Oil & Gas Law
Nationwide Comparison of Laws on Leasing, Exploration and Production

LOUISIANA

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I. CHARACTERISTICS OF THE MINERAL AND ROYALTY ESTATE

A. Definition of Oil, Gas and Casinghead Gas

In La. R.S. 30:3(4), oil is defined as crude petroleum oil and other hydrocarbons, regardless of gravity, which are produced at the well head in liquid form by ordinary production methods. Gas is defined as a residual category which includes all natural gas, casinghead gas and all other hydrocarbons not within the definition of oil given above. La. R.S. 30:3(5). The Commissioner of Conservation classifies wells as either oil or gas wells depending upon the nature of the hydrocarbons in the reservoir. This is determined by various tests and analyses. Classification can be important for such things as: setting of allowables by the Commissioner; lease maintenance questions such as the size of a declared unit that may be formed by the lessee or whether shut-in payments can be made to maintain the lease; and, for royalty paying purposes where different royalty provisions exist for gas and oil. *See, e.g., Roberts v. United Carbon Company*, 78 F.2d 39 (5th Cir. 1935); *Auzenne v. Lawrence Oil Company, Inc.*, 179 So.2d 533 (La. App. 3d Cir. 1965); *Gibbs v. Southern Carbon Company*, 171 So. 587 (La. App. 2d Cir. 1937).

B. Elements of A Mineral Interest

Nature of mineral rights

Basic mineral rights under Louisiana law include the mineral servitude, the mineral royalty and the mineral lease. These rights are real rights and are subject either to the prescription of nonuse for 10 years or to special rules of law governing the term of their existence. Louisiana Mineral Code Article 16. Ownership of land does not include ownership of oil, gas and other liquid or gaseous minerals; however, 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. Louisiana Mineral Code Article 6.

Citation and research note: The Louisiana Mineral Code is found in Title 31 of the Louisiana Revised Statutes. Thus, for example, Mineral Code Article 6 could be cited as La. R.S. 31:6. The Mineral Code was enacted by Act 50 of 1974 and made effective January 1, 1975. Because much of Louisiana oil and gas law is embodied in the Mineral Code, the author recommends that the reader begin his research of Louisiana oil and gas questions by review of the applicable code articles, comments and annotated cases.

Prescription of nonuse

A detailed discussion of the prescription of nonuse is beyond the scope of this chapter, but this concept of prescription in Louisiana mineral law is perhaps its most distinguishing feature. The Louisiana Mineral Code sets out fairly detailed provisions concerning the extinguishment of mineral interests by the running of the prescription of nonuse. *See* Louisiana Mineral Code Articles 27 through 79 relating to mineral servitudes, Articles 85 through 103 relating to mineral royalties and Article 107 relating to executive rights. Generally speaking, if a mineral servitude is created without a specific term, prescription of nonuse commences running from the date of creation and accrues 10 years later unless interrupted by good faith drilling operations on or production obtained from the servitude tract or acreage pooled therewith. Louisiana Mineral Code Articles 29 and 36. Prescription of nonuse running against a mineral royalty is interrupted by production from or attributable to the royalty tract. Louisiana Mineral Code Article 87. It is not necessary that production obtained from the royalty or servitude tract be in paying quantities. Louisiana Mineral Code Articles 38 and 88. If the well in question is located on the servitude or royalty tract, prescription is interrupted as to the entirety of the tract. If, however, the well in question is a unit well which is located off of the royalty or servitude tract, unit operations and unit production interrupt prescription only as to that portion of the servitude or royalty tract situated within the unit. Louisiana Mineral Code Articles 33, 37 and 89. It should also be noted that a single mineral servitude or single royalty cannot extend to noncontiguous tracts of land; a separate mineral servitude or mineral royalty is created for each noncontiguous tract unless the instrument creating the mineral interest provides for more. Louisiana Mineral Code Articles 64 and 101. A mineral lease is not subject to prescription but cannot be maintained in effect for more than 10 years without drilling operations or production. Louisiana Mineral Code Article 115.

C. Conveyability

The same principles apply as set forth inTexas. Mineral rights are real rights under Louisiana law and may be owned, conveyed, reserved or inherited separately from other elements. Louisiana Mineral Code Articles 15 and 16.

D. Mineral or Royalty Interest for a Term of Years

Mineral servitudes and mineral royalties can be created for a term under Louisiana law. These interests terminate upon expiration of the term. *See, e.g.*, Louisiana Mineral Code Articles 27(4) and 85(4). If the term stipulated is more than 10 years, the mineral servitude or mineral royalty will prescribe prior to expiration of the term unless prescription is interrupted or suspended within 10 years of its creation. *See* Louisiana Mineral Code Articles 74 and 103; *St. Mary Operating Co. v. Guidry*, 954 So.2d 397 (La. App. 3d Cir. 2007); *St. Mary Operating Co. v. Champagne*, 945 So.2d 846 (La. App. 3d Cir. 2006).

E. Leasehold and Overriding Royalty

Louisiana law also treats an overriding royalty as dependent on the continued existence of the mineral lease which it burdens. Louisiana Mineral Code Article 126. The overriding royalty, assuming proper execution and recordation, is thereafter binding on the successors and assigns of the mineral lessee. This is not necessarily true with regard to the obligation to honor the override as to extensions, renewals or new leases taken within a particular period of time. This obligation was previously considered personal.

Berman v. Brown, 224 La. 619, 70 So.2d 433 (1953). A particular successor is not personally bound unless he assumes the personal obligations of his transferor. Louisiana Civil Code Article 1764. That position appears to have been modified somewhat in the case of *Robinson v. North American Royalties, Inc.*, 463 So.2d 1384 (La. App. 3d Cir.), *remanded*, 470 So.2d 112 (La. 1985), *decision on remand*, 509 So.2d 679 (La. App. 3d Cir. 1987), which held that a sublessee was bound to perform its sublessor's obligation to honor an override on new leases taken by the sublessee to the extent such new leases covered acreage earned by the sublessee under a farmout but not as to acreage covered by the farmout but not earned by the sublessee through the drilling of a test well. The court in reaching this determination relied in part upon a statutorily imposed privity of contract contained in Louisiana Mineral Code Article 128.

F. Dormant Mineral Act, Marketable Title Act or Title Standards

Louisiana has not adopted a Dormant Minerals Act or Marketable Title Act. Louisiana Uniform Title Standards was published by the Louisiana State Bar Association in 2001.

II. WHO CAN LEASE?

A. Marital Property

Jointly owned — Community property

Louisiana is a community property state. Community property includes things acquired during the existence of the community with community funds or through the effort, skill or industry of either spouse. Louisiana Civil Code Article 2338. Natural or civil fruits of community property are classified as community property. Unless a spouse has specifically reserved fruits of separate property, such fruits also become community property. These include revenues attributable to separate mineral and royalty interests. Louisiana Civil Code Article 2339. There is a rebuttable presumption that things in the possession of a spouse during the existence of the community are community property. Louisiana Civil Code Article 2340. Land and mineral rights are immovable property, and such immovables are classified as either separate or community as of the date of their acquisition. The concurrence of both spouses is required for the alienation, encumbrance or lease of community immovables. Louisiana Civil Code Article 2347.

When the concurrence of both spouses is required by law, the alienation, encumbrance or lease of community property by only one spouse is relatively null. Louisiana Civil Code Article 2353.

Separate property

Separate property includes property acquired by a spouse: (a) while unmarried, judicially separated or divorced or after establishment of a separate property regime by matrimonial contract; (b) with separate things; and (c) by inheritance or donation to the acquiring spouse individually. Louisiana Civil Code Article 2341.

Of some assistance to mineral lessees is the protection afforded by Louisiana Civil Code Article 2342, which provides that when there has been a declaration in the act of acquisition that the things are acquired with separate funds as the separate property of the acquiring spouse, an alienation, encumbrance or lease of the thing by onerous title may not be set aside on the ground of the falsity of the declaration.

A spouse may alienate, encumber or lease his separate property without joinder or concurrence of the other spouse. If there is some question concerning whether or not the property is separate property, a prudent lessee will attempt to have both spouses execute the mineral lease.

Classification as either separate or marital property — Who must sign

Spouses are now free to convert separate property to community property and vice versa. *See* Louisiana Civil Code Articles 2343 and 2343.1.

Conversion of type of joint ownership between spouses

Louisiana has no similar provisions. As a civil law jurisdiction, Louisiana does not recognize common law estates in property.

Individual acknowledgment

A Louisiana form of direct acknowledgment by a party is set forth below:

STATE OF LOUISIANA
PARISH OF ______________
On this ______ day of __________________, ______, before me personally appeared (party's name), to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed it as his free act and deed.

____
NOTARY PUBLIC
See La. R.S. 35:511.

B. Homestead

Definition of homestead rights

Louisiana has no similar provisions to that of Texas. Prior to major revision of community property law, particularly by Act 709 of 1979, effective January 1, 1980, certain distinctions did exist if the property being leased was declared to be the family home. Even though the husband, as head and master of the community, was able to lease community property without joinder of the spouse under prior law, the wife's concurrence was necessary to sell, encumber or lease the property declared to be the family home. *See* Louisiana Civil Code Article 2334, as amended by Act 679 of 1976, prior to its repeal by Act 709 of 1979.

C. Business Entities

Corporations

Louisiana law is similar to that set forth for Texas. A duly incorporated and presently existing corporation (whether incorporated under the laws of Louisiana or some other state) may deal with its immovable property in the same manner as an individual assuming that its articles of incorporation or bylaws do not specifically restrict such activities. A corporation may act through any duly authorized officer or agent. It is preferable to attach an appropriate resolution to the sale, encumbrance or lease so that the agent's authority will be reflected of record.

Note that an action to set aside a sale of immovable property by a corporation on the ground the officer or agent signing on behalf of the corporation was without authority to do so prescribes five years from recordation of the conveyance. La. R.S. 9:5646.

ACKNOWLEDGMENT

A Louisiana form of corporate acknowledgment is set forth as follows:

STATE OF LOUISIANA
PARISH OF ____________________
On this ______ day of ____________________, ______, before me appeared ____________________ (agent), to me personally known, who, being by me duly sworn, did say that he is the ____________________ (office of agent) of ____________________ (corporation), and that the instrument was signed on behalf of the corporation by authority of its Board of Directors, and that ____________________ (agent) acknowledged the instrument to be the free act and deed of said corporation.

____
NOTARY PUBLIC

See La. R.S. 35:511. A corporate seal may be affixed but is not required for the validity of the instrument or acknowledgment.

General partnership

Louisiana Civil Code Article 2806 provides that a partnership may own an immovable acquired in the name of the partnership if at the time of acquisition the contract of partnership was in writing. As to third parties, however, the individual partners are deemed to own the immovable property until the contract of partnership is filed for registry with the Secretary of State. If the contract of partnership was not in writing at the time of acquisition, the immovable is owned by the partners. The mentioned provisions have been applicable since January 1, 1981, the effective date of Acts 150, 151 and 152 of 1980 by which Louisiana partnership law was substantially revised. It is thus important to file articles of partnership of domestic (Louisiana) partnerships or registration statements of foreign (non-Louisiana) partnerships with the Secretary of State prior to acquisition of Louisiana immovable property. *See* La. R.S. 9:3401 through 3427 with regard to the Central Registry for Contracts of Partnership and qualification of foreign partnerships to do business in Louisiana.

A partnership is a separate legal entity and may designate an agent to act on its behalf. In the absence of an appropriate resolution or other written evidence of authority empowering a particular partner or agent to act on behalf of the partnership in alienating, encumbering or leasing partnership immovables, all partners should be asked to sign. *Compare* Louisiana Civil Code Article 2814.

ACKNOWLEDGMENT

A Louisiana form of acknowledgment for a partnership is as set forth below:

STATE OF LOUISIANA
PARISH OF ______________
On this ______ day of ____________________, ______, before me appeared ____________________, to me personally known, who, being by me duly sworn, did say that he is the ______________ (office of agent, e.g., managing partner or attorney-in-fact) of ____________________ (partnership name), that the foregoing instrument was signed on behalf of said partnership, and ____________________ (agent) acknowledged the instrument to be the free act and deed of said partnership.

