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Louisiana Oil & Gas Update

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LOUISIANA

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I. JURISPRUDENCE

A. *Legacy Litigation: Claims for "Additional Remediation"*

In *State v. Louisiana Land and Exploration Co.*, the State of Louisiana and the Vermilion Parish School Board sued several defendants, seeking remediation and a money judgment for contamination allegedly caused by the defendants' oil and gas activities.[1] Such "legacy litigation" is governed in part by Louisiana Revised Statute 30:29, which provides that, if a defendant is found liable for contamination, the Department of Natural Resources must propose a remediation plan, and the court must approve either that plan or some other plan that a party proves is more feasible. Any damages awarded to fund the plan are paid into the registry of the court.[2]

The defendants sought a summary judgment because the plaintiffs were not entitled to a money judgment exceeding what was necessary to fund the approved plan.[3] The defendants noted that 30:29(D) requires the entirety of the damages award to be placed into the registry of the court, except as provided by 30:29(H).[4] In turn, Subsection (H) states in part:

> This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Nor shall it preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section *as may be required in accordance with the terms of an express contractual provision*. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court.[5]

The defendants argued that Subsection (H) barred a money judgment for "remediation in excess of . . . the plan" because no contract expressly authorized additional cleanup in this case.[6] A majority of the

1. State v. La. Land and Exploration Co., 2012-0884 (La. 1/30/13); 110 So. 3d 1038.
2. *Id.* at 1049.
3. *Id.* at 1040–41.
4. *Id.* at 1064.
5. LA. REV. STAT. ANN. § 30.29(H) (2013) (emphasis added).
6. *Louisiana Land*, 110 So. 3d at 1053.

Louisiana Supreme Court disagreed, stating that Louisiana Revised Statute 30:29 is procedural, not substantive.[7]

The Court's logic seemed to be that, if the Court interpreted the statute as limiting damages to the amount needed to fund the approved plan, that would change substantive rights, at least in those cases in which a plaintiff otherwise would have been entitled to a cleanup in excess of regulatory standards, because such an interpretation of the statute would entirely take away any remedy for a portion of the plaintiffs' injury. In contrast, to the extent that the statute provides that the portion of a money judgment needed to fund the approved plan must be put into the registry of the court and then used to fund a cleanup, the statute merely specifies that the particular remedy awarded for a particular portion of the plaintiffs' injury will be an actual cleanup, rather than a payment of the amount of money that would be needed to fund such a cleanup.

B. *Lease Royalty Disputes*

1. When is Royalty Due

In *Slattery Co. Inc. v. Chesapeake Louisiana LP*, the plaintiff, Slattery Co. ("Slattery"), owned land in Caddo Parish that was subject to a mineral lease held by Chesapeake.[8] Chesapeake completed two wells on the leased premises in early 2011.[9] Chesapeake began sales from one of the wells in January 2011 and began sales from the other well in February 2011.[10] Slattery and Chesapeake exchanged emails regarding when Chesapeake intended to start paying royalties on production from the two wells, but as of April 2011, Chesapeake had not paid such royalties.[11]

On April 13, 2011, Slattery made a written demand on Chesapeake for the payment of royalties from the two wells.[12] Within thirty days of receiving the letter, Chesapeake responded to Slattery in writing, stating in part: "We are setting up your royalty interest in our system . . . ." Chesapeake began paying royalties on production from the first well on June 29, 2011, and began paying royalties on production from the second well on September 29, 2011.[13]

Slattery brought suit, and subsequently sought a summary judgment that it was entitled to relief that included double damages, attorney's fees, and interest.[14] Although Chesapeake did not make royalty pay-

7. *Id.*
8. Slattery Co. v. Chesapeake La. LP, No. 11-CV-1399, 2013 WL 1152718 (W.D. La. Mar. 19, 2013).
9. *Id.* at *1.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at *2.
14. *Id.* at *1.

ments within thirty days of receiving Slattery's written demand, the court denied Slattery's motion for summary judgment.[15] The court noted that "[a] necessary precondition for the award of damages is a finding that the mineral royalties were actually 'due.'"[16] Louisiana Mineral Code Article 123 provides that a mineral lessee must make timely payments "according to the terms of the contract or the custom of the mining industry in question."[17] Because the lease at issue did not specify when payment of royalties was due, such payments were due in accordance with industry custom.[18] The court concluded that there was an issue of disputed fact regarding whether, under industry custom, royalties were due at the time Slattery made its written demand.[19]

Finally, Slattery argued that Chesapeake's reliance on industry custom was an affirmative defense that was waived because it was not properly pleaded.[20] The court rejected that argument, concluding that it was part of plaintiff's burden to prove that royalties were already due when the plaintiff made written demand for payment.[21] Accordingly, the court denied Slattery's motion for summary judgment.[22]

2. Whether Pre-Suit Notice of Royalty Claim Can be Given on Behalf of Putative Class

In *Williams v. Chesapeake Louisiana, Inc.*, the plaintiffs brought a putative class action, asserting claims based on the alleged underpayment of royalties.[23] Chesapeake filed a motion seeking a denial of certification on grounds that Mineral Code Article 137 requires a lessor to give the lessee thirty-days' notice before bringing a claim for non-payment of royalties.[24] Here, the plaintiffs who brought the putative class action had purported to give the Article 137 notice on behalf of a class of lessors.[25] Chesapeake asserted that each lessor must give the notice, and that a person cannot give notice on behalf of a proposed class of lessors who have not themselves given notice.[26]

Following prior precedent, the court held that, under Louisiana law, each individual lessor had to give notice, and that notice cannot be given on behalf of a proposed class.[27] The court also rejected the

15. *Id.* at *1.
16. *Id.* at *4.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *4 n.3.
21. *Id.*
22. *Id.* at *1.
23. Williams v. Chesapeake La., Inc., No. 10-1906, 2013 WL 951251 (W.D. La. Mar. 11).
24. *Id.* at *1.
25. *Id.* at *2.
26. *Id.*
27. *Id.* at *4.

plaintiffs' argument that, because the plaintiffs sought only monetary damages and not lease dissolution, the notice requirement did not apply.[28]

The court also examined whether U.S. Supreme Court jurisprudence makes Article 137's notice requirement inapplicable in federal actions.[29] The district court noted that, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the United States Supreme Court held that a New York statute that barred class certifications in cases in which plaintiffs pursue certain types of claims did not preclude a federal court sitting in diversity from certifying such a class action when plaintiffs assert such claims.[30] The Supreme Court reasoned that the New York rule was procedural and that Federal Rule of Civil Procedure 23, which does not bar class actions in such situations, controlled.[31]

The district court concluded that *Shady Grove* did not control the question of whether a royalty class action could proceed in a Louisiana federal court without each member of the proposed class having satisfied the notice requirement specified in Article 137.[32] The district court reasoned that Mineral Code Article 137 and the articles that accompany it contain substantive and procedural provisions that are so intertwined they cannot be separated.[33] Therefore, class certification was not proper on the royalty claims.[34]

