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UNITED STATES V. LITTLE LAKE MISERE LAND CO.—A CHOICE OF LAW

Victor A. Sachse*

The basic problem presented by *United States v. Little Lake Misere Land Co.*¹ is the extent to which state laws are applicable to lands owned by the United States. The specific problem began half a century ago. It stems from the determination in Louisiana made by the Louisiana supreme court to govern mineral rights by articles of the Civil Code relating to servitudes.² The issue was hard fought in *Frost-Johnson Lumber Co. v. Salling's Heirs*³ as all lawyers who consider mineral law well know. Sometimes it is not recognized that at one stage of that litigation, the first rehearing on May 2, 1921, the court of five decided by a majority of three to two that these articles were not applicable and a mineral reservation made more than 10 years earlier had not expired. This was a reversal of a three to two decision rendered January 5, 1920. The final action of the court was on February 17, 1922. Meanwhile, the Constitution of 1921 had been adopted. Chief Justice Monroe and Justice Summerville who had made two of the majority in the May 1921 decision had retired and by a vote of four to three the principle we speak of was embodied in our law. Only once since then so far as we have ascertained has the conclusion to treat mineral rights in that manner been seriously challenged within the court. *Haynes v. King*⁴ was decided in November of 1950 with a rehearing in March of 1951 in which the original decision was set aside. The dissent by Justice Hamiter who had been the organ of the court for the original decision forcibly presented the point: "These issues arise, and the confusion here occurs, as a result of the established jurisprudence of this court to the effect that a sale or a reservation of mineral rights creates a servitude which is governed by the provisions of the Revised Civil Code relating to the

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1. 93 S. Ct. 2389 (1973).

2. LA. CIV. CODE art. 789; *Wise v. Watkins*, 222 La. 493, 62 So. 2d 653 (1953); *Haynes v. King*, 219 La. 160, 52 So. 2d 531 (1951); *Hightower v. Maritzky*, 194 La. 998, 195 So. 518 (1940); *Lynn v. Harrington*, 193 La. 877, 192 So. 517 (1939); *Loyle v. North Cent. Tex. Oil Co.*, 187 La. 238, 174 So. 274 (1937); *Palmer Corp. v. Moore*, 171 La. 774, 132 So. 229 (1931); *Frost-Johnson Lbr. Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

3. 150 La. 756, 91 So. 207 (1922).

4. 219 La. 160, 52 So. 2d 531 (1951).

subject of servitudes"⁵ Justice Hamiter noted that:

Heretofore, I have questioned the soundness of such jurisprudence. See concurring opinion in *Ohio Oil Co. v. Ferguson*, 213 La. 183, 34 So.2d 746. It is my belief that the sale or reservation of minerals represents merely divestiture, by the landowner of a definite interest in the immovable and is governed only by those codal provisions which deal with conventional obligations.⁶

Undoubtedly treatment of a sale or purchase of mineral rights as a servitude which must be exercised to be retained has led to drilling which otherwise might not have occurred. Equally assuredly it has taken from the market vast areas of land whose owners will not sell because of the great risk of losing valuable mineral rights. If the alternative were only the one or the other, it might well be that Louisiana made the right choice. It is not a choice based upon the French law from which our Code was taken,⁷ but it has led by unmistakable steps to the controversy in *Little Lake Misere Land Co.* To voluntarily sell one's land knowing of the limited right with respect to the reservation of minerals is one thing; to be compelled to yield it to the sovereign is quite another; and it is this latter concept which led Louisiana into the adoption of statutes which for that limited purpose set aside the whole concept of the limited reservation of mineral rights.⁸ It may well be that if Louisiana had chosen to treat the United States Government in the same manner that it treats its own government a different result would have been reached in the *Little Lake Misere Land Co.* case. Act 68 of 1938 provided:

That whenever land situated in any spillway or floodway is sold to or acquired by the United States or the State of Louisiana, or any subdivisions or agencies thereof, for use in the construction, operation or maintenance of any spillway or floodway constructed, operated or maintained under authority of the Acts of Congress of May 15th, 1928, June 15th, 1936, or June 22, 1936 (Flood Control Act), as amended, or as hereafter amended, or under authority of any other Act or Acts of Congress, and the owner of said land reserves or retains the mineral rights or the

5. *Id.* at 187, 52 So. 2d at 540.