____
NOTARY PUBLIC

Limited partnerships

The same rules mentioned previously with regard to Louisiana general or ordinary partnerships are applicable to limited partnerships, which in Louisiana are sometimes referred to as partnerships in commendam. Certain special rules must be followed in order for limited partners to enjoy limited liability, including the requirement that the name of the partnership clearly identify it as a partnership in commendam by use of such language as "limited partnership"or "partnership in commendam." *See particularly* Louisiana Civil Code Article 2838, and *generally* Louisiana Civil Code Articles 2836 through 2848. A limited partner is not required to join in execution of instruments affecting partnership property and, indeed, participates in the management of partnership affairs at the risk that his limited liability will be lost. *See* Louisiana Civil Code Articles 2843 and 2844.

ACKNOWLEDGMENT

The acknowledgment form set forth previously for partnerships may also be used with regard to limited partnerships. In the recent past, many oil and gas companies decided to operate as master limited partnerships. In such cases, the general partner was often a corporation. A variation of the partnership acknowledgment set forth above suitable for use in this situation is as follows:

STATE OF LOUISIANA
PARISH OF ______________
On this ______ day of __________, ______, before me appeared ______________, to me personally known, who, being by me duly sworn, did say that he is the ______________ (office of agent) of ____________________ (corporation), managing general partner of ____________________ (partnership name), that the foregoing instrument was signed on behalf of said ______________ (corporation) by authority of its Board of Directors in its capacity as managing general partner of the aforesaid partnership, and the said ______________ (agent) acknowledged the instrument to be the free act and deed of said partnership.

____
NOTARY PUBLIC

Limited liability companies and limited liability partnerships (LLCs and LLPs)

The Louisiana Legislature adopted the Louisiana Limited Liability Company Law in 1992 (Act 780 of 1992 enacting La. R.S. 12:1301-1369). A limited liability company (LLC) is a hybrid entity sharing some characteristics of a corporation and some characteristics of a partnership. The LLC is taxed like a partnership, but its members enjoy limited liability like corporate shareholders. Unlike limited partners, members of the LLC may participate in the management of the LLC without jeopardizing their limited liability. The name of the LLC must contain the words "Limited Liability Company" or the abbreviations "L.L.C." or "L.C." La. R.S. 12:1306. Unless otherwise provided in the articles of organization or operating agreement, a majority vote of the members of the LLC is required for the alienation, encumbrance or lease of any immovables of the LLC. La. R.S. 12:1318.

ACKNOWLEDGMENT

A Louisiana form of limited liability company acknowledgment is as follows:

STATE OF LOUISIANA
PARISH OF ______________
On this ______ day of ___________________, ______, before me appeared ____________________ (agent), to me personally known, who, being by me duly sworn, did say that he is the ________________________________ (office of agent) of ____________________________ (limited liability company), that the foregoing instrument was signed on behalf of said ________ ____________________ (limited liability company) by authority of its members, and the said ________________________ (agent) acknowledged the instrument to be the free act and deed of said limited liability company.

____
NOTARY PUBLIC

D. Attorney-in-Fact

General rules

Louisiana rules concerning powers of attorney, or mandates, appear to be similar to those stated for Texas. A power of attorney must expressly grant the agent the right to sell, buy, encumber or lease. *See* Louisiana Civil Code Article 2996. If the agent is to deal with immovable property, the power of attorney must be in writing. If the agent is to grant an oil and gas lease, the power of attorney should expressly grant him the right to do so to remove any doubt regarding the agent's authority to so act. The immovable property to be leased need not be specifically described so long as the power of attorney clearly covers the lands in question, for example, "all lands which I own," or "all lands I own in Cameron Parish."

Universal power of attorney

Although, as mentioned previously, the particular property need not be specifically described in the power of attorney, it is necessary for the principal to expressly grant the agent the power to buy, sell, encumber or lease. General language to the effect that the agent is granted unfettered authority to act on behalf of the principal would not be sufficient.

Necessity of recording power of attorney

In order to evidence of record that the agent was duly authorized to act on behalf of the principal, it is preferable to record the power of attorney in the parish in which the affected immovable property is located. Recordation is not required, but it may lessen curative requirements as discussed later. Recordation may also provide additional protection for those persons relying upon a recorded power of attorney that has not been revoked of record as discussed below.

Curative necessary

Curative requirements are similar to those set forth for Texas. A title examiner must attempt to determine that the power of attorney was not revoked prior to its exercise. Louisiana Civil Code Article 3024 sets forth the conditions under which a power of attorney terminates. It is particularly important to determine that the power of attorney has not terminated by operation of law which would occur upon the death of the principal or agent or upon the interdiction of the agent or the qualification of the curator after interdiction of the principal. Third parties are afforded some protection by Louisiana Civil Code Articles 3026 and 3027 which provide:

> **Article 3026.** In the absence of contrary agreement, neither the contract nor the authority of the mandatary is terminated by the principal's incapacity, disability or other condition that makes an express revocation of the mandate impossible or impractical.
>
> **Article 3027.** Until filed for recordation, a revocation or modification of a recorded mandate is ineffective as to the persons entitled to rely upon the public records.

Another curative statute of benefit to third parties is La. R.S. 9:5647 which provides in pertinent part as follows:

> Any action to set aside a document or instrument on the ground that the party executing the document or instrument under authority of the power of attorney was without authority to do so, or that the power of attorney was not valid, is prescribed by five years, beginning from the date on which the document or instrument is recorded in the conveyance records, or the mortgage records if appropriate.

Durable power of attorney

Powers of attorney in Louisiana are "durable" in the sense that incompetency or incapacity does not terminate the power of attorney unless and until the principal or agent is interdicted. *See* Louisiana Civil Code Article 3024(2) and (3).

Acknowledgement

STATE OF LOUISIANA
PARISH OF ______________
On this ______ day of _________________, ______, before me personally appeared (agent), to me known to be the person who executed the foregoing instrument on behalf of (principal), and acknowledged that he executed the same as the free act and deed of (principal).

____
NOTARY PUBLIC

E. Estate of Resident Decedent

Rules of descent and distribution (intestate succession)

Louisiana intestacy provisions are summarized below as follows:

a. If a decedent is survived by a spouse and children:
   i. The surviving spouse receives an undivided one-half interest in the community property plus a usufruct on the decedent's one-half interest in the community inherited by the children;
   ii. Decedent's one-half interest in the community property devolves to the children in equal proportions, subject to the usufruct in favor of the surviving spouse which terminates upon death or remarriage of the surviving spouse; and,

iii. Decedent's separate property devolves to the children in equal proportions. Louisiana Civil Code Articles 888 and 890.

b. If a child predeceases the decedent and has children of his own, those children represent their parent in the succession of their grandparent and are entitled to share in equal proportions that which their parent would have otherwise inherited had he survived the decedent. Louisiana Civil Code Articles 881 through 888.

c. If the decedent dies intestate, survived by his spouse, parents and siblings:
   i. The decedent's one-half interest in the community goes to the surviving spouse if the decedent died after December 31, 1981. Louisiana Civil Code Article 889.
   ii. If the decedent died prior to January 1, 1982, the surviving spouse would get one-half of the decedent's community interest, and the decedent's parents would get the other one-half (resulting in the surviving spouse having a three-fourths interest in the former community property — her own one-half plus one-half of decedent's one-half community interest — and the parents or parent if only one survives, get the other one-half of decedent's one-half interest in the community). Louisiana Civil Code Article 915, prior to amendment by Act 919 of 1981.
   iii. Decedent's separate property devolves to the siblings in equal proportions subject to a usufruct (joint and successive) in favor of the parents of the decedent if the decedent died after December 31, 1981. Louisiana Civil Code Article 891.
   iv. If the decedent died before January 1, 1982, the parents would receive one-half of the decedent's separate property in full ownershi, or one-fourth if only one parent survived, and the decedent's siblings (and descendants thereof) would receive the remainder. Louisiana Civil Code Articles 903 and 904, prior to amendment by Act 919 of 1981.
   v. If, in the above example, the decedent was survived by half-siblings and german siblings, his separate property would be divided equally between paternal and maternal lines. German siblings participate in both lines, but half-siblings participate only in the line of the common parent. Louisiana Civil Code Article 893.

d. If the decedent is not survived by descendants, parents, siblings or descendants of siblings:
   i. The surviving spouse succeeds to the separate property of the decedent to the exclusion of other ascendants and other collaterals if the decedent died after December 31, 1981. Louisiana Civil Code Article 894.
   ii. If the decedent died on or before December 31, 1981, the decedent's ascendants inherit the decedent's separate property to the exclusion of the surviving spouse and all collaterals. The ascendant nearest in degree excludes all others. If there are ascendants in the same degree, the estate is divided into two equal shares, one of which goes to paternal ascendants and the other to maternal ascendants. Louisiana Civil Code Articles 904 through 906, prior to amendment by Act 919 of 1981.

e. If the decedent is survived only by collaterals, the nearest in degree excludes all others. If several collaterals are in the same degree, they take equally by heads. Louisiana Civil Code Article 896.

f. If the decedent is not survived by any relatives or spouse, the decedent's estate goes to the State. Louisiana Civil Code Article 902.

g. Definitions of selected terms used:

Succession. The transmission of the estate of the decedent to his successors. Louisiana Civil Code Article 871. This word is also often used to refer to the judicial proceedings by which the successors are recognized as succeeding to the decedent's estate.

Estate. The property, rights and obligations that a person leaves after his death. Louisiana Civil Code Article 872.

Intestate succession. A succession in which the decedent left no valid will. Louisiana Civil Code Article 875.

Testate succession. A succession in which the decedent left a valid will. Louisiana Civil Code Article 874.

Representation. The legal term for allowing a descendent to step into the position of his ancestor and receive similar treatment and rights. Louisiana Civil Code Article 881. Under Louisiana succession law, only the direct descendants of the decedent and the descendants of his predeceased siblings are allowed to represent their ancestors in the decedent's succession. Louisiana Civil Code Articles 882 and 884. In those cases in which representation is allowed, the property is divided by roots (per stirpes) rather than by heads (per capita). Louisiana Civil Code Article 885.

Degree of relationship. The closeness of blood relationship (propinquity of consanguinity) measured in generations. In the direct ascending or descending lines, the degree of relationship is the number of generations between the parties. In the collateral line, the number of degrees is determined by counting generations from one party up the common ancestor and then back down to the other party. Louisiana Civil Code Articles 900 and 901.

Separate property. Property acquired by a spouse:
   a. while unmarried, judicially separated or divorced or after establishment of a separate property regime by matrimonial contract;
   b. with separate things; and,
   c. by inheritance or donation to the acquiring spouse individually. Louisiana Civil Code Article 2341.

Community property. All property acquired during the marriage that is not separate property, which includes:
   a. property acquired through the effort, skill or industry of either spouse;
   b. property acquired with community things; and,
   c. natural and civil fruits of community property or of separate property when a proper reservation has not been made. Louisiana Civil Code Article 2338 and 2339.

All property in the possession of a spouse during the existence of the community regime is presumed to be community although this presumption is rebuttable. Louisiana Civil Code Article 2340.

Usufruct. A type of personal servitude in which the usufructuary is the owner of a real right of limited duration on the property of another (the "naked owner"). This right entitles the usufructuary to use and enjoy the property subject to the usufruct according to certain rules and restrictions. This right is similar to a life estate under common law. *See* Louisiana Civil Code Articles 535 through 629 and Louisiana Mineral Code Articles 188 through 196. The legal usufruct of a surviving spouse includes the use and enjoyment of the landowner's rights in minerals; however, the naked owner must consent to any mineral lease executed by the surviving spouse, as usufructuary. Louisiana Mineral Code Article 190. In the absence of any controlling provision in the instrument creating the usufruct, other usufructs of land include minerals only to the extent mines or quarries are actually worked at the time the usufruct is created. As to oil and gas, this "open mines" doctrine applies to all pools penetrated by wells producing at the time the usufruct is created. Louisiana Mineral Code Article 191. *See* related provisions at Louisiana Mineral Code Articles 188 through 196.