Finally, the court considered the plaintiffs' claims for unjust enrichment and their motion for certification of a class to pursue those claims.[35] The court granted Chesapeake's motion to deny certification of those claims, as well as Chesapeake's motion to dismiss those claims on summary judgment.[36] Under Louisiana law, a claim for unjust enrichment is unavailable if the law provides any other remedy.[37] Because Louisiana allows a claim for underpayment of royalties, the plaintiffs failed to state a claim for unjust enrichment.[38]

3. Whether Royalties are Owed on Hedging Profits

In *Cimarex Energy Co. v. Chastant*, Cimarex was a mineral lessee, and Chastant was the lessor.[39] The mineral lease required royalties to

28. *Id.* at *2.
29. *Id.* at *4.
30. *Id.* at *3.
31. *Id.* at *4.
32. *Id.*
33. *Id.* at *5.
34. *Id.*
35. *Id.* at *6.
36. *Id.* at *8, *10.
37. *Id.* at *8.
38. *Id.* at *9.
39. Cimarex Energy Co. v. Chastant, Nos. 6:11-CV-1713, 6:11-CV-2146, 2012 WL 6652360 (W.D. La. Dec. 18, 2012), *aff'd*, 2013 WL 3964121 (5th Cir. 2013).

be paid on oil based on the market price "f.o.b" and for royalties to be paid on gas based on the market value at the mouth of the well.[40] Cimarex had earned some profits through "hedging,"[41]—a type of transaction in which a company protects itself against the risk that a commodity will drop in price by purchasing futures contracts for that commodity.[42] Chastant argued that Cimarex owed royalties on those profits. Chastant noted that Cimarex had included hedging profits in the commodity prices it reported in certain filings with the Securities and Exchange Commission.[43] Chastant also cited *Frey v. Amoco Production*, in which the Louisiana Supreme Court held that a lessee owed royalties on a take-or-pay case settlement because the settlement was an "economic benefit accruing from the leased land, generated solely by virtue of the lease."[44] Chastant's arguments were rejected by the court, which held that Cimarex did not owe royalties on its hedging profits.[45]

4. Deductibility of Post-Production Costs

In *Dickson v. Sklarco, L.L.C.*, the plaintiffs and their predecessors in interest granted a series of oil and gas leases to Sklarco, L.L.C. ("Sklarko") for certain land in Caddo Parish in 2005.[46] Sklarco granted a sublease to Petrohawk Properties, LP ("Petrohawk") for depths below the Hosston formation.[47] Petrohawk established production of natural gas and began paying royalties.[48] At first, Petrohawk paid royalties that were calculated based on the sales price of the gas, without any deduction of post-production costs.[49] Later, Petrohawk began taking a deduction for gathering and transportation costs.[50] The plaintiffs brought suit, arguing that Petrohawk was not entitled to deduct such costs.[51]

Both the plaintiffs and Petrohawk moved for summary judgment, each asserting that the lease was unambiguous.[52] The court began its analysis of the leases by noting that the parties used "Bath" form leases.[53] The printed portion of the leases provided that the royalties to be paid by the lessee to the lessor would be "on gas . . . sold . . . off

40. *Id.* at *1–2.
41. *Id.* at *1.
42. *Id.* at *2.
43. *Id.*
44. Frey v. Amoco Prod. Co., 603 So. 2d 166 (La. 1992).
45. *Cimarex Energy Co.*, 2012 WL 6652360, at *4.
46. Dickinson v. Sklarco, L.L.C., No. 5:11-CV-00352, 2013 WL 1828051 (W.D. La. Apr. 29, 2013).
47. *Id.* at *1.
48. *Id.* at *2.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at *1–2.
53. *Id.* at *5.

the premises . . . the market value at the well of one-fifth (1/5) of the gas so sold . . . , provided that on gas sold at the wells the royalty shall be one-fifth (1/5) of the amount realized from such sale . . . ."[54] The court noted that the proper interpretation of such a clause is well-established under Louisiana jurisprudence for circumstances in which a lessee sells gas away from the well and incurs costs in moving the gas from the well to the place of sale.[55] In such circumstances, the royalty should be calculated based on the "gross proceeds of the sale," minus "costs of taking the gas from the wellhead to . . . the point of sale."[56] The court noted that, if the printed provision had been the only provision relevant to the deductibility of costs, the court's analysis "would end here."[57]

But the parties attached to each lease an "Exhibit B" that contained additional clauses, one of which was a paragraph that discussed deductibility of costs.[58] The paragraph stated:

> The parties agree that post production costs may be deducted from . . . the proceeds from the sale of . . . natural gas . . . insofar and only insofar as such costs either enhance the value of the product being sold and the price obtained for such product or are required to make the product marketable. Without limitation upon the foregoing, the treating, processing, or dehydrating of natural gas to meet pipeline quality specifications shall be deemed to enhance the value of the product being sold.[59]

The plaintiffs argued that this clause precluded the deduction of gathering and transport costs.[60] They asserted that, under the doctrine of *ejusdem generis*, the effect of listing "treating, processing, or dehydrating" as specific examples of deductible costs was to limit deductible costs to costs of "the same class," and that gathering and transporting costs were not in the same class.[61] The court rejected that argument, noting that the lease clause stated that the listed examples were "without limitation upon" the clause's general description of the types of costs that would be deductible.[62] The court concluded that this prevented application of the *ejusdem generis* doctrine.[63]

Petrohawk argued that the clause, which they called "Paragraph 8," unambiguously allowed the deduction of gathering and transport costs because the gathering and transport of the gas enhance its value.[64]

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at *6.
58. *Id.* at *2.
59. *Id.*
60. *Id.*
61. *Id.* at *6–7.
62. *Id.* at *7.
63. *Id.*
64. *Id.*

The court seemed to agree, stating, "The Court agrees that under its interpretation of Paragraph 8 alone, gathering and transportation costs could be deducted from royalty payments as long as those costs were shown to enhance the value of the product being sold and the price obtained."[65] Thus, under the court's reasoning, Petrohawk should prevail under the royalty clause of the printed lease, if it was read alone, or paragraph 8 of Exhibit B, if it was read alone.

But the court saw what it believed was a problem with Petrohawk's argument. If Paragraph 8 of Exhibit B was given its natural reading, it would have virtually the same meaning as the royalty clause in the printed portion of the lease.[66] The court had concluded, however, that each paragraph in Exhibit B was intended to alter some clause in the printed form.[67] Therefore, reasoned the court, Exhibit B created "ambiguity" regarding the parties' intent.[68] Accordingly, the court denied both parties' motions for summary judgment.[69]

C. *Lease Maintenance Disputes: Judicial Ascertainment Clause*

In *B.A. Kelly Land Co. L.L.C. v. Questar Exploration and Production Co.*, a mineral lessor filed suit, seeking a declaratory judgment that the mineral lease covering its property had expired subsequent to the primary term, because the lessees did not produce minerals or conduct operations for a period of several consecutive months.[70]

The lessees contested the lessor's claim, arguing that the lease had not terminated for two independent reasons. First, the lease's habendum clause provided that the lease would remain in effect for the primary term "and as long thereafter" as minerals were produced or the

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65. *Id.*

66. *Id.* at *8.

