A Sinking Coast Bubbles up Legal Challenges

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Introduction

The deteriorating condition of Louisiana's coastline is one of the most pressing problems affecting the future occupancy of southern Louisiana. According to the state's 2012 Comprehensive Master Plan for a Sustainable Coast:

> Louisiana is in the midst of a land loss crisis that has claimed 1,880 square miles of land since the 1930s. . . . If we do not aggressively address this crisis, the problem intensifies . . . This land loss will increase flooding risk with disastrous effects.
>
> . . .
>
> Every day Louisiana citizens are affected by this catastrophe in ways small and large. Whether it is families that must leave cherished communities to move out of harm's way, local businesses that have trouble obtaining insurance, or investments that lose value because of uncertainty about the future of our landscape, Louisiana's land loss disaster takes a heavy toll.

The dynamic physical condition of the coast and the likelihood that the problem will continue for at least the next 70 years produces a package of legal issues:

- Property rights related to subsiding, eroding, submerging, and accreting land and waterbottoms
- Regulatory impacts to developing and living in coastal areas subject to flooding
- Recovery from disasters and retreat from a shrinking coastline

Factual Background

The unstable state of affairs on the coast is commonly attributed to the aggressive control of the Mississippi River system beginning in the late 19th and early 20th centuries, and pursued with a vengeance following the disastrous 1927 Mississippi River flood.[1] But an unstable coast with a high exposure to deadly disasters is not a contemporary phenomenon. Southern Louisiana has been so frequently devastated by hurricanes throughout recorded history that periodic disastrous storms should be considered the norm:

> Hurricane Katrina may be the most memorable storm in New Orleans history, but its trajectory across the Pelican State was far from unique. Louisiana was hit by 49 of the 273 hurricanes that made landfall on the American Atlantic Coast between 1851 and 2004. In addition, eighteen of the ninety-two major hurricanes with Saffir-Simpson ratings of category 3 or above have struck the state. On average, one major storm crosses within 100 nautical miles of New Orleans every decade.[2]

A turning point in New Orleans' development was the hurricane of 1722. It effectively wiped the then-infant settlement of New Orleans clean and paved the way to implement the orderly layout of the historic French Quarter surveyed by Andrea de Pauger. The next century saw a tragic calamity involving Isle Derniere:

> In the early 1850's, Isle Derniere was a rapidly developing resort community. Situated in the Gulf of Mexico, ninety miles southeast of New Orleans and ten miles off the coast of Terrebonne Parish, the twenty-five mile island was gaining a reputation as a popular destination for the socially and politically elite from across southern Louisiana.
>
> . . .
>
> The twenty-five mile island boasted a fine hotel, The St. Charles, which stretched twelve hundred feet along the beach, plus rental cottages. Though not as architecturally lavish as its counterpart in New Orleans, The St.

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[1] Attempts to control the Mississippi River had been underway to some extent from the first European exploration and settlement of the region beginning in 1699. However, as the 1927 flood demonstrated, those efforts were not fully successful until the federal government ratcheted up the effort to control flooding in the Mississippi valley on a comprehensive basis.

[2] See "New Orleans Hurricane History" at http://web.mit.edu/12.000/www/m2010/teams/neworleans1/hurricane%20history.htm. Last visited 12/29/14. Internal citations omitted.

> Charles was lauded for its "comfort, pleasant and spacious rooms, [and] good eating of every kind, including oysters, terrapins and fish of every variety."[3]

The fun was short-lived. A devastating hurricane struck in August 1856, obliterating the luxury resort, drowning about half of the 400 guests. The island was severely eroded in that and subsequent hurricanes. Today, the once 25-mile long island consists of small uninhabited remnants: Wine, Raccoon, Whiskey, Trinity, and East Islands.

The disappearance of the Isle Derniers resort isn't unique in the region. A similar, but less catastrophic, fate happened at the Isle of Caprice off the Mississippi coast:

> Dog Key Island, which was only three miles long and about 487 acres, had been used for years by local fishermen because artesian springs were there, providing fresh water. During Prohibition it became a haven for bootleggers. Realizing its importance because of the fresh water supply and its location twelve miles outside of the jurisdiction of United States claims, three men . . . financed the Isle of Caprice Hotel and Resort that was built on Dog Key in 1926. . . . The Isle of Caprice was very popular until storms and the Gulf of Mexico's currents took their toll on the sandy Dog Key. Adding to the environmental problems, people visiting the island picked the sea oats that somewhat stabilized the island's sand. As a result, the fragile ecosystem maintained by the plants' root systems was destroyed. By 1932, the Isle of Caprice Resort was completely submerged.[4]

Further east is the Petit Bois Island. In the 1850's, it was several miles off the Alabama coast almost entirely within that boundaries of Alabama. Only its westernmost end extended across the state line into Mississippi. But by the early 1900s, the island had migrated several miles to the west, and now lies entirely within the boundaries of Mississippi.

These geographic vignettes – and countless more like them – illustrate that the dynamic nature of the coast is nothing new. The Mississippi River Delta that forms the greater part of south Louisiana has wandered across the width of modern-day state for eons. The illustration on the next page shows this movement over thousands of years as variously named "lobes" of the delta were created and abandoned by the forces of nature, long before European settlers built the first crude levee. This drives home the point that the shifting coast is not a new phenomenon (time epochs shown as years before the present, "BP").[5]

Louisiana's Coastal Master Plan

In a December 2005 special session to address recovery issues following Hurricanes Katrina and Rita, the Louisiana Legislature restructured the state's Wetland Conservation and Restoration Authority to form the Coastal Protection and Restoration Authority (CPRA). 2005 1st Ex. Session Act 8. The legislature tasked CPRA with coordinating local, state, and federal efforts to achieve comprehensive coastal protection and restoration. Specifically La. R.S. 49:214.5.3 requires the CPRA to prepare a "master plan for integrated coastal protection" and an annual funding plan to be submitted to the legislature. The master plan must be reviewed and amended at least every five years. La. R.S. 49:214.5.3(A)(1).

The first master plan was published in 2007. Under the statutory five-year update schedule, an extensive 2012 Coastal Master Plan was developed based on a two year analysis by prominent Louisiana scientists supported by national and international specialists. The state used this analysis to select 109 projects estimated to cost $50 billion, split roughly evenly between protection and restoration projects.[6] Work on the 2017 update is in its early stages.

