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IMPREScriptIBLE MINERAL INTERESTS IN LOUISIANA

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The purpose of this article is to familiarize the practitioner with a curious twist in Louisiana mineral law: the imprescriptible mineral interest in land. Such interests are an exception to the Louisiana system of prescriptible mineral interests; a system founded on a public policy which fosters the early return of the severed mineral right to the title from which it emanated.¹ Imprescriptible mineral servitudes may be created in two ways: (a) by a reservation of the mineral rights in a sale to the state or federal government or any other entity with the power to expropriate, or (b) by a sale of land from the state into private ownership. Each method will be dealt with separately. First, however, a brief review of general principles of Louisiana mineral law is necessary to aid in understanding imprescriptible mineral interests.

GENERAL PRINCIPLES OF LOUISIANA MINERAL LAW

With limited exception, Louisiana law does not permit the creation of a mineral estate distinct from and independent of the full title to the land.² A landowner who sells or reserves the minerals in his property merely creates a mineral servitude, which is defined as 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 A mineral right is considered a real right and incorporeal immovable which may be freely transferred as an item of commerce. If not used within ten years from the date of its creation, the mineral servitude will lapse by virtue of liberative prescription and return to the title out of which it was created.⁴

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1. See generally *Hightower v. Maritzky*, 194 La. 998, 195 So. 518 (1940); *Bodcaw Lumber Co. v. Magnolia Petroleum Co.*, 167 La. 847, 120 So. 389 (1929).

2. E.g., *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

3. LA. MIN. CODE: LA. R.S. 31:21 (1974).

4. LA. MIN. CODE: LA. R.S. 31:27 (1974); e.g., *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

Although a mineral servitude cannot last for over ten years without use,⁵ it may be created for an express term of less than ten years in which case it will lapse upon expiration of that term, irrespective of use which would otherwise be sufficient to keep it alive.⁶ Contracts attempting to avoid or extend the ten-year prescriptive period have been refused enforcement as violative of public policy.⁷ Once the

5. The use sufficient to avoid the accrual of the ten year prescription of non-use is defined in LA. MIN. CODE: LA. R.S. 31:29 (1974) as the commencement of good faith operations undertaken for the discovery and production of the minerals which are the subject of the servitude. If the servitude is to be preserved by the drilling of a well in search of oil and gas, the well, once commenced, must additionally be drilled in good faith to a depth at which there is a reasonable expectation of commercial production. LA. MIN. CODE: LA. R.S. 31:29 (1974). The prescription of non-use may also be interrupted by voluntary acknowledgment in writing by the owner of the land burdened by the servitude. LA. MIN. CODE: LA. R.S. 31:54 (1974). Such acknowledgment, however, can only waive prescription which has accrued as of the date that the acknowledgment is executed.

If the servitude reserved encompasses all minerals, and not just oil and gas, the use of the servitude with respect to any such mineral will preserve the servitude in its entirety as to all minerals, including oil and gas. LA. MIN. CODE: LA. R.S. 31:40 (1974). For example, if commercial gravel deposits existed on the area covered by the mineral servitude, the utilization of the servitude for purposes of removing gravel would preserve the servitude as to all other minerals covered by the servitude as created. Unit operations conducted on lands other than the lands burdened by the servitude will interrupt prescription on the servitude only as to that part of the servitude tract which is included within the boundaries of the unit, unless the parties expressly provide that such off-premises unit operations will interrupt prescription as to the entirety of the servitude, both inside and outside of the unit. See LA. MIN. CODE: LA. R.S. 31:72 & 75 (1974).

6. See, e.g., LA. MIN. CODE: LA. R.S. 31:25 & 27(4) (1974). See *Texas Co. v. Crawford*, 212 F.2d 722 (5th Cir. 1954); *Leiter Minerals Inc. v. California Co.*, 241 La. 915, 132 So. 2d 845 (1961).

7. See, e.g., *Ober v. McGinty*, 66 So. 2d 385 (La. App. 2d Cir. (1953)). (A mineral reservation in a sale which gave an option to renew a mineral servitude after ten years upon payment of a fixed price was held to be an attempt to evade the law of prescription; enforcement of the contract was refused.). Several cases, however, have endorsed a limited extension of the ten year prescriptive period by utilization of options to purchase at a future date incorporated into the terms of a long-term lease or other option agreement. See generally *Ober v. Williams*, 213 La. 568, 35 So. 2d 219 (1948); *Chicago Mill & Lumber Co. v. Ayer Timber Co.*, 131 So. 2d 635 (La. App. 2d Cir. 1961); LA. R.S. 31:28 (1974). The principal case in this area is *Chicago Mill & Lumber Co. v. Ayer Timber Co.*, *supra*, in which the landowner granted several ordinary leases with an option to the lessee to purchase the property at the end of the stipulated five year term of the lease, with the understanding that the sale would be subject to a mineral reservation at the time of the execution of the sale document. The original lease/option agreements provided that the minerals would remain in the landowner during the terms of the leases. The lessee subsequently exercised its option at the end of the five year terms of the leases. The minerals were reserved in the acts of sale executed in implementation of the option agreements, and minerals were ultimately discovered on the property more than ten years after the original lease/option

mineral servitude prescribes, the right to explore for and produce minerals returns to the owner of the land. The expectancy of a landowner in the extinction of an outstanding mineral servitude cannot be conveyed or reserved directly or indirectly.⁸ This expectancy is not a vested right. Thus a change in a prescriptive period, being remedial, does not interfere with substantive rights and may be applied retroactively without running afoul of the Constitution.⁹

