

# Louisiana Law Review

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Volume 75  
Number 2 *The Rest of the Story:  
Resolving the Cases Remanded by the MDL*  
*A Symposium of the Louisiana Law Review*  
Winter 2014

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Article 9

12-31-2014

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### Repository Citation

W. Drew Burnham, *Difficulties with Sharing: A Proposal to Define the Voluntary Unit and Protect the Rights of Surface Co-Owners and Mineral Servitude Holders in Louisiana*, 75 La. L. Rev. (2014)  
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# Difficulties with Sharing: A Proposal to Define the Voluntary Unit and Protect the Rights of Surface Co-Owners and Mineral Servitude Holders in Louisiana

## INTRODUCTION

“It’s always more fun to share with everyone.”<sup>1</sup> This sentiment, although nice in a children’s song, does not always hold true in the real world. Because co-ownership is frequently inconvenient, Louisiana avoids friction between co-owners by allowing them to divide the co-owned thing into separately owned portions or sell the thing and divide the proceeds.<sup>2</sup> However, these options to partition the co-owned thing may not always be ideal or available, such as when the co-owned thing is burdened by a separately owned right that cannot be partitioned.<sup>3</sup> Accordingly, difficulties with sharing may leave squabbling co-owners without a suitable remedy and potentially clueless as to their rights as co-owners. Consider the following co-ownership scenario in a mineral law context.

On January 1, 1997, Farmer Joe created a mineral servitude by selling the mineral rights on his 1,000-acre tract of land in DeSoto Parish to Big City Bob.<sup>4</sup> This mineral servitude vests Bob with the right to explore for minerals on the burdened land.<sup>5</sup> Bob’s servitude will expire, and his mineral rights will revert back to Joe, if Bob does not use the servitude within ten years of its creation.<sup>6</sup>

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1. JACK JOHNSON, *The Sharing Song*, on SING-A-LONGS AND LULLABIES FOR THE FILM CURIOUS GEORGE (Brushfire Records 2006).

2. See LA. CIV. CODE art. 807 (2012).

3. See, e.g., LA. REV. STAT. ANN. § 31:65 (2000); LA. CIV. CODE art. 747 (2012) (discussing servitudes in general); see *infra* Part I.C.

4. See LA. REV. STAT. ANN. § 31:16 (2000); see also Frost-Johnson Lumber Co. v. Salling’s Heirs, 91 So. 207, 245 (La. 1922).

5. See LA. REV. STAT. ANN. § 31:21 (2000) (“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.”).

6. See *id.* § 31:27(1) (listing “prescription resulting from nonuse for ten years” as a method of extinguishing a mineral servitude); see also *id.* § 31:29 (“The prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of minerals.”); *id.* § 31:29 cmt. (noting that dry holes may constitute good faith operations); *id.* § 31:44 (stating that the adoption of operations by another may interrupt prescription); *id.* § 31:33 (defining unit operations that can affect prescription on the servitude); *id.* § 31:36 (stating that production on the tract will interrupt prescription on the servitude); *id.* § 31:54 (declaring that a proper acknowledgment will interrupt prescription on a servitude).

Farmer Joe passes away in 1999, leaving his ten children in equal co-ownership of the tract of land burdened by Bob's servitude.<sup>7</sup> One of those children, Mike, purchases all but one of his siblings' interests in the property, leaving his sister, Kate, as a co-owner of 10% of the property.<sup>8</sup> In 2006, an oil and gas prospector, Black Gold Drilling, enters the picture. Wanting to exploit the up-and-coming Haynesville Shale in northwest Louisiana quickly and cheaply, Black Gold seeks to form a voluntary unit that would include Mike's interests. Such a unit is a contractual agreement by which a group of mineral rights owners, land owners, and other parties agree to participate in the costs and revenue of mineral exploration in a defined area.<sup>9</sup>

Bob, the mineral servitude owner, and Mike, the 90% co-owner of the surface, sign onto the voluntary unit. Bob sees his involvement in the voluntary unit as an opportunity to share in revenue, interrupt the running of prescription against his servitude, and avoid the expense of drilling individually on his servitude tract. Mike sees the voluntary unitization as an opportunity to receive some compensation for his consent.<sup>10</sup> If Mike did not consent, Bob may individually drill on his servitude, in which case Mike would not recover any compensation and would go through the inconvenience of having a well drilled on the surface of his property. On the other hand, Kate, the 10% owner of the surface, thinks that prescription will fully accrue against Bob's servitude before any drilling occurs that would interrupt prescription; thus, Kate refuses to consent to the voluntary unit, expecting that the mineral rights will revert back to her surface ownership.<sup>11</sup>

In December 2006, Black Gold, as the operator of the voluntary unit, drills a producing well on land outside the surface

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7. See LA. CIV. CODE art. 880 (2012).

8. See *id.*

9. Patrick S. Ottinger, *Conventional Unitization in Louisiana*, 49 ANN. INST. ON MIN. L. 21, 23 (2002) [hereinafter Ottinger, *Conventional Unitization*] ("Unitization is the allocation of designated acreage to a well for purposes of development, cost-sharing and allocation of production."). As opposed to compulsory unitization, conventional unitization is a contractual pooling of ownership rights in a defined area for purposes of production in that area. *Id.* at 42. A unit agreement is a contract agreed to between the consenting parties to be affected by the unitization and the agreement forms a voluntary unit. *Id.* at 42–45.

10. *Id.*

11. See LA. REV. STAT. ANN. § 31:65 (2000). As a co-owner, Kate may partition the land that she co-owns with Mike, but such a partition will not affect the servitude burdening her property. The servitude will remain intact. See *infra* Part I.C.

owned by Kate and Mike but within the unit area.<sup>12</sup> As a result of such drilling, prescription running on a mineral right in the unit will generally be interrupted.<sup>13</sup> The prescription that accrued against Bob's servitude since 1997 appears to be interrupted by Black Gold's drilling.<sup>14</sup> However, on January 2, 2007, Kate claims that Bob's servitude has expired, and that the mineral rights have reverted back to the surface owners. Kate asserts that unit production did not interrupt prescription on Bob's mineral servitude because her consent to the voluntary unit agreement was necessary for the unit to have affected her interests.<sup>15</sup>

Neither the Mineral Code nor Louisiana jurisprudence furnishes a definitive answer to the question of whether prescription is interrupted and, if so, to what extent prescription is interrupted on the non-drill site tract by a voluntary unit to which the surface co-owner did not consent. This gap poses significant problems for oil and gas operators, surface co-owners, and owners of mineral rights. Uncertainty surrounding the formation and effect of voluntary units makes this relatively cheap and quick method of unitization too unpredictable for widespread use by operators, causing them to opt for the more expensive and time-consuming process of seeking a compulsory unitization.<sup>16</sup> Misunderstandings of how non-consenting surface co-owners are affected by voluntary unitizations may produce flaws in chains of title regarding mineral rights and leases.

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12. Production from a unit well on a tract burdened by a servitude will cause prescription accruing against the servitude to be interrupted. *See* LA. REV. STAT. ANN. § 31:37 (2000). If the well is off-tract, the prescription will only occur for that portion of the burdened land that is included in the unit. *Id.* The same rule exists for mineral royalties. *Id.* § 31:89. For exceptions to this general rule, see discussion *infra* Part I.D.

13. *See* LA. REV. STAT. ANN. § 31:37 (2000); *id.* § 31:89.

14. *See id.* § 31:29.

15. *See* *Alexander v. Holt*, 116 So. 2d 532, 536–37 (La. Ct. App. 1959) (stating that inclusion of servitude acreage in a conventional unitization by the servitude owners was not effective to interrupt prescription without landowner consent because the servitude owner was powerless to extend the life of the servitude without the clear consent of the landowner burdened by the servitude); *see also* John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 732, 775 (1976).

16. Ottinger, *Conventional Unitization*, *supra* note 9, at 25–26. Compulsory unitization is accomplished through applications to, hearings with, and a favorable order from the Louisiana Office of Conservation. Even if “fast tracked” to avoid imminent lease expirations and mineral right prescription, this process takes no less than 70 days. *Id.* at 25 n.23. Significant costs are associated with preparing and filing applications for compulsory unit orders with the Office of Conservation, costs that may be substantially less if a conventional unit route is selected. *Id.* at 26.

These flaws will vitiate the consent of those who mistakenly appeared to possess mineral rights and potentially cause millions of dollars of investment in unit development, production payments, and lease acquisition to be wasted. Additionally, surface co-owners may be entitled to a reversion of the mineral rights previously held in servitudes or royalties back to their ownership.

From a synthesis of relevant Louisiana Civil Code and Mineral Code articles, three principal remedial options appear to be available to a court facing this scenario. First, the court could rule that the voluntary unitization does not affect those who do not consent to it, and thus, the servitude is not interrupted to any extent. Second, the court could conclude, using a principle found in conducting operations on mineral servitudes and leases, that a substantial majority of surface co-owners may encumber the surface through a voluntary unit without the consent of the minority co-owners. Third, the court could find that the most equitable solution is to proportionally prescribe the servitude interests to the percentage of surface co-owner consent obtained to the voluntary unitization. However, these solutions are neither equitable between the parties nor clearly consistent with existing Louisiana law.<sup>17</sup> Accordingly, amendments to the Mineral Code are necessary to define the voluntary unit and dictate how a non-consenting co-owner is affected by a voluntary unitization that lacked his or her consent.<sup>18</sup> These necessary changes are needed quickly so as to avoid unnecessary waste and delay in mineral development and to incentivize exploration through the use of the relatively cheap and speedy alternative to compulsory units—voluntary units.

This Comment proposes a solution to the pressing question of whether a surface co-owner can be burdened by a voluntary unitization to which he or she did not consent. Part I gives a brief explanation of how mineral rights are formed in Louisiana, the nature of the mineral servitude, co-ownership principles, and unit formation. Part II explores three potential remedies derived from existing law that a court may apply to the issue presented. Part III proposes two revisions to the Mineral Code—clear definitions of the voluntary unit and its effects. If adopted, these modest clarifications of existing law would ensure the ideal outcome to the current issue: a solution that provides an equitable remedy for surface co-owners, mineral servitude holders, and oil and gas operators alike.

