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## The Obstacle: A Proposal for a Universal Standard to Determine Those Acts or Events That Sufficiently Rise to the Level of an Obstacle Suspending Prescription of Non-Use for a Mineral Servitude Owner Under Louisiana Mineral Code Article 59

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## THE OBSTACLE: A PROPOSAL FOR A UNIVERSAL STANDARD TO DETERMINE THOSE ACTS OR EVENTS THAT SUFFICIENTLY RISE TO THE LEVEL OF AN OBSTACLE SUSPENDING PRESCRIPTION OF NON-USE FOR A MINERAL SERVITUDE OWNER UNDER LOUISIANA MINERAL CODE ARTICLE 59

ERIC R. HARPER\*

### *Introduction*

Like all great Louisiana tales, this one begins with our friends, Boudreaux & Thibodeaux.<sup>1</sup> Boudreaux purchased Blackacre from Thibodeaux on January 1, 2009. Thibodeaux expressly reserved the right to explore for oil & gas by a mineral servitude within the Act of Sale. Unfortunately, Thibodeaux is quite lazy, preferring to do anything but explore the land for minerals. Thibodeaux continued to ignore his mineral right on Blackacre for nearly the next 10 years. It is only on December 26, 2018, that Thibodeaux receives news that a nearby land, Whiteacre, has started producing paying quantities of oil. His wife, Clotile, informed him

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1. Boudreaux and Thibodeaux are two characters from South Louisiana experiencing life's trials and tribulations. It is common in South Louisiana to see these characters arise in oral stories passed down from one generation to another and the author has benefitted from the humorous life events presiding within these fables.

that they have bills to pay, so Thibodeaux decided to begin the process of drilling on his land. On December 29, 2018, Thibodeaux's hired contractor began drilling operations, but the equipment failed and the operations could not proceed. Later that evening, a massive storm swept over the area containing Blackacre, causing unforeseeable inundation of the land. Consequently, all equipment and personnel had to be evacuated and no successful drilling occurred. On January 2, 2019, the residual water finally drained from the land, and drilling activities commenced. On January 3, 2019, drilling was conducted to the depth where paying quantities are located. Thibodeaux became a millionaire overnight . . . or did he? Meanwhile, Boudreaux claimed that Thibodeaux improperly trespassed upon Blackacre because the right to the minerals had reverted to Boudreaux on January 1, 2019. Thibodeaux contested Boudreaux's claim, arguing that the flooding constituted an obstacle that suspended the tolling of prescription of nonuse, and correspondingly, he was within his rights to explore the minerals on Blackacre.

Louisiana courts have discussed the law regarding obstacles in several cases but failed to give a precise standard to define an obstacle—rather, the jurisprudence has defined what is *not* an obstacle, as opposed to what is.<sup>2</sup> Most of the cases involve mere legal restrictions, as opposed to physical restrictions that would materially obstruct an individual or entity from the use of a mineral servitude. In recent years, flooding concerns have vastly increased, notably the 2016 Baton Rouge Flood and the 2017 Hurricane Harvey flooding in Houston. Considering these growing concerns, it is now increasingly important to discuss and determine whether a catastrophic flood, causing inundation of prescriptable land, can establish a sufficient obstacle to use of the servitude such that the running of prescription of nonuse warrants suspension.

Part I will lay a background of the law regarding mineral servitudes in Louisiana, including a discussion of the provisions for prescription of nonuse, as well as the legal mechanisms that stop the tolling of prescription.<sup>3</sup> Part II will provide an examination of the Louisiana jurisprudence discussing the suspension of prescription as a result of an obstacle.<sup>4</sup> Part III will propose a universal standard to assist mineral servitude owners in exploring the question of whether particular acts or events are sufficient to rise to the level of an obstacle suspending

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2. See Comment to La. R.S. § 31:59.

