

Coastal Remediation in Louisiana Through “Legacy” Lawsuits—Thwarted by a Confusion Between Real and Personal Rights?

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I. INTRODUCTION

Coastal erosion and land loss are near the top of concerns facing the citizens of Louisiana. The pace of the loss is staggering: it is estimated Louisiana loses close to a football field of land per hour.¹ In light of this danger, it is necessary to rehabilitate the lost land because swamps and barrier islands protect Louisianans from the threat of a high storm surge

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1. Nathaniel Rich, *The Most Ambitious Environmental Lawsuit Ever*, N.Y. TIMES MAG. (Oct. 3, 2014), http://www.nytimes.com/interactive/2014/10/02/magazine/mag-oil-lawsuit.html?_r=0. The U.S. Geological Survey believes Louisiana loses over sixteen square miles of land per year. STATE OF LA., COASTAL PROT. & RESTORATION AUTH., LOUISIANA’S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 29 (2012).

following a hurricane or tropical storm.² Preserving the coast has value beyond protecting metropolitan areas. The marsh is also the habitat of many animals, it is the home of cherished communities, and it contains the infrastructure for Louisiana's robust oil and gas economy.³ The cause of the land loss is multi-faceted: levee systems channel freshwater and sediment away from the marsh and deposit it in the Gulf of Mexico; sea level rise, hurricanes, pipelines, dredging for oil, and gas exploration all play a part.⁴ One of the ways property owners can seek to have their land restored is through legacy litigation.⁵ These suits seek to hold the oil and gas companies responsible for damages they have caused to the environment; the suits often start decades after the initial exploration and contamination.⁶

This Comment is limited to legacy suits arising from mineral leases.⁷ This Comment seeks to propose how legacy litigation can help fund Louisiana's plan to protect and restore its coast. First, it will show that a workable procedure already exists to ensure that damages from "legacy" suits will be used to remediate contaminated land. This procedure can be tweaked to make it apply in the context of erosion. Second, it will argue that the full power of legacy litigation is blocked by the Louisiana Supreme Court's extension of the subsequent purchaser rule to land with nonapparent damage at the time of purchase, and that appellate courts have confused real rights and obligations with personal rights and obligations with respect to mineral leases and apply the subsequent purchaser rule to this context as well.

A. *Background: Policy Behind Coastal Restoration*

After Hurricanes Katrina and Rita, the Louisiana Legislature passed Act 8 of the First Extraordinary Session of 2005 to create the Coastal Protection and Restoration Authority.⁸ The unprecedented damage from the storms prompted the Legislature to think differently about land loss

2. STATE OF LA., COASTAL PROT. & RESTORATION AUTH., *supra* note 1, at 16.

3. *Id.*

4. *Id.* at 18.

5. "Legacy litigation" is a term used to describe a class of lawsuits for damages arising from past oil and gas exploration; the contamination from the drilling leaves "an unwanted 'legacy' in the form of actual or alleged contamination." Loulan Pitre, Jr., "Legacy Litigation" and Act 312 of 2006, TUL. ENVTL. L.J. 347, 348 (2007).

6. See Loulan J. Pitre, Jr. & D'Ann R. Penner, *Legacy Litigation—What Is Reasonable Behavior in the Oilfield?*, 28 TUL. ENVTL. L.J. 333, 333-34 (2015).

7. This Comment will not discuss claims arising from surface leases or mineral servitudes.

8. STATE OF LA., COASTAL PROT. & RESTORATION AUTH., *supra* note 1, at 24.

and how to prevent it.⁹ The Act tasked the Coastal Protection and Restoration Authority to create a plan for maintaining a safe and sustainable coast.¹⁰ The Authority's mandate was not limited to addressing protection of wildlife habitats.¹¹ It was also tasked with protecting the coast's robust economy and its status as home to over two million Louisianans.¹²

Part of the Coastal Protection and Restoration Authority's budget is allocated to study how restoration projects would affect coastal ecosystems.¹³ These ecosystems need to be preserved, in part because they create well-known navigation routes and house Louisiana's energy infrastructure.¹⁴ Navigation is not the only concern. The plan included models of ways to promote the habitats of various animals, including: alligators, shrimp, waterfowl, and crawfish.¹⁵ The 2012 plan also provided for the potential needs of nature-based tourism: it measured the access individuals have to animals and their habitats.¹⁶

The most ambitious part of the plan is slowing land loss. Protecting the coast is an essential aim, not just for Louisiana but the country as a whole, because Louisiana's coast provides "protection for infrastructure that supplies 90% of the nation's outer continental oil and gas, 20% of the nation's annual waterborne commerce, [and] 26% (by weight) of the continental U.S. commercial fisheries landings."¹⁷ Since its inception in 2005, the Coastal Protection and Restoration Authority has built over thirty miles of barrier islands and over one hundred and fifty miles of levees, benefitting thousands of acres of land and its coastal habitat.¹⁸

The Authority argues that inaction would lead to dire results. Absent aggressive action, the rate of land loss will accelerate over the next half century. Models show Louisiana could stand to lose anywhere from fifteen to fifty-one square miles of land each year.¹⁹ If erosion

9. *Id.*

10. *Id.* This is consistent with the public policy stated in the Louisiana Constitution. The Constitution states that "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." LA. CONST. art. 9 § 1.

11. *See* STATE OF LA., COASTAL PROT. & RESTORATION AUTH., *supra* note 1, at 20.

12. *Id.*

13. *See id.* at 58.

14. *Id.* at 16.

15. *See id.* at 59-60.

16. *Id.* at 60.

17. *Id.* at 20.

18. *Id.* at 25.

