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LOUISIANA UPDATE 2016

T. C. Turner is a founding partner of Buckley & Turner, PLLC and specializes in oil, gas, and mineral law. He is licensed in Texas, Louisiana and New Mexico and is Board Certified by the Texas Board of Legal Specialization. He loves the practice of oil and gas law and particularly enjoys the more obscure nuances of New Mexico and Louisiana law. Though trained as a common law attorney at the University of Texas School of Law, he has come to appreciate the finer aspects of the Louisiana Civil Code.[1]

[1] T. C. would like to express his gratitude and admiration for his civil law mentor, J. Hugh Willey. Your expert and patient instruction is greatly appreciated.

I – INTRODUCTION – CIVIL LAW

"[The Louisiana Civil Code]…is the most important book in your library…because it ushers you into society as a member of your parents' family and regulates your life until you reach maturity. It then prescribes the rules for the establishment of your own family by marriage and having children, and for the disposition of your estate when you die, either by law or by testament subject to law…"

> – John H. Tucker, Jr. (from the foreword to the Louisiana Civil Code)[2]

Louisiana is unlike any other state in the Union. While internationally known for its fantastic restaurants, great jazz music, and historical architecture, its civil law system is what truly sets it apart. Such a system is modeled after the Napoleonic Code of 1804, which in turn was influenced by the more ancient Roman Civil Law as codified by Justinian I.[3]

Unlike case-driven Common Law jurisdictions, the Louisiana Civil Law System rests on two authoritative legal

[2] As a corollary, the Mineral Code is the most important book in a mineral law attorney's library.

[3] For a wonderful examination of the origins of the Louisiana Civil Law System and a comparison to Texas' Common Law approach, see *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, by Patrick H. Martin and J. Lanier Yates, 52 La. L. Rev. 769 (1992).

sources: legislation and custom.[4] Legislation is the solemn expression of legislative will and is the superior source of law in Louisiana.[5] Custom is a long repeated practice that generally has acquired the force of law.[6] Custom, however, cannot trump legislation.[7] In the absence of legislation and custom, the court proceeds according to equity.[8] It must be noted that case law is not a primary source of law in Louisiana, although appellate courts' decisions are "persuasive" as to what the law is, and Louisiana Supreme Court decisions are considered to be "binding" on the appellate and trial courts.[9] Case law, then, can assist in the interpretation of legislation and custom.

Under a civil law system, the legislative will, as supplemented by custom and equity, is codified.[10] The vast majority of private law in Louisiana currently stems from the Revised Civil Code of 1870, which replaced the Code of 1825 that in turn replaced the Code of 1808.[11] The Revised Code, then, is the controlling body of law in Louisiana, with few exceptions. One such exception is the Mineral Code, enacted in 1974.

The Mineral Code is the codification of judicial decree regarding oil and gas production in the State of Louisiana that reflects the custom of the industry from inception to 1974 (and as updated, to the present date). Such jurisprudence developed as a reaction to production beginning in the early 20th century. The Mineral Code, adopted as Act 50 of 1974, is designed to "supplant by way of codification the extensive jurisprudence" that developed in the area of oil and gas law.[12] The Mineral Code makes few changes to the prior-developed jurisprudence, with most changes being clarifications of existing principles and rules.

It is important to note that the Mineral Code is supplementary to the Louisiana Civil Code and specifically applies to the subject matter of mineral law.[13] Where there is conflict between the Civil Code, other laws, and the Mineral Code, the provisions of the Mineral Code prevail.[14] Finally, the Civil Code or other laws apply to situations not anticipated or covered by the Mineral Code.[15]

[4] LA CC Art. 1 – the sources of law are legislation and custom.
[5] LA CC Art. 2 – legislation is the solemn expression of legislative will.
[6] LA CC Art. 3 – custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation.
[7] *Id.*
[8] LA CC Art. 4 – When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason and prevailing usages.
[9] *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation* by Mary Garvey Algero, 65 La. L. Rev. 2 (2005), at 792.
[10] *Id.*
[11] *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913 by* A. N. Yiannopoulos, 53 La. L. Rev. 1 (1992), at 6 – 7.
[12] *Cox v. Sanders*, 421 So.2d 869 (La. 1982), at 871.
[13] LA RS §31:2 – The provisions of this code are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws, the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.
[14] *Id.*
[15] *Id.*

Mineral Rights and Prescription

Louisiana takes a fundamentally different approach to the ownership of oil and gas than the other 49 states of the Union. Rejecting the ownership in place theory, early Louisiana court decisions determined that oil and gas minerals were insusceptible to such ownership due to their "fugacious" character.[16] Furthermore, public policy considerations such as swift development of natural resources unencumbered by ancient claims to land, and the simplicity of land titles by avoiding the dismemberment of ownership from the surface, weighed heavily on the jurisprudence.[17]

This sentiment is codified in the Mineral Code, as ownership of land does not include oil, gas, or other minerals beneath the land.[18] In Louisiana there is no separate estate. Rather, the landowner merely has the exclusive right to explore and develop his property for the production of oil and gas.[19] The landowner may create mineral rights in his property, including the mineral servitude, the mineral royalty, and the mineral lease, among others like the severed executive right, and he may convey, reserve, or lease his right of exploration.[20] These rights are subject to prescription for non-use of ten (10) years and other rules that extend their terms, discussed below.

A mineral right is a real right in property that is alienable and heritable.[21] Only a landowner who presently owns the right to explore for and produce minerals may create a mineral right.[22] Thus, when chaining title, it is important to determine that the Grantor of a mineral right has a current, vested right in the land. Any reservation to begin at the end of the term of a current mineral right will be void *ab initio* as the Grantor does not own the interest at the time of the reservation.

A mineral servitude is the right of enjoyment of land belonging to another for the purpose to explore and produce minerals and reduce them to possession and ownership.[23] Use of the mineral servitude by

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[16] *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So, 207 (1922), at 224, 245.

[17] *Id.* at *Frost-Johnson;* see *A Primer on the Louisiana Mineral* Servitude, Patrick S. Ottinger, Advanced Oil, Gas and Energy Resources Law, State Bar of Texas, October 3-4, 2002 (Chpt. 11), at 4, 5.

[18] LA RS §31:6 – Ownership of land does not include ownership of oil, gas and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.

[19] *Id.*

[20] LA RS §31:15 – A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession.

LA RS §31:16 – The basic mineral rights that may be created by a landowners are the mineral servitude, the mineral royalty, and the mineral lease. This enumeration does not exclude the creation of other mineral rights by a landowner. Mineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence.

[21] LA RS §31:18 – A mineral right is an incorporeal immovable. It is alienable and heritable. The situs of a mineral right is the parish or parishes in which the land burdened is located. All sales, contracts, and judgments affecting mineral rights are subject to the laws of registry.

[22] LA RS §31:24 – Except as provided in Article 25, a mineral servitude may be created only by a landowner who owns the right to explore for and produce minerals when the servitude is created;
LA RS §31:25 – A mineral servitude may be created by a landowner whose title terminates at a particular time or upon the occurrence of a certain condition but it is extinguished at the specified time or on occurrence of the condition divesting title.

[23] LA RS §31:21 – A mineral servitude is the right of enjoyment of land belonging to another for the

its owner is limited to only so much of the land as is reasonably necessary to conduct operations, and includes the obligation to restore the surface to its original condition.[24]

An act creating a mineral servitude that describes contiguous tracts of land creates a single mineral servitude while a description of noncontiguous tracts of land creates as many mineral servitudes as there are noncontiguous tracts.[25] Tracts are contiguous if they touch and concern another so that one may pass from one tract to the other without traversing another's property.[26] Two tracts that come together at a point, like the Northwest Quarter and the Southeast Quarter of a section, however, are not contiguous.[27] Whether lands are contiguous is paramount in determining whether or not a mineral right has been maintained by operations and/or production.

A mineral royalty is the right to participate in production of minerals from land owned by another, or land subject to a mineral servitude owned by another, and unless otherwise agreed, shares in gross production free of drilling and production costs.[28] The mineral royalty does not include executive or operating rights[29] and may be created by the owner of the landowner's rights in minerals, being either the landowner herself, or the owner of a mineral servitude.[30] Often times the source of creation of a mineral royalty becomes very important when considering matters of "confusion," discussed below.

Finally, the executive right is the right to grant a mineral lease and, in Louisiana, expressly includes the right to bonus and rentals.[31] It is considered a mineral right and can exist independently from other mineral rights. The executive has no obligation to execute a mineral lease, but must act in good faith as a reasonably prudent landowner when leasing.[32]

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purpose of exploring for and producing minerals and reducing them to possession and ownership.

[24] LA RS §31:22 – The owner of a mineral servitude is under no obligation to exercise it. If he does, he is entitled to use only so much of the land as is reasonably necessary to conduct his operations. He is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.

[25] LA RS §31:63 – A single mineral servitude is created by an act that affects a continuous body of land although individual tracts or parcels within the whole are separately described.
LA RS §31:64 – An act creating mineral servitudes on noncontiguous tracts of land creates as many mineral servitudes as there are tracts unless the act provides for more.

[26] *Baham v. Vernon*, 42 So.2d 141, 145 (La. App. 1st Cir. 1949).

[27] *Turner v. Glass*, 195 So.645 (La.App. 2nd Cir. 1940); *Lee v. Giauque*, 154 La. 491, 97 So.669 (1923).

[28] LA RS §31:80 – A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another. Unless expressly qualified by the parties, a royalty is a right to share in gross production free of mining or drilling and production costs.

[29] LA RS §31:81 – The owner of a royalty has no executive rights; nor does he have the right to conduct operations to explore for or produce minerals.

[30] LA RS §31:82 – A mineral royalty may be created either by a landowner who owns mineral rights or by the owner of a mineral servitude.

[31] LA RS §31:105 – The executive right is the exclusive right to grant mineral leases of specified land or mineral rights. Unless restricted by contract it includes the right to retain bonuses and rentals. The owner of the executive right may lease the land or mineral rights over which he has power to the same extent and on such terms and conditions as if he were the owner of a mineral servitude.

[32] LA RS §31:109 – The owner of an executive interest is not obligated to grant a mineral lease, but in doing so, he must act in good faith and in the same manner as a reasonably prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest.

Mineral rights are extinguished by several conditions. The first and most well known condition is prescription of non-use for a period of ten (10) years.[33] Unique to Louisiana,[34] prescription is a "use it or lose it"[35] proposition. It can be interrupted and subsequently commenced anew, depending on the type of mineral right and the actions of the lessee. It is important to note the methods of interrupting prescription can differ between mineral rights.

For a mineral servitude (and a severed executive right[36]), prescription is interrupted by use, which involves operations conducted in good faith for the discovery and production of oil and gas.[37] Operations must be commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth, must be continued at the location to that point or depth and must constitute a single operation.[38] Determining whether good faith exists is a fact intensive analysis applied on a case-by-case basis.

