

A Toe in the Water: A Primer on Louisiana Riparian Law and Emerging Issues

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Louisiana has a long and complex relationship with water, one that figures to get more interesting and complex in the years ahead. Culturally and economically, water has shaped Louisiana in powerful and obvious ways. Legally, the relationship has been more obscure, defined more by specific uses and periodic crises that command great attention, than by a systematic approach to management. Louisiana is hardly unique in this regard; indeed this has been the general approach that “wet” eastern and southern states have taken to water management and law. As a result, water law as a discipline and area of practice has not really developed here. But it likely will soon. Indeed it is already changing as members of the mineral law bar can attest.

The state and bar are increasingly facing a future in which water, even in Louisiana, is a scarce resource that demands a well thought out and integrated approach to its stewardship. Truth be told, that future is here. The need to purposefully balance navigation, flood control, environmental, agricultural, industrial and drinking water supplies is already pressing and becoming more so. If things were not complicated enough, regional and interstate water needs are also growing as are energy driven water uses. Louisiana will soon find that if it does not make plans for its water, then someone else will. This is a very different world from the one that saw Louisiana’s current water laws take shape. Louisiana has not been unaware of this changing environment and has taken some steps to adapt but it is likely those are just the opening acts of what promises to be an extremely compelling drama.

Before proceeding a caveat is in order. This paper is not intended to be a comprehensive treatment of either Louisiana water or emerging issues. That is almost certainly needed, is beyond the scope of what time and space allow here. Rather this paper should be seen as a reconnaissance of key elements of the law and select issues that are likely to command attention in the coming.

**1. What is Water Law?** Traditionally the term “water law” has described the body of law governing the use and control of fresh water. By and large these were matters of state law and that were originally focused on surface waters. To the extent groundwater was an issue, it was considered a distinct and different resource governed by different laws and policies. Needless to say, the field has evolved significantly over the past century and a half and now encompasses surface waters, ground water, environmental mandates, interstate and international interests, public and private rights, and a growing role for the federal government. It has been shaped not so much by logic as by necessity.

In the wetter eastern half of the United States, the central tenet of water law is “riparianism”, a common law concept rooted in civil law traditions. Under riparian law, the right to access and use water is a function of owning land adjacent to the waterbody.

In the drier western half of the nation with its vast tracts of federal lands, the central tenet of water law is the doctrine of “prior appropriation” which creates prioritized private rights of water use based on diverting water and putting it to some reasonable use. In these states water law has developed into a well established set of laws and procedures and is an active area of legal practice, driven in large part by the competition for an always scarce resource by a growing population and economy. The adage often attributed to Mark Twain, that, “Whiskey is for drinking and water is for fighting over” was born of this experience.

No two states have exactly the same system of water law, a fact that makes it perhaps one of our most American and chaotic areas of law. The boundaries and dimensions of water law continue to change as states contend with growing demand and shifting supplies of fresh water. If there is a defining trend in water law and management it is that we are entering an era of deepening water scarcity, both in the chronically dry west and the traditionally water rich east and south. This is a condition that our nation’s collection of water laws is poorly equipped to deal with and one that Louisiana would be wise to anticipate and prepare for. More on that later.

**2. Water Law in Louisiana.** Louisiana water law, like that of most water rich states, is more of a hodgepodge than a systemic approach to ordering and managing water resources. It has been shaped by the abundance of our waters rather than an experience of scarcity. Accordingly, our jurisprudence has focused on drainage, the ownership of banks and water bottoms, and rights of access rather than questions of who can divert or pump water and where and how it can be used.

True to its wet-state roots, Louisiana law treats surface waters and ground water as completely distinct from one another. Truer yet is the pervasive sense that under Louisiana law water is more of an inconvenience than an asset. It is hard to conceive that these regimes and guiding policies will endure in the face of growing regional and local demand, changing climates and the growing role that freshwater management will have to play if coastal Louisiana's wetlands –and their associated communities, cultures, and economies— are to survive and thrive. The long and short of it is that even if Louisiana does not make the stewardship of its waters a central policy and legal priority someone else will.