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17. See discussion *infra* Part II.

18. See discussion *infra* Part III.

I. FOUNDATIONAL PRINCIPLES OF LOUISIANA MINERAL AND CO-OWNERSHIP LAW

Several tenets of Louisiana mineral law and principles of co-ownership interconnect to lead to the current ambiguity of whether drilling from a voluntary unit can interrupt prescription accruing against a servitude that burdens a non-consenting surface co-owner's tract. These interrelated principles include the nature of mineral servitudes, co-ownership, and unitization.

*A. The Separation of Mineral Rights from the Land*

Louisiana adopts a non-ownership theory regarding subsurface migratory, or non-solid, minerals.<sup>19</sup> This means that the oil and gas that may be below the surface of an owner's land is not owned until extracted and possessed.<sup>20</sup> In the foundational case of *Frost-Johnson Lumber Co. v. Salling's Heirs*, the Louisiana Supreme Court found that there is no ownership of minerals until those minerals are removed from the ground and physically possessed.<sup>21</sup> This result was later codified in the Louisiana Mineral Code.<sup>22</sup> Rather than retain ownership before possession, the landowner is vested only with the right to explore for and extract migratory minerals, like oil and gas.<sup>23</sup>

The landowner may separate this right of mineral exploration from the land in whole or in part.<sup>24</sup> The fundamental mineral rights created by landowners in Louisiana are the mineral servitude,<sup>25</sup>

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19. See LA. REV. STAT. ANN. § 31:6 (2000); 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 216.1 (2012).

20. See LA. REV. STAT. ANN. § 31:6 (2000); see, e.g., *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207, 245 (La. 1922) ("We may hold, and we do hold, 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.").

21. *Frost-Johnson*, 91 So. at 243.

22. See LA. REV. STAT. ANN. §§ 31:6–7 (2000).

23. See *Id.* § 31:8; *Frost-Johnson*, 91 So. at 243. Mineral rights are real rights. LA. REV. STAT. ANN. § 31:16 (2000).

24. LA. REV. STAT. ANN. § 31:15 (2000).

25. See *id.* § 31:21 ("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.").

mineral royalty,<sup>26</sup> and mineral lease.<sup>27</sup> Louisiana's civilian tradition dictates that the sale of the right to explore for minerals does not create a permanent separation of the mineral right from the land like in the case of the mineral estate in common law jurisdictions but, rather, a real right that burdens a tract of land unless left unused for a certain period.<sup>28</sup> This Comment focuses on the mineral servitude.

### *B. The Mineral Servitude*

“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.”<sup>29</sup> The mineral servitude exists as a burden upon the land from which it is derived.<sup>30</sup> Though functioning in a manner similar to a predial servitude,<sup>31</sup> the mineral servitude is best categorized as a limited personal servitude.<sup>32</sup> The mineral servitude may be granted only by the landowner who possesses the right to explore for and produce minerals at the time of the mineral servitude's creation.<sup>33</sup> The rights of the servitude owner may be contractually limited or subjected to more onerous requirements

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26. See *id.* § 31:80 (“A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another.”).

27. See *id.* § 31:114 (“A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals.”).

28. *Id.* § 31:16. See *Wemple v. Nabors Oil & Gas Co.*, 97 So. 666, 667–69 (La. 1923) (“[W]e 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.”).

29. LA. REV. STAT. ANN. § 31:21 (2000).

30. Patrick S. Ottinger, *A Primer on the Mineral Servitude*, 44 ANN. INST. ON MIN. L. 68, 75 (1997) [hereinafter Ottinger, *The Mineral Servitude*] (quoting *Steele v. Denning*, 456 So. 2d 992, 998 (La. 1984)).

31. The mineral servitude is theoretically distinct from the predial servitude in that there is no dominant estate in the case of the mineral servitude, only a servient one. See A. N. YIANNOPOULOS, PREDIAL SERVITUDES § 1:9, in 4 LOUISIANA CIVIL LAW TREATISE (4th ed. 2013).

32. Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1099 (1987).

33. See LA. REV. STAT. ANN. § 31:24 (2000); McDougal, *supra* note 32, at 1101; Ottinger, *The Mineral Servitude*, *supra* note 30, at 77–78. If the right of the landowner is conditional or subject to resolution, the servitude created by that landowner will expire concurrently with the right of the landowner to create the servitude. See LA. REV. STAT. ANN. § 31:25 (2000).

for prescription interruption, but the contractual terms may not circumvent the minimum standards provided by law.<sup>34</sup>

A mineral servitude can be extinguished in many ways: by the prescription of nonuse of ten years,<sup>35</sup> confusion,<sup>36</sup> renunciation of the servitude,<sup>37</sup> expiration of the time contractually granted for the existence of the servitude,<sup>38</sup> occurrence of a dissolving condition imposed upon the servitude,<sup>39</sup> or extinction of the right of the grantor of the servitude.<sup>40</sup> The prescription of nonuse is the most relevant for the current analysis because, as seen in the hypothetical, the issue posed by Kate's non-consent to the voluntary unit is whether Black Gold's drilling upon the unit will constitute a use that interrupts the prescription accruing against Bob's servitude.

The prescription of nonuse for mineral servitudes is derived from the civilian concept that real rights other than ownership are subject to the prescription of nonuse.<sup>41</sup> The Mineral Code states that these mineral rights are subject to a prescriptive period of ten years.<sup>42</sup> Prescription begins to accrue on the day that the servitude is created.<sup>43</sup> Thus, a mineral servitude will terminate after ten years of nonuse by the servitude holder; however, this accrual of prescription

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34. See LA. REV. STAT. ANN. §§ 31:74–75 (2000) (“The rules of use regarding interruption of prescription on a mineral servitude may be restricted by agreement but may not be made less burdensome, except that parties may 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 of the tract burdened by the servitude tract regardless of the location of the well or of whether all or only part of the tract is included in the unit.”); see also McDougal, *supra* note 32, at 1114.

35. LA. REV. STAT. ANN. § 31:27(1) (2000).

36. See *id.* § 31:27(2). For a functionally similar provision, see La. CIV. CODE art. 765 (2012) (“A predial servitude is extinguished when the dominant and the servient estates are acquired in their entirety by the same person.”). However, the owner of land can be a co-owner of a mineral servitude burdening his property without causing “confusion.” LA. REV. STAT. ANN. §§ 31:66–67 (2000). See generally *Allied Chem. Corp. v. Dye*, 441 So. 2d 776 (La. Ct. App. 1983); Patrick H. Martin, *Mineral Rights, Developments in the Law, 1983-84*, 45 LA. L. REV. 433, 442 (1984).

37. See LA. REV. STAT. ANN. § 31:27(3) (2000); see generally *Harmon v. Whitten*, 390 So. 2d 962 (La. Ct. App. 1980).

38. See LA. REV. STAT. ANN. § 31:27(4) (2000).

39. *Id.*

40. *Id.* § 31:27(5).

41. See LA. CIV. CODE art. 3448 (2012).

42. LA. REV. STAT. ANN. § 31:27(1) (2000).

43. *Id.* § 31:28.

may be interrupted<sup>44</sup> or suspended.<sup>45</sup> Additionally, a mineral servitude may also be extended by the landowner's consent.<sup>46</sup>

This Comment primarily concerns two similar methods of interruption: good faith drilling and production. Good faith drilling is an exploratory operation that does not result in the production of minerals but constitutes a genuine effort to do so.<sup>47</sup> Drilling that leads to the production of minerals also interrupts prescription accruing against a servitude.<sup>48</sup> Good faith drilling or production in a conventional or compulsory unit<sup>49</sup> whose unit area overlaps with the land burdened by a servitude also interrupts prescription accruing against that servitude.<sup>50</sup> If the unit well is off-tract (i.e., the location of drilling is not positioned on the tract of the burdened landowner), prescription will be interrupted only for the portion of the servitude encompassed within the unit area.<sup>51</sup> If the unit well is

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44. *See id.* §§ 31:29–57. An interruption causes the time that has accrued to be erased and time begins to accrue anew upon the end of the interrupting event or condition. *See* LA. CIV. CODE art. 3466 (2012).

45. A suspension is a period of time where the servitude cannot be used. Prescriptive time does not accrue against the servitude during the period, but the time already accrued against the servitude prior to the suspensive condition is not erased by the suspending event. *See* LA. REV. STAT. ANN. §§ 31:58–61 (2000); LA. CIV. CODE art. 3472 (2012); *see also* *Louviere v. Shell Oil Co.*, 440 So. 2d 93, 97 n.8 (La. 1983) (“The basic difference between interruption and suspension of prescription is the length of the prescriptive period when prescription begins to run anew.”).

46. *See* LA. REV. STAT. ANN. § 31:56 (2000). An extension occurs when a landowner expressly, in a writing filed for registry, extends the life of the servitude beyond the servitude date for a defined period. McDougal, *supra* note 32, at 1156–57. This defined period logically must be less than the period that would result from an interruption, as law prevents a prescriptive period longer than ten years, and a ten-year “extension” would function as an acknowledgement. *Id.*

47. *See* LA. REV. STAT. ANN. § 31:29 (2000) (“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 (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.”). For a discussion on “good faith drilling,” see *Indigo Minerals, LLC v. Pardee Minerals, LLC*, 37 So. 3d 1122, 1129–31 (La. Ct. App. 2010), and *Bass Enterprises Production Co. v. Kiene*, 437 So. 2d 940 (La. Ct. App. 1983).

48. *See* LA. REV. STAT. ANN. § 31:36 (2000).

49. *See infra* Part I.D.

50. *See* LA. REV. STAT. ANN. § 31:33 (2000).

