

MINUTES

PUBLIC RECREATION ACCESS TASK FORCE

September 13, 2018

A public meeting of the Public Recreation Access Task Force was held on Thursday, September 13, 2018, beginning at 9:30 a.m. in Senate Committee Room A, Ground Floor, Louisiana State Capitol, Baton Rouge, Louisiana.

I. CALL TO ORDER

Sen. Norby Chabert called the meeting to order and made some opening remarks. **Sen. Chabert** further stated that the task force did not have dedicated staff and therefore the task force probably needs to make a few adjustments to its procedures. For instance, due to the large number of members on the task force you cannot count on the principal appointments always being available. **Sen. Chabert** stated that **Mr. Canfield** had difficulty finding a date where a quorum could meet. **Sen. Chabert** moved that prior to election of the officers that the task force consider changes to the rules of order. The motion passed without objection.

II. ROLL CALL

Mr. Blake Canfield, then called the roll for purposes of establishing a quorum. The following members of the task force were recorded as present:

Sen. Norby Chabert

Sen. Bret Allain

Rep. Beryl Amedee

Mr. Robert Michael Bengé

Mr. Rex Caffey

Mr. Blake Canfield

Mr. Daryl Carpenter

Mr. David Cresson

Ms. Cynthia Duet

Mr. Cole Garrett

Mr. John Lovett

Rep. Jack McFarland

Mr. David Peterson

Mr. Lucas Ragusa

Mr. Sean Robbins

Mr. Jonathan Robillard

Mr. Jay Schexnayder

Mr. Anthony Simmons

Mr. Harry Vorhoff

Mr. Charles Marshall (arrived at approximately 10:15 a.m. during the presentation by Harry Vorhoff)

The following members of the task force were recorded as absent:

Mr. Taylor Darden
Mr. Joseph LeBlanc
Mr. Jeff Schneider

Mr. Canfield announced that twenty (20) members of the task force were present and that a quorum was established.

The task force members introduced themselves and who they represent.

III. RULES OF PROCEDURE – NEW ITEM

- a) **Sen. Chabert** moved that the seat and microphone to the far right (when facing the panel) of the witness table be reserved for task force members not sitting on the dais to allow them the opportunity to speak and ask questions. The motion was adopted without objection.
- b) Next, the task force took up the matter of proxy voting or allowing alternate members to attend when a principal member was absent. **Mr. Paul Frey** a representative of the Louisiana Land Owner's association was asked to speak to the task force on the issue. **Mr. Frey** stated that due to the large number of members required to reach a quorum of the task force, he suggested the task force allow alternates or proxies to be designated by task force members when they are unable to attend. He further stated that this was a common practice for similar organizations. **Sen. Chabert** asked **Mr. Canfield** to speak on the issue. **Mr. Canfield** stated that SCR 99 of 2018 required the task force to follow the applicable Senate Rules of Order. The Senate Rules of Order do not allow proxy voting but SCR 99 of 2018 was itself silent as to proxy voting. **Sen. Allain** stated that the intent of the resolution was that the task force follow the Senate Rules of Order as to decorum and how members and the public were to be recognized to speak, but that the resolution was left silent as to proxies so that the task force could make its own rules regarding them. **Sen. Chabert** asked **Mr. Canfield** his opinion. **Mr. Canfield** stated that his main concern was that any such allowance not be used to get around open meetings laws and that public notice and public meetings should still be required. **Rep. Amedee** stated that it was important that if any alternates were allowed that they be qualified in the same manner that the principal member was. For instance, she said, my alternate would need to be a member of the House of Representatives. **Sen. Chabert** then moved that alternate members or proxies be allowed to be designated and that they be from the same legal entity or agency or be members of the same group that appointed or designated the principal member.
- c) **Mr. Rex Caffey** of the Louisiana Sea Grant stated that the Sea Grant program always serves on similar groups as academic subject matter advisers and that he and **Mr. James Wilkins** are not allowed to vote on policy matters. He explained that the Sea Grant was a research and extension institute which did not vote on

policy matters. **Mr. Caffey** also made note that **Mr. Wilkins** was his proxy/alternate in the event he was unable to attend a future task force meeting.

Sen. Chabert noted that if the Louisiana Sea Grant member-representative was unable to vote it would potentially leave the task force with a tie on contested matters. The Task Force unanimously approved a motion that the chair of the task force not vote except to break ties.

For scheduling purposes, **Sen. Chabert** stated that the task force member who expects to be absent should coordinate with their proxy/alternate and let the Chair know of their proxy/alternate's availability. **Sen. Chabert** moved that the member for whom an alternate or proxy was to attend should notify the chair at least 48 hours prior to the meeting of the identity of their proxy/alternate so that the task force could be made aware prior to the meeting. The task force approved the motion unanimously.

IV. ELECTION OF OFFICERS

Sen. Chabert asked **Mr. Canfield** what was required by SCR 99 of 2018. **Mr. Canfield** stated that the resolution only required election of a chair but that election of a vice chair may be warranted in the event the chair is absent.

Sen. Allain stated that the chair should be a neutral party and probably be a member of an agency that has the time and the staff to set up these meetings and run them. **Sen. Allain** nominated **Mr. Canfield** as chair of the task force and **Mr. Cole Garrett** as Vice Chair. **Sen. Chabert** suggested that he thought there should be no vice chair. Rather, **Sen. Chabert** stated that if **Mr. Canfield** or the Louisiana Department of Natural Resources (DNR) proxy was unable to make the meeting then there should be no meeting. **Sen. Chabert** made a substitute motion that there be no vice chair, but rather the DNR representative should be the Chair and if **Mr. Canfield** was absent from a meeting, then his appointing authority, Secretary Tom Harris of LDNR should appoint an alternate chair. The task force unanimously adopted this motion.

V. DISCUSSION ITEMS

- a. Review of SCR 99 of the 2018 Regular Legislative Session: **Mr. Canfield** summarized the requirements of SCR 99 of 2018. **Ms. Duet** suggested the group consider the best way to systematically cover the issues in order to ensure a comprehensive study and to lead to timely recommendations. **Mr. Canfield** agreed and suggested that we should discuss this more thoroughly under the agenda item on scheduling and the proposed agenda for next meeting.
- b. A presentation by representatives of the Attorney General's Office and the State Lands Office: **Harry Vorhoff**, representative of the Attorney General's (AG) Office presented a summary of the current state of the law as to ownership of submerged land and access to waterbodies, including State court decisions concerning navigability of waterways, accessing private canals, the importance of whether the waterway is usable for commerce, the effect of erosion of privately

owned property, and the ability of private land owners to reclaim submerged property through restoration. *See* Copy of the Presentation Attached as **Attachment A**.

