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United States Court of Appeals
for the Fifth Circuit

No. 20-40138
CONSOLIDATED WITH
No. 22-40433

PERRY BONIN; ACE CHANDLER; MICHAEL MANUEL; ROBERT ACREMAN; JACQUELINE ACREMAN, *Et al.*,

Plaintiffs—Appellees,

versus

SABINE RIVER AUTHORITY, STATE OF LOUISIANA,

Defendant—Appellant.

Appeals from the United States District Court
for the Eastern District of Texas
USDC No. 1:19-cv-527

(Filed Apr. 14, 2023)

Before RICHMAN, *Chief Judge*,* and DENNIS and HAYNES, *Circuit Judges*.

JAMES L. DENNIS, *Circuit Judge*:

This appeal presents the sole issue of whether the Sabine River Authority, State of Louisiana ("SRA-L")

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* CHIEF JUDGE RICHMAN dissents.

is an "arm of the state" entitled to sovereign immunity under the Eleventh Amendment to the United States Constitution. After applying our circuit precedent's six-factor test in *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986), we conclude that SRA-L is not an arm of the state. Accordingly, the district court's order denying SRA-L's Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction on sovereign immunity grounds is AFFIRMED.

I.

The "Sabine River Authority, State of Louisiana" ("SRA-L") was created, as a conservation and reclamation district lying within the watershed of the Sabine River, by an act of the Louisiana legislature in 1950, *see* La. R.S. 38:2321 et seq. The SRA-L subsequently entered into a joint venture with the Sabine River Authority, Texas ("SRA-T") (collectively "the SRAs"). *See* La. R.S. 38:2329 editors' note (West 2022) (including "Sabine River Compact"); *Stallworth v. McFarland*, 350 F. Supp. 920, 926 (W.D. La. 1972). "The designated purpose of this venture was the creation of a dam and reservoir to provide electrical power, promote industrial development in both States, conserve water for agricultural purposes, and create fishing, recreation, and commercial development." *Stallworth*, 350 F. Supp. at 926.

Plaintiffs are Louisiana and Texas property owners who alleged that the SRAs violated their federal Fifth Amendment constitutional rights. Their complaints

allege that the SRAs deliberately released water from the Toledo Bend reservoir into the Sabine River by opening spillway gates to relieve high-water levels in the reservoir during a rain event in March of 2016 and in doing so flooded their properties, causing significant property damage. Plaintiffs further alleged that the opening of the spillway gates was the "last straw" in a years-long pattern of mismanagement of water levels in the reservoir preceding the March 2016 event that contributed to the flooding and its severity, and claim that defendants had knowledge of the severe risk of downstream flooding.

Plaintiffs filed their lawsuit in federal court under 42 U.S.C. § 1983. SRA-L filed a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, arguing that it was entitled to Eleventh Amendment sovereign immunity as an arm of the state of Louisiana and had not waived that immunity. The district court denied the motion. Applying the *Clark* factors, that district court determined SRA-L was not an arm of the state and therefore was not entitled to Eleventh Amendment sovereign immunity. SRA-L appealed.

II.

"Denials of motions to dismiss on sovereign immunity grounds fall within the collateral order doctrine, and are thus immediately appealable." *Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009) (citing *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 411-12 (5th Cir. 2004)). Whether an entity is entitled to

Eleventh Amendment sovereign immunity is a question of law reviewed *de novo* by the appellate court. *Hudson v. City of New Orleans*, 174 F.3d 677, 682 (5th Cir. 1999). Generally, "[t]he burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citation omitted). However, there are exceptions. Relevant here, an entity asserting sovereign immunity bears the burden of demonstrating that it is an "arm of the state." *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000); *Cutrer v. Tarrant Cnty. Loc. Workforce Dev. Bd.*, 943 F.3d 265, 270 (5th Cir. 2019), *as revised* (Nov. 25, 2019).

III.

"The Eleventh Amendment has been interpreted by the Supreme Court to bar suits by individuals against nonconsenting states." *McCarthy* 381 F.3d at 412 (citing *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001)). Eleventh Amendment sovereign immunity "encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (citations omitted). "[I]dentifying when the state is a real, substantial party in interest is often not an easy task." *Hudson*, 174 F.3d at 681. Among state entities, there is a distinction between "arm[s] of the state" and those entities "possess[ing] an identity sufficiently distinct from that of the State of Louisiana to place it beyond [the Eleventh Amendment's] shield."

Milton v. St. Bernard Par. Sch. Bd., 803 F.2d 129, 131 (5th Cir. 1986). The question is "whether the defendant being sued is better described as an arm of the state partaking in the privileges of Eleventh Amendment immunity or whether the defendant is actually part of a political subdivision unprotected by the Eleventh Amendment." *Hudson*, 174 F.3d at 681.

"Whether a particular political entity is an arm of the state is a question of federal law." *Vogt v. Board of Com'rs of Orleans Levee Dist.*, 294 F.3d 684, 690 n.4 (5th Cir. 2002). "There is no bright-line test for determining whether a political entity is an 'arm of the state' for purposes of Eleventh Amendment immunity." *Id.* at 689. Rather, we must make a "reasoned judgment" whether the suit is "effectively against the sovereign state" despite the nominal defendant. *Earles v. State Bd. of Certified Public Accountants of La.*, 139 F.3d 1033, 1037 (5th Cir. 1998). "Our analysis must consider the particular nature of the entity, including its powers and duties, the nuances of its organizational structure, and its interrelationship with other organs of the state." *Id.* In this Circuit, we use the six factors from *Clark v. Tarrant County* to guide our analysis. *See* 798 F. 2d at 744-45. *Clark* is one of this Circuit's foundational Eleventh Amendment cases which identified from our case law the factors relevant to determining whether an entity is entitled to Eleventh Amendment immunity. *See Daves v. Dallas Cnty.*, 22 F.4th 522, 533 (5th Cir. 2022) (en banc) (describing our Eleventh Amendment case law); *Clark*, 798 F. 2d at 744-45. The six *Clark* factors are:

> (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Vogt, 294 F.3d at 689; *see also Hudson*, 174 F.3d at 681.

"A defendant need not possess each of the above attributes to benefit from the Eleventh Amendment. Nor are these factors necessarily equal to one another." *Hudson*, 174 F.3d at 681-82. "[T]he most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds," *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991) (quoting *McDonald v. Board of Miss. Levee Comm'rs*, 832 F. 2d 901, 907 (5th Cir. 1987)), while the last two factors "weigh significantly less" in the "balance of equities." *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 281 (5th Cir. 2002). We consider each factor in turn.

A. Characterization under state law

The first *Clark* factor considers whether state statutes and case law characterize the entity as an arm of the state. The district court found this factor weighed in favor of finding SRA-L an arm of the state. State statute characterizes SRA-L as "an agency and

instrumentality of the state of Louisiana required by the public convenience and necessity for the carrying out of the functions of the state." La. R.S. 38:2324(A). Although this classification may suggest that SRA-L is an arm of the state, we have cautioned that the description "creature or agency of the state . . . is far too inclusive to be useful for Eleventh Amendment analysis." *Vogt*, 294 F.3d at 690. Indeed, in the same sentence, the SRA-L is also characterized as "a corporation and body politic and corporate, with power of perpetual succession, invested with all powers, privileges, rights, and immunities conferred by law upon other corporations of like character including but not limited to port authorities, port commissions, and port, harbor, and terminal districts within the state."[1] La. R.S. 38:2324(A). This inconsistent characterization proves unhelpful in classifying SRA-L. On-point state case law is scarce and sheds no additional light on the question, as the

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[1] A brief survey of state statutes related to "port authorities, port commissions, and port, harbor, and terminal districts" reveals that at least some of those entities are referred to as "political subdivision[s] of the state," rather than "agenc[ies] and instrumentalit[ies]" of the state. *See*, *e.g.*, La. R.S. 34:201 (Lake Charles Harbor and Terminal District); § 34:241 (Port of Iberia District); § 34:1351 (Plaquemines Parish Port Authority). The "political subdivision" designation is typically juxtaposed as opposite an "arm of the state," and the two may even be "mutually exclusive." *See Vogt*, 294 F.3d at 692 (citing La. R.S. 13:5102(B); *Cozzo*, 279 F.3d at 281-82). Although, "this may not be a hard-and-fast rule, virtually every . . . government entity classified as a political subdivision has been denied Eleventh Amendment immunity." *Id.* & n.5 (citation omitted). Thus, if the SRA-L were analogized to a "political subdivision," this factor would weigh against sovereign immunity.

cases also describe the SRA-L's legal status, in dicta, inconsistently. *Compare Slowinski v. England Ecom. and Indus. Develop. Dist.*, 828 So. 2d 520, 528 n.7 (La. 2002) ("an instrumentality of the state of Louisiana"), *with Crump v. Sabine River Authority*, 737 So. 2d 720, 722 n.1 (La. 1999) ("a corporation and political subdivision of the State of Louisiana").

SRA-L argues that at some point after its creation as an independent authority, SRA-L was "placed within the Department of Transportation and Development," an executive branch department. La. R.S. 36:509(F)(1). It is true that some of our decisions have "suggest[ed] 'that all Louisiana executive departments have Eleventh Amendment immunity.'" *Vogt*, 294 F.3d at 692 (quoting *Champagne v. Jefferson Par. Sheriff's Off.*, 188 F.3d 312, 313 (5th Cir. 1999)). However, we have avoided pronouncing similar "hard-and fast rule[s]" in the Eleventh Amendment arm-of-the-state context, as we must "examine the particular entity" at issue. *See id.* (quoting *Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir. 1997)). Indeed, in finding a similar Louisiana port commission was not an arm of the state, we afforded little weight to its description under Louisiana law as "an executive department of the state" and "agency" of the state. *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 439-40 (5th Cir. 1985). This description under state law was "devoid of any language expressing or implying that this agency status [wa]s sufficiently broad based to make the Commission an 'alter ego' of the state," and the court therefore "decline[d] to afford the Commission . . . immunity

under the Eleventh Amendment when it ha[d] simply been described, without more, as an 'agency' of the State." *Id.* at 439. In the present case, SRA-L's belated placement in the executive branch is partly undercut by SRA-L's retention of significant operational autonomy, as the law placing it in the executive branch itself explicitly provided that SRA-L "shall exercise [its] powers, duties, functions, and responsibilities . . . independently of the secretary, the undersecretary, and any assistant secretary." La. R.S. 36:509(F)(1), 801.1(E).

Thus, while the language in the state statutes describing SRA-L as "an agency and instrumentality of the state" and as a member of the executive branch means this factor weighs in favor of finding SRA-L an arm of the state, we also note the factor's limited utility in this case given the inconsistent descriptions in the same statutes and the lack of a more-definitive characterization in either statute or case law.

B. Source of funding

The second *Clark* factor concerns the entity's source of funds. Because one of the goals of the Eleventh Amendment is to protect state treasuries, "it is well established that [this factor] is the most important." *Hudson*, 174 F.3d at 687. "In assessing this second factor, we conduct inquiries into, first and most importantly, the state's liability in the event there is a judgment against the defendant, and second, the state's liability for the defendant's general debts and obligations." *Id.* at 682.

Whether the state is liable for a money judgment against the entity is the "most significant" consideration. *Delahoussaye*, 937 F.2d at 147-48. This first prong of the second *Clark* factor's analysis generally involves review of "a state's statutes regarding indemnification and assumption of debts." *Vogt*, 294 F.3d at 693. SRA-L cites the Louisiana Constitution's command that "[n]o judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered." LA. CONST. art. XII, § 10(C). Under article XII, section 10(C), the legislature pays judgments against a state agency, while a political subdivision pays judgments against itself. *See Newman Marchive P'ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1266 (La. 2008); *Vogt*, 294 F.3d at 693. SRA-L presumes it is a state agency such that the state legislature would pay any judgment against it, but as our analysis of the first *Clark* factor makes evident, state law refers to SRA-L as both an "agency and instrumentality of the state" and "a corporation and body politic and corporate," La. R.S. 38:2324(A), including case law that describes SRA-L as a "political subdivision," *Crump*, 737 So. 2d at 722 n.1. There were no jurisdictional facts adduced in the district court as to how payment of judgments against SRA-L actually operates. SRA-L has not met its burden of showing the state is directly liable for judgments against SRA-L.

"The next step is to determine whether the state will indirectly fund a judgment against the levee

district because the state either is responsible for general debts and obligations or provides the lion's share of the levee district's budget." *Vogt*, 294 F.3d at 693. SRA-L appears to have near-total financial independence. "The authority shall operate from self-generated revenues and shall not be a budget unit of the state." La. R.S. 38:2324(B)(1). It "shall establish its own operating budget . . . subject to majority approval of the board of commissioners of the authority," though its "budget shall be submitted to the Joint Legislative Committee on the Budget for review and approval." *Id.* SRA-L "*may* . . . receive state appropriations at any time it is deemed advisable by the legislature, and only the expenditure of such appropriated funds shall be subject to budgetary controls or authority of the division of administration." *Id.* (emphasis added). Importantly, state law mandates that SRA-L pay its own debts from its self-generated revenues: SRA-L "shall have the power . . . [t]o incur debts and borrow money, but no debt so incurred shall be payable from any source other than the revenues to be derived by the authority." *Id.* § 2325(A)(5). In sum, while the legislature has the discretion to appropriate state funds to the SRA-L, the SRA-L is financially autonomous—it generates its own revenues, can incur debts and borrow money, and is obligated to pay its debts out of its own funds, without drawing on state resources.

