Louisiana Law Review

Volume 46
Number 3 *Developments in the Law, 1984-1985: A Symposium*
January 1986

Article 9

1-1-1986

Mineral Rights

Patrick H. Martin
Louisiana State University Law Center, patrick.martin@law.lsu.edu

MINERAL RIGHTS

*Patrick H. Martin**

INTRODUCTION

When will the oil and gas industry recover? That is the question that has been asked throughout the industry for nearly four years now. The indicators of the health of the industry are not improving but instead are declining. The prices of oil and gas continue their downward spiral; the price of oil is considerably below its level a year ago, and natural gas prices are in the low $2.00 range or below for new sales. The Hughes rig count for Louisiana stood at 249 on October 21, 1985, down from 311 a year ago.[1] There is considerably less leasing activity in the state, and lease values are much, much lower than a few years ago. Perhaps as a result of these conditions the focus of the cases is over somewhat different matters than a few years ago.

LEGISLATIVE DEVELOPMENTS

There was no significant legislation regarding mineral rights in the 1985 session of the Louisiana Legislature. Two acts might be noted. Act 325 permits the filing of a declaration of an agreement for the exploitation of mineral interests rather than filing the full agreement.[2] The declaration will serve as full and complete notice of the agreement to the same extent as if the original agreement had been filed and recorded. Also of interest is Act 980 which slightly modifies the program for leasing of state lands.[3] In the past, a person wishing to obtain a mineral lease on state-owned lands applied with a $300 payment. The land was then put up for competitive bidding, and the original applicant got his deposit back if the applicant bid upon the lease. The new act makes the application fee nonrefundable but reduces the amount to $200.

---

* Professor of Law, Louisiana State University.

1. Oil & Gas J. 158 (Oct. 28, 1985).
2. Amending La. R.S. 9:2732-2733 (Supp. 1985).
3. Amending La. R.S. 30:125-126 (Supp. 1985).

CONVEYANCE PROBLEMS: INTERPRETATION OF AGREEMENTS

A. Creation of Mineral Servitude Not Effected by "Subject To" Provision in Conveyance of Land

A conveyance of land "subject to reservation of minerals" does not have the effect of creating a mineral servitude where one does not exist, only the effect of recognizing rights previously in existence. Parol evidence is not admissible to show another intent, and the elements of estoppel, including justifiable reliance and a change in position to one's detriment because of the reliance, must be present for estoppel to apply. These were the holdings in *Texaco, Inc. v. Newton and Rosa Smith Charitable Trust.*[4]

Texaco, Inc. brought a concursus proceeding to determine ownership of a one-half mineral interest in a five-hundred acre tract of land. Claimants were the landowners and the Newton and Rosa T. Smith Charitable Trust (Trust). A mineral servitude for one-half the minerals had been conveyed to the Trust in 1958. All activities which would serve to interrupt prescription terminated in 1965, and thus the servitude terminated ten years later, in 1975. In 1976 the then owners of the land sold it to the predecessors in title of the landowners in this litigation, with the statement that the real property was conveyed "subject to: . . .(3) A reservation of one-half (1/2) of the oil, gas and other minerals under the real property conveyed in favor of the NEWTON AND ROSA T. SMITH CHARITABLE TRUST . . . ." The Trust contended this created a new servitude in its favor. The landowners argued this merely recognized the outstanding servitude. The trial court held for the landowners and the trust appealed.

In affirming the decision of the trial court, the second circuit held that the phrase "subject to" recognizes rights previously in existence rather than creates new rights. Parol evidence was not admissible to show a different intent. The doctrine of estoppel was not applicable because there was no showing of a change in position in reliance on a 1980 "ratification" of the 1976 "reservation" in favor of the trust.

The court was entirely correct in its approach. If the "subject to" language does not create a new right, then what is its purpose in the conveyance? It limits the warranty as to minerals which would otherwise be present.[5] The distinction the court is making here is the difference between words which create and words which merely limit. The phrase "subject to" does not grant or create, it merely limits the warranty as to the conveyance. To allow parol evidence to show a contrary intent

4. 471 So. 2d 877 (La. App. 2d Cir. 1985).

5. See Dillon v. Morgan, 362 So. 2d 1130, 63 O. & G. R. 60 (La. App. 2d Cir. 1978).

would undermine titles, since title examiners would be left without a reasonable basis for rendering title opinions as to the effect of conveyances containing the phrase of "subject to."

B. Warranty: Waiver in Sale of Royalty Where Quantum Delivered Is Less Than Described in Deed

A warranty question was involved in the case of *Callon Royalty Fund-1980 v. Walker.*[6] The Walkers conveyed by royalty deed certain interests to Callon Royalty Fund—1980 and Pacific Royalty Fund—1980. The deed stated it was the intent of the grantor to convey 4.51 net royalty acres which was to be all of the grantors' interest in the lands described. But it also stated that grantors' warranty even as to return of purchase price was limited to defense for any act committed by grantor which would impair warranty rights. After the conveyance it was learned that there was a certain royalty right outstanding which meant that grantors could only convey 3.77 royalty acres. The purchasers brought an action seeking as damages a diminution in the purchase price. The trial court granted summary judgment for the defendants. The purchasers appealed, but the court of appeal affirmed.

The first circuit held that the warranty was waived by the deed itself. Even though the Louisiana Civil Code provides that the obligation of delivery is a separate obligation from warranting the thing sold,[7] the obligation of delivery was not breached here since the grantors did convey the royalty which they owned. The effect of the provisions of the Civil Code concerning warranties[8] was superseded by the parties' agreement specifically indicating no return of purchase price. There was no genuine issue for trial.

C. Leasing: Grounds for Dishonoring Bank Drafts Given as Lease Bonus

A trio of cases, *Watson v. Manual,*[9] *Reed v. Flame Petroleum, Inc.,*[10] and *Toler v. Pacific International Petroleum, Inc.,*[11] all involve a common situation in the oil and gas business. People interested in acquiring leases will give the lessor a bank draft that is subject to title examination as to the property leased. In many instances, the lessee wishes to ascertain that he is getting what he is paying for—a valid lease; being able to dishonor the draft saves him from having to go

6. 461 So. 2d 621 (La. App. 1st Cir. 1984).
7. La. Civ. Code art. 2475.
8. La. Civ. Code arts. 2504-2505.
9. 467 So. 2d 15 (La. App. 1st Cir. 1985).
10. 469 So. 2d 1217 (La. App. 1st Cir. 1985).
11. 465 So. 2d 925 (La App. 2d Cir. 1985).

back and seek recoupment of a bonus paid under a breach of warranty claim. In such a circumstance, the title examination provision is a condition that the bonus is payable only if title is free from defect. In some instances, however, lessees may seek to dishonor the draft for reasons unrelated to the state of the title to the property. It may be that the lessee's assessment of the value of the property has changed, or the lessee is unable to find another party from whom he can raise the money for payment of the bonus draft. In such an instance, the assertion of a title problem may be made by the lessee to back out of an agreement that now appears less advantageous than at its inception.

