



**LOUISIANA STATE LAW INSTITUTE**

PAUL M. HEBERT LAW CENTER, ROOM W127

UNIVERSITY STATION

BATON ROUGE, LA 70803-1016

OFFICE OF  
THE DIRECTOR  
(225) 578-0200

FAX: (225) 578-0211

EMAIL: LAWINSTITUTE@LSLI.ORG

February 26, 2013

Senator John A. Alario, Jr.  
President of the Senate  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

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

**RE: SCR NO. 53 of 2012**

Dear Mr. President and Mr. Speaker:

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

Sincerely,

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

William E. Crawford  
Director

WEC/puc

cc: Senator Daniel Claitor

e-mail cc: David R. Poynter Legislative Research Library  
[drplibrary@legis.la.us](mailto:drplibrary@legis.la.us)

**LOUISIANA STATE LAW INSTITUTE**

**INTERIM REPORT IN RESPONSE TO S.C.R. 53 OF THE  
2012 REGULAR LEGISLATIVE SESSION**

**Groundwater and Surface Water Law**

Respectfully submitted by  
Dian Tooley-Knoblett, Reporter

2-25-13

# LOUISIANA STATE LAW INSTITUTE

## WATER LAW COMMITTEE

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Larry C. Hebert, Lafayette

Blake Hudson, Baton Rouge

Thomas E. Richard, Baton Rouge

Adam J. Swensek, New Orleans

Robert P. Thibeaux, New Orleans

James Wilkins, Baton Rouge

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Dian Tooley-Knoblett, Reporter

Lynette Roberson, Staff Attorney

Claire Popovich, Staff Attorney

**INTERIM REPORT TO THE LOUISIANA LEGISLATURE ON SENATE  
CONCURRENT RESOLUTION NO. 53 OF THE 2012 REGULAR SESSION:  
GROUNDWATER AND SURFACE WATER LAW**

**February 24, 2013**

Senate Concurrent Resolution No. 53 of the 2012 Regular Session of the Louisiana Legislature (SCR 53) requested the Louisiana State Law Institute “to study legal issues surrounding groundwater and surface water law and any needs for revision to current law.” Pursuant to this request, the Law Institute created a Water Law Committee, a study committee comprised of academicians, practitioners, judges, and environmental law specialists. The committee has also benefited from the participation of observers with expertise and interest in this area. This Interim Report will detail the progress of the committee’s work to date.

**SECTION 1. THE LEGISLATURE’S REQUEST**

The Water Law Committee’s first task was to study SCR 53 in order to understand fully what the legislature had requested to ensure that the Law Institute’s final report would be responsive to this request.

SCR 53 notes that, according to data collected by the U.S. Geological Survey for the years 2005 through 2010, groundwater withdrawals in Louisiana increased while surface water withdrawals decreased. SCR 53 then points out that Louisiana’s disparate legal regimes for groundwater and for surface water have yielded “various and often conflicting legal rules such as the rule of capture, absolute ownership, and riparian rights.” As explained in SCR 53, Louisiana law recognizes “running surface waters of the state...as public resources, owned by the state, and usually subject to a charge for consumption, with the exceptions of riparian owners and other uses such as agriculture, aquaculture, and municipal purposes.” By contrast, “groundwater,” when reduced to possession, is treated as privately owned and free of charge.”

SCR 53 explains that the legislature needs to “be fully informed as to the legal aspects of the withdrawal and sales of surface water and groundwater resources, including potential effects, consequences, impacts upon current state laws such as Civil Code Art. 667, and the necessity, if any, for revisions to Louisiana law.” In furtherance of this goal, and in accordance with the Louisiana Groundwater Resource Commission’s recommendation in its March 2012 Interim Report entitled “Managing Louisiana’s Groundwater Resources” (Groundwater Report), the legislature has requested that the Law Institute “research and explore the potential non-compensated consumption of surface water when used as an alternative to groundwater.”

