UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY – EAST INDIVIDUALLY AND AS THE BOARD GOVERNING THE ORLEANS LEVEE DISTRICT, THE LAKE BORGNE BASIN LEVEE DISTRICT, AND THE EAST JEFFERSON LEVEE DISTRICT	**Civil action no. 2:13-cv-05410** **Section: G** **Division: 3** **Judge: Nannette Jolivette Brown** **Magistrate: Daniel E. Knowles, III**

Plaintiffs

v.

TENNESSEE GAS PIPELINE COMPANY, LLC, ET AL.,

Defendants.

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE*

The oral arguments and motions in this case reflect confusion over the nature and extent of the Public Trust Doctrine. This brief presents three widely-accepted Public Trust principles important to the application of the Doctrine: (1) that it is a substantive command, (2) that it applies fully to legislative action, and (3) that it is reinforced in, but not replaced by, the Louisiana Constitution.

1. The Public Doctrine is not mere policy, it is a substantive check on government power.

The Public Trust is one of the most venerable doctrines in public law, dating from the Justinian *Institutes* of the 6th Century A.D. From the outset it recognized "things

common to mankind by the law of nature" such as "running water, the sea, and consequently the shores of the sea." J. INST. 2.1.1; *see also* Michael C. Blumm & Mary Wood, The Public Trust Doctrine in Environmental and Natural Resource Law (2013) (describing Doctrine's origins). It was incorporated in English law through the Magna Carta of 1215, which imposed several restrictions on royal power, including the alienation of public rights to navigation, fishing and water-borne commerce. Joseph L. Sax, *Liberating the Public Trust from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 185 (1980-81). Even the King was bound.

The Public Trust came to America in its earliest jurisprudence. In *Martin v Waddell*, 41 U.S. (16 Pet) 367 (1842) the Supreme Court found that colonial land grants were subject to the same restrictions as in England. *Id* .at 413. Subsequent rulings extended the Doctrine to states joining the Union via the Equal Footing Doctrine, see *Pollard v. Hagan*, 44 U.S. 212 ((1845); see generally Alexandra Kass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards* 82 NOTRE DAME L. REV. 669 (2006). The Trust thus applies to all fifty states, including Louisiana. See generally Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecol. L.Q. 53 (2010); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 Penn. St. Envt'l L. Rev. 1 (2007).

The Public Trust Doctrine was interpreted definitively in *Illinois Central v Illinois*, 146 U.S. 387 (1892), concerning a purported transfer of the Chicago waterfront to an interstate railroad company, one of the largest corporations of its day, whose strong

political influence on the transfer was noted. *Id*. at 451. While the transfer might have benefitted interstate transportation and the economy of the city, it was held to violate the doctrine due to the geographic scope of the alienation involved, *id.* at 453, and the importance of the public rights in the ceded waters. *Id*. "The state can no more abdicate its trust over property in which the whole people are interested", the Court continued, "than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id*. at 460.

While the Doctrine has gone forward in many states to check government actions on a wide front e.g. *National Audubon Soc'y. v. Superior Court of Alpine Cnty.*, 658 P.2d 709 (Cal. 1983), to apply to resources beyond public waters e.g. *U.S. v. Burlington Northern R. Co.*, 710 F.Supp. 1286, 1286 (D. Neb. 1989), and to impose affirmative duties on governments to protect them, e.g. *La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n*, 719 So. 2d 119 (La. Ct. App. 1998), the essential core has remained injunctive. It is a permanent safeguard, a protection for public interests in aquatic resources including public health, recreation and flood control, see *Avenal v State* 8886 So. 2d 1085, 1101-2 (La 2004), a zone where government may not go. It is not mere policy; it is law.

2. The Doctrine applies equally to legislative acts.

Public Trust principles have applied to, and curbed, legislative actions for well over a century. The transfer at issue in *Illinois Central* was itself authorized by both the City of Chicago and the state legislature, 146 U.S. at 455-56. In rejecting it, the Court, held: "Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved on it." *Id.* at 460. Justice Field, writing for

the Court, went on to explain: "The position advanced by the railroad company in support of its claim to the ownership of the submerged lands … would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated." Politics would trump the Trust. To the Court, this was an untenable result.

Following *Illinois Central*, courts have "re[lied] upon the public trust doctrine to invalidate legislative decisions of many kinds." Jason Rasband, et.al., *Natural Resources Law and Policy* 109 (2004) (citations omitted). In a running saga with the Arizona legislature, three separate courts invalidated the alienation of state water bottoms to adjacent landowners: See *Arizona Ctr. For Law in the Public Interest v. Hassell*, 837 P.2d. 158 (Ariz. C. App 1991); *San Carlos Apache Tribe v Superior Court ex*. Rel. County of Maraicopa, 972 P.2d 179 (Ariz. 1999); *Defenders of Wildlife v Hull*, 18 P. 3d 722 (Ariz. Ct. App. 2001). Similar results have obtained in Michigan, see *Lake Michigan Federation v U.S. Army Corps of Engineers*, 742 F. Supp 441, (N.D. Ill. 1990), and in Nevada, see *Lawrence v Clark County*, 254 P. 3d 606 (Nev. 2011).

When legislation "substantially impairs" Public Trust interests, therefore, the position that the legislature is free to interpret the Doctrine as matter of balance is not the law. See *Caminiti v Boyle*, 732 P2d 989, 994. Under these circumstances, the Doctrine becomes a bar.

