiana's Taking of Private Property Through Article 450*, 80 LA. L. REV. 1557 (2020).

⁸ It is important to note that the potential issue of takings may be implicated through operation of article 450. *See id.* However, regardless of whether or not article 450 constitutes a governmental taking, the land is currently "owned" by the State. *See* LA. CIV. CODE ANN. art. 450. Therefore, this article will not address the issue of takings.

⁹ *Outdoors in Louisiana*, EXPLORE LA., <https://www.explorelouisiana.com/fishing> (last visited Nov. 14, 2023).

¹⁰ *Economic Contributions of Recreational Fishing: Louisiana*, AM. SPORTSFISHING ASS'N (2021), https://asafishing.org/wp-content/uploads/2023/03/Louisiana/2023_ASA_Senate_Handout_Digital_Louisiana.pdf.

¹¹ *Id.*

¹² *See* LA. CIV. CODE ANN. art. 448-455.

¹³ *See id.*

¹⁴ art. 448.

¹⁵ art. 449.

¹⁶ *Id.* cmt. (b).

¹⁷ art. 453 (emphasis added).

Therefore, unlike common things, the state *can* own both private and public things.¹⁸ Revision Comment (b) to article 453 provides examples of private things which the state or its political subdivisions own in their private capacity such as “public offices, police and fire stations, markets, [and] schoolhouses.”¹⁹ On the other hand, only the state or its political subdivisions may own public things in their public capacities, and the Civil Code expressly lists “the waters and *bottoms of natural navigable water bodies*” as one of those public things.²⁰ Once something is legally classified as a public thing in Louisiana, it is insusceptible of private ownership.²¹ This classification is why the status of these submerged lands formerly belonging to private individuals is important.

B. Beds of “Navigable” Waters are Public Things

Because the state owns the bottoms of natural *navigable* water bodies, the key factor in determining whether a body of water is owned by the state is its navigability.²² Under the “equal footing doctrine,” established in the United States Constitution,²³ when new states join the Union, they acquire control over the water and beds of navigable waters, in the same manner as the thirteen original colonies at the inception of the country.²⁴ The United States’ purchase of the Louisiana Territory extended this doctrine to new states.²⁵ By virtue of this doctrine, the State of Louisiana gained ownership over its waters and beds of navigable waterways when the United States admitted it into the Union in 1812.²⁶ The state’s courts decided that whether a water body is navigable turns on whether the water is “navigable in fact.”²⁷ A waterway is “navigable in fact” if it is suitable for supporting commerce in its present form.²⁸ This inquiry considers the waterway’s “depth, width, and location.”²⁹

While article 450 of the Louisiana Civil Code states that the “bottoms of natural navigable water bodies” are public things, the Code does not define “navigable water bodies.”³⁰ Thus, courts have defined what it means for a water body to be “navigable.”³¹ Courts define navigability broadly when determining whether the width and depth of a waterway is suitable for commerce, and the fact that a water body may not seem “navigable” in the colloquial sense does not preclude a finding of navigability.³² The Louisiana Third Circuit Court of Appeal held in *State ex rel. Guste v. Two O’Clock Bayou* that a waterway eight to ten feet wide at its narrowest point and “about three feet deep in its shallowest part” was nevertheless navigable because it could support commercial fishing, logging, and even filming operations.³³ Additionally, courts analyze the relative location of the waterway when determining its “navigability in fact.”³⁴ In *Trahan v. Teleflex, Inc.*, the Louisiana Third Circuit Court of Appeal held in part that a waterway was navigable in

¹⁸ *Id.*

¹⁹ *Id.* cmt. (b).

²⁰ art. 450 (emphasis added).

²¹ *See id.*

²² *See State ex rel. Guste v. Two O’Clock Bayou Land Co.*, 365 So. 2d 1174, 1177-78 (La. Ct. App. 3 Cir. 1978).

²³ U.S. CONST. art. IV, § 3, cl. 1.

²⁴ *Pollard v. Hagan*, 44 U.S. 212, 212 (1845).

²⁵ *Art.IV.S3.C1.3 Equal Footing Doctrine Generally*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C1-3/ALDE_00013710/.

²⁶ *See Pollard*, 44 U.S. at 212.

²⁷ *Two O’Clock Bayou Land Co.*, 365 So. 2d at 1177.

²⁸ *Id.*

²⁹ *Id.*

³⁰ LA. CIV. CODE ANN. art. 450.

³¹ *See, e.g., Two O’Clock Bayou Land Co.*, 365 So. 2d at 1177.

³² *See, e.g., id.* at 1176.

³³ *Id.* at 1176-78.

³⁴ *See Trahan v. Teleflex, Inc.*, 2005-943, p. 3-4 (La. App. 3 Cir. 2/1/06), 922 So. 2d 718, 721.

fact because, among other factors, a boater could reach the Gulf of Mexico by vessel through the waterway.³⁵

By operation of article 450, the state owns any water bottom as a public thing in its public capacity that was navigable in fact in 1812 when Louisiana joined the Union and is still navigable in fact today.³⁶ Conversely, the state owns as a private thing in its private capacity any water bottom that was navigable in fact in 1812 but is now not navigable in fact.³⁷ However, both Louisiana statutory law and case law are silent regarding the proper classification when previously dry land becomes submerged and navigable in fact.³⁸ This ambiguity in Louisiana law gives rise to the issue at hand. Under current law, it seems that submerged marshlands become public things.³⁹ The problem is that the landowners, the public, and the state seem to be at a standoff when it comes to accessing these submerged marshlands.

