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Recent Developments on Interrupting Prescription of Non-Use of a Mineral Servitude

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With the Louisiana Second Circuit's recent opinion in *Smith v. Andrews*, it seems a good time to revisit the law on interruption of prescription of non-use of mineral servitudes. In *Smith*, the landowners attempted a full-frontal, but ultimately unsuccessful assault to have the court rule that a mineral servitude burdening their land had prescribed for non-use. The courts' methodical rejection of their various theories provides a good platform for reviewing the applicable law.

Prescription of non-use of a mineral servitude can be interrupted numerous ways. Under Article 29 of the Louisiana Mineral Code, prescription is interrupted by good faith operations for the discovery and production of minerals. To be in good faith, operations must be:

1) commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth,

2) continued at the site chosen to that point or depth, and

3) conducted in such a manner that they constitute a single operation.

Under this first requirement, operations must be commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth. Thus, an operator drilling an oil or gas well must have reasonable expectation that there are paying quantities of oil or gas at the depth to which he intends to drill. The reasonableness of these expectations can be proven by testimony of geologists, experienced oil men, or both. Under the second requirement, a well must actually be drilled at the chosen site to the depth at which there were reasonable expectations that oil or gas would be discovered. It is enough that a well is actually drilled; the well does not have to be a producer. Thus, a dry hole suffices to interrupt prescription assuming the other good faith requirements are met. But if an operator abandons or aborts before the target depth is reached (in either that same well or a substitute thereof if that

first well encounters problems), the operations will not interrupt prescription. Under the third requirement, the operations must be conducted in such a manner that they constitute a single continuous operation although actual drilling or mining is not conducted at all times and may actually include multiple wells if, for instance, the initial well encounters problems.

Although numerous Louisiana courts have addressed whether particular drilling operations constituted use of a mineral servitude sufficient to interrupt prescription, no single test has yet been established for all circumstances. The Louisiana Second Circuit's decision in *Smith v. Andrews*, 51,186 (La. App. 2 Cir. 2/15/17), although not yet final and still subject to Supreme Court review, is the latest development in Louisiana jurisprudence on what constitutes sufficient operations for purposes of interruption of prescription and, therefore, maintenance of a mineral servitude.

In *Smith*, Billy Joe and Betty Ruth Andrews owned several tracts of land in DeSoto Parish, Louisiana. But their land was burdened by two mineral servitudes: one granted to Union Central Life Insurance Company predecessor by merger to Ameritas Life Insurance Corporation ("Ameritas") and another in favor of a group referred to as the Smith Heirs. In 1966, the mineral servitude owners granted mineral leases to Mallard Drilling Corporation. Thereafter, Mallard drilled several successful wells on the Andrews' land. Over time, all but one of Mallard's wells ceased producing. The last producing well, the Rogers No. 1 Well, is the subject matter of this lawsuit.

In 1990, Mallard assigned its leases to Quest, who was operating the Rogers No. 1 Well at the time. At some point in the 1990s, the Andrews alleged that Quest damaged a road on their land, so Quest agreed to share certain profits in the well with the Andrews. Additionally, Quest hired Mr. Andrews to serve as "pumper" on the well checking on the well periodically and monitoring the amount of oil stored in the tanks. In 1994, the mineral servitude owners executed new leases in favor of Quest (apparently as a result of the prior leases lapsing). In 2001, Quest assigned the 1994 leases to Jordan, who was then the operator of the well. Jordan had worked for Quest in the past and took over several wells in an attempt to get them pumping again. Jordan operated the Rogers No. 1 well here pursuant to the Quest assignment and, according to his testimony, he believed that the assignment from Quest gave him the right to act for his own benefit and the benefit of anyone else with an interest in the lease (including the mineral owners).

In 2008, Andrews sent letters to the Smith heirs and Ameritas demanding that they acknowledge that their servitudes had prescribed. Upon inquiry with the Office of Conservation, the servitude owners discovered that, without their knowledge, Mr. Andrews had had the records changed to

reflect no production after 1997; they refused to execute the releases in favor of Andrews. Mr. Andrews contended that, as part of his activities in monitoring the well, he had witnessed the Rogers No. 1 Well stop pumping as a result of mechanical difficulties in May 1997. Mr. Andrews represented to the Office of Conservation "that he knew what happened to the well and when, that he had records proving that production on the well stopped in 1997, and that the servitude owners were aware of it.' Interestingly, these statements were later shown to be untruthful.

In 2009, the Smith heirs filed suit against the Andrews and others for a declaratory judgment that their servitude was still in effect. The Andrews then filed pleadings that the mineral servitudes in favor of Smith heirs and Ameritas had both prescribed for non-use from a lack of production or operations between 1997 and 2007 and thus that the Andrews (as landowners) were now the owners of the relevant mineral rights. But after a long trial, the district court sided with the mineral-servitude owners, and the Second Circuit affirmed. Both courts rejected the four arguments pushed by the Andrews.

First, the only evidence the Andrews presented regarding the lack of production between 1997 and 2007 was Mr. Andrews's own testimony, which the district court found not to be credible. The servitude owners presented sales receipts, electricity reports, expert and lay testimony to reconstruct the wells activities at that time, successfully proving that the well had actually produced through September 1998 resulting in interruption of prescription on the mineral servitudes through that date.

