Waterbottom Issues - I. Titles

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I. Introduction

Upon Louisiana’s admission to the Union in 1812, the United States owned all land within the state, except that which was the subject of a valid grant by a prior sovereign. The United States, therefore, is the author of the vast majority of titles in Louisiana. Severance of land from the public domain of the United States occurred either by 1) reservations to the state, 2) direct grants by the United States to the state or 3) grants by the United States to the private sector. Irrespective of the method by which land is severed from the public domain of the United States, when waterbottoms appear on the severed tract, title issues can occur. In Part I of this presentation, we will identify and discuss some of the circumstances giving rise to these title issues.

II. Survey and Resurvey of Public Lands

Before public lands could be disposed of by the United States they had to first be identified and subdivided. To perform this task, Congress created a Land Department, which included a General Land Office and district land offices. Since 1946, jurisdiction over public lands has vested in the Department of Interior, Bureau of Land Management.

The method by which public lands are identified is survey. By the Ordinance of 1785, Congress established a rectangular system for surveying lands. The rules of survey generally adopted by Congress in the Ordinance of 1785 are presently codified at 43 U.S.C. § 751. The rectangular survey system is based upon the establishment of a principal meridian, running north-south, and an intersecting base line, running east-west and thereafter monumenting additional east-west lines at six mile intervals. These east-west lines are called “township” lines. Additional north south lines are then monumented from the base line, also at six mile intervals, which are called “range” lines. Each of the resulting six mile squares can be identified by reference to its position relative to township and range lines. Thus, the six mile square positioned between the base line and the first township line north of the base line and between the principal meridian and the first range line east of the principal meridian is uniquely identifiable as Township 1 North, Range 1 East.

Each township is further divided by running lines in a north-south direction and east-west direction at one mile intervals and monumented

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every half mile. Each resulting one mile square is called a “section” and identified by a number. In a perfect world, each ideal six mile square will consist of 36 one mile square, or 640 acre, sections numbered 1 through 36. However, without fear of contradiction, it can be said that few, if any, of the sections surveyed by the General Land Office (GLO) are actually one mile squares due to many factors, including imprecise measurement. Exceptions to the general rules of surveying cause even greater divergence from the ideal. The presence of water is responsible for some of these exceptions. For instance, surveyors were instructed to survey river lots as radiating sections along navigable water bodies before dividing and surveying townships into square sections. Certain townships in which navigable rivers and streams are located consist of as many as 125 sections.\(^5\) The presence of navigable waters created another exception to the general rules of surveying in that the surveyor was instructed to “meander” the water course, surveying as much of the area as possible. 43 U.S.C. §751.\(^4\) The practice of meandering navigable waters, as will be discussed later, is of significant importance in determining title in Louisiana.

Patents of land along meandered water bodies generally convey title to the shore of the water body; however, where the meander line is some distance from the actual shore, it has been held that the patent conveys only to the meander line.\(^5\) The fact that a water body has been meandered does not establish its navigability; however, the meander is strong evidence of navigability and may make the water body prima facie navigable.\(^6\)

In the context of title, it is imperative to remember that government surveys do not ascertain boundaries, they create them.\(^7\) As a rule, transfers from the United States convey title only to that land which has been surveyed.\(^8\)

Generally, whether or not the original GLO survey is correct, only the federal government can require a resurvey. The courts have no juris-

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\(^3\) See Madson, Louisiana Real Property Boundary Law, p. 627 (1983).


\(^5\) See Acadia-Vermilion Rice Irrigating Co. v. Miller, 152 So. 576, 178 La. 954 (La. 1933).

\(^6\) See McDade v. Bossier Levee Board, 33 So. 628, 109 La. 625 (La. 1902); Louisiana Navigation Co. v. Oyster Commission, 51 So. 708 (1910); Brewer Elliott Oil & Gas Co. v. United States, 2 6 0 U.S. 77, 4 3 S. Ct. 60, 67 L. Ed. 14 0 (1922).

\(^7\) Horne v. Smith, 159 U.S. 40, 15 S.Ct. 988, 40 L.Ed. 68 (1895); Union Producing Co. v. Placid Oil Company, 178 So.2d 392 (La.App. 1st Cir. 1965), cert. den. 179 So.2d 432 (La. 1965), cert. den. 385 U.S. 843, 87 S.Ct. 17, 17 L.Ed. 75.

diction in the matter.9 Resurveys are limited to re-establishing the lines originally surveyed.10 However, when lands are erroneously omitted from the GLO survey as being water, the United States may have the omitted land surveyed and dispose of it.11

III. Lands Omitted from Surveys as Water

As a general rule, when the United States patents land according to an official plat or survey which shows the patented land bordering on a body of water, patentee acquires to the water itself as opposed to the meander line.12 These and numerous other cases, both state and federal, uniformly establish that meander lines along navigable bodies of water are not intended to act as a boundary but are merely to show the sinuosities of the body of water and ascertain the quantity of land in the fractional section.13