6. *Id.* at 187, 52 So. 2d at 541.

7. Sachse, *The Need for Statutory Guidance in Louisiana Mineral Law*, 22 LA. L. REV. 798 (1962) discusses the development of the mineral servitude concept in Louisiana.

8. See *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Mineral Rights*, 23 LA. L. REV. 323 (1963).

rights in and to the minerals in said land, said rights shall be imprescriptible.

Act 151 of the same legislature was even broader and provided:

That when real estate is acquired by the United States of America, the State of Louisiana, or any of its subdivisions, from any person, firm or corporation for use in any public work and/or improvement, and, by the act of acquisition, oil, gas and/or other minerals or royalties are reserved, prescription shall not run against such reservation of said oil, gas and/or other minerals or royalties.

Act 315 of 1940 replaced both of these acts explicitly but it limited the imprescriptible rule to situations:

When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect⁹

It will be noted that imprescriptibility no longer applied to acquisitions by the State of Louisiana. Not until 1958 was this rule again broadened to the 1938 concept, but even then the reservation was not imprescriptible; rather, prescription did not begin to run until the ownership of such land should pass into private hands.¹⁰ That phase of the rule did not apply to federal acquisitions. Thus it will be seen that after 1940 and even to this date the United States is to be treated differently from the State of Louisiana. Only the 1940 Act was before the Court in *Little Lake Misere Land Co.*

9. Now LA. R.S. 9:5806(A) (Supp. 1972). This statute was apparently enacted to relieve the problem faced by various federal agencies arising out of prescription provisions of the Louisiana Civil Code. *United States v. Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950).

10. LA. R.S. 9:5806(B) (Supp. 1972). Act 278 of 1958 extended the principle already applicable to the United States to acquisitions by the State Department of Highways, the State Department of Public Works, levee districts, the State Department of Wildlife and Fisheries, police juries, school districts, school or other boards or by any Commission by the State of Louisiana. There was a further amendment by Act 528 of 1969 which is substantially the same adding to those to whom the rule applies: "any political subdivision authorized to incur debt and issue bonds under the provisions of the Constitution and statutes of the State of Louisiana."

The District Court of the United States for the Eastern District of Louisiana in *U.S. v. Nebo Oil Co.*¹¹ held the Act of 1940 to be constitutional and gave effect to its retrospective provision. The court in pertinent part said:

The statute was passed to facilitate the acquisition of lands in Louisiana by the United States Government for Federal purposes. In purchasing lands in other states for national forests, there is no limitation upon the landowners in reserving their minerals in perpetuity, and, as the exhibits show, hundreds of thousands of acres were purchased in other states for national forest purposes, subject to the perpetual reservation of mineral rights. It was not unreasonable, therefore, for Louisiana to endeavor to place its citizens in the same position.

Moreover, the Federal Government is the largest landowner in Louisiana, and the dedication of large tracts for public purposes, such as forests and game preserves, withdraws these lands from commerce. It would appear entirely reasonable under these circumstances for the Louisiana Legislature to do all in its power to preserve the mineral rights of its citizens.

This is especially true when we realize that the Louisiana Civil Code Articles prescribing a servitude after ten years non-use are based upon a legal presumption of abandonment. *De La Croix v. Nolan*, 1 Rob., La., 321. This legal presumption had its foundation in the belief that it was not in the public interest to have titles to real estate clouded by outstanding servitudes unused for long periods of time. The Louisiana Legislature, in La. Act No. 315 of 1940, abolished this legal presumption, concluding that, when the surface had been withdrawn by the Federal government, the presumption was no longer justified nor in the public interest.¹²

The statute was again invoked with respect to a deed by Thomas Leiter to the United States on December 21, 1938. The mineral reservation was contractually limited to a shorter time than ten years in the absence of activity, and except for the 1940 Act, would have expired on April 1, 1945. The United States granted four oil leases on March 1, 1949, which were assigned or subleased to the California Company which drilled and completed 80 wells. The United States had received three and one-half million dollars as royalty by the time Leiter Minerals, Inc., successor to Thomas Leiter, filed suit in the

11. 90 F. Supp. 73 (W.D. La. 1950).

