

TEXAS AND LOUISIANA:
TWO STATES SEPARATED BY A COMMON LAW

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I. The Louisiana Perspective

A. Louisiana Mineral Law Background

1. The Louisiana Civil Code

- a. 1699: A royal French colony established at Ocean Springs, Mississippi
- b. 1762: France secretly cedes Louisiana to Spain which then retroceded Louisiana to France after French inhabitants revolted against Spanish rule
- c. 1804: French assembly enacts the Code Napoleon aka the French Civil Code
- d. The Code Napoleon was unique in that it provided a comprehensive and logical organization of general principals of law which were to be applied through deductive reasoning to the unique facts of a particular case.
- e. 1825: The Louisiana Civil Code is adopted, written entirely in French

2. Oil in Louisiana, the beginning

- a. Drilling for oil took place in Louisiana as early as 1866 with oil discovered in Jennings in 1901.
- b. Oil and gas exploration and development presented unique problems for Louisiana courts who were left with

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the responsibility of crafting a body of law concerning oil and gas rights.

- i. Note: The Louisiana Civil Code was drafted without any thought as to mineral rights and the Louisiana Mineral Code was not adopted until 1974.
- c. *Escoubas v. Louisiana Petroleum and Coal Oil Co.*, 22 La. Ann. 280 (1870); first reported Louisiana oil and gas case.
 - i. Dispute over failure of a lessee to search for petroleum pursuant to the terms of the lease/agreement.
 - ii. Decided in favor of the land owners who were held to be entitled to declare a forfeiture of the contract by suit.
 - iii. *Escoubas* is an example of the manner in which early Louisiana Mineral Law was developed through court decisions.

3. The Louisiana Mineral Code

- a. Enacted in 1974, effective January 1, 1975.
- b. The Mineral Code is a supplement to the Louisiana Civil Code and if the Mineral Code does not provide for a certain situation, “the Civil Code or other laws are applicable.”
- c. Many Comments in the Louisiana Mineral Code refer to Texas cases for guidance.

B. The Mineral Servitude Doctrine

1. Perhaps the most unusual feature of Louisiana Mineral Law when compared to that of Texas and other states.
2. In its simplest form the doctrine precludes the creation of a

mineral estate distinct from an independent of the full title to the land.

3. This basic principle has been preserved in the Louisiana Mineral Code under articles 6 and 21.
4. In Louisiana, the land owner does not own the oil and gas underlying his land, but only the exclusive right to explore and develop his property and the right to reduce the oil and gas to possession and ownership.
5. While a separate mineral estate cannot be created, the land owner can convey the right to produce minerals to another which thereby constitutes a servitude upon the land.
6. A mineral servitude is a real right that is alienable and heritable, and must be evidenced by a writing.
7. No obligation to explore or develop the land by the servitude owner.
8. Obviously, the “Rule of Capture” applies to those minerals beneath the surface of the land which cannot be owned until produced.
9. Limitations of the mineral servitude.
 - a. Common practice in Louisiana for oil and gas leases to be executed by parties owning mineral servitudes and servitudes are frequently purchased as investments; therefore, one must understand the limitations associated with mineral servitudes.
 - b. Louisiana Mineral Code articles 27 and 28 provides that a mineral servitude is extinguished if it is not used within ten years and is then returned to the title out of which it was created.
 - i. The owner of the surface rights at the time the servitude lapses benefits from the accrual of

prescription, not the owner at the time the servitude was created.

- ii. What constitutes “use” sufficient to avoid prescription? Mineral Code article 29 provides that use occurs when good-faith operations are commenced for the discovery and production of minerals which generally speaking means actual drilling of a well on the land burdened with the servitude and thereafter drilling with reasonable continuity to a depth at which one could reasonably expect to discover commercial deposits of oil and gas.
- iii. This holds true even if the well ultimately proves to be a dry hole.
- iv. Once the drilling operations cease, a new ten year period of prescription begins to run, during which additional drilling operations must occur to avoid prescription of the servitude.
- v. Actual drilling required, well site preparation not enough; seismic or geophysical exploration not enough.
- vi. Production from a well is considered continuing use of the servitude during the period of production and a new ten year prescriptive period does not commence to run until the production has ceased; thereafter, if production is re-established or new, good faith drilling or reworking operations are undertaken within ten years, prescription is again interrupted.
- vii. Interruption of prescription applies to all types of minerals covered by the act creating the servitude.

