LOUISIANA COASTAL LAW

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Louisiana Port, Harbor, and Terminal Districts: Their Power Over Riverbanks

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In Louisiana, port, harbor, and terminal districts have been established for the purpose of stimulating state and local industry and commerce. All current port facilities share the common character of being situated on the banks of navigable waterways. This article examines the laws affecting the ownership and use of the riverbanks and explains the significance of these laws to port development by any of Louisiana's port, harbor, and terminal districts. The terms port district, port commission, district, and commission, are used interchangeably within this article but all refer to those political subdivisions which have the authority to develop a port. These terms are used in the laws pertaining to ports.

Riverbank: a definition

Riverbank[1] has been defined as the land lying between the river's ordinary high and low stages.[2] It also includes the land adjacent to the bank that is exposed by water receding imperceptibly from the old riverbank,[3] and alluvion, which is the sediment that builds up on the bank.[4] However, "when there is a levee in proximity to the water... the levee shall form the bank."[5] This means that the land from the levee to the ordinary low water mark constitutes the bank. The issue of whether the levee is in "proximity" to the water must be determined on a case by case basis. In one case the court indicated that a levee which was a quarter mile from the water's edge constituted the bank.[6] For the purpose of this article, the riverbank includes the levee, if in proximity to the water, any land adjacent to the bank that is exposed by receding water, and any alluvion that forms adjacent to the old riverbank.

Public Servitudes and Port District Powers

Riverbanks, which may include levees, may be either public or private things, but in either case they are subject to a public servitude.[7] A public servitude is a right of the general public to be able to use and enjoy property owned by someone else, in this case a riverbank owned by a public body or private person. According to settled Louisiana jurisprudence, the public servitude which burdens the banks of navigable rivers is not for all purposes but must be consistent with the navigable character[8] of the river[9] and the river's use for commerce.

This servitude of public use gives political subdivisions of the state, such as port districts, broad

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Louisiana's "Nine Mile" Territorial Sea

Fred Whitrock

By state law, all Louisiana state waters, including the territorial sea, were closed to shrimp fishing from January 15 to March 15, 1985. During that closed season a Louisiana shrimp fisherman was harvesting shrimp approximately eight miles seaward of Grand Isle, Louisiana. The shrimper was approached and issued a citation by a Louisiana Department of Wildlife and Fisheries enforcement officer for illegally harvesting shrimp from Louisiana waters during closed season. The shrimper was upset and confused by the citation and could not understand why Louisiana had a nine mile territorial sea where he wanted to harvest shrimp but only a three mile territorial sea everywhere else.

Beginning in the 1940's the federal government began its attempt to assert ownership over the lands lying beneath and the natural resources within the marginal sea. This was, not incidentally, about the same time the United States began to realize the extent and value of the oil and gas reserves located on the continental shelf. Prior to that time many states believed that the 1845 United States Supreme Court decision of Pollard's Lessees v. Hagan,[1] which recognized state ownership of the waterbottoms beneath navigable inland waters within the state's boundaries, would be extended seaward, thereby recognizing state ownership of the continental shelf.[2]

In 1946 the United States Supreme Court, in the case of U.S. v. California,[3] ruled that the United States had paramount rights in and power over the submerged lands off the coast of California between the low-water mark and the three mile limit of the territorial sea. Additionally, the Court ruled that the federal government had superior rights to the vast quantities of natural resources on and under those lands. This decision was followed by the same Supreme Court three years later in the companion cases of U.S. v. Texas[4] and U.S. v. Louisiana.[5] These two cases affirmed the United States ownership of the submerged land and natural resources within the territorial sea, specifically those off the coasts of Texas and Louisiana.

1. Submerged Lands Act

These federal victories were short lived as Congress, in 1953, over-ruled the Supreme Court by enacting the Submerged Lands Act.[6] The Act reversed the Court by giving ownership of the lands beneath and the natural resources within the navigable waters to the respective states. Specifically, the Act provides that:

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powers to regulate the use of riverbanks and to use the banks for the construction of works serving the public interest. Under this servitude the rights of the private land owner are greatly curtailed. This curtailment is less onerous to rural riverbank owners than to urban riverbank owners[10] because rural owners are less likely to use their property in ways that would conflict with public use of the riverbank and there is simply more usable space in a rural setting. The reason for the curtailment of private rights is the overriding right of the public. Professor A. N. Yiannopoulos, an authority on Louisiana Property Law, explains the nature of this public servitude in this way:

> "The real significance of the servitude of public use burdening the banks of navigable rivers in Louisiana does not lie in the rather limited rights of use accorded to members of the general public. It lies instead in the powers that it confers upon the state and its political sub-divisions to regulate the public use of the banks and to appropriate the banks for the construction of works serving the general interest. Thus, along with inherent police powers, and several other articles of the Louisiana Civil Code, the servitude of public use under Article 456 invests public authorities with broad powers of regulation and administration. Moreover, it was by reference to the servitude of public use that the constitutionality of Louisiana legislation, enabling the state and its political subdivisions to appropriate river banks, [without compensation], was upheld and declared to be consistent with the Fifth and Fourteenth Amendments of the U.S. Constitution."[11]

Port construction may also involve river roads. Riverbanks are subject not only to a servitude related to the navigable character of the river but also to a river road servitude.[12] The land on which a river road is built may be owned by the state, a political subdivision, or a private person. The ownership of this land is not a potential obstacle to port development because a river road servitude is already imposed on land that is on the shore of navigable rivers, and it must be left by the owner for public use.[13] In addition, there are legal servitudes for making and repairing levees, levee roads (which may be different from river roads), and other public or common works which may be significant to port-related works.[14]

