

FINAL REPORT

WATER RESOURCES COMMISSION FINAL REPORT



STATE OF LOUISIANA
**DEPARTMENT OF
NATURAL RESOURCES**



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INTRODUCTION

STATEMENT OF ISSUE

In December 2017, the Water Resources Commission (WRC) passed a resolution to convene a working group to further study the possibility, implications, and mechanisms for the out-of-state sale of publicly owned surface water in Louisiana and provide recommendations to key decision-makers to help them determine whether to pursue the sale of surface water, and if pursued, how the process could work. The resolution was passed pursuant to La. R.S. 38:3097.4, which empowers the WRC to evaluate Louisiana's surface water resources. Based on the early discussions of the working group, the most likely out-of-state water sale would be to the west, and the most logical and reliable source for that sale would be Toledo Bend Reservoir. This report provides a summary of technical, legal, and policy considerations and recommendations from the working group on out-of-state sales of Louisiana's surface water within the Toledo Bend Reservoir.

Per La. R.S. 30:961, the Secretary of the Louisiana Department of Natural Resources (DNR) is responsible for overseeing cooperative endeavor agreements for the transfer, use, or sale of the State's surface water. The State Mineral and Energy Board approved a sales agreement form in accordance with the same law. While La. R.S. 30:961 states that it is applicable to all sales of surface water by state governmental entities, it is likely inapplicable to surface water sales out of the Toledo Bend Reservoir. The Sabine River Authority, State of Louisiana (SRA-Louisiana) is statutorily authorized to enter into agreements for the sale, utilization, distribution, or consumption of surface water under its jurisdiction, which includes half of the water in the Toledo Bend Reservoir. As mentioned above, it is likely that such agreements do not have to meet the specific requirements of La. R.S. 30:961 that generally govern all sales of the state's surface waters. See La. Atty. Gen. Op. No. 10-0297. The statutes governing the SRA (La. R.S. 38:2321 *et seq.*) give SRA-Louisiana "full, complete, and independent authority to perform all acts herein authorized, and no other statute or legislative act shall be construed to be applicable to the carrying out of the powers herein granted unless herein expressly so made applicable."

Act No. 261 of the 1950 Louisiana Regular Session created SRA-Louisiana to provide for works of public improvements, including water supply for municipal, industrial, domestic, hydroelectric generation, and other useful purposes associated with the Sabine River and Toledo Bend Reservoir. In 1951, the Congress of the United States authorized the negotiation and execution of a compact with respect to the apportionment of the waters of the Sabine River. The Sabine River Compact, approved by the Legislatures of the States of Louisiana and Texas as well as the Congress and President of the United States, provides for the equitable division of the waters of the Sabine River between the two states. The Compact permits and encourages the harmonious development, whether individually or jointly, of the water resources in the Sabine River. The Toledo Bend Reservoir represents a joint endeavor of the two states and ensures the water resources in the reservoir are shared equally. The compact requires certain minimum inflows at the state line, and according to past studies, the **firm yield** for the Toledo Bend Reservoir is approximately **two million acre-feet** per year. The term "firm yield" refers to the amount of water that can be supplied from a reservoir on an annual basis during the most critical drought period of record. While the firm yield is approximately two million acre-feet, the average inflow into Toledo Bend Reservoir is almost **four million acre-feet** per year.

Currently Louisiana and Texas sell approximately 27,000 and 3,000 acre-feet of water, respectively, out of Toledo Bend each year. The approximately 30,000 acre-feet of combined water sales is equivalent to the water used in operating both of Toledo Bend's hydroelectric power generators for 27 hours, which is less than 2 percent of the amount of water used in an average year of generation at Toledo Bend. In 2011, Toledo Bend Partners L.P., a private entity unaffiliated with either state's SRA, made an offer to annually purchase 600,000 acre-feet of the approximately one million acre-feet of surface water from Toledo Bend that is annually available to SRA-Louisiana as its half of the firm yield of the Toledo Bend Reservoir. The state of Louisiana explored this potential purchase but ultimately decided against moving forward with the proposal. With an aging hydroelectric plant, the expense of its operation as compared to low cost, gas-fired generation plants, and the currently limited interest in future power sales, SRA-Louisiana is looking to water sales, in the state or out, to help fund its operations. Among



other things, SRA Louisiana sees such sales as a source of funding to offset the costs of operating the reservoir and SRA Louisiana parks, which benefits the surrounding communities and the state as a whole. The need to identify such funding sources is deemed important by SRA-Louisiana as the long-term viability of electric generation, which currently provides more than half of SRA-Louisiana's total funding, is in doubt.

SCOPE OF WORK

WORKING GROUP COMPOSITION

In response to the resolution passed by WRC, DNR recruited the following representatives to serve on a working group to develop potential recommendations regarding the out-of-state sale of surface water:

Name	Organization
Thomas Harris	LDNR
Paul Frey	Louisiana Landowners Association
Tyler Gray	LMOGA
Mark Davis	Tulane Water Law Institute
Kyle Balkum	LDWF
Jim Harper	Louisiana Farm Bureau
Gary Snellgrove	LDNR – Office of Conservation
Harry Vorhoff	Attorney General's Office
Warren Founds	Sabine River Authority of Louisiana

DNR engaged Emergent Method – a Louisiana-based management consulting firm – to support the completion of this study and report and to facilitate objective and comprehensive working-group discussion.

PRIMARY AND SECONDARY RESEARCH

Given the intricate history associated with the topic, Emergent Method conducted background research, focused on developing a comprehensive understanding of the issues surrounding surface water and its potential out-of-state sale. This research included a review of relevant literature, interviews with DNR staff, and discussions with other key stakeholders who are experts on the issue.

WORKING GROUP MEETINGS

The working group met on four separate occasions from February 2018 to November 2018, with all meetings publicly noticed in accordance with state law and held at the LaSalle Building in Baton Rouge, Louisiana. Each meeting featured presentations from working group members containing research and/or recommendations for the group's consideration along with corresponding levels of robust discussion.

To begin this effort, the working group developed a list of questions to be explored throughout the study. The following questions, separated by overarching themes, were identified:

PROCESS

- Who are the different groups/experts from which we should seek perspective and technical expertise to better understand this issue?