C. The Louisiana Constitution Prohibits State Alienation of these Beds and Provides an Insufficient Exception

The Louisiana Constitution solidifies the state's control and ownership of the bottoms of natural navigable water bodies by stating:

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.⁴⁰

Therefore, if Louisiana law classifies property as the bed of a navigable water body, then not only is it a public thing,⁴¹ but the state is then unable to alienate that thing for private use or sale.⁴² It is important to note that this provision contains an exception to the alienation rule: the state may alienate the bed of a navigable water body “for purposes of reclamation by the riparian owner to recover land lost through erosion.”⁴³

While the legislature clearly envisioned reclamation as a solution, it is insufficient for the reasons set forth below. Louisiana Revised Statute section 41:1702, titled “Reclamation of lands lost through erosion, compaction, subsidence, and sea level rise,” governs the reclamation process for these owners.⁴⁴ This statute specifically applies to “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”⁴⁵ Under this statute, owners of land that is “contiguous to and abutting navigable waters . . . have the right to reclaim land, including all oil, gas, and mineral rights, except as otherwise provided in Subsection E, lost through erosion, compaction, subsidence, or sea level rise occurring on and after July 1921.”⁴⁶ The statute further lays out the exact process of reclamation, including filing paperwork with the state, requiring evidence of historical

³⁵ *Id.* at 718.

³⁶ *See* LA. CIV. CODE ANN. art. 450.

³⁷ *See* A.N. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE, PROPERTY § 4:1 (5th ed. 2023).

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ LA. CONST. art. IX, § 3.

⁴¹ LA. CIV. CODE ANN. art. 450

⁴² LA. CONST. art. IX, § 3.

⁴³ *Id.*

⁴⁴ LA. STAT. ANN. § 41:1702.

⁴⁵ *Id.* § 41:1702(B)(1).

⁴⁶ *Id.*

boundaries of the property, and requiring plans for physical reclamation submitted to the parish in which the property sits.⁴⁷ After a landowner satisfies the proper procedural requirements, the state will issue a permit granting the landowner the ability to reclaim the land lost to the aforementioned causes.⁴⁸ From that point, the landowner has two years to complete the reclamation project, after which the landowner may complete any remaining work only by undergoing the application process again.⁴⁹ Additionally, the landowner must submit proof of the extent of the land actually reclaimed within sixty days of completion of the reclamation project.⁵⁰

Importantly, the statute further defines “reclamation” as “the raising of land through filling or other physical works which elevate the surface of the theretofore submerged lands as a minimum . . . 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.”⁵¹ If the land owner fails to “reclaim” the lost area of land pursuant to the permit requirement, then the reclamation “shall be an absolute nullity and no private rights of ownership shall vest or be acquired by prescription.”⁵²

This reclamation process creates two unique issues. First, requiring a person to “reclaim” land lost to erosion potentially fundamentally conflicts with Louisiana’s principles of ownership—that it should not require anything of the owner to maintain ownership.⁵³ Article 477 defines ownership as “the right that confers on a person direct immediate and exclusive authority over a thing.”⁵⁴ Within Louisiana’s understanding of ownership also exists the core understanding that ownership itself is perpetual.⁵⁵ More specifically, article 481 of the Louisiana Civil Code states that, “[o]wnership exists independently of any exercise of it and may *not be lost by nonuse*.”⁵⁶ Thus, because a person will not lose ownership of a thing due to nonuse and will therefore not be required to take any affirmative actions to preserve his or her ownership,⁵⁷ requiring a person to undergo the “reclamation” process provided for in La. R.S. 41:1702⁵⁸ runs afoul with this core ownership principle. However, that is not the only aspect of La. R.S. 41:1702 which gives cause for concern.

Second, the reclamation process is time-consuming and requires resources of a landowner simply to maintain ownership of his or her property.⁵⁹ La. R.S. 14:1702 often involves a process that an owner could not have foreseen when acquiring said land. In reality, the statute gives landowners little time and creates high hurdles for them to reclaim their land.⁶⁰ The statute further ignores the reality of the demographics of the landowners most commonly impacted by this phenomenon. Seven of southeast Louisiana’s coastal parishes, which coastal erosion will likely impact, had an average poverty rate that was

⁴⁷ *Id.* § 41:1702(C)-(D).

⁴⁸ *Id.* § 41:1702(D)(1).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* § 41:1702(F).

⁵² *Id.*

⁵³ *See* LA. CIV. CODE ANN. art. 477; *see also* LA. CIV. CODE ANN. art. 480 (“Ownership exists independently of any exercise of it and may not be lost by nonuse.”).

⁵⁴ art. 477.

⁵⁵ *See* LA. CIV. CODE ANN. art. 481 (emphasis added).

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ LA. STAT. ANN. § 41:1702(C)-(D).

⁵⁹ *See id.*

⁶⁰ *See id.*

nearly eight percent higher than the national average in 2020.⁶¹ This statute fails to take that disparity into account. The poverty rate is a significant factor to consider when viewing the actual cost that such an operation incurs. According to subsection (F) of La. R.S. 41:1702, the reclamation project must ensure “reasonably permanent existence of the reclaimed lands” for the landowner to have successfully “reclaimed” the land in the terms of the statute.⁶² A representative from one land grading and excavation business, Marsh Buggy Services LLC, opined that it would cost a total of roughly \$80,000 to grade one acre of submerged marshland back to above water level.⁶³ The cost of reclamation, together with the two-year completion window renders the statute unfeasible, especially when areas that are most likely to be impacted had such high poverty rates in 2020.⁶⁴ As a result, once the land becomes submerged, the land owner loses ownership by operation of article 450, unless the landowner can jump through the administrative hoops and afford to do so.⁶⁵ As coastal wetland inundation increases, this problem will only become more pronounced.

