

Water and Power:
The Sabine River Authority of Louisiana—
A Review of Property Disputes,
Hydropower, and Water Sales

Ryan M. Seidemann*

Water will not solve all problems for all men. But we all know that adequate water is an essential ingredient of progress and prosperity.¹

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* © 2012 Ryan M. Seidemann. Ryan M. Seidemann holds a B.A. (Florida State Univ.) and M.A. (Louisiana State Univ.) in anthropology as well as a B.C.L. and a J.D. in law (Louisiana State Univ.). He is the Section Chief of the Lands & Natural Resources Section, Civil Division, Louisiana Department of Justice. He is also a Registered Professional Archaeologist. The views and opinions expressed herein are solely those of the author and do not necessarily represent the position of the Louisiana Department of Justice or the Attorney General.

1. John Ben Shepperd, Charter President, Sabine River Watershed Ass’n (SRWA), Remarks at the SRWA Annual Meeting (Center, Tex. Aug. 3, 1950), *quoted in* BOB BOWMAN, THE GIFT OF LAS SABINAS: THE HISTORY OF THE SABINE RIVER AUTHORITY, 1949-1999, at 48 (1999).

I. INTRODUCTION

The Sabine River Authority of Louisiana (SRA or SRA of Louisiana) has been characterized as one of the most powerful and autonomous of State agencies in Louisiana.² The SRA, along with the SRA of Texas, jointly manages the Toledo Bend Reservoir on the Louisiana-Texas border. The Reservoir is the “largest manmade reservoir in the South and contains the largest unallocated supply of fresh water in Texas.”³

Despite this importance, surprisingly little scholarly examination of the SRA exists.⁴ This Article is intended to serve as the starting point for more detailed legal analysis of the SRA. For that reason, this Article is largely a historical review of the development of the SRA and an examination of the major legal issues faced by that agency—a coalescence of issues on which to build future studies and (hopefully) an inspiration to others to follow through with those endeavors.

Part II of this Article examines, in a brief sense, the factual development of the SRA in order to situate the agency within its historic context. Part III is a review of the reported jurisprudence related to the SRA, ranging from property acquisitions to Eleventh Amendment immunity issues. Part IV situates the SRA within the broader debate of its obligations (or lack thereof) under the dormant Commerce Clause of the United States Constitution with regard to interstate water sales. This examination is undertaken through the lens of the recent decisions of the United States Court of Appeals for the Tenth Circuit regarding Oklahoma’s water sale obligations to Texas under the Red River Compact.⁵ Part V contains a brief examination of the SRA’s involvement with the federal government in the licensing of its hydroelectric generation facilities, both past and present, and the environmental issues related to those activities. Finally, Part VI contains a summary of the legal issues in Parts III through V with questions for the future of the SRA.

2. La. Op. Att’y Gen. No. 97-287, 1997 WL 730366, at *1-2 (Oct. 28, 1997).

3. SABINE RIVER AUTH. OF TEX. & SABINE RIVER AUTH., STATE OF LA., TOLEDO BEND PROJECT, FERC No. 2305—FINAL LICENSE APPLICATION EXECUTIVE SUMMARY 1 (Sept. 2011), http://www.tbpjo.org/PublicRelicensing/documents/TB_FLA/Executive_Summary_of_FLA-1109_29.pdf [hereinafter EXECUTIVE SUMMARY].

4. The majority of the treatment of the SRA in scholarly circles revolves around the case discussed *infra* regarding the appropriate scope of review under the National Environmental Policy Act. See, e.g., C.A. Gavilondo, Sabine River Authority v. Department of Interior: NEPA’s Applicability to Federal Inaction, 67 TUL. L. REV. 560 (1992).

5. See Tarrant Reg’l Water Dist. v. Herrmann (*Tarrant IV*), 656 F.3d 1222 (10th Cir. 2011); City of Hugo v. Nichols, 656 F.3d 1251 (10th Cir. 2011).

As a largely historic review of an under analyzed agency, this paper cannot, by its nature, be an exhaustive analysis of all potential legal issues. Rather, it is a treetop level examination intended to spur further analysis and discussion.

II. A BRIEF HISTORY: THE SABINE RIVER, THE SABINE RIVER COMPACT, AND THE LOUISIANA SRA

The Sabine River, likely originally named “Rio de Sabinas” after the Spanish word for cypress,⁶ begins as a small stream in Hunt County, Texas, and winds its way across 580 river miles through Texas, forming the Texas-Louisiana border until it empties into Sabine Lake between Cameron Parish, Louisiana and Orange County, Texas.⁷ From there, the waters flow into the Gulf of Mexico.⁸

The River, historically, has been both a blessing and a bane to the existence of its human neighbors. During the nineteenth and early twentieth centuries, the River was prone to massive, devastating floods.⁹ In addition, although the River was able to support some commerce, it was too treacherous to support substantial steam travel, thus limiting the economic development of the region.¹⁰ Nonetheless, the River did and does provide a source of freshwater to the region and also serves as a habitat for the Blue Sucker (*Cycleptus elongatus*), the Largemouth Bass (*Micropterus salmoides*), and the American Eel (*Anguilla rostrata*),¹¹ the latter of which is currently being considered for classification as threatened.¹²

The River remained largely untamed and forgotten in the timberlands of East Texas and West Louisiana until, in the 1930s,

6. BOWMAN, *supra* note 1, at 22-23.

7. *Id.* at 7, 17-18.

8. Paul Elliott, *Texas' Interstate Water Compacts*, 17 ST. MARY'S L.J. 1241, 1263 (1986) (citing II THE HANDBOOK OF TEXAS 525 (W. Webb ed. 1952)).

9. BOWMAN, *supra* note 1, at 35-36.

10. *Id.* at 37; SHANNON CLEMENTS, MANY, LA.: REFLECTIONS OF OUR TOWN 311 (1999).

11. See generally BIO-WEST, INC., LOWER SABINE RIVER FISHERY STUDY: DOWNSTREAM FISHERIES RESOURCES REPORT (Apr. 11, 2011), http://www.tbpjo.org/PublicRelicensing/documents/TB_FLA/TBend_Final_Sabine_FisheriesRsrsRpt-110413.pdf.

12. Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the American Eel as Threatened, 76 Fed. Reg. 60,431-32 (Sept. 29, 2011). An exhaustive list of the species present in the Sabine River and Toledo Bend Reservoir is not practical for this Article. “The Sabine River drainage supports a large assemblage of fish species with 103 documented species. Seventy-two of these species have been recorded within the Toledo Bend Reservoir.” SABINE RIVER AUTH. OF TEX. & SABINE RIVER AUTH., STATE OF LA., TOLEDO BEND PROJECT, FERC NO. 2305 - FINAL LICENSE APPLICATION, EXHIBIT E—ENVIRONMENTAL EXHIBIT, 3.5 FISH AND AQUATIC RESOURCES 3 (Sept. 2011), http://www.tbpjo.org/PublicRelicensing/documents/TB_FLA/TBend_ExhE 3.5-Fish-Aquatic-110929.pdf (citations omitted).

political rumblings began about converting the River to a water conservation area and a recreational destination.¹³ Following World War II, these rumblings became louder.¹⁴ Added to the conservation and recreation interests in controlling the Sabine River post-World War II, was the interest of industrial growth.¹⁵ The Sabine River Watershed Association, in an effort to drum up support for the necessary legislation in Texas to begin this control, expressed its desire for any improvements to the area to bring the “chemical trinity” to East Texas: “acids, hydrocarbons and fresh water.”¹⁶ The key to enticing the former two industries was the presence of the latter commodity. Similar pleas and calls were made in Louisiana.¹⁷ Thus, fresh water needs became paramount in the economic development of East Texas and West Louisiana.

The grassroots efforts of local entrepreneurs and politicians in Louisiana and Texas culminated in the creation of the Sabine River Authority of Texas in 1949 and the Sabine River Authority of Louisiana in 1950.¹⁸ From the legal machinations that created Toledo Bend Reservoir, the SRA of Louisiana has emerged as a semi-autonomous political subdivision in Louisiana with sweeping powers. In fact, a former Louisiana Attorney General noted, “Rarely in our law do we find such a sweeping grant of independent authority to an agency of the state.”¹⁹

Because the bulk of the River is situated on the border between Louisiana and Texas,²⁰ any meaningful development of the River would necessitate interstate cooperation. This cooperation came in the form of the ratification of the Sabine River Compact (Compact) in Texas in 1953 and in Louisiana in 1954.²¹ Congress ratified the Compact in 1954,²² thus opening the way for a realization of its stated goals: the conservation of

13. BOWMAN, *supra* note 1, at 42. In its attempts to sell the entire package of Sabine River control ideas to the Texas Legislature, the SRWA reminded people “not [to] underestimate the power of the tourist dollar.” *Id.* at 49.

14. *Id.* at 7, 42.

15. *Id.* at 49.

16. *Id.*

17. *See generally* TOLEDO DEV. ASS’N (TDA), THE TOLEDO BEND DAM STORY (n.d.).

18. BOWMAN, *supra* note 1, at 69, 75. For the legislative enactments, see LA. REV. STAT. ANN. § 38:2321 (2011), and Sabine River Authority, 1949 Tex. Gen. Laws 193.

19. La. Op. Att’y Gen. No. 97-287, 1997 WL 730366, at *2 (Oct. 28, 1997); *see also* La. Op. Att’y Gen. No. 07-0093, 2008 WL 2075622 (Apr. 8, 2008) (commenting on the broad authority of the SRA).

20. SAM MIMS, TOLEDO BEND 2 (1972).

21. BOWMAN, *supra* note 1, at 137; Elliott, *supra* note 8, at 1263.

22. Act of Aug. 10, 1954, Pub. L. No. 83-578, 68 Stat. 690 (1954).

water, the promotion of recreation, and the creation of a hydropower generation facility.

