Louisiana Law Review

Volume 82
Number 4 *Summer 2022*

Article 6

6-27-2022

Secured Interests in Louisiana Mineral Rights

Patrick S. Ottinger

Secured Interests in Louisiana Mineral Rights

Patrick S. Ottinger[*]

TABLE OF CONTENTS

INTRODUCTION[1]

When your author was in his first year of law school (incredibly, a half century ago at the time of this writing), he was curious as to why there

* Ottinger Hebert, L.L.C., Lafayette, Louisiana. Member, Louisiana and Texas Bars; Adjunct Professor of Law, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, Louisiana. Reporter, Mineral Law Committee of the Louisiana State Law Institute. Past Chairman, Advisory Council, Mineral Law Institute.

1. This Article is an adaptation of a virtual presentation made by the author to the Bank Counsel Conference of the Louisiana Bankers Association on December 10, 2020. Portions of this Article are taken from PATRICK S. OTTINGER, LOUISIANA MINERAL LEASES: A TREATISE (2016) [hereinafter OTTINGER, MINERAL LEASE TREATISE], principally by way of adaptation, reorganization, and supplementation. Chapter Twelve of this Treatise is entitled "Secured Interests in the Mineral Lease, and in the Parties' Rights and Interests Thereunder." Also

would be a course on "security devices." That young law student just could not understand why three hours a week would be dedicated to Yale locks, surveillance cameras, chain link fences, and burglar alarms. It is hoped that this Article shows that the young lawyer eventually figured it out, at least a little bit.

"Security devices"—far from merely keeping one's home and property safe from intruders—serve the important commercial purpose of protecting one's interest in property owned by others that might be put forth as collateral security to ensure payment of a debt or performance of an obligation. In the absence of holding such collateral rights, a creditor who seeks a monetary recovery to satisfy the debt is relegated to identifying and seizing a non-exempt asset of its debtor and hoping that its forced sale will result in sufficient value to pay off the debt owed by the debtor.[2]

When the situs of collateral is Louisiana and the nature of the property includes mineral rights, special, unique issues are presented.[3] It is the purpose of this Article to consider some of the issues, principles, and conditions that attend the establishment of security over a Louisiana mineral right.

In the case of a mortgage of the lessee's working interest in mineral leases (herein, a "mineral lease mortgage"),[4] we consider a recent opinion of the Louisiana Supreme Court that rectified a seriously flawed decision

---

utilized herein are portions of the *amici curiae* brief filed by this author in *Gloria's Ranch, L.L.C. v. Tauren Exploration, Inc.*, as described in footnote 5, *infra*.

2. "Whoever is personally bound for an obligation is obligated to fulfill it out of all of his property, movable and immovable, present and future." LA. CIV. CODE ANN. art. 3133 (2021). "In the absence of a preference authorized or established by legislation, an obligor's property is available to all his creditors for the satisfaction of his obligations, and the proceeds of its sale are distributed ratably among them." *Id.* art. 3134.

3. Indisputably, the law of Louisiana applies to a mortgage of Louisiana mineral rights, as "[r]eal rights in immovables situated in this state are governed by the law of this state." *Id.* art. 3535.

4. In the vernacular of the oil and gas industry, the interest of a lessee in a mineral lease is called a "working interest." "The term 'working interest' is synonymous with the extent of a lessee's 'lease hold interest' in a tract or subsurface geological strata thereunder." J. B. Hanks Co. v. Shore Oil Co., No. 97-00040, 2014 WL 268698, at *1 n.3 (M.D. La. Jan. 23, 2014) (citing Pinnacle Operating Co. v. ETTCO Enter., Inc., 914 So. 2d 1144, 1146 n.1 (La. Ct. App. 2d Cir. 2005)). In the interest of full disclosure, your author served as Special Master in the *Hanks* case, and this decision adopted the Report and Recommendation that he issued therein.

of an appellate court that could have had a significant negative impact on the lending industry in the oil patch.[5]

I. AN OVERVIEW OF THE LOUISIANA LAW OF MINERAL RIGHTS

The story of Louisiana's development of the law pertinent to mineral rights is both rich and interesting.[6] Louisiana courts were taking up cases involving oil and gas more than three decades before the completion of the first commercial oil well in the state.[7] In the nascent stages of the oil and gas industry, the courts played an integral—indeed, indispensable—role in the formulation of a body of laws to address this new enterprise, unaided in the main by legislative guidance.[8]

The principal challenge confronting the courts in the early days was the fact that the Civil Code contained no mention whatsoever of oil, gas, or minerals.[9] Hence, the courts had to eke out the rules to regulate oil and gas rights by analogy to other precepts in the Code, such as the law of lease or servitude.[10] Ultimately, the Louisiana Mineral Code was adopted in

---

5. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 252 So. 3d 431 (La. 2018). In the interest of full disclosure, your author represented the American Bankers Association and the Texas Bankers Association as *amici curiae* in support of the position of the mortgagee, Wells Fargo, in this suit.

6. *See* HARRIET SPILLER DAGGETT, MINERAL RIGHTS IN LOUISIANA (1949).

7. Escoubas v. La. Petroleum & Coal Oil Co., 22 La. Ann. 280 (1870). A little over three decades later, on September 21, 1901, the first oil well in Louisiana, the Jules Clement No. 1, was successfully completed in a rice field on the Mamou Prairie in the community of Evangeline near Jennings, Louisiana. This followed the discovery of oil in the Spindletop Field near Beaumont, Texas, in January 1901.

8. "Having declined to enact laws for the regulation of the oil industry and, particularly, having declined to adopt a Mineral Code, the Legislature has placed the stamp of approval upon the system of interpretation of oil and gas contracts which this court has followed for so many years." Tyson v. Surf Oil Co., 196 So. 336, 343 (La. 1940).

9. "[M]inerals under and within the soil of Louisiana were not in the contemplation of the lawmakers at the time that the Code was adopted. The Legislature up to this time has been silent upon the subject of mineral rights and contracts." Rives v. Gulf Refin. Corp., 62 So. 623, 624 (La. 1913).

10. This observation is embraced by Judge Dennis of the United States Court of Appeals, Fifth Circuit, in James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 8 (1993), where this respected jurist stated, as follows:

> One of the most striking examples of the courts' response to a need for the application of the code realistically while remaining true to its principles, was the Louisiana Supreme Court's outstanding work in the

1974.[11] The enactment of a codified approach to mineral law was the result of a multi-decade effort by leaders of the mineral bar in the State of Louisiana.[12] For the most part, the Mineral Code codified—and in some instances, clarified or changed—the rules that had developed jurisprudentially.[13]

The Mineral Code identifies three "basic mineral rights that may be created by a landowner," namely, the mineral servitude, the mineral royalty, and the mineral lease.[14] Importantly, the Code also announces that these interests "are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."[15]

Mineral rights are real rights,[16] subject to the rules pertinent to immovable property in general,[17] with limited exceptions not relevant

---

development of our mineral law (footnote omitted). The phenomenon of oil and gas production, of course, was not foreseen by the Civil Code. Nevertheless, beginning with the case of *Frost-Johnson Lumber Co. v. Salling's Heirs,* the court used the code articles relating to servitudes by analogy to develop a complete body of mineral law. These rules of law were not developed mechanically or by pure conceptualization; careful attention was paid to the conflicting and competing interests of landowners, developers, and the public at stake in this new natural resource industry.

11. Title 31, Louisiana Revised Statutes, enacted by Act No. 50, 1974 La. Acts Vol. III, effective January 1, 1975.

12. For a discussion of the interesting history of the multi-decade effort to develop and enact a Mineral Code, s*ee* Patrick S. Ottinger, *From the Courts to the Code: The Origin and Development of the Law of Louisiana on Mineral Rights*, 1 LSU J. ENERGY L. & RES. 5 (2012) [hereinafter Ottinger, *From the Courts to the Code*].

13. "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." *Id.* at 34 (quoting GEORGE W. HARDY, III, *EXPOSÉ DES MOTIFS*: SUGGESTED PRINCIPLES OF LOUISIANA MINERAL LAW—A BASIS FOR REFORM 3 (1971)).

14. LA. REV. STAT. ANN. § 31:16 (2021). There is actually a fourth mineral right, which is not ordained by the redactors of the Mineral Code as being a "basic" mineral right. That is the executive right, defined by article 105 of the Code as "the exclusive right to grant mineral leases of specified land or mineral rights." *Id.* § 31:105. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at ch. 7. While it is certainly susceptible of being mortgaged, the executive right is rarely—perhaps, virtually never—encountered as collateral.

15. LA. REV. STAT. ANN. § 31:16 (2021).

16. LA. CIV. CODE ANN. art. 478 (2021) ("The right of ownership . . . may be burdened with a real right in favor of another person as allowed by law.").

17. LA. REV. STAT. ANN. § 31:18 (2021); *see also* Guy Scroggins, Inc. v. Emerald Expl., 401 So. 2d 680, 684 (La. Ct. App. 3d Cir. 1981) ("Mineral rights,

here.[18] "A mineral right is an incorporeal immovable," which "is alienable and heritable."[19] With respect to oil, gas, or other fugacious minerals, such minerals are not susceptible to ownership until produced at the wellhead and thus "reduced to possession."[20] At that point in time, the product is a movable, subject to the rules pertinent to movable property in general.[21]

A. Mineral Servitudes

In Louisiana, it is not permissible to "own" migratory minerals in and under the lands of another—a perpetual mineral estate in other states.[22] Rather, one may only own the "right" to explore for and produce minerals; if this "right" is vested in one other than the landowner, this is called a mineral servitude.[23] It is a real right of perpetual duration, provided that it

---

including mineral leases, 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, your author represented the defendant in this suit.

18. To mention only one exception to the general proposition that mineral rights, being immovable property, are subject to the rules pertinent to immovable property, article 17 of the Mineral Code states that a "sale of a mineral right is not subject to rescission for lesion beyond moiety." LA. REV. STAT. ANN. § 31:17 (2021).

19. *Id.* § 31:18. Concerning the alienability of a mineral right, see Patrick S. Ottinger, *What's in a Name? Assignments and Subleases of Mineral Leases Under Louisiana Law*, 58 ANN. INST. ON MIN. L. 283 (2011) [hereinafter Ottinger, *What's in a Name?*].

20. LA. REV. STAT. ANN. §§ 31:6–7 (2021); Hodges v. Long-Bell Petroleum Co., 121 So. 2d 831 (La. 1960); Succession of Rugg, 339 So. 2d 519 (La. Ct. App. 2d Cir. 1976).

21. DeMoss v. Sample, 78 So. 482, 484 (La. 1918) ("The oil and gas, when reduced to possession by the vendors or their assigns, became the personal property of the vendors or their assigns."). Zadeck v. Ark. La. Gas Co., 338 So. 2d 303, 305 (La. Ct. App. 2d Cir. 1976) ("We conclude that gas that has been reduced to possession is a movable . . . .").

22. Wemple v. Nabors Oil & Gas Co., 97 So. 666 (La. 1923) ("And we therefore conclude that there is in this state no such estate in lands as a corporeal 'mineral estate,' distinct from and independent of the surface estate; that the so-called 'mineral estate' by whatever term described, or however, acquired or reserved, is a mere servitude upon the land in which the minerals lie, giving only the right to extract such minerals and appropriate them."). *Id*. at 669.

23. LA. REV. STAT. ANN. § 31:21 (2021); *see also* Patrick S. Ottinger, *A Primer on the Mineral Servitude*, 44 ANN. INST. ON MIN. L. 68 (1997); PATRICK S. OTTINGER, LOUISIANA MINERAL LAW TREATISE ch. 4 (Patrick H. Martin ed., 2012) [hereinafter OTTINGER, MINERAL LAW TREATISE].

is not extinguished by prescription of nonuse of ten years[24] or in some other manner.[25]

"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."[26] It also confers upon its owner the right to grant a mineral lease,[27] unless that right has been vested in another, called the owner of the "executive interest."[28] Importantly, the owner of the mineral servitude is entitled to its share of production from a well in which the servitude participates.[29] As will be seen, this revenue stream is a valuable asset that might serve as collateral security for a loan or other obligation.

Among other modes of extinction,[30] a mineral servitude comes to an end by accrual of the prescription of nonuse for ten years,[31] although there is a limited opportunity to contractually reduce or fix this period.[32]

---

24. LA. REV. STAT. ANN. § 31:27(1) (2021).

25. *See generally* Patrick S. Ottinger, *All Good Things Must Come to an End: The Launch, Life and Loss of a Mineral Servitude*, 81 LA. L. REV. 1129 (2021).

26. LA. REV. STAT. ANN. § 31:21 (2021). This article 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).

27. "A mineral lease may be granted by a person having an executive interest in the mineral rights on the property leased." LA. REV. STAT. ANN. § 31:116 (2021).

28. "An executive interest is a mineral right that includes an executive right." *Id.* § 31:108.

29. As noted recently in a decision arising out of a Louisiana appellate court:

> Furthermore, the comments to La. R.S. 31:16 provide that 'the [mineral] lease, like the mineral servitude, conveys rights to explore and develop, to produce minerals, to reduce them to possession, ***and to assert title to a specified portion of the production***' (emphasis added). *See also* Wall v. Leger, 402 So. 2d 704, 709 (La. App. 1st Cir. 1981) ('There is a functional similarity between the lease and the servitude in that the mineral lessee obtains a right to a share of production and to operating rights much the same as the owner of a mineral servitude.').

Citrus Realty, LLC v. Parker, No. 2018-CA-0516, 2019 WL 385194, at *4 (La. Ct. App. 4th Cir. Jan. 30, 2019). In the interest of full disclosure, your author filed an *amicus curiae* brief in this case on behalf of the Louisiana Landowners Association in support of the position of the owners of the mineral servitude.

30. LA. REV. STAT. ANN. § 31:27 (2021).

31. *Id.* § 31:27(1).

32. *Id.* § 31:74.

B. Mineral Royalties

Another one of the three "basic" mineral rights that might be created by a landowner is the mineral royalty.

> A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another. Unless expressly qualified by the parties, a royalty is a right to share in gross production free of mining or drilling and production costs.[33]

A mineral royalty is a purely passive right,[34] but it does entitle its owner to share in production brought about by the actions (and at the expense) of another.[35] A mineral royalty is extinguished by the prescription of nonuse for ten years,[36] although, as in the case of a mineral servitude, there is a limited opportunity to contractually reduce or fix this period.[37] Only production will interrupt the prescription of nonuse accruing against a

---

33. *Id.* § 31:80.

34. "The owner of a mineral royalty has no executive rights; nor does he have the right to conduct operations to explore for or produce minerals." *Id.* § 31:81 (2021); *see also* Spiner v. Phillips Petroleum Co., 94 F. Supp. 273 (W.D. La. 1950) ("The royalty owner has no right of ingress or egress, nor has he any right to drill and test the property for oil or gas. His right is merely a passive right which allows him to participate in the production of any oil or gas that might be produced from the land involved. It is therefore apparent that he was no rights at all to require the lessee of the mineral owners to drill upon the property involved and that is just what the plaintiffs are attempting to do in the case at bar."). *Id.* at 278.

35. The courts have observed the fundamental differences between a mineral servitude and a mineral royalty thusly:

> A mineral royalty is not a servitude, but a passive, non-costbearing interest and an inferior and conditional real right which entitles the owner *only* to participate and share in the gross *production* of minerals from another's land or from land subject to a mineral servitude owned by another and burdened with such interest *when and if* production is obtained.

Horton v. Mobley, 578 So. 2d 977, 983 (La. Ct. App. 2d Cir. 1991) (citing Cont'l Oil Co. v. Landry, 41 So. 2d 73 (La. 1949)).

36. LA. REV. STAT. ANN. § 31:85(1) (2021).

37. Article 74 of Mineral Code as made applicable to the mineral royalty by article 103 of the Mineral Code. *Id.* § 31:74.

mineral royalty.[38] Thus, a dry hole does not interrupt prescription accruing against a mineral royalty.[39]

C. Mineral Leases

"The mineral lease is the basic development contract utilized in the oil and gas industry in Louisiana."[40] It is, as noted by one court, "the most common vehicle used to obtain development of lands for oil, gas and other minerals . . . ."[41] "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals."[42] The lessee under a mineral lease receives a net share of production after excluding the lessor's royalty, and that revenue stream might serve as collateral for a loan. A mineral lease must have a term that does not exceed ten years without operations or production.[43]

D. The Rule of Capture and the Birth of Mineral Financing Resulting from the Adoption of Conservation Laws

It is appropriate to pause for a brief moment to consider how the adoption of conservation laws has made it possible to use mineral rights (particularly, mineral leases) as collateral for a secured loan. In Louisiana, the rule of capture has historically applied.[44] The rule of capture stands for the proposition that a landowner is privileged to use reasonable methods to produce migratory hydrocarbon minerals from under his property. He

38. "To interrupt prescription it is not necessary that minerals be produced in paying quantities but only that they actually be produced and saved." *Id.* § 31:88.

39. A "dry hole" is a "completed well which is not productive of oil and/or gas (or which is not productive of oil and/or gas in paying quantities)." 8 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS: MANUAL OF OIL AND GAS TERMS (2021). "[T]he mineral royalty does not carry with it use rights such as those conveyed in the creation of a mineral servitude, and thus the same acts that interrupt prescription of a mineral servitude, short of actual production, do not interrupt prescription accruing against a mineral royalty." LA. REV. STAT. ANN. § 31:88, cmt (2021).

40. OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at 1.

41. Mire v. Sunray DX Oil Co., 285 F. Supp. 885, 888 (W.D. La. 1968).

42. LA. REV. STAT. ANN. § 31:114 (2021).

43. *Id.* § 31:115(A). A lease of solid minerals is subject to different term requirements. *Id.* § 31:115(B).

44. La. Gas & Fuel Co. v. White Bros., 103 So. 23 (La. 1925); McCoy v. Ark. Nat. Gas Co., 143 So. 383 (La. 1932). The rule of capture is now codified in three articles of the Louisiana Mineral Code, namely., LA. REV. STAT. ANN. §§ 31:8, 13, 14 (2021).

will thereby become the owner of such minerals when they are brought to the surface and are "reduced to possession,"[45] without any liability to adjacent property owners, even though the minerals produced have in fact been drawn from under the adjacent owner's property.

Hence, "[t]he owner of a tract of land acquires title to the oil or gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands."[46] Louisiana Revised Statutes § 31:14 now codifies the rule of capture by providing that "[a] landowner has no right against another who causes drainage of liquid or gaseous minerals from beneath his property if the drainage results from drilling . . . operations on other lands."[47] The necessary corollary of the rule of capture is that the adjacent landowner's remedy is to "go and do likewise."[48]

The wasteful consequences of the unfettered application of the rule of capture were among the numerous factors motivating the conservation movement of the 1930s and 1940s, resulting in the enactment of Louisiana's Conservation Act in 1940.[49] The principal objectives of conservation legislation are the prevention of waste, the avoidance of drilling unnecessary wells, and affording each owner the opportunity to recover its just and equitable share of the common "pool."[50]

The conservation laws continue the rule of capture but regulate it by imposing reasonable restrictions on the exercise of the state's police power.[51] One of the devices that regulates the rule of capture is the notion

---

45. "Minerals are reduced to possession when they are under physical control that permits delivery to another." *Id.* § 31:7. In a functional sense, oil and gas (migratory minerals) are reduced to possession at the wellhead. *See* Patrick S. Ottinger, *A Funny Thing Happened at the Wellhead: "Post-Production Costs" and Responsibility Therefor*, 8 LSU J. ENERGY L. & RES. 1, 4 (2019) for a discussion of the role and function of a wellhead [hereinafter Ottinger, *A Funny Thing Happened at the Wellhead*].

46. Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 393 (1935).

47. LA. REV. STAT. ANN. § 31:14 (2021); *see also id.* §§ 31:8, 13.

48. Barnard v. Monongahela Nat. Gas Co., 65 A. 801, 802 (Pa. 1907); *see also* KRAMER & MARTIN, THE LAW OF POOLING AND UNITIZATION § 2.01 (2018) (stating that the interest holder's protection "is the right to drill offset wells that would intercept the hydrocarbons otherwise being drawn to the neighboring wells.").

49. Louisiana's Conservation Act was enacted by Act No. 157, 1940 La. Acts 610, and is now embodied in LA. REV. STAT. ANN. § 30:1–29.2 (2021).

50. *Id.* § 30:9(A).

51. Immediately after the Conservation Act was adopted, its constitutionality was challenged, but it was upheld by the Supreme Court in the important case of

of well spacing, that is, the governmental regulation of the placement of wells in such a way as to promote the goals of conservation legislation.[52]

Also, the legislation authorized the Commissioner of Conservation to create units for the exploration and production of oil and gas. In *Davis Oil Co. v. Steamboat Petroleum Corp.*,[53] the Louisiana Supreme Court recognized the importance of unitization, as follows:

> The general concept behind the establishment of drilling units is to prevent adjoining landowners or leaseholders from having to drill protective offset wells on their premises by permitting them to share production proportionately to the area of their acreage drained by the unit well. [54]

Finally, the legislation authorized the Commissioner of Conservation to impose a regime of proration by adopting rules and regulations "[t]o limit and prorate the production of oil or gas or both from any pool or field for the prevention of waste."[55] The imposition of a limit on the quantity of oil and gas that might be produced from a particular well constituted a drastic restriction on the exercise of rights under the rule of capture. Modifying the rule of capture resulted in a predictable amount of oil or gas that a bank's borrower might be able to produce. This, in turn, enabled a lender to have confidence in extending credit, collateralized by the oil and

---

Hunter Co. Inc. v. McHugh, 11 So. 2d 495 (La. 1942). In its opinion, the Supreme Court cited *Lilly v. Conservation Commissioner of Louisiana*:

> It can readily be seen that, without the power to regulate or control conditions in an oil field, the temptation to acquire quick riches might easily produce an intolerable situation in drilling indiscriminately upon any size or shape of tract, sufficient to permit derrick operations, resulting in waste and exhaustion of underground energy consisting of natural gas, etc., and ultimately restricting recovery, involving useless expenditures by operators and preventing some, if not all, from recovering their investments. Such a condition, it would seem, should be subject to the police power of the State, not only to prevent waste, but to insure a fair and reasonable participation, by the surface owners in the common pool within the producing area.

Id. (citing Lilly v. Conservation Comm'r of La., 29 F. Supp. 892, 897 (E.D. La. 1939)).

52. LA. REV. STAT. ANN. § 30:4(C)(13) (2021); *see* LA. ADMIN. CODE tit. 43, pt. 19, § 1901 (2019) ("Statewide Order No. 29-E").

53. Davis Oil Co. v. Steamboat Petroleum Corp., 583 So. 2d 1139 (La. 1991).

54. *Id.* at 1142.

55. LA. REV. STAT. ANN. § 30:4C(11) (2021); *see also* William Timothy Allen, III, *Drilling Permits, Well Spacing, Allowables and Louisiana Unitization Issues*, 43 ANN. INST. ON MIN. L. 205 (1996).

gas that the borrower would be able to reliably produce, because the borrower's production would be unaffected by the ability of the neighboring landowner to lawfully remove or diminish such oil and gas.

In his excellent book chronicling the history of oil and gas financing,[56] Buddy Clark of Haynes & Boone in Houston, Texas, made the following cogent observations with respect to the favorable or advantageous consequences that resulted from the imposition of conservation laws, including the assignment of allowables and proration, to wit:

> Without the introduction and subsequent court enforcement of conservation laws, the stability of the economic factors necessary for successful financing of oil may never have been achieved. Proration rules slowed the initial rate of well production and had the side effect of slowing the pace at which the producer was able to recover his investment. This created demand for longer-term credit. Fortunately, slower production also led to more disciplined commodity markets, which, in turn, created the crucial element: a predictable cash flow that bankers needed to lend with confidence.[57]

The national movement toward conservation was a positive and important one. An unanticipated but beneficial consequence of the adoption of a regime of conservation (particularly rules pertaining to the spacing of wells; the institution of rules of proration; the assignment of allowables; and unitization) was that certainty and predictability came to a chaotic industry, which in turn resulted in capital markets embracing the oil and gas industry by extending credit. These developments facilitated the advancement of one of the most important sectors of the American economy.[58]

---

56. Bernard F. Clark, Jr., *Oil Capital: The History of American Oil, Wildcatters, Independents and Their Bankers*, 2 OIL AND GAS, NAT. RES., & ENERGY J., 23 (2016).

57. *Id.* at 96.

58. For an interesting examination of the experience in the oil fields in East Texas, that at one point in August 1931, resulted in the declaration of martial law and the intervention of the Texas Rangers and the National Guard in order to enforce proration rules, *see* JAMES A. CLARK AND MICHEL T. HALBOUTY, THE LAST BOOM (1st ed. 1972). Chapter 12 addresses "Proration."

II. AN OVERVIEW OF THE LOUISIANA LAW OF SECURITY AS IT PERTAINS TO THE ENCUMBRANCE OF MINERAL RIGHTS, OR OIL AND GAS

A. Security Under Louisiana Law

At the inception of the oil and gas industry, the Louisiana legislature passed an act to extend to mineral lessees the right and ability to mortgage mineral leases and contracts, including "all buildings, constructions and improvements placed and erected on such lands, or to be placed and erected thereon . . . ."[59] The Supreme Court held that the act was "intended to encourage and promote the welfare of an industry, especially a new one, [and] ought to be interpreted as liberally as possible, so as to carry out, rather than hinder, the plain legislative intent."[60] Thus, it was held that "improvements placed upon a mineral lease became part of it by destination and that a mortgage on the lease covered such accessories without any mention of them in the act and covered, not only accessories then on the lease, but those about to be placed thereon."[61] The statutory authority for the mortgaging of mineral leases and contracts was continued with periodic amendments and revisions, ultimately resulting in today's modern formulations.[62]

The important topic of security is now regulated in Title XX of Book III of the Louisiana Civil Code, composed of articles 3133 through 3140; subsequent titles that address distinct kinds of security; and the Louisiana U.C.C. The Civil Code defines "security" in article 3136, as follows:

> **Art. 3136. Security defined**
> Security is an accessory right established by legislation or contract over property, or an obligation undertaken by a person other than the principal obligor, to secure performance of an obligation. It is accessory to the obligation it secures and is transferred with the obligation without a special provision to that effect.[63]

There are various kinds of security identified in article 3138 of the Civil Code, as follows:

---

59. Act No. 232, 1910 La. Acts 393, later codified as LA. REV. STAT. ANN. § 30:109 (1911), and then repealed by Act No. 948, 1993 La. Acts 2611.

60. Choate Oil Corp. v. Glassell, 96 So. 543, 545–46 (La. 1922).

61. Bank of Winnfield v. Olla State Bank, 124 So. 621, 622 (La. Ct. App. 2d Cir. 1929).

62. For a historical examination of the issues associated with the mortgage of mineral leases, see Thomas A. Harrell, *The Mortgage of Mineral Rights and Contracts in Louisiana*, 13 ANN. INST. ON MIN. L. 14 (1966).

63. LA. CIV. CODE ANN. art. 3136 (2021).

> **Art. 3138. Kinds of security**
> Kinds of security include suretyship, privilege, mortgage, and pledge. A security interest established to secure performance of an obligation is also a kind of security.[64]

As will be seen, any security that is established with its principal object of collateral being a mineral right, or the produced oil and gas, brings into play security in the form of mortgage, pledge, or a UCC-type security interest. The precise form of the security interest depends on the nature of the collateral. It also depends on the posture of the person creating it, i.e., a landowner or mineral servitude owner (whose land might be unleased or leased), the holder of a mineral royalty, or in the case of collateral composed of a mineral lease, a lessee or other interest owner.

