

When the Levee Servitude Breaks: a Discussion of the Paradox Facing Louisiana Property Owners

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I. INTRODUCTION

The Mississippi River, in addition to being the focal point of Louisiana's economy, culture, and history, presents a unique paradox for landowners and legislators alike. Man's struggle against nature is nowhere more evident than in the history of Louisiana's levee system, which both protects the region from flooding and contributes to the decreased prevalence and severity of flooding.² For centuries, the different governing nations (i.e. Spanish and French) of Louisiana have utilized the servitude doctrine to ensure that the levee system is properly maintained and that there are sufficient regional flood protection mechanisms in place.³

However—all too apparent to Louisianans—the threat of hurricanes has increased in both frequency and regional destruction.⁴ As a result of this intensification, Louisiana faces an interesting quandary: how to equitably balance the interests of private landowners and the general public. For example, is it worth building a levee to protect New Orleans if such a development required landowners in Plaquemines Parish to relinquish ownership of the orange groves that have been in their family for generations?

While Louisiana's geographic vulnerability is somewhat unique, the legal versus moral dilemma it faces is not.⁵ As early as the sixth century, lawmakers attempted to reach an equitable solution when faced with the task of balancing private property rights with the public interest.⁶ The nearly century and a half of jurisprudence pertaining to this conundrum has often referenced a principle known as the “public trust doctrine”—the theory that a sovereign nation has a positive duty to protect its natural resources for future use and enjoyment by the public.⁷ According to most legal scholars, this doctrine was founded upon the Institutes of Justinian, a sixth century Roman legal treatise. The provisions of the institutes were subsequently adopted by England in the Magna

² RICHARD CAMPANELLA, *BIENVILLE'S DILEMMA: A HISTORICAL GEOGRAPHY OF NEW ORLEANS* 207 (Univ. La. Lafayette, 1st ed. 2008) (“The control of the Mississippi River, an effort spanning three regimes and nearly three centuries, represents one of humanity's grandest manipulations of a natural system. . . . Spatially, the effort resolved the threat of Mississippi River flooding to New Orleans proper – only to transfer that threat to the rising, encroaching Gulf of Mexico. Temporarily, it succeeded in preventing frequent minor floods – but increased the chances of an occasional mega-catastrophe.”); see also Mark Schleifstein, *Levees, Oil Wells Biggest Causes of Barataria Basin Land Loss: Study*, NOLA (Mar. 6, 2023), https://www.nola.com/news/environment/barataria-wetlands-losses-linked-to-levees-oil-wells-study/article_de229522-bc50-11ed-9d59-1f48c1681222.html.

³ See John W. Jewell, *Civil Law Property-Levee Servitude-Civil Code Article 665*, 27 LA. L. REV.

321, 327-28 (1967); see also Richard P. Wolfe, *Appropriation of Property for Levees: A Louisiana Study in Taking Without Just Compensation*, 40 TUL. L. REV. 233 (1966).

⁴ See Angela Colbert, *A Force of Nature: Hurricanes in a Changing Climate*, NASA: GLOBAL CLIMATE CHANGE (June 1, 2022), <https://climate.nasa.gov/news/3184/a-force-of-nature-hurricanes-in-a-changing-climate/>.

⁵ See David L. Callies, *The Public Trust Doctrine*, 8 BRIGHAM-KANNER PROP. RTS. J. 71, 71-72 (2019).

⁶ Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENV'T. AFF. L. REV. 1, 7 (2017).

⁷ *Id.* at 2.

Carta of 1215 and eventually embraced by the United States Supreme Court in the mid-nineteenth century.⁸ In applying the philosophical ideals of “natural law,”⁹ Justinian wrote: “[T]he following things are by natural law common to all – the air, running water, the sea, and consequently the seashore.”¹⁰

With this principle in mind, the State of Louisiana must take the necessary action to prevent the loss of public resources due to flooding; however, the extent at which it should do so is uncertain. What is less clear is at what cost should it do so? This issue is difficult to resolve equitably and has been compounded by recent developments in legislation and jurisprudence. In response to the destruction caused by Hurricanes Katrina and Rita, the Louisiana legislature imposed two relevant regulations: (1) it expanded state and local governments’ authority to acquire land necessary for flood control projects, and (2) it modified the rules regarding the amount of compensation owed to landowners.¹¹ While these changes are fraught with implications regarding Louisiana property law, this comment discusses the potential effects that the recent developments will have on future flood control projects and Louisiana’s maritime economy.

II. BACKGROUND

A. Predial Servitudes

As defined by Article 646 of the Louisiana Civil Code, a predial servitude is a “charge on a servient estate for the benefit of a dominant estate.”¹² Additionally, the two estates “must belong to different owners.”¹³ Although the Civil Code does not reference the content or purpose of a predial servitude, it indicates that a servitude is a real right burdening an immovable—the servitude creates a right for the benefit of an *immovable*, rather than for the benefit of a *person*.¹⁴ However,

⁸ *Id.* at 6-7; *But see* James L. Huffman, *The Public Trust Doctrine: A Brief (and True) History*, 10 GEO. WASH. J. ENERGY & ENV’T L. 15, 17-19, 26 (2019) (arguing that neither Roman law nor English law provide the substantive basis for what we now call the “public trust doctrine,” but rather that the courts’ repeated references to Justinian and the Magna Carta have created a precedent based on “the modern myths of public trust doctrine history . . .”).

⁹ *Natural Law*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“a philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action; [or, a] moral law embodied in principles of right and wrong.”).

¹⁰ CAESAR FLAVIUS JUSTINIAN, *THE INSTITUTES OF JUSTINIAN*, 25 (J.B. Moyle trans., 5th ed. 1913).

¹¹ *See* 2006 La. ACT 853; *see also* LA. CONST. ANN. art. I, § 4 (2006); *see also* LA. CONST. ANN. art. VI, § 42(A) (2006).

¹² LA. CIV. CODE ANN. art. 646 (1978); *see also* A.N. YIANNPOULOS, *LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES* § 1:3 (Thomson Reuters, 4th ed. 2013) (“In civilian literature, the estate burdened with a predial servitude is designated as ‘servient’ (*praedium serviens*), and the estate for the benefit of which (or for the benefit of the owner of which) the servitude is established is designated as ‘dominant’ (*praedium dominans*).”).

¹³ LA. CIV. CODE ANN. art. 646 (1978).

¹⁴ A.N. YIANNPOULOS, *LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES* § 1:3 (Thomson Reuters, 4th ed. 2013).

while the servitude burdens the property rather than its owner, the servitude “deprives the owner of the burdened immovable of certain specified prerogatives of his ownership.”¹⁵

In general, predial servitudes impose on the owner of the servient estate (i.e., the estate burdened by the servitude) the duty to “abstain from doing something on his estate or to permit something to be done on it.”¹⁶ This duty of the landowner might include “the toleration of certain activities, the prohibition of certain acts, or the restriction of certain rights belonging to him by virtue of his ownership.”¹⁷

There are three classes of predial servitudes: natural, legal, and voluntary (or conventional).¹⁸ Natural servitudes arise from the estate’s natural situation whereas voluntary or conventional servitudes are “established by juridical act, prescription, or destination of the owner.”¹⁹ Legal servitudes, predictably, are imposed by law.²⁰ Some French commentators have declared that the “so-called legal servitudes in the Civil Code are not servitudes but general limitations on the content of ownership” of immovable property, as legal servitudes burden *all* privately-owned immovable property and do not create a servient and dominant estate.²¹ Generally, there are two types of legal servitudes in Louisiana—those for the benefit of the public and those for the benefit of particular persons.²²

B. Legal Public Servitudes

Under Louisiana law, legal servitudes are defined as “limitations on ownership established by law for the benefit of the general public or for the benefit of particular persons.”²³ This definition encompasses certain obligations imposed on landowners, such as keeping buildings in repair, contributing to the maintenance of common fences, and granting a right of passage to an enclosed estate.²⁴ Unlike other types of predial servitudes, which benefit one estate at the expense of another, legal *public* servitudes are intended to benefit the public at large.²⁵ To this end, Louisiana Civil Code Article 665 (hereinafter “the levee servitude”) establishes a legal public servitude on “the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works.”²⁶

¹⁵ *Id.*

¹⁶ YIANNOPOULOS, *supra* note 14, at § 1:4.

