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Leasing from the Dead: Production in Cemeteries and Other Curious Corners of Louisiana Mineral Law

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I. Introduction

As an attorney in charge of all legal matters related to minerals, lands, and the environment for the State, quite a few odd, interesting, and obscure issues come across my desk. This paper is intended to provide a brief review of several of the largely unknown, but fairly important, legal matters that are addressed by the State with respect to mineral matters and to provide guidance to practitioners that should assist in an understanding of these matters for future dealings with the State.

II. Of Minerals, Pipelines, and Dead Folk

Although one would generally think it axiomatic that cemeteries are sacrosanct places that are free from industrial intrusions, especially mineral production, such has not historically been the case in Louisiana. Indeed, following the case of *Humphreys et al. v. Bennett Oil Corp.*² in 1940, the Legislature passed specific legislation to protect cemeteries from intrusions by mineral production operations.

In *Humphreys*, the defendants had sunk two wells within the confines of a cemetery in Acadia Parish. The plaintiffs, several descendants of those buried in the cemetery, sued for mental anguish, among other claims. Interestingly, although the court had little problem awarding the plaintiffs damages, it did so despite the fact that the particular graves of the plaintiffs' ancestors were not actually disturbed during the operations. Although one would think that, with the *Humphreys* case and the responsive legislation, the idea of mineral operations being undertaken in a cemetery would be a thing of the past, it is not. Our office has received several requests for information in the past years about drilling and conducting seismic surveys in cemeteries in the State. Before reviewing the current law on this matter, it is worthwhile to examine some of the lan-

¹ The views and opinions expressed herein are solely those of the author and do not necessarily represent the position of the Louisiana Department of Justice or the Attorney General. The author wishes to thank Andrew J.S. Jumonville for his critical review of a previous draft of this paper. All errors and omissions remain the sole responsibility of the author.

² 197 So. 222 (La. 1940).

guage from the *Humphreys* decision to see how troubling these activities can become and how easy it can be for a court to find against a production company in such cases. The outcome for the production company was ominous when the court observed that:

It is admitted that this small Evangeline Cemetery, consisting of a one-acre plot of ground, was literally converted into an oil field by the drilling thereon of two producing wells. By such use, this consecrated ground, which was destined for the peaceful slumber of the dead, was transformed into an industrial site, to be exploited for material gain.

* * *

This use of the cemetery plot divested it of its sacred character, violated and profaned the sanctity of the graves. This was a desecration calculated to wound the feelings of the living who had relatives buried there.

* * *

There is testimony in the record that a marble slab, once used to mark the grave of a child, was placed at the door of the office building and used as a step.³

Finding that the property was properly dedicated to cemetery purposes and that the above-noted activities were sufficiently disturbing, the Court found in favor of the plaintiffs for their tort claims.

As noted above, the Court placed great weight in the general sanctity of cemeteries and it did not require that the plaintiffs' ancestors' own graves actually be disturbed to support their claims of anguish. This concept⁴ serves as the basis for the codified law that followed in the wake of this case and that now controls mineral activity in cemeteries.

Immediately following *Humphreys*, the Legislature passed Act 81 of 1940, which is now codified at La. R.S. 8:901. Under this law, among other things, the construction of hydrocarbon pipelines and the exploration for and production of minerals is expressly prohibited within the confines of a cemetery in Louisiana. Thus, there is now no question that the activities presented in *Humphreys* are not permissible. Unfortunately for the practitioner, La. R.S. 8:901 raises more questions than it answers:

³ *Id.* at 228.

⁴ The concept referred to here is that of the sanctity of cemeteries, as embodied in the following quotation:

These plaintiffs have an interest not only in the particular spots where their relatives are buried, but also a sentimental interest, at least, in the cemetery as a whole, and therefore such flagrant violation, as here shown, of the sanctity of any part of this small plot was calculated to cause mental anguish and suffering to those who have relatives buried there.

Id.

What about shooting seismic in a cemetery? What constitutes a cemetery? What if I remove the burials? These questions are addressed below.

Before discussing the answers to the above questions, a review of the law itself is in order. Louisiana Revised Statute 8:901 states:

A. It shall be unlawful to use, lease or sell any tract of land which is platted, laid out or dedicated for cemetery purposes and in which human bodies are interred, on any part of such tract, for the purpose of prospecting, drilling or mining; provided that the prohibition of leasing contained in this section shall not apply to any oil, gas, or mineral lease that contains a stipulation forbidding drilling or mining operations upon that portion of the leased premises which is included within the cemetery.

B. Whoever violates this section shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not less than thirty days nor more than six months, or both, and each day during which drilling, mining or prospecting is conducted or prosecuted shall be considered a separate offense.⁵

One thing that is permissible under La. R.S. 8:901 is the leasing of property that happens to contain a cemetery so long as there is a stipulation in the lease that none of the prohibited activities will take place within the confines of the cemetery. Of course, this raises the question of how are unknown cemeteries going to be treated under this law when they are inadvertently included within a leased tract? In the case of cemeteries for which there is no evidence of their existence on the ground surface, this is covered by La. R.S. 8:671, *et seq.*, which is discussed in detail below. In the case of cemeteries that are visible, avoidance is going to be the key.

Is it permissible to conduct seismic activity within cemeteries under La. R.S. 8:901? The law clearly prohibits “prospecting” within cemeter-

⁵ It is important to note that, in addition to the criminal penalties that can be imposed under La. R.S. 8:901, zealous prosecutors can also likely apply La. R.S. 14:101 to most activities related to mineral exploration and production in cemeteries. That statute states:

Desecration of graves is the:

(1) Unauthorized opening of any place of interment, or building wherein the dead body of a human being is located, with the intent to remove or to mutilate the body or any part thereof, or any article interred or intended to be interred with the said body; or

(2) Intentional or criminally negligent damaging in any manner, of any grave, tomb, or mausoleum erected for the dead.

Whoever commits the crime of desecration of graves shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

ies. Despite this clear statement restricting prospecting, it is unclear what exactly falls under that term. There is no Louisiana jurisprudence that defines “prospecting” in terms of conducting seismic surveys. It should be noted that there is also no jurisprudence stating that seismic surveys are not “prospecting.” Thus, it has apparently not been an issue before the Louisiana courts. However, several other states’ jurisprudence does include seismic activity within the term “prospecting.”⁶ Thus, it seems safe to say that the “prospecting” referred to in La. R.S. 8:901 does indeed include seismic operations.⁷ Accordingly, under Louisiana law, such activities are probably prohibited in a cemetery and one does seismic therein at one’s own peril and risk. It should be noted, however, that as a policy matter, the Louisiana Cemetery Board (“LCB”) has taken the position that directional drilling under cemeteries, in a manner that does not disturb or affect the graves, is permissible and is not a violation of La. R.S. 8:901.⁸

Another important question, as alluded to above, is “what constitutes a cemetery in Louisiana?” In a broad sense, the term “cemetery” is defined in La. R.S. 8:1(7) as

a place used or intended to be used for the interment of the human dead. It includes a burial park, for earth interments; or a mausoleum, for vault or crypt interments; or a columbarium, or scattering garden, for cinerary interments; or a combination of one or more of these.

Thus, a cemetery does not depend on any specialized markings or border, nor is there any need for a recordation of the existence of a cemetery to be effectuated in the public records.⁹ What is the practical implication of this definition for those leasing lands in Louisiana? You may have a cemetery on the property that you leased and you may not know it. The bulk of the law related to cemeteries applies regardless of the character of the property. Thus, it is of no moment that a cemetery is situated on private or public property, making the respect for these places of paramount importance for the exploration and production crews that are on

⁶ See e.g., *Meyer v. Berg*, 2007 WL 1430226 (E.D.Wis. 2007); *Trutec Oil And Gas, Inc. v. Western Atlas Intern., Inc.*, 194 S.W.3d 580 (Tex.App. 14 Dist. 2006).

⁷ Such has also become the opinion of the Louisiana Attorney General per La. Atty. Gen. Op. 08-0100.

⁸ Personal communication between Ryan M. Seidemann, AAG, and Lucy L. McCann, Director, Louisiana Cemetery Board, Jan. 23, 2009. It is important to note, however, that for the cemeteries covered by La. R.S. 8:671, *et seq.*, ones over which the LCB has little or no jurisdiction, the same permissibility for directional drilling cannot be said with any certainty. The Louisiana Division of Archaeology, which administers La. R.S. 8:671, *et seq.*, has made no pronouncement indicating whether or not such activities are acceptable.

⁹ See generally, *Humphreys, supra*, n.2; see also, *Thomas v. Mobley*, 118 So.2d 476 (La.App. 1 Cir. 1960).

the ground. Very simply, if there are human remains in the ground, you have a cemetery – avoid it.

Probably the more likely cemetery situation that can be a significant issue for mineral activities is the situation in which exploration and production – or more likely, pipeline construction – encounters human remains in unmarked graves during operations. In this situation, the Louisiana Unmarked Human Burial Sites Preservation Act (“the Unmarked Burials Act”)¹⁰ applies. Unlike its federal counterpart, the Native American Graves Protection and Repatriation Act (“NAGPRA”),¹¹ which only applies to Native American burial sites encountered on federal or tribal lands,¹² the Unmarked Burials Act applies to all land – public and private – and all human remains – not just Native Americans – in unmarked graves in Louisiana.¹³ What is the practical relevance of this law to mineral operations? If human remains are encountered in any situation, work must immediately STOP¹⁴ and local law enforcement, the coroner, and the State Archaeologist must be contacted.¹⁵ Although no cases have yet been brought under this law in Louisiana, those reported under NAGPRA are telling of the penalties for violating these requirements.

In *Quechan Indian Tribe v. U.S.*,¹⁶ numerous claims for the disturbance of human remains during electrical line construction were brought under the Federal Tort Claims Act (“FTCA”). The Southern District of California allowed NAGPRA to be used as establishing a standard of care in FTCA actions. Thus, it is possible that NAGPRA or the Un-

¹⁰ La. R.S. 8:671, *et seq.*

¹¹ 25 U.S.C. 3001, *et seq.* A complete discussion of the history and application of NAGPRA may be found in Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 LA. L. REV. 545 (2004); Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149 (2003).

¹² It is important to note, though it is not extremely relevant to this paper, that NAGPRA also sets forth the law related to managing Native American skeletal collections and burial artifacts in all U.S. institutions that receive federal funding. 25 U.S.C. 3003, *et seq.* The law also imposes criminal and civil penalties for the sale of or trafficking in Native American human remains. 18 U.S.C. 1170. It is also important to note that mere federal involvement in a project (unlike in situations under the National Environmental Policy Act) – for example, with federal permits – is not sufficient to trigger the application of NAGPRA. *See generally*, *Western Mohegan Tribe and Nation of New York v. New York*, 100 F.Supp. 2d 122 (N.D.N.Y. 2000); *Abenaki Nation of Mississquoi v. Hughes*, 805 F.Supp. 234 (D.Vt. 1992).

¹³ La. R.S. 8:672.

¹⁴ La. R.S. 8:678; La. R.S. 8:680(B).

¹⁵ La. R.S. 8:680(A) & (C).

¹⁶ 535 F.Supp. 2d 1072 (S.D. Cal. 2008).

marked Burials Act may be used in future cases to support claims for monetary damages.¹⁷

In *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*,¹⁸ the real problem of unmarked burial disturbance for mineral operations is brought into focus: work stoppage. In this case, the Corps of Engineers was forced to shut down operations to raise the water level in a lake until inadvertently discovered human remains could be removed from the impact area. A preliminary injunction was issued to effectuate this work stoppage. Although damages were not a part of this suit, *per se*, the economic damages realized by work stoppages by private parties may be significant. Thus, in the instance of the discovery of human remains, the most efficient and effective means for mitigating the potential financial impacts of a massive work stoppage is to follow the law up front.

Although cases under the Unmarked Burials Act and NAGPRA have not yet been litigated in Louisiana,¹⁹ attempts have been made. During initial surveys for the construction of a gas processing plant in the late 1990s, archaeologists working for Texaco discovered a Native American burial site in the swamps near Larose, Louisiana. Although the archaeologists properly reported the find and excavated the site pursuant to a permit, the United Houma Nation filed suit in the Eastern District of Louisiana to stop the disturbance of the graves. Because the Houma do not enjoy federal recognition, Judge McNamara commented, as he dismissed the case, that the group has “no more right than anyone else to protest”²⁰ the excavations.

One further cautionary note is warranted here. If human remains are inadvertently discovered during mineral-related construction operations, it is essential that workers are made aware that the removal of human remains or burial artifacts is illegal under both the Unmarked Burials Act and NAGPRA.²¹ In recent years, the Louisiana Attorney General’s Office has taken seriously the illegal treatment of human remains and burial artifacts, resulting in busts and seizures of numerous items.²² Accord-

¹⁷ Generally, aside from the civil penalties involved, the descendant groups are not provided with a cause of action for damages under NAGPRA. See, *Castro Romero v. Becken*, 256 F.3d 349 (C.A. 5 2001). However, with the ruling in *Quechan Indian Tribe*, the possibility that NAGPRA (and by implication the Unmarked Burials Act) may be used to support other theories of recovery is real.

¹⁸ 83 F.Supp. 2d 1047 (D.S.D. 2000).

¹⁹ Excepted from this statement is *Castro Romero, supra*, which was decided by the federal Fifth Circuit, but which was a Texas case that did not involve anything directly relevant to mineral operations.

²⁰ Associated Press, *Texaco Wins Fight for Burial Grounds*, 6/9/98 TIMES PICAYUNE C2 (1998).

²¹ La. R.S. 8:678 and 18 U.S.C. 1170.

²² See e.g., Ryan M. Seidemann, Christopher M. Stojanowski, and Fredrick Rich, *The Identification of a Human Skull Recovered from an eBay Sale*, J. FOREN. SCI. (in press).

ingly, it is imperative that all employees that have the potential to come into contact with human remains or burial artifacts while working in the field be admonished not to take such items and to immediately contact the appropriate authorities or otherwise risk criminal and civil sanctions that have the potential to impose vicarious liability sanctions on the employers as well.

One final note related to cemeteries. When does a cemetery cease to be a cemetery? Under La. R.S. 8:304(A), which states, in pertinent part, that:

[a]fter property is dedicated to cemetery purposes pursuant to this Chapter, neither the dedication nor the title of a plot owner shall be affected by the dissolution of the cemetery authority, by nonuse on its part, by alienation of the property, or otherwise, except as provided in this Title[.]²³

a cemetery remains a cemetery until a court has removed the dedication of that property to cemetery purposes.

Basically, what La. R.S. 8:304(A) means is that, once a piece of property is used as a cemetery, the property becomes dedicated to that purpose.²⁴ The mere removal of obvious graves from that property does not accomplish a removal of the dedication.²⁵ Part of the reason that a dedication is not *de facto* removed by the removal of obvious graves is the reality that, although obvious graves may be removed, other remains may continue to be interred at a site,²⁶ thus necessitating continued pro-

²³ La. R.S. 8:304(A).

