

Servitude Descriptions, Prescriptions, and Co-Ownership Issues; Resolutions for Landmen

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INTRODUCTION

Nature of minerals and mineral rights. Until reduced to possession, oil, gas, and other *fugacious* minerals are not owned but are subject to the landowner's right to explore for and produce minerals underlying the land. La. Min. Code Art. 6.

Ownership of land *does* include ownership of the *solid* minerals but the minerals cannot be sold apart from the land until reduced possession. La. Min. Code Art. 5.

The limit on ownership of fugacious and solid minerals and the corresponding right to explore for and produce the minerals, set the stage for the three basic mineral rights:

1. Mineral Servitude – right of enjoyment of land of another for purpose of exploring and producing minerals and reducing them to possession and ownership. La. Min. Code Art. 21.
2. Mineral Royalty – right to participate in production of minerals (free of cost) from land owned by another. La. Min. Code Art. 80.
3. Mineral Lease – a contract by which the lessee is granted the right to explore for and produce minerals. La. Min. Code Art. 114.

THREE AREAS OF CONCERN

I. SERVITUDE DESCRIPTIONS

A. What does the Mineral Code say?

- 1) Article 4: Mineral Code applies to all “forms” of minerals.
 - i. Includes oil, gas, “subterranean water”, gravel, even the “soil itself”.
 - ii. However, comment to the article: whether a particular mineral is included within a servitude is dependent on the terms of the servitude.
 - iii. Becomes a matter of contract interpretation: Did the parties intend to include _____ in the servitude?

B. What does the Servitude say?

- 1) Reservation of:
 - i. “all the mineral, oil and gas rights in and upon the lands conveyed”
 - ii. “all mineral rights”
 - iii. “the exclusive right to iron, coal, and other minerals contained in or upon”
the land
 - iv. “all of the oil, gas, and other minerals”
 - v. “all of the minerals of every nature or kind situated in, on and under the property”

C. How do the Courts Interpret?

- 1) Interpret the reservation language in light of other provisions in the contract. – La. Civil Code Art. 2050
 - i. Example: *Holloway Gravel Co. v. McKowen*, 9 So.2d 228 (La. 1942) – servitude language was “peculiarly applicable to exploiting and operating lands for minerals of a migratory character...and not for mining minerals in place,”; no reference to the kinds of equipment necessary for mining sand and gravel was made.
- 2) Nature of the contract – La. Civil Code Art. 2053
 - i. Example: *Holloway* - purchaser bought the land for agricultural purposes, and “[i]t would not be reasonable to construe the reservation of ‘mineral, oil and gas rights’ so as to embrace the right to exploit minerals which could not be removed from the land without destroying its surface for agricultural and grazing purposes.”
- 3) Conduct of the parties before and after the contract – La. Civil Code Art. 2053
 - i. Example: post-execution payment and acceptance of royalty for mineral in dispute.
 - ii. Example: pre-execution letter in which party assigned a value to lignite

- iii. Example: *Holloway* – during negotiations for the servitude, the parties never discussed the right to extract sand and gravel, only oil and gas.
- iv. Example: *Continental Group, Inc. v. Allison* 404 So.2d 428 (La. 1981) - Parties negotiated whether servitude would expressly exclude earth, sand, and gravel. The parties agreed to simply refer to “all mineral rights” without an exclusion so lignite, a solid mineral like sand, was included.
- 4) Other contracts of a like nature between the same parties – La. Civil Code Art. 2053
 - i. Example: all other leases between the parties specifically referenced lignite
- 5) Party that provided the text – La. Civil Code Art. 2056
 - i. Example: purchaser provided the Act of Sale but the landowner supplied the mineral reservation. Could be interpreted against the landowner in some instances.
- 6) *Ejusdem Generis* – a general word is limited to the kinds of things specifically listed – *See Holloway*
 - i. “mineral, oil and gas rights in and upon the lands conveyed” did not include the right to explore for and extract sand and gravel
 - ii. mineral rights’ “necessarily must be read in connection with the things subsequently named, to-wit, ‘oil rights’ and ‘gas rights’ and should be confined to things of that nature.”
- 7) Market Conditions - *See Holloway*
 - i. Considerable oil excitement in that area at time of sale but sand and gravel operations being conducted with decreasing frequency in the area
- 8) ***This list is non-exclusive*** – any relevant information may be considered if the language of the servitude is not clear.