As with any rule, there are exceptions. The exceptions to the general rule in the case of omitted lands prevents its application in circumstances in which i) the facts show conclusively that no body of water exists at or near the place indicated on the plat of survey; ii) the facts establish that there never was an attempt to survey the land in controversy; or iii) the facts establish that there has been such gross and palpable error as to constitute in effect a fraud upon the government.14 Whether the general rule or the exceptions apply to a particular case constitutes an issue of fact to be determined by the trial court based upon the evidence presented.15

In almost every instance, modern courts have considered this factual determination in light of the United States Supreme Court’s decisions in

15 Albrecht v. United States, 831 F.2d. 196, 199 (10th Cir. 1987); International Improvement Fund of the State of Florida v. Nowak, 401 F.2d 708, 718 (5th Cir. 1968).
United States v. Lane, supra, and in Jeems Bayou Fishing & Hunting Club v. United States, supra. Both of these cases were decided on the same day and both involve the same 1839 survey and 1916 resurvey of land bordering on Ferry Lake in Caddo Parish. The Court reached contrary conclusions, however, as to the application of the general rule based on its consideration of the facts in each case. In Lane, the general rule was applied while in Jeems Bayou, the gross error exception was found applicable. In each of these 1923 cases, the United States Supreme Court, while recognizing that the quantity of the omitted land in proportion to the total quantity of lands surveyed is the primary consideration determining whether to apply the general rule or the exceptions, concluded that the character, nature and value of the omitted land at the time of the original survey are also factors to be considered in determining if the failure of the surveyor to run lines with more particularity constitutes gross error.

In Lane, the Court was concerned with six tracts and omitted lands ranging in size from 5.67 acres to 97.64 acres constituting an area of about 4,000 feet in length and 12,000 feet in width. The proportional omission ranged from 10% to about 21%. In applying the general rule, the Court concluded that the establishment of a line coincident with the water’s edge would have been a matter of expense and difficulty disproportionate to the value of the omitted land and, therefore, the omission was not unreasonable. To the contrary, in Jeems Bayou, the omitted lands constituted more than 500 acres and were well timbered with a growth of pine, oak and other trees. The proportional omission in that case was almost double the size of the original tract, an incremental increase of 175%. On these facts, the Court concluded that the omission was either deliberate or the result of gross and palpable error. An excellent discussion and comparison of Lane, Jeems Bayou, as well as a significant sampling of cases that followed, appears in United States v. 295.90 Acres of Land, in which the court refused to apply the gross error exception to an area added by the new survey which resulted in an incremental increase of 21%.

More recently, the general rule rather than the exception was applied with respect to a resurvey of lands located in the vicinity of Lake des Allemands. Rathborne involved an original 1832 survey and a re-survey of the entirety of the township in 1857, 1858 and 1859 suggesting that one of the sections at issue was larger by 44.5 acres than on the original survey and another larger by 391.67 acres. Both sections were conveyed into the private sector prior to the resurvey. After initially refusing to do so, in 1923 the United States conveyed the alleged omitted

lands to the State of Louisiana by patent and described the lands conveyed as being those "lying between the meanders of Lake des Allemands as shown on the plat approved July 9, 1832 and the meanders of that lake as shown on plat approved September 26, 1859." In 1951, the state transferred that property to the Lafourche Basin Levee District. In 1999, the Levee District instituted proceedings against Rathborne asserting its ownership of the lands allegedly acquired from the state in 1951.

The issues raised in Rathborne were 1) was the land appearing on the 1859 survey omitted land or new land and 2) if omitted land, did the omission constitute such gross error as to fall within the exception to the general rule? The trial court concluded that the land was omitted, not new, and that the general rule rather than the gross error exception was applicable. Accordingly, Rathborne's title was decreed to extend to the water's edge not to the 1832 meander. In reaching its conclusion, the court observed that the original survey totaled 13,492.56 acres and the resurvey indicated 17,571.01 acres. The omitted land totaling 4,078.45 acres or 23.21% of the total did not, in the court's opinion, rise to the level of gross error in view of the value of the land omitted, the wild and remote character of the land and the attendant difficulty in surveying same.

There has not been unanimity among the courts as to the methodology to be employed in calculating the proportional omission. One method, which now appears to be the preferred method, is to divide the omitted area by the sum of the omitted area and the area originally surveyed.\(^1\) Other courts have made the comparison based on the area in controversy, while others have utilized the entire area surveyed and still others have examined the issue on a patent by patent basis. In Rathborne, supra, even though only two sections in the township were at issue, the trial court chose to calculate the proportional omission by comparing the total acres appearing on the original survey (13,492.56 acres) to the acreage platted on the resurvey (17,517.01 acres) and concluded the proportional omission of 23.21% did not constitute gross error. The court of appeal agreed with the trial court's rationale and affirmed the ruling.