²⁴ See generally, *Locke v. Lester*, 78 So.2d 14 (La.App. 2 Cir. 1955); *Humphreys*, *supra*, n.2; see also, *Thomas v. Mobley*, *supra*, n.9 at 478. It is important to note that the dedication of property as a cemetery need not be a formal or recorded dedication. *Humphreys*, *supra*, n.2 at 225. Indeed, the mere use of a piece of property as a burial place is enough to effectuate the dedication. *Id.* Although the *Humphreys* court (at 227) seems to suggest that an abandonment of the cemetery may also effectuate a removal of the dedication, such is not the case. The *Humphreys* supposition is based, as is the one in *Thomas* (at 478), on the premise that if a cemetery is abandoned-in-fact and the descendants have died off or moved away, that the cemetery “may lose [its] sacred and protected character”. *Thomas*, *supra*, n.9 at 478. However, this supposition stands in stark contrast to the more recent action of the Louisiana Legislature and the U.S. Congress, both of which have affirmed the perpetual sacred and protected nature of cemeteries with the Unmarked Burials Act and NAGPRA, respectively. Thus, this supposition is, at the least, outmoded, and at most, legislatively overruled.

²⁵ It is also important to note that Louisiana courts have held that the dedication of property as a cemetery is not subject to prescription. *Lester v. Locke*, *supra*, n.24 at 16.

²⁶ See e.g., Bryan S. Haley, GEOPHYSICAL SURVEY OF HIGHLAND CEMETERY, BATON ROUGE, LOUISIANA (Center for Archaeological Research, Univ. of Mississippi 2003) (documenting numerous unmarked graves in a historic cemetery). Indeed, Kehoe-Forutan, *et al.* have documented a historic cemetery in Pennsylvania for which there are currently 266 visible markers, but for which estimates of actual space available for burials range as high as 1080. A ground penetrating radar confirmed that there were enough unmarked burials that the 1080 burial capacity cemetery was full and should not be re-

tection. The other component to this requirement is legal: La. R.S. 8:306 – the provision of the law that provides for the removal of the dedication – requires that all remains be removed from the area that is to be undedicated.²⁷

It seems perfectly acceptable for the Division of Archaeology, the LCB, or a court to require the use of remote sensing technology, ground scraping, or any other methodology that they deem appropriate to ensure that all burials have been removed from an area in compliance with La. R.S. 8:304 and 8:306. Following such assurances, the party seeking a removal of the cemetery dedication must seek a court order removing that dedication following the procedures outlined in La. R.S. 8:306. No activities that are inconsistent with cemetery uses can occur in a cemetery until this dedication is removed.

III. Of Court and Legislative Confusion

Perhaps one of the most confusing areas of the law that must be contended with in mineral situations is the law related to school lands (also known as sixteenth section lands). What makes this area of the law so confusing is that the law related to sixteenth section lands has been piecemealed together by Congress and the Louisiana Legislature over more than two centuries and it has been poorly interpreted by the courts as a result. A fairly common situation that relates to sixteenth section lands and private attorneys has come about in recent years as a result of the proliferation of legacy site suits. In this regard, the primary issue is whether the school boards have the authority to sue for environmental damages to this land on their own (as opposed to the State doing so for them). This issue is discussed later. However, for the title examiners and government lawyers that have to determine who has the rights to the minerals and who has the authority to lease these lands, this area of the law is also extremely important. Thus, for the benefit of those title examiners and government lawyers, a review of the law related to sixteenth section lands is herein undertaken.

The sixteenth section lands constitute part of a surveyed rectangular portion of land, based on a system of survey implemented in 1784-1785 by the Second Continental Congress. “Congress reserved and dedicated the sixteen [*sic*] section in each township for the support of public

opened for new burials. Sandra J. Kehoe-Forutan, Bruce A. Campbell, and Michael K. Shepard, *Penetrating the Mystery Beneath Millville Friends Meeting Cemetery*, 28 AGS QUART. 11 (2004). See also, Shannon Seckinger, *Picking Up the Pieces: The Osborn Family Cemetery, Brielle, NJ*, AM. CEM. 22 (Apr. 2006) (a discussion of similar ground penetrating radar results); Garry O’Hara, *The Case of the Buried Tombstones: A Story of Gravestone Recovery and Restoration in Colorado*, 32 AGS QUART. 7 (2008).

²⁷ See also, La. R.S. 8:316 for the procedure to be followed for disturbing cemeteries for noncemetery purposes (a limited list of permissible purposes) both when a cemetery authority exists and when one does not.

schools.”²⁸ Although sixteenth section lands exist in every state of the nation, the laws controlling each state’s sixteenth section lands may be significantly different from one state to another. This reality requires the specific review of the federal law that granted these lands to Louisiana that is contained herein.²⁹

As a general matter, the State retains ownership, in trust, over sixteenth section lands as lands for the public’s (school board’s) use. The lands are administered through the State Land Office. The local school boards are only given custodial authority over the lands and not actual ownership.³⁰

In 1806, the United States Congress stated that

...the section ‘number sixteen,’ ... shall be reserved in each township for the support of schools within the same.³¹

This reservation of sixteenth section lands was reaffirmed by Congress with the same language in 1811.³² These reserved lands vested in the State of Louisiana upon statehood in 1812.³³

There has been some debate as to what interest was actually transferred to the State by the 1806 Act. However, following a series of United States Supreme Court rulings on the nature of certain sixteenth section land grants, it is clear that this grant was intended to give the State a fee simple interest in the sixteenth sections.³⁴ This interest becomes acutely obvious under *Papasan*, which found that the same fee simple classification existed in Mississippi.³⁵ Although that same case cautions that the law affecting each state’s sixteenth section lands must be interpreted in light of the unique federal statute granting that land, and despite the fact that Mississippi and Louisiana were granted their sixteenth section lands in different acts of Congress, the virtually identical language of these grants requires a convergent interpretation of the law as it applies to Louisiana and Mississippi sixteenth section lands.³⁶ Thus it is clear that Louisiana, like its eastern neighbor, received a fee simple interest in its six-

²⁸ La. Atty. Gen. Op. 96-188.

²⁹ *Papasan v. Allain*, 106 S.Ct. 2932, FN 18 (1986).

³⁰ See, La. Atty. Gen. Op. 96-188. See also, *Ebey v. Avoyelles Parish School Board*, 2003-765 (La. App. 3 Cir. 12/17/03), 861 So.2d 910.

³¹ 2 Stat. 391, Sec. 11.

³² 2 Stat. 662, Sec. 10.

³³ John L. Madden, *FEDERAL AND STATE LANDS IN LOUISIANA* 232 (Claitor’s Publishing Division 1973); La. Atty. Gen. Op. 96-188.

³⁴ See, *Papasan*, *supra*, n.29 at 2941-2; see also, *State of Alabama v. Schmidt*, 34 S.Ct. 301, 302 (1914); *Cooper v. Roberts*, 18 How. 173, 182 (1855).

³⁵ See also, Holmes S. Adams, *et al.*, *School Law* in Jeffrey Jackson and Mary Miller, eds., *ENCYCLOPEDIA OF MISSISSIPPI LAW* § 65 (West 2004).

³⁶ See, *Papasan*, *supra*, n.29 at FN 18; 2 Stat. 391, Sec. 11; 3 Stat. 375, Sec. 3.

teenth section lands when those lands vested in the State in 1812. This absolute (or fee simple) grant of sixteenth section lands is supported by *State of Louisiana v. Joyce*,³⁷ stating that:

[t]hose lands were unequivocally and unconditionally appropriated to a purpose for the carrying out of which the future state alone was looked to.³⁸

Additionally, the *Joyce* court goes on to state that,

...though such states were in honor bound to apply [the lands] to the purpose for which they were given, the validity of sales of them by the states is not dependent upon a compliance with a qualified permission to sell given by Congress after the lands had ceased to belong to the United States.³⁹

Despite the State's fee simple interest, in 1843, the United States Congress passed "An Act to Authorize the Legislatures of the States of Illinois, Arkansas, *Louisiana*, and Tennessee, to Sell the Lands Heretofore Appropriated for the Use of Schools in those States" (hereinafter, "the Act").⁴⁰ The Act recognized that the ownership, and thus the ability to sell sixteenth section lands, was retained by the states and did not fall to the various political subdivisions that may actually care for the lands and administer the schools. This is evident in the statement that,

the Legislatures of...Louisiana...are hereby, authorized to provide by law for the sale and conveyance in fee simple, of all or any part of the lands heretofore reserved and appropriated by Congress for the use of schools within said States...⁴¹

However, based upon the foregoing analysis, to the extent that the 1843 Act purports to grant Louisiana the power to sell its sixteenth section lands, that Act is superfluous, as such power vested in the State by virtue of the fee simple grant of these same lands when the sixteenth section lands vested in the State in 1812. While the Fifth Circuit in *Joyce*, *supra*, does not expressly mention this, it seems to strongly imply that Congress recognized that its 1843 Act was not necessary in order for the State to have authority to sell the lands at issue (i.e., sixteenth sections) which it already owned in fee simple absolute when it ended its Act with the proviso,

...so far as the assent of the United States *may be necessary* to the confirmation thereof [i.e., sales of sixteenth sections lands].⁴²

³⁷ 261 F. 128, 132 (C.A. 5 1919), *cert. denied*, 253 U.S. 484 (1920).

³⁸ *Id.*

³⁹ *Id.* at 133.

⁴⁰ 5 Stat. 600 (emphasis added).

⁴¹ *Id.*

⁴² *Id.* (emphasis added).

This is evidenced by the fact that the Court went to the trouble of quoting Section 4 of the 1843 Act, the “confirmation as may be necessary” clause, and by the following language from its decision in *Joyce*, viz:

[The] state having been destined, from the time the territory included in it was acquired by the United States, to have exclusive and plenary power over the schools for the support of which those Sixteenth Sections were set apart (*Alabama v. Schmidt*)...⁴³

The terms of the act of February 15, 1843, indicate that in enacting it Congress assumed that previously there had been consummated appropriations of the sixteenth sections for the use of schools within the states mentioned, and that, notwithstanding such prior disposition of these sections, it remained in the power of Congress to determine the method to be pursued by those states in disposing of their school lands. The former assumption is inconsistent with the latter one. The consummated gifts of the school lands to the states being absolute...[t]he sales by the state of the land sued for being questioned only on the ground that such sales were not made in the manner prescribed by the act of February 15, 1843, the attack on the validity of those sales cannot be sustained. The state had the power to sell those lands without the consent of Congress.⁴⁴

Thus, it is clear that it has been legal for the State of Louisiana to sell sixteenth section lands since 1812. Further, because the local school boards or other relevant political subdivisions have only custodial authority over the lands (as the beneficiaries of the lands held in trust for them by the State as the owner), there is no reason to believe that their permission or authority must be sought prior to a sale of such lands. In other words, at least historically, the State has had the authority to sell sixteenth section lands of its own motion, subject to the limitations set forth below (i.e., without the local school board’s permission).⁴⁵ Indeed,

⁴³ *State of Alabama v. Schmidt*, *supra*, n.34 at 302 (1914).

⁴⁴ *Joyce*, *supra*, n.37 at 131 and 133, respectively.

⁴⁵ La. Atty. Gen. Op. 94-234. In the interest of completeness, the subject of the exchange of sixteenth section lands should also be considered. Louisiana Revised Statute 17:87.6 generally allows a parish or city school board to dispose of any school site which is not used. This authority to dispose has been interpreted by the Attorney General’s Office as including the authority to exchange property. *See*, La. Atty. Gen. Op. 86-591. A school board’s general authority under La. R.S. R.S. 17:87.6 is nevertheless subject to the restrictions on the disposal of sixteenth section lands. This reality is confirmed by the provisions of La. R.S. 41:891 *et seq.*, governing the disposal of unused school lands. Louisiana Revised Statute 41:891, by its own express provisions, does not apply to sixteenth section lands. On the other hand, La. R.S. 41:711, *et seq.*, which does apply to sixteenth section lands, contains no provisions allowing an exchange. Thus, it appears that the exchange of sixteenth section lands in Louisiana is prohibited. However, the Legislature may give a school board the authority to exchange a certain parcel of sixteenth section land for other designated parcels to be utilized for public school purposes.

the local school boards must seek legislative authority to divest themselves of sixteenth section lands.⁴⁶

As alluded to above, the authority to sell sixteenth section lands does not rest solely with the State. Pursuant to La. R.S. 41:711, when the State intends to sell sixteenth section lands, the treasurer of the parish in which the lands are situated:

shall take the sense of the inhabitants of the township with reference to whether or not any lands heretofore reserved and appropriated by congress for the use of schools shall be sold.

Briefly, La. R.S. 41:711 outlines the methodology for the treasurer to follow to “take the sense of the inhabitants.” This procedure includes holding an election, following advertisement of the intent to sell, with the majority of the inhabitants’ votes (i.e., the legal voters) controlling whether or not the sixteenth section lands will be sold.⁴⁷

Louisiana Revised Statute 17:87, paragraph two, appears to conflict with La. R.S. 41:711 when it states that the election for the sale of lands is to be conducted by the parish school board rather than the parish treasurer. However, this discrepancy, which appears to have been an oversight in subsequent statutory updates, is clarified by La. Atty. Gen. Op. No. 1916-18, p.446. This opinion states that, pursuant to Act 120 of 1916, the sale of sixteenth section lands “is taken out of the hands of the Parish Treasurer...and placed in the hands of the School Board.”⁴⁸

Aside from providing the methodology for conducting the election, La. R.S. 41:711 supports the reality that, in many cases, the local school boards are at the mercy of the State and the residents when it comes to the sale of the sixteenth section lands that they administer. However, when such lands are sold by the State, whether purposefully or erroneously, the school board is entitled to a portion of the sale proceeds, as well as the revenues from mineral or timber leases or other activities.⁴⁹ The funds remain on deposit with the State treasury and will accrue an interest of four percent per annum.⁵⁰ School boards have

See, La. Atty. Gen. Op. No. 94-234. There are several statutes enacted by the Legislature for this purpose. For example, La. R.S. 41:897 provides Bossier Parish School Board with the authority to dispose of sixteenth section lands through an exchange.

⁴⁶ *Meyer v. State*, 121 So. 604 (La. 1929). Such sales may only be made in such a manner as to carry out the purpose of the dedication of these lands for the benefit of public education.

⁴⁷ La. Atty. Gen. Op. 1916-18, pp. 446-7.

⁴⁸ *Id.*

⁴⁹ La. R.S. 41:640(B).

⁵⁰ *Id.*

the right to use the said funds in the acquisition, construction, and equipping of public school buildings and other school facilities.⁵¹

The predial lease of sixteenth section lands presents a different situation from the sale of those same lands. Local school boards are only allowed to lease, for surface purposes, sixteenth section lands over which they have custodial authority if a majority of the legal voters are against the sale of the land.⁵² Leases must be conducted pursuant to a resolution of the board. Funds realized by the school board from the lease of sixteenth section lands must be credited to the general school fund of the parish. Further, whether or not sixteenth section lands are at issue, the initial term of a lease of school board property may not exceed ten (10) years.⁵³

It should be noted that the Louisiana Legislature has established special procedures for the granting of mineral leases covering “sixteenth section or school indemnity lands” in La. R.S. 30:151 through 30:158.⁵⁴ In general, the school board may request and direct the State Mineral Board (“SMB”) to lease its land, and often the mineral lease is executed by the SMB (but the school board administers the lease as lessor as if the lease were granted by it).⁵⁵ If the school board does not elect to do this, it may advertise for and grant the lease itself.⁵⁶ In any event, all mineral leases from a school board must also be approved by the SMB in order to be valid. Absent such approval by the SMB, the mineral lease “is null and void.”⁵⁷ It is also important to note that, in mineral leasing situations, special provisions are made to distinguish between “sixteenth section or school indemnity lands.”⁵⁸ The latter must only be leased by the SMB and the allocation of the funds in each of the two cases is expressly provided for.⁵⁹

⁵¹ *Id.*

⁵² La. R.S. 41:716. This appears to be in conflict with La. R.S. 17:87, which places no restriction on the predial lease of such lands. However, as La. R.S. 41:716 represents the latest pronouncement of the Legislature on this topic, it controls. *See, Ellis v. Acadia Parish School Board*, 29 So.2d 461, 464-465 (La. 1946), *reh'g denied* (1947) and La. Atty. Gen. Op. 1940-2, p.3621. *See also, Davis v. Franklin Parish School Board*, 412 So.2d 1131 (1982).