In a brief sense, the Compact is a congressionally approved document that permits Louisiana and Texas to work together to determine the management of the waters of the Sabine River.²³ Specifically, the Compact contains the following statement regarding the intent of the states in entering into the agreement:

The major purposes of this Compact are to provide for an equitable apportionment between the States of Louisiana and Texas of the waters of the Sabine River and its tributaries, thereby removing the causes of present and future controversy between the States over the conservation and utilization of said waters; to encourage the development, conservation, and utilization of the water resources of the Sabine River and its tributaries; and to establish a basis for cooperative planning and action by the States for the construction, operation, and maintenance of projects for water conservation, and utilization purposes on that reach of the Sabine River touching both States, and for apportionment of the benefits therefrom.²⁴

It is within this legal framework that Texas and Louisiana undertook the management of the portion of the Sabine River that borders the two states. This management includes water apportionment, water conservation, and the creation of hydroelectric power.²⁵ Because of this management and the goals of the Compact, the history of the Sabine River, the SRAs, and Toledo Bend Reservoir are intimately intertwined. Although Toledo Bend Reservoir is not the only reservoir created by the SRAs along the Sabine River, it is the largest.²⁶ In addition, because Toledo Bend Reservoir is the location of the interstate-owned hydropower facilities and because it is now the focus of possible interstate excess freshwater sales, Toledo Bend is the only reservoir reviewed in this Article.

Toledo Bend Reservoir is described by Bowman thusly:

Toledo Bend Reservoir, ultimately built through a joint effort of the Sabine River Authorities of both Texas and Louisiana, was proposed with a surface area of 182,900 acres behind a dam on the Sabine River located 60 airline miles south of Logansport, Louisiana. A storage allocation of 1,300,000

23. See BOWMAN, *supra* note 1, at 75.

24. Editors' Notes, LA. REV. STAT. ANN. § 38:2329 (2011).

25. *Id.*

26. In fact, initial plans for the SRAs contained proposals for fourteen reservoirs along the Sabine River. BOWMAN, *supra* note 1, at 75-78.

acre-feet was proposed to produce the hydraulic head required for the generation of electric energy at the site.²⁷

More poignantly, the Toledo Development Association (TDA), in its promotional literature for the Reservoir, noted: “Nature seems to have had this project in mind as it molded the area so that a dam one and one-sixth miles long could form a lake 100 miles long with a 650-mile shoreline. A spot so favorable has not yet been found in the entire Southwest.”²⁸

One of the most significant facts about the creation of Toledo Bend Reservoir is that, aside from some minimal scoping loans, the Reservoir, the fifth-largest artificial reservoir in the United States, was constructed without the financial assistance of the federal government.²⁹ The reality of this fact is that massive amounts of money had to be raised by the respective states in order to undertake the project.³⁰ These efforts spanned the time between the signing of a memorandum of agreement in 1955 between Texas and Louisiana to construct the Reservoir and the beginning of the use of the hydroelectric facilities in 1968.³¹ The Louisiana funding was raised by raiding a Confederate Veterans pension fund and the Texas funding was appropriated by the Legislature.³² The remaining funds were to be supplied by hydroelectric energy bonds purchased by future users of the hydropower facilities—Gulf States Utilities, Central Louisiana Electric Company, and Louisiana Power and Light Company.³³

One of the major obstacles to the construction of the Reservoir was the reality that substantial swaths of land had to be acquired for future flooding behind the Toledo Bend Dam.³⁴ Although the population in the region was thin, “some 400 families would have to be relocated.”³⁵ The impacts of this relocation resulted in a substantial amount of litigation in the 1950s and 1960s. The reported cases on this issue are discussed *infra* Part III.

27. *Id.* at 78.

28. TDA, *supra* note 17, at 2-3.

29. BOWMAN, *supra* note 1, at 97; MIMS, *supra* note 20, at 2-3.

30. In addition to the economic development ideals used to create the SRAs in Louisiana and Texas, at least in Texas, Bowman credits substantial droughts in Texas during the 1950s for spurring the Texas Legislature to increase funding for reservoir construction in the 1960s. See BOWMAN, *supra* note 1, at 138-42.

31. *Id.* at 138, 157.

32. *Id.* at 141, 144.

33. *Id.* at 145.

34. *Id.* at 143.

35. *Id.*

During the time since the completion of the Toledo Bend Dam in 1968, the SRA has expanded dramatically.³⁶ In 1970, the SRA of Louisiana was granted additional authority for the use of Louisiana's share of the waters under the Compact. Through Acts 90 and 117 of the 1970 Regular Session of the Louisiana Legislature, the SRA was authorized to create diversion canals from Toledo Bend Reservoir to industrial operations in the area around Lake Charles, Louisiana.³⁷ "In recent years, nearly 20 billion gallons of diverted water ha[ve] been pumped through the [Sabine River Diversion] system each year, primarily for [i]ndustrial use."³⁸

From their early period as water conservation entities, the SRAs of Texas and Louisiana have developed an appetite for selling the resource that they are charged to conserve.³⁹ These developments are evidenced in Parts IV and V, *infra*, in which the history of the hydropower program and issues related to water sales are reviewed.

III. SRA-RELATED JURISPRUDENCE

Since its creation in 1950, the SRA has been involved in countless lawsuits, the bulk of which were expropriation or condemnation proceedings that did not advance beyond the district court level. However, some of these property disputes were appealed and have created interesting scenarios related to mineral rights and expropriation law that any historical analysis would be incomplete without. It is within this historical framework that a brief review of the substantive jurisprudence related to the SRA is here undertaken.⁴⁰ Because the SRA,

36. *Id.* at 206-13.

37. *Diversion Canal—History*, SRA LA., <http://12.6.56.180/index.php?q=content/history-0> (last visited Feb. 20, 2012); see LA. REV. STAT. ANN. § 38:2325 (2011).

38. *Diversion Canal—History*, *supra* note 37.

39. See BOWMAN, *supra* note 1, at 212-13 (noting that the SRA of Texas anticipates, at some time, selling water to other parts of the state); Ronald A. Kaiser, *Texas Water Marketing in the Next Millennium: A Conceptual and Legal Analysis*, 27 TEX. TECH L. REV. 181, 187 n.19 (1996) (citing TEX. DEV. WATER BD., TRANS-TEXAS WATER PROGRAM, PHASE I, at 10 (1994)) (noting that Texas has investigated the potential for transporting Sabine River water to other portions of the state); see also Vickie Welborn, *SRA Committee Approves Texas Water Sales*, SHREVEPORT TIMES (Dec. 1, 2011, 7:36 AM) (on file with author) (noting the Louisiana SRA's recent plans to sell some of its water to Texas); Sabine River Auth. v. All Taxpayers, 11-1139, p. 1 (La. App. 3 Cir. 10/5/11); 74 So. 3d 278, 279 (noting the SRA's plans to sell water within Louisiana from its diversion canals).

40. This review is limited to the "substantive jurisprudence," because there have been several cases that were appealed, but the appeals involve technical procedural matters or non-substantive issues unrelated to the history of the SRA's legal battles. See, e.g., *Simmons v. Sabine River Auth. of La.*, No. 2:10 CV 1846, 2011 WL 2669472 (W.D. La. July 7, 2011) (reviewing the procedural discussion of a stay of litigation); *State v. Pierce*, 230 So. 2d 751 (La. Ct. App. 2d Cir. 1970); *State v. Pierce*, 230 So. 2d 752 (La. Ct. App. 2d Cir. 1970) (holding that the plaintiff,

under the Compact, often operates in conjunction with the SRA of Texas, a review of both states' cases is included.

The early litigation related to the SRA of Louisiana and the SRA of Texas related to the acquisition of land for the creation of the Toledo Bend Reservoir.⁴¹ Vast swaths of land had to be acquired, either through fee title purchases or through expropriation in order to flood the reservoir up to the 172-foot contour line.⁴² In both states, the respective SRAs' authority to expropriate was challenged and found unconstitutional.⁴³ The Louisiana statutes were not amended to account for this ruling and it is apparent that the SRA simply changed its expropriation practices in order to comply with general expropriation principles and constitutional mandates. In Texas, the jurisprudence was overruled,⁴⁴ ensuring that the SRA of Texas possessed the requisite authority to acquire the necessary land.

Several challenges have occurred in both Louisiana and Texas related to the effect of the expropriation of property for Toledo Bend, and other associated projects, with respect to the impacts of the expropriation

though the appellee, did not make a timely appearance before the appellate court, thus necessitating a dismissal of the appeal); *Pilcher v. Paulk*, 228 So. 2d 663 (La. Ct. App. 3d Cir. 1969) (noting that the SRA became involved in a divorce proceeding based upon the division of property that was the subject of an expropriation); *Sabine River Auth. v. Willis*, 369 S.W.2d 348 (Tex. 1963) (noting that the SRA of Texas disputed the proper party from whom to expropriate property for Toledo Bend); *Toledo Bend Proprietors v. Sabine River Auth.*, 395 So. 2d 429 (La. Ct. App. 3d Cir. 1981) (dealing with procedural matters not bearing on the substantive issues of maintenance of the water level in the Reservoir). In addition, certain other cases that do not bear on the environmental or natural resources issues related to the SRA are also excluded from this review. See, e.g., *Sabine Parish Police Jury v. Office of the Alcoholic Beverage Control*, 94-919 (La. App. 3 Cir. 8/25/94); 643 So. 2d 187 (considering whether the SRA could obtain a liquor license); *Oxley v. Sabine River Auth.*, 94-1284 (La. App. 3 Cir. 10/19/95); 663 So. 2d 497 (a personal injury suit against the SRA); *Stallworth v. McFarland*, 350 F. Supp. 920 (W.D. La. 1972) (holding that, in a personal injury suit against the SRA, the Jones Act and admiralty law are applied to Toledo Bend as a navigable waterway); *Sabine River Auth. v. All Taxpayers*, 11-1139 (La. App. 3 Cir. 10/5/11); 74 So. 3d 278 (dealing with the issuance of revenue bonds by the SRA). Reviews of such cases as these are not undertaken here.