A lesser interest in minerals than the servitude is the mineral royalty, defined as "the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another."¹⁰ The mineral royalty interest is also subject to a similar, though not identical, ten year prescription of non-use.¹¹ Understanding these principles facilitates an appreciation of the problems created by statutes which render mineral interests imprescriptible.

MINERAL RESERVATIONS IN SALES TO EXPROPRIATING BODIES

Privately-owned imprescriptible mineral interests in Louisiana date back to the Great Depression. During the 1930's, federal and state governments increased the number of public projects which required the acquisition of land.¹² Obviously, landowners in states where mineral estates of unlimited duration separate from the fee could be reserved were willing to convey their property to the government for less compensation than a Louisiana landowner whose mineral reservation might endure for only ten years without use.¹³

agreements, but less than ten years after the actual transfer of the lands to the lessee pursuant to the exercise of its option to purchase. The plaintiff, who was the current surface owner, argued that the lease/option agreements were designed to circumvent the public policy providing the foundation for the rule of liberative prescription applicable to mineral servitudes, but the court of appeal on rehearing held that prescription did not begin to run until the servitude was actually created upon the execution of the sale and the reservation of the minerals. Accordingly, the servitude was deemed preserved by the use which occurred within ten years from the date that the option had been executed.

8. LA. MIN. CODE: LA. R.S. 31:76 (1974). See *Hicks v. Clark*, 225 La. 133, 72 So. 2d 322 (1954).

9. See also *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945). See, e.g., *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951).

10. LA. MIN. CODE: LA. R.S. 31:80 (1974).

11. LA. MIN. CODE: LA. R.S. 31:85 (1974).

12. Currier, *The 1958 Louisiana Statutes On Liberative Prescription Of Mineral Interests*, 34 TUL. L. REV. 51 (1959); Comment, *Imprescriptible Mineral Reservations In Sales Of Land To The State And Federal Government*, 22 TUL. L. REV. 496 (1948).

13. *United States v. Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951); Currier, *supra* note 12; Comment, *supra* note 12.

As a result of these developments, the fairness of Louisiana's system of prescriptible mineral servitudes was questioned.¹⁴ In response to these problems the Louisiana legislature enacted Acts 68 and 151 of 1938, which made certain mineral reservations in land acquisitions by the state or federal government imprescriptible.¹⁵ These statutes required a determination of the purpose for which the land was acquired in order to determine whether a mineral reservation in the act of acquisition was imprescriptible.¹⁶ These Acts were repealed by Act 315 of 1940, which provided that prescription would not run against minerals reserved in sales to the federal government. Act 315 did not apply to land sales to the state government.¹⁷

14. Nabors, *The Louisiana Mineral Servitude And Royalty Doctrines: A Report To The Mineral Law Committee Of The Louisiana State Law Institute*, 28 TUL. L. REV. 172, 191 (1952).

15. *Id.* 1938 La. Acts, No. 68, §§ 1, 2, provided:

Section 1. Be it enacted by the Legislature of Louisiana, That whenever land situated in any spillway or floodway is sold to or acquired by the United States or the State of Louisiana, or any subdivisions or agencies thereof, for use in the construction, operation or maintenance of any spillway or floodway constructed, operated or maintained under authority of the Acts of Congress of May 15th, 1928, June 15, 1936, or June 22, 1936 (Flood Control Act), as amended, or as hereafter amended, or under authority of any other Act or Acts of Congress, and the owner of said land reserves or retains the mineral rights or the rights in and to the minerals in said land, said rights shall be imprescriptible.

Section 2. That all laws or parts of laws, general or special, as are inconsistent or in conflict herewith, be, and the same are, hereby repealed.

1938 La. Acts, No. 151, §§ 1, 2, provided:

Section 1. Be it enacted by the Legislature of Louisiana, That when real estate is acquired by the United States of America, the State of Louisiana, or any of its subdivisions from any person, firm or corporation for use in any public work and/or improvement, and, by the act of acquisition, oil, gas and/or other minerals or royalties are reserved, prescription shall not run against such reservation of said oil, gas and/or other minerals or royalties.

Section 2. That all laws and parts of laws in conflict herewith be, and the same are, hereby repealed.

