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Do We Have to Litigate Title? An Analysis of the State of Louisiana's Legal Authority to Resolve Title Disputes Arising from Conflicting Mineral Claims Short of Title Trials that Risk the Loss of Public Trust Resources

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Do We Have to Litigate Title? An Analysis of the State of Louisiana’s Legal Authority to Resolve Title Disputes Arising from Conflicting Mineral Claims Short of Title Trials that Risk the Loss of Public Trust Resources¹

*James Anderson** , *Ryan M. Seidemann*** , *Warren B. Bates, Jr.****

TABLE OF CONTENTS

I.	Introduction	542
II.	The Problem: How Can the State Resolve Title Disputes?	544
III.	What is a “Natural Resource” in the Louisiana Constitutional Sense?	548
IV.	Authorized Alienations of Title.....	552
V.	How is Title Generally Divested from the State?.....	555
VI.	What is the Significance of the American Lung Case?.....	558
VII.	What is the Significance of the Two O’Clock Bayou case?.....	567
VII.	Discussion and Conclusion	573

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1. Nothing herein necessarily represents the official position or opinion of any past, present, or future Attorney General nor does it represent the official position of the Louisiana Department of Justice. Nonetheless, the authors extend their gratitude to Mary Adams for her assistance in locating the relevant Louisiana Constitutional Convention materials relied upon in this Article and also extend their thanks to J. Blake Canfield, James J. Devitt, III, and William Iturralde for many insightful colloquies on this topic over the years that have assisted in the forming of the opinions and analyses presented herein.

“History’s shown us that the state of Louisiana hasn’t always had great protectors . . .”²

I. INTRODUCTION

This observation by a Texas bankruptcy judge in 2017 is emblematic of the troubled past of Louisiana’s public trust doctrine and its associated constitutional and statutory components. Embedded in Louisiana Constitution Article IX, Section 1, the public trust doctrine states (in pertinent part):

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment

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2. Transcript of Court Record at 80, *In re Shoreline Energy, LLC, et al.*, (Bankr. S.D. Tex. Feb. 23, 2017) (No. 16-35571) (on file with the authors).

shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.

Though much debate has occurred around the self-executing nature of this constitutional provision,³ it is clear that the people of Louisiana have mandated the protection of the State's natural resources.

This constitutional mandate, which first appeared in the 1974 Constitution, hints at the reason for the above observation in a 2017 bankruptcy hearing in which millions of dollars of environmental restoration funds were fought for by attorneys from the Louisiana Department of Justice and the Louisiana Department of Natural Resources.⁴

By the time of the 1974 Constitution, Louisiana had become accustomed to institutional corruption, or at least to the appearance of impropriety, by elected officials and public servants. A classic example of such appearances of impropriety has been extensively researched in recent years: the involvement of Huey Long and other former Louisiana governors in schemes to acquire vast amounts of mineral wealth from the State's abundant resources.⁵ Another example comes from the dealings and antics of the rabidly-racist former boss of Plaquemines Parish,⁶ Leander Perez. As cases demonstrate,⁷ Perez illegally obtained massive land and mineral interests of the state and his home parish, resulting in the creation of substantial personal wealth for him and his associates. Although the actions of Governors Long, Allen, and Noe were ultimately

3. See generally James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861 (1992); Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 LA. L. REV. 1535 (1993).

4. See generally Transcript of Court Record at 80, *In re Shoreline Energy, LLC, et al.*, (Bankr. S.D. Tex. Feb. 23, 2017) (No. 16-35571) (on file with the authors).

5. See generally Ryan M. Seidemann et al., *The Kingfish's Mineral Legacy: An Analysis of the Legality of State Mineral Leases Granted to W.T. Burton and James A. Noe During the Years 1934-1936 and Their Relevance to Former United States Senator and Louisiana Governor, Huey P. Long*, 5 LSU J. ENERGY L. & RES. 71 (2017); see generally Ryan M. Seidemann, *Did the State Win or Lose in its Mineral Dealings with Huey Long, Oscar Allen, and James Noe and the Win or Lose Oil Company?*, 59 LA. HIST. 196 (2018).

6. Adam Fairclough, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA 1915-1972* at 21-22 (1995).

7. See generally *Plaquemines Parish Comm'n Council v. Delta Dev., Inc.*, 486 So. 2d 129 (La. Ct. App. 1986); *Plaquemines Parish Comm'n Council v. Delta Dev., Inc.*, 502 So. 2d 1034 (La. 1987).

determined not to have been illegal,⁸ these actions, as discussed in this Article, set into motion legal changes that limit the authority of State actors to take certain actions regarding public property without additional checks and balances. Both the Perez and Long actions demonstrate that the appearance of impropriety by those trusted by the public to protect the State's resources can, and do, erode trust and undermine governmental integrity.⁹

Against this backdrop and history, the Texas judge's observation that Louisiana officials have often not been great protectors of the public trust and public interest was astute. It is with this history in mind that a series of constitutional, legislative, and judicial actions over the past century have occurred to limit individual officials' ability to undermine this trust. More specifically, for the purposes of this Article, elected officials and the public have massively curtailed State actors' authority and ability to alienate State land—the State's single most important natural asset. In this Article, we review the confluence of legal actions that have led to the ultimate reality that—absent legislative, judicial, or public constitutional authorization—State officials and employees cannot alienate title to most public lands and certainly cannot do so in litigation settlements to resolve title and mineral disputes.

II. THE PROBLEM: HOW CAN THE STATE RESOLVE TITLE DISPUTES?

The significance of these limitations are not as hyperbolic as the above parade of historical Louisiana horrors might suggest. Certainly, Louisiana, like every other state in this nation, has had pillaging politicians, strongmen, and other such demagogues during its history. However, whereas these past bad (or at least morally-iffy) actors laid the groundwork for legal protections against self-interested alienation of public things, everyday activities managed by State civil servants are constrained by the laws resulting from this activity. For the purposes of this Article, such constant intersections of public/private interests and the limitations on the State's civil servants are illustrated through the countless legal settlements between the State and private landowners over rights to mineral interests.

Louisiana's relatively recent Haynesville Shale gas boom has demonstrated that the basic concepts of applying the Civil Code to mineral interests along the Red River are virtually impossible. As with other

8. See generally Seidemann et al., *supra* note 5; see generally Seidemann, *supra* note 5.

9. See generally Seidemann et al., *supra* note 5.

waterways and coastlines in Louisiana, the course and size of the Red River has been drastically altered by natural and artificial means over the two-plus centuries of Louisiana's statehood. Thus, seemingly simple concepts from the Code, such as the State owning navigable waters between the ordinary low water marks of a waterway, become untenable when applied to a dynamic system such as the Red River.¹⁰

The recent Second Circuit decision in *Hall Ponderosa v. State* is illustrative of this difficulty.¹¹ At the tail end of the actual Haynesville Shale boom in the early 2010s, a dispute arose between the State and a private landowner over claims to the Red River bed near the town of Coushatta, Louisiana.¹² Applying the basic Civil Code concepts to an uncontestedly navigable river to allocate mineral royalties between the State and private landowners should be simple, with the use of readily available river gage data from which the ordinary low water mark can be calculated and overlaid on historic and modern aerial photography and maps of the river. Unfortunately, the Code's redactors, while accounting for natural occurrences within the memory of living people such as erosion, accretion, and avulsion, could never have envisioned the massive earth-changing projects of the modern U.S. Army Corps of Engineers or the existence of the modern fields of geomorphology, civil engineering, and photogrammetry combined with massive amounts of historical data on a river's activities. Because of this, simply applying the Civil Code concept that accounts for public ownership of the bed of navigable waterways between the ordinary low water marks on the disputed property in the *Hall Ponderosa* case would have rendered a great injustice to the private landowners in the immediate vicinity of the River.

The simple reason for this inapplicability of codal concepts in this case (and numerous others along the Red River and elsewhere in Louisiana) is that the Corps created the modern Red River.¹³ The Red River is storied for being fickle. It is jammed with logs; it has flooded its banks; it has changed course innumerable times.¹⁴ Thus, as a conduit for travel and

10. See generally *Wemple v. Eastham*, 90 So. 637 (La. 1922); see LA. CIV. CODE art. 450 (1979).

11. See generally *Hall Ponderosa, LLC v. La. State Land Off.*, 345 So. 3d 537 (La. Ct. App. 2022).

12. *Hall Ponderosa*, 345 So. 3d at 542–47.

13. Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVTL. L.J. 93, 118–29.

