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Freedom to Alienate as the Freedom to Negotiate: Severability of Mineral Rights Under Louisiana's Civilian Property System

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Freedom to Alienate as the Freedom to Negotiate: Severability of Mineral Rights Under Louisiana’s Civilian Property System

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INTRODUCTION

For many years, Louisiana’s coastal regions have been a point of contention for property owners seeking to maintain their ownership rights in a constantly changing landscape.¹ Louisiana’s coast harbors rich natural

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1. JIM WILKINS ET AL., PRELIMINARY OPTIONS FOR ESTABLISHING RECREATIONAL SERVITUDES FOR AQUATIC ACCESS OVER PRIVATE WATER BOTTOMS 4 (Louisiana Sea Grant College Program, 2018), <http://www.lasea-grant.org/wp-content/uploads/LSG-Coastal-Access-Report.pdf> [<https://perma.cc/A8LL-SYEV>].

resources that offer many commercial opportunities for those with the right to control them.² The assets available on these lands make assertions of ownership pervasive and frequent.³ Recently, conflicts between the State of Louisiana and its coastal landowners have arose over who owns the surface and mineral rights that accompany coastal lands and water bottoms.⁴

There are two major causes for this dispute: valid title and erosion. For one, it is unclear who has valid title to these lands due to faulty land sales by the State during the early 1800's, which purportedly transferred some public lands and water bottoms to private landowners.⁵ As a result, these lands have multiple chains of title, making legal proceedings difficult when both parties have strong claims for valid title.⁶ Secondly, natural and artificial factors contributing to erosion of private, coastal land have triggered many landowners to assert their ownership rights (against the State) in any way they can. Some natural causes of erosion include disturbances from natural disasters and rising sea levels, as well as subsidence.⁷ Human activity also increases the rate of erosion through

2. William B. Richardson, *2017 Louisiana Summary: Agriculture and Natural Resources*, LSU AGCENTER (Aug. 10, 2018, 4:35 PM), <https://www.lsuagcenter.com/profiles/aiverson/articles/page1533918931356> [<https://perma.cc/62UM-2UQJ>].

3. Christopher Flavelle, *The Fighting Has Begun Over Who Owns Land Drowned by Climate Change*, BLOOMBERG BUSINESSWEEK (April 25, 2018, 3:00 AM), <https://www.bloomberg.com/news/features/2018-04-25/fight-grows-over-who-owns-real-estate-drowned-by-climate-change> [<https://perma.cc/RQ5Q-D6EL>].

4. WILKINS ET AL., *supra* note 1, at 3; *see, e.g.*, *Riceland Petroleum Co. v. N. Am. Land Co.*, 869 So. 2d 894, 896 (La. Ct. App. 3d Cir. 2004); *see also* *State v. Salt Domes P'ship*, No. 72682, 2016 WL 3197529 (La. Dist. Ct. Jan. 15, 2016).

5. James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 872 (1992); *see also* LA. LEGIS. AUDITOR, INVENTORY OF STATE LANDS 10 (2018), [https://www.la.gov/PublicReports.nsf/2A4CDBD9DFB0BE58862582F000625135/\\$FILE/0001A476.pdf](https://www.la.gov/PublicReports.nsf/2A4CDBD9DFB0BE58862582F000625135/$FILE/0001A476.pdf) [<https://perma.cc/6PWY-9KYR>].

6. A.N. YIANNOPOULOS, PROPERTY § 11:10, *in* 2 LOUISIANA CIVIL LAW TREATISE at 2 (5th ed. 2015) (The word "title" has been used in Louisiana legislation and jurisprudence in at least three different senses. It may mean an act translative of ownership, such as a sale, donation, or exchange; it may mean an instrument evidencing ownership or another real right, such as a partition or a judgment; or it may simply mean ownership of a thing or a valid claim to a real right other than ownership).

7. Clare Davis-Wheeler, *Louisiana Coastal Land Loss*, TUL. UNIV. (Jan. 7, 2000), <http://www.tulane.edu/~bfleury/envirobio/enviroweb/LandLoss/LandLoss.htm> [<https://perma.cc/46TX-BYM2>]. (Subsidence is the general term for the

activities such as dredging canals, building river-control structures like dams and levees, and “over nourishing” wetlands with chemical pollutants when drained.⁸

Title disputes and erosion, in addition to the contradictory interests of each party, have given rise to the issue of “dual-claimed” lands along Louisiana’s coast.⁹ “Dual-claimed lands” are parcels of property to which the State and coastal landowners both claim ownership.¹⁰ There are many barriers keeping the parties from reaching a reasonable solution—mainly, poor communication and reluctance to negotiate.¹¹ In attempting to reach a resolution, Louisiana’s property laws may also be seen as an impediment. Louisiana law prohibits the severance of mineral rights from surface rights in the same parcel of land—an action which could be beneficial for negotiations.¹²

While many common law states—such as Texas, North Dakota, and Alaska—allow for severance via statutes that govern the property rights of freehold estates and mineral conveyances, Louisiana does not.¹³ If the Louisiana legislature was to pass new statutes on property law similar to those in common law jurisdictions, the State and coastal landowners would have concrete legislative authority to assist them when conducting negotiations and setting parameters. The conflict over dual-claimed lands would likely benefit from the flexibility that comes with the different types of ownership interests inherent in the common law system of mineral and surface estates in land. Separate estates can create separate ownership

gradual sinking of coastal land into the ocean. It is one of the largest causes of coastal land loss).

8. *Id.* (This process is known as eutrophication).

9. *See generally* LA. LEGIS. AUDITOR, *supra* note 5, at 10 (The report provides a map of southern Louisiana highlighting the extent of dual-claimed lands).

10. *Id.* at 9.

11. Sara Sneath, *As Louisiana’s Coast Washes Away, State Cashing in on Disputed Oil and Gas Rights*, NOLA.COM (May 31, 2018, 11:00 AM), https://www.nola.com/news/environment/article_9894c6d7-794c-5ef6-a21e-120ff729527c.html [<https://perma.cc/G9JN-ZG6L>].

12. *Id.*

13. *See generally* *Norken Corp. v. McGahan*, 823 P.2d 622 (Alaska 1991); *see also* *Krenz v. XTO Energy, Inc.*, 890 N.W.2d 222, 237 (N.D. 2017); *see also* *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016) (These states have been cited because they are among the top oil and gas producing jurisdictions in the United States, along with Louisiana, and should be viewed as good examples of strong mineral producing states that have operated well under the common law property method of severing mineral rights via separate estates in land).

rights, which can then be apportioned in accordance with the specific interests of either party in any given disputed parcel of land.¹⁴ Certainly, revitalizing Louisiana's property scheme to accommodate for common law principles would require significant changes to the law.¹⁵ However, the importance of the issue warrants some remedial actions, which will be proposed *infra*.

Part I of this Comment explains the relevant constitutional provisions and statutory law governing dual-claimed lands. This Part also addresses the historical background and causes of dual-claimed lands, highlighting the interests of each party fueling the current conflict. Part II identifies some key differences between civil law property and common law property and further states general property law principles provided by early Louisiana cases. Part III of this Comment lays out the public policy rationales behind Louisiana's prohibition on severing mineral rights from surface rights, while counter-arguments call into question the strength of these policy concerns. Part IV of this Comment provides several solutions in an attempt to resolve the dispute between the State and coastal landowners over dual-claimed lands.

I. BACKGROUND

Louisiana Civil Code article 450 states, “[p]ublic things are owned by the state or its political subdivisions in their capacity as public persons. Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.”¹⁶ Thus, any analysis of water bottom ownership must begin with the general premise that the State owns the beds of all navigable water bodies within its borders.¹⁷ Additionally, Louisiana Civil Code article 477 defines ownership as a “right that confers . . . direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by

14. David D. Haddock & Thomas D. Hall, *The Impact of Making Rights Inalienable: Merrion v. Jicarilla Apache Tribe, Texaco, Inc. v. Short, Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, and Ridgway v. Ridgway*, 2 SUP. CT. ECON. REV. 1, 2 (1983).

15. See, e.g., LA. CONST. art. IX §§ 3, 4; see also LA. REV. STAT. § 31:5 (2019).

16. LA. CIV. CODE art. 450 (2019).

17. Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVTL. L.J. 93, 118 (2009).

law.”¹⁸ Therefore, if the State owns land or water bottoms that are classified as public things, then ownership of that property comes with all rights therein.¹⁹

Ownership of the waters, bottoms, banks, and shores of waterbodies in Louisiana varies depending on the nature of the water body.²⁰ Moreover, it is well-established in Louisiana that the bottoms of navigable water bodies are public things, inalienable by the State and insusceptible to private ownership.²¹ Oftentimes, ownership of public or private things are discussed in the context of who has the rights to natural resources in certain immovable property. These general tenets of property law find their authority under the Louisiana Constitution, which requires the reservation of mineral rights, *inter alia*, by the State for all public lands.²² Louisiana Constitution article IX section 3 mandates that “[the State] shall neither alienate nor authorize the alienation of the bed of a navigable water body.”²³ Additionally, Louisiana Constitution article IX section 4 states “the mineral rights on property sold by the state shall be reserved.”²⁴

These statutory articles read in conjunction with the Louisiana Constitutional provisions provide some clear property foundations and legal rules for the classification and reservation of state lands and water bodies as “public things.” These principles seem to suggest that settling disputes over property ownership can be done by a formulaic application of statutory provisions depending on the nature of the water body.²⁵ Some scholars have taken this view to be an inadequate resolatory method because it is overly simplistic given the “peculiar geophysical conditions” of coastal Louisiana.²⁶ Louisiana’s coast regularly undergoes topographical changes to the land as it is easily affected by sea-level changes and coastal displacement activity.²⁷ The current statutory law

18. LA. CIV. CODE art. 477.

19. KATHY D. UNDERWOOD, *LOUISIANA NOTARY HANDBOOK* § 17:2, Westlaw (2019–2020 ed.).

20. Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S.U. L. REV. 149, 162 (2000).