67. *Id.* at *7.

68. *Id.* at *9. The court's reasoning can be questioned. Although the court referred to the existence of an "ambiguity," the court actually seems to have concluded that the two royalty clauses—one in the printed form and one in the typewritten form—were each unambiguous and that each allowed for the deduction of post-production costs, provided that those costs increased the value of the gas. What the court apparently meant when it referred to "ambiguity" was that that court had concluded that the parties' actual intent must have been different than what was stated in the typewritten form because the court was convinced that the parties must have intended for every provision in the typewritten form to modify some provision in the printed form. But this ignores the possibility that the parties intended for the royalty clause in the typewritten form to clarify the printed form, rather than modify it. Under Louisiana law, the court should apply the language of the contract as written, and should not resort to the consideration of extrinsic evidence to interpret the contract in the absence of ambiguity or absurd result. LA. CIV. CODE art. 2046. It does not appear that ambiguity was present or that an absurd result would occur if the lease was interpreted as written.

69. *Dickinson*, 2013 WL 1828051, at *9.

70. B.A. Kelly Land Co. v. Questar Exploration & Prod. Co., 47,509 (La. App. 2 Cir. 11/14/12); 106 So. 3d 181, 184–85.

lease was "maintained in any other manner provided."[71] The lessees asserted that the lease's *force majeure* and shut-in clauses each provided "other manners" for maintaining the lease and that the lease had been maintained pursuant to one or the other of those clauses.[72]

Second, even if one of those clauses did not maintain the lease, the "judicial ascertainment" clause prevented termination because that clause establishes certain conditions for lease termination that had not been satisfied.[73] The clause states that, once the lessee had produced minerals,

> this lease shall not be subject to forfeiture or loss, either in whole or part, for failure to conduct operations in compliance with this contract except after judicial ascertainment that Lessee has failed to conduct such operations and has been given a reasonable opportunity after such judicial ascertainment to prevent such loss or forfeiture by complying with and discharging its obligations as to which Lessee has been judicially determined to be default.[74]

The lessees argued that this "judicial ascertainment clause" prevented lease termination because the lessor had never obtained the required "judicial ascertainment" or given the lessees a chance to cure any default.[75]

The lessor replied that the shut-in clause did not apply under the circumstances that had existed during the period of non-production.[76] Further, the lack of production was a resolutory condition that caused automatic termination of the lease. Thus, the judicial ascertainment clause did not apply.[77] Moreover, the lessees were not entitled to an opportunity to cure because once the lease has terminated for non-production, subsequent production cannot retroactively revive the lease.[78] The district court dismissed the lessor's claims and denied the lessor's request to amend its petition to request a judicial ascertainment.[79] The lessor appealed.[80]

The Louisiana Second Circuit agreed with the district court that the judicial ascertainment clause would prevent automatic termination, provided that there was a bona fide dispute regarding termination, and that there was a bona fide dispute regarding whether the shut-in clause had prevented termination of the lease.[81] Accordingly, the les-

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71. *See id.* at 184 nn.1, 2 (citing habendum clause).
72. *Id.* at 192.
73. *Id.* at 188.
74. *Id.* at 184–85.
75. *Id.* at 186.
76. *Id.*
77. *Id.* at 189.
78. *Id.*
79. *Id.* at 186.
80. *Id.* at 184.
81. *Id.* at 192. Though the plaintiffs' argument was rejected by the appellate court, it should be noted that there is some authority to support the plaintiffs' position. LA.

sor's suit seeking a declaration that the lease had terminated was premature.[82] But rather than affirming the dismissal, the appellate court remanded, holding that the district court had erred when it denied the lessor's request for leave to amend its petition to seek a judicial ascertainment regarding whether the shut-in clause applied.[83]

D. *JOA Dispute—Applicability of JOA to Future Leases*

In *Clovelly Oil Co. v. Midstates Petroleum Co.*, Clovelly Oil and Midstates Petroleum each became parties to a 1972 joint operating agreement ("JOA") through assignments of interest.[84] The JOA was based on the 1956 version of the "AAPL Form 610 – Model Form Operating Agreement."[85] The JOA provided that Clovelly owned a 56.25% interest in the mineral rights governed by the JOA and that Midstates owned the remainder.[86]

A dispute arose after Midstates acquired a new mineral lease in 2008 that covered an area near the original leases that were governed by the JOA.[87] Clovelly argued that it was entitled to a 56.25% interest in the new lease.[88] Clovelly noted that the text of the JOA stated that "the lands, oil and gas leasehold interests and oil and gas interests intended to be developed and operated under this agreement" were "described in 'Exhibit A.'"[89] Exhibit A, which was titled "Lands subject to this agreement," described a geographical area that included the land covered by Midstates' new lease.[90] Effectively, Clovelly argued that this language operated like an area of mutual interest clause.[91]

Midstates disagreed. Midstates noted that the JOA used present tense language when it described the mineral interests to which the JOA would apply.[92] For example, the JOA's preamble states:

> [T]he parties . . . *are* owners of oil and gas leases covering and, if so indicated, unleased mineral interests in the tracts of land described in Exhibit "A," and all parties have reached an agreement to explore and develop these leases and interests for oil and gas . . . .[93]

REV. STAT. 31:133 & cmt. (2013); *see also* PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS OIL AND GAS LAW § 682.2 (2010).

82. *B.A. Kelly Land Co.*, 106 So. 3d at 193.
83. *Id.*
84. Clovelly Oil Co., v. Midstates Petroleum Co., 2012-2055 (La. 3/19/13); 112 So. 3d 187, 189.
85. *Id.* at 190.
86. *Id.*
87. *Id.* at 191.
88. *Id.*
89. *Id.*
90. *Id.* at 190–91.
91. *Id.* at 191.
92. *Id.* at 192–93.
93. *Id.* at 190 (emphasis added).