- i. **Sen. Chabert** asked what the law said in a case where private land is submerged then re-emerges from natural or manmade causes. **Mr. Vorhoff** responded that if it is submerged into a navigable waterbody, the key question is whether the activity that led to the re-emergence of the land was undertaken by the private landowner, the state, or was natural. The private landowner has a right to reclaim their private property and in that case they will own the re-emerged land. **Sen. Chabert** asked whether the law was clear on this point. **Mr. Vorhoff** answered that yes, if the private landowner reclaims the property then land reverts back to private ownership, assuming the private landowner properly permitted the reclamation project. **Mr. Cheston Hill** with the Office State Lands (SLO), stated that this is correct, so long as the reclamation project does not impede navigation, since that is part of the permitting process. **Sen. Chabert** asked, if private property separating two navigable waterbodies later submerges and thus the two navigable waterbodies are connected, can the landowner reclaim that land? **Mr. Vorhoff** stated that the law was silent as what was meant by impeding navigation under that hypothetical. **Mr. Hill** responded that he believes the SLO has some discretion in making that determination and allowing reclamation to the extent reasonable. **Mr. Jonathan Robillard**, also representing SLO, stated that one policy of the SLO is that if property has eroded 100%, then it is no longer capable of private reclamation. **Sen. Chabert** then asked about cases where private landowners were allowed to bulkhead out to the property line shown on their title. **Mr. Robillard** stated that he is aware of situations where private individuals purchase title to land that has 100% eroded and they wish to bulkhead and fill in the eroded property. In those cases, **Mr. Robillard** said, we will allow those projects to be undertaken on a rental basis. **Sen. Chabert** asked what those leases look like. **Mr. Robillard** stated that they are generally for a five year term with the opportunity for renewal.
- ii. **Sen. Chabert** asked what the law said about private land that submerges and then reemerges due to a Coastal Protection and Restoration Authority (CPRA) diversion project. **Mr. Vorhoff** stated that the Louisiana Constitution prohibits the State from alienating its naturally navigable water-bottoms. So, when reclamation is done by the State, the State is constitutionally prohibited from alienating that water bottom even as it becomes emergent land. **Sen. Chabert** asked what the law says if a diversion project raises the water level so that it overtops and submerges an existing private levee and now connects navigable waterways to a previously private waterbody. **Mr. Vorhoff** stated that he couldn't say as there were significant factual issues that would need to be known, including

the specific actions taken by the State and other parties. **Sen. Chabert** stated that with future restoration projects, such as the Atchafalaya East Flow project, and the unknown effects and unintended consequences like this are of concern. With water rise issues compounded with ancillary sediments and the unintended consequences to ownership, we better have these issues on our radar. **Mr. Vorhoff** stated that he can look into this. **Mr. Carpenter** requested that the task force be given copies of any presentations going forward. **Mr. Canfield** agreed to do that. **Mr. Carpenter** asked about the Bayou Laird CPRA project and the fact that the State had handed over the reclaimed land to private landowners and that one of these landowners notified the public and participants in a fishing tournament that the area was privately owned and not open to members of the public or participants in the fishing tournament. **Mr. Robillard** asked if **Mr. Carpenter** knew if the area was State claimed or if ownership had been adjudicated prior to the project. Because that is something we would need to know to answer your question. **Mr. Robillard** stated that his office could look into it.

- iii. **Mr. Lovett** stated that he thought **Mr. Vorhoff** accurately portrayed the current law and how unclear it is, which is why we still have a lot of work to do. I don't think the changes in navigability were contemplated when the civil code was drafted. Navigability has been defined by courts all across the country and it is a very fluid fact dependent concept, which is why states have typically left it to courts to define navigability on a case by case basis. We may need to be more specific considering the changes we are now facing.
- iv. **Sen. Allain** asked whether **Mr. Vorhoff** or the SLO was aware of private ownership of navigable water bottoms through property grants from the French or Spanish crowns prior to statehood, similar to such crown grant claims in Virginia. Neither **Mr. Vorhoff** nor **Mr. Robillard** were aware of such claims. **Mr. Robillard** stated that most French and Spanish crown grants in Louisiana were surveyed and specifically excluded water bottoms from the grant. **Mr. Hill** stated that these surveys stopped where the granted land ended, which was at the high water mark. **Mr. Peterson** stated that this was because of the shared civilian legal heritage with Spain and France as compared to the common law heritage of Virginia and the United Kingdom. He further stated that you cannot go to other states for a comparison. We have had jurisprudential decisions defining ownership and navigability. But these courts have done some strange things when you've had man-made changes to water-bottoms and lands. We have to look at our Civil Law tradition, **Mr. Peterson** said.
- v. **Mr. Benge** stated he felt that the State has overlooked the tremendous work of the surveyors and what they can show was navigable in 1812 or the date of the grants. The two main issues he sees regard determining what were navigable waterways as of 1812, which should be obvious to the State, and

following the flood of 1927 the Corps levied off the lifeblood of Southeast Louisiana. Now the State claims our property even though we pay taxes on the land. If private owners cannot reclaim land lost due to the levee system and coastal erosion regardless of who pays for the restoration, then private landowners do not have an incentive to favor restoration. This places those landowners who want to help save the coast into an adversarial position with the State. **Mr. Benge** asked whether the AG had issued an opinion on HB 391 of 2018 RLS. **Mr. Vorhoff** stated that he was aware that such a request had been made but he did not believe it has yet been issued. **Mr. Vorhoff** stated that he would follow up.

- vi. **Mr. Robbins** asked procedurally if the SLO or AG's office cannot answer a question the task force asks, does the task force need to make a formal request or can we count on them to look into it and get back to us? **Mr. Canfield** stated that the task force can make a formal request but if the AG's Office or SLO say they will get back to us, I think we can trust them to do that. **Mr. Robbins** stated that his point was that it would be helpful to the task force to know if the state agencies are unable to answer our questions or not. **Mr. Canfield** agreed. **Sen. Chabert** stated that a lot of times when you have an agency representative at the table you are trying to determine if the law is silent. Where the law is silent is where the battle occurs and opposing sides have to start meeting and figuring out how to remedy those areas. **Mr. Robbins** stated that in this case, he didn't know if the law was silent and so we are expecting to hear back whether the law is silent and if not what does the law say. **Mr. Canfield** agreed. **Sen. Allain** stated that what we are hearing today is the State's position. I very well expect that the Louisiana Landowners Association's position will be different and [the Louisiana Sportsmen's Coalition's] position will be different. This is more educational on what is the current law, what is everyone's position and from there we can start a dialogue of where do we go from here. **Ms. Duet** stated that when we ask a question on future projects where the law is murky we obviously want to know that, but I would like for us as a group to spend more time determining how we are going to tackle these issues. Are we going to go in some order and sequence? For instance, what the law was historically, what current law is, and what should be our considerations for the future.
- vii. **Mr. Carpenter** asked about reclamation in the event that some portion of private property remains and the process required to reclaim such property. **Mr. Robillard** mentioned that there is a permitting requirement with his office and that they will generally allow it so long as it does not impede navigation. **Sen. Chabert** distinguished his earlier hypothetical from **Mr. Carpenter's** question. **Mr. Robillard** stated that in the event the entirety of the private property erodes then they no longer recognize a riparian owner with rights of reclamation. **Mr. Marshall** stated that his

interpretation is that if private property erodes completely away, he believes that is exactly when the landowner's right to reclaim ownership springs to life under the constitution. I think it was during one of the first coastal restoration projects and it affected the barrier islands of southern Terrebonne Parish. The issue that arose was whether the State could, through its restoration project, defeat a private landowner's constitutional right to reclaim the land out to the 1921 shoreline. The issue was essentially that between the State and the private landowners you had two conflicting constitutional provisions. This conflict was resolved by a constitutional amendment whereby the State acting through the Secretary of the DNR can enter into an agreement with a private landowner as to who would own reclaimed property following initiation of the restoration project and going forward. **Mr. Marshall** stated he wanted to point that out as the precedent and process was relevant to **Sen. Chabert's** question. **Mr. Marshall** further stated that there are private property rights in conflict with some of the positions mentioned by the State. So, I believe we need to go through these issues to see if we can reach resolution that may satisfy the interests of both the private landowners and the State.