D. The State’s Current Position on Disputed Lands: An Ambiguous Stance

As noted in the 2018 Inventory of State Lands (the “Inventory”) created by the Office of State Lands Division of Administration (OSL), the state claims ownership of inundated lands while private parties dispute the state’s claim.⁶⁶ Specifically, the Inventory sought to answer a simple question, which it posed at the beginning of the report: “Has the Office of State Lands maintained a current and comprehensive inventory of state lands as required by state law?”⁶⁷ The Inventory answered that question by stating, “Overall, we found that OSL has not maintained a current or comprehensive inventory of state lands.”⁶⁸ Among other things, such as the methodology of reporting, the Inventory states that these competing claims of ownership between land owners and the state account for a large portion of the confusion.⁶⁹ On point with this issue, the Inventory stated that “[t]he state does not have clear title to an estimated 286,467 acres of water bottoms, as private parties also claim ownership of these lands.”⁷⁰

In response to the Inventory’s findings, the OSL mailed a letter, which is attached to the inventory, to the state’s Legislative Auditor.⁷¹ Specifically, the OSL indicated its agreement that “the state does not have clear title to dual claimed water bottoms.”⁷² However, the OSL made no indication that despite the state’s lack of a clear chain of title, the state would relinquish the issue.⁷³ To the contrary, the Inventory

⁶¹ See *Income, Poverty, and Health Insurance Coverage in the United States: 2020*, U.S. CENSUS BUREAU (Sep. 14, 2021), <https://www.census.gov/newsroom/press-releases/2021/income-poverty-health-insurance-coverage.html> (demonstrating that the national average for 2020 was 11.4%); *Map of Poverty Rate by County*, DATA USA, <https://datausa.io/> (last visited Nov. 12, 2023) (demonstrating the parish poverty rates for 2020: Iberia – 22.3%; St. Mary – 19.8%; Terrebonne – 18.8%; Lafourche 17.4%; Jefferson – 15.2%; Plaquemines – 17.8%; St. Bernard – 23.2%).

⁶² § 41:1702(F).

⁶³ Interview with Marsh Buggy Servs. LLC (Feb. 3, 2023).

⁶⁴ See generally *Income, Poverty, and Health Insurance Coverage in the United States: 2020*, *supra* note 61. It is also important to note that while this provision was likely enacted to hold wealthy oil companies accountable, it fails to account for the impoverished community of other private land owners as well.

⁶⁵ LA. CIV. CODE ANN. art. 450.

⁶⁶ OFF. OF STATE LANDS DIV. OF ADMIN., INVENTORY OF STATE LANDS 3 (2018), <https://biotech.law.lsu.edu/blog/0001A476.pdf>.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.*

⁶⁹ See *id.* at 3.

⁷⁰ *Id.*

⁷¹ *Id.* at A.1-A.2.

⁷² *Id.* at A.2.

⁷³ See *id.* at A.1-A.2.

stated that the only clear course of action in resolving the disputed titles is through the judiciary,⁷⁴ indicating that the state does not plan on conceding ownership to the private landowners.

II. The State and the Public's Interest in Accessing these Submerged Lands

Naturally, landowners have an interest in maintaining access to land that they previously owned. While the landowners' plight is sympathetic, the state nonetheless has a valid public interest in retaining the lands now submerged. Specifically, both the state and the public have significant and valid interests in accessing these lands for the purposes of recreational and commercial fishing.

A. The State's Interest in Accessing Submerged Lands

For centuries, Louisiana's culture and industry have valued outdoorsman activities as vital to the state. The ability to undertake activities such as hunting, fishing, and trapping are so vital to the people of Louisiana that the freedom to engage in these activities is encapsulated and enumerated in Art. I, § 27 of the Louisiana Constitution:

The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. Hunting, fishing and trapping shall be managed by law and regulation consistent with Article IX, Section 1 of the Constitution of Louisiana to protect, conserve and replenish the natural resources of the state. The provisions of this Section shall not alter the burden of proof requirements otherwise established by law for any challenge to a law or regulation pertaining to hunting, fishing or trapping the wildlife of the state, including all aquatic life. Nothing contained herein shall be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property.⁷⁵

Economically, the seafood industry is foundational to Louisiana's well-being.⁷⁶ Louisiana is the second largest seafood supplier for the United States, particularly with its production of shrimp, oysters, crabs, and crawfish.⁷⁷ On average, the shrimp industry in Louisiana supports 15,000 jobs in the state and provides an annual economic impact of \$1.3 billion.⁷⁸ The oyster industry in Louisiana supports around 4,000 jobs in the state and has an economic impact of \$317 million annually.⁷⁹ The crab industry in Louisiana supports more than 3,000 jobs and has an economic impact of \$293 million annually.⁸⁰ The crawfish industry in Louisiana supports more than 800 commercial fishermen and 1,000 farmers and has an economic impact \$120 million annually.⁸¹ Additionally, the alligator industry alone has an economic impact of \$104 million annually.⁸² More than seventy percent of seafood products from the Gulf of Mexico come through Louisiana with a total yearly economic impact of nearly \$2 billion.⁸³ The seafood industry in Louisiana is so large that one in every seventy jobs in the state deals with commercial fisheries.⁸⁴ Clearly,

⁷⁴*Id.* at 10 ("Absent agreement between the parties, these disputed title claims can only be resolved through the courts.").

⁷⁵ LA. CONST. art. I, § 27.

