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COMMENT

MINERAL RIGHTS: THE REQUIREMENT OF CONSENT AMONG CO-OWNERS

The Louisiana Mineral Code expressly requires that one who acquires a mineral servitude or lease from a co-owner of land must obtain the consent of "co-owners owning at least an undivided ninety percent interest" in the land in order to validly exercise the right.¹ This consent is required because the development of mineral interests constitutes a change in the destination of the land and would thereby infringe on the rights of a co-owner who did not consent and who wished to maintain the land in its current status.²

Co-ownership exists when there is a thing owned jointly in its entirety. Roman law recognized the concept of co-ownership as each co-owner "possessing an abstract portion of the whole," or a portion of "each molecule" of the property held in common.³ Unanimous consent was required between co-owners in order to modify the substance or change the destination of the thing. Any co-owner had the right to prevent an action to change the thing held in common. Thus, the one opposing a change had a greater right vis-a-vis the other co-owners, even though he may have been in the minority.⁴

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1. Article 164 of the Mineral Code provides that

[a] co-owner of land may create a mineral servitude out of his undivided interest in the land, and prescription commences from the date of its creation. One who acquires a mineral servitude from a co-owner of land may not exercise his right without the consent of co-owners owning at least an undivided ninety percent interest in the land. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations, except out of his share of production.

La. R.S. 31:164 (Supp. 1987).

Article 166 provides that

[a] co-owner of land may grant a valid mineral lease as to his undivided interest in the land but the lessee may not exercise his rights thereunder without consent of co-owners owning at least an undivided ninety percent interest in the land. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations or other costs, except out of his share of production.

La. R.S. 31:166 (Supp. 1987). See also *infra* note 21 and accompanying text.

2. *Gulf Ref. Co. v. Carroll*, 145 La. 299, 82 So. 277 (1919).

3. Comment, Ownership in Indivision in Louisiana, 22 Tul. L. Rev. 611 (1948).

4. *Carroll*, 145 La. at 303, 82 So. at 278-79.

French doctrine recognized co-ownership in the same manner as did Roman law. Aubry and Rau stated that

when there is indivision between several persons, each one of them possesses on the thing, in so far as concerns his or her share, all the rights compatible with the purely intellectual nature of this quota, and may exercise them unaided; on the other hand, no single one of these persons can confer rights on the entirety of the common property, or even on any specific part, without the consent of all the others.⁵

A co-owner thus may use the whole property for himself. By doing so, however, he may not interfere with the other co-owner's rights. One co-owner may prevent any change, no matter how advantageous and no matter how much the other co-owners desire it, as it is a co-owner's right to maintain the thing in its current condition.

This comment explores the concepts of co-ownership and consent among co-owners of mineral interests. It discusses what the consent entails, the effects on the consenting and nonconsenting co-owners, and suggests solutions to the problems encountered as a result of the requirement of consent.

LOUISIANA PRINCIPLES OF CO-OWNERSHIP

Prior to the adoption of the Louisiana Mineral Code,⁶ the Louisiana Civil Code governed all matters pertaining to mineral rights. The Civil Code provides that "[t]wo or more persons may own the same thing in indivision, each having an undivided share."⁷ In accordance with Roman doctrine, the Civil Code also requires that consent of all co-owners is necessary to establish a predial servitude on an estate owned in indivision.⁸ Likewise, under the mineral code a mineral servitude can be exercised only with the consent of the co-owners of the land.⁹

The Louisiana Supreme Court held in *Gulf Refining Co. v. Carroll*¹⁰ that a co-owner of land cannot exploit the land for minerals without the consent of his co-owner, and he cannot confer such a right on his

5. *Id.* at 303, 82 So. at 279, quoting Aubry and Rau, vol. 2, para. 221, pp. 404-05.

6. The Louisiana Mineral Code was enacted as Title 31 of the Louisiana Revised Statutes, Chapters 1 through 13, by 1974 La. Act No. 50. Co-ownership is governed by articles 164-187.

7. La. Civ. Code art. 480.

8. La. Civ. Code art. 714 provides that "[a] predial servitude on an estate owned in indivision may be established only with the consent of all the co-owners. When a co-owner purports to establish a servitude on the entire estate, the contract is not null; but, its execution is suspended until the consent of all coowners is obtained."