¹⁷ YIANNOPOULOS, *supra* note 14, at § 1:4.

¹⁸ YIANNOPOULOS, *supra* note 14, at § 1:12.

¹⁹ YIANNOPOULOS, *supra* note 14, at § 1:12.

²⁰ YIANNOPOULOS, *supra* note 14, at § 1:12.

²¹ YIANNOPOULOS, *supra* note 14, at § 2:9.

²² YIANNOPOULOS, *supra* note 14, at § 2:10.

²³ LA. CIV. CODE ANN. art. 659 (1996).

²⁴ LA. CIV. CODE ANN. art. 660 (1996); LA. CIV. CODE ANN. art. 684 (1996); LA. CIV. CODE ANN. art. 689 (1996).

²⁵ LA. CIV. CODE ANN. art. 665 (2005); *see* LA. CIV. CODE ANN. art. 667 (1996).

²⁶ LA. CIV. CODE ANN. art. 665 (2005).

Legal public servitudes have long been embraced by Louisiana governments as a method of ensuring flood resistance.²⁷ As early as 1770, the governments of France and Spain reserved public servitudes in land grants issued to riparian²⁸ landowners and required that landowners build and maintain levees at their own expense.²⁹ This obligation remained with landowners until the first levee district was established in 1852, after which the government assumed the responsibilities of constructing and maintaining the levee system.³⁰ While the onerous levee obligations have been replaced by public funding and government authority, the associated legal public servitudes remain.³¹

C. Riparianism

The doctrine of “riparianism” under Louisiana law delineates “the right of a landowner adjacent to a flowing stream to use the waters of that stream for certain purposes.”³² Riparian property is defined as “property located on the bank of a navigable waterway.”³³ Article 455 of the 1870 Civil Code stated that “the ownership of the river banks belongs to those who possess the adjacent lands,”³⁴ thus establishing the riparian landowner’s ownership of the banks of navigable rivers.³⁵ Yet, such ownership is not without limitation. Article 456 provides that banks of navigable rivers are private things subject to public use.³⁶

Historically, in addressing appropriations under the levee servitude, courts had to determine whether certain tracts of land should be considered “riparian” for purposes of the servitude.³⁷ Due to the ever-evolving geography of Louisiana, courts decided whether the land must be riparian “at the time of its severance from the sovereignty” or “merely riparian at the time of the appropriation” in order to fall within the scope of the levee servitude.³⁸ In 1979, the Louisiana Second Circuit Court of Appeal held that property subject to a levee servitude, even if that property was *currently* riparian, must have been riparian “at the time of its severance from the public domain”. If it was not, then its appropriation under the levee servitude was

²⁷ Jewell, 27 La. L. Rev. 321, 327-28 (1967); Wolfe, 40 TUL. L. REV. 233 (1966).

²⁸ *Riparian*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Of, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake).”).

²⁹ Jewell, 27 La. L. Rev. 321, 327-28 (1967); Wolfe, 40 TUL. L. REV. 233 (1966); S. Lafourche Levee Dist. v. Jarreau, 217 So. 3d 298, 308 (La. 2017).

³⁰ Jewell, 27 La. L. Rev. 321, 327-28 (1967); Wolfe, 40 TUL. L. REV. 233 (1966).

³¹ Jewell, 27 La. L. Rev. 321, 327-28 (1967); Wolfe, 40 TUL. L. REV. 233 (1966).

³² Mark Davis, *A Toe in the Water: A Primer on Louisiana Riparian Law and Emerging Issues*, 56 ANN. INST. ON MIN. L. 261, 263 (2009).

³³ *Plaquemines Dirt & Clay Co. v. Plaquemines Par. Gov’t*, 364 So. 3d 274, n.4 (La. App. 4th 2020).

³⁴ LA. CIV. CODE art. 455 (1870).

³⁵ LA. CIV. CODE ANN. art. 456 (2024) rev. com. (c).

³⁶ LA. CIV. CODE ANN. art. 456 (2024).

³⁷ John A. Lovett, *Batture, Ordinary High Water, and the Louisiana Levee Servitude*, 69 TUL. L. REV. 561, 579 (1994).

³⁸ *Id.*

unconstitutional.³⁹ Despite courts' protracted struggle with navigating the complex definition of the levee servitude, while oftentimes referencing the constitutional implications of an improper interpretation, the discussion regarding "riparian" has been rendered moot by the 2006 amendments discussed below.⁴⁰

D. Appropriation vs. Expropriation

Unlike other states, which acquire land through eminent domain, Louisiana's approach is based on its unique civil law tradition.⁴¹ While Louisiana exercises eminent domain over certain non-riparian acquisitions, it has adopted the doctrine of "appropriation" in acquiring riparian lands under the levee servitude.⁴² Eminent domain, referred to as "expropriation" in Louisiana, is the right of a sovereign to take private land in order to achieve a public purpose.⁴³ Notably, a landowner has complete ownership of the land, unencumbered by a public servitude, until the sovereign expropriates it.⁴⁴ On the other hand, appropriation under the levee servitude is not considered a "taking" of private land, but rather, the state's notice to a riparian landowner that it intends to exercise its legal servitude, thus "resum[ing] possession of what it always owned."⁴⁵

Because appropriation under the levee servitude does not constitute a "taking," courts have held that such action does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and as such, it does not violate the Takings Clause of the Fifth Amendment, so long as the law is impartially administered.⁴⁶ Thus, a riparian landowner whose property has been appropriated by the state is not entitled to the same due process guarantees afforded during an expropriation action; such as the right to a judicial proceeding, notice, compensation, etc.⁴⁷ As Justice Fournet of the Louisiana Supreme Court has stated, this allows the state to "act first...and talk later."⁴⁸

Notably, the expropriating authority must satisfy certain requirements prior to taking the property, such as filing a petition for expropriation, providing the owner with appraisal

³⁹ *Id.*; *Deltic Farm & Timber Co. v. Board of Comm'rs*, 368 So. 2d 1109, 1113 (La. App. 2d Cir. 1979).

⁴⁰ *See* Lovett, *supra* note 37; *see also* LA. CIV. CODE ANN. art. 665 (2005); *see also* *Plaquemines Dirt & Clay Co. v. Plaquemines Par. Gov't*, 306 So. 3d 427 (La. 2020).

⁴¹ Wolfe, 40 TUL. L. REV. 233 (1966).

⁴² *Id.*

⁴³ *Id.* at 243.; *Kohl v. U.S.*, 91 U.S. 367, 373-74 (1875).

⁴⁴ Wolfe, 40 TUL. L. REV. 233, 268 (1966).

⁴⁵ David A. Peterson, *Appropriation of Levee Servitudes in Louisiana*, ASSOCIATION OF LEVEE BOARDS OF LA. 74TH ANN. MEETING, DEC. 3, 2014, at 2; Wolfe, 40 TUL. L. REV. 233, 267-68 (1966); *see also* *Ruch v. New Orleans*, 9 So. 473, 475 (La. 1891) ("The right of *appropriation* proceeds upon the principles...that the riparian owner enjoys his property *sub modo*; *i.e.*, subject to the right of the public to reserve space enough for levees, public roads and the like. Over this space the front proprietor never acquires complete dominion. It never passes *free* of this reservation by a deed to a purchaser.").

⁴⁶ *Eldridge v. Trezevant*, 160 U.S. 452, 462 (1896).