1. Existence of Collateral Mortgage as Ground for Rejection of Title

At issue in *Toler v. Pacific International Petroleum, Inc.*, was a claim by the lessors for payment of an additional bonus for a top lease upon expiration of the base lease and upon "approval of title." The Tolers leased 47 acres of land for oil and gas development in 1978 for a primary term of five years. In October, 1981 they granted a top lease with a primary term of five years from March 21, 1983 (the end of the primary term of the existing or base lease) on the same land to Pacific International Petroleum for a bonus of $23,500. A side agreement provided that Pacific International would pay an additional bonus of $117,500 upon approval of title, but not later than ten days from March 21, 1983, and the Tolers were given a draft in this amount. When the base lease terminated, Pacific International refused to honor the draft, on the ground that there was a $55,000 mortgage on the property. The Tolers brought this action against Pacific International to recover the amount due. The trial court granted summary judgment for the lessors. Pacific International appealed, and the second circuit affirmed the court below. The court held that the existence of the collateral mortgage did not provide legal justification for the disapproval of the Tolers' title where the price to be paid was far more than sufficient to satisfy the mortgage debt.

2. Consent to Lease Inferred from Actions of Lessee

A lessee dishonoring a bonus payment draft which was payable subject to approval of the lease was held to be improper when the lessee recorded the lease in *Reed v. Flame Petroleum, Inc.* The first circuit held that even though the lessee had not signed the lease, consent to lease could be inferred from its actions.

Defendant, Flame Petroleum, gave plaintiff a bank draft as bonus for execution of an oil and gas lease on February 4, 1982, subject to approval of both the lease and the title. The lease was to terminate on March 1, 1982, unless drilling was commenced or rental payments were made. On March 11, 1982 the defendant dishonored the draft. Plaintiff brought suit to recover the money for the bonus. Defendant denied the existence of the lease on the grounds it had not been signed and approval had never been granted. The trial court held for plaintiff, and defendant appealed. Holding that the lessee's consent to the lease could be inferred from its recordation, notwithstanding the fact it was not signed or otherwise approved, the court of appeal affirmed. The title disapproval was after the lease had already terminated by its own terms.

3. Draft for Bonus for Lease Not Improperly Dishonored Where Title Question Existed

In *Watson v. Manual*, another decision from the first circuit (though from a different panel), a company giving a draft as the bonus for a lease with a stipulation that the payor had thirty days in which to examine title was held to be able to dishonor properly the draft when it appears that a genuine title issue exists as to the ability of the lessors to lease.

Defendant, Mineral Exchange, Inc., sought to lease property from plaintiffs, Charles and Amber Watson. It paid for a lease with a draft providing that payor had thirty days for title examination. The primary term of another lease that had burdened the property had expired prior to the issuance of the draft, but it developed that a portion of the property might be in a unit which could have held the entire lease beyond the end of the primary term. Defendant dishonored the draft. The Watsons brought suit claiming that dishonoring the draft was improper, since the defendant had undertaken to cure the title defects. The trial court held for plaintiffs and defendant appealed. The appellate court reversed. The existence of a lease on the public records indicated that there was a title problem. The burden of undertaking curative work was on the lessors, and this burden had not been assumed by lessee. The condition that the draft was to be collected only after title examination constituted a condition of the lease that the bonus was payable only if title were free from defect. The "proportionate reduction" clause of the lease had no application to the controversy.

The three cases summarized here are not inconsistent. In *Watson*, the court found that a genuine issue as to title existed that warranted dishonoring the draft. In *Flame*, the lease term had already lapsed prior to the discovery of a title defect and the dishonor of the draft; moreover, the lessee had acted as though the lease had come into existence, not that its existence was dependent upon a condition. In *Toler*, the claim of a title defect (because of the existence of a mortgage on the property) was not justified where the lessor could easily cure the defect. Thus, the thrust of these three recent decisions is to the effect that when a bank draft is given as bonus for the execution of a lease subject to approval of title, the lessee may dishonor the draft within the period specified if a genuine issue exists as to the validity of the title, but may not dishonor the draft when there is no reasonable basis for disapproving of title.

D. Limitation of Warranty; Cover-All Clause

In *Bergeron v. Amoco Production Co.*[12] a cover-all clause in a lease granted in 1976 was held to apply to the interests of two brothers in land inherited from their father in 1954, though the interest had not been described in the lease because it was believed the interest belonged to their mother. The mother's lease on this interest had contained a warranty clause which limited the warranty to return of royalties, and this provision was held not to cover the brothers' interest once they inherited her rights under the lease.

Lester and Bennett Bergeron, the two brothers, and their mother, Caroline Bergeron, granted four leases covering six contiguous tracts of land. These were later acquired by Amoco and Gulf. One lease, granted by the mother alone, covered a forty-acre tract. After her death, which occurred soon after the lease was granted, the brothers learned that she had only owned 513/2880ths and that they had actually owned 2367/2880ths at the time the lease was granted. They had inherited 2367/2880 from their father in 1954 and then inherited their mother's interest. They brought suit against Amoco and Gulf contending the 2367/2880 interest was not subject to a lease. The lessees counterclaimed for a declaration that the brothers' interest was covered by the warranty clause in the mother's lease which they had inherited from her or by the cover-all clause in another lease which the brothers had granted as to their undivided interest in a contiguous tract.

The federal district court held for the plaintiffs on their claim that the warranty clause of their mother's lease did not cover their 2367/2880ths interest, but it held for the lessees on their counterclaim that the cover-all clause in another lease operated to bind the brothers' 2367/2880ths interest. The mother's warranty of title was limited to the obligation to return to the lessee any royalties received from the portion of the leased premises to which title failed; the brothers were not parties to her lease and had no obligation to defend title to her lease or to maintain peaceful possession in the lessees under that lease. But the lease by the brothers on an undivided interest in a contiguous tract contained a cover-all clause which operated to include under lease all land owned by the brothers in the sections of land covered by the lease. It was the clear intent of the brothers to lease any and all interest they

12. 602 F. Supp. 551 (M.D. La. 1984).

had in any of the six tracts. Thus, the lease required reformation to reflect the intent of the parties.

The courts generally look with some disfavor on the cover-all clause in oil and gas leases.[13] The court in *Bergeron* discusses ably the law on the subject to indicate that the Louisiana precedents do not reflect quite the same reluctance to give effect to the clause as is found in other courts.[14] It is worth noting that the court goes on to require a reformation of the lease to give effect to the intent of the parties.