9. La. R.S. 31:164 (Supp. 1987).

10. 145 La. 299, 82 So. 277 (1919).

lessee. Gulf Refining had sought enforcement of a lease granted by one co-owner without the consent of the other co-owner. The court held that one co-owner can prevent another co-owner from undertaking mineral operations on the jointly owned property, as such use would constitute a change in its destination.¹¹

The mineral code provides for co-ownership of mineral rights.¹² Deviating slightly from the civilian tradition, the mineral code requires consent of co-owners owning at least an undivided ninety percent interest in the land or mineral interest in order to conduct mineral operations on the land.¹³ This requirement of consent is in direct conflict with most common law states. These states allow any co-owner of land or minerals to conduct mineral operations subject only to the duty to account to the other co-owners for their share of the profits,¹⁴ and to account to holders of future interests, if any, for waste of the estate.¹⁵ Thus, in other states, a minority owner is allowed to exploit the land for minerals despite the opposition of the majority.

THE REQUIRED CONSENT

It is clear that Louisiana law requires consent to conduct mineral operations on co-owned land or on co-owned mineral interests. A mineral servitude owner, however, is not required to obtain consent from the owner of the land subject to the servitude before developing minerals,¹⁶

11. "Co-owners are owners par mi et par tout, of part and of the whole. Neither of two co-owners has the exclusive right to any determinate part of the common property." *Id.* at 302, 82 So. at 278; see also *Amerada Petroleum Corp. v. Reese*, 195 La. 359, 196 So. 558 (1940), and *Sun Oil Co. v. St. Mineral Bd.*, 231 La. 689, 92 So. 2d 583 (1056), dismissed, 353 U.S. 962, 77 S. Ct. 1048, reh'g denied, 354 U.S. 943, 77 S. Ct. 1395 (1957).

12. Article 168 provides that "[m]ineral rights are susceptible of ownership in indivision." La. R.S. 31:168 (1975).

13. La. R.S. 31:164 and 166 (Supp. 1987). As originally enacted, these articles required unanimous consent among co-owners. By legislation enacted in 1986, the required consent was reduced to ninety percent interest.

14. For a good discussion of the common law view, see *Pico v. Columbet*, 12 Cal. 414 (1859).

15. Waste is defined as any permanent injury, loss of value, change of identity or destination, or loss of evidence of title by the tenant, and to the detriment of the future estate. This has been construed to mean that a tenant may continue to exploit open mines, but may not open new mines. See 1 Rest. Property, § 144 and *Burby*, Real Property, at 38-39 (1965). This result is consistent with the Louisiana Mineral Code. See La. R.S. 31:190, 191 (1975).

16. Article 169 provides that "[c]o-ownership does not exist between the owner of a mineral right and the owner of the land subject to the right or between the owners of separate mineral rights." La. R.S. 31:169 (1975). See also *Cox v. Sanders*, 421 So. 2d 869 (La. 1982); *Starr Davis Oil Co. v. Webber*, 218 La. 231, 48 So. 2d 906 (1950); and *Clark v. Tensas Delta Land Co.*, 172 La. 913, 136 So. 1 (1931).

for the right to develop is inherent in the very nature of the grant. Article 169 of the mineral code provides that co-ownership does not exist between the owner of land and the owner of a mineral right in the land; each has a separate right and is free to exercise this right at any time. Nor is consent required of the owners of fractional mineral servitudes;¹⁷ each owns a separate and distinct right and is free to conduct operations without the knowledge or approval of other fractional interest owners.¹⁸

As originally enacted, the mineral code required unanimous consent of co-owners. Legislation in 1986 amended this to allow operations with consent of co-owners owning ninety percent interest, thus allowing operations despite the disapproval of those owning a small interest.¹⁹ The governor vetoed legislation passed in 1987 to further reduce the required consent to seventy-five percent.²⁰

A. *Effect of Granting Rights Without Consent*

A co-owner of land may grant a valid mineral servitude or lease, but the right cannot be exercised without obtaining the requisite consent of ninety percent of all the interest owned in common.²¹ A valid contract exists between the parties, and the grantor cannot repudiate the contract for lack of his co-owners' consent. The exercise of the mineral right granted, however, will be suspended until ninety percent consent can be obtained. Nonetheless, prescription of the servitude or term of the lease continues to run from the time the right is granted.

This appears to confirm the rule of *Superior Oil Producing Co. v. Leckelt*,²² where the court held that a co-owner/lessor was estopped from

17. There is a fine distinction between co-owners of a mineral right and fractional mineral interest owners. Article 69 explains the difference as follows:

The conveyance or reservation by a mineral servitude owner of a portion of his rights does not divide the mineral servitude but creates only a co-ownership, except that if a person other than the servitude owner acquires all of the rights granted by the act creating the servitude in a specific geographic area, the servitude is divided.

La. R.S. 31:69 (1975). The division of the servitude creates a fractional mineral interest.

18. *Starr Davis Oil Co. v. Webber*, 218 La. 231, 48 So. 2d 906 (La. 1950).

