

Buried Treasure Mineral and Subsurface Rights

LEGAL EDUCATION DEPARTMENT Attorneys' Title Fund Services, LLC

Unless otherwise noted, all original material is Copyright © 2024 Attorneys' Title Fund Services, LLC (800) 336-3863

Please contact The Fund's Education Registrar for information about our programs

EducationRegistrar@thefund.com

(888) 407-7775

All references herein to title insurance policy forms and endorsements are intended to refer to the policy forms and endorsements issued by Fund members as duly appointed title agents of Old Republic National Title Insurance Company.

These materials are for educational use in Fund seminars. They should not be relied on without first considering the law and facts of a matter. Legal documents for others can only be prepared by an attorney after consultation with the client.

Attorneys' Title Fund Services, LLC acknowledges that case materials are reprinted from WestLaw with the permission of Thomson Reuters.

	Table of Contents	PDF Page Number
1.	PowerPoint Slides	5
2.	OMG! Oil, Mineral, And Gas Rights In Florida: A Guide For Real Estate Attorneys, Garret Barnes, Esq. and Adron Walker, Esq., (Fund Assembly 2017) reprinted with permission of the authors	38
Case L	aw	
3.	Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979)	66
4.	U.S. v. Causby, 328 U.S. 256 (1946)	76
5.	Dickinson v. Davis, 224 So.2d 262 (Fla. 1969)	86
6.	P&N Inv. Corp. v. Florida Ranchettes, Inc., 220 So.2d 451 (Fla. 1st DCA, 1968)	93
7.	Noblin v. Harbor Hills Development, L.P., 896 So.2d 781 (Fla. 5th DCA 2005)	96
8.	Robinson v. Speer, 185 So.2d 730 (Fla.1st DCA, 1966)	102
9.	Valls v. Arnold Industries, Inc., 328 So.2d 471 (Fla. 2nd DCA, 1976)	105
10.	Straughn v. Sun Oil Co., 345 So.2d 1062 (Fla. 1977)	108
11.	Kittrell v. Clark, 363 So.2d 373 (Fla. 1st DCA 1978)	112
12.	Askew v. Sonson, 409 So.2d 7 (Fla. 1981)	114
13.	U.S. v. Florida, 425 U.S. 791 (1976)	124
14.	Caldwell v. Kemper, 159 Fla. 231 (Fla. 1947)	127

Statute	es, Rules and Forms	
15.	Sec. 193.481, F.S., Assessment of mineral, oil, gas, and other subsurface rights	130
16.	Sec. 197.343, F.S., Tax notices; additional notice required	131
17.	Sec. 211.13, F.S., Tax exclusive	132
18.	Sec. 270.11, F.S., Contracts for sale of public lands to reserve certain mineral rights; prohibition on exercise of right of entry in certain cases	133
19.	Sec. 689.20, F.S., Limitation on the use of word "minerals"	134
20.	Sec. 689.29, F.S., Disclosure of subsurface rights to prospective purchaser	135
21.	Sec. 704.05, F.S., Easements and rights of entry	136
22.	Sec. 712.03, F.S., Exceptions to marketability	137
23.	Sec. 712.04, F.S., Interests extinguished by marketable record title	138
24.	Sec. 713.803, F.S., Entitlement to lien	139
25.	Sec. 713.805, F.S., Property subject to lien	140
26.	Rule 12D-1.004, F.A.C., Returns, Applications and Other Information (not Including Applications for Exemptions) Required to Be Filed with the Property Appraiser	141
27.	Florida Dept. of Rev. Form DR-508, Application For Separate Assessment Of Mineral, Oil, and Other Subsurface Rights	143
Miscel	laneous	
28.	Op. Att'y Gen. Fla., 71-134 (1971)	144
29.	Accreditation materials	148

Buried Treasure

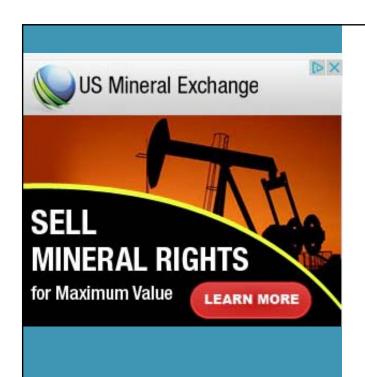
Mineral and Subsurface Rights

Bob RohanRegulatory Compliance Counsel



Landscape – introduction





Mineral

"any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil"

Black's Law Dictionary (1968)



Minerals: Yes



Dinosaur bones: Maybe?



Booty: No





Minerals - Florida law

"Whenever the word 'minerals' is hereafter used in any deed, lease, or other contract in writing, said word or term shall not include any of the following:

topsoil, muck, peat, humus, sand, and common clay, unless expressly provided in said deed, lease, or other contract in writing"

Sec. 689.20, F.S.





Subsurface rights – Florida law

"Subsurface rights' means the rights to all minerals, mineral fuels, and other resources, including, but not limited to, oil, gas, coal, oil shale, uranium, metals, and phosphate"

Sec. 689.29(3)(b), F.S.



Subsurface rights – water

"The right of the owner to ground water underlying his land is to the usufruct of the water and not to the water itself

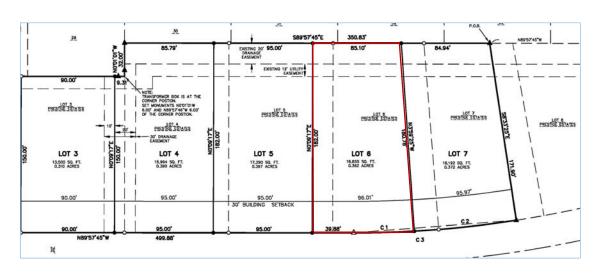
ownership of the land does not carry with it any ownership of vested rights to underlying ground water not actually diverted and applied to beneficial use"

Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979)





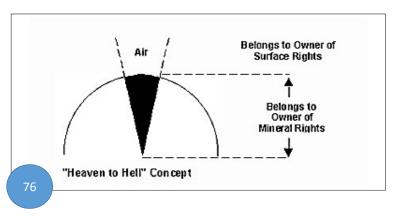
Landscape – vertical



Property ownership

Cujus est solum ejus est usque ad coelum (et ad inferos)

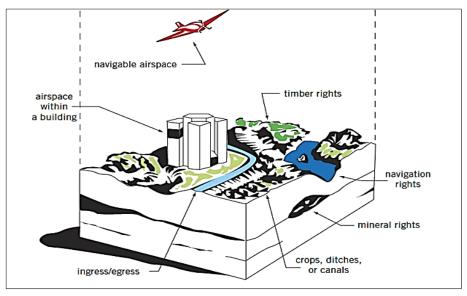
"Whoever's is the soil, it is theirs all the way to Heaven (and all the way to Hell")



U.S. v. Causby, 328 U.S. 256 (1946)



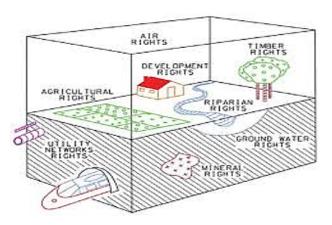
Landscape – horizontal



Horizontal rights – severance

"Land may be divided horizontally as well as vertically, so that one person may own the surface and another the minerals underground"

Dickinson v. Davis, 224 So.2d 262 (Fla. 1969)







Severance – separate chains of title

Chain of Title — a listing of all deeds, wills, or other conveyances and transfers of title to real property along with encumbrances of all kinds

Fund Procedures Handbook Chapter 4, page 4-3

Interest of holder of mineral estate not eliminated by subsequent "root of title" by holder of surface estate

TN 27.01.01



Severance – separate chains of title

Grantor reserves mineral rights in conveyance of Blackacre. A certified copy of judgment against grantor is later recorded. Grantor subsequently quitclaims his mineral rights interest to then owner of Blackacre. For insuring purposes would the unexpired judgment against Grantor need to be shown as an exception?

Yes. The mineral reservation was a separate estate and the judgment attached to that interest.



V

Subsurface rights – right of entry

"When the surface estate is severed from the mineral estate, the mineral estate is the **dominant estate** and, therefore, the owner of the mineral estate has the right of **ingress and egress** to explore for, locate, and remove the minerals..."

P&N Inv. Corp. v. Florida Ranchettes, Inc., 220 So.2d 451 (Fla. 1st DCA 1968)



Right of entry

"We conclude that even if 'the right to exploit' provision was not included in the deed...an implied easement was granted...for the purpose of exploration and extraction of the oil and minerals..."

Noblin v. Harbor Hills Development, L.P., 896 So.2d 781 (Fla. 5th DCA 2005)



15

Right of entry – damages

"...cannot so abuse the surface estate so as <u>unreasonably</u> to injure or destroy its value and is answerable in damages to the owner of the surface estate for any <u>unreasonable injuries</u> done"

P&N Inv. Corp. v. Florida Ranchettes, Inc.,



Right of entry – expenses

"One of several co-owners of mineral estate has right to extract oil without consent of other owners

has right to be reimbursed for reasonable and necessary expenses of extraction and marketing

subject to an accounting"

P&N Inv. Corp. v. Florida Ranchettes, Inc.,



17

Right of entry - MRTA

Marketable Record Title Act may be relied on for insuring purposes to eliminate private rights of entry if expressly given or reserved in a deed, as well as any common-law right of entry that may exist in connection with a mineral estate owned by a private entity

TN 27.01.01



Subsurface rights – partition

"The method of partition or dividing of the minerals, in the event of a disagreement relative thereto, is set out in the deed itself

until the method so set out in the deed has been applied to partitioning of said mineral rights, there can be no resort to a judicial partition thereof"

Robinson v. Speer, 185 So.2d 730 (Fla.1st DCA 1966)



102

Property rights – condemnation award

"Appellees lost their mineral rights by condemnation

testimony demonstrated that those severed rights had an ascertainable market value

in spite of the fact that no one knew whether the subject parcels contained any minerals"

Valls v. Arnold Industries, Inc., 328 So.2d 471 (Fla. 2nd DCA 1976)





Real property interests

Leaseholds are taxable interests in real property

"The broad terms 'otherwise transferred' encompass a transfer by lease"

Straughn v. Sun Oil Co., 345 So.2d 1062 (Fla. 1977)





Liens – oil and gas rights

"Any person who...performs any labor or furnishes any material or service used or furnished to be used:

- (1) In the drilling or operating of any oil or gas well...or in the construction of any oil or gas pipeline, or
- (2) In the construction of any material so used or employed... shall be entitled to a lien..."

Sec. 713.803, F.S.



Liens – oil and gas rights

"Liens created under s. 713.803 shall extend to:

The leasehold interest...held for oil or gas purposes or for any oil or gas pipeline for which the material or service was furnished or for which the labor was performed...

However, neither the land itself, apart from the rights granted under an oil or gas lease, nor any mineral interest or royalty interest shall be subject to such lien"

Sec. 713.805(1), F.S.



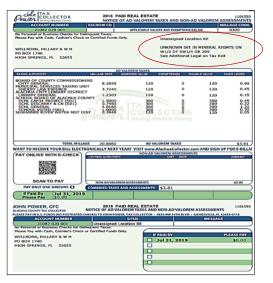


Taxation – mineral rights

Statute (*Sec. 193.221(1), F.S.) providing for separate taxation of mineral interests is constitutional

Dickinson v. Davis

*Now Sec. 193.481, F.S.





Assessment – subsurface rights

"The property appraiser shall, upon request of the owner of real property who also owns mineral, oil, gas, or other subsurface mineral rights to the same property, separately assess the subsurface mineral right and the remainder of the real estate as separate items on the tax roll"

Sec. 193.481(2), F.S.





25

130

Assessment – fractional interests

"taxation shall be against such subsurface ownership interest and not against the owner or owners thereof"

"the tax assessor should, upon application of owners, separate taxes on the basis of claimed fractional ownership"

Op. Att'y Gen. Fla. 71-134 (1971)



26

Assessment – subsurface rights

"Such subsurface rights shall be assessed on the basis of a just valuation, as required by s. 4, Art. VII of the State Constitution,

which valuation, when combined with the value of the remaining surface and undisposed of subsurface interests, shall not exceed the full just value of the fee title of the lands involved, including such subsurface rights"

Sec. 193.481(3), F.S.





Assessment – improvements

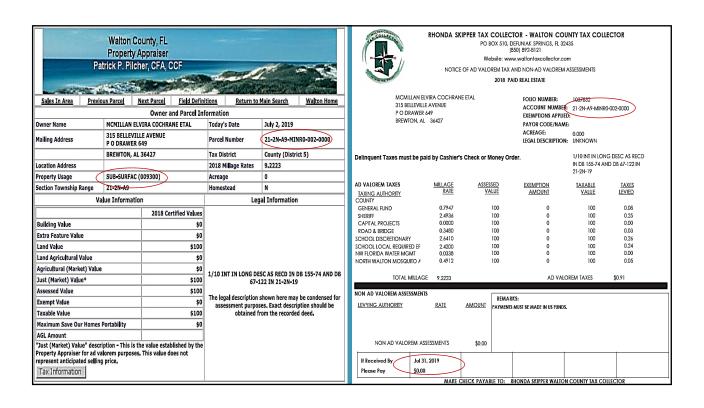
"The value of land for ad valorem tax purposes shall not be increased by reason of the location thereon of any producing oil or gas equipment or machinery used in and around any oil or gas well which is actually used in the operation thereof or because there may be taxable products under the surface of the land"



Sec. 211.13, F.S.



28



Tax certificates and deeds

"Tax certificates and tax liens encumbering subsurface rights...may be acquired, purchased, transferred, and enforced as are tax certificates and tax liens encumbering real property generally, including the issuance of a tax deed"

Sec. 193.481(5), F.S.



Tax certificates and deeds

Mineral reservation not eliminated by tax deed issued on surface estate

TN 30.01.03

Note: Tax deeds issued before 1957 eliminated mineral rights pursuant to Sec. 211.14, F.S.



24

Tax certificates – surface owner rights

"When taxes on subsurface rights become delinquent and a tax certificate is to be sold

notice of the delinquency shall be sent to the owner of the fee to which these subsurface rights are attached

the fee owner shall have the right to purchase the tax certificate at the maximum rate of interest provided by law before bids are accepted for the sale of such certificate"

Sec. 197.343(2), F.S.



Marketability – residential form contracts

"The Title Commitment shall set forth those matters to be discharged by Seller...

...an owner's policy...shall be issued...insuring Buyer's **marketable title** to the Real Property, subject only to the following matters:

(c) outstanding oil, gas and mineral rights of record without right of entry;"

Standard 18. A.



22

Marketability – other form contracts

Florida Association of Realtors **commercial contract** (CC-4, Rev. 12/10) and **vacant land contract** (VAC-10, Rev. 8/14) contain similar language:

"Seller...will convey marketable title...free of liens, easements, and encumbrances of record...subject to...covenants, restrictions, and public utility easements of record; existing zoning and governmental regulations; and (list any other matters to which title will be subject) _______"



Marketability – other contracts

"(A)sk your client buyer whether the ownership of a property's mineral rights is an essential aspect of his or her ownership of the property"

OMG! Oil, Mineral, And Gas Rights In Florida: A Guide For Real Estate Attorneys







Disclosure Summary – form

"Seller to provide at or before contract execution

if seller or affiliated/related entity
has previously severed or retained; or
will sever or retain

any of the subsurface rights or right of entry"

Sec. 689.29(1), F.S.



Property rights – review

Legal description describes surface boundaries of parcel in relation to others

Fee simple ownership includes:

Structures affixed to the land and vegetation lying within boundary

Airspace above the described parcel which can be reasonably used

Subsurface rights

Severance of subsurface rights creates a marketability issue for the surface estate



27

Mineral rights - review

Real property interest (mineral estate)

Created by grant, reservation or statute

Ownership, leasehold or royalty interest

Ownership interest has chain of title separate from surface estate chain of title

Not eliminated by tax deed to surface estate

Separate ad valorem assessment

Implied right to enter and extract minerals

Ownership of severed Oil, Gas and Mineral Rights (OGM) is an Extrahazardous Risk, and is likely not separately insurable



Private ownership

Created by express grant or reservation

Right of entry is automatic if not defined

Separate chain of title upon severance

Marketable title requirements

Marketable Record Title Act (MRTA) - not a panacea

Cannot eliminate a severed mineral estate ownership interest (TN 27.01.01)

Can eliminate right of entry...but it's tricky!



Easements and rights of entry

"The rights...which are subject to being extinguished by marketable record title pursuant to the provisions of s. 712.04 shall include rights of entry...

...when given or reserved for the purpose of mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials...

...unless those rights of entry...are excepted or not affected by the provisions of s. 712.03 or s. 712.04"

Sec. 704.05(1), F.S.





Mineral rights – MRTA

"Such marketable record title shall not affect or extinguish the following rights:

Estates, interests, claims, or charges arising out of a <u>title</u> <u>transaction</u> which has been recorded subsequent to the effective date of the root of title"

Sec. 712.03(4), F.S.

137



MRTA – subsequent transaction

Recording of probate documents including will devising "all real estate" subsequent to root of title constituted title transaction under MRTA

Testator was owner of mineral estate

Kittrell v. Clark, 363 So.2d 373 (Fla. 1st DCA 1978)



Mineral rights - MRTA

"Such marketable record title shall not affect or extinguish the following rights:

Recorded or unrecorded easements or rights...in the nature of easements...so long as the same are used..."

Sec. 712.03(5), F.S.



MRTA - use of easement

Affidavits from several witnesses indicate the easement was in fact used on many occasions and that clay, sand, limestone, and other minerals were extracted from the property

Summary judgment reversed to allow owner to present evidence

Noblin v. Harbor Hills Development, L.P.



Mineral rights – MRTA

"Such marketable record title shall not affect or extinguish the following rights:

Rights of any person in whose <u>name</u> the land is assessed on the county tax rolls for such period of time as the land is so assessed and which rights are preserved for a period of 3 years after the land is last assessed in such person's name"

Sec. 712.03(6), F.S.





45

Mineral rights - MRTA

"Such marketable record title shall not affect or extinguish the following rights:

Estates, interests, claims, or charges, or any covenant or restriction, preserved by the filing of a proper notice in accordance with the provisions hereof"

Sec. 712.03(2), F.S.

"As an owner of a separate 'piece' of real property the record owner of the mineral estate does not have to file a statutory notice."

TN 27.01.01



State ownership

Swamp and Overflow Lands Act (1850)

Federal conveyance to Florida of 2/3 of land mass

Subsequent sale to encourage dredging and development

Florida's boom and bust years (1920 – 1940)

Development required infrastructure

Paid through property taxes

Murphy Act (chapter 18296, Laws of Florida, 1937)

Tax certificates issued to state if not sold

Trustees of the Internal Improvement Fund (TIIF) deeds may contain reservations



TIIF deeds

Title to state lands vests in TIIF pursuant to Sec. 253.03, F.S.

Categories of state properties includes sovereignty lands, internal improvement lands, swamp and overflow lands, section sixteen lands, railroad lands, indemnity lands, and Murphy Act Lands

> Askew v. Sonson, 409 So.2d 7 (Fla. 1981)



Murphy Act deeds

Conveyance from State of Florida on property acquired as result of nonpayment of ad valorem taxes

Granting clause will recite authority under Section 9 of Chapter 18296, Laws of Florida, Acts of 1937 (i.e., the Murphy Act)



TIIF deed - reservations

AS TO LANDS IN TRACTS OR COMPOSITE TRACTS AGGREGATING TEN (10) ACRES OR MORE:

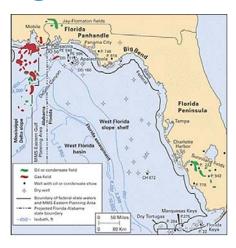
RESERVING unto the State of Florida the title to an undivided one-half of all petroleum and petroleum products and title to an undivided three-fourths of all other minerals which may be found on or under the said land, together with the right to explore for and to mine and develop the same

TN 27.04.01



State ownership – subsurface rights

"As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean extending seaward from its coastline for a distance of 3 geographic miles (and) underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues from its coastline or its historic coastline, whichever is landward"



124

U.S. v. Florida, 425 U.S. 791 (1976)



E4

Coastal Petroleum Lease

You are examining title for property on the West Coast of Florida and you find in your particular chain a Coastal Petroleum lease. How should you treat the lease for your title commitment?

- A. Always put it on as an exception
- B. Ignore it
- C. It is an automatic exclusion to coverage
- D. Put it on as a requirement to be released



Mineral rights – automatic reservation

"Unless the applicable agency chooses not to reserve such interest and except as otherwise provided by law, in all contracts and deeds for the sale of land executed by

the Board of Trustees of the Internal Improvement Trust Fund or by any local government, water management district, or other agency of the state, there shall be reserved...an undivided three-fourths interest in...all the phosphate, minerals, and metals...and an undivided one-half interest in all the petroleum...with the privilege to mine and develop the same"

Sec. 270.11(1), F.S.

Mineral rights – automatic reservation

Title is based on a clerk's tax deed. While it contains no specific mineral and petroleum reservation, is an exception required for some statutory reservation of those interests?

No. Since title was not actually vested in the county the statute (Sec. 270.11, F.S.) would not apply



Murphy Act deeds

"Murphy Act deeds were not subject to the Sec. 270.11, F.S. automatic reservation of oil, gas and mineral rights since the Murphy Act provided broad authority for TIIF to sell those lands under any terms"

Caldwell v. Kemper, 159 Fla. 231 (Fla. 1947)



127

Right of entry – statutory release

"The right of entry...reserved in favor of the Board of Trustees of the Internal Improvement Trust Fund, the State Board of Education, a local government, or other agency of the state is released for any parcel of property that is, or ever has been, a contiguous tract of less than 20 acres in the aggregate under the same ownership"

Sec. 270.11(3), F.S. Effective 7/1/19 TN 27.04.01

Fund ALWAYS DRIVEN

Murphy Deed – reservations

E-22.1 Murphy Deed — Reservations — TN 27.02.05

Reservations in favor of the State of Florida, as set forth in the deed from the Trustees of the Internal Improvement Fund of the State of Florida, recorded ______, in O.R. ______, Page _____, and/or Instrument No. _____, [where applicable add: However, the right of entry and exploration associated with the oil and mineral reservations has been released by Sec. 270.11, F.S.]

Ch. 3. (V) SCC Manual



57

Right of entry – MRTA

"The rights...which are subject to being extinguished by marketable record title...shall include rights of entry...

However, the provisions of this section shall not apply to interests reserved or otherwise held by the state or by any of its agencies, boards, or departments"

Sec. 704.05(1), F.S.

Sec. 712.04, F.S. also excepts applicability of MRTA to federal and state government reservations





ALTA Form 9 Series – mineral rights

Damage to improvements resulting from future exercise of any right to use surface of the Land for the extraction or development of minerals

Form 9 coverage may be provided without exception if:

No exception for mineral rights (legal description or Schedule B); or

Holders have released rights of entry; or

Mineral interests have been released by operation of law

See TN 27.01.02 and 27.04.01C





Commitment – mineral rights exception

- 1. Review document creating mineral estate interest
 - 1. Determine if interest held publicly or privately
 - 2. Determine if interest "sunsets" according to its terms
- 2. Review contract to determine impact on marketable title
 - 1. Will elimination of right of entry (R/E) satisfy contract?
 - 2. If not, contact owner of mineral estate for release since mineral rights cannot be eliminated by MRTA or any other statute
- 3. If public, determine if R/E eliminated by terms of reservation (TIIF deed) or statute (Sec. 270.11, F.S.)
 - 1. If not, petition governmental authority for release



61

Mineral rights exception – continued

- 4. If private, determine if R/E can be eliminated by MRTA
 - Confirm no reference to mineral estate reservation in root of title or documents recorded subsequent to root of title
 - 2. Review <u>chain of title to mineral estate</u> to confirm nothing recorded subsequent to surface estate root of title (i.e., constructive notice)
 - 3. Confirm mineral estate not separately assessed for taxes
- 5. Facts and circumstances unique to a particular parcel may lead to waiver of the exception for R/E if approved by Fund Underwriting Counsel



State-held mineral rights

Title on 10-acre parcel shows 1947 deed out of the Trustees of the Internal Improvement Trust Fund of the State of Florida (TIIF)

Contained the usual mineral reservations in favor of the state: root of title for the fee was recorded in 1972 and contained no reference to the mineral reservations

Current owner took title in 2000 by deed which specifically referenced "subject to mineral reservations" in 1947 TIIF deed



State-held mineral rights

Which statement is correct:

- A. The mineral reservations and all implied rights of entry have been extinguished by the Marketable Record Title Act, since the deed reserving the mineral rights is more than 30 years old
- B. The implied rights of entry associated with the mineral reservations are still active since the mineral reservations were expressly referenced in a deed recorded after the root of title
- C. The implied rights of entry associated with the mineral reservations have been extinguished







Fund Assembly

OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys

Garret Barnes, Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC
 Adron Walker, Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC

Speaker Information

OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys



Garret Barnes.

Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC

Garret Barnes is a founding partner in 1995 of Barnes Walker Title, Inc. and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC, in Bradenton, Florida, where he practices in the areas of real property law, residential and commercial transactions, land development and planning, administrative law, and business law.

Mr. Barnes received his Bachelor of Science degree in Business from Wake Forest University at Winston-Salem, North Carolina, in May 1987, and earned his Juris Doctor from Stetson University College of Law in Gulfport, Florida, in May 1991. He was admitted to The Florida Bar in 1991.

Mr. Barnes' community and professional commitments include being a past Director of the Manatee County Chapter of the American Red Cross, a past Director of the United Way of Manatee County, a past President and current Trustee of the Board of Trustees of St. Stephen's Episcopal School, a past member of the Kiwanis Club of Bradenton, past Vice President of the Board of Trustees of the South Florida Museum, and past Secretary and past member of the Vestry for Christ Episcopal Church and current member of the attorney/ realtor section with Realtor Association for Sarasota and Manatee Counties.

Mr. Barnes is a member of The Florida Bar, its Real Property, Probate and Trust Law Section, and the Manatee County Bar Association.

Fund Assembly 2017 144

Speaker Information

OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys



Adron Walker.

Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC

Adron H. Walker is a founding partner in 1995 of Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC, in Bradenton, Florida, where he practices in the areas of business law and real property law. He represents clients in the acquisition and sale of businesses (including manufacturing concerns, multi-store fast food franchises, and multiple small businesses of all types), and commercial properties (including marinas, bank office buildings, land developer sales, etc.).

Mr. Walker received a Bachelor of Science degree in Accounting magna cum laude in May 1977, from Stetson University in Deland, Florida, and earned his Juris Doctor degree from Stetson University College of Law in Gulfport, Florida, in May 1980. He was admitted to The Florida Bar in 1980.

Mr. Walker served as a Captain in the U.S. Army JAG (legal) Corps for more than 4 years prior to moving to Bradenton.

Mr. Walker is a member of The Florida Bar, its Real Property, Probate and Trust Law Section, and the Manatee County Bar Association.

Fund Assembly 2017 145



BARNES WALKER GOETHE, HOONHOUT PERRON & SHEA PLLC

3119 Manatee Avenue West Bradenton, Florida 34205 Phone: (941) 741-8224 Fax: (941) 708-3225

May, 2017

OMG! OIL, MINERAL, AND GAS RIGHTS IN FLORIDA: A GUIDE FOR REAL ESTATE ATTORNEYS

We're sure you've heard before the Ballad of Jed Clampett:

Come and listen to my story about a man named Jed A poor mountaineer, barely kept his family fed, Then one day he was shootin' at some food, And up through the ground come a bubblin' crude.

Oil that is, black gold, Texas tea.



← Back to Speaker Topics

For you more experienced attorneys and you younger attorneys who watch the METV or TV Land channels, you probably know by heart the lyrics to the theme song for the old *Beverly Hillbillies* situation comedy.

While ol' Jed Clampett became a multimillionaire and moved to Beverly Hills when his errant shot at a rabbit struck oil, rights associated with oil, gas, and minerals in Florida are more likely to cause problems for Realtors®, buyers, title companies, and real estate lawyers. The reason for this is, in the context of real estate sales and purchases, the oil, gas, and mineral rights, when found in the land records, are usually owned by someone other than the landowner who is selling the subject property. Does that create a title defect? Why? What are the ramifications? If it does create a title defect, can it be cured? Do certain title insurance companies quietly exclude insurance coverage for oil, gas, and mineral rights title defects? Do you have a liability if a buyer wishes to consummate the purchase despite oil, gas, and mineral rights creating a title defect?

Introduction

In Florida, oil, gas, and mineral rights (often collectively referred to herein as simply "mineral rights") can be as valuable to their owners as they are in Texas and the other significant oil-producing states. Mineral rights are an interest in real property, just like an easement. However, mineral rights may have little value in Florida if the property where these rights are located is not zoned for drilling or mining, e.g., the land is zoned for residences, retailers, service providers, industry, offices, parks, or governmental uses, or if acreage has been purchased by owners who wish to own a country estate, an equestrian estate, a secluded retreat, or who wish simply to preserve the land in its natural state. Additionally, there are substantial permitting, legal, and regulatory hurdles that must be overcome to obtain the permitting necessary to mine or drill for these mineral interests, not to mention overcoming the possible opposition of environmentalists, neighbors, and politicians. For purposes of this article, we will refer to lands used for these purposes, which we consider incompatible with drilling or mining for oil, gas, and minerals as "non-mining lands."

Not only may mineral rights have little value for non-mining lands, they may actually create title defects for those lands. These defects can be attributed to the natural conflict and friction that results when, if mineral rights are owned by a third party, the same piece of non-mining land will have different owners who own the land for totally different purposes and who are owners without the consent of each other. Normally, the ownership of land is vertically divided (think of a piece of land's surface boundaries with fences on each boundary – the fences literally exemplify a division by vertical boundaries). Even if there is more than one "vertical owner," usually they are partners, such as business partners or spouses. Now think of the land's subsurface. Mineral rights ownership is the ownership of oil, gas, and minerals beneath the surface, so you have a horizontal division of the land's ownership – you have an owner of the surface of the land (and the air to a certain height above it) who may be using the surface for a residence, a store, or an office; and an owner of the subsurface mineral rights with a financial interest in making money from mining or drilling for oil, gas, and minerals, which has a great potential for disturbing the surface owner's enjoyment of the land. Not only that, but, if a conflict arises, Florida courts have held that the rights of the mineral owner are dominant and superior to the rights of the surface owner.

¹ See, e.g., P & N Investment Corp. v. Florida Ranchettes, Inc., 220 So.2d 451 (Fla. 1st DCA 1969).

Fund Assembly 2017 147



A. MINERAL RIGHTS AND NON-MINING LANDS.

Therefore, for the owner of non-mining lands, because of this conflict, mineral rights can create a serious title defect if the owner of the mineral rights has the legal right to enter upon the property and explore, drill, and mine for oil, gas, and minerals (the "right of entry"), even if the land's zoning does not allow for drilling and mining activities. The reason, as you know, is that The Fund and Old Republic National Title Insurance Company will not rely upon zoning that prohibits drilling and mining activities because that zoning can always be changed by the governmental zoning authorities.

Why are mineral rights that are accompanied by a right of entry considered a title defect for non-mining lands? As mentioned above, ownership of mineral rights is superior to the ownership of the land (the "surface rights"), especially if the oil, gas, and mineral rights owner (hereinafter collectively referred to as the "mineral rights owner") has the important right of entry. Barring zoning and land development code restrictions (and any restrictions in the document that created the mineral rights), if the mineral rights owner has the right of entry, the mineral rights owner has the right to enter onto the surface rights owner's land; exploring and testing for oil, gas, and minerals; drilling wells throughout his or her property; digging mines everywhere on his or her property; and even "strip mining" (where the mining company comes in and removes all trees, plants, grass, and even the topsoil to lay bare the underground mineral layer being mined). However, if the mineral rights owner does not have the right of entry, the land-owning surface rights owner can prevent the mineral rights owner from entering onto the property, even if the mineral rights owner owns a portion or even all of the mineral rights. Otherwise, the surface rights owner (the landowner) has no legal right (and no title insurance) to stop the mineral rights owner from entering.

A buyer may decide that, even though the property the buyer is purchasing has mineral rights owned by a third party who has a right of entry, the buyer will consummate the purchase of the home in question, relying on the zoning not being changed and accepting a title insurance policy with an exception for the mineral rights owned, with the right of entry, by a third party. After all, the buyer may be purchasing a home on a lot in a large subdivision.

If the zoning does change to allow mining, obviously this decision will result in a poor outcome for the buyer. Would such a decision have any drawbacks if the zoning is not changed in the future, however? Should an attorney recommend that course of action in that fact situation? Maybe, but other problems may arise.

What if the buyer later tries to refinance? Our experience is that, if the mortgage lender notices the mineral rights and right of entry exception in the title policy, the lender will most likely not lend because the lender will deem the exception a title defect. Also, when the buyer goes to sell this property, the ownership of the mineral rights with right of entry by a third party must be disclosed to the new buyer, the new buyer may weigh the risks and decide not to go forward with the purchase. M ore importantly, the new buyer's mortgage lender, if it reads its title insurance commitment and discovers the issue, will probably not make a mortgage loan to the buyer. Even if the new buyer is paying cash and decides to go forward with the purchase, the new buyer may use this issue to negotiate a reduction of the price of the property below its otherwise fair market value.

² See, e.g., Noblin v. Harbor Hills Development, L.P., 896 So.2d 781 (Fla. 5th DCA 2005).

Therefore, purchasing property where all or a part of the mineral rights are owned by a third party who has a right of entry can have a very negative effect on the marketability, value, and financing of that property.

For the preceding reasons, the Florida Realtors® have long had in their contracts, including the CRSP-13, Contract for Residential Sale and Purchase, in Paragraph 10(a), a requirement that the title insurance commitment state that the seller has marketable title, subject to a few standard exceptions, one of which is "oil, gas and mineral rights of record if there is no right of entry [for the mineral rights owner]." [Emphasis added.] Similarly, the Florida Realtors® and The Florida Bar have long had in their joint Residential Contract for Sale and Purchase, in both their regular and As Is versions, in Paragraph 18.A.(i)(c), a requirement that the title insurance commitment state that the seller has marketable title, also subject to a few standard exceptions, one of which is "outstanding oil, gas and mineral rights of record without [the mineral rights owner having a] right of entry." [Emphasis added.] Therefore, the Florida Realtors® and The Florida Bar created in both of their CRSP-13 and FAR/BAR contract forms a kind of compromise between seller and buyer of residential properties regarding mineral rights. The existence of mineral rights owned by a third party is not a contractual title defect and the property's title is marketable, unless the mineral rights owner has the right of entry, i.e., the right to enter, explore, drill, and mine for oil, gas, and minerals on the property. One result of this language is that the buyer cannot object to the ownership of mineral rights by a third party regarding the property the buyer is purchasing if there is no right of entry. In other words, in such a situation, the buyer must purchase the property subject to the mineral rights, or the buyer will be in breach of the contract. If the mineral rights owner has a right of entry. however, the property's title is not marketable, and this title defect must be corrected by the seller according to Paragraph 18A(ii) of the FAR/BAR contract forms and Paragraph 10(b) of the CRSP-13 contract form.

Practice Tip 1: If you are the title agent issuing a title insurance commitment for property whose mineral rights are owned by a nongovernmental third party, Fund Title Note 27.01.01 and The Fund's <u>Standard Commitment Clauses Handbook</u>, E-37.2, provide you with the following format for the exception for the mineral rights:

"Oil, gas and mineral or other reservations as set forth in deed by recorded
in O.R, Page, and/or Instrument No, Public Records of
County, Florida. No determination has been made as to the current record owner for
the interest excepted herein. The rights of entry and/or exploration [have/have not]
been released or eliminated of record."

For automatic reservations of mineral rights in public lands by the Trustees of the Internal Improvement Trust Fund or any local government, water management district, or other agency of the State of Florida (see Section C.3. below), the exception provided from the <u>Standard Commitment</u> Clauses Handbook, E-37.5, is as follows:

"Deed from [public agency] to	, dated	_ and recorded
in O.R Page Su	bject to automatic phosphate, m	etals, minerals
and petroleum reservations by virtue of	f Section 270.11(1), Florida Stat	tutes."