Similarly, the JOA defined "oil and gas interests" by referring to interests that "*are* owned by the parties."[94]

The district court granted summary judgment for Midstates, but the Louisiana Third Circuit reversed, stating that Exhibit A conflicted with the printed portions of the JOA that referred to interests in the present tense.[95] The appellate court held that, under traditional rules of contract interpretation, the language of Exhibit A would prevail because it was typewritten and thus was more likely to reflect the true intent of the parties than the other, pre-printed portions of the JOA.[96]

The Louisiana Supreme Court reversed the Third Circuit's decision and reinstated judgment for Midstates.[97] The Court agreed that typewritten language generally will prevail over printed language when a conflict between them is irreconcilable, but a court should attempt to reconcile different portions of a contract, even if one of the portions is printed and the other is typed.[98] Here, the purported conflict between different portions of the JOA could be reconciled if the JOA was interpreted as applying only to mineral leases and other mineral interests owned by the parties when the JOA was entered, with Exhibit A describing a geographical area within which all those interests were located.[99]

The Court explained that such an interpretation was reasonable because the parties had not entered a separate area of mutual interest agreement ("AMI"), which parties commonly do when they want a JOA to apply to future leases.[100] The court also cited commentators who have noted that JOAs typically do not apply to future leases in the absence of an AMI.[101] Indeed, the American Association of Professional Landmen, the promulgator of the model form used by the parties, had filed an amicus brief supporting Midstates's position.[102]

E. *Unit Disputes*

1. Formation of Voluntary Units

In *Midnight Drilling, LLC v. Triche*, Midnight Drilling drilled and completed a well, which began producing oil and gas in 2009.[103] The Louisiana Office of Conservation entered an order creating a compulsory unit, designating Midnight's well as the unit well and naming

94. *Id.* at 190 (emphasis added).
95. *Id.* at 191.
96. *Id.* at 193.
97. *Id.* at 196.
98. *Id.* at 193–94.
99. *Id.* at 194.
100. *Id.* at 195.
101. *Id.* at 195–96.
102. *Id.* at 196 n.35.
103. Midnight Drilling, LLC v. Triche, No. 2012 CA 1043, 2013 WL 3149456 (La. Ct. App. June 19, 2013).

Midnight as the operator.[104] The unit covered an area where Midnight had executed multiple mineral leases as lessee.[105] Because numerous lessors disputed who had a right to receive lease royalty payments, Midnight filed a concursus action.[106]

The rival claimants for the disputed mineral royalties were the "Triches" and the "Cole group."[107] The Triches owned two tracts of land, one located to the north of the Intercoastal Waterway, and the other located to the south of the Waterway, but they did not own the land under the Intercoastal Waterway itself.[108] The Cole group inherited a mineral servitude that covered the north tract and a separate mineral servitude that covered the south tract.[109] The servitudes were created when the Cole group's predecessor-in-interest had sold the two tracts but reserved mineral rights for each.[110]

The royalties in dispute were royalties attributable to the north tract, which was within the compulsory unit. The Triches argued that they were entitled to the disputed royalties because the mineral servitude covering that tract had terminated by prescription of nonuse before 2009.[111] The Cole group disagreed, asserting that prescription of nonuse had been interrupted by the drilling of an earlier well, the Cole #2 Well, and that the servitude therefore had not terminated.[112]

The Cole group advanced two arguments in support of their contention that the drilling of the earlier well (the Cole #2 Well) interrupted prescription. First, it argued that the parties had created a voluntary unit for the Cole #2 Well and that the unit area included the northern

104. *Id.* at *1.

105. *Id.*

106. *Id.* A concursus is similar to an interpleader action. Cimarex Energy Co. v. Mauboules, 2009-1170 (La. 4/9/10); 40 So. 3d 931, 938–39; *compare* LA. CODE CIV. PROC. ANN. arts. 4651–62 (1998), *with* FED. R. CIV. P. 22, *and* 28 U.S.C. § 1335 (2012).

107. *Midnight Drilling, Inc.*, 2013 WL 3149456, at *1. Louisiana law does not recognize mineral estates. Hodges v. Long Bell Petroleum Co., 121 So. 2d 831, 836 (La. 1959). But it recognizes mineral servitudes. LA. REV. STAT. ANN. § 31:21 (2000). A mineral servitude is similar to a mineral estate, except that a mineral servitude terminates by prescription of nonuse if it is not used for any ten-year period. § 31:27. For purposes of interrupting prescription of nonuse, a "use" is either the production of minerals to which the servitude applies or good faith drilling in an attempt to produce such minerals. §§ 31:29, 31:36.

108. *Midnight Drilling, Inc.*, 2013 WL 3149456, at *1.

109. Under Louisiana law, a person cannot create a servitude that covers noncontiguous tracts. § 31:64. Because the north and south tracts were separated by land owned by someone other than the Triches, the servitude rights inherited by the Cole group constituted two separate servitudes—one covering the north tract and the other covering the south tract. *See Midnight Drilling, Inc.*, 2013 WL 3149456 at *1.

110. *Id.*

111. In a couple of places in the opinion, the First Circuit referred to "liberative prescription," but that reference is erroneous. *See id.* at *2. Although prescription of nonuse previously was classified as a form of liberative prescription, the Louisiana Civil Code now recognizes that liberative prescription and prescription of nonuse are different types of prescription. LA. CIV. CODE ANN. art. 3445 cmt. (b) (2007).

112. *Midnight Drilling, Inc.*, 2013 WL 3149456, at *2.

tract.[113] The Cole group did not allege that the parties had agreed in writing to create a unit. Instead, the Cole group claimed that the parties "acted in such a manner that the Cole #2 well was produced on a unit basis" and that they had created a voluntary unit through their conduct.[114]

The Louisiana First Circuit rejected that argument. The court noted that mineral servitudes are classified as "incorporeal immovables" under Louisiana law, and agreements transferring rights relating to immovables generally must be in writing.[115] The court then concluded that the parol evidence rule barred the Cole group's argument that the parties created a voluntary unit through their conduct.[116]

The Cole group's second argument was based on the fact that, although the Cole #2 well was not bottomed beneath the northern tract, the well was a directional well that had been drilled from a surface location on the northern tract.[117] The Cole group argued that the drilling on the northern tract interrupted prescription.[118] The First Circuit also rejected that argument.[119] The court held that the bottom hole location from which oil and gas would be produced, not the surface well site, was the critical location for determining whether the drilling of the well interrupted prescription.[120] Because the bottom hole location was not beneath the northern tract, and because the well was not a unit well for a unit that included the servitude tract at issue, the drilling of the well did not interrupt prescription of nonuse.[121]

2. Alternate Unit Wells

In *Walker v. J-W Operating Co.*, the Commissioner of Conservation established units in Caspiana Field following the discovery of natural gas there in the 1970s.[122] The Commissioner's orders included findings of fact that each unit could be efficiently drained by one well.[123] Beginning in the 1990s, various companies requested approval for "alternate unit wells" to be drilled as additional wells within existing units that already had a unit well.[124] The companies asserted that newer geologic evidence showed that the existing unit wells were not eco-

113. *Id.* at *3.

114. A unit can be created by order of the Commissioner of Conservation or by agreement of the parties. LA. REV. STAT. ANN. § 31:213(6) (2013). Unit activity can interrupt prescription of nonuse. §§ 31:33–36.

115. *Midnight Drilling, Inc.*, 2013 WL 3149456, at *3.

116. *Id.* at *3–4.

117. *Id.* at *4.

118. *Id.*

119. *Id.* at *4–5.

