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Do Not Disturb: A Practical Guide for What Not to Do Around Cemeteries and Human Remains for the Louisiana Energy and Land Use Practitioner

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Do Not Disturb: A Practical Guide for What Not to Do Around Cemeteries and Human Remains for the Louisiana Energy and Land Use Practitioner

*Ryan M. Seidemann**

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I. INTRODUCTION

When most people think of fossil fuels, they believe, at least to some extent, that they are filling their tanks with dead dinosaurs. Seldom do people think about dead humans when they think of fossil fuels or energy matters in general. However, as history in Louisiana and other states has shown, dead humans should be forefront in the thoughts of energy industry professionals when undertaking projects.

In 1997, when Texaco was undertaking construction projects in lower Lafourche Parish, its field crews identified a burial site dating from the Plaquemines Period¹ in the path of planned construction.² Although Texaco complied with the applicable laws in dealing with

1. The Plaquemines Period roughly refers to a Native American cultural period in Louisiana that is dated to have existed between A.D. 975 and A.D. 1640. ROBERT W. NEUMAN, AN INTRODUCTION TO LOUISIANA ARCHAEOLOGY 258 (LSU 1984).

2. *Texaco Wins Fight for Burial Grounds*, THE TIMES-PICAYUNE, June 9, 1998, at C2.

this site, the Houma tribe still sued Texaco for disturbing Native American human remains.³

Another example of interactions between cemeteries and the energy industry comes from AEP-SWEPCO's (AEP) plans in the early 2000s to strip mine portions of the Mansfield Civil War Battlefield. In this situation, AEP proposed to mine lignite from portions of the historic battlefield.⁴ The company properly engaged archaeological professionals to survey the area of impact for the presence of cultural materials and human remains, and no remains were identified.⁵ Nonetheless, it is widely known that it was common practice during the Civil War to inter soldiers where they fell on the battlefield,⁶ thus raising the specter that the archaeological survey (which is based, by necessity, on probability sampling of the impact area rather than on complete excavations unless something significant is identified)⁷ simply did not identify isolated interments of soldiers. The possibility of the historic battlefield, and especially human burials, being destroyed by strip mining provoked the ire of environmental and historic preservation groups⁸ and led ultimately to the indefinite or permanent scrapping of the mining plans.

More recently, during Haynesville Shale development activities in North Louisiana, pipeline construction occasionally encountered abandoned historic cemeteries.⁹ Some of these recent interactions

3. *Id.*

4. Mark Schleifstein, *Grave Disturbance: A coal-mining excavation at the site of the Battle of Mansfield, the last major Confederate victory of the Civil War, threatens the burial ground of the Union soldiers who died there in 1864*, THE TIMES-PICAYUNE, Mar. 23, 2005, at A8.

5. See PBS&J, DOCUMENT NO. 090118, MANAGEMENT SUMMARY FOR ADDITIONAL DATA RECOVERY AT SITE 16DS228, THE THIRD PHASE OF THE BATTLE OF MANSFIELD, DESOTO PARISH, LOUISIANA, 1, 3 (2009) (on file with the *LSU Journal of Energy Law and Resources* as report number 22-2949-1) (noting that archaeological testing was conducted at the battlefield site and that certain portions of the site will be preserved in any strip mining operations; however, no human remains were encountered in the testing).

6. KENNETH V. ISERSON, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES? 462 (1994) (noting the common practice following battle of interring bodies quickly and very close to where they fell).

7. See e.g., GORDON R. WILLEY & JEREMY A. SABLOFF, A HISTORY OF AMERICAN ARCHAEOLOGY 228 (3d ed. 1993) (noting the increasing use of probability sampling in archaeology).

8. Schleifstein, *supra* note 4; *Group files petition to preserve Mansfield battlefield*, Associated Press Apr. 20, 2004, 5:59 pm (on file with the *LSU Journal of Energy Law and Resources*).

9. Vickie Welborn, *Forgotten DeSoto cemetery is restored*, SHREVEPORT TIMES (Jan. 17, 2011) (on file with the *LSU Journal of Energy Law and Resources*).

have ranged from unverifiable anonymous complaints that a pipeline crew destroyed a cemetery during construction, to Tiger Pipeline's definitive discovery of an abandoned and largely unmarked cemetery while constructing a Haynesville pipeline in DeSoto Parish.¹⁰ The former situation, which must be investigated (assuming that the complaint is at least plausible), often leads to an unnecessary waste of government resources. The latter situation is a perfect example of a cooperative and mutually beneficial interaction of history and science on the one hand and mineral production on the other. In the latter situation, survey crews involved in constructing a Haynesville Shale pipeline from Richland Parish, Louisiana, to Carthage, Texas, identified a derelict historic cemetery in the path of the pipeline.¹¹ In this situation, Tiger Pipeline contracted with archaeologists who were able to delineate the entire site using ground scraping.¹² Rather than removing the cemetery to another location, Tiger opted to simply reroute its pipeline to avoid the cemetery.¹³ What Tiger did next was surprising and unusual. Although it was not going to impact the cemetery, Tiger unilaterally spent its own money to restore the cemetery.¹⁴ Each of the graves identified by the archaeologists was given a marker, and the cemetery was fenced.¹⁵ In this scenario, the energy company garnered considerable goodwill from the local descendants of those interred in the cemetery, and the historical and archaeological knowledge of the nineteenth century burial practices of this area expanded.¹⁶

The Louisiana examples of historic and modern interactions between cemeteries and the energy industry are not unique and are not limited to mineral production. The Corps of Engineers has

10. *Id.*

11. See LARISSA THOMAS ET AL., OLD GRAVEL POINT CEMETERY: THE ETC TIGER PIPELINE PROJECT: RESTORING A HISTORIC BURIAL PLACE IN DESOTO PARISH, LOUISIANA (2010), louisianacemeteries.wikispaces.com/file/view/ETC_Old_Gravel_Point_Cemetery.pdf/194494192/ETC_Old_Gravel_Point_Cemetery.pdf [<http://perma.cc/34NK-RPA7>] (archived Mar. 16, 2014) (see page 5 of 19 of PDF).

12. WILLIAM F. STANYARD, Doc. No. ADDENDUM 2 PHASE I CULTURAL RESOURCE INVESTIGATIONS FOR THE ETC TIGER PIPELINE PROJECT: LOUISIANA SEGMENT (2010) (on file with the *LSU Journal of Energy Law and Resources* as report number 22-3338-2) (noting the necessity to reroute a portion of the Tiger Pipeline due to the identification of a cemetery in the original pipeline path).

13. See generally THOMAS ET AL., *supra* note 11.

14. *Id.*

15. *Id.*

16. *Discovery of Cemetery Provides Answers for Some Families*, KTBS 3 NEWS, <http://www.ktbs.com/story/22318345/discovery-of-cemetery-provides-answers-for-some-families> [<http://perma.cc/7MKD-YFW7>] (archived Mar. 4, 2014).

encountered human remains when conducting draw-downs of reservoirs used to supply water for hydroelectric power that have brought their energy-generation efforts into court.¹⁷ In addition, simple development has run into unexpected cemeteries across the country that have ground modern activity to a halt.¹⁸ Human remains discoveries have also impacted efforts to construct new solar energy arrays as well as raising possible concerns with the proposed Keystone XL pipeline.¹⁹

These recent events, combined with the Louisiana Supreme Court's pronouncements in *Humphreys v. Bennett Oil*,²⁰ demonstrate that it is imperative that energy attorneys are aware of the laws related to cemeteries in Louisiana. In prior publications, certain interactions between the energy industry and cemeteries in Louisiana have been examined.²¹ However, these reviews were often broad overviews of cemetery preservation law. This Article focuses primarily on one type of land restriction that is unique to cemeteries—the cemetery dedication—and the interplay of that law with other extant laws as well as the extent of impacts that all of those laws can have on development projects.

17. See, e.g., *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F. Supp. 2d 1047 (D.S.D. 2000).

18. See, e.g., Robbie Brown, *Slave Graves, Somewhere, Complicate a Walmart's Path*, N.Y. TIMES, May 15, 2012, at A15; Andrew Gomes, *Lawsuit Again Stops Kawaiiaha'o Work*, THE HONOLULU STAR-ADVERTISER, Nov. 25, 2011 (on file with the *LSU Journal of Energy Law and Resources*); Kerry O'Shea, *Duffy's Cut dig ends as Amtrak refuses mass grave excavation*, IRISHCENTRAL (Oct. 31, 2011) http://www.irishcentral.com/roots/duffys-cut-dig-ends-as-amtrak-refuses-mass-grave-excavation-132908668-23773_9211.html?commentspage=1 [<http://perma.cc/K4XW-48DF>] (archived Mar. 4, 2014); Sanra Ritten, *Unearthed Cemetery Halts L.A. Cultural Center Construction*, INDIAN COUNTRY TODAY (Jan. 24, 2011), <http://indiancountrytodaymedianetwork.com/2011/01/24/unearthed-cemetery-halts-la-cultural-center-construction-13186> [<http://perma.cc/S99N-848V>] (archived May 13, 2014).

19. Colin Fogarty, *Proposed Power Lines Tangle with Native American History*, NPR (Sept. 25, 2013, 3:43 AM), available at <http://www.npr.org/2013/09/25/225462766/proposed-power-lines-tangle-with-native-american-history> [<http://perma.cc/G347-JESX>] (archived Mar. 4, 2014).

20. See discussion *infra* Part II.

21. See, e.g., Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVTL. L.J. 93 (2009); Ryan M. Seidemann & Rachel L. Moss, *Places Worth Saving: A Legal Guide to the Protection of Historic Cemeteries in Louisiana and Recommendations for Additional Protection*, 55 LOY. L. REV. 449 (2009).

II. *HUMPHREYS V. BENNETT OIL*—A WORST CASE SCENARIO OF
MINERALS AND THE DEAD

The case of *Humphreys v. Bennett Oil* represents the starting point for an examination of interactions between the energy industry and cemeteries in Louisiana, and it also represents the worst-case scenario of such interactions.²² In *Humphreys*, a mineral production company thought it advisable to sink two oil wells into a rural (and probably abandoned) cemetery in Acadia Parish, Louisiana.²³ These events occurred in the 1930s when there were no express statutory prohibitions against mineral activity in cemeteries.²⁴ However, when descendants of those interred in the offended cemetery brought suit against the production company, the Louisiana Supreme Court reacted harshly, with an uncharacteristically editorial decision. In this decision, the court described the dispute in the following manner:

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. . . .²⁵ 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.²⁶

It is clear simply from the tone of the decision that the court did not take kindly to such uses of cemetery property. Adding further insult to injury, the court went on to note that “[t]here 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.”²⁷ Although the court’s rhetoric in this case reflects the historic reverence for the spaces of the dead, it could base this reverence, at the time, on no positive statutory law related to proscriptions against drilling in cemeteries.

The proximate result for the litigants of the *Humphreys* case was less significant than for the protection of cemeteries in general.

22. *Humphreys v. Bennett Oil Corp.*, 197 So. 222 (La. 1940).

23. *Id.* at 223.

24. *See* 1944–1946 La. Att’y Gen. Rep., at 91.

25. *Humphreys*, 197 So. at 228.