- viii. **Mr. Cheston Hill** with the SLO provided an overview of the history of State property issues and management and the processes currently utilized by the SLO to map the State claimed water bottoms and dual claimed lands. See **Mr. Hill's** prepared remarks attached as **Attachment B**. **Mr. Hill** also stated that SLO is working with the AG's office on new policies to address many of these disputed ownership issues.
- ix. **Mr. Cresson** asked what the timeline in which a private landowner had to apply to reclaim submerged land was. **Mr. Hill** stated that so long as the landowner is a riparian owner, he or she has the right to reclaim submerged land out to the 1921 shoreline; and you may have a right to reclaim further out if you are immediately adjacent to the Gulf of Mexico. **Mr. Cresson** next asked whether on dual claimed lands, the State was still collecting property taxes. **Mr. Robillard** answered that the State no longer collects property taxes and that instead property taxes are collected at the Parish level. **Mr. Robillard** believes the State stopped collecting property taxes in 1973. **Rep. Amedee** asked whether reclamation was allowed for property owners along inland waters. **Mr. Hill** and **Mr. Robillard** responded that it generally does not occur further inland as most inland rivers and waterways constantly meander and the property boundaries change with them, however if it is a relatively static and more maintained waterway, then reclamation by private landowners is allowed. **Rep. Amedee** stated that with bulkhead permits it was her understanding that landowner's lease the property, so she asked whether landowner's ever actually owned the property that is reclaimed. **Mr. Robillard** stated that if they go through a reclamation process they would own the reclaimed land. By contrast, if the landowner

is going through a leasing process, then you are talking about a different process from reclamation and SLO would have already determined that there is no riparian owner with reclamation rights. **Rep. Amedee** asked how many types of permits SLO has. **Mr. Robillard** stated that he believes there are five permit types. Type A permits are for reclamation projects, Type B permits are for bulkheads, and Types C & D are for things that encroach onto State owned waterbottoms such as piers, certain types of docks, and mooring facilities. **Rep. Amedee** stated that she assumes SLO makes the determination as to which type of permit is applicable. **Mr. Robillard** said yes, that is correct. **Rep. Amedee** asked whether people ever appeal those decisions and if so, how. **Mr. Robillard** stated that yes but that it is generally through a discussion with SLO and that he was unaware of a formal appeal to date. **Mr. Hill** said that he thinks such an appeal would be through the court system.

- x. **Mr. Carpenter** stated in response to **Mr. Cresson's** previous question that his personal experience with property he owns in the coastal area is that where the State claimed submerged land covered by his title, he was still paying property taxes on the submerged land. Essentially, **Mr. Carpenter** stated, I have two choices: 1- I can pay the property taxes on the submerged land and retain my right to later reclaim that property, or 2- I can get a survey from SLO and the Parish will remove the submerged land from my property taxes, but in that case I have given up my rights to reclaim the property and it has then become the State's property.
- xi. **Ms. Duet** asked what specific policies and issues is SLO working with the AG's Office on and when do they think they will be complete with this review. **Ms. Duet** stated that she was asking solely to determine how the SLO and AG work on new policies might affect the task force's work and how could the task force avoid making recommendations contrary to that work. **Ms. Duet** further asked whether SLO and AG's Office could report back with updates if an estimated completion date was too difficult to determine. **Mr. Hill** stated that their policies are dealing with the law on navigability and ownership as it exists now and because that law is murky he was afraid he was unable to provide much clarity. **Mr. Vorhoff** added that they want to make sure any policy decisions are consistent and well thought out and do not conflict with the task force's recommendations. **Mr. Vorhoff** stated that they would try to provide an estimated schedule for their policy review at the next meeting.
- xii. **Sen. Chabert** stated that the task force needs to identify the issues it is going to tackle and move forward on those issues towards a vote giving recommendations to the Legislature regarding any needed changes to the law. **Sen. Chabert** further stated that while we need to recognize that the law is ever evolving, the task force will need to make tough calls and that

the task force will be asked to make recommendations on issues that the SLO and AG's Office are unable to resolve.

- c. Next Meeting – proposed dates and agenda: **Mr. Canfield** suggested that the task force look at late October or early November dates for the next meeting and that he would circulate some possible dates and times to the members for consideration. **Sen. Allain** said it will probably take around one month for presenters to prepare for the next meeting so he thought that the proposed timeline was good.

Mr. Canfield asked what topics the Task Force wanted to consider going forward. **Sen. Chabert** suggested that the task force discuss specific issues they were interested in considering and that the task force try to identify the governmental agencies or other parties that would be appropriate to present on those topics.

Rep. Amedee provided a list of items for the task force to consider and suggested that the task force use them to determine which agencies or other entities the task force would request attend future meetings: 1) A more thorough explanation of the maps of navigable waterways and ownership that are available and which are the officially recognized maps, how up to date are these maps, and how do we inform the public of the maps? 2) Create a list of key words not legislatively defined for consideration that the task force recommends the legislature to define; 3) I'm told that liability concerns of insurance companies are behind a lot of private landowner's decisions to block access to private canals, can someone representing the insurance providers discuss this with the task force; 4) Can LED present on the impact caused by cancelled fishing events caused by waterway trespassing disputes? 5) How do we determine whether something has become navigable naturally? What is the standard to be used in making this determination? What about a case where a privately dredged canal overtime takes on the flow of a navigable waterbody? 6) We need more information on navigability and its effect on access rather than just ownership of the water-bottom. Does the State own all waterways? 7) Who has the right to place a gate blocking a waterway? Which waterways can be gated? What liability do they have if the gate is not maintained or not removed after it becomes submerged and potentially damages a boat? 8) What percent of coastal Louisiana is publically owned versus privately owned? I have heard many different answers and I would like to get a definitive answer. **Mr. Canfield** stated that he can look into the appropriate agencies or other entities to answer these questions and get back with the task force on what he finds. Additionally, **Mr. Canfield** said that as we have presenters come before the task force that may have the answers to some of these questions, we can obviously ask them.

Sen. Allain stated that the task force is still in the educational phase and that he believes the task force should focus on getting the position of the various interests represented on the task force as to the issues involved. **Sen. Allain** further stated he would like the Louisiana Sea Grant to present on their recent report and

also have presentations by the landowners, the sportsmen, and the environmental interest members.

Mr. Carpenter requested help locating the minority report that accompanied a 1993 report to the legislature referenced in the Louisiana Law Review article found at Vol. 53, No. 6. It was authored by Mr. Klebba. **Mr. Lovett** offered to ask the author as he is his neighbor at Loyola Law School.

Mr. Peterson recommended that a relevant literature summary should be compiled and shared with the task force so that we don't reinvent the wheel. **Mr. Peterson** further stated that CPRA would be happy to present on land acquisition issues associated with coastal restoration projects.

Mr. Canfield stated that he would plan to reach out to the members representing each interest to determine their interest and availability to present and then work on a draft agenda to be shared with the members prior to the next meeting.

VI. PUBLIC COMMENT

There were no public comments

VII. CONSIDERATION OF ANY OTHER MATTERS THAT MAY COME BEFORE THE TASK FORCE

No other matters were brought before the task force.

VIII. ADJOURNMENT

Sen. Allain moved that the task force adjourn its meeting. This motion was approved unanimously and the meeting adjourned at 11:54 a.m.

Louisiana's Waterbodies: Ownership and Access

Harry J. Vorhoff
Assistant Attorney General
Counsel for the Louisiana Office of State Lands

Types of Waterbodies

- Public canal
- Private canal
- Naturally navigable waterbody
- Naturally non-navigable waterbody

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Private Canals



La. R.S. 9:1251

- Express or tacit permission to cross private land, solely for the purpose of providing a convenience to and from waters for boating or to access any recreational site, does not create a servitude or right of passage.