Lapse doctrine

Certain of the Louisiana rules relative to lapsed legacies are similar to those set forth for Texas. *See* Louisiana Civil Code Articles 1589 through 1597. The lapse of a particular bequest benefits the legatee who was bound to discharge it. Louisiana Civil Code Article 1591. Louisiana also recognizes the right of accretion in favor of joint legatees. So, for example, if the testator bequeaths Blackacre to A and B, and A predeceases the testator, B would take A's share. To be considered a joint legacy, it must be made in the same disposition without the testator's having assigned shares. Louisiana Civil Code Article 1588.

Administration of estate of intestate decedent

An administration is not required in an intestate succession if the succession is relatively free of debt, and all heirs are competent and accept the succession unconditionally. Louisiana Code of Civil Procedure Article 3001. Succession proceedings can be avoided altogether if a person dies intestate leaving no immovable property and movable property having a gross value of $50,000 or less and whose sole heirs are his descendants, ascendants, siblings or surviving spouse. Louisiana Code of Civil Procedure Articles 3421 and 3431. In all other cases, an administration is generally required.

The succession of a testate decedent must be opened judicially, but an administration can be avoided if all legatees are either competent or acting through qualified legal representatives, all legatees accept the succession, and none of the creditors of the succession have demanded its administration. Louisiana Code of Civil Procedure Article 3031.

Administration of estate of testate decedent

The succession representative (either an administrator of an intestate succession or an executor of a testate succession) has fairly broad administrative powers. Often the succession representative will, however, be required to petition the court for special authorization, such as to sell, mortgage or lease succession property. If the succession representative wishes to accept a third party's proposal to acquire a mineral lease covering succession property, he must follow the provisions of Louisiana Code of Civil Procedure Article 3226 and 3229 requiring that the court be petitioned for authority and that legal advertisement of the request for authority be made in the parish in which the succession is pending and in which the property to be leased is located. In his petition, the succession representative must include a copy of the proposed lease as an exhibit. Louisiana Code of Civil Procedure Article 3226.

Rules relative to closing estate

When the need for administration of the succession has ended, the succession representative files a final tableau of distribution and a final account. After the final tableau of distribution and final account are approved or homologated by the court, the succession representative may be discharged. *See* Louisiana Code of Civil Procedure Articles 3332 and 3391.

Forced heirship statute

The civil law of Louisiana is different from that of any other state in limiting a decedent from disposing of all of his property to the prejudice of his forced heirs. *See* Louisiana Civil Code Articles 1493 through 1518. Historically, Louisiana law provided that children of the decedent were entitled to receive a specified portion of their parent's estate. A forced heir has an action to enforce recognition of his right to his forced portion, or legitime. The balance of the decedent's estate that he may dispose of in any manner he chooses is referred to as the disposable portion. Recent changes have attempted to give a parent more flexibility to deal with his estate free of the claims of his forced heirs. As a result of constitutional and legislative revisions in 1996, forced heirs are limited to children 23 years of age or younger at the time of the decedent's death or children who, because of mental or physical infirmities, are incapable of taking care of themselves. The actual calculations necessary to determine whether a forced heir has received his legitime are complicated. For present discussion purposes, suffice it to note that prior donations made by the decedent during his life are added back in to the calculations and are subject to being reduced. Generally though, forced heirship problems arise in testate successions in which the decedent bequeaths his estate to other than his forced heirs. This is particularly common in ancillary successions in which a non-resident dies testate unaware of Louisiana forced heirship provisions.

A. If the decedent died before September 7, 1979:
   - i. The legitime, or forced portion of children, living or represented, is as follows:
     - a. If the decedent leaves one child — one-third of the entire estate;
     - b. If two children survive — one-half of the entire estate; and,
     - c. If three or more children survive — two-thirds of the entire estate.
   - ii. No children, but parents surviving:
     - a. One-third of the entire estate to the parents or parent as to both separate and community property of decedent (if only one parent survives and decedent has one or more siblings surviving, living or represented, then as to separate property, the single parent's forced portion is one-fourth rather than one-third).

B. If the decedent died on or after September 7, 1979, and prior to January 1, 1982, same as item (i) above, except parents are not forced heirs as to community property.
C. If the decedent died after December 31, 1981, and prior to January 1, 1996, the legitime or forced portion of children, living or represented, is as follows:
   i. If one child survives the decedent — one-fourth of the entire estate; and,
   ii. If two or more children survive — one-half of the entire estate.
D. If the decedent died after January 1, 1996, the legitime or forced portion is as follows:
   i. Same as item (c) above, except that a child is a forced heir only if, at the date of decedent's death, the child is:
      a. 23 years of age or younger; or
      b. incapable of taking care of himself or administering his estate because of mental incapacity or physical infirmity. Louisiana Civil Code Article 1493.
   ii. Representation of a predeceased child is permitted if said child would not have reached the age of 24 prior to the decedent's death. Louisiana Civil Code Article 1493.
   iii. Notwithstanding the above, the forced portion is reduced to the fraction a forced heir would otherwise be entitled under intestacy provisions. Louisiana Civil Code Article 1495. This reduction takes place as the result of the decedent being survived by some children who are forced heirs and some who are not (i.e., over age 23 and not incompetent).

Note that slight differences exist in forced heirship provisions applicable for the period between January 1, 1996 and June 17, 1996, and the period beginning June 18, 1996, that are beyond the scope of this chapter. *See* Official revision comments for Act 77 of 1st Ex. Session of 1996.

F. Estate of Non-Resident Decedent

If ancillary probate of foreign will is not necessary

An Ancillary Probate in Louisiana would not be necessary if the non-resident decedent died leaving no immovable property in Louisiana.

If ancillary probate of foreign will is necessary

Ancillary probate procedures are set forth at Louisiana Code of Civil Procedure Articles 3401 through 3405. Such procedures are applicable when the decedent was not domiciled in Louisiana at the time of his death. Ancillary probate procedures generally follow those applicable in the case of a Louisiana domiciliary. An ancillary succession is required in cases in which the decedent died leaving immovable property in Louisiana. An administration can be avoided to the same extent as mentioned previously for successions of resident decedents. If the decedent's succession has been opened in the state of his domicile, a Louisiana court will recognize the probate of his testament and the qualification and appointment of a succession representative made in the succession proceedings filed in the other state. Louisiana Code of Civil Procedure Articles 3402 and 3405. Louisiana has adopted the Uniform Probate Law which is found at Louisiana Revised Statutes Articles 9:2421 through 9:2425. Of particular note are the conflict of law provisions enacted in Act 923 of 1991, effective January 1, 1992, found at Louisiana Civil Code Articles 3528 through 3534. Insofar as ancillary successions are concerned, the law of Louisiana will be applied with regard to Louisiana immovable property owned by the decedent at the time of his death. Such immovable property includes land and mineral rights (mineral servitudes, mineral royalties, overriding royalties and mineral leases). *See* Louisiana Mineral Code Articles 16 and 18.

Conflict of law rules

By Act 923 of 1991, effective January 1, 1992, the Louisiana legislature enacted a comprehensive set of conflicts of law provisions. Of particular note are the following code articles.

Louisiana Civil Code Article 3524. Except as otherwise provided in this Title, the rights and obligations of spouses with regard to immovables situated in this state are governed by the law of this state. Whether such immovables are community or separate property is determined in accordance with the law of this state, regardless of the domicile of the acquiring spouse at the time of acquisition.

Louisiana Civil Code Article 3526. Upon termination of the community or dissolution by death or by divorce of the marriage of spouses either of whom is domiciled in this state, their respective rights and obligations with regard to immovables situated in this state and movables, wherever situated, that were acquired during the marriage by either spouse while domiciled in another state shall be determined as follows:

a. Property that is classified as community property under the law of this state shall be treated as community property under that law; and
b. Property that is not classified as community property under the law of this state shall be treated as the separate property of the acquiring spouse. However, the other spouse shall be entitled, in value only, to the same rights with regard to this property as would be granted by the law of the state in which the acquiring spouse was domiciled at the time of acquisition.

Louisiana Civil Code Article 3528. A testamentary disposition is valid as to form if it is in writing and is made in conformity with: (1) the law of this state; or (2) the law of the state of making at the time of making; or (3) the law of the state in which the testator was domiciled at the time of making or at the time of death; or (4) with regard to immovables, the law that would be applied by the courts of the state in which the immovables are situated.

Louisiana Civil Code Article 3533. Except as otherwise provided in this title, testate and intestate succession to immovables situated in this state is governed by the law of this state.

The forced heirship law of this state does not apply if the deceased was domiciled outside this state at the time of death and at the time he acquired the immovable and if he left no forced heirs domiciled in this state at the time of his death.

Louisiana Civil Code Article 3535. Real rights in immovables situated in this state are governed by the law of this state.

Real rights in immovables situated in another state are governed by the law that would be applied by the courts of that state.

Whether a thing is an immovable is determined according to the substantive law of the state in which the thing is situated.

Use of affidavit of death and heirship

An affidavit of death, domicile and heirship executed by two knowledgeable, disinterested parties is deemed to constitute sufficient evidence to allow the decedent's succession to be opened in a particular parish. Such affidavits may also be relied upon in certain circumstances in dealing with the intestate heirs of a decedent whose succession has not been opened judicially. This does not provide third parties with the degree of comfort as would a judgment of possession recognizing the decedent's successors. Of interest and potential benefit is La. R.S. 9:5630 which provides for a two-year liberative prescription running from the finality of the judgment of possession which bars an action by a person claiming to be a successor of the decedent, but who was not recognized in the judgment of possession, against a third party who has acquired an interest from a recognized successor of the decedent by onerous title (for value as contrasted with a gratuitous transfer).

G. Trustee

Power of trustee derived from the trust instrument

The statements with regard to Texas law are the same or similar to those applicable in Louisiana. Under the Louisiana Trust Code, as mentioned below a trustee has the power to execute an oil and gas lease unless the trust instrument provides to the contrary. La. R.S. 9:2118. The trust instrument must be validly executed in a form recognized by Louisiana law, and the trustee must be a natural person or a bank or trust company organized under the laws of Louisiana or of the United States domiciled in Louisiana. La. R.S. 9:1783. If the settlor names two trustees, both must exercise the powers conferred upon them unless otherwise provided in the trust instrument or by order of the proper court. La. R.S. 9:2113. If three or more trustees have been designated, the powers vested in them may be exercised by a majority of the trustees unless the trust instrument provides otherwise. La. R.S. 9:2114.

Powers of trustee derived from the trust statute

Statutory duties and powers of the trustee under the Louisiana Trust Code are set forth at La. R.S. 9:2061 through 2173. Unless the trust instrument provides otherwise, a trustee may lease, sell or mortgage trust property. La. R.S. 9:2118 through 2120.

Title in trust but no trustee named; "blind" trust

Louisiana has no statute comparable to that of Texas. It is likely, however, that the same result would apply in Louisiana, i.e., that title would vest in the individual trustee who could thereafter deal with the property free of undisclosed and unidentified beneficiaries. Joinder of the trustee's spouse, if married, would normally be required for any sale, encumbrance or lease of immovable property.

Allocation of proceeds to principal and income

Rules regarding allocation set forth for Texas are similar in many respects to those applicable under Louisiana law. *See* La. R.S. 9:2152.

H. Life Tenant/Remainderman And Open Mine Doctrine

General rules

Louisiana, being a civil law state, does not recognize the various common law estates in property. Most akin to a life estate is what is known in Louisiana as a usufruct. This is a type of personal servitude in which the usufructuary is the owner of a real right of limited duration on the property of another (the "naked owner"). This right entitles the usufructuary to use and enjoy the property subject to the usufruct according to certain rules and restrictions. *See generally* Louisiana Civil Code Articles 535 through 629 and Louisiana Mineral Code Articles 188 through 196.

As a general proposition, the usufruct of land does not include the landowner's rights in minerals. Louisiana Mineral Code Article 188. The legal usufruct of a surviving spouse, however, does include the use and enjoyment of the landowner's right in minerals. Thus, the surviving spouse, as usufructuary, may execute an oil and gas lease on the property subject to the usufruct, but the naked owner must consent to such lease. Louisiana Mineral Code Article 190.

Generally speaking, in other contexts, the usufructuary may use and enjoy the landowner's rights in minerals only to the extent the mines or quarries are actually worked at the time the usufruct is created. As to oil and gas, this "open mine" doctrine applies to all pools penetrated by wells producing or shown capable of producing in paying quantities at the time the usufruct is created. Louisiana Mineral Code Article 191. Thus, if the usufruct of land includes mineral rights, the usufructuary can lease and retain all payments accruing under the lease. If the usufruct of land does not include mineral rights, the naked owner may lease and retain all payments and benefits accruing thereunder just as he would if the land were not subject to the usufruct. Louisiana Mineral Code Article 195.