The reluctance of courts to apply the exceptions rather than the general rule appears to be grounded in substantial part in significant policy considerations which weigh heavily against the application of the exception. Thus, in Mitchell v. Smale,\(^1\) the United States Supreme Court found that the application of the exception would be "nothing more or less than taking from the first grantee a most valuable, and often most valuable,

\(^{18}\) See United States v. Zager, supra; Lafourche Basin Levee District v. Rathborne, supra.

\(^{19}\) 140 U.S. 406, 11 S.Ct. 819, 35 L.Ed. 442 (1891).
part of his grant."\(^{20}\) Subsequently, in \textit{Wright v. Blodgett Co. v. United States},\(^ {21}\) the Court reiterated that century old surveys are bound to be inaccurate in some respects and "....the immense importance of stability of titles dependent upon [government patents] demand that suits to cancel them should be sustained only by proof which produces conviction."

The gross error exception is not to be confused with the exception preventing application of the general rule in situations in which there is, in fact, the absence of a water body in the vicinity of that indicated on the original survey. Even though many of these cases appear to base the result on the gross error exception, close reading of the case will reveal the absence of a body of water within the vicinity of the surveyed lands.\(^ {22}\)

\textbf{IV. Sovereignty Lands}

As indicated previously, one of the methods by which land is transferred out of the United States is by reservation to the state in which that land is located. Under the equal footing or public trust doctrine, new states are admitted to the Union on an "equal footing" with the original 13 Colonies and succeed to the United States’ title to the beds of navigable water and tide waters to the high-water mark.\(^ {23}\) Attempts by the United States to convey title to these lands have been consistently held to be null, void and of no effect, except in extremely limited circumstances.\(^ {24}\) Thus, Louisiana, upon its admission to the Union, acquired, by virtue of its inherent sovereignty, ownership of all navigable waters, and the soils beneath same, to the high-water mark, together with ownership of the soils beneath water subject to the ebb and flow of the tide to the high-water mark.\(^ {25}\)

The concept of navigability, therefore, is critical to identification of which waterbottoms were received by the State of Louisiana upon admission to the Union as sovereignty lands. In Louisiana, a body of water is considered navigable only in those instances in which it is found to be susceptible of being used as a highway of commerce in the customary

\(^{20}\) 140 U.S. at 412.


mode of trade and travel in the area. Therefore, the mere fact that water is deep enough and wide enough for use by a pirogue or a flat-bottom fishing boat does not establish navigability.

Determination of navigability for title purposes may also have a time component. Navigability to establish state ownership by virtue of inherent sovereignty is determined as of the date of Louisiana's admission to the Union. On the other hand, navigability to determine alienability from the state to the private sector is determined as of the date of severance from Louisiana. Thus, title issues may arise when a body of water that was navigable as of Louisiana's admission to the Union in 1812 becomes non-navigable subsequently or in situations in which an area that was previously non-navigable subsequently becomes navigable. Article 450 of the Civil Code declares that "the waters and bottoms of natural navigable water bodies" are public things. While a literal interpretation of Article 450 can lead to the conclusion that a body of water which was non-navigable in 1812 but subsequently becomes navigable is a public thing, Louisiana courts appear to limit state ownership to beds and bottoms of those waters determined to be navigable as of the later of Louisiana's admission to the Union or severance of the land through which the water body courses from the state. Moreover, it has been suggested by at least one influential commentator that an interpretation of Article 450 that vests the state with ownership of the soils beneath waters which were non-navigable at the later of admission to the Union or severance may give rise to questions of constitutionality under the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to Article 1, Section 4 of the Louisiana Constitution.

In this context, Civil Code Article 506 must be considered as well. That Article was added in 1979 as a new provision to the Civil Code and declares that, in the absence of title or prescription, the beds of non-navigable rivers or streams belong to the riparian owners to the thread of the stream.

28 State v. Jefferson Island Salt Mining Co., 183 La. 304, 163 So. 145 (1935); Dardar v. Lafourche Realty, 985 F.2d 824 (5th Cir. 1993).
The State Land Office has responsibility for making navigability determinations on which the state bases its claims of ownership to water-bottoms for all purposes. The "unofficial" guidelines applied by the State Land Office for these purposes include the following:

a. One chain or 100 links (66 feet) is generally the minimum width for a waterway to be considered navigable.

b. The waterway must be illustrated on a township plat as being meandered or shown with a double line. However, not all double lined waterways shown on the township plat have a width in excess of 1 chain. State Land Office guidelines require use of the associated field notes to confirm the width of the river or stream. The waterway shown by a single line may be considered navigable, if the associated field notes confirm that the width is greater than 1 chain. Exceptions to the foregoing occur if it can be shown that the surveyor omitted a waterway by error or if the section lines were not established on the ground during the original survey.

