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The Continuing Contractual Duty Not to Aggravate a Servient Estate: Available Damages in Pipeline Servitude Cases, and Proposed Codal and Statutory Solutions

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I. INTRODUCTION & FACTUAL BACKGROUND

For a few hundred dollars at a time, oil and gas companies bought servitude rights from private landowners in the 1950s that allowed them to dredge pipeline and navigational canals to facilitate the transportation of oil and natural gas.[1] Decades later, the pipelines are largely out of use and the canals in which they lay have eroded substantially, encroaching on private property and turning marshland into open water. Landowners have lost acres of their property as canals have allowed saltwater intrusion into Louisiana's marshland, and yet oil and gas companies disclaim any continuing duty to maintain the canal banks in order to prevent erosion or to restore the landowners' property once erosion has occurred. The land loss not only implicates private property rights, but also poses great dangers to all Louisianians by facilitating the disappearance of crucial storm buffers.

Litigation offers a potential means of holding oil and gas companies accountable for the cost of restoring the land lost in Louisiana by canal widening. Toward that end, Louisiana would benefit from clearer codal provisions and a new statutory framework to settle disputes arising from oil and gas companies' failure to avoid unnecessary aggravation of, or harm to, servient landowners in their exercise of pipeline canal servitude agreements.

This Article focuses on what it means to "aggravate the servient estate" under Louisiana law and how to measure damages to compensate

1. *See, e.g.*, Terrebonne Par. Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 308 (5th Cir. 2002) (quoting an agreement in which an oil and gas company paid a private landowner $366 for a pipeline canal servitude).

for such aggravation in the context of pipeline canal servitudes.[2] Before delving into the legal question, however, it is important to understand the historical and regional context. Part I of this article will discuss (A) how pipeline canal servitudes have historically aggravated servient estates in Louisiana, i.e., the impacts that dredging and the use of canals have had on surrounding lands; and (B) what it would take to restore the surrounding lands to their original condition. Part II considers what it means to aggravate a servient estate under Louisiana's civil law in the context of pipeline canal servitudes, and whether the breach of such duty is properly classified as a contractual breach or a delict (tort). Part III discusses possible methods, under both contract principles and delictual ones, for measuring the aggravation of a servient estate for the purpose of calculating compensable damages. Part IV proposes revisions to the Civil Code and a new statutory framework designed to clarify and improve the principles discussed in Parts II and III.

A. How Pipeline Canals Have Aggravated Servient Estates in Louisiana

In Louisiana, oil and gas companies have acquired thousands of conventional (i.e., contractual) servitudes across private land to cut and dredge canals. Estimates based on permitting data suggest that more than 35,000 such canals were dredged between 1900 and 2017.[3] These canals allow pipelines carrying oil and natural gas—along with boats, drilling rigs, and other equipment—to traverse the marsh.[4] However, the canals "also permit saltwater to flow into the wetlands, weakening and killing the plants that hold the marsh together. Storms then wash the remaining soil away."[5] Saltwater comes in through the ends of the canal and can then spill over the top of or through breaches in the canal banks, thereby infiltrating surrounding waters.[6] The intruding saltwater stunts the growth of interior vegetation and damages the roots of marsh grasses, both of which hold the

2. The term "servitude" refers to an encumbrance on immovable property that gives the servitude holder a right to the limited use of part of that immovable property, similarly to the concept of "easement" in the common law. At issue in this Article are *predial* servitudes, or those that run with the land. The servitude holder or grantee has a servitude over the land of the grantor. The grantor's land is termed the servient estate. The servitude holder is termed the owner of the dominant estate. *Servitude*, BLACK'S LAW DICTIONARY (11th ed. 2009).

3. R. Eugene Turner & Giovanna McClenachan, *Reversing Wetland Death from 35,000 Cuts: Opportunities to Restore Louisiana's Dredged Canals*, 13 PLOS ONE 1 (Dec. 14, 2018).

4. John Carey, *Louisiana Wetlands Tattered by Industrial Canals, Not Just River Levees*, SCI. AM. (Dec. 1, 2013).

5. *Id.*

6. *Id.*

marshes' light organic soils in place.[7] As the soils disappear, the marsh mats erode from the bottom up and eventually disappear, thereby causing land loss.[8]

Land loss not only causes damage to the affected property owners, but it also affects the entire region. Coastal wetlands function as storm buffers in Louisiana—they dampen the impact of storm surge and strong winds, and also stabilize shorelines by promoting sediment deposition and reducing erosion.[9] As coastal wetlands erode, all Louisianians face increased risk from natural disasters.[10]

Scientists and even industry have been aware of the environmental impacts of dredging canals for decades.[11] For example, in a 1972 Battelle Study commissioned by the Offshore Pipeline Committee (composed of ten gas pipeline companies), scientists explained to industry that "[l]and loss due to canaling is a matter of serious concern in Louisiana." The study relied on data that showed in some instances canal widths in the Rockefeller Wildlife Refuge more than doubled within six years. The report advised: "[I]f bulkheads and dams are not maintained they can wash out around the end permitting water flow, and inspection and maintenance is required to ensure that these continue to fulfill their designed function."[12] And yet, industry largely failed to properly maintain canal banks, bulkheads, and dams, resulting in dramatic land loss throughout the state. But all is not lost, at least not permanently.

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7. Oliver A. Houck, *The Reckoning: Oil and Gas Development in the Louisiana Coastal Zone*, 28 TUL. ENV'T L.J. 185, 204 (2015).

8. Terrebonne Par. Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 309 (5th Cir. 2002).

9. John Tibbets, *Louisiana's Wetlands: A Lesson in Nature Appreciation*, 114 ENV'T HEALTH PERSPS. A42-43 (Jan. 2006).

10. *Id.*

11. *See, e.g.,* Sherwood M. Gagliano, *Canals, Dredging, and Land Reclamation in the Louisiana Coastal Zone*, COASTAL RESOURCES UNIT, CENTER FOR WETLAND RESOURCES, LSU, HYDROLOGIC AND GEOLOGIC STUDIES OF COASTAL LOUISIANA, Report No. 14, Oct. 1973 at i ("In addition to direct loss of habitat through dredging and spoil disposal, salt water intrusion, disruption of runoff patterns, accelerated erosion, and other secondary impacts of canals may result in severe environmental degradation."); ESPEY, HUSTON & ASSOCIATE, INC., LITERATURE REVIEW OF WETLAND LOSSES AND THE RELATIVE CONTRIBUTION OF THE PETROLEUM INDUSTRY TO THOSE LOSSES, at v (1988) (submitted as a consultant report to the American Petroleum Institute) ("Based on the literature, one can assume that the total area affected by an oil and gas canal, both by direct and indirect impacts, is 5.7 times the actual permitted canal area.").

12. *See, e.g.*, Petition for Damages and Injunctive Relief at 9, Bd. of Comm'rs of the SE La. Flood Prot. Auth.–E. v. Tenn. Gas Pipeline Co., 2013 WL 3948577 (La. Dist. Ct. 2013) (trial pleading).