The 2012 plan estimates that Louisiana would start gaining land in about 30 years if all of the restoration projects are implemented. Such a gain would be the first time since the 1930s. This sounds good, but gratification will be deferred. Because historical land loss will continue for some time to come, and because

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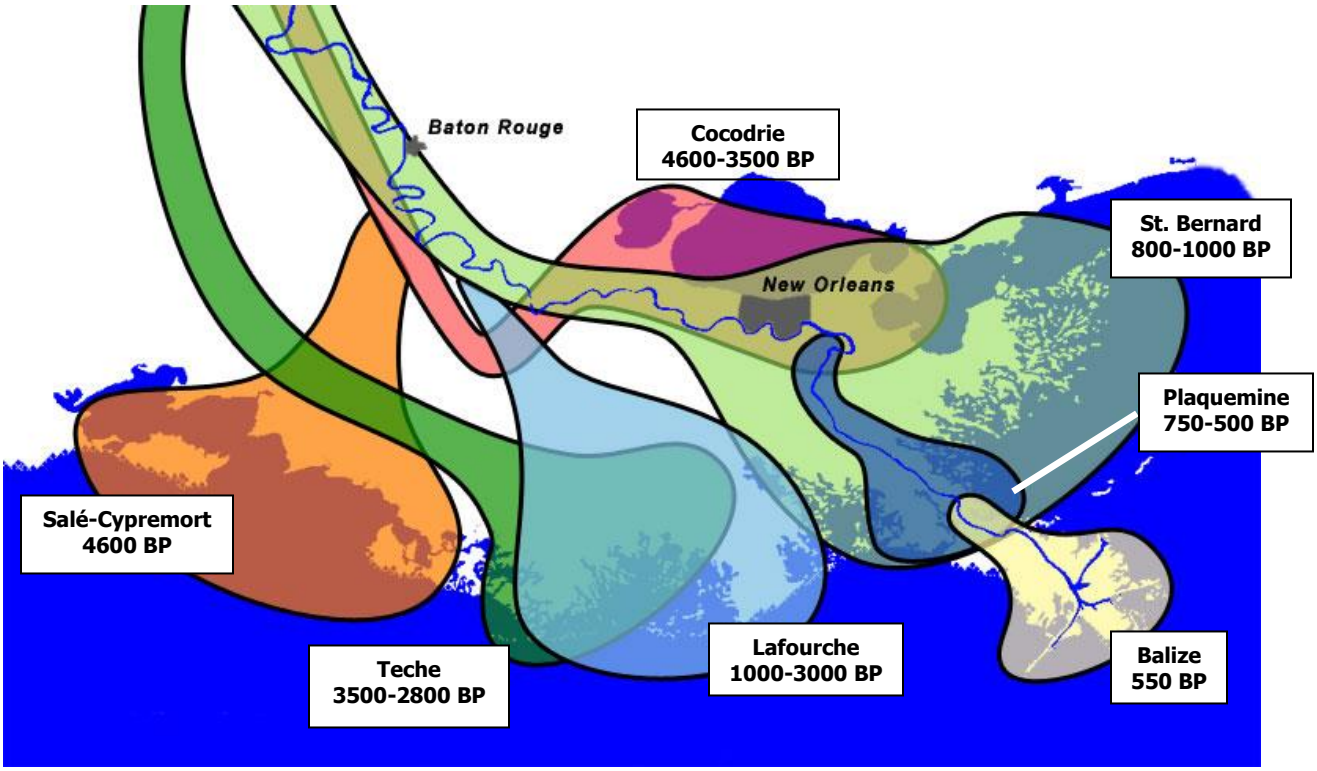
[3] Louisiana Coastal Restoration: Challenges and Controversies, 27 S.U. L. Rev. 149, 150 (Spring 2000)

[4] Gambling in Mississippi: Its Early History, Deanne S. Nuwer http://mshistorynow.mdah.state.ms.us/articles/80/gambling-in-mississippi-its-early-history (Last visited 12/27/14).

[5] Sources: USGS National Wetlands Research Center, "Barrier Islands" publication, with information derived from Kolb,van Lopik (1958), Geology of the Mississippi River deltaic plain, southeastern Louisiana, Technical Report 3-483, Vicksburg, MS: U.S. Army Corps of Engineers Waterways Experiment Station; Kulp, M. A., Howell, P., Adiau, S., Penland, S., Kindinger, J., and Williams, S. J., 2002, Latest Quaternery stratigraphic framework of the Mississippi delta region: Gulf Coast Association of Geological Societies Transactions, v. 52, p. 573-582.

[6] The 2012 plan is available at http://www.coastalmasterplan.la.gov.

Historic Lobes of the Mississippi River



coastal restoration projects will not begin to produce new land until they are completed, it will take decades merely to restore the 2012 status quo with respect to land mass. The graph on the next page, taken from the master plan illustrates this point.

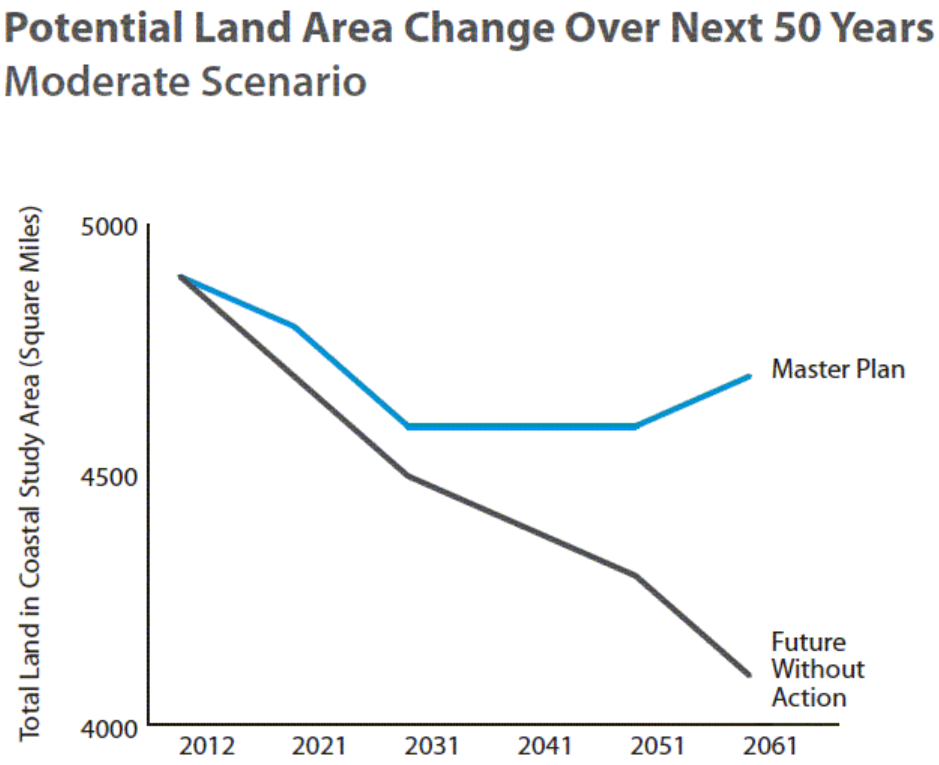
The chart shows that the rate of land loss doesn't flatten out until 2031, and the region does not start to regain land until 2051. Projecting that rate of gain forward beyond the 50-year time horizon of the master plan shows that the coast would not reach the 2012 status quo of land area until the 2081-2091 time frame.

