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The Public Trust Doctrine and Surface Water Management and Conservation: A View from Louisiana

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ABSTRACT

Recent mineral activity in North Louisiana has brought the need for surface water management to the attention of the public and the Louisiana Legislature. Hydraulic fracking activity in the Haynesville Shale, although not the largest water use in Louisiana, has become the most visible and the massive uses of water have caused concern for citizens and regulators. Within this framework, an examination of ownership rights and public trust duties of the State with regard to surface water is here undertaken. The present analysis concludes that running surface water is a thing owned by the State, the use of which is largely subject to State oversight and environmental review.

Introduction

Louisiana has plenty of water, right? Perhaps,[1] but various water sources have become threatened or even endangered in this traditionally water-rich State over the past several years. Although there have always been significant consumptive users of Louisiana's surface waters, recent events have brought concerns of overuse of this resource to the fore of public consciousness, most notably the Haynesville Shale Gas Play.

Brief history of Haynesville and other water uses

The Haynesville Shale, a massive natural gas play in northwestern Louisiana, was discovered in about 2007. Because the natural gas deposits are trapped within shale at great depths, until recently, the resource had been prohibitively difficult and expensive to exploit. With the advent of directional drilling and the ability to fracture the shale with great pressure at depth, exploitation of the Haynesville Shale began in earnest in 2008. At present, there are 1,650 natural gas wells permitted or on production in the Haynesville Shale.[2] Under normal circumstances, all of this production would not likely raise concerns about water availability. However, the natural gas in formations such as the Haynesville Shale must be extracted by way of hydraulic fracturing

[1] B. Pierre Sargent, WATER USE IN LOUISIANA, 2005, Water Resources Special Report No. 16, at 1 (La. Dept. of Trans. & Devel. 2007)("Louisiana has a total land and water area of 48,000 mi^2, and abundant water resources are throughout the State.").
[2] J. Blake Canfield, Senior Attorney, Louisiana Office of Conservation, personal communication.

(commonly referred to as "fracking").[3] This fracking requires massive amounts of water, which is sent down the well under pressure and is used to crack the deep rocks.[4] These cracks release the trapped natural gas from the shale. Although specific volumes vary, average water needs for fracking one Haynesville Shale well are around 600,000 gallons. Considering the large numbers of wells currently permitted or operating in the area, there is reason to be concerned about the depletion of water sources in northwest Louisiana.

Admittedly, the Haynesville Shale is not the only threat to Louisiana's water resources. In fact, although it is the most acute and obvious threat to those resources, this mineral production is not even the largest threat. Research has shown that agricultural uses and other industrial needs far eclipse fracking operations in terms of their demands on Louisiana's water resources. The Haynesville uses of water have simply been much more in the public's attention than other uses.[5] One example of this is the large number of trucks that will simply pull up, along a public right-of-way, to a surface water source in northwest Louisiana, stick a hose into the source, and start pumping out water for use in nearby fracking operations.[6] Not surprisingly, this sort of activity has raised the ire of local farmers and riparian owners.[7]

Historically, surface water uses for mineral operations had not been such a concern, as they largely did not exist. Groundwater resources had been the traditional water source for these operations, meaning that, in most areas, water use for mineral operations had been out of sight and out of mind. Production companies would drill a water well to supply their needs for particular operations and most people did not pay any mind to these uses. In 2008, based upon scientific concerns that the Carrizo-Wilcox Aquifer in Louisiana was under threat of overuse from mineral production operations, the Commissioner of Conservation, in his regulatory role of protecting the State's groundwater resources, issued a directive for mineral production companies to avoid using groundwater for their operations in the Haynesville Shale and to shift, instead, to surface water sources to satisfy their needs.[8] This single event instigated the sea change that has led to the focus of attention on the long-term viability of Louisiana's surface waters as a subject of consumptive uses and has required a comprehensive legal analysis regarding whether the State has the authority to control such uses at all.

Who owns Louisiana's surface waters?