B. What It Would Take to Restore Eroded Lands

When canals are dredged, the dredged material is often placed parallel to the canal to form mini levees, or spoil banks, on the sides of the canal. For every mile of canal dredged, thirty or more acres of marsh are degraded or buried under the spoil banks.[13] The spoil banks block overland flow of water from the canal into the surrounding area and are intended to prevent saltwater intrusion; however, spoil banks subside and compact over time, becoming denser and thereby decreasing the exchange of nutrients, organic matter, and sediment necessary for a healthy marshland. This process leads to a decrease in vegetative growth and alters the hydrology of the marsh. Additionally, spoil banks trap water so as to decrease drainage, thereby isolating the wetlands behind the spoil banks from healthy water exchange. Eventually, the spoil banks disappear as they subside below the water level, allowing saltwater to travel from the canal to the surrounding marshland, and furthering erosion. Thus, overall, the impact of spoil banks has not been to ensure the health of the marsh—they have contributed to subsidence, damaged the natural hydrology of Louisiana's marshland, and done little to prevent increased salinity.[14] In 2017, Louisiana "had a cumulative total length of 33,705 km of spoil bank, which is more than 3/4ths of the circumference of the Earth. The total length of spoil banks in 2017 was long enough to cross the Louisiana coast east-to-west 79 times. . . . Clearly this is a significant factor influencing wetland health."[15] There is a dominant causal relationship between the existence of these extensive spoil banks and Louisiana's coastal land loss.[16] Somewhere between forty and ninety percent of Louisiana's land loss is directly or indirectly related to canal building.[17]

Dredged material left behind on spoil banks can be pulled back into the canals to "backfill" them, even long after the canals are abandoned by industry.[18] In fact, more than seventy-five percent of dredged canals in

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13. WILLIAM H. CONNER & JOHN W. DAY, FISH & WILDLIFE SERV., DEP'T OF THE INTERIOR, THE ECOLOGY OF BARATARIA BASIN, LOUISIANA: AN ESTUARINE PROFILE, 85 BIOLOGICAL REPORT 126 (1987).

14. *See generally* John W. Day et al., *Life Cycle of Oil and Gas Fields in the Mississippi River Delta: A Review*, 12 WATER 1492 (May 23, 2020); *see also* Houck, *supra* note 7, at 205 ("[T]he spoil banks acted as tourniquets, stifling the exchange of water and nutrients and killing off wetlands at great distances from the channel. Just how distant depends on local conditions, but best estimates put these impacts at between five and six times those of the authorized project.").

15. Turner, *supra* note 3, at 6

16. *Id.*

17. CONNER & DAY, *supra* note 13, at 125.

18. *See generally* R. Eugene Turner et al., *Backfilling Canals to Restore Wetlands: Empirical Results in Coastal Louisiana*, 3 WETLANDS ECOLOGY & MGMT. 63, 63-78 (1994).

Louisiana are no longer in use and could therefore be backfilled without interfering with current pipeline operations.[19] Studies of thirty-three backfilled areas in the state began in the late 1980s and have shown that backfilling has "favorable and predictable outcomes, and with virtually no negative consequences."[20] Complete restoration can take decades, but the benefits of backfilling increase over time as the wetlands continue to redevelop.[21] Additionally, backfilling is a solution that can be implemented quickly to address coastal land loss.[22] The estimated cost of backfilling the 27,483 potential canals out of use in 2018 was approximately $335 million; adjusted for inflation, the cost would be approximately $375 million today, though that might increase somewhat if more canals are now available for backfilling.[23]

While a $375 million price tag is not cheap, it is less than one percent of the minimum amount of proposed spending outlined in Louisiana's Coastal Protection and Restoration Master Plan, and thus would be an extremely cost-effective means of slowing erosion and restoring lost marshland and Louisiana's storm buffers.[24] Additionally, litigation could ensure that these costs are shouldered primarily by industry—the responsible party here—rather than by the Louisiana taxpayer. The question then becomes how litigation can be used to assess restoration damages against the responsible parties.

II. FRAMING THE LEGAL QUESTION

With that background in mind, this Article considers the legal questions of how to define the duty that servitude holders have to prevent and then mitigate canal widening, and to what extent the failure to comply with this duty is compensable. Under Louisiana law, servitude holders have an obligation to not "aggravate the servient estate."

19. Backfilling does not work in every instance; where canals are too severely degraded, they cannot be restored via backfilling. Joseph Baustian, Restoration Success of Backfilling Canals in Coastal Louisiana Marshes, at iv (2005) (Masters' Theses, LSU).

20. Turner, *supra* note 3, at 3.

21. *Id.*

22. *Id.*

23. *Id.* at 9; *see also* CPI Inflation Calculator, https://www.in2013dollars.com/us/inflation/2018?amount=335000000.

24. Turner, *supra* note 3, at 8-9.

A. Historical Analysis of What it Means to "Aggravate the Servient Estate"

1. The Civil Code

A contract, including one establishing a predial servitude, is law between the contracting parties and must be performed in good faith.[25] When a predial servitude is established by contract (i.e., by title), the mode of use of the servitude is regulated according to such contract.[26] However, "[i]f the title is silent as to the extent and manner of use of the servitude, the intention of the parties is to be determined in light of its purpose."[27] Ambiguities in the title may be resolved by suppletive provisions of the Civil Code,[28] and doubts as to the existence, extent, or manner of exercise of a predial servitude are to be resolved in favor of the servient estate.[29] The suppletive rules impose an obligation on the dominant estate to refrain from aggravating the servient estate.

The 1870 Louisiana Civil Code expressly provided in article 778 that the owner of a dominant estate must use the servitude according to his title without a right to make changes that render the servitude more

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25. LA. CIV. CODE art. 1983.

26. Terrebonne Par. Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 311 (5th Cir. 2002); *reh'g denied*, 44 F. App'x 655 (5th Cir. 2002) (citing Ogden v. Bankston, 398 So.2d 1037, 1040 (La. 1981)). A servitude holder does sometimes have some additional rights that are considered inherent to the use of the servitude; however, these rights likely do *not* include the right to allow canals to widen and cause erosion. The current civil code article on accessory rights provides that "[r]ights that are necessary for the use of a servitude are acquired at the time the servitude is established." LA. CIV. CODE art. 743 (1977). However, such rights must be "exercised in a way least inconvenient for the servient estate." LA. CIV. CODE art. 743 (1977). For a defendant oil company to successfully argue that it has an accessory right to widen a pipeline canal, it would have to first show that the widening was (1) necessary, and (2) the right to widen was exercised "in a way least inconvenient for the servient estate." *Id.* Thus, a plaintiff landowner could defeat such an argument by showing that canal widening is not strictly necessary; a pipeline canal can be dug and used without widening if the servitude holder properly maintains the canal banks and backfills the canal once use of it ceases (and perhaps even backfill the widened portions while use is ongoing). Thus, article 743 is not generally used as a defense of a servitude holder's failure to maintain canal banks and/or prevent widening.

27. LA. CIV. CODE art. 749. This article is based on article 780 of the Louisiana Civil Code of 1870, which provided that "the use which the person to whom the servitude is granted previously made of it will serve to interpret the title." Under a historical analysis, then, it appears that the intent of the parties might be revealed in part by the parties' prior use of the servitude.