- What role do Louisiana’s Coastal Protection and Restoration Authority (CPRA), U.S. Army Corps of Engineers, Sabine River Compact Commission, and environmental groups need to have in this effort?
- How can we use past research on this topic to supplement our process, findings, and recommendations?
- If pursued, how do we ensure this process is transparent? Do we need to develop a cost/benefit analysis?
- Will our recommendations be focused on just the Sabine River and Toledo Bend or does the focus need to be expanded?

LEGAL

- Can the state sell surface water, and if so, to what extent?
- What are the legal implications of selling surface water?
- How much is the water worth? What is the right price point for out-of-state sales?
- What does the law require in terms of the price of surface water?
- What are the changes to public policy or the law that would need to occur to make this possible?
- How does this impact the Sabine River Compact?
- How does this impact agreements/contracts and relationships with the power companies?
- What does the ideal purchase agreement look like?
 - How can it be structured to maximize benefits and minimize negative impacts?
 - What limitations would need to be put in place to account for environmental/agricultural/wildlife concerns?
 - What would the agreement duration need to be to ensure it was worth pursuing and provides sustainable funding?
 - What would happen if Louisiana was facing a drought and needed to uphold the agreement to transfer water out-of-state?

IMPACTS (AGRICULTURAL/WILDLIFE/ENVIRONMENTAL)

- What would be the impacts on coastal restoration efforts if less water/sediment is available?
- What is the minimum environmental flow that is needed to maintain fisheries and wildlife and avoid negative impacts?
- What is the minimum water level needed to sustain reservoirs?
- How do the impacts of constant daily withdrawals change over the course of a year (i.e. are the impacts to the environmental resources and on the user groups different during seasonal high water versus seasonal low water)?
- Is a constant daily or weekly withdrawal volume more or less impactful than a larger withdrawal over a shorter period of time (e.g. seasonal withdrawals)?
- What are the potential impacts to landowners and residents that use the body of water for recreation?
- How do we guarantee there is enough water to meet the agricultural, commercial, and industrial needs?
- How could the sale of surface water impact the other rivers in the state?
- Is there enough water to meet the needs of power companies and meet the demand of out-of-state sales?
- How does the sale of surface water impact the river authorities?

BENEFITS

- What are the economic development opportunities made available through the sale of surface water?
- Who benefits from the increased revenues? How will these revenues be used?
- Could the increased revenues be used to benefit residents that use/depend on Sabine River and Toledo Bend?

Following the development of this list, members were assigned specific questions and conducted individual research to present to the group during the June meeting. A summary of findings and discussions for each question can be found in the appendices.

EXTERNAL RESEARCH SUBMITTED

From the outset of this study, working group members were encouraged to submit relevant external research and resources for DNR and the group’s consideration. This information helped to ensure the study group was taking a comprehensive



approach to addressing the issues and questions identified and leveraging all available input toward the formulation of corresponding recommendations.

The list below includes external research submitted by working group members and can be found in the appendices of this report:

- Water Facts for Toledo Bend Reservoir
- Current Status of Interstate Water Supply Diversion from the Lower Mississippi River
- Louisiana's Place in the Emerging Water Economy
- Protecting State Waters Within the Commerce Clause

STUDY FINDINGS

OVERVIEW

As previously noted, WRC charged this working group with providing recommendations to key decision-makers to help them determine whether to pursue the out-of-state sale of surface water, and if pursued, how the process could work.

The working group narrowed down the list of questions above to several key questions that were most relevant to the issue at hand and the working group's charge. The findings below represent a summary of facilitated discussions and research on each question as well as potential recommendations and issues to explore further.

Through the group's discussions and findings, it was decided that the most likely sale would be to the west and that the most reliable and logical source would be Toledo Bend Reservoir on the Sabine River. While some of the recommendations and information may be useful for considering out-of-state sales from other water bodies, the out-of-state sale of water from the Toledo Bend Reservoir became the focus of the working group. Recommendations concerning Toledo Bend may not in every case apply to other Louisiana watersheds. Therefore, this study's recommendations focus solely on the proposed out-of-state sale of surface water from Toledo Bend Reservoir, and they do not concern the sale of groundwater, the sale of surface water from other watersheds, or the sale of surface water from within the Sabine River watershed but outside of Toledo Bend Reservoir.

LEGAL LIMITATIONS AND REQUIREMENTS

OVERVIEW

As will be seen throughout this section, Louisiana law as it concerns the out-of-state sale of surface water is rather sparse, and the exact limitations and requirements are largely still untested. This report, therefore, attempts to outline the contours of Louisiana water law, their relative clarity, and considerations for those areas of law that are less clear. In the areas lacking clarity within Louisiana's law, this report looks to other areas of law that share similar characteristics and to other jurisdictions that have previously addressed these areas.

At its core, the working group has been asked the following question regarding possible water sales/transfers, "can the state of Louisiana, and SRA-Louisiana in particular, ever sell/transfer water?" A related and more specific question that has arisen during the committee meetings is, "can the state of Louisiana, and specifically SRA-Louisiana, act as a water merchant by selling flowing surface waters for unspecified purposes outside the state of Louisiana, to unspecified persons in order to raise revenues?"



These questions are related but distinct. The answer to the first question seems certainly to be yes. The answer to the second question is less clear and quite possibly no. To understand why requires a basic understanding of the relationship between the state, including specifically, SRA-Louisiana, and its surface water resources. Ultimately, that distinction will require a more formal and comprehensive legal analysis than the working group can offer, but some preliminary context is provided below.

The relationship between surface waters and sovereigns is unique, complicated, and more than occasionally vague. This situation is as true for the state of Louisiana as it is for all her sister states and most places that share western European legal traditions. Under those traditions, flowing surface waters are common or public things administered by the sovereign for the benefit and welfare of its people. Louisiana squarely lines up with that approach. Running waters are now public things (after being common things until 1910) as opposed to private things.¹ This distinction is important because it reflects the special place water has in human life and under our legal system. Simply put, running surface water in its natural state cannot be treated like private property. It is an article of commerce², but it is not a commodity.³

This does not mean running water cannot be bought and sold, but rather it is subject to special conditions. Indeed, it is usually misleading to use the terms “bought and sold” since it would be more accurate to say it can be transferred for valuable purposes subject to certain conditions. This is what was envisioned when the legislature enacted what is now La. R.S 9:1101 in 1910, which states:

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.