Although committee members were in agreement as to the relative narrowness of the question posed to the Law Institute in SCR 53, it was also agreed that a holistic approach to potential legislative reform of Louisiana’s water laws was imperative. Water concerns are “grow[ing] in the national consciousness,” as noted in a recent article co-authored by committee

member Mark Davis.<sup>1</sup> On February 22, 2013, committee member James Crigler forwarded a link to a breaking news story reporting that Georgia residents are so thirsty for Tennessee water that the Georgia legislature has adopted a resolution seeking to have its border moved in order to access the Tennessee River.<sup>2</sup>

Moreover, last month the United States Supreme Court granted writs in a case<sup>3</sup> posing the question of whether congressional approval of an interstate compact incorporates that compact into federal law, thereby insulating signatories whose actions are consistent with that compact from a challenge of unconstitutionality under the dormant commerce clause.<sup>4</sup> The Supreme Court's ruling in this pending case could expose Louisiana to a similar dormant commerce clause challenge, especially with regard to the Sabine River Compact.<sup>5</sup>

On a broader scale, the ever-increasing importance of water rights impelled the committee to strive to craft recommendations for legislation that can withstand the uncertain challenges in the evolving area of water rights that will inevitably occur in the 21st century. As stated by committee members Mark Davis and James Wilkins in a recent law review article they co-authored:

Just as oil came to define much of the economic and social development in the twentieth century, water is increasingly seen as the defining resource of the twenty-first century. Whether or not water is “the new oil,” as some have claimed, it is clear that the availability of dependable supplies of fresh water is already transforming our economic and cultural landscapes. As the state's and the nation's growth, energy, and environmental priorities evolve, water is often the common denominator.<sup>6</sup>

Section 2 of this Interim Report will review some of the relevant statutory provisions governing surface water and groundwater along with the judicial opinions that have shaped the legal

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

<sup>2</sup> <http://fluentnews.com/s/28287258>.

<sup>3</sup> *Tarrant Reg'l Water Dist. v. Herrmann, et al.*, 2013 WL 49810 (U.S.), 80 USLW 3453, 81 USLW 3028 (Jan. 4, 2013). The Tenth Circuit Court of Appeals rejected the plaintiff's dormant commerce clause challenge. 656 F.3d 1222 (10th Cir. 2011) (this opinion is sometimes referred to as *Tarrant IV*). *Tarrant* is set for oral arguments on Tuesday, April 23, 2013. See § 3, *infra*.

<sup>4</sup> U.S. Const. Art. I, § 8, cl. 3.

<sup>5</sup> Ryan M. Seidemann, *Water and Power: The Sabine River Authority of Louisiana—A Review of Property Disputes, Hydropower, and Water Sales*, 25 TUL. ENVTL. L.J. 389, 408-11 (2012). See § 3, *infra*.

<sup>6</sup> Mark Davis and James Wilkins, *A Defining Resource: Louisiana's Place in the Emerging Water Economy*, 57 LOY. (N.O.) L. REV. 273, 275 (2011). [This article is cited (and a portion of the above excerpt is quoted) on page 100 of the Groundwater Report.]

regimes governing each.<sup>7</sup> Section 3 will explain in greater detail the current developments that prompted the committee to request an extension.

## SECTION 2. RELEVANT STATUTORY PROVISIONS GOVERNING SURFACE WATERS AND GROUNDWATER

### A. “SURFACE WATER”

Although SCR 53 uses the phrase “surface water,” the term used in the Civil Code is “running water.” Running water is classified in Article 450 as a public thing,<sup>8</sup> meaning that running waters are owned by the state in its capacity as a public person.<sup>9</sup> Although Article 450 also classifies “waters...of natural navigable water bodies” as a public thing,<sup>10</sup> the phrase running waters includes waters of natural navigable water bodies, so the term running water will be used for the remainder of this report.

As stated by the Louisiana Supreme Court in 1881, a public thing “is out of commerce. It is dedicated to public use, and held as a public trust, for public uses.”<sup>11</sup> Hence, as a public thing, running waters are “inalienable for so long as they are subject to, or needed for, public use.”<sup>12</sup>

From 1808 until 1979, the Civil Code classified running water as a common thing, which is “property [that] belongs to nobody, and which all men may freely use, conformably to the use

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<sup>7</sup> Among the many statutes, regulations, and documents reviewed by the committee that are not discussed in this Interim Report, a few of note should be mentioned. These include: first, the February 5, 2010 Guidance Memorandum on the “Management and Sale of State Surface Waters” issued to “All State Surface Water Managers” by the Office of the Attorney General and the Secretary of the Department of Natural Resources (Exhibit F in the Groundwater Report); second, Act 955 of the 2010 legislative session authorizing cooperative endeavor agreements between the Department of Natural Resources and water users, 2010 La. Acts, No. 955, *enacting* LA. R.S. 30:961 through 30:963 (as well as the 2012 amendments thereto, 2012 La. Acts, No. 261, § 1, eff. July 2, 2012); and third, the seven Attorney General opinions referenced on page 30 of the Groundwater Report.