Louisiana's Civil Code sets forth the classification of publicly and privately owned things. In pertinent part, La. C.C. Art. 450 states:

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[3] S. Tian, G. Li, Z. Huang, J. Niu, and Q. Xia, *Investigation and Application for Multistage Hydrajet-Fracturing with Coiled Tubing*, 27 PETROLEUM SCIENCE AND TECHNOLOGY 1494, 1494-1495 (2009) ("Hydraulic fracturing technique is a key to economically exploit and develop low-permeability reservoirs.").

[4] Rick Jervis, *Gas drilling fuels a boom -- and health concerns*, 12/14/10 USA TODAY 1 (2010); Anon., *EPÀ Widens Fracking Investigation: Agency Will Study Water Volumes as Well as Risks*, 832 THE CHEMICAL ENGINEER 14 (2010).

[5] Edna Wheless, *Boomtime in DeSoto Parish: Haynesville Shale Changes Rural Landscape and Lifestyle*, 29(6) LOUISIANA LIFE 56 (2009).

[6] La. Atty. Gen. Op. No. 08-0176.

[7] Wheless, *supra*.

[8] Office of Conservation, Louisiana Department of Natural Resources, Ground Water Use Advisory: Commissioner of Conservation Recommends Wise Water Use Planning in the Haynesville Shale, issued Oct. 16, 2008, available online at http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=509 (last accessed Jan. 14, 2011).

> Public things are owned by the state or its political subdivisions in their capacity as public persons.
>
> Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.

Based upon this classification, it is clear that it is the intention of the Legislature that "running waters" are to be owned by the State in its public capacity. This classification, alone, does not imbue the State with any regulatory authority over the use of "running waters." Rather, it merely vests the ownership of this resource in the State. This regulatory authority, as discussed below, exists by virtue of Louisiana's public trust doctrine. However, before reaching an analysis of the public trust doctrine and its power to protect the State's waters, a further examination of certain provisions of the Louisiana Civil Code is necessary.

Civil Code Article 448, among other things, divides "things" under Louisiana law into the categories of common, public, and private. For the purposes of this paper, private things are fairly self-explanatory and do not enter into the analysis. Common things are defined as follows:

> 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 comformably with the use for which nature has intended them.[9]

Thus, common things are not subject to the patrimony of either the State or private citizens. Historically, "running waters" had been included within this definition, thus making them free for the use of anyone and everyone.[10] The Louisiana Legislature, in 1910, enacted La. R.S. 9:1101, which reclassifies running waters by stating (in pertinent part):

> The waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof, not under the direct ownership of any person on August 12, 1910, are declared to be the property of the state. There shall never be any charge assessed against any person for the use of the waters of the state for municipal, industrial, agricultural or domestic purposes.

This law is still valid. It appears to recognize 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. In effect, if this protection of access was the intent, La. R.S. 9:1101 was a superfluous law in 1910, as no restriction on the use of "running waters" could have existed so long as they were classified as common things. However, as was recognized by those revising this portion of the Civil Code in the 1970s, La. R.S. 9:1101 effectively (whether intentional or not) removed "running waters" from the category of common things and place them under the category of public things.[11] This change in ownership classification presents significant ramifications for the control, use, and regulation of surface water resources under the current constitutional scheme in Louisiana.

Because "running waters" have been reclassified as public things, with their ownership vested in the State, certain constitutional restrictions now apply to their use. Under La. Const. Art. VII, Sec. 14(A), the people of Louisiana have provided that:

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[9] La. C.C. Art. 449.
[10] La. C.C. Art. 449, cmt. (c).
[11] *Id*.

> 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.

Thus, by reclassifying "running waters" as a thing owned by the State, it is unconstitutional for the State to simply divest itself of such waters absent the receipt of fair market value compensation. This statement is premised on the presumption that "running waters" can be considered to be "things of value of the state" under La. Const. Art. VII, Sec. 14(A). Such a presumption, however, is not without support. Although there is no commodity trade in water,[12] people have been willing to pay for its use in Louisiana for some time. For example, the Sabine River Authority has been selling water from the Toledo Bend Reservoir for many years.[13]

Interestingly, because the restrictions against donating things of value belonging to the State existed by constitutional fiat before the enactment of La. R.S. 9:1101 in 1910, that law,[14] to the extent that it purported to allow the consumptive use of "running waters" free of charge, was unconstitutional *ab initio*. Thus, from the perspective of the control over its running waters, since at least 1910 when they were converted from common things into public things, the State has not been able to allow unrestricted use without some remuneration. Although this background is relevant and important to understanding how running waters are now managed by the State of Louisiana, it is not informative regarding how, if at all, the State manages water from a resource protection perspective.