21. A.N. YIANNPOULOS, *PROPERTY* §§ 66–67, in 2 *LOUISIANA CIVIL LAW TREATISE* 122–27 (3d ed. 1991).

22. LA. CONST. art. IX § 4.

23. LA. CONST. art. IX § 3.

24. LA. CONST. art. IX § 4.

25. Perhay, *supra* note 20, at 165.

26. *Id.* (These “peculiar conditions” refer to the often-rapid loss or gain of land that is characteristic of Louisiana’s coast, making it an unusual, and indeed difficult, landscape to apply property law to).

27. R. D. DeLaune et. al., *Relationships among Vertical Accretion, Coastal Submergence, and Erosion in a Louisiana Gulf Coast Marsh*, 53 J. SEDIMENTARY

seeks to classify, and then apportion ownership rights based on these classifications. It is sensible to say that classification of a geographically unstable area is largely susceptible to error. Louisiana's coastal landscape is seemingly too unpredictable for conventional solutions that rely on statutory law.

A. Erosion as a Cause for Controversy in Dual-Claimed Lands

Louisiana's coastal zone is constantly undergoing physical change.²⁸ What is land today might be open water tomorrow.²⁹ The pervasiveness of erosion along the coast has become one of the leading causes for the dispute over dual-claimed lands.³⁰ Ownership issues arise when privately owned land adjacent to the coast subsides into the territorial sea (the Gulf of Mexico) that is owned by the State.³¹ Naturally, erosion can occur along almost any coast where tidal flow is present.³² However, subsidence is certainly the natural phenomenon that has the strongest impact on private land abutting the Gulf coast as rates increase and coastal landowners watch their lands wash away.³³ What was once a slow, gradual loss that could be reasonably managed or accounted for by landowners has become a fast and unpredictable threat to their property.³⁴ However, the natural rate of land loss does not compare to the impacts human activity has on erosion.³⁵

Human activity has accelerated erosion in several ways. This includes the channelizing and leveeing of the Mississippi River basin, resulting in the loss of land-building sediments and the deprivation of nutrients and freshwater to adjacent wetlands.³⁶ Wetland loss can alter the spatial configuration of the landscape by reducing landscape connectivity and

PETROLOGY 147, 147 (1983) (coastal marshes are truly one of the most ephemeral of physiographical features, as they occupy the narrow intertidal zone and are therefore particularly susceptible to changes in the level of the oceans and in coastal displacement activity).

28. Wilkins & Wascom, *supra* note 5, at 861 (1992).

29. *Id.*

30. WILKINS ET AL., *supra* note 1, at 4 (Louisiana Sea Grant College Program, 2018).

31. LA. CIV. CODE art. 450 (2019).

32. Keqi Zhang et al., *Global Warming and Coastal Erosion*, 64 CLIMATIC CHANGE 41 (2004).

33. Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 13 (1983).

34. *Id.* (The rate of subsidence over the last thousand years has occurred at a rate 1.55mm per year and has increased to a current figure of 9mm per year).

35. *Id.*

36. *Id.* at 23.

increasing isolation.³⁷ Moreover, the dredging of canals across barrier islands and through wetlands directly contributes to land loss.³⁸ Private landowners, many of whom are oil and gas companies conducting mineral exploration, and the State acting through the Army Corps of Engineers, share the blame for these actions that have aggravated coastal land loss.³⁹ Nevertheless, private landowners and the State still argue over ownership rights to these lands and water bottoms. The argument is expected to intensify as erosion continues.⁴⁰

The legal effects resulting from coastal erosion are perhaps more pertinent to the dual-claimed lands issue. According to Louisiana jurisprudence, when riparian land becomes part of the bed of navigable water body, regardless of whether it be a body of freshwater, the sea or an arm of the sea, it ceases to be susceptible of private ownership.⁴¹ The land becomes a public thing, owned by the State in its capacity as a public person.⁴² Thus, the language present in Louisiana Constitution article IX sections 3 and 4, when combined with Louisiana Civil Code article 450, presents a general, but clear rule: as land erodes into navigable water bodies or the territorial sea, it becomes the property of the State, along with its underlying minerals.⁴³ Therefore, these minerals are not subject to alienation by the State.⁴⁴ Based on this analysis, it is appropriate to say that article 450 is the “heart of the controversy” over dual-claimed lands. This is because as private lands erode into navigable water bodies (in Louisiana’s case, the Gulf of Mexico) they are converted into public property by operation of law.⁴⁵ This application of article 450 is often the means by which the State claims ownership over areas where coastal land has turned open, navigable water.⁴⁶

37. Scott G. Leibowitz, *Isolated Wetlands and Their Functions: An Ecological Perspective* 23 WETLANDS 517, 525 (2003).

38. Houck, *supra* note 33, at 23.

39. *Id.*

40. WILKINS ET AL., *supra* note 1, at 4.

41. *Miami Corp. v. State*, 173 So. 2d 315, 322 (La. 1936); *see also* *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 582–83 (La. 1974).

42. *Miami Corp.*, 173 So. 2d at 322; *see also* *Gulf Oil Corp.*, 317 So. 2d at 582.

43. Seidemann, *supra* note 17, at 142.

44. *Id.*

45. *Miami Corp.*, 173 So. 2d at 322; *see also* *Gulf Oil Corp.*, 317 So. 2d at 582–83.

46. Flavelle, *supra* note 3.

B. Faulty Conveyances as a Cause for Controversy in Dual-Claimed Lands

Despite the term's frequent use in property law, the Louisiana Civil Code does not specify what constitutes a valid or clear title other than its reference as an "instrument."⁴⁷ Rather, "title" is used and explained more so in the context of other areas of the law that require it as an element for causes of action such as acquisitive prescription or petitory actions.⁴⁸ For example, Louisiana Civil Code article 3483 states that just title is a juridical act, such as a sale, exchange, or donation, sufficient to transfer ownership or another real right. The act must be written, valid in form, and filed for public registry in the conveyance records of the parish in which the immovable is situated.⁴⁹ Furthermore, in an action to prove ownership of immovable property by title, the claimant is required to prove an unbroken chain of transfers dating back to the sovereign state when two competing titles do not have a common, previous owner.⁵⁰

Many of the lands at issue first started out in the hands of the Louisiana state government upon its admission into the union in 1812 under the equal footing doctrine.⁵¹ The Federal Swamp Land Grants Acts of 1849 and 1850 permitted the State to sell "swamp lands subject to overflow," but only after the area had been ascertained by surveys and recognized by the State as land containing non-navigable water bodies.⁵²

47. LA. CIV. CODE art. 1839 (2019).

48. LA. CIV. CODE arts. 3483, 3653.

49. LA. CIV. CODE art. 3483.

50. PETER S. TITLE, LOUISIANA REAL ESTATE TRANSACTIONS § 5:32, *in* 1 LOUISIANA PRACTICE SERIES 122–27 (2d ed. 2019) (For example, a plaintiff in petitory action against a defendant in possession can prove ownership in one of three ways: title back to sovereign, title back to common author, or proof of ownership by acquisitive prescription).

51. *State v. Bayou Johnson Oyster Co.*, 58 So. 405, 407 (La. 1912) ("It is evident, then, that the State of Louisiana did not acquire the soil here claimed, which lies beneath the water of intercommunicating sounds, bayous, creeks, channels, lakes, bays, coves, and inlets bordering upon the Gulf of Mexico and within the ebb and flow of the tide, by virtue of the acts of Congress of 1849 and 1850, but that she acquired them, upon her admission into the union, by virtue of her inherent sovereignty."); *see also* YIANNOPOULOS, *supra* note 6, § 4:12, at 1.

52. *Hall v. Bd. of Comm'rs of Bossier Levee Dist.*, 35 So. 976 (La. 1904) (The federal Swamp Land Grants Acts of 1849 and 1850 made large amounts of swampland and navigable water bodies that had overflowed land available for private ownership. Originally, the grants conveyed subdivisions of coastal land to Louisiana under the acts of Congress, a large part of which were "swamp land subject to overflow." These lands were granted subject to disposal by the

A great number of the subsequent land surveys conducted by the State were done incorrectly.⁵³ Some of the surveys classified large portions of coastal land as mere swamp land (non-navigable) even though many of these lands contained navigable water bodies.⁵⁴ The process of selling these lands to private ownership was largely inexact due to the unsophisticated surveying methods used at the time, causing confusion over the ownership of some water bottoms and coastal land.⁵⁵ Based on these miscalculated surveys, the State sold areas of land to private individuals that included many public waterways and their water bottoms.⁵⁶ The State soon after became aware of its mistake and tried to reassert title claims to land already sold.⁵⁷ So began the issue of “dual-claimed” water bottoms because private landowners claim these conveyances were valid sales of non-navigable (and therefore private) land.⁵⁸ Indeed, many private parties asserting ownership of certain dual-claimed lands can trace their title back to the sovereign, satisfying the burden of proof for ownership.⁵⁹

Clear title currently does not exist for an estimated 286,467 acres of water bottoms in Louisiana due to ambiguity regarding who has valid title.⁶⁰ This problem has already had negative effects, and will likely have more, on private sellers and purchasers of coastal land who do not know that they are actually purchasing State-claimed land.⁶¹ Furthermore, absent an agreement between the parties, these disputed title claims can only be resolved through the courts—meaning each contested parcel has to be litigated separately.⁶² Extensive property litigation in this area could

Louisiana legislature. Under the act, shallow lakes and rivers, non-navigable, could be sold after their area had been ascertained by surveys recognized by the State).

53. WILKINS ET AL., *supra* note 1, at 3.

54. *Id.* (Swampland and overflowed lands are not generally considered to have navigable water bodies, and therefore, are not definitively public things).