14. See *Smith v. Dixie Oil Co.*, 101 So. 24, 26 (La. 1924) (referencing the Red River Raft—the massive log jam blocking access to Shreveport in the early years of statehood); see also *Hall Ponderosa*, 345 So. 3d at 541–47 (noting

commerce, it is no surprise that the Corps sought to stabilize the Red River in the twentieth century.¹⁵ Much of this stabilization occurred in the form of levee construction for containment and cutting straightaway channels and locks and dams to facilitate more regular travel.¹⁶ The bulk of this work occurred between the 1970s and the 1990s.¹⁷ The Corps and its local sponsoring agencies (e.g., the Red River Waterway Commission) began by acquiring servitudes of flow across lands that would be engineered with new, straight channels.¹⁸ Over the years, crop and grazing-land was converted to substantial earthworks as new channels were dug and their associated training dykes and revetments were constructed.¹⁹ By the first half of the 1990s, the earthmoving and construction were complete, and the series of locks and dams along the Red River were closed, artificially raising the water level, flooding certain areas semi-permanently, and creating a whole new regime of ordinary high and low watermarks.²⁰ The Red River, at least in Louisiana and north of the Red River Lock and Dam No. 1 near Marksville, LA, is artificial.²¹ Louisiana's Civil Code concepts that substantially rely on slow and imperceptible change to water courses no longer apply to the Red River,²² and to do so would cause inequities for the riparian owners and would ignore the terms of the flowage servitudes acquired to facilitate the project.

For this reason, for the law to be justly applied to the public/private ownership divide on the Red River, a point in time must be identified for each dispute when the last natural series of acts were brought to bear on the waterway. It is to this last natural version of the Red River that the Civil Code concepts of accretion, avulsion, and erosion can be justly applied. In almost every instance, what the public today sees as the navigable portions of the Red River are vastly wider than the River in its

overflowed banks, avulsive events, and Corps of Engineers' reroutings of the River).

15. For general reviews of the Red River works discussed in this section of the Article, see *Concerned Citizens of Rapides Par. v. Hardy*, 397 So. 2d 1063 (La. Ct. App. 3d 1981); *Red River Waterway Comm'n v. Fredericks*, 546 So. 2d 904 (La. Ct. App. 3d 1989); *Red River Waterway Comm'n v. Succession of Fry*, 36 So. 3d 401 (La. Ct. App. 3d 2010); *Red River Waterway Comm'n v. Waddle*, 631 So. 2d 1266 (La. Ct. App. 3d 1994).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See, e.g., *Morgan v. Livingston*, 6 Mart.(o.s.) 19, 57 (La. 1819).

natural state. Because mineral rights in Louisiana derive from surface ownership, knowing the actual location of the public/private land juncture is critical to allocating royalties from the Haynesville Shale play. This is what the *Hall Ponderosa* case was about.

Over the course of nearly a decade of settlement negotiations, expert witness data gathering, motion practice, and ultimately a three-week bench trial and appeals and writs through to the Louisiana Supreme Court, the ownership claims of lands and minerals for this small stretch of the Red River were contested by the State and several private land claimants.²³ The case that ultimately carried the day relied not on what the Red River appeared to be in pre-Corps alteration aerials but rather on what happened in a series of large flood events in the 1940s whose fact patterns would be the envy of any law school property professor.²⁴ By the end, the original plaintiffs were found to own little, if any, Haynesville Shale lands beyond their 1920s and 1940s title acquisitions, two other private groups acquired the lion's share of the disputed surface, and the State was adjudicated to own an oxbow of the former Red River channel formed during the mid-twentieth century avulsions caused by the flooding events.²⁵ In short, this case was long and expensive for all parties involved.²⁶

By the time of final adjudication, the State held roughly the same amount of land that it claimed in the original settlement negotiations. With this complexity and cost in mind (much of the State's costs were ultimately paid by the original plaintiffs), coupled with the wildly unpredictable nature of litigation outcomes,²⁷ it is little wonder that the majority of mineral disputes in the Haynesville Shale and elsewhere are ripe for settlement. Such settlements avoid the time and expenses of all parties gearing up for complex litigation and also minimize the unpredictability of trial outcomes. However, with the constitutional admonition discussed in Part I, how practical and legally viable can settlements of mineral and land disputes be with the State? Can the State's civil service employees negotiate away title claims? As the history of a series of constitutional provisions and judicial decisions demonstrates, the answer to the latter question is roughly "no." The State cannot settle title claims. However, in answer to the former question, as is demonstrated below, the Legislature, through its authority granted in Louisiana Constitution Article IX, Section

23. *Hall Ponderosa, LLC v. La. State Land Off.*, 345 So. 3d at 541–47.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g., Chevron U.S.A., Inc. v. State*, 993 So. 2d 187 (La. 2008) (in which the State litigated a water bottom dispute and quizzically lost a tract of land fully underwater in the Gulf of Mexico).

1, provided statutory mechanisms to resolve these complex disputes and other land-related matters short of litigation.

III. WHAT IS A “NATURAL RESOURCE” IN THE LOUISIANA CONSTITUTIONAL SENSE?

Louisiana Constitution Article IX, Section 1 clearly articulates that the “natural resources” of the State are to be protected by laws passed and implemented by the Legislature. What, then, are these “natural resources?” The Constitution itself provides a *sense* of the definition of that term in another constitutional article when it states that “natural resources” *include* the “. . . air and water, and the healthful, scenic, historic, and esthetic quality of the environment”²⁸ By the use of the term “including” in the constitutional language, the people of Louisiana intended for the above-quoted list to be illustrative and not exclusive.²⁹ This reality is particularly important for the purposes of this Article. The “natural resources” of the State were also intended to include its lands—things that are not explicitly identified in the Louisiana Constitution Article XI, Section 1

During the 1973 Constitutional Convention, the question arose of what the “natural resources” referred to in Louisiana Constitution Article IX, Section 1, was intended to mean. In fact, Louis Lambert, a delegate to the Convention and long-serving Louisiana legislator, addressed the absence of “land” from the inclusive listing of Louisiana Constitution Article IX, Section 1, specifically on day 103 of the Convention as is captured in the following excerpt from the transcripts of the debates:

Mr. Lambert

Mr. Chairman, I just wanted to make one quick point before we . . . in my closing remarks, if I might. Mr. Dennery asked me the question, why did we leave out land in the policy statement. Well, we did not leave out land. The natural resources of the state, including air and water . . . this question was talked about in the committee, and natural resources includes land, and he was satisfied with that answer. I just wanted to point that out.³⁰

28. LA. CONST. art IX, sec. 1.

29. *See Include*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The participle including typically indicates a partial list.”).

30. Verbatim Transcripts, State of Louisiana Constitutional Convention of 1973, Day 103, p. 9 (ellipses in original presumably representing pauses in dialogue).

Accordingly, there can be no doubt that the people voting in favor of the 1974 Louisiana Constitution intended not just that the State's ". . . air and water . . . [and] environment"³¹ be subject to legislative control, but they also mandated that the State's land "shall be protected [and] conserved . . . insofar as possible and consistent with the health, safety, and welfare of the people."³² The use of the tempering language of "insofar as possible"³³ in this provision is explicated in the following, and equally important, clause, which states that, "[t]he legislature shall enact laws to implement this policy."³⁴ Accordingly, though the first clause of Louisiana Constitution Article IX, Section 1 is an illustrative articulation of an aspirational policy, that policy is given mandatory effect by the second clause when it requires the Legislature to "enact laws to implement this policy."³⁵ The Louisiana Supreme Court and countless lower courts have recognized over the past 50 years that, though Louisiana Constitution Article IX, Section 1 contains mandatory language for the preservation and conservation of these State assets, this constitutional provision is not absolute.³⁶ Indeed, the Legislature is provided with flexibility in implementing this mandate by way of the "insofar as possible"³⁷ language of the first clause.

Further support for the protection of the State's property comes in the explicit form of Louisiana Constitution Article IX, Sections 3 and 4. These provisions read thusly:

Section 3. The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.

Section 4. (A) Reservation of Mineral Rights. The mineral rights

31. LA. CONST. art. IX, § 1.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Save Ourselves, Inc. v. La. Env't. Control Comm'n*, 452 So. 2d 1152, 1157 (La. 1984) (noting the balancing test implicit in Louisiana Constitution Article IX, § 1); *State v. La. Land & Expl. Co.*, 298 So. 3d 296, 318 (La. Ct. App. 2020), (same).

37. LA. CONST. art. IX, § 1.

on property sold by the state shall be reserved, except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes. The mineral rights on land contiguous to and abutting navigable water bottoms reclaimed by the state through the implementation and construction of coastal restoration projects shall be reserved, except when the state and the landowner having the right to reclaim or recover the land have agreed to the disposition of mineral rights, in accordance with the conditions and procedures provided by law.

(B) Prescription. Lands and mineral interests of the state, of a school board, or of a levee district shall not be lost by prescription except as authorized in Paragraph C.

(C) Exception. 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.³⁸

The meaning of these articles is clear: No one—not the Legislature; not an elected executive official; not a civil servant—can alienate the State's sovereign water bottoms.³⁹ With this brief statement, the people have removed all ability for any State actor to divest sovereign property in order to resolve any sort of dispute. Certainly, and as is discussed more fully below, Louisiana Constitution Article IX, Section 3 authorizes

38. LA. CONST. art. IX, §§ 2–3. For the purposes of this Article, Louisiana Constitution Article IX, § 4(C) is irrelevant but is reproduced here for completeness.