The interruption of prescription by good faith operations extends the life of the mineral servitude (and the severed executive right) for so long as there is production.[39] Interruption takes place on the date drilling commences and prescription commences anew from the last day on which actual drilling is conducted.[40] Mere onsite preparation for drilling will not interrupt prescription.[41]

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[33] LA RS §31:27 – A mineral servitude is extinguished by: (1) prescription resulting from nonuse for ten years; (2) confusion; (3) renunciation of the servitude on the part of him to whom it is due, or the express remission of his right; (4) expiration of the time for which the servitude was granted, or the happening of the dissolving condition attached to the servitude; or (5) extinction of the right of him who established the servitude.
LA CC Art. 3448 – Prescription of nonuse is a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time.

[34] "…the regime of prescription distinguishes Louisiana from other producing states…", *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, by Patrick H. Martin and J. Lanier Yates, 52 La. L. Rev. 769 (1992), Pg. 17.

[35] See Richard Bach, author of *Jonathan Livingston Seagull*, on "perspective;" generally, see Andy Stitzer.

[36] LA RS §31:107 – The prescription of nonuse of an executive right existing independently is interrupted by an act or event that would be sufficient to interrupt prescription accruing against a mineral servitude.

[37] LA RS §31:29 – The prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of minerals. By good faith it is meant that the operations must be (1) commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth, (2) continued at the site chosen to that point or depth, and (3) conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.

[38] *Id;* For an excellent discussion of good faith operations, see Jamie S. Manuel's *Louisiana Mineral Servitudes – Analyzing and Litigating "Good Faith,"* 61st Annual Mineral Law Institute (4/3/14), Section 5 at Page 213, et seq;
See *Indigo Minerals, LLC and Martin Timber Company, LLC v. Pardee Minerals, LLC, et al*, No. 45,160-CA, La. App 5/28/2010 (La. App. 2010).

[39] LA RS §31:36 – Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production.

[40] LA RS §31:30 – An interruption takes place on the date actual drilling or mining operations are commenced on the land burdened by the servitude or, as provided in Article 33, on a conventional or compulsory unit including all or a portion thereof. Preparations for the commencement of actual drilling or mining operations, such as geological or geophysical exploration, surveying, clearing of a site, and the hauling and erection of materials and structures necessary to conduct operations do not interrupt prescription. Prescription commences anew from the last day on which actual drilling or mining operations are conducted.

[41] *Id.*

A producing well located on the mineral servitude will extend all *contiguous* portions of that mineral servitude.[42] A unit well not located on the mineral servitude will extend only those portions of the servitude embraced by the unit. [43] Prescription begins to run anew when production or operations cease.[44]

Operations alone, however, will not interrupt prescription for a mineral royalty. Only actual production will suffice,[45] but such production does not have to be in paying quantities.[46] Interruption begins on the date actual production is obtained and prescription begins anew from the date of cessation of production.[47]

Unlike a mineral servitude, only unit *production* will extend a mineral royalty.[48] Operations will not suffice. As with the mineral servitude and severed executive right, unit production from a well located on the mineral royalty will interrupt prescription as to all contiguous portions of the mineral royalty, while production from a well not located on the mineral royalty will only maintain those portions of the mineral royalty located within the unit.[49]

Prescription affecting mineral servitudes, mineral royalties and severed executive rights may also be interrupted by acknowledgement of the landowner.[50] Such acknowledgment must be written, identify the parties, and express clear intent to interrupt prescription.[51] Finally, prescription for such rights may be interrupted by contract, for a period of time less than that resulting from an interruption by an acknowledgment. Such contract must meet the formalities of an acknowledgment and include a term.[52]

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[42] LA RS §31:73 – a single mineral servitude may not be created on two or more noncontiguous tracts of land.

[43] LA RS §31:37 – Production from a conventional or compulsory unit embracing all or part of the tract burdened by a mineral servitude interrupts prescription, but if the unit well is on land other than that burdened by the servitude, the interruption extends only to that portion of the servitude tract included in the unit.

[44] LA RS §31:30 - …Prescription commences anew from the last day on which actual drilling or mining operations are conducted.

[45] LA RS §31:87 – Prescription of nonuse running against a mineral royalty is interrupted by the production of any mineral covered by the act creating the royalty. Prescription is interrupted on the date on which actual production begins and commences anew from the date of cessation of actual production.

[46] LA RS §31:88 – To interrupt prescription it is not necessary that minerals be produced in paying quantities but only that they actually be produced and saved.

[47] *Id.*

[48] LA RS §31:89 – Production from a conventional or compulsory unit including all or part of the tract burdened by a mineral royalty interrupts prescription, but if the unit well is on land other than that burdened by the royalty, the interruption extends only to that portion of the tract included in the unit.

[49] *Id.*

[50] LA RS §31:56 – A landowner may extend a mineral servitude beyond the prescriptive date for a period less than that which would result from an interruption by an acknowledgment. The extension must meet all of the requirements for an acknowledgment and must specify the period for which the servitude is extended.

LA RS §31:93 – Subject to the special rules provided in Articles 94 through 96, the rules applicable to acknowledgments and extensions of prescription running against mineral servitudes are applicable to mineral royalties.

[51] LA RS §31:54 – The prescription of nonuse may be interrupted by a gratuitous or onerous acknowledgment by the owner of the land burdened by a mineral servitude. An acknowledgment must be in writing, and, to affect third parties, must be filed for registry.

LA RS §31:55 – An acknowledgment must express the intent of the landowner to interrupt prescription and clearly identify the party making it and the mineral servitude or servitudes acknowledged.

[52] LA RS §31:56 – A landowner may extend a mineral servitude beyond the prescriptive date for a period less than that which would result from an interruption by an acknowledgment. The extension

The remaining methods of extinguishing a mineral servitude, mineral royalty or severed executive right are confusion, renunciation of the servitude, expiration of a term-servitude or the occurrence of a condition attached to the servitude, and extinction of the right of he who established the servitude.[53] Confusion generally occurs when the landowner acquires the outstanding mineral right, or vice versa.[54] The reunification of the "dominant and servient" estates extinguishes the outstanding mineral right.[55]

Confusion can be very…well… confusing, when dealing with the combination of outstanding mineral servitudes, mineral royalties, and severed executive rights in one person or entity. The key is determining the origin of the right and ensuring that the dominant and servient estates have been combined.

The unification of a mineral royalty with the mineral servitude from which it was created will extinguish the mineral royalty. However, the unification of a mineral royalty created by a landowner in the owner of a servitude created by the same landowner will not "merge" the mineral royalty into the mineral servitude. In such situation the two rights are of equal dignity, each being created from the landowner's rights in minerals. Upon completion of their acquisition, this lucky individual will then own a mineral servitude burdened by the mineral royalty and a separate mineral royalty burdening the mineral servitude. Confusion, then, can be quite confusing. The remaining modes of extinction are self explanatory as indicated by their descriptions.

The Mineral Lease[56]

As noted by Patrick H. Martin, "No other type of agreement can be said to be so important to the commerce of [Louisiana]" as the oil, gas and mineral lease. The Bath form of mineral lease produced by the M. L. Bath Co., Ltd. of Shreveport is the customary form used in Louisiana (akin to the use of the Producers 88 in Texas).[57] Distinct Northern and Southern versions developed over time such that the two can be as different as Cajun country is to the northern timberlands. The Bath form, along with all other mineral leases, evolved over time in response to unfavorable court decisions.[58]

The right to grant a mineral lease is a real right[59] and is also considered a contract.[60]Appropriately then, the comments

must meet all of the requirements for an acknowledgment and must specify the period for which the servitude is extended.

[53] *Id. at* LA RS §31:27; see LA RS §31:85 as per mineral royalty;

[54] *Id.*

[55] LA CC Art. 765 – A predial servitude is extinguished when the dominant and the servient estates are acquired in their entirety by the same person.

[56] "The oil and gas lease is the fundamental instrument for the development of oil and gas in Louisiana…there are surely tens of thousands of active leases, some of which have been in production continuously for as much as a century. Billions of dollars are invested or exchanged under the terms of these leases each year. **No other type of agreement can be said to be so important to the commerce of [Louisiana]."** –Patrick H. Martin, Forward to *Louisiana Mineral Leases: A Treatise*, by Patrick S. Ottinger (Claitor's Law Books & Publishing Division, Inc., 2016).

[57] Patrick S. Ottinger, *Louisiana Mineral Leases: A Treatise*, §1:17 (Claitor's Law Books & Publishing Division, Inc., 2016).

[58] *Id.*

[59] *Id. at* LA RS §31:15 and LA RS §31:16

[60] LA RS §31:114 – A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals A single lease may be created on two or more contiguous tracts of land, and

to Article 16 consider the mineral lease a "hybrid institution." The mineral lease is not susceptible to prescription for nonuse of ten years, but it must include a term.[61] Interests carved out of the working interest are also not susceptible to prescription for nonuse.[62] A primary term greater than ten years during which no drilling or production will occur is reduced to ten years by operation of law.[63]

A landowner, a servitude owner, or the owner of a severed executive right may grant a mineral lease.[64] Ownership of the executive right is the key. Conditional owners may also grant leases, which are valid only for the life of the conditional owner's interest.[65] Additionally, usufructuaries[66] may grant leases if the usufruct includes the landowner's rights in minerals.[67] As with conditional ownership, the lease of a usufructuary's interest usually terminates upon termination of the usufruct.[68] Whether or not the usufruct includes the landowner's rights in minerals by creation of juridical act or by operation of law, etc., is well beyond the scope of this article.[69] A thorough analysis of the rights of the usufruct however, must be conducted prior to leasing and often the inclusion and cooperation of the naked owner(s)[70] must be sought.

A mineral lease is maintained by production in paying quantities[71] and the

operations on the land burdened by the lease or land unitized therewith sufficient to maintain the lease according to its terms will continue it in force as to the entirety of the land burdened.

[61] LA RS §31:115A – The interest of a mineral lessee is not subject to the prescription of nonuse, but the leases must have a term. Except as provided in this Article, a lease shall not be continued for a period of more than ten years without drilling or mining operations or production. Except as provided in this Article, if a mineral lease permits continuance for a period greater than ten years without drilling or mining operations or production, the period is reduced to ten years.

[62] LA RS §31:126 – Interests created out of the mineral lessee's interest is dependent on the continued existence of the lease and is not subject to the prescription of nonuse.

[63] *Id.*

[64] LA RS §31:116 – A mineral lease may be granted by a person having an executive interest in the mineral rights on the property leased.

[65] LA RS §31:117 – A mineral lease may be granted by the owner of an executive interest whose title is extinguished at a particular time or upon the occurrence of a certain condition, but it terminates at the specified time or on occurrence of the condition divesting the title.