Given SRA-L's financial independence—in particular SRA-L's liability for its own debts—and absent a showing by SRA-L that the legislature pays judgments against SRA-L, we cannot conclude at this juncture

that the state would be liable for a money judgment levied against SRA-L. It seems equally likely that SRA-L self-insures or pays its own judgments out of its own funds. Thus, because SRA-L, as the entity asserting sovereign immunity, bears the burden of demonstrating that it is an "arm of the state," we ultimately weigh this factor against immunity. *See Cutrer*, 943 F.3d at 271-72.

C. Autonomy

The third *Clark* factor considers the "entity's degree of authority independent from the state." *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 187 (5th Cir. 1986). This factor involves consideration of the entity's "independent management authority" and, to a lesser degree, "the independence of the individual commissioners." *Vogt*, 294 F.3d at 694-95 (quoting and citing *Jacintoport*, 762 F.2d at 442).

The district court found this factor weighed against finding SRA-L an arm of the state, noting that SRA-L "has considerable management authority" given to it by statute, including "the power to 'do all things necessary or convenient to carry out its functions.'" *See* La. R.S. 38:2325(A)(9)). SRA-L also has the power, *inter alia*, to acquire property (§ 2325(A)(2)), enter into contracts (§ 2325(A)(3)), incur debts and borrow money (§ 2325(A)(5)), and even "establish and maintain a law enforcement division within the Authority" (§ 2325(A)(17)). But ultimately SRA-L's powers are in service of its functions of maintaining,

conserving, and supervising the dam, reservoir, rivers, and streams within the Sabine River watershed. *See* § 2325.

In response, SRA-L maintains that it is a "budget unit" of the state, and thus subject to executive branch oversight. For support, it cites a 1997 Louisiana Attorney General Opinion. But the SRA-L's statute declares the exact opposite, that it "shall not be a budget unit of the state"; rather, it "shall operate from self-generated revenues" and "shall establish its own operating budget . . . subject to majority approval of the board of commissioners of the authority," though its budget "shall be submitted to the Joint Legislative Committee on the Budget for review and approval." La. R.S. 38:2324(B)(1). Clearly, SRA-L has a high degree of budgetary autonomy.

SRA-L also argues that its independent authority is counterweighted by the governor's role in appointing the board. SRA-L is governed by a thirteen-member board of commissioners appointed by the governor. *Id.* § 2322(A)(1). There are parish residency requirements for board members, but no other limits or qualifications in the statute. 258*258 *Id.* Most significantly, Board members "shall serve at the pleasure of the governor," though their nominations must be "submitted to the Senate for confirmation." *Id.* § 2322(A)(2). The district court determined that, while board members were "vulnerable" because they served at the pleasure of the governor, the board was still autonomous because the governor's discretion was limited by the

statutory requirement that members reside in certain parishes. We disagree.

The district court cited *Vogt v. Board of Commissioners of the Orleans Levee District*, 294 F.3d 684, and *Pendergrass v. Greater New Orleans Expressway Commission*, 144 F.3d 342 (5th Cir. 1998), for support, but both cases are factually distinguishable. In *Vogt*, the governor appointed six of eight levee district commissioners, subject to a requirement that his appointees be residents of the district *and* be recommended by the local legislative delegation. 294 F.3d at 684. In *Pendergrass*, the governor appointed three of five commissioners, subject to similar residency and local recommendation requirements, and further, those appointees served for a set term and not at the governor's pleasure. 144 F.3d at 347. Additionally, the other two members were appointed by local parish governing bodies. *Id.* Here, by contrast, there is no requirement that members be recommended by local legislators or local governing bodies; board members serve solely at the governor's pleasure and not for set terms; and all thirteen board members are gubernatorial appointments, with no board members appointed by local governing bodies.

Considering these circumstances, then, we think this factor weighs minimally against finding SRA-L an arm of the state. On one hand, the entire board is appointed by and serves at the pleasure of the governor; on the other hand, the SRA-L has significant management autonomy. To the degree that independent management authority weighs more heavily in the analysis

than the independence of commissioners, this factor tilts against SRA-L being an arm of the state.

D. Local or statewide focus

The fourth *Clark* factor considers whether the entity is concerned primarily with local, as opposed to statewide, problems—in other words, "whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants." *Pendergrass*, 144 F.3d at 347. State law describes SRA-L as a "conservation and reclamation district" that encompasses "all the territory . . . lying within the watershed of the Sabine River and its tributary streams" in six enumerated parishes. La. R.S. 38:2321. Limited territorial boundaries suggest that an entity is not an arm of the state. *Vogt*, 294 F.3d at 695; *Cozzo*, 279 F.3d at 282. Focusing on the SRA-L's territorial limits, the district court found that this factor weighed against finding SRA-L an arm of the state.

But SRA-L argues that its statewide purpose makes it an arm of the state, notwithstanding its territorial jurisdiction. SRA-L points to statutory language that says it is "required by the public convenience and necessity for the carrying out of the functions of the state" and "will be performing an essential public function under the constitution." La. R.S. 38:2324(A), (D). Thus, it argues in its brief that it "serves the important functions of water conservation, water management, hydropower generation, and recreational opportunities which benefits the entire state, not just local

inhabitants." For support, it cites *Delahoussaye v. City of New Iberia*, a case involving a state university whose statutory purpose was to serve the higher education needs of people statewide. 937 F.2d at 148.

We think that this factor weighs against finding the SRA-L an arm of the state. Though SRA-L surely generates some statewide benefits, its activities are localized, and it has a territorial jurisdiction. In these important respects, SRA-L is distinguishable from a state university that is a part of a system of higher education intended to serve the entire state. *See Vogt*, 294 F.3d at 695-96.

E. Authority to sue in own name

The fifth *Clark* factor asks whether the entity has authority to sue and be sued in its own name. According to state law, SRA-L "shall have and possess the authority to sue and be sued." La. R.S. 38:2324(B)(2). The district court found this factor weighed against finding SRA-L an arm of the state. SRA-L does not contest this factor, other than to correctly note that the fifth and sixth *Clark* factors "weigh significantly less" in the analysis. *Cozzo*, 279 F.3d at 281. We agree that this factor weighs against finding SRA-L an arm of the state, and also that the last two factors are properly afforded less weight than the others.

F. Right to hold and use property

Last, the sixth *Clark* factor asks whether the entity has the right to hold and use property. Based on state law, the district court found this factor weighed against finding SRA-L an arm of the state. La. R.S. 38:2325(A)(2). SRA-L contends on appeal that this factor weighs in favor of its immunity because state law says it holds property "as an instrumentality of the State of Louisiana." La. R.S. 38:2325(B). We disagree. The same statutory provision also says that "[t]itle to all property acquired by the Authority shall be taken in its corporate name." *Id.* In *Vogt*, we rejected an argument that an entity's right to hold property was "limited" because "all of its property ultimately belong[ed] to the state." 294 F.3d at 696. That argument "misse[d] the point; the relevant question is whether the [entity] has the right to hold property in its own name, and it clearly does," which "points away from Eleventh Amendment immunity." *Id.* The same applies here.

IV.

To summarize, we find that the first *Clark* factor weighs in favor of sovereign immunity, but only modestly; the remaining five factors weigh against sovereign immunity, to varying degrees. Crucially, the second factor leans against immunity given SRA-L's financial autonomy and because SRA-L failed to carry its burden of establishing that the state would be liable for any judgment rendered against it. The third factor,

and especially the fourth, weigh against immunity for the reasons explained above. The fifth and sixth factors also weigh against immunity, but those two factors weigh less in the analysis. That said, the *Clark* factors are only meant to guide the court's analysis, not to be tallied up to generate a mechanical result. Not all the factors need to be present for an entity to be entitled to sovereign immunity, nor are all the factors weighed equally. *Hudson*, 174 F.3d at 681-82.

Based on the forgoing, we conclude that the SRA-L is not an arm of the state and is not entitled to sovereign immunity. The district court's order denying SRA-L's motion to dismiss for lack of subject-matter jurisdiction is AFFIRMED. SRA-L's unopposed motion for supplemental briefing is DENIED.

United States Court of Appeals
for the Fifth Circuit

No. 20-40138
CONSOLIDATED WITH
No. 22-40433

PERRY BONIN; ACE CHANDLER; MICHAEL MANUEL; ROBERT ACREMAN; JACQUELINE ACREMAN, *Et al.*,

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SABINE RIVER AUTHORITY, STATE OF LOUISIANA,

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Appeals from the United States District Court
for the Eastern District of Texas
USDC No. 1:19-cv-527

(Filed Apr. 14, 2023)

Before RICHMAN, *Chief Judge*, and DENNIS and HAYNES, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

PERRY BONIN, ACE CHANDLER, MICHAEL MANUEL, et al., *Plaintiffs*,	§	CIVIL ACTION NO. 1:19-CV-00527
v.	§	JUDGE MICHAEL TRUNCALE
SABINE RIVER AUTHORITY OF TEXAS, SABINE RIVER AUTHORITY, STATE OF LOUISIANA, TOLBIN HOLBROOK [sic] *Defendants*.	§	

OPINION AND ORDER

(Filed Feb. 10, 2020)

Before the Court is Defendant Sabine River Authority, State of Louisiana ("SRA-L")'s Motion to Dismiss Plaintiffs' Complaint. [Dkt. 7]. SRA-L seeks dismissal of this case with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.* The Court has considered the motion, all other relevant filings, and the applicable law. For the reasons stated below, the Court finds that dismissal is not warranted.

I. BACKGROUND

The Plaintiffs are Texas and Louisiana property owners who allege that SRA-L and Sabine River

Authority of Texas ("SRA-T") (collectively "Defendants") "took, damaged, or destroyed" their property by causing or contributing to a Sabine River flood that damaged their property. [Dkt. 1, p. 6]. The Plaintiffs allege that the Defendants caused a "deliberate release of water from the Toledo Bend spillway gates into the Sabine River" in March of 2016. *Id.* at 1-2. The Defendants opened "nine spillway gates" over a twenty-four-hour period "in response to the fact that the water level had surpassed 172.5 feet." *Id.* at 2. However, Plaintiffs claim that "the opening of the spillway gates was merely the 'last straw' in a series of deliberate actions which Defendants had taken in the days, months and years prior to the flooding." *Id.* Plaintiffs alleged that homes, businesses, churches, and other properties along the Sabine River were flooded, "burial vaults were disinterred and scattered, and animals and livestock were killed, in the name of and by the authority of the Defendants . . . deliberately acting in the exercise of the powers granted [to them] by [their] respective State[s]." *Id.* at 6.

Plaintiffs allege three specific types of deliberate actions:

a. Defendants deliberately chose to reapply for and accept a renewal license to operate the facility in questions, knowing that there was a substantial certainty that downstream flooding would occur;

b. Defendants, notwithstanding clear authority from the Federal Energy Commission ("FERC") to operate the reservoir with a water level

anywhere between 168.0 and 172.0 feet, chose to allow the water level to remain very close to this upper bound throughout the month of February 2016, despite their ability and authority to release water through the spillway gates at amounts greater than the 144cfs that Defendants caused to be released each day during February 2016; and

c. Defendants, notwithstanding clear authority from FERC to operate the reservoir with a water level anywhere between 168.0 and 172.0 feet, went from approximately August 2015 through and including the flooding at issue in March 2016 with only one of the two hydroelectric generators operational; having the other hydroelectric generator operating would have caused an addition 7,000-10,000 cfs of water to be released and thereby lower the water level.

Id. at 2.

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute or the Constitution, lack the power to adjudicate claims. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001); *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). A motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(1) challenges the subject matter jurisdiction of the federal district court. *See* FED. R. CIV. P. 12(b)(1). Rule 12(b)(1)

authorizes dismissal of a case for lack of subject matter jurisdiction when the district court lacks statutory and constitutional power to adjudicate the case. FED. R. CIV. P. 12(b)(1); *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

Once a defendant files a motion to dismiss under Rule 12(b)(1) and challenges jurisdiction, the party invoking jurisdiction has the burden to establish subject matter jurisdiction. *See Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980); *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995). The Court may only grant a motion to dismiss for lack of subject matter jurisdiction if it is certain that the claimant cannot prove any plausible set of facts that would entitle the claimant to relief. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

When deciding Defendant SRAL's motion, the Court may consider "(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Lane*, 529 F.3d at 557 (5th Cir. 2008) (quoting *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)). The Court must accept as true all well-pleaded allegations set forth in the complaint and construe those allegations in the light most favorable to the plaintiff. *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994).

