A DOZEN (OR SO) OIL AND GAS ISSUES AND OTHER TIDBITS OF INTEREST TO THE REAL ESTATE LAWYER

Lafayette Bar Association
CLE By the Hour
December 15, 2017

Patrick S. Ottinger
OTTINGER HEBERT, L.L.C.
P. O. Drawer 52606
1313 West Pinhook Road (70503)
Lafayette, Louisiana 70505-2606
(337) 232-2606
e-mail: psottinger@ohllc.com

Member, Louisiana and Texas Bars

Adjunct Professor of Law, Paul M. Hebert Law Center
Louisiana State University
Baton Rouge, Louisiana

LAFAYETTE BAR
ASSOCIATION & FOUNDATION

TABLE OF CONTENTS

A DOZEN (OR SO) OIL AND GAS ISSUES AND OTHER TIDBITS OF INTEREST TO THE REAL ESTATE LAWYER

Patrick S. Ottinger
OTTINGER HEBERT, L.L.C.
P. O. Drawer 52606
1313 West Pinhook Road (70503)
Lafayette, Louisiana 70505-2606
(337) 232-2606
e-mail: psottinger@ohllc.com

Member, Louisiana and Texas Bars
Adjunct Professor of Law, Paul M. Hebert Law Center

"The meek shall inherit the Earth, but not its mineral rights."*

I. Introduction[1]

We lawyers certainly learn in law school what an "issue" is, but what is a "tidbit"? One dictionary defines "tidbit" as "a choice morsel of food," but we should probably use its alternative definition, being "a choice or pleasing bit (as of information)."[2]

The "issues" and "tidbits" we examine today are intended to identify some common or recurring matters with which a real estate lawyer might be confronted in the practice. While these are the typical fare of one practicing as an oil and gas lawyer, these matters also are—or should be—of more than a passing interest to one whose legal expertise is more purely or exclusively dedicated to the handling of real estate matters, whether as an examiner of title, or a scrivener of documents involved in the purchase or sale of land, as well as consummating a real estate transaction at a closing.

---

* J. Paul Getty (1892-1976).

[1] Portions of this paper are an adaptation of PATRICK S. OTTINGER, *Louisiana Mineral Leases: A Treatise* (Claitor's Law Books & Publishing Division, Inc., 2016) (hereinafter cited as "Ottinger, *Mineral Lease Treatise*").

[2] Merriam-Webster Dictionary (2001).

Admittedly, a real estate lawyer might find that her practice most significantly involves properties within the city limits (where, arguably, mineral servitudes are less frequently encountered), rather than rural lands located "in the country" (where the creation of a mineral servitude or mineral royalty by reservation is more frequently seen). Nevertheless, one must be reminded that, while rare, mineral reservations are found in sale deeds involving even subdivision property within a municipality. To be sure, there have been oil and gas wells drilled within the corporate limits of Louisiana cities, including the City of Lafayette. You might also ask your cousin or law school classmate in Shreveport about the many wells that have been drilled within the city limits in connection with its significant "shale play."[3]

Often, the issue encountered by the real estate lawyer pertains to the continued existence *vel non* of a mineral servitude.[4] However, even if no mineral servitude is involved, disputes concerning the ownership of rights to minerals underlying roads, streets and highways, whether involving subdivision dedications,[5] or annexation of parish lands into a municipality, have resulted in

---

[3] The term "shale plays" has reference to the areas in which operators engage in "unconventional drilling" by employing techniques of hydraulic fracturing, or "fracking." In Louisiana, the Haynesville Shale in northwestern Louisiana is a principal example.

[4] *See, e.g., Delta Refining Co. v. Bankhead*, 73 So. 2d 302, 303 (La. 1954) ("This is a concursus proceeding in which the Delta Refining Company deposited certain sums of money in the Registry of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, which sums represented the value of oil, less severance taxes, produced from a well known as A. J. Bankhead et al., Bank of Baton Rouge in Liquidation Well No. Two Unit, which well is located in the University Field of East Baton Rouge Parish, Louisiana.").

[5] *See, e.g., Pioneer Production Corp. v. Segraves*, 340 So. 2d 270, 271 (La. 1976) ("This concursus proceeding arises out of conflicting claims by the heirs of John G. Segraves and the City of Jennings to royalty payments placed in the court registry by Pioneer Production Corporation. The payments constitute oil and gas revenue attributable to land beneath a portion of Highway 90 in the City of Jennings. Highway 90, formerly known as the Old Spanish Trail, borders land which Segraves subdivided in 1946."); *Lamson Petroleum Corp. v. Hallwood Petroleum Inc.*, 814 So. 2d 596, 597 (La. App. Ct. 3d 2002) ("This case is one of many arising from ownership disputes of certain roadbeds in the Scott Field area of Lafayette Parish."), and *Webb v. Franks Inv. Co.*, 105 So. 3d 764, 765-66 (La. App. Ct. 2d 2012) ("These consolidated cases arise out of disputes over the mineral rights in two separate tracts of land in Caddo Parish, Louisiana. In both cases, in the early 1900s, a strip of land was dedicated for a public road. Both tracts were bisected by the roads. The ownership of the roadbeds is critical in determining who now owns the minerals underlying the roads and whether the mineral servitudes have prescribed through non-use.").

the filing of concursus proceedings to resolve these issues.[6] Indeed, as the Supreme Court has noted, "prior to the advent of the mineral industry in Louisiana, the subject of public ownership of dedicated property was important only insofar as it governed the use to which dedicated property could be put."[7]

In order to introduce each "issue" or "tidbit," the author frames each topic in the manner in which it might be presented in the practice of real estate law, perhaps in the pre-closing stage of title examination or drafting (and hopefully not post-closing, when it might be too late), or (as is often the case), at the closing of the transaction. Don't you just love that?

Each topic concludes a "takeaway," in the nature of the "moral of the story," or "lesson to be learned." So here we go.

II. Issues on Mineral Servitudes

A. Preface:

"A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."[8]

"A landowner may convey, [or] reserve, . . . his right to explore and develop his land for production of minerals and to reduce them to possession."[9]

Most typically, in the real estate practice, the mineral servitude is created by way of reservation in a sale of land, but such might also appear in a donation, exchange or other alienation of the land.

---

[6] *See, e.g., Chesapeake Operating, Inc. v. City of Shreveport*, 132 So. 3d 537, 539 (La. App. Ct. 2d), *writ den'd* 148 So. 3d 176 (Mem.) (La. 2014) ("The *res nova* issue presented in this appeal concerns whether annexation by the City of Shreveport ("the city") of Caddo Parish territory, which included dedicated public roads, transferred ownership of the public roads and underlying acreage to the city so that the city, rather than Caddo Parish, is entitled to the proceeds of mineral production attributable to that acreage.").

[7] *Garrett v. Pioneer Production Corp.*, 390 So. 2d 851, 855 (La. 1980).

[8] LA. REV. STAT. ANN. § 31:21. *See also* PATRICK S. OTTINGER, *Mineral Servitudes*, Louisiana Mineral Law Treatise, Chapter 4 (Martin, ed., Claitor's Law Books & Publishing Division, Inc., 2012) (hereinafter cited as "Ottinger, *Mineral Servitude Treatise*").

[9] LA. REV. STAT. ANN. § 31:15.

In the presentation of "issues" that follow in this Part II, the real estate practitioner is asked by her client to represent the seller in a sales transaction of land. Importantly for present purposes, the lawyer is told simply that the vendor wants to "reserve mineral rights" in the sale.

That instruction from your client—to "reserve mineral rights"--brings forth the need to consider a bit of context and historical background. As used in the jargon or vernacular of the industry in Louisiana, the term "mineral rights" is usually understood to mean distinctly a mineral servitude, properly speaking.[10] Hence, it is often said that the "vendor reserved his mineral rights," when it is actually envisioned that a mineral *servitude* was reserved by that seller of land.

For example, the Supreme Court in one case noted that, "[o]n March 15, 1926, the Louisiana Central Lumber Company, . . ., transferred the whole 80,000 acres to the Brown Paper Mill Company, reserving . . . all of the *mineral rights* in the land transferred."[11]

In another case, the court referred to the dispute before it as involving a party's "reserved *mineral rights*," in which the plaintiffs were "seeking a declaratory judgment that the *servitude created by reservations* in the sale included only the right to explore for and exploit oil, gas and kindred minerals and not the right to explore for or strip mine for solid minerals such as lignite."[12]

Finally, another court examined the precursor statute to article 149 of the Louisiana Mineral Code,[13] describing it as having been "enacted . . . to make imprescriptible mineral servitudes that were created when landowners *reserved mineral rights* in a sale of land to school boards and other named agencies of the state."[14]

In each of these cases, among others, the court used the term "mineral rights" to refer to a mineral servitude, properly speaking.

---

[10] *Id*. at § 31:21. *See* text associated with note 8, *supra*.

[11] *Lenard v. Shell Oil Co.*, 29 So. 2d 844, 845 (La. 1947). (Emphasis added.).

[12] *Continental Group, Inc. v. Allison*, 404 So. 2d 428, 430 (La. 1981), *writ den'd* 456 U. S. 906 (1982). (Emphasis added.).

[13] LA. REV. STAT. ANN. § 31:149.

[14] *Anadarko Production Co. v. Caddo Parish School Board*, 455 So. 2d 699, 700 (La. App. Ct. 2d), *writ den'd* 460 So. 2d 610 (La. 1984). (Emphasis added.).

With the adoption of the Louisiana Mineral Code, effective January 1, 1975,[15] the term "mineral rights" now embraces three distinct real rights that are classified as incorporeal immovables.[16] In this regard, article 16 of the Mineral Code provides that the "basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease."[17]

With this understanding, the appropriate response to your client's instruction to "reserve mineral rights," is to ask, "you want to reserve a mineral servitude, and not a mineral royalty, correct?" The vendor's answer being "yes, I want to reserve a mineral servitude," we proceed to take up our "issues."

B. Clarifying the Type of Mineral Right Being Created:

As suggested above, the lawyer who is asked to prepare a sale document in which the vendor "reserves mineral rights," would be well served to seek clarification as to whether the vendor wishes to reserve a mineral servitude, properly speaking, or a mineral royalty, as both are "mineral rights" as recognized by article 16 of the Mineral Code. One never reserves a mineral lease, being the third of the "basic" mineral rights delineated in the Mineral Code.[18]

Jurisprudence reveals certain deeds or instruments that, by reason of the lack of clarity, have given rise to disputes as to the nature or character of the interest conveyed or reserved therein.[19] This issue is of paramount importance as to the question of maintenance of the reserved interest. If the interest reserved is a mineral servitude, a dry hole would interrupt prescription, provided that the operations are conducted in "good faith,"[20] but such result would not follow if the interest is a mineral royalty as only actual production would serve to interrupt prescription accruing against a mineral royalty.[21] Additionally,

---

15 Act No. 50, 1974 La. Acts Vol. III, effective January 1, 1975.

16 "Rights and actions that apply to immovable things are incorporeal immovables. Immovables of this kind are such as personal servitudes established on immovables, predial servitudes, mineral rights, and petitory or possessory actions." LA. CIV. CODE ANN. art. 470.

17 LA. REV. STAT. ANN. § 31:16.

18 "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals." *Id*. at § 31:114.

19 *See* William Shelby McKenzie, *Classifying Mineral Interests--Mineral Servitude v. Mineral Royalty*, 23 LA. L.REV. 106 (1962).

20 LA. REV. STAT. ANN. § 31:29.

21 "Prescription of nonuse running against a mineral royalty is interrupted by the production of any mineral covered by the act creating the royalty." *Id*. at § 31:87.

only the mineral servitude owner is entitled to delay rentals that might be paid under the mineral lease.[22]

The courts have developed no bright line rules of interpretation in cases of this type. As in all cases involving the interpretation of contracts, the court's objective is to ascertain the intent of the parties.[23]

In *Phillips Petroleum Co. v. Richard*,[24] a tract of land was sold on November 30, 1939. In this sale, the vendor reserved "an undivided one-fourth of the oil, gas and other minerals under and produced and saved from said land, which reservation is equal to a one-thirty-second royalty interest under the said existing lease."[25] The vendee was given the right "to grant and execute such future oil, gas and mineral leases affecting the whole or any portion of the land conveyed hereunder, and this without the consent or joinder therein of the vendor or his heirs or assigns."[26]

Litigation ensued as to whether the reservation was of a mineral servitude interest or a mineral royalty interest. If it was a mineral royalty interest, it had prescribed, as no production was obtained within ten (10) years of its creation.[27]

It was argued that, because the language did not expressly reserve the right of ingress and egress, the reservation necessarily created only a mineral royalty. The court rejected this contention, saying that, whether stated or not, the right of ingress and egress is necessarily included within the reservation of a mineral servitude. The failure to mention it was immaterial.[28]

---

[22] *Id*. at §§ 31:105, :108.