51. *Id.* §§ 31:33–37. One instance of a limited opportunity for “freedom of contract” may occur when the landowner and the servitude owner contract for an interruption to the portion of the servitude outside the unit area. *See* LA. REV.

on the tract burdened by the servitude, interruption occurs for the whole of the servitude, regardless of whether a portion of the servitude tract is outside the unit area.<sup>52</sup>

The running of prescription of nonuse may also be interrupted by acknowledgment.<sup>53</sup> Acknowledgment occurs when the landowner of the tract burdened by the servitude makes clear in writing that he or she intends to interrupt the running of prescription of the servitude for the party owning the servitude.<sup>54</sup> To affect third parties, the acknowledgment must be filed for registry.<sup>55</sup> The requirement that the landowner make the acknowledgment is a necessary consequence of the fact that only the landowner may burden the thing owned.<sup>56</sup> The acknowledgment is an extension of the life of the servitude without the owner of the servitude engaging in activity that would constitute a “use” of the servitude.<sup>57</sup> However, obtaining the consent of surface owners to further encumber the land by means of an acknowledgement is complicated when the surface is owned in indivision, i.e., co-ownership.<sup>58</sup>

### C. Co-ownership

Ownership of one thing by more than one person is ownership in indivision, also known as co-ownership.<sup>59</sup> Land, as well as mineral rights,<sup>60</sup> is susceptible of ownership in indivision.<sup>61</sup> Though each co-owner possesses the right to use the co-owned thing,<sup>62</sup> the

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STAT. ANN. § 31:75 (2000); Ottinger, *Conventional Unitization*, *supra* note 9, at 53–54 (2002); *see also* Sandefer & Andress, Inc. v. Pruitt, 471 So. 2d 933, 937 (La. Ct. App. 1985).

52. *See* LA. REV. STAT. ANN. §§ 31:33–37 (2000).

53. *See id.* § 31:54.

54. *See id.*

55. *See id.*

56. *See id.* § 31:54 cmt.

57. *See id.* § 31:54.

58. *See* discussion *infra* Part I.C.

59. *See* LA. CIV. CODE art. 797 (2012).

60. *See* LA. REV. STAT. ANN. § 31:168 (2000).

61. *See* Patrick S. Ottinger, “Oil in the Family”: *Obtaining the Requisite Consent to Conduct Operations on Co-Owned Land or Mineral Servitudes*, 73 LA. L. REV. 745, 747 (2012) [hereinafter Ottinger, *Oil in the Family*].

62. Each co-owner has the right to use the thing consistent with the “destination” of the property. LA. CIV. CODE art. 802 (2012). As applied to land, the term “destination” references the kind of uses of the land that landowners historically practice. Thomas A. Harrell, *Problems Created by Coownership in Louisiana*, 32 ANN. INST. ON MIN. L. 379, 386 n.13 (1985).

consent of all of the co-owners is required to alienate or encumber the entire co-owned thing.<sup>63</sup>

Louisiana co-ownership law is rooted in the civilian tradition.<sup>64</sup> “Roman law recognized the concept of co-ownership as each co-owner ‘possessing an abstract portion of the whole,’ or a portion of ‘each molecule’ of the property held in common.”<sup>65</sup> Because this joint ownership is of each and every part of the thing co-owned, the co-owner has a distinct right to participate in decisions regarding the encumbrance of that thing.<sup>66</sup> The drafters of the Louisiana Civil Code adopted this principle, which can be distinctly seen in the creation of predial servitudes,<sup>67</sup> and also in its close relative, the mineral servitude.<sup>68</sup>

When conflicts arise between co-owners, the legally prescribed remedy is partition.<sup>69</sup> Partition is the division of a co-owned thing into separate, independent things or the sale of the co-owned thing and division of the sale proceeds to the former co-owners.<sup>70</sup> “The need to partition stems from the inconvenience of co-management, namely the requirement of unanimous consent . . . .”<sup>71</sup> Partition is

63. LA. CIV. CODE art. 805 (2012). Granting a mineral lease upon co-owned land or servitude is possible, but a lessee of certain co-owners may not drill upon the property without obtaining consent of co-owners with at least 80% of ownership in the co-owned thing. LA. REV. STAT. ANN. § 31:166 (2000).

64. See Angela Jeanne Crowder, *Mineral Rights: The Requirement of Consent Among Co-Owners*, 48 LA. L. REV. 931, 931–33 (1988).

65. *Id.* at 931. See also George Denègre, Comment, *Ownership in Indivision in Louisiana*, 22 TUL. L. REV. 611, 611 (1948). The rule in the Louisiana Civil Code requiring the consent of all co-owners to encumber the property is derived from the works of Roman commentators. See Crowder, *supra* note 64, at 931–33. The rule represents a long-held policy in civil jurisdictions that the rights of one co-owner in a thing may not be adversely affected by the unilateral acts of another co-owner. See *Gulf Refining Co. of La. v. Carroll*, 82 So. 277, 278 (La. 1919).

66. See Crowder, *supra* note 64.

67. LA. CIV. CODE art. 714 (2012) (“A predial servitude on an estate owned

When a co-owner purports to establish a servitude on the entire estate, the contract is not null; but, its execution is suspended until the consent of all co-owners is obtained.”).

68. Crowder, *supra* note 64, at 932.

69. LA. CIV. CODE art. 807 (2012) (“No one may be compelled to hold a thing in indivision with another unless the contrary has been provided by law or juridical act. Any co-owner has a right to demand partition of a thing held in indivision.”).

70. See LA. CIV. CODE arts. 810–11 (2012).

71. *Campbell v. Pasternack Holding Co.*, 625 So. 2d 477, 480 (La. 1993).

said to be a “favored” remedy by courts in Louisiana.<sup>72</sup> Referencing the earlier hypothetical of siblings Mike and Kate, it would seem that the minority surface co-owner, Kate, could partition the land and avoid complications with the voluntary unit and the mineral servitude burdening her land. However, a partition accomplished between co-owners of land burdened by a mineral right, including a mineral servitude, will not divide the mineral right—a consequence of legal protections afforded third parties to the co-ownership.<sup>73</sup> Accordingly, in the hypothetical, the land owned in indivision may be partitioned between Mike and Kate, but the mineral servitude held by Bob could not be divided and the problem of whether Kate’s consent to the voluntary unit is necessary for the unit to affect her rights would remain unresolved.

Prior to the adoption of the Mineral Code, the Louisiana Civil Code governed co-owner delegations of mineral rights.<sup>74</sup> Louisiana courts consistently applied the rule that universal co-owner consent was necessary to encumber land or mineral rights subject in its entirety to co-ownership.<sup>75</sup> The Mineral Code initially maintained the universal co-owner consent rule.<sup>76</sup> However, in 1986, the general principle of universal co-owner consent was excepted, making full consent among land co-owners unnecessary in certain circumstances.<sup>77</sup>

In 1986, the Louisiana Legislature amended the Mineral Code so that a small minority of co-owners of land or of a mineral servitude could not prevent the development of land for mineral production.<sup>78</sup> Because exploration required the full consent of the co-owners, the former system allowed a small minority of co-owners

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72. Ottinger, *Oil in the Family*, *supra* note 61, at 752 (quoting *Pasternack Holding*, 625 So. 2d at 480).

73. *Cf.* LA. CIV. CODE art. 747 (2012) (discussing division of a dominate estate subject to a servitude); LA. REV. STAT. ANN. § 31:65 (2000) (“The division of a tract burdened by a mineral servitude does not divide the servitude.”); *see generally* Andrew L. Gates, III, *Partition of Land and Mineral Rights*, 43 LA. L. REV. 1119, 1132–41 (1983).

74. Crowder, *supra* note 64, at 932.

75. *See* *Superior Oil Producing Co. v. Leckelt*, 181 So. 462, 467 (La. 1938) (stating that mineral servitudes granted by less than all of the co-owners would not be null, but simply suspended until all consent is obtained. Though the servitude owner was not able to explore for and develop the land for production

mineral servitude); *Gulf Refining Co. of La. v. Carroll*, 82 So. 277 (La. 1919); *see also* Ottinger, *Oil in the Family*, *supra* note 61, at 749.

76. Ottinger, *Oil in the Family*, *supra* note 61, at 762.

77. *Id.* at 761–64.

78. Act No. 1047, 1986 La. Acts 1964.

to force lessees of the majority of co-owners into disproportionately advantageous deals for the minority by withholding consent.<sup>79</sup> This “shakedown” would seem to be the natural result of giving a co-owner or a group of co-owners with a relatively small interest the ability to prevent exploitation of mineral rights without their consent. In a move inconsistent with civilian co-ownership principles,<sup>80</sup> the revisions made by the Legislature to the Mineral Code in 1986 enable co-owners of land to grant servitudes that could be exercised with only the consent of 90% of the co-owners.<sup>81</sup> The 90% consent threshold was lowered to 80% in 1988.<sup>82</sup> It was left unclear whether the new lower level of co-owner consent to the creation of servitudes would affect the formation and effects of unitization agreements—agreements that may affect both consenting and non-consenting co-owners alike.<sup>83</sup>

#### *D. Unitization*

Unitization pools ownership interests in a defined area in order to encourage oil and gas development by the sharing of costs and the equitable division of production proceeds between the assembled acreage.<sup>84</sup> There are two categories of unitization: compulsory and conventional.<sup>85</sup> In Louisiana, the Commissioner of Conservation of the Department of Natural Resources is tasked with avoiding the waste of minerals and the drilling of unnecessary wells.<sup>86</sup> To accomplish this end, the Commissioner may form compulsory units to pool the interests of land and mineral right owners in a defined geographic area.<sup>87</sup> Compulsory units are typically granted through application and hearing processes that will likely be more expensive and time consuming than would be conventional unitization processes.<sup>88</sup>

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79. See Ottinger, *Oil in the Family*, *supra* note 61, at 753.

80. Crowder, *supra* note 64, at 933.

81. See LA. REV. STAT. ANN. § 31:164 cmt. (2000). The same principle was applied for granting mineral leases by co-owners of servitudes, *id.* § 31:166, and land, *id.* § 31:175.

82. Act No. 647, 1988 La. Acts 1686.

83. See LA. REV. STAT. ANN. § 31:164 cmt. (2000).

84. See Ottinger, *Conventional Unitization*, *supra* note 9, at 23.

85. *Id.* at 28.

86. LA. REV. STAT. ANN. § 30:9(B) (2000) (stating that the drilling unit is “the maximum area which may be efficiently and economically drained by one well”).

