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Severance vs. Servitude: Understanding the Differences Between Texas and Louisiana Law Regarding Mineral Rights

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SEVERANCE VS. SERVITUDE: UNDERSTANDING THE DIFFERENCES BETWEEN TEXAS AND LOUISIANA LAW REGARDING MINERAL RIGHTS

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I. INTRODUCTION

Over the past several years, advances in drilling technology and skyrocketing prices for natural gas have led to extraordinary events in the oil and gas exploration industry. At the height of the boom, increased exploration for natural gas in urban areas created opportunities never thought possible before by owners of urban lands—gas rigs began popping up in urban neighborhoods like dandelions in the front yard, natural gas companies began paying unprecedented bonus payments of $30,000 or more per acre, and contractual royalty payments virtually doubled to a now-typical rate of 25%. Of the many beneficiaries of these events, landowners and mineral owners within the Barnett Shale region of Texas are among the most prominent and well-known.

Although the natural gas boom has dramatically fallen away since late 2008, there can be no doubt that the market will one day recover. And when it does, a great deal of emphasis will likely be placed on the

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Haynesville Shale, which spans portions of east Texas, northwestern Louisiana, and southeastern Arkansas. As the development of the Haynesville Shale progresses, and as many of the oil and gas professionals in Texas begin to migrate eastward, it is important for those accustomed to Texas oil and gas law to develop an understanding of Louisiana law as it relates to mineral interests. Indeed, there are critical differences between the laws of Texas and Louisiana that can have a significant impact on identifying who has the capacity to enter into mineral leases, timing the commencement of drilling operations, and classifying those who are entitled to receive financial benefit from production—differences that those involved in the process must be prepared to navigate. This paper is intended to serve as a starting point in that endeavor.

II. Mineral Estates in Texas

Most lawyers and land professionals in Texas are familiar with the concept of severed estates in land, or the ability to sever ownership of the surface from ownership of some or all of the minerals underlying the surface. Under Texas law, real property may be horizontally severed such that title to the surface is vested in one party, while title to the minerals is vested in another.[1] Severance of the surface from the minerals occurs either by a grant of the minerals in a deed or lease, or by reservation of the minerals in a conveyance of the property.[2] This process results in two separate and distinct estates—the surface estate and the mineral estate—each having all of the incidents and attributes of an estate in land.[3] As such, the minerals underlying a tract of land in Texas are subject to absolute ownership, separate and apart from the surface under which those minerals are found. But the same cannot be said for similarly situated mineral owners in Louisiana.

III. Mineral Servitudes in Louisiana

Louisiana law recognizes only two types of estates in land: one being a corporeal ownership of the soil, and the other being an incorporeal servitude for use of the soil.[4] There can be no separate estate in, or severance of, the minerals underlying a tract of land because minerals in place are not susceptible to absolute ownership.[5] Consequently, a sale or reservation of mineral rights does not vest in the purchaser or reserving party an "estate" in the minerals; it creates only a right to go upon the land to explore for, develop, and produce the minerals.[6] In

1. Harris v. Currie, 142 Tex. 93, 97, 176 S.W.2d 302, 304 (1943).
2. Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296 (1923).
3. *Currie*, 176 S.W.2d at 305.
4. Wemple v. Nabors Oil & Gas Co., 97 So. 666, 667 (La. 1923).
5. Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207, 242 (La. 1922).
6. La. Rev. Stat. Ann. § 31:21 (2000); *see also* Nabors Oil & Gas Co. v. La. Oil Refining Co., 91 So. 765, 777 (La. 1922) (citing *Frost-Jackson Lumber Co.*, 91 So. at

such situations, the party purchasing or reserving the minerals is vested with a mineral "servitude," which 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."[7]

A. *No Separate Mineral Estate*

In Louisiana, the mineral servitude does not carry with it the right to absolute ownership of, or a separate estate in, the minerals underlying the surface. Indeed, the Louisiana Supreme Court's opinion on rehearing in *Frost-Johnson Lumber Company v. Salling's Heirs* resolved any doubt regarding the nature of mineral rights in Louisiana:

