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THE PUBLIC TRUST DOCTRINE IN LOUISIANA

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## The Public Trust Doctrine in Louisiana\*

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### INTRODUCTION

#### *The Public Trust Doctrine in Louisiana*

Louisiana's coastal zone is one of the most unique areas of the world. It is a place in which physical change is constant and where what is land today can become open water tomorrow. The interplay of land and water in Louisiana's coastal zone has influenced the development of a culture that is as unique as its geographical surroundings.

Such an area makes it difficult to lay down permanent legal rules for the management of the physical environment; law is not at its best when applied to nature's whims. However, in Louisiana, legislators, legal scholars, judges, and legal practitioners have attempted to bring legal order to this dynamic geographical area.

We will attempt, in this article, to explain one body of legal principles that we feel helps to bring legal order to this area: the public trust doctrine.

Recently, legislation has been proposed that we feel would remove valuable areas of Louisiana's coastal region from the public trust. Our legal analysis indicates that the rights and interests of the public as a whole in these coastal areas would be compromised by the proposed legislation. We will, therefore, take a position which argues in favor of including the disputed areas in the public trust in hopes of bringing balance to this important decision.

The purpose of this article is to examine the state of the public trust doctrine in Louisiana and how its application affects natural resources and environmental protection there. We will examine the history of the public trust doctrine and its origins in Louisiana. We will discuss

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the manifestation or expression of the public trust doctrine in Louisiana law and jurisprudence, including new challenges to the scope of the doctrine. We will argue for an expansive interpretation of the public trust doctrine based on recent jurisprudence and describe how the doctrine may affect Louisiana's state agencies in their administration of public lands, natural resources, and environmental protection.

#### BACKGROUND

Many people in Louisiana have not heard of the public trust doctrine or have only vague notions of it. It is not surprising that the public trust doctrine is obscure to many people including some in the legal community. Elements of the doctrine are scattered throughout the Louisiana Civil Code, the Revised Statutes, the Louisiana Constitution of 1974, and several Louisiana judicial decisions. No single Louisiana law clearly defines the public trust doctrine and delineates its elements. In that respect Louisiana is not unique among states, for the public trust doctrine has evolved in a slightly different way in each state, with some unique terminology and various levels of codification and jurisprudential development. Professor Sax, in his extensive article on the public trust doctrine, describes how it has evolved from a loosely related set of ideas.<sup>1</sup> The central idea of the doctrine is now well established. Recently a comprehensive national study of this doctrine provided a general definition:

The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The Public Trust Doctrine is applicable whenever navigable waters or the lands beneath are altered, developed, conveyed, or otherwise managed or preserved. It applies whether the trust lands are publicly or privately owned. The doctrine articulates not only the public rights in these lands and waters. It also sets limitations on the States, the public, and private owners, as well as establishing duties and responsibilities of the States when managing these public trust assets. The Public Trust Doctrine has been recognized and affirmed by the United States Supreme Court, the lower federal courts and State courts from the beginning days of this country to the present.<sup>2</sup>

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1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-89 (1970).

2. Coastal States Organization, *Putting the Public Trust Doctrine to Work*, at 3-4 (1990).

The public trust doctrine is based on the Institutes of Justinian and eventually became part of the English common law.<sup>3</sup> It was transferred to the common law states via English law, but can fairly be said to have come to Louisiana through the French and Spanish civil law traditions which were themselves based on Roman law.<sup>4</sup> Indeed, Louisiana received a "double dose" of the public trust doctrine, because upon admission to the Union in 1812 it was, under the equal footing doctrine, accorded the same rights as the states before it in lands beneath tidal and navigable waters.<sup>5</sup> Thus, the English common law version of the public trust doctrine was superimposed over Louisiana's civil law version in 1812. It would appear then, that since 1812 the opportunity has existed for Louisiana's public trust doctrine to be at least as expansive as that in many common law states, if it was not so already.

#### ORIGIN AND DEVELOPMENT

Many scholarly articles and at least one treatise have delved extensively into the historical origins and development of the public trust doctrine.<sup>6</sup> It is not our intention to revisit these topics, but merely to outline the origin and development of the public trust doctrine in order to provide a framework for better understanding.

Under Roman law the sea and seashore, the air, and running water were common things.<sup>7</sup> The Spanish and French law, on which the Louisiana Civil Code is based, continued to classify rivers and the sea

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3. *Id.* at 4-5.

4. A. Yiannopoulos, Property § 65, at 120 in 2 Louisiana Civil Law Treatise (1991) [hereinafter Yiannopoulos Treatise]; A.N. Yiannopoulos, Five Babes Lost in the Tide—A Saga of Land Titles in Two States: Phillips Petroleum Co. v. Mississippi, 62 Tul. L. Rev. 1357, 1360 (1988) [hereinafter Yiannopoulos Article].

5. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 795-97 (1988).

6. Bernard S. Cohen, The Constitution, the Public Trust Doctrine, and the Environment, 1970 Utah L. Rev. 388; Alfred A. Porro, Jr. & Lorraine S. Teleky, Marshland Title Dilemma: A Tidal Phenomenon, 3 Seton Hall L. Rev. 323 (1972); Joseph L. Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U.C. Davis L. Rev. 185 (1980); Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970); Jan S. Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L. Rev. 195 (1980); Robert E. Tarcza, Comment, The Public Trust Doctrine as a Basis for Environmental Litigation in Louisiana, 27 Loy. L. Rev. 469 (1981); William Drayton, Jr., Comment, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.J. 762 (1970); Nelea A. Absher, Note, Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 59 Tul. L. Rev. 1557 (1985).

7. Coastal States Organization, *supra* note 2, at 4-5; The Institutes of Justinian 35 (J.B. Moyle trans. 4th ed. 1905).

and seashore as common things insusceptible of private ownership.<sup>8</sup> The current Louisiana Civil Code classifies "running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore" as public things which "are owned by the state or its political subdivisions in their capacity as public persons,"<sup>9</sup> (i.e., in public trust). More recently, Louisiana has enacted other statutes implementing and delineating the public trust doctrine, and there has been some judicial interpretation which will be discussed in the next section.

The English common law public trust doctrine also traces its ancestry to Roman law.<sup>10</sup> As early as the 13th century, portions of Justinian's Institutes dealing with the public trust doctrine had found their way to England.<sup>11</sup> Some elements of the doctrine were written into the Magna Carta.<sup>12</sup> The English common law version of the public trust doctrine, however, changed the beds of navigable rivers from common, ownerless things to things owned by the Crown for the benefit of the public.<sup>13</sup> It is significant to note that in England the test of navigability was the ebb and flow of the tide, since there were almost no water bodies that were navigable in fact that were not also influenced by the tides.<sup>14</sup>

When the English colonies in America were established, they are considered to have been passed the same sovereign rights and responsibilities with regard to public trust lands as afforded by English law.<sup>15</sup> Likewise when the colonies gained independence from England "and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state(s),"<sup>16</sup> including the public trust doctrine. As each new state was admitted to the Union, it was placed on "equal footing" with the existing states, including the ownership of public trust lands within its territory.<sup>17</sup>

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8. Yiannopoulos Treatise, *supra* note 4, at 120, 129; Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195, 197 (1980).

9. La. Civ. Code art. 450.

10. Coastal States Organization, *supra* note 2, at 5; William Drayton, Jr., *Comment, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762, 763-68 (1970); Sax, *supra* note 1, at 476.

11. Stevens, *supra* note 8, at 197; Bernard S. Cohen, *The Constitution, The Public Trust Doctrine, and the Environment*, 1970 Utah L. Rev. 388, 389.

12. Drayton, *Comment, supra* note 10, at 765-68; Cohen, *supra* note 11, at 389; Coastal States Organization, *supra* note 2, at 5.

13. Stevens, *supra* note 8, at 197-98.

14. *Illinois Central R.R. Co. v. State of Illinois*, 146 U.S. 387, 435-36; 13 S. Ct. 110, 111-12 (1892).

15. *Martin v. Waddell*, 41 U.S. 367, 413 (1842).

16. *Id.* at 416.

17. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 474-77, 108 S. Ct. 791, 794-

The geographical extent of the public trust waterbottoms transferred to the states under the equal footing doctrine has been established by a long line of United States Supreme Court cases.<sup>18</sup> The latest Supreme Court pronouncement on the geographical scope of the public trust doctrine, *Phillips Petroleum*, makes perfectly clear that the trust has historically extended and presently extends to all waters affected by the ebb and flow of the tide, whether or not navigable, as well as to nontidal navigable waters.<sup>19</sup>

The public rights of use protected by the public trust doctrine are not limited to navigation, commerce, and fishing.<sup>20</sup> Other uses protected by the public trust doctrine include traditional recreational uses such as swimming and hunting, and recently recognized uses such as environmental protection.<sup>21</sup>

One of the most important questions concerning the public trust doctrine in the United States, a question pertinent to the discussion here, is whether a state may relinquish the ownership of public trust lands to private parties so that public uses are no longer protected. It is well known that states may, under certain circumstances, alienate public trust waterbottoms. This principle was set forth as early as 1894 in *Shively*<sup>22</sup> and restated recently in *Phillips*.<sup>23</sup> But this power is not absolute; indeed it appears to operate within fairly strict confines. The most important judicial interpretation of this issue is in *Illinois Central Railroad Co. v. Illinois*.<sup>24</sup> The case arose after the Illinois legislature had in 1869 granted to the Illinois Central Railroad Co. and two other railroad companies a large tract comprising approximately one thousand acres of the bed of Lake Michigan. Realizing it had erred, the Illinois legislature repealed the grant in 1873 and reclaimed title to the submerged lands.<sup>25</sup> The United States Supreme Court, finding the repeal valid and the ownership of the submerged lands to be with the state,<sup>26</sup> announced

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95 (1988); *Shively v. Bowlby*, 152 U.S. 1, 57, 14 S. Ct. 548, 569 (1894); *Knight v. United States Land Ass'n*, 142 U.S. 161, 183, 12 S. Ct. 258, 264 (1891); *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576, 588-89 (La. 1975).

18. *Shively*, 152 U.S. at 57, 14 S. Ct. at 569; *Illinois Central*, 146 U.S. at 435, 13 S. Ct. at 111 (1892); *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851).

19. *Phillips*, 484 U.S. at 476-81, 108 S. Ct. at 795-97.

20. *Id.*, 108 S. Ct. at 795-97; Coastal States Organization, *supra* note 2, Chapter III; Sax, *supra* note 1, generally.

21. Coastal States Organization, *supra* note 2, at Chapter III; *Save Ourselves Inc. v. Louisiana Env't'l Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984); Sax, *supra* note 1, generally.

22. *Shively*, 152 U.S. at 26, 14 S. Ct. at 557.

23. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482-85, 108 S. Ct. 791, 798-99 (1988).

24. 146 U.S. 387, 452-56, 13 S. Ct. 110, 118-19 (1892).

25. *Id.* at 449, 13 S. Ct. at 117.

26. *Id.* at 463-64, 13 S. Ct. at 122.

that there are limitations on a state's authority to dispose of public trust waterbottoms. Because the title a state holds in public trust waterbottoms is "different in character from that which the State holds in lands intended for sale,"<sup>27</sup> a state may dispose of them only under certain circumstances. A state may, to improve the interest of the people, grant parcels of submerged lands for such things as "wharves, docks and piers,"<sup>28</sup> but it may not abdicate

general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust, which requires the government of the State to preserve such waters for the use of the public.<sup>29</sup>

The Court, in reiterating its position, stated the circumstances under which a state could relinquish control over public trust property: "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."<sup>30</sup> So it appears from *Illinois Central* that state alienation of public trust property that does not promote public interests and impairs substantially the public interest is "necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time."<sup>31</sup>

*Illinois Central* upheld state revocation of a grant of public trust waterbottoms to private interests and set parameters under which such a grant could be revoked. In *Appleby v. City of New York*,<sup>32</sup> the Court revisited the issue of state alienation of public trust waterbottoms, upholding a sale of "water lots" in the Hudson River to private parties by the city of New York. The lots were to be used for wharves and to be bulkheaded and filled. *Appleby* has been described as limiting the holding in *Illinois Central Railroad*, but the United States Supreme Court reconciled the two cases by indicating that the situation in *Appleby* fell within the exception provided in *Illinois Central*:

That case [*Illinois Central*] arose in the Circuit Court of the United States, and the conclusion reached was necessarily a statement of Illinois law, but the general principle *and the*

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27. Id. at 452, 13 S. Ct. at 118.