16. Act 68, *supra* note 15, related only to lands acquired for use in connection with spillway or floodway projects, and Act 151, *supra* note 15, related to lands acquired for public works or improvement.

17. LA. R.S. 9:5806 (1950) (as it appeared prior to its repeal by 1974 La. Acts, No. 50, § 3). 1940 La. Acts, No. 315, §§ 1, 2, provided:

Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.

The enactment and repeal of the 1938 Acts raise questions of retroactivity which could result in litigation. Thus a few remarks concerning their impact are in order.

In *Whitney National Bank v. Little Creek Oil Co.*,¹⁸ Act 315 of 1940 was applied retroactively to render imprescriptible a mineral servitude created in 1932. Such retroactive application of Act 315 of 1940 was held constitutional in *United States v. Nebo Oil Co.*¹⁹ For the same reasons that statutes which affect prescription are applied retroactively without violating the Constitution,²⁰ the provisions of the 1938 Acts would probably also be held retroactive. Thus, a mineral servitude created in 1929 on land which was sold to the state or federal government in 1935, for example, might be rendered imprescriptible by either Act 68 or 151 of 1938. However, if both the 1938 Acts and the 1940 Acts are to be applied retroactively, certain problems may arise.

For example, a mineral reservation in a sale to the state in 1935, first rendered imprescriptible by the Acts of 1938, might then be rendered prescriptible by Act 315 of 1940, since the 1940 Act only applied to land sales to the federal government. The difficult question to answer in this situation is whether any effect at all should be given to the Acts of 1938, in the form of either an interruption or suspension of prescription. While no decision has addressed this precise question, some cases indicate a tendency to take limited account of repealed prescriptive statutes in computing the running of prescription under a new prescriptive statute. For instance, the doctrine of proportionate prescription could be applied to give the 1938 Acts the effect of a continuing interruption of prescription until Act 315 of 1940 took effect.²¹ This doctrine is applied as follows: "[I]f two years have run against a right under a ten year prescriptive statute at a time when the statute is changed to twenty years, prescription is 1/5 accrued under the old statute and the remaining 4/5 are computed under the new statute (16 years) instead of 18 years which would remain if the old statute were ignored entirely."²² Application

Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed.

Note that Section 1 of this statute only applied to the federal government.

18. 212 La. 949, 33 So. 2d 693 (1947).

19. 190 F.2d 1003 (5th Cir. 1951).

20. See notes 9 & 19, *supra* and accompanying text.

21. See *Whitworth v. Ferguson*, 18 La. Ann. 602 (1866); *Xanpi v. Orso*, 11 La. 57 (1837); *Goddard's Heirs v. Urquhart*, 6 La. 659 (1834).

22. Comment, *supra* note 12, at 503 n.45.

of this rule to the two years period while Acts 68 and 151 of 1938 were in effect would give the following results: (1) No prescription would accrue during the two-year period; (2) Prescription accruing before the 1938 Acts would be interrupted, thus; (3) The ten-year prescription would begin to run anew when Act 315 of 1940 took effect.²³ Alternatively, a court could say the existence of the act was an obstacle to prescription which did not eliminate prescription already accrued but simply suspended it to be renewed when the Act was repealed.²⁴ Thus, a mineral interest created in 1935 would prescribe for non-use in 1947. Or finally, a court could hold that the Acts of 1938 had no impact at all, and our hypothetical mineral servitude, created in 1935, would simply prescribe in 1945 from ten years non-use. Louisiana courts have provided no firm answer to this question.

Statutes of limitation in effect when a contract is executed are not fictitiously considered a part of the contract because the parties are presumed to have known that the limitation period might be changed.²⁵ Thus, mineral reservations made in sales to the state between 1938 and 1940 should not be treated any differently than a reservation made in a year prior to the 1938 Acts. However, one author has argued that mineral reservations made between 1938 and 1940 may not have been rendered prescriptible by Act 315 of 1940 because the 1938 Acts were expressed "in such positive terms as to negate the usual presumption that the parties knew that the statutory remedial period for exercising the mineral royalty or servitude might be changed."²⁶ In the final analysis, mineral reservations in sales to the federal government as far back as 1928 would remain imprescriptible; similar reservations in sales to the state government would probably have prescribed for non-use by 1951.

The most recent interpretation of Act 315 of 1940 came in *United States v. Little Lake Misere Land Co.*²⁷ In that case the United States Supreme Court was faced with a mineral servitude for an express ten-year term created by acquisitions of land in 1937 and 1939 by the United States pursuant to the Migratory Bird Conservation Act. The mineral servitude owner argued that his interest had been rendered imprescriptible by Act 315 of 1940. The federal

23. *Id.*

24. See LA. MIN. CODE: LA. R.S. 31:149 (1974), comment. See generally Sabine River Auth. v. Salter, 184 So. 2d 783 (La. App. 3d Cir. 1966).