- viii. In short, there can never be a clear ten year period during which the mineral servitude is not used by actual good faith drilling and reworking operations or by production.
 - ix. There is no limitation on the number of successive ten year periods which can be triggered by successive use.
 - x. If the servitude is created for an express term, it lapses upon the expiration of that term regardless of use of the servitude.
- c. A mineral servitude may also be terminated by: (1) the confusion, or merger, of the fee title and the title to the servitude in a single owner; (2) by the express renunciation of the servitude by its owner; (3) by the occurrence of an express dissolving condition.

10. Servitude size/noncontiguity doctrine

- a. Generally, use of any part of the servitude suffices to preserve the entirety of the servitude.
- b. Noncontiguous tracts of land represent separate servitudes each of which must be used to avoid prescription. *Lee v. Giaouque*, 154 La. 491, 97 So. 669 (1923).
- c. The noncontiguity rule is based on public policy and may not be changed by the parties.
 - i. The Code does allow separate owners of several contiguous tracts to join together and establish a single mineral servitude.
- d. A navigable body of water triggers the noncontiguity doctrine.

11. Miscellaneous servitude rules

- a. The fee owner whose land is burdened by an outstanding mineral servitude may not sell his right of reversion as a property right separate and apart from the fee title. *Hicks v. Clark*, 225 La. 133, 72 So.2d 322(1954).
 - i. Such a sale would run contrary to public policy and could result in an endless chain of servitudes thereby circumventing the public policy against the continued fragmentation of title to lands.
- b. If a mineral servitude is reserved when selling land to the United States or State of Louisiana, the servitude is not susceptible to prescription so long as the title to the servient tract remains with the government.
 - i. If the servient tract is transferred back into private ownership, the ten year prescriptive period for nonuse commences to run on the date the instrument effecting the transfer is filed for registry.
- c. The correlative rights of the servitude owner and the surface owner should be exercised with reasonable regard for one another with neither right being deemed greater than the other.
 - i. The servitude owner must restore the surface of the land to its original condition at the earliest reasonable time.
- d. A usufructuary is not permitted to establish a mineral servitude.

C. Rights of Usufructuaries in Minerals

- 1. Usufruct and naked ownership in Louisiana are analogous to life tenant and remainder interests at common law.

2. Usufruct of a mineral right versus usufruct of the land.
 - a. Usufruct of a mineral right: the usufructuary enjoys all the benefits of production and may lease or develop the land himself.
 - i. May grant a mineral lease that extends beyond the term of the usufruct and binds the naked owner.
 - b. Usufruct of land: contrary to the common law rule, the naked owner of the land can grant a lease and go on the land to recover oil and gas while he is only a naked owner.
 - i. The naked owner need not account to the usufructuary except to pay for use of land and for any surface damages resulting from the developmental operations.
 - ii. The person creating the usufruct may provide that the usufructuary of the land can have the right to enjoy the minerals.
 - iii. May grant a mineral lease on the estate of which he has the usufruct if the usufruct includes mineral rights, but any such lease is extinguished with the termination of the usufruct.
3. Open Mine Doctrine
 - a. Originally provided that the usufructuary of land could enjoy the minerals only to mines actually worked.
 - i. This meant that the pool actually had to be penetrated and shown by a surface test to be capable of production in paying quantities.
 - b. If a usufruct of land is that of a surviving spouse, the

usufructuary enjoys the rights to the minerals regardless of whether there is an actual working of a mine at the time the usufruct comes into existence.

i. However, the rights to which the usufructuary is entitled does not include the right to execute a mineral lease without the consent of the naked owner.

c. A usufructuary of land or a mineral right is not obligated to account to the naked owner regarding production or income to which the usufructuary is entitled.

D. Co-ownership

1. Generally, Louisiana law requires consent of the co-owners in order to develop minerals.

a. Waste Exception: consent of one's co-owners is unnecessary and any co-owner may undertake development if waste is threatened.

i. This helps avoid the harshness that can result from the veto power.