41. It is relevant to note that challenges to the SRA's property acquisition authority have continued to the present, as evidenced by the recent case of *Pitts v. Sabine River Authority*, 107 S.W.3d 811 (Tex. App. 2003). Thus, not all of the acquisitions challenges were limited to the early years of these entities. Rather, they were just the predominant type of case in the early years.

42. *Wright v. Sabine River Auth.*, 308 So. 2d 402, 405 (La. Ct. App. 3d Cir. 1975) (noting that the SRA "acquired title to lands in Louisiana, including the property lying between the contour of 172 feet above mean sea level").

43. See *State v. Phares*, 159 So. 2d 144 (La. 1963) (declaring Louisiana's SRA expropriation statutes unconstitutional for failure to provide timely compensation); *Sabine River Auth. v. McNatt*, 337 S.W.2d 325 (Tex. App. 1960) (declaring Texas's SRA expropriation statutes unconstitutional for failure to provide due process), *rev'd*, 342 S.W.2d 741 (Tex. 1961).

44. *McNatt*, 342 S.W.2d 741 (overruling the appellate court's finding of the unconstitutionality of Texas' statutes).

on the mineral rights of the original owners. As is customary in expropriations, the fee title to the surface is transferred from the original landowners to the government; however, the minerals are reserved to the landowners.⁴⁵ This reservation, while preserved in the SRA land acquisitions in Louisiana and Texas, presented some practical problems at the time. The Toledo Bend Reservoir is deep.⁴⁶ In some places, the water reaches a depth of 99 feet.⁴⁷ The impracticality of drilling for minerals in water of this depth at the time of the acquisitions in the 1960s made the reservation of minerals by the landowners something of a hollow right.⁴⁸

In Louisiana, the courts, recognizing the practical impossibility of mineral production in Toledo Bend, allowed for the creation of separately compensable mineral estates in the expropriations.⁴⁹ By comparison, in Texas, the courts did not allow for additional compensation because the minerals may become difficult to reach due to the creation of the reservoir.⁵⁰ This distinction between Texas and Louisiana in terms of what is a compensable right is indeed odd, as the Louisiana courts had to struggle with the reality that, under civil law, there is no such thing as a “mineral estate.”⁵¹ In Texas, mineral estates are common.⁵² However, because the Civil Code does not recognize the ownership of fugacious things (such as oil and gas) until they are reduced to possession,⁵³ it was a stretch for the Louisiana courts to find a compensable right in a reserved thing that had not yet been reduced to possession.

In something of a legal sleight of hand, the Louisiana courts classified the mineral reservation as a servitude (which it, no doubt, is) that was being impinged upon by the expropriation and thus found that

45. LA. REV. STAT. ANN. § 31:149 (2011). *But see* Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVTL. L.J. 93, 134 (2009) (noting that such reservations are not automatic, but must be expressly reserved by the landowner).

46. *State v. Salter*, 184 So. 2d 783, 786 (La. Ct. App. 3d Cir. 1966).

47. BOWMAN, *supra* note 1, at 149.

48. *Salter*, 184 So. 2d at 787 (“The experts all agreed that the great cost of barges and other equipment would render the drilling or production of such wells, over deep water, economically infeasible.”).

49. *Id.* at 786-87 (noting that no mineral estate “as such” is recognized, but rather that the right taken by the expropriation is “in the nature of a servitude”); *see* *Bailey v. Sabine River Auth.*, 54 F.R.D. 42 (W.D. La. 1971); *State v. Miller*, 198 So. 2d 397 (La. 1967); *State v. Woodard*, 198 So. 2d 401 (La. 1967).

50. *See, e.g.*, *Sabine River Auth. v. Crabb*, 372 S.W.2d 575 (Tex. App. 1963).

51. *See* Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 803-04 (1992).

52. *See id.* at 802-03.

53. *Id.* at 803.

compensation for the impingement was due. In effect, the Louisiana courts carved out a mineral estate for those subject to Toledo Bend expropriations.⁵⁴ Shockingly, in Texas, where mineral estates are recognized, the courts found no such recompense was due.

Further complicating the situation in Louisiana is the reality that, now that the minerals underlying Toledo Bend can be reached by directional drilling, the State is faced with a situation where it compensated the original landowners for their minerals, but also allowed the reservations to continue. In effect, the State purchased the mineral servitudes through expropriation in the 1960s thinking that the minerals would be forever unreachable and now that they are reachable, the State cannot benefit from the minerals for which it already effectively paid. It would be interesting to see if the State could successfully argue that it was entitled to some share of the minerals now reachable beneath Toledo Bend under the principle of unjust enrichment of the original landowners (i.e., the landowners, by now producing the minerals that they were already paid for, are being paid twice for the same thing).⁵⁵

Further fleshing out applicable expropriation principles, the Texas Court of Civil Appeals, in *City of Dallas v. Rash*,⁵⁶ limited the recovery of landowners for property slated for use as a freshwater pipeline right-of-way from Toledo Bend to Dallas. In that case, the landowners challenged the amount of compensation for the expropriation of the right-of-way.⁵⁷ Alleging that their property was undervalued, the landowners urged that their proximity to the Toledo Bend Reservoir raised their property values and that they should be compensated at a higher rate than the value prior to the creation of the reservoir.⁵⁸ The court agreed with the landowners, suggesting that, although the City of Dallas could have expropriated the pipeline right-of-way when it had the original authority to do so, in 1955, the landowners should not be punished for the fact that, in the intervening time between 1955 and the actual expropriations in 1961,

54. However, in *State v. Carter*, 293 F. Supp. 1171 (W.D. La. 1968), a federal court in Louisiana did not apply the same principles to timber land. In that case, the court only allowed for recovery for the land and the then-existing timber, not taking into account the possible continued susceptibility of the property to multiple harvests.

55. It is difficult to tell whether the calculations applied by the Louisiana courts in these historical cases were ones of the value of the servitudes or the actual value of what the original landowners could expect to realize had their minerals been sold at market. See, e.g., *State v. Salter*, 184 So. 2d 783, 788 (La. Ct. App. 3d Cir. 1966).

56. 375 S.W.2d 502 (Tex. App. 1964).

57. *Id.* at 503.

58. *Id.*

their property values had increased by virtue of the creation of Toledo Bend.⁵⁹

In 1975, the extent of the SRA's authority to regulate activities on Toledo Bend was challenged in court. In a series of cases, hereinafter referred to as the *Wright Cases*, that ultimately culminated in a joint decision by the Louisiana Third Circuit Court of Appeal,⁶⁰ the court recognized that the SRA has broad authority to control activities in what is known as the "lease back" area around the reservoir. During the initial property acquisitions that led to the creation of Toledo Bend, the SRA acquired property above the 172-foot contour line.⁶¹ The 172-foot line was and is the normal pool stage of Toledo Bend.⁶² In order to ensure control over property during high water stages, the SRA actually acquired property up to the 175-foot contour line or a "50 foot distance horizontally from the 172 foot contour, whichever is greater."⁶³ Although this property was owned in fee by the SRA, the SRA was authorized to lease the use of this property back to the original owners for their use, subject to some restrictions.⁶⁴ This area became known as the "lease back" area.⁶⁵ The subject of the *Wright Cases* was the extent of the SRA's authority to regulate activities in the lease back area.

In the *Wright Cases*, the landowners were operators of commercial facilities on the shores of Toledo Bend. Unlike the residential and personal uses of the lease back area by most adjacent landowners, the *Wright* landowners, as commercial ventures, were required to pay fees based upon their income to the SRA.⁶⁶ Among other allegations, the *Wright* landowners alleged that the SRA was levying a tax against them in contravention of the Louisiana Constitution.⁶⁷ The Third Circuit rejected this argument and others aimed at limiting the SRA's authority to

59. *Id.* at 509. The same principles were recited in *State v. Lindsey*, 524 F.2d 934 (5th Cir. 1975). In *Lindsey*, although the increased value principles were recognized as part of Louisiana and federal common law, the Fifth Circuit did not allow for the recovery of the increased value, finding that the property was within the scope of the original expropriations and thus not eligible for an increased valuation due to its later acquisition. *Id.*

60. *Wright v. Sabine River Auth.*, 308 So. 2d 402 (La. Ct. App. 3d Cir. 1975); *Sabine River Auth. v. Pendleton Bridge Marina, Inc.*, 308 So. 2d 420 (La. Ct. App. 3d Cir. 1975); *Sabine River Auth. v. Flying Bridge Marina, Inc.*, 308 So. 2d 422 (La. Ct. App. 3d Cir. 1975).

61. See La. Op. Att'y Gen. No. 09-0166, 2010 WL 457252, at *1-2 (Jan. 26, 2010) (discussing the history of the lease-back area).

62. *Wright*, 308 So. 2d at 405.

63. *Id.*

64. *Id.*

65. *Id.*

66. This amount was a "charge of two percent (2%) of the gross income from business conducted on premises." *Id.* at 406.

67. *Id.* at 407.

regulate commercial activity in the lease back area.⁶⁸ The court further found that the simple leasing back of the subject property did not include implicit permission to conduct commercial activity in an unregulated manner and that the SRA could not only charge the complained of fees, but that it could also place reasonable restrictions on the use of the lease back area.⁶⁹

Finally, citing Louisiana Civil Code article 453, the *Wright* landowners alleged that the lease back area, as a thing owned by an instrumentality of the State, was a public thing in which the SRA had no proprietary interest (and thus no right to charge fees).⁷⁰ The Third Circuit also rejected this argument. Citing *Landry v. Council of East Baton Rouge*,⁷¹ the seminal case in Louisiana on the distinction between things owned by the government in its public versus its private capacity, the court found that the SRA held the lease back area in its private capacity and could thus impose reasonable restrictions on its use.⁷² The *Wright Cases* further solidified the largely plenary power of the SRA related to Toledo Bend.