55. *Id.*

56. LA. LEGIS. AUDITOR, *supra* note 5, at 10.

57. *Id.*

58. *Id.*

59. TITLE, *supra* note 50, § 5:32, at 122–27.

60. LA. LEGIS. AUDITOR, *supra* note 5, at 10 (This number only represents lands physically surveyed).

61. *Id.* at 8 (“[T]hese properties could have been sold or transferred multiple times since incorrectly being added to the parish tax rolls in the name of another party, resulting in these parties being unaware that the property they bought in good faith is also being claimed by the State”).

62. *Id.* at 10.

potentially inundate the courts and be very expensive for all parties involved.

The best illustration of the legal disputes over dual-claimed lands in Louisiana is the case *Stamper v. Bienville Parish Police Jury*.⁶³ *Stamper* involved a title dispute over 2.52 acres in Bienville Parish.⁶⁴ The competing claimants, George Stamper and the State, were both able to trace their titles back to the sovereign.⁶⁵ The State sold the plaintiff a plot of land near the coast—one which was authorized to be sold by the State under the Swamp Land Grants Acts—contiguous to a plot retained by the Bienville Parish Police Jury.⁶⁶ The issue concerned the property line between the plots, which was later determined to be placed incorrectly in reliance on inaccurate surveying by the State at the time of the sale.⁶⁷ The Louisiana Second Circuit Court of Appeals ruled that the State did not have title to the 2.52 acres of property, regardless of its contention that the old property line labeled the State as owner.⁶⁸ The court acknowledged that “no hard and fast rule can be established [for resolving these issues], based on the extent of discrepancy, or portion of omitted area [in the original survey], that would be applicable to any and every case.”⁶⁹ The holding in this case was based on updated surveying that showed the plaintiff Stamper was the true owner.⁷⁰

In a more recent case, *Riceland Petroleum Co. v. North American Land Co.*, a petroleum company filed a concursus proceeding to determine the ownership of royalties owed under mineral leases affecting certain lands in which ownership was disputed by the State of Louisiana and a group of private parties.⁷¹ The State claimed ownership of the lands based on boundary lines established by previous government survey and accretion of the seashore.⁷² The disputed property was located in Cameron Parish along the shore of the Gulf of Mexico.⁷³ The plaintiff’s ancestor in

63. 153 So. 2d 503 (La. Ct. App. 2d Cir. 1963).

64. *Id.*

65. *Id.* at 504; TITLE, *supra* note 50, § 5:32, at 122–27 (Tracing back to the sovereign is one of the ways to prove ownership in just title over immovable property).

66. *Stamper*, 153 So. 2d at 504.

67. *Id.* at 508.

68. *Id.* at 509.

69. *Id.*

70. *Id.* at 507.

71. 869 So. 2d 894, 895 (La. Ct. App. 3d Cir. 2004).

72. *Riceland Petroleum*, 869 So. 2d at 896.

73. *Id.*

title bought the property from the State in 1883.⁷⁴ The litigation concerned a property line between contiguous parcels of land.⁷⁵ Similarly, the issue over the placement of property lines arose due to the same inaccurate surveys conducted in the *Stamper* case.⁷⁶ The plaintiff oil company filed suit for assertion of ownership, with the mineral rights of the property being the main interest.⁷⁷ The court stated the principle that “facts and circumstances may be examined, and if they affirmatively disclose an intention to limit the grant to [the initial survey], then these must be treated as definite boundaries.”⁷⁸ The court found no such facts or circumstances indicating that the State was the owner of the lands at the time of conveyance in 1883, and rendered a judgment in favor of the plaintiff oil company as owners.⁷⁹

These are just two of the more noteworthy cases that embody the dispute over ownership of coastal land. A number of district court cases have surfaced as well.⁸⁰ However, these cases do not illustrate the different interests that each party may have in these lands, nor what measures they have taken to assert ownership other than filing suit, and are therefore, an incomplete picture of the dual-claimed lands issue.

C. The Interests and Actions of Both Parties

Conflicting interests in dual-claimed lands causes both parties to compete for ownership in the absence of an agreement. Their actions create considerable downstream effects, afflicting other groups such as fishermen and mineral producers.⁸¹ Some of these effects include restricted public access to these areas, negative economic impacts to the State, and reduced revenue generating opportunities from natural resource production for both parties.⁸²

74. *Id.*; YIANNOPOULOS, *supra* note 6, § 11:10, at 3 (The term “ancestor in title” encompasses all previous owners of a parcel of real property).

75. *Riceland Petroleum*, 869 So. 2d at 896.

76. *Id.*

77. *Id.*

78. *Id.* at 898.

79. *Id.* at 903.

80. *See State v. Salt Domes P’ship*, No. 72682, 2016 WL 3197529 (La. Dist. Ct. Jan. 15, 2016); *see also Sid Mar's Rest. & Lounge, Inc. v. State*, No. 632032, 2013 WL 9932953 (La. Dist. Ct. Aug. 09, 2013).

81. Sneath, *supra* note 11.

82. LA. LEGIS. AUDITOR, *supra* note 5, at 11.

One example of the negative impacts is that dual-claimed lands are high-risk real estate for purchasers and investors.⁸³ It is difficult for private landowners to market property that is claimed by multiple owners.⁸⁴ As such, these properties exist in the shadow of litigation, making them risky investments for prospective purchasers who presumably wish to steer clear of title disputes.⁸⁵ At its peak, this issue could potentially have the effect of stifling the sale of these properties entirely if litigation becomes the norm for resolving dual-claimed land disputes, and few purchasers would have an incentive to buy.

Additionally, private landowners have become adamant about restricting recreational access to water bottoms in an effort to assert their claim to the natural resources underneath.⁸⁶ This has caused landowners to use boundary markers extensively in coastal areas in an effort to claim their land that has subsided into the Gulf of Mexico.⁸⁷ Some private landowners have even promulgated their own property maps by employing land surveyors to set favorable property lines as a way to maintain ownership. Given that the majority of land loss occurs on private lands, it is rational for riparian owners to seek options that secure their property and economic interests.⁸⁸

The dispute also causes fewer revenue generating opportunities for both the State and private landowners.⁸⁹ Oil exploration companies with the right to explore are aware of the dual-claimed lands controversy, but that does not hinder their attempts at obtaining natural resources to make money. Thus, these companies must pay both the private landowner and the State for the rights to explore for oil on dual-claimed water bottoms due to the title ambiguities previously described.⁹⁰ It is reasonably foreseeable that if one party, either the State or private landowner, received mineral revenues at the exclusion of the other, the mineral producer could face legal action from the excluded party who simultaneously claims that they granted the mineral producer that right to explore. These additional

83. *Id.*

84. *Id.* (While the State of Louisiana and riparian owners are the two main parties to these actions, oftentimes subsets of state government, like municipal governments, state agencies, and non-profit organizations, will also claim ownership of these properties via paid taxes. Multiple riparian owners have been known to feud over the same dual-claimed properties also.)

85. *Id.*

86. Sneath, *supra* note 11.

87. WILKINS ET AL., *supra* note 1, at 4.

88. *Id.*

89. LA. LEGIS. AUDITOR, *supra* note 5, at 11.

90. *Id.* at 12.

costs may impede oil exploration efforts.⁹¹ Furthermore, the State is currently required to confer with the private landowners on how to divide any royalty revenues from production on these dual-claimed water bottoms, thus complicating the disbursement of dividends.⁹² Given that each party is seeking to maximize their royalty profits during these meetings while simultaneously involved in ownership disputes, the current negotiation scheme is not ideal.

While the circumstances outlined above indicate some of the material complications involved in the controversy over coastal lands, the sentiments and interests underlying each party's position deserve equal attention for a clarification of what is at stake. The State and landowners both have equally strong interests in the mineral rights that accompany ownership of the land.⁹³ For the State, royalties from mineral leases on state-owned lands and water bottoms accounted for 6%–8% of the State's general fund, roughly \$176 million dollars, in 2017.⁹⁴ However, Louisiana's coast is 80% privately owned.⁹⁵ From a financial standpoint, coastal landowners maintain a considerable hold on Louisiana's natural resources and have the potential to flourish financially in the private market as a result.⁹⁶ Since ownership of land comes with the mineral rights therein, private owners are incentivized to fight more aggressively for the title to their eroding land in order to maintain ownership of these mineral rights.⁹⁷

There are several other notable interests outside of natural resources. For example, the Louisiana government, through many different state agencies, is constantly undergoing restoration and conservation projects in

91. *Id.*

92. *Id.*

93. See generally Seidemann, *supra* note 17.

94. EDWARD L. O'BRIEN, III, LA. DEP'T OF NAT. RES., LOUISIANA ENERGY FACTS ANNUAL 2017, at 44 (2017), http://www.dnr.louisiana.gov/assets/TAD/newsletters/energy_facts_annual/LEF_2017.pdf.pdf [<https://perma.cc/7NP5-ZPXX>].

95. Sara Sneath, *How Louisiana Protects and Restores a Privately Owned Coast*, NOLA.COM (Oct. 3, 2017, 5:00 PM), https://www.nola.com/news/environment/article_f5782233-62f0-59df-a9be-5ac89eb3787a.html [<https://perma.cc/3J9Y-K9E2>].

96. Flavelle, *supra* note 3 (“Louisiana’s reluctance to claim ownership of submerged land is that officials are loath to antagonize coastal landowners, many of which are the same oil and gas companies that are the core of the State’s economy ‘The landowners are so freaking powerful.’”).

97. *Id.*

order to combat Louisiana's rapidly eroding coast.⁹⁸ For this reason, the State has a significant interest in obtaining title to dual-claimed lands so that it may establish a right of access to these properties to assure that future projects will not be interrupted or disturbed by private activity.⁹⁹ There are many causes of coastal erosion, but anthropogenic factors, like oil and gas companies dredging thousands of miles of canals—in addition to levees, dams, and general use of surface land for mineral exploration—play a large role in worsening the problem.¹⁰⁰ If the State could exclude private parties from surfaces by acquiring clear title, efforts to combat the coastal erosion crisis might be more efficient.

