Procrastinators’ Programs SM

A Review of the Types and Nature of Mineral Rights that Exist Under Louisiana Law

Keith B. Hall
Louisiana State University Law Center

Course Number: 0200131230
1 Hour of CLE
December 30, 2013
1:20 pm – 2:20 pm
Keith Hall's Biography

Keith B. Hall is the Director of the Louisiana Mineral Law Institute and the Campanile Charities Professor of Energy Law at LSU Law School, where he teaches Mineral Rights, Advanced Mineral Law, International Petroleum Transactions, and an Energy Law Seminar that focuses on environmental issues relating to the oil and gas industry. Before joining LSU Law School, he was a member of Stone Pigman Walther Wittmann in New Orleans, where he practiced law for 16 years, focusing his practice on oil and gas law, environmental law, and toxic tort litigation. He is a member of the Board of Editors for the Oil & Gas Reporter and a member of the Board of Trustees for the Rocky Mountain Mineral Law Foundation.
Louisiana Mineral Rights

Keith B. Hall
Director of Mineral Law Institute
Campanile Charities Professor of Energy Law
LSU Law Center
(225) 578-8709
keith.hall@law.lsu.edu

1. What is the main source of law governing mineral rights in Louisiana?
   • The Mineral Code’s article numbers correspond to Title 31’s section numbers, so that Mineral Code art. 30 is La. Rev. Stat. 31:30.
   • The provisions of the Mineral Code can be cited either as articles of the Mineral Code or as sections of Title 31 of the Revised Statutes. Each form of citation is accepted. See Min. Code art. 1 (La. Rev. Stat. 31:1).
   • The Louisiana Conservation Act (Subtitle I of Title 30 of the Louisiana Revised Statutes) also contains relevant provisions.

2. As a general rule, who has the right to explore for and produce minerals?
   • Generally, the landowner has an exclusive right to explore for and produce minerals. Min. Code art. 6 (La. Rev. Stat. 31:6).
3. **What is the nature of the landowner’s mineral rights?**
   - The general rule is that the landowner owns solid minerals that are beneath his land. Min. Code art. 5 (La. Rev. Stat. 31:5).
   - The landowner does not own liquid or gaseous minerals found beneath his land, but he generally has the exclusive right to explore for and produce such minerals from his land. Min. Code art. 6 (La. Rev. Stat. 31:6).

4. **If the landowner produces liquid or gaseous minerals from his land, can he acquire ownership, and if so, how?**
   - The landowner acquires ownership of minerals that he produces from his land when he reduces the minerals to possession. Min. Code art. 6 (La. Rev. Stat. 6).

5. **Why can the landowner own solid minerals while they are in place beneath his land, but not liquid or gaseous minerals while they are in place beneath his land?**
   - Liquid and gaseous minerals can move, and thus can migrate from an area beneath one person’s property to an area beneath another person’s property. Louisiana deals with this fact by providing that oil, gas, and other liquid or gaseous minerals are not owned until they are reduced to possession. Under the law of some other states, oil and gas are owned “in place” by a landowner, but that ownership is lost if the oil or gas migrates from beneath his property. *See e.g., SWEPI, L.P. v. Camden Resources, Inc.*, 139 S.W.3d 332 (Tex. App. 2004).
6. When a well is producing oil or gas, the oil or gas migrates to the well from the surrounding area. If a landowner’s operation of his well causes oil or gas to migrate to his well from beneath a neighbor’s property, does the landowner owe compensation to his neighbor?

- No (assuming the landowner’s well does not trespass into his neighbor’s subsurface). Under the “rule of capture,” a person owns all the oil or gas produced from his well, even if his well causes oil or gas to drain from beneath his neighbor’s land, and he owes no compensation to his neighbor. Min. Code arts. 8 and 14 (La. Rev. Stats. 31:8 and 31:14). The rule of capture also applies in other states. See e.g., Coastal Oil & Gas Co. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008); Stone v. Chesapeake Appalachia, LLC, 2013 WL 2097397 (N.D. W. Va. 2013); Barnard v. Monogahela Natural Gas Co., 65 Atl. 801 (Pa. 1907).

7. Are there exceptions or limitations to the rule of capture?

- Yes, the rule of capture does not apply if the landowner’s well trespasses onto the surface or into the subsurface of his neighbor’s property. Min. Code arts. 12 and 14 cmt. (La. Rev. Stats. 31:12 and 31:14 cmt.); Gliptis v. Fifteen Oil Co., 16 So. 2d 471 (La. 1943).