⁷⁶ See generally LA. SEAFOOD, <https://www.louisianaseafood.com/industry> (last visited Nov. 12, 2023).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Commercial Fishing: Harvesting, Processing, and Selling*, LA. DEP'T OF WILDLIFE & FISHERIES, <https://www.wlf.louisiana.gov/subhome/commercial-fishing> (last visited Nov. 12, 2023).

⁸⁴ *Eat Safe Louisiana*, LA. DEP'T OF HEALTH, <https://ldh.la.gov/page/444> (last visited Nov. 12, 2023).

with Louisiana deriving so much of its revenue from the seafood industry, the state has an interest in maintaining access to these lands that provide health to the state's economy.

B. The Public's Interest in Accessing Submerged Lands

The commercial aspect of fishing is just one part of the sport's economic impact on the state. In 2021, Louisiana issued over 1.5 million recreational hunting, fishing, trapping and non-consumptive use licenses, which resulted in over \$27 million in revenue.⁸⁵ Also relating to the recreational fishing industry, the state issued 344,000 boat registration and title transactions which worked to generate more than \$5.5 million in revenue.⁸⁶ Additionally, in 2020, 1,172,400 anglers spent \$2 billion while fishing in the state.⁸⁷

These statistics clearly demonstrate why the State of Louisiana, as well as the public, have strong interests in retaining access to all navigable waters. The state values the seafood industry to the point that it constitutionally recognizes fishing as a protected freedom.⁸⁸ As mentioned earlier, fishing is so closely associated with the Louisiana that the state is commonly known as "Sportsman's Paradise,"⁸⁹ a phrase which has even been imprinted on the state's license plates.⁹⁰ Despite the high value that the state places on both commercial and sport fishing, anglers have faced a growing issue when, in "Sportsman's Paradise," they have found themselves confronted with "posted" signs while fishing in areas which are navigable in fact.⁹¹ The issue has become so rampant that a number of public interest groups have formed—one of which the Public Recreation Access Task Force cited in its report.⁹²

Notably, this issue is especially impactful on charter fishermen in Louisiana. Currently, Louisiana Travel's website has over 290 charter fishermen listed on its contact page,⁹³ demonstrating the size of this profitable industry for the state. However, one captain of a charter boat, who wishes to remain anonymous, opined that the issue is impacting the profitability of the industry and suggested that it may force him to close up shop should the state decide to declare that the private landowners retain ownership of the submerged lands.⁹⁴ The captain currently operates a charter fishing service in south Louisiana and described a situation that he encountered while hosting clients, which led to litigation.⁹⁵

He was out fishing one day in south Louisiana with a group of clients, as is usual for him in the summer months.⁹⁶ He and his passengers were in an area he described as "an open body of water with

⁸⁵ LA. DEP'T OF WILDLIFE & FISHERIES, 2021-2022 ANNUAL REPORT 2 (2022), https://www.wlf.louisiana.gov/assets/Resources/Publications/Annual_Reports/2021-2022-Annual-Report.pdf.

⁸⁶ *Id.* at 21.

⁸⁷ *Economic Contributions of Recreational Fishing: Louisiana*, *supra* note 10.

⁸⁸ LA. CONST. art. I, § 27.

⁸⁹ *Outdoors in Louisiana*, *supra* note 9.

⁹⁰ *Louisiana is Truly a Sportsman's Paradise*, THE STOCKADE (Apr. 19, 2018), <https://thestockade.com/louisiana-is-truly-a-sportsmans-paradise>.

⁹¹ See generally LOUISIANA'S POSTED PARADISE: PROTECTING PUBLIC ACCESS TO OUR TIDALLY-INFLUENCED WATERS, <https://www.dnr.louisiana.gov/assets/Legal/PRATF/C3.pdf>.

⁹² PUB. RECREATION ACCESS TASK FORCE, REPORT OF THE PUBLIC RECREATION ACCESS TASK FORCE TO THE LOUISIANA LEGISLATURE 36-37 (2020), <http://www.dnr.louisiana.gov/assets/Legal/PublicRecAccessTFReport.pdf> (citing Louisiana's Sportsmen's Coalition, *Louisiana's Posted Paradise: Protecting public access to our tidally-influenced waters*, Presentation to PRATF, Oct. 29, 2018, Exhibit C.3 at 2.). The Public Recreation Task Force was created by Louisiana's legislature to comment on the growing issue of submerged marshlands.

⁹³ *Fishing Charters in Louisiana*, EXPLORE LA., <https://www.explorelouisiana.com/fishing> (last visited Nov. 12, 2023).

⁹⁴ Telephone Interview, *supra* note 1.

⁹⁵ Telephone Interview, *supra* note 1.

⁹⁶ Telephone Interview, *supra* note 1.

several entrances.”⁹⁷ He stated that, “in south Louisiana, it may be considered a duck pond.”⁹⁸ The “pond” covered several hundred acres with water flowing through the several entrances.⁹⁹ At the time, the anonymous captain was “trolling” (moving at a very low speed with an electric motor) along the bank of the pond, casting close to the bank to catch red drum.¹⁰⁰ He reported that a man, who was paid by the landowner to watch the property for “trespassers,” approached the boat and insisted that the captain was “somewhere he wasn’t supposed to be.”¹⁰¹ The captain had clients with him, so he decided to put the fishing gear away and leave the area.¹⁰² The captain was in Lafourche Parish at the time of the occurrence.¹⁰³