19. 1986 La. Acts No. 1047, enacting La. R.S. 31:164, 166 and 175.

20. H.R. 1154, La. Reg. Sess. (1987), introduced by Messrs. Fernandez, Jenkins, and Sour, to amend and re-enact La. R.S. 31:164, 166 and 175.

21. The mineral code specifies that the consent given is based on the percentage of interest owned, and not on the number of co-owners. Thus, nine out of ten co-owners, who together own 50% of the interest, could not grant a servitude or lease validly exerciseable by the grantee even though they represent 90% of the owners; the one co-owner holding the other 50% interest must acquiesce. La. R.S. 31:164 and 166 (Supp. 1987). See *supra* note 1.

22. 189 La. 972, 181 So. 462 (1938).

preventing his lessee from exercising the servitude, as this would be contrary to his own contract. Thus, a lessor cannot prevent the lessee from acting by objecting that the other co-owners did not consent. Furthermore, the mineral code recognizes the binding effect of the contract as between the parties.²³

B. Form of the Consent

The mineral code does not provide the form by which consent is to be given; however, the jurisprudence has recognized tacit consent as sufficient. In *Superior Oil*, one co-owner granted a lease of his one-fifth share in the minerals to a grantee who in turn subleased his interest. The court found that the other co-owners had acquiesced in the payment of royalties to the grantee, since they were aware of these payments for a continued period of time and had not objected. Such acquiescence was tantamount to valid consent, and objections as to lack of consent could not later be raised. Therefore, consent can be given orally or inferred from the actions of a co-owner.

THE TERM AND EXTENT OF CONSENT

The mineral code addresses neither the effective term nor the nature and extent of the consent. One writer has suggested that once consent is given to conduct mineral operations it should be deemed a change in the destination of the property.²⁴ Thereafter, new consent for further mineral development would not be required at any time in the future. In essence, the consent would be to a change in the destination of the land. Unanimous or perhaps ninety percent consent of the co-owners would then be required to prevent any mineral operations in the future. Construed in this light, consent would be given to the general activity of mineral development, rather than to a particular lease or servitude.

Read literally, however, the mineral code does not seem to endorse this view. Articles 164 and 166 appear to require a particular lessee or servitude owner to obtain consent of the requisite co-owners rather than to allow him to take advantage of a prior consent given to other grantees.²⁵ This means that the consent given for the mineral operation

23. La. R.S. 31:164 (Supp. 1987), official comments.

24. Harrell, Problems Created by Co-ownership in Louisiana, 32 Min. L. Inst. 379, 428 (1985).

25. Article 164, in pertinent part provides, "[o]ne who acquires a mineral servitude from a co-owner of land may not exercise his right without the consent of co-owners owning at least an undivided ninety percent interest in the land." La. R.S. 31:164 (Supp. 1987). Article 166, in pertinent part provides, "[a] co-owner of land may grant a valid mineral lease as to his undivided interest in the land but the lessee may not exercise his rights thereunder without consent of co-owners owning at least an undivided ninety percent interest in the land." La. R.S. 31:166 (Supp. 1987). For full text of these articles, see supra note 1. See also supra note 21 and accompanying text.

is directed to the particular lease or servitude granted by a co-owner, and it expires with the term of the lease or with the prescriptive period of the servitude. Viewed this way, however, the rules may lead to problems for a co-owner who seeks to exercise the mineral rights he holds.

For example, if A and B are co-owners and A grants a servitude on his undivided one-half interest, clearly the servitude owner must obtain B's consent before he can conduct operations on the land. If A's consent is strictly personal to his particular grantee, A still could object to operations conducted by his co-owner, even though A has previously given his consent to utilize the land for mineral development. Furthermore, if A's consent is deemed to be personal, and if B also granted a servitude on his one-half to another grantee, each co-owner would be allowed to object to the other's grantee. There would be two grantees holding rights from each of the co-owners, each prevented from acting because each co-owner did not extend his consent to each grantee. If the two grantees joined together to exploit the land, however, it would appear that neither co-owner could object, since to do so would prevent his own grantee from exercising the very right which he extended.²⁶

The characterization of the nature of consent as personal thus leads to absurd and unfair results. It allows some grantees to operate, while disallowing the right to others, based on agreements between the grantees rather than on the consent granted by the co-owners. In other words, if the grantees can agree on development between themselves, they can proceed over the objection of a dissenting co-owner. If, however, they are unable to agree, they will both be denied their right of development even though all co-owners have consented, albeit to different grantees. The law requires consent of the co-owner, not agreement between grantees.

