Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities

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I. INTRODUCTION

Legal issues related to minerals in Louisiana are never simple matters. Complicating the day-to-day activities of leasing and determining royalty payments are innumerable, arcane, or ill-understood provisions of Louisiana law of which every practitioner should be aware. This Paper addresses a sampling of those provisions with the aim of attempting to clarify ambiguity and to educate on vagaries.

Part II of this Article focuses on intersections between mineral law and cemetery law in Louisiana. This Part identifies common problems for mineral-related activities in Louisiana when cemeteries are involved and provides guidance for how to avoid pitfalls.

Part III of this Article examines the law of sixteenth section lands. The law covering these lands, otherwise known as school trust lands, has been misinterpreted and misapplied for nearly 200 years in Louisiana. This portion of the Article analyzes the misinterpretations and sets forth a concise review of the law that should serve to correct past errors and to create a uniform understanding of this often-arcane area of the law.

Part IV of the this Article considers the often-confusing area of the law related to the allocation of minerals in the ever-changing environment of Louisiana's waterways. In particular, this Part of the Article reviews the law applicable to mineral reservations when boundaries between the State and private landowners change due to natural erosion or accretion or anthropogenic changes in water courses.

Part V of this Article is primarily a review of the jurisprudence on the rights of access to waterways in Louisiana. This Part is aimed at analyzing how (and if) the right of access affects liability exposure when members of the public enter waterways in which mineral production is ongoing or equipment presents a hazard to navigation.

Part VI of this Article covers varied legal issues related to the State's inalienability of minerals. The first portion of this Part considers who retains mineral rights (the State or private parties) depending on when private property was acquired from the State. The second portion of this Part analyzes who retains mineral rights (the State or private parties) in situations involving coastal restoration projects. The final portion of this Part examines the role of the inalienability of minerals in the use of dredge material by the U.S. Army Corps of Engineers and the interaction of these issues with the Coastal Zone Management Act.

Finally, Part V of this Article provides an update regarding environmental issues related to federal government-permitted mineral exploration and production of the Outer Continental Shelf. Specifically,

this Part provides update to recent challenges to the federal government's activities in this area, with special attention to the implications for Louisiana.

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 been the case historically in Louisiana. Indeed, following the case of *Humphreys v. Bennett Oil Corp.*[1] in 1940, the Legislature passed specific legislation to protect cemeteries from intrusions by mineral production operations.[2]

In *Humphreys*, the defendants had sunk two wells within the confines of a cemetery in Acadia Parish.[3] The plaintiffs, several descendants of those buried in the cemetery, sued for mental anguish, among other claims.[4] 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.[5]

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. The Lands and Natural Resources Section of the Louisiana Department of Justice 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 language 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. . . .
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1. Humphreys v. Bennett Oil, 197 So. 222 (La. 1940).
2. *See* LA. REV. STAT. ANN. § 8:901 (2005).
3. *Humphreys*, 197 So. at 223.
4. *Id.*
5. *Id.*

> 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. . . .
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> . . . 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.[6]

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.[7] This concept[8] serves as the basis for the codified law that followed in the wake of this case and that now controls mineral activity in cemeteries.[9]

Immediately following *Humphreys*, the Legislature passed Act 81 of 1940, which is now codified at Louisiana Revised Statue (La. R.S.) 8:901. Under this law, the Legislature expressly prohibits the construction of hydrocarbon pipelines and the exploration for and production of minerals within the confines of a cemetery in Louisiana.[10] Thus, now there is no question that the activities presented in *Humphreys* are impermissible. Unfortunately for the practitioner, La. R.S. 8:901 raises more questions than it answers: What about shooting seismic in a cemetery? What constitutes a "cemetery"? What if the burials are removed?

Before discussing the answers to the above questions, a review of the law itself is in order. La. R.S. 8:901 states:

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6. *Humphreys*, 197 So. at 228-30.

7. *See id.*

8. 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.

9. Although the language of La. R.S. 8:901 is not as melodramatic as that used by the Louisiana Supreme court in *Humphreys*, the timing of the law's enactment (1940) and the law's scope (all mineral-related activities within cemeteries) make it clear that the same general sanctity concepts that directed the Court in *Humphreys* were at work in the Legislature with the enactment of La. R.S. 8:901.

10. LA. REV. STAT. ANN. § 8:901 (2005).

> 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.[11]

One thing that is permissible under La. R.S. 8:901 is the leasing of property that happens to contain a cemetery, as long as the lease stipulates that none of the prohibited activities will take place within the confines of the cemetery.[12] Of course, this raises the question of how unknown cemeteries will 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, which is discussed in detail below. In the case of cemeteries that are visible, avoidance is going to be the key.[13]

Is it permissible to conduct seismic activity within cemeteries under La. R.S. 8:901? The law prohibits "prospecting" within cemeteries.[14] Despite this clear statement restricting prospecting, it is unclear what exactly falls under that term.[15] In Louisiana jurisprudence, "prospecting" is not defined in terms directly analogous to those for conducting seismic surveys. Also, seismic surveys themselves may be considered

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11. 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.
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> 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.

12. *Id.* § 8:901(A).
13. *See id.* § 8:671 (2008).
14. *See id.* § 8:901(A) (2005).
15. *See* La. Op. Att'y Gen. 08-100 (2008).

"prospecting" because there is no jurisprudence that states that they are not. It has apparently not been an issue before the Louisiana courts. However, the jurisprudence of several other states includes seismic activity within the term "prospecting."[16] Thus it is possible that the "prospecting" referenced in La. R.S. 8:901 includes seismic operations.[17] Accordingly, such activities may be illegal in a Louisiana cemetery, and one does seismic therein at one's own peril and risk.[18] However, the Louisiana Cemetery Board (LCB) has stated that directional drilling under cemeteries is permissible and is not a violation of La. R.S. 8:901 as long as it does not disturb or affect the graves.[19]

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."[20] 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.[21] What is the practical implication of this definition for those leasing lands in Louisiana? Lessees may have a cemetery on the leased property and they may not know it. The bulk of the law related to cemeteries does not specify 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 the ground. Very simply, if there are human remains in the ground, it is a cemetery and should be avoided.

Probably, the more likely cemetery situation that can be a significant issue for mineral activities is the situation in which

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16. *See id.*

17. Such has also become the opinion of the Louisiana Attorney General per La. Att'y Gen. Op. 08-0100.

18. *See id.*

19. 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 through 8:680 (2008), 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 through 8:681, has made no pronouncement indicating whether or not such activities are acceptable.

20. LA. REV. STAT. ANN. § 8:1(7) (2005).

21. *See generally* Humphreys v. Bennet Oil Corp., 197 So. 222, 224-27 (La. 1940); Thomas v. Mobley, 118 So. 2d 476, 478 (La. Ct. App. 1960).

exploration and production—or more likely, pipeline construction—encounter human remains in unmarked graves during operations. In this situation, the Louisiana Unmarked Human Burial Sites Preservation Act (the Unmarked Burials Act)[22] applies. Unlike its federal counterpart, the Native American Graves Protection and Repatriation Act (NAGPRA),[23] which only applies to Native American burial sites encountered on federal or tribal lands,[24] the Unmarked Burials Act applies to all land—public and private—and all human remains—not just Native Americans—in unmarked graves in Louisiana.[25] What is the practical relevance of this law to mineral operations? If human remains are encountered in any situation, work must immediately STOP[26] and local law enforcement, the coroner, and the State Archaeologist must be contacted.[27] Although no cases have addressed this law in Louisiana, those reported under NAGPRA are telling of the penalties for violating these requirements.

In *Quechan Indian Tribe v. United States*,[28] numerous claims for the disturbance of human remains during electrical line construction were brought under the Federal Tort Claims Act (FTCA).[29] The United States District Court for the Southern District of California allowed NAGPRA to be used as establishing a standard of care in FTCA actions.[30] Thus, it

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22. LA. REV. STAT. ANN. §§ 8:671-8:681 (2005).

23. 25 U.S.C. §§ 3001-3013 (2006). 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).

24. It is important to note, though it is not extremely relevant to this Article, 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. *See* 25 U.S.C. §§ 3003-3013 (2006). The law also imposes criminal and civil penalties for the sale of or trafficking in Native American human remains. 18 U.S.C. § 1170 (2006). 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* W. Mohegan Tribe & Nation of N.Y. v. New York, 100 F. Supp. 2d 122, 125-26 (N.D.N.Y. 2000); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234, 251-52 (D. Vt. 1992).

25. LA. REV. STAT. ANN. § 8:672 (2008).

26. *Id.* §§ 8:678, 8:680(B).

27. *Id.* § 8:680(A), (C).

28. 535 F. Supp. 2d 1072 (S.D. Cal. 2008).

29. *Id.* at 1081-84.

30. *Id.* at 1108.

is possible that NAGPRA or the Unmarked Burials Act may be used in future cases to support claims for monetary damages.[31]

In *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*,[32] the real problem of unmarked burial disturbance for mineral operations was brought into focus: work stoppage.[33] 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.[34] A preliminary injunction was issued to effectuate this work stoppage.[35] Although damages were not a part of this suit,[36] 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,[37] 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.[38] 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.[39] Because the Houma do not enjoy federal tribal recognition, as he dismissed the case, Judge Shafer stated that the group has "no more right than anyone else to protest" the excavations.[40]

One further cautionary note is warranted here. If human remains are inadvertently discovered during mineral-related construction opera-

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31. 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, 354-55 (5th Cir. 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.

32. 83 F. Supp. 2d 1047 (D.S.D. 2000).

33. *See id.*

34. *Id.* at 1060-61.

35. *Id.*

36. *Id.*

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

38. *See* Associated Press, *Texaco Wins Fight for Burial Grounds*, TIMES PICAYUNE (New Orleans), June 9, 1998, at C2.

39. *See id.*

40. *Id.*

tions, 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.[41] 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.[42] Accordingly, it is imperative that all employees who 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. They should 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.

When does a cemetery cease to be a cemetery? La. R.S. 8:304(A) states 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."[43]

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 the purpose.[44] The mere removal of obvious graves from that property does not accomplish a removal of the dedication.[45] Part of the reason that a dedication is not de facto eliminated by the removal of obvious graves is the reality that,

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41. LA. REV. STAT. § 8:678; 18 U.S.C. § 1170 (2006).

42. *See, e.g.*, Ryan M. Seidemann, Christopher M. Stojanowski, & Fredrick Rich, *The Identification of a Human Skull Recovered from an eBay Sale*, 54 J. FORENSIC SCI. 1247 (2009).

43. LA. REV. STAT. § 8:304(A) (2005).

44. Locke v. Lester, 78 So. 2d 14 (La. Ct. App. 1955); Humphreys v. Bennett Oil Corp., 197 So. 222, 228 (La. 1940); *see also* Thomas v. Mobley, 118 So. 2d 476, 478 (La. Ct. App. 1960).

It is important to note that the dedication of property as a cemetery need not be a formal or recorded dedication. *See Humphreys*, 197 So. at 226-27. Indeed, the mere use of a piece of property as a burial place is enough to effectuate the dedication. *Id.* Although the *Humphreys* court seems to suggest that an abandonment of the cemetery may also effectuate a removal of the dedication, such is not the case. *See id.* at 227. The *Humphreys* supposition is based, as is the one in *Thomas*, 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*, 118 So. 2d 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 confirmed 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.