120. *Id.* at *5.

121. *Id.* at *6.

122. Walker v. J-W Operating Co., No. 2012 CA 0662, 2012 WL 6677913, at *8 (La. Ct. App. Dec. 21, 2012).

123. *Id.* at *1.

124. *Id.* at *2.

nomically and efficiently draining their units.[125] After public hearings, the Commissioner approved numerous alternate unit wells, several of which were drilled on land that was owned by the plaintiffs, but burdened by a mineral servitude.[126]

The plaintiffs filed suit, seeking a declaratory judgment that the Commissioner lacked authority to approve alternate unit wells because Louisiana Revised Statute 30:9 defines a unit to be "the maximum area which may be efficiently and economically drained by one well."[127] The court noted, however, that the issue was not the initial establishment of a unit well, but what the Commissioner has authority to do when evidence shows that an existing unit well is not efficiently draining the unit.[128] The plaintiffs argued that the Commissioner's only option is to reconfigure units, but the Louisiana First Circuit disagreed, holding that the Commissioner has discretion to approve alternate unit wells in order to prevent the waste of resources.[129]

F. *Unit Operator's Duty to Send Reports to Unleased Mineral Interest Owners*

In certain circumstances, Louisiana law requires the operator of a unit well to give the owners of unleased mineral interests "a sworn, detailed, itemized statement" containing "the costs of drilling, completing, and equipping the unit well."[130] If an operator fails to comply with this requirement and then does not send the required reports within thirty days after receiving written notice of such failure, the operator can forfeit its right to demand that the owner of the unleased interest contribute its share of the costs of drilling and completing the well.[131] Two recent cases have applied these statutes in circumstances that required the court to interpret the statutes.

1. In What Circumstances Does the Duty to Send Reports Apply

In *Adams v. Chesapeake Operating, Inc.*, the court interprets two statutes: one that governs the duty of a unit operator to send certain reports to unleased owners and a second that establishes a penalty that can apply if the operator breaches its reporting duty.[132]

The primary difficulty in the interpretation of the statutes is determining what circumstances will trigger the duty to report. Louisiana Revised Statute 30:103.1(A) states that the operator of a unit well for

125. *Id.* at *1.
126. *Id.*
127. *Id.* at *4.
128. *Id.* at *5.
129. *Id.* at *6.
130. LA. REV. STAT. ANN. § 30:103.1 (2013).
131. § 30:103.2.
132. Adams v. Chesapeake Operating, Inc., No. 11-CV-1504, 2013 WL 1193716 (W.D. La. Mar. 21, 2013).

a compulsory unit "shall issue" detailed reports of drilling costs to the owners of unleased mineral interests within ninety days of completion of the well.[133] If read in isolation, that provision suggests that the operator of a compulsory unit always has a duty to send reports to the owners of unleased mineral interests. On the other hand, a separate paragraph in the same statute, Louisiana Revised Statute 30:103.1(C), states that the operator must send such reports "by certified mail to each owner of an unleased oil or gas interest who has requested such reports in writing, by certified mail addressed to the operator."[134] If read in isolation, this second provision clearly suggests that the duty to report does not apply unless the owner of an unleased mineral sends written requests via certified mail.

One way to reconcile the two provisions is to interpret Revised Statute 30:103.1(C) as governing *whether* a duty to report applies, and to interpret 30:103.1(A), which contains much more detail regarding what must be reported, as governing *what* must be reported and *how quickly* it must be reported. Another way to reconcile the two provisions would be that 30:103.1(A) establishes a reporting duty that always applies and that 30:103.1(C) establishes a process by which an unleased mineral interest owner can demand that the reports he requests be sent by certified mail.

The second statute, Louisiana Revised Statute 30:103.2, establishes the penalty than can apply. The statute states:

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133. In its entirety, the provision states:

> A. Whenever there is included within a drilling unit, as authorized by the commissioner of conservation, lands producing oil or gas, or both, upon which the operator or producer has no valid oil, gas, or mineral lease, said operator or producer shall issue the following reports to the owners of said interests by a sworn, detailed, itemized statement:
>
> (1) Within ninety calendar days from completion of the well, an initial report which shall contain the costs of drilling, completing, and equipping the unit well.
>
> (2) After establishment of production from the unit well, quarterly reports which shall contain the following:
>
> (a) The total amount of oil, gas, or other hydrocarbons produced from the lands during the previous quarter.
>
> (b) The price received from any purchaser of unit production.
>
> (c) Quarterly operating costs and expenses.
>
> (d) Any additional funds expended to enhance or restore the production of the unit well.

§ 30:103.1(A).

134. Louisiana Revised Statute 30:103.1(C) states:

> Reports shall be sent by certified mail to each owner of an unleased oil or gas interest who has requested such reports in writing, by certified mail addressed to the operator or producer. The written request shall contain the unleased interest owner's name and address. Initial reports shall be sent no later than ninety calendar days after the completion of the well. The operator or producer shall begin sending quarterly reports within ninety calendar days after receiving the written request, whichever is later, and shall continue sending quarterly reports until cessation of production.

§ 30:103.1(C).

> Whenever the operator permits ninety calendar days to elapse from completion of the well and thirty additional calendar days to elapse from date of receipt of written notice by certified mail from the owner or owners of unleased oil and gas interests calling attention to failure to comply with the provision of R.S. 30:103.1, such operator or producer shall forfeit his right to demand contribution from the owner or owners of the unleased oil and gas interests for the costs of the drilling operations of the well.[135]

In *Adams*, the plaintiff, his siblings, and his son were owners of an unleased mineral interest in a compulsory unit for which Chesapeake drilled a unit well in October 2010.[136] In February 2011, the plaintiff, his siblings, and his son each sent a certified letter to Chesapeake, stating that the company had "failed to comply with the provisions of Louisiana RS 30:103.1."[137] The letters also requested copies of the reports required by Louisiana Revised Statute 30:103.1.[138] Within a short time, Chesapeake sent copies of the required reports to the plaintiff's siblings and son, but did not send a report to the plaintiff.[139]

The plaintiff did not contact Chesapeake again about the issue until mid-April, when his attorney sent a letter to Chesapeake.[140] The letter stated that Chesapeake had forfeited its right to demand contribution from the plaintiff for his share of drilling costs because the company had not sent a report of costs to the plaintiff.[141] Chesapeake sent a copy of the report to the plaintiff later that month, but the plaintiff filed suit, seeking a judgment that Chesapeake had forfeited its right to seek a contribution for drilling costs from him.[142]

The United States District Court for the Western District of Louisiana rejected the plaintiff's claims.[143] The court held that the Louisiana Revised Statute 30:103.1 reporting duty does not apply unless and until the unleased mineral interest owner has sent a written request by certified mail.[144] Because the plaintiff's February 2011 letter to Chesapeake was the plaintiff's first letter requesting a report, Chesapeake did not have a duty to send a report until it received that letter.[145]

The court also analyzed Louisiana Revised Statute 30:103.2. The court noted that this statute imposes a penalty on an operator who fails to send a report within thirty days of receiving written notice of his "failure to comply" with the reporting requirements of 30:103.1.[146]

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135. § 30:103.2.
136. *Adams*, 2013 WL 1193716, at *1.
137. *Id.* at *1–2.
138. *Id.* at *2.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at *6.
144. *Id.*
145. *Id.* at *4.
146. *Id.* at *4, *6.