12. *Id.* at 99.

state court in Plaquemines Parish. The United States promptly sued in the U.S. District Court for the Eastern District of Louisiana to enjoin the prosecution of this action and Judge Wright granted the injunction.¹³

On appeal, the Fifth Circuit through Judges Borah, Holmes and Dawkins affirmed.¹⁴ The United States Supreme Court granted a writ of certiorari.¹⁵ In the course of its opinion the Supreme Court noted:

The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. . . . [W]e think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret this statute with finality, the Louisiana Supreme Court. Louisiana declaratory judgment procedure appears available to secure such an interpretation. . . . It need hardly be added that the State Courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.¹⁶

Justice Douglas dissented, stating: "The problem is not only to construe the state statute but to construe it constitutionally. The federal court can make that construction as readily as the state court. That is the congressional scheme and we should not change it by judicial fiat."¹⁷

In the declaratory judgment suit which followed, the state district court held with Leiter Minerals, Inc. and the California Company and the other defendants appealed to the Supreme Court of Louisiana. The decree had held that the statute was applicable to a mineral reservation contained in the deed to the federal government and that the statute was valid and constitutional. The supreme court said it did not have jurisdiction of the appeal and transferred it to the court of appeal.¹⁸ The court of appeal reversed,¹⁹ holding that the statute was in derogation of common rights "one of which is the freedom of contract" and that it must be strictly construed and that no general words in the statute will divest the government of its remedies. Speaking for the court, Judge Yarrut said that the state

13. *United States v. Leiter Minerals, Inc.*, 127 F. Supp. 439 (E.D. La. 1954).

14. *Leiter Minerals, Inc. v. United States*, 224 F.2d 381 (5th Cir. 1955).

15. *Leiter Minerals, Inc. v. United States*, 350 U.S. 964 (1956).

16. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229-30 (1957).

17. *Id.* at 231.

18. *Leiter Minerals, Inc. v. California Co.*, 239 La. 116, 118 So. 2d 124 (1960).

19. *Leiter Minerals, Inc. v. California Co.*, 126 So. 2d 76 (La. App. 4th Cir. 1961).

could not under its police power permanently change, alter or modify contract rights between the parties.

To hold such would violate LSA-Const. Art. 4 § 15, prohibiting the Legislature from passing any law that impairs the obligation of contracts.²⁰

. . . .

We are not called upon to decide whether or not the state can deny the United States the right to acquire minerals in Louisiana, but only whether Act 315 of 1940 applies to mineral reservations by a vendor of the United States where the mineral reservation is of specific ex-contractu limitation.

. . . .

Therefore, the judgment of the District Court is reversed, and it is now declared and decreed that Act 315 of 1940 . . . does not apply in this case since the mineral reservation is of specific ex-contractu duration, less than the prevailing statutory period of ten years for non-user.²¹

The Supreme Court of Louisiana granted a writ of certiorari,²² reversed the judgment of the district court, the judgment of the court of appeal and dismissed the suit. The court through Justice Hawthorne said: "To us it is evident that in this action, instituted pursuant to the directive of the United States Supreme Court under the Louisiana Declaratory Judgments Act, we are called upon to render only an advisory opinion."²³ First saying that it did not have the authority to render an advisory opinion the court added:

This case is unusual, however, in that the highest court in the land deems it 'advisable' for us to render such an opinion. Therefore, out of respect for, and as a courtesy to, that court, we proceed to do so, in the hope that our opinion will be of some assistance to the United States Supreme Court in its solution of the fundamental question raised in the litigation pending in the federal courts.²⁴

. . . We are mindful, however, that the interpretation of this reservation [the contractual reservation] is for the United States Courts, and not for us in this proceeding, even though Leiter's petition in this suit, after praying for an interpretation of Act 315

20. *Id.* at 82.