28. Id. at 452, 13 S. Ct. at 118.

29. Id. at 452-53, 13 S. Ct. at 118.

30. Id. at 453, 13 S. Ct. at 118.

31. Id. at 455, 13 S. Ct. at 119.

32. 271 U.S. 364, 46 S. Ct. 569 (1926).

*exception* have been recognized the country over and have been approved in several cases in the State of New York.<sup>33</sup>

The Court in *Appleby* then reviewed several New York cases which had either held or stated in dicta that alienation of public trust lands would be valid if done for some public purpose or benefit.<sup>34</sup> The Court apparently considered the sale of the relatively small water lots to be in furtherance of a public benefit, not an "abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake."<sup>35</sup> The sale by Illinois of the large tract of Lake Michigan was considered to be such an invalid abdication.

Therefore, even after *Appleby*, state authority to alienate public trust waterbottoms appears to be limited to transfers of portions or parcels of those waterbottoms that further the public interest or do not substantially impair the public interest in the "lands and waters remaining."<sup>36</sup> A state would probably not be within its authority in relinquishing control over large public trust areas<sup>37</sup> such as, for instance, if a state were to alienate all of its nonnavigable tidelands. *Illinois Central* has been applied to Louisiana in *Gulf Oil v. State Mineral Board*.<sup>38</sup>

Other limitations on state authority to alienate public trust waterbottoms have been established throughout the United States. To find a valid alienation of public trust waterbottoms, most courts require that the legislative transfer be clear, specific, and express; courts will seldom uphold those that are implied.<sup>39</sup> Another facet of public trust transfers is a presumption that when public trust lands are alienated, the only interest conveyed is the *jus privatum* or private ownership interests, while the public interests or *jus publicum* remain with the state.<sup>40</sup> In other words, a servitude of public use would remain on public trust lands conveyed to private owners. Louisiana recognizes such an arrangement with respect to the banks of navigable rivers and streams which are

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33. *Id.* at 395, 46 S. Ct. at 578 (emphasis added).

34. *Id.* at 395-96, 46 S. Ct. at 578-79.

35. *Illinois Central R.R. Co. v. State of Illinois*, 146 U.S. 387, 452-53, 13 S. Ct. 110, 118 (1892).

36. *Id.* at 453, 13 S. Ct. at 118 (1892).

37. *Id.* at 452-53, 13 S. Ct. at 118 (1892).

38. 317 So. 2d 576, 589, 591 (La. 1975).

39. The requirement for express and specific language when alienating public trust waterbottoms had been established in federal law in *Martin v. Waddell*, 41 U.S. 367 (1842), and in state courts, see *Coastal States Organization*, *supra* note 2, at 177 (1990). The Louisiana Supreme Court has stated in *Gulf Oil* that clear and express language is required for the alienation of navigable waterbottoms (if at all possible); see *infra* text accompanying notes 143-44. The *Gulf Oil* reasoning can be applied to nonnavigable tidelands; see *infra* text accompanying notes 72-85.

40. *Shively v. Bowlby*, 152 U.S. 1, 11-12, 14 S. Ct. 548, 551-52 (1894); *Coastal States Organization*, *supra* note 2, at 176-77.



private things subject to public use.<sup>41</sup> The *jus publicum* can be terminated, but again courts have almost always required express intent and furtherance of the public interest.<sup>42</sup> The court in *Appleby* held that a "deed in fee simple" to water lots for filling in the Hudson River constituted a termination of the *jus publicum*.<sup>43</sup> Many other cases from across the United States have demonstrated much more judicial skepticism in finding a termination of the *jus publicum*.<sup>44</sup>

#### DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE IN LOUISIANA

With the overview of some basic parameters of the public trust doctrine in mind, we will now examine how it has been applied in Louisiana. Since Louisiana derived its law from the French and Spanish who ruled over its territory prior to statehood, some public trust principles were in place prior to its admission as a state in 1812.<sup>45</sup> The 1808 Civil Code classified the sea and seashore as common things and navigable rivers as public things; this classification was continued in the 1825 and 1870 codes.<sup>46</sup> The 1978 Civil Code changed the classification of sea and seashore to public things.<sup>47</sup> When Louisiana became a state in 1812, it was afforded the same rights over sovereignty lands as other states on an equal footing.<sup>48</sup> These sovereignty (public trust) lands included lands under all waters subject to the ebb and flow of the tide, whether or not navigable, and all navigable waters not subject to the ebb and flow of the tide.<sup>49</sup>

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41. La. Civ. Code art. 456; *Chaney v. State Mineral Board*, 444 So. 2d 105, 109 (La. 1983).

42. Coastal States Organization, *supra* note 2, at 183-85.

43. *Appleby v. City of New York*, 271 U.S. 364, 396-97, 46 S. Ct. 569, 578-79 (1926).

44. Coastal States Organization, *supra* note 2, at 175-85.

45. Yiannopoulos Treatise, *supra* note 4, at 119-20; Code Napoléon art. 538:

Highways, roads, and streets maintained by the nation, navigable or floatable rivers and streams, the shores, accretions and derelictions of the sea, sea ports, harbors, roadsteads, and in general all portions of the national territory which are not susceptible of private ownership, are considered as pertaining to the public domain.

46. La. Civ. Code arts. 450, 453 (1808); La. Civ. Code arts. 441, 444 (1825); La. Civ. Code arts. 450, 453 (1870).

47. La. Civ. Code art. 450.

48. *Shively v. Bowlby*, 152 U.S. 1, 57, 14 S. Ct. 548, 569 (1894); *Knight v. United States Land Ass'n*, 142 U.S. 161, 183, 12 S. Ct. 258, 264 (1891). The principle of inherent sovereignty as a basis for state ownership of public trust waterbottoms has been questioned [see Yiannopoulos Treatise, *supra* note 4, at 118-19], however, for the purposes of the discussion herein we will assume that Louisiana acquired ownership of public trust waterbottoms by virtue of its inherent sovereignty since that terminology is freely used in Louisiana jurisprudence.

49. *Shively*, 152 U.S. at 57, 14 S. Ct. at 569; *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476-79, 108 S. Ct. 791, 795-96 (1988).

So in 1812, by virtue of Louisiana's own pre-statehood legislation, navigable rivers and the sea and its shores were in the state's public trust, and under the equal footing doctrine Louisiana owned as sovereignty lands (i.e., in public trust) all lands under water affected by the ebb and flow of the tide and all land under non-tidal navigable water bodies.<sup>50</sup>

#### GEOGRAPHICAL SCOPE OF THE PUBLIC TRUST DOCTRINE IN LOUISIANA

States may manage their public trust lands in accordance with state law, subject to the conditions already discussed.<sup>51</sup> Therefore, we will now examine Louisiana's public trust responsibilities under its own laws since 1812 and how the state has managed its public trust lands. Because the Civil Code classified navigable rivers and the sea and its shores within the public trust, Louisiana has managed them accordingly, never expressly alienating them. The treatment of nonnavigable tidelands, however, has been unclear.

Louisiana's unique geography has led to a great deal of confusion in determining the extent of the state's public trust lands. Louisiana has about 40% of the nation's coastal wetlands, a vast amount of acreage.<sup>52</sup> Louisiana's wetlands are comprised of low-lying salt, brackish, and fresh marshes, many of them subject to tidal inundation from the daily ebb and flow of the tides, and literally thousands of lakes, bays, coves, rivers, bayous, streams, and tidal passes, a great number of which are also affected by the daily ebb and flow of the tides. Both lands—subject to daily tidal inundation such as shores, tidal flats, etc.—and water bodies—affected by the daily ebb and flow of the tides—can be said to be tidally influenced (by astronomical tides). Much of the Louisiana coastal region is subject to tidal overflow from wind-driven tides during hurricanes, storms, or high winds. These wind-driven tides can have a greater effect on overflow than the daily ebb and flow in some areas. Large coastal areas were also overflowed by flood waters from the numerous rivers, streams, bayous, etc., especially before the extensive levee building that has occurred in the last century. The boundaries between land and water in Louisiana's coastal wetlands are very often indistinct; this is the nature of wetlands. To complicate matters, Louisiana's coastal wetlands have been fluctuating for thousands of years between periods of expansion and recession, depending on factors such

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50. Yiannopoulos Article, *supra* note 4, at 1359.

51. *Shively*, 152 U.S. at 26, 14 S. Ct. at 557; *Phillips*, 484 U.S. at 476-79, 108 S. Ct. at 795-96.

52. Coalition to Restore Coastal Louisiana, *Coastal Louisiana: Here Today Gone Tomorrow?* 5 (1989).

as sea level, subsidence rate, and sediment deposition.<sup>53</sup> Soon after Europeans and other nonnatives began inhabiting southern Louisiana, they introduced new factors affecting wetlands, such as dredging and filling, levees, and canals.<sup>54</sup> It is now well established that levees and canals have accelerated natural wetland loss; recent estimates are that thirty square miles of Louisiana coastal wetlands are lost each year.<sup>55</sup>

The dynamic changes of the Louisiana coast have important implications under the state's property laws and the public trust doctrine. Erosion and subsidence on the shores of the sea and other navigable water bodies have the effect of increasing state ownership as the beds of those water bodies expand.<sup>56</sup> Consequently, state public trust ownership extends to the new beds up to the mean high water mark for lakes<sup>57</sup> and to the extent of the highest winter tides for the sea.<sup>58</sup>

The confusion in Louisiana's management of its public trust lands caused by the state's unique wetland topography is apparent from the statutes and jurisprudence dealing with this subject starting in the mid-1800's and continuing through the 1991 legislative session.<sup>59</sup> In 1849 and 1850 the United States transferred to Louisiana (among other states) ownership of "swamp and overflowed lands, made unfit thereby for cultivation" to be disposed of by the states as they saw fit to promote reclamation.<sup>60</sup> These grants consisted of tracts which encompassed public trust waterbottoms, both navigable-in-fact water bodies, including the sea and its shores, and nonnavigable tidelands as described in *Phillips*.<sup>61</sup> One thing is clear concerning these federal grants: many people seem to have been confused about the definition of "swamp and overflowed lands" and the relationship to tidelands and seashore.<sup>62</sup> There is ample evidence that the federal grants did not include navigable waters and tidal waters; nevertheless, such waterbottoms were apparently sold as

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53. Shea Penland, Ron Boyd, and John R. Suter, *Transgressive Depositional Systems of the Mississippi Depositional Plain: A Model for Barrier Shoreline and Shelf Sand Development*, 58 *J. Sedimentology Petrology* 932 (1988).

54. *Coalition to Restore Coastal Louisiana*, *supra* note 52, at 16-17.

55. May, et al., [U.S. Army Corps of Engineers] *Geological Investigation of the Mississippi River Deltaic Plain*, Technical Report GL-84-15 (1984); Louis D. Britsch and E. Burton Kemp, III, *Land Loss Rates: Mississippi River Deltaic Plain*, Technical Report GL-90-2 (1990); Joseph B. Dunbar, Louis D. Britsch, and E. Burton Kemp III, U.S. Army Corps of Engineers, *Land Loss Rates: Louisiana Chenier Plan*, Technical Report GL-90-2, Report 2 at 19 (1990).

56. *Miami Corp. v. State*, 186 La. 784, 809, 173 So. 315, 323 (1936), cert. denied, 302 U.S. 700, 58 S. Ct. 19 (1937).

57. *State v. Placid Oil Co.*, 300 So. 2d 154 (La. 1973), cert. denied, 419 U.S. 1110, 95 S. Ct. 784 (1975).

