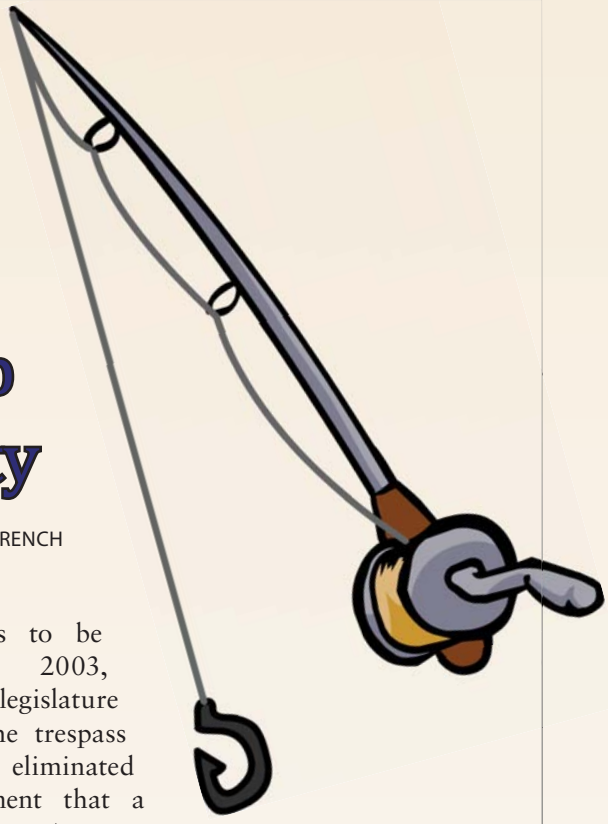
Gone Trespassin'

Why your next fishing trip might be a criminal activity



BY RYAN K. FRENCH

As spring turns into summer, droves of Louisiana residents will once again head toward the state's coastal marshes and waterways. Those who fish regularly already know that fishermen headed south are focused on two primary types of fish: redfish and speckled trout. Both fish species are famously good tasting and fun to catch. Both species also thrive in Louisiana's abundant coastal marshes—the checkered maze of saltwater bays, flats, bayous and canals that stretch across the state's entire southern border.

Drawn to this prime "in-shore" fishing habitat, saltwater anglers do not ordinarily fish in the open sea, but in shallow areas far from what you might recognize as the ocean. Incidentally, many of these popular, frequented fishing areas are claimed to be private property. Indeed, anyone who has fished more than a few times in Louisiana marshes has inevitably stumbled upon a canal, a marsh or an entire lake marked "Posted—No Trespassing." Fishing frequently commences notwithstanding the warnings, there being no one around to enforce the claim.

On other occasions, the fishing party is approached by another boat and either told to leave, or worse, issued a criminal citation for trespassing. Some police officers have reportedly issued tickets to anglers even though there are no "posted" signs, no trespassing warnings and no discernible lines between public and private property. As it turns out, the line between public fishing waters and private property is not all that legally clear either.

Louisiana's trespassing laws and on-the-water enforcement

As an initial matter, the notion that you can be cited for trespassing at your favorite fishing spot—a spot that has never been posted or marked as private—is perfectly credible. Prior to 2003, Louisiana's criminal trespassing statute expressly provided that it was an affirmative defense to a trespassing charge that the relevant property was not adequately posted.[1] The statute even described in painstaking detail how forested and un-forested property was to be posted.[2] In 2003, however, the legislature overhauled the trespass statute and eliminated any requirement that a landowner post (or even mark) his property. "[T]he law [now] requires that a person not enter immovable property without authorization, whether a sign is posted or not."[3]

Admittedly, most in-shore anglers are probably able to fish Louisiana marshes without being detained for criminal trespassing. However, there is increasing anecdotal evidence that boats are being chased away from fishing spots by landowners and law-enforcement officers. For instance, louisianasportsman.com commenter "Pirate Ship Capt" was recently fishing with his family when "a couple of big blow belly meat heads" informed him he was trespassing and demanded he leave.[4]

