



# Public Access, Private Property, & The Legislature's Attempt to Find a Solution

M. Taylor Darden



CARVER DARDEN



# Tidal Overflow & *Phillips*

- ▶ *Phillips Petroleum Co. v. Mississippi* 108 S. Ct. 791 (1988)
  - ▶ Held: land subject to the ebb and flow of the tide was acquired by the State of Mississippi upon its admission to the Union under the Equal Footing Doctrine, and that Mississippi's law did not permit its severance from the public domain under its Public Trust Doctrine.
  - ▶ Caveat: Individual state may define its own public trust doctrine
- ▶ Equal Footing Doctrine
  - ▶ New states admitted to the Union do so on an "equal footing" to the original 13 states.
  - ▶ Title to and ownership of bed and bottoms of all navigable waterbottoms were vested in the State upon admission to the Union in 1812
- ▶ Public Trust Doctrine
  - ▶ The State owns the beds and bottoms of navigable waterbottoms in trust for the benefit of its citizens, who may freely use such waterbottoms subject to reasonable restrictions placed on such use by the State.



# Public vs. Private Things

- ▶ Public things – Louisiana Civil Code art. 450
  - ▶ Owned by the state or its political subdivisions in their capacity as public persons
  - ▶ Public things are (1) running waters; (2) water and bottoms of natural navigable water bodies, (3) territorial sea; and (4) the seashore
  - ▶ Inalienable since the Louisiana Constitution of 1924
- ▶ Private things – Louisiana Civil Code art. 453
  - ▶ Things owned by individuals, other private persons, and by the state in its capacity as a private person
  - ▶ Comment (a) → residual category
- ▶ That which is not public is private

# Louisiana's Public Trust Doctrine

- ▶ Lands acquired by Louisiana are required to be held in public trust for the benefit and use of the public
- ▶ Louisiana's public trust doctrine never included "tidal land"
- ▶ Act 645 of 1978 (La. R.S. 41:1701) sets the scope
  - ▶ "The beds and bottoms of all **navigable waters** and the **banks or shores of bays, arms of the sea, the Gulf of Mexico**, and **navigable lakes** belong to the state of Louisiana, and the policy of this state is hereby declared to be that these lands and water bottoms, hereinafter referred to as 'public lands', shall be protected, administered, and conserved to best ensure full public navigation, fishery, recreation, and other interests."
- ▶ Act 998 of 1992 - Louisiana Revised Statute 9:1115
  - ▶ Louisiana declares its public trust doctrine distinguishable from Mississippi, as considered by the Supreme Court in *Phillips*: "The legislature hereby finds that as to lands not covered by **navigable waters** including the **sea** and its **shore**...the *Phillips* decision neither reinvests the state, or a political subdivision thereof, with any ownership of such lands nor does the state, or a political subdivision thereof, acquire any new ownership of such property." (La. R.S. 9:1115.1)
  - ▶ Louisiana law regards navigability as hallmark of public trust limitations
  - ▶ In-land non-navigable water bottoms are **private** things.
  - ▶ Act 998 of 1992 clarified and did not change Louisiana law




# Determining Navigability

- ▶ Question of Fact determined at two points in time:
  - ▶ Time of admission to Statehood in 1812
  - ▶ Severance from the public domain
- ▶ A water body is navigable when it is susceptible of being used as a highway of commerce in the customary mode of trade and travel in the area
  - ▶ Factors include depth and width, but traversal by pirogue or fishing boat does not in itself establish navigability
- ▶ Navigability is never presumed
- ▶ Fact that a private canal is “navigable in fact does not thereby render it public.” *Buckskin Hunting Club v. Bayard*, 03-1428 (La. App. 3d Cir. 3/3/04); 868 So.2d 266, 274.
  - ▶ Unless the construction of a private canal destroys a pre-existing natural navigable waterbody. *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 208 (1979); *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979).




# Swamp Lands Act

- Previously Federal Land
- “That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.”  
(Act of March 2, 1849, ch. 87, 9 Stat. 352 (1849))
- Louisiana Act 247 of 1855 authorized alienation of ***non-navigable*** lakes and swamp acquired under the Swamp Lands Act



# Distinguishing Rivers & Streams, Seashore, Lakes, and Private Canals.

- ▶ Rivers & Streams
  - ▶ Public or private depending on navigability at (1) admission to the Union in 1812 and (2) time of severance
  - ▶ Beds are land below the average low water mark on each side and are public
- ▶ Lakes
  - ▶ Public or private depending on navigability at (1) admission to the Union in 1812 and (2) time of severance
  - ▶ State owns the bed of navigable lakes up to mean high water mark (*State v. Placid Oil Co.*, 300 So. 2d 154, 172 (La. 1973))
- ▶ Seashore and arms of the sea (e.g. Lake Pontchartrain)
  - ▶ Land where water of the sea spreads in highest tide during winter season (La. Civ. Code art. 451)
  - ▶ Public or private nature rests on classification at time of admission to the Union in 1812 and time of severance
- ▶ Canals
  - ▶ Private things—even if navigable—not subject to public use; similar to a private road (*National Audubon Society v. White*, 302 So.2d 660, 667 (La. App. 3 Cir. 1974))



# Private ownership of non-navigable waterways that become navigable

- ▶ The Civil Code is silent
- ▶ Non-navigable water bodies are capable of private ownership and alienable by the State.
- ▶ Subsequent navigability post-1812/severance?
- ▶ Previously alienated swamp and land adjacent to seashore now navigable in fact and law?
- ▶ Takings Clause & Just Compensation
  - ▶ United States Constitution: 5<sup>th</sup> Amendment; 14<sup>th</sup> Amendment
  - ▶ Louisiana Constitution: Article 1, Section 4.



# The Question of Access

- ▶ Louisiana Civil Code art. 3413
  - ▶ “The owner of a tract of land may forbid entry to anyone for purposes of hunting or fishing, and the like.”
- ▶ Federal Navigation Servitude
  - ▶ Derives from the Commerce Clause (U.S. Constitution Article 1, Section 8)
  - ▶ Only applies to **navigable** waterway
  - ▶ Limited to aiding in navigation rather than recreation
  - ▶ If navigable → no public right of access without compensation (*Kaiser Aetna v. U.S.* 100 S. Ct. 383 (1979))
- ▶ *Dardar v. Lafourche Realty Co.* 985 F.2d 824 (1993)
  - ▶ Held: Private waterways (canals) are not subject to Federal Navigation Servitude
  - ▶ Held: No state servitude created because of State’s ownership of “running waters”
- ▶ HB 391 (2018) [Defeated]
  - ▶ “No person may restrict or prohibit, pursuant to the authority of Civil Code Article 3413 or otherwise, the public navigation of running waters”
  - ▶ “‘running waters’ shall mean running waters as provided in Civil Code Article 450 and shall include waters passing over any **privately owned water bottom**”



# The Question of Access

- ▶ Louisiana Sea Grant's study under HR 178
- ▶ An attempt to find common ground between the stakeholders
- ▶ Focus on voluntary "public recreation servitudes"
- ▶ Solutions entail
  - ▶ Payments to landowners (public/private funds)
  - ▶ Limited liability to landowners
  - ▶ Tax incentives
  - ▶ Improved mapping
  - ▶ SCR 99 (2018 Regular Session)