3. The Louisiana Constitution supplements, but does not derogate from, the Doctrine.

Article IX of the Louisiana Constitution provides in pertinent part that the "natural resources of the state, including air and water … shall be protected, conserved, and

replenished insofar as possible and consistent with the health, safety and welfare of the people. The Legislature shall enact laws to implement this authority". La. Const. art. IX, § 1.

This Article was interpreted rigorously by the Louisiana Supreme Court in *Save Ourselves v. La. Envtl Control Comm'n*, 452 So. 2d 1152 (La. 1984), finding a complex statutory scheme (for the regulation of hazardous waste facility on the banks of the Mississippi River) insufficient to satisfy the state's duties as a "public trustee". *Id*. at 1106-61. Article IX was cited again in *Avenal*, where the Court found coastal restoration to derive from a "background principal of Louisiana law", averting a "grave threat to the lives and property of others", and trumping property rights of private (oyster) leaseholders, 886 So. 2d at 1107, n. 28.

The responsibilities imposed by Article IX, however, should not be confused with the injunctive power of the Public Trust Doctrine, which would obtain had Louisiana no constitutional provision at all. See *Esplanade Properties, LLC v City of Seattle*, 307 F.3d 978 (2002). ("It is beyond question that a public trust has always existed in Washington," and noting that the doctrine was "partially encapsulated" in the state constitution.) *Id*. at 985. Legislative authority to go forward is now enshrined in the Louisiana Constitution but this does not mean that the legislature, in whatever fashion, can alienate the Trust.

A recent example of this distinction is provided in *Robinson Township v. Commonwealth of Pennsylvania*, 83 A. 3d t 901 (2013), on a fact and law pattern quite similar to the instant litigation. The state legislature had enacted measures removing local authority to ban the practice of fracking as a means of protecting their

communities. The legislation was unambiguous, and unambiguously intended to preempt local action. On the other side were principles of home rule (which were subject to legislative override), and the Pennsylvania Constitution (which was not). Section 27 of the Constitution declared natural resources to be "the common property of all the people", and that as "trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people". Pa. Const. art. 1 §27.

The plurality opinion began by finding two duties under this provision, "which are both negative (i.e. prohibitory), and affirmative (ie implicating the enactment of legislation and regulation"). *Robinson Twp., Washington Cnty. v. Com.*, at 955-56. One did not supplant the other. At issue was not state's authority to pass laws but, rather, whether it did so here "in a manner inconsistent with the constitutional mandate", *id*. at 975 to wit, the Public Trust. The Court understood the Constitutional provision as redressing a long history of resource destruction, largely coal development, that had spanned decades and left wasted environments behind. *Id*. at 976. Applying Section 27, the Court found the legislation prohibiting local governments from safeguarding their resources to be "unprecedented and constitutionally infirm", even assuming, the Court continued, "that the trustee believes that it is acting solely and in good faith to advance the economic interests of the beneficiaries." *Id*. at 982. By annulling local authority to protect itself, the legislature had gone too far.

4. Conclusion

The Public Trust Doctrine is substantive law, prohibitory in nature from its very origins and it remains so today. It applies to acts of legislation. It is reinforced by the Louisiana Constitution, but it is not limited by it. The state is authorized, even

compelled, to enact programs for coastal restoration, but those programs do not supplant its obligation not to impair the trust by other means. Whether the act of the Louisiana legislature has significantly impaired the public interest in trust resources is for the parties to argue and the Court to decide, but this is the appropriate Public Trust issue in this case.

RESPECTFULLY SUBMITTED, this 18th day of December, 2014.

/s/_____
Oliver A. Houck
Professor of Law
Tulane University
6329 Freret Street
New Orleans, LA 70118
Tel: 504-865-5946
Fax: 504-865-8855
Email: ohouck@tulane.edu

/s/ **Jane L. Johnson**
Jane L. Johnson, Attorney at Law
Louisiana Bar No. 07300
Tulane University
6329 Freret Street
New Orleans, LA 70118
Tel: 504-865-5157
Fax: 504-862-8859
Email: jjohnso5@tulane.edu

Attorney for *Amici Curiae*

Mark S. Davis
Senior Research Fellow in Law
Director, Institute for Water Law & Policy
Tulane University

Oliver A. Houck
Professor of Law
Director, Environment & Energy Law Program
Tulane University

Blake Hudson
Professor of Law
Law Center and
School of the Coast & Environment
Louisiana State University

Robert M. Verchick
Professor of Law
Director, Environmental Law Program
Loyola University

Michael W. Wascom
Professor of Law (Ret.)
Past Director, Louisiana Sea Grant Legal Program
Louisiana State University

James G. Wilkins
Professor of Law
Director, Louisiana Sea Grant Law & Policy Program
Louisiana State University

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2014 I electronically filed the foregoing with the Clerk of Court by use of the CM/ECS System, which will send notice of and access to this Brief to counsel of record of all parties.

/s/ Jane L. Johnson
Jane L. Johnson. Attorney at Law
Louisiana Bar No. 07300
Tulane Law School
6329 Freret Street
New Orleans, LA 70118
Tel: 504-865-5157
Fax: 504-862-8859
Email: jjohnso5@tulane.edu