⁴⁷ *Id.*

⁴⁸ *Dickson v. Board of Comm'rs*, 26 So. 2d 474, 478 (La. 1946).

information, and, upon request, conducting a geological survey at no cost to the property owner.⁴⁹ While those several requirements exist, no judicial proceeding is required to carry out an appropriation; the state (or levee board) only needs to pass a resolution declaring the land appropriated.⁵⁰ Subsequent notice of the resolution is customarily given to the landowner; however, failure to give notice does not invalidate the appropriation.⁵¹

a) Compensation Owed to Landowner

The most significant of the differences between appropriation and expropriation under Louisiana Law regards compensation owed to the landowner.⁵² The Fifth Amendment dictates that “private property [shall not] be taken for public use, without just compensation.”⁵³ Courts have repeatedly held that the definition of “just compensation” under the Fifth Amendment is the “market value of the property at the time of the taking.”⁵⁴ However, just compensation is merely a constitutional minimum owed to landowners when states exercise eminent domain, and Louisiana offers additional compensation in expropriation actions barring the exceptions outlined in the 2006 amendments.⁵⁵ In Louisiana, a landowner whose property has been expropriated is owed not only the fair market value of the property at the time of the expropriation, but also compensation “to the full extent of his loss,” including the cost of inconvenience and the loss of profits.⁵⁶

Despite the United States Supreme Court’s holding that the Fifth Amendment does not apply to appropriations, because they are not considered “takings”, Louisiana has nevertheless granted landowners the right to just compensation after their property has been appropriated.⁵⁷ Importantly, however, if the appropriated land is considered “batture,”⁵⁸ no compensation of any kind is owed.⁵⁹ Additionally, several important amendments were made to Louisiana’s Constitution and Civil Code in 2006 which further limited the compensation owed to landowners and expanded the scope of property subject to appropriation under the levee servitude.⁶⁰

⁴⁹ LA. REV. STAT. ANN. § 19:2.2, *et seq.*

⁵⁰ Wolfe, 40 TUL. L. REV. 233, 272-73 (1965).

⁵¹ *Id.*

⁵² *Id.* at 234.

⁵³ U.S. CONST. amend. V.

⁵⁴ Olson v. U.S., 292 U.S. 246, 255 (1934).

⁵⁵ *See id.*; *see also S. Lafourche*, 217 So. 3d at 308; *see also* LA. CONST. ANN. art. 1, § 4 (2006).

⁵⁶ *S. Lafourche*, 217 So. 3d at 308; LA. CONST. ANN. art. 1, § 4 (2006) ; *see also* LA. REV. STAT. ANN. § 9:1102.2 (setting forth the procedure for a landowner’s request for a jury trial to set the compensation award.).

⁵⁷ *Compare Eldridge* 160 U.S. at 462, with *S. Lafourche*, 217 So. 3d at 308.

⁵⁸ Although the term “batture” has various historical and colloquial definitions, it is legally defined as “alluvial accretions annually covered by ‘ordinary high water,’ the highest stage the river can be expected to reach annually in seasons of high water.” *DeSambourg v. Board of Comm’rs*, 621 So. 2d 602 (La. 1993).

⁵⁹ *S. Lafourche*, 217 So. 3d at 308.

⁶⁰ *Id.*

b) Improvements Made by Landowner

Another key distinction between the two schemes has to do with the compensation owed for improvements⁶¹ made on the property.⁶² As discussed above, a non-riparian landowner whose property has been expropriated, for a public use *not* related to flood/hurricane control, is entitled to the “full extent of his loss.”⁶³ Thus, the landowner would be entitled to recover the amount of his loss of improvements.⁶⁴ For example, a landowner who has erected a small grain silo on his property would be able to recover the cost of the materials, costs of inconvenience, appraised value of the lost property, and loss of income attributed to building that silo, in addition to the compensation owed for the property itself.⁶⁵

However, the same is not true of appropriations under the levee servitude.⁶⁶ Louisiana Revised Statute 9:1102.1 delineates the rights that riparian landowners and their lessees have in any improvements made on the property.⁶⁷ The statute grants riparian owners the right to erect and maintain “wharves, buildings, or improvements” on the batture and in the bed of the adjoining navigable waterway “as may be required for the purpose of commerce, navigation, or other public purposes.”⁶⁸ Surprisingly, the legislature then departed from the traditional compensation scheme for batture property, that is, the *denial* of compensation, and established two disjunctive categories of landowners and their respective avenues of recourse.⁶⁹

The first category of landowners are those who obtained prior permission from the port commission to erect the improvement, while conforming to the commission’s plans and specifications. These landowners are entitled to a compensation claim for the “full extent of their loss.”⁷⁰ The second category of landowners are those who did not receive the commission’s approval. Conversely, these landowners “shall be entitled to be paid compensation therefor[e] to the full extent of their loss or required to remove such wharves, buildings, or improvements at their own expense”⁷¹ This provision suggests two vastly different outcomes for the landowner: either (1) they will be compensated for *all* “damages actually incurred,”⁷² or (2) they will be

⁶¹ See LA. CIV. CODE ANN. art. 493 (1980) (“Improvements” include buildings, other constructions permanently attached to the ground, and plantings.).

⁶² Compare LA. REV. STAT. ANN. § 9:1102.1 (1981), with LA. CONST. ANN. art. 1, § 4 (2006).

⁶³ LA. CONST. ANN. art. 1, § 4 (2006).

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ Compare LA. REV. STAT. ANN. § 9:1102.1 (1981), with LA. CONST. ANN. art. 1 § 4 (2006).

⁶⁷ LA. REV. STAT. ANN. § 9:1102.1 (1981); However, the statute clarifies that the rights outlined therein apply only to “[r]iparian owners and their lessees of property on navigable rivers, lakes, or streams within the limits of any deep water port commission of this state or, in the absence of any such commission, within a municipality having a population in excess of five thousand inhabitants.” LA. REV. STAT. ANN. § 9:1102.1(A) (1981).

⁶⁸ LA. REV. STAT. ANN. § 9:1102.1(A) (1981).

⁶⁹ See LA. REV. STAT. ANN. § 9:1102.1 (1981).

⁷⁰ LA. REV. STAT. ANN. § 9:1102.1(A) (1981).

⁷¹ *Id.*

⁷² LA. CONST. ANN. art. 1, § 4(B)(5) (2006).

required to remove the improvements at their own expense.⁷³ Importantly, the statute provides that the decision whether to tender compensation or require removal is “in the discretion of the governing authority of the deep-water port commission or of the municipality.”⁷⁴ Thus, the decision of whether the appropriating authority must compensate the landowner for batture improvements is ultimately left to the same appropriating authority.⁷⁵

Although the language of the statute might seem open to interpretation and misapplication, the Louisiana Supreme Court provided important historical context in a 1903 opinion⁷⁶ authored by Justice Provosty:

“Before the adoption of article 290,⁷⁷ riparian owners wishing to build wharves did not have to obtain the consent of the public authorities; but the wharves were removable at the discretion of the public authorities, whenever the public exigencies required, without formal expropriation and without compensation. It was to change this order of things, and provide a more reliable tenure for private wharves, that article 290 was adopted.”⁷⁸

In describing the legislature’s intent to alleviate the concerns of private industrial actors, Justice Provosty hints at the underlying struggle to balance the interests of the public with the economic benefits provided by the maritime industry.

Despite the uncertainties surrounding compensation for immovables on batture, the statute makes one thing perfectly clear: the compensation scheme set forth therein does not “deprive the levee boards of . . . their right to appropriate, *without compensation*, such wharves, buildings, or improvements.”⁷⁹

⁷³ LA. REV. STAT. ANN. § 9:1102.1(A) (1981).

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *State ex rel. Ill. Cent. R.R. Co. v. Bd. of Levee Comm’rs*, 33 So. 385 (La. 1903).

