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## **“Oil in the Family”: Obtaining the Requisite Consent to Conduct Operations on Co-owned Land or Mineral Servitudes**

Patrick S. Ottinger

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# **“Oil in the Family”: Obtaining the Requisite Consent to Conduct Operations on Co-owned Land or Mineral Servitudes**

*Patrick S. Ottinger\**

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## I. INTRODUCTION

This Article examines Louisiana law regulating the circumstances under which oil and gas activities may be conducted on co-owned land or on land burdened by a co-owned mineral servitude.<sup>1</sup> Although this important topic has been considered in other writings,<sup>2</sup> a more current examination is in order because no prior commentary has considered the significant amendments to the Louisiana Mineral Code in 1988.

“Ownership of the same thing by two or more persons is ownership in indivision.”<sup>3</sup> Also known as *co-ownership*, the Civil Code further provides that “[t]wo or more persons may own the same thing in indivision, each having an undivided share.”<sup>4</sup> A person owning along with others an undivided interest in the same thing is called a *co-owner* or an *owner in indivision*. For purposes of ownership, a *person* must be a natural person or a juridical person.<sup>5</sup>

“Tracts of land, with their component parts, are immovables.”<sup>6</sup> Hence, land is a corporeal<sup>7</sup> *thing* which is susceptible of being owned in indivision.

Co-ownership of land might arise in a variety of ways. While the most typical situation giving rise to co-ownership is that resulting from a recognized mode of disposition or alienation of land to two or more persons (such as sale, donation, or exchange), it might also arise as a consequence of inheritance<sup>8</sup> or divorce

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1. First recognized by the Louisiana Supreme Court in *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (La. 1922), a *mineral servitude* is now codally defined as “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. REV. STAT. ANN. § 31:21 (2000).

2. John M. Shuey, *Some Problems of Co-ownership in Louisiana Mineral Law*, in TWELFTH ANNUAL INSTITUTE ON MINERAL LAW 63 (George W. Hardy, III ed., 1965); Thomas A. Harrell, *Problems Created by Coownership in Louisiana*, in THIRTY-SECOND ANNUAL INSTITUTE ON MINERAL LAW 379 (Patricia A. Geier ed., 1986); Angela Jeanne Crowder, Comment, *Mineral Rights: The Requirement of Consent Among Co-owners*, 48 LA. L. REV. 931 (1988).

3. LA. CIV. CODE ANN. art. 797 (2008).

4. *Id.* art. 480 (2010).

5. *Id.* art. 479. For the definition of both a *natural person* and a *juridical person*, see *id.* art. 24 (1999).

6. *Id.* art. 462 (2010).

7. “Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched.” *Id.* art. 461.

8. “When a person, at his decease, leaves several heirs, each of them becomes an undivided proprietor of the effects of the succession, for the part or

(after which, “[e]ach spouse owns an undivided one-half interest in former community property”<sup>9</sup> prior to partition). Co-ownership might also result from a legal entity’s liquidation or dissolution and the concomitant distribution of the assets to the former shareholders,<sup>10</sup> partners,<sup>11</sup> or members.<sup>12</sup>

Although “[o]wnership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, . . . [t]he landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.”<sup>13</sup>

The right to conduct oil and gas operations on land is typically created by either a mineral lease<sup>14</sup> or a mineral servitude.<sup>15</sup> Each of those mineral rights<sup>16</sup> confers the right to operate on the burdened land.<sup>17</sup>

Additionally, “[m]ineral rights are susceptible of ownership in indivision.”<sup>18</sup> When co-ownership of a mineral right exists, “use or possession of a mineral right inures to the benefit of all co-owners of the right.”<sup>19</sup> Indeed, “use of a mineral servitude must be by the

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portion coming to him, which forms among the heirs a community of property, as long as it remains undivided.” *Id.* art. 1292 (2000).

9. *Id.* art. 2369.2 (2009).

10. LA. REV. STAT. ANN. §§ 12:141–149 (2010).

11. LA. CIV. CODE ANN. art. 2833 (2005).

12. LA. REV. STAT. ANN. § 12:1337(A).

13. *Id.* § 31:6 (2000).

14. “A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals. A single lease may be created on two or more noncontiguous tracts of land . . .” *Id.* § 31:114.

15. See *Frost-Johnson Lumber Co. v. Salling’s Heirs*, 91 So. 207 (La. 1922); LA. REV. STAT. ANN. § 31:21.

16. “The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease.” LA. REV. STAT. ANN. § 31:16.

17. While a mineral royalty is also a mineral right that is susceptible of ownership in indivision, a mineral royalty is a passive interest that confers on its owner neither an executive right “nor . . . the right to conduct operations to explore for or produce minerals.” *Id.* § 31:81. Although a mineral royalty created by a co-owner of land is beyond the scope of this Article (because it does not confer the right to operate), it is noted *en passant* that, pursuant to Louisiana Revised Statutes section 31:165, a “co-owner of land may create a mineral royalty out of his undivided interest in the land,” and the “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.” *Id.* § 31:165.

18. *Id.* § 31:168.

19. *Id.* § 31:174. See *Lowry v. MRT Exploration Co.*, 382 So. 2d 1034, 1036 (La. Ct. App. 1977) (“The drilling activities conducted on the property by

owner of the servitude, his representative or employee, or some other person acting on his behalf,<sup>20</sup> with the further instruction that a “person is acting on behalf of the servitude owner only when there is a legal relationship between him and the servitude owner, such as co-ownership or agency.”<sup>21</sup>

The Civil Code states that “[a] co-owner may freely lease, alienate, or encumber his share of the thing held in indivision.”<sup>22</sup> However, at general law, the “consent of all the co-owners is required for the lease, alienation, or encumbrance of the entire thing held in indivision.”<sup>23</sup> As article 2 of the Louisiana Mineral Code recognizes,<sup>24</sup> this statement of general law would yield to the specific provisions of the Louisiana Mineral Code pertaining to co-ownership of mineral rights or land.

While this Article examines the current state of the law on this important topic, it is necessary to consider the law of Louisiana concerning the rights and duties of co-owners generally, as well as the law pertaining to oil and gas operations, both prior to the enactment in 1975 of the Louisiana Mineral Code and then as a result of significant amendments to that Code in 1986 and in 1988.

## II. RIGHTS AND DUTIES OF CO-OWNERS GENERALLY

### *A. Introduction*

Each co-owner has the right to possess and to enjoy the whole of the thing co-owned, in accordance with its destination (or consistently with its nature), coextensively with all other co-owners.<sup>25</sup> As noted by Professor Thomas A. Harrell:

Each coowner has an equal and correlative right to personally occupy and use all of the property without regard to the extent of his fractional interest if his activities are

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Smackover [the lessee of a co-owner] within ten years from the creation of this servitude interrupted prescription as to all co-owners.”).

20. LA. REV. STAT. ANN. § 31:42.

21. *Id.* § 31:43.

22. LA. CIV. CODE ANN. art. 805 (2008).

23. *Id.*

24. “The provisions of this Code are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.” LA. REV. STAT. ANN. § 31:2.

25. LA. CIV. CODE ANN. art. 802.

consistent with the destination of the property. He cannot be charged by his coowners for such use. . . . *The courts will not regulate the ordinary use of the property by several coowners, nor arbitrate disputes among them as to such matters. The remedy of the coowners is to partition the property if they cannot agree upon how the property is to be used.*<sup>26</sup>

While the right of each co-owner of a thing to possession thereof is equal and coextensive, it is also the long-recognized and well-settled law in Louisiana that one co-owner in possession of the thing cannot be evicted from such possession by another co-owner.<sup>27</sup> Rather, the remedy of the nonpossessory co-owner is in the nature of an action for partition and—or for accounting of any rents, fruits, or products that the possessory co-owner derives from the thing.<sup>28</sup>

*B. Partition Is the Remedy Available to the Unhappy Co-owner*

The case of *Juneau v. Laborde*<sup>29</sup> presented the situation wherein certain co-owners of land sued another co-owner who had taken possession of the property and cultivated cotton for 14 years. The plaintiffs sought “to recover the value of rents, revenues, use and enjoyment.”<sup>30</sup> Although the court stated that the defendant “was never a trespasser but a co-owner of the property with plaintiffs,”<sup>31</sup> he was not liable for rent because, “[as] a co-owner of the property[,] [he] was entitled, as such, to occupy it without becoming liable to plaintiffs for rent.”<sup>32</sup> The defendant was ordered to “account to his co-owner for all rents and revenues he has received because, in obtaining these fruits, he acts not only for himself but also as the agent of his co-owner for the latter’s just proportion.”<sup>33</sup> The court noted that the “remedy of the co-owner out of possession is . . . by suit for a partition and settlement of accounts, or for a division of profits.”<sup>34</sup>

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26. See Harrell, *supra* note 2, at 386–87 (emphasis added) (citations omitted).

27. Spencer v. Spencer, 273 So. 2d 605, 607 (La. Ct. App. 1973).

28. Moreira v. Schwan, 37 So. 542 (La. 1904).

29. 82 So. 2d 693 (La. 1955).

30. *Id.* at 695.

31. *Id.* See also Pettus v. Atchafalaya Wildlife Protective Soc’y, 351 So. 2d 790 (La. Ct. App. 1977) (“A lessee who possesses through his lessor is not a trespasser.”).

32. *Juneau*, 82 So. 2d at 695.

33. *Id.* (citations omitted).

34. *Id.* at 696.

The defendant in *Coon v. Miller*<sup>35</sup> was the surviving spouse of a decedent whose estate the plaintiff was administering. The succession administrator sued the defendant spouse, challenging her right to continue to use and occupy the family home, which was a portion of the former community. The plaintiff sought the eviction of the defendant under a claimed implied lease, as well as a judgment for unpaid rent.<sup>36</sup> The surviving spouse argued that she occupied the premises under her rights as co-owner, not under any lease.<sup>37</sup>

The court held that the defendant, as co-owner, had the right to possess the property coextensively with any other co-owner and, further, that as a co-owner in possession, could not be evicted.<sup>38</sup> Furthermore, the proper remedy available to the administrator was an action for partition.<sup>39</sup>

Interestingly, the court stated the following with respect to the administrator's claim that the occupancy of the surviving spouse should be viewed as that of a lessee who had not paid rent:

If this action should be considered as a proceeding against a lessee or tenant of property liable for unpaid rent, it would seem clear that plaintiff would be entitled both to the remedy of eviction and to possession of the premises, and that the present suit would be authorized under the provisions of LSA-C.C.P. Title 11, Article 4701, et seq., relating to the ejectment of tenants and occupants.

However, the instant case does not justify the application and the enforcement of the codal provisions above noted. The record does not contain evidence of any nature of lease or agreement of rent between the parties, either express or implied. Despite the fact that plaintiff is a judgment creditor for an amount representing unpaid rent, this judgment in itself is not sufficient to sustain the contention that defendant's right of occupancy derives from any agreement of lease or rental.<sup>40</sup>

The unique relationship between co-owners is fraught with the opportunity for passive tension, if not outright aggressive hostility. Even when the co-owners' shares are equal, human nature informs

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35. 175 So. 2d 385 (La. Ct. App. 1965).

36. *See id.* at 386.

37. *See id.*

38. *Id.* at 386–87.

39. *Id.* at 387.