3. See *infra* Part II.

4. See *infra* Part III.

prescription of nonuse.<sup>5</sup> Finally, Part IV will propose that under the standard elucidated, extensive flooding is an obstacle under Louisiana Mineral Code Article 59 (hereinafter “Article 59”)—and illustrate the proposal through the hypothetical introduced at the inception of this Comment.<sup>6</sup>

### *I. Background*

The prominent Roman glossator Accursius once proclaimed *cuius est solum, eius est usque ad coelum et ad inferos*, “usually translated as meaning that the rights of the surface owner extend upward to the heavens (*ad coelum*) and downward to the center of the earth (*ad inferos*).”<sup>7</sup> However, modifying the traditional *ad coelum* doctrine, Louisiana mineral law expressly restricts a person from owning “oil, gas and other minerals occurring naturally in liquid or gaseous form . . . .”<sup>8</sup> While Louisiana maintained the ownership-in-place theory for solid minerals, it established the non-ownership or servitude theory over fugacious minerals. True ownership of fugitive minerals, such as oil and gas, only occurs once the minerals are reduced to possession.<sup>9</sup> In the seminal case of *Frost-Johnson Lumber Co. v. Salling’s Heirs*, the Louisiana Supreme Court handed down a decision viewed by many as “the single most important decision ever rendered by the Louisiana Supreme Court in the area of mineral law,”<sup>10</sup> holding that fugacious minerals were insusceptible of ownership before being reduced to possession. Instead, a transfer of the “ownership” of fugitive minerals from the landowner to another was a transfer of the *right* to explore and reduce to possession—a servitude.<sup>11</sup> This landmark decision was codified in the Louisiana Mineral Code and remains the bedrock of the law governing minerals.<sup>12</sup>

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5. See *infra* Part IV.

6. See *infra* Part V.

7. John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 980–81 (2008); *Id.* at note 14 (“[Edward] Coke [in *The First Part of the Institutes of the Laws of England*] apparently borrowed this phrase from civil law scholars, where it can be traced back to Accursius, a glossator whose commentaries on Roman law were written in the thirteenth century.”).

8. La. R.S. 31:6 (2000).

9. *Id.*

10. Patrick S. Ottinger, *A Primer on the Mineral Servitude*, 47th Ann. Inst. on Min. L. 68 (1997).

11. See *Frost-Johnson Lumber Co v. Salling’s Heirs*, 150 La. 756, 863 (La. 1920).

12. *Id.*

Louisiana differs from other states in that it “does not recognize a separate mineral estate in oil and gas.”<sup>13</sup> This rule was first dictated by the Louisiana Supreme Court and subsequently codified in the Louisiana Mineral Code.<sup>14</sup> The Louisiana Mineral Code defines a mineral servitude as a right “belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership.”<sup>15</sup> This paper will not set forth an exhaustive discussion of Louisiana Mineral Servitudes, as notable scholars have previously done.<sup>16</sup>

The mineral servitude comes with significant legal consequences if unused. Most notably, a mineral servitude is extinguished by nonuse if it is not used for a period of ten years.<sup>17</sup> Unlike a mineral servitude, a common law mineral estate will generally not escheat to the landowner if not used within a certain time, absent an intent to abandon or the enactment of a state-specific Dormant Mineral Act.<sup>18</sup> Whether a mineral servitude has prescribed by nonuse is a major area of litigation under Louisiana mineral rights.<sup>19</sup> The law provides certain relief to the running of prescription of nonuse on a mineral servitude: suspension and interruption.<sup>20</sup>

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13. In the vast majority of common law states, there has been limited abrogation of *ad coelum* doctrine, so that the owner of the land retains the ownership of the minerals within the land and is capable of creating a separate mineral estate that is an independent article of commerce; see Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1098 (1987).

14. See *Frost-Johnson Lumber Co.*, 150 La. at 863 (La. 1920); see also La. R.S. 31:21 (2000).

15. La. R.S. 31:21 (2000).

16. See generally Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097 (1987); see also Patrick S. Ottinger, *A Primer on the Mineral Servitude*, 47th Ann. Inst. on Min. L. 68 (1997).

17. La. Civ. Code arts. 789, 3546; see e.g., *Frost-Johnson Lumber Company*, 150 La. at 864.

18. For an illustration of a common law state terminating a separate mineral estate under the doctrine of abandonment, see e.g., *Gerhard v. Stephens*, 68 Cal. 2d 864, 876-877 (1968); For an example of an enacted Dormant Mineral Act, see e.g., Ohio Dormant Mineral Act, Ohio Rev. Code § 5301.56(B)(1)(c) and (B)(2) (1989).