**a. Surface Waters and Louisiana Riparianism.** By and large Louisiana law falls in line with the riparian traditions that underlie most of the surface water laws in the eastern half of the United States. Louisiana's civil code traditions combined with the paucity of jurisprudence have nurtured some confusion and speculation over just how to characterize Louisiana law on the subject of surface waters. The nagging question seems to be if and how the common law concept of riparianism could come to be expressed in Louisiana's civil code and statutes. Fortunately we need not dwell on this for several reasons. First, as we shall see, the governing Code articles and the applicable (if sparse) are clearly supportive of a riparian approach. Second, it is increasingly clear that riparian law as it evolved in the nineteenth century borrowed more from the Code Napoleon than any ancient English legal traditions<sup>1</sup>. Accordingly, it should hardly be surprising that Louisiana law is consistent with a doctrine that shares a civil code heritage. This also means that the experience of other riparian states with a richer jurisprudential history can be instructive for Louisiana.

**i. Riparianism in General.** The essence of riparianism is the right of a landowner adjacent to a flowing stream to use the waters of that stream for certain purposes. At one time, those uses were restricted to subsistence purposes such as cooking, drinking, and the watering of stock. Water could not be used off the riparian tract or in a different hydrologic basin. Commercial uses were forbidden and the "natural flow" of the stream (its fundamental quality and quantity) could not be degraded. These riparian rights did not

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<sup>1</sup> A. Dan Tarlock, "Law of Water Rights and Resources", Section 3.6 (West 2002).

create a property interest in the water itself but rather a right of use that is appurtenant to the ownership of riparian lands. This right was not created by use nor could it be lost by nonuse.

Needless to say the “natural flow” doctrine was incompatible with the industrialization and growth our nation. Something had to change and it was riparianism that changed, ushering in the development of the doctrine of reasonable use. In essence, the resulting law of riparian rights allowed for traditional 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<sup>2</sup>. Hardly a perfect approach (the definition of what is reasonable is an after the fact determination with little predictive value) but enough to allow for the commercial exploitation of flowing streams and the flowering of American industry and commerce. Fair and good, but is this the law in Louisiana? For the most part yes though the exact scope and extent remains subject to debate.

**ii. Louisiana Riparianism.** The foundation of Louisiana riparianism is found in Louisiana Civil Code Articles 657 and 658, which state:

*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. (Article 657).*

*The owner of an estate through which water runs, whether it originates there or passes from land 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. (Article 658).*

Plainly these Articles describe a relationship between riparian lands and the use of the running waters that pass through or next to those lands. Just as plain is the fact that there are some limits on how those waters may be used<sup>3</sup>. The requirement that the waters be returned to the channel (in the case of waters traversing an estate) following its use implies a restriction on consumptive uses and on out of basin transfers. Both of those restrictions are entirely in keeping with American riparian law traditions, a conclusion borne out by jurisprudence. The leading, and pretty much only, case on this point is the 1925 case

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<sup>2</sup> J.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, page 12 (2002).

<sup>3</sup> In the past there was a scholarly debate over whether Articles 657 and 658 applied only to running but nonnavigable waters. See, “Legal and Institutional Analysis of Louisiana’s Water Laws with Relationship to the Water Laws of Others States and the Federal Government”, Louisiana Department of Transportation and Development, Office of Public Works, Vol. 1, pages 4 and 5 (1983). The prevailing view is that the Code articles apply to both navigable and nonnavigable running waters. This paper assumes that view to be correct.

of *Jackson v. Walton*<sup>4</sup> which involved a dispute between a riparian land owner and a nonriparian who, under contract with a second riparian, planned to remove water from Hotchkiss Bayou for irrigation purposes. In dissolving an injunction against the defendant irrigator the Court found that the plaintiff had not demonstrated an actual or probable injury to its rights or lands.