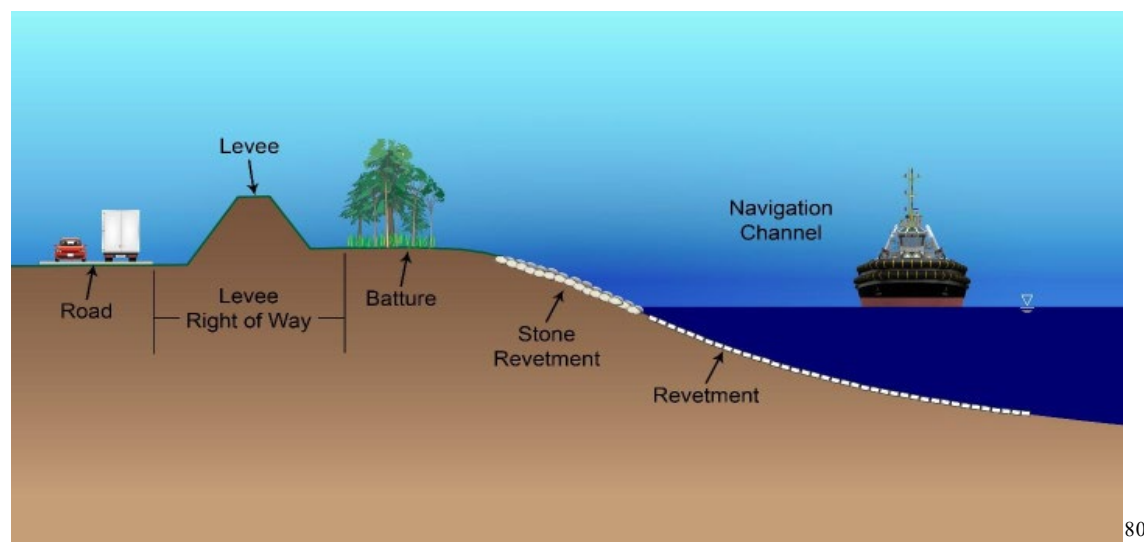
⁷⁷ LA. CONST. ANN. art. 290 (1898); *see* A.N. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE: PROPERTY § 5:7 (Thomson Reuters, 5th ed. 2015) (“Prior to the adoption of Article 290 of the Louisiana Constitution of 1898, the source of . . . R.S. 9:1102.1, a riparian owner could not claim compensation for the taking of his improvements, even if he had made them with permission of the authorities.”).

⁷⁸ *State ex rel. Ill. Cent. R.R. Co. v. Bd. of Levee Comm’rs*, 33 So. 385, 397 (La. 1903).

⁷⁹ LA. REV. STAT. ANN. § 9:1102.1(B) (1981) (emphasis added).

III. EXPANSION OF THE LEVEE SERVITUDE

A. Definition of “Batture”



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While the measure of compensation owed to riparian landowners under the levee servitude has shifted over time, one aspect has remained constant—no compensation is owed when batture is appropriated.⁸¹

Despite the historical consistency of the “batture exemption,” Louisiana courts have long struggled to provide a concise legal definition of the term.⁸² In 1993, after more than a century of confusion, the Louisiana Supreme Court granted writ “to determine the meaning of ‘batture’ as it is used in the context of the batture exemption” under the levee servitude.⁸³ The court ultimately defined batture as “alluvial accretions annually covered by ‘ordinary high water,’ the highest stage the river can be expected to reach annually in seasons of high water.”⁸⁴

⁸⁰ Department of the Army, *Regional Planning and Environment Division South Environmental Compliance Branch*, DEPARTMENT OF DEFENSE 1, 16 (2017), <https://www.mvn.usace.army.mil/Portals/56/docs/Section%20408/Draft%20Programmatic%20EA%20556%20and%20Finding%20of%20No%20Significant%20Impact.pdf?ver=2017-09-27-142932-347>.

⁸¹ *DeSambourg*, 621 So. 2d 602.

⁸² See Lovett, *supra* note 37.

⁸³ See *id.*; *DeSambourg*, 621 So. 2d at 603.

⁸⁴ *DeSambourg*, 621 So. 2d 602; *Alluvial*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “alluvial” as “[o]f, relating to, or involving soil left by rivers, lakes, floods, etc.”); *Accretion*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “accretion” as the “gradual accumulation of land by natural forces, esp[ecially] as alluvium is added to land situated on the bank of a river or on the seashore.”).

B. 2006 Amendment to Article 665

Following the devastation inflicted by Hurricanes Katrina and Rita in 2005, the Louisiana legislature amended Article 665 and broadened the scope of the levee servitude.⁸⁵ The article now defines legal public servitudes as (2006 amendment italicized):

“Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works. *Such servitudes also exist on property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees.* All that relates to this kind of servitude is determined by laws or particular regulations.”⁸⁶

This amendment, though clearly an attempt by the legislature to support flood prevention efforts, drastically transforms the levee servitude by shifting away from the centuries-old understanding that the servitude exists solely on *riparian* land.⁸⁷ As stated by Judge Roland Belsome of the Fourth Circuit Court of Appeal: “In furtherance of an effort to protect the State and its citizens from future hurricanes and flood events, allowing for appropriation of non-riparian property pursuant to article 665 created a more expeditious and economical way to access properties needed for that hurricane protection.”⁸⁸

C. Plaquemines Dirt & Clay (2020)

In June of 2017, the U.S. Army Corps of Engineers (“USACE”) notified the Plaquemines Parish Government of proposed construction on the New Orleans to Venice, West Bank Hurricane Protection Levee.⁸⁹ Three months later, the Plaquemines Parish Council passed an ordinance appropriating land for the project, a portion of which was situated on property owned by Plaquemines Dirt & Clay Company, L.L.C. (hereinafter “PDC”).⁹⁰ PDC initiated a lawsuit against Plaquemines Parish, filed a motion for summary judgment, and asserted that the Parish had no authority to appropriate the non-riparian property under the levee servitude.⁹¹ The trial court granted the motion, and Plaquemines Parish appealed.⁹²

The Louisiana Fourth Circuit Court of Appeal reversed, holding that “the plain language of the 2006 amendment to Louisiana Civil Code Article 665 eliminated the requirement that land be riparian in order to establish a servitude, if that property is located in the alignment approved by the Corps.”⁹³ PDC then sought a writ of certiorari from the Louisiana Supreme Court, which

⁸⁵ *S. Lafourche*, 217 So. 3d at 301.

⁸⁶ LA. CIV. CODE ANN. art. 665 (2006) (emphasis added).

⁸⁷ *Plaquemines Dirt & Clay Co.*, 364 So. 3d 274; see Wolfe, *supra* note 41, at 247.

⁸⁸ *Plaquemines Dirt & Clay Co.*, 364 So. 3d at 277.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 274.

⁹² *Id.* at 275.

⁹³ *Plaquemines Dirt & Clay Co.*, 364 So. 3d at 276.

the court denied in December 2020.⁹⁴ Despite the decision to deny writ, Justice Crain's dissent provides valuable insight into the significance of the 2006 amendment:

"The proper interpretation of Louisiana Civil Code article 665 has significant state-wide impacts, particularly across south Louisiana, and warrants granting and docketing this writ application for closer scrutiny of the 2006 amendment to that provision. Historically, the appropriation of a levee servitude on riparian property was not a "taking" of the owner's property under the 5th and 14th Amendments of the U.S. Constitution, because the government owned the servitude since the property's separation from the public domain... In those instances, the government is not taking anything it does not already own; it is simply using a right reserved when the property first entered private ownership. The use of that right is suited for the more streamlined appropriation procedure. A much different scenario is presented by a servitude purportedly created on *non*-riparian property privately owned in full and complete ownership and previously unburdened by the right the government seeks to acquire and exercise. The Constitutional ramifications of such governmental action has not previously been addressed by this court."⁹⁵

IV. REDUCTION OF COMPENSATION

A. 2006 Amendments to Louisiana Constitution

In conjunction with the 2006 amendment to Article 665, the legislature amended the Louisiana Constitution to reflect the change in scope of the levee servitude and the associated compensation owed to landowners.⁹⁶ Under Article I of the Louisiana Constitution, a landowner whose property is subject to expropriation is entitled to compensation to the "full extent of his loss," which "shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation."⁹⁷ This compensation scheme exceeds the requirements for just compensation under the Fifth Amendment, which requires only that the landowner be compensated for the market value of the property.⁹⁸ Nonetheless, in 2006, the Louisiana legislature included the following amendment:

Compensation paid for the taking of, or loss or damage to, property rights for the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America.⁹⁹

⁹⁴ *Plaquemines Dirt & Clay Co.*, 306 So. 3d 427.

