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April 4, 2014

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President of the Senate
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Baton Rouge, LA 70804

Representative Charles "Chuck" Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

RE: SCR 53 of 2012

Dear Mr. President and Mr. Speaker:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2012 Senate Concurrent Resolution No. 53, relative to surface water and groundwater law.

Sincerely,

A handwritten signature in black ink that reads "William E. Crawford".

William E. Crawford
Director

WEC/puc

Enclosure

cc: Senator Dan Claitor

email cc: David R. Poynter Legislative Research Library
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LOUISIANA STATE LAW INSTITUTE

**REPORT IN RESPONSE TO SCR 53 OF THE
2012 REGULAR SESSION**

The Use of Surface Water Versus Groundwater

Prepared for the Legislature on

April 4, 2014

Baton Rouge, LA

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**REPORT TO THE LOUISIANA LEGISLATURE IN RESPONSE TO SCR NO. 53 OF
THE 2012 REGULAR SESSION RELATIVE TO THE USE OF SURFACE WATER
VERSUS GROUNDWATER**

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April 4, 2014

To: Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
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Representative Chuck Kleckley
Speaker of the House of Representatives
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**REPORT TO THE LOUISIANA LEGISLATURE IN RESPONSE TO SCR NO. 53 OF
THE 2012 REGULAR SESSION RELATIVE TO THE USE OF SURFACE WATER
VERSUS GROUNDWATER**

PART I. INTRODUCTION

SUBPART A. THE LEGISLATURE'S REQUEST

Senate Concurrent Resolution No. 53 of the 2012 Regular Session of the Louisiana Legislature (SCR 53) requested the Louisiana State Law Institute "to study legal issues surrounding groundwater and surface water law and any needs for revision to current law." Pursuant to this request, the Law Institute created a Water Law Committee, a study committee comprised of academicians, practitioners, judges, and environmental law specialists. In addition, the committee has benefited immensely from the participation of observers with expertise and interest in this vital area of law.

The Water Law Committee's first task was to study SCR 53 in order to identify the scope of the legislature's request. SCR 53 observes that, according to data collected by the U.S. Geological Survey for the years 2005 through 2010, groundwater withdrawals in Louisiana increased while surface water withdrawals decreased. SCR 53 then points out that Louisiana's disparate legal regimes for groundwater and for surface water have yielded "various and often conflicting legal rules such as the rule of capture, absolute ownership, and riparian rights." It is noted in SCR 53 that Louisiana law recognizes "running surface waters of the state...as public resources, owned by the state, and usually subject to a charge for consumption, with the exceptions of riparian owners and other uses such as agriculture, aquaculture, and municipal purposes. [By

contrast,] groundwater, when reduced to possession, is treated as privately owned and free of charge.”

SCR 53 explains that the legislature needs to “be fully informed as to the legal aspects of the withdrawal and sales of surface water and groundwater resources, including potential effects, consequences, impacts upon current state laws such as Civil Code Art. 667, and the necessity, if any, for revisions to Louisiana law.” SCR 53 also references the following recommendation made by the Louisiana Ground Water Resource Commission in its March 2012 Interim Report entitled “Managing Louisiana’s Groundwater Resources”¹ (Groundwater Interim Report): “engage legal scholars to research and explore the potential non-compensated consumption of surface water when used as an alternative to groundwater.”²

¹ The Groundwater Interim Report is available online at <http://dnr.louisiana.gov/assets/docs/conservation/groundwater/12.Final.GW.Report.pdf>.

² The Groundwater Interim Report refers several times to engaging legal scholars on this issue, including the following reference on the first page of the report:

In addition to the complexity with regard to the agencies that manage our water resources, our laws governing water are also complex. Historically, our state has applied various and sometimes conflicting legal concepts such as absolute ownership, rule of capture, and riparian rights. This has resulted in a situation where the running surface waters of the state are recognized as public resources, owned by the state, and generally subject to a charge for consumption, excepting riparian landowners and where used for agriculture, aquaculture, and municipal purposes. Conversely, groundwater, when reduced to possession, is treated as privately owned and free of charge. This paradox results in the state charging for surface water resources that are normally in abundance, while allowing uncompensated withdrawal of groundwater resources that are often in limited supply. While we embrace the right of capture for landowners, in order to address this quandry, **legal scholars should research, debate, and explore the potential non-compensated consumption of surface water when used as an alternative to groundwater and as an aid to economic development, job creation, and job retention.**

Groundwater Interim Report, page 1 (emphasis added). *See* also Groundwater Interim Report, page 28.

At the end of the Groundwater Interim Report, recommendations for action are made. “Groundwater Sustainability Management Recommendation No. 10 (Governance)” provides:

ACTION REQUIRED: Administrative

Engage legal scholars to research and explore the potential non-compensated consumption of surface water when used as an alternative to groundwater, and as an aid to economic development, job creation, and job retention.

The Groundwater Interim Report's recommendation (quoted in SCR 53) is relatively specific. Nevertheless, the committee also recognized that SCR 53's actual resolution is immensely broad. That portion of SCR 53 states:

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby request the Louisiana State Law Institute to study legal issues surrounding groundwater and surface water law and any needs for revision to current law.

From the inception of its deliberations, the Law Institute recognized that a holistic approach to potential legislative reform of any of Louisiana's water laws was imperative. Water concerns are "grow[ing] in the national consciousness," as noted in a recent article co-authored by committee member Mark Davis.³ Interstate water disputes have continued to make headlines throughout the duration of the committee's deliberations.⁴ A few months ago, Governor Bobby Jindal announced that a "Water Campus" will be built in Baton Rouge. According to Baton Rouge Mayor Kip Holden: "Baton Rouge will become the epicenter for the study of the science of river deltas. It will be a place where people can come from around the world to preserve our great natural resources."⁵

SUBPART B. BACKGROUND EVENTS LEADING UP TO SCR 53

The events that led up to the adoption of SCR 53 will be summarized to lay the foundation for the context in which SCR 53 was adopted. For purposes of organizational clarity, these events will be numbered and presented chronologically.

1. House Concurrent Resolution No. 1: Ground Water Resources Commission Requested to Prepare an Interim Report by March 1, 2012

The Louisiana Ground Water Management Commission was created in 2001, and charged with the task of developing a statewide comprehensive groundwater

Groundwater Interim Report, page 106.

³ Mark S. Davis and Michael Pappas, *Escaping the Sporhase Maze: Protecting State Waters Within the Commerce Clause*, 73 LA. L. REV. 1, 3 (2012).

⁴ See, e.g., <http://fluentnews.com/s/28287258> (Feb. 22, 2013: Georgia residents' thirst for Tennessee water prompts Georgia legislature to adopt a resolution seeking to have its border moved in order to access the Tennessee River); http://mdjonline.com/view/full_story/23937881/article-Deal-appoints-lawyers-for-water-dispute? (Oct. 28, 2013: Florida sues Georgia over water rights in the Chattahoochee, Flint and Apalachicola rivers).

⁵http://blog.nolaxom/nola_river_baton_rouge_news/print.html?entry=/2013/12/jindal_scheduled_to_make_a_major.html.

management system.⁶ The commission was also given power to determine “Critical Ground Water Areas” and to respond to emergency situations. In House Concurrent Resolution No. 1 of Louisiana’s 2010 Regular Session (HCR 1), the legislature requested that the Ground Water Resources Commission study the state’s ground and surface water resources, and “provide recommendations for the optimal management and protection of the state’s water resources, both ground water and surface water...no later than March 1, 2012.”⁷

Among the topics that the legislature requested be included in the Commission’s study was “the procedure for selling running water and water in naturally navigable water bodies owned by the state for private purposes.”⁸ According to HCR 1, the Ground Water Resources Commission had already been studying the use of surface water as an alternative to ground water use.⁹

⁶ Acts 2001, No. 446, eff. July 1, 2001, *adding* LA. R.S. §§ 38:3099.1 through 3099.4 and LA. R.S. § 36:4(V).

⁷ HCR 1 requested that the report include, at a minimum, the study of:

- [1] impacts and potential impacts to water quality in surface water and ground water, as well as, current federal, state, and local efforts to protect water quality;
- [2] surface water and ground water resource management and protection policies in the areas of ground water concern as designated by the commissioner of conservation, areas of the state that have experienced increased water usage associated with the hydraulic fracturing used in the production of natural gas from shale-gas formations, and the areas of high water use in Southwest Louisiana and the capital area region;
- [3] the procedure for selling running water and water in naturally navigable water bodies owned by the state for private purposes;
- [4] necessary changes to current water resource management law in order to implement recommendations for the optimal management and protection of the state's water resources, both ground water and surface water;
- [5] the necessary changes to current government procedures to make the management and protection of the state's surface water and ground water resources both more efficient and comprehensive; and
- [6] water recycling and conservation incentives, including tax incentives.

House Concurrent Resolution No. 1, 2010 La. Reg. Sess., pages 5-6 (study topic numbers added).

⁸ House Concurrent Resolution No. 1, 2010 La. Reg. Sess., page 5. In the preceding footnote, this topic is designated as study topic 3.

⁹ HCR 1 notes that, “from October 2008 to March 2010, the Ground Water Resources Commission met seven times throughout Louisiana to learn and discuss issues involving the management of ground water, including the study of alternatives to ground water use, such as surface water.” House Concurrent Resolution No. 1, 2010 La. Reg. Sess., page 4.

2. February 5, 2010 Memorandum from Attorney General and Secretary of Department of Natural Resources Entitled “Management and Sale of State Surface Waters”

In addition to the Groundwater Interim Report, the factors most likely leading directly to the adoption of SCR 53 are four related events occurring in 2010, all of which raised issues regarding the proper protocol for withdrawing surface water.¹⁰ The first of these events was a February 5, 2010 Memorandum co-authored by the Attorney General and the Secretary of the Department of Natural Resources entitled “Management and Sale of State Surface Waters.”¹¹ The Memorandum, which was addressed to “All State Surface Water Managers,” was prompted by four pending requests to the Attorney General for opinions relative to withdrawals of surface water.¹²

Although the underlying facts of each request were different, all four requests expressed the same concern--the proper procedure for withdrawing surface water. For example, one of the requests asked “whether or not a private citizen, while parked on a public road right-of-way, has the authority to withdraw water from a running creek through a hose and deposit the water into a tanker truck for that citizen's own private use.”¹³ The Attorney General opinions rendered in response to all four requests were

¹⁰ Though not an event preceding enactment of SCR 53, it should be noted that, in 2012, after the promulgation of the Groundwater Interim Report, the Commission’s responsibilities were expanded to include surface water, its name was changed to the Louisiana Water Resources Commission, and the Commission was charged with the duty to develop a comprehensive plan for both groundwater and surface water. Acts 2012, No. 471, § 2, eff. Aug. 1, 2012.

¹¹ February 5, 2010 Guidance Memorandum on the “Management and Sale of State Surface Waters” issued to “All State Surface Water Managers” by the Office of the Attorney General and the Secretary of the Department of Natural Resources, Groundwater Interim Report, Exhibit F.

¹² These four requests resulted in the following four opinions: La. Atty. Gen. Op. No. 08-0176 dated March 17, 2010 to Robert W. Levy (District Attorney, Third Judicial District of Louisiana, Parishes of Lincoln and Union), 2010 Westlaw 1512844 (La. A.G.); La. Atty. Gen. Op. No. 09-0028 dated March 19, 2010 to B.D. Mitchell (President, DeSoto Parish Police Jury), 2010 Westlaw 1512843 (La. A.G.); La. Atty. Gen. Op. No. 09-0066 dated March 19, 2010 to Phillip Fincher (Chairman, Claiborne Parish Watershed District Commission), 2010 Westlaw 1512842 (La. A.G.); and La. Atty. Gen. Op. No. 09-0291 dated April 27, 2010 to Rep. Thomas G. Carmody, Jr. (Louisiana House of Representatives, State Representative – District 6), 2010 Westlaw 2071071 (La. A.G.).

¹³ La. Atty. Gen. Op. No. 08-0176 dated March 17, 2010 to Robert W. Levy (District Attorney, Third Judicial District of Louisiana, Parishes of Lincoln and Union), 2010 Westlaw 1512844 page 1 (La. A.G.).

The underlying facts of the three remaining opinions are summarized:

consistent: if the surface water constitutes running water, its withdrawal requires payment of fair market value to the governmental entity with authority to sell that water.

The February 5, 2010 Memorandum reiterated the legal position that has been consistently taken by the Attorney General's office: "Under Louisiana Law persons, with the possible exception of riparian owners, are not authorized to remove State owned surface water without obtaining the prior written approval of the State and without paying fair value."¹⁴ The Memorandum goes on to state that "[t]he **prior** written approval of the Attorney General and the Department of Natural Resources of any such agreement is mandated pursuant to the State constitutional obligations and

In *Mitchell*, it was alleged that water was being pumped out of Clear Lake, Smithport Lake, and some streams in DeSoto Parish for natural gas drilling purposes. La. Atty. Gen. Op. No. 09-0028 dated March 19, 2010 to B.D. Mitchell (President, DeSoto Parish Police Jury), 2010 Westlaw 1512843 (La. A.G.).

In *Fincher*, the Chairman of the Claiborne Parish Watershed District Commission requested an opinion as to the Commission's authority to sell large volumes of water from: first, Lake Claiborne; second, any tributary to Lake Claiborne; and third, any parish stream outside of the Kisatchie National Forest. La. Atty. Gen. Op. No. 09-0066 dated March 19, 2010 to Phillip Fincher (Chairman, Claiborne Parish Watershed District Commission), 2010 Westlaw 1512842 (La. A.G.).

The facts as set forth in *Carmody* are:

On November 24, 2009, the City Council for the City of Shreveport passed Resolution No. 225 of 2009 authorizing the Mayor of the City of Shreveport to execute, on behalf of the City of Shreveport, an agreement with Petrohawk Energy. This agreement would allow temporary installation of a water line traversing Clyde Fant Parkway right-of-way, property owned by the City of Shreveport, for the purpose of transporting water from the Red River to a gas well site on the west side of Clyde Fant Parkway in order to complete the well. Compensation for the use of the right-of-way was Fourteen Thousand Six Hundred Four Dollars (\$14,604.00) for a term of twelve (12) days, but not to exceed thirty (30) days absent a renewal on the same terms.

La. Atty. Gen. Op. No. 09-0291 dated April 27, 2010 to Rep. Thomas G. Carmody, Jr. (Louisiana House of Representatives, State Representative - District 6), 2010 Westlaw 2071071 (La. A.G.).

¹⁴ February 5, 2010 Guidance Memorandum on the "Management and Sale of State Surface Waters" issued to "All State Surface Water Managers" by the Office of the Attorney General and the Secretary of the Department of Natural Resources, Groundwater Interim Report, Exhibit F, page 1.

mandates set forth in LA Const. Art. IX and which directs and requires these offices protect the natural resources and the environment of the State.”¹⁵

3. April 22, 2010 Memorandum of Understanding Between State Resource Agencies Regarding Surface Water Withdrawal

The second of the four related events occurring in 2010 was the April 22, 2010 Memorandum of Understanding Between State Resources Agencies Regarding Surface Water Withdrawal (MOU), signed by the Secretary of the Department of Natural Resources, the Secretary of the Department of Environmental Quality, and the Secretary of the Department of Wildlife and Fisheries.¹⁶ Noting that all three signatory agencies have “some degree of responsibility for protection of the state’s water resources at a time when these numerous, important and novel issues regarding the resource are daily being raised,”¹⁷ the MOU designates the Department of Natural Resources as the coordinating agency for requests for surface water withdrawals. According to the MOU, the signatories entered into the agreement “to foster compliance with state laws and regulations pertaining to the withdrawal of water under the jurisdiction of the respective agencies and to provide a general framework for cooperative efforts among the signatory organizations regarding the management and use of surface water.”¹⁸

4. Act 955 of 2010: Secretary of Natural Resources Authorized to Enter into Cooperative Endeavor Agreements Permitting Withdrawal of Running Surface Water for Fair Market Value

The third related event occurring in 2010 was the enactment of Revised Statutes Sections 30:961 through 963,¹⁹ legislation that authorizes (but does not require)²⁰ the

¹⁵ February 5, 2010 Guidance Memorandum on the “Management and Sale of State Surface Waters” issued to “All State Surface Water Managers” by the Office of the Attorney General and the Secretary of the Department of Natural Resources, Groundwater Interim Report, Exhibit F, pages 1-2.

¹⁶ April 22, 2010 Memorandum of Understanding Between State Resources Agencies Regarding Surface Water Withdrawal, Groundwater Interim Report, Exhibit G.

¹⁷ April 22, 2010 Memorandum of Understanding Between State Resources Agencies Regarding Surface Water Withdrawal, Groundwater Interim Report, Exhibit G, page 1.

¹⁸ April 22, 2010 Memorandum of Understanding Between State Resources Agencies Regarding Surface Water Withdrawal, Groundwater Interim Report, Exhibit G, page 2.

¹⁹ Acts 2010, No. 955, § 1, *enacting* LA. R.S. §§ 30:961 through 30:963, eff. July 6, 2010.

Secretary of Natural Resources (DNR Secretary) to enter into cooperative endeavor agreements permitting the withdrawal of running surface water upon “ensuring that the state receives fair market value for any water removed.”²¹ Act 955 expressly exempts riparian rights from its scope, stating in relevant part:

This Chapter shall have no effect on the rights provided for in Civil Code Articles 657 and 658 or any rights held by riparian owners in accordance with the laws of this state.²²

Although Revised Statutes Sections 30:961 through 963 were originally slated to become “null, void, and without effect after December 31, 2012,”²³ the legislature in 2012 extended the period for entering into a voluntary cooperative endeavor agreement for the withdrawal of running surface water through December 31, 2014.²⁴

Act 955 requires the DNR Secretary to ensure that any agreement entered into is in the public interest,²⁵ that it is “based on best management practices and sound science, and that it is consistent with the required balancing of environmental and ecological impacts with the economic and social benefits found in Article IX, Section 1 of the Constitution of Louisiana.”²⁶

Act 955 coined a phrase not previously found in Louisiana legislation. That phrase, “running surface waters,” is defined in Act 955 as “the running waters of the state, including the waters of navigable water bodies and state owned lakes.”²⁷

²⁰ LA. R.S. § 30:961(A) provides: “No provision contained in this Chapter should be construed as a requirement for any person or entity to enter into any cooperative endeavor agreement to withdraw running surface water.”

²¹ LA. R.S. § 30:961(C), *added by* Acts 2010, No. 955, § 1, eff. July 6, 2010. This legislation can be found in Chapter 9-B (Surface Water Management) of Subtitle I (Minerals, Oil, and Gas) of Title 30 (Minerals, Oil, and Gas and Environmental Quality).

²² LA. R.S. § 30:961(A). Riparian rights are examined in Subpart B (Riparian Rights in Louisiana) of Part II (Louisiana’s Legal Treatment of “Running Surface Water” and Groundwater), *infra*.

²³ Acts 2010, No. 955, § 2. It should be noted, however, that the 2010 legislation, which imposed a two-year term limit on any agreements entered into, permitted successive two-year renewals until December 31, 2020. LA. R.S. § 30:961(E), *added by* Acts 2010, No. 955, § 1, eff. July 6, 2010.

²⁴ LA. R.S. § 30:961(E), *as amended by* Acts 2012, No. 261, § 1, eff. July 2, 2012.

²⁵ LA. R.S. § 30:961(B).

²⁶ LA. R.S. § 30:961(D).

²⁷ LA. R.S. § 30:962(1).

According to Act 955, this definition is applicable whenever the phrase "running surface waters" is used in Chapter 9-B of Subtitle I of Title 30.²⁸

5. Act 994 of 2010: Riparian Owners Permitted to Assign Access Rights to Surface Water for any Agricultural or Aquacultural Purpose Within Louisiana

Act 994 of 2010 enacted a new provision governing riparian rights, placing it not in the Civil Code near the existing provisions on riparian rights,²⁹ but in Title 9, the Civil Code Ancillaries.³⁰ Revised Statutes Section 9:1104, the riparian rights provision added by Act 994, begins with the legislative finding that "waters used in agricultural or aquacultural pursuits³¹ are not consumed, rather they are merely used."³² It then provides:

A riparian owner may assign access rights equal to his own for the surface water adjacent to his riparian land for any agricultural or aquacultural purpose within the state of Louisiana by the non-riparian owner without restriction as to the form of any such agreement to another, provided that the withdrawal of running surface waters is environmentally and ecologically sound and is consistent with the required balancing of environmental and ecological impacts with the economic and social benefits found in Article IX, Section 1 of the Constitution of Louisiana.³³

Revised Statutes Section 9:1104 prohibits a riparian owner from "authoriz[ing] the withdrawal of running waters for non-riparian use where the use of the water would significantly adversely impact the sustainability of the water body, or have undue impacts on navigation, public drinking water supplies, stream or water flow energy, sediment load and distribution, and on the environment and ecology balanced against the social and economic benefits of a contract of sale or withdrawal, or sale of

²⁸ LA. R.S. § 30:962. Title 30 of the Revised Statutes is entitled "Minerals, Oil, And Gas and Environmental Quality," Subtitle I of Title 30 is entitled "Minerals, Oil, and Gas," and Chapter 9-B of Subtitle I is entitled "Surface Water Management."

²⁹ LA. CIV. CODE arts. 657-58.

³⁰ LA. R.S. § 9:1104, *enacted by* Acts 2010, No. 994, § 1, eff. July 6, 2010.

³¹ The phrase "agricultural or aquacultural purpose" is defined as "any use by a riparian owner or an assignee of a riparian owner of running surface waters withdrawn and used for the purpose of directly sustaining life or providing habitat to sustain life of living organisms that are customarily or actually intended to be brought to market for sale." LA. R.S. § 9:1104(C).

³² LA. R.S. § 9:1104(A).

³³ LA. R.S. § 9:1104(B).

agreement, or right to withdraw running surface water for agricultural and aquacultural purposes.”³⁴ This statute will be examined later in this report.³⁵

6. Proposed Sale of Water by Sabine River Authority to TB Partners (for Texas Customers)

Another significant event involving Louisiana’s surface water that captured the public’s attention in 2011 was the proposed sale of water from the Toledo Bend Reservoir by the Sabine River Authority (SRA) to TB Partners, an entity “formed exclusively for the purpose of purchasing, selling and delivering a portion of SRA’s excess allowable yield in Toledo Bend Reservoir to customers in Texas.”³⁶ Despite a Louisiana Attorney General opinion confirming SRA’s authority to sell waters over which it has jurisdiction,³⁷ and in spite of numerous glowing letters of recommendation from prominent politicians supporting the proposed sale,³⁸ the proposal was “suspended” until “the State of Louisiana develops a statewide comprehensive water plan.”³⁹ According to one local online news report, the proposed sale engendered strong public opposition.⁴⁰ The news report stated that the following areas of concern were expressed about the proposed sale:

Many critics complained about the length of the contract and the fact there were no ironclad safeguards in it should the reservoir’s level continue to fall. Even more concerning was the lack of an independent, science-based,

³⁴ LA. R.S. § 9:1104(B).

³⁵ See Section 2 (Acts 2010, No. 994) of Subpart C (Riparian Rights in Louisiana) of Part II (Louisiana’s Legal Treatment of “Running Surface Water” Surface Water and Groundwater), *infra*.

³⁶ Sabine River Authority of Louisiana Competitive Water Purchase Proposal, Groundwater Interim Report, Exhibit A-2, page 1.

³⁷ La. Atty. Gen. Op. No. 10-0297 dated March 22, 2011 to Robert Conyer (Chairman, Sabine River Authority), 2011 Westlaw 1455968 (La.A.G.).

³⁸ Among those writing letters of support were former Louisiana governors Murphy “Mike” Foster, Charles “Buddy” Roemer, and Kathleen Babineaux Blanco. Sabine River Authority of Louisiana Competitive Water Purchase Proposal, Groundwater Interim Report, Exhibit A-2, pages 54-56.

³⁹ Groundwater Interim Report, page 84.

⁴⁰ One news source reported that between 300 and 400 people attended the public meeting held at Toledo’s Cypress Bend Resort on January 12, 2011. <http://www.toledo-bend.com/misc/Round1/index.asp?request=item027>. That same news source stated that of the 386 written comments received by the SRA about the proposed sale from members of the public, only seven comments were in favor of the proposed sale. <http://www.toledo-bend.com/misc/Round1/index.asp?request=item026>.

comprehensive study that would project Louisiana's long-range water needs.⁴¹

7. The Louisiana Ground Water Resources Commission's March 1, 2012 Interim Report and the Legislature's Response Thereto

As requested by HCR 1 of 2010, the Louisiana Ground Water Resources Commission in March 2012 promulgated an interim report.⁴² Some of the observations and recommendations from the Groundwater Interim Report were cited in SCR 53⁴³ and have already been mentioned.

