

Water They Trying to Say: Louisiana's Paradoxical Approach to Surface Water Management and Regulation

JoAnn T. Hymel

Repository Citation

JoAnn T. Hymel, *Water They Trying to Say: Louisiana's Paradoxical Approach to Surface Water Management and Regulation*, 3 LSU J. of Energy L. & Resources (2015)
Available at: <http://digitalcommons.law.lsu.edu/jelr/vol3/iss2/7>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in LSU Journal of Energy Law and Resources by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

Water They Trying to Say: Louisiana’s Paradoxical Approach to Surface Water Management and Regulation

“[F]resh water has become a strategic resource that increasingly pits the interests of the places that need it against the places that have it.”¹

INTRODUCTION

H₂O. Two microscopic atoms of hydrogen covalently bonded with one equally miniscule atom of oxygen.² Despite its infinitely small composition, this molecule has had a major and significant impact on the culture and, consequently, the legal system of the State of Louisiana.

From Louisiana’s beginning in 1682, water has played a key role in defining the state’s landscape and environmental identity.³ In an effort to manage this precious natural resource, Louisiana has evolved “a hodgepodge of laws, rules, regulations, and regulatory authorities.”⁴ Recently developed industry practices have forced the state to address this “hodgepodge” of water law as it applies to theories of ownership and requires regulation. Particularly, the question has arisen whether the state constitution demands compensation for surface water use.⁵ The statutory scheme provides that no person shall be charged for use of things owned in the state’s public capacity, such as running waters.⁶ Indisputably, a legal ambiguity exists that demands clarification if Louisiana law is to effectively address the emerging issues relating to water rights.

Copyright 2015, by JOANN T. HYMEL.

1. Mark Davis & James Wilkins, *A Defining Resource: Louisiana’s Place in the Emerging Water Economy*, 57 LOY. L. REV. 273, 284 (2011) (citing SANDRA POSTEL, *LAST OASIS: FACING WATER SCARCITY* (W.W. Norton & Co. 1997)).

2. Jill Granger, *H₂O: The Mystery, Art, and Science of Water: The Chemistry of Water: Structure Means Function*, SWEET BRIAR COLLEGE (Sept. 22, 2013, 8:15 PM), <http://witcombe.sbc.edu/water/chemistrystructure.html>, archived at <http://perma.cc/YN7Y-CDCW>.

3. LA. DEP’T OF NAT. RES., OFFICE OF CONSERVATION, *Ground Water Resources Commission Meeting*, Dec. 7, 2011, http://dnr.louisiana.gov/assets/OC/env_div/gw_res/GWRCMeeting031411Final.pdf, archived at <http://perma.cc/XU7F-A7YW>. [hereinafter *Meeting*].

4. *Id.* at 1.

5. *See generally* LA. CONST. art. VII, § 14(A).

6. *See* LA. REV. STAT. ANN. § 9:1101 (2008); LA. CIV. CODE ANN. art. 450 (2010).

This comment explores the inconsistencies in Louisiana law in relation to the resulting implications of the current management and regulation scheme of the state's running waters. Part I of this comment provides an overview of Louisiana's water resources and the environmental impact endured as a result of industrial enterprises and other influences, offering an illustration of the water needs of the state and the possible ramifications that may result under the existing structure. Next, Part II focuses on the challenges the Louisiana Constitution presents, setting forth an analysis of the various sources of law that have generated the problematic situation and proposing textual and jurisprudential perspectives to convey the ambiguities with regard to ownership theories and issues of compensation relating to Louisiana water rights. The comment then discusses in Part III the applicable Attorney General's opinions concerning surface water use and the specific plan set forth to address the legal issue: Act No. 955. Finally, Part IV outlines a suggested solution, specifically how to interpret Act No. 955 in relation to other sources of law in an effort to develop a workable revision that allows for permanent instruction.

I. MISMANAGEMENT OF LOUISIANA'S WEALTH

A. Water Wealth

Sometimes, too much of a good thing just might be a bad thing. In the case of the current state of Louisiana's water wealth, such a statement is relatively accurate due to Louisiana's failure to establish and maintain an effective water regulatory framework. Ranking fourth in the nation in total surface water area,⁷ Louisiana is certainly a water-rich state. While approximately 17% percent of Louisiana's territorial area is covered by water,⁸ over 8.5 billion gallons of water are withdrawn from surface and groundwater supplies on a daily basis.⁹ Properly considered a "Sportsman's Paradise,"¹⁰ Louisiana

7. Steven J. Levine, *Ground Water: Louisiana's Quasi-Fictional and Truly Fugacious Mineral*, 44 LA. L. REV. 1123, 1127 (1984) (citing LA. DEP'T OF TRANSP. & DEV., LA. STATE SOIL & WATER CONSERVATION COMM., LOUISIANA'S NATURAL RESOURCES – A CONSERVATION PLAN FOR THE FUTURE 5).

8. U.S. DEP'T OF COM., U.S. CENSUS BUREAU, (2010), <https://www.census.gov/geo/reference/state-area.html>, archived at <https://perma.cc/YLP2-PPBL>.

9. B. PIERRE SARGENT, LA. DEP'T OF TRANSP. & DEV., IN COOPERATION WITH THE U.S. DEP'T OF THE INTERIOR U.S. GEOLOGICAL SURVEY, WATER RESOURCES SPECIAL REPORT NO. 17 (REVISED): WATER USE IN LOUISIANA, 2010 (2012), available at [http://la.water.usgs.gov/publications/pdfs/WaterUse 2010.pdf](http://la.water.usgs.gov/publications/pdfs/WaterUse%202010.pdf), archived at <http://perma.cc/R49T-TNNQ> (of this total, about 1.6 billion gallons per day (19%) was from groundwater and about 7 billion gallons per day (81%) was from surface water).

boasts a profuse water supply, which has played a central role in the state's history and growth, providing a habitat for fisheries and sustaining wildlife, as well as a source of abundant water-related recreational activities.¹¹ However, the legal provisions surrounding this natural resource are quite abstruse, "defined more by specific uses and periodic crises that command intense but brief attention than by a systematic approach to management."¹² Given emerging regional industrial activities and surrounding states looking for additional water supplies, Louisiana now faces a future in which this typically abundant resource is quickly becoming scarce and thus demands a "well thought-out and integrated approach to its stewardship."¹³

In this instance, proper instruction and competent management of the state's natural resources require considerable attention. However, amidst efforts of water regulation remains the perplexity that "water is simultaneously a precious life-giving necessity, a commodity with universal utility in industry, and a nuisance to be disposed of, diverted, and controlled."¹⁴ In response to the situation at hand, a mixture of regulatory authorities has developed an assortment of rules and regulations to confront the complicated organization of the many forms of water.¹⁵

The term "water law" is used to describe the general body of law surrounding the governance of the use and control of the natural resource.¹⁶ As water has become a highly coveted commodity, the legal field has evolved to now encompass the following areas: surface water, ground water, environmental mandates, interstate and international interests, public and private rights, and a growing role

10. Craig Gautreaux, *Keeping Louisiana a Sportsman's Paradise*, 55 LA. AGRIC., no. 2, Spring 2012, at 14 (2012), http://www.lsuagcenter.com/NR/rdonlyres/4FD2152C-45BF-413C-9265-24C6567A8E82/86488/Spring2012_v55_n3.pdf, archived at <http://perma.cc/S52S-8ZY8>.

11. See *H2Woe: Louisiana's Water Worries*, LA. PUBLIC SQUARE (2012), http://www.lpb.org/images/lps_uploads/201207waterwoes2.pdf, archived at <http://perma.cc/UJ6M-RX8J>. [hereinafter *H2Woe*].

12. Davis & Wilkins, *supra* note 1, at 273.

13. *Id.*

14. *Managing Louisiana's Groundwater Resources with Supplemental Information on Surface Water Resources: An Interim Report to the Louisiana Legislature*, LA. DEP'T OF NAT. RES., THE LA. GROUND WATER RES. COMM'N. 1 (Mar. 15, 2012), http://dnr.louisiana.gov/assets/docs/conservation/groundwater/12_Final.GW.Report.pdf, archived at <http://perma.cc/G4PW-Y7KW>. [hereinafter *Report*].