[23] *See* Patrick S. Ottinger, *Principles of Contractual Interpretation*, 60 LA. L.REV. 765 (Spring 2000).

[24] 127 So. 2d 816 (La. App. Ct. 3d 1961).

[25] *Id*. at 817.

[26] *Id*.

[27] A dry hole was drilled within ten (10) years of the creation of the interest in question. If the interest was a mineral *servitude*, the dry hole would have interrupted prescription. However, if the interest was a mineral *royalty*, it would not have interrupted prescription.

[28] In rejecting this argument, the court cited *Horn v. Skelly Oil Co.*, 70 So. 2d 657, 660 (La. 1954) ("The contention of the defendants that the reservation by the bank in the deed to McRae was a royalty as contra-distinguished from a mineral interest [predicated principally upon the bank's failure to specifically reserve to itself the right of ingress and egress for purposes of exploration], is clearly without merit.").

It was next argued that, because the reserving party subsequently sold "royalty rights," such fact shows that he interpreted his right as being a royalty, rather than a mineral, interest. The court rejected this contention, saying, as follows:

> As the owner of a superior mineral interest Edmond Richard certainly had the right to sell off royalty interests which were no more than appendages of the mineral interests which he had reserved. The fact that he sold such royalty could in no way indicate that he construed the interest which he owned to be royalty rather than mineral.[29]

Finally, it was asserted that, "since the property was under lease at the time of the [reservation], it was legally impossible to reserve a mineral right."[30] This contention was also rejected, the court stating that "purchasers of undivided mineral interests which are subject to a pre-existing lease become in effect co-lessors."[31]

The court construed the reservation as creating a mineral servitude, not a mineral royalty, interest. As such, it had not prescribed.

A different result was reached in another case[32] in which the court interpreted a controverted deed in order to determine if it created a mineral servitude or a mineral royalty interest. The court noted that the appellants "concede that if a mere royalty interest was conveyed they have lost that interest by prescription since there has been no production on or involving the property as a result of pooling agreements since 1955."[33] On the other hand, if it is a mineral servitude interest, "prescription was interrupted in 1965 and 1974 by good faith efforts to drill wells on the property."[34]

The court interpreted the deed as conveying a mineral royalty interest that prescribed for lack of production.

---

[29] 127 So. 2d at 820.

[30] *Id*.

[31] *Id*. In rejecting this argument, the court cited *Coyle v. North Central Texas Oil Co.*, 174 So. 274 (La. 1937).

[32] *Patrick Petroleum Corp. of Michigan v. Poche*, 384 So. 2d 834 (La. App. Ct. 4th 1980).

[33] *Id*. at 835.

[34] *Id*.

One has to wonder how much money in legal fees and other costs might have been saved if only the parties had clearly stated their intention in terms of the type of mineral right being reserved.

Takeaway

The moral of the story is that the drafter of a sale document should endeavor to clearly and concisely state that the interest being reserved is a mineral servitude, if such is the intention of the vendor, or a mineral royalty, if such is desired by your client. The uncertainty, expense and anxiety of the cases noted above could have been avoided if the draftsman had stated something to the following effect, immediately after the express reservation clause, *viz.*:

> It is the intention and understanding of the parties that vendor is reserving a mineral servitude (as defined in article 21 of the Louisiana Mineral Code) as distinguished from a mineral royalty (as defined in article 80 of the Louisiana Mineral Code).

C. Clarifying the Type of Minerals Within the Scope of the Grant or Reservation:

Having clearly stated that the vendor is reserving a mineral servitude (as distinguished from a mineral royalty), consideration should be given to clarifying with respect to what distinct type(s) of minerals the mineral servitude is to relate. This is particularly so if the affected land is situated in a geographical area where oil and gas as well as other types of minerals are being exploited or producing.

The Mineral Code is applicable to "all forms of minerals, including oil and gas."[35] As indicated by the Comments to Article 4, the Mineral Code "does not attempt a firm definition of the term 'minerals.'"[36] Thus, it is always necessary to examine the instrument of grant or reservation in order to determine the types of minerals to which the reservation relates. However, the courts have not always followed a consistent methodology in the interpretation of these matters.

---

[35] LA. REV. STAT. ANN. § 31:4.

[36] *Id*., cmt.

In one case,[37] the court, applying "familiar rules of construction,"[38] held that a reservation of "iron ore, coal, fire clay, kaolin, and marl" did not include oil and gas.

The court in *Holloway Gravel Co., Inc. v. McKowen,*[39] was required to determine if a reservation of "mineral, oil and gas rights" included sand and gravel. The court invoked the *ejusdem generis* doctrine,[40] and the rule that an ambiguous instrument is to be construed against its draftsman, to support its conclusion that sand and gravel were not encompassed by the reservation.[41]

The commercial exploitation of lignite reserves in North Louisiana in the late seventies and early eighties gave rise to disputes as to whether lignite was included within the contemplation of instruments of lease, grant or reservation making mention of "all mineral rights."[42] In one of the most significant cases,[43] plaintiff landowner sought a declaratory judgment that a 1956 agreement in which a vendor of the land reserved "all mineral rights," did not include the right to explore for solid minerals such as lignite.

In the alternative, plaintiff also asserted that, even if the reservation encompassed lignite, defendant's failure to explore for lignite for a period of ten years led to prescription of the servitude for non-user as to lignite, even though oil and gas production had taken place on the lands in question during that ten year period.

---

37 *Huie Hodge Lumber Co. v. Railroad Lands Co.*, 91 So. 676 (La. 1922).

38 *Id*. at 678.

39 9 So. 2d 228 (La. 1942).

40 "Under the *ejusdem generis* rule of statutory construction, general words, such as 'other, etc.', following an enumeration of particular or specific classes or things are to take color from the specific, so that the general words are restricted to a sense analogous to the less general." *Pumphrey v. City of New Orleans*, 925 So. 2d 1202, 1211 (La. 2006).

41 The "words 'mineral rights' necessarily must be read in connection with the things subsequently named, to-wit: 'oil rights' and 'gas rights' and should be confined to things of that nature." *Holloway Gravel Co., Inc. v. McKowen, supra* note 39, at 232-33.

42 "Lignite is of the lowest rank of coals, being a brown substance intermediate between peat and bituminous coal." *Continental Group, Inc. v. Allison*, *supra* note 12, at 429, n. 2.

43 *Id*.

The Louisiana Supreme Court, on original hearing, held that the agreement was clear and express, and that the vendor's reservation of "all mineral rights" included the right to strip mine for lignite. The court also determined that (former) articles 796 and 798 of the Louisiana Civil Code[44] were not applicable and, based on the law prior to the adoption of the Mineral Code, oil and gas production on the land in question interrupted prescription as to the mineral servitude. Thus, the defendant would have the right to strip mine for lignite.

On rehearing, the court reversed itself, and held that (former) articles 796 and 798 of the Louisiana Civil Code were applicable in this case, and would prevail over jurisprudential interpretations of the law in place before adoption of the Mineral Code. Thus, oil and gas production on the land in question did not interrupt prescription for the servitude reserved for "all mineral rights," but only interrupted prescription for the produced minerals, oil and gas. Viewed in this manner, the right to explore for lignite and other minerals had prescribed through ten years' non-user.[45] This is a case of "winning the battle, but losing the war."

The case of *West v. Godair*[46] concerned vendors who sold property in three separate cash sales containing mineral reservations. Vendees subsequently entered into agreements with various parties allowing for the mining of sand, gravel and topsoil. Vendors sued, asserting that sand, gravel and topsoil were "minerals" to which the mineral reservations applied.

The appellate court found the mineral reservation in the agreement to be ambiguous, and the proper interpretation to be one that least restricted ownership of the land conveyed.[47] In order to determine the meaning of the phrase "all mineral rights" as used in the reservations, the court considered extrinsic evidence. Because the reservation of minerals usually is applied to oil and gas, and there were no negotiations by the parties concerning sand and gravel, the court determined that the vendors' mineral reservations did not include sand, gravel and topsoil. Consequently, the appellate court determined that the vendee had the right to permit exploration of the sand, gravel and topsoil.

---

[44] The cited articles, since repealed and restated, concerned the extent to which a partial use of a predial servitude would serve to maintain the servitude as a whole. *See now* LA. CIV. CODE ANN. art. 759.

[45] *See now* LA. REV. STAT. ANN. § 31:40.

[46] 538 So. 2d 322 (La. App. Ct. 3d), *rev'd* 542 So. 2d 1386 (La. 1989).

[47] The court relied on the decision in *Continental Group, Inc. v. Allison*, *supra* note 12, for this proposition.

In a *per curiam* decision, the Supreme Court reversed the judgment of the appellate court, and reinstated the judgment of the district court that had ruled, in support of the vendors, that the doctrine of *ejusdem generis* was inapplicable to the case, with which the appellate court agreed. However, the district court had also ruled that extrinsic evidence as to the intent of the parties concerning the mineral reservation was not helpful. This ruling extended the scope of the mineral reservation to include sand, gravel and topsoil.

Commenting on this case, Professor Emeritus Patrick H. Martin has admonished the practicing bar, as follows:

> This case should serve as a warning to all practitioners against allowing a purchaser of land to agree to a reservation of "all minerals." The owner of a small farm or a house on a modest tract of land may wake up one day to the sound of gravel trucks going onto his or her property. It will be to no avail for the owner to say "I was thinking this meant oil or gas and there was little likelihood of drilling."[48]

The pertinent facts in another case,[49] disclose that, in 1971, the landowner executed a mineral lease to the defendant. The lease was executed on the form of lease in prevalent use in North Louisiana.

Thereafter, in 1973, the same landowner executed a so-called "Coal and Lignite Lease" to the plaintiff. The plaintiff instituted a declaratory judgment action against the mineral lessee to "determine whether an oil, gas and mineral lease of common usage in Louisiana grants to a lessee thereunder the privilege of strip mining lignite coal."[50]

The mineral lease granted rights to the lessee to explore for and produce oil and gas and "other minerals." The court had to determine if lignite was contemplated in this phrase--"other minerals."

There was expert testimony on the similarities and dissimilarities between lignite coal, and oil and gas, particularly as to the manner in which each category of minerals is exploited. The court cogently observed that the "essential

---

[48] Patrick H. Martin, *Mineral Rights*, 50 LA. L.REV. 303, 310 (1989).

[49] *River Rouge Minerals, Inc. v. Energy Resources of Minn.*, 331 So. 2d 878 (La. App. Ct. 2d 1976).

[50] *Id*. at 879.

distinction between solid coal, liquid oil, and natural gas is in the method of extraction from the ground."[51]

The court also reviewed the provisions of the mineral lease, and found them inconsistent with the strip mining of lignite.

The court held that "the grant in the instant case was the right to explore for and produce minerals of the same physical properties as oil and gas, i.e. those minerals that are produced in liquid or gaseous form by drilling wells into the subsurface. Lignite coal is not included in the grant."[52]

Takeaway

Admittedly, the issue is less significant in geographical regions where, perhaps South Louisiana being an example, it is only oil and gas that are the subject of exploration activities. Indeed, the simple statement "Vendor hereby reserves all minerals," or "reserves his mineral rights," would more than likely be understood to apply (and perhaps only) to oil and gas.

However, in other areas of the state (say, North Louisiana) where lignite or coal might be encountered, or Southeastern Louisiana in which sand and gravel are frequently mined, it is incumbent on the draftsman to state precisely what types of minerals are covered by the reservation.

D. Contractual Alteration of Duration of Servitude:

"Mineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."[53] The mineral servitude is subject to a regime of prescription as a default matter. Article 27 of the Louisiana Mineral Code further states, as follows:

> **Art. 27. Extinction of mineral servitudes**
>
> A mineral servitude is extinguished by:
>
> (1) prescription resulting from nonuse for ten years;

---

51 *Id*.

52 *Id*. at 882.