39. LA. CONST. art. IX, § 3. The single exception to this maxim is the authorization for reclamation of land lost through erosional forces. However, with few exceptions, such reclamations are staggeringly expensive and are simply not viable or meaningful infringements on State sovereign water bottoms.

certain dismemberments of ownership of sovereign property by way of leases and other actions short of full alienation. However, that is the limit of State actors' authority under the Constitution. Accordingly, the only way for what the State's property experts (i.e., Office of State Lands personnel, Department of Natural Resources personnel, and hired experts) consider to be sovereign property (i.e., naturally navigable water bottoms) to be divested from State ownership is by way of a judicial finding that such land is, in fact, not a naturally navigable water bottom. With such a judicial determination, which, for reasons articulated more fully below is a rare occurrence, the property is not classified as sovereign, and the restrictions of Louisiana Constitution Article IX, Section 3 are inapplicable.

Although less relevant to the alienation of State property title that is at the heart of this Article, Louisiana Constitution Article IX, Section 4 also plays an important role in the State's resolution of certain disputes short of litigation. As is clear from the above quotation of that provision, not only are State actors constitutionally prohibited from alienating the State's minerals, but any authorized alienation of surface title from the State triggers an automatic reservation of the minerals associated with that property.⁴⁰ With this provision, it is similarly clear that title to the State's mineral rights cannot be relinquished by sale or otherwise. Accordingly, when negotiating settlements in property disputes, State representatives are not authorized to bargain away mineral title. How, then, can the State ever undertake to settle property disputes without a complete litigation of the competing interests? A combination of these constitutional restrictions demonstrates that, though neither surface nor mineral title to sovereign lands can be alienated, there is no prohibition on the State's actors reserving all rights to the surface and minerals in a disputed area but agreeing to an allocation of less than 100 percent of the royalties from any mineral production on that property.

Such a mechanism—allocation of mineral royalties—represents a lawful means to accomplish dispute resolution that is a common feature of private litigation: settlement, in which the hope of gain is balanced against

40. *Lewis v. State*, 156 So. 2d 431, 434–35 (La. 1963) (noting that the constitutional reservation of minerals in LA. CONST. art. IX, § 4 is automatic).

the risk of loss⁴¹ and equities are protected and allocated.⁴² Of course, pursuant to Louisiana Revised Statutes section 30:121, *et seq.*, any such resolution that includes an allocation of the State's mineral interests cannot be unilaterally resolved by civil servants. Rather, negotiations undertaken by the civil servants must be analyzed and authorized by the State Mineral and Energy Board as the sole authority for the management of the State's mineral resources.

Although the plain language of the Constitution reviewed above should represent a sufficient basis to prohibit State actors from alienating immovable property titles by way of settling lawsuits, as the following sections demonstrate, the courts also have had an opportunity to weigh in on aspects of this issue as well. Each of these aspects of State property rights and the extent of the authority of the various governmental branches are supportive of the constitutional notions already analyzed. Nonetheless, they are important components to the maxim that the State cannot settle title and are reviewed to further that reality. Moreover, there are certain situations in which the State is authorized to alienate immovable property. Those important exceptions to the limitations reviewed above are critical to the functioning of the government and are also briefly reviewed below.

IV. AUTHORIZED ALIENATIONS OF TITLE

As with most actions by State actors, the authorizations and limitations of their authority are set primarily by the Constitution as refined by the Legislature statutorily and occasionally by the agencies regulatorily. Title and mineral settlement negotiations and authorities are no different from any standard act with regard to their limitations. While regulations exist for implementation by the Louisiana Office of State Lands related to the

41. The possible loss to the State in disputes involving property, especially those involving navigable water bottoms, is compounded by not simply representing a loss of surface land and the attendant minerals, but also a loss of public access—a critically important asset of public resources in recent years. LOUISIANA PUBLIC RECREATION ACCESS TASK FORCE, REPORT OF THE PUBLIC RECREATION ACCESS TASK FORCE TO THE LOUISIANA LEGISLATURE PURSUANT TO SCR 99 OF THE 2018 REGULAR LEGISLATIVE SESSION (2020) (available online at <https://www.dnr.louisiana.gov/assets/Legal/PublicRecAccessTFReport.pdf> [<https://perma.cc/TN5M-PZ7T>]) (last visited Mar. 9, 2024) (reviewing the importance of public access to the State's waterways).

42. In such settlements, the State agrees to a royalty allocation, but that allocation is always subject to being challenged should the parties desire litigation of the actual property title. In this way, the State's equities are protected and are reserved for later litigation if future generations of State actors so desire.

alienation of title to certain lands and dismemberments of ownership to others, they are of little (if any) relevance to this analysis because they deal with hyper-technical aspects of these actions rather than the broad authority for the actions.⁴³ The overarching law that controls the divestiture of any State property—movable or immovable—is Louisiana Constitution Article VII, Section 14(A). That provision provides (in pertinent part) that:

Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.⁴⁴

The way that provision has been interpreted by courts and others is to stand for the proposition that the State and its political subdivisions cannot alienate State things without receiving recompense of a comparable value in return.⁴⁵ Because the State owns navigable water bottoms as public things by virtue of its inherent sovereignty, such things cannot be alienated without fair market value compensation. Indeed, most navigable water bottoms cannot be alienated in any manner under Louisiana Constitution Article IX, Section 3. However, for those that can be alienated—the now-dried beds of former navigable lakes—fair market compensation is mandated by constitutional fiat.

These constitutional limitations place several barriers on State action not applicable to, and typically not even contemplated by, private parties. The most important limitation is that, because by its nature settlement is a compromise by which all parties gain something and all parties lose something, a settlement of title to immovable property cannot be said to amount to the State receiving fair market value for its interest in the property. This problem applies even when competing title chains exist because the State's property all deraign from the United States (save occasional purchases by the State). The reason for this is that the public records indicate no severance of title from the State or the United States to a private party holding the competing title chain. In such cases, clearly there is an error in someone's chain. However, because the State is a record title owner, it cannot simply relinquish that title to resolve a dispute with

43. See, e.g., LA. ADMIN. CODE. tit. 43, pt. 27, § 2101 (1993).

44. LA. CONST. art. VII, § 14(A).

45. See generally Bd. of Dirs. of Indus. Dev. Bd. of Gonzales, Louisiana, Inc. v. All Taxpayers, Prop. Owners, Citizens of Gonzales, 938 So. 2d 11 (La. 2006); see also La. Atty. Gen. Op. No. 22-0053 (Dec. 19, 2022); La. Atty. Gen. Op. No. 18-0045 (Aug. 13, 2018).

a private party. Such cases have been litigated in the past and, occasionally, the State's title is determined by the courts to be faulty.⁴⁶ Such a finding means that the error inures to the private owner and the property is not public, and thus no fair market value compensation is due. More commonly, the State's title is upheld based upon the strength of the public title documents, and the only means for the private claimant to obtain clear title is to purchase it from the State.

As set forth below, the Legislature, pursuant to its obligation under Louisiana Constitution Article IX, Section 1, has created statutory schemes for the alienation of certain State lands. However, none of these reviewed schemes authorize a resolution of a title dispute by way of negotiation or settlement. In all instances of the alienation of State property, fair market value is required. Only when a court of competent jurisdiction has found that the State no longer or never owned a tract of land can the title be removed from the State's property rolls.

The complexity associated with resolving title to navigable waterways, as demonstrated above, is enhanced by the fact that the State did not acquire such lands by metes and bounds as often occurs with surveyed land. The State acquired navigable water bottoms by virtue of the Equal Footing Doctrine upon its entry into the Union on April 30, 1812. No description of the waterways that fit the definition of "navigable" was provided in the granting of statehood. Rather, the vague notion articulated by the Civil Code (and also recognized by Louisiana's common law sibling states), that navigable waters are inalienable public things as long as they were capable of supporting commercial navigation as of April 30, 1812, provides the only guidance for what lands should be State owned navigable water bottoms.

Without precise descriptions, small water bodies are often the subject of much dispute.⁴⁷ Though the Red River has been long-established as

46. See, e.g., *Dupont v. Off. of State Lands*, 248 So. 3d 506 (La. Ct. App. 2018), *writ denied*, 253 So. 3d 1304 (La. 2018) (importantly in this case, Judge Amy's dissent highlights the errors of the majority by citing to the controlling precedent in *Haggerty v. Annison*, 62 So. 946, 947 (1913) and *Bagnell v. Broderick*, 10 L.Ed. 235 (1839), cases that actually mandated a different outcome and underscores again the inherent risks of litigation).