25. See, e.g., *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951).

26. Comment, *supra* note 12, at 502.

27. 412 U.S. 580 (1973).

government argued that the mineral servitude was for an express term and retroactive application of Act 315 would impair the obligations of the contract. Both sides relied upon an earlier decision by the Louisiana Supreme Court, *Leiter Minerals, Inc. v. California Co.*,²⁸ in which the Louisiana court indicated that Act 315 was not applicable to a mineral servitude for a fixed duration. The *Leiter* court, however, did hint broadly that under Louisiana law, a mineral reservation similar to the one at issue in *Little Lake* was not for a fixed duration. However, in *Little Lake*, the United States Supreme Court refused to follow "hostile state law" which frustrated contracts made by the United States pursuant to Congressional policy. The Court held that federal law was to govern the construction of the contract, and, finding the reservation to be for an express term, refused to apply Act 315 retroactively on the grounds that to do so would be an unconstitutional impairment of contract rights.²⁹ From this holding, one may conclude that Act 315 is inapplicable when the mineral reservation is made in a sale to the federal government and is for an express term. Conversely, when the reserved servitude is for an unlimited or unspecified duration, the rationale of *Little Lake Misere* should not apply, and a servitude should have become imprescriptible upon the passage of Act 315 of 1940.

Between 1940 and 1958, no statute of general application existed which made mineral reservations in sales to the state or its agencies imprescriptible. However, mineral reservations in acquisitions by the State Parks Commission of Louisiana were rendered imprescriptible by virtue of Act 8 of an extra session of the Louisiana legislature in 1942.³⁰ In 1950 a forty year prescriptive period was established for mineral reservations in land acquisitions for the Anacoco-Prairie State Game and Fish Preserve.³¹

Act 315 of 1940 became section 5806 of Title 9 of the 1950 Louisiana Revised Statutes. This statute was amended and reenacted by the legislature in 1958, when another paragraph was added to make mineral reservations in sales to certain state agencies imprescriptible.³² This latter paragraph reintroduced the concept of imprescripti-

28. 241 La. 915, 132 So. 2d 845 (1961).

29. 412 U.S. at 604.

30. 1942 La. Acts, Ex. Sess., No. 8, § 1.

31. 1950 La. Acts, No. 169, § 1.

32. 1958 La. Acts, No. 278, §§ 1, 2. This Act read as follows:

(A) When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or

ble mineral interests reserved in sales to certain state agencies. The State of Louisiana itself was not mentioned in section 5806 of Title 9 as amended in 1958, nor were certain state agencies or subdivisions, such as municipalities. In 1960, paragraph B of section 5806 was amended to include "any political subdivision authorized to incur debt and issue bonds under the provisions of the Constitution and statutes of the State of Louisiana, heretofore or hereafter created or established by the State of Louisiana. . . ."³³ This amendment was probably sufficient to include municipalities. In *Humble Oil & Refining Co. v. Freeland*,³⁴ the third circuit held that the Board of Supervisors of Louisiana State University Agricultural and Mechanical College fell within the scope of paragraph B of section 5806. The court applied this act retroactively to hold that a mineral reservation in a sale to the Board on December 30, 1948, was imprescriptible because Act 278 of 1958 became effective on July 30, 1958,

the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible.

(B) When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the State Department of Highways, the State Department of Public Works, or by any of the several levee districts in the state, or by the State Department of Wildlife & Fisheries, or by a police jury, school district, school board or other board or by any commission, heretofore or hereafter created or established by the State of Louisiana, from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other mineral or royalties are reserved, the rights so reserved shall be imprescriptible and shall remain vested in the person, firm or corporation from whom the land was acquired, condemned or expropriated, or in the heirs or assigns of that person, firm or corporation; provided, however, that should the ownership of such land pass into private hands, the prescription of non-use provided by R.C.C. Arts. 789 and 3546 shall apply as in the usual case, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall prescribe for non-use by the owner thereof, but such rights shall revert to the owner of the land at the time of its acquisition, condemnation or expropriation by the state governmental agency, or to said owner's heirs or assigns, rather than to the owner of the expropriated land at the time of reversion; provided, however, that should the ownership of such land pass into private hands, the prescription of non-use provided by R.C.C. Arts. 789 and 3546 shall apply as in the usual case.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed, provided, however, that if this act is declared unconstitutional, in whole or in part, the rights of all parties affected by any such decision shall be determined in accordance with the laws in force and effect prior to the time that this act takes effect.

33. 1960 La. Acts, No. 528, § 1.

34. 216 So. 2d 689 (La. App. 3d Cir. 1968).

before the ten year prescriptive period had accrued. While the terms of the Act were fairly inclusive, conceivably some state agencies were not included by the 1960 revision; nor has any case ever ruled on whether the Act applied to the state itself though the state was *probably* covered.