Other Contract and Procedural Problems

A. Letter Agreements Guaranteeing Well Costs of Non-Operators under Joint Venture Operating Agreement: Exception of Prematurity where Creditor Has Brought Suit Against Guarantor without First Bringing Suit Against Defaulting Non-Operator

In *Terra Resources v. Federated Energy Commission* [sic],[15] the court held that an exception of prematurity of suit would not be granted where the terms of letter agreements by the defendant, guaranteeing well costs of two non-operators in oil wells, are ambiguous as to whether suit must first be pursued against the defaulting non-operators. Terra Resources (Terra) brought suit against Federated Energy Corporation (Federated) when Federated failed to pay the costs of two defaulting non-operators in two wells pursuant to two letter agreements between Terra and Federated. The agreements provided that Federated would stand liable for the well costs of the two, stating that "all invoices which may become delinquent for a period more than 60 days from the invoice date thereof, shall become the responsibility of FEC to pay . . . ." A later addendum provided that "Terra will use all legal means at its disposal to collect all monies due [from the two others] so that FEC's liability under this agreement will be minimized." The two non-operators failed to pay, so Terra sent invoices to Federated, which paid $499,199.98 on the non-operators' behalf and then refused to make further payments. Federated, in response to Terra's suit, filed an exception of prematurity on the ground that the agreement required Terra to exhaust all litigation against the two non-operators before it could recover from Federated. This exception was maintained by the trial court. On Terra's appeal, the fourth circuit reversed and remanded. The

13. H. Williams & C. Meyers, 1 Oil and Gas Law § 221.3 (Supp. 1984).

14. Melancon v. Melancon, 199 So. 2d 573 (La. App. 3d Cir. 1967); Williams v. Bowie Lumber Co., 214 La. 750, 38 So. 2d 729 (1948); O'Meara v. Broussard, 162 So. 2d 777 (La. App. 1st Cir. 1963). Distinguished was United Gas Public Service Co. v. Mitchell, 188 La. 651, 177 So. 697 (1937), on the ground that the rights of third parties had intervened.

15. 465 So. 2d 127 (La. App. 4th Cir.), cert. denied, 468 So. 2d 1212 (La. 1985).

addendum reference to use of "all legal means," said the court, does not mean that Federated has no obligation to pay pending use of all legal means. Because of the ambivalence or ambiguity of the addendum, the case was remanded for the trial court to inquire into the circumstance showing the parties' intentions.

B. Lessors Indispensable Parties in Suit on Validity of Lease; Partition; Ambiguity, Inappropriateness of Summary Judgment

In *Celt Oil, Inc. v. Jackson,*[16] the court held that summary judgment is inappropriate where there is ambiguity as to the interpretation of a partition agreement and there exists a genuine issue of fact. The court also held that lessors are indispensable parties when litigating the validity of a lease which they granted.

The plaintiffs in *Celt Oil* were owners of a mineral lease from the Mileys, and they sought a declaration as to the validity of the lease as to a twenty-foot strip of land between adjacent tracts of their lessors and the defendants. Ownership of the strip turned on interpretation of a partition agreement between two brothers who were ancestors in title to the lessors and the defendants. The trial court gave summary judgment for the defendants based on its interpretation of the partition agreement. The plaintiffs appealed. In reversing and remanding, the first circuit said the partition agreement was ambiguous. There was a genuine issue of fact to be resolved, and summary judgment was thus inappropriate. The lessors were never made parties to the litigation; they were indispensable parties so they had to be joined as parties.

C. Gas Balancing Agreement; Obligation to Account after Reservoir Depletion

In *Chevron U. S. A., Inc. v. Belco Petroleum Corp.,*[17] the owner of a one-eighth royalty who had elected to take royalty in-kind was held by the United States Fifth Circuit Court of Appeals to have no right to a cash balancing after reservoir depletion when the gas balancing agreement it had entered into provided only for in-kind balancing, and the royalty owner had failed to market its share of the gas prior to depletion.

Chevron had farmed-out an oil and gas lease on federal offshore lands to Belco, reserving a one-eighth overriding royalty. Belco's operations resulted in gas production which Belco sold to Tennessee Gas Pipeline Company. Chevron elected to take its royalty in-kind rather than to accept an offer of payment in cash from Belco. In 1975, Chevron and Belco entered into a balancing agreement. Chevron agreed to sell

---

16. 469 So. 2d 261 (La. App. 1st Cir. 1985).
17. 755 F.2d 1151 (5th Cir.), cert. denied, 106 S. Ct. 140 (1985).

its gas to Tennessee Gas Pipeline also, but it did not receive authority for such sale from the Federal Energy Regulatory Commission until October, 1979, four months after the field had stopped producing. Chevron demanded an accounting from Belco for one-eighth of the proceeds of Belco's sales from the field. Belco refused on the ground that the balancing agreement did not provide for such an accounting.

Applying Louisiana law and using equitable principles of unjust enrichment, the federal district court ruled in favor of Chevron for $619,052.85. Belco appealed. The fifth circuit reversed. The balancing agreement provided the exclusive means for Chevron and Belco to bring their balance into account, an in-kind taking. The parties did not leave open the possibility that cash balancing might nonetheless be used. The contract itself allocated the risk of depletion to the out-of-balance party. The equitable claim of unjust enrichment cannot supersede the contrary terms of the contract, said the court. The balancing agreement was not a "loan for consumption" under article 2910 of the Louisiana Civil Code since Chevron did not deliver gas to Belco in exchange for Belco's obligation to repay; rather, Chevron had a call on production to the partial exclusion of Belco until the accounts were balanced.

At the risk of restating the obvious, the fifth circuit in *Chevron v. Belco* is applying Louisiana law to an agreement arising under a farmout of a federal lease, and the court is simply applying its interpretation of the balancing agreement, not a theory of ownership of gas in Louisiana law. It is important that this be noted for there is an analagous problem in Louisiana, as well as other states, growing out of operating agreements, unit agreements, and unit orders. Since mid-1982, there have been many wells with pipelines taking from less than all the owners in the well or the unit. In many of these there is no balancing agreement among the parties. There have been several orders from the Commissioner of Conservation touching on the subject, and several court cases directed at the Commissioner or at operating parties. There has as yet been no authoritative court ruling on the obligations of a well or unit operator towards non-operating parties who are out of balance. The 1984 Louisiana Legislature did provide that the unit operator must account to unleased landowners requiring that if:

> there is included in any unit created by the Commissioner of Conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, then the unity [sic] operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.[18]

18. 1984 La. Acts No. 345, amending section 10 of Title 30 of Louisiana Revised Statutes.

Chevron v. Belco thus does not really speak to the range of balancing problems that can arise and in fact are now being litigated.

D. Anti-washout Clause of Sublease; Binding Effect on Sublessee without Privity of Contract

The Louisiana Third Circuit Court of Appeal in *Robinson v. North American Royalties, Inc.*[19] held that the anti-washout provision of a sublease is binding on the sublessee under the Louisiana Mineral Code even though there is no privity of contract, but only to the extent of the interest acquired by the sublessee.

The Petitjeans leased 579 acres to Robinson who thereupon subleased the entire acreage to North American Royalties with reservation of one percent of all production. The sublease contained an extension clause, or "anti-washout" provision, that provided that the overriding interest would also apply to any new mineral leases acquired by the sublessee or its successors or assigns covering any of the 579 acres under the original lease, if acquired within one year of the expiration of the original lease. North American subleased to the Stone Oil Corporation sixty percent of its interest in the Petitjean lease only insofar as the said lease covered land located within a certain production unit established by the Commissioner of Conservation. North American decided not to maintain the Petitjean lease outside the unit, and thus it expired. Within one year of the expiration, Stone took a new lease on a portion of the Petitjean acreage that was outside the unit. Robinson made a claim against North American, Stone, and David Bintliff that he was entitled to a one percent interest out of this new lease under the terms of the "anti-washout" clause.

