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All Good Things Must Come to an End: The Launch, Life, and Loss of a Mineral Servitude

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INTRODUCTION

This Article considers the various ways in which prescription accruing against a mineral servitude operates, and how extinguishment of the servitude might be avoided. As will be seen, our scrutiny is not limited to "interruption," but also includes "extension" and "suspension" of the prescription of nonuse. In the absence of one (or more) of these prescription-altering events, the mineral servitude will come to an end.[1] Because a mineral servitude might actually exist forever (our common law friends would say, "in perpetuity") if necessary actions are taken to avoid the accrual of the prescription of nonuse, one might wonder if the tag line of the title of this Article should have been "All Good Things *Might* Come to an End."

This examination draws on an array of writings of this author, including the text materials employed in his class in Mineral Rights, taught at the Paul M. Hebert Law Center at Louisiana State University, as well as other law schools in Louisiana.[2]

Additionally, the author has utilized portions of a paper presented to the Louisiana Mineral Law Institute in 1997, entitled "A Primer on the

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1. LA. REV. STAT. § 31:27(1) (2018). There is an important exception to this statement in the case of what, in industry jargon, are euphemistically called "imprescriptible minerals," a topic beyond the scope of this Article. *See id.* at § 31:149.

2. PATRICK S. OTTINGER, A COURSE BOOK ON LOUISIANA MINERAL RIGHTS (12th rev. ed. 2011).

Mineral Servitude,"[3] as well as a chapter in the *Mineral Law Treatise* on the subject of mineral servitudes.[4]

Finally, certain aspects of this Article, pertaining to mineral leases burdening a mineral servitude, are an adaptation of this author's *Treatise on Mineral Leases*.[5]

The cited materials have been adapted, principally by way of reorganization and supplementation, for purposes of this Article.

Thus, this Article examines the creation, duration, and extinction of a mineral servitude, or, as the alliterative title indicates, the "launch, life, and loss" of this important real right.[6]

While this Article's title suggests a broad array of coverage of the mineral servitude—from its creation ("launch"), its duration ("life"), to its ultimate extinguishment ("loss")—the principal focus is the "life" of the servitude, particularly how it is, or is not, perpetuated. That broad range of topics does not address the multitude of significant or unique issues attending this real right; these matters—important as they are—are addressed elsewhere, including this author's previously identified writings on the subject of mineral servitudes.[7]

In order to develop these issues, Part I of this Article considers the fact that a mineral servitude is subject to a prescriptive regime of nonuse, and explicates certain consequences arising out of that characterization, including interruption of prescription. In Part II, the ways in which prescription might be interrupted are discussed in detail. The extension of a mineral servitude is taken up in Part III of this Article, while the notion of suspension of prescription is examined in Part IV. The burden of proving the facts pertinent to the status of a mineral servitude is covered in Part V.

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3. Patrick S. Ottinger, *A Primer on the Mineral Servitude*, 44th ANN. INST. ON MIN. LAW 68 (1997).

4. PATRICK S. OTTINGER, LOUISIANA MINERAL LAW TREATISE Ch. 4 (Patrick H. Martin ed., 2012) [hereinafter OTTINGER, MINERAL SERVITUDE TREATISE].

5. PATRICK S. OTTINGER, LOUISIANA MINERAL LEASES: A TREATISE (2016) [hereinafter OTTINGER, MINERAL LEASE TREATISE].

6. The Louisiana Supreme Court has referred to the mineral servitude as "the most valuable property in the state." DeMoss v. Sample, 78 So. 482, 484 (La. 1918). Alluding to the continued relevance of this statement since it was first made by the state Supreme Court, in a later decision the Court noted that "since that date, [oil and gas has] mushroomed into an industry of almost unbelievably gigantic proportions." Ohio Oil Co. v. Ferguson, 34 So. 2d 746, 773 (La. 1946) (Fournet, J., dissenting).

7. *See* OTTINGER, *supra* note 2; *see also* Ottinger, *supra* note 3; OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4.

I. THE MINERAL SERVITUDE—A PRESCRIPTIVE REGIME

A. Preface[8]

"A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."[9]

A mineral servitude is a mineral right.[10] As such, it is "subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."[11]

Concerning the mineral servitude, it is the former—a prescriptive regime.[12] However, as will be seen, it is permissible to impose a term on the duration of a mineral servitude.[13]

Indicatively, the Mineral Code provides that a "mineral servitude is extinguished by . . . prescription resulting from nonuse for ten years."[14]

A comment on nomenclature is necessary: there are three kinds of prescription recognized by Louisiana law—acquisitive, liberative, and nonuse.[15] The prescription pertinent to a mineral servitude is of the third kind. In many cases, commentators and even judges incorrectly characterize the prescriptive regime as one of *liberative* prescription.[16]

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8. The jurisprudential development of the mineral servitude has been examined in Eugene A. Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 25 TUL. L. REV. 30 (1950) (Part 1); 25 TUL. L. REV. 155 (1950) (Part 2); 26 TUL. L. REV. 172 (1952) (Part 2 continued); 26 TUL. L. REV. 303 (1952) (Part 3).

9. LA. REV. STAT. § 31:21 (2018).

10. "The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease." *Id.* § 31:16.

11. *Id.*

12. This tenet is a codification of the essential ruling of the Louisiana Supreme Court in *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (La. 1922).

13. *See infra* Part I.G.2.

14. *See* LA. REV. STAT. § 31:27(1). This Article does not consider other modes of extinction of a mineral servitude such as "confusion," *id.* § 31:27(2), or "renunciation of the servitude on the part of him to whom it is due, or the express remission of his right," *id.* § 31:27(3).

15. LA. CIV. CODE art. 3445 (2018).

16. *See, e.g.*, Bass Enters. Prod. Co. v. Kiene, 437 So. 2d 940, 946 (La. Ct. App. 2d Cir. 1983) ("Thus, there was no use of the servitude within ten years sufficient to interrupt the running of liberative prescription."); Ultramar Oil & Gas Ltd. v. Fournet, 598 So. 2d 645, 646 (La. Ct. App. 3d Cir. 1992) ("However, there was no production south of the canal which would have interrupted the running

Even the Mineral Code utilizes this incorrect nomenclature,[17] justifying a historic observation or two on the topic of prescription under Louisiana law.

When the Mineral Code was adopted in 1974,[18] the Civil Code did not at that time distinctly identify the prescription of nonuse as a species of prescription. Rather, prescription was then of two distinct kinds—acquisitive and the familiar liberative prescription.[19] However, at that time, then-article 783(2) indicated that servitudes are extinguished "[b]y prescription resulting from non-usage of the servitude during the time required to produce its extinction," while article 790 recognized that a "right to servitude is extinguished by the non-usage of the same during ten years." Additionally, prior to its amendment and reenactment in 1982, former Civil Code article 3546 provided that "[t]he rights of usufruct, use and habitation and servitudes are lost by non-use for ten years," recognizing the prescription of nonuse as a "species of liberative prescription."[20] Yet, as previously observed, the Civil Code did not, prior to 1982, denominate that mode of extinguishment distinctly as a prescription of nonuse.[21]

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of liberative prescription."); Corley v. Craft, 501 So. 2d 1049, 1051–52 (La. Ct. App. 2d Cir. 1987) ("Appellants argue that even if an obstacle were created which prevented the use of the servitude on August 7 through August 10, and even if that obstacle were such that it could not be prevented or removed, and that even if it had the effect of suspending prescription, the most which could be said for the position of the plaintiffs-appellees is that liberative prescription accrued on or about August 20, 1984.").

17. *See* LA. REV. STAT. §§ 31:156, 31:206(A) (2018).

18. Title 31, Louisiana Revised Statutes, enacted by Act No. 50, 1974 La. Acts Vol. III, effective January 1, 1975. There are a number of academic articles that predate the adoption of the Mineral Code, but are nevertheless instructive as to the pre-Code law. *See, e.g.*, Lawrence F. Donohoe, Jr., *Acknowledgments, Joint Leases and Prescription*, 11th ANN. INST. ON MIN. LAW 82 (1964); *D.* Ryan Sartor, Jr., *Basic Principles of Liberative Prescription*, 18th ANN. INST. ON MIN. LAW 186 (1971).

19. Former article 3457 of the Louisiana Civil Code of 1870 provided as follows: "*Prescription* is a manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law. Each of these prescriptions has its special and particular definition."

20. LA. CIV. CODE art. 3445 cmt. (b) (2018) ("Article 3546 of the Louisiana Civil Code of 1870 indicates that the prescription of nonuse is a species of liberative prescription.").

21. *Id.* ("However, liberative prescription, being a bar to an action, is clearly distinguishable from prescription of nonuse, which is a mode of extinction of real rights other than ownership. For this reason, in accordance with modern

Legislative action in 1982 implemented a comprehensive revision of the law of prescription.[22] Thus, article 3445 of the Civil Code now informs that "[t]here are three kinds of prescription: acquisitive prescription, liberative prescription, and prescription of nonuse." Relevantly, article 3448 of the Civil Code defines the prescription of nonuse as "a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time."

Notwithstanding the absence in the Civil Code of explicit recognition of nonuse as a discrete kind of prescription on the date of the Mineral Code's enactment, several articles of the Mineral Code allude to the prescription of nonuse.

Seemingly, other articles, including articles 156 and 206A of the Louisiana Mineral Code, were not amended so as to clarify and recognize the newly identified species of prescription of nonuse. Thus, while perhaps not inaccurate at the date of its enactment, the Mineral Code—in continuing to refer to "liberative prescription" in these two articles—does not accurately identify the precise genre of prescription that now pertains to the real right.

This is not a matter of mere semantics. As will be seen, a significant difference between liberative prescription and the prescription of nonuse is that, in the case of the former, a prescribed right (such as a personal debt) can be revived by renunciation after prescription has accrued,[23] while, in the case of the latter, a real right that has prescribed for nonuse is not susceptible to post-extinguishment resurrection by way of acknowledgment.[24] Rather, as the Louisiana Supreme Court has often noted, "It is well settled by our jurisprudence that a mineral servitude,

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conceptual technique, Article 3445 declares that there are three kinds of prescription: acquisitive prescription, liberative prescription, and prescription of nonuse. The slight change in conceptual technique does not involve a change in the law.").

22. Act No. 187, 1982 La. Acts Vol. I, effective January 1, 1983.

23. LA. CIV. CODE art. 3449 (2018).

24. *See, e.g.*, *id.* art. 3448 cmt. (c) (2018) ("Liberative prescription bars action. See Article 3447, *supra*. However, the prescription of nonuse extinguishes the right itself. Thus, after the accrual of prescription of nonuse, no natural obligation remains."); *see also* Wise v. Watkins, 62 So. 2d 653, 656 (La. 1952) ("The courts have on occasions referred to an extinguished servitude as being a dead thing or, in other words, no longer in existence. . . . This Court has also pointed out that a servitude can only be established by acts such as are used in the transfer of title to immovable property. . . . Since the servitude in this case has become extinct, it cannot be re-created or established anew except by title.").

having once become extinct by prescription, is a dead thing."[25] Certainly, as one court has noted, "[D]rilling on the Property will not affect prescription which has already accrued."[26]

B. Effective Date of Creation of a Mineral Servitude

A mineral servitude is one of the "basic mineral rights that may be created *by a landowner*."[27] Indeed, a "mineral servitude may be created only by a landowner who owns the right to explore for and produce minerals when the servitude is created."[28] What article 24 means is that, to the extent that an existing mineral servitude already burdens the land, a landowner cannot create a second servitude, but the landowner may create a servitude as to any unencumbered rights it holds in the minerals.[29] As the courts have stated, "[O]nly a landowner may create a mineral servitude and then only to the extent of his mineral interest."[30]

Obviously, it is necessary to discern the date on which a mineral servitude is created to ascertain when, in the absence of a use, it will be extinguished. A decade is a decade, with both a start and end date. Unless the duration of the prescriptive period has been modified pursuant to the limited authority conferred in article 74 of the Mineral Code,[31] the servitude will be extinguished after the lapse of 10 years of nonuse.[32]

This rule of prescription embodies a matter of public policy that a contract cannot fundamentally vary or defeat.[33] Often, it is important to

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25. Delta Ref. Co. v. Bankhead, 73 So. 2d 302, 306 (La. 1954); *see also* Bailey v. Porter-Wadley Lumber Co., 28 F. Supp. 25, 31 (W. D. La. 1939) ("[T]he Louisiana jurisprudence is clear that prescription already accrued could not be revived, as it was a dead thing. Therefore, the payments that Bailey received and the royalties that he later received (similarly received in the case of English v. Blackman) in no manner revived the dead mineral servitude.").

26. Porter-Wadley Lumber Co. v. Bailey, 110 F.2d 974, 976 (5th Cir. 1940).

27. LA. REV. STAT. § 31:16 (2018) (emphasis added).

28. *Id.* § 31:24.

29. Wall v. Leger, 402 So. 2d 704, 709 (La. Ct. App. 1st Cir. 1981) ("Article 24 is a limitation on mineral servitudes, not on mineral leases. . . . A mineral lessor does not transfer ownership of mineral rights when he enters into a lease. . . . Ownership of mineral rights remains with the mineral lessor.").

30. Elkins v. Townsend, 296 F.2d 172, 174 (5th Cir. 1961).

31. *See infra* Part II.G.2.

32. LA. REV. STAT. § 31:27(1) (2018).

33. Chicago Mill & Lumber Co. v. Ayer Timber Co., Inc., 131 So. 2d 635, 651 (La. Ct. App. 2d Cir. 1961). ("The public policy, as relates to the prescription of nonuser as applied to mineral servitudes, is directed against attempts to renounce prescription in advance, or to suspend or to interrupt prescription by

determine the exact time of creation of a mineral servitude, which marks the beginning of the 10-year period. The ordinary rule is that the servitude is created, and prescription commences, when the landowner effectively vests the right in another person who may then exercise the rights it gives him.[34] When this occurs is, of course, determined from the ordinary rules of property.[35]

The courts have taken up the issue of when prescription commences with respect to instruments other than a stand-alone sale document, including agreements preparatory to the sale in which a mineral reservation might be contained,[36] such as a contract to sell[37] or a lease with an option to purchase.[38]

For example, in *Ober v. Williams*,[39] the Court held that a mineral servitude was created on the date of the passage of the act of sale, not on the earlier date of the contract to sell, which envisioned the mineral reservation in the case of the later passage of an act of sale.

Then, in *Chicago Mill & Lumber Co. v. Ayer Timber Co., Inc.*,[40] the court examined five-year leases that contained an option to purchase at the end of the lease term, with a reservation of a mineral servitude in the event

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means other than user or other means expressly recognized by law, such as acknowledgments made specifically for the purpose and with the intention of interrupting the running of prescription. What the courts have considered as contrary to public policy are agreements which seek to cause the lands to be burdened with mineral servitudes for more than 10 years without user.").

34. LA. REV. STAT. § 31:28 (2018) ("Prescription of nonuse of a mineral servitude commences from the date on which it is created."); *see also* Cohort Energy Co. v. Caddo-Bossier Pars. Port Comm'n, 852 So. 2d 1174, 1178 (La. Ct. App. 2d Cir. 2003) ("The ten-year prescriptive period begins to run from the date the mineral rights are acquired or created.").

35. Irrefutably, a mineral servitude is "property." *See* LA. REV. STAT. §§ 31:2, 31:16, 31:18 (2018). See sources cited, *supra* note 6, such that all laws of Louisiana pertinent to immovable property apply, except as otherwise might be provided. Guy Scroggins, Inc. v. Emerald Expl., 401 So. 2d 680, 684 (La. Ct. App. 3d Cir. 1981) ("Mineral rights . . . are classified under the Mineral Code as incorporeal immovables and are subject to the Civil Code articles respecting immovable property."). In the interest of full disclosure, the author represented the defendant in this suit. This proposition includes rules incident to the creation or transfer of property in the nature of a real right.

36. *See* Chapter 14 of Title VII of Book III of the Louisiana Civil Code, composed of articles 2620 through 2630.

37. LA. CIV. CODE art. 2623 (2018).

38. *Id.* art. 2620.

39. 35 So. 2d 219 (La. 1948).

40. 131 So. 2d 635 (La. Ct. App. 2d Cir. 1961).

of the exercise of the option, and held that prescription began to run when the option to purchase was exercised, not when the leases were granted.

From time to time, a variety of schemes have been devised in an attempt to circumvent the 10-year prescriptive period and effectively separate the enjoyment of the land from the enjoyment of the minerals for more than 10 years without the necessity of operations on or production from the property. For the most part, such schemes have been invalidated as being contrary to public policy.[41]

Illustratively, in *LeBleu v. LeBleu*,[42] the court determined to be unenforceable an agreement that created a mineral servitude and that purported to obligate the defendants to convey to the plaintiff a new mineral servitude in the event the earlier servitude should prescribe. Declining enforcement of that stipulation, the court stated that this undertaking

> constitute[d] a scheme or a device to circumvent or avoid the law and public policy of this state that a mineral servitude will be subject to the prescription of ten years, that contracts which purport to extend such a servitude for a longer period of time without use will not be enforced, and that a party cannot waive or renounce the prescription applicable to a mineral servitude before it has accrued.[43]

While courts will not enforce clauses of this type, the mere inclusion of such a provision does not invalidate the agreement in which it is contained. For example, in *Kirkland v. Faulhaber*,[44] an offer to sell land contained the following provision, to-wit: "I have had several offers on the 160 acres I own adjoining your property and have decided I will offer it for sale at $75 per acre with a reservation of mineral rights for ten years plus a ten-year extension at the close or end of that period."[45]

After the plaintiff-offeree accepted the offer, the defendant-offeror notified the offeree that she had accepted another offer. The offeree sued to enforce the offer by specific performance. The defendant asserted, in defense, "that defendant's offer and plaintiff's acceptance comprehended

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41. Prior to the adoption of the Louisiana Mineral Code, article 11 of the Louisiana Civil Code of 1870 embraced this proposition, which provided, in relevant part, that "[i]ndividuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals." *See* LA. REV. STAT. § 31:3 cmt. (2018).

42. 206 So. 2d 551 (La. Ct. App. 3d Cir. 1967).

43. *Id.* at 557.

44. 175 So. 2d 917 (La. Ct. App. 2d Cir. 1965).

45. *Id.* at 918.

an invalid agreement with respect to the reservation of minerals for a period in excess of ten years."[46] "It is urged that defendant is released from her agreement because the offer and acceptance contemplated the inclusion of a condition for the extension of the reservation of minerals which would not be valid under the laws of this State."[47]

The court was confronted with the issue of whether the stipulation for an extension of the mineral servitude was "a principal cause for making the contract."[48] The court found that it was not a principal cause, stating as follows:

> Nor do we find that the contemplated extension of the mineral reservation could, in any event, be considered as ground for the avoidance of the agreement to sell. The extension is not illegal; it is not void; it is not prohibited, but it is simply unenforceable by law. Despite the fact that plaintiff would be under no legal obligation to comply with the agreement for extension, it cannot be said that he could not voluntarily grant the extension.[49]

The court granted specific performance to enforce the sale and required that the sale contain a mineral reservation "for a period of ten years, together with the right of an extension of said reservation for an additional period of ten years."[50] Notwithstanding that courts will not enforce this stipulation, its inclusion permits the parties to abide by it if they wish to do so voluntarily, but without the prospect of judicial intervention if the landowner declines to do so.

More recently, in *Weyerhauser Co. v. A. D. Hinton, L.L.C.*,[51] the court refused to enforce a written agreement on the part of a landowner by which it had obligated itself to acknowledge an outstanding mineral servitude, upon request of the servitude owner.[52] The court noted that the "difference

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46. *Id.*

47. *Id.* at 919.

48. *Id.* The argument was based upon former article 1823 of the Louisiana Civil Code, which provided that, in order for an error of law to invalidate a contract, it must bear upon the *principal* cause for the making of the contract. *See* LA. CIV. CODE art. 2034 (2018) ("Nullity of a provision does not render the whole contract null unless, from the nature of the provision or the intention of the parties, it can be presumed that the contract would not have been made without the null provision.").

49. *See* Kirkland v. Faulhaber, 175 So. 2d 917, 919 (La. Ct. App. 2d Cir. 1965).

50. *Id.* at 920.

51. No. Civ.A.06-0272, 2006 WL 3845005 (W.D. La. Dec. 29, 2006).

52. The agreement provided, as follows:

between an *invalid* attempt to extend the life of a mineral servitude beyond the ten years dictated by public policy and *validly* extending the life of a servitude by interrupting prescription with a written and recorded acknowledgment is the conscious choice of the landowner."[53]

C. Types of Prescription-Altering Events

Prescription of nonuse accruing against a mineral servitude can be interrupted, extended, or suspended. There are significant differences attributable to each type of prescription-altering event.

"If prescription is interrupted, the time that has run is not counted. Prescription commences to run anew from the last day of interruption."[54]

By contrast, "extension" does not create a new servitude, but merely *extends* the prescriptive period pertinent to an existing mineral servitude for a period of time—usually for the term of a mineral lease. If a sufficient use is made during that extended period of time, an interruption occurs.[55]

When "suspension" occurs, time stands still for the duration of the suspending event. When the suspending event is abated or removed, time starts again, effectively adding the period of the suspension to the remaining "life" of the servitude.[56]

The Louisiana Supreme Court explained the difference between interruption and suspension of prescription in a non-mineral rights case wherein the U.S. Fifth Circuit Court of Appeals certified a question of Louisiana law to the state's highest court.[57] In the course of the decision (which involved the one-year prescriptive period applicable to torts), the

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> From time to time upon the written request of the duly authorized agent for then owners of such mineral interest, Willamette would execute such instruments as may be necessary for the purpose of interrupting or tolling the running of liberative perscription [sic] against the mineral servitudes created by the reservation. Each such instrument shall contain a provision holding Willamette and its officers and directors harmless from any and all loss or damage of whatsoever kind and character by reason of executing such instruments if, but only if, in the opinion of counsel for Willamette it is then lawful for Willamette to execute same.

Id. at *1.

53. *Id.* at *5.

54. LA. CIV. CODE art. 3466 (2018). *See infra* Part II.

55. LA. REV. STAT. § 31:57 (2018). *See infra* Part III.

56. LA. CIV. CODE art. 3472 (2018) ("The period of suspension is not counted toward accrual of prescription. Prescription commences to run again upon the termination of the period of suspension."). *See infra* Part IV.

57. Louviere v. Shell Oil Co., 440 So. 2d 93 (La. 1983).

Supreme Court explained the essential difference between interruption and suspension as follows:

> The basic difference between interruption and suspension of prescription is the length of the prescriptive period when prescription begins to run anew. When prescription is interrupted, the prescriptive period starts over in its entirety upon cessation of the interruption. Thus, when a one-year prescriptive period is interrupted at any time during the year by the filing of suit and the suit is subsequently dismissed without prejudice, the plaintiff has another full year in which to bring another suit, and that second one-year period begins to run from the last day of interruption. See La.C.C. Art. 3466. On the other hand, if a one-year prescriptive period is suspended for any reason, the "clock" merely stops during the suspension and starts again at the cessation of the suspension, so that the obligee has only so much of the one year as was remaining when the suspension began. Only the period of suspension is not counted toward the accrual of prescription. See La.C.C. Art. 3472.[58]

D. Mineral Servitude Subject to Conditional Title

An important circumstance that might result in the extinguishment of a mineral servitude is presented if the owner's title to the land burdened by the servitude is subject to a "condition divesting the title."[59] Article 25 of the Louisiana Mineral Code establishes this precept, and it reads as follows:

> A mineral servitude may be created by a landowner whose title terminates at a particular time or upon the occurrence of a certain condition but it is extinguished at the specified time or on occurrence of the condition divesting the title.[60]

Concordant with this principle is article 27(5) of the Mineral Code, which establishes that a "mineral servitude is extinguished by . . . extinction of the right of him who established the servitude."[61]

Examples of the existence of a condition that predates the creation of the mineral servitude include a landowner whose land is burdened by a

58. *Id.* at 97 n.8.
59. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 3-08.
60. LA. REV. STAT. § 31:25 (2020).
61. *Id.* § 31:27(5).

mortgage or other security interest. Unless it is subordinated in favor of the subsequently created mineral servitude, any enforcement of the superior mortgage or other security interest would result in the termination of the servitude upon the judicial sale of the burdened property.[62] The purchaser at a judicial sale is entitled to receive title to the encumbered land in the state or condition it was in on the date of the filing of the mortgage being enforced, as that is the state of title for which the lender bargained by way of mortgage.

Additionally, if the landowner acquires the land subject to a right of redemption, the mineral servitude later created by the landowner would be extinguished upon the timely exercise of the right of redemption.[63]

Yet another illustration is presented where the land burdened by a mineral servitude is already subject to an agreement preparatory to a sale to a third party that is reflected of record. This preparatory agreement might be an option to sell,[64] a contract to sell,[65] or a right of first refusal (sometimes called a "preferential right to purchase," or simply a "pref right").[66] Any mineral servitude created on the face of one of these types

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62. "The property is sold subject to any real charge or lease with which it is burdened, superior to any security interest, mortgage, lien, or privilege of the seizing creditor." LA. CODE CIV. PROC. art. 2372 (made applicable to executory proceedings by article 2724(A)); *see also* P.J.'s Army Surplus & Co., Inc. v. G.D. & G., 635 So. 2d 1217, 1218 (La. Ct. App. 5th Cir. 1994) ("In this case, the question is whether a lease, recorded after the mortgage upon which the property was foreclosed, survived the judicial sale without subsequent recordation of a new lease or ratification of the earlier lease, such that a third party purchaser would be bound by that lease. We find that it does not."). *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 12-11(c); *see also* Patrick S. Ottinger, *Enforcement of Real Mortgages by Executory Process*, 51 LA. L. REV. 87, 132 (1990).

63. "A purchaser under a reserved right of redemption may establish a predial servitude on the property, but it ceases if the seller exercises his right of redemption." LA. CIV. CODE art. 713 (2020). "The seller who exercises the right of redemption is entitled to recover the thing free of any encumbrances placed upon it by the buyer. Nevertheless, when the thing is an immovable, the interests of third persons are governed by the laws of registry." *Id.* art. 2588.

64. *See id.* art. 2620.

65. *Id.* art. 2623.

66. *Id.* art. 2625; *see* Robert J. Sergesketter, *Preferential Rights to Purchase: The Basics, and the Most Interesting Pref. Rights Case You've Never Heard About*, 5 HLRE 43, 46 (2015) ("First, let us get some nomenclature out of the way. Preferential Rights to Purchase often are referred to as Rights of First Refusal, or 'RoFRs.' They also are referred to as Preferential Purchase Rights (the naming convention primarily used in this Article), Preferential Rights, Pref. Rights, Preemptive Rights, and Contingent Rights.").

of agreements would be extinguished if a third person avails such rights to purchase the property.