⁵³ La. R.S. 41:1217(A). La. R.S. 41:1217 goes on to allow extensions to the ten-year period provided in Subsection (A).

⁵⁴ Less section 157, which was repealed by Act 292 of 1950.

⁵⁵ La. R.S. 30:153.

⁵⁶ La. R.S. 30:154 through 156.

⁵⁷ La. R.S. 30:158.

⁵⁸ La. R.S. 30:154(C).

⁵⁹ *Id.*

The Legislature has also seen fit, on several occasions, to cure past procedural inconsistencies related to the sale of sixteenth section lands.⁶⁰ It is through these statutes that the confusion regarding how to administer such lands becomes evident. Though not addressed by the Legislature, logic dictates that these ratifications can only go back as far as the time at which the State gained the authority from the United States to sell sixteenth section lands in 1812 (upon its admission to the Union). In 1934, the Legislature enacted La. R.S. 41:1322, which ratifies and confirms sixteenth section land sales made prior to 1900,

notwithstanding informalities in the sales relative to the appraisal and offering the lands in lots of forty acres, where it is affirmatively shown that the purchase price of the lands has actually been paid to the state treasury...

This statute further requires that the officer who made the sale had filed a proces verbal and granted a deed to the purchaser, and that the purchaser actually went into possession of the property, for the sale to be ratified and confirmed. This statute was clarified, in 1942, by La. R.S. 41:1323, which also applied to sixteenth section land sales made prior to 1900. This statute requires, in addition to the procedural requirements of La. R.S. 41:1322, that in order for the sale prior to 1900 to be ratified, there must also be, in the deed filed by the officer who made the sale, a record of the election in favor of selling the land under La. R.S. 41:711. Additionally, La. R.S. 41:1323 requires that where the deed states that the sale was made for cash payment or on credit, receipt of the cash sale or cancellation of the mortgage shall grant the purchaser the full benefit of the property.

In 1944, the Legislature extended the period for which the sale of sixteenth section lands could be cured of procedural inconsistencies to sales made before 1914.⁶¹ This statute largely embodies the same content as the earlier statutes of 1934 and 1942, discussed above. The Legislature later extended these curative mechanisms, *via* La. R.S. 41:1323.1 through La. R.S. 41:1323.3, to ratify and confirm sixteenth section land sales that had occurred prior to July 1, 1956.

Ultimately, the result of these statutes is that, in spite of informalities in the procedure by which sixteenth section lands were sold prior to July 1, 1956, as long as the officer who made the sale made a deed to the purchaser (and in the case of a credit sale, that the mortgage has been cancelled) and recited that an election was had and that the statutory formalities were complied with, then any inconsistencies in the procedure for the sale that may have actually existed were cured. The practical effect of these laws is to remove from the mineral leasing jurisdiction of

⁶⁰ See generally, La. R.S. 41:1321 through 41:1323.3.

⁶¹ La R.S. 41:1321 (as amended in 1948).

many school boards sixteenth section lands that had been procedurally improperly sold in the past. Thus, title searches are essential for all sixteenth section lands to determine if those lands are actually still school lands.

In a departure from the previously discussed statutes regarding the ratification of sixteenth section land sales, the Legislature, in 1978, enacted La. R.S. 41:1323.5. This statute applies only to irregular and fractional sixteenth sections and states that, with respect to this category of lands, only sales made prior to 1860 are cured as to the same procedural defects in the sale as those discussed for La. R.S. 41:1321 through 41:1323.3. Because this statute is the most recent treatment of this topic by the Legislature, and because the Legislature saw fit to single out irregular and fractional sixteenth sections, it is apparent that these lands are to be treated differently than other sixteenth section lands. Therefore, should there be sixteenth section lands that are irregular or fractional, a school board may seek recompense, through La. R.S. 41:631 *et seq.*, for the sale of those lands that occurred on or subsequent to January 1, 1860, if the procedure for sales of such lands were not properly followed.

Thus, as to sales of sixteenth section lands, there is only support in the legislation for the State, on its own, or the school board, both needing a majority vote of the township's legal voter-residents, to sell, through and only through the State of Louisiana.⁶² Thus, the discovery of any such sale by a private entity is invalid.⁶³ Because private individuals cannot acquisitively prescribe against the State in order to gain ownership of property, absent an express statute waiving sovereign immunity to prescription,⁶⁴ there can be no prescription against such property were such a scenario discovered.⁶⁵

As to sales of sixteenth section land accomplished post-1812, if the sales are not in compliance with the formal sale requirements found in La. R.S. 41:711 through 41:894, or for the relevant years covered by the curative statutes and their sales requirements,⁶⁶ these sales are invalid. Because there is no acquisitive prescription against the State and because the State is not subject to the peremptive period in which to bring actions to reclaim its property, there is no statute of limitations under which the

⁶² See generally, La. R.S. 41:631 through 41:981. As discussed below, these same entities can also lease the lands.

⁶³ See generally, *Barton's Executrix v. Hempkin*, 19 La. 510 (La. 1841).

⁶⁴ La. Const. Art. XII, § 13. This maxim also holds true in cases of liberative prescription. See generally, *Todd v. State*, 474 So. 2d 430 (La. 1985).

⁶⁵ See, La. Const. Art. IX, Sec. 4(B); La. Civ. Code Arts. 450 and 453, cmt. (c). See also, *Liner v. Terrebonne Parish School Board*, 519 So.2d 777 (App. Cir. 1, 1988); *Todd v. State*, *supra*, n.64; *City of New Orleans v. Magnon*, 4 Mart (o.s.) 2, 3 (La. 1815).

⁶⁶ La. R.S. 41:1321 through 1323.3 and 1323.5 (1812 through July 1, 1956 for regular sixteenth sections and 1812 through 1860 for irregular or fractional sections).

State is restricted from reclaiming its sixteenth section lands.⁶⁷ Such suits to reclaim sixteenth section lands may be implemented, on behalf of the State, by the Attorney General under La. R.S. 41:921, or by the local school boards under La. R.S. 41:961.⁶⁸

Of additional interest is La. R.S. 41:640. This statute provides a mechanism whereby school districts may seek some amount of recompense when they have been erroneously divested of their custodial sixteenth section lands by the State. This statute provides, in pertinent part, that

[w]here sixteenth section lands...have been *erroneously* sold by the state...such deficiencies will be properly adjusted...and the amounts so determined will be credited to the parish school boards of the parishes in which the townships are situated...⁶⁹

Additionally, La. R.S. 41:640 states that such

amounts so credited shall be treated as loans to the state on which the state shall pay interest at the rate of four percent per annum.

The language of this statute necessarily raises the question of what constitutes an “erroneous” sale by the State. Though no definition of “erroneous” exists in the statute, it is probable that this term refers to the State’s failure to follow the formal requirements for such a sale. Although La. R.S. 41:1321 *et seq.* cures the errors of form in pre-July 1, 1956 sales of sixteenth section lands, there is no legislation that cures sales for errors of form after July 1, 1956. Thus, if a school board were able to demonstrate that an “erroneous” sale of sixteenth section land was made after July 1, 1956, then the school board should be able to make a claim for a credit, plus interest, from the State for the sale. In addition, though it seems that evidence to support such a claim would be extremely difficult to come by, it is conceivable that sales of sixteenth section lands prior to the State having authority to do so (i.e., prior to 1812) may be challenged as to their validity. However, this would only apply to sixteenth section lands that were sold by the Territory of Orleans (the territorial predecessor to the State of Louisiana⁷⁰) prior to the State gaining such power to sell in 1812.

An additional important caveat regarding the ownership and management authority of sixteenth section lands is in order. Sixteenth sec-

⁶⁷ La. Civ. Code Arts. 450 and 453, cmt. (c); *Bruning v. City of New Orleans*, 115 So. 733, 737 (on first reh’g, La. 1927); *Gulf Oil Corporation v. State Mineral Board et al.*, 317 So.2d 576, 586-7 (on reh’g, La. 1975).

⁶⁸ See also, *State ex rel. Plaquemines Parish School Board v. Plaquemines Parish Government*, 652 So.2d 1, 4 (App. 4 Cir. 1995).

⁶⁹ La. R.S. 41:640 (emphasis added).

⁷⁰ Louisiana was created out of the Territory of Orleans, while the rest of the Louisiana Purchase was originally known as the District of Louisiana. See, Ory G. Poret, *History of Land Titles in the State of Louisiana*, 1 LA. HIST. Q. 25 (1973).

tions that are wholly or partially covered by navigable waters may be treated with an entirely different suite of laws than those discussed above. The reason for this caveat is because the determination of rights as to such sixteenth sections is dependant upon each unique factual situation, because, historically, sixteenth sections were granted to schools without any consideration for where they fell geographically or topographically. Thus, if they fell over navigable waters, the school boards could apply to the United States General Land Office (and later to the State Land Office) for what are called “lieu lands” or “indemnity lands”. These lieu lands were terrestrial federal or State lands that were exchanged for the submerged portions of the sixteenth section lands originally granted by Congress, such submerged portions (if navigable-in-fact) belonging only to the State of Louisiana by virtue of its inherent sovereignty and the equal footing doctrine. Thus, in many cases, submerged sixteenth sections were swapped for other lands somewhere else in the State, to make up for the navigable waters loss in the regular, in-place, sixteenth sections. The practical effect of these swaps was to provide full ownership of nonsixteenth section lands to school boards – not necessarily within their own parishes. In those cases, the submerged sixteenth sections became the property of the State in full ownership and none of the sixteenth section specific laws apply to mineral leasing of such fractional and irregular lands. In cases where no lieu lands were granted, presumably, the school boards still retain the managerial and mineral rights to those lands. In other situations, sixteenth sections that were once dry land have now become eroded water bottoms (especially in the coastal areas). These lands, as is discussed more fully below, were treated, as they eroded, as nonsixteenth section lands – a possibly unjust reality that has now been corrected by legislation.

In the interest of completeness, we must consider the impacts of Act 158 of 2007 on mineral issues related to sixteenth section lands. This law deals only with what is to become of royalties derived from eroded sixteenth section lands. In pertinent part, this Act states that:

In the event any such eroded or subsided lands are covered by an existing oil and gas lease or other contract granted by the state in its sovereign capacity, all proceeds from production and other revenues, generated after July 1, 2007, and attributable to the eroded lands, shall be credited to the account of the current school fund of the parish having an interest in the sixteenth section or indemnity lands.⁷¹

The practical effect of this Act is to reallocate royalties after July 1, 2007. As discussed above, sixteenth sections that contain navigable waters are even more unique in legal treatment than their terrestrial siblings.

⁷¹ This provision enacted La. R.S. 41:642(A)(2).

Historically, if a sixteenth section was granted to a school board and part of the land in that sixteenth section eroded into a navigable waterway, the portion of minerals attributable to that eroded land was allocated to the State as the owner of all water bottoms in the State (as opposed to allocated to the particular school board's fund). What Act 158 does is to reverse this process after its effective date. On a prospective basis, all mineral proceeds attributable to eroded sixteenth section lands are now to be paid to the school board(s) in the township to which the sixteenth section was originally granted. This law seems to be consistent with the treatment of sixteenth section lands in general. As has been belabored above, none of these lands were ever owned by the school boards. Thus, it should not matter, for the practical purposes of royalty distribution, whether they are eroded or uneroded lands. The State still retains ownership and the school boards still receive the benefits. It is understandable why these lands had been treated differently in the past, as the minerals from eroded lands generally inure to the benefit of the State. However, this Act likely represents a correction that is consistent with the congressional intent for these lands.

Another important, but rather technical question related to sixteenth section lands is whether a mineral lease of sixteenth section land is considered a State lease or a State agency lease. As discussed above, sixteenth section lands were granted to the states by Congress to be held in trust for the benefit of the schools. Thus, although school boards have been granted the authority to lease sixteenth sections for minerals in the same statute as agency land leases are authorized,⁷² this authority is consistent with (and is likely a codification of) the school boards' managerial authority over the lands and it speaks nothing to the lands' classification as State or State agency property. Because the law related to sixteenth section lands considers the land to be State land, such leases should also likely be treated as State leases rather than State agency leases. This conclusion is also supported by the Fifth Circuit's finding that the State is not merely a nominal party in suits regarding sixteenth section lands.⁷³

It should also be pointed out that, it does not seem to matter what the classification of these lands is from a practical perspective. Under La. R.S. 30:154(C),

...all funds realized from these leases shall be paid to the school board of the parish where the lands are situated...

⁷² La. R.S. 30:152(A).

⁷³ *Louisiana v. Union Oil Co. of California*, 458 F.3d 364 (C.A. 5 2006); see also, *State v. Bass Enterprises Production Co.*, 2005 WL 2406155 (W.D.La. 2005); *Vermilion Parish School Bd. v. BHP Billiton Petroleum (Americas), Inc.*, 2005 WL 2406157 (W.D.La. 2005).

Thus, there is no practical difference resulting from classifying these leases as a State rather than a State agency lease. Under La. R.S. 30:136 and La. R.S. 30:136.1, excess funds from State leases are credited to the Bond Security and Redemption Fund, among other things. Under La. R.S. 30:145, ten percent of the funds realized from State leases must be credited to the parishes covered by the lease.⁷⁴ Under, La. R.S. 30:153, all funds go directly to the agency that owns the property being leased. However, it appears that La. R.S. 30:154(C) trumps La. R.S. 30:136, La. R.S. 30:136.1, and La. R.S. 30:145, directing sixteenth section land-realized mineral funds to the appropriate school boards.

Because sixteenth section lands are of such a special character, another necessary question to ask when dealing with them is: Does the SMB need any authority from the school boards to lease sixteenth section lands? There is no language in the Revised Statutes on this issue. However, the Louisiana courts have spoken to this issue in at least two cases. In both *State ex rel. Plaquemines Parish School Bd. v. Plaquemines Parish Government*⁷⁵ and *State v. Humble Oil and Refining Co.*,⁷⁶ it was clearly stated that the SMB did not have the independent authority to let mineral leases on sixteenth section lands. Rather, the authority to create mineral leases on these lands rested solely with the school boards "owning an interest" therein. For the following reasons, I believe that this position is incorrect:

The Revised Statutes provide a fairly complex method for the sale of sixteenth sections. However, the right to sell these lands is not restricted to the school boards. Under the maxim, *eo quod plus sit, simpliciter inest et minus* ("the greater includes the lesser"), it should logically follow that, if the State retained the more substantial right to sell sixteenth section lands without school board authority, that the lesser encumbrance of mineral leasing can be done without school board authority. That said, it seems reasonable to assume that the SMB could obtain such authority from the school boards, likely in the form of a resolution, to lease the lands on their behalf. However, such a grant of authority would seem to be superfluous. In addition, because all of the proceeds of the leasing of sixteenth section minerals are dedicated to the school boards with an interest in the particular sixteenth section, and the State (i.e., the general fund) does not gain any benefit, there would not seem to be a conflict of interest if the SMB were legally able to lease the minerals without school board authority.