After promulgation of the Groundwater Interim Report, the legislature in 2012 expanded the commission's responsibilities to include surface water, changed the commission's name to the Louisiana Water Resources Commission, and charged the commission with the duty to develop a comprehensive plan for both groundwater and surface water.⁴⁴ In June 2013 the Louisiana Water Resources Commission issued an update to its March 2012 Interim Report, which includes, as stated in the cover letter by Mr. Scott Angelle, Chairman of the Louisiana Water Resources Commission, "updated information on current major issues related to the management of Louisiana's water resources, as well as a record of actions executed to meet the recommendations submitted to the Legislature" in the Groundwater Interim Report.⁴⁵

In January 2014, the Louisiana Water Resources Commission issued a second status update entitled "Management Recommendations Status Update, January 2014" (January 2014 Status Update).⁴⁶ The commission's most recent status update identifies the substantive action that has been taken to complete the "comprehensive set of water management recommendations for implementation by either Legislative or Administrative action"⁴⁷ identified in the commission's March 2012 Interim Report. Of

⁴¹ <http://www.toledo-bend.com/misc/Round1/index.asp?request=item026>.

⁴² See text of HCR 1's itemized list of matters to be included in the Groundwater Interim Report at footnote 7, *supra*.

⁴³ See Subpart A (The Legislature's Request), *supra*.

⁴⁴ Acts 2012, No. 471, § 2, eff. Aug. 1, 2012.

⁴⁵ Louisiana Water Resources Commission, Update to March 2012 *Interim Report to the Louisiana Legislature* page 1 (June 2013). The June 2013 update is available online at http://dnr.louisiana.gov/assets/OC/env_div/gw_res/NEWS_RELEASE/WRC2013UupdateFinalVersion.pdf.

⁴⁶ The Louisiana Water Resources Commission's January 2014 status update is available online at http://dnr.louisiana.gov/assets/OC/env_div/gw_res/NEWS_RELEASE/WRC_ManagementRecommendations_StatusUpdate_Jan2014.pdf.

⁴⁷ Groundwater Interim Report, p. 8.

note in the January 2014 Status Update are two items: first, Item C of Part 9 (Collaboration), entitled “Engage legal scholars to research and explore the non-compensated consumption of surface water when used as an alternative to groundwater;” and second, Item D of Part 10 (Governance), entitled “Engage legal scholars to research and explore non-compensated consumption of surface water.”⁴⁸ Both items are stamped as being “in progress,” and the explanation following each item references SCR 53’s request to the Louisiana State Law Institute as well as the Law Institute’s current work on this project.

PART II. LOUISIANA’S LEGAL TREATMENT OF “RUNNING SURFACE WATER” AND GROUNDWATER

SUBPART A. “RUNNING SURFACE WATER”

1. SCR 53’s Terminology: “Surface Water” and “Running Surface Water”

The phrase “running surface water” is not found in any article of Louisiana’s Civil Code. The phrase “running surface water” was introduced into the Revised Statutes by Act 955 of 2010,⁴⁹ which authorizes the DNR Secretary to enter into cooperative endeavor agreements for the sale of “running surface water” at fair market value.⁵⁰ Act 955 defines running surface water as “the running waters of the state, including the waters of navigable water bodies and state owned lakes.”⁵¹

Act 955’s definition of running surface water, which expressly applies to Chapter 9-B (Surface Water Management) of Subtitle I (Minerals, Oil, and Gas) of Title 30 (Minerals, Oil, and Gas and Environmental Quality), does not purport to provide a general definition of the term for all purposes. Nevertheless, within the context of Act 955 it appears that the legislature has coined the phrase “running surface water” to

⁴⁸ Groundwater Interim Report, p. 9.

⁴⁹ The phrase “running surface water” appears in four sections located in two titles of the Revised Statutes. Three of these sections were added by Act 955 and are found in Title 30 (Minerals, Oil, and Gas and Environmental Law). *See* LA. R.S. §§ 30:961, 962 & 963, *added by* Acts 2010, No. 955 § 1; *amended by* Acts 2012, No. 261, § 1, eff. July 2, 2012.

The fourth section in which the phrase “running surface water” was added in a second 2010 enactment that “complements” Act 955. This section is found in Title 9 (Civil Code Ancillaries). *See* LA. R.S. § 9:1104(B) & (C), *added by* Acts 2010, No. 994, § 1, eff. July 6, 2010.

⁵⁰ *See* Section 4 (Act 955 of 2010) of Subpart B (Background Events Leading Up to SCR 53) of Part I (Introduction), *supra*.

⁵¹ LA. R.S. § 30:962(1), *added by* Acts 2010, No. 955, § 1, eff. July 6, 2010.

signify surface waters owned by the state. Hence, in the context of Act 955, which authorizes the state to sell running surface water owned by the state, the term "running surface water" signifies surface waters owned by the state.

Although the phrase "surface water" is used in SCR 53's actual text seven times,⁵² while the phrase "running surface water" is used only once, the more general

⁵² The phrase "surface water," which is used once in the Civil Code, did not appear in the Code until 1978. Nevertheless, the legal rights and duties recognized by the article of which it is a part can be traced back to the Digest of 1808. *See* LA. DIGEST OF 1808 p. 128, art. 4 ¶ 1; LA. CIV. CODE art. 656 ¶ 1 (1825); LA. CIV. CODE art. 660 ¶ 1 (1870). The provision adding the phrase "surface waters" to the Civil Code provides: "An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow." LA. CIV. CODE art. 655, *enacted by* Acts 1977, No. 514, § 1, eff. Jan. 1, 1978. This provision recognizes the natural servitude of drain, the scope of which has been explained by Professor A.N. Yiannopoulos:

The natural servitude of drain is for surface waters, including rain waters that fall into the dominant estate or into estates situated above the dominant estate; underground waters that reach naturally the surface of the dominant estate, such as the waters of a spring or a fountain; and the waters of a river or stream. There is no servitude for liquids other than water, even if they are brought to the surface of the dominant estate by a natural process.

A.N. YIANNOPOULOS, *PREDIAL SERVITUDES* § 2:2, *in* 4 LOUISIANA CIVIL LAW TREATISE (4th ed. updated Oct. 2013).

The phrase "surface water" is frequently used in the Revised Statutes. It appears in 28 sections. LA. § R.S. 9:1104; LA. R.S. § 14:224(A); LA. R.S. § 30:25; LA. R.S. § 30:28(G); LA. R.S. § 30:2004(10) & (15)(b); LA. R.S. § 30:2018(E)(3); LA. R.S. § 30:2073(7); LA. R.S. § 30:2074(B)(4), (C), & (E); LA. R.S. § 30:2154(B)(5)(f); LA. R.S. § 30:2194(B)(9), (B)(11), (B)(13) & (C); LA. R.S. § 30:2195(A); LA. R.S. § 30:2195.2(A); LA. R.S. § 30:2202(C); LA. R.S. § 30:2272.1(A)(1); LA. R.S. § 33:4511(A); LA. R.S. § 38:3086.21; LA. R.S. § 38:3087.173(C); LA. R.S. § 38:3087.243(C); LA. R.S. § 38:3087.303(C); LA. R.S. § 38:3087.349(A)(4); LA. R.S. § 38:3097.3(C)(7); LA. R.S. § 38:3097.4(D); LA. R.S. § 38:3097.7(B) & (C); LA. R.S. § 40:734(B)(3); LA. R.S. § 40:1141(J); LA. R.S. § 40:1149(B); LA. R.S. § 47:633.5(A); LA. R.S. § 56:8(17).

These 28 sections are found in eight different titles: Title 9 (Civil Code Ancillaries); Title 14 (Criminal Law); Title 30 (Minerals, Oil, and Gas and Environmental Law); Title 33 (Municipalities and Parishes); Title 38 (Public Contracts, Works and Improvements); Title 40 (Public Health and Safety); Title 47 (Revenue and Taxation); and Title 56 (Wildlife and Fisheries).

Only one reference to surface water in the Revised Statutes warrants examination in this report. Located in Title 30 (Minerals, Oil, and Gas and Environmental Law) in which eleven of the references to surface water are found, the phrase is mentioned in

term “surface water” does not necessarily seem to be limited to surface waters owned by the state. For this reason, this report utilizes the phrase “running surface waters” since that phrase seems to comport with the intent of SCR 53.

2. The Civil Code’s Terminology: “Running Water” and “Waters...of Natural Navigable Water Bodies”

a. The Civil Code’s Classification of Waters and Beds of Navigable Water Bodies

Louisiana has always classified the waters and beds of navigable water bodies as “public things.”⁵³ From 1808 until 1979, the Civil Code described public things as “those the property of which belongs to a whole nation, and the use of which is allowed to all

the definition of “waters of the state,” a definition that is applicable to the water control chapter of the environmental quality subtitle of the title. This provision, which defines waters of the state, provides in full:

"Waters of the state" means both the surface and underground waters within the state of Louisiana including all rivers, streams, lakes, groundwaters, and all other water courses and waters within the confines of the state, and all bordering waters and the Gulf of Mexico. However, for purposes of the Louisiana Pollutant Discharge Elimination System, "waters of the state" means all surface waters within the state of Louisiana and, on the coastline of Louisiana and the Gulf of Mexico, all surface waters extending therefrom three miles into the Gulf of Mexico. For purposes of the Louisiana Pollutant Discharge Elimination System, this includes all surface waters which are subject to the ebb and flow of the tide, lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, impoundments of waters within the state of Louisiana otherwise defined as "waters of the United States" in 40 CFR 122.2, and tributaries of all such waters. "Waters of the state" does not include waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act, 33 U.S.C. 1251 et seq.

LA. R.S. § 30:2073(7).

⁵³ LA. DIGEST OF 1808 p. 93, art. 6; LA. CIV. CODE art. 444 (1825); LA. CIV. CODE art. 450 ¶ 2, enacted by Acts 1978, No. 728, § 1, eff. Jan. 1, 1979. It should be noted that the 1808 Digest and the 1825 Code used the phrase “navigable rivers” instead of the more general phrase “navigable water bodies” found in current article 450. Despite the Code’s use of the phrase navigable rivers, the state’s assertion of ownership over all natural navigable water bodies was recognized by Louisiana courts. A.N. Yiannopoulos, *Common, Public, and Private Things in Louisiana: Civilian Tradition and Modern Practice*, 21 LA. L. REV. 697, 717-29 (1961).

the members of the nation.”⁵⁴ Beginning January 1, 1979, the Code has declared that public things are “owned by the state or its political subdivisions in their capacity as public persons.”⁵⁵

Because Louisiana owns the waters and beds of natural navigable water bodies in its capacity as a public person,⁵⁶ navigability is an important concept for determining whether the state owns the bed of a particular water body. Inasmuch as the owner of land is entitled to explore for oil and gas or to grant that right to another,⁵⁷ Louisiana’s abundant natural resources, especially oil and gas, have spawned much litigation over the classification and resulting ownership of the beds of water bodies.⁵⁸ The concept of navigability also has significance for purposes of federal admiralty jurisdiction, as explained by Professor A.N. Yiannopoulos:

In determining whether a body of water is or has been navigable, Louisiana courts have in the main followed the test developed by the United States Supreme Court for the delimitation of federal admiralty jurisdiction. In general, a body of water is navigable if it is susceptible of being used, in its ordinary condition, as a highway of commerce “over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” A body of water is navigable in law if it is navigable in fact.⁵⁹

b. The “Equal Footing” and “Inherent Sovereignty” Doctrines

i. The Equal Footing Doctrine

Louisiana’s classification of the waters and beds of natural navigable water bodies as public things owned by the state in its capacity as a public person is consistent with the equal footing doctrine, described by the United States Supreme Court in 2012 as “the constitutional foundation for the navigability rule of riverbed title.”⁶⁰ As described by one student commentator: “The equal footing doctrine mandates that new

⁵⁴ LA. DIGEST OF 1808 p. 93, art. 6.

⁵⁵ LA. CIV. CODE art. 450 ¶ 1, *enacted by* Acts 1978, No. 728, § 1, eff. Jan. 1, 1979.

⁵⁶ LA. CIV. CODE art. 450 ¶ 2.

⁵⁷ LA. CIV. CODE art. 490 ¶ 2; LA. R.S. § 31:4, *enacted by* Acts 1974, No. 50, § 1, eff. Jan. 1, 1975.

⁵⁸ *See, e.g.,* State v. Two O’Clock Bayou Land Co., 365 So. 2d 1174 (La. App. 3d Cir. 1978).

⁵⁹ A.N. YIANNOPOULOS, PROPERTY § 64, *in* 2 LOUISIANA CIVIL LAW TREATISE 118 (4th ed. 2001).

⁶⁰ PPL Montana v. Montana, 132 S. Ct. 1215, 1234, 182 L. Ed. 2d 77, 80 USLW 4177 (2012).

states be admitted to the Union as equals of the existing states, in terms of power, sovereignty, and freedom....It embodies the concept that Congress has no power to create a state 'which shall be any less of a state than those which compose the Union, in terms of sovereignty, freedom, or power.'"⁶¹ Although the phrase "equal footing" was used in the Northwest Ordinance of 1787,⁶² the doctrine's origin is attributed to *Pollard v. Hagan*,⁶³ an 1845 decision of the United States Supreme Court holding that, upon Alabama's admission into the union, the state was entitled to the shores of the navigable waters, and the soils under them, within its limits.⁶⁴ In 1988, the Supreme

⁶¹ Paul Conable, *Comment, Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263, 1267 & 1279 (1996) (*quoting* *Coyle v. Smith*, 221 U.S. 559, 568, 31 S. Ct. 688, 690 (1911)).

⁶² The Northwest Ordinance of 1787 stated in relevant part:

And whenever any of the said States shall have sixty thousand free inhabitants therein, such States shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever.

An Act to provide for the Government of the Territory North-west of the river Ohio, First Congress, Sess. 1, Ch. VIII, 1 Stat. 50, 53 note (a) ("An Ordinance for the Government of the Territory of the United States north-west of the river Ohio") (Aug. 7, 1789).

⁶³ 44 U.S. 212, 11 L. Ed. 565 (1845). Although *Pollard* is credited with originating the term equal footing doctrine, the Supreme Court in *Pollard* relied upon several of its previous decisions, including *Martin v. Waddell*, 41 U.S. 367, 10 L. Ed. 997 (1842), which is quoted in the following excerpt from *Pollard*:

In the case of *Martin...*, the present chief justice, in delivering the opinion of the court, said: "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

44 U.S. at 229 (*quoting* *Martin v. Waddell*, 41 U.S. 367, 410, 10 L. Ed. 997 (1842)).

⁶⁴ The Supreme Court explained:

When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the

Court in *Phillips Petroleum Co. v. Mississippi*⁶⁵ declared that the lands acquired by states under the equal footing doctrine also extended to “all land lying under any waters influenced by the tide, whether navigable or not.”⁶⁶

ii. Inherent Sovereignty

The phrase “inherent sovereignty” is sometimes used interchangeably with the phrase “equal footing.” Though not identical, the two doctrines are certainly related.⁶⁷ The phrase “inherent sovereignty” has been used by the United States Supreme Court to describe the nature of a state’s ownership of the beds and shores of navigable waters. For example, in an 1891 decision involving a dispute over the ownership of an island in the Sacramento River, the Court announced: “[Proprietorship of the beds and shores of navigable waters] properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending, if it could extend, its survey and grants beyond the limits of high water.”⁶⁸

agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative: because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.

44 U.S. at 223.

⁶⁵ 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988).

⁶⁶ 484 U.S. at 472, 108 S. Ct. at 793.

⁶⁷ That having been said, the phrase “inherent sovereignty” has been used by the United States Supreme Court infrequently compared to the Court’s use of the phrase “equal footing.” A Westlaw search conducted Friday, February 21, 2014, at 10:09 a.m. listed 304 United States Supreme Court opinions that have used the phrase “equal footing” and 38 opinions that have used the phrase “inherent sovereignty.”

This Westlaw search also revealed that only five Supreme Court opinions have used both phrases. The five cases are: *Montana v. U. S.*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S. Ct. 517, 38 L. Ed. 2d 526 (1973); *Donnelly v. U.S.*, 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913); *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); and *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

⁶⁸ *Barney v. Keokuk*, 94 U.S. 324, 338, 24 L. Ed. 224 (1876) (*citing* *Martin v. Waddell*, 41 U.S. 367, 10 L. Ed. 997 (1842); *Pollard v. Hagan*, 44 U.S. 212, 11 L. Ed. 565 (1845); and *Goodtitle v. Kibbe*, 50 U.S. 471, 13 L. Ed. 220 (1850); and *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 13 L. Ed. 1058 (1851)).

The phrase “general right of sovereignty” was used in an 1837 Supreme Court opinion authored by Justice Story which involved a property dispute over land on the

The following year, the United States Supreme Court used the phrase in *Illinois Central Railroad Co. v. Illinois*,⁶⁹ a decision credited by some commentators as the source of modern public trust law.⁷⁰ In that case, the State of Illinois was permitted to revoke a state land grant in which it had conveyed ownership to a portion of the bed of Lake Michigan to Illinois Central Railroad. In determining that the state could revoke the railroad's title to the disputed land, the court discussed the nature of Illinois' ownership of the bed of Lake Michigan, stating:

The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state.⁷¹

Professor A.N. Yiannopoulos's analysis of the inherent sovereignty doctrine in his treatise is instructive:

Questions have arisen as to the mode by which Louisiana acquired ownership of the natural navigable water bodies within its borders. The accepted view is that Louisiana acquired ownership of these water bodies from the United States by virtue of the state's inherent sovereignty and the

border of Tennessee and Kentucky. *Poole v. Fleeger's Lessee*, 36 U.S. 185, 9 L. Ed. 680 (1837).

⁶⁹ 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

⁷⁰ See, e.g., A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 8:19 at p. 488 (2013 ed.); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and The Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 70-71 (2005); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489-91 (1970); Sam Brandao, *Comment, Louisiana's Mono Lake: The Public Trust Doctrine and Oil Company Liability for Louisiana's Vanishing Wetlands* 86 TUL. L. REV. 759, 767-68 (2012).

It should be noted that Justice White's majority opinion in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988), quoted with approval a statement from Phillip Petroleum Company's brief declaring the "seminal case in American public trust jurisprudence [to be] *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894)." 484 U.S. at 473, 108 S. Ct. at 794. One commentator has remarked: "If the Supreme Court majority in *Phillips Petroleum* had in mind to expand the reach of the public trust doctrine in the way advocated by environmentalists, *Shively* is an odd case to have identified as seminal." James L. Huffman, *Speaking of Inconvenient Truths--A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 76 (2007).

⁷¹ 146 U.S. 387, 459, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

equal footing doctrine. According to this doctrine, the original thirteen states acquired from the British Crown dominion over all navigable waters within their borders, and all states that the Union subsequently admitted received the same right from the United States.

The historical as well as the legal foundation of the doctrine of inherent sovereignty has been repeatedly questioned in Louisiana legal literature, but the effects of the doctrine remain unshaken in the jurisprudence. Resorting to inherent sovereignty to explain the state's ownership of navigable bodies of water confuses "imperium" with "dominium," sovereignty with ownership. The state exercises sovereignty over all property within its borders, not only over navigable waters. However, the state owns only those things that it has acquired in accordance with the modes by which ownership may be acquired. Sovereignty is not such a mode, and the assimilation of sovereignty with ownership achieves nothing but a confusion of ideas.⁷²

c. The Civil Code's Classification of Running Water

From 1808 until 1979, the Civil Code classified running water as a common thing, which the Code defined as "[t]hings...whose property belongs to nobody, and which all men may freely use, conformably to the use for which nature has intended them..."⁷³ Effective January 1, 1979, the Civil Code reclassified running water as a public thing (rather than as a common thing).⁷⁴ Despite the Civil Code's continued classification of running water as a common thing until 1979, its re-designation as a public thing in 1979 did not actually change the law.⁷⁵

The classification of running water as a common thing ended in 1910 when the Civil Code provision was impliedly repealed as a result of legislation declaring "[t]he waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds

⁷² A.N. YIANNPOULOS, PROPERTY § 65, *in* 2 LOUISIANA CIVIL LAW TREATISE 119-20 (4th ed. 2001).

⁷³ LA. DIGEST OF 1808 p. 93, art. 3. An identical description of common things appeared in the 1825 and 1870 Codes. *See* LA. CIV. CODE art. 441 (1825); LA. CIV. CODE art. 450 (1970). The definition of common things in effect since January 1, 1979, which is very similar to the version in effect from 1808 to 1979, provides: "Common things may not be owned by anyone. They are such as the air and the high seas that may be freely used by everyone conformably with the use for which nature has intended them." LA. CIV. CODE art. 449, *enacted by* Acts 1978, No. 728, § 1, eff. Jan. 1, 1979.

⁷⁴ LA. CIV. CODE art. 450 ¶ 2, *enacted by* Acts 1978, No. 728, § 1, eff. Jan. 1, 1979.

⁷⁵ *See* LA. CIV. CODE art. 449 revision comment (a); LA. CIV. CODE art. 450 revision comments (a) and (g).

thereof...to be the property of the state.”⁷⁶ For bodies of water described in the 1910 legislation that qualified as “running water,” the 1910 enactment recognizing state ownership of such waters prevented classification of such waters as common things. Hence, from 1910 until 1979, the Code’s classification of running water as a common thing was inaccurate, since the codal provisions had been impliedly repealed in 1910. The 1979 revision redesignating running water as a public thing merely conformed the Code to the law in effect since 1910.

Despite Louisiana’s abundant jurisprudence on natural navigable water bodies, very few cases have directly addressed the issue of whether the waters in a non-navigable water body are running or non-running. One case in which this question was squarely raised is *Verzwyvelt v. Armstrong-Ratterree, Inc.*⁷⁷ At issue was an oxbow lake formed in 1972 when the Red River abandoned its course and created a new channel. As a result, the former channel became completely sealed off. The Third Circuit Court of Appeal found that the oxbow lake did not constitute running water because it did not have a continuous current.⁷⁸ Similarly, the First Circuit Court of Appeal recently determined that the waters of Baldwin Canal were not running waters as the canal “did not have a continuous current and...the waters of the canal were stagnant, except for movement due to the tides.”⁷⁹

3. The Revised Statutes’ Treatment of Running Water and Waters of Natural Navigable Water Bodies

The Civil Code limits the surface waters owned and regulated by the state to those waters classified as public things. Additionally, Revised Statutes Section 9:1101 provides that public waters owned by the state include waters of and in all bayous, rivers, streams, lagoons, lakes and bays not under the direct ownership of any person on August 12, 1910.⁸⁰ Revised Statutes Section 49:3 adds to the list the waters of the Gulf of Mexico and of the arms of the Gulf within the boundaries of Louisiana.⁸¹ All other surface waters are classified as private things.⁸²

⁷⁶ Acts 1910, No. 258 (currently LA. R.S. § 9:1101).

⁷⁷ 463 So. 2d 979 (La. App. 3d Cir. 1985).

⁷⁸ 463 So. 2d at 985.

⁷⁹ *Brown v. Francis*, 2012 Westlaw 1799178 at *5 (La. App. 2d Cir. 2/17/12) (unreported opinion).

⁸⁰ LA. R.S. § 9:1101.

⁸¹ LA. R.S. § 49:3.

⁸² LA. CIV. CODE art. 453 revision comment (a).

4. Louisiana's Constitutional and Statutory Provisions Regarding the Alienability of Public Things

Since the adoption of the 1921 Constitution, only two of Louisiana's natural resources have been designated as inalienable and forever insusceptible of private ownership: the beds of natural navigable water bodies,⁸³ and mineral rights on property sold by the state.⁸⁴ No other natural resources are provided this level of protection.

Although the alienability of public things is no longer expressly addressed in the Civil Code, pre-revision articles did clearly distinguish between those things susceptible of private ownership and those that are insusceptible of private ownership. The Civil Code of 1870 provided that "[t]hings, in their relation to those who possess or enjoy them, are divided into two classes; those which are not susceptible of ownership and those which are."⁸⁵ Article 482 of the 1870 Civil Code further subdivided the class of things that are not susceptible of ownership as follows:

Among those which are not susceptible of ownership, there are some which can never become the object of it; as things in common, of which all men have the enjoyment and use.

There are things, on the contrary, which though naturally susceptible of ownership, may lose this quality in consequence of their being applied to some public purpose, incompatible with private ownership; but which resume this quality as soon as they cease to be applied to that purpose; such as the high roads, streets and public places.⁸⁶

This classification based on susceptibility of private ownership was not replicated in the 1979 revision of the division of things.⁸⁷ However, a revision comment to current article 450 memorializes pre-revision article 482, observing that certain public things may be privately owned when no longer dedicated to public use. It states in pertinent part:

⁸³ LA. CONST. art. IV, § 2 (1921) (currently LA. CONST. art. IX, § 3 (1974)).