Overview of legal sources available for surface water use and regulation.

In Louisiana, there has been considerable debate regarding the question of whether the public trust doctrine, embodied in La. Const. Art. IX, Sec. 1, is self-executing. In 1992, Wilkins and Wascom made a strong case that the doctrine, absent any specific enabling legislation, provided a charge on State actors to ensure the protection of the State's natural resources and environment.[15] This perspective was quickly countered by the Hargrave, who had served as the official reporter for the 1973 Louisiana Constitutional Convention.[16] Hargrave argued that the public trust doctrine put in place by the 1974 Constitution could only operate through specific legislative action. The courts have seemed to apply the doctrine in a hybrid manner, never specifically ruling on the question of whether the doctrine is stand-alone enforceable or not.[17] Nonetheless, in cases such as *State v. McHugh*,[18] the Louisiana Supreme Court has alluded to the probability that the public trust doctrine, in and of itself, is actionable thus:

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[12] Leo Lewis and Lewis Smith, *Water Whets the Appetite of Commodity Traders With an Eye to the Next Fortune*, THE TIMES (Oct. 19, 2007).
[13] La. R.S. 38:2325(A)(16) contains the SRA's authorization to sell water.
[14] Similar language to La. Const. Art. VII, Sec. 14(A) existed in the 1921, 1913, 1898, and 1879 Louisiana Constitutions. *See* La. Const. 1921, Art. 4, Sec. 12; La. Const. 1913, Art. 58; La. Const. 1898, Art. 58; La. Const. 1879, Art. 56.
[15] James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861 (1992).
[16] Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 LA. L. REV. 1535 (1993).
[17] *See State v. McHugh*, 92-1852 (La. 1/6/94), 630 So.2d 1259; *Mouton v. Department of Wildlife & Fisheries for State of La.*, 95-0101 (La.App. 1 Cir. 6/23/95), 657 So.2d 622.
[18] *McHugh, supra*.

> The state constitution establishes a public trust doctrine requiring the state to protect, conserve and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people. ... Th[is] constitutional provision[] establish[es] a standard of protection which the legislature and all public trustees are required to vigorously enforce. Upon judicial review, a public trustee is duty bound to demonstrate that he has properly exercised his responsibility under the constitution and laws.[19]

In fact, in 1984, the Louisiana Supreme Court, in *Save Ourselves, Inc., et al. v. Louisiana Environmental Control Comm'n*,[20] recognized that the public trust doctrine imposes a duty on State actors to undertake meaningful reviews of the impacts of their decisions on the natural resources and the environment. In subsequent cases, the courts have set forth a test, based upon *Save Ourselves*, to determine whether compliance with the public trust doctrine had been accomplished in particular circumstances.[21] Known as the "IT Factors,"[22] the *Save Ourselves* test asks the following questions of State agency decision-making that involves environmental or natural resource matters:

> 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] demonstrated 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[?][23]

As demands on surface water increased as a result of Haynesville Shale production in 2008 and 2009, it became apparent that any uses of these waters that were occurring were being done without an IT analysis as to their impacts. In addition, beyond the very basic concepts of water ownership discussed above, the State had no statutory scheme on which to draw to force environmental analyses of such uses. Realizing that some control had to be exercised over surface water use, primarily to ensure the protection of the resource and the environment, but also to ensure that things of value belonging to the State were not being donated, the Attorney General's Office looked to the public trust doctrine.[24]