Mineral rights are not the only compelling interest private owners have in coastal land. Some owners seek income by monetizing additional types of surface-based activity.¹⁰¹ Recognizing that mineral revenues are not the only way to maximize the economic value of their land, many landowners will charge for recreational use of their property.¹⁰² In the past, participating landowners have: collected payments in exchange for allowing the public temporary access for fishing tournaments, invested in fishermen supply stores on their land, rented out their docks, and charged for other general accesses consistent with the nature and use of their property.¹⁰³ Ecotourism—such as kayaking, fishing expeditions, and wetland tours—has increased over the last decade, and coastal landowners have expressed interest in taking advantage of the growing industry by opening their properties and charging for use.¹⁰⁴

98. Stephen R. Barnes et al., *Economic Evaluation of Coastal Land Loss in Louisiana*, 4 J. OCEAN & COASTAL ECON., June 2017, art. 3, at 1 (Louisiana has experienced a rapid loss of land due to coastal erosion, amounting to approximately 2,000 square miles over the last century. It is estimated that Louisiana will experience additional land loss of over 1,750 square miles over the next 50 years.).

99. Seidemann, *supra* note 17, at 141.

100. See Sneath, *supra* note 11. “Anthropogenic” means of, relating to, or resulting from the influence of human beings on nature. *Anthropogenic*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2020).

101. WILKINS ET AL., *supra* note 1, at 4.

102. *Id.*

103. *Id.* at 11.

104. TOURISM ECON., THE ECONOMIC IMPACT OF TOURISM IN LOUISIANA 16 (2016), <https://s3.amazonaws.com/tourism-economics/craft/Case-Studies-Docs/2016-Louisiana-Tourism-Economic-Impact-April-2017-without-visitation.pdf> [<https://perma.cc/D8LY-56UH>] (“Visitor spending in Louisiana has increased an average of 4.6% each year since 2011, supported by continued growth in visits from domestic tourists and visitors from abroad. Additionally, the tourism

II. COMPARING LOUISIANA AND COMMON LAW PROPERTY

A. Louisiana Property Law

Louisiana property law has some unique civilian features that place certain restrictions on an owner's right to *abusus*, or the right to dispose.¹⁰⁵ Louisiana Constitution article IX sections 3 and 4 prohibit *perpetual* alienations by the State of its water bottoms and mineral rights, meaning the total relinquishment or transfer of absolute ownership.¹⁰⁶ These constitutional provisions do not have the effect of limiting the use of mineral rights solely to the owner of the property. In fact, there are a number of devices that could be implemented to allow use or possession of mineral rights by another person separate from the use or possession of the surface. A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession.¹⁰⁷ The three types of mineral interests that a person can convey or receive are the mineral servitude, the mineral royalty, and the mineral lease.¹⁰⁸ Perhaps confusingly, Louisiana typically calls those who hold mineral servitudes, rights, or leases "owners," even though they do not truly own the minerals underneath a parcel of land.¹⁰⁹ This usage is meant to show that the right holder is the owner of a mineral interest itself, or is the owner of the right to explore.¹¹⁰ Regardless, it is a misnomer.

The mineral servitude is the first type of interest, and perhaps the most common.¹¹¹ Only a landowner with the right to explore for and produce minerals may create a mineral servitude by conveying his right to enjoy the land to another.¹¹² This conveyance, however, does not amount to the

economy supported over 185,000 jobs, and state and local tax revenues from visitor activity registered over 1.7 billion dollars in 2016.”).

105. *Queensborough Land Co. v. Cazeaux*, 67 So. 641, 645 (La. 1915) (“The right to alienate is but one of the constituent elements of the right to dispose . . . so may this right to alienate, a subdivision of the *abusus*, be, in turn, subdivided”).

106. YIANNPOULOS, *supra* note 6, § 9:28, at 1 (absolute ownership has three elements: *usus*, *fructus*, and *abusus*, which are, respectively, the right to use, the right to fruits of a thing, and the right to abuse, or alienate).

107. LA. REV. STAT. § 31:14 (2019).

108. *Id.* at § 31:15.

109. *See, e.g.*, LA. REV. STAT. § 31:22 (2019); *see also* LA. CODE CIV. PROC. art. 3669 (2019); *see generally* *Cox v. Sanders*, 421 So. 2d 869 (La. 1982).

110. *See, e.g.*, *Quality Envntl. Processes, Inc. v. IP Petroleum Co.*, 219 So. 3d 349, 374 (La. Ct. App. 1st Cir. 2017).

111. Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097 (1987).

112. LA. REV. STAT. §§ 31:21, 31:24 (2019).

creation of a separate mineral estate.¹¹³ What mineral servitudes illustrate is the principle that owners may dismember or divide their ownership rights by conveying their right to use and enjoyment.¹¹⁴ When this is done, ownership is burdened by the imposing servitude as a charge upon the land, the effect of which limits a landowner's full capacity to exercise his rights.¹¹⁵ However, these types of conveyances are not perpetual alienations since mineral servitudes can be extinguished by prescription resulting from non-use for ten years or by agreement of the parties.¹¹⁶ This doctrine makes Louisiana unique among other mineral producing states and distinguishes Louisiana from common law jurisdictions that treat this type of conveyance as the creation of a separate mineral estate in land subject to different ownership.¹¹⁷

One who holds a mineral royalty has "the right to participate in production of minerals on land owned by another, or land subject to a mineral servitude."¹¹⁸ A mineral royalty may be created by either a landowner with mineral rights to the property, or by the owner of a servitude.¹¹⁹ Mineral leases are contracts by which the lessee is granted the right to explore for and produce minerals. This type of contract requires a term and may be created by *anyone* with an executive right.¹²⁰ Thus, it is permissible under Louisiana law that a mineral holder, a royalty holder, or even another mineral lessee may grant a lease—the last conveyance constituting a mineral sublease.¹²¹

These modes of conveyance are some of the frequently granted mineral interests in Louisiana, although the list is not exhaustive.¹²² They

113. Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 804 (1992).

114. This constitutes a conveyance of the right to *abusus*.

115. Martin & Yeates, *supra* note 113, at 786.

116. LA. REV. STAT. § 31:27 (2019).

117. David L. Pratt II, *Severance vs. Servitude: Understanding the Differences Between Texas and Louisiana Law Regarding Mineral Rights*, 16 TEX. WESLEYAN L. REV. 71, 72 (2009).

118. LA. REV. STAT. § 31:80.

119. KATHY D. UNDERWOOD, *LOUISIANA NOTARY HANDBOOK* § 19:7, Westlaw (2019–2020 ed.).

120. LA. REV. STAT. ANN. § 31:105 cmt. b (2019); *Wall v. Leger*, 402 So. 2d 704, 710 (La. Ct. App. 1st Cir. 1981) ("A mineral lease may be granted by the landowner who owns the mineral rights, the mineral servitude owner, and the holder of executive rights over the mineral rights which he does not own; in other words, any person having an 'executive interest' in the mineral rights on the particular property may grant a mineral lease.").

121. *Wall*, 402 So. 2d at 710.

122. *Gueno v. Medlenka*, 117 So. 2d 817, 822 (La. 1960).

are noteworthy because they illustrate the principle that real property owners have rights that are fluid or separable. The “bundle of rights” that compose ownership are not totally insusceptible of division.¹²³

In addition, just as the State is prohibited from perpetually alienating its mineral rights in land, a similar prohibition is imposed on private landowners.¹²⁴ This area of substantive law refers to “solid minerals” as opposed to the rights in them.¹²⁵ Under Louisiana law, there is a statutory prohibition against landowners severing their mineral rights and surface rights.¹²⁶ It states, “ownership of land includes all minerals occurring naturally in a solid state. Solid minerals are insusceptible of ownership apart from the land until reduced to possession.”¹²⁷ Louisiana Mineral Code article 5 acknowledges a landowner’s ownership interest in solid minerals but imposes limitations on their right to alienate that interest.¹²⁸

This rule was first considered, and is still supported, by a string of early cases dating back to the early 1900’s.¹²⁹ In *Frost-Johnson Lumber Co. v. Salling’s Heirs*, the court stated that, “it is the very essence of the right of ownership that it cannot exist in two persons for the whole of the same thing; but they may be the owners of the same thing in common, and each for the part which he may have therein.”¹³⁰ The Louisiana Supreme Court relied on policy reasons that prohibit alienation apart from title of the surface, noting that it would be against public policy to allow the formation of separate estates for surface rights and mineral rights in the same parcel of land via alienation.¹³¹ Instead, the idea is that any conveyance purporting to sell minerals as they naturally lie underneath the surface, or “in place,” is not invalid but merely creates a right in the nature of a servitude.¹³²

123. LA. CIV. CODE art. 477 (2019).

124. See LA. REV. STAT. § 31:6 (2019).

125. *Id.* (Louisiana law does not recognize landowner right to ownership of solid minerals lying underneath the land, but rather only the right to explore and produce underlying minerals); see generally *Frost-Johnson Lumber Co. v. Salling’s Heirs*, 91 So. 207 (La. 1920).

126. LA. REV. STAT. § 31:5.

127. *Id.*

128. *Id.*

129. *Frost-Johnson Lumber*, 91 So. 207; *Wemple v. Nabors Oil & Gas Co.*, 97 So. 666 (La. 1923); *Iberville Land Co. v. Texas Co.*, 128 So. 304 (La. Ct. App. 1st Cir. 1930).

130. *Frost-Johnson Lumber*, 91 So. at 211.

131. *Id.* at 243.

132. *Id.* at 215.