It may be that there exists a middle ground where the consent given is neither strictly personal, extending only to the particular grantee, nor general, extending to activity by anyone who obtains the right. It can be argued that if A grants a servitude to X, he is giving consent to mineral development, but only to the extent of the right he has created.

26. A's grantee could not object to activities of B, the other co-owner from whom he did not receive any right. A grantee has only the rights which he was given and no other rights. Granting a non-exclusive right to explore does not imply a grant of the right to object to exploration by others. The grantee is not a co-owner of other servitudes granted by other co-owners. Nor is he a co-owner with the other landowner; rather he owns a separate and distinct right. Thus, he is neither required to give consent nor allowed to prevent a co-owner from acting. Consent is reserved to the co-owners and does not extend to the grantees of other rights in the property. See La. R.S. 31:169 (1975).

In other words, if the servitude is granted for ten years, A gives his consent to mineral development for only ten years, or until production obtained under this servitude ceases. By granting the servitude, A allows B, his co-owner, to consent to X. This should allow B or his grantee to also conduct operations, since A could not prevent B or B's grantee from acting if they joined efforts with X. Therefore, A should not be allowed to prevent either B or his grantee from acting alone.

There is a problem with this middle ground solution. If B has granted a mineral right to Y which expires later than X's servitude, Y would be prevented from the exercise of his full right unless A consented to his activities upon the expiration of X's servitude. A would be under no obligation to extend his consent to Y, since his prior consent was subject to a term which had expired. This would be so even if Y had obtained production and was currently producing minerals at the time consent expired. Y could be forced to suspend operations, at great expense and loss of profits, while A could use the situation to obtain greater royalties and lease bonuses.

The problem resolves itself if the consent amounts to consent to the activity, thereby constituting consent to a change in the destination of the property. Such consent is not for a term, but lasts until all of the co-owners determine that mineral development should no longer be permitted,²⁷ because, by granting the mineral right, the co-owner implies his consent to mineral operations on the land.²⁸ This consent extends to the other co-owner as well as the grantor's grantee. Since a co-owner does not own a discrete, distinguishable part of the land, but instead owns an undivided portion jointly with another, he would necessarily be implying, by consent to his grantee, that he also would permit his co-owner to grant operations. Thus, once B grants a right to conduct operations as to his share, even if granted to a grantee other than A's, he would also be giving consent to A and A's grantee. Each is expressing his desire to develop minerals and should not be able to object to development by the other's grantee. Similarly, each grantee should be able to operate without obtaining additional consent, based on each co-owner's individual consent given to another grantee.²⁹

Neither grantee would be allowed to object to the other's operations on the land. As the co-owner could not convey a greater right than he had, each grantee, whether he obtained a servitude or lease, has a non-

27. Neither the mineral code nor interpreting jurisprudence has addressed the issue of whether all co-owners must consent, or whether 90% will suffice, to *cease* mineral development.

28. Harrell, *The Mineral Code After a Year, Where Are the Problem Areas?*, 23 *Min. L. Inst.* 93, 103 (1976).

29. Harrell, *supra* note 24, at 427-28.

exclusive right. Therefore, since the interest is non-exclusive, the grantee does not obtain the right to object to another who has also been granted a non-exclusive right to develop the land. Once a mineral right is granted, neither the granting co-owner nor the grantee can object to another's mineral activities on the land if this person holds a valid mineral right.

One can argue, however, that a co-owner who consents should be free to change his mind as to the development of minerals on his own land at any time. If both co-owners join to grant a mineral right which expires after ten years non-use, it can be argued that each now should be free to decide that no operations should be conducted, and that new consent must be obtained before a new servitude could be granted. This right to control the use of one's own property is inherent in our scheme of ownership.³⁰ At the same time, mineral exploitation is an on-going activity. To permit a unilateral change after consenting to the activity deprives another co-owner of his ability to continue to use property for purposes to which all co-owners previously consented. Once the parties have agreed to develop minerals, the destination of the property now includes such development. A co-owner may exercise his rights on the whole property in order to receive the returns to which he is entitled, but he is only allowed to retain his proportion of the profits.³¹ As pointed out previously, the contrary rule may deny to a co-owner the opportunity to develop minerals if the rights granted expire at different time periods. Therefore, a determination that consent is given to the activity of mineral development provides the most equitable results.

EXCEPTION TO THE RULE—PREVENTION OF WASTE OR DESTRUCTION

The Louisiana Supreme Court has recognized one situation in which consent is not required by a co-owner to conduct mineral operations. In *United Gas Public Service Co. v. Arkansas-Louisiana Pipe Line Co.*,³² a plaintiff brought suit to enjoin mineral operations by the defendant. The plaintiff claimed he was a co-owner and, as such, was entitled to prevent operations to which he did not consent. The defendant denied that the plaintiff was a co-owner and alleged that he was being injured because the plaintiff was draining gas beneath his property from gas wells located on the plaintiff's adjacent lands. The court found that the

30. Civil Code art. 477 provides that "[o]wnership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law." La. Civ. Code art. 477.