The premise underlying this rule finds support in the well-established principle that one may not grant to a third person any rights greater than those the grantor holds.[67] As stated, the mineral lessee who proposes to operate on land burdened by a conditional mineral servitude—more accurately, a mineral servitude inferior to a valid, pre-existing right of a third party to acquire or reclaim the land—would be prudent to seek either to subordinate that superior right to the mineral servitude *and* mineral lease,[68] or to secure a "protective lease" or "top lease" from the party in whose favor the minerals would revert in the event of extinction resulting from the occurrence of the condition.[69]

One must note that an extinguishment of a mineral servitude resulting from the occurrence of a pre-existing "condition divesting the title" is in no manner dependent upon or tethered to the existence or lack of a use that would otherwise perpetuate the servitude. Indeed, the servitude will conclude upon the occurrence of the terminating condition even if, on the date of extinguishment, there exist multiple drilling or producing wells on the lands that the mineral servitude burdens that would otherwise constitute a use sufficient to interrupt prescription.

Additionally, even if a mineral servitude is properly acknowledged, even a few days before its prescriptive date, it will still be extinguished if, thereafter, the divesting condition is effectuated.

Early jurisprudence recognized an exception that might pertain to the extinguishment of a mineral servitude because of the loss of title in the party creating the servitude. Thus, in *Jefferson v. Childers*,[70] the facts disclosed that, subsequent to granting a mineral lease, the vendor sued the lessor to annul the sale because of non-payment of the purchase price for the land.[71]

Although the sale of land to the lessor was annulled, the annulment was without prejudice to the rights of the mineral lessee because the lessee relied on the "public records doctrine."[72] The Court stated:

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67. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 2-09.

68. *See id.* § 12-11(c).

69. *See id.* §§ 6-02, 6-05; *cf.* Wahlder v. Roy O. Martin Lumber Co., 337 So. 2d 669 (La. Ct. App. 3d Cir. 1976).

70. 179 So. 30 (La. 1937).

71. The deed was recorded in the conveyance records of Bossier Parish, Louisiana, and apparently not in the mortgage records. However, "[u]nder this Article [2561 of the Civil Code] the right to dissolution is effective regardless of recordation in the mortgage records." LA. CIV. CODE ANN. art. 2561 cmt. (h) (2020).

72. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 1-14.

> Even if plaintiff is successful in her suit against defendant, she can only recover the property subject to transactions affecting it made by her apparent vendee with third persons acting in good faith. In effect, she becomes the lessor of intervener, to the same extent as though she had been the original lessor.[73]

E. Rule of Non-Contiguity

When one examines a particular event or activity to determine whether it constitutes a use of a mineral servitude sufficient to interrupt prescription, it is essential to be cognizant of the rule of non-contiguity.[74]

In a rule of public policy that differs from the principle respecting a mineral lease,[75] it is not possible to create a single mineral servitude over non-contiguous tracts of land. Thus, in *Lee v. Giauque*,[76] the Louisiana Supreme Court held as follows:

> But that section does not form a continuous tract with any other part of the lands in controversy, being removed from all the other lands mentioned in said reservation, except that the southwest point of said section 31 is common to the northeast point of the lands in section 1 of township 13 north, range 12 east.
>
> We are of opinion that the exercise upon any part of a continuous tract of land of a servitude extending over the whole tract preserved the servitude over the whole for the reason that there is but one servitude on the whole tract.
>
> On the other hand, we think that servitudes extending over separate tracts of land constitute distinct servitudes; and that the exercise of the right over one of these tracts will not serve to preserve the right over other and distinct tracts. For instance, the right of passage on lands to my right, and also on lands to my left, clearly constitute two distinct servitudes, although created by the same title; and by exercising my right only on one side[,] I indicate no intention of preserving my right on the other.

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73. *Jefferson*, 179 So. at 32.

74. Although often called the "rule of contiguity," this author suggests that it more accurately is the "rule of non-contiguity," but as the phrase goes, "what's in a name?"

75. LA. REV. STAT. § 31:114 (2020) ("A single lease may be created on two or more noncontiguous tracts of land . . . .").

76. Lee v. Giauque, 97 So. 669 (La. 1923).

> And to constitute a single tract of land the lands must be so situated that one may pass from one part to the other without passing over the lands of another. But, as it is impossible to pass through a mere point, it follows that one cannot pass from said section 31 to section 1 without passing over other lands.[77]

This rule of non-contiguity is now enshrined in three articles of the Mineral Code, as follows:

> Art. 64. Presumption when servitudes created on noncontiguous tracts
>
> An act creating mineral servitudes on noncontiguous tracts of land creates as many mineral servitudes as there are tracts unless the act provides for more.[78]
>
> Art. 66. Right of owners of contiguous tracts to create single servitude
>
> The owners of several contiguous tracts of land may establish a single mineral servitude in favor of one or more of them or of a third party.[79]
>
> Art. 73. Single servitude may not exist on noncontiguous tracts
>
> A single mineral servitude may not be created on two or more noncontiguous tracts of land.[80]

So, what is the test of contiguity? An appellate court has held that "[t]wo tracts of land which touch only at a common corner are not contiguous."[81]

The courts have further recognized that "'[c]ontiguous tracts of land' must be tracts or bodies of land which have one side, or at least part of one side, in common."[82]

Consequently, if an instrument of grant or reservation describes tracts that are not contiguous, the instrument establishes as many distinct mineral

77. *Id.* at 670.
78. LA. REV. STAT. § 31:64 (2020).
79. *Id.* § 31:66.
80. *Id.* § 31:73.
81. Turner v. Glass, 195 So. 645, 646 (La. Ct. App. 2d Cir. 1940).
82. Baham v. Vernon, 42 So. 2d 141, 145 (La. Ct. App. 1st Cir. 1949).

servitudes as there are non-contiguous tracts involved, "unless the act provides for more." Each tract would be subject to its own use requirement such that a use on one servitude will have no bearing on the accrual of prescription against other non-contiguous servitudes,[83] except to the extent that it is unitized such that the tenets of articles 30, 33, 34, 35, or 37 of the Mineral Code might operate.

Article 64, which states that the rule stated therein applies "unless the act provides for more," recognizes the opportunity to make the use requirements more (but not less) burdensome by providing that more servitudes are created than the precise number of non-contiguous tracts. An example, albeit unique, is a stipulation that each named governmental section (or portion thereof) in a larger contiguous tract of land constitutes a separate and distinct servitude even though each distinct section is contiguous to one or more other governmental sections (or portion thereof).

Thus, where a tract of land was "dismembered into two tracts" by the intervention of a railroad strip owned by a third party in full ownership (and not merely in nature of a personal servitude of right of use), a use on one side of the railroad strip only interrupted prescription accruing against the mineral servitude on the side where the use occurred, but not on the other side.[84]

A common situation that invokes a factual or legal examination under the "rule of non-contiguity" is presented when a stream or river completely traverses a servitude-burdened tract of land described as a continuous body of land. If the stream or river is navigable, the State of Louisiana owns its bed,[85] and the tract is rendered into two non-contiguous parcels, such that a use on one side of the intervening water will not interrupt prescription on the other side of the stream or river.[86]

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83. "On the other hand, we think that servitudes extending over separate tracts of land constitute distinct servitudes; and that the exercise of the right over one of these tracts will not serve to preserve the right over other and distinct tracts." Lee v. Giauque, 97 So. 669, 670 (La. 1923); *see* LA. REV. STAT. § 31:64 (2020).

84. Calhoun v. Ardis, 141 So. 15, 17 (La. 1932); *see also* Patton v. Frost Lumber Indus., Inc., 147 So. 33 (La. 1933).

85. See LA. CIV. CODE art. 450 (2020) ("Public things are owned by the state or its political subdivisions in their capacity as public persons. Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.").

86. Vermilion Bay Land Co. v. Phillips Petrol. Co., 646 So. 2d 408 (La. Ct. App. 4th Cir. 1994), *writ denied*, 650 So. 2d 1176 (La. 1995).

Illustratively, in a recent case, an appellate court affirmed the trial court's conclusion that the landowners "failed to show by a preponderance of the evidence that Bayou Dolet was navigable when Louisiana was admitted to the Union in 1812," thus defeating a claim that the servitude was divided.[87]

So foundational is the rule of non-contiguity as it pertains to a mineral servitude, that principles of warranty or estoppel will not defeat its operation if a tract of land is, in fact and in law, non-contiguous.[88]

F. Disposition of Rights to Minerals upon Extinguishment of a Mineral Servitude

When the accrual of prescription of nonuse extinguishes a mineral servitude (or by other means of extinguishment as enumerated in article 27 of Mineral Code), the rights to the minerals revert to the person who is the landowner at the time of extinguishment. In the jargon of the industry, such a person to whom minerals revert upon extinction is often referred to as the "then owner of the land."[89]

This is an essential tenet of law that is a matter of public policy and was established in the case of *McDonald v. Richard*[90] in which the Louisiana Supreme Court cogently explained as follows:

> The question in the case is this: If the owner of a tract of land sells the land and reserves the mineral rights, and if, thereafter, within the period of 10 years, the purchaser of the land sells the mineral rights (which he does not own) to a third party, and if, thereafter, but within 10 years from the date of the sale of the land, the buyer

87. Furie Petrol., L.L.C. v. SWEPI, LP, 285 So. 3d 91, 94 (La. Ct. App. 2d Cir. 2019).

88. *See, e.g.*, Ultramar Oil & Gas Ltd. v. Fournet, 598 So. 2d 645, 646 (La. Ct. App. 3d Cir. 1992) (involving a mineral royalty, rather than a mineral servitude, court rejects royalty owners' contention that the landowners were estopped to assert non-contiguity where their royalty deed described one continuous tract of land, and made no reference to the canal that bisected the royalty tract). It must be noted that the court deemed highly relevant the fact that the case involved a mineral royalty, which is passive in nature.

89. *See* Williams v. Arkansas-Louisiana Gas Co., 193 So. 2d 78, 81 (La. Ct. App. 2d Cir. 1966) ("[T]he mineral servitude, upon its expiration, reverted free of any encumbrance, to the *then owner of the land*.") (emphasis added); Corley v. Craft, 571 So. 2d 718, 722 (La. Ct. App. 2d Cir. 1990) ("Thus, upon expiration of a mineral servitude, the mineral rights revert to the *owner/owners of the land*.") (emphasis added).

90. 13 So. 2d 712 (La. 1943).

> sells it to a fourth party, and if the original seller of the land loses his mineral servitude by the liberative prescription of 10 years for nonuser, to whom do the mineral rights inure,—to the party who bought the mineral rights from one who had no such rights,—or to the party who owned the land at the time when the servitude or mineral rights reserved by the original landowner lapsed by the prescription of 10 years? The judge of the district court decided that, inasmuch as the mineral rights reserved by the Morley Cypress Company were merely a real obligation, or mineral servitude imposed upon the land, the lapsing of the obligation or servitude inured to the party who owned the land at the time when the obligation lapsed. Our opinion is that the judgment is correct.[91]

This rule is so robust that contracting parties are not allowed to alter it under the guise of reserving or otherwise dealing with the so-called "reversionary interest," or the expectancy that a mineral servitude will prescribe.

This fundamental precept was first announced in *Hicks v. Clark*,[92] an important case in which Mr. Raines sold land to Mr. Brown on December 9, 1941 and reserved a mineral servitude as to one-fourth of the minerals. Within fewer than 10 years from that date, Hicks acquired ownership of the surface of the land.

On July 16, 1948, Hicks sold the land, subject to the earlier Raines's servitude, to the ancestor-in-title of Clark. In this sale, Hicks reserved a mineral servitude in and to one-fourth of the minerals and the "right of reversion" of the outstanding one-fourth of the minerals held by Raines.

After December 9, 1951 (the date of extinguishment of the Raines's servitude by reason of nonuse), Hicks sued the surface owners to be recognized as the owner of a servitude in and to the one-fourth of the minerals over which he had reserved the "right of reversion."

The Court rejected Hicks's institution as being "an effort to circumvent the public policy of this state, and [] therefore refused[d] to recognize or give effect to it."[93] Thus, the Court refused to allow a "right of reversion" to be treated as an object of commerce.[94]

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91. *Id.* at 714.

92. 72 So. 2d 322 (La. 1954).

93. *Id.* at 325.

94. That recognition of the so-called "right of reversion" would be entirely repugnant to our civil law of property is concordant with the simplicity inherent in our law. *See* State v. McDonogh's Ex'rs, 8 La. Ann. 171, 251 (La. 1853) ("The general idea of property under the Roman law, and under our system, is that of simple, uniform and absolute dominion. The subordinate exceptions of use,

The rule of *Hicks v. Clark* is now codified in article 76 of the Louisiana Mineral Code that provides as follows: "The expectancy of a landowner in the extinction of an outstanding mineral servitude cannot be conveyed or reserved directly or indirectly."[95]

In an unpublished decision,[96] a court has held that the rule of article 76 is only violated when the servitude prescribes for nonuse, but does not prevent parties from dealing with the servitude if there has been a use. Thus, in *Estate of Riggs v. Way-Jo, L.L.C.*,[97] the sale of land contained the following reservation, to-wit:

> SELLER HEREIN SPECIFICALLY ~~TRANSFERS~~ Reserves ~~AND CONVEYS UNTO PURCHASER~~ ALL MINERALS AND MINERAL RIGHTS ~~EXCEPT FOR THE ROYALTIES PRESENTLY BEING PAID TO SELLER,~~ WHICH ~~ROYALTIES~~ ARE HEREBY RESERVED UNTIL TWELVE (12) MONTHS AFTER SELLERS [SIC] DEATH. ~~AFTER THE LAPSE OF SAID TIME, ALL ROYALTIES SHALL BE PAID TO PURCHASER OR ITS SUCCESSORS AND ASSIGNS~~.[98]

The efficacy of the sale of land was attacked on several theories (including an allegation that it was a forgery and constituted a fraud). The mineral reservation was also challenged on the basis that it violated public policy as enunciated in article 76 of the Mineral Code. The trial court agreed with the challenge to the mineral reservation and held it invalid.

On appeal, all challenges to the sale were rejected, and the court then took up the issue of the validity of the mineral reservation. The court's analysis centered on the underlying policy articulated in the *Hicks* case,

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usufruct and servitudes are abundantly sufficient to meet all the wants of civilization, and there is no warrant of law, no reason of policy, for the introduction of any other.").

95. LA. REV. STAT. § 31:76 (2020).

96. While an unreported decision is not binding precedent, it is persuasive to the court. Although it was previously provided that a case that is "not designated for publication" should not be quoted or cited in any respect, Roberts v. Sewage & Water Bd., 634 So. 2d 341, 343 (La. 1994), since 2006, there is no longer a prohibition against citing "unpublished opinions of the supreme court and the courts of appeal," provided that they are "posted by such courts on the Internet websites of such courts." LA. CODE CIV. PROC. art. 2168 (2020).

97. Est. of Riggs v. Way-Jo, L.L.C., No. 2011 CA 1651, 2012 WL 6737835 (La. Ct. App. 1st Cir. Dec. 28, 2012).

98. *Id.* at * 2 (emphasis by court: strike through indicative of changes made by hand to the typed mineral reservation; bold type is the operative language of the reservation, eliminating interlined words).

that is, that it is contrary to public policy to burden land with a mineral servitude for a period longer than 10 years *without use*.[99] The court deemed that the construct presented in *Riggs* did not offend this announced policy because the court found as follows:

> There was mineral production on the Greensburg property from a period prior to the 1999 sale to Way–Jo through the time of trial. Unlike the mineral servitude at issue in *Hicks,* Riggs' mineral servitude did not terminate due to ten years non-use, but rather due to the contractual agreement the parties made at the time of the 1999 sale. Under such facts, the rationale and holding of *Hicks* is not applicable.[100]

Because no public policy was implicated where there had been a use of the mineral servitude, the court found that "the provisions of La. R.S. 31:76 also are not applicable, particularly since La. R.S. 31:3 grants parties contractual freedom to deviate from the provisions of the mineral code, as long as the deviation does not affect the rights of others and is not contrary to public policy."[101]

The *Riggs* decision upholds the language of the reservation that reserves the rights to minerals to the seller for a stated term ("until twelve (12) months after sellers [sic] death"). The court concluded that this reservation did not offend the rule of *Hicks v. Clark*, now embodied in article 76 of the Mineral Code, because "the continuous mineral production"[102] meant that, unlike the relevant facts in *Hicks*, there was a use of the mineral servitude. Hence, the public policy articulated in *Hicks* was not violated. Rather, the "freedom of contract" enunciated in Mineral Code article 3 permitted the parties to construct this type of reservation, and the court enforced it.

Article 76's prohibition against dealing with the expectancy of extinguishment is subject to exceptions set forth in the three sequentially following articles, which address the unique circumstance of an "oversale,"[103] a matter which, while vitally important, is beyond the scope of this Article.[104]

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99. LeBleu v. LeBleu, 206 So. 2d 551 (La. Ct. App. 3d Cir. 1967).

100. *Est. of Riggs*, 2012 WL 6737835, at *16–17.

101. *Id.*

102. *Id.* at *16.

103. An "oversale" situation arises when a series of sales or reservations of rights to minerals result in claims to minerals that, in the aggregate, exceed 100% of rights in minerals.

104. *See* OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4, § 416.

G. Opportunity to Invoke "Freedom of Contract"

1. Preface

While both a mineral lease and a mineral servitude confer upon their owner the right to conduct operations on the burdened land, these two basic mineral rights differ in significant respects.[105] For present purposes, one of the most significant differences between these two mineral rights is that the mineral lease is susceptible to robust alteration under the principle of "freedom of contract," a notion the Mineral Code affirms,[106] while the Louisiana Mineral Code dictates and establishes, for the most part, the intrinsic attributes of the mineral servitude, with minimal opportunity for contractual alteration.

Nevertheless, within certain limitations, the principle of "freedom of contract" is available with respect to the mineral servitude. Two particular articles of the Mineral Code are implicated here—articles 74 and 75.

2. Alteration of Prescriptive Period or Imposition of Term

Article 74 provides, "Parties may fix the term of a mineral servitude or shorten the applicable period of prescription of nonuse or both. If a period of prescription greater than ten years is stipulated, the period is reduced to ten years."[107]

If parties "fix the term," the mineral servitude comes to an end upon the accrual of that stated term, even if there then exists an activity that would otherwise constitute a use sufficient to perpetuate the servitude.

If, instead, parties merely "shorten the applicable period," a use accomplished within that shorter period of time can still perpetuate the mineral servitude, and so on, but it will thereafter extinguish if the truncated time period accrues without a use.

These issues were considered in *St. Mary Operating Co. v. Champagne*,[108] and the court stated the issue as follows: "Under the

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105. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 1-19.

106. "Unless expressly or impliedly prohibited from doing so, individuals may renounce or modify what is established in their favor by the provisions of this Code if the renunciation or modification does not affect the rights of others and is not contrary to the public good." LA. REV. STAT. § 31:3 (2020). The important principle of "freedom of contract" is addressed in Part I of Chapter Two of OTTINGER, MINERAL LEASE TREATISE, *supra* note 5.

107. LA. REV. STAT. § 31:74 (2020).

108. 945 So. 2d 846 (La. Ct. App. 3d Cir. 2006), *writ denied*, 954 So. 2d 140 (La. 2007).

Louisiana Mineral Code, does the phrase in a cash sale document, 'for a period of 10 years,' create a fixed, ten-year term, not subject to prescription, or is this phrase a reaffirmation of the parties' adoption of the regular ten-year prescriptive period, making it subject to interruption?"[109] The court explained as follows:

> Taking all of these provisions into account, it is never possible to create a mineral right that will last for more than ten years if it goes unused. However, if parties create a mineral right and *specify* that it will last for more than ten years, then the right is for a fixed term. A fixed term means that the mineral right will end at the terminus of the number of years stated, regardless of whether prescription might have been interrupted by good-faith attempts to recover minerals from the tract of land. Even if parties create a fixed term, it will still be subject to prescription if the right goes unused for ten years from the date it was created.[110]

The court held that "because there is no such affirmative statement specifying that the mineral servitude created for a period of ten years would not be subject to prescription, we find that it is subject to prescription."[111] Thus, the court found that "prescription was interrupted in March of 2003, when good-faith mining activities were begun. The mineral servitude will, therefore, continue to exist until there is a ten-year period of nonuse."[112]

In *St. Mary Operating Co. v. Guidry*,[113] a similar issue was presented—whether an instrument created a mineral servitude subject to a prescriptive period of seven years "after which the mineral rights would revert to the land owners or was this simply a shortening of the ten year prescriptive period provided for in R.S. 31:27."[114]

The court relied on the comments to article 74 of the Louisiana Mineral Code, which, in part, read as follows:

> Thus, it is suggested that in the absence of some expression to the contrary in the instrument in question, the specification of a period less than ten years for a mineral servitude should be construed as an agreement on a prescriptive period less than ten years, and the interest should be considered subject to the rules of use and thus

109. *Id.* at 848.
110. *Id.* at 850–51.
111. *Id.* at 852.
112. *Id.*
113. 954 So. 2d 397 (La. Ct. App. 3d Cir. 2007).
114. *Id.* at 399.

> renewable by exercise of the rights granted or reserved. Parties are, of course, free to specify that the stated number of years is the term of the interest and not a prescriptive period.[115]

The court found that "[t]he co-mingling agreement did not specify if the seven-year period prescribed in the document was an agreement on the prescriptive period or on the term of the mineral servitude itself. Thus, we find it was not error for the trial court to look beyond the four corners of the document in order to ascertain the intent of the parties."[116]

The court affirmed the trial court's determination that the instrument "created a mineral servitude subject to a prescriptive period of seven years and not a servitude for a fixed term of seven years."[117]

At dispute in *Moffett v. Barnes*[118] was whether a mineral servitude was subject to a "fixed" 10-year term.

The plaintiffs owned two tracts of land that they purchased from the defendants. The act of sale stated, "Vendor retains all oil, gas and other mineral rights in the land herein conveyed for ten (10) years."[119]

The defendants granted mineral leases covering the tracts, and the lessees drilled and established production on each tract before the tenth anniversary of the plaintiffs' purchase of the land.

The plaintiffs argued that the act of sale's statement that the defendants retained mineral rights "for ten (10) years" established a 10-year fixed term. Accordingly, the plaintiffs posited that the mineral servitudes terminated on the tenth anniversary of the act of sale, regardless of the existence of production.[120]

The trial court disagreed, finding that the mineral servitudes were not subject to a fixed term and that prescription had been interrupted by drilling operations conducted, and production obtained, by the defendants' lessees.

Affirming, the appellate court stated that the act of sale's reservation "merely confirm[ed] the normal 10-year limit for a servitude, and does not

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115. *Id.* at 401 (quoting LA. REV. STAT. § 31:74 (2020) cmt. (emphasis omitted)).

116. *Id.* at 402.

117. *Id.* at 398.

118. Moffett v. Barnes, 149 So. 3d 475 (La. Ct. App. 2d Cir. 2014).

119. *Id.*

120. "A mineral servitude is extinguished by: . . . (4) expiration of the time for which the servitude was granted. . . ." LA. REV. STAT. § 31:27(4) (2020); *see* OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4, § 408(4).

reject or renounce the normal operation of nonuse and interruption provided by the law."[121]

The court rejected the plaintiffs' contention that they should have been allowed to present evidence regarding the intent of the parties, stating that the act of sale was unambiguous, and therefore evidence of intent was not appropriate.[122]

Finally, *Taylor v. Morris*[123] is a case with facts very similar to those presented in *Moffett*. However, a different panel of the same appellate court similarly held that an act of sale referring to a "period of ten (10) years" did not establish a fixed term, but instead merely referred to the law's default prescriptive period.[124]

Notably, one judge submitted a concurring opinion stating that, under the court's decision, "the literal words for a term period of years are being avoided and effectively interpreted out of the contract,"[125] but that such a result was justified "[i]n this unusual setting."[126]

In his concurrence, the judge identified two conceivable interpretations in cases under article 74, one being the "Prescription Construction" ("the presumption that the parties were only referring in their contract to such normal prescription"),[127] and the other being the "Literal Construction" ("words as literally expressing a term that could extinguish the servitude").[128] He ordained the former as the "priority construction," saying as follows: "However, in the absence of such clarifying extrinsic evidence, I would hold that the near absurdity of a fixed-term mineral servitude on land, undeveloped for oil and gas, should make the Prescription Construction the priority interpretation which a court should apply."[129]

While this approach would certainly be workable, it is discordant with case law that suggests that, in the case of two possible constructions, the court should adopt that interpretation that tends to unburden the land.[130] In

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121. 149 So. 3d at 478.

122. See OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 1-16, for a thorough discussion of the "parole evidence exclusionary rule."

123. 150 So. 3d 952 (La. Ct. App. 2d Cir. 2014).

124. *Id.* at 954.

125. *Id.* at 959.

126. *Id.*

127. *Id.* at 960.

128. *Id.*

129. *Id.* at 961.

130. *See*, *e.g.,* Whitehall Oil Co. v. Heard, 197 So. 2d 672, 678 (La. Ct. App. 3d Cir.), *writ denied,* 199 So. 2d 923 (La. 1967) ("Ultimately, we conclude that, where the instrument could as reasonably be interpreted either way, the proper

a close case, the rule of interpretation is that "[d]oubt as to the *existence, extent*, *or manner of exercise* of a predial servitude shall be resolved in favor of the servient estate."[131]

3. Alteration of Rules of Use

With regard to the permissible alteration of rules of use pertaining to a mineral servitude, article 75 of the Mineral Code provides as follows:

> The rules of use regarding interruption of prescription on a mineral servitude may be restricted by agreement but may not be made less burdensome, except that parties may agree expressly and in writing, either in the act creating a servitude or otherwise, that an interruption of prescription resulting from unit operations or production shall extend to the entirety of the tract burdened by the servitude tract regardless of the location of the well or of whether all or any part of the tract is included in the unit.[132]

Because article 30 requires "actual drilling or mining operations" in order for drilling to interrupt prescription, the article announces a "rule of use" which, under article 75, "may not be made less burdensome." Thus, in an instrument of grant or reservation, parties are not free to provide that preparatory work short of "spudding in" interrupts prescription.

On the other hand, because it is permissible to "restrict," or make more "burdensome," the rules of use, parties might, for example, stipulate that—rather than being tethered to the date on which "actual drilling . . . operations are commenced"[133]—the date of interruption of prescription *only* occurs upon drilling the well to a stated depth under the earth, or by attaining a depth which represents a stated percentage of the total objective depth of the test well, provided that such activity in its entirety would constitute a "good faith" operation in accordance with the strictures of article 29. Clearly, this liberality of "freedom of contract" may not be used as a subterfuge to avoid the underlying policy enunciated in article 29.

