Constitutionality of the Louisiana Freeze Statute and Whether the Public Trust Doctrine Permits a Challenge to the Freeze Statute

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INTRODUCTION

Louisiana Revised Statutes section 9:1151, commonly known as the "Freeze Statute," is the safeguard for mineral lessors and lessees in the face of land subsidence or erosion: when a private landowner loses land to the state due to subsidence or erosion, the Freeze Statute permits the landowner to retain his or her mineral leases and the lease holder to retain his or her rights.[1] For over 60 years, the constitutional viability of the Freeze Statute has remained unquestioned.[2]

But the Attorney General's 2007 Opinion No. 07-0137 concerning the constitutionality of a related statute, Louisiana Revised Statutes section 41:1702, casts serious doubt on the continued viability of the Freeze Statute.[3] Section 41:1702 allows landowners who have lost land through erosion, subsidence, and sea level rise to obtain "subsurface mineral rights owned by the state relating to the emergent lands that emerge from waterbottoms that are subject to such owner's right

[1] La. R.S. § 9:1151.
[2] *See, e.g.*, Cities Serv. Oil & Gas Corp. v. State, 574 So. 2d 455, 461 (La. App. 2d Cir. 2/21/91) ("we find that the Freeze Statute is constitutional within the context of this case").
[3] Louisiana Attorney General's Office, Opinion No. 07-0137, *available at* http://biotech.law.lsu.edu/blog/freeze-statute-AG-Opinion.pdf [hereinafter, Opinion No. 07-0137].

of reclamation."[4] In exchange, the landowner must give the state his or her reclamation rights to the emergent land and allow his or her existing property to be utilized in connection with the state's coastal restoration projects.[5] Opinion No. 07-0137 wrestled with the constitutionality of this exchange, most pertinently with respect to Louisiana Constitution Article VII, section 14(A)'s prohibition of donation of public property.[6] The opinion concluded that this exchange was constitutional because of a perceived quid pro quo relationship: the state offers a quid—the mineral interests—in exchange for a quo—the landowner's reclamation rights and right to enter existing property.[7]

If this conclusion is true, however, that precise analysis calls into question the constitutionality of the Freeze Statute. Unlike section 41:1702, the Freeze Statute contains no built-in provision that ensures the reciprocal offerings of value that purportedly render section 41:1702 constitutional. Instead, the Freeze Statute endorses a unilateral gift of mineral rights on state-owned land to private parties—a gift for which the state receives nothing in return. That type of gift is "a gratuitous alienation of public property," which, as the Louisiana Supreme Court has made clear, is prohibited by the Louisiana Constitution.[8] As the Attorney General affirmed, "[a] quid pro quo is absolutely necessary for the State's grant of mineral rights to be constitutional,"[9] and the requisite quid pro quo relationship is wholly lacking here.

This Article confirms this inevitable result that flows from the Attorney General's opinion, concluding that the Freeze Statute cannot be considered constitutional under Opinion No. 07-0137. Part I articulates Louisiana's general prohibition against gratuitous donations of public property and illustrates how Opinion No. 07-0137 justified granting mineral interests to private landowners in spite of this prohibition. Part I then questions the constitutionality of the Freeze Statute under the same analysis. Part II turns to the procedural questions of standing and how to challenge the Freeze Statute. This Part acknowledges two First Circuit cases that seem to prohibit citizen standing based on general interests in natural resources, but highlights that the Public Trust Doctrine exists to confer standing in this type of case. State supreme courts have held as much and Louisiana commentators have agreed. Thus, the Article provides a succinct litigation guide on challenging both substantively and procedurally the Freeze Statute.

I. UNCONSTITUTIONAL DONATIONS, OPINION NO. 07-0137, AND THE FREEZE STATUTE

[4] La. R.S. § 41:1702(D)(2)(a)(i).
[5] *Id.*
[6] *See* Opinion No. 07-0137.
[7] *Id.* at p. 6–7.
[8] *See, e.g.*, Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, La, Inc. v. All Taxpayers, Property Owners, Citizens of City of Gonzales, 05-2298, 938 So. 2d 11, 20 (La. 9/6/06) ("The term donation contemplates giving something away. It is a gift, a gratuity or a liberality. We find that, essentially, [La. Const. art. VII, § 14(A)] seeks to prohibit a gratuitous alienation of public property.").
[9] Opinion No. 07-0137, at p. 6.

Louisiana's law against donations of public property underlies the constitutional problems of the Freeze Statute. And so, this Part begins by giving an overview of the prohibition, then turns to how the Attorney General applied the law in Opinion No. 07-0137, and concludes by highlighting the implications of that opinion on the Freeze Statute.

A. Unconstitutional Donations in Louisiana

The notion of donations of public property has a long and checkered history in Louisiana. For example, in 1824, a Louisiana state bank was established and thereafter issued thousands of bonds and assumed massive amounts of debt.[10] That bank defaulted on $1.3 million in bonds in 1843.[11] Thus, a responsive constitutional provision in 1845 contained a provision that prohibited pledging public credit.[12] Restrictions were later relaxed, and Louisiana Whigs formed an alliance with businesses that allowed the state to invest in plantations and railroads.[13] Restrictions returned, and in 1879, the Constitution restricted loans, pledges, and grants of "property or things of value" owned by the state or its subdivisions.[14] Ultimately, the Constitution of 1974 included Article VII, section 14, which provides, "[e]xcept as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private."[15] Professor Lee Hargrave observed that there were two underlying motivations behind this provision: (1) to avoid the state's involvement in questionable business ventures; and (2) to limit corruption in cases where politicians could use public property to benefit select private parties.[16] In practice, however, it was unclear what Article VII, section 14 actually prohibited. This Section first discusses pre-2006 law and the Louisiana Supreme Court's questionable jurisprudential rule for prohibited donations. It then turns to the transformational 2006 case that retooled the prohibited donation inquiry. And it finally concludes with a brief overview of how subsequent courts have applied the new rule and a sua sponte case study on the Louisiana charity hospital partnerships.