45. It is also important to note that Louisiana courts have held that the dedication of property as a cemetery is not subject to prescription. *Locke*, 78 So. 2d at 16.

although obvious graves may be removed, other remains may continue to be interred at a site, thus necessitating continued protection.[46] 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.[47]

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.[48] No activities that are inconsistent with cemetery uses can occur in a cemetery until this dedication is removed.[49]

III. OF COURT AND LEGISLATIVE CONFUSION: SIXTEENTH SECTION LANDS

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 (sixteenth section lands). What makes the sixteenth section land 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 their own authority to sue for

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46. *See, e.g.*, BRYAN S. HALEY, GEOPHYSICAL SURVEY OF HIGHLAND CEMETERY, BATON ROUGE, LOUISIANA 1 (2003) (documenting numerous unmarked graves in a historic cemetery). Indeed, Kehoe-Forutan, Campbell, and Shepard 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 reopened for new burials. Sandra J. Kehoe-Forutan, Bruce A. Campbell & Michael K. Shepard, *Penetrating the Mystery Beneath Millville Friends Meeting Cemetery*, 28 ASS'N FOR GRAVESTONE STUD. QUART. 11 (2004); Garry O'Hara, *The Case of the Buried Tombstones: A Story of Gravestone Recovery and Restoration in Colorado*, 32 AGS QUART. 7 (2008); *see also* Shannon Seckinger, *Picking Up the Pieces: The Osborn Family Cemetery, Brielle, NJ*, AM. CEMETERY 22 (Apr. 2006) (discussing similar ground-penetrating radar results).

47. See also LA. REV. STAT. § 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.

48. *Id.* § 8:306.

49. *See id.*

environmental damages to this land (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.

Sixteenth section lands constitute part of a surveyed rectangular portion of land, based on a system of survey implemented in 1785 by the Second Continental Congress.[50] "Congress reserved and dedicated the sixteen [*sic*] section in each township for the support of public schools."[51] 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.[52]

As a general matter, Louisiana retains ownership, in trust, over sixteenth section lands as lands for the public's (school board's) use.[53] The lands are administered through the State Land Office.[54] The local school boards are only given custodial authority over the lands and not actual ownership.[55] "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."[56] This reservation of sixteenth section lands was reaffirmed by Congress with the same language in 1811.[57] These reserved lands vested in the State of Louisiana upon statehood in 1812.[58]

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.[59] This interest

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50. JOHN MADDEN, FEDERAL AND STATE LANDS IN LOUISIANA 232 (1973).
51. La. Op. Att'y Gen. 96-0188 (1997).
52. Papasan v. Allain, 106 S. Ct. 2932 n.18 (1986).
53. *See* La. Op. Att'y Gen. 96-0188.
54. *See* LA. REV. STAT. ANN. § 1701.1(a) (2006).
55. *See* La. Op. Att'y Gen. 96-0188; *see also* Ebey v. Avoyelles Parish Sch. Bd., 203-765 (La. App. 3 Cir. 12/17/03); 861 So. 2d 910.
56. 2 Stat. 391 § 11 (1806).
57. 2 Stat. 662 § 10 (1811).
58. MADDEN, *supra* note 50, at 232; La. Op. Att'y Gen. 96-0188.
59. *See* Papasan v. Allain, 106 S. Ct. 2932, 2941-42 (1986); *see also* Alabama v. Schmidt, 34 S. Ct. 301, 302 (1914); Cooper v. Roberts, 18 How. 173, 182 (1855).

becomes acutely obvious under *Papasan v. Allain*, which found that the same fee simple classification existed in Mississippi.[60] 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,[61] and despite the fact that Mississippi and Louisiana were granted their sixteenth section lands in different acts of Congress,[62] the virtually identical language of these grants requires a convergent interpretation of the law as it applies to Louisiana and Mississippi sixteenth section lands. Thus it is clear that Louisiana, like its eastern neighbor, received a fee simple interest in its sixteenth section lands when those lands vested in the State in 1812. This absolute (or fee simple) grant of sixteenth section lands is supported by *Louisiana v. Joyce*,[63] which stated: "Those lands were unequivocally and unconditionally appropriated to a purpose for the carrying out of which the future state alone was looked to."[64]

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

> [T]hough 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.[65]

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" (the Act).[66] 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.[67] This is evident in the statement that "the Legislature[] of . . . Louisiana [is] 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

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60. *See Papasan*, 106 S. Ct. at 2941-42; *see also* Holmes S. Adams et al., *School Law*, *in* ENCYCLOPEDIA OF MISS. L. § 65 (Jeffrey Jackson & Mary Miller eds., 2004).
61. *See Papasan*, 106 S. Ct. at 2946-47 n.18.
62. *See* 2 Stat. 391, § 11 (1805); *see also* 3 Stat. 275, § 3 (1817).
63. 261 F. 128, 132 (5th Cir. 1919).
64. *Id.*
65. *Id.* at 133.
66. 5 Stat. 600 (1843) (emphasis added).
67. *See id.*

schools."[68] 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 United States Court of Appeals for the Fifth Circuit in *Joyce* does not expressly mention this, it seems to imply strongly 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),[69] 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]."[70] 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,[71] 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. . . .[72]
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> 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 . . . . The 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.[73]

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

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68. *Id.*
69. *See* La. Op. Att'y Gen. 96-0188 (1997).
70. *Id.* (emphasis added).
71. Louisiana v. Joyce, 261 F. 128, 129 (5th Cir. 1919).
72. *Id.* at 131 (quoting Alabama v. Schmidt, 34 S. Ct. 301, 302 (1914)).
73. *Id.* at 133.

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).[74] Indeed, the local school boards must seek legislative authority to divest themselves of sixteenth section lands.[75]

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."[76] 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.[77]

La. R.S. 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 a Louisiana Attorney

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74. La. Op. Att'y Gen. 94-0234 (1994). In the interest of completeness, the subject of the exchange of sixteenth section lands should also be considered. La. R.S. 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. Op. Att'y Gen. 86-0591 (1986). A school board's general authority under La. R.S. 17:87.6 (2001) 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 through 41:903, (2006), governing the disposal of unused school lands. La. R.S. 41:891, by its own express provisions, does not apply to sixteenth section lands. On the other hand, La. R.S. 41:640 through 41:1734, which apply to sixteenth section lands, contain no provision 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. *See* La. Op. Att'y Gen. 94-0234 (1994). 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.

75. Meyer v. State, 121 So. 604, 606-07 (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. *Id.*

76. LA. REV. STAT. ANN. § 41:711 (2006).

77. La. Op. Att'y Gen. 1916-18, at 446-47 (1917).

General Opinion issued on October 25, 1917.[78] 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."[79]

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.[80] The funds remain on deposit with Louisiana Department of the Treasury and will accrue an interest of four percent per annum.[81] School boards have "the right to use the said funds in the acquisition, construction, and equipping of public school buildings and other school facilities."[82]

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.[83] Leases must be conducted pursuant to a resolution of the board.[84] Funds realized by the school board from the lease of sixteenth section lands must be credited to the general school fund of the parish.[85] Further, whether or not sixteenth section lands are at issue, the initial term of a lease of school board property may not exceed ten years.[86]

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.[87] In general, the school board may request and direct the State Mineral and

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78. *Id.* at 446.

79. *Id.*

80. LA. REV. STAT. ANN. § 41:640(A) (2006).

81. *Id.*

82. *Id.* § 41:640(B).

83. *Id.* § 41:716. This appears to be in conflict with La. R.S. 17:87 (2001), which places no restriction on the predial lease of such lands. However, because La. R.S. 41:716 represents the latest pronouncement of the Legislature on this topic, it controls. *See* Ellis v. Acadia Parish Sch. Bd., 29 So. 2d 461, 464 (La. 1946); La. Op. Att'y Gen. 1940-42, at 3621 (1941); *see also* Davis v. Franklin Parish Sch. Bd., 412 So. 2d 1131 (La. Ct. App. 1982).

84. LA. REV. STAT. ANN. § 17:87 (2001).

85. *Id.*

86. *Id.* § 41:1217 (2006). La. R.S. 41:1217 goes on to allow extensions to the ten-year period provided in subsection (A).

87. *Id.* §§ 30:151-:158 (2007). Section 157 was repealed by 1950 La. Acts 292.

Energy Board (SMEB) to lease its land, and often the mineral lease is executed by the SMEB (but the school board administers the lease as lessor as if the lease were granted by it).[88] If the school board does not elect to do this, it may advertise for and grant the lease itself.[89] In any event, all mineral leases from a school board must also be approved by the SMEB in order to be valid.[90] Absent such approval by the SMEB, the mineral lease "is null and void."[91] It is also important to note that, in mineral leasing situations, special provisions are made to distinguish between "sixteenth section or school indemnity lands."[92] The latter must only be leased by the SMEB and the allocation of the funds in each of the two cases is expressly provided for.[93]

The Legislature has also seen fit, on several occasions, to cure past procedural inconsistencies related to the sale of sixteenth section lands.[94] 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 ratified and confirmed sixteenth section land sales made prior to 1900, "notwithstanding informalities in the sales relative to the appraisement 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."[95] 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.[96] This statute was clarified in 1942 by La. R.S. 41:1323, which also applied to sixteenth section land sales made prior to 1900.[97] 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

88. LA. REV. STAT. ANN. § 30:153 (2007).
89. *Id.* §§ 30:154-:156.
90. *See id.* §§ 30:153-:158.
91. *Id.* § 30:158.
92. *Id.* § 30:154(C).
93. *Id.*
94. *See generally id.* §§ 41:1321-41:1323.3 (2006).
95. *Id.* § 41:1322.
96. *Id.*
97. *Id.* § 41:323.

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.[98] 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 41:1323.3, to ratify and confirm sixteenth section land sales that had occurred prior to July 1, 1956.[99]

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.[100] The practical effect of these laws is to remove from the mineral leasing jurisdiction of many school boards sixteenth section lands that had been procedurally improperly sold in the past.[101] 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.[102] 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.[103] 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

98. *Id.* § 41:1321 (as amended in 1948).
99. *See id.* §§ 41:1323.1-:1323.3.
100. *See id.*
101. *See id.*
102. *Id.* § 41:1323.5.
103. *Id.*

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.[104] Thus, the discovery of any such sale by a private entity is invalid.[105] 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,[106] there can be no prescription against such property were such a scenario discovered.[107]

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,[108] these sales are invalid. Because there is no acquisitive prescription against the State and because the State is not subject to the peremptory period in which to bring actions to reclaim its property, there is no statute of limitations under which the State is restricted from reclaiming its sixteenth section lands.[109] 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.[110]

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 or indemnity lands . . . have been *erroneously* sold by the state . . . such deficiencies shall be properly adjusted . . . and the amounts so determined shall be credited to the

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104. *See generally id.* §§ 41:631-41:981. As discussed below, these same entities can also lease the lands.

105. *See* Barton's Executrix v. Hempkin, 19 La. 510, 514-16 (La. 1841).

106. LA. CONST. art. XII, § 13. This is also true in cases of liberative prescription. *See* Todd v. State, 474 So. 2d 430, 434-35 (La. 1985).