⁸⁴ LA. CONST. art. IV, § 2 (1921) (currently LA. CONST. art. IX, § 4 (1974)).

⁸⁵ LA. CIV. CODE art. 481 (1870).

⁸⁶ LA. CIV. CODE art. 482 (1870). This article had provided that only certain types of things, classified as "common things" in the modern code, are insusceptible of ownership by their nature. The other things, their public purpose being "incompatible with private ownership," are owned by the state only as long as they are applied to that purpose, implicitly regulated by state law.

⁸⁷ The Code's provisions on the division of things are found in Chapter 1 (Division of Things) of Title I (Things) of Book II (Things and the Different Modifications of Ownership). Title I of Book II was revised by Acts 1978, No. 728, § 1, eff. Jan. 1, 1979.

The property of the state and its political subdivisions is known as "public property." This property consists of two categories of things: public things, namely things that the state and its political subdivisions hold in a sovereign capacity, and private things, dealt with in Article 453 (1978). **Public things may also be subdivided into two categories. The first category consists of things which according to constitutional and legislative provisions are inalienable and necessarily owned by the state or its political subdivisions.** The second category consists of things which, though alienable and thus susceptible of ownership by private persons, are applied to some public purpose and are held by the state or its political subdivisions in their capacity as public persons.⁸⁸

As noted from this revision comment, public things are divided into two categories for the purpose of determining alienability, similar to the categories provided for in pre-revision article 482: first, those things that are inalienable according to constitutional and legislative provisions;⁸⁹ and second, those things that are alienable and susceptible of ownership by private persons when no longer applied to a public purpose.

5. Louisiana Jurisprudence Regarding the Alienability of Public Things

Louisiana courts over the past two centuries have identified the principal legal consequence that attaches to a thing's classification as a public thing. As stated by the Louisiana Supreme Court in 1881, so long as a public thing remains a public thing, it "is out of commerce. It is dedicated to public use, and held as a public trust, for public uses."⁹⁰ Nevertheless, Louisiana judges have struggled in their efforts to ascertain in

⁸⁸ LA. CIV. CODE art. 450 revision comment (c) (emphasis added).

⁸⁹ Retaining the divisions made by pre-revision article 482 was not necessary in the current code. In the fourth edition of his Property treatise, Professor A.N. Yiannopoulos states that the division of things as being in or out of commerce is parallel to divisions based on things being common, public, or private. A.N. YIANNPOULOS, PROPERTY § 22, *in* 2 LOUISIANA CIVIL LAW TREATISE 38-39 (4th ed. 2001). Susceptibility to private ownership is implied in the classification. *Id.* Common things are things that are not susceptible of ownership of any kind, while public things are not susceptible of private ownership while they are dedicated to public use. *Id.* § 45, at 83-86; § 53, at 97-98. In article 450 revision comment (c), also authored by Professor Yiannopoulos, he states that public things are not insusceptible of private ownership merely by their classification; they are so because of codal, statutory, or constitutional provisions. *Id.* § 49, at 90 n. 4.

⁹⁰ *Kline v. Parish of Ascension*, 33 La. Ann. 652, 656 (1881), *quoted in* LA. CIV. CODE art. 450 revision comment (b).

specific instances whether and when a public thing can be validly alienated. Cases representing this struggle resulted from enactment of the Repose Statute of 1912.⁹¹

Prior to enactment of the Repose Statute of 1912, “the state issued patents purporting to convey to private persons and to public bodies, such as levee boards, large areas that occasionally included navigable water bottoms or lands subject to the ebb and flow of the tide. The patents did not reserve to the state the ownership of those water bottoms, and consequently, a question arose as to their validity.”⁹² The Repose Statute of 1912, enacted to promote security of title, required the state to challenge a patent within six years from its issuance.

In 1954, the Louisiana Supreme Court rendered its controversial opinion in *California Co. v. Price*.⁹³ At issue in *Price* was whether the Repose Statute of 1912 was all-inclusive, applying even to patents purporting to convey ownership to the beds of navigable waters. The court in *Price* held on rehearing that all patents were within the scope of “the broad language and sweeping terms contained in Act No. 62 of 1912,”⁹⁴ including patents purporting to convey ownership of navigable water bottoms.

Twenty-one years later, the Louisiana Supreme Court overruled *Price* in its “landmark”⁹⁵ *Gulf Oil Corp. v. State Mineral Board*⁹⁶ decision. The question posed in *Gulf Oil* was whether the Repose Statute of 1912 precluded the state from challenging the validity of a patent issued in a 1910 sheriff’s sale that purported to convey ownership of the bed of a navigable water bottom. On original hearing, the court ruled that the Repose Statute of 1912 applied only to patents that were “duly signed by the Governor, duly signed by the Register of the State Land Office, and recorded in the State Land Office.”⁹⁷ Because the challenged patent did not meet the required criteria, the supreme court on original hearing held that the Repose Statute of 1912 was not applicable to the disputed patent and that the state was not precluded from attacking the transfer.

By anchoring its holding on this narrow basis, the court avoided having to revisit the correctness of its controversial 1953 *Price* decision. Justice Mack Barham’s concurrence to the court’s opinion on original hearing took issue with the majority’s failure to reconsider *Price*:

⁹¹ Acts 1912, No. 62, § 1 (currently LA. R.S. § 9:5661).

⁹² A.N. YIANNPOULOS, PROPERTY § 66, in 2 LOUISIANA CIVIL LAW TREATISE 126 (4th ed. 2001).

⁹³ 225 La. 706, 74 So. 2d 1 (La. 1954).

⁹⁴ 225 La. at 740, 74 So. 2d at 13.

⁹⁵ Professor A.N. Yiannopoulos refers to *Gulf Oil* as a landmark decision. See A.N. YIANNPOULOS, PROPERTY § 67, in 2 LOUISIANA CIVIL LAW TREATISE at 128 (4th ed. 2001).

⁹⁶ 317 So. 2d 576 (La.1974).

⁹⁷ 317 So. 2d at 579.

We owe it to these litigants as well as to potential future litigants to dispose of a question, especially one with such far-reaching ramifications as this one, when it is squarely presented to us. This obligation is not met when, as here, the Court dodges the issue and decides a case on a hypertechnical ground. The function of this Court should be to clarify the law when it is in question; by avoiding a decision on this issue we have instead compounded the existing confusion.⁹⁸

The court in *Gulf Oil* granted rehearing and, in an opinion authored by Justice Barham, overruled *Price* by holding that patents conveying navigable water bottoms are not within the scope of the Repose Statute of 1912. As support for this conclusion, Justice Barham first consulted the relevant Civil Code provisions on common and public things, which he described as “[t]he original source of law from which we must begin our investigation.”⁹⁹ He concluded:

These articles establish, in effect, that certain property designated common or public is held by the State and is neither alienable nor susceptible of private ownership, while other property can be owned by anyone and is not subject to restrictions on its alienability. The redactors of our 1808 and 1825 Codes were aware, when they included these articles in our law, that in France, public things, such as navigable rivers and their beds, are part of the public domain (*domanialité public*). Such things are governed by a regime entirely different from that governing private law ownership (*propriété privée*), for property in the public domain is held by the State not in its proprietary capacity, but for the benefit of all the people. One of the characteristics of property in the public domain is that it cannot be alienated by the State.¹⁰⁰

Justice Barham then reviewed the “series of legislative enactments, recognizing explicitly or implicitly that [the beds of navigable water bodies are] owned by the State as inalienable public things,”¹⁰¹ concluding that these enactments provided “[f]urther evidence of the strong public policy against private ownership of navigable water bodies embodied in the Civil Code articles.”¹⁰²

⁹⁸ 317 So. 2d at 581 (Barham, J., dissenting).

⁹⁹ 317 So. 2d at 581.

¹⁰⁰ 317 So. 2d at 582.

¹⁰¹ 317 So. 2d at 583.

¹⁰² 317 So. 2d at 588.

Justice Barham also invoked the equal footing doctrine as “[a]nother factor influencing our conception of the intended purpose of [the Repose Statute of 1912].” 317 So. 2d at 588. He stated that the equal footing doctrine “perhaps could, in itself, be

No constitutional prohibition against the alienation of the beds of navigable water bodies existed when the patents involved in the *Price* and *Gulf State* opinions had been granted. According to the *Gulf Oil* opinion, the inalienability of navigable water bottoms had been mandated by the Civil Code and other legislative enactments.¹⁰³ Of course, since the adoption of Louisiana's 1921 Constitution, the inalienability of the beds of navigable water bodies has been constitutionally mandated.

*Coliseum Square Association v. City of New Orleans*¹⁰⁴ is a recent Louisiana Supreme Court decision embodying the same tension between the court's initial view in *Price* and its later view in *Gulf Oil*. The property at issue in *Coliseum Square* was the 2100 block of Chestnut Street, a street dedicated to public use. The issue before the court was the legality of an ordinance passed by the City Council of New Orleans authorizing the City of New Orleans to terminate public use of the 2100 block of Chestnut Street in order to lease it to a private entity. The court on original hearing struck down the ordinance, stating:

The streets which belong to political subdivisions of the State are owned for the benefit of the public. A political subdivision owns a street subject to public use in its capacity as a public person. Such property, held as a public trust, is inalienable while it is being used by the public. Only if public use terminates can a public street be susceptible of private ownership. "The inalienability of all public things, whether belonging to the state or to its political subdivisions, is guaranteed by the Civil Code."¹⁰⁵

The court on rehearing reversed its original decision, holding instead that the city's proposed action was permissible. Article 450, which had been relied upon in the court's original opinion, was found on rehearing to present no obstacle to the City's decision to terminate public use of the street. The article was briefly mentioned in a

dispositive of the issue before us had we chosen to rely solely upon it." 317 So. 2d at 588. Whether this statement is accurate is not clear. The United States Supreme Court's latest decisions on this issue indicate that states are not constitutionally mandated to retain ownership of lands acquired under the equal footing doctrine. *See* PPL Montana v. Montana, 132 S. Ct. 1215, 1234-35, 182 L. Ed.2d 77, 80 USLW 4177 (2012); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988).

¹⁰³ For other cases finding inalienability on a similar basis, *see, e.g.*, *City of New Orleans v. Magnon*, 4 Mart. (o.s.) 2 (La. 1815); *Mayor of New Orleans v. Metzinger*, 3 Mart. (o.s.) 296 (La. 1814).

¹⁰⁴ 544 So. 2d 351 (La. 1989).

¹⁰⁵ 544 So. 2d at 353 (*quoting* A.N. YIANNPOULOS, PROPERTY § 34, in 2 LOUISIANA CIVIL LAW TREATISE SERIES 95 (3d ed.).

footnote and dismissed in a single sentence: “While...article [450] classifies [a street belonging to a political subdivision of the state] as a public thing, it does not prohibit its alienation.”¹⁰⁶ The court on rehearing focused instead upon whether the City’s proposed action was prohibited by its home rule charter, by general law, or by any constitutional provision. The court concluded:

There is no general law which prohibits a home rule entity from closing a public street and alienating it for a private purpose. Neither is there a constitutional prohibition. Neither the Civil Code nor the Constitution, therefore, prohibits the city from alienating a public street; in fact, specific authority to sell, lease, exchange or otherwise dispose of public property is authorized by both the home rule charter of New Orleans and the legislative statutes.¹⁰⁷

The supreme court in *Coliseum Square* ultimately held that City Council of New Orleans has the authority to determine whether the thing continues to be needed for public use, and if not, to revoke its dedication to such use.

Unlike Louisiana’s abundant jurisprudence addressing the alienability of the beds of natural navigable water bodies, there are no reported decisions expressly examining whether and under what circumstances the state or its political subdivisions can alienate public waters. Nevertheless, several Attorney General opinions have offered guidance on this subject. Consistent with the Louisiana Supreme Court’s analysis in *Coliseum Square*, the focal inquiry in these Attorney General opinions is whether the political entity seeking to alienate public waters had been granted legislative authority to do so.¹⁰⁸

An analysis of the alienability of running surface water begins with Civil Code article 450, which classifies running water and waters of navigable water bodies as public things, meaning things owned by the state in its capacity as a public person. The

¹⁰⁶ 544 So. 2d at 359 n. 7.

¹⁰⁷ 544 So. 2d at 358-59. *Accord*: Walker v. Coleman, 540 So. 2d 983 (La. App. 2 Cir. 1989) (holding that public things may only be alienated after a political subdivision formally determines that the things are no longer needed by the public and are alienated in accordance with applicable law); La. Atty. Gen. Op. No. 10-0151 dated September 8, 2010 to Eric P. Duplantis (Assistant District Attorney, 16th Judicial District Court), 2010 WL 4149381 (La. A.G.) (finding that the St. Mary Parish School Board has the authority to sell surplus property, pursuant to statutory authority to alienate unused school property).

¹⁰⁸ For an overview of some of the Attorney General’s recent opinions on this subject, see section 2 (February 5, 2010 Memorandum) of Subpart B (Background Events Leading Up to SCR 53) of Part I (Introduction), *supra*.

enactment of legislation expressly authorizing a designated political subdivision or entity of the state to alienate specific sources or amounts of running surface water, although inconsistent with the Civil Code, would likely be valid under the principle of statutory construction, under which a later enactment of the legislature impliedly repeals older inconsistent legislation. The argument in favor of an implied repeal would likely be based on article 450's status as legislation, which can and will be repealed by a later inconsistent expression of legislative will. Under this reasoning, the later enactment would result in the reclassification of the specific sources of running surface water identified in the later legislation as a private thing susceptible of alienation. This is the approach taken in recent Attorney General opinions.

SUBPART B. RIPARIAN RIGHTS

1. The Codal Scheme and Relevant Jurisprudence

Beginning with the Digest of 1808,¹⁰⁹ Louisiana has conferred certain rights upon an owner of land that borders or is traversed by running water. These rights, frequently referred to "riparian rights," are provided for in two articles located in the natural servitudes chapter of the predial servitudes title of Book II of the Civil Code.¹¹⁰ The Code Napoleon also recognized riparian rights,¹¹¹ and the concept is traceable to Roman law.¹¹²

The Civil Code defines a predial servitude as "a charge on a servient estate for the benefit of a dominant estate."¹¹³ A natural servitude is one of three types of predial

¹⁰⁹ LA. DIGEST OF 1808, p. 128, art. 8; LA. CIV. CODE art. 657 (1825); LA. CIV. CODE art. 661 (1870).

¹¹⁰ LA. CIV. CODE arts. 657 and 658, *enacted by* Acts 1977, No. 514, § 1, eff. Jan. 1, 1978. From 1808 until 1978, the Code had a single, two-paragraph provision on riparian rights. In the 1978 revision of predial servitudes, each paragraph was converted into a separate article. Chapter 2 (Natural Servitudes) of Title IV (Predial Servitudes) of Book II (Things and the Different Modifications of Ownership) of the Louisiana Civil Code consists of LA. CIV. CODE arts. 655 through 658.

¹¹¹ CODE NAPOLEON art. 644. Notably, the Code Napoleon excluded riparian rights along water bodies that belong to the public domain. Under the Code Napoleon, property in the public domain was "not susceptible of private proprietorship." CODE NAPOLEON art. 538. Included within the public domain are "rivers and streams which carry floats." CODE NAPOLEON art. 538.

¹¹² A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 3:3 at pp. 25-26 (2013 ed.); Samuel C. Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law*, 6 CAL. L. REV. 245, 253-55 (1918).

¹¹³ LA. CIV. CODE art. 646.

servitudes recognized in Louisiana. Differences among the three types of predial servitudes pertain to the manner in which the predial servitude is created. A natural servitude “arise[s] from the natural situation of estates.”¹¹⁴ By contrast, a legal servitude is “imposed by law,”¹¹⁵ and a conventional servitude is “established by juridical act, prescription, or destination of the owner.”¹¹⁶

Article 657, the first provision recognizing riparian rights, which is applicable to land bordering running waters, provides: “The owner of an estate bordering on running water may use it as it runs for the purpose of watering his estate or for other purposes.”¹¹⁷ Article 658, the second provision, grants to “[t]he owner of an estate through which water runs, whether it originates there or passes from lands above, [the right to] make use of [the water] while it runs over his lands. He cannot stop it or give it another direction and is bound to return it to its ordinary channel where it leaves his estate.”¹¹⁸

The riparian rights conferred upon an estate that either borders or is traversed by running water constitute a “benefit” to that estate. This is consistent with the Code’s definition of a predial servitude, which requires that there be a benefit to an estate, designated in the Code as a “dominant estate.”¹¹⁹ Additionally, the riparian rights conferred upon an estate that either borders or is traversed by running water arise from the “natural situation” of that estate: the estate must border running water or water must run through the estate. This is consistent with the manner in which a natural servitude is created.

Nevertheless, the nature of riparian rights in Louisiana remains unclear. Despite inclusion of riparian rights in the predial servitudes title of Book II of the Civil Code, and despite the above-noted ways in which riparian rights are consistent with the Code’s definitions of predial servitudes and natural servitudes, articles 657 and 658 are elliptical and incomplete.

¹¹⁴ LA. CIV. CODE art. 654.

¹¹⁵ LA. CIV. CODE art. 654.

¹¹⁶ LA. CIV. CODE art. 654.

¹¹⁷ Although this provision has been in the Code since the Digest of 1808, LA. DIGEST OF 1808, p. 128, art. 8 ¶ 1, the phrase “or for other purposes” was added in the 1825 Code. LA. CIV. CODE art. 657 ¶ 1 (1825).

¹¹⁸ LA. CIV. CODE art. 658. The original version of this provision had stated: “He through whose estate this water runs, may make use of it in the space which it runs over, but he is bound to return it to its ordinary channel when it leaves his estate.” LA. DIGEST OF 1808, p. 128, art. 8 ¶ 2. Two phrases were added in the 1825 Code: “whether it originates there or passes from lands above” and “[he] cannot stop nor give it another direction.” LA. CIV. CODE art. 657 ¶ 2 (1825).

¹¹⁹ LA. CIV. CODE arts. 646 and 647.

A predial servitude requires both a dominant estate and a servient estate. The riparian rights conferred by articles 657 and 658 do not identify the servient estate that is burdened by the charge benefitting the dominant estate. As a result, articles 657 and 658 are elliptical, as contrasted with the Civil Code provision creating the natural servitude of drainage, which provides: "An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow."¹²⁰ The failure of articles 657 and 658 to identify the servient estate may not be a fatal flaw, as it may be possible to infer the identity of the servient estate or estates.

The riparian rights conferred by article 657 upon an estate bordering running water permit the owner of that estate to use the water "as it runs for the purpose of watering his estate or for other purposes." If the state is the owner of the bed of the water body, it could be inferred that the state is a servient estate. It could also be inferred that the riparian estate bordering the other side of the water body is a servient estate. Additionally, it could be inferred that the owners of the estates downstream are servient estates.

Article 658 confers upon the owner of an estate traversed by running water the right to "make use of [the water] while it runs over his lands." Like article 657, article 658 is elliptical in that it fails to identify the servient estate. The same inferences could be made in an effort to identify the servient estate or estates.

Article 658 differs from article 657 in that it imposes specific duties upon the riparian estate's owner: first, the owner cannot stop the running water; second, he cannot give the running water another direction; and third, he must return the running water "to its original channel where it leaves his estate." The imposition of these specific duties upon an estate that is traversed by running water imposes a "charge" upon that estate. This is consistent with the Code's definition of a predial servitude, which requires that there be a charge upon an estate, designated in the Code as a "servient estate."¹²¹ Article 658 is elliptical in that it fails to identify a dominant estate.

¹²⁰ LA. CIV. CODE art. 655. Another example is the codal provision recognizing the legal servitude of passage for an enclosed estate, which provides:

The owner of an estate that has no access to a public road or utility may claim a right of passage over neighboring property to the nearest public road or utility. He is bound to compensate his neighbor for the right of passage acquired and to indemnify his neighbor for the damage he may occasion.

LA. CIV. CODE art. 689 ¶ 1.

¹²¹ LA. CIV. CODE arts. 646 and 647.

Nevertheless, article 658's imposition of both rights and duties upon the estate traversed by running water supports the inference that article 658 meets the definition of a reciprocal predial servitude,¹²² meaning that the estate traversed by running water is a dominant estate since that estate is conferred the right to make use of the water and a servient estate since the owner of the riparian estate is required to return the water to its ordinary channel. Insofar as article 658 confers riparian rights upon an estate traversed by running water, the riparian estates downstream are the servient estates upon which a real charge is imposed. Insofar as article 658 imposes duties upon an estate traversed by running water, the riparian estates downstream are the dominant estates upon which a benefit is conferred.

Professor A.N. Yiannopoulos, Reporter for the Civil Code revision of the law of property, is of the view that the riparian rights conferred by articles 657 and 658 are not natural servitudes. In his treatise on predial servitudes, he states:

The nature of riparian rights is a disputed matter. It is clear that a riparian does not own the running water and that, despite the language of the Civil Code, the right to take water is not a natural servitude. The preferable view is that riparian rights are *sui generis* real rights, part and parcel of the ownership of an estate fronting on or traversed by running water.¹²³

The elliptical nature of articles 657 and 658, coupled with the possibility that the riparian owner's right to take water may not be a natural servitude but a *sui generis* real right, underscores some of the uncertainty that exists regarding riparian rights. If riparian rights (although *sui generis* real rights) are subject to the Code's provisions governing predial servitudes, the rights accorded to the riparian estate cannot be severed from ownership of that estate -- they are "inseparable from the dominant estate and pass[] with it. The right of using the servitude cannot be alienated, leased, or encumbered separately from the dominant estate."¹²⁴ If riparian rights (although *sui generis* real rights) are subject to the Code's provisions governing natural servitudes, riparian rights are not subject to prescription of non-use.¹²⁵

Although articles 657 and 658 describe the rights conferred upon estates bordering or traversed by running water, there are few reported decisions interpreting the scope of these rights. It is clear from article 657 that riparian rights are not limited to irrigation -- the Code since 1825 has permitted the use of water for "other purposes." However, the Code gives no guidance as to the amount of water to which a riparian

¹²² LA. CIV. CODE art. 725.

¹²³ A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 22, in 4 LOUISIANA CIVIL LAW TREATISE SERIES 77 (4th ed. 2004).

¹²⁴ LA. CIV. CODE art. 650(A).

¹²⁵ LA. CIV. CODE art. 758.

estate is entitled.¹²⁶ It provides no guidance for determining whether “other purposes” means “all purposes,” or whether there are limitations upon the purposes for which the water may be withdrawn. The dearth of reported decisions interpreting articles 657 and 658 is perhaps due to the historical abundance of water in Louisiana. Nevertheless, these questions remain unanswered.

One often cited decision involving a dispute between two riparian owners is the Louisiana Supreme Court’s 1915 decision in *Long v. Louisiana Creosoting Co.*¹²⁷ The plaintiff, a farmer, owned a riparian tract below defendant’s tract. Defendant operated “a creosoting plant on or near the bank of the creek,” and plaintiff alleged that creosoting fluid had escaped from defendant’s plant into the creek, thereby damaging plaintiff’s farm. Plaintiff sought \$2,200 in damages and a “perpetual injunction” to prevent further pollution of the creek. The trial court awarded plaintiff \$200 but refused to issue an injunction. Plaintiff appealed, and the supreme court affirmed the trial court’s judgment.

The supreme court’s opinion, authored by Justice Charles O’Niell, is 384 words in length, quite brief compared to the trial court’s 373 page record of typewritten testimony. The supreme court affirmed the trial court’s award of damages, declaring the \$200 award to be “liberal, but not excessive.”¹²⁸ The supreme court also affirmed the trial court’s refusal to issue an injunction, yet the court mentioned no Civil Code provision nor any other civilian source to support its holding. Relying upon a single authority, *The American and English Encyclopaedia of Law*,¹²⁹ the court stated:

The defendant’s counsel rely upon the doctrine that the right of a riparian owner to have the water unimpaired as to its purity is subject to the right of other riparian owners to make a reasonable use of the stream. Am. & E. Enc. of Law, vol. 30, p. 382. The question, however, whether a use that pollutes a water course is a reasonable or an unreasonable use is for the judge or jury to determine from all the circumstances of a case, including

¹²⁶ A student commentator who recently evaluated riparian rights in Louisiana, has opined:

The standard for permissible withdrawal is still unknown, although it seems that two possibilities exist: the permissibility of water taken may be evaluated under a material injury standard, or an environmental balancing test. Laura Springer, *Comment, Waterproofing the New Fracking Regulation: The Necessity of Defining Riparian Rights in Louisiana’s Water Law*, 72 LA. L. REV. 225, 244 (2011).