26. *Id.*

27. *Id.*

Although the plaintiffs in this case accomplished something virtually never seen with regard to cemetery damage cases—the successful bringing of a tort suit for mental anguish²⁸—the Supreme Court did find that the jury award of \$20,000 was unreasonably high.²⁹ The court reduced this award to \$6,000.³⁰ Nonetheless, although the descendants of those buried in the disturbed cemetery in *Humphreys* did not obtain a windfall judgment, the case is an exemplar of cemetery protections available in Louisiana, which must be considered by anyone dealing with real property transactions and impacts.

The result of the *Humphreys* decision was a swift response by the Louisiana Legislature to fill the perceived lacuna in the law identified by the court in the case. In 1940, the Legislature enacted what is now codified as Louisiana Revised Statutes section 8:901.³¹ This law specifically prohibits prospecting for or producing minerals in cemeteries:

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.³²

This law, likely enacted in response to the *Humphreys* case, was incorporated into the Louisiana Cemetery Act in 1974 in its present

28. See Ryan M. Seidemann, *How Do We Deal With All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, U. BALT. J. LAND & DEVEL, 68 (forthcoming) (discussing the generally unsuccessful nature of such suits) (on file with the *LSU Journal of Energy Law and Resources*).

29. *Humphreys*, 197 So. at 229. The \$20,000 jury award in 1940 would be roughly equivalent to \$330,000 in 2013, a significant sum.

30. *Id.* at 229–30. The \$6,000 reduced damages award would be roughly equivalent to \$100,000 in 2013, still a sizable amount.

31. Act No. 81, 1940 La. Acts 400–01.

32. LA. REV. STAT. ANN. § 8:901 (2007).

location in the Revised Statutes and has stood for forty years as a bar to mineral activities in cemeteries. The existence of this law is emblematic of the reactionary nature of cemetery protection laws. Many of the scenarios discussed in the current article are premised on common sense and *in pari materia* analyses of the specific situations, as the specific situations are without positive legislation or jurisprudence in Louisiana for guidance. Although the *Humphreys* case is a somewhat shocking intersection of minerals and cemeteries, it is by no means the only example.

III. THE LAW OF DEDICATION, THE UNMARKED BURIALS ACT, THE HISTORIC CEMETERY ACT, AND THE IMPLICATIONS OF THESE LAWS FOR THE ENERGY INDUSTRY

Although not exclusive, the major laws in Louisiana that are of import to the energy industry, aside from Louisiana Revised Statutes section 8:901, are three: the cemetery dedication provisions,³³ the Louisiana Unmarked Human Burial Sites Preservation Act,³⁴ and the Louisiana Historic Cemetery Preservation Act.³⁵ In addition to these laws, there are protections for cemeteries and human remains in the Criminal Code,³⁶ the education title,³⁷ and the expropriation laws.³⁸ Although of some relevance to the energy industry, these latter laws, some of which are discussed herein, are not the primary subject of this review.

*A. Louisiana's Cemetery Dedication Provisions*³⁹

When the Louisiana cemetery laws were enacted in 1974, the Legislature included provisions to ensure the protection of cemeteries from damage and destruction by the development activities of future generations.⁴⁰ These provisions, known as the dedication provisions, are found in Louisiana Revised Statutes sections 8:304–8:306 and read, in pertinent part, as follows:

33. LA. REV. STAT. ANN. §§ 8:304–8:306 (2005 & Supp. 2014).

34. LA. REV. STAT. ANN. §§ 8:671–8:681 (2005 & Supp. 2014).

35. LA. REV. STAT. ANN. §§ 25:931–25:943 (2007 & Supp. 2014).

36. LA. REV. STAT. ANN. § 14:101 (2012) (providing penalties for the desecration of graves).

37. LA. REV. STAT. ANN. § 17:2280 (2013) (providing penal provisions for the sale of human remains); LA. REV. STAT. ANN. § 17:2354.4 (2013) (restricting the sale of human remains).

38. LA. REV. STAT. ANN. § 19:3 (2004 & Supp. 2014) (stating that cemetery property may only be expropriated under certain circumstances).

39. LA. REV. STAT. ANN. §§ 8:304–8:306 (2005 & Supp. 2014).

40. See Seidemann & Moss, *supra* note 21, at 462–69.

After 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. . . .⁴¹

Dedication to cemetery purposes pursuant to this title is not invalid as violating any laws against perpetuities or the suspension of the power of alienation of title to or use of property but is expressly permitted and shall be deemed to be in respect for the dead, a provision for the interment of human remains, and a duty to and for the benefit of the general public.⁴²

Property dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes unless and until the dedication is removed from all or any part of it by judgment of the district court of the parish in which the property is situated in a proceeding brought by the cemetery authority for that purpose and upon notice of hearing to the board, and by publication as hereinafter provided, and proof satisfactory to the court: (1) That no interments were made in or that all interments have been removed from that portion of the property from which dedication is sought to be removed; and (2) That the portion of the property from which dedication is sought to be removed is not being used for interment of human remains.⁴³

Read together, these provisions stand for the proposition that, once human remains have been interred in a piece of property, that property is forever dedicated as a cemetery.⁴⁴ In addition, such property cannot be put to any use other than a “cemetery use” unless all human remains are removed from the property and a court of competent jurisdiction issues an order removing the dedication.⁴⁵

41. LA. REV. STAT. ANN. § 8:304(A).

42. LA. REV. STAT. ANN. § 8:305.

43. LA. REV. STAT. ANN. § 8:306(B).

44. It is important to note that, although Louisiana Revised Statutes section 8:304(B), which was enacted in 2008, now requires the recordation of the existence of a cemetery in the public records (at the time that it is created), the absence of any recordation in the public records of any cemetery does not avoid compliance with these provisions. *See generally* *Humphreys v. Bennett Oil Corp.*, 197 So. 222 (La. 1940); *Thomas v. Mobley*, 118 So. 2d 476 (La. Ct. App. 1960). 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 v. Lester*, 78 So. 2d 14, 16 (La. Ct. App. 1955).

45. LA. REV. STAT. ANN. § 8:306 (2005 & Supp. 2014).

It is important to note that the Louisiana Supreme Court, in *Humphreys*, recognized the existence of the concept of the cemetery dedication “at common law,” thus projecting this protective concept back jurisprudentially at least 34 years prior to the enactment of Louisiana Revised Statutes sections 8:304–8:306.⁴⁶ The connection of the dedication concept to common law principles is also important because of the long history of documented cemetery dedication protections at common law,⁴⁷ suggesting that, even in the absence of looking to civilian doctrine, Louisiana has adopted and recognized the sacrosanct nature of cemeteries incorporated into the common law.

*B. The Louisiana Unmarked Human Burial Sites Preservation Act*⁴⁸

The Unmarked Burials Act was enacted in the wake of Congress’s enactment of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990.⁴⁹ This piece of legislation set a mechanism in place for the return and reburial of certain Native American skeletal remains and sacred objects from museum and university collections across the United States as well as providing for the protection of *in situ* remains.⁵⁰ NAGPRA’s legislative history makes it abundantly evident that Congress enacted this law because of its desire to make reparations for the wrongs committed against Native Americans since A.D. 1492.⁵¹ In recognition of the somewhat

46. *Humphreys*, 197 So. at 226.

47. See generally RUTH RICHARDSON, DEATH, DISSECTION, AND THE DESTITUTE (2d ed. 2000) (offering a comprehensive review of problems in Great Britain with cemetery desecration and human remains abuses during the eighteenth and nineteenth centuries and noting that the inviolate nature of the grave predates the enactment of the Anatomy Act in England in the first half of the 1800s—in fact the concept of the inviolate nature of the grave has existed (though it was not always followed in practice) at common law since at least the 1700s).

48. LA. REV. STAT. ANN. §§ 8:671–8:681 (2005 & Supp. 2014).

49. 25 U.S.C. §§ 3001–3013 (2012).

50. See Francis P. McManamon, *The Reality of Repatriation: Reaching Out to Native Americans*, in IMPLEMENTING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT 25 (Roxana Adams, ed., 2001).

51. See S. REP. NO. 100-601, at 2 (1988) (“It is the view of this Committee that there is a need for legislation in order to rectify the harm which has been inflicted upon Native American religious liberty and cultural integrity by the systematic collection of Native American skeletal remains, grave goods, and certain ceremonial objects which are required for the on-going conduct of religion.”). See also 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).

narrow scope of NAGPRA,⁵² many states set out to fill in the gaps left by Congress in the years after 1990.⁵³ Louisiana's enactment of the Unmarked Burials Act in 1991 was part of this state-level movement.⁵⁴ Many states, Louisiana included, enacted burial protection laws that were much more comprehensive and preservation-oriented than is NAGPRA.⁵⁵

The stated legislative purpose in Louisiana Revised Statutes section 8:672 suggests that the Unmarked Burials Act should be broadly construed. That provision states:

The legislature finds that existing state laws do not provide for the adequate protection of unmarked burial sites and of human skeletal remains and burial artifacts in such sites. As a result, there is a real and growing threat to the safety and sanctity of unmarked burial sites, both from economic development of the land and from persons engaged for personal or financial gain in the mining of prehistoric and historic Indian, pioneer, and Civil War and other soldiers' burial sites. Therefore, there is an immediate need for legislation to protect the burial sites of these earlier residents of Louisiana from desecration and to enable the proper archaeological investigation and study when disturbance of a burial site is necessary or desirable. The legislature intends that this Chapter shall assure that all human burial sites shall be accorded equal treatment, protection, and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations.⁵⁶

This legislative purpose recognizes the significant threats to cemeteries and it extends its coverage equally, regardless of the ethnic or cultural affiliation of the burials.⁵⁷ Equally important is the fact that the Legislature distinguished three classes of things in need of protection: human remains, burial artifacts, and burial sites.⁵⁸

52. See 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) (noting that NAGPRA only applies to Native American remains and graves, and it only applies on federal or tribal land or when federal funds are involved in a project).

53. See CHRISTINE QUIGLEY, *SKULLS AND SKELETONS* 215–17 (2001).

54. Ryan M. Seidemann, *NAGPRA at 20: What Have the States Done to Expand Human Remains Protections?*, 33 MUSEUM ANTH. 199, 200 (2010).

55. *Id.* at 200.

56. LA. REV. STAT. ANN. § 8:672 (2005).

57. *Id.*

58. *Id.*

Cemeteries that are otherwise exempt from the purview of Title 8 (i.e., they are not operating cemeteries) are not covered by the regulatory authority of the Louisiana Cemetery Board (LCB), but rather are under the authority of the Louisiana Division of Archaeology by virtue of the Unmarked Burials Act.⁵⁹ As created by Act 704 of 1991, the Unmarked Burials Act was placed under the enforcement authority of the Louisiana Unmarked Burial Sites Board.⁶⁰ However, in Act 713 of 2006, the Louisiana Legislature rolled this Board's duties into the Louisiana Department of Culture, Recreation, and Tourism,⁶¹ with the Board's permitting duties now resting with the Division,⁶² led by the State Archaeologist.