28. *See* LA. CIV. CODE art. 697. Louisiana Civil Code article 697 provides that "[t]he use and extent of [conventional predial] servitudes are regulated by the title by which they are created, and, in the absence of such regulation, by the following rules." *Id.*; *see also Columbia Gulf*, 290 F.3d at 315 ("[T]he Louisiana Civil Code's suppletive rules for immovable property . . . —together with relevant case law—come into play when issues are not explicitly disposed of in the writings of the parties.").

29. LA. CIV. CODE art. 730.

burdensome for the servient estate.[30] Although the current Louisiana Civil Code articles, revised in 1977, do not contain a corresponding provision,[31] the rule remains good law.[32] Accordingly, except where the express language of a servitude agreement addresses the issue of future erosion or land loss resulting from use of the servitude,[33] the suppletive rule forbidding aggravation of the servient estate applies.[34] A contractual provision allowing a canal to be left open does not suffice to avoid application of this suppletive law; the parties must expressly address the relevant erosion to escape the duty imposed by the suppletive law to not aggravate the servient estate.[35]

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30. LA. CIV. CODE art. 778 (1870) ("[H]e who has a right of servitude can use it only according to his title, without being at liberty to make either in the estate which owes the servitude, or in that to which the servitude is due, any alteration by which the condition of the first may be made worse.").

31. While the current Code does not include a provision that the servitude holder may not aggravate the servient estate, it *does* provide that "[t]he owner of the servient estate may do nothing tending to diminish or make more inconvenient the use of the servitude." LA. CIV. CODE art. 748 (1977). Additionally, there are obligations imposed on the owner of the servient estate "to keep his estate in suitable condition for the exercise of the servitude due to the dominant estate." LA. CIV. CODE art. 651 (1977). There are currently no parallel provisions expressly written into the code outlining the servitude holder's obligations to the servient estate. *See discussion infra* Part III for proposed revisions to remedy this gap.

32. LA. CIV. CODE art. 748 (1977); *see also* A. N. YIANNOPOULOS, 4 LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 7:5 (1997) ("The propositions that the owner of the dominant estate may only use the servitude within the limits established by title or possession and that he cannot make changes in the manner of use of the servitude that aggravate the condition of the servient estate are self-evident and do not require legislative affirmation.").

33. Ryan v. S. Nat. Gas Co., 879 F.2d 162, 164-65 (5th Cir. 1989) (explaining that the servitude holder's duty to avoid unreasonable damage to the servient estate "is subject to the provisions of the written servitude agreement between the parties," and holding that, because the servitude agreement at issue expressly prohibited SNG from backfilling the relevant canal, it was relieved of any duty to dam the canal). Additionally, in *Ryan*, the parties contemplated liquidated damages in case of erosion, so they had expressly dealt with the issue in their contract, and thus, there was no "gap" for the suppletive law to fill in regard to which party was responsible for erosion and to what extent. *See* Ryan v. S. Nat. Gas. Co., No. 86-794, 1987 WL 1904, at *2 (E.D. La. 1987). That the parties contracted for liquidated damages related to erosion was the key fact influencing the Fifth Circuit's decision that the servitude holder in *Ryan* did not have a duty to prevent erosion. *See Columbia Gulf*, 290 F.3d at 315 ("The best factual support for our *Ryan* holding was *not* the servitude agreement's provision . . . that the pipeline canal could be left 'open,' but rather . . . the pipeline owner's signature on and the landowner's acceptance of a 'letter agreement' that bound the former to pay the latter $400 per acre of land encroached on by the canal in the event that it widened.").

34. The Fifth Circuit distinguished the contractual agreements at issue in *Columbia Gulf* from those it considered in *Ryan*, and found that, because the *Columbia Gulf* agreements did not explicitly discuss erosion damages, the suppletive law still applied. *Columbia Gulf*, 290 F.3d 303 at 315.

35. *See, e.g., Columbia Gulf*, 290 F.3d at 314-15.

2. The Jurisprudence: Aggravation of the Servient Estate in the Context of Marsh Erosion Resulting from Servitude Holders' Failure to Maintain Canal Banks

Over the course of the past two decades, Louisiana's jurisprudence has developed to impose a continuing contractual duty on canal servitude holders to prevent and even to restore erosion of the servient estate. This development began in 2002, when the U.S. Fifth Circuit recognized in *Terrebonne Parish School Board v. Columbia Gulf Transmission Co.* that, because Louisiana's suppletive law imposes a continuing duty on a servitude holder not to aggravate the servient estate, "absent an express contractual exoneration for marsh erosion damages, to the extent that the damage to [a] servient estate [i]s caused by abuse of right, the damage should be compensable."[36] The court remanded *Columbia Gulf* to the district court to consider whether the suppletive rule not to aggravate the servient estate imposed a duty on pipeline and canal servitude holders to prevent canals from widening and eroding the marshland of the servient estate, and if so, whether such duty rendered the failure to maintain canal banks a continuing *tort* (called a "delict" in the civil law), or a continuing *breach of contractual duty*.[37] Though the case settled before the district court addressed these issues, the Fifth Circuit's *Columbia Gulf* decision pinpointed the key questions at issue when courts consider a suit for damages relative to the marshland erosion that results from a pipeline servitude.

First, the court considered whether the suppletive property law applied to impose obligations on the servitude holder beyond those explicitly written into the parties' contract.[38] The Fifth Circuit noted that the relevant servitude agreements at issue in *Columbia Gulf* contained

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36. *Id.* at 316. This statement in *Columbia Gulf* was a rejection of the Fifth Circuit's unpublished affirmance—just three months earlier—of *St. Martin v. Quintana Petroleum Corp.*, No. 98-2095, 2001 WL 175226 (E.D. La. 2001), *aff'd* 32 F. App'x 127 (5th Cir. 2002). In *Quintana*, the Eastern District of Louisiana extended *Ryan* by holding that, where a servitude agreement allows the servitude holder to leave a canal open, the servitude holder does not have a duty to prevent widening, even if the agreement provides that such canal is not to exceed an established width. *Id.* at *3. However, in *Columbia Gulf*, the Fifth Circuit explicitly rejected its affirmance of *Quintana*, noting that such affirmance was in "an unpublished, and therefore nonprecedential, decision." *Columbia Gulf*, 290 F.3d at 324. The court noted that *Ryan* dealt with a special factual scenario, and because in *Columbia Gulf* (like in *Quintana*), there were "no side agreements supplementing the servitude agreements at issue and specifically providing for the contingency of marsh erosion," *Ryan* did not apply to relieve the servitude holders of the duty not to aggravate the servient estate by allowing marsh erosion. *Id.* at 324-25.

37. *Columbia Gulf,* 290 F.3d at 325-26.