¹²⁷ 137 La. 861, 69 So. 281 (1915).

¹²⁸ 137 La. at 862, 69 So. at 282.

¹²⁹ HeinOnline includes this book in its “Legal Classics Library.”

the nature of the water course, its adaptability for particular purposes, the extent of injury caused to the lower riparian owner, etc. Id. p. 383.¹³⁰

Commentators have speculated as to whether the Louisiana Supreme Court in *Long* adopted the “reasonable use” rule of riparian rights that is followed by some states.¹³¹

Jackson v. Walton,¹³² a 1925 decision by the Second Circuit Court of Appeal, raised the question of whether a riparian owner may permit a non-riparian owner to pump water for non-riparian purposes. Plaintiff was a riparian owner on one side of Hotchkiss Bayou, and Smith was the riparian owner on the opposite side of the bayou. Smith entered into a contract with defendant, who owned land 300 feet from the bayou adjacent to Smith’s land. The contract granted to defendant the right to pump water from the bayou for two purposes: first, to irrigate defendant’s land; and second, to wash a dairy barn located on Smith’s land.

Plaintiff sought an injunction to prevent defendant from pumping water from the bayou. The trial court granted the injunction, but the court of appeal reversed, stating: “Plaintiff has not shown any actual or impending injury or danger and therefore was not entitled to an injunction.”¹³³ It cannot be concluded that *Walton* squarely posed the question as to whether a non-riparian owner might lawfully be granted the right to pump running water for non-riparian purposes since the court of appeal found it unclear whether Hotchkiss Bayou was a running stream.¹³⁴ If the bayou was not a running stream, then the case did not involve riparian rights. If the bayou was a running stream, the court of appeal never addressed this question directly. Like the supreme court’s opinion in *Long*, the court in *Jackson* neither mentioned nor discussed a single Civil Code provision or civilian source on riparian rights. The only authorities cited by the court in *Jackson* related to the requirements for an injunction.

¹³⁰ 137 La. at 862, 69 So. at 282.

¹³¹ See, e.g., James M. Klebba, *Water Rights and Water Policy in Louisiana: Laissez Faire Riparianism, Market Based Approaches, or a New Managerialism?*, 53 LA. L. REV. 1779, 1799 (1993) (“Louisiana courts seem to have followed the French rule of reasonable use”); Roderic Fleming, *Comment, Hydraulic Fracturing, Louisiana Water Law, and Act 955: An Irresistible Economic Force Meets an Immovable Legal Object*, 24 TUL. ENVTL. L.J. 363, 388 (2011) (“There is uncertainty...as to whether...*Long* effectively resolves the question in favor of reasonable use theory”); Laura Springer, *Comment, Waterproofing the New Fracking Regulation: The Necessity of Defining Riparian Rights in Louisiana's Water Law*, 72 LA. L. REV. 225, 236 (2011) (“it is fairly clear that Louisiana follows the reasonable use doctrine”).

¹³² 2 La. App. 53 (La. App. 2d Cir. 1925).

¹³³ 2 La. App. at 56.

¹³⁴ The court stated: “Whether this is a running stream or not is not made clear. We get the impression that it is not. It is not navigable.” 2 La. App. at 54.

Uncertainty over the nature and scope of riparian rights was exacerbated by the enactment of Act 994 of 2010, which will be explored in the next section.

2. Act 994 of 2010: Revised Statutes Section 9:1104

Revised Statutes Section 9:1104, enacted by Act 994 of 2010, supplements the Civil Code's provisions on riparian rights for the apparent purpose of benefitting agricultural and aquacultural pursuits in Louisiana.¹³⁵ Section 9:1104 permits a riparian owner to "assign access rights equal to his own for the surface water adjacent to his riparian land for any agricultural or aquacultural purpose within the state of Louisiana by the non-riparian owner."¹³⁶ Although section 9:1104 does not prohibit a riparian owner from charging a fee to the non-riparian for the assignment of access rights,¹³⁷ it does impose numerous environmental prerequisites that must be satisfied before a valid assignment can be made.¹³⁸

¹³⁵ R.S. § 9:1104 defines agricultural or aquacultural purpose as "any use by a riparian owner or an assignee of a riparian owner of running surface waters withdrawn and used for the purpose of directly sustaining life or providing habitat to sustain life of living organisms that are customarily or actually intended to be brought to market for sale." LA. R.S. § 9:1104(C).

Another provision in the Revised Statutes that should be mentioned is R.S. § 38:218(A), which provides:

No person diverting or impeding the course of water from a natural drain shall fail to return the water to its natural course before it leaves his estate without any undue retardation of the flow of water outside of his enclosure thereby injuring an adjacent estate.

LA. R.S. § 38:218, *added by* Acts 1906, No. 108, § 1, *amended by* Acts 2010, No. 233, § 1; Acts 2012, No. 601, § 1, eff. June 7, 2012, *and redesignated as* LA. R.S. § 38:218(A).

¹³⁶ LA. R.S. § 9:1104(B), *added by* Acts 2010, No. 994, § 1, eff. July 6, 2010. [It should be noted that R.S. § 9:1104 "shall become null and of no effect on January 12, 2035." LA. R.S. 9:1104(E).]

¹³⁷ The only reference in R.S. § 9:1104 to the charging of fees is found in Subsection D, which provides: "The state shall not charge any fee for the water usage, except where the state, including its political subdivisions, contracts or assigns rights for withdrawal as provided for in Subsection B of this Section." LA. R.S. § 9:1104(D).

¹³⁸ Subsection B requires that "the withdrawal of running surface waters [be] environmentally and ecologically sound and...consistent with the required balancing of environmental and ecological impacts with the economic and social benefits found in Article IX, Section 1 of the Constitution of Louisiana." Subsection B also states:

No riparian owner shall authorize the withdrawal of running waters for non-riparian use where the use of the water would significantly adversely impact the sustainability of the water body, or have undue impacts on

By allowing a riparian owner to assign “access rights equal to his own for the surface water adjacent to his riparian land for any agricultural or aquacultural purpose,” section 9:1104 is the first legislation to address whether riparian rights can be severed from ownership of the riparian estate. Section 9:1104 clearly does authorize the assignment of riparian rights -- but only for an agricultural or aquacultural purpose within the State of Louisiana. The legislature’s goal in enacting section 9:1104 appears to comport with the outcome in *Jackson*, in which the second circuit refused to enjoin a non-riparian’s use of running water for irrigation purposes pursuant to an agreement entered into with the adjacent riparian owner.

It could be inferred from section 9:1104 that its narrowly-drawn authorization for the assignment of riparian rights is intended to be the sole instance in which a riparian owner may assign his riparian rights without transferring ownership of his riparian estate.¹³⁹ It could also be inferred from section 9:1104 that the assignee of the riparian rights, who is bound to use the water for agricultural or aquacultural purposes in Louisiana, would not be permitted to transfer the rights assigned to him, except perhaps for agricultural or aquacultural purposes in Louisiana – though this is not expressly provided for in section 9:1104.

The inferences that could be drawn from section 9:1104 are based upon the assumption that the riparian rights provided for in articles 657 and 658 are inseparable from the ownership of the riparian estate. If the riparian rights provided for in articles 657 and 658 are not inseparable from ownership of that estate, the legislature would not have needed to enact section 9:1104 in order to expressly authorize the assignment of access rights by a riparian owner. Section 9:1104 does not assist in the resolution of the continued uncertainty over the nature and scope of riparian rights. Additionally, the placement of section 9:1104 in the Revised Statutes and not in the Civil Code near articles 657 and 658 does not promote clarity.

navigation, public drinking water supplies, stream or water flow energy, sediment load and distribution, and on the environment and ecology balanced against the social and economic benefits of a contract of sale or withdrawal, or sale of agreement, or right to withdraw running surface water for agricultural and aquacultural purposes.

LA. R.S. § 9:1104(B).

¹³⁹ See Laura Springer, *Comment, Waterproofing the New Fracking Regulation: The Necessity of Defining Riparian Rights in Louisiana's Water Law*, 72 LA. L. REV. 225, 249 (2011) (“Although riparians may not sever their rights of use from their riparian estates, it is less clear whether riparians may duplicate those rights by assigning their rights of use to non-riparians, as contemplated by Act 994.”).

A “riparian owner may assign access rights equal to his own for the surface water adjacent to his riparian land,”¹⁴⁰ if section 9:1104’s requirements are met. Obviously the phrase “equal to his own” cannot mean the assignee receives riparian rights equal to the scope of uses that are permitted by article 657 (putting aside the fact that the scope of those uses remains uncertain). The owner of a riparian estate may withdraw water “for the purpose of watering his estate or for other purposes” which are not limited to agricultural or aquacultural purposes. Perhaps the phrase “equal to his own” means that the assignee can withdraw the same amount of running water that the owner of the riparian estate could have withdrawn for his own use. This interpretation is also implausible, given that section 9:1104 imposes numerous prerequisites for the assignment of access rights that are not imposed upon the riparian owner who is withdrawing the water for his own use.

Finally, it is not clear whether the phrase “equal to his own” has any bearing upon the riparian rights subsisting to an owner of a riparian estate who has assigned access rights to a non-riparian in compliance with section 9:1104.¹⁴¹ Does an assignment permitted by section 9:1104 diminish the riparian rights that remain to the riparian owner? It is difficult to speculate upon the answer to this question; Civil Code articles 657 and 658 provide no guidance as to the amount of water to which a riparian estate is entitled or the types of uses that are permitted.

Given Act 994’s obvious purpose of benefitting agricultural and aquacultural pursuits in Louisiana, it is not surprising that the legislature did not tackle section 9:1104’s interplay with Civil Code articles 657 and 658. Uncertainty over riparian rights in Louisiana continues, and uncertainty over section 9:1104 has begun.

SUBPART C. GROUNDWATER

1. Louisiana Law Before January 1, 1975

This section employs an historical approach to Louisiana’s development of groundwater law up to January 1, 1975, the date on which Louisiana’s Mineral Code took effect. One reason for utilizing this approach is that there has been no Civil Code

¹⁴⁰ LA. R.S. § 9:1104(B).

¹⁴¹ A student commentator who has analyzed Act 994 has stated:

[I]f a riparian can lease or sell water rights to a non-riparian and still retain his or her own rights in the property, the riparian right is not truly “severed” from the land, and inheres with the riparian landowner. In Act 994, a sale does not sever the riparian right; rather, assignment seems to duplicate the riparian right.

Laura Springer, *Comment, Waterproofing the New Fracking Regulation: The Necessity of Defining Riparian Rights in Louisiana’s Water Law*, 72 LA. L. REV. 225, 250 (2011)

provision expressly addressing rights to groundwater since the Digest of 1808,¹⁴² which permitted an owner of land with a spring thereon “to use it as he pleases,”¹⁴³ and to claim compensation if “this spring supplies the water that is necessary to the inhabitants of a city or town.”¹⁴⁴ These provisions were eliminated in the 1825 Code for the reasons explained by Moreau-Lislet in the following excerpt from his revision notes that accompanied the drafting of the 1825 Civil Code:

We have thought it was for the public interest to establish...that the owner shall be bound to keep the water in its ordinary course at the place where it leaves his estate, whether the spring be on his land, or whether the water comes from above his own.¹⁴⁵

¹⁴² The Digest of 1808 contained three articles addressing the rights of a landowner on whose estate a spring is located. A spring is defined by the U.S. Geological Survey (USGS) as an “area where there is a concentrated discharge of ground water that flows at the ground surface.” <http://pubs.usgs.gov/gip/gw/glossary.html>. The USGS also provides a more detailed description:

A spring is a water resource formed when the side of a hill, a valley bottom or other excavation intersects a flowing body of groundwater at or below the local water table, below which the subsurface material is saturated with water. A spring is the result of an aquifer being filled to the point that the water overflows onto the land surface. They range in size from intermittent seeps, which flow only after much rain, to huge pools flowing hundreds of millions of gallons daily.

<http://water.usgs.gov/edu/watercyclesprings.html>.

The relevant provisions found in Louisiana’s Digest of 1808 had provided:

He who has a spring upon his estate, may use it as he pleases, saving the right which the proprietor below may have acquired by title or by prescription.

LA. DIGEST OF 1808, p. 128, art. 5.

Prescription in this case, cannot be acquired but by an uninterrupted enjoyment during the space of thirty years, to begin from the moment when the proprietor has made and completed work intended to facilitate the fall of the course of water through his estate.

LA. DIGEST OF 1808, p. 128, art. 6.

The proprietor of the spring cannot change its course when this spring supplies the water that is necessary to the inhabitants of a city or town. But if the inhabitants have not acquired the use of said spring by prescription or otherwise, the proprietor may claim a compensation for this use.

LA. DIGEST OF 1808, p. 128, art. 7.

¹⁴³ LA. DIGEST OF 1808, p. 128, art. 5.

¹⁴⁴ LA. DIGEST OF 1808, p. 128, art. 7.

¹⁴⁵ 1 La. Legal Archives, *Projet of the Civil Code of 1825*, p. 71 (Dainow ed. 1937).

The Louisiana judiciary to date has not extended to groundwater the provisions governing riparian rights that were previously described in this report.¹⁴⁶ The question was squarely raised in one court of appeal case, but the appellate court refused to extend these provisions by analogy to groundwater.¹⁴⁷

Article 490, located among the general provisions in the Code addressing the accession rights of ownership, is relevant to the question of groundwater rights. It provides:

Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.¹⁴⁸

Prior to 1980 this provision contained three paragraphs: paragraph two addressed structures erected on the surface and paragraph three dealt with works constructed below the soil. Although this provision dates back to the Digest of 1808, paragraph three was changed in the 1825 Code. In the 1808 Digest, the relevant article had provided:

He may construct below the soil all manner of works, digging as deep as he deems convenient, and draw from the holes dug in the ground, all the benefits which may accrue, under such modifications as may result from the regulations of the police.¹⁴⁹

¹⁴⁶ See Subpart B (Riparian Rights in Louisiana), *supra*.

¹⁴⁷ In *Adams v. Grigsby*, 152 So. 2d 619 (La. App. 2d Cir.), *cert. denied* 244 La. 662, 153 So. 2d 880 (1963), which is discussed in the text later in this section, the court rejected plaintiff's request by stating:

On behalf of plaintiffs it is contended that the provisions of law which directly relate to water rights are set forth in LSA-Civil Code Articles [657 and 658] and in LSA-R.S. 38:218. It is argued that the application of the codal articles and the statute noted is not limited to surface waters, and, therefore, the use of sub-surface waters is subjected to their provisions. We cannot accept this conclusion, since, in our opinion, the provisions are exclusively applicable to surface waters....[T]he application of articles [657 and 658] must be limited to surface waters, since it relates to waters which run over the lands.

152 So. at 621-22.

¹⁴⁸ LA. CIV. CODE art. 490, *enacted by* Acts 1979, No. 180, § 1, eff. Jan. 1, 1980.

¹⁴⁹ LA. DIGEST OF 1808, p. 104, art. 9 ¶ 3. Two changes were made to this paragraph in the 1825 Code. First, the phrase "the holes dug in the ground" was replaced by the

Article 490 and its predecessors have always recognized that a landowner's general right to do as he pleases upon his estate is limited by law and by the rights of others.¹⁵⁰ One such limitation is article 667, which creates what is sometimes referred to as "obligations of vicinage."¹⁵¹ In the famous 1919 decision in *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*,¹⁵² Justice Olivier Provosty made the following comment about the pre-revision version of article 490 in the context of the court's discussion of article 667:

The provision of article 667, that the owner may not make any work on his property "which may be the cause of any damage to" his neighbor is found under the title "Of Servitudes," and hence apparently is one of the exceptions to which article [490] refers, and hence would seem to be a limitation upon article [490].¹⁵³

Article 490 does not guarantee to a landowner absolute ownership of the subsurface. It does, however, introduce the concept referred to as the rule of capture. Within the context of the general principles found in this article, development of Louisiana law relative to the landowner's rights to the subsurface fell to the judiciary.

In *Higgins*, which is considered to be the fountainhead of Louisiana's abuse of rights doctrine,¹⁵⁴ the court required a mineral lessee to plug and abandon its nonproductive oil well because it markedly reduced production from plaintiff's well on an adjacent tract. Although the opinion is based upon the doctrine of abuse of rights, the court discussed landowners' rights and duties relative to the subsurface. The court relied heavily upon French commentators, especially Laurent. The following excerpt from his treatise was quoted by the court:

word "thence"; and second, the phrase "regulations of the police" was expanded to "laws and regulations concerning mines, and the laws and regulations of the police." LA. CIV. CODE art. 497 ¶ 3 (1825). Moreau-Lislet's revision note states: "The corrections in this article relate to *mines*, which are not mentioned in our Code. We have added to the words '*regulations of the police*' the word *laws*, because *they* may relate to these matters." 1 La. Legal Archives, *Projet of the Civil Code of 1825*, p. 46 (Dainow ed. 1937).

¹⁵⁰ Although the phrase "rights of others" was added in 1980, it could be said that it is the law that permits the rights of others to constitute a restraint upon the landowner's rights.

¹⁵¹ See A.N. Yiannopoulos, *Violations of the Obligations of Vicinage: Remedies Under Articles 667 and 669*, 34 LA. L. REV. 195 (1974).

¹⁵² 145 La. 233, 82 So. 206 (1919).

¹⁵³ 145 La. at 235, 82 So. at 207.

¹⁵⁴ A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New*, 54 LA. L. REV. 1173, 1176 (1994) (calling *Higgins* a "landmark opinion").

“An owner constructing works on his land diminishes the volume of a spring the benefit of which his neighbor has been having. **He is within his right. If he thereby causes an injury to his neighbor, the latter cannot complain; for he has not the absolute ownership of the waters.** But, if it has been by malice that the works have been undertaken, for the sole purpose of injuring the neighbor, we have no longer the exercise of a right, but spitefulness, and he who abuses malignantly of his right ought to repair the damage he causes.”¹⁵⁵

Of greater relevance to the topic of groundwater is the following excerpt from the court’s comments on “subterranean or percolating waters” found in the court’s discussion of the limitations upon a landowner’s rights to the subsurface:

The analogy between the subterranean oil and subterranean or percolating waters is, we believe, near complete, and defendant cites the case of *Forbell v. City of N. Y.*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666, where the operation of a pump was enjoined because it had the effect of drying up the surface of the land to the great damage of the neighbor. That decision would be in point if the surface of defendant’s land was being injured by plaintiff’s pump. True, the court reasoned the case somewhat differently; but that was the true ground of the decision, for the court admitted that, so far as the water was concerned, the complainant had no ownership of it, and, of course, if so, the taking of it, whether by means of a pump or otherwise, invaded no right of the complainant, and therefore furnished no ground of action. But invasion of the surface did, because the complainant had the right to use and enjoy the surface uninterfered with by the pump of the defendant city. In a pumping case where no surface right of the neighbor was being interfered with, but only the percolating water was being taken, the Supreme Court of Mississippi denied an injunction, although the complainant’s supply of water was being thereby reduced. *Board of Supervisors of Clarke County v. Miss. Lumber Co.*, 80 Miss. 535, 31 South. 905. In the civil law the right to drain off by means of a deeper well the subterranean water of the neighbor is well settled, and apparently in the common law too.¹⁵⁶

Forty-four years later, the Second Circuit Court of Appeal decided *Adams v. Grigsby*,¹⁵⁷ a case in which thirteen landowners (plaintiffs) sought an injunction to

¹⁵⁵ 145 La. at 240-41, 82 So. at 209, *quoting* LAURENT, DE LA PROPRIÉTÉ, vol. 6, p. No. 140 (emphasis added).

¹⁵⁶ 145 La. at 246-47, 82 So. at 211 (emphasis added).

¹⁵⁷ 152 So. 2d 619 (La. App. 2d Cir.), *cert. denied* 244 La. 662, 153 So. 2d 880 (1963) (in which the supreme court stated: “Writ refused. The judgment is correct.”)

prevent an oil operator (defendant) from using water obtained from the fresh water sands of the Wilcox formation for its secondary recovery operations. The landowners, who had drilled water wells to access fresh water from this formation for their personal needs, argued that the defendant's withdrawals were depleting the subterranean fresh water reservoir thereby damaging plaintiffs. Plaintiffs further alleged that defendant's withdrawal of fresh water was "wasteful and unnecessary in that the fresh water is being pumped into the earth from which it cannot be recovered and there are available to defendant at deeper levels salt water sands sufficient to meet the needs of defendant."¹⁵⁸

Citing *Higgins* along with a number of sundry sources, the court of appeal (with the supreme court's approval)¹⁵⁹ rejected plaintiffs' request. Not only did the court refuse to extend the Civil Code provisions on riparian rights to subterranean water, the court found article 667 to be inapplicable to facts of the case because the defendant had not violated its mandate. In explaining its reasons, the court stated:

We concede that plaintiffs in the instant case might be entitled to relief under certain circumstances; for example, if defendant by his actions caused the pollution of plaintiffs' water supply, rendering it unfit for their use, or if he simply opened his own well and allowed it to pour out the water as waste without benefit to himself. However, we reiterate our conviction that the issue of ownership is the crux of this case. Neither plaintiffs nor defendant own the water percolating into or running through the Wilcox sand which lies beneath their respective properties, but only so much thereof as they withdraw by means of their respective wells. Quite obviously, as between the parties, the amount of water withdrawn, and therefore owned, may be more or less dependent upon the need and use thereof. **In the absence of statutory regulation, apportionment or allocation of the amount of water which may be withdrawn from a common reservoir, we conclude that courts are without authority to establish such nature of regulation by judicial pronouncement.** It follows that the coincidental damages suffered by plaintiffs must be regarded as *damnum absque injuria*.¹⁶⁰

¹⁵⁸ 152 So. 2d at 621.

¹⁵⁹ Although the supreme court denied plaintiffs' *writ of certiorari* in *Adams*, 244 La. 662, 153 So. 2d 880 (1963), in denying the writ, the supreme court stated: "Writ refused. The judgment is correct."

¹⁶⁰ 152 So. 2d at 624 (emphasis added).

2. The Mineral Code's Treatment of Groundwater

On January 1, 1975, almost twelve years after *Adams* was decided, the Mineral Code took effect, article 4 of which provides:

The provisions of this Code are applicable to all forms of minerals, including oil and gas. They are also applicable to rights to explore for or mine or remove from land the soil itself, gravel, shells, **subterranean water**, or other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land.¹⁶¹

Article 4 is the only specific reference to subterranean water in the Mineral Code. Nevertheless, several other Mineral Code provisions that delineate the landowner's rights to minerals occurring naturally in a liquid or gaseous state would apply. Among these is article 6, which provides:

Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.¹⁶²

Article 8 provides:

A landowner may use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals, provided it is not prohibited by law. He may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another.¹⁶³

Adams is cited approvingly in the Reporter's comment to article 8.¹⁶⁴ It appears that, as of January 1, 1975, groundwater rights are regulated by the Mineral Code.

¹⁶¹ LA. R.S. § 31:4, *enacted by* Acts 1974, No. 50, § 1, eff. Jan. 1, 1975 (emphasis added).

¹⁶² LA. R.S. § 31:6, *enacted by* Acts 1974, No. 50, § 1, eff. Jan. 1, 1975.

¹⁶³ LA. R.S. § 31:8, *enacted by* Acts 1974, No. 50, § 1, eff. Jan. 1, 1975.

¹⁶⁴ Since Louisiana had no Mineral Code prior to 1975, the Reporter's comments explain the sources of the provisions. The first paragraph of the Reporter's comment to article 8 states:

Two interesting facts warrant mention. First, the author of the *Adams* decision was Second Circuit Court of Appeal Judge George W. Hardy, Jr., whose son George W. Hardy, III was the Reporter of the Mineral Code project. Second, in a 1972 law review article discussing the highlights of the pending Mineral Code project, the younger Mr. Hardy devoted a paragraph to water, in which he stated:

As noted in the comment following Recommendation 2, which defines "minerals," **ground and surface water have been excluded from the ambit of the recommendations because the considerations governing water use and water rights are quite different from those governing mineral law proper.** Current efforts are underway on other fronts to secure legislation concerning water in Louisiana. The exclusion of water from coverage by the proposed mineral code would not, however, harm the present provisions of the Civil Code dealing with rights to surface water, or the jurisprudence applying the nonownership concept to ground water.¹⁶⁵

3. "Correlative Rights" and Civil Code Article 667

The final Mineral Code provision that is relevant to the present discussion is article 9, addressing the correlative rights of owners of a common reservoir. It provides:

Landowners and others with rights in a common reservoir or deposit of minerals have correlative rights and duties with respect to one another in the development and production of the common source of minerals.¹⁶⁶

Article 8 preserves established law governing the landowner's right to operate and his liability for damages. There is no attempt to change or to define the specific limitations upon the landowner's right to operate. Definition of the landowner's rights has been achieved by use of various legal institutions. The *sic utere* doctrine set forth in Article 667 of the Civil Code has been utilized in some instances. E.g., *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919) (landowner leaving a well uncapped to decrease pumping efficiency of neighbor's well); *Adams v. Grigsby*, 152 So.2d 619 (La. App. 2d Cir. 1963) (right to the full and free use of subterranean water for secondary recovery operations sustained).