21. *Id.*

22. *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 132 So. 2d 845 (1961).

23. *Id.* at 927, 132 So. 2d at 849.

24. *Id.* at 927, 132 So. 2d at 850.

of 1940 as outlined in the opinion of the Supreme Court, asks the Court to declare that Act 315 of 1940 applies to the mineral reservation in the deed of the government.²⁵

We quote further:

In this state oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form a part; in other words, in Louisiana there is no separate estate in or ownership of oil and gas in place. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207. . . .²⁶

. . . .
 . . . [T]he State . . . in the exercise of its police power has authority to protect, conserve, and replenish the natural resources of the state and to prohibit and prevent their waste. . . .²⁷

. . . By making mineral rights imprescriptible in lands sold to the government and retaining these rights in the vendors, Act 315 of 1940 avoided a possible conflict by the state in the exercise of its police power with the federal government.²⁸

. . . .
 If the United States Supreme Court construes the reservation as one establishing a servitude for a certain time or of specific duration, as argued by the lessees of the United States, then Act 315 of 1940 is not applicable and if applied would be unconstitutional.²⁹

. . . .
 If the act should be held to be applicable in such a case so as to extend the right or servitude beyond the time fixed by the contract for its duration, the act would operate to impair the obligation of the contract between the parties and to divest vested rights, and hence would be unconstitutional. Art. 4, Sec. 15, La. Const. of 1921. . . .

If the United States Supreme Court concludes, as argued by counsel for Leiter, that the reservation does not establish a servitude for a certain time or of specific duration but establishes one of uncertain and indefinite duration, and that it was the intention of the parties to fix by contract the period of liberative prescrip-

25. *Id.* at 930, 132 So. 2d at 850.

26. *Id.*

27. *Id.* at 934, 132 So. 2d at 851.

28. *Id.*

29. *Id.* at 935, 132 So. 2d at 852.

tion, then Act 315 of 1940 is applicable and constitutional.³⁰

. . . .
 As we have previously stated, one of the primary objects of Act 315 of 1940 was to prevent the federal government from acquiring mineral rights by prescription in this state when those rights were reserved in sales to it, and the act in plain language provides that such rights 'shall be imprescriptible'. The act draws no distinction between statutory and contractual prescription, and, as we view the matter from the history of the act and the objects and purposes for which it was adopted, it is manifest that the Legislature intended the act to be applicable to prescription whether established by statute or by contract where prescription had not already accrued at the time the act became effective. . . .³¹

. . . .
 . . . See also *United States v. Nebo Oil Co.*, D.C., 90 F. Supp. 73; 5th Cir., 190 F.2d 1003.

In *United States v. Nebo Oil Co.*, supra, both the United States district court and the United States Court of Appeals concluded that Act 315 of 1940 did not impair the obligation of contracts in contravention of the federal Constitution, and cited numerous authorities in support of this conclusion. For the reasons there given we conclude that Act 315 of 1940 does not violate the corresponding, identical provision of the Louisiana Constitution.³²

. . . Act 315 of 1940 is applicable and constitutional.³³

The *Leiter* case was compromised.³⁴ What the supreme court of that year would have concluded cannot be known. It may be noted, however, that while there were two concurring opinions of Justices who would have reached the same result by a different reasoning, there was no dissent in *United States v. Little Lake Misere Land Co.* Chief Justice Burger said:

We granted the writ in this case to consider whether state law may retroactively abrogate the terms of written agreements made

30. *Id.* at 938, 132 So. 2d at 853.

31. *Id.* at 939, 132 So. 2d at 854.

32. *Id.* at 942, 132 So. 2d at 854.

33. *Id.* at 942, 132 So. 2d at 855.

