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Primer on Louisiana Mineral Rights

from the desk of David M. Touchstone

When I first read the new Louisiana state mandated buy/sell agreement, a few of the features in it gave me pause. One of these was the section on mineral rights. Our local MLS form had no such provision and this absence of discussion of mineral rights in the boilerplate language in the MLS contract prevented unnecessary strife. The simple fact of the matter is that in most residential sales mineral rights are so inconsequential as to be unworthy of even discussion, much less debate and negotiation. The new contract often brings to a boil what was once hardly a bubble. Predictably, since the advent of the new contract, I have gotten a lot more mineral rights queries from harried real estate agents.

So I decided to put something down in print that might prove useful to agents when they are called upon to explain these matters. First, a caveat: I am not a mineral rights lawyer. There are guys and gals who do this stuff all day long who are real experts on mineral law. I am not one of them. There are mineral rights abstractors (known as "landmen") who are trained in the exoticisms of mineral rights title searches. Our title abstractors are not trained to search mineral rights, and as the explanation goes on here, I hope it will become clear to you why there is a difference.

Having made my disclaimer, I still think that

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I am able to respond to most of the types of questions that agents will have regarding mineral rights. For future reference, you can find this article, like all the articles I have written for the newsletter, at firstcommercetitle.com.

As most of you know, Louisiana is a civil law state, the only one in the United States. However, with the exception of England, I believe every nation in Europe, as well as nearly every nation in Central America, and South America are civil law jurisdictions. All civil law jurisdictions trace their law back to the Roman Republic. Accordingly, we have a deep, deep tradition in our law and, thus, have had the benefit of thousands and thousands of brilliant minds honing and refining our law until it has reached a beauty

and polish comparable to a fine gem. In no part of the civil law is this more evident than in the area of property rights.

One of the fundamental features of civil law property is that it will not abide protracted dismemberments of ownership. This concept begins in the definition of ownership as set forth in Article 477 of the Louisiana Civil Code which states: "Ownership is the right that confers on a person direct, immediate, and *exclusive* authority over a thing…" The concept is further developed in Article 490 which states "…the ownership of a tract carries with it the ownership of everything that is directly above or *under* it…"
Reading these two laws together, we realize that an owner of land in Louisiana has the exclusive right to control not only the surface of his land, but everything that is under that land.

Now, having the exclusive authority over property that ownership implies coupled with freedom of contract means that, as owners, we have the right to create various rights that affect our land in various ways. We can mortgage it, lease it, grant servitudes (easements) against it, burden it with usufructs, and burden it with many other types of rights. Creation of rights in land for the benefit of others is sometimes referred to as "dismemberments of ownership". Some of these rights end when we die, some are for a specific term, some end when the recipient of the right dies, and some rights continue after both the grantor and grantee have died or transferred ownership to others of their respective properties.

If you think about it, it would seem that the idea that an owner has exclusive authority over the surface and everything under the surface is at odds with the idea that rights for the benefit of others than the owner can limit the owner's exclusive authority, even after the death of both the previous owner who created those rights and the death of the person for whom the rights were created. If it seems like those two ideas are at odds….it's because they are at odds. Our law acknowledges this conflict, but strikes a balance between the two concepts. Eventually, and always, dismemberments of ownership terminate. When a particular dismemberment of ownership ends, the previous reduction of the owner's exclusive authority also ends and the owner is restored to fuller authority over his land. What is the balancing mechanism? In a word, it is "prescription". This particular use of the word "prescription" means that when one who is possessed of a right affecting another's land and fails to make use of that right for a sufficiently long period of time, that right will terminate. For example, if, being the owner of a landlocked tract, I have been granted a servitude of passage which gives me an absolute right to cross my neighbor's property to get to the highway, and if I fail to use that right by traveling over the servitude of passage for a period of ten continuous years, I will lose my right. Thus, my neighbor's exclusive authority over his land will return to him unburdened of my right to cross his land. He will now be entitled to fence his property and to tell me that I may no longer cross his land.

Such is the balancing act of the civil law that eventually it restores to the surface owner full and exclusive authority over the surface and everything that lies under the surface.

In the early 1900's, the courts of our state were, like the courts of many of our sister states, faced with the predicament of the near

simultaneous discovery of new ways to get oil out of the ground and the invention and mass production of automobiles. These new technologies encountered legal structures that were devoid of mechanisms to balance the rights of land owners and the rights of oilmen. The various states adjusted the balance in different ways. In some of the common law states, *permanent* dismemberment of the mineral rights and surface rights became the model. Thankfully, this was not the model followed by the Louisiana legal community. Early on, the Louisiana Supreme Court was faced with this question and with great wisdom and vision, our Court, using the analogy of servitudes that had long been a part of our law, created the system that we now have. Thus, our courts built up a body of case law eventually codified in the Louisiana Mineral Code that was illuminated by a never failing guiding light that ownership of the surface and ownership of the minerals must eventually reunite in the surface owner. As I said above, the civil law will not tolerate permanent dismemberments of ownership.