Section 5806 of Title 9 as amended in 1960 had two paragraphs: paragraph A purported to deal with mineral reservations in acquisitions by the federal government, while paragraph B purported to deal with the same reservations in acquisitions by the state government. Paragraph B provided that when the state sold the property back into private ownership, prescription would begin to run.³⁵ Neither the 1938 nor the 1940 Acts had such a provision despite the questionable effect on an imprescriptible mineral interest of a sale back into private ownership. The inclusion of this provision in paragraph B relative to properties acquired by state agencies allows the argument to be made that, in the case of acquisitions by the federal government controlled by paragraph A, which has no similar provision, liberative prescription will not apply when the land passes back into private hands.³⁶ This result follows from the maxim *inclusio unius est exclusio alterius*; i.e., inclusion of one is deemed to be the exclusion of others. However, this approach has the unprecedented result of placing both the imprescriptible mineral interest and the land title in private hands (perhaps different hands), a result that would be contrary to public policy. Whether the legislature intended this result is doubtful, although such a result is obviously a possibility.³⁷

Paragraph B of section 5806 also provided that where the land owner sells property to a state agency subject to a prior outstanding mineral interest, the outstanding interest would still be subject to prescription for non-use. However, upon the accrual of prescription, the outstanding mineral interest would revert, not back to the state agency, but back to the land owner from whom the agency acquired the property. This paragraph created what was essentially a legislatively sanctioned dealing in a reversionary interest; a unique kind of interest which, as a general rule, was outlawed in *Hicks v. Clark*.³⁸ Paragraph A of this section had no such provision and, indeed, has been interpreted differently. In *Franks Petroleum v. Mar-*

35. LA. R.S. 9:5806(B) (as it appeared prior to its repeal by 1974 La. Acts, No. 50, § 3).

36. Currier, *supra* note 12, at 56.

37. *Id.*

38. 225 La. 133, 72 So. 2d 322 (1954).

tin,³⁹ the court held that where property was expropriated by the federal government subject to an outstanding mineral reservation, "under the unmistakable terms of the statute. . .," the outstanding mineral interest was imprescriptible and did not revert to the landowner at the time of the government's acquisition.⁴⁰ Thus, acquisitions by the federal government have been treated differently from acquisitions by a state agency.

On January 1, 1975, the Louisiana Mineral Code became effective.⁴¹ The Mineral Code repealed all prior statutes relating to imprescriptibility⁴² and replaced them with articles 149, 150 and 151.⁴³ Article 149 originally provided that the prescription of non-use would not run against mineral interests reserved in acquisitions by the state or federal governments.⁴⁴ The Louisiana legislature subsequently enacted Acts 348 and 371 of 1980; both acts amended and re-enacted article 149. Louisiana now seems to have two articles 149. This situation presents problems because the articles are substantially different.

Both of the new articles 149 include another type of entity whose acquisitions may give rise to imprescriptible mineral interests: i.e., any legal entity with expropriation authority. Louisiana Revised Statutes 19:2 defines legal entities with expropriation power to include, *inter alia*, corporations created for constructing railroads, toll roads, navigation canals, waterworks, gas pipelines, telephone lines and power lines.⁴⁵ Often companies of this sort acquire a ser-

39. 234 So. 2d 268 (La. App. 2d Cir.), *writ refused*, 236 So. 2d 36 (La. 1970).

40. *Accord* Franks Petroleum v. Hobbs, 200 So. 2d 708 (La. App. 2d Cir.), *writ refused*, 203 So. 2d 555 (La. 1967).

41. LA. MIN. CODE: LA. R.S. 31:1-214 (1974) (effective January 1, 1975; 1974 La. Acts, No. 50 § 6).

42. LA. MIN. CODE: LA. R.S. 31:2 (1974).

43. LA. R.S. 31:149, 150, 151 (1974 & Supp. 1980).

44. Mineral Code article 149 originally provided:

When land is acquired from any person by the United States or the State of Louisiana or any subdivision or agency of either by conventional deed or other contract or by condemnation or expropriation proceedings and by the act of acquisition, order, or judgment, a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the right so long as title to the land remains in the government or any of its subdivisions or agencies. If, however, the land, or any part thereof, is transferred by the government or subdivision or agency to a private owner, the prescription of nonuse shall apply as in the usual case but shall commence only from the date on which the act of acquisition by the private owner is filed for registry.

45. LA. R.S. 19:2 (Supp. 1974 & 1977) provides:

Where a price cannot be agreed upon with the owner, any of the following may expropriate needed property:

vitude or right of use which, since these interests do not involve full title to the land, will not bring into existence an imprescriptible mineral interest.⁴⁶ Nonetheless, future acquisitions by these entities