> When the original opinion was handed down by Mr. Justice O'Niell on January 5, 1920, this court then held for the *ninth* time that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part, and that a grant or reservation of such oil and gas carried only the right to extract such minerals from the soil.[8]

As a result, a reservation of minerals in a cash deed or other transfer of land is nothing more than a mere retention of the right to go on the land for exploration or exploitation of those minerals; such a right being classified as a mineral servitude.[9]

B. *Prescription of Mineral Servitude: The 10-Year Rule*

One of the most important aspects of mineral servitudes in Louisiana is the statutory limit on duration and the corresponding concept of prescription for nonuse. Under the Louisiana Mineral Code, a mineral servitude is extinguished by any one of five events, the most common of which is prescription resulting from nonuse for a period of ten years.[10]

To be sure, parties are free to fix the term of a mineral servitude or stipulate a different prescriptive period as they please, so long as their stipulation is not contrary to good morals or public policy and does

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243, for the proposition that a property owner that attempts to convey land but reserve ownership of the oil and gas to him or herself reserves only a right to explore for oil and gas).

7. § 31:21.

8. *Frost-Johnson*, 91 So. at 242; *see also* Higgins Oil & Fuel Co. v. Guar. Oil Co., 82 So. 206 (La. 1919); Hanby v. Tex. Co., 72 So. 933 (La. 1916); Saunders v. Busch-Everett Co., 71 So. 153 (La. 1914); Strother v. Mangham, 70 So. 426 (La. 1915); Elder v. Ellerbe, 66 So. 337 (La. 1914); Cooke v. Gulf Refining Co., 65 So. 758 (La. 1914); Rives v. Gulf Refining Co. of La., 62 So. 623 (La. 1913); Wadkins v. Atlanta & Shreveport Oil & Gas Co., (La. 1913) (not reported).

9. Long-Bell Petroleum Co. v. Tritico, 43 So. 2d 782, 791 (La. 1949).

10. LA. REV. STAT. ANN. § 31:27 (2000); *see also* LA. REV. STAT. ANN. § 31:16 (2000) ("Mineral rights are real rights and are subject . . . to the prescription of nonuse for ten years."). The remaining four events are confusion, renunciation, expiration or dissolution of servitude by its terms, or extinction of owner who established the servitude. § 31:27.

not violate some law.[11] However, Louisiana law firmly establishes that parties may not contract for a prescriptive period greater than ten years.[12] Consequently, an agreement that attempts to stipulate a longer period is modified by operation of law to reduce the prescriptive period to ten years.[13]

The rationale behind this strongly-enforced rule of prescription is not to prevent the free transfer of land, but rather is to prevent "non-use" of the land. Indeed, to "use" the land in a manner sufficient to extend the duration of the mineral servitude, the owner must engage either in actual production of minerals or in good-faith operations for the discovery and production of such minerals prior to the expiration of the ten-year prescriptive period.[14] Thus, the better statement of the rule is that "it is never possible to create a mineral right that will last for more than ten years *if it goes unused.*"[15] By definition, then, the right created by a mineral servitude may last more than ten years if the servitude is "used" in a manner that interrupts the prescription period.[16]

Indeed, once the prescriptive period is interrupted, the ten-year clock resets and does not commence again until the last day on which operations are conducted in good faith to secure or restore production in paying quantities with reasonable expectation of success.[17] In this regard, interruption of prescription is similar to the concept of extending the secondary term of a mineral lease by production, in that the continued right of the servitude owner to benefit from the minerals may last in perpetuity, so long as drilling operations continue in good faith. Consequently, the servitude owner may effectively extend the duration of the servitude indefinitely by simply using or exercising the servitude by exploring for, producing, or reducing to possession the underlying minerals.[18]

