



LOUISIANA STATE LAW INSTITUTE

PAUL M. HEBERT LAW CENTER, ROOM W127

1 EAST CAMPUS DRIVE

BATON ROUGE, LA 70803-1016

(225) 578-0200

FAX: (225) 578-0211

EMAIL: LAWINSTITUTE@LSLI.ORG

WWW.LSLI.ORG

August 15, 2023

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

Senator Patrick Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: HOUSE CONCURRENT RESOLUTION NO. 114 OF THE 2022 REGULAR SESSION

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to drainage and R.S. 38:113.

Sincerely,

A handwritten signature in black ink, appearing to read "Guy Holdridge".

Guy Holdridge
Director

cc: Representative Jeremy Lacombe

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov

Secretary of State, Mr. R. Kyle Ardoin
admin@sos.louisiana.gov

**LOUISIANA STATE LAW INSTITUTE
PROPERTY COMMITTEE**

**REPORT TO THE LEGISLATURE IN RESPONSE TO
HCR NO. 114 OF THE 2022 REGULAR SESSION**

Relative to drainage and R.S. 38:113

Prepared for the
Louisiana Legislature on

August 15, 2023

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE
PROPERTY COMMITTEE**

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G. Wogan Bernard, New Orleans

Andrea B. Carroll, Baton Rouge

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Edward Warner, Baton Rouge

Micah Zeno, New Orleans

Sally Brown Richardson, Reporter
Jessica G. Braun, Staff Attorney

2022 Regular Session

HOUSE CONCURRENT RESOLUTION NO. 114

BY REPRESENTATIVE LACOMBE

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study provisions of law, recent certain court rulings, and the feasibility of codifying certain prevailing appellate and supreme court cases that have interpreted R.S. 38:113, and to report its findings and recommendations, along with specific proposed legislation, to the legislature.

WHEREAS, R.S. 38:113 provides for the control of drainage channels and outfall canals in levee and drainage districts; and

WHEREAS, numerous court cases have referred to such control over drainage channels and outfall canals as a "legal servitude"; and

WHEREAS, in recent cases, courts have held that R.S. 38:113 grants levee and drainage districts a legal servitude over drainage channels or outfall canals within its district, provided certain requirements are met; and

WHEREAS, recently, courts have additionally held that within the exercise of the legal servitude that R.S. 38:113 authorizes, the provision does not authorize the taking or damaging of property without just compensation or due process.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study provisions of law, recent court rulings, and the feasibility of codifying certain prevailing appellate and supreme court cases that have interpreted R.S. 38:113, and to report its findings and recommendations, along with specific proposed legislation, to the legislature.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall study and consider Louisiana Attorney General Opinion No. 07-0085 (Apr. 24, 2007) and Louisiana Attorney General Opinion No. 14-0113 (Sept. 12, 2014), in addition to court cases including, but not limited to, the following:

- (1) Terrebonne Par. Police Jury v. Matherne, 405 So. 2d 314, 317 (La. 1981).

(2) Whipp v. Bayou Plaquemine Brule Drainage Bd., 476 So. 2d 1042, 1044-45 (La. App. 3 Cir. 1985).

(3) Berard v. St. Martin Par. Gov't, 2013-114 (La. App. 3 Cir. 6/15/13), 115 So. 3d 761. (La. Ct. App. 2013).

(4) Lavergne v. Lawtell Gravity Drainage Dist. No. 11, 562 So. 2d 1013, 1015-16 (La. App. 3 Cir. 1990).

(5) Ortego v. First Am. Title Ins. Co., 569 So. 2d 101 (La. App. 4 Cir. 1990).

(6) Simmons v. Bd. of Comm'rs of Bossier Levee Dist., 624 So. 2d 935 (La. App. 2 Cir. 1993).

(7) Savoy v. Bayou Plaquemine & Wickoff Gravity Drainage Dist., 2009-0686 (La. App. 3 Cir. 12/9/09), 25 So. 3d 986, 988-89.