31. *Stinson v. Marston*, 185 La. 365, 169 So. 436 (1936); *Moreira v. Schwan*, 113 La. 643, 37 So. 542 (1904); *Heirs of Balfour v. Balfour*, 33 La. Ann. 297 (1881); *Smith v. Wilson*, 10 La. Ann. 255 (1855).

32. 176 La. 1024, 147 So. 66 (1933).

tract in question had no value other than mineral production and that it was within a proven gas field. The court refused to issue the injunction because the plaintiff's drainage destroyed the only value of the land, the plaintiff's claim of co-ownership was denied by the defendant, and the defendant was only acting to preserve the value of the land by preventing drainage. Therefore, the defendant's actions were not injurious to a co-owner's rights.

Subsequent jurisprudence has indicated that this exception to the requirement of consent by co-owners is a very limited one. The only case to consider the matter since *United Gas* refused to allow one co-owner to operate without consent where he failed to show that he would suffer irreparable injury even though there appeared to be no other use for the land than mineral development.³³

Despite the jurisprudential requirement of proof of irreparable injury before a co-owner may act without consent, the mineral code provides in article 176 that a co-owner of a servitude "may act to prevent waste or the destruction or extinction of the servitude, but he cannot impose upon his co-owner liability for any costs of development or operation or other costs except out of production."³⁴ The article further provides that in doing so he must act in good faith at all times, and allows him to act as to the entire interest, not just his proportionate share.

The mineral code makes no attempt to define the terms "waste" or "destruction" in article 176 and thus leaves much discretion with the courts. Many instances may arise in which one co-owner must act alone in order to preserve the existence of the servitude, such as in disputes regarding drilling exploratory wells or additional wells for development of leased property, or in developing multiple completions of wells.³⁵ Article 176 accords with prior jurisprudence which allowed a co-owner to act to prevent drainage.

The mineral code only provides for action by co-owners of servitudes, but seems to be an extension of *United Gas* which applied to co-owners of land. The comments to article 176 indicate that the redactors construed *United Gas* as generally allowing development by a co-owner of land without consent of the other co-owner when he was acting to prevent waste.³⁶ Therefore, this article can be used to support application of the principle to co-owners of land as well.

33. *Ree Corp. v. Shaffer*, 246 So. 2d 313 (La. App. 1st Cir. 1971), *aff'd* on other grounds, 261 La. 502, 260 So. 2d 307 (1972).

34. La. R.S. 31:176 (1975).

35. *McLaughlin, Co-ownership and Partition of Mineral Rights in Louisiana*, 27 Min. L. Inst. 135 (1980).

36. La. R.S. 31:176 (1975), official comments.

CONSENT BETWEEN CO-OWNERS OF SERVITUDES AND OF LEASES

Servitudes

The mineral code applies the same requirement of consent to co-owners of mineral servitudes as it does to co-owners of land. Article 175 provides that a co-owner of a mineral servitude must obtain consent of co-owners owning at least an undivided ninety percent interest in the servitude in order to conduct operations. Because of the inherently exploitive nature of a mineral servitude, however, this provision does not seem to be consistent with the purpose for which consent is deemed necessary, which is to prevent one co-owner from imposing his desires as to the use of the land when such a use would constitute a change in the destination of the land.

The interests of co-owners of a servitude are distinguishable from the interests held by co-owners of land. The very nature of a mineral servitude is the right to explore for and produce minerals and reduce them to possession and ownership.³⁷ While the mineral servitude owner is under no obligation to exercise this right,³⁸ the power to do so is inherent in the very right. The servitude owners acquire the servitude purportedly to develop minerals, for this is its only value. There would seem to be an implicit agreement between the servitude owners, providing consent to the development of minerals, by the very act of acquiring the servitude. Therefore, there would not be a change in the destination of the land as this use was determined by the parties upon acquisition of the mineral right.³⁹

It would appear more logical and equitable to permit a co-owner of a mineral interest to act alone to obtain mineral development. This would be more in line with neighboring states.⁴⁰ The courts have held that once a use of the land has been determined, one co-owner may use the whole property for that purpose to which it is destined and receive the returns to which he is entitled.⁴¹ Nevertheless, even if the

37. Article 31 provides that "[a] mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership." La. R.S. 31:21 (1975).

38. Article 22 provides that "[t]he owner of a mineral servitude is under no obligation to exercise it." La. R.S. 31:22 (1975).

