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How Long Do We Have? The Applicability of the Suspension Doctrine for Louisiana Mineral Leases in Light of *Ferrara v. Questar*

INTRODUCTION

[T]his case will have some significant impact in favor of landowners whose land is burdened by an older lease to the extent they are not being included in the Haynesville development. . . . It is difficult to assess the impact on any other landowner because the facts of each landowner's lease may be different. In general, this is one of the first cases to deal with the legal obligation to fully develop a lease applied to the Haynesville Shale. . . . [I]t is probably going to be significant.¹

Those comments were made by Randall Davidson, counsel representing the lessors of a mineral lease in DeSoto Parish, Louisiana. His clients, the Ferraras, sought the cancellation of a mineral lease over approximately 50 acres in the Haynesville Shale, one of the largest natural gas plays in North America.² The Haynesville Shale, where development first occurred in the summer of 2007,³ has created an enormous economic spike in Louisiana:

This is an extraordinary time for Louisiana, particularly in north Louisiana, where we are experiencing something akin to a modern day gold rush due to excitement about the Haynesville Shale discovery. To put the magnitude of this sale into perspective: This month's lease sale surpassed by more than double the bonus collections for the previous 11 months of FY 2007–08 combined, almost entirely because of activity in north Louisiana. . . . [Twenty-five] of the 38 leases awarded were from Caddo, Red River and Bienville parishes, totaling approximately \$34 million in cash payments, and the average bonus per acre for these leases

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1. *DeSoto Landowners Prevail in Suit Against Oil and Gas Company*, GDM, INC. (June 29, 2010), <http://gdmlandsurveying.wordpress.com/2010/06/29/desoto-landowners-previal-in-suit-against-oil-and-gas-company>.

2. *Haynesville Shale*, GEOLOGY.COM, <http://geology.com/articles/Haynesville-shale.shtml> (last visited Oct. 9, 2013); see *U.S. Crude Oil and Natural Gas Proved Reserves*, EIA.GOV, <http://www.eia.gov/naturalgas/crudeoil/reserves/>; see discussion of *Ferrara v. Questar*, *infra* Part II.2.

3. J. Matthew Conrad, *Development Issues in the Major Shale Plays*, in OVERVIEW OF MAJOR SHALE GAS PLAYS 24 (Rocky Mtn, Min. L. Fdn., 2010).

was over \$13,400 per acre, while more typical prices in the past for north Louisiana have been around \$400 per acre.⁴

Litigation over the contracts generating this revenue has also run rampant, and the results reached by the courts interpreting these contracts have had, and will continue to have, widespread financial consequences.⁵ Although the market for leasing has slowed down substantially since the announcement in 2008,⁶ the amount of property available for oil and gas exploration remains significant.⁷

For the Ferraras, the ultimate ruling could have serious implications: hundreds of thousands of dollars could change hands.⁸ Unfortunately, the law governing the central issue in their case is unsettled.⁹ The Ferraras' case centered around the "suspension doctrine" and whether the doctrine could be invoked to suspend the obligations of a mineral lessee during any period of litigation over the mineral lease instituted by the lessor.¹⁰ The suspension doctrine is premised upon the idea that if a mineral lessor alleges non-performance of mineral lease obligations by the lessee, brings suit to cancel the lease, and a court rules that there was no breach by the lessee, the lessor is in violation of his duty to allow the lessee peaceful possession.¹¹ The remedy, as stated by Judge Caraway, is to "delay the lessee's obligation for continued performance."¹² Whether the suspension doctrine is still applicable to mineral leases and whether the period of litigation can be "tacked on" to the term of the lease after the litigation is complete, in effect "suspending" the term of the lease during the pendency of litigation, are critical and central questions.¹³

In the initial *Ferrara v. Ovestar* ruling, the Louisiana Second Circuit Court of Appeal held that the doctrine applied to mineral servitudes but not leases.¹⁴ The court nonetheless found in favor of

4. *Id.* (quoting the Louisiana Department of Natural Resources).

5. *Id.*

6. *Haynesville Shale*, *supra* note 2.

7. *Id.*

8. *Id.* At a conservative estimate of \$2,500 per acre, the Ferraras' leased property of 47 acres would be initially valued at over \$100,000 even before drilling operations commenced.

9. Compare *Ferrara v. Questar Exploration & Prod Co.*, 70 So. 3d 974 (La. Ct. App. 2011), with *Rougon v. Chevron, U.S.A. Inc.*, 575 F. Supp. 95, 100 (M.D. La. 1983), and *Baker v. Potter*, 65 So. 2d 598, 601 (La. 1952).

10. See generally *Ferrara*, 70 So. 3d 974 (discussing the suspension doctrine).

11. *Id.* at 980.

12. *Id.* at 986 (Caraway, J., concurring).

13. See *id.* at 981.

14. *Id.*

the lessee, Questar, and against the Ferraras, holding that the lease was still valid for other reasons.¹⁵ On rehearing, the original Second Circuit panel was joined by two additional judges, including Judge Caraway, who wrote an opinion concurring in the denial of rehearing.¹⁶ In his opinion, Judge Caraway concluded that the Second Circuit misinterpreted well-established law in determining that the suspension doctrine did not apply to a mineral lease.¹⁷

This Comment will interpret the suspension doctrine and analyze whether the Second Circuit's original opinion, or Caraway's concurring opinion denying rehearing, was correct. After reviewing the history of the suspension doctrine, both mineral leases and mineral servitudes, and Louisiana jurisprudence, this Comment concludes that the interpretation of the suspension doctrine espoused by Judge Caraway is supported by past Louisiana Supreme Court jurisprudence and therefore is correct. Further, the suspension doctrine is not only still in effect, but is almost exclusively to be used in situations litigating mineral leases and not servitudes. Because the suspension doctrine is a jurisprudentially-created, pre-Mineral Code doctrine, and neither the Mineral Code nor the Louisiana Civil Code contain any article overruling the suspension doctrine, it is still applicable today. If a lessor does not prevail in a suit alleging the lessee's non-performance of lease obligations, the lessor is in violation of his duty to maintain the lessee in peaceful possession of the property.¹⁸ The remedy, as stated by Judge Caraway, is to "delay the lessee's obligation for continued performance."¹⁹

I. BACKGROUND

Contrary to other jurisdictions, there can be no establishment of a separate mineral estate in Louisiana.²⁰ Besides perfect ownership of land, the two most common methods of obtaining the right to explore for minerals are the mineral lease and the mineral servitude.

15. *Id.* at 985.