<sup>8</sup> LA. CIV. CODE art. 450 ¶ 2, *enacted by* 1978 La. Acts, No. 728, § 1, eff. Jan. 1, 1979.

<sup>9</sup> LA. CIV. CODE art. 450 ¶ 1, *enacted by* 1978 La. Acts, No. 728, § 1, eff. Jan. 1, 1979.

<sup>10</sup> The Code provides: “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.” LA. CIV. CODE art. 450 ¶ 2, *enacted by* 1978 La. Acts, No. 728, § 1, eff. Jan. 1, 1979.

<sup>11</sup> *Kline v. Parish of Ascension*, 33 La. Ann. 652, 656 (1881), *quoted in* LA. CIV. CODE art. 450 revision comment (b).

<sup>12</sup> A.N. YIANNPOULOS, PROPERTY § 53, in 2 LOUISIANA CIVIL LAW TREATISE SERIES 98 (4th ed. 2001).

for which nature has intended them.”<sup>13</sup> Nevertheless, classification of running water as a common thing terminated in 1910 as a result of legislation declaring “[t]he waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof...to be the property of the state.”<sup>14</sup> This is why the 1979 revision of the law of property amended Article 450 by classifying running water as a public thing.

As noted in Section 1 of this report, SCR 53 requests that the Law Institute “research and explore the potential non-compensated consumption of surface water” and study “any needs for revision to current law.” Although the committee has completed neither its research nor its exploration of the permissibility of allowing non-compensated consumption of running waters, the committee has identified many of the important legal issues raised by the legislature’s request.

The first issue relative to running water is whether legislation authorizing the non-compensated consumption of running water would be valid under the principle of statutory construction, under which later enactments of the legislature impliedly repeal older inconsistent legislation. The argument in favor of an implied repeal would likely be based upon Article 450’s status as legislation, meaning it can and will be repealed by a later inconsistent expression of legislative will. Under this theory, if legislation were enacted which is inconsistent with the classification of running water as a public thing under Civil Code Article 450 (*i.e.*, a thing owned by the state in its capacity as a public person), the later enactment would result in the reclassification of running water as a private thing (*i.e.*, a thing owned by the state in its capacity as a private person).<sup>15</sup> Although there have many instances of implied repeal in Louisiana’s history, implied repeal is not favored. Moreover, this argument is vulnerable to the counterargument that such a construction would obliterate the *raison d’être* of the category of public things, the inalienability of which arises because the state holds such things in trust for public uses. The Louisiana Supreme Court in *Gulf Oil Corp. v. State Mineral Board*<sup>16</sup> is an important reminder of this principle.

Even if a court were to find that the legislature may validly reclassify running water as a private thing owned by the state in its capacity as a private person, another issue is whether legislation permitting the non-compensated consumption of running water would violate Louisiana’s constitutional prohibition against loaning, pledging, or donating state property.<sup>17</sup>

Assuming Louisiana’s judiciary were to find first, that the legislature may validly reclassify running water as a private thing owned by the state in its capacity as a private person, and second, that legislation authorizing the non-compensated consumption of running water does not violate Louisiana’s constitutional prohibition against donations of state property, there remains the critical issue of whether such legislation would violate the constitutional mandate

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<sup>13</sup> LA. CIV. CODE art. 453 (1870); LA. CIV. CODE art. 441 (1825); LA. DIGEST OF 1808 p. 93, art. 3.

<sup>14</sup> 1910 La. Acts, No. 258, *incorporated in 1950 into the Revised Statutes* as LA. R.S. 9:1101.

<sup>15</sup> LA. CIV. CODE art. 453, *enacted by* 1978 La. Acts, No. 728, § 1, eff. Jan. 1, 1979.

<sup>16</sup> 317 So. 2d 576 (La. 1975) (on rehearing).