38. *Id.* at 313-15.

provisions that allowed the canals to remain open, and also had provisions establishing "not to exceed" widths of the canals and/or rights of way.[39] The court in *Columbia Gulf* was not convinced that either of these provisions spoke directly to the question of how the parties intended to allocate responsibility for erosion, but viewed them as in "internal conflict, to whatever extent they [do] bear on the question."[40] Accordingly, the court turned to Louisiana's suppletive law, and found such law to be applicable in all cases where a servitude agreement does not expressly release the servitude holder from responsibility for erosion damages.[41]

The Fifth Circuit then considered whether the duty not to aggravate the servient estate—i.e., to properly maintain dredged canals so as to avoid erosion of the servient estate's marshland[42]—was properly classified as a contractual duty or a delictual one.[43] This question is determinative of both prescriptive period and available damages. Whether the duty was properly classified as contractual or delictual, however, the court noted that the duty breached—the duty not to aggravate the servient estate—was a *continuing* duty coextensive with the life of the servitude.[44]

As the Fifth Circuit noted, while contract claims prescribe ten years after the breach, delictual actions prescribe just one year after a plaintiff

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39. *Id.* at 314. The Koch Agreement stipulated that the canal was not to exceed forty feet, whereas the Columbia Agreement stipulated that the entire right of way was not to exceed 100 feet. Both agreements were violated: the Koch canal was found to have widened to forty feet, and the Columbia canal widened to 135 feet, thus extending beyond even the limits of the right of way. *Id.* at 309.

40. *Id.* at 314.

41. *Id.* at 315-16.

42. While the Fifth Circuit did not affirmatively conclude in *Columbia Gulf* that the duty not to aggravate the servient estate includes a duty to prevent the widening of canals beyond the "not to exceed" limits established by a servitude contract, the Eastern District of Louisiana attempted to answer this question some fifteen years later in *Vintage Assets, Inc. v. Tennessee Gas Pipeline, Co.*: "This Court finds that it is self-evident that allowing a canal to widen such that it encroaches on the servient estate or erodes the servient estate into open water constitutes aggravation." No. 16-713, 2017 WL 3601215 at *7 (E.D. La. 2017). Though the Eastern District decision was reversed on jurisdictional grounds, the 25th Judicial District Court adopted the Eastern District's reasoning on remand: "This Court finds that allowing a canal to widen such that it encroaches on the servient estate or erodes the servient estate into open water constitutes aggravation." These two decisions were in relation to servitude agreements that established "not to exceed" widths for the relevant canals. The Louisiana Fourth Circuit has also noted that the same principle might apply even in "No Measurement" agreements: "the issue of whether Respondents' use of the servitudes establish[es] a duty to maintain the canals and canal banks is a genuine issue of material fact." Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., 20-0066 (La. App. 4 Cir. 3/19/20) (*unpub.*) ("*Vintage Assets* Writ 2").

43. *Columbia Gulf*, 290 F.3d at 317-18.

44. *Id.* at 316-17, 324.

knows or should have known of both the damage and its cause.[45] At first glance, though, it appears that it would not matter so much whether the action in *Columbia Gulf* was classified as *ex contractu* or *ex delicto*; either way, the breach of duty was ongoing and thus the claim itself would not have prescribed.

There are, however, other implications of classification of the breach as contractual or delictual. First, classification of the action is important for the determination of how much damage is compensable. If aggravation of the servient estate is classified as a continuing tort, rather than as a continuing breach of a contractual duty, recoverable damages might be limited to one year before suit was brought.[46] The Fifth Circuit found in *Columbia Gulf* that recoverable damages in an action for a continuing tort are limited to one year before suit was brought, but this may not be a valid application of the law. When the operating cause of an injury is continuous, as it is here—the failure to maintain canal banks was a continuing operating cause of the erosion—then tortious conduct gives rise to "successive damages." Under Louisiana law, the one-year prescriptive rule is only appropriate in cases where continuing harm is caused by discontinuous operating causes.[47] The Fifth Circuit's misapplication of Louisiana state law in *Columbia Gulf* is not binding on Louisiana state courts, so hopefully Louisiana state courts would not follow the Fifth Circuit's reasoning on this point; however, it is addressed here out of an abundance of caution as a potentiality. Under the *Columbia Gulf* rule, only damages related to the erosion that occurred in the year prior to the suit being brought would be compensable, while historic damages would not be. Meanwhile, under Louisiana's law of obligations, damages relative to a breach of contract are not held to be limited, in the case of a continuing breach, to the ten years before suit was brought.[48]

Second, and more importantly, classification of the action as either contractual or delictual gives the court direction as to the preferred remedy

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45. *Id.* at 318; *compare* LA. CIV. CODE art. 3499 *with* LA. CIV. CODE art. 3492-93. "[W]hen damage is evident but causation is reasonably mysterious, Louisiana courts sometimes pretermit the running of prescription." *Columbia Gulf*, 290 F.3d 303 at 322-23 (collecting state court cases).

46. *Columbia Gulf*, 290 F.3d at 317 n.41 (citing R. J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776, 781 (5th Cir. 1963) ("When suit is brought, the plaintiff may recover only for damages inflicted during the period of limitation immediately preceding the filing of the complaint.").

47. *See* Hogg v. Chevron USA, Inc., (La. 6/6/10); 45 So. 3d 991, 1002-03.

48. *See* St. Martin v. Mobil Expl. & Producing U.S. Inc., 224 F.3d 402, 409 n.8 (5th Cir. 2000) (finding that under a theory of continual obligations, damages are not limited to the ten years prior to suit).

available.[49] Damages for a breach of contract "are measured by the loss sustained by the obligee and the profit of which he has been deprived,"[50] and such damages ought to be "governed by the terms of the agreements and the good or bad faith of Defendants."[51] Relative to a breach of contract, parties can either (a) bring a claim for specific performance, which in the context of these pipeline servitude cases might be a demand that the servitude holder restore the canals by backfilling them, or (b) a claim for rescission of the contract coupled with a claim for damages measured by the loss sustained.[52] However, when immovable property is damaged by *tortious* conduct, the measure of damages is controlled by a different rule.[53] In such cases, restoration costs are only available when the cost of restoring the property to its original condition is not disproportionate to the value of the property and is not "economically wasteful," or where "there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs."[54] Otherwise, in all other cases in which immovable property is damaged by tortious conduct, damages are limited to the difference between fair market value of the property before and after the harm, which is often much less than the amount needed to restore the property.[55]

While the Fifth Circuit declined to expressly decide whether aggravation of the servient estate gives rise to an action *ex contractu* or *ex delicto*, the court suggested that it was likely an action *ex contractu*.[56] The court noted that:

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49. It is also possible that classification of the breach of the duty not to aggravate the servient estate as either a breach of contract or a delict does not matter for the purposes of remedies. *See supra* Part II(B)(1).

50. LA. CIV. CODE art. 1995.

51. Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713, 2017 WL 3706314, at *2 (E.D. La. 2017).

52. VERNON VALENTINE PALMER, THE CIVIL LAW OF OBLIGATIONS: LOUISIANA LAW WITH EUROPEAN COMPARISONS 443 (2020).

53. Corbello v. Iowa Prods., (La. 2/25/03); 85 So.2d 686, 694, *superseded by statute on other grounds as stated in* State v. La. Land & Expl. Co., (La. 1/30/13); 110 So.3d 1038.

54. Roman Catholic Church v. La. Gas Serv. Co., 618 So.2d 874, 879-80 (La. 1993).

55. *Id.*

56. Terrebonne Par. Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 318 (5th Cir. 2002). The Fifth Circuit in *Columbia Gulf* questioned the correctness of the Louisiana Second Circuit Court of Appeals finding to the contrary in *Stephens v. International Paper Co.*, 542 So.2d 35 (La. Ct. App. 2d Cir. 1989). In *Stephens*, the Louisiana Second Circuit held that the duty not to aggravate the servient estate was a "general duty rather than a specific contractual duty or obligation assumed by the owner of the servitude," making the action *ex delicto*. *Id.* at 39.