(8) Daray v. St. Tammany Par., 2008-2135 (La. App. 1 Cir. 10-9-09), *writ denied*, 2009-2312 (La. 12/18/09), 23 So. 3d 945, 2009 WL 3255174.

(9) Carbo v. City of Slidell, 2001-0170 (La. App. 1 Cir. 1/8/03), 844 So. 2d 1, 12, *writ denied*, 2003-0392 (La. 4/25/03), 844 So. 2d 1.

(10) Williams v. City of Baton Rouge, 98-1981 (La. 4/13/99), 731 So. 2d 240, 248.

(11) Justice v. Bourgeois, 288 So. 2d 106, 109 (La. App. 4 Cir. 1974).

(12) Grayson v. Commissioners of Bossier Levee Dist., 229 So. 2d 139, 144 (La. App. 2 Cir. 1969).

(13) West v. Hornsby, 2020-0871 (La. App. 1 Cir. 2/25/21).

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall submit a written report of its findings and recommendations, along with specific proposed legislation, to the president of the Senate and the speaker of the House of Representatives on or before January 1, 2023.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

August 15, 2023

To: Representative Clay Schexnayder
Speaker of the House
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

Senator Patrick Page Cortez
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**REPORT TO THE LEGISLATURE IN RESPONSE TO HOUSE CONCURRENT
RESOLUTION NO. 114 OF THE 2022 REGULAR SESSION**

House Concurrent Resolution No. 114 of the 2022 Regular Session requested the Louisiana State Law Institute to “study provisions of law, recent certain court rulings, and the feasibility of codifying certain prevailing appellate and supreme court cases that have interpreted R.S. 38:113, and to report its findings and recommendations, along with specific proposed legislation, to the legislature.” Upon reviewing the relevant law, the Law Institute recommends no legislative changes at this time for the elaborated reasons below.

R.S. 38:113: A Legal Servitude for Levee and Drainage Districts

R.S. 38:113 provides:

The various levee and drainage districts shall have control over all public drainage channels or outfall canals within the limits of their districts which are selected by the district, and for a space of one hundred feet on both sides of the banks of such channels or outfall canals, and one hundred feet continuing outward from the mouth of such channels or outfall canals, whether the drainage channels or outfall canals have been improved by the levee or drainage district, or have been adopted without improvement as necessary parts of or extensions to improved drainage channels or outfall canals, and may adopt rules and regulations for preserving the efficiency of the drainage channels or outfall canals.

By its text, this statute provides a legal servitude for levee and drainage districts to use up to one hundred feet on either side of the banks of a drainage channel or outfall canal for purposes of preserving the efficiency of the drainage channel or outfall canal.

The Louisiana Supreme Court discussed constitutional issues arising with R.S. 38:113 in *Terrebonne Parish Police Jury v. Matherne*, 405 So. 2d 314 (La. 1981). In the *Matherne* case, Matherne owned an estate that was bordered by a drainage canal maintained by Terrebonne Parish. Matherne dug ditches on his estate that fed into the drainage canal. During a substantial rainstorm, the newly dug ditches on Matherne’s estate increased the amount of water flowing through the drainage canal, thereby increasing the burden (and flooding) on other estates serviced by the

drainage canal. Upon discovering that Matherne's ditches were increasing the waters in the drainage canal, Terrebonne Parish blocked Matherne's ditches without Matherne's consent. The blocking of the ditches caused the flood waters to subside almost immediately. Matherne then reopened the ditches that had been blocked by Terrebonne Parish and dug a new ditch on his property. Terrebonne Parish brought suit against Matherne to enjoin him from digging ditches that would impact the drainage canal.

The court of appeal held, *inter alia*, that under R.S. 38:113, Terrebonne Parish had a servitude to control and maintain the drainage canal that extended to one hundred feet on each side of the drainage canal, and that as part of the servitude, Terrebonne Parish could "take any appropriate measures for the preservation of the efficiency of the drainage channel" and "enjoin the activity of [Matherne] outside the project which overloads the drainage channel and thereby reduces its efficiency as part of the drainage project."