This case is instructive for several reasons:

- First, it specifically reserved plaintiff's right to renew the action should necessity (i.e. actual or impending injury) arise.
- Second, it is clear that irrigation and one would assume other commercial uses are not per se unreasonable and will be allowed to the extent they do not produce or threaten
- Third, the defendant's right was derivative of a riparian's rights and not couched in terms of a more general right to take and use water. This is directly in keeping with traditional riparian law.
- Finally, the Court was careful to note that the irrigator's property was adjacent to another riparian's land and that the pumped water would drain back to the Bayou. This fact would seem to bring the case within the bounds of usage allowed by Article 658.

Of course, one should be careful not to read too much into this case, particularly since it does not reference any codal sections; but as far as it goes it certainly suggests that Louisiana law is in step with mainstream riparian law thinking, a conclusion reached by a number of commentators as well<sup>5</sup>. If that is the case, such emerging water uses as the use of surface waters for oil and gas "fracking" (a process that injects pressured water into rock formations in order to release oil and natural gas) might be inconsistent with Louisiana riparian law. Presently, the State is encouraging the oil and gas industry to tap surface waters such as the Red River for fracking water in Northwest Louisiana in order to relieve pressure on aquifers.<sup>6</sup> This sort of policy could have far reaching implications. If large scale out of basin consumptive uses of surface water are allowable—even encouraged—for one purpose it may be impossible to restrict it for others, such as interbasin or interstate freshwater diversions. . This is not an academic point. Texas, for example, has had plans since at least the 1960s to divert up to 15 million acre feet of the Mississippi River per year

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<sup>4</sup> 2 La. App. 53 (1925).

<sup>5</sup> E.g., J. Klebba, "Water Rights and Water Policy in Louisiana: Laissez Faire Riparianism, Market Based Approaches, or a New Managerialism?", 53 La. L. Rev 1779 (1993) and J.W. Dellapenna, *supra*. In the latter article Professor Dellapenna makes the interesting observation, that despite the states distinctive legal history, "Louisiana remains closer to the classic common law of water rights for both surface and groundwater than any of the common law states in the region." (Dellapenna, *supra*, at page 77.)

<sup>6</sup> Statement of James Welch, Commission of Conservation, Louisiana Department of Natural Resources to Caddo Parish Commission, March 5, 2009. According to Commissioner Welch, millions of gallons water may be required for each oil and gas well.

to augment their fresh water supplies<sup>7</sup>. There is no indication that Louisiana is thinking about either the application of riparian law to, or the implications of, allowing consumptive nonriparian uses of its surface waters. At the least it seems that a public interest review would be in order as called for by Article 9 of the Louisiana Constitution and the Louisiana Supreme Court's decision in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*<sup>8</sup>.

Knowing that Louisiana grants certain rights to riparians is one thing, understanding the nature of those rights is another. This is not as simple a matter as one might suspect. There are two prevailing schools of thought, one being that the rights created by Articles 657 and 658 are natural servitudes and hence a form of predial servitude<sup>9</sup> and the other treating those rights as *sui generis* real rights linked to the ownership of the riparian land<sup>10</sup>. This confusion is attributable, on the one hand, in part to the Civil Code's silence as to the nature and existence of any *sui generis* riparian rights. On the other hand, the requirement that predial servitudes involve two estates, one dominant and one servient<sup>11</sup>, is an awkward fit for the rights created in Articles 657 and 658. After all what is the dominant estate and what is the servient estate?<sup>12</sup> In practical terms it may not matter much which view prevails though Professor Klebba has suggested that if the riparian rights are not natural predial servitudes the possibility may remain that they are subject to prescription<sup>13</sup>.

Central to the creation of riparian rights and certain rights of public use is the requirement that the water in question be *running water*. It is clear that lands adjacent to nonrunning waters do not enjoy the rights of use provided in Articles 657 and 658<sup>14</sup>. It is also clear that public rights of usage of water as a "public thing" are tied to its character as running water<sup>15</sup>. But what are running waters? The answer is not as clear as one might expect.