The jurisdictional regulatory authority over isolated and abandoned cemeteries is grounded in the language of the Unmarked Burials Act. That Act specifically defines "unmarked burial site" as "the immediate area where one or more human skeletal remains are found in the ground that is not in a recognized and maintained municipal, fraternal, religious, or family cemetery, or a cemetery authorized by the Louisiana Cemetery Board."⁶³ This definition leads to the following inferences. First, it clearly exempts any cemetery authorized by the LCB from the regulatory authority of the Division of Archaeology and the purview of the Unmarked Burials Act. Accordingly, this positive statement in the law leads to the conclusion that, if a cemetery holds a current certificate of authority issued by the LCB pursuant to Louisiana Revised Statutes sections 8:70–8:72, the Division of Archaeology has no jurisdiction over that cemetery, and the Unmarked Burials Act does not apply. Second, the definition in Louisiana Revised Statutes section 8:673(5) also clearly exempts cemeteries classified as those that are a "recognized and maintained municipal, fraternal, religious, or family cemetery."⁶⁴ There is no definition in Title 8 for either the words "recognized" or "maintained." However, within the broader context of Title 8, it is apparent that the "recognition" refers to the presence of a cemetery on the LCB's register of those cemeteries that are operating but do not meet the threshold requiring that the cemetery

59. LA. REV. STAT. ANN. §§ 8:671–8:681 (2005 & Supp. 2014).

60. LA. REV. STAT. ANN. § 8:675.

61. This reorganization is now codified at Louisiana Revised Statutes section 36:209(H)(3). Further, the Board was completely abolished by Act No. 438, 2009 La. Acts 2838.

62. See LA. REV. STAT. ANN. § 36:209(E) (2006 & Supp. 2014) (placing the Division of Archaeology under the authority of the Department of Culture, Recreation, and Tourism).

63. LA. REV. STAT. ANN. § 8:673(5) (2005 & Supp. 2014).

64. *Id.*

possess a LCB certificate of authority to operate a cemetery.⁶⁵ It is also important to note that under Louisiana Revised Statutes section 8:673(5), both recognition *and* maintenance are required to avoid a cemetery's classification as abandoned.⁶⁶ Thus, the simple fact that a cemetery is registered with the LCB does not exempt that cemetery from coverage by the Unmarked Burials Act. Only cemeteries that do not hold a current LCB certificate of authority but are recognized by the LCB *and* are maintained can claim an exemption from the Unmarked Burials Act.

As with the term "recognition," there is no definition of the term "maintained" in Title 8. Following the requirement of Louisiana Civil Code article 11, which states that "[t]he words of a law must be given their generally prevailing meaning," it is necessary to look to a dictionary definition of the term "maintain" to divine the Legislature's intended application of the Unmarked Burials Act. "Maintain" is defined as to "keep (a building, machine, etc.) in good condition by checking or repairing it regularly."⁶⁷ Although an unmaintained cemetery may be the equivalent of what would colloquially be referred to as an abandoned cemetery,⁶⁸ the question of abandonment is not determinative of the classification of a

65. *Id.* (referencing "registration" and the fact that the LCB has a standing practice of keeping a register of cemeteries in Louisiana). Because this is the only register of this sort in the State, it is doubtful that the Legislature could have been referring to anything else.

66. *Id.* (referencing "recognition and maintenance" in the conjunctive).

67. CONCISE OXFORD ENGLISH DICTIONARY 860 (Catherine Soanes & Angus Stevenson eds., 11th ed. 2006).

68. This is consistent with the definition of the term "abandon," which is to "give up (an action or practice) completely." *Id.* at 2. A cemetery in which the caretakers have given up on keeping in good condition would be one factor in determining whether a cemetery qualifies as an abandoned cemetery. This consistency is supported by the use of the term "abandoned cemetery" in Title 8. Although Title 8 does not contain a definition for "abandoned cemetery," the term's use in Louisiana Revised Statutes section 8:112 (2005), Louisiana Revised Statutes section 8:308 (2005 & Supp. 2014), and Louisiana Revised Statutes section 8:903 (2005) are consistent with the use of the term herein. *See Touro Synagogue v. Goodwill Indus. of New Orleans Area, Inc.*, 96 So. 2d 29, 37-38 (La. 1957) (suggesting that the other factor is the continued use of the space as a burial place) ("The cemetery in this case has clearly been abandoned. This burial ground has received no interment since 1872 and in its condition of disintegration is presently unfit for this purpose. In addition, the public and the survivors or others interested in its use as a cemetery have failed to keep and preserve it as a resting place for the dead. The premises have been permitted to fall into disorder, the walls to crumble, and the gravestones and monuments to be destroyed so that graves have lost their identity and nothing now remains to stir the emotions or sentiments of the relatives of the dead.").

cemetery as “unmarked.”⁶⁹ In other words, if a cemetery is in a poor state of maintenance—a state that evidences years of neglect—although it may not be legally abandoned, it has likely met the requirements for a lack of maintenance sufficient to trigger this prong of the Unmarked Burials Act.

*C. The New Law: The Louisiana Historic Cemetery Preservation Act*⁷⁰

Act 707 of the 2010 Louisiana Legislative Session, known as the Louisiana Historic Cemetery Preservation Act,⁷¹ was originally introduced and failed to pass the Legislature in 2008 as House Bill 1092 of the 2008 Regular Louisiana Legislative Session; as will be seen, the Historic Cemetery Act is more detailed and more specific to abandoned cemeteries and isolated graves than the preexisting law (i.e., the Unmarked Burials Act and the dedication provisions). However, a review of Act 707 reveals that the new law is largely superfluous, and it does not change the preexisting protections of the Unmarked Burials Act and the dedication provisions.

The purpose of the Historic Cemetery Act is similar in nature to that of the Unmarked Burials Act. As noted in La. R.S. 25:933, that purpose is described as follows:

The legislature hereby finds the demolition, destruction, and damage of historic cemeteries and isolated graves a disrespectful practice. The legislature further finds that existing state laws do not provide for the adequate protection of historic cemeteries that are not under the jurisdiction of the Louisiana Cemetery Board, are not on state lands, and are not solely comprised of unmarked graves. Cemeteries are considered by most cultures to be sacred spaces. In addition to being resting places for our dead, many of Louisiana’s cemeteries are repositories of significant examples of art, architecture, and archaeology as well as containing the history of their respective communities. The importance of cemeteries should not be taken lightly, as these significant elements represent a substantial tourist attraction for the state of Louisiana, and also present an endless source of data for

69. See *Touro Synagogue*, 96 So. 2d at 33 (noting that stopping maintenance of a cemetery is not enough for it to be considered legally abandoned in Louisiana; the Louisiana Supreme Court also requires the cessation of all interments for a cemetery to be considered abandoned).

70. LA. REV. STAT. ANN. §§ 25:931–25:943 (2007 & Supp. 2014).

71. Act No. 707, 2010 La. Acts 2454 (codified at LA. REV. STAT. ANN. §§ 25:931–25:943 (2007 & Supp. 2014)).

historians, taphologists, anthropologists, archaeologists, and genealogists that collectively lead us to a better understanding of our own culture.⁷²

In addition to a recognition of a reverence for the space of death, the Historic Cemetery Act also evidences the importance of such cemeteries as repositories of history for a community and, at least for Louisiana, as a potential tourist draw.⁷³ These are merely additional reasons for the preservation of these sites that were not noted in the Unmarked Burials Act.

In order to fully understand why the Historic Cemetery Act does not change the existing protections for cemeteries under the Unmarked Burials Act, it is necessary to review the scope of several portions of those laws in tandem. In several ways, the Historic Cemetery Act clarifies the extent to which certain cemeteries are protected. This is not an actual change in the law, but the Act certainly provides substantial clarity over the previous law. The jurisdictional scope of the pre-2010 law and that of the Historic Cemetery Act is best set forth in the definitions of the various cemeteries and activities subject to the later law.

Under the Unmarked Burials Act, “unmarked burial site” is defined as “the immediate area where one or more human skeletal remains are found in the ground that is not in a recognized and maintained municipal, fraternal, religious, or family cemetery, or a cemetery authorized by the Louisiana Cemetery Board.”⁷⁴ The Legislature did not intend to confine the Unmarked Burials Act’s protections to cemeteries and graves lacking markers (i.e., a literal definition of “unmarked”), but rather intended for protections to be applied to threatened areas in which human remains were interred,⁷⁵ though not to those areas that are cemeteries authorized by the LCB.

The Historic Cemetery Act provides concise definitions for “abandoned cemetery,” “historic cemetery,” and “isolated grave” that clarify that the scope of cemetery protections under Louisiana law extend beyond a narrow reading of the term “unmarked” in the Unmarked Burials Act. Those relevant definitions are:

(1) “Abandoned cemetery” shall mean any cemetery which is no longer being used for interments, is not being maintained in good condition, and has fallen into a state of disrepair, including tombs and headstones that have collapsed or been destroyed, walls and fences that have

72. LA. REV. STAT. ANN. § 25:933 (2007 & Supp. 2014).

73. *Id.*

74. LA. REV. STAT. ANN. § 8:673(5) (2005 & Supp. 2014).

75. *See infra* Part IV.C.

fallen apart, and trees and bushes that have grown amongst and within grave spaces.

(10) “Historic cemetery” shall mean any abandoned cemetery located in the state that is more than fifty years old and is not subject to the laws, rules, and regulations of the [LCB] or Chapter 10-A of Title 8 of the Louisiana Revised Statutes of 1950.

(12) “Isolated grave” shall mean any marked grave site that is not part of a larger cemetery and is not subject to the laws, rules, and regulations of the [LCB] or Chapter 10-A of Title 8 of the Louisiana Revised Statutes of 1950. The term shall also include groupings of multiple graves that are not part of a larger cemetery.⁷⁶

Because the enforcement jurisdiction of the Historic Cemetery Act and the Unmarked Burials Act both rest with the Division of Archaeology, the scope of protections from both of these laws vests the permitting authority over cemeteries not authorized by the LCB in one state entity. Further, because the prohibited acts under these laws are convergent, their application should be seamless under the Division of Archaeology’s oversight.

Under the Unmarked Burials Act, covered human remains are protected against “disturbance.”⁷⁷ “Disturb” is defined in Louisiana Revised Statutes section 8:673(2) as including “excavating, removing, exposing, defacing, mutilating, destroying, molesting, or desecrating in any way any unmarked burial sites or any human skeletal remains, burial artifacts, or burial markers on or in an unmarked burial site without a permit.”⁷⁸

The Historic Cemetery Act encompasses the prohibition against disturbance from the Unmarked Burials Act within its definitions of “damage,” “destruction,” and “modification.” Those definitions provide:

(5) “Damage” shall mean the intentional or inadvertent hurt, harm, or injury to a component of a historic cemetery or to an isolated grave so as to lessen or destroy its historic, cultural, or scientific value.

(7) “Destruction” shall mean intentionally or inadvertently destroying components of a historic cemetery by violent

76. LA. REV. STAT. ANN. § 25:933 (2007 & Supp. 2014) (in pertinent part).

77. LA. REV. STAT. ANN. § 8:678(A)(1) (2005 & Supp. 2014).

78. LA. REV. STAT. ANN. § 8:673(2) (2005 & Supp. 2014).

disintegration of its fabric so as to reduce the components to ruin.

