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Consideration of Mineral Rights in Eminent Domain Proceedings

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CONSIDERATION OF MINERAL RIGHTS IN EMINENT DOMAIN PROCEEDINGS

In an eminent domain proceeding, the owner of a mineral interest may have his or her rights affected by the outcome of the litigation.[1] For example, where a large tract of land is acquired by the expropriator, the mineral owner may find the exercise of his right to explore and produce minerals impossible or more expensive due to the use of the surface by the expropriator. In such a case, the owner of the mineral interest has suffered a loss in order to facilitate the project which is the subject of the expropriation. The determination of who should bear this loss will depend on the balancing of the need for public improvements and the protection of property rights. Ideally, the balance which should be obtained is one which will adequately compensate the loss which the mineral owner has suffered without deterring needed improvements.

This article will (1) begin by focusing on the provisions of the Louisiana Constitution of 1974 which provide for compensation to the full extent of loss whenever property is taken or damaged for public purposes;[2] (2) explore the nature of the interest which is acquired

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1. The terms "mineral owner" or "owner of a mineral interest" will be used throughout this paper to indicate the person in whom sub-surface rights are vested. Since the Mineral Code adopts the servitude theory rather than a theory based on ownership of minerals in place, this terminology can lead to some confusion. Thus, in the case where the landowner has not burdened the minerals beneath his tract, the terms "mineral owner" and "owner of a mineral interest" will refer to the landowner. Where the landowner has burdened his estate these terms will refer to the person in whose favor these charges against the estate have been established.

2. La. Const. art. I, § 4 provides:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
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> Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine com-

by the expropriator; (3) examine the policy of protection of property rights which was reaffirmed in the new constitution and which justifies limiting the interest acquired by the expropriator; and (4) address the issue of the valuation of mineral rights where they have either been taken or damaged by the expropriating authority.[3]

Implications of the Constitutional Provisions

Prior to the enactment of article 1, section 4 of the Louisiana Constitution of 1974,[4] Louisiana courts employed a categorical approach when confronted with the issue of just compensation in an eminent domain proceeding. That is, the "category of harm resulting in damage generally appears to have been dispositive of the issue of compensability."[5] Thus, even if the landowner was able to demonstrate actual economic injury, his claim would fail "if the category of the injurious activity or category of harm ha[d] not been established as compensable."[6] Under this approach, mineral rights have been recognized as a compensable category both in theory[7] and in the jurisprudence.[8] The courts nonetheless remained wary of the mineral rights category since valuation of a mineral right involves considerable speculation.

The right to receive compensation in expropriation cases is constitutionally protected by the taking clause of the United States Constitution[9] which is made applicable to the states through the operation of the Due

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pensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

3. For a discussion of the issue of the valuation of rights associated with underground storage formations, see Comment, Underground Gas Storage: Opposing Rights and Interests, 46 La. L. Rev. 871 (1986) [hereinafter cited as Comment, *Underground Gas Storage*]. See also Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662 (1985); Southern National Gas Co. v. Poland, 406 So. 2d 657 (La. App. 2d Cir. 1981); Southern Natural Gas Co. v. Sutton, 406 So. 2d 669 (La. App. 2d Cir. 1981); Mid-Louisiana Gas Co. v. Sanchez, 280 So. 2d 406 (La. App. 4th Cir. 1973).

4. See supra note 2.

5. M. Dakin & M. Klein, Eminent Domain in Louisiana 62 (1970).

6. Id.

7. Comment, Expropriation—Compensable Items in Louisiana, 24 La. L. Rev. 849, 871-72 (1964).

8. State v. Woodard, 189 So. 2d 601 (La. App. 3d Cir. 1966); State v. Miller, 189 So. 2d 603 (La. App. 3d Cir. 1966); State v. Miller, 184 So. 2d 780 (La. App. 3d Cir. 1966).

9. U. S. Const. amend. V provides, in part, "nor shall private property be taken for public use, without just compensation."

Process clause of the Fourteenth Amendment.[10] The taking clause prohibits the taking of private property for public purposes without "just compensation." This provision has been limited by the "res" concept[11] which limits compensation to the value of that which is actually acquired by the expropriating authority.[12] Such a limited construction could be detrimental to the owner. For example, damage to the landowner's remaining property would go uncompensated under this construction as the damaged property was not taken by the expropriator.