40. *Id.* at 386.

us that at least one co-owner always seems to take pleasure in exercising his or her rights of co-ownership solely for the purpose of being disagreeable with respect to the desire of another co-owner to take a certain action with regard to the commonly held thing (e.g., land).<sup>41</sup>

As cogently expressed by the ancient Roman commentators, the foundational rule was that “one of the co-owners of a thing in common can do nothing (in re) in or concerning the thing (invito altero) against the will of, or in opposition to, the other.”<sup>42</sup> When the issue was presented to the Louisiana Supreme Court, this rule naturally led to the conclusion that a “co-owner may . . . oppose any attempt by his co-owners, or by a lessee of his co-owner, to exploit the common property for oil and gas.”<sup>43</sup>

As a natural consequence of the rule that co-owners of land “are owners *par mi et par tout*, of part and of the whole,”<sup>44</sup> the only reasonable remedy available to a disagreeable co-owner is partition.<sup>45</sup> So powerful was this rule that the courts have characterized the right of a co-owner to demand a partition as “favored.”<sup>46</sup>

### *C. Jurisprudential Treatment of the Right of a Co-owner to Grant a Mineral Lease on Its Undivided Interest in the Co-owned Land*

As will be seen,<sup>47</sup> the Louisiana Mineral Code now requires the consent of a certain threshold of owners before exploration and production (E&P) operations<sup>48</sup> may be conducted on co-owned land (either pursuant to a mineral servitude or a mineral lease) or on land burdened by a co-owned mineral servitude. The full effect and legal import of these codal provisions may be fully appreciated only if they are considered in light of the law of co-ownership,

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41. Perhaps Rodney King was prescient when he asked, “Can’t we all just get along?”

42. *Gulf Refining Co. of La. v. Carroll*, 82 So. 277, 278 (La. 1919) (citing DIG. 10.3.28 (Papinian, Quaestionums 7)).

43. *Id.*

44. *Id.* (alteration in original).

45. LA. CIV. CODE ANN. art. 807 (2008).

46. *Campbell v. Pasternack Holding Co., Inc.*, 625 So. 2d 477, 480 (La. 1993) (stating that “partition is favored under Louisiana law and this Court’s jurisprudence” and further that the “need to partition stems from the inconvenience of co-management, namely the requirement of unanimous consent of co-owners in managing commonly held property”).

47. See discussion *infra* Part III.

48. E&P operations are physical activities conducted in connection with the drilling of a well in pursuit of exploration for and production of oil, gas, or other minerals. *But see* discussion *infra* Part XII.

which historically prevailed in Louisiana prior to the adoption of the Louisiana Mineral Code in 1975 and before the amendments to that Code in 1986 and 1988.

Prior to 1986, a mineral lessee was required to obtain the consent of *all* co-owners of a co-owned tract of land before it could operate on the leased premises. This proposition was announced in the seminal case of *Gulf Refining Company of Louisiana v. Carroll*,<sup>49</sup> where the Louisiana Supreme Court upheld the right of a recalcitrant co-owner to oppose the conduct of mineral operations by a lessee of a consenting co-owner.

The plaintiff held a mineral lease granted by the owner of an undivided one-half interest in a tract of land.<sup>50</sup> The other co-owner did not consent to the lease.<sup>51</sup> The lessee sought to establish its “right, supposedly derived from the lease in question, to go upon the land in question to exploit it for oil and gas.”<sup>52</sup> The court stated as follows:

Now the owner of an undivided half of a tract of land has not the right to exploit the land for oil and gas without the consent, implied or express, of his co-owner, and not having this right himself he cannot confer it upon a lessee; and the plaintiff company has not alleged that it has the consent, implied or express, of [the other co-owner] for going upon this land to exploit it for oil and gas. . . .

A co-owner may therefore oppose any attempt by his co-owners, or by a lessee of his co-owner, to exploit the common property for oil and gas. . . .

From this source<sup>53</sup> has been derived the maxims, “In re communi melior est conditio prohibentis”—a maxim meaning, “In common property the condition of the one prohibiting is the better,”—and “In re communi neminem dominorum jure facere quicquam, invito altero, posse,” a maxim meaning “One coproprietor can exercise no authority over the common property against the will of the other.” Or as the same maxim is more tersely expressed “Melior est prohibentis.” In other words, either coowner has a right of veto against the acts of the other. And it is that very legal situation which underlies the principle that no one can be

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49. See *Carroll*, 82 So. 277.

50. *Id.* at 278.

51. *Id.*

52. *Id.*

53. The court is referring to Sabinus, who is quoted previously in the case.

compelled to remain in indivision; that any co-owner may at any time demand a partition. . . .

By all this is not meant that the lease is not valid as between the lessor and the lessee, nor that one may not validly lease property belonging to another, but what is meant is that such a lease is null in so far as the co-owner is concerned; on the same principle that the lease of the property of another, while valid as between the parties to the lease, is null in so far as this other is concerned. The idea is simply that neither one of the co-owners has any right to any particular part of the common estate, or to do anything upon it, to the exclusion of his coowner.<sup>54</sup>

The court in *Carroll* cited *Gulf Refining Company of Louisiana v. Hayne*.<sup>55</sup> In that case, and as explained in subsequent litigation between those parties,<sup>56</sup> Hayne granted a mineral lease to Gulf Refining Company (Gulf). After examining title, Gulf determined that Hayne only owned an undivided one-third interest in the land.<sup>57</sup> Gulf called upon its lessor to rectify the situation by having the co-owners ratify the lease.<sup>58</sup> Upon Hayne's failure to do so, Gulf sued "for a partition of the land in order that his interest in it might be segregated and the rights conferred by the lease exercised upon that interest."<sup>59</sup> The suit failed because a mineral lessee had no standing to demand a partition of the land leased.<sup>60</sup>

Judicial proceedings taken in the *Hayne* case after the denial of the right of partition are also instructive.<sup>61</sup> Subsequent to the first opinion, Gulf went onto the property to operate and was met with

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54. *Carroll*, 82 So. at 278–80.

55. 70 So. 509 (La. 1916).

56. *Gulf Refining Co. of La. v. Hayne*, 86 So. 891 (La. 1920).

57. *Id.*

58. *Id.*

59. *Id.* at 891–92.

60. *Id.* at 892 (citing *Hayne*, 70 So. 509). See also LA. REV. STAT. ANN. § 31:169 (2000) ("Co-ownership does not exist between the owner of a mineral right and the owner of the land subject to the right or between the owners of separate mineral rights."). But see *Lacassane Co., Inc. v. Jardin Minerals Co.*, 847 So. 2d 704, 705 (La. Ct. App. 2003) (holding that an owner of a distinct mineral servitude granted by fewer than all co-owners could force a partition with the owner of a different, discrete mineral servitude granted by fewer than all of the co-owners because they commonly held "the right to explore for, develop and reduce to possession" the minerals under the co-owned land).

61. *Hayne*, 86 So. 891.

an injunction by the nonsignatory co-owners.<sup>62</sup> The injunction issued and was still in force.<sup>63</sup>

Under the mineral lease from Hayne, “operations had to begin within 12 months” from its date.<sup>64</sup> After that period elapsed, Hayne and his co-owners drilled a well that was successful.<sup>65</sup> Gulf sued for its net revenue share of the product, contending that

the delay for beginning operations could not run while the plaintiff company was prevented by the injunction from acting; and that consequently the lease has continued in full force; that it has divested Hayne of all right he had to the oil under the land, and of all right he had to operate for same, and has vested these rights fully and completely in plaintiff; and that therefore plaintiff is entitled to have the oil produced by said well, and to stand in the place of Hayne with reference to said well.<sup>66</sup>

Hayne defended by saying that he was not a party to the injunction suit and that “it was by no act of his that the plaintiff company was prevented from operating.”<sup>67</sup> The court stated that this argument would be sound “if the defendant Hayne had not been under obligation by his contract of lease to cause plaintiff company to have possession of the land, and the want of this possession had not been the sole reason of the plaintiff company’s not operating.”<sup>68</sup>

Finding the defendant lessor to be “at fault,” the court then stated that “to allow him to take advantage of the expiration of the delay in question would be to allow him to take advantage of his own fault.”<sup>69</sup> Thus, the court found that Gulf was entitled to its net revenue share of production under its lease with Hayne.<sup>70</sup>

The second *Hayne* decision says a great deal about the character of a mineral lease granted by less than all of the co-owners, as well as the lessor’s obligation to deliver the leased premises to the lessee.<sup>71</sup> While the lessee under such a lease could

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62. *Id.* at 892.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* at 892–93.

71. *See* LA. REV. STAT. ANN. § 31:119 (2000) (“A mineral lessor is bound to deliver the premises that he has leased for use by the lessee, to refrain from disturbing the lessee’s possession, and to perform the contract in good faith.”).

not—prior to 1986—operate without the consent of all other co-owners, it is otherwise a valid lease entitling its owner to its stipulated share of revenue when brought about by the efforts of others.

The issue was next visited in *United Gas Public Service Company v. Arkansas-Louisiana Pipe Line Company*.<sup>72</sup> In that case, the defendant acquired an oil and gas lease from F. E. Gloyd and began drilling operations.<sup>73</sup> Subsequently, the plaintiff acquired a 7/40 interest in the same property and filed suit to enjoin the defendant from continuing the drilling operations.<sup>74</sup> The trial court refused to issue the injunction, and the plaintiff appealed.<sup>75</sup>

On original hearing, the Louisiana Supreme Court relied on the Louisiana jurisprudence and civil law doctrine that without the other co-owner's consent, a co-owner may "oppose any attempt by his co-owner, or by lessee of his co-owner, to exploit the common property for oil or gas (or other minerals), a doctrine 'as old as the Roman Law.'" <sup>76</sup> Thus, the court held that an injunction was the proper remedy in that case and the defendant's course of action was to institute a partition proceeding.<sup>77</sup>

On rehearing, the court found that granting an injunction might cause irreparable damage to the defendant and, at the same time, prevent the use of the property for gas-drilling operations.<sup>78</sup> *Carroll* was distinguished on the stated basis that it was not shown "that the land involved was proven oil or gas land nor that it was being drained and destroyed by adjacent wells," and, further, that "the titles of the landowners" were disputed.<sup>79</sup>

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72. 147 So. 66 (La. 1933).

73. *Id.* at 68 (on rehearing).

74. *Id.* at 67 (on original hearing).

75. *Id.*

76. *Id.* The court noted this position to be contrary to the common law doctrine that would have permitted a cotenant to conduct drilling operations without obtaining the consent of the other cotenants. *Id.* (citing LAWRENCE MILLS & J. C. WILLINGHAM, *THE LAW OF OIL AND GAS* § 177, at 265 (1926)). See, e.g., *Byrom v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986) ("It has long been the rule in Texas that a cotenant has the right to extract minerals from common property without first obtaining the consent of his cotenants; however, he must account to them on the basis of the value of any minerals taken, less the necessary and reasonable costs of production and marketing. The rule announced in *Burnham* and reaffirmed in *Cox* is founded on the distinctive legal relationship existing between cotenants; that is, each cotenant has a right to enter upon the common estate and a corollary right to possession." (citing *Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965); *Burnham v. Hardy Oil Co.*, 147 S.W. 330, 334-35 (Tex. Civ. App. 1912), *aff'd on other grounds*, 195 S.W. 1139 (Tex. 1917))).

77. *United Gas Pub. Serv. Co.*, 147 So. at 67.

78. *Id.* at 69 (on rehearing).