47. See, e.g., *State v. Salt Domes P'ship, et al.*, No. 72682, 2016 WL 3197529 (16th Dist. Ct. St. Martin Parish Jan. 15, 2016) (regarding the navigability of Butte La Rose Bay in St. Martin Parish); see also *Olin Gas Transmission Corp. v. Harrison*, 132 So. 2d 721 (La. Ct. App. 1st 1961) (regarding the navigability of Round Lake in Lafourche Parish); *State v. Aucoin*, 20 So. 2d 136 (La. 1944) (regarding the navigability of Lake Long in Lafourche Parish).

navigable,⁴⁸ to where that navigability extends and what rights the State possesses as a result of its inherent sovereignty continues to be of great debate. Less common disputes arise around navigable lakes.⁴⁹ However, when such lakes have receded from their original high water marks, the now-dry former lake bed—now classified as a private thing held by the State—is fair game for alienation. Among the other lands that may be alienated are certain adjudicated properties,⁵⁰ certain lands acquired by the State by way of purchase or donation, certain lands acquired by the State through the Swamp Lands Acts of the mid-1800s, and a few others.⁵¹ In addition, State actors are authorized to alienate certain dismemberments of ownership. These lawful title divestitures, all authorized by the Legislature, are reviewed below.

V. HOW IS TITLE GENERALLY DIVESTED FROM THE STATE?

Occasionally, natural or juridical persons seek to purchase property from the State. Although, for the reasons mentioned above, the State cannot divest property by settling title, the State is allowed to divest itself of some of its property by statute in various ways. The State may sell, exchange, and lease property under certain circumstances and by following certain processes. It is important to note that, though these limited immovable property divestiture mechanisms exist, none of these means presents a method for resolving title or mineral disputes. Louisiana Revised Statutes section 41:131 is the primary authority for the sale of public lands. This provision provides:

When any person desires to enter or purchase lands belonging to the state, including public lands donated by [C]ongress to the [S]tate of Louisiana known as swamp and overflowed lands, internal improvements, indemnity lands, or dried lake lands, or to similar lands of any levee board thereof, and properties adjudicated to the state for nonpayment of taxes during tax years 1880 through 1973, he shall make application to purchase, and

48. *State v. Richardson*, 72 So. 984, 986 (La. 1916).

49. *C.f.*, *Sid-Mar's Rest. & Lounge, Inc. v. State ex rel. Governor*, 142 So. 3d 188 (La. App. 5th 2014), *writs denied*, 149 So. 3d 267 (La. 2014), (oddly finding that a portion of filled lakebed was not part of Lake Pontchartrain). *See also Crooks v. Dep't of Nat. Res.*, 263 So. 3d 540 (La. App. 3d 2018), *aff'd in part, rev'd in part*, 340 So. 3d 574 (La. 2020) (oddly finding that Catahoula Lake is, in fact, a river).

50. LA. REV. STAT. §§ 47:2121, *et seq.*

51. LA. REV. STAT. §§ 41:131, *et seq.*; LA. REV. STAT. §§ 41:631, *et seq.*

deposit with the register of the state land office, or in the case of lands of any levee board, with the president of the levee board, an amount determined by the register of the state land office to be sufficient to cover the expense of advertising as evidence of good faith. Should the applicant at the sale provided for in this Chapter fail to purchase the land, then the money so deposited shall be returned to him; provided that should no one at the sale bid up to the minimum price stipulated in this Chapter, then the money shall be retained to pay the expense of the sale.⁵²

In order to purchase such property, someone must make an application to purchase property with the State Land Office.⁵³ This has been the mechanism for the alienation of certain immovable property for more than a century.⁵⁴ Upon receipt of an application to purchase land that is subject to sale, the State must furnish information as to the value of the property.⁵⁵ The State entity selling the property must publish an advertisement for 30 days containing the description of the land, the time, place, and terms of the sale.⁵⁶ Both public advertisement and public bidding are required under the statute.⁵⁷

Louisiana Revised Statutes section 41:134 sets forth this sale process. Pursuant to this law, State property shall be sold by the sheriff of the parish where the land is located after advertisement and shall be sold to the highest bidder.⁵⁸ This means that, even if a party desires to purchase a certain tract of State land, the public bid process provides no guarantee of a sale to that party. In light of the history of unsavory self-dealing by some Louisiana elected officials, this process removes a great deal of the possibility for self-aggrandizement, and, thereby, detrimental impacts to the public are minimized. Additionally, all property so sold must have a minimum price to be paid based upon the appraised value of the property.⁵⁹ Similar to other sheriff sale minimums, the property will not be sold if the minimum bidding price is not satisfied.⁶⁰ Of course, title cannot be

52. LA. REV. STAT. § 41:131.

53. *Id.*

54. Act No. 215, 1908 Acts 319 (codified at LA. REV. STAT. §§ 41:131 et seq. (1908)).

55. LA. REV. STAT. § 41:132 (1908).

56. LA. REV. STAT. § 41:133 (2010).

57. *Id.*

58. *Id.*

59. LA. REV. STAT. § 41:134(B).

60. *Id.*

perfected until the full price is paid.⁶¹ There are occasional exceptions to the public bidding for the sale of immovable property in the form of direct sale legislation.⁶² Such legislative authorizations are occasionally used to remedy dual title chains (i.e., ones in which the State holds title under a Swamp Land Grant while private parties have acquired land directly from the United States) and for other limited uses.⁶³ Even without the need for public bidding, such direct sales, though guaranteeing that a particular purchaser can obtain a particular tract of land, do not avoid the mandate of paying fair market value for the property.

State agencies may also sell immovable property that is determined and designated to be nonessential to the efficient operation of the agency.⁶⁴ In such cases, the head of the corresponding agency transfers the immovable property to the Division of Administration (the Division), which shall prepare a land management evaluation report setting forth recommendations for the best use or disposition of the property.⁶⁵ A copy of that report must be filed with the House Committee on Natural Resources and Environment and the Senate Committee on Natural Resources, where such a divestiture will either be approved or denied.⁶⁶ Assuming that divestiture is approved, the Division then shall conduct any sale of this property under the public bid provisions of Louisiana Revised Statutes section 41:131, *et seq.* The property disposed of in this manner is usually property that was used for a public purpose but is no longer needed for that purpose.⁶⁷ In other words, this is surplus property sold by the State or its political subdivisions and is not the type of property focused on in this Article. None of the property alienated through the processes noted in this Section can include the inalienable water bottoms.⁶⁸

61. La. Atty. Gen. Op. No. 1916-18, p. 602.

62. LA. REV. STAT. § 41:134.

63. *See, e.g.*, Act No. 737, 2022 Acts (an example of direct sale legislation in the Butte LaRose area intended to authorize the correction of dual title chains between the State and a private party).

64. LA. REV. STAT. § 41:140(A).

65. *Id.* at (A)–(B).

66. LA. REV. STAT. § 41:134(D).

67. Personal Communication with Cheston Hill, Administrator, Louisiana Office of State Lands (on file with authors).

68. It is important to note that, even some land once classified as navigable water bottom has been sold pursuant to the processes discussed in this Section. *See, e.g.*, Hall v. Bd. of Comm'rs of Bossier Levee Dist., 35 So. 976 (La. 1904) (land could be sold after it was determined to be a non-navigable lake but owned by the State by virtue of the Swamp Lands Act).

For property not prohibited from sale, the State may sell immovable property, provided it follows the aforementioned procedure. These procedural requirements ensure that the public is informed of the proposed sale, is able to participate in that sale, and that the sales price is equal to or greater than the land's fair market value. None of these procedural requirements are consistent with the settlement of land in litigation, as such a transaction would not include a public bid process, would not necessarily be alienated for fair market value, and could not be guaranteed (absent direct sale legislation) to result in purchase by other litigants. Indeed, the entire statutory process for the alienation of State-owned immovables is inconsistent with resolving litigation disputes in any manner short of a final judgment. However, these processes are briefly reviewed here for juxtaposition against the idea of settlement as a negotiated compromise. As these statutes combined with the above-discussed constitutional provisions make clear: the people of Louisiana have clearly mandated that title to water bottoms is inalienable and that title to other property cannot be negotiated away but, to be alienated, must follow an open bidding process.⁶⁹ As the final Sections demonstrate, these notions are consistent with jurisprudential interpretations of the functionality of government.

VI. WHAT IS THE SIGNIFICANCE OF THE AMERICAN LUNG CASE?

A case often cited in settlement agreements with the State when resolving mineral disputes,⁷⁰ *American Lung Association of Louisiana, Inc. v. State Mineral Board (American Lung)*,⁷¹ is worthy of review. In *American Lung*, citing the mineral rights provision in Louisiana's Constitution, the Louisiana Supreme Court found that the sale of mineral rights of state-owned land is strictly prohibited.⁷² In many ways, this case has been interpreted by State attorneys over the years as representing a whole or partial ban on title settlement,⁷³ but seldom has there been an actual analysis of the significance of *American Lung* and its meaning and ramifications for the State. This Section aims to fill that analytical lacunae by answering the question of whether *American Lung* actually requires

69. See LA. CONST. art. VII, § 14(A); LA. REV. STAT. §§ 41:131, *et seq.*

70. Personal Communication with William Iturralde, Attorney, La. Dep't of Nat. Res. (on file with the authors).

71. *Am. Lung Ass'n v. Min. Bd.*, 507 So. 2d 184 (La. 1987).