In an expropriation, there are essentially three situations in which minerals are either taken or damaged. In the first situation, ownership of the tract of land is granted to the expropriator. Because the Mineral Code provides that the "landowner has the exclusive right to explore and develop"[13] the oil and gas occurring beneath the surface, such minerals are effectively taken by the expropriator. In the second situation, the ownership of the tract of land is granted to the expropriator, but the mineral rights are reserved to the landowner.[14] Both parties may consent to such a reservation if the landowner is convinced that his mineral interest is worth more than the expropriator is willing to pay and, accordingly, the expropriator would prefer the landowner keep his "overpriced" mineral interest. In the third situation, the expropriator is granted only a servitude over the land and, therefore, the mineral rights are unaffected. In both the second and third situations the "res" concept would preclude recovery as the minerals are not "taken" by the expropriator. However, the holder of such a mineral interest may incur a pecuniary loss in that the taking of the surface may make access to the minerals impossible, economically infeasible, or more difficult and expensive.

Both the 1921[15] and the 1974[16] Louisiana Constitutions provide relief for the mineral owner in such a case by providing for compensation

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10. Chicago Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 17 S. Ct. 581 (1897).

11. See Note, Expropriation: Compensating the Landowner to the Full Extent of His Loss, 40 La. L. Rev. 817 (1980) [hereinafter cited as *Note, Expropriation*].

12. The United States Supreme Court stated that "the compensation must be a full and perfect equivalent for the property taken. And the just compensation, it will be noticed, is for the property, and not to the owner." (emphasis added). Monogahela Navigation Co. v. United States, 148 U.S. 312, 326, 13 S. Ct. 622, 626 (1893).

13. Min. Code art. 6.

14. In this situation, the minerals are treated as subject to a perpetual servitude. State v. Salter, 184 So. 2d 783 (La. App. 3d Cir. 1966) (citing Hodges v. Long-Bell Petro. Co. 240 La. 198, 121 So. 2d 831 (1960).

15. La. Const. art. I, § 2 (1921): "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

16. See supra note 2.

whenever property is taken *or damaged* for public purposes. Thus, the Louisiana rule allows compensation for property remaining after the taking so long as it has been "damaged."[17] Certainly, the holder of a mineral interest that decreases in value as a result of an expropriation of surface rights has a valid claim of "damage."

Although the "taken or damaged" language was retained from the prior law, the level of compensation was increased from a standard of "just and adequate compensation" to a new standard of compensation "to the full extent of [the owner's] loss."[18] Such an expansive standard was included based primarily on the belief that landowners had been inadequately compensated in prior eminent domain proceedings[19] and that the power of expropriation had been abused by both public and private expropriators.[20]

This constitutional provision not only affects the level of compensation to be awarded in an expropriation proceeding, but also expands the categories which are compensable.[21] It has been persuasively argued[22] that categories once found to be noncompensable, such as consequential and incidental damages,[23] should now receive judicial recognition under the "full extent of his loss" standard.[24] Likewise, damage to mineral rights should more readily receive judicial recognition and more sufficient compensation. In fact, such a categorical approach seems unsound under the new standard in that *any category* of loss should be compensable "upon adequate proof of such losses."[25] To rule otherwise would be to render the "full extent" language meaningless.

In addition to the increased protection of property rights under this new standard, expropriation is "a general expression of the deep-rooted conviction that the purpose of government is to promote and protect the general welfare of society at large."[26] Thus, the courts will tend to examine the interrelation of these two policies when confronted with an

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17. See M. Dakin & M. Klein, supra note 5, at 61-62; Comment, Expropriation—A Survey of Louisiana Law, 18 La. L. Rev. 509, 551-55 (1959) [hereinafter cited as *Comment, Survey*].

18. Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 15, (1974).

19. Id. Jury trials were also given a constitutional guarantee in the hopes of encouraging more substantial awards. See Jenkins, The Declaration of Rights, 21 Loy. L. Rev. 9, 23 (1975).