87. See *id.* § 31:213(6).

88. Ottinger, *Conventional Unitization*, *supra* note 9, at 25–26.

Alternatively, a simple contract may form a conventional unit without government mandate.<sup>89</sup> Declared units and voluntary units are the two types of conventional units.<sup>90</sup> A declared unit is derived from a mineral lease and is “declared unilaterally by the lessee under the terms of a pooling clause contained in an oil and gas lease that does not require the further consent of the lessor to the creation of [the] unit.”<sup>91</sup> Without prior authorization from a landowner to his or her lessee to pool the granted mineral interest with other interests, the lessee seeking a conventional unit must turn to the voluntary unit.<sup>92</sup> The voluntary unit is “created by the bilateral execution of a unit agreement by all parties in interest, including the landowner-lessor.”<sup>93</sup> Voluntary unit agreements (VUAs) create units through contract that give only the contractually bound parties the right to participate in production and are only effective against those persons who are parties to the contract.<sup>94</sup>

As compulsory units are formed by the Commissioner and declared units are formed through existing lease clauses, the voluntary unit is the only type of unitization that will lead to the scenario that this Comment addresses—where consent to pool interests has not previously been acquired.<sup>95</sup> An operator seeking to drill in an area may choose to seek a voluntary unit rather than a compulsory unit in order to avoid excessive costs associated with forming a compulsory unit through the Commissioner of

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89. *Id.* at 24.

90. *Id.*

91. McCollam, *supra* note 15, at 773 n.296. A declared unit may only be created where each joining lessee can create a valid unit through authorization in their lease. *See id.* at 776; *see also* Union Oil Co. v. Touchet, 86 So. 2d 50, 54 (La. 1956).

92. Ottinger, *Conventional Unitization*, *supra* note 9, at 26–27.

93. McCollam, *supra* note 15, at 773 n.297. All VUAs, as contractually derived regimes, are not effective against the interests of non-consenting burdened landowners, as the mineral right holder cannot unilaterally decrease the “use” burden required by the Mineral Code. *See id.* at 775.

94. Ottinger, *Conventional Unitization*, *supra* note 9, at 43. *See* discussion *infra* Part I.E.

95. Compulsory unitizations are effective upon all interests that are found within the defined unit area as a function of the state’s police power. McCollam, *supra* note 15, at 775. Declared units are created with the consent of the grantor-landowner through a defined power explicitly conferred in the mineral lease. *Id.* at 773 n.296. A declared unit may only be created where each joining lessee can create a valid unit through authorization in their lease. *See id.* at 775; *see also* Touchet, 86 So. 2d at 50.

Conservation.<sup>96</sup> Or, because the application process for a compulsory unit can be time consuming, an operator may seek a voluntary unit to quickly unitize mineral interests to avoid prescription accruing against them.<sup>97</sup> The creation of voluntary units raises the question of whether such a contractual arrangement can affect the interests of an apparent third party.<sup>98</sup> A non-consenting surface co-owner, like our hypothetical Kate, is such a third party to the contract who would be “affected” by the contract if the voluntary unit interrupted prescription running against a servitude burdening the co-owned land, like Bob’s servitude.

*E. The Necessity of a Surface Owner’s Consent for Voluntary Units*

The Louisiana Mineral Code does not speak to the process of voluntary unit formation. Comments to the Mineral Code state that conventional units, declared and voluntary units, are formed through the consent of those parties affected.<sup>99</sup> It does not determine who is an affected party. The Mineral Code fails to address whether surface owner consent to the unit is necessary for a voluntary unit to affect the interests of that surface owner. The effects relative to an individual mineral right, including a mineral servitude, that result from a voluntary unitization depend upon two primary concerns: the location of the unit well and the extent to which the tract burdened by the mineral right is included within the unit area.<sup>100</sup> The interruption of prescription that can result from the drilling of a well on a voluntary unit occurs for those mineral rights whose owners have consented to the VUA.<sup>101</sup> Any interruption that results from drilling through a voluntary unit also affects landowners whose tracts are burdened by those mineral rights, as it ensures the mineral rights of those landowners do not revert back to them for at least a new ten-year period.<sup>102</sup>

The comments to article 213 of the Mineral Code state that conventional units are formed “by a contract executed by all

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96. The costs which may add up to burdensome levels are found in the geological and title research, application fees, profession fees, and more that are not as significant or not necessary in order to form a conventional unit. See Ottinger, *Conventional Unitization*, *supra* note 9, at 24–26, 42.

97. *Id.*

98. *See id.* at 42–43.

99. *See* LA. REV. STAT. ANN. § 31:213 cmt. (2000).

100. *See* discussion *supra* Part I.B.

101. *See* discussion *supra* Part I.D.

102. *See* discussion *supra* Part I.B.

parties affected, or otherwise.”<sup>103</sup> Landowners burdened by a mineral servitude can certainly be considered “parties affected” by the VUA, as off-tract production would interrupt the running of prescription for any portion of their land encompassed within the unit.<sup>104</sup> Thus, the comments to the article may suggest that landowner consent is necessary.<sup>105</sup> However, comments are not law.<sup>106</sup> If the comments are read to make landowner consent necessary, it is an ill-defined statement when read in isolation, as the comments fail to define what an “affect” is that would necessitate the involvement of the “affected” party in the formation of the unit. Thankfully, general contract law principles, pre-Mineral Code jurisprudence, and scholarly research support the view that voluntary unitizations require surface owner consent in order to affect those parties.

Principles of Louisiana contract law show that if the landowners do not consent to the VUA, then they should not be bound by the contract. A VUA is only formed through contractual agreement between various “affected parties.”<sup>107</sup> These contracts are agreements between two or more parties through which obligations are created.<sup>108</sup> Contracts serve as law for the parties<sup>109</sup> but only produce effects for third parties when provided by law.<sup>110</sup> There is no law that enables voluntary units to burden the ownership interests of third parties. Therefore, voluntary units must not affect non-signatories to the VUA.

In *Eads Operating Co. v. Thompson*, the Louisiana First Circuit Court of Appeals discussed conventional unitization, reciting that “[i]t was a necessary prerequisite . . . to the creation of such a unit that all interested landowners and leaseowners join in the unit agreement”<sup>111</sup> and that creation of “such a unit . . . required

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103. LA. REV. STAT. ANN. § 31:213 cmt. (2000).

104. See Ottinger, *The Mineral Servitude*, *supra* note 30, at 129.

105. See LA. REV. STAT. ANN. § 31:213 cmt. (2000).

106. See, e.g., *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307, 312 (La. 2012) (“While the Official Revision Comments are not the law, they may be helpful in determining legislative intent.”).

107. *Id.*

108. See LA. CIV. CODE art. 1906 (2012).

109. See LA. CIV. CODE art. 1983 (2012).

110. LA. CIV. CODE art. 1985 (2012).

111. *Eads Operating Co. v. Thompson*, 646 So. 2d 948, 953 (La. Ct. App. 1994) (quoting Thomas M. Winfile, *New Legislation Relating to the Conservation Department*, 8 ANN. INST. ON MIN. L. 9, 10 (1961)).

voluntary agreement by *all* interested parties.”<sup>112</sup> To paraphrase, the court declared that “interested parties,” like surface owners, are unaffected by a voluntary unit unless they consent to be bound by the contract.<sup>113</sup> Pre-Mineral Code jurisprudence sheds light on which parties are “interested” with respect to a VUA.<sup>114</sup>

In *Alexander v. Holt*, the Louisiana Second Circuit Court of Appeals held that a mineral servitude holder was without the right to affect the prescription running against his servitude by entering into a VUA without also obtaining the consent of the landowner.<sup>115</sup> The court indicated that, otherwise, the VUA would serve as a mechanism for interruption outside those given to the mineral servitude owner by contract or law.<sup>116</sup> Servitude owners “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.”<sup>117</sup> This case makes clear that, without further consent from the landowner, the mineral servitude holder cannot extend his or her own rights beyond those given to the holder by the servitude and by law.<sup>118</sup>

The Mineral Code dictates that the interruption of prescription running against a mineral servitude is accomplished through good faith drilling,<sup>119</sup> production,<sup>120</sup> acknowledgment,<sup>121</sup> or, in limited circumstances, adoption of another party’s drilling operations on the servitude-burdened tract in question.<sup>122</sup> Therefore, the right to unilaterally interrupt prescription running against a mineral servitude by means other than drilling on the burdened tract is not

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112. *Id.* at 954 (emphasis added) (quoting W. J. McAnelly, Jr., *A Review of Poolwide Unitization Under Act 441 of 1960*, 15 ANN. INST. ON MIN. L. 3, 6 (1969)).

113. *Id.* at 953–54.

114. *See, e.g.*, *Alexander v. Holt*, 116 So. 2d 532 (La. Ct. App. 1959).

115. *Id.* at 537 (“We therefore conclude that Holt’s voluntary action in signing the unitization agreement, even with the subsequent approval of the commissioner, was no more than a voluntary act upon his part and that he was, therefore, powerless to extend his mineral servitude by such voluntary act.”).

116. *Id.*

117. *Id.* at 536 (“If the order . . . is not binding on those who did not sign the conventional agreement, it is even the less binding upon nonsigning landowners or those having reversionary interests in minerals. Attempts on the part of mineral owners to perpetuate or to extend the lives of their mineral interests have frequently been held ineffective.”).

118. *See id.*

119. *See* LA. REV. STAT. ANN. § 31:29 (2000).

120. *Id.* § 31:36.

121. *Id.* § 31:54.

122. *Id.* §§ 31:44–52.

vested in the servitude owner by law. As *Alexander* holds, the servitude owner is not also vested with the right to enter into a VUA and thereby interrupt prescription by good faith drilling or production from an off-tract well without the granting of such power expressly by the landowner.<sup>123</sup> Although *Alexander* predates the adoption of the Mineral Code, its reasoning is supported by commentators.<sup>124</sup>

As one commentator stated, servitude owners “cannot unilaterally decrease the use burden imposed by law as a prerequisite to the maintenance of such interests.”<sup>125</sup> Additionally, Professor Patrick Ottinger made a worthy point when he inquired into the consequences of holding that a servitude owner could unilaterally interrupt prescription by entering into a VUA without landowner consent: if all of the persons having an interest in production from a unit well fail to agree to the unitization and this is held to be a valid conventional unitization, how many interested parties must consent to form a valid unit?<sup>126</sup> In other words, if the universal consent among affected parties is not required to affect third parties to the VUA, then what amount of consent is too little?