Perhaps more credibly, The Times Picayune/nola.com has published a series of articles chronicling the decline of public access to coastal fishing waters.[5] Citing heightened enforcement of private-property claims, some anglers have reportedly given up fishing in Louisiana altogether.[6] Times Picayune writer Todd Masson reports that trespassing citations could come from two sources: the Louisiana Department of Wildlife and Fisheries and the local sheriff's department.[7] While the former will typically issue trespassing tickets only in connection with other violations, the latter will issue tickets if requested by a landowner.[8]

Public property: Navigable waters, the sea and the seashore

To many, there is something viscerally offensive about a private party laying claim to an ideal expanse of marsh or inland lake. After all, these spots often look exactly like the other coastal areas that are indisputably

public property.

At first glance, the Civil Code seems to support the right of the public to access virtually all coastal waters. Every first-year law student is taught that "[p]ublic things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore."[9] In turn, the very next Civil Code article explains that the "[s]eashore is the space of land over which the waters of the sea spread in the highest tide during the winter season."[10] Tying everything together, Civil Code article 452 concludes:

> Public things . . . are subject to public use in accordance with applicable laws and regulations. Everyone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of adjoining owners.

Considered together, the import of Civil Code articles 450 through 452 is clear: the public can fish any natural coastal waters that qualify as: (1) navigable, (2) the sea or (3) the seashore. Thus, an angler might think he can fish in any location that he can easily access by boat, *or* that is connected to the Gulf of Mexico, *or* that is subject to the coastal tides. Unfortunately, that angler would be incorrect.

Where the law says you can take your boat

Like virtually every other area of the law, the legal status of coastal waters is less clear than it might seem at first:

Navigable: Yes, the public is free to fish navigable coastal waters, but the relevant question is not whether a given stretch of water is navigable today. Rather, navigability is determined as of the year 1812, when Louisiana first became a sovereign state.[11] Even if such ancient information was available, the fact that a recreational boat could navigate a body of water in 1812 does not make it navigable.[12] Rather, navigability is a term of art, determined by whether an area of water is "capable of being used for *commercial* purposes."[13] A water course is thus navigable when "by its depth, width, and location it [wa]s rendered available for commerce" in 1812.[14]

The Sea: Yes, the public is free to fish in the "sea" and "arms of the sea," but the sea is a rarely used and very limited category. So far, "the sea" has been interpreted to include only Lake Pontchartrain and bays directly adjacent to the Gulf of Mexico.[15]

The Seashore: Yes, the public is free to fish on water constituting the seashore, *i.e.*, anything covered by the sea at high tide; however, Louisiana courts have largely ignored the seashore designation. What few cases do exist agree that a waterway does not become seashore just because it rises or falls with oceanic tides.[16] Instead, the question is whether the tidal rise is caused directly by in-flowing seawater (seashore), or indirectly by more remote waterways backing up in response to the tide (not seashore).[17]

***Phillips Petroleum v. Mississippi* and La. R.S. 9:1115.1**

Given the above options, the "seashore" category appears most promising to an angler arguing for greater public access. Not only do many coastal areas experience direct tidal changes, but the "seashore" classification also does not require an absurd inquiry into 1812 navigability.

The argument for public access to tidal waters has significant historical support. Indeed, in the 1988 decision *Phillips Petroleum v. Mississippi*, the U.S. Supreme Court expressly recognized the public's traditional right to access tidal waters.[18] Just as with navigable waters, the Court accordingly held, each of the 50 states acquired its non-navigable tidal waters in "public trust" at statehood.[19]

In response to the *Phillips Petroleum* decision, the Louisiana legislature directed the Louisiana State Law Institute to "study the law of Louisiana with respect to the ownership of non-navigable waterbottoms."[20] The report later issued by the Law Institute opined that Louisiana has historically interpreted "public property" far more narrowly than the *Phillips Petroleum* court. Showing no concern for recreational fishermen, the Law Institute concluded that non-navigable tidelands can be, and often are, privately owned.[22] The state legislature then noted its agreement with the Law Institute's opinion by enacting La. R.S. 9:1115.1 *et seq.* and purporting to "confirm" Louisiana's traditional disinterest in non-navigable waters.

So where can I fish?