In *Wemple v. Nabors Oil & Gas Co.*, the Louisiana Supreme Court examined the question presented in *Frost-Johnson* regarding whether separate estates are legally possible in Louisiana.¹³³ The court affirmed the *Frost-Johnson* ruling that permanent severance of oil and gas, or solid minerals, is not permitted.¹³⁴ Furthermore, the court declared that the entire concept of separate mineral estates is completely foreign to the fundamental principles of our civilian property system.¹³⁵ According to the court, there is no basis in statutory law or jurisprudence that allows for mineral estates distinct from and independent of the surface estate.¹³⁶ Accordingly, these mineral rights acquired or severed are mere servitudes upon land granting only the right to extract such minerals. The court concluded that under Louisiana's property regime, a land's surface and minerals underneath can never be considered "independent planes" capable of independent ownership.¹³⁷

B. Common Law Property

While Louisiana does not permit the creation of separate estates in land, common law states have a different property regime.¹³⁸ For most other oil and gas producing states, permanent severance of mineral rights from surface rights is not prohibited. This is because in common law jurisdictions, the concept of separate estates is fundamental.¹³⁹ For example, in Texas, the surface and mineral interests in land are not considered accessories to ownership of the land, but are in fact ownership interests themselves.¹⁴⁰ Thus, the mineral estate may be severed from the surface estate by a grant of the minerals to another person via deed or lease, or by reserving them in a conveyance.¹⁴¹ Each estate can be held by a

133. *Wemple*, 97 So. at 667.

134. *Id.* at 668–69.

135. *Id.* at 667.

136. *Id.*

137. LA. REV. STAT. ANN. § 31:5 cmt. b (2019); *see also* *Iberville Land Co. v. Tex. Co.*, 128 So. 304 (La. Ct. App. 1st Cir. 1930) (an agreement purporting to create two different land estates on the same property was considered to be a "legal impossibility").

138. Pratt, *supra* note 117, at 74.

139. Martin & Yeates, *supra* note 113, at 775.

140. *Aery v. Hoskins, Inc.*, 493 S.W.3d 684, 699 (Tex. App. 2016).

141. *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 101 (Tex. 1984); *see also* *Harris v. Currie*, 176 S.W.2d 302, 304 (1943) ("The owner of the entire estate in land may convey the minerals therein separately from the surface. Conversely he may convey the surface separately from the minerals. Stated in another way: The owner has the right to sever his land into two estates, and he may dispose of the

different owner. As that may be, the mineral estate is part of the respective land where it exists.¹⁴² It cannot be physically separated from the land which it originates and derives its source from.¹⁴³ The traditional classification places upon these two estates, “mineral” and “surface,” a status of dominant and servient respectively.¹⁴⁴ It makes sense that the surface estate is servient and the mineral estate is dominant because a landowner who wishes to exercise his right to mine or drill for minerals would need to have some sort of surface access—be that the surface owner directly above, or a neighboring owner’s land.

Similarly, North Dakota’s property system resembles Texas involving separate estates in land. A mineral estate may be separated from the surface estate, and ownership of the mineral estate may exist separately and distinctly from the surface estate.¹⁴⁵ Severance occurs by a conveyance, reservation, or exception of the mines and minerals.¹⁴⁶ When a mineral estate is severed from the surface estate, the former is dominant and the latter is servient in that the law implies a mineral estate’s inherent right to access the surface in order to find and develop minerals.¹⁴⁷ Thus, the surface estate is servient in the sense that it is charged with an easement for the mineral estate’s exercise of its rights.¹⁴⁸ These same concepts are fundamental in the property law of Alaska, Utah, and Oklahoma.¹⁴⁹

C. Similarities and Differences Between Civil and Common Law

The civil and common law have some similar terminology in the context of servitudes and easements—namely, the use of the terms servient

mineral estate and retain the surface, or he may dispose of the surface estate and retain the minerals.”).

142. *Harris*, 176 S.W.2d at 304; *see also Aery*, 493 S.W.3d at 699.

143. *Harris*, 176 S.W.2d at 304; *see also Aery*, 493 S.W.3d at 699.

144. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 62 (Tex. 2016) (quoting *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 817 (Tex. 1972)) (“This court has led the way in working out accommodations which preserve unto the severed mineral owner a dominant easement for the production of his minerals while at the same time preserving a viable servient estate.”) (emphasis added).

145. *Burlington N., Inc. v. Hall*, 322 N.W.2d 233, 240 (N.D. 1982).

146. *Id.*

147. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979).

148. *Id.*

149. *See Norken Corp. v. McGahan*, 823 P.2d 622, 628 (Alaska 1991); *see also Kanawha & Hocking Coal & Coke Co. v. Carbon Cty.*, 535 P.2d 1139, 1140 (Utah 1975); *see generally Turley v. Flag-Redfern Oil Co.*, 782 P.2d 130 (Okla. 1989).

and dominant estates.¹⁵⁰ However, a major difference between the common law mineral estate and the civil law mineral servitude has to do with the landowner's rights to the minerals themselves. For example, under Texas law, the minerals in place under the land are part of the land itself.¹⁵¹ They are subject to ownership in the same manner as the land.¹⁵² This is known as a *corporeal right*.¹⁵³ Thus, when mineral rights are severed or alienated, the mineral estate is an estate in the land itself.¹⁵⁴ In Louisiana, landowners are not vested with ownership rights to the minerals themselves, but rather ownership of the right to explore and produce.¹⁵⁵ This is an *incorporeal right*.¹⁵⁶ Thus, any conveyance of mineral rights creates a mineral servitude consisting of the right to explore, and fugacious minerals—such as natural gas or oil—are only technically severed when reduced to possession.¹⁵⁷ Solid minerals like coal and copper are also unsusceptible of ownership apart from the land until reduced to possession.¹⁵⁸

The most significant legal consequence of a mineral servitude classification is that, unlike a mineral estate, which can be created in perpetuity with no obligation on the owner to use his rights, a servitude is subject to prescription for non-use of ten years.¹⁵⁹ The rationale behind prescriptive periods is to encourage landowners to use and maintain their land.¹⁶⁰ Common law jurisdictions reject this rationale and therefore do not have a rule of prescription for non-use because severing mineral rights from surface rights creates independent rights for different persons in the land estate itself. With the exception of adverse possession, ownership, as an abstract concept governing a person's "bundle of rights," is unsusceptible of prescription.¹⁶¹ The civil law embodies classical Roman property concepts of absolute dominion over land, while common law

150. See LA. CIV. CODE art. 646 (2019).

151. Martin & Yeates, *supra* note 113, at 802.

152. *Id.*

153. *Id.* (corporeal rights are real rights in tangible property).

154. *Id.*

155. LA. REV. STAT. § 31:6 (2019).

156. Martin & Yeates, *supra* note 113, at 802 (incorporeal rights are personal rights in a thing that has no body, but are comprehended by understanding); LA. CIV. CODE art 461 (2019); see LA. CIV. CODE art. 470.

157. LA. REV. STAT. § 31:6 (possession here means establishing some type of physical control or dominion over the fugacious mineral); see also LA. REV. STAT. § 31:7.

158. LA. REV. STAT. § 31:5.

159. McDougal, *supra* note 111, at 1099.

160. Pratt, *supra* note 117, at 74.

161. Martin & Yeates, *supra* note 113, at 804.

invokes more fragmented notions of property.¹⁶² These concepts and notions are rooted in historical public policies—some of which are still solid foundations for the legal rules in place today, while others might be outdated.¹⁶³

III. PUBLIC POLICY—LOUISIANA’S SUPPORT FOR ITS CIVILIAN PROPERTY SYSTEM

Adherence to a civil property system is not the sole justification for preventing the severance of mineral rights from surface rights. As previously described, there are historical justifications also.¹⁶⁴ A number of other policy rationales suggest that the prohibition is more extensive. For example, as it concerns the State as a party, the constitutional restrictions on the State’s ability to sever the mineral rights in its property are rooted in abstract notions concerned with protecting the public interest.¹⁶⁵ The idea is that by requiring the State to reserve all mineral rights and preventing immediate transfer of title to water bottoms or other state lands, valuable state assets can be reserved for future generations and used for current citizens of our state.¹⁶⁶ This concept refers to the Public Trust Doctrine.¹⁶⁷ Courts have also noted that it prevents the elite few with inside knowledge or control over the market from wasting these assets and profiting from the lost opportunity of people to benefit from natural resource revenue.¹⁶⁸

162. *Id.* at 783.

163. *Id.*

164. *Id.*

165. *American Lung Ass’n of La., Inc. v. State Mineral Bd.*, 507 So. 2d 184, 188 (La. 1987).

166. *Id.*

167. *Wilkins & Wascom*, *supra* note 5, at 862 (quoting COASTAL STATES ORG., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 3–4 (1990)) (“The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The Public Trust Doctrine is applicable whenever navigable waters or the lands beneath are altered, developed, conveyed, or otherwise managed or preserved. . . . It also sets limitations on the States, the public, and private owners, as well as establishing duties and responsibilities of the States when managing these public trust assets. The Public Trust Doctrine has been recognized and affirmed by the United States Supreme Court, the lower federal courts and State courts from the beginning days of this country to the present.”).

168. *American Lung Ass’n*, 507 So. 2d at 190.

Indeed, the State brings in a great deal of money from mineral leases and royalties each year.¹⁶⁹ Those funds can go towards public institutions like roads and schools.¹⁷⁰ If most or all of Louisiana's rights to the natural resources in public lands were permanently sold, Louisianans would likely lose out on funds that could potentially be used for the improvement of public institutions and services. However, this policy rationale is questionable in light of constitutional provisions concerning the government's duties in regulating the use of our natural resources.