⁹⁵ *Id.*

⁹⁶ S. 27, 2006 Leg., Reg. Sess. (La. 2006); *see* LA. CONST. art. I, § 4; *see* LA. CONST. art VI, § 42(A).

⁹⁷ LA. CONST. art. I, § 4(B)(5).

⁹⁸ *Olson*, 292 U.S. at 255.

⁹⁹ LA. CONST. art. I, § 4(G).

Since 2006, a landowner whose property has been *expropriated* for a hurricane protection project, whether federal or non-federal, is no longer entitled to compensation to the “full extent of his loss,” and is thereby precluded from recovering the costs of relocation, loss of income, etc.¹⁰⁰ Similar language was added to Article VI, limiting compensation to the fair market value of the property; yet, it further reiterated that no compensation is owed for expropriation of batture.¹⁰¹

Given these developments, one might consider why the 2006 amendment to Article 665 expanded the scope of *appropriations* authorized under the levee servitude, with no compensation owed under the doctrine of appropriation. Also, why did the legislature find it necessary to include these constitutional amendments at all? One answer may lie in the inclusion of the term “non-federal” – such non-federal hurricane protection projects will likely fall outside of the scope of Article 665, which specifies that the project must be “approved by the U.S. Army Corps of Engineers.”¹⁰² In such a scenario, the levee district now has the authority to expropriate land for a state or local hurricane protection project without the obligation to compensate the landowner for anything exceeding the fair market value of the property.¹⁰³

However, another probable impetus for these amendments pertains to the constitutional vagaries surrounding the expansion of the levee servitude. As Justice Crain opined, the appropriation of *non-riparian* land under the levee servitude has profound constitutional ramifications which “ha[ve] not previously been addressed by [the Louisiana Supreme Court].”¹⁰⁴ By including the language “shall not exceed the compensation required by the Fifth Amendment of the Constitution,” the legislature essentially accomplished two things: first, it decreased compensation for hurricane protection related *expropriations* to the constitutional minimum; second, it created a fallback should the expansion of levee servitude *appropriations* be declared unconstitutional.

For example, if the Louisiana Supreme Court were to declare the 2006 amendment to Article 665 as unconstitutional and had the legislature not amended the relevant constitutional articles, non-riparian landowners would be entitled to loss of income, costs of inconvenience, etc.¹⁰⁵ Under the current compensation scheme for appropriations, compensation paid to riparian and non-riparian landowners alike, is usually disbursed in the amount of the fair market value of the land; yet, it remains a gratuity alone.¹⁰⁶ Could it be that the legislature was concerned that courts would find appropriation of non-riparian land to be unconstitutional (i.e., expropriation requiring just compensation), and thus attempted to preemptively limit compensation for expropriation related to hurricane protection projects?

B. Jarreau (2017)

In 2017, the Louisiana Supreme Court issued an opinion¹⁰⁷ which further muddled the water. The plaintiff, a Lafourche Parish resident who owned and operated a dirt excavation and

¹⁰⁰ See LA. CONST. art. I, § 4(G), 4(B)(5).

¹⁰¹ LA. CONST. art. VI, § 42.

¹⁰² *Id.*; LA. CIV. CODE ANN. art. 665 (2006).

¹⁰³ See LA. CONST. art. VI, § 42.

¹⁰⁴ *Plaquemines Dirt & Clay Co.*, 306 So. 3d 427.

¹⁰⁵ See 2006 La. ACT 853; see also LA. CONST. art. I, § 4; see also LA. CONST. art VI, § 42(A).

¹⁰⁶ Peterson, *supra* note 45.

¹⁰⁷ *S. Lafourche*, 217 So. 3d at 308.

hauling business, sued the South Lafourche Levee District after his property was appropriated under the levee servitude.¹⁰⁸ The primary issue was whether he was owed compensation to the full extent of his loss (i.e., loss of income from his excavation and hauling business) or merely the fair market value of his property.¹⁰⁹ The court, after a detailed discussion of the legislative history, ultimately held that the 2006 amendments “reduced, rather than eliminated, the measure of damages” owed to a property owner whose land has been appropriated under the levee servitude.¹¹⁰

In rejecting the Levee District’s argument that Jarreau was not entitled to any compensation, Justice Clark stated:

“If the legislature had intended to eliminate all compensation for an appropriation of a permanent levee servitude for a hurricane protection project, then it would have amended La. Const. art. VI § 42 and La. R.S. 38:301 to do so. The fact that it did not suggests the legislature intended to treat property owners the same, allowing them compensation for the fair market value of their property whether it was expropriated or appropriated for a hurricane protection project.”¹¹¹

While this holding clarified that the 2006 amendments to the Louisiana Constitution reduced compensation to the fair market value of the land, Justice Clark nonetheless acknowledged that, under the Fifth Amendment, the landowner is owed no compensation.¹¹² However, despite the court’s interpretation of the legislative intent, the fact remains that the language in the Louisiana Constitution sets a *minimum*, stating that the compensation “shall not exceed” the fair market value of the land.¹¹³

This case, coupled with Justice Crain’s dissent in *Plaquemines Parish Dirt & Clay*,¹¹⁴ raises a myriad of questions regarding the nature of compensation owed under the levee servitude. Did the Louisiana Supreme Court err in finding that landowners are owed just compensation in *both* appropriation and expropriation actions under the levee servitude? If so, what is the purpose of the oft-repeated language in the Louisiana Constitution reserving the right to appropriate without compensation?¹¹⁵ If not, should we reconsider the nature of the expanded levee servitude and its classification as a “non-taking”?

V. CONCERNS

A. Balancing of Interests

At the core of every dispute surrounding the levee servitude lies the seemingly unsolvable question: how should our society strike a balance between the interests of the public and the interests of the individual? This endeavor is such a difficult one not because of the complexities

¹⁰⁸ *Id.* at 302.

¹⁰⁹ *Id.* at 303.

¹¹⁰ *Id.* at 310.

¹¹¹ *S. Lafourche*, 217 So. 3d at 311.

¹¹² *Id.* at 309.

¹¹³ *Id.* at 310; *see* LA. CONST. art. I, § 4(G).

¹¹⁴ *Plaquemines Dirt & Clay Co.*, 306 So. 3d 427 (Crain, J., dissenting).

¹¹⁵ *See* LA. REV. STAT. § 38:301(C)(1)(j).

involved in protecting these interests, but rather in *defining* them.¹¹⁶ For example, all Louisianans can agree that measures aimed at mitigating coastal erosion and flooding serve the public interest. Despite this consensus, each individual's underlying reasoning may vary wildly. One person may believe that the measures serve the public interest by reducing the number of lives lost during a flood; while another may emphasize the necessity of protecting the valuable industries which employ the local population.

These two disparate value systems, while sufficient to reach an agreement that flood control systems benefit the common good generally, nonetheless create obstacles during the "implementation" phase of the *specific* flood control measures (e.g., whether to run the freshwater diversion through the rural town of eighty people or through the neighboring chemical plant where sixty of them work). Disagreement over the definition of "public good" is not trivial; like Buridan's Ass,¹¹⁷ it can create gridlock in the implementation process, stalling the very project that both parties had previously agreed was beneficial.

More problematic are scenarios in which the notion of the "public good" becomes overly localized. For instance, should the protection of Metropolitan New Orleans be considered a public good? What if such protection was provided by converting St. Bernard Parish into a permanent flood basin? When a dozen or so landowners have portions of their property appropriated under the levee servitude, it is easy to argue that the public benefit of the levee outweighs the private interests of the landowners. However, under large-scale flood control projects such as the USACE's \$14.5 billion Hurricane and Storm Damage Reduction System,¹¹⁸ the original trade-off—that of one landowner's capitulation for the good of the Parish—is replaced by that of several Parishes' capitulation for the good of Metro New Orleans.