19. *Id.* at 29. The loss could total to 1750 square miles in fifty years. *Id.* But, factors contributing to land loss are variable and cannot be easily predicted. *Id.* at 82.

occurs at this rate, cities like Houma, Morgan City and Lafitte will be at much higher risks of flooding during a major storm like a hurricane.²⁰ It would also be harmful to a variety of animal species. With the loss of marshland, animals that depend on freshwater, like alligator and waterfowl, will suffer a major decrease in population.²¹

Because the project has such grand aspirations, funding was always going to be a major hurdle. The 2012 plan called for a budget of \$50 billion to build a coastal program over a fifty-year period.²² The plan calls for spending \$26 billion during the first twenty years of the project.²³ The next twenty years requires a budget of \$15 billion and the final ten years requires \$9 billion.²⁴ The state, however, only projects \$729 million in annual funding through 2018.²⁵ This is well short of what is needed to carry out the plan, and this analysis does not factor in inflation. A recent study by the Tulane Institute on Water Resources Law and Policy found that the necessary budget for the master plan would be closer to \$92 billion.²⁶ The report finds that the Coastal Protection and Restoration Authority has secured about \$20 billion in funding for the fifty-year period, leaving the project underfunded by about \$71 billion.²⁷ All of the possible sources of funding are through the state or federal government, with the exception of the BP Deepwater Horizon settlement.²⁸ Louisiana will receive a one-time payment of about \$6.8 billion, but the settlement obviously does not address the total magnitude of the shortfall.²⁹

20. *Id.* at 87.

21. *Id.* at 88.

22. *Id.* at 36. Funding for this project will almost certainly be an issue. *The Times-Picayune* has reported that the state has fallen short of budgeted goals each year since the plan was adopted in 2007. Mark Schleifstein, *Louisiana's 50-Year Coastal Master Plan Seen as \$71 Billion Short*, TIMES-PICAYUNE (Nov. 6, 2015), http://www.nola.com/environment/index.ssf/2015/11/louisianas_50-year_coastal_mas.html#incart_m-rpt-2. The Coastal Protection and Restoration Authority listed a variety of potential sources for funds. Sources include: the Gulf of Mexico Energy Security Act, Energy and Water Act, Coastal Wetlands Planning Protection and Restoration Act, Deepwater Horizon Natural Resources Damage Assessment, Deepwater Horizon Clean Water Act Penalties, Carbon and Nutrient Credits, Future State Funding, and Louisiana's Coastal Protection and Restoration Fund. STATE OF LA., COASTAL PROT. & RESTORATION AUTH., *supra* note 1, at 93.

23. Jacob Batte, *La. Coastal Plan \$71 Billion Short, Report Says*, HOUMA TODAY (Nov. 7, 2015), <http://www.houmatoday.com/article/20151107/ARTICLES/151109668?p=1&tc=pg>.

24. MARK DAVIS, HARRY VORHOFF & DEAN BOYER, TULANE INST. ON WATER RES. & POLICY, FINANCING THE FUTURE: TURNING COASTAL RESTORATION AND PROTECTION PLANS INTO REALITIES: HOW MUCH IS CURRENTLY FUNDED? 4 (2015).

25. Batte, *supra* note 23.

26. DAVIS, VORHOFF & BOYER, *supra* note 24, at 19.

27. *Id.*

28. *See* STATE OF LA., COASTAL PROT. & RESTORATION AUTH., *supra* note 1, at 95.

29. DAVIS, VORHOFF & BOYER, *supra* note 24, at 1.

II. HOW TO INCREASE FUNDING THROUGH THE COURTS: THE PROCEDURE IS ALREADY IN PLACE

Before 2003, there was no requirement that damages from a “legacy” suit be used to remediate contaminated land.³⁰ In response, the Louisiana Legislature passed a series of laws that required awards in these suits be used to clean the contamination and remediate land loss arising from past oil and gas exploration.³¹

These acts created a legal framework for the cleanup of contaminated land through the courts. In 2006, the Louisiana Legislature passed Act 312, which it requires that damages from oil and gas operations be used to remediate the land.³² Act 312 was drafted in part as a response to *Corbello v. Iowa Production*.³³ In *Corbello*, landowners sued Shell Oil Company for unauthorized disposal of saltwater on their property in Calcasieu Parish under an expired surface lease.³⁴ Among other points, the Louisiana Supreme Court ruled that the lease contract is the law between the parties, and the obligation “to reasonably restore property need not be tethered to the market value of the property,” in other words allowing damage for remediation of damage that exceed the value of the property itself.³⁵ In affirming the substantial award of damages, the court reviewed the Louisiana statutory scheme surrounding a landowner’s right to seek damages from oil companies for land contamination to determine whether the landowner would be required to use the award to fix the property as opposed to simply pocketing it.³⁶ The court discerned “no indication as to whether the legislature contemplated the fact that private landowners may or may not use the money from the judgment to restore land, but it is clear that it did not implement a

30. See *infra* notes 34-37 and accompanying text.

31. *Id.* As discussed below, Act 312 as currently enacted does not apply to awards based on land loss. This Comment suggest that this law should be amended.

32. 2006 La. Acts 1472 (codified as amended at LA. STAT. ANN. § 30:29 (2016)). Damages under Act 312 are not capped at the amount necessary to implement a feasible plan. See *State v. La. Land & Exploration Co.*, 12-0884, pp. 15-16 (La. 1/30/13); 110 So.3d 1038, 1049. The Louisiana State Supreme Court found that “[t]he procedure under the Act does not prohibit the award of remediation damages for more than the amount necessary to fund the statutorily mandated feasible plan, nor does the procedure described in the Act intrude into the manner in which remediation damages are determined.” *Id.*

33. Kaki J. Johnson, Comment, *The Migration from the Rig to the Courthouse: Oil and Gas Legacy Litigation in Louisiana*, 60 LOY. L. REV. 647, 658-59 (2014); see *Corbello v. Iowa Prod.*, 02-0826, pp.16-17 (La. 2/25/03); 850 So. 2d 686, 699.