72. *Id.* at 189.

73. Personal Communication with William Iturralde, Attorney, La. Dep't of Nat. Res. (on file with the authors).

such a sweeping prohibition on the alienation of state-owned immovable property.

The simple answer to this query is that *American Lung* does not appear to provide such a broad prohibition. Reading the opinion in conjunction with Louisiana's Constitution, it does not seem that the Court intended to prohibit the alienation of all state-owned immovable property. Rather, in *American Lung*, the Court solely provided that the sale of state-owned *minerals* is prohibited by the Louisiana Constitution.⁷⁴ The interpretation of this holding as providing for the prohibition on the alienation of state-owned *immovable property* is unsupported by the opinion itself. Nonetheless, in many ways, because Louisiana's legal tradition favors the unity of ownership, it is not entirely unreasonable to extend the *American Lung* prohibition on the alienation of minerals to a prohibition on the alienation of the title from which those minerals derive.

American Lung stems from an act of donation of land by a private corporation to the State of Louisiana.⁷⁵ In 1924, the American Lung Association of Louisiana (ALA), through its predecessor, the Louisiana Anti-Tuberculosis League, donated two tracts of land to the State Tuberculosis Commission "for the location of sanatoria for persons suffering from tuberculosis."⁷⁶ When making this donation, the ALA did not reserve the land's mineral rights.⁷⁷ The Greenwell Springs Tuberculosis Hospital was built on a parcel of donated land.⁷⁸ Over time, fewer tuberculosis patients, due to the post-1924 identification of a treatment for the disease,⁷⁹ meant a reduced need for the use of the hospital exclusively as a tuberculosis sanatorium.⁸⁰ In response, the hospital began to house Angola Penitentiary prisoners for treatment of ailments besides tuberculosis, all the while still treating tuberculosis patients.⁸¹

74. *American Lung*, 507 So. 2d at 189.

75. *Id.* 185.

76. *Id.*

77. Importantly, in 1920, in the matter of *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (La. 1920), the Louisiana Supreme Court interpreted Louisiana mineral law to hold that perpetual reservations of mineral rights—the mineral estates common in other jurisdictions—were not supported. Thus, even had the ALA reserved their mineral rights in 1923, those rights would have long lapsed by the time of the dispute herein in 1975. Indeed, this problem much later was identified and remedied by the passage of Louisiana Revised Statutes section 31:159, which authorized the permanent retention of mineral rights by private owners when donating the land's surface to the State.

78. *American Lung*, 507 So. 2d at 185.

79. *Id.*

80. *Id.*

81. *Id.*

In 1975, the ALA sued the State of Louisiana in an attempt to recover the donated land on grounds that “the land was no longer being used for the donative purpose.”⁸² This suit was dismissed by the district court, and the ALA appealed.⁸³ Before resolving the appeal, the two parties reached a settlement.⁸⁴ A 1977 notarial act was passed to this effect, entitled a “Compromise Agreement.”⁸⁵ The document provided the ALA \$75,000 and 212.51 acres of the property and reserved for the State 161.88 acres of the property, including the land upon which the Greenwell Springs Tuberculosis Hospital was built.⁸⁶ The State agreed to “convey, assign, and quitclaim *all right, title, and interest* it may have . . . in the 221.51 acres” of land that the ALA received.⁸⁷ The ALA likewise agreed to “convey, assign, and quitclaim *all right, title and interest* it may have had in the 161.88 acres” of land that the State received.⁸⁸ Further, the notarial act provided that the parties:

Abandon[ed] any pending or future litigation with regard to the right to such property and expressed that the parties were to receive their respective properties with freedom to use it in any

82. *Id.* Such changes in uses are not uncommon for ancient donations. One such problematic donation for the State was the original State Wildlife Refuge donation by the Ward and McIlhenny families in 1911. Though donated solely for the conservation of wildlife, this coastal land represented an attractive nuisance for the purposes of mineral leasing. As this donation predated the *Frost-Johnson* decision, its mineral reservation by the donors had lapsed. Each time the State attempted to lease the land for minerals, the Ward and McIlhenny heirs challenged such action by suing for a violation of the donative intent. *See Reily v. State*, 864 So. 2d 223 (La. Ct. App. 2003); *Reily v. State*, 533 So. 2d 1341 (La. Ct. App. 1988); *State v. Ward*, 314 So. 2d 383 (La. Ct. App. 1975). The land had not been donated for mineral production and thus could not be used by the State for that purpose. It took a century of post-*Frost-Johnson* litigation and negotiation for this donation limitation to be resolved, finally culminating in a complex settlement between the heirs and the State in 2023. *See Settlement Packet, Reily v. State*, No. C-81-42886-I (15th. Dis. Ct. Vermilion Parish). Similar problems effectuating donative intent have occurred in situations in which land was donated for use as a segregated school. Because such uses are now prohibited, several donations for those purposes have failed. *See, e.g.*, La. Atty. Gen. Op. No. 08-0352 (noting the non-enforceability of donation provisions requiring racial segregation in schools); La. Atty. Gen. Op. No. 08-0353 (same).

83. *American Lung*, 507 So. 2d at 185.

84. *Id.*

85. *Id.* at 185–86.

86. *Id.* at 186.

87. *Id.* at 186 (emphasis added).

88. *Id.* (emphasis added).

lawful manner or for any lawful purpose.⁸⁹

The Compromise Agreement also stated that each party was expressly bound to its contents and obligations.⁹⁰ A companion document to this agreement was drafted and titled “Act of Exchange,” thereby signifying the arrangement effected between the parties.⁹¹

The genesis of the new dispute began in 1979 when the ALA executed a mineral lease on the 221.51 acres it received in the Compromise Agreement.⁹² Then, in 1983, the Louisiana State Mineral Board (SMB)⁹³ publicly advertised that same 221.51 acres for mineral leasing.⁹⁴ When the ALA protested this public advertisement, at the SMB’s request, the Louisiana Attorney General opined that the mineral rights of the 221.51 acres belonged to the State.⁹⁵

The SMB continued to publicly advertise the mineral lease, and the ALA filed suit claiming ownership of the mineral rights.⁹⁶ The SMB filed exceptions of no right of action and no cause of action, which the trial court sustained and the action was dismissed.⁹⁷ The court of appeal affirmed this judgment, finding that the constitutional prohibition⁹⁸ on the sale of mineral rights on state-owned property applied to any “alienation of mineral rights,” as occurred in this case.⁹⁹ The basic premise of the SMB’s position in this matter was that, when the land was transmitted to the State without a mineral reservation, the State obtained the surface and the minerals.¹⁰⁰ However, when the State conveyed the ALA’s 221.51 acres back to it in 1977, that conveyance was limited by Louisiana Constitution Article IX, Section 4(A)’s prohibition on the alienation of

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 187.

93. The State Mineral Board was renamed in 2009. Act No. 196, 2009 Acts 1981–2010. Though it still exists in the form that it did at the time of the *American Lung* decision, its name is now the State Mineral and Energy Board. It is referred to herein according to its legal name at the time that it is being referenced.

94. *American Lung*, 507 So. 2d at 187.

95. *Id.*

96. *Id.*

97. *Id.*

98. LA. CONST. art. IX, § 4(A) (“The mineral rights on property sold by the state shall be reserved . . .”).

99. *American Lung*, 507 So. 2d at 184.

100. *Id.* at 187.

State-owned minerals.¹⁰¹ The Louisiana Supreme Court granted certiorari on the ALA's application.¹⁰²

Reaching its conclusion in this case, the Court discussed at length whether the Compromise Agreement and Act of Exchange between the parties constituted a "sale" for purposes of the constitutional prohibition on the sale of State-owned minerals.¹⁰³ This discussion is the crux of the case. The SMB's position was that the prohibition in Louisiana Constitution Article IX, Section 4(A) applies not just to sales but to all alienations of property, including exchanges and compromise agreements.¹⁰⁴ To evaluate this argument, the Court looked to Louisiana jurisprudence and the Louisiana Civil Code.¹⁰⁵

Louisiana Civil Code Article 2660 defines an exchange as "a contract by which the parties to the contract give to one another one thing for another, whatever it be, except money; for in that case it would be a sale."¹⁰⁶ In *Womack v. Sternberg*,¹⁰⁷ the Louisiana Supreme Court found that a true exchange is legally equivalent to a sale.¹⁰⁸ In addition, Louisiana Civil Code article 2667 states that "all of the other provisions relative to a contract of sale apply to the contract of exchange. And in this last contract, each of the parties is individually considered both as a vendor and vendee."¹⁰⁹ The *American Lung* Court quickly dispelled the notion that the transaction between the parties was an exchange, finding that "the companion documents . . . constituted together a single transaction, a single compromise of conflicting claims to the ownership of the entire 371.77 acres."¹¹⁰ Rather, the Court found that this transaction was a compromise.¹¹¹

101. This prohibition was not new in 1977. Indeed, Louisiana Constitution Article IX, Section 4(A), was merely a continuation of Louisiana Constitution 1921 Article IV, Section 2. Moreover, the Louisiana Supreme Court had long held that the original iteration of this prohibition was self-effectuating and reserved the minerals associated with State property regardless of any explicit reservation of those minerals in transfer documents. *Lewis v. State*, 156 So. 2d 431, 434–35 (La. 1963) (noting that the constitutional reservation of minerals in LA. CONST. art. IX, sec. 4 is automatic).