79. *Id.*

The court observed that, as a co-owner, the plaintiff would not be damaged by defendant's drilling operations if no gas were found.<sup>80</sup> On the other hand, if gas were found, the plaintiff would be compensated financially for the value of the gas.<sup>81</sup>

Consequently, the court held that a co-owner could not prevent drilling operations on property owned in indivision and refused to issue the injunction.<sup>82</sup> The co-owner could recover any damages from the drilling operations by receiving his share of the revenues from gas produced on the property.<sup>83</sup>

Professor Harriet Spiller Daggett, in her significant work on mineral rights, lamented that the supreme court, on rehearing in this case, was seemingly "influenced . . . to some extent" by "the line of common-law authorities" cited in the original opinion.<sup>84</sup> Professor Daggett stated further that the "evidence inclines toward a just decision, but the violence to the flat doctrine must be observed for future need as it makes the question a factual one."<sup>85</sup>

In *Amerada Petroleum Corporation v. Murphy*,<sup>86</sup> the plaintiff sought to cancel two mineral leases granted by some, but not all, of the co-owners of a tract of land.<sup>87</sup> The plaintiff argued that a partition sale of the property had extinguished the leases.<sup>88</sup> The lessee contended that the partition sale was null and void because it failed to comply with Act No. 336 of 1940 (the Act).<sup>89</sup> The Act required both that he be made a party to the sale and that his lease be separately appraised.<sup>90</sup> The evidence showed that although the partition judgment was rendered prior to the effective date of the Act, the writ ordering the sale, the advertisement of the sale, and the sale itself all occurred subsequent to the passage of the Act.<sup>91</sup>

The court held that because the Act did not contain any declaration that it was to have retroactive effect and because the act created substantive rights and did not deal with matters of procedure, the partition sale was valid even though it failed to comport with the Act.<sup>92</sup> Because the partition sale was valid, the

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80. *Id.*

81. *Id.*

82. *See id.*

83. *See id.*

84. HARRIET SPILLER DAGGETT, MINERAL RIGHTS IN LOUISIANA § 46, at 153 (1939).

85. *Id.*

86. 16 So. 2d 244 (La. 1943).

87. *Id.* at 244.

88. *Id.*

89. *Id.* at 245.

90. *See id.*

91. *Id.* at 245-46.

92. *Id.* at 246.

court ordered that the inscription of the lease should be cancelled and erased from the public records.<sup>93</sup>

The Louisiana Supreme Court provided further commentary on the nature of the relationship between co-owners in a case challenging a statute that authorized the State Mineral Board to grant a mineral lease on lands owned by a large number of co-owners. Prior to their repeal in 1960,<sup>94</sup> Louisiana Revised Statutes sections 30:181–185 provided a procedure whereby the State Mineral Board<sup>95</sup> could be requested to grant a mineral lease on land “owned in indivision by five hundred or more persons.” The constitutionality of Act No. 513 of 1952 (codified as Louisiana Revised Statutes sections 30:181–188) was challenged in *Sun Oil Company v. State Mineral Board*.<sup>96</sup>

One of the co-owners, Belle Isle Corporation,<sup>97</sup> granted a mineral lease on its lands to Sun Oil Company.<sup>98</sup> After the lease was granted, a group of co-owners applied to the State Mineral Board pursuant to the statute, seeking to have a lease granted on behalf of the land’s co-owners.<sup>99</sup> Both the lessor and the lessee under the first mineral lease brought this suit, “charg[ing] that such leasing by the Board would be violative of various provisions of the Federal and Louisiana Constitutions, including the due process and equal protection clauses and the prohibitions against ex post facto laws and laws impairing the obligation of contracts.”<sup>100</sup>

The trial court held that the Act was unconstitutional, but the supreme court reversed, upholding its constitutionality.<sup>101</sup> In its original decision, the court cited the *Amerada* decision for the proposition that a lease granted by less than all of the co-owners “is null insofar as the other co-owners are concerned” and noted that “a co-owner may oppose any attempt by his co-owners, or by a lessee of his co-owners, to exploit the common property for oil and gas.”<sup>102</sup>

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93. *See id.* at 245, 246.

94. Act No. 358, 1960 La. Acts 739. Inexplicably, the repealing legislation did not repeal Louisiana Revised Statutes sections 30:186–188.

95. Now called the State Mineral and Energy Board. *See* Act No. 196, 2009 La. Acts 1981.

96. 92 So. 2d 583 (La. 1956).

97. Stated in the opinion to be the “[o]wner of an undivided 13/144 plus an undivided 423/864 of an .045798 interest in the land.” *Id.* at 586.

98. *Id.*

99. *Id.* at 584–85.

100. *Id.* at 585.

101. *Id.* at 585, 588–89.

102. *Id.* at 586 (footnote omitted) (citing *Amerada Petroleum Corp. v. Reese*, 196 So. 558 (La. 1940); *Amerada Petroleum Corp. v. Murphy*, 16 So. 2d 244 (La. 1943)).

The court then cited *Carroll* for the proposition that “as between the parties, the lease of mineral interests owned in indivision with others is valid since one may validly lease property belonging to another.”<sup>103</sup> The court then noted:

However, it is well established in the cited cases and in the many authorities following them that such a lease is null insofar as the other co-owners are concerned and a co-owner may oppose any attempt by his co-owners, or by a lessee of his co-owners, to exploit the common property for oil and gas, the theory being that co-owners are owners *par mi et par tout*, of part and of the whole, and no co-owner has the exclusive right to any determinate part of the common property.<sup>104</sup>

Commenting further on such a mineral lease, the court stated:

The most accurate description of co-plaintiffs’ lease is that it was an executory contract dependent for its operation upon a suspensive condition, *viz.*, that Sun Oil Company, as lessee, obtain leases or at least acquiescence from every other co-owner of the land in question. Neither the leases nor the consent have ever been procured and it is clear that no obligation has ever come into being.<sup>105</sup>

Rejecting the plaintiff’s argument that the statute “operates as a divestiture of vested rights,” the court stated:

The lease in question vests no rights in either party since it confers neither rights nor obligations until the happening of the suspensive condition previously discussed for, as above stated, prior to this time Belle Isle Corporation could not deliver possession of the premises and Sun Oil Company is precluded from going on the land to explore for minerals.<sup>106</sup>

It is one thing to say that the lessee under a mineral lease granted by less than all co-owners of land has no right to operate on the described lands without the consent of all other co-owners. However, to say that such a lease (irrespective of the issue of the right to operate) is of no force or effect—that it “vests *no rights* in either party since it confers neither rights nor obligations until the

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103. *Id.* (citations omitted) (citing *Gulf Refining Co. of La. v. Carroll*, 82 So. 277 (La. 1919)).

104. *Id.* (footnote omitted) (citations omitted).

105. *Id.* at 586–87 (footnote omitted).

106. *Id.* at 587 (citing *Gulf Refining Co. of La. v. Carroll*, 82 So. 277 (La. 1919)).

happening of the suspensive condition previously discussed”—overstates the proposition a bit.<sup>107</sup>

Application was made for a rehearing, which was disposed of, as follows:

In briefs filed on application for rehearing issue was taken to certain statements in our opinion in this case concerning vested rights, impairment of the obligation of contracts, and the validity of the lease between Belle Isle and Sun Oil.

Upon further consideration we have decided that a discussion of these issues is unnecessary to a decision in this case, and we now prefer to rest our decision solely on the basis that Act 513 of 1952 is constitutional because it is a valid exercise by the state of its police power.<sup>108</sup>

Contrary to the statement that was withdrawn on rehearing, the proposition was more accurately stated in *Acree v. Shell Oil Company*:

A mineral lease from a co-owner does not create a mere personal obligation in the “lessor” to deliver an interest in land should the lessor ever acquire title to it. Such a lease confers a valid mineral right. The exercise of the right is merely suspended pending the consent of the other co-owners.<sup>109</sup>

A consequence of a mineral lease granted by less than all co-owners not being per se invalid is that “it may not be stricken from the public records.”<sup>110</sup> While the fact that such a mineral lease “may not be stricken from the public records” certainly says something about its legal character or efficacy, still, the mere recordation of an instrument does not give it any effect that cannot be ascribed to it by general law. Thus, as it is stated in current law, the “recordation of an instrument . . . [d]oes not create a presumption that the instrument is valid or genuine.”<sup>111</sup>

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107. *Id.* (emphasis added). See also *infra* Part XIII.

108. *Sun Oil Co.*, 92 So. 2d at 588–89 (per curiam) (denying application for rehearing).

109. 548 F. Supp. 1150, 1156 (M.D. La. 1982) (citing LA. REV. STAT. ANN. § 31:166 (2000); *id.* § 31:166 cmt.), *aff'd*, 721 F.2d 524 (5th Cir. 1984).

110. *Ree Corp. v. Shaffer*, 246 So. 2d 313, 322 (La. Ct. App. 1971), *aff'd*, 260 So. 2d 307 (La. 1972).

111. LA. CIV. CODE ANN. art. 3341(1) (2007).

*D. Jurisprudential Treatment of the Right of a Co-owner to Grant a Mineral Servitude on Its Undivided Interest in the Co-owned Land*

An early case involved the purchase of a mineral servitude interest from a co-owner of the land.<sup>112</sup> The servitude owner contended that the right of the other co-owners to withhold their consent, thereby prohibiting any drilling by the mineral purchaser, constituted an obstacle, which suspended the prescription running against the purchaser's mineral servitude.<sup>113</sup>

The court held that such right of the other co-owners of the land was not sufficient to constitute an obstacle<sup>114</sup> within the meaning of article 792 of the Louisiana Civil Code<sup>115</sup> because the mineral purchaser could remove the obstacle by suing for a partition of the land under article 740,<sup>116</sup> in which case his mineral interest would attach to the portion of the land assigned to his vendor.<sup>117</sup> The court stated that the obstacle doctrine applies "to those obstacles only which the owner of the servitude or real right has not consented to."<sup>118</sup>

### III. ENTER THE LOUISIANA MINERAL CODE

#### *A. Preface*

Without regard to the opportunity for abuse, the law prior to 1986 was clear: The owner of a minute, undivided interest in a tract of land could, absent his or her consent, object and thereby prevent E&P operations. This absolute right of recalcitrance existed despite the fact that the balance—or even the vast majority—of the remaining co-owners desired that such operations be conducted.

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112. *Hightower v. Maritzky*, 195 So. 518 (La. 1940).

113. *Id.* at 520–21.

114. *See id.*

115. *See* LA. CIV. CODE ANN. art. 755 (2008) ("If the owner of the dominant estate is prevented from using the servitude by an obstacle that he can neither prevent nor remove, the prescription of nonuse is suspended on that account for a period of up to ten years.").

116. *See id.* art. 717 ("If the estate owned in indivision is partitioned in kind, the servitude established by a co-owner on his undivided part burdens only the part allotted to him.").

117. This would no longer be good law because the "[o]wner of a mineral right acquired from a co-owner of land cannot compel partition of the land." LA. REV. STAT. ANN. § 31:167 (2000).

118. *Hightower*, 195 So. at 520.

As a practical matter, this circumstance—this opportunity for recalcitrance—resulted in the nonconsenting co-owner enjoying greater “bargaining power” to secure from the lessee (or other party desiring to operate) better terms or a higher bonus, rental, or royalty than his co-owners who had already leased. In the mind of the lessee, the term *highway robbery* or *extortion* came to mind.

If that last consenting co-owner should have received better terms, the other previously committed co-owners, who rightfully felt that they were being penalized for leasing earlier, might understandably be dissatisfied. The “holdout” might be said to have been rewarded for his recalcitrance while the earlier signing lessors felt that they were being disadvantaged for having been cooperative with the lessee and receiving lesser terms. Suffice it to say, this did not lead to happy family reunions—“All in the Family,” indeed.<sup>119</sup>

As originally adopted in 1975,<sup>120</sup> the Louisiana Mineral Code was totally consistent with then-prevailing law pertinent to co-owners. At that time, the consent of *all* co-owners was necessary for one co-owner (or the lessee of a co-owner) to operate on the co-owned land or co-owned mineral servitude.

Because it meant that the single owner of a very small, undivided interest in the land could prevent operations, which the vast majority of the co-owners desired, this high level of consent proved untenable.<sup>121</sup> The Louisiana Legislature undertook to rectify this situation, first in 1986, then in 1988.

As will be seen, three articles of the Louisiana Mineral Code come into play in considering these issues. They address the following aspects of co-ownership, to-wit:

- (a) Article 164 regulates the creation of a mineral servitude by a co-owner of land;
- (b) Article 166 addresses the granting of a mineral lease by a co-owner of land; and
- (c) Article 175 concerns the rights of co-owners of a mineral servitude to operate on the land.