In 1976 and 1993, the SRA tested its authority to regulate the use of property surrounding Toledo Bend in two separate lawsuits regarding the construction and use of a road.⁷³ In 1976, the SRA challenged a private landowner's construction of a road to connect a strip of the latter's property that had become isolated by the rising waters of Toledo Bend.⁷⁴ In that case, the SRA claimed that the landowner did not possess a permit to construct a roadbed that effectively severed a portion of the reservoir, regardless of the impacts on his ability to reach all of his property.⁷⁵ The court agreed with the SRA, finding that the landowner needed a permit to make such a construction and that no such permit existed.⁷⁶

Although through that case the SRA further solidified its authority over matters affecting Toledo Bend, the SRA did not act on the court's order to the landowner that he remove the subject road.⁷⁷ Thus, when the SRA was sued in the 1990s by another landowner attempting to force the

68. *Id.* at 408.

69. *Id.* at 409-10.

70. *Id.* at 410.

71. 220 So. 2d 795 (La. Ct. App. 1st Cir. 1969).

72. *Wright*, 308 So. 2d at 411-12.

73. *Burns v. Sabine River Auth.*, 614 So. 2d 1337 (La. Ct. App. 3d Cir. 1993); *State v. Lucius*, 335 So. 2d 95 (La. Ct. App. 3d Cir. 1976).

74. *Lucius*, 335 So. 2d at 98.

75. *Id.* at 97-98.

76. *Id.* at 100.

77. *Burns*, 614 So. 2d at 1338.

Authority to remove the road from the *Lucius* case, the court allowed the suit to proceed.⁷⁸ In *Burns*, the court found that the SRA's action against Lucius, which, while shoring up the SRA's regulatory authority for matters around Toledo Bend, was also an action to protect the access rights of the landowners whose boat access to Toledo Bend had been severed by Lucius's road.⁷⁹ The *Burns* court found that this latter basis for the *Lucius* case created a quasi-contractual relationship between the SRA and the severed landowners, one by which the SRA may have been obligated to remove the road for the benefit of the landowners.⁸⁰

In *Crump v. Sabine River Authority*, the plaintiff-landowner sued the SRA in the 1990s for activity undertaken pursuant to an SRA permit issued in the 1970s.⁸¹ The plaintiff had sold a portion of her property, situated on a bayou, to the SRA for the creation of the Toledo Bend Reservoir.⁸² As the Reservoir filled, the plaintiff essentially gained lakefront property.⁸³ However, in the 1970s, a neighboring landowner, pursuant to an SRA permit, dredged an area near the plaintiff's property, altering the flow of the bayou.⁸⁴ Over time, this dredging activity caused the area near the plaintiff's property to dry up, thus cutting off her access to the Reservoir.⁸⁵ Although she was aware of the dredging operations in the 1970s, the plaintiff did not bring an action against the SRA for permitting the dredging until the waters had receded to a point where she no longer had access.⁸⁶ The plaintiff brought a damages and injunctive relief action against the SRA in 1992, claiming that the SRA "had an obligation to 'stop the individuals from digging the canal and/or hav[e] them . . . remove the canal . . . ' and a duty 'to restore the water flow and course of McDonald Bayou to its original path.'"⁸⁷ The Louisiana Supreme Court did not reach the merits of the plaintiff's claims. Instead, the Court found that the plaintiff's claims, ones brought in tort, had prescribed after the lapse of the one-year prescriptive period from the alleged tortious action.⁸⁸ Further, the court did not find that the effects flowing from the dredging (i.e., the slow drying-up of the water allowing the plaintiff's access to the Reservoir) constituted a continuing tort

78. *See id.*

79. *Id.* at 1338-40.

80. *Id.* at 1340.

81. 98-2326 (La. 6/29/99); 737 So. 2d 720.

82. *Id.* at p. 1; 737 So. 2d at 722-23.

83. *Id.* at p. 2; 737 So. 2d at 723.

84. *Id.*

85. *Id.*

86. *Id.* at p. 3; 737 So. 2d at 723-24.

87. *Id.* at p. 5; 737 So. 2d at 725 (alterations in original).

88. *Id.* at p. 11; 737 So. 2d at 729.

sufficient to extend the prescriptive period of one year.⁸⁹ Thus, the SRA was protected from liability in this matter by prescription.

The *Crump* case does not substantially add to the SRA-specific jurisprudence in that it relates more to principles of prescription than to the actual actions and authority of the SRA. However, as this case relates to the concept of a continuing tort, it is important and is consistent with later cases involving cumulative wetlands damage to coastal Louisiana as a result of the dredging of oil and gas access channels.⁹⁰ In those latter cases, the Louisiana courts have been similarly reluctant to recognize a continuing tort even when the damage caused by the dredging accumulates and increases over time.⁹¹

Another of the SRA's cases, *Sabine River Authority of Texas v. Hughes*,⁹² provides guidance, like the mineral cases noted above, that extends beyond the scope of the SRA. In *Hughes*, the SRA of Texas was sued for an inverse condemnation when the release of waters from its reservoir temporarily flooded the plaintiffs' property.⁹³ The court found that there was no taking when flooding was occasioned by water releases because the flooding was an indirect effect of the releases.⁹⁴ Specifically, the court stated that it could not find that "the Authority's intentional act of releasing water from the reservoir 'resulted' in a taking."⁹⁵ In support of this finding, the court noted:

[T]he water being released from the reservoir was not flowing directly onto appellees' property but into the Sabine River, via various man-made channels. The released water entered the Sabine River and mixed with water from Toro Bayou, running out of Louisiana into the Sabine, before overflowing the banks of the Sabine causing flooding.⁹⁶

Based upon this attenuation between the water release and the flooding of the plaintiffs' property, the court could not conclude that the release itself was the equivalent of an inverse condemnation.⁹⁷

The nexus that was apparently required by this Texas court between the release and the flooding may have significant implications for freshwater diversion projects in Louisiana (within and beyond the SRA's

89. *Id.* at pp. 10-11; 737 So. 2d at 728-29.

90. *See generally* Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post-Katrina and Rita Imperatives*, 51 LOY. L. REV. 861, 866-75 (2005).

91. *See id.*

92. 92 S.W.3d 640 (Tex. App. 2002).

93. *Id.* at 641-42.

94. *Id.* at 642.

95. *Id.* (quoting *City of Abilene v. Smithwick*, 721 S.W.2d 949, 951 (Tex. App. 1986)).

96. *Id.*

97. *Id.*

jurisdiction). In Louisiana, there is already a strong presumption that damages occasioned by freshwater diversion projects are not compensable.⁹⁸ The *Hughes* case should provide persuasive support for extending this concept to cases where property is indirectly flooded by freshwater diversions.

Perhaps the most famous case associated with the SRA is *Sabine River Authority v. United States Department of Interior*.⁹⁹ This case, which involved the SRA of Texas, was characterized by Judge Goldberg as a case “for the birds—thousands of them. And we mean that in no facetious sense.”¹⁰⁰ The substance of the case is fairly straightforward: The SRA of Texas challenged the Department of Interior’s (Interior) decision to acquire a conservation easement over thirty-eight hundred acres in East Texas, near Toledo Bend.¹⁰¹ The challenge was brought under the National Environmental Policy Act (NEPA), and the SRA of Texas alleged that before Interior could acquire the easement, the agency was required by NEPA to conduct an environmental impact statement (EIS) of the proposed acquisition.¹⁰² The easement was acquired by Interior for the purposes of maintaining a historic flyway for migratory birds (hence the court’s characterization of the case quoted above).¹⁰³ Although the United States Court of Appeals for the Fifth Circuit agreed with the SRA of Texas in its characterization of the acquisition as a “major federal action,”¹⁰⁴ it rejected the SRA’s claim that an EIS was necessary prior to the acquisition.¹⁰⁵ In effect, the court noted that the purpose of an EIS is to ensure that federal activities will not adversely impact the environment and that, though this acquisition was a major federal action, it was one that was calculated to maintain the environment rather than to impact it.¹⁰⁶ For a maintenance of the status quo, the court did not find that an EIS was necessary.¹⁰⁷

98. *Avenal v. State*, 2003-3521 (La. 10/19/04); 886 So. 2d 1085, *cert. denied*, 544 U.S. 1049 (2005); *Alonzo v. State*, 2004-2469 (La. 1/7/05); 891 So. 2d 9.

99. 951 F.2d 669 (5th Cir. 1992).

100. *Id.* at 671.

101. *Id.*

102. *Id.* It is relevant to note that the SRA of Texas’ challenge in this matter was likely not initiated out of a genuine concern for the environment, but rather because the SRA of Texas was contemplating the construction of a new forty-five thousand acre reservoir that would have encompassed the subject area and which was blocked by the federal action. *See id.* at 673.

103. *Id.* at 672.

104. A “major federal action” is the triggering language of NEPA. National Environmental Policy Act of 1969 § 102(c), 42 U.S.C. § 4332(c) (2006).

105. *Dep’t of Interior*, 951 F.2d at 680.

106. *Id.* at 679.

107. *Id.* (citing *Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980)).

Of interesting note, but not of any substantive relevance in the bulk of the jurisprudence, is the classification of the SRA for the purposes of Eleventh Amendment immunity in *Simmons v. Sabine River Authority of Louisiana*.¹⁰⁸ At issue in the Memorandum Order authored by Magistrate Kay is whether a case filed against, among others, the SRA for damage allegedly caused as a result of the opening of Toledo Bend's floodgates in 2001, should be remanded to state court because the SRA is immune from suit in federal court.¹⁰⁹ The court in *Simmons* undertook a lengthy analysis that considered whether the SRA is considered an "arm of the State" for the purposes of applying Eleventh Amendment immunity, ultimately concluding that the SRA should be so classified.¹¹⁰ Following its conclusion that the SRA may be afforded Eleventh Amendment immunity, the court concluded that this immunity would not be granted because the SRA had either waived its immunity or had failed to assert that immunity.¹¹¹

The SRA's status as being entitled to the immunity of a sovereign under the Eleventh Amendment is significant, as it means that the SRA should only be suable (under most circumstances) in state court. The practical effect of this reality is that it puts the funding of judgments against the SRA at the whim of the Louisiana Legislature. In other words, if a judgment is rendered against the SRA in state court, that judgment can only be fulfilled by a legislative appropriation.¹¹² However, a judgment against the SRA in a federal court may be executable,¹¹³ thus opening the sovereign to potentially significant threats to its finances. Interestingly, the *Simmons* decision was handed down by Magistrate Kay on October 3, 2011—exactly one month before the Fifth Circuit arguably tightened the limitations against suing the sovereign in federal court.