Additionally, parties could permissibly stipulate that only production would be sufficient to interrupt prescription accruing against a mineral

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interpretation is that which least restricts the ownership of the land conveyed, as in the case of mineral servitudes.").

131. LA. CIV. CODE art. 730 (2020) (emphasis added) (made applicable to the mineral servitude by LA. REV. STAT. § 31:2 (2020)).

132. *Id.* § 31:75 (2020).

133. *Id.* § 31:30 (2020).

servitude, and that a dry hole would not have that effect.[134] Care should be taken, however, to negate any intention to thereby convert the mineral servitude to a mineral royalty—while the prescriptive regime would be the same (a dry hole would not interrupt prescription accruing against a mineral royalty), the two interests differ in terms of the executive right enjoyed by the owner of a mineral servitude, but not by the owner of a mineral royalty.[135]

Although it was presented in a recent case involving a mineral royalty, not a mineral servitude, the court recognized the ability to impose term restrictions on the life of a real right (while not altering the usual prescriptive period).[136] There, the mineral royalty deed provided as follows:

> This conveyance shall be for a period of *Four (4) years & Six (6) months* from July 18, 1996, and as long thereafter as oil, gas or other minerals are produced from said lands, or from lands with which said lands are pooled or unitized, *and also as long thereafter as drilling or reworking operations are being conducted on said lands, or on lands pooled or unitized therewith, without more than 90 days cessation of operations, in an effort to produce oil, gas or other minerals*, and if said operations result in the production of minerals, then for as long thereafter as oil, gas or other minerals are produced from said lands, or from lands pooled or unitized therewith. A shut-in gas well shall be considered as a producing well and shall perpetuate the term of this conveyance.[137]

No production was obtained during the four-year, six-month period mentioned in the clause, although there was drilling on the burdened tract. The landowner contended that the royalty prescribed. The trial court granted a motion for summary judgment in favor of the landowner. The royalty owner appealed.

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134. *See* Keebler v. Seubert, 120 So. 591, 592 (La. 1929) ("The right to the continued use of the servitude retained is not dependent upon the successful outcome of the exploiting, *unless it be made so by contract*.") (emphasis added); *see also* Texas Co. v. Crawford, 212 F.2d 722 (5th Cir. 1954) (language of reservation required *production* to continue the servitude beyond a stated term of 25 years).

135. *Cf.* LA. REV. STAT. § 31:111 (2020).

136. Lamoco, Inc. v. Hughes, 850 So. 2d 67 (La. Ct. App. 3d Cir.), *writ denied,* 860 So. 2d 1156 (La. 2003).

137. *Id.* at 69 (second emphasis added).

The appellate court stated that "the Royalty Deed does not present a reduction of the prescriptive period of nonuse, and we find that the provision at issue only constitutes the term of a mineral royalty."[138]

The court sustained the condition of the term of the royalty interest, that is, the necessity to conduct drilling operations without more than 90 days of cessation of operations. Even though drilling may not interrupt prescription from accruing against a mineral royalty interest,[139] still, the court seemingly allowed for drilling to continue the term of the royalty interest. In other words, the continuation of the royalty was restricted, not as a matter of prescription, but because drilling operations lapsed (which had no bearing on prescription). "However, the Royalty Deed is still subject to the ten-year prescriptive period of nonuse."[140] Summary judgment in favor of the landowner was reversed.

Although this case did not involve a mineral servitude, it illustrates a situation when the circumstances resulting in perpetuation of a real right were made more onerous than the default rules that would otherwise be pertinent.

II. INTERRUPTION OF PRESCRIPTION BY USE

A. Interruption by Drilling as a Use

1. General

As the principal object of a mineral servitude is to exploit mineral resources for commercial purposes, it is self-evident that a "use" of such servitude must be made in "good faith" for such "use" to interrupt prescription. The jurisprudence has envisioned that a "use" is in "good faith" if it is undertaken with some "reasonable expectation" that minerals will be discovered and produced in "paying quantities."[141] Any lesser

138. *Id.* at 71.

139. Cont'l Oil Co. v. Landry, 41 So. 2d 73, 75 (La. 1949) ("It is also well settled that this right is merely one to share in the production of oil, gas, and other minerals if and when they are produced from the property subject to the right. It is passive in its nature, and there is no obligation on the royalty owner to develop the property, nor does he have this right.").

140. *Id.*

141. McMurrey v. Gray, 45 So. 2d 73, 77–78 (La. 1949) ("As this court has pointed out, no iron-clad rule can be established to determine whether there has been a use of such a servitude to interrupt prescription. But it may be said that, where exploitation or drilling operations have been begun but have been stopped or abandoned at a depth at which there is no reasonable hope of discovering minerals in paying quantities, there has been no user of the servitude to interrupt prescription.

standard would allow minimal activities undertaken at insignificant costs to facilitate the perpetual continuation of a mineral servitude, a proposition repugnant to the civil law that favors reuniting the rights to minerals with the ownership of the surface.[142]

2. Nature of Use

In order to interrupt prescription, the servitude must be used "in the manner contemplated by the instrument of grant or reservation."[143] Thus, it has been held that "a geophysical exploration of the premises for the purpose of determining by scientific methods the indication of minerals underlying the surface is not a use of a servitude in the manner contemplated by the grant thereof, and consequently, such exploration does not interrupt the prescription then accruing."[144]

In a case most frequently cited as authority for the rule of noncontiguity,[145] the Louisiana Supreme Court has explained that "the court paid no regard as to whether the 'oil well' there drilled was successful or not. It was the drilling of the oil well that was there held to preserve the servitude. As a matter of fact, the well in that case was not a success."[146]

In *Louisiana Petroleum Co. v. Broussard*,[147] the landowner conveyed a mineral servitude in a tract of land to certain parties who then transferred these rights to the plaintiff. The defendants claimed that the plaintiffs failed to exercise their mineral rights for 10 years; therefore, the mineral rights were lost through 10 years of nonuse. Plaintiffs' lessees had drilled several wells, beginning seven years after creation of the servitude, none of which proved to be commercially productive. These drilling operations lasted for four years, and, for nine years, there was no drilling at all until

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In other words, the drilling of the well and the exploitation must be in good faith with reasonable expectation that the well will be a producer."). *See also* Kellogg Bros., Inc. v. Singer Mfg. Co., 131 So. 2d 578 (La. Ct. App. 2d Cir. 1961).

142. *See, e.g.*, Mire v. Hawkins, 186 So. 2d 591, 597 (La. 1966) (noting "the public policy of this State which does not favor unwarranted extensions of liberative prescription on mineral servitudes; but, to the contrary, that policy favors the timely return of outstanding minerals to the owner of the land").

143. La. Petrol. Co. v. Broussard, 135 So. 1, 2 (La. 1931). The Court relied on former article 796, Louisiana Civil Code, which provided, "By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title."

144. Goldsmith v. McCoy, 182 So. 519, 523 (La. 1938).

145. Lee v. Giauque, 97 So. 669 (La. 1923).

146. Keebler v. Seubert, 120 So. 591, 593 (La. 1920).

147. *La. Petrol. Co.*, 135 So. at 1.

drilling operations were renewed. There was another lapse of eight years before drilling was once again resumed.

The Louisiana Supreme Court had to determine if some or any of the drilling operations were insufficient to interrupt prescription of the mineral servitude through 10 years of nonuse. According to the Court, the general rule was that drilling operations that terminated at a depth at which there was no real hope of discovering minerals in "paying quantities" could not be considered use of the mineral servitude sufficient to interrupt prescription. Because one of the drilling operations ceased at a depth where no real hope of discovering minerals in "paying quantities" existed, the court found that these particular operations failed to interrupt prescription. Without inclusion of these operations, a period of 17 years passed between drilling operations sufficient to interrupt prescription. Thus, the court held that the servitude had prescribed through 10 years of nonuse.

In another case,[148] a mineral servitude was created on April 30, 1928. A well was commenced on the servitude tract on March 3, 1938 and was completed as a dry hole on March 13, 1938. The landowner contended that the "drilling of the well in this case did not have the effect of interrupting the prescription."[149] Plaintiff's contention was that the well was not commenced with any reasonable expectation of discovering minerals. The Court rejected this contention, saying as follows:

> Taking all [evidence of productive history of the field] into consideration, and the legal presumption of good faith,[150] we cannot agree with the contention that this well was drilled without, in the opinion of the driller, a reasonable prospect of success. That the well was a failure is of no moment. The servitude existed of the right to go upon the land and explore for oil, it was not confined to the actual production of oil.[151]

The courts continued to affirm the proposition that the drilling of a well in "good faith," and to a depth at which there was a reasonable hope or expectation of producing minerals in "paying quantities," is a sufficient use to interrupt prescription accruing against a mineral servitude, even if the operations result in a dry hole. "The right to the continued use of the

148. Lynn v. Harrington, 192 So. 517 (La. 1939).
149. *Id.* at 518.
150. This "legal presumption of good faith" will be discussed in *infra* Part V.B.
151. *Lynn*, 192 So. at 519.

servitude retained is not dependent upon the successful outcome of the exploiting . . . ."[152]

The Court in *Hunter Co. v. Ulrich* held that the unsuccessful drilling operations nevertheless were sufficient to interrupt prescription because:

(1) Operations were conducted for a period of about eight months.
(2) Well was drilled to 5,340 feet which compared favorably with other wells in area.
(3) 220 cores were taken.
(4) Complete log was kept.
(5) $48,000.00 was spent.

In another case,[153] operations for the drilling of a well were commenced prior to the prescriptive date of a servitude. The geologist found a "high spot" or a rise in the surface. A well was drilled to the Nacatosh Sand. However, because the Nacatosh Sand had not been productive in 30 years, the Court held that such operation was not a "good faith" use, as "there was no reasonable possibility of obtaining production from the Nacatosh Sand as this sand had long since depleted."[154]

Although this operation was not sufficient to interrupt prescription, the Court issued an injunction to prevent the landowner from interfering with the lessee's further operation designed to drill to the deeper Travis Peak formation. "The defendants should be enjoined from interfering with the drilling of the well McMurrey No. 1 to deeper horizons, and plaintiffs should be permitted to continue their efforts to interrupt prescription by these drilling operations."[155]

3. Mineral Code Formulation

a. Preface

The jurisprudentially developed rules pertinent to the interruption of prescription by "use" resulting from the conduct of drilling operations are now codified in article 29 of the Mineral Code, which reads as follows:

Art. 29. How prescription of nonuse is interrupted

The prescription of nonuse running against a mineral servitude

152. Hunter Co., Inc. v. Ulrich, 8 So. 2d 531 (La. 1942).
153. McMurrey v. Gray, 45 So. 2d 73 (La. 1949).
154. *Id.* at 78.
155. *Id.* at 79.

> is interrupted by good faith operations for the discovery and production of minerals. By good faith is meant that the operations must be
>
> (1) commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth,
>
> (2) continued at the site chosen to that point or depth, and
>
> (3) conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.[156]

Although not explicitly so stated, article 29 has relevance only if the operation is unsuccessful, resulting in a "dry hole."[157] Only then—and in the absence of some other use of the servitude—might it be necessary to evaluate the "good faith" of the operator in conducting the unsuccessful operation to ascertain if it was sufficient to interrupt prescription, despite its lack of commercial success.[158] Certainly, if the operation as proposed and drilled by the operator results in a well that is put into commercial production, prescription is interrupted effective as of the date on which actual drilling operations are commenced within the prescriptive period, without the need to evaluate the reasonableness of the operator's expectation.[159]

At the same time, if a drilling operation that results in the completion of a successful well nevertheless would have failed to meet the strictures of article 29 had it been unsuccessful (by reason of the completion being in a different "point or depth" than was originally anticipated), that resulting production would itself serve to interrupt prescription, with the only caveat being that production must commence prior to the prescriptive date.[160]

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156. LA. REV. STAT. § 31:29 (2020).

157. "Insofar as the petroleum industry is concerned, Article 29 perpetuates the rule that dry hole drilling operations satisfying the stated criteria will interrupt prescription." *Id.* cmt.

158. The "operator" may be designated by contract, such as by a joint operating agreement, or by the Commissioner of Conservation. Hunt Oil Co. v. Batchelor, 644 So. 2d 191, 196 (La. 1994) ("The Commissioner has the power to establish compulsory units and designate unit operators therefor."); Enerquest Oil & Gas, LLC v. Asprodites, 843 So. 2d 535, 539 (La. Ct. App. 1st Cir. 2003) ("[T]he commissioner has the power to establish compulsory units and designate unit operators therefor.").

159. *Id.* § 31:31.

160. *Id.*

b. Proof through Expert Testimony

To determine if the expectations of the servitude owner (or, more typically, its lessee) were reasonable, the court will receive testimony from experts, including geologists, petroleum engineers, as well as other disciplines. If there is a divergence of opinion from scientists and "experienced oil men," one case suggests that the latter might prevail. For example, in *Kellogg Bros., Inc. v. Singer Manufacturing Co.*,[161] the court stated that "the views entertained by practical oil and gas men . . . are entitled to equal *if not greater* recognition as experts in that particular field" because of their extensive experience.[162]

The Louisiana Supreme Court made an interesting comment on the conflicting testimony of technical experts, countered by experienced operators who "put their money where their mouth is," in *Lynn v. Harrington*,[163] thusly:

> The most we can gather from the geologists is that their opinions are very fallible. That the most they can do is to point out what they consider the most likely place to drill, with no assurance as to results. That the determining opinion in drilling oil wells is that of the man sinking and paying for the well. That many fields have been developed in territory condemned by geologists.[164]

It remains to be seen whether this seeming predilection in favor of the operator who expends its capital still carries the day, in view of the significant advances in drilling technology since the nascent stages of the industry.

c. Standards of Proof of Reasonableness of Driller's Expectations

Concerning the element of "reasonable expectation," is this standard to be adjudged on an "objective" or a "subjective" basis?

While article 29(1) sets forth an *objective* standard, the requirements of articles 29(2) and (3) are clearly *subjective* in nature.[165] The second and

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161. Kellogg Bros., Inc. v. Singer Mfg. Co., 131 So. 2d 578 (La. Ct. App. 2d Cir. 1961).

162. *Id.* at 584 (emphasis added).

163. Lynn v. Harrington, 192 So. 517 (La. 1939).

164. *Id.* at 518–19.

165. "Some comment is appropriate on the rather curious mixture of subjective and objective standards in Article 26 [sic]. Operations must be in 'good faith,' but 'good faith' is proven only if the operations meet *evidentiary standards* requiring

third "evidentiary standards" give rise to certain concerns. Because these "evidentiary standards" are apparently mandatory,[166] problems might be encountered if the drilling of a well that commences in compliance with the requirements of article 29(1) is not "continued at the site chosen to that point or depth."

For example, if a well is commenced with the intention to drill to a depth of 16,000 feet (from which depth other wells in the area have produced in "paying quantities"), and if, at a depth of 12,000 feet, geological evidence is obtained that demonstrates that further drilling would be useless because the original geological interpretation was not valid (e.g., an unexpected fault trap[167] is cut or basement rock[168] is encountered), the decision is made to terminate drilling. Because operations for the drilling of that well are not "continued at the site chosen to that point or depth," the mandatory requirement of article 29(2) is not met.

On the other hand, to continue the drilling of this well to 16,000 feet would be a vain and useless act and would be contrary to the "reasonable expectation" requirements of article 29(1). While it appears that such an operation does not constitute a "use" sufficient to interrupt prescription in accordance with the literal strictures of article 29, it is suggested that the courts should allow the servitude owner to demonstrate that, notwithstanding the non-compliance with these "evidentiary standards," the conduct of this operation was reasonable and in "good faith" under the circumstances. However, one must note that the comments to article 29 explain, "Short of the standards stated in Article 26 [sic], then, no amount of subjective good faith or effort will sustain a contention that a use has occurred."[169]

As noted above, the requisites for "good faith" are expressed in the conjunctive, such that each distinct element must be satisfied for the

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that there be a 'reasonable' expectation of production, an objective standard." LA. REV. STAT. § 31:29 cmt. (2020) (emphasis added).

166. "'Must' is mandatory language." Singleton v. State, Dep't of Pub. Safety & Corr. *ex rel.* Elayn Hunt Corr. Ctr., 878 So. 2d 555, 556 (La. Ct. App. 1st Cir. 2004).

167. A "fault trap" is a "structural trap, favorable for the retention of petroleum, formed by the cracking and breaking of a rock plane." PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS: MANUAL OF OIL AND GAS TERMS (17th ed. 2018).

168. "Basement rock" is "[e]ither igneous or metamorphic rock" which "does not contain petroleum." "[W]hen it is encountered in drilling, the well is abandoned." *Id.*

169. LA. REV. STAT. § 31:29 cmt. (2020).

operations that result in a dry hole to be deemed to be in "good faith," and, hence, to interrupt prescription. While elements (2) and (3) are essentially "mechanical," and it is easy to determine whether they have been met, element (1) is different in character because it requires an evaluation of the *reasonableness* of the *expectation* of the party using the servitude.

A recent case considered, but did not definitively resolve, this issue. In *Indigo Minerals, LLC v. Pardee Minerals, LLC*,[170] a mineral servitude was created on 8,000 acres in December 1971; only four sections, containing approximately 1,100 contiguous acres, were at issue in the suit.

Wells were drilled on the lands burdened by the servitude in 1980, 1989, and 1998. All of the wells were dry holes.

The surface owner and the owner of a mineral servitude that it later created challenged the continued viability of the 1971 mineral servitude. In particular, the plaintiffs contested whether certain dry holes, albeit timely commenced, constituted "good faith operations," as article 29 of the Mineral Code contemplates, and hence, were sufficient to interrupt prescription.

After extensive discovery, cross motions for summary judgment were filed. The trial court granted the defendants' motion for summary judgment and denied the motion by plaintiffs.

At issue was whether the "reasonable expectation" standard for article 29 is objective or subjective. On appeal, the Second Circuit reversed the motion for summary judgment, finding that issues of fact existed.

The defendants had offered expert testimony that the wells in question were drilled with a "reasonable expectation," based on a geological evaluation from distant or remote fields in which production had been obtained—in other words, *objective* evidence. The defendants did not demonstrate that the wells in the remote fields (in some cases, several parishes distant from the tracts involved) were geologically relevant or correlative to the lands in dispute.

In contrast, the plaintiffs presented deposition testimony and documentary evidence that the driller "had evidence and knowledge in its possession at the time of the drilling of its well which demonstrated that production in the more shallow formations was not expected."[171] That is to say, the plaintiffs presented *subjective* evidence of the lack of a "reasonable expectation" in support of their challenge to the continued existence of the mineral servitude.

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170. 37 So. 3d 1122 (La. Ct. App. 2d Cir.), *writ denied*, 46 So. 3d 1274 (La. 2010). In the interest of full disclosure, your author represented the plaintiff in this suit. *See* OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4, § 409(3).

171. 37 So. 3d at 1127.

The Louisiana Supreme Court denied writs,[172] and because the case was settled after remand, the resolution of this important issue awaits another day.

Issues not resolved, given the procedural context of the *Indigo* case, include the following:

1. Whether the "reasonable expectation" standard of article 29 is to be evaluated objectively or subjectively.
2. Who has the burden of proof as to compliance with article 29?[173]
3. Whether there is a presumption of "good faith" applicable to the activities of the servitude owner.[174]

4. Role of Production in "Paying Quantities"[175]

In the context of interruption of prescription by use, the role of production in "paying quantities" is twofold.

Under article 29(1) of the Mineral Code, one of the principal requirements for a use through drilling operations is that there must be a "reasonable expectation of discovering and producing minerals in *paying quantities* at a particular point or depth." If a drilling operation is commenced with such expectation (and if the other requirements are met), the operation will interrupt prescription even if unsuccessful; a dry hole is sufficient if it meets the "good faith" requirement.

As observed previously, if production is obtained (even if obtained as a result of a drilling operation that might be adjudged as being *not* commenced with a "reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth"), such production itself—independent of the drilling operation (which had no bearing on prescription)—will interrupt prescription, regardless of whether it produces in "paying quantities," provided that production actually commences *prior to* the prescriptive date.

As it relates to production as a use of the servitude, "[i]t is necessary only that minerals actually be produced in good faith with the intent of saving or otherwise using them for some beneficial purpose."[176] This

172. Indigo Mins. LLC v. Pardee Mins., LLC, 46 So. 3d 1274 (La. 2010).

173. *See infra* Part V.

174. The issue of whether there exists a "presumption of good faith" will be discussed in Part V.B, *infra*.

175. *See* Patrick S. Ottinger, *Production in "Paying Quantities"—A Fresh Look*, 65 LA. L. REV. 635 (2005).

176. LA. REV. STAT. § 31:38 (2020).

codifies the jurisprudence that held that it "is unimportant whether this production was in paying quantities so long as there was some production or use of the servitude."[177]

Thus, for production to interrupt prescription against a mineral servitude, production in fact is the relevant standard. Whether production is in "paying quantities," production in fact will interrupt prescription accruing against the mineral servitude so long as the minerals are produced "in good faith with the intent of saving or otherwise using them for some beneficial purpose."[178]

Production in "paying quantities" is defined in article 124 of the Louisiana Mineral Code. However, that definition is peculiarly pertinent to the "Habendum Clause" of mineral leases.[179] The essential element of the codal definition is that production "is considered to be in paying quantities when production allocable to the *total original right of the lessee* to share in production under the lease is sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss."[180]

To illustrate, if a mineral lease provides for a one-fifth lessor's royalty, "lifting costs"[181] are measured against four-fifths of total production, even if an overriding royalty interest that would further reduce the net revenue interest attributable to the working interest burdens the lessee's interest.[182]

In the case of a mineral servitude, if no mineral lease exists, and the mineral servitude owner operates in its own right (as rare as that might

177. Mays v. Hansbro, 64 So. 2d 232, 234 (La. 1953).

178. *See* LA. REV. STAT. § 31:38 (2020); *see also id.* § 31:88. It is interesting to contrast the qualitative standard of production envisioned by Mineral Code article 38 (pertinent to mineral servitudes) with the standard for mineral royalties under article 88, which is that production sufficient to interrupt prescription accruing against a mineral royalty need "only . . . actually be produced and saved." The difference is explained by the fact that a mineral royalty, being passive in nature, affords no opportunity for the mineral royalty owner to formulate an intent to save or use the produced minerals for any purpose whatsoever, or to be ascribed any attribute of being in good faith, or not.

179. *See id.* § 31:124. Article 124 appears in Chapter 7 of the Mineral Code entitled "The Mineral Lease," Part 4 of which is entitled "The Obligations of the Lessee." *See also* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 3-15.

180. LA. REV. STAT. § 31:124 (emphasis added).

181. Stewart v. Amerada Hess Corp., 604 P.2d 854, 857 n.8 (Okla. 1979). This term references the costs that the operator incurs, which are "necessary to lift the oil from the ground."

182. Clifton v. Koontz, 325 S.W.2d 684, 693 (Tex. 1959) ("The entire income attributable to the contractual working interest created by the original lease is to be considered.").

be),[183] it is entitled to five-fifths (or 100%) of production, a higher or more significant amount of production against which operating costs are to be measured. Thus, assuming one could predict the post-completion "lifting costs" prior to drilling with sufficient certainty, it is apparent that more revenue accrues to the operator under the unleased servitude than to the hypothetical mineral lessee, against which the same amount of expenses is to be measured.

In a proper case (depending upon the amount of the lessor's royalty reserved under a mineral lease), production may be in "paying quantities" for purposes of the mineral servitude, but not for purposes of a mineral lease. Again, the production in "paying quantities" standard is only relevant in determining if there was a "reasonable expectation" that a well resulting in a dry hole was drilled "in good faith."[184]

Accordingly, if a well produces, but not at a level to meet the standard of "paying quantities," it might result in the termination of the mineral lease, yet would nevertheless be sufficient to interrupt prescription on the mineral servitude, if, as envisioned by article 38, minerals are produced "in good faith with the intent of saving or otherwise using them for some beneficial purpose."

5. Effective Date of Start, Stop, and Start Anew of Interruption of Prescription

a. Preface

Equally relevant to determining the date a servitude is created—a matter discussed in Part I.B hereof—is the date on which an interruption takes place and thereafter ceases, as that date of cessation starts the prescriptive period "anew."

The Louisiana Mineral Code provides that an "interruption takes place on the date actual drilling or mining operations are commenced on the land burdened by the servitude."[185] Thus, the test for "commencement of operations" differs in the case of a mineral servitude ("spudding in" is

183. *See* Mohawk Oil Co. v. Layne, 270 F. 851, 854–55 (W.D. La. 1921) ("Not one landowner in a hundred develops his own land. Even if he should be financially able to do so, not being in the oil business, he would not care to assume the risk. The usual and almost universal custom is to lease the land to an oil operator . . . .").

184. *See* LA. REV. STAT. § 31:38. If production interrupts prescription, it need not be in "paying quantities."

185. *Id.* § 31:30.

required)[186] and a mineral lease (unless, of course, the mineral lease contains a clause defining "commencement of operations" as "turning right").[187]

In *Olinkraft, Inc. v. Gerard*,[188] the court stated the following rule regarding what constitutes "spudding," to wit:

> While there is no decision directly in point on what constitutes good faith spudding, the law is well established that when the requirement is the commencement of a well on a critical date for the purpose of maintaining viability of a lease beyond the primary term or *interruption of prescription of a mineral servitude*, that the activity involved must be such that it can be construed to be performed in a good faith attempt to drill the well. The essence of the good faith requirement is that the activities performed must be necessary for the drilling of the well and they must be pursued with diligent continuity.[189]

At issue in *Olinkraft* was whether the use of a "spudder rig"[190] to drill a hole is sufficient to satisfy a contractual requirement that a well be "spudded in." The Louisiana Second Circuit Court of Appeal determined that drilling an 18-inch diameter, 22-foot hole with a water well drilling rig was not good faith spudding based on the following factors: (1) the pipe was not cemented into place as is the practice when installing conductor pipe; (2) the specifications of the drilling contract for the well in question did not provide for the installation of the conductor pipe; (3) the "deep well drilling rig" was not brought to the location until three

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186. Hilliard v. Franzheim, 180 So. 2d 746, 747 (La. Ct. App. 3d Cir. 1965) ("[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; it has a distinct meaning different from other terms of the industry, such as to 'commence to drill', which refer to the first operations on the land preliminary to the actual drilling or spudding in."); *see also* Peironnet v. Matador Res. Co., 144 So. 3d 791, 820 (La. 2013) ("Moreover, to maintain continuous drilling operations, the Lessee had to commence actual drilling operations, *i.e.*, 'having the bit in the ground and rotating same,' . . . which, under the industry lexicon, is referred to as 'spudding' . . . .").