20. Jenkins, supra note 19, at 20.

21. See supra text accompanying note 4.

22. See supra note 11.

23. M. Dakin & M. Klein, supra note 5, at 68.

24. See Note, *Expropriation*, supra note 11, at 827.

25. See infra text accompanying note 50. State v. Constant, 359 So. 2d 666, 672 (La. App. 1st Cir. 1978).

26. M. Dakin & M. Klein, supra note 5, at 19.

expropriation case. Presumably, greater compensation will deter needed improvements. The 1974 Constitution places primary emphasis on the protection of property rights and has been construed to mean that the "landowner cannot be required to suffer pecuniarily in order to encourage public improvements."[27] This reading is consistent with prior court decisions which had found that statutes authorizing expropriation are "special and exceptional in character, in derogation of common right" and, therefore, must be strictly construed.[28]

Nature of the Interest Acquired

The nature of the interest acquired by an expropriator in an eminent domain proceeding has been the subject of far less litigation than the issue of compensability.[29] This difference is probably due to the owner's primary concern with adequate compensation and his or her unwillingness to litigate an issue which has seldom been resolved favorably. However, landowners may be encouraged to litigate this issue in the future since the "full extent of his loss" language arguably includes attorney's fees[30] and statutory provisions allow for the recovery of an expropriatee's attorney's fees under certain circumstances.[31] Moreover, the landowner will want to protect his property rights by attempting to limit the nature of the interest which is acquired by the expropriating authority.

In order to maintain a successful eminent domain proceeding, the expropriator must show that the proposed project is for a necessary and public purpose.[32] The public purpose requirement is essentially a judicial determination that the proposed project will benefit the public.[33]

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27. See *Note, Expropriation,* supra note 11, at 827; Dakin, Work of Appellate Courts 1977-78, 39 La. L. Rev. 793, 794-95, and cases cited therein.

28. Missouri Pacific R. Co. v. Nicholson, 460 So. 2d 615, 621 (La. App. 1st Cir. 1984) citing Orleans-Kenner Electric Ry. v. Metairie Ridge Nursery Co., 136 La. 968, 68 So. 93 (1915).

29. M. Dakin & M. Klein, supra note 5, at 33-57.

30. Hargrave, supra note 18, at 15.

31. La. R.S. 19:8 (1979) provides in part:

> Immediately after compensation has been determined, the plaintiff shall, upon motion of the defendant, present evidence as to the highest amount it offered the defendant for the property prior to trial on the merits. After hearing evidence on the issue, the court shall determine the highest amount offered. If the highest amount offered is less than the compensation awarded, the court may award reasonable attorney fees. . . .

32. See *Comment, Survey,* supra note 17, at 513. The requirements for maintaining a successful eminent domain proceeding involve a showing of: (1) the purpose of the taking, (2) the necessity of the taking, (3) the authority of the taker, (4) the procedure employed and the extent of compliance therewith, (5) the previous payment of fair compensation, and (6) the attempt to avoid litigation by a prior tender of value. Id. at 512.

33. M. Dakin & M. Klein, supra note 5, at 18-19, 356-370.

The public purpose requirement is distinguished from the necessity requirement which deals with "the location of the expropriation, the extent of the estate to be acquired thereby both qualitatively and quantitatively, as well as the wisdom" of the proposed project.[34] Thus, it is the necessity requirement that is the focus in an examination of the nature of the interest acquired.

The general rule is that "the amount of land and the nature of the interest taken must be reasonably necessary for the accomplishment of the proposed project.[35] As with the new constitutional provisions, this rule seeks to protect the landowner's property interest to the fullest extent possible without overly deterring needed improvements. Thus, where a servitude will be sufficient to satisfy the needs of the expropriator, it will be granted rather than full ownership despite the perpetual nature of the use.[36]

A review of the jurisprudence, however, reveals that ownership is awarded in many circumstances where the needs of the taker would have been adequately served by a mere servitude. At least three reasons can be suggested to explain this tendency. First, the issue of necessity must be raised by the landowner. Otherwise, the court will grant the nature of the interest requested by the expropriator.[37] Second, the discretion of the expropriating authority has usually been upheld and is limited only by a test of bad faith or gross abuse of discretion.[38] Third, the courts may be attempting to keep property rights from being permanently fragmented as would be the case in many of the servitudes granted in eminent domain proceedings. This last policy alone, however, has not prevented courts from limiting the nature of the interest acquired to a mere servitude despite some apparently permanent uses.

