

Louisiana's Posted Paradise:
Protecting public access to our tidally-influenced waters



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Executive Summary

We have heard a testimony of what is law, what is not, and what the law is silent on. Our goal as the Louisiana Sportsmen's Coalition is to walk hand in hand with the lawmakers and the sportsman of Louisiana to come up with a reasonable solution to the access issues of this state.

The Louisiana Sportsmen's Coalition (The Coalition) has identified a problem for sportsmen and for the state's economy. A vast majority of a coastal Louisiana resource, its free-flowing waters, sit above what current state law considers private water bottoms. The owners of these water bottoms currently have the authority to restrict access to this public resource and have chosen to do so at increasing rates in recent years.

Introduction

For generations, Louisiana sportsmen have enjoyed the bountiful outdoor opportunities our resources have provided. With seemingly-endless quantities of these resources, our ancestors were always one trip to the closest waterway away from securing dinner for the whole family. Louisianans are truly blessed to have such a fertile estuary, and to this day we carry on the livelihood and tradition of living off the water. It is a point of pride for us in Louisiana that the tactics that kept our ancestors alive have been passed from one generation to the next and ultimately to us.

Unfortunately, this institutional ritual is in peril. It's not because we have too little resource, and it's surely not because today's generation is ignoring the calling of our ancestors. Instead, the way of life is receding due to the unintended consequences of legislation of the past:

- Act 998 of 1992 reaffirmed ownership of water bottoms and mineral rights to private entities
- The requirement to post those properties was removed sometime later
- Allowed individual law enforcement agencies to interpret and enforce laws in an inconsistent manner resulting in confusion
- Fostered the use of improperly marked makeshift gates, property signs, intimidation from civilians operating unmarked vessels and has resulted in the fear of arrest or citation by local law enforcement agencies.

History lesson: How did we get here? How did Louisiana become the only state where public access to tidally-influenced water could be restricted?

In the last century, entities began moving into coastal Louisiana in search of oil and gas. They found both and began acquiring large portions of coastal land (and the mineral rights that come with said land). In order to make nautical navigation more efficient, these entities dug canals in the coastal marshes they acquired and created a vast network of waterways. These new waterways became a new home to fish and wildlife habitats in coastal Louisiana. Abiding by the Public Trust Doctrine, an internationally-recognized document that guarantees public access to all tidally-influenced waterways, fishermen took advantage of the new habitats for decades with few objections from the entities that dug the canals.

As time went on, the property acquired by these entities continuously dwindled due to coastal erosion, and it's dwindling at an accelerated pace because of the network of canals in the marsh. Realizing they were losing property and potentially mineral rights they were paying property taxes on, these entities set out to claim ownership of any waters that sit where land they acquired used to. This effort made it all the way to the U.S. Supreme Court, and in 1988, SCOTUS ruled in *Phillips Petroleum v. Mississippi* that all navigable waters affected by the ebb and flow of the tide are public things and cannot be owned.

What was initially thought to be a devastating blow to the oil and gas industry became its salvation, because SCOTUS left wiggle room for states themselves to define “navigable waters” in its decision.

This opened the door for property owners to lobby the Louisiana Legislature to pass Act 998 in 1992. Act 998 dictated that “navigable waters” shall be defined as waters which were used for commerce in 1812. This allowed all other water bottoms to be owned, and the state promptly handed over ownership of these water bottoms and their corresponding mineral rights to the property owners.

The lack of a written definition of what “NAVIGABLE WATER” really is has resulted in further confusion and ambiguity. One of the hopes of the Coalition is to help facility a properly documented, written definition of “Navigable Water” in the Civil Code of the State of Louisiana.

Present and future ramifications of restricting water access

Results of the passage of Act 998 include:

- All canals dug through Louisiana’s coastal marshes were not defined as navigable, and therefore are not public.
- The waters that exist where land did in 1812 are not deemed navigable and not public.
- Law enforcement jurisdictions have interpreted Act 998 as allowing water bottom owners to restrict public access to the tidally-influenced water above their water bottoms.
- Because of this unique ruling, the loss of recreational access in Louisiana could cost the state billions.

In reality, not much changed in the recreational habits and enjoyment by citizens for about the first two decades following the passage of Act 998. Most water bottom owners choose not to restrict access, i.e. not to enforce the new law. Unfortunately, this has changed considerably in recent years, and enforcement has skyrocketed. Some areas historically traversed are now deemed private and blocked by makeshift gates, creating navigation hazards. Other areas are patrolled by armed civilians while operating unmarked vessels. In many cases, recreational boaters and fishing charter guides – even with family members or customers aboard – are threatened with physical violence and demanded to leave by these armed civilians.