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- (1) The state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers;
 - (2) Any domestic or foreign corporation created for the construction of railroads, toll roads, or navigation canals;
 - (3) Any domestic corporation created for the construction and operation of street railways, urban railways, or inter-urban railways;
 - (4) Any domestic or foreign corporation created for the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage;
 - (5) Any domestic or foreign corporation created for the piping and marketing of natural gas for the purpose of supplying the public with natural gas or any partnership, which is or will be a natural gas company or an intra-state natural gas transporter as defined by federal or state law, composed entirely of such corporation or composed of the wholly owned subsidiaries of such corporations.
 - (6) Any domestic or foreign corporation created for the purpose of transmitting intelligence by telegraph or telephone;
 - (7) Any domestic or foreign corporation created for the purpose of generating, transmitting and distributing electricity and steam for power, lighting, heating, or other such uses. The generating plants, buildings, transmission lines, stations, and substations expropriated or for which property was expropriated shall be so located, constructed, operated, and maintained as not to be dangerous to persons or property nor interfere with the use of the wires of other wire using companies or, more than is necessary, with the convenience of the landowners;
 - (8) All persons included in the definition of common carrier pipelines as set forth in R.S. 45:251;
 - (9) Any domestic or foreign corporations created for piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline as otherwise provided for in R.S. 30:721 through 30:723.

46. Louisiana expropriation laws authorize the taking of full title to the land if necessary for public purposes. Older cases suggest that if a servitude or right-of-way will suffice to meet the public need, the full title may not be taken. *See, e.g., New Orleans Pac. Ry. Co. v. Gray*, 32 La. Ann. 471 (1880). There the court wrote:

"It is manifest that if it were a canal that was to be dug, it would require the fee, while if a turnpike or plank-road for temporary purposes was to be constructed, a simple temporary right of way would be all that could be required."

Id. at 475. More recently, in *Greater Baton Rouge Port Comm'n v. Watson*, 224 La. 136, 68 So. 2d 901 (1953), the court held:

"A public body possessed of the power of eminent domain has the right to acquire property in fee title where public improvements to be erected thereon are permanent in nature and are to be used in perpetuity."

Id. at 902. *See also* La. Elec. Co. v. Covington & St. Tammany Land & Improvement Co., 131 So. 2d 369 (La. App. 1st Cir. 1961) (an expropriating authority may not be required to take fee title when a servitude is all that is necessary in the exercise of the purpose or function for which the taking is authorized).

When land is expropriated and when it would not interfere with the purpose of the taking, the owner has the option either to reserve the minerals or to require the expropriating authority to compensate him for them.

could increase the number of imprescriptible mineral interests. Here again, a question of retroactivity arises.

Article 149 as amended by Act 371 of 1980 has another new twist not found in article 149 as amended by Act 348 of 1980. Article 149 as embodied in Act 371 provides that before the state or federal government or any legal entity with expropriation authority may transfer the property to a third person, that entity must first offer to sell the property back to the original grantor. Act 371, in addition to amending article 149, enacted Louisiana Revised Statutes 41:1338 which provides that before the state may transfer any property to a third person, the state must first offer to sell the property back to the original grantor. Two important things to note about Revised Statutes 41:1338 are (1) the statute is applicable to all property in general irrespective of whether the property is burdened by an imprescriptible mineral interest, and (2) the statute does not apply to the federal government or any non-governmental legal entity with expropriation authority. Article 149 as embodied in Act 348 does not require the government or other expropriating body to give the grantor a right of first refusal. Revised Statute 41:1338 applied in conjunction with Act 348 would require only *the state* or its agencies to give the grantor a right of first refusal. On the other hand, article 149 as embodied in Act 371 would not only require the state, but also the federal government and any legal entity with expropriation authority to give the grantor/owner of an imprescriptible mineral interest a right of first refusal. Whether the federal government or other non-governmental expropriating body must give a right of first refusal to the grantor/owner of an imprescriptible mineral servitude seems unclear. If the right of refusal must be given, the Equal Protection Clause of the Constitution may be violated in not giving this right of refusal to the grantor who does not reserve the mineral rights. Legislative reform is needed here. However, unless such legislation may be applied retroactively, this question might be asked in litigation: Will the real article 149 please stand up?

Article 150 changes the law with respect to acquisitions made by the federal government by legislatively overruling the *Franks Petroleum* decision. Under this article, prescription will continue to run against an outstanding mineral interest on land acquired either by the federal or state government and will accrue in favor of the owner from whom the land was acquired. Again the question of retroactivity arises, and Louisiana has no jurisprudence on the point. Retroactive application of article 150 to a sale in 1960, made subject to an outstanding mineral interest to a federal agency would seem

to have the effect of transferring ownership of the mineral interest from the previous owner to the owner of the land at the time of the agency's acquisition.

Finally, article 151 of the Mineral Code provides that a mineral interest which is outstanding at the time lands were acquired by the government will, upon the accrual of prescription, revert to the land owners who owned the property at the time of the government's acquisition only if the property subject to the mineral interest is still owned by the government at the time the outstanding interest prescribes. If at the time prescription accrued, the land had been transferred back into private ownership, the private owner of the land at the time that prescription accrued would get the benefit of the expiration of the previously created mineral interest.