107. *See* LA. CONST. art. IX, § 4(B); LA. CIV. CODE ANN. arts. 450, 453 cmt. (c) (1980); *see also* Liner v. Terrebonne Parish Sch. Bd., 519 So. 2d 777 (La. Ct. App. 1988); Todd v. State, 474 So. 2d 430 (La. 1985); City of New Orleans v. Magnon, 4 Mart (o.s.) 2, 3 (La. 1815).

108. LA. REV. STAT. ANN. §§ 41:1321-1323.3, 1323.5 (1812 through July 1, 1956, for regular sixteenth sections and 1812 through 1860 for irregular or fractional sections).

109. LA. CIV. CODE ANN. arts. 450, 453 cmt. (c); Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576, 585-87 (La. 1975) (on reh'g).

110. LA. REV. STAT. ANN. §§ 4:921, :961 (2006); *see also* State *ex rel.* Plaquemines Parish Sch. Bd. v. Plaquemines Parish Gov't, 93-2339 (La. App. 4 Cir. 12/15/94); 652 So. 2d 1, 4.

parish school boards of the parishes in which such townships are situated."[111] 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."[112]

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 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 Louisiana[113]) 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 sections that are wholly or partially covered by navigable waters may be treated with an entirely different suite of laws than those discussed above.[114] The reason for this caveat is because the determination of rights as to such sixteenth sections is dependent upon each unique factual situation, because, historically, sixteenth sections were granted to schools without any consideration for where they fell geographically or topographically.[115] 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

111. LA. REV. STAT. ANN. § 41:640(A) (emphasis added).

112. *Id.*

113. 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, 26 (1973).

114. *See* State *ex rel.* Plaquemines Parish Sch. Bd. v. Plaquemines Parish Gov't 93-2339, p.7 (La. App. 4 Cir. 12/5/1994); 652 So. 2d 1, 7 (Byrnes, J., concurring).

115. MADDEN, *supra* note 50, at 232-58.

lands."[116] 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.[117] Such submerged portions (if navigable-in-fact) belonged only to the State of Louisiana by virtue of its inherent sovereignty and the equal footing doctrine.[118] Thus, in many cases, submerged sixteenth sections were swapped for other lands somewhere else in the State, to make up for the navigable waters lost in the regular, in-place, sixteenth sections.[119] The practical effect of these swaps was to provide full ownership of non-sixteenth section lands to school boards—not necessarily within their own parishes.[120] In those cases, the submerged sixteenth sections became the property of the State in full ownership and none of the sixteenth section specific laws applied to mineral leasing of such fractional and irregular lands.[121] In cases where no lieu lands were granted, presumably, the school boards still retained 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.[122]

In the interest of completeness, the impacts of Act 158 of 2007 on mineral issues related to sixteenth section lands must be considered.[123] 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.[124]

The practical effect of this Act is to reallocate royalties after July 1, 2007. As discussed above, sixteenth sections that contain navigable waters are

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116. *See* Terrebonne Parish Sch. Bd. v. Texaco, Inc., 178 So. 2d 428, 436-37 (La. Ct. App. 1965); *see also* MADDEN, *supra* note 50, at 241-44.

117. MADDEN, *supra* note 50, at 241-44.

118. *See Terrebonne*, 178 So. 2d at 430-31.

119. *See* MADDEN, *supra* note 50, at 241-44 (discussing distribution of indemnity lands).

120. *Id.*

121. *Id.*

122. 2007 La. Acts No. 158.

123. *See* LA. REV. STAT. ANN. § 41:642 (2009).

124. This provision was enacted as La. R.S. 41:642(A)(2) (2006).

even more unique in legal treatment than their terrestrial siblings. 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).[125] 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.[126] 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.

It is equally important to understand what this law does not do. It does not affect the ownership of sixteenth section lands.[127] That ownership remains with the State. In addition, because this law only reallocates royalties, it does not alter which parties have the authority to lease certain lands.[128] As is noted herein, school boards have the authority to lease terrestrial sixteenth sections.[129] However, regardless of where the royalties are reallocated to, the party with the authority to lease lands does not change as a result of Act 158. What does this mean in practicality? This means that, while school boards now receive royalties for unalienated sixteenth sections that are now part of a State water bottom, they do not have the authority to actually lease those lands. Leases of State water bottoms can only be accomplished by the State. School boards may request a lease of the lands, but they cannot lease them themselves. This creates a practical problem, whereby leases that cover terrestrial and submerged lands may have to be separately leased: some from the school board and some from the State. Until this

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125. *See* Terrebonne Parish Sch. Bd. v. Texaco, Inc., 178 So. 2d 428, 430-31 (La. App. 1965).

126. *See* LA. REV. STAT. ANN. § 41:642 (2006).

127. *See id.*

128. *See id.*

129. *See id.* § 41:716.

oversight is corrected by the Legislature, this irritation of having to obtain two leases will continue. The school board, to ensure that both terrestrial and submerged portions of sixteenth sections are leased to the same party, is well advised to delegate its sixteenth section leasing authority to the State in order to minimize confusion.

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.[130] 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, 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.[131] 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 Louisiana is not merely a nominal party in suits regarding sixteenth section lands.[132]

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."[133] 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 30:136.1, excess funds from State leases are credited to the Bond Security and Redemption Fund, among other things.[134] 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.[135] Under La. R.S. 30:153, all funds go directly to the agency that owns the property being leased.[136] However, it

130. La. Op. Att'y Gen. 96-0188.

131. LA. REV. STAT. ANN. § 30:152(A) (2007).

132. *See* Louisiana v. Union Oil Co. of Cal., 458 F.3d 364, 367 (5th Cir. 2006); *see also* Louisiana v. Bass Enters. Prod. Co., No. 04-2089, 2005 WL 2406155, at *2 (W.D. La. Sept. 29, 2005); Vermilion Parish Sch. Bd. v. BHP Billiton Petrol. (Americas), Inc., No. 04-2069, 2005 WL 2406157, at *2-7 (W.D. La. Sept. 29, 2005).

133. LA. REV. STAT. ANN. § 30:154(C) (2007).

134. *See id.* §§ 30:136-136.1.

135. *See id.* § 30:145. In addition, if these lands are leased by the SMEB, the State gets a ten percent fee via La. R.S. 30:124, and it retains the $20.00 per acre fee because it is a lease of State lands via La. R.S. 30:136.1(D).

136. *Id.* § 30:153.

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 board.[137]

Because sixteenth section lands are of such a special character, another necessary question to ask when dealing with them is: Does the SMEB 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 Board v. Plaquemines Parish Government*[138] and *State v. Humble Oil & Refining Co.*,[139] it was clearly stated that the SMEB 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 Louisiana's Revised Statues 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, simper 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 SMEB 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 SMEB were legally able to lease the minerals without school board authority.

However, my opinion is merely academic in this respect. The Louisiana Supreme Court has spoken, so the matter is settled for now. The SMEB 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,

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137. *See id.* §§ 30:136-136.1, 145, 154(c).
138. 93-2339 (La. App. 4 Cir. 12/15/94); 652 So. 2d 1.
139. 197 So. 140 (La. 1940).

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 SMEB 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 SMEB 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.[140] Although the Louisiana First Circuit Court of Appeal 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.[141]

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.[142] In 2004, the First Circuit decided the case *Terrebonne Parish School Board v. Southdown, Inc.*[143] In that case, the defendants dredged canals through freshwater marshes for forty years with the express purpose of mineral exploration and production.[144] The plaintiffs, Terrebonne Parish School Board, claimed that the defendants' dredging damaged sixteenth section school lands in Terrebonne Parish.[145] The dredging took place under numerous mineral

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140. *See generally* Terrebonne Parish Sch. Bd. v. Bass Enters. Prod. Co., 2002-2119, pp. 4-6 (La. App. 1 Cir. 8/8/03); 852 So. 2d 541, 544-46.

141. *See id.*

142. *See* Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post-Katrina and Rita Imperatives*, 51 LOY. L. REV. 861, 883 (2006).

143. *Id.* at 869.

144. Terrebonne Parish Sch. Bd. v. Southdown, Inc., 887 So. 2d 8, 10 (2004).

145. *Id.*

leases.[146] The school board, suing under both tort and contract theories, claimed that although the defendants had been dredging for forty years, it was unaware of the damage until a year before it filed the complaint.[147] The trial court dismissed all the claims and the First Circuit affirmed.[148]

The First Circuit held that Louisiana's ban on prescription could only be maintained if the State itself, or a party acting on behalf of the State was a plaintiff.[149] The court held that the school board could not avail itself of the State's immunity to prescription because it sued under its own name and claimed to own the property in question.[150] While the court was correct that Louisiana's ban on prescription does not extend to state-run entities that sue under their own names, it should have also noted that the school board erred in asserting that it owned the property in question.[151] The court failed to note that school boards may sue "in their own name with respect to the lands, but they are not the owners of the lands."[152]

This case is important for two reasons. First, because prescription cannot run against the State, the prescription issue would have been defeated if the State had sued for the damage to the property.[153] Second, because the court failed to note that the State, not the school board, owns the lands, it painted a flawed picture of ownership of sixteenth section lands.[154]

The courts again misstated and misunderstood sixteenth section land law in *Terrebonne Parish School Board v. Columbia Gulf Transmission Co.*[155] In this case, the court misstated the ownership of sixteenth section lands, creating a potentially erroneous precedent in dicta.[156] The court states that the title to sixteenth section lands passed from the United States to the school board.[157] This assertion is simply incorrect. As demonstrated herein, title to sixteenth section lands vested in the State upon statehood in 1812.[158] The State is the owner of these

146. *See id.*
147. *Id.*
148. *Id.* at 14.
149. *Id.* at 12.
150. *Id.*
151. *Seidemann*, *supra* note 142, at 870.
152. *Id.*
153. *Id.*
154. *Id.* at 870-71. The Louisiana legislature has also made this mistake. In 2005, it passed a bill that incorrectly stated that school boards own sixteenth section lands in H.B. 184. The Governor signed bill into law before anyone caught the mistake. *Id.* at 909 n.76.
155. 290 F.3d 303 (5th Cir. 2002).
156. *See id.*
157. *Id.* at 307.
158. *See* MADDEN, *supra* note 50; La. Op. Att'y Gen. 96-0188 (1997).

lands and the school boards merely function as administrators or custodians.[159] These mistaken interpretations of sixteenth section land law are troubling because under these holdings, Louisiana could lose valuable land to school boards, or landowners could be inconvenienced in the future.[160]

Although 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 FREEZES: THE ALLOCATION OF MINERAL INTERESTS UNDER SHIFTING BOUNDARIES AND WATERS[161]

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

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159. *See* 5 Stat. 600 (1843).