15. *Id.*

16. Davis & Wilkins, *supra* note 1, at 284 (citing George A. Gould, *Water Rights Systems*, in WATER RIGHTS IN THE EASTERN UNITED STATES 8—10 (Kenneth R. Wright, ed. 1998)).

for the federal government.¹⁷ As previously mentioned, Louisiana water law, similar to most other water-rich states, is more of a jumbled assortment rather than “a systematic approach to ordering and managing water resources.”¹⁸ The state’s jurisprudence focuses on matters such as “drainage, the ownership of banks and water bottoms, and rights of access” instead of issues regarding diversion and questions concerning the location and specific use of certain water bodies.¹⁹ As water remains in high demand, its availability and presence is increasingly becoming the defining resource of the twenty-first century, similar to the role oil played in shaping much of the social and economic development during the twentieth century.²⁰ Nonetheless, regardless of whether water is truly “the new oil,”²¹ the accessibility, convenience and availability of water supplies is already changing the nation’s economic and cultural landscape.²²

B. More Industry, More Water (More Problems)

Ranking first among all of the states in its industrial use of water,²³ Louisiana clearly has reason to maintain its usable wealth of natural resources. However, recent industrial and agricultural activities, in addition to drought and saltwater intrusion, pose a serious threat to both aquifer levels and water quality.²⁴ In this respect, future distribution might be seriously diminished as a result of deteriorating supply and treatment.²⁵ In order for Louisiana to continue to attract new business and industry and still ensure water sustainability for all public and private users, a comprehensive water management system is required.²⁶ The emerging combination of horizontal drilling and hydraulic fracturing technologies require close proximity to fresh surface water in order to allow for large-

17. *Id.* at 284–85.

18. *Id.* at 285.

19. *Id.* (see e.g. *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d, 576 (La. 1957) (holding that the State is the true owner of certain water bottoms leased by defendants); *Dardar v. LaFourche Realty Co., Inc.*, 55 F.3d 1082 (5th Cir. 1995) (finding that no state navigational servitude arose over defendant’s body of water, thus denying plaintiff’s access to the property)).

20. Davis & Wilkins, *supra* note 1, at 275.

21. Jeneen Interlandi, *The New Oil*, NEWSWEEK, Oct. 8, 2010, at 40.

22. Davis & Wilkins, *supra* note 1, at 275.

23. U.S. DEP’T OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, *The USGS Water Science School* (2005), <http://ga.water.usgs.gov/edu/wuin.html>, archived at <http://perma.cc/RN8T-ZRX7>.

24. *H2Woe*, *supra* note 11.

25. *Id.*

26. *Id.*

scale urban and agricultural development.²⁷ While often not obvious, energy policy and water policy are inseparable. For instance, the production of oil and natural gas, as well as electricity generation by nuclear power, coal, gas, the sun, or flowing water, all require one common ingredient: an adequate water supply.²⁸

1. Hydraulic Fracturing and Haynesville Shale

One industrial activity that requires copious amounts of water and has been a major contributing cause in the need for water management in Louisiana is the recent trend of hydraulic fracturing or “fracking.”²⁹ Some have equated the development of this industrial practice to striking gold in the energy field.³⁰ However, because the process requires millions of gallons of water to fracture the shale rock deposits,³¹ water supplies have been significantly affected and, consequently, have spurred various legal issues in water law. The potential impact fracking operations have on environmental protection concerns in turn affects Louisiana’s constitutionally-imposed public trust doctrine.³² Louisiana Constitution Article IX,

27. Davis & Wilkins, *supra* note 1, at 274.

28. *Id.* at 279.

29. “The practice of hydraulic fracture stimulation in the oil and natural gas exploration industry involves using water pressure to create hairline fractures in dense geologic formations, creating a path for oil and natural gas to flow to wells through otherwise-impermeable rock.” *Report, supra* note 14, at 89.

30. See LA. DEP’T OF NAT. RES., *Mineral Lease Sale Over the Top - \$35 Million for June* (June 12, 2008), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=487>, archived at <http://perma.cc/L7Y9-YP7L>. (Mineral Board Secretary Marjorie McKeithen stated, “This is an extraordinary time for Louisiana, particularly in north Louisiana, where we are experiencing something akin to a modern day gold rush due to excitement about the Haynesville Shale discovery . . . This month’s lease sale surpassed by more than double the bonus collections for the previous 11 months of FY 2007-08 combined, almost entirely because of activity in north Louisiana.”).

31. PATRICK H. MARTIN, *LA. MINERAL LAW TREATISE* § 1601, 558 (2012).

32. Laura Springer, *Waterproofing the New Fracking Regulation: The Necessity of Defining Riparian Rights in Louisiana’s Water Law*, 72 LA. L. REV. 225, 229 (2011); LA. CONST. art. IX, § 1. See also Davis & Wilkins, *supra* note 1, at 283:

This duty has been characterized by the Louisiana Supreme Court as constituting a ‘public trust doctrine’ that imposes a mandate on the state via implementing legislation to maintain, protect, and enhance its environment via (among other things) the regulation of water control, scenic rivers and streams, and the development, coordination, and implementation of statewide policies and programs to safeguard the environment and ensure the most advantageous use of the state’s natural resources.

Section 1, known as the “The Natural Resources Article,” provides that “[t]he natural resources of the state including air and water . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”³³ In this respect, many critics of the fracking industry suggest that the operations pose environmental risks in addition to other safety concerns, such as “the design and soundness of well casings, potential chemical spills, and the ecological impact of removing millions of gallons of water from local water bodies.”³⁴

The average fracking job in Louisiana uses five million gallons of water,³⁵ most notably illustrated by northwest Louisiana’s Haynesville Shale formation, which alone has required an average of more than four million gallons of water per well.³⁶ However, the particular water source being exhausted for such purposes “may already have other users and uses that are not easily reconciled with the new energy uses.”³⁷ Considering the large numbers of wells currently permitted or operating in the northwest Louisiana area, water depletion is certainly a pressing concern.³⁸ In any event, fracking companies primarily rely on local groundwater resources to supply water for their operations because most of the gas fields are not riparian land, meaning that any landowner could drill a well and take as much water as he wants.³⁹ Simply put, the issue arose when company trucks would pull up to a surface water source along a public right-of-way, stick a hose into the water source, and start pumping out water to be used in their nearby fracking operations.⁴⁰

Such use prompted an array of legal implications based on the contradictory language of the state’s constitutional and statutory provisions. In 2008, the Commissioner of Conservation, in his

See Save Ourselves, Inc. v. La. Env’tl. Control Comm’n, 452 So. 2d 1152 (La. 1984).

33. LA. CONST. art. IX, § 1. Louisiana’s public trust doctrine is discussed further *infra* Part II (B).

34. Springer, *supra* note 32, at 229.

35. Report, *supra* note 14, at 87.

36. Davis & Wilkins, *supra* note 1, at 279 (citing Per John Adams, 2010 LA. ST. B. ASS’N ENVTL. SEC., Meeting Presentation, Slide 20, New Orleans, La., (Nov. 12, 2010) Haynesville Shale is the massive natural gas play that was discovered in 2007 in Northwest Louisiana.).

37. *Id.*

38. Ryan M. Seidemann, *The Public Trust Doctrine and Surface Water Management and Conservation: A View from Louisiana*, 2011 A.B.A. SEC. ENV’T, ENERGY, & RES.

39. *H2Woe*, *supra* note 11. Riparian Rights discussed in greater detail below *infra* Part I (D).

40. Seidemann, *supra* note 38.

regulatory role of protecting the state's groundwater resources, issued a Ground Water Use Advisory asking oil and gas companies operating in the Haynesville Shale field to avoid using groundwater for their operations and to shift, instead, to surface water sources for fracking purposes where "practical and feasible."⁴¹ Unsurprisingly, this directive resulted in approximately 77% of water used for fracking operations now coming from surface water resources, as opposed to drillers using 100% groundwater in 2008.⁴² Moreover, the Commissioner released a series of memoranda to offer more specification. In a memo released September 15, 2009, the Commissioner reported that the Office of Conservation now requires fracking companies to report water sources used in their operations.⁴³ On November 9, 2009, the Commissioner instructed oil and gas operators working in the Haynesville Shale area to not use water drawn from domestic wells in their operations without first notifying the state.⁴⁴ In regulating the state's water resources, the Commissioner seeks to ensure the sustainable and responsible use of the state's natural resources so that they remain available for the enjoyment and benefit of citizens both now and in the future.⁴⁵ In

41. See *Ground Water Use Advisory: Commissioner of Conservation Recommends Wise Water Use Planning in the Haynesville Shale*, OFFICE OF CONSERVATION, LA. DEPT. OF NAT. RES. (Oct. 16, 2008), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=509>, archived at <http://perma.cc/LLP3-SK56> [hereinafter *Advisory*] (complaints from well owners that their wells were running dry largely instituted the 2008 Groundwater Use Advisory).