Given the weight of statutory, jurisprudential, and scholarly evidence to the point that a surface owner’s consent is necessary to form a voluntary unit that affects his interests, the conclusion that such consent is necessary must follow. Any other conclusion would lead to unforeseen and unpredictable consequences. Although this Comment supports clarification through codification of the rule that surface owner consent is necessary for a voluntary unit’s off-tract drilling to affect the surface owner’s tract, the weight of authority on the subject and the lack of countervailing evidence leads to the inescapable resolution that surface owner consent to a voluntary unitization is necessary for the voluntary unit to affect the surface owner’s tract.

## II. POTENTIAL SOLUTIONS AND THEIR EFFECTS

The surface tract that Kate co-owns may be a part of a voluntary unit created by Black Gold with her fellow surface co-owner, Mike, and the mineral servitude owner, Bob, but Kate claims that her consent was necessary to include the tract within

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123. *Alexander*, 116 So. 2d at 536.

124. See McCollam, *supra* note 15, at 775; Ottinger, *The Mineral Servitude*, *supra* note 30, at 129.

125. McCollam, *supra* note 15, at 776.

126. Ottinger, *The Mineral Servitude*, *supra* note 30, at 129.

the unit.<sup>127</sup> Louisiana jurisprudence and legal scholarship strongly indicate that all “affected parties” must consent to a voluntary unit in order for their interests to be affected by the VUA.<sup>128</sup> Additionally, a general co-ownership principle in Louisiana is that a co-owner cannot encumber the interests of the co-owned thing without consent from all of the co-owners.<sup>129</sup> In other words, Mike cannot put a contractually burdensome obligation on the entirety of the co-owned thing without the consent of Kate because to do so would certainly affect her ownership interest in “each molecule” of the co-owned tract.<sup>130</sup> Accordingly, the voluntary unit must not be read to affect Kate’s rights as a co-owner of the burdened tract because she did not consent to the unitization.

Difficulty arises, though, in finding a remedy for Kate once the voluntary unit has been created, Bob and Mike have consented to the VUA, and good faith drilling or production has occurred. As Louisiana law currently stands, three remedial options are evident. First, a court may adopt an all-or-nothing approach such that Mike and Bob’s VUA fails to interrupt prescription accruing against Bob’s servitude as to the entire tract because Kate’s consent was not obtained. Second, a court may synthesize mineral co-ownership law and unitization theory to allow Mike’s majority ownership to unilaterally burden both his and Kate’s interests in the surface tract through the VUA. Third, a court may decide to interrupt prescription of a portion of the servitude proportionally to the ownership interests of Kate and Mike.

#### *A. The “All-or-Nothing” Approach*

The Mineral Code does not empower a servitude owner to unilaterally contract for off-tract, good faith drilling or production to interrupt prescription accruing against the servitude by means of his or her unilateral consent to a VUA.<sup>131</sup> Servitude prescription is only interrupted by off-tract drilling in two situations: when the servitude (in part or in whole) is included in a compulsory unit by

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127. *See supra* Introduction.

128. *See* discussion *supra* Part I.E.

129. *See* discussion *supra* Part I.C.

130. *See* Denègre, *supra* note 65, at 611.

131. *See* LA. REV. STAT. ANN. § 31:33 (2000) (declaring that rules of interruption may only be made less burdensome expressly and in writing by agreement between the parties and only by allowing unit operations to interrupt for the whole servitude regardless of whether the whole servitude lies within the unit area or the location of the unit well); Ottinger, *The Mineral Servitude*, *supra* note 30, at 128–30; *see also* discussion *supra* Part I.E.

dictate of the Commissioner of Conservation, or through inclusion of the servitude (in part or in whole) in a declared unit through the combination of pooling rights granted with a servitude or lease by the landowner.<sup>132</sup> Therefore, the voluntary unit must not be interpreted to affect surface owners who neither consented to the VUA nor granted to a burdening mineral servitude the ability to unitize the mineral interest.<sup>133</sup>

The co-owner of a surface tract cannot bind fellow co-owners to an encumbrance on their co-owned surface rights without universal approval, except in limited circumstances.<sup>134</sup> A co-owner may enter into a valid contract, such as a mineral lease, with a third party with regard to his share of a co-owned thing as the object, but such a contract is ineffectual towards the interests of his fellow co-owners in the co-owned thing until their consent is also obtained.<sup>135</sup> Logically, the same rationale could apply to a VUA entered into by a co-owner. When faced with facts similar to those presented in Kate's hypothetical situation, a court may conclude that a surface co-owner can individually enter into a VUA but that off-tract operations through the voluntary unit cannot interrupt prescription accruing against a servitude until all surface co-owners consent to the VUA.

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132. See LA. REV. STAT. ANN. § 31:33 (2000); Ottinger, *Conventional Unitization*, *supra* note 9, at 27–41. Adoption of the operations of another to interrupt prescription of the mineral right is not available in cases of off-tract drilling as the servitude owner may “adopt” another’s good faith drilling or production to interrupt prescription only when the drilling operations are on the tract burdened by the servitude, unless the landowner provided otherwise when creating the servitude. LA. REV. STAT. ANN. § 31:44 (2000) (“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.”).

133. See discussion *supra* Part I.E.

134. Those circumstances exist when landowners with 80% of the ownership interest in a tract grant a lease or a mineral servitude. LA. REV. STAT. ANN. §§ 31:164, 166. See discussion *supra* Part I.C; see also LA. REV. STAT. ANN. § 31:175 (2000) (stating co-owners of a mineral servitude may operate on the land as long as 80% of the co-owners consent to the operation).

135. LA. CIV. CODE art. 805 (2012) (“A co-owner may freely lease, alienate, or encumber his share of the thing held in indivision. The consent of all the co-owners is required for the lease, alienation, or encumbrance of the entire thing held in indivision.”). Unless the grantor of a mineral right has 80% co-ownership interest in the land or servitude tract, the servitude or lease granted will not allow the grantee to drill on the tract until the co-owner(s) of at least 80% of the co-ownership interest consent(s). LA. REV. STAT. ANN. §§ 31:164, 166, 175 (2000).

This “all-or-nothing” approach protects Kate’s interests. Mike, her fellow co-owner, could not encumber Kate’s interests without her consent to the VUA, and Bob could not unilaterally decrease the burden imposed on him by law and by the terms of his servitude. Accordingly, Bob’s consent to the VUA would not interrupt prescription accruing against his servitude without the concurrence of all parties who would be “affected” by the unitization, here both Mike and Kate. Prescription would continue to accrue against Bob’s mineral servitude until an interruptive event occurs or a suspensive condition is fulfilled.<sup>136</sup>

### *B. The Hybrid Solution*

In the interest of preventing a potentially inequitable resolution that deprives a majority surface co-owner, like Mike, from using the land as he pleases, a Louisiana court may look to the Mineral Code for an egalitarian solution. By using a hybrid approach, a court could conclude that, if the ownership interest of the consenting surface co-owners to a VUA is at least 80%, prescription running against the servitude should be interrupted.<sup>137</sup>

Under the Mineral Code, a co-owner, or group of co-owners, whose ownership interest is equal to or greater than 80% of the total interests in co-owned land, may grant the right to drill on the land through a lease or servitude without procuring the consent of the remaining co-owners.<sup>138</sup> To burden the interests of the non-consenting co-owner(s), the operator must make “every effort to contact such co-owners and, if contacted, [offer] to contract with them on substantially the same basis that he has contracted with another co-owner.”<sup>139</sup> Additionally, the co-owner of the land who does not consent is not liable for any costs of the drilling operations except out of his share of production.<sup>140</sup> The same rule applies to co-owners of land who grant a mineral lease.<sup>141</sup>

A court may find an analogous argument to the Mineral Code’s 80% co-owner consent exceptions persuasive such that the ability of co-owners to enter into voluntary units for the exploration and

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136. See discussion *supra* Part I.B.

137. The conclusion is analogous to the Mineral Code articles that allow for mineral leases and servitudes to be created with the consent of co-owners of the land whose ownership interest in the land is 80% or more. See discussion *supra* Part I.C.

138. See LA. REV. STAT. ANN. § 31:164 (2000).

139. *Id.* § 31:164 (alteration in original).

140. *Id.*

141. *Id.* § 31:166.

production of oil and gas would not be curtailed by a resistant or missing minority interest owner. This solution may enable minority co-owners to voice their opinions and convince other co-owners to resist the unitization. But, in a situation like Kate's, her resistance would not be successful since there is only one other co-owner who owns over 80%. Such efforts could only prevent voluntary unitization of the co-owned tract if the resistant co-owners own, in the aggregate, more than 20% of the co-owned thing. This feature preserves, to some degree, the civilian concept of ownership in indivision by maintaining some autonomy between co-owners.<sup>142</sup> However, this solution would also prevent a small minority of co-owners from imposing their will on the majority. This is an approach that would preserve the civilian emphasis on co-owner sovereignty, but simultaneously employ a democratic, majoritarian element that encourages the use of voluntary units to efficiently develop oil and gas in complex ownership environments.

### *C. The Proportional Interruption Method*

In the first two approaches, either Kate's refusal to consent will cause the failure of the unit to encompass any part of the servitude tract or Mike's consent to Black Gold's unitization will result in the complete inclusion of Bob's servitude in the unit. However, another solution offers an intermediate approach to these two extreme results. The Mineral Code provides that valid compulsory or conventional units with good faith drilling or production that encompass some, but not all, of a tract burdened by a servitude will cause interruption of prescription only for the portion of the servitude within the unit.<sup>143</sup> As a consequence, a court may view operations conducted under a voluntary unit that is not fully consented to as ineffectual against the interests of the non-consenting co-owner, but a court may also find that the VUA remains valid as to the consenting surface co-owner's interests. Such a finding could interrupt the running of prescription against the servitude proportional to the consenting surface co-owners' ownership interests.

The surface owner (full or co-owner) has incentives to enter into the VUA with the servitude owner. The consent will likely be

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142. See discussion *supra* Part I.C.