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[19] *Id*. at 1265 (internal citations omitted).
[20] 452 So.2d 1152 (La. 1984).
[21] *See e.g., In the Matter of Rubicon, Inc.*, 95 0108 (La.App. 1 Cir. 2/14/96), 670 So.2d 475.
[22] The name for these factors derives from the IT Corp., whose actions were the subject of examination in the *Save Ourselves* case. *See In re Shintech, Inc.*, 2000-1984, pp.11-12 (La.App. 1 Cir. 2/15/02), 814 So.2d 20, 28.
[23] *Rubicon, supra*, at 483.
[24] Such a resort to the public trust doctrine is consistent with Kundis-Craig's assertion that "public trust use rights in the East intrude – and for practical purposes always have intruded – upon privately owned riparian and littoral property far more than in the later-settled West." *See* 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, 4 (2007). In fact, in fashioning its approach to the regulation of surface water rights and protections, Louisiana has taken the position that some imposition on private

Based upon numerous complaints from the public and inquiries from industry, the Louisiana Attorney General and the Louisiana Secretary of the Department of Natural Resources, in February of 2010, issued a guidance memorandum asserting that any consumptive use of running waters in the State must be approved by the Louisiana Department of Justice and the Louisiana Department of Natural Resources.[25] The sole basis for this guidance memorandum was the public trust doctrine. Both agencies believed that they had an affirmative duty under the doctrine, as embedded in the Louisiana Constitution, to ensure the consumptive uses of the State's waters were being done in such a way as not to harm the environment or threaten the resource. This memorandum was also intended to serve as a legal stop-gap measure until more comprehensive guidance could be formulated and specific legislation enacted. To our knowledge, the governmental entities with some ability to authorize the use of waters or otherwise control running waters in Louisiana adhered to this document until more formal mechanisms were in place.

In five separate Attorney General's Opinion requests in 2010, staff from the Attorney General's Office had the opportunity to analyze whether the State has control over various types of surface waters.[26] The requests included a privately-owned (bed) creek, the Red River, and two privately-owned (bed) lakes. In all four scenarios, the Office opined that, as to the "running waters" within these water bodies, irrespective of the ownership of their beds, the State owned the water.[27] The conclusions from these analyses were based upon the language of the Civil Code, noted above, which classifies "running waters" as a public thing. These conclusions are consistent with the notion that running water is essentially a fugacious thing that is transient when over any one piece of land and thus that the law should treat the water separately from the land over which it runs. Further, it is axiomatic that impacts to running waters in any one location can have downstream impacts, it is thus necessary to recognize that this resource is public in nature to which the protections embodied in the public trust doctrine must attach.

The creek and the Red River are obviously "running waters." However, the lakes present a unique situation: are they actually "running?" In the scenario that involved Smithport Lake and Clear Lake, that question was irrelevant. In that situation, the private owners had granted the State a servitude that provided the authority for the State to control, use, and protect the waters of those privately-owned lakes. Thus, whether the waters were "running" was a superfluous question, as the State has control of the waters by contractual agreement regardless of their "running" status. In the Lake Claiborne situation, because the waters are connected with numerous bayous that flow in and out of the lake and are otherwise connected to other running waters, this lake was considered to be the running water of the State.[28] This result seems logical, as lakes are seldom unconnected (and thus flowing to and from) other water bodies. Hence, they should be considered "running waters." In fact, it is difficult to imagine a scenario when lake

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rights may be necessary and is acceptable to protect this resource. However, the broad language of the State's public trust doctrine appears to support this approach.

[25] Memorandum to All State Surface Water Managers from Attorney General James D. "Buddy" Caldwell and LDNR Secretary Scott A. Angelle (Feb. 2, 2010).

[26] *See* La. Atty. Gen. Op. Nos. 08-0176, 09-0028, 09-0066, 09-0291, and 10-0173 (all released in 2010).

[27] *Accord*, *Chaney v. State Mineral Board*, 444 So.2d 105 (La. 1983) (noting that, "[o]n 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 (depending upon whether it was originally non-navigable or navigable). On the other hand, the water which traverses that private bed is a public thing. As such, the riparian owner may use the running water for his purposes, but he may not interfere with, nor prevent, its use by the general public.)(internal citations omitted).