[66] LA CC Art. 535 – Usufruct is a real right of limited duration on the property of another. The features of the right vary with the nature of the things subject to it as consumables or nonconsumables. (The "remainder" interest of a usufruct is known as naked ownership).

[67] LA RS §31:118 – A usufructuary of land may grant a mineral lease on the estate of which he has the usufruct if the usufruct includes the mineral rights susceptible to leasing, but any such lease is extinguished with the termination of the usufruct. A usufructuary of a mineral servitude or other executive interest may grant a mineral lease that extends beyond the term of the usufruct and binds the naked owner of the servitude.

[68] *Id.*

[69] For an excellent and concise discussion of leasing the usufruct, see Andrea Knouse Tettleton's *Selected Title Issues*, 63rd Annual Mineral Law Institute (3/31/16), Section 4 at Pages 9 – 12. See LA RS 31:188 to 31:196.

[70] For example, see LA RS 31:190(B) - If a usufruct of land is that of a surviving spouse, whether legal or conventional, and there is no contrary provision in the instrument creating the usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals, whether or not mines or quarries were actually worked at the time the usufruct was created. However, the rights to which the usufructuary is thus entitled shall not include the right to execute a mineral lease without the consent of the naked owner.

[71] LA RS §31:124 – When a mineral lease is being maintained by production of oil or gas, the production must be in paying quantities. It is considered to be in paying quantities when production allocable to the total original right of the lessee to share in production under the lease is sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss.

lessee's conduct is judged by the reasonably prudent operator standard.[72] A lessee may assign or sublease his interest[73] and a partial assignment or sublease does not divide a mineral lease.[74] This last distinction is critical when determining whether operations or production in paying quantities have maintained all portions of a lease beyond its primary term, as discussed in *Guy v. Empress, LLC* below. For an outstanding and thorough review of the oil and gas lease in Louisiana, see Patrick S. Ottinger's *Louisiana Mineral Leases: A Treatise*, cited herein.

II- CASE LAW UPDATE

Habendum Clause of the Mineral Lease

Regions Bank v. Questar Exploration & Prod. Corp., 50,211 (La.App. 2 Cir. 1/13/16), 184 So.3d 260, (reh. den. 2/18/16).

Oil, gas and mineral leases containing habendum clause ("ten years and as much longer thereafter as gas or oil is found or produced in paying quantities") determined to be non-perpetual and governed by the terms of the Louisiana Mineral Code.

At issue is the proper application of Louisiana law to the terms of three mineral leases executed in 1907 covering approximately 3,214 acres. The leases were subsequently assigned to Standard Oil Company, the predecessor to Exxon Mobil Corporation. Production from hundreds of shallow wells has maintained the leases to the present.

Plaintiffs originally brought suit for failure to reasonably develop the leases at a depth below 6,000 feet, seeking cancellation and release of a portion of the leases below that depth. Subsequently, plaintiffs amended their suit to additionally seek a judicial declaration of termination of the leases pursuant to Louisiana Civil Code Article 2679[75], which provides that the duration of a term may not exceed ninety-nine years. At issue is whether the Louisiana Mineral code, enacted in 1974, controls over La. CC Art. 2679 re: interpretation of the terms of oil, gas and mineral leases.

La. R.S. 31:2[76] provides that the Mineral Code prevails on matters of mineral law in the event of a conflict with the Civil Code. Furthermore, La. R.S. 31:115(a)[77]

[72] LA RS §31:122 – A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.

[73] LA RS §31:127 – The lessee's interest in a mineral lease may be assigned or subleased in whole or in part.

[74] LA RS §31:130 – A partial assignment or partial sublease does not divide a mineral lease.

[75] LA CC Art. 2679 – The duration of a term may not exceed ninety-nine years. If the lease provides for a longer term or contains an option to extend the term to more than ninety-nine years, the term shall be reduced to ninety-nine years.

If the term's duration depends solely on the will of the lessor or the lessee and the parties have not agreed on a maximum duration, the duration is determined in accordance with the following Article.

[76] LA RS §31:2 – The provisions of this Code [Mineral Code] are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those in the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.

[77] LA RS §31:115(a) – Requirement of Term; limitations of continuation without drilling or mining operations or production: (A) the interest of a mineral lessee is not subject to the prescription of nonuse, but the lease must have a term. Except as provided in this

requires a lease to have a term and such term cannot be extended without drilling, mining or production. Thus, the maximum term of an oil, gas and mineral lease is dependent on continued operations and production.

In resolving the conflict between the Mineral Code and La. CC Art. 2679, the Court determined that the secondary term of the leases was in accord with the limitations defined in La. R.S. 31:115(a), and thus non-perpetual in nature and that the terms of the Mineral Code and the leases governed. The Court noted, "plaintiff's assertions that the secondary term of a mineral lease is limited to 99 years are contrary to the universal concept of maintaining a mineral lease for as long as minerals are produced in paying quantities." The decision, then, upholds close to a century of jurisprudence on the nature and duration of the habendum clause.

Production in Paying Quantities

Middleton v. EP Energy E&P Co., L.P., 50,300 (La.App. 2 Cir. 02/03/16), 188 So.3d 263, (writ. cert. den. 06/17/16).

Determination of production in paying quantities should include market price, relative profitability of other nearby wells, operating costs, net income, and the reasonableness of expectation of future profit, etc.

Three mineral leases were granted in November 1982 and April 1983 covering 300 acres of land in Desoto Parish, Louisiana. The leases included a three-year primary term and a standard habendum clause. The Louisiana Office of Conservation established the 480-acre PET RA SU45 Unit, which included 30 acres of the leased premises, and the PET RA SU45 Keatchie Invest No. 1 well, which was spud in 1984. Production from the well maintained the leases, which did not include a pugh clause, until the well was plugged in 2013.

Plaintiff's sought release of the leases in 2012 alleging termination for failure of production in paying quantities for the period of time from January 1990 to January 1994. The trial court granted Plaintiff's motion for partial summary judgment, and terminated the leases by finding that operating the well at a loss or minimal profit from January 1990 to January 1994 would not induce a reasonably prudent operator to continue production.

In reversing the trial court's grant of partial summary judgment and cancellation of the leases, the Court determined that all factors that would influence a reasonably prudent operator should be considered when determining production in paying quantities. These factors include market price, relative profitability of other wells, operating costs, the net income and reasonableness of expectation of future profit, etc.

Oilfield Remediation

Moore v. Denbury Onshore, LLC, No. 3:14CV913, 2016 WL 393549 (W.D. La. Mar. 1, 2016).

Court allowed remediation damages that exceeded statutorily required remediation plan while denying damages for a plan that would return the property to its

Article, a lease shall not be continued for a period of more than ten years without drilling or mining operations or production. Except as provided in this Article, if a mineral lease permits continuance for a period greater than ten years without drilling or mining operation or production, the period is reduced to ten years.

original condition based on the plain language of Act 312.

The Moores leased approximately 626 acres in Richland Parish to Denbury Onshore, LLC ("Denbury"), giving Denbury the right to lay pipe on their land. Subsequently, on March 26, 2013, Denbury's pipeline ruptured and deposited brine, oil and other toxic substances onto the Moores' property. The Moores filed a petition seeking remediation of their property to its original condition. The case was removed to U. S. District Court on grounds of diversity.

In accordance with Act 312 (LA RS 30:29, et seq)[78] Denbury admitted liability and moved the court to refer the matter to the Louisiana department for Natural Resources, Office of Conservation, in order to determine a feasible remediation plan. Each party submitted remediation plans.

The Office of Conservation ultimately adopted Denbury's plan as the most feasible and, on November 6, 2015, Denbury filed a motion for partial summary judgment seeking dismissal of the Moores' claim for remediation to the land's original condition and to declare that damages be limited to funding the most feasible plan under Act 312. The Moores response pointed out that the Louisiana Supreme Court previously held that additional remediation damages (which the Moores could pocket) are available even in the absence of express contractual provisions. Denbury's reply noted the 2014 legislative amendments to Act 312 precluded such an award.

The District Court held that the 2014 Amendments to Act 312 prevented the Moores from directly recovering additional remediation damages in the absence of an express contractual provision (see LA RS 30:29H and 30:29M).[79] All remediation damages, except those specifically excepted by Subsection D, must be deposited into the court's registry. The court further rejected the Moore's request for damages in excess of the state regulatory standard since Act 312 explicitly precludes such award in the absence of an express contractual provision.

[78] LA RS §30:29 – Remediation of oilfield sites and exploration and production sites. Note the text of the statute is too voluminous to include in this article.

[79] LA RS §30:29H – (1) This section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Any award granted in connection with the judgment for additional remediation in excess of the requirements of the feasible plan adopted by the court is not required to be paid into the registry of the court.
(2) Damages that may be awarded in an action under this Section shall be governed by the provisions of Subsection M of this Section. This Section shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease.
LA RS §30:29M – In an action governed by the provisions of this Section, **damages may be awarded only for the following;**
(1) The cost of funding the feasible plan adopted by the court.
(2) **The Cost of additional remediation only if required by an express contractual provision providing for remediation to original condition or to some other specific remediations standard.**
(3) The cost of evaluating, correcting or repairing environmental damage upon a showing that such damage was caused by unreasonable or excessive operations based on rules, regulations, lease terms and implied lease obligations arising by operation of law, or standards applicable at the time of the activity complained of, provided that such damage is not duplicative of damages awarded under Paragraphs (1) or (2) of this Subsection.
(4) The cost of nonremediation damages.
The provisions of this Subsection shall not be construed to alter the traditional burden of proof or to imply the existence or extent of damages in any action, nor shall it affect an award of reasonable attorney fees or costs under this Section.

Finally, the court determined that Denbury's liability could not be limited to funding the most feasible plan since Subsection M(C) of Act 312 allowed recovery of costs needed to repair environmental damage as a result of a party's unreasonable or excessive operations. Such determination under Louisiana precedent should be determined at a trial on the merits. Motion for Partial Summary Judgment granted as to dismissal of the Moores' claim for remediation to original condition and denied as to Denbury's request that the court limit its liability to funding the most feasible plan.

Conservation Servitude / Wetlands Mitigation Bank

Spanish Lake Restoration, L.L.C. v. Petrodome St. Gabriel II, LLC., 2015-0451 (La.App. 4 Cir. 1/13/16), 186 So. 3d 230 (4 Cir. 2016)

Summary judgment reversed as questions of material fact existed as to whether actions of Assignee under oil and gas lease were consistent with conservation servitude and whether Assignee's purchase of mitigation credits were sufficient under Interagency Agreement.