The State is required to be a prudent administrator of public resources and land held in public trust so as to be "consistent with the health, safety, and welfare of the people."¹⁷¹ To say the State would frivolously sell away a majority of its natural resource rights in public land would be to overlook the State's ability to make affluent decisions with its resources—decisions that could improve the overall welfare of Louisiana. Furthermore, the State has a duty to put the public's interests first and support the protection and conservation of natural resources under the Louisiana Constitution.¹⁷²

From a purely economic standpoint, the State will likely always have an incentive to maintain ownership of public lands and the rights therein for purposes of generating revenue. Although, as a practical matter, there are few safeguards preventing the State from exhausting mineral interests in favor of short-term gains.¹⁷³ However, economic data suggests that

169. For example, during the fiscal year of 2012, mineral lease revenue generated over 646 million dollars for Louisiana. LA. LEGIS. AUDITOR, MINERAL LEASE ROYALTY RATES 1 (2013), [https://www.la.gov/PublicReports.nsf/DB918AD8E33411F286257B490074B82A/\\$FILE/00031C97.pdf](https://www.la.gov/PublicReports.nsf/DB918AD8E33411F286257B490074B82A/$FILE/00031C97.pdf) [<https://perma.cc/JKK5-PHXS>].

170. *Louisiana State Budget and Finances*, BALLOTPEDIA, https://ballotpedia.org/Louisiana_state_budget_and_finances (last visited Sept. 12, 2020) [<https://perma.cc/SG26-SQD3>].

171. LA. CONST. art. IX § 1 (The article fully states: "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.").

172. LA. REV. STAT. § 42:1101(B) (2019) (This statute is a general declaration of government duty laid out in the Code of Governmental Ethics, as mandated by Louisiana Constitution article X section 21); *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1157 (La. 1984); LA. REV. STAT. § 30:546 (The Natural Resources and Energy Act of 1973 is a good example of the State legislature fulfilling its duty in compliance with Louisiana Constitution article IX section 1).

173. T. Michael French, *Develop a Meaningful National Energy Policy*, ST. OF LA. DEP'T OF NAT. RESOURCES (Jan. 13, 1995),

while State mineral producers might bear costs for resource and environmental temperance in the short-term, the benefits of natural resource production accumulate by conservative use over time.¹⁷⁴ Among these benefits are consistent market participation and stability.¹⁷⁵ Perhaps market stability is attributable, in part, to the prohibition against alienation that almost forces Louisiana to have supply. Either way, the economic data shows that Louisiana's best investment (which should influence decision-making) still rests in favor of longevity in the sale and use of its natural resources, regardless of whether the prohibition on alienation is in effect or not.¹⁷⁶ Louisiana has a legitimate interest in handling its resources conservatively given that mineral revenues spur the State's economy as one of the largest natural resource providers in the United States.¹⁷⁷

As it pertains to both private and public landowners, another policy reason supported by scholars and practitioners is that it is wise to keep control of all interests and rights in land as closely in the hands of the surface owner as possible.¹⁷⁸ Having separate mineral estates can lead to very complex chains of title in one piece of land; some of which are destined to have defects.¹⁷⁹ Less confusion and greater clarity as to who has rights to what and where (in the same piece of land no less) would likely prevent excessive litigation. The absence of separate estates in land further supports simplicity in our property system in that there are not multiple owners for different pieces of property, each having the power to assert any rights of action connected to ownership.¹⁸⁰ One can imagine the

<http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=194>
[<https://perma.cc/U466-4DHC>].

174. Mei-Jane Teng et al., ENVIRONMENTAL COMMITMENT AND ECONOMIC PERFORMANCE—SHORT-TERM PAIN FOR LONG-TERM GAIN 25 (2014), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/eet.1634>
[<https://perma.cc/X2TQ-C66Q>].

175. *Id.*

176. *Id.*

177. *Louisiana – State Energy Profile Analysis*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/analysis.php?sid=LA> (last updated Mar. 19, 2020)
[<https://perma.cc/5CL9-NZUS>].

178. George W. Hardy III, *Public Policy and Terminability of Mineral Rights in Louisiana*, 26 LA. L. REV. 731 (1966).

179. Patrick J. Rohan, *Title Insurance, Deeds, Binders, Brokers and Beyond*, N.Y. ST. B.J. 49, 57 (2000).

180. Martin & Yeates, *supra* note 113, at 783. (“In Louisiana, with its simpler allodial land holding system, the introduction of law that imported the antiquated feudal doctrine of tenures was unacceptable. In the early 1800's real property under Louisiana law could be contrasted for its simplicity, unity, precision and

legal complexity of partitioning a parcel of land that has multiple co-owners, or owners in indivision, for the surface and subsurface.¹⁸¹ This is a legitimate public interest for clear title assessment purposes. It is difficult to say that a title system free of complexities should be foregone in favor of expanding ownership rights.¹⁸²

This policy rationale makes a great deal of sense. Perhaps it is the case that separate estates would overly complicate the title process and hinder the efficiency of mineral production with lawsuits. Simplicity, in this respect, might be viewed as a stand-apart value of the civilian system that makes it arguably more efficient than common law systems.¹⁸³ Just because Louisiana's substantive law is the minority view in the United States is not necessarily a reason to conform to the legal theories or practices of the rest of the country. Given the general difficulty in determining valid title in Louisiana already, a little unity for ownership rights certainly would not hurt.

It is also argued that preventing the perpetual alienation of mineral rights is conducive to overall mineral transactions and development.¹⁸⁴ Purportedly, limiting the capacity to alienate encourages mineral development by forcing those who have mineral servitudes or leases to either use them or lose them.¹⁸⁵ However, this is an inadequate basis for objection. For one, other oil producing states who permit perpetual alienation have surpassed Louisiana in production without having to impose the prospect of losing the right to produce minerals by prescription of 10 years for non-use.¹⁸⁶ Natural resources are currently the second largest commodity in the world, behind data.¹⁸⁷ The "use it, or lose it"

clearness with the intricacy, complexity, uncertainty and indistinctness of the law of real property prevailing in common law America of the same period.")

181. LA. CIV. CODE art. 797 (2019).

182. Hardy, *supra* note 178, at 744 (it is thought that this reasoning was the main factor for the court's holding in *Frost-Johnson*).

183. Martin & Yeates, *supra* note 113, at 783.

184. Hardy, *supra* note 178, at 741.

185. *Id.* at 742. Recall that mineral servitudes, royalties, and leases are subject to a 10-year prescriptive period for non-use.

186. *U.S. States – Rankings: Crude Oil Production, June 2020*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/#/series/46> [<https://perma.cc/SE47-BRMA>] (last visited Oct. 7, 2020).

187. Chuck Kowalski, *What Are the Most Actively Traded Commodities?* THE BALANCE, <https://www.thebalance.com/the-most-actively-traded-commodities-809314> [<https://perma.cc/92FM-H5WH>] (last updated Sept. 11, 2020); *see also* *The World's Most Valuable Resource is No Longer Oil, But Data*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the->

rationale behind the 10-year prescription for non-use is unnecessary for commodities such as oil or natural gas that have such secure international and domestic markets.¹⁸⁸ The competitive nature of the oil and gas industry clearly indicates that non-use should not be a concern, and further, is not a valid argument for preventing the perpetual alienation of mineral rights or adopting a separate estates approach. Opponents of the civilian system suggest that “it is the presence of mineral resources, rather than a mineral property system limiting the right of alienation, that is the strongest factor in securing development.”¹⁸⁹

Overall, the civilian approach does have some favorable policy reasons underlying its property law. However, there are holes in the reasoning of many arguments supporting the current standards that regulate real estate and resources in Louisiana. The weaker policy arguments surmount the stronger, and it would be advantageous if the laws in place were based on more sound principles that reflect the interests and practices of the mineral market that they govern.

IV. LEGAL SOLUTIONS

A. The Need to Negotiate

As stated, Louisiana does not allow landowners to sever minerals rights from the surface rights in land. This is blackletter law.¹⁹⁰ But blackletter law in this instance overlooks the policy question of whether Louisiana *should* allow severance. Coastal landowners are quickly losing land, while simultaneously caught up in ownership disputes over property they purchased in good faith.¹⁹¹ Excluding private landowner concerns in order to appeal to blackletter law would be an unjust resolution. As it concerns erosion as a cause, one cannot expect coastal landowners to simply sit back and watch their land wash away. Nor should they be

worlds-most-valuable-resource-is-no-longer-oil-but-data [https://perma.cc/U9KC-LH24].

188. INT’L MONETARY FUND, FISCAL TRANSPARENCY INITIATIVE: INTEGRATION OF NATURAL RESOURCE MANAGEMENT ISSUES 13 (Jan. 2019), <https://www.imf.org/~media/Files/Publications/PP/2019/pp122818fiscal-transparency-initiative-integration-of-natural-resource-management-issues.ashx> [https://perma.cc/W8QL-8A9M] (The graph on page 13 of the report provides the average international resource revenues for 2016, as well as price indices).

189. Hardy, *supra* note 178, at 742–43.

190. LA. REV. STAT. § 31:5 (2019).

191. LA. LEGIS. AUDITOR, *supra* note 5, at 10; *see also* Barnes et al., *supra* note 98, at 1.

expected to not argue for holding the State accountable for its careless conveyances, which, as it may be recalled, is what initially started the conflict.¹⁹² Coastal landowners are already at odds with the State in seeking to protect their ownership rights in these dual-claimed lands.¹⁹³ Thus, as subsidence increases, so too will the conflict between the State and coastal landowners.

On the other hand, it may be that appealing to blackletter law and merely acknowledging its carelessness in past conveyances, without recompense, ultimately advances larger objectives for Louisiana—like further economic opportunities from a greater supply of property and resources—that are more important than the concerns of coastal owners. After all, it seems that the State only stands to benefit from this issue in that it is obtaining new found mineral rights in land-turned-water-bottom, free of cost via natural processes like erosion.¹⁹⁴ Indeed, the State could potentially drag out discussions and wait for private lands to be so far removed from the coast that the property indisputably becomes owned by the State through operation of law.¹⁹⁵ However, this is not a reasonable nor responsible plan of action.