[28] La. Atty. Gen. Op. No. 09-0066.

waters are not connected to some other running water source and are thus running in their own right. Admittedly, the question of how much flow is required for a water body to be considered "running" has not yet been addressed, however, even seasonally-existing waterways are "running" when there is water in them. Thus, it seems that even periodic or seasonal streams, when holding "running water" should fall under the Civil Code classification of public things and should be subject to State control and ownership.[29]

Along with the question of ownership comes the question of how much control and what kind of control can be exercised over these waters. Again, this question raises the applicability of the public trust doctrine. In the absence of specific legislation, the State is charged with the duty to ensure the protection of its natural resources and environment. Accordingly, the Attorney General has correctly asserted that some variation of the IT factors must be applied to every proposed consumptive use of the State's surface waters.[30] Unfortunately, what the public trust doctrine, in the absence of specific legislation, does not identify is what entity should undertake such an analysis and what the ramifications are for not adhering to the analysis.

In an effort to fill some of these gaps, the Louisiana Legislature enacted Act 955 of 2010. This law sets forth a scheme for the consumptive use of the State's surface waters and requires that an environmental analysis of any such use be undertaken.[31] Act 955 vests the authority to grant such uses and to conduct such analyses within the Louisiana Department of Natural Resources (LDNR).[32] Such uses are accomplished by means of the execution of a cooperative endeavor agreement[33] (CEA) designed and approved by the Attorney General and the State Mineral & Energy Board.[34] The CEAs now in use, in an effort to comply with La. Const. Art. VII, Sec. 14(A), acknowledge that the State will receive valuable compensation for the use of its surface waters in the form of increased tax and royalty revenue and increased job creation.[35] However, this acknowledgment, and indeed the entire concept of a CEA seems largely unnecessary, as the current CEAs also charge a price for the consumptive use of any surface waters under such agreements.[36] The value of the water charged by the State is currently

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[29] Admittedly, some jurisprudence has, on a fact-specific basis, determined that some isolated lakes do not meet the qualifications of "running water". *See e.g.*, *Verzwyvelt v. Armstrong-Ratterree, Inc.*, 463 So.2d 979 (La. App. 3 Cir. 1985). However, it should be pointed out that such cases have not been decided in the vein of identifying whether a waterbody constitutes "running waters" for the purposes of State ownership of the actual waters.

[30] La. Atty. Gen. Op. No. 09-0291.

[31] La. R.S. 30:961-963.

[32] La. R.S. 30:961.

[33] CEAs are permitted under La. Const. Art. VII, Sec. 14(C), as a means for the State to obtain some measure of *quid pro quo* for the use of its things of value in a manner that does not necessarily require the payment of fair market value for such uses. The question of what constitutes reasonable *quid pro quo* has been a matter of considerable debate. Under the current jurisprudence, it appears to be reasonable that the State receives guarantees of economic development, taxes, and job creation in exchange for certain uses. *Board of Directors of the Industrial Development Board of the City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales*, 2005-2298 (La. 9/6/06), 938 So.2d 11. The idea behind the CEA concept for water use was to recognize that the activities for which such uses are claimed are economically beneficial to the State such that reasonable guarantees of the things noted above, in addition to supporting the flow of mineral royalties, would be sufficient to avoid running afoul of La. Const. Art. VII, Sec. 14(A).

[34] La. R.S. 30:961(B).

[35] *Id.*

[36] Louisiana Running Surface Water Use Cooperative Endeavor Agreement, Art. I(F)(ii). Available online at http://dnr.louisiana.gov/assets/docs/secretary/act955/LA%20RUNNING%20SURFACE%20WATER%20

$0.15/1,000 gallons – the same amount charged by the Sabine River Authority (SRA) for consumptive uses.[37] It is interesting to note that the SRA does not acknowledge the tangential benefits of such uses nor does it enter into CEAs for the sale of its water. Thus, it seems that there is no difference between the two types of agreements except that the SMEB may be setting the CEAs up for a later detachment of the fees based upon its presumption that the tangential benefits are sufficient remuneration to the State for the use of its waters.

Aside from the CEA scheme established by Act 955, the law also requires that all CEAs undergo an environmental impacts analysis prior to their approval by the Secretary of LDNR. In order to comply with this requirement, LDNR has retained a hydrology expert to analyze each proposed use for its potential impacts to the environment on a watershed-wide basis. Although the IT factors would seem to set forth a specific scheme which should be used to analyze environmental impacts under the public trust doctrine, some of these questions are not applicable in all circumstances and it is probable that this expert analysis exceeds the minimal conceptual analyses envisioned by the *Save Ourselves* Court.

