

Water Bottoms: Private Property and Public Access

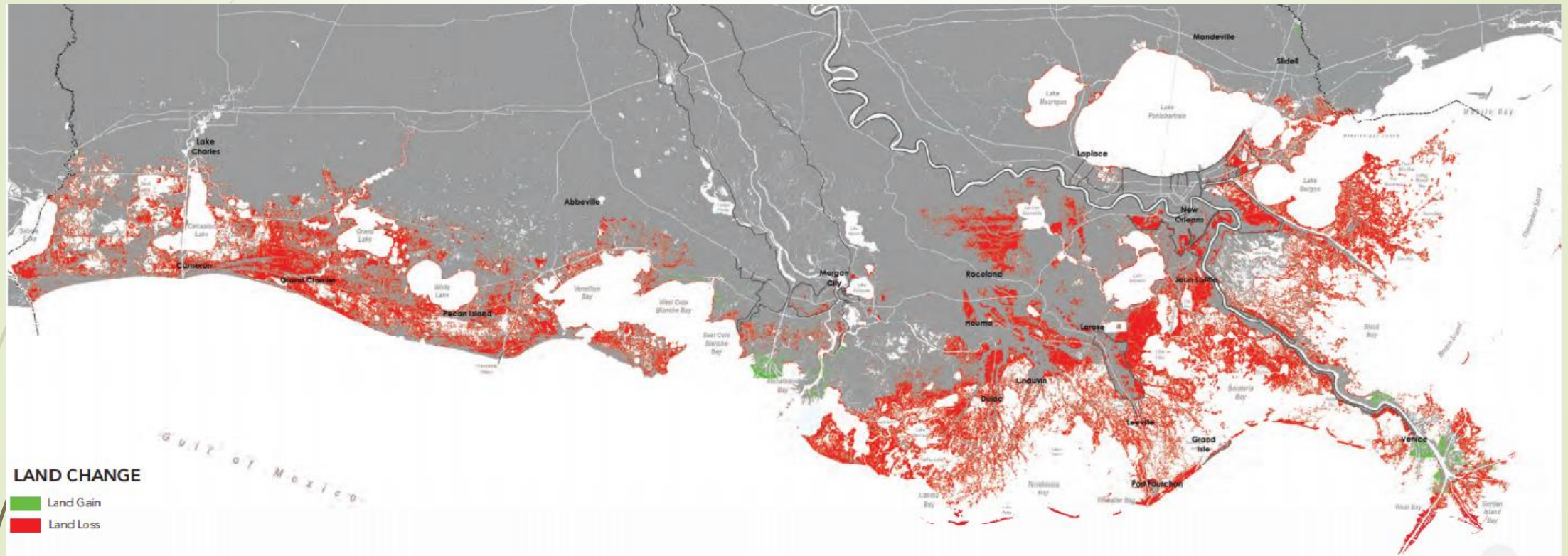


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The Problem



CPRA 2017 Coastal Master Plan, which estimates Louisiana's coast lost more than 1,800 square miles of land between 1932 and 2000.

Public vs. Private Things

➤ Public things – Louisiana Civil Code art. 450

- Owned by the State or its political subdivisions in their capacity as public persons
- Public things are:
 - Running waters;
 - Water and bottoms of natural navigable water bodies;
 - Territorial sea; and
 - The seashore

➤ Private things – Louisiana Civil Code art. 453

- Things owned by individuals, other private persons, and by the State in its capacity as a private person
- That which is not public is private

Equal Footing and Public Trust Doctrines

➤ Equal Footing Doctrine

- New states admitted to the Union do so on an “equal footing” to the original 13 states.
- Title to and ownership of bed and bottoms of all navigable water bottoms were vested in the State upon admission to the Union in 1812

➤ Public Trust Doctrine

- The State owns the beds and bottoms of navigable water bottoms in trust for the benefit of its citizens, who may freely use such water bottoms subject to reasonable restrictions placed on such use by the State.
- Act 645 of 1978 (La. R.S. 41:1701) set the scope:
 - “The beds and bottoms of all **navigable waters** and the **banks or shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes** belong to the state of Louisiana, and the policy of this state is hereby declared to be that these lands and water bottoms, hereinafter referred to as ‘public lands’, shall be protected, administered, and conserved to best ensure full public navigation, fishery, recreation, and other interests.”
- Louisiana’s public trust doctrine never included “tidal land”

Louisiana's Public Trust Doctrine

- ▶ *Phillips Petroleum Co. v. Mississippi* 108 S. Ct. 791 (1988)
 - ▶ Held: land subject to the ebb and flow of the tide was acquired by the State of Mississippi upon its admission to the Union under the Equal Footing Doctrine, and that Mississippi's law did not permit its severance from the public domain under its Public Trust Doctrine.
 - ▶ USSC: Individual states may define their own Public Trust Doctrine
- ▶ Act 998 of 1992 – (La. R.S. 9:1115)
 - ▶ Louisiana declares its public trust doctrine distinguishable from Mississippi, as considered by the Supreme Court in *Phillips*: “The legislature hereby finds that as to lands not covered by **navigable waters** including the **sea** and its **shore**...the *Phillips* decision neither reinvests the state, or a political subdivision thereof, with any ownership of such lands nor does the state, or a political subdivision thereof, acquire any new ownership of such property.” (La. R.S. 9:1115.1)
 - ▶ Louisiana law regards **navigability as hallmark of public trust limitations**
 - ▶ Act 998 of 1992 clarified and did not change Louisiana law