34. *Corbello*, 02-0826 at p. 1; 850 So. 2d at 690-91.

35. *Id.* at 6; 850 So. 2d at 693. In this case, the damages for breach of contract were 300 times greater than the value of the land. *Id.* at 4; 850 So. 2d at 692.

36. *Id.* at 16-17; 850 So. 2d at 699.

procedure to ensure that landowners will in fact use the money to clean the property.”³⁷

The court’s decision in *Corbello* invited the legislature to change the law.³⁸ Among the many changes Act 312 made, it required that remediation be performed according to a feasible plan.³⁹ Act 312 requires that when a party is found liable for environmental damage or admits guilt to environmental damage, it must submit a plan for remediation.⁴⁰ The Department of Natural Resources shall review the plan and open it to public comment.⁴¹ A public hearing will be held within sixty days of the last plan or comment submitted to the department, and the department will issue a written statement describing the plan that it approves.⁴²

Act 312 was billed as a compromise that would speed up legacy litigation.⁴³ Supporters believed the procedure contemplated in the bill would limit lengthy and expensive litigation resulting in quicker

37. *Id.* The decision in *Corbello* was roundly criticized. It created “a perception that contaminated property was the equivalent of a winning lottery ticket for the landowner. The landowner could sue for, and potentially collect, damages greatly in excess of the uncontaminated value of the property and then have no legal obligation to spend that money to remediate the property.” Pitre, *supra* note 6, at 348; *see also* Johnson, *supra* note 33, at 662-68 (explaining bills passed in response to *Corbello*).

38. Pitre, *supra* note 6, at 348 (citing *Corbello*, 02-8026 at pp. 20-23; 850 So. 2d at 699-701).

39. *See* LA. STAT. ANN. § 30:29 C(2)(a) (2016); *see also* Johnson, *supra* note 33, at 659-61. According to the statute, “‘Feasible Plan’ means the most reasonable plan which addresses environmental damage in conformity with the requirements of Article IX, Section 1 of the Constitution of Louisiana to protect the environment, public health, safety and welfare.” LA. STAT. ANN. § 30:29 I(4) (2016).

40. LA. STAT. ANN. § 30:29 (C)(1) (2016).

41. *Id.*

42. § 30:29 (C)(2)(a).

43. Mark Ballard, *House OKs Legacy Lawsuit Legislation*, ADVOCATE (May 15, 2014), <http://theadvocate.com/home/9183574-125/house-oks-legacy-lawsuit-legislation>. Some opponents to legacy lawsuits believe the litigious nature in Louisiana has led to a decline in oil and gas revenue in the state. Johnson, *supra* note 33, at 671-74. These opponents argue that the national rig count, excluding Louisiana, has increased by over 150%, while the number of rigs in Louisiana has decreased by around 30% in the same time period. *Id.* at 671-72. It is unlikely that legacy suits alone are responsible for the decline in drilling activity. In a Louisiana Oil and Gas Association suit filed to thwart a wetland damage suit filed by the Southeast Louisiana Flood Protection Authority-East against ninety-seven oil, gas, and pipeline companies, Gifford Briggs, the President of the Louisiana Oil and Gas Association, said in a deposition that he did “[not] know” of any oil and gas companies that left the state because of the threat of lawsuits. Mark Schleifstein, *Judge Orders Oil and Gas Association President To Appear in Court Tuesday or Face Jail*, TIMES-PICAYUNE (Feb. 25, 2014), http://www.nola.com/environment/index.ssf/2014/02/state_judge_throws_out_louisia.html. This admission suggests that factors other than legacy suits contribute to the decline of oil and gas revenue in Louisiana.

environmental cleanup.⁴⁴ Critics noted that big oil heavily influenced the legislature, and that the bill increased the burden of proof on plaintiffs.⁴⁵

Act 312 is not a perfect piece of legislation. And Act 312 in its current form is limited to creating a feasible plan to clean up contaminated land.⁴⁶ It does not apply to remediating land lost through coastal erosion.⁴⁷ But even as enacted, it has applicability to the battle against erosion. The dredging of canals and drilling activities raise the saltwater content in the marsh and cause the marsh to weaken.⁴⁸ With a feasible plan that removes saltwater contamination from the marsh, affected marshland strengthens and the rate of erosion is reduced. It would be a relatively simple matter to amend this law to make it apply to awards in the coastal erosion context.

The potential of the simplified Act 312 procedure has not resulted in significant improvement of the contamination statewide at this point. There is still significant backlog of legacy suits in Louisiana courts. As of 2014, there were about 360 pending suits, 137 relating to sites that had been declared contaminated by the state; most shockingly, only twelve of those sites have been cleaned to the standard required by the state.⁴⁹ The blame for the lack of efficiency of the lawsuits as a force to achieve remediation does not rest solely with the legislature or the attorneys. A significant percentage of legacy damages are on properties where the owner purchased damaged land without the knowledge that the land was contaminated by now-defunct oil and gas activity. Under current law, these owners run a very substantial risk of having their claims dismissed

44. Schleifstein, *supra* note 43.

45. David Hammer & Mike Perlstein, *Tainted Legacy: Legislature's Fixes Create Obstacles to Oil and Gas Cleanup*, WWL-TV (Dec. 14, 2014), <http://www.wwtv.com/story/news/2014/12/10/tainted-legacy-legislatures-fixes-create-obstacles-to-oil-and-gas-cleanup/17671639/>.