143. See LA. REV. STAT. ANN. §§ 31:33, 37 (2000). The default rule regarding the extent of interruption from an off-tract unit well may be modified by contract, but must be agreed to expressly and in writing. See Ottinger, *The Mineral Servitude*, *supra* note 30, at 126–28.

given as a response to some consideration and, by allowing the servitude owner to unitize his servitude, will diminish the likelihood that the mineral servitude owner will drill on the surface property.<sup>144</sup> It will be up to the individual landowner or co-owner to determine if those interests outweigh the potential reversion of the mineral rights back to the surface property if the servitude owner fails to drill on the property or a compulsory unit covering the tract in question is not formed and drilled upon.<sup>145</sup> The mineral servitude owner has the incentive to enter into the VUA to extend the life of at least a portion of the mineral servitude and share the costs of drilling and production, avoiding the totality of the enormous expense and risk involved with drilling personally.<sup>146</sup> Without the consent of the surface owner, the servitude owner cannot use a voluntary unit to interrupt prescription accruing against his right and will be reluctant to enter into a voluntary unit that prevents him from also drilling on his servitude.<sup>147</sup> Accordingly, the operator has the incentive to pursue the surface owner's consent because, without that consent, a servitude owner may not enter into the VUA. Under the proportional approach, all parties would have incentives to use voluntary unitization to quickly pool mineral rights and economically explore.

This solution would preserve the rights of a non-consenting co-owner against a servitude owner trying to interrupt the running of prescription against its servitude. It also prevents non-consenting co-owners from inhibiting those co-owners who wish to enter into the VUA and allows the mineral servitude holder to exploit its mineral rights. Under this solution, any payments made in consideration of signing the VUA and any production payments from the unit operator to the consenting parties would not be

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144. For a discussion of motivations for signing a unitization agreement, see *supra* Introduction.

145. Drilling from compulsory units has the effect of interrupting prescription running against those mineral interests that are encompassed within the unit but outside the drilling tract. See LA. REV. STAT. ANN. §§ 31:33, 37 (2000).

146. Non-unit wells will only affect those interests associated with the tract that the well is drilled upon. For a discussion of incentives and considerations of unitizations, see Ottinger, *Conventional Unitization*, *supra* note 9, at 24–26.

147. The effects upon a surface owner of a voluntary unit are limited to the interruption of prescription accruing against burdening mineral rights and are the rationale for requiring their consent before allowing these units to affect the surface owner. See discussion *supra* Part I.E. There would not appear to be a prohibition against a servitude owner entering into a unitization agreement in which he participates in costs and shares in revenue but does not interrupt prescription running against his mineral interest. *Id.*

wasted. This remedy would respect all players and preserves the ease and simplicity with which voluntary units should be formed.

#### *D. Holes in the Three Solutions*

A court faced with the difficulties posed by a minority surface owner's non-consent to a voluntary unit seems to be left to choose between one of three solutions. One solution would find that the voluntary unit had no effect upon the co-owned tract, another would dictate total interruptive effect against prescription running against the burdening servitude, and the last would divide the servitude into prescribed and interrupted sections. However, each solution faces challenges to its viability either because of its inconsistency with existing law or due to the ancillary effects of its application.

##### *1. Problems with the "All-or-Nothing" Approach*

The "all-or-nothing" approach, while preserving the civilian rule that one co-owner cannot unilaterally burden a fellow co-owner's interest, would nullify the effects of the contractual arrangement made between the consenting surface co-owner(s) and servitude owner(s) to create the voluntary unit against any part of the tract, payments made by the mineral lessee in exchange for consent, revenue sharing between those believed to be in the voluntary unit,<sup>148</sup> and the distributions of drilling costs between the consenting parties.<sup>149</sup> Allowing the servitude to not be interrupted by such an arrangement would curtail the ability of the servitude owner to exploit its mineral rights because giving any surface co-owner the power to impede unitization introduces a formidable obstacle to entering into a VUA. This approach would also allow any co-owner to infringe fellow surface co-owners' freedom of choice to engage in potentially lucrative oil and gas exploration.<sup>150</sup>

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148. It is worth noting that if a non-consenting landowner or mineral right owner knowingly accepts payments made in accordance with an agreement, the accepting party may be held to have ratified that agreement. *See* La. Canal Co. v. Heyd, 181 So. 439 (La. 1938) (holding a non-signatory party's acceptance of payments under the terms of a mineral lease served to bind the accepting party to that lease).

149. Cost sharing, equitable production allocation, and the ease of voluntary unit formation are the primary reasons that a lessee would seek to form a voluntary unit. *See supra* Introduction.

150. The 80% rule was adopted by the Legislature in order to avoid this result in other mineral law contexts. *See* discussion *supra* Part I.C.

Additionally, this remedy may give operators less security in their exploration activities involving co-owned lands, as any failure of universal co-owner consent in the past may make significant investment obsolete.<sup>151</sup>

Enabling non-consenting surface co-owners to prevent the co-owned tract from entering a voluntary unitization gives the co-owner who withholds consent an inordinate amount of leverage with an oil and gas company. This is the very problem that the Legislature sought to prevent when it amended the Mineral Code in 1986 and 1988 to allow for a significant majority of co-owners to “out-vote” the non-consenting co-owners when authorizing exploration activity on their own tract.<sup>152</sup> Without such an exception to the general rule of requiring full consent, co-owners may be incentivized to withhold consent in order to procure the most advantageous deal from the operators by being the last co-owner to agree to the VUA. Allowing minority co-owners like Kate to unilaterally inhibit a voluntary unit from affecting their tracts may make the otherwise efficient method of pooling mineral interests by VUA too cumbersome for widespread use by operators in Louisiana.

## 2. Problems with the Hybrid Approach

The hybrid solution, analogizing to the 80% rule, gives rise to two principal problems. First, non-consenting minority co-owners would have their property rights taken without compensation. Under the Mineral Code articles allowing for the 80% consent exceptions, the non-consenting co-owners are entitled to revenue generated by drilling through the agreement to which they did not consent but by which they are affected as a result of the 80% rule.<sup>153</sup> Therefore, the non-consenting co-owners are not totally without recovery for the encumbrance of their ownership interests in the co-owned thing.<sup>154</sup> However, if the 80% rule is applied to the situation where a surface co-owner does not consent to a VUA, there is no recovery for the non-consenting surface co-owner whose ownership interest is not more than 20%. The surface co-

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151. See, e.g., *Union Oil Co. v. Touchet*, 86 So. 2d 50 (La. 1956) (invalidating a declared unit when it attempted to include the interests of a landowner who did not originally consent to the declared unit and, as a result, there were no interruptive effects as to the prescription accruing against a mineral interest burdening a non-drillsite tract allegedly in the unit area).

152. See discussion *supra* Part I.C; Crowder, *supra* note 64, at 944.

153. See LA. REV. STAT. ANN. §§ 31:164, 166 (2000).

154. Crowder, *supra* note 64, at 945.

owner does not hold the mineral rights when there exists a servitude on the tract and is consequently excluded from revenue from production. All consideration obtained by the consenting surface co-owner functions like a bonus for signing the VUA. As non-signatories, non-consenting surface co-owners are not entitled to a payment made in compensation for cooperation as they are not in privity to the private contract. This analogous solution would deprive a non-consenting surface co-owner of property rights without recovery.<sup>155</sup>

Second, this twist on existing exceptions is inconsistent with civilian principles of interpretation. Civilian statutory interpretation demands that when there is an exception to a general principle, the exception should be read to apply strictly to the individual circumstances it involves.<sup>156</sup> The general rule from the Civil Code is that co-owners must unanimously consent to an encumbrance on their co-owned thing.<sup>157</sup> To construct an analogical solution from exceptions to that general rule would be inconsistent with civilian methodology.

### *3. Problems with the Proportional Interruption Approach*

Like the other two solutions, the proportional remedy has two potential complications. First, when the prescription of nonuse running against a servitude fully accrues, the proportional solution leaves unanswered the question of how to divide the servitude between prescribed and interrupted portions of the servitude. Second, division of the servitude seems to run against the Mineral Code's clear statement that mineral servitudes are indivisible.<sup>158</sup>

In the case of a declared or compulsory unit encompassing a part of the mineral servitude area but not the whole, the application of the "partial interruption" rule is relatively simple.<sup>159</sup> The unit areas are clearly defined through either the lease giving the pooling rights or the order of the Commissioner, but the clarity disappears in the case of voluntary units—units left undefined in either the

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155. The non-consenting surface co-owner may have a case for unjust enrichment (enrichment without cause). *See* LA. CIV. CODE art. 2298 (2012). An analysis of this potential remedy for the non-consenting co-owner is beyond the scope of this Comment. However, an adoption of this 80% solution may lead to further litigation between the parties.

156. *See State ex rel. Murtagh v. Dep't of City Civil Serv.*, 42 So. 2d 65, 73–74 (La. 1949).

157. *See* discussion *supra* Part I.C.

158. *See* LA. REV. STAT. ANN. § 31:62 (2000).

159. Ottinger, *The Mineral Servitude*, *supra* note 30, at 127–28.

Mineral Code or post-Mineral Code jurisprudence.<sup>160</sup> In the case of voluntary units created without the full consent of burdened surface co-owners, the coverage of the voluntary unit is less clear due to the partial nature of the consent given to include the co-owned land within the voluntary unit. In theory, whatever ownership interest the co-owner had in the land is upon every molecule of substance of the land.<sup>161</sup> If the proportional interruption remedy were used in the case of Kate and Mike's hypothetical tract, the time accruing against the servitude burdening each molecule of the co-owned tract would be interrupted for nine-tenths of each molecule (i.e., the proportional share of Mike's ownership) but would continue accruing for one-tenth of every molecule (i.e., the proportional share of Kate's ownership).