In Missouri Pacific Railroad Co. v. Nicholson,[39] a railroad sought to expropriate over 300 acres of the defendant's 2500 acre plantation for the construction of a modern railroad classification yard.[40] Uncon-

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34. Id. at 28.

35. Id. at 366.

36. John T. Moore Planting Co. v. Morgan's Louisiana & T.R. & S.S. Co., 126 La. 840, 53 So. 22 (1908).

37. M. Dakin & M. Klein, supra note 5, at 38.

38. Id. at 34-35.

39. 460 So. 2d 615 (La. App. 1st Cir. 1984).

40. A railroad classification yard was described by the court as:

> a modern, electronic or computerized, gravity classification yard, in which freight trains are received in a long receiving yard; and by moving individual cars over a hump in the yard, they are rolled by gravity, and directed by switching onto tracks designated for certain destinations. The purpose of such a classification yard is to aggregate railroad cars in blocks going to common destinations. Functionally, cars are pulled from the respective classification tracks in the proper order and assembled into trains in the departure yard. Locomotives and

tradicted evidence was admitted which showed that exclusive use of the entire 300 acre surface would be required to conduct the desired classification activities. The court correctly resolved the issue of the nature of the interest acquired by holding that the railroad was "only entitled to expropriate an exclusive personal servitude of use."[41] The trial court had erroneously granted the railroad full ownership since "the defendants (Nicholson) ha[d] not seriously questioned the necessity for the taking of property in fee."[42] The court emphasized that the railroad had "no need of any subsurface rights."[43] Implicit in this reversal was the finding that a challenge to the nature of the interest acquired is no longer mandatory—at least where a private expropriator is concerned.

Concerning the necessity requirement, the new constitutional provision provides a different standard dependent on whether the expropriating entity is public or private. The constitution provides:

> Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by a private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.[44]

Thus, where a private entity is given the power of expropriation, the Constitution requires a showing of necessity. No such showing is required where a public entity is the expropriator. Although the logic of this distinction is unclear,[45] the end result should be a greater degree of scrutiny as to the nature of the interest acquired where the expropriator is a private entity.[46] It is submitted that greater scrutiny should also be applied where the state or any of its political subdivisions is the expropriator. Although such scrutiny is not mandated by the new Constitution, in light of its emphasis on the protection of property rights, such scrutiny is appropriate for preventing the expropriator from acquiring more than is necessary to accomplish the proposed project. The

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cabooses are connected to such trains. Then, all the necessary tests, such as air-brake tests, are performed; and the trains depart from that yard.

Id. at 619-20.

41. Id. at 621.

42. Id. at 620.

43. Id. at 621 (citing John T. Moore Planting Co., 126 La. at 840, 53 So. at 22).

44. La. Const. art. I, § 4.

45. See, Hargrave, supra note 18, at 16. The distinction was the result of a compromise at the constitutional convention.

46. Id.

public expropriator would not be unduly burdened by a higher level of scrutiny, nor will it risk acquiring less than is required.

The nature of the interest acquired has practical ramifications for the valuation of minerals. Different methods of determining compensability and different burdens of proof attach depending on whether the minerals are "taken", as where full ownership is granted, or "damaged", as where a servitude is obtained or where the minerals are reserved.[47] There is no constitutional prohibition against the expropriation of ownership of the minerals and the Mineral Code "in no way attempts to prevent [a public entity] from acquiring full ownership of the land and minerals."[48] However, the absence of a prohibition should not be taken to mean that an award of ownership of land and minerals is the appropriate balance of the policies of encouraging public improvement and protecting property rights.[49]

Valuation of Minerals

As previously mentioned,[50] "the amount of compensation and damages due the landowner is usually the crucial issue in expropriation proceedings."[51] However, a hiatus in the use of jury trials[52] and "simple factual patterns"[53] have retarded the growth of evidentiary rules in this area.[54] However, it has been noticed that these rules have been "quite practically workable and generally sufficient."[55] For example, rules governing the admissibility of opinion evidence were more liberal, based both on the assumption that judges were better able to filter the evidence than were juries and on the overall need for such evidence when making property or mineral valuations. Nonetheless, as a general proposition, the rules of evidence applicable in ordinary civil proceedings have been found to be controlling in expropriation cases.[56]

Taking Analysis

Where ownership is acquired but not made subject to a mineral reservation, the expropriator becomes the holder of the mineral rights. The

47. See infra text accompanying notes 50-86.

48. Day, Prescriptibility of Mineral Rights in Public Lands: Articles 149-151 of the New Mineral Code, 1977 Min. L. Inst. 61, 63.