<sup>17</sup> LA. CONST. Art. VII, § 14(A) (1974).

found in the natural resources Article of Louisiana's 1974 Constitution, Article IX, Section 1 ("the natural resources provision"), which provides:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.<sup>18</sup>

Professor Lee Hargrave, who served as coordinator of legal research for the Louisiana Constitutional Convention of 1973, has stated that the Natural Resources and Environment Committee charged with drafting this provision consciously chose language intended to provide a legislative mandate, thereby rejecting language which would have provided for judicial review.<sup>19</sup> He states: "[I]t should be clear that the high-sounding statement [referring to the first sentence of the natural resources provision] is a generalized goal, but that the legislature is the ultimate determinant of the exact nature of the rules to be adopted."<sup>20</sup>

In 1984, the Louisiana Supreme Court was called upon to interpret this constitutional provision in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*.<sup>21</sup> Although the decision focused upon whether the Louisiana Environmental Control Commission had acted reasonably in issuing permits authorizing the construction and operation of a hazardous waste disposal plant, the court did discuss the constitutional mandate imposed by this provision.

[T]he Natural Resources article of the 1974 Louisiana Constitution imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to implement fully this policy.<sup>22</sup>

The committee will continue to study the topics and issues discussed in this subsection.

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<sup>18</sup> LA. CONST. Art. IX, § 1 (1974).

<sup>19</sup> Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?*, 58 LA. L. REV. 389, 398 (1998).

<sup>20</sup> 58 LA. L. REV. at 400.

<sup>21</sup> 452 So. 2d 1152 (La. 1984).

<sup>22</sup> 452 So. 2d at 1156.



## B. RIPARIAN RIGHTS

Although running water is classified as a public thing owned by the state in its capacity as a public person, Louisiana's Civil Code since the Digest of 1808<sup>23</sup> has conferred certain rights to an owner of land that borders or is traversed by running water.<sup>24</sup> These rights, frequently referred to as "riparian rights," are found in the natural servitudes chapter of the predial servitudes title of Book II of the Civil Code.<sup>25</sup> Article 657, which applies to land bordering running water, 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."<sup>26</sup> Article 658 grants to "[t]he owner of an estate through which water runs, whether it originates there or passes from lands above [the right to] make use of [the water] while it runs over his lands. He cannot stop it or give it another direction and is bound to return it to its ordinary channel where it leaves his estate."<sup>27</sup>

Natural servitudes are one of three types of predial servitudes,<sup>28</sup> all three of which satisfy the codal definition of a predial servitude: "a charge on a servient estate for the benefit of a dominant estate. The two estates must belong to different owners."<sup>29</sup> Differences among the three types result from the manner in which the predial servitude is created. The Code provides that natural servitudes "arise from the natural situation of estates."<sup>30</sup> Although it is clear that the rights of an owner whose estate borders or is traversed by running water do arise from the "natural situation" of that estate, it is less clear that the riparian rights conferred to that estate by Article 657 meet the definition of a predial servitude. Article 658 could be said to meet the definition of a reciprocal predial servitude.<sup>31</sup> When an estate is traversed by water, that estate could be said to be a dominant estate insofar as it is conferred the right to make use of the water

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<sup>23</sup> Prior to 1978, these two provisions were combined as separate paragraphs of a single article. LA. DIGEST OF 1808, p. 128, art. 8; LA. CIV. CODE art. 657 (1825); LA. CIV. CODE art. 661 (1870).

<sup>24</sup> The current provisions are LA. CIV. CODE arts. 657 and 658, *enacted by* 1977 La. Acts, No. 514, § 1, eff. Jan. 1, 1978.

<sup>25</sup> Chapter 2 ("Natural Servitudes") of Title IV ("Predial Servitudes") of Book II ("Things and the Different Modifications of Ownership") of the Louisiana Civil Code, consists of LA. CIV. CODE arts. 655 through 658.

<sup>26</sup> Although this provision has been in the Code since the Digest of 1808, LA. DIGEST OF 1808, p. 128, art. 8 ¶ 1, the phrase "or for other purposes" was added in the 1825 Code. LA. CIV. CODE art. 657 ¶ 1 (1825).

<sup>27</sup> LA. CIV. CODE art. 658. The original version of this provision had stated: "He through whose estate this water runs, may make use of it in the space which it runs over, but he is bound to return it to its ordinary channel when it leaves his estate." LA. DIGEST OF 1808, p. 128, art. 8 ¶ 2. Two phrases were added in the 1825 Code: "whether it originates there or passes from lands above" and "[he] cannot stop nor give it another direction." LA. CIV. CODE art. 657 ¶ 2 (1825).