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<sup>7</sup> The Texas Water Plan, Summary, Texas Water Development Board, page 12 (1968).

<sup>8</sup> 452 So.2d 1152 (La 1984).

<sup>9</sup> So. 2d See Klebba supra at page 1792.

<sup>10</sup> Id and A.N. Yiannopoulos, Louisiana Civil Law Treatise, Chapter 2, Section 22.

<sup>11</sup> Civil Code Article 646.

<sup>12</sup> Professor Klebba acknowledges this dilemma and suggests that the riparian rights are in part a reciprocal servitude and in part a charge on the upstream estate for the benefit of downstream estates. See Klebba, supra, footnote 57.

<sup>13</sup> The case of *Jackson v. Walton* mentioned earlier, raises what might be an interesting related question. Civil Code Article 650 restricts the alienation, leasing or encumbering of a predial servitude separately from the dominant estate. Yet somehow the nonriparian defendant in this case acquired by contract the right to draw water from a flowing stream. How this fits with either the notion of a predial servitude or a *sui generis* right was not discussed.

<sup>14</sup> See *Verzwyvelt v. Armstrong-Ratteree*, 463 So.2d 979, Ct App 3<sup>rd</sup> Cir (1985).

<sup>15</sup> Civil Code Articles 450 and 452. This aspect of public usage is unrelated to the matter of whether the waters are navigable or not.

First, it is important to make clear that the concept of running waters is distinct from the concept of navigability<sup>16</sup>. It is easy to conflate these two issues, and many of the cases relevant to our consideration have arisen in the context of navigability disputes, but they need to be appreciated as being different.

Second, there is no clear definition of “running water” in Louisiana law. What is clear from jurisprudence is that it is a question of fact and that it has been interpreted to exclude sloughs or swamps with no directional current and that are fed only by rain or periodic overflow<sup>17</sup>. This largely comports with the general common law rule which states that riparian rights attach to all nondiffuse natural waters. Basically, that means storm and floodwaters don’t support riparian rights but streams, bayous, and rivers do<sup>18</sup>. It is not the name of the water course (e.g. Lake X or Y River) that is controlling but rather its character. Under that general rule, natural waterways with a channel, bed, banks, directional flow and a determinable source of supply are riparian.<sup>19</sup>

**ii. Uses of Riparian Waters.** No one, of course, argues about the nature of streams or their adjacent lands in the abstract. They fight over the right to control the use of and access to those waters, their bottoms and banks. The uses of running waters vary depending on whether the waters are also navigable. Historically, most of these cases involved boundary disputes, mineral rights, navigation rights and the extent of public hunting and fishing rights. Those issues are far more involved with the rights associated with whether a given waterway is navigable in a legal sense. Fascinating and frustrating as those navigability oriented rights and disputes are they are not the focus of this paper.

Rather, we will concentrate on the rights of riparian land owners and others to withdraw or divert waters from running waters, not that this is completely divorced from their navigable status. A literal reading of the Civil Code would lead one to conclude that riparian landowners have special, perhaps exclusive rights to use the adjacent waters. Articles 657 and 658 certainly confer specific rights of use that when paired with the explicit requirement in Article 658 to return any used waters to the channel seem to echo the common law requirement that riparian uses be restricted to on tract, in basin applications.<sup>20</sup>

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<sup>16</sup> See footnote 3 supra.

<sup>17</sup> *Hall v Board of Commissioners of Bossier Levee District*, 35 So. 976 (La 1904). Code Section 652’s requirement that diverted waters be returned to their channel certainly suggests that a defined channel is a requirement.