In the process of developing this system, the courts of our state developed a tripartite division of interests. These are the principle interests: (1) surface owner, (2) mineral owner, and (3) mineral lessee. Let's talk through a real life scenario that happens hundreds of times a day in Louisiana. Every day in this state, owners sell their land with a statement in the deed that reads something like this: "Seller reserves all minerals". When this language is in the deed, there is a dismemberment of ownership. In this situation, the purchaser becomes the owner of the surface rights, but the seller continues to own the minerals. Thus, the seller is said to own a "mineral servitude" in the property. If the owner of the mineral servitude wishes to drill an oil well, he has the right to do so and has the right to keep all the oil that he is able to extract. However, in most instances, the owner of the mineral servitude will not be the person who initiates exploitation of the minerals. Most of the time it will be an oil company. Occasionally, oil companies will acquire mineral servitudes, but generally oil companies opt for mineral leases. In the mineral lease scenario, the oil company approaches the owner of the minerals to lease the minerals or some portion of the minerals from the owner of the minerals. If the mineral ownership has not been dismembered from the surface ownership, the oil company will acquire an oil lease from the surface owner. On the other hand, if the minerals have been severed from the surface ownership, the oil company will acquire its lease from the mineral servitude owner. Whoever grants the lease to the oil company is generally compensated in two ways for the granting of the lease. First, there is the bonus payment; this is an upfront payment paid to the mineral lessor by the oil company at the time the lease is signed. Bonus payments are usually paid based on a per acre basis (e.g. $500 per acre for ten mineral acres). The second method of payment is the mineral royalty. If the oil company hits a producing well, it will pay the mineral owner a fraction of the production (e.g. 3/16 of the total production). Generally speaking, mineral leases are for a specific term unless a producing well is discovered. Oftentimes, the lease is for a three year term. However, if there is a well that produces in paying quantities, the lease will continue for such time as the well continues to produce in paying quantities. Most leases contain provisions that if the oil company delays its commencement of drilling, it can make periodic payments to the owner of the

minerals and keep the lease in effect; this type of payment is known as a "delay rental". Additionally, most leases contain a provision allowing the oil company to keep the lease in effect for a time after the well stops producing in paying quantities; these payments are known as "shut-in rentals". No mineral lease (for oil and gas) in which there has been no production in paying quantities can last ten years past the cessation of production in paying quantities. But what about the mineral servitude? With certain limited exceptions, it too will die if there is a continuous period of at least ten years during which there is no production. Please note that I used the words "continuous period of at least ten years". If there are any good faith explorations or operations conducted, that will serve to interrupt the running of prescription. If, for example, a mineral servitude commences on January 1, 1990, a well is drilled on January 1, 1991 and is operated until December 31, 1994, and no further exploitation of the minerals is made, then prescription will have run on January 1, 2005, and the mineral rights will return to the surface owner at that time. Now here's a question I am frequently asked: if ten year prescription runs and the mineral servitude expires, who gets the minerals back, the guy who granted the servitude or the guy who owns the surface now? The answer is that the person who owns the surface at the time that the mineral servitude expires will become the owner of the minerals. Remember: the law of Louisiana abhors extended dismemberments of ownership and is always biased to a return of the dismembered interest to be united with the surface ownership.

Oftentimes, real estate agents are mildly flummoxed that we are unable to give them a certification as to ownership of the mineral rights. There are several reasons for this, but, generally speaking, they can all be lumped under the heading of cost. When we do a normal surface ownership title examination, everything we need to know is there in the public records. If it is not there in the public records, then we are entitled to disregard it. This is not the case with mineral rights. The big issue with mineral rights is whether or not there has been any mineral production. Whether or not a mineral owner or mineral lessee has drilled and produced minerals is information *not available to us* from research of the clerk of court's records. If there was once production, but that production has now ceased, that information, likewise, is not available from research of the clerk of court's records. There are many other types of facts that affect mineral rights that are not available from research of the clerk's records. These gaps must be filled by research in the Louisiana Department of Natural Resources records and by the taking of affidavits from various persons having knowledge of or interests in the minerals. Collection of this type of information goes far beyond what we normally do in surface rights title examinations and would add a prohibitive layer of cost to most transactions. As a practical matter, it has been my experience that most landowners (owning five or more acres) have a pretty good idea whether they own the minerals or not. For instance, if they are getting a royalty check, you can assume they own some part of the minerals. Usually, if the landowner is getting a check from an oil company, he will have also gotten some other documents that will help you ascertain what portion of the minerals he owns. If nothing else, you can review the royalty check to determine the identity of the oil company that is paying the royalty and pursue from the oil company the information it has in its file as to the mineral ownership.