Determining Navigability

- ▶ Question of Fact determined at two points in time:
 - ▶ Time of admission to Statehood in 1812
 - ▶ Severance from the public domain
- ▶ A water body is navigable when it is susceptible of being used as a highway of commerce in the customary mode of trade and travel in the area
 - ▶ Factors include depth and width, but traversal by pirogue or fishing boat does not in itself establish navigability
- ▶ Whether a water body is navigable today is irrelevant for determining ownership if the water body at issue was non-navigable in 1812 and at the time of severance (See *Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824, 831 (5th Cir. 1993))
- ▶ Navigability is never presumed, and the burden of proof in matters of navigability lies with the party seeking to establish navigability (*Burns v. Crescent Gun & Rod Club*, 41 So. 249 (La. 1906))
- ▶ If land or a non-navigable water body was severed from the public domain, it is privately owned until a court of competent jurisdiction determines otherwise



Dual Claimed Lands

- SCR 111 (2005 Regular Session) authorized the State Land Office to map State owned lands
- For competing claims, “ownership can only be decided by a court of law.”
- State’s assertion of ownership of lands claimed by others creates a cloud on title; record ownership remains unchanged.



Private ownership of non-navigable waterways that become navigable

- The Civil Code is silent
- Subsequent navigability post-1812/severance?
- Non-navigable water bodies, alienated by State, which have become navigable in fact and law?
- Previously alienated swamp and overflowed lands now navigable in fact and law?

Private ownership of non-navigable waterways that become navigable cont'd.

- ▶ Takings Clause & Just Compensation
- ▶ In his treatise, the late Professor Yiannopoulos has observed:
 - ▶ “A literal interpretation of Article 450 of the Louisiana Civil Code may lead to the conclusion that a body of water, which, though non-navigable in 1812, subsequently became navigable by operation of natural forces, is a public thing. This interpretation may give rise to a question of constitutionality under the Fifth and Fourteenth Amendments of the United States Constitution as well as Article 1, Section 4 of the Louisiana Constitution.”
 - ▶ “Strong argument may be made that the acquisition by the state of the ownership of the beds of formerly non-navigable water bodies **is a taking of property without compensation**. This argument, however, may be countered by the observation that the acquisition of land in Louisiana is subject to the terms of Article 450 of the Civil Code, namely, should the land ever become the bed or bottom of a navigable water body, it would be acquired by the state.” (2 La. Civ. L. Treatise, Property § 4:1 (5th ed.))

Right to Control Access

- ▶ Louisiana Civil Code art. 3413
 - ▶ “The owner of a tract of land may forbid entry to anyone for purposes of hunting or fishing, and the like.”
- ▶ A landowner’s “right to exclude [the public], so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation.” (*Kaiser Aetna v. U.S.*, 444 U.S. 164,179-80 (1979))
- ▶ “[A] hallmark of a protected property interest is the right to exclude others—one of the most essential sticks in the bundle of rights that are commonly characterized as property...” (*Denham Springs Economic Development Dist. v. All Taxpayers, Property Owners & Citizens of the Denham Springs Economic Development Dist.*, 05-2274 (La. 10/17/06); 945 So. 2d 665, 682)



House Bill 391 (2018 Regular Session)

- ▶ “No person may restrict or prohibit, pursuant to the authority of Civil Code Article 3413 or otherwise, the public navigation of running waters”
- ▶ “‘running waters’ shall mean running waters as provided in Civil Code Article 450 and shall include waters passing over any **privately owned water bottom**”
- ▶ “The obligations arising from water being a public thing requires the owner through whose estate running waters pass to allow water to leave his estate through its natural channel and not to unduly diminish its flow; however, this does not mandate that landowner allow public access to waterway.” (*Buckskin Hunting Club v. Bayard*, 03-1428 (La. App. 3 Cir. 3/3/04); 868 So. 2d 266, 274)

Federal Navigational Servitude Does Not An Provide Independent Right of Access

- Derives from the Commerce Clause (U.S. Constitution Article 1, Section 8)
- Private pond connected to publicly accessible marina by private canal did not make pond and canal publicly accessible under Federal Navigation Servitude. *Kaiser Aetna v. U.S.*, 444 U.S. 164,179-80 (1979)
- Only applies to public **navigable** waterways. *Dardar v. Lafourche Realty Co., Inc.* 55 F. 3d 1082,1085-86 (5th Cir. 1995).
- Limited to aiding in navigation rather than recreational fishing.

Standing

- ▶ Who can assert the right of ownership to navigable water bottoms?
- ▶ *Schoeffler v. Drake Hunting Club*, 05-499 (La. App. 3 Cir. 1/4/06); 919 So. 2d 822
 - ▶ Plaintiffs filed suit against landowners in the Atchafalaya Basin seeking access to privately owned waterbottoms, claiming “they have the right to enjoy the use and fruits of State-owned waters and bottoms”.
 - ▶ Court: Plaintiffs had no such interest.
- ▶ Named State as a third-party defendant to determine the boundaries at the high-water mark
 - ▶ Court: State, as the owner of navigable water bottoms, is proper party to bring a boundary action against landowner



Impact on Parish Property Tax Revenues

- ➔ If the State becomes the owner of navigable water bottoms that were once non-navigable and privately owned, local parishes will lose substantial tax revenues.

Questions?



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