19. Patrick H. Martin, *Mineral Rights*, 43 LA. L. REV. 523, 531 (1982).

20. See La. R.S. 31:29 (2000) (“The prescription of nonuse running against a mineral servitude is *interrupted* by good faith operations for the discovery and production of minerals. By good faith is meant that the 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 although actual drilling or mining is not conducted at all times.”); see also La. R.S. 31:59 (“If the owner of a mineral servitude is

Generally speaking, the Louisiana Civil Code states that “if the owner of the dominant estate is prevented from using the servitude by an obstacle that he can neither prevent nor remove, the prescription of nonuse is suspended on that account for a period of up to ten years.”<sup>21</sup> Feeding off of the Civil Code provision, the Louisiana Mineral Code specifically deals with mineral servitudes, providing that prescription of nonuse is suspended when there is an obstacle that prevents the owner of a mineral servitude from use.<sup>22</sup> The problem with the statutory provisions and the jurisprudence is that while these sources give us the rule for suspension of prescription of nonuse resulting from an obstacle preventing the use of the mineral servitude, they fail to provide useful concrete standards to determine acts or events that are potentially an obstacle.<sup>23</sup>

An “obstacle,” defined in laymen’s terms, is “something that impedes progress or achievement.”<sup>24</sup> To impede, an act or event must “interfere with or slow the progress of” the object at issue.<sup>25</sup> Thus, an obstacle, put plainly, is something that interferes with or slows the progress of the mineral servitude owner from using his or her servitude.<sup>26</sup> The authors of the Louisiana Civil Law Treatise for Predial Servitudes state that “[a]n obstacle may be legal, such as an injunction, or it may be material, such as a temporary inundation of the servient estate.”<sup>27</sup> Besides that, not much guidance exists on this seemingly trivial concept that can have far-reaching ramifications.

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prevented from using it by an obstacle that he can neither prevent nor remove, the prescription of nonuse does not run as long as the obstacle remains.”).

21. La. Civ. Code art. 755 (2010).

22. La. R.S. 31:59 (2000).

23. Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1159 (1987).

24. *Obstacle*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/obstacle> (last visited Dec. 11, 2019).

25. *Impede*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/impede> (last visited Dec. 11, 2019).

26. *See Obstacle*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/obstacle> (last visited Dec. 11, 2019); *See also Impede*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/impede> (last visited Dec. 11, 2019); La. R.S. 31:59 (2000).

27. A.N. YIANNPOULOS, PREDIAL SERVITUDES § 8:6, in 4 LOUISIANA CIVIL LAW TREATISE (West 4th ed. 2004).

*II. Louisiana Jurisprudence on Obstacles*

The courts have interpreted this simple provision in the Louisiana Mineral Code, addressing man made obstacles<sup>28</sup> and legal obstacles<sup>29</sup>, but there are no published opinions discussing an obstacle created resulting from action by neither man nor the State. Natural acts, such as flooding and hurricanes, have not been examined as an obstacle preventing the exercise of a mineral servitude right. Courts have addressed such an obstacle in non-binding dicta, providing support for the argument that either the courts or the legislature should expressly provide that natural disasters preventing the use of a mineral servitude should fall under the umbrella of an “obstacle” for purposes of suspending prescription of nonuse.<sup>30</sup>

*A. Under Louisiana Law, a Landowner’s Grant of a Future Right to Use the Land does not Impair a Mineral Servitude Owner from Using the Land in the Present*

In *Gayoso Co. v. Arkansas Natural Gas Corp.*, the Louisiana Supreme Court held that the landowner’s grant of a future mineral lease that was to take effect after the expiration of the outstanding mineral servitude did not suspend prescription because it was not an obstacle to the use of the right to explore the land for minerals.<sup>31</sup> The Court noted that nothing stopped the mineral servitude holder from exercising his right to explore the land.<sup>32</sup> Furthermore, the Court opined that if the landowner had resisted his act to enter the land and exploit the resources, then this “*might* be said that the resistance constituted an obstacle, placed in the way of using the servitude, with the resultant effect of suspending prescription, until removed.”<sup>33</sup>

*B. Louisiana Courts Have Consistently Held That No Obstacle Occurs Where the Mineral Servitude Owner Has a Right to Explore the Land but Did Not Exercise It Because Of a Controversy in Court.*

Two decades after *Gayoso*, the Louisiana Supreme Court was tasked with addressing another ten years nonuse claim and the accompanying defense that the running of prescription was suspended due to an obstacle restricting the exercise of the servitude.<sup>34</sup> The Court found that a lawsuit

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28. See e.g., *Hall v. Dixon* 401 So.2d 473 (La. Ct. App. 2d Cir. 1987).