The clearest and most traditional types of transfers of water allowed by state law are those for use of water on riparian tracts—real estate adjacent to a running stream. Louisiana riparian rights are summarized in more detail later. The important point is that Louisiana law—like all states that follow riparian law doctrine—allows riparian owners to access and use public waters in reasonable ways as long as they do not injure the resource or impair the rights of any down-stream riparian. General riparian law would require the water to be used on the riparian tract, though Louisiana law is not entirely clear on that point. The state cannot charge any riparian for the use of that water,⁴ but it does get value from the transfers via the development of riparian tracts in ways that strengthen and grow the community and economy.

Another example of long-standing transfers of surface water allowed by state law involves the New Orleans Sewerage and Water Board (NOSWB), chartered originally by the state as a privately-owned utility. The NOSWB takes public water from the Mississippi River and provides it to its customers. The NOSWB does not pay the state⁵ for that water, but the state gets value from its use. On the backside, NOSWB, now a governmental entity, provides water to its customers at a regulated rate largely pegged to recovering the costs of service. There is no charge for the water itself, but the state and the City of New Orleans get value from these water transfers though they are not correlated to the amount charged. The price/value dichotomy can be seen in the difference charged by NOSWB and the price charged for commercial bottled water.

In 2014, NOSWB charged \$0.0035 for a gallon of water. On the other hand, a bottle of Dasani water, which uses tap water as its source--albeit not from NOSWB, sold for \$1.89 per gallon. Imported Fiji Water, just for comparative purposes, cost \$8.82

¹ La. Civil Code Article 448.

² *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (citing Joseph L. Sax, Understanding Transfers: Community Rights and the Privatization of Water, 1 West-N.W. 13,14 (1994)).

³ See, e.g., *High Plains A&M v. S.Eastern Colorado Conservation*, 120 P.3d 710 (2005).

⁴ La. R.S. 9:1101

⁵ La. R.S. 9:1101.



per gallon. This dichotomy between public and private pricing highlights the problems of establishing a “fair market value” for public water sales when there simply is no singular, reliable market, even if a given sale/transfer is otherwise allowable.

Even where Louisiana has sought to condition water transfers on the payment of “fair market value”⁶, it is clear that the practice is to not make those payments mandatory but rather to allow them to be paid in unspecific, noncash ways, such as by expanding the tax base or employment. Clearly the emphasis remains on public value more than on some objective, fair market value when it comes to avoiding Louisiana’s constitutional stricture against donations of state property.⁷

With respect to SRA-Louisiana’s ability to sell water, these general principles apply but are supplemented or modified by the laws defining SRA’s mission, purpose, and projects. Clearly, SRA-Louisiana has the power to sell water, but that power does not mean it can sell water to anyone at any time for any purpose at any price. This means each proposed sale should be looked at in the context of:

1. Does it fall within SRA-Louisiana’s public purpose and serve the communities envisioned by the governing authorities?
2. Does it fall within the governing purposes and authorities for the specific waterway or water body at issue? Because the purposes of the Toledo Bend Reservoir are hydropower, recreation, and water supply (presumably for Louisianans in the case of SRA-Louisiana), would a proposed sale advance those ends?
3. What is the purpose of the sale? Sales or transfers for speculative purposes, at least to any non-riparian, are usually deemed insufficiently specific to be reasonable or valid. In no case that the working group has found has another state or state agency been allowed to sell water to a water merchant or speculator merely to raise operating funds.
4. Where would the water be used? If the water is to be used out of basin or out-of-state, would it trigger discrimination/preference, invasive species, or source water protection issues? Would the proposed uses injure existing water rights or permit holders (e.g. could effluent discharge permit conditions such as dilution zones be impacted)?
5. Is the proposed transferee/buyer sufficiently identified? Is it different from the ultimate water user? Because some water uses have higher priorities than others and because of the general rule against speculation, the identity of a proposed user may be dispositive.
6. What is the public value of the sale?
7. What alternatives exist for raising revenues or avoiding costs?

These issues will be discussed in greater detail below.

DETAILED ANALYSIS OF THE LEGAL ISSUES

THE AUTHORITY TO SELL OR TRANSFER SURFACE WATERS

Before evaluating *how* Louisiana, SRA-Louisiana, or any other governmental entity in Louisiana can sell surface water, a determination must be made of whether Louisiana or any of its agencies or political subdivisions *can* sell such water. Running

⁶ E.g., Act 955 of 2010 which allowed for the creation of Cooperative Endeavor Agreement that permit non riparians to access, use and consume state surface water. La. R.S. 30.961

⁷ La. R.S. 30.961(B).



waters, the waters of natural navigable water bodies, and the territorial seas within the geographical boundaries of the state of Louisiana (collectively referred to herein as “surface waters”) are public things subject to public use under Louisiana law. See La. C.C. Art. 450, 452, and La. R.S. 9:1101. Surface waters are owned by the state of Louisiana in its capacity as a public person, and the state holds these waters in trust for the people of the state. See La. Const. Art. IX, § 1.

Landowners with riparian property and members of the general public have a right to use running water for their needs, the latter only if they have access to it. See La. C.C. art. 450 and 452; see *also* La. R.S. 9:1101. The owner of an estate fronting on a river or stream has, in addition to the right of public use, a riparian right for the use of the water. La. C.C. art. 657 explains that the owner of a riparian estate may use the water as it runs for agricultural or other purposes. Persons or entities that do not own an estate fronting on a river or stream may also withdraw running surface water if they comply with the requirements and get the necessary approvals delineated under La. R.S. 30:961. Riparian owners are also specifically authorized to assign access rights equal to his or her own for any agricultural or aquacultural purpose within the state of Louisiana provided that the withdrawal of running surface waters is environmentally and ecologically sound and is consistent with the required balancing of environmental and ecological impacts with the economic and social benefits found in La. Const. Article IX, Section 1. See La. R.S. 9:1101. It is important to note that these laws allow for people and entities to *use* running water, rather than *buy* running water. Because running water is a public thing, it is not susceptible to private ownership. See La. C.C. art. 450; *Band v. Audubon Park Comm’n*, 936 So.2d 841, 845 (La. App. 4 Cir. 7/12/2006); *Vol. 2 Louisiana Civil Law Treatise, Property, Second Edition*, by Professor A.N. Yiannopoulos.