Practice Tip 2: As mentioned above, we characterized stores, offices, and industrial sites as non-mining lands. These properties are normally sold and purchased not with the above-referenced

contract forms, but rather with an attorney's commercial contract or the Florida Realtors® Commercial Contract. There is a difference between residential and commercial properties and the contracts used for their sale and purchase regarding the lack of mineral rights. Please be aware that Paragraph 6 of the FAR Commercial Contract and Paragraph 7 of the FAR Vacant Land Contract (and perhaps the title insurance provision of the other attorney's contract), where they define marketable title to the property, make no exception for mineral rights when the mineral rights owner does not have the right of entry. Therefore, the buyer can object to the property's title if a third party owns oil, gas, or mineral rights without regard to whether the mineral rights owner also has the right of entry. Since third party ownership of mineral rights without the right of entry may be compatible with store, office, and industrial uses, not requiring a buyer to purchase property where the mineral rights owner has no right to enter upon the property gives a buyer an unfair right to terminate the contract if the buyer develops buyer's remorse after signing the contract and the termination of any Due Diligence or Inspection Period. Such an objection could jeopardize the closing, since purchasing mineral rights can be very expensive and may be impossible to accomplish. Finally, if the mineral rights cannot be repurchased, the buyer would be entitled to a return of the contract's deposit(s) pursuant to the terms of the contract dealing with un-remedied title defects. Therefore, we recommend inserting the words "oil, gas, and mineral rights, without the right of entry" in the second blank of the FAR Commercial Contract's Paragraph 6 or the title insurance provision of the other attorney's commercial contract when the property is used for store, office, or industrial purposes. Then, you, if representing a buyer, must review the title insurance commitment, or the title search if you are preparing the commitment, to determine the existence of any mineral rights and the status of the right of entry so that, if applicable, you can object thereto during the Due Diligence or Inspection Period.

B. OIL, GAS, AND MINERAL RIGHTS AND MINING LANDS.

A moment should be taken at this point, however, to consider the perspective of a buyer who wishes to purchase land for drilling and mining purposes or potentially compatible purposes, such as farming, ranching, and/or land-banking uses, and therefore desires to own all of the mineral rights. You may be unaware, but the latest production figures from December 2016 provided by the Florida Department of Environmental Protection show that oil wells in Florida produced 154,274 barrels of oil, and natural gas wells in Florida produced 1,853,813 cubic feet of natural gas, all in one month alone!³ Further, in 2015 (the latest figures available), Florida reportedly produced 17,262,000 metric tons of phosphate!⁴ Thus, if an attorney is representing a buyer who desires to own mineral rights, because they are in the business of mining or drilling or their business purposes are compatible with mining or drilling, the attorney ignores the ownership of mineral rights at potentially great financial peril to himself or herself! Therefore, make sure you ask your client buyer whether the ownership of a property's mineral rights is an essential aspect of his or her ownership of the property.

If an attorney is representing such a buyer, the attorney should ensure that any real estate contract to purchase such property does not have a clause that requires the buyer to purchase the property despite the lack of all or a part of the mineral rights as long as there is no right of entry. In such a case, the fact that the mineral rights owner has no right of entry is not the issue for the buyer,

Fund Assembly 2017

³ Florida Department of Environmental Protection, Florida Oil and Gas Monthly Production Report (December 2016), http://www.dep.state.fl.us/water/mines/oil_gas/reports/mpr/2016/dec_2016_fla_mon_prod.xlsx.

⁴ U.S. Geological Survey, 2015 Minerals Yearbook: Phosphate Rock [Advance Release] (2015), https://minerals.usgs.gov/minerals/pubs/commodity/phosphate rock/myb1-2015-phosp.pdf.

← Back to Speaker Topics

the issue for the buyer is that someone else owns all or part of the mineral rights. Further, when representing such a buyer, the attorney should ensure that the contract contains an inspection or due diligence period in which the buyer can determine how the property is zoned and, if the buyer wishes immediately to drill or mine, whether the current zoning allows such activity and, if not, the likelihood of obtaining a change or variance of the prohibitive zoning. Better still, the attorney and buyer may wish to negotiate a provision that provides the buyer with time to obtain the re-zoning or variance and makes the buyer's obligation to purchase the property contingent and conditioned upon obtaining such a re-zoning or variance.

Further, we recommend that an attorney who is representing a buyer who is a farmer, rancher, or land-banker advise that buyer that the contract should contain the clauses referenced above, even if initially such a buyer plans only to farm, ranch, or land-bank. Oil and gas production in particular can be compatible with ranching and farming, and the protection of these clauses can always be waived. Otherwise, if you are their attorney, you must be concerned about the following scenario: A farmer or rancher buys land pursuant to a contract that requires the farmer or rancher to take the land subject to mineral rights. Then, such mineral rights and the right of entry are found to be owned by a third party. Even worse, valuable oil, gas, and minerals are actually found to exist. That farmer, every time she walks out onto her field, or that rancher, every time he rides onto his pasture, will be extremely upset to see those wells pumping out all of that oil or gas, worth thousands of dollars every day, day after day, for which he or she is receiving no consideration. (In addition, oil, gas, and mining company employees, vehicles, and equipment will be present frequently, if not daily, disturbing the farmer, the rancher, livestock, and wildlife.) Our concern is that the rancher or farmer might start thinking about why his or her attorney did not protect their client and ensure that the rancher and farmer received some of those profits as royalties, especially considering the inevitable disturbances they will endure. Similarly, even though a land-banker needs only control of the right of entry, not all of the mineral rights, to develop a property or to sell it to a developer, if valuable oil, gas, and minerals are discovered under the property, hindsight being 20/20, the land-banker may claim that his or her attorney should have considered this possibility and ensured that the land-banker not only controlled the right of entry, but also owned all of the mineral rights. Thus, if the rancher, farmer, or land-banker elects to proceed with the purchase of a property without all or some of the mineral rights, be certain that you have a statement in writing documenting their decision.

Practice Tip 3: Often, the FAR Vacant Land Contract is used to purchase mining, ranch, and farm lands. Like the FAR Commercial Contract, when this Contract in its Paragraph 7 defines marketable title to the property, it makes no exception for mineral rights where the mineral rights owner has no right of entry. When representing a mining company, or a rancher or farmer who feels that oil, gas, and mineral extraction would be compatible with their ranching or farming, make sure that oil, gas, and mineral rights are not listed as rights that can be excepted from the property's title. If this Contract is otherwise being used to purchase vacant lands, the intended uses of which do not include, or are not compatible with, drilling and mining activities, ensure that the language "oil, gas, and mineral rights without the right of entry" is inserted in the second blank of Paragraph 7 of said Contract for the reasons discussed in Practice Tip 2 above. Then, you, if representing a buyer, must review the title insurance commitment, or the title search if you are preparing the commitment, to determine the existence of any mineral rights and the status of the right of entry so that, if applicable, you can object thereto during the Due Diligence or Inspection Period.

C. SOLVING A TITLE DEFECT CREATED BY OIL, GAS, AND MINERAL RIGHTS.

\\S

← Back to Speaker Topics

Now let's go back to the most common situation involving the sale and purchase of non-mining land – the purchase and sale of *residential property* using a CRSP-13 or FAR/BAR contract. What if the seller's title insurance policy reveals, or the title search finds, that mineral rights are owned by a third party and that the mineral rights owner has the right of entry, which creates a title defect that the seller has to remedy according to the contract?

Doesn't happen here, you say? By 2013, "fracking" (the fracturing of underground shale rock by the injection of high pressure fluid into it to release the oil or natural gas embedded in it) had become well known as a method for reaching oil and gas that was plentiful in many states, but had previously been unreachable. In October of that year, the Reuters news service revealed that, acting on this knowledge, four large, nationally known homebuilders – D.R. Horton, the Ryland Group, Inc., the Pulte Group, Inc., and Beazer Homes USA – were retaining the oil, gas, and mineral rights under all the homes they were building! D.R. Horton alone had retained the oil, gas, and mineral rights under more than 10,000 home lots in Florida! How were these builders able to do that?

Buyers were obviously not reading the "fine print" of those long builder contracts or the often equally long title insurance commitments being handed out late at the closing by the builder's title insurance agent. Even before the Reuters story broke, we had found such a mineral rights retention, also with a retained right of entry, in a title insurance policy issued to the buyer of a D.R. Horton home in Manatee County. The buyer was then trying to re-sell the home and had no idea that the mineral rights with the right of entry were owned by D.R. Horton. (Fortunately for the seller in that case, after demand was made, D.R. Horton conveyed back the mineral rights.) Later, Reuters reported that Florida's Attorney General became involved, met with representatives of D.R. Horton, and D.R. Horton then decided to offer to return all the oil, gas, and mineral rights to the affected homeowners.

Even worse, a condominium developer in Manatee County actually embedded its retention of the mineral rights to the condominium project, together with the right of entry, in its Declaration of Covenants, Conditions and Restrictions for the master association, and, while the developer was at it, the developer retained all rights to the groundwater. We have attached excerpts from the Declaration as the last attachment to this article. Not only did the reservation include oil, gas, and groundwater, but the retention of "minerals and resources" included every mineral known to man, along with such substances as helium, peat, and salt. This mineral rights reservation was so comprehensive and exhaustive that we were forced to see if the man behind the developer was J.R. Ewing.



Finally, the State of Florida has long been involved in retaining mineral rights. Florida law [currently Florida Statutes Section 270.11(1)] has long required that the State of Florida (including any state agency, water management district, and local government), reserve back to itself one-half of all oil rights and three-quarters of all other mineral rights, together with the right of entry, any time the State conveys governmental lands to private individuals or firms. These reservations have always been automatic and do not require any express reservation to be set forth in the deed. However, for conveyances after June 14, 2001, the Statute allows the state agency to choose not to reserve said mineral rights.

Practice Tip 4: If you are representing the buyer of public land from a state agency, you should ensure that the deed expressly states that the agency is not reserving mineral rights.

Now back to the original questions: What if the seller's title insurance policy for the seller's home reveals, or a title search finds, that mineral rights are owned by a third party and that the mineral rights owner has the right of entry? What tools are available to assist attorneys to close the sale and purchase?

The following eleven (11) tools are available: (1) using the Marketable Record Title Act, (2) applying of the "less than 10-acre exception" for mineral rights reserved by the State of Florida, (3) utilizing the "less than 20-acre exception" contained in Florida Statutes Section 270.11(2), (4) finding a termination clause in a mineral rights lease, (5) purchasing of either the mineral rights or a release of the right of entry, (6) relying on the effects of certain tax deeds, (7) purchasing and foreclosing a judgment against the mineral rights owner, (8) employing arguments justifying the removal of the standard generalized, nonspecific mineral rights exception, (9) preparing a disclosure of, acceptance of, and release of liability for the buyer relating to the mineral rights, (10) obtaining a letter of indemnity, and (11) commencing a partition lawsuit. There are other fact-specific remedies or title insurance company policies to eliminate at least the right of entry that are also available on a case-by-case basis, but which are outside the scope of this article.

1. The Marketable Record Title Act (discussed in Fund Title Note 27.01.02).

The Marketable Record Title Act ("MRTA"), which is Chapter 712 of the Florida Statutes, eliminates all ownership, interests, rights, and title defects in real property that were recorded in the land records before a title transaction (usually a deed that is not a quit claim deed), which was

recorded at least 30 years before the current date (the "root of title"), with certain exceptions. Those exceptions include mineral rights, but not the private right of entry to explore, drill, and mine for oil, gas, and minerals.

MRTA will eliminate and bar the right of entry of a private mineral rights owner if: (i) there has been no recording of any documents or instruments associated with the mineral rights since the recording of the deed, reservation, or lease that is the root of title for the mineral rights to the current time as determined by a Fund MRTA title search; (ii) a review of the county property appraiser's tax roll finds that the mineral rights are not being taxed (which they should be, if they are in existence); and (iii) the surface owner signs an affidavit that no one is currently or has been exploring, mining, or drilling for oil, gas, and minerals on the property in question. In Florida, only one oil well (if drilled 7,000 feet or deeper) can be drilled for each quarter section (1/4 square mile), and only one natural gas well can be drilled in each section, or square mile. Therefore, unfortunately, the surface rights owner must be able to swear in the affidavit that no oil wells are closer than a half mile from the property and no gas well is within a mile of the property. Otherwise, a well within one of those distances could be exercising the surface owner's mineral rights, even though that well is not located on the surface owner's property. In such a case, the right of entry cannot be barred.

As you recall, both the FAR/BAR real estate contracts and the CRSP-13 real estate contract for residential sales and purchases state that mineral rights ownership by a third party *without* the right of entry is not a title defect, and, therefore, the buyer may not object to the rights. Thus, when faced with the problem of mineral rights *with* a right of entry in favor of the mineral owner, the mineral rights search referenced above can be ordered back to the root of title of the mineral rights to try to eliminate the right of entry, if the oil, gas, and minerals are not being taxed, explored for, or extracted. If they are not, the right of entry can be documented as barred at the end of the title insurance commitment's mineral rights exception in Schedule B-II.

2. The "less-than-10-acre exception" for mineral rights reserved by the State of Florida (as discussed in Fund Title Note 27.04.01 B.).

Older deeds from the State of Florida which reserved back mineral rights prefaced their reservations with the qualifying words, "As to lands in tracts or composite tracts aggregating ten (10) acres or more." This language means that if the area of all tracts described in the original Trustees of the Internal Improvement Fund ("TIIF") deed is less than ten (10) acres in the aggregate, neither mineral rights nor the right of entry were kept by the State of Florida.

Therefore, when faced with such a mineral rights reservation by the State of Florida for a parcel of land that is less than ten (10) acres (and obviously most subdivision lots are less than ten acres), the original TIIF deed containing the original mineral rights reservation should be found and examined to determine if the above-referenced qualifying language is contained in the deed. If so, any reference in the title insurance commitment to either the mineral rights or the right of entry can be deleted.

3. The statutory "less-than-20-acre exception" for mineral rights reserved by TIIF or the State Board of Education (as discussed in Fund Title Note 27.04.01 C.).

Х

⁵ See TN 27.01.02.

⁶ FLA. ADMIN. CODE R. 62C-26.004(2).

Regarding mineral rights reserved from the ownership of a property by TIIF or the State Board of Education, there is yet another tool, which is Florida Statutes Section 270.11(2)(b), which releases the right of entry for mineral rights owned by either TIIF or the State Board of Education "as to any parcel or property that is, or has ever been, a contiguous tract of less than 20 a cres in the aggregate under the same ownership." Unlike the less-than-10-acre exception discussed above which eliminates both the mineral rights and the right of entry, this less-than-20-acre exception eliminates only the right of entry, not the mineral rights ownership, and applies only to reservations in favor of TIIF or the State Board of Education. However, as you have read above, release of the right of entry alone makes title to the property good and marketable, despite the exception for the mineral rights remaining in the title insurance commitment.

4. Finding a termination clause in a mineral rights lease.

In addition to mineral rights being reserved or held back by a prior owner of the surface and/or mineral rights when property is sold to a buyer, mineral rights can be sold and conveyed by a separate deed. However, mineral rights can also be leased to a drilling or mining company and a portion of the profits paid back to the mineral rights owner/lessor as royalties, using a mineral lease. As with most leases, a mineral lease has a period of time during which it is effective, called the "term." Unlike other leases, in a mineral lease, this period of time is called the "primary term," and the term of the mineral lease will be extended indefinitely if oil, gas, or minerals are being actively extracted from the land at the end of the primary term. In such a case, the term of the lease will continue until oil, gas, or minerals are no longer being extracted.

If the mineral rights owned by a third party consist of a mineral lease, the lease should be examined to determine when the primary term ended, and then to determine if oil, gas, and minerals are actively being extracted from the subject property. If the primary term has ended and no oil, gas, or minerals are being extracted, the mineral lease and its rights no longer exist, its exception can be removed from the title insurance commitment, and title to the property will be marketable.

5. Purchase of mineral rights or purchase of a release of the right of entry.

When non-mining lands are being sold and purchased, and they are subject to mineral rights with the mineral rights owner having the right of entry, if the seller is willing to purchase the outstanding mineral rights themselves, this is the best solution for the buyer, since it removes these rights totally as an issue. However, the FAR/BAR and CRSP-13 real estate contracts require only that the right of entry of the mineral rights owner be terminated, not their mineral rights, and purchasing a release of the right of entry from the mineral rights owner is usually easier. First, valuing mineral rights themselves is typically beyond the capability of those not involved in the oil, gas, mineral industry. Second, mineral rights are more expensive to purchase than a release of the right of entry. Third, purchasing a release of the right of entry does not require the mineral rights owner to sell any portion of the mineral rights, which the owner often believes are valuable. Thus, persuading a mineral rights owner to sell a release of the right of entry is usually easier, cheaper, and faster to accomplish. At the same time, it also protects the surface rights owner because, if the surface rights owner (the landowner) obtains the right of entry back from the mineral rights owner, that will prevent anyone from exploring, drilling, or mining on the property without the landowner's consent.

\\S

Further, the lack of mineral rights does not necessarily preclude the landowner who has the right of entry from benefiting from the extraction of the oil, gas, and minerals. Even if gold is discovered under the surface of a property, the landowner without mineral rights can still benefit from the mining of the gold. Why? Even if the zoning is changed to allow the mining, the mineral rights owner still cannot mine without the landowner's consent because the landowner controls the right of entry. Thus, the landowner can allow the mining in exchange for a portion of the mineral rights or a part of the profits therefrom, payments for the latter being royalties.

6. Tax Deeds.

Under Florida Statutes Section 193.481(1), the ownership of mineral rights is taxable by each county as an ad valorem or property tax, and under subsection (5) of that Statute, tax certificates and tax deeds can be issued if the taxes are not paid on the mineral rights. Under Florida Statutes Section 197.343(2), the surface rights owner (landowner) has the first right to purchase a tax certificate for any delinquent taxes on the mineral rights relating to the landowner's property. Given the title problems that mineral rights cause for non-mining land and the value they may have for mining lands, a surface owner should jump at the opportunity to purchase such a tax certificate and, if the taxes are not paid within two years thereafter, to apply for and purchase a tax deed for the mineral rights.

If, by chance, the mineral rights are very old, and, before 1957, the property under which the oil, gas, and minerals were located was sold at a tax sale, that tax deed would have transferred not only the land but the mineral rights, too. This is because before 1957, landowners had to pay the taxes for both the land and the mineral rights, according to the old Florida Statutes Section 211.14, which is no longer in effect. Such a deed, however, would allow one to disregard any mineral rights that had existed prior to the deed and remove their exception from the title insurance commitment.

7. Foreclosure of judgments against mineral rights owners.

If, fortuitously, a surface rights owner finds that an owner of their property's mineral rights has a judgment against him or her, the surface rights owner may be able to purchase the judgment, perhaps even with a discount, and then foreclose the judgment lien against the mineral rights. If the amount of the judgment is substantial enough, hopefully the judgment holder will be the high bidder at the foreclosure sale, thereby obtaining the mineral rights.

8. Reasons justifying the removal of the standard generalized, nonspecific mineral rights exception of certain title insurers.

A number of title insurers are now inserting a standard generalized, nonspecific mineral rights exception at the end of their commitments' standard exceptions in Schedule B-II, formatting it to even look like a standard exception. It reads basically as follows: "Any oil, gas, or mineral rights." No specific recorded documents are referenced. There is no reference to whether the right of entry of the mineral rights owner is barred or not. As we know from our discussion above of the mineral rights provisions in the real estate contract forms developed by the Florida Realtors® and The Florida Bar, the preceding exception is a title defect to which the buyer can object, and to which you should object if you represent the buyer.

Back to Speaker Topics

If you are preparing the title insurance commitment for a transaction and this type of mineral rights exception is found in the seller's prior title insurance policy, look to see if the property to be insured is in a subdivision or is a unit in a condominium development. If so, you can check to see if other title insurance policies (not prepared by you) for other homes in that subdivision or other units in that condominium have any mineral rights exceptions. If you can find two such policies (informally called "go-bys") without mineral rights exceptions, The Fund will allow you to exclude the mineral rights exception from the seller's prior policy from your current title insurance commitment. If the property has a metes and bounds legal description, a 30-year mineral rights search must be ordered for an additional fee to determine if the mineral rights actually exist, and if they do, whether MRTA has barred the right of entry to the mineral rights owner for purposes of your title insurance commitment.

If the title insurance commitment for a transaction was prepared by another title insurance agent and you have received the commitment to review as the buyer's attorney, following are arguments that you can send to the agent to eliminate the mineral rights exception:

Please line through and initial the deletion of Schedule B-II Exception regarding oil, gas, and/or mineral rights for the following three reasons: (a) You have provided no O.R. Book and Page where documents creating these rights have been recorded. (I am certain that the reason no recording references were given was because your search did not reveal any oil, gas, or mineral rights documents.) (b) Further, Paragraph 18.A.(i) of the FAR/BAR Residential Contract for Sale and Purchase for this transaction requires that the title commitment be issued to the Buyer "with legible copies of instruments listed as exceptions attached thereto" You have provided no such documents as required by the Contract, which constitutes a breach of the Contract by your Seller if oil, gas, and/or mineral rights do exist, since the Seller and your company have the obligation to provide the title insurance commitment and the accompanying documents. (c) Finally, farther down in that Paragraph, it requires the Buyer to take title "subject *only* to the following matters: ... (c) outstanding oil, gas, and mineral rights of record without right of entry" [Emphasis added.] Thus, mineral rights for which the right of entry has not been barred are a title defect under this Contract. We cannot determine whether these oil, gas and mineral rights are without the right of entry unless we have the documents that created them. Therefore, without these documents and a barring of the right of entry, this Exception is a title defect according to that Contract provision, and therefore must be deleted or the defect remedied.

Further, a title insurer cannot insert exceptions in their policy other than the "gap" and standard exceptions without some recorded or statutory basis for inserting the exception, particularly an exception that is a title defect, and mineral rights cannot be conveyed, transferred, reserved, or leased without recorded documentation to protect their priority against subsequently recorded instruments. What is next as a generalized exception – "any mortgages given and recorded by prior owners," "any recorded judgment or tax lien that may have attached to the insured property previously," "any easements encumbering the insured property," etc.?

Moreover, issuing policies with broad mineral rights or similar exceptions means substantially less risk and liability is being assumed by a title insurer, yet it and

its agents are collecting the same promulgated premium as other insurers who are not inserting this exception. This gives such a title insurer a competitive advantage and is a violation of Florida Statutes Section 627.777, subsection (5), below.

627.777. Approval of forms. -

- (1) A title insurer may not issue or agree to issue any form of title insurance commitment, title insurance policy, other contract of title insurance, or related form until it is filed with and approved by the office. The office may not disapprove a title guarantee or policy form on the ground that it has on it a blank form for an attorney's opinion on the title.
- (2) The office shall approve or disapprove a form filed for approval within 180 days after receipt.
- (3) When the office approves any form, it shall determine if the current rate in effect applies or if the coverages require the adoption of a rule pursuant to s. 627.782.
- (4) The office may revoke approval of any form after providing 180 days' notice to the title insurer.
- (5) An insurer may not achieve a competitive advantage over any other insurer, agency, or agent as to rates or forms. If a form or rate is approved for an insurer, the office shall expeditiously approve the forms of other insurers who apply for approval if those forms contain identical coverages, rates, and deviations which have been approved under s. 627.783.

Finally, according to Florida Statutes Section 627.7845, subsection (1) below, a title insurer is not allowed to issue a title insurance policy until it "has caused to be made a determination of insurability based upon the evaluation of a reasonable title search" Since the title insurer has determined that mineral rights for the subject property were not insurable, that decision had to be based on the said public records. Please provide me with the information from the said public records upon which that decision was based, since subsection (2) below of the Statute requires a title insurer to preserve evidence of the title insurer's title search and examination.

627.7845. Determination of insurability required; preservation of evidence of title search and examination. –

- (1) A title insurer may not issue a title insurance commitment, endorsement, or title insurance policy until the title insurer has caused to be made a determination of insurability based upon the evaluation of a reasonable title search or a search of the records of a Uniform Commercial Code filing office, as applicable, has examined such other information as may be necessary, and has caused to be made a determination of insurability of title or the existence, attachments, perfection, and priority of a Uniform Commercial Code security interest, including endorsement coverages, in accordance with sound underwriting practices.
- (2) The title insurer shall cause the evidence of the determination of insurability and the reasonable title search or search of the records of a Uniform Commercial Code filing office to be preserved and retained in its files or in the files of its title insurance agent or agency for at least 7 years after the title insurance commitment or title insurance policy was issued. The title insurer

or its agent or agency must produce the evidence required to be maintained under this subsection at its offices upon the demand of the office. Instead of retaining the original evidence, the title insurer or its agent or agency may, in the regular course of business, establish a system under which all or part of the evidence is recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process that accurately reproduces or forms a durable medium for reproducing the original.

- (3) The title insurer or its agent or agency must maintain a record of the actual premium charged for issuance of the policy and any endorsements in its files for a period of not less than 7 years. The title insurer, agent, or agency must produce the record at its office upon demand of the office.
- (4) This section does not apply to an insurer assuming no primary liability in a contract of reinsurance or to an insurer acting as a coinsurer if any other coinsuring insurer has complied with this section.

Absent recorded documentation upon which the title insurer relied to determine that mineral rights were uninsurable for the subject property, the title insurer has no grounds to continue to refuse insurability of the mineral rights. Therefore, if documentation cannot be provided, we hereby demand the deletion of the mineral rights exception, or, if your title search requires the exception be retained, bar the right of entry.

9. A letter of indemnity.

If the seller did not provide you with the seller's existing title insurance policy and you discover a mineral rights title defect that occurred prior to the seller's purchase of the property, you should press the seller to try to find their prior title insurance policy. (If the seller cannot find the policy, a check of their deed or other closing documents should reveal the title agent who handled the seller's closing when the seller purchased the property and who the seller can call for a copy of their policy.) Once you have a copy of the prior policy, check to see if it has an exception to coverage for the mineral rights title defect. If it does not, contact your Fund underwriting attorney to determine if you can accept a letter of indemnity from the seller's title insurance company. If the current sales price greatly exceeds the amount of coverage provided by the prior policy, Old Republic National Title Insurance Company may not be willing to accept the letter of indemnity since Old Republic would still be liable for the excess coverage above the prior policy's limit. If, on the other hand, Old Republic will accept a letter of indemnity, you can request a letter of indemnity from the prior title insurer. Usually you will receive such a letter because, by issuing the letter of indemnity, the prior title insurer will delay, and maybe completely avoid, an insurance claim that will surely be filed by the seller if the prior title insurer does not agree to indemnify. Once you receive the letter of indemnity, send it to your Fund underwriting attorney to ensure that the letter's language is sufficient.

10. Disclosure of, acceptance of, and release of liability by the buyer relating to the mineral rights.

If a third party owns mineral rights and has the right of entry for the property being sold and purchased, that situation creates a title defect, according to the mineral rights provisions of the real estate contract forms developed by the Florida Realtors® and The Florida Bar. Certainly, if you are the buyer's attorney, you have a duty to disclose the title defect to your client. If you are simply a

Back to Speaker Topics

closing/title agent, you may have a duty to disclose to the buyer that the mineral rights exception that does not bar the right of entry in your title insurance commitment is a title defect pursuant to the real estate contract. A fter all, as the closing/title agent, your obligation is to follow the contract in conducting the closing, preparing the closing documents, etc. Further, even if you did not consider yourself to be the buyer's attorney, what if you "helped" the buyer with some issues related to the closing or, after soliciting the buyer at the first closing, he or she retained you to conduct a second closing? Isn't the buyer's expectation going to be that you acted as his or her attorney and should have disclosed the mineral rights title defect? Even if you disagree, if a buyer is given a title insurance commitment with such a mineral rights exception without a disclosure that the exception is a title defect pursuant to the contract, what do you think the buyer's new attorneys will claim when they are subsequently hired by the buyer after an oil or mining company starts exploring, drilling wells, or mining on the buyer's property? It will be time to call your malpractice insurance company.

Once you disclose the mineral rights title defect, what if the seller cannot remedy the defect with any of the methods referenced in this article, and the buyer decides to purchase the property subject to the mineral rights and the mineral rights owner's right of entry? We recommend, because of the risk involved, that you have the buyer sign a disclosure and release.

We have attached to the end of this article two disclosures and releases — one which is detailed and the other which is shorter. Each of the disclosures follows our firm's policy of disclosing the risk, describing why the risk is a risk, detailing the adverse effects and problems the risk can cause if it comes to fruition, and has the seller agree to an additional due diligence period in which the buyer can determine whether to proceed with the purchase of the property or cancel the contract and receive a refund of the buyer's deposit(s). The longer disclosure and release form contains the buyer's acknowledgement that our law firm does not represent the buyer, recommends the buyer retain an attorney, and actually warns against purchasing the property.

11. A partition lawsuit.

If a mineral rights owner also has the right of entry and will not cooperate with the surface rights owner, and none of the preceding tools will work, the surface rights owner, as long as that owner owns a share of the mineral rights, can file a partition lawsuit to force the sale of the mineral rights, which has to include, however, any share of the mineral rights owned by the surface rights owner. As pointed out by G. Thomas Smith, Esq., a respected Florida oil, gas, and mineral rights attorney (and Fund member) in Pensacola, Florida, there are risks to this procedure. First, if the surface owner has a minority share of the mineral rights, say 1/3, and the other mineral rights owner has a 2/3's share, at the sale of the mineral rights, the majority mineral rights owner can bid up the price of all the mineral rights, knowing that if he or she wins, he or she will only have to pay 1/3 of the price to buy all of the mineral rights, since he or she already owns the other 2/3's of the mineral rights. On the other hand, the surface rights owner will have to pay two times the price that the mineral rights owner has to pay because the surface rights owner only has 1/3 of the mineral rights and has to pay for the other 2/3's. Even if the 2/3's mineral rights owner loses the bidding war, he or she will be paid a handsome price for his or her 2/3's of the mineral rights. The second risk to the surface rights owner is, if he or she loses the bidding contest, he or she will not only lose his or her mineral rights, but will further antagonize the mineral rights owner and still not control the allimportant right of entry. Thus, since losing would worsen the surface rights owner's position, he or she has to keep bidding, thereby worsening the first risk. The third risk is that a third party, other than the surface rights owner and the mineral rights owner, will out bid both of those parties, thereby

\\S



requiring the surface rights owner, now with no mineral rights ownership, to deal with a new mineral rights owner who has paid even more for the mineral rights and is therefore probably going to charge an even higher price to release the right of entry, if he or she is even willing to discuss its release.

D. CONCLUSION.

We trust that you have learned a little more about oil, gas, and mineral rights from the perspective of a real estate attorney, when mineral rights create a title defect, and its ramifications. We hope that you will find helpful some of the eleven tools to overcome a mineral rights defect that we have discussed. If you have any questions regarding mineral rights, please do not hesitate to call us at 941-741-8224 or e-mail us. If you would like a copy of this article emailed to you, please request one from our Firm Administrator, Connie Hoff, at CHoff@BarnesWalker.com.

Garret T. Barnes

Adron H. Walker

Important Note: The information contained in the preceding is summary in nature and is provided for educational purposes only to you as a member of The Fund, of which we are a proud member. This article should not be considered as legal advice for your or your client's situation, if any, nor is it intended as specific or detailed advice, as we do not have any information specific to your or your client's situation. Further, the preceding article is not intended to be an all-inclusive discussion of oil, gas, and mineral rights, but a guide to the same, and there may be other matters not described in the article that may impact your particular situation.



Seller:

OIL, GAS, AND/OR MINERAL RIGHTS DISCLOSURE AND RELEASE ADDENDUM TO REAL ESTATE CONTRACT

Buyer:	
Property:	
Date:	
The above-refere	enced Real Estate Contract for the purchase and sale of the above-referenced Property I the following:
as buyer that the Propert	re. Seller and <i>[your law firm's or title company's name]</i> do hereby disclose to you y has a title defect by virtue of being subject to certain oil, gas, and/or mineral rights, limitations, and/or notices recorded at:
and hereinafter collective	, of the Public Records of Manatee County, Florida, all attached hereto by referred to as the "Mineral Rights."
2. Risks an	nd Effects. The risks, ramifications, and effects of the Mineral Rights are:
to as the "Mineral Own exploration, mining, and without your permission.	There are separate owners of any oil, gas, or minerals (hereinafter collectively referred ners") lying beneath the Property who have the right to conduct mineral and oil drilling operations on the Property and to remove and sell those minerals and oil, with lessened or no payment to you as owner of the Property. Typically, the rights of the rights of the owners of the surface of the land.
crops, pasture lands, c destroyed, or dismantled	As a result of the Mineral Owners' rights, the Property, and any houses, buildings, itrus groves, trees, timber and other items on the Property, may be damaged, by the Mineral Owners, their successors or assigns. The Mineral Owners typically any owner of the Property as the result of any such action.
	Further, any funds loaned by any lender or expended by a buyer or owner in ne, building, or other improvement on the Property are at risk of being lost.

e. You will have no title insurance to compensate you for any costs or expenses caused by the exploration, extraction, or use of the Mineral Rights by the Mineral Owners.

homes on the Property being removed possibly at your, the Property owners', expense, by the Mineral Owners, in the future, the existence of these Mineral Rights constitutes a defect in title to this Property, and you as owner must disclose, under Florida law, the Mineral Rights to any future buyer of the Property and to any future mortgage lender should you as owner wish to sell or refinance the Property. This disclosure obligation may prevent you from refinancing the Property or may prevent you from re-selling the Property for

f. Finally, you *may or may not* have the right to be paid rentals, royalties, or other forms

In addition to the Property being torn up by exploration, mining, or drilling and any

its full fair market value or even re-selling the Property at all.

d.

of compensation for the minerals pumped or mined from your Property.