Louisiana law declares that the right of ownership is absolute.¹⁹⁶ However, ownership can be misused in certain circumstances.¹⁹⁷ For instance, Louisiana Civil Code article 667 illustrates the principle that an owner is not allowed to assert his rights to the extent that they infringe upon the rights of another.¹⁹⁸ This is largely a question of degree.¹⁹⁹ While

192. See WILKINS ET AL., *supra* note 1, at 3.

193. Flavelle, *supra* note 3.

194. LA. CIV. CODE art 450 (2019).

195. This concern assumes that it likely becomes more difficult for coastal landowners to assert ownership over land the further they subside into the Gulf. Naturally, claims to ownership over submerged land that is 100 feet out from the coastline would be impractical.

196. LA. CIV. CODE ANN. art. 477 (2019); *see also id.*, cmt. b.

197. PREDIAL SERVITUDES § 3:28, *in* 4 LOUISIANA CIVIL LAW TREATISE (4th ed. 2019).

198. LA. CIV. CODE ANN. art. 667 (1996) (The first sentence of the article states, “Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.”).

199. A. N. YIANNPOULOS, PREDIAL SERVITUDES § 3:28, *in* 4 LOUISIANA CIVIL LAW TREATISE at 1 (4th ed. 2013) (“Whether acts, constructions, or activities constitute an abuse of the right of ownership sufficient to justify injunctive relief is ‘not to be decided by the application of any broad or inflexible rule, but by a careful weighing of all the circumstances attending them by diagnosing them.’”).

the State's failure to take preventative measures in restoring or combating coastal erosion may not constitute any particular *action* under article 667 that abuses its ownership rights in subsided lands or water bottoms, *inaction* in this respect may be legally actionable.

In *Wilson v. City of Baton Rouge*, plaintiff landowners sued the local government for failing to take steps to alleviate erosion of a drainage canal that abutted their property, causing the plaintiffs to lose acreage.²⁰⁰ Plaintiffs set forth claims for both negligence and strict liability under Louisiana Civil Code article 667.²⁰¹ The trial court granted relief to the plaintiffs on the basis that the State was liable for its failure to act, but the First Circuit Court of Appeal reversed the district court's ruling on grounds of prescription.²⁰² While the First Circuit Court of Appeal reversed on the prescription issue, the plaintiff's underlying argument was not overturned.²⁰³ Based on the reasoning of the trial court's decision in *Wilson*, it is possible for inaction in combating erosion to be a sufficient basis for State liability in damage to private property. It may be a stretch to equate liability in this sense to an "abuse of ownership rights," but *Wilson* serves as a good example of the State's duty to combat erosion and the consequences of it failing to perform that duty.²⁰⁴ Thus, the State may not be able to sit by and allow private land and its mineral rights to subside into State ownership by way of natural forces.

Second, this controversy is hindering resource production and commerce.²⁰⁵ Dual ownership means dual royalty payments, which lessens the incentive for producers to sign mineral leases.²⁰⁶ Generally speaking, easily operated resource production is good for commerce. Ownership disputes complicate this process. Both the State and coastal landowners have an interest in resolving the conflict in a manner that is beneficial for both parties so as to avoid further strife over these lands and water bottoms, or else both stand to lose out on large streams of revenue for the private market and Louisiana's state funds. As erosion worsens, the implications of letting the dispute go on unresolved create very real and

200. *Wilson v. City of Baton Rouge*, 683 So. 2d 382, 383 (La. Ct. App. 1st Cir. 1996).

201. *Id.*

202. *Id.* at 386.

203. *Id.*

204. *See* LA. CONST. art. IX § 1 (For the proposition that the State has a duty to combat coastal erosion evidenced by the language "shall be protected, conserved, and replenished.") (emphasis added).

205. LA. LEGIS. AUDITOR, *supra* note 5, at 11.

206. *Id.* at 12.

practical problems.²⁰⁷ Overall, both the State and coastal landowners need to be willing to meet in the middle. Given the already depleting lands of the coastal environment, as well as the potential for significant monetary losses and litigation, strong incentives exist for both parties to find common ground. As such, it is likely that future discussions and negotiations would benefit from the alternatives that common law rules on separate estates have to offer.

B. Adopting the Common Law Approach

Accepting the common law rules permitting landowners to sever their mineral rights from surface rights would likely help compromises for dual-claimed lands in Louisiana. Providing a legal mechanism that allows for separate perpetual rights in both the surface and minerals would be a strong incentive for both parties to reach an agreement. Both parties could receive total control over the portion of land that best suits their interests. In some cases, both the State and coastal landowners may have the same interest, likely in mineral rights, and would not be served well by settling for surface rights. This is a reasonable consideration. However, the purpose of this Section of the Comment is not to provide universal solutions for every competing interest, but rather *options* for settlement negotiations. In adopting the law of separate estates, the concept of ownership rights in land can expand, and hopefully avoid the “all or nothing” approach to ownership under Louisiana law that aggravates these property disputes. To allow the current modes of conveyance to exist exclusively—namely, the mineral servitude, royalty, and lease—would be to permit the continual characterization of our property system by a basic group of terminable interests in minerals.²⁰⁸

For certain purposes, the current modes of conveyance are sufficient if an owner has the desire to keep close control over his ownership rights by limiting their uses to other people with a term or default scenario or reversion.²⁰⁹ However, the classification of all mineral interests as terminable limits those owners who wish to engage in mineral transactions that convey perpetual rights. A landowner may wish to undergo this kind of conveyance in order to limit tax liability, or perhaps in certain circumstances, a perpetual transfer of mineral rights may be more valuable

207. See Sneath, *supra* note 11.

208. Hardy, *supra* note 178, at 733. Many people would not like settling for a couple squares of a Hershey’s bar, but give them half, and the conversation suddenly goes smoother.

209. *Id.*

than the granting of a lease or servitude.²¹⁰ It may be the case that there are not many landowners, or the State for that matter, who wish to convey absolute ownership—in other words, that the need simply is not enough to warrant a change in the law. Nevertheless, it is desirable to consider the benefits that come with adopting less restrictive common law methods.²¹¹

It is arguable that terminable interests are precisely what Louisiana's civilian system contemplates for purposes of promoting the timely and careful use of natural resources. However, as previously argued, production and use concerns are less important in the natural resource industry, which is notoriously competitive.²¹² Undoubtedly, minerals will be sought after and produced in Louisiana for the foreseeable future as demand for these products continues. This policy rationale for regulating natural resource use does not fare well when compared against the benefits of giving landowners more power over alienation of their own rights. The rationale fares even worse in the context of dual-claimed lands where granting owners more power over their right to alienate would be beneficial to appeasing the conflict. The idea is that by permitting severance of mineral rights from surface rights, the parties will have more personalized options, and solutions could be made that are tailored to the parties' specific interests.

Encouraging negotiation by expanding the right to alienate would require amending the Louisiana Constitution in order for the State to be able to bargain with private landowners. One suggestion is an amendment repealing article IX section 4, which would require a joint resolution proposing the amendment, placement of the amendment on a statewide ballot, an approval via simple majority by both houses of the Louisiana State Legislature, and a majority of voters in the statewide ballot.²¹³ The amendment would have the effect of removing article IX section 4 entirely. If amended as such, the State would not be required to reserve

210. LA. CONST. art. VI § 26 (The rate of taxes for real property is a product of assessed value multiplied by the millage rate (15%) set by the parish or municipality, or both, depending on where the property is located. If a landowner was to separate his land into estates with another owner, the other would be entitled to pay his portion of the millage rate and the original landowner could essentially decrease his property tax payments by one-half, or more if there are multiple owners of the mineral estate).

211. Hardy, *supra* note 178, at 733.

212. INT'L MONETARY FUND, *supra* note 188, at 13 (The graph on page 13 of the report provides the average international resource revenues for 2016, as well as price indices.).

213. LA. CONST. art XIII § 1(A)(1) (The article provides an in-depth discussion of the constitutional amendment procedure.).

any mineral rights for sales of State-owned property to private landowners. The goal of this amendment would be to do away with the State's restriction on alienating mineral rights so that the State could actually execute sales or exchanges of mineral rights if it wanted, and in the context of dual-claimed lands, with an eye toward the creation of separate estates.

Perhaps getting rid of an entire constitutional provision would be an overly burdensome, or even extreme, alteration to the Louisiana Constitution in light of the implications it would have on property law.²¹⁴ Alternatively, Louisiana Constitution article IX section 4(C) lists an exception to the reservation requirement in paragraph (A).²¹⁵ It states:

The legislature by act may direct the appropriate parish authority in Terrebonne Parish to transfer title and ownership as to certain lands . . . which due to an error in the original government survey completed around 1838 . . . to those persons who have possessed the property under good faith and just title for a minimum of ten years or to those who have acquired from them, reserving the mineral rights as just and sole compensation for the transfer.²¹⁶

These transfers in paragraph (C) conveyed title and ownership of the mineral rights separate from the land, which was susceptible of further conveyance.²¹⁷ Under the circumstances defined in paragraph (C), transferring mineral rights in sold land was intended to resolve ancient survey errors by the State.²¹⁸ Interestingly, this exception to the rule in paragraph (A)—requiring the reservation of mineral rights—addresses the exact same title issue causing disputes between the State and coastal landowners. However, this exception is limited only to certain persons within Terrebonne Parish who satisfy the requirements of paragraph (C),

214. For example, allowing the State to sever its mineral rights and create separate estates would cause property confusion in that some lands would have multiple estates (and likely multiple owners for the estates) while some lands would continue to have one owner and mineral interest holder. In the context of boundary disputes, for example, the clash of owners asserting old law versus new law could be very problematic for the courts.

215. LA. CONST. ANN. art. IX § 4(C).

216. *Id.*

217. *See id.*, editor's and revisor's notes.