<sup>18</sup> In most riparian law states the concept of riparianism has been extended to all surface waters other than diffuse waters. See, e.g. Sax, Thompson, et al, *Legal Control of Water Resources*, Fourth Edition, page 28 (West 2006). This would include standing waters such as lakes and coastal waters. Traditionally, those latter areas would have been covered by the doctrine of littoralism. Riparian doctrine and littoral doctrine have effectively been merged in most of those states. That is plainly not the case in Louisiana. See, e.g. *Verzwyvelt v. Armstrong-Ratteree*, supra.

<sup>19</sup> Tarlock, supra, at Section 3.22.

<sup>20</sup> See Sax Thompson et.al. supra pages 28-37. It is also interesting to note that Article 657, dealing with the rights of owners whose estates border running waters, expressly grants the right to use the water “as it runs”

Jurisprudence and commentary suggest, as noted earlier, that Louisiana follows the rule of reasonable use by riparians. Under this approach any use would be reasonable that does not (a) injure or threaten to injure the rights of another riparian or the public, (b) exhaust the supply of the water, (c) obstruct the flow of the water, or (d) make the water unsuitable for use by other riparians or the public.<sup>21</sup>

But are these exclusive rights? Are they limited to on-tract/in-basin uses? Here the sledding gets rougher.

Clearly nonriparian withdrawals and usages have been allowed in Louisiana, and indeed are commonplace. Irrigation districts and municipal water systems are major users of Louisiana's flowing surface waters. Most, if not all, of these however have been done under some color of state law, though there is no recorded instance of those waters being actually expropriated<sup>22</sup>. It has been surmised that this is because the withdrawals did not implicate the usage of any other users<sup>23</sup>. In the case of *Jackson v. Walton*, a nongovernmental nonriparian was clearly allowed to withdraw water to irrigate his lands under a contract with a riparian owner. But that case hardly stands for the proposition that nonriparian uses are generally allowed. To be sure they must still be reasonable and uninjurious but the court in that case carefully noted the in-basin nature of the usage and that the withdrawn waters would drain back to the originating stream. Perhaps the most vexing aspect of the case (at least to potential nonriparian users) is the fact that the Court did not discuss in any fashion the Civil Code provisions restricting the diversion of water (Article 658) or the alienation of predial servitudes (Article 650). It is probably not safe to assume that those issues were pled, argued or considered by the Court. Accordingly the predictive qualities of the case are very much subject to question.

If the waters in question are navigable there are additional complicating factors. Not only is there the matter of complying with federal laws governing water quality and navigation but entirely new classes of public usage come into play. Withdrawing water from a navigable stream<sup>24</sup> may not impair any riparian uses or drinking water supplies but it could impair navigation or impede public works projects such as levees or coastal restoration projects thus significantly affecting what uses might be considered reasonable.

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to water the estate or "for other purposes", while Article 658 dealing with the rights of owners whose estates are traversed by running waters does not mention any specifically permissible uses or purposes. This should not be seen as a substantive difference but rather as an illustration of the degree of vagueness and linguistic inconsistency that characterizes this entire area of law.

<sup>21</sup> See *Jackson v Walton*, supra and Yiannopoulos, *Civil Law Treatise*, supra.

<sup>22</sup> See "Legal and Institutional Analysis of Louisiana's Water Laws with Relationship to the Water Laws of Others States and the Federal Government" Vol.IV (*Handbook of Basic Water Law*, by G. Hardy III with revisions by A.N. Yiannopoulos).

<sup>23</sup> Id.

<sup>24</sup> In this context it is important to keep in mind the distinction between how navigability is defined under state law and is broader definition under federal law.

**3. Emerging Issues.** Riparian rights and the uses to which Louisiana's surface waters may be put have long been a back water of Louisiana law. Indeed, the same could be said for Louisiana water law in general, including questions about groundwater, public and private ownership and rights of use, rights of reclamation, and the relationship between mineral rights and surface ownership, particularly in the State's coastal region. Concern about that is nothing new. For years, scholars and commentators have urged that Louisiana's approach to managing its waters is woefully out of step with developments and trends in water usage.