⁷⁴ In addition, if these lands are leased by the SMB, the State gets a ten percent (10%) fee (La. R.S. 30:124) and it retains the \$20.00 per acre fee because it is a lease of State lands (La. R.S. 30:136.1(D)).

⁷⁵ 93-2339 (La.App. 4 Cir. 12/15/94), 652 So.2d 1.

⁷⁶ 197 So. 140 (La. 1940).

However, my opinion is merely academic in this respect. The Louisiana Supreme Court has spoken, so the matter is settled for now. The SMB needs the authority of the school boards to lease sixteenth section lands under the school boards' authority.

The above-discussed requirement of school board authority raises questions with respect to dually allocated sixteenth sections. For many reasons, including that sixteenth sections often fall across township lines, multiple school boards may have valid claims to partial shares of a particular sixteenth section. When this occurs, whose permission is required under the cases cited above to let mineral leases on such lands? Again, there is no law on this issue. However, should the SMB only have a resolution to so lease from the school board with the majority interest in the property (when two or more school boards have authority over one sixteenth section), La. R.S. 41:712, which applies to the sale of sixteenth sections that straddle township lines, seems instructive regarding what to do in such a situation. This statute provides the school board with the greater interest in a sixteenth section with the sole authority to sell the sixteenth section and pro-rata share the sale proceeds with the other school board(s). Thus, it seems logical that the SMB should need only the approval from the school board with the greater interest in the sixteenth section at issue in order to let a mineral lease thereon (if the interests are equal, then likely each school board should be consulted).

It should be noted, however, that, should any litigation result from the granting of such a mineral lease, all school boards with an interest in receiving a share of the mineral proceeds are necessary parties to the litigation.⁷⁷ Although the First Circuit has found that any school board with an interest in the mineral proceeds has an interest as a necessary party to any litigation over particular sixteenth sections, it did not address the question of who has the authority to create a mineral lease on the land.

As noted above, one main area in which sixteenth section lands have become an important issue for private attorneys is with respect to legacy lawsuits for environmental damage.⁷⁸ In 2004, the First Circuit rendered its decision in the case, *Terrebonne Parish School Board v. Southdown, Inc.*⁷⁹ This case derives from alleged damages to sixteenth section school lands in Terrebonne Parish caused by the dredging of canals through freshwater marshes for mineral exploration and production.⁸⁰ The damages occurred over a period of forty years and took place

⁷⁷ See, *Terrebonne Parish School Board v. Bass Enterprises Production Co.*, 2002-2119 (La.App. 1 Cir. 8/8/03) 852 So.2d 541.

⁷⁸ See, Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post-Katrina and Rita Imperatives*, 51 LOY. L. REV. 861 (2006).

⁷⁹ 03-0402 (La.App. 1 Cir. 7/14/04); 887 So. 2d 8.

⁸⁰ *Id.* at 9-10.

under numerous mineral leases.⁸¹ The school board filed suit under tort and contract theories. The school board claimed that it only recently became aware of the damages done to these lands by the mineral lessees.⁸² All of the claims were dismissed by the trial court as prescribed, and the First Circuit affirmed.⁸³

The court held that the State's ban on prescription could not be maintained by an entity that was not the State itself or suing on behalf of the State. The court reasoned that because the school board brought the suit in its own name and claimed to be the owner of the property in question, it could not avail itself of the State's immunity to prescription. While this reasoning is likely correct, the school board's contention that it was the owner of the land is patently erroneous. That being said, the school boards are entitled to bring suits in their own name with respect to the lands, but they are not the owners of the lands.

This case brings up several interesting matters. First, had the State sued for the damage to the property, the prescription issue would have been defeated. The reason for this outcome would be that prescription cannot run against the State.⁸⁴ Second, the case tends to give an incorrect picture of ownership of sixteenth section lands. As discussed above, these lands are owned by the State, not the school boards.⁸⁵

The courts again misstated and misunderstood sixteenth section land law in *Terrebonne Parish School Board v. Columbia Gulf Transmission Co.*⁸⁶ In this case, the court misstated the ownership of sixteenth section lands, creating a potentially erroneous precedent in dicta. The court states that the title to sixteenth section lands passed from the United States to the school board.⁸⁷ This assertion is simply incorrect. As demonstrated, *supra*, title to sixteenth section lands vested in the State upon statehood in 1812. The State is the owner of these lands and the school boards merely function as administrators or custodians. The volume of incorrect

⁸¹ *Id.* at 10.

⁸² *Id.*

⁸³ *Id.* at 14.

⁸⁴ La. Const. art. XII, § 13. This maxim also holds true in cases of liberative prescription. *See generally, Todd v. State, supra*, n.64.

⁸⁵ In all fairness, the courts are not the only ones still making this mistake. The Louisiana Legislature, as recently as the 2005 Regular Session, incorrectly stated the ownership of the sixteenth section lands in H.B. 184, as land to which school boards hold title. Unfortunately, this bill made it to the Governor's desk and was signed into law as Act 417 of 2005 before the error was noticed. Without belaboring the point that has been discussed fully herein, the school boards do not hold title to these lands, the State does. Hopefully an amendment in a future legislative session can redact this erroneous statement in Act 417 of 2005.

⁸⁶ 290 F.3d 303 (5th Cir. 2002).

⁸⁷ *Id.* at 307.

interpretations of sixteenth section land law is troubling because erroneous holdings on this matter could result in the stripping of valuable land from the State or in future inconveniences to landowners.⁸⁸

Although extremely confusing, the law that controls sixteenth section lands is extremely important in Louisiana mineral law. It determines proper parties, leasing and sales authority, and proper royalty payment, among many other things. Thus, practitioners, both public and private should be on guard for errors and inconsistencies anytime a sixteenth section is at issue.

IV. Of Erosion, Accretion, and Freezes⁸⁹

As a general matter, the Louisiana Civil Code holds that:

[p]ublic things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.⁹⁰

Thus any analysis of the ownership of a water bottom must begin with the general premise that the State is the owner of the beds of all navigable water bodies within its borders. This is important to mineral law

⁸⁸ One oft-cited example of such incorrect interpretations is the comment that anomalous sixteenth section lots are “not reserved for schools by acts of Congress.” *Bres v. Louviere*, 37 La. Ann. 736 (La. 1885). There is absolutely no evidence that Congress ever intended for incomplete (that is, fractional sections sixteen, not containing the normal full 640 acres) sixteenth sections not to inure to the states for educational use. Indeed, it appears that the *Bres* Court, as well as at least one other Louisiana Supreme Court ruling, misinterpreted survey terminology in rendering its decision. *See also, Lauve v. Wilson*, 38 So. 522 (La. 1905). The *Bres* Court seems to assume that radiating lots and anomalous lots are the same thing or similar enough to warrant similar treatment. Such could not be further from reality. Radiating lots are lots that radiate out from rivers and bayous (generally back to the 40 or 80 arpent line) and were part of original colonial land grants (such as those from the Kings of Spain and France). It is accurate that these lots were not intended to be included in the sixteenth section school lands inasmuch as the United States did not “own” these lands – having confirmed the royal land grants of the previous sovereigns – and thus did not have them to convey them. Anomalous, or “irregular lots,” however, are merely oddly shaped (as opposed to the standard 640 acre sections) and were granted to the states by Congress. If such were not the case, it would make no sense for the states to have been granted extra, or “in-lieu,” federal land from other sections to make up for the shortfall in these oddly shaped lots. Thus, there is erroneous case law that could cause the State to think that it does not have title to lands that it most definitely does. Debra LeMoine discusses an example of this problem. Debra LeMoine, *Options Sought to Recover Land: Livingston's Sixteenth Section in Question*, THE ADVOC. (Baton Rouge), Aug. 22, 2005 at 3-B. In this situation, an anomalous sixteenth section is at the heart of a public versus private debate over ownership.

⁸⁹ It should be noted that there are four basic situations in which mineral interests to land may be affected: (1) property that was land and is still land; (2) property that was water and is still water; (3) property that was land, but is now water; and (4) property that was water, but is now land. This portion of the paper deals with the latter two situations.

⁹⁰ La. C.C. Art. 450.

because it determines who the proper parties to a lease are, and, in the event of production, to whom royalties are properly payable.

The basis for the State's interest in eroded land⁹¹ is articulated in the Louisiana Constitution. The relevant parts of the 1974 Constitution are found within Article IX, and state, in pertinent part:

Section 3. The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion.

Section 4. The mineral rights on property sold by the state shall be reserved ... The mineral rights on land, contiguous to and abutting navigable waterbottoms reclaimed by the state through the implementation and construction of coastal restoration projects shall be reserved, except when the state and the landowner having the right to reclaim or recover the land have agreed to the disposition of mineral rights, in accordance with the conditions and procedures provided by law.

The above-quoted portions of the Louisiana Constitution make it clear that the only way for the State to alienate navigable water bottoms is through a reclamation project to recover land that originally belonged to the riparian owner, but which has now eroded into a navigable water body. Additionally, it is black letter law that as private lands erode into navigable water bodies, that new water bottom becomes the property of the State.⁹²

It is interesting to note that Louisiana courts, following U.S. Supreme Court precedent, have considered this right of reclamation "a legislative donation which may be altered or controlled by the legislature."⁹³ Thus, although the Louisiana Constitution currently provides for a right to reclamation, this right is not considered a right that is constitutionally protected by the federal government⁹⁴ and could, theoretically, be done

⁹¹ The term "eroded land" is used in this paper as a term of art to refer to any property that has submerged below the surface of a navigable water body, be it through erosion, subsidence, or other means. The term "erosion" is also used as a general term of art to refer to a broad swath of mechanisms by which property can become submerged below a navigable water body.

⁹² La. C.C. Art. 450; A.N. Yiannopoulos, *Property*, 2 LA. CIVIL L. TREATISE § 65, and the authorities cited therein.

⁹³ *Cities Service Oil and Gas Corp. v. State*, 574 So.2d 455, 460-461 (La.App. 2 Cir. 1991). See also, *Jones v. Hogue*, 129 So.2d 194 (La. 1960). The *Cities* Court relied on *Oregon ex rel State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977) for the proposition that no vested right would be disturbed by a state legislature changing the rules related to riparian property, as state law governs issues relating to riparian property, like other real property, 'unless some other principle of federal law requires a different result.' *Cities*, 574 So.2d at 460 (citing *Corvallis*, 429 U.S. at 378).

⁹⁴ *Corvallis*, *supra*.

away with by constitutional amendment in Louisiana. Although such a scenario is unlikely, what these judicial interpretations do stand for is the reality that the Legislature can change the rules on what the scope of the rights are that are conferred pursuant to the right of reclamation at any time without running much risk of violating constitutionally protected or vested rights.⁹⁵

One situation in which the Legislature has dictated such rules is with respect to La. R.S. 9:1151, commonly referred to as the “freeze statute.” Mineral interests lying beneath such eroded property are subject to the oil and gas lease freeze statute.⁹⁶ This law provides that the mineral rights held by the riparian owner at the time erosion occurs are retained by the riparian owner for as long as existing mineral leases on that land are in effect. Once these active leases are no longer in effect, the mineral interests under the eroded land reverts to the current owner – the State. Vice versa, if State-owned water bottoms on “rivers or other streams” subject to a State mineral lease become privately-owned by virtue of accretion,⁹⁷ the mineral interests under the accreted land reverts to the then-current owner – the private landowner (during the life of the mineral lease, however, the private landowner, or, as the case may be, the State, would continue to receive the royalties on production).

Thus, a simple reading of La. Const. Art. IX, Sec. 3 in connection with the freeze statute, leads to the impression that, once all active leases have expired on eroded lands, the State owns both the eroded land and the mineral rights thereunder (and since these laws cut both ways, former State-owned navigable waters now-accreted-land, are owned, surface and minerals, by the riparian private landowner). However, this truism, which does work in most circumstances, must be tempered by the language of La. Const. Art. IX, Sec. 4, which will be discussed more fully below.

Basically, the freeze statute exists for the purpose of protecting parties’ contractual rights from the laws associated with changes in water

⁹⁵ This is based on the reality that, since the 1974 Louisiana Constitution was enacted, Article IX, Sec. 3 provides the Legislature with the authority to impose conditions on and create procedures for reclamation rights.

⁹⁶ La. R.S. 9:1151.

⁹⁷ A useful definition of accretion comes from the Second Circuit:

Alluvion and accretion are terms used synonymously. Accretion is defined as the act of growing to a thing; usually applied to the gradual and imperceptible accumulation of land by natural causes, as out of the sea or river. Accretion is the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of owner [*sic*]. The term alluvion is applied to the deposit itself, while accretion denotes the act.

Walker Lands v. East Carroll Parish Police Jury, 38,376 (La.App. 2 Cir. 4/14/04) 871 So.2d 1258, note 13; *writs denied*, 2004-1421 (La. 6/3/05) 903 So.2d 442 (internal citations omitted).

courses. As a river's course migrates, the ownership of the water bottom, as a discrete piece of land, changes. The water bottom that emerges from the moving river or stream, through the process of accretion, becomes riparian land and changes its ownership status from State to private. On the other hand, lands that were private, but are now submerged by the changed water course, are converted to State ownership. In most cases, this shifting of ownership equates to a quid pro quo: both the private riparian landowner and the State gain and lose something. What the freeze statute does is to protect existing mineral leases over such property from being subject to this change in the status of surface ownership.⁹⁸ This law effectively freezes everyone's mineral rights where they are at the time a lease begins and insulates them from shifting surface rights (i.e., water or land) for the duration of the lease.

There are some unique exceptions to the general principles discussed above. One revolves around who owns water bottoms when the Corps of Engineers ("the Corps") or some other authority has cut a new channel off of the main channel, thus making a new navigation or flow channel. As a practical matter, this question gets as much at who owns the minerals under the new channel as who can control access to the new channel.

In general, when such new navigation or drainage channels are cut pursuant to a written instrument of servitude in favor of the government, the bottom of the newly created channel remains the private property of the landowner, while the original channel, whether still connected to the original channel or not, remains the public property of the State of Louisiana.⁹⁹ In such situations, the mineral rights underlying such properties remain as they were before the channel was cut.

Access to the channel becomes a bit more complex. Because such situations deal with essentially private property (i.e., the new channel), it would not seem unreasonable, under the general rules of trespass, for the private landowner to be able to limit or restrict access to the new channel (i.e., the landowner's private property). However, a complicating fact in this scenario is that the private channel has flowing through it "running waters," which, under La. C.C. 450 are public things belonging to the State.¹⁰⁰ It is clear that it is impermissible to capture or stop the flow of the running waters of this State, even if they traverse private property.

⁹⁸ Without the freeze statute, a mineral lessee would be put in an impossible practical position to pay monthly royalties properly.

⁹⁹ Most such channel cuts are accomplished by securing a servitude from the private landowners and are not expropriations or acquisitions of fee title. Even in situations of expropriation, what is expropriated is still usually only a flow or drainage servitude. Also, in cases like these, there is invariably some "public reason" for the cutting of the new channel.