34. The case went back to court again, decided for the United States, 204 F. Supp. 560 (E.D. La. 1962); reversed and remanded by the Fifth Circuit, 329 F.2d 85 (5th Cir. 1964); remanded by the Supreme Court to be dismissed as moot, 381 U.S. 413 (1965).

by the United States when it acquires land for public purposes explicitly authorized by Congress.³⁵

Reference was to:

part of the Lacassine Wildlife Refuge. Title to one parcel was acquired by the United States by purchase on July 23, 1937; to the other parcel by a judgment of condemnation entered August 30, 1939. Both the 1937 act of sale and the 1939 judgment of condemnation reserved to the respondent Lake Misere oil, gas, sulphur and other minerals for a period of 10 years from the date of vesting of title in the United States. The reservation was to continue in effect 'as long [after the initial ten-year period] as oil, gas, sulphur or other mineral is produced . . . or so long thereafter as [respondents] shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively until production results; and, if production results, so long as such mineral is produced.' The deed and the judgment of condemnation further recited that at the end of 10 years or at the end of any period after 10 years during which the above conditions had not been met, 'the right to mine, produce, and market said oil, gas, sulphur or other minerals shall terminate . . . and the complete fee title to said lands shall thereby become vested in the United States.'

. . . [N]o drilling, reworking or other operations were conducted and no minerals were obtained for a period of more than 10 years following the act of sale and judgment of condemnation, respectively. . . .

. . . Respondents contended that the 1940 enactment rendered inoperative the conditions set forth in 1937 and 1939 for the extinguishment of the reservation. . . .³⁶

Believing they were correctly following *Leiter*, the United States Court of Appeals had held against the government.³⁷

The majority opinion of the United States Supreme Court made the case turn upon whether state or federal law governs, chose the latter, and concluded:

We hold that under settled principles governing the choice of law by federal courts, Louisiana's Act 315 of 1940 has no application to the mineral reservations agreed to by the United States

35. 93 S. Ct. 2391-92.

36. *Id.* at 2392.

37. *United States v. Little Lake Misere Land Co.*, 453 F.2d 360 (5th Cir. 1971).

and respondents in 1937 and 1939, and that as a result, any contract interests of respondents expired on the dates identified by the District Court. Accordingly, we reserve the judgment of the Court of Appeals and remand the case for entry of an order consistent with this opinion.³⁸

Although the Migratory Bird Conservation Act provided the basis for the federal court's assertion of jurisdiction in *Little Lake Misere Land Co.*,³⁹ it nowhere provides a rule of decision to be applied by that court in adjudicating disputes arising under it.⁴⁰ When the controversy concerns property located in a state, the dispute generally is deemed to be of "purely local concern" and there is considerable authority for the application of the law of that state in which the res is found.⁴¹ Justice Stewart would have followed this "real property exception."

I cannot agree with the Court that the mineral reservations agreed to by the United States and the respondents in 1937 and 1939 were governed by some brooding omnipresence labelled federal common law. It seems clear to me, as a matter of law, not a matter of 'choice' or 'borrowing,' that when anyone, including the Federal Government, goes into a State and acquires real property, the nature and extent of the rights created are to be determined, in the absence of a specifically applicable federal statute, by the law of the State.⁴²

The premise of *Leiter* which is overruled by *Little Lake Misere Land Co.* is that the *Erie*⁴³ decision compels application of state law to a local land transaction to which the United States happens to be a party, because the Rules of Decision Act⁴⁴ requires application of state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." The mere presence of federal jurisdiction is not a mandate for applying federal

38. *United States v. Little Lake Misere Land Co.*, 93 S. Ct. 2389, 2403 (1973).

39. U.S. CONST. art III, § 2; 28 U.S.C. § 1331(a) (1970).

40. See C. WRIGHT, *FEDERAL COURTS* § 60, at 247 (2d ed. 1970).

41. "[There is a] general rule . . . that the tenure, transfer, control and disposition of real property are matters which vest exclusively with the State where the property lies . . ." *Sunderland v. United States*, 266 U.S. 226, 232 (1924); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). See also authorities cited by Justice Stewart *infra* at note 42.