<sup>28</sup> LA. CIV. CODE art. 654.

<sup>29</sup> LA. CIV. CODE art. 646.

<sup>30</sup> LA. CIV. CODE art. 654.

<sup>31</sup> LA. CIV. CODE art. 725.

and a servient estate (owing a duty the estates downstream) insofar as it is required to return the water to its ordinary channel.

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

The nature of riparian rights is a disputed matter. It is clear that a riparian does not own the running water and that, despite the language of the Civil Code, the right to take water is not a natural servitude. The preferable view is that riparian rights are *sui generis* real rights, part and parcel of the ownership of an estate fronting on or traversed by running water.<sup>32</sup>

An additional provision that is relevant to the present discussion is Revised Statutes 38:218(A), which provides:

No person diverting or impeding the course of water from a natural drain shall fail to return the water to its natural course before it leaves his estate without any undue retardation of the flow of water outside of his enclosure thereby injuring an adjacent estate.<sup>33</sup>

The committee will continue to study the topics and issues discussed in this subsection.

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<sup>32</sup> A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 22, in 4 LOUISIANA CIVIL LAW TREATISE SERIES 77 (4th ed. 2004).

<sup>33</sup> 1906 La. Acts, No. 108, § 1, *incorporated in 1950 into the Revised Statutes as* LA. R.S. 38:218. Amended by 2010 La. Acts, No. 233, § 1; 2012 La. Acts, No. 601, § 1, eff. June 7, 2012, *and redesignated as* LA. R.S. 38:218(A).

## C. GROUNDWATER

This subsection will take an historical approach to Louisiana's development of groundwater law. One reason for utilizing this type of approach is that there has been no Civil Code provision addressing rights to groundwater since the articles in the Digest of 1808 regulating the rights and duties of an owner to a spring upon his estate were eliminated in the 1825 Code.<sup>34</sup> The Louisiana judiciary to date has not extended to groundwater the provisions governing riparian rights described in the previous subsection. The question was squarely raised in one court of appeal case, but the appellate court refused to extend these provisions by analogy to groundwater.<sup>35</sup>

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<sup>34</sup> The Digest of 1808 contained three articles, which provided:

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

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

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

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

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

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

Moreau-Lislet's revision note explains the reasons for eliminating these three provisions: We have thought best to suppress these three articles by which it was permitted to the owner who has a spring on his estate, may dispose of its waters under certain modifications at his pleasure. We have thought it was for the public interest to establish, as we have done in the following article [referring to the provision which became current article 658], that the owner shall be bound to keep the water in its ordinary course at the place where it leaves his estate, whether the spring be on his land, or whether the water comes from above his own.

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

<sup>35</sup> In *Adams v. Grigsby*, 152 So. 2d 619 (La. App. 2d Cir.), *cert. denied* 244 La. 662, 153 So. 2d 880 (1963), which is discussed in the text later in this subsection, the court rejected plaintiff's request by stating:

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

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

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

The owner may make works on above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.<sup>36</sup>

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

He may construct below the soil all manner of works, digging as deep as he deems convenient, and draw from the holes dug in the ground, all the benefits which may accrue, under such modifications as may result from the regulations of the police.<sup>37</sup>

Article 490 and its predecessors have all recognized that a landowner's general right to do as he pleases upon his estate is limited by law and by the rights of others.<sup>38</sup> One such limitation is Article 667, which creates what is sometimes referred to as "obligations of visinage."<sup>39</sup> In the famous 1919 case of *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*,<sup>40</sup> esteemed Justice Provosty made the following comment about the pre-revision version of Article 490 in the context of a discussion of Article 667:

The provision of [A]rticle 667, that the owner may not make any work on his property "which may be the cause of any damage to" his neighbor is found under

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152 So. at 621-22.

<sup>36</sup> LA. CIV. CODE art. 490, enacted by 1979 La. Acts, No. 180, § 1, eff. Jan. 1, 1980.