In dual rulings issued on the same day, the Fifth Circuit recognized that challenges to the constitutionality of a State statute were improperly

108. No. 2:11-cv-0588, 2011 WL 4703053 (W.D. La. Oct. 3, 2011).

109. *Id.* at *1-2.

110. *Id.* at *15.

111. *Id.* at *17.

112. LA. CONST. art. XII, § 10(C).

113. *See, e.g.,* *Porche v. St. Tammany Parish Sheriff's Office*, 67 F. Supp. 2d 631, 633 (E.D. La. 1999) ("Even though political subdivisions such as parishes, counties, and municipalities exist at the behest of their State, the Eleventh Amendment affords them no protection." (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990); *Lake Cnty. Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979))). Although it is probable that the SRA is an arm of the State that is entitled to Eleventh Amendment immunity in federal court, there is no definitive jurisprudence on this matter.

brought in federal court.¹¹⁴ In these cases, even where the State of Louisiana actively intervened into federal court to defend the constitutionality of a statute, the Fifth Circuit did not find a waiver of the State's Eleventh Amendment immunity.¹¹⁵ Arguably, had *Simmons* been decided a month later, the United States District Court for the Western District of Louisiana would have been bound by the more stringent limitations on hailing the SRA into federal court put in place in the *Union Pacific* and *Faulk* cases. Looking forward, it is unlikely that a Louisiana federal court will be as willing to find an Eleventh Amendment waiver or consent in the future. This probability bodes well for protecting the finances of the SRA from seizure.

IV. AN ANALOGUE IN THE MAKING? THE OKLAHOMA/TEXAS DISPUTES OVER RED RIVER WATER RIGHTS

The SRA and Toledo Bend are not the only reservoir-regulating bodies nor are they the only sources of fresh water in Louisiana. Among other regulating bodies is the Red River Compact Commission.¹¹⁶ Of late, issues related to the use of the Red River to supply fresh water across state boundaries has led to some interesting litigation. Although this litigation, to date, has not involved Louisiana, it is interesting for a contextual review of some potential issues for the SRA in the near future.

A. *A Brief Review of the Red River Issue*

Over several years, various entities in Texas, namely the Tarrant Regional Water District (TRWD) and the City of Irving (Irving) have attempted to challenge Oklahoma's authority to regulate out-of-state water sales.¹¹⁷ These challenges have largely revolved around Oklahoma's rights to restrict or limit out-of-state sales of Red River water under various state laws ostensibly drafted under the authority of the Red River Compact.¹¹⁸ Because the cases that have resulted from these challenges may have significant bearing on issues of interstate water sales in Louisiana and especially interstate water sales by the SRA, a

114. *Union Pac. R.R. v. La. Pub. Serv. Comm'n*, 662 F.3d 336 (5th Cir. 2011); *Faulk v. Union Pac. R.R.*, No. 11-30315, 2011 WL 5223033 (5th Cir. Nov. 3, 2011).

115. *Faulk*, 2011 WL 5223033, at *4.

116. LA. REV. STAT. ANN. § 38:20 (2011).

117. These challenges culminated in two recent Tenth Circuit decisions: *Tarrant IV*, 656 F.3d 1222 (10th Cir. 2011), and *City of Hugo v. Nichols (Hugo II)*, 656 F.3d 1251 (10th Cir. 2011).

118. See *Tarrant IV*, 656 F.3d 1222; *Hugo II*, 656 F.3d 1251.

brief review of the Red River Compact and these cases is herein undertaken.

In *Tarrant Regional Water District v. Herrmann (Tarrant I)*, the TRWD, a Texas political subdivision charged with, among other things, maintaining a series of reservoirs in north Texas for use as freshwater sources,¹¹⁹ applied for water purchase permits from the Oklahoma Water Resources Board (OWRB) for the purpose of purchasing fresh water from tributaries of the Red River.¹²⁰ At about the same time, the TRWD filed suit against the OWRB, challenging the constitutionality of Oklahoma statutes that placed restrictions on out-of-state water sales and alleging that the statutes were violative of the dormant Commerce Clause of the United States Constitution.¹²¹ Following preliminary hearings that lasted for several years and went through several appeals,¹²² one of which considered a question of whether Louisiana and Arkansas, as signatories to the Red River Compact, were necessary parties to the litigation,¹²³ the United States Court of Appeals for the Tenth Circuit recently held that the Oklahoma statutes at issue were both constitutional as well as being in conformity with the Red River Compact.¹²⁴

The Red River Compact was entered into among Texas, Oklahoma, Louisiana, and Arkansas in 1978, for the purpose of apportioning the River's water among those states.¹²⁵ In 1980, Congress approved the Red River Compact¹²⁶ pursuant to the Compact Clause of the United States Constitution.¹²⁷ Because interstate compacts, to have effect, must be

119. *Overview*, TARRANT REG'L WATER DIST., <http://www.trwd.com/overview.aspx> (last visited Feb. 21, 2012).

120. *Tarrant Reg'l Water Dist. v. Herrmann (Tarrant I)*, No. CIV-07-0045-HE, 2007 WL 3226812, at *1 (W.D. Okla. Oct. 29, 2007), *aff'd in part, appeal dismissed in part by* Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906 (10th Cir. 2008).

121. *Sevenoaks*, 545 F.3d at 909. The affirmation in *Sevenoaks*, was limited to the appeal of Oklahoma's motion to dismiss; whereas the Tenth Circuit dismissed the appeal of Oklahoma's request that the federal court abstain from hearing the matter, because it did not believe that it had jurisdiction to review, interlocutorily, a determination by the lower court not to abstain.

122. *Tarrant I*, 2007 WL 3226812; *Sevenoaks*, 545 F.3d at 909; *Tarrant Reg'l Water Dist. v. Herrmann (Tarrant II)*, No. CIV-07-0045-HE, 2009 WL 3922803 (W.D. Okla. Nov. 18, 2009), *aff'd, Tarrant IV*, 656 F.3d 1222; *Tarrant Reg'l Water Dist. v. Herrmann (Tarrant III)*, No. CIV-07-0045-HE, 2010 WL 2817220 (W.D. Okla. July 16, 2010), *aff'd, Tarrant IV*, 656 F.3d 1222; *Tarrant IV*, 656 F.3d 1222.

123. The court ruled that neither Louisiana nor Arkansas were necessary parties because this dispute was strictly limited to Oklahoma law and impacts to Texas. *Tarrant I*, 2007 WL 3226812, at *4-5.

124. *Tarrant IV*, 656 F.3d 1222, 1250.

125. See Louisiana Revised Statutes Annotated section 38:20 (2011), textual notes, for a complete version of the Red River Compact, including article I, which sets forth the purposes of the Compact.

126. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305.

127. U.S. CONST. art. I, § 10, cl. 3.

approved by Congress, the Tenth Circuit recognized that this approval incorporated the Compact into federal law, thus insulating it from a dormant Commerce Clause challenge as to the Compact.¹²⁸ Based upon this conclusion, the court rejected TRWD's dormant Commerce Clause allegations.

The next question for the *Tarrant IV* court was whether the Oklahoma statutes themselves went beyond the scope of the congressionally approved Compact. Should such be the case, the laws (rather than the Compact) could be the subject of a dormant Commerce Clause challenge. Although the Tenth Circuit and the district court spent a considerable amount of time reviewing this issue, the conclusion was ultimately fairly simple.¹²⁹ Both courts found that the congressional grants of authority in the Red River Compact were intended to be "protectionist" in nature as to each signatory state's share of the Red River and that each signatory state had plenary authority to regulate the use of the River and its tributaries and distributaries within the allocated basins.¹³⁰ Based upon this plenary authority, the Tenth Circuit did not find any violation of the dormant Commerce Clause by the Oklahoma legislation.¹³¹ The Oklahoma laws were found to be within the scope of the approved authority by Congress through the Red River Compact, and thus not violative of the United States Constitution.¹³²

The litigation against Oklahoma brought by Irving was similar in nature to that brought by TRWD, but the results of the former were different from the results of the latter. In *City of Hugo v. Nichols (Hugo I)*,¹³³ the Oklahoma city of Hugo (Hugo) and the Texas city of Irving sought to enter into contractual agreements to sell water from within the Red River basin for use in northern Texas. Contemplating a similar application to the OWRB that was made in the TRWD case, Hugo and Irving alleged that the same Oklahoma laws challenged in the TRWD

128. *Tarrant IV*, 656 F.3d at 1235-36 (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 569-70 (9th Cir. 1985)). Citing a long line of jurisprudence, the Tenth Circuit noted that the dormant Commerce Clause exists for the purpose of ensuring that state laws do not interfere with interstate commerce. Once a law has been approved by Congress in the manner of a compact, that law is elevated to the level of federal law which is unassailable under the dormant Commerce Clause (as it is no longer a state acting to affect interstate commerce, but rather the federal government). *Id.*

129. *See id.* at 1236-50; *Tarrant II*, No. CIV-07-0045-HE, 2009 WL 3922803, at *3-7 (W.D. Okla. Nov. 18, 2009), *aff'd*, *Tarrant IV*, 656 F.3d 1222.

130. *Tarrant IV*, 656 F.3d at 1237; *Tarrant II*, 2009 WL 3922803, at *6.

131. *Tarrant IV*, 656 F.3d at 1250.

