

Public Access to Louisiana Beaches Following Publicly Funded Restoration Projects: The Reclamation of Fourchon Beach

Sharonne O’Shea*

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I. INTRODUCTION

If you live in Louisiana, how do you get to the beach? The state contains approximately forty-percent of the nation’s wetlands, the coast’s predominant feature, thus restricting beach recreation to a few sandy shores.¹ The scarcity of beaches makes for a compelling argument for public access at sandy spots along the Gulf of Mexico,

* Coordinator, Louisiana Sea Grant Legal Program. J.D., University of Oregon (1996); B.A. Alma College (1992). With assistance from Michelle Marney, Suzanne Wright, and Joe Stevenson. Research for this Article was funded by the Louisiana Sea Grant College Program, a part of the National Sea Grant College Program and maintained by the National Oceanic and Atmospheric Administration of the United States Department of Commerce. The Louisiana Sea Grant College Program at Louisiana State University is also supported by the State of Louisiana. The views expressed herein are the author’s own.

1. See Donald F. Boesch et al., *Scientific Assessment of Coastal Wetland Loss, Restoration and Management in Louisiana*, J. COASTAL RES., May 1994, at 1, 9; see also Oliver Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 7 (1983) (noting that “over five million acres of marshes, ridge lines, cheniers, and barrier islands” compose the coastal plain of Louisiana).

although it is questionable whether the law supports this argument. A recent coastal-use permit request for work on Fourchon Beach, Louisiana,² and the placement of unauthorized barriers thereon, brought to light questions regarding public use of Louisiana's coast that geography usually does not give citizens an opportunity to ask.³ This Article compares the ownership implications resulting from destructive storm events and the subsequent restoration of coastal property. This Article also addresses alternatives to ownership that provide public access rights, such as servitudes under the civil law. Finally, using Fourchon Beach as an example, this Article illustrates the animosity that can be generated when cherished public and private rights clash in the absence of jurisprudence to harmonize conflicting concerns.

Most will agree that the "equal footing" doctrine⁴ and the "public trust" doctrine⁵ provide authority for state ownership and management of some coastal areas. However, contention arises over just what land is subject to the state's ownership and management, particularly when hurricanes or other storm events alter the boundary between dry land and submerged areas.⁶ In such instances, ascertaining which property is subject to state control relies heavily upon factual inquiry, as well as application of property law principles.⁷ With varying outcomes,

2. Fourchon Beach is located approximately 70 miles south of New Orleans, between Port Fourchon and Grand Isle, Louisiana, on the Gulf Coast in Lafourche Parish. *See, e.g., Louisiana Fishing Magazine* (visited Mar. 28, 2000) <<http://www.lafishmag.com/publicbeach.html>> (providing a map and driving directions from New Orleans to Fourchon Beach).

3. *See* LAFOURCHE COASTAL ZONE MANAGEMENT PROGRAM, PERMIT APPLICATION # P971367 [hereinafter PERMIT APPLICATION # P971367] (on file with author).

4. *See* *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845) ("First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."); *see also id.* at 229 (noting the doctrine that new states are "admitted into the union on an *equal footing* with the original states, the constitution, laws, and compact, to the contrary notwithstanding") (emphasis added).

5. *See* *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-56 (1892) (holding that waterbottoms are held in trust for the public and that states may not alienate them in such a way that impedes public use). *See generally* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (discussing the public trust doctrine as it applies to natural resources).

6. *See, e.g., City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644 (Tex. Ct. App. 1981) (noting a distinction between erosion, which leads to loss of title, and avulsion, which does not lead to title loss); *Siesta Properties, Inc. v. Hart*, 122 So. 2d 218, 223 (Fla. Dist. Ct. App. 1960) (noting that an owner cannot claim additions to his land from accretion unless the accretion begins upon the owner's land and not that of the state).

7. *See City of Corpus Christi*, 622 S.W.2d at 644-45 (stating that plaintiff land owners must overcome a presumption of state ownership by showing avulsion or the rapid and perceptible removal of land); *see also Siesta Properties, Inc.*, 122 So. 2d at 223 (relating that the

some Gulf Coast states have addressed the boundary changes associated with hurricane damage;⁸ Louisiana has not.

In fact, Louisiana jurisprudence supports a variety of potential outcomes, with different interest groups urging application of their preference. Public access advocates assert that when the forces of nature expand a navigable waterbody, state ownership of that waterbody's bottomlands follows.⁹ Marsh owners support a "snapshot in time" analysis that holds static the boundaries of state ownership, as determined at the time of statehood.¹⁰ They argue that because a landowner owns everything above and below the soil, submergence of land does not divest the landowner of title.¹¹

Reclamation, however, can bring back land that has been lost to a waterbody.¹² The Louisiana Constitution grants a riparian landowner with enough money and machinery the opportunity to restore eroded land.¹³ This opportunity may pose an interesting

evidence respecting the physical condition of the area before and after the hurricane is considered in the determination of whether or not accretion occurred).

8. See generally *City of Corpus Christi*, 622 S.W.2d at 640; *Siesta Properties, Inc.*, 122 So. 2d at 218.

9. See *Miami Corp. v. State*, 173 So. 315, 318 (La. 1936).

10. See, e.g., Andy Crawford, *Are You Trespassing? Your Guess Is as Good as Anybody Else's*, LA. SPORTSMAN, May 1998, at 12 [hereinafter Crawford, *Are You Trespassing?*].

11. See LA. CIV. CODE ANN. art. 490 (West 2000) ("Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it."). Such an argument is likely motivated by the union of mineral rights with surface ownership in this oil- and natural gas-rich state. To lose ownership of the land would mean a concurrent loss of potentially valuable mineral rights. See *Barthold v. Dover*, 153 So. 49, 50 (La. Ct. App. 1934) ("[M]ineral rights constitute a servitude of mere right to go upon the land and explore for and reduce to possession minerals."); *Desormeaux v. Inexco Oil Co.*, 298 So. 2d 897, 899 (La. Ct. App. 1974) ("Under the law of capture, the landowner is not the owner of minerals beneath the surface of his lands. He has the right to search for and draw the mineral through the soil and thereby become the owner."). Article IX, section 4, of the Louisiana Constitution specially provides for mineral rights associated with coastal restoration projects, allowing the "state and the landowner having the right to reclaim or recover the land" to agree to the "disposition of mineral rights, in accordance with the conditions and procedures provided by law." LA. CONST. art. IX, § 4(A).

12. "Reclamation" is defined as "the raising of land through filling or other physical works which elevate the surface of the theretofore submerged land . . . to such heights as may . . . ensure reasonably permanent existence of the reclaimed lands." LA. REV. STAT. ANN. § 41:1702(F) (West 1990); see also BLACK'S LAW DICTIONARY 1277 (7th ed. 1999) (defining "reclamation" as "[t]he act or an instance of improving the value of economically useless land by physically changing the land").

13. See LA. CONST. art. IX, § 3 (The bed of a navigable waterbody may not be alienated "except for purposes of reclamation by the riparian owner to recover land lost through erosion. . . . Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use."). A riparian owner seeking to reclaim eroded land can apply to the Louisiana State Land Office, Lands and Waterbottoms Management Division. The application process consists primarily of routine paperwork, surveys of the property, and an agreement with the governor's office. See LA. REV. STAT. ANN. § 41:1702 (West 1990);

dilemma with regard to publicly sponsored reclamation projects. The state consistently assures riparian owners that the presence of a state-sponsored reclamation project does not create state ownership of the reclaimed land.¹⁴ Rather, following the rule that accretions belong to the upland riparian owner, the landowner will gain ownership of this newly created land.¹⁵ If one supports the idea that submerged land beneath a navigable waterway belongs to the state, then a restoration project completed with state monies gives a windfall of public land to a private owner at the public expense. Such a result could potentially violate the public trust doctrine. Conversely, state reclamation of waterbottoms using state funds may constitute a taking of the

Telephone Interview with Clay Carter, Section Manager, Louisiana State Land Office, Lands and Waterbottoms Management Division, Department of Natural Resources (July 6, 1998). Additionally, waterbottoms in the Coastal Zone require a coastal zone permit prior to reclamation. See LA. REV. STAT. ANN. § 41:1702 (West 1990); Telephone Interview with Rocky Hines, Manager of Permits and Mitigation Program, Office of Coastal Restoration and Management, Coastal Management Division, Louisiana Department of Natural Resources (July 6, 1998). Consequently, even if reclamation is undertaken during an “emergency” action, an after-the-fact permit would be necessary.

14. See, e.g., La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *3-*6 (Oct. 22, 1992) (addressing the question of “whether the public at large would have use or access to private property conserved, restored, created or enhanced by the expenditure of public funds,” and concluding that “the public at large and the state would not achieve any right of use or access or any vested interest in privately owned lands or waters which become the subject of [publicly funded] conservation and restoration projects”).

15. See LA. CIV. CODE ANN. art. 499 (West 2000) (stating that accretion formed as alluvion along a stream or river belongs to the owner of the bank). “Accretion” is defined as “[t]he gradual accumulation of land by natural forces, esp. as alluvium is added to land situated on the bank of a river or on the seashore.” BLACK’S LAW DICTIONARY 21 (7th ed. 1999). Authors Frank E. Maloney and Richard C. Ausness have noted the varying definitions, yet interchanging use of the terms “accretion” and “alluvion”:

Accretions or accreted lands consist of additions to the land resulting from the gradual deposit by water of sand, sediment or other material. The term applies to such lands produced along both navigable and non-navigable water. Alluvion is that increase of earth on a shore or bank of a stream or sea, by the force of the water, as by a current or by waves, which is so gradual that no one can judge how much is added at each moment of time. The term “alluvion” is applied to the deposit itself, while accretion denotes the act, but the terms are frequently used synonymously.

Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 225 (1974); see also BLACK’S LAW DICTIONARY 77 (7th ed. 1999) (defining the term “alluvion” as “[a] deposit of soil, clay, or other material caused by running water; esp., in land law, an addition of land caused by the buildup of deposits from running water, the added land then belonging to the owner of the property to which it is added”).