1. Establishment of Security by Landowner

The interest of a landowner in minerals in the land is not itself a mineral right.[65] Rather, it is an intrinsic feature of the regime of perfect ownership that the landowner owns the "right" to the migratory minerals in the land, not the physical minerals as they might be found therein.[66] "Deposits of solid minerals are inseparable component parts of the ground, whereas fugacious minerals are in theory *res nullius*. However, the right to search for and reduce all sorts of minerals to possession belongs to the owner of the ground."[67] Thus, article 6 of the Mineral Code reads:

> **Art. 6. Right to search for fugitive minerals; elements of ownership of land**
> Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of

---

64. *Id.* art. 3138.

65. As aptly noted by the Louisiana Supreme Court:

> Whilst it is true that 'oil and gas, in place, are not subject to absolute ownership as specific things *apart from the soil of which they form part*,' nevertheless it is equally well settled that the owner of the soil has alone the right to sever and appropriate them, which right, of course, he may cede to another.

Allies Oil Co. v. Ayers, 92 So. 720 (La. 1922). Under the Mineral Code, "mineral rights" are of three "basic" kinds, each "created by a landowner." LA. REV. STAT. ANN. § 31:16 (2021)

66. *Id.* § 31:6. In contrast, the landowner actually owns in-place the solid minerals that might exist in and under the land. *Id.* § 31:5.

67. A. N. YIANNOPOLOUS, LOUISIANA CIVIL LAW TREATISE, PROPERTY § 7:15 (5th ed. 2021).

> any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.[68]

With respect to a landowner who desires to grant a security interest on its property, a threshold question is whether the land in question is unleased or rather, is burdened by a mineral lease. The answer to this question is determinative of what monetary benefits the secured party might receive and the manner in which a particular kind of security is established in each circumstance.

a. Unleased Lands

If the land is unleased, the landowner has the ability to establish a mortgage on the land, but since the landowner does not "own" the fugacious minerals underlying its land, the mortgage (burdening only immovable property) would not encumber the minerals as such. The landowner does, however, own the fugacious minerals if and when produced, at which point the minerals are said to be "reduced to possession" at the surface of the earth.[69]

In the case of oil and gas, reduction to possession occurs at the wellhead, an important point of demarcation between regimes of immovable property and movable property.[70] Because the accounting for oil and gas usually occurs "at the well[head],"[71] the oil and gas produced at the wellhead is quickly converted to cash when the operator sells the oil or gas which it produces.[72] Self-evidently, being unleased, there would be

---

68. LA. REV. STAT. ANN. § 31:6 (2021).

69. "Minerals are reduced to possession when they are under physical control that permits delivery to another." *Id.* § 31:7.

70. *See* Ottinger, *A Funny Thing Happened at the Wellhead*, *supra* note 45.

71. *See* Wall v. United Gas Pub. Serv. Co., 152 So. 561, 563 (La. 1934) ("The reason why the division and delivery is made at the well, in cases where there is to be a division in kind, is that, there is where the parties come into ownership of the commodity, there is where title vests. The lessor and lessee are vested with title to the gas at the well or in the field in the same proportion as the oil is owned. And while there is to be no division of the gas in kind, it is nevertheless contemplated that there shall be a 'division,' not of the gas in kind but of its *value* as fixed by the market price.") (emphasis by court).

72. "[C]ash is considered a corporeal movable . . . ." Succession of Tebo, 358 So. 2d 337, 339 (La. Ct. App. 4th Cir. 1978). Merely because the money is derived from mineral rights does not change its character. "Money [generated in respect

no bonus, delay rentals, or other similar payments that customarily accrue to a lessor under a mineral lease.

Because a mortgage bears against an immovable,[73] the mortgage of the land itself would not entitle the mortgagee to the monetary benefits attributable to the interest of the landowner-mortgagor in and to the minerals that might be produced,[74] unless the mortgage also contains a security agreement establishing a security interest in the hydrocarbons to be produced.[75]

But even this right or entitlement to proceeds of production is inferior to the paramount right of the operator[76] to retain all revenue otherwise allocable to the interest of the unleased mineral owner until the operator has recouped the cost and expense incurred by the operator with respect to this unleased interest.[77] At that time, it is said that the well has "paid out," and the unleased-mineral owner is entitled to the entirety of its

---

of a mineral right] is not an immovable. It is movable . . . ." Steinau v. Pyburn, 229 So. 2d 153, 154 (La. Ct. App. 2d Cir. 1969).

73. LA. CIV. CODE ANN. art. 3286 (2021).

74. Analogies drawn from case law concerning agricultural crops harvested from land encumbered by a mortgage would also support this conclusion. *Cf.* Vosburg v. Fed. Land Bank of New Orleans, 172 So. 567, 570 (La. Ct. App. 2d Cir. 1937) ("[M]ere seizure of mortgaged realty did not divest the lessee thereof of title to the crop being raised thereon by him."); Wakefield State Bank v. Baker Wakefield Cypress Co., 4 La. App. 676, 677 (La. Ct. App. 1st Cir. 1926) ("[W]here the property seized had been detached from the soil, it had lost its condition of immobility and had become movable and therefore was not affected by plaintiff's mortgage."). *See also* Posey v. Fargo, 174 So. 175, 179 (La. 1937) ("But the seizing creditor, who seizes the debtor's rights under the contract of lease of an immovable, in the case of a plantation, does not seize the portion of the crop produced under the contract of lease belonging to the lessee, and the same must be separately seized. Therefore, by the same parity of reasoning, in the case of a mineral lease, it is difficult to see under what theory the fugitive minerals, in which the owner of the real property has no rights until reduced to actual possession, could be considered the property of the lessee and be held to have been placed in *custodia legis* by the mere seizure of the lessee's rights under the mineral lease.").

75. *See* LA. CIV. CODE ANN. art. 3170 (2021).

76. The "operator" may be designated by contract, such as by a joint operating agreement (*see infra* Section V.D.2) 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.").

77. *See* Patrick S. Ottinger, *After the Lessee Walks Away: The Rights and Obligations of the Unleased Mineral Owner in a Producing Unit*, 55 ANN. INST. ON MIN. L. 59, 97 (2008).

proportionate share of production (in the lexicon of the industry, "8/8ths" of production), subject to bearing a proportionate share of operating expenses, that is, the recurring, ordinary costs to operate the well and market the production thus obtained. That net revenue stream, after recovery of recoupable costs by the operator, can be made subject to a security interest in favor of the landowner's mortgagee.[78]

The interest of a landowner and of the owner of a mineral servitude, where no mineral lease exists, is not susceptible to pledge as such an unleased interest does not meet the enumeration in article 3142(2) of the Civil Code as constituting a "lessor's rights in the lease of an immovable and its rents."[79] No lease, no pledge. Certainly, such minerals are susceptible to the creation of a security interest under Chapter 9 of the Uniform Commercial Code, now codified beginning at Louisiana Revised Statutes § 10:9-101 (the Louisiana U.C.C.),[80] and this fact disqualifies pledge under article 3142(1) of the Civil Code.

Among other significant changes in the law, Act No. 281 of 2014, effective January 1, 2015,[81] amended the definition of "account" in Section 9-102(a)(2) of the Louisiana U.C.C. so as to encompass the following, to wit:

> **La. Rev. Stat. Ann. § 10:9-102. Definitions and index of definitions**
>
> (a) Chapter 9 definitions. In this Chapter:
>
> . . .
>
> (2) "Account" . . . further includes any right to payment that is

---

78. As explained by one court:

> When MBank exercised its rights under the Collateral Mortgage and Assignment of Production, it became obligated to pay Delta's proportionate share of the drilling and completion costs before sharing in the proceeds (footnote omitted). By paying Delta's share of the well costs, Grace–Cajun acquired a "right of prior claim" to the proceeds allocable to Delta's interest until those costs were recouped.

Grace-Cajun Oil Co. No. 3 v. Fed. Deposit Ins. Corp., 882 F.2d 1008, 1012 (5th Cir. 1989).

79. *See* LA. CIV. CODE ANN. art. 3142 (2021). Equally is it so that this unleased interest does not qualify for pledge under article 3142(1) as it is a "movable that is not susceptible of encumbrance by security interest."

80. According to LA. REV. STAT. ANN. § 10:9-101 (2021), Louisiana's version of Chapter 9 of the U.C.C. is properly called "Uniform Commercial Code--Secured Transactions."

81. Act No. 281, 2014 La. Acts 1765. For a comprehensive examination of the changes made to the law of pledge by Act No. 281, *see* Michael H. Rubin, *Ruminations on the Louisiana Law of Pledge*, 75 LA. L. REV. 697 (2015).

> payable out of or measured by production of oil, gas, or other minerals,[82] or is otherwise attributable to a mineral right,[83] whether or not the payment is classified as rent under the Mineral Code, except that the term does not include bonuses, delay rentals, royalties, or shut-in payments payable to a landowner or mineral servitude owner under a mineral lease, nor does the term include other payments to them that are classified as rent under the Mineral Code.[84]

The purpose and import of this amendment when read in connection with revised article 3172 of the Civil Code and the comments thereunder, are explained in the comment to this section of the Louisiana U.C.C.:

> The 2014 revision of the definition of "account" in this Section, made in tandem with the enactment of Civil Code Article 3172 (Rev. 2014), is intended to ensure that "accounts" as defined in this section and the kinds of mineral payments susceptible of encumbrance by pledge under that Civil Code Article 3172 (Rev. 2014) are mutually exclusive. Bonus, delay rentals, royalties, or shut-in payments payable to a landowner or mineral servitude owner under a mineral lease, as well as any other payments to them that are classified as rent under the Mineral Code, do not constitute "accounts" susceptible of encumbrance by a security interest under this Chapter but instead are encumbered by a pledge

---

82. As previously stated, *supra* Section II.A.1, the interest of a landowner in migratory minerals that might exist in and under its own land is not a mineral right. Thus, with respect to a landowner, the allusion in this definition of "account" to the "right to payment that is payable out of or measured by production of oil, gas, or other minerals," not being associated with a mineral right, seems to be sufficient to encompass the landowner's right to minerals, as contemplated by Mineral Code article 6, as the next clause operates as being "otherwise applicable to a mineral right."

83. The Louisiana U.C.C. contains its own definition of "mineral rights" for purposes of that important law, and it is a bit more expansive than the term as defined in the Louisiana Mineral Code. Thus, Louisiana Revised Statutes section 10:9-102(d)(14) states that, "in this Chapter, 'mineral rights' means a real right governed by Title 31 of the Louisiana Revised Statutes of 1950, including mineral servitudes, mineral leases, mineral royalties, overriding royalties, production payments, and net profits interests." In the industry, the three enumerated interests beyond the three "basic" mineral rights are not generally considered to be "real rights," as they are purely contractual in nature, dependent for their existence on the mineral lease of which they are an appendage. *See* LA. REV. STAT. ANN. § 31:171 (2021).

84. *Id.* § 10:9-102(a)(2).

> under Civil Code Article 3172. See Comment (d) to Civil Code Article (Rev. 2014).[85]

Concordant with the foregoing, § 109(d)(11)(E) of the Louisiana U.C.C. provides that such uniform code is inapplicable to "the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for: . . . payments due under certain mineral rights to the extent characterized as accounts under § 10:9-102(a)(2)."[86]

b. Leased Lands

If the land is subject to a mineral lease granted by the landowner, the lessor typically has the ability to grant a pledge in the "rent" that might accrue to the landowner under the mineral lease.[87] Relevantly, rent as defined in the Mineral Code includes delay rentals[88] and royalties.[89] While a lessor typically receives a bonus payment at the inception of the lease,[90]

---

85. *Id*. § 10:9-102(a)(2) cmt.

86. *Id.* § 10:9-109(d)(11)(E).

87. "Rent" is defined in the Louisiana Mineral Code to include and encompass

> [p]ayments to the lessor for the maintenance of a mineral lease without drilling or mining operations or production or for the maintenance of a lease during the presence on the lease or any land unitized therewith of a well capable of production in paying quantities, and royalties paid to the lessor on production . . . .

Id. § 31:123.

88. "'Rental' means money or other property given to maintain a mineral lease in the absence of drilling or mining operations or production of minerals. 'Rental' does not include payments classified by a lease as constructive production." *Id.* § 31:213(4).

89. The Louisiana Mineral Code defines "royalty" as follows:

> "Royalty," as used in connection with mineral leases, means any interest in production, or its value, from or attributable to land subject to a mineral lease, that is deliverable or payable to the lessor or others entitled to share therein. Such interests in production or its value are "royalty," whether created by the lease or by separate instrument, if they comprise a part of the negotiated agreement resulting in execution of the lease. "Royalty" also includes sums payable to the lessor that are classified by the lease as constructive production.

Id. § 31:213(5).

90. "'Bonus' means money or other property given for the execution of a mineral lease, except interests in production from or attributable to property on which the lease is given." *Id.* § 31:213(1). "The usual consideration which a lessee

bonus is not enumerated as being within the ambit of rent as defined in the Mineral Code. Yet a bonus is nevertheless susceptible of being pledged, as explicitly specified in article 3172 of the Louisiana Civil Code.[91]

In a hypothetical situation, the mineral lease will disclose that the landowner, who has the right to all minerals in the land, has negotiated a royalty, perhaps one-fifth (1/5) or one-fourth (1/4), and in the event production is obtained, this amount of revenue from the sale or other disposition of production by the lessee represents the monetary entitlement of the lessor as lessor's royalty.[92] The Supreme Court has consistently recognized that royalty under a mineral lease is rent.[93]

With regard to the royalty interest accruing to the lessor under a mineral lease, the lessor's royalty may be made the subject of a pledge pursuant to Louisiana Civil Code article 3172, *et seq*., and Louisiana Revised Statutes § 9:4401. Thus, Act No. 281 repealed and reenacted numerous articles of the Louisiana Civil Code pertaining to pledge and also rewrote Louisiana Revised Statutes § 9:4401. Hence, effective January 1, 2015, § 9:4401 addresses the creation of a "pledge of the rights of a lessor or sublessor in the lease or sublease of an immovable and its rents . . . ."[94] Additionally, this section also provides that "the rights of the lessee under a lease, or of a sublessee under a sublease, are not susceptible of pledge."[95]

The Civil Code articles relevant to the pledge of the "lessor's rights in the lease of an immovable and its rents," followed by pertinent comments, include the following:

> **Art. 3142. Property susceptible of pledge**
> The only things that may be pledged are the following:
> (1) A movable that is not susceptible of encumbrance by security interest.
> (2) The lessor's rights in the lease of an immovable and its rents.

---

gives for the privilege of exploring for oil on the property of a lessor is the cash bonus, the drilling of the land and the payment of the royalty reserved by the lessor." Nelson v. Roy, 1 La. App. 654, 657 (La. Ct. App. 2d Cir. 1925).

91. *See* LA. CIV. CODE ANN. art. 3172 (2021).

92. *See* Patrick S. Ottinger, *Calculating the Lessor's Royalty Payment: Much More Than Mere Math*, 6 LSU J. ENERGY L. & RES. 1 (2017).

93. "Under this application of the law, it was inevitable that when the question arose as to the nature of royalty, it was held to be *rent* in the form of a portion of the produce of the land . . . ." Milling v. Collector of Revenue, 57 So. 2d 679, 682 (La. 1952).

94. LA. REV. STAT. ANN. § 9:4401 (2021).

95. *Id.*

(3) Things made susceptible of pledge by law.[96]

That this article announces that the "only things" that might be the subject of a pledge are those stated within the text of the article is concordant with the concept put forth by article 3286 of the Louisiana Civil Code to the effect that the "only things susceptible of mortgage" are those things identified in that article. Both articles confirm that, while both the mortgage and the pledge are consensual, they are limited in scope to the types of property that the legislature has specifically defined and enumerated. The last enumeration in each article permits the legislature to authorize other types of things as being "made susceptible" of such security by other special "law." Hence, the lessor under a mineral lease may pledge these monetary benefits to its secured lender but may not encumber such benefits by way of a security interest pursuant to the Louisiana U.C.C.

As previously stated, Louisiana Revised Statutes § 9:4401 provides that an "obligation may be secured by a pledge of the rights of a *lessor or sublessor* in the lease or sublease of an immovable and its rents," but the "rights of the *lessee* under a lease, or of a *sublessee* under a sublease, are not susceptible of pledge."[97]

One should take cognizance of the fact that, as clearly stated in this statute, a lessee under a mineral lease may not establish a pledge of its "rights" under the lease. Nevertheless, if that lessee establishes a security interest pursuant to the Louisiana U.C.C. and thereafter assigns the mineral leases and reserves an overriding royalty interest,[98] that lessee is now a sublessor who can only create a security interest by way of pledge.[99] The subsequent change in the lessee's capacity to that of a sublessor should not impair or in any manner prejudice the previously granted U.C.C. security interest. So, at inception, although a lessee under a mineral lease may only encumber its interest by way of a security interest under the Louisiana U.C.C., if the lessee waits until after subleasing the mineral lease, thereby

96. LA. CIV. CODE ANN. art. 3142 (2021).

97. LA. REV. STAT. ANN. § 9:4401 (2021) (emphasis added).

98. *See* Broussard v. Hassie Hunt Trust, 91 So. 2d 762 (La. 1956) ("In the instant case the transfers . . . though denominated assignments, were, in legal effect, subleases, since overriding royalties as well as various other controls were reserved by the transferor in each instrument."). *Id.* at 764. *See* Ottinger, *What's in a Name?*, *supra* note 19; OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 10-07.

99. The Supreme Court has stated that a "sublessor . . . assumes all rights, interest, obligations, penalties, etc., enjoyed by and granted to the original lessor." Wier v. Grubb, 82 So. 2d 1, 7 (La. 1955).

becoming a sublessor, it may only encumber its retained interest in the mineral lease (typically an overriding royalty interest) by way of pledge.

An array of articles in the Louisiana Civil Code provides context and guidance with respect to the pledge of a lessor's rights in the lease of an immovable and its rents. These articles follow, with commentary in certain instances:

> **Art. 3168. Requirements of contract**
> A contract establishing a pledge of the lessor's rights in the lease of an immovable and its rents must state precisely the nature and situation of the immovable and must state the amount of the secured obligation or the maximum amount of secured obligations that may be outstanding from time to time.[100]

> **Art. 3170. Pledge contained in act of mortgage**
> A pledge of the lessor's rights in the lease of an immovable and its rents may be established in an act of mortgage of the immovable. In that event, the pledge is given the effect of recordation for so long as the mortgage is given that effect and is extinguished when the mortgage is extinguished.[101]

> **Art. 3172. Pledge of mineral payments by owner of land or holder of mineral servitude**
> By express provision in a contract establishing a pledge, the owner of land or holder of a mineral servitude may pledge bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases, as well as other payments that are classified as rent under the Mineral Code. Other kinds of payments owing under a contract relating to minerals are not susceptible of pledge under this Title.[102]

Noting that a pledge of the identified mineral payment must be accomplished by an "*express* provision in a contract establishing a pledge,"[103] the comment to this article recognizes that "[a] mere statement that all leases and rents of the immovable are pledged will not suffice for the pledge to encumber mineral payments."[104]

---

100. LA. CIV. CODE ANN. art. 3168 (2021).
101. *Id*. art. 3170.
102. *Id.* art. 3172.
103. *Id.*
104. *Id.* cmt. b.

The comments to article 3172, when read in conjunction with the amendment to the statutory definition of "account," provide insight into the legislature's intent pertinent to the manner by which a debtor can establish a security interest with regard to payments of the type or nature described in article 3172. The 2014 revision comment (d) to article 3172 provides great insight into the scheme effected by Act No. 281.

Indicatively, reading article 3172 of the Civil Code in association with the revised definition of "account" makes it clear that a landowner or mineral servitude owner who grants a mineral lease and who is consequently entitled to monetary benefits under that mineral lease may not encumber those rights under the Louisiana U.C.C. Rather, such a lessor may only encumber those rights by way of pledge under article 3172 of the Louisiana Civil Code:

> **Art. 3173. Accounting to other pledgees for rent collected**
> Except as provided in this Article, a pledgee is not bound to account to another pledgee for rent collected.
> A pledgee shall account to the holder of a superior pledge for rent the pledgee collects more than one month before it is due and for rent he collects with actual knowledge that the payment of rent to him violated written directions given to the lessee to pay rent to the holder of the superior pledge.
> After all secured obligations owed to a pledgee have been extinguished, he shall deliver any remaining rent collected to another pledgee who has made written demand upon him for the rent before he delivers it to the pledgor.[105]

An inferior pledgee of rent under a mineral lease must account to a superior pledgee of such rights and interests for proceeds received by the former in respect of rent that the inferior pledgee collects "more than one month before it is due."[106] Proceeds of this type would include a delay rental paid by the lessee more than a month before the "crucial date" for such payment.[107]

---

105. *Id.* art. 3173.

106. *Id.*

107. In the jargon of the industry, the "crucial date" or "critical date" of a mineral lease is the date on which the term of the mineral lease will come to an end unless, on or before such date, some specified action is taken. The requisite action might be the payment of delay rentals (if during the primary term) or the commencement of operations or the establishment of production, even if by way of unitization. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 4-04(b).

With regard to other types of rent (such as royalties on production), the issue becomes when royalties are "due." As seen, "[a] mineral lessee is obligated to make timely payment of rent according to the terms of the contract or the custom of the mining industry in question if the contract is silent."[108] One commentator stated that "[t]he custom in the oil and gas industry, when the lease is silent, is to pay royalt[ies] within ninety days after production is first obtained, and monthly thereafter."[109] With regard to royalties on production, it is customary that royalties are due by the end of the month next following the date of production.[110]

Regardless of the date paid, the inferior pledgee must also account to a superior pledgee for proceeds received by the former in respect of rent that the inferior pledgee collects after obtaining "actual knowledge that the payment of rent to him violated written directions given to the lessee to pay rent to the holder of the superior pledge."[111] Hence, the secured pledgee under the superior pledge would benefit by giving written notice of the pledge to the lessee, prudently, in a manner that can be proven with the requisite return postal receipt. Otherwise, there is no duty on the part of the inferior pledgee to account to a superior pledgee "for rent collected."

> **Art. 3174. Judicial sale prohibited**
> A pledge of the lessor's rights in the lease of an immovable and its rents does not entitle the pledgee to cause the rights of the lessor to be sold by judicial process. Any clause to the contrary is absolutely null.[112]

> **Art. 3175. Applicability of general rules of pledge**
> In all matters for which no special provision is made in this Chapter, the pledge of the lessor's rights in the lease of an immovable and its rents is governed by the provisions of Chapter

108. LA. REV. STAT. ANN. § 31:123 (2021); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 5-16.

109. *See* LUTHER L. MCDOUGAL III, LOUISIANA OIL AND GAS LAW § 5.4, at 265 n.15 (1991) (footnote omitted).

110. Melancon v. Tex. Co., 89 So. 2d 135, 142 (La. 1956) ("In the case of royalty based on gas and oil production it is the accepted custom . . . to make such payments on a monthly basis, computed on the amount of gas and oil sold or run into the line from the well.").

111. LA. CIV. CODE ANN. art. 3173 (2021).

112. *Id.* art. 3174 (2021).

1 of this Title.[113]

So here is the author's opportunity to complicate things slightly with a seeming contradiction. There is a potential scenario in which the entitlement of the lessee to a portion of a revenue stream is disrupted. Thus, if the lessee under a mineral lease is a party other than the operator, and if such lessee did not elect to participate in the cost, risk, and expense of drilling the unit well, the operator still has the paramount right to withhold revenue allocable to the unitized tract covered by this mineral lease until recovery of the initial 100% of the costs of drilling, testing, completing, equipping, and operating the unit well. Additionally, in accordance with the Louisiana Risk Fee Act,[114] the operator can assess a risk charge of 200% of the costs of drilling, testing, and completing the unit well in addition to the base costs to be reimbursed.[115]

Prior to 2012, the operator could retain *all* proceeds allocable to the unitized tract, including the royalty share. In such instance, the lessee had to pay its own royalty "out of pocket," inasmuch as it was receiving from the operator no revenue out of the well until "pay-out" of the recoupable costs plus 200% of the costs of drilling, testing, and completing the unit well.[116] Thus, if the lessor under this mineral lease had established a pledge on its entitlement to "rent" under the mineral lease, it would be relegated to making a demand on the lessee to pay its royalty, notwithstanding that the lessee was receiving no revenue until "pay-out."

The rules changed in 2012 as a result of controversial amendments to the Risk Fee Act.[117] Since 2012, although the operator may still retain revenue allocable to the interest of the non-consenting lessee, it nevertheless was required to pay over to that lessee the royalty due to the lessor of the non-consenting party, thus unburdening the non-consenting lessee from having to pay royalty "out of pocket." Hence, assuming compliance

113. *Id.* art. 3175. The reference to "Chapter 1 of this Title," is a reference to LA. CIV. CODE ANN. arts. 3141 through 3167, as amended and reenacted by Act No. 281, effective January 1, 2015.

114. LA. REV. STAT. ANN. § 30:10(A)(2)(a)–(h) (2021).

115. *See* Patrick S. Ottinger, *It Can Be a Risky Business, but There's an Act for That: The Louisiana Risk Fee Act*, 63 ANN. INST. ON MIN. L. 61 (2018).

116. Gulf Explorer, LLC v. Clayton Williams Energy, Inc., 964 So. 2d 1042 (La. Ct. App. 1st Cir. 2007) ("Clayton Williams has no contractual relationship with Gulf's lessors; under the facts presented herein, Clayton Williams has no obligation to pay Gulf's royalty and overriding royalty owners before it legally recoups its expenses from production pursuant to LSA-R.S. 30:10A(2)(b)(i) (footnote omitted)."). *Id.* at 1045. Note that this case is no longer a valid statement of law after the 2012 amendments to the Risk Fee Act.

117. Act No. 743, 2012 La. Acts 3030.

with the new requirements under the Risk Fee Act (it is this author's experience that not all operators are aware of these changes), there should be a stream of revenue inuring to the lessor who might have established a pledge of "rent" under the mineral lease, notwithstanding that the lessee is receiving no revenue from the operator pending achievement of "pay-out." However, if the lessee does not pay the royalty, issues might be presented to the detriment of the lessor and its pledgee.

One might wonder if the existing rights of a secured creditor to a revenue stream accruing to a lessee-borrower (or, for that matter, inuring to an unleased mineral owner who has established a security interest in the oil and gas to be produced) may be enforced to the prejudice of the operator who has drilled a unit well in which the lessee is a nonparticipating owner as contemplated by the Risk Fee Act. After all, the rights of the secured creditor were in place prior to the drilling of the well which gives rise to production. The rights of the operator should be paramount, a conclusion ordained by the Louisiana Supreme Court in *Hunter Co. Inc. v. McHugh*,[118] in which the constitutionality of Act No. 157 of 1940 (enacting the Conservation Act)[119] was challenged but upheld. In that significant case, the court addressed the plaintiff's contention that the Conservation Act was invalid because, among other things, it made "no provision . . . for collecting or enforcing" the operator's right of reimbursement of drilling costs. The Supreme Court rejected this contention by noting that "[t]he answer to this [contention] of course is that the [operator] has had and will have possession of all of the proceeds from the production of the well and may retain all of the proceeds until the drilling of the well and putting it on production is entirely paid for."[120]

2. Establishment of Security by Owner of Mineral Right

A mineral right is immovable property, categorized as a real right. As such, it is susceptible to mortgage pursuant to article 203 of the Mineral Code.

a. Mineral Servitude

The entitlement of the owner of the unleased mineral servitude to a share of production (other than the owner of a mineral servitude who is a lessor under a mineral lease) may be subjected to a security interest under the Louisiana U.C.C. As stated in article 204B of the Mineral Code,

118. Hunter Co. Inc. v. McHugh, 11 So. 2d 495 (La. 1943).
119. *See* note 49 *supra*.
120. 11 So. 2d at 509.

"[p]ledges of minerals produced or the proceeds from the sale or other disposition thereof entered into after Chapter 9 of the Louisiana Commercial Laws becomes effective are effective between the parties and as to third parties as provided in Chapter 9."[121] Although called a "pledge," it is a security interest under the Louisiana U.C.C.