16. *Id.*

17. *Id.* at 987.

18. LA. MIN. CODE art. 119 (2000); *Ferrara*, 70 So. 3d at 986.

19. *Ferrara*, 70 So. 3d at 986.

20. *Long-Bell Petroleum Co. v. Tritico*, 43 So. 2d 782, 791 (La. 1949); *Indigo Minerals, L.L.C. v. Pardee Minerals, L.L.C.*, 37 So. 3d 1122, 1127–28 (La. Ct. App. 2010), *writ denied*, 46 So. 3d 1274 (La. 2010)); Keith B. Hall, *2012 Survey on Oil & Gas: Louisiana*, 18 TEX. WESLEYAN L. REV. 511, 512 (2012) (citing *Hodges v. Long-Bell Petroleum Co.*, 121 So. 2d 831, 836 (La. 1959)).

A. The Mineral Lease

A mineral lease is an instrument by which a landowner or servitude owner, the lessor, authorizes another, the lessee, to look for and produce oil and gas from the tract of land.²¹ The Louisiana mineral lease is essentially the same as mineral leases used in other jurisdictions.²² The Mineral Code clearly states that mineral rights are both alienable and heritable.²³ The agreement has the effect of law upon the parties, similar to leases where mineral rights are not involved.²⁴ The contract may have any terms so desired as long as they are not otherwise illegal, immoral, or in violation of public policy.²⁵

The Mineral Code provides that its provisions are only used as a supplement to the Louisiana Civil Code.²⁶ If the Mineral Code does not cover a particular set of circumstances, the Civil Code is to be applied.²⁷ The Civil Code articles supplement the Mineral Code when evaluating mineral law, but not *vice versa*.²⁸ Therefore, the basic legal principles of leases in Louisiana are applicable to mineral leases whenever the Mineral Code is silent.²⁹ This allows refining the framework of the Mineral Code's laws on mineral leases with the applicable Civil Code articles on lease and contract.³⁰ Although article 114 of the Mineral Code gives a functional definition of a mineral lease,³¹ the subsequent articles do not give the substantive rights of either the lessor or lessee granted by the lease.

Before the adoption of the Mineral Code in 1974, Louisiana courts were repeatedly faced with the challenge of evaluating the substantive rights of mineral lessees.³² It was unclear whether the

21. See LA. MIN. CODE art. 114 (2000).

22. See Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 823 (1992) (noting that mineral leases in Texas are similar to those in Louisiana).

23. LA. MIN. CODE art. 18 (2000); see also *Ford v. Williams*, 179 So. 298, 301 (La. 1938).

24. LA. MIN. CODE art. 113 cmt. (2000).

25. LA. MIN. CODE art. 3 (2000); see also *Queensborough Land Co. v. Cazeaux*, 67 So. 641, 643 (La. 1915); *Steele v. Denning*, 445 So. 2d 94, 97 (La. Ct. App. 1984); *Acquisitions, Inc. v. Frontier Explorations, Inc.*, 432 So. 2d 1095, 1098 (La. Ct. App. 1983).

26. LA. MIN. CODE art. 2 (2000).

27. *Id.*

28. *Id.* at cmt.

29. See Jack W. Thompson, Jr., Comment, *The Nature of a Mineral Lease in Louisiana*, 25 TUL. L. REV. 497 (1951).

30. *Caskey v. Kelly Oil Co.*, 737 So. 2d 1257, 1262 (La. 1999).

31. LA. MIN. CODE art. 114 cmt. (2000).

32. John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 729, 784 (1976).

substantive nature of an oil and gas lease was a “real right,”³³ or a “personal right.”³⁴ Historically, this led to several seemingly contradictory court decisions.³⁵ However, the 1974 enactment of the Mineral Code ultimately and definitively classified mineral leases as mineral rights, which are finally deemed to be real rights and incorporeal immovables.³⁶

Article 16 of the Mineral Code, in comparison to the Mineral Code articles governing mineral servitudes, expressly states that some mineral rights are not subject to prescription of nonuse.³⁷ Furthermore, Mineral Code article 115 indicates that the interest of a mineral lessee is not subject to the prescription of nonuse, but the lease cannot be maintained for a period of more than ten years without drilling operations or production.³⁸ This article is essentially a codification of *Reagan v. Murphy*,³⁹ and the Mineral Code specifically notes that, although the mineral lease is indeed an incorporeal, it is not subject to the prescription of nonuse.⁴⁰

A mineral servitude owner may grant a mineral lease, but not the reverse.⁴¹ The lessor has an obligation to “refrain from disturbing the lessee’s possession, and to perform the contract in good faith.”⁴² The filing of a suit by the lessor against the lessee for cancellation of the lease, if unsuccessful, has been interpreted to be a “disturbance” of the lessee’s possession.⁴³ This rule is likened to Civil Code article 2475. There, the obligations of a seller are mirrored by the

33. LA. CIV. CODE art. 476 (2013) (noting that one may have various rights in things, including real rights); LA. CIV. CODE art. 476 cmt. b (“Real rights confer direct and immediate ownership over a thing. They are distinguished from personal (obligatory) rights that confer merely authority over the person of a certain debtor who has assumed the obligation to allow the enjoyment of a thing by his creditor.”).

34. LA. CIV. CODE art. 476 cmt. b.

35. Compare *Succession of Simms*, 195 So. 2d 114 (La. 1965), with *Reagan v. Murphy*, 105 So. 2d 210 (La. 1958), and *Arnold v. Sun Oil Co.*, 48 So. 2d 369 (La. 1950), and *Gulf Ref. Co. v. Glassell*, 171 So. 846 (La. 1936).

36. LA. MIN. CODE art. 16 (2000).

37. *Id.* (“Mineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence.”).

38. LA. MIN. CODE art. 115(A) (2000).

39. LA. MIN. CODE art. 115 cmt. (citing *Reagan*, 105 So. 2d 210).

40. See LA. MIN. CODE art. 115(A); *Reagan*, 105 So. 2d 210.

41. LA. MIN. CODE art. 116 cmt. (2000) (noting that the lessor need not own the thing leased, his “warranty being limited to one of peaceful possession.”).

42. LA. MIN. CODE art. 119 (2000); LA. MIN. CODE art. 119 cmt. (reiterating that there is a requirement of good faith in all contracts formed in Louisiana).