These articles of the Mineral Code attempt to answer some of the questions which arose under prior statutes. In *GMB Gas Corp. v. Cox*⁴⁷ the second circuit held that the Mineral Code is to be retroactively applied where the particular issue has not been clearly resolved to the contrary by litigation. The Louisiana Supreme Court has noted this proposition but has not affirmed or denied it.⁴⁸ Hopefully, the Mineral Code may be used to resolve some of the unanswered questions raised by prior statutes.

Some specific questions are raised by considering the creation and conveyance of imprescriptible mineral reservations. For instance, if a landowner conveys land that is subject to an outstanding mineral servitude to a public body, and fails to reserve or convey subject to said outstanding mineral servitude, do the minerals revert to the landowner or to the public body at the end of the ten year prescriptive period? The acquisition of land by the government during any of the time periods discussed above would not automatically create any imprescriptible mineral rights; the Acts are only applicable to acquisitions explicitly made subject to an outstanding mineral interest or in which an explicit reservation of mineral interests is made. Without such a reservation, the minerals will simply revert to the expropriating body which owns the land.

Another interesting question concerns the consequences of a conveyance of an imprescriptible mineral interest. If a landowner conveys to a third party minerals that the landowner had previously reserved in a conveyance to a public body, are such minerals impre-

47. 340 So. 2d 648 (La. App. 2d Cir. 1976).

48. See *The Continental Group, Inc. v. Allison* ___ So. 2d ___ (La. 1981).

scriptible in the third party, or do the minerals revert to the landowner after the running of prescription? The creation of a term of use in favor of a third party would not violate public policy, but what if the act of conveyance is silent on this point? This question is difficult to answer because of competing principles of public policy. An argument could be made that the interest should remain imprescriptible in the hands of the third party if the act of conveyance contains no language limiting or restricting the mineral interest conveyed to a specific term. Furthermore, if the initially reserving landowner were permitted to reacquire the minerals after the ten years, he would in effect be allowed to deal in reversionary interests outside the purview of the pertinent statutes and contrary to the public policy rationale of *Hicks v. Clark*. The competing argument is that the pertinent statutes were designed to favor the landowner who made the initial transfer to the government and that a third party should not be able to benefit from the imprescriptibility statute which is contrary to the basic public policy favoring extinguishment of dismembered mineral rights absent use. Note, however, that in the question posed the reversion would operate in favor of the initial landowner and not in favor of the present owner, the government. Courts should be inclined to treat the interest as imprescriptible for all purposes, regardless of who is the owner, so long as title to the surface remained in the government. If the government sold the land subject to the outstanding interest, prescription should run as in the normal case as provided in article 149 of the Mineral Code and should accrue in favor of the new private owner, who could, of course, be the party who made the initial transfer to the government.

Finally, the effect of the after-acquired title doctrine on the oversale of an imprescriptible mineral interest must be considered.⁴⁹ A prime example would be the case of a landowner who conveys land subject to an outstanding mineral servitude to a public body, reserving all minerals and/or conveying subject to the servitude. If the landowner then conveys the minerals (which he does not own) to a third party, do the minerals become vested in the third party at the end of the ten year prescriptive period under the after-acquired title doctrine and remain imprescriptible in the third party? A court might not allow the initial landowner to sell his interest in the

49. The after-acquired title doctrine provides that where one sells the property of another and later acquires title to the property sold by him, the title vests immediately in his vendee. See, e.g., *St. Landry Oil & Gas Co. v. Neal*, 166 La. 799, 118 So. 2d (1928).

statutorily created reversionary rights which are basically at odds with the public policy rationale of *Hicks v. Clark*. An argument could be made, however, that this property right, created by express statute, should be treated as any other item of commerce in which event the right to the reversion could be sold to a third party. The issue is also affected by article 78 of the Mineral Code, which deals with the sale of more minerals than the vendor owns. Article 78 provides that in the case of an oversale of minerals, the overbuyer has ten years from the date of his deed of acquisition, or the remaining prescriptive period of the right acquired by his overselling grantor, whichever is greater, in which to use the interest sold. In this case the overbuyer might argue that the greater period is the infinite prescriptive period of the overseller and therefore the minerals are imprescriptible in the overbuyer. However, article 78 clearly does not envision this factual situation and the courts are not likely to give the overbuyer the benefit of acquiring an imprescriptible servitude. At best, the overbuyer may have ten years from the date of his acquisition in which to exercise his rights.

