A Primer on the Mineral Servitude

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I. Introduction

A. Preface

Louisiana is unique among her sister states for many of her legal institutions: forced heirship, the civil law tradition and (with certain exceptions) the non-adoption of the Uniform Laws are but a few examples. As Louisiana is one of the most significant producers of oil and gas in the country, another regime of property is both unique and relevant to those involved in the mineral industry: The mineral servitude.[1]

A "primer" is defined as "a book that provides an introduction to a topic." While not a "book," through this paper your author will endeavor to examine in some detail the unique regime which is the mineral servitude.

Far from being the exception to the rule, an operator – whether located in or out of the State of Louisiana – must have a working understanding of both the function and the intrinsic nature of the mineral servitude in order to appreciate the manner in which the acquisition, existence or maintenance of leasehold rights might be dependent thereupon.

As will be seen, a mineral servitude is a real right in favor of a third person which burdens a tract of land owned by another.[2]

Although the subject of mineral servitudes has been considered previously,[3] your author has been requested to present a comprehensive re-

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1 While our mineral servitude is "unique" by reason of its jurisprudential evolution, Tennessee adopted a statute in 1939 which imposed a mineral regime of limited duration. *See* Williams Tennessee Code of 1934, § 7620.1 (1951 Supp.).

2 Article 478, Louisiana Revised Civil Code ("The right of ownership . . . may be burdened with a real right in favor of another person as allowed by law.").

3 Schoenberger, *Problems Arising from Mineral Reservations and Sales*, 1st Ann. Inst. on Min. Law 25 (1953); Onebane, *Possession of Minerals*, 4th Ann. Inst. on Min. Law 73 (1956); Holder, *The Year's Decisions: Louisiana Supreme Court Rulings Involving Unitization and the Effects Thereof on Mineral Servitudes and Royalty Rights*, 5th Ann. Inst. on Min. Law 104 (1957); Donohoe, *Acknowledgments, Joint Leases and Prescription*, 11th Ann. Inst. on Min. Law 82 (1964); Sartor, *Basic Principles of Liberative Prescription*, 18th Ann. Inst. on Min. Law 186 (1971); Morgan, *The Impact of Louisiana Mineral Code on Mineral Servitudes and Mineral Royalties*, 22nd Ann. Inst. on Min. Law 1 (1975); Johnson, *Maintenance of Mineral Interests*, 26th Ann. Inst. on Min. Law 85 (1979), and Redfearn, *The Effect of Unitization on Lease Terms and Mineral Servitudes*, 27th Ann. Inst. on Min. Law 1 (1980).

view of the mineral servitude in all of its facets. While the adoption of the Louisiana Mineral Code[4] has, for the most part, brought predictability to an area which had been developed jurisprudentially, it is still necessary to have a knowledge of the historic evolution of the mineral servitude in order to understand its role in our mineral system.

Moreover, to the extent that a mineral servitude was created prior to 1975 and, hence, to the extent that the current existence of a mineral servitude is dependent upon such prior rules, the pertinent rules which had been jurisprudentially developed prior to the adoption of the Mineral Code, continue to have relevance.[5]

In order to illustrate certain of the principles enunciated by the Mineral Code, certain examples are provided.

Prior to a detailed consideration of the mineral servitude, it is appropriate to acknowledge the role which the Louisiana judiciary has played in the development of the mineral servitude. It is noteworthy that, in this civil law jurisdiction where (at least in non-constitutional theory) the role of the judiciary is subordinate to the legislature in the formulation of private law, the area of mineral law is clearly the exception. With very few exceptions, the entire body of the law pertinent to mineral rights in general – and to the mineral servitude in particular – has evolved through the rendition of court decisions. As stated by Professor Harriet Spiller Daggett in her significant work entitled *Mineral Rights in Louisiana*,

> The decisions of other states were of small value [to the process of developing the mineral law of Louisiana] because Louisiana is a civil-law state with an old civil code. The French, Spanish, and Roman sources furnished no precedents because the problem was unknown to those forefathers. The judiciary has ever been a determining factor in defining frontier interpretation of new social and economic policies. The history of legal thought cannot neglect the role of judge-made law. Louisiana jurisprudence on oil and gas is a continuing tribute to the patience, research, wisdom, and fairness of the members of the bench of the state. The evolution in the hands of

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The mineral servitude has been treated by the Law Reviews as well: Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 25 Tul.L.Rev. 30 (Part 1); 25 Tul.L.Rev. 155, 303, 485 (Part 2) (1950); 26 Tul.L.Rev. 172 (Part 2, continued); 26 Tul.L.Rev. 303 (Part 3) (1952); Comment, *Mineral Rights and After-Acquired Title*, 18 La.L.Rev. 312 (1958) and McDougal, *Louisiana Mineral Servitudes*, 61 Tul.L.Rev. 1097 (1987).

[4] Title 31, Louisiana Revised Statutes, enacted by Act No. 50 of the 1974 Louisiana Legislature, effective January 1, 1975 (hereinafter, the "Mineral Code").

[5] Article 214 of the Mineral Code provides that the "provisions of this Code shall apply to all mineral rights, including those existing on the effective date hereof; but no provision may be applied to divest already vested rights or to impair the obligation of contracts." *See* Art. I, § 23, La. Const. of 1974.

> judges of the present body of law dealing with one of the most valuable property rights known in the state should restore the confidence of every citizen in the democratic judicial process, if such confidence has ever wavered.[6]

With particular reference to the development of the law pertinent to the mineral servitude, this notion was well stated by Judge John Minor Wisdom, who served with distinction as a Judge of the United States Court of Appeal, Fifth Circuit, for forty-two years, as follows:

> The juristic accomplishment of fitting oil and gas transactions into the codal law of praedial servitudes is a tour de force illustrative of the theory of the Code as a compilation of principles, not a digest of specific laws. As with many similar tours de force, although the result as a whole is in keeping with civilian concepts, some specific results are far from perfect. We recognize, therefore, that courts should not expect a perfect fit in cloaking a mineral servitude (the right to explore for oil and gas) with ancient laws designed for such servitudes as the right of passage. Louisiana courts have utilized this latitude to make logical extensions of the scope of the servitude doctrine, if such extensions are in keeping with the principle underlying the doctrine. But courts have no license to ignore the spirit of the law or to circumvent the underlying principle as established by the Code.[7]

B. Jurisprudential Development of a Conceptual Framework:

Most practitioners view *Frost-Johnson Lumber Co. v. Salling's Heirs*[8] as the seminal decision of the Louisiana Supreme Court which announced the non-ownership, or servitude, theory of minerals. However, this rule had actually been articulated nine years earlier in a decision which was designated by the Court as "not for publication."[9]

In *Frost-Johnson*, defendants' ancestors-in-title sold a tract of land to the ancestors-in-title of plaintiff on July 2, 1903. The sale contained the following reservation, to-wit:

> Excepting and reserving unto the first parties [Ernest N. Salling and Lottie A. Salling], however, all minerals, coal, fossils and precious stones, in, upon or underneath the lands below described, together with all mining rights connected therewith, including the right to en-

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6 Daggett, *Mineral Rights in Louisiana* pp. xxxiv-xxxv (1939).

7 *Elkins v. Townsend*, 296 F.2d 172, 179 (5th Cir. 1961).

8 150 La. 756, 91 So. 207 (1922).

9 *Wadkins v. Atlanta & Shreveport Oil & Gas Co.*, No. 19315, not for publication, cited in 150 La. 756, 91 So. 207, 212 (1922). "[The *Wadkins*] decision was not published officially, because a rehearing was granted, and while pending on rehearing the suit was settled by agreement of the parties." *Id*. at 212.

ter upon below-described lands, prospect for, dig and remove any and all minerals and precious stones, in, upon or contained in said lands, with the right to use so much of the said surface of said lands as may be necessary for such purposes; also excepting and reserving unto the first parties the exclusive right and privilege to enter upon the lands below described, or any part hereof, and bore, explore for gas and oil, and to utilize and sell gas and oil that may be found or discovered upon said lands, and to use such portions of the surface of said lands as may be necessary to carry on or conduct their oil and gas operations on said lands, and to carry and convey away from said lands such gas and oil.

In 1917 (notably, more than ten years after the date of the sale containing the reservation), the defendants granted a mineral lease to Consolidated Petroleum Corporation, which lease, by mesne conveyances, became owned by Atlas Oil Company. Atlas moved a drilling rig onto the land in April 1917, whereupon the plaintiff filed suit to "test the claim of the [defendants] and their transferees."[10]

The defendants responded to the suit by "denying that plaintiff owned any oil, gas or other mineral in the land, and alleging that all of the minerals were expressly reserved from the sale of the land by [defendants' ancestors-in-title] to plaintiff's grantors of the land."[11]

"In answer to defendant's assertion of title to the oil and gas, . . ., plaintiff pleaded the prescription of 10 years, liberandi causa, alleging that the reservation referred to, in the deed by Ernest N. Salling and his wife to plaintiff's grantors, was not a reservation of ownership of the mineral oil and gas itself, but the reservation of a real right, which, not having been exercised during 10 years, was forfeited by nonuser and lost by prescription."[12]

The trial court rendered judgment "in favor of the defendants, overruling the plaintiff's plea of prescription and rejecting plaintiff's demand in each case."[13]

On original hearing, the judgment of the trial court was reversed by the Supreme Court, which held that "the reservation . . . created a real right, or servitude of the sort called usufruct, in favor of the grantors of the land, to enter upon the land and bore and explore for and take away the oil and gas supposed to be under the surface of the land, and that the right that was thus reserved has been extinguished by the prescription by

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10 *Id.* at 209.

11 *Id.* at 209.

12 *Id.* at 209.

13 *Id.* at 209.

which servitudes are extinguished by nonuser for 10 years, ..."[14] The decision was rendered on January 5, 1920.

Rehearing was granted and, on May 2, 1921, the court reversed its earlier decision and affirmed the judgment of the trial court. The court held that, under the exception and reservation at issue, a separate estate in minerals was established.

The court granted a second rehearing and, on February 17, 1922, the court reinstated its original opinion, holding "that the right granted or reserved in such cases is a servitude, and hence prescribed by nonuser for 10 years."[15] The court specifically held that

> no matter what the intention of the parties be, the owner of lands cannot convey or reserve the ownership of the oils, gases, and waters therein apart from the land in which they lie; and we so hold, because the owner himself has no absolute property in such oils, gases and waters, but only the right to draw them through the soil and thereby become the owner of them. The intention of the parties has therefore nothing whatever to do with that holding; the principle involved being that no one can convey to another any greater right than he himself has. *Id*. at 245.

C. Analysis of *Frost-Johnson*:

It is doubtful that there has been a more comprehensively briefed case. There was much interest in the case as the industry needed an answer to the question posed, *i.e*., can a landowner dispose of his rights to oil and gas, and, if so, what is the nature and effect of such disposition?[16] Although several prior cases had answered the threshold question in the affirmative, no case considered the *nature* of such a disposal or reservation with regard to the prescription of non-user.

At this early developmental, almost pioneering, stage of the industry, most conveyances of mineral rights were effected on forms which came with the industry from other producing states. By and large, these forms generally sounded as though the oil and gas was being sold in place.

In speaking in terms of "the exclusive right and privilege," the reservation in *Frost-Johnson* could easily be interpreted as being in the nature of a servitude as to oil and gas. On the other hand, the clause dealing with hard minerals is more suggestive of a sale in place.

Why is *Frost-Johnson* important, both as a matter of substantive oil

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[14] *Id.* at 216.

[15] *Id.* at 245.

[16] Insofar as can be determined, the earliest mineral reservation in Louisiana which became the subject of litigation was effected in 1888. *Huie Hodge Lumber Co. v. Railroad Lands Co.*, 151 La. 197, 91 So. 676 (1922).

and gas law and as an example of civilian analysis? The decisional process embodied in this opinion is a classic example of civilian analysis. The Court, in Justice Provosty's concurring opinion on first rehearing, observed that "[o]il and gas were unknown as subjects of ownership at the time of the adoption of our Code. How far, therefore, that kind of property would be subject to a strict application of the provisions of our Code may be a question."[17]

In its effort to resolve the issues presented within the context of the Revised Civil Code, the Court likened oil and gas — thought to be contained in underground rivers — to "pigeons, bees and fish" which, under (former) Article 519, Louisiana Revised Civil Code, "belong to the owner" of pigeon houses, hives or fishponds.[18]

If, in this process of reaching a decision based upon the provisions of the Civil Code, the objective is to find codal authority – either direct or through the process of analogy — it might be said that the case might have gone either way. There was support both for the proposition that minerals were susceptible of ownership in place — Article 505[19] — and for the contrary view — Article 519 (noted in the preceding paragraph). Further support was to be found in the language of the contract in question; certainly as to hard minerals, the language was suggestive of a mineral estate, while, as to oil and gas, a servitude, or at least some regime less than full ownership, was suggested.

Such being the case, the decision was driven, in large part, by considerations of public policy. Some of the policy considerations which influenced the Court were the following, to-wit:

- The development of natural resources of the state. This was a prominent feature of the decision and was certainly the focus of the several *amicus curiae*.
- The court was also motivated by a desire to prohibit speculation in minerals which might result if an estate in minerals had been sanctioned.
- The economic utilization of land is promoted since the ruling prevents old, stale claims to land from destroying the surface owner's development.
- A strong practical idea was the simplicity of titles by avoiding the dismemberment of the so-called mineral estate from the surface estate.
- The distribution of wealth.

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17 *Id.* at 231.

18 *Id.* at 224. *See now* Article 3415, Louisiana Revised Civil Code.

19 "The ownership of the soil carries with it the ownership of all that is directly above and under it." *See now* Article 490, Louisiana Revised Civil Code.

It is the humble view of your author that *Frost-Johnson* is the single most important decision ever rendered by the Louisiana Supreme Court in the area of mineral law. Although its current relevance as jurisprudential authority is arguably minimal since the enactment of the Mineral Code, the fact remains that the policy announced by the decision has resulted in the eventual return of mineral wealth to the landowner.

The wisdom of this approach is demonstrated by the experience of other oil and gas states — such as Mississippi, Oklahoma and Texas — where distant or ancient owners of minerals cannot be found, resulting in wells which were not drilled. The experience of these sister states demonstrates that, in many instances, minerals were bought and resold on a widespread, speculative basis, such that today, many of the original owners, or their heirs, cannot be found. Since these heirs cannot be found or even identified, the land in question cannot be leased and, since it cannot be leased, it cannot be drilled. There is no way to tell how many otherwise geologically meritorious exploratory wells have been undrilled for this reason.

II. Creation of the Mineral Servitude

A. Nature of the Mineral Servitude:

By disallowing the establishment of a corporeal estate in minerals, the Supreme Court concomitantly gave judicial recognition to the mineral servitude.[20] The Supreme Court has referred to the mineral servitude as being "the most valuable property in the state."[21]

"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."[22] As will be seen, the intrinsic requirement that the mineral servitude must relate to "land belonging to another" is consonant with the doctrine of confusion.

A mineral servitude is a mineral right.[23] As such, it is an incorporeal immovable which is both alienable and heritable.[24] Instruments affecting

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[20] *Wemple v. Nabors Oil & Gas Co.*, 154 La. 483, 97 So. 666 (1923) ("And we therefore conclude that there is in this state no such estate in lands as a corporeal 'mineral estate,' distinct from and independent of the surface estate; that the so-called 'mineral estate' by whatever term described, or however, acquired or reserved, is a mere servitude upon the land in which the minerals lie, giving only the right to extract such minerals and appropriate them."). *Id*. at 669.

[21] *DeMoss v. Sample*, 143 La. 243, 78 So. 482, 484 (1918).

[22] Article 21, Mineral Code.

[23] Article 16, Mineral Code.

[24] Article 18, Mineral Code. The heritability of the mineral servitude has been recognized in *Ford v. Williams*, 189 La. 229, 179 So. 298 (1938) ("A right acquired under a mineral servitude is property, and all property which a person leaves at his death is transmitted by mere operation of law to his nearest heir, if there is no testament or institution of heir."). *Id*. at 301.

the mineral servitude are subject to the laws of registry.[25]

The Supreme Court has characterized the mineral servitude as "a dismemberment of the title insofar as it creates a secondary right in the property separate from the principal right of ownership of the land"; "the creation of a mineral servitude effectively fragments the title such that different elements of ownership are held by different owners . . .."[26]

"A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession."[27] Thus, a mineral servitude may be created by an instrument of grant (commonly referred to as a "Mineral Deed" or donation) or by express reservation in a sale, donation, exchange, partition or other transfer of immovable property.

Example

Landowner sells a tract of land to Jones on August 1, 1986. The sale states that "Vendor reserves all oil, gas and other minerals in and underlying the property described herein." This creates a mineral servitude which will prescribe (and become extinguished) on August 1, 1996, unless, prior to that date, Jones (either directly or through his lessee) "uses" the servitude by drilling a well thereon (or prescription is otherwise interrupted).

In *Iberville Land Co. v. The Texas Company*,[28] an instrument of grant purported to convey ". . . all of the oil, gas, sulphur, salt and all other minerals or things of any character whatsoever in, under and beneath 21,653.97 acres of land . . ., and also all of the subsoil on subjacent land lying or extending from and below a plane running parallel with the surface of said land and at a depth of 500 ft. measuring from said surface." In reliance on *Frost-Johnson* and its progeny, the Court of Appeal rejected the contention that the deed created ownership of the specified planes separate from ownership of the surface and held that the purported sale of the sub-soil transferred nothing more than "the rights of servitude."

"The owner of a mineral servitude is under no obligation to exercise it. However, 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."[29] This requirement to restore the surface "at the earliest reasonable time" is contrasted with the duty of a mineral lessee

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25 Article 18, Mineral Code.

26 *Steele v. Denning*, 456 So.2d 992 (La. 1984).

27 Article 15, Mineral Code.

28 14 La.App. 221, 128 So. 304 (La.App. 1st Cir. 1930).

29 Article 22, Mineral Code.

which, as a general proposition, does not arise until the conclusion of the lessee's operations.[30] Thus, the restoration responsibility of a lessee of a mineral servitude owner arises earlier in point of time than that of a lessee of a landowner whose land is not subject to a mineral servitude.

"The owner of a mineral servitude may conduct his operations with the freedom and subject to the restrictions that apply to a landowner. He may protect his right against interference or damage by all of the means available to a landowner."[31]

B. Date of Creation of the Mineral Servitude:

It is self-evident that the date of creation of a mineral servitude is important in order to ascertain the date on which prescription commences.[32]

The issue of when a servitude is deemed to have been created has arisen in a number of cases.

In *Ober v. Williams*,[33] plaintiff sued defendant to declare a mineral servitude extinguished. The ancestors of the parties had entered into a contract to sell on November 12, 1934. This contract provided that defendant would sell to the plaintiff a tract of land provided that, on or before November 12, 1935, the plaintiff had satisfied certain conditions, including clearing the land and building a residence. The contract also provided that the vendor would reserve a mineral servitude in and to one-half (1/2) of the oil, gas and other minerals in the land. These conditions were satisfied and the actual sale occurred on December 12, 1935. Somewhere between November 8 and December 9, 1945, operations were commenced on the land by the lessee of the defendant-vendor. Plaintiff, the surface owner, contended that ten years had passed since November 12, 1934 (the date of the contract to sell), and, thus, the servitude had expired. The defendant contended that drilling operations were timely conducted within ten years from the date of the creation of the mineral servitude on December 12, 1935. Thus, the issue was when the servitude came into existence. The court rejected the plaintiff's argument that, the conditions having been satisfied, the contract was retroactive to November 12, 1934, from which date (it was contended) prescription commenced.

In *Ober v. McGinty*,[34] the court refused to enforce a clause in an act

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30 Articles 2719-20, Louisiana Revised Civil Code, made applicable by Article 2 of the Mineral Code; *Dietz v. The Superior Oil Company*, 252 So.2d 198 (La.App. 3rd Cir.), *writ denied* 259 La. 945, 253 So.2d 383 (1971) (non-mineral lease case).

31 Article 23, Mineral Code.

32 "Prescription of nonuse of a mineral servitude commences from the date on which it is created." Article 28, Mineral Code.

33 213 La. 568, 35 So.2d 219 (1948).

34 66 So.2d 385 (La.App. 2nd Cir. 1953).

of sale reserving all of the minerals that provided the seller had the right to extend the reserved mineral servitude for an additional ten years, if no drilling occurred, by paying a fixed price to the purchaser of the land.

In *LeBleu v. LeBleu*,[35] plaintiff sued to enforce by specific performance an agreement that, in the event that prescription should accrue on a mineral servitude, the defendants would re-convey the mineral interest to the plaintiff. No use was made of the servitude by August 20, 1962, which was ten years after the servitude was created, but the defendants refused to convey the mineral interest to the plaintiff.

The court held that the agreement which purported to obligate the defendants to convey the servitude was unenforceable and "constitute[d] 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."

