

LSU Journal of Energy Law and Resources

Volume 10
Issue 2 *Summer 2022*

8-11-2022

A Title Examiner's Lament: Creation of an Imprescriptible Mineral Servitude in a Conventional Acquisition of Land by a Non-Governmental "Acquiring Authority"

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Repository Citation

Patrick S. Ottinger, *A Title Examiner's Lament: Creation of an Imprescriptible Mineral Servitude in a Conventional Acquisition of Land by a Non-Governmental "Acquiring Authority"*, 10 LSU J. of Energy L. & Resources (2022)

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*Patrick S. Ottinger**

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INTRODUCTION¹

A mineral servitude as defined by article 21 of the Louisiana Mineral Code² is “the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership.”³

One of the three “basic mineral rights that may be created by a landowner,”⁴ the mineral servitude is a prescriptible right in that it will extinguish if not “used” within ten years of its date of creation.⁵ The pertinent regime of prescription is called “nonuse,” defined by article 3448 of the Louisiana Civil Code as “a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time.”⁶

An exception to this rule of prescriptibility exists with reference to an “*imprescriptible*” mineral servitude,⁷ which is a mineral servitude created by express reservation in the contract of sale to or in the judgment of

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1. This Article is an adaptation of materials contained in Part I.D of Patrick S. Ottinger, *Current Issues Under the Louisiana Law of Oil and Gas*, 59 S. TEX. L. REV. 377, 390 (2018).

2. Act No. 50, 1974 La. Acts 237 (codified at LA. REV. STAT. §§ 31:1–31:217 (1974)).

3. LA. REV. STAT. § 31:21 (2021). For a thorough explication on the mineral servitude, see Patrick S. Ottinger, *Mineral Servitudes*, in LOUISIANA MINERAL LAW TREATISE, ch. 4 (Patrick H. Martin ed., Claitor’s Law Books & Publishing Division, Inc. 2012) [hereinafter OTTINGER, MINERAL SERVITUDE TREATISE].

4. “The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease.” LA. REV. STAT. § 31:16.

5. *Id.* § 31:27(1).

6. LA. CIV. CODE art. 3448 (2021).

7. LA. REV. STAT. § 31:149 (emphasis added). Notably, this statute operates in connection with a sale of land to an “acquiring authority” in which “a mineral right subject to the prescription of nonuse is reserved.” *Id.* § 31:149(B). This would therefore include the reservation of a mineral royalty, but one rarely, if ever, encounters such a reservation. For a thorough explication on the mineral royalty, see Patrick S. Ottinger, *Mineral Royalties*, in LOUISIANA MINERAL LAW TREATISE, ch. 5 (Patrick H. Martin ed., Claitor’s Law Books & Publishing Division, Inc. 2012).

expropriation in favor of an “acquiring authority.” An “acquiring authority” includes both a governmental body and a “legal entity with authority to expropriate or condemn.”⁸ Anyone who has driven over an interstate highway in the state of Louisiana has driven over land burdened by an imprescriptible mineral servitude.

In 2012, Act No. 702 (“Act 702”) of the Louisiana Legislature amended Title 19 of the Revised Statutes—the principal statutes on expropriation.⁹ These amendments introduced a significant amount of uncertainty in relation to a conventional acquisition of land containing an express reservation of a mineral servitude compliant with the strictures of Mineral Code article 149, confected after August 1, 2012, by a “legal entity with authority to expropriate or condemn.” As will be explained, this lament of a title examiner will first manifest itself in 2022.

This Article examines the significant title issues presented by Act 702. Part I reviews the nature and workings of the mineral servitude, particularly how it is created and how the rules of prescription of nonuse pertain to it, as well as the history and current legislative scheme relative to imprescriptible mineral servitudes. Part II focuses on the “acquiring authority,” whose acquisition of land by conventional sale might result in the establishment of an imprescriptible mineral servitude reserved by the vendor. Finally, Part III explores the uncertainty introduced by Act 702 of 2012 in reference to the type of legal entity entitled to avail itself of the power of expropriation.

I. THE MINERAL SERVITUDE

A. Mineral Servitudes

A mineral servitude is a “real right” and is “subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence.”¹⁰ Concerning the mineral servitude, it is the former—a prescriptive regime.¹¹

Indicatively, the Mineral Code provides that a “mineral servitude is extinguished by: . . . prescription resulting from nonuse for ten years.”¹²

8. LA. REV. STAT. § 31:149(A).

9. Act No. 702, 2012 La. Acts 2921. Herein referred to as “Act 702.”

10. LA. REV. STAT. § 31:16.

11. This tenet is a codification of the essential ruling of the Louisiana Supreme Court in *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (La. 1922).

12. LA. REV. STAT. § 31:27(1).

Thus, unless the servitude is “used” without a lapse of ten years, it will terminate.¹³

“To use a servitude, so as to interrupt prescription, is to use it in the manner contemplated by the grant or reservation.”¹⁴ This use principally includes the conduct of drilling operations or securing of production.

B. Imprescriptible Mineral Servitudes

Motivated by important policy considerations, Louisiana law recognizes an important exception to this rule of prescriptibility, the “imprescriptible” mineral servitude.¹⁵

Article 149 of the Louisiana Mineral Code regulates mineral servitudes not subject to the prescription of nonuse. Essentially, if land is acquired by an “acquiring authority,” and if the vendor expressly reserves minerals in such a transaction, the “prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority, or any successor that is also an acquiring authority.”¹⁶

The imprescriptible mineral servitude constitutes a statutory innovation dating back to the acquisition of vast quantities of land in the 1930s and 1940s in connection with public works projects constructed and administered as part of President Franklin D. Roosevelt’s New Deal.¹⁷ The federal government acquired land for various public projects, including military, flood protection, wildlife conservation, and other public purposes.