III. DISCUSSION

A. Sovereign Immunity

It is widely understood that a federal court's jurisdiction is "limited by the Eleventh Amendment and the principle of sovereign immunity that it embodies." *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 688 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002); *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Union Pac. R. Co. v. La. Pub. Serv. Comm'n*, 662 F.3d 336, 340 (5th Cir. 2011); *Bowens v. Fed. Bureau of Prisons*, No. CIV.A. 1:04CV688, 2005 WL 3133475, at *4 (E.D. Tex. Nov. 23, 2005) (Crone, J.). According to the Eleventh Amendment, "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[1] U.S. CONST. amend. XI. In fact, the U.S. Supreme Court has "made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting

[1] There are three exceptions to the general rule that a state may not be haled into federal court under the Eleventh Amendment. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange City, Texas*, 327 F.R.D. 131, 139 (E.D. Tex. 2017) (Crone, J.). The first exception is when a state consents to suit in federal court. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005). Second, Congress may abrogate the state's sovereign immunity through an action under § 5 of the Fourteenth Amendment. *Pace*, 403 F.3d at 277. Finally, suits may be brought against state officers for prospective injunctive relief based on an ongoing constitutional violation. *Ex parte Young*, 209 U.S. 123 (1908); *see K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013).

States." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *accord Welch v. Tex. Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987).

Sovereign immunity under the Eleventh Amendment extends not only to "actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 937 (5th Cir. 2001) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). As such, even when the State is not a named defendant, "the State's Eleventh Amendment immunity will extend to any state agency or other political entity that is deemed the 'alter ego' or an 'arm' of the State." *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 688-89 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002) (citing *Doe*, 519 U.S. at 429)); *see Raj v. La. State Univ.*, 714 F.3d 322, 328-29 (5th Cir. 2013). Therefore, "the Eleventh Amendment will bar a suit if the defendant state agency is so closely connected to the State that the State itself is 'the real, substantial party in interest.'" *Vogt*, 294 F.3d at 689; *Fairley v. Louisiana*, 254 F. App'x 275, 277 (5th Cir. 2007).

However, "[t]here is no brightline test for determining whether a political entity is an 'arm of the State' for the purposes of Eleventh Amendment immunity." *Vogt*, 294 F.3d at 689. Instead, "the matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the sovereign state." *Earles v. State Bd. of Certified*

Public Accountants of La., 139 F.3d 1033, 1037 (5th Cir. 1998). In making that inquiry, the Fifth Circuit has traditionally considered six factors, often referred to as the *Clark* factors: (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *See*, *e.g.*, *Cozzo v. Tangipahoa Par. Council-President Govt.*, 279 F.3d 273, 281 (5th Cir. 2002); *Vogt*, 294 F.3d at 689; *Anderson v. Red River Waterway Comm'n*, 231 F.3d 211, 214 (5th Cir. 2000); *Clark v. Tarrant County*, 798 F.2d 736, 745 (5th Cir. 1986) (creating what is known as the *Clark* factors).[2] "[T]he most significant factor in

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[2] "The U.S. Supreme Court applied a different six-factor test in a case involving a multistate entity created pursuant to the Compact Clause." *Vogt*, 294 F.3d at 689 n. 2 (5th Cir. 2002) (citing *Lake Country Estates, Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391 (1979)). The Fifth Circuit has largely ignored *Lake Country Estates* and has instead used a six-factor balancing test used for determining whether a state agency is a "citizen" for purposes of diversity jurisdiction. *See Richardson v. Southern Univ.*, 118 F.3d 450, 452 n. 8 (5th Cir. 1997). Moreover, the Fifth Circuit has held that *Lake Country Estates* is not applicable where the defendant is a single-state entity (as opposed to a multi-state entity created pursuant to the Compact Clause). *Vogt*, 294 F.3d at 689 n. 2 (5th Cir. 2002); *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104-05 (5th Cir. 1995). Other circuits that have squarely addressed the issue have concluded that *Lake Country Estates* is "no less applicable" in cases involving single-state entities created by state law. *Vogt*, 294 F.3d at 689 n. 2 (citing *Gray v. Laws*, 51 F.3d 426, 432-33 (4th Cir. 1995)); *see also Mancuso v. N.Y. State Thruway*

assessing an entity's status is whether a judgment against it will be paid with state funds." *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991).[3]

SRA-L claims that it is an arm of the state and therefore is entitled to immunity under the Eleventh Amendment. The Plaintiffs disagree, contending that SRA-L should not be given Eleventh Amendment immunity. The Court will now apply the *Clark* factors.

1. Characterization under state law

The first factor is characterization under state statutes and case law. Defendant SRA-L contends that the Court should adopt the *Simmons* court's analysis. *See Simmons v. Sabine River Authority of La.*, 823 F. Supp. 2d 420, 435 (W.D. La. 2011) (applying caselaw concerning bistate entities). However, the Court is

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Auth., 86 F.3d 289, 293 (2d Cir. 1996). Although the Fifth Circuit has distinguished between single-state as opposed to multi-state entities, the *Simmons* court applied the multi-state analysis to SRA-L, a single-state entity. *See infra* note 4 and accompanying text.

[3] "[T]he rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Thus, when it is apparent that the state is the real party in interest to a suit and that any monetary award against a state official or entity would be satisfied by state funds, the suit is foreclosed by the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman*, 415 U.S. at 663; *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004); *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982).

cautious to accept the *Simmons* analysis in its entirety because that district court applied precedent from the Second Circuit, instead of binding Fifth Circuit law. *See id.* at 434-35 (citing *Mancuso v. N.Y. State Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996)).[4] Nonetheless, the Court recognizes that *Simmons* found that SRA-L was an arm of the state based on two state statutes. *Simmons*, 823 F. Supp. 2d at 435 (citing La. Stat. Ann. §§ 38:2321; 2324).

Section 38:2321 refers to the entity as "Sabine River Authority, State of Louisiana." La. Stat. Ann. § 38:2321. The statute also states that SRA-L is "hereby declared to be an agency and instrumentality of the state of Louisiana . . . for the carrying out of the functions of the state." *Id.* at § 38:2324. "[H]owever, calling [SRA-L] a 'creature or agency of the state' does not necessarily mean that it is an 'arm of the state' within the meaning of the Eleventh Amendment jurisprudence." *Vogt*, 294 F.3d at 690 (5th Cir. 2002); *see*, *e.g.*, *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 939 (5th Cir. 2001) ("An entity is not an arm of the State for Eleventh Amendment purposes simply because it is

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[4] As Plaintiffs point out, the *Simmons* court failed to apply the Fifth Circuit's "arm of the state" analysis. *See Simmons*, 823 F. Supp. at 434-35; *see supra* note 2 and accompanying text. Although the Fifth Circuit has repeatedly applied their own six factor balancing factors, the *Simmons* court opted to apply the Second Circuit's analysis. *See supra* note 2 and accompanying text; *see also Simmons*, 823 F. Supp. at 434-35. This Court declines to apply the Second Circuit's analysis because those factors concern entities created pursuant to the Interstate Compact Clause. Moreover, neither party argues that SRA-L is a bistate entity created under the Interstate Compact Clause.

a creature of state law and a political subdivision of a state"); *Earles*, 139 F.3d at 1036; *Richardson v. Southern* Univ., 118 F.3d 450, 454 (5th Cir. 1997); *McDonald v. Bd. of Miss. Levee Commissioners*, 832 F.2d 901, 906-07 (5th Cir. 1987) (holding that a reference to an entity as an 'agency' of the state by state courts does not amount to the characterization of the entity as an arm of the state); *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 131 (5th Cir. 1986).

Unfortunately, there is scarce caselaw determining whether SRA-L is an arm of the state or merely a political subdivision. Based on the lack of caselaw, the Court gives greater weight to the above state statutes. Therefore, the Court finds that the first factor weighs in favor of finding that SRA-L is an arm of the state. However, such designation does not mean that SRA-L is an arm of the state within the meaning of the Eleventh Amendment.

2. Source of Funding

The second factor is source of funding. Source of funding "is given the greatest weight because one of the principle purposes of the Eleventh Amendment is to protect state treasuries." *Vogt*, 294 F.3d at 693 (internal citations omitted). Although the Fifth Circuit broadly looks at an entity's "source of funding," the inquiry is more specific: "In assessing this second factor, we conduct inquiries into, first and most importantly, *the state's liability in the event there is a judgment against the defendant, and second, the state liability for*

the defendant's general debts and obligations." Id. (emphasis added) (citing *Hudson v. City of New Orleans*, 174 F.3d 677, 687 (5th Cir. 1999)). "The state's liability for a judgment is often measurable by a state's statutes regarding indemnification and assumption of debts." *Id.*

At first glance, it seems that SRA-L is financially independent from the state. *See* La. Stat. Ann. § 38:2324(B)(1). According to Section 38:2324, SRA-L "shall operate from *self-generated revenues* and shall not be a budget unit of the state." *Id.* (emphasis added). However, the statute also provides that SRA-L *may* "receive state appropriations at any time it is deemed advisable by the legislature." *Id.* Nevertheless, the Fifth Circuit has held that voluntary/optional funds are not enough to show that an entity is an arm of the state. *United Disaster Response, LLC v. Omni Pinnacle, LLC*, 511 F.3d 476, 480 (5th Cir. 2007) ("There is no formal requirement for Louisiana to pay a judgment . . . [t]he state may choose to reimburse the parish, but that is not enough."); *Pendergrass v. Greater New Orleans Expressway Com'n*, 144 F.3d 342, 346 (5th Cir. 1998) (holding that an entity with self-supporting finances that received money from the state to service bonded debt was not an arm of the state).[5] Likewise,

[5] The Fifth Circuit has "left open the possibility that a state entity could show that the legislature—even where it is not obliged to do so—regularly appropriates money to pay judgments against the entity." *Vogt*, 294 F.3d at 693. One should note that the Fifth Circuit does not consider a state's voluntary, after-the-fact payment of a judgment to be a liability against the state's treasury. *Id.* Furthermore, SRA-L has not pointed to any prior

SRA-L generates an independent budget and may only receive optional financial appropriations.

Section 38:2325 also provides that SRA-L may "incur debts and borrow money, but no debt so incurred shall be payable from any source other than the revenues to be derived by the authority from sources other than taxation." La. Stat. Ann. § 38:2325(A)(5). Moreover, the Fifth Circuit held that debts held by entities, such as SRA-L, "are not backed by the state" according to the Louisiana Constitution. La. Const. art. 7, § 6; *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 693-94 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002) ("Although the legislature has the authority to appropriate funds to pay a judgment against a levee district, the legislature certainly has no legal obligation to do so"); *see also Pendergrass*, 144 F.3d at 345-46. As such, "no legal liability arises against the state in the event of a judgment against" SRA-L. *Vogt*, 294 F.3d at 693. Conversely, "judgments against state agencies or departments within the executive branch are treated as liabilities of the state itself." *Id.*

Therefore, the most important factor—source of funding—weighs heavily in favor of finding that SRA-L is not an arm of the state for purposes of Eleventh Amendment indemnity.

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appropriations by the legislature to support this position. Nor has SRA-L argued that there is a regular practice of the state paying their judgments, thus the Court need not consider that issue. *See*, *e.g.*, *United Disaster*, 511 F.3d at 480, n. 5.

3. Degree of Local Autonomy

The third element is whether the entity has significant local autonomy. To determine an agency's local autonomy, the Court must determine the extent of the entity's independent management authority, "as well as the independence of the individual commissioners who govern the entity." *Vogt*, 294 F.3d at 694 (citing *Jacintoport Corp. v. Greater Baton Rouge Port Com'n*, 762 F.2d 435, 442 (5th Cir. 1985)) (internal citations omitted).

SRA-L has considerable management authority, as that term has been applied in Fifth Circuit caselaw. *See*, *e.g.*, *Vogt*, 294 F.3d at 694. Among other powers vested in SRA-L by the legislature, SRA-L has the power to "do all things necessary or convenient to carry out its functions." La. Stat. Ann. § 38:2325(A)(9). As such, SRA-L can "make and enter into contracts." *Id.* at (3). In fact, SRA-L can "acquire by purchase, gift, devise, lease, expropriation or other mode of acquisition, to hold, pledge, encumber, lease and dispose of real and personal property . . . " *Id.* at (2). Although the statute points to a finding of local autonomy, SRA-L correctly points out that all thirteen board members of SRA-L are appointed by the Governor. *Id.* at § 38:2322(A).