187. Allen v. Cont'l Oil Co., 255 So. 2d 842 (La. Ct. App. 2d Cir. 1971), *writ denied*, 257 So. 2d 156 (La. 1972); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 5-04.

188. Olinkraft, Inc. v. Gerard, 364 So. 2d 639 (La. Ct. App. 2d Cir. 1978).

189. *Id.* at 644.

190. MARTIN & KRAMER, *supra* note 167 ("A colloquialism for a small drilling rig.").

weeks after the hole was drilled by the water well rig; and (4) a conductor pipe was not necessary and served no useful purpose for drilling a well such as the one in question.

Consequently, the court held that the use of a "spudder rig" did not constitute good faith spudding, but was "performed by defendant solely for the purpose of attempting to comply with his . . . agreement."[191]

"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."[192] This overrules a line of jurisprudence that held that an interruption might result from mere preparatory work.[193]

"Prescription commences anew from the last day on which actual drilling or mining operations are conducted."[194] Of course, if the operations are successful and if production ensues, the continuation of that production would, of its own force, interrupt prescription.[195]

In a proper case, a court might need to determine if periods of time between the conclusion of a distinct, prior drilling or reworking operation and the date of further or subsequent operations indicate the continuation of the prior operations in the sense that they are "conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times," or if the former operation was to be deemed concluded as an abandonment of the former use, with the result that prescription has commenced anew.

For example, in *McMurrey v. Gray*,[196] after the lessee of the mineral servitude obtained a drilling permit, the site was prepared, and the lessee used a portable drilling well to drill to the Nacatosh sand, which was at a depth of 900 to 1,000 feet. Although no production was obtained from the Nacatosh sand, the lessee applied for and was subsequently granted an amended drilling permit to drill to the Travis Peak sand, which was at a depth of about 6,000 feet.

At about the same time that the lessee applied for the drilling permit, he orally contracted with a drilling contractor, Baker, to drill a well to the deeper Travis Peak sand. Prior to commencing this next operation, the surface owners locked the gateway to the site, contending that the mineral

191. *Olinkraft, Inc.*, 364 So. 2d at 645.
192. LA. REV. STAT. § 31:30 (2020).
193. Keebler v. Seubert, 120 So. 591, 592 (La. 1929).
194. LA. REV. STAT. § 31:30.
195. *Id.* § 31:36.
196. McMurrey v. Gray, 45 So. 2d 73 (La. 1949).

servitude on the land had extinguished for 10 years of nonuse. Litigation ensued to establish the continued efficacy of the servitude.

The Court first held that drilling to the Nacatosh sand did not interrupt prescription because experienced oil men testified that there was no reasonable possibility of obtaining production from that sand because it had been depleted. Then, the Court held that McMurrey had not abandoned his operations and that the surface owners should be enjoined from interfering with his deeper drilling operations.

The Court considered additional factors when it concluded that the lessee was engaged in what would now be referred to as a single operation, including: (1) that the size of the casing used in his first drilling operation was larger than needed to drill to the Nacatosh sand and large enough to drill to the Travis Peak sand; (2) the lessee's purchase of enough pipe and tubing before commencing operations to the Travis Peak sand; and (3) the capping of the well, which would permit the lessee to continue drilling rather than cementing and plugging the well when he reached the Nacatosh sand as required by state regulators.

"Actual drilling or mining operations commenced within the prescriptive period interrupt prescription although the operations are not completed until after the date on which prescription would have accrued."[197]

Thus, if operations otherwise in compliance with the requirements of article 29(1) of the Mineral Code are commenced *prior* to the prescriptive date, and if they are continued by drilling "at the site chosen to that point or depth," and if they are "conducted in such a manner that they constitute a single operation although actual drilling . . . is not conducted at all times," then, regardless of the results of the operation, the interruptive consequences of the operation are retroactive to the date of commencement of the actual drilling operations, even if the operation is concluded after the original prescriptive date.[198]

Certainly, as stated in a recent case, "Nothing in our law prevents the drilling of a well in the last year before prescription runs out."[199] One would certainly hope so!

If this were not the rule, the servitude owner would be denied the full benefit of the servitude's 10-year prescriptive period as the owner would have to start operations on a date sufficiently early enough to allow the completion of the operations prior to the extinguishment of the servitude.

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197. LA. REV. STAT. § 31:31.

198. *Id.* § 31:29.

199. Cannisnia Plantation, LLC v. Cecil Blount Farms, LLC, 293 So. 3d 157, 172 (La. Ct. App. 2d Cir. 2020).

b. Prescription Starting Anew after an Interruption

"When prescription is interrupted, it commences anew from the last day on which operations are conducted in good faith to secure or restore production in paying quantities with reasonable expectation of success."[200]

Caution should prevail in identifying or discerning "the last day on which operations are conducted," as contemplated by article 41 of the Mineral Code. This author has heard the statement made that the date on which the operator released the drilling rig is the relevant date. That may be so, but if the rig remained on location for a period of time while logs were evaluated or other tests conducted, the period of time that ensued after the operator deemed the initial operation to be unsuccessful might be quite relevant a decade later, if prescription is not otherwise interrupted. If a third party is evaluating the situation and has no access to the records of the prior operator under a mineral lease granted by a mineral servitude owner, difficulties can arise.

For example, on August 1, 2006, Smith sells all of the minerals under a tract of land to Jones. Jones grants a mineral lease to Operator on September 1, 2015. Operator goes onto the land on July 1, 2016, and commences drilling operations, which are unsuccessfully concluded on September 1, 2016. What is the consequence on prescription?

Assuming that the operations comply with the "good faith" requirements of article 29, prescription is interrupted as of July 1, 2016, and commences anew as of September 1, 2016, the same day as the last day of drilling.

c. Interruption by Conduct of Subsequent Operations

"When prescription has commenced anew following the cessation of drilling or mining operations, it may later be interrupted by a good faith attempt to complete the well or mine or place it in production conducted in accordance with the general principles stated in Articles 29 through 31."[201] The emphasis is on the requirement that the activity be undertaken in "good faith." Thus, if the original operation resulted in conclusive evidence, through logging or otherwise, that the tested zone could not be productive, a further "attempt to complete the well . . . or place it in production" would seemingly not be in "good faith," as no reasonable, prudent operator would be justified in an expectation that such activity would yield commercial production.

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200. LA. REV. STAT. § 31:41.
201. *Id.* § 31:32.

On the other hand, if prescription has "commenced anew" after one unsuccessful operation conducted in "good faith," subsequent operations to "complete" the well or to "place it in production" will serve to interrupt prescription, if the "general principles" of "good faith" are met. Article 32 does not, by its express terms, make any differentiation as to zone, seemingly permitting the operations to be in the same zone, a shallower zone, a deeper zone, or even a side-track, provided that the "general principles" of "good faith" are satisfied.[202]

However, this issue would seem to be academic if the second (or subsequent) operation is commenced within the prescriptive period that disregards any earlier operation that was not sufficient to interrupt prescription.

EXAMPLE

On August 1, 2006, Smith sells all of the minerals under a tract of land to Jones. Jones grants a mineral lease to Operator on September 1, 2015. Operator goes onto the land on February 1, 2016 and commences drilling operations on Well A to the Marg Tex sand, a geological zone in which other wells in the field have been successfully completed. The well is dry, according to an electric log run in the hole on March 15, 2016.

Unless another use is attempted, and assuming that March 15, 2016, was "the last day on which actual drilling . . . operations [were] conducted," the mineral servitude will prescribe on March 15, 2026.

Another well, Well B, is begun on the land to a subsurface depth at which six prior wells were dry. The well was actually begun on December 1, 2017, and was completed at a depth 1,000 feet above the objective depth. The well began producing on February 1, 2018, until December 1, 2018.

Well B, had it been unsuccessful, would not interrupt

202. *See id.* However, contrast article 39 of the Louisiana Mineral Code. *See id.* § 31:39 ("After production has ceased and prescription has commenced anew, it may be interrupted by good faith operation conducted in accordance with the general principles of Articles 29 through 31 to restore production or to secure new production from the same well or mine, *whether from the same geological formation or one different from that previously producing*.") (emphasis added).

> prescription because it was not in compliance with the "evidentiary standards" of article 29 of the Mineral Code. However, under article 36 of the Mineral Code, "[p]rescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude." Thus, prescription would commence anew on December 1, 2018.

6. Interruption by Operations on Directional Wells Drilled on a "Lease Basis"

Unique issues of prescription are presented if the potential use is associated with a well that is drilled as a directional well. A directional well, also called a "slant well," is defined as "a well that departs from the vertical."[203]

The most common instance in which a well might be drilled directionally, rather than as a "true vertical well,"[204] is when topographical impediments or conditions prevent the latter, more traditional mode of drilling. An example is a well drilled so as to be "bottomed" under a residential subdivision or other commercial development, but from a different surface location rather than directly above the ultimate bottom hole of the well in question.

Moreover, to drill a well that terminates under, say, the Mississippi River would obviously necessitate a well to be drilled directionally from a drill site on nearby land.[205] In an environmentally sensitive area, several directional wells can be drilled from a single drilling pad.

A directional well could, of course, be drilled on either a "lease basis" or a "unitized basis."[206] If the "slant well" is drilled on a "lease basis," the issues considered herein are not implicated or altered, as the well is simply

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203. MARTIN & KRAMER, *supra* note 167; *see* LA. REV. STAT. § 30:171(1) (defining directional drilling as "drilling deviating from the vertical plane").

204. *See* LA. ADMIN. CODE tit. 43, pt. 19, § 135 (2019) (explaining a "true vertical well" is one that is drilled without a deviation from vertical in excess of 5°).

205. LA. REV. STAT. § 30:171(1) ("Any department or agency of the state may grant on lands of which it has title, custody, or possession: (1) A permit, lease, or servitude to engage in directional drilling in search of minerals underlying adjacent water bodies.").

206. A "lease basis" well is a well that is not unitized. *See, e.g.*, Eads Operating Co. v. Thompson, 537 So. 2d 1187, 1190 (La. Ct. App. 1st Cir. 1988) ("The Richard well was drilled on a non-unitized, lease basis in a geological stratum which correlated to the geological stratum of the 1948 unitized well known as the Miller No. 1 Zone."). In the interest of full disclosure, your author represented the plaintiffs in this suit.

"on" the servitude tract, unless there is an intervening "property line" between the surface location of the well and the bottom hole location. A "property line," for these purposes, is defined by conservation regulations as "the boundary dividing tracts on which mineral rights, royalty, or leases are separately owned, except that where conventional units shall have been created for the drilling of the well, the boundaries of the unit shall be considered the property line."[207] If a "property line," as so defined, exists between the surface location and the bottom hole location, and is situated less than the offset distances prescribed in Statewide Order No. 29-E, the well must be unitized.[208]

If the well is drilled on a "lease basis," the operator must ensure that it has the legal right to drill under each tract through which the well's borehole will traverse.[209]

Additionally, if the well is not unitized, and if different or distinct mineral servitudes exist on each tract through which the borehole traverses (reckoning from the surface location of the well to its concluding "take point"), prescription is only interrupted, if at all, on the servitude tract under which the well's ultimate bottom hole is situated.[210] Merely drilling through intervening servitude tracts is irrelevant to the issue of prescription accruing against that particular servitude as nothing more than a piece of pipe traversing that tract is involved, having no more relevance than a pipeline or road.

EXAMPLE

Ford,[211] the lessee of a mineral servitude owner, Tennyson, desires to drill a "lease basis" well to be bottomed under a tract of land burdened by Tennyson's servitude. However, the surface of

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207. LA. ADMIN. CODE tit. 43, pt. XIX, § 1903A (2019) ("Statewide Order No. 29-E").

208. See *infra* Part II.D.6 for consideration of directional wells drilled to develop a unit.

209. The "borehole" is the "hole made by drilling or boring a hole." MARTIN & KRAMER, *supra* note 167.

210. Esso Standard Oil Co. v. Jones, 98 So. 2d 236 (La. 1957) (in concursus proceeding, ascertainment of party to whom royalties were due as a result of a directional well drilled under the Mississippi River necessitated a determination of the bottom hole of the well).

211. As this example requires multiple participants, the author again exercises the prerogatives of authorship, and uses the names of his grandchildren (Ford, Tennyson, Townes, and Tucker), previously employed in Chapter 11 of the author's *Treatise on Mineral Leases* (§ 11-03, n. 11 on Page 1034), as well as a new (fifth) grandchild, Hartman.

the target tract—which Ford identifies as the "optimum geological location"[212]—constitutes a residential subdivision composed of many homes. The rights to minerals under such homes are under lease from the developer, Tennyson, who reserved minerals when the subdivision was dedicated on March 4, 2011.

Intervening between the well's surface location and the proposed bottom hole location under Tennyson's servitude are three separate tracts of land owned by Townes, Tucker, and Hartman, respectively.

Separate mineral servitudes burden each of the named parcels (created June 30, 2012, June 21, 2013, and August 9, 2019, respectively), only two of which are under lease to Ford, the operator.

Ford has a mineral lease on Tucker and Hartman's tracts, and he obtains a surface and subsurface agreement from Townes, a tough negotiator who wanted to "roll the dice," and remain unleased in anticipation of being ultimately unitized with the well.

Ford commences "actual operations" for the drilling of a "slant well" as a test well on February 6, 2021, and reaches his objective depth, underlying Tennyson's subdivision, on March 3, 2021. What is the status of each mineral servitude noted above if the well is successfully completed on March 10, 2021?

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212. In the industry, the "optimum geologic location" is that bottom hole location at which the petroleum geologist believes there is the best opportunity to encounter commercial production from the objective sand. *See* Nunez v. Wainoco Oil & Gas Co., 606 So. 2d 1320, 1326 (La. Ct. App. 3d Cir. 1992) ("Otherwise, Wainoco would not have been able to drill the Stone No. 1 well at the optimum location for this unit because this type of well requires two acres for the necessary reserve pits, water pit and water well."); J-O'B Operating Co. v. Newmont Oil Co., 560 So. 2d 852, 857 (La. Ct. App. 3d Cir. 1990) (in a case in which the author represented the plaintiff, court referred to a geophysical study "as would be sufficient to determine the prospective potential of the subleased premises and, if so determined to be prospective, the optimum location of a well"); Fuller v. XTO Energy, Inc., 989 So. 2d 298, 299–300 (La. Ct. App. 2d Cir. 2008) (explaining the lessee's methodology by which it "determined their optimum drilling locations without reference to or consideration of surface ownership of the involved properties").

> Because the well was drilled on a "lease basis," the rules pertaining to unitized operations are inapplicable. Since the target was the tract underlying Tennyson's mineral servitude, the operations conducted on the well had no bearing whatsoever on the accrual of prescription against the intervening servitudes burdening the tracts owned by Townes, Tucker, and Hartman. The well path was merely an authorized use of the subsurface, but was not an attempt to exploit the minerals under each distinct tract.
>
> However, under article 31 of the Louisiana Mineral Code, prescription accruing against Tennyson's mineral servitude was interrupted as the borehole entered the subsurface the day before the accrual of prescription.

B. Interruption by Production as a Use

1. General

"Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production."[213]

Ascertaining the precise "date of cessation of actual production" may be difficult if the person interested in the issue is not the person who conducted the operation (thus lacking access to records, including billings and reports). A challenging circumstance presents itself if such date of cessation occurred almost a decade prior to the need to ascertain that date, and the former operator is unavailable as a source. A source of information for such relevant data is the Strategic Online Natural Resources Information System (SONRIS), maintained by the Louisiana Department of Natural Resources, Office of Conservation.[214] However, while SONRIS contains a significant amount of relevant data as reported by an operator, production from a well is reported on a monthly, not daily, basis.[215] If this is the only source of data available, caution suggests that one conservatively use the earliest day of the month during which it is reported that production ceased as the commencement anew of prescription.

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213. LA. REV. STAT. § 31:36 (2020).

214. SONRIS is easily accessible through the website of the Office of Conservation.

215. LA. ADMIN. CODE tit. 43, pt. 19, § 909(B) (2019) ("Such report [of production] for each month shall be prepared and filed according to instructions on the form on or before the twenty-fifth day of the next succeeding month.").

When a servitude is maintained by production, the production alone is sufficient to interrupt prescription.[216] The Court in *Castille v. Texas Co.*[217] rejected the contention that "development" of the servitude was necessary, even in the face of production. In *Castille*, the plaintiff sued to declare a mineral servitude extinguished because the defendant failed "to produce oil in a businesslike manner as contemplated by law."[218]

On an objection of no cause of action,[219] the Court construed the allegations of the petition to mean that the defendants did in fact produce *some* oil during the term of the servitude, "for to produce oil in an unbusinesslike manner implies that some oil was produced."[220] Thus, construing the allegations of the petition together, it was held to be admitted by the plaintiff "that defendants, during the prescriptive period, used the servitudes for the production of some oil."[221] The Court said:

> As to the allegation of nondevelopment during the prescriptive period . . . so far as prescription is concerned, it is a matter of no importance whether there was development during that period, since it appears that the servitudes were used, within that time, for the production of oil from wells already drilled.[222]

However, if the servitude owner must rely on production to interrupt prescription (for the reason that the operations leading to that production were not sufficient to meet the "good faith" requirement of article 29 and are, therefore, not sufficient in their own right to interrupt prescription), such production must actually commence prior to the prescriptive date. The "date back" feature of article 31 would be unavailing to the servitude owner because the operations do not interrupt prescription.

EXAMPLE

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216. *See* LA. REV. STAT. § 31:38. As stated in article 38, production need not be in "paying quantities," provided that it is produced "in good faith with the intent of saving or otherwise using them for some beneficial purpose." *See supra* Part II.A.4.

217. Castille v. Texas Co., 129 So. 518 (La. 1930).

218. *Id.* at 519.

219. An objection of no cause of action accepts as true the plaintiff's allegations and questions whether the allegations give rise to a remedy at law. Hero Lands Co. v. Texaco Inc., 310 So. 2d 93 (La. 1975).

220. *See Castille*, 129 So. at 519.

221. *Id.*

222. *Id.* at 520.

> On August 1, 2006, Smith sells all of the minerals under a tract of land to Jones. Jones grants a mineral lease to Operator on September 1, 2015. Operator goes onto the land on July 15, 2016, and commences drilling operations to a subsurface depth at which 16 prior wells in the area were dry. The well became the seventeenth dry hole at that depth when it was logged on September 1, 2016. However, the Operator noticed an unanticipated zone of interest on the electric log about 1,000 feet above the total depth achieved in the borehole and decided to attempt a completion. To everyone's surprise, the well produced from that unanticipated zone, commencing October 1, 2016. What is the consequence on prescription?
>
> If the original drilling operation was not in compliance with the "evidentiary standards" of article 29 of the Mineral Code, it would not interrupt prescription. Since that operation did not interrupt prescription, the "date back" feature of article 31 would not be available to the servitude owner. Because an "interruption [resulting from actual production] occurs on the date on which actual production begins," the servitude prescribed because actual production did not commence prior to the original prescriptive date of August 1, 2016.
>
> After production has ceased and prescription has commenced anew, it may be interrupted by good faith operation conducted in accordance with the general principles of articles 29 through 31 to restore production or to secure new production from the same well or mine, whether from the same geological formation or one different from that previously producing.[223]

As stated in the comment to article 39 of the Mineral Code, this article "treats a situation which has not yet been of importance in the jurisprudence" but which "might arise."[224] The article attempts to provide a formulation for the circumstances under which reworking, recompletion, deepening, sidetracking, or plugging back operations in the same wellbore might effect an interruption of prescription after production has ceased.[225]

Presumably, the jurisprudential standards as to what constitutes reworking for purposes of the "Habendum Clause" of the mineral lease

223. LA. REV. STAT. § 31:39 (2020).
224. *Id.* cmt.
225. *See supra* Part II.A.5.b.

would apply in these circumstances,[226] and, if conducted in "good faith" with a "reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth," such reworking operations, even if unsuccessful, should interrupt prescription, in which case other articles would thereafter apply as to the commencement anew or further interruption of prescription.

Of course, if it is determined that reworking operations could not reasonably be conducted, a new well could be drilled in accordance with article 29 of the Mineral Code to interrupt prescription.

2. Extent of Interruption

a. Types of Minerals or "Other Substances"

"An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."[227] Therefore, if a mineral servitude affects more than one type of mineral (for example, both oil and gas, as well as coal or lignite), production of one mineral also maintains the mineral servitude as to all other minerals covered by the servitude. This represents a change in the law as it existed prior to the adoption of the Mineral Code.[228]

In this regard, one must be mindful that, according to article 4 of the Louisiana Mineral Code, the Code's provisions apply to minerals (including oil and gas) as well as to "other substances," such as "the soil itself, gravel, shells, subterranean water, or other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land."[229] Hence, the Code recognizes and reinforces the clear distinction under Louisiana law between "minerals" and "other substances."[230]

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226. *See, e.g.*, Jardell v. Hillin Oil Co., 485 So. 2d 919 (La. 1986). In the interest of full disclosure, your author represented a defendant-lessee in this case. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 4-11(c).

227. LA. REV. STAT. § 31:4.

228. *See* Cont'l Group, Inc. v. Allison, 404 So. 2d 428 (La. 1981).

229. LA. REV. STAT. § 31:4.

230. The distinction between "minerals" and "other substances" is well-established in the jurisprudence. For example, in *Gonzales v. Watson*, 111 So. 416 (La. 1927), the Court held that, in enacting the real estate licensing law, now Louisiana Revised Statutes §§ 37:1430–70, the legislature "did not have in contemplation gravel or mineral leases, but, as stated, only ordinary everyday leases, such as real estate agents generally negotiate." 111 So. at 418. As one commentator noted, "the court signifies by the use of the disjunctive 'or' that gravel and minerals fall into definitely separate categories." *See* G. R. J., *Mineral*

The issue of the interpretation of a deed to discern the particular minerals or "other substances" covered by such instrument is beyond the scope of this Article,[231] but it must be noted that, in a proper case, the production of an "other substance" that is covered by the mineral servitude will preserve the real right as to other minerals also included within the ambit of the servitude.

b. Mode of Drilling or Mining

Additionally, article 40 of the Mineral Code instructs that interruption arising from one mode of use—for example, "true vertical drilling"—will preserve all other modes of use, such as horizontal drilling. Again, this represents a change in pre-Code law as the comment to article 40 notes:

> [Former] Article 798 of the Civil Code [of 1870] provides that if a servitude is used less extensively than the right given in the title creating it, the servitude is reduced to that which is preserved by possession during the prescriptive period. . . . Additionally, it is intended that use of one particular method of mining would not exclude other forms. Thus, strip mining would not exclude shaft mining or drilling.[232]

EXAMPLE

Smith sells a tract of land to Jones on August 1, 2006. The sale states that "Smith reserves all oil, gas, and other minerals in and underlying the property described herein."

Smith drills a well on the land as a true vertical well, starting on September 1, 2015; the well is completed and produces oil in "paying quantities."

On October 1, 2016, Smith undertakes to drill a horizontal well on the land in search of natural gas at a deeper depth than the oil production. Jones, the landowner, objects, contending that Smith's right to do anything other than drill a true vertical well in search of oil has lapsed.

Rights - Gravel Not Included in Mineral Reservation - Intention of Parties Test Applied, 5 LA. L. REV. 150, 150 n.1 (1942).

231. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 5-27.

232. LA. REV. STAT. ANN. § 31:40 cmt. (2020).

Who is correct?

> Smith prevails based upon article 40 of the Mineral Code, which states that an "interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."

c. Geographical Reach

The geographical reach or scope of the effects of interruption of prescription resulting from unitized operations or production is considered in Part II.D.2 hereof.

3. Shut-In Wells[233]

a. Preface

As previously stated, two particular activities constitute a "use" that might interrupt prescription—drilling for, and production of, oil and gas (or the mining of solid minerals or "other substances"). A "shut-in well" is one that, by definition, has been drilled, but is not producing, usually because of lack of market or associated facilities.[234] Nevertheless, for policy reasons, interruptive effect is ascribed to such a well, provided the capacity of the well to produce is established by surface testing.

b. Interruption Resulting from a Shut-In Well

Articles 34 and 35 address the situation where a well is drilled, and surface testing proves that the well is capable of producing in "paying quantities," and is shut-in, insofar as such well affects prescription accruing against a mineral servitude. Thus, article 34 reads as follows:

> When there exists on a tract of land burdened by a mineral servitude, or on a conventional or compulsory unit that includes all or part thereof, a shut-in well proved through testing by surface production[235] to be capable of producing minerals in paying

233. *See* Patrick S. Ottinger, *Neither Fish nor Fowl: The Louisiana Law of Shut-in Gas Wells*, 69 LA. L. REV. 43 (2008).

234. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 4-13(d)(1).

235. The Louisiana Office of Conservation has promulgated Statewide Order No. 29-B, which dictates the manner in which the productive capability of a well might be demonstrated through an "initial potential test." LA. ADMIN. CODE tit.

> quantities, prescription is interrupted on the date production is obtained by such testing. . . . Prescription commences anew from the date on which the well is shut in after testing.[236]

This rule is in harmony with the jurisprudence, most of which involved mineral royalties (rather than mineral servitudes), because the *drilling* of the well would have interrupted prescription against the mineral servitude, but not against the mineral royalty.[237]

As one court stated, "An unused, potential well cannot interrupt prescription until its potential is proven."[238]

c. Unitization of Shut-In Well

(i) Geographical Scope of Interruption

Consistent with the rules pertinent to the interruptive effect of unit operations[239] or production,[240] article 34 of the Mineral Code states, in pertinent part, as follows:

> If only a part of the tract burdened by the servitude is included in such a unit and the [shut-in] unit well is on land other than that burdened by the servitude, the interruption of prescription extends only to that portion of the tract burdened by the servitude included in the unit.

In a similar manner, article 35 addresses the effect of the unitization of a tract on which a "tested shut-in well" already exists. Article 35 provides as follows:

43, pt. 19, § 121(C) (2019); *see* Webb v. Hardage Corp., 471 So. 2d 889 (La. Ct. App. 2d Cir. 1985).

236. LA. REV. STAT. § 31:34 (2020).

237. *See, e.g.*, LeBlanc v. Haynesville Mercantile Co., 88 So. 2d 377, 380 (La. 1956) (involving a mineral royalty) ("The fact that the well was shut in for want of a market and that no gas was sold from it until after the expiration of ten years from the date of the royalty sale cannot defeat the rights of the defendant to share in the production, once begun.").

238. Sandefer & Andress, Inc. v. Pruitt, 471 So. 2d 933, 936 (La. Ct. App. 2d Cir. 1985).

239. LA. REV. STAT. § 31:33.

240. *Id.* § 31:37 ("Production from a conventional or compulsory unit embracing all or part of the tract burdened by a mineral servitude interrupts prescription, but if the unit well is on land other than that burdened by the servitude, the interruption extends only to that portion of the servitude tract included in the unit.").