A usufructuary of a mineral right, as distinguished from the usufructuary of land, is entitled to all of the benefits of use and enjoyment that would accrue to him if he were the owner of the right without regard to whether mines are "open." Louisiana Mineral Code Article 193. Such a usufructuary is entitled to retain all benefits accruing under any mineral lease covering mineral interests subject to the usufruct.

It is important to note that any mineral lease executed by a usufructuary of land is extinguished upon termination of the usufruct. The 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. Louisiana Mineral Code Article 118.

As a practical matter, it is necessary for both the usufructuary and the naked owner to join in execution of the lease and to execute rental and royalty division orders apportioning the benefits that accrue under the lease.

I. Minors and Mental Incompetents

Minors

Under Louisiana law, a child remains under the authority of his parents until he becomes 18 years of age unless prior to that time he is emancipated. Louisiana Civil Code Article 216. During the marriage, the father is the administrator of the estate of his minor children. The mother assumes that position if the father is interdicted or absent. Louisiana Civil Code Article 221.

Once a minor reaches 15 years of age, his father, or if he has no father, his mother, may emancipate him by notarial act. Louisiana Civil Code Article 366. A minor is also emancipated of right by marriage. Louisiana Civil Code Article 379. Until the emancipated minor reaches 16 years of age, he has only the power of administration and cannot alienate, mortgage or lease any immovable property he owns without authorization of the court. Louisiana Civil Code Articles 373 and 382. A married minor upon reaching 16 years of age and a 16-year-old person who is judicially emancipated are relieved of all disabilities which attach to minority. Louisiana Civil Code Articles 382 and 385.

In the event the parents are judicially separated, divorced or one is deceased, a tutorship proceeding must be instituted. Tutorship procedures are outlined in Louisiana Code of Civil Procedure Articles 4031 through 4464. The surviving or custodial parent is generally the party to be named tutor or tutrix. When both parents are dead or have been disqualified, the party named tutor is likely to be the person named by the parents in their wills or a relative found by the court to be best qualified. To summarize procedures required to obtain a mineral lease covering a minor's interest, a tutor and undertutor must be appointed by the court. The tutor must petition for and obtain court authority to grant a mineral lease with concurrence of the undertutor. The lease may extend beyond the anticipated duration of the tutorship. Louisiana Code of Civil Procedure Article 4268. If the parent, as administrator, wishes to sell, mortgage or lease the minor's immovable property, the same procedures followed in a normal tutorship are applicable. Louisiana Code of Civil Procedure Article 4501.

Mental incompetents

Article 1918 of the Louisiana Civil Code provides, "All persons have capacity to contract except unemancipated minors interdicts, and persons deprived of reason at the time of contracting."

Louisiana jurisprudence indicates that all parties are presumed to have capacity and that the burden of proof rests with the party alleging incapacity. *Meadors v. Pacific International Petroleum, Inc.*, 449 So.2d 26 (La. App. 1st Cir.), *writ denied*, 450 So.2d 964 (La. 1984). An interdict is a person who has been judicially declared incapable of caring for his own person or of administering his estate by reason of mental retardation, mental disability or other infirmity. Louisiana Civil Code Article 389. The court appoints a curator to care for the interdict and to administer his affairs with concurrence of an undercurator. The same procedures are generally followed with regard to obtaining a mineral lease covering the interdict's property as were discussed with regard to minors. Louisiana Code of Civil Procedure Article 4566.

J. Mineral Owners Who Cannot be Located

Receivership for mineral owner who cannot be located

Louisiana has no comparable receivership provisions to those discussed for Texas. By Act 513 of 1952, the legislature did authorize the State Mineral Board to execute a mineral lease covering property owned in indivision by more than 500 persons if the property had not been leased for over one year and any 50 of the co-owners requested in writing that such land be leased. Even this limited provision was repealed effective July 8, 1960 (Prior to repeal, these provisions were found at La. R.S. 30:181-85).

The Louisiana Mineral Code now provides that co-owners of land or co-owners of a mineral servitude, or their mineral lessees, may conduct mineral operations on the co-owned property if they own or have under lease at least an undivided 80 percent interest. Louisiana Mineral Code Articles 164 and 175. It is necessary, however, to "make every effort to contact the other co-owners and to offer to contract with them on substantially the same basis." Id. This feature of the Mineral Code was not added until 1986 (Act 1047), and the aggregate undivided interest necessary to act independently was first set at 90 percent and then lowered to 80 percent in Act 647 of 1988.

K. Public Entities

Cities, towns or other political subdivisions

Procedures for leasing are as set forth above for state agencies. The pertinent municipality or political subdivision may lease independently following the same procedures applicable to the State Mineral and Energy Board, or it may request the State Mineral Board to lease for it. La. R.S. 30:153, 158.

Minerals owned by the state

State Mineral and Energy Board. The State Mineral and Energy Board is the state agency charged with leasing state lands for mineral exploration and developing and administering the state's proprietary interest in minerals. La. R.S. 30:121(D), 124. The Board may also lease lands owned by various state agencies at the request of those agencies and must approve those mineral leases which other state agencies grant independently. La. R.S. 30:153, 158. Statutory powers and procedures relative to the State Mineral and Energy Board are set forth in Louisiana Revised Statutes, Title 30, Part II, beginning with Section 121.

Leasing procedures followed by the State Mineral and Energy Board. The leasing procedure is a three-step process consisting of application or nomination of a tract for lease, advertisement of that tract and bidding by prospective lessees on the tract. Once a producer has identified lands he would like to lease from the state, he must request in writing that this land be advertised for leasing by the Board. This is accomplished by submitting in triplicate a detailed description of the tract with an acreage approximation and a plat of the property to the assistant secretary of the Office of Mineral Resources. A nonrefundable certified check, cashier's check or bank money order in the amount of $400. must accompany each application. La. R.S. 30:125. Assuming the tract is recommended for leasing, it is then advertised in the official state journal and in the official journal in the parish in which the tract is located. The advertisements must appear not more than 60 days prior to the date for the opening of bids. La. R.S. 30:126. Lease sales are held monthly in the Department of Natural Resources building in Baton Rouge, La., generally on the second Wednesday of the month. At the lease sale, state leases are awarded through a process of receiving competitive bids in sealed envelopes. La. R.S. 30:127. Bids must meet certain minimum requirements. Rentals must be at least one-half of the initial cash payment. Royalties must be at least one-eighth. For school board lands, however, the minimum royalty is set at one-sixth. A certified check, cashier's check or bank money order must be enclosed for the amount of the bid, and a separate check equal to 10 percent of the cash payment is also required of the successful bidder as is a $20. per acre payment. Under present board policy, onshore leases will be executed for a primary term of three years and offshore leases will be granted for a primary term of five years. Board policy limits the amount of acreage that may be covered by one lease to a maximum of 2500 acres. State lands are leased on the Louisiana State Lease Form Revised 2000 with approved rider attached.

State lands. Navigatable water bottoms. Navigable water bottoms constitute the largest category of lands owned by the State of Louisiana. Such lands are considered public things that are inalienable. Louisiana Constitution Article IX, Section 3; Louisiana Civil Code Article 450. Louisiana, being a coastal state, also enjoys ownership of inland waters and lands covered thereby, which boundary has been fixed at 3 statute miles from the coastline. This 3-mile line has been established as the result of extensive, lengthy litigation. *See United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida*, 363 U.S. 1, 80 S.Ct. 961 (1960), and supplemental decrees found at 364 U.S. 502, 81 S.Ct. 258 (1960); 382 U.S. 288, 86 S.Ct. 419 (1965); 394 U.S. 11, 89 S.Ct. 773 (1969); 404 U.S. 388, 92 S.Ct. 544 (1971); 409 U.S. 17, 93 S.Ct. 1478 (1972); 420 U.S. 529, 95 S.Ct. 1180 (1975); 422 U.S. 13, 95 S.Ct. 2022 (1975). The law of navigable water bodies is well beyond the scope of this chapter. Suffice it to say that the State of Louisiana will likely claim ownership to the historic high water mark of a naturally navigable lake, to the current low water mark of a naturally navigable river or stream and to all lands in the vicinity of the open gulf directly affected by the ebb and flow of the tides.

There is no simple test of navigability in Louisiana. A reviewing court will generally require factual evidence that the water body in question has sufficient depth and width to float a boat of some size so as to allow the waterway to be used in commerce, e.g., *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906). Generally, the cases focus on navigability as of 1812 when Louisiana was granted statehood. Some question still exists as to the ownership of the bed of a water body that has become navigable since 1812, although one should expect the state of Louisiana to assert a claim to all such beds, particulary if the evidence establishes that the water body became navigable prior to the date the property was otherwise transferred into private ownership by the state. *See Vermilion Bay Land v. Phillips Petroleum*, 646 So.2d 408 (La. App. 4th Cir. 1994), *writ denied*, 650 So.2d 1176 (La. 1995). Beds of nonnavigable streams and lakes are private things and are subject to private ownership. Louisiana Civil Code Article 506. For rules concerning alluvion and avulsion, *see* Louisiana Civil Code Articles 499 through 505 and *State v. Placid Oil*, 300 So.2d 154 (La. 1974), *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784 (1975). If navigability is artificially created, for example, by dredging a canal on privately-owned lands, the private landowner does not lose ownership of the bed of such canal. In some cases, however, public access cannot be prohibited if, for example, the canal was created in part by means of diversion or destruction of preexisting naturally navigable waterways. *See Vermilion Corp. v. Vaughn*, 356 So.2d 551 (La. App. 3d Cir. 1978), *aff'd in part, and vacated and remanded in part*, 444 U.S. 206, 100 S.Ct. 399 (1979); *decision on remand* 387 So.2d 698 (La. App. 3d Cir. 1980), *reversed*, 397 So.2d 490 (La. 1981).

Louisiana has adopted a so-called "freeze statute" which maintains mineral, royalty and leasehold interests in lands whose ownership has changed as the result of the action of navigable water bodies. *See* La. R.S. 9:1151 and *Cities Service Oil and Gas Corp. v. State*, 574 So.2d 455 (La. App. 2d Cir.), *writs denied*, 578 So.2d 132, 134, 136, 137 (La.), *cert. denied*, *Gore v. Louisiana*, 502 U.S. 863, 112 S.Ct. 186 (1991).

School lands. Although the state of Louisiana commonly holds title to in-place sixteenth sections in trust for school purposes, those lands are administered by the respective parish school boards. La. R.S. 30:152. The school board may lease such lands independently or may request the State Mineral and Energy Board to lease for it. La. R.S. 30:152 and 153. The same is true with regard to lands owned by various state agencies rather than the state of Louisiana itself. Procedures to be followed are generally the same as set forth previously with regard to state lands with the added requirement that the State Mineral and Energy Board approve such leases. La. R.S. 30:155 through 158.

Other state lands. The state may hold title to lands by virtue of tax adjudications, expropriation proceedings and conventional sales and donations. Procedures for leasing such lands generally follow those set forth previously in this chapter.

Highway rights of way

Lands subject to a road right of way should be leased from the mineral owner. Surface operations on the right of way may be prohibited by the terms of the right of way instrument or simply based on practical considerations. If the road is owned in fee by a governmental entity, the same procedures set forth above for other state-owned lands are applicable.

Quasi-public land — Cemeteries, churches and other unincorporated associations

Cemeteries. Louisiana law appears to be generally similar to that of Texas. Note, however, that La. R.S. 8:901 prohibits use of a cemetery tract for prospecting, drilling or mining. Such tracts can be leased for mineral purposes if the lease contains a provision prohibiting any drilling or mining operations on the cemetery lands.

Churches. Churches may be nonprofit corporations, established pursuant to La. R.S. 12:201, *et seq.*, or unincorporated associations. In either case, mineral leases covering church property may be obtained in accordance with the church's charter and bylaws. If the church is an unincorporated association without applicable bylaws, leasing may be done in accordance with La. R.S. 9:1051.