Furthermore, many oil companies will ask the various owners of the minerals to sign a "division order" prepared by the oil company in which the various owners of the minerals certify as to their respective interests, and the seller may have a copy of this document. If, on the other hand, the current surface owner is not getting a check, usually he will still have a pretty good idea about his ownership of the minerals. I find that most landowners ask enough questions of the neighboring landowners, gather information as to whether there are any wells in the neighborhood, and otherwise collect sufficient information to have some idea as to their ownership of the minerals. So, when the buyer is concerned about ownership of the minerals, you should make a close inquiry of what the seller knows; oftentimes the information you are able to collect in this manner is enough to satisfy the buyer. Finally, if you want to do some outside research on your own about any wells in the vicinity of the property you are dealing with you can go to the Louisiana Department of Natural Resources website at http://dnr.louisiana.gov, look in the right hand column on the home page for the button styled "SONRIS", click on that button which will take you to the next page where you will find a button in the upper left hand column styled "SONRIS Lite", click on it which will take you to the next page where you will see a column in the upper left portion of the page titled "Well Information". Scan the column titled "Well Information" until you see a line styled "Wells by Section, Township, and Range"; click on this line and then input the required information. You can obtain the history of all the wells drilled in the requested section. If you do this type of research, you should be very restrained about giving advice based on the information you glean from the Department of Natural Resources. There are many factors that go into a determination of whether any exploration or production has interrupted prescription. If you are not careful, you may be setting yourself up for a malpractice claim.

Let's talk for a moment about some mineral rights issues that frequently arise in my discussions with realtors. Oftentimes, realtors ask me to include a provision in the deed to the effect that the seller is conveying all the minerals to the buyer. If requested, I will include such a provision, but it really isn't necessary. Remember, the default position of Louisiana law is that ownership includes not only the surface, but everything beneath the surface as well. Therefore, if the deed simply says that Smith sells to Williams "Lot 1, Blackacre", without any statement in the deed concerning the minerals, by default, the sale of "Lot 1, Blackacre" includes all the minerals located in and under "Lot 1, Blackacre". This point of law raises another issue that deserves a moment of consideration. What if Smith has already transferred the mineral rights to someone else? Or, what if the fellow who sold the land to Smith sold the minerals to someone else before he sold the land to Smith? In either such instance, Smith should have a provision included in the deed to Williams that Smith does not warrant title to the minerals; otherwise, Williams is entitled to assume that he becomes the owner of the minerals and Williams may have a claim for damages against Smith when it turns out that someone else owns the minerals. Sometimes the current owner of the surface rights owns only a fractional interest in the minerals but is willing to convey to the buyer such interest in the minerals as he owns; in such an instance, it is prudent to include a provision in the deed that the seller

conveys any and all interest he may have in the minerals, but does not warrant title to the minerals.

Oftentimes, we are called upon to prepare a deed in which the seller owns the minerals and wishes to continue in his ownership of all or a portion of the minerals after the sale of the surface rights. Typically, this is effected by a statement in the deed along the lines of "Seller reserves all oil, gas, and other fugacious minerals" or "Seller reserves an undivided one half of all oil, gas, and other fugacious minerals". Oftentimes, the buyer does not object to the seller reserving ownership of the minerals, but does object to any type of drilling operations or other operations on the surface of the property being conveyed. Frequently, these competing interests can be reconciled. Let us suppose that the tract in question is five acres. Usually, oil companies lease at least 80 acres, oftentimes a great many more acres than that. The oil company will take leases from all or nearly all of the mineral owners until the oil company has put together a tract of sufficient size. If one of the leased tracts is subject to a provision in the mineral servitude that says that no operations are to be conducted on the surface, that is usually not a big deal, because chances are that isn't where the oil company wanted to drill anyway. Even if that tract was the ideal drilling location, most times it still isn't that big of a deal because the oil company can easily move over to the next tract for its well site. Hence, we frequently put a clause in the deed that reads something like this: "Seller reserves all oil, gas, and other fugacious minerals, but agrees that no operations will be conducted on the surface of the herein conveyed tract".

One final point: standing timber and standing crops are not "minerals". The surface owner is considered by the law to be the owner of standing timber and standing crops, unless a document such as a "timber deed" has been recorded in the public records.

I hope this article has been of some use to you and your clients. This is a complicated subject and we have barely scratched the surface here, but I have tried to address the questions I hear most frequently.