This concept of interrupting prescription is one of the most important aspects of Louisiana law, in that it requires proper calculation of the servitude expiration date and a keen awareness of the events that are sufficient to extend that date. From the servitude owner's perspective, prescription imposes a significant burden to ensure that good-faith drilling operations begin prior to the servitude expiration

11. Leiter Minerals, Inc. v. Cal. Co., 132 So. 2d 845, 853 (La. 1961).

12. St. Mary Operating Co. v. Guidry, 2006-1495 (La. App. 3 Cir. 4/4/07); 954 So. 2d 397, 400 (citing Hodges v. Norton, 8 So. 2d 618, 621 (La. 1942); Bodcaw Lumber Co. of La. v. Magnolia Petroleum Co., 120 So. 389, 390 (La. 1929); LeBleu v. LeBleu, 206 So. 2d 551, 554 (La. Ct. App. 1967); Ober v. McGinty, 66 So. 2d 385, 386 (La. Ct. App. 1953)).

13. LA. REV. STAT. ANN. § 31:74 (2000).

14. This concept is discussed in more detail in Section III below.

15. St. Mary Operating Co. v. Champagne, 2006-984 (La. App. 3 Cir. 12/6/06); 945 So. 2d 846, 850.

16. *Id.* at 851–52.

17. *Id.* at 852 (citing LA. REV. STAT. ANN. 31:41 (2000)).

18. Leiter Minerals, Inc. v. Cal. Co., 132 So. 2d 845, 851 (La. 1961).

date; otherwise, the owner risks losing the financial benefits of the servitude. From the landman's perspective, this legal mechanism demands a thorough factual understanding of which tracts of land are subject to an extended mineral servitude. And from the operator's perspective, servitude extension requires precise determinations as to which parties are entitled to receive payments from production.

From every perspective, however, the concept of interrupting prescription begs the question: What degree of conduct constitutes "good-faith drilling operations" for purposes of tolling the prescriptive period and extending a mineral servitude?

C. *Interrupting Prescription: Good-Faith Drilling Operations*

To interrupt the ten-year period of prescription for nonuse and, thereby, extend the duration of the mineral servitude, the servitude owner must engage in one of two types of development conduct: (1) actual production of any mineral covered by the act creating the servitude;[19] or (2) good-faith operations for the discovery and production of such minerals.[20] Anything less constitutes nonuse, causes prescription to accrue, and causes the minerals to revert to the landowner.[21]

To interrupt prescription by actual production, "it is essential that there be exploitation of the land . . . by the extraction of the minerals lying under the land by draining or otherwise removing them through operations conducted from outside of the land."[22] However, it is not necessary that minerals be produced in paying quantities. "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."[23] In this regard, actual production is a relatively unambiguous concept that leaves little room for debate as to whether adequate action has been taken to preserve the servitude—minerals are either extracted or they are not.

On the other hand, interrupting prescription by good-faith drilling operations is a concept that is certainly open to interpretation. As a starting point, however, the Louisiana Mineral Code defines "good faith drilling operations" as those that are:

(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

19. LA. REV. STAT. ANN. § 31:36 (2000).
20. LA. REV. STAT. ANN. § 31:29 (2000).
21. *See* LA. REV. STAT. ANN. § 31:27 (2000); *see also* LA. REV. STAT. ANN. § 31:16 (2000) (allowing landowners to create mineral servitudes subject to the prescription of nonuse).
22. Boddie v. Drewett, 87 So. 2d 516, 517 (La. 1956).
23. LA. REV. STAT. ANN. § 31:38 (2000).

(3) Conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.[24]

Once actual drilling or mining operations are timely *commenced* with the reasonable expectation of discovering and producing minerals, the prescriptive period is interrupted, even if the operations are not *completed* until after the date on which prescription would have accrued.[25]

Importantly, unlike extending a typical mineral lease from the primary term into the secondary term, the duration of a mineral servitude may not be extended by preparatory actions that generally constitute "commencement of drilling operations." Indeed, the Louisiana Mineral Code explicitly provides that:

> 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.[26]

Therefore, something more in the way of actual spudding and drilling is required. But exactly what degree of drilling operations is sufficient to interrupt the prescriptive period appears to be an elusive concept that consistently requires courts to engage in a factually intensive, case-by-case analysis.