In contrast, being a lessor of an immovable, the owner of a mineral servitude that is subject to a mineral lease may establish security on its interest in minerals to be produced in the same manner as a landowner who is subject to a mineral lease, that is, by the express grant of a pledge pursuant to article 3172.

b. Mineral Royalty

As previously noted, a mineral royalty "is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another."[122] The lands or mineral servitude to which a mineral royalty relates may be either unleased or leased.

If the lands burdened by a mineral royalty are not subject to a mineral lease, the entitlement of the owner of a mineral royalty is subject to the same circumstance—the operator must first recover its costs incurred *vis-à-vis* the unleased tract of land or mineral servitude—before the owner of the mineral royalty would receive proceeds of production or a share thereof. Otherwise, to suggest that the royalty owner is entitled to receive production "from day one" (regardless of whether the operator has recouped expenses allocable to the unleased interest) is to attribute to that owner greater rights than its grantor had. That is, if the creator of the mineral royalty (either a landowner or a mineral servitude owner)[123] must await "pay-out" before receiving proceeds, so should the party whose rights emanate from the unleased land or mineral servitude.[124]

A mineral royalty that burdens land or a mineral servitude that is unleased would create an entitlement (after "pay-out" is achieved) of the

---

121. LA. REV. STAT. ANN. § 31:204(B) (2021) (internal citation omitted).

122. *Id.* § 31:80 (2021); *see also* Cormier v. Ferguson, 92 So. 2d 507, 508–09 (La. Ct. App. 1st Cir. 1957) ("a 'royalty' right or interest merely imparts to its owner a right to share in production if and when obtained by the owner or lessee of a mineral right affecting the land.").

123. "A mineral royalty may be created either by a landowner who owns mineral rights or by the owner of a mineral servitude." LA. REV. STAT. ANN. § 31:82 (2021).

124. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 2-09 for authority supporting the proposition that a party cannot grant, lease, or convey any greater rights than it holds or owns.

same character as the parent interest (unleased land or mineral servitude) so that the establishment of a security interest by the mineral royalty owner would be of the same character as an unleased landowner or servitude owner, that is, not by way of pledge as might be the opportunity of a mineral lessor, but by way of a security agreement pursuant to the Louisiana U.C.C.

The relevant precepts in both the Civil Code (relative to pledge) and the Louisiana U.C.C. (pertinent to security interests) rather clearly dictate that the revenue accruing to a mineral royalty may only be encumbered by a security interest under the Louisiana U.C.C. These relevant provisions make no distinction between lands that are leased or unleased. Certainly, the owner of a mineral royalty is not within the class of persons who might make use of pledge as being the relevant regime for the establishment of security on the mineral proceeds generated in respect of that real right. This is borne out by comment (f) to article 3172, which states that "[m]ineral payments owing to a person other than a landowner or holder of a mineral servitude are not susceptible of pledge under this Title."[125] Indicatively, the holder of a mineral royalty is not within the permissible scope of those whose interest is "susceptible of pledge" under the pertinent articles of the Louisiana Civil Code.

Nevertheless, this author advances the following rationale as to how the issue might have been handled by the redactors that would result in the use of pledge by the owner of a mineral royalty that burdens land subject to a mineral lease, and conversely, by way of invocation of the Louisiana U.C.C. in the case of a mineral royalty on a tract of land that is unleased. While the conclusion to be drawn from an examination of the relevant articles of the Civil Code and the Louisiana U.C.C. seems obvious to the effect that the proceeds generated in respect of a mineral royalty may not be encumbered by way of pledge, your author suggests that a point of clarification is in order. Thus, it is submitted that a mineral royalty created by either a landowner or mineral servitude owner should be susceptible to pledge with respect to land that is subject to a mineral lease, but not in the instance where the land is unleased. Although the owner of a mineral royalty is indisputably "a person other than a landowner or holder of a mineral servitude,"[126] the mineral royalty with respect to a tract of leased land uniquely emanates from and is created by either a landowner or holder of a mineral servitude and hence, is, if anything, merely a

125. LA. CIV. CODE ANN. art. 3172 cmt. f (2021). "At the outset, we note that statements contained in the official comments are not part of the statute, and are not binding on this court, although we do not discount them entirely." Terrebonne Par. Sch. Bd. v. Castex Energy, Inc., 893 So. 2d 789, 797 (La. 2005).

126. LA. CIV. CODE ANN. art. 3172 cmt. f (2021).

reallocation of a portion of the lessor's royalty, and consequently should be susceptible to pledge of rent under the mineral lease with which it is associated. This is the necessary force of the derivative relationship between the superior interest (the leased minerals or land) and the mineral royalty, under the same rationale that a grantor cannot convey greater rights than the grantor has.[127]

The following comment to article 80 of the Mineral Code supports the notion that the interest of a mineral royalty owner is intrinsically affiliated with the terms of the mineral lease under which its revenue arises:

> Determining those things that constitute production costs as compared with processing costs or other costs for which the royalty owner might be liable for his ratable share would have presented insuperable drafting difficulty. *Often, this problem is solved by the lease contract entered into by the land or mineral owner. The royalty owner would ordinarily receive the same benefits as to distribution of costs as the lessor.*[128]

Additionally, most royalty deeds contain a provision such as the following:

> This sale and transfer is made and accepted subject to an oil, gas and mineral lease now affecting said lands but the royalties hereinabove described shall be delivered and/or pair to the purchaser out of and deducted from the royalties reserved to the lessor in said lease.[129]

While the analysis set forth above with respect to the encumbrance of the revenue accruing to a mineral royalty that burdens land subject to a mineral lease is conceptually sound, the law directs one to a different conclusion. Thus, the owner of a mineral royalty in a leased tract can encumber the revenue stream arising out of its interest by way of a security agreement pursuant to the Louisiana U.C.C., unless the lessor had already encumbered the interest prior to the creation of the mineral royalty.

Under the principle of "belts and suspenders," a prudent draftsman of an instrument intended to encumber a mineral royalty covering a leased tract of land might consider creating a mortgage on the real right and including both a pledge *and* a grant of security pursuant to the Louisiana

---

127. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 2-09 for authority supporting the proposition that a party cannot grant, lease, or convey any greater rights than it holds or owns.

128. LA. REV. STAT. ANN. § 31:80, cmt. (2021) (emphasis added).

129. Spiner v. Phillips Petroleum Co., 94 F. Supp. 273, 273 (W.D. La. 1950).

U.C.C., as it pertains to "accounts." In that regard, Civil Code article 3143 provides as follows:

> **Art. 3143. Pledge of property susceptible of encumbrance by security interest**
> A contract by which a person purports to pledge a thing that is susceptible of encumbrance by security interest does not create a pledge under this Title but may be effective to create a security interest in the thing.[130]

As stated by a respected commentator:

> To help avoid problems in the future, and because "it remains a common practice" for UCC 9 security interests to be "styled as a 'pledge,' the 2014 amendments make it clear that calling a UCC 9 security interest a "pledge" does not subject it to the provisions of the Civil Code pledge articles, but nonetheless the document "may be effective to create a [UCC 9] security interest in the thing."[131]

c. Mineral Lease

The third basic mineral right is the mineral lease. The topic of security in the interest of a mineral lessee is taken up in Part III.

d. Dependent Rights

The owner of a mineral lease has the ability to create an interest out of its working interest.[132] These are called "dependent rights" (as indicated in the title to Mineral Code article 171), "interests," or sometimes "appendage interests."[133] The principal import of article 171 of the Mineral Code[134] is to affirm the right of a co-owner to fractionate its interest in this

---

130. LA. CIV. CODE ANN. art. 3143 (2021).

131. Rubin, *supra* note 81, at 703–04.

132. Pinnacle Operating Co. v. Ettco Enters., Inc., 914 So. 2d 1144, 1146 (La. Ct. App. 2d Cir. 2005).

133. *See* Fontenot v. Sun Oil Co., 243 So. 2d 783, 786 (La. 1971) ("These overriding royalty interests were appendages to the leases and were effective as accessory rights, so long as the leases were in existence.") (citation omitted).

134. "A co-owner of the lessee's interest in a mineral lease may create a dependent right such as an overriding royalty, production payment, net profits interest, or other non-operating interest out of his undivided interest without the

manner, but in making that statement, the article necessarily acknowledges the existence of an "overriding royalty, production payment, net profits interest, or other non-operating interest" that constitute dependent rights. Article 126 of the Mineral Code recognizes that an "interest created out of the mineral lessee's interest is dependent on the continued existence of the lease and is not subject to the prescription of nonuse."[135] Indeed, the Louisiana Supreme Court recognized the dependent nature of an overriding royalty interest when it stated that "royalty, by its very nature, when created by a lessee, is dependent for its existence upon the lease under which it is created."[136]

So what is the legal character of such a dependent right? What type of security is necessary to encumber the interest and the revenue associated with it? The comment to article 126 states that "[a]cts creating overriding royalties, production payments and other similar interests are subject to the registry requirements applicable to mineral leases and other mineral contracts."[137] Although comments to a statute are not the law,[138] they are persuasive,[139] and this comment validates the notion that these rights or interests are immovable property, as the public records doctrine has no relevance to movable property.[140]

Additionally, the Louisiana U.C.C. contains a definition of "mineral rights" as including "a real right governed by Title 31 of the Louisiana Revised Statutes of 1950, including . . . *overriding royalties, production payments, and net profits interests*."[141] Case law supports this characterization.[142]

---

consent of his co-owner. He may also transfer all or part of his undivided interest." LA. REV. STAT. ANN. § 31:171 (2021).

134. *Id.*

135. *Id.* § 31:126.

136. Wier v. Glassell, 44 So. 2d 882, 887 (La. 1950).

137. LA. REV. STAT. ANN. § 31:126 cmt. (2021).

138. "The comments under the various articles of the mineral code . . . shall not be considered as part of the proposed law . . . ." S. Con. Res. 2 § 3, 1974 Leg., Reg. Sess. (La. 1974).

139. Terrebonne Par. Sch. Bd. v. Castex Energy, Inc., 893 So. 2d 789, 797 (La. 2005) ("At the outset, we note that statements contained in the official comments are not part of the statute, and are not binding on this court, although we do not discount them entirely.").

140. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 1-14.

141. LA. REV. STAT. ANN. § 10:9-102(d)(14) (2021) (emphasis added).

142. Robichaux v. Pool, 209 So. 2d 77, 79 (La. Ct. App. 1st Cir. 1968) ("Overriding royalty interests are classified as real rights and incorporeal immovable property.") ("It is well settled that title to overriding royalty interests may not be proved by parol evidence."); Porter v. Johnson, 408 So. 2d 961, 965

Certainly, although the dependent right or interest is to be characterized as immovable property, it still differs from the mineral lease itself (and of which it is an appendage) in the fact that it is inherently passive, embodying no operational rights. It is, to be sure, tantamount to a vehicle to reallocate a portion of revenue to which the working interest owner would be otherwise entitled in its absence.

Because these dependent rights constitute immovable property, they would be susceptible to mortgage to the same extent as a mineral lease. However, the mortgage alone would not reach or encumber the revenue produced in respect of the dependent right. To establish security in respect of such production, it would either involve pledge or a security interest under the Louisiana U.C.C.

Pledge would not be a relevant regime as only the "things" enumerated in article 3142 "may be pledged," to wit:

> **Art. 3142. Property susceptible of pledge**
> The only things that may be pledged are the following:
> (1) A movable that is not susceptible of encumbrance by security interest.
> (2) The lessor's rights in the lease of an immovable and its rents.
> (3) Things made susceptible of pledge by law.[143]

Addressing these in inverse order, no law makes the revenue associated with a dependent right in a mineral lease "susceptible of pledge." Correspondingly, the holder of a dependent right is not a lessor, and the revenue does not constitute rent as defined in the Louisiana Mineral Code.[144] Finally, as demonstrated above, revenue associated with a dependent right *is* "susceptible of encumbrance by security interest" such that subsection (1) is not pertinent. The revenue associated with a dependent right would come within the ambit of "account" under the Louisiana U.C.C., such that this interest is "susceptible of encumbrance by security interest."[145]

(La. Ct. App. 2d Cir. 1981) ("An overriding royalty under an oil and gas lease is an incorporeal immovable."); Terry v. Terry, 565 So. 2d 997, 1000 (La. Ct. App. 1st Cir. 1990) ("Overriding royalties are, therefore, classified as real rights and incorporeal immovables.").

143. LA. CIV. CODE ANN. art. 3142 (2021).

144. LA. REV. STAT. ANN. § 31:123 (2021).

145. *Id*. § 10:9-102(a)(2).

B. Basic Principles and Features of the Louisiana Mortgage[146]

1. Definition and Essential Features of Mortgage

"Mortgage" is defined in article 3278 of the Louisiana Civil Code, as "a nonpossessory right created over property to secure the performance of an obligation."[147] The Louisiana Supreme Court has characterized the effects and consequences of a mortgage on immovable property as follows: "Perfect ownership becomes imperfect when the property is mortgaged, by the alienation of that real right; but the title and the possession still remain in the owner."[148]

"Mortgage may be established only as authorized by legislation."[149] Consequently, "[a] mortgage is *stricti juris*, since '(t)he mortgage only takes place in such instances as are authorized by law.'"[150] At an early date, our Supreme Court succinctly announced this principle when it stated:[151]

> Our lawgivers have thought it wise to restrain the power of hypothecating property, which is one of the rights of dominion, by the following general and sweeping rule: "The mortgage only takes place in such instances as are authorized by law." The mortgage right then is to be measured, in every case, by the express grant of power in our Codes and other statute books.[152]

The Louisiana Civil Code provides further guidance as to the character and consequences of mortgage in the following articles:

> **Art. 3279. Rights created by mortgage**
> Mortgage gives the mortgagee, upon failure of the obligor to perform the obligation that the mortgage secures, the right to cause the property to be seized and sold in the manner provided by law and to have the proceeds applied toward the satisfaction of the obligation in preference to claims of others.[153]

---

146. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at §§ 12-03–12-06.
147. LA. CIV. CODE ANN. art. 3278 (2021).
148. Duclaud v. Rousseau, 2 La. Ann. 168, 173 (1847).
149. LA. CIV. CODE ANN. art. 3281 (2021).
150. Guillory v. Desormeaux, 179 So. 2d 456, 457 (La. Ct. App. 3d Cir. 1965).
151. Voorhies v. DeBlanc, 12 La. Ann. 864 (1857) (internal citation omitted) (citing LA. CIV. CODE ANN. art. 3250 (1857)).
152. *Id.* at 865.
153. LA. CIV. CODE ANN. art. 3279 (2021).

> **Art. 3280. Mortgage is an indivisible real right**
> Mortgage is an indivisible real right that burdens the entirety of the mortgaged property and that follows the property into whatever hands the property may pass.[154]

Once established on an immovable, the mortgage encumbers the entirety of the property affected by it as security for the secured debt, and the mortgagee has the right to enforce the mortgage against all of the property, notwithstanding that the mortgagor might have alienated a portion or portions of the encumbered land to a third person.[155] This important feature of mortgage is fully explained in 1991 revision comment (a) to article 3280 of the Louisiana Civil Code, which states, in part, as follows:

> The concept of indivisibility is central to the understanding of mortgage. In essence "indivisibility" expresses the notion that each portion of the mortgaged property secures every part of the mortgaged debt. "It is well settled . . . that a mortgage is in its nature indivisible and prevails over all the immovables subjected to it, and over each and every portion." Correlatively, each part of the obligation is secured by all of the mortgage over all of the property. "Each and every portion of the property mortgaged, is liable for each and every portion of the debt." The concept of indivisibility does not prevent the parties from agreeing to the partial release or division of the right to enforce the mortgage, or otherwise modifying its effect within the limits permitted by law, and subject to the rights of third possessors under the laws of registry.[156]

---

154. *Id.* art. 3280.

155. Most mortgages contain a pact *de non alienando*, which authorizes the mortgagee to foreclose the mortgage against subsequent transferees in the same manner as though no divestiture of the mortgagor's title and ownership had ever occurred. *See* Avegno v. Schmidt & Ziegler, 35 La. Ann. 585 (1883); Lotz v. Iberville Bank and Trust Co., 146 So. 155 (La. 1933). Louisiana Code of Civil Procedure article 2701 also provides a statutory pact *de non alienando*. This article states that "[t]he third person who then owns and is in possession of the property need not be made a party to the [executory] proceeding." LA. CODE CIV. PROC. ANN. art. 2701 (2021).

156. LA. CIV. CODE ANN. art. 3280 cmt. a (2021) (citations omitted) (first citing Lawton v. Smith, 146 So. 361, 363 (La. Ct. App. 2d Cir. 1933); and then citing Bagley v. Tate, 10 Rob. 45 (La. 1845)).

The validity of a mortgage is immutably tethered to the continued existence of the obligation that it secures, a proposition established by article 3282 of the Civil Code, which states:

> **Art. 3282. Accessory nature**
> Mortgage is accessory to the obligation that it secures. Consequently, except as provided by law, the mortgagee may enforce the mortgage only to the extent that he may enforce any obligation it secures.[157]

As noted in the last cited article, a mortgage is an accessorial obligation. Its existence necessarily depends upon the continued existence of a principal debt for which the mortgage serves as security. Hence, if the principal debt fails or becomes unenforceable, the mortgage also fails.[158] Defenses that defeat the enforceability of the principal obligation would also defeat the enforceability of the mortgage.[159]

2. Kinds of Mortgage

There are three kinds of mortgage contemplated by Louisiana law: conventional, legal, and judicial.[160] This Article considers only the conventional mortgage as being pertinent to a mortgage of mineral rights, because that is the only kind of mortgage that is established by contract.[161]

---

157. *Id.* art. 3282; Louis Werner Saw Mill Co. v. White, 17 So. 2d 264 (La. 1944).

158. Lacoste v. Hickey, 14 So. 2d 639, 641 (La. 1943) (quoting LA. CIV. CODE ANN. art. 3285 (1943)) ("Hence it happens, that in all cases where the principal debt is extinguished, the mortgage disappears with it.").

159. LA. CIV. CODE ANN. art. 3296 (2021) ("Neither the mortgagor nor a third person may claim that the mortgage is extinguished or is unenforceable because the obligation the mortgage secures is extinguished or is unenforceable unless the obligor may assert against the mortgagee the extinction or unenforceability of the obligation that the mortgage secures.").

160. *Id.* arts. 3283–3284.

161. This is not to say that a mineral right cannot be the subject of a legal or judicial mortgage. As noted by the comment to Civil Code article 3300:

> By declaring that a judicial mortgage is created by the filing of the judgment emphasizes that, unlike a conventional mortgage, which is created by contract, a judicial mortgage does not exist merely by virtue of the judgment. Consequently, none of the effects of mortgage can be said to flow from the judgment itself. Recordation creates the mortgage as a right in favor of the creditor and establishes it over the property then owned by the debtor.

Id. art. 3300 cmt.

"A conventional mortgage may be established to secure performance of any lawful obligation, even one for the performance of an act. The obligation may have a term and be subject to a condition."[162] There are three types of conventional mortgages recognized under Louisiana law:

> (1) The "ordinary" or "special" mortgage, wherein a mortgagor secures the payment of a specific, existing debt.[163]
> (2) The "collateral mortgage" in which the mortgagor executes a collateral mortgage note (secured by the collateral mortgage), which note is given in pledge as security for the payment of one or more debts, represented by "hand notes."[164]
> (3) Mortgage securing future obligations under which the mortgagor creates a present mortgage securing an obligation to arise in the future.[165]

In contemporary practice, the mortgage securing future obligations (often called a multi-indebtedness mortgage) has emerged as the most popular type of conventional mortgage due to its ease of use and flexibility.[166] The emergence of the multi-indebtedness mortgage as the preferred mortgage instrument, an essential replacement of the collateral mortgage, obviated a significant controversy associated with the necessity that a borrower make and execute a collateral mortgage note in excess of the amount being borrowed, such note to be pledged as collateral security for the "hand note" issued in connection with the mortgage transaction.

---

162. *Id.* art. 3293.

163. *Id.* art. 3288.

164. *Id.* art. 3158; Thrift Funds Canal, Inc. v. Foy, 260 So. 2d 628, 630 (La. 1972) ("A collateral mortgage is a mortgage designed, not to directly secure an existing debt, but to secure a mortgage note pledged as collateral security for a debt or a succession of debts."); First Guaranty Bank v. Alford, 366 So. 2d 1299, 1302 (La. 1978) ("Unlike the other two forms of conventional mortgages, a collateral mortgage is not a 'pure' mortgage; rather, it is the result of judicial recognition that one can pledge a note secured by a mortgage and use this pledge to secure yet another debt."); Diamond Servs. Corp. v. Benoit, 780 So. 2d 367, 371 (La. 2001) ("The pledge secures only that debt or debts contemplated in the contract between the pledgor and pledgee."). *See* LA. REV. STAT. ANN. §§ 9:5550–55 (2021). *See also* Jason R. Johanson, Diamond Services Corp. v. Benoit*: The Louisiana Supreme Court Limits Liability for the Third-Party Maker of a Collateral Mortgage Note*, 76 TUL. L. REV. 819 (2002).

165. LA. CIV. CODE ANN. art. 3298 (2021).

166. *See* David S. Willenzik, *Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative*, 55 LA. L. REV. 1 (1994).

Bank counsel (of a certain generation) will recall having to explain to borrowers why they were being asked to sign, for example, a collateral mortgage note for $10 million when they were only borrowing $1,000. Courts found that the maker of a collateral mortgage note had personal responsibility on such an instrument, even though its essential purpose was to facilitate the mortgage transaction by way of the pledge of the collateral mortgage note to secure the "hand note."[167]

3. Essential Requirements for the Validity of the Conventional Mortgage

"No special words are necessary to establish a conventional mortgage."[168] However, the Civil Code dictates certain essential requirements for the confection of a valid conventional mortgage. "A conventional mortgage may be established only by written contract."[169] Consequently, parol evidence is not admissible to prove the existence of a mortgage.[170]

---

167. In a trilogy of cases arising out of the Third Circuit Court of Appeals, Bank of Lafayette v. Bailey, 531 So. 2d 294 (La. Ct. App. 3d Cir. 1988); Concordia Bank & Trust Co. v. Lowry, 533 So. 2d 170 (La. Ct. App. 3d Cir. 1988); Merchants & Farmers Bank & Trust v. Smith, 559 So. 2d 845 (La. Ct. App. 3d Cir. 1990), the Third Circuit held that the maker of a collateral mortgage note was personally liable under the note. However, these cases were abrogated in *Diamond*, 780 So. 2d 367, in which the Supreme Court stated that "we decide today that personal liability beyond the value of the mortgaged property does not generally arise on the collateral mortgage note when the note is pledged to secure the obligation of a third party." *Id*. at 380. There were three concurrences in this decision, and the statement that personal liability "does not *generally* arise" is not particularly comforting.

168. *Id.* art. 3287.

169. *Id.*

170. "[I]t is certain that a conventional mortgage cannot be the result of a parole (sic) agreement . . . ." Moore v. Louaillier, 2 La. 571, 576 (1831). This proposition has been consistently noted by the courts:

> The plaintiffs, on the trial of the cause, objected to the admission of parol evidence offered by *Miller* to prove the existence of an encumbrance on the property for which the notes were given, to wit, an outstanding mortgage. As the evidence of that fact must exist in writing, we think the parol evidence ought not to have been received.

Union Bank v. Ellis, 3 La. Ann. 188, 188 (1848). "In the absence of allegations that execution of an authentic act of sale of immovable property was induced by fraud or mistake, parol evidence to show that a mortgage was intended is properly excluded." Breaux v. Royer, 57 So. 164, 164 (La. 1912).

The essential requirements for a contract of mortgage are enumerated in Civil Code article 3288:

> **Art. 3288. Requirements of contract of mortgage**
> A contract of mortgage must state precisely the nature and situation of each of the immovables or other property over which it is granted; state the amount of the obligation, or the maximum amount of the obligations that may be outstanding at any time and from time to time that the mortgage secures; and be signed by the mortgagor.[171]

Notably, there is no requirement that the mortgage be signed by the mortgagee, "whose consent is presumed and whose acceptance may be tacit."[172] One court has noted that "Article 3289 did not require a mortgage to be signed by the mortgagee because it was simply codifying a 'widely accepted commercial practice.'"[173]

Civil Code article 3288 enumerates, according to its title, the "requirements of contract of mortgage." The requirements set forth therein are listed in the conjunctive and are mandatory. By stating that the "contract of mortgage *must*" meet or include the enumerated requirements, it is an immutable proposition that a failure to include any of the elements renders the purported mortgage ineffective.[174]

The institution of mortgage represents an authorized exception to the general tenet that "an obligor's property is available to all his creditors for the satisfaction of his obligations."[175] This statement is subject to the distinct exception that it applies "in the absence of a preference authorized or established by legislation."[176] A contract of mortgage is such a preference. Being an exception to the general principle, it should be strictly construed.[177]

---

171. LA. CIV. CODE ANN. art. 3288 (2021).

172. *Id*. art. 3289.

173. KeyBank Nat. Ass'n v. Perkins Rowe Ass'n, LLC, 823 F. Supp. 2d 399, 406 (M.D. La. 2011) (quoting HARDY, *supra* note 13).

174. "'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). "Under well-established rules of interpretation, the word 'shall' excludes the possibility of being 'optional' or even subject to 'discretion,' but instead 'shall' means 'imperative, of similar effect and import with the word 'must.'" La. Fed'n of Tchrs. v. State, 118 So. 3d 1033, 1051 (La. 2013).

175. LA. CIV. CODE ANN. art. 3134 (2021).

176. *Id.*

177. "Where exceptions are provided for in a statute laying down a general rule, the exceptions must be strictly construed." State *ex rel.* Murtagh v. Dep't of

One final observation reinforces the notion that the inclusion of these requirements is mandatory and that the validity of the contract of mortgage is tethered to full compliance. As pertains to the "required information" that must be contained in a mortgage so as to be recorded, article 3352 of the Civil Code instructs that an "instrument [of mortgage] shall contain" the "last four digits of the social security number or the taxpayer identification number of the mortgagor, whichever is applicable."[178] Yet despite the use of the mandatory word "shall," the article then states that the "omission of that information does not impair the validity of an instrument or the effect given to its recordation."[179] Hence, the legislature is cognizant of the manner in which the failure to abide by a mandatory requirement might be excused and did not do so in reference to the requirements of Civil Code article 3288.[180]

4. Adequacy of Legal Descriptions

It is self-evident that particular property—whether movable or immovable—may be encumbered only to the extent that it is properly described or identified to a sufficient degree of certainty such that third persons are reasonably apprised or informed that such property is burdened by such security interest. The necessary precision for describing such property depends on the nature of the property, either movable or immovable.

a. Immovable Property

"A contract of mortgage must state precisely the nature and situation of each of the immovables or other property over which it is granted . . . ."[181] The codal requirement for a precise description of the lands to be encumbered is not simply a matter of providing notice to a third person, as

City Civil Serv., 42 So. 2d 65 (La. 1949). In Succession of Andrews, 153 So. 2d 470 (La. Ct. App. 4th Cir. 1963), the court said that the "article is in effect an exception to the rule prescribed by Article 1492, and as an exception to the general rule it should be strictly construed."