- Also, the rule of capture does not apply if the landowner negligently or intentionally causes “waste.” Min. Code art. 14 (La. Rev. Stat. 31:14); see also Eliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948).

- In addition, the Louisiana Office of Conservation has authority to issue unitization orders that establish units (areas in which the law generally will allow only one well to be drilled) and pooling orders that require all persons owning land within the unit to pool their mineral interests, meaning that all the landowners will share in mineral production. See La. Rev. Stats. 30:9 and 30:10. The sharing results from imputing some of the production from the unit well to each separately-owned tract in the unit, with the
portion of the total production imputed to each tract typically being in proportion to the size of the tract relative to the total size of the unit. In Louisiana, unitization and pooling orders generally are issued simultaneously, typically in the same document. If they wish, parties can voluntarily enter pooling agreements.

8. In some states, landowners can sever ownership of minerals from ownership of the land, creating a split estate, with one person owning the surface estate and another person owning the mineral estate. That separation of surface rights and mineral rights can be permanent. Does Louisiana law allow a person to do that?
   • No, but Louisiana law allows a landowner to create a mineral servitude. See Frost-Johnson Lumber Co. v. Salling’s Heirs, 150 La. 756, 91 So. 207 (1922); Wemple v. Nabors Oil & Gas Co, 154 La. 483, 97 So. 666 (1923); Min. Code arts. 21, 24 (La. Rev. Stats. 31:21, 31:24).
   • But a landowner can convey mineral rights that are somewhat similar to a mineral estate – namely, a mineral servitude.

9. What is a mineral servitude?
   • “A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership.” La Min. Code art. 21 (La. Rev. Stat. 31:21).
   • A mineral servitude is somewhat like the mineral estates that can be created in other states.

10. What is the difference between a mineral estate and a mineral servitude?
    • A mineral estate generally can be a permanent separation of surface ownership and mineral ownership, with the mineral estate owner, rather than the landowner, owning the right to explore for
and produce minerals. A mineral servitude owner effectively “owns” the right to explore for and produce minerals that otherwise would belong to the landowner, but a mineral servitude will terminate by prescription of nonuse if there ever is a 10-year period when the mineral servitude is not used. Min. Code art. 27 (La. Rev. Stat. 31:27). A servitude owner “uses” a mineral servitude by producing minerals or drilling in good faith. Min. Code arts. 29, 31, 36 (La. Rev. Stats. 31:29, 31:31, and 31:36).

11. What rights does a mineral servitude owner have?
   - The mineral servitude owner has a right to explore for and produce minerals. Min. Code art. 21 (La. Rev. Stat. 31:21).
   - The servitude owner generally will have a right to use the surface of the land as reasonably necessary to use his servitude. Min. Code art. 22 (La. Rev. Stat. 31:22).

12. What is a mineral royalty?
   - “A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another.” La. Min. Code art. 80 (La. Rev. Stat. 31:80).

13. Who can create a mineral royalty?
   - Landowners and mineral servitude owners each have the right to create mineral royalties. Min. Code art. 82 (La. Rev. Stat. 31:82).

14. Can a landowner create a permanent royalty?
   - No, a landowner in Louisiana cannot create a permanent mineral royalty. A mineral royalty need not have a term, but a mineral royalty is subject to prescription of nonuse. Min Code art. 85 (La. Rev. Stat. 31:85).
15. **What constitutes a “use” for purposes of interrupting prescription of nonuse for a mineral royalty?**

- Production of minerals from the tract covered by the royalty (or production from land unitized with the tract covered by the royalty) will constitute a “use.” Min. Code art. 89 (La. Rev. Stat. 31:89).
- But unit production from a well located on land other than that burdened by the mineral royalty will interrupt prescription of nonuse only for the area in the unit. Min. Code art. 89 (La. Rev. Stat. 31:89).

16. **What law applies to oil and gas leases?**

- Oil and gas are classified as “minerals.” Min. Code art. 4 (La. Rev. Stat. 31:4). Thus, an oil and gas lease is a type of mineral lease.
- Accordingly, oil and gas leases are governed by the Louisiana Mineral Code.
- The Louisiana Civil Code applies to the extent that the Mineral Code “does not expressly or impliedly provide for a particular situation.” Min. Code art. 2 (La. Rev. Stat. 31:2).
- The Louisiana Conservation Act (Subtitle I of Title 30 of the Louisiana Revised Statutes) also contains relevant provisions.