In February 1999, Lago Espanol, LLC, ("Lago") the surface and mineral rights owner of Section 12, Iberville Parish, Louisiana, entered into an Interagency Agreement with numerous federal and state agencies to create the Lago Espanol Mitigation Bank. Lago recorded the Interagency Agreement, which contained numerous land use restrictions that run with the land, in March of 1999. Rio Bravo Energy Partners ("Rio Bravo") acquired a lease of the mineral rights covering Section 12 from Lago in 2006, and later assigned the lease to AUS-TEX Exploration, Inc. ("AUS-TEX"). AUS-TEX obtained a Wetlands Permit from the U. S. Army Corp of Engineers that allowed it to board the pre-existing north-south road and the intersection with the unimproved east-west road in Section 12. AUS-TEX boarded the roads, drilled a dry hole on adjacent Section 13, and subsequently plugged and abandoned the well and assigned the lease and the Wetlands Permit to Rio Bravo.

Spanish Lake Restoration, LLC ("Spanish Lake") acquired the surface rights to Section 12 in 2009 while Lago reserved the minerals rights. In 2011, Rio Bravo assigned its rights in the lease and the Wetlands Permit to Petrodome St. Gabriel II, LLC ("Petrodome") who later reboarded the north-south road and drilled a well on adjacent Section 13. Petrodome later improved the north-south and east-west roads further with limestone and installed an aboveground natural gas gathering line that runs from the Section 13 well pad across the surface of Section 12.

Spanish Lake filed a trespass action on April 30, 2013, against Petrodome claiming the road improvements and gathering line violated the conservation servitude, damaged the surface of Section 12, and undermined its ability to operate its wetlands mitigation bank and fulfill its legal obligations under the permits, leases, etc., associated with the ownership and operations of its property as a wetlands mitigation bank. Petrodome filed a motion for summary judgment arguing that the Lease, the Wetlands Permit and the conservation servitude all authorized its operations on Section 12. Spanish Lake filed a cross motion for partial summary judgment.

The trial court determined that Petrodome did not commit trespass and

found Petrodome's actions were authorized. The trial court granted summary judgment in favor of Petrodome, dismissed Spanish Lake's action, and denied Spanish Lake's cross motion for partial summary judgment. Spanish Lake timely appealed to the Louisiana 4th Circuit Court of Appeals.

The appellate court determined there was a question of material fact as to whether the improvement to the roads in Section 12 and the installation of the gathering lines were consistent with the restrictions in the conservation servitude which limited the exploration and development of minerals to an impact no greater than "a limited, localized impact on the surface, with no permanent destruction of any conservation values of the property without compensation for the loss of wetland value." Additionally, the appellate court determined there were questions of fact as to whether Petrodome's purchase of mitigation credits from the Bayou Paul Mitigation Bank (not associated with the Lago Espanol Mitigation Bank) sufficiently complied with the Interagency Agreement as the record lacked sufficient information regarding the circumstances surrounding the purchase of the credits. For those reasons, the appellate court reversed the ruling of the trial court in favor of Petrodome and remanded the case for further proceedings.

Instrument Construction: Servitude or Conveyance?

Keystone Energy Co., LLC v. Denbury Onshore, LLC, 15-99 (La.App. 3 Cir. 3/30/16), 188 So.3d 458, (3 Cir. 2016).

Summary judgment reversed as questions of material fact existed as to whether a 1904 notarial act transferred fee title or a mere servitude.

A Notarial Act dated March 4, 1904 conveyed an interest in six and 29/100 acres located in what was then Calcasieu Parish. Subsequently, a handwritten version of the Notarial Act was filed in Orleans Parish on March 7, 1904, while a typed copy of the instrument was recorded in Calcasieu Parish's conveyance records on March 12, 1904. Jefferson Davis Parish was subsequently carved out of Calcasieu Parish, and as a result, the typed copy of the Notarial Act is also filed in the Jefferson Davis Parish conveyance records. Years later, in March of 2010, the handwritten version of the Notarial Act was similarly recorded in the Jefferson Davis Parish conveyance records. The typed copies both contain the heading "Right of Way" on the left-hand side of the page. Such heading does not appear in the original, handwritten instrument.

Denbury and Hilcorp, the operators of the Petijean Tr. et al 1 Well in the MT RA SUA Unit that embraces the property, contend that the Notarial Act transferred a mere servitude while Keystone and Union Pacific believe the Notarial Act conveyed fee title. After cross-motions for partial summary judgment, the trial court ruled that the Notarial Act transferred fee title in the property, and thus Union Pacific was owner of the mineral rights and Keystone and Union Pacific were the only entities entitled to funds deposited in the registry of the court in the attendant concursus proceeding.[80] Denbury and Hilcorp appealed.

The appellate court rejected Denbury and Hilcorp's argument that, under the

[80] LA CCP Art. 4651 – A concursus proceeding is one in which two or more persons having competing or conflicting claims to money, property, or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding.

public records doctrine, the handwritten 1904 version of the Notarial Act filed in Calcasieu Parish had no effect as to them as third parties as it was not filed in the conveyance records of Jefferson Davis Parish until March of 2010, several years after they acquired rights in the property. The appellate court noted the trial court disregarded the inclusion of the words "Right-of-Way" in the typed version of the Notarial Act and determined the parish clerk of court added the "Right-of-Way" designation, and noted the body of the typed and handwritten instruments was identical. Additionally, the appellate court noted the parties did not dispute that the 1904 handwritten version of the Notarial Act was filed of record in Calcasieu Parish, which originally embraced Jefferson Parish, the result being that the Notarial Act is effective as to third parties from date of recordation.

Denbury and Hilcorp also argued that the Notarial Act unambiguously reflected an intent to convey a right-of-way servitude and not fee title. The appellate court rejected this argument by pointing out that the discrepancy between the instrument's words of grant ("give[en], convey[ed], assign[ed], and set over" combined with the property description) and its language reflecting the purpose of the conveyance ("adjoining the north side of right of way previously conveyed…" and in the North Line of the right of way of said "Lacassine Branch"; thence in an Easterly direction along said Right of Way line…") and the consideration given ($1.00), created an ambiguity as to the parties' intent.

Finally, the 3rd Circuit noted that the extrinsic evidence offered was conflicting and that the intent of the parties to the Notarial Act was ambiguous for the reasons stated above. Thus, summary judgment was improper. The 3rd Circuit reversed the trial court's partial summary judgment in favor of Union Pacific and Keystone, and remanded the case for further proceedings.

Lessee's Duties to Lessor

McCarthy v. Evolution Petro. Corp., 2014-2607 (La. 10/14/15), 180 So.3d 252 (2015)

Lessee has no obligation to disclose information about future development to lessor in the absence of a contractual duty between the parties; Article 122 cannot create such a duty.

Plaintiffs are the successors in interest to producing mineral rights held by production for over 60 years at a 1/8 royalty. In 2004 Evolution Petroleum Corporation ("Evolution"), the then current operator, sought a purchaser for the Delhi Field Unit leases, which includes Plaintiffs' property, specifically seeking a purchaser to employ enhanced CO2 recovery techniques of the proven reserves. Denbury Resources, LLC ("Denbury") agreed to purchase the Delhi Field Unit. Simultaneously, Evolution made offers to purchase Plaintiffs' royalty interests without disclosing the pending sale to Denbury, the proven reserves, or the possibility of increased production due to CO2 recovery techniques. Plaintiffs claimed Evolution's statements and omissions amounted to fraud and sought rescission of the sale of their royalty interests.

Evolution filed an exception of no cause of action, which the district court granted and dismissed the Plaintiffs' petition. On appeal, the appellate court agreed the petition failed to state a cause of action, but allowed plaintiffs the opportunity to amend their petition to state a cause of

action.[81] Evolution again filed an exception of no cause of action in objection to Plaintiffs' amended petition. The second exception was also granted. Plaintiffs appealed.[82]

The appellate court in *McCarthy II* ruled that the Plaintiffs successfully stated a cause of action for fraud and fraud by silence. The court reasoned that Evolution's purchase price, which was equal to total past royalty payments, did not take into account future production potential and that Evolution, although neither a fiduciary nor trustee under the plain terms of Article 122[83], was required to utilize its advanced understanding of the leasehold and geology for the mutual benefit of the parties as part of the duty of a reasonably prudent operator.

On appeal to the Supreme Court of Louisiana, Evolution argued Article 122 did not support the appellate court's findings. The Supreme Court agreed in reversing the appellate court's decision and reinstating the trial court's dismissal of Plaintiffs petition with prejudice for failure to state a cause of action. The Supreme Court reasoned that the plain wording of Article 122 did not include the duty to disclose information to lessors, thus invalidating the cause of action for fraud by silence. The Supreme Court further explained that such duty can be contractually imposed as per Article 122. A successful claim for fraud by silence, then, can be brought if the duty to disclose is provided for contractually. Citing Article 17 of the Mineral Code[84], which excludes a cause of action stemming from "lesion beyond moiety[85]" in a sale of mineral rights, as well as legislative history, the Supreme Court found Plaintiffs' allegations of insufficient price to be claims of lesion, and thus barred. Plaintiffs, then, cannot rescind the sale merely because they struck a bad deal with Evolution.

Prudent Operator Standard

Hayes Fund for the First United Methodist Church of Welsh, LLC, et al., v. Kerr-McGee Rocky Mountain, LLC, et al., 2014-C-2592 (La. 12/8/15); 2015 WL 8225654.

Proper application of the manifest error standard supported trial court's conclusion that defendants had not violated the prudent operator standard found in Mineral Code Article 122.

Plaintiffs (mineral royalty owners) brought suit against defendants (lessees/working interest owners) for unrecovered hydrocarbons alleging the Rice Acres No. 1 well and the Hayes Lumber No. 11-1 well in Jefferson Davis Parish were improperly constructed, thus resulting in recovery of a lesser amount of hydrocarbons, in violation of Mineral Code

[81] *McCarthy v. Evolution Petro. Corp.,* 47,907 (La. App. 2 Cir. 2/27/13), 111 So.3d 446, writ denied, 13-1022 (La. 6/28/13), 118 So.3d 1097 (*McCarthy I)*.

[82] *McCarthy v. Evolution Petro. Corp.,* 49,301 (La. App. 2 Cir. 10/15/14), 151 So.3d 148 (*McCarthy II*).

[83] LA RS §31:122: A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.

[84] LA RS §31:17 – A sale of a mineral right is not subject to rescission for lesion beyond moiety.

[85] LA CC Art. 2589 – The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable. Lesion can be claimed only by the seller and only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court.

The seller may invoke lesion even if he has renounced the right to claim it.

Article 122: Obligations of the Lessee.[86] Dubbed a "battle of the experts," the trial court heard twenty-five days of testimony over an eleven-month period. The court ultimately ruled the operators had not caused any loss of hydrocarbons and dismissed plaintiffs' claims with prejudice. On appeal, the 3rd Circuit reversed and entered a judgment in favor of plaintiffs for approximately $13.4 million.