While accretion formed as alluvion on a navigable river or stream belongs to the riparian owner, such ownership is subject to a right of public use. See La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *5-*6 (Oct. 22, 1992) (“Should accretion form as alluvion from a [publicly funded] coastal restoration or vegetation project on a navigable river or stream, it would belong to the owner of the bank, subject to the right of public use defined by the Civil Code.”); see also LA. CIV. CODE ANN. arts. 456, 499 (West 2000).

landowner's constitutional right to restore the land.¹⁶ In either case, the ability of the state to counteract coastal land loss is compromised.

An ancillary issue presents itself with regard to Fourchon Beach. Whether the public owns restored dry land or not, they do have a right to use seashore areas—areas where the waters of the Gulf periodically wash upon the sand and recede.¹⁷ However, exercising that right may pose some practical difficulties. A dispute rages at Fourchon Beach over the ownership of a “sand road” parallel to the Gulf.¹⁸ The port and public access advocates claim the public created the road while undertaking post-hurricane restoration activity,¹⁹ while others assert that the strip of land is privately owned.²⁰ The dispute over this sand road arose after the Louisiana Department of Natural Resources (LDNR) armored the area with sandbags to bolster the land and protect it from wave action. In effect, LDNR's actions served to barricade the end of the only undisputedly public road providing direct vehicular access to the beach, highway 3090 (LA 3090).²¹ The public now uses the sand road as a means to circumvent the barricade and access the beach. However, vehicular use of the sand road exacerbates beach erosion.²² Nevertheless, given the scarcity of beaches in Louisiana, prohibiting public use of the sand road would effectively deny many area residents the opportunity to enjoy a local

16. See U.S. CONST. amends. V, XIV (prohibiting the taking of private property for public use); LA. CONST. art. 1, § 4.

17. See LA. CIV. CODE ANN. art. 450 (West 2000) (providing that the seashore is a public thing that is “owned by the state or its political subdivisions in their capacity as public persons”); *id.* art. 452 (providing that public things “are subject to public use” and that “[e]veryone has the right . . . to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like”). In Louisiana, the seashore is defined as “the space of land over which the waters of the sea spread in the highest tide during the winter season.” LA. CIV. CODE ANN. art. 451 (West 2000); see also *Buras v. Salinovich*, 97 So. 748, 750 (La. 1923) (“The fact that it is subject to tidal overflow does not characterize the land as ‘seashore,’ under the provisions of the Code. . . . [The term ‘seashore’ has] reference to the gulf coast, and to the lakes, bays and sounds along the coast.”).

18. See Joanna Weiss, *Plan to Fence LaFourche Beach Blasted*, TIMES-PICAYUNE (New Orleans), Nov. 18, 1997, at B3; Telephone Interview with Ted Falgout, Executive Director, Greater Lafourche Port Commission (June 3, 1998) [hereinafter Falgout Telephone Interview].

19. See *id.* The law surrounding creation of public roads on private property is generally established in Louisiana. See *St. Charles Parish Sch. Bd. v. P & L Inv. Corp.*, 674 So. 2d 218 (La. 1996).

20. See Weiss, *supra* note 18, at B3.

21. See *id.* One commentator suggests that reclamation or restoration projects that interfere with public access rights violate the public trust doctrine. See Kathy Ketchum, *Waterways of the Marsh: Marsh Management Plans and Public Rights*, 1 TUL. ENVTL. L.J. 3, 5 (1988).

22. See Weiss, *supra* note 18, at B2 (noting complaint that “vehicles have destroyed vegetation and damaged land on the beach”).

beach environment.²³ Thus, while seemingly local in scope, this dispute implicates broader issues concerning the nature and duration of public access to Louisiana beaches.

II. THE SETTING: FOURCHON BEACH, HURRICANE JUAN, AND FEATS OF ENGINEERING

In 1985, Hurricane Juan hit the Fourchon Beach area, destroying much of the beach.²⁴ For approximately seven years thereafter the public spent three million dollars to rebuild a five thousand-foot submerged section of the nine-mile beach.²⁵ The Federal Emergency Management Administration (FEMA), the LDNR, the Greater Fourchon Port Commission (the Port Commission), and the Wisner Foundation (Wisner), which owns most of the remaining land near Fourchon Beach, have supported the rebuilding effort, much of which Americorps volunteers completed.²⁶ Yet, despite the permit process required for activity in the coastal zone, a paper trail for these activities is nonexistent.²⁷ However, activity at the site included building a retaining wall for dredged material, backfilling with dredged material, erecting sand-retaining fences, and replanting vegetation.²⁸ The Port Commission claims that the controversial sand road was constructed during the course of these activities.²⁹

23. On a given summer weekend in Lafourche Parish, the nine-mile strip of sand along the Louisiana Gulf Coast known as Fourchon Beach hosts roughly 1,000 area residents. *See Weiss, supra* note 18, at B1-2.

24. *See id.* Hurricane Juan was a category 1 storm (74-95 mph winds) and ranked the fourteenth most costly hurricane in history at \$2.1 billion in damages. For more information on Hurricane Juan, see *Costliest Storms in U.S. History* (last modified Mar. 28, 2000) <<http://www.washingtonpost.com/wp-srv/weather/hurricane/info/costliest.htm>>.

25. *See Weiss, supra* note 18, at B2.

26. *See id.* (noting that the rebuilding effort “was financed with private donations, state and federal money, and some money from the port, a public entity”); Falgout Telephone Interview, *supra* note 18.

27. Prior to the publication of this Article, I searched the LDNR permit files and examined each permit filed under the name of the Port Commission. Jeff Harris, Consistency Coordinator, Department of Natural Resources, examined the state’s consistency database for activity undertaken by FEMA. Neither of us located a permit for the placement of the barricade or construction of the sand road. Ted Falgout, Executive Director, Greater Lafourche Port Commission, confirmed that LDNR did not require a permit. *See* Facsimile from Ted Falgout, Executive Director, Greater Lafourche Port Commission, to Sharonne O’Shea, Coordinator, Louisiana Sea Grant Legal Program 1 (June 6, 1998) (on file with author); *see also* Letter from C.G. Groat, Assistant to the Secretary, Coastal Management Division, LDNR, to Ted Falgout, Executive Director, Greater Lafourche Port Commission 1 (Apr. 24, 1986) (determining that the activity fell within the general spoil deposition permit issued by the Army Corps of Engineers and therefore no permit was necessary) (on file with author).

28. *See* Falgout Telephone Interview, *supra* note 18; *see also* Weiss, *supra* note 18, at B2.

29. *See* Falgout Telephone Interview, *supra* note 18.

The Caillouet Land Corporation (Caillouet) has claimed ownership of the strip of beach below the sand road and requested a permit to place pilings at four-foot intervals across the disputed beach area, to the mean high water line.³⁰ Caillouet owns property on both sides of LA 3090, at the point where the road is barricaded.³¹ The pilings were proposed in order to restrict vehicles from straying onto Caillouet property while still allowing people to access the beach by foot.³² The proposal does not, however, make allowances for heavy ice chests and fishing gear, which are generally loaded into vehicles and driven onto the beach.

Wisner dedicated its land holdings in the Fourchon Beach area to the recreational use of Louisiana citizens.³³ In 1985, Caillouet granted a servitude to the Port Commission across Caillouet property, further inland.³⁴ This servitude was intended to connect LA 3090 with the Wisner property, thus allowing the public to reach the shore by traveling from LA 3090, over Caillouet's property via the servitude, and south over the Wisner land to the coast.³⁵ However, diagrams of the servitude suggest it does not actually connect LA 3090 with the Wisner property and, as a practical matter, the land comprising the

30. See PERMIT APPLICATION # P971367, *supra* note 3; see also Weiss, *supra* note 18, at B2 (discussing Caillouet's proposal).

31. See PERMIT APPLICATION # P971367, *supra* note 3; see also Joe Macaluso, *No Cars Allowed: Caillouet Corporation Restoring Fourchon Beach, Limiting Access*, BATON ROUGE ADVOC., Apr. 5, 1998, at C18.

32. See Macaluso, *supra* note 31, at C18. Caillouet's noble endeavor to protect a patch of Louisiana's quickly fading coastline from the erosive forces of vehicular traffic is questionable in light of the corporation's plans for cabins, a sports field, and restrooms in the area. See Weiss, *supra* note 18, at B3; Mike St. Pierre, local resident, Remarks at the Lafourche Parish Council Coastal Zone Management Public Hearing for Caillouet Land Corporation Permit # P971367 (Nov. 4, 1997) [hereinafter Mike St. Pierre, Remarks] ("We came over here for a hearing on three rows of pilings to restrict access, now we have a commercial plan for development on Fourchon Beach.") (transcript on file with author); see also Andy Crawford, *Fourchon Beach Owner Says Abuses Forcing His Hand*, LA. SPORTSMAN, May 1998, at 16, 21.

33. See Macaluso, *supra* note 31, at C18. The Louisiana Department of Wildlife and Fisheries manages the Wisner property. Cathy Norman, Secretary-Treasurer, Wisner Donation Advisory Committee, at the Lafourche Parish Council Coastal Zone Management Public Hearing for Caillouet Land Corporation (Nov. 4, 1997).

34. See Servitude of Passage, Doc. 639399, filed with Clerk of Court, Lafourche Parish, Louisiana (Dec. 3, 1985) (on file with author). The document evidences an agreement between Caillouet and the Port Commission granting a right of passage "conditioned upon the [Port Commission] constructing, maintaining and policing a road thereon." *Id.* at 1. The servitude agreement continues:

This right of passage is further conditioned upon the said road and right of passage being used as a means of access for the public in its use of the beach west of Pass Fourchon on the gulf coast [The parties] agree that the said road shall not be dedicated to the public, and its use shall be private in nature

Id. at 1-2 (emphasis added).