Other unincorporated associations. If an unincorporated association has no applicable leasing provisions in its charter or bylaws, it may follow the procedures set forth in La. R.S. 9:1051. Such procedures require notice of a special meeting to be published on two separate days at least 15 days prior to the date of the meeting in the official journal of the parish in which a majority of the members reside or, if none, in a newspaper of general circulation in the parish. A resolution to lease may be adopted by the majority of the members of the association who vote on the resolution at the special meeting called and held for that purpose. The copy of the resolution and proof of publication must then be attached to each act effectuating the transaction.

L. Riverbeds and Streams

Navigable and non-navigable streams or rivers

See Section II.K. above under the state lands, navigable water bottoms headings.

III. INTERPRETATION OF PROVISIONS OF THE OIL AND GAS LEASE

A. Habendum Clause – Generally

General nature of the oil and gas lease

A mineral lease is defined in Louisiana Mineral Code Article 114 as being a contract by which the lessee is granted the right to explore for and produce minerals. A mineral lease is considered to be a real right and an incorporeal immovable which is alienable and inheritable. Louisiana Mineral Code Articles 16 and 18. In contrast to a mineral servitude or mineral royalty, a mineral lease is not subject to prescription of nonuse, but an oil and gas lease cannot be continued in effect for a period of more than 10 years without drilling operations or production. Mineral Code Article 115.

Doctrine of indivisibility

Louisiana law is the same or similar to that set forth for Texas. Louisiana Mineral Code Article 130 provides that a partial assignment or partial sublease does not divide a mineral lease. A division of the lease, with corresponding separate maintenance obligations, can result from an assignment of all of the lessee's rights to a segregated portion of the leased premises if language in the lease provides for this result. *See, e.g., Tyson v. Surf Oil Co.*, 195 La. 248, 196 So. 336 (1940).

Statutory Pugh (Termination) Clause

Louisiana has no requirement that private oil and gas leases contain a Pugh clause nor is such clause imposed by law. Pugh clauses are commonly included in commercial pooling leases or attached as a rider thereto. The legislature requires that all state leases executed by the State Mineral Board after August 1, 1991, contain a Pugh clause which will allow the lessee to maintain the lease as to outside unit acreage by payment of rentals for no more than two years beyond the primary term. *See* La. R.S. 30:129(B)(3) (added by Act 786 of 1991).

Requirement to file affidavit confirming production in paying quantities

Louisiana, just as Texas, has no statute requiring the recording of an affidavit confirming that an oil and gas lease has been maintained in effect by production in paying quantities. Thus, it is necessary to investigate drilling operations and production to determine whether a lease beyond its primary term has been maintained in effect. This is often done by research of the records of the Office of Conservation.

Statutory requirement to release an oil and gas lease

Unlike Texas, Louisiana law provides that the former owner of a mineral right which has terminated or expired shall, within 30 days after written demand, execute a recordable act of release. Louisiana Mineral Code Article 206(A). If a mineral lease is extinguished prior to expiration of its primary term, Louisiana law requires the former lessee to file a release within 90 days after its expiration (even if no written demand for release has been received). Louisiana Mineral Code Article 206(B). Failure to comply with the obligation to release exposes the defaulting party to liability for all damages resulting therefrom plus attorney's fees. Louisiana Mineral Code Article 207.

Note that Paragraph 7(c) of the lease form used by the State Mineral and Energy Board obligates the lessee to file for record an appropriate instrument of release within 90 days of expiration of the lease in whole or part. Violation of this provision triggers a penalty of $100. per day for each day of noncompliance. This penalty provision does not require that the state put the lessee in default by some written notice or demand for release

Termination cured by adverse possession by lessee

Mineral rights are not acquired by adverse possession apart from the land itself. Similarly, the fulfillment of a resolutory condition causing a mineral right to terminate will not typically be cured by adverse possession.

B. Production in "Paying Quantities"

General rule

Louisiana law appears to be similar to that of Texas with regard to production in paying quantities. Louisiana Mineral Code Article 124 provides that an oil and gas lease is considered to be producing 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. Mineral Code Article 125 further provides that in determination of whether production is in paying quantities, the amount of royalties being paid may be considered only insofar as may show the reasonableness of the lessee's expectation in continuing production. The amount need not be a serious or adequate equivalent for continuance of the lease as compared with the amount of the bonus rentals or other sums paid to the lessor. A reviewing court will generally require that production be such so as to enable the lessee to recover its operating costs over some period of time at a minimum. The comments to Mineral Code Article 124 specifically look to *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684 (1959) for guidance.

Operating expenses

It appears that Louisiana law is similar to that of Texas. Expenses attributable to drilling, equipping, reworking and recompleting a well are generally excluded from the determination of paying quantities. Properly included expenses include such normal monthly operating expenses as the expenses of pumpers, gaugers, electricity and other fuel costs. *Noel Estate, Inc. v. Murray*, 223 La. 387, 65 So.2d 886 (1953); *Lege v. Lea Exploration Co., Inc.*, 631 So.2d 716 (La. App 3d Cir.), *writ denied*, 635 So.2d 1112 (La. 1994); *C.C.H., Inc. v. Heard*, 410 So.2d 1283 (La. App. 3d Cir. 1982). *See also, Edmundson Brothers Partnership v. Montex Drilling Co.*, 731 So.2d 1049 (La. App. 3d Cir. 1999), and related case, *Edmundson Bros. Partnership v. Montex Drilling Co.*, 672 So.2d 1061 (La. App. 3d Cir. 1996).

C. Shut-In Gas Clause

General rules

Principles in Louisiana appear to be similar to those stated for Texas. The characterization of shut-in payments as either rentals or royalties depends upon language in the lease form itself. Generally, in South Louisiana lease forms, shut-in payments are treated as rentals and must be paid timely in order to maintain the lease. In some lease forms in use in North Louisiana, shut-in payments may be characterized as royalties. In such case, absent any language in the lease to the contrary, failure to pay timely or properly would not result in automatic termination of the lease but rather would require the lessor to put the lessee in default by written demand in the same manner and with the same remedies provided for late payment of royalties. *See* Louisiana Mineral Code Articles 137 through 142.

The shut-in provisions in lease forms in common use in Louisiana contain a fair amount of variation. Generally, such provisions allow the lease to be maintained by shut-in payments only if the well on the leased premises, or acreage pooled therewith, is capable of producing gas in paying quantities. The provision may further restrict payments to those cases in which lessee is not producing the shut-in well for lack of market. If the shut-in provision is not broad enough to cover the situation in question, the lessee may have to rely upon any *force majeure* provision contained in the lease for continued maintenance of the lease.

Amount of shut-in gas royalty

Particularly in South Louisiana lease forms, shut-in payments are calculated at the same rate as delay rentals. Some old lease forms provide for payment of a fixed amount per well per year to maintain the lease. Louisiana has no statute comparable to that of Texas by which wells are classified as either oil wells or gas wells. The Office of Conservation does classify wells according to whether the hydrocarbons in the producing reservoir exist in a liquid or gaseous state as determined by various tests and analyses. This determination would certainly be persuasive, if not controlling, in the event the shut-in provision specifically applies only to gas wells.

D. Temporary Cessation of Production

Common law rule

Louisiana law is sparse on this point but may follow Texas law. *See Tyson v. Surf Oil Co.*, 195 La. 248, 196 So. 336 (1940).

Lease provision

Cessation of operations or production provisions in common use in Louisiana appear to be similar to those used in Texas.

E. Delay Rental Clause

General rule

The standard delay rental provision and its interpretation appear similar to that set forth for Texas.

Permitted excuses for faulty payment

As indicated for Texas, Louisiana courts have often exhibited little tolerance for lessee's failure to strictly comply with the terms of the lease, particularly is this true in some of the early cases, *e.g., Rushing v. Griffin*, 240 La. 31, 121 So.2d 229 (1960); *Johnson v. Smallenberger*, 237 La. 11, 110 So.2d 119 (1959); *Atlantic Refining Co. v. Shell Oil Co.*, 217 La. 576, 46 So.2d 907 (1950). In certain cases, however, Louisiana courts have maintained the lease in spite of the lessee's failure to strictly comply with the delay rental provision. For example, in *Jones v. Southern Natural Gas Co.*, 213 La. 1051, 36 So.2d 34 (1948), the court upheld a lease even though the lessee improperly calculated the number of acres covered by the lease insofar as partially assigned to it in the absence of any complaint by the lessor for in excess of one year. In *Baker v. Potter*, 223 La. 274, 65 So.2d 598 (1952), the court refused to attribute fault of the transmitting agency, Western Union Telegraph Company, to the lessee for belated delivery of the rental payment to the depository bank. In *Calhoun v. Gulf Refining Co.*, 235 La. 494, 104 So.2d 547 (1958), the court refused to cancel the lease based upon the lessor's complaint that the lessee paid more than was due. In *Richard v. Tarpon Oil Co.*, 269 So.2d 261 (La. App. 3d Cir. 1972), *writ denied*, 271 So.2d 262 (La. 1973), lessee timely mailed the rental payment to the depository bank in the proper amount; however, in the letter of instruction accompanying the check, the lessee incorrectly stated that the check should be deposited to the credit of the lessor in his capacity as curator. Lessor noticed that the check had been incorrectly credited to his fiduciary account but did not notify the lessee until after the rental paying date. The court upheld the lease, concluding that the lessor was under a duty to inform the lessee of the mistake without undue delay. The court held that the lessor's failure to do so effectively estopped him from obtaining forfeiture of the lease. As mentioned with regard to Texas law, a ratification containing "lease and let" language reviving and reinstating the lease would cure an untimely or improper delay rental payment.

Modification of delay rental requirement — Change a condition into a covenant

The author is not aware of this practice being followed by lessees in Louisiana. On small tracts where rental payments would be quite low, the examiner has noticed the tendency to obtain leases on paid-up lease forms.

F. Definition of Operations

General rule

Louisiana law appears to be similar to that of Texas. If only commencement of drilling operations is required by the lease, substantial preparatory activities followed by actual spudding of the well without undue delay will likely be sufficient to maintain the lease. *See, e.g., Breaux v. Apache Oil Corp.*, 240 So.2d 589 (La. App. 3d Cir. 1970).

Obstruction doctrine or lockout rule

Louisiana law seems to be the same or similar to that of Texas. Under Louisiana Mineral Code Articles 59 and 60 dealing with mineral servitudes and Articles 98 through 100 dealing with mineral royalties, it is specifically provided that an obstacle which prevents the owner of the mineral right from using it suspends prescription so long as the obstacle remains. For examples of the application of the obstruction doctrine in the context of mineral servitudes, *see Corley v. Craft*, 501 So.2d 1049 (La. App. 2d Cir.), *writ denied*, 503 So.2d 18 (La. 1987); *Hall v. Dixon*, 401 So.2d 473 (La. App. 2d Cir. 1981).

G. Pooling

Reasons for pooling

Pooling is sometimes used interchangeably with unitization. It may also be used in connection with the conventional cross-conveyances by which mineral rights of two or more owners are combined so that the combined properties may thereafter be explored and developed as a unit and benefits proportionately shared by the contributing owners. Insofar as unitization is concerned, in Louisiana, units generally fall into three categories: compulsory units, created by the Commissioner of Conservation; declared units, created by declaration under the terms of mineral leases giving the lessee pooling power; and voluntary units, created by agreement of all parties having an interest in the mineral rights and land included within the unit.

Voluntary, compulsory or both

Commissioner's units. Insofar as compulsory drilling units are concerned, the Commissioner of Conservation is authorized to prevent waste and the drilling of unnecessary wells by establishing a drilling unit or units for each pool. La. R.S. 30:9(B). This can be done prior to drilling the proposed unit well, while drilling or after the well has been completed. The Commissioner has issued rules of procedure by which establishment of such units is accomplished. In summary, an applicant must file a pre-application notice at least 20 days before the application is filed and schedule a conference should any party at interest request it. At the pre-application conference, the applicant is required to present geological and engineering bases for the unit that the applicant is requesting. After the application is filed, and any counterplans by opponents, a hearing is scheduled before the Commissioner and his staff. At the hearing, the applicant establishes with exhibits and testimony of witnesses the following matters: the well (if already drilled) is completed in a certain defined sand and producing or capable of producing oil or gas; the proposed unit or units are entirely underlain by the productive sand; that the unit is reasonable and equitable for all concerned; and that a single well will efficiently and economically drain the unit. Generally within about 30 days after the hearing, the Commissioner will issue an order establishing the unit.