The court reasoned that the plaintiff's February 2011 letter to Chesapeake could not serve as written notice of its "failure to comply" with the duty to send reports because that duty did not exist until Chesapeake received the February 2011 letter.[147] Thus, the company's first written notice of its failure to comply with its reporting duties was when it received the mid-April letter from the plaintiff's lawyer. Because Chesapeake sent the required reports within thirty days of receiving the lawyer's letter, the 30:103.2 penalty did not apply.

2. What Constitutes a Detailed Report

In *Brannon Properties, LLC v. Chesapeake Operating, Inc.*, the parties disputed whether a report that the operator sent contained sufficient detail to satisfy the operator's statutory duty to send well cost reports to unleased mineral interest owners.[148]

There, Chesapeake was the operator of a unit well for a compulsory unit, and Brannon Properties was an unleased mineral interest owner.[149] Chesapeake sent a report to Brannon within the time required, but the parties disputed whether the report was sufficiently "detailed" to satisfy the statutory requirement that an operator provide a "detailed" statement of costs.[150] Chesapeake's report, which was eighteen pages long, listed the date and dollar amount of expenses and identified each expense as being either a "Tangible Drilling and Completion" cost or an "Intangible Drilling and Completion" cost.[151] The United States Fifth Circuit Court of Appeals ruled that the report was not sufficient to satisfy the statutory duty to provide a report that contains a detailed list of drilling expenses.[152] The court acknowledged that the statute, which imposes the duty, does not specify what information is required, but the court stated that the list, which Chesapeake provided to Brannon, could not satisfy any reasonable understanding of the word "detailed."[153] The court contrasted the report to other reports that Chesapeake had provided, including a report for a different well that contained a description of the type of equipment, supplies, or service associated with each cost.[154] Because the report at issue did not satisfy statutory requirements, the court held that Chesapeake had forfeited its right to demand that Brannon pay its share of drilling costs for the unit well.[155]

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147. *Id.* at *4.

148. Brannon Props., LLC v. Chesapeake Operating, Inc., No. 12-30306, 2013 WL 657781 (5th Cir. Feb. 21, 2013).

149. *Id.* at *1.

150. *Id.*

151. *Id.*

152. *Id.* at *2, *4.

153. *Id.* at *2.

154. *Id.* at *3.

155. *Id.* at *4.

G. *Acquisitive Prescription*

In *Roberts v. Patterson*, the plaintiff owned and held record title to certain property in Bossier Parish.[156] She had acquired the property from her father, who had owned it since the 1950s.[157] During that entire time, a fence had stood along a line that the plaintiff thought was the north border of the property.[158] But the fence was, in fact, somewhat north of the property line, so that the fence enclosed 2.2 acres to which the plaintiff did not have record title.[159]

In 1999, a company called Investors Property Group ("IPG") purchased a tract that included the 2.2 acres.[160] IPG later leased the 2.2 acres to lessees for use as pastureland, and those lessees erected a fence enclosing the 2.2 acres.[161] The plaintiff then brought a possessory action, claiming to have the right to possess the property.[162] IPG intervened, asserting ownership of the property and thereby converting the litigation to a petitory action.[163]

The trial court heard evidence and entered a judgment that the plaintiff had acquired ownership of the surface by thirty years acquisitive prescription.[164] But the court held that the plaintiff had not acquired ownership of mineral rights because she had not used the mineral rights and therefore had not "possessed" them.[165] The plaintiff appealed the portion of the judgment holding that she had not acquired mineral rights. The other parties did not appeal.[166]

The appellate court reversed.[167] The court noted that Mineral Code Article 160 states: "When title to land is perfected by a possessor on the basis of acquisitive prescription, the title includes mineral rights to the extent that his possession included mineral rights for the required prescriptive period."[168]

The appellate court appears to have reached the correct conclusion. Further, Mineral Code Article 160, which the appellate court cited, ultimately controls the result. But that article does not fully explain the apparent error in the district court's reasoning because Article 160 merely provides that a person who obtains ownership of land by acquisitive prescription also acquires ownership of mineral rights "to the extent that his possession included mineral rights." But given that

156. Roberts v. Patterson, 47, 576 (La. App. 2 Cir. 1/16/13); 108 So. 3d 816.
157. *Id.* at 817.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 818.
165. *Id.*
166. *Id.*
167. *Id.* at 818–19.
168. *Id.* at 818.

mineral rights may be "possessed" by using them,[169] and that the plaintiff had not used the mineral rights, someone might conclude that Article 160 was consistent with the district court's decision, rather than with the appellate court's decision. Yet such a conclusion would be erroneous. Mineral Code Article 155, which was not explicitly cited by the appellate court, provides that a person who does not have title, but who possesses property as if he were the owner, "possesses the mineral rights inherent in perfecting ownership of land."[170] That possession can be lost if someone else actually uses the mineral rights,[171] but apparently no one else had used the mineral rights during the thirty-year period in which the plaintiff was acquiring ownership via acquisitive prescription.

H. *Usufructs*

In *Quantum Resources Management, L.L.C. v. Pirate Lake Oil Corp.*, Mr. and Mrs. Jones had three children.[172] Mrs. Jones died testate, bequeathing to Mr. Jones all of her property, including certain land that was separate property and subject to a mineral lease.[173] But the children were forced heirs, and in a succession proceeding, the legacy to Mr. Jones was reduced to a one-half interest in the property and a usufruct[174] over the remaining one-half interest.[175] No oil or gas well existed on the property prior to Mrs. Jones death, but two wells were drilled between the time of her death and the time of the court order reducing Mr. Jones's legacy.[176] Mr. Jones and his daughter disputed who was entitled to royalties from the wells, so the operators of the wells filed a concursus.[177]

Article 190(B) of the Mineral Code governs the extent to which a usufructuary of land has a right to proceeds from minerals when the "usufruct is that of a surviving spouse," but Louisiana's Fifth Circuit concluded that article 190(B) did not apply.[178] The court reasoned