42. *H2Woe*, *supra* note 11. See also *Ground Water Resources Commission updated on water use*, LA. DEP'T OF NAT. RES. (Aug. 19, 2010), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=11>, archived at <http://perma.cc/K83Y-925A>.

43. See Martin, *supra* note 31, at 564 (discussing the memorandum).

44. *Office of Conservation reinforces that domestic water well owners must notify before selling water for industrial purposes*, LA. DEP'T OF NAT. RES. (Nov. 9, 2009), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=402>, archived at <http://perma.cc/P2HW-6KNN> (The Office of Conservation has taken the position that a domestic well owner cannot sell the water.). Statute defines "domestic well" to mean:

A water well used exclusively to supply the household needs of the owner, lessee, or his family. Uses may include but are not limited to drinking, cooking, washing, sanitary purposes, lawn and garden watering, and caring for pets. Domestic wells shall also include wells used on private farms and ranches for the feeding and caring of pets and watering of lawns, excluding livestock, crops, and ponds.

LA. REV. STAT. ANN. § 38:3097.2(5) (Supp. 2014).

45. *Message from the Secretary*, LA. DEP'T OF NAT. RES., <http://dnr.louisiana.gov/>, archived at <http://perma.cc/PE4A-9ATN> (last visited Jan. 30, 2015) ("Our goal is to provide a fair, predictable and effective regulatory system that allows opportunities for development and economic growth through the use of our natural

effectively regulating surface water use, the Commissioner safeguards the proper and required balance of the environmental and ecological impacts with the economic and social benefits found in Article IX, section 1 of the Louisiana Constitution.⁴⁶

C. Groundwater v. Surface Waters

After the 2008 Ground Water Use Advisory, the language of Louisiana's laws concerning the public use of surface water quickly became a pressing issue, as Louisiana law treats surface water and groundwater as completely distinct.⁴⁷ The Louisiana Ground Water Resource Commission noted that conflicting legal concepts concerning the state's water rights have created a paradox that 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."⁴⁸ As the Attorney General advised fracking companies to make the switch from groundwater to surface water, it is worth noting the distinction between the two sources and the underlying theories they respectively represent.

Regarding groundwater, Louisiana has historically operated under the rule of capture theory, which essentially allows for the resource to be available for the taking by permitting any landowner to drill a well and "suck out basically as much as they want."⁴⁹ The Louisiana Circuit Court of Appeal decision in *Adams v. Grigsby* is the principal case that discusses issues of ownership and proper use of subsurface waters prior to the Mineral Code.⁵⁰ In *Adams*, the plaintiff property owners sued the defendant oil operator for injunctive relief and claims for damages, maintaining that the oil operator depleted the aquifer on which the plaintiffs relied for drinking water and other personal needs.⁵¹ The court held that, in

resources while at the same time ensuring protection of public safety and the environment.").

46. *Louisiana's Surface Water Management Initiative, Act 955 of 2010: a voluntary process*, LA. DEP'T OF NAT. RES. (2010), http://dnr.louisiana.gov/assets/docs/secretary/DRAFT_955_pamphlet_pt.pdf, archived at <http://perma.cc/W4UM-D9PG>. [hereinafter *Initiative*].

47. Davis & Wilkins, *supra* note 1, at 286.

48. *H2Woe*, *supra* note 11. See also *Report*, *supra* note 14, at 1.

49. *H2Woe*, *supra* note 11. See also LA. CIV. CODE ANN. art. 450 (2010) (provides for a landowner to assert ownership over whatever he can get to the surface).

50. *Adams v. Grigsby*, 152 So. 2d 619 (La. App. 2 Cir. 1963), *writ refused*, 153 So. 2d 880.

51. *Id.* at 620.

the context of ownership, neither party owned the percolating waters that lay beneath their respective properties, but only so much thereof as they withdrew from their individual wells.⁵²

In its ruling, the court stated that without statutory regulation, it did not have authority to establish the allocation of the amount of water that may be drawn from a common reservoir; thus, any damages the plaintiffs suffered must be regarded as a non-injurious loss.⁵³ The court ultimately declined to adopt the “American Rule,” which is “predicated upon the equitable conclusion that the rights of ownership in subterranean waters from the same source are correlative and subject to the restriction of reasonable use.”⁵⁴ In rejecting the American Rule, the Louisiana Second Circuit Court of Appeal offered that upholding the rule would “[r]equire quite a presumptuous and unjustified reversal of the large and uniform body of our jurisprudence with respect to ownership of fugitive minerals as exemplified by established determination.”⁵⁵ Rather, the *Adams* court ultimately held that the nature of ownership of fugitive substances is best depicted by analogizing subterranean oil with subterranean waters, placing further emphasis on “the analogy by likening the right reserved as to oil and gas with the right to draw water from another’s land a right of servitude.”⁵⁶ In so concluding, the court stated that it could not find a basis for granting the relief sought by the plaintiffs, declaring that “under the law and jurisprudence of this state the regulation of the amount of oil and gas withdrawn from a well was not regulated by our courts, but was only established and controlled by enactment by the Legislature of statutory conservation measures.”⁵⁷ While recognizing the importance of water as a natural resource, the court determined that the problem with the regulation

52. *Id.* at 624.

53. *Id.* (“It follows that the coincidental damages suffered by plaintiffs must be regarded as *damnum absque injuria*.”).

54. *Id.* at 623 (stating that the “‘American Rule’ is predicated upon the equitable conclusion that the rights of ownership in subterranean waters from the source are correlative and subject to the restriction of reasonable use.”); LA. REV. STAT. ANN. § 31:9 (2000) (“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.”).

55. *Adams*, 152 So. 2d at 623.

56. *Id.* The Mineral Code speaks directly to the issue of “correlative rights,” stating: “A person with rights in a common reservoir or deposit of minerals may not make works, operate, or otherwise use his rights so as to deprive another intentionally or negligently of the liberty or enjoying his rights, or that may intentionally cause damage to him.” LA. REV. STAT. ANN. § 31:10 (2000).

57. *Adams*, 152 So. 2d at 623.

and control of water supply and use would be best resolved by the legislature.⁵⁸

Unlike groundwater, surface water is categorized as a public thing owned by the state, “the use of which is largely subject to State oversight and environmental review.”⁵⁹ While Louisiana has historically applied the riparian rights theory⁶⁰ to surface water use, the law now incorporates the doctrine of reasonable use.⁶¹ For example, surface water was previously allowed for traditional domestic uses and other, largely commercial, uses to the extent they were deemed “reasonable.”⁶² However, such a determination of what is reasonable typically only comes after the action has occurred, which has been “enough to allow for the commercial exploitation of flowing streams and the flowering of American industry and commerce.”⁶³

D. My Land, My Water

Surface water use in Louisiana is maintained under the theory of riparianism. The scope of the riparian legal doctrine “affords rights of reasonable use to the owners of land abutting flowing waters.”⁶⁴ This standard views water as a common thing that is shared by anyone who has legal access to it, an approach that Louisiana has traditionally maintained.⁶⁵ In essence, riparian rights allow “for traditional

58. *Id.* at 624.

59. Seidemann, *supra* note 38.

60. Riparian Rights discussed in greater detail *infra* Part I (D).

61. Davis & Wilkins, *supra* note 1, at 278 n.32. (“This doctrine generally recognizes that persons who take water from public flowing waters and put it to beneficial use have a right to that water in preference to persons who come later.” See JOSEPH L. SAX, ET AL., *LEGAL CONTROL OF WATER RESOURCES* 13 (4th ed. 2006)).

62. *H2Woe*, *supra* note 11.

63. Davis & Wilkins, *supra* note 1, at 291 (citing SAX, ET AL., *supra* note 61). See also *H2Woe*, *supra* note 11 (Since 1808, Louisiana has employed the riparian rights theory as it applied to surface water use. Commercial uses were forbidden and the “natural flow” of the waters could not be reduced, as it was incompatible with the industrialization and growth of the state. As such, the State then relied on the doctrine of reasonable use. Courts used this approach until the enactment of Act No. 955, discussed in detail below.)