LA. R.S. § 31:8 comment ¶ 1, enacted by Acts 1974, No. 50, § 1, eff. Jan. 1, 1975.

¹⁶⁵ George W. Hardy, III, *Highlights of the Mineral Code Recommendations: A Guide to the More Important Changes and Elaborations*, 32 LA. L. REV. 542, 546 (1972) (emphasis added).

¹⁶⁶ LA. R.S. § 31:9, enacted by Acts 1974, No. 50, § 1, eff. Jan. 1, 1975.

The “correlative rights and duties of landowners with rights in a common reservoir” described in Mineral Code article 9 echo the “obligations of vicinage” found in Article 667. Although a handful of decisions rendered after January 1, 1975 have cited *Adams*, the theory of correlative rights relative to landowners sharing a common groundwater reservoir has not been developed by the judiciary because of the paucity of reported decisions involving groundwater disputes.

Civil Code article 667 was amended in 1996 as part of Governor Foster’s tort reform. As amended, the article permits the recovery of damages “only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.”¹⁶⁷ Louisiana courts have sometimes struggled to articulate a cohesive theory underlying the liability imposed by this article.¹⁶⁸

In the previous section, it was noted that the court in *Adams* refused to apply article 667 by analogy to a contest between landowners with rights to the fresh water sands of the Wilcox formation. Because subterranean water is expressly included within the scope of the Mineral Code, the proper provision governing landowners with rights in a common reservoir is article 9 of the Mineral Code, not article 667 of the Civil Code.

PART III. CONSTITUTIONAL ISSUES

SUBPART A. FEDERAL CONSTITUTIONAL ISSUE: THE DORMANT COMMERCE CLAUSE

1. The Dormant Commerce Clause as Applied to Water

¹⁶⁷ LA. CIV. CODE art. 667, as amended by Acts 1996, 1st Ex. Sess., No. 1, § 1, eff. April 16, 1996.

¹⁶⁸ See, e.g., *Butler v. Baber*, 529 So. 2d 374 (La. 1988). One commentator offered the following criticism of *Butler*:

The *Butler* opinion does not clearly articulate a single theory by which to interpret article 667, and much of the analysis the court concluded is disguised in its discussion of seven prior cases. Nevertheless, the language of the opinion and the holdings of the cases discussed seem to present four significant points about article 667.

John C. Anjier, *Butler v. Baber: Absolute Liability for Environmental Hazards*, 49 LA. L. REV. 1139, 1141 (1989).

The Commerce Clause of the United States Constitution empowers Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”¹⁶⁹ The term “dormant Commerce Clause” refers to “[t]he constitutional principle that the Commerce Clause prevents state regulation of interstate commercial activity even when Congress has not acted under its Commerce Clause power to regulate that activity.”¹⁷⁰ As explained by Professors Mark S. Davis and Michael Pappas:

Far from being a creature of state law, the Dormant Commerce Clause is thoroughly federal in nature. It grows out of the Commerce Clause in the United States Constitution, which gives the federal government the power to regulate interstate commerce. The “flip side” of this grant of power to the federal government is the Dormant (or Negative) Commerce Clause, a doctrine built on the reasoning that if the federal government has the exclusive power to regulate interstate commerce, then states necessarily cannot legislate to interfere with interstate commerce. The fundamental inquiry in Dormant Commerce Clause cases, then, is whether states are interfering with interstate commerce, and the challenge courts face is distinguishing between impermissible interference and economic protectionism, on the one hand, and permissible exercise of state police power to regulate health and safety, on the other.¹⁷¹

¹⁶⁹ U.S. CONST. Art. I, § 8, cl. 3.

¹⁷⁰ BLACK’S LAW DICTIONARY “dormant commerce clause” (9th ed. 2009). This doctrine, which is sometimes referred to as the negative Commerce Clause, is based on the premise that the Commerce Clause contains an implied limitation upon the power of states. This doctrine evolved from dicta in an 1824 decision authored by Chief Justice John Marshall. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). As described by one recent commentator:

Gibbons suggested in dicta that in some circumstances states may lack the authority to regulate interstate commerce, even in the absence of conflicting federal legislation. Through that suggestion, the Chief Justice entangled the Court in an uncertain enterprise, one with which it has struggled for almost two centuries.

Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131, 134 (2011). For a discussion of the history and development of the dormant Commerce Clause principle, see Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 384-400 (2013).

¹⁷¹ Mark S. Davis and Michael Pappas, *Escaping The Sporhase Maze: Protecting State Waters Within the Commerce Clause*, 73 LA. L. REV. 175, 186-87 (2012).

In the seminal 1982 *Sporhase v. Nebraska*¹⁷² decision, the United States Supreme Court declared that water is an article of commerce governed by the dormant Commerce Clause. Under the strict-scrutiny balancing test articulated in *Sporhase*, the Court invalidated a provision in a Nebraska statute that limited water exportation.

Sporhase provides guidance to states in determining which efforts to regulate water go too far. The Supreme Court in *Sporhase* upheld Nebraska's separate permit process for out-of-state ground water transfers, inasmuch as Nebraska had a similar permit process for intrastate transfers of ground water; however, its facially discriminatory requirement that out-of-state water transferees grant reciprocal water rights to Nebraska was found to violate the dormant Commerce Clause.

The plaintiff-landowner in *Sporhase*, owning land sprawling across the Colorado-Nebraska state line, was prohibited under Nebraska law from irrigating the Colorado portion of the land from a well on the Nebraska side. The Nebraska statute at issue read as follows:

Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.¹⁷³

The Supreme Court found the statute to be facially discriminatory, deserving of the strictest scrutiny, and applied a balancing test articulated in *Pike v. Bruce Church, Inc.*¹⁷⁴:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the

¹⁷² 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

¹⁷³ NEB. REV. STAT. § 46-613.01 (1978), *quoted in Sporhase*, 458 U.S. at 944, 73 S. Ct. at 3458.

¹⁷⁴ 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) (Arizona law prohibiting the sale of uncrated cantaloupes held to create unlawful burden on interstate commerce).

extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.¹⁷⁵

Upon examining the statute, the Court upheld Nebraska's requirements "that the withdrawal of the ground water requested [be] reasonable,...not [be] contrary to the conservation and use of ground water, and...not [be] otherwise detrimental to the public welfare." The Court also discussed its "[reluctance] to condemn as unreasonable, measures take by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage," particularly since the state was using its police power to protect the health of its citizens and not merely the health of its economy.¹⁷⁶ Recognizing the need to conserve ground water to be a legitimate local public interest and, in light of the strict limitations on in-state transfers of ground water in other Nebraska statutes, the Supreme Court found the regulation of the transfer of ground water to be evenhanded.¹⁷⁷

However, the Court found that the requirement of reciprocal rights granted by the state in which the water would be used went too far. Colorado prohibited the exportation of ground water;¹⁷⁸ hence, the Nebraska reciprocity requirement explicitly barred commerce between the two states. The Court found that Nebraska failed to prove that the reciprocity requirement was narrowly tailored to achieve the state's interest in conserving ground water.¹⁷⁹

¹⁷⁵ Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970) (citation omitted), *quoted in Sporhase*, 458 U.S. at 954, 102 S. Ct. at 3463.

¹⁷⁶ 458 U.S. at 956, 102 S. Ct. at 3464.

¹⁷⁷ 458 U.S. at 955-56, 102 S. Ct. at 3464. The state regulated intrastate transfer of ground water with a different set of regulations. The Court stated that there existed "legitimate reasons for the special treatment accorded requests to transport ground water across state lines" and found the regulation of all transfers to be consistent with evenhandedness. 458 U.S. at 955-56, 102 S. Ct. at 3464.

¹⁷⁸ After the *Sporhase* decision was rendered, Colorado's statutes governing water transfers were amended to provide for a permit process. Harnsberger, *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 848-49 (1991); COLO. REV. STAT. § 37-81-101 (2012).

¹⁷⁹ 458 U.S. at 957-58, 102 S. Ct. at 3465. Nebraska asserted that its ground water is a publicly-owned resource, with the state entrusted to preserve it for the benefit of its people, 458 U.S. at 946, 102 S. Ct. at 3459 (*relying on* Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908) (New Jersey statute prohibiting the interstate transfer of its surface water was upheld as being well within a state's police power)).

The Court dismissed Nebraska's argument, stating that the precedent cited in *Hudson County* had been overruled. The Court stated that "[i]n expressly overruling

Aside from blanket prohibitions of water exports and reciprocity requirements, other attempts to restrict interstate water transfers that have failed under Commerce Clause challenges include using conservation and public welfare criteria when evaluating applications for interstate transfers of state ground water and only certain in-state transfers,¹⁸⁰ imposing a moratorium on transfers intended to impact only out-of-state transfers,¹⁸¹ and requiring administrative approval for out-of-state transfers (but not in-state transfers). Other Commerce Clause decisions not related to water would also invalidate legislation charging a higher fee to transfer water out-of-state than is charged for transfers or use in-state unless such fees are cost-justified.¹⁸²

Under *Sporhase*, the dormant Commerce Clause generally prohibits states from restricting or burdening the exportation of water resources. Despite recognition by

Geer [v. Connecticut], this Court traced the demise of the public ownership theory and definitively recast it as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." 458 U.S. at 951, 102 S. Ct. at 3461 (internal citations omitted). The Court cited the state's municipal water arrangements, whereby ground water is withdrawn from rural areas and transported to urban areas. The state's ability to regulate rates, which does not depend on the public ownership of the water, was found to be economically analogous to price regulation. Nebraska, the court found, treated its water as an article of commerce. 458 U.S. at 951-52, 102 at 3461-62. [Note that *Hudson County* has not been expressly overruled. Nevertheless, in light of *Sporhase*, a state would be ill-advised to assert that an interest in conservation immunizes a regulation burdening only out-of-state transfers from Commerce Clause scrutiny.]

This finding, though not part of the central holding of the case, was cited extensively in *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984). There, a New Mexico federal district court interpreted the dicta in *Sporhase* broadly so as to conclude: first, all water to be an article of commerce, including the water affected by an interstate compact in that case; second, all state regulations of water to be subject to Commerce Clause review; and third, any claim of public ownership in water to be a fiction. However, upon remand, the same court tempered its broad interpretation of the dicta in *Sporhase* and applied a strict scrutiny test to find some of the statutes at issue unconstitutional. The appropriate view of this dicta in *Sporhase*, then, is that states that regularly withdraw, transport, and sell public waters may not claim that those waters are not articles of commerce and that applicable state laws are immune from Commerce Clause scrutiny.

¹⁸⁰ *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984).

¹⁸¹ *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984).

¹⁸² Harnsberger, *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 835 (1991); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977).

courts that water conservation is a compelling local interest, *Sporhase* requires not only that state regulations must be narrowly tailored to achieve that interest, but they must treat intrastate and interstate transfers in an even-handed manner to avoid being struck down as protectionist. State regulations that have survived Commerce Clause scrutiny include a severance tax on coal mined in a state where the same tax applies regardless of its destination¹⁸³ and permitting processes for water transport outside of a certain area applicable to both in-state and out-of-state users, as in *Sporhase*.

Act 955 authorizes the DNR Secretary to enter into cooperative endeavor agreements that permit the withdrawal of running surface water upon “ensuring that the state receives fair market value for any water removed.”¹⁸⁴ SCR 53 references the following recommendation made by the Louisiana Ground Water Resource Commission in its Groundwater Interim Report: “engage legal scholars to research and explore the potential non-compensated consumption of surface water when used as an alternative to groundwater.” Putting aside for the present discussion the potential unconstitutionality of such legislation under provisions of Louisiana’s Constitution, if Louisiana were to allow the non-compensated consumption of surface water, would out-of-state applications be denied? If an out-of-state applicant were to seek to enter into such a cooperative endeavor agreement, and were denied the right to do so, this could be found to violate the dormant Commerce Clause as interpreted by the Supreme Court in *Sporhase*. Even if no out-of-state applicants have sought to enter into a cooperative endeavor agreement pursuant to Act 955, out-of-state applicants would certainly be interested in free water. In short, the dormant Commerce Clause is a significant obstacle to any protectionist legislation governing transfers of water.

Revised Statutes Section 9:1104, enacted by Act 994 of 2010, permits a riparian owner to “assign access rights equal to his own for the surface water adjacent to his riparian land for any agricultural or aquacultural purpose within the state of Louisiana by the non-riparian owner.”¹⁸⁵ This provision could be challenged as a protectionist statute subject to scrutiny under the dormant Commerce Clause as interpreted by the Supreme Court in *Sporhase*.

¹⁸³ See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946 (1981).

¹⁸⁴ LA. R.S. § 30:961(C), *added by* Acts 2010, No. 955, § 1, eff. July 6, 2010. This legislation can be found in Chapter 9-B (Surface Water Management) of Subtitle I (Minerals, Oil, and Gas) of Title 30 (Minerals, Oil, and Gas and Environmental Quality).

¹⁸⁵ LA. R.S. § 9:1104(B), *added by* Acts 2010, No. 994, § 1, eff. July 6, 2010.

2. Waters Subject To Interstate Compact: the Recent *Tarrant* Decision

Interstate compacts, entered into with Congressional consent, are given the force of federal law and are immune from Commerce Clause scrutiny.¹⁸⁶ They permit states to regulate commerce in accordance with the compact. They may also insulate those state regulations from Commerce Clause review.

For water bodies subject to interstate compacts, such as the Sabine River and the Red River, these compacts are generally immune from dormant Commerce Clause review. They are entered into with Congressional authorization, making them federal law. State regulations made pursuant to the compacts are also immune from dormant Commerce Clause scrutiny, as long as they do not conflict with the authorizing compact.

The Red River Compact allocates water rights in the Red River basin among four signatory states: Oklahoma, Texas, Arkansas, and Louisiana.¹⁸⁷ Tarrant Regional Water District, a Texas state agency providing water to north-central Texas, unsuccessfully sought a water permit from Oklahoma to acquire surface water from the Kiamichi River, a tributary of the Red River located in Oklahoma, for diversion to Texas. In the suit that followed, Tarrant argued that Oklahoma's protectionist water policy violated the Red River Compact. Its second argument was that, even if the compact allowed Oklahoma to implement protectionist water laws, Congressional approval of that compact does not insulate a state's protectionist policies from scrutiny under the dormant Commerce Clause. The federal district court¹⁸⁸ and the Tenth Circuit Court of

¹⁸⁶ See *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 3021-22, 73 L. Ed. 2d 664 (1982), cited in *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. at 2130. See also *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568 (9th Cir. 1985).

¹⁸⁷ "An Act to grant the consent of the United States to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas." PL 96-564 (S 2227), December 22, 1980, 94 Stat. 3305. United States Public Laws, 96th Congress - Second Session. As noted by the Supreme Court in *Tarrant*:

[I]n 1955, to forestall future disputes over the River and its water, Congress authorized the States of Arkansas, Louisiana, Oklahoma, and Texas to negotiate a compact to apportion the water of the Red River basin among themselves. See Act of Aug. 11, 1955, Pub.L. 346, 69 Stat. 654. These negotiations lasted over 20 years and finally culminated in the signing of the Red River Compact in 1978.

Congress approved the Compact in 1980, transforming it into federal law.

133 S. Ct. at 2125.

¹⁸⁸ *Tarrant Regional Water Dist. v. Herrmann*, 2009 Westlaw 3922803 (W.D. Okla. Nov 18, 2009) (NO. CIV-07-0045-HE).

Appeals rejected Tarrant’s argument.¹⁸⁹ On January 4, 2013, the United States Supreme Court granted writs,¹⁹⁰ and on June 13, 2013, the Supreme Court unanimously affirmed the lower courts in *Tarrant Regional Water District v. Herrmann*.¹⁹¹

Louisiana water transfer laws involving water not subject to an interstate compact are subject to review under the Commerce Clause. The statutes may not prohibit interstate commerce and, where they restrict or burden it, they must be narrowly tailored to achieve a compelling state interest. Evenhanded regulations—where burdens are imposed on both intrastate and interstate transfers to achieve the state interest—are most likely to survive Commerce Clause scrutiny.

Under *Tarrant*, Louisiana’s interest in the water apportioned to it under an interstate compact enables it to enact statutes that would otherwise be subject to scrutiny under the Commerce Clause. Any Louisiana regulation of its compact waters that does not conflict with the compact would likely be upheld, so long as the state has met its obligations to the other signatory states. In light of the Supreme Court’s ruling in *Tarrant*, Louisiana is free to transfer its share of apportioned water under interstate compacts to which Louisiana is a signatory in any manner it deems proper. Such transfers are immune from scrutiny under the dormant Commerce Clause.

SUBPART B. LOUISIANA CONSTITUTIONAL ISSUE: THE NATURAL RESOURCES CLAUSE

1. Overview of Louisiana Constitution’s Article IX, Section 1

Louisiana’s 1921 Constitution extended constitutional protection to the state’s natural resources by providing:

The natural resources of the State shall be protected, conserved and replenished; and for that purpose shall be placed under a Department of Conservation, which is hereby created and established....The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof.¹⁹²

¹⁸⁹ *Tarrant Regional Water Dist. v. Herrmann*, 656 F.3d 1222 (10th Cir. 2011).

¹⁹⁰ *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 831, 184 L. Ed. 2d 646, 80 USLW 3453, 81 USLW 3028, 81 USLW 3357, 81 USLW 3364 (U.S. Jan 04, 2013) (NO. 11-889).

¹⁹¹ 133 S. Ct. 2120, 186 L. Ed. 2d 153, 81 USLW 4399 (June 13, 2013).

¹⁹² LA. CONST. art. VI, § 1 (1921).

Although Louisiana’s 1974 Constitution retained this constitutional mandate in Article IX, Section 1 (the natural resources provision), the section was rewritten, so that it now provides:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.¹⁹³

Interestingly, the 1974 natural resources provision expressly includes air and water in addition to the “healthful, scenic, historic, and esthetic quality of the environment.”

Professor Lee Hargrave, who served as coordinator of legal research for the Louisiana Constitutional Convention of 1973, has stated that the Natural Resources and Environment Committee charged with drafting this provision consciously chose language intended to provide a legislative mandate, thereby rejecting language which would have provided for judicial review.¹⁹⁴ He states: “[I]t should be clear that the high-sounding statement [referring to the first sentence of the natural resources provision] is a generalized goal, but that the legislature is the ultimate determinant of the exact nature of the rules to be adopted.”¹⁹⁵

2. *Save Ourselves* — “The Landscape Would Never be the Same”¹⁹⁶

Among the legislature’s many enactments implementing the Constitution’s natural resource provision was the 1983 Louisiana Environmental Quality Act,¹⁹⁷ which

¹⁹³ LA. CONST. art. IX, § 1 (1974).

¹⁹⁴ Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?*, 58 LA. L. REV. 389, 398 (1998).

¹⁹⁵ 58 LA. L. REV. at 400.

¹⁹⁶ The quoted language is from Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409, 409 (2012).

¹⁹⁷ Acts 1983, No. 97. Since 1984, the year in which the Louisiana Supreme Court rendered its decision in *Save Ourselves*, the legislature has enacted many environmental provisions. However, the legislation in effect in 1984 was fairly recent, and the legislature was engaged in an ongoing revision process in order to satisfy the constitutional mandate imposed by the natural resources provision. In 1978, the legislature added a new chapter (Chapter 11 (Environmental Affairs)) containing a new Part I (Hazardous Waste Control) to Title 30, Acts 1978, No. 334, § 1, *adding* LA. R.S. §§ 30:1101 through 30:1116, which invested the DNR with “exclusive jurisdiction for the development, implementation, and enforcement of a comprehensive state hazardous waste control program.” LA. R.S. § 30:1103(A), *added by* Acts 1978, No. 334, § 1. In 1979,

established the Department of Environmental Quality (DEQ) within the Department of Natural Resources (DNR).¹⁹⁸ DEQ is the successor agency to the Environmental Control Commission (ECC), which had been “specifically charged with such duties as promulgating regulations, accepting and reviewing permit applications to operate hazardous waste facilities—duties formerly exercised by the secretary of the DNR.”¹⁹⁹

In 1984, the Louisiana Supreme Court in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*²⁰⁰ was called upon to determine whether the ECC had acted reasonably in issuing permits authorizing the construction and operation of a hazardous waste disposal plant. Reversing the lower courts’ affirmance of ECC’s decision to issue permits, the supreme court vacated the commission’s ruling and remanded for further proceedings because it could not be determined from the record “whether the agency followed correct interpretations of its constitutional and statutory duties, or whether its determinations are arbitrary, capricious or unreasonable.”²⁰¹ In the course of the opinion authored by Justice James Dennis,²⁰² the court enunciated a

the legislature restructured Chapter 11 of Title 30, consisting of seven parts. Part I of Chapter 11 under the 1978 Act became Part VII of the 1979 Act, entitled Hazardous Waste Control Law. Acts 1979, No. 449, *adding* LA. R.S. §§ 30:1131 through 30:1147.

¹⁹⁸ Acts 1983, No. 97, § 1, *amending* LA. R.S. § 30:1061; Acts 1983, No. 97, § 2, *adding* LA. R.S. §§ 36:231 through 36:239.

¹⁹⁹ *Save Ourselves, Inc. v. Louisiana Environmental Control Comm’n*, 452 So. 2d 1152, 1155 n. 3 (La. 1984).

²⁰⁰ 452 So. 2d 1152 (La. 1984). Professor Oliver A. Houck recently published a law review article chronicling the tenacity of the individuals who fought against the construction of the hazardous waste disposal facility near their homes. *See* Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409 (2012).

²⁰¹ 452 So. 2d at 1154.

²⁰² Professor Oliver A. Houck offers the following description of Justice Dennis, author of the court’s opinion in *Save Ourselves*:

[T]he lot for drafting an opinion fell to James Dennis. Justice Dennis had written related opinions and had also written more widely on the Louisiana public trust doctrine, under which the state managed natural resources for the benefit of the people. Dennis had been the kind of student who read Great Books of the World in law school simply to broaden his mind; he was also the kind of judge who read all the briefs and, often to the consternation of attorneys before him, did his own research and thinking as well. By coincidence, Dennis had been a delegate to the 1974 state constitutional convention where he had participated in drafting the new provision for environmental protection. All of these strands, the constitutional amendment, the public trust doctrine, and an independent legal mind, would come to bear on his consideration of the *Save Ourselves* appeal.

test to evaluate whether the Constitution's natural resources mandate has been satisfied. *Save Ourselves* was recently described by Professor Oliver A. Houck as a case that made "Louisiana legal history and revolutionize[d] environmental decision making in the state."²⁰³

The court in *Save Ourselves* analyzed the Constitution's natural resources provision, stating that it "imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to implement fully this policy."²⁰⁴ The court described the constitutional standard as

a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.²⁰⁵

The *Save Ourselves* rule of reasonableness balancing test has been applied in numerous decisions since the test was enunciated by the supreme court twenty years ago.²⁰⁶ The balancing test enunciated by the supreme court in *Save Ourselves* has been

Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409, 433-34 (2012).

²⁰³ Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409, 409 (2012). A student commentator reviewing *Save Ourselves* stated that the case "represents an important step in Louisiana environmental law. The decision recognizes a judicial responsibility to examine agency action not only for conformity to its own regulations, but also for compliance with its constitutional-statutory obligation to maintain the public trust. Judicial sentiment favoring use of the public trust doctrine for the protection of natural resources indicates that this constitutional provision will no longer lie dormant and unenforced." Nelea A. Absher, *Note, Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 59 TUL. L. REV. 1557, 1572 (1985).

²⁰⁴ 452 So. 2d at 1156. *But see* W. LEE HARGRAVE, *THE LOUISIANA CONSTITUTION* 171 (2011), in which Professor Hargrave has stated that the natural resources provision "is only a statement of policy; it is a nonbinding mandate to the legislature to protect the environment."

²⁰⁵ 452 So. 2d at 1157.