Louisiana has over three dozen port districts.[15] Although they all have similar purposes and powers, each is established and regulated by specific legislation[16] which may vary in important respects. The specific legislation for the Plaquemines Parish Port, Harbor, and Terminal District spells out powers of the District that are typical of the powers set out for the other ports. The Plaquemines Port District is authorized to acquire, by purchase, donation, expropriation, appropriation, or otherwise, any lands in the district which are needed for railways, wharves, sheds, buildings, canals, channels, and other facilities required for the operation of the port.[17] It can make and construct any works which may be necessary and useful for the business of the port.[18] It is empowered to own, have charge of, administer, construct, operate, and maintain wharves, warehouses, landings, docks, sheds, belts, and connection railroads, shipways, canals, channels, slips, basins, locks, elevators, and other structures and facilities necessary and proper for the use and development of the business of the port. This also includes buildings and equipment for the handling, storage, transportation, and delivery of freight.[19] In short, it can do all things incidental to the operation of a port.

The Louisiana Civil Code[20] expressly confers on all port districts the authority to construct and maintain in public places, such as the beds of navigable waters or their banks or shores, works necessary for public utility. These works include buildings, wharves, and other facilities for mooring vessels and for loading and discharging cargo and passengers. In the event that a port commission determines that the needs of commerce or other public purposes respecting riverbank land are being satisfied, and would not be interfered with, it may allow the owner to use the property for any purpose.[21] A port commission is also authorized to lease or sublease any property which it owns or leases, including any wharves, buildings or improvements that are owned or leased by it and which are located on any riverbank land.[22]

Expropriation or Appropriation

As noted, most port districts can acquire land or the use of land owned by private persons through expropriation or appropriation. Expropriation is a taking by the government of private property for public purposes. This taking is justified by the first law of society which, according to Louisiana Civil Code, is that the general or public interest is superior to that of private individuals.[23] Appropriation, on the other hand, is an exercise by the government of property rights which are vested in the public.[24] Louisiana courts have sometimes confused these two terms,[25] but the fundamental distinction between them is that expropriation removes the title of property from the original owner, and requires compensation for the lost value of the property. If property has no value, then no compensation is due. Conversely, appropriation does not remove the title or require compensation.

An example of expropriation is found in the Louisiana Constitution of 1974 which states that compensation is due for lands and improvements which are expropriated for levee purposes.[26] This rule is, however, subject to an exception which states that the compensation requirement does not apply to riverbanks[27] or to property the control of which is already vested in the state or in a political subdivision for the purpose of commerce.[28] This exception clearly means that port district-owned or controlled property may be taken for levee purposes, without compensation.

The power to expropriate property for port development is conferred upon port commissions by law. Louisiana Revised Statutes 19:2(1) deals with expropriation by public bodies generally, and Louisiana Revised Statutes 19:141 et seq. deals with expropriation by port commissions specifically. To expropriate private property, the port commission must file a petition[29] in the district court where the property is located. The petition must specify the purposes for the expropriation and describe the property, the name of the owner, and any improvements located on the property, and must include a plan.[30] It must contain a certified copy of a resolution adopted by the port commission which declares that the taking is necessary or useful for the purpose for which the port district was created.[31] The petition must also contain a signed statement by a consulting engineer that the specified property is that which is required.[32] Finally, a signed statement of the estimated compensation which should be paid to the owner must be attached.[33] As noted earlier, since riverbank property is already burdened with legal servitudes, and therefore much of the use of the property is already lost to the owner, the property's value and consequently the compensation owed when it is expropriated may be significantly reduced.[34] As also noted earlier, a rural riverbank owner may lose less of the value of his property due to servitudes than his urban counterpart, so the compensation due for the loss of his property by expropriation might be greater than that owed to an urban riverbank owner. In case of a dispute between the port commission and the landowner over the value of the land, either party has a right to a jury trial to set the value of the property.[35]

The Louisiana Supreme Court has in the past ruled that "taking" for levee purposes is an "appropriation" rather than an "expropriation," and therefore requires no compensation to the private owner.[36] This was, however,

before the adoption of constitutional and statutory requirements of compensation for lands taken or destroyed for levee purposes. But in a similar context, Louisiana courts have held that land "taken" for the construction of a river road was also not "expropriated," but merely "appropriated" for public use, in accordance with the implied condition in the title of the riverbank owner, which is the burden of the river road servitude established by law.[37] Appropriation of land for levee purposes has, in the past, been accomplished by a simple resolution adopted by a levee district. In one case such an appropriation by resolution, without prior judicial proceedings, was upheld against a claim that it violated due process guarantees of either the state or federal constitutions.[38] The crucial and as yet unanswered questions are whether a port commission can "appropriate" property, and if so, whether it can do so by simple resolution.

Statutory Requirements

In addition to the legal considerations discussed above, port commissions wishing to conduct port-related activities on the riverbank, river bottom, or levee, must comply with the applicable federal, state, and local permitting programs.