64. Davis & Wilkins, *supra* note 1, at 281. See BLACK’S LAW DICTIONARY 1442 (9th ed. 2009) (defining “riparian right” as “[t]he right of a landowner whose property borders on a body of water or water course. Such a landowner traditionally has the right to make reasonable use of the water). See also *Tyler v. Wilkerson*, 24 F. Cas. 472 (D.R.I. 1827) (providing a description of traditional American Riparianism and the nature of a riparian’s rights to the flowing waters that abut his or her property as being a right common to all riparians).

65. Davis & Wilkins, *supra* note 1, at 281 (However, such riparian rights do not create a property interest in the water, but rather merely the right to use).

domestic uses (referred to as ‘natural uses’) and other, largely commercial, uses to the extent they were deemed reasonable and not injurious of the rights of other riparians.”⁶⁶ As such, Louisiana courts have taken this approach when determining who could use surface waters and for what purposes, at least until 2010 when the legislature addressed the issue.⁶⁷

Governing the laws of riparianism, Louisiana Civil Code article 657 provides that “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.”⁶⁸ This provision potentially allows for some consumptive uses by offering that such water can be used for “watering the estate.”⁶⁹ However, room for interpretation exists when ascertaining what consumptive use specifically entails and what is truly contemplated by the word “use” and the phrase “other purposes.”⁷⁰ Moreover, Civil Code article 658 states that “the owner of an estate through which water runs, whether it originated there or passes from lands above, may make use of it 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.”⁷¹ In this instance, the article’s language appears to provide some limitations to the amount of water riparian owners can use, essentially creating a servitude in favor of riparian owners for the use of waters that is less than a consumptive use.⁷² In sum, the legal sources governing riparianism, as they relate to surface water issues, are ambiguous and leave many riparian owners uncertain as to the applicable legal bounds.

Illustrating the approach typically taken by courts, the Louisiana Third Circuit Court of Appeal in *Keeley v. Schexnailder* issued a permanent injunction to enjoin defendant property owners from engaging in any activity that would interfere with the plaintiff property owners’ right of passage over and access to the water frontage on the predial servitude area in question.⁷³ Similarly, the

66. *Id.* at 291 (citing Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, 12 (2002)).

67. *Id.* at 291; Act No. 955 of 2010 discussed in greater detail *infra* Part III.

68. LA. CIV. CODE ANN. art. 657 (2008).

69. *Id.* see also Seidemann, *supra* note 38.

70. Seidemann, *supra* note 38.

71. LA. CIV. CODE ANN. art. 658 (2008).

72. Seidemann, *supra* note 38.

73. *Keeley v. Schexnailder*, 708 So. 2d 838, 843 (La. App. 3 Cir. 1998). (In *Keeley*, the property users established a predial servitude that gave access to a waterway on some of the parcels purchased by the property owners. The court went on to specify prohibited acts to include, but not limited to, the following: (a) parking trailers, boats, cars, trucks, campers or other vehicles on the servitude area; (b) placing brick and concrete on the servitude area so as to prevent or interfere with

Louisiana Second Circuit Court of Appeal provided limits on how certain waters may be used by riparian owners in *Jackson v. Walton*.⁷⁴ In *Jackson*, the plaintiff landowner on one side of the bayou contested a contract existing between the riparian landowner on the opposite side of the bayou and another nearby landowner for the right to take water from that side of the bayou to the nearby landowner's property primarily for irrigation purposes.⁷⁵ The court held that injunctive relief should not be granted because the plaintiff failed to show any actual or impending damages, and the plaintiff did not offer any evidence indicating his need or intended use of the water in the bayou at present or any time in the future.⁷⁶ Thus, courts have recognized that one riparian owner's use of running water can detrimentally impact the rights of another riparian owner, though matters concerning "damages between private parties are best left for the courts to determine."⁷⁷ The Attorney General opined that, "[t]he reasoning relied upon in *Jackson* will clearly be relevant in any future cases on the issue of civil liability and injunctive relief . . . however, the issues of compensating the State for the unauthorized withdrawal of running water is currently unlitigated."⁷⁸ In effect, the rights governing riparian owners' use of surface waters are not clearly defined, creating confusion as to how to properly regulate ownership and usage rights.

E. Regional Needs & Interstate Opportunities

Regional and interstate water needs are expanding, particularly due to the emergence of energy-driven water uses.⁷⁹ Surrounding states are looking to Louisiana's rich water supply to help facilitate their own needs. Both nationally and internationally, fresh water has become a valuable commodity, putting it at the forefront of economic growth and vitality.⁸⁰ Yet, while Louisiana may have historically vast

boat launching; (c) placing of a flower garden, gazebo or recreational items on the servitude area; and (d) erecting a fence along any part of the boundary of the servitude area so as to prevent access by the plaintiffs.).

74. *Jackson v. Walton*, 2 La. App. 53 (La. App. 2 Cir. 1925).

75. *Id.*

76. *Id.* at 55–56. ("There is nothing to show that the water was low at that time or that it would be needed to sustain the fish, and . . . plaintiff does not attempt to show that he had need of the water in the bayou . . . the inference from the pleadings and the facts is clear that unless there is dry season plaintiff has no reason to apprehend danger or injury.").

77. Op. La. Att'y. Gen. 10-0173, 9 (2010).

78. *Id.*

79. Davis & Wilkins, *supra* note 1, at 273.

80. *Id.* at 279.

water resources, the state also has a growing and critical need for water, which presents the question of “[w]hether [it] wants to develop methods to export its water to facilitate growth elsewhere, or it wants to use its last great natural resource to attract and retain development” within its boundaries.⁸¹ Louisiana will find itself drawn into internal and interstate water negotiations, and its success in safeguarding its interests will undoubtedly turn on the applicable water laws.⁸²

In their article on surface waters, co-authors and researchers Davis and Wilkins observe that “the present and growing interest in using those waters for consumptive industrial purposes, such as fracking, or for export to increasingly dry states such as Texas will soon test both the bounds of Louisiana law and the will and wisdom of all branches of state government.”⁸³ Moreover, the urgency of confronting this situation is illustrated in the fact that many cities and states face a future without readily available water.⁸⁴ In addressing interstate water needs, Louisiana has agreed to participate in interstate compacts,⁸⁵ particularly the Sabine River Compact and the Red River Compact. The Sabine River Compact between Louisiana and Texas provides for an equitable apportionment of the waters of the Sabine River and its tributaries.⁸⁶ Similarly, under the Red River Compact, Louisiana, Arkansas, Oklahoma, and Texas⁸⁷ formed an arrangement to (1) govern the use, control, and distribution of the waters of the Red River and its tributaries; (2) provide for an equitable apportionment of the waters; (3) promote active programs for water conservation, flood control, and navigation development; and (4)

81. *Id.* at 278.

82. *Id.* at 284.

83. *Id.* at 296.

84. *Id.* at 276. See generally Joseph W. Dellapenna, *Transboundary Water Allocation in the Twenty-First Century: Colloquium Article: Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the Hooch*, 12 N.Y.U. ENV'T. L. J. 828 (2005).

85. Dellapenna, *supra* note 84, at 833 (“Interstate compacts are agreements or contracts between states . . . interstate compacts are effective only upon consent by Congress as well as by each state involved in the agreement.”).

86. *Sabine River Basin: Characterization Report*, LA. DEP’T OF TRANSP. & DEV., LA. STATE RESERVOIR PRIORITY & DEVELOPMENT PROGRAM 21 (2009), http://www.sp.dotd.la.gov/Inside_LaDOTD/Divisions/Engineering/Public_Works/Dam_Safety/RPDP_Reports/Sabine%20River%20Basin%20Report%20FINAL%20.pdf, archived at <http://perma.cc/2ZDT-4W6Y> (“The compact also established a basis for cooperative planning and action by the States for the construction, operation and maintenance of projects for water conservation and utilization purposes on that reach of the Sabine River bordering both States, and for apportionment of the benefits therefrom.”). See TEX. WATER CODE ANN. § 46 (West 2014).

87. TEX. WATER CODE ANN. § 46 (West 2014).

alleviate the water's natural deterioration and pollution.⁸⁸ In light of these agreements and emerging industrial practices, Louisiana's place in both the regional and interstate water industry remains essential in order to support the growth of future water supplies, in turn requiring management and regulation of the state's natural resources.