178. LA. CIV. CODE ANN. art. 3352(A)(5) (2021).

179. *Id*. art. 3352(B).

180. *See* LA. REV. STAT. ANN. § 24:177(C) (2021).

181. LA. CIV. CODE ANN. art. 3288 (2021).

important as that is.[182] Rather, it implicates the very validity of the mortgage.[183]

If the mortgage encumbers a mineral servitude or mineral royalty, the mortgage should refer to the instrument creating the mineral servitude or mineral royalty. For example, the contractual language could include language such as, "that certain mineral servitude reserved in that certain act of sale, etc.," followed by a legal description of the burdened lands. Merely referring to a mineral servitude or royalty in and to identified real estate should be avoided as there might be multiple real rights affecting the same land.

If the mineral servitude or royalty has been previously acknowledged for purposes of interrupting prescription,[184] reference to the instrument of acknowledgment should also be included.

It is not uncommon to encounter a mineral lease mortgage that describes the encumbered property as "all of Mortgagor's right, title and interest" in and to described mineral leases. This language could be problematic if the mortgagor either sells or acquires interests in the burdened leases or owns an undivided interest in the mineral leases. Moreover, it has been held that language in an advertisement indicating the judicial sale of a judgment debtor's "right, title, and interest" in certain real estate does not meet the requirement that an appraisal be precise.[185]

Equally problematic is a description of a particular well as being the subject of mortgage. Even setting aside the issue of whether it is susceptible of mortgage in the first instance, a mortgage that merely describes a well would fail to cover the associated mineral lease, if any, and make such a mortgage of dubious value or validity. As stated by Professor Harrell, "This should be grounds for repealing the prohibition

182. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 10-05.

183. "The mortgage cannot be valid without a legal description of the property." Ocwen Loan Servicing v. Succession of Porter, 248 So. 3d 491, 496 (La. Ct. App. 4th Cir. 2018).

184. "The 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." LA. REV. STAT. ANN. § 31:54 (2021). These rules are made applicable to the mineral royalty by article 93 of the Mineral Code. *Id.* § 31:93.

185. Gales v. Christy, 4 La. Ann. 293 (1849); Moore v. Knapp, 7 La. Ann. 21 (1852); Dearmond v. Courtney, 12 La. Ann. 251 (1857); Mulling v. Jones, 97 So. 202, 203 (La. 1923); Lambert v. Bond, 102 So. 2d 467 (La. 1958).

against visiting cruel and unusual punishment upon drafters of contracts and agreements generally."[186]

Other common descriptions of mineral leases that are the subject of a mortgage seemingly confuse (or certainly fail to articulate with specificity) the nature or extent of the mortgagor's interest in such collateral. For example, if the mortgagor has granted a sublease of the encumbered leases, such that the mortgagor no longer owns the leases, but merely an overriding royalty interest therein,[187] this should be clearly stated.[188]

If a mortgagor holds a mineral lease subject to a farmout agreement,[189] and if the farmee "earns" an assignment of the mineral lease by drilling a well and otherwise complying with the requirements of the farmout agreement, the mortgagor-lessee would typically be required to execute an assignment of the mineral lease and reserve an overriding royalty interest. That would mean, in legal contemplation, that the mineral lease has been subleased rather than simply assigned.[190] In a typical farmout arrangement, the overriding royalty interest might be convertible to a working interest at "pay-out," meaning that the sublessee would re-assign a certain undivided interest to the sublessor, and the overriding royalty interest would be concomitantly extinguished. Depending upon when the mortgagor grants a mortgage in this situation, it would encumber either the entirety of the mineral lease through a mortgage, the overriding royalty interest reserved in the sublease by way of pledge, or the undivided interest

---

186. Thomas A. Harrell, *The Effect of Louisiana's New Mortgage Provisions and Article 9 on Oil and Gas Financing*, 40 ANN. INST. ON MIN. L. 271, 278 (1993).

187. An overriding royalty interest is an interest in and to a mineral lease that entitles the owner thereof to participate in production from or attributable to such mineral lease, without the payment of costs or expenses associated therewith. In the industry, an overriding royalty interest is called an "override" or an "ORRI." For a comprehensive examination of the ORRI, *see* Randall S. Davidson, *The Overriding Royalty*, 27 ANN. INST. ON MIN. L. 38 (1980).

188. Harrell, *supra* note 186.

189. "A farmout agreement is understood to be an arrangement under which the lessee in an oil and gas lease agrees to assign his lease, retaining an overriding royalty only, to one who successfully causes a well to be drilled to a desired depth upon the leased land." Massey Petroleum, Inc. v. Decca Drilling Co., 647 So. 2d 1196, 1198 n.2. (La. Ct. App. 2d Cir. 1994).

190. *See* Pepper v. Pyramid Oil & Gas Corp., 287 So. 2d 620, 622 (La. Ct. App. 3d Cir. 1973) ("The reservation of an overriding royalty is, of itself, sufficient to stamp the transfer as a sublease."); OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 10-07(d); *see also* Ottinger, *What's in a Name*, *supra* note 19, at 297–303.

in the mineral lease assigned back to the mortgagor, after achievement of pay-out, in the form of a mortgage.[191]

One often encounters a mineral lease mortgage, typically prepared out of state, that contains a clause purporting to subject to the mortgage any property to be acquired "hereafter" or in the future. Louisiana law does not allow a "future property" clause but will enforce an "after-acquired property" clause. The difference between the two approaches resides in the fact that, while a mortgage may describe with particularity a piece of property (say, land or a mineral lease), such that the mortgage will automatically encumber such specifically described property in the event the mortgagor thereafter acquires it, a mortgage clause that purports to affect "all" property thereafter acquired, on an omnibus basis, will not be enforced.[192] These propositions are established by article 3292 of the Civil Code:

> **Art. 3292. Mortgage of future property permitted in certain cases**
> A special mortgage given over property the mortgagor does not own is established when the property is acquired by the mortgagor. A general conventional mortgage is permitted only when expressly provided by law.[193]

The permissibility of including an after-acquired title in the mortgage has been recognized in Louisiana for more than 160 years. Thus, in *Amonett v. Amis*,[194] the Louisiana Supreme Court said:

---

191. A particular issue presented in the scenario involving a farmout agreement is that such agreements are rarely, if ever, recorded so that the mortgagee under a mineral lease mortgage would not be bound by an unrecorded agreement as constituting a burden on its collateral. This concern is often addressed by the notion of "permitted encumbrances" or "permitted liens," as specified in the mortgage instrument or by reference to the credit agreement. It has been held that a mortgagee was bound by certain unrecorded agreements when the mortgage document made express reference thereto, holding that the bank "is entitled to exactly the proportionate interest, no more and no less, which was fixed and warranted by its debtor in the security mortgage and the assignment of proceeds." Sw. Gas Producing Co. v. Creslenn Oil Co., 181 So. 2d 63, 68 (La. Ct. App. 2d Cir. 1965).

192. As has been explained by a court, "Under Louisiana law, pursuant to LSA-C.C. arts. 3304 and 3308, future indefinite property may not be the subject of a conventional mortgage, although future definite property may be mortgaged." Ewing v. Small Bus. Admin., 359 F. Supp. 16, 17 (E.D. La. 1973).

193. LA. CIV. CODE ANN. art. 3292 (2021).

194. Amonett v. Amis, 16 La. Ann. 225 (1861).

> These articles of the Code present no difficulty. *Collier* did not mortgage to *Lambeth* and *Thompson* future, uncertain acquisitions. He mortgaged as owner, a specific immovable which they accepted in good faith, and caused their act of hypothecation to be recorded, and thus the public had notice of the thing covered by the mortgage. When, therefore, *Collier* subsequently acquired title to the particular thing upon which he had granted a mortgage, the case had happened which was contemplated by Art. 3271, and the right of the mortgagees affected the whole of the immovable.[195]

b. Movable Property

The quality or sufficiency of the description of movable property in the security agreement contained in a mineral lease mortgage—typically, equipment placed on the leased premises in support of the lessee-mortgagor's drilling or production activities—is not measured against the same strictures as pertain to immovable property. It is customarily sufficient to describe such movable property generally, by type of equipment, without the need for serial numbers or other unique identifiers.

The Louisiana version of the U.C.C. exhibits a bit of tolerance with respect to the manner in which personal property is described by providing that, with certain exceptions, "a description of personal property is sufficient, whether or not it is specific, if it reasonably identifies what is described."[196]

Additionally, in contrast to the mortgage that might be established by a lessee, which cannot encumber future property,[197] a lessor may establish a pledge that will encumber its rights in mineral leases "not yet in existence, without the necessity of specific description of the leases in the contract establishing the pledge."[198] This is clearly established by article 3171 of the Civil Code.[199]

---

195. *Id.* at 227.
196. LA. REV. STAT. ANN. § 10:9-108(a) (2021).
197. *See supra* Section II.B.4.a.
198. LA. CIV. CODE ANN. art. 3171 (2021).
199. *Id.* The article provides:

> A pledge may be established over all or part of the leases of an immovable, including those not yet in existence, without the necessity of specific description of the leases in the contract establishing the pledge. If the pledge is established over leases not yet in existence, the pledge encumbers future leases as they come into existence. The pledge has effect as to third persons, even with respect to leases not in existence at

The comment to article 3171 indicates that it "restates the provisions of former R.S. 9:4401(A)(2), without any intent to change the law."[200]

C. Leasehold Mortgages[201]

1. Property Susceptible of Mortgage

The types of "things" that might be made subject to a mortgage are enumerated in article 3286 of the Louisiana Civil Code, reading, in pertinent part, as follows:

> **Art. 3286. Property susceptible of mortgage**
> The only things susceptible of mortgage are:
>
> . . .
>
> (4) The lessee's rights in a lease of an immovable with his rights in the buildings and other constructions on the immovable.
> (5) Property made susceptible of conventional mortgage by special law.[202]

A mortgage in which the essential collateral is a lease owned by the mortgagor, as lessee, is called a "leasehold mortgage," sometimes called a

---

> the time of formation of the contract establishing the pledge, from the time that the contract establishing the pledge is recorded in the manner prescribed by law.

Id.

200. *Id.* cmt. The cited (former) statute was eliminated effective January 1, 2015, pursuant to Act No. 281, and previously provided, as follows:

> Such assignment may include all or any portion of the assignor's presently existing *and anticipated future leases* and rents pertaining to the described immovable property. As future leases or rents of an immovable come into existence the assignee's rights as to such leases and rents shall have effect as to third persons from the date of the filing of the instrument. It shall not be necessary to specifically describe the presently existing or future arising leases or rents; to affect the assignor, the assignee, the debtor, or other third parties the instrument shall suffice if it contains a general description of the leases and rents together with a description of the immovable affected by the lease.

LA. REV. STAT. ANN. § 9:4401(A)(2) (1995) (emphasis added).

201. For a comprehensive discussion of the role of leasehold mortgages in commercial financing, *see* Michael H. Rubin & S. Jess Sperry, *Lease Financing in Louisiana*, 59 LA. L. REV. 845 (1999).

202. LA. CIV. CODE ANN. art. 3286 (2021). Subparagraph (5) would refer to article 203 of the Louisiana Mineral Code as a "special law" that makes a mineral lease "susceptible of conventional mortgage."

"leasehold estate." However, in *Rivet v. Regions Bank of La., F.S.B.*,[203] the court noted the following with respect to the term "leasehold estate" under Louisiana law, to wit:

> "Leasehold estate" is a term unknown to the Civil Law, which does not recognize estates in land. In Louisiana, a lease of immovable (real) property is a personal (in personam) contract which does not create rights in rem; however, under provisions of various statutes, both predial (real estate) and mineral leases are afforded some of the attributes of rights *in rem*, notably the protection of the public records doctrine, including the susceptibility of the rights of the lessee to conventional (real estate) mortgages and the ranking of such encumbrances among themselves based on time of recordation.[204]

"A lessee's leasehold interest, particularly with respect to a long-term lease, is also an important form of collateral to a lender to secure the obligations of the lessee. Leasehold mortgages are particularly used to finance the lessee's construction or renovation of improvements under a long-term ground lease."[205]

The unique nature of the collateral in a leasehold mortgage presents significant issues. These include (a) the need (or certainly, prudence) to secure a subordination and attornment agreement from the prime lessor in relation to the status of the security granted by the lessee,[206] (b) the nature of the interests acquired by a purchaser at a judicial sale, and whether the purchaser has any duty to pay rent under the thus-acquired lease,[207] and

---

203. Rivet v. Regions Bank of La., F.S.B., 108 F.3d 576 (5th Cir. 1997).

204. *Id.* at 580 n.2 (internal citation omitted) (citing A.N. YIANNOPOULOS, 2 LOUISIANA CIVIL LAW TREATISE § 226, at 422–23 (3d ed.1991)).

205. Peter S. Title, *Leasehold Mortgage*, 2 LA. PRAC. REAL EST. § 18:93 (2d ed.).

206. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 12-11(b). The necessity for securing a subordination and attornment agreement from the prime lessor is also discussed (albeit in a different commercial context) in Patrick S. Ottinger, *Is There a Future for Wind Energy in the Bayou State? The Answer, My Friend, Is Blowin' in The Wind*, 7 LSU J. ENERGY L. & RES. 1, 48–49 (2019). Subordination and attornment agreements are not typically involved in an RBL transaction.

207. *See* Junior Money Bags, Ltd. v. Segal, 970 F.2d 1 (5th Cir. 1992); Carriere v. Bank of La., 702 So. 2d 648, 666–67 (La. 1996) ("Applying the above precepts, a lessee who has availed himself of his statutory right (footnote omitted) to mortgage his interests in his lease may mortgage either: (1) his entire lease, which includes all of the lessee's rights, duties and obligations under the lease,

(c) the potential of confusion resulting in the extinguishment of the mortgage occurring if, for example, the lessor acquires the mortgaged lease at the judicial sale.[208] While of great significance, these issues are beyond the scope of this article.

Moreover, a commercial lease is not a real right,[209] while a mineral lease is both a real right[210] and an incorporeal immovable.[211] Critically, a leasehold mortgage involving collateral composed of commercial leases differs from a leasehold mortgage in which mineral leases constitute the collateral. Significantly, unlike a mineral lease, the failure on the part of the lessee-mortgagor to timely pay rent under a commercial lease does not result in the *ipso facto* termination of the lease, unless the lease provides otherwise.[212] In contrast, the failure to pay delay rentals under a mineral lease results in the *ipso facto* termination of the lease,[213] and there exists the potential for dissolution of the mineral lease for non-payment of royalties[214] or a breach of an implied covenant.[215]

---

including the obligation to pay rents; or (2) only his right of occupancy, use and enjoyment under the lease.").

208. *See* Ranson v. Voiron, 146 So. 681, 682 (La. 1933) ("It is true that the lease came to an end, by confusion, so to speak, when the lessor bought the lessee's right of occupancy.").

209. "In Louisiana, a lease of immovable (real) property is a hybrid, a personal contract which nonetheless enjoys a number of attributes of a real contract, including public records protection, the right to peaceable possession, the right to evict, and the like." Matter of Dibert, Bancroft & Ross Co., Ltd., 117 F.3d 160, 164 n.2 (5th Cir. 1997) (internal citations omitted).

210. LA. REV. STAT. ANN. § 31:16 (2021).

211. *Id.* § 31:18 (2021).

212. "Failure of a lessee to pay rent promptly does not automatically necessitate the termination of the lease." Plunkett v. D & L Fam. Pharmacy, Inc., 562 So. 2d 1048, 1053 (La. Ct. App. 3d Cir. 1990) (quoting Port Arthur Towing Co. v. Owens-Ill., Inc., 352 F. Supp. 392 (W.D. La. 1972)). Rather, the doctrine of judicial control permits the court to decline to terminate the lease if such remedy is deemed inappropriate under the circumstances. *See* Sieward v. Denechaud, 45 So. 561 (La. 1908). *See also* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 13-34(g). The doctrine of judicial control has been applied with respect to breaches of a mineral lease. *See* Walker v. Chesapeake La. LP., Civ. No. 09-1727, 2010 WL 3843682 (W.D. La. Sep. 24, 2010). In the interest of full disclosure, your author represented the defendant-lessee in this case.

213. LA. REV. STAT. ANN. § 31:133 (2021); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 4-08(d)(4).

214. LA. REV. STAT. ANN. §§ 31:140–41 (2021).

215. *Id.* § 31:136 (2021).

2. Reserve-Based Loans

a. Extension of Credit Based upon Evaluation of Reserves

In the "upstream" sector of the oil and gas industry,[216] the participants are so-called E&P companies.[217] The principal form of collateral for an oil and gas loan by an E&P company is the mineral leases held by such a borrower. A loan of this type is called a "reserved-based loan" or "RBL."[218] When mineral leases constitute the collateral to secure a loan in an RBL transaction, it is important to recognize the unique issues thereby presented. This might best be illustrated when one considers two different loans—one secured by raw land for a commercial-development purpose, and the other secured by mineral leases. The principal indebtedness of each borrower is $10 million.

In the former case, the collateral is essentially dirt or land, the classic immovable.[219] That corporeal collateral is not going anywhere; the secured lender can actually see and walk on the collateral securing its loan via a mortgage. There is absolutely no fear or concern that the lender's collateral will disappear or cease to exist. In contrast, in the instance where the collateral is composed of mineral leases, the lender can see and hold the written contract evidencing the lessee-borrower's rights under the mineral

---

216. The "upstream" sector of the oil and gas industry is explained in Federal publications, as follows:

> Upstream companies—also known as E&P companies—find, develop, and produce oil, natural gas, and natural gas liquids (NGL). The upstream business model is analogous to mining for raw materials. Upstream companies manage their development and production costs and emphasize production volume to generate profit margins, which are sensitive to commodities market prices. This price risk can cause volatility in company cash flow and the value of O&G reserves.

Comptroller's Handbook on Safety and Soundness, Oil and Gas Exploration and Production Lending, OFFICE OF THE COMPTROLLER OF THE CURRENCY 1–2 (2016) https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/oil-gas-exploration-prod-lending/index-oil-gas-exploration-production-lending.html [https://perma.cc/2QA7-TS6E] [hereinafter OCC Lending Manual].

217. In the vernacular of the industry, "E&P" means "exploration and production." *See* LA. REV. STAT. ANN. § 30:29(I)(5) (2021).

218. An excellent series of four articles on the topic of reserve-based lending was presented by Jason Fox, Dewey Gonsoulin & Kevin Price, *Reserve Based Finance: A Tale of Two Markets*, OIL & GAS FIN. J. (2014).

219. *See* LA. CIV. CODE ANN. art. 462 (2021) ("Tracts of land . . . are immovables.").

lease, but, by its very nature, such incorporeal collateral is perishable or precarious in the sense that the collateralized mineral leases must be maintained in force and effect by the lessee-borrower taking certain actions prescribed therein.[220] In other words, mineral leases serving as collateral for this secured loan have—in contrast to the land itself—the potential to expire and terminate,[221] in which case the collateral ceases to exist and the lender becomes unsecured or under-secured.[222]

Both loans for $10 million will be documented by a credit agreement and an array of security interests, principally a mortgage describing the collateral coupled with a security interest in the revenue generated by any lease on the land or in the oil and gas produced by the mortgagor. However, the loan to the E&P borrower will typically have significantly more and different clauses, conditions, requirements, and covenants, in contrast to the loan secured by the raw land. Again, this is so the RBL lender might have the highest level of comfort and assurance that its collateral will not perish or become extinguished, essentially leaving that bank unsecured or under-secured.

Additionally, even when the collateralized mineral leases are being properly maintained in force and effect, the volatility in commodity prices can quickly exacerbate the status of the loan, in contrast to the raw land.[223]

---

220. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 4-03. ("A mineral lease is 'perishable.' Unless it is properly and timely maintained in force and effect, it will come to an end at some determinable date. This occurrence of the 'perishing' of the mineral lease is called 'lease expiration,' or 'lease termination,' and it is avoided by 'lease maintenance.'").

221. LA. REV. STAT. ANN. § 31:133 (2021) ("A mineral lease terminates at the expiration of the agreed term or upon the occurrence of an express resolutory condition.").

222. "A mortgage is extinguished: By the extinction or destruction of the thing mortgaged." LA. CIV. CODE ANN. art. 3319(1) (2021); *see also* Cont'l Supply Co. v. Hoell, 129 So. 522, 525 (La. 1930) ("Appellant's next complaint has reference to his alternative demand, that his mortgage on the three-sixteenths of the oil lease, and the assignment of three-sixteenths of the oil run, should be recognized. The record shows, and it is admitted, that, while this suit was pending, the lessor . . . sued to annul the oil lease and obtained judgment against them by default, annulling the lease. The annullment of the lease annulled all mortgages granted by the lessees on the lease.").

223. For example, a sharp decline in oil or gas prices could cause the value of the reserves to decline below the value of the loan, causing the lender to be under-secured. Conversely, land typically has a more stable basis of valuation. Indeed, this has been a major concern of federal regulators. *See* Gillian Tan, Ryan Tracy & Ryan Dezember, *Regulators Warn Banks on Loans to Oil, Gas Producers*, WALL ST. J. (July 2, 2015, 6:21 PM), https://www.wsj.com/articles/banks-

So clearly, the terms and provisions pursuant to which a bank might be willing to loan money to the E&P company are carefully negotiated so as to ensure that the unique collateral on which the bank relies for repayment continues to exist for the life of the loan. Given the precarious nature of mineral leases, it is both reasonable and understandable that a bank would want to have additional safeguards in place to protect against the lapse or extinction of such leases and accordingly, the loss of its collateral.

b. Periodic Redetermination of Reserves

At its core, a reserve-based loan is predicated upon the lender's evaluation of the quantity of oil and gas under the control of the lessee, based upon reserve reports, pricing of commodities, the net revenue interest accruing to the lessee, and the anticipated costs to obtain the production, among other factors. An initial determination of reserves (oil and gas anticipated to be in place and available for production) is made at the inception of the RBL transaction and, from the viewpoint of the lender, adequately justifies the extension of credit.

Among other covenants typically encountered in credit documents is the requirement that the borrower provide to the lender "reserve reports" from time to time, setting forth an analysis of the estimate of the quantity of reserves that might be produced and generate revenue to repay the loan.[224] Typically, the lender will have these reports evaluated by a consulting geologist or reservoir engineer as a part of its due diligence, principally to verify that anticipated future reserves exist to continue as a source of loan repayment. Periodically, a borrowing base determination is made to stay current as to the limits of the line of credit available to the borrower, with adjustments being made as to the amount of available credit going forward.[225]

---

facecurbs-onoil-gaslending-1435866277 [https://perma.cc/4WTP-D9E2] ("U.S. regulators are sounding the alarm about banks' exposure to oil-and-gas producers, a move that could limit their ability to lend to companies battered by a yearlong slump in prices.").

224. A "reserve report" is typically prepared by a reservoir engineer and identifies "proved, probable and possible reserves." *See Compliance and Disclosure Interpretations*, SECURITIES & EXCHANGE COMM'N, http://www.sec.gov/divisions/corpfin/guidance/oilandgas-interp.htm [https://perma.cc/E4RS-JNTQ] (last updated May 16, 2013) (comprising interpretations of the Oil and Gas Rules in Regulation S-X and Regulation S-K).

225. "The borrowing base for O&G loans is the estimated value of O&G that can be produced from the mineral rights. It is determined by analyzing prior production reports and independent engineering valuations." OCC Lending

3. Federal Law Encourages the Use of Covenants in RBL Financing Structures

A mineral lease mortgage typically includes distinct covenants that take into account the nature of the collateral. Not only are clauses of this type contained in a mineral lease mortgage customary and typical as a matter of affording security to the lender, but they are actually encouraged by federal law.[226] In March 2016, the Office of the Comptroller of the Currency issued its OCC Lending Manual.[227] As explained in the preamble to this Manual:

> This booklet addresses only E&P lending to upstream companies because their financing structures are more specialized than financing structures used by midstream, downstream, and service companies. Loan policies and underwriting standards applied to midstream, downstream, and service companies are similar to traditional commercial and industrial loans.[228]

The OCC Lending Manual noted the following with respect to the management of risk in an RBL transaction:

> Underwriting standards and approval requirements that are specific to lending to the E&P industry and provide appropriate lender controls, including measurement of O&G reserve and production history; financial analysis expectations; realistic repayment terms consistent with the use of proceeds; advance rates and risk adjustments on various reserve types; pricing parameters; stress or sensitivity analysis of cash flow; covenant and structure expectations; approval authority; and policy exception authority.[229]

Manual, *supra* note 216, at 17, 56. It is a "collateral base agreed to by the borrower and lender that is used to limit the amount of funds the lender advances the borrower." *Id.* at 56. "The borrowing base specifies the maximum amount that can be borrowed in terms of collateral type, eligibility, and advance rates." *Id.* Typically, but not universally, the amount of the loan would be based upon 80% of the value of the borrower's assets, supported by reserve reports, title opinions, etc. *Id.*

226. These guidelines are suggested, not mandated, by the OCC Lending Manual, in the nature of "best practices." A search of this manual discloses that the mandatory word "shall" does not appear therein.

227. OCC Lending Manual, *supra* note 216.

228. *Id.* at 3.

229. *Id.* at 18.

Consequently, it is an absolute necessity for lenders to contractually safeguard and protect against their collateral being alienated, extinguished, diminished, or destroyed, thereby finding themselves either unsecured or under-secured. Lenders must know that their borrowers will not terminate, damage, sell, transfer, or otherwise alienate collateral without their knowledge and without first making other accommodations to protect the lender from loss.

Protective contractual provisions requiring the borrower to communicate with the lender and address the outstanding loan, before it alienates or terminates the lender's collateral, are important protections to the lender. Such protections, however, should neither cause the nature of a debtor-creditor relationship to change; impose upon lenders the underlying obligations of an owner of mortgaged assets; nor be misconstrued as "control" over the borrower to give rise to any sort of liability upon the lender *vis-à-vis* third persons, a proposition considered in the *Gloria's Ranch* decision next discussed.

4. The Gloria's Ranch *Decision*

Any examination of the covenants customarily contained in credit documentation associated with an RBL transaction justifies a brief consideration of the decision in *Gloria's Ranch, L.L.C. v. Tauren Exploration, Inc.*[230] In that case, the Louisiana Supreme Court unanimously reversed a decision of the Second Circuit Court of Appeal that would have had significant detrimental consequences on the lending industry, particularly in the energy space. The Second Circuit's decision had affirmed a trial court decision that held that a bank holding a mortgage on its borrower's mineral leases was solidarily liable along with its borrower and other leasehold owners for damages resulting from a failure to release an expired mineral lease and for failure to pay royalties. Never before has a bank holding a mortgage been deemed responsible, for that reason alone, for such damages.

The trial court had held that by reason of an "assignment of proceeds" (essentially a pledge of revenue from the mineral lease), the mortgagee was to be considered an "owner" of the mineral lease and thereby liable as such for faults of the lessee-borrower. The Second Circuit reversed that determination, correctly recognizing that the so-called assignment was merely a security interest in a movable (oil and gas). But the court nevertheless affirmed the trial court's assessment of co-responsibility on the bank because it viewed the various covenants of the mortgage as

230. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 252 So. 3d 431 (La. 2018).

evidencing "control" by the bank over the actions of the lessor-mortgagor with respect to the administration of the mineral lease, principally a restriction on the power or right of the lessee to release an item of collateral.