46. See LA. STAT. ANN. § 30:29 I (1)-(3) (2006).

47. See *id.* In 2014, the State Legislature passed a bill that required state or local governmental entities filing claims for contamination remediation to use the damages “for integrated coastal protection, including coastal restoration, hurricane protection, and improving the resiliency of the coastal area.” Act of June 2, 2014, no. 544, 2014 La. Acts 544 (codified as amended at LA. STAT. ANN. § 49:214.36 (O)). Unlike Act 312, the damages can be used to remediate lost coastal land. This act has been subjected to a constitutional challenge. On October 31, 2014, Judge Clark of the 19th Judicial District Court in Baton Rouge declared the act unconstitutional. Toni Ellington, *Act 544 Ruled Unconstitutional by Louisiana District Court*, REMEDIATION LAW (Nov. 6, 2014), http://remediationlaw.blogspot.com/2014/11/act-544-ruled-unconstitutional-by_6.html.

48. STATE OF LA., COASTAL PROT. & RESTORATION AUTH., *supra* note 1, at 18.

49. Mike Perlstein & David Hammer, *Plenty of Legacy Suits Come From ‘Inside,’* ADVERTISER (Jul. 16, 2014), <http://www.theadvertiser.com/story/news/local/louisiana/2014/07/11/plenty-legacy-suits-come-inside/12557019/>.

under the subsequent purchaser rule if they choose to sue.⁵⁰ As will be discussed in detail below, Louisiana courts have generally misapplied the subsequent purchaser rule—sapping Act 312’s effectiveness as an alternative means of remediating Louisiana’s economically, culturally, and ecologically valuable coast.

III. THE PROCEDURE FOR REMEDIATION OF CONTAMINATION THROUGH THE COURTS IS LARGELY BLOCKED BY THE SUBSEQUENT PURCHASER RULE

A. *Seeds of Change*—Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.

The subsequent purchaser rule is a jurisprudential rule which holds that an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.⁵¹

This jurisprudential rule has been used by Louisiana Courts since the mid-nineteenth century.⁵² Historically, the rule was rooted in the assumption that overt damage to property was reflected in a reduction in the purchase price.⁵³ The rule’s goal was to prevent the purchaser from obtaining a windfall by both receiving the benefit of a reduced purchase price and receiving a recovery in a suit for damages.⁵⁴

The Louisiana Supreme Court, in *Eagle Pipe v. Amerada Hess*, found that the subsequent purchaser rule extends to property with non-apparent defects.⁵⁵ It reasoned that the rationale behind the rule exists whether damage is apparent or not.⁵⁶ The court explained that this is because the damage disturbs the seller’s ability to dispose of the property in either case.⁵⁷ A seller of property with apparent damage must sell his property at a diminished value; a seller of property with non-apparent damage may face a suit for redhibition when the owner discovers the damage.⁵⁸

50. See generally *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267, 10-2272, 10-2275, 10-2279, 10-2289 (La. 10/25/11); 79 So. 3d 246.

51. *Id.* at p. 8; 79 So. 3d at 256-57.

52. See *infra* notes 64-67 and accompanying text.

53. See *infra* note 61 and accompanying text.

54. See *infra* notes 63-64 and accompanying text.

55. *Eagle Pipe*, 10-2267, 10-2272, 10-2275, 10-2279, 10-2289 at p. 37; 79 So. 3d at 275.

56. *Id.*

57. *Id.*

58. *Id.* at pp. 37-38; 79 So. 3d at 275 (citing LA. CIV. CODE ANN. art. 2531 (2015)). Article 2531 requires that a seller of property with a non-apparent defect is “bound to repair,

It is important to note that the holding in *Eagle Pipe* was limited to surface leases.⁵⁹ A lease as defined by the Civil Code is a personal obligation.⁶⁰ A lease does not give the lessee or the lessor any real rights, which bestow direct authority over the thing and are held against the world.⁶¹ A lease merely allows the lessee to demand performance from the landlord and his universal successors.⁶² The court did not “express [an] opinion as to the applicability of [the] holding to fact situations involving mineral leases or obligations arising out of the Mineral Code.”⁶³

B. *How Eagle Pipe Changed the Subsequent Purchaser Rule*

Historically, the subsequent purchaser rule was a rule grounded in common sense and applied to situations where the damage to property was overt.⁶⁴ The idea behind the rule was that “a buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to the sales price.”⁶⁵ The majority in *Eagle Pipe* suggested that its decision was not necessarily an ambitious extension of the rule, because it declined to decide “[w]hether this should be called an extension of the subsequent purchaser rule or simply the way in which the fundamental principles of property law operate.”⁶⁶

There is little question *Eagle Pipe* extended the subsequent purchaser rule to circumstances significantly different than originally