II. AMBIGUITY GOVERNS

At the forefront of the issue concerning proper surface water management and regulation of the state's running waters are the various sources of Louisiana law that control water use and ultimately compel revision. Louisiana Civil Code article 450 provides that running waters are owned by the state.⁸⁹ The article provides: "Public things are owned by the State . . . in their capacity as public persons . . . Public things that belong to the state are such as running waters, the bottom of natural navigable water bodies, the territorial sea, and the seashore."⁹⁰ In classifying running waters as a public thing, Louisiana Revised Statute Section 9:1101 specifies that

[t]he waters of and in all bayous, rivers, streams, lagoons, lakes and bays . . . are declared to be the property of the state. There shall never to be any charge assessed against any person for the use of the waters of the state for municipal, industrial, agricultural or domestic purposes.⁹¹

From a historical perspective, the statute recognizes that, during a time when running waters were classified as common things, the legislature deemed it necessary to ensure that no one would be restricted from their use.⁹² However, as noted in both the Code and statutory language, "running waters" was removed from the category of common things and placed under the classification of public things in 1954.⁹³ This change in categorization consequently presents significant ramifications for the control, use, and regulation of surface water resources under the current constitutional scheme in

88. *Id.*

89. LA. CIV. CODE ANN. art. 450 (2010).

90. *Id.*

91. LA. REV. STAT. ANN. § 9:1101 (2008).

92. Seidemann, *supra* note 38, at 3.

93. LA. CIV. CODE art. 449, cmt. (c) (2010) ("Running water and the seashore have been taken out of the category of common things by legislation declaring that these things are owned by the State." *See, e.g.,* La. R.S. 9:1101, as amended by Acts 1954, No. 443.). *See generally* LA. CIV. CODE art. 450 (2010); LA. REV. STAT. ANN. § 9:1101 (2008).

Louisiana,⁹⁴ as the state is prohibited from donating publicly owned state property.

As set forth in Article VII, Section 14(A) of the Louisiana Constitution, “[e]xcept as otherwise provided by this constitution, . . . property . . . of the state . . . shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private . . .”⁹⁵ Therefore, reclassifying running waters as a thing publicly owned by the state under Section 9:1101 effectively made it unconstitutional for the state to simply divest itself of such waters without receiving fair market value compensation in return.⁹⁶ Simply put, while the state cannot charge for the unrestricted use of running waters pursuant to Section 9:1101, the state is also precluded from donating the waters under the constitutional language of article VII, section 14(A).⁹⁷

A. Constitutional Challenge

1. Looking Back

In assessing the implications of Louisiana’s laws as they affect the rights surrounding surface waters, it is necessary to examine the constitutional backdrop from which the situation arises. The general prohibition of donating publicly owned state property has resulted in numerous constitutional amendments, which have established exceptions and provided more legislative flexibility.⁹⁸ For example, Committee Proposal 15, Section 16 (A) of the 1973 Constitutional Convention presented the general rule of the 1921 Constitution, providing that

[t]he . . . property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged, or donated to or for any person or persons, associations or corporations, public or private, nor shall the state nor any political corporation purchase or subscribe to the capital stock or stock of any corporation or association whatever or for any private enterprise.⁹⁹

94. Seidemann, *supra* note 38, at 3. *See generally* LA. CONST. art. VII, § 14(A).

95. LA. CONST. art. VII, § 14(A).

96. Seidemann, *supra* note 38, at 4.

97. Since 1954, when converted from common to public things, the state has not been able to allow unrestricted use without some form of remuneration.

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

99. *Id.* at 143 (citing IV Records of the Louisiana Constitutional Convention of 1973: Convention Instruments at 160)).

However, Section (B) proposed new language to allow for an exception to Section (A) that would give more flexibility to governmental entities, stating that “[n]othing contained in this Section shall prevent intercooperation between the state and its political corporations or between the state or its political corporations and the US, or between the state or its political corporations and any public or private association or corporation or individual for a public purpose.”¹⁰⁰ In this respect, Section (B) allows for agreements with private interests for any public purpose, substantially relaxing Section 16 (A).¹⁰¹ The committee comments suggest that Section (B) intended to allow the “[l]oan, pledge, or donation of property of the state or its political corporations only for public purposes . . . under this Section the term ‘public purpose’ is left to interpretation by the judiciary so that there is sufficient flexibility for a lasting and workable document.”¹⁰²

In examining the textual language,¹⁰³ it appears that the Constitution does not define the terms “donation,” “property,” or “things of value.”¹⁰⁴ Nevertheless, the development of case law suggests a narrow definition of “donation” to best adhere to traditional Civil Code concepts.¹⁰⁵ A donation is currently defined as “a gratuitous act, one ‘which is made without condition and merely from liberality.’”¹⁰⁶ To get around the constitutional language of the prohibition on donating state-owned property, proposals such as “Conditional Transfers to the State” or “Leases” have been suggested.¹⁰⁷ A simplistic reading of Section 14 suggests that the state is not prohibited from leasing state property to private interests.¹⁰⁸

In an effort to work around the constitutional prohibition on donations of state-owned property, prior judicial analysis examines alternative solutions, such as leasing the property or allowing use for public utility purposes. In *State v. Board of Commissioners*, the Louisiana Supreme Court held that leases of state property are

100. *Id.*

101. *Id.*

102. *Id.* (citing I Records of the Louisiana Constitutional Convention of 1973: Journal of Proceedings at 130 (July 6, 1973)).

103. “[T]he funds, credit, property, or things of value of the state . . . shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.” LA. CONST. art. VII, § 14(A).

104. Hargrave, *supra* note 98, at 156.

105. *Id.* at 157.

106. *Id.* Louisiana Civil Code Article 1468 defines a donation inter vivos as a contract by which a person, called the donor, gratuitously divests himself, at present and irrevocably, of the thing given in favor of another, called the donee, who accepts it.

107. *See generally* Hargrave, *supra* note 98, at 157–62.

108. *Id.* at 158; *see also* LA. CONST. art. VII, § 14(A).

acceptable, thus affirming the lower court's ruling, which allowed the Board of Commissioners of the Port of New Orleans to sublease a warehouse it leased from the Federal Government.¹⁰⁹ Likewise, in *State v. Cumberland Telephone & Telephone Company*, the Louisiana Supreme Court permitted the free use of state property in upholding a statute that allowed telephone companies to lawfully place their lines on public lands without cost, reasoning that such use was not within the limitation of the 1879 Constitution.¹¹⁰ Relying on the *Cumberland* decision, the court in *State v. South Central Bell Telephone Company*, held that the defendant utility company was not required to compensate the state for the use of public lands in placing and maintaining telephone poles, lines, and other systems.¹¹¹ In allowing this kind of use of state-owned property, the court maintained a strict construction and noted that the state did not give up control of the land because it still retained all other ownership rights over the property.¹¹² Additionally, the *South Central Bell* court relied on Louisiana Civil Code article 1468 to define a donation, noting that because the state still retained full ownership over the land used by South Central Bell, it could not claim that the land was unconstitutionally donated.¹¹³

In the current context, the Attorney General has opined that allowing industries to withdraw public water for its private interests is an impermissible donation because running water is a public thing owned by the state.¹¹⁴ In this instance, "when an oil and gas company

109. *La. v. Bd. of Comm'rs.*, 153 La. 664, 670 (1923) ("The proposed sublease is not, within the meaning of the constitutional mandate, a loan, pledge, or grant, of any fund, credit, or thing of value, of the state or of the dock board. The right of occupancy of the warehouse is not now of any value to the state, or to the dock board, except for the right to sublease it and collect the rent.").

110. *State v. Cumberland Tel. & Tel. Co.*, 52 La. Ann. 1411, 1415–16 (1900) ("The State, as we take it, was not divested of its power to permit a telephone company to use an insignificant portion of her lands to plant its poles and string its wires. It is not a 'loan,' 'pledge' or 'grant,' as we read the statute but a mere permission to use . . . if the use is not in any manner to the State's prejudice. We have not found that the power of the State is so restrained that it cannot permit a *quasi* public corporation to string its wires over her hands.").

111. *State v. South Central Bell Tel. Co.*, 619 So. 2d 749 (La. App. 4 Cir. 1993).