"If a prescriptive period consists of one or more years, prescription accrues upon the expiration of the day of the last year that corresponds with the date of the commencement of prescription."[36]

C. Who May Create a Mineral Servitude?

Subject to an exception with respect to a landowner whose title is conditional or subject to extinguishment, "a mineral servitude may be created only by a landowner who owns the right to explore for and produce minerals when the servitude is created."[37] As stated in one case, "in Louisiana a landowner has the exclusive right to create a new servitude (to the extent that he owns mineral rights commensurate with his land); the owner of a mineral interest only is powerless to do so."[38]

With respect to a "mineral servitude . . . created by a landowner whose title terminates at a particular time or upon the occurrence of a certain condition," such a servitude "is extinguished at the specified time or on occurrence of the condition divesting the title."[39] This exception is consistent with the principle that one may not convey to another greater rights than he has.[40]

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35 206 So.2d 551 (La.App. 3rd Cir. 1967).

36 Article 3456, Louisiana Revised Civil Code, made applicable by Article 2 of the Mineral Code.

37 Article 24, Mineral Code.

38 *Elkins v. Townsend*, 296 F.2d 172, 178 (5th Cir. 1961).

39 Article 25, Mineral Code.

40 *See Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207, 245 (1922) (". . . no one can convey to another any greater right than he himself has."); *Her-*

"A usufructuary cannot establish a mineral servitude on the estate of which he has the usufruct even for the period of his usufruct."[41] However, ". . . the usufructuary of a mineral servitude, may establish a mineral royalty for the period of his usufruct."[42] "Functionally, the sale of a mineral royalty for the life of a usufruct is a present realization of income which the usufructuary, under such circumstances, would have a right to in the future" and, consequently, "the sale of such a nonoperating right does not pose the same problems as the creation of a mineral servitude."[43]

In *Long-Bell Petroleum Co. v. Tritico*,[44] Long-Bell Petroleum Co. owned all minerals under a tract of land pursuant to the grant of a mineral servitude on December 29, 1931, by the landowner, Long-Bell Farm Land Corporation. On November 14, 1941, both entities – Long-Bell Farm Land Corporation (the surface owner) and Long-Bell Petroleum Co. (the mineral servitude owner) – sold the lands to an individual, who later sold the tract to the defendant. Both entities signed the deed as vendors, with Long-Bell Petroleum Co. expressly reserving "all of the oil, gas and minerals" under the property. On December 9, 1946, Long-Bell Petroleum Co. granted a lease to Barnsdall Oil Company. As this lease was granted more than ten years after the creation of the initial mineral servitude (December 29, 1931), the surface owner brought an action to confirm its mineral title and to have the lease to Barnsdall declared invalid. The court held that the deed of November 14, 1941 "effected an extinguishment of the mineral servitude previously owned by the Petroleum Company and simultaneously created and vested in the latter new and independent servitudes on the lands conveyed by the respective instruments."

The existence of a mineral lease does not preclude the creation of a mineral servitude on the theory that the landowner no longer "owns the right to explore for and produce minerals when the servitude is created."[45]

D. Scope of Mineral Grant or Reservation:

The Mineral Code is applicable to "all forms of minerals, including oil and gas."[46] As indicated by the Comments to Article 4, the Mineral

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litz Construction Company, Inc. v. Matherne, 476 So.2d 1037 (La.App. 3rd Cir. 1985) ("An assignee acquires no greater rights than its assignor.").

41 Article 26, Mineral Code.

42 Article 84, Mineral Code.

43 Comments to Article 84, Mineral Code.

44 216 La. 426, 43 So.2d 782 (1949).

45 *Wall v. Leger*, 402 So.2d 704 (La.App. 1st Cir. 1981) ("A mineral lessor does not transfer ownership of mineral rights when he enters into a lease;").

46 Article 4, Mineral Code.

Code "does not attempt a firm definition of the term 'minerals.'" Thus, it is always necessary to examine the instrument of grant or reservation in order to determine the types of minerals to which it relates. However, the courts have not always followed a consistent methodology in the interpretation of these matters.

Applying "familiar rules of construction," it has been held that a reservation of "iron ore, coal, fire clay, kaolin, and marl" did not include oil and gas.[47]

The court in *Holloway Gravel Co., Inc. v. McKowen*[48] was required to determine if a reservation of "mineral, oil and gas rights" included sand and gravel. The court invoked the *ejusdem generis* doctrine 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.[49]

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 grant or reservation. In the most significant case,[50] 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. 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 Revised Civil Code[51] 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) Arti-

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47 *Huie Hodge Lumber Co. v. Railroad Lands Co.*, 151 La. 197, 91 So. 676 (1922).

48 200 La. 917, 9 So.2d 228 (1942).

49 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* at 232-3.

50 *Continental Group, Inc. v. Allison*, 404 So.2d 428 (La. 1981).

51 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 Article 759, Louisiana Revised Civil Code.

cles 796 and 798 of the Louisiana Revised 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.[52]

West v. Godair[53] concerned vendors who sold property in three separate cash sales containing mineral reservations. Vendees 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. In order to determine the meaning of the phrase "all mineral rights" as used in the reservations, extrinsic evidence was considered. 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.

The Supreme Court reversed the judgment of the Court of Appeal and reinstated the judgment of the district court which had ruled, in support of the vendors, that the doctrine of *ejusdem generis* was inapplicable to the case, with which the Court of Appeal 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.

E. Drafting Considerations:

1. Preface.

Made applicable to the interpretation of instruments of grant or reservation are the principles of the Louisiana Revised Civil Code concerning obligations in general.[54]

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[52] *See now* Article 40, Mineral Code.

[53] 538 So.2d 322 (La.App. 3rd Cir.), *rev'd* 542 So.2d 1386 (La. 1989).

[54] Article 2, Mineral Code ("The provisions of this Code are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.").

"Interpretation of a contract is the determination of the common intent of the parties."[55]

"When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."[56] Consequently, when a clause in a contract is clear and unambiguous, the letter of that clause should not be disregarded under the pretext of pursuing its spirit.[57]

2. Freedom of Contract.

Article 3 of the Mineral Code instructs that, "[u]nless expressly or impliedly prohibited from doing so, individuals may renounce or modify what is established in their favor by the provisions of this Code if the renunciation or modification does not affect the rights of others and is not contrary to the public good." This article announces the well-known concept of "freedom of contract" which applies generally at law.[58]

As will be seen in Part II.D.3 hereof, the Mineral Code establishes certain principles which parties are not free to modify by contract.

(a) Expression of Interest Granted or Reserved.

It is the author's experience that the most frequent problem encountered in the interpretation of instruments of grant or reservation is the determination of the type of interest affected – servitude or royalty – and the quantification of the interest involved. Grants or reservations which express the interest as all or a stated fraction or percentage of the "royalty and mineral rights," or simply "mineral rights," give rise to the appropriate inquiry as to the *type* of mineral right affected.

It is advisable to include a simple concluding sentence which states that "this is a mineral servitude as distinguished from a mineral royalty," or vice versa.

Even where the instrument is clear as to the fact that it creates a mineral servitude rather than a mineral royalty, the manner in which this is accomplished is often inconsistent with the servitude theory as espoused in *Frost-Johnson* and now codified in the Mineral Code. Thus, an instrument of grant or reservation will often state that the vendor grants or reserves "all of the oil, gas and other minerals" in the described land. Properly speaking, the instrument should express the intent to grant or reserve "a mineral servitude in and to all of the oil, gas and other minerals" in the described land.

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55 Article 2045, Louisiana Revised Civil Code.

56 Article 2046, Louisiana Revised Civil Code.

57 *Maloney v. Oak Builders, Inc.*, 256 La. 85, 235 So.2d 386 (1970).

58 Article 1971, Louisiana Revised Civil Code, provides that "[p]arties are free to contract for any object that is lawful, possible, and determined or determinable."

The draftsman should also be careful in describing the quantity of the mineral interest granted or reserved. Thus, it has been held that a reservation, in the sale of an undivided one-half (1/2) interest in a plantation, of "one-half (1/2) of all the oil, gas and other minerals rights" in the plantation, resulted in the reservation of one-half (1/2) of one-half (1/2) of the minerals in the plantation, rather than (as had been contended by the vendors) a full one-half (1/2) mineral interest therein.[59]

It is not uncommon for the title examiner to encounter an instrument of grant or reservation wherein the mineral servitude is described in terms of "mineral acres." While the term "mineral acre" might be a convenient unit reference for purposes of calculating a purchase price, the courts have held that, while "the term has usage in the oil industry," it "does not have a simple, definite meaning which is easily understood by a person who has little or no experience in the sale of minerals."[60] The difficulty arises because, according to the generally understood usage of the phrase, one of the components of calculation is the acreage content in the affected tract. As that element often changes after formal survey, so changes the fractional amount of the mineral interest actually conveyed. From the point of view of the title examiner, it is a concept to be avoided and, when used, most often necessitates a curative instrument or division order to cure.

Uncertainty may also arise from a clause which mixes, without clarity, a reservation of "mineral rights" and of a usufruct. Such a clause recently encountered by your author read, as follows:

> Vendor hereby reserves unto himself all mineral rights and the usufruct of the above described property for the remainder of his life.

In the involved case, the vendor died within three years of the instrument of reservation and the contention was made by the vendee-landowner that the mineral servitude (and not merely the usufruct) was subject to a term "for the remainder of [vendor's] life." Clearly, the usufruct terminated upon the death of the vendor, but the question posed was whether the mineral servitude also extinguished pursuant to Article 27(4), Mineral Code.[61]

A dispute can also arise if, in an instrument transferring land, it is recited that the sale is made "subject to" the "reservation" of minerals in favor of a third party. In such a case, it was held that the "subject to" clause did not establish a new mineral servitude, but was merely "a recognition of whatever rights existed by virtue of the previously created

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[59] *Krauss v. Fry*, 209 La. 250, 24 So.2d 464 (1945).

[60] *Light v. Crowson Well Service, Inc.*, 299 So.2d 869 (La.App. 2nd Cir. 1974), *aff'd* 313 So.2d 803 (1975).

[61] *See* Part V.B.4, *infra*.

servitude."[62]

(b) Duration of Mineral Servitude.

"Parties may fix the term of a mineral servitude or shorten the applicable period of prescription of nonuse or both. If a period of prescription greater than ten years is stipulated, the period is reduced to ten years."[63]

Article 74 of the Mineral Code correctly recognizes the distinction between the "period of prescription" (which may not exceed ten years) and the "term of a mineral servitude" (which may be "fixed" either more or less than ten years, provided that, if "fixed" greater than ten years, it is still subject to the normal rules of prescription).[64] Thus, if the instrument of grant or reservation is silent, the prescription of nonuse is ten years. If any other period of time is stated, the question arises as to whether the parties intend to "fix" an absolute term (such that the servitude will be extinguished upon the accrual of the stated term regardless of the presence of operations or production which would have otherwise served to perpetuate the interest), or to shorten the applicable period of prescription of nonuse (with the result that, unless a use is timely made prior to that shortened date, the servitude will prescribe, but would be maintained if operations are conducted or production is secured prior to that date).

For example, an instrument of grant or reservation might provide that the mineral servitude is to be for a "period of five years." In such a case, the issue arises as to whether the parties have agreed to merely shorten to five years the otherwise applicable prescriptive period of ten years, or whether the parties have agreed that the mineral servitude will extinguish at the end of five years regardless of the existence of a use which would otherwise perpetuate the servitude.

In the event of uncertainty, the courts have resorted to a rule of contractual construction which accepts the interpretation which least burdens the property.[65]

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62 *Texaco, Inc. v. Newton and Rosa Smith Charitable Trust*, 471 So.2d 877, 881 (La.App. 2nd Cir.), *writ denied* 475 So.2d 1104 (La. 1985).

63 Article 74, Mineral Code.

64 *Hodges v. Norton*, 200 La. 614, 8 So.2d 618 (1942) (instrument of reservation subject to a term of fifteen years; *held*, a mineral servitude for a term greater than ten years is nevertheless subject to usual rules of prescription.).

65 *Whitehall Oil Company v. Heard*, 197 So.2d 672, 678 (La.App. 3rd Cir.), *writ denied* 250 La. 924, 199 So.2d 923 (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."). *Compare* Article 730, Louisiana Revised Civil Code ("Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.").

Example

A mineral servitude is granted on August 1, 1986, for a "term of fifteen years." A well is commenced on the tract on September 1, 1997, and is completed as a dry hole. What is the consequence on prescription?

The servitude prescribed, in the absence of prior use, on August 1, 1996. The commencement of a well on the tract on September 1, 1997, was not a "use" of the servitude as it had prescribed (and become extinguished) on August 1, 1996. If, however, the well had been started on September 1, 1995, the servitude would nevertheless expire on August 1, 2001, as the parties fixed fifteen years as the maximum term of the servitude, notwithstanding that the "use" resulting from the well commenced on September 1, 1995, would ordinarily commence anew a full ten year prescription.

(c) Size and Horizontal Limitations.

There is no size limitation on a mineral servitude. In one case,[66] a sale of some 80 thousand acres of land contained a reservation of minerals. It was contended that it was against public policy to permit the reservation or creation of a mineral servitude on so vast an area. The court rejected this contention, noting that:

> . . . as everyone knows, the production of mineral oil or gas is such an expensive operation that it cannot be done profitably on a small scale. No one would undertake to drill for oil or gas in unproven territory – what is called a wildcat well – without owning or controlling the mineral rights on a vast area surrounding the prospective well.

"A single mineral servitude is established on a continuous tract of land notwithstanding that certain horizons or levels are excluded or the right to share in production varies as to different portions of the tract or different levels or horizons."[67] For example, an instrument of grant of a mineral servitude as to oil (only), which described one contiguous tract of land containing 106 acres, but which stipulated that the vendor excluded "all oil now being produced or hereafter to be produced to a depth of 2200 feet on the south 30 acres," with no such limitation or restriction as to the remaining 76 acres, was held to constitute one mineral servitude as to which one use requirement existed.[68]

A series of instruments whereby minerals were granted or transferred, first, "above 3100 feet from the surface," and, secondly, "below 3100 feet from the surface" were held to be permissible under Louisiana law and to have created two separate mineral servitudes with separate

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66 *Lenard v. Shell Oil Company*, 211 La. 265, 29 So.2d 844 (1947).

67 Article 68, Mineral Code.

68 *Gulf Oil Corporation v. Clement*, 239 La. 144, 118 So.2d 361 (1960).

use requirements.[69]

It has also been held that the sale of mineral rights on three distinct, contiguous tracts of land, subject to an existing fractional mineral servitude on the center tract of land, created a single mineral servitude.[70] As a consequence, "[p]roduction of minerals from any part of one continuous, contiguous tract of land constitutes production from the whole of the tract and preserves the servitude on the whole."

Example

On August 1, 1986, landowner donates to his nephew "all of the sulphur in 100 acres below 1,000 feet; the lignite in the south 50 acres and the oil and gas in the north 50 acres." The nephew, through his lessee, drills and completes a gas well in the north 50 acres on September 1, 1995. What are the consequences on prescription?

The donation, an instrument of grant, creates one mineral servitude. Although it deals with different minerals in different portions or at different levels, it is only one servitude with one use requirement. Thus, production of gas from the north 50 acres will interrupt prescription as to the sulphur in 100 acres below 1,000 feet; the lignite in the south 50 acres and the oil and gas in the north 50 acres.

3. Limitations on Freedom of Contract.

As noted above, the Mineral Code establishes certain principles which parties are not free to modify by contract. Thus, "[p]arties to an act creating a mineral servitude may alter the applicable legal rules subject to the limitations provided in Articles 73 through 79."[71]

(a) Contiguity.

"A single mineral servitude may not be created on two or more noncontiguous tracts of land."[72] Consequently, if an instrument of grant or reservation describes tracts which are not contiguous, there are established as many distinct mineral servitudes as there are non-contiguous tracts involved.[73] Each tract would be subject to its own use requirement such that a use on one servitude will have no bearing on the accrual of prescription against other servitudes. Thus, where a tract of land was

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[69] *Roemer v. Caplis*, 369 So.2d 1186 (La.App. 2nd Cir.), *writ denied* 371 So.2d 620 (La. 1979) ("We hold specifically that Louisiana law permits the creation of separate servitudes as to separate depths, levels or horizons.").

[70] *Gunby v. Commercial Solvents Corporation*, 170 So.2d 259 (La.App. 2nd Cir. 1965).

[71] Article 72, Mineral Code.

[72] Article 73, Mineral Code.

[73] "An act creating mineral servitudes on noncontiguous tracts of land creates as many mineral servitudes as there are tracts unless the act provides for more." Article 64, Mineral Code.

"dismembered into two tracts" by the intervention of a railroad strip owned in full ownership (and not merely in servitude) by a third party, a use on one side of the railroad strip only interrupted prescription accruing against the mineral servitude as to that side, and not as to the other side.[74]

Example

On August 1, 1986, a sale of land describing the NW1/4 of the NW1/4 and the SE1/4 of the SE1/4 of Section 1, is executed; minerals are reserved. A well is started on the NW1/4 of the NW1/4 in 1995. The well is successful and production continues for twelve years. What is the consequence on prescription?

Prescription accruing against the NW1/4 of the NW1/4 is interrupted by the drilling and resultant production. Prescription would begin anew at the cessation of production. However, the NW1/4 of the NW1/4 activities would have no bearing on prescription accruing against the SE1/4 of the SE1/4 as the two affected tracts are not contiguous. The SE1/4 of the SE1/4 servitude prescribed on August 1, 1996.

A tract of land is "contiguous" when it is so situated that one might pass from one part to the other without the necessity of crossing the property of another party.[75] Thus, the court has held that, where two tracts met only at a common survey point (*i.e.*, two corners touch), the tracts were not contiguous because no one could pass through a mere point.[76]

(b) Use Requirements.

The public policy inherent in the establishment of a prescriptive period would dictate that the "default" period stipulated by law may not be enlarged but may be shortened. As stated in Article 75 of the Mineral Code, the "rules of use regarding interruption of prescription on a mineral servitude may be restricted by agreement but may not be made less burdensome."[77]

Parties may, however, "agree expressly and in writing, either in the act creating a servitude or otherwise, that an interruption of prescription resulting from unit operations or production shall extend to the entirety

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74 *Calhoun v. Ardis*, 174 La. 420, 141 So. 15 (1932).

75 *Baham v. Vernon*, 42 So.2d 141, 145 (La.App. 1st Cir. 1949) (. . . "'[c]ontiguous tracts of land' must be tracts or bodies of land which have one side, or at least part of one side, in common."). "Two tracts of land which touch only at a common corner are not contiguous." *Turner v. Glass*, 195 So. 645 (La.App. 2nd Cir. 1940).

76 *Lee v. Giauque*, 154 La. 491, 97 So. 669 (1923).

77 *Compare* Article 3471, Louisiana Revised Civil Code ("A juridical act purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null.").

of the tract burdened by the servitude tract (sic) regardless of the location of the well or of whether all or any part of the tract is included in the unit."[78] This would suggest that the rules governing the extent to which unitized operations or production will interrupt prescription accruing against a mineral servitude[79] are not inviolate but may be modified as stated in this article. Other illustrations of the contractual alteration of the default use requirements are considered in Part V.C.1(a) hereof.

(c) Reversionary Interests.

One of the most significant limitations imposed by public policy on the freedom of contract is the rule that the "expectancy of a landowner in the extinction of an outstanding mineral servitude cannot be conveyed or reserved directly or indirectly."[80] The so-called "right of reversion" may not be an object of commerce.[81]

This rule finds its origin in the important case of *Hicks v. Clark*.[82] In *Hicks*, Mr. Raines sold land to Mr. Brown on December 9, 1941, and reserved a mineral servitude in and to one-fourth (1/4) of the oil, gas and other minerals. Within less than ten years from that date, the surface came to be owned by Hicks. On July 16, 1948, Hicks sold the land, subject to the Raines' servitude, to the ancestor-in-title of Clark. In this sale, Hicks reserved, in addition to a mineral servitude in and to one-fourth (1/4) of the oil, gas and other minerals, the "right of reversion" of the outstanding one-fourth (1/4) of the oil, gas and other minerals. After December 9, 1951, Hicks sues the surface owners to be recognized as the owner of the one-fourth (1/4) of the oil, gas and other minerals as to which Hicks had reserved the "right of reversion."

The court rejected this institution as being "an effort to circumvent the public policy of this state, and [] therefore refuse[d] to recognize or give effect to it." Thus, the court refused to allow a "right of reversion" to be treated as an object of commerce.

Example

On August 1, 1986, landowner sells one-half (1/2) of the minerals in a tract of land to Jones. On August 1, 1991, landowner sells the land to

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78 Article 75, Mineral Code.

79 Articles 33 and 37, Mineral Code. It is not clear if parties may also contractually stipulate that an interruption resulting from the existence of a unitized shut-in well might have the same consequence. See Article 34, Mineral Code.