49. See supra text accompanying note 14.

50. See supra text accompanying note 29.

51. M. Dakin & M. Klein, supra note 5, at 354.

52. Jury trials were not used from 1948 to 1974. See Hargrave supra note 18, at 14 n. 58.

53. See *Comment, Survey,* supra note 17, at 557.

54. Id.

55. Id.

56. M. Dakin & M. Klein, supra note 5, at 354-55.

ordinary test for "just compensation" in a "taking" case is the fair market value of that which is taken.[57] Fair market value is generally defined as the price "a buyer, willing but not obligated to buy, would pay a seller, willing but not obligated to sell that subject property."[58] Since the expropriator is acquiring the land as containing the minerals, those minerals cannot be valued separately and added to the value of the land. Where valuable oil and gas are concerned, the speculative nature of the value of these minerals makes such a mutually agreed upon price difficult to obtain. Thus, the reservation of such minerals becomes a more attractive solution in this situation.

Where less valuable solid minerals are concerned, the "unit rule"[59] functions to limit compensation to the fair market value of that which is taken. For example, if the land contained "X" quantity of minerals which have a market value of "Y per unit," the product X Y cannot simply be added to the value of the land so as to obtain a figure in excess of the value of the land in a normal real estate transaction.

The traditional statement of the unit rule is that "condemned land containing minerals is to be valued as including the minerals, the value of which cannot be shown separately."[60] This rule has been harshly criticized since a willing buyer would at least want to be informed of the mineral content of the land, whereas this rule holds such evidence inadmissible.[61]

The more liberal, modified unit rule allows the parties to admit evidence of the separate value of minerals in the subject property provided certain criteria are fulfilled:

(1) The existence and quantity of the minerals can be accurately determined (technological advances have gone far in the elimination of guesswork in this area);

(2) The expenses of production and marketing are taken into consideration in valuing the minerals;

(3) This element of value is clearly significant;

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57. M. Dakin & M. Klein, supra note 5, at 30.

58. Id. at 30-31. See, e.g. State v. Hayward, 243 La. 1036, 150 So. 2d 6 (1963).

59. The unit rule has been the subject of a considerable amount of comment. The following works are examples: J. D. Eaton, Real Estate Valuation in Litigation 37-42 (1982); H. Kaltenbach, Master Guide to the Successful Handling of Condemnation Valuation 1603-17 (1972); E. Rams, Valuation for Eminent Domain 280-82 (1973); S. Searles, Eminent Domain, 23-31 (1982). Bickley, Current Trends and New Decisions in Eminent Domain, Institute on Eminent Domain 213, 218-224 (1967); Bickley, Compensable and Non-Compensable Damages, Institute on Eminent Domain 31, 32-39 (1960); Note, Eminent Domain: Approaches to Valuation of Real Estate with Emphasis on Mineral Properties, 74 W. Va. La. Rev. 307 (1971-1972) [hereinafter cited as *Note, Eminent Domain*].

60. 29A C.J.S. Eminent Domain § 174 (1965).

61. Note, *Eminent Domain,* supra note 59.

(4) The exploitation of the minerals is not inconsistent with the highest and best use of the land; and most importantly

(5) The jury should be instructed that the evidence of separate value is only a factor to be considered in determining the total value of the land itself.[62]

Since these criteria are more in accord with the factors a normal buyer or seller would consider in valuing the land, it appears that the modified version of the unit rule more accurately reflects fair market value and more adequately compensates the landowner.