112. *Id.* at 754 ("The legislature has expressly provided that telephone poles and wires may not obstruct 'the ordinary use of the roads, works, railroads, and waters.' Thus, it is clear that the State still retains the use of the lands on which the telephone equipment sits.").

113. *Id.* ("A donation 'is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it'"). LA. CIV. CODE ANN. art. 1468 (2012).

114. *Op. La. Att'y. Gen.* 08-0176, 4 (2010) ("Clearly, if the water . . . is running water . . . it belongs to the State of Louisiana and is a public thing that cannot be

appropriates millions of gallons of the public's running water, the withdrawal must come with a price tag to avoid being an unconstitutional donation,"¹¹⁵ so as to adhere to the explicit constitutional language set forth in Section 14(A). However, the Louisiana Revised Statutes do not permit such a price tag.¹¹⁶ Furthermore, the aforementioned jurisprudence does not directly resolve the right to use publicly owned surface waters. The idea of leasing running water has not yet specifically been addressed or allowed. In addition, use of the commodity for industrial activities such as fracking neither serves a public utility purpose nor provides a public benefit as the use of the land for telephone services did in *Cumberland and South Central Bell*.¹¹⁷

B. The Public Trust Doctrine

In furtherance of the constitutional challenges surrounding the issue at hand, Louisiana's public trust doctrine comes into play and presents additional obstacles. Article IX, Section 1, of the Louisiana Constitution states that "the natural resources of the state, including air and water . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."¹¹⁸ From this reading of the article, it is clear that while the Louisiana Legislature intended for the state to own running waters in its public capacity, the state constitution does not afford the state with any regulatory authority or appropriate enforcement power over the use of such waters, but instead, the constitution merely vests the ownership of the resource in the state.¹¹⁹ Furthermore, Article IX "requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors."¹²⁰ In making such a determination, and before granting approval of a particular proposed action affecting the government, an agency or official must

donated by allowing a person with a tanker truck to pump it out of the creek from a public right-of-way.").

115. Springer, *supra* note 32, at 230. See LA. CONST. art. VII, pt. I § 14(A).

116. See LA. REV. STAT. ANN. § 9:1101 (2008).

117. Use of public waters for industrial purposes such as hydraulic fracturing does not squarely fit within the strict application of serving the public interest as the private entities incur a profitable gain while depleting the natural resources of the state.

118. LA. CONST. art. IX, § 1.

119. Seidemann, *supra* note 38.

120. *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n* 452 So. 2d 1152, 1157 (La. 1984).

reasonably “determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.”¹²¹ In this context, the Louisiana Supreme Court has held that the constitutional and statutory language present a very broad conception of the public trust doctrine.¹²² In the absence of specific legislation, Louisiana’s public trust doctrine does not identify what entity should undertake the analysis or the ramifications of failing to adhere to the resulting analysis.¹²³

However, in 1978, the Louisiana Legislature charged the Secretary of the Department of Natural Resources with authorizing environmental regulations by enacting Louisiana Revised Statutes section 30:2013.¹²⁴ Further, the legislature expanded the statute a year later with The Environmental Affairs Act of 1979, which created the Environmental Control Commission, to be tasked with reviewing permit applications to determine whether a proposed project or facility complied with constitutional and legislative standards.¹²⁵ Assuring that reasonable decisions were rationally connected, the Louisiana Supreme Court in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission* noted the importance of doing so, particularly “in a case such as this where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.”¹²⁶ The 1984 case asserts the basic proposition that the public trust doctrine requires state actors to review the impact of their decisions on natural resources and the environment.¹²⁷ The constitutional doctrine is founded in the state’s function as “a

121. *Id.* at 1157.

122. Martin, *supra* note 31, at 564. See *Save Ourselves, Inc.*, 452 So. 2d at 1157.

123. Seidemann, *supra* note 38. See also Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 LA. L. REV. 1535, 1540 (1993) (arguing that the public trust doctrine can only operate through specific legislative action, “. . . custom under state law only produces law if it is consistent with legislation. In any event, any kind of public trust doctrine coming from long term practices would have to be subordinate to the specific rules and provisions of statutes.”).

124. LA. REV. STAT. ANN. § 30:2013 (2000) (“All powers and duties granted to the Environmental Control Commission prior to the effective date of this Section are hereby transferred to and shall be vested in the secretary. Where the term ‘commission’ is used in this Subtitle, it shall mean the secretary of the Department of Environmental Quality.”).

125. *Save Ourselves, Inc.*, 452 So. 2d at 1156 (“In 1978 the legislature directed the Secretary of the Department of Natural Resources to promulgate regulations to prevent the transportation, treatment or disposal of hazardous wastes except by permit issued upon a showing that the particular project or facility to be licensed does not involve substantial risk to the environment.”); see also LA. REV. STAT. ANN. § 30:2013 (2000).

126. *Save Ourselves, Inc.*, 452 So. 2d at 1159–60.

127. See *id.* See also Seidemann, *supra* note 38.

protector of public health and welfare where the latter is rooted in a property interest that is held in trust for the people of the state.”¹²⁸ This duty essentially imposes an obligation on the state to “maintain, protect and enhance [the state’s] environment via the regulation of water control, scenic rivers and streams, and the development, coordination, and implementation of statewide policies and programs to safeguard the environment and ensure the most advantageous use of the state’s natural resources.”¹²⁹

III. ACT NO. 955 OF 2010: AN OVERVIEW

A. Starting Anew

In seeking to confront the ambiguity that the state Constitution and statutory laws present regarding public use of running water, the Louisiana Legislature enacted Act 955 during the 2010 Regular Session to address the issue of how to regulate the sale of running surface waters.¹³⁰ However, this attempt to reassess and improve the current water scheme fell short of adequate resolution. Act 955 of 2010 expressly provides the Secretary of the Department of Natural Resources (DNR) with the ability to enter into cooperative endeavor agreements with any person or entity seeking to withdraw running surface water.¹³¹ In simple terms, the law implements a procedure to allow the DNR to enter into agreements of monetary value for the withdrawal of running surface water from Louisiana water bodies¹³² in order to fit within the context of Louisiana Revised Statutes section 9:1101. Prior to the institution of Act 955, no legislation offered specific protections for the state’s surface waters.¹³³ Act 955 somewhat filled this gap, specifically directing its provisions to a person or entity, who is not a riparian owner, and who seeks to withdraw water from the running surface waters of the state.¹³⁴ Additionally, in allowing for the consumptive use of the state’s surface waters, the Act requires an environmental analysis of any such use in an attempt to balance the environmental and ecological impacts with the economic and social benefits.¹³⁵

128. Davis & Wilkins, *supra* note 1, at 283.

129. *Id.* (citing *Save Ourselves, Inc.*, 452 So. 2d at 1154).

130. 2010 La. Acts 955 (codified as LA. REV. STAT. ANN. § 30:961–63 (Supp. 2014)).

131. *Id.* See also *Initiative*, *supra* note 46.

132. 2010 La. Acts 955.

133. Seidemann, *supra* note 38.

134. 2010 La. Acts 955.

135. *Id.*

B. Controlling the Waters

In 2010, the Attorney General issued a series of opinions that analyzed whether the state has control over various types of surface waters.¹³⁶ In the collectively issued opinions, the Attorney General opined that the state owns the running waters of the water bodies, irrespective of the ownership of their beds, and that the law should treat the water separately from the land over which it runs.¹³⁷ The opinions directly resulted from the demands for water made by nontraditional water users, particularly the companies involved in the northwest Louisiana fracking industry.¹³⁸ As mentioned in Part I(B)(i), operators were seeking to develop natural gas from the shale formations, which requires fracturing the shale, “a practice that is done with highly pressurized and often adulterated water—millions of gallons per well.”¹³⁹ A 2010 Attorney General opinion stated that the running waters of the state are “public things” and cannot be given away because the Louisiana Constitution prohibits the donation of things of value.¹⁴⁰ Moreover, the opinion allowed for agreements to put a price on water withdrawn on a per gallon basis, yet it also allowed for industry to show some other form of compensation to the state, such as demonstrating an increase in public revenue.¹⁴¹

C. You Say You Want a Resolution

Following the Attorney General’s rulings that affirmed Louisiana’s riparian law and restricted the waters available for fracking to surface waters, the legislature’s quick enactment of Act 955 allowed the state to authorize water withdrawals from the running waters of the state by nonriparian users.¹⁴² Although the

136. See Op. La. Att’y. Gen. Op. Nos. 08-0176, 09-0028, 09-0066, 09-0291, 10-0289 and 10-0173 (2010). (No. 08-0176 (Mar. 17, 2010): The State owns the running water as a public thing, however (Nov. 23, 2010): A riparian owner may access and “use” running water for his estate, but the water remains a public thing owned by the state).