The trial court, relying on *Berman v. Brown*,[20] ruled in favor of the defendants on the ground that there was "no cause and/or right of action" for Robinson since there was no privity of contract between him and Stone. Robinson appealed, and the court of appeal affirmed in part, reversed in part, and rendered judgment. The *Berman* case has been overruled legislatively by Article 128 of the Louisiana Mineral Code,[21] so that even without privity of contract the sublessee is responsible for performance to the sublessor. But this is only to the extent of any interest acquired by the sublessee. The court ruled that since Stone as sublessee only acquired rights in the original Petitjean lease that were in the conservation unit, it was not bound by the anti-washout provision as to acreage outside that unit.

19. 463 So. 2d 1384 (La. App. 3d Cir. 1985).
20. 244 La. 619, 70 So. 2d 433, 3 O. & G. R. 608 (1953).
21. La. R.S. 31:128 (1951).

E. Intervention by Lessors in Lessee-Pipeline Litigation

Several cases have concerned rights of parties claiming to benefit from a stipulation *pour autrui*. The first involved a lessor's rights under a gas purchase contract. In *Amoco Production Co. v. Columbia Gas Transmission Corp.*,[22] it was held that lessors-royalty owners had sufficient justiciable interests relating to the enforcement of a gas purchase contract between their lessee and a pipeline to allow their intervention in litigation between the lessee and the pipeline over the gas purchase contract.

Amoco, a lessee and gas producer, brought a claim against Columbia Gas, a natural gas pipeline company, concerning performance of two natural gas purchase contracts. Intervenors, some of Amoco's lessors and royalty owners in a field subject to the gas purchase contracts, filed a petition of intervention asserting that their leases entitled them to an accounting for a portion of any benefit derived by Amoco under one of the contracts as either additional royalty or damages. The petition was amended to allege further that they were third-party beneficiaries of the gas purchase contract and that Amoco and Columbia had engaged in unfair trade practices. Amoco and Columbia both opposed the intervention by filing exceptions of no right of action and asserting that the petitions failed to state a justiciable case sufficient to allow intervention. The trial court granted the exceptions. Upon the intervenor's appeal, the fourth circuit court of appeal reversed. Under the Louisiana Code of Civil Procedure,[23] having a "justiciable right" for purposes of intervention means the right of a party to seek redress or a remedy against either plaintiff or defendant in the original action or both, and those parties have a real interest in opposing it. If that right does exist, then, in order to intervene, it must be so related or connected to the facts or object of the principal action that a judgment on the principal action will have a direct impact on the intervenor's rights. The court ruled that the intervenors here met this test. This does not go to the merits of the intervenors' claims, but simply because there may be a valid defense on the merits does not warrant the dismissal of an intervention on an exception of no right of action.

F. Liability of Lessee for Surface Damages to Farming Lessee; Stipulation Pour Autrui

In *Broussard v. Northcott Exploration Co.*,[24] a farming lessee under an unrecorded surface lease sought damages from a mineral lessee for

22. 455 So. 2d 1260 (La. App. 4th Cir.), cert. denied, 459 So. 2d 542, 543 (La. 1984).

23. La. Code Civ. P. art. 1091 (1960).

24. 469 So. 2d 392 (La. App. 3d Cir.), cert. granted, 474 So. 2d 940 (La. 1985).

damages to his crops. The mineral lease provided that "[t]he lessee shall be responsible for all damages caused by lessee's operations." The trial court held that this was a stipulation pour autrui allowing the farming lessee to recover from the mineral lessee. Reversing the trial court, the third circuit ruled that the quoted provision only applied to the lessor's damages, distinguishing this case from *Andrepont v. Acadia Drilling Co.*, where the lease language made the mineral lessee expressly liable for "all damages" caused by his operations.[25] Liability *ex delicto*[26] as a basis for damages was rejected by the court; in the absence of a stipulation pour autrui a surface lessee under an unrecorded lease could not recover damages from a third party holding a real right of a recorded mineral lease.

G. Oil Well Lien Act: Prescription of Lien Privilege If Not Filed for Record Within Ninety Days

The court in *C - Craft Marine Services, Inc. v. Llog Exploration Co.*[27] held that the statutory period for filing of record a claim or privilege in the Louisiana Oil Well Lien Act[28] is a prescriptive period after which the privilege is lost. It is not a period for filing simply to make the privilege superior to all other privileges or mortgages.

Llog Exploration Company (Llog) and Blind Bay Corporation (Blind Bay) were joint lessees who hired Explorer Drilling to drill a well for them. Explorer in turn contracted with C-Craft for towing and barge services. When Explorer failed to pay C-Craft, C-Craft asserted a privilege under the Louisiana Oil Well Lien Act against the well and a working interest in the lease. Llog and Blind Bay filed exceptions to the claim. The trial court ruled that the privilege was not filed for record within ninety days of the performance of the services and thus could not be asserted as having prescribed. C-Craft appealed. The fourth circuit court of appeal affirmed. In specifying a ninety day period for the filing of a claim or privilege, the Oil Well Lien Act was providing a prescriptive period for the creation of a privilege, not simply providing a time period for filing the privilege in order to make the privilege superior to all other privileges.

It is to be noted that the Louisiana Oil Well Lien Act has since been amended to provide a 180 day period for filing of the privilege,

25. 255 La. 347, 231 So. 2d 347 (1969). The printed lease clause providing for damages "to timber and growing crops of lessor" had been struck out and replaced by the more expansive provision. See also, Hargroder v. Columbia Gulf Transmission Co., 290 So. 2d 874 (La. 1974).

26. La. Civ. Code art. 2315.

27. 470 So. 2d 241 (La. App. 4th Cir.), cert denied, 472 So. 2d 921 (La. 1985).

28. La. R.S. 9:4861-4867 (1983 & Supp. 1985).

but this should not disturb the court's holding that this is a prescriptive period. Also, one should observe that the court has interpreted *Western Wireline Services, Inc. v. Pecos Western Corp.*,[29] as "overruling" the holdings of the federal court decisions in *Continental Casualty Co. v. Associated Pipe & Supply Co.*,[30] and *Beacon Gasoline Co. v. Sun Oil Co.*[31] Under the *Erie* doctrine, there is little or no precedential impediment to a state court interpreting state law differently from the federal court.

III. Lease Maintenance

A. Shut-in Well clause

In *Webb v. Hardage Corp.*,[32] the second circuit court of appeal ruled that for a lease to be held by a shut-in well under a shut-in well clause, the well must be shown to be capable of producing in paying quantities prior to the end of the primary term or the continuous drilling term. It also held that voluntary bankruptcy does not constitute *force majeure* under the lease.