> [E]ven though the servitude agreements here do not expressly impose on the grantees an affirmative duty actively to prevent the canals from widening, the duty to avoid aggravating a servient estate is not one that is owed to all persons under the law, but is one that is owed only to the servient estateholder by the grantee *as a result of the conventional (contractual) relationship of the parties*.[57]

Because the duty to refrain from aggravating the servient estate by maintaining the canal banks is not one imposed on all members of the public but is instead a duty particular to conventional servitude holders, the Fifth Circuit reasoned that violation of such duty cannot be appropriately classified as a tort.[58]

The 25th JDC followed this reasoning in *Vintage Assets, Inc. v. Tennessee Gas Pipeline, Co.*, wherein the court treated the servitude holders' failure to maintain canals and to refrain from aggravating the servient estate as a breach of contractual duties. The Louisiana Fourth Circuit denied writ on this issue, affirming the lower court's treatment, but granted writ to consider whether such contractual duty extends even where the servitude agreements do not explicitly establish "not to exceed" limits.[59] The Fourth Circuit found that the servitude holders were not free from an obligation to maintain the canals and canal banks as a matter of law simply because the agreements did not establish "not to exceed" limits; instead, Louisiana's suppletive law created a genuine issue of material of fact as to whether these servitude holders' "use of the servitudes establish[ed] a duty to maintain the canals and canal banks."[60] This holding stands for the proposition that *all* conventional servitude agreements for pipeline canals may (depending on the servitude holders' use of the servitude in question) include a *contractual* duty to prevent erosion of the servient estate, even where they do not establish express "not to exceed" widths for the canal, unless they explicitly release the servitude holder from erosion damages.[61] Even though this contractual

57. *Columbia Gulf*, 290 F.3d at 318 (emphasis added).

58. *Id.*; *see also id.* at 311 ("[C]ontractual fault consists of violating a contractual obligation; delictual fault is an act between *juridical strangers* that violates some duty imposed by law, not by contract, and that requires reparation. The parties here are juridical acquaintances.") (emphasis added).

59. Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., 20-0066 (La. App. 4 Cir. 3/19/20) (*unpub.*) ("*Vintage Assets* Writ 2").

60. *Id.*

61. *Id.*

approach is potentially quite protective of servient estates, it does leave behind neighboring estates, as they are not parties to the contract.[62]

B. How to Measure Aggravation of the Servient Estate for the Purposes of Evaluating Damages in Pipeline Servitude Cases

1. Injunctive Relief Under Louisiana Code of Civil Procedure Article 3601

It is possible that the classification of the breach of the duty not to aggravate the servient estate as either a breach of contract or a delict is not determinative of remedies because injunctive relief would be available in either instance pursuant to Louisiana Code of Civil Procedure article 3601(A): "An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law."[63] Because irreparable damage to a servient estate's land holdings (as well as their storm protection) would likely "otherwise result" in a pipeline canal case absent a mandatory injunction requiring the servitude holder to backfill the canal after use, such injunctive relief may be available under article 3601(A). Scholars have declared that "[w]hen the owner of the dominant estate aggravates the condition of the servient estate by an impermissible use of the servitude . . . *the owner of that estate is entitled to demand . . . that the premises be restored to their previous condition*."[64] "In Louisiana, a plaintiff is entitled to injunctive relief *as a matter of right* when the defendant interferes with the ownership of immovable property."[65]

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62. Neighboring estates may instead pursue delictual or property claims, but courts have rejected trespass theories of recovery for erosion. *See, e.g.*, Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713, 2017 WL 3601215 at *4 (E.D. La. 2017) ("[T]he Louisiana Supreme Court has indicated that to succeed on a trespass claim, the plaintiff must show that the trespasser took some intentional, affirmative action . . . [H]ere the alleged trespass was caused by the passive work of erosion[, and thus is not] sufficient to support a claim of trespass."). Instead, neighboring estates might seek injunctive relief by filing a possessory action against the party responsible for the erosion. *See* LA. CODE CIV. PROC. art. 3662. Relief is only available via a possessory action within one year of the canal-owner's "disturbance" of the neighbor's land, however, and so a neighbor who does not act quickly enough may find themselves evicted from their land. Then, only a perfect title could defeat the canal-owner's newfound possessory interest in the now-widened canal.

63. LA. CODE CIV. PROC. art. 3601(A).

64. RONALD J. SCALISE, JR. & A. N. YIANNOPOULOS, 4 LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 7:10 (Sept. 2021).

65. *Id.*

However, of the two cases cited for this proposition, *Efner v. Ketteringham*[66] and *Waters v. Backus*,[67] only *Efner* required the servitude holder to make repairs to the right of way so as to avoid future damage to the servient estate, and it did not require the servitude holder to repair the damage previously suffered by the servient estate. Thus, the injunctive relief available under article 3601(A) historically has not been sufficient to restore the eroded land.

Additionally, this sort of injunctive relief seems to be in express contradiction with a common provision in pipeline servitude agreements that allows the canals to be left open. A suit for a mandatory injunction requiring conduct that was expressly excused by the servitude agreement likely would be unsuccessful.[68] However, in such cases, a judge can order the servitude holders to restore the canals back to the stipulated not-to-exceed widths, as Judge Milazzo in fact did in *Vintage Assets*, even where such restoration costs will greatly exceed the cost of backfilling the entire canal.[69]

2. Damages Available Under Louisiana's Delictual Law

When immovable property in Louisiana is damaged by *tortious* conduct, the so-called "*Roman Catholic* rule" holds that restoration costs are only available when the cost of restoring the property to its original condition is not disproportionate to the value of the property and is not "economically wasteful," or where "there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs."[70] Under the rule, in all other cases in which immovable property is damaged by tortious conduct, damages are limited to the difference between fair market value of the property before and after the harm, which is often much less than the amount needed to restore the property.[71]

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66. 41 So.2d 130, 135 (La. Ct. App. 2d Cir. 1949), *aff'd in part, rev'd in part on other grounds*, 47 So.2d 331 (La. 1950).

67. 8 Martin 1, 1820 WL 1288 (La. 1820).

68. *See* Final Judgment in Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713, 2018 WL 2078606 (E.D. La. May 4, 2018) (wherein Judge Milazzo held that contractual language allowing the canals to be "left open" precluded her from ordering backfilling).

69. *Id.* However, on appeal, the U.S. Fifth Circuit found that Judge Milazzo's court lacked federal subject-matter jurisdiction over the case and remanded it back to the 25th JDC. Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 18-30688, 2018 WL 6264375, at *1 (5th Cir. Oct. 2, 2018). A final remedy has not yet been reached on remand.