58. La. Civ. Code arts. 450, 451.

59. H.B. 538, 539 Reg. Sess. La. (1991). See *infra* text accompanying notes 65-67.

60. 43 U.S.C. § 982 (1988).

61. See Yiannopoulos Article, *supra* note 4, at 1362.

62. *Id.* at 1361.

part of the swamp and overflowed lands acquired in the federal grants.<sup>63</sup>

With regard to navigable waters including the sea and its shores, it is now settled law that any patents purporting to alienate them are null and void. This issue was put to rest in *Gulf Oil v. State Mineral Board*.<sup>64</sup> With respect to nonnavigable tidelands, which Louisiana acquired as public trust lands at statehood, the situation is not so clear. Indeed, *Phillips Petroleum* has highly sensitized Louisiana's private property owners and lawmakers to a problem that has been smoldering since the first sale of swamp and overflowed lands in 1855: namely, what has been done with the state's nonnavigable tidelands? *Phillips* was a reminder that the question was still unanswered, though undoubtedly many people in Louisiana were unaware the title to nonnavigable tidelands was in doubt.

Concern for the security of titles and the fruits of ownership, such as mineral rights, prompted the introduction of two bills in the 1991 Regular Session of the Louisiana Legislature designed to quiet the titles to nonnavigable tidelands in favor of private owners. House Bill 538 distinguished Louisiana's civil law system of property ownership from the English common law system and stated that *Phillips Petroleum* would not have the same effect in Louisiana as in Mississippi.<sup>65</sup> The bill further

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63. John L. Madden, *Federal and State Lands in Louisiana* 281-84 (1973); Yiannopoulos Article, *supra* note 4, at 1361-62. See also *Board of Comm'rs for Buras Levee Dist. v. Mt. Forest Fur Farms of Am.*, 178 La. 696, 152 So. 497 (1933); *State ex rel. Board of Comm'rs of Buras Levee Dist. v. N.A. Baker & Son*, 146 La. 413, 83 So. 693 (1920); *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912).

64. 317 So. 2d 576 (La. 1975). For a thorough discussion of the controversy surrounding this issue see: A.N. Yiannopoulos, *Validity of Patents Conveying Navigable Waterbottoms-Act 62 of 1912*, Price, Carter, And All That, 32 La. L. Rev. 1 (1971) and Yiannopoulos Treatise, *supra* note 4, at §§ 66-68. The following is a brief summary:

Sales of land acquired by the state in Swamp Land Grants inadvertently included navigable waterbottoms which were encompassed within some tracts. When the sales of these public trust waterbottoms were later challenged the legislature attempted to cure the private titles by passing a statute, Act 62 of 1912, which limited the time in which the state could revoke land patents to six years from the date of the issuance of the patent. Since Louisiana law at that time prohibited the alienation of navigable waterbottoms, the question arose as to whether or not Act 62 included, and therefore ratified, the sale of navigable waterbottoms. In landmark cases the Louisiana Supreme Court held first in *California Co. v. Price*, 225 La. 706, 74 So. 2d 1 (1954) that Act 62 did include sales purporting to transfer navigable water bodies and therefore ratified the sales of navigable waterbottoms; but then *Gulf Oil v. State Mineral Board*, 317 So. 2d 576 (La. 1975) reversed the earlier decision and held that it did not. The *Gulf Oil* court declined to decide the issue of whether Act 727 of 1954, which had attempted to legislatively overrule *California v. Price*, was valid as an interpretative statute. The court did, however, state that Act 727 would be valid under the holding of *Illinois Central* (see *infra* discussion at notes 77-79). Since the Louisiana Constitution of 1921, it has been unconstitutional for the State to alienate navigable waterbottoms. So as it stands in Louisiana today, some public trust waterbottoms may be under private title, but these titles are revocable under the statutory law and the holding in *Gulf Oil*.

65. H. B. 538, Reg. Sess. La. 1991.

provided that waterbottoms other than the sea and its shores and navigable-in-fact water bodies constituted "inland nonnavigable water bodies" which could be privately owned, and that alienation by the state of land encompassing such inland nonnavigable waterbodies would be deemed to convey those waterbodies unless specifically reserved by the state. House Bill 538 applied to lands acquired by the state in any manner, specifically including lands obtained by the Swamp Land Grant Acts and under the equal footing doctrine. House Bill 539 proposed to amend Civil Code article 451 to change the definition of seashore to "the space of land *in the open coast* over which the waters of the sea spread *directly* in the highest tide during the winter season."<sup>66</sup> Neither of the bills were passed; instead a compromise was reached between proponents and opponents which resulted in the passage of House Concurrent Resolution No. 145.<sup>67</sup> The resolution directed the Louisiana State Law Institute to determine the status of Louisiana law regarding "ownership of nonnavigable waterbottoms subject to the ebb and flow of the tide" and what changes if any had been effected by *Phillips Petroleum*, and to report its findings to a special joint subcommittee of the legislature by February 1, 1992.

There are several issues that will undoubtedly be considered by the Louisiana State Law Institute in fulfilling its legislative mandate and by the legislature if the same or similar legislation is introduced in 1992. The first question that arises is whether Louisiana's conception of the public trust doctrine's geographical scope has historically encompassed nonnavigable tidelands. If these tidelands are recognized to be part of the sea and its shores, then they have always been unsusceptible of private ownership under the Civil Code. If the Code did not classify nonnavigable tidelands as seashore, were they unsusceptible of private ownership under some other provision of law, or was there a recognized public policy to that effect? In either instance, patents purporting to convey them would be absolutely null under *Gulf Oil* (discussed below). The second question that must be answered is whether Louisiana ever clearly and expressly alienated its nonnavigable tidelands.<sup>68</sup> Thirdly, if nonnavigable tidelands were alienated, would that action be null or revocable under *Illinois Central* and *Gulf Oil*? The Louisiana legislature added to the confusion by passing what appears to be imprecise and ambiguous legislation affecting public trust waterbottoms beginning in 1855 and continuing well into this century.<sup>69</sup> A chronology of this legislation demonstrates legislative uncertainty in early dealings with

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66. H. B. 539, Reg. Sess. La. 1991.

67. H. C. R. 145, 17th Reg. Sess. La. 1991, La. Session Law Service (West).

68. See *supra* note 39.

69. See the summary of legislative acts affecting public trust waterbottoms in the appendix.

public trust lands, followed by very definitive statements affirming the public trust doctrine. As can be seen from the acts authorizing the sale of land, the terms "swamplands," "overflowed lands," "lands subject to regular tidal overflow," "lands subject to tidal overflow," "sea marsh," "prairie," and "lands . . . that belong to the state by virtue of her inherent sovereignty" were all used at one time or another.<sup>70</sup> These words are never clearly defined, and some appear to have been used interchangeably. In none is the term "ebb and flow of the tide" used, leaving unanswered the question of the relationship of the terms "swamp and overflowed lands" to tidelands and seashore and whether the difference was recognized during that period.<sup>71</sup>

#### APPLICABILITY OF *GULF OIL* TO NONNAVIGABLE TIDELANDS

In finding patents purporting to convey navigable waterbottoms to private parties absolutely null, and not cured by Act 62 of 1912,<sup>72</sup> the *Gulf Oil* court never used the term tidelands or nonnavigable tidelands. Obviously, this could indicate that the case does not apply to tidelands other than the sea and arms of the sea which the court specifically included in its holding.<sup>73</sup> However, there is evidence that the *Gulf Oil* court contemplated nonnavigable tidelands within the scope of its holding. First, the court established that navigable waterbottoms other than rivers were inalienable and cited in support three cases which had stated tidelands were within the public trust, independent of finding them to be navigable.<sup>74</sup> Thus, the implication is that all tidelands are considered to be included in the term navigable waters. Second, the *Gulf Oil* court cited the Oyster Statutes as indicative of the long-standing public policy against alienation of navigable waterbottoms.<sup>75</sup> But, as will be shown, the Oyster Statutes have never been limited to navigable waters. The court either misstated the scope of the Oyster Statutes or considered the waterbottoms covered by them, including nonnavigable tidelands, to be within the conception of navigability for public trust purposes. Third, the court analyzed the intent of Act 75 of 1880, which authorized the

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70. *Id.*

71. Yiannopoulos Article, *supra* note 4, at 1361; Yiannopoulos Treatise, *supra* note 4, at §§ 66 & 73.

72. See *supra* note 64.

73. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d. 576, 582-83 (1975).

74. *State ex. rel. Board of Comm'rs of Atchafalaya Basin Levee District v. Capdeville*, 146 La. 94, 83 So. 421 (1919), cert. denied, 252 U.S. 581, 40 S. Ct. 346 (1920) (see *infra* discussion at notes 106, 107); *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912) (see discussion at notes 108, 109); *Louisiana Navigation Co. v. Oyster Comm'n of Louisiana*, 125 La. 740, 51 So. 706 (1910) (see discussion at notes 110-13).

75. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d. 576, 583 (La. 1975); 1880 La. Acts No. 75.

sale of sea marsh or prairie subject to tidal overflow acquired in the 1849 and 1850 federal grants:

Moreover, in formulating Act No. 75 of 1880, the legislature did not enunciate as specific a recognition of public policy as it had in the two previous statutes, *but it did exercise extreme caution in providing that the lands it authorized to be sold were only those received by the State under the Swamp Land Acts of 1849 and 1850. This specific restriction evinces an intent to make certain that inalienable water beds were excluded*, in recognition of the public policy emanating from the Civil Code.<sup>76</sup>

More simply, only those lands acquired by the state through the Swamp Land Grant Acts could be sold by the state's acts purporting to convey the same lands to private parties. Nonnavigable tidelands did not belong to the state by virtue of the Swamp Land Grant Acts, but by virtue of inherent sovereignty and "equal footing."<sup>77</sup> Therefore, under the *Gulf Oil* court's analysis of Act 75 of 1880, nonnavigable tidelands were not within the Swamp Land Grant Acts and thus could be considered inalienable waterbeds. Fourth, the court analyzed Act 727 of 1954.<sup>78</sup> Section 3 of Act 727 prohibits statutes from being construed as conveying navigable *or tide waters*.<sup>79</sup> Without so holding, the court stated that Act 727 would be valid under the public trust doctrine as enunciated in *Illinois Central*.<sup>80</sup> The court was thus citing with approval a statute which includes tide waters in the public trust.

Finally, the court in *Gulf Oil* discussed the importance of the public trust doctrine in shaping public policy regarding the treatment of navigable waterbottoms. The court stated that the public trust doctrine could, on its own, be dispositive of the case before it.<sup>81</sup> The court then reiterated that by virtue of their inherent sovereignty and under the equal footing doctrine, states acquired navigable water bodies in public trust, and that *Illinois Central* prohibits a state's abdication of its "trust over property in which the people as a whole are interested so as to leave it entirely under the use and control of private parties."<sup>82</sup> While the court spoke in terms of navigable waters, the public trust doctrine on which it based its argument is not limited to navigable waters, but encompasses land under tide waters whether or not navigable. This is obvious from the federal pronouncements of the public trust doctrine,

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76. *Gulf Oil*, 317 So. 2d at 583 (emphasis added).

77. See *supra* discussion of *Phillips Petroleum* at notes 18, 19.

78. *Gulf Oil*, 317 So. 2d at 590-91.

79. *Id.* at 590; 1954 La. Acts No. 727, § 3.

80. *Gulf Oil*, 317 So. 2d at 591.

81. *Id.* at 589.

82. *Id.*

of which *Illinois Central* is a part.<sup>83</sup> Additionally, nonnavigable tidelands are certainly property in which the people as a whole are interested, especially in light of their natural resources and fisheries production values.<sup>84</sup> The natural resources value of tidelands has become more apparent with increasing scientific knowledge, but the passage of the 1886 oyster statute indicates an existing recognition of the importance of tidelands to all the people of the state.<sup>85</sup> Given the fact that the court in *Gulf Oil* relied on federal pronouncements of the public trust doctrine, which include nonnavigable tidelands, and the fact that nonnavigable tidelands are property in which the people as a whole are interested, nonnavigable tidelands can reasonably be considered to have been encompassed within the scope of the holding.