80 Article 76, Mineral Code.

81 This rule – now well established – represented a departure from earlier court decisions which seemingly recognized the permissibility of the sale of the "reversionary right." *See Gailey v. McFarlain*, 194 La. 150, 193 So. 570, 573 (1940) ("It is clear that the reversionary mineral interest of the owner of the fee simple title is 'a certain object,' which can be legally sold.").

82 225 La. 133, 72 So.2d 322 (1954).

Smith, reserving "all minerals." No use of either servitude is made by August 1, 1996.

Landowner's reservation on August 1, 1991, creates a mineral servitude in and to one-half (1/2) of the minerals. When Jones' mineral servitude prescribes on August 1, 1996, landowner's mineral servitude does not increase. The one-half (1/2) of the minerals previously enjoyed by Jones inures to Smith, as the landowner on the date of prescription.

Closely associated with the principles of reversion are the concepts of oversale and warranty, which are hereinafter discussed.[83]

Although the landowner's "expectancy . . . in the extinction of an outstanding mineral servitude" may not be an item of commerce, it may be leased by the person to whom prescription will accrue, provided that the lessee cannot operate until prescription accrues. In ***Wahlder v. Roy O. Martin Lumber Co., Inc.***,[84] plaintiff filed suit seeking to recover a $1200.00 bonus payment paid by a mineral lessee to the defendant-mineral lessor. The defendant was the owner of the tract of land which was leased to the mineral lessee. Plaintiff claimed that the bonus payment is due because he is the owner of the minerals underlying the tract of land leased and owned by the defendant.

By act dated July 18, 1966, plaintiff and defendant entered into an act of exchange whereby defendant acquired the tract of land; the mineral rights were reserved by plaintiff in the act of exchange. On January 19, 1976, defendant executed a mineral lease covering the tract of land. Defendant did not own the minerals at the time it entered into the mineral lease.

The mineral lease provided, in part, that ". . . this lease, without further evidence thereof, shall immediately attach to and affect any and all rights, titles, and interest in the above described land, including revisionary (sic) mineral rights, hereafter acquired by or inuring to Lessor and Lessor's successors and assigns."

The court found that the petition failed to state a cause of action, saying:

> Although plaintiff owned a mineral servitude over the subject tract, under the provisions of LSA-R.S. 31:27 (absent any interruption) his servitude was to expire on July 18, 1976 at which time all of the mineral rights would revert to the defendant, who was the owner of the property. LSA-R.S. 31:144 recognizes that a lessor and a lessee may validly execute a lease covering outstanding mineral rights which may terminate and become reunited with the landowners (sic) title during the term of the lease. This is what was done in the in-

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83 *See* Part IV.A.1, *infra*.

84 337 So.2d 669 (La.App. 3rd Cir. 1976).

stant matter.

(d) Attempts to Circumvent Prescription.

At the heart of Louisiana's policy that there may not be a "mineral estate" separate and apart from the surface is the rule that a grant or reservation of minerals creates a mineral servitude which is subject to the rule of prescription. The courts have been most diligent in rendering nugatory any attempt to circumvent the rule of prescription. The policy in this regard has been expressed,[85] as follows:

> The parties to a contract in which a mineral servitude is either granted or reserved may stipulate that the servitude will expire or terminate within a period of less than ten years, but they cannot stipulate effectively that it will continue or remain in effect without use for a period of more than ten years. A provision in any such contract to the effect that the mineral servitude will not be subject to the prescription of ten years, liberandi causa, or that it will continue in effect for a period of more than ten years without use, is unenforceable. This firmly established rule is based on public policy, it being the public policy of this state that a debtor, or an obligor in the case of a mineral servitude, will not be permitted to renounce in advance the benefit of the prescription which may release him or his land from the obligation.

Thus, in *Bodcaw Lumber Co. v. Magnolia Petroleum Co.*,[86] the plaintiff claimed ownership of minerals and mineral rights under a tract of land and filed suit to annul a lease given to defendant by a third party. Defendant claimed that the mineral rights – which plaintiff had reserved for fifteen years – had prescribed through ten years of nonuse. The issue facing the court was whether the parties had consented that the mineral servitude would not be subject to prescription by non-user for ten years. The court determined that (former) Article 3460 of the Louisiana Revised Civil Code permitted the renunciation of the benefit of prescription only *after*, but not *before*, prescription has accrued. Since the specified time limit was inconsistent with the prescription of non-user for ten years and was, in reality, a fifteen year limitation in which to enjoy the mineral servitude, the plaintiff was declared to have lost the servitude through non-user for ten years.

In another case,[87] the plaintiff sued for recognition of ownership of an undivided one-half (1/2) interest in the mineral rights under a tract of land and for judgment ordering defendant to execute a conveyance to plaintiff of such interest upon payment to defendant of funds deposited in

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85 *LeBleu v. LeBleu*, 206 So.2d 551, 554 (La.App. 3rd Cir. 1967).

86 167 La. 847, 120 So. 389 (1929).

87 *Ober v. McGinty*, 66 So.2d 385 (La.App. 2nd Cir. 1953).

the Registry of the court. In the alternative, plaintiff demanded a rescission of the sale of the land by plaintiff to defendant upon payment of sum of $2,500.00 to defendant. The deed from plaintiff to defendant contained a reservation of mineral rights for ten years at which point plaintiff could extend this right for an additional ten years upon payment of 25 cents per acre. Plaintiff alleged that he would not have made the sale to defendant without having the right to extend mineral rights for an additional ten years. The trial court sustained defendant's exception of no cause and no right of action. The Court of Appeal viewed the agreement as an attempt to avoid the ten year prescription of a mineral servitude rather than as an option. Based on two previous decisions, the court found that a reservation of mineral rights is subject to a prescription of ten years even where an agreement grants such rights for a period exceeding ten years. Since the contract at issue was an attempt to reserve mineral rights for a period longer than ten years, the court held the agreement was invalid because it was prohibited by law.

An agreement purporting to obligate a landowner in whose favor a prior mineral servitude prescribed, to reestablish the mineral servitude after prescription, was held unenforceable as being against public policy.[88]

If, however, the agreement is found not to be a subterfuge designed to circumvent the rules of prescription, it would be enforced.[89]

III. Rights Conferred by the Mineral Servitude

A. Rights of Ingress and Egress:

The Mineral Code recognizes that, in its essence, a mineral servitude confers 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."[90] The Supreme Court has observed that a mineral servitude imparts the right "to go upon the land and explore for oil or gas and to possess and own such oil or gas as may be produced."[91]

In another case,[92] the owner of land subject to an outstanding min-

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88 *LeBleu*, cited *supra*.

89 *See*, *e.g.*, *Ober v. Williams*, 213 La. 568, 35 So.2d 219 (1948) (contract to sell, subject to conditions that certain actions must first occur; after conditions met, sale completed with reservation of mineral servitude; *held*, prescription began to run when deed of sale was exercised, *not* when contract to sell was executed) and *Chicago Mill & Lumber Company v. Ayer Timber Company, Inc.*, 131 So.2d 635 (La.App. 2nd Cir. 1961) (five year leases each containing an option to purchase at the end of lease term, with reservation of mineral servitude in the event of exercise of option; *held*, prescription began to run when option to purchase was exercised, *not* when leases were granted).

90 Article 21, Mineral Code.

91 *Standard Oil Co. of Louisiana v. Futral*, 204 La. 215, 15 So.2d 65 (1943).

92 *Grayson v. Lyons, Prentiss & McCord*, 226 La. 462, 76 So.2d 531 (1954).

eral servitude sued the lessee of the mineral servitude owner, complaining about "an alleged trespass to his property by the construction of a roadway." The court cited *Continental Oil Co. v. Landry*[93] for the proposition that the "owner of the mineral right has the right of ingress to, and egress from, the land, the right to produce the minerals . . ." The court then concluded that the lessee of the mineral servitude owner "had a right of passage over plaintiff's land and were within their rights in constructing the road." The court did, however, undertake "to determine if in exercising this right plaintiff was damaged in an unnecessary manner." An award of $875.00 was affirmed.

Grayson would suggest that the extent to which the servitude owner may, in exercising a "use" of the servitude tract, avail himself of the tract subject to the mineral servitude (and of the improvements and facilities situated thereon) is restricted, if at all, by a standard of reasonableness and necessity. Thus, unless restricted by the terms of the instrument of grant or reservation, a mineral servitude owner can enter the property and locate a well at such location as is deemed reasonable and may locate thereon such surface facilities as are reasonable and necessary.

In an unpublished decision,[94] a Federal district court has held that a "land owner may not place any conditions precedent to a mineral owner's reasonably necessary use of the surface lands." Moreover, in rejecting the land owner's contention that his "demands on the mineral owners' lessees were reasonable," it was stated that "the reasonableness of his actions is simply irrelevant to this proceeding" for the "land owners may not interfere with the mineral owners' reasonable use of the land to reach their minerals." "To the extent that the [servitude owners] exceeded the bounds of reasonable use, the [land owners]' proper recourse would be a damages action."

B. Contractual Restrictions on Surface Use:

It is not uncommon for parties to deny, limit or restrict the right of the mineral servitude owner to enter upon the burdened tract for purposes of exercising servitude rights. Such a modification is particularly appropriate if the affected land is a smaller tract (which would be totally consumed by drilling operations) or is land which is anticipated to be developed for residential or commercial purposes. A typical clause might read, as follows:

> Anything herein contained to the contrary notwithstanding, it is expressly understood that no operations of any type or nature may be conducted on the surface of the land, it being further understood that

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93 215 La. 518, 41 So.2d 73 (1949).

94 *Peabody v. Weeks*, Civil Action No. 96-2283, United States District Court, Western District of Louisiana, Alexandria Division (J. Little, Ruling on Motion for Preliminary Injunction, December 20, 1996).

the rights granted (or reserved) may only be exercised by unitization or directional drilling operations conducted from a site or location situated off of the surface of the land herein described.

Instead of an outright prohibition, it might also be provided that any operations would require the prior written consent or approval of, or the prior consultation with, the surface owner.

Because such prohibitions or restrictions are an exercise of the right of freedom of contract to which the servitude owner has agreed, they would not constitute an "obstacle" to the exercise of the mineral servitude.[95]

C. Right to Grant Mineral Lease:

Unless restricted by agreement, a mineral servitude is an executive interest and the owner thereof may grant a mineral lease.[96] As another illustration of the principle that one cannot grant greater rights than the grantor owns,[97] the Code recognizes that 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."[98]

Example

On August 1, 1986, Smith sells a tract of land to Jones, reserving all minerals. On April 1, 1996, Smith grants a mineral lease to lessee for a primary term of five (5) years. No use is made of the servitude and no operations are conducted on the leased premises prior to August 1, 1986. On that date, the servitude prescribes and the mineral lease also terminates.

Other illustrations of conditional titles of a mineral servitude owner which would bring about the termination of a mineral lease granted by such mineral servitude owner are set forth in Part V.B.5 hereof.

D. Right to Create Mineral Royalty:

The owner of a mineral servitude may create a mineral royalty.[99] However, if the mineral servitude out of which the royalty is created should prescribe, the royalty is concomitantly extinguished.[100] An excep-

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95 *McDonald v. Richard*, 203 La. 155, 13 So.2d 712 (1943) (Former Article 792 of the Civil Code "has reference only to obstacles which the owner of the servitude has not consented to, either expressly or tacitly."). *See* Part V.C.4(b), *infra*.

96 Article 108, Mineral Code.

97 *See* footnote 40, *supra*.

98 Article 117, Mineral Code.

99 Article 82, Mineral Code.

100 Article 83, Mineral Code.

tion exists in the case of the "extinction of a mineral servitude by inheritance or by any act of the servitude owner," in which event, such a cause of extinction "does not extinguish a royalty burdening the servitude unless the royalty owner is a party to the act or otherwise consents expressly and in writing to become bound by it."[101]

Example

On August 1, 1986, Smith donates all minerals in a tract of land to his son, Bubba, thereby creating a full mineral servitude. Bubba then sells a one-eighth (1/8) mineral royalty interest to Fran on January 1, 1988. Smith – Bubba's father – dies intestate on July 1, 1988, leaving Bubba as his only legal heir; Bubba inherits the land burdened by his own mineral servitude. While the mineral servitude is extinguished by confusion, under Article 27(2), this is without effect on the mineral royalty owned by Fran which continues despite the extinction of the servitude out of which it was created.

IV. Incidents of the Mineral Servitude

A. Oversale, Reversion and Warranty:

1. Oversale and Reversion.

Whether through inadvertence or intention, it is, unfortunately, not uncommon that a given tract of land might be subject to successive grants or reservations of fractional or whole interests which, in the aggregate, numerically exceed one hundred (100%) per cent. The instrument of grant or reservation which, on a cumulative basis, results in a putative total burden in excess of one hundred (100%) per cent is said to result in an "oversale." As the sum of the parts should never exceed the whole, it is inevitable that production will lead to controversy as to the ownership of the minerals in or attributable to the producing tract of land. To the extent that an instrument of grant or reservation results in an "oversale," the "oversold" portion would not, at that time, be effectively granted or reserved.[102]

An early case mixed the inconsistent theories of "obstacle" [citing (former) Article 792, Louisiana Revised Civil Code], and "after-acquired title" [citing *St. Landry Oil & Gas Co., Inc. v. Neal*, 166 La. 799, 118 So. 24 (1928)] in reaching a determination that the existence of outstanding mineral servitudes constitutes an obstacle to the accrual of prescription against an oversold mineral servitude.[103] These theories are incompatible because the existence of an "obstacle" presupposes the existence of a servitude, while the "after-acquired title" doctrine suggests that the servi-

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101 Article 85(5), Mineral Code.

102 "The sale of a thing belonging to another does not convey ownership." Article 2452, Louisiana Revised Civil Code.

103 *White v. Hodges*, 201 La. 1, 9 So.2d 433 (1942).

tude does *not* exist, but is given effect at a later date pursuant to the grantor's warranty obligation. The court held that prescription against the oversold mineral servitude does not commence until the prior existing mineral servitude prescribes.

The "obstacle" theory enunciated in *White* was short lived. In a case decided the next year,[104] the Supreme Court chose between the two theories and embraced the "after-acquired title" approach now embodied in the Mineral Code. In reality, the options presented to the court were the adoption of a rule which would essentially permit servitudes to exist for longer than ten years (which is against public policy) and one which enforced a party's warranty obligations. The court adopted the latter.

In *Bates v. Monzingo*,[105] Mr. Monzingo acquired certain land on November 30, 1927, subject to the reservation by his vendors of a mineral servitude in and to one-half (1/2) of the oil, gas and other minerals in the land. On December 6, 1935, Mr. Monzingo sold to Mr. Baker a mineral servitude in and to one-half (1/2) of the oil, gas and other minerals in the land. On December 30, 1935, Mr. Monzingo sold to Mr. Fuller a mineral servitude in and to one-eighth (1/8) of the oil, gas and other minerals in the land. On August 6, 1942, Mr. Monzingo sold to plaintiff all land affected by the above reservations or sales, and other lands. This sale contained a reservation of a mineral servitude in and to one-half (1/2) of the oil, gas and other minerals. After a dispute arose as to who owned what interest in the minerals, the court stated, as follows:

The largest interest which Monzingo ever owned in the subject land was a one-half, because of the mineral reservation contained in his own act of purchase. His vendors' interest had not yet prescribed when he sold a one-half interest in the minerals to M. M. Baker in 1935; as a matter of fact, by virtue of the sale of a one-eighth interest to A. B. Fuller a few days later, Monzingo oversold his interest. However, he remained the owner of the land until 1942, and therefore, if his own vendors' one-half interest prescribed in 1937, that interest inured to Monzingo's benefit and also to the benefit of any vendee of an interest theretofore "oversold."

The current scheme pertinent to oversale and the "after-acquired title" doctrine is set forth in Articles 77 through 79 of the Mineral Code, as follows:

> Article 77.
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> If a party purports to acquire a mineral servitude from a landowner when the right purportedly acquired is outstanding in another and the landowner either subsequently acquires the outstanding right or

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104 *McDonald v. Richard*, 203 La. 155, 13 So.2d 712 (1943).

105 221 La. 479, 59 So.2d 693 (1952).

is the owner of the land at the time it is extinguished, the after-acquired title doctrine operates to vest the right in the party who purported to acquire it to the full extent of his title.

Example

On August 1, 1986, landowner sells one-half (1/2) of the minerals in a tract of land to Jones. On August 1, 1991, landowner sells "all minerals" in the land to Smith. No use is made of either servitude by August 1, 1996.

Landowner's sale on August 1, 1991, grants to Smith a mineral servitude in and to one-half (1/2) of the minerals. When Jones' mineral servitude prescribes on August 1, 1996, Smith's mineral servitude will increase to a full interest pursuant to the after-acquired title doctrine.

Article 78.

If the landowner who purported to create the mineral servitude acquires the previously outstanding mineral servitude, after having alienated the land, the party in whose favor the doctrine operates has ten years from the date of the transaction by which he purported to acquire or the remaining period of the rights acquired by his grantor in which to exercise his rights, whichever period is greater.

Example

On August 1, 1986, landowner sells one-half (1/2) of the minerals in a tract of land to Jones. On August 1, 1991, landowner sells "all minerals" in the land to Smith. On September 1, 1991, landowner sells the land to Thomas. After receiving his cash consideration from the sale to Thomas, (the former) landowner "buys" the minerals from Jones. No use is made of either servitude by August 1, 1996.

Landowner's sale on August 1, 1991, initially grants to Smith a mineral servitude in and to one-half (1/2) of the minerals. When (the former) landowner acquired Jones' mineral servitude, Smith's mineral servitude will increase to a full interest pursuant to the after-acquired title doctrine. Smith thereupon "has ten years from the date of the transaction by which he purported to acquire or the remaining period of the rights acquired by his grantor in which to exercise his rights, whichever period is greater." Thus, Smith has until August 1, 2001, "in which to exercise his rights."

Article 79.

If the landowner who purported to create the servitude remains the owner of the land at the time of the extinction of the previously outstanding rights, the party in whose favor the doctrine operates has whatever time remains between the date of vesting of title in him and ten years from the date of the transaction by which he purported to acquire in which to exercise his rights.

This article fictitiously vests title in the overpurchaser retroactively

to the date of his oversale for the purposes of calculating his prescriptive period.

Example

On August 1, 1986, landowner sells one-half (1/2) of the minerals in a tract of land to Jones. On August 1, 1991, landowner sells "all minerals" in the land to Smith. No use is made of either servitude by August 1, 1996.

Landowner's sale on August 1, 1991, grants to Smith a mineral servitude in and to one-half (1/2) of the minerals. When Jones' mineral servitude prescribes on August 1, 1996, Smith's mineral servitude will increase to a full interest pursuant to the after-acquired title doctrine and Smith will have "whatever time remains between the date of vesting of title in him and ten years from the date of the transaction by which he purported to acquire in which to exercise his rights." Thus, Smith's (now) full mineral servitude will prescribe, in the absence of use, on August 1, 2001.

In *Rodgers v. CNG Producing Co.*,[106] plaintiffs purchased five noncontiguous tracts of land in 1975, subject to a mineral servitude reserved by a prior landowner in 1968. The very same day, plaintiffs conveyed all of the mineral rights to the vendors without warranty of title. In 1978, the mineral servitudes on the land prescribed from nonuse and the vendors executed leases to the defendants. Defendants subsequently drilled a dry hole on the plaintiffs' property and the plaintiffs sued to have themselves recognized as owners of the mineral rights as well as to collect damages for trespass by the defendants. The trial court held that the sale of minerals from plaintiffs to vendors was a nullity and, thus, plaintiffs became owners of the mineral rights when the previous landowner's mineral servitude prescribed through ten years of nonuse.

The Court of Appeal held that, where land subject to an outstanding mineral servitude is sold to a buyer and the buyer then conveys minerals back to the seller, the latter sale will be ineffective as a disguised reservation of reversionary rights in minerals which is not permitted under Article 76 of the Mineral Code. This analysis was based on the jurisprudence[107] which concluded that, while mineral rights of the landowner were outstanding, the landowner could neither sell nor reserve a servitude to take effect upon the prescription of the outstanding one. Since this eventually was codified in Article 76, the court found the facts and issue in this case were controlled by the Mineral Code. The court also found the after-acquired title doctrine in Article 77 of the Mineral Code – the purpose of which is to protect an innocent purchaser from an oversale

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106 528 So.2d 786 (La.App. 3rd Cir.), *writ denied* 532 So.2d 180 (La. 1988).

107 *Hicks v. Clark*, 225 La. 133, 72 So.2d 322 (1954).

of mineral rights by a landowner – not applicable to the facts in this case. Article 77 is limited to oversales and does not permit the creation of future mineral reservations.