39. Harrell, *supra* note 24, at 409.

40. See *supra* notes 14 and 15.

41. *Stinson v. Marston*, 185 La. 365, 169 So. 436 (1936).

co-owner acts alone, he may be allowed only to retain his share of the proceeds, and must account to the other co-owners.⁴²

It would at least appear that the parties who acquire a servitude must contemplate the eventual development of minerals and should not be allowed to obstruct the very purpose for which the grant is obtained. Withholding consent could be detrimental to the co-owning servitude holder desiring development, as the right may be lost through prescription. This co-owner of the servitude would be deprived of the total value of his right if it cannot be exercised. A servitude co-owner who does not wish to participate, perhaps for financial reasons, is still protected. He is not personally liable for the cost of the operations, except that, in the event of production, his share of the costs may be withheld from his share of the proceeds from production. This is consistent with mineral code article 22, which provides that a servitude owner is not obligated to exercise the servitude, and is also fair to the co-owner whose right could be useless because of the whim of another whom he cannot control. It may be that the developing co-owner will not want to accept all the risk while only being able to retain a proportion of the proceeds; nevertheless, he is not denied the exercise of his right and the choice to proceed is entirely his own.⁴³

A distinction also exists between the co-owner who merely consents to mineral development and the co-owner who agrees to participate in the venture. The one who only gives his consent is not held personally liable for the costs of the operation; however, in the event of production, costs may be withheld out of his production proceeds.⁴⁴ Similarly, he is entitled to his share of the proceeds if the operations are successful, as the operating co-owner is only allowed to retain his proportionate share and no more. If the operations prove unsuccessful, a co-owner who agrees to participate will be held liable for costs in accordance with his agreement.⁴⁵ Thus, the co-owner who is no longer willing to participate

42. *Huckaby v. Texas Co.*, 227 La. 191, 78 So. 2d 829 (1955); *Starr Davis Oil Co. v. Webber*, 218 La. 231, 48 So. 2d 906 (1950); *Clark v. Tensas Delta Land Co.*, 172 La. 913, 136 So. 1 (1931). These cases involved owners of fractional mineral interests; however, the same rule of accounting has been applied to co-owners.

43. The projet to the mineral code allowed servitude owners to operate independently of each other, without the requirement of consent. There was no distinction as to consent between co-owners of a servitude and fractional mineral interest owners, which seems to be the proper conclusion. See *Harrell*, *supra* note 24, at 440. However, by requiring consent among co-owners, the code places a burden on them merely because they acquired their rights at the same time, whereas fractional mineral interest owners own a portion of the interest but are not co-owners because they acquired their rights at different times.

44. La. R.S. 31:177 (1975); *Scott v. Hunt Oil Co.*, 152 So. 2d 599 (La. App. 2d Cir. 1963).

45. *Harrell*, *supra* note 24, at 406-07.

may consent and still be protected from financial risk. This allows the other co-owner to pursue his interests with no harm to the co-owner who merely consents, yet allows the consenting co-owner to share in the proceeds after the costs are withheld in the event of successful operations.

Leases

Co-owners of a mineral lease are also required to obtain the consent of other co-owners, pursuant to article 177.⁴⁶ The legislation amending the code to require ninety percent of the co-owned interest did not extend to co-owners of mineral leases; thus unanimous consent is still required.

The comments to article 173 provide insight into the purpose of consent between lessees. The redactors stated that consent was required because "leases are taken in contemplation of development, and to permit one co-owner to make a business decision which binds or has an effect on the value of the interest of the other co-owner is unwise."⁴⁷ A lessee, however, is contractually bound to develop the lease.⁴⁸ If he must obtain consent from his co-owner he may be placed in a position where he cannot validly exercise the lease and will not be able to fulfill the contract. Co-owners of leases, however, may seek the remedy of partition if unresolvable problems arise.⁴⁹ It can be argued that this remedy of partition would also be the appropriate remedy for the servitude owner whose co-owner has refused to give consent.⁵⁰

THE "REMEDY" OF PARTITION

Partitions can prove to be a very unfair remedy for the co-owner who desires development. The courts overwhelmingly have held that mineral interests cannot be divided in kind and must be divided by

46. Article 177 provides that "[a] co-owner of the lessee's interest in a mineral lease may not independently conduct operations, or, except as provided in this article and Article 171, deal with the interest without the consent of his co-owner." La. R.S. 31:177 (1975).

47. La. R.S. 31:173, official comments.

48. Article 122 provides that "[a] mineral lessee is not under a fiduciary obligation to his lessor, but 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." La. R.S. 31:122 (1975).