35. See *id.*

servitude has been eroded to the point that it is no longer a feasible route.³⁶ Moreover, as noted in the text of the servitude agreement, there appears to be some question about whether the servitude was for official Port Commission business exclusively or for public access purposes as well.³⁷

III. APPLICABLE LEGAL PRINCIPLES ALLOCATING OWNERSHIP

A. *The Equal Footing Doctrine, the Submerged Lands Act, and the Public Trust Doctrine*

*The public's expectation of access considerably antedates any private development on the coast It is therefore private landowners who threaten the disruption of settled public expectations.*³⁸

According to the “equal footing” doctrine and the Submerged Lands Act,³⁹ states own the beds of navigable water bottoms, including the beds of the sea, up to three miles out from the land.⁴⁰ States own the waterbottoms on behalf of the public.⁴¹ Thus, their alienation is restricted and uses are limited.⁴² In *Shively v. Bowlby*, the United States Supreme Court acknowledged that each state had the power to govern the lands below the high water mark and that approaches to governance of these lands would vary among the states.⁴³

36. *See id.*

37. *See id.*

38. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 847-48 (1987) (Brennan, J., dissenting).

39. 43 U.S.C. §§ 1301-1356 (1994 & Supp. III 1997).

40. *See id.* §§ 1311(a), 1312; *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845) (relying upon equal footing doctrine); *Shively v. Bowlby*, 152 U.S. 1, 26, 57-58 (1894) (same).

41. *See Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-56 (1892) (holding that waterbottoms are held in trust for the public); LA. CIV. CODE ANN. arts. 450-452 (West 2000); DAVID C. SLADE ET AL., COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES (2d ed.1997).

42. *See Illinois Cent. R.R.*, 146 U.S. at 452-56; *see, e.g.*, LA. CONST. art. IX, § 3 (prohibiting “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”); *see also* James Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 865-68 (1992) (discussing the “fairly strict confines” within which a state may alienate public trust waterbottoms).

43. 152 U.S. at 557-58; *see also* *Bell v. Town of Wells*, 557 A.2d 168, 176-79 (Me. 1989) (holding unconstitutional a broad statutory extension of the public trust doctrine to include unlimited recreational activity in addition to the traditional, common law easement for “fishing, fowling, and navigation and related uses”); *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987) (“The rights Wisconsin citizens enjoy with respect to bodies of water held in trust by the state include the enjoyment of natural scenic beauty as well as the purposes of navigation, swimming and hunting.”); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363-66 (N.J. 1984)

The Louisiana Constitution, both in 1921 and in the 1974 revision, recognized a “public trust” for the protection, conservation, and replenishment of natural resources.⁴⁴ The legislature enacted statutes to implement the provisions⁴⁵ and vested authority to manage these state-owned properties in the LDNR.⁴⁶ The Civil Code provides that the seashore is a “public thing,” that is “owned by the state or its subdivisions in their capacity as public persons.”⁴⁷ As such, the seashore is “subject to public use in accordance with applicable laws and regulations.”⁴⁸ Thus, in Louisiana, the seashore is also subject to the public trust doctrine.⁴⁹

The mean high water mark typically determines the landward boundary of state ownership.⁵⁰ Nature and mankind cause this boundary to change over time, resulting in a variety of challenging property questions.⁵¹ As illustrated below, the factual determination

(extending public access to municipally and privately owned “dry sand areas as well as the foreshore,” yet restricting public access to privately owned areas to circumstances “where use of dry sand is essential or reasonably necessary for enjoyment of the ocean”).

44. See LA. CONST. art. VI, § 1 (1921) (“The natural resources of the State shall be protected, conserved and replenished . . .”); LA. CONST. art. IX, § 1 (1974) (“The natural resources of the state, . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”).

45. See, e.g., LA. CIV. CODE ANN. art. 450 (West 2000); LA. REV. STAT. ANN. § 41:1701 (West 1990) (prescribing statutory policy to protect, administer, and conserve “[t]he beds and bottoms of all navigable waters and the banks or shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes . . . to best insure full public navigation, fishery, recreation, and other interests”).

46. See LA. REV. STAT. ANN. § 41:1701 (West 1990).

47. LA. CIV. CODE ANN. art. 450 (WEST 2000).

48. *Id.* art. 452.

49. See Robert E. Tarcza, *The Public Trust Doctrine as a Basis For Environmental Litigation in Louisiana*, 27 LOYOLA L. REV. (New Orleans) 469, 475-76 (1981).

50. See *State v. Placid Oil Co.*, 300 So. 2d 154, 157 (La. 1973); La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *4 (Oct. 22, 1992) (“As to lakes, bays and arms of the sea, the state owns the beds and bottoms up to the ordinary high water mark of 1812 . . .”). See generally Maloney & Ausness, *supra* note 15.

51. See generally Maloney & Ausness, *supra* note 15, at 224-37 (discussing the “ambulatory nature” of coastal boundaries). The Louisiana Attorney General has noted such boundary changes and their effects in Louisiana:

[S]ince the time of state sovereignty, 1812, there have been enormous changes in the size, shape and configuration of land and water forms, land/water contacts and the characteristics and appearance of formerly natural navigable water bodies throughout the state. . . . Consequently, many land/water boundaries defining private/public boundaries are now submerged and may be determined only by complex and technical analysis of land and water elevation data

La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *4 (Oct. 22, 1992). More dramatically, the Coalition to Restore Coastal Louisiana describes the rapidly changing nature of the Louisiana coast as follows:

Simply put, coastal Louisiana is disappearing. The past several generations have seen the delta disappear at the rate of 25-30 square miles per year. Roughly every thirty

of how a boundary changes bears heavily upon ultimate ownership under Louisiana jurisprudence and consequently on whether public trust restrictions apply.⁵² Adding to the confusion is the varying determinations of states regarding the rights and duties incidental to ownership of lands abutting the seashore, or “littoral” ownership.⁵³

minutes an area of coastal land the size of a football field vanishes only to be replaced by open water. This pattern of land loss has resulted in the shrinkage of the land area in the delta from about 4 million acres in 1930 to about 2.8 million acres today.

Coalition to Restore Coastal Louisiana, *Coalition History and Accomplishments* (last modified Mar. 28, 2000) <<http://www.crcl.org/background/index.htm>>.

An erroneous 1872 survey of the Louisiana coast exacerbates the boundary problem by eliminating a reliable baseline from which to compare changes over time. See Andy Crawford, *Keep Out!*, LOUISIANA SPORTSMAN, June 21, 1998, at 21 [hereinafter Crawford, *Keep Out!*]; Crawford, *Are You Trespassing?*, *supra* note 10, at 12.

52. See *infra* Part III.B. Boundary changes may be attributable to a variety of processes, including accretion, dereliction, erosion, submergence and reemergence, and subsidence. See *Dickson v. Sandefur*, 235 So. 2d 579, 584-85 (La. Ct. App. 1970); see also Maloney & Ausness, *supra* note 15, at 224-26 (discussing accretion, avulsion, erosion, and reliction). For a legal characterization of accretion, avulsion, and erosion, see DONNA CHRISTIE & RICHARD G. HILDRETH, COASTAL AND OCEAN MANAGEMENT LAW IN A NUTSHELL 14-17 (2d. ed. 1994).

53. See BLACK’S LAW DICTIONARY 945 (7th ed. 1999) (providing that the term “littoral” relates “to the coast or shore of an ocean, sea, or lake”); Maloney & Ausness, *supra* note 15, at 187-88 (discussing rights of littoral owners). Louisiana statutory law delineates the rights and duties of “riparian” ownership, that of property adjacent to rivers and streams. See LA. REV. STAT. ANN. 9:1102-:1102.2 (West 1990); LA. CIV. CODE ANN. arts. 503, 506 (WEST 2000); see also *supra* notes 13-15 and accompanying text (discussing riparian ownership of reclaimed land). Sometimes, riparian doctrines are applied by analogy to coastal property, while in other instances such application is inappropriate. See, e.g., *Miami Corp. v. State*, 173 So. 315 (La. 1936); *infra* notes 61-63 and accompanying text. However, reference to “littoral” ownership is proper in the seashore context. See Maloney & Ausness, *supra* note 15, at 187 n.8 (“The term ‘riparian’ is applied to fresh water streams, while the term ‘littoral’ is used in connection with lakes and the seashore.”).

With regard to ownership of accreted property, many states make important distinctions based upon whether the land in question is littoral or riparian, and whether the emergence of the land is sudden, gradual, natural, or artificial. See Maloney & Ausness, *supra* note 15, at 226; see also *supra* note 15 (discussing and defining “accretion” and “alluvion”). For instance, in California, all artificially created littoral accretions belong to the state. See *State ex rel. State Lands Commission v. Superior Court of Sacramento County*, 11 Cal. 4th 50, 69 (1995). In Washington, state law makes all coastal accretions state property. See *Hughes v. Washington*, 389 U.S. 290, 293 (1967). In Louisiana, ownership of accreted property varies with regard to the classification of the waterbody. See La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *5 (Oct. 22, 1992). Alluvion formed on a navigable river or stream belongs to the riparian owner, subject to a right of public use. See *id.* However, alluvion formed on the seashore or a navigable lake belongs to the state. See *id.* These rules of accretion “apply even where the change is an indirect result of artificial works of man.” *Id.* (noting further that Louisiana jurisprudence indicates that “artificial works which result in rapid development of accretion may also result in application of the usual rules of [accretion]”).

B. *The Law of Natural Coastal Processes: Erosion, Submergence, Avulsion, and Storms*

The hurricanes that regularly visit the Gulf Coast cause flooding, storm surge, and heavy rains, which can, and often do, cover dry land with water for varied periods of time. As noted below, a different result in property ownership may be reached depending upon whether a hurricane caused “erosion,” “submergence,” or “avulsion” of the land. Following Hurricane Juan’s assault on Fourchon Beach in 1985, each of these theories gained support from proponents depending upon the property ownership sought to be established.

The confusion and difficulty in this area of law stems neither from the inherent complexity of the legal principles nor their novelty. Coastal ownership doctrines are not the modern, ever-changing tax code; they have remained relatively static since the ancient days of monarchy.⁵⁴ Over time, our growing understanding of coastal processes has been incorporated into property law, contributing to the loss of discrete meanings for doctrinal terms of art and allowing coastal doctrines to be interpreted in light of the facts presented.⁵⁵ Moreover, coastal ownership questions are inherently fact driven and these facts often become complex in Louisiana, where there are many different types of waterbodies. While tedious perhaps, undertaking the factual analysis to distinguish one type from the other allows application of the appropriate doctrine and maintains clarity and distinction in the jurisprudence.