13. See Patrick S. Ottinger, *All Good Things Must Come to an End: The Launch, Life, and Loss of a Mineral Servitude*, 81 LA. L. REV. 1130 (2021).

14. *La. Petrol. Co. v. Broussard*, 135 So. 1, 2 (La. 1931).

15. See OTTINGER, *MINERAL SERVITUDE TREATISE*, *supra* note 3, § 418; see also Paul A. Strickland, *Imprescriptible Mineral Servitude Issues*, 68 ANN. INST. ON MIN. LAW (2021). The respected author of this Article examines in detail the full legislative history of prior Acts that have now been incorporated into article 149 of the Mineral Code.

16. LA. REV. STAT. § 31:149(B). One should note the inconsistent terminology employed in article 149. In one instance, reference is made to the servitude’s “imprescriptibility”—that is, that the servitude is *not* subject to prescription at all. *Id.* In another instance, the article states that the “prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority, or any successor that is also an acquiring authority,” a formulation suggestive of the notion that it is afflicted with prescription, which is merely suspended. *Id.*

17. See MICHAEL HILTZIK, *THE NEW DEAL: A MODERN HISTORY* (Free Press 2011).

Landowners in most states (this Article uses Texas as an example) desired to reserve their rights to minerals, whether the transfer was by conventional deed or by condemnation.¹⁸ A mineral reservation in other states created a mineral estate which exists in perpetuity.¹⁹ In stark contrast, the reservation of rights to minerals by landowners in Louisiana created a mineral servitude subject to the rules of prescription but did not create a separate mineral estate as such was not legally permissible under Louisiana law.²⁰

The court in *United States v. Nebo Oil Co.*²¹ explained the state of affairs motivating the adoption of the early statutes of imprescriptibility:

Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for national forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of a servitude which was subject to prescription by then years nonuser. However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes.²²

18. “The process of exercising the power of eminent domain is commonly referred to as ‘condemnation’, or, ‘expropriation.’” *Taub v. Aquila Sw. Pipeline Corp.*, 93 S.W.3d 451, 456 (Tex. App.—Houston [14th Dist.] 2002) (quoting *Eminent Domain*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

19. See *Stephens Cnty. v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 292 (Tex. 1923) (“The question whether gas and oil in place were capable of separate ownership and sale was carefully considered and finally determined by this court in *Texas Co. v. Daugherty*, [176 S. W. 717]. The opinion in that case leaves no room for reasonable doubt as to the soundness of the conclusion that gas and oil in place are objects of distinct ownership and sale as a part of the land.”).

20. *Wemple v. Nabors Oil & Gas Co.*, 97 So. 666, 668–89 (La. 1923) (“And we therefore conclude that there is in this state no such estate in lands as a corporeal ‘mineral estate,’ distinct from and independent of the surface estate; that the so-called ‘mineral estate’ by whatever term described, or however, acquired or reserved, is a mere servitude upon the land in which the minerals lie, giving only the right to extract such minerals and appropriate them.”).

21. 190 F.2d 1003 (5th Cir. 1951).

22. *Id.* at 1005.

In response to this concern and the understandable reluctance of Louisiana landowners to sell their land for these public purposes, the Legislature enacted Act Nos. 68²³ and 151²⁴ of 1938 which classified as imprescriptible mineral reservations in certain land acquisitions by the State of Louisiana or the United States (“U.S.”). These statutes were intended to place Louisiana landowners on par with their Texas counterparts who had the ability—not enjoyed in Louisiana—to establish a perpetual mineral estate.²⁵

In 1940, the Louisiana Legislature enacted Act No. 315 which repealed the 1938 legislation and adopted a new statute that exempted mineral servitudes created in transactions between Louisiana landowners and the U.S. from the usual rules of prescription.²⁶

While the 1938 legislation was limited to acquisitions in connection with particular types of projects—“spillway or floodway” (Act No. 68) and “public work and/or improvement” (Act No. 151)—and thus necessitated a determination as to the purpose for which land was being acquired to confirm its applicability, the 1940 legislation was not as restricted.

Act No. 315 of 1940 applied only to acquisitions by the federal government, whereas Act Nos. 68 and 151 of 1938 applied to acquisitions by both the state and federal governments. This distinction gave rise to concerns as to the constitutionality of the 1940 legislation to the extent that it discriminated against the federal government, thus arguably denying it the equal protection of the law.²⁷

In 1958, the legislation was amended and reenacted as Louisiana Revised Statutes section 9:5806; subsection (A) regulated acquisitions by the federal government while subsection (B) regulated acquisitions by the state of Louisiana.²⁸ Thus, between 1940 and 1958, no legislation existed, rendering mineral reservations contained in acquisitions by the state of Louisiana imprescriptible.

23. Act No. 68, 1938 La. Acts 187.

24. Act No. 151, 1938 La. Acts 362.

25. See OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 3, § 418.

26. Act No. 315, 1940 La. Acts 1249.

27. See *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001) (“While we are sympathetic to the Government’s argument [that Act 315 unconstitutionally discriminates against the United States and therefore cannot be applied retroactively or prospectively], we are foreclosed from considering the constitutionality of Act 315 as discriminatory against the United States by our prior decision in *United States v. Little Lake Misere Land Co.*”). In the interest of full disclosure, the author represented a defendant in this suit.