53 LA. REV. STAT. ANN. § 31:16.

* * *

> (4) expiration of the time for which the servitude was granted, . . .;[54]

However, in one of the limited opportunities to contractually alter the attributes of a mineral servitude, parties are permitted to "fix the term of a mineral servitude or shorten the applicable period of prescription of nonuse or both."[55] A distinct limitation on this contractual right to modify the duration of the reserved servitude is that, "[i]f a period of prescription greater than ten years is stipulated, the period is reduced to ten years."[56]

This limitation on contractual liberality codifies pre-Code jurisprudence that disallows the creation or perpetuation of a mineral servitude for more than ten years without operations or production.[57]

If parties undertake to "fix the term," the mineral servitude comes to an end upon the accrual of that stated term, even if there then exists an activity that would otherwise perpetuate the servitude.

If, instead, parties merely "shorten the applicable period," the mineral servitude can still be perpetuated by a use accomplished within that shorter period, and so on, but it will thereafter extinguish if the truncated time period accrues without a use of the servitude.

A few cases in recent years have taken up the issue of whether parties, in availing themselves of this right of "freedom of contract," intended to "fix the term" of the mineral servitude, or to merely "shorten the applicable period of prescription of nonuse."[58]

---

54 *Id*. at § 31:27.

55 *Id*. at § 31:74.

56 *Id*.

57 *See, e.g., LeBleu v. LeBleu*, 206 So. 2d 551 (La. App. Ct. 3d 1967), where the court held an agreement "constitut[ed] a scheme or a device to circumvent or avoid the law and public policy of this state that a mineral servitude will be subject to the prescription of ten years, that contracts which purport to extend such a servitude for a longer period of time without use will not be enforced, and that a party cannot waive or renounce the prescription applicable to a mineral servitude before it has accrued."

58 *See* Ottinger, *Mineral Lease Treatise*, § 3-08(b).

The case of *St. Mary Operating Co. v. Champagne*[59] was a concursus proceeding that was filed to determine the ownership of proceeds of production allocable to a mineral servitude that had been created "for a period of ten years." As stated by the court, the issue presented for judicial resolution was, as follows:

> Under the Louisiana Mineral Code, does the phrase in a cash sale document, "for a period of 10 years," create a fixed, ten-year term, not subject to prescription, or is this phrase a reaffirmation of the parties' adoption of the regular ten-year prescriptive period, making it subject to interruption?[60]

The trial court held that "the reservation clause in the cash sale deed reserved a servitude for a fixed term that was not subject to the rules of prescription."[61] "Therefore, it could not be perpetuated beyond ten years by the good-faith exploration for minerals within the ten-year period beginning on the date the servitude was established."[62]

The mineral servitude owners appealed, and the judgment of the trial court was reversed. The appellate court held that "[t]he phrase 'for a period of ten years' was a restatement of the default prescriptive period assumed into all mineral rights created in the State of Louisiana because the parties did not specifically state otherwise."[63]

The court further held, as follows:

> The mineral servitude reserved to them in the cash sale deed is still active and valid because the ten-year prescriptive period was interrupted when mining activities began in March of 2003, within ten years of its creation on June 22, 1993. Accordingly, the mineral servitude will continue to exist until there is a ten-year lapse in the use of the servitude.[64]

---

[59] 945 So. 2d 846 (La. App. Ct. 3d 2006), *writ den'd* 954 So. 2d 140 (La. 2007).

[60] *Id*. at 848.

[61] *Id*.

[62] *Id*.

[63] *Id*. at 851.

[64] *Id*.

At dispute in *Moffett v. Barnes*,[65] was whether a mineral servitude was subject to a 10-year term that was "fixed."

The plaintiffs owned two tracts of land that they purchased from the defendants. The act of sale stated, "Vendor retains all oil, gas and other mineral rights in the land herein conveyed for ten (10) years."[66]

The defendants granted mineral leases covering the tracts, and the lessees drilled and established production on each tract before the tenth anniversary of the plaintiffs' purchase of the land.

The plaintiffs argued that the act of sale's statement that the defendants retained mineral rights "for ten (10) years" established a 10-year fixed term. Accordingly, the plaintiffs posited that the mineral servitudes terminated on the tenth anniversary of the act of sale, regardless of the existence of production.[67]

The trial court disagreed, ruling that the servitudes were not subject to a fixed term, and that prescription had been interrupted by drilling operations conducted, and production obtained, by the defendants' lessees.

Affirming, the appellate court stated that the act of sale's reservation "merely confirm[ed] the normal 10-year limit for a servitude, and does not reject or renounce the normal operation of nonuse and interruption provided by the law."[68]

The court rejected the plaintiffs' contention that they should have been allowed to present evidence regarding the intent of the parties, stating that the act of sale was unambiguous, and therefore the receipt of evidence of intent was not appropriate.

Taylor v. Morris[69] is a case with facts very similar to those presented in *Moffett*. However, it was decided by a different panel of the same appellate court.

---

65 149 So. 3d 475 (La. App. Ct. 2d 2014).

66 *Id*.

67 LA. REV. STAT. ANN. § 31:27(4). *See* text associated with note 54, *supra*. *See also* Ottinger, *Mineral Servitude Treatise*, § 408(4).

68 149 So. 3d at 478.

69 150 So. 3d 952 (La. App. Ct. 2d 2014).

This panel similarly held that an act of sale referring to a "period of ten (10) years" did not establish a fixed term, but instead merely referred to the law's default prescriptive period.[70]

Notably, one judge submitted a concurring opinion stating that, under the court's decision, "the literal words for a term period of years are being avoided and effectively interpreted out of the contract,"[71] but that such a result was justified "[i]n this unusual setting."[72]

The concurring judge identified two conceivable interpretations in cases under article 74, one being the "Prescription Construction" ("the presumption that the parties were only referring in their contract to such normal prescription"),[73] and the other being the "Literal Construction" ("words as literally expressing a term that could extinguish the servitude.").[74] He ordained the former as the "priority construction," saying, as follows:

> However, in the absence of such clarifying extrinsic evidence, I would hold that the near absurdity of a fixed-term mineral servitude on land, undeveloped for oil and gas, should make the Prescription Construction the priority interpretation which a court should apply.[75]

While this approach would certainly be workable, it is discordant with case law that suggests that, in case of two possible constructions, the court should adopt that interpretation that tends to unburden the land.[76] In a close case, the rule of interpretation is that "[d]oubt as to the existence, extent, or

---

70 *Id*. at 958

71 *Id*.

72 *Id*.

73 *Id*. at 960.

74 *Id*.

75 *Id*. at 961.

76 *See*, *e.g*., *Whitehall Oil Co. v. Heard*, 197 So. 2d 672, 678 (La. App. Ct. 3d), *writ den'd* 199 So. 2d 923 (La. 1967) ("Ultimately, we conclude that, where the instrument could as reasonably be interpreted either way, the proper interpretation is that which least restricts the ownership of the land conveyed, as in the case of mineral servitudes.").

manner of exercise of a predial servitude shall be resolved in favor of the servient estate."[77]

The principal consequence of the fixing of a term is that any mineral lease granted by such servitude owner would concomitantly come to an end, regardless of the existence of a well situated on the servitude tract. This is an illustration of the important doctrine of "conditional title."[78]

Takeaway

Here is the takeaway: If a party avails itself of one of the limited opportunities in the Mineral Code to contractually alter the intrinsic features of a mineral servitude, the scrivener should take special care to express clearly and unambiguously the intention of the parties—that is, to expressly state whether the servitude is being made subject to a strict, fixed term, or that the prescription period is being shortened (remaining otherwise subject to the usual rules of use).[79]

If, for example, parties to a mineral servitude wish to use a six-year period rather than the default period of ten years, this could be accomplished by including language as simple as one or the other of the following alternative constructs, *viz*.:

> It is the intention of the parties that the prescriptive period is shortened to six years, but is otherwise subject to the usual rules of nonuse.
>
> OR
>
> It is the intention of the parties that the reserved mineral servitude is subject to a fixed term of six years, and is not subject to rules pertaining to the interruption of prescription.

---

[77] LA. CIV. CODE ANN. art. 730, made applicable to the mineral servitude by LA. REV. STAT. ANN. § 31:2.

[78] "A mineral lease may be granted by the owner of an executive interest whose title is extinguished at a particular time or upon the occurrence of a certain condition, but it terminates at the specified time or on occurrence of the condition divesting the title." *Id*. at § 31:117. *See* Ottinger, *Mineral Lease Treatise*, § 3-08.

[79] *See* Ottinger, *Mineral Servitude Treatise*, § 415.

E. Restoration Responsibility of Servitude Owner to Surface Owner:

Even if the vendor's lawyer makes it perfectly clear and express that a mineral servitude (rather than a mineral royalty) is to be reserved, the discussion that follows might suggest that it is appropriate to inform the vendor of the potential consequences that might attend the ownership of a mineral servitude.

While the legal right to drill a well on a particular tract of land is indisputably granted by a mineral servitude,[80] and, indeed, although a landowner may drill a well on his own land in his own right,[81] wells in search of oil and gas are rarely drilled on such a basis. Rather, as was aptly observed by one court:

> Not one landowner in a hundred develops his own land. Even if he should be financially able to do so, not being in the oil business, he would not care to assume the risk. The usual and almost universal custom is to lease the land to an oil operator, ...[82]

But whether a well is drilled by a mineral lessee or the mineral servitude owner, the Mineral Code recognizes a certain affirmative restoration duty as being owed by the latter to the surface owner. Thus, article 22 of the Mineral Code provides, as follows:

> **Art. 22. Certain rights and obligations of mineral servitude owner**
>
> The owner of a mineral servitude is under no obligation to exercise it. If he does, he is entitled to use only so much of the land as is reasonably necessary to conduct his operations. He is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.[83]

---

80 LA. REV. STAT. ANN. § 31:21. *See* text associated with note 8, *supra*.

81 "Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it. The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others." LA. CIV. CODE ANN. art. 490.

82 *Mohawk Oil Co. v. Layne*, 270 F. 851, 854 (W.D. La. 1921).

83 LA. REV. STAT. ANN. § 31:22.

Case law is instructive in this regard. For example, in *Dupree v. Oil, Gas & Other Minerals, Inc.*,[84] a suit for damages to growing crops, roads, and culverts was brought by the surface owner against the lessors of a mineral lease, and their lessee. After the lessee filed for bankruptcy, and following the joinder of the owners of the mineral servitude, the plaintiff dismissed the mineral lessee.

The trial court granted a motion for summary judgment filed by the servitude owners on the basis that, following the execution of a mineral lease, the lessee, as the only party entitled to explore for and produce minerals, is the only party that may be liable for surface damages.

At issue on appeal was the liability of a mineral servitude holder to the surface owner for damages caused by the former's mineral lessee. The court of appeal refused to excuse the servitude owners from the statutory obligation to restore the surface imposed by article 22. The court reasoned that the servitude owners benefited from the lessee's activities, which interrupted the running of prescription on the servitude only several months before its extinguishment.

Moreover, the court noted that the mineral lease expressly obligated the lessee to indemnify the lessors for claims by the landowner, and the court refused to allow the servitude owners to benefit from the interruption of prescription while avoiding the obligations of article 22 of the Mineral Code.

Thus, by reversing the summary judgment in favor of the servitude owners, the court of appeal held that an owner of a mineral servitude may be liable for damages to the surface of land burdened by a mineral servitude that were caused by its lessee.

Another court, reversing the trial court's grant of an objection of prematurity, found "nothing in the mineral code that requires a landowner to wait until completion of all mineral production before he can bring a suit to enforce the mineral servitude's restoration obligations."[85]

Did your client assume that the ownership of a mineral servitude could only be a positive thing, an asset of potential value? Was your client informed of the potentially significant—dare one say, catastrophic—circumstance arising out of the ownership of a mineral servitude?

---

[84] 731 So. 2d 1067 (La. App. Ct. 2d), *writ den'd* 749 So. 2d 635 (La. 1999).

[85] *Crooks v. Louisiana Pacific Corp.*, 155 So. 3d 686, 688 (La. App. Ct. 3d 2014).

Inasmuch as many mineral servitudes are held by parties who were formerly owners of the land, but who have sold the land and created a mineral servitude by reservation in the sale, the implications on the "servitude owner" could be quite extreme. In other words, a servitude owner is not always—perhaps is virtually never—a Fortune 500 company, but is an individual, a married couple, or the proverbial "Mom and Pop." He or she who is, at one moment, the owner of the land, becomes, after the closing of the transaction, the owner of a mineral servitude (and no longer a landowner), and probably is one who was not educated or informed by the closing lawyer as to the potential consequences or exposure to the owner of the surface.