Cenac v. Public Access Water Rights Association

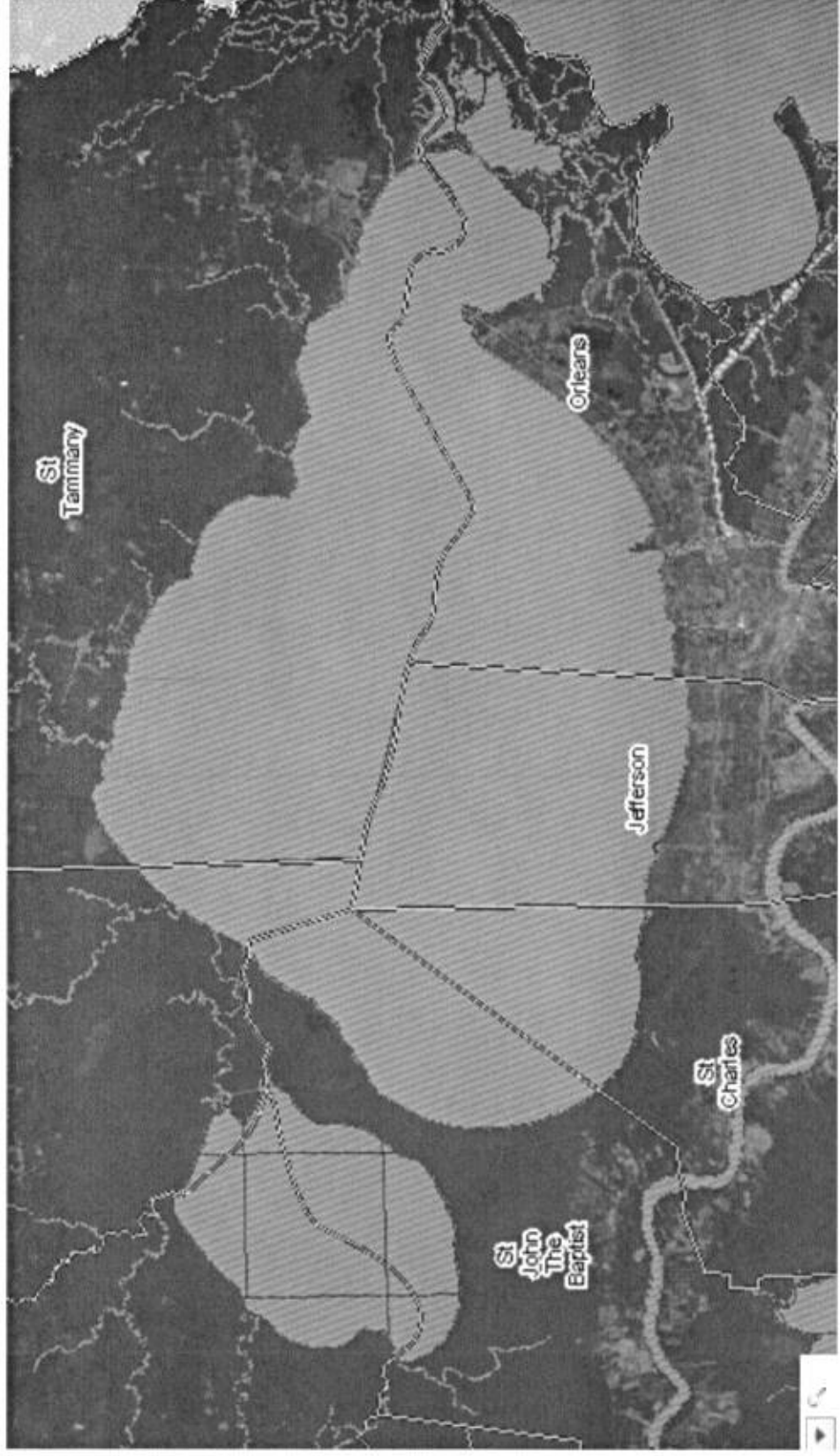
2002-2660 (La. 06/27/03); 851 So.2d 1006

- Public historically and continuously used Company Canal and boat launch
- Court:
 - Navigable in fact ≠ public canal
 - Mere toleration of public use ≠ implied dedication to public use

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Natural Waterbodies



La. Civil Code art. 450

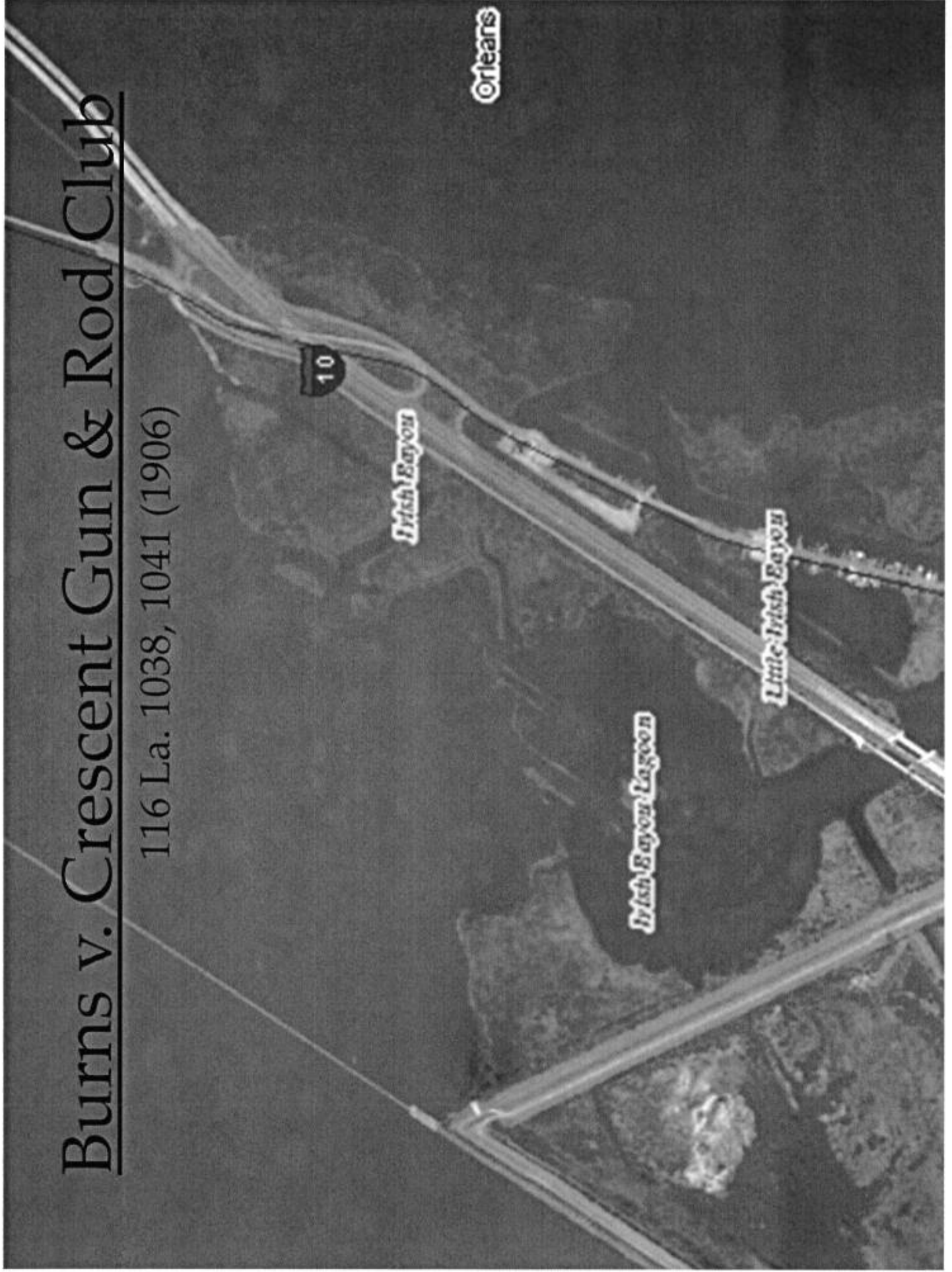
- Public things are owned by the state or its political subdivisions in their capacity as public persons.
- Public things that belong to the state are such as
 1. running waters,
 2. the waters and bottoms of natural navigable water bodies,
 3. the territorial sea, and
 4. the seashore.