SRA-Louisiana’s authority under La. R.S. 38:2325 to sell water is, therefore, unique in Louisiana law. Pursuant to the Louisiana Constitution of 1974, the legislature shall enact laws to implement the policy of protecting, conserving, and replenishing the natural resources of the state, including air and water, insofar as possible and consistent with the health, safety, and welfare of the people. *Id.* The corollary of this mandate is that the legislature cannot enact laws that are contrary to the policy of protecting, conserving, and replenishing the natural resources of the state. SRA-Louisiana’s authority to sell surface waters remains jurisprudentially untested. While courts have yet to evaluate the constitutionality of surface water sales, they will likely apply heightened scrutiny if such sales are to private or out-of-state parties.

Further, a legal survey of other states that, like Louisiana, utilize a riparian legal framework (either traditional or regulated riparian) are also of little help in providing guidance for an out-of-state sale by SRA-Louisiana as they do not specifically authorize water sales.⁸ Rather, they authorize a regulated use or withdrawal of surface water with various levels of limitations placed on riparian and non-riparian users. As such, no other state appears to contemplate agreements for such water use being based on a “fair market value” of the surface water *in situ*. Finally, nearly all riparian states limit use of surface water by prohibiting uses that are not both reasonable and beneficial. For this reason, it would be wise for SRA-Louisiana to consider the reasonableness and beneficial nature of the proposed withdrawal(s) contemplated in an out-of-state surface water sale prior to making the decision to enter into such an agreement. The case law from other jurisdictions have found that agreements allowing the withdrawal and use of surface water for speculative purposes would be either unreasonable, non-beneficial, or both. SRA-Louisiana should keep this in mind as agreements for such purposes may potentially face similar legal challenges.

Surface waters are things of value that belong to the people of the state of Louisiana, and pursuant to La. Const. Art. VII, § 14, and they may not be donated to any person, association, or corporation, public or private. Louisiana’s Office of the Attorney General has stated that “running water is a state-owned resource that has value and that must be purchased pursuant to the laws governing the sale of state property if it is to be used for anything other than a public purpose.” See AG Op’s 08-0176; 09-0028; and 09-0066. Such a purchase of surface water must be for a “fair market value” pursuant to La. R.S. 30:961. Both

⁸ Survey performed by the Tulane Institute on Water Resources Law & Policy includes review of legal frameworks of the following traditional riparian and regulated riparian states: Louisiana, Mississippi, Arkansas, Kentucky, Tennessee, Missouri, Minnesota, Hawaii, Virginia, Florida, South Carolina,



direct payments to the state, as well as, positive economic impacts resulting from the sale may be considered in determining fair market value. *Id.*

THE PUBLIC TRUST MANDATE

Any law allowing the sale of surface water must comply with the Public Trust Mandate found in La. Const. Art. IX, § 1. Under this constitutional provision, the state must balance the environmental and ecological impacts against economic and social benefits. As discussed above, while La. R.S. 30:961 may not be applicable for sales from Toledo Bend, it provides useful guidance in that it sets forth the considerations the legislature requires for surface water transfers, uses, or sales generally. La. R.S. 30:961 calls for the adequate consideration of the potential and real effects of such surface water withdrawal on the sustainability of the water body and on navigation. Furthermore, this same statute sets forth the following impacts that must be considered: (a) stream or water flow energy, (b) sediment load and distribution, (c) navigation, (d) aquatic life, (e) other vegetation or wildlife, and (f) consistency with the comprehensive master plan for coastal restoration and protection as approved by the Coastal Protection and Restoration Authority Board and the legislature. Against these impacts, the Louisiana Constitution requires that the state balance the economic, social, and environmental benefits that may arise from such surface water sales. In order to comply with its public trust obligations under La. Const. Art. IX, § 1, SRA-Louisiana must conduct and document the IT analysis as delineated by the Louisiana Supreme Court in *Save Ourselves, Inc., et al. v. the Louisiana Environmental Control Commission, et al.*, 452 So.2d 1152 (La. 1984) and its progeny.

The IT analysis requires:

- 1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible
- 2) a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former
- 3) there are no alternative projects, alternative sites, or mitigating measures that would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable

In order to be compliant with the Louisiana Constitution, SRA-Louisiana must explicitly explain how such a decision complies with the IT analysis before deciding to engage in an out-of-state water sale.

A requirement that is separate but related to the cost benefit analysis is that the state is constitutionally prohibited from donating public property. See La. Const. Art. VII, § 14. Surface waters are things of value that belong to the people of the state of Louisiana, and they may not be donated to any person, association, or corporation, public or private. Louisiana's Office of the Attorney General has stated that "running water is a state-owned resource that has value and that must be purchased pursuant to the laws governing the sale of state property if it is to be used for anything other than a public purpose." See AG Op's 08-0176; 09-0028; and 09-0066. Such a purchase of surface water must be for a "fair market value" pursuant to La. R.S. 30:961. Both direct payments to the state, as well as, positive economic impacts resulting from the sale may be considered in determining fair market value. *Id.* Again, basing the sale of surface water on "fair market value" appears to be unique among the states. Instead, other states allow withdrawals and the use of surface water subject to regulatory limitations and recognize that riparian owners and others may receive compensation for the transportation, manufacturing, or processing of withdrawn surface water. La. R.S. 30:96 recognizes this as well as it concerns the re-sale of surface water.

INTERSTATE COMMERCE

Louisiana's authority (including SRA-Louisiana) to regulate water sales across state lines is not necessarily unilateral, as it may be limited in certain circumstances by the U.S. Constitution. Primary among these limitations is the degree to which Louisiana's regulation of interstate sales of surface water may impact interstate commerce in such a way as to violate the commerce clause of U.S. Const. Art. I, § 8, Cl. 3. Generally, state regulation of interstate commerce will be found permissible if



such regulation is done in order to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental and minimized. See *Sporhase v. Nebraska*, U.S., Jan. 2, 1982 (458 U.S. 941 at 954). Such regulation will not be upheld, however, if the impact on interstate commerce is clearly excessive in relation to the putative local benefits. *Id.* For example, the U.S. Supreme Court found that a Nebraska law prohibiting the transfer of groundwater to those states which did not reciprocate in allowing their groundwater to be transferred to Nebraska was prohibited by the commerce clause. *Id.*

The legal analysis, however, likely changes when state regulation of interstate water sales concerns waters covered by interstate compacts, which are agreements between states that are then approved by Congress. When Congress approves an interstate compact, it becomes federal law, and any actions made by a signatory state in accordance with the terms of the compact will not likely run afoul of U.S. Const. Art. 1, § 8, Cl. 3. Louisiana is a signatory to two interstate compacts that allocate interstate waters: the Sabine River Compact and the Red River Compact.