43. See *Pennington v. Colonial Pipeline Co.*, 400 F.2d 122,124 (5th Cir. 1968); *Rougon v. Chevron, U.S.A. Inc.*, 575 F. Supp. 95, 100 (M.D. La. 1983) (citing *Hanszen v. Cocke*, 246 So. 2d 200, 203 (La. Ct. App. 1971)); *Baker v. Potter*, 65 So. 2d 598, 601 (La. 1952).

obligations of the lessor of a mineral lease in Mineral Code article 119.⁴⁴

Likewise, the mineral lessee has obligations to the lessor. Listed in Mineral Code article 122, the lessee is bound to “perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor.”⁴⁵ The article also provides that the lessee has no fiduciary obligation to the lessor.⁴⁶

If the lessee fails to perform or violates the lease, the lessor is entitled to appropriate relief.⁴⁷ Generally, the lessor will seek dissolution of the lease.⁴⁸ Following the pattern of mimicking the Civil Code, this rule is aligned with Civil Code articles 1876, 2013, and 2018.⁴⁹ However, courts are quick to point out that cancellation of a lease is a harsh remedy that should be awarded sparingly.⁵⁰

B. The Mineral Servitude

The mineral servitude is much like the mineral estate of common law jurisdictions and is granted by a landowner to another party.⁵¹ Unlike most common law mineral estates, the mineral servitude terminates if not used for a period of ten consecutive years.⁵² This termination is known as prescription⁵³ of nonuse.⁵⁴

44. LA. CIV. CODE art. 2475 (2013) (“The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use.”); *id.* See also LA. CIV. CODE art. 2682 (2013).

45. LA. MIN. CODE art. 122 (2000).

46. *Id.* The several factors to be considered in determining whether the lessee has acted as a “prudent operator” are beyond the scope of this Comment. For a discussion on a prudent operator determination, see 5 PATRICK H. MARTIN & BRUCE M. KRAMER, *WILLIAMS AND MEYERS OIL AND GAS LAW*, ch. 8 (1969); see also LA. MIN. CODE art. 122 cmt.; *Williams v. Humble Oil & Ref. Co.*, 290 F. Supp. 408 (E.D. La. 1968); *Carter v. Ark. La. Gas Co.*, 36 So. 2d 26 (La. 1948); *Caddo Oil & Mining Co. v. Producers’ Oil Co.*, 64 So. 684 (La. 1913).

47. LA. MIN. CODE art. 134 (2000).

48. LA. MIN. CODE art. 134 cmt.

49. LA. CIV. CODE arts. 1876, 2013, 2018 (2013) (explaining that if the lessor violates the contract, the lessee is similarly entitled to damages); see also LA. MIN. CODE art. 134.

50. *Ferrara v. Questar Exploration & Prod. Co.*, 70 So. 3d 974, 982 (La. Ct. App. 2011); *Rivers v. Sun Exploration & Prod. Co.*, 559 So. 2d 963, 968–69 (La. Ct. App. 1990); *Taussig v. Goldking Properties Co.*, 495 So. 2d 1008, 1012 (La. Ct. App. 1986).

51. LA. MIN. CODE art. 24 (2000) (“[A] mineral servitude may be created only by a landowner who owns the right to explore for and produce minerals when the servitude is created.”).

52. LA. MIN. CODE art. 27 (2000).

This prescription, a system for terminable mineral interests, was one of the principal purposes of the analogy to other types of servitudes in Louisiana law.⁵⁵

A servitude, as listed in the Civil Code, “confers in favor of a person a specified use of an estate less than full enjoyment.”⁵⁶ A servitude is an incorporeal.⁵⁷ Article 533 of the Civil Code states that a servitude is either personal or predial.⁵⁸ A personal servitude is “a charge on a thing for the benefit of a person.”⁵⁹ A predial servitude “is a charge on a servient estate for the benefit of a dominant estate. The two estates must have different owners.”⁶⁰ The comments to Civil Code article 646 explain that predial servitudes are essentially due to the estate, and not the owner of the estate,⁶¹ which means that the servitude will stay with the estate, regardless of who the owner is.

The mineral servitude, most similar to the predial servitude, was first seen in the case of *Frost-Johnson Lumber Co. v. Salling’s Heirs*,⁶² and it is generally seen as the most unusual aspect of Louisiana mineral law when compared to the law of other states.⁶³ Essentially, the mineral servitude not only restricts anyone from “owning”⁶⁴ fugacious minerals that have not been reduced to

53. In Louisiana, prescription is the equivalent of a “statute of limitations” as applied in other states. For a more detailed explanation and comparison to the common-law analog, see LA. PRAC. CIV. PRETRIAL § 6:12 (2012–2013 ed.).

54. LA. CIV. CODE art. 3448 (2013) (“Prescription of nonuse is a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time.”); see also LA. CIV. CODE art. 754 (2013) (“Prescription of nonuse begins to run for affirmative servitudes from the date of their last use, and for negative servitudes from the date of the occurrence of an event contrary to the servitude.”).

55. LA. MIN. CODE art. 27 cmt. Mineral Code article 27 is a partial direct restatement of several Civil Code articles pertinent to prescription of servitudes. Landowners have an interest in seeing servitudes developed, and this Mineral Code article restricts servitude owners from holding mineral rights to manipulate the market for more than ten years without drilling operations. See also *Frost-Johnson Lumber Co. v. Salling’s Heirs*, 91 So. 207, 245 (La. 1920).

56. LA. CIV. CODE art. 534 cmt. b (2013).

57. See LA. CIV. CODE art. 461 (2013).

58. LA. CIV. CODE art. 533 (2013).

59. LA. CIV. CODE art. 534.

60. LA. CIV. CODE art. 646 (2013).

61. LA. CIV. CODE art. 646 cmt. (noting that predial servitudes are not attached to a person; instead, they are due to anyone who may become owner of the dominant estate); LA. CIV. CODE art. 650 (2013).

62. *Frost-Johnson Lumber Co. v. Salling’s Heirs*, 91 So. 207 (La. 1920).