While the board members are vulnerable as they have to serve at the governor's pleasure, which weighs against a finding of local autonomy; in this case, the governor's discretion is limited by statutory requirements that a commissioner must be a resident of a certain parish. *Vogt*, 294 F.3d at 695 (citing *Jacintoport*

Corp. v. Greater Baton Rouge Port Com'n, 762 F.2d 435, 442 (5th Cir. 1985)).[6] In *Pendergrass*, the Fifth Circuit stated that residency requirements and local nominations "tug[ged] strongly" in favor of a finding of local autonomy, in spite of the governor's role in the appointment process. *Pendergrass v. Greater New Orleans Expressway Com'n*, 144 F.3d 342, 347 (5th Cir. 1998). "Moreover, *Jacintoport* suggests that the appointment process is given less weight than the scope of the entity's authority over its day-to-day activities." *Vogt*, 294 F.3d at 695 (citing *Jacintoport*, 762 F.2d at 442). On balance, then, SRA-L's considerable degree of local autonomy supports a finding of no Eleventh Amendment immunity. *Id.*

4. Local Versus Statewide Problems

This factor focuses on whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 321 (5th Cir. 2001) (quoting *Pendergrass*, 144 F.3d at 347). Limited territorial boundaries suggest that an agency is not an arm of the state. *See*, *e.g.*, *Cozzo v. Tangipahoa Par. Council-President Gov't*, 279 F.3d 273, 282 (5th Cir. 2002) (noting that a sheriff's duties are usually within

[6] Under Section 2322, four members shall be residents of Sabine Parish, two members shall be residents of Calcasieu Parish, two members shall be residents of Vernon Parish, two members shall be residents of DeSoto Parish, two members shall be residents of Beauregard Parish, and one member shall be a resident of Cameron Parish. La. Stat. Ann. § 38:2322(A)(1).

one parish); *Hudson v. City of New Orleans*, 174 F.3d 677, 690-91 (5th Cir. 1999) (looking at the geographic reach of the district attorney's prosecutorial powers). Although SRA-L's powers are immense, they may be exercised only within clearly defined territorial limits. La. Stat. Ann. § 38:2321.[7] Unlike most other entities that are entitled to Eleventh Amendment immunity, SRA-L does not have statewide jurisdiction. *See Vogt*, 294 F.3d at 695 (citing *Earles v. State Bd. of Certified Public Accountants of La.*, 139 F.3d 1033, 1038 (5th Cir. 1998)).

SRA-L's counter-argument is that the entity addresses a statewide problem because of the broad reach of the Sabine River and the hydroelectric power, water conservation, irrigation, and recreational uses that result from Toledo Bend. "However, primary education and law enforcement are also statewide concerns, yet school boards and sheriffs are not arms of the state." *Vogt*, 294 F.3d at 695; *accord Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 131-32 (5th Cir. 1986); *Cozzo*, 279 F.3d at 282; *McDonald v. Bd. of Miss. Levee Commissioners*, 832 F.2d 901, 908 (5th Cir. 1987) ("While flood control along the Mississippi River is undoubtedly important to the State of Mississippi, the problem of immediate and primary concern to the Levee Board is the maintenance of the levee within its district."). As such, the fourth factor cuts against

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[7] While it is clear that the six parishes within SRA-L's territory are the parishes that lie within the watershed of the Sabine River, they are just that—a local concern, rather than statewide.

SRAL's entitlement to Eleventh Amendment immunity.

5. Authority to Sue

The fifth factor is whether the entity can sue and be sued. Under the applicable statute, SRA-L "shall have and possess the authority to sue and be sued." La. Stat. Ann. § 38:2324(B)(2). SRA-L acknowledges this statute, but insists that the fifth and sixth factors are accorded significantly less weight than the others. *See e.g.*, *Vogt*, 294 F.3d at 695. While this factor may not be dispositive, it clearly weighs in favor of finding that SRA-L is not an arm of the state.

6. Right to Hold Property

The final factor looks at whether the entity can hold property. Section 2325 provides that SRA-L may "purchase, gift, devise, lease, expropriation or other mode of acquisition, to hold, pledge, encumber, lease and dispose of real and personal property . . . " La. Stat. Ann. § 38:2325(A)(2). SRA-L contends that § 38:2325(B) negates SRA-L's ability to hold property, because that section of the statute provides that: "all property acquired by the Authority shall be taken in its corporate name and shall be held by it as an instrumentality of the State of Louisiana . . . " La. Stat. Ann. § 38:2325(B). But, this argument misses the point; the relevant question is whether SRA-L has the right to hold property in its own name, and it clearly does. *See Vogt*, 294 F.3d at 696 (declining to side with a board that argued that

all of its property ultimately belongs to the state and that the board was merely exercising a delegated power). This final factor points away from Eleventh Amendment immunity.

In sum, consideration of the six factors leads to the conclusion that SRA-L is not an arm of the State of Louisiana for purposes of Eleventh Amendment immunity. Thus, SRA-L should not be awarded Eleventh Amendment immunity.

B. Judicial Estoppel

The Plaintiffs also argue that SRA-L should be estopped from arguing that they have Eleventh Amendment immunity because it argued the opposite in a prior proceeding. Judicial estoppel "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (citing *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996)). The purpose of the judicial estoppel doctrine is "to prevent litigants from playing fast and loose with the courts . . . " *Id.* (citing *Ergo Science*, 73 F.3d at 598) (internal quotations omitted). Judicial estoppel is an equitable doctrine "invoked by a court at its discretion" to "protect the integrity of the judicial process." *Reed v. City of Arlington*, 650 F.3d 571, 573 (5th Cir. 2011) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). While the Supreme Court has enumerated several factors that a court may look to when

determining whether to apply judicial estoppel, the court has refused to "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Reed*, 650 F.3d at 574.

Although judicial estoppel is an equitable doctrine that defies "inflexible prerequisites or an exhaustive formula," the Fifth Circuit has repeatedly held that there are two elements that must be met before a party may be estopped under the judicial estoppel doctrine. *Gabarick v. Lauren Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001)). "First, the estopped party's position must be 'clearly inconsistent with its previous one,' and second, 'that party must have convinced the court to accept that previous position.'" *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (quoting *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003)).

The Court need not determine whether SRA-L is estopped from claiming sovereign immunity because the Court has already found that SRA-L is not an arm of the state and as a result not entitled to Eleventh Amendment immunity. Additionally, as the Plaintiffs concede, judicial estoppel is not sufficient to waive Louisiana's Eleventh Amendment Immunity. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (listing the only three ways that sovereign immunity may be waived).[8]

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[8] *See also supra* note 1 and accompanying text.

IV. CONCLUSION

IT IS THEREFORE ORDERED that SRA-L's motion to dismiss for lack of subject matter jurisdiction [Dkt. 7] is DENIED.

SIGNED this 10th day of February, 2020.

/s/ Michael J. Truncale
Michael J. Truncale
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

PERRY BONIN, ACE CHANDLER, ET AL.,	§	
Plaintiffs,	§	CIVIL ACTION NO. 1:19-CV-00527
v.	§	JUDGE MICHAEL TRUNCALE
SABINE RIVER AUTHORITY OF TEXAS, ET AL.,	§	
Defendants.	§	

ORDER DENYING DEFEDNANT SABINE RIVER AUTHORITY, STATE OF LOUISIANA'S MOTION TO DISMISS AMENDED COMPLANT

(Filed Jun. 30, 2022)

Before the Court is Defendant Sabine River Authority, State of Louisiana's Motion And Incorporated Memorandum To Dismiss Plaintiff's Amended Complaints Against Sabine River Authority, State Of Louisiana Pursuant To F.R.C.P. Rule 12(B)(1) For Lack Of Subject Matter Jurisdiction. [Dkt. 61]. Defendant moves the Court to reconsider its prior denial of a motion to dismiss based on the same, or substantially similar grounds. [Dkt. 19]. The Court denies the current motion for two reasons. First, the current motion is a regurgitation of Defendant's prior arguments and does not explain if or how the Amended Complaint, [Dkt. 59], provides additional support for Defendant's position. Given the Court's prior consideration and ruling

on these arguments, it is inappropriate to revisit them at this juncture. Second, the Court's prior denial of Defendant's first motion to dismiss, [Dkt. 19], is currently on appeal to the Fifth Circuit. Reevaluating this Court's prior decision will be a waste of judicial resources for both courts, which may lead to substantial confusion. In the hypothetical event that the Fifth Circuit affirms, while this Court overrules its prior Order, the parties will be left with a procedural quagmire that will likely lead to further appeals and litigation. In sum, this Court has ruled on Defendant's sovereign immunity defense, and it is now the Fifth Circuit's providence to render a decision on the matter.

It is therefore **ORDERED** that Defendant Sabine River Authority, State of Louisiana's Motion And Incorporated Memorandum To Dismiss Plaintiff's Amended Complaints Against Sabine River Authority, State Of Louisiana Pursuant To F.R.C.P. Rule 12(B)(1) For Lack Of Subject Matter Jurisdiction, [Dkt. 61], is hereby **DENIED**.

SIGNED this 30th day of June, 2022.

/s/ Michael J. Truncale
Michael J. Truncale
United States District Judge

United States Court of Appeals
for the Fifth Circuit

No. 20-40138
CONSOLIDATED WITH
No. 22-40433

PERRY BONIN; ACE CHANDLER; MICHAEL MANUEL; ROBERT ACREMAN; JACQUELINE ACREMAN, *Et al.*,

Plaintiffs—Appellees,

versus

SABINE RIVER AUTHORITY, STATE OF LOUISIANA,

Defendant—Appellant.

Appeals from the United States District Court
for the Eastern District of Texas
USDC No. 1:19-cv-527

(Filed May 15, 2023)

ON PETITION FOR REHEARING

Before RICHMAN, *Chief Judge*, and DENNIS and HAYNES, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Constitution of the State of Louisiana of 1974

Article III.

§ 16. Appropriations

Section 16. **(A) Specific Appropriation for One Year.** Except as otherwise provided by this constitution, no money shall be withdrawn from the state treasury except through specific appropriation, and no appropriation shall be made under the heading of contingencies or for longer than one year.

(B) Origin in House of Representatives. All bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills.

(C) General Appropriation BM; Limitations. The general appropriation bill shall be itemized and shall contain only appropriations for the ordinary

operating expenses of government, public charities, pensions, and the public debt or interest thereon.

(D) Specific Purpose and Amount. All other bills for appropriating money shall be for a specific purpose and amount.

(E) Extraordinary Session. Except for expenses of the legislature, a bill appropriating money in an extraordinary session convened after final adjournment of the regular session in the last year of the term of office of a governor shall require the favorable vote of three-fourths of the elected members of each house.

Constitution of the State of Louisiana of 1974

Article XII.

§ 10. Suits Against the State

Section 10. **(A) No Immunity in Contract and Tort.** Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

(B) Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

(C) Limitations; Procedure; Judgments. Notwithstanding Paragraph (A) or (B) or any other provision of this constitution, the legislature by law may limit or provide for the extent of liability of the state, a

state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. It shall provide a procedure for suits against the state, a state agency, or a political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered.

Louisiana Civil Code

Preliminary Title

Chapter 1.

Art. 1. Sources of law

The sources of law are legislation and custom.

Editors' Notes

REVISION COMMENTS – 1987

(a) This provision is new. It does not change the law. Articles 1 and 3 of the Louisiana Civil Code of 1870 make it clear that the sources of law in Louisiana are legislation and custom. However, as in all codified

systems, legislation is the superior source of law in Louisiana.

(b) Article 1 declares that the sources of Louisiana law are legislation and custom. Legislation is defined in Article 2 and custom is defined in Article 3, *infra*. According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom. See Yiannopoulos, Louisiana Civil Law System Sections 31, 32 (1977). The distinction of sources of law into primary and secondary sources is a matter of theory of law; for this reason, this distinction is not mentioned in text.

(c) In Louisiana, as in other civil law jurisdictions, legislation is superior to any other source of law. Article 1 of the Louisiana Civil Code of 1870 (Article 2 of this projet), declaring that legislation is a formal expression of legislative will, has been interpreted to establish the supremacy of legislation and to exclude judicial legislation. It is only in cases not covered by legislation that a lawyer or judge may look for solutions elsewhere. See Yiannopoulos, Louisiana Civil Law System Section 32 (1977). Article 1 does not derogate from the principle of the supremacy of legislation. This provision serves as an introduction to Articles 2 and 3. Article 2 continues to have the meaning that it had in the 1870 Code.

(d) Article 1 makes no reference to sources of law such as the Constitution of the United States, federal legislation and executive orders, international treaties, and the Louisiana Constitution. These sources of law are the prius of all Louisiana legislation and need not be mentioned in Article 1 of the Civil Code.

Louisiana Civil Code

Preliminary Title

Chapter 1.

Art. 2. Legislation

Legislation is a solemn expression of legislative will.

Editors' Notes

REVISION COMMENTS – 1987

(a) Article 2 reproduces the substance of Article 1 of the Louisiana Civil Code of 1870. It does not change the law.

(b) Article 1 of the Louisiana Civil Code of 1870 declares: "Law is a solemn expression of legislative will." This does not mean that legislation is the only source of law in Louisiana, that is, that all rules of law are to be found in enactments of the Legislature. In the French text of the Louisiana Civil Code, Article 1 reads: "La loi est une declaration solemnelle de la volonté legislative," which ought to be translated: "Legislation is a formal expression of legislative will." The

new provision defines legislation rather than law, and leaves room for sources other than legislation.

Louisiana Civil Code

Preliminary Title

Chapter 1.

Art. 3. Custom

Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation.

Editors' Notes

REVISION COMMENTS – 1987

(a) The first sentence of Article 3 reproduces the substance of Article 3 of the Louisiana Civil Code of 1870. It does not change the law.

(b) According to civilian theory, the two elements of custom are a long practice (*longa consuetudo*) and the conviction that the practice has the force of law (*opinio necessitatis or opinio juris*). The definition of custom in Article 3 reflects these two elements.

(c) The second sentence of Article 3 is new.

(d) Legislation and custom are primary sources of law. Article 1 *supra.* However, as in all codified systems, legislation is the superior source of law in Louisiana.

Louisiana Civil Code

Preliminary Title

Chapter 2.