D. Landman Solutions:

- 1) Be careful when running title:
 - i. Read existing reservation language closely;
 - ii. Read the entire contract;
 - iii. If your client is seeking a mineral lease for lignite (or any other mineral) and a servitude owner has rights in the “oil, gas, and other mineral rights in the property”, recognize that his servitude may include a right to lignite, even though not expressly mentioned; may have to investigate facts and circumstances surrounding the creation of his servitude.
- 2) Good draftsmanship is key:
 - i. If your client wants a servitude in lignite, mention it specifically in the contract.

- ii. If your client wants to cover all minerals, model the language in the Mineral Code and expressly state that the servitude applies to all minerals, liquid, fugacious, and solid, whether such minerals can be produced profitably at time of contracting or at some point in the future, including minerals that later become valuable or if new technology makes the minerals profitable.
- iii. Be careful about listing specific minerals.
- iv. Be careful about the other language used in the contract, if it is non-applicable to a particular form of minerals.

E. Application Note:

- 1) Focused on servitude descriptions because more jurisprudence in context of servitude.
- 2) But the same concepts apply to mineral leases. *See River Rouge Minerals, Inc. v. Energy Resources of Minnesota*, 331 So. 2d 878 (La.App. 2 Cir. 1976).

II. PRESCRIPTION

A. **Servitude** – a servitude is extinguished by prescription resulting from nonuse for ten years. La. Min. Code Art. 27.

- 1) When does prescription begin to run?
 - i. Date the servitude was created. La. Min. Code Art. 28.
- 2) What's a use? Or what interrupts prescription?
 - i. Good faith operations. La. Min. Code Art. 29.
 - 1. Reasonable expectation of discovering/producing minerals in “paying quantities” at a particular point or depth;
 - 2. Continued at the site chosen to that point or depth; and
 - 3. Single operation (actual drilling or mining does not have to be conducted at all times).
 - 4. Notes:
 - a. Interruption occurs on date actual drilling or mining operations commence.
 - b. Preparatory activities do not count. (seismic testing, creating roads, etc.)
 - c. Prescription begins running again on last day of drilling/mining operations.
 - ii. Actual production. La. Min. Code Art. 36
 - 1. Of any mineral covered by the act – ***this shows the importance of the first topic, “what minerals are covered by the servitude?”***
 - 2. Does not have to be in “paying quantities” – Art. 38.

3. But does have to be in “good faith” – can’t produce just to interrupt prescription.
 4. Prescription begins running again when production ceases
 - iii. Acknowledgment - Not a use but an interruption. La. Min. Code Art. 54.
 1. By the person who would get the mineral servitude rights if prescribed – usually the landowner.
 2. Must express intent to interrupt prescription.
 3. Must be filed for registry to affect third parties.
 - a. **Check the Record**
 - iv. Unit Operations:
 1. When good faith unit operations are conducted on the servitude tract, the operations interrupt prescription as to the entire servitude tract – not just that portion of the tract in the unit.
 - a. the operations must be directed toward the unitized sand.
 2. In contrast, when good faith unit operations are conducted on other land included in the unit, the operations interrupt prescription *only* as to that portion of the servitude included in the unit. La. Min. Code Art. 33
 3. The parties may contract around this rule: may provide that good faith unit operations interrupt prescription as to the entire servitude tract regardless of the location of the operations.
 - a. **Check the Contract**
- 3) Who may use?
- i. Generally, has to be servitude owner, his representative or employee, someone acting on his behalf. La. Min. Code Art. 42.
 - ii. But may adopt another’s operations/production:
 1. Adopt within 3 years of knowledge of the operations/production and earlier than date servitude owner’s rights would prescribe.
 2. Filing an Instrument:
 - a. Conveyance records
 - b. Describing the land
 - c. Identifying the operations
 - d. Specifying the date operations commenced
 - e. Expressing intent to adopt the operations as his own
 - f. **Check the Record**

B. **Mineral Royalty** - also extinguished by prescription resulting from nonuse for 10 years
La. Min. Code Art. 85

- 1) When does prescription begin to run?