2. Warranty.

The sale of a mineral servitude is subject to the rules governing the transfer of immovable property.[108] Thus, a vendor in an instrument of grant of a mineral servitude "is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing."[109] A seller of a mineral right also "warrants the buyer against eviction, which is the buyer's loss of, or danger of losing, the whole or part of the thing sold because of a third person's right that existed at the time of the sale."[110]

The warranty obligations of a vendor may be modified by visible signs which could be readily discovered upon simple inspection. Thus, in *Richmond v. Zapata Development Corp.*,[111] a vendor sold a tract of land to a vendee who neither examined title nor inspected the property. In the deed, the vendor declared the existence of certain charges which burdened the property, but did not declare the existence of a 1930 mineral lease. When, after the passing of title, the vendee discovered that the property was being exploited for oil and gas pursuant to the (undeclared) 1930 mineral lease, the vendee sued the vendor for breach of warranty against eviction. The court held that

> just as an apparent servitude, an undisclosed mineral lease which produces on the property ample signs of its existence is a real charge of which it is the buyer's business not to be ignorant and against which he cannot claim warranty.

Failure of a vendor to declare the existence of an outstanding mineral servitude is at the risk of the vendor. In *Dillon v. Morgan*,[112] Mr. Morgan acquired a tract of land in 1969 from Mr. Dean who reserved a mineral servitude in and to one-half (1/2) of the minerals. In 1973, Mr. Morgan sold the property by warranty deed to Mr. Dillon, reserving a mineral servitude in and to one-half (1/2) of the minerals. "The existence of the Dean servitude was not declared by defendant and was not otherwise revealed to plaintiff by visible signs as in *Richmond v. Zapata Development Corp.*, 350 So.2d 875 (La. 1977)." The court stated, as follows:

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[108] Article 2, Mineral Code; *Toler v. Pacific International Petroleum, Inc.*, 465 So.2d 925 (La.App. 2nd Cir.), *writ denied* 468 So.2d 1210 (La. 1985).

[109] Article 2475, Louisiana Revised Civil Code.

[110] Article 2500, Louisiana Revised Civil Code.

[111] 350 So.2d 875 (La. 1977).

[112] 362 So.2d 1130 (La.App. 2nd Cir. 1978).

> Here, the seller shall not be allowed to derogate from his obligations in the contract of sale. When the existence and validity of the earlier Dean servitude of one-half minerals is recognized, it is impossible to uphold on the one hand, defendant's reservation of one-half minerals, while upholding on the other hand, defendant's obligations of delivery and of warranty of the right to explore and exploit one-half the minerals. There cannot be three halves in a whole. Because of his obligations in the contract of sale, defendant cannot assert against the buyer his claim to the servitude of one-half minerals reserved in the deed.

In *Huckabay v. Keahey*,[113] plaintiffs sued defendants to recover on drafts issued as consideration for a mineral deed granted to defendants by plaintiffs; the mineral deed excluded warranty as to the equipment located on the servitude tract but was otherwise a "warranty deed" as to the minerals. Plaintiffs' demands were resisted by defendants based upon the fact that certain lessees had claims against the minerals and that "the presence of liens would interfere with [the mineral servitude owner]'s ability to garner the net profits from any production from the wells." The court held that the existence of the liens was not manifested by "visible signs" as envisioned by *Richmond* and, thus, the defendants were held to have been evicted, giving rise to an action in warranty. However, because of the court's disapproval of the defendants' "self-help of filing unilateral reconveyances to achieve the judicial remedy contemplated by the Civil Code," the court "consider[ed] the initial sales of mineral rights rescinded and the parties restored to the status quo ante."

B. Co-ownership:

1. General.

"Mineral rights are susceptible of ownership in indivision."[114] As such, a co-owned mineral servitude is subject to partition.[115]

Example

Landowner sells to Jones and Smith all minerals under his tract. Jones and Smith are co-owners of a single mineral servitude.

Thereafter, Smith donates one-half (1/2) of his one-half (1/2) mineral interest, or a net one-fourth (1/4) interest, to his nephew. Jones, Smith and the nephew are co-owners of a single mineral servitude.

The jurisprudence has clarified the nature of the rights owned by a mineral servitude owner and the owner of the land to which such servitude is subject. In *Clark v. Tensas Delta Land Co.*,[116] the defendant ac-

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113 600 So.2d 97 (La.App. 2nd Cir. 1992).

114 Article 168, Mineral Code.

115 Article 172, Mineral Code.

116 172 La. 913, 136 So. 1 (1931).

quired a mineral servitude in and to one-half (1/2) of the minerals in and underlying a certain tract of land on July 18, 1917. No "use" of the mineral servitude was made within ten years of the date of its creation. In response to the plaintiff's suit to declare the servitude extinguished by nonuse, the defendant contended that "prescription could not run against the company because [the landowner] and the [defendant] were co-owners of the mineral rights, and therefore the [defendant] could not go upon the land to drill for the oil, gas, or other minerals, without [the landowner]'s consent."

The court stated that what the defendant "owned was not half of the right to the minerals, but the right to half of the minerals, in Clark's land." "Therefore, [the landowner] . . . was obliged, . . . to permit the [servitude owner] to go upon the land and explore for oil, gas, and other minerals, and to reduce them to possession, and account to the owner of the land for half of such oil, gas, or other minerals." In rejecting the defendant's contention that case law maintained that one who acquires mineral rights from an owner of only an undivided interest in land has no right to explore for minerals without the consent of the other owners of the land,[117] the court noted that the "difference between those cases and this case is that in this case the grantor of the mineral rights to the [defendant's ancestor-in-title] was the sole owner of the land."

Example

On August 1, 1986, landowner sells one-half (1/2) of the minerals to Jones. Jones is the owner of a full mineral servitude in and to one-half (1/2) of the minerals; landowner is the owner of the land subject to Jones' mineral servitude. Landowner has the right to operate and may lease that right to another, and such operations may be conducted without Jones' consent. Similarly, Jones has the right to operate and may lease his right to another, and such operations may be conducted without the landowner's consent.

Consistent with *Clark*, the Mineral Code instructs that "[c]o-ownership does not exist between the owner of a mineral right and the owner of the land subject to the right or between the owners of separate mineral rights."[118] This rule is supported by the jurisprudence. In *Starr Davis Oil Co., Inc. v. Webber*,[119] plaintiff, the owner of a mineral servitude in and to one-half (1/2) of the minerals under a tract of land owned by the defendants, sued for a partition of the mineral interest under the tract of land. The plaintiff claimed that, "as owner of one-half of the minerals, it holds in indivision and as co-owner with defendants." The

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117 *Gulf Refining Co. of Louisiana v. Carroll*, 145 La. 299, 82 So. 277 (1919).

118 Article 169, Mineral Code.

119 218 La. 231, 48 So.2d 906 (1950).

court observed that the "primary question for determination is whether one having a fractional mineral interest is the coproprietor of the landowners, who have retained the remainder of the mineral rights, as it is essential to the action of partition that the parties thereto hold the property in common." The court rejected this contention and held that plaintiff's "supposition is founded on a false premise, i. e., a belief that there is co-ownership of a single right to explore for minerals, when in truth plaintiff was granted a whole and unencumbered right of exploration. The only limitation in the grant [of a mineral servitude] is that, if minerals are found, plaintiff is entitled to take but one-half. However, this does not in any way restrict its right to explore; the real right ceded by defendants."

Example

On August 1, 1986, landowner sells one-half (1/2) of the minerals under a tract of land to Jones. On September 1, 1986, landowner sells one-half (1/2) of the minerals under the tract of land to Smith.

Jones owns a mineral servitude which, unless used, will prescribe on August 1, 1996. Smith owns a separate, distinct mineral servitude which, unless used, will prescribe on September 1, 1996. Each may operate without the concurrence of the other. However, if the operations are successful, the operating party must share one-half (1/2) of the produced minerals with the other, subject to the right to withhold out of production drilling and other permissible costs.

2. Co-ownership of Mineral Servitude.

As previously noted, Article 168 of the Mineral Code acknowledges that mineral rights are susceptible of ownership in indivision. Certain consequences of this regime of mineral co-ownership are set forth in Articles 170, 175 and 176, as follows:

Article 170.

> A co-owner of a mineral servitude may create a mineral royalty out of his undivided interest in the servitude and prescription of nonuse commences from the date of its creation. The consent of the co-owner of the party creating the royalty is not necessary to entitle the royalty owner to receive his proportionate part of production.

Because the owner of a mineral royalty only participates in production when, as and if obtained, and since, quite obviously, production can only be brought about by drilling, this article — in not requiring the "consent of the co-owner of the party creating the royalty" in order "to entitle the royalty owner to receive his proportionate part of production" — presupposes that drilling on the co-owned servitude occurs as a consequence of the consent of all, or the appropriate number, of co-owners.

Article 175.

> A co-owner of a mineral servitude may not conduct operations on

the property subject to the servitude without the consent of co-owners owning at least an undivided eighty percent interest in the servitude, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. Operations as used in this Section shall include geological surveys, by means of a torsion balance, seismographic explosions, mechanical device, or any other method. A co-owner of the servitude who does not consent to such operations has no liability for the costs of development and operations except out of his share of production.

The *proviso* contained in the first sentence of Article 175 makes no sense in the instance where the servitude owner operates in his own right. This requirement concerns the necessity for a co-owner enjoying the "consent of co-owners owning at least an undivided eighty percent interest in the servitude," to contact the remaining co-owners and to offer "to contract with them on substantially the same basis that he has contracted with another co-owner." Although the requirement was added to this article in 1988[120] concomitantly with the amendment to Article 166 of Mineral Code (governing the circumstances under which a lessee may conduct operations on co-owned land without the consent of all co-owners), the *proviso* has utility in the latter article (where there is a "contract" to serve as the "basis" for "substantial" comparison). However, in the context of a mineral servitude owner desiring to operate on the property in his own right and not through a mineral lessee, there would presumably be no such "contract."

Article 175 was amended in 1995 by adding the second sentence in an attempt to clarify the right of a mineral servitude owner to conduct geophysical operations and, in so doing, to respond to a court decision which raised doubts about that right.[121]

Article 176.

A co-owner of a mineral servitude may act to prevent waste or the destruction or extinction of the servitude, but he cannot impose upon his co-owner liability for any costs of development or operation or other costs except out of production. He may lease or otherwise contract regarding the full ownership of the servitude but must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership.

The reference to the prevention of "waste" would seem to contem-

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120 Act No. 647 of the 1988 Louisiana Legislature.

121 *Jeanes v. G.F.S. Company*, 94-739 (La.App. 3rd Cir. 12/7/94); 647 So.2d 533, *writ denied* 95-0036 (La. 2/17/95); 650 So.2d 255.

plate that a co-owner of a mineral servitude could operate without the concurrence of the other co-owners in order to protect the servitude tract against drainage. Similarly, the co-owner could independently operate in order to avoid "destruction or extinction of the servitude" by prescription of nonuse. Under these two specific circumstances, a co-owner of a mineral servitude may exercise its rights, unbridled by any obligation to obtain any particular level of consent.

In order to induce a lessee to operate under such circumstances, a co-owner is empowered to "lease or otherwise contract regarding the full ownership of the servitude," not merely his undivided interest. Such a co-owner "must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership." A co-owner who does not lease, but who operates in his own right in order "to prevent waste or the destruction or extinction of the servitude," assumes the risk of a dry hole; he cannot charge his co-owners for "costs of development or operation or other costs except out of production."

Because this exception to Article 175 is so narrow, a lessee desiring to operate under a lease from a single co-owner [or certainly from co-owners owning in the aggregate less than eighty (80%) per cent in interest] as to the "full ownership of the servitude" should proceed with extreme caution as its authority to "be on the ground" is predicated upon its ability to demonstrate that the exceptional purposes of Article 176 are applicable.

3. Creation of Mineral Servitude by Co-owners of Land.

"A co-owner of land may create a mineral servitude out of his undivided interest in the land, and prescription commences from the date of its creation."[122]

Because, as a proposition at general law,[123] a co-owner of land cannot operate without the consent of the remaining co-owners,[124] it followed that one who acquires a mineral servitude from a co-owner of land may not exercise his right without the consent of co-owners. Since 1988, however, the owner of a mineral servitude granted by a co-owner of land requires "the consent of co-owners owning at least an undivided eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another

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122 Article 164, Mineral Code.

123 As seen, this is subject to exceptions set forth in Article 176.

124 Article 801, Louisiana Revised Civil Code ("The use and management of the thing held in indivision is determined by agreement of all the co-owners."). As drilling operations would not be a use "according to its destination," Article 802, Louisiana Revised Civil Code, would not appear applicable.

co-owner."[125] A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations, except out of his share of production.

"The owner of a mineral right acquired from a co-owner of land cannot compel partition of the land."[126]

4. Partitions of Land With Reservation of Mineral Servitude.

Article 67 of the Mineral Code provides, as follows:

> Co-owners of land constituting a continuous whole may partition it and reserve a single mineral servitude in favor of one or more of them.

This rule — which reflects a departure from the civilian principle that one may not fractionate his title in favor of himself — is best understood by reference to jurisprudence. Thus, it is appropriate to consider the implications of *Whitehall Oil Company v. Heard*[127] (involving mineral royalties) and *GMB Gas Corporation v. Cox*[128] (involving mineral servitudes). These cases concern mineral rights created as a consequence of a partition of land with reservation of minerals (or royalties) and whether or not (and the extent to which) a single or separate mineral servitude (or mineral royalty) interest is thereby created and, hence, whether or not (and the extent to which) operations conducted on or production secured from a well situated on one of the internal partitioned tracts will serve to interrupt prescription accruing as to other portions of the (parent) mineral servitude (or royalty) tract. A threshold question is whether one or several mineral servitudes are created. Thus, the issue was framed in *Whitehall*,[129] as follows:

> Did [the parties to the partition] intend each tract transferred to be subject to separate mineral royalty reservations which affected that tract alone? Or did they instead intend for each coheir to have a single undivided mineral interest affecting the entire mass of the property partitioned by the agreements?

Prior to enactment of the Mineral Code, there was serious doubt as to whether or not parties – despite a clear statement of intent – could create a *single* servitude or royalty over the partitioned property, as to do so

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125 Article 164, Mineral Code, as amended by Act No. 647 of 1988.

126 Article 167, Mineral Code. The Comments to this article indicate that it rejects (former) Article 740, Louisiana Revised Civil Code, which, under certain circumstances, permitted the owner of a predial servitude granted by a co-proprietor of land to compel his grantor "to sue for a partition."

127 197 So.2d 672 (La.App. 3rd Cir.), *writ denied* 250 La. 924, 199 So.2d 923 (1967).

128 340 So.2d 638 (La.App. 2nd Cir. 1976).

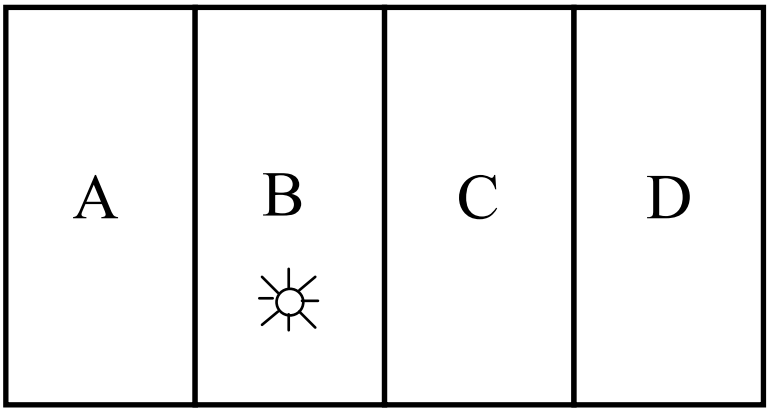
129 Although *Whitehall* involved a mineral royalty (and not a mineral servitude), the principles involved are the same.

would be "contrary to the traditional concept that a landowner may not fractionate his title in favor of himself."[130] That the public policy inherent in the civil law imposes limitations on freedom of contract was recognized by Judge Tate in *Whitehall* in the following terms, to-wit:

> Likewise, whether either multiple royalty interests are created in favor of each co-owner, or instead **(insofar as legally possible)** a single royalty interest, must ultimately be decided in accordance with the intent of the parties as reflected by the partition agreement. (Emphasis added.).

The limiting expression "insofar as legally possible" is in recognition of the fact that, as noted above, there are limitations imposed by public policy considerations on the ability of contracting parties to create a servitude (or royalty) on such parties' property, in favor of themselves.

Prior to the enactment of the Mineral Code, the implications of this determination on the issue of interruption of prescription presented complicated regimes of ownership. For example, assume that four co-owners of a forty acre tract of land partitioned the property into four 10-acre tracts and "reserved the minerals in indivision." A well is drilled in good faith on Tract B within ten years of the partition. The resulting configuration would be, as follows:



In this configuration, A owns no mineral servitude on his own tract [A "owns" a one-fourth (1/4) interest in the minerals in Tract A, but it is ownership attendant to his surface ownership, not a servitude ("Article 6 ownership"], but does own a mineral servitude in and to one-fourth (1/4) of the minerals in and under Tracts B, C and D, such tracts (insofar as A is concerned) being contiguous with the tract (Tract B) on which the well is situated. B owns a mineral servitude in and to one-fourth (1/4) of the

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[130] *See* Hardy, *The Work of the Louisiana Appellate Courts for the 1966-1967 Term*, 28 La.L.Rev. 312, 366 (1968) and Jumonville, *Recent Jurisprudence*, 15th Ann. Inst. on Min. Law 164, 177 (1968).

minerals in and under Tract A, no mineral servitude in Tract B [B owns a one-fourth (1/4) interest in the minerals in Tract B, but, as in the case of each distinct owner of a given tract, it is ownership attendant to his surface ownership, not a servitude] and a mineral servitude in and to one-fourth (1/4) of the minerals in and under Tracts C and D, and so on. As a consequence, if a well were drilled on Tract B, it would interrupt prescription accruing against A's mineral servitude in Tracts B, C and D, since those three tracts – insofar as A is concerned – are contiguous with the tract (Tract B) on which the well is situated. The well would have no bearing on A's minerals in Tract A since those minerals are simply owned by A as a consequence of A's ownership of Tract A; A's interest in the minerals in Tract A is not subject to a regime of prescription.

That same well, however, would not interrupt prescription accruing against B's mineral servitude in Tracts A, C and D since the well, being on Tract B, has not affected any minerals in which B owns an interest in servitude. This is so because B cannot, at one and the same time, own the surface of Tract B and a mineral servitude thereon. Any attempt to create a servitude on Tract B in favor of B would be met with extinguishment on the basis of the doctrine of confusion.[131] Insofar as C is concerned, prescription accruing against his mineral servitude would be interrupted in Tracts A and B, because those tracts are contiguous with the tract (Tract B) on which the well is situated insofar as C is concerned and, hence, are burdened by his mineral servitude therein. Prescription accruing against C's mineral servitude in Tract D, however, would not be interrupted since Tract D is not contiguous to Tract B (on which the well is located) insofar as surface ownership is concerned since the ownership of Tract C by C would defeat mineral contiguity between Tracts A and B and Tract D.

It is thus seen that, due to the legal limitations on the creation of a *single* mineral servitude (with a *single* use requirement) over a continuous tract, a uniformity or continuity of ownership was legally impermissible.[132]

As noted above, the treatment of this issue has been modified by Article 67 of the Mineral Code. This article was held applicable to "pre-code issues which have not been clearly resolved by the jurisprudence" in *GMB Gas Corporation v. Cox*.[133] In a dissent, Judge Marvin noted

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[131] *See Allied Chemical Corporation v. Dye*, 441 So.2d 776 (La.App. 2nd Cir. 1983), *writ denied* 444 So.2d 119 (1984) ("When the owner in entirety of the servitude becomes the full owner of the land which is subject to the servitude, confusion extinguishes the servitude."). In the common law, this is referred to as the doctrine of "merger."

[132] It is reiterated that the situation described herein was the situation which prevailed *prior* to the adoption of the Mineral Code, effective January 1, 1975.

[133] 340 So.2d 638 (La.App. 2nd Cir. 1976).

that, "[i]n effect, we are holding the Mineral Code (R.S. 31, Act 50 of 1974, effective January 1, 1975) to be retroactive under the guise of promoting stability or uniformity, notwithstanding R.S. 31:214:

> 'The provisions of this Code shall apply to all mineral rights, including those existing on the effective date hereof; *but no provision may be applied to divest already vested rights or to impair the obligation of contracts*.' (Emphasis added by court)."

Although the *Cox* case involved the issue of "whether the lessee of a co-owner of a mineral servitude created prior to the enactment of the Mineral Code may conduct operations on land subject to the servitude without the consent of the other co-owner," the analysis in which the court engaged would seem to support the application of the provisions of the Mineral Code (particularly Article 67) to pre-existing mineral servitudes. Later decisions have cited the *Cox* case with approval.[134]

C. Division and Indivisibility:

As a general proposition, and subject to certain exceptions, "the rights and obligations of the owner of a mineral servitude are indivisible."[135] Thus, production from a certain subsurface geological zone or formation will hold the mineral servitude as to all subsurface geological zones or formations, even those which are not in production or have not been tested.[136]

"A single mineral servitude is created by an act that affects a continuous body of land although individual tracts or parcels within the whole are separately described."[137] Accordant with the instruction of Article 75 of the Mineral Code that the "rules of use regarding interruption of prescription on a mineral servitude may be restricted by agreement but may not be made less burdensome," it is permissible to specify, in an instrument of grant or reservation which affects a continuous body of land comprised of separately described tracts or parcels of land, that each separate and distinct tract is burdened by a separate and distinct mineral servitude, with each being subject to a separate and distinct use requirement.