3. Acknowledgment, Recommendation, & W [your law firm's name] nor its affiliated title company, [you seller regarding this issue of Mineral Rights or the purchase that you take this Disclosure Addendum and its attachments the do not do so, [your law firm's name], and its affiliated title control to purchase the Property.	of the Property. We hereby strongly recommend o an attorney of your selection for review. If you			
4. Additional Due Diligence Period. You as be Period by the seller of () business days from the day whether to cancel the Contract or proceed with the purchase you decide within the additional Due Diligence Period not to written notification of cancellation of the Contract on or be signing the Cancellation section below and returning it to Lyowill be promptly refunded your deposit(s). You are caute Property or its purchase until such time as you have made purchase of the Property or not. If you decide within the additionate of the Property or not. If you decide within the additionate of the Property or not if you decide within the additionate of the Property or not. If you decide within the additionate of the Property or not if you decide within the additionate of th	of the Property, despite the Mineral Rights. If proceed with the purchase, you must give seller fore, at 5:00 p. m., by we law firm's or title company's name], and you foned not to expend any monies regarding the ea decision as to whether to proceed with the decision to proceed with the decision to proceed with the purchase also on or expendence. Non-Cancellation, Release, And Assumption			
ACKNOWLEDGMENT &	AGREEMENT			
I, the undersigned buyer, do hereby acknowledge that its attachments on, and accept above. I also agree to carefully read this Disclosure Addenditake this Disclosure Addendum and its attachments to an attor I, the undersigned seller, do hereby make the above above.	the additional Due Diligence Period referenced um and its attachments and have been advised to ney of my own selection for his or her review.			
SELLER:	BUYER:			
[Name]	[Name]			
[Name]	[Name]			
CANCELLATION				
I, as buyer, have decided to cancel the Contract. I understand that my deposit(s) will be promptly				
returned.	understand that my deposit(s) will be promptly			
BUYER:				
[Name]				

\\

Α



NON-CANCELLATION, RELEASE, AND ASSUMPTION OF RISK

I as huvar have voluntarily	decided not to cancel the Contract during the Due Diligence Period. I
intend to purchase the Property for	•
1 1 2	purposes, and I have acknowledged to the urrent purchase price that I am paying for the Property is appropriately
	restrictions, limitations, and reduction in value caused by the Mineral
	entering into the Contract and agreeing to give me as buyer the additional
	release and discharge the seller; seller's and buyer's Realtors [®] ,
and : [you	; and their real estate brokerages,; name and/or your title company's name] (collectively, the
	action, suits, liabilities, expenses, costs, agreements, promises, damages,
	w or in equity, which I ever had, now have, can, shall, or may have, or
	cessor, heir, or assign of me, hereafter can, shall or may have, against the
Releasees, for, upon, or by reason o	f any matter, cause or thing whatsoever, arising out of, related to, or
	Mineral Rights, and I assume all risks, liabilities, and responsibilities
	with the above-referenced Mineral Rights. This Addendum shall survive
closing.	
DIMED	
BUYER:	
[Name]	
[rume]	
[Name]	
Date:	
(May not be dated prior to	
, , , <u> </u>	



OIL, GAS, AND/OR MINERAL RIGHTS DISCLOSURE AND RELEASE

I/We, the undersigned buyer(s) of property located at
(the "Property") do hereby acknowledge that I/we have been advised that there are oil, gas, and/or minera rights and restrictions against the Property as described in the following documents, copies of which I/we have received, had the opportunity to examine, and about which I/we have had the opportunity to consult with ar attorney:
These oil, gas, and/or mineral rights and restrictions typically include, but are not necessarily limited to, the rights of mining and drilling companies to enter, explore, drill, and mine on the Property without my/our permission; to sell the oil, gas, and/or minerals with lessened or no payment to me/us, and to remove homes and other structures from, and damage or destroy any pasture land, agricultural crops, or citrus groves on, the Property. I/we understand that these rights and restrictions are superior to my rights as the surface landowner. These rights and restrictions are defined as title defects in most Florida real estate contracts. Thus these rights and restrictions may therefore substantially impair the future price and marketability of the Property and hinder or completely prevent future financing of the Property by me/us or any buyer from me/us Therefore, I/we understand that monies paid by me or loaned to me to purchase the Property are at a certain amount of risk, and I/we will not have title insurance protection against that risk and, instead, I/we will be assuming that risk.
Choose one of the following paragraphs:
[I/we further acknowledge that, after receiving this disclosure orally, I/we had the opportunity to cancel my/our real estate contract for the purchase of the Property and have any deposits that I/we had previously made returned to me/us.
OR
The Seller agrees that I/we will have a 10-day investigative period from the date hereof to determine the acceptability of these oil, gas, and/or mineral rights and restrictions. Should I/we find the results of my/our investigation to be unsatisfactory in my/our sole opinion, and I/we cancel the real estate contract for the Property in writing during my/our investigation period, the Seller agrees to accept said cancelation and the escrow agent shall promptly refund my/our deposit.]
If I/we do not or did not cancel the real estate contract for the purchase of the Property as described above, I/we do he reby release and discharge my/our Seller,; my/our Realtor [®] ,; and his/her real estate brokerage, and <i>Choose one of the following:</i> [the attorney and/or title company that handles my/our closing] <i>OR</i> [your law firm's and/or title company's name], and their employees, owners, heirs, successors, and assigns, as applicable (collectively, the "Releasees"), of and from all causes of action, suits, liabilities, expenses, costs agreements, promises, damages, claims, and demands whatsoever, in law or in equity, which I/we ever had now have, can, shall, or may have, or which any personal representative, successor, heir or assign of me/us hereafter can, shall or may have, against the Releasees, for, upon or by reason of any matter, cause or thing whatsoever, arising out of, related to, or connected with the above-referenced oil, gas, and/or mineral rights and restrictions. This Disclosure and Release shall survive closing. Dated this day of, 20
Dated this day of
Buyer Signature

 $\setminus \boldsymbol{A}$

	Printed Name			
	Buyer Signature			
	Printed Name			
If the second option above is selected, the following Joinder should be added:				
JOI	NDER			
FOR VALUE RECEIVED, the undersigned Seller does hereby agree to the third paragraph above.				
Dated this day of, 2	20			
	Seller Signature			
	Seller Signature			
	Printed Name			
	Seller Signature			
	Printed Name			



DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR HARBOUR ISLE ON ANNA MARIA SOUND MASTER ASSOCIATION

Section 19. <u>"FHA"</u> shall mean and refer to the Federal Housing Administration, an agency of the government of the United States of America.

Section 20. "Groundwater" shall mean and refer to all groundwater and other subsurface water of any and every type, kind, category or nature whatsoever, separately, mixed or combined with any other substance, found beneath the surface of the earth (whether referred to or categorized as ground water, underground water, reclaimed water, percolating ground water, moisture in soils or other substances, underflow of streams or underground streams), together with all rights, privileges and interest pertaining thereto, including without limitation all rights and benefits accruing from historical production, use and usage, and any and all permits, licenses or other governmental approvals that now or hereafter pertain or accrue to such Groundwater ownership, production and use.

Section 21. "Master Association" shall mean and refer to HARBOUR ISLE ON ANNA MARIA SOUND MASTER ASSOCIATION, INC., a Florida corporation not-for-profit, its successors and assigns, which shall be responsible for administering the lands and improvements covered by this Master Declaration, which duties and obligations shall include, but are not limited to, the imposition and levy of assessments and/or fines that are separate, apart and in addition to any and all assessments and or fines imposed or levied by the Association. The Master Association shall be superior in all respects to the Association, and shall have a separate board of directors. Every Owner in the Project shall be a member of the Master Association as provided by the terms of this Master Declaration.

Section 22. "Master Association Documents" shall mean this Declaration, the Articles, the Bylaws and the Rules and Regulations of the Master Association.

Section 23. "Member" shall mean and refer to a member of the Master Association, that is, each Owner of a Unit which is subject to assessment by the Association and the Declarant.

Section 24. "Minerals and Resources" shall mean and refer to all subsurface rights and interests underlying the Project, or any portion thereof, including but not limited to, any hydrocarbons of whatever name or type, all metals and any and all other minerals, gases and substances of whatever name or type, geothermal energy and geothermal substances and rights, all aluminum, asphalt, barite, basalt beryllium, bismuth, bentonite, clays, brines, bromine, caliche, celestite, cement, clay, coal, copper, diatomite, dolomite, evaporates, feldspar, fluorspar, gas, gemstones, gold, gravel, greensand, gypsum, helium, hydrogen, iron, lead, lime, limestone, lignite, magnesite, magnesium, manganese, mercury, mica, mineral water, molybdenum, natural gas, nitrates, novaculite, oil, oyster, peat, perlite, petroleum, phosphate, potash, polyhalite, pumicite, salt, shell, silver, sulfur, talc, tin, titanium, topaz, tripoli, turquoise, uranium, vermiculite, zeolites and zinc that now or in the future that are located in whole or in part, in, on, and under, and/or that may be produced from, the Project, together with all ores thereof and other products or materials produced therefrom or in association therewith.

Section 25. "Minerals, Resources and Groundwater" shall mean and refer to Minerals and Resources and Groundwater collectively.

- Section 2. <u>Duration</u>. The covenants and restrictions of this Declaration shall run with and bind the land for a term of twenty-five (25) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years.
- Section 3. Notices. Any notice required to be sent to any Owner under the provisions of this Declaration shall be deemed to have been sent when mailed, postage prepaid, to the last known address of the person or persons who appear as the Owner of the Unit on the records of the Association at the time of such mailing.
- Section 4. FHA/VA Approval. As long as there is a Class B membership, the following actions will require the prior approval of the FHA and/or the VA if required by the VA and/or the FHA regulations.
 - Annexation of additional properties,
 - b. Dedication of Common Areas, and
 - Amendment of this Declaration of Covenants and Restrictions,
- Section 5. Rules and Regulations. The Master Association may publish unrecorded Rules and Regulations from time to time that shall be applicable to the Project but which shall not be applicable to the Declarant or its affiliates, agents or employees and contractors (except in such contractor's capacity as Owners), nor to institutional first mortgagees, nor to property while owned by either the Declarant or its affiliates or such mortgagees. Such Rules and Regulations shall apply to all other Owners and occupants. The Board of Directors shall be permitted to grant relief to one or more Owners from specific Rules and Regulations upon written request therefor and good cause shown in the sole opinion of the Board.
- Section 6. <u>Easements.</u> Formal language of grant or reservation with respect to such easements, as appropriate, is hereby incorporated in the easement provisions hereof to the extent not so recited in some or all of such provisions.
- Section 7. Covenants Running With the Land. Anything to the contrary herein notwithstanding, it is the intention of the Declarant as fee simple owner of the Project, that this Declaration shall constitute covenants running with the land and with title to the Project or any part thereof, or as equitable servitudes upon the land, as the case may be.
- Section 8. <u>Dissolution of Association.</u> In the event of a permanent dissolution of the Master Association, the fee simple owners of the Units in the Project shall immediately thereupon hold title to the Common Areas, as tenants in common and shall collectively provide for the continued maintenance and upkeep thereof by conveying same to an appropriate governmental entity or another organization similar to the Master Association.
- Section 9. Minerals, Resources and Groundwater. Declarant expressly reserves the right to all Minerals, Resources and Groundwater lying beneath the surface of the Project, together with (a) the right of ingress, egress and possession of the surface of the Property at all times for the purposes of exploring, studying, mining, drilling and operating for such Minerals, Resources and Groundwater and the construction, installation and maintenance of well sites,

24

facilities and means necessary or convenient for producing, developing, withdrawing, capturing, pumping, treating, storing and transporting the Minerals, Resources and Groundwater, including, without limitation, the right to develop or produce the Minerals, Resources and Groundwater by pooling, unitization or by directional drilling under the Property from well sites located on the Project or other land, and (b) all bonuses, rents, royalties, production payments or monies of any nature accrued in the past or future with respect to the Minerals, Resources and Groundwater, and (c) the right from time to time to convey all or any part of such Minerals, Resources and Groundwater to a third party or third parties, either prior to or after the date of recording of this Declaration. Neither the conclusion of the Class 'B' Control Period, nor any assignment of Declarant rights to the Association, shall be deemed to transfer the rights of Declarant to the Minerals, Resources and Groundwater, either expressly or by implication, but such rights may be conveyed to the Master Association or other third party or third parties, solely by an instrument in writing, executed with the formalities of a deed and recorded in the Official Records of the County. The Master Association and each Owner for themselves, their respective heirs, personal representatives, successors and assigns, as applicable, by acceptance of the rights and obligations under this Declaration, hereby waive and release any rights, claims, actions or causes of action now existing or hereafter arising against Declarant, its successors, assigns, contractors, employees or agents, arising out of or in connection with exercise by Declarant or any such parties of the rights in Minerals, Resources and Groundwater reserved by this Section.

ARTICLE XI ESTOPPEL CERTIFICATE

The Master Association shall deliver an estoppel certificate within ten (10) days of a written request therefor. The Owner requesting the certificate shall pay to the Association a reasonable sum to cover the costs of examining records and preparing the certificate.

ARTICLE XII ENFORCEMENT

Section 1. Compliance by Owners. Every Owner shall comply with the restrictions and covenants set forth herein and in the Master Association Documents, including without limitation any and all Rules and Regulations which from time to time may be adopted by the Board of Directors of the Master Association without the necessity of the same being recorded in the public records.

Section 2. Enforcement. The Master Association, acting by and through its Board, and any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration and the Master Association By-Laws and Rules and Regulations. Failure by the Master Association or by any Owner to enforce any covenant or restriction herein contained shall in no way be deemed a waiver of the right to do so thereafter. The Master Association may also impose sanctions against an Owner for violation of the Association Rules and Regulations. Such sanctions shall be in addition to all other enforcement powers and remedies of the Association provided herein and in the By-Laws. The offending Owner shall be responsible for all sanctions and costs of enforcement, including attorneys' fees actually incurred and court costs. Such sanctions may include, without limitation:

KeyCite Yellow Flag - Negative Treatment
Distinguished by Schick v. Florida Dept. of Agriculture, Fla.App. 1
Dist., March 18, 1987

371 So.2d 663 Supreme Court of Florida.

The VILLAGE OF TEQUESTA, etc., et al., Petitioners,

JUPITER INLET CORPORATION, etc., Respondent.

No. 52223. | May 3, 1979. |

Rehearing Denied June 26, 1979.

Synopsis

Owner instituted action for inverse condemnation and injunction on theory that, due to depletion by village of shallow-water aquifer beneath its property, owner was effectively deprived of beneficial use of its property rights in such aquifer. The Circuit Court, Palm Beach County, Lewis Kapner, J., granted summary judgment in favor of village, and owner appealed. The District Court of Appeal, 349 So.2d 216, reversed and certified question whether municipality could be held responsible through inverse condemnation for taking of underground shallow aquifer water to extent that owner was deprived of beneficial use of aquifer. The Supreme Court, Adkins, J., held that: (1) diversion of water from shallow-water aquifer was not a "taking" or appropriation of property for public use requiring condemnation proceeding; (2) owner did not have constitutionally protected property right in water, requiring compensation for taking of water when used for a public purpose; (3) owner's only remedy was through proper application for permit under Water Resources Act, and (4) village could not be held responsible for damages for inverse condemnation.

Decision of District Court of Appeal quashed and cause remanded with instructions.

West Headnotes (14)

[1] Water Law

Elimitation to reasonable amount and beneficial purpose

Water Law

Correlative rights of landowners

Water Law

Effect of comprehensive management and conservation regime

Prior to adoption of Water Resources Act, Florida followed reasonable use rule; that is, a landowner, who in the course of using his own land removed percolating water to the injury of his neighbor had to be making a reasonable exercise of his proprietary rights, i. e., such an exercise as might be reasonably necessary for some useful or beneficial purpose, generally relating to land in which waters were found. West's F.S.A. § 373.012 et seq.

2 Cases that cite this headnote

[2] Water Law

Rights in Owner of Overlying Lands, in General

Reasonable use rule afforded landowner no ownership in waters below land, as right of owner to ground water underlying his land was to use of water and not to water itself.

2 Cases that cite this headnote

[3] Water Law

Rights in Owner of Overlying Lands, in General

Percolating water, which is migratory in nature and is part of land only so long as it is in it, belongs to overlying owner in limited sense that he has unqualified right to capture and control it in reasonable way with immunity from liability to his neighbors for doing so but, if it flows or percolates from his land, he loses all right and interest in it the instant it passes beyond property boundaries.

3 Cases that cite this headnote

[4] Water Law

Necessity of capture and withdrawal to vest rights

Water Law

Elimitation to reasonable amount and beneficial purpose

Right of owner to ground water underlying land is to usufruct of water and not to water itself; ownership of land does not carry with it any ownership of vested rights to underlying ground water not actually diverted and applied to beneficial use.

4 Cases that cite this headnote

[5] Eminent Domain

Water rights

Right to use water does not carry with it ownership of water lying under land, and thus, although "right of user" may be protected by injunction or regulated by law, right of user is not "private property" requiring condemnation proceedings unless property has been rendered useless by diversion of water for certain purposes; overruling *Valls v. Arnold Industries, Inc., et al.*, 328 So.2d 471.

1 Cases that cite this headnote

[6] Eminent Domain

← What Constitutes a Taking;Police and Other Powers Distinguished

When governmental action is such that it does not encroach on private property but merely impairs its use by owner, action does not constitute a "taking" but is merely consequential damage and owner is not entitled to compensation. West's F.S.A.Const. art. 10, § 6.

3 Cases that cite this headnote

[7] Eminent Domain

Recovery of compensation

If damage suffered by owner is equivalent of a taking or an appropriation of property for public use, then Constitution recognizes owner's right to compel compensation; on the other hand, if damage suffered is not taking or appropriation within limits of organic law, then damages suffered are damnum absque injuria and compensation therefor by the public agency cannot be compelled. West's F.S.A.Const. art. 10, § 6.

7 Cases that cite this headnote

[8] Water Law

Reasonable use

"Reasonable use" rule, insofar as proprietary beneficial use of water is concerned, has no application where court is concerned with proprietary use of land, and in which water is only incidentally affected.

Cases that cite this headnote

[9] Eminent Domain

Water rights

Eminent Domain

Recovery of compensation

Where village utilized all available percolating water of shallow-well aquifer in area of owner's land, owner decided to become competing user, which desire was thwarted because village had utilized all water that could be safely withdrawn from aquifer, and owner then had to go deeper to Floridan aquifer to obtain its water, owner, which had right to use water but which had never perfected use to point that it was in existence, was not entitled to compensation on inverse condemnation theory for "taking" or appropriation of property for public use as result of village's diversion of water from shallow-water aquifer. West's F.S.A.Const. art. 10, § 6.

3 Cases that cite this headnote

[10] Eminent Domain

Water rights

Landowner does not have constitutionally protected property right in water beneath property, requiring compensation for taking of water when used for a public purpose. West's F.S.A.Const. art. 10, § 6.

1 Cases that cite this headnote

[11] Water Law

Regulation and Permit Systems for Allocating Riparian Rights to Take or Use Water

Just as legislation may limit use of property for certain purposes by zoning, so right to use of water may also be limited or regulated. West's F.S.A. § 373.012 et seq.

2 Cases that cite this headnote

[12] Water Law

Effect of comprehensive management and conservation regime

Owner, in serving a 120-unit condominium, did not qualify as individual user and thus, in order to draw water from beneath its property, it had to secure a permit under the Water Resources Act, which now controls use of water, and without a permit owner had no property right to use of water beneath its land for deprivation of which it had to be compensated through inverse condemnation. West's F.S.A. §§ 373.016, 373.023(1), 373.219(1).

4 Cases that cite this headnote

[13] Eminent Domain

Nature and grounds in general

Where village, which had utilized all available percolating water of shallow-well aquifer in area of owner's land, had acquired permit under Water Resources Act and owner was merely a proposed user that had not exercised its common-law water right, owner had no perfected legal interest to use of water beneath its land which would support action in inverse condemnation against village. West's F.S.A. §§ 373.226(2, 3).

2 Cases that cite this headnote

[14] Eminent Domain

Constitutional and statutory provisions

Statutory prohibition of use of eminent domain in one situation cannot be used as authority for its use by implication in another, as statute must be strictly construed. West's F.S.A. § 373.1961(7).

Cases that cite this headnote

Attorneys and Law Firms

*664 John C. Randolph of Johnston, Sasser & Randolph, West Palm Beach, for petitioners.

Marjorie D. Gadarian of Jones, Paine & Foster, West Palm Beach, for respondent.

Robert Grafton, Thomas J. Schwartz, John H. Wheeler and Stephen A. Walker, West Palm Beach, amicus curiae for South Florida Water Management District.

John T. Allen, Jr., St. Petersburg, amicus curiae for Pinellas County.

Louis de la Parte, Jr., Tampa, amicus curiae for West Coast Regional Water Supply Authority.

Jacob D. Varn, of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tampa, amicus curiae for Pasco County, S. C. Bexley, Jr., L. S. B. Corporation, and Angeline Corporation.

*665 John F. Wendel, of Wendel, Broderick & Chritton, Lakeland, amicus curiae, for Citrus County.

Opinion

ADKINS, Justice.

Pursuant to article V, section 3(b)(3), Florida Constitution, the Fourth District Court of Appeal in Jupiter Inlet Corp. v. Village of Tequesta, 349 So.2d 216 (Fla. 4th DCA 1977) certified to this Court as a matter of great public interest the following question:

Can a municipality be held responsible through inverse condemnation for a taking, from private ownership for public purposes, of underground shallow aquifer water, to the extent that the owner is deprived of the beneficial use of the aquifer?

Jupiter Inlet Corporation, plaintiff in the trial court, will be referred to as Jupiter, and The Village of Tequesta, defendant in the trial court, will be referred to as Tequesta.

Jupiter owned property near Tequesta on which it planned to build a 120-unit condominium project, "Broadview." This property was located approximately 1200 feet from Tequesta's well field number four. This well field contained seven wells, seventy-five to ninety feet deep, which pumped in excess of a million gallons of water a day from the shallow water aquifer to supply Tequesta residents with water. It was relatively inexpensive to withdraw water from the shallow-water aquifer.

As a result of the excessive amount of water withdrawn by Tequesta from the shallow-water aguifer, the freshwater supply was endangered and salt water from the intercoastal waterway intruded into the shallow-water aguifer. There was testimony from a hydrologist that saltwater intrusion was caused by a reduction in the water levels in the interior to a point low enough that the fresh-water level could not withstand the pressure of the saltwater level in the intercoastal. The water which Tequesta withdrew came from the shallow-water aquifer beneath its property. Because Tequesta would not supply Jupiter water, it was necessary for Jupiter to secure a special exception from the county. Tequesta opposed the permit application and it was denied. Jupiter was not permitted to drill wells to withdraw water from the shallow-water aquifer because of the endangered condition of the aquifer due to the excessive withdrawals made by Tequesta.

The only means by which Jupiter could supply water to its property was to drill a well to the Floridan aquifer located 1200 feet below the surface, at a substantially greater cost.

Jupiter instituted an action for inverse condemnation and injunction due to the excessive pumping by Tequesta. The theory of Jupiter's action was that due to depletion by Tequesta of the shallow-water aquifer beneath its property Jupiter was effectively deprived of the beneficial use of its property rights in the shallow-water aquifer.

Considering any factual conflicts in the light most favorable to Jupiter, the trial judge granted a summary judgment in favor of the Village of Tequesta. Viewing the facts in the same light as did the trial court, the district court of appeal said:

The owner has been deprived by government action of the use and enjoyment of what was his, and so through a suit in inverse condemnation he can compel the government to pay for what it has taken.

349 So.2d at 217. The district court of appeal then certified the above question to this Court for consideration.

The following hydrological statements are fully supported by F. Maloney, S. Plager, and F. Baldwin, Water Law and Administration, page 141 (1968) (hereinafter referred to as Water Law) as well as the discussion in City of St. Petersburg v. Southwest Florida Water Management District, 355 So.2d 796 (Fla. 2d DCA 1977).

Water-bearing zones under the earth's surface capable of receiving, storing, and transmitting water are called aquifers. Most aquifers in Florida are cavernous limestone or sand and shale beds. Aquifers are separated by relatively impervious layers of shales and clays which are called aquicludes.

*666 There are two basic types of acquifers. One is the unconfined aquifer associated with the water table. It is free to rise and fall with the amount of rainfall and other surface-water influences such as rivers, lakes, irrigation, etc. Near the coast the water level in this aquifer fluctuates with the tidal action. It is referred to as the ground-water aquifer, water-table aquifer, and the shallow aquifer.

The other type of aquifer is an artesian aquifer. Water in this aquifer is confined within aquicludes. Water will either not pass through these aquicludes or will do so at a much slower rate than it can travel within the aquifer itself. Water enters artesian aquifers slowly through the surrounding aquiclude by virtue of fissures, sinkholes, or other openings in the aquiclude. Water in the artesian aquifer is under pressure. One artesian aquifer is known

as the Floridan aquifer. It underlies most of the state and furnishes most of the well-water supplies of the state.

In an early decision, Tampa Watchworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896), we made a classification of water passing over or through lands as follows:

(1) In respect to surface streams which flow in a permanent, distinct, and well-defined channel from the lands of one owner to those of another; (2) in respect to surface waters, however originating, which, without any distinct or well-defined channel, by attraction, gravitation, or otherwise, are shed and pass from the lands of one proprietor to those of another; (3) subterranean streams which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor; (4) subsurface waters which, without any permanent, distinct, or definite channel, percolate in veins or filter from the lands of one owner to those of another.

20 So. at 782.

Although we classified water as if its different physical states were separate and distinct, we recognize that these classes are interrelated parts of the hydrologic cycle. We are primarily concerned in this case with the rights of landowners in the shallow-water aquifer.

[1] Ancient law gave no special consideration to ground water, treating all water like the air, the sea, and wild animals, as the property of no one or the property of everyone. Trelease, Government Ownership and Trusteeship of Water, 45 Calif. Law Review 638, 640 (1957). Technological ignorance about the existence, origin, movement and course of percolating ground waters resulted in the so-called "English rule" which essentially allowed a land owner to take or interfere with percolating waters underlying his land, irrespective of any effects his use might have on ground water underlying his neighbors' lands. This doctrine, first enunciated in 1843 in an English case, Acton v. Blundell, 152 Eng.Rep. 1235 (1843) was based upon the maxim, "To whomsoever the

soil belongs, he owns also to the sky and to the depths." See Water Law at 155. With the growth of hydrological capabilities in pumping technology, the English rule was repudiated in most American jurisdictions. See Annots. 29 A.L.R.2d 1354, 1361-65 (1953); 109 A.L.R. 395, 399-403 (1937); 55 A.L.R. 1385, 1398-1408 (1928), and cases cited therein. The so-called "American," or "reasonable use," rule rejected the "to the sky and to the depths" notion for another maxim, "use your own property so as not to injure that of another." See Koch v. Wick, 87 So.2d 47 (Fla.1956); Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535 (Fla.1917); Bassett v. Salisbury Manufacturing Co., 43 N.H. 569 (1862). The reasonable use rule adopted by most Eastern states, including Florida, was stated by one court as follows:

(A) landowner, who, in the course of using his own land, obstructs, diverts, or removes percolating water to the injury of his neighbor . . . must be (making) a reasonable exercise of his proprietary right, i. e., such an exercise as may be reasonably necessary for some useful or beneficial purpose, generally relating to the land in which the waters are found.

*667 Finley et ux. v. Teeter Stone, Inc., 251 Md. 428, 435, 248 A.2d 106, 111-12 (Md.App.1968). See also Water Law at 158.

In applying the reasonable use rule this Court has not given definite answers as to the actual amount of water that may be taken by overlying land owners, nor have we considered the meaning of the term "ownership" as applied to percolating water.

In 93 C.J.S. Waters section 90, page 765 (1956), the rule is stated thus:

There can be no ownership in seeping and percolating waters in the absolute sense, because of their wandering and migratory character, unless and until they are reduced to the actual possession and control of the

person claiming them. Their ownership consists in the right of the owner of the land to capture, control, and possess them, to prevent their escape, if he can do so, from his land, and to prevent strangers from trespassing on his land in an effort to capture, control, or possess them. If percolating waters escape naturally to other lands, the title of the former owner is gone; while a landowner may prevent the escape of such waters from his land, if he can do so, yet he has no right to follow them into the lands of another and there capture, control, or reduce them to possession. (Footnotes omitted).

[2] The common-law concept of absolute ownership of percolating water while it is in one's land gave him the right to abstract from his land all the water he could find there. On the other hand, it afforded him no protection against the acts of his neighbors who, by pumping on their own land, managed to draw out of his land all the water it contained. Thus the term "ownership" as applied to percolating water never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself.

[3] This necessarily follows from the physical characteristic of percolating water. It is migratory in nature and is a part of the land only so long as it is in it. There is a right of use as it passes, but there is no ownership in the absolute sense. It belongs to the overlying owner in a limited sense, that is, he has the unqualified right to capture and control it in a reasonable way with an immunity from liability to his neighbors for doing so. When it is reduced to his possession and control, it ceases to be percolating water and becomes his personal property. But if it flows or percolates from his land, he loses all right and interest in it the instant it passes beyond the boundaries of his property, and when it enters the land of his neighbor it belongs to him in the same limited way.

[4] The right of the owner to ground water underlying his land is to the usufruct of the water and not to the water itself. The ownership of the land does not carry with it any ownership of vested rights to underlying ground water not actually diverted and applied to beneficial use.

In Valls v. Arnold Industries, Inc. et al., 328 So.2d 471, 473 (Fla. 2d DCA 1976) the court said:

Water, oil, minerals and other substances of value which lie beneath the surface are valuable property rights which cannot be divested without due process of law and the payment of just compensation.

This case involved a post-trial apportionment award in condemnation as between fee-title owners and owners of reserved mineral rights. In order to effect a payment to the holders of the mineral rights, it was necessary for the court to find that these mineral rights were property rights and therefore subject to condemnation. The court relied upon Copello v. Hart, 293 So.2d 734 (Fla. 1st DCA 1974) and Dickinson et al. v. Davis et al., 224 So.2d 262 (Fla.1969). These cases held that minerals, gas, and oil are separate properties from the surface and may be conveyed and taxed separately. Neither case referred to property rights in water.

We overrule the dicta in Valls, supra, that water beneath the surface is a private property right which cannot be divested under any circumstances without due process of law and the payment of just *668 compensation. The right to use water does not carry with it ownership of the water lying under the land. Of course, "property" in its strict legal sense "means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects." Tatum Brothers, etc. v. Watson, 92 Fla. 278, 109 So. 623, 626 (1926). This "right of user" may be protected by injunction, Koch v. Wick, supra, or regulated by law, Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909), but the right of user is not considered "private property" requiring condemnation proceedings unless the property has been rendered useless for certain purposes. For example, in Kendry et al. v. State Road Department, 213 So.2d 23 (Fla. 4th DCA 1968), the state agency caused such flooding on the owner's property that it was rendered useless for residential purposes. This was a "taking."

In the case Sub judice, Jupiter was only subjected to the consequential damages incurred when it was required to draw water from the Floridan aquifer instead of the shallow-water aquifer. It still had a "right of user."

There is a distinction when this right of user as to water has been invaded by circumstances showing an intentional invasion in an unreasonable manner or an unintentional invasion when the conduct was negligent, reckless, or ultrahazardous, resulting in a destruction of the right of user as to land.

For example, in Labruzzo et ux. v. Atlantic Dredging & Const. Co. etc., 54 So.2d 673 (Fla.1951), plaintiff sued for damages for the interruption and diversion of the natural flow of the underground waters which fed plaintiff's spring. The defendant contended that there was no indication of the existence of a well-defined subterranean stream feeding plaintiff's spring. Therefore, the source of the spring should have been considered percolating waters, the flow of which had been interrupted by the defendant in the lawful and reasonable use of its property. Under the reasonable use rule, defendant contended that plaintiff had no cause of action. The trial judge agreed and, upon appeal, this Court reversed, saying:

At the outset, it should be noted that we are not here dealing with a problem involving a proprietary competition over the water itself that is to say, there is no conflict here between the respective rights of persons to make competing proprietary uses of subterranean waters to which they both have access. In such cases, the present trend among the courts of this country is away from the old common-law rule of unqualified and absolute right of a landowner to intercept and draw from his land the percolating waters therein; and the latter cases hold that the right of a landowner to subterranean waters percolating through his own land and his neighbor's lands is limited to a reasonable and beneficial use of such waters...

In the instant case, however, we are concerned with an interference with plaintiffs' use of the spring on their land, caused by conduct of the defendant not involving a competing use of water and in which the effect on the subterranean water is only incidental to the defendant's use of its land. Obviously, then, the rule of "reasonable use," as engrafted upon the old common-law rule of absolute and unqualified ownership of percolating waters,

insofar as the proprietary beneficial use of the Water is concerned, has no application here where we are concerned with the proprietary use of Land, and in which the water is only incidentally affected. Under such circumstances, even at common law, a person was subject to liability for interference with another's use of water, either for (1) an intentional invasion when his conduct was unreasonable under the circumstances of the particular case, or (2) an unintentional invasion when his conduct was negligent, reckless or ultrahazardous. Restatement of Torts, Vol. IV, Section 849, and Sections 822-840. In the absence, then, of surface indications, an interference with subterranean water is, or course, unintentional and Damnum absque injuria unless *669 the conduct resulting therein is negligent, reckless or ultrahazardous...

Since the allegations of plaintiffs' declaration must be taken as true on demurrer, it is clear that plaintiffs have stated a cause of action for an intentional invasion by defendant of their water rights, for which it must respond in damages if its conduct was unreasonable under the particular circumstances. . . . (Citations omitted).

54 So.2d at 675-77.

Article X, section 6, of the Florida Constitution forbids the "taking" of private property except for a public purpose and with full compensation. Unlike the constitutions of several other states, the Florida Constitution does not expressly forbid "damage" to property with just compensation. Arundel Corp. et al. v. Griffin et al., 89 Fla. 128, 103 So. 422 (1925).

[6] When the governmental action is such that it does not encroach on private property but merely impairs its use by the owner, the action does not constitute a "taking" but is merely consequential damage and the owner is not entitled to compensation. Selden et al. v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891).

In Poe v. State Road Department, 127 So.2d 898, 901 (Fla. 1st DCA 1961) the court said:

It is universally recognized that injury by the condemnor to remaining land caused by obstructing, diverting or increasing the flow of surface waters, but which do not amount to a permanent deprivation by the owner of the use of such remaining lands, is a consequential damage resulting from the taking in an eminent domain proceeding, and must be recovered in that proceeding, if at all. (Footnote omitted).

[7] If the damage suffered by the owner is the equivalent "of a taking" or an appropriation of his property for public use, then our constitution recognizes the owner's right to compel compensation. On the other hand, if the damage suffered is not a taking or an appropriation within the limits of our organic law, then the damages suffered are Damnum absque injuria and compensation therefor by the public agency cannot be compelled. Weir v. Palm Beach County, 85 So.2d 865 (Fla.1956).

The district court of appeal, in its opinion, relied upon White v. Pinellas County, 185 So.2d 468 (Fla.1966), as authority for the principle that a taking can occur when any property rights are involved. This case involved trees and shrubs located on the property which were used as a windbreak and a privacy screen. In White there was a physical invasion of the property when the state, through its agents, cut down large trees and shrubs. In the case Sub judice there was no physical invasion of Jupiter's property by the agents of Tequesta, so no compensation is due for consequential damage.

The cases relied upon by respondent involve situations where there was damage to the land itself, a result which does not exist in this case. Cason v. Florida Power Co., supra, dealt with resulting damage to the fee because of the diversion of percolating water. Koch v. Wick, supra, dealt with damage to the fee by diversion of water therefrom to the point that the fee would become infertile and unsuitable for cultivation. In State Road Department et al. v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941), the construction of a highway embankment impeded the flow and raised the level of a millrace to such an extent as to destroy the use of plaintiff's grist mill. This was held to be a taking.

[8] The "reasonable use" rule insofar as the proprietary beneficial use of water is concerned has no application where the court is concerned with the proprietary use of Land, and in which the water is only incidentally affected.

See Labruzzo v. Atlantic Dredging and Construction Co., supra.

Property owners have been successful in seeking relief under the theory of inverse condemnation against the appropriate authority as a result of the excessive noise from low-flying jet aircraft. See Hillsborough County Aviation Authority v. Benitez, 200 So.2d 194 (Fla. 2d DCA 1967). The *670 "taking" of an airspace above the land is not comparable to the "taking" of the water located in a ground aquifer beneath the land in the absence of a trespass on the land itself. The damage to the airspace was such as to deprive the property owners of all beneficial use of their property. The alleged damage to the shallow-water aquifer deprived Jupiter of no beneficial use of the land itself. Jupiter developed the property to its highest and best use and has suffered no more than consequential damage, which is not compensable through inverse condemnation.

[9] The bare essential facts controlling this case are simple and direct. Tequesta utilized all of the available percolating water of the shallow-well aquifer in the area of Jupiter's land. Jupiter decided to become a competing user. This desire was thwarted because Tequesta had utilized all of the water which could be safely withdrawn from the shallow-well aquifer. This meant Jupiter had to go deeper to the Floridan aquifer to obtain its water and to spend more money than it would have if allowed to use the shallow-well aquifer. The costs were increased both in drilling and treatment of the water. It is a hydrologic impossibility to place a value upon the water which was withdrawn from underneath Jupiter's land.

It is incumbent upon Jupiter to show, not only a taking, but also that a private property right has been destroyed by governmental action. Jupiter did not have a constitutionally protected right in the water beneath its property. In the cases cited by Jupiter, the courts supported compensation for the taking of a use which was existent and of which a party was deprived. Jupiter seeks to be compensated for a use which it had never perfected to the point that it was in existence. Jupiter had a right to use the water, but the use itself is not existent until this right is exercised.

The property rights relative to waters that naturally percolate through the land of one owner to and through the land of another are correlative. Reasonableness could only be determined after the conflict arises between users. The "reasonableness" of a given use depends upon many variables such as: the reasonable demands of other users; the quantity of water available for use; the consideration of public policy. Even an allocation between conflicting users has no durability, for the decision by another land owner to exercise his previously neglected right to use water could easily render all other uses unreasonable. A person developing his own land could make a substantial investment with no way of determining whether reasonable use by others would limit or destroy his development right even though it was the first in time.

[10] The judicial system was ill-equipped to deal with such conflict and became oriented to a case-by-case approach to solving disputes. This Court recognizes that all conflicts between competing users must be determined from the facts and circumstance of particular cases as they arise. Cason v. Florida Power Co., supra. This "right to use" is not "private property" as contemplated by article X, section 6, Florida Constitution requiring full compensation before taking for a public purpose.

[11] The State of Florida operates under an administrative system of water management pursuant to the terms of the Florida Water Resources Act. Ch. 373, Fla.Stat. (1972). The law prior to the Florida Water Resources Act did not allow ownership in the corpus of the water, but only in the use of it. Even then, the use was bounded by the perimeters of reasonable and beneficial use. Legislation limiting the right to the use of the water is in itself no more objectionable than legislation forbidding the use of property for certain purposes by zoning regulations. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); 54 A.L.R. 1016 (1928).