169. LA. REV. STAT. ANN. § 31:153 (2013).
170. § 31:155.
171. § 31:156.
172. Quantum Res. Mgmt., L.L.C. v. Pirate Lake Oil Corp., 12-256 (La. App. 5 Cir. 11/13/12); 105 So. 3d 867.
173. *Id.* at 869.
174. A "[u]sufruct is a real right of limited duration on the property of another." LA. CIV. CODE ANN. art. 535 (2013); *see also* art. 890 (regarding usufruct of a surviving spouse). If a usufruct is for the life of the usufructuary (the person who receives the benefit of the usufruct), the usufruct is somewhat like a life estate. *See* Pendegast v. Schawtz, 30 La. Ann. 590 (La. 1878) (comparing usufruct to a life estate); *but see* Succession of Hunter, 105 So. 596, (La. 1925) (holding that the wording of particular bequest could not be construed as a usufruct and instead was an attempt to designate a common law life estate, which is not recognized under Louisiana law).
175. *Quantum*, 105 So. 3d at 869.
176. *Id.*
177. *Id.* at 869–70.
178. *Id.* at 873.

that Mr. Jones had inherited the usufruct in the capacity of a legatee, not as a surviving spouse.[179]

The court determined that Mr. Jones's usufruct was a conventional usufruct and that Mineral Code Article 190(A) applied.[180] It provides that "if there is no provision including the use and enjoyment of mineral rights in a conventional usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals as to mines or quarries actually worked at the time the usufruct was created."[181] With respect to oil and gas, Mineral Code Article 191 explains that this means the usufructuary is entitled to "the landowner's rights in minerals as to all pools penetrated" by any wells that were producing or capable of producing when the usufruct was created.[182]

Mr. Jones's daughter argued that Mr. Jones's usufruct was created at the time of Mrs. Jones's death (before any wells existed) because a legatee's right to inherited property arises at the time of a testator's death, but the court disagreed.[183] Mrs. Jones's testament had granted her husband full ownership.[184] The succession proceeding court reduced Mr. Jones's legacy (and substituted a usufruct) because it impinged on the children's rights as forced heirs, but forced heirs can waive their rights, and such rights do not affect a succession until asserted and recognized by a court.[185] Thus, Mr. Jones was entitled to proceeds from the well that was drilled after his wife died and before the judgment reducing his legacy.[186]

I. *Trespass Claim and Civil Code Article 670 Predial Servitude*

In *SGC Land, LLC v. Louisiana Midstream Gas Services*, Chesapeake had acquired a mineral lease that contained two clauses, which had the effect of generally prohibiting Chesapeake from using the leased premises for any purpose other than the support of a well drilled on the premises.[187] After Chesapeake began drilling a well on the leased premises, the company and the lessors entered a surface use agreement that authorized Chesapeake to construct a pipeline on the premises, but which also provided that the pipeline could only carry gas from wells drilled on the leased premises.[188] Chesapeake assigned its rights to Louisiana Midstream Gas Services, Inc. ("Mid-

179. *Id.*
180. *Id.*
181. *Id.* at 871–72.
182. *Id.* at 872.
183. *Id.* at 870.
184. *Id.* at 873.
185. *Id.*
186. *Id.* at 874.
187. SGC Land, LLC v. La. Midstream Gas Servs., 939 F. Supp. 2d 612, 615 (W.D. La. 2013).
188. *Id.*

stream"), which entered a third agreement with the lessors.[189] This agreement granted Midstream the right to construct and operate a pipeline along a specified route without any restrictions on the source of the gas that the pipeline carried.[190]

Midstream constructed a pipeline across the leased premises and began using it to carry both gas produced from the leased premises and "third party gas" produced from other property.[191] The plaintiffs discovered, however, that there was a section of pipeline "less than 30 feet" in length that strayed outside the route designated in the Easement and Right of Way by an amount "no more than 4.4 feet."[192] The plaintiffs brought suit for trespass, seeking a disgorgement of all profits earned by use of the pipeline.[193]

The United States District Court for the Western District of Louisiana noted that, under Louisiana law, a disgorgement of profits is not an available remedy for unauthorized possession of property unless the possession is in bad faith.[194] The court noted that the contracts authorized Midstream to construct and operate a pipeline "anywhere on the property," so long as it did not carry third party gas, and that the contracts authorized Midstream to construct and operate a pipeline that carried third party gas, as long as it followed a specified route.[195] The court concluded that the construction of the pipeline about four feet outside the route that was designated for a line that would carry third party gas "did not harm Plaintiffs" and did not appear to bring "any additional profits" to the lessees.[196] Further, the court stated that, "the entire record reveals an inadvertent surveying mistake, not bad faith." Thus, the remedy of disgorgement of profits was not available.[197]

The court found that the most appropriate damages analysis was derived from the doctrine of encroachment, which is found in Civil Code Article 670.[198] The article provides that, when a landowner in good faith constructs a building that encroaches on the neighboring property, and the neighbor does not complain until after the construction is substantially complete, the landowner who constructed the building is entitled to a predial servitude that allows the building to remain in place, though he must pay fair compensation for that servi-

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 620.
197. *Id.* Further, the court concluded that the violation committed by the lessees was "more accurately classified as a breach of contract, not a trespass." *Id.* at 619.
198. *Id.* at 620.

tude.[199] The court held that the defendants were entitled to a servitude for a "for a reasonable area surrounding the pipeline," subject to the obligation to pay the landowners for that servitude.[200]

The plaintiffs also sought lease dissolution based on the apparently undisputed fact that Chesapeake had used a frac pond and other facilities on the leased premises to support both the well drilled on the leased premises and a well drilled on other property.[201] Chesapeake argued that the lease prohibited the lessee from using the leased premises to support operations on other land until the first well was drilled on the leased premises, but allowed the leased premises to be used after that time to support operations on other land.[202] The court rejected Chesapeake's interpretation and concluded that Chesapeake's use of the facilities to support drilling activities on other properties was a violation of the lease.[203] But the court also noted that the surface use restrictions in the lease were "inartfully worded"[204] and that Chesapeake could have reached its interpretation of the surface use restrictions in good faith.[205] Under Louisiana law, a party's right to dissolution of a lease is subject to judicial control.[206] Under the circumstances of this case, the court held that dissolution was not appropriate.[207]

J. *Imprescriptible Mineral Servitudes*

In *Yates v. Marston*,[208] Ruby and Son Hui Yates (the "Yates") purchased land in Red River Parish in 1997 that was subject to two mineral servitudes. One of the servitudes, which was for one-half of any minerals produced from the property, was created in 1995 and was owned by Marston.[209] Young reserved the second servitude, which was for one-fourth of any minerals produced from the property, when he sold the property to the Yates in 1997.[210]

In 2002, the Yates sold the land to the Nature Conservancy. The deed transferring the land stated that the Yates "hereby expressly reserve unto themselves . . . all of the subsurface oil, gas and liquid hydrocarbons in, on, or under the property . . . and reversionary rights related thereto."[211] The immediate effect of this reservation was to