On review, the Supreme Court reversed the 3rd Circuit's decision and reinstated the trial court's verdict explaining the 3rd Circuit improperly applied the manifest error (clearly wrong) standard in light of review of the entire record. The Supreme Court explained that an appellate court "does not function as a choice-making court…[but rather functions]…as an errors correcting court." The proper analysis is a two-step process: the appellate court must find there is no reasonable factual basis for the trial court's conclusion and the finding must be clearly wrong. Here, the Supreme Court found the 3rd Circuit's determination that the trial court verdict was wrong, was not a proper application of the manifest error rule. Upon proper application of the rule, the Supreme Court found the trial court's conclusion was reasonable in light of review of the whole record.

Cost of Drilling Operations under LA RS 30:103.1 and 30:103.2

XXI Oil & Gas, LLC vs. Hilcorp Energy Company, 16-269 (La. Ct. App. 3rd Cir. 9/28/16)

[86] LA RS §31:122: A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.

"Cost of drilling operations" under LA RS 30:103.1 and 30:103.2 includes drilling, completing and equipping a unit well (pre- and post-production costs)[87]

Hilcorp recompleted the Trahan No. 1 unit well and obtained production beginning January 11, 2011. Subsequently, XXI acquired leases covering lands constituting approximately 21.0646257% of the drilling unit. XXI then filed suit against Hilcorp in September of 2011 for failure to provide a sworn, detailed and itemized statement of costs, as required by LA RS 30:103.1.[88] Hilcorp countered by filing an

[87] For an insightful discussion of the split between federal and state courts on this issue, see Brittan J. Bush's *Louisiana State and Federal Courts Split Over Parties Entitled to Reports Under La. R.S. 30:103.1.*
http://www.theenergylawblog.com/2016/10/articles/louisiana-mineral-law/louisiana-state-and-federal-courts-split-over-parties-entitled-to-reports-under-la-r-s-30103-1/

[88] LA RS §30:103.1 – A. Whenever there is included within a drilling unit, as authorized by the commissioner of conservation, lands producing oil or gas, or both, upon which the operator or producer has no valid oil, gas or mineral lease, said operator or producer shall issue the following reports to the owners of said interests by a sworn, detailed, itemized statement:

(1) Within ninety calendar days from completion of the well, an initial report which shall contain the costs of drilling, completing, and equipping the unit well.

(2) After establishment of production from the unit well, quarterly reports which shall contain the following:

a. The total amount of oil, gas or other hydrocarbons produced from the lands during the previous quarter.

b. The Price received from any purchaser of unit production.

c. Quarterly operating costs and expenses.

d. Any additional funds expended to enhance or restore the production of the unit well.

B. No operator or producer shall be required under the previsions of this Section to report any information which is not known by such operator or producer at the time of a report. However, the operator or producer shall report the required

exception of no cause claiming 30:103.1 does not apply to XXI as a mineral lessee, which the trial court denied. Hilcorp's application for supervisory writs with the 3rd Circuit was denied in April of 2012, as the appeals court found no error in the trial court's ruling.

Subsequently, the trial court granted partial summary judgment in favor of XXI, finding that LA RS 30:103.2[89] did apply to XXI as a mineral lessee and that Hilcorp should be penalized thereunder. On appeal, the 3rd Circuit found Hilcorp's actions constituted a substantial breach of the disclosure requirements of LA RS 30:103.1. After a bench trial on September 21, 2015, limited to the parties' stipulations and exhibits introduced into evidence, the trial court found Hilcorp liable in the amount of $367,231.30, being an amount equal to the revenue from the Trahan No. 1 well times XXI's interest in the unit, or 21.064625% x $1,743,355.49. Hilcorp appealed.

On appeal, Hilcorp again argued error in the trial court's application of LA RS 30:103.1 and 30:103.2 to XXI as a mineral lessee, citing the federal opinion *TDX Energy, LLC. v. Chesapeake Operating, Inc.,* 2016 WL 1179206 (W. D. La. 2016) which determined LA RS 30:103.1 does not apply to a mineral lessee. The 3rd Circuit rejected Hilcorp's argument pointing out that they previously recognized XXI's cause of action, ruled that Hilcorp's actions and omissions constituted a breach, and pointed out that a federal court's decision, while persuasive, is not binding on state courts, especially on matters of state law that have been previously ruled upon.

The 3rd Circuit additionally rejected Hilcorp's argument that a strict construction of 30:103.2 would not include pre- and post-production costs. Reviewing the pre-2001 amendments to the statute as well as its current form, the court concluded that the legislature clearly intended to include the costs of drilling, completing and equipping the unit well in the "cost of drilling operations."

The 3rd Circuit also rejected Hilcorp's argument that the trial court erred in finding it failed to provide quarterly reports as it had previously ruled on the issue and there was no evidence in the record before the court that Hilcorp submitted sworn, detailed and itemized quarterly reports. Additionally, the trial court properly placed the burden of proof on Hilcorp to disprove XXI's leases were valid, and properly rejected Hilcorp's complaint that leases taken by XXI from a succession representative were invalid, as the right to such a challenge is a personal action

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information to the owner of the unleased interest within thirty days after such information is obtained by the operator or producer, or in the next quarterly report, whichever due date is later.

C. Reports shall be sent by certified mail to each owner of an unleased oil or gas interest who has requested such reports in writing, by certified mail addressed to the operator or producer. The written request shall contain the unleased interest owner's name and address. Initial reports shall be sent no later than ninety calendar days after the completion of the well. The operator or producer shall begin sending quarterly reports within ninety calendar days after receiving the written request, whichever is later, and shall continue sending quarterly reports until cessation of production.

[89] LA RS §30:103.2 – Whenever the operator or producer permits ninety calendar days to elapse from completion of the well and thirty additional calendar days to elapse from date of receipt of written notice by certified mail from the owner or owners of unleased oil and gas interests calling attention to failure to comply with the provisions of R. S. 30:103.1, **such operator or producer shall forfeit his right to demand contribution from the owner or owners of the unleased oil and gas interests for the costs of the drilling operations of the well.**

belonging only to the parties who executed the lease.

Mineral Lease Severability

Guy v. Empress, LLC, *et al*, No. 50,404-CA (La.App. 2 Cir. 4/8/2016), 193 So.3d 177 (2 Cir. 2016), reh'g denied (May 12, 2016)[90]

Assignment of all right, title and interest in oil, gas and mineral lease with depth reservation did not horizontally sever the lease so that unit operations and production from the "shallow zone" during and after the primary term combined with continuous unit operations commenced during the primary term and production commenced during the secondary term from the "deep zone" maintained all depths of the lease.

Plaintiffs leased to Long Petroleum, LLC ("Long") on March 23, 2004 for a three (3) year primary term with a two (2) year option to extend the primary term. The lease contained a horizontal pugh clause and a continuous drilling operations clause, among others. Long subsequently assigned all right, title and interest in the oil and gas lease to Empress, LLC ("Empress") and reserved all depths from the surface to the base of the Cotton Valley formation. Empress executed an identical assignment to PXP Louisiana Operations, LLC ("PXP") and Larchmont Resources, LLC ("Larchmont") while Long assigned various overriding royalty interests to numerous assignees.

The Commissioner of Conservation later created the HOSS RA SUR Unit, which included a portion of the lease. The Edwards No. 1 well was spud in the unit on January 16, 2009, during the lease's primary term (as extended) and was completed as a gas producer from the Hosston formation in June of 2009. Subsequently, the Department of Conservation additionally unitized plaintiffs' tract into the HA RA SU HH Unit for production from the deeper Haynesville Shale formation. Chesapeake Operating, Inc. spudded the Yarborough No. 1 Unit Well on September 21, 2009, which has produced since its completion on June 30, 2009 to the present.

Plaintiffs initially sent a letter to Long, Pinnacle and Chesapeake in March of 2011 requesting a release of the lease. Plaintiffs' subsequent certified letter in March of 2012 requested release of all depths 100' below the deepest depth of the Edwards No. 1 well according to the pugh clause contained in the lease. Plaintiffs also requested by certified letter in 2013 that Long and its assignees release all of the shallow rights.

Plaintiffs filed their original petition on August 14, 2012 seeking full or partial termination of the lease. Their motion for summary judgment dated March 25, 2014 alleged that the assignment of the deep rights horizontally severed the lease, and as a result, the lease terminated as to the shallow rights ninety (90) days after December 31, 2011 when the Edwards No. 1 well ceased producing, while the deep rights terminated at the end of the primary term on March 23, 2009 as the Yarborough No. 1 well was spud in September of 2009, approximately six months after the end of the primary term.

[90] For a thorough overview of this issue, see Amy Duplantis Gatreaux' article *Lease Division In Louisiana – "The Times They Are A-Changin'"*, *http://www.drilldeeperblog.com/2016/08/lease-division-in-louisiana-the-times-they-are-a-changin/*

The district court denied plaintiff's motion for summary judgment and stated that the terms of the lease were met by the spud of the Edwards No. 1 well in January of 2009, within the primary term of the lease, and that continuous operations on the Yarborough No. 1 well commenced within 90 days of the completion of the Edwards No. 1 well. The trial court, however, did not address whether the assignment operated to sever the lease into two separate leases.

Relying on LA RS 31:127 through 31:130[91], the 2nd Circuit rejected plaintiff's contention that a partial assignment or partial sublease divides a mineral lease into two separate leases. The court compared the case at bar to *Hoover Tree Farm, LLC v. Goodrich Petr. Co.,* 46, 153 (La. App. 2d Cir. 3/23/11), 63 So.3d 159, writ den'd, as the lease in Hoover and the plaintiff's lease contained identical language that the leases "may be assigned in whole or in part." The 2nd Circuit similarly rejected horizontal severance as the result of assignment of a lease in *Hoover.*

Although unnecessary to show extension of the lease, the 2nd Circuit went on to explain how the lease's continuous drilling operations clause operated to extend the lease beyond its primary term. Discussing *Allen v. Continental Oil and Cason v. Chesapeake*, the court noted that operations on the lease such as the cutting and stacking of lumber, road construction, etc. during the primary term constituted commencement of operations such that, when combined with the actual drilling of a well during the secondary term, operated to extend the life of the lease. As such, the spud of the Edwards No. 1 well within the primary term of the lease and production therefrom effectively extended the life of the lease into its secondary term and commencement of the Yarborough No. 1 well within ninety (90) days of the spud of the Edwards No. 1 well constituted continuous drilling operations so as to extend the lease.

Depth Severance Clause Interpretation

BRP, LLC v. MC Louisiana Minerals, LLC, et al, 50,549-CA (La.App. 2 Cir. 5/18/2016)

Depth severance in mineral rights conveyance determined to be unambiguous to convey stratigraphic equivalent of all depths below the Cotton Valley Formation, including the Bossier C formation, as per intent of the parties.