The defendants sought writs of certiorari and review from the Louisiana Supreme Court, supported by significant *amici curiae* briefing.[231] Writs were granted,[232] the case was briefed, and oral arguments were heard on March 13, 2018. The Court issued its unanimous opinion on June 27, 2018, reversing the Second Circuit's decision as it relates to the liability of a mortgagee for the faults or inactions of its borrower-lessee.[233] Associate Justice Marcus Clark, writing for the court, noted that the mortgagee was not an "owner" for purposes of article 207 of the Mineral Code[234] and therefore, was not liable to the plaintiff for damages "resulting" from the lessee's failure to release the expired mineral lease. Additionally, it found the mortgagee was not a "lessee" for purposes of article 140 of the Louisiana Mineral Code and was not liable for failure to pay royalties that were due.

The Supreme Court rejected the propriety of any analysis of the relationship created by the mortgage under the provisions in the Louisiana Civil Code pertaining to the intrinsic attributes of ownership. Noting that the mortgage at issue was created in accordance with article 203 of the Louisiana Mineral Code,[235] the court found no basis to go outside of the Mineral Code to determine the effect or consequences of this mortgage.[236] It reached this conclusion in reliance on article 2 of the Mineral Code, which provides:

> **Art. 2. Relation to Civil Code**
> The provisions of this Code are supplementary to those of the

---

231. As noted previously, your author filed an *amicus curiae* brief on behalf of American Bankers Association and Texas Bankers Association.

232. *Gloria's Ranch*, 231 So. 3d 639–42.

233. *See supra* note 5. While the decision on the liability of the bank was unanimous, one justice dissented on an unrelated issue pertaining to the appropriate damages for nonpayment of royalties.

234. Mineral Code article 207 provides for damages and attorney's fees "if the former lessee of a mineral lease fails to" provide, after written demand, a recordable act evidencing its release or extinction. LA. REV. STAT. ANN. § 31:207 (2021). *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 13-22.

235. *See infra* text associated with note 253.

236. "First, on a legal basis, we find no authority for superseding the ownership principles set forth in the La. Mineral Code with those of the La. Civil Code." Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 252 So. 3d 431, 438 (La. 2018).

> Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.[237]

For this and other reasons, the court found no basis "where the La. Mineral Code addresses or sanctions ownership of a lessee's interest via a theory of control of rights."[238] Rather, the court noted that "[o]wnership of the mineral lease can be transferred by assignment or sublease," citing to the relevant articles of the Mineral Code.[239]

Finding that articles 203 and 204 of the Louisiana Mineral Code expressly authorized the mortgage of mineral leases, the court concluded:

> Based on the foregoing, we find no authority for the court of appeal's holding that a mortgage and a credit agreement, which are both legally provided for in the La. Mineral Code, can be methods by which ownership of a mineral lease are conveyed simply because they assert some control over the collateral described therein. We find the "bundle of rights" controlled by Wells Fargo are not traits of ownership, but of security rights. The mortgage and credit agreement contain provisions typical of security contracts, all designed to protect the collateral.[240]

Gloria's Ranch filed for a rehearing, which was denied by the Supreme Court on September 7, 2018.[241]

---

237. LA. REV. STAT. ANN. § 31:2 (2021).

238. *Gloria's Ranch*, 252 So. 3d at 438.

239. LA. REV. STAT. ANN. § 31:127 (2021); *see also* Ottinger, *What's in a Name?*, *supra* note 19.

240. *Gloria's Ranch*, 252 So. 3d at 439. Among other authority, the court cited OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 12-10, for the proposition that it is "customary in the oil and gas industry" to include covenants and provisions of the type as found in the Wells Fargo mortgage.

241. Gloria's Ranch, L.L.C., v. Tauren Expl., Inc. 251 So. 3d 392 (La. 2018). However, "Tauren's rehearing application [was] granted for the limited purpose of remanding the matter for the trial court to consider the effect the reversal of Wells Fargo's liability has on the award, particularly as it relates to the virile share accounted for in the EXCO settlement." *Id.* at 393. On November 4, 2020, the Supreme Court, calling it a *res nova* issue, issued a *per curiam* decision in which the court did "expressly hold that when an obligee remits (or compromises) the debt of one solidary obligor, he absorbs that obligor's portion of the loss caused

D. Interrelationship Between the Louisiana Civil Code and the Louisiana Mineral Code as Pertaining to the Mineral Lease and the Mortgage

In order to create a bridge from a leasehold mortgage, discussed in the previous Section, to its important subset, the mineral lease mortgage, it is instructive to recognize the relevant law with respect to the mineral lease (the collateral) and the mortgage itself.

Three decades after the adoption and implementation of the Louisiana Mineral Code, the law of lease was comprehensively amended and reenacted, effective January 1, 2005.[242] As reenacted, article 2668 of the Louisiana Civil Code now defines the "lease" as follows:

> **Art. 2668. Contract of lease defined**
> Lease is a synallagmatic contract by which one party, the lessor, binds himself to give to the other party, the lessee, the use and enjoyment of a thing for a term in exchange for a rent that the lessee binds himself to pay.[243]

Article 2671 of the Louisiana Civil Code characterizes a lease according to the "agreed use of the leased thing," thusly:

> **Art. 2671. Types of leases**
> Depending on the agreed use of the leased thing, a lease is characterized as: . . . mineral, when the thing is to be used for the production of minerals . . . .[244]

Concordant with that statement, article 2672 of the Louisiana Civil Code provides that a "mineral lease is governed by the Mineral Code."[245] This referral gives primacy to the Louisiana Mineral Code in matters pertaining to the mineral lease.[246]

The Louisiana Mineral Code, in turn, directs one to resolve the dispute involving a mineral lease within the framework of the Mineral Code, rather than the "Civil Code or other laws," if the Mineral Code addresses the matter at hand.[247]

---

by another solidary obligor's insolvency." Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 303 So. 3d 626, 627 (La. 2020).

242. Act No. 821, 2004 La. Acts 2556.

243. LA. CIV. CODE ANN. art. 2668 (2021).

244. *Id.* art. 2671.

245. *Id.* art. 2672.

246. As has been seen, this was a matter of great significance to the Supreme Court in the *Gloria's Ranch* case previously discussed.

247. *See* LA. REV. STAT. ANN. § 31:2 (2021).

If the Mineral Code "does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable."[248] In this sense, the Civil Code and the Revised Statutes are said to be suppletive to the Mineral Code in that those sources will "fill in the gap," where the Mineral Code does not provide an answer or guidance with regard to a particular issue. In contrast, the Louisiana Mineral Code operates to the exclusion of the Civil Code or other laws if it addresses the situation presented.[249]

Thus, the clear instruction of both codes is to resolve issues pertaining to mineral leases and other mineral rights within the text and strictures of the Louisiana Mineral Code, to the extent that it can be done.

III. NATURE OF COLLATERAL TO BE BROUGHT UNDER A MINERAL LEASE MORTGAGE

Paramount to any consideration of the proper treatment of oil and gas, and of the mineral rights from which they are produced, as collateral is the issue of its characterization—are we dealing with immovable (in common law vernacular, "real") or movable (in the common law, "personal") property? If the proposed collateral is immovable property, it is not subject to the provisions of the Louisiana U.C.C. Rather, it is governed by the precepts of the Louisiana Civil Code, as made applicable to mineral rights by the Louisiana Mineral Code. Conversely, the creation and perfection of a secured position in movable property constituting collateral under a mineral lease mortgage are governed by the Louisiana U.C.C. This distinction is supported in the Louisiana U.C.C. in both positive[250] and negative[251] terms.

A. Immovable Property

Self-evidently, and as discussed above, a mineral lease mortgage has, as its principal item of collateral, one or more mineral leases owned in

248. *Id.*

249. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 3-02.

250. *See* LA. REV. STAT. ANN. § 10:9-109(a)(1) (2021) ("this Chapter applies to . . . a transaction, regardless of its form, that creates by contract a security interest in any type of personal property. . . ."). "'Personal' property means movable property." *Id.* § 10:9-102(d)(15).

251. *See id.* § 10:9-109(d)(11) ("This Chapter does not apply . . . to the creation or transfer of an interest in or lien on real property . . . .").

whole or in part by the mortgagor. Indisputably, a mineral lease is immovable property and a real right.[252]

Being one of the three basic mineral rights enumerated in article 16 of the Mineral Code, each of the rights is susceptible to mortgage as firmly recognized by article 203 of the Mineral Code, providing as follows:

> **Art. 203. Mineral rights susceptible of mortgage; effect of mortgage**
> A mineral right is susceptible of mortgage to the same extent and with the same effect, and subject to the same provisions of rank, inscription, reinscription, extinguishment, transfer, and enforcement as is prescribed by law for mortgages of immovables under Article 3286 of the Civil Code.[253]

B. Movable Property

1. Produced Oil and Gas

Indicatively, oil and gas, once reduced to possession when brought to the surface of the earth at the wellhead are movable property. The Louisiana Supreme Court has observed that "with respect to oil and gas, possession marks both the vesting of title and mobilization."[254] Thus, it is at this functional point in time—when the oil and gas is brought to the surface of the earth and is reduced to possession by being captured or gathered—that the product itself ceases to be a component part of the immovable, which is the earth,[255] and becomes movable property.[256] As a

---

252. A mineral lease mortgage frequently includes, as a part of the borrower's portfolio of collateral, land or a mineral servitude (but rarely a mineral royalty). The law applicable to these interests is noted elsewhere herein but is essentially applicable to all immovable property without distinction between their precise character.

253. *Id.* § 31:203.

254. Frey v. Amoco Prod. Co., 603 So. 2d 166, 171 (La. 1992); *see also* State *ex rel.* Muslow v. La. Oil Refin. Corp., 176 So. 686, 691 (La. Ct. App. 2d Cir. 1937) ("When reduced to possession, oil becomes personal property . . . .").

255. *See* Allies Oil Co. v. Ayers, 92 So. 720, 720 (La. 1922):

> Whilst it is true that 'oil and gas, in place, are not subject to absolute ownership as specific things *apart from the soil of which they form part*,' nevertheless it is equally well settled that the owner of the soil has alone the right to sever and appropriate them, which right, of course, he may cede to another.

256. Southport Petroleum Co. of Del. v. Fithian, 13 So. 2d 382, 383 (La. 1943):

consequence, the laws pertinent to immovable property no longer apply to the produced oil and gas, upon being "reduced to possession."[257]

As the produced oil and gas are movable property when severed at the wellhead, they suddenly become susceptible of being subjected to a security interest.[258] As previously stated, the share of production allocable to the lessee, typically called its net revenue interest (NRI),[259] may not be pledged, but it may be subjected to a security interest pursuant to the Louisiana U.C.C. Mineral Code article 204B:

> **Art. 204. Mortgage may include pledge; effect of pledge**
>
> . . .
>
> B. Pledges of minerals produced or the proceeds from the sale or other disposition thereof entered into after Chapter 9 of the Louisiana Commercial Laws (R.S. 10:9-101, et seq.) becomes effective are effective between the parties and as to third parties as provided in Chapter 9.[260]

Prior to the enactment of the Louisiana U.C.C., the Louisiana Mineral Code addressed the issue of the pledge of mineral rights, which was governed by Part 1 of Chapter 12 of the Louisiana Mineral Code, entitled "Secured Rights in Mineral Rights." Since September 1, 1990, the former provisions regulating the pledge of mineral rights have been codified in the Louisiana U.C.C.

As a general proposition, the provisions of the Louisiana U.C.C. that are relevant to the granting of a security interest in minerals by one other than a lessor under a mineral lease, commence with consideration of the following section:

> **La. Rev. Stat. Ann. § 10:9-301. Law governing perfection and priority of security interest**

> It is well settled in this State that there is no title to oil so long as it remains in the earth; consequently, no lien could attach to it as the property of anyone until it is brought to the surface, and when brought to the earth, it is clearly no part of the well.

257. *See* DeMoss v. Sample, 78 So. 482, 484 (La. 1918); Zadeck v. Ark. La. Gas Co., 338 So. 2d 303, 305 (La. Ct. App. 2d Cir. 1976).

258. Produced oil and gas, or the proceeds thereof after sale or other disposition, as might be the subject of a security interest might constitute "as-extracted collateral," as well as "goods," an "account," or "personal property."

259. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 11-03.

260. LA. REV. STAT. ANN. § 31:204(B) (2021). Omitted is paragraph A of article 204, which addressed the creation of a pledge prior to the enactment of the Louisiana U.C.C.

> Except as otherwise provided in R.S. 10:9-303 through 9-306,[261] the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:
>
> . . .
>
> (4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.[262]

The filing of a UCC-1 Financing Statement in connection with a mineral lease mortgage encumbering mineral leases located in Louisiana is addressed in Section IV.C.2.

2. "Other Substances"

The Louisiana Mineral Code applies to oil and gas, and other minerals, both solid and fugacious. The Mineral Code also applies to other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land.[263] This proposition is established by article 4 of the Mineral Code which reads as follows:

> **Art. 4. Substances to which Code is applicable**
> The provisions of this Code are applicable to all forms of minerals, including oil and gas. *They are also applicable to* rights to explore for or mine or remove from land 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*.[264]

No definition of the term "mineral" (or, for that matter, of the word "substance") appears in either the Louisiana Civil Code or the Louisiana Mineral Code.[265]

---

261. These exceptions to the rule of this section are not pertinent to the collateral under a security agreement contained in a mineral lease mortgage.

262. *Id.* § 10:9-301(4).

263. *Id.* § 31:4 (emphasis added).

264. *Id.* § 31:4 (emphasis added).

265. Although it was not adopted, and while it is neither particularly informative nor dispositive as to the intrinsic characterization of minerals, article 15 of The Report of the Comm'n to Draft Oil, Gas and Mineral Code of 1938, contained the following proposed definition of the term "minerals," as follows:

Article 4's first sentence clearly establishes that both oil and gas are indisputably a "form of mineral." That being established, the text of the article then pivots to assert that the provisions of the Code are also applicable to the enumerated non-migratory items or products, as well as to "*other* substances occurring naturally in or as a part of the soil or geological formations on or underlying the land."[266] Consequently, a significant line of demarcation is drawn in that the other physical commodities listed in the second sentence of the article are clearly *not* "minerals," but rather, are "other substances" to which the provisions of the Mineral Code are also applicable.[267]

The redactors of the Code explained the policy reasons justifying the application of the Mineral Code's provisions to other substances in the following comment to Mineral Code article 4, to-wit:

> Making the code applicable to rights to remove other substances is a furtherance of what is felt to be the policy of the civil law system of land tenures. That is, that it is undesirable for land to be burdened by ancient claims or use rights. The free and continuing utilization of land to the highest economic advantage should not be inhibited. Thus, it is undesirable that a right to remove gravel, shells, sand, or clay remain outstanding against the land except under the terms of the code. A lease to remove any such substances is governed by the principle of Article 115 that it may not permit maintenance of the lessee's rights without development for a period greater than ten years. If the instrument cannot be classified as a lease, a right to remove such substances is a mineral

---

> Whenever the term mineral occurs in this Code or is used in any contract, it shall be understood as including oil, gas and other hydrocarbons, whether in liquid or gaseous form, unless the contrary be expressed or necessarily implied; those substances though fugacious by nature and of peculiar character, being recognized as minerals by the law of Louisiana.

266. LA. REV. STAT. ANN. § 31:4 (emphasis added).

267. There is a well-established difference between "minerals" and "other substances" under Louisiana law. This author believes that article 4's two-word connector ("also applies") is a rather tenuous basis to establish that the word "minerals" and "other substances" are always interchangeable for all purposes and in all contexts within the Mineral Code. As one illustration, and being mindful of this difference, the definition of a mineral lease, Mineral Code article 114, as "a contract by which the lessee is granted the right to explore for and produce *minerals*," makes one wonder if the provisions of Chapter 7 of the Mineral Code also apply to "other substances." *Id.* § 31:114 (2021) (emphasis added).

> servitude subject to the prescription of nonuse.[268]

Thus, as a relevant example, sand is not a mineral, but is an "other substance" to which the provisions of the Mineral Code apply.

This is not a purely academic, unimportant question. To illustrate, your author recently represented a borrower in a financial transaction in which the principal item of collateral under the mortgage was a tract of land in northwest Louisiana owned by the mortgagor and used for the production of sand. The sand was being mined by an affiliate of the borrower, pursuant to a sand lease granted by the borrower. The bank required the affiliate to join the transaction as a co-borrower, establishing a security interest in the produced sand.

A slight digression is necessary. Sand is a key component in the fluids used in areas where hydraulic fracturing is the principal operation. As Professor Keith B. Hall has noted:

> Hydraulic fracturing is a process that uses a high-pressure fluid to create fractures in underground rock formations, thereby facilitating the production of oil and gas from formations that have low permeability. The fluid used in hydraulic fracturing typically consists of water, *sand*, and various additives.[269]
>
> . . .
>
> Fracturing fluid consists of a "base fluid," small particles called "proppants," and various other additives. Typically, the base fluid and proppants will comprise about 98 to 99.5% of the fracturing fluid. The most common base fluid is water, though other fluids can be used. The most common proppant is *sand*, but very small ceramic beads or other substances are sometimes used.[270]

As recently stated by the United States Fifth Circuit Court of Appeals, "'Frac sand' is a naturally occurring form of sand with properties that make it particularly useful to the oil and gas industry in the process of 'hydraulic fracturing,' or 'fracking.'"[271] So essential is the role of sand in the Haynesville Shale in northwest Louisiana,[272] that many operators have

---

268. *Id.* § 31:4, cmt. (emphasis added).

269. Keith B. Hall, *Hydraulic Fracturing: Trade Secrets and the Mandatory Disclosure of Fracturing Water Composition*, 49 IDAHO L. REV. 399, 400 (2013) (emphasis added).

270. *Id.* at 402–03 (emphasis added).

271. Sierra Frac Sand, L.L.C., v. CDE Global Ltd., 960 F.3d 200, 202 (5th Cir. 2020).

272. "This court would take judicial notice that March 2008 marked the beginning of the land-leasing boom associated with the Haynesville Shale

undertaken to obtain rights to mine for sand in an attempt to ensure that such a critical substance is available for E&P operations that employ hydraulic fracturing.

Understandably, the bank wanted a secured interest in the sand that was to be mined on the property by the borrower's affiliate, as lessee under a sand lease. To evaluate the susceptibility of sand to serve as collateral under the Louisiana U.C.C., one must first examine the question of whether sand constitutes "as-extracted collateral."[273] That important term is defined in Louisiana Revised Statutes § 10:9-102(a)(6) as follows:

> **La. Rev. Stat. Ann. § 10:9-102. Definitions and index of definitions**
> (6) "As-extracted collateral" means:
> (A) oil, gas, or *other minerals* that are subject to a security interest that:
> (i) is created by a debtor having a mineral right that provides the debtor an interest in *such minerals* when the *minerals* are reduced to possession; and
> (ii) attaches to the *minerals* as severed by being reduced to possession; or
> (B) accounts arising out of the sale at the wellhead or minehead of *oil, gas, or other minerals* attributable to a mineral right held by the debtor such that the debtor's interest in the *minerals* arises when the minerals are reduced to possession.[274]

Hence, for sand to come within the ambit of this important definition, it must be a mineral. As we have seen, sand is not a mineral but is an "other substance" within the contemplation of article 4. Because the substance of sand is not a mineral, it cannot be as-extracted collateral, and another provision of the Louisiana U.C.C. must be invoked to subject that collateral to a security interest thereunder.[275]

The next most logical definition within the Louisiana U.C.C. is the term goods, which is defined in Louisiana Revised Statutes § 10:9-102(a)(44) as "all things that are movable when a security interest

---

formation." Kennedy v. Saheid, 209 So. 3d 985, 994 n.3 (La. Ct. App. 2d Cir. 2016).

273. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 12-09(b)(4).

274. LA. REV. STAT. ANN. § 10:9-102(a)(6) (2021) (emphasis added).

275. "'Collateral' means the property subject to a security interest . . . ." *Id.* § 10:9-102(a)(12).

attaches."[276] "A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment."[277]

Sand, if treated as an "other substance" pursuant to Mineral Code article 4, would be a component part of the land in which it is found, prior to severance. Article 5 of the Louisiana Mineral Code reads:

> **Art. 5. Ownership of solid minerals**
> Ownership of land includes all minerals occurring naturally in a solid state. Solid minerals are insusceptible of ownership apart from the land until reduced to possession.[278]

Once mined or produced, sand would also constitute personal property, defined in the Louisiana U.C.C. as movable property.[279]

This seems to render sand as subject to a security interest under the Louisiana U.C.C. as goods or personal property at such time as it is severed (reduced to possession), provided a financing statement has been properly filed. However, not being as-extracted collateral, the UCC-1 Financing Statement is not to be filed in the State of Louisiana unless the debtor is a Louisiana organization. Rather, it would be filed where the debtor is "located."[280]

3. Equipment as "Fixtures" Under the Louisiana U.C.C.

In the context of the creation of a security interest pursuant to the Louisiana U.C.C., items of equipment of the type customarily involved in a mineral lease mortgage are called fixtures. Although the term fixtures is not a civil law term, it is a mainstay of financing under the Uniform Commercial Code. Professor Yiannopoulos explains that "[i]n common law jurisdictions, fixtures . . . are treated either as chattels or as part of realty."[281]

---

276. *Id.* § 10:9-102(a)(44).
277. *Id.* § 10:9-203(a).
278. *Id.* § 31:5. Notably, article 5 makes no references to "other substances." At the risk of redundancy, because general law—reinforced by the Mineral Code—recognizes a clear line of demarcation between minerals and other substances, this author believes the tenuous reference in article 4 is not a compelling basis to conclude that the references in the Mineral Code to minerals necessarily includes other substances in all contexts in which the former term is used in the Mineral Code.
279. *Id.* § 10:9-102(d)(15).
280. *Id.* §§ 10:9-301, 10:9-307.
281. YIANNOPOLOUS, *supra* note 67, at § 7:10.

a. A Temporal Requirement for a Fixture Filing

In order to establish a security interest under the Louisiana U.C.C. on movable property that the lessee intends to introduce to the leased premises in support of its operations or production, it is absolutely essential that a "fixture filing" be properly filed *prior to* the point in time when the movables become a component part of the immovable. This temporal requirement is clearly provided in a number of codal provisions in the Louisiana U.C.C.

Section 9-102(a)(41) defines fixtures as "goods . . . that *after placement on or incorporation in an immovable* have become a component part of such immovable as provided in Civil Code Articles 463,[282] 465,[283] and 466[284] or that have been declared to be a component part of an immovable under Civil Code Article 467."[285] A fixture filing is defined in § 9-102(a)(40) as "the filing of a financing statement covering goods . . . that *are to become* fixtures and satisfying R.S. 10:9-502(a) and (b), *made before the goods become fixtures*."[286] The definition of goods,

---

282. "Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees, are component parts of a tract of land when they belong to the owner of the ground." LA. CIV. CODE ANN. art. 463 (2021).

283. "Things incorporated into a tract of land, a building, or other construction, so as to become an integral part of it, such as building materials, are its component parts." *Id.* art. 465.

284. According to Civil Code article 466:

> Things that are attached to a building and that, according to prevailing usages, serve to complete a building of the same general type, without regard to its specific use, are its component parts. Component parts of this kind may include doors, shutters, gutters, and cabinetry, as well as plumbing, heating, cooling, electrical, and similar systems.
>
> Things that are attached to a construction other than a building and that serve its principal use are its component parts.
>
> Other things are component parts of a building or other construction if they are attached to such a degree that they cannot be removed without substantial damage to themselves or to the building or other construction.

Id. art. 466.

285. LA. REV. STAT. ANN. § 10:9-102 (2021).

> The owner of an immovable may declare that machinery, appliances, and equipment owned by him and placed on the immovable, other than his private residence, for its service and improvement are deemed to be its component parts. The declaration shall be filed for registry in the conveyance records of the parish in which the immovable is located.

LA. CIV. CODE ANN. art. 467 (2021).

286. LA. REV. STAT. ANN. § 10:9-102(a)(40) (2021) (emphasis added).

in § 9-102(a)(44)(i), indicates that it includes "fixtures *but only if they were movable when a fixture filing covering them was made*."[287]

Section 9-109(a)(1) provides, with certain enumerated exceptions, that

> this Chapter applies to . . . a transaction, regardless of its form, that creates by contract a security interest in any type of personal property,[288] . . . or fixtures, *but as to fixtures only if the security interest has been perfected by a fixture filing when the goods become fixtures*.[289]

Concordantly, § 9-334(a) states that "[a] security interest under this Chapter may not be created or perfected in goods *after they become fixtures*."[290] Additionally, under § 9-334(e)(1)(A), "[a] perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer[291] or owner of the real property if," among other requirements, it "is perfected by a fixture filing *before the interest of the encumbrancer or owner is of record*."[292] Finally, § 9-502(b), which enumerates the required contents of a fixture filing, reaffirms the temporal requirement that it must be filed *before* the fixtures are affixed by stating that in order "[t]o be sufficient, a financing statement . . . that is filed as a fixture filing and covers goods *that are to become fixtures* . . . ."[293]

These several temporal features explicitly stated in the relevant sections—"*are to become* fixtures";[294] "*made before* the goods become fixtures";[295] "*but only if they were* movable when a fixture filing covering them was made"[296]—clearly mandate that the filing of the fixture filing must precede the affixing of the equipment onto the immovable.

---

287. *Id.* § 10:9-102(a)(44)(i) (emphasis added).

288. As noted previously, personal property is defined in LA. REV. STAT. ANN. § 10:9-102(d)(15) (2021) as "movable property."

289. *Id.* § 10:9-109(a)(1) (emphasis added). It is suggested that greater clarity to this section would be provided if a comma preceded the word "only."

290. *Id.* § 10:9-334(a) (emphasis added).

291. An "'[e]ncumbrancer' means a person holding an encumbrance," while an "'[e]ncumbrance' means a right, other than an ownership interest, in real property." The latter term "includes mortgages and privileges on real property." *Id*. § 10:9-102(a)(32).

292. *Id.* § 10:9-334(e)(1)(A) (emphasis added).

293. *Id.* § 10:9-504(b) (emphasis added).

294. *Id.* § 10:9-102(a)(40).

295. *Id.*

296. *Id.* § 10:9-102(a)(44).

b. Fixture Filings Under the Louisiana U.C.C.

The financing statement that is intended to be filed as a fixture filing must meet the following requirements, in addition to the requirements for financing statements in general, to wit:

> **La. Rev. Stat. Ann. § 10:9-502. Contents of financing statement; time of filing financing statement**
>
> . . .
>
> (b) Real-property-related financing statements. To be sufficient, a financing statement . . . that is filed as a fixture filing and covers goods that are to become fixtures, must satisfy Subsection (a) and also:
> (1) indicate that it covers this type of collateral;
> (2) [Reserved.]
> (3) provide a description of the real property to which the collateral is related sufficient to cause the mortgage to be effective against third persons if the description were contained in a mortgage of real property filed for registry; and
> (4) if the debtor does not have an interest of record in the real property, provide the name of a record owner.[297]

If the requirements are fulfilled, and the other conditions for perfection are met, the security interest described in the fixture filing applies, superior to the secured position of the mortgagee imposed by the mineral lease mortgage.[298] If no proper fixture filing is filed *prior to* the affixing of the movables into the immovable, no security interest binding on third persons (including the mortgagee under the mineral lease mortgage) can be obtained under the Louisiana U.C.C.

c. The Mortgage Document Cannot Serve as a Fixture Filing

Although the National Revised article 9, specifically § 9-502(b)(2), provides that the financing statement filed as a fixture filing must "indicate that it is to be filed [for record] in the real property records,"[299] Louisiana's version of the U.C.C. did not adopt this provision. Rather, § 9-502(b)(2)

297. *Id.* § 10:9-502(b).

298. "The rules governing fixtures determine under which circumstances a security interest continues to exist in the goods after they become component parts of an immovable and what priority the security interest may have with respect to interests in or over the immovable." YIANNOPOULOS, *supra* note 67, at § 7:46.