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134 *See Sandefer & Andress, Inc. v. Pruitt*, 471 So.2d 933 (La.App. 2nd Cir. 1985) ("We further note that the Mineral Code is a codification and clarification of the law in force prior to the Code's 1975 enactment. This court has held that the Code is retroactive when it serves the remedial function [citing *Cox*].").

135 Article 62, Mineral Code. The exceptions to this general rule are enumerated in Articles 63 through 71 of the Mineral Code.

136 *White v. Frank B. Treat & Son Inc.*, 230 La. 1017, 89 So.2d 883 (1956) ("In the instant case admittedly the servitude of the defendants was not contractually restricted or limited as to formations. They had the unqualified privilege of obtaining from beneath the land a stipulated portion of whatever minerals they could locate and extract; they did not have several rights to take minerals from particular pockets or levels.").

137 Article 63, Mineral Code.

Conversely, an "act creating mineral servitudes on noncontiguous tracts of land creates as many mineral servitudes as there are tracts unless the act provides for more."[138] Thus, the use of one such mineral servitude has no bearing on the accrual of prescription against another such mineral servitude.

"The division of a tract burdened by a mineral servitude does not divide the servitude."[139] This comports with the rules contained in the Louisiana Revised Civil Code governing predial servitudes.[140]

Article 65 of the Mineral Code codifies existing jurisprudence. Hence, once a mineral servitude is established on a continuous tract of land, subsequent sales of land by distinct parcels do "not have the effect of creating new or additional servitudes covering the separate tracts." Rather, it "incumber[s] and [binds] the entire tract like a mortgage or a lease."[141] Thus, a use of the mineral servitude on any part of the parent tract will serve to interrupt prescription as to the entire tract, despite these subsequent sales of the surface into distinct parcels. Use of any part of a mineral servitude will preserve the servitude in its entirety.[142]

"The owners of several contiguous tracts of land may establish a single mineral servitude in favor of one or more of them or of a third party."[143]

"The conveyance or reservation by a mineral servitude owner of a portion of his rights does not divide the mineral servitude but creates only a co-ownership, except that if a person other than the servitude owner acquires all of the rights granted by the act creating the servitude in a specific geographical area, the servitude is divided."[144]

Article 69 codifies prior case law wherein a landowner reacquired all of the servitude rights in certain distinct portions of the original servitude tract. This reacquisition was held to result in a division of the servitude as to the remaining, unacquired portions, which were rendered noncontiguous by the landowner's reacquisition.[145]

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138 Article 64, Mineral Code.

139 Article 65, Mineral Code.

140 *See* Article 747, Louisiana Revised Civil Code ("If the dominant estate is divided, the servitude remains due to each part, provided that no additional burden is imposed on the servient estate.").

141 *Patton v. Frost Lumber Industries, Inc.*, 176 La. 916, 147 So. 33 (1933).

142 *Lenard v. Shell Oil Company*, 211 La. 265, 29 So.2d 844 (1947).

143 Article 66, Mineral Code.

144 Article 69, Mineral Code.

145 *Arent v. Hunter*, 171 La. 1059, 133 So. 157 (1931) (as a result of the landowner's reacquisition, the "servitude upon the five noncontiguous parcels of land became five distinct servitudes, and the exercise of the servitude on one of the parcels by [a certain use on one of the five tracts], did not constitute an exercise of the servitude upon the four

Example

Landowner sells a tract of land, reserving all minerals. This creates a mineral servitude. Thereafter, landowner donates to his children "one-half (1/2) of the oil and gas lying below the base of the Marg Tex Sand as seen and encountered in this area." This does not divide the mineral servitude, but "creates only a co-ownership."

Instead of the donation mentioned above, landowner donates to his children all minerals underlying the southern half of the tract of land. This divides the servitude such that a use on the north half will have no bearing on prescription accruing against the south half of the tract.

Instead of the donations mentioned above, landowner donates to his children "all of the minerals underlying the base of the Marg Tex Sand as seen and encountered in this area." This does not divide the mineral servitude (because it is not an acquisition by the children of "all of the rights granted by the act creating the servitude in a specific *geographical* area"), but "creates only a co-ownership."

"Execution of a lease or other contract for use or development of a portion of a tract burdened by a mineral servitude does not divide the servitude."[146] This rule perpetuates prior jurisprudence.[147] It is also appropriate in view of the functional distinction between the mineral servitude and the mineral lease. To formulate any other rule would make the rights of the servitude owner unnecessarily dependent upon the happenstance of what some future mineral lessee might require in terms of acreage to be leased.

"Unitization of a portion of a tract burdened by a mineral servitude does not divide the servitude."[148] This statement, when read in context with Articles 33 and 37, simply means that a division of the servitude does not result from the "mere" fact of unitization, but, as seen by the cited articles, a unitized use may effect a division.

In *Ohio Oil Company v. Ferguson*,[149] a landowner granted a mineral servitude on his property and the original mineral owners divested themselves of title to all of the mineral interests acquired by them in designated portions of the tract of land. In a concursus proceeding, the court found that several claimants had lost their mineral interests through ten years' prescription of nonuse. These claimants then appealed.

On original hearing, the Louisiana Supreme Court found that the exercise of a servitude on a designated portion of a tract of land by one

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noncontiguous parcels.").

146 Article 70, Mineral Code.

147 *Levy v. Crawford, Jenkins & Booth*, 194 La. 757, 194 So. 772 (1940).

148 Article 71, Mineral Code.

149 213 La. 183, 34 So.2d 746 (1947).

servitude owner did not interrupt prescription as to the other servitude owners. Based on (former) Article 803, Louisiana Revised Civil Code, the court held that, if a mineral servitude is due to two or more persons on designated portions of a tract of land, the servitude is not considered divided but the "advantages" of the servitude are divided. Thus, the exercise of the servitude on a designated portion of the tract of land did not interrupt prescription on the entire tract.

On rehearing, the court further explained its decision by comparing the sale of a mineral servitude to two or more persons to the division of a dominant estate under (former) Articles 789 and 801, Louisiana Revised Civil Code. Thus, under (former) Article 803, Louisiana Revised Civil Code, the tract in question became a divided tract although the servitude itself was not divided. The use of the servitude by one person on a designated portion of the tract of land would only interrupt prescription on that particular portion – it did not interrupt prescription on the other designated portions of the land. Based on that principle, the court concluded that those servitude owners who failed to exercise their right on the designated portions of the tract of land in question, lost their servitude through ten years of nonuse.

In *Mire v. Chevron Oil Company*,[150] Mr. Mire donated to his eight (8) children eight-ninths (8/9) "of the oil, gas, and other minerals" under certain lands and one-half (1/2) "of the oil, gas, and other minerals" under other lands on December 14, 1957. This created a mineral servitude.

On June 4, 1965, Mr. Mire donated the entirety of the surface of these lands to his eight (8) children, reserving all minerals under the same lands. The court noted that Mr. Mire "could not reserve in 1965 more than the mineral interest he had reserved in the 1957 donation; viz, 1/9 on one tract and 1/2 on the other." On the same day, Mr. Mire's eight (8) children partitioned the lands donated to them by their father. The lands were partitioned into eight (8) distinct lots. In this partition, the children expressly reserved all minerals "in indivision." When the property was placed in a producing unit, a dispute as to the mineral ownership ensued.

The court held that the mineral servitude which was created in 1957 was extinguished by confusion in 1965 when the same donees acquired the surface of the lands which theretofore were burdened by the mineral servitude. Additionally, at that time, Mr. Mire "created unto himself a mineral servitude of one-ninth (1/9th), something which he did not own before inasmuch as he could not own the surface rights and own a mineral servitude in his own favor at the same time." Upon the extinguishment by confusion of the servitude in 1965, and in view of the reserva-

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[150] 353 So.2d 462 (La.App. 3rd Cir.), *writ denied* 355 So.2d 256 (La. 1978).

tion contained in the partition, a new servitude was created. The court found that "a single servitude on the entire tract, which servitude was shared by each of the partitioners in an equal undivided one-ninth (1/9th) interest each, was created by the act of partition, and as of that date, a new ten-year prescriptive period for non-user commenced to run."[151]

V. Maintenance and Duration of the Mineral Servitude

A. Preface:

While the jargon of the industry often speaks in reference to the "term" of a mineral servitude or to a mineral servitude having a "life" of ten years, in actuality, a servitude is a right of unlimited duration, provided that it does not extinguish in some manner recognized by law.

B. Modes of Extinguishment:

Being in the nature of a servitude, the right of the servitude owner is subject to extinguishment in several ways. For the most part, these modes of extinguishment are consonant with the manner in which predial servitudes are extinguished.[152]

1. Prescription Resulting from Nonuse.

"A mineral servitude is extinguished by . . . prescription resulting from nonuse for ten years."[153]

Self-evidently, if no "use" is made of the mineral servitude within ten years from its creation, it is extinguished and ceases to exist. A "mineral servitude, having once become extinct by prescription, is a dead thing."[154] What constitutes a "use" is discussed in Part V.C below.

2. Confusion.

"A mineral servitude is extinguished by . . . confusion."[155]

Confusion occurs "[w]hen the qualities of obligee and obligor are united in the same person."[156] When the landowner acquires (by purchase, inheritance, donation or otherwise) the mineral servitude to which his land is subject, confusion operates by operation of law to extinguish the servitude. Thus, the doctrine of confusion explains the intrinsic requirement of Article 21 of the Mineral Code that the mineral servitude

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151 The Supreme Court denied writs, with Justice Tate dissenting, stating that "[t]he 1965 act did not create a new servitude. Therefore the original 1957 servitude was extinguished by non-user in 1967." 355 So.2d 256 (La. 1978).

152 *See* Articles 751-774, Louisiana Revised Civil Code.

153 Article 27(1), Mineral Code. "Prescription of nonuse is a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time." Article 3448, Louisiana Revised Civil Code.

154 *Delta Refining Co. v. Bankhead*, 225 La. 422, 73 So.2d 302 (1954).

155 Article 27(2), Mineral Code. *Compare* Article 765, Louisiana Revised Civil Code.

156 Article 1903, Louisiana Revised Civil Code.

must relate to "land belonging to another."

3. Renunciation or Remission.

"A mineral servitude is extinguished by . . . renunciation of the servitude on the part of him to whom it is due, or the express remission of his right."[157] This article is in accord with the principle at general law that an obligation may be extinguished by remission of the debt by the obligee.[158]

There must be "the clearly expressed intention on the part of the servitude owners necessary . . . for the renunciation of the servitudes which were in existence."[159]

4. Expiration of Term or Happening of Dissolving Condition.

"A mineral servitude is extinguished by . . . expiration of the time for which the servitude was granted, or the happening of the dissolving condition attached to the servitude."[160]

As noted previously, freedom of contract allows parties to place a term on the mineral servitude. The term of the servitude may be measured by units of time, volumes of product or amounts of money. Such servitudes are called "term minerals." Additionally, parties are free to express a condition which, upon its occurrence, will effect the dissolution of the servitude. Upon accrual of the stated term or the happening of the dissolving condition attached to the servitude, the mineral servitude is concomitantly extinguished.[161]

5. Extinction of Right of Establisher.

"A mineral servitude is extinguished by . . . extinction of the right of him who established the servitude."[162] This article effectuates the intent of Article 25 of the Mineral Code and, as mentioned above, is but an application of the principle that one may not convey to another greater rights than he has.[163] Examples of circumstances which would effect the conclusion of a mineral servitude upon the "extinction of the right of him who established the servitude" would include the effectuation of the resolutory condition, implied in every act of sale, upon the failure of the buyer to pay the purchase price;[164] the exercise by a vendor of a right of

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157 Article 27(3), Mineral Code.

158 Article 1888, Louisiana Revised Civil Code.

159 *Bourg v. Hebert*, 224 La. 535, 70 So.2d 116, 120 (1954).

160 Article 27(4), Mineral Code. *Compare* Article 773, Louisiana Revised Civil Code.

161 *Texas Co. v. Crawford*, 212 F.2d 722 (5th Cir. 1954).

162 Article 27(5), Mineral Code. *Compare* Article 774, Louisiana Revised Civil Code.

163 *See* footnote 40, *supra*.

164 Article 2561, Louisiana Revised Civil Code.

redemption,[165] and the enforcement of a superior mortgage or lien.[166] The owner of a mineral servitude granted by one with such a conditional title (or a lessee of such an owner), might avoid this result by securing and recording a subordination of the superior right or by securing protective leases from the holders of such rights.[167]

An important limitation to this rule arises out of the "public records doctrine." In a case involving a mineral lease granted by a lessor who, subsequent to granting the lease, was sued by his vendor to annul the sale because of non-payment of the purchase price, the annulment was without prejudice to the rights of the mineral lessee because the lessee relied on the "public records doctrine."[168]

C. Prescription Resulting from Nonuse:

A mineral servitude being a mineral right, it is (as are all mineral rights) "subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."[169]

The operative word is "use": If no "use" is made of a mineral servitude within ten years of its creation, it will extinguish.[170]

1. Interruption by Use.

(a) General.

The rules pertinent to the interruption of prescription by "use" resulting from the conduct of drilling operations are now codified in Article 29 of the Mineral Code which reads, as follows:

> The prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of minerals. By good faith is meant that the operations must be

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165 Article 2567, Louisiana Revised Civil Code. See also Article 713, Louisiana Revised Civil Code ("A purchaser under a reserved right of redemption may establish a predial servitude on the property, but it ceases if the seller exercises his right of redemption.").

166 Article 3279, Louisiana Revised Civil Code.

167 "In Louisiana, parties are free to alter or modify the priority of rights or claims otherwise established by law." *Calcasieu Marine National Bank of Lake Charles v. Scarlett Investments*, 556 So.2d 911 (La.App. 3rd Cir.), *writ denied* 599 So.2d 1366 (1990) citing *T. D. Bickham Corp. v. Hebert*, 432 So.2d 228 (La. 1983); *Richey v. Venture Oil & Gas Corp.*, 346 So.2d 875 (La.App. 4th Cir.), *writ denied* 350 So.2d 891 (La. 1977) and *Odom v. Cherokee Homes, Inc.*, 165 So.2d 855 (La.App. 4th Cir.), *writ denied* 246 La. 868, 167 So.2d 677 (1964).

168 *Jefferson v. Childers*, 189 La. 46, 179 So. 30 (1938).

169 Article 16, Mineral Code.

170 When a mineral servitude is extinguished by accrual of liberative prescription, the former owner must furnish the landowner with a recordable act evidencing its extinction within thirty days of receipt of written demand therefor. Failure to comply with such demand will subject the former owner to damages and, unless there is a good faith dispute as to whether it has extinguished, attorney's fees. Articles 206-8, Mineral Code.

(1) commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth,

(2) continued at the site chosen to that point or depth, and

(3) conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.

As the principal object of a mineral servitude is to exploit mineral resources for commercial purposes, it is self-evident that a "use" of such servitude must be made in good faith in order for such "use" to interrupt prescription. The jurisprudence has envisioned that a "use" is in good faith if it is undertaken with some reasonable expectation that minerals will be discovered and produced in "paying quantities."[171]

(b) Role of Production in "Paying Quantities."

In the context of interruption by use, the role of production in "paying quantities" is two-fold. Under Article 29 of the Mineral Code, one of the requirements for a use through drilling operations is that there must be a "reasonable expectation of discovering and producing minerals in *paying quantities* at a particular point or depth." If a drilling operation is commenced with such expectation (and if the other requirements are met), the operation will serve to interrupt prescription even if unsuccessful; a dry hole is sufficient if it meets the "good faith" requirement. If production is obtained (even if obtained as a result of an operation <u>not</u> commenced with a "reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth"), such production itself – independent of the drilling operation (which had no bearing on prescription) – will interrupt prescription, regardless of whether it is in "paying quantities," provided that production actually commences prior to the prescriptive date. "It is necessary only that minerals actually be produced in good faith with the intent of saving or otherwise using them for some beneficial purpose."[172] This codifies the jurisprudence which held that it "is unimportant whether this production was in paying quantities so long as there was some production or use of the servitude."[173]

Thus, for purposes of the interruption of prescription by production, production in fact is the standard. Whether or not production is in "paying quantities," production in fact will interrupt prescription accruing against the mineral servitude so long as the minerals are produced "in good faith with the intent of saving or otherwise using them for some beneficial purpose."

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171 *Kellogg Bros., Inc. v. Singer Manufacturing Company*, 131 So.2d 578 (La.App. 2nd Cir. 1961).

172 Article 38, Mineral Code.

173 *Mays v. Hansbro*, 222 La. 557, 64 So.2d 232 (1953).

Production in "paying quantities" is defined in Article 124 of the Mineral Code. However, that definition is pertinent to mineral leases.[174] The essential element of the codal definition is that production "is considered to be in paying quantities when production allocable to the *total original right of the lessee* to share in production under the lease is sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss." Thus, if a mineral lease provides for a one-fifth (1/5) lessor's royalty, "lifting costs" are measured against four-fifths (4/5) of total production (even if the lessee's interest is burdened by an overriding royalty interest which would further reduce the net revenue interest attributable to the working interest). If no mineral lease exists, and the mineral servitude owner operates in its own right, it is entitled to five-fifths (5/5) of production, a higher amount of production against which operating costs are to be measured. Thus, assuming one could predict post-drilling "lifting costs" with sufficient certainty, it is apparent that more revenue accrues to the operator under the (unleased) servitude than to the hypothetical mineral lessee, against which the same amount of expenses are to be measured. In a proper case (depending upon the amount of the royalty reserved under a mineral lease), it might be that production would be found to be in "paying quantities" for purposes of the mineral servitude but not for purposes of a mineral lease. Again, the production in "paying quantities" issue is only relevant in determining if a dry hole was drilled "in good faith."[175]

(c) Nature of Use.

In order to interrupt prescription, the servitude must be used in the manner contemplated by the instrument of grant or reservation. Thus, it has been held that a geophysical exploration made for the purpose of determining the presence of minerals was not the use of a servitude in the manner contemplated by the grant of the servitude and, consequently, did not interrupt prescription.[176]

In *Louisiana Petroleum Co. v. Broussard*,[177] the owner of land conveyed the mineral rights in a tract of land to certain parties who then transferred these rights to plaintiff. Defendants claimed the mineral rights owned by plaintiff were not exercised for ten years and, consequently, were lost through ten years of nonuse. Plaintiff's lessees had drilled several wells, beginning seven years after creation of the servitude, none of

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174 The article appears in Chapter 7 of the Mineral Code entitled "The Mineral Lease," Part 4 of which is entitled "The Obligations of the Lessee."

175 If prescription is interrupted by production, it need not be in paying quantities. Article 38, Mineral Code.

176 *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938).

177 172 La. 613, 135 So. 1 (1931).

which had proved to be commercially productive. These drilling operations lasted for four years and, for nine years, there was no drilling at all until drilling operations were renewed. There was another lapse of eight years before drilling was once again resumed. The Louisiana Supreme Court had to determine if some of the drilling operations were insufficient to interrupt prescription of the mineral servitude through ten years of nonuse. The general rule, according to the court, was that drilling operations that terminated at a depth at which there was no real hope of discovering minerals in "paying quantities" could not be considered use of the mineral servitude sufficient to interrupt prescription. Since one of the drilling operations ceased at a depth where no real hope of discovering minerals in "paying quantities" existed, the court found these particular operations failed to interrupt prescription. Without inclusion of these operations, a period of seventeen years existed between drilling operations sufficient to interrupt prescription. Thus, the court held that the servitude had prescribed through ten years of nonuse.

In *Lynn v. Harrington*,[178] a mineral servitude was created on April 30, 1928. A well was commenced on the servitude on March 3, 1938, and was completed as a dry hole on March 13, 1938. The landowner contended that the "drilling of the well in this case did not have the effect of interrupting prescription." Plaintiff's contention was that the well was not commenced with any reasonable expectation of discovering minerals. The court rejected this contention, saying, as follows:

> Taking all [evidence of productive history of the field] into consideration, and the legal presumption of good faith, we cannot agree with the contention that this well was drilled without, in the opinion of the driller, a reasonable prospect of success. That the well was a failure is of no moment. The servitude existed of the right to go upon the land and explore for oil, it was not confined to the actual production of oil.

In another case,[179] operations were commenced prior to the prescriptive date. The geologist found a "high spot" or a rise in the surface. A well was drilled to the Nacatosh Sand. However, because the Nacatosh Sand had not been productive in thirty years, the court held that such operation was not a good faith use as "there was no reasonable possibility of obtaining production from the Nacatosh Sand as this sand had long since depleted." Although this operation was not sufficient to interrupt prescription, the court issued an injunction to prevent the landowner from interfering with the lessee's further operation designed to drill to the deeper Travis Peak formation. "The defendants should be enjoined from interfering with the drilling of the well to deeper horizons and

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178 193 La. 877, 192 So. 517 (1939).