[12] The Florida Water Resources Act, in recognizing the need for conservation and control of the waters in the state (Section 373.016, Fla.Stat. (1973)) makes all waters in the state subject to regulation, unless otherwise specifically exempt. s 373.023(1) Fla.Stat. (1973). The Department *671 of Environmental Regulation and the various water management districts are given the responsibility to accomplish the conservation, protection, management, and control of the waters of the state. s 373.016(3) Fla.Stat. (1973). In order to exercise such controls a permitting system is established which requires permits for consumptive use of water, exempting only "domestic consumption of water by individual users"

from the requirements of a permit. s 373.219(1) Fla.Stat. (1973). Jupiter, in serving a 120-unit condominium, does not qualify as an individual user and thus must secure a permit in order to draw water from beneath its property. Without a permit Jupiter has no such property right to the use of water beneath its land for which, upon deprivation, it must be compensated through inverse condemnation.

[13] The Water Resources Act of 1972 recognizes a right to use water under the common law as separate from the right to use water under a permit granted pursuant to the act. This is done by a provision concerning the termination of the common-law right and a transitional procedure. The holder of such a common-law water-use right was given two years to convert the common-law water right into a permit water right. s 373,226(3) Fla.Stat. (1973). In order to qualify for the initial permit under section 373.226(2) Florida Statutes (1973), the right must have been exercised prior to the implementation of the Florida Water Resources Act by a water management district with geographical jurisdiction in that area. Otherwise the right is abandoned and extinguished requiring a new application for a permit. Tequesta had acquired the permit and Jupiter was merely a proposed user. The Florida Water Resources Act makes no provision for the continuation of an Unexercised common-law right to use water. Jupiter had perfected no legal interest to the use of the water beneath its land which would support an action in inverse condemnation.

Section 373.1961 Florida Statutes (1975) provides additional powers and duties for the governing boards of the water management district. Subsection (7) provides that the governing board:

May acquire title to such interest as is necessary in real property, by purchase, gift, devise, lease, eminent domain, or otherwise, For water production and transmission consistent with this section. However, the district shall not use any of the eminent domain powers herein granted to acquire water and water rights already devoted to reasonable and beneficial use or any water production or transmission facilities owned by any

county, municipality, or regional water supply authority. (Emphasis supplied).

Condemnation of "water rights" is not granted in the first sentence of this subsection. The authority granted is specifically limited to the acquisition of land for the purpose of constructing and operating well fields and other withdrawal facilities and for the right-of-way necessary for the transmission of water to consumers. The second sentence prohibits the use of eminent domain to acquire such "water rights" which were Already being put to a reasonable and beneficial use. The statutory prohibition of the use of eminent domain in one situation cannot be used as authority for its use by implication in another, as the statute must be strictly construed. Canal Authority v. Miller, 243 So.2d 193 (Fla.1970). All that Section 373.1961(7) Florida Statutes (1975) accomplishes is to further protect presently existing legal uses of water. No implication can be drawn that this section intends to include any "water right" other than the permit that may be granted by a water management district. After all, if a use of water is both preexisting and also reasonable and beneficial, after two years, it must be either under permit or it is conclusively presumed to be abandoned. There was no necessity for the Water Resources Act to provide for the condemnation of an unexercised right to use water, as the owner became subject to the permit provisions of the law. There was no "taking" of this right.

*672 In summary, we hold:

- 1. Prior to the adoption of the Water Resources Act, Florida followed the reasonable use rule; that is, a landowner, who, in the course of using his own land, removes percolating water to the injury of his neighbor, must be making a reasonable exercise of his proprietary rights, I. e., such an exercise as may be reasonably necessary for some useful or beneficial purpose, generally relating to the land in which the waters are found;
- 2. There was no ownership in the waters below the land, as the right of the owner to ground water underlying his land was to the use of the water and not to the water itself;

- 3. In applying the reasonable use rule, this Court has not given definite answers as to the actual amount of water that may be taken by overlying landowners;
- 4. The diversion of water from the shallow-water aquifer is not a "taking" or an appropriation of property for public use requiring condemnation proceeding unless there is a resulting damage to the land itself, for example, a diversion of water to the extent that the land becomes unsuitable for cultivation, raising the level of flowing waters to the extent that land is flooded, etc.;
- 5. The landowner does not have a constitutionally-protected property right in the water beneath the property, requiring compensation for the taking of the water when used for a public purpose;
- 6. Just as legislation may limit the use of property for certain purposes by zoning, so it is that the right to the use of the water may also be limited or regulated.
- 7. The Water Resources Act now controls the use of water and replaces the ad hoc judicial determination in water management districts where consumptive use permitting is in force.
- 8. Jupiter's remedy is only through proper application for a permit under the Florida Water Resources Act.

For the above reasons, we answer the certified question in the negative and hold that Tequesta cannot be held responsible for damages through inverse condemnation.

The decision of the district court of appeal is quashed and this cause is remanded with instructions to affirm the summary judgment entered by the trial judge in favor of Tequesta.

ENGLAND, C. J., and BOYD, OVERTON AND SUNDBERG, JJ., concur.

All Citations

371 So.2d 663

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Andrews v. United States, Fed.Cl.,
December 21, 2012

66 S.Ct. 1062 Supreme Court of the United States

UNITED STATES

v. CAUSBY et ux.

No. 630. | Argued May 1, 1946. | Decided May 27, 1946.

Synopsis

Action by Thomas Lee Causby and wife, Tinie Causby, against the United States, to recover for the alleged taking by defendant of plaintiffs' home and chicken farm which was adjacent to a municipal airport leased by the defendant. To review a judgment of the Court of Claims in favor of the plaintiffs, 60 F.Supp. 751, the United States brings certiorari.

Reversed and remanded.

Mr. Justice BLACK and Mr. Justice BURTON dissenting.

On Writ of Certiorari to the Court of Claims.

Military airplanes are subject to rules of Civil Aeronautics Board where there are no army or navy regulations to the contrary.

West Headnotes (14)

[1] Armed Services

- Relation of Military to Civil Authority

Aviation

- Rules and regulations

Military airplanes are subject to rules of Civil Aeronautics Board where there are no army or navy regulations to the contrary.

1 Cases that cite this headnote

[2] Eminent Domain

← Taking Entire Tract or Piece of Property

The owner's loss, and not the taker's gain, is the measure of value of condemned property. U.S.C.A. Const.Amend. 5.

21 Cases that cite this headnote

[3] Eminent Domain

← Taking Entire Tract or Piece of Property

Eminent Domain

← Value for special use

Market value fairly determined is the normal measure of recovery in condemnation proceeding, and that value may reflect the use to which the property could readily be converted as well as the existing use. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[4] Eminent Domain

Easements and other rights in real property

Where federal Government permitted its airplanes to fly so low over plaintiffs' land which adjoined municipal airport in North Carolina leased by federal Government as to deprive plaintiffs of use and enjoyment of their land for purpose of raising chickens, there was a "taking", so as to entitle plaintiffs to recover just compensation. Air Commerce Act of 1926, §§ 1 et seq., 6(a), 10 as amended 49 U.S.C.A. §§ 171 et seq., 176(a), 180; Civil Aeronautics Act of 1938, §§ 1 et seq., 1(3), 3, 49 U.S.C.A. §§ 401 et seq., 401(3), 403; U.S.C.A. Const.Amend. 5; G.S.N.C. §§ 63–11 to 63–13.

77 Cases that cite this headnote

[5] Eminent Domain

Easements and other rights in real property

The fact that path of glide taken by airplanes in taking off and landing over plaintiffs' land, which adjoined municipal airport leased by federal Government, was approved by Civil Aeronautics Authority, did not prevent the flights over plaintiffs' land from constituting a "taking" entitling plaintiffs to just compensation, since the path of glide is not the "minimum safe altitude of flight" prescribed by Civil Air Regulations as the downward reach of navigable air space placed within public domain by Congress. Air Commerce Act of 1926, § 10, 49 U.S.C.A. § 180; U.S.C.A. Const.Amend. 5.

261 Cases that cite this headnote

[6] Property

Ownership and incidents thereof

Landowner owns at least as much of the air space above the ground as he can occupy or use in connection with the land, and fact that he does not occupy it in a physical sense by erection of buildings and the like is not material.

34 Cases that cite this headnote

[7] Eminent Domain

Statutory Provisions and Remedies

The meaning of "property" as used in Fifth Amendment prohibiting the taking of private property for public use without just compensation, is a "federal question," but it will normally obtain its content by reference to local law, U.S.C.A. Const.Amend. 5.

32 Cases that cite this headnote

[8] Eminent Domain

Statutory Provisions and Remedies

A holding that flights by airplanes at low levels over plaintiffs' land, which adjoined municipal airport in North Carolina leased by federal Government, deprived plaintiffs of use and enjoyment of their land and constituted a "taking," so as to entitle them to just compensation, was not inconsistent

with local law of North Carolina governing land owner's claim to immediate reaches of the superadjacent air-space. G.S.N.C. §§ 63–11 to 63–13; U.S.C.A. Const.Amend. 5.

159 Cases that cite this headnote

[9] Eminent Domain

Easements and other rights in real property

Flights by airplanes of federal Government over private lands are not a "taking", so as to entitle owner to just compensation, unless they are so low and so frequent as to be direct and immediate interference with the enjoyment and use of the land. Air Commerce Act of 1926, §§ 1 et seq., 6(a), 10 as amended 49 U.S.C.A. §§ 171 et seq., 176(a), 180; Civil Aeronautics Act of 1938, §§ 1 et seq., 1(3), 3, 49 U.S.C.A. §§ 401 et seq., 401(3), 403; U.S.C.A. Const.Amend. 5.

156 Cases that cite this headnote

[10] United States

Takings claims

A claim for taking of private land by federal Government is a "claim founded upon the Constitution" and within jurisdiction of the Court of Claims to determine. Jud.Code, § 145(1), 28 U.S.C.A. § 1491; U.S.C.A. Const.Amend. 5.

64 Cases that cite this headnote

[11] Federal Courts

Review of specialized federal courts

On certiorari from United States Supreme Court to Court of Claims, deficiency in findings of fact by Court of Claims cannot be rectified by statements in its opinion. 28 U.S.C.A. § 1255.

16 Cases that cite this headnote

[12] Federal Courts

- Review of specialized federal courts

On certiorari from United States Supreme Court to Court of Claims, Supreme Court would not examine evidence to determine whether it would support a finding of fact, if such finding had been made by Court of Claims. 28 U.S.C.A. § 1255.

19 Cases that cite this headnote

[13] Federal Courts

Review of specialized federal courts

In action against federal Government for alleged taking of plaintiffs' chicken farm, which was adjacent to municipal airport leased by federal Government as result of Government permitting its airplanes to fly so low over land as to destroy plaintiffs' use and enjoyment thereof, where Court of Claims held that an easement was taken, but its findings of fact contained no description as to whether the easement taken was permanent or temporary, it would be premature for Supreme Court to consider whether amount of award made by Court of Claims was proper. 28 U.S.C.A. § 1255; U.S.C.A. Const.Amend. 5.

38 Cases that cite this headnote

[14] Eminent Domain

← Value for special use

Market value to which owner of condemned land is entitled may reflect not only use to which property is presently devoted but also that use to which it may be readily converted.

6 Cases that cite this headnote

Attorneys and Law Firms

**1064 *257 Mr. Walter J. Cummings, Jr., of Washington, D.C., for petitioner.

Mr. William E. Comer, of Greensboro, N.C., for respondent.

Opinion

*258 Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking and entered judgment for respondent, one judge dissenting. 60 F.Supp. 751. The case is here on a petition for a writ of certiorari which we granted becuase of the importance of the question presented.

[1] Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina. It has on it a dwelling house, and also various outbuildings which were mainly used for raising chickens. The end of the airport's northwestsoutheast runway is 2,220 feet from respondents' barn and 2,275 feet from their house. The path of glide to this runway passes directly over the property—which is 100 feet wide and 1,200 feet long. The 30 to 1 safe glide angle 1 approved by the Civil Aeronautics Authority 2 passes over this property at 83 feet, which is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree. ³ The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six *259 months after the end of the national emergency, whichever is the earlier.

Various aircraft of the United States use this airport bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The north-west-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the **1065 planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken

business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was \$2,000.

*260 I. The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. s 171 et seq., 49 U.S.C.A. s 171 et seg., as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. s 401 et seq., 49 U.S.C.A. s 401 et seq. Under those statutes the United States has 'complete and exclusive national sovereignty in the air space' over this country. 49 U.S.C. s 176(a), 49 U.S.C.A. s 176(a). They grant any citizen of the United States 'a public right of freedom of transit in air commerce 4 through the navigable air space of the United States.' 49 U.S.C. s 403, 49 U.S.C.A. s 403. And 'navigable air space' is defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. And it is provided that 'such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation.' Id. It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—Cujus *261 est solum ejus est usque ad coelum. ⁵ But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

[3] But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the **1066 taker's gain, which is the measure of the value of the property taken. United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55. Market value fairly determined is the normal measure of the recovery. Id. And that value may reflect the use to which the land could readily be converted, as well as the existing use. United States v. Powelson, 319 U.S. 266, 275, 63 S.Ct. 1047, 1053, 87 L.Ed. 1390, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. 6 It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

[4] We agree that in those circumstances there would be a taking. Though it would be only an easement of flight *262 which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance such as was involved in Richards v. Washington Terminal Co., 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088, L.R.A.1915A, 887. In that case property owners whose lands adjoined a railroad line were denied recovery for damages resulting from the noise, vibrations, smoke and

the like, incidental to the operations of the trains. In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.⁷ That was the philosophy of *263 Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. In that case the petition alleged that the United States erected a fort on nearby land, established a battery and a fire control station there, and fired guns over petitioner's land. The Court, speaking through Mr. Justice Holmes, reversed the Court of Claims which dismissed the petition on a demurrer, holding that 'the specific facts set forth would warrant a finding that a servitude has been imposed.' 8 **1067 260 U.S. at page 330, 43 S.Ct. at page 137, 67 L.Ed. 287. And see Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245, 140 A.L.R. 1352. Cf. United States v. 357.25 Acres of Land, D.C., 55 F.Supp. 461.

[5] The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61, ss 61.7400, 61.7401, Code Fed.Reg.Cum.Supp., Tit. 14, ch. 1) and from 300 to 1000 feet for *264 other aircraft depending on the type of plane and the character of the terrain. Id., Pt. 60, ss 60.350-60.3505, Fed.Reg.Cum.Supp., supra. Hence, the flights in question were not within the navigable airspace

which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

[6] We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. ⁹ The landowner owns at least as much of the space above the ground as the can occupy or use in connection with the land. See Hinman v. Pacific Air Transport, 9 Cir., 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected *265 an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. ¹⁰ The reason is that there would be **1068 an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface. 11

In this case, as in Portsmouth Harbor Land & Hotel Co. v. United States, supra, the damages were not merely consequential. They were the product of a direct invasion of respondents' domain. *266 As stated in United States v. Cress, 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746, '* * * it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.'

[7] [8] We said in United States v. Powelson, supra, 319 U.S. at page 279, 63 S.Ct. at page 1054, 87 L.Ed. 1390, that while the meaning of 'property' as used in the Fifth Amendment was a federal question, 'it will normally obtain its content by reference to local law.' If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State 'except where granted to and assumed by the United States.' Gen.Stats. 1943, s 63-11. The flight of aircraft is lawful 'unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.' Id., s 63-13. Subject to that right of flight, 'ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath.' Id. s 63-12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

[9] The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court *267 of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

[10] II. By s 145(1) of the Judicial Code, 28 U.S.C. s 250(1), 28 U.S.C.A. s 250(1), the Court of Claims has jurisdiction to hear and determine 'All claims (except for

pensions) founded upon the Constitution of the United States or * * * upon any contract, express or implied, with the Government of the United States.'

We need not decide whether repeated trespasses might give rise to an implied contract. Cf. Portsmouth Harbor Land & Hotel Co. v. United States, supra. If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction **1069 of the Court of Claims to hear and determine. See Hollister v. Benedict & Burnham Mfg. Co., 113 U.S. 59, 67, 5 S.Ct. 717, 721, 28 L.Ed. 901; Hurley v. Kincaid, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637; Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 21, 60 S.Ct. 413, 415, 84 L.Ed. 554. Thus, the jurisdiction of the Court of Claims in this case is clear.

[12] III. The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States. United States v. Cress, supra, 243 U.S. 328, 329, 37 S.Ct. 385, 386, 61 L.Ed. 746, and cases cited. It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion. United States v. Esnault-Pelterie, 299 U.S. 201, 205, 206, 57 S.Ct. 159, 161, 162, 81 L.Ed. 123; United States v. Seminole Nation, 299 U.S. 417, 422, 57 S.Ct. 283, 287, 81 L.Ed. 316. Findings of fact on every 'material issue' are a statutory *268 requirement. 53 Stat. 752, 28 U.S.C. s 288, 28 U.S.C.A. s 288. The importance of findings of fact based on evidence is emphasized here by the Court of Claims' treatment of the nature of the easement. It stated in its opinion that the easement was permanent because the United States 'no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so.' (60 F.Supp. 758.) That sounds more like conjecture rather than a conclusion from evidence; and if so, it would not be a proper foundation for liability of the United States. We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. United States v. Esnault-Pelterie, supra, 299 U.S. at page 206, 57 S.Ct. at page 162, 81 L.Ed. 123.

[13] Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper.

The judgment is reversed and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

The Fifth Amendment provides that 'private property' shall not 'be taken for public use, without just compensation.' The Court holds today that the Government has 'taken' respondents' property by repeatedly flying Army bombers directly above respondents' land at a height of eighty-three feet where the light and noise from these planes caused respondents to lose sleep and their chickens to be killed. Since the effect of the Court's decision is *269 to limit, by the imposition of relatively absolute Constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since in my view the Constitution does not contain such barriers, I dissent.

The following is a brief statement of the background and of the events that the Court's opinion terms a 'taking' within the meaning of the Fifth Amendment: Since 1928 there has been an airfield some eight miles from Greensboro, North Carolina. In April, 1942, this airport was taken over by the Greensboro-High Point Municipal Airport Authority and it has since then operated as a municipal airport. In 1942 the Government, by contract, obtained the right to use the field 'concurrently, **1070 jointly, and in common' with other users. Years before, in 1934, respondents had bought their property, located more than one-third of a mile from the airport. Private planes from the airport flew over their land and farm buildings from 1934 to 1942 and are still doing so. But though these planes disturbed respondents to some extent, Army bombers, which started to fly over the land in 1942 at a height of eighty-three feet, disturbed them more because they were larger, came over more frequently, made a louder noise, and at night a greater glare was caused by their lights. This noise and glare disturbed respondents' sleep, frightened them, and made them nervous. The noise and light also frightened respondents' chickens so much that many of them flew against buildings and were killed.

The Court's opinion seems to indicate that the mere flying of planes through the column of air directly above respondents' land does not constitute a 'taking'. Consequently, it appears to be noise and glare, to the extent and under the circumstances shown here, which make the government a seizer of private property. But the allegation *270 of noise and glare resulting in damages, constitutes at best an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute, ¹ or were the result of negligence. ² But the Government has not consented to be sued in the Court of Claims except in actions based on express or implied contract. And there is no implied contract here, unless by reason of the noise and glare caused by the bombers the Government can be said to have 'taken' respondents' property in a Constitutional sense. The concept of taking property as used in the Constitution has heretofore never been given so sweeping a meaning. The Court's opinion presents no case where a man who makes noise or shines light onto his neighbor's property has been ejected from that property for wrongfully taking possession of it. Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property. Even the one case in this Court which in considering the sufficiency of a complaint gave the most elastic meaning to the phrase 'private property be taken' as used in the Fifth Amendment, did not go so far. *271 Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. I am not willing, nor do I think the Constitution and the decisions authorize me, to extend that phrase so as to guarantee an absolute Constitutional right to relief not subject to legislative change, which is based on averments that at best show mere torts committed by Government agents while flying over land. The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air

navigation, be left where I think the Constitution left it, with Congress.

Nor do I reach a different conclusion because of the fact that the particular circumstance which under the Court's opinion makes the tort here absolutely actionable, **1071 is the passing of planes through a column of air at an elevation of eighty-three feet directly over respondents' property. It is inconceivable to me that the Constitution guarantees that the airspace of this Nation needed for air navigation, is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below. 3 No rigid Constitutional rule, in my judgment, commands that the air must be considered as marked off into separate compartments by imaginary metes and bounds in order to synchronize air ownership with land ownership. I think that the Constitution entrusts Congress with full power to control all navigable airspace. Congress has already acted under that power. It has by statute, 44 Stat. 568, 52 Stat. 973, provided that 'the United States of America is * * * to possess and exercise complete and exclusive national sovereignty in the *272 air space (over) the United States.' This was done under the assumption that the Commerce Clause of the Constitution gave Congress the same plenary power to control navigable airspace as its plenary power over navigable waters. H. Rep. No. 572, 69th Cong., 1st Sess., p. 10; H. Rep. No. 1162, 69th Cong., 1st Sess., p. 14; United States v. Commodore Park, Inc., 324 U.S. 386, 65 S.Ct. 803, 89 L.Ed. 1017. To make sure that the airspace used for air navigation would remain free, Congress further declared that 'navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation,' and finally stated emphatically that there exists 'a public right of freedom of transit * * * through the navigable airspace of the United States.' Congress thus declared that the air is free, not subject to private ownership, and not subject to delimitation by the courts. Congress and those acting under its authority were the only ones who had power to control and regulate the flight of planes. 'Navigable air-space' was defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. Thus, Congress has given the Civil Aeronautics Authority exclusive power to determine what is navigable airspace subject to its exclusive control. This power derives specifically from the Section which authorizes the Authority to prescribe 'air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.' 49 U.S.C.A. s 551. Here there was no showing that the bombers flying over respondents' land violated any rule or regulation of the Civil Aeronautics Authority. Yet, unless we hold the Act unconstitutional, at least such a showing would be necessary before the courts could act without interfering with the exclusive authority which Congress gave to the administrative agency. Not even a *273 showing that the Authority has not acted at all would be sufficient. For in that event, were the courts to have any authority to act in this case at all, they should stay their hand till the Authority has acted.

The broad provisions of the Congressional statute cannot properly be circumscribed by making a distinction as the Court's opinion does between rules of safe altitude of flight while on the level of cross-country flight and rules of safe altitude during landing and taking off. First, such a distinction can not be maintained from the practical standpoint. It is unlikely that Congress intended that the Authority prescribe safe altitudes for planes making crosscountry flights, while at the same time it left the more hazardous landing and take-off operations unregulated. The legislative history, **1072 moreover, clearly shows that the Authority's power to prescribe air traffic rules includes the power to make rules governing landing and take-off. Nor is the Court justified in ignoring that history by labeling rules of safe altitude while on the level of cross-country flight as rules prescribing the safe altitude proper and rules governing take-off and landing as rules of operation. For the Conference Report explicitly states that such distinctions were purposely eliminated from the original House Bill in order that the Section on air traffic rules 'might be given the broadest construction by the * * * (Civil Aeronautics Authority) * * * and the courts.' In construing the statute narrowly the Court *274 thwarts the intent of Congress. A proper broad construction, such as Congress commanded, would not permit the Court to decide what it has today without declaring the Act of Congress unconstitutional. I think the Act given the broad construction intended is constitutional.

No greater confusion could be brought about in the coming age of air transportation than that which would result were courts by Constitutional interpretation to hamper Congress in its efforts to keep the air free. Old concepts of private ownership of land should not be introduced into the field of air regulation. I have no

doubt that Congress will, if not handicapped by judicial interpretations of the Constitution, preserve the freedom of the air, and at the same time, satisfy the just claims of aggrieved persons. The noise of newer, larger, and more powerful planes may grow louder and louder and disturb people more and more. But the solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid Constitutional restraints formulated and enforced by the courts. What adjustments may have to be made, only the future can reveal. It seems certain, however, *275 the courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems. The contribution of courts must be made through the awarding of damages for injuries suffered from the flying of planes, or by the granting of injunctions to prohibit their flying. When these two simple remedial devices are elevated to a Constitutional level under the Fifth Amendment, as the Court today seems to have done, they can stand as obstacles to better adapted techniques that might be offered by experienced experts and accepted by Congress. Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital and national problems. In my opinion **1073 this case should be reversed on the ground that there has been no 'taking' in the Constitutional sense.

Mr. Justice BURTON joins in this dissent.

All Citations

328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206

Footnotes

- A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.
- 2 Military planes are subject to the rules of the Civil Aeronautics Board where, as in the present case, there are no Army or Navy regulations to the contrary. Cameron v. Civil Aeronautics Board, 7 Cir., 140 F.2d 482.
- 3 The house is approximately 16 feet high, the barn 20 feet, and the tallest tree 65 feet.
- 4 'Air commerce' is defined as including 'any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.' 49 U.S.C. s 401(3), 49 U.S.C.A. s 401(3).
- 5 1 Coke, Institutes, 19th Ed. 1832, ch. 1, s 1(4a); 2 Blackstone, Commentaries, Lewis Ed. 1902, p. 18; 3 Kent, Commentaries, Gould Ed. 1896, p. 621.
- The destruction of all uses of the property by flooding has been held to constitute a taking. Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L.Ed. 557; United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; United States v. Welch, 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787, 28 L.R.A., N.S., 385, 19 Ann. Cas. 680.
- It was stated in United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 156 A.L.R. 390, 'The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.' The present case falls short of the General Motors case. This is not a case where the United States has merely destroyed property. It is using a part of it for the flight of its planes.
 - Cf. Warren Township School Dist. v. Detroit, 308 Mich. 460, 14 N.W.2d 134; Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300; Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575.
- 8 On remand the allegations in the petition were found not to be supported by the facts. 64 Ct.Cl. 572.
- 9 Baten's Case, 9 Coke R. 53b; Meyer v. Metzler, 51 Cal. 142; Codman v. Evans, 7 Allen 431, 89 Mass. 431; Harrington v. McCarthy, 169 Mass. 492, 48 N.E. 278, 61 Am.St.Rep. 298. See Ball, The Vertical Extent of Ownership in Land, 76 U.Pa.L.Rev. 631, 658—671.
- 10 It was held in Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716, 11 L.R.A., N.S., 920, 116 Am.St.Rep. 563, 9 Ann.Cas. 858, that ejectment would lie where a telephone wire was strung across the plaintiff's property, even though it did not touch the soil. The court stated pages 491, 492 of 186 N.Y., page 718 of 79 N.E.: '* * an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam

- into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.'
- 11 See Bouve, Private Ownership of Navigable Airspace Under the Commerce Clause, 21 Amer.Bar Assoc.Journ. 416, 421 —422; Hise, Ownership and Sovereignty of the Air, 16 Ia.L.Rev. 169; Eubank, The Doctrine of the Airspace Zone of Effective Possession, 12 Boston Univ.L.Rev. 414.
- 1 Neiswonger v. Goodyear Tire & Rubber Co., D.C., 35 F.2d 761.
- As to the damage to chickens, Judge Madden, dissenting from this judgment against the Government said, 'When railroads were new, cattle in fields in sight and hearing of the trains were alarmed, thinking that the great moving objects would turn aside and harm them. Horses ran away at the sight and sound of a train or a threshing machine engine. The farmer's chickens have to get over being alarmed at the incredible racket of the tractor starting up suddenly in the shed adjoining the chicken house. These sights and noises are a part of our world, and airplanes are now and will be to a greater degree, likewise a part of it. These disturbances should not be treated as torts, in the case of the airplane, any more than they are so treated in the case of the railroad or public highway.'
- The House in its report on the Air Commerce Act of 1926 stated: 'The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of adjacent or subjacent soil'. House Report No. 572, 69th Congress, First Session, page 10.
- The full statement read: 'The substitute provides that the Secretary shall by regulation establish air traffic rules for the navigation, protection, and identification of all aircraft, including rules for the safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft. The provision as to rules for taking off and alighting, for instance, was eliminated as unnecessary specification, for the reason that such rules are but one class of air traffic rules for the navigation and protection of aircraft. Rules as to marking were eliminated for the reason that such rules were fairly included within the scope of air rules for the identification of aircraft. No attempt is made by either the Senate bill or the House amendment to fully define the various classes of rules that would fall within the scope of air traffic traffic rules, as, for instance, lights and signals along airways and at air-ports and upon emergency landing fields. In general, these rules would relate to the same subjects as those covered by navigation laws and regulations and by the various State motor vehicle traffic codes. As noted above, surplusage was eliminated in specifying particular air traffic rules in order that the term might be given the broadest possible construction by the Department of Commerce and the courts.' House Report No. 1162, 69th Congress, 1st Session, p. 12.

That the rules for landing and take-off are rules prescribing 'minimum safe altitudes of flight' is shown by the following further statement in the House Report: '* * the minimum safe altitudes of flight * * * would vary with the terrain and location of cities and would coincide with the surface of the land or water at airports.' Id. at p. 14.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

224 So.2d 262 Supreme Court of Florida.

Fred O. DICKINSON, Jr., as Comptroller of the State of Florida, Robert Overstreet, as Tax Collector for Dade County, Florida, Arvida Corporation, a Florida corporation, and E. B. Leatherman, as Clerk of the Circuit Court in and for Dade County, Florida, Appellants,

v.

Thornton DAVIS et al., Appellees. ARVIDA CORPORATION et al., Appellants,

v.

Thornton DAVIS et al., Appellees.

Nos. 37068, 37069. | April 2, 1969.

Rehearing Denied May 20, 1969.

Synopsis

Direct appeal from final judgment of the Circuit Court, Dade County, Marshall C. Wiseheart, J., declaring statute relating of taxation of mineral interests unconstitutional. The Supreme Court, Adkins, J., held that statute providing for separate taxation of subsurface rights transferred, retained or acquired through reservation by return for taxation by owner of fee does not constitute unauthorized delegation of legislative power, and even though assessor probably erred by fixing assessed valuation of subsurface rights at ten per cent of total valuation of realty, owners were barred from complaining where they failed to exhaust their administrative remedies and institute suit as provided by law.

Reversed and remanded with directions to enter judgment dismissing complaint.

Drew, Thornal and Carlton, JJ., dissented.

West Headnotes (15)

[1] Statutes

Prior or existing law in general

Legislature is presumed to know existing law when statute is enacted.

3 Cases that cite this headnote

[2] Statutes

Reenactment or incorporation of prior statute

In reenacting a statute, legislature is presumed to be aware of constructions placed upon it by the court.

2 Cases that cite this headnote

[3] Statutes

Reenactment or incorporation of prior statute

Legislature in considering and passing statute to replace one previously held unconstitutional is presumed to have intended to correct constitutional defect causing invalidation of previous statute.

Cases that cite this headnote

[4] Statutes

Giving effect to entire statute and its parts; harmony and superfluousness

It is never presumed that legislature intended to enact purposeless or useless legislation.

7 Cases that cite this headnote

[5] Taxation

- Real property in general

Purpose of law providing for separate assessment of mineral, oil, gas and other subsurface rights was to place upon persons owning subsurface rights obligation to pay portion of real property taxes proportionate to their interest in the whole. F.S.A. § 193.221.

Cases that cite this headnote

[6] Mines and Minerals

- Requisites and validity

Land may be divided horizontally as well as vertically, so that one person may own surface and another the minerals underground.

2 Cases that cite this headnote

[7] Taxation

- Real property in general

Where fee in mineral is severed from fee in surface, it is subject to separate taxation.

Cases that cite this headnote

[8] Taxation

Power of legislature in general

Legislature had authority to subject separate mineral interest in realty to taxation. F.S.A. § 193.221(3).

Cases that cite this headnote

[9] Taxation

Making and requisites in general

Purpose of statute providing that subsurface rights, when separated from fee, should be subject to separate taxation when returned for taxation by owner of fee or others named was to specifically permit fee owner to file return covering mineral rights, even though fee owner might not have the control, management, custody, direction, supervision or agency of the mineral rights. F.S.A § 193.221(3).

2 Cases that cite this headnote

[10] Statutes

Presumptions and Construction as to Validity

All acts of legislature are presumed to be valid.

Cases that cite this headnote

[11] Taxation

Mineral or mining property

Measure of valuation of mineral rights for ad valorem taxation is "just value" of such subsurface rights determined largely from their market value if placed on market for sale by person willing to sell but not forced to sell to another person willing to buy but not forced to buy and if subsurface rights can be, and are, severed by conveyance, fair market value, or just market value, may be determined by comparable sales. F.S.A. § 193.221(3).

1 Cases that cite this headnote

[12] Taxation

Mineral or mining property

In determining value of mineral rights for ad valorem taxation, assessor may apply methods provided by law, including consideration of amounts paid for subsurface rights in area as reflected by public records. F.S.A. § 193.221(3).

1 Cases that cite this headnote

[13] Taxation

Appurtenances, easements, and improvements

Inasmuch as total value of other interests in realty, including improvements, have little relationship to value of subsurface interests, it is improper to equate value of same in each instance to value of the whole for purposes of ad valorem taxation. F.S.A. § 193.221(3).

3 Cases that cite this headnote

[14] Taxation

Validity

Statute providing for separate taxation of subsurface rights transferred, retained or acquired through reservation by return for taxation by owner of fee does not constitute unauthorized delegation of legislative power. F.S.A. §§ 193.221, 193.221(1).

Cases that cite this headnote

[15] Taxation

Exclusiveness of statutory remedy

Even though assessor probably erred by fixing assessed valuation of subsurface rights at ten per cent of total valuation of realty, owners were barred from complaining where they failed to exhaust their administrative remedies and institute suit as provided by law. F.S.A. §§ 192.21(2), 193.221.

1 Cases that cite this headnote

Attorneys and Law Firms

*263 Earl Faircloth, Atty. Gen., and Larry Levy, Asst. Atty. Gen., for Fred O. Dickinson, Jr., as Comptroller of the State of Florida.

Thomas C. Britton, County Atty., and Stuart Simon, Asst. County Atty., for Robert Overstreet, Tax Collector and E. B. Leatherman, Clerk of the Circuit Court. Woodrow M. Melvin, Jr., of Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, for Arvida Corp.

Shutts & Bowen, Miami, for appellees.

Opinion

ADKINS, Justice.

This is a direct appeal taken from a final judgment of the Circuit Court declaring Ch. 63—355 (Fla.Stats. s 193.221, F.S.A.) to be unconstitutional for the reasons stated in *264 Cassady v. Consolidated Naval Stores Company (Fla.1960), 119 So.2d 35. This statute relates to the assessment of mineral interests.

The appellant Arvida Corporation returned the mineral interests of appellees for taxation pursuant to Ch. 63—355. The appellees filed their complaint seeking to enjoin Arvida Corporation from applying for a tax deed to the mineral interest, as well as to enjoin the Clerk of the Circuit Court from issuing tax deeds with respect to the mineral interests. They also sought to have the tax assessments against the mineral interests declared void and all tax certificates previously sold cancelled. The final judgment granted the relief sought by appellees-plaintiffs.

The original statute, Ch. 57—150 contained the following provision:

'If a return is not made by the owner of the sub-surface rights, the duty is hereby imposed upon the tax assessor to assess said separate sub-surface rights for taxation and place it (sic) upon the tax rolls; Provided that such separate assessment shall be required only when the owner of some record interest in said lands shall file with the tax assessor of the county, prior to April 1 of the year A written request for such separate assessment of such mineral, oil or other sub-surface rights.' (Emphasis added.)

This Court in Cassady v. Consolidated Naval Stores Company, supra, held this law unconstitutional because it constituted an unauthorized delegation of legislative power. The Court also pointed out that the execution of a tax statute or the exercise of taxing powers thereby granted cannot be made to depend upon the unbridled discretion or whim of an individual or group of individuals.

After this decision, the Legislature enacted the present statute which reads as follows:

'Whenever the mineral, oil, gas, and other subsurface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation or otherwise, such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee. Such mineral, oil, gas and other subsurface rights, when separated from the fee, or other interest in the fee, shall be subject to separate taxation, when returned for taxation by the owner of the fee, or other interest in the fee, or the owner or claimant of such subsurface rights or interests, or any person, firm or corporation claiming by, through or under the subsurface owner or claimant. Such taxation shall be against such subsurface interest and not against the owner or owners thereof or against separate interests or rights in or to such subsurface rights.' Fla.Stats. s 193.221(1), F.S.A. (Emphasis added.)