17. **What is a mineral lease?**

- “A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals.” Min. Code art. 114 (La. Rev. Stat. 31:114).
18. Who has authority to grant a mineral lease?

• Generally, the person who “owns” the mineral rights associated with particular land will have the right to grant a mineral lease covering such land. Thus, in the absence of a mineral servitude, the landowner generally will have authority to grant a mineral lease. La. Min. Code arts. 15, 16, and 116 cmt. (La. Rev. Stats 31:15, 31:16, 31:116 cmt.). If a mineral servitude exists, the servitude owner generally will have the right to grant a lease. La. Min. Code art. 116 (La. Rev. Stat. 31:116 cmt.).

19. Granting clause

• Most leases contain a “granting clause.”

• Granting clause grants to the lessee the exclusive right to enter the leased premises to explore for and produce minerals.

• Typically, the granting clause is found near the beginning of the lease.

• Often expressly lists various minerals that lessee will have the right to produce.

• Often a granting clause expressly lists numerous things that lessee will have a right to do on the property in furtherance of efforts to explore for and produce minerals (e.g., build roads, conduct seismic operations, dredge canals, etc.).

• Because mineral lessees have the implied right to use the surface as reasonably necessary to explore for minerals, a lessor who wishes to prevent the lessee from engaging in any particular activities (e.g., withdrawal of water for use in operations, operation of an injection well to dispose of produced water, operating in a particular portion of the premises, etc., should include a provision in the lease that expressly prohibits such conduct; the lessor should not rely on the fact that the granting clause might not expressly authorize such activity).
20. **Adjacent lands clause**

- Gives lessee the right to use the surface of the leased premises to support oil and gas operations on adjacent property.
- Often this clause is included within the granting clause.
- Lessors who are mineral servitude owners should avoid agreeing to an adjacent lands clause unless it is limited to a grant of the right during the life of the lease to use the leased premises to support operations on land unitized with the leased premises.
- Lessee should not depend on adjacent lands clause granted by a servitude owner (except in circumstances immediately above).
- If lessee is going to depend on an adjacent lands clause when the landowner is lessor, the lessee should consider drafting the clause so that it can survive the mineral lease (consider expressly providing for it to survive the rights of exploration and production in return for additional compensation).

21. **The habendum clause**

- In modern mineral leases, the term typically is for a specified number of years (generally called the “primary term”) and as long thereafter as there is production of minerals. See, e.g., Reagan v. Murphy, 105 So. 2d 210, 211 (La. 1958).
- The period after the primary term is sometimes called the “secondary term.” Pilkinton v. Ashley Ann Energy, L.L.C., 77 So. 3d 465, 472 (La. App. 2nd Cir. 2011), writ denied, 80 So. 3d 484 (La. 2012).
- The clause that specifies the term of the lease is sometimes called a “habendum clause.” See Pilkinton, 77 So. 3d at 472.
- For a lease to be maintained beyond the primary term by production of minerals, the production must be in paying
quantities, even if the habendum clause does not specify that production must be in paying quantities in order to maintain the lease. Min. Code art. 124 (La. Rev. Stat. 31:124).

- The basic idea of what is meant by “paying quantities” is that operating revenue generally should exceed operating expenses.
- The Mineral Code states that production “is considered to be in paying quantities when production allocable to the total original right of the lessee to share in production under the lease is sufficient to induce a reasonably prudent operator to continue producing in an effort to secure a return on his investment or to minimize any loss.” Min. Code art. 124 (La. Rev. Stat. 31:124).
- An oil or gas lease cannot be continued more than ten years without drilling operations or production. Min. Code art. 115 (La. Rev. Stat. 31:115). If an oil and gas lease provides for a primary term in excess of ten years, the primary term is reduced by operation of law to ten years. Min. Code art. 115 (La. Rev. Stat. 31:115).

22. **Maintaining a lease by operations**

- Oil and gas leases typically also will contain clause providing that drilling operations or “reworking” an existing well will maintain the lease beyond the primary term as long as such operations do not cease for more than a specified number of days (perhaps 60 or 90). *See Woods v. Ratliff*, 407 So. 2d 1375 (La. App. 3rd Cir. 1981).