Where a taking analysis is appropriate, Louisiana courts have followed the more liberal unit rule which allows evidence of the value of minerals underlying the surface, provided adequate jury instructions are given to prevent jurors from simply adding the mineral value rather than considering mineral value as merely an element of the land's value.[63] In *State Department of Highways v. Hart*,[64] this evidence was held admissible, but the case was tried before a judge. To hold such evidence inadmissible under the "full extent of his loss" standard would greatly impair the landowner's ability to prove the full extent of his loss. In addition, carefully drafted jury instructions should prevent excessive awards, thereby furthering the policy of encouraging public improvement.

As in most civil litigation, the allocation of the burden of proof is often determinative of the outcome of litigation.[65] Interestingly, when applying a taking analysis, "neither party to [an expropriation proceeding] must bear the burden of proving the fair market value of the property taken."[66] Thus, where a taking of minerals is concerned, it is a misnomer to speak of a failure to carry the burden of proof. Each party will attempt to introduce evidence as to the effect that the minerals have upon the value of the land with the trier of fact resolving the issue.

Damage Analysis

Unlike the taking analysis, the burden of proof is clearly on the owner, as the party claiming damages, to show the extent of damage to his mineral interest. The applicable test requires the owner to prove both the value of his mineral rights before the taking of the surface and the value of his mineral rights after the taking of the surface. His

62. S. Searles, supra note 59, at 23-24.
63. *Note, Eminent Domain,* supra note 59, at 322.
64. 249 So. 2d 310 (La. App. 1st Cir. 1971).
65. M. Dakin & M. Klein, supra note 5, at 355.
66. Id. at 373.

damages are the difference between these two values. This is commonly known as the "before and after test."[67]

A damage analysis is applicable where a servitude is granted—thereby leaving the minerals in the same hands as before the expropriation. This approach should also be used where ownership is granted subject to a reservation of a mineral interest. Although the Mineral Code prohibits separate ownership of minerals from the land until those minerals are reduced to possession,[68] such an analysis applies because the mineral owner has the exclusive right to exploit such minerals during the term of his interest.[69] Significantly, where the federal government or the state is the expropriator, such a mineral interest becomes imprescriptable.[70] This rule protects the holder as his interest will not prescribe for failure to exercise that interest during the ten year prescriptive period. If title is later transferred to a non-public entity, prescription of nonuse is treated as suspended while ownership was vested in the government.[71]

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67. Id. at 70-78.

68. Min. Code art. 5: Ownership of land includes all minerals occurring naturally in a solid state. Solid minerals are insusceptible of ownership apart from the land until reduced to possession."

Min. Code art. 6 provides:

> Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.

69. Hodges v. Long-Bell Petro. Co., 240 La. 198, 121 So. 2d 831 (1960).

70. Min. Code art. 149 provides:

> When land is acquired from any person by the the United States or the state of Louisiana or any subdivision or agency of either by conventional deed or other contract or by condemnation or expropriation proceedings and when by the act of acquisition, order, or judgment, a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the mineral right so long as title to the land remains in the government or any of its subdivisions or agencies, or any legal entity with expropriation authority. If, however, the land, or any part thereof, is transferred by the government subdivision, agency or legal entity with expropriation authority to a private owner, the prescription of nonuse shall apply as in the usual case but shall commence only from the date on which the act of acquisition by the private owner is filed for registry.

71. Min. Code art. 150 provides:

> When land is acquired in the manner prescribed in Article 149, the prescription of nonuse shall continue to run against any then outstanding mineral rights subject to such prescription and shall accrue in favor of the owner from whom the land was acquired. Thereafter, the prescription of nonuse shall not run against such rights except as provided in Article 151.

Min. Code art. 151 provides:

> Article 150 is applicable only if the government, governmental subdivision, agency or legal entity with expropriation authority remains the owner of the

Finally the unit rule has no application when a damage analysis is used. As one author stated, the unit rule applies

> only where there has been no severance of the mineral rights into the separate estates of the surface and mineral ownership. Where there has been a mineral deed or a severance, the estates should be valued separately, and all of the owners should be made parties to the suit. Where they are separated, the extent of the taking is going to have a lot to do with the value that is placed upon the mineral estate. It is possible . . . that there will be no actual taking of the mineral estate itself . . . . In this situation it is possible that there may be an increased cost in the mining, in that it may have to be directional or somewhat limited, but still not any actual taking.[72]

A review of the Louisiana cases illustrates that the landowner may have a difficult time recovering the full extent of his loss under the damage analysis where evidentiary problems stand in his way.