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119. A lessor who leases early might protect itself by insisting upon a “most favored nations” clause under which the lessee is obligated to extend or pay to those lessors who signed earlier at lesser terms or considerations, the greater or better terms or considerations if paid by the lessee to a lessor who subsequently signs a mineral lease. Courts have enforced clauses of this type, resulting in significant damage awards. *See, e.g.,* Stephenson v. Petrohawk Props., L.P., 37 So. 3d 1145 (La. Ct. App. 2010) (awarding \$1,920,000); Hoover Tree Farm, L.L.C. v. Goodrich Petroleum Co., L.L.C., 63 So. 3d 159 (La. Ct. App. 2011) (awarding \$7.6 million), *cert. denied*, 69 So. 3d 1161–62 (La. 2011).

120. Act No. 50, 1974 La. Acts 237 (effective January 1, 1975).

121. *See* LA. REV. STAT. ANN. § 31:164 cmt.

These three articles are examined in Parts IV, V, and VI hereof, respectively.

*B. Amendments in 1986*

With the foregoing historical perspective in mind, in 1986, the Louisiana Legislature amended several of the co-ownership articles of the Louisiana Mineral Code. These included articles 164, 166, and 175.<sup>122</sup>

As amended at that time, the relevant articles permitted the conduct of E&P operations by the party desiring to operate who obtained the consent from less than all of the co-owners, provided that at least 90% of the co-owners had expressed their consent to such operations. In this manner, a minority of co-owners owning, in the aggregate, less than a 10% interest in the land or servitude could not frustrate the will of the great majority.

This amendment's rationale was explained in the Comment to the 1986 Amendment under article 164 of the Louisiana Mineral Code, as follows:

The 1986 amendments to Articles [sic] 164, 166, and 175 continue to preserve the principle in the Mineral Code that one co-owner may not conduct operations without the consent of his co-owner, *but limit this principle so that a small minority of co-owners cannot prevent mineral operations desired by other owners of rights in the land or mineral rights. . . .*

*These amendments are intended to be read broadly in favor of allowing the majority of owners to develop where they so desire. Thus the ninety percent is to be calculated such that it includes the interest of the owner seeking to gain the consent of the others.*<sup>123</sup>

*C. Amendments in 1988*

In 1988, the 90% threshold introduced in 1986 was lowered to 80%.<sup>124</sup> These amendments—as the commentary noted above explains—clearly and unambiguously evince the Louisiana Legislature's intent to permit the conduct of oil and gas operations by an operator to whom not less than 80% of the co-owners (of co-

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

123. LA. REV. STAT. ANN. § 31:164 cmt. (emphasis added).

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

owned land or of a co-owned mineral servitude, as the case may be) have granted consent.

#### IV. CREATION OF A MINERAL SERVITUDE BY A CO-OWNER OF LAND

##### *A. Article 164, Louisiana Mineral Code*

Article 164 addresses the creation of a mineral servitude by a co-owner of land. It reads as follows:

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 eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. 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.<sup>125</sup>

##### *B. How It Works*

Although a mineral servitude indisputably confers upon its owner the right to operate on the land,<sup>126</sup> one who acquires a mineral servitude from a co-owner of land may not exercise such right without the consent of co-owners of the land owning at least an undivided 80% interest *in the land*. Inasmuch as a co-owner of land must obtain the requisite consent of its co-owners, a person whose rights arise under a co-owner—such as a mineral servitude owner or a mineral lessee—may not operate on the land until that level of consent is obtained.<sup>127</sup>

Rather, the party desiring to operate must demonstrate that he has made every effort to contact such yet-to-have-consented co-

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125. LA. REV. STAT. ANN. § 31:164.

126. See LA. REV. STAT. ANN. § 31:21.

127. Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207, 245 (La. 1922) (“[N]o one can convey to another any greater right than he himself has.”); Herlitz Constr. Co., Inc. v. Matherne, 476 So. 2d 1037 (La. Ct. App. 1985) (“An assignee acquires no greater rights than its assignor.”); Town of Homer v. United Healthcare of La., Inc., 948 So. 2d 1163, 1169 (La. Ct. App. 2007); (“An assignor cannot assign any rights greater than that which he held.”).

owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner.<sup>128</sup>

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.<sup>129</sup>

#### V. GRANTING OF A MINERAL LEASE BY A CO-OWNER OF LAND

##### A. Article 166, Louisiana Mineral Code

Similar to article 164, article 166 concerns the granting of a mineral lease by a co-owner of land. That article provides as follows:

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 eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. 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.<sup>130</sup>

##### B. How It Works

This article works in the same manner as the prior article, but it is directed to a mineral lease granted by less than all of the co-owners of the land. As in the situation regulated by article 164, the lessee desiring to conduct E&P activities on the co-owned land must first obtain the “consent of co-owners owning at least an undivided eighty percent interest in the land” and must satisfy the requirements of the proviso. More about that later.<sup>131</sup>

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128. This feature of the rule pertaining to a nonconsenting co-owner is discussed *infra* in Part X.

129. This aspect of the rule pertaining to a nonconsenting co-owner is more fully developed *infra* in Part XI.

130. LA. REV. STAT. ANN. § 31:166. The omitted text is discussed *infra* in Part XII. That Part considers the granting of consent to conduct seismic or geophysical activities, which differ from traditional E&P operations.

131. This feature of the rule pertaining to a nonconsenting co-owner is discussed *infra* in Part X.

VI. RIGHTS OF CO-OWNERS OF A MINERAL SERVITUDE TO OPERATE  
ON THE LAND

*A. Article 175, Louisiana Mineral Code*

The rights of co-owners of a mineral servitude to operate on the land are regulated by article 175, which reads:

A co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of co-owners owning at least an undivided eighty percent interest in the servitude, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner . . . . A co-owner of the servitude who does not consent to such operations has no liability for the costs of development and operations except out of his share of production.<sup>132</sup>

*B. How It Works*

As with the two articles previously considered, and except as hereinafter provided, no E&P operations may be conducted on land burdened by a distinct mineral servitude that is owned in indivision unless the requisite level of consent is obtained. There is an important difference, however, in the manner in which the level of consent is calculated.<sup>133</sup>

*C. A Limited Exception to the Need for a Requisite Level of Consent*

Article 176 of the Louisiana Mineral Code provides an exception to the requirement of article 175 that the requisite level of consent be obtained before E&P operations can be conducted under a co-owned mineral servitude. That article reads as follows:

A co-owner of a mineral 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. He may lease or otherwise contract regarding

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132. LA. REV. STAT. ANN. § 31:175. The omitted text is discussed *infra* in Part XII. That Part considers the granting of consent to conduct seismic or geophysical activities, which differ from traditional E&P operations.

133. See *infra* Part IX.

the full ownership of the servitude but must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership.<sup>134</sup>

The language in this article “act to prevent waste” refers to the possibility that drainage is occurring by reason of the presence of a “lease basis” well on an adjacent or nearby tract of land, whereby a neighbor exercises its right under the “rule of capture,”<sup>135</sup> which is draining minerals from under the servitude tract.

The language “destruction or extinction of the servitude” alludes to the potential loss of the mineral servitude by the accrual of the prescription of nonuse.<sup>136</sup> What is not clear is how a court would view the earliest date prior to the accrual of prescription that would, in the absence of operations, give rise to the possible “destruction or extinction of the servitude” such that a co-owner of the servitude may take action to preserve the servitude. A lessee under a mineral lease granted pursuant to this article would be vitally interested in knowing that the lease has not been granted too soon.

Although the article does not explicitly so state, seemingly, these exceptions are only necessary in the absence of compulsory unitization affecting or including the servitude tract or a portion thereof. To the extent that a compulsory unit includes all or a portion of the servitude tract, there is no “waste” because there is no drainage of the servitude as such tract would participate in unit production.<sup>137</sup> By the same token, unit operations or production

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134. LA. REV. STAT. ANN. § 31:176.

135. The “rule of capture” is codified by three articles of the Louisiana Mineral Code. *See* LA. REV. STAT. ANN. § 31:6 (“The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.”); *id.* § 31:8 (“A landowner . . . may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another.”); *id.* § 31:14 (“A landowner has no right against another who causes drainage of liquid or gaseous minerals from beneath his property if the drainage results from drilling or mining operations on other lands.”).

136. “A mineral servitude is extinguished by . . . prescription resulting from nonuse for ten years.” *Id.* § 31:27(1).

137. “A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities.” *Id.* § 30:9(B) (2007).

would maintain the mineral servitude in force and effect to the extent that the servitude tract is in the unit.<sup>138</sup>

In those instances when the law dispenses with the need to obtain the requisite level of consent to prevent “waste” or to avoid the “destruction or extinction of the servitude,” the co-owner desiring to operate has the power to bind the nonacting co-owners to a mineral lease that the acting party chooses to grant, and such lease would validly cover “the full ownership of the servitude.” The instruction that the co-owner desiring to operate “must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership” is concordant with the similar principle as in a mineral lease granted by the owner of an executive interest.<sup>139</sup>

Although the Louisiana Mineral Code fails to explain the rights of a nonacting co-owner who is dissatisfied with the lease’s terms, a court would apply by analogy the standards of articles 109 and 110<sup>140</sup> of the Louisiana Mineral Code as the most logical controlling principles. The rule announced by the latter article is of great importance to the lessee who is willing to incur the significant costs to drill the well. A violation of the standard of conduct, while giving rise to a personal action by the nonconsenting co-owner against the acting co-owner, would not invalidate the mineral lease.

Also unanswered is the treatment to be given to a mineral lease granted to a different lessee by one or more co-owners *after* another co-owner has granted a mineral lease, pursuant to this article, which purports to cover and affect “the full ownership of the servitude.” Does the “first come, first served” rule operate to deny effect to that second lease? Does that subsequent lease essentially become a *top*

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138. “It is now well established in the jurisprudence of this court that where there is a forced unitization, on order of the Commissioner of Conservation, commercial production from any part of the unit interrupts the running of prescription as to all mineral servitudes within the unit.” *White v. Frank B. Treat & Son, Inc.*, 89 So. 2d 883, 884 (La. 1956). *See also* LA. REV. STAT. ANN. § 31:47 (“When drilling or mining operations or actual production otherwise sufficient to interrupt prescription takes place on a compulsory unit including all or a part of the land burdened by a mineral servitude, an interruption of prescription takes place without formal adoption by the owner of the servitude.”).

139. LA. REV. STAT. ANN. § 31:109 (“The owner of an executive interest is not obligated to grant a mineral lease, but in doing so, he must act in good faith and in the same manner as a reasonably prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest.”).

140. *Id.* § 31:110 (“A mineral lease granted in violation of the standard of conduct required by Article 109 is not invalid for that reason, but the owner of a nonexecutive interest may recover any damages sustained by him by a personal action against the owner of the executive right. The action prescribes one year from the date on which the lease is filed for registry.”).

*lease*<sup>141</sup> *vis-à-vis* the mineral lease granted pursuant to article 175, at least with respect to the interest of the lessor signatory to such lease?

While not explicitly so stated, the placement of this limited exception immediately following article 175—coupled with the fact that logic would not compel a different conclusion—indicates that the limited exception is not available to one whose servitude is addressed by article 164.

#### *D. Scenario Within a Scenario*

The mineral servitude, which is treated by article 175 (by reason of the fact that it is a discrete, co-owned mineral servitude), might also be subject to article 164 if all co-owners of the land did not create it in the first instance.

Consequently, if a co-owner of the land created the mineral servitude in question, article 164 necessarily applies and requires the “consent of co-owners owning at least an undivided eighty percent interest in the land” so that operations might be conducted on the land.<sup>142</sup>

Even having obtained the “consent of co-owners owning at least an undivided eighty percent interest in the land,” if that discrete mineral servitude is itself co-owned, or owned in indivision, article 175 also applies and requires the “consent of co-owners owning at least an undivided eighty percent interest in the servitude” so that operations might be conducted on the land.<sup>143</sup>

Thus, under these unique circumstances, two levels of consent must be obtained from two different categories of persons to operate on a co-owned servitude obtained from a co-owner of land.