132. *Id.*

133. No. CIV-08-303-JTM, 2010 WL 1816345 (E.D. Okla. Apr. 30, 2010), *vacated*, *Hugo II*, 656 F.3d 1251 (10th Cir. 2011).

case were impermissible restrictions on interstate commerce under the dormant Commerce Clause and that the laws should be enjoined.¹³⁴ The district court in *Hugo I* followed the same logic as the court in *Tarrant IV*, finding that the challenged laws did not violate the dormant Commerce Clause and that they should not be enjoined.¹³⁵ However, on appeal, although the *Hugo II* decision was rendered on the same day as the *Tarrant IV* decision (with the tacit implication that the cases were considered together), the Tenth Circuit refused to reach the merits of Hugo's and Irving's challenges to the same laws.¹³⁶ Instead, the court in *Hugo II*, *sua sponte*, focused on the plaintiffs' standing.¹³⁷ The Tenth Circuit dismissed Hugo's claims against the OWRB because "the Supreme Court has made clear that the Constitution does not contemplate the rights of political subdivisions as against their parent states" over substantive provisions of the Constitution.¹³⁸ The court went on to dismiss Irving's claims against the OWRB as impermissible because Irving did not allege an actual case or controversy as against the OWRB.¹³⁹ Thus, in the context of the *Hugo II* matter, the court did not reach the substantive questions of the constitutionality of the Oklahoma laws as it did in *Tarrant IV*. However, based on the *Tarrant IV* decision, it is doubtful that the outcome as to the validity of the laws would have been different.

Although no such challenges have, as yet, been leveled against the SRA, because of increased discussion of interstate water sales from Toledo Bend, the Oklahoma cases provide an interesting perspective on some SRA issues—particularly what protections the SRA, specifically the SRA of Louisiana, may have should it decide not to sell water interstate. This question is reviewed in Part IV(B) in the context of the Oklahoma cases. Further, the news and applicable laws related to SRA water sales are also reviewed.

B. A Comparison to the SRA's Current Water Sale Plans

Recently, the SRA has been contemplating a long-term water sale to Texas.¹⁴⁰ Although this sale would not necessarily trigger the TRWD-style legal challenges as it currently stands, it is important to understand

134. *Id.* at *1.

135. *Id.* at *7.

136. *See Hugo II*, 656 F.3d 1251.

137. *Id.* at 1255.

138. *Id.* at 1257-58.

139. *Id.* at 1263-65.

140. Welborn, *supra* note 39.

the analogues in the event that a similar scenario does develop between Louisiana and Texas. The main reason that the currently contemplated SRA sale does not initially raise TRWD-style concerns is because, unlike in Oklahoma, the SRA does seem to want to sell its water. Thus, there is not yet a situation in which Texas wants water that it cannot have (the TRWD situation). However, if the SRA's position on its currently planned sale changes, it is possible that Louisiana could be on the receiving end of a TRWD-style challenge. In order to determine whether the Tenth Circuit's decision in *Tarrant IV* will be persuasive in a Louisiana analogue, it is necessary to compare the Red River Compact and the Sabine River Compact.

In terms of sheer girth, the Red River Compact (RRC) appears more complex than the Sabine River Compact (SRC). Some of this apparent complexity relates to simple geography: the Red River, as it is covered by the RRC, includes four states (Texas, Oklahoma, Arkansas, and Louisiana), reaching from the Texas-New Mexico border to the confluence of the Red River with the Atchafalaya and Old Rivers in Louisiana.¹⁴¹ In contrast, the Sabine River, as it is covered by the SRC, includes only two states (Texas and Louisiana).¹⁴² Thus, there are simply more interested parties and more moving parts with regard to the RRC. Another distinction between the RRC and the SRC that causes an apparent difference in complexity is a matter of timing: the SRC was approved by Congress in 1954;¹⁴³ whereas the RRC was approved in 1980.¹⁴⁴ In the interim between the two compacts, federal environmental laws were enacted and the latter compact contains provisions for compliance with these laws.¹⁴⁵ On the whole, despite the apparent differences in complexity between the two compacts, they are largely the same for the purposes of this comparison.

As with the RRC, the SRC itself, having been incorporated into federal law through Congress's approval in 1954, is unassailable as a violation of the dormant Commerce Clause.¹⁴⁶ Thus, in order for Louisiana to refuse out-of-state water sales and not run afoul of the dormant Commerce Clause, there must be evidence that the SRC, like the RRC, contains a clear indication that Congress intended for the

141. Act of Dec. 22, 1980, Pub. L. No. 96-564, §§ 2.12, 3.01, 94 Stat. 3305.

142. Act of Aug. 10, 1954, Pub. L. No. 83-578, 68 Stat. 690, 690.

143. *Id.*

144. 94 Stat. 3305.

145. *See, e.g.*, Preamble, Art. XI, 94 Stat. 3305, 3305, 3317-18 (containing provisions for compliance with the Clean Water Act, 33 U.S.C. § 1251 (1972)).

146. *Tarrant IV*, 656 F.3d 1222, 1235-36 (10th Cir. 2011).

former to be “protectionist” in nature.¹⁴⁷ As in the *Tarrant* cases, such a protectionist bent to the Compact would indicate Congress’s intent to allow Louisiana (or Texas, as the case may be) to restrict water sales in a manner that would otherwise represent a violation of the dormant Commerce Clause.¹⁴⁸

A side-by-side comparison of the operative provisions of the RRC and the SRC demonstrate that the same protectionist inclinations are present in the SRC as the *Tarrant IV* court found in the RRC. The *Tarrant IV* court placed great weight on Congress’s ratification of the RRC language, which provides, “Each Signatory State may use the water allocated to it by this compact in any manner deemed beneficial by that state.”¹⁴⁹ Virtually identical language is present in the SRC, to wit: “Each State may use its share of the water apportioned to it in any manner that may be deemed beneficial by that State.”¹⁵⁰

Further, the language deemed important to the *Tarrant IV* court—the provision deferring to the apportioned state’s law for the regulation of the states’ respective water uses¹⁵¹—is also substantially similar between the RRC and the SRC. The RRC provides, “Each state may freely administer water rights and uses in accordance with the laws of that state.”¹⁵² Similarly, the SRC provides, “[N]othing in this Compact shall be construed as applying to, or interfering with, the right or power of either signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.”¹⁵³ Based upon the substantial similarities of the RRC and the SRC in the provisions found to be most important to the *Tarrant IV* court, it is unlikely that a dormant Commerce Clause challenge to a Louisiana decision not to sell water out-of-state from its allocation of Toledo Bend would be successful.

Giving further possibility to the specter of a *Tarrant IV*-like suit are the environmental requirements that the SRA must fulfill in order to proceed with its contemplated water sale. As the Louisiana Attorney General has recently stated, “[T]he . . . SRA [is] obligated to comply with the Public Trust Mandate while executing [its] statutory duties,

147. *Id.* at 1237; *Tarrant II*, No. CIV-07-0045-HE, 2009 WL 3922803, at *6 (W.D. Okla. Nov. 18, 2009), *aff’d*, *Tarrant IV*, 656 F.3d 1222.

148. *Tarrant IV*, 656 F.3d at 1235-36; *Tarrant II*, 2009 WL 3922803, at *6.

149. *Tarrant IV*, 656 F.3d at 1237 (quoting art. II, § 2.01, 94 Stat. 3305, 3306) (citing *Tarrant II*, 2009 WL 3922803, at *6).

150. Act of Aug. 10, 1954, Pub. L. No. 83-578, art. V(k), 68 Stat. 690, 693.

151. *Tarrant IV*, 656 F.3d at 1250.

152. § 2.01, 94 Stat. 3305, 3306.

153. Art. II, 68 Stat. at 692.

[including] any agreements which provide for the sale, utilization, distribution, or consumption of State-owned water.”¹⁵⁴ In addition, there is some indication in the press that citizens’ groups may oppose the contemplated water sale.¹⁵⁵ Substantial political pressure from the citizens’ groups or a finding under studies conducted pursuant to article IX, section 1 of the Louisiana Constitution in compliance with the public trust doctrine may lead to alterations or even a cancelling of the SRA’s plans to sell water. Such a situation could lead to the Texas interests seeking to acquire a portion of Louisiana’s share of Toledo Bend’s water to bring a *Tarrant IV*-style suit.¹⁵⁶ Although all of this is speculative at this time, the SRA would be well advised to proffer Oklahoma’s defenses against such an attack should it come. In this instance, the *Tarrant IV* decision is a favorable one for Louisiana—if the SRA decides to sell and encounters no challenges, *Tarrant IV* is inapplicable;¹⁵⁷ if the SRA decides to sell and encounters challenges to the sale, *Tarrant IV* is similarly inapplicable;¹⁵⁸ if the SRA decides not to sell, *Tarrant IV* provides the SRA with a substantial shield against suits for violations of the dormant Commerce Clause for a decision not to sell.¹⁵⁹

154. La. Op. Att’y Gen. No. 10-0297, 2011 WL 1455968, at *6 (Mar. 22, 2011) (stating that although the SRA has the unique statutory authority to sell its water and that it must not comply with Act 955 of 2010 for the sale of water, such sales must still comply with the public trust doctrine embodied in LA. CONST. art. IX, § 1 and commenting that the SRA should use the scheme developed in *Save Ourselves, Inc. v. La. Evtl. Control Comm’n*, 452 So. 2d 1152 (La. 1984), in analyzing its compliance with LA. CONST. art. IX, § 1, for the purposes of water sales); see also La. Op. Att’y Gen. No. 11-0071, 2011 WL 3665435 (July 11, 2011) (noting that the SRA, while exempt from certain specific environmental statutes—in this case, the protections of historic and archaeological resources on State property—nonetheless has a duty to comply with the public trust doctrine); La. Op. Att’y Gen. No. 09-0291, 2010 WL 2071071 (Apr. 27, 2010) (commenting that the Red River Waterway Commission also should use the approach from *Save Ourselves*, 452 So. 2d 1152).