Federal

A port commission is required to comply with the permitting and authorization requirements of Section 10 of the Rivers and Harbors Act.[39] Under this federal statute anyone or any agency proposing to conduct an activity obstructing the navigable capacity of navigable waters, or altering or modifying the course, location, condition, or capacity of navigable waters must first obtain a permit from the U.S. Corps of Engineers' District in which the change is to occur. Under Section 404 of the Federal Clean Water Act,[40] if a port-related activity involves any discharge of dredged or fill material into navigable waters then a permit is required from the Corps of Engineers' District in which the discharge is to occur. Wetlands are considered navigable waters under Section 404 while under Section 10, they are not. For some projects, both Section 10 and Section 404 permits are required. In reviewing Section 10 permit applications, the Corps uses its own general regulatory policies and Section 10 regulations and comments from federal, state, and local agencies and the public.[41] In reviewing Section 404 permit applications, the Corps uses guidelines established by the Administrator of the U.S. Environmental Protection Agency, its own general regulatory policies and its Section 404 regulations, as well as comments from federal, state, and local agencies and the public.[42] The decision whether to issue a Section 10 or Section 404 permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for the protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposed project will be balanced against its reasonably foreseeable detriments. All factors which might be relevant to the proposed activity will be considered.[43]

A port commission applying for a Section 10 and/or Section 404 permit for an activity that will affect land or water uses in Louisiana's coastal zone must certify that the proposed activity complies with and will be carried out in a manner which is consistent with Louisiana's state coastal resources management program, which includes approved local coastal management programs. These programs are discussed later in this article.

If Corps approval of a Section 10 and/or a Section 404 permit application constitutes a major federal action which significantly affects the quality of the environment, then an environmental impact statement will have to be prepared. If an environmental impact statement is needed, then comments on the activity must be received from several federal, state, and local agencies and the public, before a permit is granted.[44]

Before the Corps will issue these permits, a "letter of no objection" and/or comments must be obtained from the Louisiana Department of Wildlife and Fisheries,[45] the Louisiana Department of Natural Resources, Coastal Management Division (this letter constitutes a determination that the proposed activity is consistent with the state coastal resources management program, including approved local coastal management programs),[46] and the Louisiana Department of Environmental Quality, Water Pollution Control Division.[47] Additionally, the Corps requires that requests for "letters of no objection" and/or comments be made to various other state agencies and political subdivisions which may be interested in such activities. These entities include the Division of State lands, the Louisiana Department of Transportation and Development, the Louisiana Department of Health and Human Resources, the Louisiana Department of Culture Recreation, and Tourism (State Archeologist and State Historical Preservation Officer), the relevant local governing body and the relevant levee District.[48] Federal agencies which are entitled to notification of such activities, and to the opportunity to object or make comments include the Fish and Wildlife Service,[49] the National Marine Fisheries Service,[50] and the Environmental Protection Agency.[51]

The New Orleans District of the Corps has issued a general permit for Section 10 and Section 404-type activities that take place within the coincidental boundaries of the Louisiana coastal zone and the New Orleans District of the Corps.[52] This means that permit applicants who propose to conduct activities in that part of the Louisiana coastal zone that is coincident with the boundaries of the New Orleans District (this encompasses nearly all of the coastal zone) will not have to apply for Section 10 and Section 404 permits but will have to apply only for a coastal use permit under Louisiana's coastal resources program. This program covers activities that have a direct and significant impact on the coastal zone.

Under this general permit for activity in the coastal zone, if an applicant feels that his proposed activity is covered under the general permit, he submits his application to the state's Coastal Management Division, which will then forward a copy to the Corps. The Corps determines on a case by case basis whether an activity, such as a port-related activity, falls under the general permit or whether the applicant must obtain an individual Section 10 and/or Section 404 permit.

Since the Corps has also assumed complete or partial responsibility for the construction and maintenance of levees in many areas of the state, an additional Corps approval of port-related activities will be required because of the impact which port development may have on those levees. Port-related activities conducted by the Corps of Engineers itself, such as maintenance dredging or the creation of a navigation channel which would directly affect the Louisiana coastal zone must be carried out in a manner which is, to the maximum extent practicable, consistent with the Louisiana coastal resources management program, including the coastal use guidelines, and with approved local coastal management programs.[53] Additionally, if a proposed Corps' port-related activity constitutes a major federal action significantly affecting the quality of the environment, then, as noted earlier, an environmental impact statement concerning the proposed activity will have to be prepared. Commenting authority on the proposed activity and the environmental impact statement is given to state, local, and federal agencies and to the public, as noted above.[54]

State and Local

In addition to the federal permits discussed above, a port district must acquire two other permits before

conducting a port project. A port district conducting a project resulting in the discharge of a pollutant into waters and wetlands in Louisiana will also need a state water discharge permit from the Louisiana Department of Environmental Quality, Office of Water Resources. Dredge and fill operations do not generally require this permit but they do require a certification from that office signifying that federal standards are being met. Additionally, some port districts fall entirely within the Louisiana coastal zone established by the Louisiana State and Local Coastal Resources Management Act (the Act).[55] The purpose of the Act is to protect, develop, and, where possible, to restore and enhance the resources of the state's coastal zone. This purpose is to be accomplished through the use of a comprehensive state coastal management program, which includes approved local (parish) coastal management programs,[56] that regulates activities within the coastal zone, by means of a coastal use permitting system.[57]

Coastal use permits are divided into uses of state concern and uses of local concern. Uses of state concern are those which have impacts of greater than local significance or which significantly affect interests of regional, state, or national concern. All other coastal uses are uses of local concern. Depending on the significance of the impact of the port-related activity, it can be either a use of state or local concern. Coastal use permit decisions are made for each type of use by the Louisiana Department of Natural Resources, Coastal Management Division, unless there is an approved local coastal management program where the proposed coastal use is to take place. If there is a local program, decisions on uses of local concern are made locally.[58]

Whether made at the state or local level, coastal use decisions must represent an appropriate balancing of social, environmental, and economic factors. In all decisions, local government comments are to be given substantial consideration. In making its coastal use decisions, the Coastal Management Division uses the state coastal use guidelines (which are performance standards) and the comments of the public and state, local, and federal agencies. The Coastal Management Division also considers the policies and performance standards set out by local coastal management programs for the environmental management units in the parish, which are established as a part of a local program. Coastal Management Division permit decisions must be consistent with the state coastal management program,[59] including affected local programs.