Takeaway

Here is the lesson to be learned: A lawyer representing a vendor of land, in which a mineral servitude is created by reservation in favor of that lawyer's vendor-client, should advise the soon-to-be mineral servitude owner of the potential for restoration liability. And while you are at it, why not get that advice in writing, signed by the client in order to acknowledge such information.

When the servitude owner grants a mineral lease, it should endeavor to exercise its right of "freedom of contact" so as to create a contractual undertaking in its favor whereby the lessee expressly obligates itself to protect the lessor (mineral servitude owner) by assuming its obligations to the surface owner under article 22 of the Mineral Code, and indemnifying the lessor-servitude owner from any claims by the surface owner.[86]

F. Imprescriptible Mineral Servitudes:

On first blush, amendatory legislation in 2012[87] would not seem to have much relevance as an "issue" in the Louisiana law of oil and gas, or mineral rights, in that it amends certain sections of Title 19 of the Revised Statutes, Expropriation, including (relevant for our immediate purposes) Section 2 of Title 19 that identifies the types of juridical persons enjoying the power of expropriation or condemnation.

---

[86] Of course, an indemnity by the lessee in favor of the lessor is only as good as the ability of the indemnitor to perform or respond. The indemnity in *Dupree* was of little comfort to the mineral servitude owner after the lessee went into bankruptcy.

[87] Act No. 702, 2012 La. Acts 2921.

This Act made numerous procedural and other changes to the law of expropriation (including a change to the so-called "*St. Julien* Doctrine"),[88] but for our immediate purposes, your presenter deems it appropriate to highlight only one amendment made to the statute.

Signed by the Governor on June 11, 2012,[89] Act No. 702 amended Louisiana Revised Statutes section 19:2 so as to expand the "created for" standard of eligibility for the right to expropriate, in order to now include a legal entity that is "engaged in" certain specified activities.

We must first digress. Article 149 of the Louisiana Mineral Code regulates the mineral servitude that is not subject to the prescription of non-use. Basically, if land is acquired by an "acquiring authority," and the vendor reserves minerals in such transaction, the "prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority, or any successor that is also an acquiring authority."[90]

As stated, these are euphemistically called "imprescriptible minerals,"[91] and constitute a statutory innovation dating back to the acquisition of vast quantities of lands in the '30's and '40's in connection with public works projects. The statutes were intended to put Louisiana landowners on a par with their Texas counterparts who had the ability—not enjoyed in Louisiana—to establish a perpetual mineral estate.[92]

---

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

[89] This legislation became effective on August 1, 2012.

[90] LA. REV. STAT. ANN. § 31:149B. *See* Ottinger, *Mineral Servitude Treatise*, § 418.

[91] One should note the inconsistent terminology employed in article 149. In one instance, reference is made to the servitude's "imprescriptibility"–that is, that it is *not* subject to prescription at all. *Id*. In another instance, it states that the "prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority, or any successor that is also an acquiring authority," a formulation suggestive of the notion that it is afflicted with prescription. *Id*.

[92] *Wemple v. Nabors Oil & Gas Co.*, 97 So. 666 (La. 1923).

As defined in article 149, an "acquiring authority" includes, in addition to the Federal and State governments (and certain political subdivisions thereof), "any legal entity with authority to expropriate or condemn, except an electric public utility acquiring land without expropriation."[93]

Louisiana Revised Statutes section 19:2 specifies the types of "legal entity with authority to expropriate or condemn," and, hence, enumerates those non-governmental legal entities that would constitute an "acquiring authority" as envisioned by Mineral Code article 149.

Prior to this legislation in 2012, those juridical persons included certain entities that were "created for" certain specific purposes, *e.g.*, the construction of railroads, toll roads, or navigation canals; the construction and operation of street railways, urban railways, or inter-urban railways; the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage; the piping and marketing of natural gas for the purpose of supplying the public with natural gas; the purpose of transmitting intelligence by telegraph or telephone; the purpose of generating, transmitting and distributing or for transmitting or distributing electricity and steam for power, lighting, heating, or other such uses, and piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline.

In view of the foregoing, prior to 2012, it was both necessary and sufficient to examine the organizational papers of a legal entity involved in such a transaction (a legal entity being a vendee in a sale of land wherein the vendor reserves a mineral servitude), in order to determine with certainty if the legal entity had been "created for" any of the purposes enumerated in Louisiana Revised Statutes section 19:2.

As noted, Act No. 702 of 2012 expanded the "created for" standard of eligibility for the right to expropriate or condemn, so as to now include a legal entity that is "engaged in" the specified activities.[94]

---

[93] LA. REV. STAT. ANN. § 31:149A(2).

[94] Although LA. REV. STAT. ANN. § 19:2(11) listed, as an entity having the right to expropriate, "any domestic or foreign limited liability company *engaged in* any of the activities otherwise provided for in this Section," this Subsection, by its explicit terms, does not reach or apply to corporations or partnerships.

Thus, if a corporation was created "for any lawful activity,"[95] or if a limited liability company was organized "for any lawful purpose,"[96] (and, hence, was not "created for" one of the enumerated purposes), but is in fact "engaged in" certain specified activities, a reservation of a mineral servitude in a sale of a land to such entity might be imprescriptible.

Here is where the situation gets a bit unclear or complicated. When, prior to the adoption of these amendments to the expropriation law, the standard by which one could ascertain if a legal entity had the power of expropriation was simply whether the entity was "created for" a stated purpose, a title examiner had the actual ability to scrutinize and examine the organizational articles of the pertinent legal entity,[97] and make a determination as to whether the vendee was an "acquiring authority,"[98] and, hence, to determine if the vendor's mineral servitude was (or was not) subject to prescription.

Now that the touchstone for the power of condemnation has been expanded to include an entity that is "engaged in" those specified activities (even if the entity is not explicitly "created for" such purpose), this new standard gives rise to a factual matter *not* reflected by the public records, and would seemingly require an inquiry as to the activities in which the entity is or has been "engaged."

And worse, the acquisition in question might be for purposes unrelated to the statutory activity, but if that entity is "engaged in" a prescribed activity in another parish or state (unrelated to the transaction at hand), is that

---

[95] As stated in LA. REV. STAT. ANN. § 12:1-301A, "[e]very corporation incorporated under this Chapter has the purpose of engaging in any lawful business or activity unless a more limited purpose is set forth in the articles of incorporation."

[96] "A limited liability company may be organized under this Chapter and may conduct business for any lawful purpose, unless a more limited purpose is stated in its articles of organization." *Id*. at § 12:1302A.

[97] The Model Business Corporation Act, effective January 1, 2015, has eliminated the requirement (under prior law) that the articles be filed in "the office of the recorder of mortgages of the parish in which the registered office of the corporation is located," (former) LA. REV. STAT. ANN. § 12:25D, now repealed. However, the articles would be available in the office of the Secretary of State, *id*. at § 12:1-123B.

[98] *See Calcasieu & S. Ry. Co. v. Bel*, 69 So. 2d 40, 41 (La. 1953) ("The plaintiff *by its charter* is an organization constituted under the laws of this state for the construction of a railroad, and is thus a corporation to which this article gives the right of expropriation."); *Central Louisiana Electric Co., Inc. v. Pugh*, 96 So. 2d 523, 525-26 (La. App. Ct. 2d 1957), and *Texas Eastern Transmission Corp. v. Terzia*, 138 So. 2d 874, 875-76 (La. App. Ct. 2d 1962) (court rejected an argument that the plaintiff-corporation failed to prove it had right of expropriation, calling such argument "so technical and unreasonable as to hardly be worthy of consideration.").

sufficient to bring that transaction within the ambit of article 149 so as to make the reserved servitude imprescriptible? Nothing in the new formulation requires that the land purchase (with attendant reservation of a mineral servitude) actually be effectuated in connection with a qualifying activity in which the vendee is then "engaged."[99]

In other words, a corporation or LLC "created for" the generic purpose of engaging in "any lawful" activity or purpose might actually be "engaged in" a qualifying activity in Bossier Parish, and thereby might enjoy the power of expropriation in Terrebonne Parish, even though its activities in that latter parish (some 300 miles away) are unrelated to the conduct of (or "engagement in") the specified activity.

So, if one is examining title to land in that southern parish, and finds that the vendee purchased property in a deed in which the vendor reserved minerals, is the mineral servitude prescriptible or not? What inquiry must the title examiner make in order to ascertain the status or character of the reserved mineral servitude?

Admittedly, the concern expressed herein might be assuaged somewhat by the requirement that the "instrument or judgment shall reflect the intent to reserve or exclude the mineral rights from the acquisition *and their imprescriptibility as authorized under the provisions of this Section* and shall be recorded in the conveyance records of the parish in which the land is located."[100]

If there is no reference in the deed to the minerals' "imprescriptibility as authorized under the provisions of this Section," the inquiry should end there. This conclusion is reinforced by the codal requirement that the "provisions of this Chapter shall not apply to: * * * [a] transfer in which the acquiring authority neither expressly reserves or excludes nor conveys to the transferor a mineral right otherwise subject to prescription."[101]

However, even with compliance with this requirement, it is still necessary to inquire into the underlying facts so as to determine that the vendee is in fact an "acquiring authority" by reason of the circumstance that the vendee (while not "created for" a certain purpose) has "engaged in" a prescribed activity.

---

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

[100] LA. REV. STAT. ANN. § 31:149B(2). (Emphasis added.).

[101] *Id*. at § 31:149G(2).

Said differently, merely stating, in the deed or judgment, that the reserved minerals are "imprescriptib[le] as authorized under the provisions of" article 149, does not make it so, unless it is actually so as a factual matter, compliant with the strictures of the relevant article. "Bootstrapping" is not allowed here.

This legislation creates an unnecessary burden on a title examiner and, thus, results in significant and unnecessary potential uncertainty in the law.

Takeaway

While important, the issue is admittedly academic until 2022 which is ten years after the 2012 amendment, followed by the creation of a qualifying servitude. So mark your calendar for then!! It will be here before you know it.

If the mineral servitude has been used, the issue will still remain academic, but if the servitude is not used within ten years of its post-amendment creation (in a sales transaction confected after August 1, 2012), it would be necessary to ascertain if the servitude is imprescriptible, by reason of having been created in a sale of land to an "acquiring authority" that has been "engaged in" a qualifying activity.

G. Usufructs and Minerals:[102]

One might encounter instruments that fail to distinguish between the usufruct, properly speaking, and other mineral rights, such as the mineral servitude. Especially where a particular duration is expressed, one should be cognizant of the prescriptive nature of a mineral right. Failing to employ clarity in this regard can lead to conflict and uncertainty, in the event of production.

For example, consider the following reservation contained in an act of donation, to-wit:

> Donor reserves unto himself, for life, the usufruct of the mineral rights affecting the subject property.

[102] *See* Ottinger, *Mineral Lease Treatise*, Chapter Nine.

If, prior to the donation, the donor owns the entirety of the described land, which is not subject to an outstanding mineral servitude, then, the donor owned the land, and the "rights" to minerals inherent in such ownership.[103]

Said another way, the landowner, properly speaking, "owns" no "mineral rights," but holds--in the words of article 6 of the Mineral Code--the "landowner's rights in minerals."[104]

One might contend that this is an impermissible attempt to deal with minerals separate and apart from the surface without the creation of a mineral servitude.

If such a reservation is to be construed as the creation of a mineral servitude, and if the donor lives for more than ten years after its creation, and no use of the minerals has been made, issues are presented as to the status of the reserved interest.

Takeaway

Another takeaway: If your vendor-client asks to reserve both a usufruct and a mineral servitude, endeavor to state with great clarity the nature and scope of the reserved interest, so as to clarify any issue with regard to the termination of such rights.

H. Operating Under Non-compliant Servitude:

Article 11 of the Louisiana Mineral Code articulates Louisiana's "doctrine of accommodation."[105] The article was amended in 2006 to add Subsection B, requiring that language be included in a sale of land in which minerals are reserved, to essentially alert the vendee (as the new landowner

---

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

[104] *See Hornsby v. Slade*, 854 So. 2d 441, 445-46 (La. App. Ct. 1st 2003), *writ granted* 866 So. 2d 833 (La. 2004); *case withdrawn* 2003-3018 (La. 2004) ("Our statutory schemes have distinguished the classification of land with mineral deposits and the classification of the alienation of component parts called mineral rights. The former are corporeal immovables subject to lesionary inquiry and the latter are incorporeal immovables not subject to a lesionary inquiry.").