28. Act No. 278, 1958 La. Acts 887.

The Louisiana Mineral Code was adopted in 1974.²⁹ The rules pertinent to the imprescriptible mineral servitude were originally set forth in articles 149 through 152. While the original provision contained in the Louisiana Mineral Code pertained only to acquisitions by the government, an amendment in 1980 extended the statute to “any legal entity with expropriation authority.”³⁰

The current version of the law is now entirely in article 149 of the Louisiana Mineral Code, as amended and enacted in 2004.³¹

As a passing observation, one notes that the title to Louisiana Revised Statutes section 31:149 is, in pertinent part, “Mineral rights reserved from acquisitions of land by governments or agencies thereof imprescriptible.” Additionally, article 149 is placed in Chapter 8 of Title 31 of the Revised Statutes entitled: “Mineral Rights in Land Acquired or Expropriated by Governments or Governmental Agencies.” Thus, notably, the headings to both the section and the chapter in which it reposes make no reference to an acquisition of land by a private entity possessing the power of expropriation. Seemingly, the aforementioned legislative amendments in 2004 failed to adjust or revise these titles to reflect the expansion of the establishment of an imprescriptible mineral servitude to transactions involving an acquisition of land by a non-governmental entity. While an apt observation, it is of no particular importance as “[h]eadings to sections . . . are given for the purpose of convenient reference and do not constitute part of the law.”³²

II. THE “ACQUIRING AUTHORITY”

A. Preface

A critical component of the creation of an imprescriptible mineral servitude is that the land must be acquired by an “acquiring authority,” defined (in relevant part) in article 149(A)(2) of the Louisiana Mineral Code as follows: “‘Acquiring authority’ for the purposes of this Section

29. Act No. 50, 1974 La. Acts 237 (codified at LA. REV. STAT. §§ 31:1–31:217 (1974)). For a discussion of the interesting history of the multi-decade effort to develop and enact a Mineral Code, see Patrick S. Ottinger, *From the Courts to the Code: The Origin and Development of the Law of Louisiana on Mineral Rights*, 1 LSU J. ENERGY L. & RESOURCES 5 (2012).

30. Act No. 348, 1980 La. Acts 864; Act No. 371, 1980 La. Acts 905. Each of these Acts was signed by the governor on the same day.

31. Act No. 919, 2004 La. Acts 2837.

32. LA. REV. STAT. § 1:13(A) (2021).

means . . . any legal entity with authority to expropriate or condemn, except an electric public utility acquiring land without expropriation.”³³

The explicit carve-out from the identification of a legal entity possessing the power of expropriation—“except an electric public utility acquiring land without expropriation”—seems to disallow the creation of an imprescriptible mineral servitude in a conventional sale of land to such a legal entity.³⁴ Simultaneously, it seemingly affirms the notion that a sale of land to all *other* legal entities possessing the power of expropriation does in fact create such a servitude; otherwise, the exception or carve-out would be meaningless and unnecessary.³⁵

As it pertains to the establishment of an imprescriptible mineral servitude, the acquisition of land by an “acquiring authority” with respect to which “a mineral right subject to the prescription of nonuse is reserved in the instrument . . . by which the land is acquired” may be accomplished consensually “through act of sale, exchange, donation, or other contract,” or involuntarily, “by condemnation, appropriation, or expropriation.”³⁶

This Article focuses solely on a conventional acquisition of land by a “legal entity,” rather than on an involuntary divestiture by way of expropriation.

B. Types of Legal Entities That Might Be an “Acquiring Authority”

The reference in Mineral Code article 149(A)(2) to “any legal entity with authority to expropriate or condemn” is an allusion to the types of non-governmental entities identified in Louisiana Revised Statutes section

33. *Id.* § 31:149(A). Omitted from the textual definition of this important term are certain governmental bodies (state and federal), *see id.* § 31:149(A)(1), and a “nonprofit entity, . . . organized and operated as a public charitable organization, that is certified by the secretary of the Department of Natural Resources to be a state or national land conservation organization,” *see id.* § 31:149(A)(3); these features are not pertinent to the immediate analysis.

34. The term “electric public utility” is not used in the text of Louisiana Revised Statutes § 19:2. However, it is presumed that this is a reference to a legal entity “generating, transmitting, and distributing or for transmitting or distributing electricity and steam for power, lighting, heating, or other such uses,” as identified in Louisiana Revised Statutes § 19:2(11).

35. “The legislature is presumed to have acted with deliberation and to have enacted a statute in light of the preceding statutes involving the same subject matter.” *Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.*, 943 So. 2d 1037, 1045 (La. 2006). In the interest of full disclosure, the author filed an amicus curiae brief before the Supreme Court in this case.

36. LA. REV. STAT. § 31:149(B).

19:2 which, by its heading, addresses, “Expropriation by state or certain corporations, limited liability companies, or other legal entities.”

Disregarding subsection (1) of section 19:2 dealing with the “state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers,” this statute identifies 11 potential non-governmental expropriators in connection with 11 purposes for potential expropriation.