160. Seidemann, *supra* note 142, at 875. For example, in *Bres v. Louivere*, 37 La. Ann. 736 (La. 1885), the comment was made that anomalous sixteenth section lots are "not reserved for schools by acts of Congress." The Louisiana Supreme Court likely misinterpreted survey technology and concluded that radiating lots and anomalous lots are the same thing when it handed down this decision. This is incorrect. Radiating lots radiate out from rivers and bayous and were part of original colonial land grants while anomalous lots are irregularly shaped. Congress never intended to include radiating lots in sixteenth section school lands because sovereigns had granted the lands to the United States and the United States did not technically "own" the lands. Therefore, Congress could not convey them to school boards. Congress did grant anomalous lands and extra federal lands from other sections to make up for the shortfall in the oddly shaped anomalous lands to the states, however. This mistake could cause the State to think that it does not have title to anomalous sixteenth section lands when it does. Debra LeMoine provides an example of a debate centered around whether an anomalous sixteenth section land is publicly or privately owned. Debra LeMoine, *Options Sought To Recover Land: Livingston's Sixteenth Section in Question*, ADVOCATE, Aug. 22, 2005, at 3-B.

161. 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 Article deals with the latter two situations.

162. LA. CIV. CODE ANN. art. 450 (1980).

The basis for the State's interest in eroded land[163] 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 4A. 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 project[s] 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.[164]

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, as private lands erode into navigable water bodies, that new water bottom becomes the property of the State.[165]

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."[166] 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 government[167] and could, theoretically, be done 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

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163. The term "eroded land" is used in this Article 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.

164. LA. CONST. art. IX, §§ 3, 4(A).

165. Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S. U. L. REV. 149, 166-67 (2000).

166. Cities Serv. Oil & Gas Corp. v. State, 574 So. 2d 455, 460-61 (La. Ct. App. 1991); *see also* Jones v. Hogue, 129 So. 2d 194, 202 (La. 1960). The court in *Cities* relied on *Oregon ex rel. State Land Board v. Corvallis Sand & 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 (quoting *Corvallis*, 429 U.S. at 364).

167. *Corvallis*, 429 U.S. at 364.

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.[168]

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."[169] Mineral interests lying beneath such eroded property are subject to the oil and gas lease freeze statute.[170] 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,[171] the mineral interests under the eroded land reverts to the current owner—the State.[172] 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,[173] 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 Louisiana Constitution article IX, section 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 because 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 Louisiana Constitution article IX, section 4, which will be discussed more fully *infra*.

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

169. *See* LA. REV. STAT. ANN. § 9:1151 (2008).

170. *Id.* § 9:1151.

171. *Id.*

172. None of this discussion would exist in the absence of La. R.S. § 9:1151.

173. A useful definition of accretion comes from the Louisiana Second Circuit Court of Appeal:

> 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. E. Carroll Parish Police Jury, 38-376, p.8 n.13 (La. App. 2 Cir. 4/14/04); 871 So. 2d 1258, 1264 n.13, *writs denied*, 2004-1421 (La. 6/3/05); 903 So. 2d 442 (internal citations omitted).

Basically, the freeze statute exists for the purpose of protecting parties' contractual rights from the laws associated with changes in water 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.[174] 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.[175] It is likely that in such situations, the mineral rights underlying such properties remain as they were before the channel was cut.[176]

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

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174. *See* LA. REV. STAT. ANN. § 9:1151 (2008). Without the freeze statute, a mineral lessee would be put in an impossible practical position to pay monthly royalties properly.

175. 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.

176. *See* LA. REV. STAT. ANN. § 9:1151. This discussion would not exist without section 9:1151.

(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 Louisiana Civil Code section 450 are public things belonging to the State.[177] 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. Because these situations do not impact matters related to the freeze statute, per se, they will be considered in a subsequent section of this Article.

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? Occasionally, in such situations, the original channel will become an oxbow lake before it disappears entirely.[178] 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.[179] 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 the 1980s, the Corps, in an effort to improve water flow in the Red River in Rapides Parish, cut a channel along the river.[180] This channel allowed the river to flow in a straight path and bypass a sharp bend in the river that had naturally formed.[181] The main flow of the river abandoned the curve and it appears that an oxbow lake formed as a result of the new flow causing silt to build up and trap water in between the channel and the natural curve.[182] Around the channel, the Red River was a navigable waterway of

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177. YIANNOPOULOS, *supra* note 165, § 57.

178. *See, e.g.*, Nevels v. State, 95-0100 (La. App. 1st Cir. 11/9/95); 665 So. 2d 26 (discussing a naturally-occurring oxbow lake created by similar processes as those discussed here).

179. *See* State v. Placid Oil Co., 300 So. 2d 154, 157 (La. 1974) (citing State v. Cap de Ville, 146 La. 94 (1919); *see also* MADDEN, *supra* note 50, at 327.

180. La. Op. Att'y Gen. 07-0030 (2007).

181. *Id.*

182. *Id.* In this opinion, it is stated that an oxbow lake was "possibly" formed 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.

the State.[183] Thus, notwithstanding agreements to the contrary (such as a servitude), the State would typically own the bottom of the Red River as it traverses the channel.[184]

It is impossible to create a rule for the ownership of channels such as these because each cut in water courses presents a unique set of facts.[185] Ownership can depend on factors including documents that create interest in the property, the laws that were in effect when the channel was cut, and the hydrological and geological processes that affected the original channels after the cut created a new channel.[186] These factors all affect ownership differently and make a clear rule about ownership impossible.[187] This Article, however, will set forth a process to analyze ownership under certain conditions.

In determining ownership of a channel, the first step is to analyze the documents that relate to the cut. The level of ambiguity in a document can determine whether that document conveys a servitude or fee title.[188] If there is no ambiguity in the document, the parties interpret the conveyance based on the language of the document alone and cannot consider extrinsic evidence.[189] If the document clearly conveys a servitude or a fee simple title, then the parties cannot make a further inquiry.[190] If, however, ambiguity exists or application of an unambiguous document would lead to absurd circumstances, then the parties may consider extrinsic evidence.[191] Evidence of ambiguities may include, "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.'"[192] In addition, in cases where mineral rights are retained, there is a strong argument that the servitude agreement was actually a transfer of fee title.[193] Such a reservation would be superfluous in a servitude.

If the parties review the documents and identify an ambiguity, the next step is to determine whether the conveyance is a servitude or a cash

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* (citing Porter v. Acadia-Vermilion Irrigation Co., 479 So. 2d 1003, 1006 (La. App. 3 Cir. 1985)).
192. *Id.*
193. *See id.*

sale.[194] Louisiana courts consider a number of factors when deciding whether a fee transfer or a servitude has been conveyed.[195] According to the courts, the 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;
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.[196]

These factors present common sense guidelines for determining whether rights to a particular piece of property was acquired in fee title or via servitude.

The first factor represents the idea that the closer the consideration is to fair market value, the more likely the conveyance will be found a fee title.[197] The second factor embodies the idea that a document of sale will include an exact property description.[198] In the case of channel cuts, the third factor always supports the acquisition of fee title because the purpose of making a cut is to "ensure the perpetual flow of a waterway" and the acquiring entity will usually have a definite need for title.[199] The channel will likely carry the flow of waters of the State forever, so a servitude would not make sense in the case of channel cuts.[200] The fourth factor is considered because when an original landowner continues to pay taxes on the property, it lends to the finding that a servitude was granted.[201] Factor five is presumably on the list because properties that are conveyed for a specific purpose that has an indefinite duration (e.g., a channel cut) will usually result in a finding of fee title.[202] The sixth factor is all about the connotations of the language. The *Porter* court noted that "a grant 'in perpetuity' connotes only a limited grant, whereby a grant 'forever' connotes an unlimited grant and a sale in fee simple."[203] The

194. *Id.* (citing *Porter*, 479 So. 2d at 1007).
195. *Id.*
196. *Porter*, 479 So. 2d at 1007.
197. La. Op. Att'y Gen. 07-0030.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203 *Porter*, 479 So. 2d at 1008.

final factor often directs the analyst back to factor four because it is often difficult to ascertain the grantor's intentions in such an agreement.[204] The interest in the property of a grantor and her heirs can be determined based on factors such as payment of taxes or subsequent sales of the property that may or may not contain language involving a fee title interest to another party to the tract of land in question.[205]

If the language of a conveyance granting land to the State is ambiguous or would lead to an absurd result, a court of competent jurisdiction must undertake the above analysis to determine whether the State has acquired a servitude or a fee title.[206] The only way to be certain about the result of an ambiguous contract or a contract that would lead to an absurd result is to obtain a declaratory judgment from a court.[207]

The law also provides additional guidance as to the ownership of cut channels.[208] This additional guidance depends on the facts of each specific situation.[209] Courts distinguish between cases when an oxbow lake is formed where the old channel used to be, and cases where no oxbow is formed. If no oxbow is formed, the analysis will depend on whether the cut was made and the silting occurred before the law changed in the late 1970s.[210]

If the silted channel forms a traditional oxbow lake, it becomes a lake in the legal sense of the term.[211] Thus, if the oxbow lake was formed before 1812, when it dries, the riparian landowners do not own the land that was once the lake bottom, but the land remains with the State.[212] If the oxbow lake formed after 1812, however, it becomes, "through indemnification, 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.[213]

The Louisiana Civil Code does not contemplate artificial channel water bottom ownership and accretion.[214] In the case of most artificial channel cuts, the Corps or other responsible party does not outright

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204. La. Op. Att'y Gen. 07-0030.

205. *Id.* This language may include terms such as "bounding owner" or alternatively "bounded by the right-of-way of [so-and-so]."

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* (citing 2 A.N. YIANNOPOULOS, PROPERTY, LOUISIANA CIVIL LAW TREATISE § 76 (4th ed. 2001)).

212. *Id.*

213. *Id.*

214. *Id.*

purchase the land under the new channel, but obtains a servitude from the landowner.[215] This practice is significantly different from what takes place when a natural change in the course of a navigable waterway occurs.[216] When the waterway naturally shifts, the State takes ownership of the newly formed water bottom and the "landowner . . . take[s] by indemnification from the abandoned bed of the waterway."[217]

In some cases, however, an unambiguous servitude grants the Corps or other responsible party the right to make the cut.[218] When there is an unambiguous servitude, the State does not obtain an ownership interest in the newly formed water bottom.[219] Accordingly, the landowner retains ownership of the water bottom and the minerals beneath it and, additionally, is compensated for its use as a waterway.[220] The State then retains ownership of the original water bottom and the minerals beneath it.[221]

Traditional accretion laws are intended to return land to the market as State water bodies dry and the water bottoms become exposed.[222] Although accretion laws may apply to the situation above, it seems that the law should treat an original water body channel differently if the landowner retains ownership of the newly created water bottom.[223] The Civil Code's accretion laws, however, are based on ancient French and Roman laws and do not mention or "contemplate the massive earth-moving works of the modern Corps of Engineers."[224]

When anthropogenic, not natural, forces fill in the original path of a natural river and the State does not obtain an interest in the newly formed water bottom, the State continues to own the original, inundated channel of the navigable waterway.[225] The only way for riparian landowners to gain an interest is through accretion.[226] If this were not the case, an inequity would exist to Louisiana citizens.[227]

Therefore, if a navigable oxbow lake forms anytime after 1812 as the result of an artificial channel cut and the State gains no interest in the

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215. *Id.*
216. *Id.* (citing La. C.C. arts. 502, 504).
217. *Id.*
218. *See id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

new channel bottom, the State retains ownership of the old water bottom and can only lose ownership through accretion.[228] If the oxbow is cut off from the channel at both ends and becomes a true oxbow lake, the law of accretion is inapplicable and the State retains ownership of the water bottom, even after it is exposed.[229] Finally, if an old river channel "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."[230] In all the above scenarios, however, the minerals beneath a dried oxbow lake would belong to the State.[231]

There are two possible outcomes when the facts indicate that the movement of silt from a channel cut did not create an oxbow lake.[232] The outcome will depend on when the channel cut was made. Assuming, *arguendo*, the channel is a river or stream and not a lake, most cuts effectively create a temporary island within the stream of a navigable waterway.[233] This is important to remember, because the Civil Code accretion articles for islands changed in 1978.[234]

Prior to 1978, the Civil Code theory was that accretion could not occur to islands. Therefore, if the Corps or other responsible party began the channel cut before 1978, the State would own some or all of the silt that accreted to the island.[235] In that case, however, the riparian landowner would own the accretion on the non-island side of the channel.[236]

After 1978, though, the accretion on both the island and non-island side of the channel would likely inure to the riparian owners.[237] Therefore, if a silted-in channel is not a true oxbow lake and the channel was cut after 1978, the accretion becomes the private property of riparian landowners.[238] 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.