[105] *See* Ottinger, *Mineral Lease Treatise*, § 3-10(a)(7). *Cf. Pennington v. Colonial Pipeline Co.*, 400 F. 2d 122 (5th Cir. 1968).

subject to the vendor's reserved mineral servitude) of the rights of the servitude owner to utilize the surface of the land.[106]

This requirement for the inclusion of particular language only applies to a mineral servitude created by reservation, but does not pertain if the servitude is created by grant.[107]

Subsection B(2) of the article sets forth a "safe-harbor" clause that might be included to accomplish the intent of the article.

As noted, article 11B makes no mention whatsoever of the consequences of a failure to comply with the article's new requirement. Does non-compliance with the textual requirements of the article mean that the reserved mineral servitude is not valid? Or might it mean that, while the non-compliant mineral servitude valid, no operations may be conducted on the surface of the burdened land?

If the vendor-servitude owner may not, for that reason, conduct operations on the surface of the burdened tract, may its lessee do so? Must the servitude owner or its lessee seek consent of the landowner to conduct operations? That this might be a concern to the lessee of such vendor is supported by the observation that one may not grant greater rights to another than it itself owns.[108]

Any requirement that the servitude owner (or its lessee) must seek the permission or consent of the landowner to operate on the servitude tract, is totally contrary to the essential nature of a mineral servitude, which is that the servitude owner may conduct operations on the burdened land, *without the need to secure the consent of the landowner*.[109] Indeed, the servitude itself constitutes the authority to enter the land and drill a well, as that is its inherent purpose.

---

[106] Act No. 446, 2006 La. Acts 1828. Article 11B(1) of the Mineral Code now provides, as follows:

> A reservation of mineral rights in an instrument transferring ownership of land must include mention of surface rights in the exercise of the mineral rights reserved, if not otherwise expressly provided by the parties.

[107] LA. REV. STAT. ANN. § 31:15. *See* text associated with note 9, *supra*.

[108] *See* Ottinger, *Mineral Lease Treatise*, § 2-09, for authority supporting the proposition that a party cannot grant, lease or convey any greater rights than it holds or owns.

[109] *See*, *e.g.*, *Peabody v. Weeks*, 129 F. 3d 608 (5th Cir. 1997) ("[T]he [trial] court found that Weeks had impermissibly interfered with the mineral owners' reasonable use of the land to reach their minerals, and that their actions were 'plainly contrary to the fundamental tenets of the Louisiana Mineral Code.'").

Takeaway

In the view of your presenter, the 2006 amendment to article 11 was nothing more than "feel good" legislation. This presenter's personal preference would be to repeal and remove that amendment (restoring article 11 to its original verbiage), but if not, one should be mindful of the need to comply with this requirement in the preparation of a sale deed in which minerals are reserved.[110]

III. Issues on Mineral Royalties

A. Preface:

"A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another."[111] In contrast to a mineral servitude, a mineral royalty is a passive right, conferring on its holder the right to receive revenue in case production is obtained through the efforts and capital of others.[112]

Although it is more typically brought about by a sale of a mineral royalty, called a "Royalty Deed," a mineral royalty may certainly be created by reservation.

B. "Royalty Acres":

A recurring, but regrettable, occurrence in connection with the sale or reservation of a mineral royalty is the use of the term "royalty acres."[113] This typically reads, as follows:

> Grantor is hereby [conveying] [reserving] 22 royalty acres.

In the event of production, the interest in production to which a royalty owner is due is calculated by the operator, and is customarily expressed

---

[110] *See* Ottinger, *Mineral Lease Treatise*, § 11-03.

[111] LA. REV. STAT. ANN. § 31:80. *See* PATRICK S. OTTINGER, *Mineral Royalties*, Louisiana Mineral Law Treatise, Chapter Five (Martin, ed., Claitor's Law Publishing, 2012).

[112] *Spiner v. Phillips Petroleum Co.*, 94 F. Supp. 273 (W.D. La. 1950).

[113] A "royalty acre" is commonly understood to be the economic equivalent of one surface acre leased at a 1/8th royalty.

in decimals.[114] The accepted formula to calculate a royalty interest (in decimals), if one knows the number of royalty acres and the total number of acres in a tract of land, is to divide the royalty acres by the total acreage, and multiply by one-eighth (1/8). However, if the number of acres is shown to be inaccurate by a later survey, the royalty interest will necessarily change, thus arguably not effectuating the intention of the parties.

Courts have recognized that "the term [royalty or] mineral acres has usage in the oil industry but does not have a simple definite meaning which is easily understood by a person who has little or no experience in the field of minerals."[115]

The uncertainty of the meaning of this term often leads to conflict, in the event of production, and certainly to the need to undertake curative efforts or the institution of a concursus proceeding.

The term "royalty acres" is often used as a "rule of thumb" basis to calculate the purchase price for the mineral royalty, such as "$200 per royalty acre."

Even if the term is understood by the contracting parties (which is unlikely), if it is determined that the tract involved is of a different size than the parties anticipated or believed it to be, problems may occur. Certainly, the expectation of one party or the other will not be achieved.

Yet another problem is presented when the reservation of a mineral royalty in the sale of land states that the "vendor reserves *all* mineral royalty." This typically occurs when the scrivener takes a form of reservation of a mineral servitude ("Vendor reserves *all* minerals as a mineral servitude"), and merely changes the word "servitude" to "royalty." The former works; the latter does not.

When the vendee who owns the rights to minerals later undertakes to grant a mineral lease, the prior recorded deed of "all" of the mineral royalty, leaves no entitlement to revenue to be enjoyed by either the lessor or its lessee.

Takeaway

This is a simple admonition: The phrase "royalty acres," or (while we are at it) "mineral acres," should be avoided. In like manner, one should not reserve "all" mineral royalty, as to do so necessarily withdraws the revenue feature from the rights in minerals inuring to the vendee in a sales transaction.

---

[114] *See* Ottinger, *Mineral Lease Treatise*, § 3-10(a)(6).

[115] *Light v. Crowson Well Service, Inc.*, 313 So. 2d 803, 806 (La. 1975).

IV. Issues on Mineral Leases[116]

A. Preface:

The real estate lawyer is not typically involved in the granting of a mineral lease (although she certainly may be).[117] Rather, the real estate lawyer will more typically encounter a mineral lease in the title examination that often precedes the sales transaction.

The "issues" that follow represent certain topics involved in that regard.

B. Divisibility of Mineral Lease:

The lawyer who conducts a title examination in anticipation of closing a sales transaction might encounter existing mineral leases, as well as transfers of such leases.[118] Issues presented include the status of the lease (viable or expired), and who has the right to operate under the lease. It is necessary to take into consideration, not only the existence of the lease, but also the ownership of such contract. This entails an examination of each instrument of transfer of the mineral lease.

Although both the assignment and the sublease will certainly accomplish the transfer of the working interest under the mineral lease (presumably the principal objective of the transaction), certain consequences are presented by the characterization given to one type of transfer or the other. The distinction between an assignment and a sublease has no significant legal consequences in other oil and gas producing states. "In Louisiana, however, the distinction has been of considerable importance."[119]

---

[116] Portions of this Part are an adaptation of material contained in Ottinger, *Mineral Lease Treatise,* and presented in Patrick S. Ottinger, *What's in a Name? Assignments and Subleases of Mineral Leases Under Louisiana Law*, 58 ANN. INST. ON MIN. LAW 283 (2011).

[117] *See* Ottinger, *Mineral Lease Treatise*, § 1-25.

[118] "The lessee's interest in a mineral lease may be assigned or subleased in whole or in part." LA. REV. STAT. ANN. § 31:127.

[119] 2 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law*, § 412 (LexisNexis Matthew Bender 2015).

This is so because the proper characterization of a transfer document as being either an assignment or a sublease gives rise to a myriad of significant consequences, not all of which are readily apparent.

One of the more significant "issues" arising out of the distinction between an assignment and a sublease is the potential that a mineral lease might be "divided" by a partial assignment (but not by a sublease),[120] if the mineral lease contains a "Division of Rental Clause."[121]

To "divide" a mineral lease is to turn one mineral lease into two (or more) leases, each standing alone and having separate lease maintenance obligations.[122]

A "Division of Rental Clause" provides, in essence, that, "[i]n the event of an assignment of the lease as to a segregated portion of the land, delay rentals shall be apportioned among the several leasehold owners according to the surface area of each, and default in payment by one shall not affect the rights of others."

Particularly in connection with the purchase and sale of producing mineral leases, the purchaser, in conducting its due diligence, should be mindful of this possibility, and investigate the leasehold history of the leases in order to discern if any prior partial assignment in the chain of title has resulted in lease division.[123]

In the seminal case on this subject,[124] the court relied upon the "Division of Rental Clause" as giving rise to a division of the lease in case of a partial assignment.

---

[120] *See* Ottinger, *Mineral Lease Treatise*, § 4-28(d)(3). This clause is also called an "Apportionment of Rental Clause."

[121] *See id*., § 4-28.

[122] "The unarticulated premise of these cases is that in the absence of such provisions the lease would be indivisible in the sense that a partial assignment would not have the effect of creating two leases where but one existed before." LA. REV. STAT. ANN. § 31:130, cmt.

[123] *See* Patrick S. Ottinger, *Closing the Deal in the Bayou State: The Purchase and Sale of Producing Oil and Gas Properties*, 76 LA. L. REV. 691, 738 (2016).

[124] *Swope v. Holmes*, 124 So. 131 (La. 1929).

In *Roberson v. Pioneer Gas Co.*,[125] the court again considered the issue of whether a certain transfer of a mineral lease was an assignment or a sublease. It articulated the following distinction between the two types of transfer, to-wit:

> The distinction between an *assignment of a lease* and a *sublease* is that, in an assignment, the assignor transfers his entire interest in the lease in so far as it affects the property on which the lease is assigned; whereas, in a sublease, the original lessee, or sub-lessor, retains an interest in the lease in so far as it affects the property subleased -- by imposing some obligation upon the sublessee in favor of the sub-lessor, such as an obligation to pay additional rent to the sublessor.[126]

The mineral lease covered 125 acres, and the lessee assigned the lease as to 25 acres, with no reservation sufficient to render the transaction a "sublease."

The mineral lease contained a "Division of Rental Clause." The court noted that such a clause "made the lease a divisible one,"[127] citing *Swope v. Holmes*.[128] Thus, the partial assignment divided the lease, and the drilling of a well on one portion of the lease did not have any effect as to the other portion of the lease.

In *Noel Estate, Inc. v. Murray*,[129] the plaintiff-lessor sought cancellation of mineral lease on the whole of 60 acres. The lessee had obtained production on 10 acres, and then later assigned the lease on the other 50 acres. No production was secured on the 50-acre tract. The court canceled the lease as to the 50-acre tract, but not as to the 10-acre tract on which a well was located. Both parties appealed.

The mineral lease contained a clause that "recited that the rights of either party thereunder could be assigned in whole or in part."[130]

---

125 137 So. 46 (La. 1931).

126 *Id*. at 48. (Emphasis supplied by court.).

127 *Id*. at 47.

128 *Supra* note 124.

129 65 So. 2d 886 (La. 1953).

130 *Id*. at 887. The clause in the instant mineral lease differs from the clause in *Swope v. Holmes*, *supra* note 124.

By assigning the lease on the 50-acre tract, the court held that the lessee "divided a divisible lease, creating in favor of Smith an independent lease on the north 10 acres."[131] Production never having been obtained on 50 acres, the lease as to that tract was properly canceled. Production on the retained 10 acres did not have the effect of perpetuating the "other" lease on the 50 acres.

This presenter questions the court's reliance on this lease provision to find a division, since the principal purpose of this clause is of a different focus, *viz.*, the apportionment of delay rentals among two or more assignees of a segregated portion of the leased premises, and the consequences of default in payment by one such assignee.