#### *E. Jurisprudential Treatment of the Co-owned Servitudes Created by Partition*

It is not uncommon for co-owners to partition their land and reserve a mineral servitude on the partitioned land. In those cases, absent a clear stipulation to the contrary,<sup>144</sup> the mineral servitude is

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141. A *top lease* is a lease to take effect upon the expiration of an existing lease. *See Scoggin v. Bagley*, 368 So. 2d 763, 766 (La. Ct. App. 1979).

142. LA. REV. STAT. ANN. § 31:164.

143. *Id.*; *id.* § 31:175.

144. A threshold question in a partition wherein a mineral servitude is reserved is whether the parties intended to create one mineral servitude over the entire tract or as many mineral servitudes as there are partitioned tracts. *See, e.g., Whitehall Oil Co. v. Heard*, 197 So. 2d 672, 676 (La. Ct. App. 1967) (“Did [the parties to the partition] intend each tract transferred to be subject to separate mineral royalty reservations which affected that tract alone? Or did they instead intend for each

owned in indivision in the same proportions that the land had been held prior to the partition.

Such was the case in *GMB Gas Corporation v. Cox*<sup>145</sup> in which on July 1, 1968, certain co-owners of a tract of land entered into a partition, which provided that "the parties shall continue to remain as owners in indivision with respect to the oil, gas and other minerals in, on and under the property herein partitioned."<sup>146</sup> Prior to this partition, a previous operator drilled ten wells on the co-owned lands, and these wellbores remained on the premises.<sup>147</sup>

Subsequent to the partition, on May 23, 1972, one group of the co-owners (the Sanders) of the minerals granted a mineral lease to GMB Gas Corporation.<sup>148</sup> The other co-owner (Cox) was not a party to the mineral lease and refused to permit the lessee to conduct exploratory operations on the part of the lands that he received in the partition.<sup>149</sup>

The Sanders' lessee sought an injunction to prevent interference.<sup>150</sup> Cox, the recalcitrant co-owner, reconvened for a judgment declaring the lease invalid and sought an injunction forbidding the lessee from conducting any operations on any part of the servitude tract in which he was a co-owner of the mineral servitude.<sup>151</sup>

The court stated that the issue was "whether the lessee of a co-owner of a mineral servitude created prior to the enactment of the Mineral Code may conduct operations on lands subject to the servitude without the consent of the other co-owner."<sup>152</sup> The court held that the Louisiana Mineral Code was applicable to "pre-code issues which have not been clearly resolved by the jurisprudence."<sup>153</sup> Applying articles 66 and 67, the court concluded that the parties "intended to own the minerals under the entire [servitude] tract in indivision and to create a single mineral servitude for this purpose."<sup>154</sup>

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coheir to have a single undivided mineral interest affecting the entire mass of the property partitioned by the agreements?").

145. 340 So. 2d 638 (La. Ct. App. 1976).

146. *Id.* at 639.

147. *Cox v. Sanders*, 421 So. 2d 869, 871 (La. 1982).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *GMB Gas Corp. v. Cox*, 340 So. 2d 638, 640 (La. Ct. App. 1976).

153. *Id.*

154. *Id.*

The court observed that under article 175,<sup>155</sup> a “co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of the other co-owner.”<sup>156</sup> Based on this article, the appellate court remanded for the entry of an injunction in favor of the recalcitrant, nonconsenting co-owner and against the lessee.<sup>157</sup>

In a subsequent suit, Mrs. Cox sued to have the Sanders’ mineral servitude terminated.<sup>158</sup> The court observed that it

is important to note that in this suit [Mrs. Cox] is asserting her rights as a land owner against the owner of an undivided interest in a mineral servitude, and thus she is asserting rights on a different basis than those which she asserted in the prior case, . . . wherein she was asserting her rights as the co-owner of an undivided mineral servitude.<sup>159</sup>

The court first considered the issue of whether the Louisiana Mineral Code could be applied to the controversy because the mineral servitude was created in 1968.<sup>160</sup> The supreme court noted that the court of appeal had applied the Louisiana Mineral Code but stated that “the controlling law is the pre-codal law applicable to the rights existing between land owner and mineral interest owner, and not between two mineral interest owners.”<sup>161</sup>

The court found that the rule of *Clark v. Tensas Delta Land Company*<sup>162</sup> and *Starr Davis Oil Company, Inc. v. Webber*<sup>163</sup> was applicable.<sup>164</sup> The court then concluded that “the Sanders were given the right by the landowner to explore and drill upon the partitioned lands and that the production obtained by the Sanders’ lessee was sufficient to interrupt prescription of Sanders mineral servitude for non-use.”<sup>165</sup> The court further held that “the interruption of prescription applied not only to the tract owned by Sanders upon which production was had but also upon the contiguous tracts owned by Cox.”<sup>166</sup>

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155. Decided in 1976, *GMB Gas Corporation* involved the original version of Article 175, prior to its amendments in 1986 and 1988.

156. *GMB Gas Corp.*, 340 So. 2d at 640.

157. *Id.* at 641.

158. *Cox v. Sanders*, 421 So. 2d 869, 870 (La. 1982).

159. *Id.* at 871.

160. *Id.*

161. *Id.* at 872.

162. 136 So. 1 (La. 1931).

163. 48 So. 2d 906 (La. 1950).

164. *Cox*, 421 So. 2d at 872.

165. *Id.* at 873.

166. *Id.*

VII. RIGHTS OF CO-OWNERS OF LAND TO OPERATE ON THE LAND,  
INDEPENDENT OF A MINERAL RIGHT

There is no article in the Louisiana Mineral Code that addresses the right of a co-owner of land to operate in its own right on the co-owned property in the absence of a mineral right regulated by articles 164, 166, or 175. This is understandable because the Mineral Code regulates “mineral rights,” and the conduct of drilling activities by a landowner in no manner involves a mineral right.<sup>167</sup> Rather, it is the availment of a landowner’s inherent right in his ownership of the land.<sup>168</sup> This was recognized in one case in the following observation:

The doctrine that the owner of land has no property right in the oil or gas beneath the surface, until he has reduced it to possession, in no manner denies to such owner the exclusive right to the use of the surface for the purpose of such reduction, or for any other purpose, not prohibited by law, but, to the contrary, concedes that right, as inherent in the title to the land, and subject only to the control of the state, in the exercise of its police power; and the right may be sold, as may be any other right, and may carry with it the right to the oil and gas that may be found and reduced to possession.<sup>169</sup>

Hence, as article 2 of the Louisiana Mineral Code instructs,<sup>170</sup> the Civil Code would regulate this issue. Civil Code article 801 says that “[t]he use and management of the thing held in indivision is determined by agreement of all the co-owners.”<sup>171</sup>

Further, because oil and gas activities are not the normal or usual activities conducted on land, such activities would constitute “substantial alterations or substantial improvements.” In that regard, the Civil Code further provides that “[s]ubstantial alterations or

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167. “Whilst it is true that ‘oil and gas, in place, are not subject to absolute ownership as specific things *apart from the soil of which they form part,*’ nevertheless it is equally well settled that the owner of the soil has alone the right to sever and appropriate them, which right, of course, he may cede to another.” *Allies Oil Co. v. Ayers*, 92 So. 720, 720 (La. 1922).

168. LA. REV. STAT. ANN. § 31:6 (2000).

169. *Strother v. Mangham*, 70 So. 426, 440 (La. 1915) (citations omitted).

170. “The provisions of this Code are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.” LA. REV. STAT. ANN. § 31:2.

171. LA. CIV. CODE ANN. art. 801 (2008).

substantial improvements to the thing held in indivision may be undertaken only with the consent of all the co-owners.”<sup>172</sup>

Thus, in the absence of an agreement providing a different level of consent, unanimity would be needed for one co-owner to conduct E&P operations on the co-owned land.<sup>173</sup>

## VIII. FORM, DURATION, AND EXTENT OF CONSENT

### A. Introduction

The Louisiana Mineral Code neither prescribes the form of the consent that articles 164, 166, or 175 envision, nor stipulates how it might be manifested.<sup>174</sup> Obviously, to avoid controversy (an admittedly radical thought in our “All in the Family” situation), a party desiring to conduct operations on co-owned land or a co-owned servitude should acquire such consent in writing and should be as clear and concise as possible.<sup>175</sup>

### B. Form of Consent

#### 1. Must Consent Be Granted in Writing?

Examining the issue of form in a different way, the issue of whether a co-owner’s verbal granting of consent may be proven by oral testimony must be considered. More precisely, because the co-owned land constitutes immovable property, is such evidence precluded by the “parol evidence exclusionary rule”?<sup>176</sup>

No reported decision has considered this precise issue in the context of the relevant articles. However, one case suggests that the “parol evidence exclusionary rule” should not be an obstacle to proving, by other than written evidence, the granting of consent to operate.<sup>177</sup>

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172. *Id.* art. 804.

173. The law noted *supra* in Part II.A would provide the guidance under such circumstances.

174. Neither did the Civil Code, insofar as it pertained to the use of a predial servitude created by a co-owner, “provide any particular form or manner by which the consent is given.” *Superior Oil Producing Co. v. Leckelt*, 181 So. 462, 467 (La. 1938).

175. In a non-oil-and-gas case, it has been held that “the law does not require that the consent of co-owners be written in order to lease property.” *Schroth v. Seminole Supermarket, Inc.*, 829 So. 2d 597, 600 (La. Ct. App. 2002).

176. LA. CIV. CODE ANN. art. 1832 (2008); *id.* art. 1839.

177. “The management and development of this [co-owned] property contains issues which are wholly distinct from the ownership of the property and the admission of parol evidence to establish a management agreement concerning the

### 2. *Should the Consent, if Obtained in Writing, Be Recorded?*

If the consent is obtained in writing (and the author hopes that this Article demonstrates that there are a variety of reasons why it should be), the question arises as to whether it must (or should) be recorded. The easy answer is, “Yes, why not record it?” It would be “money well spent.”

But that easy response does not answer the question of whether it *must* be recorded. It is submitted that, without regard to the obvious prudence of doing so, the answer is, “No, it is not necessary to record it.” The notion of “consent,” for these purposes, might be likened to the concept of “authority” to act, such that under applicable law, a “matter of . . . authority . . . and a *similar matter* pertaining to rights and obligations evidenced by a recorded instrument are effective as to a third person although not evidenced of record.”<sup>178</sup> In the context of this Article, the reference to “a recorded instrument” would be to the juridical act creating the mineral servitude (whether by grant or reservation) or to a mineral lease.

### 3. *Must Consent Be Granted by a Mineral Lease?*

The 80% rule—in the circumstances when it applies—only addresses the issue of whether operations can be conducted on the ground. The rule does *not* mean that a co-owner cannot grant a mineral lease unless the consent of not less than 80% of the co-owners is obtained. Consistent with this observation, article 166 of the Louisiana Mineral Code says that “the lessee . . . may not exercise his rights thereunder without *consent* of co-owners owning at least an undivided eighty percent interest in the land.”<sup>179</sup>

While a mineral lease is, quite obviously, a juridical act, which, by its very nature, necessarily grants consent to operate,<sup>180</sup> and is the more typical vehicle by which consent is manifested, the

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property would not be violative of LSA-C.C. Arts. 1832 and 1839.” Riddle v. Simmons, 589 So. 2d 89, 92 (La. Ct. App. 1991). “In cases such as this, however, where the claimants are co-owners of the immovable property, we see no reason to exclude parol evidence to establish agreements concerning the management, exploitation, development or sharing of profits with reference to the co-owned property.” *Id.* at 93.