About six weeks later, the captain was at his “home base” in Jefferson Parish.¹⁰⁴ He described his home as a house on a dead-end road.¹⁰⁵ The captain was cleaning fish in his driveway.¹⁰⁶ He explained that his customers were in a hurry to leave, so they were packing their bags in the house for check-out time.¹⁰⁷ As he was cleaning, a Lafourche Parish sheriff’s vehicle, followed by a Grand Isle officer, turned down the road and drove past his house.¹⁰⁸ The captain finished cleaning the fish, loaded them into his truck, and drove down the street to give them to his customers.¹⁰⁹ As he drove, the captain stated that the officers “basically pulled [him] out of his truck.”¹¹⁰ After a brief conversation, the officers allowed the captain to bring the fish to his clients and then return to speak with the officers at his house.¹¹¹ When the captain returned to converse with the officers, the Lafourche Parish officer released the Grand Isle officer so that he could conduct the conversation one-on-one.¹¹² The captain and the Lafourche Parish officer sat at a picnic table outside of his property where the officer showed the captain the State Lands GIS map on a computer and informed the captain that he had trespassed onto private property six weeks earlier.¹¹³ The captain directed the officer to the “terms of use” for the website,¹¹⁴ which stated that the map was not to be used to provide evidence of legal title of property.¹¹⁵ According to the captain, the Lafourche Parish officer insisted that Lafourche Parish used it for legal purposes and said that if the captain was found on areas which the map marked as private property again, legal consequences would ensue.¹¹⁶ After the conversation, the officer left.¹¹⁷

⁹⁷ Telephone Interview, *supra* note 1.

⁹⁸ Telephone Interview, *supra* note 1.

⁹⁹ Telephone Interview, *supra* note 1.

¹⁰⁰ Telephone Interview, *supra* note 1.

¹⁰¹ Telephone Interview, *supra* note 1.

¹⁰² Telephone Interview, *supra* note 1.

¹⁰³ Telephone Interview, *supra* note 1.

¹⁰⁴ Telephone Interview, *supra* note 1.

¹⁰⁵ Telephone Interview, *supra* note 1.

¹⁰⁶ Telephone Interview, *supra* note 1.

¹⁰⁷ Telephone Interview, *supra* note 1.

¹⁰⁸ Telephone Interview, *supra* note 1.

¹⁰⁹ Telephone Interview, *supra* note 1.

¹¹⁰ Telephone Interview, *supra* note 1.

¹¹¹ Telephone Interview, *supra* note 1.

¹¹² Telephone Interview, *supra* note 1.

¹¹³ Telephone Interview, *supra* note 1.

¹¹⁴ Telephone Interview, *supra* note 1.

¹¹⁵ *State and Building System (SLABS) Data*, LA. DIV. OF ADMIN.,

https://www.doa.la.gov/media/lfhbw2/data_info_and_disclaimer.pdf (last visited Apr. 22, 2023) (“This information is intended to serve only as an initial reference for research and does not purport to provide evidence of legal title to property.”).

¹¹⁶ Telephone Interview, *supra* note 1.

¹¹⁷ Telephone Interview, *supra* note 1.

The captain and his legal counsel later sent two letters to enforcement authorities outlining that he makes his living on the water and needed to be told where he could and could not apply his trade.¹¹⁸ The enforcement authorities refused to respond to the letters.¹¹⁹ Once the enforcement authorities failed to respond the second time, the captain and his legal team decided to file suit.¹²⁰ The captain emphasized that this encounter was not the first time that he has been confronted with the issue and that he continues to face uncertainty as to his rights today.¹²¹

When asked how it would impact his business if the state decided to declare these submerged waters as privately owned and thus inaccessible to him and the rest of the public, he stated that he “doesn’t think [he] could conceivably stay in business because at any given time, [he] would be subjecting [his] customers to [the risk of] arrest.”¹²² The captain attributes this dilemma to the change in the Louisiana coastal marshland through erosion and sea-rise.¹²³ The captain stated that these changes have directly influenced where he can find fish from September until May, which he claimed have moved to inland areas of submerged marshland during that time.¹²⁴ The captain claimed that the “[s]tate tells [the fishing community] that they can fish in the twenty percent of the coast that’s not privately owned. There’s a difference between fishing and catching.”¹²⁵ The captain stated that if he were limited to the “twenty percent of water that’s not ‘privately owned’,” he and his colleagues in the industry, “would not [meet] the [level of] production [required] to have a successful business.”¹²⁶ Clearly, the issue of submerged marshland threatens the charter fishing industry and those who depend on it for their general welfare.

The lack of clarity of the situation and indeterminacy of the state with regard to the issue lead to very real consequences as demonstrated above. The landowners are left wondering whether their rights, time, and money dedicated to acquiring the land simply disappear along with the land. The public is left wondering whether one of their constitutionally protected “freedoms” to fish on the land¹²⁷ is simple puffery. The state and its political subdivisions are left wondering if their significant revenue from the fishing and seafood industries will now dwindle, causing economic downturn. The state must find a solution by striking a balance between its interest in economic preservation, the public’s interest in accessing submerged wetlands, and state landowners’ interests in retaining what is rightfully theirs.

III. Louisiana Should Codify Submerged Marshland as a Private Thing Subject to Public Use to Properly Balance Relevant Interests

There are certain viable solutions to this issue that would both allow landowners to retain ownership of their property and grant the state and public access to submerged waters. Specifically, this Comment suggests the possibility of extending the principles underlying Louisiana Civil Code article 456 to encompass this very specific type of property by codifying these submerged marshlands as private things subject to public use. To promote consistency, this codification requires the amendment of Louisiana Civil Code article 450, Louisiana Constitution Article IX, § 3, and La. R.S. 41:1702. Importantly, with the amendment of article 456, landowner liability is a non-issue: the recreational use immunity statutes would protect landowners from liability.