179 *McMurrey v. Gray*, 216 La. 904, 45 So.2d 73 (1950).

plaintiffs should be permitted to continue their efforts to interrupt prescription."

While Article 29(1) sets forth an *objective* standard, the requirements of Article 29(2) and (3) are *subjective* in nature. The second and third "evidentiary standards" give rise to certain concerns. Because these "evidentiary standards" are apparently mandatory,[180] problems might be encountered if the drilling of a well which commences in compliance with the requirements of Article 29(1) is not "continued at the site chosen to that point or depth." For example, if a well is commenced with the intention to drill to a depth of 16,000 feet (from which depth other wells in the area have produced in "paying quantities"), and if, at a depth of 12,000 feet, geological evidence is obtained which demonstrates that further drilling would be useless because the original geological interpretation was not valid (*e.g.*, an unexpected fault is cut or basement rock[181] is encountered), the decision is made to terminate drilling. Since the drilling of that well is not "continued at the site chosen to that point or depth," the mandatory requirement of Article 29(2) is not met. On the other hand, to continue the drilling of this well to 16,000 feet would be a vain and useless act and would be contrary to the "reasonable expectation" requirements of Article 29(1). While it would appear that such an operation would not constitute a "use" sufficient to interrupt prescription in accordance with the literal terms of Article 29, it is suggested that the courts should allow the servitude owner to demonstrate that, notwithstanding the non-compliance with these "evidentiary standards," the conduct of this operation was reasonable and in good faith under the circumstances.

"An interruption takes place on the date actual drilling or mining operations are commenced on the land burdened by the servitude . . ."[182] Thus, the test for "commencement of operations" differs in the case of a mineral servitude ("spudding in" is required) as contrasted with the mineral lease (unless, of course, the mineral lease contains a clause defining "commencement of operations" as "turning right").[183] "Preparations for the commencement of actual drilling or mining operations, such as geological or geophysical exploration, surveying, clearing of a site, and the hauling and erection of materials and structures necessary to conduct operations do not interrupt prescription."[184] This overrules a line of juris-

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180 Comment to Article 29, Mineral Code.

181 "Basement rock" is "[e]ither igneous or metamorphic rock" which "does not contain petroleum." ". . . when it is encountered in drilling, the well is abandoned." Williams and Meyers, *Manual of Oil and Gas Terms*.

182 Article 30, Mineral Code.

183 *Allen v. Continental Oil Company*, 255 So.2d 842 (La.App. 2nd Cir. 1971), *writ denied* 260 La. 701, 257 So.2d 156 (1972).

184 Article 30, Mineral Code.

prudence which had held that an interruption might result from mere preparatory work.[185]

Article 30 announces a "rule of use" which, under Article 75, "may not be made less burdensome." Thus, parties are not free to provide, in an instrument of grant or reservation, that prescription is interrupted by preparatory work short of "spudding in." On the other hand, since it is permissible to "restrict" or make more burdensome the rules of use, parties may, for example, provide that prescription is interrupted only by drilling to a stated depth under the earth or by attaining a depth which represents a stated percentage of the total objective depth of the test well, provided that such activity would constitute a "good faith" operation. Clearly, this liberality of freedom of contract may not be used as a subterfuge to avoid the underlying policy enunciated in Article 29.

Additionally, parties could permissibly stipulate that only production would be sufficient to interrupt prescription accruing against a mineral servitude, and that a dry hole would not have that effect.[186] Care should be taken, however, to negate any intention to thereby convert the mineral servitude to a mineral royalty – while the prescriptive regime would be the same (a dry hole would not interrupt prescription), the two interests differ in terms of the executive right enjoyed by the owner of a mineral servitude, but not by the owner of a mineral royalty.

"Prescription commences anew from the last day on which actual drilling or mining operations are conducted."[187] Of course, if the operations are successful and if production ensues, the continuation of that production would, of its own force, interrupt prescription.[188]

"Actual drilling or mining operations commenced within the prescriptive period interrupt prescription although the operations are not completed until after the date on which prescription would have accrued."[189] Thus, if operations otherwise in compliance with the requirements of Article 29(1) of the Mineral Code are commenced prior to the prescriptive date, and if they are continued by drilling "at the site chosen to that point or depth," and if they are "conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times," then, regardless of the results of the operation,

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185 *Keebler v. Seubert*, 167 La. 901, 120 So. 591 (1920).

186 "The right to the continued use of the servitude retained is not dependent upon the successful outcome of the exploiting, *unless it be made so by contract*." (emphasis added.). *Id*. at 592. *See also Crawford v. Texas Co.*, 212 F.2d 722 (5th Cir. 1954) (language of reservation required *production* to continue the servitude beyond a stated term of twenty-five years).

187 Article 30, Mineral Code.

188 *See* Article 36, Mineral Code.

189 Article 31, Mineral Code.

the interruptive consequences of the operation are retroactive to the date of commencement of the actual drilling operations, even if the operation is concluded after the original prescriptive date.

Example

On August 1, 1986, landowner sells all of the minerals under a tract of land to Jones. Jones grants a mineral lease to Operator on September 1, 1995. Operator goes onto the land on July 1, 1996, and commences drilling operations which are unsuccessfully concluded on September 1, 1996. What is the consequence on prescription?

Assuming that the operations comply with the requirements of Article 29, prescription is interrupted and commences anew as of September 1, 1996, the same day as the last day of drilling.

"When prescription has commenced anew following the cessation of drilling or mining operations, it may later be interrupted by a good faith attempt to complete the well or mine or place it in production conducted in accordance with the general principles stated in Articles 29 through 31."[190] The emphasis is on the requirement that the activity be undertaken in "good faith." Thus, if the original operation resulted in conclusive evidence, through logging or otherwise, that the tested zone could not be productive, a further "attempt to complete the well . . . or place it in production" would not be in good faith, as no reasonable, prudent operator would be justified in an expectation that such activity would yield production.

Example

On August 1, 1986, landowner sells all of the minerals under a tract of land to Jones. Jones grants a mineral lease to Operator on September 1, 1995. Operator goes onto the land on February 1, 1996, and commences drilling operations to the Marg Tex sand, a geological zone in which other wells in the field have been successfully completed. The well is dry, according to an electric log run in the hole on March 15, 1996.

Unless another use is attempted, and assuming that March 15, 1996, was "the last day on which actual drilling or mining operations [were] conducted," the mineral servitude will prescribe on March 15, 2006.

Another well is begun on the land to a subsurface depth at which six prior wells were dry. The well was actually begun on December 1, 1997, and was completed at a depth 1,000 feet above the objective depth. The well produced, commencing February 1, 1998, until December 1, 1998.

The initial operation, if it had been unsuccessful, would not interrupt prescription because it was not in compliance with the "evidentiary

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190 Article 32, Mineral Code.

standards" of Article 29, Mineral Code. However, under Article 36, Mineral Code, "[p]rescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude." Thus, prescription would commence anew on December 1, 1998.

"When there exists on a tract of land burdened by a mineral servitude . . . a shut-in well proved through testing by surface production[191] to be capable of producing minerals in paying quantities, prescription is interrupted on the date production is obtained by such testing. . . . Prescription commences anew from the date on which the well is shut in after testing."[192] This rule is in harmony with the jurisprudence, most of which involved mineral royalty (rather than mineral servitudes) since the *drilling* of the well would have interrupted prescription accruing against the mineral servitude (but not against the mineral royalty).[193]

As stated by one court, "an unused, potential well cannot interrupt prescription until its potential is proven, . . ."[194]

Consistent with the rules pertinent to the interruptive effect of unit operations or production,[195] Article 34 of the Mineral Code states that, if "only a part of the tract burdened by the servitude is included in such a unit and the [shut-in] unit well is on land other than that burdened by the servitude, the interruption of prescription extends only to that portion of the tract burdened by the servitude included in the unit."

"If the land, or part thereof, burdened by a mineral servitude is included in a conventional or compulsory unit on which there is a well located on other land within the unit capable of producing in paying quantities, as required by Article 34, and shut in at the time the unit is created, prescription is interrupted on and commences anew from the effective date of the order or act creating the unit."[196]

Unanswered is the question of whether Article 35 envisions that an "order or act creating the unit" can have retroactive effect if the (ostensible) date of prescription of the servitude is *prior to* the date of issuance

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191 The Louisiana Office of Conservation has promulgated Statewide Order No. 29-B which dictates the manner in which the productive capability of a well might be demonstrated through an "initial potential test." *See Webb v. The Hardage Corporation*, 471 So.2d 889 (La.App. 2nd Cir. 1985).

192 Article 34, Mineral Code.

193 *See*, *e.g.*, *LeBlanc v. Haynesville Mercantile Co., Inc.*, 230 La. 299, 88 So.2d 377 (1956) (involving a mineral royalty; "The fact that the well was shut in for want of a market and that no gas was sold from it until after the expiration of ten years from the date of the royalty sale cannot defeat the rights of the defendant to share in the production, once begun.").

194 *Sandefer & Andress, Inc. v. Pruitt*, 471 So.2d 933, 936 (La.App. 2nd Cir. 1985).

195 Articles 33 and 37, Mineral Code.

196 Article 35, Mineral Code.

of the order or confection of the act, but *after* the effective date thereof. Insofar as compulsory units are concerned, the Commissioner of Conservation will generally make unit orders effective as of the date of the public hearing (as that is the first and usually last date on which the Commissioner will have received evidence in support of the order) and the order (with such an effective date) may not be issued for several weeks.[197] If, in that interim period of time, prescription has accrued, is the servitude "brought back to life" by reason of the effective date of the order? In *Baker v. Chevron Oil Company*,[198] a mineral servitude was created by reservation in an act of sale dated March 29, 1956. After the expiration of ten years, suit was brought by the owners of the mineral servitude to declare their servitude as being viable and outstanding. It was established that a well was completed on a nearby tract of land on January 6, 1966. The lessees undertook to form a voluntary unit. The pooling agreement was dated March 4, 1966, and was circulated for execution. The agreement was not signed by certain parties until April or May of 1966, and the document was recorded in the conveyance records on May 12, 1966. The court noted that, inasmuch as no drilling operations were conducted on the servitude tract during the ten-year period, the plaintiffs' mineral interests had prescribed, unless the forming of the voluntary unit containing that tract and the drill site tract effected an interruption of the prescription. The court found that, "because a legal unit had not been established on or before March 29, 1966, the ten-year prescription accrued, its course not having been interrupted by the drilling and production on land other than the [servitude] tract."[199]

"Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production."[200] However, if the servitude owner must rely on production to interrupt prescription (for the reason that the operations leading to that production do not meet the "good faith" requirement of Article 29 and are, therefore, not sufficient in their own right to interrupt prescription), such production must actually commence prior to the prescriptive date. The "date back" feature of Article 31 would be unavailing to the servitude owner since the operations do not serve to interrupt prescription.

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197 *See* Policy Memorandum dated August 20, 1985, issued by Louisiana Office of Conservation. *See also Exxon Corporation v. Thompson*, 564 So.2d 387 (La.App. 1st Cir.), *writ denied* 568 So.2d 1054 (La. 1990).

198 260 La. 1143, 258 So.2d 531 (1972).

199 *See* Johnson, *Maintenance of Mineral Interests*, 26th Ann. Inst. on Min. Law 85 (1979).

200 Article 36, Mineral Code.

Example

On August 1, 1986, landowner sells all of the minerals under a tract of land to Jones. Jones grants a mineral lease to Operator on September 1, 1995. Operator goes onto the land on July 15, 1996, and commences drilling operations to a subsurface depth at which sixteen prior wells in the area were dry. The well became the seventeenth dry hole at that depth when it was logged on September 1, 1996. However, the Operator noticed an unanticipated zone of interest on the electric log about 1,000 feet above the total depth achieved in the borehole and decided to attempt a completion. To everyone's surprise, the well produced from that unanticipated zone, commencing October 1, 1996. What is the consequence on prescription?

If the original drilling operation was not in compliance with the "evidentiary standards" of Article 29, Mineral Code, it would not interrupt prescription. Since that operation did not interrupt prescription, the "date back" feature of Article 31 would not be available to the servitude owner. Because an "interruption [resulting from actual production] occurs on the date on which actual production begins," the servitude prescribed since actual production did not commence prior to the original prescriptive date of August 1, 1996.

"After production has ceased and prescription has commenced anew, it may be interrupted by good faith operation conducted in accordance with the general principles of Articles 29 through 31 to restore production or to secure new production from the same well or mine, whether from the same geological formation or one different from that previously producing."[201] As stated in the Comment to Article 39 of the Mineral Code, this article "treats a situation which has not yet been of importance in the jurisprudence" but which "might arise." The article attempts to provide formulation for the circumstances under which reworking, recompletion, deepening, sidetracking or plugging back operations in the same wellbore might effect an interruption of prescription after production has ceased. Presumably, the jurisprudential standards as to what constitutes reworking would apply in these circumstances[202] and, if conducted in good faith with a "reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth," such reworking operations, even if unsuccessful, should interrupt prescription, in which case other articles would thereafter apply as to the commencement anew or further interruption of prescription. Of course, if it is determined that reworking operations could not reasonably be conducted, a new well could be drilled in accordance with Article 29 of the Mineral Code in order to interrupt prescription.

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201 Article 39, Mineral Code.

202 *See*, *e.g.*, *Jardell v. Hillin Oil Company*, 485 So.2d 919 (La. 1986).

If a mineral servitude affects more than one type of mineral (for example, both oil and gas), production of one mineral also maintains the mineral servitude as to the other mineral. Additionally, interruption arising from one mode of use – for example, true vertical drilling – will preserve all other modes of use – such as horizontal drilling. Thus, "[a]n interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."[203]

Example

Smith sells a tract of land to Jones on August 1, 1986. The sale states that "Smith reserves all oil, gas and other minerals in and underlying the property described herein." A well is drilled by Smith on the land as a true vertical well, starting on September 1, 1995; the well is completed as a producer of oil in "paying quantities." On October 1, 1996, Smith undertakes to drill a horizontal well on the land in search of natural gas at a deeper depth than the oil production. Jones – the landowner – objects, contending that Smith's right to do anything other than drill a true vertical well in search of oil has lapsed.

Who is correct?

Smith prevails based upon Article 40, Mineral Code.

"When prescription is interrupted, it commences anew from the last day on which operations are conducted in good faith to secure or restore production in paying quantities with reasonable expectation of success."[204]

(d) By Whom May Use be Made?

Except as provided with respect to the adoption of a use resulting from operations or production, "use of a mineral servitude must be by the owner of the servitude, his representative or employee, or some other person acting on his behalf."[205] As observed by one court in a case predating the Mineral Code, the "burden of proof is upon the owner of the servitude to establish that *he or someone in his name* has made timely use of the servitude to prevent the tolling or the accrual of prescription."[206]

In *Nelson v. Young*,[207] drilling operations had ceased in 1952, thus recommencing anew prescription on a mineral servitude. In 1957, the surface owner granted leases even though his lands were subject to the

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203 Article 40, Mineral Code.

204 Article 41, Mineral Code.

205 Article 42, Mineral Code.

206 *Scott v. Hunt Oil Company*, 160 So.2d 433 (La.App. 2nd Cir.), *writ denied* 245 La. 950, 162 So.2d 8 (1964) (emphasis added). The court relied upon former Article 804, Louisiana Revised Civil Code.

207 255 La. 1043, 234 So.2d 54 (1971).

outstanding mineral servitude. The surface owner's lessee drilled a producing well in 1959; it produced until 1964. In 1967, the servitude owners sued to be declared owners of the mineral rights. The trial court dismissed the suit. On appeal, the Court of Appeal reversed, basing its decision on the provisions of former Article 794 of the Louisiana Revised Civil Code (now repealed):

> The servitude is preserved to the owner of the estate to which it is due, by the use which any one, *even a stranger*, makes of it, provided it be used as appertaining to the estate. (emphasis supplied.)[208]

The Louisiana Supreme Court affirmed, but chose to rely on a theory of quasi-contract. This was based on the approving silence of the servitude owners when the lease was executed by the landowner and production was established under the lease. Through this approving silence, a quasi-contractual relationship was established, whereby the landowner's act became the servitude owner's act, thus interrupting prescription.

The rule of *Nelson v. Young* has now been suppressed by the Louisiana Mineral Code, Article 43 of which provides that:

> A person is acting on behalf of the servitude owner only when there is a legal relationship between him and the servitude owner, such as co-ownership or agency, or when there is clear and convincing evidence that he intended to act for the servitude owner. Silence or inaction by the servitude owner will not suffice to establish that a person is acting on behalf of the servitude owner.

In *Producers Oil & Gas Company v. Nix*,[209] the plaintiff owned a mineral servitude which was perpetuated by production until 1972, at which time prescription commenced anew. In 1979, the landowner granted a lease and the lessee conducted drilling operations on the land subject to the mineral servitude. Producers had no contractual relationship with the landowner's lessee, Nix. Since Producers conducted no operations after production ceased in 1972, the servitude would ordinarily expire in 1982, unless Producers benefited from Nix's use as to which it was "conceded that Nix's work qualifies as good faith operations sufficient to interrupt prescription." The question presented was whether the use of Nix complied with Article 42 as a use "made by the owner of the servitude, his representative or employee, or some other person acting on his behalf."

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[208] *See now* Article 757, Louisiana Revised Civil Code.

[209] 488 So.2d 1099 (La.App. 2nd Cir.), *writ denied* 493 So.2d 641 (La. 1986). The court rejected the servitude owner's contention that an application of the 1975 Mineral Code to a mineral servitude created initially in 1941 would violate constitutional proscriptions against the impairment of vested rights, saying that "the expectation that laws about liberative prescription will not change is not a vested right." *Id*. at 1102.

Producers' reliance upon *Nelson v. Young* was rejected since the Mineral Code overruled that case. "Thus, under the Mineral Code, these operations did not interrupt prescription for the servitude owner."

That the approach of *Nelson v. Young* has been abrogated is shown by Article 53 which states that Articles 44 through 52 of the Mineral Code "provide the only means by which the prescription of nonuse may be interrupted by operations conducted by persons other than those designated in Article 42."[210]

(e) Adoption.

"A mineral servitude owner may adopt operations or production by a person other than those designated by Article 42 if his servitude includes the right to conduct operations of the kind involved."[211]

A mineral owner who was a stockholder in a corporation which conducted operations on the burdened tract was not, merely by reason of being a stockholder, permitted to avail himself of the use of the servitude since the stockholder was not personally a party to the contract which gave rise to the operations.[212]

The utilization by the landowner of a small quantity of gas for household purposes could not be considered a use by the servitude owner and, thus, would not interrupt prescription.[213]

The articles on adoption seem to contemplate that the mineral servitude is without limitation, either geographically (horizontal) or geologically (vertical). Thus, it is not clear if the owner of a mineral servitude limited to the depth of, say, 8,000 feet could adopt operations conducted by another which are directed to a geological objective of, say, 12,000 feet. Because such (deeper) drilling operations are not intended to exploit the shallower depths, it is doubtful that such operations could be adopted since the servitude of the adopter does not "include[] the right to conduct operations of the kind involved," that is, does not permit that servitude owner to drill deeper than 8,000 feet.

"An adoption must be made within three years of the servitude owner's knowledge of such operations or production and in any event prior to the date on which his rights would otherwise prescribe. This limitation does not affect the prescription applicable to any action that the servitude owner may have against another for the wrongful appro-

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210 Article 53, Mineral Code. The Comment to this article states that it was "inserted out of an abundance of caution to make certain that the holding in Nelson v. Young . . . is negated."

211 Article 44, Mineral Code.

212 *Sample v. Louisiana Oil & Refining Corp.*, 162 La. 941, 111 So. 336 (1927).

213 *Pan American Petroleum Corp. v. O'Bier*, 201 So.2d 280 (La.App. 2nd Cir.), *writ refused* 251 La. 227, 203 So.2d 558 (1967).

priation of his rights of exploration or of production belonging to him."[214]

"Adoption of the operations of another is accomplished when the servitude owner files for registry in the conveyance records of the situs of his servitude an instrument describing the land subject to the servitude, identifying the operations, specifying the date on which the operations commenced, and expressing the intent to adopt them as his own."[215]

"When drilling or mining operations or actual production otherwise sufficient to interrupt prescription takes place on a compulsory unit including all or a part of the land burdened by a mineral servitude, an interruption of prescription takes place without formal adoption by the owner of the servitude."[216] This rule is harmonious with the fact that the operator of a compulsory unit is viewed as a "representative" of all interests in the unit.[217] It is not clear if the phrase "takes place on a compulsory unit" is intended to only apply to the situation where the drilling or production take place on an existing unit as a unit activity, or whether the article also dispenses with the necessity of a "formal adoption" where a well is drilled *prior* to the formation of the compulsory unit and thereafter the unit is created.