155. Vickie Welborn, *Citizens Get Involved in Texas Water Sales Decision*, SHREVEPORT TIMES (Dec. 20, 2011, 11:09 PM) (on file with author).

156. It is also interesting to note that certain mineral interests have begun to consider Toledo Bend as a water source for hydraulic fracturing, thus possibly creating an additional interest group that might challenge a decision by the SRA not to sell water. See, e.g., Vickie Welborn, *Fresh Water Flowing to Shale Operators*, SHREVEPORT TIMES (Dec. 15, 2011, 11:34 PM) (on file with author).

157. In this instance, *Tarrant IV* would be inapplicable because no challenge to the sale would exist and there would be no need for a shield from suit.

158. In this instance, *Tarrant IV* neither hurts nor helps the SRA, because it does not consider environmental or other issues, making it inapplicable to such challenges.

159. In this instance, *Tarrant IV* would be directly on point to a challenge to the SRA. Although it is not controlling precedent in the Fifth Circuit (where any challenge to the SRA from Texas or Louisiana would be brought), it is certainly strongly persuasive due to the analogous issues.

V. A BRIEF HISTORY OF THE SRA'S HYDROPOWER LICENSING AND RELICENSING

A. *The Original Federal Power Commission License—1963*

On October 14, 1963, the SRAs of Louisiana and Texas were jointly awarded a license by the Federal Power Commission (FPC)¹⁶⁰ to construct the “Toledo Bend Project, to be located on Sabine River in Newton, Sabine and Shelby Counties, Texas, and Sabine and DeSoto Parishes, Louisiana.”¹⁶¹ The FPC required the SRAs to obtain a license for the Toledo Bend Project because some of the implicated property included federal lands¹⁶² and because, under the Federal Power Act, the FPC was the licensing entity for hydropower projects.¹⁶³ It is important to note that, at the time of the licensure of the Toledo Bend Project, none of the environmental laws that are applicable to such major construction projects existed.¹⁶⁴ Thus, there was no inquiry during the licensing process into the impacts of the project on the environment aside from a few passing charges imposed on the SRAs by some interested federal agencies. From a historical context, it is interesting to note what these concerns were and what obligations were imposed on the SRAs as part of the licensing process.

The Department of Interior (presumably through its bureaus, the Fish and Wildlife Service (USFWS) and the National Park Service) recommended that the FPC license require that the SRAs be charged with “certain special conditions in the interests of fish and wildlife and archeological survey and salvage work in the area involved.”¹⁶⁵ It is unclear from the minimal licensing order what the extent of these

160. The FPC's duties as to hydropower generation licensing, subsequent to the granting of the original Toledo Bend license, were transferred to the Federal Energy Regulatory Commission. 42 U.S.C. § 7172(a) (2006). The references to these agencies herein are made based upon the agency possessing licensing power at the time of the respective actions related to the SRA.

161. Sabine River Auth. of Tex. and Sabine River Auth. of La., 30 F.P.C. 1009, 1010 (1963) (order issuing license for Project No. 2305, on Oct. 14, 1963).

162. *Id.* The current project covers 3797 acres of federal land in Texas. EXECUTIVE SUMMARY, *supra* note 3, at 1.

163. 16 U.S.C. § 797 (2006).

164. *See, e.g.*, National Historic Preservation Act (NHPA), Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470-470x-6); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f); Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)); Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544); Archaeological Resources Protection Act (ARPA), Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa-470mm).

165. *Sabine River Auth.*, 30 F.P.C. at 1010.

“special conditions” were. However, extant reports demonstrate that some amount of salvage archaeology was undertaken in the Toledo Bend area in advance of the flooding of the reservoir.¹⁶⁶ It is not possible to tell from these reports whether the scope of the work would comport with today’s standards under the National Historic Preservation Act or the Archeological Resources Protection Act. Nonetheless, these reports are evidence that some environmental assessment work was done in the pre-environmental laws era that was not specifically mandated by statute. In terms of the protection of wildlife and fisheries, the Order is similarly minimalist. It reserves the right of the FPC, of its own motion or on recommendation from the Department of Interior, the Louisiana Wildlife and Fisheries Commission, the Texas Game and Fish Commission, or the Forest Service, to direct the modifications of “the project structures and operation” in a manner consistent with the “primary purpose of the project, and consistent with the provisions of the Act.”¹⁶⁷ The Order never specifically states that wildlife or fisheries habitats or organisms must actually be protected, but the inference of this protection is present in the entities’ ability to request project modifications and in the requirement that such modifications be “consistent with the primary purpose of the project,” which included habitat creation and recreation.¹⁶⁸

The Department of Agriculture and its bureau, the Forest Service, “recommended . . . certain conditions for the protection and administration of the Sabine National Forest.”¹⁶⁹ As with the wildlife, fisheries, and archaeological protections noted above, it is unclear from the Order to what extent the FPC intended the Sabine National Forest to be protected.

In 1963, it is apparent that one of the FPC’s main protectionist objectives with the Order was to ensure that the navigation of the Sabine River would not be disrupted. The project plans were submitted to the United States Army Corps of Engineers, which commented that “the project structures were satisfactory insofar as the interests of navigation are concerned.”¹⁷⁰ Several conditions were inserted into the Order to ensure that navigation was maintained.¹⁷¹ In addition, the FPC dedicated a considerable portion of the Order to conditions to ensure the

166. See, e.g., J. NED WOODALL, *ARCHAEOLOGICAL EXCAVATIONS IN THE TOLEDO BEND RESERVOIR*, 1966 (1969); BURNEY B. MCCLURKAN, WILLIAM T. FIELD & J. NED WOODALL, *EXCAVATIONS IN TOLEDO BEND RESERVOIR*, 1964-65 (1966).

167. *Sabine River Auth.*, 30 F.P.C. at 1012.

168. *Id.* at 1012-13.

169. *Id.* at 1010.

170. *Id.*

171. *Id.* at 1014.

recreational use of the reservoir¹⁷² as well as for the parameters of the hydropower generation facilities proposed for the project.¹⁷³

The Order provided for a license term of fifty years.¹⁷⁴ Thus, although the license has been modified and amended numerous times since its issuance in 1963,¹⁷⁵ the original (as modified and amended) license does not lapse until 2013. Because of the pending lapse of the 1963 license, the SRAs are currently working through the Federal Energy Regulatory Commission (FERC) relicensing process. As a result of the changes in the environmental laws since the granting of the 1963 license, the current licensing efforts are far more complex and require considerable time and preparation to ensure compliance.

B. The Federal Energy Regulatory Commission Relicensing—2013

On September 22, 2008, the SRA of Louisiana and the SRA of Texas filed a Notice of Intent (NOI) to apply for a new license for the Toledo Bend Project.¹⁷⁶ The NOI notes that the current FERC (then-FPC) license lapses on September 30, 2013, and the NOI represents the first submission to FERC for a new license in the now-complex application process.¹⁷⁷ Following the submission of the NOI, the respective SRAs, operating together through the Toledo Bend Project Joint Operation (TBPJO), produced and submitted several environmental and economic analyses of the impacts related to the relicensing process. Of particular import to this paper are the environmental analyses submitted as part of the Final License Application.

172. *Id.* at 1012-13.

173. *Id.* at 1011-12.

174. *Id.* at 1011.

175. *See, e.g.*, Sabine River Auth. of Tex. and Sabine River Auth. of La., 32 F.P.C. 1416 (1964) (amendments to the Toledo Bend Dam plans); Sabine River Auth. of Tex. and Sabine River Auth. of La., 37 F.P.C. 786 (1967) (approval of Recreational Use Plan and modifications to license); Sabine River Auth. of Tex. and Sabine River Auth. of La., 39 F.P.C. 215 (1968) (license modifications); Sabine River Auth., 52 F.P.C. 938 (1974) (plan modifications); Sabine River Auth. of Tex. and Sabine River Auth., State of La., 7 FERC 61189 (1979) (modifying recreational plans); Sabine River Auth. of Tex., 17 FERC 62012 (1981) (same); Sabine River Auth. of Tex. and Sabine River Auth., State of La., 36 FERC 62166 (1986) (amendments to increase power generation capacity); Sabine River Auth. of Tex. and Sabine River Auth., State of La., 110 FERC 62028 (2005) (amendments to reverse the 1986 power capacity increase amendments); Sabine River Auth. of Tex. and Sabine River Auth., State of La., 128 FERC 62051 (2009) (amendments to land use provisions).

176. Letter from Melvin T. Swoboda, Licensing Manager, Toledo Bend Project Joint Operation, to Kimberly D. Bose, Sec'y, FERC (Sept. 22, 2008), http://www.tbpjo.org/Public_Relicensing/documents/TB_PAD/TB_NOI.pdf.

177. *Id.* at 1.

The TBPJO has proposed, through its relicensing efforts, not only a renewal of the existing license for forty-five years, but also the construction of a new hydropower facility and “a series of new measures to enhance fishery and aquatic resources and water quality in the lower Sabine River, and improve recreation, shoreline management, and historic properties management over the new license term.”¹⁷⁸ The proposed mechanism to “enhance fishery and aquatic resources and water quality” is to increase the volume of water releases from the Toledo Bend Reservoir and to operate the releases in such a way as to raise the temperature of the released water.¹⁷⁹ The proposed recreational improvements include restoration and upgrades to existing recreational facilities.¹⁸⁰ Shoreline management is proposed to include the implementation of an erosion monitoring program,¹⁸¹ an evaluation and, if necessary, alteration of the shoreline use permits issued by the SRAs to ensure shoreline protection, and efforts to control the invasive Chinese tallow trees.¹⁸² Finally, the management of historic properties proposal includes a “phased approach for field studies and evaluation of archaeological resources along the Project’s shoreline by identifying sensitive, high-priority locations—totaling approximately 250 miles” and policies and procedures for identifying and managing archaeological and structural historic properties within the Project’s area of potential effect.¹⁸³

As noted above, although the SRAs had to submit environmental analyses in conjunction with later license amendments, the 1963 license was obtained largely without any comprehensive environmental impacts analysis. Thus, the relicensing efforts present an opportunity to comprehensively assess the environmental impacts and benefits of the Toledo Bend Reservoir that has not heretofore been available.¹⁸⁴ The

178. EXECUTIVE SUMMARY, *supra* note 3, at 4.

179. *Id.* at 4-5. The latter suggestion will be accomplished by not just releasing waters from below the thermocline in the Reservoir, but also by releasing higher elevation waters that are warmer, thus raising the overall temperature of the released water. *Id.*

180. SABINE RIVER AUTH. OF TEX. & SABINE RIVER AUTH., STATE OF LA., TOLEDO BEND PROJECT, FERC No. 2305—FINAL LICENSE APPLICATION, EXHIBIT E—ENVIRONMENTAL EXHIBIT, 3.8 RECREATION, LAND USE, SHORELINE MANAGEMENT, AND AESTHETICS 12 (Sept. 2011), http://www.tbpjo.org/PublicRelicensing/documents/TB_FLA/TBend_ExhE3.8-RecLndUseSMngmt-110928.pdf.