The plaintiffs in *Webb v. Hardage* leased three tracts of land under three leases to Enerco. The five year primary term ended in 1981. At that time there was a shallow, shut-in well on each tract. Enerco had voluntarily gone into bankruptcy in 1978, and the leases were subsequently acquired by defendant Hardage Corporation. Some gas was flared from the wells for a short period, but the intial potential test required by the Office of Conservation was not performed; such a test was finally performed on one well in March, 1983. When defendant tendered shut-in royalties, they were refused by the lessors. When the defendant attempted to perform an intial potential test on another well, the landowner prevented it. Suit by the lessors followed seeking a declaration that the leases had terminated, a temporary restraining order, and a preliminary injunction preventing the defendant from taking any other action with respect to the property, and attorney fees and damages. The defendant filed a reconventional demand for a declaration that the leases were still in force. The trial court held for plaintiffs, and the defendant appealed. In affirming, the second circuit held that just as production must be in paying quantities to maintain a lease when there is production,[33] so too must a shut-in well be capable of producing in paying quantities. The capacity to produce in paying quantities must be

---

29. 377 So. 2d 892 (La. App. 4th Cir. 1979).
30. 447 F.2d 1041 (5th Cir. 1971).
31. 455 F. Supp. 506 (W.D. La. 1978).
32. 471 So. 2d 889 (La. App. 2d Cir. 1985).
33. La. R.S. 31:124 (Supp. 1985).

present at the end of the primary term or the continuous drilling operations term, reasoned the court. The lessee who wishes to maintain the lease in this manner has the burden of proving the capacity to produce in paying quantities, and the defendant did not meet that burden here. The fact that the original lessee went into voluntary bankruptcy did not constitute *force majeure* such as to effect the extension of the terms of the leases. The provisions of the leases for the lessee to retain forty acres around each producing well in the event of lease cancellation did not apply, since the wells were not producing, being worked on, or being drilled within the meaning of the leases. Finally, the court ruled that the lessors were entitled to the attorneys' fees awarded by the trial court.

It may be noted that the court in *Hardage* did not state that the intial potential test is the only method whereby the lessee can show that a well is capable of production in paying quantities prior to the end of the primary term or the continuous drilling term. But the court does say that as a general rule such a test must be conducted in order to maintain the lease.

B. Effect of Unit Established by Commissioner of Conservation on Acreage Outside of Unit When Unit Well is Off Leased Tract

The pooling clause in a lease that divided the lease upon the exercise of pooling power (if the unit well was not on the leased tract) was held not to apply to pooling resulting from an order of the Commissioner of Conservation in *Mathews v. Goodrich Oil Co.*[34] The Louisiana Mineral Code did not increase the obligations of the mineral lessee with respect to this aspect of unitization.

The plaintiffs were successors in interest of a lessor of fifty-one acres. The defendants held the working interest in that lease. A portion of the tract was included in a unit formed by the Commissioner of Conservation (upon application of the lessee), and the unit well was off the leased tract. A new unit was created in 1982 which included thirty-one acres of the leased tract, with the unit well located on the leased tract. Plaintiffs brought this suit claiming the lease had already terminated as to those thirty-one acres by operation of the pooling clause of the lease and by operation of the Louisiana Mineral Code. The trial court granted summary judgment for defendants, and plaintiffs appealed. The second circuit affirmed.

The pooling clause in question provided for division of the lease if a unit was established pursuant to it and the unit well was off the leased tract. This did not apply to units created by the Commissioner

34. 471 So. 2d 938 (La. App. 2d Cir.), cert. denied, 475 So. 2d 1105 (La. 1985).

of Conservation. Where the clause was not applicable, there was no duty under it to furnish plaintiffs with a plat showing the unit. The Mineral Code did not increase the burdens on the lessee to divide the lease as to contiguous tracts, nor does the principle of reasonable development under Mineral Code article 122 divide the lease in these circumstances.

C. Pugh Clause, Requirement of Delay Rental for Acreage Outside of Unit Which is Not a Voluntary Unit

The United States Fifth Circuit Court of Appeals reached the same result as the second circuit did in *Mathews v. Goodrich Oil Co.* In *Lowman v. Chevron U.S.A, Inc.*,[35] the court held a Pugh clause requiring payment of rentals or operations to maintain a lease as to acreage outside a unit, applied only to voluntary units, not units established by the Commissioner of Conservation. Thus, the lease in this case was also maintained as to its entirety by unit operations even without payment of shut-in rentals as to outside acreage.

Plaintiffs, lessors, brought suit in state court in Louisiana to cancel an oil and gas lease as to acreage outside producing units established by the Commissioner of Conservation. The suit was removed to Federal court. The lease contained a Pugh clause requiring payment of delay rentals or shut-in rentals, or operations to maintain the lease on acreage not in the unit where the unit is established by the lessee pursuant to a clause of the lease. The lease covered 4314 acres, and portions of the tract were included in six different units established by the Commissioner. In 1979 and 1980 the lessee paid Pugh clause rentals for the portions of the leased tract not in production. Three units had shut-in wells. The lessee attempted to pay shut-in rental on the acreage covered by these three units, but the check, through a typographical error, bore a date more than ninety days beyond the cessation of production or operation of the unit wells. Plaintiffs claimed the leases were cancelled by failure to make shut-in payments timely under the Pugh clause. Lessee defended on the basis that no payments were required since the Pugh clause only pertained to units established by the lessee and not to units established by the Commissioner of Conservation. The trial court held for the defendant lessee.[36] The plaintiffs appealed, and the fifth circuit affirmed. Operations on the leased land sufficient to maintain the lease according to its terms will normally continue the lease as to its entirety. While this result may be modified by appropriate contract terms, the Pugh clause here operated only as to units established by

35. 748 F.2d 320 (5th Cir. 1984).
36. 599 F. Supp. 14 (M.D. La. 1983), aff'd, 748 F.2d 320 (5th Cir. 1984).

the lessee and not to those established by the Commissioner of Conservation. Drilling units established by the Commissioner are not "voluntary" actions of the lessee and therefore do not trigger the operation of a Pugh clause.

While the result in *Lowman* is correct based on those particular facts, the practitioner is cautioned to note that the case turns on the language of the Pugh clause itself, as did *Mathews*, and not on a general principle of law or conservation policy that units established by the Commissioner of Conservation do not trigger a Pugh clause. That is to say, a Pugh clause so drafted will be triggered into operation by a unit, whether established by the lessee pursuant to the pooling clause of a lease or by the Commissioner of Conservation.

D. *Modified Pugh Clause; Continuous Drilling Operations Clause*

In *Roseberry v. Louisiana Land and Exploration Co.*,[37] plaintiffs-lessors brought suit against defendants-lessees seeking cancellation of the portions of a lease outside of a unit. They relied on a lease provision, a modified "Pugh clause," providing for continuation of the lease beyond the primary term and any continuous drilling operations at the expiration of the primary term only as to that acreage for which production royalties were payable, even though there were one or more wells on the leased property. The defendants claimed the lease was continued by an additional well commenced with no cessation of operations of more than ninety days between it and the well being drilled on the unit at the end of the primary term. The trial court ruled that the modified "Pugh clause" had the effect of dividing the lease at the end of the primary term as to acreage outside a unit, and that the "between operations" language of the "continuous drilling clause" referred to multiple operations on a continuous drilling operation and not to multiple wells unless a subsequent well was the result of a cessation of production or a dry hole. Thus, it held the lease had terminated as to the acreage outside a drilling unit on which there were operations at the end of the primary term. Defendants appealed. The Louisiana Second Circuit Court of Appeal affirmed.