Decision-makers interested in regulating the interstate sale of water from Toledo Bend should be aware of the Supreme Court decision *Tarrant Reg'l Water Dist. v. Hermann*, U.S., June 13, 2013 (569 U.S. 614). This case concerned a dispute between the Oklahoma Water Resources Board and a Texas regional water district, wherein the Texas district sought to prevent the Oklahoma board from enforcing an Oklahoma statute that prohibited the Texas district from withdrawing water out of a river located in Oklahoma. The river in dispute is part of the Red River watershed and was subject to the Red River Compact, which allocates water rights within the Red River watershed. The Red River Compact is a congressionally approved agreement between Oklahoma, Texas, Arkansas, and Louisiana.

The Texas water district unsuccessfully attempted to purchase water from Oklahoma and then sought a permit from the Oklahoma Water Resources Board to take water from a tributary of the Red River at a point within Oklahoma. The Oklahoma law at issue prohibited out-of-state parties from taking or diverting water from within Oklahoma's borders, so the Texas water district filed suit in a federal court seeking to enjoin the Oklahoma Water Resources Board from enforcing its state law. The U.S. Supreme Court ultimately upheld the Oklahoma law. The Court found that the Red River Compact does not pre-empt the Oklahoma water statutes because the compact's mere silence on the matter of cross border water withdrawals cannot be interpreted as pre-empting Oklahoma's law prohibiting such withdrawals. The court further found that Oklahoma's water statutes do not run afoul of the commerce clause as applied in the instant case because under the compact, Oklahoma is entitled to regulate the water within its state boundaries, unless and until Texas requests an accounting of the water and demands that Oklahoma refrain from utilizing more than its share of the water in accordance with the procedures set forth in the compact.

Similar to the Red River Compact at issue in the *Tarrant* case, Art. II of the Sabine River Compact reserves the right of Louisiana to "regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under th[e] Compact." See La. R.S. 38:2329 and PL 102-575, Title 12, §§1201-1203. The compact further allocates waters of the Sabine where the Toledo Bend Reservoir is located (an area known as the "Stateline Reach") evenly between Louisiana and Texas when the water is flowing at least 36 cubic feet per second. *Id.* These provisions seem remarkably similar to the provisions of the Red River Compact at issue in *Tarrant*. Therefore, it is reasonable to expect that under commerce clause analysis, Louisiana's regulation of Sabine River water within its boundaries will be deemed consistent with the commerce clause, so long as in practice such regulation does not run counter to the Sabine River Compact. Such regulatory authority is of paramount importance. For even if SRA-Louisiana decides to enter into an out-of-state water sales agreement, such an agreement will need to include enforceable procedural and substantive safeguards and requirements as discussed in this report.

CONTINUING LEGAL UNCERTAINTY

A compelling question was also raised in meetings of the study group regarding the unique nature of waters within Toledo Bend Reservoir. Does Louisiana law as outlined above classify water stored in a reservoir the same way as surface water in other types of waterbodies? As pointed out in the study group meetings, several aspects of the Toledo Bend Reservoir distinguish it from most water bodies in Louisiana. For instance, there is a tremendous volume of water stored in the reservoir,



which would otherwise flow into the Gulf of Mexico but for the reservoir. Reservoirs also are not specifically identified in those statutory provisions that set forth the public nature of surface water. See La. C.C. Art. 450, 452, and La. R.S. 9:1101. It is questionable, however, that the construction of a dam across a river or any other public waterway can unilaterally convert the water into a private thing. The AG Opinions discussed herein do not address reservoirs specifically. See AG Op's 08-0176; 09-0028; and 09-0066. In fact, a survey of Louisiana laws and judicial decisions did not identify any statement one way or the other. A survey of other riparian state laws similarly did not identify such a distinction. Unfortunately, the lack of such a legal distinction creates greater legal uncertainty rather than less. As such, further consideration of the above stated issues is still recommended.

Finally, the Louisiana Senate requested in 2014 for the Louisiana State Law Institute to create a Water Code Committee in order to develop legislation establishing a comprehensive water code that integrates all of Louisiana's water resources and enables Louisiana to successfully manage and conserve its water resources. The Water Code Committee's work is ongoing, and its recommendations as to proposed legal changes have not yet been made. Therefore, SRA-Louisiana's decision as to entering into an out-of-state water sale may be affected by changes to the law governing water resources made as a result of the Water Code Committee's recommendations. Alternatively, additional guidance for SRA-Louisiana in making its decision about whether to enter into an out-of-state water sale is likely to be provided by the Water Code Committee's recommendations and any subsequent legislation.

PROCEDURAL REQUIREMENTS

There are various procedural requirements that must be met in order to effectuate an out-of-state sale or use of Louisiana's share of Toledo Bend surface water. The Louisiana Legislature authorized SRA-Louisiana to enter into agreements for the sale and withdrawal of water in the Toledo Bend Reservoir. See La. R.S. 38:2325(A)(16). Under Louisiana law, SRA-Louisiana will have to approve any agreement for the sale, utilization, distribution, or consumption of water by a majority vote of its commission. See La. R.S. 42:11, et seq. Therefore, SRA-Louisiana is the primary decision-maker for entering into an out-of-state water sale for Toledo Bend's surface water. The FERC license that both Texas and Louisiana SRAs operate the reservoir under requires FERC approval for any sale of more than one million gallons per day. Additionally, such an agreement requires the written concurrence of the Governor of Louisiana, the Senate Committee on Natural Resources, the House Committee on Natural Resources and Environment, the Water Resources Commission, and at least two-thirds of the governing authorities of the parishes within the territorial jurisdiction of SRA-Louisiana.⁹

As mentioned earlier, the sale must be for fair market value and in accordance with the Public Trust Doctrine. In order to ensure that these requirements are met, it would be advisable for SRA-Louisiana to seek comment on any specific proposal from the appropriate natural resource agencies. These may include: the Department of Natural Resources, the Department of Wildlife and Fisheries, the Department of Environmental Quality, Louisiana Department of Health and Hospitals, and the Coastal Protection and Restoration Authority. Under the process established by La. R.S. 30:961, review by the state's resource agencies typically takes less than 30 days to complete.