Article 48 of the Mineral Code provides that, "upon filing for registry of the instrument required by Article 46, the servitude owner becomes obligated to pay his proportionate share of the reasonable, actual costs of development and operation of the well or mine." For this reason, one should only adopt operations if the adopted operations are "necessary" in the sense that the servitude would prescribe in the absence of an adoption. It is not apparent if a servitude owner – having adopted an operation conducted on a "lease basis" – will be excused from cost responsibility when the well is subsequently unitized by the Commissioner of Conservation. In any event, the servitude owner "is not obligated to [make such payment] if the operations adopted were conducted by a possessor in legal or moral bad faith and resulted in production to which the servitude owner is entitled."

"If the operations adopted were unsuccessful, the servitude owner is not only obligated to pay costs as required by Article 48, he also waives any right to damages against the party conducting the operations."[218]

"The servitude owner may adopt the operations of another as a mat-

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214 Article 45, Mineral Code.

215 Article 46, Mineral Code.

216 Article 47, Mineral Code.

217 *Mire v. Hawkins*, 249 La. 278, 186 So.2d 591 (1966).

218 Article 49, Mineral Code.

ter of right. Consent of the party conducting them is not required."[219]

"The owner of a mineral servitude may adopt the operations of another even though his rights are under lease and his lessee is unwilling to share in the costs of development and operation. If the operations have resulted in production to which the servitude owner is entitled and the servitude owner's lessee refuses to participate in the operations after production is first obtained, the lessee is not entitled to participate in production from the operations except by express agreement with the mineral servitude owner. In the absence of agreement, the mineral lease, if otherwise maintained according to its terms, remains in force except as to the well or wells or mine or mines as to which the servitude owner has asserted his claim and in which the lessee has refused to participate."[220]

"Although the servitude owner fails to adopt operations by another, he may claim the proportion of production allocable to his interest which was obtained prior to the lapse of three years from his knowledge of the operations resulting in production or the date on which his servitude prescribed, whichever occurs first. If he does so, he is obligated to pay his proportionate share of the cost of development and operation accrued prior to the date on which his servitude prescribed unless the person conducting the operations was in legal or moral bad faith."[221]

(f) Unitized Operations or Production.

i. Interruptive Effect of Use.

For the most part, the Mineral Code codifies and, in some instances, clarifies the rules which had been developed jurisprudentially. One area where the law has been changed in the interest of consistency is the extent to which unitized operations or production will interrupt prescription.

As previously noted, the Mineral Code now instructs that mere "[u]nitization of a portion of a tract burdened by a mineral servitude does not divide the servitude."[222] However, a unitized *use* may effect a division in accordance with various articles of the Mineral Code.

Prior to the adoption of the Mineral Code, the law was both inconsistent and illogical. Whether operations or production would interrupt prescription as to the entirety of the servitude tract (both within and without the unit) or only as to the portion of the servitude tract within the unit was dependent upon whether the unit was a compulsory or conventional unit and whether the unit well was located on the servitude tract or

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219 Article 50, Mineral Code.

220 Article 51, Mineral Code.

221 Article 52, Mineral Code.

222 Article 71, Mineral Code.

off of it.[223] The following table illustrates the pre-Code rules pertinent to the interruption of prescription accruing against a mineral servitude by unitized operations or production, to-wit:

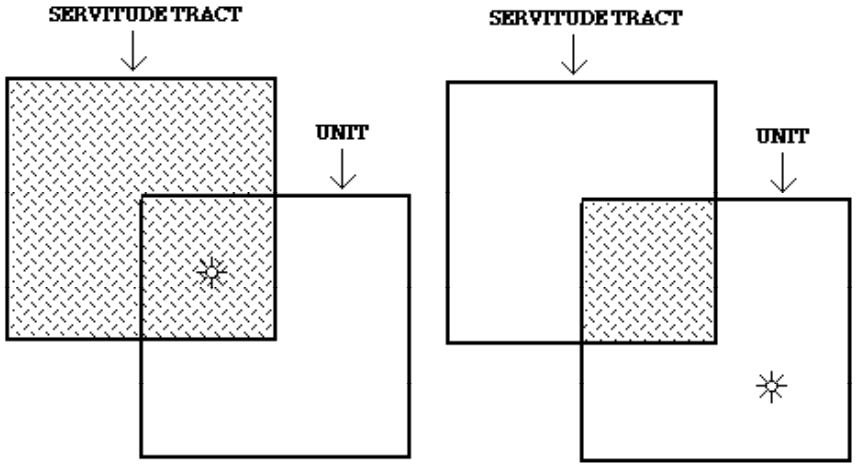
Full = Full Interruption (both unitized and non-unitized portions)

Limited = Limited Interruption (only unitized portion)

	Compulsory	Conventional
Well On Tract	Full[224]	No jurisprudence
Well Off Tract	Limited[225]	Limited[226]

As seen, there was no "rhyme or reason" to the rules which evolved jurisprudentially. The Mineral Code now provides that unitized operations or production, if otherwise sufficient to interrupt prescription, will interrupt prescription accruing against that portion of the mineral servitude included within the unit and, if the unit well is located on the mineral servitude, will also interrupt as to that portion of the servitude tract situated outside of the unit.[227] This rule is stated to apply regardless of what type of unit is involved (conventional or compulsory).

A visual presentation of this situation follows, with the shaded area reflecting the areal extent of the interruption resulting from unitized operations or production, as follows:



As previously noted, as a limited area where freedom of contract is allowed, parties may provide that "an interruption of prescription result-

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223 Further inconsistency was introduced by the consideration of whether the interest was a mineral servitude or mineral royalty.

224 *Trunkline Gas Co. v. Steen*, 249 La. 520, 187 So.2d 720 (1966).

225 *Jumonville Pipe & Machinery Co., Inc. v. Federal Land Bank*, 230 La. 41, 87 So.2d 721 (1956).

226 *Elson v. Mathewes*, 224 La. 417, 69 So.2d 734 (1954).

227 Articles 30, 33 and 37, Mineral Code.

ing from unit operations or production shall extend to the entirety of the tract burdened by the servitude tract (sic) regardless of the location of the well or of whether all or any part of the tract is included in the unit."[228]

Although the rule announced by Articles 33 and 37 is clear in its statement, certain issues are presented with respect to its application. There is no real question as to the application of the articles in the case of compulsory units which are well defined both statutorily and jurisprudentially. Similarly, the articles present no real concern in reference to declared units since the jurisprudential treatment of such units – and the resultant modification of the printed lease forms to address issues arising therefrom – virtually ensures that a *properly formed* declared unit will be a valid, "100%" unit. However, since the Mineral Code does not define precisely the term "conventional unit," it is unclear as to how or if the rule applies to a voluntary unit formed by an agreement which has not been executed or adopted by a landowner in whose favor prescription would accrue in the absence of a use.

As noted in the Official Comments to Article 213 of the Mineral Code, the definition of the term "unit" "includes conventional units of all kinds, whether established by declaration under a pooling power, *by a contract executed by* ***all*** *parties affected*, or otherwise." (Emphasis added.). While it is commendable that the legislature – in not providing a more precise (and thus restrictive) definition of "conventional unit" – has allowed the parties to craft institutions or arrangements of their own desires, the lack of a precise definition gives rise to certain questions as to when the rules of Article 33 and 37 might not be applicable.

If, according to Articles 33 and 37 of the Mineral Code, unitized operations conducted on or production secured from a conventional unit well situated off of the servitude tract has the consequence of interrupting prescription accruing against that portion of the servitude tract situated within the unit, then clearly the landowner of the servitude tract – in whose favor prescription would otherwise accrue in the absence of a use – is an "affected" party. If the landowner has not signed the voluntary unit agreement, it might be argued that the non-signatory landowner should be "not bound by it in any way."[229]

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[228] Article 75, Louisiana Mineral Code. *See also White v. Evans*, 457 So.2d 159 (La.App. 2nd Cir. 1984), *writ denied* 462 So.2d 207 (La. 1985) (Without discussing the issue of applying the Mineral Code retroactively to a servitude created prior to its enactment, the court found that the language of "the pooling agreement in question expresses such an agreement as Art. 75 contemplates"; consequently, it was held that the servitude was maintained in its entirety, including that portion of the servitude tract not included within the producing voluntary unit.).

[229] *Carter v. Arkansas Louisiana Gas Co.*, 213 La. 1028, 36 So.2d 26, 28 (1948). *See also* Article 1983, Louisiana Revised Civil Code ("Contracts have the effect of law *for the parties* . . .") and Article 1985, Louisiana Revised Civil Code ("Contracts may produce effects for third parties only when provided by law.").

In a case predating the adoption of the Mineral Code, it was held that production from a conventional unit did not interrupt prescription accruing against a mineral servitude for the reason that the owner of the land burdened by the servitude was not a party signatory to it.[230]

It might be argued that a landowner who creates a mineral servitude will be deemed to have done so in reference to all applicable and pertinent laws, including Article 33 and 37 of the Mineral Code, so that an intrinsic consequence of the creation of a mineral servitude is that prescription might be interrupted by operations or production from a "conventional unit," even without the involvement of the landowner. Even so, the question remains, under what circumstances will this result follow if less than all "affected" parties have signed the voluntary unit agreement?

As stated, uncertainty is presented because of the absence of a codal definition of the term "conventional" unit as used in Articles 33 and 37 of the Mineral Code.[231] Perhaps there is no problem with a "declared" unit constituting a "conventional" unit since the jurisprudence has adequately addressed the legal requirements for the formation of such a unit. There is, however, a question as to when or under what circumstances a "voluntary unit agreement" constitutes a "conventional" unit within the contemplation of these articles.

To illustrate, assume that a "voluntary unit agreement" is executed by every person having an interest in production from the identified (conventionally pooled) unit well. Presumably that would constitute a "conventional" unit as contemplated by Articles 33 and 37 of the Mineral Code. Assume, then, that less than all of the parties having an interest in production from the identified (conventionally pooled) unit well have executed the agreement. Is this a "conventional" unit? What if, say, only five out of ten parties having an interest in production from the identified (conventionally pooled) unit well have executed the agreement? Is this a "conventional" unit? What about two out of ten parties? Sooner or later, a court might determine that a given agreement does *not* form a "conven-

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230 *Alexander v. Holt*, 116 So.2d 532 (La.App. 2nd Cir. 1959) ("The [mineral servitude owner]'s inclusion of the 35.56 acres in the conventional agreement was by his own act, not concurred in, consented to, or approved by [the landowner]; nor is it shown by any act on the part of [the landowner], he has, in any manner, approved or acquiesced in the agreements or in the subsequent proceedings. The owners of a servitude are powerless to extend their mineral rights without the consent of the landowners who, under the law, must clearly and definitely state or act in such a way so as to show that it was their intention to interrupt the running of prescription and start it anew.").

231 In a non-mineral servitude context, the absence of a codal definition of the term "conventional unit" contributed to the rendition of a fundamentally flawed and totally erroneous decision. *Banner v. GEO Consultants International, Inc.*, 593 So.2d 934 (La.App. 4th Cir. 1992). While this decision is clearly erroneous as a matter of "Pugh clause" law, it might be correct under the law of lease divisibility. *Cf. Swope v. Holmes*, 169 La. 17, 124 So. 131 (1929).

tional" unit as contemplated by Articles 33 and 37 of the Mineral Code for the reason that an insufficient number of affected parties have signed the document.

As noted, all of the jurisprudence on this subject predates the adoption of the Mineral Code. Thus, while it might be argued that the legislature, in enacting Articles 33 and 37 of the Mineral Code, intended to resolve any ambiguity or inconsistency in that prior jurisprudence, the fact remains that, until the Code is amended to more precisely define "conventional unit" or a definitive court decision is rendered, one will not be able to predict with certainty how or if these articles will be applied to a conventional unit which is not signed by a landowner or, more fundamentally, to a "conventional" unit which is signed by (significantly) less than all parties having an interest in production from the described acreage.

ii. What Constitutes Unitized Operations or Production?

The principles now provided with respect to unitized operations and production are applicable "provided such operations are for the discovery and production of minerals from the unitized sand or sands."[232] The myriad of circumstances which might be presented in the conduct of drilling operations has given rise to various issues of whether a particular operation – or a modification of an ongoing operation – constitutes unitized or "lease basis" operations for various purposes, including the interruption of prescription. Thus, in *Matlock Oil Corporation v. Gerard*,[233] the issue was whether prescription accruing against certain mineral servitudes was interrupted by the conduct of certain operations which were contended by the lessee of the mineral servitude owners to have been unitized operations. It was concluded that the mineral servitudes prescribed in August of 1969 unless certain operations conducted in the early part of 1969 constituted unitized operations. The court examined the facts pertaining to this operation and concluded that the lessee "simply did not intend to obtain production from the Lower Hosston Formation through Matlock-Fuller Well No. 1" and that "no bona fide attempt was made to test this particular formation; therefore, there was no good-faith drilling as to the unit established for drilling and production from the Lower Hosston Formation."

The court in *Bass Enterprises Production Co. v. Kiene*[234] found that a shallower unitized sand was sufficiently tested, in good faith, even where the well was permitted and drilled to a deeper, non-unitized depth. The opponent had argued that, since the well was not permitted to the

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232 Article 33, Mineral Code.

233 263 So.2d 413 (La.App. 2nd Cir.), *writ refused* 265 So.2d 241 (La. 1972).

234 437 So.2d 940 (La.App. 2nd Cir. 1983).

(shallower) unitized sand, it could not be considered for any purpose a unitized operation sufficient to interrupt prescription accruing against a mineral servitude partially included within the unit. The court found relevant the fact that, as a matter of practice in the Office of Conservation, "exceptional locations can be and are approved after a hearing either before or after a particular well is drilled."

Obviously, the well must reach the unitized zone in order to constitute a use of the servitude based upon Article 33.[235]

In *Malone v. Celt Oil, Inc.*,[236] plaintiffs transferred their interest in property, but reserved an undivided one-half (1/2) interest in the minerals. Drilling on one of the wells in question on the property was commenced one month before the accrual of prescription. Plaintiffs filed suit for the recognition of their mineral servitude alleging that the drilling of the well in question was a sufficient good faith operation to interrupt prescription under Article 29 of the Mineral Code. The trial court held that the initial drilling of the well in question and certain logging tests and later recompletion of the well after prescription had accrued did not constitute one continuous operation under Article 29 of the Mineral Code. Rather, later completion of the well was a separate operation. On appeal, the issue was "whether lessee's action in recompleting the well at a shallower formation constituted a single operation with the initial drilling so as to be good faith operations sufficient to interrupt the ten year liberative prescription of nonuse established for mineral servitudes."[237] The Court of Appeal noted that Article 29 was a codification of the jurisprudence that good faith drilling is a *bona fide* attempt to obtain production. Merely drilling through a shallower sand without evaluating or testing the shallower sand was not sufficient to interrupt prescription. However, if the shallower sand is evaluated during the drilling process and extensive tests are conducted during the period of the servitude, prescription is interrupted. Because the court found that the initial drilling of the well in question and the subsequent recompletion and production from that well were not one single operation under Article 29 of the Mineral Code, there was no need to determine if there was testing of the well that constituted a *bona fide* effort to obtain production. Consequently, the court

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235 *Sandefer & Andress, Inc. v. Pruitt*, 471 So.2d 933 (La.App. 2nd Cir. 1985) ("Gaines No. 2 and 3 were simply not deep enough to create a user of the Bodcaw Unit" as the "wells reached only into the relatively shallow Hill Zone Unit, not deep enough to penetrate Bodcaw or D Sand depths.").

236 485 So.2d 145 (La.App. 2nd Cir.), *writ denied* 488 So.2d 692 (La. 1986).

237 Although courts often allude to the prescriptive regime as a "liberative prescription," in actuality, the proper regime is the "prescription of nonuse." See Article 3448, Louisiana Revised Civil Code; Article 27(1), Mineral Code. Nevertheless, two articles of the Mineral Code – Articles 156 and 206 – refer to the prescriptive regime as being "liberative."

held that the running of prescription was not interrupted by the initial drilling of the well, and plaintiff's mineral servitude was prescribed by ten years of nonuse.

2. Interruption by Acknowledgment.

"The prescription of nonuse may be interrupted by a gratuitous or onerous acknowledgment by the owner of the land burdened by a mineral servitude. An acknowledgment must be in writing, and, to affect third parties, must be filed for registry."[238]

Parol evidence is not admissible to establish an acknowledgment.[239]

"An acknowledgment must express the intent of the landowner to interrupt prescription and clearly identify the party making it and the mineral servitude or servitudes acknowledged."[240]

This article perpetuates the jurisprudential rule "that the legal requirement for an acknowledgment sufficient to interrupt ten years prescription for nonuser of a mineral servitude must be expressed and certain, must have been made for that purpose and must adequately describe the property to which it applies."[241]

Although consideration is not needed to support an acknowledgment,[242] the codal requirement that the acknowledgment be "express" and "in writing" guards against an inadvertent acknowledgment by a landowner.

In *Wise v. Watkins*,[243] it was held that a sale of land which contained a reservation of "one-half of all oil, gas, and other minerals in and under said land which has heretofore been reserved by [an ancestor-in-title] in sale to this Grantor" did not constitute an acknowledgment of the outstanding mineral servitude sufficient to interrupt prescription accruing thereagainst. The Supreme Court stated, as follows:

> This Court has on numerous occasions stated that the acknowledgment required by this article of the Code must be more than a bare acknowledgment. It must be accompanied by, or coupled with, the purpose and intention of the party making the acknowledgment in order to interrupt the prescription then accruing.[244]

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238 Article 54, Mineral Code.

239 *Barnsdall Oil Co. v. Succession of Miller*, 224 La. 216, 69 So.2d 21, 23 (1953) ("However, parol evidence will not be considered in cases where there is a claimed interruption by acknowledgment.").

240 Article 55, Mineral Code.

241 *James v. Noble*, 214 La. 196, 36 So.2d 722, 724 (1948).

242 *Id*. at 724 (. . . "there is no provision in our law requiring a special consideration for an acknowledgment.").

243 222 La. 493, 62 So.2d 653 (1953).

244 The court specifically declined to follow its earlier decision in *Frost-Johnson Lum-*

In order to affect third parties, the instrument effecting the acknowledgment must be recorded.[245]

Example

On August 1, 1986, a mineral servitude is granted. No use is made of it. On July 15, 1996, the landowner executes an instrument acknowledging the mineral servitude and expressing an intent to interrupt prescription. On August 2, 1996, the landowner executes a mineral lease which is immediately recorded. On August 4, 1996, the acknowledgment is recorded. On August 5, 1996, the mineral servitude owner grants a mineral lease which is immediately recorded. Which mineral lease is good?

The landowner's lease is valid because the lessee is protected by the "public records doctrine" since the acknowledgment was not recorded on the date of recordation of that lease. The mineral servitude owner may have a claim against the landowner, but the assertion of such claim should not prejudice the right of the lessee of the landowner.

3. Contractual Extension.

"A landowner may extend a mineral servitude beyond the prescriptive date for a period less than that which would result from an interruption by an acknowledgment. The extension must meet all of the requirements for an acknowledgment and must specify the period for which the servitude is extended."[246]

Article 56 is motivated by the principle that the "greater includes the lesser"; since a landowner may interrupt prescription by an acknowledgment (thereby starting prescription anew), there is no reason why a landowner should not be able to accomplish less than a full interruption, such as an extension for a period of time less than ten years. This liberality does not violate public policy as the extension may only be "for a period less than that which would result from an interruption by an acknowledgment."

In *Mulhern v. Hayne*,[247] the court held that the execution by a landowner and a mineral servitude owner of a "joint lease" resulted in an *interruption* of prescription. Subsequent to its rendition, the *Mulhern* decision was consistently distinguished or questioned by later courts.[248] Finally, *Mulhern* was rather decisively repudiated (albeit not expressly

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ber Co. v. Nabors Oil & Gas Co., 149 La. 100, 88 So. 723 (1921) (which, under similar facts, had held that such a reservation did have the effect of interrupting prescription) because the earlier decision was not "a sound pronouncement of law."

245 *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938).

246 Article 56, Mineral Code.

247 171 La. 1003, 132 So. 659 (1931).

248 *See*, *e.g.*, *Spears v. Nesbitt*, 197 La. 931, 2 So.2d 650 (1941).

overruled) in *Achee v. Caillouet*.[249] The *Achee* court rather disingenuously stated that the *Mulhern* court, in referring to an *interruption* of prescription, was using the word in the "layman's" sense of the word, not in the legalistic sense used in the Revised Civil Code. This superficial departure from its earlier decision failed to disguise the fact that the court was changing the rule in order to protect the landowner from an inadvertent, unintentional interruption. After *Achee*, the execution of a "joint lease" by a landowner and a mineral servitude owner resulted in an *extension*, not an *interruption*, of prescription.