c. The waterway must be either connected to a navigable waterway or be in close proximity to it. The waterway in question may not be completely landlocked.

d. If a river or stream completely dries up, the state loses its ownership to the riparian landowner. For the state to retain ownership, water must flow through the waterway at least part of the year. The length of time for the required flow has not been determined. Waterways which carry water only during flood stage are not considered navigable.

e. Waterways are generally considered as potentially navigable only if they are named on either the township plat or the field notes. A named waterway is not assumed to be navigable, but naming of the waterway is a general prerequisite for a determination of navigability. Exceptions occur if it can be shown that the surveyor omitted a waterway by error or if the original survey did not establish the section lines on the ground.

f. If sections lines were not established on the grounds during the original survey, the State Land Office utilizes the 1930s editions of the USGS Quadrangle Map and applies the foregoing guidelines.

If requested, the State Land Office will now provide a plat of an area in question on which it will identify those waterbottoms presently claimed by the state. The plat is accompanied by a letter from the State Land Office indicating that the plat represents only an estimate of the state's claims. In considering these guidelines and determinations by the State Land Office, it must be kept in mind that these are state guidelines applied by state employees to determine the extent of state claims of ownership. Both the guidelines and their application are often challenged.
by private claimants. This is particularly true of the guideline requiring utilization of the 1930s editions of U.S.G.S. Quadrangle Map in circumstances in which section lines were not established on the ground by the original GLO survey. In many instances, private claimants assert the existence of other maps, such as Civil War era military maps, that provide better evidence of navigability during time periods that are much more relevant than the 1930s. Navigability is never presumed and the burden of proof always lies with the party seeking to establish navigability.32

V. Disposition of Sovereignty Lands

One of the more fertile grounds for debate and litigation has been the extent to which Louisiana is obligated to maintain ownership of sovereignty lands and the extent to which the state has, in fact, divested itself of sovereignty lands. Historically, beds or bottoms of navigable water bodies have been considered public things, inalienable by the state and insusceptible of private ownership. Originally based on interpretations of Article 449, 450 and 453 of the Civil Code of 1870, the legislature first directly prohibited alienation of state-owned waterbottoms by Act 106 of 1886. That Act, however, pertains only to waters adjoining the Gulf of Mexico and declared that same were publicly owned and that public ownership should be maintained. By its express terms, Act 106 of 1886 exempted the beds of all such navigable waters that had been "here-tofore sold or conveyed by special grants or by sale by this State, or by the United States to any private party or parties." The first direct declaration of inalienability applicable to the beds of all navigable waters appears in Article 4, Section 2 of the Louisiana Constitution of 1921, which prohibited the legislature from alienating "the bed of any navigable stream, lake or body of water, except for purposes of reclamation." In the 1974 Constitution, the proscription was revised to prohibit 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."33

Prior to 1921, the State of Louisiana had issued a significant number of patents which, for one reason or another, failed to except beds of navigable waters from the area conveyed. By Act 62 of 1912, now R.S. 9:5661, the Louisiana legislature enacted a six year prescriptive limit on suits to annul patents. In a number of subsequent decisions, Louisiana courts held that patents of areas including navigable waters, which did not reserve title to those waters to the state, are valid and no longer assailable.34 In reaction to these decisions, the legislature adopted Act 727

32 Burns v. Crescent Gun and Rod Club, supra; McCluskey v. Mereaux and Nunez, Inc., 186 So. 117 (La. 1939); State v. Two O’Clock Bayou Land Company, 365 So.2d 1174 (La.App. 3rd Cir. 1978), writ refused 367 So.2d 387 (La. 1979).
33 1974 Constitution, Article IX, Sec. 3.
34 See Californic Co. v. Price, 225 La. 706, 74 So.2d 1 (1954); Humble Oil and Refining Co. v. State Mineral Board, 223 La. 47, 64 So.2d 839 (1953).
of 1954, which act states its purpose to be the reaffirmation of the public policy of Louisiana that navigable waters and beds thereof are insusceptible of private ownership. That Act specifically declares that it was not the intention of Act 62 of 1912 to authorize the alienation or transfer of navigable waters or their beds. Acts 1954, No. 727, now R.S. 9:1107 et seq. Section 3 of Act 727 provides that "No statute enacted by the legislature of Louisiana shall be construed as to validate by reason of prescription or peremption any patent or transfer issued by the state or any levee district thereof, so far as the same purports to include navigable or tidal waters or the beds of same."

In *Gulf Oil Corporation v. State Mineral Board*, the Louisiana Supreme Court overruled its earlier decisions in *Humble Oil & Refining Co. v. State Mineral Board* and *California Co. v. Price* and held that attempts by the state to convey title to navigable waterbottoms were null and void. The Court in *Gulf* engages in a rather extensive discussion of public trust doctrine and, among others, cites *Illinois Central Railroad Company v. Illinois,* for the proposition that a state cannot abrogate the public trust with which the lands it has received by virtue of its inherent sovereignty are impressed.