178. LA. CIV. CODE ANN. art. 3339 (2007) (emphasis added).

179. LA. REV. STAT. ANN. § 31:166 (2000) (emphasis added).

180. “A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals. A single lease may be created on two or more noncontiguous tracts of land . . .” *Id.* § 31:114. *But see infra* Part VIII.F.

articles do not require that a mineral lease be acquired to grant consent. In other words, a mineral lease is sufficient, but not necessary, to grant the requisite consent of a co-owner.

So, while the granting of a mineral lease is one thing, the conduction of operations thereunder is another matter. A mineral lease can be granted, without regard to the level of consent, but the lessee cannot operate on the leased premises without the requisite level of consent. Hence, permission can also be granted by a simple writing that expresses the “consent” of the owner to the conduction of operations. Such a “simple writing” may be as concise as the following, to-wit: “As a co-owner of Blackacre, I hereby grant my consent that you may conduct oil and gas activities and drilling operations on the land. I expressly retain all rights to production attributable to my interest in the land.”

While a written document of this sort would suffice as the granting of consent by a co-owner, is it a mineral lease? As noted above, a *mineral lease* is defined as “a contract by which the lessee is granted the right to explore for and produce minerals.”<sup>181</sup> Although this codal definition does not explicitly require that a traditional royalty be reserved or that any of the other customary features of a mineral lease be included, the reference to *lessee* would conjure the traditional attributes of a mineral lease such that this “simple writing” would *not* be deemed for any purpose to constitute a *mineral lease*. This observation is not a matter of mere semantics or academic intrigue; it is important for a variety of purposes.<sup>182</sup>

#### 4. Can Tacit Consent Be Inferred from a Co-owner’s Conduct?

As noted previously, the court in the early case of *Carroll* noted that “the owner of an undivided half of a tract of land has not the right to exploit the land for oil and gas without the consent, *implied or express*, of his co-owner, and not having this right himself he cannot confer it upon a lessee.”<sup>183</sup>

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181. LA. REV. STAT. ANN. § 31:114.

182. For example, an interest that is *not* subject to a mineral lease is, self-evidently, “unleased,” such that the owner of that interest (if the Commissioner of Conservation unitizes the well) has a right and remedy under the Well Cost Reporting Statute, *id.* § 30:103.1–103.2 (2007), but is not subject to the Risk Fee Act, *id.* § 30:10(A)(2) (Supp. 2013). See Patrick S. Ottinger, *After the Lessee Walks Away—The Rights and Obligations of the Unleased Mineral Owner in a Producing Unit*, in FIFTY-FIFTH ANNUAL INSTITUTE ON MINERAL LAW 59 (Patrick H. Martin ed., 2008).

183. Gulf Refining Co. of La. v. Carroll, 82 So. 277, 301 (La. 1919) (emphasis added).

Although admittedly arising in a different context (the need for a lessor's consent to a proposed transfer of a commercial lease), the permissibility of consent that is not in writing, but which might be inferred by the party's action or inaction, was discussed by an early court as follows:

The tacit consent suffices, even when it has been said that the consent in writing of the lessor shall be necessary. The necessity of a writing has been stipulated only to facilitate the proof: the parties did not intend to subordinate the validity of the sub-lease to a writing. Even had they so intended, the verbal or tacit consent would still be sufficient, because the lessor could not bind his hands and condemn himself not to be able to consent without a writing; therefore if he gives his consent without writing, a new agreement is formed by virtue of which the sub-lease is admitted by the lessor.<sup>184</sup>

Guided by this early case, if tacit consent suffices even in the face of an explicit requirement that it be in writing, *a fortiori*, tacit consent should suffice where, as here, there is no legal requirement for a writing.

In *Superior Oil Producing Company v. Leckelt*,<sup>185</sup> it was held that although a mineral servitude granted by less than all of the co-owners "would not be null but its execution would be suspended until the consent of the coowners was given,"<sup>186</sup> those nonsignatory "coowners acquiesced in the payment of the royalties to [the mineral servitude owner]" and that this acquiescence "was in effect the giving of consent by the coowners."<sup>187</sup>

While not precisely involving tacit consent, it was held in another case that "execution of the division orders and the receipt of [a co-owner's] share of the proceeds of all of the oil produced and sold was a complete ratification by defendant of the drilling operations conducted by plaintiff on the whole property."<sup>188</sup>

Although tacit consent to the conduction of operations has been found in these cases, it must be observed that this case predated the adoption of the amendments in 1988 with the resultant requirement that the proviso be met. Because the codal requirement is really "consent plus," it remains to be seen if a court would infer consent where, despite the open and notorious nature of the co-owner's

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184. *McWilliams v. Dawes*, 5 Pelt. 577, 593 (La. Ct. App. 1922).

185. 181 So. 462 (La. 1938).

186. *Id.* at 467.

187. *Id.* at 468.

188. *Connette v. Wright*, 98 So. 674, 676 (La. 1924).

action, there is no showing that the operator has satisfied the proviso of the relevant article.

### *C. Duration of Consent*

Unresolved is the issue of whether the consent has a term—does it only apply to one then-anticipated distinct operation? Or, does the consent continue to apply to future operations beyond the first anticipated operation for the duration of the mineral right in question?

If the consent is granted with respect to one identified operation, it would—in the absence of greater clarity—likely be construed to be limited to that distinct operation, and not to apply to future, nondescribed operations. Conversely, if it is stated in more general language without a reference to a specific well or other activity, it would likely be construed as continuing, without limitation as to time.

Is the success *vel non* of the first operation, to which the requisite consent was granted, relevant to these questions? If the first operation pursuant to consent is a dry hole, rather than a producer, must new consent be obtained, or does such consent continue to apply to subsequent operations?

Because neither the Mineral Code nor the interpretive jurisprudence provide answers to these questions, suffice it to say that the party desiring to operate should obviate these compelling issues by obtaining the consent in writing.

### *D. Revocability of Consent*

Additionally, can the consent, once granted and reaching the requisite level, be revoked? And, if so, what level of revocation is necessary to rescind that previously granted consent?

If revocable at all, what activities, preliminary to spudding the well,<sup>189</sup> taken by the operator in reliance on the previously granted consent will be deemed to preclude, under a theory of detrimental reliance or estoppel, a revocation of consent?<sup>190</sup> If the lessee,

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189. “[T]he term to ‘spud in’ has a well-defined meaning in the oil industry as the first boring of the hole in the ground, that is, the first actual penetration of the earth with a drilling bit . . . .” *Hilliard v. Franzheim*, 180 So. 2d 746, 747 (La. Ct. App. 1965).

190. In Louisiana, a claim of detrimental reliance is grounded in Louisiana Civil Code article 1967, which reads as follows:

Cause is the reason why a party obligates himself. A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and

having obtained the requisite consent, then proceeds to sell interests in its “drilling deal,” can consent thereafter be revoked after parties have relied to their detriment upon the consent previously granted? This significant contingency or potentiality, if none other, argues forcefully for obtaining consent in writing with sufficient clarity.

*E. Transfer of Lease After Obtaining Consent*

If a lessee under a mineral lease or leases that, in the aggregate, cover(s) less than all of the co-owners in a tract of land obtains the requisite level of consent from the nonsignatory co-owner(s) and thereafter transfers the lease(s), does the assignee of such lease(s) get the benefit of such previously granted consent? That is to say, is the consent itself transferable, and, if so, does it necessarily attend the transfer of the lease(s), or must it be specially assigned?<sup>191</sup>

Neither the Louisiana Mineral Code nor jurisprudence addresses this precise question; yet, it might be argued that, there being no express requirement that the consent be in writing, and, further, that tacit consent has been found in at least one case,<sup>192</sup> the consent follows the lease(s) when transferred. Although articles 128<sup>193</sup> and 131<sup>194</sup> of the Louisiana Mineral Code may be facially interpreted to support this observation, this is a rather tenuous basis to resolve the important issue of the successor lessee’s right to operate pursuant to previously granted consent. It is for this reason, if no other, that it is prudent to obtain the consent in writing and to expressly transfer it to the assignee or sublessee.

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the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee’s reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

LA. CIV. CODE ANN. art. 1967 (2008).

191. This notion of rights as being either “personal” or “real” has been judicially examined in the context of the “subsequent purchaser doctrine.” *See, e.g., Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246 (La. 2011).

192. *See supra* text accompanying notes 184–88.

193. “To the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes responsible directly to the original lessor for performance of the lessee’s obligations.” LA. REV. STAT. ANN. § 31:128 (2000).

194. “A mineral lessor must accept performance by an assignee or sublessee whether or not the assignment or sublease is filed for registry.” *Id.* § 31:131.

*F. Mineral Lease Containing a “No Surface Operations” Clause*

A party desiring to operate on co-owned land often “bundles” the consent represented by its mineral lease(s) with the consent vested in another party who holds a mineral lease from one or more other co-owners of the targeted leased premises.<sup>195</sup> If any of the mineral leases contains a “no surface operations” clause, yet the undivided interest represented by the lease is necessary to reach the requisite level of consent, the operator could not operate on the surface of the co-owned land without aggregating—from any source—the unrestricted or unconditional consent of at least 80% of the co-owners “in the land” or “in the servitude,” as the case may be.

Conversely, if the operator obtains the consent of at least 80% of the co-owners in the land or servitude, it can conduct operations thereon, notwithstanding that any other co-owner (whose interest is not counted in the attainment of the requisite 80%) might have granted a lease with a “no surface operations” clause. This is so because, having obtained the consent of at least 80% of the co-owners, and having complied with the proviso, it has the right to operate at that level, the consent (or absence of consent) of the balance of the co-owners being immaterial.

Also unanswered is the question of whether the party lessor who, by reason of the “no surface operations” clause contained in the lease, did not give consent to operate on the surface of the lands, has a claim for damages or injunction against the operator who is not its lessee. The answer should be “no” because the operator—having obtained the requisite level of consent—does not need any additional consent, provided that it has complied with the requirements of the relevant article.

The attainment of consent is one thing; the repudiation of a contractual commitment is another. Thus, if the lessee under a “no surface operations” clause participates (by way of financial support) in drilling operations conducted by another party who has independently attained the requisite level of unconditional consent from other co-owners of the land, the lessee might be subject to a claim for damages for violating the terms of its lease.<sup>196</sup> However, the lessor under such a restricted lease should not be able to enjoin

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195. This “bundling” might be accomplished by a joint operating agreement, a participation agreement, a “dry hole letter,” or a farm-in agreement executed by the working interest owners. See Patrick S. Ottinger, *Be Careful What You Ask for: Subsequent Operations Under the Model Form Operating Agreement*, in *SIXTY-THIRD ANNUAL INSTITUTE ON OIL AND GAS LAW* ch. 7 (2012).

196. “If a mineral lease is violated, an aggrieved party is entitled to any appropriate relief provided by law.” LA. REV. STAT. ANN. § 31:134.

the drilling operations if the operator has accumulated the requisite level of consent without regard to the interest of that lessor.

#### IX. DOING THE MATH

Calculating the requisite consent is simple under articles 164 and 166—it is necessary to get the consent of at least 80% of the co-owners “in the land” to allow a person to operate on the co-owned land. This consent may be granted through either a mineral servitude granted by less than all of the co-owners or a mineral lease granted by less than all of the co-owners “in the land.”

By its nature, article 175 works differently. This article addresses the rights of co-owners of a discrete, co-owned mineral servitude—either personally or through another—to operate on the land burdened by the servitude. In this situation, the consent needed is 80% of the co-owners “in the servitude.”

Thus, regardless of the size or quantification of the mineral servitude, if the mineral servitude is co-owned, no E&P operations may be undertaken on the burdened land without the consent of not less than 80% of the co-owners “in the servitude.” For example, if the mineral servitude pertains to, say, one-half of the minerals in the land,<sup>197</sup> and if such servitude is owned by, say, ten persons, then, at least eight of those co-owners must consent so that operations may be conducted pursuant to that servitude—eight out of ten is 80%.