remedy, or correct the defect. If he is unable or fails so to do, he is then bound to return the price to the buyer with interest from the time it was paid.” LA. CIV. CODE ANN. art. 2531 (2015). On its face, it seems a nonapparent defect restricts the seller’s rights of *abusus*. However, it is not much of a restriction at all, because the prescriptive period on a claim for redhibition ends one year from the date of delivery of the property to the purchaser. art. 2534 (2) (2015). In many instances, the purchaser does not discover contamination until years later. *See Eagle Pipe*, 10-2267, 10-2272, 10-2275, 10-2279, 10-2289 at p. 3; 79 So. 3d at 253 (noting that the purchaser acquired the property two decades earlier); *Boone v. Conoco Phillips Co.*, 13-1196, pp. 1-2 (La. App. 3 Cir. 5/7/14); 139 So. 3d 1047, 1050 (noting that the purchaser bought land in 2005 and filed suit in 2010); *Duck v. Hunt Oil Co.*, 13-628, p. 1 (La. App. 3 Cir. 3/5/14); 134 So. 3d 114, 116, *cert. denied*, 2014-C-0703 (La. 6/13/14); 140 So. 3d 1189 (noting that the purchaser acquired the property in 2004 and discovered the contamination in 2010); *Lejeune Bros., Inc. v. Goodrich Petroleum Co.*, 06-1557, p. 1 (La. App. 3 Cir. 11/28/07); 981 So. 2d 23, 25 (noting that the plaintiffs purchased property in September of 2000 and filed suit in August of 2003); *Broussard v. Dow Chem. Co.*, 550 Fed. App’x. 241, 243 (5th Cir. 2013) (noting that the plaintiffs purchased land in 2009 and filed suit in 2011).

59. *See Eagle Pipe*, 10-2267, 10-2272, 10-2275, 10-2279, 10-2289 at p. 48, n.80; 79 So. 3d at 281, n.80.

60. LA. CIV. CODE ANN. art. 2668 cmt. b (2015).

61. *See id.*

62. *Id.*

63. *Eagle Pipe*, 79 So.3d at 281, n.80.

64. *Id.* at 286 (Weimer, J., dissenting).

65. *Prados v. S. Cent. Bell Tel. Co.*, 329 So. 2d 744, 751 (La. 1975).

66. *Eagle Pipe*, 79 So. 3d at 275.

contemplated. The subsequent purchaser rule—as it was first defined in *Clark v. J.L. Warner & Co.*—was designed to prevent a plaintiff from recovering for obvious damage to the property because it “caused the moderate price given” and should not “be a source of profit for the purchaser, who had a perfect knowledge of [its] existence when he purchased.”⁶⁷

Whatever one might make of the extension of the rule to surface leases, this Comment argues that the rule should not preclude recovery for claims based on real rights. When real rights are not involved, a claim for damages is separate from the property, and the original owner is a creditor for the damage done.⁶⁸ But this is not true if the right effectively belongs to the property itself. In other words, a subsequent purchaser should be able to enforce obligations that relate to real rights if “[t]he original owner acquired the right as a servitude for the benefit of the estate and not his own benefit.”⁶⁹

C. *Mineral Leases Are Real Rights, but What Real Obligations Do They Create?*

A real right is a right in a thing that can be held against the world.⁷⁰ A real right establishes a duty called a real obligation.⁷¹ In situations like remediation of the land under a mineral lease, whether the obligation is real or merely a personal obligation is difficult to determine.⁷² The classic example of a real right burdening anyone owning the property is a mortgage.⁷³ Servitudes also create real rights.⁷⁴ Because a mineral lease is, at least in part, a limited personal servitude, the real rights and obligations it creates are particularly difficult to determine.⁷⁵

67. *Clark v. J. L. Warner & Co.*, 6 La. Ann. 408, 409 (La. 1851); see, e.g., *Taylor v. New Orleans Terminal Co.*, 126 La. 420 (La. 1910) (awarding damages from failure to maintain and construct drainage ditches); *Gumbel v. New Orleans Terminal Co.*, 1 So. 2d 686 (La. 1941) (noting that the plaintiff was aware of damage caused by railroad construction); *Marin v. Exxon Mobil Corp.*, 09-2368, 09-2371 (La. 10/19/10); 48 So. 3d 234 (explaining that the subsequent purchaser was aware that contamination prevented growth of sugarcane, but his claims were extinguished due to filing after the prescriptive period had passed).

68. *Taylor*, 126 La. at 425.

69. *Id.*

70. LA. CIV. CODE ANN. art. 1763 cmt. b (2015).

71. LA. CIV. CODE ANN. art. 1763 (2015).

72. 5 SAÚL LITVINOFF, LOUISIANA CIVIL LAW TREATISE, LAW OF OBLIGATIONS § 3:3 (2d ed. (1999)).

73. LA. CIV. CODE ANN. art. 1764 cmt. e (2015).

74. See 5 LITVINOFF, *supra* note 72, at § 3:2.

75. An obligation is personal when “performance can be demanded only by a certain person, . . . Likewise, when performance can be demanded only from a certain person and not from his successors, the obligation is strictly personal as to that person.” 5 LITVINOFF, *supra* note

Determining the real rights and obligations established by mineral servitudes is of particular importance because whatever those rights are, they are automatically transferred to the universal or particular successor without a provision to that effect.⁷⁶ Real rights transfer without stipulation because the obligation attaches to the movable or immovable thing.⁷⁷ Courts have been confused about whether a mineral lease creates a real obligation to remediate the land, because claims for damages are traditionally a personal right.⁷⁸

The plain language of the Louisiana Mineral Code leaves some doubt as to the proper classification of a mineral lease, but the better reading is that the rights are real, not personal. The Mineral Code defines a mineral lease as “a contract by which the lessee is granted the right to explore for and produce minerals.”⁷⁹ The language suggests a mineral lease is similar to an ordinary lease under the Civil Code. Under this interpretation, *Eagle Pipe*’s rule would extend to mineral leases, and the right to sue for damages would have to be specifically assigned to a particular successor or it would not transfer. Article 16 of the Mineral Code, however, states that mineral rights are “the mineral servitude, the mineral royalty, and the mineral lease. . . . Mineral rights are real rights.”⁸⁰ Finally, the comments to the Mineral Code indicate that Article 114 should be interpreted “in conjunction with Article 16, providing that the mineral lease falls within the generic term ‘mineral right’ Thus, the running controversy between the courts and the legislature as to the nature of a mineral lease is laid to rest by classification of the interest as a real right.”⁸¹

The question of whether a mineral lease grants real rights against the world may be relatively clear, but the question of what real rights are created by the mineral lease is a separate matter. Because of the status of a mineral lease as a limited personal servitude, there is ambiguity over

72, at § 4:11. In many senses, this confusion is caused by the nature of limited personal servitudes, because they establish both real rights and personal rights. See *infra* note 83-84 and accompanying text. The distinction between real and personal rights is further blurred when the performance relates to an immovable thing. See 5 LITVINOFF, *supra* note 72, at § 3:3.