Together, all of the points just stated argue for applying the holding in *Gulf Oil* to nonnavigable tidelands. This argument is especially compelling in light of public policy, which has come to recognize intertidal areas as invaluable to all citizens of the state for their ecological and economic importance.

#### WHICH TIDELANDS ARE SEASHORE?

Official comment (b) to the 1978 revision of Louisiana Civil Code article 451 states that Louisiana jurisprudence has limited the definition of seashore to "the space of land in the *open* coast that is *directly* overflown by the tides."<sup>86</sup> Other cases have used this language, first set

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83. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791 (1988); *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548 (1894).

84. Herke, Knudsen, Knudsen & Rogers, *Effect of Semi-impoundment on Fish and Crustacean Nursery Use and Export*, North American Journal of Fisheries Management (in press); William H. Herke and Barton D. Rogers, *Comprehensive Estuarine Nursery Study Completed*, 9 Fisheries, No. 6 (1984); William H. Herke, *Use of Natural, and Semi-Impounded, Louisiana Tidal Marshes as Nurseries for Fishes and Crustaceans*, Ph. D. dissertation, Louisiana State University (1971); U.S. Dept. of the Interior, *A Study of Marsh Management Practice in Coastal Louisiana*, OCS Study, MMS 90-0076 vol. II, 66-68, 72-76 (1990); Thomas J. Minello and Roger J. Zimmerman, *Fish Predation on Juvenile Brown Shrimp, *Penaeus aztecus**, Ives: The Effect of Simulated *Spartina* Structure on Predation Rates, 72 J. Exp. Mar. Biol. Ecol. 211 (1983); Roger J. Zimmerman and Thomas J. Minello, *Densities of *Penaeus aztecus*, *Penaeus setiferus*, and other Natant Macrofauna in a Texas Salt Marsh*, 7 Estuaries 421 (1984); Roger J. Zimmerman, Thomas J. Minello, and Gilbert Zamora, Jr., *Selection of Vegetated Habitat by Brown Shrimp, *Penaeus aztecus*, in a Galveston Bay Salt Marsh*, 82 (2) Fishery Bulletin 325-36 (1984).

85. 1886 La. Acts 106; see *infra* discussion at note 116.

86. La. Civ. Code art. 451, comment (b): "According to Louisiana decisions seashore is the space of land in the *open* coast that is *directly* overflown [sic] by the tides. See *Buras v. Salinovich*, 154 La. 495, 97 So. 748 (1923); *Morgan v. Negodich*, 40 La. Ann. 246, 3 So. 636 (1887). See also *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906). Thus, not all lands subject to tidal overflow are 'seashore.'"



forth in *Morgan*, to define seashore.<sup>87</sup> However, the jurisprudence interpreting Article 451's reference to seashore is not as determinative or consistent as the official comment to the article indicates. At least one eminent legal scholar on Louisiana property law has questioned the effect of *Morgan* and *Buras* on the scope of Louisiana's public trust doctrine.<sup>88</sup> A close examination of these decisions shows why. The earliest case, *Morgan* (decided in 1887), appears to rest on a poor understanding of the facts relating to the physical processes affecting the disputed water body, Bayou Cook, which is about three miles from the open coast to the south and about three miles from the Mississippi River to the north. Bayou Cook, apparently a navigable-in-fact bayou (two "acres" wide and twenty feet deep), connected two bays, one considered by the court to be an arm of the sea. The court made several statements regarding the hydrology of Bayou Cook:

He avers that this property is subject to tidal overflow . . . .<sup>89</sup>;

. . . .  
 . . . Some water passes into it [Bayou Cook] from the Mississippi river, through small bayous, and an adjacent swamp; and some salt water comes into it by way of Bay Bastian, from the gulf. This commixture of fresh and salt water is decidedly brackish.<sup>90</sup>

. . . The proof does not clearly show the extent to which the ebb and flow of the tides of the gulf affect those lands on the shores of Bayou Cook, or whether or not the oyster beds of the defendants are, at any time, bared by the ebb-tide. Evidently the salt water found in Bayou Cook does not result from the overflow occasioned by the high tides flooding its banks; it enters Bay Bastian, in the first instance, and thence passes into Bayou Cook. The salt water thus supplied, combined with the accumulation of fresh water derived from the Mississippi river, floods the banks of Bayou Cook and passes into the adjacent marsh, to be returned again to the gulf, when the tide is low. . . .<sup>91</sup>

. . . The salt water ascertained to be in Bayou Cook, is not supplied by a "water-flood" from the gulf; nor do "the waters of the sea (gulf) spread, in the highest water, during the winter season," over its banks. . . .<sup>92</sup>

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87. *Davis Oil Co. v. Citrus Land Co.*, 576 So. 2d 495 (La. 1991); *State v. Erwin*, 173 La. 507, 138 So. 84 (1931); *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 113 So. 833 (1927).

88. Yiannopoulos Article, *supra* note 4, at 1364; Yiannopoulos Treatise, *supra* note 4, at § 73.

89. *Morgan v. Negodich*, 40 La. Ann. 246, 247, 3 So. 636, 637 (La. 1887).

90. *Id.* at 251, 3 So. at 639.

91. *Id.*, 3 So. at 639.

92. *Id.* at 252, 3 So. at 640.

Several things are confusing about the language in *Morgan*, which raises questions as to whether the physical nature of the area in dispute constituted tidelands under the public trust doctrine and *Phillips* and as to the court's level of knowledge regarding Bayou Cook:

- (1) Was Bayou Cook affected by daily ebb and flow from astronomically driven tides or was it tidally overflowed periodically by wind driven water, especially during storms? Or, was Bayou Cook primarily overflowed by flood water from the Mississippi River?
- (2) Did the court consider Bayou Cook to be affected by daily (astronomical) ebb and flow or by other sources of overflow?
- (3) Did the court understand the difference between daily ebb and flow, tidal overflow, and other flooding so common in the Louisiana coastal area?
- (4) What was the significance of using salinity to characterize the water in Bayou Cook?
- (5) Finally, *Morgan* was decided in 1887, one year after the 1886 Oyster Statute<sup>93</sup> had asserted state ownership to water bodies bordering on the coast. Bayou Cook was a navigable water body and therefore inalienable. *Morgan* was not a possessory or petitory action, but decided the exclusive right to use the disputed waterbottoms for the cultivation of oysters.<sup>94</sup> In that context, did the court intend to establish a sweeping rule of property ownership along Louisiana's coast or was it merely establishing who had the right to harvest oysters in this particular case?

*Buras* followed the holding in *Morgan*, but again the facts are unclear. The land, bordering on the Mississippi River 85 miles south of New Orleans, is described as being "subject to tidal overflow, and not fit for cultivation."<sup>95</sup> In finding the plaintiff's land not to be seashore, the court stated:

The waters of the Gulf of Mexico, or the bays or coves behind plaintiff's land, do not "spread" upon it, during the ordinary high tides, or in the highwater seasons. The tide waters back up into the coves behind the land, and cause the bayous in the land to rise and spread over most of the area.<sup>96</sup>

Nowhere in the decision is there any mention of the land being subject to the ebb and flow of the tide. It sounds as if the lands in question were marsh lands above high tide and therefore not tidelands. Thus,

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93. 1886 La. Acts No. 106.

94. *Morgan*, 40 La. Ann. at 247, 3 So. at 637.

95. *Buras v. Salinovich*, 154 La. 495, 97 So. 748 (La. 1923).

96. *Id.* at 500, 97 So. at 750.

*Buras* cannot really stand for excluding tidelands that are not on the open coast from the definition of seashore.

In *Burns*<sup>97</sup> a bayou and lagoon connected to the shores of Lake Pontchartrain were held not to be arms of the sea even though they were affected by the ebb and flow of the tides. These lands would probably qualify as *Phillips*-type tidelands. The court again seemed to attempt to use salinity as a determining factor for one of the water bodies:

It has no channel, and its waters are not the same as those of the lake; for in it are found the fresh-water fish to which we have before referred. . . . It is not navigable, nor can it be considered a part of Lake Pontchartrain or any part of its shores. It is a container of fresh water and, while it may be affected by the ebb and flow from the lake, it is not a salt-water pond or lake.<sup>98</sup>

A salinity test is confusing, especially in light of the fact that Lake Pontchartrain, which has been found to be an arm of the sea,<sup>99</sup> is very often essentially fresh, depending on the season. In finding Bayou Castiglione not to be a part of an arm of the sea, the court cited French and Spanish authority<sup>100</sup> but curiously did not cite *Morgan*.

In the *Sweet Lake*<sup>101</sup> decision, the court decided that Sweet Lake, located fifteen miles from the Gulf, was not within the tidewaters of the sea. However, this lake was described as "an isolated body of rain water in the midst of a dense sea marsh, without a natural inlet or outlet large enough for a pirogue to navigate."<sup>102</sup> No mention is made of tidal influence, and even though *Morgan* is cited in support of the decision, these were apparently not tidelands like those considered under the holding in *Phillips*.

In *State v. Erwin*,<sup>103</sup> Calcasieu Lake, a usually fresh lake "affected more or less by the tides, especially at the southern end,"<sup>104</sup> was found not to be an arm of the sea. The court quoted *Morgan* and *Buras* as authority for its decision. This case arose when riparian land owners challenged the state's ownership of a portion of the lake bed which had once comprised their property but had been lost by erosion of the lake's shores. The original decision dealt with whether Calcasieu Lake was a

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97. *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906).

98. *Id.* at 1042, 41 So. at 251.

99. *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882).

100. *Burns*, 116 La. at 1043, 41 So. at 251, quoting Laurent, Baudry, and Dalloz.

101. *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 113 So. 833 (1927).

102. *Id.* at 147, 113 So. at 836.

103. 173 La. 507, 138 So. 84 (1931).

104. *Id.* at 510, 133 So. at 85.

lake or a river, whether the laws of accretion and dereliction applied to lakes, and whether erosion on a navigable lake's shores vested state ownership in the new lakebed areas. When the state lost its ownership argument, it contended the lake was an arm of the sea, and the court decided on rehearing that Calcasieu Lake is not an arm of the sea. The geography of Calcasieu Lake would seem to limit the effect of this decision as an interpretation of seashore. The lake is at least five miles from the Gulf, and its outlet is very restricted. It is of a very different character from many of the areas in question. Still, it appears to qualify as *Phillips*-type tidelands. It is significant, however, that the court was not placed in the position of deciding between state and private ownership of the original bed since the lake is navigable, but had to decide only ownership of the eroded areas.

*Davis Oil Co. v. Citrus Land Co.*<sup>105</sup> followed the interpretation of seashore in *Morgan* and *Buras*. However, even though these two cases are cited as supporting the finding of a seashore, there are two points that weaken the proposition that seashore is limited to the open coast directly overflowed by the tides. First, *Davis* found that Little Bay is directly overflowed by the Gulf tide, so this positive finding sheds little light on what is *not* seashore. Second, and more importantly, an examination of the area in question reveals that it lies at least in part behind other land masses. So, in that situation, what does "directly overflowed" mean? Additionally, the court's finding has the effect of expanding the public trust, so it cannot be used as an example of a restriction of that trust.

There are other Louisiana Supreme Court decisions which used ebb and flow of the tides as the determinant of state ownership without requiring the lands in question to be on the open coast or directly overflowed by the tides. The ownership of four lakes ranging in depth from three inches to over nine feet was under dispute in *State ex rel Board of Commissioners of Atchafalaya Basin Levee District v. Capdeville*.<sup>106</sup> The lakes had been encompassed in the Federal Swamp Land Grants of 1849 and 1850, and the question arose as to whether the state had alienated them when it sold the surrounding tracts to private parties. The court found that at least portions of three lakes were navigable year-round, one was navigable in high water, and all were subject to the regular ebb and flow of the tides. In holding that the state still held title to the waterbottoms, the court used as part of its argument the fact that the waters of the lakes were within the tidewaters of the sea:

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105. 576 So. 2d 495 (La. 1991).