Of the remaining enumerated purposes, subparts (2) through (7) and subparts (9) through (12) make reference to “[a]ny domestic or foreign corporation, limited liability company, or other legal entity created for, or engaged in,” an articulated purpose for which the power of expropriation might be availed.³⁷ Notably, the text of Louisiana Revised Statutes section 19:2 does not reference a partnership, but a partnership would be encompassed in the several references to “other legal entities.”³⁸

At the outset, it is suggested that a more apt reference in Mineral Code article 149(A) to a non-governmental “acquiring authority” might have been a “juridical person.” This is not to insinuate that the reference in article 149 to a “legal entity” is a concept that is not understood or is insufficient in any respect. Rather, “juridical person” is deemed to be a more appropriate term because the Louisiana Civil Code provides a definition of that term as “an entity to which the law attributes personality, such as a corporation or a partnership.”³⁹

Louisiana Civil Code article 24 further provides the “personality of a juridical person is distinct from that of its members.”⁴⁰ A “juridical person” is distinguished from the other “kind[.]” of person, a “natural person,” which refers to a “human being.”⁴¹

The precise term “legal entity” appears in the Louisiana Civil Code only a single time in an article describing the persons in whose favor a right of use might be established.⁴² In contrast, the term “juridical person”

37. Subpart (11) of Louisiana Revised Statutes § 19:2 states “[a]ny domestic or foreign corporation, limited liability company, or other legal entity engaged in any of the activities otherwise provided for in this Section,” thus not providing a new or additional purpose for which the right of expropriation might be availed.

38. *See id.* Louisiana subscribes to the “entity” theory of partnership, regulated by Title XI of Book II of the Louisiana Civil Code, composing articles 2801 through 2844. *See* LA. CIV. CODE art. 2801 cmt. e (2021) (“As a juridical person, a partnership is a legal entity distinct from the partners who compose it.”).

39. LA. CIV. CODE art. 24 (2021).

40. *Id.*

41. *Id.*

42. *See id.* art. 641 (“A right of use may be established in favor of a natural person or a legal entity.”).

is employed 15 times. The term “entity” appears in a number of codal articles, including “business entity,” and in each context, it is employed in a manner envisioning a “legal entity,” or more precisely, a “juridical person.”⁴³

The types of juridical persons envisioned in Louisiana law certainly include a business corporation, a limited liability company, and a partnership, including a limited partnership or partnership *in commendam*.⁴⁴

C. Purpose for Which Land Might Be Acquired by an “Acquiring Authority”

Interestingly, there is no requirement in the text of article 149 that the qualifying conventional acquisition by a legal entity “with authority to expropriate or condemn” actually be in connection with a precise and distinct project or enterprise involving one of the activities for which a legal entity might be authorized to expropriate, e.g., for the construction of a pipeline or utility line. Rather, the focus is on the character of the vendee (a “legal entity with authority to expropriate or condemn”⁴⁵) instead of on the actual purpose for which the land is acquired.⁴⁶ This seemingly means a qualifying “acquiring authority” can purchase land for the construction of an office building (but not precisely for the enumerated purpose), and the reservation of minerals by the vendor would conceivably be imprescriptible.

To illustrate, a natural gas transportation company—or, stated more precisely, a legal entity whose principal business is “the piping and marketing of natural gas for the purpose of supplying the public with natural gas”⁴⁷—can expropriate land for the laying of a pipeline. If a mineral servitude is reserved in the instrument of acquisition, that servitude would be imprescriptible (assuming full compliance with all relevant legal requirements).⁴⁸

This textual omission of a purpose is noteworthy in connection with a conventional sale when one compares it to a qualifying expropriation.

43. See, e.g., *id.* art. 3042(2) (“A commercial suretyship is one in which: . . . (2) The principal obligor or the surety is a business corporation, partnership, or other business entity.”).

44. It is virtually unimaginable that an expropriation project would be undertaken by a partnership, due to the absence of limited liability.

45. LA. REV. STAT. § 31:149(A)(1).

46. See *id.* § 31:149.

47. See *id.* § 19:2(5).

48. See discussion *infra* Part II.D (examining the nature of the interest in land that might be acquired by an “acquiring authority”).

While this Article is not concerned with the creation of an imprescriptible mineral servitude arising out of expropriation by a non-governmental entity meeting the definition of an “acquiring authority,” recognition should be made of the fact that, in an expropriation, the Louisiana Constitution provides “Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.”⁴⁹

Thus, in an expropriation proceeding, an inherent constitutional safeguard exists dictating that the purpose for which the land is acquired by an “acquiring authority” must be “for a public and necessary purpose” according to article I, section 4 of the Louisiana Constitution, as further elaborated in Louisiana Revised Statutes section 19:2.

In stark contrast, the conventional land acquisition by a legal entity that might give rise to a reservation creating an imprescriptible mineral servitude is not, by explicit terms, so circumscribed. Thus, Mineral Code article 149 simply states:

When land is acquired from any person by an acquiring authority through act of sale, exchange, donation, or other contract . . . , and a mineral right subject to the prescription of nonuse is reserved in the instrument . . . by which the land is acquired, prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority, or any successor that is also an acquiring authority.⁵⁰

It might be that the land is acquired on a conventional basis by a juridical person (or “legal entity”) as a result of successful negotiations to forego or obviate the need for expropriation as it is an essential requirement that the

49. LA. CONST. art. I, § 4. The issue of what constitutes a “public purpose” took on a significant meaning by reason of the decision of the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005), in which it was held that the defendant-city’s exercise of eminent domain power in furtherance of an economic development plan satisfied the constitutional “public purpose” requirement. In response to *Kelo*, article I, section 4 of the Louisiana Constitution was amended in 2006 to restrict the definition of “public purpose.” Hence, post-2006, the Louisiana Constitution provides that neither economic development, enhancement of tax revenue, nor any incidental public benefit shall be considered when determining whether the taking or damaging of private property serves a public purpose.