According to the court majority, the typewritten "Pugh clause" implied that the lease would be divided upon unitization. Since production from a unit at the end of the primary term would maintain the lease only as to the acreage included in that unit, to find that the drilling operations conducted within a unit would hold all of the leased acreage, whereas production from the same unit would not, would be an absurd consequence. A dissenting judge read the Pugh clause to apply to continuation of the lease beyond the primary term and any continuous drilling operations period.

37. 470 So. 2d 178 (La. App. 2d Cir. 1985).

The *Roseberry* case shows the difficulties that can be caused by insertion of typewritten clauses in oil and gas leases when they must interact with other printed provisions. While the holding of the principal case is not clearly incorrect, the reading of the modified Pugh clause by the dissenting judge would also appear to have merit, even proceeding from the rationale given by the majority of the court. The majority opinion states that the

> obvious intent of the inserted typewritten clause was to insure that defendants would diligently attempt to explore and develop all of the acreage encompassed within the lease. The defendants' interpretation of this clause would effectively defeat the purpose of the clause and would not be in accord with the clear intent of the parties.

Here the court seems a bit wide of the mark, because with the dissenting judge's reading of the clause, the provision would require that the defendants begin drilling within ninety days on outside acreage to keep the lease alive. The outside acreage could not be left idle even if the unit well was then producing. Thus, diligent exploration and development also follow from the dissenting judge's position. The problem partly stems from the fact that unitization under Louisiana practice may take place before there is a producing well as well as after there is production. The problem posed by the majority position may be seen in the following example.

Consider the possibility that a producing well on a leased tract of 500 acres would be included in a 160 acre unit covering only eighty acres of the leased tract after the end of the primary term. What steps could the lessee take at that point to maintain the lease as to the outside 420 acres? Under the rationale of the trial court, which was not disturbed by the court of appeal, the well could not be said to have ceased production nor to have been a dry hole, so the lessee would not have the benefit of the continuous drilling clause to start a new well within ninety days. The lessee would have to get a rig to begin drilling in anticipation of the unit order which might or might not contain acreage they anticipated to be put into a unit. This reading of the continuous drilling clause puts the lessee into a real bind. Of course, the problem may be said to be partially of the lessee's making, since most Pugh clauses contain language allowing a period of time after inclusion of a portion of the lease into a unit to take steps to maintain the outside acreage. And many continuous drilling clauses are written to make it clear that additional wells may be commenced which will have the effect of continuing the lease irrespective of the results of the operations taking place at the end of the primary term.[38]

---

38. For a more complete discussion of the subject of "drilling operations" and

EXECUTIVE RIGHT: DUTY TO LEASE

The second circuit held in *Sparks v. Anderson*[39] that a landowner who sold land for lignite development rather than lease it did not breach a duty to a royalty owner who would have shared in the lease bonus and royalty but had no share of the sale of land.

Plaintiff Sparks, a landowner, contracted to sell 512 acres to the Andersons, reserving oil, gas, and other minerals. Before the title was conveyed, a question arose as to whether lignite was a mineral under the reservation. To resolve the issue, the parties agreed to an additional reservation of sixty percent of the royalty under any future lease affecting coal or lignite. After several negotiations with Phillips Coal Company (including cancellation of a lease to Phillips that the Andersons had signed before the actual conveyance of title to them by Sparks), the Andersons decided not to lease the land to Phillips. Instead, they sold Phillips 242 acres out of the 512 acres for $326,700, with the Andersons also getting back from Phillips an agricultural lease for ten years on the land. Sparks brought suit claiming that the Andersons had breached a duty to him by their refusal to lease, and he sought damages in the amount of at least the advance royalties which would have been paid. The trial court, ruling for the plaintiff, concluded that the Andersons and Phillips did not act in good faith towards Sparks, and their actions were taken to avoid the payment of royalties to Sparks. The Andersons appealed, and the second circuit reversed and rendered judgment for them. The owner of an executive right is under no duty to lease, only to act in good faith and in the same manner as a reasonably prudent landowner whose interest is not burdened by a non-executive interest.[40] The Andersons did not breach this duty.

PARTITION

A. *Necessity of Appraisal Prior to Sale*

Partition of land where mineral rights are involved continues to be a problem area under the Mineral Code. In *Thigpen v. Boswell*,[41] it was held that the Louisiana Mineral Code's appraisal of the rights to be affected by a partition involving mineral rights must be made prior to the sheriff's sale in order to extinguish the mineral rights.

Perrin was owner of certain property which he desired to partition. He filed suit for partition by licitation. Thigpen, the owner of a servitude

---

"continuous drilling operations" clauses, see H. Williams & C. Meyers, 3 Oil and Gas Law § 617 (Supp. 1984).

39. 465 So. 2d 830 (La. App. 2d Cir.), cert. denied, 467 So. 2d 538 (La. 1985).

40. La. R.S. 31:109 (1951).

41. 465 So. 2d 865 (La. App. 2d Cir. 1985).

for one-third of the minerals of the property, was made a defendant. Pursuant to the Mineral Code's provisions for partition by licitation of land burdened by mineral rights created by fewer than all the owners,[42] a notary was appointed to make the partition, and two appraisers were to make separate appraisals of the property as a whole and of the outstanding mineral servitudes. The property was sold at a sheriff's sale prior to the appraisals being performed. Perrin purchased the property, and, on the same day as he was deeded the tract, he deeded it to Boswell without warranty as to the minerals. Thigpen brought this suit for declaratory judgment to recognize him as owner of one-third of the mineral rights. The trial court held for Boswell, and Thigpen appealed. The court of appeal reversed. The Mineral Code procedures require that the appraisals be made prior to the sale of the tract. Failure to comply with the requirements results in the mineral rights not being extinguished or otherwise affected by the sale.

B. Necessity of Common Elements of Ownership Where Land is Subject to Mineral Rights

The case of *Steele v. Denning*[43] holds that owners of an undivided interest in land whose interest is burdened by a mineral servitude reserved by a prior landowner may not provoke a partition of the land and the mineral rights, as they do not hold a common element of ownership with the servitude owner.

Plaintiff landowners brought suit for partition by licitation of land and mineral interests. The defendants were the owner of the mineral servitude burdening the plaintiffs' interests in the land, a mineral lessee, and other property co-owners whose undivided interests were not subject to mineral servitudes. The trial court ruled that the mineral lease was conveyed by all co-owners and was attributable to the entire property; thus, the lease would not be suject to the partition. However, the trial court ordered a partition by licitation of the interests of the other parties. The defendants appealed. The appellate court reversed this ruling insofar as it would apply to the defendant who owned the mineral servitude; it affirmed the trial court as to the other defendants, subject to the exclusion of the mineral servitude from any partition by licitation. The plaintiffs sought writs for review. The Louisiana Supreme Court affirmed. The court's position was that although the Louisiana mineral servitude doctrine precludes creation of a mineral estate independent of full title to the land, land subject to a mineral servitude may not be partitioned by licitation with respect to the servitude because the land-

42. La. R.S. 31:178-184 (Supp. 1985).
43. 456 So. 2d 992 (La. 1984).

owners do not hold a common element of ownership with the servitude owner. Creation of a mineral servitude effectively fragments the title such that different elements of ownership are held by different owners, and there is not anything held in common between them.