"An extended mineral servitude is subject to the rules relating to interruption of prescription."[250] Thus, where the intention to enter a "joint lease" is found, and production ensues from the granting of that mineral lease, prescription is interrupted by that production.[251]

Example

A mineral servitude is reserved in a sale of land on August 1, 1986. On August 1, 1995, the landowner and the mineral servitude owner jointly execute a mineral lease for a primary term of three years, in which it is expressly declared to be the intention of the parties to extend prescription for the "duration of the lease." On August 1, 1997, a well is begun on the land. The well is a dry hole according to an electric log run in the well on September 15, 1997. What is the consequence on prescription?

Assuming that the well meets the requirements of Article 29, prescription commences anew on September 15, 1997.

4. Suspension.

While an interruption of the prescription of nonuse results ultimately in the commencement anew of prescription, and an extension adds additional time to the then remaining period of prescription, a suspension will "stop the clock" for the duration of the suspension.

(a) Minority.

"The prescription of nonuse is not suspended by the minority or other legal disability of the owner of a mineral servitude."[252] This rule restates a statutory provision which was first enacted in 1944[253] and later incorporated into the Revised Statutes.[254] These provisions reversed a

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249 197 La. 313, 1 So.2d 530 (1941).

250 Article 57, Mineral Code.

251 *Armour v. Smith*, 247 La. 122, 170 So.2d 347 (1964).

252 Article 58, Mineral Code.

253 Act No. 232 of 1944.

254 La. R.S. 9:5805. This statute was not explicitly repealed by the adoption of the Mineral Code.

line of jurisprudence which had extended to mineral servitudes the rule of (former) Article 802 of the Louisiana Revised Civil Code.[255] The courts had held that the minority of a mineral servitude owner suspends, during the minority, the prescription accruing against the servitude as to all co-owners, including majors.[256]

(b) Obstacle.

"If the owner of a mineral servitude is prevented from using it by an obstacle that he can neither prevent nor remove, the prescription of non-use does not run as long as the obstacle remains."[257]

The mere granting of a mineral lease by a landowner whose land is subject to a full mineral servitude is not an obstacle which would suspend the running of prescription.[258] Moreover, the courts have rejected as meritless the "contention that the purchase of mineral rights subject to a previous exclusive lease is the purchase of a suspended servitude, the prescription of which is also suspended."[259] Additionally, the existence of another mineral lease granted by the mineral servitude owner has been held to not constitute an obstacle to the use of the servitude.[260]

"An obstacle to drilling or mining operations or to production of any mineral covered by an act creating a mineral servitude suspends the running of prescription as to all minerals covered by the act."[261]

"Issuance of a compulsory unitization order establishing a unit that includes all or part of a tract burdened by a mineral servitude does not constitute an obstacle to its use."[262] This rule codifies the holding of the Supreme Court[263] that the designation of non-drilling areas, within drilling units created by orders of the Commissioner of Conservation, did not constitute an obstacle to use of mineral servitudes on lands within the

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255 *See now* Article 763, Louisiana Revised Civil Code ("The prescription of nonuse is not suspended by the minority or other disability of the owner of the dominant estate.").

256 *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931).

257 Article 59, Mineral Code.

258 *Gayoso Co., Inc. v. Arkansas Natural Gas Corp.*, 176 La. 333, 145 So. 677 (1933). However, the court suggested that an obstacle would be presented if "an effort [had] been made by the [mineral servitude owner] to exploit the land, and the effort had been met with resistance by [the landowner]." *Id*. at 680.

259 *Coyle v. North Central Texas Oil Co.*, 187 La. 238, 174 So. 274, 276 (1937).

260 *Baker v. Chevron Oil Company*, 260 La. 1143, 258 So.2d 531 (1972) ("[I]f the leasing of a mineral interest combined with failure of the lessee to develop the property constitutes an obstacle which could suspend the running of prescription on an outstanding mineral servitude, then such mineral interest could be kept in effect indefinitely by the simple expedient of arranging for a lease of the interest prior to its expiration.").

261 Article 60, Mineral Code.

262 Article 61A, Mineral Code.

263 *Mire v. Hawkins*, 249 La. 278, 186 So.2d 591 (1966).

non-drilling area. The court stated that the classification does not prevent the use of the servitude, it merely controls the method of the user. To hold otherwise would be "inconsistent with the objectives, aims and policies of our conservation law."[264] The court stated:

> Denying the existence of an obstacle said to result from an order of the Department of Conservation creating nondrilling areas in a unit, as in this case, is consonant with the public policy of this State which does not favor unwarranted extensions of liberative prescription on mineral servitudes; but, to the contrary, that policy favors the timely return of outstanding minerals to the owner of the land.

Most of the cases involving obstacles which suspend prescription of nonuse involve facts where the recalcitrant landowner – in whose favor prescription would run if the mineral servitude owner does not timely "use" the servitude – has prevented operations through devices which interfere with, or deny, access to the burdened land.[265]

Example

A mineral servitude is reserved in a sale of land on August 1, 1986. On July 28, 1996, the lessee of the mineral servitude owner attempts to enter the property by way of the only access road in order to conduct drilling operations. The landowner has denied access to the property by laying lumber across the road. The access is denied until August 5, 1996, when it is removed by the landowner. What is the status of the mineral servitude?

If the denial of access over the "only access road" is in fact an obstacle "that he can neither prevent nor remove," the servitude owner would have nine days (the period of the duration of the "obstacle"), or until August 14, 1996, within which to commence operations. If, however, there is another means of access which is not impeded by the landowner, it would not constitute an "obstacle" which would suspend prescription. The mineral servitude owner should not, however, be required to engage in "self help" to remove the obstacle.

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[264] The court declined to follow its earlier decision in *Boddie v. Drewett*, 229 La. 1017, 87 So.2d 516 (1956), which had held that orders of the Commissioner of Conservation which restrict drilling to a certain area in the unit cause an obstacle to user of the servitudes in the nondrilling area.

[265] *Hall v. Dixon*, 401 So.2d 473 (La.App. 2nd Cir. 1981) (landowner removed survey stake and locked the gate; obstacle held to suspend prescription as against all co-owners, even those who did not contribute to the obstacle); *Corley v. Craft*, 501 So.2d 1049 (La.App. 2nd Cir.), *writ denied* 503 So.2d 18 (La. 1987) (landowner dug out the only access road, blocked access to replacement road by bulldozer, refused access because the drilling permit was not personally signed by the Commissioner of Conservation and reported his own property to the DEQ as constituting a "solid waste disposal site").

5. Burden of Proof.

"The extinguishment of a servitude by nonuse for a given period is a prescription and not a peremption."[266] Thus, the prescription of nonuse is susceptible to interruption, suspension or extension.[267] Obviously, proof of a prescription-altering event must be shown.[268]

If the prescription of nonuse has ostensibly – "on the face of things" — accrued, the issue arises as to who bears the burden of proof to show that the servitude has, or has not, prescribed. It was early held, in reference to predial servitudes, that, "when the prescription of non-usage is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he, or some person in his name, has made use of the servitude as appertaining to his estate, during the time necessary to prevent the establishment of such prescription."[269]

This is harmonious with the general rule that the "party pleading the exception of prescription has the burden of proving that prescription has accrued. . . . This is the rule unless prescription is evident from the face of the pleadings, in which case the plaintiff bears the burden of showing the action has not prescribed."[270]

If the asserted basis of interruption of prescription is the existence of an act effecting an acknowledgment, the burden is either met or not met by the introduction of the written instrument, duly recorded, as envisioned by Articles 54-5 of the Mineral Code. As mentioned above, parol evidence is not admissible for this purpose.

Similarly, if the servitude owner contends that prescription has been *extended*, the burden is on the servitude owner to show compliance with the requirements of Article 56 of the Mineral Code by the introduction of an appropriate written agreement. If *production* is the basis for the interruption, the fact of production and the date of commencement and the duration thereof is easily shown, particularly since production need not be in "paying quantities."[271]

If, however, the servitude owner contends that prescription has been interrupted by the conduct of "good faith" operations, it is incumbent

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[266] *Gayoso Co., Inc. v. Arkansas Natural Gas Corp.*, 176 La. 333, 145 So. 677, 678 (1933).

[267] *See* Articles 3462-72, Louisiana Revised Civil Code.

[268] *Texas Co. v. Crawford*, 212 F.2d 722, 725 (5th Cir. 1954) (If the servitude is not used, "the right prescribes, *but like all other prescriptions, must be pleaded and proved, by the one owning the land, for the simple reason that it may be waived*.").

[269] *de la Croix v. Nolan*, 1 Rob. 321 (1842). *Compare* Article 764, Louisiana Revised Civil Code, as it pertains to predial servitudes.

[270] *Abbott & Meeks v. de la Vergne*, 94-0263 (La.App. 4th Cir. 9/29/94); 643 So.2d 827, citing *Bouterie v. Crane*, 616 So.2d 657, 660 (La. 1993).

[271] Article 38, Mineral Code.

upon the servitude owner to carry the burden of showing that the use has satisfied the requirements of Articles 29 and 42-3 of the Mineral Code. In that regard, it is necessary to determine when drilling activities or production began and ended, and by whom conducted. This is sometimes difficult, particularly if the relevant activities were undertaken many years ago. While the rules and regulations of the Louisiana Office of Conservation require an operator to file certain reports, reflecting dates of operations and production,[272] as a practical matter, there is often no way to independently confirm the completeness or correctness of such information. Additionally, the absence of reported information does not necessarily mean that an (unreported) operation did not take place.

The court in *Bass Enterprises Production Co. v. Kiene*[273] stated the following relative to the nature of the inquiry into the sufficiency of a use as constituting an interruption of prescription:

> The question of whether the operations engaged in in connection with a particular well constitute a use of the servitude in such a manner as to interrupt the running of prescription is a question of fact dependent upon the particular circumstances under which the operations were conducted and the factor of good or bad faith on the part of the operators (sic) is inextricably connected with, although perhaps not wholly decisive of, the factual situation presented.

Early cases suggest that the servitude owner who demonstrates the timely existence of a dry hole is entitled to a "presumption of good faith."[274] Because the operation either does or does not satisfy the Article 29 requirements for a "good faith operation," there are no consequences to be attached to an operation found to be insufficient to meet the Article 29 standards *other* than a failure to have interrupted prescription; the dry hole simply did not interrupt prescription. Despite the court's reference in *Bass* to "the factor of good or bad faith," overcoming this "presumption of good faith" – by failing to establish a compliance with Article 29 – is not necessarily indicative of the operation being in "bad faith." While admittedly a point of semantics, the opposite of "in good faith" in this context is not necessarily "in bad faith"; it is simply not "in good faith" as contemplated by Article 29.

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[272] It is a criminal offense to make a "false entry or statement of fact" in any report filed with the Louisiana Office of Conservation. See La. R.S. 30:17.

[273] 437 So.2d 940 (La.App. 2nd Cir. 1983).

[274] *Keebler v. Seubert*, 167 La. 901, 120 So. 591, 592 (1929) ("There is nothing justifying the conclusion that the operations were not conducted in good faith."); *Lynn v. Harrington*, 193 La. 877, 192 So. 517, 519 (1939) ("Taking all these things into consideration along with the legal presumption of good faith," . . .) and *Kellogg Bros., Inc. v. Singer Manufacturing Company*, 131 So.2d 578, 580 (La.App. 2nd Cir. 1961) ("Without denying the existence of the presumption" of good faith . . .).

As noted by reference to the Comments under Article 29, that article's formulation gives rise to "the rather curious mixture of subjective and objective standards." In a close case, the rule of interpretation is that "[d]oubt as to the *existence, extent, or manner of exercise* of a predial servitude shall be resolved in favor of the servient estate."[275]

In a typical case, evidence would have to be submitted to establish each of the following elements in order to establish the existence of a "good faith" use of a mineral servitude, to-wit:

Element of Proof	**Authority**	**Type of Evidence**
Date of creation	MC Article 28	Written agreement
Date of commencement anew of prescription	MC Articles 30, 36	Engineering testimony (LOC Form WH-1 or LOC Form DM 1 R)
Date of "spudding in"	MC Article 30	Same as above
Operations were commenced with reasonable expectation of discovering and producing minerals in "paying quantities" at a particular point or depth	MC Article 29(1)	Geological testimony
Operations were continued at the site chosen to that point or depth	MC Article 29(2)	Engineering testimony
Operations were conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times	MC Article 29(3)	Engineering testimony
Use was by the owner of the servitude, his representative or employee, or some other person acting on his behalf	MC Articles 42-3	Written evidence of relationship

Obviously, in a particular case, certain of these elements might be irrelevant, uncontested or actually stipulated, thereby removing the need for proof.

Finally, if the servitude owner institutes suit to judicially establish

[275] Article 730, Louisiana Revised Civil Code, made applicable by Article 2, Mineral Code.

the existence of the servitude, and if this is resisted by the landowner on the basis of the accrual of prescription of nonuse, the defendant-landowner must file an objection of prescription, which may not be supplied by the court.[276]

VI. The Imprescriptible Mineral Servitude

A. Introduction:

In the 1930s and 1940s, as part of the "New Deal," the Federal Government acquired vast amounts of land for various public projects, including military, flood protection, wildlife conservation and other public purposes. Landowners in most states wanted to reserve their mineral rights, whether the transfer was by conventional deed or condemnation. As a result of this situation, the Louisiana Legislature enacted Act Nos. 68 and 151 of 1938 which made mineral reservations in certain land acquisitions by the State of Louisiana and by the United States of America imprescriptible.

In 1940, the Louisiana Legislature enacted Act No. 315 which repealed the 1938 legislation and adopted a new statute which exempted from the usual rules of prescription, mineral servitudes created in transactions between Louisiana landowners and the United States of America. While the 1938 legislation was limited to acquisitions in connection with particular types of projects — "spillway or floodway"[277] and "public work and/or improvement"[278] — thus necessitating a determination as to the purpose for which land was being acquired in order to confirm its applicability, the 1940 legislation was not so limited.

The rationale behind the legislation was that Louisiana landowners — due to Louisiana's unique rules that disallowed the creation of "mineral estates" — were at a disadvantage when compared with landowners in other states who were able to retain their minerals in perpetuity in connection with acquisitions by the Federal Government.

The 1938 legislation (which applied to acquisitions by both the State and Federal Government) was repealed by the 1940 legislation (which applied only to acquisitions by the Federal Government). This distinction gave rise to concerns as to the constitutionality of the legislation to the extent that it discriminates against the Federal Government, thus arguably denying it the equal protection of the law.

In 1958, the legislation was amended and reenacted as La. R.S.

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276 Article 927, Louisiana Code of Civil Procedure ("The court cannot supply the objection[] of prescription . . ., which must be specially pleaded."). *See also* Article 3452, Louisiana Revised Civil Code ("Prescription must be pleaded. Courts may not supply a plea of prescription.").

277 Act No. 68 of 1940.

278 Act No. 151 of 1940.

9:5806, Section A of which applied to acquisitions by the Federal Government while Section B applied to acquisitions by the State of Louisiana.

Hence, between 1940 and 1958, no legislation rendered imprescriptible mineral reservations contained in acquisitions by the State of Louisiana.

The current version of the law is now contained in Articles 149-152 of the Louisiana Mineral Code.

Article 149A of the Mineral Code provides, as follows:

> When land is acquired from any person by the United States or the state of Louisiana, or any subdivision or agency of either, or any legal entity with expropriation authority by conventional deed, donation, or other contract or by condemnation or expropriation proceedings and by the act of acquisition, order, or judgment, a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the right so long as title to the land remains in the government, or any of its subdivisions or agencies, or any legal entity with expropriation authority.

Article 150 of the Mineral Code reads, as follows:

> When land is acquired in the manner prescribed in Article 149, the prescription of nonuse shall continue to run against any then outstanding mineral rights subject to such prescription and shall accrue in favor of the owner from whom the land was acquired. Thereafter, the prescription of nonuse shall not run against such rights except as provided in Article 151.

Article 151 of the Mineral Code provides, as follows:

> Article 150 is applicable only if the government, governmental subdivision, agency, or legal entity with expropriation authority remains the owner of the land at the time the mineral right is extinguished. If the land, or part thereof, is transferred by the government, subdivision, agency, or legal entity with expropriation authority to a private owner, the prescription of nonuse shall commence or resume as to the whole or the part in question from the date on which the act of acquisition by the private owner is filed for registry and shall accrue in his favor.

B. Jurisprudential Treatment:

The early legislation gave rise to a variety of issues, not the least of which was whether it applied to outstanding mineral servitudes which were in existence on the effective date of the legislation. In *Whitney National Bank of New Orleans v. Little Creek Oil Co.*,[279] the Louisiana Su-

[279] 212 La. 949, 33 So.2d 693 (1947).

preme Court held that Act No. 315 of 1940 was applicable to a mineral reservation in a 1932 transaction because, under Louisiana law, prescription rules are retrospective and could be applied to the earlier transaction – a party contracting in the face of an existing prescriptive regime has no vested right that the prescription would not be altered in the future. Particularly is this true in light of *Hicks v. Clark*,[280] which recognizes that the so-called "reversionary right" is a mere expectancy which may not be treated as an item of commerce.

Other issues were considered in the following cases which, because of the different results reached by Federal Courts, have left many issues unresolved.

In *United States v. Nebo Oil Co.*,[281] the Fifth Circuit held that mineral rights which had been reserved prior to the acquisition by the Federal Government were imprescriptible by virtue of Act 315 of the Louisiana Legislature of 1940. The court upheld the constitutionality of the legislation, noting that, "by virtue of its ownership of the land [the United States] could merely hope that the outstanding servitude might lapse but this hope or expectancy was born of a statute of prescription based on the then existing public policy of the State as declared by its legislature. . . . It was wholly given by law and the power that gave it could increase, diminish, or otherwise alter, or wholly take it away without violating the Federal Constitution."

Subsequently, in *United States v. Little Lake Misere Land Company, Inc.*,[282] the United States Supreme Court refused to apply state law to the determination of the mineral rights in lands owned by the Federal Government pursuant to a "congressional scheme . . . and indeed all other federal land acquisition programs" which were "national in scope." Said the Court:

> Under Louisiana's Act 315, land acquisitions of the United States, explicitly authorized by the Migratory Bird Conservation Act, are made subject to a rule of retroactive imprescriptibility, a rule that is plainly hostile to the interests of the United States. As applied to a consummated land transaction under a contract which specifically defined conditions for prolonging the vendor's mineral reservation, retroactive application of Act 315 to the United States deprives it of bargained-for contractual interests.

In a concurring opinion, Justice Rehnquist (who became Chief Justice on September 26, 1986) indicated a disposition to go further than the majority and to hold Act No. 315 of 1940 unconstitutional as discrimi-

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280 225 La. 133, 72 So.2d 322 (1954).

281 190 F.2d 1003 (5th Cir. 1951).

282 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed. 2d 187 (1973).

nating against the Federal Government.

C. Miscellaneous Observations:

Although the issue is most commonly presented in reference to the imprescriptibility of a mineral *servitude* reserved in an acquisition of lands by a governmental entity — whether conventional or by condemnation — Article 149 makes it clear that imprescriptibility would also apply to any "mineral right" otherwise subject to a prescriptive regime, such as a mineral royalty.

Additionally, the regime of imprescriptibility is not self-operative; it only applies if, "by the act of acquisition, order, or judgment, a mineral right otherwise subject to the prescription of nonuse is reserved." If no mineral right is reserved in the acquisition or judgment of expropriation, minerals would pass to the governmental entity as purchaser of the land.[283]

Litigation has also ensued as to whether a particular purchaser is a "subdivision or agency" of the State Government so as to bring the statute into play. For example, in *Humble Oil & Refining Company v. Freeland*,[284] it was held that an earlier acquisition by the Board of Supervisors of Louisiana State University came within the ambit of the statute.

The enforceability of Article 149 is not free from doubt. The decision (and probably Justice Rehnquist's concurring opinion) in *Little Lake Misere* was strong enough to lead the redactors of the Louisiana Mineral Code to comment under Article 149:

> The statute was described [in the *Little Lake Misere* case] as plainly hostile to the interests of the United States, and *its future application is cast into deep doubt*. (Emphasis added.)

The remainder of the comments on Articles 149 through 152 were based on an "assumption of validity," which, of course, is not particularly reassuring to a party relying on the enforceability of the statute.

VII. Conclusion

If, as is often stated (particularly by out of state lawyers and operators), Louisiana is "unique," then the mineral servitude might be viewed as representative of that characterization. While "unique," the mineral servitude has served well the interests of landowners and, thus, the petroleum industry at large.

As stated by Professor Daggett, the mineral servitude as jurisprudentially developed is "sui generis in servitudes and does not fall *precisely* into any predetermined groove; hence, it cannot always be gov-

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

284 216 So.2d 689 (La.App. 3rd Cir. 1968).

erned by the letter of the articles on the Code."[285] Several decades later, the uncertainty and lack of consistency which were the concern of Professor Daggett have been removed, for the most part, by the adoption of the Mineral Code.

[285] Daggett, *Mineral Rights in Louisiana* p. 27 (1939).