1. Pre-2006: City of Port Allen *and Shaky Beginnings*

Prior to 2006, Louisiana courts struggled with how to determine what constituted a prohibited donation. In a 1983 case called *City of Port Allen, Louisiana v. Louisiana Municipal Risk Management Agency, Inc.*, the Louisiana Supreme Court issued a definition of prohibited donations that stood for 33 years.[17] In *City of Port Allen*, a statute authorized municipalities to form an association for the purpose of reducing the danger of loss due to public liability and

[10] Lee Hargrave, *Limits on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 LA. L. REV. 137, 138 (2001).
[11] *Id.*
[12] LA. CONST. art. 113 (1845).
[13] Hargrave, *supra* note 10, at 140–42.
[14] LA. CONST. art. 56 (1879).
[15] LA. CONST. art. VII, § 14(A).
[16] Hargrave, *supra* note 10, at 142.
[17] *See* City of Port Allen, La. v. La. Mun. Risk Mgmt. Agency, Inc., 439 So. 2d 399 (La. 1983).

workmen's compensation.[18] The strength-in-numbers approach pooled funds "to manage risks, to establish group self insurance funds, and to purchase joint insurance."[19] The question was whether the solidary liability that flowed from this scheme would effect unconstitutional loans or donations.[20]

The court held that the scheme was unconstitutional. In so holding, the court set forth its rule: a prohibited loan, pledge, or donation occurs "whenever the state or a political subdivision seeks to give up something of value when it is under no legal obligation to do so."[21] Here, "[b]y attempting to impose solidary liability on all members of the fund for unpaid claims, the legislative provision ha[d], in effect, attempted to circumvent the constitutional provision and compel municipalities who participate in the fund to make donations to one another."[22]

Courts subsequently endeavored to apply the *City of Port Allen* rule to new situations, with varying results. For example, the Louisiana Supreme Court held that payment of sick leave benefits to firemen for off-duty injuries or sickness was not prohibited where legislation created the obligation.[23] Conversely, lower courts found unconstitutional a scheme diverting tax revenue to developers instead of taxpayers because the state was not obligated to pay the developers,[24] and a transfer of leave hours to a payroll record that was not legally required.[25] Still other courts sought to avoid *City of Port Allen* altogether and expressly limit it to its facts.[26]

Further, as Professor Hargrave later wrote, the *City of Port Allen* rule was far from infallible. For example, "[t]he state obviously can give up funds to buy things even though it has no legal obligation to buy the thing. The state can invoke its credit to borrow money even though it has no obligation to borrow."[27] In fact, the Fourth Circuit recognized as much in 2002, when it distinguished *City of Port Allen* by observing that "[a] public entity has wide discretion to contract, provided it receives sufficient consideration."[28] Where a governmental entity "expect[s] to receive substantial funds in consideration," "[i]t cannot be said that the [entity] has [unconstitutionally]

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[18] *Id.* at 400.
[19] *Id.*
[20] *See id.* at 401.
[21] *Id.*
[22] *Id.* at 402.
[23] Johnson v. Marrero-Estelle Volunteer Fire Co. No. 1, 04-2124, 989 So. 2d 351, 358–59 (La. 4/12/05).
[24] World Trade Ctr. Taxing Dist. v. All Taxpayers, Property Owners, and Citizens of World Trade Ctr. Taxing Dist. and Nonresidents Owning Property or Subject to Taxation Therein, 05-0048, 894 So. 2d 1185, 1195 (La. App. 4th Cir. 2/1/05).
[25] Taylor v. Haik-Terrell, 02-1612, 845 So. 2d 616, 619–20 (La. App. 1st Cir. 5/9/03).
[26] *See, e.g.*, State v. Davis, 87-1048, 539 So. 2d 803, 808 (La. App. 3d Cir. 2/8/89) (noting "we do not read the case to be that broad" and "we distinguish the case"); City of Shreveport v. Chanse Gas Corp., 34,958, 794 So. 2d 962, 975 (La. App. 2d Cir. 8/22/01) ("*City of Port Allen* and the Attorney General Opinion are thus distinguished.")
[27] Hargrave, *supra* note 10, at 155–56.
[28] Bd. of Assessors of City of New Orleans v. City of New Orleans, 02-0691, 829 So. 2d 501, 509 (La. App. 4th Cir. 9/25/02).

undertaken, without cause or consideration, the obligation of another."[29] Given the questionable validity of the rule, Professor Hargrave argued that it "probably would be simpler to analyze these matters in the traditional system used by the civil code since before statehood—donations are transfers based on a gratuitous cause as opposed to an onerous one."[30]

2. 2006: A Return to Gratuitous Intent Inquiries

In 2006, the Louisiana Supreme Court took Professor Hargrave's advice and clarified precisely what "donation" means for purposes of the prohibition. In particular, the court stated:

> The generally understood meaning of a donation is an act whereby one gratuitously gives something to another. The term donation contemplates giving something away. It is a gift, a gratuity or a liberality. We find that, essentially, the constitutional provision at issue seeks to prohibit a gratuitous alienation of public property.[31]

The court further bolstered this definition by invoking the writings of Planiol and Domat. Planiol noted that "[a]ny transaction through which some right is assigned without the demand for a counter-performance is a donation. It is an intentional procurement of a gratuitous enrichment."[32] And Domat observed that "[i]n gratuitous contracts, where there is neither reciprocity of obligations, nor prior performances, the 'cause' [which is the civil law equivalent of 'consideration'] of the obligation of the donor can only be found in the motives of liberal intention."[33] Reciprocity of obligations is therefore critical in avoiding a prohibited donation.

3. The Gratuitous Intent Inquiry in Practice

Eleven cases have cited the Louisiana Supreme Court's decision that reformulated the prohibited donation inquiry,[34] but only two of those cases have considered the precise question of prohibited donations.