299. LA. REV. STAT. ANN. § 10:9-502(b) (2021).

of the Louisiana U.C.C. is "reserved," that is, vacant and not used. Additionally, while the National Revised article 9 permits the filing of the mortgage document as a financing statement, such is not permitted in Louisiana. Section 9-502(c) of the Louisiana U.C.C. is similarly reserved, and the comments to this provision state, in pertinent part, the following with regard to this variation in the commercial laws:

> This section varies from revised U.C.C. Article 9 in order to preserve Louisiana's existing filing system. See Louisiana Official Revision Comment to R.S. 10:9-501. References in subsections (b) (2) and (c) to filings of financing statements in the real property mortgage records are omitted and reserved. All financing statements in Louisiana are filed in the uniform commercial code records, even those pertaining to real property related collateral.[300]

The purpose of the refusal to adopt the national version is commendable in that it accommodates the uniqueness of Louisiana's filing system.

4. Equipment as a Component Part

Louisiana Revised Statutes § 9:5391 reads as follows:

> **La. Rev. Stat. Ann. § 9:5391. Additions, accessions, and natural increases subject to mortgage**
> A mortgage of immovable property without further action attaches to present and future component parts thereof and accessions thereto, without further description and without the necessity of subsequently amending the mortgage agreement.[301]

This statutory provision, which results in the *per force* inclusion of component parts in a mortgage affecting the encumbered mineral lease, has received the approbation of the judiciary.[302] It is consistent with the conclusions resulting from an analysis of applicable codal provisions on this issue.

The notion of component parts is developed in a few articles of the Civil Code. Thus, as previously noted, article 465 states that "[t]hings

---

300. *Id.* § 10:9-502 cmt. a.

301. *Id.* § 9:5391.

302. Hyman v. Ross, 643 So. 2d 256, 261 (La. Ct. App. 2d Cir. 1994) ("Based upon [this statute], it is clear that the heating and air conditioning units are covered by the . . . previously recorded mortgage, (footnote omitted) which is superior to Carrier's vendor's privilege.").

incorporated into a tract of land, a building, or other construction, so as to become an integral part of it, such as building materials, are its component parts."[303] In an oil and gas operational context, things that would be fixtures, but for the temporal requirement that a fixture filing must precede their incorporation into the immovable, would be considered component parts.[304]

As noted, article 3286 of the Civil Code authorizes the granting of a mortgage covering "[t]he lessee's rights in a lease of an immovable with his rights in the buildings and other constructions on the immovable."[305] Comment (f) to article 3286 explains, in relevant part, that "[t]he reference to the lessee's rights in the buildings and other constructions on the immovable has been included for the same reasons as are discussed in comment (d), above, relative to the personal servitude of right of use."[306] That is to say, article 3286 borrows the characterization in comment (d), and makes those comments applicable to the mortgage of "the lessee's rights in a lease of an immovable." Comment (d) provides insight into article 3286(3), which is pertinent to the mortgage of a "servitude of right of use 'with the rights that the holder of the servitude may have in the buildings and other constructions on the land,'" and states that "[t]he classification of things established by Civil Code Articles 462-475 (rev. 1978), makes a building constructed on the land subject to a servitude of right of use is a distinct immovable. C.C. Art. 464 (rev. 1978)."[307] It continues to articulate that

> [o]ther constructions are movables, and thus neither a part of the servitude nor of the land. . . . Paragraph (3) is intended to make it clear that a mortgage of such a servitude covers the mortgagor's rights in such things, and in essence, treats them as though they were an integral part of the servitude for the purposes of the mortgage. It does not change their classification for other

303. LA. CIV. CODE ANN. art. 465 (2021).

304. An early case found an oil derrick to be a "building" for purposes of liability. Vinton Petroleum Co. v. L. Seiss Oil Syndicate, 139 So. 543 (La. Ct. App. 1st Cir. 1932). Later cases relied on *Vinton* for the proposition that "a permanent structure, such as the fixed drilling platform owned by Shell and which has a foundation in the soil, is indeed a building for purposes of that article, whether or not intended for habitation." Olsen v. Shell Oil Co., 365 So. 2d 1285, 1290 (La. 1978).

305. LA. CIV. CODE ANN. art. 3286 (2021).

306. *Id.* cmt. f.

307. *Id.* cmt. d.

purposes.[308]

Hence, article 469 of the Louisiana Civil Code embraces the proposition that "[t]he transfer or *encumbrance* of an immovable includes its component parts." Accordingly, the mortgage of a mineral lease—a mode of "encumbrance of an immovable"—covers these items by its own force and effect.[309]

Thus, a mortgage of "the lessee's rights in a lease of an immovable" would encumber the items of lessee's equipment, to the extent that they are component parts of the immovable to which they are attached. If a secured creditor perfects a security interest in identified equipment by the timely and proper filing of a fixture filing, then that security interest will persist on a superior basis to any subsequent mineral lease mortgage granted by the lessee on the same equipment.[310] Conversely, unless a security interest is perfected by a fixture filing prior to the incorporation of the equipment into the immovable, a fixture filing filed after the registry of a mineral lease mortgage will be ineffective and inferior to the mineral lease mortgage.[311] Nevertheless, the equipment will be encumbered by the mortgage as a component part of the immovable that is burdened by the mortgage.

IV. CUSTOMARY DOCUMENTATION IN A MORTGAGE OF MINERAL LEASES

A. Credit Agreement

While there is no statute mandating that the parties to a loan transaction must enter into a credit or loan agreement, it is obviously advantageous to the lender to do so. This is because Louisiana law disallows a cause of action by a debtor against a lender unless the credit agreement is in writing. Thus, Louisiana Revised Statutes § 6:1122 provides, as follows:

> **La. Rev. Stat. Ann. § 6:1122. Credit agreements to be in writing**

---

308. *Id.*

309. *Id.* art. 469.

310. "Except as otherwise provided in this Subsection, a security interest in goods that become fixtures continues in the fixtures if the security interest was perfected by a fixture filing when the goods become fixtures." LA. REV. STAT. ANN. § 10:9-334(a) (2021).

311. "A security interest under this Chapter may not be created or perfected in goods after they become fixtures." *Id.*

> A debtor shall not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.[312]

This statutory provision, sometimes called the Louisiana Credit Agreement Statute, has been interpreted and enforced by our courts on numerous occasions.[313]

For example, in *Jesco Construction Co. v. NationsBank Corp.*,[314] the Louisiana Supreme Court took up a question certified to it by the United States Fifth Circuit Court of Appeals: "whether the Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery."[315] The Louisiana Supreme Court examined the history of the cited statute and its prior precedent on the topic[316] and concluded as follows:

> We answer the question certified to us in the affirmative. The Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery asserted.[317]

The Louisiana Supreme Court reaffirmed this decision with respect to actions against lenders based on alleged "oral credit agreements" and added additional commentary on the statute in *King v. Parish National Bank*,[318] in which the court stated:

> that the Louisiana credit agreement statute precludes all claims, including bad faith breach and bad faith acts, when predicated on the existence and enforceability of oral credit agreements and implied agreements based on the creditor's and debtor's previous relationship. Furthermore, we find that the provisions of La. R.S.

---

312. *Id.* § 6:1122 (2021); *but see* Citizens Nat'l Bank v. Coates, 563 So. 2d 1265 (La. Ct. App. 1st Cir. 1990) and the discussion of this case as being contrary to the prohibitions of the Louisiana Credit Agreement Statute in Willenzik, *supra* note 166, at 29 n.116.

313. *See* Stephen P. Strohschein, La. Bankers Ass'n Bank Counsel Comm. Member, Recent Lender Liability Litigation & Tips for Managing Risk of Lender Liability (Dec. 12, 2019).

314. Jesco Const. Co. v. NationsBank Corp., 830 So. 2d 989 (La. 2002).

315. *Id.* at 990.

316. Whitney Nat'l Bank v. Rockwell, 661 So. 2d 1325 (La. 1995).

317. *Jesco*, 830 So. 2d at 992.

318. King v. Par. Nat'l Bank, 885 So. 2d 540 (La. 2004).

> 6:1121 *et seq.,* extend to bar claims based on oral credit agreements against a creditor's employees when the employees are acting within the course and scope of employment.[319]

However, the court then noted that the Louisiana Credit Agreement Statute "is inapplicable to the bad faith claims against the appraisers and appraisal company since these claims are outside the parameters of the statute."[320] Certainly, depending upon the magnitude and nature of the secured debt, prudence and policy dictate that the lender and its borrower execute a written credit agreement.

B. Mortgage

A mineral lease mortgage will contain all of the necessary provisions for the confection of a conventional mortgage under Louisiana law but will also include many provisions that are necessitated or justified by the nature of the collateral brought under the mortgage.

1. Customary Representations and Warranties

The mortgage document will customarily contain an array of representations and warranties by the mortgagor with respect to the status of collateral, its business activities, and similar matters. It is imperative that the mortgagor be confident in the accuracy of these representations and warranties as a breach of such typically constitutes an event of default. Typical of the enumerated events of default is a statement such as the following, to wit:

> Any representation or warranty made or deemed made by Borrower or any Obligated Party (or any of their respective officers) in any Loan Document or in any certificate, report, notice, or financial statement furnished at any time in connection with this Agreement shall be false, misleading or erroneous in any material respect when made or deemed to have been made.

Some of the more customary representations and warranties that one might encounter in a mineral lease mortgage include the following (with the defined terms indicated):

- *Compliance with Laws*—Mortgagor and the Mortgaged Property are, in all material respects, in compliance with all applicable

---

319. *Id.* at 542.
320. *Id.*

federal, state and local laws, regulations, and ordinances. All producing Wells located on the Subject Leases have been and will be drilled, operated, and produced in conformity with all applicable laws and rules, regulations, and orders of any Governmental Authority having jurisdiction, including the Louisiana Office of Conservation. None of such Wells is deviated from the true vertical more than the maximum permitted by applicable laws, rules, regulations, and orders. All such Wells are in fact bottomed under and are producing from, and the Well bores are wholly within, the Leased Premises, or lands validly pooled or unitized therewith.[321]

- *Obligations under Marketing Contracts*—Mortgagor is not obligated in any material respect by virtue of any prepayment made under any Marketing Contract containing a take-or-pay or "prepayment" provision or under any similar agreement to deliver Hydrocarbons produced from or allocated to any of the Mortgaged Property at some future date without receiving full payment therefor at the time of delivery.[322]
- *Title to Mortgaged Property*—Mortgagor hereby declares that the Mortgaged Property stands registered in the name of Mortgagor and that it has not been heretofore alienated by Mortgagor and that there are no Liens, of record or otherwise, against such Property subject to Permitted Liens.[323]

---

321. A lender is certainly justified in knowing that its borrower is operating in full compliance with all applicable laws as well as the orders, rules, and regulations of any applicable governmental authority having jurisdiction of the activity in question, as a failure to comply could potentially result in a compliance order or order to shut-in a well. This representation and warranty might also specify particular laws, including environmental laws.

322. A gas-purchase contract might contain a take-or-pay clause, which obligates the purchaser to take a prescribed quantity of gas or if it does not do so, to pay for a minimum annual contract volume of natural gas that the producer has available for delivery. The contract further provides that the purchaser who pays for, but does not take, the gas has the right to later "make up" the deficiency. Certainly, the lender would want to know if its entitlement to a share of the revenue stream might be disrupted at a later date. *See* Frey v. Amoco Prod. Co., 603 So. 2d 166, 171 (La. 1992); *see also* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 4-25(d)(7).

323. It is obvious that a lender would want assurance that the borrower's title to the mineral leases to be encumbered by a mineral lease mortgage is merchantable, both as to essential ownership as well as to the net revenue represented by each lease. Title is unmerchantable when it is suggestive of litigation. Marsh v. Lorimer, 113 So. 808 (La. 1927).

- *Subject Leases in Effect*—All of the Subject Leases are in full force and effect. All delay rentals, shut-in rentals or royalties, "Pugh Clause" rentals, royalties and similar payments due and payable by Mortgagor or its predecessors-in-interest under the Subject Leases or in connection therewith have been duly paid or provided for. All material covenants, express or implied, in respect of the Subject Leases, or of any assignment of any of the Subject Leases, which may affect the validity of, or the title of Mortgagor in and to, any of the Subject Leases, have been performed.[324]
- *Interests Free of Liens*—Except for Permitted Liens, the interests of Mortgagor in the Mortgaged Property are free and clear of all Liens and all gross production taxes and other taxes as to which non-payment could result in a Lien against any of the Mortgaged Property have been paid.[325]
- *Taxes and Assessments*—Mortgagor declares that all severance, production and other similar taxes payable with respect to the production from the Subject Leases have been and will be timely and correctly paid up to and including the year immediately preceding the year in which this Act is executed.[326]

---

324. "A mineral lease is 'perishable.' Unless it is properly and timely maintained in force and effect, it will come to an end at some determinable date. This occurrence of the 'perishing' of the mineral lease is called 'lease expiration,' or 'lease termination,' and it is avoided by 'lease maintenance.'" OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 4-03; *see also* LA. REV. STAT. ANN. § 31:133 (2021) ("A mineral lease terminates at the expiration of the agreed term or upon the occurrence of an express resolutory condition."). Hence, this representation is intended to give assurance to the lender that the lessee-mortgagor under a mineral lease mortgage is properly maintaining the encumbered mineral leases in force and effect.

325. It is self-evident that the mortgagee would want to maintain a first-priority ranking.

326. Severance taxes are assessable against oil and gas as "severed," and such taxes

> shall operate as a first lien and privilege on the natural resources which lien and privilege shall follow the natural resources into the hands of third persons whether in good or bad faith, and whether the same be found in a manufactured or unmanufactured state. In addition, oil and gas leases, interests and minerals, mineral rights, royalty interests, timber contracts, and rights of any kind to the ownership of any natural resource severed from the soil or water, shall be subject to seizure and sale for the payment of the tax levied in this Part in preference to all other claims, liens, and privileges.

- *Qualification to Hold Leases Issued by Public Body or Agency*—Mortgagor is and, for so long as any part of the Subject Indebtedness remains unpaid, will remain duly qualified to own or hold oil and gas leases as issued by any Governmental Authority.[327]
- *Obligation to Pay Costs*—No operating or other agreement to which Mortgagor is a party or by which Mortgagor or the Subject Leases is bound, affecting any part of the Mortgaged Property, requires Mortgagor to bear any of the costs relating to the Subject Leases greater than the interest of the Mortgagor therein.[328]

An action in reference to a breach of an express representation or warranty is subject to a liberative prescription of ten years.[329]

2. Customary Covenants

It is a foundational principle of banking that a lender should be able to rely upon the existence of the collateral throughout the life of a loan. The continued existence and availability of collateral during the life of a proposed loan is a risk factor considered at the time a loan is made. When a lender makes a secured loan, it is vital that the collateral is safeguarded so as to manage the risk of loss by mortgage lenders.

To this end, a credit agreement or the mortgage (or both) customarily includes an array of unique covenants to allow the lender to monitor the activities of the borrower, and to inform itself of the borrower's operations, plans, and projections. These types of safeguards are widely used in both commercial and residential mortgage loans and are intended to protect and

---

LA. REV. STAT. ANN. § 47:632(A) (2021).

327. As discussed in Section V.D.5 *infra*, it is necessary that the owner of leases burdened by the mineral lease mortgage, including any successor at a judicial sale, be duly qualified or registered to hold title to the leases in accordance with the requirements of governmental office having jurisdiction over E&P activities.

328. In extending credit to a lessee pursuant to a mineral lease mortgage, the lender typically makes an evaluation of the quantity of production to which it would be entitled in the event of a foreclosure. Not only is the lender interested in the value of the revenue stream (called "net revenue interest"), but it would also want to make sure that the borrower is not disproportionately liable for expenses (called "working interest").

329. Olinde Hardware & Supply Co. v. Ramsey, 98 So. 2d 835 (La. Ct. App. 1st Cir. 1957); Hodges v. Heier, 159 So. 2d 791 (La. Ct. App. 4th Cir. 1964).

preserve the property mortgaged, including requiring the perpetuation of the mineral leases by the mortgagor-debtor.[330]

Due to the nature of oil and gas as an item of collateral, a mortgage or security agreement customarily contains unique covenants appropriate to the operation or maintenance of oil and gas interests or mineral rights. These are justified by the precarious nature of mineral leases as the source of collateral for loan security.

By way of illustration, a mortgage or security agreement might include provisions regulating the following matters, in addition to the customary mortgage provisions:

- *Agreement of Mortgagor Relative to Operation of Mortgaged Property*—The lender will often include provisions that restrict the manner in which the borrower will operate the property in order to ensure compliance with applicable laws and the maintenance in force and effect of the collateral.
- *Prohibition of Advance Payment Contracts*—This provision is often included as a representation or warranty on the part of the borrower that no portion of the borrower's future revenue stream is committed to any obligation such as take-or-pay, whereby future revenue will be diverted to another party, thereby diminishing the mortgagee's collateral position.
- *Compliance with Environmental Laws; Indemnity*—Because of the nature of oil and gas exploration, and the concomitant opportunity to become exposed to environmental liability, a lender will often require that its borrower conduct its operations in a specified manner, and certainly in a manner which complies with applicable environmental regulations.[331]
- *Keeper of Mortgaged Property*—In order to ensure that the mortgaged property is properly and efficiently operated after seizure and prior to the judicial sale, the mortgagee will often designate a keeper of the property in the mortgage document. This is discussed below.[332]

---

330. Protections widely included in mortgage loan documentation include the following requirements of the borrower: to maintain property insurance, repair any damage, maintain the property to prevent it from deteriorating or decreasing in value due to its condition, refrain from any major alterations to the property without the lender's knowledge, and pay taxes promptly to prevent loss of property at tax sale.

331. Some comfort might be afforded to secured lenders by reason of LA. REV. STAT. ANN. § 9:5395 (2021).

332. *Id.* § 9:5131, discussed in Section V.D.1 *infra*.

- *Incorporeal Rights Incidental or Accessory to Mortgaged Property*—Louisiana Revised Statutes § 9:5386 permits parties to collaterally assign certain incorporeal rights, including proceeds attributable to the insurance loss of mortgaged property.
- *Obtain Consent of Mortgagee to Release an Item of Collateral*—The mortgagee is entitled to ensure that its collateral is not withdrawn from the mortgage by a release granted by the borrower-lessee except when the mineral lease has already expired.[333]

Commentators have recognized the propriety of including an array of covenants in a credit agreement or mortgage executed by a lessee-mortgagor. For example, in an article entitled *Some Aspects of Oil and Gas Financing*, the author explained:

> The instrument creating the pledge of an oil and gas property to secure payment of a loan is customarily in the form of a . . . mortgage which, together with the note, is the most important document to the banker. . . . In a few brief words, the special provisions we like are as follows:
>
> (1) That the mortgagor will comply with all State and Federal Regulations regarding the production of oil and gas.
>
> (2) That he will keep his leases and mineral rights in full force and effect.
>
> (3) That he will comply with and fulfill all his obligations under the leases.
>
> (4) That he will operate his leases in a good and workmanlike manner and in accordance with best engineering practices.
>
> (5) That he will permit the mortgagee or its representatives to inspect the properties at all reasonable times.
>
> (6) That he will furnish the mortgagee with a monthly report of his operations, if requested.
>
> (7) That the mortgage not only secures the note described therein, but also any and all renewals, extensions and rearrangements of the debt.
>
> (8) That the mortgage secures the payment of all future advances and loans as well as other obligations to the bank, whether fixed or contingent, primary or secondary, express or implied, or past, present or future, and whether created or not

333. This covenant was an important feature in the *Gloria's Ranch* case discussed in Section II.C.4 *supra*.

under the terms and provisions of the mortgage.[334]

3. Knowing Inclusion of Unenforceable Provisions in the Mineral Lease Mortgage

Although each mineral lease mortgage document is unique insofar as it constitutes a distinct mortgage transaction, prevalent forms of mortgage utilized in a collateral-based lending transaction, such as a mineral lease mortgage, also tend to include many provisions that, albeit perhaps varying in verbiage or manner of expression, are to the same essential import.

Typically, mortgage documents commonly encountered in such asset-supported lending transactions frequently contain incidental, non-essential provisions that are incompatible with certain aspects of Louisiana law. If the lender is not located in the Bayou State, it is the author's experience that these mortgage forms are often prepared by lawyers in another state, often Houston or Dallas, Texas. These mortgage documents are remarkably similar in content and substance.

While such incidental terms are not enforceable, their inclusion in the mortgage documents would not necessarily invalidate the mortgage transaction (even if the mortgage does not contain a severability clause),[335] unless the terms pertain to an essential codal requirement that is necessary for the confection of a valid mortgage.[336]

Examples of unenforceable, yet commonly encountered, clauses of this type include the following:

- A future-property clause that purports to subject to the mortgage property that might be acquired in the future by the mortgagor, but that is not described in the mortgage with particularity.

---

334. John R. Scott, *Some Aspects of Oil and Gas Financing*, 5 PROC. ANN. INST. ON OIL & GAS L. & TAX'N 325, 330–31 (1954). *See also* Hubert Dee Johnson, *Legal Aspects of Oil and Gas Financing*, 9 PROC. ANN. INST. ON OIL & GAS L. & TAX'N 141, 157 (1958), for a similar list of typical covenants often encountered in an RBL.

335. A common example of such a clause reads: "Should any paragraph, sentence or clause of this Act be determined or held to be invalid by any court of competent jurisdiction, the other provisions hereof shall not be affected thereby but shall remain in full force and effect."

336. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 12-06(e); *see* LA. CIV. CODE ANN. art. 2034 (2021) ("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.").

- Waiver of certain statutorily mandated notices.[337]
- Authorization of the filing of the mortgage document as a financing statement.[338]

Typically, a practitioner might not object to the inclusion of such clauses, but rather, might render a transaction or closing opinion in which the lawyer either opines as to the invalidity of such clauses or expressly states that no opinion is expressed with respect to such matters. One reason that the clause, albeit unenforceable, is permitted to remain in the mortgage instrument is that the possibility always exists that the legislature will, at a future date, amend the law of mortgage in a way that validates such provisions.[339]

C. Security Agreement

A security agreement is "an agreement that creates or provides for a security interest."[340] "A security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against

---

337. Although many mortgages purport to waive the notice of seizure required by LA. CODE CIV. PROC. ANN. art. 2721 (2021), such waivers are ineffective, according to the jurisprudence. *See id.* art. 2721, cmt. b; First Fed. Sav. & Loan Ass'n v. Blake, 465 So. 2d 914, 918 (La. Ct. App. 2d Cir. 1985) ("Service under this article is mandatory and may not be waived."); Hibernia Nat'l Bank v. Con-Agg Equip. Leasing Corp., 478 So. 2d 976 (La. Ct. App. 5th Cir. 1985); Gen. Motors Acceptance Corp. v. Henderson, 228 So. 2d 323 (La. Ct. App. 3d Cir. 1969); Mack Trucks, Inc. v. Magee, 141 So. 2d 85 (La. Ct. App. 1st Cir. 1962).

338. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 12-09(b)(3)(ii).

339. One commentator offered a different plausible explanation as to why parties to a contract continue to include provisions that are demonstrably unenforceable, suggesting that

> [o]ne answer is where the making of the promise—not its legal enforceability—is the point of the exercise. The so-called "gentlemen's agreement" is an example. Although much derided, the essence of such an agreement is that it depends on the honor of the parties, not the coercive power of the law. A party might seek such a commitment if it thought that the other's sense of honor, ethics, morality, self-interest, or its fear of reputational consequences in a community whose confidence it needs would lead it to comply regardless of the absence of legal sanctions.

Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1134–35 (2009).

340. LA. REV. STAT. ANN. § 10:9-102(a)(74) (2021).

creditors."[341] A security agreement can be a stand-alone document or, as is typical with a mineral lease mortgage, contained within the mortgage document.[342]

1. UCC-1 Financing Statement

For the security agreement to constitute notice to third persons, it is necessary to file a financing statement.[343] Because a mineral lease mortgage has, as its principal source of repayment, the proceeds that accrue to the working interest held by the borrower, the definition of as-extracted collateral is relevant and determinative for the filing office. The definition of this important term is set forth in § 9-102(a)(6) of the Louisiana U.C.C.[344]

Section 9-301(4) establishes that Louisiana law controls the filing of a financing statement with respect to collateral that is composed of as-extracted collateral, with certain exceptions not typically pertinent to a mineral lease mortgage: "The effect of perfection or nonperfection, and the priority of a security interest in collateral: The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral."[345]

Having thus established that the law of Louisiana is the relevant law pertinent to as-extracted collateral produced by a well located in this state, § 9-501(a)(4) specifies the applicable filing office for a financing statement covering as-extracted collateral.[346] The requirements for the contents of a financing statement covering as-extracted collateral are set forth in § 9-502(a) and (b).

2. Letter to Purchaser of Production

While the secured creditor enjoys a pledge or assignment of production, typically, these funds continue to be paid to the lessee until an event of default occurs. At that time, the secured creditor will need a

341. *Id*. § 10:9-201(a).

342. LA. CIV. CODE ANN. art. 3170 (2021), *see* text associated with note 101 *supra*.

343. LA. REV. STAT. ANN. § 10:9-310(a) (2021).

344. *Id.* § 10:9-102(a)(6). *See* text associated with note 274 *supra*. As previously discussed, *see supra* Section III.B.2 hereof, this definition pertains to "minerals," but not explicitly "other substances."

345. LA. REV. STAT. ANN. § 10:9-301 (2021).

346. *Id.* § 10-9-501(a)(4). *See* text associated with note 365 *infra*.

mechanism to direct the purchaser of production to pay such proceeds to the creditor. This is accomplished by a simple letter, signed at closing by the borrower, that authorizes and directs the purchaser of production to pay proceeds to the secured party after receipt of the letter.

D. Filing of Collateral Documentation

1. Mortgage

A mineral lease mortgage, being a mortgage of immovable property, must be filed for recordation in the mortgage records of the parish in which the encumbered assets are situated.[347] This is provided in article 3346A of the Civil Code:

> **Art. 3346. Place of recordation; duty of the recorder**
> A. An instrument creating, establishing, or relating to a mortgage or privilege over an immovable, or the pledge of the lessor's rights in the lease of an immovable and its rents, is recorded in the mortgage records of the parish in which the immovable is located. All other instruments are recorded in the conveyance records of that parish.
> B. The recorder shall maintain in the manner prescribed by law all instruments that are recorded with him.[348]

It is not uncommon for a mineral lease mortgage to cover many mineral leases in multiple parishes. This common circumstance is addressed by article 3355 of the Civil Code, which allows for the legal descriptions of the encumbered leases to be adjusted so that only the leases in a particular parish are described in the mortgage (whether an original or certified copy), which is filed in one of the relevant parishes. Thus, article 3355 reads as follows:

> **Art. 3355. Mortgage, pledge, or privilege affecting property in several parishes**
> An act of mortgage, contract of pledge, instrument evidencing a privilege, or other instrument that affects property located in more than one parish may be executed in multiple originals for re-cordation in each of the several parishes. An original that is filed with a recorder need only describe property that is within the parish in which it is filed.