76. See LA. CIV. CODE ANN. art. 1764 (2015); see also 5 LITVINOFF, *supra* note 72, at § 3:11.

77. 5 LITVINOFF, *supra* note 72, at § 3:11.

78. A lease, as defined by the Civil Code is “a synallagmatic contract by which one party, the lessor, binds himself to give to the other party, the lessee, the use and enjoyment of a thing for a term in exchange for a rent that the lessee binds himself to pay.” art. 2668 (2015). Therefore, a lease can only be enforced against the lessor and his heirs. LA. CIV. CODE ANN. art. 2668 cmt. b; see also, *infra* note 97-109 and accompanying text.

79. LA. STAT. ANN. § 31:114 (2016).

80. § 31:16.

81. § 31:114 cmt.

what real obligations it creates.⁸² It is true that mineral leases establish personal obligations that are not binding on the subsequent purchaser.⁸³ But the comment to the Mineral Code states that “the lease has the major characteristics of a real right: the mineral lessee may follow the land, regardless of transfer of ownership; the mineral lessee may assert his rights against the world just as the proprietor of any other real right; he may enjoy directly and draw from the land a part of its economic advantages by appropriating a wasting asset.”⁸⁴ While the Mineral Code establishes many real rights and obligations relating to the lessee, it is mostly void of obligations and rights for the lessor.⁸⁵

Looking at the language of Article 114, it is arguable that the only real right created by a mineral lease is the right of the lessee to drill for minerals.⁸⁶ The lessee’s obligation to “perform the contract in good faith and to develop and operate the property as a reasonably prudent operator for the mutual benefit of himself and his lessor” may not be a real right⁸⁷ because it may be for the benefit of the lessor and not the land. Even if a court holds that the obligation to act as a prudent operator is a personal obligation that does not extend to the subsequent purchaser,⁸⁸ the lessee may still have some real duties. Because a mineral lease is a limited personal servitude, the lease may be interpreted according to the rules of usufruct or predial servitudes “to the extent that their application is compatible with the rules governing a right of use servitude.”⁸⁹ A mineral lease may be closer to a usufruct because the beneficiary of the mineral

82. See 3 A.N. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE, PERSONAL SERVITUDES § 8:2 (5th ed. 2010). A limited personal servitude is

an intermediary category between personal and predial servitudes. Like usufruct and habitation, they are charges on things in favor of a person rather than an estate; like predial servitudes, they are necessarily charges on an immovable belonging to another person and are confined to certain advantages of use or enjoyment. Thus, they are both “personal” and “limited.”

LA. CIV. CODE ANN. art. 639 cmt. c (2015).

83. See LA. STAT. ANN. § 31:16 cmt (2016).

84. § 31:16 cmt. (citing 1 A.N. YIANNPOULOS, CIVIL LAW OF PROPERTY 6 (1966)).

85. See *id.* (citing 1 A.N. YIANNPOULOS, CIVIL LAW OF PROPERTY 6 (1966)).

86. § 31:114.

87. § 31:122.

88. An obligation is personal when “its performance can be enforced only by the obligee, or only against the obligor.” LA. CIV. CODE ANN. art. 1766 (2015). Consequently, “[a] particular successor, that is, one who acquires a thing by particular title, is not bound by the personal obligations of his author with respect to the thing.” LA. CIV. CODE ANN. art. 1763 cmt. d.

89. LA. CIV. CODE ANN. art. 645. The Mineral Code invites the courts to apply compatible law: “If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.” LA. STAT. ANN. § 31:2 (2015).

lease is a person, not an estate.⁹⁰ In other words, the usufruct articles might provide another avenue of recovery to the current owner-lessor.

At the termination of the usufruct, the usufructuary has a set of obligations to the naked owner.⁹¹ Here, the mineral lessor would be the burdened party because he must refrain from interfering with the lessee's possession of the land.⁹² The usufructuary is bound to use the land "as a prudent administrator and to deliver them to the naked owner at the termination of the usufruct."⁹³ The benefitting party would be the lessee because he contracts for the right to possess the land and explore for minerals. If the property is damaged or has deteriorated by the fault of the benefitting party, the current owner of the land "is entitled to the value the property otherwise would have had at the termination of the usufruct."⁹⁴ The recovery to a potential plaintiff lessor would not include the natural deterioration of the land.⁹⁵ This might not be the only remedy a plaintiff could receive, because a usufructuary is also "answerable for losses resulting from his fraud, default, or neglect."⁹⁶

The application of compatible usufructuary law in the mineral lease context would be particularly attractive for plaintiffs for other reasons. A real action to enforce a real right is almost imprescriptible.⁹⁷ In Louisiana, a suit for the recovery of a corporeal immovable cannot prescribe.⁹⁸ Because the mineral lease holder is analogous to a usufructuary, he is a precarious possessor of the land.⁹⁹ This allows the lessor to make a claim for restoration of the land after a lapse of thirty years of the termination

90. Usufruct is defined as a "real right of limited duration on the property of another." LA. CIV. CODE ANN. art. 535 (2015). The usufruct and mineral lease are similar, because the burdened party is bound not to disrupt the benefitting party's possession of the land. Compare LA. CIV. CODE ANN. art. 605 ("The naked owner must not interfere with the rights of the usufructuary."), with LA. STAT. ANN. § 31:119 (2015) ("A mineral lessor is bound to deliver the premises that he has leased for use by the lessee, to refrain from disturbing the lessee's possession, and to preform the contract in good faith.").