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[29] *Id.* at 509–10.
[30] *See id.*
[31] *See* Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, La, Inc. v. All Taxpayer, Property Owners, Citizens of City of Gonzales, 05-2298, 938 So. 2d 11, 20 (La. 9/6/06).
[32] *See id.* at 22 (citing 3 MARCEL PLANIOL, TREATISE ON CIVIL LAW § 2543(A) (La. State Law Inst. Trans., 11th ed. 1959)).
[33] *See id.* (citing 3 MARCEL PLANIOL, TREATISE ON CIVIL LAW § 1030 (La. State Law Inst. Trans., 11th ed. 1959)).
[34] *See* Huston v. City of New Orleans, 12-1171, 157 So. 3d 600 (La. App. 4th Cir. 2/27/13); Council v. FedEx Custom Critical Inc., 46, 558, 73 So. 3d 461 (La. App. 2d Cir. 9/21/11); Estate of Burch v. Hancock, 09-1939, 39 So. 3d 742 (La. App. 1st Cir. 5/7/10); Rainey v. Entergy Gulf States, Inc., 09-572, 35 So. 3d 215 (La. 3/16/10); Transcontinental Gas Pipe Line Corp. v. La. Tax Comm'n, 09-0628, 23 So. 3d 329 (La. App. 1st Cir. 8/10/09), *overruled by* Transcontinental Gas Pipeline Corp. v. La. Tax Comm'n, 09-1988, 32 So. 3d 199 (La. 3/16/10); Fransen v. City of New Orleans, 08-0076, 988 So. 2d 225 (La. 7/1/08); M.J. Farms, Ltd. v. Exxon Mobil Corp., 07-2371, 998 So. 2d 16 (La. 7/1/08); Jackson v. Vidalia Riverfront Dev. Dist., 07-1569, 982 So. 2d 346 (La. App. 3d Cir. 5/7/08); Deculus v. Welborn, 07-1836, 970 So. 2d 1057 (La. App. 1st Cir. 9/19/07);

First, in 2007, the United States District Court for the Western District of Louisiana in *Monroe Fighters Association v. City of Monroe* considered whether overtime payments were unconstitutional donations.[35] There, numerous firefighters sued the city of Monroe for unpaid overtime compensation under the federal Fair Labor Standards Act.[36] The city, in response, filed a counterclaim, seeking recovery of compensation paid for hours not actually worked.[37] In the city's view, such compensation was a prohibited donation of public funds.[38] The court held that it was possible that the compensation was prohibited. In particular, the court emphasized that under the Louisiana Supreme Court's definition of prohibited donations, "the donor's intent is now determinative": "If gratitude and love, instead of an intent to impose or a desire to remunerate, motivated the donor, the donation is gratuitous . . . ."[39] Here, the city had not alleged that its overpayment of the firefighters was motivated by gratuitous intent, and thus the city had failed to state a claim for relief under the Louisiana Constitution; however, the court concluded its opinion by giving the city an opportunity to amend its counterclaim accordingly.[40]

The second case was *Hutson v. City of New Orleans*, a 2013 decision by the Fourth Circuit Court of Appeal concerning the constitutionality of the erection of a barrier on a "through" street in New Orleans.[41] Newcomb Boulevard is a public street that is one of the few through streets that connect St. Charles Avenue and Ferret Street.[42] Residents who live along Newcomb complained to the city about speeding and safety problems caused by cut-through traffic.[43] The city thereafter approved closure of Newcomb at Ferret.[44] A neighborhood association then cemented a permanent wrought iron fence into the ground at that intersection, rendering Newcomb a dead-end street.[45] Two nearby residents who formerly used Newcomb as a through street filed suit against the city, and the trial court found that the city had violated Article VII, section 14(A) of the Louisiana Constitution by permitting a private association to erect and maintain the private fence barring vehicular traffic on a dedicated public street.[46]

Monroe Firefighters Ass'n v. City of Monroe, No. 06-1092, 2007 WL 1695672 (W.D. La. May 16, 2007) (unpublished); Corkern v. Corkern, 05-2297, 950 So. 2d 780 (La. App. 1st Cir. 11/3/06).

[35] Monroe Firefighters Ass'n v. City of Monroe, No. 06-1092, 2007 WL 1695672 (W.D. La. May 16, 2007) (unpublished).

[36] *Id.* at *1.

[37] *Id.*

[38] *Id.*

[39] *Id.* at *2 (quoting Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, La, Inc. v. All Taxpayers, Property Owners, Citizens of City of Gonzales, 05-2298, 938 So. 2d 11, 20 (La. 9/6/06)).

[40] *See id.*

[41] Huston v. City of New Orleans, 12-1171, 157 So. 3d 600 (La. App. 4th Cir. 2/27/13).

[42] *Id.* at 601–02.

[43] *Id.* at 602.

[44] *Id.* at 601–02.

[45] *Id.* at 602.

[46] *Id.* at 602, 604.

On appeal, the First Circuit agreed that permitting the erection of the fence was "an illegal donation of public property."[47] The court primarily faulted the city for not "requiring that Newcomb Boulevard residents *purchase* the public right-of-way and assume the maintenance costs," which would have created a clear quid pro quo relationship.[48] The city and neighborhood association nonetheless argued that there was no clear gratuitous intent.[49] But the court held that "[t]o establish the lack of a gratuitous alienation, [defendants were] required to show the benefits to the public *as a whole*, not to Newcomb Boulevard residents."[50] Indeed, the benefits of the fence flowed unilaterally to the residents alone because it gave them free use of a public intersection, a decrease in traffic, and a quieter street.[51] By contrast, the general public "suffered the loss of the right to use Newcomb Boulevard as a through street and an increase in traffic congestion on neighboring streets."[52] The public *also* suffered the loss of revenue that would have been produced had the residents been required to purchase the public right-of-way.[53] So, the First Circuit clearly articulated the need for a quid pro quo relationship as well as an absence of gratuitous intent as demonstrated by benefit to the public as a whole.