[1] [2] [3] [4] The Legislature is presumed to know existing law when a statute is enacted, Collins Investment Company v. Metropolitan Dade County (Fla.1964) 164 So.2d 806, and, also, in re-enacting a statute the Legislature is presumed to be aware of constructions placed upon it by the Court. Delaney v. State (Fla.1966), 190 So.2d 578. It necessarily follows that the Legislature in considering and passing a statute to replace one previously held unconstitutional by the Court intended to correct the constitutional defect causing the invalidation of the previous statute. It is never presumed that the Legislature

intended to enact purposeless or useless legislation. Sharer v. Hotel Corporation of America (Fla.1962) 144 So.2d 813.

[5] It is common practice for each multiple owner in the same real property to be taxed separately as to his individual interest in same. Prior to the enactment of this law providing for separate assessment *265 of mineral, oil, gas and other subsurface rights, the fee title holder was placed in the position of paying taxes on the entire interest of the real property, including the sub-surface rights in same, which might be owned by other persons. The purpose of this law was to place upon those persons who own only the sub-surface rights in real property the obligation to pay a portion of the real property taxes proportionate to their interest in the whole.

The principal alleged deficiency in the statute is that it places upon the owner of the mineral, oil, gas and other sub-surface rights, or the owner of some other interest in the property, the duty of notifying the tax assessor of said separated ownership and requesting that the said interests be assessed separately. This means that the owner of the fee may pay the taxes on the entire property or, at his discretion, may notify the assessor of the separate ownership of the above-mentioned sub-surface rights in order that they may be taxed separately and then, the total valuation of the property should be modified to reflect the value of such rights.

The first sentence of Fla.Stats., s 193.221, F.S.A., the statute under attack, reads as follows:

'Whenever the mineral, oil, gas, and other sub-surface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation or otherwise, such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee.'

[6] [7] Land may be divided horizontally as well as vertically, so that one person may own the surface and another the minerals underground. Where the fee in the mineral is severed from the fee in the surface, it is subject to separate taxation. 51 Am.Jur. Taxation, ss 437, 452; Annot., 1916D L.R.A. 307. In fact, separate estates or interests in subsurface rights are taxable as real property or real estate under the tax statutes of many of the states. 4 Summers Oil and Gas (Perm.Ed.) s 784.

[8] Unquestionably, the Legislature had the authority to subject this separate interest in real estate to taxation.

The second sentence of Fla.Stats., s 193.221, F.S.A., which causes the greatest concern, reads as follows:

'Such mineral, oil, gas and other subsurface rights, when separated from the fee, or other interest in the fee, shall be subject to separate taxation, when returned for taxation by the owner of the fee, or other interest in the fee, or the owner or claimant of such subsurface rights or interest, or any person, firm or corporation claiming by, through or under the subsurface owner or claimant.'

All statutes and regulations, not in conflict with Fla. Stats., s 193.221, F.S.A., relating to the assessment and collection of ad valorem taxes on real property are, by the specific terms of this statute, applied to the separate assessment and taxation of subsurface rights, insofar as they may be applicable. Fla. Stats., s 193.221(3), F.S.A.

Therefore, the controversial second sentence quoted above should be considered in connection with the provisions of Fla.Stats., s 193.12, F.S.A., which reads as follows:

'Every person owning or having the control, management, custody, direction, supervision or agency of property of whatsoever character that is subject to taxation under the laws of this state, shall return under oath the same for taxation to the county assessor of taxes in the proper county, or to other proper officer, on or before April 1 of each and every year, giving the character and the

value of the same, as required by law; upon failure to do so the assessment *266 and valuation made by the assessing officer or officers shall be deemed and held to be binding upon such owner or other person or corporation interested in such property, unless complaint is made of such assessment and valuation on the day set for hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes.' (Emphasis added.)

By virtue of the holding in Cassady v. Consolidated Naval Stores Company (Fla.1960) 119 So.2d 35, the Legislature was aware that requiring such a separate assessment Only when the owner of some record interest in the land filed a written request for such separate assessment constituted an unauthorized delegation of legislative power and was unconstitutional.

The Legislature, by the provisions of the statute under attack, declared that the subsurface rights would be subject to taxation under the conditions specified in the first sentence of the section. This brought into play the provisions of Fla.Stats., s 193.021, F.S.A. relating to the method of assessment of property and Fla.Stats., s 193.11, F.S.A. requiring the assessor to ascertain the names of all taxable persons and ascertain all taxable real estate.

[9] In the event the assessor overlooked the ownership of mineral rights, a return for taxation could be made by those persons specified in the controversial second sentence of the statute under attack. In other words, the purpose of the second sentence was to specifically name the fee owner as one of those persons who could file a return covering the mineral rights in the manner specified in Fla.Stats., s 193.12, F.S.A., quoted above, even though the fee owner may not have the 'control, management, custody, direction, supervision, or agency' of the mineral rights.

[10] All Acts of the Legislature are presumptively valid, Village of North Palm Beach v. Mason (Fla.1964), 167 So.2d 721, and the above construction does no violence to the Constitution.

[11] The measure of valuation of mineral rights for the purpose of ad valorem taxation is the 'just value' of such subsurface rights determined largely from their market value if placed on market for sale by a person willing to sell but not forced to sell to another person willing to buy but not forced to buy. If subsurface rights can

be, and are severed by conveyance in various localities, fair market value, or just value, may be determined by comparable sales. This Court was confronted with valuations of mineral deposits in Camp Phosphate Co. v. Allen, 77 Fla. 341, 81 So. 503 (1919). The Court said:

'Valuations for taxation must have a just relation to the real and known value of the property assessed, and not to some unknown and speculative value, and there must be no substantial inequality in valuations in the various kinds and items of property that is subject to tax. There is no law requiring the assessor to prospect land to ascertain if it contains valuable mineral deposits; neither is there any law compelling the owner of land to extend \$75 or \$100 an acre prospecting his land for the information of a tax assessor.'

The statute does not prescribe the manner or amount of assessment, as did the prior statute which was held unconstitutional.

[12] In determining the value of same, the assessor may apply the methods provided by law, including consideration of the amounts paid for mineral, oil, gas and other sub-surface rights in the area as reflected by the public records. It should be recognized that such property rights in this State are generally conveyed either for possible mining purposes, or to eliminate clouds upon real property titles caused by the separate ownership of same *267 from the ownership of the other interests in the land and improvements thereon.

This law does not reduce assessments or eliminate any property from taxation.

[13] The total value of other interests in the realty, including improvements, should have little relationship to the value of the subsurface interests and it is, therefore, improper to equate the value of same in each instance to the value of the whole.

[14] [15] Section 193.221 of the Florida Statutes, F.S.A. is valid and constitutional. Although the assessor probably erred by fixing the assessed valuation of the subsurface rights at 10 per cent of the total valuation of the real property in question, the owners are barred from complaining here because they failed to exhaust their administrative remedies and institute suit as provided by law. Fla.Stats. s 192.21(2), F.S.A., 23 F.L.P., Taxation, s 249.

The final judgment is reversed and the cause is remanded with directions to enter a judgment dismissing the complaint with prejudice.

ERVIN, C.J., and ROBERTS and BOYD, JJ., concur.

DREW, J., dissents with opinion.

THORNAL and CARLTON, JJ., dissent and concur with DREW, J.

DREW, Justice (dissenting).

The former statute, ¹ enacted in 1957, was declared invalid in Cassady v. Consolidated Naval Stores, Fla.1960, 119 So.2d 35, and the decree in the present case holds that the amendment did not eliminate the defect defined in the Cassady opinion as follows:

** * We cannot help but conclude that the italicized provision of s 193.221, quoted above, has the effect of vesting in the owner of some record interest in the surface of the land an unbridled discretion as to when the authority granted by the Act to assess severed sub-surface rights for ad valorem tax purposes shall be exercised as to that particular tract of land. This is clearly an unauthorized delegation of the legislative power * * *.'

It is plain from a comparison of the language of the original and amended statutes that the first sentence in each provides severed subsurface rights shall be 'subject' to separate taxation. By a proviso the original law made the duty of separate assessment conditional first on a return by the owner of the rights and second, as an alternative in the absence of such return, by further proviso that 'separate assessment shall be required Only when' a written request shall be filed by the owner of

some record interest in the lands. The amended law omits from the initial sentence the proviso that the owner of the rights shall return same for taxation, and by the second clause simply repeats the provision that such rights 'when separated from the fee' shall be subject to separate taxation, adding: 'when returned for taxation by the owner of the fee, *268 * * * or the owner or claimant of such subsurface rights. * * *'

The language last quoted clearly qualifies the provision of the law that such rights 'shall be subject to separate taxation.' Even if the word 'when' is accorded the meaning urged, i.e. 'at the time of' as opposed to 'if,' the latter clause in my opinion remains a limitation or condition on the right or duty of separate assessment imposed by the law. The provision is not simply that the owner of any of the identified interests in the property may return severed subsurface rights for separate assessment (the propriety of which may not, of course, be determined in this appeal). Instead the provision is that such rights Shall be subject to separate taxation 'when separated from the fee' and 'when returned for taxation' as specified. Both factors, severance and return for taxation, are expressed and imposed with equal clarity as conditions precedent to the mandate that 'such rights * * * shall be subject to separate taxation. * * * * I do not agree that the initial sentence of the law stands independent and unqualified by the stated condition immediately following, or in the contention that the omission of the word 'only,' whatever the intent, is sufficient to eliminate the stated condition remaining in the law.

I agree with the conclusion of the trial court that the provision still vests in the specified parties the right to control the execution of the statute, or, in the language of the former opinion, to determine 'when the authority granted by the Act to assess severed sub-surface rights for ad valorem tax purposes shall be exercised as to that particular tract of land.' The law and reasoning applied in the Cassady opinion compels an affirmance of the decree.

I dissent.

THORNAL and CARLTON, JJ., concur.

All Citations

224 So.2d 262

Footnotes

- The statute formerly read: 'Whenever the * * * rights * * * shall have been * * * transferred * * * such rights shall be taken and treated as real property and shall be subject to taxation separate from the fee; provided, however, that such subsurface rights shall be assessed as separate property and separate from the fee, and it shall be the duty of the owner of such sub-surface rights to make separate return thereof for taxation by the first day of April. If a return is not made by the owner of the subsurface rights, the duty is hereby imposed upon the tax assessor to assess said separate sub-surface rights for taxation and place it upon the tax rolls; provided that such separate assessment shall be required Only when the owner of some record interest in said lands shall file with the tax assessor of the county, prior to April 1 of the year a written request for such separate assessment of such mineral, oil or other sub-surface rights. * * *' (e.s.)
- Problems presented by related statutory provisions, as well as constitutional inhibitions, are treated in a limited fashion in the Cassady opinion, 119 So.2d 35, 38.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

220 So.2d 451 District Court of Appeal of Florida, First District.

P & N INVESTMENT CORP., a Florida corporation, Appellant,

v.

FLORIDA RANCHETTES, INC., a Florida corporation, Appellee.

No. J-224. | Oct. 24, 1968. |

As Amended on Rehearing Feb. 27, 1969.

Synopsis

Action was brought for declaratory decree. The Circuit Court, Volusia County, J. T. Nelson, J., rendered a decree in favor of the plaintiff, and the defendant appealed. The District Court of Appeal, Carroll, Donald K., J., held that one of several co-owners of mineral estate has right to extract oil without consent of other owners and has right to be reimbursed for reasonable and necessary expenses of extraction and marketing, all subject to right of nonconsenting mineral owner to an accounting.

Reversed and remanded with directions.

West Headnotes (2)

[1] Mines and Minerals

Servitudes Granted, Retained, or Reserved

When surface estate is severed from mineral estate, mineral estate is the dominant estate and, therefore, owner of mineral estate has right of ingress and egress to explore for, locate, and remove minerals, but he cannot so abuse surface estate as unreasonably to injure or destroy its value and is answerable in damages to owner of surface estate for any unreasonable injuries done.

5 Cases that cite this headnote

[2] Tenancy in Common

← Mines and Minerals

One of several co-owners of mineral estate has right to extract oil without consent of other owners and has right to be reimbursed for reasonable and necessary expenses of extraction and marketing, all subject to right of nonconsenting mineral owner to an accounting.

6 Cases that cite this headnote

Attorneys and Law Firms

*451 Hansford D. Tyler, Jr., Miami, for appellant.

Robert H. Matthews, New Smyrna Beach, for appellee.

Earl Faircloth, Atty. Gen., and T. T. Turnbull, Asst. Atty. Gen., as amici curiae; William M. Register, Jr., and Peter J. Winders, of Carlton, Fields, Ward, Emmanuel, Smith & Cutter, Tampa, as amici curiae; Warren E. Hall, Jr., and Gordon H. Harris, of Holland & Knight, Bartow, as amici curiae.

CARROLL, DONALD K., Judge.

ON PETITION FOR REHEARING GRANTED

The appellant and three amici curiae have filed petitions for rehearing addressed to *452 our opinion and judgment filed in this cause on October 24, 1968, affirming the final decree entered by the Circuit Court for Volusia County.

After careful consideration of the briefs submitted by the parties and the amici curiae and the oral argument at the hearing on the said petitions for rehearing, we have reached the conclusion that we erred in entering our opinion and judgment of October 24, 1968, and that we should have reversed the said final decree. Therefore, we hereby grant the said petitions, and amend our said opinion to read in its entirety as follows:

The defendant in a suit for a declaratory decree has appealed from an adverse final decree entered by the Circuit Court for Volusia County.

The question presented for our determination in this appeal, briefly stated, is whether, where each of the parties own a 50% Interest to the mineral rights in certain land and the plaintiff also owns the fee simple title, the chancellor erred in declaring in effect that the plaintiff may mine, drill, or otherwise develop the said minerals without the express permission of the defendant, and in otherwise ruling upon the relative rights of the parties.

The undisputed facts are as follows:

In 1946 Garland W. Spencer and his wife conveyed the land in question to Eola Mack by a deed of conveyance containing this reservation: 'Reserving and excepting, however, to the grantors, their heirs and assigns forever an undivided one-half interest in all of the oil, gas, and all other minerals underlying the above-described lands with the right to mine, drill for and develop the same.' The said land was thereafter conveyed by mesne conveyances to the plaintiff, which now holds the title to the land. Similarly, by proper instruments of conveyance the defendant has acquired the mineral rights reserved by the Spencers in the above-quoted reservation-clause.

A dispute arose between the parties as to whether the defendant had the right to enter upon the land in question for the purpose of exploring for minerals and, if discovered, removing them from the land. The dispute being unresolved by the parties, the plaintiff filed the instant action seeking a declaration of the rights of the parties with respect to the said dispute.

Following the final hearing the Curcuit Court entered the final decree appealed from herein. In that decree the court held that it had jurisdiction of the parties and subject-matter of the dispute; that the plaintiff's allegations are sufficient to entitle it to a declaration of the parties' rights; and that the defendant could not, in the absence of the plaintiff's specific permission 'arbitrarily enter upon the land for exploration or mining purposes.' In its appellate brief the defendant states that it 'takes no specific exception' to the last-mentioned holding, but rather 'accepts this rule. * * * 'The defendant contends, however, that the plaintiff and the defendant are tenants in common of the said undivided mineral rights and that the same logic which bars the defendant from entering upon the land to mine or develop its 50% Of the mineral rights, applies equally to the plaintiff, as the owner of the fee and the remaining 50% Of the minerals, so the plaintiff should

not be allowed to mine or develop any minerals 'without specific permission of, or an agreement of joint venture with, or having first acquired the interests of, the other owner or owners of fractional portions of the mineral rights.'

In this appeal the defendant-appellant takes exception only to paragraphs numbered 5 and 6 of the said final decree, which paragraphs read as follows:

'5. The Court further finds and so decrees that in the event the plaintiff should mine or otherwise produce minerals from the land as covered by the retention of the mineral rights of the defendant, then, and in that event, the defendant would be entitled to 50% Of *453 the minerals so mined or produced, less the cost of production thereof;

'6. The Court further finds that in the event the Plaintiff should explore for minerals or mine or produce minerals, that it cannot bind the Defendant without an express agreement, for the payment of a proportion of said exploration costs, over and above the amount received from the sale of the minerals; * * * *.'

In defense of the final decree appealed from, however, the plaintiff sets forth what it calls the 'practical problem that is posed in this case, and similar cases throughout the State of Florida. * * * * Briefly stated, the plaintiff's description of that 'practical problem' is as follows: when the original reservation of mineral rights was agreed to in 1946, the value of the land was low and the use of the land was strictly agricultural, but today, with the great influx of people into the State of Florida, the price of the land has become more dear and the use of the land has changed from agricultural to residential; the development of residential properties has caused the owners to turn to lending institutions for the proper financing of the development, but the reservation of mineral rights, with the right of exploration reserved to the original grantors, has caused those institutions 'to look with a jaundiced eye at this property, which is so sorely needed for residential development;' and the title examiner, 'fearing the worst that could possibly happen under the circumstances, is quick to bring to the attention of any prospective purchaser the possibility that at some future date oil rigs or excavating machinery might be operating in the front yars of the new home owner.'

It is impossible to determine with any certainty just what influence the foregoing 'practical problem' considerations or any of them may have had upon the court when it entered the final decree.

As stated above, the defendant-appellant concedes that it should not explore or mine the minerals without the consent of the plaintiff but contends that this rule should apply the other way around. Valid as these considerations might have been if this had been a case of first impression in this country and if there had been no judicial precedents as to the questions before us, we must recognize the fact that there are ample precedents in other jurisdictions which should have a persuasive, if not a controlling, effect upon our determination in this appeal.

The special circumstance that makes difficult the determination of this appeal is the fact that the plaintiff is not only the owner of the surface but is also the owner of 50% Of the mineral estate. Because of this circumstance we shall discuss the plaintiff's rights as a surface owner and then his rights as the owner of half of the mineral estate. First as to its surface rights:

[1] We are convinced that the weight of authority in this country, especially in the major oil-producing states, is as follows: When the surface estate is severed from the mineral estate, the mineral estate is the dominant estate and, therefore, the owner of the mineral estate has the right of ingress and egress to explore for, locate, and remove the minerals, but he cannot so abuse the surface estate so as unreasonably to injure or destroy its value and is answerable in damages to the owner of the surface estate for any unreasonable injuries done.

One of the leading cases recognizing the just-summarized rule is Parker v. Texas Co., 326 S.W.2d 579

(Tex.Civ.App.1959). For the citations to many cases upholding this rule see 58 C.J.S. Mines and Minerals s 159, pages 332 and 333.

[2] Secondly, as to the mutual rights of the plaintiff and the defendant, each as the holder of 50% Of the mineral estate, the cases are in considerable conflict. For a discussion of these conflicting decisions, see 38 Am.Jur.2d, Gas and Oil, Sec. 10, pages 487 and 488. Ae we read the authorities, *454 we have reached the conclusion that the prevailing view among the jurisdictions passing on the subject is that one of several co-owners of the mineral estate has the right to extract oil without the consent of the other owners and has the right to be reimbursed for the reasonable and necessary expenses of extraction and marketing, all subject to the right of the nonconsenting mineral owner to an accounting. One of the leading cases recognizing this rule is Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 40 A.L.R. 1389 (U.S.C.C.A., 8th Cir., 1924).

Since several provisions of the final decree appealed from appear to conflict with the above two general rules which we conceive to be the weight of authority in this country and which we believe are applicable here, that decree must be, and it is, reversed, and the cause remanded with directions for further proceedings consistent with the views hereinabove set forth.

Reversed and remanded with directions.

WIGGINTON, C.J., and SPECTOR, J., concur.

All Citations

220 So.2d 451

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

896 So.2d 781 District Court of Appeal of Florida, Fifth District.

Nancy NOBLIN, Appellant,

v.

HARBOR HILLS DEVELOPMENT, L.P., et al., Appellees.

No. 5D03-2636. | Jan. 14, 2005.

Synopsis

Background: Developer brought action against landowner asserting that landowner did not have an easement interest in the property or, alternatively, that any easement previously created had been extinguished under Marketable Record Titles To Real Property Act (MRTA). The Circuit Court, Lake County, William G. Law, Jr., J., granted partial summary judgment in favor of developer. Landowner appealed.

Holdings: The District Court of Appeal, Sawaya, C.J., held that:

- [1] implied easement for ingress and egress to explore for and remove oil and minerals found on or underneath surface estate could be extinguished, and
- [2] genuine issue of law and fact existed as to whether root of title and use exceptions existed under MRTA.

Reversed and remanded.

West Headnotes (4)

[1] Mines and Minerals

Construction and Operation in General

Generally, a reservation or grant of oil and mineral rights reflects an intent on the part of the parties to sever the surface estate from the underlying mineral estate and create two separate estates. Cases that cite this headnote

[2] Mines and Minerals

Servitudes Granted, Retained, or Reserved

A grant or reservation of oil and mineral rights implies an easement for ingress and egress to explore for and remove the oil and minerals found on or underneath the surface estate.

Cases that cite this headnote

[3] Limitation of Actions



Implied easement for ingress and egress to explore for and remove oil and minerals found on or underneath surface estate could be extinguished under Marketable Record Titles To Real Property Act (MRTA). West's F.S.A. § 704.05.

Cases that cite this headnote

[4] Judgment

Partial Summary Judgment

Issues of law and fact existed as to whether root of title and use exceptions existed under Marketable Record Titles To Real Property Act (MRTA), precluding partial summary judgment in developer's action against landowner asserting that easement previously created had been extinguished under MRTA. West's F.S.A. §§ 689.20, 712.03(1).

Cases that cite this headnote

Attorneys and Law Firms

*781 Nancy Noblin, pro se.

Gary L. Summers of Williams, Smith & Summers, P.A., Tavares for Appellees Harbor Hills Development, L.P. and Charles A. Schell.

Opinion

*782 SAWAYA, C.J.

Nancy Noblin appeals a partial summary judgment in favor of Harbor Hills Development and Charles Schell rendered in a suit to quiet title concerning certain property located in Lake County, Florida. The partial summary judgment extinguishes Noblin's right of access to the property owned by Harbor Hills and Schell to exercise certain oil and mineral rights Noblin has in the property. The specific issues we must resolve are: 1) whether Noblin has an easement, express or implied, that allows her ingress and egress to the subject property to search for and extract the oil and mineral deposits thereon; and 2) if Noblin has such an easement, whether it has been extinguished by the Marketable Record Titles To Real Property Act (MRTA) found in chapter 712, Florida Statutes. In order to resolve these issues, we will explain the factual background followed by a discussion of each issue in the order presented.

Factual Background

We note at the outset that the facts related to the history of the underlying action are convoluted due to the interrelationship between the original owners of the property interests and the current heirs and interested parties. For purposes of the issues we must resolve, we will only relate the facts and the essential deraignment of title to the property that affect resolution of those issues.

William Dietrich owned certain property in Section 1, Township 18 South, Range 24 East located in Lake County, Florida. The property that is the subject of the instant proceeding consists of a portion of the East one-half of Section 1, Township 18 South, Range 24 East. Dietrich executed a deed, which included the property subject to the instant proceeding, to D.O. Rainey and his wife, Gladys. This deed made no mention of any separate oil or mineral rights.

On October 1, 1948, the Raineys executed a deed that conveyed one-half of the oil and mineral rights on the subject property to E.C. Huey. Specifically, this deed provided in pertinent part that Rainey conveyed to Huey "[o]ne-half of the mineral and oil rights, including the right to exploit the same"

On October 22, 1950, the Raineys conveyed the subject property to A.M. Collins and several other grantees by a deed that made no mention of the previously conveyed oil and mineral interest to Huey. Harbor Hills and Schell correctly assert, as we will later explain, that this deed constitutes the root of title to their property under MRTA. It is not necessary to list and discuss all of the instruments of conveyances in the chain of title. For purposes of the issues we must resolve, suffice it to say that Harbor Hills acquired title to the majority of the subject property through a deed recorded in 1994 and to the remainder of the property by a deed recorded in 2000. Harbor Hills subsequently conveyed a portion of the property to certain grantees, who in turn conveyed the property to Schell.

Harbor Hills initiated a suit, later joined by Schell as a party plaintiff, to quiet title to the subject property against a number of defendants, including Wilma Boyles, who was an heir of Huey. After Boyles died, her heir, Noblin, became a party defendant. Although Harbor Hills and Schell did not contest Noblin's ownership of one-half of the oil and mineral rights, they did file a motion for summary judgment asserting that Noblin did not have an easement interest in the property or, alternatively, that any easement previously created had been extinguished under MRTA. The trial court agreed with Harbor Hills and Schell and entered the partial summary judgment that we now review.

Having discussed the factual background and the pertinent deraignment of *783 the title to the subject property, we will address the first issue previously presented, which is whether an easement was created in favor of Noblin.

Whether An Easement, Expressed Or Implied, Was Created

In order to determine whether Noblin, as successor in interest to Huey and heir of Boyles, has an easement, we must analyze the pertinent provisions of the 1948 deed from the Raineys to Huey. When the Raineys executed the deed, they included the following provision to describe the interest conveyed to Huey: "One-half of the mineral and oil rights, including the right to exploit the same" Noblin contends that the provision "right to exploit the same" conveys an easement that allows her the right to

enter the property to search for and extract one-half of the oil and minerals located thereon. We agree. We note the plain meaning of "exploit" is generally to employ to the greatest extent possible, i.e., "to put to productive use." Webster's New Collegiate Dictionary 438 (9th ed.1989). Accepting Noblin's uncontested ownership of the one-half oil and mineral rights in the subject property, then the logical productive use of this interest would be to search for and extract the oil and minerals for consumer or other use. Hence, it appears to us that the intent of the parties in accordance with the plain meaning of the language employed in the deed, which is what we must consider to discern the meaning of the pertinent provisions in the deed, was to convey an easement to Huey for ingress and egress onto the subject property to search for and remove one-half of the oil and mineral deposits located thereon. This interpretation comports with the general rule we next discuss regarding the creation of an implied easement when a grant of oil and mineral rights is contained in an instrument of conveyance.

[1] The general rule alluded to provides that a reservation or grant of oil and mineral rights reflects an intent on the part of the parties to sever the surface estate from the underlying mineral estate and create two separate estates. Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 525-26 (Fla.1973) ("When the surface estate and the mineral estate are severed, they remain independent. Possession of one does not carry with it possession of the other."); P & N Inv. Corp. v. Florida Ranchettes, Inc., 220 So.2d 451 (Fla.1968). This is the view adopted by the courts in many other jurisdictions. ¹ In Tufts College, the Florida Supreme Court recognized, citing the decision in P & N Investment, that when the surface estate and the mineral estate are severed, the mineral estate is dominant *784 over the surface estate allowing the mineral estate owner the right of ingress and egress over the surface estate to explore, locate, and remove the minerals. The court in P & N Investment explained this rule more fully:

We are convinced that the weight of authority in the country, especially in the major oil-producing states, is as follows: When the surface estate is severed from the mineral estate, the mineral estate is the dominant estate and, therefore, the owner of the mineral estate has the right of ingress and egress to explore for, locate, and remove the minerals, but he cannot so abuse the surface

estate so as unreasonably to injure or destroy its value and is answerable in damages to the owner of the surface estate for any unreasonable injuries done.

One of the leading cases recognizing the just-summarized rule is *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex.Civ.App.1959). For the citations to many cases upholding this rule see 58 C.J.S. Mines and Minerals § 159, pages 332 and 333.

P & N Investment, 220 So.2d at 453; see also Coraci v. Hogan, 515 So.2d 1064 (Fla. 5th DCA 1987), review denied, 525 So.2d 878 (Fla.1988); Hill v. Bridgers, 397 So.2d 1212, 1214 (Fla. 2d DCA 1981) ("[A]n owner of an interest in minerals is entitled to enter the land and explore for minerals without liability to the surface owner as long as injury to the surface is reasonable.") (citation omitted).

[2] Based on the general rule adopted by the Florida courts, a grant or reservation of oil and mineral rights implies an easement for ingress and egress to explore for and remove the oil and minerals found on or underneath the surface estate. Decisions in many other jurisdictions adopt this view. We conclude that even if "the *785 right to exploit" provision was not included in the 1948 deed from Rainey to Huey, an implied easement was granted to Huey for the purpose of exploration and extraction of the oil and minerals located on the surface estate.

Having determined that Noblin, as successor in interest to Huey, has an easement for ingress and egress in the surface estate owned by Harbor Hills and Schell, we must next determine whether that easement is extinguishable under MRTA.

Whether MRTA Applies To Extinguish The Easement

[3] "Section 712.02 of MRTA expressly provides that any person vested with any estate in land of record for thirty years or more shall have a marketable record title free and clear of *all claims* of an interest in land except those preserved by section 712.03" *H & F Land, Inc. v. Panama City-Bay County Airport & Indus. Dist.*, 736 So.2d 1167, 1171 (Fla.1999), receded from on other grounds, *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 29 Fla. L. Weekly S614 (Fla. Oct. 21, 2004); see also Cirelli v. Ent, 885 So.2d 423 (Fla. 5th DCA 2004). The rights or interests

in land subject to extinguishment by MRTA include "rights of entry or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials, unless those rights of entry or easement are excepted or not affected by the provisions of s. 712.03 or s. 712.04." § 704.05(1), Fla. Stat. (2002); see also H & F Land (holding that a common law way of necessity is an easement that arises from an implied grant or reservation of an interest in land and is extinguishable by MRTA). It is clear that an expressed or implied easement for ingress and egress to explore for and extract oil and minerals from the surface estate is an interest that may be extinguished by MRTA, provided the other requirements of MRTA are met.

[4] MRTA requires that in order to extinguish an interest in real property, that interest must have existed prior to the root of title. Cirelli. The root of title is defined as "any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least 30 years prior to the time when the marketability is being determined." § 712.01(2), Fla. Stat. (2002). The root of title to the property owned by Harbor Hills and Schell is the deed from Rainey to Collins dated May 22, 1950. This deed does not mention in any way the one-half interest in mineral and oil rights conveyed two years earlier by Rainey to Huey, and it does not mention or identify any easement, expressed or implied, that may have been created at the time the prior deed *786 from Rainey to Huey was executed. Because the prior deed from Rainey to Huey creating the easement for ingress and egress predates the root of title, it may be extinguished by MRTA unless an exception applies. It is important to emphasize that the trial court's order granting partial summary judgment only holds that the easement is extinguished by MRTA, not the actual oil and mineral rights owned by Noblin.

The exceptions to MRTA that may be pertinent to the instant case are found in section 712.03(1), Florida Statutes, relating to easements disclosed in the muniments of title and section 712.03(5), Florida Statutes, relating to prior use of the easement by Noblin and her predecessors in title. We must next determine whether these exceptions apply.

The exception under section 712.03(1) preserves "[e]states or interests, easements and use restrictions disclosed

by and defects inherent in the muniments of title on which an estate is based beginning with the root of title" § 712.03(1), Fla. Stat. (2002). This exception has been narrowly construed by the courts, which limit its application to easements or interests disclosed on the face of an instrument. See H & F Land, 736 So.2d at 1173; ITT Rayonier, Inc. v. Wadsworth, 346 So.2d 1004 (Fla.1977). As we have indicated, the 1950 root of title from Rainey to Collins does not mention the prior grant of oil and mineral rights or any easement associated therewith. Noblin contends that a 1980 deed from SunBelt Investments to Ojay Corporation that references the 1948 deed from Rainey to Huey by official record book and page number sufficiently complies with the exception. The partial summary judgment shows the trial court did not resolve this particular issue. Because this issue raises questions of law and fact that need to be resolved by the trial court, the partial summary judgment rendered in favor of Harbor Hills and Schell must be reversed.

Noblin argues that the use exception found in section 712.03(5), Florida Statutes (2002), applies to salvage her easement. This statute provides in pertinent part that excepted from extinguishment under MRTA are "[r]ecorded or unrecorded easements or rights, interests or servitude in the nature of easements ... so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof." § 712.03(5), Fla. Stat. (2002). Noblin presented affidavits from several witnesses that indicate the easement was in fact used on many occasions by Huey and that clay, sand, limestone, and other minerals were extracted from the property. Noblin also states in her reply brief that at the summary judgment hearing, she clearly stated that she and others "could attest that on many occasions, sand, clay, limestone, and other minerals had been removed from (but not limited to), the subject Property." The affidavit of Wilma Boyles, executed prior to her death, stated that Huey used minerals from the subject property "throughout [his] lifetime" and that he "spent a great deal of time and money in pursuit" of "oil and natural gas."

Harbor Hills and Schell make two arguments in opposition to Noblin's use exception. First, they argue that the affidavits presented by Noblin consist of conclusory and hearsay statements and do not provide information regarding the particular uses of the easement with any specificity. Second, they contend that clay, sand, and limestone are not minerals, and in support of

that argument they cite section 689.20, Florida Statutes, enacted in 1959, which provides that "[w]henever the word 'minerals' is hereafter used in any deed, lease, or other contract in writing, said word or term shall not include any of the following: *787 topsoil, muck, peat, humus, sand, and common clay, unless expressly provided in said deed, lease, or other contract in writing." Noblin contends that this law, unchanged since its enactment, expressly provides for prospective application and, therefore, it is inapplicable given the fact that the 1948 deed creating the easement was executed and recorded before the statute was enacted.

As to the first argument, we disagree that all of the evidence and statements in the affidavits presented by Noblin are conclusions and hearsay. Harbor Hills and Schell acknowledge that we must view the evidence presented by Noblin in the light most favorable to her, and if any doubt exists as to whether there are any issues of material fact, summary judgment is inappropriate. See Krol v. City of Orlando, 778 So.2d 490 (Fla. 5th DCA 2001). Because the easement allows for exploration and extraction, we conclude that when the evidence presented by Noblin is viewed in the proper light, questions of fact exist regarding the use of the property by Huey to explore for minerals on the surface estate. As to the second argument, notwithstanding the provisions of section 689.20, 3 we agree with Harbor Hills and Schell that clay, sand, topsoil, and limestone may not be minerals within the meaning of the 1948 deed from Rainey to

Huey. See Florida Audubon Soc'y v. Ratner, 497 So.2d 672 (Fla. 3d DCA 1986), review denied, 508 So.2d 15 (Fla.1987). Nevertheless, we conclude that factual issues remain regarding what "other minerals" may have been extracted in the past from the surface estate by Huey or his successors in interest.

Conclusion

Noblin has an easement for ingress and egress to explore for and extract one-half of the oil and mineral deposits on the subject property. This easement may be extinguished under MRTA; however, material issues of law and fact exist regarding the two exceptions under MRTA previously discussed that preclude entry of summary judgment. Therefore, the partial summary judgment rendered in favor of Harbor Hills and Schell is hereby reversed, and this case is remanded for further proceedings.

REVERSED and REMANDED.

SHARP, W. and GRIFFIN, JJ., concur.