¹¹⁸ Telephone Interview, *supra* note 1.

¹¹⁹ Telephone Interview, *supra* note 1.

¹²⁰ Telephone Interview, *supra* note 1.

¹²¹ Telephone Interview, *supra* note 1.

¹²² Telephone Interview, *supra* note 1.

¹²³ Telephone Interview, *supra* note 1.

¹²⁴ Telephone Interview, *supra* note 1.

¹²⁵ Telephone Interview, *supra* note 1.

¹²⁶ Telephone Interview, *supra* note 1.

¹²⁷ LA. CONST. art. I, § 27.

A. Louisiana Should Add a Subpart (b) to Article 456 to Codify Submerged Marshlands as Private things Subject to Public Use

As discussed above, in Louisiana, there are three basic types of “things”—the pertinent one here being public things.¹²⁸ Naturally, the law of private things implicates the law of ownership. “The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.”¹²⁹ Scholars have suggested that ownership, in most cases, encompasses the right to exclude.¹³⁰ However, the Louisiana Civil Code provides for certain situations where a landowner of private property may not exclude individuals from accessing the land.¹³¹

Article 455 of the Louisiana Civil Code states that “[p]rivate things may be subject to public use *in accordance with law* or by dedication.”¹³² The Code further explicitly enumerates a specific type of private thing subject to public use—“the banks of navigable rivers or streams.”¹³³ Under article 456 of the Louisiana Civil Code, “[t]he banks of navigable rivers or streams are private things that are subject to public use.”¹³⁴ However, the mere fact that these private things are subject to public use does not mean that they are subject to *every* public use. Comment (b) to article 456 conveys that art. 455(1) of the Code of 1870 is the predecessor of the modern-day article 546.¹³⁵ Art. 455(1) of the Code of 1870 stated that “everyone has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.”¹³⁶ Thus, Louisiana jurisprudence has well settled that article 456 allows the use of the land for “purposes that are ‘incidental’ to the navigable character of the stream and its enjoyment as an avenue of commerce.”¹³⁷

In *Parm v. Shumate*, the United States Court of Appeals for the Fifth Circuit discussed the scope of activities which are allowed on river banks pursuant to article 456.¹³⁸ In *Parm*, a local sheriff arrested the appellants for trespass while they were fishing on land which the Mississippi River occasionally covered.¹³⁹ The arrested men tried to rely on article 456, arguing that the article, coupled with Louisiana’s constitutional “right to fish,” allowed for their presence on that land.¹⁴⁰ The court rejected that argument, stating that the public use provided for in article 456 “is limited to use for navigational purposes.”¹⁴¹ Thus, the banks of rivers are things which may be susceptible to private ownership, but the public maintains a limited *right to use* such land for navigation.¹⁴² This scenario is an important example of the Code recognizing that a hybrid

¹²⁸ See LA. CIV. CODE ANN. art. 448.

¹²⁹ LA. CIV. CODE ANN. art. 477.

¹³⁰ MARKUS G. PUDER ET AL., LOUISIANA PROPERTY LAW: THE CIVIL CODE, CASES, AND COMMENTARY 33 (2d ed. 2020) (“As the owner, you can now fence it in and exclude the entire world from that parking lot, assuming there are no conflicting real rights that have been created in that same lot.”).

¹³¹ See LA. CIV. CODE ANN. art. 455.

¹³² *Id.* (emphasis added).

¹³³ LA. CIV. CODE ANN. art. 456.

¹³⁴ *Id.*

¹³⁵ *Id.* cmt. (b).

¹³⁶ *Id.*

¹³⁷ *Id.* (citing *State v. Richardson*, 72 So. 984 (La. 1916); *Morgan v. Livingston*, 6 Mart. (O.S.) 19 (La. 1819); *State v. Cockrell*, 162 So. 2d 361 (La. Ct. App. 1 Cir. 1964)).

¹³⁸ *Parm v. Shumate*, 513 F.3d 135 (5th Cir. 2007).

¹³⁹ *Id.* at 137-38.

¹⁴⁰ *Id.* at 144..

¹⁴¹ *Id.* at 145 (citing *Walker Lands, Inc. v. E. Carroll Par. Police Jury*, 38,376, p. 15 (La. App. 2d Cir. 4/14/04), 871 So. 2d 1258, 1268).

¹⁴² See *id.*; LA. CIV. CODE ANN. art. 456.

category, like private things subject to public use, may be necessary in some instances to facilitate the practical use of the property by the public.

While the substance of article 456 is strictly limited to navigational public use, the state legislature should consider using the article's approach to deal with the issue of submerged coastal marshlands. Article 456 maintains that a very specific type of land—riverbanks—are subject to a very specific public use—use for navigational purposes.¹⁴³ This structure of legislation has long been accepted, as this article's predecessor, article 455(1) of the Louisiana Civil Code of 1870, dated back to the Code's enactment in 1870.¹⁴⁴

Like riverbanks, the state legislature should recognize submerged coastal marshlands as private things subject to public use. Importantly, they should be accessible by the public for a very specific use—to fish. The state need not force landowners to allow members of the public to traverse their non-submerged land to reach the navigable, submerged marshland but should allow the public to reach it by boat. The proposed legislation would modify article 456 through the addition of a succeeding paragraph and read as follows:

Art. 456(b). Privately owned submerged marshland. Privately owned submerged marshlands which are navigable in fact and that was once dry but has been lost due to erosion or sea rise are private things that are subject to public use. The public use applicable to these properties is limited strictly to fishing when accessing these properties by boat. This article does not function to allow public access by traversing across privately owned dry land to access the submerged marshlands that are navigable in fact. This article does not prohibit a landowner from reclaiming his or her submerged marshland under R.S. 41:1702.¹⁴⁵

B. This Revised Article Would Require Amendments to Existing Law

Should the legislature enact this amendment to article 456, amendments to a few other bodies of law should follow to ensure consistency. Specifically, this amended article requires amendments to Louisiana Civil Code article 450, Louisiana Constitution Article IX, § 3, and La. R.S. 41:1702 to reflect this newly recognized private thing subject to public use.