63. McCollam, *supra* note 32, at 739.

64. LA. MIN. CODE art. 6 (2000) (“Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form . . .”). This concept is in stark contrast to the law of several other states

possession independently from the land in which they are found, but it also restricts other rights.⁶⁵ Therefore, the landowner does not own any oil and gas that may be underlying his land.⁶⁶ Instead, the landowner has the exclusive right to explore and develop his property, along with the right to reduce them to possession, and in turn, ownership.⁶⁷

A landowner may grant a mineral servitude to any other person with capacity.⁶⁸ Mineral servitudes are frequently purchased as investments.⁶⁹ Once the mineral servitude is established, the servitude owner has no obligation to exercise it, but if he does, he can only use as much of the land as is reasonably necessary to conduct operations.⁷⁰ However, the servitude will expire, as previously mentioned, if the servitude is not used for a period of ten years.⁷¹ Prescription of nonuse begins on the date the servitude is created.⁷² Unfortunately, Louisiana jurisprudence is not consistent in determining the exact time the servitude is created.⁷³

A pertinent rule regarding the mineral servitude is found in Mineral Code article 59, which states that, “[i]f the owner of a mineral servitude is prevented from using it by an obstacle that he can neither prevent nor remove, the prescription of nonuse does not run as long as the obstacle remains.”⁷⁴ The comments to article 59 indicate, but do not explicitly state, that the filing of a suit by a landowner contesting title to mineral servitude likely would

where the “mineral estate” entitles a landowner to direct ownership of minerals under his land without any attempt to extract them.

65. LA. MIN. CODE art. 22 (2000) (“The owner of a mineral servitude is under no obligation to exercise it. If he does, he is entitled to use only so much of the land as is reasonably necessary to conduct his operations. He is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.”).

66. LA. MIN. CODE art. 7 (2000).

67. *Id.*; LA. MIN. CODE art. 7 cmt. (noting that possession of produced oil and gas is generally accepted to occur at the wellhead).

68. *See* LA. MIN. CODE art. 22. cmt. (noting that questions of capacity are resolved by reference to the general law.)

69. McCollam, *supra* note 32, at 740.

70. LA. MIN. CODE art. 22.

71. LA. MIN. CODE art. 27 (2000).

72. LA. MIN. CODE art. 28 (2000).

73. *See* LA. MIN. CODE art. 28 cmt. Because there is a strict ten-year limitation involved with the extinction of servitudes, determining when a servitude is created may be critical in some circumstances. Although not directly pertinent to the *Ferrara* decision, this is an important area to monitor in Louisiana mineral law.

74. LA. MIN. CODE art. 59 (2000).

constitute an obstacle.⁷⁵ However, some case law may lend itself to an opposite conclusion.⁷⁶ In *Perkins v. Long-Bell Petroleum Co.*, the Louisiana Supreme Court was presented with a defendant who argued that prescription had not run on his mineral servitude because the plaintiff's institution of the suit constituted an obstacle.⁷⁷ The court held that, in the specific circumstances of the case, no obstacle was present, but the court did not explicitly rule it out as a possibility if the facts were different.⁷⁸

A common issue with interpreting Mineral Code article 59 is in determining what constitutes an obstacle. Most cases addressing this issue deal with stating what is not an obstacle, rather than what is.⁷⁹ This Mineral Code article is a reflection of former Civil Code article 792 (now Civil Code article 755),⁸⁰ but it has only been applied in rare instances.⁸¹

C. Adoption of the Mineral Code

The adoption of the Mineral Code in Louisiana was a watershed moment intended to clarify what had previously been muddy water.⁸² Prior to the Mineral Code's adoption, the Louisiana Supreme Court held that "[h]aving declined to enact laws for the regulation of the oil industry, and, particularly, having declined to adopt a Mineral Code, the Legislature has placed the stamp of approval upon the system of interpretation of oil and gas contracts which this court has followed for so many years."⁸³ The Louisiana Supreme Court had been faced with several instances of lower courts inconsistently and incorrectly applying the law with mixed results. This problem was sought to be resolved with the Mineral Code's enactment.

75. See LA. MIN. CODE art. 59 cmt. (noting that, in *Perkins v. Long-Bell Petroleum*, "the court gave strong indication that under proper circumstances an obstacle would be found to exist.").

76. See *Perkins v. Long-Bell Petroleum Co.*, 81 So. 2d 389, 394 (La. 1955).

77. *Id.* at 392.

78. *Id.* at 394. The court further noted that "the facts of this case do not justify such a holding." The landowner "did not at any time deny the defendant free access to the land for exploration purposes." *Id.* at 393.

79. See *id.* at 393.

80. LA. CIV. CODE art. 792 (1870) (current version at LA. CIV. CODE art. 755 (2013)).

81. LA. MIN. CODE art. 59 cmt. (2000).

82. McCollam, *supra* note 32, at 732 ("With some significant exceptions, the Code is essentially a codification of prior case law. . . . It should also be recognized that some articles of the Code adopt entirely new principles of law, while other areas are not affected at all.").

83. *Tyson v. Surf Oil Co.*, 196 So. 336, 343 (1940).

Clearly, the Mineral Code was an attempt to unify oil and gas law, as well as set forth a framework by which courts may directly apply law. However, the adoption of the Mineral Code is by no means a discarding of all jurisprudential precedent. Notably, the Mineral Code is silent on the suspension doctrine even though the doctrine was already fully developed at the time of the Code's adoption. However, the Mineral Code does say that the obligation to provide peaceful possession still applies.⁸⁴

II. THE SUSPENSION DOCTRINE

One of the first instances of the Louisiana Supreme Court applying what is now referred to as the suspension doctrine⁸⁵ was in *Baker v. Potter*.⁸⁶ On September 15, 1947, Baker granted Lawrence Potter a mineral lease over an area covering 95.48 acres for a period of five years.⁸⁷ Potter was to make annual rental payments to Baker, due on September 15 of each year.⁸⁸ In 1950, the payment was not received until September 18, and Baker refused to accept it.⁸⁹ On October 17, 1950, Baker sued for cancellation of the lease.⁹⁰ The initial ruling was in his favor, but on appeal, the Supreme Court of Louisiana reversed, holding that the payment had been reasonably timely and that there was no ground for cancellation of the lease.⁹¹

The defendants, who prevailed in the Supreme Court decision, filed for rehearing.⁹² The defendants, in addition to having the plaintiff's suit dismissed, sought to have the mineral lease extended for a period of two years after termination of the suit.⁹³ The Supreme Court initially declined to rule on this issue, but upon rehearing, addressed it.⁹⁴ The court explained that, when the initial

84. LA. MIN. CODE art. 119 (2000).

85. The Louisiana Supreme Court has never used the term "suspension doctrine" when deciding cases involving mineral rights. The phrase was not used until the district court's ruling in the *Ferrara* decision, *Ferrara v. Questar Exploration & Prod. Co.*, No. 69,590, 2010 WL 7877122 (La. Dist. Ct. June 25, 2010), but as Judge Caraway pointed out in his concurrence, the doctrine is misnamed. *Ferrara v. Questar Exploration & Prod. Co.*, 70 So. 3d 974, 986 (La. Ct. App. 2011) (Caraway, J., concurring). A more proper name likely would be the "doctrine of repudiation."