The court in *Hoover Tree Farm, L.L.C. v. Goodrich Petroleum Co., L.L.C.*,[132] seems to have embraced this observation when it noted, as follows:

> While the contractual provision itself [*i.e.*, the "Division of Rental Clause"] contemplated only a type of limited lease division upon the nonpayment of a portion of the lease rentals during the primary term, both Sun Oil and Roberson without explanation interpreted the clause broadly and by implication ruled that a lease containing such provision would be divided for all purposes into two leases upon the transfer of the entirety of the leasehold rights to a specific geographical portion. Such broad interpretation therefore moved the clause beyond merely the subject of rental payment default to effect a stringent modification of the typical habendum clause principle for maintenance of the entire lease beyond the primary term by the operations and production of one well.[133]

Takeaway

Thus, one should be aware of the potential of lease division, and of the consequences on lease maintenance. While article 130 of the Louisiana Mineral Code provides that a "partial assignment or partial sublease does not

---

131 65 So. 2d at 888.

132 63 So. 3d 159 (La. App. Ct. 2d), *writ den'd* 69 So. 3d 1161-62 (La. 2011).

133 *Id*. at 174.

divide a mineral lease,"[134] that is not a statement of public policy that cannot be modified in the exercise of "freedom of contract."[135]

This is particularly so in the Haynesville Shale in Northwest Louisiana, in which many old mineral leases are HBP[136] from shallow production, and have been subject to numerous instruments of transfer at various subsurface depths over many years. The potential that the rule of divisibility would be held applicable to a horizontal transfer of a mineral could lead to significant—arguably catastrophic--consequences, in that shallow production might not hold deeper rights, or *vice versa*.[137] Such a ruling would clearly result in a new "Gold Rush" as lessees would be faced with lease expiration and significant accounting issues to lessors.

C. The Executive Right is Alienable and Heritable:

Despite the pronouncement in article 16 of the Mineral Code that there are three "basic" mineral rights, there is yet another mineral right, albeit not characterized by the Code as being "basic," making it somewhat akin to the "Uncola," or the "other white meat" of oil and gas, both of Madison Avenue fame. That is the "executive right,"[138] defined in article 105 of the Code as "the exclusive right to grant mineral leases of specified land or mineral rights."[139]

Mineral Code article 106 explicitly characterizes the executive right as a mineral right, thus invoking the attributes specified in article 16 for those interests as being "real rights [that] are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."[140] Importantly for our consideration of this "issue," article 18 provides

---

134 LA. REV. STAT. ANN. § 31:130.

135 *Id*. at § 31:3.

136 "HBP" means "held by production."

137 *See*, *e.g.*, *Guy v. Empress, L.L.C.*, 193 So. 3d 177 (La. App. Ct. 2d), *writ den'd* 208 So. 3d 376 (Mem.) (La. 2016), in which a horizontal division of a mineral lease was sought, but denied by the court.

138 Although article 16 states that the "basic" mineral rights are the mineral servitude, the mineral royalty, and the mineral lease, the executive right is explicitly stated in article 106 to be a "mineral right." *See also* Ottinger, *Mineral Lease Treatise*, § 7-08.

139 LA. REV. STAT. ANN. § 31:105. *See* Ottinger, *Mineral Lease Treatise*, Chapter 7.

140 LA. REV. STAT. ANN. § 31:16.

the further characterization of the executive right as being alienable and heritable.[141]

The fact that the owner of an executive right is free to alienate it, or that the exclusive leasing right would be subject to the law of inheritance, ought to give concern to the party creating the right.

An executive right is a "thing," and could actually be a "thing" of great value.[142] As held by a deceased, it constitutes part of his estate.[143] As such, it devolves upon the heirs or legatees of the decedent.[144]

An undesirable situation might arise if the executive right owner bequeaths his estate in general, or the executive right in particular, to a multitude of parties. The need to deal with a vast number of parties in order to grant a mineral lease defeats the very purpose of the executive right, which often is to facilitate ease of leasing by a competent, experienced person.

Equally undesirable is the situation where the executive right is bequeathed, or falls by intestacy, to a person or persons who are totally unfit to serve in such capacity.

One who creates an executive right obviously has a degree of faith, confidence and trust in the person to whom this right is initially granted, but may not have the same level of faith, confidence or trust in a stranger to whom it might be alienated, or in the heirs or legatees of the executive right owner. This is particularly so if the heirs or legatees of the executive right owner are minors, or are impaired or incapable of managing their own affairs, not to mention having absolutely no talent or experience in the leasing of minerals.

---

[141] *Id*. at § 31:18.

[142] "Things are divided into common, public, and private; corporeals and incorporeals; and movables and immovables." LA. CIV. CODE ANN. art. 448.

[143] "The estate of a deceased means the property, rights, and obligations that a person leaves after his death, ..." *Id*. at art. 872.

[144] "In the absence of valid testamentary disposition, the undisposed property of the deceased devolves by operation of law in favor of his descendants, ascendants, and collaterals, by blood or by adoption, and in favor of his spouse not judicially separated from him, in the order provided in and according to the following articles." *Id*. at art. 880.

Takeaway

In order to obviate this possibility, the party creating the right should either negate or deny the owner's ability to transfer it,[145] or make it "strictly personal" to the original grantee,[146] and subject to termination at the death of the executive. One might consider language such as the following in order to achieve this objective, to-wit:

> Anything herein contained to the contrary notwithstanding, it is expressly understood and agreed that the rights conferred upon Grantee, as owner of the executive right herein [granted] [reserved], (i) are strictly personal to Grantee; (ii) shall not be conveyed, delegated or otherwise transferred by Grantee without the prior written consent of Grantor (which consent may be withheld for any reason whatsoever), and (iii) shall terminate upon the death or incapacity of Grantee; *provided*, *however*, that the termination under such circumstances shall be without prejudice to any lawful acts taken by Grantee pursuant to such executive right, prior to such event of termination.

D. Right to Demand Recordable Instrument of Termination:

In examining title to lands that are to be the subject of a pending sale, the title examiner might encounter a mineral lease that is, on its face, beyond its primary term, but that remains uncancelled in the public records. The mere fact that the primary term of the mineral lease has accrued does not necessarily establish that the lease has expired inasmuch as operations or production might be ongoing so as to continue it in force and effect.[147] Those operations or production might also be on lands other than the leased premises, such as in a unit containing the leased premises.

---

[145] "Rights and obligations arising from a contract are heritable and assignable unless the law, the terms of the contract or its nature preclude such effects." LA. CIV. CODE ANN. art. 1984. *See Bryan v. Griggs*, 128 So. 3d 1255, 1264 (La. App. Ct. 2d 2013) ("Based upon the entire record in this case, it is clear that the obligations created by the letter agreement were strictly personal on the part of the obligor, Bryan, and required the special skills or qualifications that he represented that he possessed.").

[146] "An obligation is strictly personal when its performance can be enforced only by the obligee, or only against the obligor." LA. CIV. CODE ANN. art. 1766.

[147] ". . . operations on the land burdened by the lease or land unitized therewith sufficient to maintain the lease according to its terms will continue it in force as to the entirety of the land burdened." LA. REV. STAT. ANN. § 31:114.

Obviously, the vendee, as the new owner of the land, will be most interested in knowing if its land remains burdened by the recorded mineral lease, with the possibility that future operations might be undertaken under the lease, frustrating a particular use anticipated by the new owner. Equally important as a reason to "clean up the public records" is to remove any future impediment to the next leasing opportunity from a potential lessee.

Louisiana law provides a mechanism to effect the cancellation of the expired mineral lease of record.[148] Thus, article 206 of the Louisiana Mineral Code provides, as follows:

> **Art. 206. Obligation of owner of expired mineral right to furnish recordable act evidencing extinction or expiration of right; mineral lease**
>
> A. Except as provided in Paragraph B of this Article, when a mineral [lease] is extinguished by . . . expiration of its term, or otherwise, the former owner shall, within thirty days after written demand by the person in whose favor the right has been extinguished or terminated, furnish him with a recordable act evidencing the extinction or expiration of the right.
>
> B. When a mineral lease is extinguished prior to the expiration of its primary term, the former lessee shall, within ninety days after the extinguishment, record an act evidencing the extinction or expiration of the lease in the official records of all parishes wherein the lease is recorded.[149]

Paragraph A of article 206 applies to the situation where a mineral lease "is extinguished by . . . expiration of its term, or otherwise." Seemingly, when read in connection with Paragraph B (which explicitly addresses a termination of a mineral lease "*prior to* the expiration of its primary term"), this paragraph contemplates that the mineral lease has accrued its entire primary term, and then expires at that point, or some point in time thereafter.

---

[148] As will be seen, this article also applies to other mineral rights, including the mineral servitude and mineral royalty. Our discussion considers an expired mineral lease, but the remedy would apply equally to a prescribed mineral servitude or royalty.

[149] *Id*. at § 31:206.

In a case regulated by Paragraph A, it is incumbent on the lessor to make "written demand" on the lessee, calling upon the lessee to provide a written release of the expired mineral lease. The lessee must accomplish this within 30 days of receipt of the written demand.

Paragraph A of article 206 does not require that the former lessee actually record the instrument of release, but, rather, that the former lessee must "furnish" the instrument to "the person in whose favor the [mineral lease] has been extinguished or terminated."

In contrast, under Paragraph B of article 206, if the mineral lease terminates "prior to the expiration of its primary term," it is not required that the lessor write a demand letter to its lessee. Rather, the lessee is under the affirmative duty to record the instrument of release (not merely furnish it to its lessor). This must be accomplished within 90 days of the termination of the mineral lease. The most relevant example that would invoke Paragraph B of article 206 would be the failure of the lessee to pay a delay rental during the primary term, resulting in the *ipso facto* termination of the lease.[150]

Your presenter has been consulted by real estate practitioners expressing concern that the pertinent mineral lease might have been affected by numerous transfers to third parties, and that it is unclear as to whom—among a series of transferees—the written demand envisioned by article 206A must be sent. Comfort might exist in the provisions of article 132 of the Mineral Code, reading, as follows:

> **Art. 132. Demands by lessor; effect on assignee or sublessee**
>
> An assignee or sublessee is bound by any notice or demand by the lessor on the lessee unless the lessor has been given written notice of the assignment or sublease and the assignment or sublease has been filed for registry. If filing and notice have taken place, any subsequent notice or demand by the lessor must be made on the assignee or sublessee.[151]

Article 207 of the Louisiana Mineral Code specifies the consequences of a lessee's failure to meet its obligation under article 206. This article reads, as follows:

---

[150] "A mineral lease terminates at the expiration of the agreed term or upon the occurrence of an express resolutory condition." *Id*. at § 31:133.

[151] *Id*. at § 31:132.

Art. 207. Effect of failure to furnish act evidencing extinction or expiration of right; mineral lease

> If the former owner of the . . . expired mineral [lease] fails to furnish the required act within thirty days of receipt of the demand or if the former lessee of a mineral lease fails to record the required act within ninety days of its extinguishment prior to the expiration of its primary term, he is liable to the person in whose favor the right or the lease has been extinguished or expired for all damages resulting therefrom and for a reasonable attorney's fee incurred in bringing suit.[152]

Takeaway

So a mechanism and remedy is available to the closing lawyer to seek the cancellation of an expired mineral lease of record. However, it is the rare closing in which parties have the luxury of time involved in enforcing this remedy. When time is of the essence, the lawyer will have to undertake the effort to achieve a level of comfort that the mineral lease has in fact expired. This might be done in a variety of ways.

One approach, although not conclusively decisive of the issue, is to obtain an affidavit from the vendor that no monies have been received for some period of time, or otherwise attesting to the defunct or ineffectual status of the mineral lease. While, in practice, this is the easiest way to address the situation, it is of little comfort or utility if the vendor is not sophisticated; is unwilling to attest to these matters, or simply does not have sufficient information to attest to the relevant circumstances of non-activity.

Another way to address the situation is to investigate the mineral activity on the land or in its vicinity (or lands pooled therewith), and draw the necessary conclusion as to the status of the facially expired mineral lease. This may be done by either hiring a land man to prepare a "mineral history," or reviewing the on-line records of the Louisiana Office of Conservation, principally through its Strategic Online Natural Resources Information System, or SONRIS.

---

[152] *Id*. at § 31:207.

V. Other Tidbits

A. Preface:

A couple of our "tidbits" do not quite fit into the categories set forth above, but are worthy of consideration to the real estate practitioner.