106. 146 La. 94, 83 So. 421 (1919).

Neither do the beds of streams, lakes, etc., within the tidewaters of the sea belong to the United States, but, for the reasons just stated, are the property of the state.

*Consequently, no property which fell within either category, that is, the beds of navigable streams, lakes, etc., or those within the tidewaters of the sea, ever came under the operation of the Swamp Land Acts. All of the lakes, whose beds are involved in this case (with the possible exception of Little Lake Long), according to the record, are navigable (at least portions thereof) the whole year round, by small craft, and in high-water seasons all are navigable to steamboats, and are so used. They are all also shown to be within the ebb and flow of the tides. It follows that they were not included in the swamp and overflowed lands granted by Congress to the state, and by the latter transferred to the Atchafalaya Basin levee district.<sup>107</sup>*

The bodies of water in question were at least fifteen miles from the shores of the open coast, yet the court found they were in the tidewaters of the sea. Such a determination was probably not necessary. Although there was doubt as to the navigability of one, the court found the lakes to have been navigable. The court appears to have used the tidewaters of the sea determination as an alternative or additional argument to bolster its decision. In any event, *State v. Capdeville* does not support the proposition that Louisiana jurisprudence has consistently defined seashore as lands in the open coast which are directly overflowed by the tides.

*State v. Bayou Johnson Oyster Co.*<sup>108</sup> decided the character of several bodies of water ranging in depth from two-and-a-half to twelve feet and as much as two-and-a-half to three miles from the shores of Lake Borgne. After determining that the water bodies were tidelands and therefore not included in the Swamp Land Grants of 1849 and 1850, the court stated:

the conveyance to Sanger was nevertheless a conveyance of public lands which the state held for sale, and did not purport to be a conveyance of navigable *and tide waters and waterbottoms, which the state was holding in trust for all of her citizens.*

It may be, and probably is, true that there is no legal impediment in the way of the state's alienating such property in favor of particular individuals or corporations, save in so far as such alienations might conflict with the power vested in Congress to regulate interstate and foreign commerce; but, as

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107. *Id.* at 107, 83 So. at 425 (emphasis added).

108. 130 La. 604, 58 So. 405 (1912). See also *infra* text accompanying notes 146-48.

we have already seen, *her declared policy has always been not to do so, and any statute or contract from which such effect were claimed would, necessarily, be strictly construed against the grantee.*<sup>109</sup>

In *Louisiana Navigation Co. v. Oyster Commission of Louisiana*,<sup>110</sup> a dispute arose between the state and private owners of land in St. Bernard Parish adjacent to the Gulf of Mexico over ownership of waterbottoms encompassed by the plaintiff's property. The private claimants traced their title to the Swamp Land Grants. Several of these waterbottoms were bayous and coves that were sheltered from the "direct" (if the word is given its literal meaning) influence of the tides, but subject to the ebb and flow of the tides. In other words, there was not a direct path for the water to flow from the open Gulf, but tides still rose and fell in the water bodies. The court did not know if the passes were navigable-in-fact. The court found that there may be "non-navigable streams, pools, ponds, and wet places, so insignificant in dimensions *and so within the borders of the dry land* covered by plaintiff's grants as that plaintiff would be entitled to hold them, as included therein."<sup>111</sup> The waters the court described, being within the borders of dry land, would not have been subject to the daily ebb and flow of the tides, but with respect to the tidally-influenced waterbottoms in question the court said:

Hence, there can be no such thing in this state as private ownership of the bed of a navigable river, and a fortiori can there be no such thing as private ownership of the bed of the sea or of an arm of the sea. . . .<sup>112</sup>

We conclude, then, that the grants under which plaintiff claims—being of land bordering upon, and partially surrounded by, the *tide water* of the Gulf of Mexico—carry its titles no farther than high-water mark, and that, in so far as it (plaintiff) asserts ownership and possession, under such titles, of land lying beneath the waters which surround the tracts of dry land included in said grants, or, lying beneath any navigable passes, or channels, which intersect such tracts or separate them from each other, the exception, of no cause of action, was properly maintained.<sup>113</sup>

Therefore, without a finding that they were navigable-in-fact, these waterbottoms were found to constitute the bed of the sea or arms of

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109. Id. at 68, 58 So. at 410 (emphasis added).

110. 125 La. 740, 51 So. 706 (1910).

111. Id. at 755, 51 So. at 712 (emphasis added).

112. Id. at 754, 51 So. at 711.

113. Id. at 755, 51 So. at 711-12.

the sea, even though they were not "directly" overflowed by the tides.

The foregoing analysis indicates the jurisprudence of this state has not necessarily been consistent in its interpretation of seashore; thus there is not jurisprudence constante on this issue.<sup>114</sup> Therefore, the proposed legislation very possibly does not constitute an interpretation or a clarification of the law, but is a redefinition—one that could divest the state's public trust of hundreds of thousands of acres (or more) of intertidal waterbottoms.

#### HAS LOUISIANA EXPRESSED A PUBLIC POLICY THAT INCLUDES NONNAVIGABLE TIDELANDS IN THE PUBLIC TRUST?

Besides the possibility that nonnavigable tidelands could be recognized as part of the sea or seashore under Civil Code article 451, what other public policies has Louisiana expressed in its management of these waterbottoms? Statutes affecting nonnavigable tidelands can be categorized into those authorizing the sale of state-owned land and those asserting state ownership.<sup>115</sup> Those acts authorizing the sale of state lands will be discussed in the following section. In this section we will examine statutes asserting state ownership to public trust waterbottoms.

In 1870 the legislature passed the first of a series of acts commonly referred to as "Oyster Statutes."<sup>116</sup> These statutes dealt with the regulation and development of Louisiana's oyster industry and, beginning with Act 106 of 1886, each contains a clause which we will term a "state ownership clause" substantially similar in substance. For example, Act 106 of 1886 contains the following language:

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114. For discussions of the use of judicial precedents as a source of law in Louisiana see Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 727 (1962); William T. Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 Tul. L. Rev. 1 (1973); A. N. Yiannopoulos, *Civil Law System Coursebook Part I* § 35 (1977); and Yiannopoulos *Treatise*, supra note 4, at § 73. In *Miami Corp. v. State*, 186 La. 784, 802, 317 So. 2d 576, 173 So. 315, 320 (1936), the court stated: "In Louisiana, this court has never hesitated to overrule a line of decisions where they establish a rule of property when greater harm would result from perpetuating the error than from correcting." In *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576, 591 (La. 1975), the court, citing with approval the above quote from *Miami Corp.*, stated: "The so-called rule of property has little or no validity in this civilian jurisdiction. That concept stems from the theory of *stare decisis*, is founded entirely upon common law, and finds no basis in our Civil Code, or in our statutory law. Stability in the law and constancy of jurisprudence are undoubtedly objects to be constantly sought. However, when it is necessary to overrule a short line of clearly erroneous jurisprudence in order to reinstate the long-standing law and public policy of this State, that course is clearly the one that must be followed." In these situations, the Louisiana Supreme Court has overruled prior decisions affecting property rights when strong public policy considerations were at stake.

115. See Appendix.

116. See Appendix.

Section 1. *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 shell fish, 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).<sup>117</sup>

Act 106 also provided that riparian land owners adjoining rivers, bays, lakes, bayous, coves, inlets, or passes would have the exclusive right to use waterbottoms comprised within the boundaries of their land for oyster cultivation.<sup>118</sup> Other riparian owners were given the right to use the water bodies to the low-water mark for oyster cultivation.

Act 110 of 1892, which repealed Act 106 of 1886, read as follows:

Section 1. *Be it enacted by the General Assembly of the State of Louisiana*. That all the beds of the rivers, bayous, creeks, lakes, coves, and inlets, bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of this State, shall continue and remain the property of the State of Louisiana, and may be used as a common by all citizens of the State for the purposes of fishing and taking and catching oysters and other shell fish 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; and the citizens, of this State shall have the exclusive privilege to fish or take oysters in any natural oyster bed or shoal subject to the restrictions hereinafter imposed.<sup>119</sup>

Act 110 of 1892 deleted from the previous enactment (Act 106 of 1886) the phrases "sea marshes" and "and not heretofore sold or conveyed by special grants or by sale by this State, or by the United States to

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117. 1886 La. Acts No. 106, § 1.

118. 1886 La. Acts No. 106, § 2.

119. 1892 La. Acts No. 110, § 1.



any private party or parties." These changes were continued in the 1896 enactment.<sup>120</sup> In Act 153 of 1902, the phrase "bordering on the Gulf of Mexico" was changed to read "bordering on or connecting with the Gulf of Mexico," and the clause remained essentially unchanged in successive Oyster Statutes.<sup>121</sup>

Of course, it could be concluded that the language in the first Oyster Statute "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," evinces a recognition that nonnavigable tidelands could be alienated prior to enactment of the statute. Just as logical a conclusion is that this language refers to those waterbottoms susceptible of being alienated, i.e., nonnavigable and non-tidally-influenced waterbottoms. Additionally, since all tidelands came to the state by virtue of her inherent sovereignty, how could the United States have sold them? This phrase did not appear in any subsequent enactments.

In 1904, Act 52 added a provision prohibiting anyone from owning in fee simple the bottoms of navigable waters.<sup>122</sup> The use of the term "navigable" raises the question of whether the statute intended to indicate by negative implication that nonnavigable tidelands were susceptible of private ownership in fee simple. Three facts mitigate against such an interpretation. First, Section 1 of Act 52 (and all subsequent enactments) asserted state ownership to *all* the enumerated water bodies bordering on or connecting to the Gulf of Mexico. Second, reenactments in 1906 and 1908 left this provision intact but described it as prohibiting the alienation in fee simple of "the bottom or beds of the bodies or streams of water along the coast of the Gulf of Mexico, and the waters of the Gulf of Mexico within the jurisdiction of the State of Louisiana."<sup>123</sup> There is no description of the water bodies or streams being navigable. Third, Act 189 of 1910 repealed the previous Oyster Statutes and prohibited anyone from owning in fee simple *any* waterbottoms described therein<sup>124</sup> (i.e., "rivers, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico within the jurisdiction of the State of Louisiana").

The Oyster Statutes indicate a strong public policy to include non-navigable tidelands in the state's public trust. Whether such a policy existed prior to 1886 independent of the Civil Code provision regarding the sea and its shores cannot be conclusively proven. However, a logical conclusion is that by enacting the Oyster Statutes, the legislature was

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120. 1896 La. Acts No. 121, § 1.

121. 1902 La. Acts No. 153, § 1 (emphasis added); see Appendix for later Oyster Statutes.

122. 1904 La. Acts No. 52, § 2.

123. 1906 La. Acts No. 178, § 1; 1908 La. Acts No. 167, preamble.

124. 1910 La. Acts No. 189, § 2.

merely clarifying and strengthening preexisting public policy which included nonnavigable tidelands in the public trust. The Louisiana Supreme Court recognized such a policy in *State v. Capdeville* and *State v. Bayou Johnson Oyster Co.*<sup>125</sup>

At least one lower court case has limited the scope of the Oyster Statutes to areas bordering on, or connecting with, the Gulf where oysters can be cultivated.<sup>126</sup> This court of appeal decision dealt with waterbottoms more than 50 miles from the Gulf and, therefore, would not seem to have much effect as precedent. Additionally, oysters are known to occur in a great range of salinities,<sup>127</sup> so even if there were such a limitation, it would still encompass waterbottoms a substantial distance from the open coast.<sup>128</sup> Finally, the court in *Gulf Oil* recognized no such limitation when it cited the Oyster Statutes as an example of public policy regarding navigable water bodies.