86. *Baker v. Potter*, 65 So. 2d 598 (La. 1952).

87. *Id.* at 598.

88. *Id.*

89. *Id.* at 599.

90. *Id.* at 598, 601.

91. *Id.* at 600.

92. *Id.*

93. *Id.* at 601.

94. *Id.*

suit was filed on October 17, 1950, the lease had been in effect for three years, one month, and two days.⁹⁵ Because the litigation put the lessee's rights in dispute, the defendants were entitled to an extension on the lease by the same amount of time the litigation lasted.⁹⁶ This holding reiterated the court's ruling in the 1924 decision, *Fomby v. Columbia County Development Co.*, where the court explained that "[t]he period of . . . litigation should not be included in determining when the leases expire."⁹⁷ This rule would come to be known as the "suspension doctrine."

The suspension doctrine provides that the obligations and duties of the lessee are suspended when a mineral lessor contends that a lease has expired and litigation ensues.⁹⁸ If the lessee prevails in the litigation, he is granted an extension of the mineral lease, usually equal to the amount of time the litigation was ongoing.⁹⁹

A. Application of the Suspension Doctrine in Louisiana

In addition to the *Baker* decision, the Louisiana Supreme Court and appellate courts have consistently applied the suspension doctrine in disputes over mineral leases.

The first application of the rule was by the Louisiana Supreme Court in 1916, in the decision of *Leonard v. Busch-Everett Co.*, where the rule was introduced as an equitable means of continuing an innocent lessee's rights.¹⁰⁰ The lessor sought cancellation of two mineral leases, and the lessee did not act during the period of litigation.¹⁰¹ The court awarded the lessee additional time to perform under the lease after the conclusion of the suit.¹⁰² Although the rule had not yet garnered a name, it would become a pattern in Louisiana Supreme Court decisions where the lessee of a mineral lease was not at fault.

The Louisiana Supreme Court came to the same conclusion in 1924 with the *Fomby* decision.¹⁰³ In that case, the court found that the initiation of the suit "made it utterly impracticable for assignees

95. *Id.*

96. *Id.* (noting that the litigation had lasted nearly two years).

97. *Fomby v. Columbia Cnty. Dev. Co.*, 99 So. 537, 542 (La. 1924).

98. *Baker*, 65 So. 2d at 285–86; see *Williams v. James*, 178 So. 384, 386 (La. 1938); see also *Knight v. Blackwell Oil & Gas Co.*, 1 So. 2d 89 (La. 1941).

99. *Id.*; see also *O'Neal v. JLH Enters., Inc.*, 862 So. 2d 1021 (La. Ct. App. 2003).

100. *Leonard v. Busch-Everett Co.*, 72 So. 749, 751 (La. 1916).

101. *Id.* at 750.

102. *Id.* at 751.

103. *Fomby v. Columbia Cnty. Dev. Co.*, 99 So. 537 (La. 1924).

of [a mineral lease] to exercise the rights granted by the leases.”¹⁰⁴ The court concluded that “the period of [the] litigation should not be included in determining when the leases expire.”¹⁰⁵

Significant time passed before *Baker v. Potter*, the next significant ruling from the Louisiana Supreme Court regarding the suspension doctrine.¹⁰⁶ However, only two years after the *Baker* decision, the Louisiana Supreme Court issued a decision, *Perkins v. Long-Bell Petroleum Co.*, which proved pivotal in the *Ferrara* litigation.¹⁰⁷ Unlike *Ferrara*, *Long-Bell* involved a mineral servitude and not a mineral lease. In *Perkins*, the defendants cited the *Baker*, *Leonard*, and *Fomby* decisions, but the court distinguished these cases because they dealt with mineral leases rather than servitudes.¹⁰⁸ In a lease, both the lessor and the lessee are interested in developing the property because both stand to make economic gains from exploration and production.¹⁰⁹ However, in the situation of a servitude, the landowner has no incentive to develop the land, and he is therefore without right to demand performance.¹¹⁰ His only duty is “to permit the servitude owner to explore as long as the servitude remains in [existence]. The grant of the servitude . . . does not oblige the owner of the estate subject to it to do anything.”¹¹¹

This brought the court to utilize what was then Civil Code article 792, which concerns obstacles and stopping prescription of nonuse from running.¹¹² Clearly, this rule is inapplicable to a mineral lease because leases are not subject to prescription. The court has never, and would never, apply former article 792 to mineral servitudes. Because the landowner did not create an obstacle, the court held that the prescription had fully run, and the servitude had expired.¹¹³

Since *Long-Bell*, the Louisiana Supreme Court has not addressed the issue of the suspension doctrine, but other courts have followed the rule, both before and after the adoption of the Louisiana Mineral Code. In both *Pennington*¹¹⁴ and *Hanszen*,¹¹⁵ decided by the Federal Fifth Circuit and Louisiana First Circuit

104. *Id.* at 542.

105. *Id.*

106. *Baker v. Potter*, 65 So. 2d 598 (La. 1952).

107. *Perkins v. Long-Bell Petroleum Co.*, 81 So. 2d 389 (La. 1955).

108. *Id.* at 392.

109. *Id.* at 393.

110. *Id.*

111. *Id.*

112. LA. CIV. CODE art. 792 (1870) (current version at LA. CIV. CODE art. 755 (2013)).

113. *Id.* at 394.

114. *C.B. Pennington v. Colonial Pipeline Co.*, 400 F.2d 122, 124 (5th Cir. 1968).

115. *Hanszen v. Cocke*, 246 So. 2d 200, 207 (La Ct. App. 1st 1971).

Court of Appeal respectively, the courts applied the reasoning of the Louisiana Supreme Court to mineral leases and held that the suspension doctrine applied.

In two decisions after the enactment of the Mineral Code, the suspension doctrine and its underlying rationale did not change. In *Rougon*, decided in 1983, the court quoted the language used by the first circuit in *Hanszen*, explaining that “according to established Louisiana jurisprudence,” the lessee is to be granted an extension for the period when the lease was in jeopardy.¹¹⁶ Similarly, in *Noel v. Amoco Production Co.*, the court found that the lessor was restricted from alleging insufficient production because of the pending lawsuit.¹¹⁷ The court held that “the lessee should not be punished for the breach of an obligation which is brought about by the lessor’s act of questioning the validity of the lease.”¹¹⁸

The suspension doctrine cases, spanning a period of roughly 70 years, all support the application of the suspension doctrine when a lessor fruitlessly attempts to have a mineral lease cancelled.¹¹⁹ Although the rules are different when mineral servitudes are involved, mineral leases are clearly subject to the suspension doctrine if the circumstances are appropriate.