A local coastal management program uses the coastal use guidelines, its environmental management unit policies, and the comments of the public and state, local, and federal agencies in making its permit decisions. A local program's permit decisions must be consistent with the state coastal management program,[60] including its own program.

As a general rule, activities covered by the Act include but are not limited to, dredging, bulkheading, or fill activities, and activities occurring on land within the coastal zone with a natural elevation of less than five feet. As noted earlier, port-related activities can be either uses of state concern or uses of local concern. Deepwater port commissions are expressly exempted from compliance with the permitting requirements of the Act, provided that their activities are consistent, to the maximum extent practicable, with the state coastal resources management program, and with affected local coastal management programs.[61]

Shallow draft ports must comply with the coastal use permit process established by the Act and must obtain coastal use permits in order to carry out activities in the coastal zone that have a direct and significant impact on coastal waters. Thus, these ports must comply with the state coastal management program and with approved local coastal management programs. If there is a finding that the proposed activity will not have a direct and significant impact on coastal waters, then a coastal use permit will not be required; however, the activity must still be carried out in a manner consistent with the state program and affected local programs.[62]

Port districts may also have overlapping jurisdiction with one or more levee boards located in their district. This would be significant if a port commission lacked the authority to accomplish any of the incidental tasks necessary to port development and therefore needed assistance; but since port commissions are fully autonomous political subdivisions of the state and are expressly authorized to do all things required for port development, there is no dependency upon other political subdivions of the state. However, the methods used by a port commission to accomplish its tasks must not be inconsistent with the purposes served by a levee board. This means that port development must proceed in a manner which is compatible with the flood control objectives of local levee boards.[63]

Conclusion

During the 1985 Louisiana legislative session all port commissions or port, harbor, and terminal districts were added to the list of entities which are authorized to apply to the U.S. Department of Commerce to become foreign trade zones.[64] This expanded potential for commercial navigation may bring increased pressure on ports to exercise their authority over the riverbanks for the purpose of port development and expansion. As has been shown, port commission authority includes the power to do all things which are incidental to port development, but federal and state permit requirements must first be met.

One recent report indicated that Louisiana ports are already handling more tons of cargo than countries such as France, Canada, and Belgium.[65] This amount of commerce has a tremendous impact on the economic well-being of the state and its people and justifies the control of the riverbanks by Louisiana's port, harbor, and terminal districts.

FOOTNOTES

1. The law for riverbanks also applies to the banks of bayous and streams.
2. McKean v. Kurtzar, 10 La. Ann. 523 (1855).
3. Packwood v. Walden, 7 Mart. (N.S.) 81, (1828), La. Civ. Code. art. 499.
4. La. Civ. Code art. 499.
5. La. Civ. Code art. 456.
6. Lake Providence Port Comm. v. Bunge Corp. 193 So.2d 363 (La. App. 2d Cir 1966) writ refused 195 So.2d 147 (1967).
7. La. Civ. Code art. 456.
8. Warner v. Clarke, 257 So.2d 99 (1970).
9. State v. Richardson, 72 So. 984 (1916).
10. Lake Providence Port Comm. v. Bunge, supra at note 7.
11. Yiannopoulle, Louisiana Civil Law Treatise - Property 454. (Ed. 1980).
12. La. Civ. Code art. 665, 666.
13. La. Civ. Code art 456, 665.
14. La. Civ. Code art 456, 665 and 666.
15. La. R.S. Title 34 Chapters 7-44
16. For example, while most port commissions are expressly granted authority to expropriate property, that power is expressly denied to the Concordia Parish Port Commission. See La. R.S. 34:1856.
17. La. R.S. 34:1353.
18. La. R.S. 34:1354.
19. La. R.S. 34:1360.
20. La. Civ. Code art. 460.
21. La. R.S. 9:1102.2(11)a.
22. La. R.S. 9:1102(2)a & b.
23. La. Civ. Code art. 2626.
24. Baklin, M. G. and M. R. Klein, Eminent Domain in Louisiana, p. 3 (1970).
25. Id. p. 7.
26. La. Const. art. 6 §42(A) (1974).
27. In the Louisiana Constitution the word used is "batture" not riverbanks. However, the Louisiana Supreme Court has defined batture to be synonymous with the natural riverbank. See Seibert v. Conservation Comm. of Louisiana 159 So. 375 (1935).
28. La. Const. art 6 §42(A) (1974).
29. La. R.S. 19:2.1.
30. Id.
31. La. R.S. 19:142(1).
32. La. R.S. 19:142(2).
33. La. R.S. 19:142(3).
34. Boyce Cottonseed Oil Mfg. Co. v. Board of Commissioners 107 So. 506 (1926).
35. La. R.S. 19:4. See also La. Civ. Code art. 2626-2641.
36. Board of Commissioners for Pontchartrain Levee Dist. v. Baron 236 La. 846, 109 So. 641 (1959).
37. Fegil v. Hecker 45 La. Ann. 423, 12 So. 490 (1893), and La. Civ. Code art. 666.
38. Hathorn v. Board of Commissioners of Red River, Atchafalaya, Bayou Boeuf Levee Dist. 218 So. 2d 335 (App. 1969) writ refused 220 So.2d 461.
39. 33 USC §403. The Federal Rivers and Harbors Act of 1899.
40. 33 USC §1344. The Federal Clean Water Act.
41. 33 CFR 320 et seq.
42. Id. and 40 CFR 230 et seq.
43. 33 CFR 320 et seq.
44. 42 USC 4341 et seq. The federal National Environmental Policy Act; 40 CFR 1500 et seq., Presidential Executive Order 11514, Protection and Enhancement of Environmental Quality, (March 5, 1970, as amended by Presidential Executive Order 11991, May 24, 1977).
45. 16 USC 661 et seq., the federal Fish and Wildlife Coordinations Act.
46. 16 USC 1456(c).
47. 33 USC 1341, the federal Clean Water Act.
48. New Orleans District, U.S. Corps of Engineers, Permits Section. APPROVALS BY STATE AND LOCAL GOVERNMENTS IN LOUISIANA.
49. 16 USC 661, et seq.
50. Id.
51. 42 USC 7609, the federal Clean Air Act. 33 USC 1344, the federal Clean Water Act.
52. Department of the Army General Permit LMVOD-SP, NOD-27, effective 15 July 1983.
53. 16 USC 1451 et seq., the federal Coastal Zone Management Act of 1972 and LOUISIANA COASTAL RESOURCES PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT.