70. Roman Catholic Church v. La. Gas Serv. Co., 618 So.2d 874, 879-80 (La. 1993).

71. *Id.*

A third option may be available, however, where restoration is "too costly and impracticable," but stabilization of the land is possible. For example, in *Ryan v. Southern Natural Gas Co.*, the Eastern District of Louisiana calculated damages for the servitude holder's negligence to include not only the liquidated damages provided by contract, but also the cost of *stabilizing* the plaintiff's land so as to prevent future damage.[72] In *Ryan*, restoring the land to its initial condition was estimated to cost $4 million, while stabilization was estimated to only cost $271,000.[73] While the Eastern District's award of stabilization damages in this case was reversed by the Fifth Circuit (which found that the servitude holder had no duty in this instance because the servitude agreement absolved it of the duty to dam the canal),[74] the court's method of calculating damages is still instructive. It raises the possibility that stabilization costs might provide a "middle ground" for assessing damages resulting from tortious conduct when the cost of restoration is high but the difference in fair market value of the property before and after the damage is low.

However, an award of stabilization damages would fail to compensate landowners for the past harm suffered and would not put their land back into its original condition. The answer might then be to ensure restoration costs are not unreasonable in relation to the property's fair market value. When restoration costs are deemed reasonable, a court may award such costs as damages under the *Roman Catholic* rule.[75] In *St. Martin v. Mobil Exploration & Producing U.S. Inc.*, the district court asked the plaintiffs to scale back their original restoration plan before awarding damages, presumably to reduce costs and render the plan more practicable. The *St. Martin v. Mobil* decision thus suggests that restoration costs are more likely to be awarded for cost-conscious restoration plans.[76]

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72. No. 86-794, 1988 WL 32241, at *1 (E.D. La. 1988)

73. *Id.* at *1, 2.

74. Ryan v. S. Nat. Gas Co., 879 F.2d 162, 163 (5th Cir. 1989).

75. St. Martin v. Mobil Expl. & Producing U.S. Inc., 224 F.3d 402 (5th Cir. 2000) (affirming the district court's award of restoration damages in the amount of $10,000 per acre, for $240,000 in total damages). The court should not have applied the *Roman Catholic* rule at all in *St. Martin v. Mobil* because the court decided damages based on a continuing *obligations* theory, rather than a continuing *tort* theory, and the *Roman Catholic* rule is only properly applied in tort cases. Corbello v. Iowa Prod., 2002-0826, (La. 2/25/03); 85 So.2d 686, 694, *superseded by statute on other grounds as stated in* State v. La. Land & Expl. Co., 2012-0884, p. 8 (La. 1/30/13); 110 So.3d 1038 ("We find that damages to immovable property under a breach of contract claim should not be governed by the rule enunciated in [*Roman Catholic*] *Church*."). However, the Fifth Circuit's reasoning for its award of restoration costs under the *Roman Catholic* rule is still instructive for future tort suits for restoration costs, where the rule would properly apply.

76. In *St. Martin v. Mobil*, restoration costs in excess of property value were permitted because the court found that the St. Martins demonstrated a "genuine interest in the health of the

If, however, a plaintiff landowner cannot meet the *Roman Catholic* exceptions to qualify for restoration damages, his recovery in tort will be limited to the lost real estate value resulting from the servitude holder's failure to prevent erosion of the landowner's estate.

3. Damages Available Under Louisiana's Obligations Law

Damages for a breach of contract "are measured by the loss sustained by the obligee and the profit of which he has been deprived,"[77] and such damages ought to be "governed by the terms of the agreements and the good or bad faith of Defendants."[78] "An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made."[79] Because erosion damages resulting from dredged canals were likely foreseeable as early as 1925,[80] and surely foreseeable by the 1950s,[81] servitude holders could generally be held liable for such damages if they contracted with the landowner after such dates. Additionally, because the duty not to aggravate the servient estate by allowing canals to widen is a *continuing* duty,[82] damages are compensable from the moment of foreseeability onward. This obviates the need for landowner plaintiffs to affirmatively plead bad faith to recover erosion damages in cases where the erosion damages were not foreseeable at the time of contracting.[83]

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marsh through their efforts on behalf of the Mandalay Wildlife Refuge," which neighbored their property. 224 F.3d at 410. The court noted that where such a strong personal interest in the marsh land exists, "the possibility of an additional commercial interest does not foreclose damages under *Roman Catholic Church*." *Id.* at 411 n.11. Not all landowners may be able to establish such a personal interest in restoring the marshland, and restoration costs in excess of property value therefore will not always be available.

77. LA. CIV. CODE art. 1995.

78. Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713, 2017 WL 3706314, at *2 (E.D. La. 2017).

79. LA. CIV. CODE art. 1996.

80. Percy Viosca Jr., a biologist for Louisiana's Department of Conservation, noted as early as 1925 that "[m]an-made modifications in Louisiana wetlands . . . are changing the conditions of existence from its very foundations" and were in part the result of "the cutting of navigation and drainage canals." Houck, *supra* note 7, at 198.

81. In 1955, an assistant administrator of the Fish and Game Division of Louisiana's Wildlife and Fisheries Commission, Lyle St. Amant, noted that mineral permits to dredge canals would have ecological effects on large segments of land. Houck, *supra* note 7, at 208. In 1957, St. Amant further observed that "[e]cological and hydrographic changes may be permanent . . . and may affect extensive areas ten miles or more on either side of the canal." *Id.* Similarly, a trade journal for what is now Exxon observed in the 1950s that "land area may be lost through soil erosion due to current through flotation canals." *Id.* at 209.

82. *See discussion supra* Part II(A)(2).

83. *Compare with* LA. CIV. CODE art. 1997 ("An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform."); Vintage

The question then becomes how these erosion damages ought to be measured—fair market value, restoration damages, the value of the lost use of land,[84] or some other metric. The *Roman Catholic* rule has been held inapplicable in breach of contract cases.[85] In *Corbello v. Iowa Production*, the Louisiana Supreme Court rejected the defendant oil company's contention that restoration damages are only awardable in a contract suit where the cost of restoration is "rationally or reasonably related to the market value of the property" and that any restoration obligation is limited by "reasonableness."[86] In that case, the contract included an explicit provision to "reasonably restore the premises as nearly as possible to their present condition," whereas in the pipeline servitude cases, the duty to restore is based on the suppletive law.[87] Such suppletive rules, however, impose the same duties as the express contractual provision that controlled in *Corbello*, and, accordingly, restoration damages should be recoverable wherever restoration is feasible, and the loss of fair market value should be the measure of recovery only where restoration is not feasible.[88] "[T]he damage award . . . need not be tethered

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Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713, 2017 WL 3706314, at *3 (E.D. La. 2017) (providing that bad faith must be pled in the complaint).