B. Mid-Barataria Sediment Diversion: A Microcosm

Beginning in 2017, Louisiana began drafting proposals to construct the Mid-Barataria Sediment Diversion ("MBSD"), a coastal restoration project aimed at diverting freshwater, nutrients, and sediment from the Mississippi River to the Barataria Basin.¹¹⁹ After evaluating seven

¹¹⁶ See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 172 (Susan Dunn ed., Yale Univ. Press 2002). "It follows from what precedes that the general will is always right and always tends to the public good; but it does not follow that the deliberations of the people always have the same rectitude. Men always desire their own good, but do not always discern it . . . There is often a great deal of difference between the will of all and the general will; the latter regards only the common interest, while the former has regard to private interests, and is merely a sum of particular wills"

¹¹⁷ *Buridan's Ass*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/humanities/dictionaries-thesauruses-pictures-and-press-releases/buridans-ass> (last visited Mar. 31, 2023). A philosophical paradox in which a donkey is both hungry and thirsty, but because it is standing equidistant from a bundle of hay and a pail of water, it is unable to decide whether to eat or drink, thus dying of hunger and thirst at the same time.

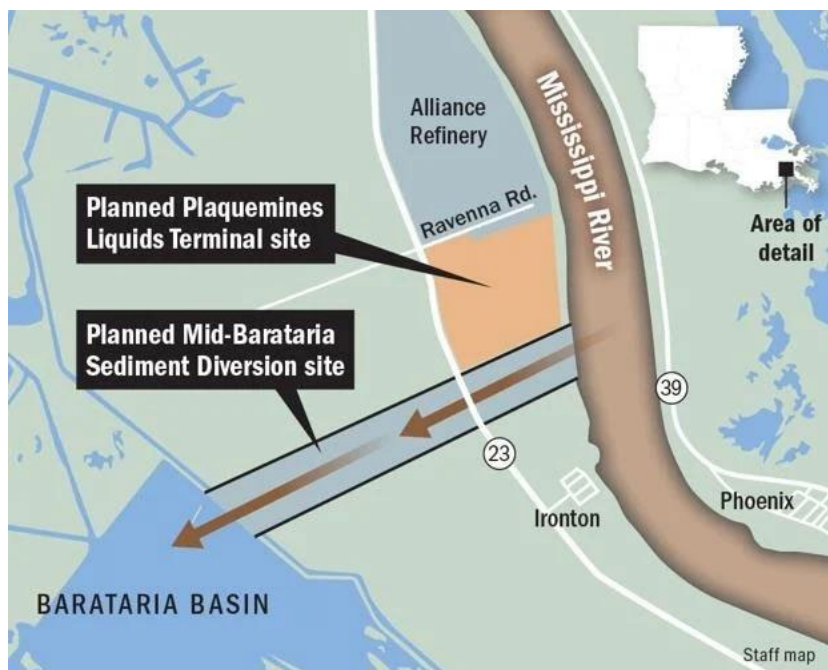
¹¹⁸ See Nathaniel Rich, *Destroying a Way of Life to Save Louisiana*, N.Y. TIMES MAG. (July 21, 2020), <https://www.nytimes.com/interactive/2020/07/21/magazine/louisiana-coast-engineering.html>.

¹¹⁹ *Louisiana Trustees Seek Comments on Proposed Mid-Barataria Sediment Diversion*, GULF SPILL RESTORATION (Mar. 5, 2021),

alternatives, the USACE concluded that the restorative benefits of the diversion outweighed its potential problems and issued key permits for the project.¹²⁰

Following the Deepwater Horizon Oil Spill in 2010, BP reached a settlement with the United States and the five Gulf states for claims under the Clean Water Act and the Oil Pollution Act of 1990.¹²¹ The global settlement totaled \$20.8 billion, and the Deepwater Horizon Trustees Council was created thereafter to provide a detailed framework regarding the use of the settlement funds to restore the Gulf Coast.¹²² In February 2023, the Louisiana Trustee Implementation Group approved the allocation of \$2.26 billion of the settlement damages to fund the MBSD.¹²³

a) Plaquemines Liquids Terminal



In April of 2021, Tallgrass Energy LP (“Tallgrass”) announced that it would continue its efforts to build Plaquemines Liquids Terminal, a proposed \$2.5 billion oil terminal on the

<https://www.gulfsplrestoration.noaa.gov/2021/03/louisiana-trustees-seek-comments-proposed-mid-barataria-sediment-diversion>.

¹²⁰ Mark Schleifstein, *Corps grants Louisiana permits needed to build \$2.5 billion Mid-Barataria Sediment Diversion*, NOLA (Dec. 19, 2022), https://www.nola.com/news/business/corps-grants-permits-needed-to-build-mid-baratariadiversion/article_2b74d292-7fdc-11ed-877b-1fe4c8ce0c75.html.

¹²¹ *U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill*, U.S. DEP’T OF JUST., <https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater> (Nov. 14, 2016).

¹²² *Id.*

¹²³ *Louisiana Trustees Approve Funding for Mid-Barataria Sediment Diversion*, GULF SPILL RESTORATION (Feb. 1, 2023), <https://www.gulfsplrestoration.noaa.gov/2023/02/louisiana-trustees-approve-funding-mid-barataria-sediment-diversion-project>.

Mississippi River near Ironton.¹²⁴ The Louisiana Coastal Protection and Restoration Authority¹²⁵ (“CPRA”) determined that the project was “not inconsistent” with its coastal restoration master plan. Still, it required that the developers commission a study evaluating the terminal’s potential effects on the diversion, as well as design the facility to avoid such effects.¹²⁶ However, a previous study conducted in 2012, in relation to a later-abandoned project to build a coal facility, found that the presence of nearby vessels would result in a seventeen percent reduction in sediment entering the diversion.¹²⁷ Less than a year after receiving most of the necessary permits to construct the facility, Tallgrass decided to cancel the project.¹²⁸

The evolution of the Plaquemines Liquids Terminal project highlights the nuance of a localized balancing of interests. The estimated 500,000 tons of greenhouse gasses the terminal could emit per year¹²⁹ would have further exacerbated climate change, and the project’s impairment of the diversion would have hindered efforts to combat those effects. While the termination of the project might seem like a wholly positive development, the decision came merely eleven days after the nearby Alliance Refinery announced it would permanently shut down operations.¹³⁰

Alliance’s internal levee was breached by a storm surge during Hurricane Ida, inundating much of the property with five feet of water.¹³¹ The flood damage, along with global trends in the oil market, led to the company’s ultimate decision to close its doors.¹³² In addition to being one of the largest employers in the area, Alliance had been Plaquemines Parish’s single largest source of property tax revenue for several years.¹³³

¹²⁴ Halle Parker, *Amid climate, change controversial \$2.5B oil terminal moves forward in Plaquemines Parish*, NOLA (Apr. 18, 2021), https://www.nola.com/news/environment/amid-climate-change-controversial-2-5b-oil-terminal-moves-forward-in-plaquemines-parish/article_3c619b70-9c95-11eb-82c0-b7113194838f.html.

¹²⁵ *About CPRA*, COASTAL PROT. AND RESTORATION AUTH., <https://coastal.la.gov/about/> (last visited Mar. 10, 2023).

¹²⁶ Parker, *supra* note 123.

¹²⁷ *Id.*

¹²⁸ Halle Parker, *Energy company cancels plans for 2.5 billion oil terminal in Plaquemines Parish*, NOLA (Nov. 19, 2021), https://www.nola.com/news/environment/energy-company-cancels-plans-for-2-5-billion-oil-terminal-in-plaquemines-parish/article_50f4c9e2-4981-11ec-869a-cb148f617108.html.

¹²⁹ Parker, *supra* note 123.

¹³⁰ Parker, *supra* note 127.

¹³¹ Anthony McAuley, *'Gut punch to the community.' Plaquemines Par. braces for fallout from Alliance Refinery Closure*, NOLA (Nov. 10, 2021), https://www.nola.com/news/business/gut-punch-to-the-community-plaquemines-parish-braces-for-fallout-from-alliance-refinery-closure/article_867b5516-417c-11ec-ac49-bf71045823f9.html.