---

347. LA. CIV. CODE ANN. art. 3346(A) (2021).
348. *Id*. art. 3346.

> A certified copy of an instrument that is recorded in the records of a parish need only describe property that is within the parish in which it is filed.[349]

With respect to a mineral lease granted by the State Mineral and Energy Board, Louisiana Revised Statutes § 30:128(A) requires that any "transfer or assignment in relation to any lease of minerals or mineral rights owned by the state" must be "approved by the State Mineral and Energy Board."[350] This means that, in addition to filing the assignment (including a Sheriff's Deed resulting from a judicial sale) in the conveyance records of the parish in which the encumbered assets are situated, such assignment must be submitted to the Board for approval.[351]

This statutory requirement of approval by the State Mineral and Energy Board does not include a mortgage affecting a state mineral lease as Louisiana Revised Statutes § 30:128(C) states that "[a] transfer for purposes of this Section shall not be deemed to occur by the granting of a mortgage in, collateral assignment of production from, or other security interest in a mineral lease or sublease . . . ."[352]

A mineral lease mortgage that encumbers oil and gas leases on the Outer Continental Shelf presents a particularly important dynamic since, by definition, the lease does not cover land within the geographical boundaries of the State of Louisiana as to which Louisiana filing requirements would indubitably apply, but rather, water bottoms in the Gulf of Mexico within the jurisdiction of the federal government. Where is such a mineral lease mortgage to be filed?

The first task is to determine the state that is adjacent to the offshore block in question. If the mortgage encumbers a federal offshore lease covering a block generally in the center of the State of Louisiana, little difficulty is presented. However, if the relevant offshore block is located in the far western or far eastern portion of the Gulf of Mexico, other states might be in play—Texas to the west (generally south or southwest of Cameron Parish) or Mississippi or Alabama to the east (conceivably involving a variety of parishes in the southeastern part of the state).

Determination of the adjacent state is not always an easy task. For example, in *Snyder Oil Corp. v. Samedan Oil Corp.*,[353] a suit was filed in

---

349. *Id*. art. 3355.

350. LA. REV. STAT. ANN. § 30:128(A) (2021).

351. *See infra* Section V.D.5.b hereof relative to the necessity to register with the State Mineral and Energy Board in order to hold an interest in a state mineral lease.

352. LA. REV. STAT. ANN. § 30:128(C) (2021).

353. Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521 (5th Cir. 2000).

the Western District of Louisiana to seek a declaratory judgment concerning a joint operating agreement. The defendant challenged the venue of the suit and urged the court to transfer to the Southern District of Alabama, and the motion was granted. After an extensive discussion of the standards by which "adjacency" is to be determined, the Fifth Circuit affirmed the transfer of the case to Alabama, finding it to be the adjacent state for purposes of the Outer Continental Shelf Land Act (OCSLA).[354]

If, as a result of a factual analysis of the type employed in the *Snyder* case, Louisiana is determined to be the adjacent state,[355] the next issue is whether any portion of Louisiana recording law has been preempted by federal law under the OCSLA. In *Union Texas Petroleum Corp. PLT Engineering, Inc.*,[356] the court stated:

> OCSLA adopts this state law and extends the boundaries of Vermilion parish to the outer limits of the OCS by providing that state law applies to the subsoil and seabed of the OCS and all artificial islands thereon "which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ." Thus the liens were actually filed in the parish where the property is located.[357]

While it is not entirety free from doubt, the custom among lenders and their counsel is to file mortgages affecting federal offshore leases in the parish records[358] and the records of the Bureau of Ocean Energy Management (BOEM). The filing of a mortgage with BOEM is said to be "non-required," but that office will accept them for filing and place them in the associated lease file.

---

354. 43 U.S.C. § 1331.

355. Federal law provides as follows:

> To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

§ 1333(A)(2)(A).

356. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043 (5th Cir. 1990) (citation omitted) (citing 43 U.S.C. § 1333(a)(2)(A)).

357. *Id*. at 1052.

358. *See* LA. REV. STAT. ANN. § 49:6(A) (2021).

2. Security Agreement

Article 3169 of the Louisiana Civil Code instructs as follows:

> **Art. 3169. Effectiveness against third persons**
> The pledge of the lessor's rights in the lease of an immovable and its rents is without effect as to third persons unless the contract establishing the pledge is recorded in the manner prescribed by law.
> Nevertheless, the pledge is effective as to the lessee from the time that he is given written notice of the pledge, regardless of whether the contract establishing the pledge has been recorded.[359]

The comment to this article states, in part, as follows:

> Recordation of a contract establishing a pledge of the lessor's rights in the lease of an immovable and its rents is required for the pledge to have effect against third persons other than the lessee. To that extent, the Article restates a requirement that was contained in former R.S. 9:4401. Unlike that statute, however, this Article does not specify the place where recordation must occur. The place of recordation is specified in Article 3346 (Rev. 2014), which changes the law by requiring recordation in the mortgage records, rather than in the conveyance records, as former R.S. 9:4401 previously provided.[360]

Noting the reference in the previous comment to article 3346, the comment to Civil Code article 3346 further clarifies where certain instruments are to be recorded, as follows:

> Effective as of January 1, 2015, this Article provides that a pledge of the lessor's rights in the lease of an immovable and its rents is recorded in the mortgage records of the parish in which the immovable is located. This represents a change in the law, which formerly required recordation in the conveyance records. For transitional rules applicable to the continued effectiveness of assignments of leases and rents filed in the conveyance records in accordance with former R.S. 9:4401 prior to January 1, 2015, as well as rules that apply to the reinscription, release, transfer,

---

359. LA. CIV. CODE ANN. art. 3169 (2021).

360. *Id*. art. 3169 cmt. As noted previously, Act No. 281 became effective on January 1, 2015. The transitional filing rules are set forth in LA. REV. STAT. ANN. § 9:4403 (2021).

> amendment, or other modification of those assignments, see R.S. 9:4403. After January 1, 2015, despite the filing of the original assignment of leases and rents in the conveyance records, an instrument effecting the reinscription, release, transfer, amendment, or other modification of the assignment must be filed in the mortgage records, and a filing in the conveyance records is neither necessary nor effective to cause the instrument to have effect against third persons.[361]

The mineral lease mortgage will contain a security agreement such that the filing of the mortgage document itself in the mortgage records will obviously carry with it the filing of the security agreement.

With respect to a stand-alone security agreement, not embedded in a mortgage,[362] article 3346(A) of the Louisiana Civil Code states that it is also to be recorded in the mortgage records of the parish in which the immovable is located.[363] This is a change in the law as, prior to Act No. 281, a pledge was to be recorded in the conveyance records.

3. Financing Statement

As is more fully discussed in Section IV.D.3, a mineral lease mortgage containing a security agreement creating and imposing a security interest in hydrocarbons produced in respect of the lessee's working interest brings into play the notion of as-extracted collateral as defined in Louisiana Revised Statutes § 10:9-102(a)(6).[364] Such being the case, the following section of the Louisiana U.C.C. dictates that a financing statement be filed in the filing office in Louisiana where the wellheads are located, rather than in the state in which the debtor is located. Section 9-501(a)(4) of the Louisiana U.C.C. states, in pertinent part, as follows:

> **La. Rev. Stat. Ann. § 10:9-501. Filing office**
> (a) If the local law of this state governs perfection of a security

361. *Id*. § 9:4403 cmt.

362. "A pledge of the lessor's rights in the lease of an immovable and its rents *may* be established in an act of mortgage of the immovable. In that event, the pledge is given the effect of recordation for so long as the mortgage is given that effect and is extinguished when the mortgage is extinguished." LA. CIV. CODE ANN. art. 3170 (2021) (emphasis added). The use of the permissive word "may" indicates that the pledge may also be confected by separate written contract. Regardless, it must be recorded in the mortgage records of the parish where the immovable is located.

363. *Id*. art. 3364(A).

364. *See* text associated with note 274.

> interest, the office in which to file a financing statement to perfect the security interest is:
>
> . . .
>
> (4) The clerk of court of any parish, in all other cases, including when the collateral is as-extracted collateral or goods that are to become fixtures and the financing statement is filed as a fixture filing.[365]

It is virtually impossible to improperly file a financing statement in Louisiana. It is to be filed in "any parish," without regard to the location of the collateral, the debtor, or the secured party. Having chosen a parish, future filings in reference to that initial filing are to be filed in that selected parish. This would include amendments, assignments, continuation statements, or termination statements with respect to a filed financing statement.[366]

V. SPECIAL CONSIDERATIONS IN THE ENFORCEMENT OF A MINERAL LEASE MORTGAGE

In Louisiana, the enforcement of mortgages on immovable property or of security interests on movable property may only be enforced through judicial process.[367] The enforcement may be either by ordinary process or executory process. The unique nature of the collateral under a mineral lease mortgage presents a myriad of other issues.

A. Modes of Enforcement

Ordinary process is a lawsuit, pure and simple, which would conclude after a trial on the merits. Of course, in a proper case, a final judgment recognizing the security right may be obtained by a motion for summary judgment.[368] Executory proceedings are those which are "used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law."[369]

To illustrate the time delays associated with each form of proceeding, an ordinary proceeding could take a significant period of time

365. LA. REV. STAT. ANN. § 10:9-501(a)(4) (2021).

366. These actions are accomplished by filing a UCC-3.

367. However, a secured party may take possession of collateral as provided in LA. REV. STAT. ANN. § 10:9-609 (2021).

368. LA. CODE CIV. PROC. ANN. art. 3722 (2021).

369. *Id*. art. 2631.

(conceivably measured in years), depending upon the opposition presented by the debtor-defendant, discovery, court schedules, etc. By comparison, an enforcement by executory process might take as little as 60 to 75 days, possibly slightly less or slightly more, depending, understandably, on the workload of the parish involved—an executory proceeding prosecuted in a rural parish would probably be concluded more quickly than one in a more densely populated parish.[370]

The most expeditious means of enforcing a mortgage is by executory process. Article 2631 of the Louisiana Code of Civil Procedure, reads:

> **Art. 2631. Use of executory proceedings**
> Executory proceedings are those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law.[371]

It is not *every* mortgage or privilege that can be enforced by executory proceedings, but only a mortgage or privilege "evidenced by an authentic act importing a confession of judgment."[372] An authentic act is an act that is executed before a notary public and two witnesses.[373] Article 2632 of the Louisiana Code of Civil Procedure states that "[a]n act evidencing a mortgage or privilege imports a confession of judgment when the obligor therein acknowledges the obligation secured thereby, whether then existing or to arise thereafter, and confesses judgment thereon if the obligation is not paid at maturity."[374]

In summary, an enforcement by ordinary proceeding entails a lawsuit, with all attendant procedural delays, citation, trial, etc. The most expeditious mode—if available—is by executory process. Although still filed as a court proceeding, executory process is not subject to all of the procedural delays inherent in an ordinary enforcement action. The ultimate consequence of an executory proceeding is a judicial sale—after appraisement (unless waived, in which event the creditor cannot obtain a

---

370. *See* Patrick S. Ottinger, *Enforcement of Real Mortgages by Executory Process*, 51 LA. L. REV. 87 (1990) [hereinafter Ottinger, *Enforcement of Real Mortgages*].

371. LA. CODE CIV. PROC. ANN. art. 2631 (2021).

372. *Id*. art. 2632 (2021).

373. LA. CIV. CODE ANN. art. 1833 (2021).

374. LA. CODE CIV. PROC. ANN. art. 2632 (2021).

deficiency judgment) and legal advertisement—at which the property is sold to the highest bidder or adjudicated to the creditor.[375]

B. Mortgage Certificates—A Word of Caution When the Mortgaged Property Is Composed of Multiple Mineral Leases

There is no requirement under Louisiana law that the creditor seeking to enforce a mineral lease mortgage must obtain a mortgage certificate.[376] If there is a duty to obtain a mortgage certificate, it is a duty placed upon the sheriff in connection with the judicial sale that the sheriff administers. Article 2334(A) of the Louisiana Code of Civil Procedure states that "the sheriff shall also read aloud a mortgage certificate and any other certificate required by law or otherwise provide, at least twenty-four hours prior to the sale, a copy of such certificates to the public by means of public posting, written copies, electronic means, or by any other method."[377] Nevertheless, the seizing creditor might find it prudent to obtain a mortgage certificate in order to ascertain parties to whom a *Mennonite* notice ought to be sent.[378]

Here is a word of caution about ordering a mortgage certificate from the clerk of court where the collateral is composed of mineral leases, often *many* mineral leases. It is this author's experience that many clerks of court are unfamiliar with this type of collateral (they more frequently encounter a mortgage encumbering land via traditional legal descriptions). Where the collateral as to which a mortgage certificate is desired is composed of a long listing of mineral leases—typically described by reference to the lessor, the lessee, the date, and the recordation data pertinent to the leases—this author has encountered clerks who state, prior to the conduct of the necessary research, that the cost of the certificate will be so much (say, $10) per mineral lease, rather than being aware that the long list of mineral leases really constitutes one piece of property (albeit a "block" of

375. *See* Ottinger, *Enforcement of Real Mortgages*, *supra* note 370, at 130.

376. A mortgage certificate is a certificate prepared by a clerk of court, based upon research of the mortgage records, which attests to the existence of mortgages, privileges, or other real encumbrances revealed by recorded instruments. A mortgage certificate can be special (meaning it only lists encumbrances bearing against a distinctly described parcel of land) or general (in that it reflects any and all encumbrances pertaining to a named person, without regard to legal descriptions). Prior to 1978, article 3664 of the Civil Code required that a notary who passes an act of sale or mortgage must obtain a mortgage certificate; that article was repealed by Act No. 651, § 3, of 1978.

377. LA. CODE CIV. PROC. ANN. art. 2334(A) (2021).

378. Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

property) as to which a lesser amount should be charged. Warning: If you want a mortgage certificate on mineral leases, have this conversation with the clerk and ask for a cost estimate before ordering it.

C. Appraisal

Prior to the Louisiana Supreme Court decisions in *Guaranty Bank of Mamou v. Community Rice Mill, Inc.*[379] and *First Guaranty Bank, Hammond, La. v. Baton Rouge Petroleum Center, Inc*.,[380] case law indicated that a creditor could not obtain or pursue a deficiency judgment after a judicial sale conducted without an appraisal *or* a judicial sale preceded by an otherwise invalid executory proceeding.[381] In these cases, the court limited the circumstances that disallowed a deficiency judgment solely to defects pertaining to the appraisal of the property.[382]

The law does not require that the appraiser be a disinterested party.[383] Indeed, that a "party to an action or proceeding" may serve as an appraiser is implicitly recognized in Louisiana Revised Statutes § 13:4366A(3), which provides that "[a] party to an action or proceeding who acts as an appraiser is not entitled to a fee."[384] Appraisers should personally examine and inspect the seized property[385] and should possess some degree of knowledge and experience with regard to the type of property to be appraised.[386] In the case of an appraisal in connection with the enforcement of a mineral lease mortgage, the property is typically appraised by a reservoir engineer or other professional.

---

379. Guar. Bank of Mamou v. Cmty. Rice Mill, Inc., 502 So. 2d 1067 (La. 1987).

380. First Guar. Bank v. Baton Rouge Petroleum Ctr., Inc., 529 So. 2d 834 (La. 1987).

381. LA. REV. STAT. ANN. § 13:4106 (2021).

382. *See* Michael H. Rubin & Jamie D. Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 LA. L. REV. 783, 804 (2009).

383. Consolidation Loans, Inc. v. Guercio, 200 So. 2d 717 (La. Ct. App. 1st Cir. 1966).

384. LA. REV. STAT. ANN. § 13:4366(A)(3) (2021).

385. "A valuation of property absent actual knowledge of the property attained via an inspection is not an *appraisement*." Ford Motor Credit Co. v. Blackwell, 295 So. 2d 522, 525 (La. Ct. App. 4th Cir. 1974) (Morial, J., concurring).

386. *See also* Citizens Bank v. Am. Druggists Ins. Co., 471 So. 2d 1119, 1122 (La. Ct. App. 3d Cir. 1985) ("These statutes contemplate that the appraisal be made by appraisers who are competent by education and/or experience to appraise the particular object to be sold and who actually appraise the object.").

The property seized must be appraised with such minuteness that it can be sold separately or together.[387] One case dealing with the appraisal of equipment emphasizes the importance of a minute appraisal. In *International Harvester Credit Corp. v. Majors*,[388] the defendant-debtor opposed a deficiency judgment on the ground that the six encumbered pieces of farm equipment had not been properly appraised. In the executory proceedings, the appraisers listed the pieces of farm equipment separately although the appraisal form in the pleadings indicated that the property was appraised *in globo* for a lump sum. Noting that this appraisal would not enable the separate sale of the equipment, the court reversed a summary judgment in favor of the plaintiff. The court went on to state that

> [t]he obvious purpose of minute appraisals under the statute is to protect debtors from unnecessary deficiency judgments by encouraging more competitive bidding on each piece of equipment sold rather than forcing prospective buyers to bid on the equipment in globo. It is certainly possible, if not probable, that more money could have been realized from the sale had the farm equipment been sold separately. In order to accomplish that, each piece of equipment would, of necessity, have had to be appraised separately. The record in this case leads us to conclude that this obviously was not done.[389]

This requirement of a minute appraisal that will permit a separate sale of the mortgaged property creates certain interesting situations not yet addressed by the courts. For example, in connection with the appraisal of a six-acre parcel of land of which, say, two and one-half acres is comprised of an apartment development and the balance of three and one-half acres is undeveloped, should the developed two and one-half acres be appraised separately from the undeveloped three and one-half acres? Similarly, in connection with the appraisement of a package of mineral leases, should each mineral lease be separately appraised? Should the unitized, productive portion of the leases be appraised separately from the non-unitized portion?

Another problem arises in connection with the appraisal of mortgaged property that was unimproved on the date of execution of the mortgage but is improved subsequent to the recordation of the mortgage by the construction of buildings or other constructions permanently attached to

---

387. LA. REV. STAT. ANN. § 13:4365(C) (2021).

388. Int'l Harvester Credit Corp. v. Majors, 467 So. 2d 1251 (La. Ct. App. 2d Cir. 1985).

389. *Id*. at 1254.

the ground.[390] Under Louisiana Civil Code article 3310, the conventional mortgage, once established on an immovable, includes all the improvements that it may afterward receive.[391] Since the writ of seizure and sale is prepared in accordance with the legal description contained in the mortgage and since that description would not refer to improvements not then in existence, parties must ensure that the appraiser assess the value of the land under mortgage, as well as the improvements situated on the land.

Another nuance of the minute-appraisal requirement involves a financing arrangement where both commercial premises and inventory are involved. In such a situation one might confect separate mortgages for the real estate and for the inventory. Drafting distinct mortgage agreements for each type of property separates the precise or minute appraisal required for the inventory from the less cumbersome appraisal of the immovable property.

One means of ensuring that an appraisal will pass judicial muster is to give the debtor and any surety advance notice of the manner in which the appraisal will be conducted. The courts have indicated that where a debtor receives advance notice of an appraisal and the debtor does not object to that appraisal, that debtor is precluded from challenging the propriety of the appraisal after the sale. *First Federal Savings and Loan Association of Lake Charles v. Morrow*[392] involved a debtor's appeal to avoid a deficiency judgment because of an alleged failure to properly appraise the property in connection with the seizure and sale of the property. In dismissing the debtor's argument, the court noted:

> They [the debtors] were notified of each and every step in the seizure and sale proceeding. If they wished to question the procedure, it was incumbent on them to challenge the process before the sale was made rather than sit back and save their attack only if they were not pleased with the result of the sale.[393]

---

390. Under LA. CIV. CODE ANN. art. 463 (2021), "Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees, are component parts of a tract of land when they belong to the owner of the ground."

391. *See also* LA. REV. STAT. ANN. § 9:5391 (2021) relative to "additions, accessions, and natural increases subject to mortgage."

392. First Fed. Sav. Loan v. Morrow, 469 So. 2d 424 (La. Ct. App. 3d Cir. 1985).

393. *Id*. at 427.

The jurisprudence further dictates that an appraisal be accurate and detailed.[394] For instance, if the mortgagor owns an undivided interest in the mortgaged property, the precise undivided interest should be recited in the legal advertisement and the appraiser should base his appraisal thereon.[395] Language in an advertisement indicating the judicial sale of a judgment debtor's "right, title and interest" in certain real estate does not meet the precision requirement.[396]

D. Operation of Producing Properties During and After Foreclosure

1. Keeper

Louisiana Revised Statutes §§ 9:5131–5135 allow parties to a mortgage affecting mineral rights to designate an individual as a keeper of the mortgaged property in the event of a seizure. Louisiana Revised Statutes § 9:5131 provides as follows:

> **La. Rev. Stat. Ann. § 9:5131. Appointment by court**
> If a mineral right affected by a mortgage executed under the provisions of R.S. 31:203 [the Louisiana Mineral Code] is seized as an incident to an action for the enforcement of such mortgage, the court issuing the order under which the seizure is to be effected shall direct the sheriff or other officer making the seizure to appoint as keeper of the mineral right such person as the parties may have designated as herein provided.[397]

The powers, duties, and compensation of the keeper are set forth in §§ 9:5132–5135. The court may direct the keeper to render an accounting of his administration; thus, it is essential that proper records be maintained. This statute embodies legislative recognition of the fact that a civil sheriff lacks both the technical expertise and facilities to properly and prudently administer producing mineral properties. This ability is especially important where valuable, producing mineral properties are involved since these properties must be adequately maintained pending the foreclosure. Otherwise, the quality or quantity of production and consequently, the security of the mortgagee, could be seriously impaired.

---

394. Ardoin v. Fontenot, 374 So. 2d 1273 (La. Ct. App. 3d Cir. 1979).

395. Mulling v. Jones, 97 So. 202 (La. 1923).

396. *See* Gales v. Christy, 4 La. Ann. 293, 295–96 (1849), finding void, as being vague and insufficient, a description of "the rights, interests, claims and demands" of certain heirs in a mortgage.

397. LA. REV. STAT. ANN. § 9:5131 (2021).

If any part of the collateral in the mineral lease mortgage is land (such as a parcel used for a pipe yard or processing facility), a different statute provides for a keeper with respect to such immovable.[398]

2. Operating Agreements

If the mineral leases covered by the mineral lease mortgage are owned solely by the mortgagor, there is no need for an operating agreement. However, if the mortgagor only owns an undivided interest in the mortgaged mineral leases, such that other parties own the remainder of the interest therein, the co-owners typically enter into agreements called "joint operating agreements," which provide for the exploration, development, operation, or production of mineral rights. If the mortgagor is the operator, these agreements provide a mechanism whereby another party might become successor operator. If the mortgagor is a non-operator, the designated operator will continue to operate the property for the benefit of the owners of the mineral leases.

Joint operating agreements are customarily unrecorded. The public records doctrine enunciated in *McDuffie v. Walker*[399] dictates that these unrecorded agreements should not be binding upon third persons, including a purchaser at a judicial sale. Louisiana Revised Statutes § 31:216, however, provides that such agreements "shall be binding upon third persons when the agreement is filed for registry in the conveyance records of the parish or parishes where the lands affected by the mineral rights are located."[400] Moreover, Louisiana Revised Statutes § 31:217 permits the recordation of a mere declaration in lieu of the agreement.

General first-to-file principles apply to these agreements. For instance, if the mortgage is recorded before the joint operating agreement or the declaration of that agreement, a purchaser of mineral rights at judicial sale would not be bound by the joint operating agreement.[401]

The interaction of mortgages and joint operating agreements was addressed in *Grace-Cajun Oil Co. No. 3 v. Federal Deposit Insurance*

398. *Id*. § 9:5136.

399. McDuffie v. Walker, 51 So. 100 (La. 1909).

400. LA. REV. STAT. ANN. § 31:216 (2021).

401. If the operating agreement is not recorded, it might still be binding upon a purchaser of the mineral leases if the purchaser takes title "subject to" the unrecorded operating agreement. Whether or not a party intended to assume the debt of the assignor under the operating agreement is an issue of fact to be determined by the trial court. Transworld Drilling Co. v. Tex. Gen. Petroleum Co., 480 So. 2d 323 (La. Ct. App. 4th Cir. 1985). In the interest of full disclosure, your author represented the assignee-purchaser in this case.

Corp.[402] In that case, the obligation of a secured creditor to pay well costs out of production was declared. The court's decision turned on the fact that the mortgage "was made subject to the operating agreement."[403] Another factor influencing the decision was the principle that "the owner of property cannot pledge any right greater than that owned."[404] Since the mortgagor's undivided working interest was burdened by the legal obligation to pay its share of operating costs,[405] the pledgee's interest was similarly burdened. Unanswered by the *Grace-Cajun* Court was the question of how the same case would be decided if the mortgage was *not* made subject to the operating agreement. Considering the court's analysis and the intrinsic obligation of a working interest owner to pay its share of operating costs, one might conclude that a creditor whose mortgage is not made subject to the operating agreement must also pay well costs from production revenues.[406]

3. Contract Operators

If the secured creditor is the successful bidder at a judicial sale, the saying "be careful what you ask for" might come to mind. Like the proverbial dog chasing the car, the banker might wonder, "what do I do with this collateral now that I own it?" If the defaulting borrower is the sole owner of the mineral leases and hence, is the operator of the mineral leases covered by the mineral lease mortgage, the secured creditor needs to make arrangements for operations to continue on a seamless basis after it takes over the property.[407] Rare would be the bank possessing the in-

402. Grace-Cajun Oil Co. No. 3 v. Fed. Deposit Ins. Corp., 882 F.2d 1008, 1009 (5th Cir. 1989).

403. *Id.* at 1009.

404. *Id*. at 1011.

405. Huckabay v. Tex. Co., 78 So. 2d 829, 831 (La. 1955) ("on several occasions this Court has applied the equitable rule that where one co-owner (or co-lessee) has explored and developed a field without the concurrence or assistance of the other, the former is bound to account to that other for his proportionate share of the proceeds less a proportionate share of the expenses.").

406. *See* Sw. Gas Producing Co. v. Creslenn Oil Co., 181 So. 2d 63, 68 (La. Ct. App. 2d Cir. 1965) (the public records doctrine did not apply where the mortgage made express reference to the operating agreement).

407. If the mineral leases are co-owned, there will typically exist an operating agreement, and that agreement will contain a mechanism whereby another party will be entitled to succeed to operatorship, as previously discussed. *See* Patrick S. Ottinger, *Be Careful What You Ask For: Subsequent Operations Under the Model Form Operating Agreement*, *in* INST. FOR ENERGY L. OF THE CTR. FOR AM. & INT'L L., SIXTY-THIRD ANNUAL INSTITUTE ON OIL AND GAS LAW (2012).

house capability to operate a producing oil and gas property. The typical solution is to contract with a contract operator to manage and administer the property.[408] The engagement of a contract operator allows the foreclosing creditor to continue to operate the property during a period in which it might pursue divestiture of this new asset.[409]

4. Notification to Commissioner of Conservation

The oil and gas industry is regulated in Louisiana by the Conservation Act.[410] The conservation laws are administered by the Commissioner of Conservation[411] who has jurisdiction and authority over all persons and property necessary to effectively enforce the provisions of the Conservation Act and all other laws relating to the conservation of oil or gas.[412] Among the many powers vested in the Commissioner of Conservation is the "authority to make . . . any reasonable rules, regulations, and orders that are necessary from time to time in the proper administration and enforcement of" the Conservation Act.[413] Of particular relevance, the law expressly gives the Commissioner the authority to make rules, regulations, or orders to

> require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the escape of oil or gas out of one stratum to another; to prevent the intrusion of water into oil or gas strata; to prevent the pollution of fresh water supplies by oil, gas, or salt water; to require the plugging of each dry and abandoned well and the closure of associated pits, the removal of equipment, structures, and trash, and to otherwise require a general site

408. *See, e.g.*, Jardell v. Hillin Oil Co., 485 So. 2d 919 (La. 1986) ("Although the well was not drilled by Auster Oil and Gas, the latter, a contract operator, assumed the maintenance of the Roy Jardell in 1979. As the contract operator, Auster was paid a flat fee for overhead charges and collected proportionate assessments from the working interest owners for additional expenses."). *Id*. at 921. In the interest of full disclosure, your author represented the defendants in this suit.