In the event that a court holds that the entrance of a servitude and partial surface interest into a voluntary unit would place that tract partially within the unit area, the question of application necessarily arises. Upon the conclusion of the ten-year prescriptive period running against a portion of the servitude, the court must then decide whether to divide the servitude geographically or to simply interrupt prescription on the servitude proportionally to the ownership interests of the consenting and non-consenting surface co-owners. A court would likely choose the latter option. A geographic division would create questions of how the division would take place upon land and potentially cause more uncertainty, litigation, and expense for the parties seeking resolution. The division by area would potentially increase the burden on the servitude owner by forcing the servitude owner to drill wells on that newly divided portion of land in order to preserve his mineral right by interrupting prescription.<sup>162</sup>

When the servitude partially prescribes, the court may avoid these aforementioned difficulties by instead distributing to the non-consenting surface co-owner a portion of the mineral interests previously held by the servitude owner without geographic division.<sup>163</sup> The mineral interests of the mineral servitude owner would simply be preserved in proportion to the consent obtained

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160. *Id.*

161. See discussion *supra* Part I.C.

162. See LA. REV. STAT. ANN. § 31:179 (2000).

163. Upon the occurrence of this solution, however, the servitude holder may be placed in a situation requiring it to gain the approval of at least 80% of the co-owners of the surface in order to drill on the tract, whereby placing the servitude owner in a diminished situation that was not contracted for upon the creation of the servitude.

from the surface co-owners. The surface co-owner would hold a percentage of a tract's mineral rights proportional to the co-owner's ownership interest and would be free to lease the rights, apply to unitize them, or seek a partition of the property into geographically separate areas. Therefore, the remedy to the issue on the mechanics of dividing the servitude partially prescribed by a voluntary unit presents itself through a non-geographic solution. However, a legal implication of the division of a mineral servitude also presents a problem for the proportional approach.

The proportional solution appears to divide Bob's servitude when mineral servitudes, like predial servitudes,<sup>164</sup> are indivisible.<sup>165</sup> Mineral servitude indivisibility means, for instance, that in a case where co-owned land is partitioned, a separately owned mineral servitude that burdens the land of the co-owners is not divided between the partitioned tracts.<sup>166</sup> This general rule protects the interests of third-party servitude owners so that preserving their mineral rights does not become more onerous and complicated.<sup>167</sup> A complication of dividing a mineral servitude may be that the owner of what was formerly one servitude would be required to drill multiple wells to prevent prescription of non-use accruing on what is now several servitudes instead of just one.

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164. See LA. CIV. CODE art. 652 (2012).

165. See LA. REV. STAT. ANN. § 31:62 (2000). The mandate of servitude indivisibility is essentially excepted in several situations. Pre-Mineral Code jurisprudence suggested that when an existing servitude is granted in part to another by geographic area, the servitude is not divided but the "advantages" of the servitude could be divided. See McDougal, *supra* note 32, at 1119. This means that the prescription accruing against one geographically subdivided portion of the mineral servitude would not be interrupted through use of the other subdivided portion. See LA. REV. STAT. ANN. § 31:69 cmt. (2000); Ohio Oil Co. v. Ferguson, 34 So. 2d 746 (La. 1947). Pre-Mineral Code jurisprudence also suggested that when a servitude owner grants a portion of the servitude to the owner of the surface and thereby make the remaining servitude non-contiguous, the servitude portions are divided by the resultant non-contiguous tract. See Arent v. Hunter, 133 So. 157 (La. 1931); LA. REV. STAT. ANN. § 31:69 cmt. (2000).

166. Martin, *supra* note 36, at 443 ("Although the Louisiana mineral servitude doctrine precludes the 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 landowners do not hold a common element of ownership with the servitude owner."). See Steele v. Denning, 445 So. 2d 94 (La. Ct. App.), *aff'd*, 456 So. 2d 992 (La. 1984).

167. The rule regarding the indivisibility of the mineral servitude flows from the indivisibility of predial servitudes. See LA. REV. STAT. ANN. § 31:62 cmt. (2000). The indivisibility of predial servitude is made out of concern for adverse effects upon the dominant estate. LA. CIV. CODE art. 652 cmt. c (2012).

The Mineral Code states that servitudes may be partially prescribed by area when included in a conventional or compulsory unit.<sup>168</sup> The division of mineral servitudes seems to occur in cases of partial unitization of a mineral servitude. When prescription is interrupted for a portion of a mineral servitude inside a unit by production from an off-tract producing unit well, the prescription for the portion of the servitude outside the unit continues to accrue.<sup>169</sup> For practical purposes, the servitude would seem to be divided upon the arrival of the full ten-year prescriptive period.<sup>170</sup> One portion of the servitude would remain existent, but the mineral rights previously held by the mineral servitude portion outside the unit area would revert back to the landowner.<sup>171</sup> Though the “division” terminology is not used in the partial unitization context, the rule against mineral servitude divisibility seems to be functionally circumvented.

Since servitudes may be partially prescribed by area when included in a conventional unit,<sup>172</sup> this rule should apply with equal force to voluntary units—a subset of conventional unitizations.<sup>173</sup> Servitudes only partially included in voluntary units through a failure of surface co-owner consent to the voluntary unit should partially prescribe. The effects of partial unitization and partial prescription through a voluntary unit are not distinguished from partial unitization and partial prescription through a declared or compulsory unitization.<sup>174</sup> The exception to the prohibition against mineral servitude indivisibility available for partial unitization through conventional or compulsory units is not withheld from situations involving voluntary units and should therefore apply in these circumstances.

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168. See LA. REV. STAT. ANN. § 31:33 (2000). Mineral Code articles 34, 35, and 37 state the same rule that partial inclusion of a mineral servitude in a unit will cause prescription to be interrupted for only that portion of the mineral servitude included in the unit. See *id.* §§ 31:34–35, 37.

169. *Id.* § 31:33.

170. See McDougal, *supra* note 32, at 1144. (“Article 33, which reflects pre-Code jurisprudence, provides that a good faith drilling of a well to the unitized sand or sands on unit land not subject to the mineral servitude that turns out to be a dry hole interrupts prescription of nonuse only for the portion of the lands subject to the servitude included in the unit, not the entire servitude. Article 34 provides for the same division if the well is shut-in, and article 37, which reflects prior jurisprudence, provides for the same result when the well comes in as a producer.” (footnotes omitted)).

171. See discussion *supra* Part I.B.

172. See LA. REV. STAT. ANN. § 31:33 (2000); *id.* §§ 31:34–35, 37.

173. See discussion *supra* Part II.C.

174. See LA. REV. STAT. ANN. §§ 31:34–35, 37 (2000).

### III. LEGISLATIVE SOLUTION: DEFINE VOLUNTARY UNITS AND AFFIRM CO-OWNER SOVEREIGNTY

Co-ownership principles establish that a co-owner cannot encumber a co-owned thing without the full consent of all co-owners.<sup>175</sup> A thorough reading of the jurisprudence surrounding voluntary unitization leads to the conclusion that surface owner consent to a voluntary unit is necessary for the unit to affect his or her interests.<sup>176</sup> These two findings may cause a court to adopt any of the three approaches available under current law. However, the “all-or-nothing” approach, holding that one co-owner may prevent a voluntary unit from affecting the co-owned thing, produces a harsh result for operators and mineral rights holders.<sup>177</sup> This approach would result in prescription continuing to accrue against Bob’s servitude despite the drilling on the voluntary unit, protecting non-consenting surface co-owner Kate’s interests. But it would disregard the VUA between Mike, Bob, and the unit operator, render pointless any compensation made to Mike and Bob for entering the VUA, and force Bob to move away from the quick and less expensive voluntary unit to more expensive options to preserve his mineral rights (e.g., have a well drilled on his servitude or seek a compulsory unit).

Alternatively, the hybrid solution would enable a significant majority of the co-owners to overrule a small minority in order to encourage the economical and un wasteful exploration of minerals in the unit area. A court’s application of the hybrid solution would result in non-consenting co-owners, like Kate, being left potentially without economic recovery from an encumbrance of the co-owned thing.<sup>178</sup> This approach also interprets exceptions to the general rule of universal co-owner consent broadly when civilian methodology mandates they be read narrowly.<sup>179</sup> Accordingly, a codification of this result is not an ideal solution.

The proportional approach, on the other hand, is the most equitable solution available and would also encourage the use of VUAs as a means of economically exploring for oil and gas. This

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175. LA. CIV. CODE art. 805 (2012). See discussion *supra* Part I.C.

176. See discussion *supra* Part I.E.

177. See discussion *supra* Part II.A.

178. Although applying the 80% consent exception to voluntary unitizations and surface owners may result in non-consenting co-owners being *offered* substantially the same deal as the consenting co-owner, non-consent would deprive the non-consenting co-owner of property rights without compensation. See LA. REV. STAT. ANN. §§ 31:164, 166 (2000).

179. See discussion *supra* Part I.C.

approach would allow surface co-owners to voluntarily consent to their interests being a part of a VUA and would thus extend the voluntary unit over the tract but only to the extent of the consenters' interests.<sup>180</sup> It would not affect the interests of non-consenting co-owners who are not a party to the contract.<sup>181</sup> However, it would not give those non-consenting surface co-owners a heavily advantaged bargaining position with an operator seeking to form a voluntary unit, as the operator would not need all of the surface co-owners' consent to form a unit over the area. The problems of the proportional resolution can be avoided by division according to ownership interest and not through an arbitrarily determined geographic area,<sup>182</sup> and by treatment of the servitude "division" as a permissible and necessary function of partial unitization.<sup>183</sup>

The proportional approach should be adopted by the Louisiana courts and its Legislature because the solution preserves the ownership rights and interests of each party involved in the unitization: land co-owners, mineral right holders, and mineral lessees.<sup>184</sup> The Mineral Code should clarify the way voluntary units are formed, define their effects, and adopt the proportional solution for when courts are confronted with a scenario similar to Mike and Kate's in order to avoid inequitable results amongst the various parties and to promote the use of the voluntary unit as a relatively speedy and inexpensive method to unitize mineral interests.

#### *A. Voluntary Unitization and the Mineral Code*

The Legislature should act to define the voluntary unit—without clarity, the use of VUAs in Louisiana remains in a state of uncertainty, an unattractive situation to would-be mineral lessees, mineral right holders, and landowners. Additionally, the answer to the question of whether the voluntary unit affects non-consenting landowners may have significant effects upon the current ownership of mineral rights across the state. Any voluntary unit formed without the consent of every surface owner in its defined area may have the mineral ownership which the operator believed to have existed turned on its head simply because one or more surface owners did not consent to the VUA.<sup>185</sup> Mineral rights (e.g.,

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180. See discussion *supra* Part II.C.