²⁰⁶ *See, e.g., In re American Waste and Pollution Control Co.*, 642 So. 2d 1258, 1265-66 (La. 1994) (vacating DEQ's decision which contained "only conclusions without stated

been given a number of nicknames, all of which use the letters “IT” – a reference to IT Corporation, the company whose permit application was at issue in *Save Ourselves*.²⁰⁷

bases”); *Lake Bistineau Preservation Society, Inc. v. Wildlife and Fisheries Comm’n*, 895 So. 2d 821, 39, 369 (La. App. 2d Cir. 2005) (upholding agency’s decision to lower water level in Lake Bistineau though *Save Ourselves* test was found to be inapplicable to agency involved in case); *Coalition for Good Government v. Louisiana Dept. of Environmental Quality*, 772 So. 2d 715 (La. App. 1st Cir. 2000) (finding DEQ complied with *Save Ourselves* balancing test); *In re Rubicon*, 670 So. 2d 475, 483 (La. App. 1st Cir. 1996) (finding DEQ’s procedure “[fell] short of what *Save Ourselves* and *American Waste* call for”); *In re Dravo Basic Materials Co.*, 604 So. 2d 630 (La. App. 1st Cir. 1992) (finding DEQ complied with *Save Ourselves* balancing test); *In re Shreveport Sanitary and Industrial Landfill*, 521 So. 2d 710 (La. App. 1st Cir. 1988) (finding DEQ complied with *Save Ourselves* balancing test); *Blackett v. Louisiana Dept. of Environmental Quality*, 506 So. 2d 749 (La. App. 1st Cir. 1987) (finding DEQ complied with *Save Ourselves* balancing test).

It should be noted that in 1997 legislation was enacted requiring applicants for a hazardous waste permit to submit an environmental assessment statement addressing:

(1) The potential and real adverse environmental effects of the proposed permit activities.

(2) A cost-benefit analysis of the environmental impact costs of the proposed activity balanced against the social and economic benefits of the activity which demonstrates that the latter outweighs the former.

(3) The alternatives to the proposed activity which would offer more protection to the environment without unduly curtailing non-environmental benefits.

LA. R.S. § 30:2018(B), *added by* Acts 1997, No. 1006, § 1. R.S. § 30:2018(E) exempts some permit applications from the environmental assessment statement requirement.

The 1997 enactment makes clear that the new requirements relieve neither “permit applicants [n]or the department from the public trustee requirements set forth in Article IX, Section 1 of the Constitution of Louisiana and by the Supreme Court of Louisiana in *Save Ourselves v. Louisiana Environmental Control Commission*, 452 So.2d 1152 (La. 1984).” LA. R.S. § 30:2018(H), *added by* Acts 1997, No. 1006, § 1.

²⁰⁷ Four different nicknames were found: IT Decision, I.T. Test, IT Questions, and IT Factors. The following list gives examples of the use of each of these nicknames:

“IT Decision”: *In re Rubicon*, 670 So. 2d 475, 482 (La. App. 1st Cir. 1996). *But see Louisiana Environmental Action Network v. Louisiana Dept. of Environmental Quality*, 2010 Westlaw 431500 at *4 (La. App. 1st Cir. 2010) (*Save Ourselves* opinion referred to by the first circuit as the “IT Decision”).

“I.T. test”: Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409, 440 (2012).

“IT” questions: *In re Dravo Basic Materials Co.*, 604 So. 2d 630, 632 (La. App. 1st Cir. 1992).

As summarized by the first circuit in 1996, the test requires that the decision-maker's written finding of facts and reasons for its decision satisfy the issues of whether:

- (1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible;
- (2) a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and
- (3) there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.²⁰⁸

“IT Factors”: Ryan M. Seidemann, Daniel D. Henry, Jr., Irys L.V. Allgood, and Jackson D. Logan, III, *Drops in the Bucket: Historic Classifications and Recent Developments Related to the Legal Aspects of Surface Water in Louisiana*, 27 TUL. ENVTL. L.J. 61, 71 (2013).

²⁰⁸ *In re Rubicon*, 670 So. 2d 475, 483 n. 8 (La. App. 1st Cir. 1996) (*amending* the enumeration in *Blackett v. Louisiana Dept. of Environmental Quality*, 506 So. 2d 749, 754 (La. App. 1st Cir. 1987) of five separate issues which was labeled by first circuit in *Rubicon* as “an overstatement”).

A law review article exploring recent developments surrounding surface water in Louisiana offered the following restatement of *Save Ourselves'* balancing test:

- (1) [Has the agency considered whether] the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible[?]
- (2) [Has the agency performed] a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project [[such that it has] demonstrate[d] that the latter outweighs the former[?] and
- (3) [Has the agency examined whether] there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable[?]

Ryan M. Seidemann, Daniel D. Henry, Jr., Irys L.V. Allgood, and Jackson D. Logan, III, *Drops in the Bucket: Historic Classifications and Recent Developments Related to the Legal Aspects of Surface Water in Louisiana*, 27 TUL. ENVTL. L.J. 61, 71 (2013).

3. Louisiana's "Public Trust Doctrine"

Commentators throughout the United States have written extensively about the sources of the public trust doctrine and its core principles.²⁰⁹ A general definition of the phrase, compiled by the Coastal States Organization as a result of a survey it conducted in 1997, states:

The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The doctrine also sets limitations on the States, the public, and private owners, as well as establishing the responsibilities of the States when managing these public trust assets.²¹⁰

²⁰⁹ See, e.g., Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 113 (2010); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007); James L. Huffman, *Speaking of Inconvenient Truths--A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and The Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57 (2005); Lisa Lombardi, *Note and Comment, The Public Trust Doctrine in Idaho*, 33 IDAHO L. REV. 231 (1996); Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 LA. L. REV. 1535 (1993); James G. Wilkins and Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861 (1992); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989); Charles F. Wilkinson, *The Headwaters Of The Public Trust: Some Of The Traditional Doctrine*, 19 ENVTL. L. 425 (1989); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Joseph L. Sax, *The Public Trust Doctrine in National Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1968); Sam Brandao, *Comment, Louisiana's Mono Lake: The Public Trust Doctrine and Oil Company Liability for Louisiana's Vanishing Wetlands* 86 TUL. L. REV. 759, 767-68 (2012).

²¹⁰ COASTAL STATES ORGANIZATION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 3-5 (2d ed. 1997), *quoted in* Sam Brandao, *Comment, Louisiana's Mono Lake: The Public Trust Doctrine and Oil Company Liability for Louisiana's Vanishing Wetlands* 86 TUL. L. REV. 759, 767-68 (2012).

The following definition is taken from Professor A. Dan Tarlock's treatise on water law:

The public trust is a doctrine that asserts that states do not have unlimited discretion to decide how the beds of tidal and navigable waters and shoreland formed by accretion are used. The core idea is that such beds are held as trust

Nine years before Louisiana's 1921 Constitution extended constitutional protection to the state's natural resources, the Louisiana Supreme Court in *State v. Bayou Johnson Oyster Company*²¹¹ quoted at length from one of the United States Supreme Court's early decisions describing the public trust doctrine. The court in *Bayou Johnson* stated:

In *Martin et al. v. Lessee of Waddell*, supra, Taney, C. J., speaking for the Supreme Court of the United States, said:

"We do not propose to meddle with the point, which was very much discussed at the bar, as to the power of the king, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell fish or floating fish within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But, from the opinion expressed by the justices of the Court of King's Bench in the case of *Blundell v. Caterall*, 5 Barn. & Ald. 287, 294, 304, 309, and in the case of *Duke of Somerset v. Fogwell*, 5 Barn. & Cress. 883, 884, the question must be regarded as settled in England against the right of the king, since Magna Charta, to make such a grant."

Considering, in the same case, the question whether the charters granted by Charles II to his brother, the Duke of York, conferred upon the latter the right to dispose, as of his private property, of the soil lying beneath Raritan river and bay, in the state of New Jersey, the learned Chief Justice said:

for the benefit of the public and this requires that state decisions to alienate, lease, or use submerged lands must be consistent with trust purposes. During the nineteenth century, the federal and state governments encouraged the filling of submerged lands to promote urban and port development so the trust served more as a rationale for state alienation and development than as a source of limitation on state power. However, these older precedents must be read with caution as more and more states are equating the public trust with the protection of public access to navigable waters and the protection of environmental quality.

A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 8:18 at 487 (2013 ed.).

²¹¹ 130 La. 604, 58 So. 405 (1912).

The dominion and property in navigable waters and in the lands under them, being held by the king, as a public trust, the grant to an individual of an exclusive fishery, in any portion of it, is so much taken from the common fund intrusted [sic] to his care for the common benefit. In such cases, whatever does not pass by the grant still remains in the crown, for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly, and it will not be presumed that he intended to part from any portion of the public domain unless clear and especial words are used to denote it.²¹²

In 1974, the Louisiana Supreme Court decided *Gulf Oil Corp. v. State Mineral Board*,²¹³ an important decision that was previously discussed.²¹⁴ On rehearing in *Gulf Oil*, the supreme court held that state patents conveying navigable water bottoms were not within the scope of the Repose Statute of 1912, which required the state to challenge the validity of a patent within six years from its issuance. In reaching this conclusion, Justice Barham, author of the court's opinion on rehearing, examined the Civil Code's provisions classifying the waters and beds of navigable water bodies as property in the public domain held by the state for the benefit of all the people. The court also relied upon a series of legislative enactments that recognized that the navigable water bodies were inalienable public things. Additionally, the court recognized the public trust doctrine to be an important factor influencing the court's decision on rehearing.

Justice Barham began this portion of the opinion by citing the equal footing doctrine²¹⁵ and a number of decisions by the United States Supreme Court,²¹⁶ followed by the following summary of the United States Supreme Court's holding in *Illinois Central Railroad Co. v. Illinois*.²¹⁷

²¹² 130 La. 604, 618-19, 58 So. 405, 410 (1912) (quoting *Martin v. Waddell*, 41 U.S. 367, 10 L. Ed. 997 (1842)).

²¹³ 317 So. 2d 576 (La.1974).

²¹⁴ See Section 5 (Louisiana's Jurisprudence Regarding the Alienability of Public Things) of Subpart A (Running Surface Water), *supra*.

²¹⁵ The equal footing doctrine was cited as "[a]nother factor influencing our conception of the intended purpose of [the Repose Statute of 1912]." Justice Barham then stated that the equal footing doctrine "perhaps could, in itself, be dispositive of the issue before us had we chosen to rely solely upon it." 317 So. 2d at 588.

²¹⁶ Included among the cases cited were: *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); *Pollard v. Hagan*, 44 U.S. 212, 11 L. Ed. 565 (1845); *Martin v. Waddell*, 41 U.S. 367, 10 L. Ed. 997 (1842).

²¹⁷ 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

[T]he states cannot abdicate their trust over property in which the people as a whole are interested so as to leave it entirely under the use and control of private parties. In that case, the United States Supreme Court even held that a legislative grant of the State's title to submerged lands under Lake Michigan could be repealed by subsequent legislation because the lands in question were held in trust for the public use.²¹⁸

Justice Barham then quoted from John L. Madden's book *Federal and State Lands in Louisiana*, which had been published the preceding year, in which the author stated:

[T]he public policy of the state treating navigable water beds as inalienable and insusceptible of private ownership actually arose when Louisiana attained statehood, for the public trust was then created, resulting in the vesture of a fixed and indestructible public right, only changeable by the Consent and positive action of the people of the state in their collective sovereignty.²¹⁹

²¹⁸ 317 So. 2d at 589 (*citing* Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892)).

²¹⁹ JOHN L. MADDEN, FEDERAL AND STATE LANDS IN LOUISIANA 335 (1973). A student commentator writing about *Gulf Oil* made the following observation about the court's discussion of the public trust doctrine:

Of special interest in the instant case is the initial emergence of a judicial statement of the public trust doctrine in Louisiana. According to one writer, cited favorably by the majority, Louisiana holds navigable waterbottoms in trust for the people, and this trust may be dissolved only by means of a constitutional amendment; no legislative enactment would be sufficient to divest the state of title to navigable waterbottoms. This view seems far stronger than other statements of the doctrine and may be too severe to serve as a practical guide for the future. The requirement of a constitutional amendment as a condition precedent to alienation of natural resources by the state government would inhibit the state's ability to act for the public good and in effect seems to recognize a public interest in property distinct from the state's interest as representative of the people. A better view of the public trust doctrine is that the state is committed only to maintain the public use of property held in trust, and an inquiry into the validity of state transfers, therefore, centers on whether the transfers permit continued use of a property by the public and retention of state regulatory power over that use. From this view, Act 62, if intended to apply to navigable waterbottoms, could be seen as a prohibited abdication of the state's general control over navigable waterbottoms since the statute made no provision for continued public use. If applied in the future, the public trust doctrine may serve as an effective weapon in preserving ecologically important areas in Louisiana.

Justice Barham then concluded:

This theory casts grave doubt upon whether the legislature could have alienated the beds of navigable waters under the 1912 repose statute or, for that matter, under any legislative pronouncement; for this reason, we stated above that the notion of public trust could be dispositive of this case.²²⁰

In *Save Ourselves*, examined in the preceding section, the Louisiana Supreme Court explained the source and scope of Louisiana's public trust doctrine, stating:

It is the well settled law of this country that a state holds title to land under navigable waters within its limits and that the title is held in trust for the people of the state that they may enjoy and use the waters free from obstruction or interference. A public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by art. VI § 1 of the 1921 Louisiana Constitution. The public trust doctrine was continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent

Francis J. Crosby, *Note, Ownership Of Navigable Waterbottoms – California Co. v. Price Revisited*, 36 LA. L. REV. 694, 701-02 (1976).

²²⁰ 317 So. 2d at 589. Justice Barham intimated that there exists a federal public trust doctrine which might also require that the state be allowed to annul any patent containing the water and beds of navigable water bodies. However, in the United States Supreme Court's most recent discussion of the public trust doctrine, the Court indicated that states have the power to determine the scope of their public trust doctrine, even as to lands acquired under the equal footing doctrine. The Court stated:

the public trust doctrine remains a matter of state law, subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power....While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.

PPL Montana v. Montana, 132 S. Ct. 1215, 1234-35, 182 L. Ed.2d 77, 80 USLW 4177 (2012) (citations omitted).

with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy.²²¹

Although Louisiana courts for over a century have recognized and relied upon Louisiana's public trust doctrine, the Louisiana Supreme Court in *Save Ourselves* breathed life into the natural resources provision and the public trust doctrine by enunciating the rule of reasonableness balancing test. As stated by Professor Oliver A. Houck:

The outcome of *Save Ourselves*, however improbable, is not the reason why the case had such a seismic impact on the state bureaucracy, the petrochemical industry, community groups, and corporate law firms. To be sure, a large hazardous waste disposal operation that could have become a nation-wide magnet was canceled, but many things are canceled in life and we continue with our routines. What the *Save Ourselves* opinion did was change the routine.²²²

If the state were to implement a policy allowing the uncompensated withdrawal of running surface water, it is difficult to evaluate whether such a policy would pass muster under Louisiana's natural resources provision. Under the rule of reasonableness balancing test of *Save Ourselves*,²²³ the focus of the inquiry is upon the process by which

²²¹ 452 So. 2d at 1154 (*citing* Illinois Central R. Co. v. Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892)).

²²² Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409, 439 (2012).

²²³ Professor Oliver A. Houck has observed:

Save Ourselves' requirements were a most unwelcome intrusion of the judiciary. From industry and development quarters, including corporate law firms, came a storm of opprobrium: "infamous," "overly burdensome," and the imposition of "extra-legislative will." What these criticisms overlooked is that Justice Dennis simply asked the state to justify its decision. Similar plants better planned and located to minimize risks have since passed the "I.T. test" with flying colors.

What the critics also overlooked is that Justice Dennis, in his decision, actually cut them considerable slack. The hazardous waste law under which the I.T. permit had been granted, and which Irving thought were his issue on appeal, required the state to "assure safe treatment, storage and disposal." The word "assure" in English dictionaries means more than someone's opinion; it puts the burden on the state to prove that risks are minimal. Justice Dennis, focusing on other law, let this language slip, reducing the law's potentially heavy burden of proof to, in effect, a constitution-based procedural review. The

the decision was made. The decision maker must satisfy all three elements in the IT test created by *Save Ourselves*.

SUBPART C. LOUISIANA CONSTITUTIONAL ISSUE: LOUISIANA CONSTITUTION'S PROHIBITION AGAINST DONATIONS OF STATE PROPERTY

1. Overview of Louisiana Constitution's Article VII, Section 14

Section 14 of Article VII of Louisiana's Constitution of 1974, located in the Revenue and Finance article, addresses a variety of matters relating to the donation, loan, or pledge of things of value belonging to the state or to any of its political subdivisions. For purposes of the present discussion, the relevant portion of this provision is the general proscription set forth in Subsection A: "[T]he funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private."²²⁴ Although some of the concepts in the quoted passage were also found in

result was an opinion that reached more widely than the statute at hand, but with a lighter hand.

Oliver A. Houck, *Save Ourselves: The Environmental Case That Changed Louisiana*, 72 LA. L. REV. 409, 439-40 (2012).

²²⁴ LA. CONST. art. VII, § 14 (1974). As amended ten times since its adoption in 1974, this section currently provides:

La. Const. of 1974 Art. VII, § 14. Donation, Loan, or Pledge of Public Credit

- (A) **Prohibited Uses.** Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private. Except as otherwise provided in this Section, neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.
- (B) **Authorized Uses.** Nothing in this Section shall prevent
- (1) the use of public funds for programs of social welfare for the aid and support of the needy;
 - (2) contributions of public funds to pension and insurance programs for the benefit of public employees;
 - (3) the pledge of public funds, credit, property, or things of value for public purposes with respect to the issuance of bonds or other evidences of indebtedness to meet public obligations as provided by law;
 - (4) the return of property, including mineral rights, to a former owner from whom the property had previously been expropriated, or

-
- purchased under threat of expropriation, when the legislature by law declares that the public and necessary purpose which originally supported the expropriation has ceased to exist and orders the return of the property to the former owner under such terms and conditions as specified by the legislature;
- (5) acquisition of stock by any institution of higher education in exchange for any intellectual property (*added by* Acts 1983, No. 729, § 1, approved Oct. 22, 1983, eff. Nov. 23, 1983);
 - (6) the donation of abandoned or blighted housing property by the governing authority of a municipality or a parish to a nonprofit organization which is recognized by the Internal Revenue Service as a 501(c)(3) or 501(c)(4) nonprofit organization and which agrees to renovate and maintain such property until conveyance of the property by such organization (*added by* Acts 1995, No. 1320, § 1, approved Oct. 21, 1995, eff. Nov. 23, 1995; *amended by* Acts 1996, 1st Ex. Sess., No. 97, § 1, approved Nov. 5, 1996, eff. Dec. 11, 1996);
 - (7) the deduction of any tax, interest, penalty, or other charges forming the basis of tax liens on blighted property so that they may be subordinated and waived in favor of any purchaser who is not a member of the immediate family of the blighted property owner or which is not any entity in which the owner has a substantial economic interest, but only in connection with a property renovation plan approved by an administrative hearing officer appointed by the parish or municipal government where the property is located;
 - (8) the deduction of past due taxes, interest, and penalties in favor of an owner of a blighted property, but only when the owner sells the property at less than the appraised value to facilitate the blighted property renovation plan approved by the parish or municipal government and only after the renovation is completed such deduction being canceled, null and void, and to no effect in the event ownership of the property in the future reverts back to the owner or any member of his immediate family (*added by* Acts 1998, No. 75, § 1, approved Oct. 3, 1998, eff. Nov. 5, 1998);
 - (9) the donation by the state of asphalt which has been removed from state roads and highways to the governing authority of the parish or municipality where the asphalt was removed, or if not needed by such governing authority, then to any other parish or municipal governing authority, but only pursuant to a cooperative endeavor agreement between the state and the governing authority receiving the donated property (*added by* Acts 1999, No. 1396, § 1, approved Oct. 23, 1999, eff. Nov. 25, 1999);

several of Louisiana's prior Constitutions,²²⁵ the term "donation" was added in the 1974 Constitution; replacing the phrase "granted to," which was used in the Constitutions of 1921,²²⁶ 1913,²²⁷ 1898,²²⁸ and 1879.²²⁹

(10) the investment in stocks of a portion of the Rockefeller Wildlife Refuge Trust and Protection Fund, created under the provisions of R.S. 56:797, and the Russell Sage or Marsh Island Refuge Fund, created under the provisions of R.S. 56:798, such portion not to exceed thirty-five percent of each fund (*added by* Acts 1999, No. 1402, § 1, approved Nov. 20, 1999, eff. Dec. 27, 1999);

(11) the investment in stocks of a portion of the state-funded permanently endowed funds of a public or private college or university, not to exceed thirty-five percent of the public funds endowed (*added by* Acts 2006, No. 856, § 1, approved Sept. 30, 2006, eff. Oct. 31, 2006); or

(12) the investment in equities of a portion of the Medicaid Trust Fund for the Elderly created under the provisions of R.S. 46:2691 et seq., such portion not to exceed thirty-five percent of the fund (*added by* Acts 2006, No. 857, § 1, approved Sept. 30, 2006, eff. Oct. 31, 2006).

(C) **Cooperative Endeavors.** For a public purpose, the state and its political subdivisions or political corporations may engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual.

(D) **Prior Obligations.** Funds, credit, property, or things of value of the state or of a political subdivision heretofore loaned, pledged, dedicated, or granted by prior state law or authorized to be loaned, pledged, dedicated, or granted by the prior laws and constitution of this state shall so remain for the full term as provided by the prior laws and constitution and for the full term as provided by any contract, unless the authorization is revoked by law enacted by two-thirds of the elected members of each house of the legislature prior to the vesting of any contractual rights pursuant to this Section.

(E) **Surplus Property.** Nothing in this Section shall prevent the donation or exchange of movable surplus property between or among political subdivisions whose functions include public safety (*added by* Acts 1999, No. 1395, approved Oct. 23, 1999, eff. Nov. 25, 1999).

²²⁵ Professor Lee Hargrave, coordinator of legal research for the Louisiana Constitutional Convention of 1973, has stated that the current provision "can be traced back to the language of the 1845 and 1852 constitutions," Lee Hargrave, *Limitations on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 LA. L. REV. 137, 141-42 (2001); however, this is true only with respect to pledges and loans, both of which were prohibited by the 1852 Constitution, LA. CONST. art. 108 (1852). The 1845 Constitution only prohibited the legislature from "pledg[ing] the faith of the State for the payment of

The general proscription against pledges, loans, and donations set forth in Subsection A of Article VII, Section 14 of the 1974 Constitution is subject to a variety of exceptions that are listed in Subsection B. Professor Hargrave has offered the following description of the deliberations on Section 14 of Article VII that took place during the 1973 Constitutional Convention:

The records of the Constitutional Convention of 1973 do not exhibit a strong political or policy debate that might give a clear guide to interpreting the limitations [of Subsection B]. The floor debate on the issue takes up only six pages in the published transcripts, and the technical provision that was adopted, one that made little change, passed by a 91-1 vote.

The CC '73 Committee on Revenue, Finance and Taxation had to focus on numerous controversial political and policy problems, including income and ad valorem taxation, homestead exemptions, sales tax exemptions and supermajority votes for tax increases. Given the time constraints, it did not devote substantial attention to the problem of donating state property or using state credit for private interests. To the extent the committee dealt with problems and basic policies in this area, its concern was with the difficulty under the 1921 Constitution to secure funding for desirable programs, especially those related to social welfare and those benefitting from federal matching funds. Numerous constitutional amendments had been required to establish exceptions to the general prohibition in the previous constitution, and the committee's main policy initiative was to provide more legislative flexibility.²³⁰

Subsection B as originally proposed to the Constitutional Convention by the Committee on Revenue, Finance and Taxation contained five exceptions -- only three of which were enacted at that time.²³¹ Thereafter, a fourth exception was added to

any bonds, bills, or other contracts or obligations, for the benefit or use of any person or persons, corporations or body politic whatever." LA. CONST. art. 113 (1845).

²²⁶ LA. CONST. art. IV, § 12 (1921).

²²⁷ LA. CONST. art. 58 (1913).

²²⁸ LA. CONST. art. 58 (1898).

²²⁹ LA. CONST. art. 56 (1879).

²³⁰ Lee Hargrave, *Limitations on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 LA. L. REV. 137, 142 (2001).

²³¹ LA. CONST. art. VII, § 14(B)(1) through (3) (1974). The first excised exception has been described by Professor Hargrave as "the most far reaching exception which would have allowed substantially more power to be exercised." Lee Hargrave, *Limitations on*

Subsection B in 1983;²³² and eight additional exceptions were added to Subsection B between 1990 and 2006.²³³

Subsection C authorizes “the state and its political subdivisions or political corporations [to] engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual” for a “public purpose.”²³⁴ The substance of Subsection C was originally recommended by the Committee on Revenue, Finance and Taxation as one of

Borrowing and Donations in the Louisiana Constitution of 1975, 62 LA. L. REV. 137, 145 (2001). The second excised provision, which became Subsection C, is discussed later in this section.