Second, the Andrews argued that the operation on the wells were not performed on behalf of the servitude owners, as there was no legal relationship between Jordan, the operator, and the servitude owners. Although the lease in favor of Jordan had previously lapsed under the 90 day cessation of operations provision, Mineral Code article 43 provides that a person may also act on behalf of the servitude owners to interrupt prescription "when there is clear and convincing evidence that he intended to act for the servitude owner." Based on testimony from Jordan, the operator at the time, the court found that it was clear that Jordan intended to act, not only for himself, but also the servitude owners. Jordan testified that he was 66 years old and had over 50 years' experience working in the oilfield, including 38 years as a pumper. Jordan testified that he understood that the wells were subject to a lease and that any production obtained would benefit the royalty owners and the mineral servitude owners. Jordan testified that he believed his assignment gave him the right to produce the Rogers No. 1 Well and thus that he was acting both for his own benefit and for anyone else who owned an interest in the lease. His assignment clearly referenced the two leases from the servitude owners. The court found all of this evidence

clear and convincing and concluded that Jordan was acting to make money for both himself and the servitude owners, and, thus, intended to act for, among others, the servitude owners.

Third, the Andrews argued that the operator did not obtain enough production sufficient to interrupt the prescription of non-use. Citing the comments to Mineral Code article 38, the Andrews contended that, to interrupt prescription, production must be in an amount sufficient to put to a beneficial use. But the court swiftly rejected this novel theory. The text of article 38 is clear: "To interrupt prescription, it is not necessary that minerals be produced in paying quantities. It is necessary only that minerals actually be produced in good faith with *the intent* of saving or otherwise using them for some beneficial purpose." The record clearly demonstrated that Jordan produced oil in good faith in accordance with the statutory requirements.

Finally, the Andrews argued that Jordan's actions in "bumping" the well were insufficient to constitute operations for purposes of interruption of the mineral owners' servitudes. They insisted that, under the statute, the operator must perform operations involving equipment actually in the bore hole and that Jordan's activities were not "intimately connected with the resolution of the difficulty that caused the well to cease production in order to constitute reworking." In support, the Andrews cited the following comments to Mineral Code article 39:

> Once actual production of minerals has ceased, operations seeking to restore production or to secure new production from the same site may be conducted. It is felt that as long as such operations are conducted in good faith and in accordance with the basic principles stated in Articles 29 through 31, they should constitute an interruption of prescription. Insofar as the petroleum industry is concerned, Article 39 should be construed to include any good faith reworking operations or operations for recompletion of the well in another sand that involve use of equipment in the well bore.

The court reasoned that Article 39 clearly states that *either* good faith reworking operations *or* operations for recompletion of the well in a different sand that involve the use of equipment in the wellbore will interrupt prescription. Although it involved the sufficiency of reworking operations within the scope of the contractual provisions in a mineral lease rather than for purposes of maintaining mineral servitudes such as here, the Supreme Court's discussion on reworking operations in *Jardell v Hillin Oil Co.*, 485 So. 2d 919 (La. 1986), is pertinent here. After analyzing several earlier cases that considered the definition of "reworking" as used in mineral lease and

similar contract provisions in the oil and gas industry, the Court concluded that reworking operations at least include the following:

> Any process or procedure which you may undertake to either regain, increase or create new production in a well or activity to restore or increase production of a well that has been drilled[,] usually the second attempt or to work again on a well. In a well that has produced it would be an operation when the well came off of production or ceased production, and it would be an operation to maintain, restore, improve production.

The *Jardell* court ultimately held that the lease at issue therein did not terminate under its cessation of production clause, for the lessees had commenced good faith reworking operations within 90 days of the shut in of the well. In S*mith*, the well had ceased to produce because a pump was stuck. The court found that Jordan's actions in jarring the well to unstick the pump and restore production (albeit for a short period of time to follow) constituted good faith reworking operations under the reasoning in *Jardell*.

The Louisiana Supreme Court case of *Nelson v. Young*, 255 La. 1043, 234 So. 2d 54 (1970) is historically significant to the ruling in *Smith*. In *Nelson*, the surface owner granted leases even though he did not own the minerals. In 1959, the lessee drilled a well, which produced until 1964. In 1967, the mineral servitude owners filed suit to be declared owners of the mineral rights. The trial court dismissed the suit. But the Second Circuit reversed. Thereafter, the Supreme Court affirmed the Second Circuit, relying on the theory of quasi-contract based on the approving silence of the servitude owners when the lease was executed by the landowner and production was established thereunder. Pursuant to the apparent acquiescence of the mineral servitude owner, the landowner's act became the servitude owner's act, thus interrupting prescription.

The reasoning of *Nelson* was not enthusiastically received by all. It appeared to be contrary to jurisprudence that no act by a landowner should have the effect of interrupting prescription unless he intended it to do so. As a result of much criticism, the redactors of the Mineral Code legislatively overruled *Nelson* in 1975 with the adoption of Mineral Code article 43. Mineral Code article 43 specifically defines when a person is deemed to have acted on behalf of the servitude owner and includes the scenario present in Smith where an operator's intent to act on behalf of the servitude owner is evident.

In *Smith*, the court ultimately held that the prescription of non-use of the mineral servitudes was interrupted by good faith reworking operations conducted by a person who, based on clear and convincing evidence, had the intention to act on behalf of the mineral servitude owners in his

attempts to regain production from the well, thereby making use of the mineral servitude for their benefit. In short, the *Smith* decision reminds us that the actual beliefs/intent of an operator can sometimes make all the difference.