54. 42 USC 4341 et seq. The federal National Environmental Policy Act; 40 CFR 1500 et seq. Presidential Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Presidential Executive Order 11991, May 24, 1977).
55. La. R.S. 49:213.1 et seq.
56. Lafourche Parish is the only parish with an approved local program, while Jefferson, Cameron, Orleans, and St. Bernard Parishes are at various levels in the program approval process. Lafourche, Jefferson, Cameron, Orleans, and St. Bernard Parish Coastal Zone Management Plans, submitted to the Louisiana Dept. of Natural Resources, Coastal Management Division.
57. Id. and LOUISIANA COASTAL RESOURCES PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT U.S. Dept. of Commerce, 1980.
58. Id.
59. Id.
60. Id.
61. The Coastal Management Division of the Louisiana Department of Natural Resources and the Board of Commissioners of the Port of New Orleans have a "memorandum of understanding" designed to ensure that Port of New Orleans activities will be consistent, to the maximum extent practicable with the state coastal resource management program.
62. La. R.S. 49:213.3 et seq. and LOUISIANA COASTAL RESOURCES PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT U.S. Dept. of Commerce, 1980. The "consistent" standard of compliance which is applied to shallow draft port activities not having a direct and significant impact on coastal waters is a more restrictive standard than "consistent to the maximum extent practicable" standard that applies to deep draft ports.
63. La. R.S. 9:1102.2B
64. Act 470 of the 1985 Regular Louisiana Legislative Session.
65. Louisiana Statewide Port Assessment: Summary Report, April 1985. Prepared by the Ports and Waterways Institute, Louisiana State University.

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> (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with the applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective State in which the land is located,and the respective grantees, lessees, or successors in interest thereof;[7]

Congress also stated that the United States "released and relinquished unto the States" any right, title, or interest it maintained in the land, improvements, and natural resources beneath the navigable waters within the boundaries of the respective states.[8]

The cases that arose subsequent to the Submerged Lands Act specifically pertained to ownership of oil and gas located on the continental shelf, rather than to natural resources generally. Oil and gas are two types of natural resources as defined by the Act:

> (e) The term "natural resources" includes without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;[9]

Even though the cases apply only to oil and gas located under the continental shelf within the territorial sea, the Submerged Lands Act grants ownership of all natural resources, living and nonliving, to the states. The Act gives the states ownership of the nonliving resources located on and under the lands beneath the navigable waters, and also the living resources located within the water column. All fish, shrimp, oysters, and other marine animals and plants, then, are owned and can be managed and regulated by the states.

The rights given to the coastal states are limited under the Act by which lands are defined as "lands beneath navigable waters." Specifically, "lands beneath navigable waters" are defined as all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide extending three geographical miles seaward from the coastline of the state (except for Texas and the gulf coast of Florida, which were given three marine leagues, or nine geographical miles).[10]

The enactment of the Submerged Lands Act shifted the focus of the dispute from the ownership of the lands and resources to a determination of the exact boundary lines. The Act gave each state ownership and control over the lands and natural resources out to three geographical miles as measured from it's "coastline."[11] Coastline was defined by the Act as:

> (c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;[13]

This definition provides that the coastline can be one of two lines. The first is the ordinary low water line along those portions of the coast in direct contact with the open sea. The second is the line marking the seaward limit of inland waters. As a result of the ambulatory nature of the shoreline and the number of bays, tributaries, and dredged channels that comprise Louisiana's border with the Gulf of Mexico, controversy arose over the exact location of the Louisiana coastline. The exact location of these lines in Louisiana remained in litigation for 30 years because the state drew the coastline giving itself the largest area possible while the federal government drew the line to do the reverse.