50. LA. REV. STAT. § 31:149(B) (2021).

party seeking expropriation must first comply with the strictures of the law.⁵¹

Indeed, courts have consistently held that, before bringing suit, an expropriating authority must make a good faith attempt to acquire the property conventionally through negotiation.⁵² The failure to do so subjects the expropriation suit to dismissal for prematurity.⁵³ “The requirement of negotiation is met, however, if the condemnor makes a good faith attempt to acquire a conventional right of way prior to filing an expropriation suit.”⁵⁴

This pre-suit negotiation requirement constitutes an inherent safeguard that the land acquired in a conventional manner (in lieu of expropriation) will be put to a use or purpose for which expropriation is authorized by law. Otherwise, the vendor would conceivably have a basis to seek dissolution of the sale for error if the vendee did not pursue or effectuate the use to which the parties had agreed through the requisite pre-expropriation negotiation process.⁵⁵

Yet this possible “inherent safeguard” exists *only* if the vendee intends to pursue a potential expropriation, thereby triggering the prerequisite to engage in pre-suit negotiations with the landowner. If the vendee—who otherwise meets the statutory definition of an “acquiring authority”—simply approaches the landowner and negotiates a direct purchase of the land (not as a result of pre-expropriation negotiation), the transaction still meets the condition or circumstance of a conventional acquisition of land “acquired from any person by an acquiring authority.”⁵⁶

51. *See id.* § 19:2 (“Prior to filing an expropriation suit, an expropriating authority shall attempt in good faith to reach an agreement as to compensation with the owner of the property sought to be taken and comply with all of the requirements of R.S. 19:2.2.”). Only if “unable to reach an agreement with the owner as to compensation,” may any of the enumerated entities “expropriate needed property.” *Id.*

52. *Faustina Pipe Line Co. v. Levert-St. John, Inc.*, 463 So. 2d 964, 967 (La. Ct. App. 1985) (“Negotiation is a prerequisite to bringing suit for expropriation. LSA-R.S. 19:2. The requirement is met when the expropriating authority makes a good faith attempt to acquire the property by conventional agreement.”).

53. *City of Thibodaux v. Hillman*, 464 So. 2d 370, 372 (La. Ct. App. 1985) (“The failure to negotiate with the landowners prior to institution of an expropriation suit subjects the suit to dismissal for prematurity.”).

54. *Cent. La. Elec. Co. v. Brooks*, 201 So. 2d 679, 680 (La. Ct. App. 1967).

55. *See* LA. CIV. CODE art. 1950 (2021).

56. LA. REV. STAT. § 31:149(B) (“[w]hen land is acquired from any person by an acquiring authority . . .”).

Because the text of article 149 of the Mineral Code does not explicitly limit its application to an acquisition for a particular purpose, it is significant as it concerns parties who might be motivated by a nefarious or sinister objective to enter into a transaction in which land is sold to a legal entity meeting the definition of “acquiring authority” for the sole purpose of creating a mineral servitude not subject to the prescription of nonuse. This deviation would be contrary to the established rules of prescription that embody a matter of public policy which cannot fundamentally be varied or defeated by contract.⁵⁷

D. Nature of the Interest in Land Acquired by Acquiring Authority

Louisiana civil law recognizes a limited number of tenures, or interests, in land.⁵⁸ Principally, depending on the needs of the “acquiring authority,” one may acquire either full ownership of the land⁵⁹ or a lesser interest called a personal servitude of use.⁶⁰

A recognized principle of expropriation law is that the expropriating authority should only take the least interest necessary to achieve its

57. See *Chi. Mill & Lumber Co. v. Ayer Timber Co.*, 131 So. 2d 635, 651 (La. Ct. App. 1961) (Hardy, J., dissenting) (“The public policy, as relates to the prescription of nonuser as applied to mineral servitudes, is directed against attempts to renounce prescription in advance, or to suspend or to interrupt prescription by means other than user or other means expressly recognized by law, such as acknowledgments made specifically for the purpose and with the intention of interrupting the running of prescription. What the courts have considered as contrary to public policy are agreements which seek to cause the lands to be burdened with mineral servitudes for more than 10 years without user.”).

58. See *Wemple v. Nabors Oil & Gas Co.*, 97 So. 666, 667 (La. 1923) (“On the contrary, our civil law, coming to us through Roman, Spanish, and French sources, recognizes but two kinds of estates in lands, the one corporeal and termed ownership, being the dominion over the soil and all that lies directly above and below it; and the other incorporeal and termed servitude (including usufruct) being a charge imposed upon land for the utility of other lands or persons.” (citations omitted)); see also *Harper v. Stanbrough*, 2 La. Ann. 377, 382 (La. 1847) (“The modifications of the right of property under our laws are few and easily understood, and answer all the purposes of reasonable use. It is incumbent on courts to maintain them in their simplicity.”).

59. LA. CIV. CODE. art. 477 (“Ownership is the right that confers on a person 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 law.”).

60. *Id.* art. 639 (“The personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment.”).

purpose.⁶¹ Thus, in many cases, if rights to land are acquired by way of expropriation, a personal servitude of right of use would more likely be acquired, as opposed to full ownership of the pipeline strip or corridor.