102. *American Lung*, 507 So. 2d at 184.

103. *Id.* at 189–90.

104. *Id.* at 189.

105. *Id.* at 189–90.

106. LA. CIV. CODE art. 2660.

107. *Womack v. Sternberg*, 172 So. 2d 683 (La. 1965).

108. *Id.* at 685.

109. LA. CIV. CODE art. 2667.

110. *American Lung*, 507 So. 2d at 189.

111. *Id.*

Louisiana Civil Code article 3071 states:

A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

The Court recognized that the agreement between the parties as contained in the Compromise Agreement and Act of Exchange fell into the category of a “compromise” as defined by the Civil Code.¹¹² In coming to their agreement, the parties both aimed to end the lawsuit by mutual consent to “the hope of gaining and the risk of losing.”¹¹³ Additionally, two considerations influenced the form of the agreement—an “Act of Exchange.” First, the ALA needed the Chief Executive of the State (i.e., the Governor) to approve a land title resolution rather than an appointed attorney.¹¹⁴ Second, the caution of the notary involved in the matter influenced the use of conveyance language in the Act of Exchange.¹¹⁵ Despite this conveyance language, the Court concluded that the transaction was a compromise rather than a sale or an exchange of property.¹¹⁶

In support of this conclusion, the Court cited Planiol’s *Treatise on the Civil Law*.¹¹⁷ The treatise explains that a compromise does not grant new rights, but recognizes those rights to prevent further litigation.¹¹⁸ An act such as this is “not an act transferring rights, but purely an act in recognition, or declaratory, of such rights.”¹¹⁹ Further, “neither party acquires the thing of the other.”¹²⁰ The Court found that “with respect to the two land parcels and the title thereto, it was . . . purely an act in recognition or declaration of the original rights of the respective claimants, not an act transferring rights.”¹²¹

112. *Id.*

113. *Id.*

114. *Id.* at 190.

115. *Id.*

116. *Id.* at 191.

117. *Id.* at 190.

118. *Id.*

119. MARCEL PLANIOL, 2 TREATISE ON THE CIVIL LAW 2295 (11th ed. La. S. L. Inst. Trans. 1959).

120. *Id.*

121. *American Lung*, 507 So. 2d at 190.

Concerning the \$75,000 given to the ALA by the State, Planiol explains that compromises can also contain translative clauses without affecting its status as a compromise. Planiol's Treatise states:

. . . the parties can agree that the [object] should remain in one of them, for a thing determined or a sum of money which the other pays. This thing or this sum which is not included in the object in litigation comes from the patrimony of one of the parties and falls into that of the other. To that extent the contract really transfers, and the consequences which it produce[d] are inverse to those which are enumerated above; transcription [recording] is necessary if the thing thus assigned is an immovable; the transcription can serve as a just title (Orleans, 23 Nov. 1893), D.94.2.287, S.95.2.9), and the warranty is due to the person acquiring. The object of the transfer is only the thing or the sum promised and not a corresponding part of the object in dispute; the latter remains in its entirety with its possessor by virtue of the original title which he invoked before the compromise, and the thing or the sum which was stipulated should be considered as the price of the waiver obtained.¹²²

With these authorities in mind, the Court held that this case concerned a compromise, not a sale or exchange, and therefore Louisiana Constitution Article IX, Section 4(A)'s prohibition on the alienation of mineral rights did not apply¹²³. The Court noted that this interpretation strictly applied to a good faith compromise of competing claims to real property.¹²⁴ The Court then addressed the district court's error in sustaining the SMB's exception of no right of action by explaining that the Louisiana Legislature authorized the ALA to file suit against the state based on ownership matters relating to the Greenwell Springs property.¹²⁵

As the Court stated, the heart of *American Lung* laid in determining whether the Compromise Agreement and Act of Exchange between the parties constituted a "sale" in terms of La. Const art. IX, sec. 4(A).¹²⁶ The Court's opinion does not directly speak to the question of whether the State may alienate immovable property. Where the case has been used as a prohibition on the alienation of all state-owned property, this likely stems from the Court's discussion of principles upon which this Constitutional

122. PLANIOL, *supra* note 119, at 13, pt. 2, no. 2297, n.6.

123. *American Lung*, 507 So. 2d at 191.

124. *Id.*

125. *Id.*

126. *Id.* at 189–90.

provision was founded. The Court applied the principles to the case's facts to explain the prohibition on alienating state-owned property.¹²⁷ However, the Court made no assertion that these principles should be applied to other forms of state-owned immovable property.¹²⁸

American Lung does not speak directly to the alienation of title. However, the way that it references the rights exchanged in a settlement or compromise forecloses an alienation of title. Moreover, because mineral rights are dependent upon that title, a title alienation would be a violation of Louisiana Constitution Article IX, Section 4(A). Thus, a logical extension of the *American Lung* decision has the effect of preventing State bureaucrats (and even individual elected officials) from transferring or alienating sovereign title.¹²⁹ The basic argument for this interpretation is that when the State claims land, that claim is a science-based determination that the title is owned by the State. It is a good faith belief that the State owns property that is, as to navigable waterways, inalienable under the Constitution.¹³⁰ Accordingly, settling a lawsuit or other dispute for less than that scientifically-determined title is a traversal of both Louisiana Constitution Article IX, Sections 3 and 4(A). To compromise in an action regarding a disputed land that is in good faith believed to be State-owned is simply relinquished with no legal authority. Such an action, in the words of *American Lung*, is not a recognition of rights to the land,¹³¹ but rather an alienation (a divestiture) of immovable property and the associated mineral rights that the State owns. Such a scenario is not to say that the State's scientific-based claim passes muster under judicial scrutiny.¹³² However, a judicial determination that the State never owned or has, pursuant to the terms of the Civil Code lost, land provides a lawful basis for a relinquishment of the State's claim of ownership. In effect, such a determination serves as a check and balance on the executive branch's assertion of ownership—precisely the reason for the tripartite governmental scheme present in the United States. Thus, only complete litigation of title in which a court determines that the science is wrong and

127. *Id.* at 188–89.

128. *Id.* at 191.

129. As noted elsewhere in this Article, certain immovable property is alienable by the State and, indeed, is regularly alienated pursuant to legislative grants of authority. However, the Louisiana Constitution Article IX, § 3 prohibition on the alienation of water bottoms identifies a class of land that cannot be alienated by bureaucratic or elected official action.

130. LA. CONST. art. IX, § 3.

131. *American Lung*, 507 So. 2d at 190.

132. *E.g.*, *Sid-Mar's Rest. & Lounge, Inc. v. State ex rel. Governor*, 142 So. 3d 188 (La. Ct. App. 2014), *writs denied*, 149 So. 3d 267 (La. 2014).

identifies the actual ownership can divest State-claimed lands. Conversely, a settlement of title is a compromise by civil servants or contract lawyers and is prohibited by the terms of the Constitution and by the Court's analysis in *American Lung*. Moreover, simply relinquishing title to land for which the State asserts a good faith claim of ownership, without a judicial determination to the contrary, would also represent the divestiture of a State thing of value in violation of Louisiana Constitution Article VII, Section 14(A).

Returning to *American Lung*, specifically, neither in the original donation to the State in 1924 nor in the following Compromise Agreement and Act of Exchange in 1977 and 1978 were any mineral rights expressly reserved by any party.¹³³ Yet, as noted by the Court, both the 1921 Louisiana Constitution and 1974 Louisiana Constitution contained “nearly identical language, requir[ing] that in all cases the mineral rights on property sold by the state shall be reserved.”¹³⁴ This language derives from principles designed to protect the public interest. Quoting Judge Albert Tate, Jr. in his concurrence in *King v. Board of Commissioners for the Atchafalaya Basin Levee District*,¹³⁵ a reason for this constitutional provision is:

to prevent the plundering of valuable state assets “for the benefit of the privileged few with inside knowledge or connections, rather than used for the benefit of all people in whom the title to the minerals under State lands is vested.”¹³⁶

The constitutional provision further protects the public interest by “preventing immediate divestiture of title, preserv[ing] valuable State assets for future generations.”¹³⁷ In this regard, Judge Tate was pontificating based upon experience having lived through several Louisiana political regimes who had taken advantage of the public's trust for their own benefit—the same actions referred to in the 2017 bankruptcy hearing when the judge observed that “Louisiana hasn't always had good protectors.”¹³⁸

133. *American Lung*, 507 So. 2d at 187–88.

134. *Id.* at 188.

135. *King v. Bd. of Comm’r for the Atchafalaya Basin Levee Dist.*, 148 So. 2d 138 (La. Ct. App. 3d 1962).