The location of the coastline was decided in the 1969 United States Supreme Court decision of U.S. v. Louisiana.[13] The task of determining of the exact coordinates of the coastline was given to a special master, and his decision was later affirmed by the Supreme Court.[14]

The Court found little difficulty in determining the coastline for that part of the Louisiana coast in direct contact with the open sea. However, much of the Louisiana coast is not in direct contact with the sea and the coastline for those areas is the less easily determined line designating the seaward limit of inland waters. For the purpose of establishing this line under the Submerged Lands Act, the Court adopted the definitions and procedures in the 1961 Geneva Convention on the Territorial Sea and Contiguous Zone.[15]

2. Geneva Convention on the Territorial Sea and the Contiguous Zone[16] (Geneva Convention)

The Geneva Convention provides that "the sovereignty of a [nation] extends, beyonds its land territory and its internal waters, to a belt of a sea adjacent to its coast, described as the territorial sea."[17] The Convention continues by stating that the line, called the baseline,[18] from which the territorial sea is measured is the "low-water line along the coast."[19] The Convention provides several alternative baselines for places where the low-water line is not applicable, such as the line marking the seaward limit of inland waters. It also provides exceptions to the low-water baseline by allowing the baseline to extend to and from certain natural and manmade structures. These alternative baselines and exceptions include bay and river closing lines, baselines extending to and from permanent harbor works, low-tide elevations, islands, and roadsteads. Because of Louisiana's diverse and dramatic coast, most of these alternative baselines and exceptions apply.

a. bays

Article 7, paragraph 2 of the Geneva Convention defines bay as:

> 2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as

> a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

In defining a bay, this paragraph provides the "semi-circle test" to determine whether an indentation is of such size and shape to be considered a bay. If an indentation is found to be a bay, then a straight line, called a bay closing line, is drawn from one headland of the bay to the other. This bay closing line then becomes the baseline from which the territorial sea is measured.

In order to determine the boundaries comprising the baseline of Louisiana the Court was required to establish which areas along the coast satisfied the semi-circle test. Three areas of particular concern to the Court were East Bay off the Mississippi River Delta, Outer Vermilion Bay, and Ascension Bay.

Applying the semi-circle test to each of these three bodies of water, the Court concluded that neither Outer Vermilion Bay nor East Bay qualified as a "bay." Regarding the issue of whether Ascension Bay met the semi-circle test the Court reached a different conclusion for the following reasons.

Article 7 paragraph 3 of the Geneva Convention provides that "islands within an indentation shall be included as if they were part of the water areas of the indentation." Islands cannot seal off areas of an indentation so as to defeat the semi-circle test. Thus, the strings of islands separating Caminada Bay and Barataria Bay from Ascension Bay, including Grand Isle and Grand Terre Island are disregarded. The Court, by disregarding the islands, found that the entire area fell within the definition of a bay. The headlands of Ascension Bay were found to be Southwest Pass on the east and the jetties at Belle Pass on the west. (See map 1).

The Geneva Convention adopted two articles defining how and where the "bay closing line" can be drawn. Article 7(4) provides:

> If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

In the event that the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, Article 7(5) states that "a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." In other words, if the mouth of a bay is wider than twenty-four miles, then the bay closing line will not be drawn at its mouth, but will be drawn between the two points within the bay that are twenty-four miles apart and which enclose the largest possible amount of water.

The distance between the jetties at Belle Pass and Southwest Pass far exceeds twenty-four miles. Therefore, the proper method for determining the bay closing line of Ascension Bay is by the criteria in Article 7(5), the twenty-four mile line enclosing the maximum amount of water within the indentation. The court found that this line was a straight line drawn from just west of Caminada Pass on the west to the outlet of Empire Canal on the east. (See map 1). This results in the baseline, from which the territorial sea is measured, deviating from the actual shoreline at a point near Caminada Pass, running straight across Ascension Bay, and intersecting the shoreline at Empire Canal. As measured from the actual shoreline, this gives Louisiana a territorial sea that ends three miles from the actual shoreline at Caminada Pass and Empire Canal, but almost nine miles from Quatre Bayou Pass.

b. low-tide elevations

The Court also considered the issue of whether the shell reefs located at the mouth of Atchafalaya Bay are low-tide elevations which can be used as baseline points from which the territorial sea is measured. If the reefs are low-tide elevations then the result is a territorial sea measured from those elevations rather than from a baseline drawn further landward. Article 11 of the Geneva Convention defined low-tide elevations as:

> 1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

Regarding the issue of whether these geographical formations comprise part of the baseline the Court held that low-tide elevations, such as those at the mouth of the Atchafalaya Bay, would be deemed part of the baseline. The three-mile band of territorial waters would then be measured from these points.

The court left the decision of the exact location of these shell reefs to the special master. The special master set the exact coordinates. The result is a series of points seaward of a straight line running from the South Point of Marsh Island to Point Au Fer.[20] (See map 2)

Had the Court found that the shell reefs were not low-tide elevations and therefore could not be used as points from which the territorial sea is measured, two other possible baselines could be drawn, both of which would result in a smaller territorial sea. The first possibility is that the Atchafalaya Bay area could be considered a "historic" bay with a bay closing line running from South Point on Marsh Island on the west to Point Au Fer on the east. (See map 2). This line would exceed 24 miles in length. As discussed above, when using the semi-circle test, a bay closing line cannot exceed 24 miles in length. However, an exception to this is provided in the Geneva Convention if an area is determined to be a bay based on the "economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage."[21] This "historic" bay test could result in a bay closing line running from Marsh Island to Point Au Fer, even though it would exceed 24 miles in length.