23. **Compensation to lessor**

- Mineral leases typically provide for multiple types of compensation to a lessor.
- Common types of compensation include a bonus, royalties, and shut-in payments. Many leases also provide for delay rentals.
24. **Bonus**

- The “bonus” is a one-time, upfront payment that often is expressed on a per acre basis. Mineral Code article 213 (La. Rev. Stat. 31:213) contains a definition of “bonus.”
- The “bonus” amount might not be specified in the text of the lease, which may contain only a reference to something like “$10 and other good and valuable consideration.”
- The bonus amount can vary dramatically depending on market conditions.

25. **Royalties.**

- Leases provide for a “royalty” that is a specified fraction of the value of oil or gas produced. Mineral Code article 213 contains a definition of “royalty” (La. Min. Code art. 31:213).
- Historically, a one-eighth royalty was standard, but now royalties often are higher.
- Royalty amounts greater than one-fourth are not very common.
- The liberative prescription period for royalty claims is three years, the same prescriptive period that applies to claims for rents owed under other types of leases. La. Civ. Code art. 3494.
26. **Delay Rentals**

- Early in oil and gas jurisprudence, courts concluded that oil and gas lessees had an implied duty to drill an initial well within a relatively short period after obtaining the lease.

- Lessees began including clauses in the lease that allowed the lessee to pay annual “delay rentals” during the primary term in order to defer or delay the obligation to drill an initial well.

- In some leases, called “or leases,” such clauses required the lessee to drill a well or pay delay annual delay rentals before the anniversary date of the granting of the lease.

- In most leases, called “unless leases,” such clauses provided that the leases would expire on the anniversary date of the granting of the lease unless the lessee already had drilled its first well or had paid delay rentals for that year.

- Under “unless” clause leases, a lessee is not obligated to drill or pay delay rentals, but the lease automatically expires if the lessee does not do one of those things.

- Courts often applied “unless” clauses strictly, holding that a lease had expired if a lessee paid delay rentals, but was late in making the payment or underpaid, even if the underpayment amount was small or apparently based on an error. See *Johnson v. Smallenberger*, 110 So. 2d 119 (La. 1959).

- Some lessees began drafting their leases as “paid-up” leases, in which the initial payment was deemed to include both the bonus and an upfront payment of all delay rentals. This achieved the purpose of annual delay rentals – eliminating the obligation to drill an initial well – while avoiding the danger of a late payment or erroneous payment amount leading to termination of the lease.

- In some leases that require delay rentals in the absence of drilling, the obligation to pay delay rentals is eliminated by the drilling of the first well. In some leases, if the first well is a dry hole, the
lessee may be obligated to resume delay rental payments until another well is drilled.

27. **Shut-In payments**
   - Many leases require the lessee to make “shut-in payments” to the lessor if the lessee drills a well that is capable of producing natural gas in paying quantities, but the well is shut-in.
   - Depending on how the lease is written, shut-in payments may be classified as royalties on constructive production (that can maintain the lease beyond the primary term) or as delay rentals. La. Min. Code art. 123 cmt. (La. Rev. Stat. 31:123 cmt.).

28. **Pooling or unitization clause**
   - Many leases have a clause authorizing the lessee to commit the leased premises to a conventional pooling or unitization agreement.

29. **Mother Hubbard or cover all clauses**
   - Some leases have a type of clause called a “Mother Hubbard” or “cover all” clause.
   - The traditional purpose of such clauses is to provide that any land owned by the lessor that is adjacent to land described in the legal property description contained in the lease will also be considered part of the leased premises, even though it is not covered by the legal property description.
   - The justification for such clauses was that in circumstances in which the parties intended that the entirety of the lessor’s tract of land would be included in the lease, the lessee should get the benefit of that bargain even if the legal property description erroneously left off some strip of land.
   - Although such clauses are designed to protect the lessee, such clauses do not work an unfair result for the lessor provided it is
the parties’ intent is that the lease will cover the entirety of the 
lessor’s tract and the language of the Mother Hubbard clause does 
not do more than that.

- Sometimes such clauses are written such that the literal terms of 
  the Mother Hubbard clause would cause the lease to apply to any 
  property owned by the lessor within some broad area, such as the 
  entire parish. Lessors who own land that is in the general area of 
  the tract to be leased should be careful that the Mother Hubbard 
  clause is not written so broadly as to potentially cover the other 
  land.