Art. 9. Clear and unambiguous law

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

Editors' Notes

REVISION COMMENT – 1987

This provision reproduces the substance of Article 13 of the Louisiana Civil Code of 1870. Changes in phraseology and terminology, made in the light of Article 2046 of the Civil Code as revised in 1984, do not change the law.

Louisiana Civil Code

Preliminary Title

Chapter 2.

Art. 10. Language susceptible of different meanings

When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.

Editors' Notes

REVISION COMMENTS – 1987

(a) This provision is new. It is based on Article 18 of the Louisiana Civil Code of 1870 and Article 2048 of the Louisiana Civil Code as revised in 1984. It does not change the law.

(b) This provision expresses the principle of teleological interpretation.

Louisiana Civil Code

Preliminary Title

Chapter 2.

Art. 11. Meaning of words

The words of a law must be given their generally prevailing meaning.

Words of art and technical terms must be given their technical meaning when the law involves a technical matter.

Editors' Notes

REVISION COMMENT – 1987

This provision reproduces the substance of Articles 14 and 15 of the Louisiana Civil Code of 1870. Changes in phraseology and terminology, made in the light of

Article 2047 of the Civil Code as revised in 1984, do not change the law.

Louisiana Civil Code

Preliminary Title

Chapter 2.

Art. 12. Ambiguous words

When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Editors' Notes

REVISION COMMENT – 1987

This provision reproduces the substance of Article 16 of the Louisiana Civil Code of 1870. It does not change the law.

Louisiana Civil Code

Preliminary Title

Chapter 2.

Art. 13. Laws on the same subject matter

Laws on the same subject matter must be interpreted in reference to each other.

Editors' Notes

REVISION COMMENT – 1987

This provision reproduces the substance of Article 17 of the Louisiana Civil Code of 1870. It does not change the law.

Louisiana Civil Code

Book II.

Title I.

Chapter 1.

Section 1.

Art. 450. Public things

Public things are owned by the state or its political subdivisions in their capacity as public persons.

Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.

Public things that may belong to political subdivisions of the state are such as streets and public squares.

Editors' Notes

REVISION COMMENTS – 1978

(a) The first two paragraphs of this provision reflect the definition of public things in Article 453 of the

Louisiana Civil Code of 1870. The third paragraph reproduces the substance of Article 454 of the same Code. This provision does not change the law.

(b) As to the nature of public things, see City of New Orleans v. Carrollton Land Co., 131 La. 1092, 1095, 60 So. 695, 696 (1913): "Such property is out of commerce. It is dedicated to public use, and held as a public trust, for public uses"; Kline v. Parish of Ascension, 33 La. 652, 656 (1881): "The parochial authorities are mere trustees for the benefit of the inhabitants of the parish"; Mayor of New Orleans v. Metzinger, 3 Mart. (O.S.) 296, 303 (La.1814): "That public places, such as roads and streets, cannot be appropriated to private use, is one of these principles of public law which require not the support of much argument." Certain public things are inalienable and forever insusceptible of private ownership. See Const., Art. IX, §§ 3, 4 (1974). For exemption from seizure and prescription, *see* Const. Arts. XII, §§ 10, 13 (1974); *cf.* IX, § 4(B).

(c) According to civilian theory, the state and its political subdivisions have dual personality. At times they act as public persons, that is, in a sovereign capacity, and at times as private persons, that is, as private citizens or corporations. The relations in which the state and its political subdivisions figure in a sovereign capacity are governed by rules of public law, and the relations in which the state and its political subdivisions figure as private persons are governed by private law. See Yiannopoulos, Louisiana Civil Law System, Part I, p. 78 (1977).

The property of the state and its political subdivisions is known as "public property". This property consists of two categories of things: public things, namely, things that the state and its political subdivisions hold in a sovereign capacity, and private things, dealt with in Article 453 (1978). Public things may also be subdivided into two categories. The first category consists of things which according to constitutional and legislative provisions are inalienable and necessarily owned by the state or its political subdivisions. The second category consists of things which, though alienable and thus susceptible of ownership by private persons, are applied to some public purpose and are held by the state or its political subdivisions in their capacity as public persons.

According to French doctrine and jurisprudence, public property is divided into property of public domain and property of the private domain. This distinction, which corresponds to some extent to the Roman law distinction, between *res publicae* and *res fisci*, has ample foundation in the French as well as in the Louisiana Civil Code of 1870. Writers, however, are not in agreement as to which things belong to the public domain and which to the private domain, nor as to the criteria for this distinction. See Yiannopoulos, Civil Law Property, § 30 (1966). The present text has formally dispensed with the theory of the public domain. The public things are *owned* by the state or its political subdivisions, though this ownership may be subject to limitations not present in the case of "private things" which may also be owned by the state or its political subdivisions.

(d) Act No. 62 of 1912, now R.S. 9:5661, provides that "actions, including those by the State of Louisiana, to annul any patent issued by the state, duly signed by the governor and the register of the state land office, and of record in the state land office, are prescribed by six years, reckoning from the day of the issuance of the patent." Courts interpreting this statute have held in the past that, in the absence of any constitutional prohibition against the alienation of navigable water bottoms prior to 1921, state patents meeting the requirements of the statute are unassailable even if they purport to convey to private persons the ownership of navigable water bottoms. See California Co. v. Price, 225 La. 706, 74 So.2d 1 (1954). The legislature sought to overrule the *California* case by Act 727 of 1954, now R.S. 9:1107-1109. The Louisiana Supreme Court overruled *California* in Gulf Oil Corp. v. State Mineral Board, 317 So.2d 576 (La. 1975). The alienation of navigable water bottoms by patents issued after 1921 is ineffectual both under Article IV, § 2 of the Constitution of 1921 and under Article IX, § 3 of the 1974 Constitution.

(e) The enumeration of public things is illustrative rather than exclusive. Thus, for example, drainage ditches may be "public things" under this article. See Town of Amite City v. Southern United Ice Co., 34 So.2d 60 (La.App. 1st Cir. 1948). Further, parks, cemeteries, or even open spaces might, under certain circumstances, qualify as "public things". See Town of Vinton v. Lyons, 131 La. 673, 60 So. 54 (1912); Town of Kenner v. Zito, 13 Orl.App. 465 (La.App.Orl.Cir.1916);

Locke v. Lester, 78 So.2d 14 (La.App. 2d Cir. 1955); Collins v. Zander, 61 So.2d 897 (La.App.Orl.Cir.1952); Shreveport v. Walpole, 22 La.Ann. 526 (1870).

(f) The question whether a body of water is a river or a lake, and the question whether it is navigable or not, are controlled by Louisiana doctrine and jurisprudence. For literature and decisions on point, see Yiannopoulos, Civil Law Property, §§ 32, 38 (1966). The expression "natural navigable water bodies" refers to inland waters the bottoms of which belong to the state either by virtue of its inherent sovereignty or by virtue of other modes of acquisition, including expropriation. Artificial waterways located on private property for private purposes may, of course, be private things, for the same reasons that a road built on private property for private purposes may be a private thing.

(g) Running waters, the sea, and the seashore are public things by virtue of R.S. 9:1101 and 49:3; see Comments under Article 449 (1978). As to arms of the sea, see Morgan v. Negodich, 40 La.Ann. 246, 3 So. 636 (1888); Buras v. Salinovich, 154 La. 495, 97 So. 748 (1923). *Cf.* D'Albora v. Garcia, 144 So.2d 911 (La.App. 4th Cir. 1962). Lake Pontchartrain has been consistently regarded as an arm of the sea. See Brunning v. City of New Orleans, 165 La. 511, 115 So. 733 (1928); Burns v. Crescent Gun and Rod Club, 116 La. 1038, 41 So. 249 (1906); Zeller v. Southern Yacht Club, 34 La.Ann. 837 (1882). See also Milne v. Girodeau, 12 La. 324 (1838) (declaring that the bed of Lake Pontchartrain is insusceptible of private ownership and thus, by implication, classifying the Lake as "sea"); New

Orleans Land Co. v. Board of Commissioners of Orleans Levee Dist., 171 La. 718, 132 So. 121, aff'd 51 S.Ct. 646, 283 U.S. 809, 75 L.Ed. 1427 (193 1) (the bed of Lake Pontchartrain is owned by the state up to the high water mark).

Following a general trend in the United States, the Louisiana legislature has asserted, by a series of statutes, state ownership over a variety of living creatures of the land, sea, and air. See Acts 1926, No. 273; 1932, No. 68; 1918, No. 83; 1926, No. 80; 1932, No. 50; 1932, No. 67; 1918, No. 104. In a sense, these are now public things rather than *res nullius*. Ownership of wildlife, however, is a new concept. This form of state ownership, asserted in an effort at conservation of natural resources, confers mainly administrative advantages and stresses the idea that certain assets of society are not capable of private appropriation except under regulations that protect the general interest. See Yiannopoulos, Civil Law Property, § 38 (1966).

Editorial Comment. LSA-Const. Art. 7, § 4 allocates part of the royalties received from mineral leases granted by the state.

LSA-Const. Art. 9, § 3 prohibits the legislature from alienating, or authorizing the alienation of, the bed of a navigable water body, except for purposes of reclamation to recover land lost through erosion. Mineral or other leases are, however, permitted.

LSA-Const. Art. 9, § 4 requires that mineral rights on property sold by the state be reserved, except in the

case of redemption of property sold or adjudicated to the state for taxes.

Under LSA-R.S. 33:3741, municipalities may exchange any public property with property owners for any public purpose, except for cemetery use.

LSA-R.S. 33:4711 authorizes sale, exchange or lease of public property owned by a police jury and no longer required for public purposes.

LSA-R.S. 41:1336 (Acts 1950, No. 208, § 1) ratified all previous land sales (expressly including those "of the shore, bank, bed or bottom of a lake, stream or any body of water") by the request of the state land office to the department of highways.

Louisiana Revised Statutes

Title 1.

Chapter 1.

§ 4. Unambiguous wording not to be disregarded

When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit.

Louisiana Revised Statutes

Title 13.

Chapter 32.

Part XV.

§ 5102. Definitions

A. As used in this Part, "state agency" means any board, commission, department, agency, special district, authority, or other entity of the state and, as used in R.S. 13:5106, any nonpublic, nonprofit agency, person, firm, or corporation which has qualified with the United States Internal Revenue Service for an exemption from federal income tax under Section 501(c)(3), (4), (7), (8), (10), or (19) of the Internal Revenue Code, and which, through contract with the state, provides services for the treatment, care, custody, control, or supervision of persons placed or referred to such agency, person, firm, or corporation by any agency or department of the state in connection with programs for treatment or services involving residential or day care for adults and children, foster care, rehabilitation, shelter, or counseling; however, the term "state agency" shall include such nonpublic, nonprofit agency, person, firm, or corporation only as it renders services to a person or persons on behalf of the state pursuant to a contract with the state. The term "state agency" shall not include a nonpublic, nonprofit agency, person, firm or corporation that commits a willful or wanton, or grossly negligent, act or omission. A nonpublic, nonprofit agency, person, firm or corporation otherwise included under the provisions of this Subsection shall

not be deemed a "state agency" for the purpose of prohibiting trial by jury under R.S. 13:5105, and a suit against such agency, person, firm or corporation may be tried by jury as provided by law. "State agency" does not include any political subdivision or any agency of a political subdivision.

B. As the term is used in this Part, "political subdivision" means:

(1) Any parish, municipality, special district, school board, sheriff, public board, institution, department, commission, district, corporation, agency, authority, or an agency or subdivision of any of these, and other public or governmental body of any kind which is not a state agency.

(2) Any private entity, such as Transit Management of Southeast Louisiana, Inc. (TMSEL), including its employees, which on the behalf of a public transit authority was created as a result of Section 13(c) of the Urban Mass Transportation Act, requiring the terms of transit workers' collective bargaining agreements to be honored and provides management and administrative duties of such agency or authority and such entity is employed by no other agency or authority, whether public or private.

C. As the term is used in this Part, "suit" means civil actions as defined in Code of Civil Procedure Art. 421 whether instituted by principal or incidental demand.

Louisiana Revised Statutes

Title 13.

Chapter 32.

Part XV.

§ 5106. Limitations

A. No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.

B.(1) The total liability of the state and political subdivisions for all damages for personal injury to any one person, including all claims and derivative claims, exclusive of property damages, medical care and related benefits and loss of earnings, and loss of future earnings, as provided in this Section, shall not exceed five hundred thousand dollars, regardless of the number of suits filed or claims made for the personal injury to that person.

(2) The total liability of the state and political subdivisions for all damages for wrongful death of any one person, including all claims and derivative claims, exclusive of property damages, medical care and related benefits and loss of earnings or loss of support, and loss of future support, as provided in this Section, shall not exceed five hundred thousand dollars, regardless of the number of suits filed or claims made for the wrongful death of that person.

(3)(a) In any suit for personal injury against a political subdivision wherein the court, pursuant to

judgment, determines that the claimant is entitled to medical care and related benefits that may be incurred subsequent to judgment, the court shall order that a reversionary trust be established for the benefit of the claimant and that all medical care and related benefits incurred subsequent to judgment be paid pursuant to the reversionary trust instrument. The reversionary trust instrument shall provide that such medical care and related benefits be paid directly to the provider as they are incurred. Nothing in this Paragraph shall be construed to prevent the parties from entering into a settlement or compromise at any time whereby medical care and related benefits shall be provided, but with the requirement of establishing a reversionary trust.