All Citations

896 So.2d 781, 164 Oil & Gas Rep. 863, 30 Fla. L. Weekly D237

Footnotes

- See Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923); Nevada Irrigation Dist. v. Keystone Copper Corp., 224 Cal.App.2d 523, 36 Cal.Rptr. 775, 778 (1964) ("The owner of real property may divide his lands horizontally as well as vertically, and when he conveys the subsurface mineral deposits separately from the surface rights, or reserves them from a conveyance of such surface rights, he creates two separate fee simple estates in the land, each of which has the same status and rank.") (citations omitted); Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 III. 241, 47 N.E.2d 96, 98 (1943) ("It has long been recognized in this State that mineral rights may be severed from the surface rights and conveyed separately, and that two estates are thus created in the land, each of which is distinct, and each of which may be conveyed or devised, and each is subject to taxation.") (citations omitted); Maynard v. McHenry, 271 Ky. 642, 113 S.W.2d 13 (1938); Calvert Joint Venture # 140 v. Snider, 373 Md. 18, 816 A.2d 854 (2003); Groves v. Terrace Mining Co., 340 S.W.2d 708, 710 (Mo.1960) ("The owner of land containing minerals may segregate the surface rights from the underlying minerals by a conveyance in writing so that there is a complete severance of title and separate estates are created.") (citations omitted); Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976).
- See Rocky Mountain Fuel Co. v. Heflin, 148 Colo. 415, 366 P.2d 577, 580 (1961) ("The owner of a mineral estate has rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of his interest.") (citations omitted); Slade v. Rudman Res., Inc., 237 Ga. 848, 230 S.E.2d 284, 285 (1976) ("It is established law in this state that a grant of minerals conveys, by implication, the rights of ingress and egress, and possession of the surface necessary to the use and enjoyment of the estate conveyed.") (citation omitted); Jilek v. Chicago, Wilmington

& Franklin Coal Co., 382 III. 241, 47 N.E.2d 96, 100 (1943) ("There appears to be little doubt when the mineral estate is severed from the surface estate that with the mineral estate all means to attain it are also granted for the purpose of enjoying it. This is because it is presumed the grantor intended to convey, and the grantee expected to receive, the full benefit of the mineral estate, and therefore the grantor not only conveyed the thing specifically described, but all other rights and privileges necessary to the enjoyment of the thing granted.") (citations omitted); Calvert Joint Venture # 140 v. Snider, 373 Md. 18, 816 A.2d 854, 873 (2003) ("[O]nce the mineral rights have been reserved (or granted) and the whole estate has been encumbered by the instrument of conveyance, some other states have found that the reservation, conveyance or leasing of mineral rights includes an implied easement for the owner of those rights to ingress, egress, occupy and use the surface of land, as reasonably necessary, for the purpose of extracting those minerals in the absence of specific language granting those rights.") (footnote omitted) (citations omitted); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509, 512 (1940) ("[W]e must assume that the grantors intended to convey what they could legally convey, namely, the right of ingress and egress necessary to develop and remove the oil and gas, there being nothing in the instrument or circumstances indicating a contrary intention. This right is analogous to a way of necessity implied where the land of a grantor is entirely surrounded by the land conveyed.") (citations omitted); Flying Diamond Corp. v. Rust, 551 P.2d 509, 511 (Utah 1976) ("The general rule which is approved by all jurisdictions that have considered the matter is that the ownership (or rights of a lessee) of mineral rights in land is dominant over the rights of the owner of the fee to the extent reasonably necessary to extract the minerals therefrom.") (footnote omitted); Phillips v. Fox, 193 W.Va. 657, 458 S.E.2d 327, 332 (1995) ("It is well-settled that ownership of a mineral estate includes the right to enter upon and use the superjacent surface by such manner and means as is fairly reasonable and necessary to reach and remove the minerals.") (citations omitted); Squires v. Lafferty, 95 W.Va. 307, 121 S.E. 90, 90-91 (1924) ("There being no question or contention as to ownership by the plaintiff, Milam's Fork Smokeless Coal Land Company, of the coal underlying the entire 137 acres, it has also as incident to this ownership the right to use the 'surface' of the land in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.") (citations omitted); see also Kysar v. Amoco Prod. Co., 135 N.M. 767, 93 P.3d 1272, 1278 (2004) (stating the general rule "that when an oil and gas lease grants to the lessee a particular tract of land for the purpose of exploring, drilling, mining and producing oil and gas, the lessee gains by implication the right to enter upon and use as much of the surface as may be necessary for the lessee's operations.") (citation omitted); Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex.1972).

3 While Noblin presents a persuasive argument regarding the prospective application of section 689.20, it is not necessary for us to decide that issue because, regardless of whether the statute is applied, material issues of fact exist regarding what other minerals may have been extracted from the surface estate.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

185 So.2d 730 District Court of Appeal of Florida, First District.

Melvin A. ROBINSON and Dorothy Robinson, his wife, and Daniel Melnick and Janice Melnick, his wife, Appellants,

v.

Eugene M. SPEER and Myrtle E. Speer, his wife, Appellees.

No. H-87. | April 14, 1966.

Rehearing Denied May 19, 1966.

Synopsis

Action to partition mineral rights. The Circuit Court for Volusia County, Robert H. Wingfield, J., dismissed the complaint, and plaintiffs appealed. The District Court of Appeal, Johnson, J., held that plaintiffs who had purchased one-half of acreage in tract which original grantors had conveyed by deed which reserved to themselves undivided one-half interest in minerals with right, in case of dispute, to choose mineral rights under one-half of acreage, were not entitled to judicial partition of mineral rights before resort to method prescribed in deed.

Affirmed.

West Headnotes (4)

[1] Partition

Effect of Provisions of Deed or Will

Plaintiffs who had purchased one-half of acreage in tract which original grantors had conveyed, by deed which reserved to themselves undivided one-half interest in minerals with right, in case of dispute, to choose mineral rights under one-half of acreage, were not entitled to judicial partition of mineral rights before resort to method prescribed in deed.

Cases that cite this headnote

[2] Mines and Minerals

Requisites and Validity

Reservation in deed of undivided one-half in mineral rights, with right in grantors to choose mineral rights under one-half of acreage in case of dispute, was valid contractual right between grantors and subsequent grantees.

Cases that cite this headnote

[3] Mines and Minerals

← Kind, Quantity, and Location of Minerals Granted or Reserved

Under deed whereby grantors reserved undivided one-half interest in minerals, with right in case of dispute to choose mineral rights under one-half of acreage, grantors had right to claim all minerals under that one-half of tract which was ultimately purchased by plaintiffs.

Cases that cite this headnote

[4] Perpetuities

Creation of Future Estates in General

Perpetuities

Restraints on Alienation in General

Reservation to grantors, who reserved undivided one-half interest in minerals, of right to claim minerals under one-half of tract did not violate rule against perpetuities and was not unreasonable restraint on rights of partition or alienation.

1 Cases that cite this headnote

Attorneys and Law Firms

*730 Dean F. Cochran, Mount Vernon, N.Y., and Parker Foster & Madigan, Tallahassee, for appellants.

Giles, Hedrick, & Robinson, Orlando, Andrews, Kurth, Campbell & Jones, Leon M. Payne and Selby W. Sullivan, Houston, Tex., for appellees.

Opinion

JOHNSON, Judge.

This is an appeal from an order dismissing the complaint of plaintiff-appellant, without prejudice.

Plaintiffs sought partition by sale of mineral rights held in common with the *731 appellees-defendants below in 1600 acres of land in Volusia County, Florida. The appellees owned 3200 acres of land and sold the same reserving 'an undivided one-half interest in the minerals' with the perpetual right of ingress and egress to mine etc. The appellants purchased about one-half of the 3200 acre tract, or 1600 acres, by deed which expressly provided that such conveyance was subject to the ownership of the mineral rights of Speers. We think the language contained in the reservation by Speer is controlling in this case and should be set out in full as follows:

'The grantors do not sell, but expressly reserve for themselves, their heirs, personal representatives and assigns, an undivided one-half (1/2) interest in and to all of the oil, gas, coal and other minerals and mineral rights, whether metallic or non-metallic, in and under the lands described herein, subject only to said lease recorded in Book 304, page 299, of the Public Records of Volusia County, Florida, with the perpetual right of ingress and egress to and from said land for the purpose of drilling, exploring, mining and in every way operating for such minerals and removing the same, as well as the right of laying pipe lines and building tanks, towers, stations, and structures to produce, save, and take care of such minerals. In case that hereafter these grantors, their heirs, personal representatives or assigns, as owners of an undivided one-half (1/2) interest in said oil, gas, coal, minerals and mineral rights in the property

above described, cannot agree with the owners of the other undivided one-half (1/2) interest in such oil, gas, coal, minerals, and mineral rights, as to the lease, mortgage, sale or disposition thereof, or any part thereof, then these grantors, their heirs, legal representatives or assigns shall have the right to choose onehalf (1/2) in acreage of the above described property which they may independently lease, mortgage, sell or dispose of as they see fit; and in such event the grantees, their heirs, legal representatives and assigns, may independently lease, mortgage, sell and dispose of the oil, gas, coal, minerals and mineral rights in the one-half (1/2)acreage not chosen by the grantors, their heirs, legal representatives and assigns, as aforesaid.'

[3] [4] The method of partition or dividing of the minerals, in the event of a disagreement relative thereto, is set out in the deed itself, and until the method so set out in the deed has been applied to partitioning of said mineral rights, there can be no resort to a judicial partition thereof. The reservation constituted a valid contractual right as between the parties. The appellants purchased their lands with full knowledge of the reservation and of the method of partitioning same. Under the terms of the reservation, the Speers had the legal right to claim all the minerals under the acreage purchased by the appellants and appellants were or should have been aware of this fact and certainly, if the Speers had so elected to take their mineral rights under the appellants' land, there would have been nothing to partition. The reservation does not violate the rule against perpetuities nor is it an unreasonable restraint on the right of partition or alienation. No request was made by plaintiffs-appellants that a partition of the mineral rights in question be made in accordance with the provisions of the deed and reservation therein. Therefore, what the plaintiffs were attempting to do was to remove the claim of the Speers from any mineral rights under plaintiffs' land, thereby forcing the Speers to claim all their mineral rights under the remaining lands.

We feel that both law and equity are against the plaintiffs and that if the lower court made any error in dismissing the appellants' complaint, it was in doing so *732 without prejudice, a question we do not determine at this time.

For the reasons stated, the order appealed is Affirmed.

RAWLS, C.J., and CARROLL, DONALD K., J., concur.

All Citations

185 So.2d 730

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Red Flag - Severe Negative Treatment
Overruled by Village of Tequesta v. Jupiter Inlet Corp., Fla., May 3, 1979
328 So.2d 471

District Court of Appeal of Florida, Second District.

Felipe A. VALLS and Elias G. Elias, Appellants,

ARNOLD INDUSTRIES, INC., et al., Appellees.
PEERLESS INVESTMENT
CORPORATION, Appellant,

v.

ARNOLD INDUSTRIES, INC., et al., Appellees.

Nos. 75-769, 75-770.

|
March 3, 1976.
|
Rehearings Denied April 5, 1976.

Synopsis

Postcondemnation hearing was held for purpose of determining apportionment of award between fee title owners and owners of reserve mineral rights. The Circuit Court for Polk County, Thomas M. Langston, J., entered judgment apportioning the award, and appeal was taken. The District Court of Appeal, Grimes, J., held that fact that absent evidence of likelihood of minerals in the property the jury would not have been entitled to consider the speculative possibility that the property might be more valuable because of the existence of minerals did not preclude holders of the reserved mineral rights from a recovery for the value of their interest and that they were entitled to a portion of the award in view of testimony demonstrating that the mineral rights had an ascertainable market value in spite of fact that no one knew whether subject parcels contained any minerals.

Affirmed.

West Headnotes (7)

[1] Mines and Minerals

Requisites and Validity

Minerals, gas and oil are distinct properties which may be conveyed separately from the surface.

Cases that cite this headnote

[2] Taxation

Mines, Mining Rights, and Minerals

Where a fee in minerals is severed from the fee in the surface, it is subject to separate taxation.

Cases that cite this headnote

[3] Constitutional Law

Other Particular Issues and Applications

Eminent Domain

- Real Property in General

Eminent Domain

Water Rights

Water, oil, minerals and other substances of value which lie beneath the surface are valuable property rights that cannot be divested without due process of law and payment of just compensation. West's F.S.A.Const. art. 10, § 6.

2 Cases that cite this headnote

[4] Eminent Domain

Apportionment

Fact that jury award in eminent domain proceeding could not have been enhanced by value of subsurface mineral interests absent evidence that there were valuable minerals under the surface did not require application of a similar rule in apportionment proceedings so as to preclude owners of reserved mineral rights from recovery for the value of their interests. West's F.S.A.Const. art. 10, § 6.

Cases that cite this headnote

[5] Eminent Domain

Determination of Conflicting Claims

Although at a hearing to resolve conflicting claim to an eminent domain award the court must consider the value of each interest in the property, the sum of the several awards to the parties cannot exceed the total amount of the condemnation verdict. West's F.S.A. §§ 73.071, 73.081, 73.101; West's F.S.A.Const. art. 10, § 6.

1 Cases that cite this headnote

[6] Eminent Domain

Apportionment

Although practical effect of apportioning condemnation award between title owners and owners of reserved mineral rights was to diminish amount received by the fee owners, such owners were in no position to complain notwithstanding that absent evidence that there were valuable minerals on the property the jury, in fixing condemnation award, was not entitled to consider the speculative possibility that the property might be more valuable because of mineral deposits since fee owner's interest in the property without the mineral rights was not as valuable as if they were the sole owners of both the surface and the minerals. West's F.S.A.Const. art. 10, § 6.

Cases that cite this headnote

[7] Eminent Domain

Persons Entitled

In view of evidence that reserved mineral rights had an ascertainable market value in spite of fact that no one knew whether subject parcel contained any minerals, owners of the mineral rights were entitled to a portion of the condemnation award. West's F.S.A.Const. art. 10, § 6.

Cases that cite this headnote

Attorneys and Law Firms

*472 William D. Jones, Jr., Jacksonville, for appellants.

C. Jeffery Arnold, of Arnold, Matheny & Eagan, P.A., Orlando, for appellees.

Opinion

GRIMES, Judge.

This case involves a post-condemnation award apportionment dispute between certain fee title landowners and the owners of reserved mineral rights.

*473 The Southwest Florida Water Management District initiated condemnation proceedings to acquire 101.70 acres of land owned by appellants, Valls and Elias, and 80.28 acres of land owned by appellant, Peerless Investment Corporation. The appellees were joined as defendants because they owned an undivided 15/16ths interest in all oil, gas and other minerals in each of the parcels, together with an easement for ingress and egress and such other rights as required for the development of the minerals. In the course of the proceedings, all parties agreed on the total value of the properties, and a jury was impaneled to return the agreed amount of the compensation awards to be paid by the condemning authority. Thereafter, the court held a hearing for the purpose of determining an apportionment of the award between appellants and appellees.

One of the appellees testified concerning the value of the mineral rights in each parcel. A real estate appraiser gave an opinion of the value of these rights predicated in large part upon ten comparable sales of mineral rights in nearby properties. Appellees also presented evidence of mineral rights leases previously executed by them to an oil company for a dollar per acre per year, though at the time of the suit these leases had expired. There was no testimony of the actual presence of minerals in the land, and appellees admitted that they had never had the land explored for minerals. No one testified to what the parcels were worth as encumbered by the mineral reservations. The land was unimproved. The court ultimately entered a judgment apportioning the condemnation award as follows:

The allocation to appellees was in the precise amount of the values stated by the appraiser.

[1] [2] [3] It is well settled that minerals, gas and oil are distinct properties which may be conveyed separately from the surface. Copello v. Hart, Fla.App.1st, 1974, 293 So.2d 734. Where a fee in minerals is severed from the fee in the surface, it is subject to separate taxation. Dickinson v. Davis, Fla.1969, 224 So.2d 262. Water, oil, minerals and

other substances of value which lie beneath the surface are valuable property rights which cannot be divested without due process of law and the payment of just compensation. Koch v. Pinellas County, 6th Cir.Ct.1953, 5 Fla.Supp. 116. See 2 Nichols on Eminent Domain, s 5.78(3), Revised Third Edition.

[4] [5] the absence of prospecting data or other evidence tending to show the presence of minerals in the land, appellees were not entitled to any portion of the condemnation awards. In support of this position, appellants cite Board of Com'rs of State Inst. v. Tallahassee B. & T. Co., Fla.App.1st, 1958, 100 So.2d 67, in which the court said: "... To warrant admission of testimony as to the value for purposes other than that to which the land is being put, or to which its use is limited by ordinance at the time of the taking, The landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, (3) that the market value of the land has been enhanced by the other use for which it is adaptable.' (Emphasis added.)

Our court quoted this proposition of law with approval in Swift & Company v. Housing Authority of Plant City, Fla.App.2d, 1958, 106 So.2d 616. In the latter case, the owner of both the surface and the minerals *474 was permitted to offer evidence of phosphate prospecting data as bearing upon the value of the land providing it could be shown that there was a reasonable probability that an existing ordinance against mining the property would be changed.

In essence, appellants argue that since the jury award could not have been enhanced by the value of subsurface mineral interests without evidence that there were valuable minerals under the surface, the court should have applied a similar rule in the apportionment proceedings so as to preclude appellee from a recovery for the value of their mineral rights. We cannot agree with this contention.

In Florida, the compensation for property being appropriated by eminent domain is first determined by a jury. Fla.Stat. s 73.071 (1975). The verdict must

specify the amount to be paid for each parcel, and when severance damages are sought, these amounts shall be separately stated. Fla.Stat. s 73.081 (1975). Where there are conflicting claims to the amount awarded, the court, upon appropriate motion, is authorized to determine the rights of the interested parties with respect to the amount which is awarded for each parcel. Fla. Stat. s 73.101 (1975). [6] [7] However, appellants contend that in At this hearing, the court must consider the value of each interest in the property, but the sum of the several awards to the parties cannot exceed the total amount of the condemnation verdict.

> It is well known that severed mineral rights are bought and sold in the market place, and as reflected by this record where accompanied by the right to explore and extract the minerals, they often command a substantial price. True it is that the practical effect of the court's ruling was to diminish the amount which the appellants received for the taking of their fee interest in the properties, but they are in no position to complain. Their ownership in the property without the mineral rights was not as valuable as if they had full ownership of the surface and the minerals.

> It makes no difference that without evidence of the likelihood of minerals in the property, the jury would not have been entitled to consider the speculative possibility that the property might be more valuable because of the existence of minerals. Our Constitution guarantees that no private property shall be taken except for a public purpose and 'with full compensation therefor paid to each owner.' Fla.Const. art. X, s 6. Appellees lost their mineral rights by condemnation, and the testimony demonstrated that these severed rights had an ascertainable market value in spite of the fact that no one knew whether the subject parcels contained any minerals. Since there was competent substantial evidence to support the amount of the awards to appellees, the judgment must be

AFFIRMED.

BOARDMAN, A. C. J., and SCHEB, J., concur.

All Citations

328 So.2d 471

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

345 So.2d 1062 Supreme Court of Florida.

J. Ed STRAUGHN, etc., Petitioner,

v.

SUN OIL COMPANY

(DELAWARE) et al., Respondents.

F. M. 'Bubba' FISHER et al., Petitioners,

v.

SUN OIL COMPANY et al., Respondents.

AMOCO PRODUCTION COMPANY, etc., Petitioner,

v.

J. Ed STRAUGHN, etc., et al., Respondents.

Nos. 49387-49391, 49397 and 47274. | March 17, 1977.

Rehearing Denied June 7, 1977.

Synopsis

Oil companies brought separate suits seeking declarative and injunctive relief from ad valorem taxation of oil, gas and mineral leasehold interests. The Circuit Court of Hardee County, Marvin B. Woods, J., and the Circuit Court of Santa Rosa County, Ernest E. Mason, J., determined that such interests were not subject to taxation, and appeals were taken. In the Hardee County case, the District Court of Appeal, Second District, 309 So.2d 39, reversed and remanded, and certiorari was granted. In the Santa Rosa County case, the District Court of Appeal, First District, 330 So.2d 76, affirmed, and decision was certified to be one passing on question of great public interest, and certiorari was granted and the cases were consolidated. The Supreme Court, Boyd, J., held that the leaseholds were taxable interests in real property and that term 'otherwise transferred' in the applicable statute encompassed transfer by lease.

Decision of District Court of Appeal, First District, quashed; writ to District Court of Appeal, Second District, discharged; causes remanded.

Drew, J. (retired), filed a dissenting opinion in which Adkins, J., concurred.

West Headnotes (2)

[1] Mines and Minerals

Nature of Mining Leases and Agreements

Taxation

Mines, Mining Rights, and Minerals

Leasehold interest under leases giving oil companies exclusive rights to explore for, drill and extract oil, gas and minerals and reserving to fee owners a fraction in value or in kind of the oil, gas and minerals so produced were "interests in real property" and subject to ad valorem taxation. West's F.S.A. § 193.481(1).

2 Cases that cite this headnote

[2] Taxation

Particular Estates or Interests in Property

Purpose of statute providing that whenever mineral, oil, gas and other subsurface rights have been "sold or otherwise transferred," such shall be treated as an interest in real property subject to taxation separate and apart from the fee was to subject such rights to separate taxation when they are separated from the fee, as they are when transferred by lease, and term "otherwise transferred" encompasses transfer by lease. West's F.S.A. § 193.481(1).

1 Cases that cite this headnote

Attorneys and Law Firms

*1063 Robert L. Shevin, Atty. Gen., and Larry Levy and Joseph C. Mellichamp, III, Asst. Attys. Gen., Gerald L. Brown, of Wells, Brown, Caton & Brady, Pensacola, and A. L. Johnson, of Johnson, Johnson & Green, Milton, for petitioners, J. Ed. Straughn and F. M. 'Bubba' Fisher.

Peter J. Winders, of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tampa, and W. Spencer Mitchem, of Beggs, Lane, Daniel, Gaines & Davis, Pensacola, for respondents, Sun Oil Co.

Wofford H. Stidham, of Holland & Knight, Bartow, for petitioner, Amoco Prod. Co.

Robert L. Shevin, Atty. Gen., and Larry Levy and Joseph C. Mellichamp, III, Asst. Attys. Gen., for respondents, J. Ed. Straughn.

Opinion

BOYD, Justice.

Owners is fee of real property in Santa Rosa County and Hardee County have entered lease agreement with various oil companies. Generally, the leases give to the companies the exclusive rights to explore for, drill and extract oil, gas and minerals on the property and reserve to the fee owners a fraction in value or in kind of the oil, gas and minerals so produced. Local county tax assessors assessed the value of the oil companies' interests in the leases for the purpose of levying against them county ad valorem taxes for 1973. The counties acted under Section 193.481(1), Florida Statutes (1973), which provides:

'193.481 Assessment of oil, mineral, and other subsurface rights.-(1) Whenever the mineral, oil, gas, and other subsurface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation *1064 or otherwise, such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee. Such mineral, oil, gas, and other subsurface rights, when separated from the fee or other interest in the fee, shall be subject to separate taxation. Such taxation shall be against such subsurface interest and not against the owner or owners thereof or against separate interests or rights in or to such subsurface rights.'

After exhaustion of administrative remedies, five suits by five oil companies in the Circuit Court for Santa Rosa County and one suit by Amoco Production Company in the Circuit Court for Hardee County seeking declarative and injunctive relief from the taxation were brought against J. Ed Straughn, Executive Director of the Department of Revenue, local tax assessors and local tax collectors.

The Circuit Court for Hardee County concluded that a legislative intent to tax Amoco Production's leasehold interest could not be discerned from the statute and furthermore that under Miller v. Carr ¹ the interest created in Amoco, rather than being a possessory interest in real property, was no more than a contractual license to explore and produce. Since the leasehold interest was not one in property, it could not be subjected to real property taxes. Accordingly, final judgment was granted in favor of Amoco, the defendants were enjoined from collection of the taxes, and the assessment was declared illegal. Based on substantially the same reasoning, the Circuit Court for Santa Rosa County declared nontaxable the leasehold interests of the oil companies and granted a consolidated summary final judgment in their favor.

The judgment of the Circuit Court for Hardee County was appealed to the District Court of Appeal, Second District. In its opinion the court distinguished Miller v. Carr, held that the Legislature may tax leasehold interests in realty, found in the statute legislative intent to tax the leasehold hold interests of Amoco and reversed the judgment. ² Amoco filed a petition for a writ of certiorari in this Court.

While the Amoco case was pending here, the District Court of Appeal, First District, rendered its decision on the appeal of the other judgment. The court found the wording of the statute to be ambiguous, so that legislative intent to subject the leasehold interests to taxation could not be clearly determined. Following the rule that the terms of a statute imposing taxes must be clear and specific and that tax statutes should be construed liberally in favor of the taxpayer, the court affirmed the judgment. The decision was certified to be one which passes upon a question of great public interest. ³

The Director of the Department of Revenue petitioned this Court for five writs of certiorari⁴ to the District Court of Appeal, First District. Santa Rosa County tax officials brought a separate petition for a like writ. We granted certiorari. The six cases were consolidated with the Amoco Production case for purposes of argument and decision. We have jurisdiction of all the cases because of conflict between the two decisions. Article V, Section 3(b) (3), Florida Constitution.

Preliminarily we agree with the Second District Court that Miller v. Carr has no influence here. At the time of that decision Section 193.481(1) had not been enacted. Furthermore, the issue before the Miller court is completely distinct from the issue here. As the Second District Court said:

'... Clearly, the court was there concerned only with the Alienability by the Lessor of a reserved interest in the *1065 unsevered oil. Here, we are concerned with the Taxability of the total interest in the Lessee, i.e., of his right to occupy, explore and probe the land together with his inchoate interest in the unsevered oil. . . . ' 309 So.2d at 41.

[1] The issue before us then is whether under the statute the leasehold interests are interests in real property which the Legislature intended should be subject to taxation. We hold that they are taxable interests in real property. It has long been held that the Legislature may classify leasehold interests as real property for tax purposes. For example, in Williams v. Jones, 326 So.2d 425 (Fla.1975), we held that the Legislature has the power constitutionally to treat leasehold interests in public land as real property for ad valorem tax purposes. Indeed, the oil companies concede that the Legislature has the inherent power to define real property for tax purposes. Their argument is that the Legislature did not clearly do so by enactment of Section 193.481(1), Florida Statutes.

[2] Although the operative effect of the statute is not spelled out in terms as clear as is possible within the limits of the English language, we think the purpose the Legislature intended the statute to have is clear. That purpose is to classify leasehold interests in subsurface minerals, oil and gas as interests in real property and to have them taxed accordingly. The statute recites that whenever rights to subsurface minerals, oil or gas have been sold or 'otherwise transferred' they shall be treated as an interest in real property. The broad terms 'otherwise transferred' encompass a transfer by lease. When these rights are separated from the fee, as they are when

transferred by lease, the statute directs that they be subject to separate taxation. The oil companies are the only ones with the technological power to find and extract oil, gas and minerals from the subsurface. There is little difference whether the rights to the subsurface minerals are transferred to them by deed or lease, since in either case they can then extract the minerals and become the true owners of the severed minerals in fact. It is only just that the tax burden generated by subsurface mineral rights fall on those who benefit from possession of those rights, and it is clear that the Legislature was motivated by such a concern.

[3] Our conclusion of legislative intent is bolstered by a comparison of the present statute with its predecessor, Section 193.221, Florida Statutes (1961), which specifically exempted leasehold interests. The exemption was deleted when the present statute was enacted. All property is subject to taxation unless expressly exempt and exemptions are strictly construed against the party claiming them. State ex rel. Wedgworth Farms, Inc. v. Thompson, 101 So.2d 381 (Fla.1958).

Accordingly, the decision of the District Court of Appeal, First District, is quashed, the writ to the District Court of Appeal, Second District, is discharged, and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

OVERTON, C. J., and ENGLAND, SUNDBERG and HATCHETT, JJ., concur.

DREW (Retired), J., dissents with an opinion, with which ADKINS, J., concurs.

DREW, Justice (Retired), dissenting.

It is not necessary for us to decide whether the legislature may constitutionally authorize the levy of Ad valorem (emphasis mine) taxes on mineral leases of the kind involved in these cases. A study of these, and related acts, simply leads to the inescapable conclusion that there was no intention to do so.

The words used in the act viz. 'otherwise transferred' immediately following the word 'sold' clearly indicates an intention to tax only an interest in real estate that would be susceptible to intelligent and uniform appraisal, levy

and enforcement by methods constitutionally authorized and long recognized by the legislature in dealing with ad valorem taxation on real estate. These 'oil leases,' if they can properly be *1066 classified as leases 1 simply do not, in my view, relate to 'an interest in real estate.' The problems which will arise in the appraisal of such leases, equalization of values as the organic law requires and in levy and enforcement are obvious. And, I'm sure, the members of the legislature charged with the duty of drafting these laws are aware of this even more than we are. Moreover, it seems to me they have already spoken on this subject, when, in the enactment of s 211.13 F.S.A. they stated, 'it is impossible under known valuation methods to accurately ascertain the time value of oil and gas in place.' These acts must be construed together to ascertain legislative intent. And both acts can be preserved by a

recognition that so called 'oil leases' are not interests in real property.

The decision authorized by Judge McCord below² reaches the same conclusions I do but in a much more detailed manner. I agree completely with that decision as supplemented by these additional observations.

I therefore respectfully dissent.

ADKINS, J., concurs.

All Citations

345 So.2d 1062

Footnotes

- 1 141 Fla. 318, 193 So. 45 (Fla.1940), 137 Fla. 114, 188 So. 103 (Fla.1939).
- 2 Straughn v. Amoco Production Co., 309 So.2d 39 (Fla.2d DCA 1975).
- Fisher v. Sun Oil Co., 330 So.2d 76 (Fla.1st DCA 1976). The certification vests jurisdiction in this Court. Art. V, s 3(b) (3), Fla.Const.
- 4 One for each of the cases consolidated before the Court.
- 1 I agree with the Hardee County Circuit Judge's view that these documents are no more than a 'contractual license to explore and produce.'
- 2 330 So.2d 76 (Fla.1st DCA 1976).

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Mullins v. Mullins, Fla.App. 5 Dist., June 7, 2019
363 So.2d 373
District Court of Appeal of Florida, First District.

Julius B. KITTRELL, Appellant, v. John A. CLARK et al., Appellees.

No. EE-419. | Sept. 25, 1978. | Rehearing Denied Nov. 7, 1978.

Synopsis

Appeal was taken from a judgment of the Circuit Court, Marion County, William T. Swigert, J., denying relief to plaintiff in suit to quiet title. The District Court of Appeal, Mills, Acting C. J., held that even though there was no description, inventory or mention of mineral and oil rights in will of grantor who conveyed real property but reserved mineral and oil rights or mention of such rights in probate proceeding, probate and recording of grantor's will within 30 years after recording of deed serving as root of title and at time there was no requirement that inventory of real estate be filed in estate proceedings constituted a "title transaction" within meaning of Marketable Record Title Act preserving prior interest from extinguishment.

Affirmed.

West Headnotes (2)

[1] Mines and Minerals

← Conveyance, Abandonment, or Other Termination of Rights Granted or Reserved

Even though there was no description, inventory or mention of mineral and oil rights in will of grantor who conveyed real property but reserved mineral and oil rights or mention of such rights in probate proceeding, probate and recording of grantor's will within 30 years after recording of deed serving as root of title and at time there was no requirement that inventory of real estate be filed in estate proceedings constituted a

"title transaction" within meaning of Marketable Record Title Act preserving prior interest from extinguishment. West's F.S.A. §§ 712.01 et seq., 712.01(3), 712.02, 712.03, 712.03(1, 4), 712.06(1)(c).

4 Cases that cite this headnote

[2] Limitation of Actions

- Recovery of Real Property

Court would not construe term "title transaction" in Marketable Record Title Act to require description of the land it purports to affect since to do so would encroach upon authority of Legislature which has sole prerogative to supply statutory terms. West's F.S.A. §§ 712.01(3), 712.03(1, 4), 712.06(1)(c).

3 Cases that cite this headnote

Attorneys and Law Firms

*373 Harvey R. Klein and H. Randolph Klein, Ocala, for appellant.

Kenneth H. MacKay, Jr. and Thomas C. Ranew, Jr. of Pattillo, MacKay & McKeever, Ocala, for appellees.

Opinion

MILLS, Acting Chief Judge.

The question presented by this appeal is whether the probate of an estate of a former party in interest within 30 years after the recording of the root of title preserves the prior interest from extinguishment under the Marketable Record Title Act even though there is no description, inventory or mention in the probate proceedings of the property in question.

In 1903, R. S. Hall, appellee Hallie Hall Blocker's grandfather, conveyed certain land to H. M. and O. Goethe, "excepting and reserving from the operation of this conveyance all phosphate minerals, and oils upon, in or under any or all of the . . . land." In 1905, H. M. Goethe, et al., conveyed the land to C. J. McGehee, et al., d/b/a McGehee Lumber Company by warranty deed containing the following clause:

"Reserving, however, unto said first parties, . . . all phosphate, minerals and oils upon . . . the lands above described, which were conveyed to first parties by R. S. Hall, (et al.)...."

In 1910 McGehee Lumber Company conveyed the property without reservation to Florida National Land Company, and in 1914 Florida National Land Company conveyed the property to John A. Clark. The *374 latter deed, relied upon by appellant Kittrell as his root of title, made no reference to, and purported to convey, the phosphate, minerals and oils in the land previously reserved to R. S. Hall. In 1919, R. S. Hall died and his will, which devised all his real property to his wife, Mamie Hall, was probated in Marion County. The will did not particularly describe any real property, and nothing filed in the estate, including the Federal Estate Tax Return, which listed numerous real estate holdings, contained any description or reference to the subject mineral and oil rights. The estate of Mamie Hall, probated in 1948, does not contain any reference to the subject rights, and the Petition for Probate of Will recites that no real estate was owned by the decedent. No estate appears of record for W. Robert Hall, appellee's father, and the estate of Sarah D. Hall, appellee's mother, probated in 1968, contains no reference or inventory of the phosphate, minerals and oils. The appellant received title to the property in question in 1957 from John A. Clark, and filed this suit to quiet title in 1976.

Chapter 712 is Florida's Marketable Record Title Act. The Act provides that any person who, along with his predecessors, "... has been vested with any estate in land of record for thirty years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claim except the matters set forth as exceptions to marketability in Section 712.03." Section 712.02. Section 712.03 lists the rights that are not extinguishable by the marketable record title. Among the rights that are not extinguished are estates or interests "... arising out of a title transaction which has been recorded subsequent to the effective date of the root of title." Section 712.03(4). A "title transaction" is defined as "... any recorded instrument or court proceeding which affects title to any estate or interest in land." Section 712.01(3).

Appellee Blocker contends that the probate of R. S. Hall's estate in 1919 was a court proceeding affecting title to the

subject phosphate, mineral and oil interest which occurred subsequent to the date of the root of title, and therefore the interest is preserved pursuant to Section 712.03(4).

Under the common law in effect in Florida in 1919, no probate of a will of real estate was necessary. Redfern, Wills and Administration in Florida, fourth edition, s 10.07. However, under the Revised Statutes of 1892, wills of real estate could be admitted to probate. Section 1808, Florida Statutes (1892). Insofar as it concerned personalty, the probate of a will was conclusive as to its validity; insofar as it concerned real estate, probate was prima facie evidence as to the validity of the will. Section 1810. Wills which were admitted to probate were to be recorded by the county judge. Section 1814.

The will of R. S. Hall conveyed all of the real property owned by him to his wife. The will was admitted to probate and recorded in the office of the county judge.

[1] We conclude that the probate and recording of R. S. Hall's will in 1919 was a "title transaction" within the meaning of Section 712.01(3) even though there was no description, inventory or mention in the will or probate proceedings of the specific property in question. Section 712.01(3) does not require that the "title transaction" specifically describe the estate or interest which it affects, and in 1919 there was no requirement that an inventory of real estate be filed in estate proceedings. Since the probate of R. S. Hall's estate was a title transaction recorded subsequent to Kittrell's root of title, the phosphate, minerals and oils interest was preserved from extinguishment by Section 712.03(4).

[2] Appellant suggests that we construe "title transaction" to require the description of the land it purports to affect and that this would be consistent with the provisions of Sections 712.03(1) and 712.06(1)(c) which require an accurate description of the land or interest involved. This is a persuasive and appealing argument but we may not supply that which the legislature did not choose to include in Sections 712.01(3) and 712.03(4). This is the sole prerogative of *375 the legislature and we will not encroach upon its authority.

The judgment appealed is affirmed.

SMITH and ERVIN, JJ., concur.

All Citations

363 So.2d 373

409 So.2d 7 Supreme Court of Florida.

Reubin O'D. ASKEW, et al., Appellants,

v.

Stephen R. SONSON, et ux., Appellees.

No. 53843. | July 23, 1981. |

Rehearing Denied Feb. 18, 1982.

Synopsis

Trustees of Internal Improvement Fund appealed from a partial summary final judgment entered by the Circuit Court, Dade County, Rhea Pincus Grossman, J., quieting title to certain lands in favor of the landowners. The Supreme Court, Adkins, J., held that Marketable Record Title Act applied to section 16 lands designated for school purposes such that landowners' title to such lands, which had been undisturbed for over 30 years, divested state of its interest.

Affirmed.

Sundberg, C. J., concurred in the result only.

Overton and England, JJ., dissented.

Overton, J., dissented from denial of motion for rehearing and filed opinion.

West Headnotes (3)

[1] Courts

← In general; nature and source of judicial authority

Courts will determine only issues which are based on genuine controversy, supported by sufficient factual predicate.

1 Cases that cite this headnote

[2] States

Disposition of property

State officers vested with power to direct, control, and dispose of public lands of state can exercise power vested in them only in accordance with State Constitution and statutes and not otherwise.

1 Cases that cite this headnote

[3] Public Lands



Marketable Record Title Act applied to section 16 lands designated for school purposes such that landowners' title to such lands, which had been undisturbed for over 30 years, divested state of its interest. West's F.S.A. §§ 712.01 et seq., 712.03, 712.04, 712.10.