> If the land, or part thereof, burdened by a mineral servitude is included in a conventional or compulsory unit on which there is a well located on other land within the unit capable of producing in paying quantities, as required by Article 34, and shut in at the time the unit is created, prescription is interrupted on and commences anew from the effective date of the order or act creating the unit.[241]

(ii) Temporal Scope of Articles 34 and 35

A temporal observation is appropriate with respect to these relevant articles in a unitized context. Articles 34 and 35 are mutually exclusive in that they differ according to when the unit is formed in relation to when the well is shut in.

Article 34 applies to a non-unitized servitude tract on which there is situated a shut-in well. Yet, it also applies to a unit containing a tract burdened by a mineral servitude in which the unit well is subsequently shut in. In other words, in the latter case, unit created first, well shut in later.

In contrast, article 35 regulates the situation in which a non-unitized well is shut in and, thereafter, a unit is created around that well (or, as the article says it, well "shut in at the time the unit is created"). If such subsequently-created unit includes lands burdened by a mineral servitude—or a well shut-in first, unitized later, and assuming the shut-in well was surface tested prior to unitization and thereby shown to be capable of producing minerals in "paying quantities"—then prescription accruing against the servitude that has been brought into the unit, will be interrupted as of the effective date of the unit, and immediately prescription commences anew.

The comments to article 35 elucidate the principles embodied in the Mineral Code as follows:

> In the vast majority of cases, the principle already stated in Article 34 is of greater significance to mineral royalty owners than to mineral servitude owners because if the well has been drilled on the servitude tract or on a unit after its formation, an interruption of prescription will result from the drilling operations. However, if the unit is formed after drilling, testing, and shutting in of the well, the rule will be of essential value to owners of mineral servitudes since no interruption will have been wrought by the drilling operations. Thus, Article 35 specifies that the effective date of the order or act creating the unit governs the date of

241. *Id.* § 31:35.

> interruption and commencement anew of prescription rather than the actual date on which the unit well might previously have been shut in.[242]

As noted above, articles 34 and 35 are "mutually exclusive." Nevertheless, there is a factual circumstance in which they both might come into play.

Thus, a unique, hybrid situation arises if a compulsory unit is formed and is later enlarged to include additional lands. For example, if a shut-in well is drilled on a tract of land burdened by a mineral servitude, and thereafter a unit is created (a circumstance covered by article 34), and the drill site tract contributes lands both within and outside of the unit, and if the unit is subsequently enlarged, consideration must be given to the previously non-unitized acreage now brought into the unit by supplemental order of the Office of Conservation.

Under article 34, prescription accruing against a mineral servitude that covers the portion of the tract within the original unit is interrupted when the well is tested and it is shown to be capable of production. In this instance, prescription commences anew when the well is shut in after testing.

However, prescription continues to accrue with respect to the portion of the non-drillsite lands burdened by a servitude, as to the portion *not* originally included in the unit. Thereafter, the unit is enlarged to include additional acreage that includes the remainder of the non-drillsite servitude tract, originally non-unitized. According to article 35, the portion of the non-drillsite servitude tract newly brought within the boundaries of the enlarged unit would be interrupted upon the effective date of the order or act enlarging the unit, and commence anew that same date. In the event the well remains shut in and never produces, the portion of the servitude originally within the unit will prescribe at a date earlier than the other portion of the non-drillsite servitude tract later brought into the unit.

While accurate, it must be admitted that this scenario would, as a practical matter, presumably not be presented inasmuch as the prescriptive period is 10 years, and it is unimaginable that the operator would not bring the well into production in that period of time. Additionally, the lessee's right to maintain the mineral lease while the well is shut in is presumably time-limited to a period well short of 10 years, pursuant to the lease's "Shut-in Clause,"[243] thus providing sufficient motivation to get the well on stream to avoid lease termination.

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242. LA. REV. STAT. ANN. § 31:35 cmt. (2020).

243. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 4-13(d)(3).

Nevertheless, if the parties had availed themselves of their rights under article 74 to "shorten the applicable period of prescription of nonuse" to, say, two or three years, this scenario might be a real (rather than merely academic) concern.

(iii) Effective Date of Interruption

Article 35 does not provide an answer to the question of whether an "order or act creating the unit" can have retroactive effect if the (ostensible) date of prescription of the mineral servitude accrues "in the gap," that is, *prior to* the date of issuance of the order or confection of the act, but *after* the stipulated effective date thereof.

Insofar as compulsory units are concerned, the Commissioner of Conservation will generally make unit orders effective as of the date of the public hearing (as that is the earliest—and usually last—date on which the Commissioner will have received evidence in support of the order), while the order (with such an effective date) may not be issued for several weeks.[244] If, in that interim period of time, prescription has accrued, is the servitude "brought back to life" because of the effective date of the order?

In *Baker v. Chevron Oil Co.*,[245] the vendor reserved a mineral servitude in an act of sale dated March 29, 1956. After the expiration of 10 years, the owners of the mineral servitude brought suit to declare their servitude viable and outstanding. It was established that a well was completed on a nearby tract of land on January 6, 1966. The lessees undertook to form a voluntary unit.[246] The unitization agreement was dated March 4, 1966 and was circulated for execution. Certain parties did not sign the agreement until April or May of 1966, and the document was recorded in the conveyance records on May 12, 1966.

The Court framed the issue by noting that, inasmuch as no drilling operations were conducted on the servitude tract during the 10-year period, the plaintiffs' mineral interests had prescribed, unless the forming of the voluntary unit containing that tract and the drill site tract effected an interruption of prescription.

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244. *See* Policy Memorandum from La. Office of Conserv. (Aug. 20, 1985) (on file with author); *see also* Pierce v. GoldKing Props., 396 So. 2d 528 (La. Ct. App. 3d Cir. 1981); Burley v. Sunbelt Royalty, Inc., 534 So. 2d 101 (La. Ct. App. 3d Cir. 1988); and Exxon Corp. v. Thompson, 564 So. 2d 387 (La. Ct. App. 1st Cir. 1990).

245. Baker v. Chevron Oil Co., 258 So. 2d 531 (La. 1972).

246. A "voluntary unit" is "a unit specifically created by joint agreement of the mineral lessee and the owners of all the other mineral or royalty interests affecting the land in question." MARTIN & KRAMER, *supra* note 167.

The Court found that "because a legal unit had not been established on or before March 29, 1966, the ten-year prescription accrued, its course not having been interrupted by the drilling and production on land other than the [servitude] tract."[247]

d. Burden of Proof of Shut-In Conditions[248]

As noted, article 34 alludes to "a shut-in well *proved through testing by surface production* to be capable of producing minerals in paying quantities."

Who has the burden of proof in this regard? How does one establish the existence of shut-in conditions sufficient to invoke articles 34 and 35? The jurisprudence has addressed this issue in a lease-maintenance case in which it also noted the requirements of article 34 pertinent to proof of shut-in conditions through "testing by surface production."

In *Webb v. The Hardage Corp.*,[249] three separate mineral leases were granted for a primary term of five years in May 1976. The lessee drilled a well on each of the leased premises in April 1981, or one month prior to the expiration of the primary terms of the leases. The wells were cored, logs were run, casing was set, the wells were perforated, and the formation was fracked. The only surface testing that the lessee performed was to flare the gas for four or five hours. After flaring such gas, the wells were shut-in for lack of a market for the gas. Work on the wells was completed in June 1981. The initial potential test required by the Commissioner of Conservation was not performed.

The lessee tendered shut-in royalty payments to the lessors, which were refused and returned. In March 1983, the lessee performed an initial potential test on one of the wells. The lessors filed suit to seek a declaration of the termination of the leases and to enjoin the lessee from taking any further action on the property in question.

Each of the mineral leases in question contained the following shut-in provision, to wit:

> If lessee obtains production of minerals on said land or on land with which the lease (sic) premises or any portion thereof has been pooled, and if, during the life of this lease either before or after the expiration of the primary term, all such production is shut in by reason of force majeure or the lack either of a market at the well or wells or of an available pipeline outlet in the field, this lease

247. *Id.* at 533.
248. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 4-13(d).
249. Webb v. Hardage Corp., 471 So. 2d 889 (La. Ct. App. 2d Cir. 1985).

> shall not terminate but shall continue in effect during such shut-in period as though production were actually being obtained on the premises within the meaning of Paragraph 2 hereof . . . .[250]

The issue presented was whether or not the lessee had timely demonstrated the existence of shut-in conditions. The court stated as follows:

> Reading LSA-R.S. 31:124 [which defines "production in paying quantities"] in conjunction with the terms of the leases, the shutting-in of the gas wells on the three leased properties could only extend the leases beyond their primary terms if the wells were capable of producing in paying quantities. See *Taylor v. Kimbell*, 219 La. 731, 54 So. 2d 1 (1951).[251]

The court then noted that the lessor generally "has the burden of proving the propriety of cancellation of a mineral lease,"[252] but held that "the situation encountered in this case presents an exception to that general rule."[253] The court further stated:

> A lessee cannot place the burden of proving the propriety of cancellation on the lessor by simply alleging that a well that has never been placed into actual production is capable of producing in paying quantities. Rather, the lessee must prove by a preponderance of the evidence that prior to the expiration of the primary term or the continuous drilling operations term a well was completed and surface tested to the extent that the well was at that time demonstratively capable of producing in paying quantities. See *Taylor* [*v. Kimbell*, 54 So. 2d 1 (La. 1951)], supra.
>
> Ordinarily, proof sufficient to carry this burden is a finding of commercial productivity resulting from the performing of the initial potential test required by the Department of Conservation. . . . While other kinds of evidence of production potential could also be considered, such as the results of logs and

250. Although not explicitly stated in the opinion, it appears that the leases in question were executed on the Bath 14-BR1-2A commercial form of printed lease, prevalent in North Louisiana. This is the so-called "North Form." *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 1-17.

251. *Webb*, 471 So. 2d at 892.

252. *Id.* (citing Frazier v. Justiss Mears Oil Co., 391 So. 2d 485 (La. Ct. App. 2d Cir. 1980)); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 13-06.

253. *Webb*, 471 So. 2d at 892.

> cores, the flaring of the wells for periods of time and the history of the wells in the same zone in the field, the importance of actual testing of surface production is obvious and is the most direct indication of production capability.[254]

The court, albeit in a lease-maintenance case, then noted, by analogy, that the "importance of surface testing is illustrated by the provisions of LSA-R.S. 31:34 and 31:90 which address the testing of shut-in wells in the context of interrupting prescription on mineral servitudes and mineral royalties respectively."[255] According to the court, the initial potential test "must be conducted during the primary term or the continuous operations term in order to continue a lease in effect beyond the primary and the continuous operation terms."[256] "Without such surface testing, the status of the lease would ordinarily remain uncertain while the well is shut-in."[257] The court concluded that the " lessee should not be able to rely on the shut-in clause to hold a lease beyond its primary term where the well's capacity to produce in paying quantities cannot be determined until further testing and procedures are carried out at some later date."[258]

C. By Whom May Use Be Made?

1. General

A "use" sufficient to interrupt prescription of nonuse accruing against a mineral servitude might result from either operations or production.[259] These might occur either on the land burdened by the servitude or in a unit including all or a part of the servitude tract.

Whose use is eligible or sufficient to interrupt prescription accruing against a mineral servitude? Who must undertake the activity such that it constitutes a use inuring to the benefit of the owner of the servitude?

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254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 893.
259. As discussed in Part II.B.3 hereof, the policy embodied in the Mineral Code also states that a "shut-in well," while by definition not constituting production, also interrupts prescription, which then starts anew as of "the date on which the well is shut in after testing."

2. Jurisprudence Prior to the Mineral Code

As one court observed in a case predating the Mineral Code, the "burden of proof is upon the owner of the servitude to establish that *he or someone in his name* has made timely use of the servitude to prevent the tolling or the accrual of prescription."[260]

A mineral owner who was a stockholder in a corporation that conducted operations on the burdened tract was not, merely by reason of being a stockholder, permitted to avail himself of the use of the servitude because the stockholder was not personally a party to the contract that gave rise to the operations.[261]

The landowner's utilization of a small quantity of gas for household purposes could not be considered a servitude owner's use and, thus, would not interrupt prescription.[262]

In *Nelson v. Young*,[263] drilling operations ceased in 1952, thus commencing a new prescriptive period on a mineral servitude originally created in 1917. In 1957, the surface owner granted leases even though his lands were subject to the outstanding mineral servitude. The surface owner's lessee drilled a producing well in 1959; it produced until 1964. In 1967, the servitude owners sued to be declared owners of the mineral rights. The trial court dismissed the suit.

On appeal, the appellate court reversed, basing its decision on the provisions of former article 794 of the Louisiana Civil Code (now

260. Scott v. Hunt Oil Co., 160 So. 2d 433, 435 (La. Ct. App. 2d Cir. 1964) (emphasis added). The court relied upon former Louisiana Civil Code article 804: "When the prescription of non-usage is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he, or some person in his name, has made use of this servitude as appertaining to his estate during the time necessary to prevent the establishment of the prescription." The current version of Louisiana Civil Code article 764: "When the prescription of nonuse is pleaded, the owner of the dominant estate has the burden of proving that he or some other person has made use of the servitude as appertaining to his estate during the period of time required for the accrual of the prescription." LA. CIV. CODE art. 764 (2020).

261. Sample v. Louisiana Oil & Refin. Corp., 111 So. 336 (La. 1927). This holding is certainly concordant with the established precept that a "corporation is a separate entity from its shareholders." Fina Oil & Chem. Co. v. Amoco Prod. Co., 673 So. 2d 668, 672 (La. Ct. App. 1st Cir. 1996).

262. Pan Am. Petrol. Corp. v. O'Bier, 201 So. 2d 280 (La. Ct. App. 2d Cir. 1967); *see also* Magee v. Worley, 163 So. 3d 23 (La. Ct. App. 2d Cir. 2015) (finding that evidence did not establish that taking by the surface owner of residential gas occurred such as would constitute a use of a servitude).

263. Nelson v. Young, 234 So. 2d 54 (La. 1971).

repealed): "The servitude is preserved to the owner of the estate to which it is due, by the use which any one, *even a stranger*, makes of it, provided it be used as appertaining to the estate."[264]

The Louisiana Supreme Court affirmed, but chose to rely on a theory of quasi-contract. This conclusion was based on the approving "silence" and acquiescence of the servitude owners when the landowner (who owned no minerals) executed the mineral lease, and the lessee established production under the lease. Through this approving silence, a quasi-contractual relationship was established, whereby the landowner's act became the servitude owner's act, thus interrupting prescription.[265]

3. Adoption under the Mineral Code

The rule of *Nelson v. Young* has now been suppressed by article 43 the Louisiana Mineral Code, which provides as follows:

> 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, or when there is clear and convincing evidence that he intended to act for the servitude owner. Silence or inaction by the servitude owner will not suffice to establish that a person is acting on behalf of the servitude owner.[266]

While a mineral lease is indisputably a "legal relationship between [a lessee] and the servitude owner,"[267] it is not the exclusive instance of such a relationship. For example, a servitude owner may execute a simple letter authorizing a person to act on its behalf.

In a significant case,[268] the plaintiff owned a mineral servitude that was perpetuated by production until 1972, at which time prescription

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264. LA. CIV. CODE art. 794 (1870) (emphasis added) (current version at LA. CIV. CODE art. 757 (2020)).

265. "It follows that the voluntary acts of defendants were for the benefit of the plaintiffs; they transacted the business of other persons. Thus a quasi contract came into existence between plaintiffs and defendants." 234 So. 2d at 61.

266. LA. REV. STAT. § 31:43 (2020).

267. "Probably the most common example of use by a representative or agent of the servitude owner occurs when his mineral lessee or an assignee of his lessee engages in operations on the servitude land." Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1149 (1987).

268. Producers Oil & Gas Co. v. Nix, 488 So. 2d 1099 (La. Ct. App. 2d Cir. 1986). The court rejected the servitude owner's contention that an application of the 1975 Mineral Code to a mineral servitude created initially in 1941 would

commenced anew. In 1979, the landowner granted a lease and the lessee conducted drilling operations on the land subject to the mineral servitude. Producers had no contractual relationship with the landowner's lessee, Nix. Because Producers conducted no operations after production ceased in 1972, the servitude would ordinarily expire in 1982, unless Producers benefited from Nix's use as to which it was "conceded that Nix's work qualifie[d] as good faith operations sufficient to interrupt prescription."[269]

The question presented was whether Nix's operations complied with article 42 as a use "made by the owner of the servitude, his representative or employee, or some other person acting on his behalf." Producers's reliance upon *Nelson v. Young* was rejected inasmuch as the Mineral Code clearly overruled that case. "Thus, under the Mineral Code, these operations did not interrupt prescription for the servitude owner."[270]

That the approach of *Nelson v. Young* has been abrogated is shown by article 53, which states that articles 44 through 52 of the Mineral Code "provide the only means by which the prescription of nonuse may be interrupted by operations conducted by persons other than those designated in Article 42."[271]

"A mineral servitude owner may adopt operations or production by a person other than those designated by Article 42 if his servitude includes the right to conduct operations of the kind involved."[272]

Some consideration must be given to the meaning or import of article 44's limitation that adoption is only available to a servitude owner "if his servitude includes the right to conduct operations of the kind involved."

The articles on adoption seem to contemplate that the adopter's mineral servitude be without limitation, either geographically (vertical) or geologically (horizontal).[273] Thus, it is not clear if the owner of a mineral

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violate constitutional proscriptions against the impairment of vested rights, saying that "the expectation that laws about liberative prescription will not change is not a vested right." *Id.* at 1102.

269. *Id.* at 1100.

270. *Id.* at 1101.

271. LA. REV. STAT. § 31:53. The comment to this article states that it was "inserted out of an abundance of caution to make certain that the holding in Nelson v. Young . . . is negated." LA. REV. STAT. ANN. § 31:53 cmt. (2020).

272. *Id.* § 31:44.

273. It is the author's experience that there is not a universally accepted understanding of the difference between a "vertical" limitation and a "horizontal" limitation—whether it be in the context of a stratigraphic limitation on a mineral servitude, or, with respect to a mineral lease, a "Pugh Clause" or an "Absolute Depth Limitation Clause." On more than one occasion, the author has encountered a discussion wherein one party alludes to a "vertical" limitation or restriction, or has stated that a mineral lease has expired "vertically," only to be asked, "Don't

servitude limited to the bottom depth of, say, 8,000 feet below the surface of the earth,[274] could adopt operations conducted by another which are directed to a geological objective of, say, 12,000 feet. Because such (deeper) drilling operations are not intended to exploit the shallower depths,[275] it is doubtful that such operations could be adopted because the adopter's servitude does not "include[] the right to conduct operations of the kind involved," that is, the adopter's servitude does not permit that servitude owner to drill deeper than 8,000 feet.

A more logical example concerns the types of minerals or "other substances" covered by the servitude.[276] As noted above, although an "interruption of prescription applies to all types of minerals covered by the act creating the servitude,"[277] in a proper case it is necessary to discern whether a mineral servitude encompasses a particular mineral or "other substances." For example, if a mineral servitude *only* relates to fugacious or migratory minerals, such as oil and gas,[278] the servitude owner would not be able to adopt an operation conducted for the mining of lignite or coal, as the servitude does not cover those minerals and, hence, his servitude does not "include[] the right to conduct operations of the kind involved."

As a further illustration, what if a mineral servitude is created subject to a "No Surface Operations Clause," effectively denying the servitude owner or its lessee the right to conduct drilling operations on the surface

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you mean 'horizontally'?" The confusion or misunderstanding resides in the fact that "vertical" means, and in a visual sense runs, "north to south," while horizontal means, and visually runs, "east to west." Nevertheless, in the jargon of the industry, while "horizontal" might allude to a specific stratum under the earth, is not such stratum reached "vertically" from the surface of the earth? And conversely, the term "vertical" conjures the notion that the exterior perimeter of a unit is, in a sense, defined as extended into the earth, vertically, "from the surface to China," as says the jargon of the industry. Think "cookie cutter" into the earth. Yet to some, that seems to deal with the "horizontal" because it is running "north to south," into the earth's subsurface. *See supra* Part II.D.1.b.

274. "A single mineral servitude is established on a continuous tract of land notwithstanding that certain horizons or levels are excluded or the right to share in production varies as to different portions of the tract or different levels or horizons." LA. REV. STAT. § 31:68.

275. *See infra* Part II.D.4.

276. *See supra* note 230.

277. *See supra* Part II.B.2.a.

278. *See, e.g.*, Nat'l Food & Beverage Co. v. United States, 105 Fed. Cl. 679, 694 (2012) (finding that a reservation of "all oil, gas and other materials in or under the property," "covered only fugacious resources").

of the burdened land?[279] Should this mean that the servitude owner is unable to adopt operations that have been conducted on the surface of land by a stranger since that owner himself could not in its own right conduct the operations because of the contractual limitation?

With the exception of the recent case of *Citrus Realty, LLC v. Parker*,[280] in which adoption was found to be irrelevant to the issue before the court,[281] no case has considered this precise issue. It is suggested that the existence of a "No Surface Operations Clause" is not an innovation or limitation contemplated by article 44 of the Mineral Code that implicates "the right to conduct operations of the kind involved." Rather, this author submits that the allusion to "the right to conduct operations" references the inherent features of a particular mineral servitude, such as noted or illustrated in the preceding paragraphs (e.g., depth limitations, types of minerals or "other substances" covered), and not to restrictions on surface activity that are contractually imposed but which do not touch upon the contractually defined scope or coverage of the real right.

Three consecutive articles of the Mineral Code provide the workings of the precept of adoption of operations by the owner of a mineral servitude.

> An adoption must be made within three years of the servitude owner's knowledge of such operations or production and in any event prior to the date on which his rights would otherwise prescribe. This limitation does not affect the prescription applicable to any action that the servitude owner may have against another for the wrongful appropriation of his rights of exploration or of production belonging to him.[282]

> Adoption of the operations of another is accomplished when the servitude owner files for registry in the conveyance records of the situs of his servitude an instrument describing the land subject to the servitude, identifying the operations, specifying the date on

279. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 5-09.

280. Citrus Realty, LLC v. Parker, No. 2018-CA-0516, 2019 WL 385194 (La. Ct. App. 4th Cir. Jan. 30, 2019), *writ denied*, 2019 WL 2251536 (Mem.) (La. May 20, 2019). In the interest of full disclosure, your author filed a brief on behalf of the Louisiana Landowners Association as amicus curiae in support of the defendants in this case.

281. The court properly recognized that "those adoption procedures relate to adoption of another's use for purposes of interrupting prescription," an issue not involved in the case. *Citrus realty, LLC*, 2019 WL 385194, at * 7.

282. LA. REV. STAT. § 31:45 (2020).

> which the operations commenced, and expressing the intent to adopt them as his own.[283]
>
> 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.[284]

This rule is harmonious with the fact that the operator of a compulsory unit is viewed as a "representative" of all interests in the unit.[285] It is not clear if the phrase "takes place on a compulsory unit" only applies to the situation where the drilling or production take place on an existing unit as a unit activity, or whether the article also dispenses with the necessity of a "formal adoption" where a well is drilled *prior* to the formation of the compulsory unit and thereafter the unit is created.

Article 48 of the Mineral Code provides that "upon filing for registry of the instrument required by Article 46, the servitude owner becomes obligated to pay his proportionate share of the reasonable, actual costs of development and operation of the well or mine." For this reason, one should only adopt operations if the adopted operations are "necessary" in the sense that the servitude would prescribe in the absence of an adoption.

It is not apparent if a servitude owner—having adopted an operation conducted on a "lease basis"—will be excused from cost responsibility when the Commissioner of Conservation subsequently unitizes the well. In any event, the servitude owner "is not obligated to [make such payment] if the operations adopted were conducted by a possessor in legal or moral bad faith and resulted in production to which the servitude owner is entitled."[286]

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283. *Id.* § 31:46. This is consistent with article 18 of the Mineral Code, providing that "[a]ll . . . contracts . . . affecting mineral rights are subject to the laws of registry."

284. *Id.* § 31:47.

285. Mire v. Hawkins, 186 So. 2d 591, 596 (La. 1966). Other characterizations of the nature of the relationship between the designated operator and other interest owners in the unit have been made, including "forced agent," *id.* at 599 (McCaleb J., dissenting); "joint venture" of a "common interest," *id.* at 604 (Fournet, C.J., dissenting); an "agent *pro hoc vice*," Dixon v. Am. Liberty Oil Co., 77 So. 2d 533, 539 (La. 1954); "managing owner," Amoco Prod. Co. v. Thompson, 516 So. 2d 376, 392 (La. Ct. App. 1st Cir. 1987), and *negotiorum gestor* or "manager," Taylor v. David New Operating Co., Inc., 619 So. 2d 1251 (La. Ct. App. 3d Cir. 1993).

286. *See* State v. Jefferson Island Salt Mining Co., 163 So. 145 (La. 1935) (finding the producer to be a trespasser who acted in bad faith, the amount of the

"If the operations adopted were unsuccessful, the servitude owner is not only obligated to pay costs as required by Article 48, he also waives any right to damages against the party conducting the operations."[287]

"The servitude owner may adopt the operations of another as a matter of right. Consent of the party conducting them is not required."[288] The reason that there is a dispensation of the need to seek or obtain the consent of the operating party is explained in the comment to article 50:

> The motive for Article 50 is to make the opportunity to adopt operations of another a reality. If this Article were not adopted, it might be possible for a party drilling a well or opening a mine to attempt to deny the servitude owner the right to adopt the operations or at least to delay his adoption and possibly promote the extinction of the servitude. The servitude owner should not be made vulnerable to such possible conduct.[289]

Articles 51 and 52 of the Mineral Code provide the basic rules as to responsibility for costs in the event of adoption or failure to adopt, as the case may be:

> The owner of a mineral servitude may adopt the operations of another even though his rights are under lease and his lessee is unwilling to share in the costs of development and operation. If the operations have resulted in production to which the servitude owner is entitled and the servitude owner's lessee refuses to participate in the operations after production is first obtained, the lessee is not entitled to participate in production from the operations except by express agreement with the mineral servitude owner. In the absence of agreement, the mineral lease, if otherwise maintained according to its terms, remains in force except as to the well or wells or mine or mines as to which the servitude owner has asserted his claim and in which the lessee has refused to participate.[290]

Although the servitude owner fails to adopt operations by

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damages was fixed as the value of the mineral at the well without deducting the cost of production.).