Coastal erosion occurs when land bordering the sea is gradually worn away, or eroded, by natural processes.⁵⁶ *Miami Corp. v. State* is the seminal case in Louisiana’s development of the ownership consequences attributable to erosion.⁵⁷ The issue before the *Miami Corp.* court was whether a riparian landowner retained title to eroded land, which became submerged below the high-water mark of a navigable lake.⁵⁸ The court first reasoned that, although the then-current version of the Civil Code did not specifically list navigable lakes among public things, Louisiana jurisprudence recognized them

54. See Maloney & Ausness, *supra* note 15, at 189-93.

55. For example, riparian law is commonly applied to littoral land. See *supra* note 53.

56. See BLACK’S LAW DICTIONARY 562 (7th ed. 1999) (defining “erosion” as “[t]he wearing away of something by action of the elements; esp., the gradual eating away of soil by the operation of currents or tides”); see also Maloney & Ausness, *supra* note 15, at 225 (defining “erosion” as “the gradual and imperceptible wearing away of land bordering a body of water by the natural action of the elements”).

57. 173 So. 315 (La. 1936).

58. See *id.* at 316-18, 322.

as such.⁵⁹ The court noted that the overwhelming body of Louisiana jurisprudence holds that if a lake is in fact navigable, and was navigable in fact when the state was admitted into the Union in 1812, then the bed of the lake is a public thing, the title to which is vested in the state.⁶⁰ Having determined that the law was settled with regard to the beds of navigable lakes, the court narrowed the issue and stated the applicable rule as follows:

[T]he question arises whether the eroded or disputed area, which has been added to the bed of the lake by the combined forces of nature—subsidence and erosion—has so become a part of the bed of the lake, that it is now the property of the State, and the riparian proprietors have lost their title. It appears to be the rule that where the forces of nature—subsidence and erosion—have operated on the banks of a navigable body of water, regardless of whether it be a body of fresh water or the sea, or an arm of the sea, the submerged area becomes a portion of the bed and is insusceptible of private ownership. This is of necessity the law, because to hold otherwise would be contrary to sound principles and public policy upon which the rule is predicated. It is the rule of property and of title in this State, and also a rule of public policy that the State, as a sovereignty, holds title to the beds of navigable bodies of water.⁶¹

Accordingly, the court held that the submerged property at issue was not susceptible of private ownership, as it was incorporated into the bed of a navigable lake and was therefore a public thing, title to which was vested in the state. Yet, given the above quoted passage, it is readily apparent that the court's holding applies broadly, beyond the limited class of navigable lakes and encompasses the entirety of the state's navigable waters.⁶² Notably, the *Miami Corp.* court reasoned that its decision rested on conformity with civil law policy precluding private ownership of navigable waterbottoms, not on a doctrine of

59. *See id.* at 318-22.

60. *See id.* At the time the court considered the issue, Civil Code article 453 defined "public things" to include "navigable rivers, seaports, roadsteads and harbors, highways and the beds of rivers, as long as the same are covered with water." LA. CIV. CODE ANN. art. 453 (West 1972).

61. *Miami Corp.*, 713 So. at 322.

62. In effect, the court extended the then-limited coverage of article 453 to all navigable waters. *See supra* note 59 (providing the text of article 453 as it appeared at the time of the *Miami Corp.* decision). In actuality, the court merely recognized and reinstated the overwhelming body of jurisprudence which included all navigable waters of the state within the category of public things. *See generally Miami Corp.*, 173 So. at 318-27 (discussing case law concerning ownership of the beds of navigable bodies of water). The current version of the Civil Code now codifies the holding in *Miami Corp.* *See* LA. CIV. CODE ANN. art 450 (West 2000) (providing that "the waters and bottoms of natural navigable water bodies" are public things).

state accession to ownership by erosion.⁶³ The court addressed its public policy concerns following its statement of the applicable rule:

The mere fact that a portion of the bed of a navigable body of water may have been formed by the action of natural forces does not change the situation, for the rule is, that when submersion occurs, the submerged portion becomes a part of the bed or bottom of the navigable body of water in fact, and therefore the property of the State, by virtue of its inherent sovereignty, as a matter of law. If this were not so, there could be a complete rim of privately owned submerged lands around the entire circumference of a navigable lake. This is wholly undesirable and destructive of progress, because it would practically deprive the public of the use of the lake under State laws.⁶⁴

Another instructive case in this area is *Bruning v. City of New Orleans*.⁶⁵ The *Bruning* court speculated that the shoreline of Lake

63. See *Miami Corp.*, 713 So. at 323, 327. The court based its holding on Civil Code provisions concerning public things in general, rather than specific provisions of the Civil Code dealing with alluvion, dereliction, and reliction. See *id.* at 327 (holding that the bed of a navigable lake is “a public thing insusceptible of private ownership under the provisions of articles 450 and 453 of the Revised Civil Code” and refusing to consider the applicability of Civil Code articles 509 and 510); see also LA CIV. CODE ANN. arts. 450, 453, 509, 510 (West 1972). But see *California Co. v. Price*, 74 So. 2d 1, 9-10 (La. 1954) (noting that the “practical effect” of the holding in *Miami Corp.* “was to necessarily extend the provisions of Articles 509 and 510 . . . so as to include other navigable bodies of water insofar as the right of accession by the State is concerned”).

In *Price*, the Louisiana Supreme Court called into question its prior reliance on specific Civil Code provisions for its conclusion in *Miami Corp.* that the beds of navigable waters are “insusceptible” of private ownership. See 74 So. 2d at 10. The *Price* court noted that under the Civil Code, public things “are not necessarily insusceptible of private ownership;” rather, “because of their nature,” such things “are committed to public use exclusively.” *Id.* Notably, however, the court in *Price* did not take “issue with the pronouncement of the [*Miami Corp.*] court, that it is inimical to the policy of our Civil Code to permit private ownership of the beds of navigable waters.” *Id.*; see also *id.* at 11 (limiting the holding in *Miami Corp.* to provide only that “the bottoms or beds of navigable waters are public things within the contemplation of our Civil Code and it is contrary to the policy expressed therein to permit private interests to own them”).

64. *Miami Corp.*, 173 So. at 323; see also *id.* at 319 (noting similar public policy concerns regarding private ownership of the lake bottom at issue).

65. 115 So. 733 (La. 1926) (published opinion includes the initial decision in the case, as well as the decisions on first rehearing, July 11, 1927, and second rehearing, February 13, 1928). Due to procedural issues, the case is primarily illustrative, not dispositive, on the issue of public ownership. The Supreme Court of Louisiana, when first it considered the *Bruning* plaintiff’s claim, characterized it as possessory, rather than petitory, and reiterated this characterization at the opening of each subsequent rehearing. See *id.* at 734, 736 (first rehearing), 738 (second rehearing). On the second and final rehearing of the case, the supreme court opined that “the court below went beyond the issue involved in the case, deciding the question of ownership.” *Id.* at 739. Consequently, the court’s “decree that the ownership of the property, its ownership not being at issue, was in the defendant, was erroneous.” *Id.* Chief Justice O’Niell, concurring in the second rehearing, further explained:

The judgment should merely have dismissed the plaintiff’s possessory action A possessory action against a municipality, to oust the municipality from the possession

Ponchartrain had remained intact since 1873 because of the breakwater erected by the city of New Orleans “in the shape of a ‘protection levee,’ . . . which prevented further erosion.”⁶⁶ The court denied the existence of “a ‘right of batture, alluvions and accretions’ on . . . an arm of the sea . . . ; [and] in any case as to lands reclaimed by artificial process and with public money.”⁶⁷ Finding further that the property at issue was once seashore and lakebottom recovered by artificial means and with public funds, and dedicated to public park purposes, the court determined the property was publicly owned.⁶⁸

Advocates of public ownership for Fourchon Beach cite the natural erosive forces of Hurricane Juan in support of their position. For example, Susan Terrebonne, a member of the Lafourche Parish Council Coastal Zone Board remarked: “The land in question immediately adjacent to the roadway is not obviously [Caillouet’s], in my eyes, in my opinion. This land has been built up after disappearing into the gulf from erosion. There has [sic] been many efforts environmentally to recreate this land and to protect it.”⁶⁹

The law of submergence, however, provides support for the contrary proposition, that a landowner retains the property in question. In *Hughes v. Birney’s Heirs*, the ever-changing course of the Mississippi River submerged a portion of De Soto Point.⁷⁰ Subsequently, the land was restored through the gradual accumulation of sediments.⁷¹ The Louisiana Supreme Court cited then-current Civil

of property that is being used for a public purpose, is an improper and unauthorized proceeding, because the claim of the municipality that the property is public property, and is therefore not subject to private ownership, necessarily puts at issue the question of ownership, and the right of possession in such a case is merely an incident or a necessary consequence of the main issue. Bringing a possessory action in such case, instead of a petitory action, against the municipality, is a begging of the question of ownership. That ought to be the doctrine of our decision in this case, without expressing an opinion as to whether the city has the legal right to occupy as public property the property which the city is in fact—whether rightfully or wrongfully—using and occupying as public property.

Id. at 739-40 (O’Niell, C.J., concurring).

66. *Id.* at 738.

67. *Id.* (citations omitted).

68. *See id.*

69. Susan Terrebonne, Remarks at the Lafourche Parish Council Coastal Zone Management Public Hearing for Caillouet Land Corporation Permit # P971367 (Nov. 4, 1997) [hereinafter Susan Terrebonne, Remarks] (transcript on file with author).

70. 32 So. 30, 131 (La. 1902). In an Alabama case involving temporary submersion resulting from a hurricane, the court cited *Hughes* in support of the finding that submersion by natural forces does not destroy title to the submerged land. *See United States v. Property on Pinto Island*, 74 F. Supp. 92, 104 (S.D. Ala. 1947). However, no court has addressed the consequences of land loss due to permanent, hurricane-induced submersion.

71. *See Hughes*, 32 So. at 31-32.