At issue is the proper interpretation of a depth limitation clause contained in a mineral rights conveyance. Note that the base of the Cotton Valley formation is the top of the Bossier Shale formation and the base of the Bossier Shale formation is the top of the Louark formation. The Louark Group includes the Haynesville Shale formation while the Cotton Valley Group is considered to include the Bossier Shale, the most productive part of which is the Bossier C.

International Paper Company (IP) owned thousands of acres of mineral rights in Bienville, DeSoto, Red River and Sabine

[91] LA RS §31:127 – The lessee's interest in a mineral lease may be assigned or subleased in whole or in part;
LA RS §31:128 – To the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes responsible directly to the original lessor for performance of the lessee's obligations;
LA RS §31:129 – An assignor or sublessor is not relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing;
LA RS §31:130 – A partial assignment or partial sublease does not divide a mineral lease.

Parishes. By Letter of Intent dated June 30, 2008, Chesapeake Royalty, LLC ("Chesapeake") agreed to purchase 13,000 acres of such mineral rights. The Purchase and Sale Agreement, executed July 24, 2008, included the following depth limitation:

> "…INSOFAR AND ONLY INSOFAR as such oil, gas and other minerals are located below that depth which is the stratigraphic equivalent of the base of the Cotton Valley formation and the top of the Louark Group defined as correlative to a depth of 10,765' in the Winchester Samuels 23 #1 well (API# 1703124064) located in Section 23-14N-13W, DeSoto Parish, LA, and correlative to a depth of 9,298' in the Tenneco Baker #1 well (API# 1701320382) located in Section 12-16N-10W, Bienville Parish, LA…"

Subsequent to the conveyance to Chesapeake, IP transferred its minerals to BRP, LLC ("BRP").

When BRP attempted to sell additional mineral rights, Chesapeake claimed their purchase included rights in the Bossier Shale formation as well as the deeper Haynesville Shale formation. BRP filed a petition for damages, declaratory judgment and injunctive relief in November of 2010.

In their motions for summary judgment, both BRP and Chesapeake argued that the conveyance was unambiguous and should be interpreted in their favor. The trial court rejected the motions for summary judgment.

The proceeding was then split into separate phases. Phase I, from which this appeal stems, solely addressed the interpretation of the conveyance and limited the parties to BRP, Chesapeake and MC Louisiana Minerals, LLC ("MC").

The trial court heard several days of testimony by the parties' representatives as to their intent and from the parties' expert witnesses. Ultimately, the trial court determined that it was clear the parties' focus was on the Haynesville Shale formation, that Chesapeake's intent was to purchase everything below the base of the Cotton Valley and IP's intent was to retain its Cotton Valley production. The parties' expert witnesses disagreed as to whether the well depths could correlate to properly define the depths conveyed. The trial court determined that the wells used in the depth limitation could be correlated and the final judgment dated March 23, 2015 awarded Chesapeake:

> "All depths below the stratigraphic equivalent of 10,765' in the Winchester Samuels 23#1 well (API# 1703124064) located in Section 23-14N-13W, DeSoto Parish, LA, and correlative to a depths of 9,298' in the Tenneco Baker #1 well (API# 1701320382) located in Section 12-16N-10W, Bienville Parish, LA."

Such award included the productive Bossier C Shale formation. In the event of conflict or if the two stratigraphic markers did not correlate, the trial court determined Chesapeake acquired ownership in the depths stratigraphically below the deeper of the two stratigraphic markers. BRP appealed.

On appeal, the 2nd Circuit refused to apply the manifest error (clearly wrong) standard to the trial court's finding, noting the voluminous testimony and evidence

upon which the court based its conclusions. The appellate court rejected BRP's argument that the agreement conveyed only the rights below the lowest of the four depths included in the PSA, being the top of the Louark Group, by noting the PSA did not specify that rights were conveyed below the stratigraphic equivalent of each of the four mentioned locations.

Finally, the 2nd Circuit additionally found the intent of the parties was to convey everything below the Cotton Valley formation noting that IP could have done more due diligence and specifically limited the conveyance to the Haynesville Shale formation. The court also rejected the contention that the base of the Cotton Valley formation and the top of the Louark Group be given precedence as "natural monuments" because, as the record indicated, the location and composition of formations can change over time.

State's Exclusive Right to Regulate Oil and Gas Operations

St. Tammany Parish Gov't v. Welsh, et al., 2015-CA-1152 (La.App. 1 Cir. 3/9/2016).
Parish's local zoning ordinances preempted by LA RS 30:28F insofar as they affect the State's exclusive jurisdiction to regulate oil and gas activity.

Helis Oil & Gas Company, LLC ("Helis") obtained a permit to drill a well on a location in a residential area designated as "A-3 Suburban District" on the St. Tammany Parish zoning map. The site, which has been used as a pine tree farm for at least the past thirty years, lies above the Southern Hills Aquifer, which is the area's sole source of drinking water.

The Parish filed suit against the Commissioner of Conservation (Welsh) for declaratory relief, alleging the residential zoning in the area rendered Helis' use of the property as a drill site illegal. Helis intervened for the Commissioner and the nonprofit CCST intervened on behalf of the Parish. All parties filed motions for summary judgment and the trial court granted those in favor of Helis and the Commissioner, finding that LA RS 30:28F[92] preempted the Parish zoning ordinances and ruled such ordinances unconstitutional insofar as they relate to the well Helis planned to drill. The Parish and CCST appealed.

The 1st Circuit affirmed the ruling of the trial court, holding that State law preempts the Parish's zoning ordinances insofar as they affect the State's regulation of oil and gas activity. The appellate court noted the clear legislative intent of state preemption as evidenced by the express language of LA RS 30:28F, which expressly forbids the Parish from prohibiting or interfering with the drilling of a well by a permit holder, as well as the pervasive legislation regulating the oil and gas industry. The 1st Circuit further rejected the Parish's argument that La. Const. Art VI, §17's[93] requirement of uniformity in land

[92] LA RS §30:28F – The issuance of the permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. **No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.**

[93] La. Const. Art VI §17 – Subject to uniform procedures established by law, a local governmental subdivision may (1) adopt regulations for land use, zoning, and historic preservation, which authority is declared to be a public purpose; (2) create commissions and districts to implement those

use precluded preemption by LA RS 30:28F, by noting that the police power of the state granted by La. Const. Art. VI, §9(B) shall never be abridged "notwithstanding any provision of this article." §17 is contained within this article, and thus cannot abridge the State's police powers. The appellate court further rejected several similar arguments based on different statutes, again reemphasizing the State's supremacy to regulate the oil and gas industry.

Finally, the 1st Circuit rejected the Parish's argument that they interpret the word "consider" in LA RS 33:109.1[94], which requires a State agency to consider a Parish's master plan before undertaking any action that would affect such plan, to mean "give heed to." The court applied the ordinary meaning of the word and found ample evidence that the Commissioner considered the Parish's master plan when approving and adopting the drilling and production unit that embraced the drillsite, and in later issuing a drilling permit to Helis. Summary judgment AFFIRMED.

regulations; (3) review decisions of any such commission; and (4) adopt standards for use, construction, demolition, and modification of areas and structures. Existing constitutional authority for historic preservation commissions is retained.

[94] LA RS 33:109.1 – Whenever a parish or municipal planning commission has adopted a master plan, state agencies and departments shall consider such adopted master plan before undertaking any activity or action which would affect the adopted elements of the master plan.

Coastal Zone Lawsuit(s)[95]

Parish of Jefferson v. Atlantic Richfield Company, No. 732-768 24th Jud. Dist. Ct. Jefferson Parish (8/1/2016).

Failure to exhaust administrative remedies precluded judicial relief.

This is the first of numerous Coastal Zone suits to come to judgment. The Parish of Jefferson filed suit against nine oil and gas companies for alleged violations of the State and Local Coastal Resources Management Act of 1978 [96] (the "SLCRMA"), alleging damage to land and water bodies located in the Coastal Zone.

Defendants filed several exceptions including Dilatory Exceptions of Prematurity for Failure to Exhaust Administrative Remedies. The State of Louisiana ex rel. Jeff Landry, Attorney General, filed a Petition for Intervention and a First Amended, Supplemental and Wholly Restated Petition for Intervention. The Department of Natural Resources, Office of Coastal Management, also filed a Petition for Intervention (the "Interventions").

The Interventions sought damages from all parties found liable and the payment of restoration costs or actual restoration of the coastal area, as well as any other relief provided by the SLCRMA. Defendants responded to the Interventions with exceptions that adopted their original exceptions, including the Dilatory Exception of Prematurity for Failure to Exhaust Administrative Remedies.

[95] For an overview of the situation, see Catherine Traywick's *Louisiana's Sinking Coast is a $100 Billion Nightmare for Big Oil http://www.bloomberg.com/news/features/2016-08-17/louisiana-s-sinking-coast-is-a-100-billion-nightmare-for-big-oil*

[96] LA RS 49:214.21, et seq.

The court noted it is well settled Louisiana law that failure to pursue and exhaust administrative remedies precludes judicial relief and pointed out that the doctrine of exhaustion of administrative remedies has previously been applied to the administrative coastal use permitting process at issue.

The court further noted that the SLCRMA includes a thorough administrative procedure for addressing permit violations. Such procedure includes field surveillance programs, the authority to issue cease and desist orders, and authority to suspend, revoke, or modify coastal use permits, [97] while the Louisiana Administrative code sets forth the procedure.[98]

After defendants met their burden of proving the existence of an administrative remedy, plaintiffs were required to demonstrate their case was an exceptional situation where any administrative remedy was irreparably inadequate, thus entitling them to judicial relief. The court rejected plaintiff's argument that the administrative process does not provide for an award of civil damages as it was unknown whether civil damages existed in the absence of exhaustion of administrative remedies. The court concluded by ruling that the suit was premature for failure to exhaust administrative remedies.