By Act 645 of 1978 the Louisiana legislature declared 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." That statute places the management of waterbottoms under the Department of Natural Resources. By Act 876 of 1985, the legislature enacted R.S. 41:14 which provides that "no grant, sale or conveyance of the lands forming the bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state shall be made by the secretary of the Department of Natural Resources or by any other official or by any subordinate political subdivision, except pursuant to R.S. 41:1701 – 1714." That statute goes on to provide that rights accorded to owners or occupants of lands on the shores of any waters described therein shall not extend beyond the ordinary low-water mark. These statutes, without question, express the strong policy of the state regarding the inalienability of navigable waters above the low-water mark.

In 1988, the United States Supreme Court revisited the public trust

35 317 So.2d 576 (La. 1974).
36 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892).
37 R.S. 41:1701.
doctrine in *Phillips Petroleum Company v. Mississippi*, supra, and concluded that individual states have the authority to define the limits of their own public trust and to recognize private rights in such lands as they see fit. 108 S.Ct. at 794. Thus, *Phillips* appears to directly contradict the Louisiana Supreme Court’s suggestion in *Gulf* that *Illinois Central* stands for the proposition that sovereignty lands are impressed with a federal public trust which the states cannot abrogate. To the contrary, *Phillips*, and its progeny, teach that *Illinois Central* should be viewed as nothing more than the application by a federal court of state law and that the federal public trust is spent upon the state’s admission to the Union. 108 S. Ct. at 795. As stated by the Court in *Phillips*:

> Because we believe that our cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath water subject to the tide’s influence, we affirm the Mississippi Supreme Court’s determination that the lands at issue here became property of the State upon its admission to the Union in 1817. Furthermore, because we find no reason to set aside the lower court’s state-law determination that subsequent developments did not divest the State of its ownership of these public trust lands, the judgment below is affirmed.

... And as for the effect of our decision today in other States, we are doubtful that this ruling will do more than confirm the prevailing understanding — which in some States is the same as Mississippi’s, and in others, is quite different. As this Court wrote in *Shivley v. Bowlby*, 152 U.S., at 26, “There is no universal and uniform law upon the subject; but ... each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy.”

... We see no reason to disturb the “general proposition[that] the law of real property is, under our Constitution, left to the individual States to develop and administer.”

In *Delacroix Corporation v. O’Brien*, a case involving Lake Quatro Caballo in Plaquemines Parish, the state urged *Phillips* as a basis for a state claim to ownership of the lake. The court found, as a matter of fact, that the lake was not subject to the ebb and flow of the tide in 1812 and that it was, therefore, unnecessary to discuss *Phillips*. The court,

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nonetheless, apparently felt compelled to comment that Act 62 of 1912 would render unnecessary the production of expert testimony to determine the extent of ebb and flow of the tide in 1812 to determine the extent of the state's ownership. The denial of writs by the Louisiana Supreme Court in *Delacroix* may suggest the re-emergence of Act 62 of 1912 as a major factor in the resolution of waterbottom disputes between the state and private claimants involving pre-1921 patents.

Clearly, Louisiana has exercised its legislative prerogative to reclassify and relinquish the public trust as to multiple types of lands received by it as sovereignty lands upon admission. For instance, Louisiana law has consistently recognized banks of streams and rivers, the area between ordinary low and ordinary high-water, as private things, subject to a limited right of public use. Accordingly, while Louisiana clearly received title to the high-water limits of rivers and streams as sovereignty lands upon its admission to the Union, it has without question relinquished title to those lands lying above ordinary low-water.

Similarly, notwithstanding the commonly understood fact that tides in Louisiana reach their highest levels during the summer season, seashore, as defined by Article 451 of the Civil Code, is limited to the high-water mark in the winter. Louisiana courts have refused to interpret the article in a manner other than it is written. Moreover, Louisiana courts have consistently interpreted Civil Code Article 451 as limiting seashore to the area that is directly overflowed by the tides. Again, although Louisiana clearly acquired all lands subject to the direct and indirect ebb flow of the tide as sovereignty land upon its admission to the Union, it has relinquished that title as to all lands lying above high tide in the winter and all lands lying beneath tide waters that are not subject to direct coastal ebb and flow.

By Act 998 of 1992, now R.S. 9:1115.1 *et seq*, the Louisiana legislature addressed the issues raised in *Phillips* and distinguished the results of that case under Mississippi law from the results which would obtain by application of that decision in Louisiana. By virtue of that Act, Louisiana law now expressly 1) declares that lands subject to tidal influence, which are neither navigable waters, sea nor seashore, and which have

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40 C.C. arts. 446, 448 (1825); C.C. arts. 455, 457 (1870); and C.C. art. 456 (1978). See also *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *State v. Bayou Johnson Oyster Company*, 130 La. 604, 58 So. 405, 409 (La. 1912); and *Buckskin Hunting Club v. Bayard*, 868 So.2d 266 (La.App. 3rd Cir. 2004).

