## October 11, 2007 Opinion No. 07-0194

Honorable E. Keith Bardwell Justice of the Peace Ward 8, Tangipahoa Parish 23288 Bardwell Road Ponchatoula, LA 70454

Dear Judge Bardwell:

22-1 DRAINAGE AND DRAINAGE DISTRICTS
Civil Code art. 450; R.S. 9:1101, 1107, 1108, and 1109; R.S. 38:113, 219, and1491; Tangipahoa Parish Ordinance Chapter 20, Article II (Drainage), Sec. 20-45.

If Sims Creek is a navigable waterway, it and its bed would be public property owned by the State. Whether Sims Creek was navigable in 1812, when Louisiana was admitted to the Union, or is navigable in fact and in law today, would require a determination of several facts which have to be shown by expert opinions and/or other evidence. If an expert or other evidence were to confirm that the creek was navigable in fact and in law at some point and now is not, then a determination would also have to be made as to why and how the creek became non-navigable. But we do not have enough facts to make these determinations. However, the drainage district of Tangipahoa Parish has a legal servitude on Sims Creek as a drainage channel. While the status of Sims Creek as a public drainage channel does not necessarily mean that the bed of the creek is not private property, it does restrict what can be done in the creek with respect to its drainage function. No person shall extend fences of wire or any other material across drainage channels.

You have requested a legal opinion of our office as to whether the bottom of Sims Creek, which connects to the Tangipahoa River, is public or private. You explain that some persons use the creek bed as a pathway for all terrain vehicles (ATV's) and travel from one adjoining property to another without having to use roads and highways; however, one of the adjoining owners objects to the use of the creek bed for such purpose and complains when it is so used. You further advise that the latter has erected fence posts half-way into the creek bed along his property and imply that he may intend to string a wire fence to them, in order to discourage the ATV's. You still further explain that the creek is navigable when enough water flows into it after heavy rains and when the river rises sufficiently.

If Sims Creek is a navigable waterway, it and its bed would be public property owned by the State. Civil Code art. 450; R.S. 9:1101, 1107, 1108, and 1109. Whether Sims Creek was navigable in 1812, when Louisiana was admitted to the Union, or is navigable in fact and in law today, would require a determination of several facts which have to be shown by expert opinions and/or other evidence. Also, if an expert or other evidence were to confirm that the creek was navigable in fact and in law at some point and now is not, then a determination would also have to be made as to why and how the creek became non-navigable. We do not have enough facts to make these determinations. We can say that the information you provided us from your own experience that, when you were much younger, you could paddle a canoe in Sims Creek, is a small part of the vast overall magnitude of evidence needed to determine the outcome of this question. Your testimony and that of your neighbors could be relevant to the resolution of this issue.

Nor do we have enough evidence or facts to determine whether the riparian landowner in this case owns half the creek bed or even has a colorable claim to it. We do not have the act of sale by which he or his predecessor in title purchased the land, nor the

property description in the original grant. We do not know, for example, whether the creek was once navigable and then, at some point, became non-navigable and the then property owner simply mistakenly thought that he automatically became the owner of half the creek bed thereby, without an investigation as to why or how the creek became non-navigable, and sold it later with an overreaching property description. From the limited facts and evidence we have, we simply cannot answer your question as to whether the creek bed is public or private.

However, the drainage district of Tangipahoa Parish has a legal servitude on Sims Creek as a drainage channel. R.S. 38:1491 provides, in pertinent part,

§1491. Drainage channels or outfall canals; Tangipahoa Parish

A. All drainage channels or outfall canals in the parish of Tangipahoa created pursuant to law shall be public drainage channels or outfall canals.

B. On July 1, 2003, all drainage channels or outfall canals in the parish of Tangipahoa that have been or thereafter are kept up, maintained, or worked for a period of three years by authority of the governing authority of the parish or the governing board of any drainage district located in the parish shall be public drainage channels or outfall canals.

\* \* \* \*"

## And 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."

Thus, the Tangipahoa Parish drainage district has a servitude on private properties which may also form public drainage channels to perform whatever maintenance is necessary to preserve the drainage function of the channel. As you have noted, the drainage district has performed maintenance on Sims Creek, and the drainage district itself has informed us that such maintenance has been for more than three years and that Sims Creek has been designated to be an integral part of the overall drainage system of Tangipahoa Parish maintained by the district. Hence, it is a public drainage channel.

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While the status of Sims Creek as a public drainage channel does not necessarily mean that the bed of the creek is not private property, it does restrict what can be done in the creek with respect to its drainage function. For example, R.S. 38:219 and Tangipahoa Parish Ordinance Chapter 20, Article II (Drainage), Sec. 20-45 both provide, in pertinent part,

"No person shall

\* \* \*

(3) Extend fences of wire or any other material across drainage channels;"

We trust that this opinion has sufficiently answered your request. If you have any further questions, please feel free to ask them of us. With warmest regards, we remain

Yours very truly,

CHARLES C. FOTI, JR. ATTORNEY GENERAL

By:\_\_\_\_\_

THOMAS S. HALLIGAN Assistant Attorney General

CCF, Jr./TSH/sfj

## SYLLABUS

## OPINION NUMBER 07-0194

22-1 DRAINAGE AND DRAINAGE DISTRICTS
90-b-3 PUBLIC LANDS – Public & Private domains, distinctions

172-B WATERS – Natural Resources

Civil Code art. 450; R.S. 9:1101, 1107, 1108, and 1109; R.S. 38:113, 219, and1491; Tangipahoa Parish Ordinance Chapter 20, Article II (Drainage), Sec. 20-45.

If Sims Creek is a navigable waterway, it and its bed would be public property owned by the State. Whether Sims Creek was navigable in 1812, when Louisiana was admitted to the Union, or is navigable in fact and in law today, would require a determination of several facts which have to be shown by expert opinions and/or other evidence. If an expert or other evidence were to confirm that the creek was navigable in fact and in law at some point and now is not, then a determination would also have to be made as to why and how the creek became non-navigable. But we do not have enough facts to make these determinations. However, the drainage district of Tangipahoa Parish has a legal servitude on Sims Creek as a drainage channel. While the status of Sims Creek as a public drainage channel does not necessarily mean that the bed of the creek is not private property, it does restrict what can be done in the creek with respect to its drainage function. No person shall extend fences of wire or any other material across drainage channels.

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Thomas S. Halligan Assistant Attorney General