Jurisdiction on the Coast and at Sea

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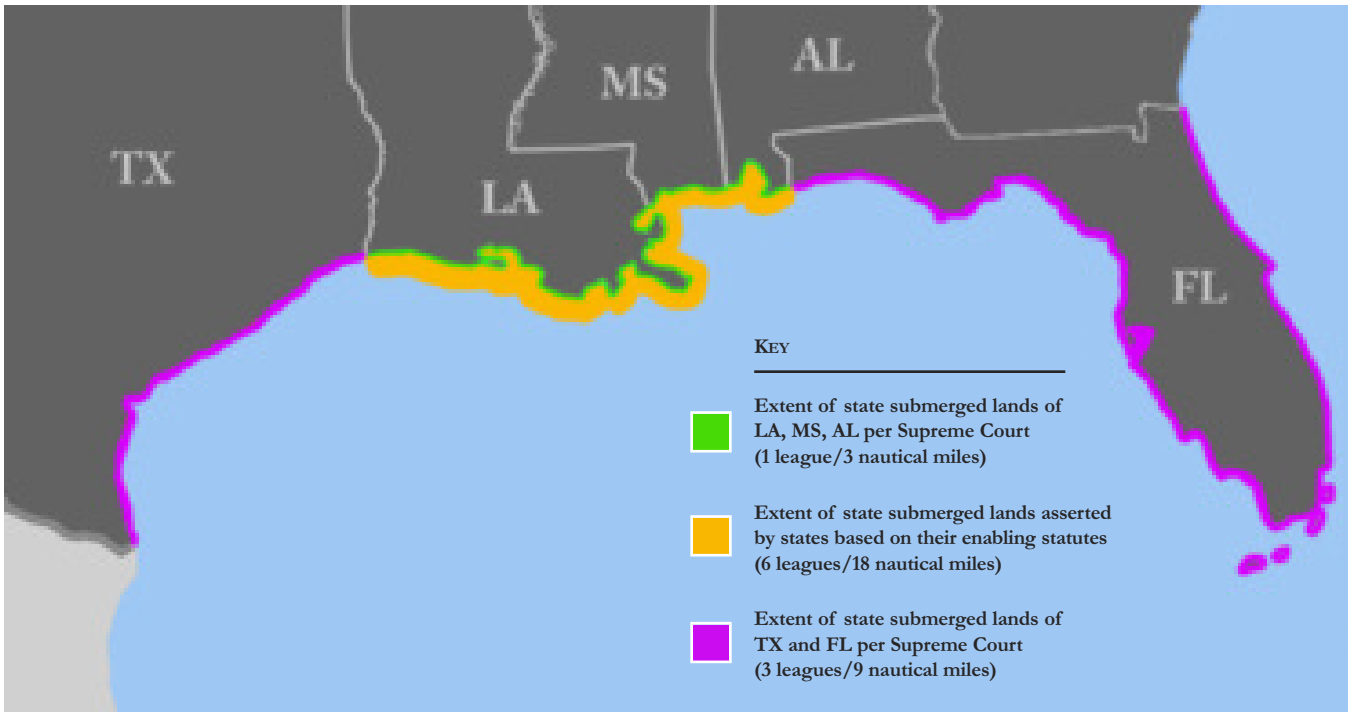
Coastal waters have to start somewhere. That line in the sand is the mean high tide line.[1] From that point, coastal waters are subject to overlays of jurisdiction that dictate, depending on the activity, who is in charge, where it occurs, and whether it impacts waters, the land beneath the waters, or the things in the waters. While coastal waters are not owned in the way that people and entities own land, the resources found in and under coastal waters, such as fish, plants, and oil, are managed by the government for the good of the people as a whole. This authority, often referred to as a type of sovereign ownership, is derived from the Public Trust Doctrine, a centuries-old theory that posits that the government holds title to submerged lands, and the waters above such lands, in trust for public use.

Legal authority also has to start somewhere. In the United States, that starting point is the constitution, although some roots, such as the Public Trust Doctrine, run deeper. The U.S. Constitution establishes that "This constitution, and the laws of the United States ... shall be the supreme law of the land." This is known as the Supremacy Clause and means that where the United States is directed or chooses to enforce laws pursuant to an underlying constitutional authority, state and local laws are pre-empted, i.e. the federal law must be followed. Thus, even if a state chooses to extend its jurisdiction, such a decision cannot supersede what the federal government has legislated.

As a practical matter, determining jurisdiction over coastal waters is complicated by the fact that the distances from shore are seldom given in uniform units. Nautical miles are commonly used, which equal 1.15 land (or statute) miles. A league equals 3 nautical miles, or 3.45 statute miles.