(13) “Modification” shall mean the altering of the original substance of a grave space.⁷⁹

These same protections are provided for under the Unmarked Burials Act definition of “disturb,” but the Historic Cemetery Act language, by specifically defining these three terms, clarifies the protections available for grave spaces in historic cemeteries or for isolated graves under the Unmarked Burials Act.⁸⁰ Further, through the addition of the term “modification,” it is clear that the Historic Cemetery Act extends its grave space protections to substantial modifications, such as those contained within Louisiana Revised Statutes sections 8:308, 8:903, and 8:903.1.⁸¹

Read together, both the Unmarked Burials Act and the Historic Cemetery Act provide protections for grave spaces against disturbance, damage, destruction, and modification.

IV. THE APPLICATION OF CEMETERY LAWS TO ENERGY-SPECIFIC SCENARIOS IN LOUISIANA

The dedication provisions, the Unmarked Burials Act, and the Historic Cemetery Act are all historic preservation laws of one sort or another. However, for the purposes of this Article, these laws are also land use restrictions, and it is in this context that these laws come into contact with the energy industry. As noted above in the Introduction, cemeteries and the dead can become potential problems for the drilling of mineral wells, laying of pipelines, and

79. LA. REV. STAT. ANN. § 25:933.

80. The protection referred to herein exists pursuant to following statutes: Louisiana Revised Statutes section 25:935 (2007 & Supp. 2014) (outlining the requirements for obtaining a permit under the Historic Cemetery Act); Louisiana Revised Statutes section 8:676 (2005 & Supp. 2014) (listing unlawful acts under the Historic Cemetery Act); Louisiana Revised Statutes section 25:938 (2007 & Supp. 2014) (providing civil remedies under the Historic Cemetery Act); Louisiana Revised Statutes section 25:933(14) (permitting under the Unmarked Burials Act); Louisiana Revised Statutes section 8:678 (2005 & Supp. 2014) (listing unlawful acts under the Unmarked Burials Act); and Louisiana Revised Statutes section 8:679 (2005 & Supp. 2014) (providing civil remedies under the Unmarked Burials Act).

81. Although not as clearly worded, such protections were not absent from the Unmarked Burials Act. In fact the use of the terms “mutilating” and “molesting” in the definition of “disturb” under Louisiana Revised Statutes section 8:673(2) incorporates the term “modification” as defined by Louisiana Revised Statutes section 25:933(14). For an application of Louisiana Revised Statutes section 8:308, 8:903, and 8:903.1, see Seidemann & Moss, *supra* note 21.

running of power lines. With the potential land use conflicts in mind between energy needs and cemetery protections, the following informal series of questions and answers are presented as a guide to energy practitioners faced with problems of the dead.

A. Is Compliance With the Unmarked Burials Act and Historic Cemetery Act Tantamount to Compliance With the Dedication Provisions?

Under the above-discussed dedication laws, property dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes unless the dedication is removed from all or any part of the property by judgment of the district court of the parish in which the property is situated in a proceeding brought by the cemetery authority for that purpose.⁸² In order to remove such a dedication, the applicant⁸³ must present satisfactory proof to the court that (1) no interments were made in or that all interments have been removed from that portion of the property from which dedication is sought to be removed; and (2) the portion of the property from which dedication is sought to be removed is not being used for interment of human remains.⁸⁴

As alluded to above, these provisions stand for the proposition that, once human remains have been interred in a piece of property, that property is forever dedicated as a cemetery. To this point, the *Humphreys* court specifically held the following:

Regardless of the laws and rules relating to the ownership and control of real property, when a plot of ground is set apart for cemetery purposes, and burials are made in the land, the ground changes its character in the minds and feelings of the community. It assumes a sacred quality that overrides conveyancers' precedents and requires freedom from profanation until, by abandonment and removal of the bodies or by complete disintegration, there remains nothing to appeal to the emotions of the survivors.⁸⁵

82. LA. REV. STAT. ANN. § 8:306 (2005 & Supp. 2014).

83. The statute uses the term "cemetery authority," which is specifically defined by Louisiana Revised Statutes section 8:1(9) (2005 & Supp. 2014) as "any person, firm, corporation, limited liability company, trustee, partnership, association or municipality owning, operating, controlling or managing a cemetery or holding lands within this state for interment purposes." However, in the case of abandoned cemeteries, the "authority" of necessity, must be the landowner.

84. LA. REV. STAT. ANN. § 8:306.

85. *Humphreys v. Bennett Oil Corp.*, 197 So. 222, 229 (La. 1940) (internal citations omitted).

In addition, such property cannot be put to any use other than a “cemetery use” unless any and all human remains have been removed from the property and a court of competent jurisdiction issues an order removing the dedication.⁸⁶ Although “cemetery use” is not defined in Louisiana law, a reasonable interpretation of this term is that the use of any dedicated cemetery property for anything other than the interment, inurnment, or otherwise the housing of human remains or other cemetery operations would constitute a non-cemetery use.⁸⁷

A related question is whether the demolition and removal of nonconforming structures currently situated atop a cemetery would require a removal of the cemetery dedication under the dedication provisions. Logically, the removal of nonconforming uses from dedicated cemetery property would not require the removal of the property’s cemetery dedication. The reason for this result is that the removal of such structures would actually bring the property back into compliance with current law (i.e., the property would be returned to a “cemetery use”). However, there is little doubt that demolition operations, while not changing the character of the cemetery property to something other than a cemetery use, will impact or disturb the human burials contained therein. Thus, pursuant to the Unmarked Burials Act and the Historic Cemeteries Act, activity occurring on cemetery property is under the regulatory jurisdiction of the Division of Archaeology.⁸⁸ Therefore, any demolition activity on such property must be undertaken pursuant to the terms of a permit obtained from the Division. Further, no work that may impact the subsurface burials can be undertaken without first obtaining such a permit.

B. What Is the Effect of a Judicial Removal of a Cemetery Dedication When Human Remains are Later Found?

One important issue that sometimes arises is the matter of whether a judicial removal of a cemetery dedication pursuant to Louisiana Revised Statutes section 8:306 is automatically reversed

86. LA. REV. STAT. ANN. § 8:306.

87. This general definition would include the construction of structures to service the cemetery and to house cemetery-related equipment. Although Louisiana does not define the term “cemetery use,” at least one state does. Pennsylvania’s definition is more restrictive than the use contemplated herein. However, this definition seems unreasonably restrictive. *See* 53 PA. CON. STAT. ANN. § 1241 (West 2008) (defining “cemetery use” as “use for the interment of human beings.”).

88. *See* LA. REV. STAT. ANN. § 8:676 (2005 & Supp. 2014); LA. REV. STAT. ANN. § 25:935 (2007 & Supp. 2014).

when human remains are later found on the same site: does the site become a cemetery again under the law merely because someone did not completely remove all of the remains when the dedication was removed? In other words, if human remains are found in a judicially undedicated area, does the dedication automatically become reestablished such that it must be removed again before the property can be put to a non-cemetery use?

It would seem that, in such situations, a prior dedication removal that has become a final judgment would be *res judicata* as to the dedication should remains ever be found on that site again. Thus, short of petitioning the court to reopen the prior dedication case, it is a matter of law that the dedication is removed from the subject property. Regarding the ability to reopen a case, the Louisiana Fourth Circuit Court of Appeal has recently stated that:

The standard of review of a peremptory exception of *res judicata* requires an appellate court to determine if the trial court's decision is legally correct or incorrect. Louisiana courts recognize that "a final judgment has the authority of *res judicata* only as to those issues presented in the pleading and conclusively adjudicated by the court." Moreover, the doctrine of *res judicata* is *stricti juris* and, accordingly, any doubt concerning the applicability of the principle must be resolved against its application.

Notably, there is statutory recognition that application of the doctrine of *res judicata* in all circumstances would be unfair. Specifically, [Louisiana Revised Statutes section] 13:4232(A)(1) provides that a judgment does not bar another action by the plaintiff "[w]hen exceptional circumstances justify relief from the *res judicata* effect of the judgment." Moreover, the comments accompanying [Louisiana Revised Statutes section] 13:4232 make clear that his [*sic*] court has the authority under the statute to exercise its equitable discretion to balance the principle of *res judicata* with the interests of justice, although clearly "this discretion must be exercised on a case by case basis and such relief should be granted only in truly exceptional cases. . . ."⁸⁹

In other words, *res judicata* carries strong weight in Louisiana's jurisprudence, and matters that have been previously resolved are not overturned by the courts lightly. Because a court, or multiple courts, ruled previously to remove a cemetery dedication based upon

89. Simmons v. Baumer Foods, Inc., 55 So. 3d 789, 792 (La. App. Ct. 2010) (citations omitted).

evidence and assurances that apparently convinced those courts that the human remains that had once been interred in the subject cemetery were no longer interred (thus obviating the need for the cemetery dedication on the property), it is doubtful that a court today would question that ruling. Because the matter is *res judicata*, it is doubtful that even a finding of human remains on the property today would have the effect of undoing the prior ruling. It would merely give the appropriate parties under Louisiana Revised Statutes sections 8:304–8:306 the ability to petition a court to have the dedication reinstated if they so desired.⁹⁰ It is, however, important to note that, should human remains be identified on property to which a dedication had been properly removed, the above-discussed subsequently-enacted laws—the Unmarked Burials Act and/or the Historic Cemetery Act—would be triggered by the identification of human remains on the property, requiring adherence to additional processes in order to avoid violating the law.

The simple reality of historic removals of cemetery dedications is that they were often not done well and were certainly not done pursuant to modern scientific standards.⁹¹ Because of this historical reality, if cemetery dedication removals are identified in the public records in association with a proposed project area, those intending to disturb the soil in that area, be it for drilling operations or other development, should proceed with caution.

In situations where documentary reviews suggest that human remains at a site are probable, there is no positive state law imposing an obligation to avoid the property in the absence of actual remains being found. Thus, compliance with later-enacted burial protection laws on the front end of the proposed activity at a site is not indicated nor is it required. However, where remains are likely, the presence of an archaeological monitor may be advisable, though not required by any law, during the contemplated activities in order to minimize unintended impacts should remains be encountered. If and when human remains are identified at such sites by an archaeological monitor or someone else, the Unmarked Burials Act or the Historic Cemetery Act immediately applies to the site and compliance with those laws is then mandatory.

90. See LA. REV. STAT. ANN. § 8:306 (“Property dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes unless and until the dedication is removed from all or any part of it by judgment of the district court of the parish in which the property is situated in a proceeding brought by the cemetery authority for that purpose . . .”). Thus, the proper party would likely be either the cemetery authority or the current landowner.

91. See, e.g., *Sorrentino v. State*, 201 N.Y.S.2d 429 (N.Y. Ct. Cl. 1960) (noting the situation of a funeral director overseeing the disinterment of human remains in advance of construction).

Upon the discovery of human remains or a cemetery on or near a project area, what then are the limitations on the use of that property? As noted in Part III(A) above, if remains are within a project area, the use of that area for anything other than a cemetery may only be accomplished subsequent to compliance with, at a minimum, the removal of the cemetery dedication under Louisiana Revised Statutes section 8:306. If the site qualifies as a cemetery under either the Unmarked Burials Act or the Historic Cemeteries Act, compliance with those laws must also be accomplished before any use of the property can occur.