Besides the Oyster Statutes, other legislative enactments have reflected a strong public policy toward including nonnavigable tidelands within the public trust (see Appendix). For example, Act 258 of 1910 declared that:

Section 1. Be it enacted by the General Assembly of the State of Louisiana, that the waters of and in all bayous, lagoons, lakes and bays and the beds thereof, within the borders of the State not at present under the direct ownership of any person, firm, or corporation are hereby declared to be the property of the State. There shall never by any charge assessed against any person, firm or corporation for the use of the waters of the State for municipal, agricultural or domestic purposes.<sup>129</sup>

This Act applied to all waters—navigable, nonnavigable, tidal, and non-tidal. Consequently, as with the Oyster Statutes, the phrase “not at present under the direct ownership” does not necessarily attempt to ratify alienation of navigable or tidal water bodies. Just as logically, it could merely be ratifying the sale of alienable waterbottoms. In 1912 the legislature enacted the now-famous Act 62 which limited the period for challenging validity of a state land patent to six years from date of issuance.<sup>130</sup> In 1921, the constitution was amended to read,

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125. See *supra* text accompanying notes 106-09.

126. *Sinclair Oil and Gas Co. v. Delacroix Corp.*, 285 So. 2d 845, 854 (La. App. 4th Cir. 1973).

127. Gulf States Marine Fisheries Commission, *The Oyster Fishery of the Gulf of Mexico*, United States, March 1991, at 5-16.

128. See, for example, Center for Wetland Resources, *Barataria Basin: Salinity Changes and Oyster Distribution*, Sea Grant Publication No. LSU-T-76-004 at 30-33, 47-50 (1976).

129. 1910 La. Acts No. 258, § 1; La. R.S. 9:1101 (1991).

130. La. R.S. 9:5661 (1991); see *supra* text accompanying note 64.

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.<sup>131</sup>

In 1938, Act 55 was enacted "[t]o declare the sovereignty of Louisiana along its seacoast and to fix its present seacoast boundary and ownership."<sup>132</sup> Section 3 of that act stated:

Section 3. That the State of Louisiana owns in full and complete ownership the waters of the Gulf of Mexico and of the arms of the said Gulf and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico, including all lands that are covered by the waters of the said Gulf and its arms either at low tide or high tide, within the boundaries of Louisiana, as herein fixed.<sup>133</sup>

Act 727 of 1954, an attempt to legislatively overrule the *Price* line of cases,<sup>134</sup> states in part that no statute shall be construed to validate the transfer of "navigable or tide waters or the beds of same."<sup>135</sup> The court in *Gulf Oil* discussed this statute and, without holding so, strongly suggested that it is interpretative legislation. Because it was not necessary for its holding, the court did not decide the constitutionality of the Act, but stated that it would be valid anyway under the public trust doctrine as enunciated in *Illinois Central*.<sup>136</sup> In the same year (1954), Act 443 amended Act 258 of 1910 by rescinding and revoking purported conveyances of navigable waters and their beds.<sup>137</sup> The 1974 Louisiana Constitution continued the prohibition against alienation of navigable water bodies except for reclamation purposes.<sup>138</sup> Act 645 of 1978 proclaimed that 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.<sup>139</sup> Act 645 also allows riparian land owners to reclaim land lost through erosion.<sup>140</sup> Finally, Act 876 of 1985 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

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131. La. Const. of 1921 art. IV, § 2 (superseded 1974).

132. 1938 La. Acts No. 55, preamble.

133. 1938 La. Acts No. 55, § 3.

134. See supra note 64.

135. 1954 La. Acts No. 727, § 3 (La. R.S. 9:1107-1109 (1991)) (emphasis added).

136. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576, 590-91 (La. 1975).

137. 1954 La. Acts No. 443 § 1 (La. R.S. 9:1101 (1991)).

138. La. Const. art. IX, § 3.

139. La. R.S. 41:1701-1714 (1990).

140. La. R.S. 41:1702 (1990).

to R.S. 41:1701-1714" and states that "[n]o one shall own in fee simple any bottoms of lands covering the bottoms of waters described in this Section."<sup>141</sup> Again, there is no stipulation that the water bodies must be navigable. Although Act 876 contains state ownership language identical to that of previous Oyster Statutes, it is not an Oyster Statute, but is contained in the public lands section of the Revised Statutes. The current enactment of the Oyster Statutes is found at Louisiana Revised Statutes 56:3.

The point of this detailed and somewhat tedious analysis of statutory language is to demonstrate a consistent pattern in Louisiana's treatment of its nonnavigable tidelands. All of these statutes taken together present a strong argument that the state has recognized a public trust encompassing nonnavigable tidelands.

#### HAS LOUISIANA EXPRESSLY ALIENATED HER NONNAVIGABLE TIDELANDS?

We have already discussed why *Gulf Oil* can reasonably be applied to nonnavigable tidelands, and that the case affirmatively applies federal restrictions on alienation of public trust lands as set forth in *Illinois Central*.<sup>142</sup> *Gulf Oil* also established the requirement that alienations of navigable waters be express and specific:

It is now clearly manifested by the La. Constitution of 1921, Art. IV, § 2, and the La. Constitution of 1974, Art. IX, § 3, that the State can never divest itself of its navigable waterbottoms except through authority of the people themselves. We hold, for pre-constitutional purposes that because the beds of navigable waters of Louisiana are held in "public domain" for the people of the State, that at the very least (if at all possible) "\* \* \* [a]ny alienation or grant of the title to navigable waters by the legislature *must be express and specific and is never implied or presumed* from general language in a grant or statute. \* \* \*"<sup>143</sup>

The requirement for express language when alienating navigable waters should apply equally to other waterbottoms acquired by virtue of inherent sovereignty and held in public trust. Nonnavigable tidelands were placed in Louisiana's public trust along with navigable rivers at statehood. Just as there is a strong public interest in navigable rivers, so is there such an interest in nonnavigable tidelands. Indeed, the now widely recognized natural resource and environmental value of nonnavigable tidelands argue

141. La. R.S. 41:14 (1990).

142. See *supra* discussions at notes 72-85 and 136.

143. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576, 589 (La. 1975).

a fortiori that the requirement for express language when alienating public trust lands be applied to them.<sup>144</sup>

There is little conclusive evidence that the legislature has ever expressly and specifically alienated Louisiana's nonnavigable tidelands. The legislature has created confusion in enacting legislation affecting these tidelands that does not satisfy the requirements of the public trust doctrine and *Gulf Oil* for express and specific language. An illustrative list and summary of the acts we have found that relate to the disposition of the tidelands in question is provided in the Appendix. The legislature used several terms to describe the land the state was selling or granting without ever clearly defining the terms. The various acts described the land as "swamplands," "overflowed lands," "lands subject to regular tidal overflow," "lands subject to tidal overflow," "sea marsh," "prairie," and "lands that belong to the state by virtue of her inherent sovereignty," but never describe lands subject to the ebb and flow of the tides. Whether the legislature perceived a difference between swamp and overflowed lands and lands subject to the ebb and flow of the tides is very difficult to fathom from these acts.

Several cases have interpreted the acts authorizing the sale of swamp and overflowed lands donated by Congress—usually in an attempt to determine whether the legislature intended to and did sell along with those lands waterbottoms, such as nonnavigable tidelands acquired through inherent sovereignty. In *Chauvin v. Louisiana Oyster Commission*<sup>145</sup> a dispute arose between the Oyster Commission and a private party over the ownership of a waterbottom. The court held (in part) that the state was estopped to deny that Bay Crocodile, a nonnavigable saltwater bay subject to the ebb and flow of the tides, had been included in the sale of Federal Swamp Land Grant lands to a private party. However, in this case, the Oyster Commission was the party asserting the invalidity of the patent, and on rehearing the court affirmed the judgment on the ground that the Oyster Commission was not the proper representative of the state to assail the patent. The court did not again mention that the state would be estopped to deny that the patent had transferred Bay Crocodile, so the case cannot with any certainty stand for that proposition.

Other Louisiana decisions have held that tidelands did not come into state ownership via the Swamp Land Grants but were already state-owned, being acquired by virtue of inherent sovereignty at statehood and, therefore, not alienated with Swamp Land Grant sales.

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144. There has also been established a federal requirement for specific and express language when alienating public trust lands (see *supra* note 39).

145. 121 La. 10, 46 So. 38 (1907), on reh'g (1908).

This view was supported by the court in *State v. Bayou Johnson Oyster Co.*,<sup>146</sup> which was a dispute over tidally influenced water bodies ranging in depth from two-and-a-half to twelve feet and as much as two-and-a-half to three miles from the shores of Lake Borgne. The defendant claimed title derived from Swamp Land Grant sales, but the court said:

It is evident, then, that the state of Louisiana did not acquire the soil here claimed, which lies beneath the waters of intercommunicating sounds, bayous, creeks, channels, lakes, bays, coves, and inlets, bordering upon the Gulf of Mexico and *within the ebb and flow of the tide*, by virtue of the acts of Congress of 1849 and 1850, but that she acquired them, upon her admission into the Union, by virtue of her inherent sovereignty.<sup>147</sup>

The court in *Bayou Johnson* went on to say that it had always been the declared policy of the state not to alienate such waterbottoms.<sup>148</sup>

In *State v. Capdeville*,<sup>149</sup> the court decided the ownership of lakes at least fifteen miles from the Gulf that had been encompassed in the Federal Swamp Land Grant Acts of 1849 and 1850, and the question arose as to whether the state had alienated them when it sold the surrounding tracts to private parties. The court found that at least portions of three lakes were navigable year round, one was navigable in high water, and all were subject to the regular ebb and flow of the tides.<sup>150</sup> In holding that the state still held title to the waterbottoms the court stated that navigable water bodies and tidewaters of the sea were never included in Swamp Land Grant sales.<sup>151</sup> Thus, *State v. Capdeville* does not support the proposition that Louisiana intended to sell its tidelands, whether or not navigable.

As already discussed, the court in *Gulf Oil* analyzed the intent of Act 75 of 1880, which authorized the sale of "sea marsh or prairie subject to tidal overflow," and found it authorized only the sale of those lands received in the federal grants of 1849 and 1850. These grants did not include lands acquired through inherent sovereignty such as tidelands.<sup>152</sup>

*Board of Commissioners for Buras Levee District v. Mt. Forest Fur Farms of America*<sup>153</sup> involved a dispute over lands which had been

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146. 130 La. 604, 58 So. 405 (1912). See also supra text accompanying notes 108-09.

147. Id. at 611, 58 So. at 407.

148. Id., 58 So. at 407.

149. State ex rel. Board of Comm'rs of Atchafalaya Basin Levee District v. Capdeville, 146 La. 94, 107, 83 So. 421, 425 (1919). See supra discussion at notes 106, 107.

150. *Capdeville*, 146 La. at 94, 83 So. at 421.

151. Id., 83 So. at 421. See supra text accompanying notes 106, 107.

152. See supra discussion at notes 76, 77.

153. 178 La. Ann. 696, 152 So. 497 (1933).

alienated by the state and a contest over boundary lines near an oil well. The legislature had transferred to the Buras Levee District, a political subdivision of the state, by Act 205 of 1910 "all lands or parts of lands that were originally granted by the Congress of the United States to this State or that belonged to this state by virtue of her inherent sovereignty"<sup>154</sup> and authorized the levee district to "sell, mortgage, pledge or otherwise dispose of said lands as provided by law."<sup>155</sup> A plain reading of the language would indicate the state was authorizing one of its subdivisions to sell waterbottoms acquired by virtue of its inherent sovereignty, including navigable water bodies and all tidelands including the sea shore and sea bed. As we have already seen from *Gulf Oil*, interpreting Act 205 of 1910 to authorize alienation of navigable waters or the shores and bed of the sea would be directly against strong public policy and invalid under the holding in that case.<sup>156</sup> Can Act 205 be interpreted then to authorize the alienation of nonnavigable tidelands? Aside from applying *Gulf Oil* to nonnavigable tidelands, there are other indications that by enacting Act 205 of 1910 the legislature did not intend to alienate them. For example, in describing the lands in question the court stated:

A very large percentage of this territory is composed of water. There are various lakes and bays in each of the townships, *the beds of which the state did not pretend to sell. All it intended to sell was the land area.*<sup>157</sup>

No mention is made of navigability; therefore, the court appears to be asserting that the state did not intend to sell *any* waterbottoms. Later the court stated:

The state intended to grant, and did grant, to the levee board, and the board intended to sell, and did sell, to Jordan, trustee, *all the land area* within this parallelogram . . . this being apparent, because the state was obligated under legislative enactment to transfer all its lands of this character to the board;

. . . .