4. A Case Study: What About the Charity Hospitals?

The First Circuit's reasoning may provide some insight as to the constitutionality of the recent charity hospital transformation in Louisiana. During 2013 and 2014, the LSU Health Care Services Division underwent significant change as six hospitals transitioned to public-private partnerships.[54] As a result of this process, the private hospital partners essentially lease the facilities and equipment used by LSU, and then assume the responsibility for operation of the LSU hospital and its affiliated clinics.[55] The private partners are further required to provide "a safety-net system of care and to support medical education."[56]

Facially, this may appear to be an unconstitutional gratuitous alienation of hospitals. But at least three points militate against that conclusion. First, the Louisiana Supreme Court and the First Circuit in *Hutson* required some sort of bilateral exchange—a quid pro quo relationship. Here, the private partners, to be sure, gain use of the hospitals; but they are also *paying* leases and acquiring the state's obligations to provide care to the public, which seems to be a clear quid pro quo relationship. Second, the First Circuit looked for benefits to the public as a whole. Here, medical care and services undertaken by the private partners surely count as benefits to the public,

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[47] *Id.* at 612.
[48] *Id.* (emphasis added).
[49] *See id.* at 612–13.
[50] *Id.* at 613 (emphasis added).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *See* LSUHealth, *available at* http://www.lsuhospitals.org (last visited May 16, 2015).
[55] *A New Safety Net: The Risk and Reward of Louisiana's Charity Hospital Privatizations*, THE PUBLIC AFFAIRS RESEARCH COUNCIL OF LOUISIANA 9 (Dec. 2013), *available at* http://www.parlouisiana.org/s3web/1002087/docs/parhospital2013.pdf (last visited May 16, 2015).
[56] *Id.* at 9–10.

rather than some subset of the public singled out for special treatment. And finally, the charity hospital transactions were actually made pursuant to "cooperative endeavor agreements."[57] The Louisiana Constitution's prohibition of donations of public property includes an express exception for "cooperative endeavors," whereby "[f]or a public purpose, the state . . . may engage in cooperative endeavors . . . with any public or private association, corporation, or individual."[58] Thus, the overall transactions were completed under a constitutional exception and are arguably constitutional.

B. Opinion No. 07-0137's Reliance on Quid Pro Quo Relationships

In light of the Louisiana Supreme Court's emphasis on quid pro quo relationships and lack of gratuitous intent, it is unsurprising that the Attorney General's office hewed closely to quid pro quo language in Opinion No. 07-0137. At issue in the opinion was Revised Statutes section 41:1702(D)(2)(a), which provides that mineral rights may be granted to the riparian owner of land "in exchange for the owner's compromise of his ownership and reclamation rights[.]"[59] Among the many questions addressed in Opinion No. 07-0137, one question was whether "there [is] a constitutional prohibition against granting private landowners perpetual mineral interests to land that can erode and become State water bottoms by operation of law[.]"[60] The corresponding question to this inquiry was whether the requisite quid pro quo relationship existed to condone the apparent donation of mineral rights.

The Attorney General's office reasoned that there was such a relationship. The opinion conceded that the statutory scheme under Revised Statues section 41:1702 permits "the State to 'donate' certain rights—in this case mineral rights."[61] That, in the Attorney General's view, was the requisite quid. But the opinion argued that in exchange for the grant of mineral interests, the state actually receives "something of value that furthers a public purpose—in this case the right to enter and use private land for coastal restoration and protection."[62] In the Attorney General's view, that thing of "value" was the requisite quo.

The open-ended nature of the Attorney General's opinion should be concerning because it seems to imply that the state need not actually *exercise* its right to enter and use private land for coastal restoration and protection. Such a rule is unsound because it would effectively create phony transactional regimes, where the state receives a right in name only and never intends to utilize the right. The state's decision would harm the public, for whom the prohibition on donations of public property and corresponding quid pro quo rule were intended to protect, because the public would receive nothing in return for the depletion of its natural resources due to the state's inaction.[63] It could also implicate and contravene well-settled Louisiana contract law, which provides that "fraud may be predicated on promises made with the intention not to perform

[57] *Id.* at 9.
[58] *See* La. Const. art. VII, § 14(C).
[59] Opinion No. 07-0137, at p. 5–6.
[60] *Id.* at p. 1.
[61] *Id.* at p. 6.
[62] *Id.*
[63] *See* Hargrave, *supra* note 10, at 142.

at the time the promise is made."[64] Although this is not an express, contractual scenario, the state functionally promises to protect the public interest when it gives away public resources. If the state has no intention to cash in on what it receives in return, the state would fraudulently deprive the public of compensation.

But whatever the merits of the Attorney General's argument, it is quite telling how far Opinion No. 07-0137 went to emphasize the need for a quid pro quo relationship. The opinion was adamant that "[t]his quid pro quo is *absolutely* necessary for the State's grant of mineral rights to be constitutional."[65] But then the opinion went on to say, "if and when the emergent land re-erodes, the quid pro quo is gone," and "[w]hen this occurs, the constitutional basis—the quid pro quo—for the 'donation' of the mineral rights ceases to exist and those rights revert to the State[.]"[66] That is, Opinion No. 07-0137 expressly recognized the constitutional significance of the *absence* of a quid pro quo relationship and the consequences of such an absence.