Partition of land and mineral rights is a difficult area of Louisiana mineral law. A handful of partition cases touching upon mineral rights have been decided since the enactment of the Mineral Code in 1974.[44] The decision of the Louisiana Supreme Court here seems at odds with the language of the Mineral Code. To understand the difficulty with the case, one must start with the premise that one co-owner may not lease land and have the lessee drill for oil or gas without the consent of the other co-owners, but that a person owning a fractional mineral servitude which is not a co-owned right does have the right to drill without consent of others who may have a right to a share of the production.[45] Partition is the means for a co-owner to divide the land and thus have the right to develop without having to get the consent of another. This combination of a "veto" power with the right of partition avoids one owner being able to put the land to a use inconsistent with the other owner's desired use.

If *Steele* is correct, it would appear to mean that one co-owner of land could create a mineral servitude in a third party, and thereby defeat the ability of the other co-owner to prevent his land from being used for oil and gas purposes even through a partition of the land; since the servitude owner would not be a co-owner, he presumably would be able to exercise his right to drill after a partition, and he is likewise not subject to a partition action. What is the landowner who does not want drilling on his land to do? He did not take the land subject to an outstanding mineral right, and he did not create the right that has come into existence, but he is now burdened by the mineral servitude and cannot get away from it through a partition action. The difficulty of this proposition may prompt a subsequent court ruling to limit the holding of *Steele* to its facts: here the parties seeking the partition are

---

44. See the Discussion Notes at 79 O. & G. R. 46; Patrick v. Johnstone, 361 So. 2d 894, 62 O. & G. R. 1737 (La. App. 2d Cir.), cert. denied, 364 So. 2d 600 (La. 1978); Harmon v. Whitten, 390 So. 2d 962, 68 O. & G. R. 460 (La. App. 2d Cir.), cert. denied, 396 So. 2d 899 (La. 1980); Tri-State Concrete Co. v. Stephens, 406 So. 2d 205, 70 O. & G. R. 534 (La. 1981); Roberson v. Hollis, 403 So. 2d 845, 71 O. & G. R. 347 (La. App. 2d Cir. 1981); Thibaut v. Thibaut, 407 So. 2d 466, 72 O. & G. R. 55 (La. App. 1st Cir.), cert. denied, 409 So. 2d 659 (La. 1981).

45. Article 169 of the Mineral Code provides: "Co-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." La. R. S. 31:169 (1951). The cases referenced in the comments to this article make it clear that under the Mineral Code consent does not have to be obtained in order for development to take place where there is no co-owned right.

descendents in title to the person who purchased the interest in the land subject to a reservation of mineral rights. The parties cannot complain of the existence of a servitude burdening the land when they acquired their interest. This would have more the flavor of an estoppel. The full import of this decision cannot be assessed at this time.

INTERRUPTION OF PRESCRIPTION OF A MINERAL SERVITUDE

A. Effect of Unit Operations: Where Unit Well is Off the Servitude Tract

1. Effect Where There is Agreement That Off-Tract Well Will Interrupt Prescription

The court in *White v. Evans*[46] held that where the pooling agreement so provides, production from a unit well will interrupt prescription as to the entirety of the mineral servitude even if the unit well is off the lease and only a portion of the lease is in the unit.

On October 2, 1934, A sold a servitude for one-half the minerals on Blackacre (a tract of 120 contiguous acres) to B. A leased Blackacre and 299 other acres to Placid in 1942, and four months later B executed a co-lessor's agreement covering his one-half mineral servitude. In 1943 and 1944 Placid executed voluntary pooling agreements for two 640 acre units, one of which included 40 acres of Blackacre. A and B both signed the pooling agreements. On the unit that included the forty acre portion of Blackacre, a well was spudded on June 7, 1944 (i.e. within ten years of the servitude's creation), but the well was not on the servitude property. The well was successful and has produced since then. Landowners-plaintiffs, successors to A, brought suit to declare that production from the well did not interrupt prescription against the eighty acres of land burdened by the servitude which were not in the unit. The trial court concluded that the pooling agreements should be interpreted as intending to interrupt prescription against the contiguous 120 acre servitude whether in or out of the unit. The plaintiffs appealed, and the second circuit affirmed. Although contrary to the general rule regarding the effect of unitization of a portion of a tract burdened by a servitude, partiês may agree expressly and in writing that an interruption of prescription by unit production shall extend to the entirety of the servitude tract, wherever the location of the unit well and even if only part of the servitude tract is within the unit. Here the landowner and servitude owner expressly agreed in the pooling agreements that production would interrupt prescription on the part of the servitude that was not contained in the unit.

46. 457 So. 2d 159 (La. App. 2d Cir. 1984), cert. denied, 462 So. 2d 207 (La. 1985).

The reported case is a straightforward application of the Louisiana Mineral Code provisions regarding the effect of unit operations on the interruption of liberative prescription running against a mineral servitude. Normally, the unit operations will interrupt prescription only as to that portion in the unit if the unit well is not located on the tract burdened by the servitude.[47] However, the landowner and servitude owner may agree that such unit operations will interrupt prescription as to the entire servitude.[48] This is the only instance in which the parties may make the rules of prescription less onerous. The rights in question here were in effect prior to the effective date of the Mineral Code, but the court indicated that the pre-Mineral Code jurisprudence was not contrary to the Mineral Code.

2. Effect Where There is No Agreement That Off-Tract Well Will Interrupt Prescription

In a case involving facts analogous to those in *White v. Evans* but without an agreement as to the effect of operations on interruption of prescription, the court held that operations or production on a unit will not interrupt prescription on that part of a servitude tract not included within the unit, even if the rights were in existence prior to the enactment of the Louisiana Mineral Code. This was the case of *Sandefer & Andress, Inc. v. Pruitt*.[49]

In a concursus proceeding to determine the owners of mineral rights in a sixty acre portion of a 260 acre tract, the landowners (the Pruitts) asserted that a mineral servitude owned by certain mineral claimants had been extinguished by ten years nonuse. The claimants tried to show at trial that there had been production, but the trial court concluded there was evidence that the wells in question had not produced for a period of more than ten years. The claimants also asserted that unit production had interrupted prescription, but none of the sixty acre portion of the tract in question was in a unit for which there was production. Thus, the trial court held for the landowners. The mineral claimants appealed, and the court of appeals affirmed. It was not erroneous for the trial court to conclude that there had been no production from the tract in a twelve year period. And it was the law both before and after the adoption of the Louisiana Mineral Code in 1974 that unit operations and production will interrupt prescription only as to that portion of the servitude tract included in the unit if the unit well is not on the tract burdened by the servitude. While a voluntary pooling agreement may expressly provide that operations or production

47. La. R.S. 31:33, 34, 37 (1975).
48. La. R.S. 31:75 (1975).
49. 471 So. 2d 933 (La. App. 2d Cir. 1985).

on a voluntary unit will interrupt prescription as to any affected servitude tract in its entirety, the pooling agreements in question here did not provide for this effect. Nor could agreements subsequent to the extinguishment of the servitude in question have had the effect of reviving the servitude.