Artificial cuts are not the only means by which anthropogenic activities affect water courses and the ownership of minerals in

228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*

Louisiana. As was ably analyzed by the Louisiana Attorney General's Office in a recent opinion, the damming of a navigable channel can have fairly bizarre consequences for property and mineral ownership.[239]

In this opinion, which analyzed the impact of a 1904 damming of Bayou Lafourche, it was noted:

> The low-water mark of 1812 defines the bed; and, therefore, the boundary line of ownership of the Bayou in 1812. The State's ownership of the bed of Bayou Lafourche is from the ordinary low-water mark of 1812 on one side of the Bayou, to the ordinary low-water mark of 1812 on the opposite side of the Bayou, excluding any alluvion which accumulated by natural accretion until 1904, when the dam was installed at Donaldsonville. Then, in 1904, the water level dropped because of the installation of the dam, thereby exposing a portion of the bed of the Bayou. The State owns that exposed Bayou bed in its private sovereign capacity, rather than its public sovereign capacity, and any accretion to that exposed bed as riparian owner. In addition, the State also owns the bed of the Bayou from today's low-water mark on one side to low-water mark on the other side. . . . Any natural accretion creates alluvion, which belongs to the riparian owner. It is possible that natural accretion did occur from 1812 until the dam was built in 1904. Therefore, in such situations, the low-water mark in 1904, immediately prior to the dam construction, would be the natural low-water mark and, arguably, the line of State ownership.[240]

In other words, to the extent determinable, the land above the low-water line on each side of the Bayou is private, the accretion between 1812 and 1904 to that formerly riparian land is private (under the general rules of accretion noted above), but any exposed land that resulted from the sudden water level drop due to the dam construction did not constitute accretion, and thus remained the property of the State.[241] Because the State now owns all riparian land along the Bayou, it now gains the benefit of any accretion (post-1904) to that land.[242]

For the purposes of determining mineral rights on areas adjacent to dammed navigable water courses in Louisiana, it is advisable to determine the low-water mark at the time of the damming and then allocate royalties on the water-side of that line to the State. The reason for this, as shown above, is that this land does not represent accretion and thus does not belong to the private former riparian owners.

In addition to the issues related to who owns what when artificial cuts and dams are made to the navigable waterways of the state, other

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239. La. Op. Att'y Gen. 07-0211 (2008).
240. *Id.*
241. *Id.*
242. *Id.*

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-owned 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 as long as the lease exists.[243] When the lease terminates, the mineral rights accrue to the State.[244] Although this issue relates to the freeze statute, it merits its own section and is analyzed more fully in Part VI(B), *infra*.

V. OF ACCESS RIGHTS AND LIABILITY: WHO CAN GO WHERE IN LOUISIANA'S WATERWAYS?

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 practicing in the private sector, a review of these issues is warranted.

As a general premise, Yiannopoulos states, "According 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."[245] 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*.[246] In this case, the Louisiana Third Circuit Court of Appeal held that certain pipeline canals in the Atchafalaya Basin were not susceptible of the public use tenet provided for in the Civil Code.[247] 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.[248] The *Buckskin* canals were made for the purpose of supporting

243. *See* LA. REV. STAT. § 9:1151 (2008).
244. *See id.*
245. YIANNOPOULOS, *supra* note 165, § 57 (footnotes omitted).
246. 2003-1428 (La. App. 3 Cir. 3/3/04); 868 So. 2d 266.
247. *Id.* at 13-14; 868 So. 2d at 275-76.
248. *Id.* at 11-12; 868 So. 2d at 273-75.

hydrocarbon transport through pipelines.[249] These canals were dug on private land with private funds.[250]

Also of interest with respect to this matter is *People for Open Waters, Inc. v. Estate of J.G. Gray*.[251] 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.[252] 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.[253] 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."[254] 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.[255] 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.[256]

In *Cenac v. Public Access Water Rights Ass'n*,[257] 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.[258] 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.[259] The appellate court affirmed the ruling on the boat launch, but also stated the canal was not available for public access.[260] The

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249. *See id.* at 18-19; 868 So. 2d at 274 (comparing a navigable canal to a private road used for commercial traffic).

250. *See id.* 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. *Id.* at 9-10; 868 So. 2d at 272. However, those lands were not the subjects of the holding in the case. *Id.* Only the private lands were the subjects of the holding. *See id.* at 10-15; 868 So. 2d at 273-76.

251. 94-301 (La. App. 3 Cir. 10/5/94); 643 So. 2d 415.

252. *Id.* at pp. 1-2; 643 So. 2d at 416.

253. *Id.* at pp. 3-4; 643 So. 2d at 417-18.

254. *Id.* at p. 4; 643 So. 2d at 418.

255. *Id.*

256. *See id.* at 1-2; 643 So. 2d at 416.

257. 2002-2660 (La. 6/27/03); 851 So. 2d 1006.

258. *Id.* at pp. 3-4; 851 So. 2d at 1010.

259. *Id.* at p. 4; 851 So. 2d at 1010.

260. *Id.*

Supreme Court affirmed the appellate court's ruling, rejecting all of the "dedication to the public use" arguments.[261]

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.[262] It stated that because those seeking access had failed to prove a "plain and positive intent" to 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.[263]

In the recent Third Circuit case, *Schoeffler v. Drake Hunting Club*, the issue in dispute was whether citizens of the State had a right to access water bodies within patented lands.[264] The facts are fairly straight forward: a group of citizens brought an action against several land-owners in the Atchafalaya Basin who had posted no trespassing signs and barriers on waters within the Basin.[265] 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.[266] 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.[267] Similar to the canal access cases when dealing with mineral law, if access were allowed in a situation such as that in *Schoeffler*, then issues of landowner liability would be encountered. These landowners (including the State) could be liable for any injuries or property damage that occurred on the land or, possibly, for the actions of an equipment operator who causes injuries or property damage or is otherwise involved in a harmful incident with members of the public.

In addition, in their third 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.[268] 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.[269] The court noted several times the extreme difficulties in accomplishing what the plaintiffs were requesting:

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261. *Id.* at pp. 18-19; 851 So. 2d at 1018.
262. *See id.*
263. *See id.* at pp. 9-18; 851 So. 2d at 1013-17.
264. 2005-499 (La. App. 3 Cir. 1/4/06); 919 So. 2d 822.
265. *Id.* at pp. 1-2; 919 So. 2d at 826.
266. *Id.* at p. 2; 919 So. 2d at 826.
267. *Id.* at p. 7; 919 So. 2d at 829.
268. *Id.* at p. 3; 919 So. 2d at 826.
269. *Id.* at pp. 32-33; 919 So. 2d at 843.

> 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.[270]

The plaintiffs claimed to be proper parties to bring such a boundary action because, as they claimed, they were "usufructuaries" since "they have the right to enjoy the use and fruits of State-owned waters and bottoms."[271] The court rejected this argument.[272] 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.[273]

The court additionally found that the plaintiffs were improper parties to bring a boundary action.[274] If these waters were state-owned, then, said the court, the State would be the proper party to bring a boundary action.[275] The court also noted the extreme difficulty and expense should the State choose to bring such actions.[276] 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.[277] 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.[278]

In *Schoeffler*, the court also rejected the plaintiffs' argument that they had acquired an interest in the water bodies through historic and traditional use.[279] It stated:

> 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

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270. *Id.* at p. 11; 919 So. 2d at 831.
271. *Id.* at p. 13; 919 So. 2d at 832 (internal quotations omitted).
272. *Id.* at p. 14; 919 So. 2d at 833.
273. *Id.* at p. 15; 919 So. 2d at 833.
274. *Id.* at pp. 16-18; 919 So. 2d at 834-35.
275. *Id.*
276. *Id.* at p. 18; 919 So. 2d at 835-36.
277. *Id.* at p. 24; 919 So. 2d at 838.
278. *Id.* at pp. 10-11; 919 So. 2d at 831.
279. *Id.* at pp. 26-27; 919 So. 2d at 840.

> argument that a thing has "always" been done, does not provide a cause or right of action.[280]

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.[281] 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.[282] This topic is, however, outside of the scope of this Article.

The problems discussed herein related to the constant tension between private landowners and recreational users of the State's natural resources spurred the Louisiana Legislature to pass two resolutions that charged the State Land Office with the creation of a publically accessible database of all State-owned waters in Louisiana.[283] This charge placed a burden on the State Land Office to continually evaluate State claims to waterways.[284]

Although the Web site is considered "dynamic," it does not represent a comprehensive title analysis of State-owned waterways. Instead, it likely creates more tension between the State and private landowners than it relieves between the private landowners and recreational users.[285] However, one thing is abundantly obvious: this well-intentioned law has created an inconclusive, but widely available

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280. *Id.* at p. 24; 919 So. 2d at 840.

281. The federal courts have somewhat differed from the State courts in this regard. *See, e.g.*, Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007), *writs denied*, 129 S. Ct. 42 (2008); *cf.* Parm v. Shumate, No. 01-2624, 2006 WL 2513856 (W.D. La. Oct. 11, 2006), *aff'd*, 513 F.3d 135 (5th Cir. 2007) (finding that the plaintiffs in this case only wanted access to the water that overflowed during flood stages and did not want access to the dry land; it was a permissible use of State waters and supported by common law and state law, as long as the public stayed within the ordinary high water stage of the river). Interestingly, the *Parm* case related to the same land that the State lost in *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. *See also* Meche v. Richard, No. 05-0385, 2007 WL 634154 (W.D. La. Feb. 26, 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).

282. *See, e.g.*, *Walker Lands*, 871 So. 2d at 1258.

283. *See* La. S. Con. Res. 111, 31st Reg. Sess. (2005); La. S. Res. 115, 32d Reg. Sess. (2006).

284. *See* La. Op. Att'y Gen. 08-0290 (2009); State Land Office, Disclaimer, http://www.doa.louisiana.gov/SLO/Disclaimer.htm (last visited May 8, 2009).

285. This tension is created when the State makes a public claim to a particular water bottom that a private entity believes that it has valid title to (as a nonnavigable water bottom). Thus this is a direct challenge to the private entity's claims to the property, whereas before this Web site's existence, any such claims would require extensive research to divine.

source of potential State water-bottoms claims.[286] As noted in Louisiana Attorney General Opinion 08-0290, the practitioner is advised not to rely on this Web site as a definitive analysis of ownership.[287] Instead, title research is essential in such situations.