III – OTHER CASES OF NOTE

Anadarko Petroleum Corporation, 187 IBLA 77 (2016)[99]

Red Willow Offshore, LLC v. Palm Energy Offshore, LLC, 2015-0512, La. App. 4th Cir. 2016, (aff'd 2/3/2016), 185 So.3d 293 (La.App. 4 Cir. 2016) [100]

D & D Drilling, & Exploration, Inc. vs. XTO Energy, Inc., et al, 15 631 La.App. 3 Cir. 05/04/16, 190 So.3d 827 (La.App. 3 Cir. 2016)[101]

Nguyen v. American Commercial Lines, LLC, 805 F.3d 134 (5 Cir. 2015)[102]

TDX Energy, LLC v. Chesapeake Operating, Inc., CA 13-1242 (W.D. La. 3/24/16), 2016 WL 1179206[103]

Noble Energy, Inc. v. Jewell, No. 15-5202 (D.C. Cir. Apr. 29, 2016), 2016 WL 3039397[104]

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[97] LA RS 49:214.36; LA RS 49:214.36(C)

[98] LA Admin. Code Title 43, Pt. I Sec. 723(D)(I-4)

[99] Apologies to my BOEM friends, but the only time I get offshore is fly-fishing for red fish out of Port La Hache. See Margaret "Peggy" Welsh's *IBLA Upholds Decommissioning Order Against OCS Lease Assignor.* *http://www.drilldeeperblog.com/2016/02/ibla-upholds-decommissioning-order-against-ocs-lease-assignor/*

[100] See Lauren J. Delery's *Processor Required to Account for Diverted Volumes Used for Gas Lift*. http://www.liskow.com/upload/RedWillowOffshoreLLCvPalmEnergyOffshoreLLC(2).pdf

[101] See Court. C. Van Tassell's *Forum Shopping Curtailed: Venue Limited to Parish Where Drilling Rig Was Lost.* *http://www.theenergylawblog.com/2016/05/articles/exploration-and-production/forum-shopping-curtailed-venue-limited-to-parish-where-drilling-rig-was-lost/*

[102] See Lauren E. Godshall's *5th Circuit Addresses Oil Pollution Act*, La. Bar. Journal Vol 63, No. 6, Page 431. http://files.lsba.org/documents/publications/BarJournal/Journal-April-May-2016.pdf

[103] See David J. Rogers' *Amendment to Louisiana Risk Fee Statute Closes Loophole Shown by Recent Case.* *http://www.drilldeeperblog.com/2016/07/amendment-to-louisiana-risk-fee-statute-closes-loophole-shown-by-recent-case/*

AIX Energy, Inc. v. Bennett Properties, LP, 13-cv-3304 (W.D. La. 9/26/16)

LeBlanc v. Texas Brine Co., LLC, F.Supp.2d, (E.D. La. 5/10/16), 2016 WL 2849506

IV – LEGISLATIVE / STATUTORY UPDATE

Sale of Mineral Rights by Mail Solicitation

Act 179 of the 2016 Louisiana Legislature, effective May 19, 2016, strengthened the rules governing the sale of mineral rights by mail solicitation (the "Act"). [105] The perception is that unscrupulous mineral rights purchasers are using underhanded techniques to take advantage of unsophisticated landowners. Thus, the purpose of the Act is to prevent such exploitation by regulating the sale of mineral rights by mail solicitation and providing for an exception to the prohibition of rescission of a mineral rights sale for lesion beyond moiety.[106]

The Act is limited to unsolicited offers to create or transfer mineral servitudes, mineral royalties, or options or contracts to transfer same, received with any form of payment through a common carrier. Mineral leases are explicitly excepted from the Act, as are offers received through the mail after prior personal contact (telephone, e-mail, in person, etc.).

The Act requires the first page of the instrument evidencing the sale to include the phrase "Seller's Right to Cancel" and a disclosure (defined in the Act). Such disclosure must be conspicuous and in legible type no smaller than fourteen-point font.[107]

An instrument that includes the disclosure may be rescinded within a period of sixty (60) days after the date on which the transferor signs it. However an instrument that does not contain the disclosure may be rescinded within a peremptive[108] period of

[104] See Alex B. Rothenberg's *Can the Government Keep Changing the Rules for Its Existing Contracts? http://www.drilldeeperblog.com/2016/06/can-the-government-keep-changing-the-rules-for-its-existing-contracts/*

[105] LA RS 2:2991.1, et seq.

[106] LA RS §31:17 – A sale of a mineral right is not subject to rescission for lesion beyond moiety.

[106] LA CC Art. 2589 – The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable. Lesion can be claimed only by the seller and only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court.

The seller may invoke lesion even if he has renounced the right to claim it.

[107] LA RS 9.2991.5 – Seller's Right to Cancel… "THIS IS A [SALE] CONTRACT REQUIRING THE [SALE] OF YOUR VALUABLE MINERAL RIGHTS. If you sign this agreement, you may cancel it by mailing a notice to the buyer. You may use any written statement that indicates your intention to cancel, or you may sign and return the notice provided below. Your Notice must be mailed no later than 60 days after you signed the agreement, to the following: [name and address of transferee]. Within 60 days after mailing your notice you must return any payment you have received from the buyer, and the buyer must return your mineral rights and any royalties and other payments received since the sale. You may lose important rights if you do not file your notice in the conveyance records of the parish where the property is located within 90 days after this agreement is filed in the conveyance records."

[108] "Real consequences flow from the distinction between prescription and *peremption*. Liberative prescription is defined ... as a mode of barring of actions as a result of inaction for a period of time. Peremption, on the other hand, is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period. In other words, prescription sets a time limit within which one is allowed to seek enforcement of a

three years after the date of signature by the transferor. Timely rescission of an option, contract, etc., also rescinds a subsequent transfer of such right.

$0.02 per barrel fee implemented on disposal of exploration and production waste excluding produced brine, produced water, or salvageable hydrocarbons

Act No. 277 of the 2016 Regular Session of the Louisiana Legislature, effective August 1, 2016, amended portions of RS 30:21 which governs fees and charges of the Commissioner of Conservation. Act No. 277 added section RS 30:21(B)(1)(e), which creates a $0.02 per barrel fee per month to dispose of waste generated by exploration and production activities. The fee is to be paid to the Office of Conservation for waste that is delivered to (1) Office of Conservation-permitted, off-site commercial facilities; (2) transfer stations permitted by the Office of Conservation for waste transfer to an out-of-state treatment or disposal facility; or (3) any other legally permitted Louisiana off-site waste storage, treatment or disposal facility approved by the Office of Conservation for the receipt of exploration and production waste. The Act specifically excludes brine, produced water or salvageable hydrocarbons from the definition of "waste."[109]

New Requirements for Changing the Operator of a Well

Act No. 342 of the 2016 Regular Session of the Louisiana Legislature, effective August 1, 2016, amended LA RS 30:28 which governs drilling permits. New section J requires an operator to identify on an approved form the surface owner of lands on which the well site is located no later than thirty (30) days after the issuance of an amended permit to transfer a well to another operator. A surface owner is defined as the current owner of the surface rights as reflected by the assessor's rolls of the parish for the land on which the well site is located.[110]

Risk Fee Statute Updated[111]

Act No. 524 of the 2016 Louisiana Legislative Session, effective June 13, 2016, Amended LA RS 30:10 by striking the language in the statute that required risk fee

right; peremption completely does away with the right." *Yen v. Avoyelles Parish Police Jury,* 2007-0225 La.App. 3rd Cir. 3/4/09, 5 So.3d 1002 (3 Cir. 2009).

[109] LA RS 30:21(B)(1)(e) - (e) For the purposes of this Paragraph, exploration and production waste shall not include produced brine, produced water, or salvageable hydrocarbons bound for permitted salvage oil operators. There shall be a monthly fee payable to the office of conservation of two cents per barrel of exploration and production waste delivered, as reported on a form prescribed by the department to collect commercial facilities monthly report of waste receipts, from the original generator of the waste to the following facilities:

(i) Office of conservation permitted off-site commercial facilities.

(ii) Transfer stations permitted by the office of conservation for waste transfer to out-of-state treatment or disposal facilities.

(iii) Any other legally permitted Louisiana off-site waste storage, treatment, or disposal facilities also approved by the office of conservation for the receipt of exploration and production waste.

[110] LA RS 30:28(J) – No later than thirty days after shall require that the operator identify on a form approved by the commissioner the surface owner of lands in which the well site is located. "Surface owner" shall mean the person shown in the assessor's rolls of the parish as the current owner of the surface rights for the land on which the well site is located.

[111] For an excellent discussion, See David J. Rogers *Amendment to Louisiana Risk Fee Statute Closes Loophole Shown by Recent Case* http://www.drilldeeperblog.com/2016/07/amendment-to-louisiana-risk-fee-statute-closes-loophole-shown-by-recent-case/

notices to be sent prior to the spud of a unit well. The new language allows a unit operator to send the required risk fee notices after spud or even completion of a unit well.

As background, the prior versions of the Risk Fee statute required notice to be sent prior to the spud of a well. Such requirement could result in a non-operator avoiding the 200% risk fee penalty[112] for not electing to participate in the cost of the unit well by waiting until after the spud of the unit well to record his leases, or by other forms of chicanery.[113] The new language was crafted to address this loophole and effectively closes it by allowing the operator of the unit well to send the required notices after spud or completion of the unit well.[114]

Increase in Financial Security Required to be posted by an applicant when applying for a permit to drill or when amending a permit to drill.

Act No. 634 of the 2016 Louisiana Legislative Session, effective June 17, 2016, provides for the financial security an applicant must post when (1) applying for a permit to drill or when (2) amending a permit to drill. The security for an application for a permit to drill must be provided within thirty (30) days of the completion date or from the date the operator is notified that financial security is required. The security required for an application to amend a permit to drill for a change of operator shall be provided as required by RS 30:4.3, or by establishing a site-specific trust account.

The Office of Conservation shall provide for the amount of financial security required in accordance with the Administrative Procedure Act. Such amounts may be on an individual-well or multiple-well basis and may be categorized based on the well's location. The financial security required for individual wells drilled to three thousand feet or less is two dollars

[112] LA RS 30:10 (2)(b)(i) - Should a notified owner elect not to participate in the risk and expense of the unit well, substitute unit well, alternate unit well, or cross-unit well or should such owner elect to participate in the risk and expense of the proposed well but then fail to pay his share of the estimated drilling costs determined by the AFE timely or fail to pay his share of actual reasonable drilling, testing, completing, equipping, and operating expenses within sixty days of receipt of detailed invoices, then such owner shall be deemed a **nonparticipating owner,** and the drilling owner shall, in addition to any other available legal remedies to enforce collection of such expenses, be entitled to own and recover out of production from such well allocable to the tract under lease to the nonparticipating owner such tract's allocated share of the actual reasonable expenditures incurred in drilling, testing, completing, equipping, and operating the well, including a charge for supervision, together with a **risk charge.** For purposes of this Subparagraph, the payment of estimated drilling costs shall be deemed timely if received by the drilling owner within sixty days of the actual spudding of the well or the receipt by the notified owner of the notice required by this Subsection, whichever is later. The risk charge for a unit well, substitute unit well, or cross-unit well that will serve as the unit well or substitute well for the unit shall be **two hundred percent** of such tract's allocated share of the cost of drilling, testing, and completing the well, exclusive of amounts the drilling owner remits to the nonparticipating owner for the benefit of the nonparticipating owner's royalty and overriding royalty owner.