41 *Roy v. Board of Commissioners*, 238 La. 926, 117 So.2d 60 (1960) (rejecting the levee district's argument that seashore should be understood to refer to that land which is "normally covered by the highest tides of the year.")


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http://digitalcommons.law.lsu.edu/mli_proceedings/vol54/iss1/6
been alienated in accordance with laws in existence at the time of the alienation are valid transfers by the state (R.S. 9:1115.1); 2) defines inland non-navigable water bodies as those which are not navigable in fact and which are not sea, arms of the sea, or seashore (R.S. 9:1115.2); 3) declares inland non-navigable water beds or bottoms to be private things subject to private ownership (R.S. 9:1115.2); and 4) states that transfers by the state encompassing inland non-navigable water beds or bottoms within the boundaries of the property transferred, are presumed to convey the ownership of the inland non-navigable waterbottoms, unless title to the water body has been expressly reserved by the state in the act of transfer (R.S. 9:1115.3). The definitive statements by the Court in Phillips combined with Act 998 of 1992 appear to put to rest any notion that ownership issues with respect to sovereignty lands are to be determined by reference to any body of law other than those of Louisiana.

VI. School Lands

In 1785, the Continental Congress set aside sixteenth section lands for the exclusive use of public education. Upon acquisition of the Louisiana Territory by the United States in 1803, the reservation of sixteenth section lands attached. On April 21, 1806, Congress authorized the President of the United States to sell lands within the Louisiana Territory, subject to a reservation of sixteenth section lands for public education purposes, specifically stating that the sixteenth section "shall be reserved in each township for the support of schools within the same." On March 3, 1811, Congress again authorized the President of the United States to sell lands within the Louisiana Territory, again subject to a reservation of sixteenth section lands for public education purposes. The several statutes adopted by Congress relating to the reservation of sixteenth section lands generally vest title in the state upon completion of the survey of the township in which the section is located. A formal conveyance of school lands to the state is neither necessary nor customary.


44 1 Stat. 563.
45 2 Stat. 391.
46 2 Stat. 662.
In those situations in which the United States has previously disposed of the school land, or the school land did not vest in the United States, or the township contained no sixteenth section, the state is granted statutory authority to select "indemnity" or "in-lieu" land. A selection of indemnity lands must be certified to and approved by the Secretary of the Interior. Despite the fact that the reservation of sixteenth sections is referred to as a trust, a long line of jurisprudence makes clear that the grant is absolute and not conditional.

In the context of this presentation, the reservation of sixteenth sections to the state raises an issue only in those circumstances in which the sixteenth section consists, in whole or in part, of lands which were beds of navigable waters or soils underlying water subject to the ebb and flow of the tide as of the date of Louisiana's admission to the Union. The issue there, of course, is whether the sixteenth section is reserved to the state as sovereignty lands or as school lands. That issue has apparently now been resolved and in circumstances in which the sixteenth section constitutes a bed of a navigable water or soil underlying water subject to the ebb and flow of the tide, the sixteenth section is reserved to the state as sovereignty lands and is not impressed with the school trust.

VII. Swamp Land Grants

Prior to 1849, Louisiana had made a considerable investment in the construction of levees along the Mississippi River. In an effort to aid Louisiana in constructing levees and reclaiming swampland, Congress adopted the Act of March 2, 1849 (9 Stat. 352) and Act of September 28, 1850 (9 Stat. 519) familiarly known as the Swamp Land Grants.

Procedurally, the Swamp Land Grants allowed the state to identify and select swamp and overflowed lands and once the selection was approved by the Secretary of Interior, title passed to the state. Irrespective of the date on which the state selects and the Secretary of Interior approves the selection, the state's title relates back to the effective date of the granting statute.


51 For an excellent discussion of the history leading to the enactment of the Swamp Land Grants, see Madden, Federal and State Lands in Louisiana, 260 et seq (1973).
In the wake of the Swamp Land Grants, considerable litigation resulted over the issue of whether alleged sovereignty lands were included within transfers to the state of swamp and overflowed lands. In *McDade v. Bossier Levee Board*, the Louisiana Supreme Court affirmed that even permanently overflowed swamps, or shallow lakes, were included within the Swamp Land Grants. In *Chauvin v. Louisiana Oyster Commission*, the Louisiana Oyster Commission sought to have declared as null transfers of land donated to Louisiana under the Swamp Land Grants and sold by the state in 1876 alleging that the land in question had been acquired by Louisiana as sovereignty land, the alienation of which had not been authorized by the legislature. The Louisiana Supreme Court characterized the Oyster Commission's claim as "novel" in view of the fact that "for more than half a century the United States and State of Louisiana have acquiesced in the title so conveyed." The Court then found that the Oyster Commission cannot collaterally attack the title derived by the plaintiffs from the state and that acceptance by the state of lands certified to it by the Secretary of Interior as swamp and overflowed land is conclusive upon the state as to the title to and character of such lands. The Court declared that the state is estopped to deny that the tract in dispute is swamp and overflowed land and decreed evidence to the contrary to be inadmissible. While the holding in *Chauvin* appeared to be definitive, decisions in cases which followed *Chauvin* seem to blur the results in *Chauvin*.