In *Nicholson,* the defendant claimed damage to his mineral interest as a compensable item. Since a servitude was granted, a damage analysis is appropriate. As previously discussed, the burden of proof, therefore, rests on the landowner to show a difference in the value of the minerals before and after the taking of the surface rights. The trial court had awarded $250,000 to the defendant for damage to mineral rights. Reversing, the first circuit stated:

> Having been granted only a servitude, the Railroad has not taken any mineral rights. The record does not establish any restrictions on the landowner's right to recover minerals, if any; except possibly directional rather than straight drilling would be required. The evidence fails to show that the value of mineral rights, if any, would be measurably diminished by the restriction of surface access to the landowner.[73]

Faced with the conflicting testimony of the two parties' expert witnesses, the court refused to award compensation. The railroad's expert testified that there was no potential for mineral exploitation on the subject property. The defendant's expert disagreed pointing out that the directional drilling required would increase recovery cost thereby decreasing

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land at the time the mineral right is extinguished. If the land, or a part thereof, is transferred by the government, subdivision, agency, or legal entity with expropriation authority to a private owner, the prescription of nonuse shall commence or resume as to the whole or the part in question from the date on which the act of acquisition by the private owner is filed for registry and shall accrue in his favor.

72. Bickley, supra note 59, at 219.

73. Nicholson, 460 So. 2d at 628.

the profit realized on the minerals. Such damage was estimated at $600,000. The court phrased its decision as a failure of the defendant (landowner) to meet his burden of proof.

In light of the renewed emphasis on the protection of property rights in the 1974 Constitution, as exemplified by the "full extent of his loss" standard, the court's analysis is at least questionable. In expropriation cases, the term "burden of proof" refers to a burden of persuading the trier of fact by a preponderance of the evidence.[74] Where the trier of fact is persuaded as to the occurrence of a loss and as to its amount, it should not be lightly overturned upon review. The credibility of witnesses is a much easier determination at the trial level and the weight given to such evidence is determined accordingly. In fact, it is difficult to determine what amount of evidence, short of an admission, would suffice when making such a valuation.

Such an admission was involved in *State v. Salter*[75] and its companion case.[76] In *Salter,* eighty acres of the defendant's land were expropriated by a state agency for use as a floodland for the Toledo Bend Dam and Reservoir Project. As a pre-1974 case involving a public expropriator, no issue appears to have been raised as to the necessity of the interest acquired. However, all mineral rights were reserved to the landowner in perpetuity and, therefore, were not "taken."[77] The primary issue on appeal was whether the defendant could recover damages for the reserved mineral rights.

The defendant was able to overcome the evidentiary obstacle of proving damage to his mineral interest by obtaining from the plaintiff a stipulation that the court should consider the valuation evidence introduced in a contemporaneous case[78] pending in federal district court. In that case, the testimony of geologists, petroleum engineers, drillers, and operators established a mineral value of eleven dollars per acre. Faced with this evidence, the state's own appraiser represented the value of the minerals in Salter's land as ten dollars per acre. With the value of the minerals thereby established, the defendant went on to show that due to the inundation[79] of his land, extraction of the minerals was not economically feasible. Applying the before and after method of valuation, and since the mineral worth was totally destroyed, the court

74. M. Dakin & M. Klein, supra note 5, at 355.

75. 184 So. 2d 783 (La. App. 3d Cir. 1966).

76. State v. Miller, 184 So. 2d 780 (La. App. 3d Cir. 1966).

77. Salter, 184 So. 2d at 786.

78. Id. at 787 (citing State v. Elden Dees, No. 10707 (W.D. La. 1966)).

79. Other restrictions were also in existence—namely that "the constitution [of 1921] provides that the exploration and development of such mineral rights 'shall not endanger or impair properties and facilities of the authority.'" Salter, 184 So. 2d at 186. However, the court placed little emphasis on this restriction.

found defendant's minerals to be damaged to the extent of their value.[80] Requiring total destruction of minerals before allowing the owner to recover for their "damage," of course, cannot be supported under the "full extent of his loss" standard. Nonetheless, landowners have had difficulty in establishing lesser damages, absent a stipulation as was present in Salter.