Code article 505⁷² for the proposition that ownership of the soil is accompanied by ownership of “all that is directly above and under it.”⁷³ The soil over which the river made a temporary course “never ceased to belong to defendants . . . , and the deposits placed upon it by the river in retiring from it . . . became likewise their property.”⁷⁴ Factually, the court found that during low water stages the land was dry.⁷⁵ The court declined to apply the principles of land acquisition by accretion or dereliction, favoring instead a theory of reappearance after submergence.⁷⁶ In support, the court cited, among other authorities, a New York Court of Appeals case, *Mulry v. Norton*, noting that the *Mulry* court held that:

If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner. No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed, and assert his proprietorship, when the identity can be established by reasonable marks, or by situation, extent of quantity, and boundary on the firm land.⁷⁷

The submersion argument finds contemporary supporters in Louisiana. Land companies holding title to marsh argue that they do not control the height of the water, that navigability is a natural variable dependent upon depth, and that “[j]ust because water covers

72. At the time of the court’s decision, article 505 read as follows:

The ownership of the soil carries with it the ownership of all that is directly above and under it.

The owner may make upon it all the plantations, and erect all the buildings which he thinks proper, under the exceptions established in the title: *Of Servitudes*.

He may construct below the soil all manner of works, digging as deep as he deems convenient, and draw from them all the benefits which may accrue, under such modifications as may result from the laws and regulations concerning mines and the laws and regulations of the police.

LA. CIV. CODE ANN. art. 505 (West 1972) (emphasis in original). After revision in 1979, the principles of article 505 were rephrased in article 490:

Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.

LA. CIV. CODE ANN. art. 490 (West 2000).

73. *Hughes*, 32 So. at 32.

74. *Id.*

75. *See id.*

76. *See id.*

77. *Id.* at 33. The *Hughes* court appears to be quoting the holding in *Mulry v. Norton*, 3 N.E. 581 (N.Y. 1885); however, the exact quotation is not found in the *Mulry* opinion. Nevertheless, the substance of the quotation may be taken from *Mulry*, 3 N.E. at 585.

the land doesn't mean we don't own the land."⁷⁸ Essentially, these companies argue for confining state ownership of waterbottoms to a snapshot at the time of statehood; variations in waterways and water depths thereafter do not alter ownership of land once privately owned.⁷⁹ The argument gains support in that many submerged areas remain subject to property taxes, paid by the upland owner.⁸⁰

In applying the submergence doctrine, however, one must be wary and mindful that a contrary result arises for nonriparian property. The case of *Gaudet v. City of Kenner* demonstrates that, with respect to land adjacent to Lake Ponchartrain, "any subsequent submersion would serve to revest title to [the land], or parts of it, in the State. Once lost, lake bed remains State property until otherwise alienated; it does not vest in a private riparian owner should it reappear."⁸¹ Exclusive application of the submergence doctrine to riparian property would preclude it from use at Fourchon Beach.

Finally, some may deem the actions of Hurricane Juan at Fourchon Beach avulsive.⁸² In determining title to land lost to the sea, the New York Court of Appeals, in *Schwarzstein v. B.B. Bathing Park, Inc.*, noted the characteristics of avulsion: "The change in the foreshore . . . submerging the land . . . was not a gradual or imperceptible encroachment on the land, but occurred by reason of avulsion, sudden or violent action of the elements perceptible while in progress."⁸³ The court held that the loss of the land by avulsion "did not change the boundaries, nor did the owner lose his title, where the extent and quantity of his land was apparent."⁸⁴ Thus, given the

78. Crawford, *Are You Trespassing?*, *supra* note 10, at 14 (quoting unidentified "land manager for a major land-holding company").

79. In fact, the absence of an accurate survey of the state at the time of statehood contributed to outright grants of title to submerged lands. See Crawford, *Keep Out!*, *supra* note 51, at 21-22.

80. See Marc Hebert, *Coastal Restoration Under CWPPRA and Property Rights Issues*, 57 LA. L. REV. 1165, 1186 (1997).

81. 487 So. 2d 446, 448 (La. Ct. App. 1986).

82. See BLACK'S LAW DICTIONARY 132 (7th ed. 1999) (defining "avulsion" as the "sudden removal of land caused by a change in a river's course or by flood").

83. 197 N.Y.S. 490, 492 (App. Div. 1922).

84. *Id.* The court, quoting *Hargreaves' Law Tracts*, continued:

"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or . . . the [boundaries] can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his propriety . . . though the inundation continue for forty years . . . for he cannot lose his propriety of the soil, though it be for a time become part of the sea . . ."

Id. at 493 (quoting HARGREAVES' LAW TRACTS (Sir Matthew Hale's de Jure Maris) 15, 17).

Schwarzstein court's reasoning, it can be fairly said that an avulsive event is discrete in time and leaves property boundaries intact.

The distinction between erosion and avulsion rests primarily upon the magnitude of time over which the land loss occurs; sudden losses are considered avulsive in nature, whereas gradual losses over prolonged periods of time are considered erosive. However, subjective determinations of avulsion often distort this distinction. For example, the New York State Supreme Court concluded that avulsion could occur over a three-year period.⁸⁵ In *In re Point Lookout*, the court considered the land loss avulsive despite the three-year period because "much of the loss took place upon particular occasions during heavy storms These losses were not gradual and imperceptible [but] . . . caused by what might well be described as a cataclysm or catastrophe."⁸⁶ Attributing the loss of land to avulsion meant the claimants still owned the land despite its submergence for three years.⁸⁷ The court cited a case where property had remained submerged by the ocean for thirty years and title remained in the individual owner subject to the public right of navigation over waters.⁸⁸ However, the important factor in avulsion is not the length of submergence but the amount of time over which land loss occurred.⁸⁹

While the concept of avulsion has a long history of application to changes in river courses,⁹⁰ relatively little jurisprudence addresses the nature and consequence of hurricanes. In the recent past, other Gulf Coast jurisdictions have considered the characterization of land loss attributable to coastal storms; Louisiana has not.⁹¹ The results vary by state with some states finding severe storms avulsive and others

85. See *In re Point Lookout*, 144 N.Y.S.2d 440, 444 (Sup. Ct. 1954).

86. *Id.*

87. See *id.* at 444-45.

88. See *id.* at 444 (citing *City of New York v. Realty Ass'n*, 176 N.E. 171 (N.Y. 1931)).

89. Recall that avulsion is the rapid and perceptible removal of land. See *supra* note 82.

90. See, e.g., *Nebraska v. Iowa*, 143 U.S. 359, 363-64 (1892) (stating that the concept can be traced to the laws of Rome); *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1919) (noting that the concept is settled beyond dispute).

91. See *City of Corpus Christi v. Davis*, 622 S.W.2d 640 (Tex. Ct. App. 1981); *Siesta Properties, Inc. v. Hart*, 122 So. 2d 218 (Fla. Dist. Ct. App. 1960); *State v. Balli*, 190 S.W.2d 71 (Tex. 1944). Other jurisdictions not subject to hurricanes have addressed the legal ramifications of coastal storms generally. For example, a severe storm in 1929 breached breakwaters along Lake Michigan and destroyed property. See *Wall v. Chicago Park Dist.*, 37 N.E. 2d 752, 755 (Ill. 1941). The Illinois Supreme Court deemed this an avulsion, leaving the boundary line static. See *id.* at 760.

finding them erosive.⁹² The confusion may stem, in part, from the varying effects of storms. The same hurricane may cause erosion in one area, submergence in another, and avulsion in yet another area along the coast.

In a Florida case, it was held that the rule of avulsion is not restricted to streams and rivers.⁹³ Consequently, the rule may very well apply to tidal land. In dicta, however, the court noted that the application of avulsion to seashores was impractical.⁹⁴ The court explained that while the boundary may remain the same after an avulsive event, ownership of the land beneath waters belonging to the state is vested in the state.⁹⁵ Consequently, a landowner would necessarily be in a position to find the land torn away and be forced to prove its origin in order to exercise ownership over the dry land, an odd reconciliation of opposing doctrines.

The Texas Supreme Court decided that no redress exists for the landowner whose property is lost to the advance of the mean high tide line from an encroaching sea.⁹⁶ In *City of Corpus Christi v. Davis*, the court combined this principle with two other Texas cases to establish the rule that whenever the line of mean high tide moves landward, by whatever cause, the state acquires title to the land newly submerged by the tide.⁹⁷

Even if Louisiana law were to define hurricanes as avulsive events, there are ample reasons for adopting a Texas-like approach and defining state ownership as the consequence of coastal land loss, irrespective of the cause. The straightforward nature of the Texas approach, its ease of application, the resulting unity of title, and consistency of littoral access favor its adoption. When combined with the ability of landowners to reclaim land in Louisiana, as discussed below, the Texas approach provides a fair legal scheme that also encourages much-needed restoration.

92. See, e.g., *City of Corpus Christi*, 622 S.W.2d at 646 (finding the actions of a hurricane erosive); *Siesta Properties, Inc.*, 122 So. 2d at 224 (finding the sudden and violent actions of nature avulsive).

93. See *Siesta Properties, Inc.*, 122 So. 2d at 222.

94. See *id.* at 222-23.

95. See *id.*

96. See *State v. Balli*, 190 S.W.2d 71 (Tex. 1944).

97. 622 S.W.2d at 643 (citing *Lorino v. Crawford Packing*, 175 S.W.2d 410, 414 (Tex. 1943); *Rudder v. Ponder*, 293 S.W.2d 736, 741 (Tex. 1956)). Cf. *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 954 (Tex. 1976) (holding that subsidence of land below navigable, nontidal waters, in the absence of conflict between private and public navigation interests, allows title to remain in the riparian owner).

C. *Reclamation and Restoration*

Reclamation and restoration of lost coastal land further complicate the determination of ownership at Fourchon Beach. Reclamation or restoration of the land is a common response to hurricane and storm damage, regardless of whether the damage is legally deemed “erosion” or “avulsion.” Different restoration methods can have different impacts on ownership of the new, restored land. For example, avulsive restoration activities, such as backfilling, keep ownership boundaries static.⁹⁸ Restoration activity might also be accretive, such as placing sand fences and replanting vegetation. The Civil Code grants upland, riparian owners the right of ownership to land reclaimed by accretion.⁹⁹

Thus, the loss of coastal lands first must be attributed to erosion, submergence, or avulsion to determine if ownership boundaries have changed or remained static. Thereafter, the effect of restoration involving both avulsive and accretive elements must be ascertained in order to establish ownership of reclaimed land. As demonstrated below, in Louisiana, the state clearly retains ownership of reclaimed lands only if they were lost by erosion and restored by avulsion.¹⁰⁰ Any other combination of actions creates questionable title.