3 Cases that cite this headnote

Attorneys and Law Firms

*7 Jack W. Pierce, Tallahassee, and Henry Dean, Gen. Counsel, S. Sherman Weiss, Richard P. Ludington, Director, Division of State Lands, Dept. of Natural Resources/Bd. of Trustees of the Internal Improvement Trust Fund, Tallahassee, for appellants.

Kenneth L. Ryskamp of Goodwin, Ryskamp, Welcher & Carrier, Miami, for appellees.

Jim Smith, Atty. Gen., J. Kendrick Tucker, Deputy Atty. Gen., and David K. Miller, Asst. Atty. Gen., Tallahassee, for Attorney General, amicus curiae.

Paul J. Stichler, Orlando, for Lawyers' Title Guaranty Fund, amicus curiae.

J. Richard Harris of Scott, Burk, Royce, Harris & Loucks, Palm Beach, for the Real Property, Probate and Trust Law Section of The Florida Bar, amicus curiae.

Jim Smith, Atty. Gen., David K. Miller, Asst. Atty. Gen., and Herbert D. Sikes, Tallahassee, for State Bd. of Ed., amicus curiae.

Peter Guarisco, Tallahassee, for Florida Land Title Ass'n, Inc. and Florida Title Underwriters Bureau, amicus curiae.

Chesterfield Smith and Wofford H. Stidham of Holland & Knight, Tallahassee, for Mobil Oil Corp., amicus curiae.

Opinion

ADKINS, Justice.

This is a direct appeal from a partial summary final judgment quieting title in favor of appellees (hereinafter referred to as plaintiffs) against the appellants (hereinafter referred to as defendants) based upon the application of the Marketable Record Title Act (chapter 712, Florida Statutes).

Plaintiff's complaint alleged their "root of title" had remained of record and unchallenged for a period in excess of thirty years and requested that the court foreclose any claim of defendants as Trustees of the Internal Improvement Fund. Defendants, by affirmative defenses, contended that the application of the Marketable Record Title *8 Act against defendants would be unconstitutional since the lands involved were section sixteen lands which are designated for school purposes. The summary judgment entered for plaintiffs rejected defendants' argument that chapter 712, Florida Statutes, was unconstitutional as applied to the facts of the case and the land in question, and extinguished defendants' claims. This appeal resulted. We have jurisdiction. Art. V, s 3(b)(1), Fla.Const. (1972).

The land involved was granted to the state by act of Congress in 1845, the year Florida was admitted to the Union. In 1917 drainage taxes were assessed against the property by the Southern Drainage District pursuant to chapter 7599, Laws of Florida, Acts of 1917. The land was sold to the District for the taxes due. This tax sale was held invalid under a previous decision of this Court. Southern Drainage District v. State, 93 Fla. 672, 112 So. 561 (1927).

Plaintiffs' claim is not based upon the tax sale. The "root of title" goes back to the following: A warranty deed from Edwards to Malon Holding Company in 1926; a warranty deed from West to McKool in 1928; and a warranty deed from Lawrence to McKool in 1927. Since the last "root of title" no instrument contradicting plaintiffs' claim has been placed of record for more than thirty years and no notice of claim pursuant to section 712.05, Florida Statutes (1975), has been filed by the defendants which would protect their rights under the Marketable Record Title Act.

The purported unconstitutional proceedings against school lands for the collection of drainage taxes (which resulted in the tax sale) were concluded in 1922. If the root of title in the instant case was based upon a "wild deed" the prior tax proceedings would be rendered irrelevant. We have held that "initially void tax title claims" can ripen into incontestable title through the Marketable Record Title Act. See Marshall v. Hollywood, Inc., 236 So.2d 114 (Fla.), cert. denied, 400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970).

We must determine whether the Marketable Record Title Act may constitutionally divest the state of title to lands which were granted for school purposes, including the sixteenth section in each Township.

After deliberating on this issue we decided to request additional briefs on the following question: "Are state properties affected by the marketable record title act, and if so, what categories are affected?"

We were furnished excellent briefs by amici curiae and the parties. The order requesting additional briefs restated and broadened the questions initially presented, so as to include the application of the marketable record title act to all state lands, of which section sixteen lands are merely one category. The question framed by the Court encompasses all categories of state properties, including sovereignty lands. Among the other categories of state properties are internal improvement lands, swamp and overflow lands, railroad lands, indemnity lands, and Murphy Act lands. The amici curiae urge the Court to reserve ruling on those arguments until they are presented in the context of a proper controversy. In other words, they urge us to confine our ruling to the question initially presented.

[1] It is a wise rule that courts will only determine issues which are based on a genuine controversy, supported by a sufficient factual predicate. This rule is particularly appropriate where complex issues of great public interest are concerned. This Court has stated that it will not address issues, particularly those of constitutional import, which are neither directly presented nor necessary to the resolution of the dispute at hand. See e. g., Pace v. King, 38 So.2d 823, 827 (Fla.1949); W. S. Badcock Corp. v. Kunze, 126 Fla. 725, 171 So. 657, 658 (1936). See also Daggett v. Willey, 6 Fla. 482, 511-512 (1855).

Chapter 78-288, Laws of Florida, amended chapter 712 (marketable record title act, hereinafter referred to as MRTA),

so as to provide that the MRTA should not affect or extinguish "(s)tate title to lands beneath navigable waters acquired by virtue of sovereignty." s 712.03(7), Fla.Stat. (Supp.1978).

*9 It is clear that in no case does the MRTA serve to protect a private party's title to sovereignty lands if title had not been perfected prior to the effective date of the 1978 amendment. We do not now pass on the question of whether a private owner's title to what had been sovereignty lands could be perfected by the MRTA prior to the effective date of the 1978 amendment. See Odom v. Deltona Corp., 341 So.2d 977, 988 (Fla.1976).

In the case we are now considering we limit our discussion to the question of whether the MRTA may constitutionally divest the state of title to lands which were granted for school purposes, including the sixteenth section in each township.

By an act of Congress on March 3, 1845, entitled "An Act Supplementary to an Act for the Admission of Florida and Iowa into the Union, and for Other Purposes," the state of Florida was granted the sixteenth section in every township for the use of the inhabitants of such township for the support of public schools. This grant was made in consideration of concessions made by the state of Florida.

The grant contained a provision for giving other land in lieu of the sixteenth section. Prior to the grant, portions of the territory of Florida had been encumbered in the Articles of Cession and other portions by Congress in the fulfillment of public obligations. This interfered with the general policy of setting apart the sixteenth section for school purposes.

In some instances, settlements with a view to preemption or homestead had been made in the sixteenth section; some of the sixteenth sections were mineral land or embraced within a military, Indian, or other reservation; and some sixteenth sections were fractional in quantity, or wanting by reason of the township being fractional, or from natural cause. For these reasons Congress passed what is known as the "Lieu Land Statute" which authorized the state to select unappropriated government lands in lieu of the deficiency in the short sections. See 43 U.S.C.A. s 851 (1976); Hampton v. Matheson, 121 Fla. 768, 164 So. 714 (1935).

By an act of the legislature, section 6.01, Florida Statutes, approved July 25, 1845, the state assented to the terms of admission into the union and to the provisions of the acts of Congress respecting the public lands of the United States in

this state. When, by survey, a sixteenth section, or fractional part thereof, was ascertained to exist in any township, the grant immediately attached thereto without a patent and related back to the date of the act of Congress. State ex rel. Kittel v. Jennings, 47 Fla. 302, 35 So. 986 (1904).

This grant of school lands was an absolute grant, vesting title in the state of Florida. The nature of the title was discussed in Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323 (1925). This was a suit by Hampton against the State Board of Education seeking specific performance of a contract to sell school lands. The Court held that the suit was predicated directly upon a contract made by state officers representing the state and was in effect a suit against the state without its consent. The suit was therefore properly dismissed. The Court, in its opinion, said:

By sections 602, 603 and 3798, Revised General Statutes, 1920, the state retains the title to all state school lands and merely authorizes the state board of education to take possession of, to manage, to preserve and to fix the terms of sale, and to convey the title to "all lands granted to or held by the state for educational purposes." Under these statutes the title remains in the state and the state officers have no title, but a mere power of agency to sell the lands, not for trust purposes of an administrative nature, but such sales are for "the principal of the state school fund" which "shall remain sacred and inviolate." Sections 4 and 5, art. 12, Constitution. In view of these organic and statutory provisions, a suit brought against the state officers to enforce a contract for the sale of state school land, is in effect a suit against the state, since it relates to land the title to which is in the state for the benefit of a "sacred and inviolate" school fund, and *10 the state has not by statute directed the contract to be made, and has not by law authorized a suit against the state.

105 So. at 327.

Whitfield's Notes-Division II, Governmental, Legal, and Political History of Florida, Florida Statutes, Volume III, Helpful and Useful Matter (1941), contains a discussion of the origin of land titles in Florida. The following discussion relates to the "state school fund":

The constitution of 1868 provided that "the common school fund * * * * * shall be derived from the following sources: The proceeds of all lands that have been or may hereafter be granted to the State by the United States for educational purposes; * * * * * twenty-five per centum of the sales

of public lands which are now or may hereafter be owned by the State;" and that "the principle of the common school fund shall remain sacred and inviolate." (ss 4, 6, art. VIII, const. 1868). The constitution of 1885 makes the same provision as to the state school fund. (s 4, art. XII, const.). On October 22, 1907, the state board of education adopted a resolution calling upon the trustees of the internal improvement fund to account to the school fund for twenty-five per cent of the proceeds from sales of public lands made by the trustees.

On February 6, 1908, Attorney General William H. Ellis rendered to Governor Napoleon B. Broward an opinion that "The term 'public lands' as used in the constitutions of 1868 and 1885, designated a class of lands distinguished from those granted by the United States to the State of Florida for public school purposes, all the proceeds of the sales of such lands constituting part of the School Fund, while only twenty-five per cent of the proceeds of the sales of 'public lands' * * * * * was to be paid into the School Fund. The public lands consisted, among others, of the sixteenth section in every township granted by Act of Congress of March 3, 1845, for school purposes; five hundred thousand acres granted by Act of Congress of September 4, 1841 for Internal Improvement, and the swamp and overflowed lands granted by Act of September 28, 1850. * * * * * The lands designated in the Act of 1855, Chapter 610, Laws of Florida, did not lose their character as public lands by being pledged in trust to aid in the construction of certain objects of improvement. The legislature by that act simply designated some object of improvement to be constructed first and to postpone others * * * * Section 4, Article VIII, Constitution of 1868, which was carried into and became a part of the Constitution of 1885, so far as it provides that the Common or State School Fund should consist in part of the twenty-five per cent of the sales of public lands which were then owned or thereafter acquired by the State, operated as an amendment to Chapter 610, Laws of Florida * * * * * and is a limitation or inhibition upon the Legislature from diverting more than seventy-five per cent of the sales of the public lands designated in the act to purposes other than increasing the Common or State School Fund. Section 4, Article VIII, Constitution of 1868, was not applicable to the sales of the lands which were sold for the purpose of discharging the lien of the bondholders of the railroads which acquired the right of the provisions of the act prior to 1868. The constitutional provisions could not, of course, have the effect of impairing the obligations of contracts nor depriving those persons of vested rights acquired under an Act of 1855." (Citing, Newhall v. Sanger, 92 U.S. 761, 23

L.Ed. 769; 10 Fla. 112, 125; Gormley v. Bunyan, 138 U.S. 623, text 625, 11 S.Ct. 453 (454,) 34 L.Ed. 1086; Trustees I. I. Fund v. St. Johns Ry. Co., 16 Fla. 531).

In an opinion rendered January 3, 1920, by Glenn Terrell, as counsel for the trustees of the internal improvement fund, it is held: (1) that the "public lands" of the state are those state lands that are open to sale and disposition under general laws, citing Bardon v. Northern Pac. R. Co., 145 U.S. 535, text 538, 12 S.Ct. 856 (857,) 36 L.Ed. 806; and Newhall v. Sanger, 92 U.S. 761, 762, 23 L.Ed. 769; (2) *11 that at the date of the adoption and ratification in 1868, of the organic provisions that the school fund "shall be derived from the following sources: The proceeds of all lands * * * * * granted to the State by the United States for public school purposes * * * * * twenty-five per centum of the sales of public lands * * * * * owned by the State," the only public lands owned were those held under grants by congress (a) of the sixteenth sections of lands for school purposes, (b) of lands for internal improvement purposes, (c) of swamp and overflowed lands; (3) that in adopting and ratifying the quoted provision as to twenty-five per cent of the sales of public lands, the convention and the electors could have had in mind no other lands than the internal improvement lands and the swamp and overflowed lands. since the whole of the sixteenth sections belonged to the state school fund; (4) that the state could apply to the state school fund twenty-five per cent of the sales of the internal improvement lands and the swamp and overflowed lands in the absence of objection by the United States, the grantor of such lands; (5) that the statutory vesting of the title of the internal improvement lands and the swamp and overflowed lands in public officers as trustees, was subject to future changes in the law and the beneficial ownership of the lands remained in the state; (6) that the organic provision operated as a self executing amendment of the statute, chapter 610, laws of Florida, defining the trust purposes of the lands vested in the state trustees; (7) that since the constitution of 1868 became effective the state school fund is entitled to receive twenty-five per cent of the internal improvement lands and of the swamp and overflowed lands held by the state trustees, provided no obligations or vested right against the internal improvement fund that existed prior to the effective date of the constitution of 1868 is thereby impaired. (Citing, Mills County v. Burlington & M. R. Co., 107 U.S. 557, 565, 2 S.Ct. 654 (661,) 27 L.Ed. 578; Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569; U. S. v. State of Louisiana, 127 U.S. 182, 187, 8 S.Ct. 1047 (1050,) 32 L.Ed. 66; American Emigrant Co. v. Adams County, 100 U.S. 61, 25 L.Ed. 563;

Trustees of Internal Imp. Fund v. Root, 59 Fla. 648, 51 So. 535; Trustees of Internal Imp. Fund v. Bailey, 10 Fla. 112, 125, 81 Am.Dec. 194; Lainhart v. Catts, 73 Fla. 735, 75 So. 47).

Lands under bodies of navigable waters and tide lands in the state, known as sovereignty lands, belong to the state; and statutes may require all as well as twenty-five per cent of the proceeds of permissible sales of such sovereignty lands to be paid into the state school fund, that "shall remain sacred and inviolate." Chapter 12016, acts 1927, relating to the internal improvement fund, expressly recognizes the organic right of the state school fund to receive twenty-five per cent of all sales of internal improvement lands and of swamp and overflowed lands held by the trustees of the internal improvement fund.

Id. at 236-37.

In adopting the constitution of 1968, the people of the state of Florida obviously recognized that the purposes of the section sixteen grant had been accomplished and deleted from the 1968 constitution reference to the grant as a source of the state school fund. The only reference to the state school fund is in article IX, section 6, Florida Constitution (1968):

The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

Although the source of these lands was a grant from the United States government, once the lands vested in the state of Florida, the state was authorized to deal with these lands in any manner not inconsistent with the Florida Constitution. In 63 Am.Jur.2d, Public Lands, s 107 (1972), it is said:

Following a grant, the lands and the proceeds thereof are under the control of the state legislature, and it may deal with *12 them in any manner not inconsistent with the express commands of the state constitution. Through properly designated boards or officers it may control and manage the

lands, and in a proper case they may be sold, or leased. As trustee, the state is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.

(Footnotes omitted.)

The only provision in the Florida Constitution relating to the disposition of public lands is found in article X, section 11, Florida Constitution (1968), which reads as follows:

The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Sovereignty lands are not involved in this litigation, so we are not concerned with the provisions of this section of the constitution.

After the grant from the United States, all sixteen-section lands were owned by the state. By an act of the legislature, the State Board of Education was empowered to convey school lands. See section 3798, Revised General Statutes (1920). Commencing September 1, 1967, all lands held in the name of the state or any of its boards, departments, agencies, or commissions, were deemed to be vested in the Board of Trustees of the Internal Trust Fund for the use and benefit of the state. By October 1, 1967, any board, commission, department, or agency holding title to any state lands used for public purpose was required to execute all instruments necessary to transfer such title to the Board of Trustees of the Internal Improvement Trust Fund. Lands which reverted to the state under the commonly known "Murphy Act" for nonpayment of taxes were excepted from this statute. s 253.03(6), Fla.Stat. (1979).

[2] The state of Florida acquired a fee simple title to the lands and the legislature had the sole power of disposition of the lands. State officers vested with power to direct, control, and dispose of the public lands of the state can exercise the power vested in them only in accordance with the state constitution and statutes and not otherwise. See Thompson on Real Property (1978), Vol. 5B, s 2720, page 364.

It is argued that it would be unconstitutional to apply the MRTA to section sixteen school lands. This Court has previously considered an argument that the application of the MRTA to constitutionally protected homestead interests would be unconstitutional. In ITT Rayonier, Inc. v. Wadsworth, 346 So.2d 1004 (Fla.1977), we rejected this argument. In the opinion we quoted with approval from ITT Rayonier v. Wadsworth, 386 F.Supp. 940, 943 (M.D.Fla.1975) as follows:

Section 712.03 delineates specifically the interests which are not subject to extinction by the Act, and the statutory interest of homestead beneficiaries which vested prior to the root of title is not among them. Thus, the only reasonable assumption to be drawn from the express terms of the Act is that the Legislature did not intend to except therefrom such interests of persons claiming under the homestead statute (now F.S.A. s 731.27).

The attorney general also argues that estoppel acts such as the MRTA should not apply to the state of Florida but should apply only to private citizens. This Court held to the contrary in Daniell v. Sherrill, 48 So.2d 736 (Fla.1950), where the facts of the case raised an equitable estoppel against the state in a suit to quiet the title to land as against parties claiming under tax deeds issued by the state.

In Trustees of Internal Improvement Fund v. Bass, 67 So.2d 433 (Fla.1953), swamp and overflow lands were erroneously placed on the tax rolls. The lands were sold for delinquent taxes in 1908. The Trustees of the Internal Improvement Fund *13 brought ejectment proceedings against the grantee of the tax deed holder. This grantee acquired title in 1941 and had been in possession for eleven years, fencing and improving

the property, as well as paying taxes each year. We held that, even though the grantee's title was not good by adverse possession, the state was estopped to question it. See also Lobean v. Trustees of the Internal Improvement Fund, 118 So.2d 226 (Fla. 1st DCA 1960).

There are no provisions in the Florida Constitution which prohibit the Florida legislature, in some instances, from subjecting the state to the same laws it imposes on the people. The legislature has made the statute of limitations applicable to the state. s 95.011, Fla.Stat. (1977). It has not excluded the state from the recording act. A 1977 statute required all laws which purport to convey title to real property from one government agency or political subdivision to another to be recorded in the public records of the county or counties in which the property is located. s 695.015, Fla.Stat. (1977).

In City of Miami v. St. Joe Paper Co., 364 So.2d 439 (Fla.1978), we described the MRTA as follows:

The Marketable Record Title Act is a comprehensive plan for reform in conveyancing procedures. It is a curative act in that it may operate to correct certain defects which have arisen in the execution of instruments in the chain of title. Curative statutes reach back on past events to correct errors or irregularities and to render valid and effective attempted acts which would be otherwise ineffective for the purpose the parties intended. They operate to complete a transaction which the parties intended to accomplish but carried out imperfectly.

The Marketable Record Title Act is also a statute of limitations in that it requires stale demands to be asserted within a reasonable time after a cause of action has accrued. It prescribes a period within which a right may be enforced.

The Marketable Record Title Act is also a recording act in that it provides for a simple and easy method by which the owner of an existing old interest may preserve it. If he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished. The legislature did not intend to arbitrarily wipe out old claims and interests without affording a means of preserving them and giving a reasonable period of time within which to take the necessary steps to accomplish that purpose.

(Emphasis added.) We held the MRTA to be constitutional.

Under our constitution the legislature is not prohibited from making the Marketable Record Title Act applicable to the state. Whether it has done so must be determined from the act.

In 1963 the legislature enacted the Marketable Record Title Act for the express purpose of simplifying and facilitating land title transactions by allowing interested parties to rely on a record title as described in the act. The legislature expressly directed that the act be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title "as described in s. 712.02 subject only to such limitations as appear in s. 712.03." s 712.10, Fla.Stat. (1977). Section 712.01, Florida Statutes (1977) reads as follows:

As used in this law:

(1) The term "person" as used herein denotes singular or plural, natural or corporate, private or governmental, including the state and any political subdivision or agency thereof as the context for the use thereof requires or denotes.

(Emphasis added.) By including the state and any political subdivision or agency thereof as a "person" the legislature clearly intended for the MRTA to affect state properties as well as that of private citizens.

The interests extinguished by the MRTA are described in section 712.04, Florida Statutes (1977), which reads as follows:

Subject to the matters stated in s. 712.03, such marketable record title shall be free and clear of all estates, interests, *14 claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to the effective date of the root of title. All such estates, interests, claims or charges, however denominated, whether such estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void, except that this chapter shall not be deemed to affect any right, title or interest of the United States, Florida or any of its officers, boards, commissions or other agencies reserved in the patent or deed by which the United States, Florida or any of its agencies parted with title.

(Emphasis added.) One important exception for governmental entities is any right, title, or interest reserved in the patent or deed by which it parted with the title. Section sixteen lands, or school lands, could not be included in this exception or the exceptions to marketability listed in section 712.03, Florida Statutes (1977).

In Sawyer v. Modrall, 286 So.2d 610, 613 (Fla. 4th DCA 1973), cert. denied, 297 So.2d 562 (Fla.1974), the court said:

With reference to s 712.04, all interests, whether they are private or governmental, are void except and only where any right, title or interest is reserved in the deed. The 1890 deed from the Trustees was outside plaintiff's thirty year chain of title and contained no reservation in the deed. It is the defendant's contention that we should read s 712.04 as to include implied state governmental reservation of title to sovereign lands. In our view, and considering the purposes of the statute and the provision that it should be "liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely" on a record title, the statute should be interpreted so as to require an explicit reservation on the state's part.

(Emphasis added.)

In Odom v. Deltona Corp., 341 So.2d 977, 989 (Fla.1977), this Court said:

It seems logical to this Court that, when the Legislature enacts a Marketable Title Act, as found at Chapter 712, Florida Statutes, clearing any title having been in existence thirty years or more, the state should conform to the same standard as it requires of its citizens; the claims of the Trustees to beds underlying

navigable waters previously conveyed are extinguished by the Act. Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to rights specifically reserved in such conveyances.

(Footnotes omitted).

After Odom v. Deltona Corp., supra, subsection (7) was added to section 712.03, Florida Statutes (1977), so that state title to land beneath navigable waters acquired by virtue of sovereignty was excepted from the provisions of the MRTA. Thus, with the adding of subsection (7), the legislature, for the first time, made an exception for state lands, and then only for submerged lands beneath navigable waters acquired because of sovereignty. The essence of the MRTA is that if a person, as defined in section 712.01, Florida Statutes, holds a chain of title going back over a period of thirty years and no other person or governmental entity has filed a notice of claim to the property during the thirty-year period, then all conflicting claims based upon any *15 title transaction prior to such thirty-year period are extinguished. The only exceptions to the MRTA not extinguished are those found in section 712.03 and 712.04, Florida Statutes (1977). The lands involved in this litigation are not included in these exceptions.

Appellants rely upon Board of Public Instruction of Dade County v. Little River Valley Drainage District, 119 So.2d 323 (Fla.3d DCA 1960), to the effect that public school lands are not subject to execution or levy for improvement liens. This decision has no applicability to the facts in the case under consideration. The Sonsons are not presenting a claim based

upon a tax sale, but upon "roots of title" which have remained unchallenged for over thirty years.

Appellants' reliance upon State v. New Orleans Land Co., 143 La. 858, 79 So. 515, cert. denied, 248 U.S. 577, 39 S.Ct. 19, 63 L.Ed. 429 (1918), is misplaced since that case dealt with the validity of an execution sale on school lands after the creditor had reduced its claim to judgment. The question of judicial sales is not involved in this appeal since the Sonsons' root of title does not include the judicial sale.

The task of defining which state lands, if any, are to be excluded from the operation of the MRTA is a legislative function in view of the clear language and purpose of the act. In addition to amending the MRTA in 1978 to provide an exception for sovereignty lands, the legislature at the same session enacted chapter 78-301, Laws of Florida, creating a state land study committee. It is apparent that the legislative branch of government has come to grips with the issues resolved by this Court in prior MRTA decisions and has left the framework of the act intact. Substantive rules governing the law of real property are peculiarly subject to the principles of stare decisis. United States v. Title Insurance and Trust Company, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924); Alta-Cliff Co. v. Spurway, 113 Fla. 633, 152 So. 731 (Fla.1933). The legislative experience and the doctrine of stare decisis mandate the answer that the MRTA extinguishes the state's interest in the section sixteen school lands in question. The decision of the lower court is affirmed.

BOYD, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, C. J., concurs in result only.

OVERTON and ENGLAND, JJ., dissent.

MOTION FOR REHEARING

Upon consideration of the Motion for Rehearing filed by attorneys for Appellants,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

SUNDBERG, C. J., and ADKINS, BOYD, ALDERMAN and McDONALD, JJ., concur.

OVERTON, J., dissents with an opinion.

OVERTON, Justice, dissenting.

I would grant rehearing and vacate our original opinion. I initially dissented to the majority opinion without explaining my reasons, but now I believe on rehearing it is necessary to express my views so that the legislature may have a better perspective of a contrary interpretation of Florida's Marketable Record Title Act when making a determination of whether corrective legislation is necessary to protect stateowned section sixteen lands.

The majority opinion construes the Marketable Record Title Act (MRTA) in a manner which allows the state to be stripped and divested of its title to section sixteen lands without any action or conveyance on the state's part, other than the legislature's initial passage of the act itself. In my view, this is totally contrary to the trust for which the United States Government granted these lands to the State of Florida. I find no legislative intent for MRTA to be used as an instrument of conveyance of unidentified section sixteen lands to individual owners unknown to the state, who, by happenstance, are the beneficiaries of a thirty-year-old interloper deed as root of title.

*16 As expressed in the majority opinion, Florida received section sixteen lands from the federal government in 1845, the date of Florida's admission into the Union, to be held in trust for the people. The land grant was to benefit the public school system and the proceeds from any sale of these lands was strictly for public school purposes. This Court has previously and clearly held that title to section sixteen lands is vested in the state for the benefit of the "sacred and inviolate" school fund, and that state officials may not convey such lands without a statute expressly directing such for school benefit. See Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323 (1925).

In these proceedings, the state argues that the lands claimed by respondent were never conveyed out of the public domain, and that, in accordance with the purpose behind section sixteen lands, title remains in the State of Florida. This view is supported by all evidence of title which remains presently in the public land office established by the trustees of the internal improvement trust fund at Tallahassee. See s 253.031, Fla. Stat. (1979). I totally agree with this argument.

To say that the questioned lands have, in fact, been conveyed by the operational effect of MRTA is not, in my view, a reasonable interpretation of that act, particularly when another reasonable construction exists which does not defeat the act's purpose. I recognize the purpose of MRTA is to simplify land title transactions and to allow reliance upon roots of title in existence for thirty years or more. And I agree that the act applies to lands that the state previously conveyed, even if it did so erroneously, such as swamp and overflow lands or Murphy Act Deed properties. See, e.g., Odom v. Deltona Corp., 341 So.2d 977 (Fla.1977); Sawyer v. Modrall, 286 So.2d 610 (Fla. 4th DCA 1973). I cannot agree, however, that the legislature in any manner intended that MRTA apply to lands which the state never conveyed. To so interpret the act would defeat its purpose and deprive the state of funds for the benefit and support of its school system.

The portion of MRTA principally relied on by this Court's majority for its decision is section 712.04, Florida Statutes (1977), which reads as follows:

Subject to the matters stated in s. 712.03, such marketable record title shall be free and clear of all estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to the effective date of the root of title. All such estates, interests, claims or charges, however denominated, whether such estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void, except that this chapter shall not be deemed to affect any right, title or interest of the United States, Florida or any of its officers, boards, commissions or other agencies reserved in the patent or deed by which the United States, Florida or any of its agencies parted with title.

By my interpretation, the interest of "governmental" bodies extinguished by the above-quoted portion of the statute is any claim a governmental body makes after the government has initially conveyed publicly-owned land. I cannot read that section to act as an instrument which actually conveys unknown state lands to unknown persons. The exceptions contained in section 712.04 in my view prohibit such a result. I construe the section as creating three categories of exceptions to which MRTA has no application: (1) unconveyed lands of the United States which exist in Florida; (2) unconveyed lands of the State of Florida; and (3) certain governmental rights which have been expressly reserved in the patent or deed made by the United States or the State of Florida, such as the reservation of mineral rights. My construction places section sixteen lands not previously conveyed within the second exception.

*17 Further, it necessarily follows that the legislature had no intent to place unconveyed state property within the application of MRTA. For example, section sixteen lands, as well as other sovereignty lands, are only legally placed of record in the county of their location when the state, by appropriate official action, conveys the land to private or other public ownership. The lands in the instant case were never legally placed of record. Rather, they were illegally

entered into the official records by an interloper deed and not by any overt act of the state. In this regard, the state is not like a private party who knows he will receive a tax bill each year, and, if he does not, knows he must investigate or subject himself to possible loss of the property through adverse possession. The state does not receive tax bills on its property. Moreover, it would be virtually impossible for the state to check the official records every year in all 67 counties to determine if any interloper deeds have been filed attempting to claim title to state-owned properties.

I strongly believe the legislature had no intent by enactment of MRTA to divest the state of its title to section sixteen lands. To do so without receiving funds for the property is a clear violation of the sacred trust for which the state has held these lands.

In view of the majority's construction of the Marketable Record Title Act, I strongly dissent and recommend that the legislature amend chapter 712 to protect all presently state-owned lands.

All Citations

409 So.2d 7

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

96 S.Ct. 1840, 48 L.Ed.2d 388

96 S.Ct. 1840 Supreme Court of the United States

UNITED STATES, Plaintiff, v.

State of FLORIDA.

No. 52, Orig. | May 24, 1976.

Synopsis

Proceeding was brought in which the United States sought decree defining seaward boundary of submerged lands of continental shelf in the Atlantic Ocean in which the State of Florida has rights to the natural resources and proceeding was brought by the State of Florida for decree defining more specifically the seaward boundary of the submerged lands of the continental shelf in the Gulf of Mexico in which Florida has the right to natural resources. The proceedings were consolidated and the matter was referred to a special master who filed his report and exceptions were noted. The Supreme Court, 420 U.S. 531, 95 S.Ct. 1162, referred the exceptions to special master and after supplemental report of the special master a joint motion for entry of decree was granted by the Supreme Court which set forth the respective rights of the United States and the State of Florida in lands, minerals and resources underlying both the Atlantic Ocean and the Gulf of Mexico.

Motion for decree granted, and jurisdiction reserved.

West Headnotes (4)

[1] Mines and Minerals

Ownership of minerals

Water Law

Seaward boundaries of coastal states

As against State of Florida, United States is entitled to all lands, minerals and other natural resources underlying Atlantic Ocean more than three geographic miles seaward from coastline of State of Florida and extending seaward to the edge of the Continental Shelf, and the State of Florida

is not entitled to any interest in such lands, minerals and resources.

3 Cases that cite this headnote

[2] Mines and Minerals

Ownership of minerals

Water Law

Seaward boundaries of coastal states

As against United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean extending seaward from its coastline for a distance of three geographic miles and the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals or resources with exceptions provided by Submerged Lands Act. Submerged Lands Act, § 5, 43 U.S.C.A. § 1313.

1 Cases that cite this headnote

[3] Mines and Minerals

Ownership of minerals

Water Law

Seaward boundaries of coastal states

As against State of Florida, United States is entitled to all lands, minerals, and other natural resources underlying the Gulf of Mexico more than three marine leagues from the coastline of State of Florida, and the State of Florida is not entitled to any interest in such lands, minerals and resources.

1 Cases that cite this headnote

[4] Mines and Minerals

Ownership of minerals

Water Law

Seaward boundaries of coastal states

As against United States, State of Florida is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico extending seaward for a distance of three marine leagues from its coastline or its historic coastline, whichever is landward,

96 S.Ct. 1840, 48 L.Ed.2d 388

but for not less than three geographic miles from its coastline, and the United States is not entitled, as against the State of Florida to any interest in such lands, minerals or resources with the exceptions provided by the Submerged Lands Act. Submerged Lands Act, § 5, 43 U.S.C.A. § 1313.

5 Cases that cite this headnote

*791 **1840 DECREE

The joint motion for entry of a decree is granted.

For the purpose of giving effect to the decision and opinion of this Court announced in this case on March 17, 1975, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375, and to the Supplemental Report of the Special **1841 Master filed January 26, 1976, it is Ordered, Adjudged, and Decreed as Follows:

- [1] 1. As against the State of Florida, the United States is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean more than 3 geographic miles seaward from the coastline of that State and extending seaward to the edge of the Continental Shelf, and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "coastline" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, as determined under the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606.
- [2] 2. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean extending seaward from its coastline for a distance of 3 geographic miles, and the United States is not entitled, as against *792 the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U.S.C. s 1313.
- [3] 3. As against the State of Florida, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than 3

marine leagues from the coastline of that State; the State of Florida is not entitled to any interest in such lands, minerals, and resources. Where the historic coastline of the State of Florida is landward of its coastline, the United States is additionally entitled, as against the State of Florida, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico more than 3 marine leagues from the State's historic coastline (but not less than 3 geographic miles from its coastline), and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "historic coastline" refers to the coastline as it existed in 1868, as to be determined by the parties.

- [4] 4. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues from its coastline or its historic coastline, whichever is landward, but for not less than 3 geographic miles from its coastline; the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U.S.C. s 1313.
- 5. For the purpose of this decree, the Gulf of Mexico lies to the north and west, and the Atlantic Ocean to the south and east, of a line that begins at a point on the northern coast of the island of Cuba in 830 west longitude, and extends thence to the northward along that meridian of longitude to 240 35' north latitude, thence eastward along that parallel of latitude through Rebecca *793 Shoal and the Quicksands Shoal to the Marquesas Keys, and thence through the Floda Keys to the mainland at the eastern end of Florida Bay, the line so running that the narrow waters within the Dry Tortugas Islands, the Marquesas Keys, and the Florida Keys, and between the Florida Keys and the mainland, are within the Gulf of Mexico.
- 6. There is no historic bay on the coast of the State of Florida. There are no inland waters within Florida Bay, or within the Dry Tortugas Islands, the Marquesas Keys, and the lower Florida Keys (from Money Key to Key West), the closing lines of which affect the right of either the United States or the State of Florida under this decree.
- 7. Jurisdiction is reserved by this Court to entertain such further proceedings, enter such orders and issue such writs

96 S.Ct. 1840, 48 L.Ed.2d 388

as may from time to time be deemed necessary or advisable to give proper force and effect to this decree.

All Citations

425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

159 Fla. 231 Supreme Court of Florida, Special Division A.

CALDWELL, Governor, et al.

v.

KEMPER et ux.

July 3, 1947.

Synopsis

Suit by Millard F. Caldwell, Governor of the State, and others, as Trustees of the Internal Improvement Fund, against Donald B. Kemper and Elizabeth B. Kemper, his wife, for a declaratory decree determining whether the State or the Trustees of Internal Improvement Fund had any lawful claim to oil and mineral rights in certain lands. From decree in favor of defendants, the plaintiffs appeal.

Affirmed in part and reversed in part.

West Headnotes (3)

[1] Taxation



The statute requiring trustees of internal improvement fund to reserve an undivided three-fourths mineral interest in land sold by them relates only to public land, and does not apply to lands vested in state under the Murphy Act for failure to pay taxes or to redeem from tax sale. F.S.A. §§ 192.38, 270.11.

Cases that cite this headnote

[2] Taxation



That part of Murphy Act authorizing trustees of internal improvement fund to sell lands which have become vested in state for failure to pay taxes or to redeem from tax sales under "such rules and regulations as may be fixed and adopted from time to time" by them affords authority for reserving oil and mineral rights in such deeds of sale. F.S.A. § 192.38.