²³² LA. CONST. art. VII, § 14(B)(4) (1974), *as amended by* Acts 1983, No. 729, § 1, approved Oct. 22, 1983, eff. Nov. 23, 1983.

²³³ LA. CONST. art. VII, § 14(B)(5) through (12) (1974), *as amended by* Acts 1990, No. 1099, § 1, approved Oct. 6, 1990, eff. Nov. 8, 1990; Acts 1995, No. 1320, § 1, approved Oct. 21, 1995, eff. Nov. 23, 1995; Acts 1996, 1st Ex. Sess., No. 97, § 1, approved Nov. 5, 1996, eff. Dec. 11, 1996; Acts 1998, No. 75 § 1, approved Oct. 3, 1998, eff. Nov. 5, 1998; Acts 1999, No. 1395, § 1, approved Oct. 23, 1999, eff. Nov. 25, 1999; Acts 1999, No. 1396, § 1, approved Oct. 23, 1999, eff. Nov. 25, 1999; Acts 1999, No. 1402, § 1, approved Nov. 20, 1999, eff. Dec. 27, 1999; Acts 2006, No. 856, § 1, approved Sept. 30, 2006, eff. Oct. 31, 2006; Acts 2006, No. 857, § 1, approved Sept. 30, 2006, eff. Oct. 31, 2006.

It should also be noted that Subsection E of Article VII, § 14 (*added by* Acts 1999, No. 1396, § 1, approved Oct. 23, 1999, eff. Nov. 25, 1999) contains an additional exception to Subsection A’s prohibition against pledging, loaning, or donating state property. It provides:

Nothing in this Section shall prevent the donation or exchange of movable surplus property between or among political subdivisions whose functions include public safety.

The proliferation of exceptions to the proscription against pledging, loaning, or donating state property also occurred frequently under Louisiana’s prior constitutions. Chalin O. Perez, Chairman of the 1973 Constitutional Convention’s Committee on Local Government, told the convention delegates that there had been “over two hundred pages in our present constitution as a result of...[the prohibition] against the funds, credit, property or things of value of the state from being loaned, pledged or donated.” IX RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS at 2896 (Dec. 17, 1973).

Subsection D of Article VII, § 14, which is not discussed in this report, confirms the continued validity of any loan, pledge, or donation of state property that was valid at the time of its authorization. The subsection also provides a mechanism for legislative revocation of such authorizations.

²³⁴ LA. CONST. art. VII, § 14(C) (1974).

Subsection B's exceptions to the proscription found in Subsection A.²³⁵ When the committee's recommendation was reviewed by the members of the Constitutional Convention, Delegate Jack Avant proposed the relocation of "the reference to intergovernmental cooperation to a separate section so that it would not be an exception to [Sub]section A. He explained that he did not object to cooperative ventures in general, but did not want to let them defeat the rule of [Sub]section A:

That is the purpose of the amendment. In other words, this intercooperation would be acceptable and permissible and legal and fine, but you still can't under the guise of cooperation do what the constitution has set out to prohibit, and that is: take public funds and give them or loan them or otherwise dispose of them to private entities.²³⁶

Revised Statutes Section 33:9022 defines a cooperative endeavor as:

any form of economic development assistance between and among the state, its local governmental subdivisions, political corporations, public benefit corporations, the United States or its agencies, or any public or private association, corporation, or individual. The term "cooperative endeavors" shall include but not be limited to cooperative financing, cooperative development, or any other form of cooperative economic development activity.²³⁷

The decision to subject cooperative endeavors to the proscription against loaning, pledging, or donating state property was an important one. Any cooperative endeavor agreement – whether intergovernmental or between a governmental body and a private person or entity – is permitted, but only if it serves a public purpose and only if no state property is loaned, pledged, or donated pursuant to such agreement.

²³⁵ The original proposal would have exempted "intercooperation among agencies and private associations for a public purpose" from the proscription in Subsection A. Lee Hargrave, *Limitations on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 LA. L. REV. 137, 144 (2001).

²³⁶ Lee Hargrave, *Limitations on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 LA. L. REV. 137, 145 (2001) (*quoting* IX RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS at 2900 (Dec. 17, 1973)).

²³⁷ LA. R.S. 33:9022(1). The definition is found in Chapter 27 (Cooperative Economic Development) of Title 33 (Municipalities and Parishes).

2. *Cabela*: The Louisiana Supreme Court’s Most Recent Interpretation of Article VII, Section 14(A)

Although there have been a plethora of Attorney General opinions interpreting Louisiana’s constitutional prohibition against donations of state property,²³⁸ very few judicial opinions have addressed this subject.²³⁹ The Louisiana Supreme Court most recently interpreted this provision in its 2006 decision in *Board of Directors of the Industrial Development Board of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of Gonzales (Cabela)*.²⁴⁰

Cabela involved the interplay among Subsection A’s proscription against donations of state property, Subsection C’s approval of cooperative endeavor agreements that serve a public purpose, and Louisiana’s Tax Incentive Funding Act (TIF Act).²⁴¹ *Cabela* squarely posed the question of whether a cooperative endeavor agreement proposing to finance a private retail development with public funds – albeit pursuant to the TIF Act – would violate Article VII, Section 14(A)’s prohibition against donations of state property.²⁴²

The private retail development at issue was *Cabela’s Retail Center (Cabela’s)*, to be built on 49.22 acres of land in Gonzales. *Cabela’s*, self-described as “the world’s

²³⁸ Only the 127 post-*Cabela* Attorney General opinions interpreting Subsection A were reviewed for this report.

²³⁹ This is also true for the pre-1974 version of this provision which, instead of proscribing donations of state property, had stated in relevant part: “things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person...” See LA. CONST. art. IV, § 12 (1921); LA. CONST. art. 58 (1913); LA. CONST. art. 58 (1898); LA. CONST. art. 56 (1879).

²⁴⁰ 938 So. 2d 11 (La. 2006).

²⁴¹ Louisiana’s Tax Incentive Funding Act is currently found in LA. R.S. §§ 33:9038.31 through 9038.42 (redesignated pursuant to the statutory revision authority of the Louisiana State Law Institute). Tax incentive funding was first authorized in Louisiana in 1979. Acts 1979, No. 668, § 1. For an in-depth analysis of the TIF Act, see John Grand, *Comment, Tax Increment Financing: Louisiana Goes Fishing for New Business*, 66 LA. L. REV. 851 (2006).

²⁴² One year before deciding *Cabela*, the supreme court granted writs in another tax incentive financing case in which the use of tax incentive financing for a private business was alleged to violate Article VII, Section A’s prohibition against donations of state property. In that case, however, the court resolved the case on a non-constitutional basis, obviating the need to consider the constitutional issue posed. See *Denham Springs Economic Development District v. All Taxpayers*, 894 So. 2d 325 (La. 2005) (TIF Act held to prohibit the use of previously-dedicated sales tax increments for the economic project proposed by plaintiff).

foremost outfitter”,²⁴³ was perhaps a veritable “sportsman’s paradise” compressed into a 165,000 square foot retail facility to many, but not to the local owners of two Gonzales sporting goods stores. Upset that Gonzales’ Industrial Development Board (the Board) would be using public funds to subsidize one particular sporting goods retailer, the business owners contested the constitutionality of the Board’s proposed cooperative endeavor agreement²⁴⁴ funding Cabela’s.²⁴⁵

A general overview of the TIF Act and a description of the relevant provisions of the Cabela project are necessary in order to appreciate the precise context in which the supreme court assessed whether the arrangement violated the prohibition against donation of state property found in Article VII, Section 14(A) of Louisiana’s Constitution. The TIF Act will be described first, followed by the salient features of the Cabela project.

a. Description of Louisiana’s Tax Incentive Funding Act

²⁴³ <http://www.cabelas.com>.

²⁴⁴ The term “cooperative endeavor agreement” is used for consistency; however, the “agreement” in *Cabela* consisted of multiple agreements among multiple parties (and authorized by the appropriate government entities). The project documents consisted of four related but distinct agreements: the cooperative endeavor agreement, the trust indenture, the lease agreement with option to purchase, and the public facilities management agreement. Rather than distinguishing among these four documents, the report employs the phrase “the Cabela Project” to refer to the various agreements among the parties.

The explanation of these agreements in this report is “streamlined” in that it does not pinpoint the specific agreement imposing a particular duty or creating a particular right or entitlement. It is also streamlined in that it focuses upon Cabela’s Retail LA, LLC, and omits discussion of Carlisle Resort, LLC, the entity that sold the 49.22 acres of land to Cabela and that was bound to develop 48.5 acres of its real estate adjacent to the 49.22 acres as a Sportsman Park Center, for purposes of attracting certain complementary retail and commercial ventures.

²⁴⁵ 938 So. 2d at 16. The business owners’ challenge of the Cabela Project was made in an action that had been brought by the Board under the Bond Validation Act, LA. R.S. §§ 13:5121 through 13:5130, in which the Board sought a declaratory judgment that the Project was valid and legal.

The local sporting goods owners advanced two arguments: first, that the Cabela Project was an unconstitutional donation; and second, that the Board’s special treatment of Cabela violated the Equal Protection clauses of the federal and state constitutions. Both challenges were rejected by the trial court, the First Circuit Court of Appeal, 929 So. 2d 743 (La. App. 1st Cir. 2005), and the Louisiana Supreme Court. The supreme court’s rejection of their equal protection challenge was based upon the low level of scrutiny courts apply to equal protection claims in areas of economic policy. 938 So. 2d at 28-29.

One student commentator has described the TIF Act as “a new solution” to the problem of creating economic development by “permit[ing] government subdivisions to use tax revenues to offer financial incentives to private business in hopes of encouraging new growth.”²⁴⁶ The author explains:

Tax increment financing is a method of trapping incremental increases in tax revenues generated from new businesses and using them to fund local government projects. Generally, a state passes enabling legislation allowing city and parish governments to create special taxing districts. The district can be as small as a single building or as large as the government body creating it. The district then issues bonds and spends the subsequent revenue developing the area. Presumably the investments will bring new growth and new tax revenues. The districts use these new revenues to finance the bonds.

When a district is created, tax dollars are essentially divided into two streams. The first stream represents the amount of money the district received in taxes before the creation of the district. The second stream represents all increases in tax collection in the district after it is created. This amount collected in the first stream remains constant. Thus, if a district generated one million dollars in tax revenue before the creation of the district, local taxing authorities will continue to collect one million dollars in tax revenue. The amount in the second stream depends upon the level of new tax dollars collected. Using the one million dollar example, any taxes collected in excess of one million dollars goes into this stream. Presumably increases are attributable to the district's investments, so the district should be able to use this money to fund the redevelopment projects.²⁴⁷

b. Description of the Cabela Project

The governing authority of Gonzales utilized tax incentive financing (TIF) to promote economic development. It created the Gonzales Economic Development District No. 1 (the District), a political subdivision of the state consisting of a 233-acre tract of land. It then obtained authorization by special election for a portion of previously authorized sales and use taxes to be rededicated for economic development in the District. The Board issued TIF bonds, which Cabela was bound to purchase and

²⁴⁶ John Grand, *Comment, Tax Increment Financing: Louisiana Goes Fishing for New Business*, 66 LA. L. REV. 851, 843 (2006) (citing the TIF Act, LA. R.S. § 33:9020 *et seq.*).

²⁴⁷ John Grand, *Comment, Tax Increment Financing: Louisiana Goes Fishing for New Business*, 66 LA. L. REV. 851, 843-44 (2006).

which were secured by the annual pledged state increment (1.50% of state sales and use tax collected within the District up to a maximum total amount of \$10,500,000) and the annual pledged local increment (1.50% of the city sales and use tax collected within the District).

Cabela agreed to acquire 49.22 acres of property in the District on which it would construct, furnish, and equip a 165,000 foot retail facility, title to which Cabela agreed to transfer to the Board upon issuance of the TIF bonds. The Board would then lease the property back to Cabela (and would grant to Cabela an option to purchase the property for its fair market value at the time Cabela exercised the option).

The term of the option was the earlier of the expiration of or payment in full of the TIF bonds. Upon exercise of the option, Cabela would be allowed to take as a credit against the purchase price an amount equal to:

- (1) the amount Cabela paid for the property before it was transferred to the Board;
- (2) all rent paid by Cabela to the Board during the lease term;
- (3) all additional rent paid by Cabela during the lease term (consisting of all costs for insurance, maintenance and improvements);
- (4) \$2,500 for each full-time job and \$1,250 for each part-time job created by Cabela at the Retail Center;
- (5) \$1,900,000 for each year that Cabela operated the Retail Center during the Lease; and
- (6) Cabela's actual costs arising out of the operation, maintenance and repair of the public facilities plus interest.²⁴⁸

c. The Court's Analysis of Article VII, Section 14

In a seven-to-two²⁴⁹ decision authored by Chief Justice Catherine Kimball, the court found that the Cabela project and the TIF Act authorizing it did not amount to an unconstitutional donation of public funds to a private entity in violation of Article VII, section 14(A) of the Louisiana Constitution. The court repudiated its 1983 decision in *City of Port Allen v. Louisiana Municipal Risk Management*,²⁵⁰ in which the court had stated that the constitutional prohibition against donations of public property "is violated whenever the state or a political subdivision seeks to give up something of value when

²⁴⁸ The public facilities included a museum located in the District.

²⁴⁹ A dissenting opinion by Justice Traylor (in which Justice Knoll agreed) stated: "I do not believe that the use of public funds to wholly finance a private for-profit business, at the expense of small business owners and tax payers, was one of the envisioned uses of the TIF statute." 938 So. 2d at 32.

²⁵⁰ 439 So. 2d 399 (La. 1983).

it is under no legal obligation to do so.”²⁵¹ As noted by the court in *Cabela*, the *City of Port Allen* case had been criticized by Professor Hargrave, who wrote: “That statement can make no sense without distorting the meaning of the words. The state obviously can give up funds to buy things even though it has no legal obligation to buy the thing. The state can invoke its credit to borrow money even though it has no obligation to borrow.”²⁵²

The court in *Cabela* then reinterpreted the word “donation”:

The term donation, as used in La. Const. art. VII, § 14(A), is plain and unambiguous. The generally understood meaning of a donation is an act whereby one gratuitously gives something to another. The term donation contemplates giving something away. It is a gift, a gratuity or a liberality. We find that, essentially, the constitutional provision at issue seeks to prohibit a **gratuitous alienation** of public property.²⁵³

The court’s interpretation of the word “donation” in Subsection 14(A) as a gratuitous alienation comports with the court’s prior jurisprudence²⁵⁴ and is consistent with “the 1973 delegates’ understanding of donation as an act of giving away public property.”²⁵⁵ The court looked to the Civil Code’s provisions on donations inter vivos,²⁵⁶ which distinguish among gratuitous, onerous, and remunerative donations, concluding that “[t]he generally understood meaning of the term donation correlates with gratuitous donations as defined by the Civil Code, and we believe the constitution’s use of the term envisions a gratuitous intent.”²⁵⁷

The court explained precisely why the agreement at issue was not a gratuitous alienation. First, the bonds were not secured by state’s full faith and credit (and hence there was no violation of Subsection A’s prohibition against pledging state property). Second, the state and city had not entered into their obligations gratuitously—“both parties expect to receive something of value in return for the performance of their

²⁵¹ 439 So. 2d at 401.

²⁵² 938 So. at 21 (*quoting* Lee Hargrave, *Limitations on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 LA. L. REV. 137, 157 (2001)).

²⁵³ 938 So. 2d at 20 (emphasis added).

²⁵⁴ 938 So. 2d at 21 (*citing* Johnson v. Marrero-Estelle Volunteer Fire Co. No. 1, 898 So. 2d 351, 359 (La. 2005); City of Port Allen v. Louisiana Municipal Risk Management, 439 So. 2d 399 (La. 1983) (yes, this is the case that *Cabela’s* also repudiated)).

²⁵⁵ 938 So. 2d at 20-21 (*quoting* IX RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS at 162897).

²⁵⁶ The provisions discussed by the court were revised in 2008. They currently appear as LA. CIV. CODE arts. 1526 and 1527.

²⁵⁷ 938 So. 2d at 21-22.

obligations.”²⁵⁸ Third, the agreement unequivocally stated that the annual pledged increment of the state and the city “collectively is less than the financial benefits to be received by each as a result of the Project.”²⁵⁹ Fourth, only a portion of sales tax revenues was pledged; hence, if “the Project is successful, significant sales tax revenues will be generated.”²⁶⁰

The court stated that “the non-gratuitous nature of the Project is also plainly demonstrated by the obligations imposed by the project documents upon Cabela...in exchange for the State's and City's participation in the Project.”²⁶¹ These obligations were then listed and discussed, and the court ultimately concluded that, despite the advantages conferred upon Cabela by the agreement, Cabela was risking an appreciable amount of its own assets in the Project. Hence, no liberality had been conferred upon Cabela.

3. The Post-*Cabela* Attorney General Opinions

Although the *Cabela* decision has been construed in only a few cases, it has been applied in almost 100 Attorney General opinions. Moreover, the Attorney General has articulated a three-prong *Cabela* inquiry that summarizes his office's interpretation of *Cabela*:

Under the standards that this Office has adopted to ensure compliance with *Cabela*'s, the following will determine whether the lease constitutes a permissible expenditure or transfer of public funds:

- (1) Does the lease comport with a governmental purpose for which the public entity (in this case, the Pontchartrain Levee District) has legal authority to pursue?

- (2) Does the lease, taken as a whole, appear to be gratuitous?

²⁵⁸ 938 So. 2d at 24.

²⁵⁹ 938 So. 2d at 24. The court noted that “these statements, standing alone, would be insufficient to allow us to conclude a non-gratuitous intent on the parts of the State and the City. Taken as parts of the Agreement and related documents as a whole, however, they provide insight into the intent of the parties, and reveal that neither the State nor the City intend to enter into a gratuitous contract with Cabela[.]” 938 So. 2d at 24.

²⁶⁰ 938 So. 2d at 24.

²⁶¹ 938 So. 2d at 24.

- (3) Does the public entity have a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the lease?²⁶²

4. The Concept of “Gratuitous Alienation” in the Civil Code

As explained in the previous section, the court in *Cabela* replaced the repudiated *Port Allen* test with the concept of a “gratuitous alienation.” A gratuitous alienation, such as a donation inter vivos,²⁶³ is classified in the Code as a gratuitous contract,²⁶⁴ meaning that a party has obligated himself toward another without obtaining an advantage in return. In a donation inter vivos, as in any gratuitous contract, the obligor’s reason for binding himself is to benefit the other party, the obligee.²⁶⁵ By contrast, in an onerous contract, “each of the parties obtains an advantage in exchange for his obligation.”²⁶⁶ Of course, a donation inter vivos is not the only type of gratuitous contract. The Civil Code recognizes a handful of gratuitous unilateral contracts.²⁶⁷

²⁶² La. Atty. Gen. Op. No. 09-0303 dated January 22, 2010 to Eddie J. Lambert (Louisiana State Representative, District 59), 2010 Westlaw 457261 p. 2 (La. A.G.).

²⁶³ LA. CIV. CODE art. 1468. As referenced in *Cabela*, 938 So. 2d at 21, the Code’s scheme is complicated by the concepts of the remunerative and the onerous donation. A remunerative donation is given to recompense the donee for services rendered in the past while an onerous donation burdens the donee with some charge. The Code contains a formula for determining whether a remunerative or onerous donation is governed by the rules peculiar to donations inter vivos.

The relevant provisions state:

The rules peculiar to donations inter vivos do not apply to a donation that is burdened with an obligation imposed on the donee that results in a material advantage to the donor, unless at the time of the donation the cost of performing the obligation is less than two-thirds of the value of the thing donated.

LA. CIV. CODE art. 1526, *as amended by Acts 2008, No. 204, § 1, eff. Jan. 1, 2009.*

The rules peculiar to donations inter vivos do not apply to a donation that is made to recompense for services rendered that are susceptible of being measured in money unless at the time of the donation the value of the services is less than two thirds of the value of the thing donated.

LA. CIV. CODE art. 1527, *as amended by Acts 2008, No. 204, § 1, eff. Jan. 1, 2009.*

²⁶⁴ LA. CIV. CODE art. 1910.

²⁶⁵ LA. CIV. CODE art. 1967.

²⁶⁶ LA. CIV. CODE art. 1909.

²⁶⁷ *See, e.g.*, LA. CIV. CODE art. 2992 (gratuitous mandate); LA. CIV. CODE art. 2891 (loan for use); LA. CIV. CODE art. 2904 (loan for consumption); and LA. CIV. CODE art. 2926 (deposit).

5. The Constitutionality of Non-Compensated Transfers of Running Surface Water

If the state were to implement a policy allowing non-compensated withdrawals of running surface water, this policy would likely violate the prohibition against gratuitous alienations of state property found in Louisiana's Constitution. The test announced by the Louisiana Supreme Court in *Cabela* offers little hope that such a policy would pass constitutional muster.

The state would have to prove that each time it enters into such an agreement, it expects to receive something of value in return for allowing the non-compensated withdrawal of running surface water. In *Cabela*, the state and city anticipated that the benefits each would receive would be greater than the annual pledged increments each gave to *Cabela*. Assuming for example that the state were to allow uncompensated surface water withdrawals for use in fracking operations, the state would likely rely upon the same arguments made by the state and the City of Gonzales in *Cabela*: the drilling project will create jobs, generate tax dollars, stimulate economic growth, and protect the groundwater by diverting withdrawals to running surface water.²⁶⁸ Assuming the state were to make this argument, the argument's validity would have to be assessed within the framework of *Cabela*, and the additional factors present in that case would have to be considered in the context of the Civil Code's classification of contracts.

In *Cabela*, the parties entered into a series of agreements which, under the Civil Code's classification scheme for contracts, were bilateral and onerous. The Code classifies a contract as bilateral (or synallagmatic) "when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other."²⁶⁹ The distinguishing feature of a bilateral contract is the reciprocity of the obligations undertaken by the parties. Using the contract of sale as a simple example,²⁷⁰ a seller binds himself to convey ownership of the thing because the buyer has bound himself to pay the price. The obligations of each of the parties to a bilateral contract can be compared to a coin—one side of the coin is the seller's obligation, while the other side of the coin is the buyer's obligation. A coin, like a bilateral contract, has two sides, each of which is correlative to the other.

²⁶⁸ The Groundwater Interim Report suggested that "the non-compensated consumption of surface water when used as an alternative to groundwater [would] aid economic development, job creation, and job retention." Groundwater Interim Report, page 106 (quoted in Subpart A (The Legislature's Request) of Part I (Introduction), *supra*).

²⁶⁹ LA. CIV. CODE art. 1908.

²⁷⁰ LA. CIV. CODE art. 2439.

It can thus be seen that in a bilateral contract each party is both an obligor and an obligee.²⁷¹ Returning to the sale example, the seller is an obligor with respect to his duty to convey ownership of the thing, and he is an obligee with respect to the buyer's duty to pay the price. Conversely, the buyer is an obligor with respect to his duty to pay the price, and he is an obligee with respect to the seller's duty to convey ownership of the thing. In a bilateral contract, as in a coin, the two sides are indispensable parts. A bilateral contract cannot exist without reciprocal obligations.

The "opposite" of a bilateral contract is a unilateral contract. The Code classifies a contract as unilateral when "the party who accepts the obligation of the other does not assume a reciprocal obligation."²⁷² In a unilateral contract, only one of the parties is an obligor and the other party only an obligee.

A contract is classified as onerous "when each of the parties obtains an advantage in exchange for his obligation."²⁷³ The "opposite" of an onerous contract is a gratuitous contract. The Code classifies a contract as gratuitous "when one party obligates himself toward another for the benefit of the latter, without obtaining any advantage in return."²⁷⁴ Determination of whether a contract is onerous or gratuitous requires an inquiry into each party's "cause," which the Code defines as "the reason why a party obligates himself."²⁷⁵ If the reason a party binds himself as an obligor towards an obligee is to confer a benefit or advantage to that obligee, the obligor's cause is gratuitous. If by contrast the reason a party binds himself as an obligor towards an obligee is to receive an advantage from that obligee, the obligor's cause is onerous.

While there is substantial overlap between the Code's definition of a bilateral contract and its definition of an onerous contract, the two are not synonymous—although it is difficult to conceive of a bilateral contract that is not onerous. The definition of a bilateral contract states that each party's obligation is correlative to the other party's obligation—each party binds himself in order to obtain the "advantage" he will receive from the other party's obligation.

Although every bilateral contract may be onerous, not every unilateral contract is gratuitous. Examples of onerous unilateral contracts from the sales title of Book III of

²⁷¹ "An obligation is a legal relationship whereby a person, called the **obligor**, is bound to render a performance in favor of another, called the **obligee**." LA. CIV. CODE art. 1756 (emphasis added).