The Louisiana Constitution provides the right to reclaim eroded land.¹⁰¹ By following statutory procedures, the state forfeits ownership of the formerly submerged portion, returning the landowner to pre-erosion status.¹⁰² Primarily, the process involves application to the LDNR, and the conducting of surveys, both before and after restoration, to ensure that private ownership remains within the original property

98. See, e.g., *New Jersey v. New York*, 523 U.S. 767, 783-85 (1998). *But cf.* *State v. Gill*, 66 So. 2d 141, 145 (Ala. 1953) (finding that parcel of land created by dredging was accretive in nature); *Esso Standard Oil Co. v. Jones*, 98 So. 2d 236, 249 (La. 1957) (finding that land where oil wells were located was built up by accretion).

99. See LA. CIV. CODE ANN. art. 499 (West 2000); see also LA. REV. STAT. ANN. § 9:1102 (West 1990); *State v. Buck*, 15 So. 531, 537 (La. 1893). Louisiana statutory law supports the Civil Code and poses no bar to upland owners receiving formerly state-owned submerged lands. See LA. REV. STAT. ANN. § 30:136.1 (West 1990). *Cf.* *United States v. Harrison County, Miss.*, 399 F.2d 485, 491 (5th Cir. 1968) (noting the “common law doctrine of artificial accretion must yield to the command of the Mississippi Constitution,” which forbids donating state lands to private parties); *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 414 (Tex. 1943) (holding that land created by artificial accretion belongs to the state); *Carpenter v. City of Santa Monica*, 147 P.2d 964, 975 (Cal. Ct. App. 1944) (holding that artificial means of inducing accretion result in state-owned accretions).

100. See LA. REV. STAT. ANN. § 41:1702 (West 1990); *infra* text accompanying notes 101-109.

101. See LA. CONST. art. IX, § 3.

102. See LA. REV. STAT. ANN. §§ 41:1701, :1702 (West 1990).

boundaries.¹⁰³ The state may also undertake restoration of submerged lands for public use.¹⁰⁴

To some, allowing both the private property owner and the state the right to reclaim land creates a “takings” controversy.¹⁰⁵ The Fifth and Fourteenth Amendments of the United States Constitution prohibit the taking of private property for a public use without just compensation and due process,¹⁰⁶ as does the Louisiana Constitution.¹⁰⁷ Proponents of the takings argument may contend that a landowner has a property right to reclaim lost land.¹⁰⁸ State efforts to restore an area lost to the sea effectively eliminate the opportunity of the landowner to reclaim the eroded land, unconstitutionally depriving the landowner of his or her property right. However, allowing a private landowner to claim land restored by the state would violate a constitutional, public use requirement applicable to state reclamation projects.¹⁰⁹ This suggests that whenever the state undertakes an accretive-type restoration, the public use requirement, as well as several constitutional amendments, stand to be violated.

The right to reclaim lost land is not a vested right.¹¹⁰ Rather, the upland owner must obtain permission from the state prior to undertaking reclamation efforts.¹¹¹ Allowing landowners to reclaim eroded land should not be construed as an effort to deny the state its own constitutionally created role in restoration.¹¹² Rather, in a state

103. See *id.* § 41:1702.

104. See, e.g., *Save Our Wetlands, Inc. v. Orleans Levee Bd.*, 368 So. 2d 1210, 1213 (La. Ct. App. 1979); see also Hebert, *supra* note 80, at 1185 (discussing the meaning of “public use” in Louisiana jurisprudence).

105. See generally Hebert, *supra* note 80 (analyzing the “takings” issue).

106. See U.S. CONST. amends. V, XIV.

107. See La. CONST. art. I, § 4.

108. See generally Hebert, *supra* note 80 (arguing that a landowner should have the right to reclaim lost land).

109. See La. CONST. art. IX, § 3; see also Hebert, *supra* note 80, at 1189.

110. See Hebert, *supra* note 80, at 1188; see also *Plantation Landing Resort v. United States*, 30 Fed. Cl. 63, 67 (Fed. Cl. 1993) (“Before a party can recover just compensation under the 5th Amendment for a taking, . . . it must establish a compensable property interest.”). The *Plantation Landing Resort* court concluded that no taking occurred where the plaintiff failed to renew the coastal use permit applicable to nearly 51 acres of land located below the mean high water mark and was thereafter precluded from developing the land. See *id.* at 66. “By not renewing the permit, plaintiff extinguished its compensable interest [in those lands], subject to state reclamation regulation. Without such interest, plaintiff cannot proceed with a takings claim as to this land.” *Id.* A different situation exists when avulsion causes the land loss, as the landowner then retains some property interest in the submerged land. See *City of New York v. Realty Assocs.*, 176 N.E. 171, 172 (1931).

111. See LA. REV. STAT. ANN. §§ 41:1701- :1702 (West 1990).

112. See LA. CONST. art. IX, § 3 (“Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.”). Some have advocated legislative changes to the Civil Code to clarify or to expand the public trust servitudes for coastal

where land loss poses a grave problem, increasing the number of parties eligible to reclaim lost land theoretically increases the likelihood that reclamation will take place. The opposite approach leaves the state at the mercy of the landowner's whim and financial position, contrary to the objective of fostering reclamation and, in many cases, thwarting the state's ability to reclaim land it owns.

Moreover, it is in the upland owner's best interest to allow government reclamation activity. Reclamation of barrier islands and other land formations substantially assists in preventing future hurricane damage, loss of life, and further loss of private property. Suspending state-funded reclamation projects will likely result in additional dry land being lost to erosive forces, a perverse application of the takings doctrine.

IV. PUBLIC ACCESS

Ownership of property entails the right to access the property and to exclude others from it.¹¹³ Individuals, as well as the public, often seek to own coastal land in order to access the water for recreational, aesthetic, or commercial purposes. Under the public trust doctrine and other servitudes, however, full public ownership of coastal property is not necessarily required in order for the public to obtain access.¹¹⁴ Moreover, Louisiana jurisprudence respecting roads and public use thereof potentially provides other means for public access at Fourchon Beach.¹¹⁵ Consequently, those advocating for public access at Fourchon Beach have two alternative arguments for access even if the land itself is not publicly owned.

application. See Hebert, *supra* note 80, at 1199. However, legislative authority to expand servitudes beyond their historical bounds is subject to the takings doctrine and is at odds with the investment-backed expectations of current landowners with regard to road servitudes. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978). While the suggestion may have merit for the future, it does not resolve the situation with respect to existing owners. See, e.g., *Lucas*, 505 U.S. 1003; *Penn Cent. Transp. Co.*, 438 U.S. 104. Another commentator suggests that the navigation servitude functions as an inherent burden to coastal property ownership and serves as authority for the state and federal governments to undertake activity without providing compensation. See Douglas F. Britton et al., *Avenal v. United States: Does the State of Louisiana Have a Property Interest in the Salinity of its Waters?*, 2 OCEAN & COASTAL L. J. 153, 162-63 (1996); see also *Delaune v. City of Kenner*, 550 So. 2d 1386, 1389 (La. Ct. App. 1989) (taking does not occur when state exercises the levee servitude; "the State . . . merely resumes possession of what it always owned").

113. See LA. CIV. CODE ANN. art. 477 (West 2000).

114. See *id.* arts. 450, 452.

115. See *infra* Part IV.B.

A. *Access to Waterbodies*

The type of waterbody determines whether the public trust doctrine or a Civil Code-based servitude applies, and thus impacts the extent to which the public may access the waterbody, if at all.¹¹⁶ In short, if the waterbody is nonnavigable, the public has no right to cross private lands to access the water.¹¹⁷ Even if the waterbody is navigable, public access can be restricted.¹¹⁸ However, if the waterbody is a highway of commerce, the public has unfettered access.¹¹⁹ With regard to Fourchon Beach, the abutting waterbody, the Gulf of Mexico, is obviously a highway of commerce.

In *People for Open Waters, Inc. v. Estate of J.G. Gray*, the plaintiff argued that, as a public thing under Civil Code article 450, running waters must be susceptible to public use under Civil Code article 452.¹²⁰ The court did not accept this contention:

The obligations arising from water being a public thing require an owner, through whose estate running waters pass, to allow the water to leave his estate through its natural channel and not to unduly diminish its flow. However, this does not mandate that the landowner allow public access to the waterway.¹²¹

An artificially constructed canal built with private funds on private property is not subject to public use merely because it connects with an existing navigable waterway, unlike canals created by diverting a natural, navigable waterway.¹²²

With regard to public waterways, such as navigable rivers and the sea, the bed and banks give rise to public use or ownership of the land, or both, not merely public ownership of the water flowing in them.¹²³ Private landowners may not deprive the public of its right to use public waterways. Civil Code article 458 requires a permit for works built on public things that may obstruct public use, and certain criminal provisions also prohibit the obstruction of a “highway of commerce.”¹²⁴ Moreover, once implied or tacit dedication operates to

116. See LA. CIV. CODE ANN. arts. 450, 452 (West 2000); see also *supra* notes 44-45 (setting forth the public trust doctrine).

117. See LA. CIV. CODE ANN. arts. 450, 452 (West 2000).

118. See *National Audubon Soc’y v. White*, 302 So. 2d 660, 665 (La. Ct. App. 1974).

119. See sources cited *infra* note 124.

120. 643 So. 2d 415, 417 (La. Ct. App. 1994); see also LA. CIV. CODE ANN. arts. 450, 452 (West 2000).

121. *People for Open Waters, Inc.*, 643 So. 2d at 418 (citations omitted).