¹⁰⁰ A.N. Yiannopoulos, *Property*, 2 LA. CIV. L. TREATISE § 57 (4th ed.).

Because these situations do not impact matters related to the freeze statute, *per se*, they will be considered in a subsequent section of this paper.

Of course, the question that follows from the above discussion of man-made cuts in a navigable river or stream is, what happens to the ownership of the surface and the minerals when the original water course in the area of a man-made cut dries up? In such situations, most of the time, the original channel will become an oxbow lake before it disappears entirely. Should an oxbow lake owned by the State dry up, this property will remain in the ownership of the State, as the laws of accretion do not apply to lakes.¹⁰¹ In such a situation, though now dry land, the surface and mineral rights of this original channel – turned – oxbow lake – turned – dry land, remain the property of the State.

When the formation of an oxbow lake does not result from the cutting of a new channel, but the original channel nevertheless dries up, what then becomes of the surface and mineral rights? The answer to this question depends largely on the facts of each situation, as is discussed below.

One example of this type of situation comes from a recent Attorney General's opinion: La. Atty. Gen. Op. No. 07-0030. In this situation, during the 1980s, the Corps cut a channel along the Red River to improve the flow of that waterway. The practical effect of creating this channel was to create a straight-away in the River where a sharp curve had naturally occurred. As the River was straightened the main flow largely abandoned the natural curve, resulting in a silting-in of part or all of the original bodies of water, possibly creating an oxbow lake.¹⁰² In the area of the cut, the Red River is (or was) unquestionably a navigable waterway of the State. Thus, in a typical situation, notwithstanding agreements to the contrary (such as a servitude), the State would be the owner of the bottom of the Red River as it traverses the Corps channel.

Each such cut in water courses throughout the State presents a unique set of facts. Thus, it is impossible to create a rule that will apply to every channel around the State. Each channel was created based on unique documents to acquire some interest in the property, each for a particular purpose, each was created at a different time (meaning that as the law changed over time, different rules applied to ownership), and the hydrological and geological processes that acted upon the original channels after the cuts were made differ substantially from one cut to another and are often incompletely documented. All of these factors make gener-

¹⁰¹ See, *State v. Placid Oil Co.*, 300 So.2d 154 (La. 1974); see also, John L. Madden, FEDERAL AND STATE LANDS IN LOUISIANA, 327-8 (Claitor's Publishing Division 1972).

¹⁰² In this opinion, it is stated that an oxbow lake was "possibly" created because the factual information available at the time did not lead to a clear conclusion as to whether a true oxbow existed in the area of the subject cut.

alizations about the ownership of such channels impossible. However, this paper is aimed at setting forth a series of processes for analyzing such ownership under certain conditions.

In order to make a complete analysis of who owns what when an artificial cut is made to a navigable waterway, the documents related to that cut must be analyzed. As has been noted in numerous cases in this State, whether an instrument purports to convey a servitude or fee title to a party depends first on the ambiguity *vel non* inherent in the particular document.¹⁰³

Under *Esso Standard Oil Co. v. Texas & New Orleans Railroad Co.*,¹⁰⁴ if there is no ambiguity in the document conveying an interest in the particular property, extrinsic evidence cannot be considered and the conveyance must be interpreted based on the language contained within the four corners of the document.¹⁰⁵ If it is clear from the language of the document that what was intended to be conveyed was a servitude, or, conversely, a fee simple title, then no further inquiry can be made. If, on the other hand, ambiguity does exist or an application of the instrument as it is styled would lead to absurd consequences, extrinsic evidence may be considered.¹⁰⁶ Ambiguity may be inferred from such things as a disproportionate price paid for the interest purported to be conveyed; a caption of the document that does not conform to the stated purposes in the text; language in a servitude that grants the right “forever” or language in a cash sale that grants the right “in perpetuity”; among other factors. In addition, in cases where mineral interests are retained, there is a strong argument that the servitude agreement was actually a transfer of fee title. Such a reservation would be superfluous in a servitude. Once ambiguity has been identified, the *Porter* court proposes the following questionnaire to determine whether an instrument is a servitude or a cash sale.

Our jurisprudence notes several factors which should be considered when deciding whether fee title or a servitude has been conveyed ... These factors include:

1. The consideration recited in the deed;
2. Whether a specific measurement was given to the “right-of-way”;
3. Whether the party claiming the fee title had an actual need for such title;

¹⁰³ See, *Esso Standard Oil Co. v. Texas & New Orleans Railroad Co.*, 127 So.2d 551 (La. App. 3 Cir.1961); *Porter v. Acadia-Vermilion Irrigation Co., Inc.*, 479 So.2d 1003 (La. App. 3 Cir. 1985).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Porter, supra*, n.103 at 1006.

4. To whom the property was assessed and who paid the taxes on the property;
5. Whether the grant was made for a specific purpose;
6. Whether the grant was made “in perpetuity” or “forever”; and,
7. How the parties to the conveyance, or their heirs and assigns, have treated the property.¹⁰⁷

The ideas behind these factors are fairly straight-forward. If the consideration in the instrument approaches the fair market value for the cost of the property, that factor lends towards a finding of fee title. If specific measurements were given to the property to be contained within the servitude or the right-of-way, this too lends towards a finding of fee title, as exactness of property description is a hallmark of a sale. In cases involving channel cuts, the third factor above should always support the acquisition of fee title. The acquiring entity will generally have a need for the fee title, as the whole purpose of making the cut is to ensure the perpetual flow of a waterway. It would seem nonsensical to acquire a servitude for a channel that is anticipated to carry the waters of the State forever. As to the fourth factor, if the original landowner continues to pay taxes on the property, this lends to a finding that a servitude was granted. Factor five examines whether there was a specific purpose for the conveyance. It is unclear from *Porter*, but presumably if property were conveyed for a specific purpose and that purpose had an indefinite duration (e.g., a channel cut), this factor would lend towards a finding of fee title. As noted by the *Porter* court regarding the sixth factor, “a grant ‘in perpetuity’ connotes only a limited grant, whereby a grant ‘forever’ connotes an unlimited grant and a sale in fee simple.”¹⁰⁸ The final factor often dovetails back to factor four. It is often difficult to ascertain what the intentions of the grantors were in such agreements. The payment of taxes can provide some insight into what the grantors and their heirs or assigns believed their interest in the property was. Also informative with respect to this factor could be subsequent sales of the property which may or may not mention a fee title interest to another party of the tract of land in question, such as a “bounding owner”, or the opposite, such as “bounded by the right-of-way of [so-and-so].”

Should the language of a conveyance be ambiguous or lead to absurd consequences, the above-noted inquiry should be undertaken to determine whether a servitude or fee title has been acquired by the State with respect to property used for channel cuts. The only way to be certain about the interpretation of such contracts would be to obtain a declaratory judgment from a court of competent jurisdiction.

¹⁰⁷ *Porter, supra*, n.103 at 1007.

¹⁰⁸ *Id.* at 1008.

In addition to the analysis of the documents dealing with the right to cut channels, the law also provides some guidance as to who owns what, depending on the facts. There are three possible outcomes for the ownership of a silted-in old river channel, all of which are discussed more fully below. The first scenario contemplates a situation whereby an oxbow lake is formed where the old channel used to be. The second two possible outcomes are legal distinctions of the same geomorphological phenomenon. In these outcomes, which contemplate that no oxbow was created, depending on when the cut was made and when the silting occurred, there will be a difference of ownership of accretion based on a change in the law in the late 1970s.

The simplest outcome would result from the silted channel forming a traditional oxbow lake. It is well accepted that, once an oxbow forms from the movement of a navigable water body, it becomes a lake in the legal sense of the term.¹⁰⁹ Thus, as with all navigable lakes in existence prior to 1812, as the oxbow dries, the newly-dry land does not inure to the ownership of the riparian landowners, but rather remains with the State.¹¹⁰ The question then becomes, when did the oxbow lake form? According to *State v. Bourdon*,¹¹¹ if a navigable oxbow lake was formed prior to statehood in 1812, it became the property of the State at statehood, and has remained as such since. However, navigable oxbows formed since 1812 become, through indemnification,¹¹² the property of the landowner whose property was inundated when the navigable waterway that used to run through the oxbow channel moves to its new channel.

The *Bourdon* case presents a unique problem when considering artificial channels in Louisiana. Situations in which the Corps of Engineers or other entity has created an artificial cut in a navigable waterway, thus creating a new main channel of that waterway, are not contemplated by the laws related to water bottom ownership and accretion in the Louisiana Civil Code.¹¹³ In most of these cases, the Corps or other entity does not purchase the property underlying the new channel outright. Rather, it obtains a servitude from the landowner and proceeds to reroute the water

¹⁰⁹ See, A.N. Yiannopoulos, *Property*, LA. CIV. L. TREATISE, Vol. 2, 4th ed., § 76 (West 2001). Just because a navigable portion of a river or stream becomes a lake in the legal sense of the term does not necessarily mean that the ownership of that new water body remains with the State – this scenario is detailed in the succeeding text.

¹¹⁰ See, *State v. Placid*, *supra*, for a discussion of the inapplicability of the law of accretion to lakes; see also, La. C.C. Art 500.

¹¹¹ 535 So.2d 1091 (La.App. 2 Cir. 1988).

¹¹² The indemnification referred to here is the indemnification contemplated in La. C.C. Art. 504.

¹¹³ See, La. C.C. Arts. 499-501; see also, La. C.C. Arts. 502-505 for other relevant laws.

through this formerly dry property. This scenario is substantially different from the law on the ownership of water bottoms when a natural (even if abetted or accelerated by the act of man) change in the course of a navigable waterway occurs.¹¹⁴ Under that general law, the State takes ownership of the newly-inundated water bottom and the landowner whose land has disappeared beneath the water takes by indemnification from the abandoned bed of the waterway.

However, in situations where there is a clear servitude that grants the Corps or other entity the right to make the cut, the State does not gain an ownership interest in the newly-inundated water bottom due to the existence of the servitude (subject to a finding that the servitude is, in fact and in law, a servitude and not a transfer of fee title). Accordingly, the landowner has not lost his now-inundated property and, indeed, he was compensated for its use as a waterway. In such situations, there is no indemnification owed. The landowner retains ownership of and minerals beneath the channel cut and the State retains ownership of and minerals beneath the original water bottom.

Although the laws of accretion, in the traditional sense of accretion, may apply to the such a situation, it seems that, for reasons of equity, the original channel of a navigable waterway must be treated somewhat differently when the landowner retains ownership of the newly-created water bottom. These laws are intended to return land to the stream of commerce as it emerges from the bottoms of State water bodies. However, again, the Civil Code articles related to accretion,¹¹⁵ which are based on ancient French and Roman laws,¹¹⁶ do not contemplate the massive earth-moving works of the modern Corps of Engineers.

In situations in which the original path of a navigable river or other stream did not accrete by natural forces, but rather were filled in as a direct result of anthropogenic factors and, unlike the more ancient traditional situation, the State did not obtain an interest in the newly formed water bottom, a certain inequity would exist to the citizens of Louisiana if the State were not allowed to retain some of the property involved.¹¹⁷

¹¹⁴ La. C.C. Arts. 502 and 504.

¹¹⁵ La. C.C. Arts. 499-501.

¹¹⁶ See, A.N. Yiannopoulos, *Property*, LA. CIV. L. TREATISE, Vol. 3, 4th ed., § 49.

¹¹⁷ The inequity referred to here is based on the scenario where a Corps channel is cut pursuant to a servitude – meaning that the State does not have an ownership interest in the new water bottom – and the general laws of accretion come into play on the former channel. In this instance, the State would lose its interest in the former bed, assuming that accretion did in fact occur, but would gain no interest through indemnification as to the new channel because of the servitude. This situation, on the river or other stream, is vastly different from that contemplated by the Civil Code in Article 504 and would cause an inequity to the citizens of the State in that property would be lost with no correlative gain as envisioned by the Civil Code. Thus, the citizens stand to lose the benefits that inure to the State by virtue of the ownership of a navigable water bottom.

As a result of this inequity, so long as an original channel of such a navigable waterway remains inundated (as with an oxbow lake or via a direct opening to the new channel), that property remains with the State and the only way for the adjacent landowners to gain an interest in the property is through the law of accretion.

Thus, unlike the general rule that, once formed, a navigable oxbow lake created post-1812 becomes the property of the private landowner,¹¹⁸ when the oxbow is formed as a result of an artificial cut in which the State gains no interest in the new channel, ownership of the old water bottom remains with the State and can only be lost through the law of accretion. If the oxbow becomes a lake in the true sense of the word (i.e., cut off from the old channel at both ends), the law of accretion does not apply,¹¹⁹ and the dried water bottom remains the property of the State. If the old river channel at issue, in whole or in part, formed an oxbow lake and that lake, navigable-in-fact and thus navigable-in-law, has, over time, dried up, then the bed of that portion of the channel that was the oxbow lake belongs to the State. In any case, all minerals underneath a dried oxbow lake would similarly remain in the ownership of the State.

For the other two outcomes it must be assumed, *arguendo*, that a channel is legally considered a river or a stream and not a lake. This scenario thus contemplates a situation whereby an oxbow lake is not formed by the movement of silt into the old channel. The ownership distinction between these outcomes is made based on the actual time at which the cut was made. The reason for this is that the Civil Code articles related to accretion to islands were changed in 1978.¹²⁰ This is relevant because most such cuts effectively create, at least for a time, an island within the stream of the navigable waterway.

If a channel cut was begun before the changes to the Code, some or all of the silt that accreted to the island would inure to the State, while the accretion on the other bank (the nonisland side of the channel) would inure to the riparian owner. This follows from the theory that accretion, in the strict legal sense of the term, cannot occur to islands under the applicable pre-1978 Civil Code articles.¹²¹

However, if a channel cut was made after the Code was changed, it appears likely that all of the accretion, whether on the island side or the nonisland side of the channel, would inure to the riparian landowners.

¹¹⁸ See generally, *State v. Bourdon*, *supra*, n. 111.

¹¹⁹ La. C.C. Art. 500.

¹²⁰ La. C.C. Arts. 456, 499, and 665 (former articles 455, 509, and 665).

¹²¹ Andrew J.S. Jumonville, *Accretion in the Atchafalaya Basin: Present and Future Title Controversies*, Presentation to the Louisiana Mineral Law Institute, 1974 at 19-21. This is because under the pre-1978 Code articles, islands were incapable of having "banks" as then defined in the Civil Code.

Thus, any area of a silted-in channel that was not once a true oxbow lake, for channelization occurring after the Civil Code was revised in 1978, accretion becomes the private property of the riparian landowners. In such a case, the State loses. All of these issues are of significant importance when attempting to determine who a landowner is when a particular lease is sought.

In addition to the issues related to who owns what when artificial cuts are made to the navigable waterways of the State, other significant issues related to the freeze statute are those surrounding the loss of the State's coastline. As the coast erodes, the newly submerged land becomes State water bottom. Generally, the minerals go with the land. However, because of the freeze statute, if mineral leases exist over this property, the mineral rights will remain with the original landowner for so long as the lease exists. When the lease terminates, the mineral rights accrue to the State.

V. Of Access Rights and Liability

Other issues related to ownership of man-made canals and cuts have arisen in recent years. Many of these revolve around liability for injuries that occur in such channels. Because these issues relate to the above discussion of the rights to minerals lying underneath such channels and because these liability issues are important to those of you practicing in the private sector, a review of these issues is warranted.