- i. Date the royalty was created. Art. 28
- 2) What's a use? Or What interrupts prescription?
 - i. **Only** Actual production. Art. 87
 - 1. Of any mineral covered by the act – *this shows the importance of the first topic, what minerals are covered by the servitude.*
 - 2. Does not have to be in “paying quantities” – La. Min. Code Art. 38.
 - 3. “Good faith” is not a factor because royalty owner does not have operating rights like a servitude owner, can control operations, thus production is all that matters.
 - 4. Prescription begins running again when production ceases.
 - 5. Operations do not matter – only production
- 3) Royalties otherwise governed by the rules for servitudes.

C. **Mineral Lease** – **not prescription**; but cannot be for a **term** of more than 10 years without drilling/mining operations or production. La. Min. Code Art. 115.

- 1) Oil and Gas Lease:
 - i. Habendum clause: lease is for a primary term of ___ years and as long thereafter as operations are conducted without cessation for more than 90 days (or other conditions – freedom of contract as to the nature, quantity, and frequency of operations and production that will continue the lease beyond the primary term).
 - 1. Check the Contract** – lease specific and must read closely.
- 2) Solid Minerals:
 - i. Can be continued for greater than 10 years *without* drilling/mining or production by payment of annual rent if:
 - 1. Solid mineral discovered susceptible of production in paying quantities.
 - 2. Lessee commenced operations on neighboring land for the same mineral.
 - 3. Plan of development includes ultimate production of the mineral from the leased land.
 - 4. Additionally: (i) operations must not cease for more than 6 months; (ii) maintenance beyond 10 yr. primary cannot be for more than twenty years (total of 30 year term) without operations or production.
- 3) Coal and Lignite:
 - i. Can be continued for greater than 10 years *without* drilling/mining or production by any form of periodic payment to the lessor if:

1. Requirements similar to those for other solid minerals stated above – See Article 115(C) of La. Mineral Code.
 2. Maintenance beyond primary 10 yr. primary term cannot be for more than 30 years (total of 40 year term) without operations or production.
- 4) Multiple Tracts:
- i. Mineral lease may be granted over noncontiguous tracts of land and ***operations on any tract will maintain all of the lease tracts.*** La. Min. Code Art. 114.
 1. Not enough to look at the tract you are interested in – if the tract is part of a multi-tract lease, have to look at operations/production from those tracts as well to determine if the lease has been maintained.
 - ii. Opposite of mineral servitude – noncontiguous tracts cannot be covered by a single servitude.
- 5) Unit operations:
- i. Default Rule: Unit operations on land burdened by the lease ***or land unitized therewith*** maintains the ***entire*** lease, not just that portion of the lease included in the unit. La. Min. Code Art. 114.
 1. Note: this is opposite from the default rule for servitudes (discussed above).
 - ii. But parties may contract around this rule by use of a **Pugh Clause**.
 1. Only that portion of the lease in the unit is maintained by unit operations.
 - a. **Check the Contract**

D. Landman Solutions:

- 1) When running title and mineral interest appears to have prescribed “on its face”:
 - i. Identify the type of mineral interest (servitude, royalty, or lease).
 - ii. Identify the activities that maintain that type of interest.
 - iii. Check the record for acknowledgments and adoptions of another’s use.
 - iv. Check the contract for the effect of unit operations, Habendum clause, and Pugh clause.
 - v. Beware of special rules for maintenance of a lease for coal and lignite and other solid minerals.
 - vi. Remember that interruption of prescription/maintenance of lease as to one mineral covered by a servitude/royalty/lease interrupts as to all minerals covered by the mineral interest. Have to determine what minerals are covered by the interest.
- 2) When negotiating for mineral leases:
 - i. The Habendum clause and Pugh clause are essential.

III. CO-OWNERSHIP¹

a. The Consent Requirement

1) As to co-owned land:

- i. A tract of land owned by more than one person is co-owned.
- ii. A co-owner of land may grant a mineral servitude or mineral lease out of his interest in the land but the servitude owner/mineral lessee may not exercise his rights without the consent of co-owners owning an 80% interest *in the land*. La. Min. Code Art. 164 and 166.
- iii. The servitude and lease are *valid* (and prescription/term limits commence) but *exercise* of the servitude/lease *rights* is *suspended* until the 80% consent is obtained.

2) As to a co-owned mineral servitude:

- i. When a landowner grants a mineral servitude to more than one person, the servitude is co-owned.
- ii. A co-owner of a mineral servitude may not conduct operations on the property without the consent of co-owners owning an 80% interest *in the servitude*. La. Min. Code Art. 175.
- iii. The same applies to the co-owner's lessee.

3) Both consent requirements may apply:

- i. Example: A co-owner of land grants a mineral servitude to three persons. If one of the mineral servitude owners desires to conduct operations, he will have to meet both 80% consent requirements – 80% interest *in the land* and 80% interest *in the servitude*.

4) When co-ownership does not exist:

- i. Co-ownership does not exist between the landowner and the mineral servitude owner/ mineral lessee. La. Min. Code Art. 169
- ii. Co-ownership does not exist between the owners of separate mineral rights. La. Min. Code Art. 169
- iii. Example: A landowner grants a servitude over ½ of his mineral interest in certain property to Phil and grants a separate servitude over the other ½ of his mineral interest to Jayce. Phil and the landowner are not co-owners of anything. Phil and Jayce are also not co-owners of anything – they are the owners of separate mineral interests and do not need the consent of anyone to exercise their rights.

b. The Effort Requirement

¹ This portion of the outline borrows from Patrick Ottinger's well written Louisiana Law Review Article "Oil in the Family": *Obtaining the Requisite Consent to Conduct Operations on Co-owned Land or Mineral Servitudes*, La. Law Review, Vol. 73, No. 3, Spring 2013, available at: <http://digitalcommons.law.lsu.edu/lalrev/vol73/iss3/5>. Please see Ottinger's article for a more in-depth review of co-ownership issues.

- 1) In addition to the consent requirement, the lessee/servitude owner must make ***“every effort to contact”*** the non-consenting co-owners of the land (or of the mineral servitude) and offer to contract with them on ***“substantially the same basis that he has contracted with another co-owner.”***
 - 2) Little guidance from the Mineral Code and Jurisprudence:
 - i. What constitutes every effort? Is one call enough? One letter? What if cannot identify the other co-owners?
 - ii. If contracted on different terms with multiple co-owners on which terms should the offer be based? Because Article uses the singular term “co-owner”, implies that any of the terms used can be offered.
 - 3) Landman Solutions: Really, best practices:
 - i. Try multiple forms of contact and document efforts to contact in writing.
 - ii. Offer should be very similar to contract with other co-owner – don’t overreach.
- c. Form of consent:
- 1) Little guidance given in the Mineral Code and Jurisprudence.
 - i. It is clear that granting a lease is consent to operate but no requirement that consent be in the form of a lease.
 - ii. No requirement that consent be in writing
 - iii. No requirement that it be recorded
 - iv. Duration – not clear how long consent lasts – for one operation, for life of lease/servitude, until the first unsuccessful operation?
 - v. Can the consent be revoked? If so, for what reasons.
 - vi. Is the consent transferrable?
 - 2) Landman Solutions – Really, best practices:
 - i. At a minimum get the consent in writing and record to put third parties on notice.
 - ii. If possible, specify the duration, scope, transferability, and other aspects of the consent.
 1. But be careful of overreaching in drafting the consent. The landowner is not required to consent and may retract if the provisions seem too onerous.
 - iii. Hopefully the courts and the legislature can provide some guidance in this area.
- d. Landman Solutions:
- 1) When desiring to conduct operations:
 - i. Distinguish between co-owned land, and co-owned servitudes.
 - ii. Apply the proper 80% rule.
 - iii. Attempt to contact all co-owners using best practices.
 - iv. Use best practices regarding the form and terms of consent.

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