B. "Subsequent Purchaser Doctrine":

In 2003, the Louisiana Supreme Court rendered its decision in *Corbello v. Iowa Production*.[153] This significant case has led to a spate of law-suits seeking monetary awards for the actions of a lessee in failing to adequately (from the viewpoint of the landowner) restore the surface, and to remediate any environmental damages allegedly caused by the lessee's operations. These suits are euphemistically called "legacy lawsuits."[154]

In some instances, the cases brought by plaintiffs were dismissed because the alleged damage had occurred *prior to* the acquisition of the land by the plaintiff-landowner. Courts have disallowed these claims by the "subsequent purchaser" of the land burdened by a mineral lease, unless the vendor who owned the land at the time of the damage, had expressly assigned to the vendee, the right to assert claims for damage to the land arising prior to the sale, a right deemed "personal," not "real" in character. This is called the "subsequent purchaser doctrine."

The "subsequent purchaser doctrine" finds its origin in the fact that a claim for damages to immovable property is a personal right against the party who is responsible for the damage, not a "real right" burdening the land. As stated in official comment (f) to article 1764, Louisiana Civil Code:

> Louisiana courts have held that the . . . damages due to the owner of a thing for its partial destruction or for an interference with the owner's rights, belong to the

---

[153] 850 So. 2d 686 (La.), *rehearing granted in part, opinion clarified, and otherwise rehearing den'd* 850 So. 2d 714 (La. 2003); *judgment rendered on remand*, 851 So. 2d 1253 (La. App. Ct. 3d 2003).

[154] "'Legacy litigation' refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of this Court's decision in *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03); 850 So. 2d 686. These types of actions are known as 'legacy litigation' because they often arise from operations conducted many decades ago, leaving an unwanted 'legacy' in the form of actual or alleged contamination." *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 239, fn. 1 (La. 2010).

> person who was owner at the time of the . . . destruction, or interference. These are personal rights that are not transferred to a successor by particular title without a stipulation to that effect.[155]

Thus, "[t]he general Louisiana rule is that a purchaser cannot recover from a third party for property damage inflicted prior to the sale."[156] At least in theory, the law contemplates that the condition of the land was taken into consideration when the vendor and vendee agreed upon the purchase price, such that the purchaser has already been compensated, by way of a reduction in the sales price, for the condition of the land.[157]

While the doctrine is of broader application, it has been applied in a number of cases involving suits by purchasers of contaminated land against lessees under mineral leases for damages due to unremediated environmental conditions caused by the conduct of drilling and production activities on the land subject to the mineral lease.

Illustrative of the doctrine is the case of *LeJeune Brothers, Inc. v. Goodrich Petroleum Co., L.L.C.*,[158] in which the trial court granted an operator's motion for summary judgment and peremptory exception raising the objection of no right of action, and dismissed all of a property owner's claims in a pending legacy oilfield suit. The appellate court upheld the trial court's decision.

LeJeune Brothers, Inc., the property owner, claimed that Goodrich Petroleum Company, L.L.C., a company whose predecessor-in-interest had operated an oil and gas well on the property at issue, was liable to LeJeune for damages arising in tort and in contract, punitive damages, as well as damages for claims arising under the Louisiana Mineral Code.

Goodrich's predecessor-in-interest had operated pursuant to a 1970 mineral lease that had been executed with LeJeune's predecessor-in-

---

[155] LA. CIV. CODE ANN. art.1764, cmt. (f).

[156] *St. Jude Medical Office Building Limited Partnership v. City Glass and Mirror, Inc.*, 619 So. 2d 529, 530 (La. 1993).

[157] "This personal right [to assert a claim 'against the tortfeasor for the disturbance of his real right in the property'] exists even during and after his disposal of the property, as it is assumed the apparent damage would result in a loss of value to the property which would be reflected in the sale price." *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246, 275 (La. 2011).

[158] 981 So. 2d 23 (La. App. Ct. 3d 2007), *writ den'd* 978 So. 2d 327 (La. 2008).

interest. LeJeune claimed that it was only after the purchase of the property in 2000 that it discovered that the property was contaminated with waste resulting from oilfield exploration and production activities.

The well at issue was drilled in 1976, and was plugged and abandoned in 1987. In 1999, production from the mineral lease ceased entirely. LeJeune purchased the property on September 19, 2000, from a party who was the original mineral lessor. As part of the purchase, LeJeune's predecessor-in-interest reserved a mineral servitude in and to one-half (1/2) of the rights in and to the minerals. LeJeune filed suit in 2003.

In dismissing LeJeune's contract claims, the trial court ruled that LeJeune was not a successor or assignee to its predecessor-in-interest's rights and obligations under the mineral lease, as the lease had expired prior to its purchase of the land. The trial court also found that LeJeune's claims for damages arising in tort that belonged to its predecessor-in-interest had not been transferred to LeJeune. Thus, the trial court granted Goodrich's peremptory exception raising the objection of no right of action, dismissing all of LeJeune's tort claims.

The appellate court upheld the trial court's grant of Goodrich's peremptory exception raising the objection of no right of action based on the "subsequent purchaser doctrine." The September 2000 sale from LeJeune's predecessor-in-interest to LeJeune did not contain a specific assignment of any claims for damage to the property.

In reaching the conclusion that LeJeune did not acquire rights to sue in tort as a result of its purchase of the property, the appellate court disagreed with LeJeune's argument that the writ grant decision rendered in *Hopewell, Inc. v. Mobil Oil Co.*,[159] "overturned consistently held jurisprudence that the right to assert a claim for damages to land is a personal right, not a real right, and can only be transferred through a specific assignment of that right."[160]

The appellate court explained that the *Hopewell* decision did not establish a new legal principle, and reiterated that the rule in *Prados v. South Central Bell Telephone Co.*[161] applied--"the right to damages conferred by a lease was a personal right, not a property right, and as a personal right/obligation, it did

---

159 784 So. 2d 653 (La. 2001).

160 981 So. 2d at 31.

161 329 So. 2d 744 (La. 1975).

not pass to the new owners of the land because there was no specific conveyance of it in the instrument of sale."[162]

In the next significant case to consider the "subsequent purchaser doctrine,"[163] the landowners filed suit against Chevron and its assigns, seeking to recover damages for environmental contamination alleged to have arisen out of more than 60 years of oil and gas operations conducted on the property.

The trial court granted peremptory exceptions raising the objection of no right of action filed by Chevron, Merit, and Devon, thereby dismissing them as parties to the lawsuit. The trial court overruled similar exceptions filed by all other defendants who conducted operations on the property *after* the date of landowners' acquisition of the property, but did grant various peremptory exceptions raising the objection of no cause of action. The landowners appealed.

On appeal, the landowners presented numerous arguments, all of which the appellate court rejected. First, the landowners argued that they had a right of action against Chevron, Merit and Devon on the basis of the "subsequent purchaser doctrine."

The court stated, as follows:

> The general rule . . . is that a purchaser cannot recover from a third party for property damage inflicted prior to the sale. . . . It is the landowner at the time of the alleged damages who has the real and actual interest to assert a claim.
>
> The right to damages conferred by a lease . . . is a personal right, not a property right; and, as a personal right, it does not pass to the new owners of the land when there is no specific conveyance of that right in the instrument of sale.[164]

---

[162] *Hopewell, Inc. v. Mobil Oil Co.*, *supra* note 158, at 31 [citing *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 844 So. 2d 380 (La. App. Ct. 3d), *writ den'd* 857 So. 2d 476 (La. 2003); *May v. Texaco, Inc.*, 73 Fed. Appx. 78 (5th Cir. 2003), and *Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc.*, 380 F. Supp. 2d 755, 771 (W.D. La. 2004)].

[163] *Wagoner v. Chevron USA Inc.*, 55 So. 3d 12 (La. App. Ct. 2d 2010), *writ den'd* 83 So. 3d 1032 (La. 2012) (on rehearing).

[164] *Id*. at 23.

The court found no express assignment of such a personal right in the landowners' deed of acquisition.

The appellate court issued its original opinion by which it reversed the trial court as to the peremptory exceptions raising the objection of no right of action against Chevron, Merit, and Devon. Shortly thereafter, the Louisiana Supreme Court rendered its decision in *Marin v. Exxon Mobil Corp.*[165] The court in *Wagoner* granted a rehearing "for the purpose of deciding whether the Plaintiffs have a right of action against Defendants,"[166] and, with the benefit of *Marin*, affirmed the trial court's decision to grant the asserted objections filed by Chevron, Merit, and Devon.

In *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*,[167] the plaintiff, Eagle Pipe, operated a pipe yard in Lafayette Parish pursuant to a surface lease (not a mineral lease). It sued a number of oil companies, trucking companies and other parties that, over the years, had stored pipe in that yard.

Plaintiff "asserted that radioactive scale known by the acronym TENORM[168] was removed from the tubing or pipes during [a prior lessee's] cleaning process and was deposited onto the surface of the pipe yard, contaminating the soil where Eagle Pipe now conducts its business."[169]

"All of the defendants filed, or joined in, the peremptory exception of no right of action, arguing Eagle Pipe had no right to assert a claim for damage to the property which occurred before Eagle Pipe was its owner. After a hearing on the exceptions, the trial court ruled, *inter alia*, that the defendants' exceptions of no right of action be sustained, dismissing Eagle Pipe's claims with prejudice."[170]

"Thereafter, the plaintiff filed an appeal with the Fourth Circuit Court of Appeal. On original hearing, a three-judge panel affirmed the trial court's ruling on the exception of no right of action by a two-to-one vote. On rehearing before a five-judge panel, the court of appeal majority reversed the judgment of the district court with respect to its ruling on the exception of no right of action."[171]

---

165 *Supra* note 154.

166 55 So. 3d at 20.

167 *Supra* note 157.

168 "TENORM" means "Technologically Enhanced Naturally Occurring Radioactive Materials."

169 79 So. 3d at 253-54.

170 *Id*. at 254.

171 *Id*. at 254-55.

Writs were granted.[172] The author of the majority opinion stated the issue, as follows:

> We granted writs to determine whether a subsequent purchaser of property has the right to sue a third party for non-apparent property damages inflicted before the sale in the absence of the assignment of or subrogation to that right.[173]

A deeply divided Supreme Court held that the "subsequent purchaser doctrine" operated to deny a right of action to the plaintiff.[174]

Plaintiff strongly urged the court to recognize a limitation on the doctrine where the defects were non-apparent. The court declined to impose that limitation on the "subsequent purchaser doctrine," stating, as follows:

> After review, we find the fundamental principles of Louisiana property law compel the conclusion that such a right of action is not permitted under the law. Instead, the subsequent purchaser has the right to seek rescission of the sale, reduction of the purchase price, or other legal remedies.[175]

As noted, this case is not one that involved a mineral lease; the plaintiff operated a surface lease, and sought damages for contamination caused by radioactive material deposited on the property by the defendants.

Indeed, in a footnote, the Louisiana Supreme Court stated the following, to-wit:

> Moreover, because not factually relevant, we express no opinion as to the applicability of our holding to fact situations involving mineral leases or obligations arising out of the Mineral Code.[176]

---

[172] 56 So. 3d 982 (La. 2011).

[173] 79 So. 3d at 252.

[174] Written by Justice Clark, dissents were entered by Justice Johnson, Justice Weimer and Justice *ad hoc* Lobrano (sitting for Justice Knoll, recused), and concurrences were written by Justices Guidry and Victory.

[175] *Id*. at 252.

[176] *Id*. at 281, n. 80.

More recently, in *Boone v. ConocoPhillips Co.*,[177] the court applied the "subsequent purchaser doctrine" to a case involving a mineral lease. The court stated, as follows:

> In the present case, the acts of sale fail to transfer any pre-acquisition rights to the new owners for damages caused by the lessee prior to the act of sale and specifically withhold the minerals and all leases from the act of sale. Lagneaux reserved the rights for himself in 2003, and in 2005 Primeaux, who never obtained them from Lagneaux, referenced the mineral and lease reservations in its sale to the Boones and pointed the Boones to the recorded prior act of sale from Lagneaux. Accordingly, the Boones knew that the land was encumbered by reserved mineral rights and leases. Under the subsequent purchaser doctrine, they do not have a right of action to sue the lessee for damages occurring prior to their acquisition of the property.[178]

It has been held that "the supreme court's instruction to the trial court in *Global Marketing* is a recognition that the subsequent purchaser rule applies in matters involving mineral leases."[179]

Finally, in a more recent decision,[180] the United States Court of Appeal, Fifth Circuit, rejected an argument that the afore-quoted footnote in *Eagle* "has created uncertainty about the applicability of the subsequent purchaser rule to mineral leases and has resulted in a 'mishmash of appellate jurisprudence," concluding that "a clear consensus has emerged among all Louisiana appellate courts that have considered the issue, and they have held that the subsequent purchaser rule does apply to cases, like this one, involving expired mineral leases."[181]

---

177 139 So. 3d 1047 (La. App. Ct. 3d 2014).