B. The Ferrara Decision

In 1999, Questar acquired lease rights to a tract of the Ferrara land in Desoto Parish.¹²⁰ In 2000, Questar drilled a well on land unitized with the leased premises, though not on them.¹²¹ At the time of the district court’s ruling on the matter between the two parties, that well was still in production.¹²²

116. *Rougon v. Chevron, U.S.A. Inc.*, 575 F. Supp. 95, 100 (M.D. La. 1983) (quoting *Hanszen*, 246 So. 2d at 203).

117. *Noel v. Amoco Prod. Co.*, 826 F. Supp. 1000, 1015 (W.D. La. 1993).

118. *Id.* at 1014 (equating *Noel* to *Lelong v. Richardson*, 126 So. 2d 819, 829–30 (La. Ct. App. 1961)).

119. See *Baker* 65 So. 2d 598; *Ferrara v. Questar Exploration & Prod. Co.*, 70 So. 3d 974 (La. Ct. App. 2011).

120. *Ferrara*, 70 So. 3d at 977.

121. *Id.*

122. *Id.* Outside of this well, there was no evidence of any development by Questar. The presence of the well may seem to indicate that Questar must have been aware of the Haynesville Shale’s presence, but it was later discovered at depths not explored by Questar, or anyone else for that matter. Several other wells were drilled in the area between 1998 and 2000, including a dry hole on the Ferrara property. *Ferrara v. Questar Exploration & Prod. Co.*, No. 69,590, 2010 WL 7877122 (La. Dist. Ct. June 25, 2010).

In March of 2008, Chesapeake Energy¹²³ announced the discovery of the Haynesville Shale, an unprecedented, large natural gas formation spanning across northwest Louisiana and into east Texas.¹²⁴ On August 18, 2008, the Louisiana Commissioner of Conservation issued a statement recognizing the shale formation and its potential economic capacity.¹²⁵ Seven days later, the Ferraras sent a letter to Questar demanding release of the lease or, alternatively, that they explore and develop the deeper zones within the Haynesville Shale.¹²⁶ Questar did not immediately act or respond to the request, and on October 10, 2008, the Ferraras filed suit for cancellation of the lease.¹²⁷

1. District Court Ruling

At trial, evidence of Questar's drilling activity between August and December of 2008 was admitted, showing that they had drilled 70 wells in the Haynesville Shale formation, none of which were on the Ferrara property.¹²⁸ Questar objected that the development evidence was inadmissible, claiming that the suspension doctrine made it irrelevant.¹²⁹ Though all of the evidence involved Questar actions that occurred after filing of the suit, the trial court nevertheless admitted it.¹³⁰ After hearing Questar's argument for why the suspension doctrine should be applied, the district court explained that this case was distinct from the cited cases because "of the 'unique characteristics of the Haynesville Shale'" and that the suspension doctrine was inapplicable because of "the existence of the highly productive, 'world-class asset,' namely the Haynesville shale."¹³¹

123. Chesapeake Energy is the second largest producer of natural gas and one of the most active companies in drilling oil and gas wells in North America. Chesapeake claims to be the most active driller of new wells in the U.S. CHESAPEAKE ENERGY CORPORATION, <http://www.chk.com/Pages/default.aspx> (last visited Oct. 1, 2013).

124. *Haynesville Shale – Haynesville Shale Formation*, OILSHALEGAS.COM, <http://oilshalegas.com/haynesvilleshale.html> (last visited Oct. 1, 2013).

125. *Ferrara*, 70 So. 3d at 978 (noting that the commissioner also dispensed with the production test requirement for proposed units in the Haynesville Shale, which effectively allowed approval of Haynesville wells to be expedited dramatically).

126. *Id.*

127. *Id.*

128. *Ferrara*, 2010 WL 7877122 (La. Dist. Ct. June 25, 2010).

129. *Ferrara*, 70 So. 3d at 978–79.

130. *Id.*

131. *Ferrara*, 2010 WL 7877122.

2. First Hearing at the Louisiana Second Circuit Court of Appeal

On Questar's appeal, the Louisiana Second Circuit Court of Appeal also declined to apply the suspension doctrine to the facts of the case.¹³² The Second Circuit explained that the suspension doctrine did not apply for several reasons.¹³³ First, the court questioned whether the suspension doctrine had survived the enactment of the Mineral Code in 1974, but ultimately elected not to address the issue.¹³⁴ Second, the court explained that, even if the suspension doctrine were in force, it is only to be applied to mineral servitudes and not mineral leases.¹³⁵

The court cited both former Civil Code article 792 and equity as the foundations of the suspension doctrine.¹³⁶ Article 792, as discussed, has been reenacted as Civil Code article 755, which discusses obstacles as reasons to suspend prescription of nonuse against a servitude.¹³⁷ Since the dispute in question was over a mineral lease, the "doctrine" could not be applied.¹³⁸ Finally, the court declined to apply the suspension clause that had been written into the contract between the Ferraras and Questar.¹³⁹ The court declined to apply this part of the contract to the litigation because it was only applicable in situations where the right or interest of the lessee is disputed, and the Ferraras never disputed Questar's right to develop, only performance of its implied obligation of further exploration under Mineral Code article 122.¹⁴⁰

Despite rejecting Questar's arguments that the suspension doctrine should apply, the Second Circuit nonetheless reversed the district court's ruling, holding that there was insufficient evidence to prove that Questar had failed to sufficiently explore and develop the

132. *Ferrara*, 70 So. 3d at 981.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. LA. CIV. CODE art. 755 (2013); *id.* (citing *Perkins v. Long-Bell Petroleum Co.*, 81 So. 2d 389, 394 (La. 1955), where a mineral servitude was in dispute, and *Baker v. Potter*, 65 So. 2d 598, 601 (La. 1952), where a mineral lease was in dispute, but the court dismisses *Baker* without discussion or reason).

138. *Ferrara*, 70 So. 3d at 981.