For example, the Louisiana Supreme Court held in *Louisiana Petroleum Company v. Broussard* that "[t]o use a servitude, so as to interrupt prescription, is to use it in the manner contemplated by the grant or reservation."[27] In that case, the servitude owner began drilling with the apparent intent of drilling to a depth at which oil or gas could be produced, but abandoned drilling operations at a depth at which it was known among experts in the field that minerals could not reasonably be expected to be found. The Court found that such abandonment did not comply with the grant or reservation because, for purposes of measuring prescription, the drilling operations that did occur left the minerals in the same position as if no drilling had ever been conducted. Thus, although no ironclad rule could be established to determine whether there had been a use sufficient to interrupt prescription, the Court found that failure to conduct drilling operations with a reasonable expectation of success was more than sufficient to sustain prescription for nonuse.[28]

In contrast, the Court held in *Keebler v. Seubert* that the servitude owner's rights are not dependant upon successful exploitation of min-

24. § 31:29.
25. LA. REV. STAT. ANN. § 31:31 (2000).
26. LA. REV. STAT. ANN. § 31:30 (2000).
27. La. Petroleum Co. v. Broussard, 135 So. 1, 2 (La. 1931).
28. *Id.* at 3.

erals within the prescriptive period.[29] In that case, the servitude owner initiated drilling and excavation on the land shortly before the expiration of the ten-year prescriptive period. Although these operations led to a final drill depth beyond that at which minerals had been located on neighboring land, the well proved unsuccessful. Nevertheless, the Court rejected the landowner's assertion that the land was not exploited in a manner sufficient to extend the servitude, reasoning that the servitude owner had taken substantial steps, at considerable expense, to locate and sink wells in a reasonable effort to realize commercial production. The Court went on to note that:

> Where a person, owning such a servitude, enters upon the land to which the servitude attaches within the ten-year period, and there, in good faith, drills wells for the purpose of exploiting for minerals, he is thereby exercising the right reserved by him, or using the servitude retained, within that period, for the purposes, for which it was retained. *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.[30]

Consequently, the Court clarified that a mineral servitude may be extended by drilling operations that are undertaken with a reasonable *expectation* of locating and producing minerals in paying quantities, even if those operations do not ultimately lead to successful production. In other words, a dry hole does not automatically equate to failure of good faith.

Despite the guidance provided by *Broussard* and *Keebler*, disputes over the line between good-faith efforts and non-good-faith drilling operations are sure to persist as the demand for and price of minerals begin to increase. The factually-intensive analysis illustrates the importance for the servitude owner to engage in appropriate geological and geophysical research, surveying, site planning, and timely spudding and drilling of a well that has a reasonable expectation of success. To ensure that a mineral servitude remains viable, it is critical for the servitude owner to work with the operator to achieve these goals prior to the expiration of the prescriptive period. If this cannot be accomplished, then it is even more critical for the servitude owner to plan for alternative drilling means so as to avoid last-minute, unplanned efforts that increase the risk of commencing operations that do not have the requisite expectation of success and that are, consequently, inadequate to interrupt the prescriptive period.

29. Keebler v. Seubert, 120 So. 591, 593 (La. 1929).

30. *Id.* at 592 (emphasis added); *see also* Lee v. Giauque, 97 So. 669, 670 (La. 1923) (holding, *inter alia*, that the drilling of a well was sufficient to preserve the servitude, even though the well was not successful).

IV. CONCLUSION

Ultimately, although the oil and gas industry may never again see the inflated bonuses and market prices that occurred in the boom of 2008, modern technology will certainly continue to guide the exploration of deposits previously thought impossible to reach, including those located within the Haynesville Shale. As a result, those who are well-educated and well-advised as to the intricacies of Louisiana mineral laws will position themselves to realize success. Hopefully, this paper has provided a general foundation in that process.