The potential non-environmental impacts caused by such a sale also strongly support SRA-Louisiana's consideration of impacts on and solicitation of comment from all currently established users of the reservoir and the lower Sabine River. The users identified in the study group meetings include: rice farmers in the southern reaches of the Sabine River, recreational users of the reservoir and lower Sabine River (including boaters, sportsmen, and nearby landowners), the Sabine River Diversion Canal users, the electricity purchaser, and the businesses that serve these users. It was generally agreed that of these potential users, recreational users, and the businesses that serve them around the reservoir were the groups with the most potential to be impacted by such a sale. Depending on the volume of the contemplated water sale(s), they would likely

⁹ See La. R.S. 38:2325(A)(16). The territorial jurisdiction of SRA-Louisiana includes the parishes of DeSoto, Sabine, Vernon, Beauregard, Calcasieu, and Cameron. At least four of these six parishes would need to provide written concurrence with any proposed out-of-state sale of Toledo Bend Reservoir surface water in order for such agreement to become effective.



only experience significant impacts in the event of a severe drought that coincided with withdrawals associated with the out-of-state sale(s).

Finally, as Toledo Bend Reservoir is operated in accordance with a license issued by the Federal Energy Regulatory Commission, any change to that license necessitated by an agreement to sell water out of state would also require SRA-Louisiana to receive FERC's approval.

FAIR MARKET VALUE

As mentioned above, according to past AG opinions, any sale of Louisiana's surface water, whether for in-state or out-of-state use, must be for a "fair market value." In addition to a monetary price paid to the state (through SRA-Louisiana) for the sale of surface water from Toledo Bend, fair market value for the sale of such water should include the economic development, employment, and increased tax revenues created by the activities associated with the sale of running surface water.

SRA-Louisiana board, by statute, is responsible for Louisiana's share of the water in Sabine River and Toledo Bend Reservoir and therefore is the appropriate authority to propose a sales agreement for an out-of-state sale of surface water from the Toledo Bend Reservoir. SRA-Louisiana would be charged with recommending a price to the board for its consideration that it believes meets fair market value. Warren Founds provided historical information related to the pricing of surface water. The price for surface water out of the Toledo Bend Reservoir used today by SRA-Louisiana is \$0.18/1000 gallons. Currently, the largest water sales are to International Paper's Mansfield Containerboard Mill and the Cleco Power unit in Madison, Louisiana. Also, currently the price for Sabine River Diversion Canal water is \$0.23/1000 gallons and increasing to \$0.26/1000 gallons in 2019. This price is based on the price of Toledo Bend Reservoir water plus the operation cost associated with the Diversion Canal system. The out-of-state price considered in the proposed sale from Toledo Bend in 2011 was \$0.28/1000 gallons. The Sabine River Authority of Texas water rates from the lower Sabine River are in the same range but are increasing as a result of it building a new \$50 million pumping system to service the southeast Texas area. By way of comparison, R.S. 30:961(J) states that for purposes of sale of surface water from waterbodies managed by the Department of Wildlife and Fisheries and determined by them to be negatively impacted by invasive aquatic vegetation, "fair market value shall be at a rate of not more than fifteen cents per thousand gallons."

Again, by statute, SRA-Louisiana board has the ability to establish the rates for selling the water in its control. Some working group members raised the possibility of establishing a fair market price through an open bid process. Other members of the working group responded that determining fair market value in this way may be problematic. First, and perhaps foremost, surface water is a public thing generally not subject to private ownership rights. As a public thing, private rights to surface water are subordinate to the public good. Therefore, a contract to sell surface water must always be subject to overarching public interests, perhaps necessitating less reliable out-of-state surface water delivery in favor *in situ* priorities. The sale of surface water, for instance, must be subordinate to ensuring a certain minimum level of flow to protect environmental, ecological, and societal benefits. Therefore, in extreme drought conditions, the delivery of surface water to a purchaser may not be possible. Second, analysis of potential lost benefits needs to be considered. Would, for instance, the more immediate benefit from an out-of-state water sale limit potential future in-state industrial or residential uses of the same surface water resource? One way of limiting this loss potential is to limit the length of the term of a sales agreement. Finally, several members of the working group mentioned that much of the value of surface water is actually reflected in the cost of transporting and treating the raw surface water. For all of these reasons, valuation of surface water from such sales does not avail itself to a conventional open market. The value of surface water is obviously subject to the price someone is willing to pay, but the need to protect those public benefits associated with surface water strongly opposes allowing speculation in the surface water rights.

Consistent with past water sales from Toledo Bend, it appears that in order to support a fair market value determination, SRA-Louisiana staff will need to, at a minimum, compare any proposed price rate with existing and historical rates for untreated



Toledo Bend surface water as well as any other comparable water sale prices. Additionally, other economic and non-economic benefits from the sale of water may be considered when determining the value of the Toledo Bend surface water.

MINIMUM WATER LEVEL AND DOWNSTREAM RELEASES REQUIREMENTS

One of the major considerations for any proposed sale of surface water is ensuring that elevations of the reservoir are maintained to protect the recreational use of Toledo Bend and that any proposed sale would not impact releases from the reservoir to meet the downstream obligations of both authorities ensuring environmental, ecological, navigation, or societal benefits. The Toledo Bend Reservoir is unique in this regard, as the reservoir is under a FERC license, which already requires minimum water levels for operations. In the process for receiving this license, all stakeholders were consulted, and the public was provided an opportunity to comment.