- Also, the literal terms of some Mother Hubbard clauses could 
  cause the lease to apply to future acquisitions of property by the 
  lessor. That might be fine for the lessor if the Mother Hubbard 
  clause would apply to future acquisitions only if it turned out that 
  the lessor actually did not own title to land that the parties had 
  intended would be part of the leased premises, but the lessor later 
  acquired such land. In that circumstance, the clause would merely 
  be an after acquired title clause, which the law itself sometimes 
  imposes as part of the lessor’s warranty obligation. But the lessor 
  should be careful that a Mother Hubbard clause is not written so 
  broadly that its literal terms would cause the lease to apply to any 
  neighboring property that the lessor might purchase, even though 
  the purchased land was not part of the area that the parties 
  originally intended the lease to cover.

30. **Clauses that the Lessor Might Wish to Add to a Lease – Restrictions 
on Surface Use**

- If the lessor has a house or barn on property that would be 
  covered by a proposed lease, the lessor should consider including 
  a clause that no drilling operations can be conducted any closer 
  than a specified distance from the house or barn (perhaps 300 
  feet).
31. **Surface restoration**

- Since legacy litigation became prominent in Louisiana, lessees have been reluctant to agree to express restoration clauses, but a prospective lessor should consider asking for a clause requiring a lessee to restore the property as close as reasonably possible to its original condition after the lease is complete.

32. **Pugh Clause**

- Generally, if a unit overlaps the leased premises, unit production or unit drilling operations will maintain the lease in its entirety, even if the unit activity does not occur on the leased premises and the unit does not cover the entirety of the leased premises. *Hunter Co. v. Shell Oil Co.*, 31 So. 2d 10 (La. 1947); Min. Code art. 114 (La. Rev. Stat. 31:114).

- A Pugh Clause provides that unit activity will maintain the lease beyond the primary term only as to the portion of the leased premises covered by the unit. La. Min. Code art. 114 cmt. (La. Rev. Stat. 31:114 cmt.).

- A Pugh Clause benefits lessors because it can prompt a lessee to drill on the portion of the leased premises not covered by the unit or the clause can result in termination of the lease as to the area not covered by the unit (thereby freeing the lessor to grant a lease to someone else for that area).

33. **Horizontal Pugh Clause**

- A “horizontal Pugh Clause” provides that, at the end of the primary term, the lease terminates as to all depths more than 100 feet (or some other distance) deeper than the deepest depth to which the lessee has drilled.

- A horizontal Pugh Clause benefits the lessor because it might prompt the lessee to drill to deeper depths than it otherwise would, and because the clause causes the lease to terminate as to
depths deeper than the lessee has drilled (thus giving the lessor the opportunity to lease the deeper depths to someone else).

34. **Compensation for damages to crops or timber**
   - The lessor should consider including a clause that requires the lessee to pay compensation for damages the lessee causes to any crops, timber, fences, etc.

35. **Other common lease clauses**
   - Leases typically give the lessee a certain amount of time after the lease expires to remove its equipment from the leased premises.
   - Leases sometimes have a clause suspending the lessee’s obligations or extending the lease’s term in the event of *force majeure* circumstances.
   - Although Louisiana law imposes an implied warranty, some leases include an express warranty.
   - Some leases have a clause stating that the lessee may make any payments owed to the lessor by payment to a particular bank, for the credit of the lessor.
   - Some leases contain indemnity provisions – perhaps a mutual indemnity clause providing that each party, as indemnitor, will indemnify the other for liabilities arising from the fault of the indemnitor.
   - Some leases obligate the lessee to carry a specific amount of insurance and to name the lessor as an additional insured.
   - Some leases require the lessor to give the lessee notice and an opportunity to cure before seeking damages or judicial dissolution of a lease or before a lease will terminate based on a breach of the lessee’s obligations.
• Some leases include a judicial ascertainment clause that provides that, before the lease will expire based on the lessee’s breach of some duty, there must be (1) a judicial ascertainment that there actually has been a breach of duty and (2) a reasonable opportunity for the lessee to cure the breach. *Melancon v. Texas Co.*, 89 So. 2d 135 (La. 1956); *B.A. Kelly Land Co., L.L.C. v. Questar Exploration and Production Co.*, 106 So. 3d 181 (La. App. 2nd Cir. 2012).

Keith B. Hall  
Director of Mineral Law Institute  
Campanile Charities Professor of Energy Law  
LSU Law Center, Rm. 428  
1 East Campus Drive  
Baton Rouge, LA 70803-1000  
Ph. 225-578-8709 • fax 225-LSU-5935  
e-mail: keith.hall@law.lsu.edu