As a general premise, Yiannopoulos states that,

[a]ccording to Article 450 of the Louisiana Civil Code, running water is a public thing. As such, it is owned by the state in its capacity as a public person and it is subject to public use.¹²²

Thus, it is axiomatic that the general public has a right to access running water in the State of Louisiana. However, several cases have narrowed this broad generalization.

The most important of these cases is *Buckskin Hunting Club v. Bayard*.¹²³ In this case, the Third Circuit held that certain pipeline canals in the Atchafalaya Basin were not susceptible of the public use tenet provided for in the Civil Code.¹²⁴ This is not a surprising result, as it is also well settled that private canals constructed with private funds, even if navigable, are not *de facto* subject to a public use.¹²⁵ The *Buckskin* canals

¹²² A.N. Yiannopoulos, *Property*, 2 LA. CIV. L. TREATISE, § 57 (4th ed.) (footnotes omitted).

¹²³ 2003-1428 (La.App. 3 Cir. 3/3/04) 868 So.2d 266.

¹²⁴ *Id.* at 275.

¹²⁵ *Id.* at 274-275.

were made for the purpose of supporting hydrocarbon transport through pipelines. These canals were dug on private land¹²⁶ with private funds.

Also of interest with respect to this matter is *People for Open Waters, Inc. v. Estate of J. G. Gray*.¹²⁷ This case dealt with a canal wholly constructed on private land where the landowner was concerned with problems such as litter and bank erosion, among other things.¹²⁸ The Third Circuit here also found that the public did not have a *de facto* right of use to this canal simply because it is navigable-in-fact and because it captures the flow of waters of the State. Interestingly, the court in *Gray* noted that

we find no validity to the assumption that because the water in the canal is a public thing, the public must have a right to use the canal.¹²⁹

The court stated that the only thing, in this case, that the landowner was obligated to do was to ensure that the flow of the waterway was not diminished as it traversed his property. Nowhere did the court state that this use of public waters required an opening of the otherwise private canal to the public. Additionally, as with *Buckskin*, the channel in *Gray* was a channel constructed for specific commercial purposes.

In *Cenac v. Public Access Water Rights Association*,¹³⁰ the Louisiana Supreme Court dealt with the public's right to access a boat launch and a privately-owned canal in Lafourche Parish. In this case, members of the public argued that historic use of these things equated to a dedication of their use to the public and that the current landowner could not now restrict public access. The trial court rendered judgment in favor of the landowner as to the boat launch, but in favor of the public as to the use of the canal. The appellate court affirmed the ruling on the boat launch, but also stated the canal was not available for public access. The Supreme Court affirmed the appellate court's ruling, rejecting all of the "dedication to the public use" arguments.

This case established a high burden for parties claiming that a dedication to public use had been established. The Court held that historic access was not enough to prove such a dedication. It stated that because those seeking access had failed to prove a plain and positive intent to

¹²⁶ It should be pointed out that at one point in the *Buckskin* case, there were some State owned lands at issue as well as some contested lands. However, those lands were not the subjects of the holding in the case. Only the private lands were the subjects of the holding.

¹²⁷ 94-301 (La.App. 3 Cir. 10/5/94) 643 So.2d 415.

¹²⁸ *Id.* at 416.

¹²⁹ *Id.* at 418.

¹³⁰ 2002-2660 (La. 6/27/03) 851 So.2d 1006.

dedicate by language or acts so clear as to exclude every other hypothesis but that kind of dedication, there was no implied dedication to public use.

In the recent Third Circuit case, *Schoeffler v. Drake Hunting Club*,¹³¹ the issue in dispute was whether citizens of the State had a right to access water bodies within patented lands. The facts are fairly straight forward: A group of citizens brought an action against several landowners in the Atchafalaya Basin who had posted no trespassing signs and barriers on waters within the Basin. In contrast to some of the canal access cases, this case related to waters that were subject to the tidal overflow in the Atchafalaya Basin. The citizens basically argued that they should have access to these waters because the waters were part of the “waters of the State”, which are open to public use. Like the canal access cases, for the purposes of mineral law, cases such as this, should access be allowed, raise issues of liability for landowners (including the State) should injuries occur thereon and for operators whose equipment may cause injuries or damage if it is hit or otherwise involved in a harmful incident by members of the public.

In addition, in their fourth amended petition, the Plaintiffs named the State as a party-Defendant, seeking an order for the State to survey the entire Basin and set boundaries throughout based on the high-water mark. The Third Circuit did not take kindly to the Plaintiffs’ position. It affirmed the trial court’s ruling that dismissed all claims against the State. The Court noted several times the extreme difficulties in accomplishing what the Plaintiffs were requesting:

Nonetheless, Plaintiffs seek to combine traditional boundary articles with La.Civ.Code art. 456, and force the State and the private owners to fix numerous boundaries based on numerous bodies of water. Plaintiffs concede the inundated nature of the swamp land at issue, and therefore in reality seek to establish a boundary, not between contiguous lands, but between the water flowing onto private land and the navigable waters of the State of Louisiana.¹³²

The Plaintiffs claimed to be proper parties to bring such a boundary action because, as they claimed, they are “usufructuaries” since “they have the right to enjoy the use and fruits of State-owned waters and bottoms.”¹³³ The court rejected this argument. The Court stated that the authorities cited by the Plaintiffs did not establish a usufructuary interest in the waters and flooded areas of the Basin on behalf of the public-at-large.

The Court additionally found that the Plaintiffs were improper parties to bring a boundary action.¹³⁴ If these waters were State-owned,

¹³¹ 2005-499 (La.App. 3 Cir. 1/4/06) 919 So.2d 822.

¹³² *Id.* at 831.

¹³³ *Id.* at 832.

¹³⁴ *Id.* at 834.

then, said the Court, the State would be the proper party to bring a boundary action.¹³⁵ The Court also noted the extreme difficulty and expense should the State choose to bring such actions. It stated that this virtually impossible task would require separate actions against each landowner with the unique facts of each piece of property controlling the outcome. Due to the ephemeral nature of much of the Basin, the Court felt that such claims would be a waste of resources, as the facts could change from day-to-day.

In *Schoeffler*, the court also rejected the Plaintiffs' argument that they had acquired an interest in the water bodies through historic and traditional use. It stated that:

We cannot avoid the observation that where one owner of long ago may have invited the public to fish and hunt his land, a modern owner may be less generous, or more concerned with liability associated with free access, or obligated to his lessors who pay for the privilege of access. The argument that a thing has "always" been done, does not provide a cause or right of action.¹³⁶

Thus, as these cases demonstrate, the courts have generally upheld the private nature of waterways on strictly private land and the right to control access thereto.¹³⁷ As noted above, this fairly consistent holding bodes well for operators on private property, as claims for damages are mitigated by trespass issues. However, determining what constitutes a private waterway is often a fiercely fought battle between the State and private landowners.¹³⁸ This topic is, however, outside of the scope of this paper.

VI. Of the Inalienability of Minerals

It is a general tenet of Louisiana law that when a private party transfers property to the State *and* expressly reserves its mineral rights, La.

¹³⁵ *Id.*

¹³⁶ *Id.* at 840.

¹³⁷ The federal courts have somewhat differed from the State courts in this regard. *See e.g., Parm v. Shumate*, 513 F.3d 135 (C.A. 5 2007), *writs denied*, 129 S.Ct. 42 (2008); *see also, Parm v. Shumate*, 2006 WL 2513856 (W.D.La. 2006) (Because the Court was satisfied that the plaintiffs in this case only wanted access to the water that overflowed this area during flood stages and did not want access to the dry land, such would be a permissible use of State waters. The Court found this right to be supported by common law and state law. Thus, so long as the public stayed within the ordinary high water stage of the river, access was permissible.). Interestingly, the *Parm* case related to the same land that the State lost in *Walker Lands*, *infra*. *See also, Meche v. Richard*, 2007 WL 634154 (W.D.La. 2007) (holding, that Lake Rycade is navigable-in-fact for the purposes of applying admiralty law – no decision has yet been reached on the actual ownership).

¹³⁸ *See e.g., Walker Lands v. East Carroll Parish Police Jury*, 38,376 (La.App. 2 Cir. 4/14/04) 871 So.2d 1258; *writs denied*, 2004-1421 (La. 6/3/05) 903 So.2d 442.

R.S. 31:149 permits this reservation to be virtually perpetual.¹³⁹ The reservation should be considered virtually perpetual, because if the State (or one of its agencies) were to keep the property forever, the reservation would last forever. However, should the State ever divest itself of the property to a private entity, the reservation of mineral rights ceases to be perpetual and the reservation of such rights provided for in La. R.S. 31:16 and 31:85 takes effect.¹⁴⁰ Thus, when transferring immoveable property in Louisiana, there is a distinct advantage to private sellers wishing to expressly reserve mineral rights by transferring to the State rather than to another private individual: they get to retain their mineral rights virtually indefinitely. One major policy behind this advantage is to promote the donation of surface rights for the conservation and preservation of, among other things, wildlife habitats, ecologically important or sensitive areas, or historic and archaeological resources; to encourage the selling of same to a government or governmental agency or subdivision; or, in the case of expropriation or condemnation, to perhaps limit the vehemence of the private landowner's defense.

Since 1921, this situation also exists when the surface property goes the other way: from the State to a private party. Pursuant to La. Const. Art. IX, Sec. 4(A), if the State divests itself of property, the mineral rights thereunder are reserved to the State and they cannot be alienated.¹⁴¹ There are, however, a few nuances to this reservation that are essential to understand.

¹³⁹ La. R.S. 31:149, which is part of the Mineral Code (effective Jan. 1, 1975), continues earlier statutes permitting such a retention that would apply to property sold to the State prior to the adoption of the Mineral Code. As noted in the 2000 comments to La. R.S. 31:149:

Articles 149 through 152 are a revision of former La.R.S. 9:5806 (1950, as amended 1960). Paragraph A of La.R.S. 9:5806 was in essence Act 315 of 1940, which dealt with situations in which land is deeded to or expropriated by the United States or any of its agencies or subdivisions. Paragraph B was added by Act 278 of 1958, as amended by Act 528 of 1960; it dealt with similar situations where the land is acquired by certain listed categories of state agencies and subdivisions.

¹⁴⁰ See *however*, La. Atty. Gen. Op. No. 08-0215, FN 10, for one possible exception for a brief span of time. The general mineral reservation as between private parties is effective for ten years. La. R.S. 31:16 and 31:85. However, should the minerals subject to the reservation actually be in production at the tolling of the ten-year period, the reservation remains in force until such time as the production ceases. La. R.S. 31:87, *et seq.* Furthermore, as to minerals (though not as to royalties) the good faith drilling of a dry hole interrupts the tolling of prescription and commences it anew for ten years.

¹⁴¹ This reservation is limited in two situations, the first is explicitly presented in La. Const. Art. IX, Sec. 4(A), thus:

except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes.

The second relates to coastal restoration efforts and is discussed in more detail *infra*.

Many private landowners in Louisiana obtained their property from the State of Louisiana at some point in time. If a landowner acquired the subject property from the State before 1921, then he likely owns the minerals.¹⁴² However, due to a constitutional change in 1921, if a landowner or his ancestor in title acquired the subject property from the State post-1921, then he never acquired any of the minerals.¹⁴³ The 1921 Louisiana Constitution created a restriction against divesting State-owned mineral rights even if the State sells the surface rights to a piece of property, therefore vesting in the State a perpetual mineral interest (since prescription does not run against the State).¹⁴⁴ Thus, if a landowner or his ancestor in title purchased his property from the State post-1921, the inquiry stops here. The State owned the minerals at the time of the sale and continued to own them after the sale, and no subsequent landowner has any interest in the minerals at any point in their ownership of the property. Accordingly, any reservations of such mineral rights by private parties in their conveyance documents would be null *ab initio*. However, if a present landowner or his ancestor in title acquired from an entity other than the State or acquired from the State pre-1921, then he could quite likely hold the minerals underlying his property.¹⁴⁵

As noted above, one of the complex nuances of the State's perpetual reservation of its minerals relates to the timing of the sale of the State property at issue. In many cases, in the nineteenth century, the government erred in granting certain land patents. In those situations, the holder of a patent was entitled to present it to the General Land Office (the precursor to the Bureau of Land Management) for a lieu warrant that could later be "cashed in" for a patent on a different piece of property. Several cases have addressed what rights are acquired with the issuance of these documents and the timing of when the warrants are presented to the government agency for honoring.

¹⁴² This would also apply if the landowner's ancestor in title acquired the property from the State pre-1921. However, this scenario does not necessarily apply to situations in which a lieu warrant is issued by the State prior to 1921 and the warrant is not "cashed-in" until after 1921. This scenario is discussed more fully in the text *infra*.

¹⁴³ See, La. Const. 1921 Art. IV, Sec. 2. Interestingly, very few landowners realize this reality. Often, post-1921-acquired private landowners purport to transfer or reserve mineral interests as they sell property acquired from the State post-1921. See *e.g.*, La. Atty. Gen. Op. No. 08-0212. In such situations, such transfers, reservations, or other references to the minerals being owned by anyone other than the State are null and void. *Id.*

¹⁴⁴ It is important to note in this regard (unlike the private landowner) that there need be no express reservation of such rights in a sale by the State. Because this restriction is mandated by constitutional fiat, silence on the reservation of minerals in a sale post-1921 does not act as a transfer of those rights. See, *Lewis v. State*, 156 So.2d 431 (La. 1963); see also, La. Atty. Gen. Op. Nos. 08-0212; 79-1000; 1969, p.132. It is also important to note that this restriction was continued by the 1974 Louisiana Constitution. La. Const. Art. IX, Sec. 4.

¹⁴⁵ Subject to the lieu warrant and patent issuance discussed *infra*.

It is generally accepted that a lieu warrant (which is sometimes referred to as a "land warrant") creates an inchoate right to some unspecified property at some unspecified point in time.¹⁴⁶ Thus, if a landowner or his ancestor in title acquired a lieu warrant from the General Land Office, he acquired a right to later petition the State for the selection of a parcel of land.¹⁴⁷ The courts have held that swapping a defective patent for a lieu warrant does not convey to the holder of the lieu warrant any rights in a particular, specific tract of land that may have vested under the traded-in defective patent.¹⁴⁸ Nonetheless, the courts have also held that a properly issued warrant that was presented for a patent prior to 1921 permits the warrant holder to acquire both some specific tract of land and the minerals thereunder.¹⁴⁹

A confusing situation presents itself when a warrant is submitted to the State for the selection of land after 1921. The reason for this is that, in 1921, as noted above, the law related to the alienability of minerals was substantially changed when the Louisiana Constitution of 1921 was adopted by the voters of the State. For the first time, the Louisiana Constitution contained a perpetual, imprescriptible mineral reservation vested in the State that attached to the minerals lying beneath lands sold by the State. The relevant provision provides, in pertinent part,

In all cases the mineral rights on any and all property sold by the State shall be reserved, except where the owner or other person having the right to redeem may buy or redeem property sold or adjudicated to the State for taxes.¹⁵⁰

Thus, any land that was sold by the State subsequent to the passage of the 1921 Constitution would be subject to the mandated, reserved State perpetual, imprescriptible mineral reservation discussed above. The problem for warrant holders whose warrants predate 1921 but who do not present the warrant for a patent until after 1921 is that, per *Douglas v. State*,¹⁵¹ the rights in the subject property only vest once the lieu warrant is presented to the State Land Office. Accordingly, the State could not, by constitutional mandate, transfer the mineral rights along with the property when such landowners cashed-in their lieu warrants post-1921.