Toledo Bend's full pool level is 172' MSL. Louisiana law limits power generation below 168' MSL to emergencies for power and to meet downstream obligations, and 162' MSL is the lowest level to accomplish power generation. In the 50-plus years of Toledo Bend history, the reservoir reached as low as 159.4' MSL one time, which was during a period of extreme drought and after a 2.5' drawdown for maintenance of the dam. Water can be released through the spillway down to elevation 145' MSL and through a sluice way at elevation 100' MSL. Currently normal operation of Toledo Bend Reservoir is between 172' and 168' MSL. The Toledo Bend generation station was designed to operate between 162' MSL and 172' MSL. In the past 50 years, the reservoir dipped below 162' less than 1 percent of the time, below 165' MSL less than 4 percent, and remained above 168' MSL more than 75 percent of the time. Kyle Balkum, representative for the Department of Wildlife and Fisheries, provided general guidance for minimum flow requirements sufficient to protect fisheries and other ecological benefits, but he stated that such guidance was not applicable to reservoirs like Toledo Bend and that the operational requirements found within the FERC permit were adequate to protect against negative environmental impacts. It is clear, however, that downstream flow could be maintained with reservoir levels significantly below the designed operational level of 162' MSL. The current FERC license does have a Drought Contingency Plan with defined levels as to when certain actions would occur; however, accommodating a large water sale during record drought conditions would likely affect the reservoir's water level and implementation of the Drought Contingency Plan. This drought scenario, while only temporary, could have significant impacts even though the reservoir has plenty of stored water available to accommodate the sale.

Historical data reflects that generally the Toledo Bend Reservoir would remain within its operational limits if it both entered into a large water sale (200,000 acre feet/year, or approximately 10 percent of annual yield) and continued power generation at the Toledo Bend station. The Sabine River Authorities (both Louisiana and Texas SRAs), through the Sabine River Compact, have had to and continue to have discussions relative to large water sales (200,000 acre-feet/year, approximately 10 percent of the firm annual yield) from Toledo Bend. These types of sales could possibly affect reservoir levels and the local economy of the entire area, so the benefit of a proposed sale outweighs any potential negative impacts.

Maintenance of this operational level would likely ensure downstream flow as sufficient for current lower Sabine River Diversion canals users and not endangering ecological or coastal resources. In such a scenario, the most likely negative impacts would be limitations on recreational uses of Toledo Bend by boaters, sportsmen, and adjacent landowners being negatively impacted during extreme drought conditions and possible limitations on economic and residential growth in Louisiana. No environmental or ecological negative impacts were identified by the group if these water levels were maintained. For these reasons, at a minimum, any proposed sale agreement should clearly state that SRA-Louisiana (alone or in conjunction with SRA-Texas) has the authority to limit or even cease water withdrawals when water levels in the reservoir are in danger of going below a level that would cause significant environmental impacts or perhaps when significant impacts to other users are threatened, such as the lower Sabine River Diversion Canals are in danger of not being supplied. Finally, any agreement should consider potential impacts to recreational use of the reservoir and future development in the Sabine River basin. SRA-Louisiana should attempt to document potential negative impacts, if any, to recreational uses and those business associated with recreational uses from the proposed withdrawals. Such documentation can be used to justify needed limits or conditions on withdrawals or may even be used to determine how to appropriately compensate those injured by such impacts.



BENEFITS OF POTENTIAL SALE

The reality of the issue is that any future, large out-of-state water sale is probably destined to go west. Texas is already in control of half of the annual water yield from Toledo Bend and one day may contract for its sale. Currently, however, Texas state law limits the movement of water between river basins. See *Texas Water Code, Title 2, Subtitle B. Chapter 11. Subchapter A. Sec. 085*. Until such time that this law is changed, Louisiana's share of the Sabine River may be a more viable option for Texas-based users to attempt to source their water needs; however, using only Louisiana's share of surface water for a large sale, while having some financial benefits to the state, could potentially have the same negative impact on the local area and possibly restrict future needs for Louisiana's projects.

Mr. Founds stated that he hopes the two SRAs will be able to jointly accommodate a future, large water sale, to share equally in the benefits, and to work together to limit any negative impacts from the sale. The value of water sold for domestic or industrial use, under the current price for water, is approximately 18 times more valuable than the revenue derived from the same quantity used for power generation. The Toledo Bend Power Sales Agreement of the past 50 years has just ended. The two SRAs recently signed a new, five-year power sales agreement that will end in 2023. The cost of the hydropower with all of the associated regulations, compared to the current market price for electricity, did not give the Sabine River Authorities much room for negotiation, which may have resulted in the short-term contract. With such a short-term contract, a future water sale could be accommodated in a timely manner. Any water sale of significant volume would require the construction of a pipeline and, more likely than not, many years to permit and construct. Revenues from a large water sale could easily replace the required funds to operate Toledo Bend Reservoir that are currently supplied by water used for power generation.

Currently, SRA-Louisiana's water sales from Toledo Bend, which are all to users located in Louisiana, supply less than 20 percent of the annual budget to operate the Toledo Bend project, and approximately half of the budget is funded by power sales from the hydroelectric generation. These power sales are less competitive in the current power market than they were at the time the Toledo Bend Generation Plant was constructed due to the low cost of natural gas fired stations. A change in funding streams for SRA-Louisiana may be necessary, as currently the power sales supply over 50 percent of the revenues required to operate the Toledo Bend project but are an insignificant component of the MISO-South³ power grid. The original long-term contract for power generation from the Toledo Bend Generation Plant recently ended. Attempts to renew that contract resulted in just a five-year agreement, thus leaving future revenues from hydroelectric generation at Toledo Bend uncertain. A large water sale could replace the power sales revenue for SRA-Louisiana. According to Warren Founds, the goal would be to 1) attract a large water sale to be shared by both the Louisiana and Texas SRAs, 2) still maintain a water reserve for future use, and 3) not compromise the other recreational and economic attributes of the Toledo Bend Reservoir to the states.

Failure to find a new funding source, could lead to decreased resources for SRA-Louisiana and potentially lead to decreased maintenance of the reservoir. Such decreases could have a profoundly negative impact on the mission of the SRA-Louisiana. The SRA-Louisiana's mission is to "provide for economic utilization and preservation of the waters of the Sabine River and its tributaries by promoting economic development, irrigation, navigation, improved water supply, drainage, public recreation, and hydroelectric power for the citizens of Louisiana." Out-of-state water sales have been identified by SRA-Louisiana as a potential future funding source to ensure that SRA-Louisiana can continue to perform its mission into the future.