To be clear, it is possible that a court could disagree with the Law Institute and find that coastal waters need not be navigable to be inalienable public property.[23] In the specific context of coastal lakes and waters, there is also a good argument that waterways that have become navigable since 1812 have become public property, regardless of who claims the land.[24] These arguments, however, do not help an angler trying to figure out where he can fish. Nor is it a satisfactory alternative to evaluate whether a given

area is navigable, the "sea" or the "seashore."

In case it is not clear yet, the ordinary coastal fisherman has no sure way of determining whether he is fishing on public or private property. Indeed, the "easiest" course of action is simply to disregard the legal inquiry and assume that any property claimed to be private is in fact private. If the property is not posted, this means consulting the Office of State Lands' waterbottom database to verify that the state identifies the area as public—and it probably does not.[25]

On second thought, maybe fishing is not that much fun after all.

[1] La. R.S. 14:63(C)(2).
[2] *Id.* at 14:63(E).
[3] *State ex rel P.L.*, 11-1173 (La. App. 4 Cir. 1/11/12), 81 So.3d 983, 989.
[4] https://www.louisianasportsman.com/lpca/index.php?section=reports&event=view&action=full_report&id=55359, posted April 6, 2009, at 8:47 p.m.
[5] *See* Todd Masson, *Louisiana's Trespass Laws Lock Anglers out of Most Coastal Marshes*, *The Times Picayune/nola.com*, August 8, 2014; Todd Masson, *Sheriff's Offices Enforce On-water Ttrespassing Differently*, *The Times Picayune/nola.com*, July 6, 2016; Todd Masson, *Fishing Guide Sues After Being Chased from Tidal Water*, *The Times Picayune/nola.com,* February 6, 2017; Todd Masson, *Paradise Lost: Louisiana Anglers Getting Squeezed out of Most Tidal Waters*, *The Times Picayune/nola.com*, July 7, 2016.
[6] *Paradise Lost. supra* n. 5.
[7] *Sheriff's Offices. supra* n. 5.
[8] *Id.*
[9] La. C.C. art. 450.
[10] La. C.C. art. 451.
[11] *See, e.g.*, *Ramsey River Rd. Prop. Owners Ass'n, Inc. v. Reeves*, 396 So.2d 873, 875 (La. 1981).
[12] *See Sinclair Oil & Gas Co. v. Delacroix Corp.*, 285 So.2d 845, 852 (La. App. 4 Cir. 1973) ("We cannot accept the State's premise that any body of water deep enough to float a pirogue is navigable under Louisiana law.").
[13] *Ramsey River*, 396 So. 2d at 875 (emphasis added).
[14] *Dunaway v. La. Wildlife & Fisheries Comm'n*, 08-1494 (La. App. 1 Cir. 2/13/09), 6 So.3d 228, 232.
[15] *Burns v. Crescent Gun & Rod Club*, 41 So. 249, 250 (1906); *Davis Oil Co. v. Citrus Land Co.*, 576 So.2d 495, 501 (La. 1991); *Morgan v. Negodich*, 3 So. 636, 639 (La. 1887).
[16] *Buras v. Salinovich*, 97 So. 748, 749 (La. 1923); *Morgan*, 3 So. at 639; *Dardar v. Lafourche Realty Co.*, 985 F.2d 824, 830 (5 Cir. 1993).
[17] La. C.C. art. 451 cmt. (b).
[18] 484 U.S. 469.
[19] *Id.* at 484.
[20] Lawrence E. Donahoe, Jr. et al., *"Phillips Petroleum Co. v. Mississippi: The Louisiana State Law Institute's Advisory Opinion Relative to Non-Navigable Waterbottoms,"* 53 La. L. Rev. 35 (1992).
[21] *See id.* at 66-67, 69.
[22] *Id.*
[23] *See* James G. Wilkins, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861 (1992).
[24] *See Vermilion Bay Land Co. v. Phillips Petroleum Co.*, 93-1393 (La. App. 4 Cir. 11/10/94), 646 So.2d 408, 411; *Miami Corp. v. State*, 173 So. 315, 323 (La. 1936).
[25] *See* http://www.doa.la.gov/Pages/osl/GIS-Data.aspx.

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