2. A co-owner of land may grant a lease; however, the lessee is unable to exercise the lease without the consent of the other co-owners owning at least an undivided eighty percent interest in the land.

3. A co-owner of land may create a mineral servitude; however, one who acquires such a mineral servitude may not exercise his right without the consent of co-owners owning at least an undivided eighty percent interest in the land.

E. Marital Property

1. Louisiana requires the concurrence of both husband and wife for the alienation, encumbrance, or lease of community immovables, including mineral rights.

- a. Previously the husband could administer community property and alienate community property without the consent of his wife.
 - b. *Kirchberg v. Feenstra*, held such acts to be unconstitutional. 609 F.2d 727 (5th Cir. 1979), aff'd., 450 U.S. 455, 101 S.Ct. 1195 (1981).
2. Generally, both spouses must execute mineral leases or other agreements affecting mineral rights that are classified as community property unless a spouse expressly renounces the right to concur.

II. The Texas Perspective

A. Texas Mineral Law Background

1. Civil Law tradition from Spain, then Mexico
2. Civil Law has influence as to some property rights
 - a. Lands that were granted by Kingdom of Spain or Republic of Mexico, rights granted before the adoption of common law.
 - b. Rule that mineral estate is dominant to surface estate originated under Spanish law (Justice Daniel's dissent in *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972)).
 - c. Minerals reserved to the sovereign/state
3. Texas declares independence in 1836.
4. 1840 – Texas Congress officially adopts English common law.
5. Constitution (1866, 1869, and 1876) and statutes (1879 and 1895) release minerals to surface owners.

6. 1866 – first oil well drilled near Oil Springs in Nacogdoches County.
7. 1901 – Spindletop – Texas Oil Boom begins
8. Oil and gas exploration takes off when common law has been firmly entrenched – judicial precedent and case law are the basis (not as dependent on statutes like in Louisiana with the Louisiana Mineral Code and Civil Code).

B. Mineral Ownership

1. Real property right

- a. Minerals are owned as they lie beneath the surface. They do not have to be captured to be owned.
- b. Rule of Capture – “owner of a tract of land acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands.” *Eliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1948).
 - i. Minerals can be lost through drainage.

2. Severance

- a. Mineral estate may be severed from the surface estate.
- b. Mineral estate is the dominant estate.
- c. Surface estate is the servient estate.
- d. Mineral owner may use as much of the surface as is reasonably necessary to produce and remove the minerals.
 - i. Mineral owner’s rights are to be exercised with due regard for the rights of the owner of the servient (surface) estate.

ii. Accommodation Doctrine – “where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.” *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).

- Surface owner, Jones, used a self-propelled sprinkler irrigation system known as a “Valley System” to irrigate his farmland. The sprinklers hovered 7 feet off the ground.
- Getty Oil then drilled two wells, installing pumping units (17 feet and 34 feet high) that interfered with the irrigation system.
- There were reasonable alternatives to Getty Oil’s pumping units being used on adjacent land: (1) placing pumping units in sunken concrete cellars to provide clearance and (2) using shorter hydraulic pumping units.
- Labor shortage in the area made Jones’ sprinkler system his only reasonable method for irrigating his land.
- Under circumstances such as these, the surface estate may be entitled to an accommodation from the dominant mineral estate.

3. Can be owned in perpetuity (no prescription)

- a. Where there has been longtime mineral development (East Texas for instance), you can end up with hundreds of mineral or royalty owners on a particular tract.

4. Five elements

- a. “Bundle of sticks” – *Winegar v. Martin*, 304 S.W.3d 661 (Tex.App.–Fort Worth 2010, no pet.)
 - i. Right to develop
 - ii. Right to lease
 - iii. Right to receive bonus
 - iv. Right to receive delay rentals
 - v. Right to receive royalty
- b. Each “stick” can be separate from the bundle and conveyed on its own.