RESTORE Act

The Resources and Ecosystems Sustainability Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (the "RESTORE Act") became law on July 6, 2012.[7] In general, the RESTORE Act establishes the Gulf Coast Restoration Trust Fund (the "Trust Fund") and deposits to the Trust Fund 80% of all civil penalties paid by BP in connection with the Deepwater Horizon oil spill. The total amount of funds paid by BP is estimated between $4.4 and $17.6 billion, depending on the outcome of pending litigation. The Trust Fund may be used to fund projects and activities to restore the long-term health of the coastal ecosystem and local economies in the Gulf Coast, including Mississippi, Louisiana, Alabama, Florida, and Texas.

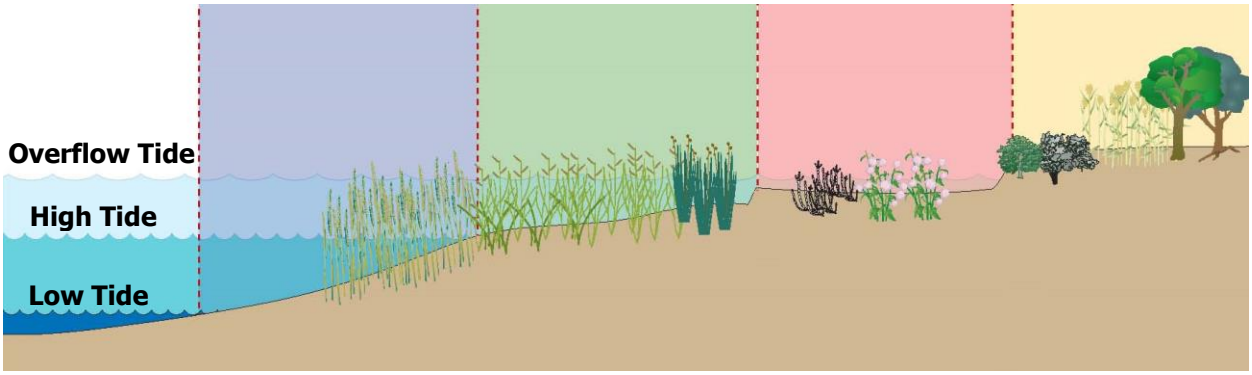
In Louisiana, money from the RESTORE Act is statutorily dedicated to the Coastal Protection and Restoration Fund. La. R.S. 214.5.4(I)(1). Although that fund is subject to appropriation by the legislature, §49:215.5.4(G), the statute limits expenditures to the annual plan under the control of CPRA. Therefore, while the RESTORE Act is not, itself, a land use statute, its "trickle down" effect in Coastal Louisiana is the same as the Coastal Master Plan described above.

[7] RESTORE was included as Title F of the surface transportation and federal-aid highways funding act (MAP-21), Pub. L. No. 112-141.



Property Law at the Water's Edge

Legal issues related to the changing coastline are intimately tied to the topography and geometry of the coast. Minor changes in elevation (of dry land or of water levels) can change the legal regime that governs a property. Because of the low, flat status of the coastal area, relatively small changes in elevation can affect a very large surface area. The following figure illustrates some of the important characteristics of the land/water interface that trigger different legal effects.



The surface area that becomes exposed between the high and low tides is the "seashore" if it is adjacent to the open sea (La. C.C. Art. 451) but is the "bank" if adjacent to a river or stream (La. C.C. Art. 456). The distinction is important. If it is a "seashore," then it is a public thing owned by the state (La. C.C. Art. 450). If it is a "bank," it is a private thing that is susceptible to private ownership (La. C.C. Art. 456).

These nuanced differences in how the law refers to the physical characteristics of property involving waterbodies and waterbottoms are the source of much confusion (and litigation). Over the years, Louisiana's constitutions and statutes have referred to such properties using a variety of undefined (or vaguely defined) terms, such as

- arm of the sea
- bays
- beds of the rivers, bayous, creeks, lakes, coves, inlets and sea marshes
- bottoms of natural navigable water bodies
- creeks
- inland non-navigable water bodies
- inlets
- lagoons
- lakes
- lands subject to regular tidal overflow
- lands subject to tidal overflow
- lands that are covered by the waters of the Gulf and its arms either at low tide or high tide
- lands that belong to the state by virtue of her inherent sovereignty
- navigable lakes
- navigable waters
- overflowed lands
- prairie
- sea
- sea marsh
- seashore
- sounds
- streams
- swamplands
- territorial sea

The sloppy terminology in legislation and judicial decisions is a source of considerable imprecision and confusion.

Sovereign Ownership in Colonial Days

Waterbottoms below the extent of mean high tide – whether directly on the coast or further inland yet subject to tidal influence – have a special status. These areas are typically called "tidelands." In colonial days, tidelands were held by the sovereign (French, Spanish, or English, depending on the time and location). When the Louisiana Purchase occurred in 1803, these tidelands were conveyed to the United States. In 1812, they passed to the State of Louisiana by virtue of the "equal footing doctrine" under which each newly formed state after the original 13 was admitted to the union with the same rights of statehood.[8] The areas (often called "tidelands") came into the state ownership by virtue of Louisiana's statehood in 1812.