409. *See* Patrick S. Ottinger, *Closing the Deal in the Bayou State: The Purchase and Sale of Producing Oil and Gas Properties*, 76 LA. L. REV. 691 (2016).

410. LA. REV. STAT. ANN. §§ 30:1–30:78 (2021).

411. *Id*. § 30:1(A).

412. *Id*. § 30:4(A). *See also* Nunez v. Wainoco Oil & Gas Co., 488 So. 2d 955 (La. 1986) for a thorough analysis of the conservation laws and of the authority vested in the Commissioner of Conservation.

413. LA. REV. STAT. ANN. § 30:4(C) (2021).

> cleanup of such dry and abandoned wells; and to require reasonable bond with security for the performance of the duty to plug each dry or abandoned well and to perform the site cleanup required by this Paragraph.[414]

Pursuant to this express authority, the Commissioner of Conservation promulgated Statewide Order No. 29-B relative to the plugging and abandonment of wells.[415] In order to facilitate the exercise of this authority by the Commissioner of Conservation, the 1990 legislature enacted Louisiana Revised Statutes § 30:74(A)(3) to provide as follows:

> **La. Rev. Stat. Ann. § 30:74. Abandoned oilfield waste sites; notification; clean up**
> A.(3)(a) Prior to any sheriff's sale or public auction of any property related to the operation of oil and gas wells, the person seeking such sale shall notify the commissioner of such sale not less than thirty days prior to such sale. Such sale shall not occur unless the commissioner consents thereto in writing, and the sale shall include the wellbore unless specifically excluded from the sale. In the event the wellbore is not specifically excluded from the sale as provided herein, the sheriff or person seeking such a sale shall cause to be included in the notice of the sale and in the sale instrument a statement or notice that the purchaser shall be required to file the appropriate documents with the office of conservation to become operator of record of the subject well pursuant to the provisions of R.S. 30:204.
> (b) The commissioner may, if he deems it appropriate to insure (sic) the proper plugging and abandonment of the wells and closure of the associated oilfield pits, retain a first lien and privilege on such property, which lien and privilege shall follow such property into the hands of third persons whether such persons are in good or bad faith. The commissioner shall record a notice of such lien with the clerk of court in the parish in which the property is located and in which the sale is to occur. The lien and privilege may be enforced against any person in possession of the property in the same manner as a lien provided under the Louisiana Oil Well Lien Act.

---

414. *Id*. § 30:4(C)(1) as amended by 1990 La. Acts No. 192.

415. *See* Statewide Order No. 29-E, LA. ADMIN. CODE tit. 43, pt. 19, § 137 (2019). For an illustration of the problems that can be encountered as a consequence of a failure to properly plug and abandon a well, *see* Magnolia Coal Terminal v. Phillips Oil Co., 576 So. 2d 475 (La. 1991).

> (4) Failure to notify the commissioner as provided in Paragraph (3) of this Subsection shall render the person seeking such a sale and the purchaser liable, in solido, to the office of conservation for the fair market value of the property at the time of such seizure and sale.[416]

The scope of this statute is not clear in that the reference to "any property related to the operation of oil and gas wells" might contemplate only movable property, such as surface equipment, or it might reach the oil, gas, and mineral leases owned by the operator of an oil and gas well. Moreover, while authority for the retention by the Commissioner of Conservation of "a first lien and privilege on such property" is expressly recognized, no provision is made for the manner in which the Commissioner might manifest his option to retain such lien and privilege. The retention of this "first lien and privilege" is not self-operative in every instance, only in those cases where the Commissioner of Conservation "deems it appropriate to insure (sic) the proper plugging and abandonment of the wells and closure of the associated oilfield pits."

5. Registration with Public Bodies and Agencies

A bank that has loaned money secured by a mineral lease mortgage, if it elects to enforce the mortgage by way of foreclosure, would be well served to seek to take title in the name of a non-bank subsidiary or affiliate, rather than in the name of the licensed bank itself. If such is the case, it will be necessary for the entity taking title to the mineral leases and other associated items of collateral to qualify or register with certain governmental agencies to hold or operate the property to be obtained via foreclosure or by way of *dation en paiement*.

The typical governmental agencies or offices involved in the change in ownership resulting from the enforcement of a mineral lease mortgage are discussed below.

a. Louisiana Office of Conservation

If the party taking title to the foreclosed collateral intends to operate the property, it is necessary to obtain an amended permit to drill from the Office of Conservation. To be designated as operator pursuant to the amended permit to drill, "an applicant for a permit to drill or to amend a

416. LA. REV. STAT. ANN. § 30:74 (2021) (emphasis added).

permit to drill for change of operator shall provide financial security as provided in this Section in a form acceptable to the commissioner."[417]

b. State Mineral and Energy Board

If, among the mineral leases encumbered by the mineral lease mortgage, there are one or more mineral leases granted by the State Mineral and Energy Board—covering and affecting "any lands belonging to the state, or the title to which is in the public, including road beds, water bottoms, vacant state lands, and lands adjudicated to the state at tax sale"[418]—the successor lessee must be registered with the Office of Mineral Resources.[419] The deed or assignment by which a state mineral lease is transferred must be approved by the State Mineral and Energy Board as required by § 30:128, provided that the prospective leaseholder must be registered with Office of Mineral Resources.

c. Bureau of Ocean Energy Management

A mineral lease mortgage might pertain to oil and gas leases on the Outer Continental Shelf.[420] If so, the lessee must be qualified with BOEM to hold such lease as required by 43 U.S.C.A. § 1337 and 30 C.F.R. § 256.35.[421]

6. OCC Rules on Holding Property

A bank that obtains ownership of a producing oil and gas field as a result of enforcement of a mineral lease mortgage, or by way of a *dation en paiement*, must be mindful of the rules of the OCC relative to "other real estate owned," or "OREO."

---

417. *Id*. § 30:4.3(A).
418. *Id*. § 30:124(B).
419. *Id*. § 30:123.1.
420. *See* text associated with *supra* note 355.
421. 43 U.S.C.A. § 1337; 30 C.F.R. § 256.35 (2021). In the aftermath of the Deepwater Horizon tragedy on April 20, 2010, the Obama administration implemented a reorganization of the former Minerals Management Service (MMS) by creating two successor agencies, the Bureau of Safety and Environmental Enforcement (BSEE) and the Bureau of Ocean Energy Management (BOEM). *See* Rebecca M. Bratspies, *A Regulatory Wake-Up Call: Lessons from BP's Deepwater Horizon* Disaster, 5 GOLDEN GATE U. ENVTL. L.J. 7, 12 (2011) (Before the reorganization, the MMS had been "responsible for supervising all exploration and extraction of gas and mineral resources on federal lands, including offshore drilling in the Gulf of Mexico.").

The ability of a national banking association to own real estate is regulated by 12 U.S.C. § 29, entitled "Power to Hold Real Property," which provides:

> **12 U.S.C. § 29. Power to hold real property**
> A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:
> First. Such as shall be necessary for its accommodation in the transaction of its business.
> Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.
> Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.
> Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.
> But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.[422]

These rules are addressed in the Final Rule as published in the Federal Register.[423] As a general proposition, the holding period for national banks under the final rule consists of an initial five-year holding period, with up to an additional five years if approved by the OCC. A comparable provision applies to state-chartered banks.[424] A bank will certainly be motivated to dispose of the property as the management and administration of producing oil and gas field is well beyond the ability of a bank.

E. Other Privileges

The enforcement of a mineral lease mortgage often corresponds to the mortgagor's failure to pay third party contractors, suppliers, or furnishers of laborers, as well as its lessors or working interest parties. These parties

---

422. 12 U.S.C. § 29.

423. Other Real Estate Owned and Technical Amendments, 84 Fed. Reg. 56,369 (Oct. 22, 2019) (to be codified at 12 C.F.R. pt. 3, 6, 34, 46, 160, 171, 163, 167).

424. LA. REV. STAT. ANN. § 6:243 (2021), allowing the holding of OREO for a period not greater than 10 years, with certain exceptions. It has been held that "the authority or power of a corporation to acquire or hold property may be examined only in a suit by the sovereign." Currie v. Cont'l Am. Bank & Tr. Co., 37 So. 2d 709, 710 (La. 1948).

have, in a proper case, the right to file privileges that must be taken in account and ranked *vis-à-vis* the mortgage being enforced.

1. Louisiana Oil Well Lien Act[425]

Upon the mortgagor's failure to pay third-party contractors, suppliers, or furnishers of laborers, these creditors often file lien affidavits. The mortgagee must then determine whether its mortgage is superior to the liens granted by law to these suppliers or furnishers. The lien rights of such persons are granted by Louisiana Revised Statutes §§ 9:4861–4867 and are significant for the attorney contemplating a mortgage foreclosure. This statute is referred to as "LOWLA." In Louisiana's civil law terminology, a lien is called a privilege.[426] Article 3185 of the Louisiana Civil Code states that "[p]rivilege can be claimed only for those debts to which it is expressly granted in this Code." However, this privilege is almost universally referred to as a lien, both by the courts and commentators.[427]

Louisiana Revised Statutes §§ 9:4861–4867 provide a privilege to any person providing labor, services, or supplies in connection with the operating of a well in search of oil or gas. The privilege encumbers the mineral leases under which the well is drilled, the oil or gas produced therefrom, and the proceeds thereof inuring to the operating interest and upon all equipment located on the well site. This privilege secures the

425. *See* Donald J. Brannan, *Drilling Contracts, Indemnity Provisions and the Lien Statute*, 29 ANN. MIN. L. INST. (1982); M. Taylor Darden, *Current Problems Under the Louisiana Oil, Gas and Water Well Lien Statute (La. R.S. 9:4861 et seq.)*, 31 ANN. INST. ON MIN. L. 81 (1984); Thomas A. Harrell, *The Oil and Gas Well Lien Statute -- Annotated*, 35 ANN. INST. ON MIN. L. 91 (1992); Patricia H. Chicoine, *LOWLA: Louisiana Oil Well Lien Act--Recent Revisions*, 43 ANN. INST. ON MIN. L. 105 (1996); Patricia H. Chicoine, *Lien on LOWLA: It's a Privilege: Recent Revisions to the Louisiana Oil Well Lien Act*, 57 LA. L. REV. 1133 (1997); Benjamin W. Kadden and Meredith S. Grabill, *What One Court Giveth; Another Court Taketh Away: Understanding LOWLA and the Impact of Recent Decisions on the Breadth of the Protections Afforded to Claimants by the Louisiana Legislature*, 66 ANN. INST. ON MIN. L. 326 (2019).

426. "*Privilege* is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages." LA. CIV. CODE ANN. art. 3186 (2011) (emphasis added).

427. As the Fifth Circuit has stated, "[t]he common law term 'lien' and civil law term 'privilege' will be used interchangeably throughout this opinion because the parties spoke of the terms as equivalent and as the differences between the terms are not relevant to our analysis." Shaw Constructors v. ICF Kaiser Eng'rs Inc., 395 F.3d 533, 536 n.3 (5th Cir. 2004).

amount of such unpaid labor, services, or supplies, together with the cost of preparing and recording the privilege plus 10% attorney's fees.[428]

The lien is effected by filing notice of the lien in the mortgage records of the parish where the property is located within 180 days of the date on which the last labor or services were performed or the date on which the last materials were delivered.[429] The ranking of privileges under LOWLA *vis-à-vis* other security interests is addressed in Louisiana Revised Statutes § 9:4870. In essence, these privileges are

> superior in rank and priority to all other privileges, security interests, or mortgages against the property they encumber except the following which are of superior rank and priority:
>
> . . .
>
> (2) Mortgages and vendor's privileges on the operating interest and other property affected by such mortgages or privileges that are effective as to a third person before the privilege is established.
> (3) Security interests in collateral subject to the privilege that are perfected before the privilege is established or that are perfected by a financing statement covering the collateral filed before the privilege is established if there is no period thereafter when there is neither filing nor perfection.[430]

2. Lessor's Privilege

Additionally, Louisiana law grants "a right of pledge" to the lessors under mineral leases "for the payment of his rent, and other obligations of the lease" and extends the lessor's privilege to "all equipment, machinery and other property of the lessee on or attached to the property leased."[431]

3. Consensual Privilege in Favor of Operator Securing Debt Under Operating Agreement

As noted previously, mineral leases that are co-owned by more than one company or person are customarily governed by an operating

---

428. However, if the services of the attorney are limited to recording the affidavit, attorney's fees shall not exceed $500.00, but this limitation does "not apply when it is necessary to institute judicial action to enforce the lien." LA. REV. STAT. ANN. § 9:4961 (2021).

429. *Id*. § 9:4862.

430. *Id*. § 9:4870.

431. *Id*. § 31:146; *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 12-15.

agreement. In the industry, operating agreements tend to be in a commercially printed form published and marketed by the American Association of Professional Landmen (AAPL). The AAPL has played an integral role in the development and refinement of operating agreements through the publication and promotion of its Model Form. The most widely used form of operating agreement is the AAPL Form 610—Model Form Operating Agreement published by the AAPL. First introduced in 1956 at its Annual Meeting in Denver, Colorado, revised forms were issued by the AAPL in 1977, 1982, 1989, and 2015.

The Model Form operating agreement contains a provision that confers an "operator's lien," or privilege, in favor of the operator to secure the obligation of a non-operator to pay its share of expenses. However, such language must be analyzed in view of Louisiana Civil Code article 3185 and the jurisprudence interpreting this article. That article states that "[p]rivilege can be claimed only for those debts to which it is expressly granted in this Code."[432] Hence, the language contained in the operating agreement is unenforceable in Louisiana, which does not tolerate consensual liens.[433]

In seeming recognition of the proposition that the so-called operator's lien in the printed Model Form operating agreement is ineffective in Louisiana, a recent innovation is the inclusion in an operating agreement of contractual language purporting to grant a mortgage on the interest of the non-operator to secure its obligations to the operator. Of course, the efficacy of this approach must be measured against the legal requirements for the validity of a mortgage under Louisiana law. It is the observation of this author that most clauses of this type fail to include the mandatory requirement that the parties "state the amount of the obligation, or the maximum amount of the obligations that may be outstanding at any time and from time to time that the mortgage secures."[434] A deficiency of this nature would be fatal to the efficacy of a mortgage.

Even beyond this fatal deficiency, one never sees an operating agreement containing a provision purporting to grant a mortgage filed in the mortgage records of the parish. Parties do, however, frequently file a

---

432. LA. CIV. CODE ANN. art. 3185 (2021).

433. The cases in support of this proposition are legion, but to mention only two, "Where the law gives no privilege, none can be given by contract or consent." Hoss v. Williams, 24 La. Ann. 568, 569 (La. 1872), and "Under these provisions of law it is not astonishing that our courts have universally held that privileges are *stricti juris* and exclusively the creatures of the law, not to be brought into existence by convention." New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co., 10 F. 330, 332 (E.D. La. 1881).

434. LA. CIV. CODE ANN. art. 3288 (2021).

"declaration" of the operating agreement in the conveyance records, as permitted by article 217 of the Louisiana Mineral Code.[435]

4. Statutory Privileges of Operator and Non-operator

As noted above, LOWLA extends a right of privilege to contractors, suppliers, and laborers against the operating interest for amounts owed to the lien claimant in connection with a well.[436]

Prior to the comprehensive reenactment of the LOWLA in 1995,[437] the courts had allowed an operator to enjoy privilege or lien rights under the predecessor statute. In *Kenmore Oil Co. v. Delacroix*,[438] the court—arguably contrary to the well-recognized rule that privileges are *stricti juris* and are not to be extended by implication[439]—held that there is "no reason, either under the terms of R.S. 9:4861 or as a matter of policy, why the operator should not enjoy the privilege or why he might not exercise it against less than all of the working interest."[440] Under *Delacroix*, an operator that incurred expenses for the joint account was allowed to assert the privilege as against the undivided working interest of a non-operating working interest owner that had failed to pay its share of such expenses.

When LOWLA was amended and reenacted in 1995, the legislature rather clearly negated the possibility that an operator could enjoy lien rights. This deletion arises from the fact that operators are not among the class of persons to whom a privilege is granted under § 9:4862(A). Thus, while *Delacroix* allowed a privilege under the circumstances, there would

---

435. *See* LA. REV. STAT. ANN. § 31:217 (2021). This article, read in conjunction with Mineral Code article 216, authorizes the filing of a declaration, "in lieu of filing an agreement as provided in R.S. 31:216," in the conveyance records, but not in the mortgage records. Hence, the filing of a mere declaration in the conveyance records is not sufficient to provide notice of the purported mortgage which is not itself recorded in the mortgage records. *See* Wede v. Niche Marketing USA, LLC, 52 So. 3d 60 (La. 2010).

436. "An 'operating interest' is a mineral lease or sublease of a mineral lease, or an interest in a lease or sublease that gives the lessee, either singly or in association with others, the right to conduct the operations giving rise to the claimant's privilege." LA. REV. STAT. ANN. § 9:4861(5)(a) (2021).

437. Act No. 962, 1995 La. Acts 2604.

438. Kenmore Oil Co. v. Delacroix, 316 So. 2d 468 (La. Ct. App. 1st Cir. 1975).

439. *See* Shaw & Co. v. Grant, 13 La. Ann. 52, 52 (La. 1858) ("Privileges are *stricti juris*, as the lawgiver has himself declared. They 'can be claimed only for those debts to which it is expressly granted in this Code.' . . . They cannot be extended to analogous cases."). *Id*. at 52.

440. *Kenmore*, 316 So 2d. at 469.

appear to be no basis in the current version of the privilege statute to support an operator's privilege.

Act No. 1040 of the 1997 Louisiana Legislature enacted Louisiana Revised Statutes §§ 9:4881–4889. In distinction from LOWLA, these new provisions now extend a privilege in favor of an operator as against the interest of a non-operator "to secure payment of all obligations incurred in the conduct of operations which the non-operator is personally bound to pay or reimburse,"[441] and also in favor of a non-operator as against the interest of an operator "to secure payment of all obligations owed to him by the operator from the sale or other disposition of hydrocarbons of the non-operator produced from the well."[442] The ranking of these privileges is functionally similar as provided above with respect to privileges under LOWLA.[443]

5. Statutory Privileges in Favor of State of Louisiana

Other privileges granted to the State of Louisiana are set forth in Louisiana Revised Statutes § 30:32 (in favor of the State Department of Public Works, now called the Department of Transportation and Development); § 30:74(A)(3) (in favor of the Commissioner of Conservation); § 30:91(B)(2) (in favor of the Commissioner of Conservation), and § 30:2281 (in favor of the state, through the Department of Environmental Quality). Each of these privileges arises in the context and circumstances there particularly described, and each is intended to afford a mechanism for the relevant state department or office to be reimbursed for costs and expenses incurred, respectively, in the closing of wells; proper plugging and abandonment of the wells and closure of the associated oilfield pits; orphan wells, and cost of remediation of E&P sites. Where they exist in the text of the statute, the ranking mechanisms differ.[444] Nevertheless, if applicable, these privileges would need to be taken into account by way of ranking in connection with the enforcement of a mineral lease mortgage.

---

441. LA. REV. STAT. ANN. § 9:4882(A) (2011).
442. *Id*. § 9:4882(B).
443. *Id*. § 9:4888.
444. The privileges created in the first three listed statutes in Title 30 are expressly mentioned in the text of Louisiana Revised Statutes section 9:4870 as being superior in rank (along with pre-existing privilege for taxes and pre-existing mortgages and security interests) to privileges established under LOWLA.

F. Recharacterization of Overriding Royalty Interest in Bankruptcy[445]

Although the subject of a bankruptcy involving dependent rights in mineral leases is beyond the scope of this article, brief mention is made as to the possibility that, in a bankruptcy proceeding involving a working-interest owner responsible for the payment of revenue to third parties, the holder of an overriding royalty interest might be subject to an action seeking to recharacterize the interest as a contractual obligation to pay money, rather than as a real property interest outside of the estate of the debtor.

The result of a recharacterization to a contractual right or obligation would be to treat the interest as property of the debtor's estate, with the consequence that the revenue attributable to the interest is available for distribution to creditors. Conversely, if the characterization as a real property interest persists, the interest is not included as property of the estate and remains a responsibility of the debtor to pay the override.

The issue has arisen in bankruptcy proceedings applying Louisiana substantive law. In *In the Matter of Senior-G&A Operating Co., Inc.*,[446] PSI held an interest in production under a "Production Payment Loan Agreement." After Senior-G&A entered bankruptcy, the trustee sought to impose upon PSI responsibility for costs associated with reworking a well. PSI asserted that "it was a royalty owner, not a secured creditor. PSI insisted that the Agreement clearly established that it received production payments, a form of royalty, and that the Agreement made clear that its arrangement with Senior was a 'loan' only for tax purposes."[447] The court held

> that PSI was a secured creditor under the terms of its Agreement with Senior, that the Agreement gave PSI only an in rem interest in the well and no right to proceed against Senior, that PSI had received a benefit from the rework of the well, that the reworking charges of Timco Well Services were properly allowable as administrative expenses, that those charges were both "necessary" and "reasonable," and that 11 U.S.C. § 506(c) authorized charging PSI with its proportionate share of Timco's charges.[448]

445. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 10-29(b).

446. Matter of Senior-G&A Operating Co., Inc., 957 F.2d 1290 (5th Cir. 1992).

447. *Id*. at 1295.

448. *Id*.

On appeal, the United States Fifth Circuit Court of Appeals analyzed the document and evaluated its true nature and character under Louisiana law. The court rejected PSI's arguments that it was a mere royalty owner who could not be held responsible for costs, and found the agreement to create a "hybrid" security interest, saying:

> It is, therefore, clear that Senior mortgaged--it did not transfer--its mineral interest in the well to PSI (and also pledged its production), and under Louisiana law, PSI must be classified as a secured creditor as opposed to a royalty owner. The rulings of the courts below so holding are thus affirmed.[449]

More recently, the issue again presented in the bankruptcy of an operator owning mineral leases on the Outer Continental Shelf, as to which the substantive law of Louisiana applies.[450] Thus, in *NGP Capital Res. Co. v. ATP Oil & Gas Corp*,[451] ATP, prior to entering bankruptcy, had assigned certain "term overriding royalty interests" to NGP. An issue arose as to whether these interests were interests in real property (such that they did not constitute property of the estate)[452] or other types of interest. ATP contended that "these are 'disguised financing' transactions. That is, although characterized in the relevant documents as ORRIs, the economic substance is that of a financing arrangement."[453] Citing Louisiana precedent,[454] the court explained as follows:

> It is well-established that we are not bound by the label placed on a written agreement or the subjective intent of the contracting parties, but must look to the substance of the transaction in determining rights and obligations.[455]

The court engaged in a detailed discussion of Louisiana law as it pertains to an overriding royalty interest, or other non-cost bearing interests, and a loan agreement, and ultimately held that there were

---

449. *Id*. at 1297.

450. 43 U.S.C.A. § 1333(a)(2)(A).

451. NGP Capital Res. Co. v. ATP Oil & Gas Corp. (*In re* ATP Oil & Gas Corp.), 2014 WL 61408 (Bankr. S.D. Tex. Jan. 6, 2014).

452. 11 U.S.C.A. § 541(b)(4)(B).

453. *NGP Capital Res. Co.*, 2014 WL 61408, at *1.

454. Howard Trucking Co., Inc. v. Stassi, 474 So. 2d 955, 960 (La. Ct. App. 5th Cir. 1985). The tenet that the label placed by contracting parties on an agreement is not determinative of its meaning or import is fully developed in OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, at § 10-06.

455. *NGP Capital Res. Co.*, 2014 WL 61408, at *5.

genuine issues of material fact that precluded a determination of the character of the term overriding royalty interests, which prevented a summary judgment.

CONCLUSION

Mineral rights are assets of great value. As this author has stated in his class at LSU Paul M. Hebert Law Center, "there are mineral leases I would prefer to own than a city block in any city in Louisiana." The mineral servitude has been an important institution of Louisiana law for a century.[456] The Supreme Court has referred to the mineral servitude as being "the most valuable property in the state."[457]

Mineral rights are clearly "things" that can be subjected to a security interest, the precise type of which varies according to the nature of the right and the person who is establishing such security. The uniqueness of a mineral lease as an item of collateral under a mineral lease mortgage justifies certain tailored covenants and representations for the benefit of the lender. While the oil and gas industry can be cyclical, depending on market conditions, as well as the political winds, a mineral right might be an important piece of collateral in connection with the financing needed to raise capital for this capital-intensive industry.

There is attached an Appendix that summarizes the various types of collateral, with references to the manner in which security can be established, and the authority for the creation of such security as well as to the filing thereof.

456. Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207 (La. 1922).
457. DeMoss v. Sample, 78 So. 482, 484 (La. 1918).

APPENDIX

Granting of Security in Mineral Right or Oil and Gas that Might Be Produced Therefrom

Collateral	Grantor	Type of Security	Codal Authority – Creation of Security	Filing Office	Codal Authority – Filing
Landowner's Rights in Minerals as Produced	Unleased landowner*	UCC Security Interest	CC 488, 490; R.S. 31:6, 10:9-102(a)(2)	Any parish	R.S. 10:9-501(a)(4)
Landowner's Rights in "Other Substances"	Unleased landowner*	UCC Security Interest	R.S. 31:4, 10:9-102(a)(44)	Debtor's Location	R.S. 10:9-301, 10:9-307
Bonus, Delay Rentals, Royalties and Shut-in Payments Under Mineral Lease	Lessor Under Mineral Lease	Pledge	R.S. 9:4401, CC 551, 3172	MOB	CC 3346
Revenue Resulting from Mineral Servitude – Unleased*	Mineral Servitude Owner	UCC Security Interest	R.S. 31:21, 31:204B, 10:9-102(a)(2)	Any parish	R.S. 10:9-501(a)(4)
Revenue Resulting from Mineral Servitude – Leased	Mineral Servitude Owner, as Lessor	Pledge	R.S. 31:21, 31:204B, 9:4401, CC 551, 3172	MOB	CC 3346
Revenue Resulting from Mineral Royalty*	Mineral Royalty Owner	UCC Security Interest	R.S. 31:80, 31:204B, 10:9-102(a)(2)	Any parish	R.S. 10:9-501(a)(4)
Mineral Servitude	Mineral Servitude Owner	Mortgage	R.S. 31:16, 31:18, 31:21, 31:203	MOB	CC 3346
Mineral Royalty	Mineral Royalty Owner	Mortgage	R.S. 31:16, 31:18, 31:80, 31:203	MOB	CC 3346
Mineral Lease	Lessee	Mortgage	R.S. 31:16, 31:18, 31:114, 31:203	MOB	CC 3346
Revenue Resulting from Lessee's Proceeds Under Mineral Lease	Lessee	UCC Security Interest	R.S. 31:114, 31:204B, 10:9-102(a)(6)	Any parish	R.S. 10:9-501(a)(4)
Fixtures – Before Incorporation	Lessee	UCC Security Interest	R.S. 10:9-102(a)(41), 502(a) and (b)	Any parish	R.S. 10:9-501(a)(4)
Fixtures – After Incorporation (component part)	Lessee	Mortgage	CC 463, 465-67, R.S. 9:5391	MOB	CC 3346

* The unleased owner (and, hence, its pledgee) is not entitled to receive any revenue until the operator who drilled the well at its sole cost, risk, and expenses has been reimbursed for the unleased owner's allocable share of costs incurred in drilling the unit well. *See* Huckabay v. Texas Co., 78 So. 2d 829, 831 (La. 1955) ("on several occasions this Court has applied the equitable rule that where one co-owner (or co-lessee) has explored and developed a field without the concurrence or assistance of the other, the former is bound to account to that other for his proportionate share of the proceeds less a proportionate share of the expenses.").