Do the current laws and analyses solve the problem?

For all of the advances made by the Legislature with Act 955, there are still several problems with this law. In addition, as is noted below, there are also several problems with other laws impacting the issue of surface water use and protection, not all of which can be covered by a simple reliance on the public trust doctrine.

With regard to Act 955, as an initial matter, the law exempts from its coverage agricultural and aquacultural uses.[38] Further, the law retains existing riparian rights to surface waters without undertaking an excursus of what such rights are nor whether those rights might be subject to the public trust doctrine analysis of other natural resource uses.[39] Most importantly, compliance with Act 955 is voluntary.[40] Finally, the law is set to sunset in late 2012.[41]

With the exemption of agriculture and aquaculture from Act 955, the Legislature has left unchecked two of the prominent surface water users in Louisiana. In and of itself, this exemption raises concerns, not just for the question of whether the State is, by this exemption, giving away public things of value (which it is), but also 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. In fact, although there is no violation of the *Save Ourselves* case in this scenario, as that case applies only to State actions[42] (of which there are none when permitting and agreements are not allowed), there is a potential violation of the public trust doctrine if these exempted uses are allowed to continue unchecked. As Wilkins and Wascom pointed out in 1992,[43] the public trust doctrine that is embodied in La. Const. Art. IX, Sec. 1, charges the State's trustee agencies, even in the absence of specific legislation, with a duty to ensure that the natural

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USE%20COOPERATIVE%20ENDEAVOR%20AGREEMENT%20(EDITED%208-5-10).pdf (last accessed Jan. 14, 2011).

[37] *Id*.

[38] This exemption is not actually contained within Act 955. Rather it is a charge on Act 955 from some companion legislation – Act 994 of 2010.

[39] La. R.S. 30:961(A).

[40] *Id*.

[41] Act 955, Sec. 2 (uncodified).

[42] *Save Ourselves*, *supra*.

[43] *Supra*, note 4.

resources of this State are not misused. Thus, even though Act 955 exempts agriculture and aquaculture from its regulatory purview, both the Attorney General and LDNR (not to mention other trustee agencies such as the Louisiana Departments of Environmental Quality and Wildlife & Fisheries), still have some authority to examine the impacts occasioned by these uses and to take enforcement action against such users if the resources are being adversely impacted.

As noted above, another gaping hole in Act 955 is the reservation of riparian rights in that law. This raises the questions of what riparian rights may be in conflict with this law and what activity may be exempted from the purview of the law by this reservation. Much of the Civil Code's contents with regard to riparian owners are limited to riparian rights and losses with respect to accretion, erosion, and dereliction.[44] Only La. C.C. Art. 456 speaks to riparian rights with regard to access to the water and this article 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.[45] This provision does not purport to grant riparian owners any specific right to use water from the waterway along which their property is situated.

The only provisions that provide some authority to riparian owners to use water along their property are La. C.C. Arts. 657 and 658. The former law 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.[46]

Thus, some use of surface water by riparian owners is allowed under Louisiana law. It is unclear from this provision what is meant by the word "use" and what is contemplated by the phrase "other purposes." However, La. C.C. Art. 658 does appear to limit the amount of water used by riparian owners. The latter law provides:

> The owner of an estate through which water runs, whether it originates 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.[47]

This provision creates a servitude in favor of riparian owners for the use of waters that is something less than a consumptive use. As the article states, the riparian owner is required to return the water to its channel. There is no reported jurisprudence under this article, however a plain reading of the provision suggests that although water running over a riparian owner's lands can be diverted for the creation of a pond or for the powering of devices while on or adjacent to the riparian's property, it cannot be diminished through such uses.[48] Clearly, however, La. C.C. Art. 657 allows for some consumptive uses through the statement that such water can be used for "watering his estate."