Statehood, Equal Footing, and Public Trust Tidelands

Public trust tidelands upon statehood under the equal footing doctrine are those areas below the "high water mark." *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894). The extent of the high water is based on "mean high tide" measured over a long period of time. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935). This is true regardless of whether the tidelands are adjacent to the territorial sea or along inland (but tidal) waterbodies, and regardless of whether they are navigable in fact. At the moment of statehood, the mean high tide line defined what Louisiana received from the federal government as public property – or a "public thing" in Civil Code parlance.

> In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that "Mean high water at any place is the average height of all the high waters at that place over a considerable period of time," and the further observation that, "from theoretical considerations of an astronomical character," there should be "a periodic variation in the rise of water above sea level having a period of 18.6 years."

296 U.S. at 26-27 (internal citations omitted).

> The boundary of each waterway navigable in fact is that point where mean high water mark (variously determined) strikes land. Within that surveyable, territorial boundary (and outside the navigable channel/area) will always be some non-navigable areas. Yet so long as by unbroken water course -- when the level of the waters is at mean high water mark – one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we

[8] The federal common law of public trust tidelands articulated in *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed.2d 877 (1988) and its precedents is based in large measure on English law, and starts from the proposition that the United States succeeded to the tideland holdings of the English sovereign when the 13 original colonies became an independent nation. It is these English sovereign holdings that passed to the states under the equal footing doctrine. In contrast to the eastern seaboard and some Gulf states, most of Louisiana's coastline came into the United State's possession from the French sovereign (who retrieved it from a short stint of Spanish colonial rule following France's initial "discovery" of Louisiana. The differences, if any, between what the United States acquired from the English sovereign versus what it acquired from the French sovereign with the Louisiana Purchase have not been addressed in judicial decisions, to this writer's knowledge.

> consider the United States set for the properties granted the State in trust."

Cinque Bambini Partnership v. State, 491 So.2d 508, 151 (Miss. 1986); affirmed, *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed.2d 877 (1988).

This is the point where legal regimes at the water's edge get complicated. Louisiana law does not use the mean high tide line to differentiate public from private things. Instead, the Civil Code refers to "the highest tide during the winter season," and then only with respect where the "waters of the sea spread." La. C.C. Art. 451. The "highest tide during the winter season" does not necessarily correspond to "mean high tide." The difference – higher or lower – depends on the location, as tidal behavior is a complicated function of lunar cycles, topography, and hydrology. Further, the Civil Code is silent about the status of tidelands that are not "seashore" under La. C.C. Art. 451, leaving these other tidelands outside of the protective cloak afforded to "public things" by the Civil Code.

There is another mismatch between the statehood concept of public trust tidelands and Louisiana law regarding the use of the term "navigable waters." As important as that term is when dealing with coastal issues, it is not defined by positive Louisiana law, to this writer's knowledge. It is defined – vaguely – in a number of judicial decisions:

> A body of water is navigable in law when it is navigable in fact. *E.g., State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145 (1935). The factual question turns on whether the evidence shows a body of water to be suitable by its depth, width and location for commerce. *E.g., State v. Capdeville*, 146 La. 94, 83 So. 421 (1919), *cert. denied*. A stream, to be navigable must be usable for commerce in its natural state or ordinary condition. *E.g., Delta Duck Club v. Barrios*, 135 La. 357, 65 So. 489 (1914); The Daniel Ball, 10 Wall 557, 19 L. Ed. 999 (1870).

Vermilion Bay Land Co. v. Phillips Petroleum Co., 646 So.2d 408, 413 (La. App. 4 Cir. 1994)

Swamp and Overflowed Lands Acts, 1849 and 1850[9]

In 1849, the U.S. Congress granted to Louisiana "those swamp and overflowed lands, which may be or are found unfit for cultivation." 9 Stat. 352 (1849). The purpose of the statute was to "aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed land therein . . ." This statute was the prototype for subsequent swampland acts by which Congress granted wetlands to the states.

States with large amounts of wetlands, such as Illinois, Michigan, and Florida, where only half the land was considered suitable for farming, joined a general move to have federal swamplands ceded to them. This led Congress to pass the Swamp Land Act of 1850, the intent of which was to enable Arkansas, Alabama, California, Florida, Illinois, Indiana, Iowa, Michigan, Mississippi, Missouri, Ohio, and Wisconsin to reclaim the swamplands within their boundaries (9 Stat. 519, 1850). The statutes are codified in 43 U.S.C. §§ 981 et seq. (1988).

The Swamp Land Act's vague definition – "wet and unfit for cultivation" – led to substantial litigation. Almost 200 swampland cases reached the Supreme Court by 1888.

The timing of the swamp and overflowed lands acts is important to understanding the ownership status of lands and waterbottoms in Louisiana. The "swamp and overflowed lands" transferred to Louisiana by the federal government later became the source of land patents granted by the state to private parties under state legislation. That legislation authorized the sale of those same lands, with the state authorizing statutes typically identifying the lands granted by the various federal acts from 1849 forward. By the time the federal government began transferring swamp lands to Louisiana beginning with the 1849 act, it had already divested itself of Louisiana's tidelands by virtue of Louisiana's statehood in 1812. Accordingly, none of the public trust tidelands acquired in 1812 were included in any of the swamp lands acquired under the 1849 and later swamp land acts. It follows that when the state subsequently patented to private parties those lands received from the federal government as swamp

[9] The source of the historical description in this section is primarily WETLANDS: CHARACTERISTICS AND BOUNDARIES, p. 44. (Committee on Characterization of Wetlands, National Research Council, 1995). Available at: http://www.nap.edu/openbook.php?record_id=4766&page=44. (Last checked: 12/27/14.)

lands, the patents would not have included tidelands, unless there was a separate conveyance of the tidelands to the private parties.[10]

Many more constitutional and statutory enactments have impacted property law related to tidelands and waterbottoms in Louisiana for over one and a half centuries. A more detailed compendium of relevant law is provided at the end of this paper.