A final example will again show the difficulty mineral owners have had in establishing their damages. In *Cajun Electric Power Cooperative, Inc. v. Estate of Thomas*,[81] a private entity sought to expropriate over 220 acres of land belonging to two defendants for the construction of a lignite-powered electric generating plant. The court was again faced with conflicting testimony:

> The Thomas defendants offered testimony by an engineer who had conducted tests on the Thomas property to show that there were lignite deposits beneath that property. Plaintiff countered with the testimony of an expert mining engineer who testified that because of the size and depth of the deposits, mining would be economically unfeasible and the deposits had no value.
>
> As previously noted, the defendants offered no expert opinion evidence as to value.[82]

Although it may be argued that what is not economically feasible today may be so tomorrow,[83] it is apparent that this argument was not before the court and, furthermore, without "evidence in the record as to the present value of mineral rights or the effect of the taking on such value,"[84] the court was correct in denying recovery. Without this information, the court cannot determine the value of the mineral rights since the evidence of value before and after the taking is missing.

Cajun Electric is also significant in that it recognizes that *Salter* is "authority for taking into consideration a *reduction* in the present value of mineral rights caused by an interference with or prohibition against exercise of those rights resulting from the use to which the surface will be put."[85] Thus, *Cajun Electric* is authority for the proposition that a reduction in the present value of mineral rights caused by the increased costs in extracting such minerals, should be recognized as a compensable element of damages in cases such as *Nicholson*.

The difficulty which mineral holders have in establishing their losses, and the hesitancy which courts exhibit in making awards which are

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80. M. Dakin & M. Klein, supra note 5, at 149.
81. 408 So. 2d 1001 (La. App. 2d Cir. 1981).
82. Id. at 1003.
83. *Comment, Underground Gas Storage*, supra note 3, at 892-93.
84. Thomas, 408 So. 2d at 1004.
85. Id.

inherently speculative in nature, leads one to question the validity of a test based upon the present value of the mineral rights. Mineral rights are seldom sold based on present value. They are normally leased to an entity which may or may not conduct drilling operations on the property. The mineral owner in such a situation may wish to establish the value of comparative mineral leases in the area in order to avoid the problems posed by such a test. In fact, the mineral holder in *Salter* argued that the present market value *for leasing* was the appropriate test, but due to the stipulation which was previously discussed, he was not forced to look to comparative leases to establish that value.[86] The speculative nature of the inquiry into the value of mineral rights makes finding a test which will compensate the mineral owner without unduly deterring needed improvements a difficult task.

Conclusion

The adoption of the "full extent of his loss" standard in the Louisiana Constitution of 1974 calls for a reexamination of the necessity requirement and the methods for valuating mineral rights. When private entities expropriate, courts have employed a higher level of scrutiny in reviewing the decision of the expropriator as to the nature of the interest acquired. Such scrutiny will lead to a greater number of servitudes which are granted in fact situations where ownership had previously been granted. The effect of limiting the nature of the interest acquired is that the "damage" analysis will be used more frequently where minerals are involved. This calls for a reevaluation of the evidentiary rules which have made recovery more difficult for the mineral holder. If a public expropriator is involved, a greater degree of scrutiny is also suggested although it is not mandated by the new Constitution.

In those cases where a "taking" analysis is appropriate for the mineral interest involved, the application of the more liberal of the unit rules, which has already been adopted in Louisiana, will more fully compensate the mineral owner than would the more conservative approach. Additionally, jury instructions should be carefully constructed so as to not encourage excessive awards, thus deterring needed public improvements.

Where a "damage" analysis is appropriate, the mineral owner's attorney must be prepared to meet the burden of proving both the present value of the minerals and the value of the mineral rights after taking. Without proving both of these values by a preponderance of the evidence, the court is unlikely to award compensation because such an award would be too speculative in nature. The mineral owner may wish to use comparative leases, if available, to help establish these values.

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86. 184 So. 2d at 786.

Where both of these elements are proved to the court's satisfaction, the landowner mineral holder whose interest has been "damaged" by an expropriation of surface rights should be able to recover the "full extent of his loss" in accordance with the before and after test.

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