Starting on shore heading seaward, activities are subject to multiple laws enforced by multiple authorities. Land above the mean high tide line is likely private property, and state and local authorities have jurisdiction. Generally speaking, a property owner may do as she pleases on her property, but not to the extent that those activities harm another. If the activity on private property adversely affects the tidal wetlands, for example, such as excavating soil or building a hard structure, the U.S. Army Corps of Engineers ("Corps") will dictate what is lawful pursuant to its authority under the Clean Water Act. Certain activities may also need permission from the state to ensure the activity is consistent with the state's Coastal Zone Management Act plan.

At the point where the water covers the shore at high tide, private rights fade and government rights begins. The state government owns the tidal lands – that is, the land between the high and low water marks. These are lands that are covered by the tides at some point during the day. Coastal property owners abutting these tidelands, known as upland owners, are described as having littoral rights, which sometimes, but not precisely, are called riparian rights (which more correctly refer to rights of property owners abutting freshwater). While both Alabama and Mississippi[2] allow littoral owners the rights to access the water, build docks, piers, and structures, and to harvest oysters, the exercise of these so-called "rights" still require permission from the state and likely the federal government, depending on the activity. For example, Alabama Code Ann. § 33-7-53 authorizes littoral landowners to fill, reclaim, and gain title to tidal lands. However, the law requires the landowner to obtain permission from the state and the "United States engineer officers or other federal authority having jurisdiction." In Alabama, the responsible agency is the Department of Conservation and Natural Resources; in Mississippi, the Secretary of State is responsible for issuing leases for submerged state lands. Activities in the near-shore area such as oyster aquaculture require the permission of the upland owner.



The mean high tide line changes over time, and with it, those property rights. When the high tide line extends farther seaward, as dirt and sand gradually add to the shoreline, it is known as accretion. For the most part, the owner of the upland owns that extra land, just as when the coastline has eroded and the property owner experiences avulsion, losing that land. Different rules apply when an artificial force, such as a dock, pier, or bulkhead, causes the accretion or avulsion, as to opposed the gradual changes by tides.

Alabama and Mississippi differ significantly on how they treat artificial accretion. In Mississippi, an upland owner has the right to title only over artificial accretions that occurred prior to the state established coastal boundaries as of July 1, 1973.[3] However, in Alabama, a Great Depression-era law gives littoral landowners the right to acquire tidelands not devoted to public use and fill, reclaim, and get title to those lands.[4] In other words, any accretion, natural, sudden, or artificial, may give the littoral owner title in Alabama, if they get the right permit.

As with the tidal lands, the state owns the submerged lands extending from its coasts. Submerged lands refers to those lands that are never exposed by the tide. The extent of that jurisdiction is disputed by the states, although the Supreme Court had the last word. According to its 1960 decision, the federal government limits the Alabama and Mississippi state-owned submerged lands to three nautical miles from the low tide mark based on a 1953 law called the Submerged Lands Act.[5] The federal laws establishing the states, commonly referred to as enabling acts, suggest a rather different boundary. According to Mississippi's 1817 enabling act, state lands extend to "the Gulf of Mexico ... including all the islands within six leagues of the shore." According to the Alabama Enabling Act, the state boundaries continued "south, to the Gulf of Mexico ... including all islands within six leagues of the shore." In other words, the state enabling acts set forth submerged land boundaries of 18 nautical miles or just over 20 statute miles. The Supreme Court held that the 1953 law, and not the earlier laws, dictated the boundaries, based on the reasoning that the earlier laws would have extended the boundaries only if there had been islands at that distance (which there are not).

The States of Alabama and Mississippi, therefore, have rights to minerals, such as oil and gas, found under state submerged lands out to three miles. That three-mile line also dictates the extent of state law over the use of the water column above those submerged state lands, which affects activities such as setting fishing quotas and seasons. After years of disputes over the brevity of federal red snapper seasons, the U.S. Congress extended state boundaries for the regulation of reef fish from three to nine nautical miles starting in 2016.[6]

Coastal states do not have exclusive authority over state submerged lands. The federal government also has an interest. The Corps enforces laws for activities affecting the waters of the United States to ensure that navigation is not obstructed or the federal constitutional authority over commerce impaired. A 750-yard long dock, for example, could not be built by a Mississippi littoral owner (who, by state law has the "right" to build), even if permitted by the state, without permission by the Corps.

While the Corps has authority to exercise its jurisdiction in state waters, so does the U.S. Coast Guard. The Coast Guard provides rescue, defense, and law enforcement on the seas. A primary duty of the Coast Guard is described as "the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States."[7] The Environmental Protection Agency ("EPA") also has jurisdiction in those waters, enforcing pollution laws, such as the Clean Water Act.[8]

The United States has a long arm when it comes to law enforcement off its shores. The responsibilities tend to fall into two types of roles: defending the homeland, or authorizing use and extraction of its natural resources, including oil and gas. The justification for the exercise of power comes from two Presidential Proclamations. Under a 1988 Presidential Proclamation defining "territorial seas," the United States asserted "sovereignty and jurisdiction that extend to airspace ... as well as to its bed and subsoil" to a distance of "12 nautical miles from the baselines of the United States" (meaning the low tide line). This synchronizes with the international definition of territorial sea found in the United Nations Convention on the Law of the Sea ("UNCLOS"), to which the United States is not a party. Similarly, the United States asserted jurisdiction in 1983 to an "Exclusive Economic Zone"[10] ("EEZ") extending 200 nautical miles to "sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone."