What does “navigable in law” mean?

- “If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway.” *Ramsey River Rd. Property Owners Assoc. v. Reeves*, 396 So.2d 873, 876 (La. 1981).
- “Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.” *Ramsey River Rd. Property Owners Assoc. v. Reeves*, 396 So.2d 873, 876 (La. 1981) (citing *Economy Light and Power Co. v. U.S.*, 256 U.S. 113 (1921)).

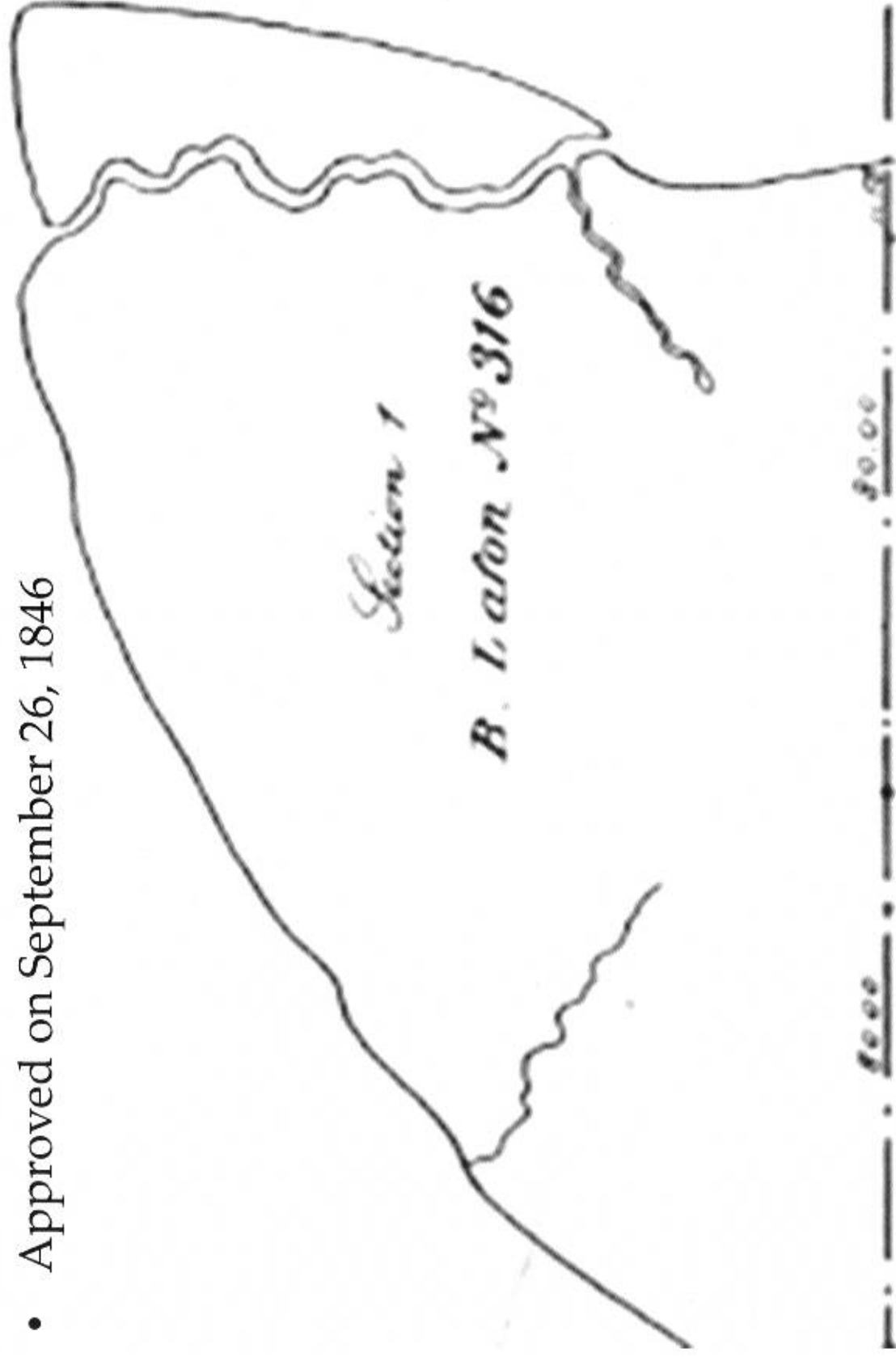
Burns v. Crescent Gun & Rod Club

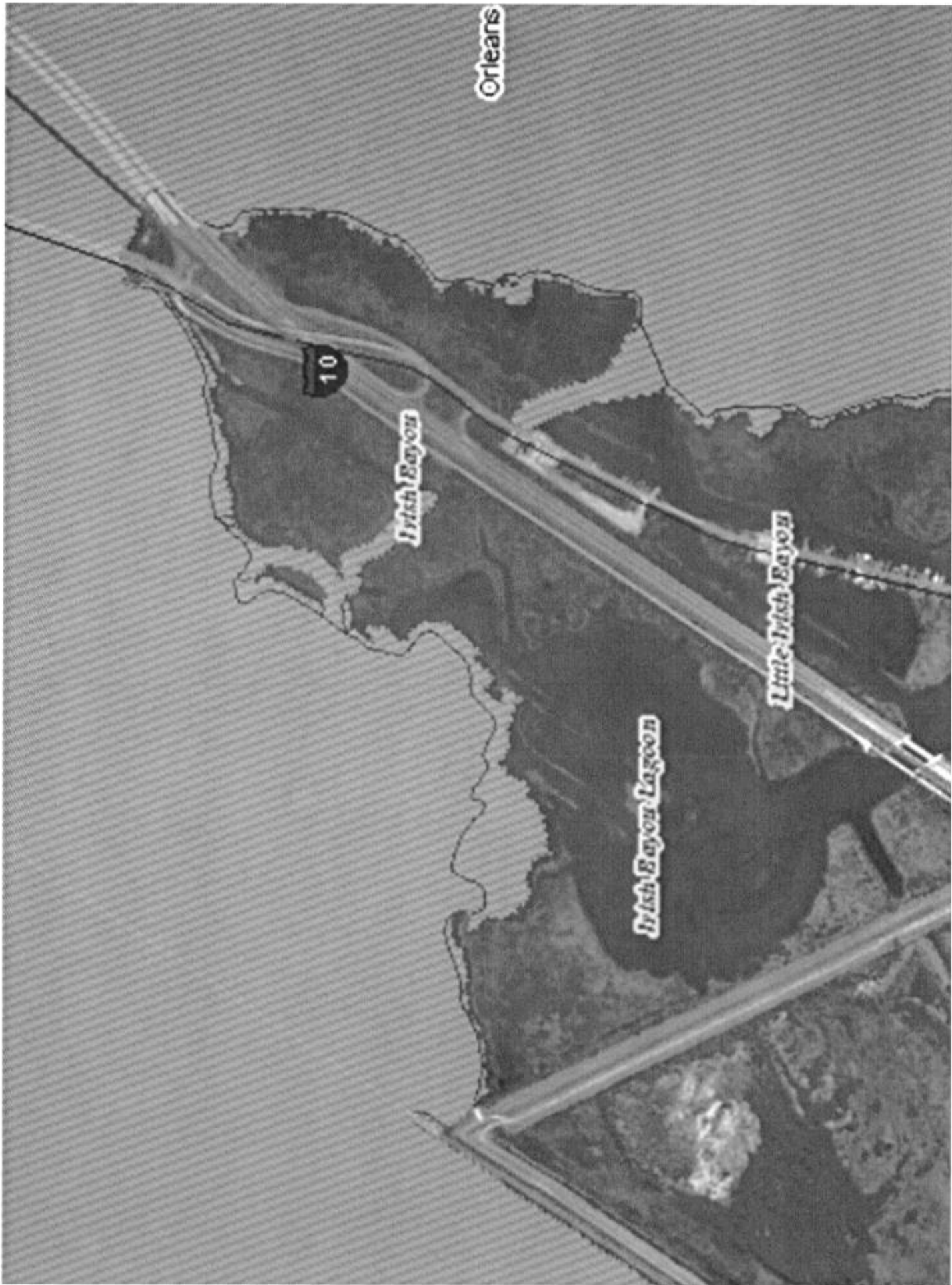
116 La. 1038, 1041 (1906)