Judicial Decisions

Numerous reported judicial decisions obliquely address coastal protection and restoration issues. It is not surprising that much of the litigation over waterbottom ownership and the relative rights and obligations of private versus public persons involves disputed mineral rights; that's where the money is. But in the process of adjudicating mineral rights, Louisiana's courts have had to come to grips with the underlying principles of property law at the water's edge. Indirectly, those decisions address what the state and its political subdivisions can do to further coastal protection and restoration.

The large volume of reported decisions are difficult to wade through, in part because of fact intense nuances inherent in property descriptions and conveyancing and in part because of significant judicial flip-flops as disputes move up the appellate ladder or as similar cases are decided differently over time. Some significant examples:

- *Gulf Oil Corp. V. State Mineral Bd.*, 317 So.2d 576 (La. 1975) held that state land patents did not convey land beneath navigable waters within the boundaries of a described tract, and that "any alienation or grant of the title to navigable waters by the legislature must be express and specific and is never implied or presumed rom general language in a grant or statute." Id. at 589. This overruled *California Co. v. Price*, 74 So. 2d 1 (La. 1954) and *State v. Cenac*, 132 So.2d 928, 241 La. 1055 (La., 1961).
- *Miami Corporation v. State*, 186 La. 784, 173 So. 315 (La. 1936) held that waterbottoms created by the erosion of the shoreline of a navigable waterbody (Grand Lake, Cameron Parish) became public property. This overruled *State v. Erwin*, 173 La. 507, 138 So. 84 (La. 1931), which itself had overruled *New Orleans Land Co. v. Board of Levee Commissioners of Orleans Levee District*, 171 La. 718, 132 So. 121 (La. 1930).

Despite the complexities and historically shifting judicial opinions, several principles pertinent to coastal protection and restoration emerge from the body of reported decisions:

- As privately owned dry land erodes and becomes part of a navigable waterbody, ownership of that area converts to the state.
- Once the area becomes part of the navigable waterbody, it becomes inalienable.
- The state (or its delegated political subdivisions) may fill waterbottoms that it owns to create new land, and ownership of that new land is retained by the public; it does not accrete to adjoining private owners.
- New land that naturally accretes on the sea or an arm of the sea belongs to the state, even though if may front on privately owned land.
- However, new land that naturally accretes along rivers or streams belongs to the adjacent upland owner.
- Changes in ownership as a result of accretion, dereliction, erosion, subsidence, or other conditions resulting from the action of navigable waterbodies do not change mineral servitudes in force at the time of the change. La. R.S. 9:1151 (commonly called the "Freeze Statute").
- Where new land naturally accretes at the confluence of a river or stream and the sea or arm of the sea, courts have to make an equitable division of the ownership based on an assessment of how much of the accretion relates to riverbank versus the seashore, based on the underlying principles of La. C.C. Art. 501. *Davis Oil Co. v. The Citrus Land Co*., 576 So. 2d 495 (La. 1991).
- Louisiana law related to the ownership of non-navigable tidelands is undeveloped. Until the *Phillips Petroleum* case prompted La. R.S. 9:1115.1 through 1115.3, positive Louisiana law did not address this genre of the land/water

[10] In some instances, the state expressly conveyed tidelands in addition to the 1949 swamp lands. For example, by Act No. 18 of 1894, the legislature created the Buras Levee District on the west bank of Plaquemines Parish, and transferred to that district all lands granted to Louisiana by the United States as swamp or overflowed land, and all lands that had been forfeited to or bought in by the state for delinquent taxes, within the levee. Later, by Act No. 205 of 1910, the state transferred as additional property "all lands within the district belonging to the State by virtue of her inherent sovereignty." *State v. Gulf Refining Co.*, 13 So. 2d 277 (La. 1943). Thus, the Buras Levee District acquired all swamp or overflowed lands and all tidelands. as separate classes of property.

interface. 9:1115.2(B) declares that inland non-navigable water beds or bottoms are susceptible of private ownership (an issue that had been the subject of academic debate following the *Phillips Petroleum* decision.) While tidelands are declared susceptible of private ownership, the statute does not convey such tidelands still in state ownership by virtue of their transfer upon statehood. As enacted 9:1115.3 establishes a retroactive presumption that any conveyance from the state of immovable property that encompasses inland non-navigable waterbottoms conveys ownership of the bottoms. However, a savings clause in 9:1115.3 declares that the statute does not convey land not previously conveyed to by the state. So while the statutory presumption aids private owners in proving ownerships claims asserted against the state, it does not result in any actual conveyance of property.

As outlined above, applying property law at the water's edge is often sloppy and always fact intense. It is a difficult body of law to grasp comprehensively. Fortunately, a number of law journal articles provide useful overviews that are tough to glean from reported decisions, and are presented here for the reader's reference:

- Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and other Oddities*, 23 Tul. Envtl. L.J. 93 (2009).
- Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S.U. L. Rev. 149 (2000).
- Marc C. Hebert, *Coastal Restoration under CWPPRA and Property Rights Issues*, 57 La. L. Rev. 1165 (1997).
- Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 La. L. Rev. 1535 (1993).
- Lawrence E. Donohoe, JR. and Patrick G. Tracy, Jr., *Phillips Petroleum Co. v. Mississippi: the Louisiana State Law Institute's Advisory Opinion Relative to Non-Navigable Waterbottoms*, 53 La. L. Rev. 35 (1992)(referenced by the legislature as the basis for La. R.S. 9:1115.1, et seq.).
- James G. Wilkins and Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861 (1992).

Developing, Redeveloping and Relocating Coastal Hazard Areas

After Hurricanes Katrina and Rita, civic leadership across southern Louisiana was resolute about how recovery should be approached. Several recurring themes were commonly heard:

- This calamity should be an impetus for a community development plan allowing for economic growth and resurgence.
- We need to guarantee preparedness in the event of another disaster.
- Rather than supporting unchecked growth, development should be steered to reduce vulnerability of local residents and communities.
- Hazard mitigation policies should be implemented to minimize development in high risk areas and direct new development to safer locations.
- Local governments need to pool their resources and provide infrastructure and services on a coordinated, regional basis.