42. *United States v. Little Lake Misere Land Co.*, 93 S. Ct. 2389, 2403 (1973).

43. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

44. 28 U.S.C. § 1652 (1970).

law in all circumstances.⁴⁵ Here the dispute involved land acquisitions arising from and bearing heavily upon a federal regulatory program. Under the holding of *Clearfield Trust Co. v. United States*,⁴⁶ the presence of a prevailing federal program may override the considerations which ordinarily mitigate in favor of applying state law.

When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority [to spend] had its origin in the Constitution and the statutes of the United States and was in no way dependent on laws . . . of any other state. The duties imposed on the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.⁴⁷

Although the Migratory Bird Conservation Act did not dictate the choice of law, "silence on that score in federal legislation is no reason for limiting the reach of federal law"⁴⁸ If, pursuant to a statute authorizing the acquisition of land, Congress specified the application of federal law to all questions arising out of the transaction, federal courts would be compelled to apply federal law. The central issue in *Little Lake Misere Land Co.* is, given the existence of a prevailing federal program, what is the applicable standard when Congress is silent on the choice of law?

In *Wallis v. Pan American Petroleum Corp.*,⁴⁹ the question was whether federal or state law should govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920. In revising the Fifth Circuit's application of federal law, the Supreme Court said:

In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant* conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. . . . *Whether*

45. Diversity cases are by and large governed by state law applied of its own force. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). It is unclear whether *Leiter* applied state law of its own force because of the "local land" exception, or recognized that it was a choice of federal law and merely applied "borrowed" state law because it was appropriate in the context of real property. 93 S. Ct. 2396 n.8 (1973).

46. 318 U.S. 363 (1943).

47. *Id.* at 366. (Citations omitted.)

48. *United States v. Little Lake Misere Land Co.*, 93 S. Ct. 2389, 2397 (1973). "In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U.S. at 367.

49. 384 U.S. 63 (1966).

*latent federal power should be exercised to displace state law is primarily a decision for Congress.*⁵⁰

And added:

Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern.⁵¹

The Supreme Court made a similar statement in *United States v. Standard Oil Co.*:⁵²

[I]n many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically.⁵³

Having decided that whether state law is to be applied is a matter of federal policy, the effects of state law on the interests and relations of the United States must be considered.⁵⁴ Such reasoning might lead to the conclusion that federal law is to be applied always but the Court found it "unnecessary to resolve this case on such broad terms." Instead, the Court held that since the conflict with the government's interests were clear in Louisiana's discriminatory, retroactive application of Act 315, "the reasons which may make state law at times the appropriate federal rule are singularly inappropriate here."⁵⁵

We do not deprecate Louisiana's concern with facilitating federal land acquisitions by removing uncertainty on the part of reluctant vendors over the duration of mineral reservations retained by them. From all appearances, this concern was a significant force behind the enactment of the 1940 legislation. But today we are not asked to consider Act 315 on its face, or as applied to transactions consummated after 1940; we are concerned with the application of Act 315 to a pair of acquisition agreements in 1937 and 1939. And however legitimate the State's interest in facilitating federal land acquisitions, that interest has no application to

50. *Id.* at 68. (Emphasis added.) (Citations omitted.)

51. *Id.* at 68.

52. 332 U.S. 301 (1947).

53. *Id.* at 308.

54. *United States v. Little Lake Misere Land Co.*, 93 S. Ct. 2389, 2398 (1973).

55. *Id.* See also *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

transactions already completed at the time of the enactment of Act 315: the legislature cannot 'facilitate' transactions already consummated.⁵⁶

. . . .
 . . . Years after the fact, state law may not redefine federal contract terminology 'in a way entirely strange to those familiar with its ordinary usage . . .' *DeSylva v. Ballentine*, supra, 351 U.S. at 581.⁵⁷

Justice Stewart rested his concurrence on constitutional grounds.