(b) Any funds remaining in a reversionary trust that is created pursuant to Subparagraph (3)(a) of this Subsection shall revert to the political subdivision that established the trust, upon the death of the claimant or upon the termination of the trust as provided in the trust instrument. The trustee may obtain the services of an administrator to assist in the administration of the trust. All costs, fees, taxes, or other charges imposed on the funds in the trust shall be paid by the trust. The trust agreement may impose such other reasonable duties, powers, provisions, and dispute resolution clauses as may be deemed necessary or appropriate. Disputes as to the administration of the trust can be appealed to the district court. Nothing in this Paragraph shall preclude the political subdivision from establishing other alternative funding mechanisms for

the exclusive benefit of the claimant. The terms and conditions of the reversionary trust instrument or other alternative funding mechanism, prior to its implementation, must be approved by the court. The parties to the case may present recommendations to the court for the terms and conditions of the trust instrument or other funding mechanism to be included in the order. Upon request of either party, the court shall hold a contradictory hearing before granting a final order implementing the reversionary trust or the alternative funding mechanism.

(c) In any suit for personal injury against the state or a state agency wherein the court pursuant to judgment determines that the claimant is entitled to medical care and related benefits that may be incurred subsequent to judgment, all such medical care and related benefits incurred subsequent to judgment shall be paid from the Future Medical Care Fund as provided in R.S. 39:1533.2. Medical care and related benefits shall be paid directly to the provider as they are incurred. Nothing in this Subparagraph shall be construed to prevent the parties from entering into a settlement or compromise at any time whereby medical care and related benefits shall be provided but with the requirement that they shall be paid in accordance with this Subparagraph.

C. If the state or a state agency or political subdivision is held liable for damages for personal injury or wrongful death, the court shall determine:

(1) The amount of general damages exclusive of

(a) Medical care.

(b) Related benefits.

(c) Loss of earnings and/or support.

(d) Loss of future earnings and/or support.

(2) The amount of medical care, related benefits and loss of earnings and/or support to date of judgment.

(3) Whether the claimant is in need of future medical care and related benefits and the amount thereof; and

(4) Whether there will be a loss of future earnings or support, and the amounts thereof.

D.(1) "Derivative claims" include but are not limited to claims for survival or loss of consortium.

(2) "Loss of earnings" and "loss of support" for the purpose of this Section means any form of economic loss already sustained by the claimant as a result of the injury or wrongful death which forms the basis of the claim. "Loss of future earnings" and "loss of future support" means any form of economic loss which the claimant will sustain after the trial as a result of the injury or death which forms the basis of the claim.

(3) "Medical care and related benefits" for the purpose of this Section means all reasonable medical, surgical, hospitalization, physical rehabilitation, and custodial services, and includes drugs, prosthetic devices, and other similar materials reasonably necessary in the provision of such services.

(4) "Reversionary trust" means a trust established by a political subdivision for the exclusive benefit of the claimant to pay the medical care and related benefits as they accrue, including without limitation reasonable and necessary amounts for all diagnosis, cure, mitigation, or treatment of any disease or condition from which the injured person suffers as a result of the injuries, and the *sequelae* thereof, sustained by the claimant on the date the injury was sustained. The trustee shall have the same fiduciary duties as imposed upon a trustee by the Louisiana Trust Code. Nothing herein shall limit the rights of claimants to contract with respect to attorney fees and costs.

E. The legislature finds and states:

(1) That judgments against public entities have exceeded ability to pay on current basis.

(2) That the public fisc is threatened by these judgments to the extent that the general health, safety, and welfare of the citizenry may be threatened.

(3) That the limitations set forth in this Section are needed to curb the trend of governmental liability abuses, to balance an individual's claim against the needs of the public interests and the common good of the whole society, and to avoid overburdening Louisiana's economy and its taxpaying citizens with even more new and/or increased taxes than are already needed for essential programs.

(4) That the purpose of this Section is not to reestablish any immunity based on the status of sovereignty

but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the Constitution of Louisiana.

F. The provisions of this Section shall not apply to claims arising under R.S. 40:1237.1 et seq.

Louisiana Revised Statutes

Title 13.

Chapter 32.

Part XV.

§ 5109. Authority to compromise; judgment; notice of judgment; payments

A. In any suit filed against the state of Louisiana, a state officer, a state agency, a local public official or a political subdivision, the defendant, or the proper representative thereof, upon the advice and with the concurrence of the attorney general, district attorney, parish attorney, city attorney, or other proper official, as the case may be, may compromise and settle the claims presented in any such suit.

B.(1) If a judgment is rendered by a trial or appellate court or the supreme court against the state or a state agency in the amount of five hundred thousand dollars or more, and the attorney general is not an attorney of record in the suit, the clerk of the court shall also mail a notice of judgment to the attorney general, through

the chief of the civil division, in accordance with Code of Civil Procedure Articles 1913, 2166, or 2167, as appropriate.

(2) Any judgment rendered in any suit filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political subdivision.

C. The governing authority of a parish or municipality, upon the advice and the concurrence of the district attorney, parish attorney, or city attorney of that parish or municipality or proper official as the case may be, may compromise or settle any claim against that parish or municipality without the necessity for the filing of a suit against the parish or municipality in the matter. Any such compromise settlement shall be exigible, payable, and paid only out of funds appropriated for that purpose by the governing authority of that parish or municipality. No claim in excess of ten thousand dollars may be compromised or settled as provided herein before ten days have elapsed after the publication of such proposed compromise or settlement in the official journal of the appropriate political subdivision.

Louisiana Revised Statutes

Title 36.

Chapter 11.

§ 509. Transfer of agencies to Department of Transportation and Development

A. The following agencies are hereby transferred to the Department of Transportation and Development and shall exercise and perform their powers, duties functions, and responsibilities as provided by law:

(1) The Flood Control Project Evaluation Committee (R.S. 38:90.1 et seq.).

(2) The Offshore Terminal Authority (R.S. 34:3101 et seq.).

(3) The Coastal Port Advisory Authority (R.S. 34:3551 et seq.) shall be placed within the office of multimodal planning, Department of Transportation and Development.

B. The Louisiana Professional Engineering and Land Surveying Board (R.S. 37:681 et seq.) is transferred to and hereafter shall be within the Department of Transportation and Development, as provided in R.S. 36:803.

C. The following agencies are hereby abolished, and their powers, duties, functions, and responsibilities are transferred to the secretary of the Department of Transportation and Development and hereafter shall be exercised and performed as provided in R.S. 36:921 et seq.:

(1) Department of Highways (Article VI, Sections 19, 19.2, 19.3, 19.4, 22(1), and 23 of 1921 Louisiana Constitution, made statutory by Article XIV, Section 16(A)(3) of 1974 Louisiana Constitution and such provisions of Title 48 of the Louisiana Revised Statutes of 1950 as apply to the abolished department)

(2) Department of Public Works (R.S. 38:1 and such provisions of Title 38 of the Louisiana Revised Statutes of 1950 as apply to the abolished department)

(3) Board of Public Works (R.S. 38:7 and 16)

(4) State Board of Highways (Article VI, Sections 19, 19.2, 19.3, 19.4, 22(1), and 23 of the 1921 Louisiana Constitution, made statutory by Article XIV, Section 16(A)(3) of the 1974 Louisiana Constitution, and such provision of Title 48 of the Louisiana Revised Statutes of 1950 as directly relate to the board)

(5) Louisiana Expressway Authority (R.S. 48:1251 et seq.)

(6) Larose-Lafitte Toll Road Authority (Act No. 335 of the 1964 Regular Session of the Legislature)

(7) South Central Louisiana Toll Road Authority (Act No. 35 of the 1969 Regular Session of the Legislature)

(8) Mississippi River Bridge Authority

D. The Mississippi River Parkway Commission of Louisiana (R.S. 48:101 et seq.) is placed within the Department of Transportation and Development and shall exercise and perform its powers, duties, functions, and responsibilities as provided for agencies

transferred in accordance with the provisions of R.S. 36:901 et seq.

E. The Louisiana Transportation Authority (R.S. 48:2071 et seq.) is placed within the Department of Transportation and Development and shall perform and exercise its powers, duties, functions, and responsibilities in the manner provided for agencies transferred in accordance with the provisions of R.S. 36:801.

F. The following agencies are placed within the Department of Transportation and Development and shall perform and exercise their powers, duties, functions, and responsibilities in accordance with the provisions of R.S. 36:801.1:

(1) The Sabine River Authority, state of Louisiana (Article XIV, Section 45 of 1921 Louisiana Constitution, made statutory by Article XIV, Section 16(A)(10) of 1974 Louisiana Constitution; R.S. 38:2321 et seq.).

(2) The Poverty Point Reservoir District (R.S. 38:3087.1 et seq.).

Louisiana Revised Statutes

Title 38.

Chapter 11.

§ 2321. Creation

All the territory in the parishes of DeSoto, Sabine, Vernon, Beauregard, Calcasieu and Cameron, lying within the watershed of the Sabine River and its

tributary streams, shall be embraced in the limits of and shall constitute a conservation and reclamation district to be known and styled "Sabine River Authority, State of Louisiana".

Louisiana Revised Statutes

Title 38.

Chapter 11.

§ 2322. Board of commissioners

A.(1) The governing authority of the Sabine River Authority shall be vested in a board of commissioners thereof, which is hereby provided for. The board shall be composed of thirteen members, who shall be appointed by the governor, one of whom shall serve as chairman. Of the thirteen members of the board to be appointed by the governor, four members shall be residents of Sabine Parish, two members shall be residents of Calcasieu Parish, two members shall be residents of Vernon Parish, two members shall be residents of DeSoto Parish, two members shall be residents of Beauregard Parish, and one member shall be a resident of Cameron Parish.

(2) Each member of the board appointed by the governor shall serve at the pleasure of the governor making the appointment. Each appointment by the governor shall be submitted to the Senate for confirmation.

B. Seven members of said board shall constitute a quorum for the transaction of business and meetings of the board shall be held upon call of the chairman at such time and place as may be designated, after notice to the full membership.

C. Each member of the board shall be entitled to receive a per diem allowance of two hundred dollars for each day of a meeting of the board or any of its committees actually attended by such member, to be paid out of such funds of the authority as may be available for this purpose, on the warrant of the chairman, attested by the secretary. All members of the board shall be entitled to be reimbursed for expenses actually incurred in attending meetings of the board or its committees, or in the transaction of any business of the authority, when such business has been authorized by the board. However, the board shall not meet more than two days in any one month.

Louisiana Revised Statutes

Title 38.

Chapter 11.

§ 2324. Status; suits; process; exemption from taxation

A. The Sabine River Authority is hereby declared to be an agency and instrumentality of the state of Louisiana required by the public convenience and necessity for the carrying out of the functions of the state, and to

be a corporation and body politic and corporate, with power of perpetual succession, invested with all powers, privileges, rights, and immunities conferred by law upon other corporations of like character including but not limited to port authorities, port commissions, and port, harbor, and terminal districts within the state.

B.(1) The authority shall operate from self-generated revenues and shall not be a budget unit of the state. The authority may, however, receive state appropriations at any time it is deemed advisable by the legislature, and only the expenditure of such appropriated funds shall be subject to budgetary controls or authority of the division of administration. The authority shall establish its own operating budget for the use of its self-generated revenues or unencumbered fund balances subject to majority approval of the board of commissioners of the authority. Any budget adopted shall be effective for a fiscal year commensurate with that of the state. The budget shall be submitted to the Joint Legislative Committee on the Budget for review and approval.

(2) The authority shall not have the power to levy taxes but it may assess and collect charges, fees, and rentals for the use of its lands or water bottoms and for the construction, installation, maintenance, and operation on such lands or water bottoms, or on the surface of any lake or reservoir owned by it or in which it has an interest, any wharf, dock, boathouse, pier, marine, shop, store, gasoline dispenser, or other commercial establishment. It shall have and possess the authority to

sue and be sued. All legal process shall be served upon the chairman of the board of commissioners.

C. The domicile of said authority shall be within Sabine Parish.

D. Said authority, in carrying out the purposes of this Chapter, will be performing an essential public function under the constitution and shall not be required to pay any tax or assessment on its properties or any part thereof, nor to pay any excise, license, or other tax or imposition on its operating revenues, and the bonds issued hereunder and their transfer and the income therefrom shall at all times be free from taxation within this state.

Louisiana Revised Statutes

Title 38.

Chapter 11.

§ 2325. Powers

A. Said authority shall have the power:

(1) To have a corporate seal.

(2) To acquire by purchase, gift, devise, lease, expropriation or other mode of acquisition, to hold, pledge, encumber, lease and dispose of real and personal property of every kind within its territorial jurisdiction, whether or not subject to mortgage or any other lien.

(3) To make and enter into contracts, conveyances, mortgages, deeds or trusts, bonds, and leases in the carrying out of its corporate objectives including but not limited to contracts for the legal services of a special counsel.

(4) To let contracts for the construction or acquisition in any other manner of property and facilities incident to the carrying out of the corporate purposes of the authority, which contracts shall be let in such manner as shall be determined by the board of commissioners.