One must note that eight of ten owners of a mineral servitude in and to one-half of the minerals represent, in the vernacular, a “net” 40% interest in the *entire* minerals in and under the land. There is no need to secure the consent from the owners of an additional 40% interest in the minerals in and under the land—it is unnecessary to get to 80% of the *whole* interest in the land or minerals. Rather, what is necessary is to obtain the consent of the owners’ 80% of the mineral servitude in question. The interest of the party who has granted the mineral right is included in the calculation of the 80%.

Illustrative of this proposition is the case of *Superior Oil Producing Company v. Leckelt*, wherein a widower and five children granted a mineral lease.<sup>198</sup> After the lease was granted, the

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197. Although it is sometimes so called, this is not a half-mineral servitude. Rather, it is a full mineral servitude in and to one-half of the minerals. *See, e.g., Clark v. Tensas Delta Land Co.*, 136 So. 1, 2 (La. 1931) (stating that what the defendant “owned was not half of the right to the minerals, but the right to half of the minerals, in Clark’s land”).

198. *Superior Oil Producing Co. v. Leckelt*, 181 So. 462, 463 (La. 1938).

children's father died, leaving his five children, who thereupon owned the entire property in indivision, one-fifth each, subject to the existing lease.<sup>199</sup>

During the term of the lease, one of the children, Richard Leckelt, executed a mineral deed to William Campbell conveying "an undivided on[e]-half interest in all the minerals that Richard Leckelt owned in and under the property."<sup>200</sup>

Thereafter, Richard Leckelt executed a mineral deed to P. S. Moore "conveying an undivided one-half interest in all the minerals that he owned in and under the property."<sup>201</sup>

In both instances, the mineral deeds were made subject to the then-existing mineral lease.<sup>202</sup> The outstanding mineral lease expired and was released.<sup>203</sup> Thereafter, but within ten years of the last use of the servitude,<sup>204</sup> mineral leases were "acquired . . . from all the co-owners, except Richard Leckelt, and from all the outstanding holders of minerals rights."<sup>205</sup> A well was drilled pursuant to this lease.<sup>206</sup>

After Richard Leckelt challenged the validity of this latter lease, the lessee under the subsequently granted mineral lease sued to cancel a mineral lease granted by Richard Leckelt and other documents that the plaintiff alleged had "cast a cloud upon plaintiff's titles."<sup>207</sup>

Richard Leckelt, a defendant, contended that the lease was invalid because, as a co-owner of the property, his consent was necessary.<sup>208</sup> The court rejected this contention, saying that

Richard Leckelt consented to the establishment of the servitude and he would be estopped from preventing William Campbell from exercising the servitude under the provisions of article 739<sup>209</sup> and cannot prevent the exercise of the servitude by objecting on the ground that the consent

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199. *See id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 463–64.

204. "A mineral servitude is extinguished by: prescription resulting from nonuse for ten years . . ." LA. REV. STAT. ANN. § 31:27(1) (2000).

205. *Leckelt*, 181 So. at 464.

206. *Id.*

207. *Id.*

208. *See id.* at 464.

209. *See* LA. CIV. CODE ANN. art. 715 (2008) ("A co-owner who has consented to the establishment of a predial servitude on the entire estate owned in indivision may not prevent its exercise on the ground that the consent of his co-owner has not been obtained.").

of the other coproprietors has not been given. Furthermore he would be estopped from preventing William Campbell from exercising the servitude by derogating from or destroying his own grant.<sup>210</sup>

The court upheld the mineral lease granted by the co-owners of the land and by the owner of the mineral servitude created by Richard Leckelt.<sup>211</sup>

## X. THE PROVISIO

### A. *The Legislature Lowers the Threshold but Introduces a Proviso*

When the Louisiana Legislature amended the three articles in 1986 to lower the consent threshold from 100% to 90%, there was no further requirement on the part of the party desiring to operate. Thus, with the consent of 90% of the co-owners of either a tract or a distinct mineral servitude, E&P operations could be conducted without any further showing or condition.

However, in 1988, when the Legislature amended the three articles to lower the consent threshold from 90% to 80%, it added a proviso to each article. The proviso in each of the three articles requires “that he [that is, the person who desires to conduct E&P operations] has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner.”<sup>212</sup>

### B. *Unanswered Questions*

This language presents a few unanswered questions. Noting that the articles require that “every effort” be made to contact the other co-owners, and that the adjective *reasonable* does not modify those words, what effort “to contact” will be deemed to be sufficient or, more importantly, will be deemed to fall short of constituting “every effort”? Reminiscent of the famous utterance of our 42nd president, it “depends upon what the meaning of the word [‘every’] is.”<sup>213</sup>

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210. *Leckelt*, 181 So. at 467.

211. *Id.* at 468.

212. LA. REV. STAT. ANN. §§ 31:164, :166, :175 (2000).

213. See 1998: *Clinton’s Grand Jury Testimony Released*, BBC HOME (Sept. 21, 1998), [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/21/newsid\\_2525000/2525339.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/21/newsid_2525000/2525339.stm).

Is the phrase “every effort” intended to be read literally, or does it mean “every *reasonable* effort”?<sup>214</sup> If a lessee cannot locate an owner using conventional methods, does the lessee have to advertise in a newspaper in an attempt to ascertain the absentee’s whereabouts? What effort will be deemed to fail to constitute the making of “every effort” to contact these parties?

In the absence of unanimous consent, how does a title examiner issue an opinion that the unsuccessful efforts “to contact” the yet-to-consent co-owner are nevertheless sufficient to constitute “every effort,” and, thus, that the proviso has been satisfied such that E&P operations can be lawfully conducted even without the consent of the parties who have not been contacted?

Who is to be contacted? The articles say, “*such* co-owners.” But who are “*such* co-owners”? Grammatically, the word *such*, as used in this sentence, seems to refer to those co-owners who have already consented.<sup>215</sup> However, logic suggests that it probably refers to *all* co-owners with whom the lessee (or other party desiring to operate) has *not* yet contracted.

Those who are contacted must be “offered [the opportunity] to contract . . . on substantially the same basis that [the party desiring to operate] has contracted with another co-owner.”<sup>216</sup> Does the proviso essentially impose a statutory “most favored nations” clause?<sup>217</sup> To whose “other contract” or “basis [of terms]” is this to be compared? What, for these purposes, does “another co-owner” mean?

What if the lessee has reached five different deals with five distinct co-owners—different bonus, rental, royalty, primary term, Pugh clause term, other specific provisions, etc.? What does

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214. In several articles of the Louisiana Mineral Code, a statement or legal requirement is modified by a standard of reasonableness. Thus, article 11(A) of the Mineral Code requires “reasonable regard” in the exercise of rights, LA. REV. STAT. ANN. § 31:11(A) (Supp. 2013); article 22 limits use of a mineral servitude to that which is “reasonably necessary” and requires restoration of the surface “at the earliest reasonable time,” *id.* § 31:22 (2000); article 29 requires a “reasonable expectation” for a dry hole to constitute a “good faith operation,” *id.* § 31:29; and numerous articles allude to a “reasonably prudent operator,” *e.g.*, *id.* § 31:122. The absence of such a modifier in these articles could be relevant.

215. “Where the word [*such*] modifies a term, that term is limited to the previous identification of that same term within the statute.” *Ouachita Parish Sch. Bd. v. Ouachita Parish Supervisors Ass’n*, 362 So. 2d 1138, 1141 (La. Ct. App. 1978) (case actually involved the modifying term *said*, but the conclusion to be drawn is the same). *See also Mathews v. Goodrich Oil Co.*, 471 So. 2d 938 (La. Ct. App. 1985); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314 (5th Cir. 1991).

216. *See* LA. REV. STAT. ANN. §§ 31:164, :166, :175.

217. *See supra* note 119.

“*substantially* the same basis” mean? Does the operator discharge its duty under the proviso by merely offering “to contract,” but only on the terms most favorable to it? Can the co-owner so contacted insist that it be offered the opportunity to contract on the terms which are most favorable to it, failing which, the proviso has not been met? A Rubik’s Cube comes to mind.

Is the implication that unless the lessee has tried to contact and contract with *all* co-owners, his operations under lease(s) from, say, 95% of the co-owners could be opposed by non-contracting parties? What standard of proof will be required to demonstrate that the lessee has complied with the proviso (or has made “every effort” to do so)? Should all offers to lease be in writing?

In view of these unanswered issues, it is appropriate to again ask the question: How can a title examiner approve title for drilling purposes under these circumstances?

### C. The “Other” Contract

Although each of the three articles uses the word as a verb and not a noun, the reference to *contract* is a bit uncertain when one considers that, as noted above, the requisite consent may be granted and obtained by a simple writing, involving no consideration. As previously noted, it is not necessary that the operator acquire a mineral lease, only that “consent” be obtained.

The “contract” to which article 164 refers would seemingly be a mineral deed because it seems to contemplate a third person, other than one of the co-owners, who seeks to operate pursuant to a mineral servitude.

The “contract” that article 166 contemplates would apparently be a mineral lease because it seems to anticipate a third person, other than one of the co-owners, who seeks to operate under a mineral lease.

The “contract” to which article 175 refers would presumably be a simple statement of consent because, by definition, it does not seem to envision a third person but rather one of the owners of the co-owned mineral servitude. Given the context regulated by Article 175, the use of the word *contract* seems somewhat misplaced and is probably the result of inadvertence in the legislative drafting process, which likely duplicated the three articles.

## XI. RIGHTS AND OBLIGATIONS OF A NONCONSENTING OWNER

The last sentence of each of the relevant articles recognizes that a party who does not grant its consent cannot be charged with any

portion of the costs incurred in the operation. This is consistent with general law, which rarely imposes personal liability on a party who has not consented to or agreed to participate in the cost, risk, and expense of the drilling of a well. However, as a corollary, the interest of the nonconsenting owner is liable, on an in rem basis, for such owner's proportionate share of the drilling costs.<sup>218</sup>

The court in *Arkansas Fuel Oil Corporation v. Weber* affirmed the proposition that “while the right of an owner to refrain from exercising his right of ownership is absolute, he is nevertheless, precluded from the enjoyment of profits without participation in the expenses incurred in the production of such profits.”<sup>219</sup>

Another example of this proposition is found in *Davis Oil Company v. Steamboat Petroleum Corporation* where the Supreme Court stated: “A non-operating owner of a mineral interest, who does not consent to operations within a compulsory drilling unit by an operating owner, has no liability for the costs of development and operations except out of his share of production.”<sup>220</sup>

The verbiage of each of the relevant articles is identical in saying that the nonconsenting co-owner “has no liability for the costs of development and operations, except out of his share of production,”<sup>221</sup> except that article 166 makes reference to “the costs of development and operations *or other costs*.”<sup>222</sup> Assuming that it was intentional (and even meaningful), it is unapparent why this article (addressing the granting of a mineral lease by a co-owner of land) would justify this different formulation.

## XII. APPLICATION OF CONSENT REQUIREMENTS TO THE CONDUCT OF SEISMIC ACTIVITIES ON CO-OWNED LANDS OR CO-OWNED MINERAL SERVITUDES

By reason of legislative amendments in 1995,<sup>223</sup> article 166—in addition to specifying the requisite consent necessary to conduct E&P operations under a mineral lease granted by less than all co-owners—also requires the same level of consent to “operate”—permit your author to change that word to “conduct activities”—under “a valid lease or permit for geological surveys, by means of a torsion balance, seismographic explosions, mechanical device, or any other method.”<sup>224</sup> Similarly, article 175 defines *operations* (for

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218. See Ottinger, *supra* note 182.

219. 149 So. 2d 101, 108 (La. Ct. App. 1963).

220. 583 So. 2d 1139, 1141 (La. 1991).

221. LA. REV. STAT. ANN. §§ 31:164, :166, :175.

222. *Id.* § 31:166 (emphasis added).