139. The clause read: "Should the right or interest of Lessee hereunder be disputed by Lessor, or any other person, the time covered by the pendency of such dispute shall not be counted against Lessee either as affecting the term of the lease or for any other purpose, and Lessee may suspend all payments without interest until there is a final adjudication or other determination of such dispute." *Id.*

140. *Id.*

property.¹⁴¹ The court noted that “[c]ancellation is a harsh remedy that is rarely granted; the breach must be substantial to warrant dissolution.”¹⁴² The Ferraras had allowed only 46 days between their demand notice and the filing of the suit, which the court found to be unreasonable.¹⁴³ In conclusion, the court held that “[t]he district court was plainly wrong to find that Questar never intended to develop the Ferraras’ deep rights.”¹⁴⁴ In the Second Circuit’s opinion, the suspension doctrine was inapplicable, but Questar nevertheless was held to not be in violation of its implied obligations under the lease.¹⁴⁵

3. *On Questar’s Application for Rehearing*

On application for rehearing, Judge Caraway, who was not on the original three-judge panel, wrote an opinion concurring in the denial of rehearing.¹⁴⁶ Two of the other four judges joined his opinion.¹⁴⁷

Caraway argued that the suspension doctrine should apply.¹⁴⁸ Without holding back, Caraway stated that, in the original opinion, the “misnamed suspension ‘doctrine’ is cast aside by the majority as untethered equity without any analysis of the parties’ contractual obligations in this breach of lease action. The lessee is thus admonished for ‘its dilatory conduct after suit was filed.’”¹⁴⁹

Caraway explained that the suspension doctrine is not based on prescription, as stated by the Second Circuit in the original opinion.¹⁵⁰ There is no servitude theory involved in the suspension doctrine.¹⁵¹ Instead, there are bilateral obligations between the lessor and lessee, and the institution of a suit clearly disturbs them.¹⁵² The Second Circuit’s opinion was a “mistaken discarding of established law.”¹⁵³

The lessor’s failed suit for lease cancellation amounts to a breach of its warranty of peaceful possession, and the lease must be

141. *Id.* at 985. The court noted that more than one of the cases cited by Questar were decisions that predate the Mineral Code’s effective date. *Id.* at 981.

142. *Ferrara*, 70 So. 3d at 982; *see* LA. MIN. CODE art. 137 cmt. (2000).

143. *Ferrara*, 70 So. 3d at 984–85.

144. *Id.* at 985.

145. *Id.* at 974.

146. *See id.* at 985–88 (Caraway, J., concurring).

147. *Id.* at 987–88.

148. *Id.* at 986.

149. *Id.*

150. *Id.* at 987.

151. *Id.*

152. *Id.* at 986.

153. *Id.* at 987.

suspended.¹⁵⁴ Caraway cited this warranty theory in the 1937 decision, *Smith v. Kennon*, which supported the argument that a formal repudiation, such as the filing of a suit, puts the obligations of continuous performance in jeopardy.¹⁵⁵ Further, there was no evidence that Questar did not intend to explore and develop the leased property.¹⁵⁶ Finally, addressing the conclusion of the district court that there might be some “Haynesville exception,”¹⁵⁷ to the measure of a reasonably prudent operator, Caraway concluded that no such exception existed.¹⁵⁸

III. PROPOSAL FOR REVISION

A. *The Questar Decision*

Louisiana jurisprudence, including multiple decisions from the Louisiana Supreme Court, indicate that Judge Caraway’s concurring opinion was the correct application of law and that the Second Circuit’s interpretation of the suspension doctrine was flawed.¹⁵⁹ Initially, the Second Circuit held that the suspension doctrine did not, in any situation, apply in instances where a mineral lease was in dispute, restricting any potential application of the doctrine to mineral servitudes.¹⁶⁰ Even then, the Second Circuit questioned whether the doctrine had survived the drafting of the Mineral Code.¹⁶¹ However, other Louisiana courts have almost exclusively applied the suspension doctrine in cases involving mineral leases, and not servitudes.

Cases decided both before and after the enactment of the Mineral Code follow the reasoning of the suspension doctrine. Although each decision citing the suspension doctrine subsequent to the adoption of the Mineral Code was rendered in federal court, those courts correctly applied the suspension doctrine.¹⁶² The facts in those cases were extremely similar to those in the *Ferrara* case,¹⁶³

154. *Id.* at 986.

155. *Id.* (citing *Smith v. Kennon*, 175 So. 763 (1937)).

156. *Id.* at 985.

157. *Id.* at 987. The original Second Circuit panel noted an unpublished writ grant where the court “rejected the same district court’s finding that the Haynesville Shale’s ‘quality and composition render it different from ordinary minerals.’” *Id.* at 982 n.5.

158. *Id.* at 987.

159. *See generally* *Baker v. Potter*, 65 So. 2d 598, 601 (La. 1952).

160. *Ferrara*, 70 So. 3d at 981.

161. *See generally* *Ferrara*, *id.* at 974.

162. *Noel v. Amoco Prod. Co.*, 826 F. Supp. 1000 (W.D. La. 1993); *Rougon v. Chevron, U.S.A. Inc.*, 575 F. Supp. 95 (M.D. La. 1983).

163. *Ferrara*, 70 So. 3d 974.

and Caraway was accurate in his attempt to correct the Second Circuit's interpretation of well-settled law.

Mineral Code article 2 says that the Mineral Code is a supplement to the Civil Code, and in cases of conflict, the Mineral Code prevails.¹⁶⁴ In areas where the Mineral Code provides no law, the Civil Code governs.¹⁶⁵ In regard to the suspension doctrine, because neither the Mineral Code nor the Civil Code negate its validity, the doctrine must still be in effect. Indeed, the Mineral Code articulates the lessor's obligation to allow the lessee peaceful possession,¹⁶⁶ and the institution of a lawsuit is in clear violation of that obligation. Further, the Second Circuit cites the Civil Code as the foundation and root of the suspension doctrine in the *Ferrara* decision.¹⁶⁷ Because the Mineral Code does not exclude the existence of the suspension doctrine, it is still valid.

B. Comparison to Texas Mineral Law

Louisiana courts that allow suspension of the lessee's obligations during a period of litigation are consistent with the rules governing similar situations in other states.

In Texas, for example, the equivalent of the suspension doctrine is well established and regularly applied. In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, the Texas Supreme Court was presented with a lessor seeking to dissolve a mineral lease granted to a lessee, Coastal Oil & Gas.¹⁶⁸ Similar to Louisiana law, the court explained that a lessee has a continuous obligation to develop a mineral lease.¹⁶⁹ However, the repudiation of a lease by a lessor relieves the lessee from any and all obligations to develop or conduct operations.¹⁷⁰ The lessee's obligations are not reinstated, if at all, until the validity of the lease is determined by the court.¹⁷¹ Just as the suspension doctrine provides in Louisiana, the Texas Supreme Court has found it unreasonable to expect a lessee to develop a challenged lease.