287. LA. REV. STAT. § 31:49.

288. *Id.* § 31:50; *see* Patrick S. Ottinger, *Permission Granted: The Requirement of Consent under the Louisiana Mineral Code*, 80 LA. L. REV. 1285, 1290 (2020).

289. LA. REV. STAT. ANN. § 31:50 cmt. (2020).

290. LA. REV. STAT. § 31:51.

> another, he may claim the proportion of production allocable to his interest which was obtained prior to the lapse of three years from his knowledge of the operations resulting in production or the date on which his servitude prescribed, whichever occurs first. If he does so, he is obligated to pay his proportionate share of the cost of development and operation accrued prior to the date on which his servitude prescribed unless the person conducting the operations was in legal or moral bad faith.[291]

At issue in a recent case was whether the owners of a mineral servitude pertaining to clay (a "substance" to which the provisions of the Mineral Code were applicable)[292] were entitled to revenue associated with the surface owner's exploitation of that substance.[293] The reservation in the instrument that created the mineral servitude contained a "No Surface Operations Clause," disallowing the conduct of operations on the surface of the land.[294] On that basis, the surface owner contended that the servitude owner had no right to the revenue associated with the clay produced by the surface owner because the servitude owners had no right to exploit the clay in their own right. A further contention was that the servitude owners never adopted the operations conducted by the surface owner. The trial court accepted this position.

Reversing the trial court's ruling for the surface owner, the appellate court stated as follows:

> As an initial matter, we agree with Appellants that the trial court's primary reliance on Articles 42 through 46 of The Mineral Code is misplaced, as those articles fall under Chapter 4, Part 4, Subpart C of The Mineral Code. Chapter 4 concerns "The Mineral Servitude" generally, while Part 4 concerns "Commencement of Prescription." Subpart A, applicable to "General Principles," includes Article 28, which provides "[p]rescription of nonuse of a mineral servitude commences from the date on which it is created." Subpart B, Article 29, in turn, states "[t]he prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of

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291. *Id.* § 31:52.

292. *Id.* § 31:4.

293. Citrus Realty, LLC v. Parker, No. 2018-CA-0516, 2019 WL 385194 (La. Ct. App. 4th Cir. Jan. 30, 2019), *writ denied*, 2019 WL 2251536 (Mem.) (La. May 20, 2019). The author filed a brief on behalf of the Louisiana Landowners Association as amicus curiae in support of the defendants in this case.

294. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 5-09.

> minerals." Subpart C of Part 4, under which fall the articles relied upon by the district court, is entitled "By Whom a Use May be Made." . . . Given the foregoing authority [on principles of statutory interpretation], we presume the Legislature deliberately placed Articles 42 through 46 under that part of Chapter 4 concerning prescription for a reason. We, therefore, conclude that those articles are relevant to the issue of "use" as it relates to prescription, and not to the substantive issues presented by the facts of this case. For example, the trial court relies on Article 46 of The Mineral Code relative to "Procedure for Adoption" to suggest Appellants did not "adopt" the operations of Appellees and therefore cannot benefit from Appellees' labors in extracting the clay. However, those adoption procedures relate to adoption of another's use for purposes of interrupting prescription.[295]

D. Unitized Operations or Production

1. Preliminary Comments on Unitization

A use resulting from operations conducted on, or production obtained from, a well that might interrupt prescription can be associated with a well that is either non-unitized or unitized. There are certain foundational principles of a unitized well that must be examined before taking up the subject of the interruptive effect of a use by way of a unitized well.

a. Types of Units

Article 213(6) of the Mineral Code defines a unit as follows:

> "Unit" means an area of land, deposit, or deposits of minerals, stratum or strata, or pool or pools, or a part or parts thereof, as to which parties with interests therein are bound to share minerals produced on a specified basis and as to which those having the right to conduct drilling or mining operations therein are bound to share investment and operating costs on a specified basis. A unit may be formed by convention or by order of an agency of the state or federal government empowered to do so. A unit formed by order of a governmental agency is termed a "compulsory unit."[296]

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295. 2019 WL 385194, at *6–7.
296. LA. REV. STAT. § 31:213(6).

Hence, there are two types of units under Louisiana law, namely, conventional and compulsory.[297] Within the two types of units, there are several variants of those units.

While the differences between a conventional and a compulsory unit are many and profound, these differences have no particular influence on the matters that the Louisiana Mineral Code addresses, as such articles, where they do regulate matters involving a unit, refer to a "conventional or compulsory unit." Thus, the codal rules do not differentiate between the type of unit involved, applying equally to each type.

b. "Vertical" and "Horizontal" Features of Unitization

When the Louisiana Office of Conservation creates a compulsory unit pursuant to statutory authority, the compulsory unit has certain intrinsic features that might be called "vertical" and "horizontal." There are five kinds of compulsory units.[298]

With regard to a conventional unit,[299] while it has a "vertical feature," whether it also has a "horizontal feature" depends upon the language of the contract that created it. It is not uncommon to encounter a conventional unit in which no subsurface geological limits of a unitized sand are described or identified.[300] In these instances, the conventional unit involves no "horizontal feature."[301]

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297. *See* Patrick S. Ottinger, *Conventional Unitization in Louisiana*, 49 ANN. INST. ON MIN. LAW 21 (2002).

298. These are "drilling and production" units, LA. REV. STAT. § 30:9; a "fieldwide" or "reservoirwide" unit (sometimes called a "441 unit") references Act No. 441 of 1960, *id.* § 30:5C; a "deep pool" unit, *id.* § 30:5.1A; an "ultra deep structure" unit, *id.* § 30:5.1B; and a "coal seam natural gas producing" unit, *id.* § 30:5.2.

299. "It is often said that there are three types of units—'compulsory' (sometimes called 'forced', 'governmental' or 'Commissioner's'), 'voluntary' and 'declared.' Actually, it is more accurate to say that there are two types of units—'compulsory' and 'conventional.' Of the latter type, there are two kinds—'declared' and 'voluntary' (also called 'contractual' or, sometimes, 'conventional')." *See* Ottinger, *supra* note 297, at 24.

300. Illustratively, the commercially printed forms of mineral lease in prevalent use in Louisiana contain a "Pooling Clause" that authorizes the unilateral creation by the lessee of a "declared unit" by filing an instrument or declaration "describing the pooled acreage," with no stated requirement that any unitized zone or stratum be distinctly identified. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 4-21.

301. In this instance, it is often said that the unit covers subsurface depths "from the surface of the earth to China," but more precisely, it would cover depths

The creation of a compulsory unit intrinsically introduces both a "horizontal feature" and a "vertical feature" with respect to the drilling of, or production from, the unit well.[302] Consequently, a well only constitutes a compulsory unit well if it comports with these two necessary aspects or features.

In forming a compulsory unit, the Commissioner of Conservation orders a "Sand Definition," which is a geologically defined subsurface structure being unitized, normally called a "zone," "sand," "horizon," or "stratum."[303] The "horizontal feature" involved in compulsory unitization is the intrinsic requirement that the well's bottom hole must be completed within the subsurface geological limits of the unitized sand as defined in the order.[304]

In *Midnight Drilling, LLC v. Triche*,[305] citing prior precedent,[306] it was noted that "the court specifically considered the location of the bottom

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"to Hades," or to the center of the Earth. *Cf.* Alyce Gaines Johnson Special Tr. v. El Paso E & P Co., 773 F. Supp. 2d 640, 645 (W.D. La.), *aff'd*, 438 Fed. Appx. 340 (5th Cir. 2011) ("As the Louisiana Civil Code makes clear Louisiana property law embraces the colorful Latin maxim of *cujus est solum ejus est usque ad coelum et ad inferos* ('for whoever owns the soil, it is theirs up to Heaven and down to Hell').").

302. *See supra* note 273 for the author's commentary.

303. "At the request of an applicant (operator or any interested party), an oil unit or a gas unit is established for a sand, a zone or a formation. For the unitization purposes, a sand implies a stratigraphic interval containing a reservoir stratum capable of producing hydrocarbons (oil or gas and condensate) . . . . For a conservation unit to be established, a sand, a zone or a formation is defined in a specific well (referred to as the 'Definition Well') with the depths (electric log measurements) of the top and the base of the defined interval identified as encountered in the well." Madhurendu B. Kumar, *Geological Aspects of Unitization in the Petroleum Fields of Louisiana: A Brief Overview*, THE PETROLEUM GEOLOGIST, p. 30 (November/December 2007), *available at* http://www.dnr.louisiana.gov/assets/OC/geo_div/TPG_Kumar-Articles.pdf [https://perma.cc/SS3R-TKFM].

304. The commissioner's rules require that the pre-application notice and application for a public hearing contain a "definition of the sand proposed for unitization with such sand defined in each reservoir thereof by reference to well log measurements." *See* RULES OF PROCEDURE FOR CONDUCTING HEARINGS BEFORE THE COMMISSIONER OF CONSERVATION OF THE STATE OF LOUISIANA (effective October 11, 1983); *see also* LA. ADMIN. CODE tit. 43, pt. 19, §§ 3901–37 (2017).

305. Midnight Drilling, LLC v. Triche, No. 2012 CA 1043, 2013 WL 3149456 (La. Ct. App. 1st Cir. 2013).

306. Esso Standard Oil Co. v. Jones, 98 So. 2d 236 (La. 1957).

holes of the respective wells to determine to whom the royalties were owed."[307]

The "vertical feature" associated with compulsory unitization dictates that the unit well's bottom hole, in the case of a true vertical well, or "take points," in the case of a horizontal well,[308] must be within the exterior geographic perimeter of the unit as established by the order to constitute a unit well.[309] However, nothing dictates that the surface location must be *within* the unit boundary, as the well can be directionally drilled from a location outside of the unit to be completed at a subsurface location that satisfies both of these features.

2. Interruptive Effect of Use

Prior to the adoption of the Mineral Code, the law concerning the interruptive effect of unitized operations or production was both inconsistent and illogical. Whether operations or production would interrupt prescription as to the entirety of the servitude tract, both within and without the unit, or only as to the portion of the servitude tract within the unit, was dependent upon whether the unit was a compulsory or conventional unit and whether the unit well was located on the servitude tract or off of it.[310]

The following table illustrates the pre-Code rules pertinent to the interruption of prescription accruing against a mineral servitude by unitized operations or production, to-wit:

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307. *Midnight Drilling, LLC*, 2013 WL 3149456, at *5.

308. *See infra* note 365.

309. Louisiana Revised Statutes § 30:9(B) provides that a "drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by the well or wells designated to serve the drilling unit as the unit well, substitute unit well, or alternate unit well." *See* Delatte v. Woods, 94 So. 2d 281, 286 (La. 1957) ("Thus, the sole question before us is whether the basic Order No. 280-A of the Commissioner of Conservation, unitizing a portion of the leased land with other lands, designating Well No. 2 as the unit well, and limiting said unit to one well, constituted a production of oil, gas or other minerals affecting all lands within said unit and thus relieved the defendant of any drilling operations towards production or the 'spudding in' or commencement of actual drilling on any portion of the entire leased premises so as to have kept in full force and effect the lease here in controversy. We are constrained to hold in the affirmative.").

310. Although not relevant to this Article, further inconsistency was introduced by the consideration of whether the interest was a mineral servitude or a mineral royalty.

	Compulsory	Conventional
Well on Tract	Full[311]	No jurisprudence
Well off Tract	Limited[312]	Limited[313]

For the most part, the Mineral Code codifies—and, in some instances, clarifies or changes—the jurisprudentially developed rules.[314] One area where the law has been changed in the interest of consistency is the extent to which unitized operations or production interrupts prescription.

As previously noted, the Mineral Code now instructs that mere "[u]nitization of a portion of a tract burdened by a mineral servitude does not divide the servitude."[315] However, a unitized *use* may effect a division in accordance with various articles of the Mineral Code.[316]

As seen above, there was no particular "rhyme or reason" to the jurisprudentially developed rules. The Mineral Code now provides that if unitized operations or production is otherwise sufficient to interrupt prescription, then such operations will interrupt prescription accruing against the portion of the mineral servitude included within the unit, and, if the unit well is located on the mineral servitude, it will also interrupt prescription on the portion of the servitude tract situated outside of the unit.[317] As noted previously, this rule applies whether the unit is

311. Trunkline Gas Co. v. Steen, 187 So. 2d 720 (La. 1966). "Full" interruption means both the prescription was interrupted as to both the unitized and non-unitized portions of the servitude.

312. Jumonville Pipe & Mach. Co., Inc. v. Fed. Land Bank of New Orleans, 87 So. 2d 721 (La. 1956). "Limited" interruption means that prescription was interrupted only as to the unitized portion of the servitude.

313. Elson v. Mathewes, 69 So. 2d 734 (La. 1954).

314. "The Mineral Code is designed in large measure to supplant by way of codification the extensive jurisprudence that developed in this area of the law." GEORGE W. HARDY, *EXPOSÉ DES MOTIFS*: SUGGESTED PRINCIPLES OF LOUISIANA MINERAL LAW—A BASIS FOR REFORM 3 (1971).

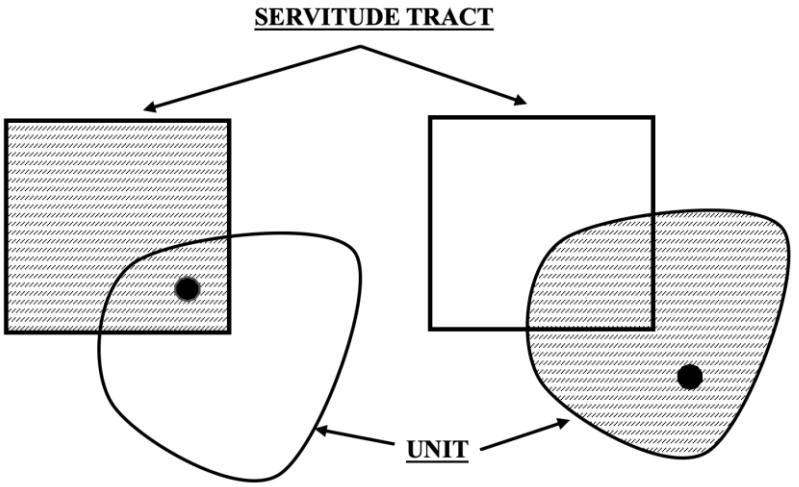
315. LA. REV. STAT. § 31:71 (2020).

316. McDougal, *supra* note 267, at 1126. ("The general thrust of these three articles [33, 34, and 37] is that a use on a portion of the unit not burdened by the servitude will interrupt prescription for the portion of the burdened land included in the unit, but not for the portion of the servitude not included in the unit. Thus, these articles divide the servitude into unit and nonunit portions for purposes of prescription of nonuse. What article 71 really means is that the 'mere' fact that land burdened by a servitude is included in a conventional or compulsory unit does not 'automatically' trigger a division of the servitude.").

317. LA. REV. STAT. §§ 31:30, 31:33–35, 31:37 (2020).

conventional or compulsory, but it is subject to the author's caveat in the next section regarding a voluntary unit not signed by all of the owners of interest in production.

A visual presentation of this situation follows, with the shaded area reflecting the areal extent of the interruption resulting from unitized operations or production depending upon the location of the unit well.[318]



As previously noted,[319] as a limited area where "freedom of contract" is allowed, parties may provide that "an interruption of prescription resulting from unit operations or production shall extend to the entirety of the tract burdened by the servitude tract [sic] regardless of the location of the well or of whether all or only part of the tract is included in the unit."[320] The invocation of this permitted alteration to the rules noted above is not uncommon in more sophisticated mineral transactions.

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318. In his Mineral Rights class at the Paul M. Hebert Law Center, Louisiana State University, this author advocates that, in order to verify maintenance of a mineral lease or a mineral servitude, it is necessary to use "tunnel vision" when one or more mineral leases and mineral servitudes burden a tract of land, and there exists a number of units including such tract of land. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 3-08(b).

319. *See supra* Part I.G.3.

320. LA. REV. STAT. § 31:75; *see also* White v. Evans, 457 So. 2d 159, 162 (La. Ct. App. 2d Cir. 1984), *writ denied*, 462 So. 2d 207 (La. 1985) (without discussing the issue of applying the Mineral Code retroactively to a servitude created prior to its enactment, the court found that the language of "the pooling agreement in question expresses such an agreement as Art. 75 contemplates"; consequently, it was held that the servitude was maintained in its entirety, including that portion of the servitude tract not included within the producing voluntary unit.).

3. A Word of Caution about Voluntary Units

Although the rule announced in articles 33 and 37 is clear, certain issues are presented regarding its application in certain instances. There is no real question as to the application of the articles in the case of compulsory units, which are well defined both statutorily and jurisprudentially.[321]

Similarly, the articles present no real concern in reference to declared units because the jurisprudential treatment of such units—and the resultant modification of the printed lease forms to address issues arising therefrom—virtually ensures that a *properly formed* declared unit will be a valid, "100%" unit.[322] However, because the Mineral Code does not define the term "conventional unit" precisely, it is unclear how or if the rule applies to a voluntary unit formed by an agreement which has not been executed or adopted by a landowner in whose favor prescription would accrue in the absence of a use.[323]

As noted in the Official Comments to article 213 of the Mineral Code, the definition of the term "unit" "includes conventional units of all kinds, whether established by declaration under a pooling power, by a contract executed by *all* parties affected, or otherwise."[324] While it is commendable that because the legislature did not provide a more precise, restrictive definition of "conventional unit," it allowed the parties to craft institutions or arrangements of their own desires. Furthermore, the lack of a precise definition and the absence of any guideposts as to the creation of a conventional unit give rise to certain questions as to when the rules of articles 33 and 37 might not be applicable.[325]

According to articles 33 and 37 of the Mineral Code, if unitized operations conducted on or production secured from a conventional unit well situated off of the servitude tract has the consequence of interrupting prescription accruing against that portion of the servitude tract situated within the voluntary unit, then clearly the landowner of the servitude tract—in whose favor prescription would otherwise accrue in the absence of a use—is an "affected" party. If the landowner has not signed the

321. LA. REV. STAT. § 30:9(B) (2020).

322. *See, e.g.*, Union Oil Co. of Cal. v. Touchet, 86 So. 2d 50 (La. 1956); Viator v. Haynesville Mercantile Co., Tr., 88 So. 2d 1 (La. 1956); Mallett v. Union Oil & Gas Corp. of La., 94 So. 2d 16 (La. 1957).

323. *See* Ottinger, *supra* note 297.

324. LA. REV. STAT. ANN. § 31:213 cmt. (2020) (emphasis added).

325. Certainly, the voluntary unit agreement must be in writing. *See* Midnight Drilling, LLC v. Triche, No. 2012 CA 1043, 2013 WL 3149456 (La. Ct. App. 1st Cir. 2013), *writ denied*, 125 So. 3d 432 (La. 2013).

voluntary unit agreement, one could argue that the non-signatory landowner should be "not bound by it in any way."[326]

In a case predating the adoption of the Mineral Code, it was held that production from a conventional unit did not interrupt prescription accruing against a mineral servitude because the owner of the land burdened by the servitude was not a party signatory to it.[327]

It might be argued that a landowner who creates a mineral servitude will be deemed to have done so in reference to all applicable and pertinent laws, including articles 33 and 37 of the Mineral Code, so that an intrinsic consequence of the creation of a mineral servitude is that operations or production from a "conventional unit," even without the involvement or participation of the landowner, might interrupt prescription. Even so, the question remains, under what circumstances will this result follow if fewer than *all* "affected" parties have signed the voluntary unit agreement?

As stated, uncertainty is presented because the Mineral Code does not define the term "conventional unit" as used in articles 33 and 37.[328] Perhaps there is no problem with a "declared" unit constituting a "conventional" unit because the jurisprudence has adequately addressed the legal requirements for the formation of such a unit. There is, however, a question as to when or under what circumstances a "voluntary unit agreement" constitutes a "conventional" unit within the contemplation of these articles.

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326. Carter v. Ark. La. Gas Co., 36 So. 2d 26, 28 (La. 1948); *see also* LA. CIV. CODE art. 1983 (2020) ("Contracts have the effect of law for the parties . . . ."); LA. CIV. CODE art. 1985 (2020) ("Contracts may produce effects for third parties only when provided by law.").

327. Alexander v. Holt, 116 So. 2d 532, 536 (La. Ct. App. 2d Cir. 1959) ("The [mineral servitude owner's] inclusion of the 35.56 acres in the conventional agreement was by his own act, not concurred in, consented to, or approved by [the landowner]; nor is it shown by any act on the part of [the landowner], he has, in any manner, approved or acquiesced in the agreements or in the subsequent proceedings. The owners of a servitude are powerless to extend their mineral rights without the consent of the landowners who, under the law, must clearly and definitely state or act in such a way so as to show that it was their intention to interrupt the running of prescription and start it anew.").

328. In a non-mineral servitude context, the absence of a codal definition of the term "conventional unit" contributed to the rendition of a fundamentally flawed and erroneous decision as it relates to "Pugh Clauses." Banner v. GEO Consultants Int'l, Inc., 593 So. 2d 934 (La. Ct. App. 4th Cir. 1992). While this decision is clearly erroneous as a matter of "Pugh Clause" law, it is correct under the law of lease divisibility. *Cf.* Swope v. Holmes, 124 So. 131 (La. 1929); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 10-16.

To illustrate, assume that every person having an interest in production from the identified conventionally pooled unit well executes the agreement. Presumably that would constitute a "conventional" unit as contemplated by articles 33 and 37 of the Mineral Code. Assume, then, that fewer than all of the parties having an interest in production from that unit well have executed the agreement. Is this a "conventional" unit? What if, say, only 5 out of 10 parties having an interest in production from the identified, conventionally pooled unit well have executed the agreement? Is this a "conventional" unit as contemplated by these articles? What about 2 out of 10 parties? Sooner or later, a court might determine that a given agreement does *not* effectively form a "conventional" unit as contemplated by articles 33 and 37 of the Mineral Code because an insufficient number of affected parties have signed the document.

As noted, all of the jurisprudence on this subject predates the adoption of the Mineral Code. Thus, while one may argue that the legislature enacted articles 33 and 37 of the Mineral Code to resolve any ambiguity or inconsistency in prior jurisprudence, the fact remains that, until the Code is amended to more precisely define "conventional unit" or a definitive court decision is rendered, one will not be able to predict with certainty how or if these articles will be applied to a conventional unit that the landowner has not signed or, more fundamentally, to a "conventional" unit that significantly less than all of the parties in interest have signed.

At issue in *AIX Energy, Inc. v. Bennett Properties, LP*[329] was whether a certain mineral servitude had prescribed for nonuse for 10 years. Although neither operations nor production occurred on the servitude tract, it was included in a voluntary unit created by agreement, but the landowner never signed that agreement. The court noted:

> There is no evidence that their predecessor in interest, Thomas Sale, Jr., signed the unit agreement, but there is compelling evidence that Sale tacitly consented to or ratified the agreement by signing division orders that included an express ratification clause, accepting payments from unit production, and otherwise acting consistently with having joined the unit.[330]

On this showing, the court held that Sale was bound by the agreement through principles of either ratification or acceptance.

The owner of the land then contended that a successor to Sale was not bound by any such ratification since it was not reflected in the public

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329. AIX Energy, Inc. v. Bennett Properties, LP, No. 13-CV-3304, 2016 WL 5395870 (W.D. La. Sept. 26, 2016).

330. *Id.* at *1.

records of DeSoto Parish. The court rejected this argument on the basis of article 3339 of the Louisiana Civil Code, finding that the actions of Sale that resulted in a ratification or acceptance of the voluntary unit agreement constituted a "similar matter pertaining to rights and obligations evidenced by a recorded instrument," which, under article 3339, "are effective as to a third person although not evidenced of record."[331]

Because the mineral servitude was included within the voluntary unit, and was held to be binding on the landowner through principles of ratification or acceptance, the servitude did not prescribe, but was perpetuated through article 37 of the Louisiana Mineral Code.

4. What Constitutes Unitized Operations or Production?

The principles now provided with respect to unitized operations and production are applicable "provided such operations are for the discovery and production of minerals from the unitized sand or sands."[332] The myriad of circumstances that might be presented in the conduct of drilling operations has given rise to various issues of whether a particular operation or a modification of an ongoing operation constitutes unitized or "lease basis" operations for various purposes, including the interruption of prescription.

Thus, in *Matlock Oil Corp. v. Gerard*,[333] the issue was whether the conduct of certain operations, which the mineral servitude owner's lessee contended were unitized operations, interrupted prescription against certain mineral servitudes. The court concluded that the mineral servitudes prescribed in August of 1969 unless certain operations conducted in the early part of 1969 constituted unitized operations. The court examined the facts pertaining to this operation and concluded that the lessee "simply did not intend to obtain production from the Lower Hosston Formation through Matlock-Fuller Well No. 1" and that "no bona fide attempt was made to test this particular formation; therefore, there was no good-faith drilling as to the unit established for drilling and production from the Lower Hosston Formation."[334]

The case of *Sandefer & Andress, Inc. v. Pruitt* was a concursus proceeding to determine the ownership of minerals in a tract of land.[335] A

331. *Id.* at *4 (emphasis omitted); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 1-14(f).

332. LA. REV. STAT. § 31:33 (2020).

333. Matlock Oil Corp. v. Gerard, 263 So. 2d 413 (La. Ct. App. 2d Cir.), *writ denied,* 265 So. 2d 241 (La. 1972).

334. *Id.* at 418.

335. 471 So. 2d 933 (La. Ct. App. 2d Cir. 1985).

mineral servitude was created in 1936. Two wells were drilled on the servitude tract and produced for a brief period of time in 1940. A third well on the servitude tract was drilled in 1954. Based upon the drilling and production activities on the surface of the servitude tract, prescription presumptively accrued before the drilling of the well in 1954.

"If the only issue were on-tract production, then this conclusion would completely dispose of the case. There is, however, an extensive history of unitization and drilling on adjacent tracts."[336]

While there was some unit activity, none of the wells included any portion of the servitude tract. The servitude tract was not unitized until 1978. Three wells, the Gaines No. 1, the Gaines No. 2, and the Gaines No. 3, were drilled. The court held that the "Gaines Nos. 2 and 3 were simply not deep enough to create a user of the Bodcaw Unit."[337] In order for unit operations to be sufficient to interrupt prescription accruing against a servitude burdening the non-drillsite tract, the unit well must reach the unitized sand. The mineral servitude prescribed.

In *Malone v. Celt Oil, Inc.*,[338] plaintiffs transferred their interest in property, but reserved an undivided one-half interest in the minerals. Drilling on one of the wells in question on the property was commenced one month before the accrual of prescription. Plaintiffs filed suit for the recognition of their mineral servitude alleging that the drilling of the well in question was a sufficient "good faith" operation to interrupt prescription under article 29 of the Mineral Code.