136. *Id.* at 150.

137. *American Lung*, 507 So. 2d at 188.

138. Transcript of Court Record at 80, *In re: Shoreline Energy, LLC, et al.*, (Bankr. S.D. Tex. Feb. 23, 2017) (No. 16-35571) (on file with the authors).

Evidently, the constitutional redactors, the Legislature, and the people who voted to ratify the 1921 and 1974 Constitutions were similarly concerned with the temptation of, and possibility for, fraud and corruption by a select few wasting away the State's valuable resources. Although not explicitly extending this notion to encompass all state-owned property, the *American Lung* Court, especially in its citation to Judge Tate's observations in the *King* case, strongly suggests that the Court expected a similar interpretation of the Constitution to extend not just to minerals, but also to at least certain immovable property.¹³⁹

Although the *American Lung* case proximately decided whether a compromise agreement and an act of exchange triggers the constitutional prohibition on the sale of state-owned mineral rights, an extension of the *American Lung* decision to provide an absolute prohibition on all alienations of State-owned immovable property, with some caveats, is not unreasonable.

VII. WHAT IS THE SIGNIFICANCE OF THE TWO O'CLOCK BAYOU CASE?

Another component of Louisiana's Constitution that limits the authority of government actors to alienate immovable State property is Louisiana Constitution Article XII, Section 10(B). At first glance, this provision, one that provides for the State's sovereign immunity from suit in most cases, appears to have nothing to do with immovable property. However, analyzing the impact of this provision through the subsequent interpreting jurisprudence demonstrates the contrary. In its entirety, Louisiana Constitution Article XII, Section 10(B) states:

Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

This provision is best understood in comparison to its preceding provision. In this regard, Louisiana Constitution XII, § 10(A) states:

No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

As demonstrated in the matter of *Two O'Clock Bayou Land Company, Inc. v. State (Two O'Clock Bayou)*,¹⁴⁰ these two provisions, when read in

139. *Id.* at 188.

140. 415 So. 2d 990 (La. Ct. App. 1982).

concert, stand for the people's waiver of the State's immunity when a tort or a contractual breach has occurred. All other types of suits against the State are authorized either by statute or by a waiver of immunity by the State's chief legal officer, the Attorney General. Importantly included in the category of cases for which the State may not be hailed into court without its consent are petitory, possessory, or declaratory actions—the primary means for determining ownership to immovable property.¹⁴¹ The significance of this immunity cannot be understated in the context of the prohibitions in Louisiana Constitution Article IX, Sections 3 and 4. As demonstrated in *Two O'Clock Bayou*, even the judicial check on alienations of the State's immovable property (i.e., adjudication of ownership discussed in the previous Section) is substantially limited.

Two O'Clock Bayou largely details the steps a plaintiff would have to take in order to bring a title ownership suit against the State.¹⁴² However, it also provides critical insight into the concept of sovereign immunity in the context of an ownership dispute regarding the bed of Two O'Clock Bayou located in St. Landry Parish.¹⁴³ Albeit a short case, *Two O'Clock Bayou* succinctly discusses the constitutional redactors' intent behind the phrasing of Louisiana Constitution article XII, Section 10—the article that both creates and allows a waiver of sovereign immunity in certain suits against the State.¹⁴⁴

The *Two O'Clock Bayou* case arises out of a lawsuit by the State and the St. Landry Parish Police Jury against the Two O'Clock Bayou Land Company, Inc. (the Land Company).¹⁴⁵ In 1976, the State filed suit seeking a declaratory judgment that Two O'Clock Bayou was a navigable body of water and injunctive relief to prevent the Land Company from obstructing the bayou by a cable it had erected to span Two O'Clock Bayou.¹⁴⁶ The district court found that Two O'Clock Bayou was navigable and subject to public use and enjoined the use and placement of the obstructive cable.¹⁴⁷ The Third Circuit Court of Appeal affirmed this judgment and, in doing so, concluded that deciding the title holder of the bayou was unnecessary at present.¹⁴⁸

Subsequently, the Land Company filed a separate suit against the State seeking a declaratory judgment that the Land Company, through its

141. *See generally id.*

142. *Id.*

143. *Id.*

144. *Id.* at 991–92.

145. *Id.* at 991.

146. *Id.*

147. *Id.*

148. *Id.*

ancestor-in-title, was the owner of the bed of the bayou within certain sections of land that were patented by the State in 1860.¹⁴⁹ The Land Company alleged that the State's 1860 patents conveyed all lands within the patented sections, notably with no reservation of rights by the State, meaning the Land Company owned the land outright.¹⁵⁰ Alternatively, if the court determined that Two O'Clock Bayou was not navigable in either 1812 or 1860 but is now navigable and owned by the State, the Land Company sought a declaration that the former Louisiana Civil Code article 453¹⁵¹ together with Louisiana Constitution Article IX, Section 3, were unconstitutional.¹⁵² The Land Company alleged that this determination would violate the United States Constitution as an impermissible taking of private property without just compensation and would also violate the Constitution as being an *ex post facto* law.¹⁵³

In response, the State filed peremptory exceptions of sovereign immunity and no cause of action, which were both heard on May 8, 1981.¹⁵⁴ At the hearing, the district court sustained the State's exception of sovereign immunity, to which the Land Company appealed, resulting in the now-reviewed published opinion.¹⁵⁵ On appeal, the Louisiana Third Circuit noted at the outset that the disposition of the case required an inquiry into whether the State could be sued without its consent.¹⁵⁶ Article 12, Section 10 of the Louisiana Constitution of 1974 provides the following:

- (A) No immunity in Contract and Tort: Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

- (B) Waiver in Other Suits: The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity

149. *Id.*

150. *Id.*

151. In 1982, Louisiana Civil Code article 453 was Louisiana Civil Code articles 450 and 452.

152. *Id.* La. Civ Code. art. 453 and La. Const. art. IX, § 3 effectively provide that the beds of navigable streams are public and inalienable by the State of Louisiana. Consequently, the determination of navigability is critical to an analysis of ownership of such land.

153. 415 So. 2d at 991.

154. *Id.*

155. *Id.*

156. *Id.*

from suit and liability.

- (C) Procedure; Judgments: The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from the funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.¹⁵⁷

The State asserted that the Land Company's suit was not a suit based in contract or tort, meaning that legislative authorization was not required, but rather an "other suit" within the meaning of subsection (B), such that legislative authorization was required.¹⁵⁸ It contended that a suit to determine ownership falls into the category of "other suits," and that the State was immune from this type of action as the legislature had not authorized the suit against the State.¹⁵⁹

The Louisiana Third Circuit agreed with the State of Louisiana.¹⁶⁰ Central to this decision, the Third Circuit evaluated the drafting of Louisiana Constitution Article XII, Section 10 in conjunction with existing Louisiana jurisprudence.¹⁶¹ *Daigle v. Pan American Production Company* provides that, prior to the adoption of the Louisiana Constitution of 1974, an action to establish title or ownership to real rights claimed by the State could only be brought after legislative authorization was obtained by the proposed litigant.¹⁶² In addition, Judge Paul B. Landry, Jr.'s concurring-dissenting opinion in *DiVincenti Bros v. Livingston Parish School Board* states the following:

The debate on the article during the constitutional convention of 1974 indicates intent to clothe the sovereign with immunity from suit and liability in all cases except suits in tort and contract. The convention rejected amendments to proposed Article 12, Section 10, which would have terminated the doctrine of sovereign immunity in its entiretyThe clearly expressed intent was to

157. LA. CONST. art. 12, § 10 (1974).

158. *Two O'Clock Bayou Land Co.*, 415 So. 2d at 992.

159. *Id.*

160. *Id.*

161. *Id.*

162. 108 So. 2d 516 (La. 1958).

adopt the doctrine of sovereign immunity as part of our basic law, and to waive that immunity in the field of contracts and torts as exceptions to the general rule.¹⁶³

Moreover, the following exchange by delegates to the constitutional convention gives insight to the meaning of “other suits” as contemplated by Louisiana Constitution Article XII, Section 10(B):

Mr. Drew: Don, with reference to your statement as to all other actions, would you tell this body what those all other actions which you are not covering include?

Mr. Kelly: Well, Mr. Drew, I don’t think that really it would be incumbent, and I can’t describe and particularize all other actions, but as I understand it, I have come with an exception first, and any and all other actions against the state would require the approval of your legislative body. The only thing that I’m saying that we do not need your approval to institute suits is suits in contracts, suits for personal injury and suits for property damage. *All other suits would require the old legislative approval method. Now, what those might be, I can imagine titles to land; that was raised here, yesterday. Obviously that would be covered before anyone could contest the title to property upon which the State Capitol rests, well, they would have to seek legislative approval in order to institute and file such a suit.*¹⁶⁴

From this exchange, the Louisiana Third Circuit Court of Appeal surmised that the framers of Louisiana Constitution Article XII, Section 10(B) did not intend that suits against the State to determine ownership of land be included in the waiver of sovereign immunity from suits based in contract or injury to property.¹⁶⁵ Rather, these types of suits would be classified within the “other suits” provision of Section 10(B) and therefore required legislative authorization for the institution of the suit.