¹³² *See id.*

¹³³ *Id.*

b) Compensation

Roughly one year after the abandonment of the Plaquemines Liquids Terminal project, the state purchased the 500-acre property from Tallgrass for \$36 million.¹³⁴ Governor John Bel Edwards, in addressing the agreement with Tallgrass, expressed the importance of “prioritizing the people of southeast Louisiana and advancing our hurricane preparedness,” as well as “attracting companies to Louisiana who prioritize Louisianans.”¹³⁵ Why did the state purchase the land at all? Could it not have exercised its powers of appropriation under the levee servitude?

Governor Edwards’ quote implies that the state has an interest in encouraging industry investment when conducting its flood control and coastal restoration projects. However, the same consideration may not be afforded to other landowners. The Louisiana Trustee Implementation Group’s final MBSD plan stated that property acquisitions would ideally be achieved through negotiations with the landowners, but if a negotiated sale is not possible, the land may also be acquired through “the state’s eminent domain authority.”¹³⁶ Given that the property is being acquired for “water control structures on the alignment approved by the U.S. Army Corps of Engineers,”¹³⁷ the acquisition would qualify as an appropriation, and the aforementioned compensation standards would apply.

In the case of the MBSD, the state was able to incorporate property acquisition costs into the plan’s \$2.6 billion budget.¹³⁸ These BP settlement funds will eventually be exhausted, and the state will then have to decide the proper approach in these types of situations, including whether to encourage negotiated sales, carry out appropriations, or prioritize industrial interests.

VI. MARITIME IMPLICATIONS

A. Expansion of Admiralty Jurisdiction

In a recent decision¹³⁹ issued by the United States Court of Appeals for the Fifth Circuit, the court addressed the issue of whether a single boat allision in the D’Arbonne Refuge occurred on “navigable” waters, in which case general Maritime Law would apply.¹⁴⁰ After discussing the physical and historical characteristics of the channel in question, the court affirmed the district court’s judgment that the channel did not meet the criteria for a “navigable waterway” subject to federal jurisdiction.¹⁴¹

In authoring the opinion, Judge Engelhardt provided the following in relation to federal jurisdiction over navigable waterways:

¹³⁴ Mark Schleifstein, *State pays \$36 million for rights to land for Mid-Barataria Sediment Diversion*, NOLA (Dec. 28, 2022), https://www.nola.com/news/environment/state-to-pay-36m-for-mid-barataria-diversion-land-rights/article_77fcc764-86d5-11ed-970a-37f2ed6eca4b.html.

¹³⁵ *Id.*

¹³⁶ NAT’L OCEANIC AND ATMOSPHERIC ADMIN., LOUISIANA TRUSTEE IMPLEMENTATION GROUP FINAL PHASE II RESTORATION PLAN #3.2: MID-BARATARIA SEDIMENT DIVERSION 3-17 (2022).

¹³⁷ LA. CIV. CODE ANN. art. 665 (2006).

¹³⁸ Schleifstein, *supra* note 134.

¹³⁹ *Newbold v. Kinder Morgan SNG Operator, L.L.C.*, 65 F.4th 175, 177 (5th Cir. 2023).

¹⁴⁰ *Id.* at 179.

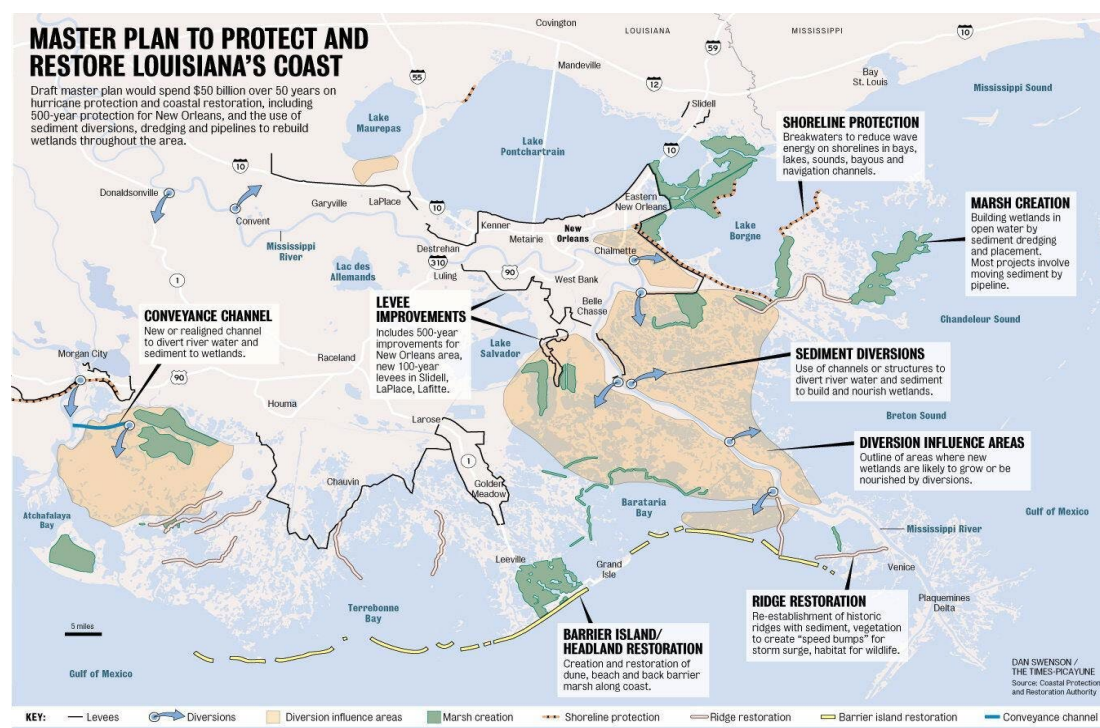
¹⁴¹ *Id.* at 182.

“The navigational servitude relates to actualities - ‘the waters below the ordinary high-water mark,’ ‘the line of the shore,’ and so forth, . . . - rather than potentialities. Should the Corps permanently flood the Refuge, the water there would likely be navigable. But as the parties agree that the Corps has not in fact permanently flooded the refuge, the water may not be said to be navigable under this theory.”¹⁴²

By including the language regarding the Corps’ potential flooding of the Refuge, Judge Engelhardt acknowledged the fact that such intentional permanent flooding would establish the Refuge’s “navigability,” thus subjecting its waterways to admiralty jurisdiction.¹⁴³ Such permanent flooding is a key aspect in Louisiana’s strategy to combat coastal erosion, thus prompting questions regarding jurisdiction of waterways.¹⁴⁴

a) Louisiana’s 2023 Master Coastal Restoration Plan

Louisiana’s Comprehensive Master Plan for a Sustainable Coast (“Master Plan”) sets forth the state’s long-term coastal restoration goals and proposed projects to achieve its goals.¹⁴⁵ The most recent edition of the Master Plan was released by the CPRA in January 2023.



The document enumerates thirteen “project types,” separated into two categories: risk reduction and restoration.¹⁴⁶ Each project type presents a unique set of problems, but one overarching

¹⁴² *Id.* at 179.

¹⁴³ *Id.*

¹⁴⁴ COASTAL PROT. & RESTORATION AUTH. LA., COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST (2023).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

question lurks: which of these projects qualify as “water control structures”¹⁴⁷ under the levee servitude?

i. Risk Reduction Projects

One such project type, “structural risk reduction,” presents a straight-forward set of consequences. This project category, familiar to most Louisianans, employs the use of levees, flood gates, storm surge barriers, and other structural elements to prevent the inundation of floodwaters.¹⁴⁸ While there may be confusion surrounding the levee servitude’s applicability to other proposed projects, the standards regarding structural risk reduction are clear. The state may appropriate the land necessary to build or maintain the structures, and the landowner (whether riparian or non-riparian) is limited to compensation in the amount of the fair market value of the property.¹⁴⁹

Less clear, however, are the consequences of “nonstructural risk reduction” projects.