NON-ALIENATION OF STATE-OWNED MINERALS

The second way in which imprescriptible mineral rights are created is by the sale of state-owned property. The Louisiana Constitution of 1921 prohibited the alienation of mineral rights owned by the state. Article 4, section 2 of the 1921 constitution provided in pertinent part: "In all cases the mineral rights on any and all property sold by the State shall be reserved, except where the owner or other person having the right to redeem may buy or redeem property sold or adjudicated to the State for taxes. . . ." This provision of the 1921 constitution changed the law and was not given retroactive effect.⁵⁰

A corollary to the prohibition of alienation of state-owned minerals is that prescription does not run against state-owned mineral rights. In *Shell Oil Company v. Board of Commissioners of Pontchartrain Levee District*,⁵¹ the appellants contended that they acquired the mineral rights to the subject property by acquisitive prescription of ten years. In rejecting this contention the court of appeal held:

50. *Haas v. Board of Comm'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist.*, 206 La. 378, 19 So. 2d 173 (1944); *Schwing Lumber & Shingle Co. v. Board of Comm'rs of Atachafalaya Basin Levee Dist.*, 200 La. 1049, 9 So. 2d 409 (1942); *Board of Comm'rs of Tensas Levee Dist. v. Earle*, 169 La. 565, 125 So. 619 (1929).

51. 336 So. 2d 248 (La. App. 1st Cir.), writ refused, 338 So. 2d 1156 (La. 1976).

With respect to this contention we *must hold that the subject Constitutional prohibition against the alienation of minerals by the state equally prohibits the acquisition of these minerals by others by the running of prescription against the state.* Notwithstanding the fact that the Legislature has on numerous occasions provided for the running of prescription against the state, these statutes can not be construed to include mineral rights for neither the Legislature nor the courts can permit what the Constitution itself prohibits.⁵²

Article 9, section 4 of the 1974 constitution expressly provides that prescription shall not run against the state, school board, or levee district. This provision was merely a codification of existing jurisprudence.⁵³

Article 4, section 2 of the 1921 constitution prohibited the "state" from alienating minerals.⁵⁴ This wording raised the question of whether the prohibition also applied to state agencies. In *Stokes v. Harrison*,⁵⁵ the Louisiana Supreme Court, in an opinion by Justice Hamlin, held that a school board, despite being an agency of the state, was not the "state" within the meaning of article 4, section 2 and could, therefore, alienate minerals. In a concurring opinion in *Rycade Oil Corporation v. Board of Commissioners*,⁵⁶ Judge Tate opined that what the supreme court meant to say in *Stokes* is that the term "state" does not refer to a purely local subdivision such as a school board, but does encompass an arm of the executive branch such as a levee district. In *Shell Oil Co. v. Board of Commissioners*,⁵⁷ the first circuit was called upon to decide whether a levee district was the "state" within the meaning of article 4, section 2. The court distinguished *Stokes*, employing the rationale suggested by Judge Tate in *Rycade*, and held that a levee district was incapable of alienating minerals by virtue of the 1921 constitution. In *Dynamic Exploration, Inc. v. LeBlanc*,⁵⁸ the supreme court, in a brief opinion citing *Shell*, affirmed a decision of the First Circuit Court of Ap-

52. 336 So. 2d at 254 (emphasis supplied).

53. See *Dynamic Exploration, Inc. v. LeBlanc*, 362 So. 2d 734 (La. 1978) (which held that the 1921 constitutional prohibition of alienation of mineral rights barred divestiture through acquisitive prescription) (citing *Shell Oil, id.*). See generally *Board of Comm'rs of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929).

54. LA. CONST. art. IV, § 2 (1921, repealed 1974).

55. 238 La. 343, 115 So. 2d 373 (1959).

56. 129 So. 2d 302, 305 (La. App. 3d Cir. 1961).

57. 336 So. 2d 248 (La. App. 1st Cir.), writ refused, 338 So. 2d 1156 (La. 1976).

58. 362 So. 2d 734 (La. 1978).

peal holding that a levee district was the "state" within the meaning of article 4, section 2 of the 1921 constitution. The court noted that the 1974 constitution overruled *Stokes* by providing that a school board cannot alienate minerals.⁵⁹

CONCLUSION

In short, there are two types of imprescriptible mineral interests: Those that are privately owned and those that are owned by the state and its agencies. Imprescriptible mineral interests have been susceptible of private ownership since 1938; minerals owned by the state have been imprescriptible since 1921. No particular language is necessary for the state to reserve an imprescriptible mineral right as the state is incapable of alienating minerals. On the other hand, privately owned imprescriptible mineral interests may be created only by explicit reservations in sales to government bodies or other legal entities with expropriation power. Because prescriptive statutes are remedial, the practitioner should be aware of the retroactive impact of the enactment, amendment or repeal of acts dealing with the period of prescription of mineral interests. Finally, legislative reform is needed (a) to take care of the problem created by having two Mineral Code articles 149,⁶⁰ and (b) to clarify to what extent privately owned imprescriptible mineral interests may be conveyed. These remarks have by no means exhausted the potential problems that imprescriptible mineral interests create. The author has tried instead to simply illuminate some of the major areas where a practitioner may have difficulty.

59. LA. CONST. art. IX, § 4, provides:

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

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

60. House Bill No. 907 and Senate Bill 496 presently under consideration by the Louisiana legislature would eliminate Mineral Code article 149 as embodied by Act 371 of 1980.