(5) To incur debts and borrow money, but no debt so incurred shall be payable from any source other than the revenues to be derived by the authority from sources other than taxation.

(6) To fix, maintain, collect, and revise rates, charges, and rentals for the facilities of the authority and the services rendered thereby including but not limited to all charges for services and goods provided by or through the Sabine River Channel and Diversion System.

(7) To pledge all or any part of its revenues.

(8) To enter into agreements of any nature with any person or persons (natural or artificial), corporation, association, or other entity, including public corporations, political subdivisions, municipalities, and federal and state agencies and instrumentalities of every kind, for the operation of all or any part of the properties and facilities of the authority.

(9) To do all things necessary or convenient to carry out its functions.

(10) To conserve, store, control, preserve, utilize, and distribute the waters of the rivers and streams of the Sabine watershed including but not limited to all waters flowing through the Sabine River Channel and Diversion System; to drain and reclaim or cause to be drained and reclaimed, the undrained or partially drained marsh, swamp, and overflow lands in the district of said authority, with the view of controlling floods and causing settlement and cultivation of such lands; and in addition to all of the aforementioned powers for the conservation and beneficial utilization of water resources, to control and employ such waters of the Sabine River and its tributaries in the state of Louisiana, including the storm and flood waters thereof, as are hereinafter set forth:

(a) To provide through practical and legal means for the control and coordination of the regulation of the waters of the Sabine River and its tributary streams;

(b) To provide by adequate organization and administration for the preservation of the equitable rights of the people of the different sections of the watershed area, in the beneficial use of the waters of the Sabine River and its tributary streams;

(c) For storing, controlling, and conserving the waters of the Sabine River and its tributaries within and without the district, and the prevention of the escape of any such waters without the maximum of service to the public; for the prevention of devastation of lands from

recurrent overflow and the protection of life and property in such district from uncontrolled flood waters;

(d) For the conservation of the Sabine River and its tributaries essential for the domestic use of the people of the district, including all necessary water supplies of cities and towns;

(e) For the irrigation of lands within the state of Louisiana where irrigation is required for agricultural purposes, or may be deemed helpful to more profitable agricultural production, and for the equitable distribution of said waters to the regional potential requirements for all uses, hydroelectric, domestic, municipal, manufacturing, and irrigation, provided that no generating capacity other than hydroelectric shall be installed by the authority. The authority shall have no power to construct, own, or lease any electric transmission or distribution lines. All plans and all works provided by said authority shall have primary regard to the necessary and potential needs for water;

(f) For the encouragement and development of drainage systems and for drainage of lands in the watershed of the Sabine River and its tributary streams needed for agricultural production; and drainage of other land in the watershed area of the authority requiring drainage for the most advantageous use;

(g) For the purpose of encouraging the conservation of all soils against destructive erosion and preventing the increased flood menace incidental thereto;

(h) To control and make available for employment of said waters in the development of commercial and industrial enterprises in all sections of the area within the watershed of the Sabine River and its tributaries, to improve the Sabine River for navigation; to construct or otherwise acquire and operate navigation facilities and to make contracts with the United States with reference thereto;

(i) For the control, storing, and employment of the waters of the watershed area of the Sabine River and its tributaries, including storm and flood waters, in the development and distribution of hydroelectric powers.

(11)(a) To utilize the waters of the Sabine River for the generation of electric power, to sell the use of the water of said river for the production of electric power, to provide or furnish power and to that end to construct, maintain, operate, or lease any or all hydroelectric generating facilities within its territorial jurisdiction useful for such purpose. Rates set by the authority shall be regulated by the Public Service Commission.

(b) Notwithstanding any other provisions of law to the contrary, the authority shall not utilize or sell the use of the waters of the Toledo Bend Reservoir for the generation or production of hydroelectric power if the mean sea level of the reservoir is below one hundred sixty-eight feet, except under any one of the following circumstances:

(i) The Federal Energy Regulatory Commission or its successor orders or requires a reduction in the water

level of the reservoir for purposes of inspecting or repairing the dam.

(ii) Failure to do so will result in an insufficient supply of electric power in relation to the demand for such power by its firm or non-interruptible power users.

(iii) Nonuse of the waters of the reservoir for the generation of hydroelectric power will result in the failure to satisfy minimum down river flow requirements necessary to meet water sales from the diversion canals of the Sabine River Channel and Diversion System and deter saltwater encroachment.

(iv) Nonuse of the waters of the reservoir for the generation of hydroelectric power will result in saltwater encroachment in the Sabine River Estuaries.

(12) To purchase or construct all works and facilities necessary or convenient to the exercise of the foregoing powers and to accomplish the purposes specified in this Chapter, and to purchase or otherwise acquire, within its territorial jurisdiction all real and personal property necessary or convenient for carrying out such purposes.

(13) To enter into an agreement with the Department of Wildlife and Fisheries for the permanent assignment of four commissioned wildlife officers and agents to the Toledo Bend Reservoir, wherein the authority shall be obligated to pay the salaries and related benefits, including all costs of equipment and land and water transportation for such officers for a period of two years, commencing September 1, 1992.

(14) To do all things necessary to facilitate economic development and to promote recreation and tourism within its jurisdiction including the advertisement and publication of information relating to business opportunities, businesses, recreational activities, parks and other recreational facilities, and tourist attractions.

(15) Nothing in this Subsection is intended to restrict the use of water from the Toledo Bend Reservoir for any reason, other than hydroelectric power generation, when the mean sea level is below one hundred sixty-eight feet, provided however, that during any time period that the Sabine River authority restricts the use of water for electric generation, the utility shall not pay the authority for power that it was prevented from generating.

(16)(a) To enter into any and all contracts and other agreements with any person, real or artificial, any public or private entity, any government or governmental agency, including the United States of America, the state of Texas, the Sabine River Authority of Texas, the state of Louisiana, and the agencies, bureaus, departments, and political subdivisions thereof, which contracts and other agreements may provide for the sale, conservation, storage, utilization, preservation, distribution, or consumption, whether within or without the state of Louisiana, of the waters over which the authority has jurisdiction or over which the authority has legal control.

(b) The written concurrence of the governor shall be required for any contracts and other agreements which

provide for the sale, utilization, distribution, or consumption, outside of the boundaries of the state of Louisiana, of the waters over which the authority has jurisdiction or control.

(c) The written concurrence of the Senate Committee on Natural Resources and the House Committee on Natural Resources and Environment shall be required for any contracts and other agreements which provide for the sale, utilization, distribution, or consumption, outside of the boundaries of the state of Louisiana, of the waters over which the authority has jurisdiction or control.

(d) In addition, at least two-thirds of the governing authorities of the parishes within the territorial jurisdiction of the authority shall concur before the authority can enter into any contracts or other agreements which provide for the sale, utilization, distribution, or consumption, outside of the boundaries of the state of Louisiana, of the waters over which the authority has jurisdiction or control. However, the concurrence from each of the parish governing authorities shall be by resolution, adopted by a two-thirds vote of the members of each of the parish governing authorities.

(e) The written concurrence of the Water Resources Commission shall be required for any contracts and other agreements which provide for the sale, utilization, distribution, or consumption, outside of the boundaries of the state of Louisiana, of the waters over which the authority has jurisdiction or control.

(17) To establish and maintain a law enforcement division within the Authority in order to provide for the safety and security of the public and to protect the natural resources and the properties and waters within the territory and under the jurisdiction or management of the board of commissioners.

B. Title to all property acquired by the Authority shall be taken in its corporate name and shall be held by it as an instrumentality of the State of Louisiana, or title to any such property may be taken jointly with the State of Texas or any instrumentality or agency thereof, including Sabine River Authority of Texas. Any of the powers herein imposed in the Authority may be exercised by the Authority jointly with the State of Texas or any such instrumentalities or agencies thereof, including said Sabine River Authority of Texas. The Authority shall have and be recognized to exercise such authority and power of control and regulation over the waters of the Sabine River and its tributaries as may be exercised by the State of Louisiana, subject to the provisions of the constitution of Louisiana.

Editors' Notes

EFFECTIVE DATE – 2003 LEGISLATION

<Section 1 of Acts 2003, No. 295, amended subsec. A by, inter alia, adding subpar. (A)(11)(b) and par. (A)(15). Section 2 of Act 295 provides:>

<"This Act shall become effective on May 1, 2004; provided however that this Act shall become effective prior to such date if and when all contracts and other obligations to which the Authority is a party for the production of hydroelectric power are amended to allow for the accommodation of the restriction of the reservoir water level.">

Louisiana Revised Statutes

Title 38.

Chapter 11.

§ 2329. Contracts with federal and state agencies

The board of commissioners of the Authority in addition to the powers hereinabove set out shall have general power and authority to make and enter into all contracts, leases and agreements necessary or convenient to carry out any of the powers granted in this Chapter, which contracts, leases and agreements may be entered into with any person, real or artificial, any corporation (municipal, public or private), any government or governmental agency, including the United States of America, the State of Texas, the State of Louisiana, and the agencies, bureaus, departments and subdivisions thereof, and may contract with any one or more of the foregoing for the joint ownership, construction or operation, any or all, of any facilities or properties authorized to be acquired or operated by the Authority within its territorial jurisdiction.

[Included as Editors' Note to La. R.S. 38:2329]

SABINE RIVER COMPACT

Entered Into by the States of

LOUISIANA

and

TEXAS

The State of Texas and the State of Louisiana, parties signatory to this Compact (hereinafter referred to as "Texas" and "Louisiana", respectively, or individually as a "State", or collectively as the "States"), having resolved to conclude a compact with respect to the waters of the Sabine River, and having appointed representatives as follows:

For Texas: Henry L. Woodworth, Interstate Compact Commission for Texas; and John W. Simmons, President of the Sabine River Authority of Texas;

For Louisiana: Roy T. Sessums, Director of the Department of Public Works of the State of Louisiana;

And consent to negotiate and enter into the said Compact having been granted by Act of the Congress of the United States approved November 1, 1951 (Public Law No. 252; 82d Congress, First Session) [U.S.Code Cong. & Adm.Service 1951, p. 748], and pursuant thereto the President having designated Louis W. Prentiss as the representative of the United States, the said representatives for Texas and Louisiana, after negotiations participated in by the representative of the United States, have for such Compact agreed upon Articles

as hereinafter set forth. 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.

ARTICLE I

As used in this Compact:

(a) The word "Stateline" means the point on the Sabine River where its waters in downstream flow first touch the States of both Louisiana and Texas.

(b) The term "Waters of the Sabine River" means the waters either originating in the natural drainage basin of the Sabine River, or appearing as streamflow in said River and its tributaries, from its headwater source down to the mouth of the River where it enters into Sabine Lake.

(c) The term "Stateline flow" means the flow of waters of the Sabine River as determined by the

Logansport gauge located on the U.S. Highway 84, approximately four (4) river miles downstream from the Stateline. This flow, or the flow as determined by such substitute gauging station as may be established by the Administration, as hereinafter defined, pursuant to the provisions of Article VII of this Compact, shall be deemed the actual Stateline flow.

(d) The term "Stateline reach" means that portion of the Sabine River lying between the Stateline and Sabine Lake.

(e) The term "the Administration" means the Sabine River Compact Administration established under Article VII.

(f) The term "Domestic use" means the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation, and other personal comforts and necessities; and for the irrigation of an area not to exceed one acre, obtained directly from the Sabine River or its tributaries by an individual or family unit, not supplied by a water company, water district, or municipality.

(g) The term "stock water use" means the use of water for any and all livestock and poultry.

(h) The term "consumptive use" means use of water resulting in its permanent removal from the stream.

(i) The terms " 'domestic' and 'stock water' reservoir" means any reservoir for either or both of such uses having a storage capacity of fifty (50) acre feet or less.

(j) "Stored water" means water stored in reservoirs (exclusive of domestic or stock water reservoirs) or water withdrawn or released from reservoirs for specific uses and the identifiable return flow from such uses.

(k) The term "free water" means all waters other than "stored waters" in the Stateline reach including but not limited to that appearing as natural stream flow and not withdrawn or released from a reservoir for specific uses. Waters released from reservoirs for the purpose of maintaining stream flows as provided in Article V, shall be "free water". All reservoir spills or releases of stored waters made in anticipation of spills, shall be free water.

(l) Where the name of the State or the term "State" is used in this Compact, it shall be construed to include any person, or entity of any nature whatsoever of the States of Louisiana or Texas using, claiming, or in any manner asserting any right to the use of the waters of the Sabine River under the authority of that State.

(m) Wherever any State or Federal official or agency is referred to in this Compact, such reference shall apply equally to the comparable official or agency succeeding to their duties and functions.

ARTICLE II

Subject to the provisions of Article X, nothing 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.

ARTICLE III

Subject to the provisions of Article X, all rights to any of the waters of the Sabine River which have been obtained in accordance with the laws of the States are hereby recognized and affirmed; provided, however, that withdrawals, from time to time, for the satisfaction of such rights, shall be subject to the availability of supply in accordance with the apportionment of water provided under the terms of this Compact.

ARTICLE IV

Texas shall have free and unrestricted use of all waters of the Sabine River and its tributaries above the Stateline subject, however, to the provisions of Articles V and X.