178 *Id*. at 1055.

179 *Bundrick v. Anadarko Petroleum Corp.*, 159 So. 3d 1137, 1143 (La. App. Ct. 3d 2015).

180 *Guilbeau v. Hess Corp.*, 854 F. 3d 310 (5th Cir. 2017).

181 *Id.* at 312-13.

In *Pierce v. Atlantic Richfield Co.*,[182] the "subsequent purchaser doctrine" was held inapplicable to a change in ownership resulting from inheritance, as opposed to a conventional sale of the land. In a *per curiam* reversal of the appellate court, the Louisiana Supreme Court stated, as follows:

> Because *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.* . . . addressed subsequent purchaser rights following a sale, which are distinguishable from the rights acquired through a succession transfer, we find *Eagle Pipe* is not dispositive of the exceptions of no right of action filed by the defendants in this case.
>
> Accordingly, the lower court judgments are reversed, and the case is remanded to the district court for further proceedings.[183]

Takeaway

So what is to be learned from the cases that articulate the "subsequent purchaser doctrine"? If the land that is the object of the sale has been subject to oil and gas activities, and if damage has occurred to the land at an earlier date, a sale of the land without a particularized, express assignment of the right to sue for such damages will mean that the vendor, not the vendee, will be the proper party to bring such a claim for monetary damages based upon a failure to remediate or rectify the existing damages to the land.

C. Dedication of Roads; Ownership of Minerals Thereunder:

Roads, streets, highways and alleys give rise to a variety of legal "tidbits" in an oil and gas context. This observation is certainly attested to by the jurisprudence involving an array of "tidbits."

Article 457, Louisiana Civil Code, provides, as follows:

> **Art. 457. Roads; public or private**
>
> A road may be either public or private.
>
> A public road is one that is subject to public use. The public may own the land on which the road is built or merely have the right to use it.

---

182 161 So. 3d 679 (La. App. Ct. 3d 2014), *rev'd* 166 So. 3d 996 (La. 2015).

183 *Id*.

> A private road is one that is not subject to public use.[184]

Roads, streets and highways might be created by a conventional transaction, but may also be acquired or established by expropriation. And regardless of how created, a road, street or highway that was originally outside of any municipality, might be annexed into a municipality at a later date, resulting in a change of ownership of the rights to minerals (if owned by the parish).[185] In any event, the "tidbit" presented would necessitate a determination or identification of the party or parties entitled to proceeds of production allocable to such strips of land.

Certainly in connection with the creation of a road, street or highway by conventional transaction, the real estate practitioner has the responsibility to effectuate the intention of the parties pertinent to the reservation of a mineral servitude (or perhaps a mineral royalty), if such is the case. These matters have been discussed previously, with the common "takeaway" being the need for the scrivener to be express and clear in terms of the type of right being reserved (mineral servitude or mineral royalty); the minerals to which the reserved interest relates, and the need to state the obvious proposition that the mineral servitude owner cannot exercise the servitude by conducting operations on the road, street or highway.

If the vendee in a conventional deed confected for the purpose of creating a public road, street or highway is a governmental entity or other "acquiring authority," the reservation can be made imprescriptible by complying with the requirements of article 149 of the Louisiana Mineral Code. Failure to satisfy the requirements of the article would leave the reserved servitude subject to the usual rules of prescription. The principal requirement in that regard is to make an express reservation of the mineral servitude, as it is not self-operative otherwise.[186] A corollary to this requirement is that article 149 expressly requires that the "instrument or judgment shall reflect the intent to reserve or exclude the mineral rights from the acquisition and their imprescriptibility as authorized under the provisions of this Section . . .."[187]

---

184 LA. CIV. CODE ANN. art. 457.

185 *See Chesapeake Operating, Inc. v. City of Shreveport*, *supra* note 6.

186 *Inversiones Del Angel, S.A. v. Callon Petroleum Co.*, 883 F. 2d 29 (5th Cir. 1989).

187 LA. REV. STAT. ANN. § 31:149B.

The real estate practitioner who represents a developer developing a subdivision must be mindful of the need to dedicate the roads or streets to be located within the subdivision, and depicted on the requisite plat of survey.

There are four types of dedication, including "formal,"[188] "statutory,"[189] "implied,"[190] and "tacit."[191] The following table summarizes each type of dedication.

Type	Requisites of Dedication	Authority	Interest Conveyed
Formal	This is essentially a donation, requiring an authentic act	Jurisprudential	Depends on intent
Statutory	Subdivider prepares a plat that meets certain requirements and dedicates all streets, alleys and public squares to public use; substantial compliance sufficient. No need for a formal acceptance by the public, nor is use by the public necessary.	LA. REV. STAT. ANN. §33:5051	Full Ownership
Implied	Results from acts such as conveying a lot depicted on a plat as fronting on a public road or other public area, where the grantor may not be construed as a "subdivider," no intent to dedicate the public road may be found from the deed, and the plat does not meet the requirements of a statutory dedication; may be accomplished without any express or written act, but requires two indispensable elements, namely, proof of a positive intent to dedicate, termed an "offer," and an "acceptance" by the public. Neither the offer nor the acceptance need be in writing, but may be implied by acts by the parties. Mere forbearance in allowing use by the public is not an implied dedication.	Jurisprudential	Servitude

---

[188] *See, e.g., Richard v. City of New Orleans*, 197 So. 594 (La. 1940); *Jaenke v. Taylor*, 106 So. 711 (La. 1925); *Flournoy v. Breard*, 40 So. 684 (La. 1906), and *Anderson v. Police Jury of East Feliciana Parish*, 452 So. 2d 730 (La. App. Ct. 1st 1984).

[189] LA. REV. STAT. ANN. § 33:5051.

[190] *See, e.g., Cenac v. Public Access Water Rights Assn.*, 851 So. 2d 1006 (La. 2003).

[191] LA. REV. STAT. ANN. § 48:491.

Type	Requisites of Dedication	Authority	Interest Conveyed
Tacit	Roads kept-up, maintained, or worked for three years by authority of any parish governing body and, after 1954, by any municipality, are tacitly dedicated to public use; requires no affirmative action or intent by the landowner, consent is statutorily presumed ". . . if there is actual or constructive knowledge of such work by adjoining landowners exercising reasonable concern over their property."	LA. REV. STAT. ANN. § 48:491	Servitude

Takeaway

As noted, depending upon the type employed in the establishment of the subdivision, either the title to the road bed is conveyed to the government having jurisdiction over the property, or the bed of the road is made subject to a personal servitude of right of use, such that title remains in the developer. Accordingly, the rights to minerals underlying the dedicated road or street will either be owned by the public body, or the developer.

D. Describing Lands as Being "Bounded by" a Road, Street or Highway:

Examining yet another "tidbit," public roads, streets and highways represent a relevant factor in the confection of a legal description of land as used in a sale, lease, donation or other real transaction.

It is not uncommon to encounter a deed utilizing a legal description describing the affected lands as being "bounded by" an identified road, street or highway. Such descriptions give rise to the question of whether the grantor intends to lease or convey the described property to the centerline of the bounding road, street or highway, or merely to the identified boundary of the bounded passageway.

The courts had held that instruments that utilize such descriptions would only cover the described lands up to the outer boundary of the road, street or highway, but would not cover any portion of the road bed itself.[192] As most landowners were unaware of this rule, title to the bed of the bounding road, street

[192] "In Louisiana a sale of land by fixed boundaries is known as a sale *per aversionem*. Deeply imbedded in our law is the principle that in such a sale the purchaser acquires only the land included within the designated boundaries." *State Through Dept. of Highways v. Tucker*, 170 So. 2d 371, 373 (La. 1965).

or highway would remain vested in the ancestor, and would presumably fall by inheritance to successors of that ancient owner after his or her death.

Louisiana Revised Statutes section 9:2971 was enacted in 1956 to resolve this issue. After an amendment in 2003, the statute currently reads, as follows:

> **LA. REV. STAT. ANN. § 9:2971. Presumption of grant of all interest; exceptions**
>
> It shall be conclusively presumed that any transfer, conveyance, surface lease, mineral lease, mortgage or any other contract, or grant affecting land described as fronting on or bounded by, or as described pursuant to a survey or using a metes and bounds description that shows that it actually fronts on or is bounded by a waterway, canal, highway, road, street, alley, railroad, or other right-of-way, shall be held, deemed and construed to include all of grantor's interest in and under such waterway, canal, highway, road, street, alley, railroad, or other right-of-way, whatever that interest may be, in the absence of any express provision therein particularly excluding the same therefrom; provided, that where the grantor at the time of the transfer or other grant holds as owner the title to the fee of the land[193] situated on both sides thereof and makes a transfer or other grant affecting the land situated on only one side thereof, it shall then be conclusively presumed, in the absence of any express provision therein particularly excluding the same therefrom, that the transfer or other such grant thereof shall include the grantor's interest to the center of such waterway, canal, highway, road, street, alley, railroad, or other right-of-way; provided further, however, that no then existing valid right-of-way upon, across or over said property so transferred or con-

---

[193] The reference to "fee of the land" is incompatible with Louisiana's civil law of property, but would be taken to mean full or perfect ownership. *See Northcott v. Livingood*, 10 So. 2d 401, 405 (La. App. Ct. 2d 1942) ("Rules governing the common-law relation of joint tenancy and tenancy in common have no application to a case of this character arising in this state. Ownership of property, real or personal, in this state may arise only in the manners expressly established and recognized by its laws; and divestiture of such ownership may be effectuated only in the manner and form as by them directed.").

> veyed or so presumed to be conveyed and no warranties with respect thereto shall be in any manner or to any extent impaired, prejudiced, or otherwise affected by any of the terms and provisions of this Part or because of the failure of such grantor or transferor to therein make special reference to such right-of-way or to include or exclude same therefrom.[194]

In *State Through Dept. of Highways v. Tucker*,[195] it was held that this legislation could not be constitutionally applied retroactively to deeds executed prior to the enactment of the legislation in 1956. Thus, mineral leases, surface leases or other deeds executed prior to 1956, and which utilize abutting descriptions, would not cover the bed of the road, street or highway, unless the language states otherwise.

In 2003, the parent statute was amended to expand its applicability to transaction in which the land "is described pursuant to a survey or using a metes and bounds description that shows that it actually fronts on or is bounded by" the relevant road, street or highway.[196]

Takeaway

It should be noted that, since 1956, a legal description in "any transfer, conveyance, surface lease, mineral lease, mortgage or any other contract, or grant" that describes the affected premises "as fronting on or bounded by a waterway, canal, highway, road, street, alley, railroad or other right of way," or "as described pursuant to a survey or using a metes and bounds description," is sufficient to cover the ownership of the grantor-lessor under the described bounded strip. However, title to the lands may not have passed by earlier (pre-1956) transaction, and may remain vested in the heirs of the ancestor owner, if such descriptions were used in such deeds prior to 1956.

VI. Conclusion

Whether it is an "issue," or merely a "tidbit," the matters pertaining to oil and gas which are discussed herein, should be of interest to the real estate lawyer in her daily practice. As seen, some of these "issues" or "tidbits," are rather obvious, while others are more nuanced, perhaps less apparent.

---

194 LA. REV. STAT. ANN. § 9:2971.

195 *Supra* note 192.

196 Act No. 723, 2003 La. Acts Vol. II 2441, effective August 15, 2003.

Regardless of the nature or scope of one's law practice, an awareness of these matters is essential in order to well serve one's client. If there is a common thread in our "takeaways," it is to have a clear understanding of your client's intentions, and express those in explicit terms so as to avoid misunderstandings—and controversies—down the road.

The very nature of an "issue"--or even a "tidbit"--pertaining to oil, gas or other minerals is that such may remain dormant for years, and is not economically worthy of determination or rectification until production is obtained in commercial quantities. At that time, the value having been realized, it is more likely to result in expensive, possibly contentious, litigation, all of which could have been avoided had the scrivener expressed more clearly the intention of the parties with respect to the parties' rights to minerals.