<sup>37</sup> LA. DIGEST OF 1808, p. 104, art. 9 ¶ 3. Two changes were made to this paragraph in the 1825 Code. First, the phrase "the holes dug in the ground" was replaced by the word "thence"; and second, the phrase "regulations of the police" was expanded to "laws and regulations concerning mines, and the laws and regulations of the police." LA. CIV. CODE art. 497 ¶ 3 (1825). Moreau-Lislet's revision note states: "The corrections in this article relate to *mines*, which are not mentioned in our Code. We have added to the words '*regulations of the police*' the word *laws*, because *they* may relate to these matters." 1 La. Legal Archives, *Projet of the Civil Code of 1825*, p. 46 (Dainow ed. 1937).

<sup>38</sup> Although the phrase "rights of others" was added in 1980, it could be said that it is the law which permits the rights of others to constitute a restraint upon the landowner's rights.

<sup>39</sup> See, e.g., A.N. Yiannopoulos, *Violations of the Obligations of Vicinage: Remedies Under Articles 667 and 669*, 34 LA. L. REV. 195 (1974).

<sup>40</sup> 145 La. 233, 82 So. 206 (1919).

the title “Of Servitudes,” and hence apparently is one of the exceptions to which [A]rticle [490] refers, and hence would seem to be a limitation upon [A]rticle [490].<sup>41</sup>

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

In *Higgins*, which is considered to be the fountainhead of Louisiana’s abuse of rights doctrine,<sup>42</sup> the court required a mineral lessee to plug and abandon its nonproductive well because it markedly reduced production from plaintiff’s producing well on an adjacent tract. Although the opinion is based upon the doctrine of abuse of rights, the court discussed the landowners’ rights and duties relative to the subsurface. The court relied heavily upon French commentators, especially Laurent. The following excerpt from his treatise was quoted by the court:

“An owner constructing works on his land diminishes the volume of a spring the benefit of which his neighbor has been having. **He is within his right. If he thereby causes an injury to his neighbor, the latter cannot complain; for he has not the absolute ownership of the waters.** But, if it has been by malice that the works have been undertaken, for the sole purpose of injuring the neighbor, we have no longer the exercise of a right, but spitefulness, and he who abuses malignantly of his right ought to repair the damage he causes.”<sup>43</sup>

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

**The analogy between the subterranean oil and subterranean or percolating waters is, we believe, near complete,** and defendant cites the case of *Forbell v. City of N. Y.*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666, where the operation of a pump was enjoined because it had the effect of drying up the surface of the land to the great damage of the neighbor. That decision would be in point if the surface of defendant’s land was being injured by plaintiff’s pump. True, the court reasoned the case somewhat differently; but that was the true ground of the decision, for the court admitted that, so far as the water was concerned, the complainant had no ownership of it, and, of course, if so, the taking of it, whether by means of a pump or otherwise, invaded no right of the complainant, and therefore furnished no ground of action. But invasion of the

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<sup>41</sup> 145 La. at 235, 82 So. at 207.

<sup>42</sup> A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New*, 54 LA. L. REV. 1173, 1176 (1994) (calling *Higgins* a “landmark opinion”).

<sup>43</sup> 145 La. at 240-41, 82 So. at 209, *quoting* LAURENT, DE LA PROPRIÉTÉ, vol. 6, p. No. 140 (emphasis added).

surface did, because the complainant had the right to use and enjoy the surface uninterfered with by the pump of the defendant city. In a pumping case where no surface right of the neighbor was being interfered with, but only the percolating water was being taken, the Supreme Court of Mississippi denied an injunction, although the complainant's supply of water was being thereby reduced. Board of Supervisors of Clarke County v. Miss. Lumber Co., 80 Miss. 535, 31 South. 905. In the civil law the right to drain off by means of a deeper well the subterranean water of the neighbor is well settled, and apparently in the common law too.<sup>44</sup>

Forty-four years later, the Second Circuit Court of Appeal decided *Adams v. Grigsby*,<sup>45</sup> a case in which thirteen landowners (plaintiffs) sought an injunction to prevent an oil operator (defendant) from using water obtained from the fresh water sands of the Wilcox formation for its secondary recovery operations. The landowners, who had drilled water wells to access fresh water from this formation for their personal needs, argued that the defendant's withdrawals were depleting the subterranean fresh water reservoir thereby damaging plaintiffs. Plaintiffs further alleged that defendant's withdrawal of fresh water was "wasteful and unnecessary in that the fresh water is being pumped into the earth from which it cannot be recovered and there are available to defendant at deeper levels salt water sands sufficient to meet the needs of defendant."<sup>46</sup>