218. *See id.*

and not the rest of the State.²¹⁹ This is likely due to the fact that a majority of dual-claimed lands are in Terrebonne Parish.²²⁰

Hence, it appears that the Louisiana Constitution already contains an exception to article IX section 4 that addresses dual-claimed lands.²²¹ The existence of this exception suggests that it would be a reasonable solution to amend the Louisiana Constitution with another exception that permits the State to perpetually transfer mineral rights, thereby severing mineral rights from surface rights, for purposes of resolving dual-claimed land disputes. This new exception might avoid some of the concerns over repealing article IX section 4 by limiting the scope of the amendment's application. Thus, the common law rule of separate estates can be put to good use for dual-claimed lands without becoming a fundamental characteristic of our property system. However, dual-claimed land disputes are not limited to Terrebonne Parish; they are increasingly prevalent throughout coastal Louisiana.²²² The new amendment should be fashioned so as to expand the exception in paragraph (C) for severance of mineral rights in state lands to include all parishes.

The amendment would simply delete the Terrebonne Parish reference and all adjoining references to specific plots of land.²²³ The new

219. Paragraph (C) states:

The legislature by act may direct the appropriate parish authority in Terrebonne Parish to transfer title and ownership as to certain lands near Bayou Dularge in Section 16 of Township 20 South, Range 16 East, which due to an error in the original governmental survey completed around 1838 until recently were thought to be within Section 9, to those persons who have possessed the property under good faith and just title for a minimum of ten years or to those who have acquired from them, reserving the mineral rights as just and sole compensation for the transfer. Consistent with the provisions of Article XIII, Section 3, the notice requirements of Article III, Section 13 are satisfied for an act passed as a companion to the act setting forth this Paragraph.

LA. CONST. ANN. art. IX § 4(C).

220. LA. LEGIS. AUDITOR, *supra* note 5, at 10 (see map of Southern Louisiana highlighting the geography of the dual-claimed lands).

221. LA. CONST. ANN. art. IX § 4(C).

222. *See generally* LA. LEGIS. AUDITOR, *supra* note 5, at 10 (provides a map of southern Louisiana highlighting the extent of dual-claimed lands).

223. Paragraph (C) states:

The legislature by act may direct the appropriate parish authority in Terrebonne Parish to transfer title and ownership as to certain lands **near Bayou Dularge in Section 16 of Township 20 South, Range 16 East**, which due to an error in the original governmental survey completed around 1838 until recently were **thought to be within Section 9**, to those

amendment would read “may direct the appropriate parish authority to transfer title and ownership,” allowing for all parishes to fall under the exception. A broadened approach to the existing exception would give every parish with conflicts over dual-claimed lands—including non-coastal parishes—a means for resolution, or at the very least, guidance for negotiation.

For coastal landowners, there would also need to be a substantial change to the statutory law governing private landowner’s mineral rights. Louisiana Mineral Code article 5 states that solid minerals, such as coal, can only be owned by the owner of the land.²²⁴ Louisiana Mineral Code article 6 also prevents landowners from legally severing their mineral rights by the creation of separate estates in land because the statute prohibits ownership of fugacious minerals, like oil and gas, as part of the land.²²⁵ Fugacious minerals must be reduced to physical control before one has a viable property claim for possession or ownership of them.²²⁶ Avoiding the obstacle of these articles would require repealing the statutes and creating a new one that specifically allows for ownership of *all types* of minerals in place, apart from the land itself.²²⁷ In many common law jurisdictions, like North Dakota for example, the creation of separate rights in land is inherent in statutes that define “freehold estates” or mineral conveyances.²²⁸ These types of statutes are usually based on state constitutional provisions that permit landowners to create mineral estates. Moreover, by establishing the rule of separate estates, enacting several new statutes would likely be required in order to delineate matters such as: (1) how separate estates can be created; (2) the respective rights of each owner in those estates; (3) the relation of those estates to one another

persons who have possessed the property under good faith and just title for a minimum of ten years or to those who have acquired from them, reserving the mineral rights as just and sole compensation for the transfer. Consistent with the provisions of Article XIII, Section 3, the notice requirements of Article III, Section 13 are satisfied for an act passed as a companion to the act setting forth this Paragraph.

LA. CONST. ANN. art. IX § 4(C) (the bolded language of this paragraph would need to be erased so as not to limit the exception to those plots of land listed).

224. LA. REV. STAT. § 31:5 (2019).

225. LA. REV. STAT. § 31:6.

226. LA. REV. STAT. § 31:7; *see also* LA. REV. STAT. § 31:6.

227. LA. REV. STAT. § 24:176.

228. “As used in this title, unless the context or subject matter requires otherwise, ‘freeholder’ means the legal title owner of the *surface* estate in real property.” N.D. CENT. CODE ANN. § 58-01-01.1 (Westlaw 2020); *see also* OKLA. STAT. ANN. tit. 52, § 802 (Westlaw 2020); *see generally* CAL. PUB. RES. CODE § 3602.2 (Westlaw 2020).

(dominant and servient status); and (4) modes of conveyance and termination.

The common law system of creating different estates in land to accommodate separate ownership rights in minerals and the surface affords each party more freedom in reaching agreements that are tailored to their specific interests. It has been argued that separate estates simply grant the parties more options and bargaining ability when negotiating, which is something the current civilian system does not provide.

For example, in *American Lung Association of Louisiana, Inc. v. State Mineral Board*, the private company American Lung originally donated land to the State for the purpose of building a hospital.²²⁹ When the State did not do so and instead executed mineral leases, American Lung sued.²³⁰ In the settlement negotiations leading up to trial, the State sought to divide ownership of the mineral rights in the land with American Lung, but the Louisiana Supreme Court ruled the settlement was invalid under Louisiana Constitution article IX section 4 because the State was required to reserve mineral rights.²³¹ If the common law rules of separate estates were in place, the settlement could have saved costly time during litigation and both parties could have reached a mutually advantageous agreement. Moreover, the litigation might have been avoided altogether if American Lung had split the land into two estates by selling the surface rights to the State for the construction of the hospital.

In light of these issues, Louisiana would benefit from adopting some common law property rules, but at the end of the day, it likely will not. This is clear from Louisiana's legislative history.²³² The dual-claimed land controversy has been around since the mid-1800's.²³³ Since then, Louisiana has adopted and ratified eleven constitutions and passed a great deal of statutory law.²³⁴ If Louisiana wanted to convert to common law property devices to settle dual-claimed land disputes, it likely would have done so already. Furthermore, Louisiana is firm in its legal practices. In contrast to common law, civil law systems simply emphasize different structural concepts in the holding and disposition of property.²³⁵ In Louisiana, with its simpler land holding system, the introduction of law

229. *Am. Lung Ass'n of La., Inc. v. State Mineral Bd.*, 507 So. 2d 184, 185 (La. 1987).

230. *Id.*

231. *Id.* at 190–91.

232. Alain A. Levasseur & Roger K. Ward, *300 Years and Counting: The French Influence on the Louisiana Legal System*, 46 LA. B.J. 301, 304 (1998).

233. LA. LEGIS. AUDITOR, *supra* note 5, at 10.

234. Levasseur & Ward, *supra* note 232, at 304.

235. Martin & Yeates, *supra* note 113, at 783.

that sought to challenge the civil law's Roman roots with feudal common law "interests" and "estates" was frankly unacceptable from a traditional standpoint.²³⁶ Thus, for these reasons, it might be more attainable to resolve the legal issues regarding dual-claimed lands under existing Louisiana law without converting to common law methods.

While Louisiana constitutional law may not allow for severance explicitly, perhaps it does implicitly. For one, there is a reasonable alternative viewpoint to the rule in paragraph (A) of Louisiana Constitution article IX section 4 that requires State reservation of mineral rights. In terms of the article's practical application, could not the reservation of mineral rights be viewed as a form of severance itself? When land is conveyed by the State to another party, the reservation is effectively operating as a separate interest in that someone other than the owner of the property—the State in this scenario—is extensively exercising the mineral rights on the land of another. Conceptually, this arrangement could reasonably be viewed as a "quasi-severance." Furthermore, there are other principles within Louisiana statutory law that suggests there is some space within the property regime that allows for severance under certain circumstances.²³⁷ These considerations comprise the type of interpretation, argumentation, and abstract-thinking that one should experiment with in creating a rule for severance that exists strictly under Louisiana law.

CONCLUSION

Arriving at a reasonable solution for the controversy surrounding dual-claimed lands requires a critical evaluation of Louisiana's current property law. In doing so, this Comment suggests that substantial changes are likely

236. *Id.*

237. *See* LA. REV. STAT. § 9:1151 (2019); *see also* LA. REV. STAT. § 41:1702(D)(2)(a)(i) (Under Louisiana Revised Statutes section 9:1151, riparian owners may retain mineral rights on land that has changed in ownership as a result of the sudden actions of rivers, lakes, or the territorial sea so long as existing leases are in effect on that land. Additionally, Louisiana Revised Statutes section 41:1702 declares that the State has the right to transfer mineral interests in emergent land back to the riparian owner if the owner allows the State to perform restoration projects. This "freeze" statute, in combination with section 41:1702, illustrates the principle that the legislature has been willing to carve out exceptions to the prohibition on severance of mineral rights when the rights of landowners are at risk. A reading *in pari materia* of the two statutes suggest this point: there is some wiggle-room within Louisiana's existing property law for perpetual alienation of mineral rights by the State or private parties.).

needed to solve the dual-claimed lands issue. Granting the State and private landowners the power to sever their mineral rights and create different estates in land is a serious modification to the civilian property regime that will likely receive pushback. However, coastal erosion and deep-seated title conflicts are such significant issues that they warrant the solutions proposed.

The adoption of common law property concepts would certainly constitute a fundamental change to Louisiana's property system that would require an amendment to the Louisiana Constitution and further statutory enactment. This solution is justifiable in light of the prevalence of the controversy. However, justified as it may be, historical evidence of inaction in the area of creating new law that permits severance, as well as strong loyalties to our civil tradition, makes it unlikely that Louisiana would accept the solutions set forth in this Comment. In any event, resolution to the conflict over dual-claimed lands is likely reliant on some sort of substantive change to Louisiana's constitutional and property law governing ownership rights if practical agreements are to be reached.

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