199. *Id.*
200. *Id.*
201. *Id.* at 622.
202. *Id.* at 618.
203. *Id.* at 619.
204. *Id.* at 622.
205. *Id.*
206. *Id.*
207. *Id.*
208. Yates v. Morrison, 48,009 (La. App. 2 Cir. 5/22/13); 121 So. 3d 673.
209. *Id.* at 674.
210. *Id.*
211. *Id.*

create a mineral servitude in favor of the Yates for one-fourth of all minerals.[212] The reservation could not immediately grant any greater servitude rights in favor of the Yates because of the outstanding servitudes in favor of Marston and Young for three-fourths of the minerals.[213] It is noteworthy for the dispute that later arose, however, that the Yates purported to reserve all of the mineral and reversionary rights.[214]

The Nature Conservancy sold the land to the United States in August 2003.[215] In March 2008, more than ten years after the creation of the servitudes held by Marston and Young, the Yates granted a mineral lease to Petrohawk Properties, LP ("Petrohawk"), which began drilling later that year, several Haynesville Shale wells for units that included the property.[216] Petrohawk's drilling apparently was the first mineral activity relating to the property in more than ten years. Petrohawk began producing natural gas from those wells and paid all royalties attributable to the property to the Yates.[217]

A dispute arose between the Yates, Marston, and Young regarding entitlement to royalties.[218] Marston and Young argued that their servitudes still were in effect and that they therefore were entitled to a share of proceeds from the production of Petrohawk's wells.[219] The Yates argued that the Marston and Young servitudes had terminated by prescription of nonuse, making the Yates the owners of all the mineral rights relating to the property.[220] Both sides relied on Mineral Code provisions relating to imprescriptible mineral servitudes, including Mineral Code Article 149.1, which was in effect at the time of Yates' sale to the Nature Conservancy, though the article has been repealed and replaced since then.[221] The former article stated:

> When land is acquired from any person by [a] . . . nonprofit land conservation organization by conventional deed, donation, or other contract and by the act of acquisition, a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the mineral right . . . .[222]

The Second Circuit noted that the statute referred to "mineral right" twice; the first time referred to "a mineral right," and the second time referred to "the mineral right."[223] The court acknowledged

212. *Id.*
213. *Id.* at 679.
214. *Id.*
215. *Id.* at 674.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 675.
220. *Id.* at 675–76.
221. *Id.*
222. *Id.*
223. *Id.* at 679.

that the phrase "*the mineral right* (definite article) appears to relate to the first, *a mineral right* (indefinite article)" and indeed that would seem to comport with the typical use of language.[224] Notwithstanding the statute's apparent meaning, the majority concluded that the phrase "the mineral right" did "not necessarily" apply only to "a mineral right."[225] Accordingly, the court stated that the statute's provision that prescription would not run against "the mineral right" was not necessarily limited to "a mineral right" created in the transfer of land to a nonprofit land conservation organization.[226] Instead, the majority's opinion was that the statute was ambiguous.[227] The court's explanation that the statue was ambiguous is not entirely convincing, but having reached that conclusion, the court had to decide how to interpret the supposedly ambiguous statute.

The court then said that it would interpret the statute in the manner that "best conforms to the purpose of the law."[228] The majority ultimately concluded that, under old article 149.1, the pre-existing servitudes held by Marston and Young were rendered imprescriptible by the Yates' sale of land to the Nature Conservancy.[229]

The court also addressed another issue. After the Yates sold the land to the Nature Conservancy, but before the Nature Conservancy re-sold the land to the Federal Government, the legislature repealed Article 149.1 and replaced it with a new article 149.[230] The new article 149 contained provisions with language very similar to the language in old Article 149.1 that allowed for the creation of imprescriptible servitudes. But the new article 149 also contained a new section that allowed a landowner to retain a reversionary interest with respect to outstanding mineral rights.[231] That new section explicitly states that the pre-existing servitude would still be subject to prescription.[232] The Yates argued that the new article should be given retroactive effect and that the article would both validate their purported reservation of a reversionary interest and make clear that prescription still ran on the pre-existing servitudes. The majority concluded, however, that this provision should not be given retroactive effect.[233] Judge Caraway dissented.[234]

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 667.
230. *Id.* at 680.
231. *Id.* at 675–76.
232. *Id.*
233. *Id.* at 681.
234. *Id.*

K. *Interpretation of Overriding Royalty Deed's "Calculate and Pay" Clause in Relation to the Deep Water Royalty Relief Act*

In *Total E&P USA, Inc. v. Kerr-McGee Oil & Gas*, the parties disputed the proper interpretation of an overriding royalty deed and whether the lessee's obligation to pay overriding royalties was affected by the Deep Water Royalty Relief Act ("DWRRA").[235]

The United States adopted DWRRA in 1995 to encourage drilling in deep waters on the outer continental shelf.[236] DWRRA authorized the Department of Interior to suspend collection of certain royalties that otherwise would be owed under federal offshore leases for the production of oil and gas in deep water between 1996 and 2000.[237] The suspension would apply until a certain threshold amount of production was obtained.[238]

In 1998, the Federal Government issued an offshore lease to Mariner Energy and Westport Oil and Gas.[239] Westport assigned overriding royalty interests ("ORRIs") to several persons.[240] The assignments contained a "calculate and pay" clause that stated: "The overriding royalty interest assigned herein shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner's royalty under the Lease."[241] Westport and Mariner later assigned their interests to Chevron, Total E & P ("Total"), and Statoil.[242]

In 2009, the new owners of the lease established production.[243] Because the production qualified for a royalty suspension, the owners did not pay royalties to the Federal Government, but Chevron began making payments to the ORRIs owners and continued to do so.[244] In contrast, Total and Statoil took the position that, for purposes of the "calculate and pay" clause, the royalty suspension was one of the "terms and conditions" of their obligation to make royalty payments to the "landowner."[245] Accordingly, they argued their obligation to make ORRIs payments was also suspended. The ORRIs owners disagreed and litigation ensued.[246]

The district court granted summary judgment for Statoil and Total, but the United States Fifth Circuit Court of Appeals reversed, con-

235. Total E&P USA, Inc. v. Kerr-McGee Oil & Gas Corp., 719 F.3d 424 (5th Cir. 2013).
236. *Id.* at 430.
237. *Id.*
238. *Id.*
239. *Id.* at 431.
240. *Id.*
241. *Id.* at 432.
242. *Id.* at 428.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*

cluding that the "calculate and pay" clause was ambiguous.[247] The Fifth Circuit stated that the clause could be interpreted as incorporating the federal regulations that define how royalties are calculated, without interpreting the clause as also incorporating DWRRA's suspension of royalty payment obligations.[248] Because of the ambiguity, the Fifth Circuit remanded the case for further proceedings.[249]

II. Legislation: Grant of Explicit Authority and Directive to Regulate Solution Mining

In 2013, Act No. 368 amended Louisiana Revised Statute 30:3 to add definitions of "solution mined cavern" and "solution mining injection well." Act No. 368 also amended Louisiana Revised Statute 30:4 to direct that the Office of Conservation must promulgate rules to regulate solution mining.

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247. *Id.* at 440–41.
248. *Id.*
249. *Id.* at 441.