This is no particular problem in the case of a pipeline, for example. It would be atypical if the ownership of land were acquired by expropriation for the installation and operation of a pipeline. More commonly, rights to lay a pipeline are established by an instrument known as a pipeline “easement.”⁶²

If a personal servitude of right of use is acquired, no change of title to the land occurs (simply the establishment of a real burden on the land) and, hence, no occasion to reserve a mineral servitude, as the rights to minerals remain with the landowner now burdened by the pipeline servitude.⁶³

Yet, in some instances, ownership of the land might be necessary. An example would be a tract of land needed by a non-governmental “acquiring authority” for a field office or a compression or metering station associated with a pipeline project. In that event, a mere personal servitude of right of use would be deemed insufficient to serve the purposes of the expropriator. The necessity for full ownership (rather than a mere servitude) would entail an acquisition of land by an “acquiring authority,” and an imprescriptible mineral servitude could be reserved.

Certainly, the very text of article 149(B) acknowledges the notion that land, rather than a lesser interest, might be obtained by an “acquiring authority.”⁶⁴

61. See *New Orleans Pac. Ry. Co. v. Gay*, 32 La. Ann. 471, 474–75 (La. 1880) (“[T]he public can take no more, either in quantity or estate, than will suffice the public wants. If necessary, the fee may undoubtedly be taken; but if not necessary, it cannot. If a servitude or right of way will answer all the purposes of the plaintiff, to take more would be to violate the letter and spirit of the constitution.”).

62. *Quibodeaux v. Andrus*, 886 So. 2d 1258, 1261 (La. Ct. App. 2004) (“It is also uniformly accepted in the law of Louisiana that the common law word ‘easement’ is the same as the Louisiana ‘servitude.’”).

63. LA. REV. STAT. § 31:6 (2021) (“Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.”).

64. See *id.* § 31:149(B) (“[w]hen land is acquired from any person by an acquiring authority . . .”).

E. Prior to 2012, in Order to Have the Power of Expropriation, a Legal Entity Had to Be “Created for” a Purpose Enumerated in Louisiana Revised Statutes Section 19:2

Prior to Act 702, the juridical persons empowered to avail themselves of the laws of expropriation included particular entities “created for” certain specific purposes enumerated in Louisiana Revised Statutes section 19:2.⁶⁵

In view of the foregoing, prior to 2012, examining the organizational papers of a legal entity involved in such a transaction was both necessary and sufficient (a legal entity being an expropriator, a plaintiff in an expropriation suit, or a vendee in a sale of land wherein the vendor reserves a mineral servitude) to determine with certitude that the legal entity had been “created for” any of the purposes enumerated in Louisiana Revised Statutes section 19:2.

Thus, a title examiner had the ability to scrutinize and examine the organizational articles of the pertinent legal entity⁶⁶ and make a determination as to whether the vendee was in fact an “acquiring authority.”⁶⁷ This,

65. Included are the construction of railroads, toll roads, or navigation canals; the construction and operation of street railways, urban railways, or interurban railways; the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage; the piping and marketing of natural gas for the purpose of supplying the public with natural gas; the purpose of transmitting intelligence by telegraph or telephone; the purpose of generating, transmitting, and distributing, or for transmitting or distributing electricity and steam for power, lighting, heating, or other such uses, and piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline.

66. The Model Business Corporation Act, effective January 1, 2015, has eliminated the requirement (under prior law) that the articles be filed in “the office of the recorder of mortgages of the parish in which the registered office of the corporation is located,” LA. REV. STAT. § 12:25(D), Act No. 328, 2014 La. Acts 1191 (repealed 2014). However, the articles would be available in the office of the Secretary of State. *See id.* § 12:1-123(B).

67. *See Calcasieu & S. Ry. Co. v. Bel*, 69 So. 2d 40, 41–42 (La. 1953) (“The plaintiff by its charter is an organization constituted under the laws of this state for the construction of a railroad, and is thus a corporation to which this article gives the right of expropriation.” (emphasis added)); *Cent. La. Elec. Co. v. Pugh*, 96 So. 2d 523, 525–26 (La. Ct. App. 1957); *Tex. E. Transmission Corp. v. Terzia*, 138 So. 2d 874, 875–76 (La. Ct. App. 1962) (rejecting an argument that the plaintiff-corporation failed to prove it had the right of expropriation, calling such argument “so technical and unreasonable as to hardly be worthy of consideration.”).

in turn, allowed the examiner to immediately determine if the vendor's reserved mineral servitude was (or was not) subject to prescription.

III. ACT NO. 702 OF 2012

A. Preface

Act 702, enacted in 2012, amended certain sections of Title 19 of the Revised Statutes, *Expropriation*, including section 2 of Title 19 identifying the types of juridical persons enjoying the power of expropriation or condemnation. This legislation made numerous procedural and substantive changes to the law of expropriation (including a change to the so-called "*St. Julien Doctrine*"),⁶⁸ but for the purposes of this Article, only one amendment made to the statute is deemed worthy of commentary.

Signed by Governor Bobby Jindal on June 11, 2012,⁶⁹ Act 702 amended Louisiana Revised Statutes section 19:2 so as to expand the "created for" standard of eligibility for the right of a juridical person to expropriate to include a legal entity "engaged in" certain specified activities.⁷⁰

68. Taking its name from the decision in *St. Julien v. Morgan Louisiana & Texas Railroad Co.*, 35 La. Ann. 924 (La. 1883), this doctrine stands for the proposition that a landowner who acquiesces in the installation of facilities on its property by a party having the power of expropriation forfeits the right to demand the removal of the facilities and is relegated to a claim for money damages. Later overruled by *Lake, Inc. v. Louisiana Power & Light Co.*, 330 So. 2d 914 (La. 1976), the doctrine is now codified in Louisiana Revised Statutes section 19:14.