ARTICLE V

Texas and Louisiana hereby agree upon the following apportionment of the Waters of the Sabine River:

(a) All free water in the Stateline reach shall be divided equally between the two States, this division to be made without reference to the origin.

(b) The necessity of maintaining a minimum flow at the Stateline for the benefit of water users below the

Stateline in both States is recognized, and to this end it is hereby agreed that:

(1) Reservoirs and permits above the Stateline existing as of January 1, 1953, shall not be liable for maintenance of the flow at the Stateline.

(2) After January 1, 1953, neither State shall permit or authorize any additional uses which would have the effect of reducing the flow at the Stateline to less than 36 cubic feet per second.

(3) Reservoirs on which construction is commenced after January 1, 1953, above the Stateline shall be liable for their share of water necessary to provide a minimum flow at the Stateline of 36 cubic feet per second; provided, that no reservoir shall be liable for a greater percentage of this minimum flow that the percentage of the drainage area above the Stateline contributing to that reservoir, exclusive of the watershed of any reservoir on which construction was started prior to January 1, 1953. Water released from Texas' reservoirs to establish the minimum flow of 36 cubic feet per second, shall be classed as free water at the Stateline and divided equally between the two States.

(c) The right of each State to construct impoundment reservoirs and other works of improvement on the Sabine River or its tributaries located wholly within its boundaries is hereby recognized.

(d) In the event that either State constructs reservoir storage on the tributaries below Stateline after January 1, 1953, there shall be deducted from that State's

share of the flow in the Sabine River all reductions in flow resulting from the operation of the tributary storage and conversely such State shall be entitled to the increased flow resulting from the regulation provided by such storage.

(e) Each State shall have the right to use any main channel of the Sabine River to convey water stored on the Sabine River or its tributaries located wholly within its boundaries, downstream to a desired point of removal without loss of ownership of such stored waters. In the event that such water is released by a State through the natural channel of a tributary and the channel of the Sabine River to a downstream point of removal, a reduction shall be made in the amount of water which can be withdrawn at the point of removal equal to the transmission losses.

(f) Each State shall have the right to withdraw its share of the water from the channel of the Sabine River in the Stateline reach in accordance with Article VII. Neither State shall withdraw at any point more than its share of the flow at the point except, that pursuant to findings and determination of the Administration as provided under Article VII of this Compact, either State may withdraw more or less of its share of the water at any point providing that its aggregate withdrawal shall not exceed its total share. Withdrawals made pursuant to this paragraph shall not prejudice or impair the existing rights of users of Sabine River waters.

(g) Waters stored in reservoirs constructed by the States in the Stateline reach shall be shared by each State in proportion to its contribution to the cost of storage. Neither State shall have the right to construct a dam on the Stateline reach without the consent of the other State.

(h) Each State may vary the rate and manner of withdrawal of its share of such jointly stored waters on the Stateline reach, subject to meeting the obligations for amortization of the cost of the joint storage. In any event, neither State shall withdraw more than its pro rata share in any one year (a year meaning a water year, October 1st to September 30th) except by authority of the Administration. All jointly stored water remaining at the end of a water year shall be reapportioned between the States in the same proportion as their contribution to the cost of the storage.

(i) Except for jointly stored water, as provided in (h) above, each State must use its apportionment of the natural stream flows as they occur and there shall be no allowance of accumulation of credits or debits for or against either State. The failure of either State to use the stream flow or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use in the future; conversely, the failure of either State to use the water at the time it is available does not give it the right to the flow in excess of its share of the flow at any other time.

(j) From the apportionment of waters of the Sabine River as defined in this Article, there shall be excluded from such apportionment all waters consumed in either State for domestic and stock water uses. Domestic and stock water reservoirs shall be so excluded.

(k) Each State may use its share of the water apportioned to it in any manner that may be deemed beneficial by that State.

ARTICLE VI

(a) The States through their respective appropriate agencies or subdivisions may construct jointly or cooperate with any agency or instrumentality of the United States in the construction of works on the Stateline reach for the development, conservation, and utilization for all beneficial purposes of the waters of the Sabine River.

(b) All monetary revenues growing out of any joint State ownership, title and interest in works constructed under Section (a) above, and accruing to the States in respect thereof, shall be divided between the States in proportion to their respective contributions to the cost of construction; provided, however, that each State shall retain undivided all its revenues from recreational facilities within its boundaries incidental to the use of the waters of the Sabine River, and from its severally State-owned recreational facilities constructed appurtenant thereto.

(c) All operation and maintenance costs chargeable against any joint State ownership, title, and interest in works constructed under Section (a) above, shall be assessed in proportion to the contribution of each State to the original cost of construction.

ARTICLE VII

(a) There is hereby created an interstate administrative agency to be designated as the "Sabine River Compact Administration" herein referred to as "the Administration".

(b) The Administration shall consist of two members from each State and of one member as representative of the United States, chosen by the President of the United States, who is hereby requested to appoint such a representative. The United States Member shall be ex officio chairman of the Administration without vote and shall not be a domiciliary of or reside in either State. The appointed members for Texas and Louisiana shall be designated within thirty days after the effective date of this Compact.

(c) The Texas members shall be appointed by the Governor for a term of six years; provided, however, that one of the original Texas members shall be appointed for a term to establish a half-term interval between the expiration dates of the terms of such members, and thereafter one such member shall be appointed each three years for the regular term. The Louisiana members shall be residents of the Sabine Watershed and shall be appointed by the Governor for

a term of four years, which shall run concurrent with the term of the Governor. Each State member shall hold office subject to the laws of his State or until his successor has been duly appointed and qualified.

(d) Interim vacancy, for whatever cause, in the office of any member of the Administration shall be filled for the unexpired term in the same manner as hereinabove provided for regular appointment.

(e) Within sixty days after the effective date of this Compact, the Administration shall meet and organize. A quorum for any meeting shall consist of three voting members of the Administration. Each State member shall have one vote, and every decision, authorization, determination, order, or other action shall require the concurring votes of at least three members.

(f) The Administration shall have power to:

(1) Adopt, amend, and revoke bylaws, rules and regulations, and prescribe procedures for administration of and consistent with the provisions of this Compact;

(2) Fix and determine from time to time the location of the Administration's principal office;

(3) Employ such engineering, legal, clerical, and other personnel, without regard to the civil service laws of either State, as the Administration may determine necessary or proper to supplement State-furnished assistance as hereinafter provided, for the performance of its functions under this Compact; provided, that such employees shall be paid by and be

responsible to the Administration and shall not be considered to be employees of either State;

(4) Procure such equipment, supplies, and technical assistance as the Administration may determine to be necessary or proper to supplement State-furnished assistance as hereinafter provided, for the performance of its functions under this Compact;

(5) Adopt a seal which shall be judicially recognized.

(g) In cooperation with the chief official administering water rights in each State and with appropriate Federal agencies, the Administration shall have and perform powers and duties as follows:

(1) To collect, analyze, correlate, compile, and report on data as to water supplies, stream flows, storage, diversions, salvage, and use of the waters of the Sabine River and its tributaries, and as to all factual data necessary or proper for the administration of this Compact;

(2) To designate as official stations for the administration of this Compact such existing water gauging stations (and to operate, maintain, repair, and abandon the same), and to locate, establish, construct, operate, maintain, repair, and abandon additional such stations, as the Administration may from time to time find and determine necessary or appropriate;

(3) To make findings as to the deliveries of water at Stateline, as hereinabove provided, from the streamflow records of the Stateline gauge which shall be

operated and maintained by the Administration or in cooperation with the appropriate Federal Agency, for determination of the actual Stateline flow unless the Administration shall find and determine that, because of changed physical conditions or for any other reason, reliable records are not obtainable thereafter; in which case such existing Stateline station may with the approval of the Administration be abandoned and, with such approval, a substitute Stateline station established in lieu thereof;

(4) To make findings as to the quantities of reservoir storage (including joint storage) and releases therefrom, diversion, transmission losses and as to incident streamflow changes, and as to the share of such quantities chargeable against or allocable to the respective States;

(5) To record and approve all points of diversion at which water is to be removed from the Sabine River or its tributaries below the Stateline; provided that, in any case, the State agency charged with the administration of the water laws for the State in which such point of diversion is located shall first have approved such point for removal or diversion; provided further that any such point of removal or diversion once jointly approved by the appropriate State agency and the Administration, shall not thereafter be changed without the joint amendatory approval of such State agency and the Administration;

(6) To require water users at their expense to install and maintain measuring devices of approved type in

any ditch, pumping station, or other water diversion works on the Sabine River or its tributaries below the Stateline, as the Administration may determine necessary or proper for the purposes of this Compact; provided that the chief official of each State charged with the administration of water rights therein shall supervise the execution and enforcement of the Administration's requirements for such measuring devices;

(7) To investigate any violation of this Compact and to report findings and recommendations thereon to the chief official of the affected State charged with the administration of water rights, or to the Governor of such State as the Administration may deem proper;

(8) To acquire, hold, occupy, and utilize such personal and real property as may be necessary or proper for the performance of its duties and functions under this Compact;

(9) To perform all functions required of the Administration by this Compact, and to do all things necessary, proper or convenient in the performance of its duties hereunder.

(h) Each State shall provide such available facilities, supplies, equipment, technical information, and other assistance as the Administration may require to carry out its duties and function, and the execution and enforcement of the Administration's order shall be the responsibility of the agents and officials of the respective States charged with the administration of water rights therein. State officials shall furnish pertinent factual

and technical data to the Administration upon its request.

(i) Findings of fact made by the Administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of such facts.

(j) In the case of a tie vote on any of the Administration's determinations, orders or other actions subject to arbitration, then arbitration shall be a condition precedent to any right of legal action. Either side of a tie vote may, upon request, submit the question to arbitration. If there shall be arbitration, there shall be three arbitrators: one named in writing by each side, and the third chosen by the two arbitrators so elected. If the arbitrators fail to select a third within ten days, then he shall be chosen by the Representative of the United States.

(k) The salaries, if any, and the personal expenses of each member of the Administration, shall be paid by the Government which he represents. All other expenses incident to the Administration of this Compact and which are not paid by the United States shall be borne equally by the States. Ninety days prior to the Regular session of the Legislature of either State, the Administration shall adopt and transmit to the Governor of such State for his approval, its budget covering anticipated expenses for the forthcoming biennium and the amount thereof payable by such State. Upon approval by its Governor, each State shall appropriate and pay the amount due by it to the Administration.

The Administration shall keep accurate accounts of all receipts and disbursements and shall include a statement thereof, together with a certificate of audit by a certified public accountant, in its annual report. Each State shall have the right to make an examination and audit of the accounts of the Administration at any time.

(l) The Administration shall, whenever requested, provide access to its records by the Governor of either State or by the chief official of either State charged therein with the administration of water rights. The Administration shall annually on or before January 15th of each year make and transmit to the Governors of the signatory States, and to the President of the United States, a report of the Administration's Activities and deliberations for the preceding year.

ARTICLE VIII

(a) This Compact shall become effective when ratified by the Legislature and approved by the Governors of both States and when approved by the Congress of the United States.

(b) The provisions of this Compact shall remain in full force and effect until modified, altered, or amended in the same manner as hereinabove required for ratification thereof. The right so to modify, alter, or amend this Compact is expressly reserved. This Compact may be terminated at any time by mutual consent of the signatory States. In the event this Compact is

terminated as herein provided, all rights then vested hereunder shall continue unimpaired.

(c) Should a court of competent jurisdiction hold any part of this Compact to be contrary to the constitution of any signatory State or of the United States of America, all other severable provisions of this Compact shall continue in full force and effect.

ARTICLE IX

This Compact is made and entered into for the sole purpose of effecting an equitable apportionment and providing beneficial uses of the waters of the Sabine River, its tributaries and its watershed, without regard to the boundary between Louisiana and Texas, and nothing herein contained shall be construed as an admission on the part of either State or any agency, commission, department, or subdivision thereof, respecting the location of said boundary; and neither this Compact nor any data compiled for the preparation or administration thereof shall be offered, admitted, or considered in evidence, in any dispute, controversy, or litigation bearing upon the matter of the location of said boundary.

The term "Stateline" as defined in this Compact shall not be construed to define the actual boundary between the State of Texas and the State of Louisiana.

ARTICLE X

Nothing in this Compact shall be construed as affecting, in any manner, any present or future rights or powers of the United States, its agencies, or instrumentalities in, to, and over the waters of the Sabine River Basin.

In Witness Whereof, the Representatives have executed this Compact in three counterparts hereof, each of which shall be and constitute an original, one of which shall be forwarded to the Administrator, General Services Administration of the United States of America and one of which shall be forwarded to the Governor of each State.

Done in the City of Logansport, in the State of Louisiana, this 26th day of January, 1953.

Signed HENRY L. WOODWORTH, Representative for the State of Texas

Signed JOHN W. SIMMONS, Representative for the State of Texas

Signed ROY T. SESSUMS, Representative for the State of Louisiana

Approved:

Signed LOUIS W. PRENTISS, Representative of the United States

Amended by Acts 1961, No. 75, §§ 1, 2; Acts 1974, No. 625, § 1; Acts 1988, No. 471, § 1, eff. Oct. 30, 1992.