The trial court held that the initial drilling of the well in question, certain logging tests, and later recompletion of the well after prescription had accrued did not constitute one continuous operation under article 29 of the Mineral Code. Rather, the activities associated with the later completion of the well were separate operations.

On appeal, the issue was "whether a mineral lessee's action in recompleting a well at a shallower formation constituted a *single operation* with the initial drilling so as to be good faith operations sufficient to interrupt the ten year liberative prescription of non-use established for mineral servitudes."[339] The appellate court noted that article 29 was a codification of the jurisprudence that "good faith" drilling is a *bona fide* attempt to obtain production.[340] Merely drilling through a shallower sand

336. *Id.* at 935.

337. *Id.* at 936.

338. Malone v. Celt Oil, Inc., 485 So. 2d 145 (La. Ct. App. 2d Cir.), *writ denied*, 488 So. 2d 692 (La. 1986).

339. *Id.* at 146.

340. "As the readactor's comment indicates, this article is simply a broad restatement of the existing jurisprudence." *Id.* at 147.

without evaluating or testing the shallower sand was not sufficient to interrupt prescription. However, if the shallower sand is evaluated during the drilling process and extensive tests are conducted during the period of the servitude, prescription is interrupted.

Because the court found that the initial drilling of the well in question, and the subsequent recompletion and production from that well, were *not* one single operation under article 29 of the Mineral Code, there was no need to determine if there was testing of the well that constituted a *bona fide* effort to obtain production. Consequently, the court held that the initial drilling of the well did not interrupt prescription, and the plaintiff's mineral servitude was prescribed by 10 years of nonuse.

5. Operations Conducted Prior to Approval by Commissioner

If an operator conducts an operation—drilling or reworking—on a "true vertical well" before the Louisiana Office of Conservation issues a permit or order which, for regulatory purposes, recognizes or characterizes the well as a unit well, does the pre-approval operation nevertheless have the effect of interrupting prescription on mineral servitudes on non-drillsite tracts included within the unit in which such operations are being conducted? In other words, does the absence of administrative approval preclude the prescription-interrupting effect of the operation as being on a unitized basis?

An illustration of this problem is as follows. A compulsory unit well ceases to produce, and, some 9 years and 11 months later, a new operator elects to drill a substitute unit well rather than attempt reworking operations in the primary unit well. It takes a period of time to prepare the application to the Commissioner for the designation and approval of a substitute unit well. The operator gets a permit to drill the well, which will eventually be designated as the substitute unit well, but the drilling permit does not so designate the well, pending the application for approval. Operations on the second well begin before accrual of prescription against a mineral servitude affecting a unitized, non-drillsite tract of land, and the well is not designated as the substitute unit well until *after* the accrual of prescription. The non-drillsite landowner demands a release of the mineral servitude, asserting that the operations on the well were not "unit operations," but were "lease basis" operations on the drill site tract, because the Commissioner had not so designated the well as a substitute unit well until after the servitude prescribed.

The following cases indicate that the *intent* of the operator controls, notwithstanding the manner in which the Commissioner of Conservation

has or has not characterized the operation at the time the operation is conducted.

In *Bass Enterprises Production Co. v. Kiene*,[341] the landowner contended that operations within a unit that were conducted unsuccessfully to a non-unitized zone had no effect on prescription accruing against a mineral servitude covering a unitized tract, although the well was plugged back and tested to the unitized sand. The opponent argued that, because the well was not permitted to the shallower unitized sand, it could not be considered a unitized operation sufficient to interrupt prescription accruing against a mineral servitude partially included within the unit.

The court found that the failure to secure pre-drilling approval did not disqualify the operation as constituting unit operations, noting that it was

> apparent from the testimony of the representative of the Office of Conservation that exceptional locations can be and are approved after a hearing either before or after a particular well is drilled. This witness further testified that he had never known of such a request to be denied when a well had been tested and found to be commercially productive.[342]

The issue was next considered in *Gorenflo v. Texaco Inc.*,[343] where the court considered the landowner's contention that "even if the leases were validly pooled and even if operations were timely commenced at the Milford Cobb No. 1 site, such operations were not unit operations because they were not permitted as such by the Department of Conservation on the date the primary term expired."[344] The court rejected this contention, saying that the "provisions [cited by lessor] do not indicate that drilling under a permit which gives the well a name which does not show its status is illegal."[345]

Finally, the Louisiana Supreme Court summarized the law on this issue in the last of this trilogy of cases, *Nunez v. Wainoco Oil and Gas Co*.[346] The Court relied on *Bass* and *Gorenflo* and stated as follows:

> The jurisprudence indicates that it is the *intent* of the operator and

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341. 437 So. 2d 940 (La. Ct. App. 2d Cir. 1983).

342. *Id.* at 944.

343. Gorenflo v. Texaco Inc., 566 F. Supp. 722 (M.D. La. 1983), *aff'd*, 735 F.2d 835 (5th Cir. 1984).

344. *Id.* at 728.

345. *Id.* at 729.

346. Nunez v. Wainoco Oil & Gas Co., 488 So. 2d 955 (La.), *cert. denied*, 479 U.S. 925 (1986).

> the operations conducted which determine whether drilling operations constitute unit operations or merely lease operations. In *Bass Enterprises Production Co. v. Kiene*, 437 So. 2d 940 (La. App. 2d Cir.1983), the well was permitted for non-unitized sand but was drilled within the boundaries of a unitized sand. When the permitted sand was found not to be commercially productive of hydrocarbons, the well was plugged back and tested at other intervals, including the unitized sand. Although production was not obtained from the unitized sand and thus the well was never permitted as the unit well, these operations were sufficient to interrupt prescription on a servitude tract within the unit. Similarly, in *Gorenflo v. Texaco, Inc.*, 566 F.Supp. 722 (M.D. La.1983), operations for the drilling of a well, conducted before the well was permitted as the unit well, were found sufficient unit operations to maintain the lease. The court noted that there was no indication that "drilling under a permit which gives the well a *name* which does not show its status [as a unit well] is illegal." *Id.* at 729. Indeed, the amended permit, which designated the Stone Well No. 1 as the unit well for Sand Unit F, indicated that the amendment action was a change in the well "name" from lease to unit. Such a procedure does not seem to be of sufficiently significant stature to affect the relationships between the parties.[347]

6. Directional Well Drilled on Unitized Basis

In Part II.A.6, consideration was given to the issues attendant to a directional well drilled on a "lease basis."

In the case of a unit well that is directionally drilled to be ultimately bottomed under the unit (accommodating the "horizontal" feature in the case of a compulsory unit), and distinctly for purposes of articles 30, 33, 34, 35, and 37 of the Mineral Code, the well would be deemed to be "on" the tract under which the well's ultimate bottom hole exists, regardless of whether the precise location of the surface of the well is within or without the unit boundary, or whether the path of the borehole lies under any particular unitized tract.

In this regard, emphasis is placed on the word "on," as it relates to where a well is deemed to be situated for purposes of articles 30, 33, 34, 35, and 37 of the Mineral Code. Consider the case of *Wilcox v. Shell Oil*

347. *Id.* at 964 n.28.

Co.,[348] the first decision of the Louisiana Supreme Court to scrutinize a lessee's exercise of the "pooling power" in a mineral lease. The language in the "Pooling Clause" implicitly required the unit to be formed *prior* to drilling of the unit well:

> The commencement of a well or the completion of a well to production, and the production of oil or gas therefrom, *on* any portion of an operating unit in which all or any part of the land described herein is embraced shall have the same effect, under the terms of this lease, as if a well were commenced or completed on the land embraced by this lease.[349]

Although no well was drilled on Mr. Wilcox's land, the lessee drilled a well on Mr. Breaux's land that was completed on August 6, 1952. A declaration of unit was filed on September 2, 1952, including a portion of Mr. Wilcox's land with the Breaux well. Mr. Wilcox challenged the validity of the unit on the grounds that it was not properly formed.

The Court held that, because the well was drilled and completed *prior* to the unitization, it did not satisfy the express requirements of the lease's "Pooling Clause" that the unit well be commenced "on" the unit or completed "on" the unit. That is, the lease required that the unit exist *prior* to drilling, or else it could not be said that the well was commenced "on" the unit or completed "on" the unit. The Court held that the unit was invalid, such that it did not serve to maintain Mr. Wilcox's lease in force and effect.

While the issue in *Wilcox* was more temporal than geographic (or, more precisely, a mixture of both), still, at least for purposes of the "Pooling Clause" in a mineral lease, the contractually anticipated attribute that a well must be "on" a unit for a certain consequence to follow means that the unit must first exist so that the well can then be said to be "on" that unit.[350]

In each of the three cases noted in the preceding section,[351] the well in question was drilled within the geographic boundary of a compulsory unit as a "true vertical well."[352] In those instances, under any view there is a

348. Wilcox v. Shell Oil Co., 76 So. 2d 416 (La. 1954).

349. *Id.* at 419 (emphasis added).

350. That the unit must first exist for a well to be "on" the unit presented a "predicate" for the operation of the "Pooling Clause" in the *Wilcox* case. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 2-06.

351. *See supra* Part II.D.5.

352. The well involved in *Nunez v. Wainoco Oil & Gas Co*. was deemed to constitute a "straight hole," notwithstanding that it deviated from true vertical

well being drilled within, and hence "on," the compulsory unit in question. That is to say, in those cases, the wells involved met and satisfied the "vertical feature" of compulsory unitization (a matter to be hereafter discussed) on the date on which the wells were "spud."

Consideration should be given to a situation in which a well is drilled from a surface location *outside* of the unit boundary and directionally drilled to a targeted bottom hole location that would complete the well in the unit sand or zone, as defined in the relevant order of the Commissioner of Conservation.[353]

In the case of a well drilled directionally from a location outside of the unit, but to be completed within the unit, and if a mineral servitude covers lands within the unit, and prescription accruing against the servitude is nearing expiration, on what date is the prescription interrupted by the commencement of actual drilling operations for the well? To be more precise, how does the rule of article 30 operate with respect to such a well? That article, in relevant part, states that an "interruption takes place on the date actual drilling or mining operations are commenced *on* the land burdened by the servitude or, as provided in article 33, *on* a conventional or compulsory unit including all or a portion thereof."[354] Yet, as noted, the surface location of the well in question is not situated "*on* the land burdened by the servitude," nor is it situated "*on* a conventional or compulsory unit."

Because this hypothetical well is located neither "on" the servitude tract nor "on" the unit including such servitude tract, it is submitted that the wellbore must "cut" the vertical plane of the unit before it can interrupt prescription. Even "actual operations" for a well that is neither "on" the servitude tract nor "on" a unit including the servitude tract are irrelevant to the unit until the borehole enters the area overlain by the unit.[355]

This conclusion is supportable if one considers that, when a well is drilled on a unit basis from a surface location within the exterior perimeter of the unit, prescription is interrupted on the date on which the well is

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with a deviation of "significantly less than five degrees" from the vertical. 488 So. 2d 955, 957 (La. 1986); *see* LA. ADMIN. CODE tit. 43, pt. 19, § 135 (2019).

353. *See supra* note 303.

354. LA. REV. STAT. § 31:30 (2020) (emphasis added).

355. The ascertainment of the precise date on which the borehole "breaks the plane" of the unit is facilitated by the fact that the rules and regulations of the Office of Conservation require the operator of a well that is directionally drilled to procure, as the well is drilled, a "directional survey" that establishes both the path and trajectory of the borehole measured in depth, displacement, and date. LA. ADMIN. CODE tit. 43, pt. 19, §§ 135–45.

spud-in. This is so because, on that date, the vertical feature of compulsory unitization is met ab initio.

In contrast, if the unit well is drilled from a surface location *not* situated within the exterior perimeter of the unit, the vertical component is not met or satisfied until the drill bit breaks the vertical or exterior plane of the unit. While it is not a perfectly apt analogy, the drilling of a directional wellbore from a location outside of the unit is tantamount to preparatory actions that are irrelevant to the interruption of prescription until the vertical plane of the unit is traversed.

This view is consistent with the previously noted precept that the proper interpretation is the interpretation that least restricts the ownership of the land conveyed, as in the case of mineral servitudes. In other words, the court should embrace the interpretation that tends to free the land from the burden of the mineral servitude.[356]

7. "Cross-Unit Wells"

A relatively new innovation—perhaps demonstrative of the proposition that engineering technology is often ahead of the law—is the "cross-unit well."[357] The full rationale and reasoning behind such wells are beyond the scope of this Article, but in summary, a "cross-unit well" is a well that the Office of Conservation permits to be drilled in and through two or more units, principally in the Haynesville Shale.[358] It is not a directional or slant well, but a well that is drilled as a "true vertical well" to a certain subsurface depth, and then takes a 90° turn and is drilled as a horizontal lateral into multiple units.[359] Anecdotally, horizontal laterals

356. "The law favors the free and unrestrained use of immovable property. It follows that any doubt as to the interpretation of a servitude encumbering property must be resolved in favor of the property owner." McGuffy v. Weil, 125 So. 2d 154, 158 (La. 1960); *see also* LA. CIV. CODE art. 730 (2020) ("Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.").

357. "Law must bend to science; it must accommodate technology." Patrick H. Martin, *What the Frack? Judicial, Legislative, and Administrative Responses to a New Drilling Paradigm*, 68 ARK. L. REV. 321, 321 (2015).

358. "'Cross-unit well' means a well drilled horizontally and completed under multiple drilling units that is designated by the commissioner after notice and public hearing to serve as a unit well, substitute unit well, or alternate unit well for said units." LA. REV. STAT. § 30:9.2(A)(2) (2020).

359. For a comprehensive examination of "cross unit" wells, the reader is referred to Wm. Timothy Allen, III, *Recent Developments Related to Louisiana Unitization and Drilling*, 62 ANN. INST. ON MIN. L. 58, 65 (2018).

have been drilled in the Haynesville Shale, extending as far as 15,000 feet.[360]

The Commissioner of Conservation has issued orders in the Haynesville Shale in Northwestern Louisiana[361] authorizing the drilling of "cross-unit wells," initially in accordance with a Policy Memorandum of the Commissioner of Conservation,[362] and later pursuant to Louisiana Revised Statutes § 30:9.2, enacted in 2015.[363] This memorandum sets forth the policy of the office and the procedures for applications for such units. Among other things, the memorandum states: "Production from each cross unit lateral well shall be separated and metered individually and this information shall be reported to the Office of Conservation in a manner to be prescribed by this office."[364]

In the case of a "cross-unit well," the surface location is located in one unit and the ultimate terminus point of the well's lateral member is in another unit. Multiple perforations are introduced to the lateral, and each constitutes a "take point" for unit production.[365] Significant issues of gauging and measurement are necessary to ensure that each owner in the unit is allocated its just and equitable share of unit production.

The implications on prescription accruing against any mineral servitudes in multiple units are obvious—and significant. It must be noted

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360. "At the end of 2017, Chesapeake Energy drilled its first 15,000-ft lateral in the Haynesville. Located in Caddo Parish, the GEPH 30&19&18-16-15 1HC flowed a recordshattering IP24 of 48 MMcf/d in May. After 170 days, the well continues to produce 25 MMcf/d and has flowed a total of 5.8 Bcf. The company is currently drilling its second and third 15,000-ft laterals in the play. Another five may be drilled in 2019." *Chesapeake 15,000-ft Haynesville HZ Still Flowing 25 MMcf/d*, DRILLINGINFO (Nov. 15, 2018), https://www.plsx.com/news/article/chesapeake-15000-ft-haynesville-hz-still-flowing-25-mmcfd [https://perma.cc/D6YZ-PGFD].

361. Kennedy v. Saheid, 209 So. 3d 985, 994 n.3 (La. Ct. App. 2d Cir. 2016), *writ denied*, 215 So. 3d 681 (La. 2017) ("This court would take judicial notice that March 2008 marked the beginning of the land-leasing boom associated with the Haynesville Shale formation.").

362. *See* Policy Memorandum from La. Office of Conserv. (Nov. 2, 2012) (on file with author) (concerning "[h]orizontal cross unit lateral wells in shales, tight gas sands and unconventional reservoirs").

363. Act No. 253, 2015 La. Acts.

364. Policy Memorandum from La. Office of Conserv., *supra* note 362, at ¶ 3.

365. A "take point" is essentially a perforation in a horizontal well's lateral that permits the introduction of oil and gas in the process of production. *See* Springer Ranch, Ltd. v. Jones, 421 S.W.3d 273, 285 (Tex. App. 2013) ("Along the horizontal displacement are takepoints through which hydrocarbons flow into the well.").

that a "cross-unit" is not a particular type of unit. Rather, a "cross-unit well" is authorized by the Office of Conservation, after public hearing, to be drilled in and through multiple, adjacent drilling and production units as created by the Commissioner. Each such unit remains a "stand-alone" unit, and the Commissioner grants the authority for one well to cover multiple units.

In a proper case, operations conducted on, or production secured from, a cross-unit well will maintain a mineral lease, or interrupt prescription accruing against a mineral servitude, assuming that such operations or production otherwise meets the requirements of the mineral lease or of the Mineral Code (as the case may be). Hence, a landowner whose unitized land is burdened by either a mineral lease or a mineral servitude has a legitimate interest in whether the burdening mineral right will be continued or perpetuated by the penetration of a lateral into a unit to only a slight extent.

The text of Louisiana Revised Statutes § 30:9.2 assuages this concern in reference to what is defined as a "short unit," that is, "a unit in which the proposed well shall have less than five hundred feet of perforated lateral."[366] A "short unit" is avoided by the filing of a timely objection by a "cross-unit person," defined as "an interested owner, interested party, or represented party as defined in LAC 43:XIX, other than a mineral lessee."[367] If such an objection is timely filed, and the other provisions of this statute are met, the Commissioner lacks the authority to authorize or permit the drilling of a "cross-unit well that is proposed to have less than 500 feet of perforated lateral in any unit to be served by the cross-unit well."[368]

From these observations, and recognizing that an order authorizing the operator to drill a "cross-unit well" is permissive, not mandatory,[369] this author suggests that, until the drill bit enters a particular unit, crossing a common unit boundary, it is not a unit well as to that second (and perhaps third) unit. Only when the drill path crosses the unit boundary can it be said that the "cross-unit well" constitutes a unit well for, or "on," that second (and perhaps third) unit, with whatever effect on prescription results with respect to servitudes or other interests in the second (and perhaps third) unit. This is yet another application of the "'on' means 'on'" principle noted above.

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366. LA. REV. STAT. § 30:9.2(A)(3) (2020).

367. *Id.* § 30:9.2(A)(1).

368. *Id.* § 30:9.2(C)(2).

369. Language commonly seen in such an order typically provides that "the applicant is hereby authorized to drill, designate and utilize two (2) cross unit horizontal wells as alternate unit wells."

E. Interruption by Acknowledgment[370]

If no use has occurred on a mineral servitude, it will prescribe after the lapse of 10 years. The law prescribes a method to interrupt prescription in the absence of a use, namely, an acknowledgment by the owner of the land burdened by the servitude. It is logical that only a landowner may acknowledge a mineral servitude for purposes of interrupting prescription inasmuch as such action effectively creates a new servitude, and only a landowner can create a mineral servitude.[371]

Why would the landowner acknowledge the servitude to interrupt prescription? After all, if there is no use, the rights to minerals will be reunited with the landowner.[372]

The simple answer is, for any reason that is valid in the mind of the landowner. For example, a father or grandmother who donated the minerals to his or her children or grandchildren might wish to allow the mineral value to remain in such donees, rather than his or her own estate. A corporation or limited liability company that granted a mineral servitude to its shareholders or members might wish to continue that arrangement, perhaps with the creation of an executive right so as to allow leasing rights at the entity level. The landowner might receive a cash consideration for acknowledging the mineral servitude, thereby continuing said servitude. Again, there might be other reasons, such as settling a lawsuit or dispute, that are of interest to the landowner.

The facts in *James v. Noble*[373] disclose that James, the landowner, granted a mineral servitude in 1916. Minors acquired an interest in the mineral servitude, and the law at the time stated that prescription was suspended against minors until the minors attained majority. As such, the mineral servitude would have prescribed on August 18, 1943, unless the landowners acknowledged the servitude. In this instrument, the landowner acknowledged the outstanding servitude. Plaintiff later contended "that the acknowledgment is null for lack of consideration."[374]

Rejecting this contention, the Court stated that the landowner "has not favored us with authorities to the effect that a special consideration must

370. The case law involving the effect of an acknowledgment on a mineral servitude was examined in Eugene A. Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 26 TUL. L. REV. 172 (1951–52).

371. LA. REV. STAT. § 31:16 (2020) (describing the mineral servitude as one of the three "basic mineral rights that may be created by a landowner").

372. *See supra* Part I.F.

373. James v. Noble, 36 So. 2d 722 (La. 1948).

374. *Id.* at 723.

be given to support an acknowledgment and we know of no law that requires it."[375]

The Court held "that the legal requirement for an acknowledgment sufficient to interrupt ten years prescription for nonuser of a mineral servitude must be expressed and certain, must have been made for that purpose and must adequately describe the property to which it applies."[376]

Applying this rule, the Court found that the "acknowledgment in this case is clear and explicit and shows on its face that it was purposefully executed to interrupt the then running prescription."[377]

The requisites for a valid acknowledgment are now codified in the Louisiana Mineral Code. Thus, it is now provided that "[t]he prescription of nonuse may be interrupted by a gratuitous or onerous acknowledgment by the owner of the land burdened by a mineral servitude. An acknowledgment must be in writing, and, to affect third parties, must be filed for registry."[378]

As a logical corollary to the requirement that an acknowledgment must be in writing, parol evidence is not admissible to establish an acknowledgment.[379] Because the effect of a proper acknowledgment is to create a new servitude with a new commencement date of prescription, it is obvious that a third person is entitled to rely upon the "public records doctrine" if the public records do not reflect a *recorded* written instrument of acknowledgment.[380]

"An acknowledgment must express the intent of the landowner to interrupt prescription and clearly identify the party making it and the mineral servitude or servitudes acknowledged."[381]

This article perpetuates the jurisprudential rule "that the legal requirement for an acknowledgment sufficient to interrupt ten years prescription for nonuser of a mineral servitude must be expressed and certain, must have been made for that purpose and must adequately describe the property to which it applies."[382] The rule's principal purpose

375. *Id.*
376. *Id.* at 724.
377. *Id.*
378. LA. REV. STAT. § 31:54 (2020).
379. Barnsdall Oil Co. v. Succession of Miller, 69 So. 2d 21, 23 (La. 1953) ("However, parol evidence will not be considered in cases where there is a claimed interruption by acknowledgment."); *see* OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4, § 413(2).
380. LA. REV. STAT. § 9:2721; McDuffie v. Walker, 51 So. 100 (La. 1909); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 1-14.
381. LA. REV. STAT. § 31:55.
382. *James*, 36 So. 2d at 724.

is the avoidance of the significant consequence of interruption of prescription that might otherwise result if the landowner makes a casual or inadvertent reference to an existing servitude.

Although it is not stated in the text of articles 54 or 55, for the acknowledgment to be valid and effective, it must be accomplished *prior* to the accrual of the prescription of nonuse. This should be inferred from the requirement in article 54 that acknowledgment must result from the actions of "the owner of the land burdened by a mineral servitude." If prescription accrues, the mineral servitude no longer burdens the land. As noted previously, a mineral servitude that has prescribed for nonuse is not susceptible to post-extinguishment resurrection by way of acknowledgment.[383]

Although consideration is not needed to support an acknowledgment,[384] the codal requirement that the acknowledgment be "express" and "in writing" guards against a landowner's inadvertent acknowledgment.

In *Wise v. Watkins*,[385] the Court held that a sale of land that contained a reservation of "one-half of all oil, gas, and other minerals in and under said land which has heretofore been reserved by [an ancestor-in-title] in sale to this Grantor" did not constitute an acknowledgment of the outstanding mineral servitude sufficient to interrupt prescription accruing thereagainst. The Supreme Court stated, as follows:

> This Court has on numerous occasions stated that the acknowledgment required by this article of the Code must be more than a bare acknowledgment. It must be accompanied by, or coupled with, the purpose and intention of the party making the acknowledgment in order to interrupt the prescription then accruing.[386]

To affect third parties, the instrument effecting the acknowledgment must be recorded.[387] Certainly, a written acknowledgment comporting

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383. *See supra* text accompanying note 24.

384. *James*, 36 So. 2d at 724. ("[T]here is no provision in our law requiring a special consideration for an acknowledgment.").

385. Wise v. Watkins, 62 So. 2d 653 (La. 1953).

386. *Id.* at 654. The Court specifically declined to follow its earlier decision in *Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co.*, 88 So. 723 (La. 1921), which, under similar facts, had held that such a reservation did have the effect of interrupting prescription because the earlier decision was not "a sound pronouncement of law." *Wise*, 62 So. 2d at 655.

387. Goldsmith v. McCoy, 182 So. 519, 522 (La. 1938) ("We therefore conclude that a contract, whether intended to create or acknowledge an existing

with the codal requirements is a "contract" as contemplated by article 18 of the Mineral Code, which instructs that "[a]ll sales, contracts, and judgments affecting mineral rights are subject to the laws of registry."

EXAMPLE

On August 1, 2006, a mineral servitude is granted. No use is made of it. On July 15, 2016, the landowner executes an instrument acknowledging the mineral servitude and expressing the intent to interrupt prescription. On August 2, 2016, the landowner executes a mineral lease, which is immediately recorded. On August 4, 2016, the acknowledgment is recorded. On August 5, 2016, the mineral servitude owner grants a mineral lease, which is immediately recorded. Which mineral lease is good?

The landowner's lease is valid because the "public records doctrine" protects the lessee because the acknowledgment was not of record on the date of recordation of that lease. The mineral servitude owner may have a claim against the landowner, but the assertion of such claim should not prejudice the right of the landowner's lessee.

F. Consequences on Mineral Lease of Extinction of Servitude

If the prescription of nonuse is not interrupted by one of the means noted in the previous sections, the mineral servitude will come to an end—it will be extinguished.[388]

One must consider the effect of the extinction of a mineral servitude on any mineral lease that might relate to such prescribed mineral servitudes. As in many cases, "It depends."

If a landowner grants a mineral servitude on its land at a time when the land is not subject to an existing mineral lease, the owner or grantee of the mineral servitude is vested with the executive interest, that is, the right to grant a mineral lease.[389] While the mineral servitude owner, not the landowner, has the right to grant a mineral lease, such a lease is necessarily

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discontinuous servitude or a continuous nonapparent servitude against which prescription was accruing, in order to affect third parties in good faith, must be recorded in conformity to the law of registry in this State.").