The second possibility is a series of straight baselines and bay closing lines running from Marsh Island to Point Chevreuil to Eugene Island to Point Au Fer. (See map 2). This would result in a territorial sea much smaller than one drawn using the "historic" bay approach or the one drawn from the low-tide elevations. Thus, the Court, by accepting the low-tide elevations as baseline points from which the territorial sea can be measlured, granted Louisiana a territorial sea larger than three miles would seem to suggest.

There are several other areas along the coast where low-tide elevations exist and are used as baseline points. While not discussed in this article, several are located around the Mississippi River delta and others southwest of Marsh Island. The distance of these from the actual shoreline vary from several feet to close to three miles.

c. harbor works

The Geneva Convention provides that manmade structures, located off the shoreline, can be used as points from which the territorial sea is measured. These structures are considered harbor works and are defined in Article 8 as:

> For the purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

The special master found two such harbor works. One is off the mouth of Sabine River and the other is off Calcasieu River. (See map 3). As measured from the actual shoreline, then, Louisiana's territorial sea is greater than three miles around these two harbor works.

d. Breton and Chandeleur Sounds

Another issue the Court settled concerned the effect of the Breton and Chandeleur Islands. These islands are located more than three miles off the mainland and could therefore be far enough away to not be aligned with the mainland. This raises the issue of whether the Louisiana baseline should connect from the mainland to the islands, thereby enclosing the Sounds as inland waters, or whether the territorial sea should be measured off the mainland with the islands having their own territorial sea, thereby resulting in a band of federal territory running between the islands and the mainland. The Court found that the United States had conceded that the bays behind Breton and Chandeleur Islands are part of Louisiana's internal waters. Thus the baseline runs from the mainland to the outer edge of the islands.

Based on the rules for drawing the baseline pursuant to the Geneva Convention, the Louisiana baseline deviates significantly from the actual shoreline in several places. Of the places discussed herein, the largest deviation occurs in Ascension Bay. The territorial sea, measured from the actual shoreline, reaches approximately nine miles in one place giving the state sovereignty over more waterbottom and resources than three miles would seem to suggest. Although the demarcation of this area is of primary significance because of oil and gas revenues, it is also of special concern to the shrimp fishermen of the state because the shrimp line is not, in all places, the same as the baseline.

3. Shrimp line

Louisiana has, for many years, divided its state waters into inside and outside waters for purposes of shrimp management. The dividing line, called the shrimp line, is statutorily defined and generally follows the actual shoreline. Waters landward of the line are considered inside waters. Outside waters run seaward from the shrimp line to the extent of Louisiana's jurisdiction.[22]

As discussed above, the extent of Louisiana's jurisdiction is the limit of the territorial sea, the breadth of which runs three miles from the baseline, not the actual shoreline. As measured from the shrimp line, Louisiana has an "extended" territorial sea in several areas.

The baseline deviates significantly from the shrimp line in a number of places along the coast. In the Ascension Bay area, discussed above, the shrimp line runs along the gulf edge of Grand Isle, Grand Terre, and the other islands separating the Barataria-Caminada Bay complex from Ascension Bay. The baseline, on the other hand, is the straight line starting just west of Caminada Pass and intersecting with the outlet of Empire Canal. This creates a zone of state outside waters measuring approximately nine miles at one point. (See map 1).

Another bay closing line is used to enclose West Bay, located just north of Southwest Pass of the Mississippi River. The shrimp line follows the actual shoreline within West Bay whereas the baseline is a straight line running from one headland to the other. This creates a zone of outside waters measuring almost seven miles at one point. (See map 1).

The other area where the baseline deviates significantly from the actual shoreline is the Atchafalaya Bay area. As discussed above, the baseline includes many of the shell reefs (low-tide elevations) at the mouth of the Bay. The deviation of the baseline from the shrimp line, though, is not as great as the deviation of the baseline from the actual shoreline. The shrimp line runs from Point Au Fer to Eugene Island to South Point on Marsh Island. (See map 2). Thus, the area measuring three miles from the shrimp line is not significantly different than the actual territorial sea as measured from the baseline.

The location of the baseline in relation to the shrimp line was not important to the shrimp fisherman until 1984. Prior to 1984 the state outside waters were never closed to shrimp fishing, and it made almost no difference where state waters ended.[23] In 1984 the Louisiana Legislature enacted Act 300 requiring the annual closure of state outside water for a period not to exceed sixty days. The specific sixty day period is determined by the Louisiana Wildlife and Fisheries Commission and must take place sometime between December 31 and March 30.[24]