49. Article 173 provides that "[c]o-owners of the lessee's interest in a mineral lease may compel partition of their rights." La. R.S. 31:173 (1975).

50. Article 172 provides that "[m]ineral servitudes and royalties are subject to partition." La. R.S. 31:172 (1975).

licitation.⁵¹ Because of uncertainty about the exact location of minerals while they are in the ground, a partition in kind would be virtually impossible. One co-owner cannot compel another to accept ownership of a definite area which may not contain any minerals. When equality cannot be had by a partition in kind, partition must be by licitation; however, such a partition deprives the co-owner of his right to develop the minerals.

Furthermore, several other problems may arise if the co-owners must partition by licitation. Because of the required sale of the interest, a co-owner may be deprived of the opportunity to speculate, which might have resulted in later development yielding higher financial benefits. An action for partition frequently is quite expensive, and it usually takes several years to resolve.⁵² In addition, if one co-owner is at an economic disadvantage to the other, partition by licitation can be used by the wealthier co-owner to deprive the disadvantaged co-owner of his interest at a nominal cost.⁵³ Therefore, although partition is frequently suggested, it may not always be an appropriate remedy.

CONSENT TO ROYALTY INTERESTS AND OTHER PASSIVE RIGHTS

The mineral code differentiates the requirement of consent according to the particular mineral interest involved. As previously stated, co-owners of servitudes must obtain consent of co-owners holding ninety percent interest while co-owners of leases must obtain unanimous consent. There is no requirement, however, that a co-owner of land or a co-owner of a servitude acquire the consent of his co-owner in order to create a mineral royalty out of his undivided interest.⁵⁴ Furthermore,

51. *Sellwood v. Phillips*, 185 La. 1045, 171 So. 440 (1936); *Connette v. Wright*, 149 La. 478, 89 So. 626 (1921); *Gulf Refining Co. v. Hayne*, 138 La. 555, 70 So. 509 (1915); *Thibaut v. Thibaut*, 407 So. 2d 466 (La. App. 1st Cir. 1981), writ denied, 409 So. 2d 659 (La. 1982); *Patrick v. Johnstone*, 361 So. 2d 894 (La. App. 2d Cir.), writ denied, 364 So. 2d 600 (La. 1978).

52. *McLaughlin*, *supra* note 33, at 148.

53. It will generally be to the offeree's advantage financially to accept a low offer and forego the cost and delay of a partition. Whether he accepts the offer or forces a partition, the disadvantaged co-owner ends up with less than the full value of his interest. The wealthy co-owner profits from avoiding partition costs, too, but also receives the property at a price lower than market value and retains the potential for speculative profits in the future. Partition of mineral rights has been widely discussed in numerous law review and Mineral Law Institute articles; see, e.g., *Gates, Partition of Land and Mineral Rights*, 43 La. L. Rev. 1119 (1983).

54. Article 165 provides that "[t]he consent of the co-owner of the party creating the royalty right is not necessary to entitle the royalty owner to receive his proportionate part of production." La. R.S. 31:165 (1975).

Article 170 provides that "[t]he consent of the co-owner of the party creating the royalty is not necessary to entitle the royalty owner to receive his proportionate part of production." La. R.S. 31:170 (1975).

a co-owner of a lessee's interest or a co-owner of a mineral servitude "may create a dependant right such as an overriding royalty, production payment, net profits interest, or other non-operating interest out of his undivided interest without the consent of his co-owner."⁵⁵ This distinction exists because all of these rights are passive rights and do not convey any rights of use of the land or servitude. Therefore, they do not constitute a change in the destination of the land. The requirement that consent be given must have already been met in order for production to have occurred. Furthermore, the granting of any of these passive rights does not infringe on the other co-owner's interest; thus, they should not be allowed a voice in the decisions of a co-owner as to the use of the proceeds of his own share.

RIGHTS OF CONSENTING AND NONCONSENTING CO-OWNERS

The mineral code and the jurisprudence have both strongly favored the nonconsenting co-owner, whether the thing held in indivision is the land or a mineral right. This has been lessened to a small degree by the requirement that only ninety percent consent be obtained rather than the prior insistence upon unanimous consent by co-owners. While this amendment does lean in favor of consenting co-owners and majority rule, it is a small step, and in most cases one co-owner can still prevent development of minerals.

The 1987 Regular Session of the Legislature passed House Bill 1154 which decreased the required percentage of co-owners who must consent to mineral operations from ninety percent to seventy-five percent. This would have been closer to the allowance of majority rule in the management of mineral interests. However, the governor vetoed this legislation, stating that such a decrease is unjust to the dissenting minority co-owners and erodes the civilian concept of ownership.⁵⁶ The governor believed this decrease resulted in an unreasonable balance favoring the co-owners who consented and placing those who did not at a disadvantage. This opinion is accurate if only the right of the nonconsenting co-owner is considered. If he does not desire development of his share, imposition of the other co-owners' decision on him would infringe on his ownership rights to have absolute control over the thing.