223. Act No. 479, 1995 La. Acts 1264.

224. LA. REV. STAT. ANN. § 31:166.

purposes of that article) as including “geological surveys, by means of a torsion balance, seismographic explosions, mechanical device, or any other method.”<sup>225</sup>

These amendments to articles 166 and 175 were adopted in response to the controversial 1994 decision in *Jeanes v. G.F.S. Company*.<sup>226</sup> In that case, the defendant conducted seismic operations on a tract of land, which approximately 80 co-owners owned.<sup>227</sup> The seismic company claimed that it had procured the “consent of 80% of the mineral servitude owners pursuant to La. R.S. 31:175 and therefore it could conduct operations on the property.”<sup>228</sup> However, because a certain corporation, to which most of the co-owners transferred their surface interest, “did not own an interest in a mineral servitude on the land,” the court held that article 175 “does not apply to this case.”<sup>229</sup>

The court further noted that “what was being conducted on this land were seismic operations.”<sup>230</sup> The court held that Louisiana Revised Statutes section 30:217<sup>231</sup> “is applicable to this case” and stated as follows:

G.F.S. for its operations needed the consent of the owner of the land irrespective of who owned the mineral rights. The evidence is clear that G.F.S. obtained permission of more than 80% of the landowners, since Wetlands is the owner of the land, but did not obtain permission from Jeanes.

La. Civ. Code art. 801 provides that the use and management of the thing held in indivision is determined by agreement of all the co-owners. Since G.F.S. used the land for its seismic exploration, it needed the consent of all the co-owners of the land. It failed to get the consent of Jeanes and is therefore liable to her.<sup>232</sup>

Prior to 1995, the term *operations*, as it appears in several articles of the Louisiana Mineral Code, was used in the context of

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225. *Id.* § 31:175.

226. 647 So. 2d 533 (La. Ct. App. 1994).

227. *Id.* at 534.

228. *Id.*

229. *Id.* at 534–35.

230. *Id.* at 535.

231. This statute requires the consent of the “owner or the party or parties authorized to execute geological surveys, leases, or permits as provided in the Louisiana Mineral Code” prior to conducting geophysical surveys. LA. REV. STAT. ANN. § 30:217(A)(1) (2007).

232. *Jeanes*, 647 So. 2d at 535 (citing *State v. Evans*, 38 So. 2d 140 (La. 1948); *Picou v. Fohs Oil Co.*, 64 So. 2d 434 (La. 1953); *Layne Louisiana Co. v. Superior Oil Co.*, 26 So. 2d 20 (La. 1946)).

“drilling or mining operations.”<sup>233</sup> Indeed, the Louisiana Supreme Court in *Bouterie v. Kleinpeter* held that *operations* means and relates to “the physical activity associated with the attempt to discover or maintain production.”<sup>234</sup> Geophysical, or seismic, activities are simply not of this character.

To expand the definition of *operations* to include the conduct of geophysical or seismic activities somewhat distorts that important word because the traditional understanding of *operations* has reference to those E&P activities that might be conducted under a mineral lease or a mineral servitude, having the result of maintaining the lease or interrupting prescription accruing against the servitude. Clearly, geophysical or seismic activities would neither maintain leasehold rights under a mineral lease nor interrupt prescription accruing against a mineral servitude.<sup>235</sup> They are simply not *operations*, in the industry-accepted sense of the word.<sup>236</sup>

The conduction of geophysical or seismic activities is not in and of itself the exploitation of a mineral right. If anything, such activities are more akin to a helicopter flyover of a potential drillsite for the purpose of ascertaining or evaluating topographical impediments to the conduction of E&P operations.<sup>237</sup> While this may be important, it is not per se relevant to the “use” of a mineral right, and for this reason alone, the 1995 amendment to the Louisiana Mineral Code seems unwarranted.

To legislatively address the disconcerting decision in *Jeanes* by amending these articles of the Louisiana Mineral Code (and thereby distorting the traditional understanding of *operations*) seems both misplaced and a bit of overkill. A preferable manner of addressing

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233. See, e.g., LA. REV. STAT. ANN. §§ 31:14, :30, :31, :32, :47, :60, :112, :115, :123, :213(4), :213(6) (2000).

234. 247 So. 2d 548, 555 (La. 1971).

235. “Preparations for the commencement of actual drilling or mining operations, such as geological or geophysical exploration, surveying, clearing of a site, and the hauling and erection of materials and structures necessary to conduct operations do not interrupt prescription.” LA. REV. STAT. ANN. § 31:30.

236. Rather, as to mineral servitudes, “interruption takes place on the date *actual drilling . . . operations* are commenced on the land burdened by the servitude.” *Id.* (emphasis added).

237. *But see* *Musser-Davis Land Co. v. Union Pac. Res. Co.*, 201 F.3d 561 (5th Cir. 2000) (holding that, unless excluded by contract, the right to conduct seismic operations was inherent in the grant of a mineral lease). The court’s analysis seemingly viewed seismic activities as being within the ambit of *exploration*. That does not mean, however, that the conduction of geophysical operations, without more, would serve to maintain leasehold rights in the same manner as conventional drilling would. No one could seriously contend that the conduction of geophysical operations over an anniversary date of a mineral lease would maintain leasehold rights and abate the need to pay a delay rental.

this issue would have been to clarify Louisiana Revised Statutes section 30:217, which regulates the conduct of geophysical or seismic operations.

To be sure, amending articles 166 and 175 of the Mineral Code without a corresponding amendment to Louisiana Revised Statutes section 30:217 only confuses the situation. The latter is a criminal statute; therefore, one should diligently comply with it or not violate its terms.<sup>238</sup> The difficulty is that, while such criminal statute does contain a definition of the term *owner*, it is a negative definition, explaining what the term does *not* include.<sup>239</sup> While that definition is immaterial in a situation where the landowner inherently owns its rights to the minerals underlying its lands (for the reason that no mineral servitude exists),<sup>240</sup> it is less than clear in the opposite situation—that is, where the land is burdened by one or more mineral servitudes.

Perhaps comfort can be taken from the fact that it is hard to imagine any district attorney prosecuting anyone under this penal statute, and if all else fails, perhaps the statute could be challenged on a “void for vagueness” basis.<sup>241</sup> But the fact remains that no attempt was made to coordinate this statute with the articles of the Mineral Code, resulting in uncertainty about which statute controls in a co-ownership situation that articles 166 and/or 175 seemingly address.<sup>242</sup>

### XIII. WHAT IS THE WORTH OF A MINERAL RIGHT IF THE REQUISITE CONSENT CANNOT BE OBTAINED?

Despite the language in the early cases that a mineral lease granted by one co-owner is “null in so far as the co-owner is

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238. “Whoever violates this Subsection shall be fined not less than five hundred dollars nor more than five thousand dollars or imprisoned for not less than thirty days nor more than six months, or both.” LA. REV. STAT. ANN. § 30:217(A)(3) (2007).

239. “‘Owner’ as used herein shall not include a person or legal entity with only a surface or subsurface leasehold interest in the property.” *Id.* § 30:217(A)(2).

240. *See id.* § 31:6 (2000) (“The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.”).

241. “A statute is unconstitutionally vague if an ordinary person of reasonable intelligence is not capable of discerning its meaning and conforming his conduct thereto.” *State v. Hair*, 784 So. 2d 1269, 1274 (La. 2001).

242. While one should not be unmindful of the instruction of article 2 of the Mineral Code that “[i]n the event of conflict between the provisions of this Code and those of the Civil Code *or other laws*[,] the provisions of this Code shall prevail,” this is of little comfort in view of a criminal statute’s possible relevance. LA. REV. STAT. ANN. § 31:2 (emphasis added).

concerned,<sup>243</sup> the lease is still valid between the lessor and the lessee. Actually, this is explicitly recognized in the text of article 166 where it states that a “co-owner of land *may grant a valid mineral lease . . . as to his undivided interest in the land but the lessee or permittee may not exercise his rights thereunder without consent of co-owners owning at least an undivided eighty percent interest in the land.*”<sup>244</sup>

A similar observation is drawn from article 164 under which, by stating that a “co-owner of land may create a mineral servitude out of his undivided interest in the land” and that “prescription commences from the date of its creation,”<sup>245</sup> one must conclude that the servitude is valid and effective (inasmuch as prescription has begun to accrue) but simply cannot be used unless and until the requisite consent is acquired and the proviso is met. Hence, the failure or inability to obtain the requisite consent does not render the mineral right invalid or without any value whatsoever. Rather, it simply means that no operations may be conducted on the surface of the land pursuant to that mineral right.

If the mineral servitude owner cannot operate on the land because it is unable to obtain the requisite consent as either article 164 or 175 requires or if the owner of a mineral lease cannot operate on the land because it is unable to obtain the requisite consent as article 166 requires, is there any value to the mineral right which it holds?

Yes. Even though the owner of such a mineral right is not able to conduct drilling operations on the surface of the land due to the absence of the required consent, it is still a valid mineral servitude or mineral lease. Thus, if the land in question is unitized with a well drilled on another tract in the unit, then the mineral right is valid and the owner thereof is entitled to participate in production to the extent provided by law. Clearly, participation in a producing unit on which the unit well is situated on another tract does not violate the prohibition of the conduction of operations on the co-owned tract of land.

It is also possible that E&P operations could be conducted on the land pursuant to a different, discrete operational mineral right for which the requisite consent has been obtained (or is unnecessary because of the inapplicability of articles 164, 166, and 175). In such an event, the use of a mineral servitude inures to the

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243. Gulf Refining Co. of La. v. Carroll, 82 So. 277, 279 (La. 1919).

244. LA. REV. STAT. ANN. § 31:166 (emphasis added).

245. *Id.* § 31:164.

benefit of all co-owners of that servitude,<sup>246</sup> and the mineral lease would be maintained because the activities that are sufficient to maintain the lease need not be performed personally.<sup>247</sup>

Although no case has considered the issue of whether the mineral servitude could be exercised or the mineral lease could be availed by the drilling of a directional well to be completed under the tract of land (with no surface operations being conducted), it would seem that without the requisite consent, no such operations could take place. Article 490 of the Louisiana Civil Code provides:

Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.<sup>248</sup>

Hence, the rights of a co-owner to object, or certainly withhold consent, are as availing with respect to the subsurface as they are to the surface of the land.

#### XIV. CONCLUSION

Land that is owned in indivision is far from atypical. An operator desiring to operate in a given area will most certainly encounter at least one tract with multiple co-owners.

The Louisiana Legislature has struck a reasonable balance of interests by abrogating a rule—as historic and traditional as it might have been—that frustrated the desires of a large majority of co-owners who wished to conduct oil and gas operations. The law now embraces a rule that permits operations on the co-owned land if at least 80% of the co-owners authorized it, while also affording

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246. “A use or possession of a mineral right inures to the benefit of all co-owners of the right.” *Id.* § 31:174. *See also id.* § 31:42–43.

247. “Performance may be rendered by a third person, even against the will of the obligee, unless the obligor or the obligee has an interest in performance only by the obligor.” LA. CIV. CODE ANN. art. 1855 (2008). *See also* Delatte v. Woods, 94 So. 2d 281 (1957) (rejecting an argument that operations must be conducted by the lessee personally) (“The exercise of such rights could not be accomplished if it were literally intended by the parties that the defendant [lessee] should personally perform drilling obligations.”).

248. LA. CIV. CODE ANN. art. 490 (2010). *See also* Logan v. State Gravel Co., 103 So. 526, 527 (La. 1925) (noting that real estate cannot be destroyed because “land” runs downward to the center of the earth).

an opportunity for a reluctant co-owner to enjoy the same benefits as other co-owners.

The public interest in the development of the state's natural resources is advanced inasmuch as wells that would otherwise not be drilled (due to a small minority of co-owners) can now be drilled without doing economic harm to the interests of those who are not as enthusiastic as others.