The Commissioner of Conservation has issued a series of statewide orders to implement his statutory powers of preventing waste and the drilling of unnecessary wells, minimizing reasonably avoidable net drainage, giving each producer the opportunity to produce his just and equitable share of unit production and protecting correlative rights of all parties owning an interest in the reservoir. The Commissioner sets allowables regulating production from each pool. *See* Statewide Order Nos. 151-A-1, 45-I and 29-F. The Commissioner also regulates the spacing of wells. In the absence of special field rules or exemptions, oil wells drilled below 3,000 feet must be located no closer than 330 feet from any property line and 900 feet from any well completed in, drilling to or permitted for the same pool. Gas wells must not be located closer than 330 feet from any property line, nor closer than 2,000 feet from any well completed in, drilling to or permitted for the same pool. *See* Statewide Order No. 29-E.

Declared units. Declared units are created pursuant to the pooling power commonly granted the lessee in commercial pooling lease forms. These provisions must be strictly complied with. As illustrated in several early cases, reliance upon declared units for lease maintenance purposes is risky. For example, in *Union Oil Co. of California v. Touchet*, 229 La. 316, 86 So.2d 50 (1956), the court held that a declared unit was invalid because one of the mineral leases affecting lands included within the unit did not contain a provision authorizing the creation of a unit by declaration. This lease was amended to add a pooling provision but after the primary term of the subject lease had expired. Other examples of the lessee's pooling power being narrowly interpreted by the courts are *Wilcox v. Shell Oil Co.*, 226 La. 417, 76 So.2d 416 (1954) and *Mallett v. Union Oil and Gas Corp. of La.*, 232 La. 157, 94 So.2d 16 (1957). In *Wilcox*, the court, interpreting the pooling provision in the lease, held that the lessee's pooling power did not extend to the creation of a declared unit after the unit well had been drilled and completed as a producer. In *Mallett*, the court held that the pooling provision in the lease did not allow the lessee to pool the leased premises with producing property.

Voluntary units. Voluntary units can be created by agreement of all mineral, royalty, overriding royalty and working interest owners. So long as all parties agree, the unit can be made any size or shape, participation percentages can be established in any manner and the unit can be given any other legal consequences the parties desire.

Unleased mineral owner within the pooled unit

A valid declared unit could not be created which affects the interest of an unleased mineral owner. A voluntary unit agreement could provide that it is binding on all parties who sign whether or not all interested owners join in. If the mineral owner's interest is in the drillsite tract, however, his share of production could not be diluted by virtue of the voluntary unit agreement which he did not sign. If an unleased mineral owner is included in a compulsory unit and does not participate in the drilling of the unit well, he is not entitled to receive any share of production or proceeds therefrom until the unit operator recovers the cost of drilling, completing, equipping and operating such well. This right to recover the unleased mineral owner's proportionate share of costs out of production can be lost by failure of the operator to timely respond to the mineral owner's request for a sworn detailed, itemized statement of the cost of drilling operations. *See* La. R.S. 30:103.1 and 103.2.

Miscellaneous pooling issues

In addition to the definitions of voluntary, declared and compulsory units listed previously, other specialized references to various types of units include the following:

Drilling unit. In La. R.S. 30:9(B), a drilling unit is defined as the maximum area which may be efficiently and economically drained by one well. In many oil and gas pools in Louisiana, more than one well is needed for effective drainage of the entire pool and, therefore, the Commissioner often establishes multiple drilling units for each pool or subsequently approves the drilling of alternate unit wells to service the unit.

Reservoir-wide unit. A reservoir-wide unit is a unit established for any pool by the Commissioner of Conservation under the provisions of La. R.S. 30:5(C). A pool is defined in La. R.S. 30:3(6) as an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both. Unlike drilling units, a reservoirwide unit cannot be created unless three-fourths of the owners in interest have executed a unit agreement approving formation of the unit and the participation formula by which unit production is to be shared. La. R.S. 30:5(C)(2)(d).

Deep well unit. By Act 1094 of 1999, the Louisiana Legislature enacted La. R.S. 30:5.1, giving the Commissioner the power to establish a single unit larger than can be efficiently drained by one well but without the requirement to obtain three-fourths approval of the owners in interest. This type of unit can only be established for wells completed in reservoirs encountered below a true vertical depth of 15,000 feet. The Commissioner must find that the proposed unit operation is economically feasible, the limits of the reservoir are reasonably established and the plan of development for the unit is reasonable. If the reservoir could be efficiently drained by one well, the operator could simply request and receive a single drilling unit. These deep pool units contemplate multiple wells on the unit drilled in accordance with a schedule of development. Unlike reservoir-wide units under La. R.S. 30:5, participation in unit production must be on a surface acreage basis.

Coal seam natural gas units. By Act 892 of 2004, the Louisiana Legislature added 30:5.2 governing the creation of coal seam natural gas units. This statute allows the Commissioner of Conservation to set up units within coal seam natural gas producing areas which are larger than can be efficiently and economically drained by a single well. The statute has not been frequently used, but units on the order of 5000 acres have been established in Riverton and Northeast Cuba Church Fields, principally operated by Southwestern Energy Production Company.

H. Calculation and Payment of Royalties

Meaning of a "market value" gas royalty clause

A market value royalty clause in Louisiana has generally been interpreted in a manner which limits the lessor to a fraction of the amount received by the lessee assuming no breach of the lessee's implied obligation to market prudently. In *Henry v. Ballard & Cordell Corp.*, 418 So.2d 1334 (La. 1982), the Louisiana Supreme Court determined that the lessor had been properly paid a fraction of the amount received by the lessee under a long-term gas sales contract. The court recognized that this amount was less than the price available under gas sales contracts currently being executed. The court, however, noted that the long-term gas contract was prudent at the time it was executed. In *Shell Oil Co. v. Williams, Inc.*, 428 So.2d 798 (La. 1983), market value was determined to be current market value rather than market value at the time the gas sales contract was entered into. The Louisiana Supreme Court, however, held that market value must be determined by comparable sales in quality, including legal characteristics of the gas, and found intrastate and interstate gas not comparable in quality. Thus, the lessee was again allowed to account to the royalty owner on the basis of the price received. Following this notion that the lease is a cooperative venture entered into for the mutual benefit of both lessor and lessee, the Louisiana Supreme Court held that take-or-pay payments received by the lessee are royalty bearing and must be shared with the lessor. *Frey v. Amoco Production Co.*, 603 So.2d 166 (La. 1992).

Items of expense deducted from royalty payment/post-production costs (PPCs)

Louisiana law appears generally similar to Texas. Certain post-production costs are proportionately borne by lessor and lessee in the absence of a provision in the lease or other agreement to the contrary:

a. Gross production and severance taxes - *Sartor v. Union Carbon Co.*, 183 La. 287, 163 So. 103 (1935); *Wright v. Imperial Oil & Gas Products Co.*, 177 La. 482, 148 So. 685 (1933);
b. Transportation - *Wall v. United Gas Public Service Co.*, 178 La. 908, 152 So. 561 (1934);
c. Treatment and dehydration - Compare *Freeland v. Sun Oil Co.*, 277 F.2d 154 (5th Cir.), *cert. denied*, 364 U.S. 826 (1960);
d. Extraction of liquids - *Freeland v. Sun Oil Co.*, 277 F.2d 154 (5th Cir.), *cert. denied*, 364 U.S. 826 (1960); *Crichton v. Standard Oil Co. of La.*, 178 La. 57, 150 So. 668 (1933);
e. Compression costs - *Merritt v. Southwestern Electric Power Co.*, 499 So.2d 210 (La. App. 2d Cir. 1986).

Certain ordinary and customary costs for gathering, handling, treating, separating, dehydrating and processing performed on the lease are generally not deductible based on either industry custom or specific language in the lease. Note also that even if an expense falls within a category that is otherwise deductible under the lease form in question, both the amount of the expense and the manner in which that expense is allocated to the lessor must be justifiable. The lessee is under an implied obligation to prudently market for the mutual benefit of the lessor and lessee. *See* Louisiana Mineral Code Article 122, and official comments thereunder. Many custom form leases contain complicated royalty provisions which deny or restrict deduction of various costs from calculation of royalty payments to the lessor.

Implied covenant to market

As is the case under Texas law, a Louisiana lessee is under an implied obligation to diligently market for the mutual benefit of lessor and lessee. *See* Louisiana Mineral Code Article 122 and the comments thereunder.

Methods by which royalties are calculated

Louisiana, like Texas, follows the tract allocation method of calculating royalties whereby a lessee accounts to his lessor based upon the gas sales contract under which his share of production is sold. *See Arkansas Louisiana Gas Co. v. Southwest Natural Production Co.*, 221 La. 608, 60 So.2d 9 (1952). Thus, a lessee pays only his own lessors based on his contract price, not some weighted average of all contract prices in the unit. In a unit in which production is being sold by some lessees, but not all, the question arises whether a non-selling lessee may await actual sales before paying royalties to his lessors (payment based on "takes" versus "entitlements"). Although somewhat unsettled in Louisiana, it is likely that a lessee must pay royalties out-of-pocket to his lessor on the allocated share of unit production attributable to his lessor's tract which is saved and sold by any working interest owner in the unit in accordance with the provisions of the applicable lease. *See* La. R.S. 30:10(A)(d) and *Amoco Production Co. v. Thompson*, 516 So.2d 376 (La. App. 1st Cir. 1987), *writs denied*, 520 So.2d 118 (La. 1988). It may be difficult for the lessee to determine the proper price basis to account to royalty owners in advance of actual sales, particularly if the non-selling lessee has no gas sales contract.

When royalties are due and penalties for late payment

Article 123 of the Louisiana Mineral Code provides that a lessee is obligated to make timely payment of royalties according to the terms of the lease or the custom of the industry if the lease is silent. Most commercial lease forms in Louisiana do not provide for a specific due date. In this situation, the lessee is obligated to pay royalties within a reasonable time after production is obtained in accordance with the custom of the industry. Assuming no title disputes or unforeseen complications, the lessee might be expected to pay royalties to his lessor within 90 to 120 days after initial production commences if the well is producing on a lease basis and monthly thereafter. In the event of unitization, longer delays may be experienced because the Commissioner must issue an order establishing the unit, and then the unit must be accurately surveyed in order to determine each tract's allocated share of production. *See, e.g., Hilliard v. Amoco Production Co.*, 688 So.2d 1176 (La. App. 3d Cir. 1996).

The Mineral Code provides a statutory framework by which a lessor may place a lessee in default for untimely payment of royalties. *See* Louisiana Mineral Code Articles 137 through 142. If the lessee fails to pay royalties found to be due or fails to inform the lessor of a reasonable cause for failure to pay within 30 days of receipt of written demand therefor, the court may award as damages double the amount of royalties due, interest on that sum from the date due and a reasonable attorney's fee. Louisiana Mineral Code Article 140. Dissolution of the lease is not a favored remedy and is properly granted only if the remedy of damages is deemed inadequate to do justice. Louisiana Mineral Code Article 141. Assuming the lessee pays within 30 days in response to the notice, damages are limited to legal interest on the royalties computed from the date due and a reasonable attorney's fee if such interest is not paid within 30 days of written demand therefor unless the lessee's original failure to pay royalties was either fraudulent or willful and without reasonable grounds. Louisiana Mineral Code Article 139.

Are take-or-pay proceeds royalty bearing?

In *Frey v. Amoco Production Co.*, 603 So.2d 166 (La. 1992), the Supreme Court of Louisiana decided unanimously that take-or-pay payments were royalty-bearing under the facts presented. The court stated that the lease is a cooperative venture between the lessor and lessee, and the economic benefits flowing therefrom should be divided by the parties in the proportions set forth in the royalty clause absent specific language to the contrary. Under the broad rationale used by the court in reaching its decision, one should expect that take-or-pay payments will be found royalty-bearing in most factual situations.

IV. OTHER TOPICS

A. Seismic Activity

Who has the right to conduct or authorize seismic tests?