U.S. General Land Office Survey Map

- Surveyed in the winter and spring of 1843
- Approved on September 26, 1846





Orleans

10

Irish Bayou

Little Irish Bayou

Irish Bayou Lagoon

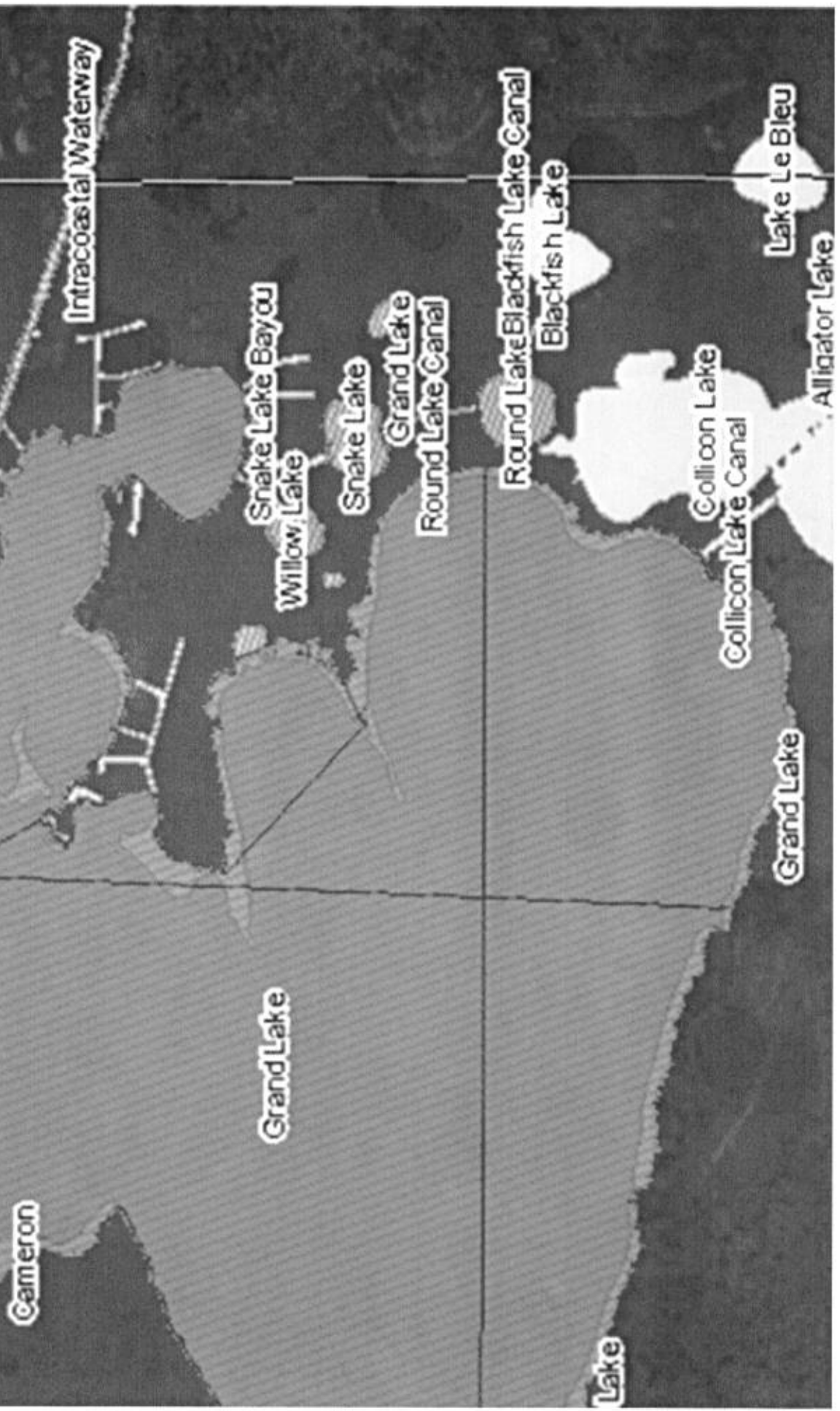
Burns v. Crescent Gun & Rod Club

116 La. 1038, 1041 (1906)

- Irish Bayou = arm of the sea = navigable
 - “It is a safe harbor, and has received storm-tossed boats and afforded them ample protection. It is a large indentation on the coast of the lake and is in that light highly useful. It, as well as the lake, is an arm of the sea, not susceptible of private ownership.”
- Irish Lagoon, Branch Bayou, Little Irish Bayou ≠ navigable
 - Always clogged; difficult to access in a pirogue

O'Brien v. State Mineral Bd.

209 La. 266, 273, 24 So. 2d 470, 472 (1945)



O'Brien v. State Mineral Bd.

209 La. 266, 273 (1945); 24 So. 2d 470, 472

- Snake Lake, Willow Lake, and Snake Bayou
 - Privately owned
 - Surrounded on all sides by marshes
 - "These dead-end bodies were never destined to be public waterways for commerce or navigation and are of no commercial importance."
 - "Whether Snake Bayou, Snake Lake, etc., were navigable or not in 1812 and 1883 cannot be definitely determined from the record."
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Miami Corp. v. State

Cameron

Grand Lake

Miami Corp. v. State

186 La. 784 (1936); 173 So. 315

- Grand Lake's navigability conceded by parties
- Question: whether eroded land, which has been added to the bed of the lake by subsidence and erosion, is now the property of the State
 - Answer: YES
- Why?
 - "Because, to hold otherwise would be contrary to sound principles and public policy upon which the rule is predicated. It is the rule of property and of title in this State, and also a rule of public policy that the State, as a sovereignty, holds title to the beds of navigable bodies of water."