137. *Id.* See *Chaney v. State Mineral Bd.*, 444 So. 2d 105, 109 (La. 1983) (discussing the distinction between private and public things in relation to ownership water and waterbeds. “On the one hand, the bed and bottom of a non-navigable river or stream is a private thing belonging either to the riparian owners or the state. On the other hand, the water which traverses that private bed is a public thing.”). See LA. CIV. CODE. ANN. art. 450 (2010).

138. Davis & Wilkins, *supra* note 1, at 289.

139. *Id.*

140. Op. La. Atty. Gen. 08-0176 (2010). See LA. CONST. art. VII, pt. I § 14(A).

141. Op. La. Atty. Gen. 08-0176 (2010). See also footnote 149; price charged for consumptive use is \$0.15/1,000 gallons.

142. 2010 La. Acts 955. Davis & Wilkins, *supra* note 1, at 289.

legislature may not donate a public thing, under statutory authorization it may *sell* a public thing, pursuant to Act 955.¹⁴³ Thus, the Attorney General's memorandum opined that persons "with the *possible* exception of riparian landowners, are not authorized to remove State owned surface water without obtaining the prior written approval of the State and without paying fair value."¹⁴⁴ More specifically, the Act recognizes that running water is a public thing owned by the state pursuant to Louisiana Civil Code article 450 and Louisiana Revised Statutes section 9:1101. The Act provides that the DNR is the state agency charged with "ensuring that all State rights in running water are protected, and especially ensuring that the State receives compensation for the sale of a public thing of value so as to ensure compliance with La. Const. Art. VI, Sec. 14."¹⁴⁵ Moreover, under Louisiana Civil Code articles 657 and 658, riparian landowners may use such waters for the benefit of their estates without providing payment to the state.¹⁴⁶ However, this riparian use of the water "does not convey ownership, and cannot be used to the detriment of other riparian landowners."¹⁴⁷ The overall design of the Act also provides for explicit provisions through the "Plan of Water Use,"¹⁴⁸ as well as offering the applicant the option to submit an Economic Impact Report (EIR), which allows the applicant to select to pay the state for the water they use at the rate in place at the time of usage.¹⁴⁹ Upon submission, the

143. *Id.* See also LA. CONST. art. VII, pt. I § 14(A); LA. REV. STAT. ANN. § 9:1101 (2008).

144. Memorandum from Office of Att'y Gen. & Sec., Dept. of Nat. Res. on Management and Sale of State Surface Waters to All State Surface Water Managers (Feb. 5, 2010), available at http://dnr.louisiana.gov/assets/docs/conservation/groundwater/Appendix_F.pdf, archived at <http://perma.cc/DV6Y-KH8V>.

145. *Id.* Op. La. Att'y Gen. 10-0173 (La. 2010).

146. Op. La. Att'y Gen. 10-0173 (La. 2010). See also LA. CIV. CODE ANN. arts. 657-658 (2008); LA. REV. STAT. ANN. § 9:1101 (2008).

147. Op. La. Att'y Gen. 10-0173 (La. 2010).

148. *Initiative*, *supra* note 46 (To participate in a CEA the applicant must submit a mandatory application-specific Plan of Water Use, which will be appended to the agreement. The plan is required to be certified by a professional and contain certain details such as a statement of the water body's name, a description of the public interest in the project, and the proposed end-user of the withdrawn water, among other things.)

149. *Id.* (A project-specific EIR must be included with the application if the applicant seeks recognition of "in-kind value received in lieu of payment for the withdrawal." In this instance, the report must include the following detailed description of how the state will be compensated: the types of increased tax revenue that will be generated; how the use to which the water will be put will be in the public interest; the specific economic developments that will ensue and what the specific social benefits will be that ensue. Once the EIR is submitted, the Office of Coastal Protection and Restoration then reviews the application for consistency with the State's Master Plan. Under this design, the State will then

Office of Coastal Protection and Restoration reviews the application for consistency with the master plan.¹⁵⁰

D. Experiencing Technical Difficulties

However, while the Act intended to resolve the legal discrepancy, and despite all of the advancements the Louisiana Legislature made with Act 955, several problems still remain that have prevented total and clear resolution of the ambiguous sources that govern the state's surface water use. First, the law exempts from its coverage agricultural and aquacultural uses, meaning that two of the most prominent surface water users in Louisiana go unchecked.¹⁵¹ As such, if these exemptions are allowed to continue to go unrestricted, the public trust doctrine may be violated.¹⁵² From this perspective, the issue arises of "whether the law violates the public trust doctrine by instructing the state's trustee agencies to essentially look the other way if these exempted uses are not unilaterally ensuring that their uses of the state's surface waters are not harmful to the resource or the environment."¹⁵³

Second, the law preserves the existing riparian rights to surface waters without mentioning what the rights entail or whether they "might be subject to the public trust doctrine analysis of 'other natural resource uses'."¹⁵⁴ In effect, the situation presents the issue of riparian rights that may be in conflict with one another, as well as certain activity that may be exempted by this reservation.¹⁵⁵ The only authority concerning riparian rights with regard to water access is

receive valuable compensation for the use of its surface waters in the form of increased tax and royalty revenue and increased job creation.)

150. *Id.* (If usage is approved, the state and the company enter into a cooperative endeavor agreement (discussed *supra* footnote 148) that may or may not recommend limitations on withdrawal and use.)

151. See H.R. 1486, 2010 Reg. Sess. (La. 2010). See also Seidemann, *supra* note 38; Report, *supra* note 14, at 28 ("Following the adoption of Act 955, the Louisiana Legislature approved Act 994 of the 2010 legislative session, (La. R.S. 9:1103). This exemption is found in Act 944, which expanded riparian rights for agricultural and aquaculture uses. The legislature recognized the beneficial use of surface water for agricultural and aquacultural purposes by riparian owners. The legislature decided that 'waters used in agricultural or aquacultural pursuits are not consumed, rather they are merely used' and that no prohibited donation was created by their use free of charge.")

152. Seidemann, *supra* note 38.

153. *Id.*

154. H.R. 1486, *supra* note 151; LA. REV. STAT. ANN. § 30:961(A) (Supp. 2014). See also Seidemann, *supra* note 38.

155. Seidemann, *supra* note 38.

Louisiana Civil Code article 456, which simply provides that riparian owners' rights are "burdened by a public use for the mooring of vessels and the drying of nets along their property."¹⁵⁶ A simple reading of the provision does not reason to grant riparian owners any specific right to use water from the waterway along which their property is situated, thus it remains unclear what, if any, rights have actually been reserved to riparian owners through the Act's exemption.¹⁵⁷

Additionally, Act 955 offers voluntary compliance, allowing users to opt out of the cooperative endeavor agreements (CEA).¹⁵⁸ However, if a user chooses not to enter an agreement, he "risk[s] running afoul of the public trust doctrine as well as threatening the analyses undertaken for those who have submitted to the process."¹⁵⁹ Lastly, the Act was merely set forth as a temporary provision to allow the use of surface waters to continue through the next regular session of the Louisiana Legislature, eventually ending in 2012.¹⁶⁰ Therefore, the need for appropriate long-term regulation of these resources remains unanswered. Yet, the legislature extended the legislation by passing Act 261 of 2012 "[t]o amend and reenact . . . relative to withdrawal of surface water; to extend the time frame within which opportunities for cooperative agreements for such withdrawal may be entered into; to provide for approval by legislative committees of certain cooperative endeavor agreements . . ."¹⁶¹ Act 261 is clearly not a permanent solution, as it only adds that no new agreement shall be entered into if the department received the application after December 31, 2014.¹⁶²

In addition to the underlying issues accompanying Act 955, no direct form of punishment for noncompliance with the law's

156. LA. CIV. CODE ANN. art. 456 (2010).

157. Seidemann, *supra* note 38.

158. *Initiative*, *supra* note 46. *Contracts*, DIV. OF ADMIN., STATE OF LA., <http://www.prd.doa.louisiana.gov/LaTrac/contracts/help.cfm>, archived at <http://perma.cc/7QNZ-YPA3> (last updated Jan. 12, 2015) (CEAs are agreements, which La. Const. art. VII, sect. 14 authorizes, for a public purpose, among the State and its political subdivisions or political corporations, and with the United States or its agencies, or with any public or private association, corporation, or individual. Since a CEA is a form of contract, "[i]t would be in the best interest of the state of Louisiana to have all such agreements reviewed by an arm of the state that is not a party to the agreement . . . all [CEAs] require the expenditure of public funds to the Office of Contractual Review for review and approval." Executive Order BJ 2008-29).