Over time, many of Louisiana's natural coastal waterways used for commerce 200 years ago, and would likely be used today, have silted in due to artificially dug canals, changing the area's hydrology. The areas in which fishermen may fish legally has decreased dramatically due to this hydrology change and silting in effect. Here's how it happened. The artificial canal channeled water to one area and decreased water flow to what was once a natural waterway. Because of this, silting in of the natural waterways began. After decades of this process happening, the artificial canals became the only means of traversing coastal Louisiana. Unfortunately, there are areas in coastal Louisiana where, literally, as soon as you leave the marina, you enter these artificial canals have entered private property.

A compounding problem has been created by a Louisiana law passed years later. Those traversing a waterway are required to know whether they are above a private water bottom or not. It's the waterway traverser's responsibility despite the water bottom owner holding NO responsibility to post signs deeming the area under private ownership. This puts boat operators at constant risk of breaking criminal trespassing laws. The resulting criminal record could, for example, affect a charter captain's ability to obtain a U.S. Coast Guard license or a private recreational angler's ability to secure future employment.

Not being able to take kids fishing in the areas in which your grandparents and their grandparents fished should be enough to frustrate us all. Now consider the financial ramifications that water access restrictions can have on businesses, your community or your personal investments. According to the American Sportfishing Association, Louisiana recreational fishing creates an economic output of \$1.5 billion annually. The National Oceanic and Atmospheric Administration estimates that Louisiana recreational fishing accounts for 15,000 jobs.

Stan Mathes, tourism director for Plaquemines Parish, estimates each out-of-state angler who travels to his parish spends \$1,000 to \$2,000 over the course of a weekend. This figure is surely quite similar across Louisiana.

In August 2017, B.A.S.S. announced it would no longer allow participants in the Sabine River Tournament, hosted in nearby Orange, Texas, to fish in Louisiana waters. Additionally, B.A.S.S. declared it would no longer hold ANY TOURNAMENTS IN SOUTH LOUISIANA due to "Louisiana's unusual laws governing access to navigable waters have created conflict and confusion among anglers." According to B.A.S.S. director of event and tourism partnerships Michael Mulone, local economies get a \$2.5M impact from each Elite Series tournament and a \$2.1M impact from each Open Series event. This will also eliminate the possibility of ever hosting the organization's top event in the Bassmasters Classic and Expo that carries 25 to 30 million dollars of direct impact to the state's economy.

Each of these is a significant sum of money to leave on the table, and if public access to our waters continues to be attacked it won't just be anglers who will lose. It will be the hotels, the restaurants, the gas stations, the tackle shops, the boat dealerships and all the other supporting businesses that rely on this economic engine. If people stand to be threatened, harassed or even worse, just for fishing or bird watching, then why would they ever come back to spend their money in your area, purchasing goods in your community or frequenting your business?

Present and Future Actions

Our ultimate goal is negotiating an agreed solution to this issue with water bottom owners and their attorneys. Here are some points we have explored and will continue to explore:

- It seems unethical to continue to spend public money restoring private property as part of Louisiana's Coastal Master Plan with ***catastrophic storm protection*** used as one of the only benefits to the general public. At the very least, the public should be granted access to traverse the waterways above these private water bottoms that have been improved by public funds
- A logical remedy is to explore any and all solutions, including legislative solutions, to restore and preserve free access to ebbing and flowing waters of the State of Louisiana.

Additionally, we believe that there are specific things we should not pursue in this endeavor. We believe it is appropriate to concede the following negotiation points to the water bottom owners:

- We have NO interest in disputing the ownership of mineral rights of the water bottoms.
- We are willing to forfeit the right to sue if unintentional injury or property damage happens above an owned water bottom (obviously, if a property owner purposely places materials in the water designed to damage vessels, we do not forfeit the right to sue in this or a similar case)
- We are willing to accept liability for property damage we create above a private water bottom.
- We are willing to not traverse certain areas during hunting seasons and in other special situations.

The negotiation efforts of the coalition have been met with little to no feedback and, at times, a refusal to participate in any meaningful discussion of the matter. Despite this, we have and will continue to attempt to cordially meet with water bottom owners and their attorneys in an effort to come to a reasonable legislative solution that benefits everyone. Our supporters must continually remind themselves that the eventual legislative solution must be one with which water bottom owners agree. We feel a solution is attainable when all affected sides can amicably see the others augment clearly and respectfully. The Coalition and its members recognize the landowner's concerns and do consider them in all our efforts.

Our goal with this task force is to find solutions to the problems at hand for all parties involved. We hope to be able to provide solutions to the questions the citizens of Louisiana have been asking. The culture and tradition of Louisiana, its citizens and its reputation as "The Sportsman's Paradise" are at risk. The sportsmen of Louisiana are weary of the continued threat to the recreational activities that have been part of our way of life for centuries. We have an opportunity to stop kicking this can further down the road address this problem in a manner that is fair and equitable to all parties involved.

The members of the Louisiana Sportsmen's Coalition believe the SCR99 Task Force is a perfect opportunity to remedy this problem permanently. We should not squander this remarkable opportunity for our beloved state and we will continue to advocate for the rights of Louisiana Sportsmen.