One logical question related to such compliance is whether an entire site must be cleared of human remains prior to its use or only the area to be actually used. Although it may seem contrary to logic, an entire cemetery need not be removed to facilitate an alternative use of only a portion of the site. There is no positive law to cite for this premise.⁹² However, it is not a prohibited notion and is an interpretation of the dedication laws, Unmarked Burials Act, and Historic Cemetery Act that is most consistent with ensuring the maximum *in situ* protection of a cemetery site, while allowing modern activity to occur where necessary. Although the dedication provisions are intended to ensure the sanctity of the grave (a concept that is supported, generally, by Louisiana jurisprudence),⁹³ these provisions contain no mandate that an entire cemetery be removed in order to put one portion of that cemetery to a non-cemetery use. For example, if a drilling pad must be placed within a two-acre cemetery that contains thousands of burials, all of those thousands of burials need not be removed pursuant to the applicable law in order to place an industrial use on a ¼-acre portion of the cemetery. Only the burials within the ¼-acre need be removed, and the remainder should be left intact. In addition to the absence of a prohibition of such an approach by the dedication provisions, this concept is consistent with modern archaeological practice, which favors *in situ* preservation and avoiding unnecessary impacts to sites where

92. In fact, a comprehensive review of nationwide jurisprudence suggests that this issue has never been presented in a case that resulted in a reportable decision.

93. See, e.g., *Bunol v. Bunol*, 127 So. 70, 70 (La. Ct. App. 1930) (noting that exhumation is disfavored, but allowing a surviving spouse to remove and relocate deceased spouse's remains because wife believed the burial place was temporary). See also *Choppin v. Labranche*, 20 So. 681, 682 (La. 1896) (discouraging the disturbance of the dead except for "lawful necessary purposes"); T. SCOTT GILLIGAN & THOMAS F.H. STUEVE, *MORTUARY LAW* 49–53 (9th ed., 2003) (noting that disinterment is generally disfavored).

possible.⁹⁴ Thus, only the footprint of a project within an abandoned or historic cemetery should be subjected to the removal of remains in order to ensure compliance with the dedication provisions.

If only partial removal of remains is advisable for certain cemetery sites, is it also reasonable to leave intact the burials that will have to be driven over or parked on in order to access the cleared area? Again, this is a scenario not contemplated by the existing law in Louisiana.⁹⁵ At least one Louisiana suit was filed that could potentially have answered this question,⁹⁶ but the matter was settled at the district court level, meaning that no jurisprudential guidance was created. In *Savoie*, a family sued the current owner of property upon which their family cemetery was located.⁹⁷ There were disputes between the family and the new owner concerning the extent of the family's access to the cemetery and the owner's use of the fringes of the cemetery.⁹⁸ As to the latter dispute, the new owner had a habit of parking his vehicles on the unmarked edges of the cemetery.⁹⁹ The family believed that this was disrespectful and filed suit, claiming that essentially creating a parking lot was not a proper use of the underlying cemetery.¹⁰⁰ Unfortunately, this case was not decided on the merits, and without a decision on the merits there is no guidance on this issue.

However, examining what is and is not a culturally-acceptable use of a cemetery provides reasonable guidance on this subject, not just for purposes of the *Savoie* case, had it been decided on the merits, but also for the more common scenario of roads needing to be opened through cemeteries. As was alluded to in the *Humphreys* case, cemeteries are afforded a considerable amount of reverence.¹⁰¹ Certainly, from a historic perspective, these spaces were used not

94. See generally Mark J. Lynott & Alison Wylie, *Stewardship: The Central Principle of Archaeological Ethics*, in ETHICS IN AMERICAN ARCHAEOLOGY 35 (2d rev. ed. 2000).

95. See *Wood v. Macon and Brunswick R.R. Co.*, 68 Ga. 539, 546–47 (Ga. 1882) (tangentially noting that a road over unused portions of a cemetery would not conflict with the cemetery dedication). The converse of this observation is that the opening of a road across used cemetery property would violate the cemetery dedication.

96. See generally *Lopez & Lopez Cemetery Ass'n v. Savoie*, No. C-509-10 (La. 31st Jud. Dist. Ct. June 16, 2010). The question asked is whether a parking area or a road over a cemetery is an inconsistent use with the cemetery use.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See generally *Humphreys v. Bennett Oil Corp.*, 197 So. 222 (La. 1940).

only as repositories of the dead, but also as places of recreation.¹⁰² In this sense, the recreation was not raucous or disrespectful, but rather more akin to picnicking and socializing.¹⁰³ In the nineteenth century, many cemeteries doubled as parks.¹⁰⁴ The historic record for cemeteries in the United States contains no other uses for cemeteries other than as parks. Thus, history instructs that uses of cemetery property other than for the burial of the dead or as green space are inconsistent uses. Therefore, pursuant to the dedication provisions, roads cannot be opened through a cemetery to service nonconforming uses without ensuring that all remains have been properly removed from the right of way of this use.¹⁰⁵ In the absence of positive law on this issue, the available guidance suggests that any use of an area in which human remains are interred for anything other than a cemetery use or green space is unlawful under the dedication provisions.

What, then, of the scenario where a road had historically been placed over a cemetery (e.g., Canal Boulevard) and repairs to that road need to be made? Again, there is no guidance on this issue under Louisiana law. Clearly, a road that is not intended to service the cemetery but is merely an intrusive construction, should not be considered a “cemetery use” under the law. However, although this was a historic violation of the dedication concepts, it seems impractical to punish those charged with maintaining the road today for the sins of the past. In other words, it is unreasonable to tear up an entire road to remove the remains only to put the road back on top of the same property. However, should a section of the road need to be torn up for repairs, the remains beneath the offending section should be removed pursuant to the Unmarked Burials Act or the Historic Cemetery Act, and the dedication for that portion of the cemetery should be removed.

102. See generally DAVID C. SLOANE, *THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY* (1995).

103. See *id.* at 116–19 (describing public use of cemeteries as recreational parks).

104. *Id.*

105. See LA. REV. STAT. ANN. § 19:3 (2004) (noting the general restriction on the expropriation of cemetery property for road uses). See also *City of New Orleans v. Christ Church Corp.*, 81 So. 2d 855 (La. 1955) (upholding judgment allowing expropriation of the Girod Street Cemetery for road-widening purposes after disinterment and reinterment elsewhere).

C. Can Repairs or Changes to Nonconforming Uses Be Made Without Removing the Remains From a Dedicated Area?

To continue the discussion from the previous section regarding what can be done with pre-existing, nonconforming uses atop cemeteries, it is necessary to understand the context of this problem. It is not unusual for cemeteries to be unintentionally or inadvertently built over by later development. Examples of this range from cemeteries properly undedicated and built over, such as the Girod Street Cemetery and the Superdome,¹⁰⁶ to those never undedicated but built over anyway, such as the Thomy Lafon School (also called the Locust Grove Cemetery) and Canal Boulevard (or, Charity Hospital #2 Cemetery).¹⁰⁷ When the latter situations occur, later landowners and developers often want to know whether they can undertake substantial repair or reconstruction of the nonconforming property uses without going through the process of removing the default and de facto cemetery dedication on that property.

For any existing, nonconforming facility to be expanded, several requirements must be met. First, if the cemetery dedication is to be removed, compliance with Louisiana Revised Statutes sections 8:304–8:306, as well as both the Unmarked Burials Act and the Historic Cemetery Act, is required. A permit would have to be secured from the Division under the Unmarked Burials Act or the Historic Cemetery Act, and following the scientific removal of human remains under those laws, a petition to remove the cemetery dedication from the property must be submitted to and approved by

106. See *Christ Church Corp.*, 81 So. 2d at 856 (noting the closure of the Girod Street Cemetery and the removal of the remains interred therein). See ERIC J. BROCK, *IMAGES OF AMERICA: NEW ORLEANS CEMETERIES* 104 (1999) (noting that the Superdome, the Poydras Plaza Shopping Center, and a post office now stand on the site of the former cemetery).

107. See generally THURSTON H.G. HAHN III & ANDREA MCCARTHY, COASTAL ENVIRONMENTS, INC., *ARCHAEOLOGICAL MONITORING OF THE DEMOLITION OF THOMY LAFON ELEMENTARY SCHOOL, LOCUST GROVE CEMETERY/LAFON SCHOOL SITE* (16OR565) (2012) (on file with the *LSU Journal of Energy Law and Resources* as report number 22-3934) (discussing the history of the demise of the Locust Grove Cemetery in New Orleans and its eventual coverage by a nonconforming use); MICHAEL GODZINSKI ET AL., *EARTH SEARCH, INC., PHASE I/II ARCHAEOLOGICAL INVESTIGATIONS AT THE PROPOSED SITE OF THE CANAL BOULEVARD TRANSIT TERMINAL AT CHARITY HOSPITAL CEMETERY NO. 2* (16OR108), NEW ORLEANS, ORLEANS PARISH, LA (2008) (on file with the *LSU Journal of Energy Law and Resources* as report number 22-2931) (noting the existence of Charity Hospital No. 2 Cemetery beneath modern-day Canal Boulevard in New Orleans).

a court of competent jurisdiction.¹⁰⁸ To expand the existing, nonconforming use, the removal of remains under the Unmarked Burials Act, the Historic Cemetery Act, and the removal of the cemetery dedication must extend to the area slated for expansion as well as to the footprint of the existing nonconforming use.¹⁰⁹

Second, if the cemetery dedication is not to be removed, the only acceptable expansion of a nonconforming use would be to create a structure that is intended to be used for “cemetery purposes” under Louisiana Revised Statutes section 8:306. However, compliance with the dedication provisions in unmarked or historic cemeteries (as defined in Louisiana Revised Statutes section 8:673(5) and Louisiana Revised Statutes section 25:933(10)) also requires compliance with the Unmarked Burials Act and Historic Cemetery Act (i.e., the application for a permit from the Division of Archaeology).¹¹⁰ Upon compliance with these laws, expansion of a nonconforming use would be permissible in the “cleared”¹¹¹ area, as that area would no longer be considered a cemetery for the purposes of Louisiana Revised Statutes sections 8:304–8:306.

A question relating to the above discussion is whether expanding an existing, noncompliant use would be a violation of the dedication provisions if it does not require ground disturbance. This question hinges on a distinction between the dedication provisions of Louisiana Revised Statutes sections 8:304–8:306 and the Unmarked Burials Act and Historic Preservation Act. If no ground disturbance is to occur, there is no surface evidence of the cemetery (e.g., grave markers), and no adverse impacts are anticipated from the solely surface activity at the site, the Unmarked Burials and Historic Cemetery Acts are not triggered. However, the same is not true for the dedication provisions. As noted above, unless human remains are properly removed from an area, that area’s use is limited to activities that are consistent with a “cemetery purpose” under Louisiana Revised Statutes section 8:306.¹¹² Thus, an expansion that does not cause ground disturbance would still be a violation of Louisiana Revised Statutes section 8:306, absent a removal of the cemetery dedication pursuant to that law.

108. See LA. REV. STAT. ANN. § 8:306 (2005 & Supp. 2014); LA. REV. STAT. ANN. § 8:676 (2005 & Supp. 2014); LA. REV. STAT. ANN. § 25:935 (2007 & Supp. 2014).