State v. Scott

185 So. 2d 877 (La. App. 1 Cir. 1966)

- State patented 1321 acres of sea marsh in Lafourche Parish in 1883

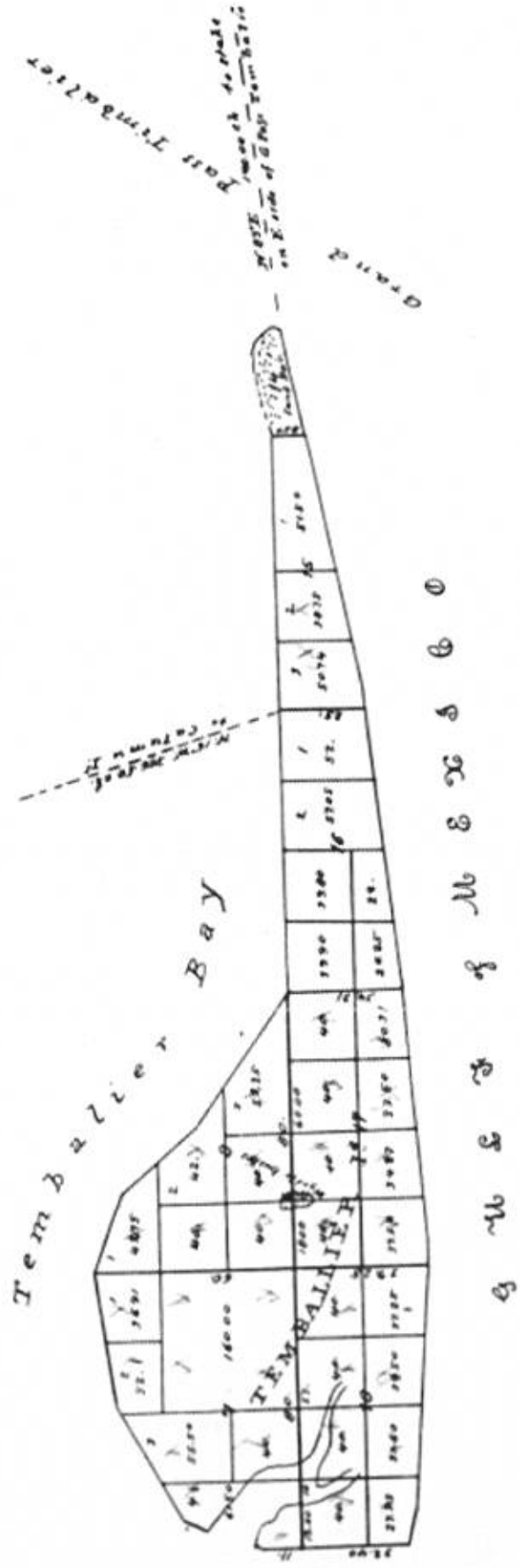


State v. Scott

185 So. 2d 877 (La. App. 1 Cir. 1966)

1842 Original Survey by GLO

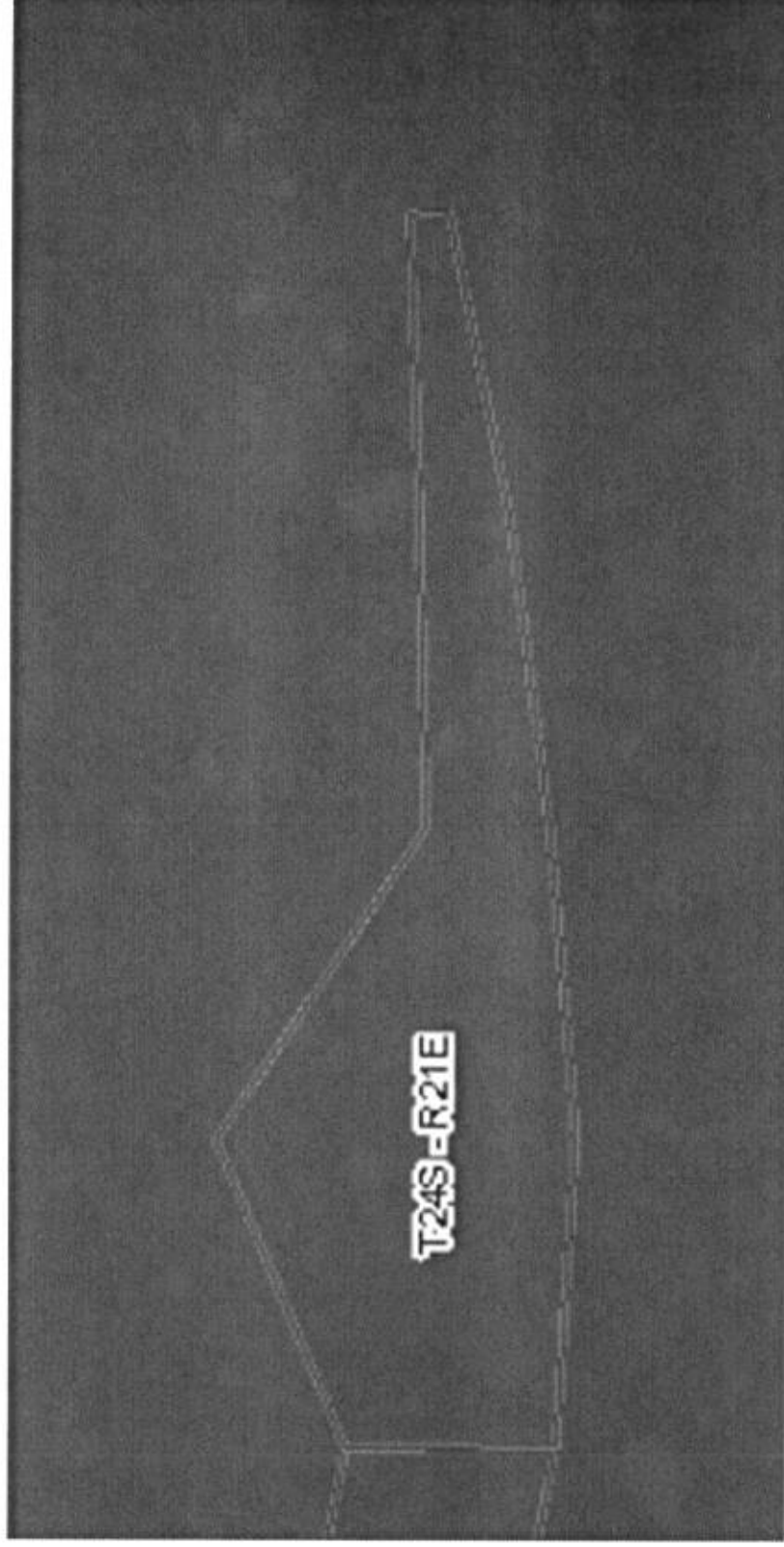
South Eastern Dist.
La.



State v. Scott

185 So. 2d 877 (La. App. 1 Cir. 1966)

- By 1960, land had eroded into the Gulf of Mexico



State v. Scott

185 So. 2d 877 (La. App. 1 Cir. 1966)

- Both parties claimed ownership.
- Court quoted and applied Miami Corp.:
- “When submersion occurs, the submerged portion becomes a part of the bed or bottom of the navigable body of water in fact, and therefore the property of the State, by virtue of its inherent sovereignty, as a matter of law.”

9/13/2018 9:30 a.m.

Comments by Cheston Hill

Good morning. My name is Cheston Hill. I work for the Louisiana State Land Office and I manage the Titles and Surveys Section. I want to discuss the history and development of our inventory of State claimed water bodies. I also want to discuss some long standing policy of our office and the reasons for many of the dual claims depicted in our GIS database, and maybe try to touch on some law and policy issues that we're discussing with the Attorney General's office.

In 2004, 5 and 6, the Legislature issued a number of Senate Concurrent Resolutions directing the State Land Office to create a Statewide inventory of State-owned water bottoms, and make this inventory available to the public. This severely nuanced and difficult directive was obeyed to the best of our ability by the creation of a Geographic Information System, or GIS, database, and the development of a GIS mapping layer which, subject to a disclaimer, can be selected on an interactive map accessible online and overlain with aerial photography and other informational mapping layers maintained by the Department of Natural Resources. There was one catch: the GIS mapping layer developed by the State Land Office was not able to show State-owned water bodies unless they had been adjudicated to be State-owned by a court of law. Instead, it was developed as a State-claimed inventory. Please allow me to explain.