84. In a breach of contract case, damages could also be measured according to the value of the lost use of land. However, the value of the lost use of land may not be a helpful remedy for all landowners who do not make an economically productive use of their marshlands, however, and so would not be ideal for all plaintiffs. This method of calculating damages in a breach of contract suit was used in *Pembroke v. Gulf Oil Corp.*, a pipeline case wherein the Fifth Circuit calculated damages according to the value of the use of the land's surface before it was inundated with water. 454 F.2d 606 (5th Cir. 1971). In *Pembroke*, the landowner had granted Gulf Oil a 100-foot right of way, which included the right to construct a pipeline canal forty-five feet in width, across two tracts of his land. *Id.* at 609. However, due to subsidence and widening of the canal due to boat traffic, the average width of the canal was 111.53 feet on Tract A and 89.6 feet on Tract B by the time suit was brought. *Id.* at 610. The court calculated actual damages by first evaluating the value of the use of the land. *Id.* at 613. It found that the use of Pembroke's land was valued at $600 per acre. *Id.* Thus, the district court awarded Pembroke $600 per acre in damages for the water-covered land outside of the 100-foot right of way, and $300 per acre in damages for the water-covered land inside the right of way but beyond the forty-five feet granted for the canal by agreement ("[t]he percentage of use enjoyed by Pembroke under the agreements was . . . used to compute the actual damages"). *Id.* The Fifth Circuit affirmed these computations as "eminently reasonable under the circumstances." *Id.*

85. Corbello v. Iowa Prod., (La. 2/23/03); 85 So.2d 686, 694, *superseded by statute on other grounds as stated in* State v. La. Land & Expl. Co., (La. 1/30/13); 110 So.3d 1038.

86. *Id.* at 692-93.

87. *Id.* at 694.

88. *See, e.g.,* Final Judgment in Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713, 2018 WL 2078606 (E.D. La. 2018) (awarding restoration costs where it was feasible to restore the canals to the stipulated forty-feet widths and awarding lost fair market value where restoration was not feasible). *But see* note 69 (noting that, on appeal to the U.S. Fifth Circuit, *Vintage Assets* was remanded back to the 25th JDC).

to the market value of the property."[89] In *Corbello*, the Court upheld a damage award 300 times greater than the fair market value of the restored property. Thus, where the suppletive duty to refrain from aggravating the servient estate, i.e., to prevent widening of a canal dredged pursuant to a conventional servitude agreement, is treated as a contract claim, full restoration damages should be available even when such damages are dramatically greater than the fair market value of property.

III. SOLUTIONS TO CLARIFY THE DUTY NOT TO AGGRAVATE IN THE CONTEXT OF PIPELINE SERVITUDES

A. Proposed Codal Revisions

Currently, the Louisiana Civil Code does not expressly declare that the owner of a dominant estate, i.e., a servitude holder, has an obligation not to aggravate the servient estate. This omission is excused on the ground that such obligation is so obvious or "self-evident" that it need not be stated.[90] However, such principle is not so self-evident that servitude holders treat it as law; in litigation, they dispute their duty to prevent the encroachment of their widening canals onto the servient estate. Accordingly, the duty not to aggravate the servient estate would benefit from legislative affirmation.

In addition, as Part II of this Article highlights, there is much debate about whether the duty not to aggravate the servient estate ought to be treated as a contractual or delictual duty. This question is of utmost importance not only for the purpose of prescription, but also to determine how much damage is compensable and how such damage awards are to be calculated. These questions could be clarified by a revision to the Civil Code.

A new article should be inserted after article 651, which outlines the obligations of the owner of the servient estate, to outline the obligations of the dominant estate or servitude holder.

Such article could read as follows:

LA. CIV. CODE art. 651.1 Obligations of the owner of the dominant estate.

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89. *Corbello*, 85 So.2d at 693.

90. RONALD J. SCALISE, JR. & A. N. YIANNOPOULOS, 4 LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 7:5 (Sept. 2021) ("The propositions that the owner of the dominant estate may only use the servitude within the limits established by title or possession and that he cannot make changes in the manner of use of the servitude that aggravate the condition of the servient estate are self-evident and do not require legislative affirmation.").

> The owner of the dominant estate, i.e., the servitude holder, has a continuing duty not to aggravate the condition of or physically encroach upon the servient estate except as expressly and specifically provided by this Title or by the unambiguous terms of a servitude agreement.
>
> Where the servitude is established by agreement, violation of the duty not to aggravate the condition of the servient estate is treated as a breach of contract, and thus the prescriptive and damage rules for obligations apply.

The first paragraph of proposed article 651.1 codifies the jurisprudence as expressed in *Columbia Gulf* and *Ryan*.[91] It also clarifies that the duty not to aggravate is a *continuing* duty, which is important to protect servient estates in two key ways: (1) The servitude holder cannot dispose of the duty through a temporary or one-time fix; each successive servitude holder must continue to refrain from aggravation throughout the life of the servitude,[92] and (2) the prescriptive period is prevented from running during the life of the servitude. However, this first paragraph still allows the parties to contract around the obligation not to aggravate. Should the servitude holder want to escape the duty not to aggravate the servient estate (e.g., the duty to prevent erosion), it would simply have to include a release provision in its contract, or, as in *Ryan*, stipulate liquidated damages for such aggravation. The servitude holder would likely have to pay more upfront for such an agreement. Thus, contractual freedom is protected, but so is the servient estate. This protection of the servient estate is in line with the principles of the suppletive law governing servitudes, especially the article 730 instruction that any doubts as to the extent or manner of exercise of a predial servitude ought to be resolved in favor of the servient estate. It also protects the intent of the parties by making the terms of servitude agreements (such as not-to-exceed widths of canals) enforceable in contract, and thus supports the principle embodied in article 749 that the parties' intent should be prioritized.[93]

The second paragraph of proposed article 651.1 codifies the *Erie* guess made by the Fifth Circuit in *Columbia Gulf* and confirmed by the

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91. *See Columbia Gulf*, 290 F.3d at 316 ("Absent an express contractual exoneration for marsh erosion damages, to the extent that the damage to [a] servient estate [i]s caused by abuse of right, the damage should be compensable."); *see generally* Ryan v. S. Nat. Gas Co., 879 F.2d 162, 163 (5th Cir. 1989).

92. As such, this obligation, like the obligation to remove construction materials pursuant to article 745, would be a real obligation that attaches to the predial servitude. "*This obligation must, therefore, be discharged by the present owner of the dominant . . . estate, even if the works were constructed by a previous owner.*" RONALD J. SCALISE, JR. & A. N. YIANNOPOULOS, 4 LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 7:10 (Sept. 2021) (emphasis added).

93. LA. CIV. CODE art. 749.

Louisiana Fourth Circuit in *Vintage Assets* by classifying the duty not to aggravate a servient estate as a contractual obligation. This would have three key effects: (1) The prescriptive period would be ten years rather than one, (2) all past damages would be compensable, and (3) full restoration damages could be awarded even where the cost of restoration dramatically exceeds the fair market value of the restored property. These effects are eminently reasonable in the case of coastal erosion cases brought by landowners because the damage itself is not limited to the fair market value of property, but also extends to the entire region's storm protection. Restoration, then, is the only way for the servitude holder to truly compensate all injured parties for their losses.

B. Proposed Statutory Framework

These proposed codal revisions would codify longstanding civil law principles and recent jurisprudence. They would not, however, necessarily clarify the litigation landscape for erosion cases, especially where the injured estate holder is a neighboring estate rather than a contracting estate, where restoration is impossible, or where parties propose competing approaches to restoration. Thus, in addition to the codal revision suggested above, the Louisiana state legislature should consider a new statutory framework designed both to protect private property owners, and also to restore some of Louisiana's coastal storm buffers at the expense of oil and gas companies that failed to fulfill their contractual duties, rather than at the taxpayers' expense, where feasible.