[113] See *TDX Energy, LLC v. Chesapeake Operating, Inc.*, cited above in Section III - Other Cases of Note

[114] Updated LA RS 30:10(A)(2)(a)(i) – Any owner drilling ~~or,~~ intending to drill, or who has drilled a unit well, a substitute unit well, an alternate unit well, or a cross-unit well on any drilling unit heretofore or hereafter created by the commissioner, may, by registered mail, return receipt requested, or other form of guaranteed delivery and notification method, not including electronic communication or mail, notify all other owners in the unit ~~prior to the actual spudding of any such well~~ of the drilling or the intent to drill and give each owner an opportunity to elect to participate in the risk and expense of such well

per foot, subject to possible increase in September 1, 2017 according to the Administrative Procedure Act. Financial security is not required for orphan wells or for an operator who has an agreement with the Office of Conservation to plug an orphaned well that is similar in depth and location to the well being permitted.[115]

Increase in Oil Severance Tax Audits

The Louisiana Department of Revenue (the "Department") has dramatically increased[116] their oil severance tax audits. The Department has determined that negative adjustments to the market center price are no longer available and thus additional severance taxes are due on the difference between the unadjusted market center price and the adjusted price. This is a change from the current procedure, which determines severance taxes based on the higher of two options (1) the gross receipts received from the first purchaser, **less** charges for trucking, barging and pipeline fees, or (2) the posted field price.[117]

[115] See LA RS 30:4.3

[116] As background, the Louisiana Department of Revenue transferred responsibility for performing the audits to the Department of Natural Resources in 2010. This resulted in a 99.8% reduction in unpaid severance taxes between 2010 and 2012. Estimated losses are upwards of $1.1 Billion. The recent uptick in audits can be attributed to the return of audit responsibility to the Department of Revenue.

[117] LA RS 47:633(7)(a) – On oil twelve and one-half percentum of its value at the time and place of severance. Such value shall be the higher of (1) the gross receipts received from the first purchaser, less charges for trucking, barging, and pipeline fees, or (2) the posted field price. In the absence of an arms length transaction or a posted field price, the value shall be the severer's gross income from the property as determined by R.S. 47:158(C).

See RJ Marse, James C. Exnicios and Cheryl Mollere Kornick's *Louisiana Department of Revenue Targets Energy Companies in Rash of Oil Severance Tax Audits*. http://www.theenergylawblog.com/2016/07/articles/litigation/louisiana-department-of-revenue-targets-energy-companies-in-rash-of-oil-severance-tax-audits/

Proposed Changes to State Lease Form[118]

Our article[119] dated July 20, 2016 outlines several of the proposed changes to the State oil and gas lease form, including, but not limited, to the following:

- Liquidated damages equal to double the annual rental payment where lessee fails to commence secondary or tertiary recovery methods, or fails to commence drilling of ultra-deep well.

- Creation of "suspending events" in force majeure clause. Suspending events include lack of availability of personnel or materials, unreasonable delay of governmental agency or political subdivision to grant permits, an order of a Federal court preventing operations or production in paying quantities, a third party actor shutting down and unreasonably refusing to reopen facilities through which hydrocarbons produced from the lease normally pass through, and the catch all "other events" not described in the lease but recognized by the Lessor.

- Liquidated damages in the amount of $100/day beginning on the 31st day after Lessee has received notice that he failed to provide a survey or unit plat with his conventional unit or pooling agreement.

[118] More recent changes incorporated after July of 2016 are reflected on this mark up of the State oil and gas lease form: http://dnr.louisiana.gov/assets/OMR/media/forms_pubs/Proposed_New_Lease_Form_Revised_8-2-16.pdf Changes are indicated with highlights and ~~strike outs~~

[119] www.buckleyturner.com/proposed-changes-to-louisianas-state-oil-and-gas-lease/

- Requirement to drill and parameters regarding "offset wells."

- Liquidated damages in the amount of $100/day beginning on the 31st day after Lessee has received notice that he failed to provide required well and survey data, among other information.

- Update to method by which "fair market price" of hydrocarbons is determined when paying royalty as well as disallowing deduction of certain post-production costs from royalty payments.

- New commercial general liability insurance requirement to equal not less than $1,000,000 per occurrence and $2,000,000 in the aggregate.

- In the event of a title dispute, Lessee may petition Lessor for permission to deposit all royalty and rental payments in an interest bearing account, or initiate concursus proceedings, or take other action as required by Lessor.

- Liquidated damages in the amount of $100/day commencing after the end of the "restoration period" (one year after lease termination, if not extended by request of lessee) where lessee fails to plug all wells, remove all equipment and restore the leased premises, among other obligations.

The period for public comments regarding changes to the State Lease form ended August 31, 2016. Most recently, the State Mineral Board considered adoption of a specific procedure to discuss and adopt/approve each article of the proposed new lease form at their October 12, 2016 meeting.[120] I am unaware of the results of such discussion. It is unknown when the State Mineral Board will adopt the proposed changes.

V – Recent Attorney General Opinions / Governor's Executive Orders

Opinion: 15-0134 [121] **-** The Coastal Protection and Restoration Authority may establish in favor of a private, littoral landowner a perpetual mineral interest in littoral land that is not affected by future erosion of the land. A perpetual mineral interest agreement over emergent lands, however, is limited to the time such land remains emergent.
Opinion Released:8/30/2016

Executive Order JBE 2016 – 27, [122] **effective June 28, 2016 –** Sets the regularly scheduled meeting of the State Energy and Mineral Board to be the second Wednesday of each month and grants to the Chairman of the Board the Governor's power to cancel such meeting in case of emergency or in the absence of a quorum, among other delegations of authority.

[120] See Agenda Item No. IX – New Business http://dnr.louisiana.gov/assets/OMR/Board_MTG_Agendas/2016/Board_Meeting_Agenda.pdf

[121] Note that Opinions of the Attorney General are advisory only; they do not have the force and effect of the law; and they are limited to the facts presented by the official or officials requesting the opinion. Further, the opinions may be changed or recalled due to subsequent court decisions and/or legislative enactments.

[122] http://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-27.pdf

Executive Order JBE 2016 – 28, [123] effective June 28, 2016 – Authorizes the Chairman of the State Mineral and Energy Board to sign on behalf of the Governor Board approved transfers or assignments of leases of minerals or mineral rights.

VI – Recent Louisiana Law Review Articles

1. Patrick S. Ottinger, *Closing the Deal in the Bayou State: The Purchase and Sale of Producing Oil and Gas Properties*, 76 La. L. Rev. (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6565&context=lalrev

- Provides a broad overview of the most important rules and legal issues surrounding the purchase and sale of producing properties in Louisiana.

2. William Wallander, Katie Drell Grissel, Bradley Foxman, Garrick Smith, and Reese O'Connor, *Dealing in Distressed Energy Assets*, 4 LSU J. of Energy L. & Resources (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1079&context=jelr

- Details the process of dealing in distressed assets in the energy space, with special focus on upstream assets, and reviews certain of the benefits and risks encountered.

3. Mitchell E. Ayer, *Minimizing Counterparty Bankruptcy Risk*, 76 La. L. Rev. (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6568&context=lalrev

-Discusses the consequences of bankruptcy for parties to sales contracts for oil and gas production, joint operating agreements, oil and gas leases, purchase and sale agreements, and farmout agreements, and provides practical strategies.

4. Nathan Telep, *Staying Out of Treble: A Comprehensive Civilian Approach to the Louisiana Mineral Code Provisions on Damages for Unpaid Royalties*, 76 La. L. Rev. (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6572&context=lalrev

-Article seeks to end the debate over the interpretation of Mineral Code articles 138.1, 139, 140, and 212.23 by showing that treble damages are not appropriate for a lessee's failure to pay royalties.

5. Alex Richie, *Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation*, 76 La. L. Rev. (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6567&context=lalrev

6. David E. Pierce, *Employing a Reservoir Community Analysis to Define and Marshal Correlative Rights in the Oil and Gas Reservoir*, 76 La. L. Rev. (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6566&context=lalrev

-Article explores the positive rights aspects of correlative rights and how such an analysis can assist in resolving intra-reservoir conflicts.

7. Jacques Mestayer, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 La. L. Rev. (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6569&context=lalrev

[123] http://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-28.pdf

8. Charles A. Nunmaker, *Overview of the Application and Treatment of Act 312 in Federal Courts*, 4 LSU J. of Energy L. & Resources (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1086&context=jelr

-Explores the development and evolution of Act 312—particularly regarding its treatment by Louisiana's federal courts—with the objective of identifying those portions of the Act that have been, or are likely to be, adopted by federal courts handling legacy litigation.

9. Taylor Boudreaux, *Legislatively Capping an Energy Lawsuit: Problems Posed by Stripping a Pending Suit Against Ninety-Seven Oil and Gas Companies*, 76 La. L. Rev. (2016)
http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6571&context=lalrev

10. Marcus Adams, *Transparency and the Protection of Trade Secrets in the Fracturing World: The Case for Upfront Substantiation and Immediate Evaluation of Fracturing Fluid Trade Secret Claims in Louisiana*, 4 LSU J. of Energy L. & Resources (2016)

http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1089&context=jelr

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BIOGRAPHY

Thomas Charles ("TC") Turner, Jr. is a by God Texas Longhorn and a founding member of Buckley & Turner, PLLC. He is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization and is additionally licensed in Louisiana and New Mexico. Although trained in the common law at the University of Texas School of Law, TC has come to admire the finer points of Louisiana Civil Law.

TC's oil and gas practice involves transactional and title work. He routinely examines complex mineral title and has rendered over one thousand title opinions, including drilling, division order, and acquisition title opinions. His work in Texas spans the Permian Basin, Barnett Shale, East Texas, and the Eagle Ford Shale in South Texas, while his work in Louisiana includes the Tuscaloosa Marine Shale in Central and Eastern Louisiana and the Brown Dense play in Northern Louisiana, among others. TC's work in New Mexico encompasses state, federal and fee lands in the Permian Basin of Eastern New Mexico (Lee and Eddy Counties). TC is proud to report he can correctly pronounce potash, and humbled to admit his wife first corrected him.

In addition to title matters, TC routinely counsels his clients on regulatory matters involving the Texas Railroad Commission, the Louisiana Office of Conservation, the New Mexico State Land Office and the Federal Bureau of Land Management. TC's litigation practice involves the proper construction of deeds and contracts under declaratory judgment acts as well as suits for unpaid/underpaid royalties.

Outside of his law practice, TC is a very active member of the Texas Lawyers Assistance Program (TLAP) as a volunteer and is a member of the State Bar's Standing Committee for the Lawyers Assistance Program. He is also an active member of the Texas Lawyers Concerned for Lawyers (TLCL) group and was the 2016 President of the organization. TC is a staunch advocate for recovery from mental health and drug and alcohol addiction issues that plague the legal profession. He routinely speaks at conventions and local meetings about recovery methods and resources available to the legal community.

If you or someone you know needs help with drugs, alcohol or mental health issues, please contact the Texas Lawyers Assistance Program at 1-800-343-8527. All calls are confidential as mandated by Texas statute. Help is just a phone call away!

https://www.texasbar.com/TLAP

When not in the office, TC can be found fly fishing in New Mexico, Colorado or Louisiana, walking his two toy poodles, Teddy and Beau, or spending time with his wife, Kathleen.