91. The naked owner is the party whose property is burdened by the usufruct. The usufructuary is the beneficiary of the usufruct. Like a mineral lease, the usufructuary has the right "to possess [the thing] and to derive the utility, profits, and advantages that [it] may produce, under the obligation of preserving their substance." LA. CIV. CODE ANN. art. 539 (2015).

92. See *supra* note 91 and accompanying text.

93. LA. CIV. CODE ANN. art. 539.

94. LA. CIV. CODE ANN. art. 628.

95. See LA. CIV. CODE ANN. art. 628 cmt.d; LA. CIV. CODE ANN. arts. 537, 539.

96. LA. CIV. CODE ANN. art. 576.

97. 3 YIANNOPOULOS, *supra* note 82, § 6:27. The prescriptive period for delictual actions is one year from the day the injury took place. art. 3492 (2015). The prescriptive period for damage to immovable property is one year "from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. LA. CIV. CODE ANN. art. 3493. For all other personal actions, the prescriptive period is ten years. LA. CIV. CODE ANN. art. 3499.

98. 3 YIANNOPOULOS, *supra* note 82, § 6:27.

99. *Id.*

of the lease.¹⁰⁰ For plaintiffs who have damage that may go undiscovered for years, this is a significant advantage over ordinary prescriptive periods.¹⁰¹

*D. Frank C. Minvielle, L.L.C. v. IMC Global Operations, L.L.C.—
Genesis of Confusing Real and Person Rights Arising from
Mineral Leases*

Another barrier for plaintiffs in “legacy” litigation is the confusion in the courts of which is the dominant and servient estate in the context of mineral leases. This has allowed appellate courts to conclude that a mineral lease establishes a personal right to remediation of the land like the surface lease-holders in *Eagle Pipe*. This holding has led courts to apply the subsequent purchaser rule to mineral leases—seemingly against the actual holding in *Eagle Pipe* because courts are applying the subsequent purchaser rule to cases arising from mineral leases and servitudes.¹⁰² The majority in *Eagle Pipe* stated that its decision did not address whether the subsequent purchaser rule was applicable to obligations arising under the Mineral Code.¹⁰³

The factual circumstances of *Frank C. Minvielle, L.L.C. v. IMC Global Operations, L.L.C.* are not unlike many cases involving subsequent purchasers and contamination from past mineral leases. The plaintiff, Minvielle, purchased a tract of land in Iberia Parish, Louisiana, in 1998 via cash sale.¹⁰⁴ Minvielle’s predecessor in title entered into a mineral lease in 1961.¹⁰⁵ The plaintiff submitted an affidavit, which claimed that the plaintiff did not have reason to suspect contamination of his property from the defunct mineral lease until 2003, after a geologist filed a report regarding the probable contamination of the property.¹⁰⁶

The importance of this case for the purposes of remediating oil and gas contamination is not in the facts, but in the rationale employed by the court. The court in *Minvielle* confuses the dominant and servient estate.¹⁰⁷ The court states that “a personal servitude, is a real right, it is

100. *See id.*

101. *See supra* note 58 and accompanying text.

102. *See supra* notes 59-63 and accompanying text.

103. *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267, 10-2272, 10-2275, 10-2279, 10-2289, p. 48, n.80 (La. 10/25/11); 79 So. 3d 246, 281, n.80.

104. *Frank C. Minvielle, L.L.C. v. IMC Glob. Operations, L.L.C.*, 380 F. Supp. 2d 775, 758-59 (W.D. La. 2004).

105. *Id.* at 758.

106. *Id.* at 763.

107. The court is correct that a mineral servitude is a limited personal servitude and establishes a real right for the mineral leaseholder to drill for oil and gas regardless of whether the land is sold by the owner. *See id.* at 774-75.

one granted in favor of a person rather than an estate, and therefore it does not pass with the property upon sale of the property. . . . [T]he mineral lease gives real rights to the lessee, but the Mineral Code is void of any indication that it creates real rights in the favor of the lessor.”¹⁰⁸ The court goes on to assert that the Mineral Code “designates the right as a real one in order to protect the mineral lessee from losing his rights if the land is sold during the existence of the lease.”¹⁰⁹ This analysis ignores that the mineral code should be read in tandem with the Civil Code.¹¹⁰ Because mineral leases are analogous to usufructs, a sale of the servient estate, the lessor’s interest, should mean that the new owner has the right to require delivery of the thing back to the naked owner in the state that it existed in at the establishment of the lease, minus ordinary wear and tear.¹¹¹ The analysis from *Minvielle* that lessors lack real rights has been mostly adopted in Louisiana appellate jurisprudence.¹¹² This view leaves the current landowner with no method of recovery and enriches the oil and gas industry by providing a loophole to avoid paying damages for the harm they plainly caused.