159. Seidemann, *supra* note 38.

160. H.R. 1486, *supra* note 151.

161. H.R. 532, 2012 Reg. Sess. (La. 2012).

162. *Id.* The act also mentions, however, that "existing agreements may be renewed in two-year increments but shall terminate no later than December 31, 2020."

provisions currently exists.¹⁶³ The environmental laws of Louisiana do not prove substantial enough to provide for a direct enforcement action or to implement regulatory penalties and fines for the unauthorized use of the state's running surface waters.¹⁶⁴ The Attorney General's Office held that in their opinion, "the State may seek either recompense for an unauthorized use of water or injunctive relief to stop an ongoing unauthorized use of water."¹⁶⁵ Before any action is initiated though, the DNR must first determine that unauthorized use has actually occurred, as the agency is charged with managing the state's natural resources, including running waters by virtue of Louisiana Revised Statutes section 36:351, as well as being the permitting agency identified by Act 955.¹⁶⁶ However, under the current scheme, individuals using the state's waters without the appropriate permission would only be liable for the misappropriation of state things, rather than for "the more direct problems of degradation and harm to the environment."¹⁶⁷ Instead of punishing violators with directly applicable punishments, authorities are left with general provision prohibitions in the Criminal Code to stop those who choose not to comply with Act . 955.¹⁶⁸ For instance, because of the lack of environmentally specific penal provisions in place, state actors are limited to using theft of state property laws for the unauthorized use of surface waters¹⁶⁹ instead of specific regulatory penalties.

IV. CHANGE IS GONNA COME

The current language of Louisiana's laws and governing scheme clearly does not offer a workable solution for adequate surface water regulation. Notably, the increase in fracking operations within the state has highlighted the fact that Louisiana can no longer ignore the essential need for a highly technical water regulation and management plan. As this comment has discussed, current theories of ownership and rights of use of the state's running waters are not

163. See generally H.R. 1486, *supra* note 151.

164. Seidemann, *supra* note 38.

165. La. Att'y Gen. Op. No. 10-0173 (2010).

166. *Id.* LA. REV. STAT. ANN. § 36:351(B) (2006) ("The Department of Natural Resources, through its offices and officers, shall be responsible for the conservation, management, and development of water, minerals, and other such natural resources of the state, including coastal management, except timber and fish and wildlife and their habitats.").

167. Seidemann, *supra* note 38.

168. *Id.* See also, La. Att'y Gen., *supra* note 165.

169. La. Att'y Gen., *supra* note 165 ("Upon a determination that such an unauthorized use has occurred, either the local district attorney or the AG has the authority to pursue criminal and/or civil actions against the violator.").

clearly delineated, leaving many uncertain as to what their rights specifically entail. In addition, while attempting to resolve the legal complexities, Act 955 has failed to fully provide complete guidance or resolution.

Keeping the jurisprudential perspective in mind, it seems that the obvious solution requires legislative action and statutory modification in order to provide a conclusive guideline for the entire state to follow. However, before statutory modification can be approved, much less proposed, Act 955 must, at the very least, outline the rights of riparian owners. While an amendment to the current statutory language would be an appropriate remedy, the vague provisions of Act 955 must first be addressed and clearly delineated to properly align with the various sources governing Louisiana's water law.

State actors should be called upon to reexamine and expound upon the rights of riparian owners and other individuals who seek to use publicly owned running waters for personal profit. In addition, Louisiana's position at the forefront of the emerging water economy demonstrates that the legislature should strongly consider the issues that underlie interstate agreements, while still preserving its own water supply and needs. Clearly, exploration and production activities such as hydraulic fracturing have a significantly greater impact on the state's water depletion than other forms of public use; yet use of the state's surface waters for such purposes would provide the state with an increase in tax revenue as well as afford more jobs in the industry.¹⁷⁰ In this instance, the legislature should design a permanent statutory distinction between use of surface waters for profitable industrial activities versus the traditional domestic public use. Reiterating what the Louisiana Second Circuit held in *Adams v. Grigsby*, "we are not unaware of the growing value and importance of water as a natural resource . . . in some instances, it is more valuable and necessary than oil or gas. However, the problem of the regulation and control of water supply and use addresses itself to the [legislature] . . ." ¹⁷¹

In response to the Louisiana Legislature's recent request¹⁷² that the Louisiana State Law Institute "study the legal issues surrounding groundwater and surface water law and any needs for revision to

170. *Report, supra* note 14, at 86. ("In a 2010 economic impact study, economist Loren Scott noted that Haynesville Shale activity benefited [Louisiana] through \$16.9 billion in business sales, \$4.3 billion in new household earnings, and more than 111,000 jobs tied directly or indirectly to the activity. Expansion in the oil and natural gas industry sector alone contributed nine percent of all jobs created in the U.S. in 2011.")

171. *Adams v. Grigsby*, 152 So. 2d 619, 624 (La. App. 2 Cir. 1963), *writ refused*, 153 So. 2d 880.

172. S. Con. Res. 53, 2012 Reg. Sess. (La. 2012).

current law,” the Institute thereby created a Water Law Committee, comprised of academicians, practitioners, judges, and environmental law specialists.¹⁷³ With the added participation of individuals with expertise and interest in this vital area of law, the Law Institute has recommended that the state legislature allow the entity to enact a comprehensive Water Code to “integrate[s] all of its water resources . . . and enable Louisiana to successfully manage and conserve its water resources as it prepares to face the inevitable challenges that lie ahead.”¹⁷⁴

From commencement of the project, the Law Institute immediately recognized that a “holistic approach to potential legislative reform of any of Louisiana’s water laws was imperative.”¹⁷⁵ In urging the need for water reform,¹⁷⁶ the Law Institute thereby recommended that a Water Code Committee be enacted and entrusted 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.”¹⁷⁷ Due to the inadequate guidance governing Louisiana’s water system, the Institute’s proposed Water Code project presents the best workable solution to the state’s need to overcome this long-standing problem. As noted by one committee member, water concerns are “[g]rowing in the national consciousness,”¹⁷⁸ and the time has passed for expansive and comprehensive reform.

CONCLUSION

While Act 955 purports to offer a workable regulatory regime addressing the state’s water resources, the legislative measure has proven less than adequate. Louisiana’s incompatible constitutional

173. Louisiana State Law Institute, Report in Response to SCR 53 of the 2012 Regular Session: The Use of Surface Water Versus Groundwater, 1 (2014). SCR 53 points out that Louisiana’s disparate legal regimes for groundwater and for surface water have yielded “various and often conflicting legal rules”

174. *Id.* at 87.

175. *Id.* at 3.

176. “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.” *Id.* at 87.

177. *Id.* The recommendation provides that the Committee function in an interdisciplinary capacity, consisting of the following members: “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.”

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

and statutory provisions have left supervisory authorities, as well as private entities and landowners, uncertain as to what exactly their obligations and corresponding rights entail. As such, the state can no longer function under the existing regime if they want to properly address the underlying issues imposed by riparian rights and recent fracking activities and remedy the mismanagement that has been troubling both agencies and citizens alike for far too long. Louisiana cannot afford to miss out on the economic opportunities and advantages that are so intertwined with this natural resource. The legislature's implementation of a comprehensive water code that integrates the state's water resources will serve to provide a long-term solution to the current inoperable scheme governing Louisiana's surface waters.

[T]he 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.¹⁷⁹

*JoAnn T. Hymel**

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

* J.D./D.C.L., 2015, Paul M. Hebert Law Center, Louisiana State University. I owe immense gratitude to Professor Patrick H. Martin, Professor Emeritus of Law, and Professor Kevin Bennardo for their invaluable expertise and guidance. I also owe many thanks to Professor Melissa T. Lonegrass, Beth Williams, and the entire Editorial Board, for whom this Journal would not function without. Most of all, I thank my parents for their unconditional support and encouragement.