In *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, the Oyster Commission alleged state ownership of certain submerged lands in St. Bernard Parish. The Court concluded that the private claimant, to the extent that he asserts title to lands bordering on or surrounded by the Gulf, cannot sustain his title below the high-water mark and that he may not claim title to navigable streams and channels. Similarly, in *State v. Capdeville*, the Court declared that beds of navigable streams and lakes and lands underlying the tidal waters of the sea were not conveyed to the state by virtue of the Swamp Land Grants because the property never belonged to the United States; but rather, those lands constitute property reserved to the state by virtue of inherent sovereignty.

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53 109 La. 625, 33 So. 628 (La. 1902).
54 1 La. 10, 46 So 38 (1908).
55 121 La. at 14.
56 125 La. 740, 51 So. 706 (1910).
57 51 So. at 755.
58 146 La. 94, 83 So. 421 (La. 1919), cert. denied 246 U.S. 581, 40 S.Ct. 346, 64 L.Ed 727.
59 146 La. at 106.
To the contrary, in *State v. Sweet Lake Land and Oil Co.*, the Court concluded that there was no merit in the state's contention that the bottom of a dried lake allegedly subject to the ebb and flow of the tide was not included in the Swamp Land Grants. The Court found that the legislature, in providing for the sale of "sea marsh, subject to tidal overflow," acknowledged that such lands are included in the Swamp Land Grants and, therefore, are susceptible to transfers to the private sector. The Court in *Sweet Lake* apparently distinguishes *Capdeville* by suggesting that those "tide waters of the sea" which are excluded from the Swamp Land Grants are those falling within the definition of seashore in Article 451 of the Civil Code.

The foregoing jurisprudence appears consistent in two significant respects. First, the beds and bottoms of navigable waters, the sea and its shores, as defined by Louisiana law, are sovereignty lands acquired by Louisiana upon admission and not by virtue of the Swamp Land Grants. Second, to the extent Louisiana designated lands as being acquired pursuant to the Swamp Land Grants, the designation of these lands as swamp and overflowed land is not subject to challenge, except to the extent the lands constitute the beds and bottoms of navigable waters, the sea or seashore as defined by the Civil Code as of the date of Louisiana's admission to the Union. Such an interpretation is also consistent with the legislature's declarations in R.S. 9:1115.1 et seq.

VIII. Issues Related to Land Loss and Restoration

The fact of coastal land loss due to multiple factors, including erosion, subsidence and sea level rise, is well known and well documented. The deterioration has occurred with respect to both the coastline and internal marshes. The United States Geological Survey, based on a comparison of satellite photography taken in October 2004 to photographs taken in October 2005, has estimated that Hurricanes Katrina and Rita transformed 217 square miles of Louisiana coastal marsh into open water. How much of that loss is permanent is still unknown. The effect of coastal land loss on titles is also uncertain. The resolution of issues relating to the impacts of coastal erosion on title will be significant in a number of respects, not the least of which will be the ownership of substantially valuable mineral rights in coastal Louisiana.

In the context of state lease sales, we are already witnessing significantly increased claims by the state both along the shore and in the interior marshes as a result of coastal land loss and interior marsh deterioration. In most instances, lessees are obtaining dual leases. In virtually every instance in which a dual lease is drilled and made productive, a

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60 164 La. 240, 113 So. 833 (1927).
61 164 La. at 249.
62 164 La. at 250.
concursus proceeding results. As erosion continues, and state claims of ownership to traditionally private land increases, the economic viability of drilling prospects will become more questionable as the costs of acquiring protective leases from both the state and the private claimant increases. Revised procedures adopted by the State Mineral Board are exacerbating issues related to the identification of state private claims. In past years, state claimed waterbottoms were cross-hatched on tract maps for identification purposes. That practice has been terminated. Presently, tract maps carry no identification of the state claimed waterbottoms but only an estimate of the number of acres of waterbottoms within the limits of the tract. Accordingly, we have seen situations in which the state purports to lease an estimated 1,000 acres of waterbottoms within a tract consisting of more than 7,000 acres with no identification as to the location of the state claimed waterbottoms. In the view of many, the current practice will increase the cost of lease acquisitions and chill oil and gas development in areas in which the state claims are significant.