³ MISO is a not-for-profit member-based organization that ensures reliable, least-cost delivery of electricity across all or parts of 15 U.S. states and one Canadian province. MISO manages approximately 65,000 miles of high-voltage transmission and 200,000 megawatts of power-generating resources across its footprint. MISO is divided into three regions with separate control centers. MISO-South, headquartered in Little Rock, AR includes grids in portions of Texas, Mississippi, and Arkansas, and covers nearly all of Louisiana (a portion of North-western Louisiana is serviced by a different electric management organization).



It should also be understood that Louisiana's failure to agree to such a sale would not necessarily prevent SRA-Texas from entering into an agreement on its own someday in the future.

TERM

It is important that a water sales agreement include a reasonable term. Agreements that are too long have the potential to become outdated and have consequences completely unforeseeable at the time the agreements are entered into. Not only can environmental and ecological concerns change, but nearby infrastructure, adjacent residences, and potential stakeholders all might be fundamentally different over time. On the other hand, agreements that are too short have the potential to be unworkable or to be so unattractive that interest to enter into such a sales agreement would not exist. At a minimum, the term of such an agreement has the very real potential to affect the price a private party is willing to pay for surface water due to the investments that would be required to construct necessary infrastructure. Two of the larger in-state water sales SRA-Louisiana has finalized are for thirty-year terms, with 5 and 10-year extensions. By way of comparison, La. R.S. 30:961 provides that the agreements for sale of all other state surface water shall be for an initial term not to exceed two years and may be renewed in two-year increments but shall terminate no later than December 31, 2030. The term and renewal structure of any future out-of-state water sale agreement would need to be developed based on existing operating conditions of Toledo Bend and resulting effects of the proposed sale that best accommodates **all** parties concerned.

PRECEDENTIAL VALUE

The prospect of the out-of-state sales of surface water from Toledo Bend is unique within Louisiana. As pointed out herein, Toledo Bend is subject to an interstate compact, it is a reservoir that is currently operated pursuant to a FERC license, and it provides the boundary between Texas and Louisiana. In these capacities, it provides little in the way of precedential value for proposed out-of-state sales from other water bodies. Policymakers, however, need to keep in mind that an out-of-state sale from Toledo Bend could and most likely would be used by a proponent of a future out-of-state sale from a different waterway. The value of a future out-of-state water sale and compensation received by SRA-Louisiana or another state entity would certainly have precedential implications for subsequent sales. An out-of-state sale of surface water from Toledo Bend may also make it more difficult to prevent or otherwise limit out-of-state water sales from other Louisiana waterbodies. Based on the specific legal framework established for the management of Toledo Bend surface water, such a sale would have the most precedential value for future proposed sales out of the Sabine River watershed, whether from inside or outside of Toledo Bend. The next most analogous Louisiana waterway would seem to be the Red River, which is also subject to an interstate compact. For this reason and in order to maintain the state's prerogative to regulate out-of-state sales of surface water going forward, it is of paramount importance that a strong statement setting forth the factors that make a specific out-of-state surface water sale proposal distinct from other out-of-state sales proposals be included in any decision approving an out-of-state sale. This can be accomplished by SRA-Louisiana through a comprehensive explanation of its reasons for a decision that considers the many factors addressed in the report and the study group meetings.

SUMMARY OF PROPOSED RECOMMENDATIONS

A proposed out-of-state sale of surface water by SRA-Louisiana from Toledo Bend would be unique both in its nature and characteristics from the authority of riparian owners and other governmental entities authorized to allow the use or withdrawal of surface water in the state. The SRA-Louisiana's legal authority is to-date jurisprudentially untested. At a minimum, such a sale must meet several legal requirements. These include approval by SRA-Louisiana board and the written consent of the Governor, the Senate Committee on Natural Resources, the House Committee on Natural Resources and Environment, the Water Resources Commission, and two-thirds of the Parish governing authorities for the parishes within SRA-Louisiana's jurisdiction. Additionally, any sale of surface water from Toledo Bend is constitutionally required to be in exchange for something of equal or greater value, which should include economic and tax benefits in addition to any price agreed to be paid. The Louisiana Constitution also requires that prior to deciding to agree to such a sale, SRA-Louisiana must determine that the benefits of such a sale outweigh any potential negative impacts on the environment.



In addition to the legal requirements outlined above, the study group makes several additional recommendations. One is that a reasonable term limit be placed on any sales agreement or a schedule for review and renewal be put in place. Second, a clearly stated provision allowing SRA-Louisiana to limit, condition, and even stop withdrawals under the agreement should certain water level limits be reached or other public interests be threatened.

A thorough consideration of impacts and benefits may require additional study by SRA-Louisiana. Among other things, seeking the input of Louisiana's resource agencies and current users of Toledo Bend is highly recommended. In addition to helping meet the constitutional balance required by Art. XI, Sec. 1, seeking such input should make enforcement of mitigating requirements and withdrawal limitations more defensible and may further identify ways in which to compensate those who may be negatively impacted by drawdowns due to withdrawals under the agreement.

Finally, documentation supporting any potential out-of-state surface water sale from Toledo Bend is highly encouraged. In addition to making a final agreement safer from judicial reversal, such a document would help distinguish a proposed sale from subsequent sales from Toledo Bend and elsewhere, thereby helping to preserve the state's ability to regulate out-of-state water sales into the future.

The study group supports SRA-Louisiana undertaking these recommended steps in reaching a decision for out-of-state sales and recommends that similar considerations guide the other decision makers legally required to concur with such sales.

APPENDICES

■ Background

- **Appendix A:** La. R.S. 38:3097.4
- **Appendix B:** La. R.S. 30:961
- **Appendix C:** Resolution from WRC

■ Study Group

- **Appendix D:** WRC Key Questions Submissions

■ External Research

- **Appendix E:** Water Facts for Toledo Bend Reservoir
- **Appendix F:** Current Status of Interstate Water Supply Diversion from the Lower Mississippi River
- **Appendix G:** Louisiana 's Place in the Emerging Water Economy
- **Appendix H:** Protecting State Waters Within the Commerce Clause