122. See *Vaughn v. Vermilion*, 444 U.S. 206, 208-09 (1979).

123. See *National Audubon Soc’y*, 302 So. 2d at 665.

124. See LA. CIV. CODE ANN. art. 458 (West 2000); LA. REV. STAT. ANN. §§ 14:96, :101, 48:512 (West 1989); see also *id.* § 14:97 (defining a “highway of commerce” as “any railway,

create a public servitude, the servitude can be withdrawn only under narrow circumstances.¹²⁵ However, private landowners may regulate access.¹²⁶

Some citizens argue that the expenditure of public funds, such as in the restoration of Fourchon Beach, establishes public use.¹²⁷ However, Louisiana jurisprudence does not support this argument. Rather, in *Amigo Enterprises v. Gonzales*, a case involving public rights in a canal constructed with federal funds on private land, the Louisiana Fourth Circuit found that “the property owners granted the Corps of Engineers the right to build the canal, but did not convey any rights to the public to utilize the canal for recreation or commercial purposes.”¹²⁸ In reaching this conclusion, *Amigo Enterprises* court relied upon the reasoning of *Brown v. Rougon*, a similar case in the Louisiana First Circuit wherein the court held that “the use of public funds does not convey greater rights than those contracted for by the parties.”¹²⁹ To conclude otherwise would have resulted in a constitutional takings violation, absent the consent and compensation of the owner.¹³⁰

railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport”); La. Att’y Gen. Op. No. 81-1298, 1982 WL 181726, at *1 (Apr. 5, 1982) (opining that private hunting club could not block access to a public waterway); La. Att’y Gen. Op. No. 96-206, 1996 WL 462002, at *7 (May 23, 1996) (opining that a public road, which provided access to a public boat launch on a navigable lake, could not be blocked by a fence).

125. See La. Att’y Gen. Op. No. 96-206, 1996 WL 462002, at *5 (May 23, 1996) (citing *Robinson v. Beauregard Parish Police Jury*, 351 So. 2d 113 (La. 1977)); La. Att’y Gen. Op. No. 97-145, 1997 WL 409074, at *2 (June 30, 1997) (noting that the public servitude on a public road may be withdrawn only through “a formal act of revocation in accordance with the statutes; relocation of the public road by the governing authority; clear and well-established proof of intent by the governing body to abandon”; or, absent such express acts of withdrawal, if the strip of land is not used as public road for more than 10 years); see also LA. REV. STAT. ANN. § 48:451 (West 1990).

126. See *Delta Sec. Co. v. Dufresne*, 160 So. 620, 621 (La. 1935) (upholding injunction permitting private company to regulate use of its stream banks); *Dardar v. Lafourche Realty Co.*, 55 F.3d 1082, 1085-87 (5th Cir., 1995) (holding that private construction work undertaken on a navigable canal, in accordance with an Army Corps of Engineers permit, did not eliminate the public’s right to use the canal but did provide the landowner the ability to control access points).

127. See, e.g., Mike St. Pierre, Remarks, *supra* note 32 (“The taxpayers have built a road, built up the beach, and maintained the property, now it is time to give something back by letting us use the beach.”); Daniel Lorraine, Lafourche Parish Councilman, Remarks at the Lafourche Parish Council Coastal Zone Management Public Hearing for Caillouet Land Corporation Permit # P971367 (Nov. 4, 1997) (noting that “there were millions of dollars from the federal government, State of Louisiana, and local taxes that really built [Fourchon Beach] up”) (transcript on file with author).

128. 581 So. 2d 1082, 1084 (La. Ct. App. 1991).

129. 552 So. 2d 1052, 1060 (La. Ct. App. 1989); see also *Amigo Enters.*, 581 So. 2d at 1084 (quoting *Rougon*).

130. See *Amigo Enters.*, 581 So. 2d at 1084 (quoting *Rougon*, 552 So. 2d at 1060).

Louisiana law thus excludes the public from private lands or waters on which public funds were spent unless the landowner agrees to allow public use.¹³¹ As a result, the expenditure of public funds for authorized purposes does not alone provide a public right of use, access, or any interest in privately owned lands or waters on which the expenditure was made.¹³² In sum, the public and state do not gain “any right of use or access or any vested interest in privately owned lands or waters which become the subject of . . . conservation or restoration projects.”¹³³

B. Public Road Access

As the issue regarding Fourchon Beach concerns public access to a road, an examination of the law creating public roads in Louisiana is instructive.¹³⁴ The Port Commission asserts that the reclaimed area at Fourchon Beach serves as a public road.¹³⁵ If such is the case, the public has a right to access the road and, in turn, to use it to access the adjacent, publicly owned beach area.

In *St. Charles Parish School Board v. P & L Investment Corp.*, the Louisiana Supreme Court elaborated upon the means of creating public road access on privately owned property.¹³⁶ A public road may be subject to public use due to several possible events: purchase, exchange, donation, expropriation, prescription, or dedication.¹³⁷ The *P & L Investment Corp.* court held that a public road was created by tacit dedication, where the road provided access to a public school,

131. See La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *6 (Oct. 22, 1992); see also, e.g., *Amigo Enters.*, 581 So. 2d at 1084.

132. See La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *6 (Oct. 22, 1992); see also, e.g., *Amigo Enters.*, 581 So. 2d at 1084; *Rougon*, 552 So. 2d at 1060 (“[T]he use of public funds in the construction of a navigable canal does not necessarily create a public right to use the canal.”); *State v. Jeanerette Lumber & Shingle Co.*, 350 So. 2d 847, 856 (La. 1977) (holding that the construction of canals on private property with public funds does not give navigation rights, rights of use, or access to the public). Both *Rougon* and *Jeanerette Lumber & Shingle Co.* held that the state enjoys only such rights as are necessary for purposes of the project. See *Rougon*, 552 So. 2d at 1060; *Jeanerette Lumber & Shingle Co.*, 350 So. 2d at 855.

133. La. Att’y Gen. Op. No. 92-472, 1992 WL 610613, at *6 (Oct. 22, 1992).

134. See LA. REV. STAT. ANN. § 33:1236(2)(a), (20) (West 1989). Cf. LA. REV. STAT. ANN. § 32:1(51) (West Supp. 1999) (defining a private road as “every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons”). Use of private roads is regulated by the owner. See LA. REV. STAT. ANN. § 32:25 (West 1989).

135. See Falgout Telephone Interview, *supra* note 18.

136. 674 So. 2d 218 (La. 1996).

137. See *id.* at 221 (citing LA. CONST. art. I, § 4; LA. REV. STAT. ANN. tit. 19 (West 1989)); see also *Coleman v. Chevron Pipe Line Co.*, 673 So. 2d 291, 295-96 (1996); 2 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE § 96, at 207 (1991).

yet also crossed over private property.¹³⁸ The court also elaborated upon several alternative methods available to create a public servitude.¹³⁹

First, the court explained the Civil Code requisites for obtaining a servitude of passage by acquisitive prescription: “peaceable and uninterrupted possession of the right for ten years in good faith and by just title,” or after “uninterrupted possession for thirty years without title or good faith.”¹⁴⁰ The requisite “just title” consists of documentation sufficient to transfer ownership or other real right, “written, valid in form, and filed for registry in the conveyance records of the parish in which the immovable is situated” and expressly describing the nature and extent of the servitude.¹⁴¹

Next, the court noted that Louisiana has no comprehensive statutory scheme for dedication of property to public use although the jurisprudence of the state recognizes four methods: formal, statutory, implied, and tacit.¹⁴² A deed or other written act will create a formal dedication.¹⁴³ A formal dedication transfers ownership of the property to the public unless the property is expressly or implicitly retained.¹⁴⁴ When the owner retains the land, a servitude of public use is created.¹⁴⁵ Statutory dedication occurs when a landowner subdivides real estate. “A statutory dedication vests ownership in the public unless the subdivider reserves ownership of streets and public places and grants the public only a servitude of use.”¹⁴⁶ Louisiana courts also recognize the common law doctrine of implied dedication.¹⁴⁷ Assent of the owner, use by the public, and maintenance by the municipality constitute an implied dedication and establish a servitude of public use.¹⁴⁸ Finally, a tacit dedication of a strip of land for use as a public road essentially occurs after three years of public maintenance.¹⁴⁹

138. See *P & L Inv. Corp.*, 674 So. 2d at 223.

139. See *id.* at 221.

140. *Id.*; LA. CIV. CODE ANN. art. 742 (West 2000).

141. *P & L Inv. Corp.*, 674 So. 2d at 221; LA. CIV. CODE ANN. art. 3483 (West 2000).

142. See *P & L Inv. Corp.*, 674 So. 2d at 221.

143. See *id.*

144. See *id.*

145. See *id.*

146. *Id.* at 222.

147. See *id.*

148. See *id.*

149. See *id.* at 223; see also LA. REV. STAT. ANN. § 48:491(B)(1)(a) (West 1989) (providing that all roads maintained by the municipality for three years “shall be public . . . if there is actual or constructive knowledge of such work by adjoining landowners”).

Interestingly, the holding in *P & L Investment Corp.* may differ when applied to riparian roads. Although Fourchon Beach's sand road is littoral and not riparian, riparian doctrines may be extended to littoral areas and the terms used interchangeably.¹⁵⁰ Additionally, the primary purpose of the servitude duty—aid to navigation—applies to Fourchon Beach as the beach is adjacent to navigable water. In a 1996 opinion, the Louisiana Attorney General's Office addressed several questions, including whether “the public [can] be denied access to a navigable river by the property owner of the river banks” and “[i]f there is a public road on the property, to what extent, if any, can the property owner post the land and prevent access to the river?”¹⁵¹ In so doing, the opinion identified a conflict of law.

The opinion affirmed public rights to use the water and waterbottoms for purposes traditionally related to navigation, and “to include both recreational and commercial activities, such as fishing, swimming, wading, tubing, crabbing, and similar pursuits” in navigable waters.¹⁵² However, the Attorney General concluded that no legal requirement existed for public access over a riparian owner's property “from a public highway to the water's edge where there is no road, public right-of-way or public passageway connecting the two.”¹⁵³ The opinion continued:

Civil Code Article 666 provides that riparian owners are bound by law to give a public road on the border of a river or stream R.S. 9:1251 provides that when an owner of land voluntarily . . . permits passage . . . solely for the purpose of providing a convenience in ingress and egress to and from waters for boating or recreational purposes, neither the public or private person shall acquire a servitude or right-of-passage, nor shall the passage become a public road or street by reason of upkeep, maintenance or work performed by any governing authority. This latter statute reaches conflict with R.S. 48:491 in situations where a roadway has become dedicated by publicly funded maintenance activities.¹⁵⁴

In *Hebert v. T. L. James & Co.*, a municipality sought to convert an existing thirty-foot servitude along a navigable waterway into a seventy-five-foot paved road without compensating the property owner for the additional forty-five feet.¹⁵⁵ The municipality argued

150. See *supra* note 53.

151. La. Att'y Gen. Op. No. 96-257, 1996 WL 656196, at *1 (Sept. 5, 1996).

152. *Id.* at *3.