. . . The Federal Government bargained for this contingent future interest in the minerals; it was clearly agreed to in the conveyances, and was thus reflected in the consideration paid by the Government to the former owners.

. . . This retroactive application of Act 315, I believe is a textbook example of a violation of Art. I, § 10, cl. 1, of the Constitution, which provides that no State shall pass any law 'impairing the Obligation of Contracts.'⁵⁸

This, it will be noted, is precisely the reasoning of Judge Yarrut and his colleagues on the Fourth Circuit Court of Appeals, though they referred to the State Constitution rather than to the Federal Constitution.

Justice Rehnquist agreed with Justice Stewart in part and said that *Clearfield Trust Co. v. United States* on which the majority relied did not go so far. We quote:

In *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), this Court held that federal common law governed the rights and duties of the United States 'on commercial paper which it issues. . . .' But the interest of the Federal Government in having real property acquisitions that it makes in the States pursuant to a particular federal program governed by a similarly uniform rule is too tenuous to invoke the *Clearfield* principle, especially in light of the consistent statements by this Court that state law governs real property transactions.⁵⁹

However, he added:

Implicit in the holdings of a number of our cases dealing with

56. 93 S. Ct. at 2400.

57. *Id.* at 2402.

58. *Id.* at 2404.

59. *Id.*

state taxation and regulatory measures applied to the Federal Government is that such measures must be nondiscriminatory. See, e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *New York v. United States*, 326 U.S. 572 (1946); *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 210 (1946).

The doctrine of intergovernmental immunity enunciated in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), however it may have evolved since that decision, requires at least that the United States be immune from discriminatory treatment by a State which in some manner interferes with the execution of federal laws. If the State of Pennsylvania could not impose a nondiscriminatory property tax on property owned by the United States, *United States v. Allegheny County*, 322 U.S. 174 (1944), *a fortiori*, the State of Louisiana may not enforce Act 315 against the property of the United States involved in this case. I therefore concur in the judgment of the Court.⁶⁰

The conclusion that to permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the Congressional scheme contemplated by the Migratory Bird Conservation Act, seems justified only if mineral reservations in such game preserves are likewise limited in other states. It appears that in all other states landowners selling to the government can retain a mineral estate in ownership, but not in Louisiana.⁶¹ The United States Supreme Court thus accepts the *Frost-Johnson* concept, which is state law, but rejects the state law which would make such rights imprescriptible and deprives Louisianians of the benefit of 16 U.S.C. § 715.

The Court's treatment of the *Clearfield* principle seems to the writers to be the long range importance of the decision for it is difficult to envision federal acquisition of lands within the states apart from federal regulatory programs. The mere presence of such a program should not mandate the avoidance of state law in the ordinary local transaction. One acquisition in *Little Lake Misere Land Co.* was effected through expropriation which has traditionally been regarded as of a "special and peculiar nature . . . intimately involved with sovereign prerogative."⁶² The other was by purchase. A simple sale of land to the federal government, for example as a post office site,

60. *Id.* at 2405.

61. 16 U.S.C. § 715(e) (1970) expressly provides that rights-of-way, easements, and reservations may be retained by the grantor or lessor from whom the United States receives title. No time limit for such reservation is specified.

62. *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959).

ought not compel the application of federal law to defeat private expectations under state law. Yet obviously the postal system is of as much importance to the federal government as is the care of migratory birds.

The "choice of law" concept presents a problem to Congress, not just as to Louisiana but as to all states. It becomes important for Senators and Representatives in devising federal programs to explicitly choose state law as controlling if that is their wish. This would still leave open, as it should, questions of constitutional law such as impairment of contracts and discriminatory laws, the obvious issues of this case, but it would remove what must otherwise be the continuing uncertainty as to what law governs wherever a choice would produce varying results.

Moreover, determination by the legislature in 1940 to treat the United States less favorably than the State itself has had much weight in leading to this unhappy result. The 1974 legislature might well review the current Act on the same subject to make sure that it treats both governments alike.