109. *Id.*

110. LA. REV. STAT. ANN. § 25:933(10) (2007 & Supp. 2014).

111. In this regard, the word “cleared” is intended to refer to the geographic area from which human burials were removed pursuant to an Unmarked Burials Act or Historic Cemetery Act permit and that is then the subject of a court ruling removing the dedication to cemetery purposes.

112. LA. REV. STAT. ANN. § 8:304 (2005 & Supp. 2014).

A logical corollary to this discussion is what, if any, buffer must be left around burials before a nonconforming use can be made of adjacent property. One reason for this question is practical: can a road be placed within a foot of a burial space as long as it does not disturb that burial? Another reason is legal: Louisiana Revised Statutes section 8:673 mentions that an unmarked burial is the “immediate area” around human burials.¹¹³ As with many of the previous issues, Louisiana law provides little guidance to answering this question.¹¹⁴ Indeed, there is no specific legal guidance to determine the “immediate area” around human burials under Louisiana Revised Statutes section 8:673. Neither the Unmarked Burials Act, the Historic Cemetery Act, nor Louisiana cemetery law in general provide any guidance as to what the term “immediate area” means.¹¹⁵ In addition, Louisiana law does not provide for or require a buffer between burials or burial sites and nonconforming uses. In the absence of a clearer definition of “immediate area where one or more human remains are found,” it is advisable for those wishing to construct anything near a cemetery to consult with archaeologists regarding how close to the graves their operations can safely be without compromising the graves or the project. In other words, when considering what the appropriate buffer around human burials should be, as long as the extent of the burial area is known (either through documentary evidence or through archaeological or remote sensing methods), an archaeologist should be able to determine what a reasonable buffer would be in order that the burials are not impacted by any current or proposed activities nearby. Such a determination should satisfy the requirement of avoiding using the “immediate area” around a grave under Louisiana Revised Statutes section 8:673.

D. Is There an Exception to the Dedication Provisions?

For all dedicated cemeteries under Louisiana Revised Statutes sections 8:304–8:306 (i.e., not the “immediate area around a burial,” but rather the actual cemetery), there is no exception to the dedication provisions under Louisiana law. In the absence of such exemptions, it is of no moment that a nonconforming use once existed on dedicated cemetery property. Under the current law,

113. LA. REV. STAT. ANN. § 8:673 (2005 & Supp. 2014).

114. Cf. ME. REV. STAT. ANN. tit. 13 § 1371-A (2005) (requiring a 25-foot buffer around cemeteries).

115. No regulations have ever been promulgated under the Unmarked Burials Act or the Historic Cemetery Act. Thus, in addition to the lack of any guidance from the law itself, there are also no regulations concerning this question.

nonconforming uses of dedicated cemetery property are not permitted under Louisiana law. Thus, once a nonconforming use on a cemetery is no longer used or usable for its originally intended purpose (i.e., once it has to be partially or wholly reconstructed in order to function again), compliance with the dedication provisions is mandatory before any such reconstruction can begin.

E. Is There a Grandfather Provision for the Dedication Laws?

The cemetery dedication provisions are absolute restrictions on the use of real property. Thus, there is no “grandfathering” contemplated under Louisiana law allowing a nonconforming use to be considered as a conforming use merely because it predated the codification of the dedication provisions in 1974.¹¹⁶

If a nonconforming use was constructed, innocently or not, on dedicated cemetery property, it is a violation of Louisiana Revised Statutes sections 8:304–8:306 and the antecedents to those laws. However, if the nonconforming use is a permanent or semi-permanent structure, it may now be virtually impossible to remove the nonconforming use (especially if the nonconforming use is still in use). In many cases (especially those cases where there is no record of the existence of a cemetery or burial), the construction of a nonconforming use may have obliterated any evidence of the existence of a cemetery on the property.¹¹⁷ These realities create obvious enforcement problems, making the removal of nonconforming uses under many circumstances virtually impossible.

However, when the nonconforming uses have ceased and must undergo reconstruction to be fit for any future use, it is easier to enforce the law and remove the nonconforming use. Thus, when it is known or likely that a cemetery or human burials have been subject to a nonconforming use, such nonconforming use should be

116. Some jurisdictions recognize analogous legal fictions for certain nonconforming uses in a zoning context. *See, e.g.*, ALA. CODE § 4-6-7 (1996) (grandfathering certain nonconforming uses around airports); ARK. CODE ANN. § 14-363-206 (2004) (grandfathering certain nonconforming uses around airports); CAL. GOV'T CODE § 65863.4 (West 2013) (establishing a process to consider grandfathering certain nonconforming residential uses). However, due to the unique nature of cemeteries and due to the unambiguous absoluteness of the dedication provisions, such a zoning analogy is likely inappropriate in this context. *See* *Mothe Funeral Homes, Inc. v. United States*, No. 94-1147, 1995 WL 367939, at *3-4 (E.D. La. Mar. 29, 1995) (noting the extremely unique nature of cemeteries under Louisiana law).

117. *See, e.g.*, *Original Petition, State v. Jetton*, (Docket No. 594,142) (La. 19th Jud. Dist. Ct. June 16, 2010) (noting that the conversion of a traditional cemetery to a nonconforming use obliterated surface traces of the cemetery) (on file with the *LSU Journal of Energy Law and Resources*).

removed, if practicable, subject to the applicable requirements of the Unmarked Burials Act or the Historic Cemetery Act.¹¹⁸

Therefore, compliance with the Unmarked Burials Act or the Historic Cemetery Act is not tantamount to compliance with the dedication provisions. As noted above, once human remains have been interred in a piece of property, that property is forever dedicated as a cemetery.¹¹⁹ In addition, such property cannot be put to any use other than a “cemetery use” unless all human remains are removed from the property and a court of competent jurisdiction issues an order removing the dedication.¹²⁰

Accordingly, compliance with the Unmarked Burials Act or Historic Cemetery Act alone does not obviate the need to remove the cemetery dedication on a particular piece of property. Compliance with the Unmarked Burials Act or the Historic Cemetery Act pursuant to a properly issued permit ensures, both from a scientific and archaeological perspective, that the archaeological resources represented by the human remains, burial artifacts, and burial sites are protected, properly analyzed and removed. In some instances—for example, when the appropriate course of action is to avoid disturbing the remains—this may amount to leaving human remains in the ground.¹²¹ However, because the dedication provisions are absolute, the cemetery or burial in question would either have to be avoided or removed, and a court of competent jurisdiction would have to issue a judgment pursuant to Louisiana Revised Statutes section 8:306 for compliance with Louisiana law to be complete.

118. In this regard, if it is anticipated that human burials will be impacted by the removal of a nonconforming use and when those burials would otherwise be subject to the protections afforded in the Unmarked Burials Act or the Historic Cemetery Act, the removal of the nonconforming uses must proceed pursuant to the permitting requirements of those laws.

119. See LA. REV. STAT. ANN. § 8:304 (2005 & Supp. 2014); LA. REV. STAT. ANN. § 8:306 (2005 & Supp. 2014).

120. See LA. REV. STAT. ANN. § 8:306.

121. See, e.g., RYAN M. SEIDEMANN, DESCRIPTIVE BIOARCHAEOLOGICAL ANALYSIS OF HUMAN REMAINS EXCAVATED FROM THE CHARITY HOSPITAL CEMETERY (16OR175) FOR THE HURRICANE KATRINA MEMORIAL, 2 (2008) (on file with the *LSU Journal of Energy Law and Resources*) (discussing new construction in Charity Hospital I Cemetery in New Orleans. In this instance, human remains were allowed to remain in the ground underneath the new construction in the cemetery because the new construction was a consistent use of the property (a series of mausoleums to house the unidentified victims of Hurricane Katrina). Compliance with the Unmarked Burials Act in this situation was sufficient to satisfy Louisiana law because the property was not being put to a non-cemetery use.).

F. Must a Dedication Be Removed from Property Platted But Never Used As a Cemetery?

There is no clear legal requirement for such a removal under Louisiana law with one possible exception. In cases where the property in question has been legally recorded, either under Louisiana Revised Statutes section 8:304(B)¹²² or simply under general rules related to recordation, as “cemetery property” but has never been used for the interment of human remains, there exists *prima facie* evidence of the presence of human remains on the property.¹²³ In that event, Louisiana Revised Statutes section 8:306 would require the removal of the explicit, recorded cemetery dedication.¹²⁴ Should there, in fact, be no burials in a particular area in which a dedication is in effect, but in which a nonconforming use is undertaken, such an action would be a technical violation of the dedication provisions in the absence of the removal of a dedication from the property. In other words, the failure to remove a Louisiana Revised Statutes section 8:304(B) dedication from property, even when the property was never used as a cemetery, would technically mean that using the property as something other than a cemetery is unlawful. However, it is doubtful that there would be any utility to challenging such a use, as it is essentially a no harm, no foul situation. Such a failure to remove the dedication would effectively create a cloud on the title that may have to be removed prior to subsequent property transfers.

Beyond the one above-noted exception concerning recordation, there is no legal requirement to remove a cemetery dedication in the clear absence of human burials. In an abundance of caution, and to ensure that the subject property has clear title—free from any defects that may result from an erroneous classification of the property as cemetery property—when faced with an unrecorded cemetery or a known unmarked human burial, Louisiana Revised Statutes section 8:306 should be followed. If it is known that there

122. LA. REV. STAT. ANN. § 8:304(B) (“An official act of dedication of cemetery property shall be filed with the clerk of the district court for the parish in which the cemetery is located and with the Louisiana Cemetery Board. These requirements shall not apply to individual cemetery spaces within dedicated cemetery property. The provisions of this Subsection shall apply only to a cemetery established after June 21, 2008.”).

123. Although this notion exists nowhere in the positive law, it is based on the reality that recordation of a parcel that is intended for use as a cemetery is evidence on its face (thus, creating a cloud of title) that the property was, in fact, used as a cemetery. Clearly, this presumption may be rebutted by evidence of a lack of interments on the property.

124. See LA. REV. STAT. ANN. § 8:306.

are no burials present on the subject property, Louisiana Revised Statutes section 8:306 would be a simple transaction before the proper court, one that would likely save the fee title owners potential problems in the future if any confusion arises as to the actual location of burials in relation to the subject property.

G. Do Cremated Remains Scatterings Trigger the Dedication Provisions?

With a significant rise in the use of cremation, pulverized human remnants are being scattered in numerous places, thus raising questions regarding the implications of the scattering of cremated human remains. Specifically, does the scattering of cremated human remains trigger the dedication provisions of Title 8 of the Louisiana Revised Statutes? The answer to this question under the dedication provisions could have staggering effects on ongoing energy projects, especially those offshore due to the common preference of scattering the remains at sea.

As noted above, the dedication provisions constitute an absolute bar to the use of cemetery property for anything other than “cemetery purposes” unless all human remains have been properly removed from the property and a court of competent jurisdiction has issued a final order removing the cemetery dedication of the property.¹²⁵ The above discussions that consider the dedication provisions only analyze the application of the law and custom to the inhumation, interment, or entombment of (largely) intact human bodies on or in a particular piece of property. None of these discussions consider the legal implications of the dedication provisions for property on which cremated human remains have been scattered. Again, there appears to be no specific law or jurisprudence in Louisiana that addresses this issue.