On April 30th of 1812 when the United States Congress created the State of Louisiana, it declared that it shall be created on an equal footing with the other States that were already a part of the Union. The United States Congress declared, as a condition upon which Louisiana was incorporated into the Union, the river Mississippi, and the navigable rivers and waters leading into it, and into the Gulf of Mexico, shall be common highways, and forever free. We call navigability as of the date of this declaration historical navigability, and our office strives to identify those waterways that could be historically navigable for the purpose of inventorying the claims of the State to such waterways pursuant to this condition of Statehood and our Legislative directive. Please understand, however, that, due to erosion, subsidence and sea level rise over the course of over 200 years, the waterways on the coast have grown and become more intricate and interconnected, and our office also strives to identify and inventory the claims of the State to these natural navigable water bodies as they have grown and changed over time. Let me stress this does not decide ownership, only claims for which the State Land Office has readily available evidence or has obtained evidence clearly supporting the State's ownership. Let me also stress that the State's claims reflect a limited opinion of this office based on internal guidance documents to allow a consistent method of review Statewide using in-house historical records and other information held at the State Land Office. This was the only financially viable way to fulfill our directive to inventory all State owned water bottoms Statewide. It is important to understand that the State Land Office's initial reviews and subsequent claims based on these records are limited by the Louisiana Constitution – the State cannot alienate naturally navigable water bottoms. The Louisiana Constitution prohibits the State from alienating naturally navigable water bottoms, so the State necessarily and in perpetuity reserves the right to seek a judicial determination of State ownership on any water body no matter what our decision on claims have been in the past, because we know we cannot possibly confirm that we have at hand when making the decision all possible pieces of evidence in existence relative to the question of navigability of every water body in every part of the State.

Several things warrant explanation. Let me explain the reasons for many of the dual claimed water bodies depicted in our GIS database and how the State Land Office operates to determine State claims and the valid dual claims to be reflected in our GIS database, particularly in coastal areas. The explanation begins with the original U.S. Government public land surveys which we call township plats because they typically cover a 36 square mile area known as a township. These United States surveys were on a township by township contract basis with U.S. deputy surveyors in the 1800s who were paid by the chain and link, these were actual 66' metal chains made of 100 links each that were required to be held tight, level and plum over every piece of land surveyed.. When doing these surveys, Federal Deputy surveyors were expected to use their own judgement to identify navigable rivers and streams and were instructed to record certain observations and measurements of them. They were instructed to record certain observations and measurements of lakes and ponds of sufficient size and depth to justify the expense. Various versions of these instructions were issued en masse to the deputy surveyors in general circulars at different times, such as the General Instructions of 1815, of 1831, and of 1855. Other circulars for General Instructions for certain States have been issued at different times and often special instructions were issued directly to specific deputy surveyors for certain survey contracts covering particular areas, directing them to take certain actions relative to surveying some of these areas based on their own judgement regarding the value of the land compared to the expense of the survey work – with regard to the coast, and the vast areas of marsh land that is often extremely difficult to walk on foot, this often resulted in unsurveyed or partially unsurveyed townships comprised of lands which were viewed in the 1800s as waste land, unfit for settlement and cultivation. For example, special instructions have been issued for surveys on the coast in the 1800s which made clear that “nothing herein contained shall require the survey of waste or useless lands” and that the surveyor “will not be paid for sectionizing lands entirely unfit for settlement and cultivation”. Clearly the opinion of the value of pristine coastal wilderness has changed over time, as today such lands are not considered waste or useless. Nevertheless, often in coastal areas, the value of the land in the 1800s did not justify the expense that would have been borne by the US Government to survey the entire 36 square mile township, so the extent to which navigable waters may have traversed these unsurveyed areas was not documented. Unfortunately, vast swaths of these unsurveyed areas on the coast were viewed as swamp lands within the meaning of the Federal swamp land grants, selected by the State as swamp lands and approved by the Federal Government, and subsequently acquired, to the extent they were susceptible of being acquired, by private persons who purchased them from the State, presumably prospectors and investors. It is the extent to which they were susceptible of being acquired by private persons that is not clear because these transactions occurred, in large part, without the benefit of a survey, and any natural navigable water bodies which traversed these unsurveyed areas were inalienable by the State and insusceptible of private ownership. The State considers those sales null and void insofar as they purport to convey navigable waters.

Due to the issuance of survey instructions such as these, which resulted in unsurveyed areas and questionable severance from the public domain into private using estimated acreages, the long standing policy of our office in areas such as these, where townships were “unsurveyed”, their interior dimensions and features being estimated, is to refer instead to the early editions of the United States Geological Survey topographic quadrangles, and in particular to those editions that were the first to utilize aerial photography, because those are the most reliable. The earliest editions of the USGS topographic maps to utilize aerial photography in most areas are the Editions of the 1930s. For these

unsurveyed areas, our policy has always been to assume those waterways depicted on the 1930s quadrangles were there in 1812, the same assumption we make with the township surveys performed on the ground in the mid-1800s. However, ownership of many of these unsurveyed lands can be and is contested by persons holding State or Federal documents that purport to sever and sell naturally navigable water bottoms. In such instances of competing claims, ownership can only be decided by a court of law. For the most part, those are the areas that we have designated dual claimed in our GIS inventory and labeled "Claimed by the State and Adjoining Landowner".

Let me explain the State's position in this regard. If the State were to rely entirely on the historical governmental survey data available in unsurveyed or partially unsurveyed townships, a great disservice to the public trust could occur as a result of situations such as this and the resultant and very questionable sale of unsurveyed areas that, unknown to the State at the time of sale, included navigable waters. It has always been a strong public policy of this State that natural navigable water bodies are to be highways of commerce and forever free, inalienable by the State and unsusceptible of private ownership, held in public trust for the citizens of Louisiana. This long standing public policy was finally codified in the Louisiana Constitution in 1921, and is now identified as Article 9, Section 3 of the current Louisiana Constitution, wherein the Legislature states as follows:

"The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. ...".

With regard to erosion, as well as subsidence and sea level rise: as Harry just discussed, Article 450 of the Louisiana Civil Code states that the waters and bottoms of natural navigable water bodies are defined as public things and belong to the people of the State. With the vast geomorphologic changes occurring on our coast due to erosion, subsidence and sea level rise, the difficulties inherent in determining the State's claim in accordance with the Louisiana Civil Code and Constitution are enormous, and involve identifying which water bodies of the expansive and rapidly growing interconnected network of bayous, lakes and bays on the coast should be claimed as navigable in fact today. We have traditionally relied on aerials for this, but these at times prove insufficient, and we have been increasing our surveyor's presence in the field for the purpose of field investigations and depth studies. With limited financial and personnel resources, vastly outmatched by the expansive coastal area of our State and it's rapidly changing nature, the State Land Office strives to fulfill our duties with diligence and perseverance.

Currently, we are working together with the Attorney General's office on a number of complex law and policy issues. These issues relate to claiming and inventorying natural navigable water bodies in coastal areas that were not historically navigable, but appear to have become navigable naturally and to be currently navigable in fact.

Regardless of our work, however, this issue cannot be decided by us. No amount of identification and mapping of claimed waters will bring closure to this issue. Our office is charged with making claims and inventorying based on evidence available to us, not deciding ownership. Ownership can only be decided by a court of law.

Thank you for allowing me to speak, I appreciate your time and attention.