The same general rules as set forth for Texas likely apply in Louisiana. Some uncertainty has been injected into Louisiana law regarding the need to obtain the surface owner's consent to seismic activities in addition to the mineral owner's consent by the case of *Jeanes v. G.F.S. Co.*, 647 So.2d 533 (La. App. 3d Cir. 1994), *writ denied*, 650 So.2d 255 (La. 1995). In that case, the court stated that in order to conduct seismic operations the operator "needed the consent of the owner of the land irrespective of who owned the mineral rights." *Id.*, at 535. The reasoning of the case is questionable, and certain legislative changes have been made, including amendment of Mineral Code articles 166 and 175 and La. R.S. 30:217, designed to clarify that the surface owner's consent is not required. Whether these amendments fully accomplished this purpose is still somewhat uncertain. At a minimum, however, the surface owner would be allowed to recover his damages that were caused by such operations. Seismic and other geophysical operations are exploration activities which must be conducted by the mineral owner or his lessees, licensees, etc. *See Musser Davis Land Co. v. Union Pacific Resources*, 201 F.3d 561 (5th Cir. 2000).

Does the lease grant the exclusive right to conduct seismic tests?

Louisiana law appears similar to that of Texas on this point. *Musser Davis Land Co. v. Union Pacific Resources*, 201 F.3d 561 (5th Cir. 2000). In *Musser Davis*, the plaintiff had executed a special form mineral lease. The granting language in the lease was fairly typical, however, and the lessee was given the exclusive right to explore for minerals. The lease was silent as to the lessee's right to conduct seismic operations on the leased premises. The court held that, absent language in the lease to the contrary, the lessee's right to conduct prudent and reasonable seismic operations on the leased premises was implicitly included in the exclusive right to explore expressly granted to the lessee in the mineral lease. Much to the relief of many in industry, this case reversed the decision of the federal district court which had ruled to the contrary in an unpublished decision. *Musser-Davis Land Co. v. Union Pacific Resources*, 1998 WL 1115016 (W. D. La. 1998). Further, the Fifth Circuit held that seismic data developed by the lessee in the exercise of its prudent and reasonable geophysical operations is owned by the lessee.

Liability for wrongfully condemning land

The measure of damages is unsettled in Louisiana. Damages must be proved with sufficient certainty to be legally recoverable. *See Tinsley v. Seismic Explorations*, Inc., 239 La. 23, 117 So.2d 897 (1960).

B. Surface Issues

General rule as to payment; Surface Damage Act

With regard to payment of damages to the surface owner for drilling operations, Louisiana law appears to be similar to that of Texas. Absent a contractual breach, the mineral lessee is held to the standard of a reasonably prudent operator who must exercise his rights with due regard to the rights of others, including the surface owner. Liability could be imposed on the lessee if it is determined by a reviewing court that the lessee is using more of the surface than reasonably required for lessee's operations, *e.g., Edwards v. Jeems Bayou Production Co.*, 507 So.2d 11 (La. App. 2d Cir. 1987); *Broussard v. Waterbury*, 346 So.2d 1342 (La. App. 3d Cir.), *writ denied*, 350 So.2d 674 (La. 1977); *Rohner v. Austral Oil Exploration Co.*, 104 So.2d 253 (La. App. 1st Cir. 1958). Note, however, that the mineral lessee cannot always escape liability for damages sustained by others as the result of lessee's operations even though such operations are conducted in a careful, non-negligent manner. *See Butler v. Baber*, 529 So.2d 374 (La. 1988) (oyster lessees granted recovery against mineral lessees despite exercise of care and prudence on the part of the mineral lessees), as modified and limited by *Inabnet v. Exxon*, 642 So.2d 1243 (La. 1994).

Substantial authority exists for the position that an implied obligation to restore the leased premises exists in Louisiana. *See*

Louisiana Civil Code Articles 2719 and 2720, Louisiana Mineral Code Article 122 and comments thereunder; *Wemple v. Pasadena Petroleum Co.*, 147 La. 532, 85 So. 230 (1920); *Smith v. Schuster*, 66 So.2d 430 (La. App. 2d Cir. 1953). The most recent expression of the Louisiana Supreme Court restricts the lessee's implied restoration obligation to those cases in which the use was either excessive or unreasonable. *Terrebonne Parish School Board v. Castex Energy, Inc.*, 893 So.2d 789 (La. 2005). If there is an express restoration obligation in the lease, a reviewing court may require the lessee to incur costs or pay damages in an amount many times the current market value of the leased premises to accomplish restoration. *See, e.g., Corbello v. Iowa Production*, 850 So.2d 686 (La. 2003) (involving restoration under a surface lease). This is a rapidly developing area of law with numerous pending suits involving old "legacy" oil field sites. A detailed examination of this topic is beyond the scope of this presentation. Note that a mineral servitude owner is under an express statutory obligation to restore the surface of the servitude tract to its original condition at the earliest reasonable time. *See* Louisiana Mineral Code Article 22.

Lessee's right to use the surface, water, etc.

Louisiana law appears to be similar to that set forth for Texas. A mineral lessee must exercise his rights with reasonable regard for the rights of others and conduct his operations as a reasonably prudent operator. Louisiana Mineral Code Articles 11 and 122. For an interesting application of this same standard to a mineral lessee's attempted exercise of surface use rights pertaining to adjacent or adjoining lands, *see Caskey v. Kelly Oil Co.*, 737 So.2d 1257 (La. 1999) (such rights expressly granted in the mineral lease could be exercised without lessee's making a showing that such use was mutually beneficial to both lessee and lessor).

Obstruction doctrine

Louisiana law is similar to that set forth for Texas. Procedural rights and remedies for a mineral owner generally include real actions available to a landowner. *See* Louisiana Mineral Code Article 12, the cases cited thereunder, and Louisiana Code of Civil Procedure Articles 3664 through 3671. *See also Foscue v. Mitchell*, 185 La. 963, 171 So. 91 (1936); *Gibbs v. Southern Carbon Co.*, 171 So. 587 (La. App. 2d Cir. 1937).

Accommodation doctrine

A separate and discrete accommodation doctrine is not recognized in Louisiana; however, the prior use of the property by the surface owner may be one factor a reviewing court would consider in allowing both the surface owner and the mineral lessee to exercise their rights with due regard for the rights of the other owner.

C. Severance of Title from the State (Patents)

Severance materials, information and documents relating to lands owned by the state of Louisiana are housed and maintained in the State Land Office, P. O. Box 44124, Baton Rouge, LA 70804. Patents issued by the state of Louisiana are subject to a statute of repose requiring annulment actions to be filed within six years of issuance of the patent. La. R.S. 9:5661. As has been mentioned above, the state of Louisiana holds title to naturally navigable water bodies and the beds thereof, and title to same is inalienable. Louisiana Constitution Article IX, Section 3. The statute of repose does not operate to confirm title to navigable water bodies in private owners. *Gulf Oil Corporation v. State Mineral Board*, 317 So.2d 576 (La. 1974). It should be noted that, since adoption of the 1921 Constitution, the state of Louisiana has been prohibited from conveying minerals under lands it owns with the exception of tax lands redeemed by the tax debtor. Thus, it is important to establish that the land in question was properly severed from the state prior to 1921. In conveyances after 1921, minerals are reserved to the state. This mineral reservation need not be express. Article IX, Section 4 of the 1974 Constitution provides in pertinent part as follows:

a. The mineral rights on property sold by the state shall be reserved except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes.
b. Lands and mineral interests of the state, of a school board or of a levee district shall not be lost by prescription.

D. Recording Acts

Nature of the oil and gas lease for recording purposes

Mineral leases, as is the case with other mineral rights, are real rights, and recording rules applicable to mineral rights are the same as for land. Louisiana Mineral Code Articles 16 and 18.

Effect of not recording

Any contract or agreement affecting mineral rights must be in writing and must be recorded in the parish in which the property is located to affect third parties. Louisiana Civil Code Articles 1839 and 3338. Louisiana Civil Code Article 3338 provides:

> The rights and obligations established or created by the following written instruments are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title:
>
> 1. An instrument that transfers an immovable or establishes a real right in or over an immovable.
> 2. The lease of an immovable.
> 3. An option or right of first refusal or a contract to buy, sell or lease an immovable or to establish a real right in or over an immovable.
> 4. An instrument that modifies, terminates or transfers the rights created or evidenced by the instruments described in Subparagraphs (1) through (3) of this Article.

Note that general provisions concerning recordation have been gathered in the Louisiana Civil Code at Articles 3338 through 3353.

An unrecorded instrument would affect parties to the instrument, their heirs and parties who assume the obligation or contract. Unlike Texas, the fact that a third party has actual notice of an instrument does not make it binding on him. *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909). The public records doctrine in Louisiana is negative in nature; i.e., a third party is entitled to ignore those unrecorded instruments and interests which, under law, are required to be recorded. Third parties are not allowed to affirmatively rely upon recorded but legally ineffective or invalid instruments.

Doctrine of bona fide purchaser

This concept is not part of the Louisiana public records doctrine. As mentioned, actual notice of an unrecorded claim does not make it binding on the third party with knowledge. According to Louisiana Civil Code Article 3343, protection afforded by the Louisiana public records doctrine extends to third parties who are distinguished in the following manner:

a. A third person is a person who is not a party to or personally bound by an instrument.
b. A witness to an act is a third person with respect to it.
c. A person who by contract assumes an obligation or is bound by contract to recognize a right is not a third person with respect to the obligation or right or to the instrument creating or establishing it.

The notion of good faith is relevant to establishing a prescriptive title to land by possession for 10 years. *See* Louisiana Civil Code Article 3480 and 3482. In connection with this type of acquisitive prescription, constructive notice and notice sufficient to excite further inquiry are important concepts and appear to be used in a fashion similar to that mentioned before for Texas. *See, e.g., Thibodeaux v. Quebodeaux*, 282 So.2d 845 (La. App. 3d Cir. 1973); *Dinwiddie v. Cox*, 9 So.2d 68 (La. App. 2d Cir. 1942). Also, additional protection is sometimes afforded third parties who acquire by onerous title as opposed to gratuitous title. *See, e.g.*, Louisiana Civil Code Articles 1264, 1498, and 2342.

Instruments that are void or voidable even if recorded

As mentioned, Louisiana public records doctrine does not afford protection to third parties who affirmative rely upon recorded instruments that are invalid or defective in some manner. Examples of such instruments are as follows:

Forgery. Same as Texas. *See Succession of Rosinski*, 158 So.2d 467 (La. App. 3d Cir. 1963).

Mistaken identity. Article 2452 of the Louisiana Civil Code provides that the sale of a thing belonging to another person is null.

Agent without authority. *E.g., Tedesco v. Gentry Development, Inc.*, 521 So.2d 717 (La. App. 2d Cir. 1988), *aff'd*, 540 So.2d 960 (La. 1989); *East Bank Realty, Inc. v. Robert*, 411 So.2d 500 (La. App. 1st Cir. 1982); *Fleming v. Romero*, 342 So.2d 881 (La. App. 3d Cir.), *writ denied*, 345 So.2d 50 (La. 1977).

Note that the lack of authority is a defect that one of the parties may raise, and the contract may be ratified by the purported principal. *Marchand v. Armstrong*, 354 So.2d 581 (La. App. 4th Cir. 1977), *writ denied*, 355 So.2d 254, 255 (La. 1978). Additionally, the doctrine of apparent authority may be applicable in special circumstances as discussed in *Tedesco v. Gentry Development, Inc.*, 540 So.2d 960 (La. 1989). Also, note the curative effect of the five-year liberative prescription applicable to actions to set aside a sale by a corporation on the ground the corporate officer or agent signing the sale was not authorized to do so provided for in La. R.S. 9:5646. With regard to powers of attorney, see Section II.D. above.

Minority. A contract made by an unemancipated minor is relatively null or voidable by him or his legal representative. Louisiana Civil Code Article 1919. An action for annulment must be brought within five years from the date the minor reaches majority. Louisiana Civil Code Article 2032. Note certain exceptions exist with regard to annulment, including contracts made for the purpose of providing the minor with something necessary for his support or education or a purpose related to his business (Louisiana Civil Code Article 1923); contracts in which the minor represented his majority and the other contracting party reasonably relied upon the minor's representation (Louisiana Civil Code Article 1924); and where, for example, a third party has acquired by onerous title in good faith from the minor's transferee (Louisiana Civil Code Article 2035).