In a case similar to *Coastal Oil & Gas, Ridge Oil Co. v. Guinn Investments, Inc.*, the Texas Supreme Court reached the same

164. LA. MIN. CODE art. 2 (2000).

165. *Id.*

166. LA. MIN. CODE art. 119 (2000).

167. *Ferrara*, 70 So. 3d at 981.

168. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 5–6 (Tex. 2008).

169. *Id.* at 19.

170. *See id.* at 20.

171. *Id.*

conclusion.¹⁷² The 2004 decision resolved a dispute involving a lessor who sought to cancel a mineral lease granted to the lessee.¹⁷³ The lease stated that it would remain in effect “as long as operations are being carried on.”¹⁷⁴ Again, the Texas court concluded that the lessee would not be bound to continue operations during the course of litigation because the lessee cannot be held responsible when the lessor is challenging his rights.¹⁷⁵

In Texas, if the court determines that the lease has not terminated, and thus survives the lessor’s suit, the remedy is to allow the lessee “a reasonable time after termination of the litigation in which to perform conditions required to extend the lease.”¹⁷⁶ Essentially, this rule has the same effects in Texas as the suspension doctrine does in Louisiana. Where the suspension doctrine has allowed lessees a “reasonable time” or, in some cases, an exact amount of time to resume the obligations of the lease, the “doctrine of repudiation” in Texas almost always allows a “reasonable time” to fulfill the obligations of the lease after the conclusion of the litigation.

C. A Louisiana Without the Suspension Doctrine

If Louisiana courts adopted the opinion that the suspension doctrine is inapplicable to mineral leases, there would be several negative consequences. Primarily, mineral lessors would be able to coerce lessees into producing and operating at higher standards than necessary. One of the advantages of the suspension doctrine is that it forces the lessor to remain at a distance while the lessee is attempting to operate. If the lessor brings suit for cancellation and is unsuccessful, the lessor has spent time and money litigating, and the lessee still has the same amount of time to operate under the lease as he would have had there not been any litigation. If the suspension doctrine were not applicable, lessees may be pressured to acquiesce to any demand by the lessor, regardless of how unreasonable the demand may be, in order to avoid litigation.

172. Ridge Oil Co. v. Guinn Invs., Inc., 148 S.W.3d 143, 157 (Tex. 2004).

173. *Id.* at 147.

174. *Id.* at 148.

175. *Id.* at 156; *see also* Mitchell Energy Corp. v. Samson Res. Co., 80 F.3d 976, 982 (5th Cir. 1996); Chesapeake Exploration, L.L.C. v. Valence Operating Co., No. H-07-2565, 2008 WL 4240486 (S.D. Tex. Sept. 10, 2008); Kothmann v. Boley, 308 S.W.2d 1, 4 (Tex. 1957).

176. NRG Exploration, Inc. v. Rauch, 671 S.W.2d 649, 652 (Tex. Ct. App. 1984); *see also* Chesapeake Exploration, 2008 WL 4240486 (S.D. Tex. Sept. 10, 2008).

Without the suspension doctrine, any suit by the lessor, regardless of whether it was successful, would count against the lessee's time remaining on the lease. Even if the lessor's suit were held to be frivolous, the lessee would still have significantly less time to perform and utilize the lease. If the lessee wanted to drill for the full duration of the lease, he would have to do so during the pendency of any suit, jeopardizing any potential profits. Even worse, if the litigation lasted beyond the length of the lease, and there is no production at the time of the suit, the lessor could effectively force the lessee to abandon the lease or operate it during the litigation at his own peril. The suspension doctrine serves as a way to buffer this potential problem, and it is critical that courts continue to apply it where lessors dispute mineral leases.

D. Proposed Revisions to the Louisiana Mineral Code

The Louisiana Legislature should amend either Mineral Code article 119 or 122 to reflect the continued applicability of the suspension doctrine to mineral leases. Although case law indicates that the suspension doctrine is good law, clarification from the Legislature would eliminate any doubt as to its continued efficacy.

If article 119 were to be amended, as this author urges it should, the Legislature must clarify that "disturbing the possession" of the lessee includes initiating an ultimately unsuccessful lawsuit that disputes the validity of the lease. If the Legislature were to amend article 122, it would be necessary to state that litigation over the leased property serves as a sufficient cloud over the title to suspend the implied obligation to conduct future exploration, both for accumulating time in which the lessee does not develop the property and producing evidence of the lessee's operations outside of the leased property during the period of the litigation. The lessee obviously has the *right* to continue exploration and development, but he should not be bound to do so when his rights are disputed by the lessor.

Another possible revision would be adding a duplicate of Mineral Code article 59 to the chapter on mineral leases. An example of the article would read:

If within the primary term, the owner of a mineral lease is prevented from exercising its rights under the lease by an obstacle that he can neither prevent nor remove, the primary term does not run as long as the obstacle remains.

Even if the Legislature declined to redress the articles in the Mineral Code, the Louisiana Mineral Law Institute could still provide much-needed clarification. As seen in the discussion of Mineral Code

articles 59 and 122, the comments to the Mineral Code articles are enormously illustrative. If the Institute inserts a comment to either of the articles proposed for revision, courts would have the necessary guidance and confidence to appropriately apply the suspension doctrine. Although the suspension doctrine is clearly established, the Second Circuit's misinterpretation indicates the need for clarity. By simply inserting a comment to either article 119 or article 122, the requisite transparency to the law surrounding the suspension doctrine would be ensured. In any case, the filing of a suit by a mineral lessor seeking cancellation should be considered an obstacle.

CONCLUSION

The suspension doctrine is good law, and its applicability to mineral leases should not be at risk of possible equivocation by Louisiana courts. By revising these Mineral Code articles, the Louisiana Legislature would bolster the confidence of private drilling companies in developing leases in Louisiana. The Haynesville Shale continues to be an important resource for the state going forward, and clarifying the law concerning a lessee's protection in a mineral lease is critical. Further, the Haynesville play has shown the potential of mineral development in several other emerging plays across the state. Regardless of the Haynesville development, Louisiana has a prodigious future in oil and gas development. The Legislature has an opportunity to bolster what courts have held to be good law. A revision to the Mineral Code would be in the best interest of all concerned, and the suspension doctrine should be explicitly listed as good law to avoid any possible lingering confusion or dispute.

*Noah B. Baker**

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