1. Amendment to Article 450—Public Things

First, the state would need to amend article 450 to provide for an exception for submerged marshland lost to erosion. Article 450 of the Louisiana Civil Code, as it stands now, reads:

Art. 450. Public things. Public things are owned by the state or its political subdivisions in their capacity as public persons. Public things that belong to the state are such as running waters, *the waters and bottoms of natural navigable water bodies*, the territorial sea, and the seashore. Public things that may belong to political subdivisions of the state are such as streets and public squares.¹⁴⁶

The state legislature should amend article 450 to include a subpart (a), which would state that “the above provision relating to the waters and bottoms of natural navigable water bodies does not include those lands

¹⁴³ art. 456.

¹⁴⁴ *Id.* cmt. (a).

¹⁴⁵ The legislature would include this as a subparagraph following the existing article 456. *See generally id.*

¹⁴⁶ LA. CIV. CODE ANN. art. 450 (emphasis added).

which are privately owned and have since been submerged, now becoming navigable in fact.” This amendment is imperative so as to prevent confusion between the articles. Without the amendment, it would appear that the Civil Code was still classifying those submerged lands as public things and could give rise to costly litigation about the classification that the proposed legislation would seek to remedy.

2. Amendment to Article IX, § 3 of the Louisiana Constitution

Additionally, the state legislature would need to amend the Louisiana Constitution. As mentioned, Article IX, § 3 of the Louisiana Constitution prohibits the state legislature from alienating the bed of a navigable water body but provides an exception for reclamation by the riparian landowner to recover land lost through erosion.¹⁴⁷ The current configuration of this constitutional provision insinuates that land lost due to erosion automatically transfers over to state ownership by operation of law—something that the proposed legislation seeks to avoid. The state legislature would need to amend the provision as follows:

§ 3. Alienation of Water Bottoms. Section 3. The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body. This Section shall have no effect on privately owned submerged marshland under Article 456(b).¹⁴⁸ Riparian owners may reclaim certain land lost to erosion through regulated processes. 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.

Making these changes to Article IX, § 3 of the Louisiana Constitution would remove any lingering confusion about whether the state obtains ownership by operation of law when the land becomes submerged and navigable in fact.

3. Amendment to La. R.S. 41:1702

Lastly, the state legislature would need to amend La. R.S. 41:1702 to reflect the changes in Article IX, § 3 of the Louisiana Constitution and to change the relative purpose of the statute. As the statute now stands, it reads in pertinent part:

B. (1) 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, except as otherwise provided in Subsection E of this Section, 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.¹⁴⁹

In its current state, R.S. 41:1702 is ambiguous as to whether the land that the owner is “reclaiming” is owned by the State before being reclaimed by the riparian owner, or if the landowner still retains ownership and he or she is simply reclaiming it from the water with no aspects of ownership at issue. The state legislature should amend the statute to indicate that the landowner is simply “reclaiming” the submerged land from the water, affecting no aspects of ownership. However, the process laid out by the legislature in this statute is still valuable because it provides a very specific process by which landowners

¹⁴⁷ LA. CONST. art. IX, § 3.

¹⁴⁸ The proposed legislation in this article. *See generally id.*

¹⁴⁹ LA. STAT. ANN. § 41:1702(B)(1).

may rebuild their land.¹⁵⁰ The process is vital because of the implications involved in such a delicate procedure, such as the desire to prevent any more harm to the coastline through erosion or pollution. Thus, the regulatory structure of R.S. 41:1702 remains sound, but the legislature should amend it to clarify that the purpose of the statute is to regulate the resurrection of submerged land and not the process through which an owner may reclaim ownership of land which now allegedly belongs to the state.

C. Liability is a Non-Issue: The Recreational Use Immunity Statutes Would Protect Landowners from Liability

Lastly, liability under this amended article is a non-issue because the recreational use immunity statutes would protect landowners from liability. Some commentators and legislators may express concern that allowing access to this land would subject the landowners to liability for injuries sustained by third parties while using the land. However, liability should be of no concern to legislators when dealing with this issue because the recreational use immunity statutes remove all liability from both the state and the landowner.

1. The Recreational Use Immunity Statutes

“Carving out a space from tort liability, states began enacting recreational use immunity statutes in 1953 to promote public use of private lands.”¹⁵¹ Louisiana Revised Statutes § 9:2791 protects landowners from liability when they allow members of the public to use their land for recreational purposes:

A. An owner, lessee, or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, *fishing*, camping, hiking, sightseeing or *boating* or to give warning of any hazardous conditions, use of, structure, or activities on such premises to persons entering for such purposes, whether the hazardous condition or instrumentality giving the harm is one *normally encountered in the true outdoors or one created by the placement of structures or conduct of commercial activities on the premises*. If such an owner, lessee, or occupant gives permission to another to enter the premises for such recreational purposes he *does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for an injury to persons or property caused by an act of person to whom permission is granted*.¹⁵²

As illustrated in the statute, when an owner allows the public to use his or her land for recreational purposes, such as fishing and boating, the landowner is not subject to any liability for injury sustained on the land.¹⁵³ The state enacted this statute specifically to encourage private landowners to allow the public to access their lands.¹⁵⁴ Specifically, the state enacted this statute to effectively create more “private things subject to public use.”¹⁵⁵ “The purpose of the [recreational use immunity statutes] is to encourage owners of land to make land and *water areas* available to the public for *recreational purposes* by limiting their liability toward persons entering thereon for such purposes.”¹⁵⁶

¹⁵⁰ See *id.* § 41:1702(C)-(D).