²⁷² LA. CIV. CODE art. 1907.

²⁷³ LA. CIV. CODE art. 1909.

²⁷⁴ LA. CIV. CODE art. 1910.

²⁷⁵ LA. CIV. CODE art. 1967 ¶ 1.

the Code include the option to buy or sell²⁷⁶ and the right of first refusal,²⁷⁷ the two types of unilateral agreements preparatory to a sale. In each of these contracts, only the grantor of the option or of the right of first refusal is an obligor. In an option to sell (or buy), the grantor has bound himself to buy (or sell) if the grantee exercises the option that has been conferred upon him. In the right of first refusal, the grantor binds himself that, should he decide to sell the thing, he will offer it to the grantee first before selling to another. In neither the option to buy (or sell) nor the right of first refusal is the grantee bound to do anything. The grantee is an obligee, but not an obligor.

Another simple example of a unilateral contract that was found to be onerous is *Kirk v. Kansas City Railroad Co.*²⁷⁸ In *Kirk*, the plaintiff conveyed a servitude of passage to the defendant for \$1. Thereafter, plaintiff sued to annul the contract, arguing that the conveyance was not a valid sale, inasmuch as \$1 was not a serious price in proportion to the value of the thing sold.²⁷⁹ The plaintiff argued that the contract was also not a valid donation inter vivos, because the form of the transfer was an act "*sous seing privé*," or act under private signature, and not an authentic act (notarial act), which is required for a valid donation inter vivos. The court rejected the plaintiff's argument and upheld the conveyance. As noted in the case summary:

An act by which landowners granted a right of way, wherein the consideration stated was one dollar, and the advantages and conveniences resulting from the building of the road, evidences, not a donation pure and simple, but a commutative (onerous) contract.²⁸⁰

In *Kirk*, the plaintiff conveyed the right of passage to defendant to induce defendant to construct its railroad adjacent to plaintiff's property. Plaintiff's "cause" or reason for conveying the right of passage to defendant was to obtain an advantage for himself, *viz.*, proximity to the railroad. Had plaintiff not conveyed the right of passage to defendant, the railroad would not have been built near plaintiff's land.

Returning to *Cabela*, the parties in that case entered into a bilateral, onerous contract. The District and the City of Gonzales agreed to finance a private development project with public funds, and ultimately to sell the property to Cabela, which would be

²⁷⁶ The Code defines an option to buy or sell as "a contract whereby a party gives to another the right to accept an offer to sell, or to buy, a thing within a stipulated time." LA. CIV. CODE art. 2620 ¶ 1.

²⁷⁷ A right of first refusal is created when an owner of a designated thing "agree[s] that he will not sell [that] thing without first offering it to a certain person." LA. CIV. CODE art. 2625.

²⁷⁸ 51 La. Ann. 667, 25 So. 457 (1899).

²⁷⁹ 51 La. Ann. at 672, 25 So. at 459-60. *See* LA. CIV. CODE art. 2464.

²⁸⁰ 51 La. Ann. 667, 25 So. 457 (1899).

allowed a credit against the purchase price for those expenditures that were set forth in the parties' agreement. Cabela in return agreed to purchase the land, build the store, pay rent, and perform maintenance. As it turned out, the venture was a success, the credited expenditures exceeded the purchase price, and Cabela obtained ownership of the property. However, as the court noted, Cabela assumed the risk of the project's potential failure.

The Groundwater Interim Report has recommended that the state explore the possibility of permitting non-compensated withdrawals of running surface water. If this recommendation is implemented, any resulting agreement will be a unilateral contract. The state will be bound to allow its grantee to withdraw running surface water, but the grantee will not have assumed any reciprocal obligation. Could such a unilateral contract be classified as onerous? Let us return to the advantages that the state might assert that it would receive under such contracts. The state would likely assert that the drilling projects will create jobs, generate tax dollars, stimulate economic growth, and protect the groundwater by diverting withdrawals to running surface water.

The first three alleged "advantages" do not directly result from allowing the uncompensated withdrawal of running surface water. In other words, there is no cause and effect relationship between the two. The state is not attempting to induce fracking operations by giving away water. Were the state to allow non-compensated withdrawals of surface water, its "cause" would not be to induce oil and gas companies to engage in fracking to create jobs and stimulate the state's economy. There is no indication that the oil and gas industry needs to be incentivized to conduct fracking operations. Fracking operations are already taking place and will likely continue to take place regardless of whether the state allows non-compensated withdrawals of running surface water.

The drilling projects are already creating jobs, already generating tax dollars, and already stimulating economic growth, and will continue to do so even if the drilling companies have to pay for the water needed for their fracking operations. The state is not in any way in a position similar to that of the plaintiff in *Kirk*, who both facilitated the building of the railroad and induced the defendant to locate the railroad adjacent to his property by conveying a right of passage to defendant "for free." In *Kirk*, the plaintiff's cause or motive was to receive an advantage that he did not already have, and that he could not have obtained without the contract he entered into with the defendant.

The true "cause" or reason why the state might desire to implement this proposal is to conserve groundwater by incentivizing the use of running surface water, thereby de-incentivizing withdrawals of groundwater. The state's true "cause" - to de-incentivize withdrawals of groundwater for fracking operations - indisputably is an important state goal. Nevertheless, the state has the power to accomplish this goal

directly by imposing additional restrictions on groundwater withdrawals. Moreover, because groundwater is presently regulated under the Mineral Code, the rule of capture enables a landowner to withdraw groundwater, thereby acquiring ownership of that which he captures. The direct beneficiary of the proposal is any landowner in a position to gain ownership of more groundwater beneath his land under the rule of capture.

Groundwater is indisputably one of the state's important natural resources. It is subject to the public trust doctrine that is embraced in the Constitution's natural resources clause. Nevertheless, de-incentivizing withdrawals of groundwater benefits the state only indirectly. It is improbable that this indirect benefit could successfully transform what in actuality is a gratuitous alienation into an onerous transfer.

PART IV. FINDINGS AND RECOMMENDATIONS

SUBPART A. FINDINGS

1. SCR's Narrow Question: Explore Non-Compensated Consumption of Surface Water

The Law Institute has thoroughly studied and explored the constitutionality of permitting the non-compensated consumption of running surface water, as requested by SCR 53. If such a policy were implemented, it would not likely survive constitutional challenge. As explained in Part III (Constitutional Issues), a policy permitting the non-compensated withdrawal of running surface water is vulnerable to three distinct constitutional challenges.

The first constitutional challenge the policy might face would be based upon the dormant Commerce Clause of the United States Constitution. Such a challenge could arise if two conditions are met: first, if the source of the running surface water withdrawn pursuant to this policy is not part of Louisiana's apportioned share of water under an interstate compact; and second, if the state prohibits out-of-state parties from entering into an agreement for the uncompensated withdrawal of running surface water. *Sporhase* requires states to treat intrastate and interstate transfers in an evenhanded manner. State regulations that restrict or burden the export of water resources are subject to the strict scrutiny of the dormant Commerce Clause. It is questionable whether a protectionist policy limiting uncompensated withdrawals to in-state users could survive constitutional muster.

The second constitutional challenge that could be made against such a policy is based upon the natural resources provision of Louisiana's Constitution. It is impossible to assess whether a challenge based on this constitutional provision would be

successful, since the IT test enunciated by the court in *Save Ourselves* is a rule of reasonableness that is factually driven. Nevertheless, if such a policy were challenged under the natural resources provision, the state would have to demonstrate that it has satisfied all three elements of this test.

The third constitutional challenge, which is based on Louisiana's constitutional prohibition against the donation of state property, presents serious problems if the state were to institute a policy of allowing non-compensated withdrawals of running surface water. Most likely, the policy would not survive this challenge. *Cabela*, the Louisiana Supreme Court's most recent interpretation of this constitutional provision, imposes several burdens on the state when alienating public property.

First, it must be shown that the public body transferring state property has the legal authority to do so. This burden can be overcome, since the Code's classification of running water and waters of navigable water bodies as public things is legislation that can be repealed by a subsequent inconsistent legislative enactment.

Second, the contract taken as a whole cannot appear to be gratuitous. The state would have a difficult time satisfying this threshold. A contract permitting uncompensated withdrawals of running surface water is a unilateral contract. Although unilateral contracts are not always gratuitous, on their face they appear to be.

Third, it must be shown that the state has a demonstrable, objective, and reasonable expectation of receiving something of value in return for the performance of its obligation. In *Cabela*, the court noted that each of the public bodies anticipated that its annual pledged increment would be less than the anticipated financial benefits that these bodies expected to receive from the *Cabela* project. The state is not likely able to meet this burden. The advantages that the state receives from fracking operations are not the direct result of giving away state-owned water, since the companies engaged in fracking operations are able to acquire water from other sources, which they presently do, sometimes from groundwater.

Although the private development project funded with public funds at issue in *Cabela* was actualized as a result of a cooperative endeavor agreement that was found to be constitutional by the supreme court, here there is no cause and effect relationship – the advantages to the state in this case would be indirect. The direct advantages (for which a cause and effect relationship does exist) flow to those landowners who might be able to capture more groundwater as a direct result of the state incentivizing the withdrawal of running surface water instead of groundwater. In conclusion, the implementation of a policy permitting the non-compensated withdrawal of running surface water would likely be declared unconstitutional under Article VII, Section 14 of the Louisiana Constitution.

2. SCR's Broad Question: An Analysis of Legal Issues Surrounding Groundwater and Surface Water and any Needs for Revision to Current Law

The Law Institute has spent almost eighteen months researching and discussing Louisiana's legal treatment of running surface water and groundwater. Although the legal issues affecting Louisiana's water resources have been identified and discussed in detail throughout this report, they will be briefly summarized. The first issue is the lack of certainty over the nature and scope of riparian rights. Although this uncertainty has existed for over two hundred years, the abundance of Louisiana's water resources yielded few efforts to obtain clarification of these rights. It is clear, however, that in the few instances in which riparian owners asked Louisiana courts for protection of their riparian rights, the judiciary failed to engage in the kind of deductive reasoning that breathes life into general principles of the type found throughout the Civil Code.

The second issue concerns groundwater. As in the case of riparian rights, there are very few reported decisions addressing groundwater rights, and there exists significant uncertainty about Louisiana's legal regime for groundwater. Groundwater was grafted onto the Mineral Code by the insertion of two words in article 4: "subterranean water" – the only mention of groundwater in the Mineral Code.

As recognized in SCR 53, Louisiana water law, which likely developed without an understanding of hydrology, has "disparate legal regimes for groundwater and for surface water." Like many jurisdictions, Louisiana has adopted different rules for surface water than for groundwater in a naïve attempt to divide "the continuous hydrologic cycle into discrete segments."²⁸¹ The interconnectedness of these different sources of water has not gone unnoticed by the State of Texas, which has instituted a proceeding presently pending before the United States Supreme Court under its original jurisdiction. As stated in one of the pleadings that has been filed in the lawsuit:

Texas complains that New Mexico has depleted Texas's equitable apportionment under the [Rio Grande] Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande below Elephant Butte, thereby diminishing the amount of water that flows into Texas.²⁸²

²⁸¹ A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 2:4 at p. 6 (2013 ed.).

²⁸² *Texas v. New Mexico*, No. 141, Original. Brief for the United States as Amicus Curiae, 2013 Westlaw 6917385 at *1 (U.S. Dec. 10, 2014). The United States recently filed a motion seeking to intervene in the pending lawsuit as a plaintiff. *Texas v. New Mexico*, No. 141, Original. On Bill of Complaint: Motion of the United States for Leave to Intervene as a Plaintiff, 2013 Westlaw 6917385 (U.S. Feb. 27, 2014).

From the inception of its study in response to SCR 53, the Law Institute recognized that a holistic approach to potential legislative reform of Louisiana’s water law is imperative. The topic of legislative reform will be addressed in the next subpart.

SUBPART B. RECOMMENDATIONS

1. Recommendations of the Experts

a. The Reporter for the Mineral Code on Water Rights

Earlier in this report it was noted that the redactors of the Mineral Code initially decided to exclude ground and surface water from coverage in the Mineral Code.²⁸³ An attempt to retrieve all of the original documents from the Mineral Code project was undertaken in an effort to learn why this policy decision was reversed. Few documents are extant, and those that were located do not illuminate the reasons for this policy reversal. The documents do, however, provide support for the conclusion that Louisiana groundwater law should be revisited.

In 1966, Mr. George W. Hardy, III, Reporter of the Mineral Code project, convinced the Council of the Louisiana State Law Institute that water should be excluded from the proposed Mineral Code. The minutes of that meeting summarize Mr. Hardy’s presentation on this point:

The reason water is excluded here is because it is a relatively new problem in Louisiana and there may be different principles to be applied in water cases. A thorough study should be made of water before trying to handle it.²⁸⁴

Six years later, Mr. Hardy apparently still planned to exclude water from the Mineral Code, as he wrote a law review article in which he observed that “considerations governing water use and water rights are quite different from those governing mineral law proper.”²⁸⁵ He was correct. Even though Mr. Hardy was of the view for six years that water should be excluded from the Mineral Code, the decision to include

²⁸³ See Section 2 (The Mineral Code’s Treatment of Groundwater) of Subpart C (Groundwater) of Part II (Louisiana’s Legal Treatment of “Running Surface Water” and Groundwater), *supra*.

²⁸⁴ The Louisiana State Law Institute, Minutes of the Meeting of the Council, May 6-7, 1966, page 2.

²⁸⁵ George W. Hardy, III, *Highlights of the Mineral Code Recommendations: A Guide to the More Important Changes and Elaborations*, 32 LA. L. REV. 542, 546 (1972).

“subterranean water” in the Mineral Code appears to have been made in October of 1973, just months before the project was submitted to the legislature.²⁸⁶

b. The Reporter for the Civil Code Property Revision on Riparian Rights

It was discussed earlier in this report that Louisiana’s provisions on riparian rights are elliptical and incomplete. This was in no way intended to denigrate the extraordinary efforts and achievements of Professor A.N. Yiannopoulos, Reporter for the project. In the *Exposé des Motifs* to the Revision of Predial Servitudes, Professor Yiannopoulos made the following observations when explaining the revision of the law governing natural servitudes:

Members of the Council expressed the views that the matter of water law should be referred to the Legislature as a special project, that a public servitude designed to prevent pollution be established, that a landowner should be only entitled to make reasonable use of waters running through his estate, and that the owner of the estate situated above should be allowed to make works that impose a reasonable burden on the servient estate. These policy decisions deserve exploration and discussion. The Council of the Louisiana State Law Institute recommends, however, that revision at this point should be limited to a restatement of the rules of the Civil Code. A change of policy would require implementation by detailed water legislation. If a water law project is undertaken, the general principles set out in this revision may be reconsidered.²⁸⁷

²⁸⁶ The Louisiana State Law Institute, Minutes of the Meeting of the Council, October 11-13, 1973, pages 12-13. Here are the relevant minutes:

RECOMMENDED ARTICLES

Art. 1.

Schoenberger: I thought we were going to exclude water.

Reporter: I’m wondering if this article will have an adverse effect on those articles in the Civil Code on running water.

Dainow: Does rain water occur naturally? With reference to subterranean water, there is no ownership. But surface water can be owned. There are different kinds of water.

Yiannopoulos: Say "subterraneous water" instead of just "water".

Dainow: That would solve the problem.

Jewell: Suppose you get salt from water? Is that included?

Davidson: Should it be?

Art. 1 was adopted as amended with "subterranean" before "water in the fifth line.

²⁸⁷ *Exposé des Motifs*, Acts 1977, No. 514, eff. Jan. 1, 1978, revising LA. CIV. CODE arts. 646-774.

Professor Yiannopoulos and the Council members whose views were described in the *Exposé des Motifs* were correct. Their insights pinpoint the persistent deficiencies in Louisiana's treatment of riparian rights, and the compelling reasons why reform is necessary.

2. Recommendations of Those Who Have Already Spoken (But Whose Voices Have Not Yet Been Heard)

This section consists of a handful of excerpts from law review articles published during the past 58 years in which the respective authors advocated water law reform in Louisiana.

a. Recommendation for Reform of Louisiana's Treatment of Riparian Rights

Twenty-one years ago Professor James M. Klebba published a comprehensive law review article on Louisiana water rights, in which he made the following recommendation for reform of Louisiana's provisions governing riparian rights:

Legislation to define the rights of riparians and non-riparians ought to be considered. Such legislation might have several objectives: (1) to provide a more secure right to "deserving" (i.e., economically productive) non-riparians than they now have, (2) to determine priorities in time of shortages, or (3) simply to codify what are thought to be the existing rights of riparians and non-riparians in a way that will provide more certainty with a view to minimizing litigation. However,...any attempt by the legislature to merely codify current riparian rights may be an illusory undertaking because of the lack of precedent in Louisiana and the conflict between precedents....If codification is to provide any meaningful guidance, then choices among several alternative versions of the riparian doctrine will have to be made....²⁸⁸

b. Recommendations for Reform of Louisiana's Treatment of Groundwater

In casenotes on *Adams* in 1964, two student commentators made observations about Louisiana's treatment of its groundwater resources. The first student expressed the view that Louisiana should develop conservation strategies for its groundwater:

²⁸⁸ James M. Klebba, *Water Rights and Water Policy in Louisiana: Laissez Faire Riparianism, Market Based Approaches, or a New Managerialism?*, 53 LA. L. REV. 1779, 1814-15 (1993).

The increase of both population and industry in the state soon may render the present laws concerning underground waters obsolete. Unrestricted withdrawal of oil and gas has already been modified by the Louisiana Conservation Act, which obtains much the same effects on oil and gas as does the common-law correlative rights rule on water. It is conceivable that unless Louisiana takes measures to conserve water in a similar manner, requirements for fresh water in particular areas may, in the foreseeable future, outstrip the supply.²⁸⁹

The second student commentator writing about *Adams* suggested administrative oversight of groundwater to protect this important water resource:

At least twenty-three states have already recognized the growing importance of their underground fresh water resources and have enacted statutes governing their distribution and protection. While it is true that Louisiana is unusually blessed with bounteous water supplies, it is submitted that cases do arise, and with increasing industrialization will arise more often in the future, when large consumers in one area provoke shortages. The possibility that industrial installations will be pitted against each other, or against farming or the domestic consumer, is not remote. Relief should be available to the landowner who is deprived of receiving a fair share of the waters beneath his land. To this end it is submitted that some sort of legislative scheme should be enacted which would specifically empower the commissioner of conservation to make the requisite findings, orders, and regulations necessary for equitable solution of water shortage problems whenever they arise and - what is more important - for the administration of these resources in such a manner as to eliminate the possibility of their occurrence.²⁹⁰

The next recommendation is from a 2011 student comment addressing the interplay between fracking and Louisiana water law, in which the author identified four deficiencies in Louisiana's water law:

Despite the unsustainable present circumstances and the looming conflict, existing Louisiana water law stood in the way of effecting a solution, not only for the parties seeking continued development of the play, but also for those seeking compromises and protection. Four aspects of water law characterized this standoff: (1) the fundamental need for water law to

²⁸⁹ Paul B. Clemenceau, *Adams v. Grigsby Casenote, Mines and Minerals - Underground Water Considered a Fugitive Mineral*, 38 TUL. L. REV. 583, 587-88 (1964).

²⁹⁰ Wendell G. Lindsay, Jr., *Adams v. Grigsby Casenote, Water Resources - Limitations on Consumption of Subterranean Water*, 24 LA. L. REV. 428, 433-33 (1964).

protect a community that relies on groundwater, (2) the inability of existing Louisiana water law to protect these groundwater interests, (3) the uncertainties in Louisiana water law with regard to whether energy companies can utilize surface waters for their fracking operations, and (4) the complexities and inefficiencies of Louisiana water law that limit its adaptability and its potential to protect these groundwater interests.²⁹¹

c. Recommendation for Holistic Reform

The final recommendation is from a student comment published in 1956. After first discussing the myriad of problems pertaining to Louisiana's treatment of riparian rights, this law student 58 years ago prophesied the necessity of a holistic approach to water law:

It is submitted that the solution to the problem lies in the adoption of comprehensive legislation designed to treat all related problems of water law. The present system, composed only of statutes passed to meet limited problems, has produced a number of conflicts from which inequitable results are apt to follow.²⁹²

3. The Louisiana State Law Institute's Recommendations

The Civil Code's provisions governing riparian rights have not changed since 1825. The redactors of the 1978 revision of predial servitudes wisely decided to leave the Code's existing provisions on riparian rights intact, for they realized that a "change of policy would require implementation by detailed water legislation."²⁹³

With regard to groundwater, the Civil Code has impliedly endorsed the disparate legal treatment of running surface water and groundwater by expressly providing legal rules for surface water while practically ignoring groundwater.²⁹⁴ It is

²⁹¹ Roderic Fleming, *Comment, Hydraulic Fracturing, Louisiana Water Law, and Act 955: An Irresistible Economic Force Meets an Immovable Legal Object*, 24 TUL. ENVTL. L.J. 363, 365 (2011).

²⁹² Jerry G. Jones, *Comment, Water Rights in Louisiana*, 16 LA. L. REV. 500, 511 (1956).

²⁹³ *Exposé des Motifs*, Acts 1977, No. 514, eff. Jan. 1, 1978, revising LA. CIV. CODE arts. 646-774.

²⁹⁴ The 1808 Digest did contain limited provisions addressing the rights of a landowner on whose estate a spring was located, but they were repealed by the 1825 Civil Code. See Section 1 (Louisiana Law Before January 1, 1975) of Subpart C (Groundwater) of Part II (Louisiana's Treatment of "Running Surface Water" and Groundwater), *supra*.

not surprising that ultimately groundwater was grafted onto the Mineral Code, giving it some place to call home.

It has been almost 200 years since there has been any substantive revision of the Civil Code's provisions on riparian rights, and it has been 40 years since the legislature enacted Louisiana's Mineral Code. The time has come for water law reform in Louisiana. It is recommended that a Louisiana State Law Institute Water Code Committee be created and invested with the responsibility of continuing to study Louisiana's current treatment of running surface water and groundwater, with a view towards the development of a comprehensive Water Code that integrates all of Louisiana's water resources.

The Louisiana State Law Institute recommends that the proposed Water Code Committee be an interdisciplinary committee, composed of academicians, practitioners, scientists with expertise in hydrology, and government representatives with expertise in Louisiana's water resources and the state's existing administrative system of water management.

Current Louisiana law provides insufficient guidance on the rules that govern the nature and scope of riparian and groundwater rights. Louisiana needs a Water Code that integrates all of its water resources, a Water Code that will enable Louisiana to successfully manage and conserve its water resources as it prepares to face the inevitable challenges that lie ahead. Therefore, it is recommended that the legislature implement the foregoing recommendations and that it entrust this important project to the Louisiana State Law Institute.

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APPENDIX

Regular Session, 2012

ENROLLED

SENATE CONCURRENT RESOLUTION NO. 53

BY SENATOR CLAITOR

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study legal issues surrounding groundwater and surface water law and report its recommendation to the legislature on or before March 1, 2013.

WHEREAS, Article IX, Section 1 of the Constitution of Louisiana states that the water of the state "shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people"; and

WHEREAS, according to the U.S. Geological Survey, total withdrawals from Louisiana groundwater and surface water sources in 2010 were approximately eight thousand five hundred million gallons per day, a decrease of about seventeen percent since 2005; and

WHEREAS, according to the U.S. Geological Survey, surface water withdrawals decreased by approximately twenty percent during this period, and groundwater withdrawals increased by two percent; and

WHEREAS, Louisiana has applied various and often times conflicting legal rules such as rule of capture, absolute ownership, and riparian rights, and this has resulted in the concept that running surface waters of the state are recognized as public resources, owned by the state, and usually subject to a charge for consumption, with the exceptions of riparian owners and other uses such as agriculture, aquaculture, and municipal purposes; and

WHEREAS, groundwater, when reduced to possession, is treated as privately owned and free of charge; and

WHEREAS, this differing treatment of groundwater and surface water results in the state charging for surface water that is normally in abundance, but allowing the free withdrawal of groundwater which is often in limited supply; and

WHEREAS, a recommendation of the Louisiana Groundwater Resources Commission's report entitled "Managing Louisiana's Groundwater Resources" is to engage legal scholars to research and explore the potential non-compensated consumption of surface water when used as an alternative to groundwater; and

WHEREAS, the legislature should be fully informed as to the legal aspects of the withdrawal and sales of surface water and groundwater resources, including potential effects, consequences, impacts upon current state laws such as Civil Code Art. 667, and the necessity, if any, for revisions to Louisiana law.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby request the Louisiana State Law Institute to study legal issues surrounding groundwater and surface water law and any needs for revisions to current law.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall report its finding and recommendations to the Legislature of Louisiana on or before March 1, 2013.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES