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RUMINATIONS ON THE EFFECT OF
CONSERVATION LAWS AND PRACTICES ON THE LOUISIANA MINERAL
SERVITUDE AND MINERAL ROYALTY

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INTRODUCTION

Conservation laws and practices have been operative in Louisiana in essentially their present form for approximately twenty-five years.¹ In this time administrative practices have crystallized, customary industrial practices have evolved, and a substantial amount of jurisprudence has accumulated regarding the effect of these laws, administrative orders, and private agreements on mineral rights. Principal focus in litigation has been on the effect of conservation orders, or contractual arrangements designed to promote conservation, and operations conducted under them on the duration of mineral interests of various kinds. There are problems yet unsolved, but the recent decisions concerning the effect of unitization orders and agreements on mineral royalties² permit a rather full examination of the difficulties encountered in making the conservation regime compatible with private property rights and contractual agreements. Although problems related to the impact of conservation orders and practices on mineral leases may require discussion in several instances, this piece is intended as a basic examination of the impact of these laws and practices on mineral servitudes and mineral royalties in Louisiana.

It is believed that the major difficulty in the jurisprudence is that the courts have been disposing of issues of public policy by purporting to resolve assumed conflicts between conservation orders and servitude and royalty rights or by finding an implied

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1. Over the years, several isolated statutes intended to achieve the purpose of conservation in specific areas were enacted. The first comprehensive act was passed in 1936, La. Acts 1936, No. 225. However, the present broadly encompassing act was passed in 1940. La. Acts 1940, No. 157 (La. R.S. 30:1-22 (1950)).

At a time when the psychology of the oil and gas industry and, indeed, the entire economy of the United States, was geared to the boom and rapid development, the Supreme Court established Louisiana's non-ownership theory of oil and gas law. The public policy which has, according to the court, underlain this non-ownership theory is that mineral rights should be kept in commerce by fostering their return to the land if not used. This is a policy which encourages development of minerals. This "land policy" is executed by application of the rules of liberative prescription. One of these rules, and, therefore, one of the means for implementation of this public policy, has been the requirement that in the case of a mineral servitude a use must occur within ten years by drilling in good faith to a depth at which there is reasonable expectation of commercial production in order to maintain existence of the servitude by interrupting prescription. Absent such use, and absent any other event or
agreement which may interrupt or suspend the running of liberative prescription, the servitude interest expires. In the case of a mineral royalty, production in which the royalty owner is entitled to share must occur within ten years to interrupt prescription.6

The Supreme Court has stated that the use sufficient to interrupt prescription running against a mineral servitude must be a use "in the manner contemplated by the original grant or of good faith drilling operations as an interruption of prescription assumed). In Mays v. Hansbro, 222 La. 357, 64 So. 2d 232 (1953), marginal production had been obtained from the servitude tract over a period of several years. The court held this to be a use constituting a continuing interruption although the production was not in "paying quantities." This is correct as the concept of "production in paying quantities" is peculiarly applicable to and fitted for the problem of lease maintenance beyond the primary term. In McMurrey v. Gray, supra, the operator had drilled to an already exhausted sand with a light rig, but had set casing which would permit later operations to lower strata and then removed the rig. He proceeded to make contractual commitments for a heavier rig and necessary supplies. On attempting to re-enter, the landowner prevented resumption of operations. The court held that the operator's course of conduct constituted a continuing action directed toward drilling to lower productive strata. Although the operations to the exhausted sand were insufficient to interrupt prescription because there was no reasonable expectation of commercial production, the operator, and therefore the servitude owner, was permitted to continue the operations already begun, which if completed at a depth at which there was reasonable expectation of production, would cause an interruption of prescription. This was held to be true even though the operations extended across the prescriptive date. La. Acts 1958, No. 332 (La. R.S. 30:112 (1950) is relevant to the rules of use in that it attempts to define when prescription shall commence against a mineral servitude and the dates on which prescription shall be interrupted and shall recommence as the result of the beginning and termination of drilling and production operations. For a critique see Currier, The 1958 Louisiana Statutes on Liberative Prescription of Mineral Interests, 34 Tul. L. Rev. 51, 61-68 (1959). The statute has not yet been involved directly in any significant litigation.

6. E.g., Crown Central Petroleum Co. v. Barousse, 238 La. 1013, 117 So. 2d 575 (1960); Union Sulphur Co. v. Andrau, 217 La. 662, 47 So. 2d 38 (1950); Continental Oil Co. v. Landry, 215 La. 518, 41 So. 2d 73 (1949); Humble Oil & Refining Co. v. Guillory, 212 La. 646, 33 So. 2d 182 (1947); Union Sulphur Co. v. Lognion, 212 La. 632, 33 So. 2d 178 (1947); St. Martin Land Co. v. Pinckney, 212 La. 604, 33 So. 2d 169 (1947); Frey v. Miller, 165 So. 2d 43 (La. App. 3d Cir. 1964), writs denied, 246 La. 844, 167 So. 2d 669; Montie v. Sabine Royalty Co., 161 So. 2d 118 (La. App. 3d Cir. 1964), writs denied, 246 La. 84, 163 So. 2d 359. In a supplemental opinion in the recent case of Lee v. Goodwin, 174 So. 2d 651, 655 (La. App. 2d Cir. 1965), the court indicates that to interrupt prescription accruing against a mineral royalty production need not be in "paying quantities" as the inherent nature of a royalty interest is that of a right to share in any production. It follows, the court asserts, that production, regardless of whether it be in paying quantities, constitutes an interruption of prescription. This certainly seems to be a correct view when the question is whether production from a royalty tract or a unit including all or part of a royalty is in question. This rule regarding interruption of prescription may legitimately be distinguished from the cases holding that presence of a shut-in well on a royalty tract or a unit including a royalty tract prohibits the accrual of prescription during the shut-in period. See the authorities cited in note 141 infra. These cases are based on the presence of a well capable of commercial production. This requirement is completely justifiable as the shut-in of a non-commercial well should not have any effect on prescription. However, production, once begun in a well previously
reservation.” This rationalization of use in terms of the intent of parties to a conveyance is in a sense a fiction. Certainly, parties such as those to the conveyance in Frost-Johnson Lumber Co. v. Sallings’ Heirs,8 who intended to provide for a reservation of ownership of minerals in place, could not have had any concept of use in their minds at the time the agreement was con- fected. Our mineral conveyancing system still utilizes the sale concept.9 Therefore, the courts have imparted “implied in law” rules defining what will constitute use of a servitude. The rules of use reflect a determination that the use must be “in good faith.”10 However, it is extremely difficult to prove a state of mind. Thus, the courts have developed the rule that, to con- stitute good faith drilling operations sufficient to interrupt pre- script, the operations must be prosecuted to a depth at which there is reasonable expectation of commercial production.11 This evidentiary standard affords protection against bad faith and is more easily administered than any lesser standard. Short of this standard, no amount of good faith, and apparently no amount of investment,12 would move the court to find an interruption of prescription.

deed capable of commercial production may not be “production in paying quan- tities” in the sense that it pays current operating costs. Insofar as any interrup- tion of prescription is concerned, this fact should be of no significance so long as the royalty owner actually shares in the production which is obtained.

8. 150 La. 756, 91 So. 207 (1922).
9. For example, BATH’S FORM MD-4-37-R1 provides that grantor conveys to grantee an “undivided interest in and to all the oil, gas, sulphur and other minerals on, in and under, and the same interest in the mineral rights relating to, the following described lands.”
BATH’S FORM RD-7-37-R1 provides that the grantor conveys to grantee a specified fraction “of the whole of any oil, gas or other minerals, except sulphur, on and under and to be produced from said lands.”
For other conveyances which demonstrate the same hangover from common law conveying of minerals, see, e.g., Hodges v. Long-Bell Petroleum Co., 240 La. 198, 121 So. 2d 831 (1960); Arkansas Fuel Oil Co. v. Sanders, 224 La. 448, 69 So. 2d 745 (1955); McMurry v. Gray, 216 La. 904, 45 So. 2d 73 (1949); Ober v. Williams, 213 La. 568, 25 So. 2d 219 (1948); Gregory v. Central Coal & Coke Corp., 197 La. 95, 200 So. 832 (1941); Hightower v. Maritzky, 194 La. 998, 95 So. 518 (1940); Smith v. Anisman, 85 So. 2d 351 (La. App. 2d Cir. 1956); Bennett v. Robinson, 25 So. 2d 641 (La. App. 2d Cir. 1946). For con- veyances creating royalties see, e.g., Union Oil & Gas Corp. v. Broussard, 237 La. 660, 112 So. 2d 96 (1959); Union Sulphur Co. v. Andrau, 217 La. 662, 57 So. 2d 38 (1950); Continental Oil Co. v. Landry, 215 La. 518, 41 So. 2d 73 (1949); Humble Oil & Refining Co. v. Guillory, 212 La. 646, 33 So. 2d 169 (1947); Vincent v. Bullock, 192 La. 1, 187 So. 35 (1939).
10. See the authorities cited in note 5 supra.
11. See the authorities cited in note 5 supra.
12. In Louisiana Petroleum Co. v. Broussard, 172 La. 613, 135 So. 1 (1931) plaintiff had made good faith, but thoroughly frustrated, attempts to discover oil. One location was abandoned; an attempt to rework an old well was abandoned
The rules of use are, then, one of the means by which the public policy favoring development has been enforced. Also, rationalization of the use concept in terms of "intent of the parties" is an intent implied in law, and not in fact. One suspects, moreover, though there is no concrete proof available, that the "development" psychology probably includes a preference for the distribution of wealth. Without in any way derogating from the possible merits of this attitude, we should frankly recognize that the desire to see the "man in the little white house" located by the oil well share in mineral wealth probably has a motivating role in the decisions administering our mineral property system.

With the advent of conservation in Louisiana, the property system has had superimposed upon it a legal structure antithetical in almost every respect to the non-ownership-development theory. The act contemplates a concerted and efficient conservation of minerals rather than unrestricted development and exploitation of minerals.\textsuperscript{13} It is intended to assure that those whose land overlies a common source of supply shall, as nearly as practical, receive the recoverable hydrocarbons which underlie their property.\textsuperscript{14} It is directed toward prevention of economic and

\begin{itemize}
  \item Without actual drilling; a new well was commenced but had to be abandoned at 767 feet when, after penetrating cap rock, salt water was encountered. No interruption of prescription resulted from these operations.
  \item The key provision in the entire structure is \textit{La. R.S. 30:2} (1950), which declares that "waste of oil or gas . . . is prohibited." \textit{La. R.S. 30:3(t)} defines waste as follows: "(1) 'Waste', in addition to its ordinary meaning, means 'physical waste' as that term is generally understood in the oil and gas industry. It includes:
    \begin{itemize}
      \item \textit{(a)} the inefficient, excessive, or improper use or dissipation of reservoir energy; and the location, spacing, drilling, equipping, operating, or producing of an oil or gas well in a manner which results, or tends to result, in reducing the quantity of oil or gas ultimately recoverable from a pool; and
      \item \textit{(b)} the inefficient storing of oil; the producing of oil or gas from a pool in excess of transportation or marketing facilities or of reasonable market demand; and the locating, spacing, drilling, equipping, operating, or producing of an oil or gas well in a manner causing, or tending to cause, unnecessary or excessive surface loss or destruction of oil or gas."
  \item \textit{La. R.S. 30:9D} (1950):
    "Subject to the reasonable necessities for the prevention of waste, and to reasonable adjustment because of structural position, a producer's just and equitable share of the oil and gas in the pool, also referred to as a tract's just and equitable share, is that part of the authorized production of the pool, whether it be the total which could be produced without any restriction on the amount of production, or whether it be an amount less than that which the pool could produce if no restriction on amount were imposed, which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract or tracts in the pool bears to the recoverable oil and gas in the total developed area of the pool, in so far as these amounts can be practically ascertained. To that end, the rules, regulations, and orders of the commissioner shall be such as will pre-
physical waste\textsuperscript{15} by several means. The unnecessary drilling of wells and other forms of waste are prevented through exercise by the Commissioner of Conservation of his powers to establish drilling units\textsuperscript{16} and compel unit operations,\textsuperscript{17} by the establishment of statewide spacing regulations\textsuperscript{18} and special field regulations,\textsuperscript{19} by controlling individual well location,\textsuperscript{20} by controlling drilling and completion practices,\textsuperscript{21} by regulating production practices,\textsuperscript{22} and by fixing allowables.\textsuperscript{23}

vent or minimize reasonably avoidable net drainage from each developed area, that is, drainage not equalized by counter drainage, and will give to each producer the opportunity to use his just and equitable share of the reservoir energy. In determining each producer's just and equitable share of the production authorized for the pool, the commissioner is authorized to give due consideration to the productivity of the well or wells located thereon, as determined by flow tests, bottom hole pressure tests, or any other practical method of testing wells and producing structures, and to consider other factors and geological and engineering tests and data as may be determined by the commissioner to be pertinent or relevant to ascertaining each producer's just and equitable share of the production and reservoir energy of the field or pool." See also LA. R.S. 30:5B and C (1950).

Although the statute contemplates distribution of production on a volumetric basis, computation of participations in this manner is difficult, if not impossible, in many instances, particularly when a field is in the developmental stage. For this reason, participation will more often than not be computed by the following formula:

\[
\frac{\text{acreage of tract in unit}}{\text{acreage in unit}} \times \text{unit production} = \text{just and equitable share}
\]

15. LA. R.S. 30:3(1) (1950) is quoted in full in note 13 supra.
16. Single well units are established under the provisions of LA. R.S. 30:9 and 30:10.
17. Broad powers concerning "unit operation," the creation of a poolwide or, sometimes, fieldwide, unit to promote maximum recovery, pressure maintenance, or secondary recovery are granted in LA. R.S. 30:5B and 5C (1950). The discussion in this article, however, is almost exclusively in terms of the single well units authorized in LA. R.S. 30:9.
18. LA. R.S. 30:4C(13) (1950). See also Statewide Orders No. 29-E and No. 29-H relating to spacing.
19. E.g., Order No. 35, adopting operating rules for the Haynesville Field, Claiborne Parish, Louisiana, effective February 9, 1942. Such orders usually describe the field, establish a unit pattern, provide a formula for allocating production, and establish rules governing drilling and completion practices and other technical provisions. Early orders had technical provisions which had to be repeated in every order. Because so many of these provisions were standard in nature, statewide orders were issued, thus shortening the normal field order. The statewide orders are normally controlling unless the field order contains contrary provisions. See, e.g., Statewide Order No. 29-B.
20. Well spacing on a statewide basis is provided for in LA. R.S. 30:4C(13) (1950) and Statewide Orders No. 29-E and No. 29-H. Under LA. R.S. 30:9C, the Commissioner is authorized to designate a location for a unit well. As required by the statute, this is done in the unitization order by designating a "drilling area." Exceptional locations can be obtained under the same statutory provision.
21. See generally, LA. R.S. 30:4C (1950). See also Statewide Orders No. 29-B, No. 29-C (also 29-C-1 and C-2), and No. 29-J.
22. See generally LA. R.S. 30:4C (1950). See also Statewide Orders No. 29-B, §§ X-XVI; No. 29-C, C-1, and C-2; No. 29-D; and No. 45-1.
23. LA. R.S. 30:4C(11) and 30:11 (1960). See also Statewide Orders No. 29-F, No. 29-H, and No. 151.
All of these various powers and devices substantially inhibit the rights of the landowner or mineral owner to use his property. Further, they affect the rights of a royalty owner insofar as interruption of prescription may be concerned. The protection of property owners of all kinds from unlawful deprivation of their use rights is achieved through the correlative right to share proportionately in the common reservoir. The right to share in production from a common reservoir is, in a very real sense, a substitute for the use rights which are substantially impaired by enforcement of the conservation laws. Thus, it might be forcefully argued that, because of this inhibitive effect on use rights, the rules of use hammered out by the courts should be liberalized, rather than restricted, to accommodate the limitations under which the servitude or royalty owner must operate today.

It should readily appear, then, that there is a major conflict between our basic property regime and our conservation laws. The task is to bring about an accommodation of these two legal structures, both of which are heavily weighted with elements of public policy deserving serious consideration at all times. Fundamentally, all of the problems concerning the impact of unitization and unit operations on mineral servitudes and mineral royalties are derived from the conflict between these two regimes and depend for solution upon determination of which, in any given situation, should prevail.

A subsidiary consideration which has been and should continue to be influential on the courts in balancing the two policy elements is a purely pragmatic concern for judicial administration and certainty in the property law. There may well be instances in which the policies recognized in the conservation laws should be given precedence, yet the only easily administered standard is one which gives greater weight to the property policies. The interests of reasonable certainty and predictability in the law, and ease of administration, may overbalance the scales in favor of the property regime.

**Compulsory Unitization**

With these considerations in mind, we may now proceed to an examination of the jurisprudence. The cases reveal two means by which conservation orders or practices may have an
impact on the duration of mineral servitude and royalty interests: (1) the possibility that issuance of a conservation order may have some automatic legal effect on such mineral interests; and (2) the possibility that operations on a unit can have some impact on the accrual of liberative prescription. To allow orderly examination of the jurisprudence it is divided accordingly.

1. Effect of Issuance of a Conservation Order

A. Pooling Effect

There are several legal effects that may flow automatically from the mere issuance of a conservation order. The first of these is the pooling of the various tracts in a single-well unit. Close analysis of the jurisprudence reveals a rather hazy picture, but provides a reasonable basis for concluding that pooling of the royalty interests involved takes place as a direct result of a unitization order.24

Two early cases treated this problem25 under the 1936 Conservation Act, which authorized the Commissioner of Conservation to compel pooling in the absence of agreement to prevent waste under certain circumstances.26 In Placid Oil Co. v. North Central Texas Oil Co., 206 La. 693, 19 So. 2d 616 (1944), the court held that issuance of a conservation order could result in the pooling of the various tracts in a single-well unit. Other cases considering this matter or bearing on it by analogy or implication are:


25. Dillon v. Holcomb, 110 F.2d 610 (5th Cir. 1940); Placid Oil Co. v. North Central Texas Oil Co., 206 La. 693, 19 So. 2d 616 (1944).

26. La. Acts 1936, No. 225, § 6 reads in part, as follows: “Without prejudice to the general authority conferred by this Act the Commissioner of Conservation is hereby empowered to adopt rules and regulations and to make orders on the following matters: . . . (6) permitting the pooling of properties for drilling or production if agreed upon, and if not agreed upon, to require pooling of properties in any case where the smallness or shape of a separately owned tract would, under the enforcement of a uniform spacing plan or proration unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover his just and equitable share of the crude petroleum oil, natural gas, and sulphur in the pool; provided that the owner of any tract that is smaller than the drilling or production unit established for the field, shall not be deprived of the right to drill on and produce from such tract, if same can be done without waste; but in such case, the allowable production from such tract, as compared with the allowable production therefrom if such tract were a full unit, shall be in the ratio of such tract to the area of the full unit. All orders requiring such pooling shall be upon terms and conditions that are just and reasonable, and will afford to the owner of each tract in the pool the opportunity to recover or receive his just and
Central Texas Oil Co.,27 it was held that filing of a plat and issuance of a drilling permit under an eighty-acre spacing order, issued as a part of the comprehensive order governing operations in the Cotton Valley Field,28 had the effect of creating an eighty-acre unit. Thus, the owners of royalty under one forty-acre portion of the unit were entitled to share ratably in the production according to the provisions of the order. It is significant, however, that both tracts were covered by the same lease.

In Dillon v. Holcomb29 an operator secured a permit to drill a well on a specified ten acres of land composed of two tracts under separate ownership, both of which were leased by the operator. The permit was issued under an order establishing operating rules for the Rodessa Field similar to that in the Placid case.30 The United States Court of Appeals for the Fifth Circuit held that the owners of royalty under the tract on which the well was not drilled were entitled to share ratably in the production from the well.

Several observations may be made concerning these cases. First, it seems clear that the Placid decision is correct, as the special field orders in question provided for unitization, fixing of allowables, and allocation of production to all tracts on an acreage basis.31 Further, it speaks in terms of pooling separately owned tracts.32 In this particular instance, however, only a single lease was involved. It may also be observed that the pooling power granted to the Commissioner of Conservation under equitable share of the oil, gas and sulphur, in the pool as above provided, so far as may be practicably recovered without waste. In the event such pooling is required, the cost of development and operation of the pooled unit shall be limited to the lowest actual expenditures required for such purpose, including a reasonable charge for supervision; and in any case of any dispute as to such cost, the Commissioner of Conservation shall determine the proper costs.

27. 206 La. 693, 19 So. 2d 616 (1944).
28. Order No. 10, providing special rules and regulations governing the production of gas and oil from any depth of eight thousand feet or more below the surface in the Cotton Valley Field, Webster Parish, Louisiana, effective July 24, 1937.
29. 110 F.2d 610 (5th Cir. 1940).
30. Order No. 7, adopting operating rules for the Hill Sand Horizon, Neugent Sand Horizon, Gloyd (or Caddo Levee Board) Horizon, Dees-Young Group of the Glen Rose Formation in the Rodessa Field, Caddo Parish, Louisiana, effective January 1, 1937. This order has been subsequently amended by Order No. 11, effective March 1, 1938, Order No. 7-A, effective August 1, 1943, and Order No. 7-2, effective July 25, 1960.
31. Order No. 10, §§ IV and V. See also § I, which states as a purpose of the order the assurance to each producer of his just and equitable share of production and full utilization of his share of reservoir energy.
32. Order No. 10, § V.
the 1936 act was indisputably broad enough to include this sort of pooling.\textsuperscript{33} The field order applicable in \textit{Dillon v. Holcomb}\textsuperscript{34} is not as broad as that in \textit{Placid}; however, there is sufficient similarity to justify the result.\textsuperscript{35} Also, defendant was lessee of both tracts involved.

Both of these decisions have been cited by one national authority as indicating the possible existence of the doctrine of "equitable pooling" in Louisiana.\textsuperscript{36} This concept has its origins in a Mississippi holding that spacing regulations based on general conservation statutes without compulsory pooling authority effected a pooling of the royalty interests in each designated drilling unit.\textsuperscript{37} The same authority asserts, with great logic, that the proper term in this instance is, perhaps, "judicial pooling" rather than "equitable pooling."\textsuperscript{38} In neither \textit{Placid} nor \textit{Dillon}, however, was there separate ownership of leases, and in \textit{Placid} only a single lease was involved. Thus, the \textit{Dillon} decision fits the concept of equitable pooling more comfortably than \textit{Placid}.

It is significant that in both of these cases the pooling effect does not stem from mere issuance of the conservation order, but rather from issuance of the drilling permit in accordance with the order.

The pooling power granted under the 1936 act contrasts somewhat with that of the present Conservation Act. The creation of single well units is contemplated under R.S. 30:9B.\textsuperscript{39} In

\textsuperscript{33} La. Acts 1936, No. 225, § 6(6). This provision is quoted in pertinent part in note 26 \textit{supra}.  
\textsuperscript{34} 110 F.2d 610 (5th Cir. 1940).  
\textsuperscript{35} Order No. 7, § V. The provisions of the Rodessa Field Order do not speak of "pooling" in express terms. However, § V does allot acreage to existing and future wells drilled in the field. It specifically provides that only one permit to drill will be granted on a tract of ten acres or less. As indicated in the text, § V of Order No. 10 utilizes the terms "pooling" or "pooled" in several instances.  
\textsuperscript{36} 6 WILLIAMS \& MEYERS, OIL AND GAS LAW 53 (1964).  
\textsuperscript{37} \textit{E.g.}, Griffith v. Gulf Refining Co., 215 Miss. 15, 60 So. 2d 518, 61 So. 2d 306 (1952); Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551 (1952). These and other cases are discussed in 6 WILLIAMS \& MEYERS, OIL AND GAS LAW § 906.1 (1964).  
\textsuperscript{38} 6 WILLIAMS \& MEYERS, OIL AND GAS LAW 36 (1964).  
\textsuperscript{39} La. R.S. 30:9B (1950): "For the prevention of waste and to avoid the drilling of unnecessary wells, the Commissioner shall establish a drilling unit or units for each pool, except for those pools which, prior to July 31, 1940, had been developed to an extent and where conditions exist making it impracticable or unreasonable to use a drilling unit at the present stage of development. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities."
R.S. 30:10A it is provided that when two or more separately owned tracts of land are embraced within a drilling unit which has been established by the Commissioner of Conservation, the owners may validly agree to pool their interests and to develop their lands as a drilling unit. However, if the owners have not agreed to pool their interests, the Commissioner must force the pooling after notice and hearing. The term "owner" is defined in R.S. 30:3(8) as the person having the right to drill into and to produce from a pool and to appropriate the production either for himself or for others. Thus the act envisions issuance of a unitization order and a subsequent pooling order in the absence of voluntary agreement by the "owners."

A person of literal mind could make a strong argument in favor of the proposition that any pooling effect stemming from creation of a drilling unit and subsequent pooling order under these provisions should affect only the interests of the owners in question, who will most often be the lessees. Such a construction would probably require separate agreement on the part of those with royalty interests, a heavy burden on the conservation regime. Fortunately, the cases have not reflected such a literal turn of mind; yet it cannot be said that the jurisprudence is completely clear.

40. LA. R.S. 30:10A (1950): "A. When two or more separately owned tracts of land are embraced within a drilling unit which has been established by the commissioner as provided in R.S. 30:9B, the owners may validly agree to pool their interests and to develop their lands as a drilling unit."

"(1) Where the owners have not agreed to pool their interest, the commissioner shall require them to do so and to develop their lands as a drilling unit, if he finds it to be necessary to prevent waste or to avoid drilling unnecessary wells.

"(a) All orders requiring pooling shall be made after notice and hearing. They shall be upon terms and conditions that are just and reasonable and that will afford the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense. They shall prevent or minimize reasonable avoidable drainage from each developed tract which is not equalized by counter drainage.

"(b) The portion of the production allocated to the owner of each tract included in a drilling unit formed by a pooling order shall, when produced be considered as if it had been produced from his tract by a well drilled thereon.

"(c) In the event pooling is required, the cost of development and operation of the pooled unit chargeable by the operator to the other interested owners shall be limited to the actual reasonable expenditures required for that purpose, including a charge for supervision. In the event of a dispute relative to these costs, the commissioner shall determine the proper costs, after due notice to all interested persons and a hearing."

41. LA. R.S. 30:3(8) (1950): "Owner means the person who has the right to drill into and to produce from a pool and to appropriate the production either for himself or for others."
In *Sun Oil Co. v. Stout*[^42] the owner of a forty-acre tract had conveyed one acre of his property to a church, subject to the condition that title would revert if the premises ceased to be used as a church. A lease was obtained from the owner of the tract, but none was executed by the church. Under the field order applicable to the Delhi Field[^43], development was ordered on a forty-acre basis, each unit corresponding to a regular, governmental sixteenth section. The church, which had never ratified the lease or entered into any pooling agreement, claimed a proportionate share of royalties from the unit well located on the tract in question. It was held that this order had the effect of pooling the entire forty acres and that the church was entitled to its just and equitable share of production from the unit well, subject to adjustment for its share of well and operating costs.

The court refused to determine whether the church could have drilled a well on its one-acre plot without causing occurrence of the resolutory condition in the original donation. Thus, the status of the church as an “owner” under the act is doubtful. The significant aspect of the decision is that the church had a right to claim its share of production without any formal pooling agreement. If the church did not qualify as an “owner” under the act but stood somewhat in the position of a royalty owner, the decision may be viewed as holding that the order itself had the effect of pooling the interests of all royalty owners. If, on the other hand, the church could be regarded as an “owner” under the act, it had a right both under the act and the order itself to apply to the Commissioner to have a pooling order issued[^44]. The holding that the church was entitled to the full amount of production attributable to its one acre, subject to

[^42]: 46 So. 2d 151 (La. App. 2d Cir. 1950).
[^43]: Order No. 96, adopting operating rules for the Holt Zone and the May sand in the Delhi Field, Richland Parish, Louisiana, effective May 31, 1945. This order has been amended by Order No. 96-AA, effective February 1, 1946, and an Order of January 10, 1961. Numerous other orders have been issued similarly regulating other sands in the Delhi Field.
[^44]: La. R.S. 30:10A (1950). Section I B of Order No. 96 reads as follows: "When two or more separately owned tracts of land are embraced within a drilling unit, the owners thereof may validly agree to pool their interest and to develop their lands as a drilling unit; and any one or more of such owners may apply for and secure a drilling permit as provided in Section II hereof. Where, however, such owners have not agreed to pool their interest, the Commissioner will upon written request by any such owner and if he finds it necessary for the prevention of waste to avoid the drilling of unnecessary wells require such owners to do so and to develop their lands as a drilling unit, after notice of hearing, and upon the conditions stated in § 9(a) of Act 157 of 1940."

adjustment for well and operating costs, tends to place it in the position of an owner.

In *Smith v. Holt*⁴⁵ plaintiff landowner sought to have a servitude declared terminated. The interest was one of two servitudes created from the same sixteenth section by a prior owner of the entire tract. The servitude owner had leased both tracts to the same lessee, who had in turn assigned an undivided one-half interest in the lease to an oil company. This unit, too, was established under Order No. 96, which governed the Delhi Field. The co-lessees of the sixteenth section in question applied for a drilling permit on the unit and completed a producing well located on one of the two servitudes. Plaintiff, owner of the tract on which the well was not located, sought to have the servitude applicable to his land declared terminated and to have it cancelled from the public records. Plaintiff argued that defendant's lessees had not secured a pooling order, as contemplated by the act and the field order, the unitization order being only a spacing measure. Thus, it was contended, the servitude had lapsed for non-use. The court rejected plaintiff's demands on the ground that only the "owners" of the tracts within a drilling unit were required to secure a pooling order, if they could not agree. As the two co-owners of the only lease involved on this unit had applied for a drilling permit and drilled and completed a well, there was no necessity for a pooling order. To require one would be to require a useless act.

*Smith v. Holt*⁴⁶ may be interpreted in at least two ways. First, it might be inferred that as only the "owners" could seek a pooling agreement or order under the field order, the interests of the royalty owners (lessors and mineral royalty owners) are pooled automatically by issuance of the order. On the other hand, there is a reasonable basis for interpreting the decision as being similar to the *Placid* and *Dillon* cases, which indicated that the pooling effect came into existence upon issuance of a drilling permit. It is difficult to discern which of these interpretations is correct, but the latter interpretation seems more reasonable.

The Supreme Court was finally presented with a case involving separate lease ownership in *Everett v. Phillips Petroleum Co.*⁴⁷ Plaintiffs were owners of numerous small strips of

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⁴⁵. 223 La. 821, 67 So. 2d 93 (1953).
⁴⁶. Ibid.
⁴⁷. 218 La. 835, 51 So. 2d 87 (1950).
land and canals running through the area of the Erath field. Their holdings were under lease to defendant. In negotiating the lease, the parties took cognizance of the fact that the location of a well on any of the narrow strips of land would be unlikely. Thus, defendant agreed to pay plaintiff compensatory royalties measured by 1 1/2% of the amount of production from wells drilled within a specified distance of any of the plaintiffs' property. The Commissioner of Conservation issued special orders for the 7300' and 7700' sands in the field, establishing a forty-acre unit pattern; further, it was provided that when two or more tracts of land were embraced within a drilling unit, the owners could validly agree to pool their interests and that upon their failure to agree the Commissioner could, upon request and after hearing, require pooling. This language tracks the provisions of R.S. 30:10A.

Two units were brought into question. One involved tracts of land which were all under lease to defendant. Further, defendant had applied for an integration, or pooling, order on this unit pursuant to the field order. The other, however, was comprised of a small portion of plaintiffs' property and lands under lease to another operator. In holding that plaintiffs were not entitled to receive the 1 1/2% compensatory royalties provided in the lease with defendant, the Supreme Court made the statement that "the drilling of the [unit] well, even in the absence of a specific order of forced pooling, . . . was effective as a drilling upon the 100 foot square [belonging to plaintiffs] and plaintiffs are entitled, under Order 34-D and Section 9(a) of Act No. 157 of 1940 [now R.S. 30:10A], to recover from [the unit operator] their proportionate share of the total production in accordance with the acreage they own." This holding is the only direct indication by the Louisiana Supreme Court that issuance of a conservation order establishing developmental unit patterns as a part of special field orders governing the development of an identified field has the effect of pooling the interests of royalty owners so as to entitle them to share ratably in production from the unit well. Nevertheless,

48. Order No. 34-D, adopting operating rules for the 7300' and 7700' oil sands in the Erath Field, Vermillion Parish, Louisiana, effective November 1, 1944. This order has been amended by an order effective May 19, 1952.
49. Order No. 34-D, § I-C.
50. See note 40 supra.
it seems sufficient authority for establishment of that principle. In practice, the procedure of issuing the unitization order followed by a pooling order in the event owners cannot agree to pool their separate interests, as envisioned by the Conservation Act, is no longer followed. In forming drilling units under R.S. 30:9B, it is now customary to pool all interests within the unit by the same order establishing the unit. Therefore, the question raised by these decisions, exactly what accomplishes the pooling effect, is largely academic under present administrative practice. This administrative practice and the result of the *Everett* case are laudable and are much preferred over the apparent position of the earlier jurisprudence. The order in question will be of record, whereas the drilling permit would not be. Therefore, the task of the title examiner is relieved of the burden of seeking one more item of information outside the public records. The pooling effect is essential to the effectiveness of the conservation regime. It must occur at some point, and both the *Everett* decision and the administrative practice are practical in fixing this effect at the time the order is issued.

The nature of the pooling effect as between the parties affected, particularly those entitled to production royalties, is largely unspecified. It does not seem to have any effect as a cross-conveyance. Further, it is subject to change, as the Commissioner may enlarge or contract the size of the unit.

52. See note 39 *supra* for the full text or LA. R.S. 30:9B (1950).

53. *E.g.*, Order No. 341, adopting operating rules for the production of gas and condensate from the Landry Sand in the Leleux Field, Vermillion Parish, Louisiana, effective June 1, 1956. In accordance with the findings recited, § 2 of the order declares: "All separately owned tracts and property interests within each unit created herein are hereby force pooled and integrated for the exploration for and the production of gas and liquid hydrocarbons from the Landry Sand, with each tract sharing in unit production in the proportion that the area of such tract bears to the entire area of such unit. Each tract as to which the obligations of the owner are separate shall be considered as 'a separately owned tract of land even though a single owner may own more than one tract.'" (Emphasis added.)

54. LA. R.S. 30:11.1 (1950) requires the recordation of all orders creating drilling or production units.

55. Arkansas-Louisiana Gas Co. v. Southwest Natural Production Co., 221 La. 608, 60 So. 2d 9 (1952); *cf.* Martel v. A. Veefer Co., 199 La. 423, 6 So. 2d 335 (1942); Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co., 185 La. 751, 170 So. 785 (1936). See also Whitwell v. Commissioner of Internal Revenue, 257 F.2d 548 (5th Cir. 1958).

The parties to a voluntary pooling or unitization agreement may contract in such manner as to effect a cross-conveyance, as in Monsanto Chemical Co. v. Southern Natural Gas Co., 254 La. 309, 102 So. 2d 223 (1958), involving an operating agreement.

acts or events which will terminate the unit, and therefore the pooling arrangement, are substantially unclear. It appears, however, that at this time the jurisprudence supports the view that a compulsory unit is terminated only by subsequent order of the Commissioner of Conservation.\textsuperscript{57} It may be concluded that the pooling effect stems from the unit order, and that upon the occurrence of production a royalty owner may assert a claim to his proportionate part. It is, then, a legally imposed sharing arrangement. It does not seem reasonable to assume that binding legal relations occur laterally among the royalty owners themselves, except as to the right to share, subject to the limitation that the sharing arrangement resulting from the order must provide each participant with his just and equitable share of production according to the Conservation Act.\textsuperscript{58}

There are some problems in the enforcement of this right to claim a share in production. If the tract in which a servitude or mineral royalty owner is entitled to share is not under lease, then certainly the right to share in future production is enforceable directly against the unit operator,\textsuperscript{59} subject to the possibility that the servitude owner may be liable to adjust the amount he is entitled to receive to account for a proportionate share of drilling and operating costs.\textsuperscript{60} If, however, the tract in

\textsuperscript{57} Monsanto Chemical Co. v. Hussey, 234 La. 1058, 102 So. 2d 455 (1958) (by implication); Sohio Petroleum Co., 207 La. 370, 21 So. 2d 383 (1952) (by implication); Alston v. Southern Production Co., 207 La. 370, 21 So. 2d 383 (1945) (by implication). \textit{But cf.} Boddie v. Drewett, 229 La. 1017, 87 So. 2d 516 (1956) (by implication), in which the court held that the obstacle created by issuance of a compulsory unitization order was "subject to removal following the unsuccessful exploration" in the drilling area designated in the original order. It was then held that prescription would not recommence after unsuccessful unit drilling operations until a "reasonable time" after abandonment of the dry hole. This might be taken as a indicating that absent a subsequent order or issuance of a subsequent permit designating an exceptional location, the effect of the unitization order will terminate, for some purposes at least. The question whether drilling of a dry hole will terminate a unit established by exercise of a pooling power granted in a mineral lease is raised but not definitively met in McDonald v. Grande Corp., 148 So. 2d 441 (La. App. 3d Cir. 1962). This question has not been raised regarding a compulsory unit.

\textsuperscript{58} LA. R.S. 30:9D (1950), quoted note 14 \textit{supra}.

\textsuperscript{59} Anisman v. Stanolind Oil & Gas Co., 98 So. 2d 603 (La. App. 2d Cir. 1957); Sun Oil Co. v. Stout, 46 So. 2d 115 (La. App. 2d Cir. 1950).

\textsuperscript{60} Such an accounting was required in Sun Oil Co. v. Stout, 46 So. 2d 151 (La. App. 2d Cir. 1950). See also Hunter Co. v. McHugh, 202 La. 97, 11 So. 2d 495 (1942), aff'd, 320 U.S. 222 (1943); Huckabay v. Texas Co., 227 La. 191, 78 So. 2d 829 (1955); Anisman v. Stanolind Oil & Gas Co., 98 So. 2d 603 (La. App. 2d Cir. 1957). This right of the operator to recover the reasonable costs of development and operation may be enforced by withholding production, as in Hunter Co. v. McHugh, \textit{supra}. However, the Fourth Circuit Court of Appeal has recently held that where a party provokes the hearing resulting in establishment of a unit surrounding a well previously drilled by another operator, the
question is under lease to one other than the unit operator, the lessee will qualify as an "owner" under the Conservation Act\textsuperscript{61} and the operator's obligation to account may run only to the interested "owners."\textsuperscript{62} Thus, the royalty or servitude owner's right to an accounting might run only against the appropriate lessee.\textsuperscript{63} If the right to share is being asserted to recover for past production, it seems that the interested royalty or servitude owner would be entitled to enforce his right against the unit operator or, when appropriate, against the lessee "owner" as outlined above. But there is also the possibility that if the royalties in question have been paid to other interested parties, the right might be enforced against them as well as the operator or lessee.\textsuperscript{64} It is possible, however, only to suggest the problems concerning enforcement of the right to share, as there are many contracts, such as division orders or production purchase agreements, which may be essential to a determination of rights in a particular case.

The pooling effect normally has no immediate impact on the duration of a servitude or royalty, regardless of how it comes about, and it is not, of course, peculiarly applicable to servitude

party requesting the unitization can be forced to pay its proportionate share of well costs in cash. Superior Oil Co. v. Humble Oil & Refining Co., 165 So.2d 905 (La. App. 4th Cir. 1964). This latter decision is closely limited by the court to its specific facts. Whether a servitude owner provoking a unitization hearing could be similarly forced to pay well costs in cash is a matter left open to doubt.

\textsuperscript{61} LA. R.S. 30:3(8) (1950).

\textsuperscript{62} It is decidedly unclear exactly what the extent of the unit operator's obligation to account is. LA. R.S. 30:10A, the basic pooling provision, speaks only of the pooling of the interests of "owners." It must be assumed that this term is used as defined in the act. Therefore, if a unit operator has paid a lessee-owner the value of production attributable to a tract included in the unit, the operator might contend that his obligation to account is completely fulfilled.

\textsuperscript{63} But cf. Young v. West Edmond Hunton Lime Unit, 275 P.2d 304 (Okla. 1954), suggesting the existence of implied obligations between the unit operator and interested lessors. The entire spectrum of problems raised by the legal status of the unit is discussed in the context of Oklahoma statutes and decisions in Merrill, \textit{The Legal Status of a Statutory Oil and Gas Production Unit}, 10\textit{Okla. L. Rev.} 249 (1957).

\textsuperscript{64} LA. CIVIL CODE arts. 2301-2305 and 2311-2314 (1870), concerning payment of things not due, suggest by analogy the possibility of an election on the part of a claimant. If the unit operator has sold production belonging to a particular royalty owner, he might be considered liable for the return of the price under article 2314, and under article 2302 he might be entitled to a judgment over against the person to whom he has paid the proceeds of the sale. These articles rather clearly subject the party receiving the money to liability.

It is also possible that the relationship of the operator to all parties interested in the unit may be somewhat in the nature of a mandate. Such a view would permit the imposition of a quasi-fiduciary duty in managing the affairs of the unit.

\textsuperscript{64} LA. CIVIL CODE arts. 2301-2305 and 2311-2314 (1870).
or royalty interests, but it has great significance in considering the consequences of subsequent unit operations, as will be seen in the treatment of unit operations below.

B. Obstacle

A second area in which the issuance of a conservation order apparently has some immediate legal effect is presented in *Boddie v. Drewett*, in which it was held that issuance of an order establishing a drilling unit including an entire servitude tract created an obstacle to use of the servitude, thus suspending prescription from the effective date of the order. This holding is apparently based on the fact that the servitude tract was not within the drilling area designated by the Commissioner, preventing operations on the tract. It is implied that if the drilling area had fallen on the servitude tract, no obstacle would have been created.

As to the nature of the obstacle, the court apparently considered it of no moment that the order was applicable to only two sands. The productivity of a third sand was ultimately proven by completion of a producing well. Thus, although the servitude owner could technically have used the servitude for the purpose of drilling to sands other than those unitized, the court seemingly felt that in view of the basic objectives of conservation and the economic factors which affect exploration in the industry, there was an effective obstacle to the exercise of the entire servitude.

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66. The Supreme Court specifically held that the order itself constituted the obstacle in response to a contention that the obstacle should be deemed to come into existence only with the commencement of drilling operations. *Boddie v. Drewett*, 229 La. 1017, 1028, 87 So.2d 516, 520 (1956).

67. In reciting the facts of the case, the court specifically mentions that the drilling area originally designated in the unitization order did not include the tract in question. Further, in deciding the case, the court repeats the provisions of the order designating the drilling area and makes the following statement: “Thus, drilling operations on the twelve acre tract were prohibited by the order which, being based on geophysical and scientific findings and entered for the purpose of avoiding waste and preventing the unnecessary drilling of wells, was a valid conservation measure.” *Id.* at 1025, 87 So.2d at 519.


70. “But, when the facts exhibit a real obstacle to the use of the servitude such as the lawful orders of the Commissioner of Conservation the codal provision [art. 792] applies and the running of prescription is suspended by operation of law . . . . In the case at bar, we think it evident that the order of the Com-
This pragmatic application of the obstacle theory is one recognition of the inhibitive effect of conservation on servitude rights. Although a unitization order including the entire servitude tract might apply to a single sand, the effective result of the order is often that a prudent investor would not drill to those other sands without the right to test the unitized sand. Moreover, it may well be that the unitized sand is the only known potential. This decision has the effect of lightening the use burden imposed on the servitude owner. It is a logical recognition that the conservation concept has real, inhibitive effects on the servitude owner's use rights, though short of totally prohibiting their exercise.

As far as the geographical extent of the obstacle is concerned, there was no real difficulty in Boddie, as the entire servitude tract was included in the unit. One may ponder what the result might have been if only part of the tract had been included within the unit. The possibility that an obstacle might exist was apparently denied in Jumonville Pipe & Machinery Co. v. Federal Land Bank. The answer to this problem requires a weighing of the two policy sources involved. It seems that if the practical existence of an obstacle was recognized in Boddie v. Drewett, even though the unit order was limited to two designated horizons, the same practical considerations should be given great weight when only part of the servitude's acreage is included in the unit.

There are several factors which can be weighed against an approach based on the notion that unitization of a portion of the surface can create a real obstacle. Though this solution is attractive in giving validity to the obstacle concept as articulated in Boddie v. Drewett, it would inevitably require the court to determine whether the amount of acreage included constitutes...

missioner of Conservation...imposed an effective obstacle to the use of the servitude." (Emphasis added.) Id. at 1024, 87 So.2d at 518-19.
71. 230 La. 41, 49, 87 So.2d 721, 724 (1956). In Mire v. Hawkins, La. App. 3d Cir., No. 1397 (May 1965) it has recently been held that no obstacle is created by an order unitizing a portion of the servitude tract. An interesting possibility raised by the decisions indicating that a unitization order may have some divisive effect on a servitude was treated briefly in Mire v. Hawkins, supra. Alluding to the decisions speaking of possible "division" of the servitude by the unit order, the court stated that even if it were assumed that a true division occurred, no obstacle was created in the case at bar as a portion of the included acreage lay within the drilling area. The implications in this argument would greatly extend the division concept. For further discussion of this area, see the text beginning with note 80 infra.
72. 229 La. 1017, 87 So.2d 516 (1956).
73. Ibid.
a "substantial" obstacle, a most indefinite and ultimately inefficient standard. Subsequent title examiners would be at a loss to determine whether a particular unit order including a portion of a servitude should be regarded as an obstacle, and litigation would be required to settle many such questions. The instability of titles, so arising, is thoroughly undesirable.

Two other possible approaches have the benefit of certainty and ease of administration. It could be argued that the inclusion of any part of the servitude tract in a unit constitutes an obstacle to use of the entire tract. However, the possibility that unitization of a tiny fragment of a servitude tract might be held to suspend prescription means that the rule would, in some cases, be unrelated to the realities which call for application of the obstacle concept in the first place.

The second alternative approach, which would also lend certainty to the law, is to require that the entire tract be included in the unit to create an obstacle. On balance, this test is to be preferred among the three. If a particular sand or combination of sands underlies an entire tract, though there be other possible sands to which the servitude owner or his lessee might drill, it is realistic to recognize the existence of an obstacle. This test assures that the courts will find an obstacle only in situations where the inhibitive effect of the conservation order is real. The intermediate approach of basing application of the obstacle theory on degree of inhibition is objectionable for administrative reasons, and the other extreme of recognizing an obstacle in all cases of partial unitization is objectionable because it would, on occasion, allow a suspension of prescription in the absence of a real obstacle.

It is true that requiring a total inclusion will create the difficult case in which 620 acres of a 640-acre tract may lie within a unit. However, the general application of the rule would not be manifestly unjust, though its particular application in some instances might be unfortunate.

Another matter of significance to the obstacle theory as employed in *Boddie v. Drewett*74 is the duration of the obstacle. The decision held that the obstacle existed at least until the initial well was plugged and abandoned and for a reasonable time.

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74. Ibid.
thereafter.\textsuperscript{75} In speaking of a "reasonable time thereafter," the court may have been contemplating that interested parties should have a period in which to apply for further orders from the Commissioner to secure an alternative location or reformation of the unit before recommencement of prescription. This is highly practical, but it poses great difficulty for the title examiner or other interested party in determining whether a servitude interest is still outstanding.

It is possible that R.S. 30:112\textsuperscript{76} may have some effect on the duration of the obstacle in such cases. The statute provides that prescription shall recommence after drilling operations from the last day of such operations. Although applicable literally only to interruptions of prescription, the statute might nevertheless be construed to be applicable to the termination of an obstacle in a \textit{Boddie} type situation. Direct application of the statute or its concept would have the advantage of certainty.

Another problem concerning duration is that after establishment of a unit, drilling might never take place. If the obstacle is created immediately upon issuance of the order, when does it terminate if the unit remains undeveloped? This question is still unlitigated. The only present answer would seem to be that within a "reasonable time" after the order, the obstacle should be held to have terminated.\textsuperscript{77} However, this is an indefinite standard, and ultimately legislation should deal with the question directly.

\textsuperscript{75} Id. at 1026, 87 So. 2d at 519.

\textsuperscript{76} La. R.S. 30:112A (1950): "Except as otherwise provided by R.S. 9:5806, prescription shall begin to run on a mineral servitude on the day on which the servitude is created, provided, however, that in the event a bona fide attempt is made to drill for or produce minerals, or in the event that there is actual production, prescription shall be interrupted and shall commence to run again on the last day of production or the last day actual drilling or production operations are conducted on the property, regardless of whether an application to abandon the well shall have been filed with the Louisiana Department of Conservation, or regardless of whether said well shall be actually plugged and abandoned, or in the event of contracts providing for shut-in rental payments in lieu of production, prescription shall commence to run again at the end of the period for which the last such rental payment was made in the event of no production."

\textsuperscript{77} There is some basis in the jurisprudence for arguing that the unitization order does not expire for any purposes unless terminated by subsequent order of the Commissioner of Conservation. See note 57 supra. Certainly, if the sharing arrangement created by the unitization has become operative through production, a subsequent order is required to change the unit outline or participation. However, if the unit is undrilled for an extended period of time and development of a field has virtually ceased, there does not appear to be any unreasonable burden placed on the conservation regime by holding that an obstacle created by issuance of a unitization order has terminated. Of course, the indefinite nature of this rule is objectionable.
Some practitioners believe that the obstacle theory, as proposed in this case, would be unnecessary if the Supreme Court had merely held that the drilling of the dry hole would constitute a use of all interests included in the unit. On the specific facts of the case, this view might have merit. However, there would be a need for the obstacle theory if, contrary to Boddie v. Drewett, the unit well had been drilled after the prescriptive date of the servitude. In such a situation, there would have been no use by drilling within ten years, and unless the servitude were preserved by a suspension of prescription, it would have expired. A similar situation was presented in Phillips Petroleum Co. v. Richard, in which a well commenced prior to the prescriptive date was completed as a producer after it. The obstacle was held to have extended until the well was put into production.

C. Division of Servitudes and Royalties

Yet another, and perhaps the most important, area in which mere issuance of a unitization order may have automatic legal effects is presented in those cases in which only a portion of a royalty or servitude tract is included in a compulsory unit. Two opinions by the Louisiana Supreme Court and one by the Third Circuit Court of Appeal suggest the possibility that the issuance of a unitization order may in some way "divide" or "reduce" a servitude or royalty tract with the result that subsequent production from a unit well will have the effect of interrupting prescription only on that portion of the interest included in the unit.

Three possible rationalizations can be gleaned from the various opinions rendered in these cases. In Childs v. Washington, Chief Justice Fournet reasons from earlier decisions involving contractual agreements executed by the servitude owner. His logic runs in the following fashion:

"It logically follows, therefore, that if the landowner and the mineral owner can by agreement extend the servitude as to a portion only of the acreage without by such act

78. 229 La. 1017, 87 So. 2d 516 (1956).
79. 127 So. 2d 816 (La. App. 3d Cir. 1961).
82. 229 La. 869, 87 So. 2d 111 (1956).
interrupting the tolling of prescription as to the servitude on the remainder of the tract, as held in Elson v. Mathewes, supra, and if the mineral owner can divide the advantages of a servitude by assigning to a third person all of his interest in a designated portion of the land affected by the servitude and create a situation whereby user of a portion would not hold the remainder, as held in Ohio Oil Co. v. Ferguson, supra, and Byrd v. Forgotson, supra, then clearly when the Commissioner of Conservation, acting for the State in the exercise of its police power, by his orders after due hearing included within a unit or units portions of a tract as to which owners had failed to agree to pool their interests for development purposes, his act produced the same result as if the parties had formed a drilling unit by convention and for development purposes had reduced the servitude to that extent.\textsuperscript{83}

There are several errors in this logic. The most obvious lies in the construction of the conservation order according to the result reached in \textit{Elson v. Mathewes},\textsuperscript{84} in which a unitization agreement jointly executed by a landowner and a mineral servitude owner was construed as evidencing an intent to "divide" the servitude. Such an agreement furnishes at least some basis for inferring that the parties intended to modify the use requirements implied in the original conveyance creating the interest, but in the case of the conservation order, there is no such agreement from which to reason. The identification of the effect of a unitization order with the judicial construction of the agreement in \textit{Elson v. Mathewes}\textsuperscript{85} necessarily assumes that the landowner and mineral owner in executing such an instrument will always agree in the same fashion. What if the parties in \textit{Elson} had clearly agreed that production from the voluntary unit would interrupt the running of prescription on the entire servitude? Would the result achieved by the Chief Justice in \textit{Childs} have been different?

The later case of \textit{Crown Central Petroleum Corp. v. Barousse},\textsuperscript{86} though it involves a royalty interest, clearly demonstrates that parties may agree in a fashion other than that found

\textsuperscript{83} Id. at 879, 87 So. 2d at 114.
\textsuperscript{84} 224 La. 417, 69 So. 2d 734 (1953).
\textsuperscript{85} Ibid.
\textsuperscript{86} 238 La. 1013, 117 So. 2d 575 (1960).
in *Elson v. Mathewes*\(^8^7\) by structuring the contract to avoid the inference that execution divides or reduces the servitude or royalty. The oddity of *Crown Central* is that, as pointed out in the dissenting opinion,\(^8^8\) the agreement involved was very nearly identical to that construed in *Elson v. Mathewes*.\(^8^9\) Thus, the *Crown Central* case completely destroys the factual basis for the logic employed in *Childs v. Washington*.\(^9^0\) Nevertheless, this reasoning has now been extended, in result at least, to mineral royalty interests.\(^9^1\)

As for the citations of *Byrd v. Forgotson*\(^9^2\) and *Ohio Oil Co. v. Ferguson*,\(^9^3\) these cases seem irrelevant. Under the facts of those cases, the servitude owner had, in reality, alienated all of his use rights on a specified portion of the tract. It was held that this constituted a "division of the advantages" of the servitude. This phrase is, in practical effect, a euphemism, for there is a clear departure from the principle of indivisibility, and the result of the decision is that the parties divided what was one servitude into two. These decisions, however, bear little relation to the question under examination for at least two reasons: first, there was no contract between the servitude owner and the landowner, as in *Elson v. Mathewes*;\(^9^4\) and second, division by unitization agreement or order involves the relationship of the servitude owner and the landowner, but not contracts by which the servitude owner in effect partitions his own interest in alienating portions to others. The only real relevance of these decisions is that they substantially buttress the court's adherence to the land policy. Perhaps this is the real reason which motivated their citation.

Thus, it appears that it is erroneous to base these unitization decisions on the earlier cases involving entry by the servitude owner into contracts subsequent to the conveyance creating his interest. If "intent of the parties" is to play any role in determining the effect of *compulsory* unitization on a servitude or royalty interest, the only agreement subject to construction is

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\(^8^7\) 224 La. 417, 69 So.2d 734 (1953).
\(^8^9\) 224 La. 417, 69 So.2d 417 (1953).
\(^9^0\) 229 La. 869, 87 So.2d 111 (1956).
\(^9^1\) 165 So.2d 43 (La. App. 3d Cir. 1964), *writs denied*, 246 La. 844, 167 So.2d 669.
\(^9^2\) 213 La. 276, 34 So.2d 777 (1946).
\(^9^3\) 213 La. 183, 34 So.2d 746 (1946).
\(^9^4\) 224 La. 417, 69 So.2d 734 (1953).
the original conveyance creating the interest, and there is cer-
tainly no real intent, either express or implied, in the language
of the vast majority of such instruments. As suggested initial-
ly, the only intent which exists is that which is implied in law
through the rules of use. Thus, if the court wishes to invoke the
"intent of the parties," it should perhaps attempt to infer what
the parties "contemplated" would constitute a use sufficient to
interrupt prescription when they executed the original convey-
ance.

A second possible rationalization is found in the suggestion
that there is some conflict between unitization orders and private
contracts. What contract does the court have in mind? The
only available one is the conveyance creating the interest. The
fallacy of assuming conflict here is demonstrated by reasoning
from a hypothetical conveyance in which the parties, contrary
to the standard practice, actually provide that no conservation
order will divide or reduce the interest or in any manner in-
crease the use burden, and specify that any production from a
unit including any portion of the premises will suffice to inter-
rupt prescription on the whole. Assuming that such an agree-
ment is valid as a matter of public policy, would there be any
conflict between it and a conservation order unitizing a portion
of the tract in question? Clearly not. The conservation order
could be completely effective without conflicting in any man-
ner with this agreement. The truth of the matter is that these
cases present only questions of what shall constitute a use of
real rights and in no way involve conflicts between private
agreements and conservation orders.

This rationalization is also cast in terms of the idea that the
order of the Commissioner of Conservation cannot have any
effect outside the unit, either by its own terms or under the

95. See the conveyances quoted and cited in note 9 supra.
96. Jumonville Pipe & Machinery Co. v. Federal Land Bank, 220 La. 41, 47,
87 So. 2d 721, 724 (1956); Childs v. Washington, 229 La. 869, 877-88, 87 So. 2d
111, 113-14, 115 (1956); Frey v. Miller, 165 So. 2d 43, 49 (La. App. 3d Cir. 1964).
97. The courts have not neglected the concept of use in disposing of these cases,
as evidenced by passages in almost every one of the relevant opinions. See Jumon-
ville Pipe & Machinery Co. v. Federal Land Bank, 230 La. 41, 879, 87 So. 2d 721,
723 (1956); Boddie v. Drewitt, 229 La. 1017, 1021, 87 So. 2d 516, 517 (1956);
Childs v. Washington, 229 La. 869, 881, 87 So. 2d 111, 115 (1956) (Justice
McCaleb concurring); Frey v. Miller, 165 So. 2d 43, 48 (La. App. 3d Cir. 1964).
Utilization of the term "use" regarding a mineral royalty may be questioned by
some. However, one leading authority has categorized the prescription running
against a royalty as that of "non-use." Thus, though superficially incongruous,
the concept is not necessarily inapplicable. See Yannopoulos, Real Rights in Loui-
This, too, is an erroneous suggestion. The order of the Commissioner is not the operative event. The event having significance for the parties is the production which occurs on the unit. This is a use. Certainly the order of the Commissioner cannot have effect beyond the limits of the unit, but holding that use occurring through unit production has the effect of interruption as to the entire servitude would not give the order effect beyond the unit. It would merely represent a holding that an event which could properly be regarded as a use had occurred. The court had no difficulty in recognizing that the orders of the Commissioner are not being given "extra-territorial" effect, as it were, by allowing operations conducted on a unit to maintain the entirety of a lease only partially included therein. It is impossible for the author to discern how the problem of unlawful extension of the effect of a unitization order is a valid consideration in the servitude and royalty cases, but not in the lease cases.

The third possible rationalization is found in Justice Caleb's concurring opinion in *Childs v. Washington*, which is rather frank about the basis for giving the conservation order some divisive effect:

"While it can hardly be gainsaid that the extraction of oil from the portion of the encumbered land contained in the drilling units constituted a user of the servitude in a real sense, it was only because of the unitization orders that this user was effective in law forasmuch as no drilling explorations were ever conducted on any part of the land subject to the servitude. This being so, it seems only proper to conclude that interruption of prescription extends only to that

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98. In the *Jumonville* case, for example, the court quotes a portion of the applicable conservation order demonstrating that it is by its own terms limited to the lands included within the unit. *Jumonville Pipe & Machinery Co. v. Federal Land Bank*, 230 La. 41, 87 So. 2d 721, 724 (1956). It was also asserted that the legislature never intended that conservation orders should have effect beyond the limits of the units established by them. The great irony of this assertion is that the court quoted as its authority for the proposition the decision rendered in *LeBlanc v. Danciger Oil & Refining Co.*, 218 La. 463, 49 So. 2d 855 (1950). This case involved lease maintenance by unit operations, and the Supreme Court reached the exact opposite conclusion from that in *Jumonville*.

99. *Delatte v. Woods*, 232 La. 341, 94 So. 2d 281 (1957); *LeBlanc v. Danciger Oil & Refining Co.*, 218 La. 463, 49 So. 2d 855 (1950); *Hunter Co. v. Shell Oil Co.*, 211 La. 893, 31 So. 2d 10 (1947). In the *LeBlanc* case, the court quite properly saw the problem in terms of whether the obligations of the lease were indivisible and not in terms of the unitization order or any intention which might have flowed therefrom.

100. 229 La. 893, 87 So. 2d 111 (1956).
portion of the land covered by the servitude from which the oil is actually withdrawn or where the user has taken place—that is, the part included within the drilling unit.

"Under ordinary conditions a servitude is a whole right incapable of division. However, as this right may be subordinated to all lawful orders made in the interest of conservation, the conclusion appears inescapable that, when drilling units are established embracing a portion of the area subject to the servitude, its area is reduced by operation of law and the area lying within the drilling units excluded therefrom as long as the unitization order remains in effect."  

Thus, Justice McCaleb recognizes a policy consideration which, whether right or wrong, seems to be a more rational basis for giving the order some divisive effect upon its issuance than the other rationalizations discussed. Justice McCaleb's reasoning is based on the notion that the servitude owner is getting "something extra" in being given credit for an off-premises use, what has been termed an "implied-in-law use." Therefore, the benefit of this extension of the use concept should be limited, thus enforcing the basic land policy of encouraging development by fostering return of mineral rights to the land.

But even Justice McCaleb's opinion lends confusion to the picture by suggesting in the second paragraph quoted that the order "reduces" the servitude by operation of law for the duration of the unit order. This insistence by all members of the court on basing a desired policy result upon an idea that the order divides or reduces the servitude is shown to be erroneous by analyzing three other aspects of the problem.

First, what would be the effect of drilling operations conducted on the portion of the servitude tract included in the unit?

101. Id. at 881, 87 So. 2d at 115.
102. Comment, 30 Tul. L. Rev. 769 (1962). The authors of this very thorough and thoughtful student work seize upon Justice McCaleb's reasoning to suggest that in the case of use by unit operations there is a use which is "implied-in-law." The only shortcoming of this suggestion is that in reality all rules of use are "implied-in-law" because our conveyancing system does not reflect any basis for implying them in fact. Therefore, there seems no more reason to regard use occurring by unit operations as an implied-in-law use than to regard use occurring on the premises as an implied-in-law use. This is really a part of the problem which has arisen as a result of these decisions. The court appears to be operating under the impression that it is doing something different from what it did in forging the rules of use in the early days of our mineral law. There is, in fact, no reason to distinguish the two situations.
Is the court using the term “divide” as a word of art, to be given its technical, legal meaning? If so, then the effect of such drilling must be limited in its geographical extent.

The only discoverable expression which might conceivably be appropriate to this problem is found in Hodges v. Norton, in which the court explained a prior holding in Spears v. Nesbitt. In the Spears case, the court had dealt with the effect of joint execution of two community leases by servitude and landowner, one lease incorporating one half of a tract subject to a mineral servitude and the other lease including the remaining half. Drilling and subsequent production on one community lease, but not on the servitude tract, were given the effect of interrupting prescription only on the half included in the developed lease. In the course of its opinion, the court used the words “divide” and “division” with reference to the effect of signing the two community leases on the servitude. In Hodges v. Norton, the court alluded to its earlier decision in the following terms:

“We did not say that, if the well had been drilled on part of the land subjected to the servitude, prescription would not have been interrupted as to the whole. That question was not before us.”

Whether these words can be taken as indicating that the Supreme Court might reach a different result if the well were drilled on the servitude premises in the case of a conservation unit is a matter of the purest conjecture. The most that can be gleaned is that the question is still undecided.

The irrelevance of any concept of division by issuance of the conservation order is further demonstrated in White v. Frank B.
in which it was contended that issuance of the conservation order unitizing a single sand underlying a servitude had the effect of dividing it, so that drilling to and production from that sand would interrupt prescription only for the unitized sand. The court saw this case as a use problem, holding that a servitude is indivisible and that use of any part constitutes use of the whole. The logic of the landowner’s argument in the White case is identical to that of the Childs and Jumonville decisions, yet the court does not hesitate to reject the argument. This serves to remind us that “division” is not a good description of the effect of the unitization order.

Finally, the difficulties wrought by the division concept are brought to the point of virtual injustice in the recent royalty cases. In Frey v. Miller, the unit was formed by compulsory order. In Montie v. Sabine Royalty Co., the unit was formed as a result of exercise of a pooling power in a lease granted by the landowner. In both instances, the unit included only a portion of the royalty tract in question. In neither instance was there any contract executed by the landowner and the royalty owner subsequent to the original conveyance from which any intent to divide the royalty as a result of unitization could have been found. Yet, in Montie v. Sabine Royalty Co. the Third Circuit Court of Appeal held that there was no division of the royalty resulting from the declared unitization, while in Frey v. Miller, it was held that unit production interrupted prescription only as to the acreage included in the unit. There is no difference whatsoever between these two cases save the method by which the unit was formed. The directly opposite results strongly suggest that some future litigant would be well advised to protest that in the case of a compulsory unitization he is being denied equal protection of the law under the fourteenth amendment to the United States Constitution. The distinction between the two cases is wholly arbitrary.

Viewing these decisions as a group, then, it appears that Justice McCaleb’s concurring opinion in Childs v. Washington

109. 230 La. 1017, 89 So. 2d 883 (1956).
110. 165 So. 2d 43 (La. App. 3d Cir. 1964), writs denied, 246 La. 844, 167 So. 2d 669.
111. 161 So. 2d 118 (La. App. 3d Cir. 1964), writs denied, 246 La. 84, 163 So. 2d 359 (1964).
112. Ibid.
113. 165 So. 2d 43 (La. App. 3d Cir. 1964), writs denied, 246 La. 84, 167 So. 2d 669.
114. 229 La. 869, 87 So. 2d 111 (1956).
and, perhaps, Judge Tate's opinion in Frey v. Miller,\textsuperscript{115} give some hint of the real reason which underlies the results achieved. The court is generally favoring the "land policy"—that of limiting mineral interests and encouraging mineral development by fostering the return of mineral rights to the land—rather than giving recognition to the overlay of ownership concepts imposed by the conservation laws. Evaluation of the validity of this judicial attitude will be found in the ensuing section on the effect of unit operations.

The difficulty with the compulsory unitization decisions, assuming the validity of the policy determinations which underlie them, is clearly the manner in which they are articulated. The talk of "division" or "reduction" only causes problems, with the result that inconsistencies in the cases have arisen.

As noted, the court has hammered out the rules of use by itself and implied them in conveyances creating mineral interests as a matter of law. True, the articulation of these rules has sometimes been in terms of "use contemplated by the grant or reservation."\textsuperscript{116} But the average mineral conveyance offers no basis, either express or implied, for the imposition of these rules.\textsuperscript{117} Further, these rules are imposed as a part of the general land policy. There seems to be no reason why the court could not rationalize its decisions in terms of rules of use. It has previously fashioned the rules applicable to use occurring on the premises. Why should it not do likewise for operations off the servitude but within a unit?

2. The Effect of Unit Operations

The suggestion that the effect of operations on a compulsory unit on the duration of mineral servitudes should be determined by rules of use rather than any automatic legal effects of the orders themselves is to be differentiated from those situations in which the order does have automatic legal consequences. The pooling effect of the order is essential to the conservation scheme. Its automatic character unburdens operators of the cumbersome task of seeking voluntary agreements from all

\textsuperscript{115} 165 So.2d 43 (La. App. 3d Cir. 1964), \textit{writs denied}, 246 La. 844, 167 So.2d 669.
\textsuperscript{116} Louisiana Petroleum Co. v. Broussard, 172 La. 613, 617-18, 135 So. 1, 2 (1931).
\textsuperscript{117} See the conveyances quoted and cited in note 9 \textit{supra}. 
those with royalty interests in the unit without substantial inequity to those in interest. It further assures interested parties of a right to share from the incipience of unit production, and in this respect is a supportable modification of the non-ownership theory in deference to the basic policy of the conservation law. An automatic effect is also found in those cases in which a unitization order creates an obstacle to use of a servitude. The effective date of the order marks the creation of the obstacle.

However, when the question is whether unit operations constitute a use, issuance of the unitization order is not the event of legal significance to the interested parties. In such cases it is the date on which the operation in question commences which is of significance, just as in the case of an ordinary use on the servitude premises.

As the rules of use have been imposed by the courts on conveyances which, in their wording, furnish no basis for finding an express or implied intent concerning what should constitute a use sufficient to interrupt prescription, it seems that determination of the effect of operations on both compulsory and voluntary units must, to offer any hope of consistency in the law, begin at the same point.

Therefore, the courts should frankly consider what policy should be given precedence in any given case. Then, subject to the possibility that ease of administration and certainty of titles may demand an opposite conclusion, this policy determination should be articulated as a rule of use. True, there is ordinarily no real basis for ascertaining “what the parties to the original conveyance intended,” but there never has been.

A. Unit Drilling Operations

Present jurisprudence requires that to interrupt prescription on all or any part of a mineral servitude, operations on a compulsory unit but off the servitude premises must result in extraction of the minerals lying under the land by draining or otherwise removing them.\(^{118}\) It therefore follows that if unit operations at a site located off the servitude are begun, this will not

\(^{118}\) Jumonville Pipe & Machinery Co. v. Federal Land Bank, 230 La. 41, 87 So. 2d 741 (1956); Boddie v. Drewett, 229 La. 1017, 87 So. 2d 516 (1956); Childs v. Washington, 229 La. 809, 87 So. 2d 111 (1956). \textit{But see} Alexander v. Holt, 116 So. 2d 532, 534 (La. App. 2d Cir. 1959), which in dictum indicates applicability of the dry hole rule to unit operations.
mark the beginning of an event which, if unsuccessfully terminated at a depth at which commercial production could be reasonably expected, could be construed as an interruption of prescription. Succinctly, the "dry hole" rule is inapplicable in these circumstances.

Whether good faith drilling operations conducted to the required depth on that part of the servitude premises included in a forced unit interrupt prescription for the whole does not appear clearly from the jurisprudence. However, to reach any other result would run contrary to the rules of use now developed as a part of the property regime and to the philosophy of the conservation act. Therefore, there should be little question about the result to be achieved when the courts are faced with this issue. Any doubt stems from the unfortunate language of "division."

The court's failure to apply the "dry hole" rule to off-premises unit drilling operations is seriously questioned by some of the outstanding members of the Louisiana bar. It must be admitted that the proposition that an interruption should be found has considerable merit. Assuming that the servitude owner or his lessee actually participates in the drilling operations, whether by actually conducting them, by bearing a direct share of drilling costs, or making some other contribution toward development, there is much to be said for allowing the "dry hole" rule to apply. Viewing the general philosophy of the Conservation Act, it can be argued that drilling on the unit is, in contemplation of the law and the unit order, exploration for oil and gas on every part of the land included in the unit. In Everett v. Phillips Petroleum Co. the court applied this principle when dealing with a question of lease administration. Yet it has not recognized the principle as applicable to use of a servitude. The principle is further recognized in Leblanc v. Danciger Oil & Refining Co. The object of the establishment of drilling units is to promote proper reservoir development control and to prevent the economic waste involved in unnecessary drilling operations by substituting one well for the many which would normally be drilled when several tracts under separate ownership overlie the reservoir. To assure the validity of this open restriction of use rights, the correlative rights of each overlying owner to secure his just and equitable share of the minerals in place is protected through the pooling provisions of the statute. Thus, any operations which are conducted on a unit take the place of the individual uses which would have occurred in the absence of unitization. In this sense, the unit drilling operations are operations on every tract. See La. R.S. 30:9, 30:10 (1950).

119. The court's decision in Everett v. Phillips Petroleum Co. The court applied this principle when dealing with a question of lease administration. Yet it has not recognized the principle as applicable to use of a servitude. The principle is further recognized in Leblanc v. Danciger Oil & Refining Co. The object of the establishment of drilling units is to promote proper reservoir development control and to prevent the economic waste involved in unnecessary drilling operations by substituting one well for the many which would normally be drilled when several tracts under separate ownership overlie the reservoir. To assure the validity of this open restriction of use rights, the correlative rights of each overlying owner to secure his just and equitable share of the minerals in place is protected through the pooling provisions of the statute. Thus, any operations which are conducted on a unit take the place of the individual uses which would have occurred in the absence of unitization. In this sense, the unit drilling operations are operations on every tract. See La. R.S. 30:9, 30:10 (1950).

120. 218 La. 835, 51 So. 2d 87 (1950).
121. 218 La. 493, 49 So. 2d 855 (1950).
and Hunter Co. v. Shell Oil Co.,\textsuperscript{122} in which it was held that drilling operations and production from a unit including only part of a leased tract served to maintain the lease in force over the entire premises. This result was obtained on the theoretical basis that the obligations of the lease are indivisible, directly contrary to the court's attitude concerning servitudes and royalties.\textsuperscript{123} Consideration may have been given to the risks of oil and gas exploration and to the practices of the industry in leasing and developing large tracts of land. If this is true, it seems strange that the Supreme Court should be willing to consider the risks entailed in exploration for oil and gas when determining the effect of unit operations on lease maintenance, yet is unwilling to do so when dealing with the property interests on which these leases are dependent. If the underlying property interest is extinguished, what good is the lease?

Another possible motivation for this incongruity is that a mineral lessor has a measure of protection in the obligation of diligent development, whereas the landowner has no present interest in the servitude and no means of requiring development. His only protection lies in prescription. The court may also have felt that as leases are often of shorter duration, there is greater flexibility in the contractual system which can permit the lessor to insert a "Pugh clause" in any future leases to avoid maintenance of the lease by operations on a unit including only a small part of the lease premises.

All of the foregoing arguments in favor of the "dry hole" interruption spring from the limitations placed upon use rights by the conservation laws and are supported by the modern realities of the oil and gas industry. There are, however, several considerations in the land policy counterpoised against them. First, there is the possibility that some servitude owners, individually or through their lessee, might not contribute, or be liable to contribute, to the cost of a dry hole on the unit. If such were the case, one of the main functional reasons for granting an interruption would be absent. Further, one may question whether it is practical to burden the title examiner with determining the fact of contribution. Such information will normally lie outside the public records and may be very difficult to obtain.

\textsuperscript{122} 211 La. 893, 31 So. 2d 10 (1947); \textit{accord}, Delatte v. Woods, 232 La. 341, 94 So. 2d 281 (1957).

\textsuperscript{123} See authorities cited in note 118 \textit{supra}. See also Frey v. Miller, 165 So. 2d 43 (La. App. 3d Cir. 1964), \textit{writs denied}, 167 So. 2d 669.
A most important consideration which seems to have motivated the judicial attitude toward this problem is the possibility that an interruption of prescription may be brought about by drilling operations conducted on a unit including only a very small portion of the surface acreage of a servitude. This is openly suggested by the opinion of Judge Tate in Frey v. Miller.\textsuperscript{124}

Ease of administration is a substantial factor in making the choice required in this instance. There appear to be two easily administrable rules available for application. One is to apply the "dry hole" rule regardless of economic contribution. This approach is rather easily administered as drilling information, though outside the public records, is readily available, and development histories are customarily procured as a part of title examination. The second is to favor the land policy and retain the present view that the "dry hole" rule is not to be applied in the case of unit operations. The intermediate position, that of allowing application of the rule if the servitude owner, individually or through his lessee, contributes or is liable to contribute to the cost of the well would be difficult to administer, would cause instability of titles, and would foster litigation.

It is difficult to find comfort on either horn of this dilemma. On one hand, it seems that if there is a situation in which recognizing the impact of conservation on use rights would be fully justifiable, this is it. This is the most outstanding example of the inhibition of use rights; a major objective of mineral conservation is the prevention of waste by drilling one well where the non-ownership theory prior to conservation would have resulted in the drilling of many. Yet, there is substance to the negative argument, particularly the court's apparent fear that the inclusion of a small portion of the servitude tract may give rise to an interruption. This argument is further strengthened by the inexactitude with which the unitization process is congenitally affected, especially in the developmental stages of a field when units will normally have regular geometric shapes unrelated to conformation of the reservoir.\textsuperscript{125} It is also to be noted, in all frankness, that the unitization process is not insusceptible of some manipulation by the applicant. This is not in

\textsuperscript{124} 165 So. 2d 43, 48 (La. App. 3d Cir. 1964), \textit{writs denied}, 246 La. 844, 167 So. 2d 669.

any sense an accusation of impropriety; rather, it is further admission of the unavoidable inaccuracies in the system.

After weighing all of these arguments, it is hard to criticize the present judicial attitude. But how should it be articulated? As suggested before, the court should simply state that as a matter of law, the drilling operations in question do not constitute a use of the servitude. If it feels constrained to phrase this holding in terms of what the parties to the original conveyance intended, absent some express provision to the contrary, there is nothing to prohibit this any more than similar holdings in cases defining what constitutes a use by drilling operations on the premises. Similarly, if the policy determination should be changed from the present view, the court could simply state that in the absence of express provisions to the contrary, the parties to the original conveyance “contemplated” that drilling operations on a unit including any portion of the servitude premises would interrupt prescription.

The geographical extent of any interruption allowed on the basis of drilling operations located off the premises is, of course, a question which will arise only if the court changes its present position. In view of the fact that this seems to be such a remote possibility, there is little utility in any detailed consideration of the question. It is sufficient to note that the court might have a reasonable basis in policy for preferring the property system and thus limiting the extent of the interruption. As a general rule, however, the author prefers the view that if there is any use at all under the conservation regime, it is as real a use under modern conditions as if it occurred on the premises. The problem is avoided, however, under the present rule.

B. Production

If production occurs through a unit well, it is clear that there will be some effect on the running of prescription, but the nature and extent of this effect is somewhat cloudy. In Childs v. Washington,126 there is language in Chief Justice Fournet’s opinion which might be taken as indicating that prescription is only extended during the existence of the unit.127 Justice McCaleb’s opinion uses terms which might indicate that the effect is one

126. 229 La. 869, 87 So. 2d at 111 (1956).
127. Id. at 879-80, 87 So. 2d at 114.
of interruption.\textsuperscript{128} The overall sense of the cases is overwhelmingly in favor of an interruption of prescription.\textsuperscript{129} Therefore, it seems safe to conclude that insofar as production from a unit well located off servitude premises but within a compulsory unit will affect prescription at all, it will cause an interruption. The duration of this interruption is measured by the duration of production.\textsuperscript{130}

A second problem is what the geographical extent of any interruption should be. If the “dry hole” rule is applied, as it should be, when the unit well is located on the premises, production through such a well would clearly interrupt prescription for the entirety of either a servitude or a royalty.\textsuperscript{131} Further, if the entire tract is included in the unit, it is clear that the interruption by production is effective for the whole of the servitude regardless of location of the well. In the case of partial inclusion and location of the well off the servitude or royalty premises, the decisions limit the effect of the interruption to that portion of the tract included in the unit.\textsuperscript{132} Thus, the court presently favors the land policy by imposing this limitation. One may seriously question the correctness of this attitude.

Despite the jurisprudence, it is suggested that when minerals are drained from beneath a servitude tract by a unit well located off the premises, there is, in the overwhelming majority of cases, a use which is as real as if the well were located directly on it. Except for the possibility that a servitude could be maintained by inclusion of a small portion of its area in a producing unit, all of the dangers inherent in applying the “dry hole” rule in this situation are absent, and the favorable factors are even more in evidence.

\textsuperscript{128} Id. at 881, 87 So. 2d at 115.
\textsuperscript{129} Crown Central Petroleum Corp. v. Barousse, 238 La. 1013, 117 So. 2d 575 (1960); Boddie v. Drewett, 229 La. 1017, 87 So. 2d 516 (1956); Ohio Oil Co. v. Kennedy, 28 So. 2d 504 (La. App. 2d Cir. 1946).
\textsuperscript{130} La. R.S. 30:112 (1950). See also Mays v. Hanebro, 222 La. 957, 64 So. 2d 232 (1953) (production need not be in “paying quantities” to constitute use of a servitude.)
\textsuperscript{131} Boddie v. Drewett, 229 La. 1017, 87 So. 2d 516 (1956); Phillips Petroleum Co. v. Richard, 127 So. 2d 816 (La. App. 3d Cir. 1961); cf. Jumonville Pipe & Machinery Co. v. Federal Land Bank, 230 La. 41, 87 So. 2d 721 (1956); Childs v. Washington, 229 La. 869, 87 So. 2d 11 (1956), from which one may reason that if production interrupts prescription only as to that part of a servitude included in a compulsory unit, total inclusion will result in interruption as to the entirety of the tract.
First, there is the fact that production from beneath the servitude tract has the physical effect of causing migration of the hydrocarbons to the well bore. Second, those who own or have assumed the development burden on any given tract will, absent some special contractual arrangement, always be liable for their proportionate share of drilling and operating costs. Thus, the tract's contribution to development is not a matter of doubt, as in the case of mere drilling operations. Further, by express provision of the conservation law, the presence on the unit of a well capable of production in commercial quantities constitutes every part of the unit a "developed area." In this particular context, the legislature has manifested an intent that successful unit development should inure to the benefit of all lands and interests included in a unit. Most important, the act categorically states that production allocable to a tract included in a unit shall, when produced, be "considered as if it has been produced from [the] tract by a well located thereon." In these cases rationalization by finding an "intent" in the original conveyance to limit the effect of the use is empty and artificial. It has no foundation in fact, and it is not justified as a matter of policy.

Against the argument that fragmentary inclusion may unfairly maintain a large servitude it should be pointed out that the landowner has received great consideration in other areas involving balancing of the interests of the parties. It has been suggested, and it seems reasonably well established, that there is no suspension of prescription by obstacle in the case of partial inclusion. It has been observed that the courts presently refuse to apply the "dry hole" rule to unit operations conducted off the servitude. Certainly in this instance when the solution suggested is actually the most easily administered rule and when the policy of the conservation law is so overwhelmingly insistent, it seems that the servitude owner should be credited with a use

133. This obligation may be fulfilled by withholding from production as in Hunter Co. v. McHugh, 202 La. 97, 11 So. 2d 495 (1942), affd 320 U.S. 222 (1943), or under certain circumstances, the obligation to contribute may be enforced by requiring payment in cash, as in Superior Oil Co. v. Humble Oil & Refining Co., 165 So. 2d 905 (La. App. 4th Cir. 1964).


135. La. R.S. 30:10A(b). This statutory provision speaks in terms of production allocable to "owners" of the tract in question. Nevertheless, it unmistakably displays an intent to have the production considered as if it had come from a well located on a tract included in the unit.


137. See authorities cited in note 118 supra.
and the royalty owner with an interruption of prescription resulting from production.

Despite all arguments to the contrary, it must be recognized that present decisions do limit the effect of unit production from an off-premises well. Alteration of this position would require reversal of the decisions in Childs v. Washington, Jumonville Pipe & Machinery Co. v. Federal Land Bank and Frey v. Miller, an eventuality which seems unlikely, however desirable.

If the present rule is preserved, it should be rationalized in terms of "use in accordance with the original grant or reservation." This will, at least, permit some harmonization of the jurisprudence in this and related areas.

C. The Shut-in Well

Discussion of the effect of a shut-in well in the context of unit operations is questionable on the ground that it might have been discussed as one of the situations in which an order of the Commissioner of Conservation has automatic effects. Certainly this might be true when the shut-in results directly from an order of the Commissioner, but there may be some instances in which the shut-in is voluntary and without the compulsion of an order. Thus, the effect of presence of a shut-in well is discussed at this juncture.

R.S. 30:9B provides that the area within a unit shall be deemed developed as long as there is a well capable of production in commercial quantities located on it. Just as this statutory expression weighs in favor of giving unlimited effect to production through a unit well as an interruption of prescription, it strongly suggests that presence of such a well which is shut-in should prohibit the running of prescription in some fashion. If the well is on the servitude tract, there ordinarily would be no difficulty as the drilling operations would have caused an interruption of prescription.

However, if the well is located off the premises, there is some question. It is clear that if the unit completely includes a tract subject to a royalty, prescription will not run during the

138. 229 La. 869, 87 So. 2d 111 (1956).
139. 230 La. 41, 87 So. 2d 721 (1956).
140. 165 So. 2d 43 (La. App. 3d Cir. 1964), writs denied, 246 La. 844, 167 So. 2d 669.
shut-in. In the case of a servitude, the jurisprudence is silent. However, there seems little reason to grant this advantage to a royalty and not to a servitude.

Once again, serious problems are presented if the tract is only partly included in the unit. It is believed that the decision to be made in this instance is whether to relate the effect of shut-in more closely to the obstacle cases or to the use-by-production cases. The latter course seems desirable.

The reasons why the _Boddie v. Drewett_ obstacle theory should not be applied in the case of partial inclusion with the servitude tract lying outside the drilling area were: first, major administrative difficulties in determining what might constitute a "substantial obstacle"; and second, the fact that applying the obstacle concept in the event of inclusion of any part of the tract would result in suspension of prescription without substantial reason for allowing it. In the case of the obstacle created by unitization order, the prohibitive effect of the order is against use by drilling. The prohibitive effect in the case of the shut-in well is against production from a known commercial well which cannot be placed into production because of lack of a market, lack of marketing facilities, reservoir engineering requirements, or other considerations beyond the control of all parties concerned.

It should be further noted that in this instance, as in the case of use by unit production, the tract will have made, or will be liable to make, its contribution toward development. Thus, in the case of a servitude at least, the risk of development will have been borne or incurred in the manner contemplated under the conservation regime. For these reasons, the situation should be dealt with in the same fashion as production from the unit well. This suggested rule is something of a compromise for failure to apply the "dry hole" interruption rule to unit operations. It seems reasonable to apply the rule in this manner because the factors weighing against the "dry hole" rule are absent.

If the court adheres to its present view concerning the effect of production on a partially included royalty or servitude

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142. 229 La. 1017, 87 So. 2d 516 (1956).
143. See authorities cited in note 133 supra.
tract, the presence of a shut-in well would prohibit the running of prescription only on the included acreage. If, on the other hand, the position is changed, the prohibition would apply to the entire tract. There is no definitive holding on the nature of this prohibition against the running of prescription, but there seems little doubt that it should be regarded as a suspension beginning from the date of the shut-in and terminating either on the date production commences, which would mark the beginning of an interruption, or on the date the well is abandoned in the event some occurrence should destroy or otherwise terminate its status as a commercial producer which has been shut in.

**Voluntary Unitization**

It is impossible to terminate this discussion without considering the present jurisprudence concerning construction of voluntary unitization agreements and without giving some evaluation of it. The construction of such agreements should be in line with the suggested rationale of compulsory unitization cases if consistency is to be achieved in the law.

Before embarking on a discussion of the jurisprudence, it should be observed that parties to conveyances or unitization agreements have freedom, within the limits of public policy, to stipulate what acts or events will divide a servitude or in some other manner affect the use burden. The following discussion is directed principally toward contracts, and their interpretation, insofar as the use rules are concerned. The author does not neglect the possibility that agreements may, in the true sense, divide a servitude or royalty interest. Ordinarily, however, the intent to accomplish this result, or that of altering the use rules implied by law, should be found only in the presence of an express intent in a particular agreement.

1. **The Jurisprudence**

From a brief review of the cases already mentioned, several rules and some pronounced fuzziness emerge. In Spears v. Nesbitt, the joint execution by landowner and mineral owner of two community leases, each covering one-half of the servitude tract, was, by implication from this division into two leases,

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145. 197 La. 931, 2 So. 2d 650 (1941).
held to have "divided" the servitude, so that subsequent production on one community lease through a well off the premises was not sufficient to interrupt prescription accruing against the other half of the servitude tract. As noted, the court later qualified its use of the term "divided" and stated that its decision did not hold that operations directly on the premises would not have interrupted prescription.\textsuperscript{146}

In \textit{Elson v. Mathewes}\textsuperscript{147} the landowner and mineral owner jointly executed a voluntary unitization agreement dealing specifically with a described portion of the servitude tract. Again on the basis of an implied intent, it was held that subsequent unit production interrupted prescription only against the portion of the acreage included in the unit. In \textit{Crown Central Petroleum Corp. v. Barousse},\textsuperscript{148} an almost identical agreement was executed by both royalty owner and landowner. In this instance no intent to divide was found, and the court expressly stated that if a servitude had been involved, the same result would have been reached. There is some basis for concluding that the court's liberal use of implied intent as a technique of construction in \textit{Elson v. Mathewes}\textsuperscript{149} was altered by \textit{Crown Central}. The earlier decision might be interpreted as holding that, in the absence of express provision to the contrary, an intent to divide a servitude would be presumed from entry into a unitization agreement partially including the servitude. \textit{Crown Central} has the appearance of establishing the opposite presumption, particularly in view of the close similarity between the agreements.\textsuperscript{150}

In \textit{Montie v. Sabine Royalty Co.}\textsuperscript{151} the original conveyance creating a royalty interest had expressly granted the landowner the power to lease. In exercising this power, which would have been inherent in the landowner's title even in the absence of the express provision, the landowner executed a lease containing a "Pugh clause" and granting the pooling power to the lessee. The lessee exercised the pooling power by declaration. There was never any pooling agreement or other contract regarding the

\textsuperscript{146} Hodges v. Norton, 200 La. 614, 8 So. 2d 618 (1942).
\textsuperscript{147} 224 La. 417, 69 So. 2d 734 (1953).
\textsuperscript{148} 238 La. 1013, 117 So. 2d 575 (1960).
\textsuperscript{149} 224 La. 417, 69 So. 2d 734 (1953).
\textsuperscript{150} In Brown v. Mayfield, 92 So. 2d 762 (La. App. 2d Cir. 1959), it is implied that the parties intend by entry into a unitization agreement to divide the servitude, absent an express provision to the contrary. This closely approaches direct imposition of this intent on the original conveyance.
\textsuperscript{151} 161 So. 2d 118 (La. App. 3d Cir. 1964), \textit{writs denied}, 246 La. 84, 163 So. 2d 359.
unit signed by both the royalty owner and the landowner. Therefore, there was no basis for finding any implied intent to divide, as in Elson, unless such an intent could be inferred from the conveyance creating the royalty.

The landowner contended that, as the instrument creating the mineral royalty had specifically authorized the landowner to lease and further as he had executed a lease with a “Pugh clause,” the unitization had the effect of “dividing” the royalty in such manner as to limit the geographical extent of the use stemming from production through the unit well. The argument was rejected. The incongruity of this decision with Frey v. Miller\(^{152}\) has already been observed.

Thus, in none of the decided cases can any agreement containing \textit{express} intent to divide the servitude or royalty interest be found. In the Spears, Elson, and Crown Central cases the court deals with agreements executed by both landowner and servitude or royalty owner subsequent to the original conveyance.\(^{153}\) In Montie there is no agreement, save the original conveyance, executed by both parties.

\section*{2. Rules of Use and Construction of Agreements}

Rationalization of the compulsory unitization decisions in terms of use is the thesis of the earlier discussion. This task, it was argued, requires the establishment in any given situation of a rule of use; such a rule is likely to be articulated by the courts in terms of the “contemplation of the original grant or reservation.” If, in a compulsory unit situation, a particular rule of use is imposed by the court on the original conveyance, it seems that this same implied-in-law intent should form the starting point for decisions involving voluntary unitization.

For example, if the court’s present policy concerning use by unit production through a well off the premises is pursued in the future, it must be presumed that, in the absence of express provision to the contrary, the original grant or reservation “contemplated” that such a use would cause an interruption of prescription only on acreage included in the unit.\(^{154}\) To overcome this presumption, it seems an \textit{express} provision in the conveyance, or in a subsequent agreement regarding unitization, should

\begin{itemize}
\item \textbf{152.} 165 So. 2d 43 (La. App. 3d Cir. 1964), \textit{writs denied}, 246 La. 844, 167 So. 2d 669.
\item \textbf{153.} See also Brown v. Mayfield, 92 So. 2d 762 (La. App. 2d Cir. 1959).
\item \textbf{154.} \textit{Ibid.}
\end{itemize}
be required. Proceeding from this premise, we may briefly ex-
amine the effect it would have on the jurisprudence outlined
immediately above and on various types of agreements.

3. The Effect of Unit Operations

A. Unit Drilling Operations

It appears highly likely that the court will continue its policy
of denying that unsuccessful drilling operations on a compulsory
unit but off the servitude premises do not constitute a use in-
terrupting prescription, even though all evidentiary require-
ments are met.155 If this be true, the use rule could be expressed
by holding that the parties to a conveyance creating a servitude
"contemplated" that result. This is, of course, a presumption
in the normal conveyance, as there is no evidence whatsoever
in the wording of the average mineral deed or reservation which
discloses even an implied, much less an express, intent.156 Never-
theless, this rule of use should persist until expressly modified
by subsequent contractual agreement of the parties.

In the context of voluntary unitization by an instrument exe-
cuted by servitude owner and landowner, the result would be
that an off-premises drilling operation would have no effect
whatsoever on prescription unless the unitization agreement or
some other binding instrument expressly provided for such a
result.

B. Production

In the light of the assertion upon which this discussion is
based, the present jurisprudence concerning the effect of pro-
duction from an off-premises voluntary unit well is in a highly
confused state. If we apply the reasoning proposed on the basis
of the present position of the Supreme Court regarding the
effect of forced unit production from a well off the servitude
premises, it appears that the implied-in-law rule of use is that
such production shall interrupt prescription only on acreage in-
cluded in the unit.157 Thus, the parties to a conveyance creating
a servitude or royalty interest "contemplate" or "intend" this
result. That being true, it should require an express provision
of a subsequent agreement to overcome this rule of use.

155. See the authorities cited in note 118 supra.
156. See the conveyances quoted and cited in note 9 supra.
157. See the authorities cited in note 132 supra.
From this premise it can be concluded that the apparent result of *Elson v. Mathewes*\(^{158}\) is correct and the subsequent results of *Crown Central Petroleum Corp. v. Barousse*\(^ {159}\) and *Montie v. Sabine Royalty Co.*\(^ {160}\) are inconsistent with the use rule presently being employed. In none of these cases was there any agreement subsequent to the original conveyance *expressly* altering the normal rule of use which has been suggested. In keeping with the previous discussion, it is asserted that the present use rule found in the court's compulsory unit cases is erroneous. If a change of position were effected, harmonizing the compulsory and voluntary unitization decisions would require that *Elson v. Mathewes*\(^ {161}\) be disregarded. The other two decisions would be correct, for the use rule would be that the original conveyance "contemplated" that production from a unit well would interrupt prescription on the entire interest, regardless of location or acreage included, and in such cases there is no agreement *expressly* providing for a contrary result. This view is the more desirable—at least in the mind of this author.

C. The Shut-in Well

If the effect of a shut-in well located on a unit but off the servitude or royalty tract is, as suggested, likened to the use rule for production, then extending the effect of the suspension of prescription to acreage other than that included in the unit would, under present jurisprudence, require an express intent to accomplish that effect in an agreement binding the landowner whose title is burdened by the servitude or royalty in question. Of course, a change in the production use rule would give rise to the opposite construction, and it would require express intent in a subsequent agreement to provide for a limited interruption of prescription.

4. Power of the Parties to Alter the Rules of Use

The foregoing discussion of the suggested rules of construction of agreements subsequent to conveyances creating servitude

\(^{158}\) 224 La. 417, 69 So. 2d 734 (1953). The result reached in Brown v. Mayfield, 92 So. 2d 762 (La. App. 2d Cir. 1959), seems even more in line with this analysis.

\(^{159}\) 238 La. 1013, 117 So. 2d 575 (1960).

\(^{160}\) 161 So. 2d 118 (La. App. 3d Cir. 1964), writs denied, 246 La. 84, 163 So. 2d 359.

\(^{161}\) 224 La. 417, 69 So. 2d 734 (1953). Brown v. Mayfield, 92 So. 2d 762 (La. App. 2d Cir. 1959) would also be incorrect under this analysis.
or royalty interests is obviously based on the assumption that it is within the power of the parties involved to alter the implied-in-law rules of use by contract. It must be admitted that this is a possible flaw in the entire analysis for there are very likely certain limitations on the degree of flexibility available to parties creating or modifying mineral rights to change the applicable rules of use.\textsuperscript{162} Certainly, any alteration making the use burden more onerous than that implied in law is permitted.\textsuperscript{163} For example, drilling of a specified number of wells or production of a certain minimum amount of oil might be required to effect an interruption of prescription.\textsuperscript{164} However, there may well be a limit to the alterations which can be made in the basic rules of use applicable to operations on or production from the servitude premises or units including all or part of the servitude tract.

Regarding unit use, however, it seems that permitting a reasonable amount of alteration could not cause any harm to the property system or the conservation regime. It might, in fact, promote the latter. Suppose the parties to a conveyance create a mineral servitude with the following specific provisions:

1. All of the normal rules of use shall apply to any use occurring by operations conducted on the described premises.

2. In the event of unitization by any means, and in the absence of a binding contract providing for a contrary result, the parties agree that prescription accruing against the servitude shall be interrupted for the acreage included in the unit by the good faith drilling of a well located off the servitude premises, provided the servitude owner or his lessee or one acting for him in any other manner contributes or incurs liability to contribute to the expense of drilling the well, and further provided that the well be drilled to a depth at which there is reasonable expectation of commercial production.

\textsuperscript{162} LA. CIVIL CODE art. 799 (1870); Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961) (rules of use more onerous than those implied by law were apparently approved); Hicks v. Clark, 225 La. 133, 72 So. 2d 332 (1954) (limitation on dealing with reversionary right for policy reasons); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923) (limitation on ability of parties to contract so as to create one servitude on non-contiguous tracts); Ober v. McGinty, 66 So. 2d 385 (La. App. 2d Cir. 1953) (contract to renew servitude prohibited). These cases are but examples; however, they serve to suggest that public policy underlies the rules of prescription and, therefore, has a limiting effect on the power of parties to vary the incidents of creation of a servitude by contract.


\textsuperscript{164} Ibid.
3. In the event of unitization by any means, and in the absence of a binding contract providing for a contrary result, the parties agree that prescription accruing against the servitude shall be interrupted by production from a unit well located off the premises, and such interruption shall be effective for the entire servitude regardless of the amount of surface acreage included in the unit.

In some instances, such a conveyance would clearly liberalize the rules of unit use now in existence, but why should the parties be prohibited from contracting in this manner? Several good reasons appear for allowing such flexibility of contract. First, the rules of unit use involve a choice between two legal structures, the property law and the conservation law. There is substantial merit in arguing for preference of either system in almost all of the unit use areas. Therefore, there is nothing severely damaging to the public policy in permitting parties to exercise some freedom of choice.

A further consideration is that under modern commercial conditions overreaching is far less common than in the past. The bargaining power of parties to such contracts is likely to be within an acceptable range of difference, for the potential value of mineral rights is a matter of common knowledge. As long as all of these provisions must be expressed in the conveyance there is little likelihood that the parties will unwittingly prejudice their interests, and the terms of the transaction are therefore likely to reflect fair dealing.

Additionally, it may be pointed out that the decisions involving lease administration are contrary to those governing unit use of servitude and royalty interests.166 This underscores the fact that the public policy which underlies the unit use decisions is not so sacred as to be beyond reasonable exception.166 For all of these reasons, then, it appears fully justifiable to permit con-

165. See authorities cited in note 99 supra.
166. The possibility that parties might be free to contract in the manner suggested so as to alter the present use rule applicable to unit production is directly suggested in the following passage from Brown v. Mayfield, 92 So. 2d 762, 766 (La. App. 2d Cir. 1957):
"From the foregoing authorities we deduce that as to the acreage contained in a production unit, production from a well timely located in such a pooled unit without regard to whether or not the unit was created by an integration order of the Commissioner of Conservation, constitutes production from all of the separately owned acreage within the unit and, therefore, there is an interruption of the servitude, but this is not necessarily true as to the land outside of the unit. The servitude will not be extended beyond the unit by production on the unit, except where the parties concerned clearly indicate
tractual variation of the suggested unit use rules within the limits of the two policy sources. Of course, there might be limitations on contractual power if the conveyance oversteps reason in this regard. For example, if the parties provided that drilling of a dry hole on a unit adjacent to but not including any portion of the servitude would constitute a use of the servitude, it seems that such a provision would be reprobated as a matter of public policy.167

CONCLUSIONS

The basic fault of the existing jurisprudence is a failure to recognize the major change in public policy represented by the Conservation Act. Two principal aspects of this change have not been given adequate consideration. The first is the high degree of restriction which is imposed on those with use rights. Rather than taking assumed "conflicts" with the conservation law as a pretext for further limiting the effective exercise of use rights, this restrictive effect should provide the motive for liberalizing them where reasonable. The signal example of this failure of insight is in the decisions limiting the effect of interruptions wrought by unit production. The second aspect of this change in policy is the strong overlay of ownership concepts imposed upon the non-ownership property system. This further substantiates the case for some degree of liberalization in the use rules, particularly in the case of use by unit production.

Whether any of the theoretical rationalizations recommended above can be implemented is obviously highly conjectural. However, it is earnestly suggested that the following steps would lend greater clarity and consistency to the decisions regarding the effects of conservation laws and use by unit operations.

First, any notion that the issuance of a conservation order including only part of a servitude or royalty tract "divides" or "reduces" the interest should be abandoned, particularly if such a concept is founded on the theory of conflict between the unitization order and the conveyance creating the mineral interest.

Second, all of the problems of use by unit operation should

167. See authorities cited in note 162 supra.
be disposed of by the application of rules of use imposed judicially on the conveyancing system. Although such rules would be implied in the absence of any real intent of the parties, this has been the case with the basic rules of use previously worked out by the courts.

Third, the present limited interruption which occurs as a result of production from a well located on a unit including part of the servitude or royalty tract should be abandoned in favor of a rule granting an interruption for the entire interest.

Fourth, the basic use rules implied in conveyances should be the root of all interpretations of subsequent unitization agreements executed by servitude or royalty owner and landowner, and alteration of those rules should occur only if the subsequent agreement contains express provisions accomplishing that result. This would have the effect of harmonizing the compulsory unit and voluntary unit jurisprudence.

Fifth, the parties to a conveyance creating a servitude or royalty interest should be allowed a reasonable degree of freedom to contract changes in the rules applicable to unit use. Any such changes, however, should be found only in the presence of a clearly expressed intent in the instrument in question.

The adoption of these and the other suggestions in the body of this article will produce harmony in the jurisprudence. Further, it will eliminate the problem of “division” or “reduction.” The principal source of this problem presently is the decisions involving use by unit production, and if the proper approach were taken — i.e., reversal of the present rule — the problem would be of no significance under the other existing rules of use.

The remoteness of the possibility that these suggestions can be implemented judicially suggests that legislation may be advisable. Such a course has its temptations, but it might cause serious problems unless included in a comprehensive codification of the basic mineral law of the state. 168 Certainly, any such codification must contain rules of use taking cognizance of all of the problems here discussed.

168. The author is presently acting as Reporter for the Louisiana State Law Institute’s Mineral Law Project, which is intended to culminate in a proposal for comprehensive codification of Louisiana’s mineral law.