388. LA. REV. STAT. § 31:27(1) (2020).

389. "A mineral lease may be granted by a person having an executive interest in the mineral rights on the property leased." *Id.* § 31:116.

dependent upon the continuation of the mineral servitude on the basis of which it was granted.[390]

If, under this scenario, the mineral servitude prescribes, the mineral lease falls with it. This is a natural consequence of the notion, previously noted, that one may not grant a third person any rights greater than those the grantor holds.[391] Under this circumstance, regardless of whether the payment of delay rentals maintained the mineral lease, the lease falls concurrently with the mineral servitude under which the mineral lease was granted.

On the other hand, assume that a landowner grants a mineral lease at a time when no mineral servitude burdens the land. Assume further that the mineral lease provides for a primary term of 10 years, and as is customary, the lease can be perpetuated by the payment of delay rentals in the absence of operations or production.[392] After the grant of the mineral lease, the landowner conveys a mineral servitude and, availing itself of article 75 of the Mineral Code, stipulates that the prescriptive period is shortened to, say, six years. The mineral servitude created is subject to the previously recorded mineral lease.[393] If, despite the maintenance of the mineral lease by the timely and proper payment of delay rentals, there is no use of the servitude in the six-year period, the servitude will prescribe, but the mineral lease will continue in accordance with its terms. This is so because the mineral lease was not dependent upon the servitude created after the grant of the mineral lease. The rights to the minerals would revert to the then surface owner of the land, subject to the mineral lease.[394]

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390. "A mineral lease may be granted by the owner of an executive interest whose title is extinguished at a particular time or upon the occurrence of a certain condition, but it terminates at the specified time or on occurrence of the condition divesting the title." *Id.* § 31:117.

391. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 2-09.

392. *See id.* § 4-08.

393. Coyle v. N. Cent. Tex. Oil Co., 174 So. 274, 276 (La. 1937) ("The defendants purchased an interest in the mineral rights with the knowledge of and subject to the existing lease.").

394. *See* Plaquemines Par. Gov't v. Getty Oil Co., 673 So. 2d 1002, 1008 (La. 1996) ("The effect of the compromise is that the Lobrano lease was granted by a landowner, not a mineral servitude owner. Thus the termination of the Rose and Morris servitudes would have no effect on the validity of the lease. A landowner is entitled to create one lease covering several noncontiguous tracts; operations on any of the tracts are sufficient to maintain the lease as to the entirety of the land burdened. La. Mineral Code art. 114. Therefore, we conclude that the Lobrano lease remains valid and binding on 100% of the compromise lands.").

III. EXTENSION OF PRESCRIPTION

A. Contractual Extension Prior to the Mineral Code

Under article 3505 of the Louisiana Civil Code, "an obligor may by juridical act extend the prescriptive period," "[a]fter liberative prescription has commenced to run but before it accrues." This article was adopted in 2013.[395] While the Civil Code did not previously provide for the extension of a prescriptive period, the ability to do so was jurisprudentially recognized.

In *Mulhern v. Hayne*,[396] the Court held that the execution by a landowner and a mineral servitude owner of a "joint lease" resulted in an *interruption* of prescription. Subsequent to its rendition, later courts consistently distinguished or questioned the *Mulhern* decision.[397]

Finally, *Mulhern* was repudiated, albeit not expressly overruled, in *Achee v. Caillouet*.[398] The *Achee* Court rather disingenuously stated that the *Mulhern* Court's reference to an *interruption* of prescription used the word in the "layman's" sense, not in the legalistic sense used in the Civil Code.[399] This superficial departure from its earlier decision failed to disguise the fact that the court was changing the rule to protect the landowner from an inadvertent, unintentional interruption. After *Achee*, the execution of a "joint lease" by a landowner and a mineral servitude owner resulted in an *extension*, not an *interruption*, of prescription.

B. Extension under the Mineral Code

"A landowner may extend a mineral servitude beyond the prescriptive date for a period less than that which would result from an interruption by an acknowledgment. The extension must meet all of the requirements for an acknowledgment and must specify the period for which the servitude is extended."[400]

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395. Act No. 88, 2013 La. Acts 1301.

396. Mulhern v. Hayne, 132 So. 659 (La. 1931).

397. *See, e.g.*, Spears v. Nesbitt, 2 So. 2d 650 (La. 1941).

398. Achee v. Caillouet, 1 So. 2d 530 (La. 1941).

399. *Id.* at 536. ("In those cases in which we said that the effect of the landowner's joining the owners of the servitude in making a mineral lease was to 'interrupt' the running of prescription, we meant that the prescription was interrupted in the sense that it was broken into, hindered, or stopped, as defined in the dictionary, and not in the sense that the word is used in the Civil Code relating to the acknowledgment of a debt.").

400. LA. REV. STAT. § 31:56 (2020).

Article 56 is motivated by the principle that the "greater includes the lesser."[401] Since a landowner may interrupt prescription by an acknowledgment, there is no reason why a landowner should not be able to accomplish less than a full interruption, such as an extension for a period of time less than 10 years. This liberality does not violate public policy, as the extension may only be "for a period less than that which would result from an interruption by an acknowledgment."

"An extended mineral servitude is subject to the rules relating to interruption of prescription."[402] Thus, where the intention to enter a "joint lease" is found, and production ensues from the granting of that mineral lease, such production interrupts prescription.[403]

EXAMPLE

A mineral servitude is reserved in a sale of land on August 1, 2006. On August 1, 2015, the landowner and the mineral servitude owner jointly execute a mineral lease for a primary term of three years, in which it is expressly declared to be the intention of the parties to extend prescription for the "duration of the lease." On August 1, 2017, the lessee begins a well on the land. The well is a dry hole according to an electric log run in the well on September 15, 2017. What is the consequence on prescription?

Assuming that the well meets the requirements of article 29, prescription commences anew on September 15, 2017.

IV. SUSPENSION OF PRESCRIPTION

A. General

While an interruption of the prescription of nonuse ultimately results in prescription commencing anew, and an extension adds additional time to the then remaining period of prescription, a suspension will "stop the clock" for the duration of the suspension.[404]

401. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 2-04(k).
402. LA. REV. STAT. § 31:57.
403. Armour v. Smith, 170 So. 2d 347, 350 (La. 1964).
404. LA. CIV. CODE art. 3472 (2020).

B. Suspension Resulting from the Minority of the Owner of a Servitude

"The prescription of nonuse is not suspended by the minority or other legal disability of the owner of a mineral servitude."[405] This rule restates a statutory provision which was first enacted in 1944,[406] and later incorporated into the Revised Statutes.[407] These provisions reversed a line of jurisprudence that extended the rules of former article 802 of the Louisiana Civil Code to mineral servitudes.[408] The courts previously held that the minority of a mineral servitude owner suspends the prescription accruing against the servitude as to all co-owners during the minority, including majors.[409]

A limitation on this former rule—now suppressed by article 58 of the Mineral Code—was recognized if the minors were introduced into title "by manipulation or subterfuge."[410] In this cited case, the Court refused to apply the rule of *Sample v. Whitaker* where the servitude owners admitted "that the purpose of the transfers [to minor children] were for the purpose of suspending the servitude."[411] On the basis of this admission, the Court found that the transfer to the minors "was a mere arrangement among the parties to preserve the mineral rights from the running of prescription, using the minors' names for that purpose."[412]

C. Suspension Resulting from Obstacle

"If the owner of a mineral servitude is prevented from using it by an obstacle that he can neither prevent nor remove, the prescription of nonuse does not run as long as the obstacle remains."[413]

Before examining those matters that, under article 59, would constitute an obstacle sufficient to suspend the accrual of the prescription of nonuse, it is appropriate to note those situations that have *not* been held to constitute an obstacle.

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405. LA. REV. STAT. § 31:58.

406. Act No. 232, 1944 La. Acts 687.

407. LA. REV. STAT. § 9:5805. The adoption of the Louisiana Mineral Code did not explicitly repeal this statute.

408. *See* LA. CIV. CODE art. 763 ("The prescription of nonuse is not suspended by the minority or other disability of the owner of the dominant estate.").

409. Sample v. Whitaker, 135 So. 38, 40 (La. 1931).

410. Roy O. Martin Lumber Co., Inc. v. Hodge-Hunt Lumber Co., 181 So. 865, 867 (La. 1938).

411. *Id.*

412. *Id.*

413. LA. REV. STAT. § 31:59 (2020).

The mere granting of a mineral lease by a landowner whose land is subject to a full mineral servitude is not an obstacle that would suspend the running of prescription.[414] Moreover, the courts have rejected as meritless the "contention that the purchase of mineral rights subject to a previous exclusive lease is the purchase of a suspended servitude, the prescription of which is also suspended."[415] Additionally, the existence of another mineral lease granted by the mineral servitude owner has been held to not constitute an obstacle to the use of the servitude.[416]

In *Hightower v. Maritzky*,[417] the plaintiff sued to have the defendants' mineral rights in a 200-acre tract of land declared prescribed. The defendants defended by asserting that the mineral servitude was not subject to prescription for several reasons. Among other things, the defendants contended that "the stipulation in the deed from Hightower to [defendants' ancestor], that Hightower should have the exclusive right to lease the land for the production of oil or gas, established an obstacle in the way of [defendants' ancestor] exercising his real right on the land."[418]

Rejecting that contention, 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."[419] Since the servitude owner had agreed to the reservation of the executive right, the inability to lease the land was, in a sense, of the owners' own making and, hence, was an arrangement to which he had consented.

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414. Gayoso Co. v. Ark. Nat. Gas Corp., 145 So. 677, 680 (La. 1933). However, the Court suggested that an obstacle would be presented if "an effort [had] been made by [the mineral servitude owner] to exploit the land, and had the effort been met with resistance by [the landowner]."

415. Coyle v. N. Cent. Tex. Oil Co., 174 So. 274, 276 (La. 1937); *see also* Gailey v. McFarlain, 193 So. 570, 576 (La. 1940) ("There is no doubt under the law of registry, that the purchaser or grantee of mineral rights or a servitude takes his ownership thereof subject to pre-existing recorded leases covering the same mineral rights.").

416. Baker v. Chevron Oil Co., 258 So. 2d 531, 534 (La. 1972). ("[I]f the leasing of a mineral interest combined with failure of the lessee to develop the property constitutes an obstacle which could suspend the running of prescription on an outstanding mineral servitude, then such mineral interest could be kept in effect indefinitely by the simple expedient of arranging for a lease of the interest prior to its expiration."). *See* OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4, § 413(2).

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

418. *Id.* at 520.

419. *Id.*

In *Deas v. Lane*,[420] the landowner sold some mineral interests after he had previously sold all of his mineral interests. The Court correctly held that the mineral rights subsequently sold could not prejudice the rights of the original mineral purchasers and, therefore, were not an obstacle under article 792 of the Louisiana Civil Code.[421]

The courts have held that, in order for a certain circumstance alleged to constitute an "obstacle" to result in the suspension of prescription accruing against a mineral servitude, the circumstances must totally impede the ability of the servitude owner to operate on the servitude.

Thus, in *Hanszen v. Cocke*,[422] the servitude owner interposed the existence and pendency of a lawsuit challenging the existence of a mineral lease as being an "obstacle." However, the court found that the asserted circumstances did not result in the suspension of prescription because on the servitude tract, there were areas where operations were not impeded because the suit did not affect those other areas. Adopting the reasoning of the trial court, the appellate court stated:

> It is unnecessary, however, for this Court to determine whether or not the institution of the Pan-Am suit did constitute an obstacle to the exercise of the Picton servitude on those portions of 'Amanda Plantation' involved in the suit for it is clear that even if it be conceded, for sake of argument, that the suit was an obstacle to the user of the servitude, that plaintiffs' contention is without merit since the obstacle did not affect the whole of 'Amanda Plantation', there being a portion thereof subject to the Picton servitude which was not then under lease and which was not involved in the Pan-Am suit and upon which plaintiffs could have exercised their right of servitude.[423]
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> * * *
>
> Since drilling was thus permissible on at least a part of the servitude area at all times, there was no obstacle to the user of the servitude; since 'if a definite mineral interest is granted (or reserved) by a single instrument covering the whole of a continuous tract of land only one servitude is created thereby, and the proper exercise of it on any part of the tract interrupts the accruing of

420. Deas v. Lane, 13 So. 2d 270 (La. 1943).

421. *Id.* at 276. *See* LA. CIV. CODE art. 755 (2020). ("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.").

422. Hanszen v. Cocke, 246 So. 2d 200 (La. Ct. App. 1st Cir. 1971).

423. *Id.* at 205.

prescription as to any and all of the remaining portion.'[424]

In a recent case,[425] the court rejected an argument that prescription was suspended because portions of the land were used for military purposes, thus constituting an "obstacle." The court found that there was a period of time, greater than 10 years, during which the plaintiffs were not impeded from conducting operations. Moreover, even if an obstacle existed, it did not affect the entirety of the servitude. Thus, a military "obstacle" did not suspend prescription, and the servitude prescribed.

In a more recent case,[426] the court rejected the contention that excessive rains and the terms of a USDA easement constituted an obstacle to the use of a mineral servitude.

"An obstacle to drilling or mining operations or to production of any mineral covered by an act creating a mineral servitude suspends the running of prescription as to all minerals covered by the act."[427] This is a logical corollary to Mineral Code article 40, which provides that an "interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."

"Issuance of a compulsory unitization order establishing a unit that includes all or part of a tract burdened by a mineral servitude does not constitute an obstacle to its use."[428] This rule codifies the holding of the Louisiana Supreme Court[429] that the designation of non-drilling areas within drilling units created by orders of the Commissioner of Conservation did not constitute an obstacle to use of mineral servitudes on lands within the non-drilling area. The Court stated that the classification does not prevent the use of the servitude, it merely controls the method of the user. To hold otherwise would be "inconsistent with the objectives, aims and policies of our conservation law."[430] The Court stated:

> Denying the existence of an obstacle said to result from an order of the Department of Conservation creating nondrilling areas in a

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424. *Id.* at 206.

425. Cent. Pines Land Co. v. United States of America, 274 F.3d 881, 896 (5th Cir. 2001).

426. Petro-Chem Operating Co. v. Flat River Farms, L.L.C., No. 51,212-CA, 2017 WL 786868 (La. Ct. App. 2d Cir. Mar. 1, 2017).

427. LA. REV. STAT. § 31:60 (2020).

428. *Id.* § 31:61A.

429. Mire v. Hawkins, 186 So. 2d 591, 596 (La. 1966).

430. *Id.* at 595. The Court declined to follow its earlier decision in *Boddie v. Drewett*, 87 So. 2d 516 (La. 1956), which held that orders of the Commissioner of Conservation that restrict drilling to a certain area in the unit cause an obstacle to user of the servitudes in the nondrilling area.

> unit, as in this case, is consonant with the public policy of this State which does not favor unwarranted extensions of liberative prescription on mineral servitudes; but, to the contrary, that policy favors the timely return of outstanding minerals to the owner of the land.[431]

Most of the cases involving obstacles that suspend prescription of nonuse involve facts where the recalcitrant landowner—in whose favor prescription would run if the mineral servitude owner does not timely "use" the servitude—prevents operations through devices that interfere with, or deny, access to the burdened land.[432]

If a landowner files suit against the servitude owner, contending that the mineral servitude no longer exists, and the landowner obtains an injunction against the servitude owner, preventing it or its lessee from conducting operations that constitute a use, and if the servitude owner prevails in the litigation, the prescription should be suspended from the date of the injunction, if not earlier, to the date on which the judgment adverse to the landowner is final, and the period of time of such suspension should be added to the servitude. The servitude owner cannot conduct operations in the face of the injunction, and should not be penalized under such circumstances.

It is important to recognize that the circumstances that might constitute an obstacle for purposes of suspending prescription against a mineral servitude present a different focus than a situation that might give rise to the invocation or assertion of a force majeure under a mineral lease. The author recalls a situation where a client, as a lessee under a mineral lease granted by a mineral servitude owner, believed that its obligations under its mineral lease were excused by a weather event that met the requirements of a "Force Majeure Clause" under the lease.[433] The client was correct in that the "Force Majeure Clause" did explicitly mention "significant rain event," or words to that effect. However, the factual circumstances did not constitute "an obstacle that he [could] neither

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431. 186 So. 2d at 597.

432. Hall v. Dixon, 401 So. 2d 473 (La. Ct. App. 2d Cir. 1981) (landowner removed survey stake and locked the gate; obstacle held to suspend prescription as against all co-owners, even those who did not contribute to the obstacle); Corley v. Craft, 501 So. 2d 1049, 1051–52 (La. Ct. App. 2d Cir. 1987) (landowner dug out the only access road, blocked access to replacement road by bulldozer, refused access because the drilling permit was not personally signed by the Commissioner of Conservation, and reported his own property to the DEQ as constituting a "solid waste disposal site").

433. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 13-34(k).

prevent nor remove," sufficient to suspend prescription accruing against the underlying servitude. Under such a situation, the result is that the lease lapses upon extinction of the mineral servitude, such servitude not being suspended under the theory of obstacle.[434]

EXAMPLE

A mineral servitude is reserved in a sale of land on August 1, 2006. On July 28, 2016, the lessee of the mineral servitude owner attempts to enter the property by way of the only access road to conduct drilling operations. The landowner has denied access to the property by laying lumber across the road. The access is denied until August 5, 2016, when the landowner removes the impediment to access. What is the status of the mineral servitude?

If the denial of access over the "only access road" is in fact an obstacle "that he can neither prevent nor remove," the servitude owner would have nine days (the period of the duration of the "obstacle"), or until August 14, 2016, within which to commence operations. If, however, there is another means of access which is not impeded by the landowner, it would not constitute an "obstacle" that would suspend prescription. The mineral servitude owner should not, however, be required to engage in "self-help" to remove the obstacle.[435]

V. BURDEN OF PROOF

A. General

"The extinguishment of a servitude by nonuse for a given period is a prescription and not a peremption."[436] Thus, as has been demonstrated, the prescription of nonuse is susceptible to interruption, extension, or suspension.[437] Obviously, proof of a prescription-altering event must be shown.[438]

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434. *See* LA. REV. STAT. § 31:117 (2020).

435. See OTTINGER, MINERAL LEASE TREATISE, *supra* note 5, § 13-09(e) for a discussion of the judiciary's disdain of the remedy of "self-help."

436. Gayoso Co. v. Ark. Nat. Gas Corp., 145 So. 677, 678 (La. 1933).

437. *See* LA. CIV. CODE arts. 3462–72 (2020).

438. Texas Co. v. Crawford, 212 F.2d 722, 725 (5th Cir. 1954) (if the servitude is not used, "the right prescribes, but like all other prescriptions, must be pleaded

If the prescription of nonuse has ostensibly—"on the face of things"—accrued, the issue arises as to who bears the burden of proof to show that the servitude has, or has not, prescribed. Previously, in reference to predial servitudes, courts held that

> when the prescription of non-usage is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he, or some person in his name, has made use of the servitude as appertaining to his estate, during the time necessary to prevent the establishment of such prescription.[439]

Courts have also held that "[w]hen the prescription of nonuse is pleaded, the owner of the dominant estate has the burden of proving that he or some other person has made use of the servitude as appertaining to his estate during the period of time required for the accrual of the prescription."[440] This is harmonious with the general rule that the "party pleading the exception of prescription has the burden of proving that prescription has accrued. This is the rule unless prescription is evident from the face of the pleadings, in which case the plaintiff bears the burden of showing the action has not prescribed."[441]

If *production* is the basis for the interruption, the fact of production, the date of commencement, and the duration thereof is easily shown, particularly because production need not be in "paying quantities."[442]

If the servitude owner contends that prescription has been *extended*, the burden is on the servitude owner to show compliance with the requirements of article 56 of the Mineral Code by introducing the appropriate written agreement.

In a similar manner, if the asserted basis of interruption of prescription is the existence of an act effecting an acknowledgment, the burden is either met or not met by the introduction of the written instrument, duly recorded, as envisioned by articles 54 and 55 of the Mineral Code. As mentioned above, parol evidence is not admissible for this purpose.

If, however, the servitude owner contends that prescription has been interrupted by the conduct of "good faith" operations, the servitude owner

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and proved by the one owning the land, for the simple reason that it may be waived").

439. *Compare* de la Croix v. Nolan, 1 Rob. 321, 324 (La. 1842), *with* LA. CIV. CODE art. 764 (2020), as it pertains to predial servitudes.

440. *See* Smith v. Andrews, 215 So. 3d 868, 878 (La. Ct. App. 2d Cir. 2017); *see also* OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4, § 411.

441. Pineda v. Ruppel, 639 So. 2d 858, 860 (La. Ct. App. 5th Cir. 1994) (citation omitted).

442. LA. REV. STAT. § 31:38 (2020).

carries the burden of showing that the use has satisfied the requirements of articles 29 and 42 to 43 of the Mineral Code. In that regard, it is necessary to determine when drilling activities or production began and ended, and who conducted them. This is sometimes difficult, particularly if the relevant activities were undertaken many years in the past. While the rules and regulations of the Louisiana Office of Conservation require an operator to file certain reports, reflecting dates of operations and production,[443] as a practical matter, there is often no way to independently confirm the completeness or correctness of such information. Additionally, the absence of reported information does not necessarily mean that an unreported operation did not take place.

In *Bass Enterprises Production Co. v. Kiene*,[444] the court stated the following concerning the nature of the inquiry into the sufficiency of a use as constituting an interruption of prescription:

> The question of whether the operations engaged in in connection with a particular well constitute a use of the servitude in such a manner as to interrupt the running of prescription is a question of fact dependent upon the particular circumstances under which the operations were conducted and the factor of good or bad faith on the part of the operators [sic] is inextricably connected with, although perhaps not wholly decisive of, the factual situation presented.[445]

B. Presumption of Good Faith

Early cases suggest that the servitude owner who demonstrates the timely existence of a dry hole is entitled to a "presumption of good faith."[446] Because the operation either does or does not satisfy the article 29 requirements for a "good faith operation," the only consequence for failure to meet the article 29 standards is that prescription is not interrupted—the dry hole simply did not interrupt prescription. Despite the court's reference in *Bass* to "the factor of good or bad faith," a landowner's overcoming of

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443. It is a criminal offense to make a "false entry or statement of fact" in any report filed with the Louisiana Office of Conservation. *See* LA. REV. STAT. § 30:17.

444. Bass Enter. Prod. Co. v. Kiene, 437 So. 2d 940 (La. Ct. App. 2d Cir. 1983).

445. *Id.* at 945.

446. Keebler v. Seubert, 120 So. 591, 592 (La. 1920) ("There is nothing justifying the conclusion that the operations were not conducted in good faith."); Lynn v. Harrington, 192 So. 517, 519 (La. 1939) ("Taking all these things into consideration along with the legal presumption of good faith . . . ."); Kellogg Bros., Inc. v. Singer Mfg. Co., 131 So. 2d 578, 580 (La. Ct. App. 2d Cir. 1961) ("Without denying the existence of the presumption [of good faith] . . . ."). This author does not believe these cases remain authoritative for this proposition.

this "presumption of good faith"—by demonstrating a failure to establish compliance with article 29—is not necessarily indicative of the operation being in "bad faith." While admittedly a point of semantics, the opposite of "in good faith" in this context is not necessarily "in bad faith"; it is simply not "in good faith" as contemplated by article 29.

C. Elements of Proof

As noted in the comments to article 29, that article's formulation gives rise to "the rather curious mixture of subjective and objective standards." In a close case, the rule of interpretation is that "[d]oubt as to the *existence, extent, or manner of exercise* of a predial servitude shall be resolved in favor of the servient estate."[447]

In a typical case, evidence would have to be submitted to establish each of the following elements to establish the existence of a "good faith" use of a mineral servitude, to wit:

Element of Proof	**Mineral Code Article**	**Evidence**
Date of creation	28	Written agreement
Date of "spudding in"	30	Engineering testimony
Date of commencement anew of prescription	30, 36	Same as above
Operations were commenced with reasonable expectation of discovering and producing minerals in "paying quantities" at a particular point or depth	29(1)	Geological testimony
Operations were continued at the site chosen to that point or depth	29(2)	Engineering testimony
Operations were conducted in such a manner that they constitute a single operation although actual drilling . . . is not conducted at all times	29(3)	Engineering testimony
Use was by the owner of the servitude, his representative or employee, or some other person acting on his behalf	42-43	Written evidence of relationship

447. LA. CIV. CODE art. 730 (2020) (emphasis added) (made applicable by LA. REV. STAT. § 31:2 (2020)).

Obviously, in a particular case, certain of these elements might be irrelevant, uncontested, or actually stipulated, thereby removing the need for proof.

Finally, if the servitude owner institutes suit to judicially establish the existence of the servitude, and if the landowner resists on the basis of the accrual of prescription of nonuse, the defendant-landowner must file an objection of prescription, which the court may not supply.[448]

CONCLUSION

As mentioned at the outset of this Article, a "mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."[449]

The mineral servitude has been an important institution of Louisiana law for a century.[450] As previously noted, the Supreme Court has referred to the mineral servitude as being "the most valuable property in the state."[451]

While unquestionably a "valuable property," the mineral servitude is, if anything, perishable by its very nature. That is to say, it will be extinguished after the lapse of 10 years without a "use."

Viewed differently, one often hears it said, in lay terms, that a mineral servitude "is good for ten years unless used." While perhaps not functionally inaccurate, a better way to understand the matter is that a mineral servitude "lasts forever"—or, using a common law term, a mineral servitude exists "in perpetuity"—"unless a ten-year period of time lapses without a use."

It is, therefore, critical for one interested in the "life" (or, from the viewpoint of the landowner, "demise") of a mineral servitude to understand the variety of ways in which prescription might be affected.

Finally, it is noted that, with the exception of conducting operations to interrupt prescription, and the quality of production that is obtained from

448. LA. CODE CIV. PROC. art. 927 (2020) ("The court may not supply the objection of prescription, which shall be specially pleaded."); *see also* LA. CIV. CODE art. 3452 (2020) ("Prescription must be pleaded. Courts may not supply a plea of prescription.").

449. LA. REV. STAT. § 31:21 (2020).

450. Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207 (La. 1922).

451. DeMoss v. Sample, 78 So. 482, 484 (La. 1918).

an operation,[452] prescription accruing against a mineral royalty is generally interrupted in the same manner as a mineral servitude. Therefore, some of the commentary herein might pertain to a mineral royalty also.[453]

It is hoped that this Article has removed the uncertainty regarding the manner in which the prescription of nonuse pertinent to a mineral servitude can be avoided.

452. *Compare id.* § 31:38 (with regard to a mineral servitude, "minerals [must] actually be produced in good faith with the intent of saving or otherwise using them for some beneficial purpose"), *with id.* §31:88 (with regard to a mineral royalty, "minerals [must] be produced in paying quantities but only that they actually be produced and saved").

453. *See generally* OTTINGER, MINERAL SERVITUDE TREATISE, *supra* note 4, at Ch. 5.