181. See discussion *supra* Part I.D.

182. See discussion *supra* Part II.D.3.

183. LA. REV. STAT. ANN. § 31:33 (2000). See *id.* §§ 31:34–35, 37.

184. See discussion *supra* Parts II.C., II.D.3.

185. See discussion *supra* Part I.E.

mineral servitudes) may prescribe because drilling activity from the unit failed to interrupt prescription running against them since the surface owners previously burdened by the mineral servitude did not consent to any form of conventional unitization. At the same time, surface owners must be included in the voluntary unit formation process and must have that right codified; otherwise, the powers of the servitude owner to interrupt its own prescription may be greatly expanded beyond those expressly enumerated in the Mineral Code.<sup>186</sup>

Accordingly, the Mineral Code should be amended to recognize this right. Language should be added to Mineral Code article 213(6)—the article, in current form, inadequately articulates the unitization process—to explicitly recognize this right of surface co-owners. The proposal below clarifies the law regarding voluntary unit formation:

Unless otherwise provided by law, a voluntary unit is formed through an agreement between consenting parties and is ineffective against the interests of non-signatory parties, including landowners burdened by mineral rights, mineral right owners, and mineral lessees.<sup>187</sup>

This alteration would not change the effects of any provision in the Mineral Code. However, it would serve to clarify that any interests not brought into the VUA by contract would be unaffected by the agreement, including the burdened surface owner's interests in the reversion of a mineral servitude back to the landowner after the ten-year prescriptive period of nonuse fully accrues. The use of the modifier "non-signatory" clearly expresses the intention that the parties affected must be directly involved with the contractual creation of the unit. This addition would only

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186. *Id.*

187. The full text of the proposed Mineral Code article 213(6) would thus read:

(6)(a) "Unit" means an area of land, deposit, or deposits of minerals, stratum or strata, or pool or pools, or a part or parts thereof, as to which parties with interests therein are bound to share minerals produced on a specified basis and as to which those having the right to conduct drilling or mining operations therein are bound to share investment and operating costs on a specified basis. A unit may be formed by convention or by order of an agency of the state or federal government empowered to do so.

(b) Unless otherwise provided by law, a voluntary unit is formed through an agreement between consenting parties and is ineffective against the interests of non-signatory parties, including landowners burdened by mineral rights, mineral right owners, and mineral lessees.

alter the definition of conventional unitization as far as voluntary units are concerned and would leave unaffected the well-established jurisprudential rules regarding the formation and effect of declared units.<sup>188</sup> Because of the rule that on-tract drilling interrupts prescription accruing against a servitude, regardless of whether the servitude is fully encompassed by the unit,<sup>189</sup> the statement “[u]nless otherwise provided by law” is necessary. This statement ensures that the proposed paragraph does not conflict with that rule regarding on-tract drilling. Consent of the landowner to form a voluntary unit is unnecessary when the drill site is on the surface tract, as the servitude owner had the legal capacity upon the creation of the servitude to drill on the tract and thus interrupt prescription running against the entire servitude.<sup>190</sup>

For a non-consenting surface co-owner like Kate, this provision should make clear that her interests are protected against inclusion in the VUA without her express consent. However, the provision does not outline how her failure to consent would affect Bob’s servitude, the interests of her fellow co-owner, Mike, or the undertakings of Black Gold Drilling.

### *B. The Rights of Surface Co-Owners*

Even with the voluntary unit defined by Mineral Code article 213, a court may interpret the provision such that neither Mike nor Kate is affected by drilling upon the voluntary unit, even though Mike signed the VUA.<sup>191</sup> Or, Mike’s consent may be read to be binding upon the tract through analogy to the 80% exception.<sup>192</sup> Thus, the Legislature should amend the Mineral Code to further clarify voluntary units’ effects on non-signatory surface co-owners. The adoption of the language below to Mineral Code article 37—the article addressing the extent to which production from a unit well will affect tracts wholly and partially encompassed by the unit—would effectuate that result:

A co-owner of land burdened by a mineral servitude may contract for his interest in the land to be included in a voluntary unit without the consent of the remaining co-

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188. See Ottinger, *Conventional Unitization*, *supra* note 9, at 27–42. For purposes of clarity, a definition of a declared unit in the Mineral Code should also be included, but such a proposal is beyond the scope of this Comment.

189. See LA. REV. STAT. ANN. § 31:37 (2000).

190. See *id.* §§ 31:21–23.

191. See discussion *supra* Part II.A.

192. See discussion *supra* Part II.B.

owners. Such an act is ineffective as to the interests of non-signatory co-owners. A voluntary unit is only effective to interrupt prescription accruing against a separate mineral right proportional to the interest(s) of the consenting landowner(s) burdened by that right.<sup>193</sup>

This addition would preserve the traditional civilian rule of co-owner sovereignty<sup>194</sup> and allow a surface co-owner to gain compensation for entering into a VUA. At the same time, it would not affect the individual ownership interests of other co-owners in the co-owned thing. The codification of the proportional approach would not affect servitude owners' rights to drill on burdened land, lease their mineral right for drilling, seek a compulsory unit, or enter into a conventional unit when their lease or servitude agreement allows for unitization of their mineral right. This solution only expands the servitude owner's rights.

Such a provision would provide the servitude owner an economical way to interrupt prescription on the mineral servitude, in proportion to consenting surface co-owner consent, by drilling through a voluntary unit's off-tract well, a method that was not previously available to the servitude owner.<sup>195</sup> The proposed change does so by giving the co-owners of the burdened land the ability to extend the encumbrance as to their own unique ownership interest in exchange for compensation. The extension

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193. An appropriate location for this addition to the Mineral Code is in the articles providing for a servitude to be partially interrupted by area. As a provision that ultimately will allow for prescription to remain accruing for one portion of a servitude and be interrupted for another, it is logically consistent with articles in Chapter 4, Part 4, Subpart B, of the Mineral Code. The addition of a second paragraph to article 37 would provide a natural flow from the preceding five articles regarding unitized production partially interrupting a servitude. The full text of the proposed Mineral Code article 37 would read:

(a) Production from a conventional or compulsory unit embracing all or part of the tract burdened by a mineral servitude interrupts prescription, but if the unit well is on land other than that burdened by the servitude, the interruption extends only to that portion of the servitude tract included in the unit.

(b) A co-owner of land burdened by a mineral servitude may contract for his interest in the land to be included in a voluntary unit without the consent of the remaining co-owners. Such an act is ineffective as to the interests of non-signatory co-owners. A voluntary unit is only effective to interrupt prescription accruing against a separate mineral right proportional to the interest(s) of the consenting landowner(s) burdened by that right.

194. See discussion *supra* Part I.C.

195. See discussion *supra* Part I.E.

then enables the mineral servitude owner to interrupt prescription accruing against his servitude by drilling a well through a voluntary unit, sharing costs and revenue between neighboring mineral interests. This addition simultaneously empowers the landowner and servitude owner in previously unavailable ways and makes voluntary unitization a more predictable and attractive option for oil and gas operators.

Under this modification, Kate, the hypothetical non-consenting co-owner, has options in regards to using her newly acquired mineral rights when Bob's servitude partially prescribes. She would be able to contract to be included in a voluntary unit, seek the formation of a compulsory unit that would include her tract, or seek a judicial partition of the co-owned land, as she is in full ownership of all the rights associated with her share of the land. A partition would enable the previously non-consenting co-owner, Kate, to apply for a permit to drill upon her now solely-owned partitioned tract.

Adopting the proposed amendments to the Mineral Code, which would allow surface co-owners to individually enter into a VUA and servitude owners to have their servitude interrupted by partial co-owner consent, incentivizes the use of VUAs and removes uncertainty surrounding how the voluntary unit affects a non-consenting co-owner's rights. These legislative solutions could not only save millions of dollars in litigation over the effects of voluntary units and in unnecessary royalty and bonus payments, but could also make voluntary units a more attractive unitization option for operators, mineral servitude holders, and landowners alike.

#### CONCLUSION

The first amendment to the Mineral Code proposed by this Comment will clarify the method of voluntary unit creation. This proposal defines the extent of a voluntary unit's effect by stating that a voluntary unit is effective only as to the parties who consented to the unitization agreement. The second proposal clarifies the law so that proportional interruption of servitudes may be accomplished through partial surface co-owner consent to a unitization. By employing two clarifying amendments to the Mineral Code, the Louisiana Legislature can avoid ambiguity in the law and prevent inconsistent and inequitable results for operators, lessees, surface owners, and mineral-right owners alike. Through the amendments, surface co-owners will be prevented from trampling on each other's interests in the unitization context,

taking a potential source of strife out of the co-ownership environment.

The beneficial effects of the proportional interruption solution are well illustrated by the hypothetical scenario posed by Mike and Kate's surface co-ownership, Bob's mineral servitude, and Black Gold's voluntary unit. Kate and Mike have a difference of opinion. Mike wishes to avoid the inconvenience and environmental and aesthetic damage posed by oil and gas exploration on his land and receive some consideration for the inclusion of his interest in the voluntary unit. Additionally, Mike sees his resistance as futile because he thinks Black Gold will simply seek a compulsory unit if he does not consent. Kate, on the other hand, believes that there will not be good faith drilling or production on the tract or through a unit prior to the conclusion of the ten-year prescriptive period on Bob's servitude. Thus, she does not consent. Through the use of the proportional approach, Mike's consent to the voluntary unit remains effective against the servitude burdening his co-ownership interest, Kate's minority ownership is unaffected, Bob's servitude may be partially preserved through unit drilling, and Black Gold maintains a voluntary unit over the tract in proportion to Mike's ownership interest. The adoption of the proportional approach through these amendments is the only way forward that protects and enhances each involved party's interests and encourages the use of voluntary unitizations to efficiently explore for minerals in Louisiana. Who knows? Maybe in the end it will be just a little "more fun to share with everyone."

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\* J.D./D.C.L., 2015, Louisiana State University, Paul M. Hebert Law Center. I would like to thank Professor Olivier Moréteau, Professor Patrick Ottinger, McClain Schonekas, and Minia Bremenstul for their encouragement and advice in the construction of this Comment. This product would not have been possible without their tireless efforts.