¹⁴⁶ See, *Hyman's Heirs v. Grace*, 1 So.2d 683, 686 (La. 1941) ("The Act, under which the lieu warrant involved herein was issued, contemplates a future location of the warrant on lands of like character belonging to the State without designating any particular time within which it can be done.").

¹⁴⁷ *Id.*

¹⁴⁸ *Lewis, supra*, n.144 at 433.

¹⁴⁹ See generally, *Hyman's Heirs, supra*, n.146.

¹⁵⁰ La. Const. 1921, Art. IV, Sec. 2. This same provision, in virtually identical language, was also incorporated into the 1974 Constitution at La. Const. 1974 Art. IX, Sec. 4.

¹⁵¹ 23 So.2d 279 (La. 1945).

Unfortunately, there is no law directly in point on this matter.¹⁵² There are three lead cases that discuss who owns what in lieu warrant situations. Both *Hyman's Heirs v. Grace* and *Douglas*, are informative, but do not consider the exact scenario discussed above. Both of these cases deal with lieu warrants that were presented to the Land Office prior to 1921. In *Douglas*, the Louisiana Supreme Court clearly stated when the rights of full ownership attach to a lieu warrant.

[W]hen an entryman complies with the appropriate statute and does everything required thereby, as she has done in this case, equitable title vests immediately, although the execution of the necessary documents to convey legal title is delayed. Applying this principle to the instant case she maintains that for all practical purposes the property herein involved became hers on February 19, 1919, or if not then, on February 3, 1939, the date of the renewal of her original application.¹⁵³

The Court further noted that,

when the plaintiff applied for the patent in 1919 and renewed the same in 1939, her right thereto became perfect and complete and she thereby acquired a vested right to the property the same as if the patent had issued, entitling her to all revenues derived therefrom.¹⁵⁴

In both *Douglas* and *Hyman's Heirs*, the problem addressed by the court was the Land Office's failure to complete the ministerial duties associated with acting on lieu warrants presented to it prior to the passage of the 1921 Constitution. Such is not the case in the above scenario. In this hypothetical scenario, although the lieu warrant was issued prior to 1921, it was not presented to the Land Office until some time thereafter. Thus, there was no ministerial duty to perform in this matter for which *Douglas* and *Grace* would control.

In the case of *Lewis v. State*, both the lieu warrant and the patent were issued after 1921. The Supreme Court in that case rejected the *Hyman's Heirs* and *Douglas* dicta to the extent that they conferred some interest in the minerals based upon the defective patent that the lieu warrant was intended to remedy.¹⁵⁵ This case clearly recognized that the issuance of a lieu warrant and patent post-1921 could not convey any min-

¹⁵² One case was presented to the Louisiana Supreme Court (twice) whose facts are identical to those presented in the scenario presented herein. In *Albritton v. Grace*, 96 So.2d 565 (La. 1957), and *Albritton v. Moore*, 116 So.2d 502, (La. 1959), the Supreme Court was presented with a lieu warrant issued in 1919 and a request for a patent to be issued in the 1950s. The matter was remanded both times on technical problems, thus meaning that the Supreme Court never ruled on the merits.

¹⁵³ *Douglas, supra*, n.151 at 654.

¹⁵⁴ *Id.* at 663.

¹⁵⁵ *Lewis, supra*, n.144 at 433.

eral interests to the presenter of the warrant.¹⁵⁶ Further, the Court noted that,

[i]n our opinion, Article IV, Section 2 of the Constitution of 1921 is clearly applicable to this conveyance. The section is mandatory. It applies to all sales of land, whereby the state divests itself of title, with one exception: the redemption of property adjudicated to the state for taxes.¹⁵⁷

Most importantly however, the Court emphatically stated that,

[w]e conclude that the state patent is null, void, and of no effect as to mineral rights and that these rights are owned by the State of Louisiana.¹⁵⁸

Although the *Lewis* case strongly suggests that no mineral interests are conveyed with a patent issued post-1921, the Louisiana courts have not directly addressed the question of whether a lieu warrant issued before 1921 but not presented until after 1921 would result in the holder of the warrant owning the minerals when they cash it in. However, it is apparent that, considering the totality of what is relevant from the *Hyman's Heirs*, *Douglas*, and *Lewis* cases, it is unlikely that such landowners would have a valid claim to the minerals.

In the absence of a definitive answer on this issue from the jurisprudence, it also seems appropriate to analogize a lieu warrant to a contract for sale in Louisiana. In order for a sale to be perfected in Louisiana, La. C.C. Art. 2457 states that,

[w]hen the object of a sale is a thing that must be individualized from a mass of things of the same kind, ownership is transferred when the thing is thus individualized according to the intention of the parties.

Indeed, the jurisprudence related to La. C.C. Art. 2457 contemplates precisely the problem presented herein:

According to the Louisiana Civil Code, when the thing to be sold is part of a greater like mass and thus uncertain and unidentified, the first prerequisite is not satisfied, and, therefore, the *contract of sale* is not perfected. Instead, the contract is executory, or otherwise called a contract to sell.¹⁵⁹

Thus, the lieu warrant essentially represents a receipt for the selection of a certain class of land from all of the lands held by the State. The

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 434.

¹⁵⁸ *Id.* In such a situation, this State ownership of minerals does not prohibit the private party from owning the surface.

¹⁵⁹ *In re Evangeline Refining Co., Inc.*, 37 B.R. 450, 453 (Bktrcy. La. 1984); *see also*, *George D. Witt Shoe Co. v. J.A. Seegars & Co.*, 47 So. 444, 446 (1908).

warrant references something that “is part of a greater like mass” that is not actually individualized until the warrant is presented to the Land Office for the selection of the specifically described lands and the issuance of a patent thereon.

Another important matter related to inalienability dovetails from the discussion of the freeze statute, *supra*. This matter relates to what is to be done with the minerals attributable to lands reclaimed from coastal erosion.

Coastal land loss through erosion is nothing new to the residents of South Louisiana.¹⁶⁰ It is a harsh reality that our coastline is disappearing into the Gulf of Mexico at an alarming rate due to both natural and anthropogenic factors.¹⁶¹ In an effort to slow, or perhaps even stem, this process, the Legislature and the people of the State have, over time, added numerous laws to the books. Among those provisions is Section 4 to Article IX of the 1974 Louisiana Constitution. Portions of this Section establish the respective rights of the State and riparian owners with respect to minerals once the surface has become a navigable water body. Section 4 provides, as a default scenario, that when formerly submerged lands emerge, the State shall reserve the mineral rights under the reclaimed land. However, Section 4 also contemplates that this emergent land¹⁶² can, by contract between the State and the riparian owner, have a different mineral ownership scheme than the default. According to the procedures established by law, which must be in harmony with other constitutional and statutory provisions, the State may reassign certain mineral interests lying beneath eroded lands. Act 626 of the 2006 Regular Session of the Louisiana Legislature, discussed more fully below, is one of these laws that provides for the establishment of alternative (i.e., non-default, non-State) ownership of mineral rights following reclamation.

As a general rule, when land is expropriated by the State, the original landowner may retain a perpetual mineral servitude for so long as the property is in the possession of the State.¹⁶³ However, this general rule

¹⁶⁰ See generally, Seidemann, *supra*, n.78.

¹⁶¹ See generally, Ryan M. Seidemann and Catherine D. Susman, *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*, 17 J. ENVTL. L. & LIT. 441 (2002).

¹⁶² It should be noted that the status of land as being “emergent” determines the legal rights attached to that land. In other words, emergent land is singled out for special treatment by the law of Louisiana because of its classification as “emergent” and the public benefits that stem from land reclamation. Accordingly, when the land is no longer “emergent” (i.e., it once again becomes submerged beneath a navigable water body), it loses its “emergent” classification and the special treatment attached thereto.

¹⁶³ La. R.S. 31:149. It should be noted that this provision of the Mineral Code applies not only to State expropriation, but to property expropriated by any “expropriating authority.” See, La. Atty. Gen. Op. No. 07-0147. See also, La. Atty. Gen. Op. No. 08-0215,

does not apply to eroded lands. Once eroded and, if applicable, at the termination of mineral leases protected by the freeze statute, the mineral interests become one with the newly created water bottoms of navigable waterways, making all surface and subsurface mineral interests the property of the State in its sovereign capacity.¹⁶⁴ The point of this discussion is simple: the reservation of mineral rights by landowners provided for in the Mineral Code does not necessarily apply to situations of eroded lands.

Act 626 of the Louisiana Legislature's 2006 Regular Session amended and reenacted La. R.S. 41:1702(D)(2)(a). Its stated purposes included granting the Secretary of the Department of Natural Resources ("DNR") the authority to enter into agreements

concerning the acquisition of land by certain entities for coastal projects ... to provide for the adoption of rules and regulations [to facilitate these ends, and] to provide relative to agreements concerning ownership of minerals ...¹⁶⁵

Basically, Act 626 falls into line with the other laws of recent vintage aimed at slowing or stemming the land loss problems of coastal Louisiana. It attempts to achieve this goal by providing for expanded powers that the State can use to implement its reclamation plans. More specifically, though, Act 626 attempts to provide a mechanism to resolve ownership issues with respect to reclaimable property, with its key ingredient being the preservation of the State's right of access to such property to maintain its coastal protection and restoration projects.

Many of the mineral provisions of this Act and those contained in the already-existing La. R.S. 41:1702(D)(2)(a)(i) exist to ensure that mineral interests will not interfere with the primary purpose of reclaiming eroded lands to facilitate coastal restoration and protection, and encourages the cooperation of the private landowner – if needed or desired – in any such reclamation project. Act 626 does not, however, materially alter the existing law regarding the ownership of minerals on State water bottoms or eroded lands. Subject to that caveat, a review of the effects of that law are important. Before embarking on such a review, an analysis of the amended language of the law is necessary. Louisiana Revised Statute 41:1702(D)(2)(a)(i) states that:

To facilitate the development, design, and implementation of coastal conservation, restoration and protection plans and projects, including hurricane protection and flood control, pursuant to R.S. 49:214.1 *et seq.*, the secretary of the Department of Natural Resources may enter into agreements with owners of land contiguous to and abut-

note 10, for the possible exception for particular times in 1990 through 1991.

¹⁶⁴ La. Atty. Gen. Op. No. 81-274.

¹⁶⁵ Act 626 of 2006, preamble.

ting navigable water bottoms belonging to the state who have the right to reclaim or recover such land, including all oil and gas mineral rights, as provided in Subsection B of this Section, which agreements may establish in such owner the perpetual, transferrable ownership of all subsurface mineral rights to the then existing coast or shore line. *Such agreements may also provide for a limited or perpetual alienation or transfer, in whole or in part, to such owner of subsurface mineral rights owned by the state relating to the emergent lands that emerge from waterbottoms that are subject to such owner's right of reclamation in exchange for the owner's compromise of his ownership and reclamation rights within such area and for such time as the secretary deems appropriate and in further exchange for the owner's agreement to allow his existing property to be utilized in connection with the project to the extent deemed necessary by the secretary.*¹⁶⁶

Immediately upon reading La. R.S. 41:1702(D)(2)(a)(i), the question of “is there a constitutional prohibition against granting private landowners perpetual mineral interests to land that can erode and become State water bottoms by operation of law?” arises. What this question assumes is that Act 626 appears to provide for the creation of perpetual mineral servitudes, but what becomes of such servitudes when the land over which they are granted re-erodes into the Gulf of Mexico and once again becomes State water bottom?

The language of La. Const. Art. IX, Sec. 3, when combined with La. C.C. Art. 450 is clear: as land erodes into navigable waterways, it becomes the property of the State, along with its underlying minerals.¹⁶⁷ Neither Act 626 nor La. R.S. 41:1702(D)(2)(a)(i) conflict with this mandate. As to emergent lands, the law is now clear:

agreements [between the State and the riparian owner] *may* ... provide for a limited or perpetual alienation or transfer, in whole or in part, to such owner of subsurface mineral rights owned by the state ... that are subject to such owner's right of reclamation ...¹⁶⁸

In other words, the State has the option to transfer back to the riparian owner the mineral interests under emergent lands. In order for such a transfer to be constitutional under the mandates of La. Const. Art. IX, Sec. 3 and La. C.C. Art. 450, the term “perpetual” as used in Act 626 and La. R.S. 41:1702(D)(2)(a) must be interpreted as referring to the perpetual life of the emergent land.¹⁶⁹ If and when that emergent land again

¹⁶⁶ La. R.S. 41:1702(D)(2)(a)(i) (emphasis added).

¹⁶⁷ See, A.N. Yiannopoulos, *Property*, 2 LA. CIV. L. TREATISE § 65. All of this is subject to the reservations of the freeze statute.

¹⁶⁸ La. R.S. 41:1702(D)(2)(a)(i) (emphasis added).

¹⁶⁹ Note that this interpretation must be applied to all land covered within the scope of

erodes into a navigable waterway, the life of that land has expired and so too would any agreement for a perpetual interest in the underlying minerals.¹⁷⁰

This interpretation of Act 626 is based on two factors. First, the language of La. R.S. 41:1702(D)(2)(a)(i) specifically states that the agreement transferring the mineral interests of emergent lands from the State to the riparian owner is tied to the classification of that land as emergent. Thus, it is only logical to conclude that, once the land is no longer emergent (i.e., it has re-eroded into a navigable waterway) the authority of the State to transfer those rights evaporates. Second, and more importantly, it is apparent that La. R.S. 41:1702(D)(2)(a) was constructed to avoid the prohibition in La. Const. Art. VII, Sec. 14(A) against the donation of State assets. Specifically, the law states that the mineral rights *may* be granted back to the riparian owner

... in exchange for the owner's compromise of his ownership and reclamation rights within such area and for such time as the secretary deems appropriate and in further exchange for the owner's agreement to allow his existing property to be utilized in connection with the project to the extent deemed necessary by the secretary.¹⁷¹

In other words, pursuant to La. Const. Art. IX, Sec. 3, riparian owners have the right to reclaim eroded lands on their own. In exchange for allowing the State to exercise this private right and then to intrude on this private property for the purposes of coastal restoration and protection projects, the State will grant certain mineral interests to the riparian owner. In essence, what the law establishes is a process for the State to enter into cooperative endeavor agreements with the riparian owners under La. Const. Art. VII, Sec. 14(C). Such agreements allow the State to “donate” certain rights – in this case mineral rights – in exchange for something of value that furthers a public purpose – in this case the right to enter and use private land for coastal restoration and protection. This quid pro quo is absolutely necessary for the State’s grant of mineral rights to be constitutional. Accordingly, if and when the emergent land re-erodes, the quid pro quo is gone: the State can no longer access private property for coastal restoration and protection purposes, absent, of course, a later reclamation agreement with the private riparian landowner. When this re-erosion occurs, the constitutional basis, the quid pro quo, for the “donation” of the mineral rights ceases to exist and those rights revert to the

La. R.S. 41:1702(D)(2)(a). To do otherwise would lead to a donation of State assets in violation of La. Const. Art. VII, Sec. 14(A) once any land that such an agreement has been confected for once again becomes a navigable water bottom. In that situation, the Constitution must be followed and the water bottom falls to State ownership once again under La. Const. Art. IX, Sec. 3.