In discussing the authority of Terrebonne Parish over the drainage canal, the Louisiana Supreme Court stated,

La.R.S. 38:113, by its terms, merely authorizes a levy [*sic*] or drainage district to preserve and maintain the efficiency of public drainage channels within its districts. Undoubtedly, the local governing body may exercise its power to prevent obstruction of the channels and to perform ordinary maintenance necessary for the efficient operation of the canals and ditches. When necessary for these purposes, the authorities may send their workers and equipment on to private property along public drainage channels for a space of 100 feet on each side of the channel. The legislative aim was a modest one, viz., to enable levy and drainage authorities to keep the public drainage channels within their districts clear and in good working order. See *Dugas v. St. Martin Parish Police Jury*, 351 So.2d 271 (La.App. 3d Cir. 1977); *Grayson v. Comm'rs of Bossier Levee Dist.*, 229 So.2d 139 (La.App. 2d Cir. 1969); *Scott v. Red River-Bayou Pierre Levee & Drainage Dist. of La.*, 7 So.2d 429 (La.App. 2d Cir. 1942).

The statute does not authorize the taking or damaging of private property without just compensation or without due process of law; nor do we think the legislature could do so constitutionally. Accordingly, we must reject the lower courts' interpretation of La.R.S. 38:113 as an impingement upon an individual's constitutional right to property and as unjustified by the words of the statute. The statute does not authorize the governing authority to enjoin activities on private property which do not have the effect of obstructing a public drainage channel or impeding its maintenance. The act certainly does not enable a local government to take or damage property rights by way of injunction. See, *Plaquemines Parish Comm'n Council v. Hero Lands Co.*, 388 So.2d 790 (La.1980). It may be desirable and in the public interest to take property or prevent its enjoyment in order to promote the overall efficiency of a drainage system. The lawful method, however, is through expropriation and not by enjoining an owner from use of his property rights. See *Arkansas Louisiana Gas Co. v. City of Minden*, 341 So.2d 607 (La.App. 2d Cir. 1977).

Id. at 317.

Although the Supreme Court held that Terrebonne Parish could not, through R.S. 38:113, impinge on Matherne's rights to do things on his property, such as build his own ditches, the Supreme Court did find that Matherne's digging of the ditches increased the burden on the servitude in violation of the servitude of drain in Civil Code Articles 655 and 656.

Since *Matherne*, multiple courts of appeal have opined on the legal servitude in R.S. 38:113. Opinions by the courts of appeal have generally centered around whether a legal servitude exists and, if a legal servitude exists, what actions the servitude allows.

When Does R.S. 38:113 Apply?

In *Whipp v. Bayou Plaquemine Brule Drainage Board*, 476 So. 2d 1042 (La. App. 3 Cir. 1985), the court discussed the standards for whether R.S. 38:113 applied, noting that there were three prerequisites for the legal servitude to exist:

First, the drainage channel must have been either previously improved by the drainage district or adopted without prior improvement as a necessary part of or extension to improved drainage channels. Second, the drainage channel must be a public channel. Third, the channel must be selected by the drainage district and recommended and approved by the Office of Public Works.

Id. at 1044–45 (emphasis omitted); *see also Berard v. St. Martin Parish Government*, 115 So. 3d 761, 769 (La. App. 3 Cir. 2013) (citing the *Whipp* three-prong test for establishing when a legal servitude exists); *Lavergne v. Lawtell Gravity Drainage District No. 11*, 562 So. 2d 1013, 1015–16 (La. App. 3 Cir. 1990) (same); *Ortego v. First American Title Insurance Co.*, 569 So. 2d 101, 105 (La. App. 4 Cir. 1990) (same); *Board of Com'rs of Bossier Levee Dist.*, 624 So. 2d 935, 952 (La. App. 2 Cir. 1993) (same); *Savoy v. Bayou Plaquemine & Wickoff Gravity Drainage Dist.*, 25 So. 3d 986, 988 (La. App. 3 Cir. 2009) (same); *Daray v. St. Tammany Parish*, 2009 WL 3255174, *3 (La. App. 1 Cir. 2009) (noting that R.S. 38:113 cannot apply if there are not drainage districts). To the extent a levee or drainage district takes actions along a drainage canal that is not subject to the legal servitude under R.S. 38:113 because the three requirements listed above are not met, courts have found the actions of the levee or drainage district to be unlawful takings. *See Whipp*, 476 So. 2d at 1047.