Thus, it is unclear what, if any, rights have actually been reserved to riparian owners through the exemption in Act 955. Although La. C.C. Art. 657 provides for some amount of consumptive use of State waters by riparian owners, such uses, absent payment to the State for

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[44] La. C.C. Arts. 499, 501, 503, 506, and 563.
[45] This notion is supported by other navigation-supporting restrictions on riparian uses in the Civil Code Ancillaries at La. R.S. 9:1102, 9:1102.1, and 9:1102.2.
[46] La. C.C. Art. 657.
[47] La. C.C. Art. 658.
[48] *See Adams v. Grigsby*, 152 So.2d 619 (La. App. 2 Cir.1963).

the water used, would be inconsistent with both the prohibition against donating State-owned things of value and possibly, if such uses are in substantial amounts, the protections provided for in the public trust doctrine.

Probably the most significant shortcoming of Act 955 is its voluntary nature. The fact that water users can elect to submit to the CEAs envisioned by that law undermines both the public trust doctrine and La. Const. Art. VII, Sec. 14(A). Clearly, under La. Const. Art. VII, Sec. 14(A), the consumptive use of the State's running waters mandates payment of the value of that resource used to the State. In addition, because the CEAs developed pursuant to Act 955 require environmental impacts reviews of such uses to determine consistency with the public trust doctrine mandates, users opting out of such CEAs risk running afoul of the public trust doctrine as well as threatening the analyses undertaken for those who have submitted to the process.[49] It is difficult to say that there is a positive duty under the public trust doctrine, in the absence of clear adverse impacts to the State's resources, for the State to take action against someone. Act 955 certainly provides no penal provisions for failure to adhere to the law. Thus, the real stick with regard to the failure to comply with Act 955 is La. Const. Art. VII, Sec. 14(A). It is unfortunate that the environmental laws of Louisiana are not substantial enough to provide for a direct enforcement action or to provide for regulatory penalties and fines for the unauthorized use of the State's waters, but they currently do not. As was noted in another recent Attorney General Opinion on this subject, the State is left with, in the absence of clear evidence of harm to the environment, general conversion prohibitions in the Criminal Code to stop those who opt not to comply with Act 955.[50]

Finally, Act 955 is somewhat tenuous in its long-term protections of the State's surface waters. The law is to sunset on December 31, 2012. The general idea behind this sunset provision, as was alluded to in the legislative hearings on this bill, is that the law is a temporary provision that allows the use of surface waters to continue through the next regular session of the Louisiana Legislature.[51] In the interim, through HCR 1, the Legislature has charged the Louisiana Groundwater Resources Commission with the duty to conduct a comprehensive study of the State's ground and surface waters and their uses in an effort to determine what, if any, long-term regulation of these resources is appropriate.[52] It is hopeful that a more permanent solution to the regulation of the State's surface waters will arise from this study and will be incorporated into permanent legislation in 2012.

Conclusion

It is undeniable that the uses of Louisiana's surface waters have gone largely unchecked for more than 200 years. Although not the primary threat to this resource, the Haynesville Shale natural gas play has brought concerns about the overuse of such resources to the fore of the collective consciousness of the State and has mandated a review of what protections, if any, exist for this resource. Prior to Act 955, no specific protections of the State's surface waters existed by legislation. Even with the enactment of Act 955, as noted above, there are still substantial gaps in the protection of the State's surface waters. Accordingly, the Attorney General has had to resort

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[49] The latter point is in reference to the watershed-wide nature of the analyses currently being undertaken. If the analyses are based upon the ecological viability of the watershed based upon known uses, unknown uses (i.e., the uses of those not submitting to the review process) could undermine and invalidate all of the analyses.

[50] La. Atty. Gen. Op. No. 10-0173.

[51] The next regular session is not until 2012, as the 2011session is a fiscal only session.

[52] House Concurrent Resolution 1, Louisiana Legislature, Regular Legislative Session, 2010.

to the charges of the public trust doctrine to attempt to control surface water use in Louisiana. Unfortunately, due to the lack of penal provision in the Constitution and Act 955, State actors such as the Attorney General and local law enforcement are limited to using theft of State property laws for the unauthorized use of surface waters. In addition, much like the fact that Al Capone was sent to jail for tax evasion rather than for murder or for violation of the prohibition laws, those who use the State's waters without authorization would be liable (for now) only for the misappropriation of State things and not for the more direct problem of degradation and harm to the environment.