These pleas for a better approach to development following a disaster should sound familiar. A chorus of civil leadership across Louisiana raised them publically and repeatedly after Hurricanes Katrina and Rita. But it was the second verse of an old song. Those with good memories may recall the similar statements more than 45 years ago after Hurricane Camille devastated the Mississippi Gulf Coast in 1969.[11] That catastrophe prompted ground-breaking legislation in 1971 when Mississippi enacted the Gulf Regional District Law, Miss. Code Ann. § 17-11-1, et seq., that allowed local governments to pool resources to address area-wide recovery problems by regional cooperation within the framework of local control. The statute was never utilized.

The same conditions existed after Hurricane Katrina. Just as in the aftermath of Hurricane Camille decades earlier, new laws were passed that allowed local governments to utilize their resources for recovery. This time, more of the concept turned into reality, but still not nearly as much as had been envisioned decades earlier.

Notwithstanding that governments haven't been good students of history, disasters still present major challenges and opportunities for rebuilding. And disasters are highly likely to occur with increasing frequency and severity until the region successfully

[11] The list above was drawn from news articles published after Hurricane Camille.

reverses and erases nearly a century of major land loss – a process that will easily take 70 years or more – even if the state's coastal master plan hits its mark..

Disasters typically bring a significant influx of federal dollars for local communities. Federal Emergency Management Agency (FEMA) and Community Development Block Grant (CDBG) programs are the prime conduits of federal funding after disasters. Both of these sources have built up a cadre of disaster response professionals in both the public and private sectors who are highly knowledgeable about the nuances of the programs. They are invaluable resources.

FEMA funding is geared toward cleanup, repair, and restoration. It does not have a lot of flexibility. But it does have the advantage of being exempt in some respects from many environmental review procedures that can be extremely burdensome in a post-disaster setting. In contrast, CDBG funding is much more flexible, but it is not exempt from environmental (and other) statutory review procedures.

Full coverage of the legal issues involved with FEMA and CDBG disaster funding is beyond the scope of this presentation. But a few highlights of how CDBG funding works and how local government attorneys can help is a useful exercise.

The Governing Documents for CDBG

Every major disaster is unique, as are the federal and state governments' responses. But the overall approach follows a general pattern:

- **Appropriation**. Congress appropriates funding for disaster relief, either as a stand-alone emergency appropriation or embedded in a larger appropriation bill. The appropriation bill may set general parameters what the funds may be expended on, how long the funding will be available, and what regulatory flexibility the administering agencies may have. Often, the committee reports provide a great deal more information about what Congress expects than does the text of the actual appropriation. The funds are usually provided to the state, through an agency designated by the governor, for redistribution to local governments or use directly by the state (often through contractors).
- **Waivers**. For CDBG funding, Congress typically authorizes the Department of Housing and Urban Development (HUD) to waive certain administrative and requirements where necessary to facilitate recovery efforts. These waivers are published in the Federal Register. (See, e.g., 71 FR 7666, February 12, 2006 publication of common waiver provisions for post-Katrina recovery across the Gulf Coast.) States are allowed to petition HUD for waivers particularly useful to them.
- **Action Plan (with amendments)**. In the HUD CDBG system, an Action Plan is the document by which the state tells HUD how it intends to spend the recovery money. In the hierarchy of governing documents, the Action Plan is the "top level" document that is largely under the state's control. Once approved by HUD, the Action Plan becomes the program description that governs the overall recovery programs.
- **Grant Agreements, Subgrant Agreements, MOUs, etc**. Below the level of the Action Plan, the next rung of governing documents can get fairly diverse. Essentially, such documents are contracts between HUD and the administering state agency or between the state agency and a local government, a nonprofit, or some other entity to carry out a specific activity, task, or project.

Each of these levels of governing documents creates a set of authorizations and obligations. They have to be "stacked" for a local government to understand the full range of the requirements placed on it as a condition of a disaster grant. Typically, the bulk of those obligations are embrace in an extensive set of "assurances" by which the local government agrees to comply with several dozen federal statutory, regulatory, and executive order provisions. Each of these provisions has a body of law associated with it. For the most part, a local government's operations would normally comply with these provisions as a matter of course. However, some provisions stand out as more troublesome than others because they can introduce counterintuitive (but mandatory) delays in a project. For example, HUD's eight-step review process for activities in flood plains at 24 CFR 55.20, or its environmental decision making and funding release processes in 24 CFR Part 51, which mandates a 30-day+ minimum waiting period ***after*** all environmental reviews are finished. The programs are "hard-wired" for these processes based on federal statutory or regulatory requirements. It is important to understand how these requirements stack up to create long lead times.

In the aftermath of a disaster, the CDBG program can be hard for a local government attorney to navigate. A good source of guidance for the effort is Disaster Recovery CDBG Grantee Administrative Manual

(Version 3.5, April 15, 2014).[12] The manual is published by the Louisiana Office of Community Development Disaster Recovery Unit. Weighing in at a hefty 956 pages, it is designed as comprehensive guidance for its primary audience, program administrators. However, it provides useful entry points for attorneys who deal with the legal aspects of the program. It is a good resource for a practitioner to understand how different aspects of the disaster recovery program fit together.

However, post-Katrina recovery teaches that the culture of the disaster response establishment is compliance rather than performance – quite the opposite of what is needed. Further, state and local governments generally do not have the institutional setup to "turn on" a major recovery effort following a disaster. Louisiana does not have a body of law to facilitate ***recovery***. This is in contrast to the law and public institutions devoted to emergency ***preparedness and response***. See, e.g., Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. R.S. 29:721, et seq. The state and local governments are more ready than ever to swing into action to evacuate in the face of a major disaster, and to deal with the immediate aftermath. But longer term recovery presents a different set of needs. It requires:

- Decisions about rebuilding (whether, where, and how to rebuild)
- Massive physical cleanup and rebuilding.
- Relocation and rehousing.

The experience of Katrina is instructive. The hurricane struck in August 2005, but the first homeowner assistance grant under the Road Home Program was not made until the end of August 2006 – a year later.

With the strengthened levee system in the New Orleans metro area, losses on the scale of Katrina are much less likely in the future. However, studies estimate that over 157,000 families in Southeast Louisiana live in unprotected special flood hazard areas.[13] For many decades to come, these families will live under a greater threat of hurricane damage than in 2005 because coastal land loss will outpace restoration for at least that period of time. When a disaster strikes, these families will be faced with the choice of rebuilding in place (in an increasingly hazardous place) or relocating. To this writer's knowledge, there are no structured provisions of Louisiana law to facilitate this choice.