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

We concede that plaintiffs in the instant case might be entitled to relief under certain circumstances; for example, if defendant by his actions caused the pollution of plaintiffs' water supply, rendering it unfit for their use, or if he simply opened his own well and allowed it to pour out the water as waste without benefit to himself. However, we reiterate our conviction that the issue of ownership is the crux of this case. Neither plaintiffs nor defendant own the water percolating into or running through the Wilcox sand which lies beneath their respective properties, but only so much thereof as they withdraw by means of their respective wells. Quite obviously, as between the parties, the amount of water withdrawn, and therefore owned, may be more or less dependent upon the need and use thereof. **In the absence of statutory regulation, apportionment or allocation of the amount of water which may be withdrawn from a common reservoir, we conclude that courts are without authority to establish such nature of regulation by judicial pronouncement.** It follows that the coincidental damages suffered by plaintiffs must be regarded as *damnum absque injuria*.<sup>47</sup>

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<sup>44</sup> 145 La. at 246-47, 82 So. at 211 (emphasis added).

<sup>45</sup> 152 So. 2d 619 (La. App. 2d Cir.), cert. denied 244 La. 662, 153 So. 2d 880 (1963) (in which the supreme court stated: "Writ refused. The judgment is correct.")

<sup>46</sup> 152 So. 2d at 621.

<sup>47</sup> 152 So. 2d at 624 (emphasis added).

On January 1, 1975, almost twelve years after *Adams* was decided, Louisiana's Mineral Code took effect, Article 4 of which provides:

The provisions of this Code are applicable to all forms of minerals, including oil and gas. They are also applicable to rights to explore for or mine or remove from land the soil itself, gravel, shells, **subterranean water**, or other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land.<sup>48</sup>

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

Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.<sup>49</sup>

Article 8 provides:

A landowner may use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals, provided it is not prohibited by law. He may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another.<sup>50</sup>

*Adams* is cited approvingly in the Reporter's comment to Article 8.<sup>51</sup> It appears that, as of January 1, 1975, groundwater rights are regulated by the Mineral Code.

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<sup>48</sup> LA. R.S. 31:4, *enacted by* 1974 La. Acts, No. 50, § 1, eff. Jan. 1, 1975 (emphasis added).

<sup>49</sup> LA. R.S. 31:6, *enacted by* 1974 La. Acts, No. 50, § 1, eff. Jan. 1, 1975.

<sup>50</sup> LA. R.S. 31:8, *enacted by* 1974 La. Acts, No. 50, § 1, eff. Jan. 1, 1975.

<sup>51</sup> Since Louisiana had no Mineral Code prior to 1975, the Reporter's comments explain the sources of the provisions. The first paragraph of the comment to article 8 states:

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

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

Landowners and others with rights in a common reservoir or deposit of minerals have correlative rights and duties with respect to one another in the development and production of the common source of minerals.<sup>52</sup>

The “correlative rights and duties of landowners with rights in a common reservoir” described in Mineral Code Article 9 echoes the “obligations of visinage” found in Article 667. Overall, reported decisions applying the Mineral Code to groundwater are rare, although a handful of decisions rendered after January 1, 1975 have cited *Adams*. The committee will continue to study the topics and issues discussed in this subsection.

Two interesting facts warrant mention. First, the author of the *Adams* decision was Second Circuit Court of Appeal Judge George W. Hardy, Jr., whose son George W. Hardy, III was the Reporter of the Mineral Code project. Second, in a 1972 law review article discussing the highlights of the pending Mineral Code project, Mr. Hardy (son not father—dad died in 1967) devoted a paragraph to water, in which he stated:

As noted in the comment following Recommendation 2, which defines “minerals,” **ground and surface water have been excluded from the ambit of the recommendations because the considerations governing water use and water rights are quite different from those governing mineral law proper.** Current efforts are underway on other fronts to secure legislation concerning water in Louisiana. The exclusion of water from coverage by the proposed mineral code would not, however, harm the present provisions of the Civil Code dealing with rights to surface water, or the jurisprudence applying the nonownership concept to ground water.<sup>53</sup>

Prior to reading Mr. Hardy’s article, the Reporter attempted unsuccessfully to locate the Law Institute’s files on the Mineral Code for general background information. A more diligent attempt to find the files will be made by the Reporter in order to determine what prompted this important policy reversal relative to groundwater.