¹⁵¹ H. Ryan Flood, Beal v. Westchester Surplus Lines Ins. Co.: *The Judiciary’s Unwarranted Expansion of Recreational Use Immunity*, 69 LOY. L REV. 325, 328 (2022).

¹⁵² LA. STAT. ANN. § 9:2791A. (emphasis added).

¹⁵³ *Id.*

¹⁵⁴ Flood, *supra* note 153, at 328.

¹⁵⁵ See Flood, *supra* note 153, at 328 n. 2 (citing Broussard v. Dep’t of Transp. & Dev., 539 So. 2d 824, 829-30 (La. Ct. App. 3 Cir. 1989)).

¹⁵⁶ See Flood, *supra* note 153, at 328.

“The second immunity statute, § 2795, amended § 2791 and included an illustrative and non-exhaustive list of recreational uses of land”¹⁵⁷ Section 2795 states in pertinent part:

A.(3) “Recreational purposes” includes but is not limited to any of the following, or any combination thereof: hunting, *fishing*, trapping, swimming, *boating*, camping, picnicking, hiking, horseback riding, bicycle riding, motorized or nonmotorized vehicle operation for recreational purposes, nature study, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or viewing or enjoying historical, archaeological, scenic, or scientific sites.

....

B.(1) Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:

(a) Extend to any assurance that the premises are safe for any purposes.

(b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring or man-made.¹⁵⁸

As shown above, § 2795 explicitly lists both fishing and boating as protected activities under the recreational use immunity statutes.¹⁵⁹ The statute also provides for a few situations where the owner is not protected: (1) where the owner willfully failed to warn against a dangerous condition and a person using the land was injured, (2) where the owner maliciously failed to warn against a dangerous condition and a person using the land was injured, and (3) where the owner is one of a commercial recreational development or facility.¹⁶⁰ Thus, the legislation proposed earlier in this article would place the affected landowners squarely within this statute, shielding them from liability, so long as they don’t meet one of the disqualifying criteria. While some critics may attack this position by stating that the statute is inapplicable to these landowners because they are not granting access to their land willingly, that point holds no weight. Nothing in either § 2791 or § 2795 indicates that a requirement for protection is that the landowner give access to the public through his or her own volition.¹⁶¹ Whether the landowner gives access through his or her own volition or because he or she is required to, the statute still applies.¹⁶² Moreover, the legislature clearly provided for exceptions where the statute is inapplicable in § 2795 B(1);¹⁶³ thus, the legislature’s failure to mention volition as a requirement for applicability is not indicative of an exception to the applicability of the statute.

Nevertheless, to avoid potential dispute or confusion, the legislature should amend Sections 2791 and 2795 to reflect the addition of the proposed legislation. Specifically, the state legislature should amend the statutes to both include the following statement: “This statute is also applicable to submerged marshlands which are private things subject to public use under Article 456(b).”

¹⁵⁷ Flood, *supra* note 153, at 329-30.

¹⁵⁸ LA. STAT. ANN. § 9:2795(A)(3), (B)(1) (emphasis added).

¹⁵⁹ *Id.* § 9:2795(A)(3).

¹⁶⁰ *See id.* § 9:2795(B)(1).

¹⁶¹ *See* LA. STAT. ANN. §§ 9:2791, :95.

¹⁶² *See* LA. STAT. ANN. § 9:2795.

¹⁶³ *Id.* § 9:2795(B)(1) (“*Except for* willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, *except* an owner of recreational developments or facilities”) (emphasis added).

This addition to the recreational use immunity statutes would prevent any confusion that may arise in a potential judicial setting or any attack from critics who would wish to latch onto potential ambiguity. This addition would further eliminate the concern any private landowners would have regarding persons fishing on the submerged land, potentially holding the private landowner liable for any sustained injuries.

IV. Conclusion

It does not take long for one to examine the legal issue surrounding coastal wetland loss and see the vast complications that arise out of what may seem like a simple natural phenomenon. Whether the issue be that the legislators were not at first aware of the land loss plaguing Louisiana when it enacted article 450, or simple legislative oversight, one aspect remains true: the land is disappearing each year. This Comment takes that immutable fact and closely examines the neighboring issues that are caused as a secondary effect—ones that may not be evident upon first impression.

As the Code is designed today, when the land washes away, the landowners' rights go with it. This unjust result calls for legislative action. However, state legislators must examine the situation cautiously, taking careful consideration by examining the landowners' interests in retaining ownership of the land and balancing them against both the state's interest in retaining access to the land for purposes of revenue and the public's interest in accessing the land in exercise of their constitutionally protected freedom to fish—something that many outdoorsmen are now viewing as an empty-handed promise. A viable solution to this issue is to codify submerged marshlands as private things subject to public use, nearly paralleling riverbanks. Without legislative action, the landowners, the state, and the public are left in utter dismay. Residents of the state are left with one thing: confusion. The landowners are left to ponder which rights—if any—they retain over the land; the public is left wondering if there is any weight to the words “freedom to fish” in the Louisiana Constitution; and the state is left to wonder whether one of its main revenue sources will diminish.