What Actions Does R.S. 38:113 Allow?

If a legal servitude under R.S. 38:113 exists, levee or drainage districts still must operate within the bounds of the servitude. Courts have found the legal servitude allows for actions of “ordinary maintenance,” but not for actions that exceed “ordinary maintenance” or “maintaining the efficiency of the public drainage canals.” In *Simmons v. Board of Com'rs of Bossier Levee Dist.*, 624 So. 2d 935 (La. App. 2 Cir. 1993), the court noted that “[n]either the existence of the servitude, nor the fact that the levee district's activities have occurred entirely within the bounds of the servitude, will defeat a claim for constitutional compensation when those activities exceed ordinary maintenance and constitute a taking or damaging of private property.” *Simmons*, 624 So. 2d at 952. *See also Justice v. Bourgeois*, 288 So. 2d 106, 109 (La. App. 4 Cir. 1974) (noting that

R.S. 38:113 restricts the right of the governmental agency to maintain the efficiency of the public drainage channels).

Courts have found that actions such as cleaning and maintaining the canal, *see Ortego*, 569 So. 2d at 105; clearing a channel of trees, roots, and debris along the drainage canal, *see Berard*, 115 So. 3d at 773; and similar actions constitute legitimate actions under R.S. 38:113. Other actions such as dumping soil and debris from the canal onto private property, *see Jones v. Ouachita Parish Policy Jury*, 833 So. 2d 1094, 1100 (La. App. 2 Cir. 2002); digging out new drainage ditches, *see Williams v. City of Baton Rouge*, 731 So. 2d 240, 248 n.3 (La. 1999); selling off soil dredged from the riparian landowner's property, *see Justice*, 288 So. 2d at 109; and removing trees beyond ordinary maintenance of the drainage canal, *see Grayson v. Commissioners of Bossier Levee Dist.*, 229 So. 2d 139, 143–44 (La. App. 2 Cir. 1969), are beyond the actions that R.S. 38:113 allows.

Recommendation

House Concurrent Resolution No. 114 of the 2022 Regular Session asked the Law Institute to study “the feasibility of codifying certain prevailing appellate and supreme court cases.” In reviewing the aforementioned cases, the Law Institute found that courts have reached the following main conclusions: There are three prerequisites for a drainage channel or outfall canal to fall under the auspices of R.S. 38:113, namely (1) the drainage channel or outfall canal must have been either previously improved by the drainage district or adopted without prior improvement as a necessary part of or extension to improved drainage channels, (2) the drainage channel or outfall canal must be public, and (3) the drainage channel or outfall canal must be selected by the drainage district and recommended and approved by the Office of Public Works. Even when these prerequisites are satisfied, the action by the drainage district must be part of the “ordinary maintenance” or “maintaining the efficiency of the public drainage canals.”

In reviewing these conclusions, the Law Institute found that most of the conclusions already have footing in the text of R.S. 38:113. While courts' recitation of these conclusions may be clearer in language than the text of the statute, wording in the legislation provides substantial basis for these requirements. Thus, the Law Institute does not see that there is a need at this time to add new text to the existing statute to provide a legislative basis for the standards courts have applied.

The inherent difficulty for courts, and thus for levee and drainage districts and for private landowners, is determining what exact actions constitute “ordinary maintenance” or “maintaining the efficiency of the public drainage canals.” Legislating the exact actions that constitute “ordinary maintenance” or “maintaining the efficiency” of the canals is a challenging task, given that each drainage canal is slightly different. Removing a tree root or even a tree for one drainage canal may be ordinary maintenance, while it may be beyond ordinary maintenance for another drainage canal. In reviewing the aforementioned cases, the Law Institute determined that it is better not to over-legislate specific individual actions that levee and drainage districts can (or cannot) take, but instead to continue monitoring how courts interpret and apply R.S. 38:113.