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(right to the full and free use of subterranean water for secondary recovery operations sustained).

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

<sup>52</sup> LA. R.S. 31:9, enacted by 1974 La. Acts, No. 50, § 1, eff. Jan. 1, 1975.

<sup>53</sup> George W. Hardy, III, *Highlights of the Mineral Code Recommendations: A Guide to the More Important Changes and Elaborations*, 32 LA. L. REV. 542, 546 (1972) (emphasis added).



### SECTION 3. CURRENT DEVELOPMENTS

Two recent developments affect the committee's study. The first is a Sea Grant award entitled "Planning for Water," for which committee member James Wilkins is the principal investigator and committee member Mark Davis is the co-principal investigator. Pursuant to this grant, a survey of Louisiana water law will be conducted as well as a comparative analysis of water law in selected states. The results yielded by the studies funded by this grant will undoubtedly be of immeasurable value to the committee as it progresses in its examination of Louisiana water law. The committee has already assembled 93 pages of relevant Louisiana legislation, but has not had an opportunity to explore what other states are doing (one of the tasks militated by the committee's holistic approach). While the committee will not rely entirely upon the findings of the Sea Grant studies, it will be useful to coordinate the committee's work with that of the Sea Grant team.

The second development is the United States Supreme Court's granting of writs in *Tarrant Regional Water District v. Herrmann*<sup>54</sup> on January 4, 2013. As noted in Section 1 of this Interim Report, the issue pending before the Supreme Court is whether congressional approval of an interstate compact incorporates that compact into federal law, thereby insulating signatories (whose actions are consistent with that compact) from a challenge pursuant to the dormant commerce clause. The Tenth Circuit Court of Appeals held that it did.<sup>55</sup> Finding that the "the congressional grants of authority in the Red River Compact were intended to be 'protectionist' in nature as to each signatory state's share of the Red River,"<sup>56</sup> the Tenth Circuit upheld Oklahoma's legislation placing restrictions on out-of-state water sales. The court found no merit in Tarrant's claim that the Oklahoma statutes were unconstitutional under the dormant commerce clause irrespective of the fact that the Red River Compact had been approved by Congress thereby incorporating it into federal law.

In a recent law review article, Mr. Ryan M. Seidemann, Section Chief of the Lands and Natural Resources Section, Civil Division, Louisiana Department of Justice, first analyzed the Tenth Circuit decision in *Tarrant IV*, and then compared the Red River Compact with the Sabine River Compact. He concluded: "[D]espite the apparent differences in complexity between the two compacts, they are largely the same for the purposes of this comparison."<sup>57</sup> If the Supreme Court affirms the Tenth Circuit's opinion in *Tarrant IV*, this is good news for Louisiana. By contrast, it is uncertain at present what the impact will be should the Supreme Court reverse the Tenth Circuit in *Tarrant IV*. With oral arguments set for Tuesday, April 23, 2013, the court's decision *Tarrant* is still months away.

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<sup>54</sup> 2013 WL 49810 (U.S.), 80 USLW 3453, 81 USLW 3028 (Jan. 4, 2013).

<sup>55</sup> *Tarrant Regional Water Dist. V. Herrmann*, 656 F.3d 1222 (10th Cir. 2011) (sometimes referred to as "*Tarrant IV*").

<sup>56</sup> Ryan M. Seidemann, *Water and Power: The Sabine River Authority of Louisiana—A Review of Property Disputes, Hydropower, and Water Sales*, 25 TUL. ENVTL. L.J. 389, 407 (2012).

<sup>57</sup> Ryan M. Seidemann, *Water and Power: The Sabine River Authority of Louisiana—A Review of Property Disputes, Hydropower, and Water Sales*, 25 TUL. ENVTL. L.J. 389, 409 (2012).

In conclusion, the committee will continue its work in order to consider all of the issues highlighted in this Interim Report. As noted earlier in this section, the committee has expressed interest in examining the ways in which other states treat surface water and groundwater, with a view toward providing the legislature a comprehensive report.

Respectfully submitted,

Dian Tooley-Knoblett, Reporter, Water Law Committee

SENATE CONCURRENT RESOLUTION NO. 53

BY SENATOR CLAITOR

A CONCURRENT RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

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PRESIDENT OF THE SENATE

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SPEAKER OF THE HOUSE OF REPRESENTATIVES