. . . The maps show that each of the quarter sections mentioned is entirely within either Lake Baptiste or Lake Grande Ecaille. *Hence no sale, of course.*<sup>158</sup>

This language strongly suggests that no sales of waterbottoms were intended. Earlier the court had made a general pronouncement regarding

154. *Id.* at 703-05, 152 So. at 499 (emphasis added); 1910 La. Acts No. 205, § 11.

155. 1910 La. Acts No. 205, § 11.

156. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576, 592 (La. 1975).

157. *Mt. Forest Fur Farms*, 178 La. Ann. at 697, 152 So. at 498 (emphasis added).

158. *Id.* at 718, 152 So. at 503 (emphasis added).

the difference between lands acquired through inherent sovereignty and those acquired under the Swamp Land Grants:

*The state owns, by virtue of its inherent sovereignty, all tidal overflow lands within its boundaries.* It is entitled to receive from the government all so-called swamp lands under the Swamp Land Act of March 2, 1849. The lands in this section of the state are all low; *some of them being tidal overflow and owned by the state by virtue of that fact.* Some of them are swamp lands as defined by the act of 1849.<sup>159</sup>

Again, this language raises the question of the meaning of the term "tidal overflow." Some of the acts authorizing the sale of lands acquired in the Swamp Land Grants used the term "tidal overflow" and "regular tidal overflow,"<sup>160</sup> but the court here is using the term "tidal overflow" to describe inherent sovereignty lands. Thus, we see another indication of confusion in describing lands being sold, and a lack of express intent to alienate nonnavigable tidelands.

In *State v. N.A. Baker*,<sup>161</sup> the state was again contesting title to lands that had been sold pursuant to Act 215 of 1908. In the opinion, the contract of sale by which the Buras Levee District sold the disputed property to N.A. Baker is reproduced verbatim. The contract contains the following clause: "It is a further condition that the said board of commissioners for the Buras levee district shall transfer only the lands of the various sections, and not to waterbottoms."<sup>162</sup> In this particular sale, then, the levee board, a political subdivision of the state, made it clear that no waterbottoms were to be transferred. Was this specific reservation limited only to this contract, or was it a standard clause? Such language weakens the theory that the state intended to sell any waterbottoms including nonnavigable tidelands. *N.A. Baker* also distinguishes between swamp and overflowed land acquired under the Swamp Land Grants and that belonging to the state by virtue of inherent sovereignty.<sup>163</sup> This is more evidence that the acts conveying lands acquired through the Swamp Land Grants did not purport to transfer nonnavigable tidelands which are sovereignty lands. So there is hardly convincing evidence that the state clearly or expressly alienated its non-navigable tidelands from the public trust.

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159. *Id.* at 704-05, 152 So. at 499 (emphasis added).

160. See Appendix: 1859 La. Acts No. 197; 1870 La. Acts No. 38; 1871 La. Acts No. 104, 1880 La. Acts No. 75.

161. *State ex rel. Board of Comm'rs of Buras Levee District v. N.A. Baker*, 146 La. 413, 83 So. 693 (1920).

162. *Id.* at 418, 83 So. at 695.

163. *Id.* at 419-20, 83 So. at 695.



ARE ALIENATIONS OF NONNAVIGABLE TIDELANDS TO PRIVATE PARTIES  
NULL OR REVOCABLE?

We have already discussed the limitations on a state's authority to alienate public trust waterbottoms established by *Illinois Central*<sup>164</sup> and the application of *Gulf Oil* to nonnavigable tidelands.<sup>165</sup> Under *Illinois Central* the alienation of nonnavigable tidelands would appear to be revocable. Indeed, such alienation amounts to a general abdication of state control over a large area and a substantial impairment of the public interest of the lands and waters remaining. For example, public access to the coastal area is a hotly-contested issue in Louisiana.<sup>166</sup> Private ownership of tidelands will in all likelihood impair public access. Protection of fisheries habitat is another issue that may be affected by private ownership.<sup>167</sup>

On the other hand, what public interests are promoted by placing nonnavigable tidelands in the private domain? Some may argue that private ownership promotes commerce and industry and stimulates the economy. However, such a direct relationship does not always exist, especially with marginal property such as tidelands. Tidelands and wetlands are most productive when left in their natural state, a state in which they provide great environmental and natural resource benefits. However, these benefits inure to all and not just the owner who is very often faced with the necessity of making immediate profits from his property. Very often adverse environmental impacts are the result of private property owners' short-term, profit-oriented activities. This has resulted in the explosion of environmental regulations under a state's police powers as it became obvious that the "market place" would not address environmental problems. In the area of wetlands protection, the clash between private property rights and protection of the resource has become heated. Two recent United States Court of Claims decisions have found takings in regulatory actions under section 404 of the Clean Water Act.<sup>168</sup> If private ownership of tidelands is increased by the proposed legislation,<sup>169</sup> such takings claims could severely hinder the state's ability to protect this priceless public resource. Such a result would seem directly opposed to the public policy of the state.

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164. See *supra* text accompanying notes 22-38.

165. See *supra* text accompanying notes 72-85.

166. *Summersgill Dardar v. Lafourche Realty Co.*, No. 85-1015, slip op. (E. D. La., May 16, 1991); see U.S. Dept. of Interior, *supra* note 84.

167. See U.S. Dept. of Interior, *supra* note 84.

168. *Florida Rock Indus. Inc. v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990).

169. See *supra* text accompanying notes 65-67.

We have already discussed why we think *Gulf Oil* can reasonably be applied to nonnavigable tidelands.<sup>170</sup> Under that reasoning, alienations of nonnavigable tidelands would certainly be null or revocable. The *Gulf Oil* decision is very much in line with the reasoning in *Illinois Central* regarding public policy,<sup>171</sup> and there is no reason to think the same policy would not apply to nonnavigable tidelands in light of their recognized value. As science advances our knowledge and understanding of the coastal area, the desire to protect and maintain it has increased. This can be seen from the increasing protectiveness of the oyster statutes and other state ownership statutes already discussed and in constitutional provisions. See, for example, Article VI, Section 1 of the 1921 Louisiana Constitution<sup>172</sup> and its successor, Article IX, Section 1 of the 1974 Louisiana Constitution, which is more expansive in scope and directs the legislature to enact laws implementing the policy:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic 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.<sup>173</sup>

The Louisiana Supreme Court recognized the public trust mandate of this constitutional provision in its 1984 decision of *Save Ourselves v. Louisiana Environmental Control Commission*:

A public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by Art. VI § 1 of the 1921 Louisiana Constitution. The public trust doctrine was continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy.<sup>174</sup>

Article IX, Section 1 may on its own provide a constitutional limitation on state authority to alienate public trust tidelands. Thus, an amendment to Civil Code article 451 which has the effect of validating previous

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170. See *supra* text accompanying notes 72-85.

171. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d. 576, 589 (La. 1975).

172. See Appendix.

173. La. Const. art. IX § 1.

174. *Save Ourselves v. Louisiana Envtl. Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984). The court reaffirmed that the public trust doctrine underlies Article IX, § 1 in *American Waste & Pollution Control Co. v. State of Louisiana*, 588 So. 2d 367 (La. 1991).

transfers of non-navigable tidelands could be invalid under Article IX, Section 1. Whether Article IX, Section 1 can reasonably be interpreted to prohibit alienations of public trust lands is uncertain. The following section discusses the court's interpretation of state responsibility under Article IX, Section 1. In summary, while Louisiana's early treatment of its nonnavigable tidelands was somewhat ambiguous, ample evidence of public policy for over one hundred years is a strong indication that nonnavigable tidelands have been retained in the state's public trust.

THE ENVIRONMENT AS A PUBLIC TRUST NATURAL RESOURCE IN  
LOUISIANA

As explained earlier, the public trust doctrine protects the right of the public, as beneficiary of the public trust, to use and enjoy public trust natural resources free from obstruction or interference. There has been a recent trend in court decisions in other states involving the public trust doctrine to include the environment as a public natural resource protected by the public trust—beyond the traditional scope of application of the public trust doctrine to navigable water bodies and waterbottoms and tidelands and the resources therein—and Louisiana has followed this trend.<sup>175</sup> As noted above, in addition to the origin of the public trust doctrine in the Louisiana Civil Code, the Louisiana Supreme Court in *Save Ourselves* held that a public trust obligation for the protection, conservation, and replenishment of the natural resources of the state was enunciated in Article VI, Section 1 of the 1921 Louisiana Constitution and continued and expanded in Article IX, Section 1 of the 1974 Louisiana Constitution.<sup>176</sup> The court also held that the "natural resources of the state" encompassed under the public trust obligation set forth in Article IX, Section 1, include air and water and the environment.<sup>177</sup> These holdings were reaffirmed by the court in its 1991 decision *In re American Waste and Pollution Control Co.*<sup>178</sup>

In *Save Ourselves*, the Louisiana Supreme Court held that Article IX, Section 1 imposed a public trust *duty of environmental protection* on all state agencies and officials, established a *standard of environmental protection*, and mandated the legislature to *implement* these public trust responsibilities.<sup>179</sup> The court explained that the constitutional public trust

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175. Coastal State Organization, *supra* note 2, at 133.

176. *Save Ourselves*, 452 So. 2d. at 1152.

177. *Id.* at 1154; Nelea A. Absher, Note, Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 59 Tul. L. Rev. 1557, 1560 (1985).

178. 588 So. 2d 367 (La. 1991).

179. *Save Ourselves*, 452 So. 2d. at 1156. Cf. Robert E. Tarcza, Comment, The Public Trust Doctrine as a Basis for Environmental Litigation in Louisiana, 27 Loy. L. Rev. 469 (1981).

standard for the environment in Article IX, Section 1 requires environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people."<sup>180</sup> The court held that this public trust responsibility for the environment requires: "an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."<sup>181</sup> Additionally, the court found that "the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which *environmental costs and benefits* must be given *full and careful consideration* along with economic, social and other factors."<sup>182</sup> In carrying out this balancing process, the court stated that an agency must necessarily "consider whether *alternate projects, alternate sites, or mitigative measures* would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits."<sup>183</sup> In implementing these public trust responsibilities for the environment, the legislature enacted the Louisiana En-

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180. *Save Ourselves*, 452 So. 2d at 1156-57, quoting La. Const. art. IX, § 1.

181. *Id.* at 1157.

182. *Id.* at 1157 (emphasis added). Although this decision requires all state agencies to establish criteria for performing this balancing process, only the Department of Environmental Quality has done so. Called the "5 IT tests" (after the name of the company whose permits were the subject of litigation in the *Save Ourselves* decision), the Department uses the following criteria for balancing the environmental costs and benefits of a proposed DEQ permit action with economic, social, and environmental factors:

Have the potential and real adverse environmental effects of the activity been avoided to the maximum extent possible?

Does a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the activity demonstrate that the latter outweigh the former?

Are there alternative projects which would offer more protection to the environment than the activity without unduly curtailing nonenvironmental benefits?

Are there any alternative sites which would offer more protection to the environment than the proposed activity site without unduly curtailing nonenvironmental benefits?

Are there mitigating measures which would offer more protection to the environment than the activity proposed without unduly curtailing nonenvironmental benefits?

In re Dravo Basic Materials La. D.E.Q. June 22, 1990 at page 1 (admin. hearing).

It should be noted that the Coastal Management Division of the Louisiana Department of Natural Resources is specifically required by the legislation creating it (in addition to the *Save Ourselves* holding) to weigh and balance social, economic, and environmental factors in making coastal use permit decisions. State and Local Coastal Resources Management Act of 1978, La. R.S. 49:214.30 (Supp. 1992); *Pardue v. Stephens*, 558 So. 2d. 1149 (La. App. 1st Cir. 1989).