For the most part, the laws under which we operate today were not designed to address the myriad of issues resulting from the land loss we are currently experiencing. As a result, there has been an emergence of statutes designed to address specific problems associated with the land loss and efforts to restore the coast.

One example of a statute which has been adopted to address coastal land loss issues is: R.S. 9:1151, familiarly referred to as the “freeze statute.” In pertinent part, that statute provides when ownership of lands or waterbottoms changes as a result of the action of a “navigable stream, bay, lake, sea, or arm of the sea” the new owner, including the state, shall take the same subject to and encumbered with “any oil, gas, or mineral lease covering an affecting such lands or water bottoms, and subject to the mineral and royalty rights of the lessors in such lease, their heirs, successors, and assignees.”

The essence of the freeze statute is to establish that rights of mineral lessees and royalty owners shall not be affected by changes in ownership as a result of dereliction, erosion, subsidence or other action of the water body. By its express terms, it is the existence of a mineral lease which determines the applicability of the freeze statute, not the presence of oil and gas production.

In determining if the freeze statute is applicable, it should be kept in mind that the statute was amended in 2001. Acts 2001, No. 963, §1. Prior

to 2001, the statute provided that it was applicable to changes in ownership resulting from "the action of a navigable stream, bay or lake." The 2001 amendment added the words "sea, or arm of the sea." That act also expressly added the words "erosion" and "subsidence" to the non-exclusive list of actions that implicated the statute. To date, there has not been a judicial determination as to whether the 2001 revision was substantive or a mere clarification of the prior statute.

The legislature has also adopted statutes to address both reclamation of eroded lands by the riparian owner and efforts by the state to restore coastal land loss. For example, by Act 633 of 2004, the legislature provided the Department of Natural Resources with authority to expropriate property rights needed for "barrier island preservation and restoration, or creation for coastal wetland purposes." The filing of a petition for expropriation constitutes the agreement of the state to establish in the owner of the property condemned the perpetual, transferable ownership of all subsurface mineral rights to the then-existing coast or shoreline of the property acquired. The mineral rights created in favor of the former owner of the condemned land are neither subject to the prescription of non-use nor subject to the loss as a result of future changes in the coast or shoreline, whether such changes result from natural or artificial causes. In addition, the filing of the petition of expropriation constitutes the agreement to transfer to the owner of the property an undivided 50% of the mineral rights in and to the emergent land, i.e. land created as a result of the restoration project. The mineral rights created in the emergent land are not subject to the prescription of non-use; however, those mineral rights may be lost in the event the emergent land is subsequently lost. The mineral rights created under these statutes in favor of the owner of the property condemned are expressly made subject to the provisions of R.S. 41:1702 and R.S. 9:1151 (the freeze statute).

R.S. 41:1702 is familiarly known as the reclamation statute. It was initially adopted by Act 645 of 1978. It was subsequently amended in 1996, 2001, 2004 and 2006 to address the ever changing faces of both land loss and efforts to restore that loss. In addition to giving the riparian owner the authority to reclaim, subject to permits issued by the Department of Natural Resources, land lost through erosion, compaction, subsidence, or sea level rise occurring on and after July 1, 1921, it attempts to facilitate state acquisition of lands and rights necessary to conduct coastal conservation and restoration projects by authorizing agreements between the state and the riparian owner by which the riparian owner is granted certain mineral rights in exchange for the land rights required for

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64 R.S. 49:214.61.
the restoration project.

In these circumstances, the Department of Natural Resources is authorized to enter into agreements which will provide to the riparian owner a perpetual, transferable ownership of subsurface mineral rights to the then-existing shoreline and which may also provide for a limited or perpetual transfer, in whole or in part, of subsurface mineral rights relating to the emergent land. In essence, the reclamation statute extends to the Secretary of the Department of Natural Resources the authority to negotiate with the riparian owner for the rights necessary to implement coastal restoration and conservation projects by creating unique mineral rights. The mineral rights authorized by the reclamation statute as to the existing shoreline, being perpetual and transferable, are fixed forever, and are not diminished by future erosion of the shoreline or by the prescription of non-use. On the other hand, mineral rights created in the emergent land will generally be lost if the emergent land subsequently erodes.

IX. Conclusion

Many waterbottom title issues involve legal concepts that have been with us since the acquisition of the Louisiana Territory by the United States. Others are the result of Louisiana’s changing coastal environment. In either situation, the issues are often complex and are almost certain to be fact sensitive. If this presentation has resulted in a greater awareness of the issues, then it has served its purpose. These issues are likely to become neither less numerous nor less complex in the future. Hopefully, these materials will assist those facing these issues in their analysis and resolution of same.

67 R.S. 41:1702(2)(a)(i).