With respect to the submerged lands under the territorial seas and EEZ, the United States had asserted its authority much earlier. For example, in 1953 the Outer Continental Shelf Lands Act asserted the United States' right to develop minerals from the area: "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided [in this law]."[11]

Farther out beyond the EEZ are the so-called high seas, or international waters or, more boringly, areas beyond national jurisdiction. Even there the United States has asserted jurisdiction in certain instances. For example, there are two areas of the Gulf of Mexico where the EEZs of Cuba, Mexico, and the United States do not reach. Those areas are known as the Western Gap and the Eastern Gap. Mexico and the United States entered a treaty in 2000 to divvy-up the Western Gap for the purpose of seabed and subsoil exploration and development, and the United States is in the process of addressing oil development in the Eastern Gap.

The notion of the high seas gives an impression that no laws apply. To a large extent that is true. High sea areas are open to fishing, possibly leading to exploitation of fisheries because there are no limits on harvest numbers or methods. But some U.S. laws apply where U.S. interests are at stake. For example, the Maritime Drug Law Enforcement Act authorizes U.S. interdiction of drugs and their transporters, as is explored more fully in the article by Morgan Springer in this edition.[12] The pollution treaty, MARPOL, authorizes member states to enforce laws over ships at their ports for events that occurred on the high seas.

U.S. wildlife laws, such as the Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA") can also apply to the high seas, as those laws are concerned more with the species or the person harming the species than where the harm occurs. The ESA, for example, applies to any person "subject to the jurisdiction of the United States." Therefore, a U.S. citizen is prohibited from harming (or buying or selling) listed species even on the high seas. Similarly, the bans within the MMPA apply to any person or *any vessel* subject to U.S. jurisdiction.[13] The MMPA also prohibits importing fish captured with technology that injures or kills an excessive number of marine mammals, regardless of where caught.[14]

Thus, the question of who can do what along the coasts of Alabama and Mississippi (and the whole United States) is complex. The area is regulated by states, more closely to shore, and by the federal government, farther out, to allow individual activities without allowing those activities to harm the interests of the public as a whole.

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Endnotes

1. 43 U.S.C. § 1301(a)(2).
2. Mississippi limits littoral rights to 750 yards to sea – almost a half-mile (Miss. Code Ann. § 49-15-9).
3. Coastal Wetlands Protection Act, Miss. Code Ann. § 29-15-7. The accreted land must also not be for a public purpose in order for the upland owner to claim title. *See also*, Bayview Land, Ltd. v. Mississippi, 950 So. 2d 966 (S. Ct. Miss. 2007).
4. Ala. Code Ann. § 33-7-53.
5. United States v. Louisiana, 363 U.S. 1 (1960) (based on the Submerged Lands Act, 43 U.S.C. § 1301).
6. Consolidated Appropriations Act 2016, P.L. 114-113, div. B., tit. I, § 110(b); 9 Stat. 2242 (Dec. 18, 2015).
7. 14 U.S.C. § 2.
8. *See, e.g.*, United States v. Trident Seafood Corp., No. 2:18-CV-00210 (W.D. Wash. *Consent Decree* Feb. 9, 2018) (enforcing CWA violations against a seafood company for dumping seafood waste covering over three acres in waters off the coast of Alaska).
9. Pres. Proc. No. 5928 (Dec. 27, 1988), 54 Fed. Reg. 777.
10. Pres. Procl. No. 5030 (March 10, 1983), 48 Fed. Reg. 10605.
11. 43 U.S.C. § 1332(1).
12. 46 U.S.C. § 70503.
13. 16 U.S.C. § 1372(a).
14. 16 U.S.C. § 1371(a)(2).

In Sum.

A Summation of the Facts and Figures of Interest in this Edition

★ *Number of charges for involuntary manslaughter against Well Site Leaders on Deepwater Horizon oil well for 2010 explosion:*	22
★ *Number of convictions:*	0
★ *Average number of days before alleged drug-runners caught in international waters are brought to U.S. court:*	18
★ *Length in miles that a riparian/littoral landowner in Mississippi can build a dock out to sea (if permits are granted):*	0.5
★ *Distance in nautical miles that Alabama and Mississippi have jurisdiction over oil and gas in submerged lands:*	3
★ *Distance in nautical miles that Gulf states have management authority over reef fish:*	9
★ *Distance in nautical miles that Alabama, Louisiana, and Mississippi have management authority over other fish:*	3
★ *Distance in nautical miles that Florida, Texas have management authority over all fish:*	9