IV. PROPOSALS FOR CHANGE

Because of the confusion surrounding the application of the subsequent purchaser rule, there has been a call for legislative change. In 2012, a bill was proposed to the Louisiana House of Representatives to overrule *Eagle Pipe*.¹¹³ The bill proposed “the current owner of any

108. *Id.* at 775 (citing *Sustainable Forests, L.L.C. v. Harrison*, 03-37,152, p. 2 (La. App. 2 Cir. 5/22/03); 846 So. 2d 1283, 1284). The *Minvielle* court ignores the main holding in *Sustainable Forests*: in a right of use there is no dominate estate; therefore, he has a personal right to the enjoyment of the property, not a real right in the property. See *Sustainable Forests*, 03-37,152, at p. 4; 846 So. 2d at 1285. But, there still remains a servient estate—that is why a rights of use or a limited personal servitude holds some real right and some personal rights. The benefitting party only has the right to use the property for his enjoyment. LA. CIV. CODE ANN. 639 cmt. c (2015). But, they are charges on a piece of immovable property, so the lessor is the burdened party in a mineral lease.

109. *Minvielle*, 380 F. Supp. 2d at 775.

110. See *supra* note 90 and accompanying text.

111. See LA. CIV. CODE ANN. arts. 539, 628 (2015); see also *supra* notes 92-97 and accompanying text.

112. See, e.g., *Glob. Mkts. Sols., LLC v. Blue Mill Farms, Inc.*, 13-2132 (La. App. 1 Cir. 9/19/14); 153 So. 3d 1209, *cert. denied*, 14-2572 (La. 4/23/15); 2015 WL 2167804, at *1 (Apr. 23, 2015); *Duck v. Hunt Oil Co.*, 13-628 (La. App. 3 Cir. 3/5/14); 134 So. 3d 114, *cert. denied*, 14-0703 (La. 6/13/14); 140 So. 3d 1189; *Bundrick v. Anadarko Petroleum Corp.*, 14-993 (La. App. 3 Cir. 3/4/15); 159 So. 3d 1137; *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267, 10-2272, 10-2279, 10-2289 (La. 10/25/11); 79 So. 3d 246.

113. Louisiana State Legislature, <http://www.legis.state.la.us/> (under “Bill Search,” select “Other Sessions,” then select “2012 Regular Session,” then select “HB”; type “862” in search box; follow “Text” hyperlink; follow “HB862 Original” hyperlink).

property . . . shall have a right of action to assert claims for non-apparent environmental damages that were caused or sustained prior to his acquisition of the property and which he had no actual knowledge at the time of acquisition.”¹¹⁴ The bill would have had prospective and retroactive effect¹¹⁵ and would have brought the subsequent purchaser rule back to its original iteration from the 19th Century. The bill would have provided property owners causes of action in delict and breach of contract.¹¹⁶ After debate in the Louisiana House of Representatives Civil Law and Procedure Committee, the bill was withdrawn for reconsideration.¹¹⁷

The opponents to the bill had two major issues with the bill. First, damage is a personal right, and cannot be passed down to the successor in title without express provision to that effect.¹¹⁸ The bill, according to the opponents, would essentially turn personal rights into real rights.¹¹⁹ The second concern was how to apply the rule to agreements executed before the bill’s enactment.¹²⁰

There is still need for legislative change. Perhaps a more palatable approach would be to propose a bill that makes clear that mineral leases establish real rights in favor of the lessor. The proposed legislation would clarify that the mineral lessor, as the burdened party, has a real right to require remediation of his land.

Such a clear rule would bring the subsequent purchaser rule closer to its original jurisprudential moorings because this approach would bring the law back to where it was when *Eagle Pipe* was decided. The subsequent purchaser rule could still extend to apparent and nonapparent damage in the context of surface leases.¹²¹

Additionally the bill could amend Act 312 to make it clearly apply to awards relating to erosion as well as contamination. As discussed above, the Act is a good start because it requires damages from “legacy” suits to be used to remediate contaminated land.

Expanding Act 312 to remediate land lost from accelerated erosion due to the dredging of canals and drilling for oil would augment the

114. *Id.*

115. *Id.*

116. *See id.*

117. Provides Civil Procedures for the Remediation of Oilfield Sites: Hearing on H.B. 862 Before H. Comm. on Civil Law and Procedure, 2012 Regular Sess. (La. 2012), http://house.louisiana.gov/H_Video/WM/2012/Apr_2012/0424_12_CL.asx.

118. *See id.*

119. *Id.*

120. *Id.*

121. *See supra* note 55-58 and accompanying text.

State's mission to restore and create a sustainable coast. In fact, the Legislature has done something similar to this already in a bill that requires state and local governmental entities to use damages to help restore the coast.¹²² The legislation proposed in this comment would be a fair compromise for both sides. The subsequent purchaser rule would still have effect on nonapparent damages resulting from activities under a surface lease, and whatever monies paid to restore property damaged under a mineral lease would go to fix the property, not to enrich the owner.¹²³

V. CONCLUSION

Louisiana faces major challenges in funding its effort to protect and restore its coast. Legacy lawsuits can help augment the state's coastal restoration effort. There is a mechanism in place—Act 312—that requires damages from the suits to be used to restore the contaminated land in certain contexts. Passing legislation that would clarify that real rights in the lessor are created under a mineral lease and expand Act 312 to land lost by erosion would streamline the use of legacy litigation as a potential weapon in the battle to fix the coast. Ideally, this will lead to an increase of land remediation and will augment the State's goal of preserving our coastal wildlife ecosystems, culture, and economic infrastructure.

122. See *supra* note 47 and accompanying text.

123. This aspect of *Eagle Pipe's* holding is closest to the actual spirit of the subsequent purchaser doctrine. Ignoring the extension to nonapparent damage, a lease is a personal right that only “confers on the lessee the right to demand performance from the lessor and his universal successors.” LA. CIV. CODE ANN. art. 2668 cmt. b (2015). It would only follow that the original owner would have the right to bring an action, because “a particular successor does not acquire without stipulation to that effect, any personal rights that his author has with respect to the thing.” LA. CIV. CODE ANN. art. 1764 cmt. d (2015).