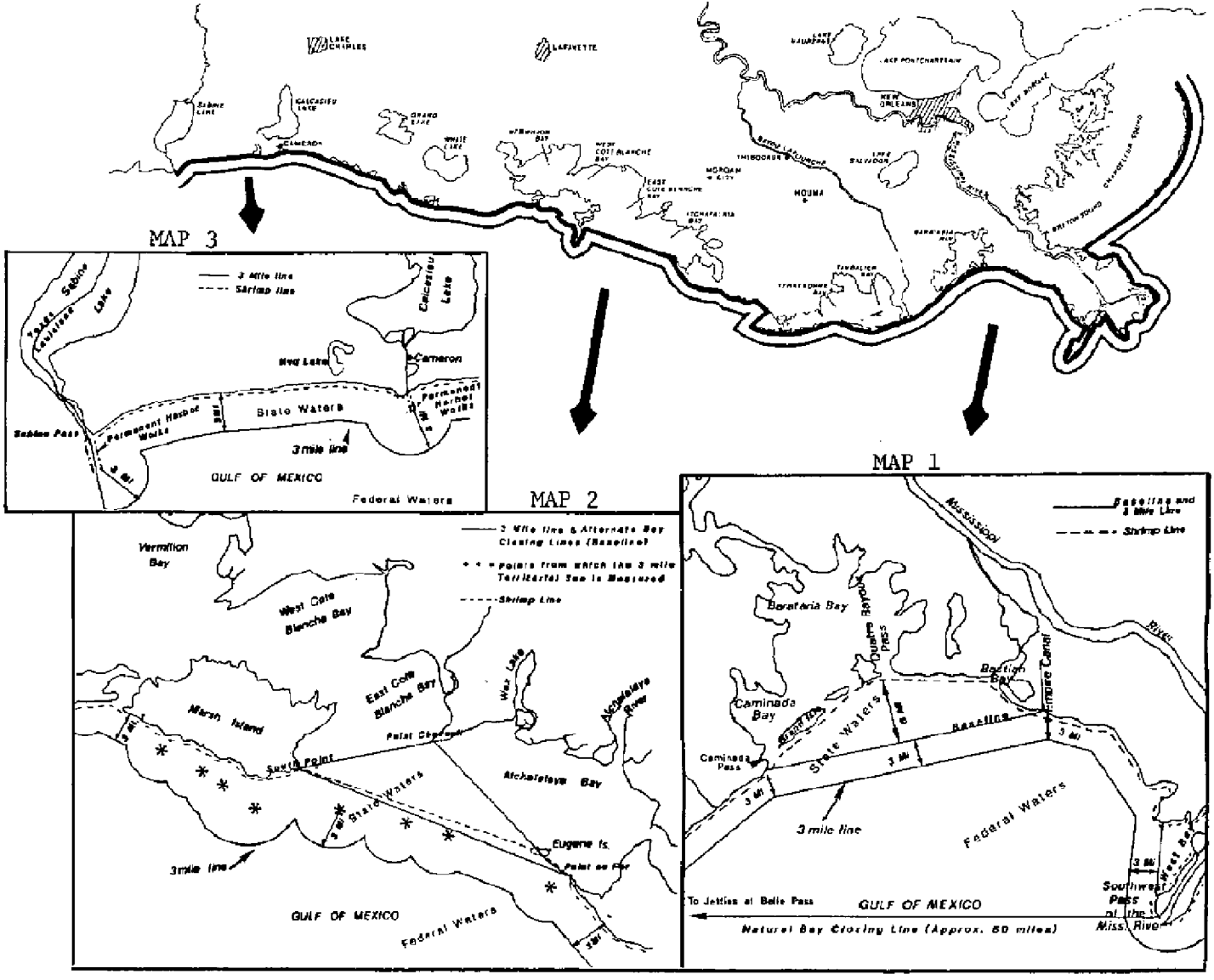
The problem for the shrimp fisherman is that state territorial waters are measured three miles from the baseline, and not from the shrimp line. Therefore the fisherman may mistakenly believe he is beyond state waters when he is actually still within state jurisdiction. This problem is particularly acute in Ascension Bay, not only because of the nine mile distance from shore at Quatre Bayou Pass, but also because of its large expense.

Conclusion

The application of the definition of coastline, found in the Submerged Lands Act, to Louisiana's coast gives Louisiana a legal "coastline" that is, in many places, different from the actual shoreline. Drawing the baselines pursuant to the Geneva Convention's definitions for bays, low-tide elevations, and harbor works sets a legal coastline seaward of the actual shoreline in several places. In these places, the state has ownership of and regulatory authority over the natural resources within an area greater than three miles as measured from the actual shoreline. This is important not only for oil and gas revenues, but also for fisheries management. This extended jurisdiction combined with the common misconception that Louisiana's territorial sea is measured from the actual shoreline can result in fisheries violations since state fishery laws are more restrictive than the fishing regulations in federal waters. One important example is the closed shrimp season for state outside waters. Thus, it is important for the fisherman to know this distinction in order to avoid violation of the state fishery laws and to fish the full extent of Louisiana's waters.

FOOTNOTES

1. 44 U.S. (3 How.) 212 (1845).
2. Stockwell, The Boundaries of the State of Louisiana, 44 La. L. Rev. 1043, 1075 (1982).
3. 332 U.S. 19 (1946).
4. 339 U.S. 707 (1950).
5. 339 U.S. 699 (1950).
6. 43 U.S.C. §1301 (1953).
7. 43 U.S.C. §1311 (1953).
8. Id.
9. 43 U.S.C. §1301(e) (1953).
10. 43 U.S.C. §1301(a)(2) (1953).
11. 43 U.S.C. §§1301(b), 1311 (1953).
12. 43 U.S.C. §1301(c) (1953).
13. 394 U.S. 11 (1969).
14. 44 U.S. 13 (1975).
15. U.S. v. Louisiana, 394 U.S. 11 (1969).
16. 516 U.N.T.S. 205 U.S.T. 1606, T.I.A.S. No. 5639, in force September 10, 1964.
17. Article 1.
18. The baseline under the Geneva Convention is synonymous with the coastline under the Submerged Lands Act.
19. Article 3.
20. see U.S. v. Louisiana, 422 U.S. 13 (1975).
21. Article 4.
22. La. R.S. 56:497.
23. The Louisiana shrimp laws are written in such a way that there is little difference in what is legal in the state outside waters and what is legal in federal waters. The primary effect would have been on nonresidents fishing in these "extended" state waters believing they were in federal waters, and therefore not obtaining the proper Louisiana licenses.
24. The 1985 closure runs from January 15 to March 15.



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