Should the dedication provisions apply to such dispositions, the scattering of cremated human remains outside of cemeteries creates a practical problem: numerous entities could see their property converted to cemetery purposes, with all of the attendant restrictions, without granting permission for such a disposal and without any practical means to reverse the process.¹²⁶ Taking this

125. *See id.*

126. Inherent in the dedication provisions as they are drafted is the ability, albeit sometimes with substantial financial difficulty, to reverse the dedication by the removal of the remains and the subsequent removal of the dedication by court order. In the case of scattered cremated remains, it is not feasible to remove such remains in the same manner as an exhumation or excavation of intact or partially intact bodies. Thus, from a practical perspective, the implications of applying the

problem to its extreme, considering the wishes of the deceased in the matter of *Mavromatis v. Lou-Mar, Inc.*,¹²⁷ who wanted his ashes to be scattered in the Gulf of Mexico. The application of the dedication provisions to such a scenario could have the entire Gulf converted to a cemetery and effectively out of commerce for other purposes. Surely this result, which is obviously an exaggeration of the proximate question, is an absurd result that the Legislature could not have possibly intended when enacting the dedication provisions.¹²⁸ Accordingly, the dedication provisions must be applied in such a manner as not to lead to the absurd result of wholesale conversion of every tract of land (or water) upon which cremated human remains are scattered to cemetery-only uses.

As discussed above, cemeteries hold a unique place in American culture—they are considered by custom and the law to be inviolate places where the dead may find eternal rest.¹²⁹ It is from this cultural concept that laws such as the dedication provisions, the Unmarked Burials Act,¹³⁰ and the Historic Cemetery Act¹³¹ were created. This inviolate nature must dictate the application of the dedication provisions to the scattering issue. In other words, while it is unlikely that the dedication provisions were intended to apply to, nor does the law require their application to, isolated scatterings of cremated human remains, such a conclusion should not be seen as undermining any of the burial protection laws noted above as they have been applied in the jurisprudence or elsewhere.

Under Title 8 of the Revised Statutes, a cemetery is defined 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.”¹³² This definition noticeably omits mention of isolated scattering of cremated human remains. Because the dedication provisions specifically apply to cemetery property, isolated scatterings of cremated human remains outside of cemeteries are not implicated by Title 8 or by the dedication provisions.

dedication provisions to isolated events of scattered cremated human remains is distinguishable from other applications of the dedication provisions.

127. *Mavromatis v. Lou-Mar, Inc.*, 632 So. 2d 828 (La. App. Ct. 1994).

128. *See Touchard v. Williams*, 617 So. 2d 885, 892 (La. 1993) (citing *Smith v. State*, 366 So. 2d 1318, 1320 (La. 1978) (“[A] [c]ourt will not ‘impute to a statute a meaning which would lead to an absurd result. . . .’”)).

129. *See generally* Seidemann & Moss, *supra* note 21.

130. LA. REV. STAT. ANN. §§ 8:671–8:681 (2005 & Supp. 2014).

131. LA. REV. STAT. ANN. §§ 25:931–25:943 (2007 & Supp. 2014).

132. LA. REV. STAT. ANN. § 8:1(7) (2005 & Supp. 2014).

In addition, Louisiana law clearly exempts isolated scatterings of cremated human remains from the coverage of the dedication provisions via the definition of “interment” under Louisiana Revised Statutes section 8:1(26). Interment is defined as “the disposition of human remains by inurnment, scattering, entombment, or burial in a place used or intended to be used, and dedicated, for cemetery purposes.”¹³³ This definition demonstrates that the scattering of cremated human remains outside of an area that is dedicated to cemetery purposes does not qualify as an interment under Louisiana law. Because a cemetery can only be created (and hence have the dedication provisions apply thereto) by way of the interment of human remains,¹³⁴ the isolated scattering of such remains outside of a cemetery does not constitute interment and therefore does not create a cemetery to which the dedication provisions would attach.

In addition, Louisiana Revised Statutes section 8:1(7) includes, within the definition of “cemetery,” the term “scattering garden.”¹³⁵ This term is not defined in Title 8. However, in practice, a scattering garden is a portion of a cemetery that is otherwise covered by Title 8 (and thus the dedication provisions) in which people may scatter the cremated remains of their loved ones.¹³⁶ Scattering garden is not an analogous term to an isolated scattering for at least two reasons. First, scattering gardens are located within cemeteries that are provided for by Title 8. In addition, the scattering of remains in scattering gardens would not be considered isolated events, but rather they are areas that are specifically set aside for scattering human remains on otherwise protected property. Thus, the inclusion of the term “scattering garden” in Louisiana Revised Statutes section 8:1(7) does not mean that isolated events of scattering in non-cemetery areas would trigger the dedication provisions.¹³⁷ This conclusion is further consistent with Louisiana Revised Statutes section 8:1(26), which clearly makes a distinction between

133. LA. REV. STAT. ANN. § 8:1(26) (2005 & Supp. 2014).

134. See LA. REV. STAT. ANN. § 8:1(7).

135. LA. REV. STAT. ANN. § 8:1(7).

136. See OR. REV. STAT. § 97.010(32) (2010) (defining “scattering garden” as “a location set aside within a cemetery that is used for the spreading or broadcasting of cremated remains that have been removed from their container and can be mixed with or placed on top of the soil or ground cover or buried in an underground receptacle on a commingled basis and that are nonrecoverable”). See also, *Scattering gardens offer permanent memorials for cremated remains*, CANADIAN PRESS (July 8, 2003) (on file with the *LSU Journal of Energy Law and Resources*).

137. This distinction is supported by the law related to cremation. Specifically, Louisiana Revised Statutes section 37:880(D) (2007) distinguishes isolated scatterings from the scattering of cremated human remains in dedicated cemeteries.

scattering within and outside of dedicated cemeteries, the latter not qualifying as “interment” under Louisiana law.¹³⁸

Finally, it is important to note that the above discussion is inapplicable to situations in which cremated remains have been purposefully buried, either in an urn or in some other receptacle. In this instance, the remains have not been scattered and are largely separable from the matrix within which they have been interred. In this regard, one must be mindful of the historic and prehistoric practice of the intentional burial of cremated human remains.¹³⁹ The discovery of such purposefully buried remains outside of a cemetery registered with the LCB would trigger either the Unmarked Burials Act or the Historic Cemetery Act, or both, and as such, the interred remains would be subject to the dedication provisions. The reason for this distinction is that the act of the burial of such cremated remains cannot be said to be an isolated scattering, but rather a purposeful interment much in the manner of the regular interment of intact human remains.

H. What Should Be Done if Human Remains or an Unexpected Cemetery Are Encountered During Field Operations?

It is unusual today for a project to knowingly run through a burial site. Most burials or cemeteries are identified accidentally during field operations. In such situations, the existing law provides direct guidance regarding whom to notify. In this regard, with respect to unexpected burials that do not appear to be related to a historic cemetery, the Unmarked Burials Act, specifically Louisiana Revised Statutes sections 8:680(C) and 8:680(D), controls what needs to occur upon discovery. These provisions state:

C. Each law enforcement agency that receives notice of an unmarked burial site or human skeletal remains shall immediately notify the coroner of the parish where the site or remains are found. The law enforcement agency shall also notify the secretary through the division of archaeology within two business days of any discovery unless circumstances indicate that the death or burial is less than fifty years old or that there is need for a criminal investigation or legal inquiry by the coroner.

138. This reality exists because Louisiana Revised Statutes section 8:1(26), which specifically defines “interment,” is limited only to activities occurring within a cemetery.

139. See, e.g., ROBERT W. NEUMAN, AN INTRODUCTION TO LOUISIANA ARCHAEOLOGY 140 (1984).

D. If the coroner finds that the unmarked burial site is over fifty years old and that there is no need for a legal inquiry by his office or for a criminal investigation, the secretary shall have jurisdiction of the site, human skeletal remains, and the burial artifacts.¹⁴⁰

Accordingly, the first notice should go to the local law enforcement entity in the area of the project. That entity must notify the coroner who will have primary jurisdiction over the remains in the first instance. In the event that the coroner or the law enforcement entity determines that the remains are more than fifty years old and are not part of a crime scene, then the law enforcement entity must also contact the Division of Archaeology.¹⁴¹ These portions of the Unmarked Burials Act set the threshold age of a burial for coverage by the jurisdiction of the Division at fifty years or older.¹⁴²

In the event that a discovered burial is determined not to “need . . . a criminal investigation or legal inquiry by the coroner,”¹⁴³ the burial, if isolated or historic,¹⁴⁴ falls under the jurisdiction of the Historic Cemetery Act and notification to the Division of Archaeology is required.¹⁴⁵ The same general principles for dealing with the remains under the Historic Cemetery Act and the Unmarked Burials Act apply to such finds. In both cases, once discovered, no further activity on the burial or cemetery property may occur in the absence of a permit authorizing such activity by the Division.¹⁴⁶

For any discovered remains that do not constitute evidence of a crime or fall under the jurisdiction of the Division of Archaeology, the discoverer may only dispose of or disturb such remains in accordance with the general provisions of Louisiana Revised

140. LA. REV. STAT. ANN. § 8:680 (2005 & Supp. 2014).

141. *Id.*

142. *Accord* La. Att’y Gen. Op. No. 99-376 (1999), available at <https://www.ag.state.la.us/Opinions.aspx>.

143. LA. REV. STAT. ANN. § 8:680(C).

144. *See* LA. REV. STAT. ANN. § 25:933(10), 25:933(12) (2007 & Supp. 2014) (defining “isolated grave” means as “any marked grave site that is not part of a larger cemetery and is not subject to the laws, rules, and regulations of the board or Chapter 10-A of Title 8 of the Louisiana Revised Statutes of 1950. The term shall also include groupings of multiple graves that are not part of a larger cemetery.” The term “historic cemetery” means “any abandoned cemetery located in the state that is more than fifty years old and is not subject to the laws, rules, and regulations of the board or Chapter 10-A of Title 8 of the Louisiana Revised Statutes of 1950.”).

145. LA. REV. STAT. ANN. § 25:939(A) (2007 & Supp. 2014).

146. LA. REV. STAT. ANN. § 8:680(B).

Statutes section 8:655.¹⁴⁷ Because the Division has no jurisdiction over such recent human remains, such remains would be under the jurisdiction of the coroner unless and until a proper identification has been made such that the provisions of Louisiana Revised Statutes section 8:655 may be applied. In the event that no such identification is possible or that the remains are otherwise unclaimed, the default legal provisions related to the burial of paupers, Louisiana Revised Statutes section 13:5715, would apply. That law provides, in pertinent part, as follows:

A. (1) Upon completion of an autopsy or completion of the coroner's investigation, if the investigation reveals that an autopsy is not required, the coroner shall release the body to the family or friends for burial.¹⁴⁸

(2) The coroner shall arrange for the burial of paupers, preferably by a Louisiana licensed funeral home. The burial expenses shall not exceed the actual cost of the service, and shall be paid by the parish or municipality in which the death occurred. . . . The state or any municipality or parish may establish a maximum amount which it shall pay for individual burial expenses.¹⁴⁹

Thus, should human skeletal remains be discovered that are not within the ambit of the Division through the Unmarked Burials Act or the Historic Cemetery Act, then such remains are under the jurisdiction of the local coroner who has the duty to either dispose of those remains pursuant to Louisiana Revised Statutes section 8:655 (if the individual can be and is positively identified) or pursuant to Louisiana Revised Statutes section 13:5715 (if the individual is unidentifiable, unclaimed, or a pauper).¹⁵⁰

147. LA. REV. STAT. ANN. § 8:655 (2005) (establishing which individuals have the right to control the disposition of identified human remains).