B. Retroactive Application of Statute Making Servitude Imprescriptible

A statute making certain mineral servitudes imprescriptible does not affect vested rights and thus does not impair the obligations of contract. Therefore, it can be applied retroactively. This was the holding of the second circuit court of appeal in *Anadarko Production Co. v. Caddo Parish School Board*.[50]

In 1954, Bryan sold eighty acres of land to the Caddo Parish School Board with a reservation of mineral rights. In 1978 Anadarko took a mineral lease on this acreage from the School Board, and in 1981 took a lease from Bryan on the same acreage. After obtaining production, Anadarko filed this concursus proceeding to determine which of the lessors had a right to the royalty. The School Board claimed that Bryan's interest reserved in 1954 had been lost through the liberative prescription of ten years, since there had been no use of the servitude within that period. Bryan claimed that a statute enacted in 1958, to make imprescriptible mineral servitudes created when landowners reserved mineral rights in a sale of land to school boards and other named agencies of the state, had made her servitude imprescriptible. The trial court ruled that the statute was not to be applied to servitudes already in existence when the statute became effective, and thus her 1981 lease was ineffective. Bryan appealed, and the second circuit reversed. The servitude created in the 1954 deed was not one for a definite term set by the contract, but was instead a servitude of indefinite term that was subject to the law of liberative prescription. The 1958 act applied to the 1954 servitude because the ten year period had not accrued in 1958. Application of the act in these circumstances does not affect vested rights and does not impair the obligations of the contract. Therefore, Bryan was entitled to the royalty as grantor of the valid lease.

The *Anadarko* case correctly distinguishes between statutes which impair vested rights and those which merely prevent the operation of a rule of prescription, a public policy in which no one has a vested right. The only point to note here is the court's reference to the codification of the 1958 act as Article 149 of the Louisiana Mineral Code.[51]

50. 455 So. 2d 699 (La. App. 2d Cir.), cert. denied, 460 So. 2d 610 (La. 1984).
51. La. R.S. 31:149 (1951).

There are actually two Articles numbered 149 in the Mineral Code. Both were 1980 amendments to the statute, and they do differ though not in ways that would be applicable to the facts of the *Anadarko* case.

EXPROPRIATION

A. *Surface Use: Valuation of Damages to Mineral Development*

In *Missouri Pacific Railroad Co. v. Nicholson*,[52] a case concerning an expropriation of surface use of 300 acres of land for a railroad yard, the court held that no damages could be awarded for loss of the landowner's right to recover minerals where it was not shown that the value of the mineral rights would be measurably diminished by the restriction of surface access to the landowner.

Missouri Pacific Railroad brought an action for expropriation of 300 acres of plantation land to construct a railroad yard. The trial court awarded the land to the railroad and fixed damages for the land, mineral rights, and attorney fees. The landowner appealed the award of full ownership of the land to the railroad and the amount of damages. The first circuit court of appeal amended, affirmed in part, and reversed in part; judgment was recast and rendered. The appellate court ruled that the railroad needed only a servitude to the surface, and thus the railroad did not take any mineral rights. The record did not show any restrictions on the landowner's right to recover the minerals except that he might have to drill directionally in order to exploit the minerals; there was no showing that the value of the mineral rights had been measurably diminished.

It should be observed that in *Nicholson* the landowner retained considerable acreage around the area expropriated. Thus, the landowner had access to land from which drilling could take place. Had this not been the situation, a case could be made that loss of use of the surface would also deprive the landowner of the ability to develop the minerals since he would have no ability to control access for drilling from a neighbor's property. Even with the facts of this case, it would appear that lack of surface access to the 300 acres would make the mineral rights less attractive to a potential lessee.

B. *Gas Storage Reservoir; Prescription of Claims for Trespass and Damages Incidental to Public Use; Compensation for Expropriation; Extinction of Mineral Right by Confusion; Warranty Inapplicable to Successor's Interest Where Warranty Excluded All Interests in Effect and Recorded*

An owner of a fractional mineral servitude who suffers a trespass to his interest by a gas storage project is barred from asserting a claim

---

52. 460 So. 2d 615 (La. App. 1st Cir. 1984), cert. denied, 462 So. 2d 185, 186 (La. 1985).

for trespass damages by a two year prescriptive period, but he is not barred from asserting a claim for expropriation of the storage rights or for the actual taking of recoverable hydrocarbons by that prescriptive period. When that owner's servitude is extinguished by operation of the principle of confusion upon his acquiring the rights to the land, he does not lose his claim for expropriation, as the unencumbered ownership interest became his through a reversion of the interest to the land and because a tort claim would survive the extinction of the servitude interest. A successor in interest is not bound by a gas storage agreement as to all rights where that agreement excluded all interests in effect and recorded as of the date of the agreement. These were the holdings of the United States Fifth Circuit Court of Appeals in *Mississippi River Transmission Corp. v. Tabor.*[53]

Mississippi River Transmission Corporation (MRT) entered into a gas storage agreement with Tabor, Sr. in 1972 covering four tracts, but excluded from warranty were all interests in effect and of record at the time of the agreement. His son, Tabor, Jr., owned a fractional interest in one tract and a part of the mineral interests in two other tracts covered by the agreement, but Tabor, Jr. did not enter into the ageement. In 1977 Tabor, Jr. came into full ownership of all four tracts. After Tabor, Jr. became aware of MRT's activities on the property in 1978, negotiations began between him and MRT. Thereupon, MRT filed for declaratory judgment as to Tabor Jr.'s compensable interest in the four tracts at the time of the agreement with Tabor Sr., and MRT also filed for expropriation of any such interest through eminent domain. Tabor, Jr. filed a counterclaim for damages for trespass and for compensation for the lawful expropriation of his property. MRT's defenses to the counterclaims were that any claims for trespass had been lost through prescription, and that when Tabor, Jr.'s mineral interests in the tracts were extinguished by confusion in 1977, MRT acquired all rights in the property under the storage agreement with the father. The district court held that Tabor, Jr.'s claims for the public use of his property had prescribed, but that his claim for compensation for expropriation of his rights had not prescribed. Both parties appealed.

The fifth circuit affirmed the district court's rulings. Tabor, Jr.'s claims for damages incidental to the taking of the property prescribed two years after the first occurrence of any damage under Louisiana Revised Statutes (La. R.S.) 9:5624. But this statute does not apply to compensation for the value of property taken in an expropriation. La. R.S. 19:2.1(B) provides a two year prescriptive period for claims arising out of an expropriation, but the two year period begins to run only after the interest has been legally expropriated, and this did not occur

53. 757 F.2d 662 (5th Cir. 1985).

here until this suit began for expropriation. However, no additional compensation is due for the taking of recoverable reserves because no trespass occurred, and because the compensation for the actual taking of Tabor, Jr.'s recoverable reserves is the same as his compensation for the expropriation. His claims for expropriation were not lost through the confusion that occurred in 1977 when he succeeded to his father's interests in the four tracts which were subject to the storage agreement with MRT because the warranty given by his father excluded all interests in effect and of record when the agreement was made; thus, Tabor, Jr. could not succeed to an obligation that was never imposed on his father or upon his father's estate. And any rights reverting from the servitudes that were extinguished reverted to Tabor, Jr. as owner of the land and not to MRT.