181. This proposal is in keeping with the original FPC license charge that “[t]he Licensees shall be responsible for and shall minimize soil erosion and siltation on lands adjacent to the stream.” Sabine River Auth. of Tex. and Sabine River Auth. of La., 30 F.P.C. 1009, 1014 (1963).

182. EXECUTIVE SUMMARY, *supra* note 3, at 5.

183. *Id.* at 6.

184. It is important to note, as was the case with impacts to archaeological resources discussed in La. Op. Att’y Gen. No. 11-0071, 2011 WL 3665435 (July 11, 2011), that the FERC relicensing environmental impacts analyses do not always cover impacts and benefits to

environmental analyses undertaken by the TBPJO and presented to FERC are substantial and cannot be reviewed in any detail here.¹⁸⁵ It is worthy to note that the scope of the analyses is impressive, including considerations of the geology, geomorphology, soils, water quantity and quality, aquatic resources, wildlife and botanical resources, recreation uses, other land uses, shoreline management, cultural resources, and socioeconomic resources.¹⁸⁶ Nonetheless, despite the expansive nature of the analyses, the federal regulators and some members of the public have expressed some concerns about the proposed projects.¹⁸⁷

In May of 2011, the USFWS commented regarding its concerns about dissolved oxygen levels,¹⁸⁸ water temperatures during releases from the dam,¹⁸⁹ the presence of the dam as a barrier to migratory species,¹⁹⁰ and several issues related to various fisheries' habitat impacts.¹⁹¹ Many of the USFWS's concerns remained outstanding in its last official communique to FERC on August 3, 2011.¹⁹² However, it is apparent that

nonfederal lands. In addition, they do not cover impacts or benefits beyond the proposed scope of the issues noted in the FERC relicensing documents (e.g., the impacts of fresh water sales, etc.).

185. All of the scientific and economic studies are available for download on the TBPJO's Web site, <http://www.tbpjo.org/PublicRelicensing/default.aspx> (last visited Feb. 21, 2011).

186. See SABINE RIVER AUTH., STATE OF LA. & SABINE RIVER AUTH. OF TEX., FINAL LICENSE APPLICATION, TABLE OF CONTENTS (Sept. 2011), http://www.tbpjo.org/PublicRelicensing/documents/TB_FLA/TBend_FLA_Contents.pdf.

187. A sampling of the regulatory comments on the project is set forth below. The bulk of the public comments on the project do not relate to specifically identifiable problems and thus lack value in any meaningful review of the project. See, e.g., Electronic Comments from Paul Ringo to FERC, FERC Accession No. 20110901-5006 (Aug. 31, 2011) (containing unsubstantiated allegations of impropriety in the operation of the Toledo Bend Reservoir, historically, and general complaints about the proposed water sale from the Reservoir); Electronic Comments from Paul Ringo, Sabine Riverkeeper, to FERC, FERC Accession No. 20110901-5117 (Sept. 1, 2011) (same). Cf. Electronic Comments from Paul Ringo, Sabine Riverkeeper, to FERC, FERC Accession No. 20110901-5123 (Sept. 1, 2011) (raising reasonable suggestions for habitat studies related to the project). Other public comments suggest consideration of tourism-boosting measures for the Sabine River's unique attributes. See, e.g., Electronic Comments from Roman Ryder, President, Sabine Whitewater Club, to FERC, FERC Accession No. 20110808-5007 (Aug. 7, 2011) (commenting that study should be directed to enhancing the white-water rafting tourism on the Sabine River).

188. Letter from Edith Erfling, Field Supervisor, USFWS, to Kimberly D. Bose, Sec'y, FERC, FERC Accession No. 20110504-5082, at 1-2 (May 4, 2011).

189. *Id.* at 2-3.

190. *Id.* at 6.

191. *Id.* at 3-6. Many of the same concerns expressed by USFWS were also expressed by the Texas Department of Parks and Wildlife (TDPW). See generally Letter from Kevin Mayes, Inland Fisheries Div., TDPW, to Kimberly D. Bose, Sec'y, FERC, FERC Accession No. 20110504-5160 (May 4, 2011).

192. Letter from David Hoth, Assistant Field Supervisor, USFWS, to Kimberly D. Bose, Sec'y, FERC, FERC Accession No. 20110804-5007, at 1 (Aug. 3, 2011). However, by the same time, TDPW had substantially rescinded their concerns with the project. See Letter from Kevin

at least the TBPJO is making attempts to address some, if not all, of these concerns in subsequent studies.¹⁹³

On December 28, 2011, the Forest Service submitted comments on the project noting shortcomings regarding the cultural resources impacts analyses and the effects of the project on Chinese Tallow.¹⁹⁴ The lateness of these comments, which are largely suggestions for improved analytical measures prior to approval of the license, means that no project documents have yet been released addressing the concerns.

Because the relicensing is incomplete at the time of this writing, it is impossible to know what the ultimate outcome of these concerns will be. All that can be said of the relicensing project at this point is that unresolved issues remain related to dissolved oxygen, water temperatures, aquatic habitats, cultural resources, and invasive species. Between now and September of 2013 (the lapsing of the 1963 license), these issues must be resolved to the satisfaction of FERC.

VI. SUMMARY AND CONCLUSION

Because this Article was designed as a review, and because several of the issues discussed are either in the early stages of development and discussion (i.e., the possible water sale to Texas) or are ongoing (i.e., the FERC relicensing), it is difficult to make any overarching conclusions regarding the matters herein discussed.

The SRA certainly provides an interesting glimpse into the processes of land acquisition for large-scale public works projects. However, although these cases certainly support ongoing efforts in Louisiana (e.g., coastal restoration projects), there have been many more cases that are likely controlling in that arena.¹⁹⁵ Thus, while helpful in providing a framework for such acquisitions, it is doubtful that any SRA-related cases will be determinative of any of the State's current public works efforts. One possible exception to this premise is the *Sabine River Authority v. Hughes*¹⁹⁶ case, which provides interesting persuasive jurisprudence on the noncompensability of property inadvertently damaged by freshwater releases. The State would do well to keep this

Mayes, Inland Fisheries Div., TDPW, to Kimberly D. Bose, Sec'y, FERC, FERC Accession No. 20110801-5194 (Aug. 1, 2011).

193. See EXECUTIVE SUMMARY, *supra* note 3, at 4-5.

194. See USDA Forest Service's Comments on: Sabine River Authority's Updated Study Report, FERC Accession No. 20111228-5051, at 12 (Dec. 28, 2011).

195. *E.g.*, *Avenal v. State*, 2003-3521 (La. 10/19/04); 886 So. 2d 1085.

196. 92 S.W.3d 640 (Tex. App. 2002).

case in the forefront in future disputes related to freshwater diversion activities.

As noted above, the water sale issue is in its early stages. True, the SRA has put out a request for proposals for potential parties to bid on the ability to sell its excess water and it has also produced a draft water sale contract for public comment.¹⁹⁷ However, this idea has yet to be subject to any meaningful environmental reviews and it is, as of the time of this writing, unclear whether the proposed sale will go forward. Ultimately, as the law is currently structured, the SRA requires a final approval for any such contracts from the Governor.¹⁹⁸ Based upon recent reports from the Governor's Office, it is likely that this approval will not be forthcoming until the entire matter is reviewed and vetted.¹⁹⁹

Suffice it to say that, if the SRA or Louisiana (through the Governor) opts not to sell the State's allocation of freshwater to Texas, it is likely that Louisiana will be on the receiving end of a *Tarrant IV*-style lawsuit. However, the Tenth Circuit's recent decision in *Tarrant IV* bodes well for Louisiana's insulation from such suits, especially as to allegations of violations of the dormant Commerce Clause.

Finally, also as noted above, the FERC relicensing will not be complete for nearly two years. Thus far, it appears that the SRA is well on its way to being relicensed for a new forty-five-year term with FERC. However, as is evident from the comments discussed above, there are still outstanding questions and conflicts that must be addressed prior to the issuance of the new license. It is too early to speculate on the outcome of this process.

What is possible to take from this review is that the SRA has grown substantially since the early ideas in the mid-twentieth century of forming a State agency that would ensure the conservation of the Sabine River's waters. The legal issues presented by the SRA today—compliance with the water sale laws of Louisiana and compliance with federal environmental laws—are much more complex than anything its founders could have envisioned. These issues should provide substantial fodder for future legal analyses as their respective scenarios develop.

197. Mark Ballard, *Vote on Sale of Water Looms: Toledo Bend Plan Draws Criticism*, ADVOCATE, Jan. 3, 2012, <http://theadvocate.com/home/1705700-125/vote-on-sale-of-water.html>.

198. LA. REV. STAT. ANN. § 38:2325(A)(16) (2011). It is important to note that this authority of the Governor only extends to sales of water outside of the State. *Id.*

199. See Ballard, *supra* note 197 ("The Jindal administration opposes, at least for the time being . . .").