C. What About the Freeze Statute?

But that crucial reliance upon the existence of a quid pro quo relationship in granting mineral interests on public land to private landowners calls into question circumstances where no such relationship exists. Specifically, the Freeze Statute, Revised Statutes section 9:1151, mirrors the statute at issue in Opinion No. 07-0137 in only one way—the quid or grant of mineral interests. Like section 41:1702, the Freeze Statute grants a private landowner mineral interests. In particular, the Freeze Statute provides:

> In all cases where a change occurs in the ownership of land or water bottoms as a result of the action of a navigable stream, bay, lake, sea, or arm of the sea, in the change of its course, bed, or bottom, or as a result of accretion, dereliction, erosion, subsidence, or other condition resulting from the action of a navigable stream, bay, lake, sea, or arm of the sea, *the new owner of such lands or water bottoms, including the state of Louisiana, shall take the same subject to and encumbered with any oil, gas, or mineral lease covering and affecting such lands or water bottoms, and subject to the mineral and royalty rights of the lessor in such lease, their heirs, successors, and assigns; the right of the lessee or owners of such lease and the right of the mineral and royalty owners thereunder shall be in no manner abrogated or affected by such change in ownership*.[67]

When land automatically transfers to the state at the time of submergence, the Freeze Statute effectively "freezes" mineral leases in place such that when the state acquires the formerly private land, the state honors the rights of the lessors and lessees under those leases. The Freeze Statute only applies "when there is a change of ownership of land or water bottoms . . . and there is in effect a mineral lease covering and affecting the lands or water bottoms"; thus, a lease must exist

[64] *See, e.g.*, Bass v. Coupel, 93-1270, 671 So. 2d 344, 351 (La. App. 1st Cir. 6/23/95).
[65] *Id.* (emphasis added).
[66] *Id.*
[67] La. R.S. § 9:1151 (emphasis added).

at the time the state acquires the land.[68] In practical terms, the natural resources of the state under land now owned by the state continue to be removed and payments for those resources go not to the state but to the private parties as established by the leases. In the words of the Constitution, the mineral resources are "property, or things of value of the state" being arguably donated to private parties.[69]

And that is where section 41:1702 and the Freeze Statute part ways. Section 41:1702 expressly accounts for a quo in the State's favor—"the owner's compromise of his ownership and reclamation rights[.]"[70] The Freeze Statute contains no such provision. To the contrary, the Freeze Statute disclaims any benefit to the state from the withdrawal of the natural resources because it preserves "the right of the lessee or owners of such lease and the right of the mineral and royalty owners."[71] Indeed, this looks much like the unconstitutional scenario in *Hutson*, where the donation of public property benefited only a select subset of the public, rather than the public as a whole.[72] Thus, the glaring absence of a quo under the Freeze Statute is constitutionally problematic.

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Both the Louisiana Supreme Court and Opinion No. 07-0137 have been emphatic that a quid pro quo relationship is necessary in order to render constitutional a distribution of the state's natural resources. The Freeze Statute effectively condones a unilateral gift of mineral interests without anything in return to the benefit of the state or its citizens. The lack of reciprocal obligations burdening the parties who benefit under the Freeze Statute thus absolutely represents a forbidden gratuitous donation in violation of the Louisiana Constitution.

II. THE PUBLIC TRUST DOCTRINE AS A VEHICLE FOR CHALLENGING THE FREEZE STATUTE

Now, the inescapable threshold question in challenging the constitutionality of the Freeze Statute is *how* to obtain citizen standing in such a suit. Given the subject matter at issue—i.e., natural resources of Louisiana—it makes sense that the Public Trust Doctrine would be the appropriate vehicle for ensuring proper use and distribution of the state's resources. In its most basic form, "the public trust doctrine is the idea that there are some resources . . . that are forever subject to state ownership and protective trust for the use and benefit of the public."[73] Louisiana has constitutionalized this common-law doctrine in Article IX, section 1, of the Louisiana Constitution, which provides: "The natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the

[68] Patrick H. Martin, *Mineral Rights*, 52 LA. L. REV. 677, 681 (1992).
[69] LA. CONST. art. VII, § 14(A).
[70] La. R.S. § 41:1702(D)(2)(a).
[71] La. R.S. § 9:1151.
[72] *See* Huston v. City of New Orleans, 12-1171, 157 So. 3d 600, 612–13 (La. App. 4th Cir. 2/27/13).
[73] Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 699 (2006).

people."[74] And although this formulation of the Public Trust Doctrine sounds like a creation of a cause of action, the doctrine can invaluably operate primarily as "a basis for citizen standing to sue to protect public trust resources."[75]

In Louisiana, only the First Circuit has expressly considered standing under Louisiana's Public Trust Doctrine, but applied a standard standing analysis instead of considering the Public Trust Doctrine as itself a conferral of standing. This approach directly contradicts more common-sense approaches in decisions by state supreme courts in Hawaii, Illinois, and Delaware, which have all interpreted the doctrine to confer standing on the general public without conducting typical standing analyses. This Part first gives an overview of the historical foundations of the Public Trust Doctrine, and then details the juxtaposition of views on standing under the doctrine.

A. Overview of the Public Trust Doctrine

The Public Trust Doctrine has been regarded as "perhaps the single most controversial development in natural resources law."[76] At its core, the doctrine stands for the proposition that "certain resources are, by their nature, public."[77] It "requires the government to act as a trustee, to maintain some level of quality in the resources, and to protect those resources from being depleted by private interests or expended to the detriment of future generations."[78]

The Public Trust Doctrine in America has roots in both jurisprudence and statutory law. The United States Supreme Court, for example, first examined the doctrine in *Illinois Central Railroad Co. v. Illinois*, in which the Court asserted that no state has the authority to alienate property in violation of the public trust.[79] States also sought to express the doctrine in their state constitutions and statutes, covering not only "the tidelands under navigable waters and for the benefit of navigation and fishing," but also "certain nonnavigable tributaries, nonnavigable streams that support established public trust interests, state groundwaters, various recreational and ecological needs, [and] drinking water."[80] Against this backdrop, Professor Joseph Sax is credited with rebirthing the Public Trust Doctrine, and he believed:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental

[74] LA. CONST. art. IX, § 1.
[75] John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 951, 953 & nn. 132–33 (2012).
[76] Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989).
[77] Gregory S. Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 MONT. L. REV. 123, 136 (2012).
[78] *Id.*
[79] 146 U.S. 387, 460 (1892).
[80] Carol Necole Brown, *Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1, 8–9 (2006).

> conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.[81]

In short, the government operates under significant scrutiny when public resources are at issue, and the government owes the public an equally significant duty as trustee of those resources.

And if the Public Trust Doctrine means anything for our purposes, it surely operates at the zenith of its power in Louisiana because of Louisiana's civil law tradition and the civil law origins of the doctrine. *Las Siete Partidas*, the famous Spanish book of laws, affirmed in thirteenth-century Spain that "[r]ivers, harbors, and public highways belong to all persons in common[.]"[82] In eleventh-century France too, French law proclaimed that "the public highways and byways, running water and springs, meadows, pastures, forests, heaths and rocks . . . are not to be held by lords[;] . . . nor are they to be maintained . . . in any other way than that their people may always be able to use them."[83] And as many scholars recognize, "[i]t seems to be universally accepted that the public trust doctrine in Anglo-American jurisprudence has its most obvious roots in early Roman civil law."[84] So, the Public Trust Doctrine should arguably enjoy its strongest application in a civil law jurisdiction like Louisiana.

B. Standing Under Louisiana's Public Trust Doctrine

Nonetheless, although some Louisiana courts have substantively discussed the doctrine,[85] jurisprudential guidance concerning *citizen standing* under the Public Trust Doctrine is conspicuously absent in Louisiana. In fact, only two cases from the First Circuit Court of Appeal have addressed the issue. And in both cases, the First Circuit curiously decided to apply a standard standing analysis instead of considering the doctrine's unique role in conferring standing on general members of the public.

In *Neighborhood Action Committee v. State*, the Neighborhood Action Committee (NAC), a Jefferson parish non-profit corporation consisting of Kenner residents, challenged whether Kenner and Louisiana could amend their state-granted lease of public land to allow a riverboat gaming operation to occur where the lease required Kenner to build a public recreational facility.[86] This was a somewhat atypical public trust case because it did not involve a dispute about the

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[81] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1969).

[82] LAS SIETE PARTIDAS 821 (Robert I. Burns ed., Samuel Parsons Scott trans., University of Pennsylvania Press 2001).

[83] MARC BLOCH, FRENCH RURAL HISTORY 183 (Janet Sondheimer trans., 1966) (citation and internal quotation marks omitted).

[84] Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust Doctrine in Wildlife*, 35 LAND & WATER L. REV. 23, 31 (2000).

[85] *See, e.g.*, Avenal v. State, 03-3521, 886 So. 2d 1085, 1101–02 (La. 2004) ("The State simply cannot allow coastal erosion to continue; the redistribution of existing productive oyster beds to other areas must be tolerated under the public trust doctrine in furtherance of this goal.").

[86] Neighborhood Action Comm. v. State, 98-0807, p. 2–3 (La. App. 1st Cir. 3/3/95), 652 So. 2d 693, 694–95.

ordinary types of natural resources like water[87] and public access to the water.[88] That anomaly aside, the plaintiffs claimed, *inter alia*, that "the Public Trust Doctrine confer[red] upon them an individual right in the use and management of public lands."[89] That right, they asserted, gave them standing to challenge the proposed amendment to the lease.[90]

The First Circuit disagreed on both grounds. With respect to whether the Public Trust Doctrine granted the NAC a right to challenge the amendment, the court found no language in the operative statutes under which the lease was created that would "describe[] or implement[] the public trust doctrine."[91] The court thus found no creation of a right of action under the Public Trust Doctrine.[92] Additionally, the court held that the NAC lacked standing. The court emphasized that "[i]n order to have standing, a plaintiff must show an interest in the litigation peculiar to him personally and separate and distinct from that of the general public."[93] The court thought it apparent that the NAC "failed to establish a 'special interest' sufficient to state a right of action."[94]

Judge Foil, however, dissented and highlighted that "[t]hese [were] citizens of the state and city who [were] contesting the right of the state and city to amend a property lease."[95] In his view, "citizens of the city of Kenner have the right to contest the actions of their governmental officials in a case such as this."[96]

A few months after *Neighborhood Action Committee*, the First Circuit again expressly considered citizen standing in the public-trust context. In *Mouton v. Department of Wildlife & Fisheries for State of Louisiana*, the Louisiana Wildlife and Fisheries Commission had adopted a "Spotted Sea Trout Management Plan" that prohibited weekend commercial taking of spotted sea trout in Louisiana waters.[97] The Legislature subsequently adopted a resolution that purported to nullify that prohibition.[98] A Louisiana citizen, Henry Mouton, along with the Louisiana Association of Coastal Anglers (LACA) and the Louisiana Environmental Action Network (LEAN) as intervenors, filed a petition for a writ of mandamus ordering the Secretary of the Louisiana Wildlife and Fisheries Department to enforce the prohibition.[99] Mouton alleged interests in that he often fished in Louisiana waters and was "deeply interested in conservation of

[87] Lawrence v. Clark County, 254 P.3d 606 (Nev. 2011).
[88] ABKA Ltd. P'ship v. Wis. Dep't of Nat. Res., 635 N.W.2d 168 (Wis. Ct. App. 2001).
[89] *Id.* at p. 6, 652 So. 2d at 696.
[90] *Id.*
[91] *Id.* at p. 6–7, 652 So. 2d at 697.
[92] *Id.*
[93] *Id.* at p. 7, 652 So. 2d at 697.
[94] *Id.*
[95] *Id.* at p. 1, 652 So. 2d at 698 (Foil, J., dissenting).
[96] *Id.*
[97] Mouton v. Dep't of Wildlife & Fisheries for State of La., 95-0101 (La. App. 1st Cir. 6/23/95), 657 So. 2d 622, 623–24.
[98] *Id.* at 624.
[99] *Id.*

the state wildlife and fisheries resources."[100] LACA and LEAN alleged interests in "protect[ing] the state's coastal and fishing resources" and protecting "the state's environment for the health, safety, and enjoyment of [their] members."[101]