By analogy, Louisiana Revised Statute 30:29 (also known as Act 312) provides some guidance for a possible statutory framework. Act 312 was originally drafted by industry to ensure that plaintiffs recovering for legacy environmental contamination had to spend their recovered damages on actual restoration of their property.[94] It was also designed to give defendants a voice in the development of "feasible" restoration plans, which would be executed under state oversight.[95] A similar structure can be duplicated here, but a new statute should be tailored to fit the unique needs of coastal landowners who have suffered erosion as a result of servitude holders' failure to properly maintain canals. It should emphasize restoration where possible, provide other damages where not, allow for recovery by neighboring landowners, and ensure that litigation is

94. *See* LA. R.S. 30:29(D)-(E).
95. *See* LA. R.S. 30:29(C)-(D).

accessible to landowners by requiring responsible parties to bear costs. Such statute could read as follows:

> Proposed Louisiana Revised Statute to Compensate Coastal Landowners for Erosion Damages Resulting from Canal Widening.
>
> A. Purpose.
>
> The legislature hereby finds and declares that Article IX, Section 1 of the Constitution of Louisiana mandates that the natural resources and the environment of the state, including its coastal marshland and barrier islands, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people, and further mandates that the legislature enact laws to implement this policy. Toward this end, this Section provides the procedure for judicial resolution of claims for erosion of property arising from the widening of canals dredged pursuant to servitude agreements between private parties.
>
> The provisions of this Section shall not be construed to impede or limit provisions under private contracts imposing remediation obligations in excess of the requirements of the department, or to impede or limit the right of a party to a private contract to enforce any contractual provision in a court of proper jurisdiction. This Section shall apply where a servitude agreement does not clearly delineate the servitude holder's duty to prevent erosion beyond the canal widths established by agreement.
>
> Under the provisions of this Section, landowners suffering from erosion of their property due to canal widening beyond the bounds established by agreement will be entitled to restoration of their land funded by the responsible parties where such restoration is feasible, and the fair market value of their lost land where restoration is not feasible. This Section is not limited to plaintiff landowners who were parties to the relevant servitude agreement; neighboring landowners may recover as well.
>
> Initiating Legal Action.
>
> Notwithstanding any law to the contrary, immediately upon the filing or amendment of any litigation or pleading making a judicial demand arising from or alleging property damage resulting from canal widening, the provisions of this Section shall apply.
>
> Upon filing of such litigation, a one-year investigatory period will commence, during which time the plaintiff landowner and the defendant may engage experts to determine:
>
> the extent and location of erosion of the landowners' property,
>
> a description of the alleged erosion, and
>
> the hydrologic connection between the alleged erosion and the defendant servitude holder's canal.

After the investigative period closes, the plaintiff landowner and the defendant will each have a 180-day planning period in which to develop and submit a feasible restoration plan to the court. Such restoration plans should detail:

in which areas restoration is feasible,

the relevant alternatives for restoration,

the cost of implementing each alternative,

the effectiveness of each alternative in restoring the eroded land,

the submitting party's opinion, substantiated by data, of which alternative is the most feasible plan.

The restoration plans should also specify:

the areas in which restoration is not feasible, and

the lost fair market value of those areas due to erosion.

LDNR Review & Public Hearing.

After the parties submit their restoration plans, the court shall submit the plans to the Louisiana Department of Natural Resources (LDNR) for review.

The LDNR shall publish each plan for public comment within thirty days of the close of the planning period. The public comment period shall last sixty days.

At the close of the public comment period, the LDNR shall have ninety days to review and respond to public comments, and to file with the court its determination of which plan is the most feasible, along with written reasons explaining its decision.

Court Adoption of Restoration Plan.

The plan approved by the LDNR for submission to the court will be adopted by the court unless a party proves by a preponderance of the evidence that another plan is a more feasible plan to adequately protect the public health, safety, and welfare.

The court shall enter a judgment adopting a plan with written reasons assigned.

Upon adoption of a plan, the court shall order the party or parties admitting responsibility, or the party or parties found legally responsible by the court to fund the implementation of the restoration plan, and to compensate the plaintiff landowners for the eroded land that cannot feasibly be restored in accordance with its lost fair market value.

The funds required for restoration will be deposited into the registry of the court and may be paid in increments as necessary, by the court's determination.

> The funds required to compensate the plaintiff landowners for lost fair market value of property that cannot be restored will be paid to the plaintiff landowners directly as damages.
>
> The court shall issue such orders as may be necessary to ensure that the funds deposited for restoration are actually expended in a manner consistent with the adopted plan for the restoration of eroded land.
>
> Attorney Fees & Other Costs.
>
> Where the factfinder determines that the defendant is liable, plaintiff landowners are entitled to recover from the defendant expert witness fees, costs incurred during investigation, the cost of developing a restoration plan, and reasonable attorney fees incurred.
>
> However, if the defendant admits liability during the one-year investigatory period or within in the first sixty days of the 180-day planning period, the defendant will not be responsible for attorney fees and costs.
>
> Feasibility.
>
> A "feasible" plan is the most reasonable plan that best restores the eroded land in conformity with the requirements of Article IX, Section 1 of the Constitution of Louisiana to protect the environment, public health, safety, and welfare, and such plan must comply with the relevant and applicable standards and regulations in effect at the time.

The above proposed statutory framework is expressly designed to allow affected landowners—even those not party to the servitude agreement at issue—recovery for erosion caused by widening canals. It also places preference on restoration where possible, devising a system by which parties can propose restoration plans and the court will oversee the execution of the most feasible plan. This proposed framework also defines the feasibility of a restoration plan in terms of its ability to restore eroded land, rather than in terms of its cost-effectiveness. It also attempts to preserve plaintiffs' financial incentive to sue by guaranteeing the recovery of attorneys' fees and other costs where the defendants do not admit liability, as well as the recovery of fair market value of lost land where restoration is not possible. Accordingly, this framework is designed to incentivize restoration of eroded marshland without destroying plaintiffs' financial incentive to sue.

Further, this statutory framework creates an incentive for defendant oil and gas companies to admit liability and thus supports the efficient resolution of litigation. If defendants admit liability in a timely fashion, they can escape liability for attorneys' fees and court costs, though they still will be on the hook for the price of restoration.

Combined with the proposed Civil Code revisions suggested *supra* in Part III(A), this statutory framework could facilitate the restoration of Louisiana's coastal wetlands in a cost-effective and efficient manner, while protecting private property rights and giving defendants a voice in the restoration planning process.

IV. CONCLUSION

With the help of a minor codal revision, a new statutory framework, and smart litigation, there is hope for Louisiana's wetlands. Defendant servitude holders already have duties to maintain canal banks to prevent erosion, and to restore land loss where they have failed to do so; the codal revision and new statutory framework proposed in this Article simply clarify that duty and attempt to streamline litigation. Louisiana is running out of time to restore its marshlands. If we spend the next several decades litigating who is responsible for what, it may be too late. However, if our legislature can pass a statutory framework that clarifies remedies and imposes strict deadlines, parties will be incentivized to cooperate in the timely development and implementation of feasible and cost-effective plans that restore the coastal land loss caused by canal widenings. If Louisiana hopes to restore its storm buffers before the state is further devastated by hurricanes, such cooperation is key.