As a "leftover" from Hurricanes Katrina and Rita, local governments own thousands of properties where the homeowners elected a "sell" option under the Road Home Program. Approximately 1,800 of these are in New Orleans and over 1,000 are in St. Bernard Parish. Much smaller inventories are scattered in other parishes as well. These largely vacant properties could be utilized for future rebuilding or resettlement programs following a future disaster. However, a legal mechanism for carrying out such a program is not in place. As a practical matter, the affected population that would be most in need of such a program is largely outside of New Orleans and St. Bernard, which are "hardened" with the upgraded levee systems. The local governments that would have to respond to the disasters (most likely in Plaquemines, Jefferson, Terrebonne, and Cameron Parishes) are not in control of the properties.

Biggert-Waters Act/National Flood Insurance Program (NFIP)

The Biggert-Waters Flood Insurance Reform Act of 2012 was signed into law on July 6, 2012. It enacted significant revisions to the National Flood Insurance Program (NFIP), which was originally enacted in 1968 and is managed by the Federal Emergency Management Agency (FEMA). See, generally, 42 U.S.C. 4001, *et seq*.

Biggert-Waters was relatively non-controversial at the time. But as its practical implementation began taking effect, it triggered a major scare in coastal and riverine communities when it became clear that multifold increases in federal flood insurance premiums here hitting local communities hard. One of the goals of the act was to abolish subsidized insurance rates in phases. The resulting steep premium increases made it apparent that many existing properties in high risk areas would become uneconomical to develop or occupy. This had significant land use implications for community development patterns.

The impacts were ameliorated somewhat by the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA), which passed congress on March 13 and was signed into law by the President on March 21, 2014. Pub. L. No. 113-89. That act stretches out, but does not eliminate, flood insurance rate increases, and "buys time" for FEMA to complete a series of congressionally-mandated studies that will ultimately

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[12] Available at http://www.doa.louisiana.gov/cdbg/DR/manual/version3-5/DR-GranteeAdminManual-Ver3-5_(4-15-14).pdf (last visited 7/7/14).

[13] Christopher Dalborn and Scott A. Hemmerling, *Community Resettlement Prospects in Southeast Louisiana*, Tulane Institute on Water Resources Law & Policy, p. 45 (2014).

lead to new rate structures to migrate the NFIP toward actuarially based premiums.

In the long run, Biggert-Waters and HFIAA combined will have a significant effect on rebuilding after disasters. As subsidies are phased out and flood insurance premiums increase to reach full-risk actuarial rates, building (or rebuilding) in unprotected areas will become increasingly more expensive relative to locating inside of the federal levee system. This differential exposure is likely to increase for decades to come until the implementation of the costal master plan begins to have a discernible effect on coastal risks.

The federal funding that supported the recovery of Southeast Louisiana from Hurricanes Katrina and Rita came with a perpetual string attached: in return for assistance, property owners are prospectively obliged to maintain flood insurance on their property if it is in a NFIP "special flood hazard area" (which is a large portion of the region). This obligation is typically ensconced in a recorded covenant on the assisted property. As a result, nearly 150,000 properties in Louisiana have this obligation filed in the land records. Moreover, under federal law, the failure to maintain flood insurance could render the property ineligible for future disaster assistance. See. 42 U.S.C. §5154a.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELATING TO TIDELANDS AND WATER BOTTOMS

Source: The Public Trust Doctrine in Louisiana, 52 La. L. Rev. 861 (March 1992), as updated and augmented by Victor J. Franckiewicz, Jr.

Year	Act or Constitutional Provision	
1853	284	Authorized sale of nonnavigable lakes susceptible of being reclaimed.
1855	247 § 1	Authorized sale of land within Swamp & Overflowed lands donated in 1849 and 1850 including shallow lakes which were not navigable.
1859	197	Authorized sale of lands "subject to regular tidal overflow, designated as 'Swamp and Overflowed Lands,' *within the intent* and meaning of the several acts of Congress. . ." (emphasis added)
1862	124 § 1	Declared lakes dried up by natural causes to be "swamp lands" within the meaning of the 1849 and 1850 Swamp Land Grants.
1870	38 §§ 12 & 14	Authorized sale of swamp and overflowed lands and lands subject to regular tidal over-flow that had been included in the Federal Swamp Land Grants.
1871	104 §§ 1 & 3	Authorized sale of swamp and overflowed lands and lands subject to tidal overflow so as to be unfit for settlement and cultivation that had been included in the Federal Swamp Land Grants.
1880	75 § 11	Authorized sale of sea marsh or prairie subject to tidal overflow so as to be unfit for cultivation.
1910	205 § 11	Transferred to the Buras Levee District all lands within the district belonging to the state that had been granted to the state by the U.S. Congress or acquired by the state by virtue of inherent sovereignty. Authorized the levee district to sell the lands transferred to it by the state.
OYSTER STATUTES AFFECTING STATE OWNERSHIP OF TIDELANDS		
1870	18 §§ 1 & 2	Established oyster season and prohibited disturbing oyster beds on any reefs, bays, and coasts of the state.