In analyzing the plaintiffs' standing, the First Circuit characterized their petition as seeking "to compel the performance of a public duty," but nonetheless found that all plaintiffs lacked standing.[102] The court held that "the law clearly requires that there be a special interest" and listed a plethora of standard standing precedents concerning whether the plaintiff has "a *real* and *actual* interest in the action asserted," whether the plaintiff is "sufficiently affected," whether the plaintiff's "special interest [is] separate and distinct from that of the public at large"—essentially a mine run of typical standing inquiries that one would expect to flow from the spirit of *Lujan*.[103] Importantly for purposes of this Article, the court recognized that "the state's natural resources are held in common trust for all of the citizens of the state." But the court continued on to opine that "[w]hile each member of the general public has an interest, in equal measure with all other citizens of the state, in the public trusts of the state's various natural resources, including wildlife and fisheries, no one citizen or citizen group has a 'special interest' beyond that enjoyed by the general public." The court thought the opposite rule to "ignore[] the body of jurisprudence requiring a special interest separate and apart from the general public." Here, the court strangely believed that the plaintiffs' interests in fishing were simply insufficient to establish standing.

But this ill-contrived standing analysis ignores the special role that the Public Trust Doctrine plays in standing analyses. As beneficiaries of the natural resources held in public trust by Louisiana, Louisiana citizens are the real parties in interest in ensuring that those resources are used and distributed in a constitutional manner. Indeed, in situations like this, where the trustee—the state—will not enforce the public trust doctrine to annul the Freeze Statute and the private parties to the mineral leases have no interest in annulling the Freeze Statute, Louisiana citizens are virtually the *only* willing parties to protect the resources held in public trust. To refuse standing to citizen-beneficiaries under the Public Trust Doctrine would be to render the doctrine a dead letter by creating (and thus, insulating from challenge) an oligarchical regime where the only parties who could challenge the Freeze Statute are the parties who monetarily and politically benefit from the Freeze Statute.

C. Other Affirmations of Citizen Standing Under the Public Trust Doctrine

That potential absurdity is precisely why the state high courts in Hawaii, Illinois, and Delaware have all continuously affirmed that ordinary citizens have standing under the doctrine to challenge governmental abuses of the public trust even without satisfying the typical standing requirements. In fact, early commentators on Louisiana's own Public Trust Doctrine (with whom the First Circuit of course disagreed) emphasized that this very quality flows from Louisiana's articulation of the doctrine. These examples make clear that when the Louisiana Supreme Court

[100] *Id.* at 627.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 626–27. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

considers standing under the Public Trust Doctrine, it should determine that the doctrine absolutely grants citizens unique standing to protect the state's natural resources held in public trust.

1. Hawaii

As recently as 2013, in *Kilakila 'O Haleakala v. Board of Land & Natural Resources*, the Supreme Court of Hawaii has reaffirmed that a "public trust claim can be raised by members of the public who are affected by potential harm to the public trust."[104] In so doing, and in interpreting its own constitutional provision codifying the Public Trust Doctrine, the court has observed that retaining an injury-in-fact requirement would "conflict[] with the broad constitutional basis underlying the public trust doctrine."[105] Indeed, the injury-in-fact requirement is premised upon a theory of "individual harm and therefore emphasizes the private interest."[106] That theory is diametrically opposed to the theories undergirding the Public Trust Doctrine, under which no harm is individualized or particularlized but is instead harm to "the common good . . . at stake."[107] Thus, "any member of the general public has standing to raise a claim of harm to the public trust."[108] Here, members of an organization alleged an interest in protecting the "sacredness" of a summit where a telescope and observatory were to be constructed, and the court concluded that such an interest satisfied the standing requirement with the Public Trust Doctrine as a backdrop.[109]

2. Illinois

Similarly, in Illinois, it has long been the law that citizens, particularly those who are taxpayers, need not allege any particular interest or injury under the Public Trust Doctrine in order to obtain standing to challenge government action. In *Paepcke v. Public Building Commission of Chicago*, citizen-plaintiffs filed a class action against local government action that endeavored to build schools in two city parks.[110] The plaintiffs' theory was "that the parks in question are so dedicated that they are held in public trust for use only as park or recreational grounds" and that "all plaintiffs who are citizens and residents of any area of the city have a public property right to enforce the public trust existing by reason of the dedication of the parks as aforesaid."[111] The trial court held consistent with Illinois Supreme Court precedent that "they had no rights sufficient to enable them to maintain the action 'except as taxpayers.'"[112]

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[104] Kilakila 'O Haleakala v. Bd. of Land & Nat. Resources, 317 P.3d 27, 46 (Haw. 2013) (quoting In re 'Ïao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 182 (Haw. 2012) (Acoba, J., concurring)).
[105] *Id.*
[106] *Id.* (quoting *In re 'Ïao*, 287 P.3d at 182 (Acoba, J., concurring)).
[107] *Id.* (quoting *In re 'Ïao*, 287 P.3d at 182 (Acoba, J., concurring)).
[108] *Id.* at 47 (quoting Nat'l Audubon Society v. Superior Court of Alpine Cnty., 658 P.2d 709, 717 n.11 (Cal. 1983).
[109] *Id.* at 29, 47.
[110] Paepcke v. Pub. Bldg. Comm'n of Chicago, 263 N.E.2d 11, 13, 15 (Ill. 1970).
[111] *Id.* at 15.
[112] *Id.* at 18.

But the Illinois Supreme Court reconsidered and rejected that precedent that held "an individual taxpayer or property owner, in the absence of statutory authority conferring that right, had no standing in equity to enjoin an alleged misuse of property held in trust for the public unless he alleges and proves that he will suffer special damage, different in degree and kind from that suffered by the public at large."[113] Taking a practical view of the role the Public Trust Doctrine plays in conferring standing on citizens, the court reasoned "[i]f the 'public trust' docrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it."[114] Indeed, "[t]o tell them that they must wait upon governmental action is often an effectual denial of the right for all time."[115] The court thus recognized the dangers of leaving protection of the public trust in the hands of an unable or unwilling government and the corresponding practical and legal benefits of instead allowing the sovereign people standing to challenge governmental action.