148. This provision is consistent with Louisiana Revised Statutes section 8:655, which would control once the release of the remains occurs.

149. LA. REV. STAT. ANN. § 13:5715(A) (2012).

150. It is important to note that, although the coroner may have jurisdiction over such remains and be responsible for their ultimate disposition, the costs of that disposition are not borne by the coroner. For a discussion of the duties of the coroner, political subdivisions, and the State with regard to the disposition of paupers' remains, see La. Att'y Gen. Op. No. 09-0144 (2009) and La. Att'y Gen. Op. No. 13-0002 (2013).

V. ACCESS RIGHTS TO CEMETERIES ON INDUSTRIAL PROPERTY
—AN UPDATE

In an earlier article, I examined the limitations on property owners on whose property a cemetery sits with regard to whether such owners must allow access to people who are descendants of those interred on their property for purposes of visitation and maintenance of the cemetery.¹⁵¹ Louisiana law answers this question in the affirmative. If a person owns property with a cemetery on it, that person must allow reasonable access to the cemetery to those descended from the individuals buried on the property in order for those descendants to maintain the cemetery and visit the graves of their loved ones.¹⁵² Although this issue does not often arise with regard to the energy industry, a recent Texas case suggests that a brief review of this issue in this article is appropriate.

In the Texas case of *Levandovsky v. Targa Resources Inc.*,¹⁵³ a one-acre family cemetery became surrounded, over time, by an industry.¹⁵⁴ The industry sought the removal of the cemetery dedication and the relocation of the interred individuals, alleging that the cemetery was abandoned and that visiting a cemetery in an industrial site was unsafe for the public.¹⁵⁵ The descendants challenged this action but lost on a motion for summary judgment in the district court.¹⁵⁶ The district court found that the cemetery was abandoned under the law because no one from the family knew of it or visited it in more than 30 years.¹⁵⁷ Because Texas law permits the removal of a cemetery dedication by a property owner when the cemetery is abandoned,¹⁵⁸ and because the family had not visited the cemetery, the district court ruled that the cemetery could be moved.¹⁵⁹ It is important to note that no such law exists in Louisiana. A cemetery cannot simply be undedicated and moved based upon a lack of visitation.

In this case, the appellate court noted that the cemetery did not meet the definition of an abandoned cemetery,¹⁶⁰ thus the industrial landowner could not avail itself of the law allowing for the removal

151. Seidemann & Moss, *supra* note 21, at 482–84.

152. *Id.*

153. *Levandovsky v. Targa Res. Inc.*, 375 S.W.3d 593 (Tex. Ct. App. 2012).

154. *Id.* at 595.

155. *Id.*

156. *Id.* at 596.

157. *Id.*

158. TEX. HEALTH & SAFETY CODE ANN. § 711.010(b) (West 2010).

159. *Levandovsky*, 375 S.W.3d at 596.

160. *Id.* at 597–98.

of the cemetery's dedication as an abandoned cemetery.¹⁶¹ Ironically, under a regulation that defines abandoned cemeteries, it was the industry's own actions that kept the cemetery from being abandoned. Under the Texas Administrative Code, to be abandoned, a cemetery must: "(1) contain one or more graves; (2) ha[ve] cemetery elements for which no cemetery organization exists; and (3) is not otherwise maintained by *any* caretakers."¹⁶² In this case, the record reflected that the industry maintained the cemetery for many years, thus defeating its own claim that the cemetery was abandoned.¹⁶³

This regulation saved this particular cemetery from being undedicated and relocated. Although, from a historic preservation perspective, it is a bit troubling that a cemetery can so seemingly easily be undedicated in Texas (it seems to be left up to the discretion of the landowner, with little or no consideration given to the integrity of the historical record or to the proscription against exhumation), it does appear that the industry in this case was going to appropriately accomplish the disinterments.

The relevance of this case to the energy industry is twofold. On the one hand, cemeteries are often acquired (sometimes unknowingly) in large land acquisitions by industrial operations.¹⁶⁴ When such cemeteries are acquired, the industry has an obligation under the visitation allowances of Louisiana law to provide access for family members to the graves of their loved ones.¹⁶⁵ In addition, unlike in Texas where the landowner can seemingly unilaterally move a cemetery that is abandoned on its property, Louisiana landowners do not have this luxury. Avoidance is the best approach for Louisiana industrial landowners to take should they find a cemetery on their property.

VI. THE RISKS OF EMPLOYEES REMOVING MATERIALS FROM DISTURBED GRAVES—A CAUTIONARY NOTE

If human remains or cemeteries are inadvertently discovered during field operations, it is essential that employees are educated

161. *Id.*

162. 13 TEX. ADMIN. CODE § 22.1 (2013) (emphasis added).

163. *Levandovsky*, 375 S.W.3d at 598.

164. Susan Buchanan, *African American Descendants Sue to Save Louisiana's Revilletown Cemetery*, THE LOUISIANA WEEKLY (Jan. 7, 2013), <http://www.louisianaweekly.com/african-american-descendants-sue-to-save-revilletown-cemetery/> [<http://perma.cc/3A2E-NPK2>] (archived Mar. 16, 2014) (noting problems inherent in the existence of a cemetery acquired as part of a larger industrial complex purchased by Georgia Gulf Corp. in Plaquemine, LA).

165. *Seidemann & Moss*, *supra* note 21, at 482–84.

that the removal of human remains or burial artifacts is illegal under the Criminal Code,¹⁶⁶ the Unmarked Burials Act, and the Historic Cemetery Act—and may even constitute a federal criminal offense under NAGPRA.¹⁶⁷ With regard to these activities, the Unmarked Burials Act specifically provides as follows:

- A. It is unlawful for any person, entity, or group, to whom the secretary has not issued a permit, to knowingly:
- (1) Disturb an unmarked burial site or any human skeletal remains or burial artifacts in an unmarked burial site.
 - (2) Buy, sell, barter, exchange, give, receive, possess, display, discard, or destroy human skeletal remains from an unmarked burial site or burial artifacts. . . .
 - (3) Allow any person, entity, or group access to an unmarked burial site, human skeletal remains, or burial artifacts for the purpose of disturbing them.
 - (4) Provide funds to or for any person, entity, or group for the purpose of disturbing any unmarked burial site, human skeletal remains, or burial artifacts.

B. Each violation of this Section shall be punishable upon conviction of a first offense by a fine of not more than five thousand dollars or imprisonment for not more than one year, or both. Upon conviction of a second or subsequent offense each violation shall be punishable by imprisonment for not more than two years or a fine of not more than ten thousand dollars, or both. Each disturbance of an unmarked burial site, human skeletal remains, or burial artifacts constitutes a separate offense.¹⁶⁸

Likewise, the Historic Cemetery Act provides:

- A. It is unlawful for any person, entity, or group, to whom the department has not issued a permit, to knowingly:
Disturb a historic cemetery or an isolated grave.

166. See La. Att’y Gen. Op. No. 13-0120 (2013) (noting that the intentional removal or damage of human remains constitutes criminal desecration under Louisiana Revised Statutes section 14:101(1) (2012) and the intentional damage or removal of burial artifacts (including, but not limited to grave markers) constitutes criminal desecration under Louisiana Revised Statutes section 14:101(2) (2012)).

167. The latter laws (i.e., the Unmarked Burials Act, the Historic Cemetery Act, and NAGPRA) would be violated by acts disturbing the relevant cemeteries or burials pursuant to Louisiana Revised Statutes section 8:678 (2005 & Supp. 2014), Louisiana Revised Statutes section 25:937 (2007 & Supp. 2014), and 18 U.S.C. § 1170 (2012).

168. LA. REV. STAT. ANN. § 8:678.

(2) Allow any person, entity, or group access to a historic cemetery or an isolated grave for the purpose of disturbing any such cemetery or grave.

(3) Provide funds to or for any person, entity, or group for the purpose of disturbing any historic cemetery or isolated grave.

B. Each violation of this Section shall be punishable upon conviction of a first offense by a fine of not more than five thousand dollars or imprisonment for not more than one year, or both. Upon conviction of a second or subsequent offense each violation shall be punishable by imprisonment for not more than two years or a fine of not more than ten thousand dollars, or both. Each disturbance of a historic cemetery or isolated grave constitutes a separate offense.¹⁶⁹

Finally, NAGPRA states:

(d) Inadvertent discovery of Native American remains and objects

(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.¹⁷⁰

169. LA. REV. STAT. ANN. § 25:937.

170. 25 U.S.C. § 3002(d)(1) (2012).

(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.¹⁷¹

It is important to drive home these restrictions and penalties to employees because the temptation to remove and possibly even to sell such discovered items as curios is often irresistible.¹⁷² This can lead to civil and criminal penalties for both employees and employers and must be avoided to minimize potential damages. In recent years, the Louisiana Attorney General's Office has taken the illegal treatment of human remains and burial artifacts seriously, resulting in busts and seizures of numerous items.¹⁷³ Accordingly, it is imperative that all employees who may come into contact with human remains or burial artifacts while working in the field be admonished not to take such items and to immediately contact the appropriate authorities or otherwise risk criminal and civil sanctions that have the potential to impose vicarious liability sanctions on the employers as well.

171. 18 U.S.C. § 1170.

172. See, e.g., WILLIAM T. HAWKINS & RYAN M. SEIDEMANN, LOUISIANA DEP'T OF JUSTICE, DESCRIPTIVE BIOARCHAEOLOGICAL ANALYSIS OF HUMAN REMAINS SEIZED FROM THE NEW ORLEANS AUCTION GALLERY, 2–3 (2011) (discussing the analysis of human remains seized from an illicit sale as an example of the interest in these items as curios).

173. See, e.g., Ryan M. Seidemann et al., *The Identification of a Human Skull Recovered from an eBay Sale*, 54 J. FOREN. SCI. 1247 (2009).

VII. CONCLUSION

As can be seen from the review above, the intersections of the energy industry and cemeteries can range from the mundane (a cemetery identified and avoided in the path of a pipeline) to the bizarre (the arrest of an employee for collecting human remains from that same cemetery). Because of the heightened sensitivities involved with the buried dead, courts in Louisiana have been willing to award damages where similar situations not involving the dead may not warrant such treatment. With cemeteries and human remains, the pitfalls for the unwary in Louisiana are many. Title examiners must be especially cautious, as they are the first line of defense against an energy company unwittingly impacting a cemetery. However, due to the nature of the cemetery dedication provisions, even title examinations will often miss the existence of cemeteries (because they need not be recorded until 2008). Thus, the exercise of caution by field personnel is also critical. As is demonstrated above, although complicating to a particular project, cemeteries can be managed when they intersect with energy projects; they simply have to be managed with care and in strict adherence to the laws reviewed in this Article to avoid bad publicity, destroying a company's goodwill, and running afoul of the law.