¹⁷⁰ Again, subject to the limitations provided for in the freeze statute.

¹⁷¹ La. R.S. 41:1702(D)(2)(a)(i).

State just as they did, by operation of law, when the land eroded in the first instance.

Thus, there is no constitutional prohibition against the granting of perpetual mineral rights to riparian owners for land that may re-erode, because the term perpetual in this instance refers to the life of the emergent land. Additionally, such agreements must be accomplished pursuant to the quid pro quo scheme envisioned by La. R.S. 41:1702(D)(2)(a)(i) and mandated by La. Const. Art. VII, Sec. 14(C).

Another, albeit tangential, issue should be considered along with the questions above: When does the riparian owner's right to the minerals under the once-eroded land attach?

It is a basic tenet of obligations that a conditional agreement cannot occur until the happening of the event (the "suspensive condition") upon which that agreement depends.¹⁷² Accordingly, though the State may begin to work on reclamation projects not long after the perfection of the Act 626 agreements with riparian owners, the condition upon which these agreements is based is the emergence of once-eroded land from navigable waterways. Thus, I believe that until the land emerges from the water, the riparian owner's rights in the underlying minerals have not vested.

Another issue that merits some attention that is not often covered in the literature is the issue of dredge spoil as a mineral. Much discussion exists in the literature regarding the general inalienability of the State's minerals but little, if any, concerns dredge spoil. The initial question is whether dredged material is a mineral at all and, if it is, whether the discard of such dredged material by entities such as the Corps of Engineers in its general work to maintain the navigability of the State's waterways is a violation of the Louisiana Constitution.

As to the ownership of dredged material, that matter was largely resolved by La. Atty. Gen. Op. No. 05-0222. That opinion stated that sand and gravel dredged from the State's water bottoms does fall into the category of "other mineral" under La. R.S. 30:209. As with any other mineral deriving from State lands – of which there is no question that the State has an interest – these "other minerals" that come from dredging activities must also be owned by the State.¹⁷³ Accordingly, it is axiomatic that sand and gravel dredged from State water bottoms does have intrinsic value and, due to the prohibitions against donations embodied in La.

¹⁷² See, La. C.C. Art. 1767 (referring to suspensive conditions).

¹⁷³ This proposition is also supported by La. R.S. 31:4, which applies the provisions of the Louisiana Mineral Code to "rights to explore for or mine or remove from land the soil itself, gravel, shells, subterranean water, or other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land" [emphasis added]. These solid minerals would not have been included in the coverage of the Mineral Code had the Legislature not intended for such to be considered minerals.

Const. Art. VII, Sec. 14(A), such materials cannot be given away without adequate compensation.¹⁷⁴

Based upon the State's ownership of such dredged materials, as was noted in La. Atty. Gen. Op. No. 05-0222, if the Corps,¹⁷⁵ or another federal agency, is not the party undertaking the dredging, and such dredging is not being undertaken for the purpose of facilitating navigation, the State has great latitude in the control of the disposition of the dredge material.

The question of whether dredging entities can discard the dredged material gets at the real question of whether the State can either charge a fee for such minerals or otherwise require that the material be used in a manner that benefits the State. The latter of these two possibilities is a practice known as beneficial use. Beneficial use is when dredged materials are taken from the State's navigable waterways, ports, and harbors, and used to help in the efforts to rebuild the State's vanishing coast. This practice has been a matter of much discussion in the scientific, environmental, and governmental communities for some years now.¹⁷⁶ Because it is clear that dredged material is a mineral and because it derived (generally) from State water bottoms, Louisiana can mandate that the Corps put the dredged material to a beneficial use through authority granted to the State by Congress in the Coastal Zone Management Act ("CZMA"). The CZMA¹⁷⁷ – a federal law that is locally administered by the Louisiana Department of Natural Resources¹⁷⁸ – provides clear authority for the State to make beneficial use a precondition to certain administrative actions.

The primary objective of the CZMA is to

¹⁷⁴ The proposition that dredged materials are the property of the State and have intrinsic value is also supported by *Ronald Adams Contractor, Inc. v. State ex rel. Dept. of Wildlife & Fisheries*, 2000-1490 (La.App. 1 Cir. 9/28/01), 807 So.2d 881. Indeed, the Department of Wildlife & Fisheries is statutorily tasked with administering the sale of dredged material. La. R.S. 56:2011, *et seq.*

¹⁷⁵ "The United States Army Corps of Engineers (Corps), the agency primarily responsible for maintaining federally designated navigation channels..." Gregory A. Bibler, *Contaminated Sediments: Are There Alternatives to Superfund?*, 18 NAT. RES. & ENV'T. 56 (Fall 2003); *see also*, Robert P. Fowler, Jeffrey H. Wood, Thomas L. Casey, III, *Maintaining the Navigability of America's Inland Waterways*, 21 NAT. RES. & ENV'T 16 (Fall 2006).

¹⁷⁶ Lisa C. Schiavinato and James G. Wilkins, BENEFICIAL USE OF DREDGED MATERIAL: TO WHAT EXTENT DO STATES HAVE A VOICE? GACRDP Technical Report Series (Louisiana Sea Grant Legal Program/Louisiana Governor's Applied Coastal Research and Development Program 2004).

¹⁷⁷ 16 U.S.C. 1451, *et seq.*

¹⁷⁸ La. R.S. 49:214.21, *et seq.*

preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations.¹⁷⁹

With the CZMA, Congress recognized that there was a

national interest in the effective management, beneficial use, protection, and development of the coastal zone¹⁸⁰

due to the great demands on our coasts for food, energy, defense, recreation, transportation, and other industrial activities. In an effort to facilitate coastal preservation, Congress concluded that the most effective management of the coastal zone could be achieved by cooperation among federal, state, and local authorities. Therefore, one of the main thrusts of the CZMA is to coordinate the efforts of individual states and local communities with those of the federal government.¹⁸¹

In furtherance of achieving this goal, any coastal state is eligible to submit a coastal management plan ("CMP") for federal approval. To be federally approved the CMP must be a comprehensive statement that lays out the objectives, policies, and standards for the use of private and public lands in the coastal zone and complies with all CZMA requirements.¹⁸² Once the CMP is approved, the State may receive federal assistance and assume the authorities granted to the states under the CZMA.¹⁸³ In 1980, Louisiana's CMP, called the Louisiana Coastal Resources Program ("LCRP"), was federally approved.¹⁸⁴

One mechanism for cooperation between state and federal governments is the federal consistency provision of the CZMA.¹⁸⁵ The CZMA allows states with federally approved CMPs to require that federal agency activities in the coastal zone be consistent to the maximum extent practicable with the state CMP.¹⁸⁶ Federal regulations define "maximum extent practicable" as

fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.¹⁸⁷

¹⁷⁹ 16 U.S.C. 1452(1).

¹⁸⁰ 16 U.S.C. 1451 (a).

¹⁸¹ 16 U.S.C. 1451(i)-(m). *See also*, Carolyn R. Langford, Marcelle S. Morel, James G. Wilkins, Ryan M. Seidemann, *The Mouse that Roared: Can Louisiana's Coastal Zone Management Consistency Authority Play a Role in Coastal Restoration and Protection?*, 20 TUL. ENVTL. L. J. 97 (2006).

¹⁸² 16 U.S.C. 1455.

¹⁸³ 16 U.S.C. 1455(b) & 1456.

¹⁸⁴ Langford *et al.*, *supra*, n.181 at 116.

¹⁸⁵ 16 U.S.C. 1456.

¹⁸⁶ 16 U.S.C. 1456(c)(1)(A) & (c)(3).

¹⁸⁷ 15 C.F.R. 930.32(a)(1).

It is within the consistency provision of the CZMA that the State of Louisiana, via DNR (the administrator of the LCRP) finds its voice with respect to telling the federal government that it must beneficially use dredged material.¹⁸⁸ The State, in order to grant consistency on federal projects in the Louisiana coastal zone, should require the beneficial use of dredged materials to restore Louisiana's ailing coast. Indeed, there are at least two provisions of the LCRP that would render a proposed federal action inconsistent with Louisiana's CMP if dredged material was not beneficially used.¹⁸⁹

Dredge material from Louisiana water bodies is currently disposed of by entities such as the Corps by either returning the material to the water column downstream of the dredging operations or by shipping the material to Ocean Dredged Material Disposal Sites ("ODMDS") in the deep waters of the Gulf of Mexico.¹⁹⁰ These are deep water areas designated by the Environmental Protection Agency ("EPA") as approved areas for disposing of dredged materials. Aside from the concerns of the scientific community over the disturbance of sensitive deep-water habitats,¹⁹¹ the deep-water disposal of dredged material is a waste of a valuable resource that could be used to rebuild Louisiana's coast.

It appears that the federal government is coming to a realization that it is wasting this potentially vital resource. In a recent joint guidance report by the EPA and the Corps, those agencies stated that,

[m]uch of the several hundred million cubic yards of sediment dredged each year from U.S. ports, harbors, and waterways could be

¹⁸⁸ It should be noted that, because dredged material is considered a mineral, and thus a thing of value, any entity (including private entities) that removes the material from a State water bottom must compensate the State for the value of the material to avoid running afoul of La. Const. Art. VII, Sec. 14(A). The federal government presents a unique situation in this regard, both due to its charge (via the Corps) to maintain the navigability of the waters of the United States and through the benefit that the State gains through such maintenance. However, as is discussed herein, these factors do not absolve the federal government of an obligation to somehow compensate the State for the loss of its dredged material.

¹⁸⁹ LAC 43:1.707(B) states that,

[s]poil *shall be used* beneficially to the maximum extent practicable to improve productivity or create new habitat, reduce or compensate for environmental damage done by dredging activities, or prevent environmental damage.

(emphasis added). Further, LAC 43:1.707(G) states that,

[t]he alienation of state-owned property shall not result from spoil deposition activities without the consent of the Department of Natural Resources.

The latter consistency requirement appears to restrict the wholesale disposal of dredge material that derives from State property.

¹⁹⁰ Schiavinato & Wilkins, *supra*, n.176.

¹⁹¹ See e.g., Tony Koslow, *THE SILENT DEEP: THE DISCOVERY, ECOLOGY, AND CONSERVATION OF THE DEEP SEA* (Univ. of Chicago 2007).

used in a beneficial manner, such as for habitat restoration and creation, beach nourishment, aquaculture, forestry, agriculture, mine reclamation, and industrial and commercial development. Yet most of this dredged material is instead disposed of in open water, confined disposal facilities, and upland disposal facilities.¹⁹²

Although the agencies are quick to caution that their recent musings on the possible uses of dredged material are “intended solely as guidance”¹⁹³ and are thus not enforceable federal policies, their conclusions support the enforcement of Louisiana’s own coastal use guidelines that require, to the maximum extent practicable, the beneficial use of dredged materials in the coastal zone. Indeed, though the report is “guidance,” the Corps has an existing standard that supports the beneficial use of dredged material.¹⁹⁴

The major obstacle to the beneficial use of dredged material appears to be a matter of cost.¹⁹⁵ However, the excuse that the cost of an operation is too high and thus need not be complied with in order for a project to be considered consistent with a state’s coastal program is unacceptable. The CZMA clearly demonstrates that lack of funding is not an excuse for noncompliance with a federally-approved coastal management plan.¹⁹⁶ In addition, 15 C.F.R. 930.32(a)(2) clearly states that Congress’

¹⁹² U.S. EPA and U.S. Army Corps of Engineers, THE ROLE OF THE FEDERAL STANDARD IN THE BENEFICIAL USE OF DREDGED MATERIAL FROM U.S. ARMY CORPS OF ENGINEERS NEW AND MAINTENANCE NAVIGATION PROJECTS: BENEFICIAL USES OF DREDGED MATERIALS, EPA842-B-07-002, ii (EPA/Corps 2007).

¹⁹³ *Id.*

¹⁹⁴ 33 C.F.R. 335.7; 53 FR 14902. This standard requires that the Corps identify the least costly dredged material disposal or placement alternative ... that is consistent with sound engineering practices and meets all federal environmental requirements ...
EPA/Corps, *supra*, n.192 at 2.

¹⁹⁵ *Id.* at ii.

¹⁹⁶ 15 C.F.R. 930.32(a)(3) states that,

Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program. The only circumstance where a Federal agency may rely on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption described in section 307(c)(1)(B) of the Act (16 USC 1456(c)(1)(B)). In cases where the cost of being consistent with the enforceable policies of a management program was not included in the Federal agency’s budget and planning processes, the Federal agency should determine the amount of funds needed and seek additional federal funds. Federal agencies should include the cost of being fully consistent with the enforceable policies of management programs in their budget and planning processes, to the same extent that a Federal agency would plan for the cost of complying with other federal requirements.

intent with the law that supports these regulations was to cause federal agencies to adhere to the consistency requirements of the states. Under this charge, the federal government requires its agencies to either consider the increased expenses of requirements such as beneficial use when requesting funding for projects or to adjust their funding requests once they become aware of the increased costs of consistency.

To the extent that beneficial use of dredged materials exceeds the “least costly” standard, the excess costs may be covered either by federal/non-federal cost sharing or may be solely borne by a non-federal entity.¹⁹⁷ The joint EPA/Corps report notes that the costs of beneficial use projects that “do not contribute to USACE navigation, ecosystem restoration, or flood and storm damage reduction missions” are to be borne solely by the non-federal project sponsor.¹⁹⁸ However, as has been documented countless times in the academic literature, coastal restoration and protection (the probable use of Louisiana’s dredged materials) is essential to support both ecosystem restoration¹⁹⁹ and flood and storm damage reduction.²⁰⁰ Thus, should the federal government enter into beneficial use projects with the State to restore Louisiana’s coast, the excess costs of such projects cannot, under federal law, be solely borne by the State of Louisiana. An argument can be made that Louisiana need not pay any of the costs of beneficial use, as the State supplies its own resources (the dredge material) to the Corps, a reality that should substantially minimize the State’s costs in these essential efforts.

Thus, although Louisiana cannot force the federal government to beneficially use dredged material through legal concepts under Louisiana’s property and mineral law regimes,²⁰¹ federal projects that implicate Louisiana’s coastal zone that do not contain provisions to beneficially use dredged materials to offset coastal land loss are – in many cases – not consistent with the State’s approved CMP. In such instances, the State can use its authority under the CZMA to require that the federal government beneficially use dredge material for coastal restoration purposes.

See also, Schiavinato & Wilkins, *supra*, n.176 at 20.

¹⁹⁷ EPA/Corps, *supra*, n.192 at 4.

¹⁹⁸ *Id.*

¹⁹⁹ *See generally*, Seidemann & Susman, *supra*, n.161.

²⁰⁰ *See generally*, Seidemann, *supra*, n.78.

²⁰¹ In other words, although dredged material is a mineral and does have value, the State cannot force its use in the form of beneficial use. However, as noted above, this does not relieve the federal government of the duty to compensate the State for the material. One proposed means of compensation is for the State to enter into cooperative endeavor agreements with the Corps through which the State will not charge for the material as long as the State’s share of beneficial use costs is exchanged for this agreement not to charge. Alternatively, the State should be charging for the dredged material.

VII. Conclusion

It is difficult to sum up the disparate matters discussed herein. Thus, suffice it to say that the State is bound by many arcane and complex legal theories with respect to mineral matters. These matters, while consuming the bulk of the time of governmental mineral lawyers also have substantial implications for private counsel.

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