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## Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007)

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# COURT REPORTS

## FEDERAL COURTS

### UNITED STATES CIRCUIT COURTS

#### FIFTH CIRCUIT

**Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007)** (holding that neither the federal navigation servitude nor Louisiana law grant citizens the right to fish on privately owned riparian lands when a navigable body's seasonal floodwaters cover the land).

Every spring, the Mississippi River floods and covers ordinarily dry private riparian property in East Carroll Parish, Louisiana for at least two months. Small lakes and trapped water remain on the ordinarily dry land when the seasonal floodwaters recede. Walker Cottonwood Farms ("Walker") owns land on which one of the trapped water bodies, Gassoway Lake, is located. Members of the public frequently fished in this lake during the spring flood cycle despite the objections of Walker, who filed numerous complaints with the sheriff against the fishermen. The Sheriff responded by arresting the fishermen for trespass.

In 1996, Walker filed suit in Louisiana state court seeking a declaration that it owned the property and an injunction to prevent the public from fishing in Gassoway Lake without permission. The trial court granted Walker's summary judgment motion and issued a permanent injunction. The Second Circuit Court of Appeal of Louisiana reversed the state court's ruling in favor of Walker because the issues could not be decided on summary judgment and remanded the case.

In 2001, before the state trial court issued a final decision, the fishermen filed a U.S.C. § 1983 complaint in the United States District Court for the Western District of Louisiana, claiming that the Sheriff did not have probable cause to arrest them for trespass because either: (1) Louisiana owned the lake on behalf of the public; or (2) the lake was subject to federal and state navigational servitudes. The federal district court stayed the action until the state court issued a final decision because that decision could render the federal suit moot. The state appellate court affirmed in part and reversed in part the trial court's ruling in favor of Walker, ruling that the property encompassing Gassoway Lake was not the bed of the Mississippi River because "a river's bed consists only of the land lying below the river's ordinary low water mark." The court held that Gassoway Lake was not a navigable body of water owned by the state and "[p]rivately owned land does not

become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property.”

In 2005, the federal district court lifted the stay and the magistrate judge issued his report and recommended that no federal statute nor the federal navigation servitude authorized the fishermen to fish on private land, but that federal common law did create a right to fish on navigable waters, and that right burdens private property when covered by flood waters of navigable waters. The district court adopted the recommendations in part, but disagreed that federal common law and state law granted a right to fish on privately owned land. The court reasoned that although the property encompassing Gassoway Lake is a bank of the Mississippi River and subject to a state servitude, the servitude “is limited to activities that are incidental to the navigable character of the Mississippi River and its enjoyment as an avenue of commerce.” The rights granted by the servitude did not include fishing because that right is not incidental to using the river for commerce or navigation.

In their appeal to the United States Court of Appeals, Fifth Circuit, the fishermen mistakenly relied on a provision of the Louisiana Constitution that preserves the freedom to hunt and fish. However, read in its entirety, the provision explicitly states that it does not authorize the right to use private property to fish without consent. The court rejected the fishermen’s argument that the federal navigation servitude granted the right to fish on private property because the right to “fish on public trust lands is governed” by state law. The court, citing the Walker state court ruling, held that the state servitude of public use does not grant the rights claimed by the fishermen because fishing is not incidental to using the river as an avenue of commerce or navigation. The court also rejected the fishermen’s argument that Louisiana Civil Code granted the right to fish on submerged private lands because the state owns running waters. The court cited a Third Circuit Court of Appeal of Louisiana decision holding that state law “does not mandate that the landowner allow public access to the waterway.” Because the fishermen had neither a federal nor state right to fish on privately owned lands, the Sheriff had probable cause to arrest them for trespass.

Therefore, the court affirmed the district court’s summary judgment in favor of the sheriff because the sheriff had probable cause when he arrested the fishermen.

*James Shine*