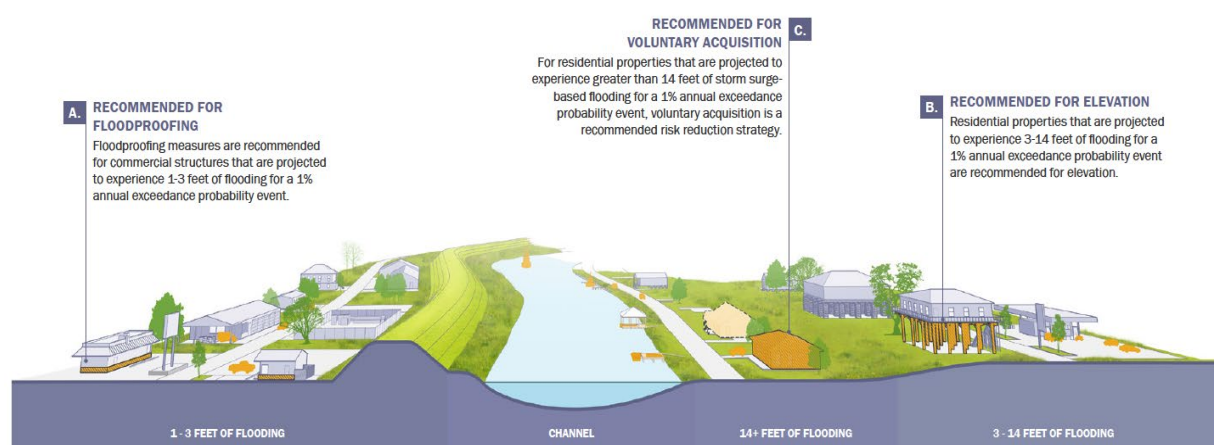


Figure 4.2: Nonstructural Risk Reduction Project Type Visualization.

According to the Master Plan, these measures include elevating residences, commercial floodproofing, and voluntary acquisition.¹⁵⁰ While these nonstructural risk reduction measures are entirely optional, the long-term effects of adopting such a system will likely create issues.

For example, as sea levels rise, the area slated for “voluntary acquisition” may become necessary to build a levee protecting elevated homes. In such a scenario, the state may appropriate the land without the consent of the property owner; if the land falls below the ordinary high-water mark, then the landowner is not entitled to compensation.¹⁵¹

ii. Restoration Projects

In addition to the risk reduction projects, the Master Plan offers a variety of “restoration” proposals, including bank stabilization, marsh creation, and diversions. Hydrologic restoration is

¹⁴⁷ LA. CIV. CODE ANN. art. 665 (2006).

¹⁴⁸ COASTAL PROT. & RESTORATION AUTH. LA., *supra* note 144, at 54.

¹⁴⁹ See LA. CONST. art. VI, § 42.

¹⁵⁰ COASTAL PROT. & RESTORATION AUTH. LA., *supra* note 144, at 54.

¹⁵¹ *DeSambourg*, 621 So. 2d 602.

one of the proposed methods that presents questions regarding the levee servitude as well as admiralty jurisdiction.

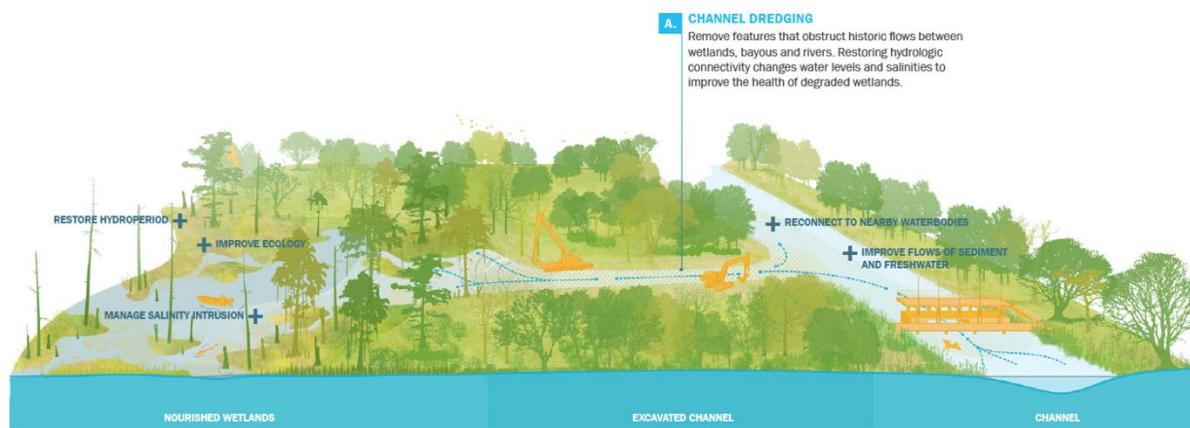


Figure 4.7: Hydrologic Restoration Project Type Visualization.

Hydrologic restoration involves dredging canals in order to reestablish historic flows between wetlands and nearby bodies of water.¹⁵² In such a case, the scenario presented by Judge Engelhardt might come to fruition—a previously non-navigable waterway may become permanently flooded and navigable, thus falling under federal jurisdiction.¹⁵³ Activities on the newly-navigable waterway would thereby be subject to, among others, general Maritime Law, the Clean Water Act, and the Oil Pollution Act of 1990.¹⁵⁴

It is unclear whether the levee servitude allows for the appropriation of land for hydrologic restoration projects. Diversions involve the construction of levees and other structures, thus falling squarely within the language of Article 665.¹⁵⁵ Hydrologic restoration, on the other hand, *may* involve water control structures.¹⁵⁶

VII. CONCLUSION

Despite the unpredictability surrounding Louisiana's levee servitude, the centuries-old practice nonetheless serves as a valuable tool for the state in the fight against Mother Nature. Louisiana ports carry roughly twenty-five percent of all waterborne commerce in the United States, including sixty percent of the country's grain and twenty percent of its coal.¹⁵⁷ These marine facilities, although essential to Louisiana's economic success, are vulnerable to state appropriation pursuant to the levee servitude. Additionally, many of these facilities' assets are located on the

¹⁵² COASTAL PROT. & RESTORATION AUTH. LA., *supra* note 144, at 62.

¹⁵³ *Newbold*, 65 F.4th at 179.

¹⁵⁴ *See id.*

¹⁵⁵ COASTAL PROT. & RESTORATION AUTH. LA., *supra* note 144, at 60; LA. CIV. CODE ANN. art. 665 (2006).

¹⁵⁶ COASTAL PROT. & RESTORATION AUTH. LA., *supra* note 144, at 62.

¹⁵⁷ *Louisiana Skillfully Navigates Choppy Economic Waters*, TRADE & INDUS. DEV. (Mar. 28, 2022), <https://www.tradeandindustrydev.com/region/louisiana/louisiana-skillfully-navigates-choppy-economic-30146>.

batture, which is owed no compensation.¹⁵⁸ As sea levels rise and the state initiates additional flood control projects, the unresolved questions regarding compensation will surely present a dilemma for Louisiana lawmakers and property owners.

Consider the following hypothetical: Louisiana, having exhausted all available federal funding, decides that it must take extreme measures to fund a flood control project. The levee district then issues a notice that it has exercised its right of appropriation over Alliance Refinery's property after determining that the property is necessary for the maintenance of the adjoining diversion and levees. The state offers no compensation for the batture property and exercises its right to appropriate the dock facility under Louisiana Revised Statute 9:1102.1.¹⁵⁹

Is the state able to then lease the property to another liquid storage company and use the revenue to fund the proposed flood control project? Can the state sell Alliance's dock equipment? While this scenario seems unlikely, the increasingly imminent threat of climate change may force the state to adopt drastic measures.

As Justice Crain intimated,¹⁶⁰ the 2006 expansion of the levee servitude has significant implications and may eventually be ruled unconstitutional. Until that time comes; however, the servitude proves to be a useful method of enforcing the state's ability to protect citizens from the unique geological threats faced by the Pelican State.

¹⁵⁸ *DeSambourg*, 621 So. 2d at 608.

¹⁵⁹ LA. REV. STAT. § 9:1102.1 (2018).

¹⁶⁰ *Plaquemines Dirt & Clay Co.*, 306 So. 3d 427.