VI. OF THE INALIENABILITY OF MINERALS: WHO OWNS THE MINERALS?

A. Your Patent Controls What Mineral Rights You Own

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. R.S. 31:149 permits this reservation to be virtually perpetual.[288] 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.[289] Thus, private sellers in Louisiana can retain their mineral rights almost indefinitely by transferring their immovable property to the State rather than to another private individual. 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

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286. *See* La. Op. Att'y Gen. 08-0290.

287. *Id.*

288. *See* LA. REV. STAT. ANN. § 31:149 (2000). Section 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.

289. *See* La. Op. Att'y Gen. 08-0215, 7 n.10 (2009) (noting one possible exception for a brief span of time). The general mineral reservation as between private parties is effective for ten years. LA. REV. STAT. ANN. §§ 31:16, 31:85 (2007). 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. *Id.* §§ 31:87-31:92. 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. *See, e.g.*, Harrison v. Grandison Co., 51 F. Supp. 768, 771 (D. La. 1943).

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 Louisiana Constitution article IX, section 4(A), if the State divests itself of property, the mineral rights thereunder are reserved to the State and they cannot be alienated.[290] There are, however, a few nuances to this reservation that are essential to understand.

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.[291] 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.[292] Article IV, section 2 of 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 (because prescription does not run against the State).[293] 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

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290. This reservation is limited in two situations, the first is explicitly presented in Louisiana Constitution article IX, section 4(A): "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* Part VII.

291. 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 below.

292. *See* LA. CONST. 1921 art. IV, § 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. Op. Att'y Gen. 08-0212 (2009). 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.*

293. LA. CONST. art. IV, § 2 (1921). 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, 434 (La. 1963); *see also* La. Op. Att'y Gen. 08-0212; La. Op. Att'y Gen. 79-1000 (1980); La. Op. Att'y Gen. 1969, at 132. It is also important to note that this restriction was continued by the 1974 Louisiana Constitution. LA. CONST. art. IX, § 4.

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.[294]

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.[295] 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.[296] 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.[297]

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.[298] 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.[299] 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.[300] 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.[301]

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

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294. Subject to the lieu warrant and patent issuance discussed *infra* Part VI.

295. *See, e.g.*, State *ex rel.* Hyam's Heirs v. Grace, 136 So. 569 (La. 1931).

296. *Id.*

297. *See, e.g.*, *id.*; *see also* Douglas v. State, 23 So. 2d 279 (La. 1945).

298. *See* State *ex rel.* Hyams' 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.").

299. *Id.*

300. Lewis v. State, 156 So. 2d 431, 433 (La. 1963).

301. *See generally Hyams' Heirs*, 1 So. 2d at 686.

by the State.[302] 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."[303] 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*, the rights in the subject property only vest once the lieu warrant is presented to the State Land Office.[304] 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.[305]

Unfortunately, there is no law directly on point in this matter.[306] There are three lead cases that discuss who owns what in lieu warrant situations. Both *Hyams' Heirs v. Grace* and *Douglas* are informative, but do not consider the exact scenario discussed above. Both of these cases dealt 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.[307]

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

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302. *See* LA. CONST. 1921, art. IV, § 2.

303. *Id.* This same provision, in virtually identical language, was also incorporated into the 1974 Constitution. LA. CONST. art. IX, § 4(A) (1974).

304. 23 So. 2d 279, 282-83 (La. 1945).

305. *See id.*

306. One case was presented to the Louisiana Supreme Court (twice) whose facts are identical to those presented in the scenario presented herein. In *State ex rel. Albritton v. Grace*, 96 So. 2d 565, 566 (La. 1957), and *State ex rel. Albritton v. Moore*, 116 So. 2d 502, 503 (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 the Supreme Court never ruled on the merits.

307. *Douglas*, 23 So. 2d at 280 (quoting the trial court).

property the same as if the patent had issued, entitling her to all revenues derived therefrom."[308] In both *Douglas* and *Hyams' 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 sometime 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.[309] The Supreme Court in that case rejected the *Hyams' 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.[310] This case clearly recognized that the issuance of a lieu warrant and patent post-1921 could not convey any mineral interests to the presenter of the warrant.[311] 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.[312]

Most importantly however, the court emphatically stated, "We 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."[313] 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. One possible deviation from this general rule comes from a later Grace case: *Hyams' Heirs v. Grace*.[314] In this case, the Louisiana Supreme Court did allow for the honoring of a pre-1921 warrant that was presented post-1921.[315] However, the difference between this warrant and most others is that the

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308. *Id.* at 283.
309. 156 So. 2d 431, 432-35 (La. 1963).
310. *Id.* at 433.
311. *Id.*
312. *Id.* at 434.
313. *Id.* In such a situation, this State ownership of minerals does not prohibit the private party from owning the surface.
314. 1 So. 2d 683 (La. 1941).
315. *Id.* at 686.

warrant itself specifically identified the property to be issued in the patent.[316] In other words, the factual circumstances underlying this decision were very unique. Thus, really all that this later Grace case stands for is the notion that, if someone presents a warrant that *specifically identifies* lands to be issued in the patent post-1921, because the property was previously identified, the presenter has a vested interest and they acquire the minerals with the surface. When considering the general sales concepts discussed herein, this scenario is unsurprising, as this would be the equivalent of identifying the thing to be sold with specificity prior to the sale, a reality that does not exist in most warrant situations. However, considering the totality of what is relevant from the *Hyams' 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, Louisiana Civil Code article 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."[317]

Indeed, the jurisprudence related to Louisiana Civil Code article 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.[318]

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 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.[319]

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316. *Id.* at 683-84.

317. LA CIV. CODE ANN. art. 2457 (2008).

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

319. *See George D. Witt Shoe Co.*, 47 So. at 446.

B. Inalienability of Minerals and Coastal Restoration

Another important matter related to inalienability dovetails from the discussion of the freeze statute.[320] 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 southern Louisiana.[321] 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.[322] 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 land[323] 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.[324] 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., nondefault, nonstate) 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 as long as the property is in the possession of the State.[325] However, this general

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320. *See* LA. REV. STAT. ANN. § 9:1151 (2008).

321. *See* Seidemann, *supra* note 142.

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

323. 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.

324. L.A. CONST. art. IX, § 3.

325. LA. REV. STAT. ANN. § 31:149(A) (2000). 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. Op. Att'y Gen. 07-0147 (2007); *see also* La. Op. Att'y Gen.

rule 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.[326] 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).[327] 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."[328]

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.[329] More specifically, 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.[330]

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 encourage 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.[331] Subject to that caveat, a review of the effects of that law is important. Before embarking on such a review, an analysis of the amended language of the law is necessary. La. R.S. 41:1702(D)(2)(a)(i) states:

08-0215, 7 n.10 (2009) (discussing the possible exception for particular times in 1990 through 1991).

326. La. Op. Att'y Gen. 81-0274 (1981).

327. *See* 2006 La. Acts 626; LA. REV. STAT. ANN. § 41:1702(D)(2)(a) (2006).

328. 2006 La. Acts 626 pmbl.

329. *See id.*

330. *See id.*

331. *See id.*

> 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 abutting 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.*[332]

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 provides for the creation of perpetual mineral servitudes, but what becomes of such servitudes when the land over which they are granted reerodes into the Gulf of Mexico and once again becomes State water bottom?

The language of Louisiana Constitution article IX, section 3, when combined with Louisiana Civil Code article 450 is clear: as land erodes into navigable waterways, it becomes the property of the State, along with its underlying minerals.[333] 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: "[A]greements [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."[334]

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 Louisiana

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332. LA. REV. STAT. ANN. § 41:1702(D)(2)(a)(i) (2006) (emphasis added).

333. *See* YIANNOPOULOS, *supra* note 165, § 65. All of this is subject to the reservations of the freeze statute. LA. REV. STAT. ANN. § 9:1511 (2008).

334. LA. REV. STAT. ANN. § 41:1702(D)(2)(a)(i) (2006) (emphasis added).

Constitution article IX, section 3 and Louisiana Civil Code article 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.[335] If and when that emergent land again erodes into a navigable waterway, the life of that land would expire and so too would any agreement for a perpetual interest in the underlying minerals.[336]

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."[337] Thus, it is only logical to conclude that, once the land is no longer emergent (i.e., it has reeroded 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 Louisiana Constitution article VII, section 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.[338]

In other words, pursuant to Louisiana Constitution article IX, section 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 Louisiana Constitution article VII, section 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

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335. Note that this interpretation must be applied to all land covered within the scope of La. R.S. 41:1702(D)(2)(a). To do otherwise would lead to a donation of State assets in violation of Louisiana Constitution article VII, section 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 Louisiana Constitution article IX, section 3.

336. *See* LA. REV. STAT. ANN. § 9:1511 (2008). Again, subject to the limitations provided for in the freeze statute.

337. *See id.* § 41:1702(D)(2)(a)(i) (2006).

338. *Id.*

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 reerodes, 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 reerosion occurs, the constitutional basis, the quid pro quo, for the "donation" of the mineral rights ceases to exist and those rights revert to the 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 reerode, 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 Louisiana Constitution article VII, section 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.[339] 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 are 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.

In 2008, several landowning groups supported legislation to amend the Louisiana Constitution to reverse the above-discussed scenario.[340] This legislation, Louisiana Senate Bills 216 and 349 of 2008, would have made it permissible under the Constitution to sever mineral and surface rights ownership. The practical effect of this legislation would be to reverse a long-standing civilian concept of unity of property rights to allow private landowners to rid themselves of surface ownership and

339. *See* LA. CIV. CODE ANN. art. 1767 (2008) (referring to suspensive conditions).

340. *See Testimony of Newman Trowbridge and Charles Marshall Before Senate Natural Resources Committee* (Apr. 24, 2008).

liability while retaining the mineral rights to property used for coastal restoration.[341]

Although this concept (i.e., one whereby the landowners give up surface rights for coastal restoration efforts) seems to be a reasonable quid pro quo with the State, it is not. Such a scenario straddles the State with surface liability while not providing a mechanism (i.e., mineral revenues) by which to offset that liability.[342] In addition, if the State or a nonprofit organization takes possession of formerly private property, then the local government loses substantial property tax revenue—the bulwark of local government funding.[343] Finally, with an absent mineral rights holder, there is no incentive for that party to ensure the future viability of the coastal restoration efforts.[344] Under the current law, because those interests lapse as property reerodes, the landowner has a vested interest in the survival of the land (discussed above). Under the approach proposed in 2008, no such vested interest exists. In short, the landowner gets away from all liability free and clear, they retain all minerals forever, the local governments lose much-needed income, and the State has the sole responsibility for liability and maintenance of the restoration project with no correlative funds to assist in those efforts.[345]

In that light, the proposals of Senate Bills 216 and 349 of 2008 do not appear so advantageous to the people of Louisiana. Both bills failed, but it is likely that they will appear again.

C. Is Dredge Material a Mineral and Who Controls It?

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 Louisiana Attorney General Opinion 05-0222 (2005). That opinion stated that sand and gravel dredged from the State's water

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341. *Id.*; *Testimony of Dr. Patrick Martin, Ryan M. Seidemann, and James J. Devitt Before La. S. Natural Resources Comm.* (Apr. 24, 2008).