3. Delaware

Like Illinois, Delaware law holds that taxpayer status combined with the power of the Public Trust Doctrine grants citizens standing to protect the resources held in public trust. In *City of Wilmington v. Lord*, various citizen taxpayers sued the city of Wilmington to enjoin what they thought was a misuse of public property—the city was attempting to construct a water tank on land conveyed to the city for use as a public park.[116] The city questioned whether ordinary citizens had standing to challenging the city's action.[117]

The Delaware Supreme Court had no qualms finding that the citizens certainly had standing, and the court reached this conclusion by analogy to misuse of tax funds. The court began with the proposition that a taxpayer has a direct interest in proper use and allocation of tax receipts, which gives the taxpayer a sufficient stake in a suit to challenge improper use of those funds.[118] Here, the court observed, "the alleged illegal activity involves the use not of public funds, but of public property, held by the City in trust for public park purposes."[119] And the court concluded that "[t]he improper use of publicly held real property is sufficiently analogous to the improper use of public money so that if a taxpayer has a legal right to sue in the latter case, then necessarily a taxpayer should have a similar right in the former case."[120] And just as the Illinois Supreme Court recognized, the Delaware Supreme Court noted, "if suit by taxpayers is not allowed, the governmental action questioned will likely go unchecked, at least in the absence of action by the Attorney General."[121] In other words, given "the impracticality of any other form of enforcement

[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] City of Wilmington v. Lord, 378 A.2d 635, 637 (Del. 1977).
[117] *Id.*
[118] *Id.* at 637–38.
[119] *Id.*
[120] *Id.* at 638.
[121] *Id.*

of that trust," citizens must have standing to practice the public trust.[122] Therefore, "a taxpayer must be accorded standing to sue to challenge the misuse of property held in trust for the public."[123]

4. Early Louisiana Commentators

Finally, these clear articulations of citizen standing under the Public Trust Doctrine are in no way foreign to the civil law Louisiana literature concerning Louisiana's doctrine. James G. Wilkins and Michael Wascom wrote a lengthy overview in 1992 of the Public Trust Doctrine as understood in Louisiana, and they made plain the avenue for relief through citizen standing.[124] These commentators explained that "the public trust obligation under Article IX, Section 1 should be construed as a self-executing obligation."[125] Therefore, "the public trust responsibilities of the state should be enforceable against 'trustee agencies' by a writ of mandamus or injunctive relief brought against a trustee agency by the Louisiana Attorney General on behalf of the citizens of the state or by a Louisiana citizen, as a beneficiary of the trust, and thus, an affected party."[126] As examples, they opined that "the Attorney General, a citizen, or another state agency might sue a 'trustee agency' for failure to protect a public trust natural resource, or suit might be brought by the Attorney General or a citizen to recover damages against a 'trustee agency' or a citizen who had 'damaged' a public trust natural resource."[127]

Now, to be sure, the First Circuit in *Mouton* addressed this article and complained that it ignored the body of jurisprudence that specifies standing requirements for civil plaintiffs.[128] But that complaint fatally ignores the function of the Public Trust Doctrine in standing analyses. As the Hawaii Supreme Court emphasized, the typical standing analysis fails to account for the wholly unique posture of cases grounded in the doctrine.[129] The injury is not unique—it is common to the whole public by design of the *public* trust. The interests are not unique—they are common to the whole public by the very nature of the *public* trust. And so, it makes sense to treat the Public Trust Doctrine, as many state supreme courts have done,[130] as a conferral of standing at least upon taxpaying citizens who have profound interests in protecting their constitutionally guaranteed rights in the natural resources held in public trust.

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And beyond the doctrinal and functional reasons why the Public Trust Doctrine grants citizens standing despite not necessarily satisfying typical standing requirements, the *practical*

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[122] *Id.*
[123] *Id.*
[124] James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana,* 52 LA. L. REV. 861, 898 (1992).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Mouton v. Dep't of Wildlife & Fisheries for State of La., 95-0101 (La. App. 1st Cir. 6/23/95), 657 So. 2d 622, 627.
[129] *See* Kilakila 'O Haleakala v. Bd. of Land & Nat. Resources, 317 P.3d 27, 46 (Haw. 2013).
[130] *See* discussion *supra* Part II.B.1–3.

reason why this is so and should be so is prominently displayed by the decisions in the Illinois and Delaware supreme courts and the probable effect of the opposite rule in this case. Those courts recognized that there may be situations where the government's interests are not aligned with the citizens' interests. The paradigmatic example of the Attorney General being the enforcer of the public trust is simply not always the case in practice. In those cases, where the government's interests are not aligned with the interests of the people, the people should be able to enforce and protect their rights under the Public Trust Doctrine.

This is such a case. The private parties to the continuing mineral leases—i.e., the parties directly affected under the Freeze Statute—have no incentive to challenge the statute. The government is either politically unable or politically unwilling to do so. In fact, a long line of Louisiana cases has limited public officers' right to challenge the constitutionality of a statute.[131] Thus, the people of Louisiana plainly have standing under the Public Trust Doctrine to vindicate a right that otherwise would go unprotected.

CONCLUSION

This Article has explained that the constitutionality of the Freeze Statute is deeply concerning and that the parties directly affected by the statute likely have no reason to question the constitutionality of the statute. Therefore, this Article has proposed the Public Trust Doctrine as an avenue for standing through which to challenge the effects of the Freeze Statute as unconstitutional donations of public property. Jurisprudence justifies this as the proper result and common sense confirms it.

[131] *See, e.g.*, Groves v. Bd. of Trustees of Teachers' Retirement Sys. of La., 10491, 324 So. 2d 587, 595 (La. App. 1st Cir. 11/24/75); Dore v. Tugwell, 84 So. 2d 199, 201 (La. 1955).