5. Oil, Gas and Mineral Lease

- a. Treated as deed or conveyance of a real property interest.
- b. Lessee acquires fee simple determinable in the minerals.
- c. Lessor retains possibility of reverter in the minerals.
- d. Lessor’s interest is a nonpossessory interest.
 - i. “The execution of an oil and gas lease simultaneously divests the grantor (lessor) of the right to possess, use, or dispose of the oil and gas in, upon or under the land in question, and invests these rights in the grantee (lessee) of the lease.” *Texas Oil & Gas Corp. v. Ostrom*, 638 S.W.2d 231, 234 (Tex. App.—Tyler 1982, writ ref’d n.r.e.)

C. Life Estates

- 1. Analogous to usufruct and naked ownership in Louisiana.

2. The owner of the life interest is called the life tenant.
 - a. Life tenant has the right of possession.
 - b. Has the right to use the property but must maintain the corpus of the property for the remainder interest. Life tenant cannot commit waste as to the remainder interest (such as producing the minerals).
3. The owner of the remainder interest is called the remainderman.
 - a. Remainderman has no present right to the use or corpus of the property.
4. Leasing the minerals
 - a. Life tenant and remainderman cannot lease minerals without the joinder of the other.
 - i. Oil and gas lease executed by either party binds that party's interest, but no lessee will be able to act on such oil and gas lease until obtaining a lease or ratification from the other interest owner.
 - b. Proceeds of production
 - i. Income is paid to the life tenant.
 - Delay rentals
 - Interest on royalty and bonus payments
 - ii. Corpus/principal is held for the remainderman
 - Royalty payments
 - Bonus payments

- Remainderman will not be able to touch those funds until the life estate terminates and his interest entitles him to possession.

c. Open Mine Doctrine

i. Exception to general rule

ii. Life Tenant may continue to operate a well and receive all of the proceeds related to such operation (income and corpus) if such “open mine” was in existence at the creation of the life estate.

- Producing well is an open mine.
- Oil and gas lease in existence at creation of life estate constitutes an open mine.
- Subsequent oil and gas lease executed after life tenant has already acquired interest will not constitute an open mine, as new lease was not in existence at creation of life estate. *Moore v. Vines*, 474 S.W.2d 437 (Tex. 1971).

D. Cotenancy

1. Each cotenant has the ability to go onto the land and develop the minerals thereunder without the joinder or consent of his fellow cotenants. *Wilson v. Superior Oil Co.*, 274 S.W.2d 947 (Tex. Civ. App.—Texarkana 1954, writ ref’d n.r.e.).

- a. Oil and gas lease executed by one cotenant is a valid lease.
- b. An oil and gas lease is not effective as to the non-joining cotenant’s interest.

- c. Lessee of the oil and gas lease steps into the shoes of the lessor and becomes a cotenant with the non-joining cotenant.
 - d. Court rationale – The rights of one cotenant must be interfered with if another cotenant is to be permitted to exercise those rights properly belonging to him. *Cox v. Davison*, 397 S.W.2d 200, 203 (Tex. 1965).
2. Cotenant developing minerals must account to the non-joining cotenants for their proportionate share of proceeds on the basis of the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same.
- a. Non-joining cotenant is treated as an unleased working interest owner.

E. Marital Property

- 1. Community property state
- 2. Property acquired in both names requires both parties to lease or otherwise convey.
- 3. Sole Management Community Property
 - a. Spouse who has the sole management may lease or otherwise convey the property without the consent or joinder of the other spouse.
 - b. Any property that one spouse would have owned if he or she had been single at the time of acquisition.
 - i. Personal earnings
 - ii. Income from separate property
 - iii. Property acquired in name of only one spouse
- 4. Homestead

- a. Exception to rule regarding sole management community property.
- b. Both spouses must consent to a conveyance of real property (including oil and gas leases).
- c. Lease will not be effective if only one of the spouses signs an oil and gas lease covering the couple's homestead.
 - i. An oil and gas lease in such circumstances would not be void, but it would be inoperative as long as the property remained the non-signing spouse's homestead. *Grissom v. Anderson*, 79 S.W.2d 619, 621 (Tex. 1935).
- d. Homestead rule also applies to spouse's separate property.
 - i. An oil and gas lease of homestead property in Texas, community property or separate property, must be signed by both spouses.