69. This legislation became effective on August 1, 2012.

70. Although section 19:2(11), prior to the 2012 amendment, listed as an entity having the right to expropriate, "[a]ny domestic or foreign limited liability company *engaged in* any of the activities otherwise provided for in this Section," this subsection, by its explicit terms, does not reach or apply to corporations or partnerships. LA. REV. STAT. § 19:2(11) (emphasis added) (amended 2012). Hence, the pre-2012 "engaged in" feature only pertained to expropriation by an LLC. *See id.*

*B. Act 702 Extends the Power of Expropriation to a Juridical Person
“Engaged in” a Stated Activity*

If a corporation was created “for any lawful business or activity,”⁷¹ or if a limited liability company was organized “for any lawful purpose,”⁷² (and, hence, was not “created for” one of the enumerated purposes) but is in fact “engaged in” certain specified activities, a reservation of a mineral servitude in a sale of a land to (or an expropriation by) such “acquiring authority” might be imprescriptible as a result of the enactment of Act 702.

Because of this new statutory development, the situation turns somewhat murky, and the life of the title examiner becomes rather complicated. Now that the touchstone for the power of expropriation has been expanded to include an entity “engaged in” those specified activities (even if the legal entity was not explicitly “created for” such purpose), this new standard gives rise to the need to evaluate a factual matter *not* reflected by the public records and would seemingly necessitate an inquiry into the activities in which the relevant entity is or has been “engaged.”

Worse still, the acquisition in question might be for purposes unrelated to the statutory activity, but if that entity is “engaged in” a prescribed activity in another parish or state (unrelated to the transaction at hand), one may wonder if that is sufficient to bring that transaction within the ambit of article 149 so as to render the reserved mineral servitude imprescriptible. As noted previously,⁷³ nothing in the new statutory formulation requires the land purchase (with the attendant reservation of a mineral servitude) be effectuated in connection with a qualifying activity in which the vendee is actually “engaged.”⁷⁴

To illustrate, a corporation or limited liability company “created for” the generic purpose of engaging in “any lawful” activity or purpose might actually be “engaged in” a qualifying activity in Bossier Parish, and thereby might enjoy the power of expropriation in Terrebonne Parish, even

71. LA. REV. STAT. § 12:1-301(A) (“Every corporation incorporated under this Chapter has the purpose of engaging in any lawful business or activity unless a more limited purpose is set forth in the articles of incorporation.”).

72. *Id.* § 12:1302(A) (“A limited liability company may be organized under this Chapter and may conduct business for any lawful purpose, unless a more limited purpose is stated in its articles of organization.”).

73. See discussion *supra* Part II.C.

74. Seemingly, a large, multi-national, publicly-traded corporation might be “engaged in” the piping of natural gas in North Dakota (what about Indonesia?), but not in Louisiana, and thereby qualify as an “acquiring authority” for purposes of article 149.

though its activities in the latter parish (some 300 miles away) are unrelated to the conduct of (or “engagement in”) the specified activity.

The expansion of the subset of juridical persons possessing expropriation power from entities distinctly “created for” an enumerated purpose to additionally include those legal entities that, while not “created for” one of those purposes, are nevertheless “engaged in” the activity, is problematic.

As a matter of policy, this statutory expansion is contrary to the established principle that “[e]xpropriation laws are special and exceptional in character, in derogation of common rights, and as such, must be strictly construed.”⁷⁵ Indisputably, the doctrine of strict construction applies to the interpretation of a statute but does not operate to constrain the prerogatives of the legislature to enact laws.⁷⁶ Yet, policy should support the proposition that the range of parties vested with the power of expropriation should only be expanded for a justifiable and articulable reason. As cogently observed by one commentator:

Louisiana’s prescription laws are the legal expression of public policy. If the Legislature decides to change the general land policy of the state, the legality of such legislation cannot be questioned as long as no state or federal constitutional provision is infringed. The wisdom of such changes, however, is subject to inquiry.⁷⁷

No such reason for this significant expansion is discerned in the available, yet scant, legislative history of Act 702, and the addition of the “engaged in” standard creates an unintended consequence when considering its effect on the law of imprescriptible mineral servitudes.

C. Issues Presented to the Title Examiner

Admittedly, the concerns expressed herein might be assuaged somewhat by the requirement that the “instrument or judgment *shall reflect* the intent to reserve or exclude the mineral rights from the acquisition *and their imprescriptibility as authorized under the provisions of this Section* and shall be recorded in the conveyance records of the parish in which the

75. *ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So. 3d 192, 197 (La. 2010) (citing *United Gas Pipe Line Co. v. Blanchard*, 149 So. 2d 615 (La. Ct. App.), *writ denied*, 150 So. 2d 590 (1963)).

76. *See La. Health Serv. & Indem. Co. v. Tarver*, 635 So. 2d 1090, 1099 (La. 1994) (“In its exercise of the entire legislative power of the state, the legislature may enact any legislation the state constitution does not prohibit.”).

77. *See A.B. Atkins, Jr., Mineral Rights—Mineral Reservations in Sales of Land to the United States*, 13 LA. L. REV. 153, 156 (1952).

land is located.”⁷⁸ If the instrument or judgment does not reference the minerals’ “imprescriptibility as authorized under the provisions of this Section,” the inquiry should end there.⁷⁹ However, even with compliance with this requirement, investigating the underlying facts is still necessary to determine that the vendee is in fact an “acquiring authority” by reason of the circumstance that the vendee (while not “created for” a certain purpose) has “engaged in” a prescribed activity.