342. Martin et al., *supra* note 341.

343. *Id.*

344. *Id.*

345. *Id.*

bottoms does fall into the category of "other mineral" under La. R.S. 30:209.[346] 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.[347] 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 Louisiana Constitution article VII, section 14(A), such materials cannot be given away without adequate compensation.[348]

Based upon the State's ownership of such dredged materials, as was noted in Louisiana Attorney General Opinion 05-0222, if the Corps,[349] 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."[350] 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.[351] This practice has been a matter of much discussion in the scientific, environmental, and governmental communities for some years

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346. La. Op. Att'y Gen. 05-0222 (2005).

347. This proposition is also supported by La. R.S. 31:4 (2001), 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." 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.

348. 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, pp. 3-4 (La. App. 1 Cir. 9/28/01); 807 So. 2d 881, 882-83. Indeed, the Department of Wildlife & Fisheries is statutorily tasked with administering the sale of dredged material. LA. REV. STAT. ANN. § 56:2011 (2008).

349. "The United States Army Corps of Engineers (Corps) [is] 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, 56 (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, 16 (2006).

350. *See, e.g.*, LISA C. SCHIAVINATO & JAMES G. WILKINS, LOUISIANA STATE UNIVERSITY BENEFICIAL USE OF DREDGED MATERIAL: TO WHAT EXTENT DO STATES HAVE A VOICE? 7-9 (2004).

351. *Id.*

now.[352] 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).[353] The CZMA, a federal law that is locally administered by the Louisiana Department of Natural Resources (DNR),[354] provides clear authority for the State to make beneficial use a precondition to certain administrative actions.

The primary objective of the CZMA is to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[355] With the CZMA, Congress recognized that there was "a national interest in the effective management, beneficial use, protection, and development of the coastal zone."[356] This was 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.[357] 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.[358]

In furtherance of achieving this goal, any coastal state is eligible to submit a coastal management plan (CMP) for federal approval.[359] 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.[360] Once the CMP is approved, the State may receive federal assistance and assume the authorities granted to the states under

352. *Id.*
353. 16 U.S.C. §§ 1451-1466 (2006).
354. *See generally* LA. REV. STAT. ANN. §§ 49:214.21-.42 (2008).
355. 16 U.S.C. § 1452(1).
356. *Id.* § 1451(a).
357. *Id.* § 1451(i).
358. *Id.* § 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, 109 (2006).
359. 16 U.S.C. § 1455.
360. *Id.* § 1455(a)(2).

the CZMA.[361] In Louisiana, Congress approved the state CMP, called the Louisiana Coastal Resources Program (LCRP), in 1980.[362]

One mechanism for cooperation between state and federal governments is the federal consistency provision of the CZMA.[363] 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.[364] Federal regulations define "consistent to the 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."[365]

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.[366] 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.[367]

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

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361. *Id.* §§ 1455(b), 1456.

362. Langford, Morel, Wilkins & Seidemann, *supra* note 358, at 116 (citing Office of Ocean & Coastal Res. Mgmt., Nat'l Ocean Serv., Louisiana Coastal Resources Program, http://coastalmanagement.noaa.gov/mystate/la.html (last visited Nov. 20, 2009).

363. 16 U.S.C. § 1456(c).

364. *Id.* § 1456(c)(1)(A), (c)(3).

365. 15 C.F.R. § 930.32(a)(1) (2009).

366. 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, § 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.

367. LA. ADMIN. CODE tit. 43, pt. 1, § 707(B) (1990) ("Spoil *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)); LA. ADMIN. CODE tit. 43, pt. 1 § 707(G) (1990) ("The 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.

material to Ocean Dredged Material Disposal Sites (ODMDS) in the deep waters of the Gulf of Mexico.[368] These are deep water areas designated by the Environmental Protection Agency (EPA) as approved areas for disposing of dredged materials.[369] Aside from the concerns of the scientific community over the disturbance of sensitive deep-water habitats,[370] 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:

> Much of the several hundred million cubic yards of sediment dredged each year from U.S. ports, harbors, and waterways could be 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.[371]

Although the agencies are quick to caution that their recent musings on the possible uses of dredged material are "intended solely as guidance"[372] 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.[373] Indeed, though the report is "guidance," the Corps has an existing standard that supports the beneficial use of dredged material.[374]

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368. *See* Raghunathan Ravi "Ray" Krishna et al., *Volatilization of Contaminants from Suspended Sediment in a Water Column During Dredging*, 2nd International Symposium on Contaminated Sediments (May 26-28, 2003) (on file with author), for a discussion of some of the effects of returning dredge material to the water column. *See also Summary of the Joint Public Scoping Meeting for the Gulfport Harbor Supplemental Environmental Impact Statement and the Gulfport Offshore Ocean Dredged Material Disposal Site Environmental Impact Statement*, United States Army Corps of Engineers (May 16, 2006) (on file with author), for a discussion of ODMDS dumping of dredged material.

369. 40 C.F.R. § 228.1.

370. *See, e.g.*, TONY KOSLOW, THE SILENT DEEP: THE DISCOVERY, ECOLOGY, AND CONSERVATION OF THE DEEP SEA pt. III (2007).

371. U.S. EPA & U.S. Army Corps of Eng'rs, *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*, preface (EPA working paper No.EPA842-B-07-002, 2007), *available at* http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Adobe/PDF/P10039RT.PDF.

372. *Id.*

373. LA. REV. STAT. ANN. § 49:214.30(H)(1) (2008).

374. 53 Fed. Reg. 14,902-01 (Apr. 26, 1998) (codified at 33 C.F.R. § 335.7). This standard requires that the Corps identify the "least costly dredged material disposal or placement

The major obstacle to the beneficial use of dredged material appears to be a matter of cost.[375] 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.[376] In addition, 15 C.F.R. § 930.32(a)(2) clearly states that Congress's 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.[377]

To the extent that beneficial use of dredged materials exceeds the "least costly" standard, the excess costs may be covered either by federal/nonfederal cost sharing or may be solely borne by a nonfederal entity.[378] 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 nonfederal project sponsor.[379] However, as has been documented countless times in the academic literature, coastal restoration and protection (the probable use of Louisiana's dredged

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alternative . . . that is consistent with sound engineering practices and meets all federal environmental requirements." U.S. EPA & U.S. ARMY CORPS OF ENG'RS, *supra* note 371, at 2.

375. U.S. EPA & U.S. ARMY CORPS OF ENG'RS, *supra* note 371, preface.

376. *See* 16 U.S.C. §§ 1451-1466 (2000). 15 C.F.R. § 930.32(a)(3) (2009) states:

> 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.

See also Schiavinato & Wilkins, *supra* note 352, at 20.

377. 16 U.S.C. §§ 1451-1466.

378. *See* U.S. EPA & U.S. ARMY CORPS OF ENG'RS, *supra* note 371, at 4.

379. *Id.*

materials) is essential to support both ecosystem restoration[380] and flood and storm damage reduction.[381] 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,[382] 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.

VII. OF FEDERAL WATERS: STATE INVOLVEMENT IN THE OCS PROCESS—UPDATES

Another rather obscure area of federal law that may be of some interest to Louisiana mineral law practitioners deals with the State's involvement in the federal government's efforts to lease Outer Continental Shelf (OCS) lands for mineral development. As I have noted in two previous articles, coastal states play a substantial role in reviewing and commenting on the federal environmental process with respect to mineral activities in federal waters, particularly on the OCS.[383] These previous studies focused on the impacts of these State actions on how the

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380. *See generally* Seidemann & Susman, *supra* note 322.

381. *See generally* Seidemann, *supra* note 142.

382. 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.

383. *See* Langford, Morel, Wilkins & Seidemann, *supra* note 358; *see also* Ryan M. Seidemann & James G. Wilkins, Blanco v. Burton*: What Did We Learn from Louisiana's Recent OCS Challenge?*, 25 PACE ENVTL. L. REV. 393 (2008); Katherine Henry, Presentation at the 54th Louisiana Mineral Law Institute at Louisiana State University: State and Federal Interaction Affecting the Oil and Gas Industry: Partners or Adversaries? (Apr. 12-13, 2007).

federal government does business. However, in keeping with this Article's general theme of reviewing the relatively obscure laws that impact mineral activities in Louisiana, a brief review of the impacts of recent developments related to these laws is undertaken.[384]

There are two issues related to OCS matters that have not been extensively discussed elsewhere that merit attention. First are the implications of the recent decision of the United States Circuit Court for the District of Columbia in the matter of *Center for Biological Diversity v. U.S. Department of the Interior*.[385] The other matter relates to public relations implications that stem from such suits.

In 2008, I reported on the early stages of a new challenge to the environmental efforts of the Minerals Management Service (MMS) in the case of *Center for Biological Diversity v. U.S. Department of the Interior*.[386] Since the publication of that article, the D.C. Circuit Court of Appeals has issued a decision in this case.[387] This case, as with Louisiana's challenge to MMS in 2006,[388] demonstrated that states, local governments, and nongovernmental organizations can have some impact on the environmental processes and mineral activities of the federal government. Although this case centered around the sufficiency of MMS's compliance with the OCSLA, the Endangered Species Act (ESA), and NEPA in the waters off the coast of Alaska, it still holds some importance for the Gulf of Mexico area and Louisiana in particular.[389]

The reason that this case holds some importance for the Gulf of Mexico and Louisiana mineral interests in particular is that it focused on the 2007-2012 Leasing Program that served as a baseline planning

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384. Extensive analyses of the laws under which the States are authorized to act with regard to OCS activities—the CZMA, the Outer Continental Shelf Lands Act (OCSLA), and the National Environmental Policy Act (NEPA)—have appeared elsewhere. *See, e.g.*, Langford, Morel, Wilkins & Seidemann, *supra* note 358; Seidemann & Wilkins, *supra* note 383; Henry, *supra* note 383. To avoid duplication and unnecessary waste of space, the reader is directed to those sources for a comprehensive review of those laws.

385. 563 F.3d 466 (D.C. Cir. 2009).

386. *See* Seidemann & Wilkins, *supra* note 383, at 439-40 (discussing the case of *Ctr. for Biological Diversity*, 563 F.3d 466).

387. *Ctr. for Biological Diversity*, 563 F.3d at 488-89.

388. *See generally* Blanco v. Burton, No. 06-3813, 2006 WL 2366046 (E.D. La. Aug. 14, 2006). An alternative review of this case may be found at Patrick B. Sanders, Blanco v. Burton*: Louisiana's Struggle for Cooperative Federalism in Offshore Energy Development*, 69 LA. L. REV. 255 (2008).

389. *Ctr. for Biological Diversity*, 563 F.3d at 471-72. It is important to note that the petitioners in this case did not bring any claims under the CZMA as those in *Blanco* did in 2006. The reason for this is that only the states can avail themselves of redress against MMS for inadequate environmental analyses under the CZMA and none of the petitioners in this matter were states.

document for all MMS lease sales between those years.[390] This document covers the Gulf of Mexico regions as well as the Alaska area and the Atlantic OCS region.[391] In addition, because the petitioners won on one of their claims,[392] the case presents a potential chink in the armor of MMS's program for future challenges and may proximately impact MMS's efforts to lease in the Gulf of Mexico region in the short term.