The *Two O’Clock Bayou* Court found that the Land Company’s suit, although involving the consideration of state patents or contracts, was in nature a declaratory judgment to determine title and ownership of land and not a suit for damages arising from a breach of contract.¹⁶⁶ Indeed, the

163. 355 So. 2d 1, 8 (La. Ct. App. 1977).

164. Verbatim Transcripts, State of Louisiana Constitutional Convention of 1973, Vol. VI, Day 21, p. 40 (emphasis added).

165. *Two O’Clock Bayou Land Co., Inc.*, 415 So. 2d at 992.

166. *Id.* at 993.

Land Company's suit was precisely the kind contemplated by the drafters of the La. Const art. XII, sec. 10(B) and, as such, required legislative authorization for the institution of the Land Company's suit. As no authorization was obtained, the State's exception of sovereign immunity was properly sustained by the district court.¹⁶⁷

As the *Two O'Clock Bayou* case made clear, "the framers of the Louisiana Constitution did not intend that suits against the State to determine ownership of land be included in its waiver of sovereign immunity from suits in contract or injury to property."¹⁶⁸ The citizenry, in voting to approve this provision, intended for ownership disputes to be subject to sovereign immunity unless a legislative waiver has been granted. Although the court found that the State had not intended to entirely waive sovereign immunity in these types of cases, the court recognized that only the Legislature is provided the ability to authorize certain suits in certain situations.¹⁶⁹

Theoretically, this ability to waive sovereign immunity does provide a check on bad actors in this State who have the authority to divest public property for improper means. The ability to waive sovereign immunity in select situations provides that the Legislature, acting as a full body and by a majority of its votes, can choose to expose the State to suit under circumstances where it deems this exposure fit.

Under this analysis of Louisiana Constitution Article XII, Section 10(B), the State must have a means of providing a check on improper alienation of State property. Given the bureaucratic authority to divest public property in the certain statutory situations reviewed above, there will almost certainly be a bad actor looking for personal gain at some point in time. This may not be common, and it may, in fact, be quite rare, but without a check (here, a review by the entire Legislature), bad actors would have unreasonable authority to impact the State's assets and potentially leave private property owners with no recourse to challenge or correct the impacts of such unilateral action on their rights.

The Louisiana Third Circuit in the *Two O'Clock Bayou* case recognized that a suit for declaratory judgment to clarify ownership of a piece of land falls into the category of "other suits" as contemplated by the Louisiana Constitution of 1974.¹⁷⁰ Its holding that the State has sovereign immunity from suit in this case is not a sweeping declaration of sovereign immunity in all cases involving the State's title to land.¹⁷¹ While it is true

167. *Id.*

168. *Id.*

169. *Id.* at 992–993.

170. *Id.* at 992.

171. *Id.*

that the court found that the State had sovereign immunity in the *Two O’Clock Bayou* case, the court based this immunity on the fact that the Land Company did not receive legislative authorization prior to instituting its suit, not because the State could not be sued in a case of this type.¹⁷² The plaintiff’s mistake entitled the State to sovereign immunity, not the nature of the case at issue. Notably, the court determined that a suit to determine ownership of land does fall into the category of “other suits,” and these other suits can be instituted after legislative authority has been granted.¹⁷³ Absent such authorization, the plaintiff cannot proceed.¹⁷⁴

The decision to allow the Legislature to authorize certain suits is as much a way of choosing when it should right the wrongs of individual state actors as it is of preventing even more State resources and time from being wasted in defending suits with little-to-no merit. By the same token, the requirement for authorization provides an opportunity for plaintiffs to bring their claim to the Legislature for authorization as a preliminary matter, and, in the event that authorization is not granted, the plaintiff would not waste his own resources in bringing suit against the state when the claim might not have promise, and an adverse judgment is inevitable. The authorization requirement serves both the potential plaintiff and the State.

Ultimately, the *Two O’Clock Bayou* case, while largely a discussion of whether a suit for a declaratory judgment of ownership falls into Louisiana Constitution Article XII, Sections 10(A) or (B), implicitly recognized a check on bureaucratic authority to alienate property. The decision to allow suit against the State is left to the Legislature, the elected officials that represent the citizens of Louisiana, the latter of which would suffer the most harm if bad State actors go unchecked. Both the framers of the Louisiana Constitution of 1974 and the Louisiana Third Circuit felt it appropriate to classify suits for declaratory judgment regarding ownership of land as “other suits,” thereby leaving the decision up to the Legislature—the elected officials that represent the people of Louisiana—when to even allow suits against the State to challenge title.

VII. DISCUSSION AND CONCLUSION

Considering the above-discussed prohibitions in Louisiana Constitution Article IX and XII, it is clear that the redactors of the Constitution did not intend to vest alienation authority—especially for

172. *Id.* at 993.

173. *Id.* at 992.

174. *Id.* at 993.

sovereign property—in the hands of bureaucrats and public servants. As the Louisiana Supreme Court observed the importance of mandating mineral reservations to protect “valuable State assets for future generations,”¹⁷⁵ the same has to be said to be the reason for the constitutional prohibitions discussed above. Clearly, the Louisiana Supreme Court in *American Lung* and the Louisiana Third Circuit in *Two O’Clock Bayou* represent the judiciary’s affirmation of the general distrust in the bureaucratic management of State assets. Moreover, *American Lung*, though admittedly about mineral rights reservations, articulates the critical importance of removing certain property alienation decisions from bureaucratic and individual elected official authority.¹⁷⁶ For this reason, *American Lung* can be said to be an appropriate shorthand for a judicial prohibition on the alienation of immovable title in litigation settlements.

Indeed, the Louisiana Supreme Court has recently again reaffirmed its limitation on individual government actors’ unilateral action to alienate State assets. In the matter of *Crooks v. State Through Department of Natural Resources* the Court held that the State Treasurer could not unilaterally authorize the expenditure of State funds to satisfy an adverse judgment against the State.¹⁷⁷ Rather, in this case, in which a mandamus action was brought by certain landowners for past mineral royalties found to be due to them by the State,¹⁷⁸ such authorizations were held only to lie with the Legislature acting as a whole.¹⁷⁹ Again, as with *American Lung*, the *Crooks* decision is further support for the absence of legal authority for the alienation of State sovereign things lying with individual government actors. In short, these actors are charged with protecting the State’s (i.e., the people’s) stuff and only the people’s representatives (i.e., the Legislature) can authorize deviations from the constitutional protections of that stuff.

Certainly, as discussed above, State actors are not wholly without authority to alienate either full ownership or dismemberments of ownership of certain State property. There is a statutory means for alienating certain State land; but that means is reserved for alienable property. This statutory authorization does not provide for the alienation

175. *American Lung*, 507 So. 2d at 188.

176. *Id.*

177. 359 So. 3d at 452.

178. *Id.* at 449.

179. *Id.* at 452. In the end, though the Court rejected mandamus as a means for effectuating such money judgments against the State, the Legislature did act in this matter in the 2023 Regular Session by allocating the prayed for funds through the general budget bill. Act No. 397, 2023 Acts, §20-950(A)(10) (supplemental appropriations not impacted by line items vetoes).

of land owned by the State by virtue of its inherent sovereignty (e.g., navigable water bottoms). That land is exempted by constitutional fiat from alienation.

Though never explicitly so stated in the Constitution, the Revised Statutes, or jurisprudence, the only conclusion that can be reached regarding the question of whether the State, through its individual agents (i.e., civil servants or individual elected officials) can sever immovable title claims by way of anything less than complete litigation finding that the land never belonged to the State or by the statutorily-authorized alienation mechanisms, is inescapable. Certainly, the settlement of litigation is essential to resolving disputes in ways that do not result in complete loss to any one party. However, the State, as explained here, cannot settle immovable title to its land; it also cannot settle title by way of alienating its minerals.

What has not been prohibited by the Constitution, the Legislature, or the courts is settling immovable property disputes that arise as a result of mineral rights claims via an allocation of mineral royalties while not relinquishing the underlying title to the minerals or the land. Moreover, State actors also possess the authority to alienate some immovable title rights by way of boundary agreements.¹⁸⁰ However, boundary agreements are ill advised on water courses as those boundaries are bound to change over time.

Thus, royalty allocations are the most reasonable approach to settling mineral claim disputes with the State without running afoul of existing prohibitions on the alienation of immovable title. Indeed, because such royalty allocation settlements typically last only for the duration of a mineral lease or unit production, though equity suggests that these settlements likely will not change over time, at the termination of such leases or unit production, each party (public and private) is protected by reserving the right to protect its interests in title as necessary. In other words, these resolutions hold out the possibility that any party may litigate title disputes at any time if the on-ground realities or equities have changed so much that the existing royalty allocation settlements are no longer viable or if any party simply seeks a final judicial declaration of their property rights.

180. LA. REV. STAT. §§ 41:1131, *et seq.*