Stated differently, merely providing in the instrument of acquisition that the reserved minerals are “imprescriptib[le] as authorized under the provisions of” article 149 does not render it, unless it is actually so as a factual matter, compliant with the strictures of the relevant article. “Bootstrapping” is not allowed here.

Therefore, if, after August 1, 2012, the lawyer reviews title to land in one parish and finds that land is acquired by a legal entity not “created for” a certain qualifying purpose, the vendor reserved minerals, and the reservation is expressly stated to be pursuant to Mineral Code article 149, how does one ascertain if the mineral servitude is prescriptible or not? An array of questions is presented, including the following.

What inquiry must be made to ascertain the status or character of the reserved mineral servitude? Evidently, this necessary inquiry involves a determination of matters not reflected in the public records. No particular source of information would reflect the actual conduct of any commercial activity constituting the “engaging in” a qualifying activity.

Notably, this factual scenario, to the extent that it necessitates an inquiry or investigation outside of the public records to determine, as a factual matter, that the vendee is or has been “engaged in” a pertinent activity, is not of a nature or character that it could be saved or rectified by operation of article 3339 of the Louisiana Civil Code.⁸⁰

How does one “prove the negative,” that is, that the entity is *not* “engaged in” a qualifying activity in a remote parish? The inquiry is not

78. LA. REV. STAT. § 31:149(B) (2021) (emphasis added).

79. *See id.*; *see also id.* § 1:3 (“The word ‘shall’ is mandatory and the word ‘may’ is permissive.”).

80. *See* LA. CIV. CODE art. 3339 (2021). This article provides an exception to the “public records doctrine” as to a “matter of capacity or authority, the occurrence of a suspensive or a resolutive condition, the exercise of an option or right of first refusal, a tacit acceptance, a termination of rights that depends upon the occurrence of a condition, and a similar matter pertaining to rights and obligations evidenced by a recorded instrument,” by declaring such matters “effective as to a third person although not evidenced of record.” *Id.*

limited to one of the 64 parishes in Louisiana but conceivably concerns undertakings in other states or nations.⁸¹

Additionally, how long must the entity be “engaged in” the relevant activity? Is it sufficient that the entity “engages in” the activity on only one occasion, even occurring a number of years prior to the transaction in question? Must it be the primary line of business of the relevant legal entity? Must it have personally conducted the activity directly, or can it be through a contractor? Or a subsidiary?

If one is able to establish the entity was “engaged in” the activity, how does one manifest such a conclusion so as to “bind the world” to the extent that third persons would recognize and accept the imprescriptibility of the reserved mineral servitude? Certainly, if the vendor reserving the mineral servitude in reliance on its imprescriptibility wants to sell the servitude in the future, that remote vendee would need this information to evaluate the worth or value of the servitude. These are but a few of the obvious issues presented by the operation of the 2012 legislation as it pertains to the creation of a servitude as being imprescriptible or not.

CONCLUSION

Act 702 creates an unnecessary burden on a title examiner and thus potentially results in significant and unnecessary uncertainty in the law. While important, the issue is admittedly academic until August 1, 2022, ten years after the 2012 amendment, followed by the creation of a qualifying servitude.

If a use has been made of the mineral servitude created after August 1, 2012, in a conventional sale to an “acquiring authority” not “created for” the purpose of the acquisition, the issue will still remain academic. However, if the servitude is not used within ten years of its post-amendment creation (in a sales transaction effected after August 1, 2012), ascertaining whether the servitude is imprescriptible would be necessary by reason of having been created in a sale of land to or expropriation by an “acquiring authority” “engaged in” a qualifying activity.

Article 149 of the Mineral Code should be amended to limit the type of juridical person possessing the power of expropriation to those “created for” the purposes enumerated in Louisiana Revised Statutes section 19:2, thus returning the issue to the state of affairs prior to the adoption of Act

81. Consider, for example, a large oil and gas company operating in several states in addition to Louisiana. If that company is active in, say, the Bakken Formation in North Dakota and is there “engaged in” the laying of pipelines, is that a sufficient predicate to allow it to invoke the power of expropriation in the Haynesville Shale Formation in Northwest Louisiana?

702. Such an amendment to article 149(A)(2) of the Mineral Code might be such as the following, to-wit: “‘Acquiring authority’ for the purposes of this Section means . . . (2) any legal entity [*created for a purpose specified in R.S. 19:2(2) through (7) or (9),*] with authority to expropriate or condemn, except an electric public utility acquiring land without expropriation.”⁸²

An amendment of this type would leave in place the changes made by Act 702 in the text of Louisiana Revised Statutes section 19:2 but would address the unintended consequence of the circumstances by which an imprescriptible mineral servitude might be created, limiting it to the situation whereby the ascertainment of a legal entity “created for” an enumerated purpose can be easily accomplished.

At the same time, it is appropriate to amend the headings or titles to article 149 and Chapter 8 of the Mineral Code for accuracy and clarity and also to indicate that certain juridical persons (in addition to governmental entities) are within the ambit of those provisions.

In the meantime, pending the enactment of appropriate clarifying or amending legislation, the title examiner should consider including a boilerplate paragraph of limitation in a title opinion, alerting the client to this issue should it ever arise in the future.

82. See LA. REV. STAT. § 31:149(A) (emphasis added).