Year	Act or Constitutional Provision	
1886	106 §§ 1 & 2	"*Be it enacted by the General Assembly of the State of Louisiana*, That *all* the beds of the rivers, bayous, creeks, lakes, coves, inlets and sea marshes bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of this State, and not heretofore sold or conveyed by special grants or by sale by this State, or by the United States to any private party or parties, shall continue and remain the property of the State of Louisiana, and may be used as a common by all the people of the State for the purposes of fishing and of taking and catching oysters and other shellfish, subject to the reservations and restrictions hereinafter imposed, and no grant or sale, or conveyance shall hereafter be made by the Register of the State Land office to any estate, or interest of the State in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not." (emphasis added); granted riparian land owners adjoining rivers, bays, lakes, bayous, coves, inlets, or passes the exclusive right to use those water bottoms within the boundaries of their land for the cultivation of oysters and other shellfish to the low watermark.
1892	110 §§ 1 & 2	Same as Act 106 of 1886 but dropped "sea marshes" and "not heretofore sold or conveyed by special grants or by sale by this State, or by the United States to any private party or parties."
1896	121 §§ 1 & 2	Same state ownership clause as Act 110 of 1892.
1902	153 §§ 1 & 2	Same state ownership clause as Act 121 of 1896 except added "bays" and "sounds" to the list and added "bordering on or connecting with the Gulf. . ."
1904	52 §§ 1 & 2	Same state ownership provision as Act 153of 1902 except removed creeks and coves from the list and added State ownership of oysters and other shellfish growing on the beds. Prohibited anyone from owning in fee simple the bottoms of navigable waters.
1906	178 § 10	No changes in state ownership provision but added a section prohibiting state from leasing for oysters water bottoms claimed under private title until the state had disputed the title in court.
1908	167 § 7	No changes in state ownership sections.
1908	291 § 22	Provided penalties for oyster robbing.
1910	189 § 1-3	Same state ownership provision as Act 52 of 1904 but prohibited anyone from owning in fee simple any water bottoms described therein and that no private claim would have any effect until adjudicated
1914	54 § 1-3	Same state ownership provision as 189 of 1910.
1924	139 § 2	Same state ownership provision as Act 54 of 1914 except disclaimed any effect on mineral leases.
1932	67 § 1	Same state ownership provisions except added “streams" to the list
1985	876 §3 (R.S. 56:3)	Same state ownership provision as Act 67 of 1932 except added wild birds and wild quadrupeds, fish, & other aquatic life. Act876 deleted the prohibition against anyone owning in fee simple the water bottoms de-scribed therein. That provision was transferred to R.S. 41:14 by § 2 of the same act. Act 876 also deleted the provision in preceding oyster statutes granting riparian landowners the exclusive right to cultivate shell-fish to the low watermark.
OTHER STATE OWNERSHIP STATUTES		
1910	258 §§ 1 & 2 (R.S. 9:1101)	Asserted ownership to waters of and in all bayous, lagoons, lakes and bays and their beds not under direct ownership; Asserted ownership to navigable waters; States that it did not intend to interfere with good faith acquisition of any waters or beds transferred. Note that this provision merely asserted state ownership; it did not prohibit alienation of navigable waters. Such a prohibition was enacted by 1954 Acts 727, codified at La. R.S. 9:1107-1109.
1912	62 (R.S. 9:5661)	"Actions, including those by the State of Louisiana, to annul any patent issued by the state, duly signed by the governor and the register of the state land office, and of record in the state land office, are prescribed by six years, reckoning from the day of the issuance of the patent." (Held in *Gulf Oil* not to apply to transfers of navigable water bodies).
1921	Louisiana Constitution Art. VI § 1	"The natural resources of the State shall be protected, conserved and replenished; . . ."

Year	Act or Constitutional Provision	
1921	Louisiana Constitution Art. IV § 2	"Nor shall the Legislature alienate, or authorize the alienation of, the fee of the bed of any navigable stream, lake or other body of water, except for purposes of reclamation."
1938	55 (R.S. 49:3)	Declared sovereignty of state and fixed sea-coast boundary and ownership by declaring full and complete ownership of the "waters of the Gulf of Mexico and of the arms of the Gulf and the beds and shores of the Gulf and the arms of the Gulf including all lands that are covered by the waters of the Gulf and its arms either at low tide or high tide, within the boundaries of Louisiana."
1952	341 (R.S. 9:1151)	Commonly called the "Freeze Statute," this act preserved mineral servitudes where a change in ownership of land or waterbottoms occurs. As amended by broadened terminology by Acts 2001, No. 963, the triggers for change in ownership were "as a result of the action of a navigable stream, bay, lake, sea, or arm of the sea . . . or as a result of accretion, dereliction, erosion, subsidence, or other condition resulting from the action of a navigable stream, bay, lake, sea, or arm of the sea."
1954	727 (R.S. 9:1107-1109)	Stated it had always been the policy of the State that navigable waters and their beds were public things and that no act of the legislature had been in contravention of that policy; that Act 62 of 1912 (R.S. 9:5661)ratified only patents which had conveyed land susceptible of private ownership which does not include navigable water and their beds; that any patent purporting to alienate navigable waters was null and void and that no statute shall be construed to validate the transfer of navigable or *tide waters* or their beds (in R.S. 9:1109). (emphasis added)
1954	443	Amended 9:1101 to add clause rescinding and revoking purported conveyances of navigable waters and their beds
1974	Louisiana Constitution Art. IX § 1	"The natural resources of the state including air and water, and the healthful, scenic, historic and aesthetic quality of the environment shall be protected, conserved and replenished insofar as possible and consistent with the health safety and welfare of the people. The Legislature shall enact laws to implement this policy"
1974	Louisiana Constitution Art. IX § 3	"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."
1978	645 (R.S. 41:1701-1714)	Proclaimed the beds and bottoms of all navigable waters and banks or shores of bays, arms of the sea, the Gulf of Mexico and navigable lakes belong to the state and are public lands to be protected and conserved for public navigation, fishery, recreation, and other interests. Prohibits alienation (except for reclamation of lands lost through erosion as authorized by this section) to ensure public interests "protected by the trust"
1985	876 § 2 (R.S. 41:14)	Prohibits alienation of "the bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico . . . except pursuant to R.S. 41:1701 through 1714" and states that "No one shall own in fee simple any bottoms of lands covering the bottoms of waters described in this section."
1992	998,§ 1 (R.S. 9:1115.1 – 1115.3(	Legislative declaration distinguishing Louisiana law from *Phillips Petroleum Co. v. Mississippi*, 108 S.Ct. 791 (1988), and expressly rejecting the public trust doctrine in that case. The Act stated that "the Phillips decision neither reinvests the state, or a political subdivision thereof, with any ownership of such land nor does the state, or a political subdivision thereof, acquire any new ownership of such property." However, the act preserved all existing public ownership. It defines "inland non-navigable water bodies" and declares them to be private things (9:1115.2), and creates a presumption that any conveyance by the state of a property includes ownership of inland non-navigable water bottoms, unless the conveyance expressly reserves such areas. (9:1115.3). The act includes a savings clause in 9:1115.3: "Nothing contained in this Part shall be construed as conveying to any person title to any land that have not previously been conveyed or transferred by the state."
2001	963, § 1	Amended R.S. 9:1151 (the "Freeze Statute") to broaden the types of waterbodies covered by the statute, and to include erosion and subsidence as triggers of ownership change.