Regardless of how the decision is made, some co-owners will be deprived of their preference for the use when there is disagreement. The rights of the consenting co-owners who wish to initiate mineral development must also be considered. Presently, a small dissident minority

55. La. R.S. 31:171 (1975).

56. Veto Message from Governor Edwin Edwards to Honorable Alfred Speer, Clerk of the House of Representatives, July 6, 1987, H.R. 1154, La. Reg. Sess (1987).

may dictate its desires to them, depriving the consenting co-owners of their right to develop. It is unfair to allow a small percentage, perhaps even one person, to control the economic commitment of the majority who holds a thing jointly.

Majority rule would be a more equitable solution. It would not erode the civilian concept of ownership, because both sides would be given equal opportunities to muster a majority in the determination of the destination of the land. Furthermore, majority rule would encourage the use of the land rather than the removal of land from commerce that occurs because a small minority refuses to allow it to be put to the more profitable use. The minority would retain its protections because, if they refused to participate, they would only be subject to costs withheld from their production proceeds in the event of production.

CONCLUSION AND RECOMMENDATIONS

Co-ownership laws in Louisiana require consent of owners holding a ninety percent interest in land or a mineral servitude before mineral development can be undertaken. Such a strict requirement can prove to be quite harsh to those who hold mineral interests which have no other value than that which results from development of the minerals. It also operates to keep valuable land out of commerce due to the refusal of even a small minority to undergo mineral development. This result is attributable to civil law concepts which hold that each co-owner owns a portion of "each molecule" of the property held in common. Louisiana law favors holding the land in a state of status quo unless those representing ninety percent of the ownership interest can agree to a change, so as not to infringe on any of the co-owner's absolute rights of dominion over the land he owns.

The requirement of consent, however, can also operate to deprive co-owners of the absolute right over the thing should they choose to undergo mineral development. A small minority can block development, even though the land has no value other than mineral development. Furthermore, once consent has been given, it should be considered a change in the destination of the land. Such a conclusion would allow a co-owner who desires development to proceed with relative assurance that he will be able to complete his investment without the possibility of subsequent action halting development of the minerals.

In recent years there has been limited success in adopting a more equitable solution concerning disagreement among co-owners. The 1986 Louisiana legislature authorized the requirement of only ninety percent consent among co-owners, rejecting the long-held requirement of unanimous consent of co-owners in order to change the destination of the property for mineral development.

Presently, the code unnecessarily maintains a uniform rule as to co-owners of land and co-owners of mineral interests. There are different considerations to be applied in these situations which should allow a distinction between the consent needed for development. Some co-owners of land may want to put the land to use in ways which would be incompatible with mineral development. These non-mineral considerations make it logical that at least a majority of the owners should determine the manner in which the land is utilized. Any co-owner would be hard-pressed to prove his use is better or more advantageous than those of the others. Therefore, consent of at least a majority of the co-owners of land is a desirable requirement.

Those considerations are not present in co-owned mineral interests. Furthermore, the requirement of consent distinguishes co-owners of mineral interests from fractional mineral interest owners for no apparent reason. The difference between these two interests is the manner by which the interests are created—co-owners each receive their interests in one juridical act,⁵⁷ while owners of fractional mineral servitudes obtain their interests each at different times or in different acts.⁵⁸ Since their interests are essentially the same, to require co-owners of the mineral interests to obtain consent while allowing fractional mineral interest owners to act independently does not seem consistent. Majority rule should certainly be permitted for co-owners of mineral interests as mineral development is contemplated by the mere acquisition of the right. A co-owner should not be disadvantaged by another co-owner withholding consent when the activity has already been determined by obtaining the mineral right.

A requirement of majority rule among co-owners would not erode the civilian concept of ownership, as it would still allow for all co-owners to have a voice in the determination of the use of the property held in common. Such a rule will not allow one co-owner to determine the destination of the property just as it will not allow one co-owner or a small minority to prevent a beneficial use of the jointly-owned property. Each side may express its desires as to the destination of the property, with majority ruling, as is the case in our democratic society. In this light, a further reduction in the requirement of consent should prove to develop a more equitable system.

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57. La. R.S. 31:63 (1975).

58. If A and B each separately acquire a mineral servitude for one-half of the minerals from a landowner, they are not co-owners. Each can develop independent of and without the consent of the other.