Importantly, two of the petitioners' NEPA claims and their ESA claim were dismissed for being unripe.[393] It is unclear when such claims may become ripe, but perhaps the lease sale stage of the OCS process rather than the plan stage would be an appropriate time to challenge violations of NEPA and the ESA.[394] However, the dismissal of these claims demonstrates that the courts have yet to appreciate the programmatic MMS documents as the sources from which all subsequent mineral activity stems and at which time the most comprehensive corrections to errors in environmental analysis can be caught and corrected.[395]

Although the court in *Center for Biological Diversity* found that most of the petitioners OCSLA claims lacked merit,[396] it did vacate the Leasing Program "on grounds that the Program's environmental sensitivity rankings are irrational."[397] This claim, ultimately the winning claim for the petitioners, was based on the allegation that MMS did not consider the relevant factors of applying a particular analytical method to assess the risk that oil spills pose to all of the OCS environments.[398] This claim was based on a failure of MMS to comply with Section 18(a)(2)(G) of the OCSLA,[399] which requires MMS to factor in the "'environmental sensitivity of . . . different areas *of the outer Continental*

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390. *Id.*

391. *See generally* MINERALS MGMT. SERV., U.S. DEP'T OF INTERIOR, PROPOSED FINAL PROGRAM OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROGRAM 2007-2012 (2007).

392. *Ctr. for Biological Diversity*, 563 F.3d at 488-89.

393. *Id.* at 481-83.

394. This issue was briefly discussed by Judge Engelhardt in *Blanco v. Burton*, where he suggested that the applicable federal laws should be considered at every stage of the OCS process. *See* 2006 WL 2366046, at *17.

395. *See* Seidemann & Wilkins, *supra* note 383, at 415-18. Although Judge Engelhardt in *Blanco* stated that the law must be complied with at each stage of the OCS process, he, like the D.C. Circuit in the *Center for Biological Diversity* case, still failed to see that the early stages of the OCS process are the best times to catch major errors. *See Blanco*, 2006 WL 2366046, at *1.

396. *Ctr. for Biological Diversity*, 563 F.3d at 481-83.

397. *Id.*

398. *Id.* at 487-89.

399. 43 U.S.C. § 1344(a)(2)(G) (2000).

Shelf.'"[400] The court found that the use of a method that only considered shoreline effects and not all OCS environments violated this legal requirement.[401]

For the above reason alone, the D.C. Circuit vacated the Leasing Program.[402] The decision made no mention of whether this invalidates leases that were already let under this Program.[403] However, it would seem that several legal theories would stop the leases already issued from being cancelled. One such theory would be the concept of ex post facto, which would seem to apply here, thus not allowing this decision to impact leases already issued.[404] Another theory is simply that the petitioners' original demands did not include any requests for canceling lease sales. Thus, new lawsuits would have to be instituted to cancel the leases already let. This would be very complex and time consuming.

It would seem unreasonable to consider the past lease sales invalid, but it is reasonable to expect that MMS will do no more leasing under this Program until the errors identified in the court's decision are remedied.[405] However, because there is a 2010-2015 Plan in the works, it may not be long before MMS begins leasing again under that program. In such a situation, it would be much easier and efficient for MMS to delay the remainder of the 2009 lease sales, not correct the 2007-2012

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400. *Ctr. for Biological Diversity*, 563 F.3d at 487 (quoting 43 U.S.C. § 1344(a)(2)(G) (emphasis added)).

401. *Id.* at 487-89.

402. *See id.* at 488-89.

403. Lease Sales 204, 205, 206, 207, and 208 were conducted for the Gulf of Mexico region between 2007 and the 2009 decision in *Center for Biological Diversity*. 72 Fed. Reg. 39,832-37 (July 20, 2007) (Lease Sale 204); 72 Fed Reg. 50,387 (Aug. 31, 2007) (Lease Sale 205); 73 Fed. Reg. 8347 (Feb. 13, 2008) (Lease Sale 206); 73 Fed. Reg. 15,774-75 (Mar. 25, 2008) (Lease Sale 207). The fact that the court made no mention of what was to become of the lease sales did not stop the industry from sounding the alarm, commenting that

> this decision could have potentially devastating consequences for leases that have already been issued under this program in both Alaska and the Gulf of Mexico, as well as for lease sales scheduled into the future. At stake are thousands of well-paying American jobs, billions of dollars in much-needed revenue for federal, state and local governments and the nation's energy security.

Press Release, Am. Petroleum Inst., Court Ruling on Offshore Leasing Program Could Cost Jobs and Weaken Energy Security 1 (May 2009), *available at* http://www.api.org/policy/exploration/upload/Offshore_Ruling_5_2009.pdf.

404. U.S. CONST. art. I, § 9, cl. 3; LA. CONST. art. I, § 23. Although this concept, under both the Louisiana and U.S. Constitutions, is aimed at restricting the retroactive application of legislation, the concept seems applicable here in a sort of res judicata manner.

405. It is also important to note that the federal government may opt to appeal the case (an eventuality not known at the time of this writing) and thus stall the effectiveness of the D.C. Circuit's decision.

Leasing Program, and simply incorporate the suggested changes into the 2010-2015 plan and continue on with business as usual.[406]

The implications of this decision for Louisiana are likely negligible from the perspective of affecting the State's bottom line. Although Louisiana receives a share of OCS revenues from MMS leases (an amount that will grow over the years as a result of the Gulf of Mexico Energy Security Act of 2006[407]), short disruptions to the MMS leasing process do not have noticeable impacts on the coastal states. For example, as a result of the cancellation of Lease Sale 201 in 2007 due to the *Blanco v. Burton* settlement,[408] MMS rolled the Lease Sale 201 areas into Lease Sales 204 and 205, thus meaning that a delay in the actual leasing of these areas of the OCS was only a few months.[409] Over several years of planning and production from a lease sale, it is probably that the impacts of these lost months will effectively disappear.

Thus, the only potential fallout to Louisiana during the period of waiting for MMS to correct its errors will be in the form of whatever Louisiana companies would have geared up to work on the early planning stages of upcoming leases. Again, however, there is little doubt that this work will be available; it will simply be delayed for a little while. Thus, it is extremely doubtful that any long-term (and likely no short-term) impacts of this decision will be felt by the Louisiana mineral industry.

Another matter that is part and parcel with the fears of OCS challenges that merits discussion is the potential impacts that these challenges have on the public through increased prices at the pump. This allegation has a direct impact on those with mineral interests in Louisiana and is briefly analyzed.

There is no indication, as Louisiana challenged Lease Sale 200 in 2006 or threatened to challenge Lease Sale 201 in 2007, that there was any noticeable impact to oil prices or prices at the gas pump. This is consistent with the literature on the economics of oil. Oil is traded on a global market that relies on numerous complex variables to set the price

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406. If MMS goes this route, the court decision would only impact one lease sale in the Gulf of Mexico: Lease Sale 210. Minerals Mgmt. Serv., U.S. Dep't of Interior, 2007-2012 Lease Sale Schedule, http://www.mms.gov/5-year/2007-2012LeaseSaleSchedule.htm (last visited May 8, 2009). However, if Lease Sale 210 does go forward, Louisiana would have solid grounds to object to its consistency with the State's coastal management program, as the underlying document has been declared flawed by the D.C. Circuit.

407. Tax Relief and healthcare Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922, § 101-105 (2006).

408. *See* Blanco v. Burton, 2006 WL 2366046 (E.D. La. Aug. 14, 2006).

409. *See* Seidemann & Wilkins, *supra* note 383, at 420.

of the commodity.[410] Thus, it would not be anticipated that regulatory spats within one oil-producing country, especially those of limited duration, such as OCS lease sale challenges, would have any impact on the price of oil products.

The other impact to mineral interests that has been alleged in OCS challenges is that a stoppage in leasing activity would cause substantial economic hardships to the local support industries.[411] Although this allegation is often made, it is difficult, if not impossible, to quantify. Based upon the above discussion of the short-term impacts of OCS lease sale challenges, it is doubtful that such effects are ever substantial.

However, assuming, arguendo, that such an allegation is true, how can the mineral industry minimize these impacts? The very simple answer to this question is for the industry to demand that the federal government, particularly MMS, do a better job of adhering to the law that governs that agency. The number of challenges to OCS activity has been on the rise in recent years.[412] The logical way to bring these challenges under control is to avoid the shortcomings that lead to valid challenges in the first place. The success of the Center for Biological Diversity's case in the D.C. Circuit and the strong language of Judge Engelhardt's opinion in the *Blanco v. Burton* matter should give the mineral industry pause as to where its allegiances should lie in matters of OCS environmental law compliance.[413] The most efficient means of stemming the valid, substantive challenges to OCS activity is to force the federal government to actually address the legitimate concerns of those filing such lawsuits rather than attempting to oppose each challenge without remedying the underlying problem. This stopgap approach will not solve the long-term problems.

VIII. CONCLUSION

Although the legal issues discussed herein are varied, they can be reduced to a few cautionary principles.

1. Do not disturb the dead. Make sure that any mineral activities that might impact cemeteries comply fully with Title 8;

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410. *See generally* Ling-Yun He, Ying Fan & Yi-Ming Wei, *Impact of Speculator's Expectations of Returns and Time Scales of Investment on Crude Oil Price Behaviors*, 31 ENERGY ECON. 77, 77 (2009).

411. *See generally* Press Release, Am. Petroleum Inst., *supra* note 403.

412. *See* Blanco v. Burton, 2006 WL 2366046 (E.D. La. Aug. 14, 2006); *see also* Ctr. for Biological Diversity, 563 F.3d 466 (D.C. Cir. 2009); *see also* N. Slope Borough v. Minerals Mgmt. Serv. No. 3:07-cv-0045-RRB, 2007 2L 1106110 (D. Alaska Arp. 12, 2007).

413. *See Blanco*, 2006 WL 2366046.

2. Watch out for school lands. Sixteenth section lands, generally, are not that confusing, but be aware of them when conducting title searches to ensure that leases are taken from and royalties are paid to proper parties;
3. Be aware of water movements. The impact of natural and anthropogenic changes in waterways can affect ownership of mineral rights;
4. Know who can access your waters. For liability protection purposes, it is imperative that you are aware of the law related to who has the right to be where in the waterways of the State. Not all questions related to this issue have yet been answered, but the review herein is suggestive of several trends;
5. When performing title searches, be aware of when patents were issued by the State. These will likely control who owns the mineral rights;
6. The State cannot alienate its minerals. Coastal restoration provides a reasonable basis for temporary reorganizations of mineral rights depending on the character of the land (submerged v. emerged); and
7. Dredge material is a mineral that State actors must be careful of alienating without adequate compensation. In addition, the Corps is likely out of compliance with the CZMA through its failure to beneficially use material dredged from Louisiana's water bottoms.
8. The State has a public trust duty to protect its environment through critical analyses of federal environmental documents. Challenges to the feds on inadequate documents are not attacks on the mineral industry and should be supported in the vein of facilitating future, ecologically sound OCS mineral exploitation.

These disparate issues, all of which revolve around the State's role and involvement in mineral matters can have significant implications for the practitioner, ones that I hope have been clarified through this Article.