153. *Id.* at *4.

154. *Id.*; see also LA. CIV. CODE ANN. art. 666 (West 2000); LA. REV. STAT. ANN. §§ 9:1251, 48:491 (West 1989).

155. 70 So. 2d 102, 103 (La. 1953).

that the servitude imposed by law is not limited to specific widths.¹⁵⁶ The property owners argued that the servitude provides particular purposes incident to navigation, not general public road purposes.¹⁵⁷ The court concluded that the public road servitude imposed by the Civil Code is restricted to purposes incident to the navigable character of the proximate waterbody; thus, the government's position was untenable.¹⁵⁸

An earlier case, *Village of Moreauville v. Boyer*, involved the same Civil Code servitude duty at issue in *T.L. James & Co.*¹⁵⁹ In *Village of Moreauville*, the government sought to obtain a servitude wide enough to include a sidewalk along the road.¹⁶⁰ The court denied the government's request, noting that a servitude is a "debt inherent . . . in the title to the property."¹⁶¹ The Legislature cannot create a new servitude where none exists without compensating the landowner or unconstitutionally taking private property.¹⁶² By virtue of fronting navigable water, the title to the land is inherently burdened with a public road servitude, not a public sidewalk servitude.¹⁶³

A civil law equivalent to the common law easement by necessity also exists, potentially challenging the Louisiana Attorney General's determination that landowners have no duty to provide access from a public road to public property.¹⁶⁴ The Civil Code establishes a "right of passage" for private property owners who lack access to a public road.¹⁶⁵ This provision allows the landowner to demand a court-created right of passage over neighboring land or to seek court approval of an agreement providing for such a right; simply receiving permission to use the land of a neighbor as access to a public road is insufficient.¹⁶⁶ The right of passage only provides access from the enclosed property to the nearest public roadway.¹⁶⁷ Furthermore, the right only allows one to cross the neighbor's land; the neighbor has no

156. *See id.* at 104.

157. *See id.* at 106.

158. *See id.* at 108-09.

159. 71 So. 187 (La. 1916).

160. *See id.* at 188-89.

161. *Id.* at 189-90.

162. *See id.* at 190.

163. *See id.* at 189-90.

164. *See Smith v. State*, 620 So. 2d 1172, 1186-87 (La. Ct. App. 1992).

165. *See* LA. CIV. CODE ANN. art. 689 (West 2000) ("The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbor for the damage he may occasion."); *Smith*, 620 So. 2d at 1187.

166. *See Smith*, 620 So. 2d at 1172.

167. *See* LA. CIV. CODE ANN. art. 689 (West 2000); *Rockholt v. Keaty*, 237 So. 2d 663, 668 (La. 1970).

responsibility for building or maintaining the roadway used by another.¹⁶⁸ Arguably, the publicly owned wet sand shore along Fourchon Beach and other beaches is isolated property, which would support a right of passage over private property to the nearest roadway.

V. CONCLUDING NOTES ON THE LIMITATIONS OF LAW

To determine whether the public has access to Fourchon Beach, one must examine legal principles relevant to natural processes such as avulsion, erosion, submersion, and storms. Adopting the Texas approach, as expressed in *City of Corpus Christi*, and finding public ownership of the property would conclusively allow for public access, regulated by the state as one of the rights inherent to ownership.¹⁶⁹ Failing this, the public trust doctrine or the Civil Code may establish a burden of public access on the property despite private ownership. Lastly, the sand road may qualify as a public road, thereby providing public access.

None of the public comments, articles, or doctrines discussed herein can address the two issues at the heart of the matter, as they are issues that only the residents and users of Fourchon Beach can resolve. First, many beach users want a guarantee that they may continue to use the beach in the manner in which they are accustomed.¹⁷⁰ The complaints are not entirely founded in public access but in the nature of the access. Even under the Caillouet proposal, most of the public would still have access to Fourchon Beach.¹⁷¹ Pedestrian access would remain and many all-terrain vehicles would be able to fit between the pilings.¹⁷² The Caillouet proposal would not bar beach access; rather, the proposal would substantially change the nature of access and limit the activities available to beachgoers.¹⁷³ However, public ownership or a public access servitude offers no guarantee that these same limitations will not occur in the future.

The public owns a variety of properties, many of which have reasonable restrictions placed upon them for the safety of visitors or

168. See *Martini v. Cowart*, 23 So. 2d 655, 657 (La. Ct. App. 1945).

169. See *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643 (Tex. Ct. App. 1981); see also *supra* notes 96-97 and accompanying text.

170. See Weiss, *supra* note 18, at B3; Susan Terrebonne, Remarks, *supra* note 69.

171. See *supra* text accompanying notes 30-32.

172. See Joe Macaluso, *Trashing Paradise*, BATON ROUGE ADVOC., July 19, 1998, at C18.

173. See *supra* text accompanying notes 30-32; cf. *Shanks v. Forsyth County Park Auth., Inc.*, 869 F. Supp. 1231, 1238 (M.D.N.C. 1994) (holding a motorcycle ban inside a county park constitutional because it did not forbid travel but merely regulated the method of travel).

for the protection of the property itself. Parks, monuments, schools, fire stations, and libraries are all publicly owned. The regulation and behavior of the public visitor reflects the diversity of activities appropriate to each place. Given the rarity of Gulf Coast beaches in Louisiana, one could reasonably argue that prohibiting or restricting vehicular access and other activities that threaten the continued viability of Fourchon Beach is entirely appropriate. Even on public roads, there is no right to drive a motor vehicle; driving is a privilege subject to reasonable state regulations.¹⁷⁴ However, restricting the nature of public use on public property is a function of government, not a neighboring landowner.

Second, consensus on the best use of Fourchon Beach does not exist, as reflected in the state and parish “coastal zone management programs” (CZMPs).¹⁷⁵ The state CZMP recognizes the various uses of coastal areas, and in particular, special features such as beaches.¹⁷⁶ Louisiana Revised Statute 49:214.27(c) establishes goals to be incorporated into guidelines for the implementation of the parish CZMP:

Recognize the value of special features of the coastal zone such as . . . recreation areas, . . . and other areas where developments and facilities are dependent upon the utilization of or access to coastal waters, and . . . manage those areas so as to enhance their value to the people of Louisiana.¹⁷⁷

The guidelines developed under the statute include special sections relating to various activities but none directly addressing recreational access.¹⁷⁸ However, general guidelines apply to all uses and indicate that adverse impacts are to be avoided, to the maximum extent practicable.¹⁷⁹ Adverse impacts include “[d]estruction or adverse alterations of . . . beaches, dunes, barrier islands, . . . disruption of existing social patterns . . . [and] adverse alteration or destruction of public parks, shoreline access points, public works,

174. See *Everhardt v. City of New Orleans*, 217 So. 2d 400, 412 (La., 1968); see also LA. REV. STAT. ANN. § 33:1236(2)(a), (15), (17), (18), (20) (West 1989).

175. See Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§ 1451-1465 (1994 & Supp III 1997). Section 1452 specifically requires CZMPs. See *id.* § 1452.

176. See LA. REV. STAT. ANN. § 49:214.27 (West 1989); 45 Fed. Reg. 64615, 64615 (1980). The CZMA was amended in 1976 to include beach access as one of the factors states must address in their coastal zone management plans. See 16 U.S.C. § 1452 (2)(E) (1994).

177. LA. REV. STAT. ANN. § 49:214.27(C)(4) (West Supp. 2000); see also *id.* § 49:214.27(C)(10) (listing goal of providing “ways to enhance opportunities for the use and enjoyment of the recreational values of the coastal zone”).

178. See LA. ADMIN. CODE tit. 43, § I-701 (1990).

179. See *id.*

[and] designated recreation areas”¹⁸⁰ What happens when “existing social patterns,” such as the public’s routine use of vehicular beach access, cause the adverse alterations? Which carries the day, social patterns of public access or protecting the resource? If the public has any right to access Fourchon Beach, they must resolve these questions.

The parish guidelines provide no answers. Lafourche Parish recognized the unique features of Fourchon Beach in an Environmental Management Unit (EMU) because it contains a port, the parish’s only Gulf Coast sand beach, and some industrial and recreational activity.¹⁸¹ The parish government set five goals for the area: (1) promote continued development of Port Fourchon, (2) provide sufficient levels of services to Port Fourchon so as to eliminate or minimize any environmental degradation, (3) protect and maintain the remainder of the EMU in its present state by discouraging development involving reclamation in areas other than Port Fourchon, (4) reduce the shoreline erosion rate, and (5) promote recreational access to the beach and the Gulf of Mexico.¹⁸²

Conceivably, with respect to current use patterns at Fourchon Beach, goals four and five are at odds with one another. Each of the goals has advocates within the community and the divisiveness precipitated by Caillouet’s permit proposal will not diminish following a legal determination. Rather, the funds used to resolve the issue legally might be better spent on public education and enforcing the existing restrictions at Fourchon Beach. The existing rules and statutes are designed to permit the peaceful coexistence of varied coastal uses. The dilemma at Fourchon Beach reflects not only conflicting legal principles, but also conflict within the community over the direction to best employ one of its rarest resources, a beach.

180. *Id.*

181. *See id.* § 725(B)(1)(a) (defining an EMU as a division of the coastal zone consisting of areas “that have similar environmental and natural resource characteristics”); EDWIN DURABB, LAFOURCHE PARISH COASTAL ZONE MANAGEMENT PROGRAM, VOL. II: COASTAL ZONE MANAGEMENT IN LAFOURCHE PARISH—A REPORT OF THE COASTAL ZONE MANAGEMENT ADVISORY COMMITTEE AND LAFOURCHE PARISH PLANNING DEPARTMENT TO THE LAFOURCHE PARISH COUNCIL 143-45 (1982).

182. *See DURABB, supra* note 181, at 146.