Mental incompetence. Generally the same as for minority. *See* Louisiana Civil Code Articles 1919 through 1921, 1925 and 1926, 2029 through 2035.

Absolute nullities. Article 2030 of the Louisiana Civil Code provides that a contract is absolutely null when it violates a rule of public order. Such contracts cannot be confirmed.

Defective form. Certain contracts must be in a particular form to be valid. For example, a will must be in a form recognized under Louisiana law. Louisiana Civil Code Articles 1570 through 1583. A donation inter vivos must be in authentic form (i.e., executed before a notary and two witnesses). Louisiana Civil Code Article 1536.

Fraudulent cancellation of recorded mortgage. *Gallagher v. Conner*, 138 La. 633, 70 So. 539 (1915).

Priority of recording

Louisiana is a pure "race" jurisdiction. The first person to record his interest of record prevails over a party holding under a subsequently recorded instrument even if it was previously executed. As mentioned previously, instruments affecting immovable property are binding on third parties only from the time the instrument is filed in the parish records, *e.g.*, Louisiana Civil Code Article 1839 *(An instrument involving immovable property shall have effect against third persons only from the time it is filed for registry in the parish where the property is located)*; Louisiana Civil Code Article 2442 *(The sale of any immovable made under private signature, shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered according to law, and the actual delivery of the thing sold took place)*; Louisiana Civil Code Article 3347 *(The effect of recordation arises when an instrument is filed with the recorder and is unaffected by subsequent errors or omissions of the recorder. An instrument is filed with a recorder when he accepts it for recordation in his office.)*.

E. Important Conveyancing Rules

Duhig Rule (Overconveyance)

The same rule applies as in Texas. *See Dillon v. Morgan*, 362 So.2d 1130 (La. App. 2d Cir. 1978).

Reference to "interest conveyed" v. "land described"

The writer is not aware of a case directly on point. Certainly a reviewing court would attempt to discern the common intent of the parties. *See* Louisiana Civil Code Articles 2045 through 2057 for general rules concerning interpretation of contracts.

Effect of a large non-participating royalty

The term "royalty" is used in different ways in Louisiana. A mineral royalty, as defined in Louisiana Mineral Code Article 80, exists separate and apart from any mineral lease covering lands burdened by the royalty. Royalty is also defined in Mineral Code Article 213(5) as an interest in production, or its value, accruing under the terms of a mineral lease. If a large fractional royalty interest is created prior to the recordation of a current oil, gas and mineral lease, the mineral lessee should have the royalty deed amended to provide for a fractional interest in the royalties accruing to the lessor under the mineral lease. Because of ambiguous language in the grant, it may also be unclear whether the royalty interest is intended to survive expiration of the particular mineral lease. All such ambiguities should be eliminated in the corrective instrument.

"Strip and Gore" Doctrine and the "Mother Hubbard" Clause

Louisiana law appears similar to that of Texas. *See, e.g., Farrell v. Hodges Stock Yards, Inc.*, 333 So.2d 745 (La. App. 4th Cir. 1976), *reversed* on other grounds, 343 So.2d 1364 (La. 1977); *Welsh Southern Oil Co., Inc. v. Scurlock Oil Co., Inc.*, 201 So.2d 376 (La. App. 3d Cir. 1967). A reviewing court attempts to discern the common intent of the parties, and a particular case may turn on its peculiar facts and circumstances. It is not uncommon that a question may exist whether the earlier grant of a road, canal or railroad was in fee or merely a servitude. Also take note of a related question regarding whether use of "bounded by" references to adjoining canals, roads and railroads in the description are sufficient to convey the grantor's interest in and under same. A statutory presumption in favor of the grantee is contained in La. R.S. 9:2971. This statutory presumption does not apply to grants made prior to August 1, 1956. *See State Through Department of Highways v. Tucker*, 247 La. 188, 170 So.2d 371 (1964).

Conveyance of mineral acres or royalty acres instead of an undivided interest

Grants made exclusively in terms of mineral acres or royalty acres are not that common in Louisiana. Typically a grant will be in terms of a fraction of eight-eighths or a fraction of the grantor's interest. When ambiguities arise because of inconsistencies in the use of both fractional interests and mineral or royalty acres, the court attempts to discern the common intent of the parties. For examples of litigation arising out of the use of mineral or royalty acres, *see Callon Royalty Fund-1980 v. Walker*, 461 So.2d 621 (La. App. 1st Cir. 1984); and, *Thibodeaux v. American Land & Exploration, Inc.*, 450 So.2d 990 (La. App. 3d Cir.), *writ denied*, 458 So.2d 118 (1984).

Legal description

Sufficiency of description. Rules applicable to Louisiana immovable property appear similar to that of Texas. *See, e.g., Cupples v. Harris*, 202 La. 336, 11 So.2d 609 (La. 1942).

Omnibus/Coverall/Global description. The rule in Louisiana is contrary to that cited for Texas. An omnibus description is effective between the parties but is not binding on third parties. *See, e.g., Williams v. Williams*, 586 So.2d 569 (La. App. 2d Cir.), *writ denied*, 590 So.2d 64 (La. 1991); *Major v. Morgan*, 408 So.2d 923 (La. App. 1st Cir. 1981); *Valvoline Oil Co. v. Krauss*, 335 So.2d 64 (La. App. 3d Cir. 1976).

F. "Pore Space" Ownership Issue

As mentioned previously, Louisiana with its civil law heritage does not recognize separate estates in property. Louisiana Civil Code Article 490 provides as follows,

> Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it. The owner may make works on, above or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.

Thus, the landowner is generally the proper party from whom to obtain those rights absent a mineral servitude. Storage rights a mineral servitude owner might enjoy are likely to be found only accessory to the development of the servitude. In addition to the context of acquiring rights to allow carbon sequestration, a similar inquiry is involved in underground storage of hydrocarbons. Louisiana has numerous salt dome storage facilities as well as gas storage in depleted reservoirs. Both are regulated by the Office of Conservation. *See* La. R.S. 30:22 and 23 and Statewide Order 29-M. In *United States of America v. 43.42 Acres of Land*, 520 F.Supp. 1042 (W.D. La. 1981), the court held that a mineral servitude owner was not entitled to compensation for the value of the cavern to be created by removal of salt in an expropriation case. Mineral owners would be essential parties in expropriation of gas storage rights in a depleted or partially depleted reservoir because of the necessity to determine both the existence and value of any remaining recoverable reserves for which the mineral owner would be entitled to be compensated.

G. Definition of "Other Minerals" — Coal Development

The Louisiana Mineral Code does not attempt to make a firm definition of the term "minerals." Article 4 does state that the Code is applicable to all forms of minerals, including not only oil and gas, but also soil, gravel, shells and subterranean water. Article 5 provides that ownership of land includes solid minerals, but they cannot be owned separately from the land before they are reduced to possession. Civil law discourages having land burdened by ancient rights of use. *See* Official comments under Article 4. For this reason, Louisiana law has applied the servitude theory applicable to fugacious minerals to ownership of solid minerals as well.

A reservation or grant of "all minerals" may very well be interpreted to include both solid and fugacious minerals, depending on the particular fact and circumstances. *See The Continental Group, Inc. v. Allison*, 408 So.2d 922(La. 1982).

There are at least two active commercial lignite mines in Louisiana: Dolet Hills and Oxbow in the Northwest portion of Louisiana. The Louisiana Mineral Code contains several provisions specifically addressing maintenance or ownership of interests in coal, both as to servitudes and leases, *e.g.*, Articles 61, 115, 191 and 195.

Competing lessees of oil and gas and coal and lignite are obliged to exercise their respective rights with due regard for the rights of the other lessee. Louisiana Mineral Code Article 11.

H. Unique State Issues (Non-Conveyancing)

Statute allowing interest owners to perfect a security interest in proceeds from a well

Louisiana does not have a statute comparable to that of Texas. Louisiana Mineral Code Article 211 does provide for a mandamus action against a purchaser of production to pay sums due for production purchased by him. Louisiana Mineral Code Article 210.1 provides for the collection of interest should the purchaser hold funds more than 30 days after payment would be due under the purchase contract. Also, working interest owners, whether the operator or a non-operator, can perfect a privilege to secure performance by the other under provisions of the oil well lien statute. *See* La. R.S. 9:4881 *et seq.*

Statute allowing one working interest owner to share in the proceeds of another working interest owner's gas contract

Louisiana has no such statute; however, the Commissioner of Conservation has the authority to order one working interest owner to share his market with other working interest owners who are without a market if he deems this necessary to protect correlative rights. *See Amoco Production Co. v. Thompson*, 566 So.2d 138 (La. App. 1st Cir.), *writs denied*, 571 So.2d 627 (La. 1990).

I. How to Use County Records

Records in the parish

Louisiana has 64 parishes, many of which have substantial oil and gas production. In Texas, the clerks of court in the various parishes have considerable discretion in how the records are organized and maintained. Although parish tax assessors may maintain helpful information organized by tracts, the examination of title in Louisiana will require research through various indices, particularly those maintained for vendor/vendee and mortgages, in order to construct a chain of title. This can be a very difficult and time-consuming process. Since each parish may have peculiarities in how records are indexed, organized and maintained, experience and familiarity with the parish in question is essential for accurate and efficient record research. Because various parishes were created at different times in the state's history, earliest records for a particular tract in question may be found in the records of the parish out of which the existing parish was carved. Also, it is not uncommon that all or parts of the earliest records have been lost through the years as the result of courthouse fires or other disasters. As previously mentioned, abstracters, landmen and title examiners will be most concerned with conveyance and mortgage records and indices for these records. In some parishes, for certain periods of time, the clerk of court may maintain as a part of the conveyance records mineral lease books. Thorough title research would include review of indices maintained for such things as suits, maps or plats, marriage records, corporation and partnership indices, any separate index maintained for donations and frequently an index simply, but mysteriously, referred to as "miscellaneous." Parishes are currently in different stages of placing their records on computer and/or microfilm. Although certain fees are set by statute, *see e.g.* La. R.S. 13:841, recordation costs and other fees vary considerably from parish to parish. As in many things, practice and procedures in Orleans Parish (in which New Orleans is located) are frequently quite different from that in other parishes by both custom and statute.

Records outside the parish

Severance materials. Although some patent information may be contained in the parish records, a determination of whether the subject tract has been properly severed from both the state and federal governments will require an investigation of records housed and maintained by the State Land Office in Baton Rouge. It may also be necessary to obtain additional federal severance materials and information from the Bureau of Land Management. It is important to confirm a proper severance since acquisitive prescription does not run against the state's interest in the subject tract. Louisiana Constitution Article IX, Section 4(B). Also, if a proper severance from the state of Louisiana is not made before 1921, as a general rule, mineral rights are automatically reserved to the state except with respect to tax lands being redeemed from the State.

Office of Conservation. Since mineral servitudes, mineral royalties and mineral leases will prescribe and/or expire in the absence of drilling operations or production sufficient to maintain them in effect, title examination for oil and gas purposes in Louisiana will generally require a review of applicable records of the Office of Conservation. For the most part, this information has been placed on computer. Terminals for public use are available at the three district offices of the Office of Conservation in Monroe, Shreveport and Lafayette and in the State Office in Baton Rouge. Internet access is also now available free of charge athe following Web site: www.dnr.state.la.us/SONRIS2000. These records cannot be accurately and efficiently researched without considerable expertise; however, improvements continue to be made with respect to the scope of information available and the ease with which such information can be accessed from the Office of Conservation Web site.

Other records topics

Abstracts or run sheets are generally prepared by the abstracter or landman for review by a title attorney. It is sometimes possible to obtain a base abstract on the subject tract from an abstract company by payment of a "rental fee" (perhaps in the neighborhood of $1.50 per page). That abstract company may be asked to update title to a current date or some other abstracter or landman may update the base abstract independently. It is not a common practice in Louisiana for abstracters to allow outside parties access to their place of business to directly review abstracts or tract indices for an hourly or daily fee.

Prices vary for preparation of abstracts. Abstracters in the past often charged on a per page basis. Now it is more common for both abstracters and landmen to charge by the day. As in Texas, a title attorney may examine title directly from the records with the aid of run sheets prepared by an abstracter or landman or by review of an abstract covering the subject tract.