This paper continues that tradition. But what were once conjectural concerns are now fast becoming realities. The needs of coastal restoration, energy production and regional water shortages all demand a thoughtful, prioritized and comprehensive to freshwater management. As long as surface waters and groundwater are viewed as unrelated and largely unlimited in supply Louisiana will be setting the stage for conflict and confusion.

In the specific case of surface waters, 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. The status quo will not hold. The only question is what role Louisiana will choose to play in charting the future, a future in which the availability and control over freshwater will increasingly determine who prospers and who suffers, who succeeds and who fails, and whether water will be just a commodity going to those with the ability to pay for it or whether it will also sustain our cultural and natural heritage.

The urgency of embracing this challenge can be seen all around us. In Florida, new developments must be able to demonstrate an available water supply. Georgia is in a deepening dispute with its sister states and the Army Corps of Engineers over the use and management of the Apalachicola, Flint, and Chattahoochee rivers system in order to ensure Atlanta's water future. Georgia is also contesting its boundary with Tennessee in order to claim a share of the Tennessee River. South Carolina and North Carolina are litigating the apportionment of the Catawba River in the United States Supreme Court. News accounts and scientific studies attest to shifting climates and rising seas that will affect both demands on and uses of our water resources.

Interest in these water issues is growing in Congress as well. The House Committee on Science and Technology has already held hearings looking into the need for more coordinated federal approach to research and development. The sense of mood is evident from Chairman Bart Gordon (D-Tenn) who has stated "Constraints on water supplies are taking a toll on society, our economy, and the environment. Water is too valuable a resource for us to manage on a crisis-by-crisis fashion"<sup>25</sup>.

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<sup>25</sup> House Committee on Science and Technology press release, March 4, 2009.

Plainly, this game is already underway and Louisiana needs to play a much more active role.

**Conclusions and recommendations.** Louisiana is a state rich in water resources. So much so that it has taken them for granted in many ways. We now stand on the threshold of a new era in which freshwater will be recognized as a scarcer and more valuable resource. It will also increasingly be viewed and managed as a regional or national resource. To promote the welfare of its people and economy and discharge its natural resource stewardship/public trust duties, the State needs to recognize the enormity and urgency of this challenge and opportunity and should consider the following recommendations:

1. Louisiana needs to systematically review the entire body of its current water and policies and assess if and to what degree they reflect the State's present and future needs and priorities. At the least, this should include its laws regarding surface waters, groundwater, public and private ownership of waters, banks and water bottoms, mineral ownership, and reclamation.
2. With regard to surface waters specifically the State needs to assess, explicate and where necessary change or clarify the rights of riparians and others to use the surface waters of the State.
3. Louisiana should actively monitor national and regional developments, such as the South Carolina v North Carolina case, closely and view them as a template for framing and articulating its rights, needs and values. It should be prepared to engage in those where appropriate and be a leader in regional watershed planning and management. By way of illustration, the state should play a greater role in the efforts to lower nutrient levels in the Mississippi River and reduce the hypoxia problem in the Gulf of Mexico.
4. Louisiana should be aggressively making its need for specific aquatic resources clear and acting to secure or defend them. Examples of this would include (a) demanding the development of water and sediment budgets for the Mississippi River and linking those to its plans to rehabilitate Louisiana's coast; (b) working to ensure that the interstate waters and sediments we receive are suitable in quality and quantity for the state's vital interests; and (c) aggressively exercising the rights the state has under laws such as the Coastal Wetlands Planning, Protection, and Restoration Act to demand that navigation, flood control and irrigation projects under federal control be conducted in way consistent with the comprehensive plans to restore coastal Louisiana.

The things I have been able to touch on in this paper, if nothing else, should suggest that water law in general and riparian law in particular need to be brought into the 21<sup>st</sup> century. This will be no small undertaking but it is one the State can ill afford to ignore. No state is in a better position to lead and benefit from the development of the emerging “water economy” and no state is presently less ready. It is very much the business of us all to help change that.