183. *Save Ourselves*, 452 So. 2d. at 1157 (emphasis added). See Nelea A. Absher, Note, Constitutional Law and the Environment: *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 59 Tul. L. Rev. 1557 (1985).

vironmental Affairs Act in 1979<sup>184</sup> and created the Department of Environmental Quality in 1983.<sup>185</sup>

ACCOMPLISHING PUBLIC TRUST PROTECTION OF PUBLIC NATURAL  
RESOURCES IN LOUISIANA

The public trust doctrine is a source of authority in Louisiana that is supplementary to the traditional police power of the state as a basis for the management and regulation of natural resources. The public trust doctrine, which is based on the state's authority to manage publicly owned property and to preserve the public trust rights in public trust resources that have been legally conveyed to private interests (i.e., *jus publicum* rights), differs from the police power, which is used primarily to regulate private property.<sup>186</sup> Since the public trust doctrine is based on the state's authority to manage natural resources owned by the public and protect public trust rights, regulation under the public trust doctrine is less vulnerable than regulation pursuant to the police power "to a challenge by a private property owner based upon the 'takings' clause of the U.S. Constitution in cases where a State has exercised its rights and obligations as a trustee over public trust land to restrict (or prohibit) the activities of private landowners."<sup>187</sup>

It is submitted that, as a logical extension of its reasoning in *Save Ourselves*, the supreme court would construe Article IX, Section 1 as having also established a public trust duty of protection of *all public trust natural resources* on *all* state agencies and officials and a *standard of public natural resources protection* and mandated the legislature to *implement* these public trust responsibilities. In implementing the public trust obligation established by the Louisiana Civil Code and Article IX, Section 1, the legislature has designated several state "public trustee" agencies: to supervise the state's public trust natural resources; to preserve, so far as consistent with the interests of the people of Louisiana, the uses protected by the trust; to protect and maintain trust resources and manage them so that they remain open to public use and enjoyment; and, in general, to act as fiduciaries of the public's interests.

Among the primary state "public trustee" agencies in Louisiana is the State Land Office in the Division of Administration, which is charged with the general management of state-owned lands and waterbottoms.<sup>188</sup> State co-trustees for the management of the mineral leasing of state-

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184. 1979 La. Acts No. 449, amended to read "Louisiana Environmental Quality Act" by 1983 La. Acts No. 97, codified at La. R.S. 30:2001 (1989).

185. 1983 La. Acts No. 97, § 1061(A), codified at La. R.S. 30:2001, et seq. (1989).

186. Coastal States Organization, *supra* note 2, at 225.

187. *Id.*

188. La. R.S. 36:4 (1985 & Supp. 1991); La. R.S. 41:1, et seq. (1990).

owned property are the Office of Mineral Resources in the Department of Natural Resources and the State Mineral Board.<sup>189</sup> The co-trustees over fish, shellfish, and wildlife of the state, state wildlife management areas and refuges, the leasing of waterbottoms for oyster production and shell dredging, and the permitting of aquaculture are the Department of Wildlife and Fisheries and the Wildlife and Fisheries Commission.<sup>190</sup> To conserve and manage the coastal zone of the state and to manage the Wetlands Conservation and Restoration Fund established in the 1974 Louisiana Constitution,<sup>191</sup> the legislature established the Office of Coastal Restoration and Management in the Department of Natural Resources and the Wetlands Conservation and Restoration Authority in the Office of the Governor.<sup>192</sup> The Department of Environmental Quality was created as the primary trustee agency for the environment, including air and water quality.<sup>193</sup> The Department of Culture, Recreation, and Tourism serves as trustee over state-owned parks and recreation areas.<sup>194</sup> The Department of Health & Hospitals is the trustee of the sanitary quality of our wetlands and water bodies and the seafood found in them.<sup>195</sup> The Office of Conservation in the Department of Natural Resources is the trustee for preventing the waste of oil and gas resources found in the state, for regulating hazardous waste subsurface injection disposal wells, and for regulating certain other aspects of oil and gas drilling and production activities in the state that impact the environment.<sup>196</sup> The Commissioner of the Department of Agriculture and Forestry is the trustee for regulating the use and disposal of pesticides and their impact on the environment.<sup>197</sup> The primary function of these "public trustee" agencies is to manage the public trust natural resources within their respective jurisdictions in order to preserve the public's right to

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189. La. R.S. 36:358 (1985 & Supp. 1991); La. R.S. 30:121, et seq. (1989 & Supp. 1991).

190. La. R.S. 36:601, et seq. (1985 & Supp. 1991); La. R.S. 56:1, et seq. (1987 & Supp. 1991); La. Const. art. IX, § 7.

191. La. Const. art. X, § 10.2.

192. La. R.S. 36:351 (1985 & Supp. 1991); La. R.S. 49:213.1 (1987 & Supp. 1991); La. R.S. 49:214.1, et seq. (1987 & Supp. 1991); La. R.S. 49:214.21, et seq. (1987 & Supp. 1991).

193. La. R.S. 36:231, et seq. (1985 & Supp. 1991); La. R.S. 30:2001, et seq. (1989 & Supp. 1991).

194. La. R.S. 36:201, et seq. (1985 & Supp. 1991).

195. La. R.S. 36:251, et seq. (1985 & Supp. 1991).

196. La. R.S. 36:351, et seq. (1985 & Supp. 1991); La. R.S. 30:4.1 (1989 & Supp. 1991). As this article was being prepared, the Commissioner of Conservation denied a company's permit to continue operation of an injection well pursuant to *Save Ourselves Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984), because the company failed to disclose the availability of an alternative disposal technology. (BASF Injection Well Permit Cancelled, Baton Rouge "Saturday" Advocate, January 11, 1992 at 7c, col. 1.).

197. La. R.S. 36:621, et seq. (1985 & Supp. 1991); La. R.S. 3:3201, et seq. (1987 & Supp. 1991).

use and enjoy these public resources. In addition, as shown above, *all* state agencies and officials have a public trust responsibility to protect the public natural resources of the state in order to preserve the public's right to use and enjoy these resources. The Louisiana Attorney General is recognized as the "trustee agency" for bringing litigation to enforce the state's public trust responsibilities and the public trust rights of the citizens of the state on behalf of the citizens, as beneficiaries of the public trust.<sup>198</sup>

Since the public trust obligation established by Article IX, Section 1 is a constitutional (and affirmative)<sup>199</sup> obligation, it is submitted that the public trust responsibilities of the state should be enforceable against "trustee agencies" by a writ of mandamus or injunctive relief brought against a trustee agency by the Louisiana Attorney General on behalf of the citizens of the state or by a Louisiana citizen, as a beneficiary of the trust, and thus, an affected party. In this regard, the public trust obligation under Article IX, Section 1 could be construed as a self-executing obligation. Thus, for example, the Attorney General, a citizen, or another state agency might sue a "trustee agency" for failure to protect a public trust natural resource, or suit might be brought by the Attorney General or a citizen to recover damages against a "trustee agency" or a citizen who had "damaged" a public trust natural resource.

The public trust doctrine also gives Louisiana significant potential power over federal activities conducted in Louisiana's coastal zone. Under the federal Coastal Zone Management Act of 1972,<sup>200</sup> federal agency activities and activities requiring federal permits that affect the coastal zone resources of a state having a federally approved coastal management program must be carried out in a manner consistent with the state's coastal management program.<sup>201</sup> Prior to conducting such an activity, the agency or permit applicant must clarify that the activity will be consistent. The state can review the proposed activity for compliance with the state program and condition the activity so that it does comply with the state's coastal management program or deny permission for the activity to go forward. This is known as a "federal consistency determination." In carrying out its constitutional public trust responsibilities, the legislature passed the State and Local Coastal Resources Management Act of 1978<sup>202</sup> and developed a coastal management program in the Louisiana Department of Natural Resources that received

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198. La. Const. art. IV, § 8; La. R.S. 36:701, et seq. (1985 & Supp. 1991); La. R.S. 30:2025 (1989 & Supp. 1991).

199. Coastal State Organization, *supra* note 2, at 215.

200. 16 U.S.C. § 1451, et seq. (1985 & Supp. 1991).

201. 16 U.S.C. § 1456 (1985 & Supp. 1991).

202. 1978 La. Acts No. 361, codified at La. R.S. 49:214.21, et seq. (1987 & Supp. 1991).

federal approval in 1980.<sup>203</sup> Thus, Louisiana has authority to exercise the "federal consistency determination" power.

If the public trust doctrine is explicitly or implicitly incorporated into a state's coastal management program, federal agency activities and activities requiring a federal permit must be consistent with it. As noted above, the state can require that the activity be conditioned so that it complies with the state's public trust doctrine—as a component of the state's coastal management program—in order to be conducted or the state can deny the consistency certification and thus prohibit the proposed activity. The *Louisiana Coastal Resources Program—Final Environmental Impact Statement* states in Appendix I that Article IX, Section 1 of the 1974 Louisiana Constitution has been incorporated into the Louisiana Coastal Resource Program.<sup>204</sup> Thus, Louisiana has specifically incorporated the public trust doctrine into its coastal management program.

The public trust doctrine is similarly useful to the state in assessing federal permit applications that require a water qualification certification by the Louisiana Department of Environmental Quality pursuant to Section 401 of the federal Clean Water Act.<sup>205</sup> An applicant for a federal license or permit to conduct any activity must receive a certification from the state in which the activity will take place that the proposed activity will comply with the state's water quality standards. Similarly, as with a federal consistency certification, the Department of Environmental Quality can put conditions on the proposed activity or deny certification and thus prohibit the proposed activity. Since the public trust doctrine is the *constitutional* basis of authority for Department of Environmental Quality, the water quality certification must also comply with it.

The public trust doctrine is also a beneficial tool for the Department of Wildlife and Fisheries to use in its review and commenting authority on proposed federal activities and federal permits pursuant to the federal Fish and Wildlife Coordination Act.<sup>206</sup>

#### CONCLUSION

It has been our intention in this article to explain the public trust doctrine and its current status in Louisiana. We have shown that Louisiana's public trust doctrine is based in the Louisiana Civil Code, the

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203. Louisiana Coastal Resources Program-Final Environmental Impact Statement. (U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Coastal Zone Management and Louisiana Department of Natural Resources, Coastal Management Section, 1980.).

204. *Id.* See Appendix I, at 1-1.

205. 33 U.S.C. § 1341 (1986).

206. 16 U.S.C. § 661, *et seq.* (1985).



Louisiana Constitution, and Louisiana court decisions. We have also demonstrated that it is arguable that Louisiana's public trust doctrine extends geographically today to the waters and bottoms of nonnavigable tidelands. Additionally, we have shown that *all* state agencies and officials are under a public trust duty to protect the public natural resources of the state and the public's right to use and enjoy these resources, and that the environment is among the public natural resources protected by the public trust doctrine in Louisiana.

We hope that this article will inform and generate discussion and debate among legal practitioners, scholars, judges, lawmakers, and students and the Louisiana citizenry about the nature and scope of the public trust doctrine in Louisiana and how it can effectively be used to protect the public's right to use and enjoy our public natural resources.

The public trust doctrine is a powerful public natural resources management tool, which we feel has been too long disregarded in Louisiana. We especially hope that it will not be disregarded by those who will influence and make legislative decisions in the 1992 Regular Session of the Louisiana Legislature.

## APPENDIX

ACTS OF THE LOUISIANA LEGISLATURE RELATING TO PUBLIC TRUST  
WATERBOTTOMS LAND SALES

Date	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,' <i>within the intent and meaning of the several acts of Congress. . .</i> " (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 overflow 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
- 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 shell fish, 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 waterbottoms 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 153 of 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 waterbottoms 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* waterbottoms 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. Act 876 deleted the prohibition against anyone owning in fee simple the waterbottoms described 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 land owners the exclusive right to cultivate shellfish 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.
- 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; . . ."
- 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"
- 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 (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.”