2 Cases that cite this headnote

[3] Taxation

Estate or Interest Created

Where one of the two deeds executed by trustees of internal improvement fund for sale of land which had been acquired by state under Murphy Act for failure to pay taxes or to redeem from tax sale contained reservation of oil and mineral rights in the land, but no such reservation was made in other deed, reservation in first deed was binding and could be enforced, but such reservation could not be enforced as to lands described in second deed, since the statute did not in terms make the reservation, but only empowered the trustees to make it. F.S.A. § 192.38.

2 Cases that cite this headnote

*232 **555 Appeal from Circuit Court, Bay County; E. C. Welch, Judge.

Attorneys and Law Firms

J. Tom Watson, Atty. Gen., Sumter Leitner, Asst. Atty. Gen., and Ernest W. Welch, Sp. Asst. Atty. Gen., for the State.

Julius F. Parker, John T. Wigginton, Leo L. Foster, T. T. Turnbull and Parker, Foster & Wigginton, all of Tallahassee, for Trustees of Internal Improvement Fund of Florida.

Mabry, Reaves, Carlton, Anderson, Fields & Ward, of Tampa, for appellees.

Hill & Hill, Lewis H. Hill, Jr., and W. B. Dickenson, Jr., all of Tampa, James N. Daniel, of Chipley, Manley P. Caldwell, of West Palm Beach, and Lawrence Truett, of Tallahassee, amici curiae.

Opinion

**556 TERRELL, Justice.

The legislature of 1911 enacted Chapter 6159, the pertinent part of which is now embraced in Section 270.11,

31 So.2d 555

Florida Statutes 1941, F.S.A. and is as follows: 'In all contracts for sale and all deeds for the sale of lands executed by the trustees of the internal improvement fund of the State of Florida, * * * there shall be reserved for the trustees of the internal improvement fund and their successors * * * an undivided three-fourths interest in, and title in and to, an *233 undivided three-fourths interest in all the phosphate, minerals and metals that are or may be in, on, or under the said above described land; and an undivided one-half interest in, and title in and to, an undivided one-half interest in all the petroleum that is or may be in, on, or under said above described land, with the privilege to mine and develop the same.'

The legislature of 1937 enacted Chapter 18296, sometimes known as the Murphy Act, Section 9, of which was later amended and is now Section 192.38, Florida Statutes Annotated, and is as follows: 'At the expiration of two years from the date chapter 18296, acts of 1937, became a law, the fee simple title to all lands in this state, against which there remained outstanding tax sale certificates which, on the date said act became a law, were more than two years old, became absolutely vested in the state and every right, title or interest of every nature or kind whatsoever of the former owner of said property, or anyone claiming by through or under him, or anyone holding a lien thereon, ceased, terminated and ended and the state through the trustees of the internal improvement fund may: (a) sell said lands to the highest and best bidder for cash at such time and after giving such notice and according to such rules and regulations as have or may be fixed and adopted from time to time by said trustees of the internal improvement fund.'

Pursuant to authority vested in them by the last-quoted act, Trustees of the Internal Improvement Fund, on February 22, 1944, executed its deed and sold to Donald B. Kemper certain lands in Bay County, Florida, said deed being made without any reservation of oil or mineral rights as provided by the Act first quoted herein or any other act.

On November 9, 1943, the Trustees of the Internal Improvement Fund adopted a resolution requiring that oil and mineral reservations be made in deeds executed by them to lands conveyed under Chapter 18296. Pursuant to said act and resolution the Trustees of the Internal Improvement Fund, on June 28, 1945, executed a deed to H. S. McQuagge, describing certain lands in Bay

County, Florida, said deed containing the oil and mineral reservations provided by the act *234 first quoted herein. H. S. McQuagge later conveyed his title in said lands to Donald B. Kemper and his wife Elizabeth Kemper.

Donald B. Kemper and Elizabeth B. Kemper denied the authority of the Trustees of the Internal Improvement Fund to claim oil and mineral rights in the deed so executed to McQuagge and refused to recognize it. The Trustees of the Internal Improvement Fund then instituted this suit by bill in chancery, alleging the facts here stated and praying that a declaratory decree be entered determining whether or not the State of Florida or the Trustees of the Internal Improvement Fund for the State had any lawful claim to oil and mineral rights in the said lands. Answer was filed denying the right of the State or the Trustees of the Internal improvement Fund to claim or reserve oil and mineral rights in lands acquired under Chapter 18296. On final hearing the chancellor so decreed and this appeal was prosecuted from that decree.

The point for determination is whether or not the State of Florida or the Trustees of the Internal Improvement Fund for the State may, under the provisions of Section 270.11, Florida Statutes 1941, F.S.A., or any other law of the State, make reservation of oil and mineral rights in deeds for the sale of lands acquired pursuant to Chapter 18296. Acts of 1937.

[1] It will be observed by inspection of Section 270.11, Florida Statutes 1941, F.S.A., and its context, that it has to do with oil and mineral reservations in the **557 'public lands', which this court has defined as being a different class of lands from those accruing to the State under Chapter 18296. State v. Holland, 151 Fla. 806, 10 S.2d 577. Chapter 18296 provided a complete set up for disposing of lands acquired by the State thereunder, and since it deals with a different class of lands from those contemplated by Section 270.11 and does not by word or implication require oil and mineral reservations to be made as there required, we are constrained to hold that Section 270.11 in no way affects or controls the sale of lands under Chapter 18296. In is quite true that lands acquired by the State under the latter act are different in some respects from the 'public lands' discussed in State v. Holland, and are disposed of under different provisions of law.

*235 Chapter 18296 had to do with lands forfeited to the State for the nonpayment of State and County taxes.

31 So.2d 555

It gave the former owners two years within which to redeem their lands by paying the cost of the sale, but if they fail in this, then the title becomes vested in the State absolutely and the Trustees of the Internal Improvement Fund may sell to the highest and best bidder for cash. Chapter 21684, Acts of 1943, amended Chapter 18296, in many respects, one of which amendments charged the Trustees of the Internal Improvement Fund with the 'administration, management, control, supervision, conservation and protection of lands and products on, under or growing out of or connected with lands mentioned in this section.'

[2] Aside from these provisions, we think that part of the quoted section of Chapter 18296, Murphy Act, authorizing the Trustees of the Internal Improvement Fund to sell the lands referred to therein under 'such rules and regulations as * * * may be fixed and adopted from time to time' by them affords ample authority for reserving oil and mineral rights in such deeds of sale. The State's title had ripened into a fee simple and there being no prohibition to the contrary, the additional powers vested in the Trustees of the Internal Improvement Fund certainly authorized them to impose such reservations as an individual could impose under like circumstances.

We think the latitude given the Trustees of the Internal Improvement Fund in handling and disposing of these lands forces this conclusion.

[3] It follows that the reservations of oil and mineral rights in the deed executed by the Trustees of the Internal Improvement Fund to H. A. McQuagge was good and binding and may be enforced, but no such reservation having been made in the deed to Donald B. Kemper, it cannot be enforced as to the lands described therein, because the statute does not in terms make the reservation, but empowers the Trustees of the Internal Improvement Fund to make it. The final decree of the chancellor is accordingly affirmed in part and reversed in part.

Affirmed in part and reversed in part.

THOMAS, C. J., CHAPMAN, J., and WILLIAMS, Associate Justice, concur.

All Citations

159 Fla. 231, 31 So.2d 555

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

The 2019 Florida Statutes

Title XIV
TAXATION AND FINANCE

Chapter 193
ASSESSMENTS

View Entire Chapter

193.481 Assessment of mineral, oil, gas, and other subsurface rights.—

- (1) Whenever the mineral, oil, gas, and other subsurface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation or otherwise, such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee. Such mineral, oil, gas, and other subsurface rights, when separated from the fee or other interest in the fee, shall be subject to separate taxation. Such taxation shall be against such subsurface interest and not against the owner or owners thereof or against separate interests or rights in or to such subsurface rights.
- (2) The property appraiser shall, upon request of the owner of real property who also owns mineral, oil, gas, or other subsurface mineral rights to the same property, separately assess the subsurface mineral right and the remainder of the real estate as separate items on the tax roll.
- (3) Such subsurface rights shall be assessed on the basis of a just valuation, as required by s. 4, Art. VII of the State Constitution, which valuation, when combined with the value of the remaining surface and undisposed of subsurface interests, shall not exceed the full just value of the fee title of the lands involved, including such subsurface rights.
- (4) Statutes and regulations, not in conflict with the provisions herein, relating to the assessment and collection of ad valorem taxes on real property, shall apply to the separate assessment and taxation of such subsurface rights, insofar as they may be applied.
- (5) Tax certificates and tax liens encumbering subsurface rights, as aforesaid, may be acquired, purchased, transferred, and enforced as are tax certificates and tax liens encumbering real property generally, including the issuance of a tax deed.
- (6) Nothing contained in chapter 69-60, Laws of Florida, amending subsections (1) and (3) of this section and creating former s. <u>197.083</u> shall be construed to affect any contractual obligation existing on June 4, 1969.

History.—ss. 1, 2, 3, 4, ch. 57-150; s. 1, ch. 63-355; ss. 1, 2, ch. 69-55; ss. 1, 2, ch. 69-60; s. 13, ch. 69-216; s. 2, ch. 71-105; ss. 33, 35, ch. 73-332; s. 1, ch. 77-102; s. 29, ch. 95-280.

Note. - Former s. 193.221.

The 2019 Florida Statutes

Title XIV Chapter 197 View Entire Chapter
TAXATION AND FINANCE TAX COLLECTIONS, SALES, AND LIENS

197.343 Tax notices; additional notice required.—

- (1) An additional tax notice shall be sent, electronically or by postal mail, by April 30 to each taxpayer whose payment has not been received. Electronic transmission of the additional tax notice may be used only with the express consent of the property owner. If the electronic transmission is returned as undeliverable, a second notice must be sent. However, the original electronic transmission used with the consent of the property owner is the official notice for the purposes of this subsection. The notice shall include a description of the property and a statement that if the taxes are not paid:
 - (a) For real property, a tax certificate may be sold; and
 - (b) For tangible personal property, the property may be sold.
- (2) When the taxes under s. <u>193.481</u> on subsurface rights become delinquent and a tax certificate is to be sold under this chapter, a notice of the delinquency shall be sent to the owner of the fee to which these subsurface rights are attached. The additional notice may be transmitted electronically only with the express consent of the fee owner. If the electronic transmission is returned as undeliverable, a second notice must be sent. However, the original electronic transmission used with the consent of the property owner is the official notice for the purposes of this subsection. On the day of the tax sale, the fee owner shall have the right to purchase the tax certificate at the maximum rate of interest provided by law before bids are accepted for the sale of such certificate.
- (3) The tax collector shall send such additional notices as he or she considers proper and necessary or as may be required by reasonable rules of the department. An additional notice may be transmitted electronically only with the express consent of the property owner. If the notice of taxes is sent electronically and is returned as undeliverable, a second notice shall be sent. However, an original electronic transmission used with the consent of the property owner is the official mailing for purpose of this section.

History.—s. 160, ch. 85-342; s. 5, ch. 88-146; s. 13, ch. 93-132; s. 1011, ch. 95-147; s. 3, ch. 96-288; s. 32, ch. 2000-151; s. 6, ch. 2001-137; s. 2, ch. 2009-130; s. 28, ch. 2011-151.

The 2019 Florida Statutes

Title XIV
TAXATION AND
FINANCE

Chapter 211 TAX ON PRODUCTION OF OIL AND GAS AND SEVERANCE OF SOLID MINERALS

<u>View Entire</u> <u>Chapter</u>

211.13 Tax exclusive.—No other excise or license tax, in addition to the tax provided in this part, may be imposed by the state or by a county, municipality, drainage district, or road, school, or other taxing district within this state upon any person who produces in any manner any taxable product by taking it from the earth or water of this state. The value of land for ad valorem tax purposes shall not be increased by reason of the location thereon of any producing oil or gas equipment or machinery used in and around any oil or gas well which is actually used in the operation thereof or because there may be taxable products under the surface of the land.

History.—s. 13, ch. 22784, 1945; s. 13, ch. 23883, 1947; s. 19, ch. 72-360; s. 1, ch. 77-102; s. 11, ch. 86-178.

The 2019 Florida Statutes

Title XVIII
PUBLIC LANDS AND PROPERTY

Chapter 270
PUBLIC LANDS

View Entire Chapter

270.11 Contracts for sale of public lands to reserve certain mineral rights; prohibition on exercise of right of entry in certain cases.—

- (1) Unless the applicable agency chooses not to reserve such interest and except as otherwise provided by law, in all contracts and deeds for the sale of land executed by the Board of Trustees of the Internal Improvement Trust Fund or by any local government, water management district, or other agency of the state, there shall be reserved for such local government, water management district, other agency of the state, or the board of trustees and its successors an undivided three-fourths interest in, and title in and to an undivided three-fourths interest in, all the phosphate, minerals, and metals that are or may be in, on, or under the said land and an undivided one-half interest in all the petroleum that is or may be in, on, or under said land with the privilege to mine and develop the same.
- (2)(a) The Board of Trustees of the Internal Improvement Trust Fund may, in its discretion, sell or release any reserved interest or any portion thereof in or as to any particular parcel of land, and the State Board of Education may sell or release any such interest or any portion thereof which was reserved for said board pursuant to this section prior to September 1, 1967. Such sale or release shall be made on application of the owner of the title to the particular parcel of land with statement of reason justifying such sale or release.
- (b) A local government, a water management district, or an agency of the state may, at its discretion, sell or release reserved interest in any parcel of land, except that such sale or release shall be made upon petition of the owner of the parcel of land with a statement of reasons justifying such sale or release.
- (3) The right of entry to any interest in phosphate, minerals, and metals or any interest in petroleum reserved in favor of the Board of Trustees of the Internal Improvement Trust Fund, the State Board of Education, a local government, a water management district, or other agency of the state is released for any parcel of property that is, or ever has been, a contiguous tract of less than 20 acres in the aggregate under the same ownership.
- (4) Any state agency, except a water management district, which receives royalties for parcels shall remit any such moneys into the General Revenue Fund, unless otherwise provided by law.

History.—ss. 1, 2, ch. 6159, 1911; RGS 1226; CGL 1771; s. 1095, ch. 19355, 1939; CGL 1940 Supp. 892(414); s. 1, ch. 26849, 1951; s. 1, ch. 59-220; s. 2, ch. 61-119; ss. 27, 35, ch. 69-106; s. 76, ch. 71-355; s. 1, ch. 86-205; s. 1, ch. 86-257; s. 9, ch. 2001-256; s. 1, ch. 2019-85.

The 2019 Florida Statutes

Title XL
REAL AND PERSONAL
PROPERTY

Chapter 689
CONVEYANCES OF LAND AND DECLARATIONS OF
TRUST

View Entire

Chapter

689.20 Limitation on use of word "minerals."—Whenever the word "minerals" is hereafter used in any deed, lease, or other contract in writing, said word or term shall not include any of the following: topsoil, muck, peat, humus, sand, and common clay, unless expressly provided in said deed, lease, or other contract in writing. History.—s. 1, ch. 59-375.

The 2019 Florida Statutes

Title XL
REAL AND PERSONAL
PROPERTY

Chapter 689
CONVEYANCES OF LAND AND DECLARATIONS OF
TRUST

View Entire Chapter

689.29 Disclosure of subsurface rights to prospective purchaser.—

(1) A seller must provide a prospective purchaser of residential property with a disclosure summary at or before the execution of a contract if the seller or an affiliated or related entity has previously severed or retained or will sever or retain any of the subsurface rights or right of entry. The disclosure summary must be conspicuous, in boldface type, and in a form substantially similar to the following:

SUBSURFACE RIGHTS DISCLOSURE SUMMARY

SUBSURFACE RIGHTS HAVE BEEN OR WILL BE SEVERED FROM THE TITLE TO REAL PROPERTY BY CONVEYANCE (DEED) OF THE SUBSURFACE RIGHTS FROM THE SELLER OR AN AFFILIATED OR RELATED ENTITY OR BY RESERVATION OF THE SUBSURFACE RIGHTS BY THE SELLER OR AN AFFILIATED OR RELATED ENTITY. WHEN SUBSURFACE RIGHTS ARE SEVERED FROM THE PROPERTY, THE OWNER OF THOSE RIGHTS MAY HAVE THE PERPETUAL RIGHT TO DRILL, MINE, EXPLORE, OR REMOVE ANY OF THE SUBSURFACE RESOURCES ON OR FROM THE PROPERTY EITHER DIRECTLY FROM THE SURFACE OF THE PROPERTY OR FROM A NEARBY LOCATION. SUBSURFACE RIGHTS MAY HAVE A MONETARY VALUE.

(Purchaser's Initials)

- (2) If the disclosure summary is not included in the contract for sale, the contract for sale must refer to and incorporate by reference the disclosure summary and must include, in prominent language, a statement that the potential purchaser should not execute the contract until he or she has read the disclosure summary required under this section.
 - (3) As used in this section, the term:
- (a) "Seller" means a seller of real property which, at the time of sale, is zoned for residential use and is property upon which a new dwelling is being constructed or will be constructed pursuant to the contract for sale with the seller or has been constructed since the last transfer of the property.
- (b) "Subsurface rights" means the rights to all minerals, mineral fuels, and other resources, including, but not limited to, oil, gas, coal, oil shale, uranium, metals, and phosphate, whether or not they are mixed with any other substance found or located beneath the surface of the earth.

History.-s. 1, ch. 2014-34.

The 2019 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 704 EASEMENTS **View Entire Chapter**

704.05 Easements and rights of entry.—

- (1) The rights and interests in land which are subject to being extinguished by marketable record title pursuant to the provisions of s. <u>712.04</u> shall include rights of entry or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials, unless those rights of entry or easement are excepted or not affected by the provisions of s. <u>712.03</u> or s. <u>712.04</u>. However, the provisions of this section shall not apply to interests reserved or otherwise held by the state or by any of its agencies, boards, or departments.
- (2) Any person claiming such a right of entry or easement may preserve and protect the same from extinguishment by the operation of this act by filing a notice in the form and in accordance with the procedures set forth in ss. 712.05 and 712.06.
 - (3) This section is intended, and shall be deemed, to operate both prospectively and retrospectively.
- (4) The provisions of this section shall not revive any right or interest that was extinguished by the operation of chapter 712 prior to June 6, 1975.

History.-s. 1, ch. 70-100; s. 1, ch. 73-140; s. 1, ch. 75-94; s. 70, ch. 99-3.

The 2019 Florida Statutes

Title XL

REAL AND PERSONAL

PROPERTY

<u>Chapter 712</u> MARKETABLE RECORD TITLES TO REAL PROPERTY View Entire Chapter

- **712.03 Exceptions to marketability.**—Such marketable record title shall not affect or extinguish the following rights:
- (1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests; subject, however, to the provisions of subsection (5).
- (2) Estates, interests, claims, or charges, or any covenant or restriction, preserved by the filing of a proper notice in accordance with the provisions hereof.
 - (3) Rights of any person in possession of the lands, so long as such person is in such possession.
- (4) Estates, interests, claims, or charges arising out of a title transaction which has been recorded subsequent to the effective date of the root of title.
- (5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof. No notice need be filed in order to preserve the lien of any mortgage or deed of trust or any supplement thereto encumbering any such recorded or unrecorded easements, or rights, interest, or servitude in the nature of easements, rights-of-way, and terminal facilities. However, nothing herein shall be construed as preserving to the mortgagee or grantee of any such mortgage or deed of trust or any supplement thereto any greater rights than the rights of the mortgagor or grantor.
- (6) Rights of any person in whose name the land is assessed on the county tax rolls for such period of time as the land is so assessed and which rights are preserved for a period of 3 years after the land is last assessed in such person's name.
 - (7) State title to lands beneath navigable waters acquired by virtue of sovereignty.
 - (8) A restriction or covenant recorded pursuant to chapter 376 or chapter 403.
- (9) Any right, title, or interest held by the Board of Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

History. – s. 3, ch. 63-133; s. 12, ch. 65-420; s. 1, ch. 73-218; s. 1, ch. 78-288; s. 2, ch. 97-202; s. 17, ch. 2000-317; s. 1, ch. 2010-104.

The 2019 Florida Statutes

Title XL

REAL AND PERSONAL

PROPERTY

Chapter 712

MARKETABLE RECORD TITLES TO REAL
PROPERTY

View Entire Chapter

712.04 Interests extinguished by marketable record title.—Subject to s. 712.03, a marketable record title is free and clear of all estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title. Except as provided in s. 712.03, all such estates, interests, claims, or charges, however denominated, whether they are or appear to be held or asserted by a person sui juris or under a disability, whether such person is within or without the state, natural or corporate, or private or governmental, are declared to be null and void. However, this chapter does not affect any right, title, or interest of the United States, Florida, or any of its officers, boards, commissions, or other agencies reserved in the patent or deed by which the United States, Florida, or any of its agencies parted with title.

History.—s. 4, ch. 63-133; s. 1, ch. 65-280; s. 2, ch. 2010-104.

The 2019 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 713 LIENS, GENERALLY

View Entire Chapter

713.803 Entitlement to lien.—Any person who, under contract with an interest holder or operator, performs any labor or furnishes any material or service used or furnished to be used:

- (1) In the drilling or operating of any oil or gas well upon the land or leasehold of the interest holder or in the construction of any oil or gas pipeline, or
- (2) In the construction of any material so used or employed, whether the labor is performed or the material or service is furnished on or off the said land or leasehold,

shall be entitled to a lien, whether or not a producing well is obtained and whether or not such material is consumed or becomes a part of the completed oil or gas well or oil or gas pipeline, for the amount due him or her for the performance of such labor or the furnishing of such material or service, but in no case greater than the contract price, with legal interest from the date the same was due.

History.-s. 1, ch. 75-51; s. 833, ch. 97-102.

The 2019 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 713 LIENS, GENERALLY View Entire Chapter

713.805 Property subject to lien.—Liens created under s. <u>713.803</u> shall extend to:

- (1) The leasehold interest or that portion thereof covered by an assignment, farmout agreement, or operating agreement held by the operator, whichever shall be the lesser interest, held for oil or gas purposes or for any oil or gas pipeline for which the material or service was furnished or for which the labor was performed, and the appurtenances thereunto belonging as title thereto existed on the date such labor was first performed or such material or service was first furnished. However, neither the land itself, apart from the rights granted under an oil or gas lease, nor any mineral interest or royalty interest shall be subject to such lien.
- (2) All materials and fixtures owned by the interest holder and used or furnished to be used in the drilling or operating of any oil or gas well, or in the construction of any oil or gas pipeline, located on the land or leasehold held by the interest holder.
- (3) All oil or gas wells located on such land or leasehold, the oil or gas produced therefrom, and the proceeds from the sale thereof inuring to those interests subject to such lien.

History.-s. 1, ch. 75-51; s. 1, ch. 77-174.

West's Florida Administrative Code
Title 12. Department of Revenue
Subtitle 12d. Property Tax Oversight Program
Chapter 12D-1. General Rules

Rule 12D-1.004, F.A.C. Fla. Admin. Code r. 12D-1.004

12D-1.004. Returns, Applications and Other Information (not Including Applications for Exemptions) Required to Be Filed with the Property Appraiser.

Currentness

- (1) The following returns shall be filed according to the following schedule in each county which is the situs of the property, on forms and in compliance with the instructions for their use prescribed by the Department.
 - (a) Outdoor recreational or park lands. The owner of lands assessed as outdoor recreational or park lands, under Section 193.501, F.S., shall, on or before March 1 of each year, file with the property appraiser a written statement that the lands were utilized for such purposes on January 1.
 - (b) Pollution control devices. The owner of lands assessed under Section 193.621, F.S., relating to pollution control devices, shall, on or before April 1 of each year, file a return in the manner and form prescribed by the Department. The Department prescribes Form DR-492, Return of Pollution Control Devices for Ad Valorem Tax Purposes, incorporated in Rule 12D-16.002, F.A.C., by reference.
 - (c) Mineral, oil and gas or other subsurface rights, assessed under Section 193.481, F.S., by owner of the surface fee. The owner of real property who also owns mineral, oil, gas or other subsurface mineral rights to the same property shall, on or before April 1 of each year, file with the property appraiser a request in the manner and form prescribed by the Department of Revenue in order to have such mineral, oil, gas or other subsurface mineral rights separately assessed from the remainder of the real estate as a separate item on the tax roll. Failure to file the above request, on or before April 1 of each year, shall relieve the property appraiser of the duty to assess mineral, oil, gas or other subsurface rights separately from the remainder of the real estate owned by the owner of such mineral, oil, gas or other subsurface rights. The Department prescribes Form DR-508, Application for Separate Assessment of Mineral, Oil, and Other Subsurface Rights, incorporated in Rule 12D-16.002, F.A.C., by reference.
 - (d) Property subject to a conservation easement, qualified and designated as environmentally endangered by resolution of the governing board of a municipality or county, or designated as conservation land in a comprehensive plan adopted by the appropriate municipal or county governing board. The owner of property so designated may, on or before March 1 of each year, petition the property appraiser in the manner and form prescribed by the Department of Revenue, for a reclassification and reassessment of the land pursuant to Section 193.501, F.S. See Rule 12D-8.001, F.A.C. The Department prescribes Form DR-482C, Land Used for Conservation, incorporated in Rule 12D-16.002, F.A.C., by reference.
 - (e) Every person or organization who has the legal title to houses of public worship, the lots on which they are located, personal property located thereon or therein, every parsonage, house of public worship owned burial grounds and tombs,

and all other such property not rented or hired out for other than religious or educational purposes at any time, shall, on or before April 1 of each year, file a return of such property in the manner and form prescribed by the Department with the property appraiser of the county in which the property is located.

- (2) All state and governmental entities, including all departments (boards, authorities, agencies, commissions, etc.) of state governments, and all forms of local government (including county commissions, school boards, commissions, authorities, and agencies of a public or quasi-public nature), special taxing districts, multi-county districts and municipalities, shall, on or before April 1, furnish to the several property appraisers of this state a list of real property owned. Such list shall include a description sufficient to identify the same and an estimate of the value of the same. The list may include only the property which has been acquired or disposed of by the governmental entity since the filing of the previous return or list, and shall be due on or before April 1 of each year.
- (3) An assessment may not be contested unless a return, as required by Section 193.052, F.S., is timely filed by the taxpayer.

Credits

Adopted Oct. 12, 1976; Transferred from 12D-1.04; Amended Dec. 31, 1998. Amended Sept. 19, 2017.

Authority: 195.027(1), 213.06(1) FS. Law Implemented 193.052, 193.062, 193.085, 193.481, 193.501, 193.621, 196.011, 196.193 FS.

Current with amendments available through July 8, 2019.

Rule 12D-1.004, F.A.C., 12 FL ADC 12D-1.004

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.



APPLICATION FOR SEPARATE ASSESSMENT OF MINERAL, OIL, AND OTHER SUBSURFACE RIGHTS

DR-508 R. 12/94

Section s.193.481, Florida Statutes

(Spaces will expand online, as needed.)

	e with the provisions aiser separately asse					
County		Property appraise	r name			
Applicant name			<u>.</u>		Tax year	
Mailing address of legal description (required)			Applicant address, if different			
Phone			Parcel ID			
Full legal description						
Kind of subsurface rights						
My recorded inte recorded in Offic	rest in the above propial Record, book	perty is by o , page o	r other legal	(deed, inherita instrument (speci		nd
	Signature, applicant			Print name		 Date

071-134—June 8, 1971

TAXATION

ASSESSMENT OF OIL, MINERAL, AND SUBSURFACE RIGHTS—LEASED RIGHTS

To: D. Reid Stewart, Tax Assessor, Wauchula
Prepared by: John L. Westberry, Assistant Attorney General
QUESTIONS:

1. Do the provisions of Ch. 70-100, Laws of Florida (§704.05,

- F. S., 1970 Supp.), in any way invalidate a separate mineral rights assessment which is a part of the Hardee County 1970 tax roll?
 - 2. Are leased mineral rights taxable?

3. If so, to the lessee or lessor?

4. Assume a parcel of separated mineral rights shown on tax roll to one owner, in the absence of a return of ownership; several owners applying to pay taxes on a fraction of ownership. Should the tax assessor separate the taxes on the basis of the claimed fractional ownership? Even if this leaves a fractional interest unpaid? Say: A. 1/8, B. 1/8, C. 1/8, leaving 5/8 ownership unpaid, possible owner unknown.

SUMMARY:

The provisions of Ch. 70-100, Laws of Florida, do not invalidate a separate mineral rights assessment which is a part of the county tax roll; leased mineral rights are taxable to the owners of such right; and the tax assessor should, upon application of the owners, separate taxes on the basis of claimed fractional ownership.

Chapter 70-100, Laws of Florida, now §704.05, F. S. (1970 Supp.), provides as follows:

704.05 Easements and rights of entry.—

(1) The rights of entry, or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring or developing, shall be limited to a twenty year period beginning with the recording of such conveyance or devise if such rights are not exercised during this twenty year period.

(2) After the twenty year period has expired, the owner of such property may file a suit in the circuit court of the county in which the property is located, and upon such procedure as used in quieting title the court shall, upon proof of the nonexercise of such rights and the expiration of the twenty year limitation, enter a decree forever clearing and confirming the removal of said rights from the title to the said real estate.

The first question is answered in the negative. Subsection (2) of the above-quoted statute provides a procedure for confirmation of the expiration of an easement or a right of entry as provided in subsection (1) of the statute. Until such time as the written confirmation of the expiration of an easement or right of entry is acquired as provided by law, the tax assessor should assess all of such rights which are subject to assessment as they appear on the public records of his county, as provided in §193.481, F. S. (1970 Supp.).

In order to answer your second question, consideration must be given to the language and legislative history of \$193.481(1) and (2), F. S. (1970 Supp.), which now reads as follows:

193.481 Assessment of oil, mineral, and other subsurface rights.—

(1) Whenever the mineral, oil, gas and other subsurface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation or otherwise, such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee. Such mineral, oil, gas and other subsurface rights, when separated from the fee or other interest in the fee, shall be subject to separate taxation. Such taxation shall be against such sub-

surface *interest* and not against the owner or owners thereof or against separate *interests* or *rights* in or to such subsurface *rights*.

(2) Such subsurface *rights* shall be assessed on the basis of a just valuation, as required by §4, Art. VII of the [S]tate [C]onstitution, which valuation, when combined with the value of the remaining surface and undisposed of subsurface *interests*, shall not exceed the full just value of the fee title of the lands involved, including such *subsurface rights*. (Emphasis supplied.)

Chapter 57-150, Laws of Florida (§193.221, F. S., 1957), the original act requiring separate taxation of mineral, oil and other subsurface rights, specifically stated that a leasehold interest in subsurface rights was not assessable thereunder. Chapter 63-355, Laws of Florida (enacted after the court held Ch. 57-150 unconstitutional in the case of Cassidy v. Consolidated Naval Stores, Fla. 1960, 119 So.2d 35), eliminated the last prohibition relating to assessment of leasehold interests in subsurface rights. The constitutionality of Ch. 63-355 was upheld in the case of Dickinson v. Davis, Fla. 1969, 224 So.2d 262. In 1969, §193.221, F. S., was amended and renumbered §193.481.

In 20 Fla. Jur., Landlord and Tenant, §2, a lease is defined as follows:

A lease has been defined as a contract for the possession and profits of lands and tenements on one side, and a recompense or rents or other income on the other; a conveyance to a person for life, or years, or at will, in consideration of a return or rents or other recompense. Again, it has been said to be a conveyance by the owner of an estate to another of a portion of his interest therein for a term shorter than his own. A lease passes a present interest in the land for the period specified. (Emphasis supplied.)

The court in construing §193.221, F. S., 1963, in the case of Dickinson v. Davis, Fla. 1969, 224 So.2d 262, at p. 265, said:

Land may be divided horizontally as well as vertically, so that one person may own the surface and another the minerals underground. Where the fee in the mineral is severed from the fee in the surface, it is subject to separate taxation. 51 Am. Jur. Taxation, Sec. 437, 452; Annot., 1916D L.R.A. 307. In fact, separate estates or interests in subsurface rights are taxable as real property or real estate under the tax statutes of many of the states. 4 Summers Oil and Gas (Perm. Ed.) Sec. 784.

Unquestionably, the Legislature had the authority to subject this separate interest in real estate to taxation. (Emphasis supplied.)

Under the above-quoted definitions and pronouncement by the Florida court, there can be little doubt that a leasehold interest of subsurface rights is subject to separate taxation under §193.481, F. S. The answer to question 2 is therefore in the affirmative.

For further clarification of what does or does not constitute "subsurface rights in or to real property," see AGO 058-51, and cases there cited.

Having concluded that leasehold interests of subsurface rights are subject to separate taxation, your third question as to tax liability of lessor or lessee will be controlled by §193.481(1), F. S., providing in part: "... Such taxation shall be against such subsurface interest and not against the owner or owners thereof or against separate interests or rights in or to such subsurface rights."

This is a statement generally applicable in all ad valorem taxation; however; the general law, §193.114(2), F. S., provides that the tax assessor shall prepare the assessment roll to reflect "the owner" of the property being taxed. In the situation under consideration the property being taxed is ". . . mineral, oil, gas, and other subsurface rights in or to real property in this state [which]

des

/ean itil tht of shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation or otherwise. . . ." In my opinion the separate assessment under §193.481, F. S., may be made against any person owning such rights, on the assessment date, except, of course, the owner of the surface fee.

Both parts of your fourth and last question, are answered in the affirmative. Your attention is directed to page 28a of the Florida Tax Assessor's Guide, under the heading of "Cut-outs and Splits," which reads as follows:

- 1. When property has been properly assessed in the name of the owner as of January 1st of the tax year, the assessor may not cancel the assessment by reason of a sale of the whole or a part of the property. The assessment is against the property, not the
- 2. When the new owner or the original owner wishes to pay taxes on his proportionate share of the whole property, it is the duty of the assessor to figure the amount of taxes due on that portion of the whole.
- 3. The collector may issue his receipt showing that taxes have been paid on that portion of the property in order to prevent that part from being sold for delinquent taxes. LHT's letter to JNA; 12-11-62.

My conclusions hereinabove are that the provisions of Ch. 70-100, Laws of Florida, do not invalidate a separate mineral rights assessment which is a part of the county tax roll; that leased mineral rights are taxable to the owner of such rights; and the tax assessor should, upon application of owners, separate taxes on the basis of claimed fractional ownership. These conclusions are, of course, subject to any changes effected by amendatory legislation now pending before the Florida Legislature.



CERTIFICATE OF ATTENDANCE

Certified Paralegals are required to record evidence of 50 hours of continuing legal education hours to renew the CP credential every 5 years. CLE hours are recorded in CPs' accounts through the NALA online portal. Of the 50 hours, 5 hours must be in legal ethics, and no more than 10 hours may be recorded in non-substantive areas. If attending a non-NALA sponsored educational event, this certificate may be used to obtain verification of attendance. Please be sure to obtain the required signatures for verification of attendance. The requirements to maintain the CP credential are available from NALA's web site at https://www.nala.org/certification/certtest2view. Please keep this certificate in the event of a CLE audit or further information is needed.

PLEASE COMPLETE THE SPACES BELOW AND ATTACH A PROGRAM

Session Topics

Session Length

In Hours	(Description and Speakers)	of Attendance	
		1	_
1.0	Buried Treasure: Mineral & Subsurface Rights / Robert	Robert Rohan	
	Rohan		

Name of CP (Please Print)	NALA Account Number (On Mailing Label)		
	149113		
Signature of CP	Name of Seminar/Program Sponsor		
	Buried Treasure: Mineral & Subsurface Rights / ATFS, LLC		
Address		Authorized Signature of Sponsor Representative	
		Robert Rohan	
		Date of Educational Event:	
City: State (XX):			
Preferred e-mail address		Location:	
		Recorded Webinar	

For Office Use Only		
Substantive hours		
Non-substantive hours		
Ethics		

Validation



651 East Jefferson Street Tallahassee, FL 32399-2300

Joshua E. Doyle Executive Director

850/561-5600 www.FLORIDABAR.org

Jan. 18, 2024

Certificate of Accreditation for Continuing Legal Education

256131 Attorney's Title Fund Services PO Box 628600 Orlando, FL 32862-8600

Reference Number: 2400685N

Title: Buried Treasure: Mineral and Subsurface Rights

Level: Intermediate

Approval Period: 05/01/2024 - 11/30/2025

CLE Credits

General 1.0

Certification Credits

Real Estate 1.0