29. See e.g., *Gayoso Co. v. Arkansas Natural Gas Corp.*, 176 La. 333 (1933); see also *Perkins v. Long-Bell Petroleum Co.*, 227 La. 1044 (La. 1955).

30. See e.g., *Hall v. Dixon*, 401 So.2d 473, 476-77 (La. Ct. App. 2d Cir. 1987).

31. *Gayoso*, 176 La. at 333, 340.

32. *Id.* at 341.

33. *Id.* (emphasis added).

34. *Perkins v. Long-Bell Petroleum Co.*, 227 La. 1044, 1049 (La. 1955).

over ownership of the mineral rights was not a sufficient obstacle to suspend prescription because at no time was the mineral servitude owner denied entry onto the land, and the mineral servitude owner actually had free access to the land for exploration purposes.<sup>35</sup>

The holding in *Perkins v. Long-Bell Petroleum Co.* reinforces the principle that if the mineral servitude owner has legal access to the land and is permitted and capable of exploring the land, then no obstacle is present even though there is pending questions over the ownership over these rights. However, the disputed mineral servitude owner whom is currently exercising its perceived right to explore will be permitted to use the land, but damages may result for trespass should the court determine that the party is not the lawful owner of the right to explore.

*C. A Government Order That Restricts the Right of Mineral Servitude Owner from Exercising His Right to Explore for Minerals, While Seemingly an Obstacle, Has Been Legislatively Declared to Not Suspend Prescription of Nonuse*

In *Boddie v. Drewett*, defendants alleged that their mineral servitude was not subject to prescription for nonuse because there was a compulsory unitization order<sup>36</sup> from the Commissioner of Conservation that prohibited them from drilling on said land.<sup>37</sup> It was argued that the government's restriction on the mineral servitude owner's ability to act was an obstacle that should suspend prescription from running. The Louisiana Supreme Court noted that the jurisprudence in mineral servitude cases typically leads to the conclusion that an obstacle was not in existence but "when the facts exhibit a real obstacle to the use of the servitude, such as the lawful orders of the Commissioner of Conservation, the Codal provision applies and the running of prescription is suspended by operation of law."<sup>38</sup> Accordingly, the court found that the order by the Commission of Conservation was an effective obstacle to the use of the mineral servitude because it effectively prohibited any drilling operations on the 12-acre tract.<sup>39</sup> However, this

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35. *Id.* at 1056.

36. A compulsory unitization order is a formal exercise "of the state police power to compel owners of mineral interests, working interests and royalty interests to consolidate their separately owned estates over all, or a portion of, a common source of supply." See Bruce M. Kramer, *Compulsory Pooling and Unitization with an Emphasis on the Statutory and Common Law of the Eastern United States*, 27 *Energy & Min. L. Inst. Ch.* 7 (2007).

37. 229 La. 1017, 1020 (1956).

38. *Id.* at 1024.

39. *Id.* at 1025.

decision was overruled by the Louisiana Supreme Court nearly a decade later, and the *Mire* decision is retained under Article 61, which provides that a compulsory unitization order is not an obstacle for purposes of suspending prescription.<sup>40</sup>

*D. A Physical Act by The Surface Owner, Which Prevents the Owner of the Mineral Rights from Exercising His Right to Explore the Land and Cannot Be Removed by Lawful Means, is an Obstacle Suspending the Running of Prescription of Nonuse*

The Louisiana Second Circuit for the Court of Appeal faced a controversy involving a physical restriction that was an alleged obstacle in the way of use of a mineral servitude.<sup>41</sup> In *Hall*, a property owner who claimed partial ownership of the land subject to Plaintiff's mineral servitude, engaged in several acts that caused the court to determine if the prescription was suspended.<sup>42</sup> He pulled up the stake marking the site of the proposed well, locked the gate which controlled access to the proposed well site, and refused to permit the mineral servitude holder's contractor to enter the land to do work preparatory to the drilling.<sup>43</sup> The court concluded that the obstructions could not have been removed by any legal way other than by the suit which they instituted, holding that the property owner had effectively created an obstacle to the use of plaintiffs' servitudes.<sup>44</sup> The court further noted "that an obstacle may exist wholly apart from the actions of the surface owners."<sup>45</sup> A notable scholar has briefly discussed that this could lead to a reasonable inference that flooding would constitute an obstacle to the exercise of a servitude.<sup>46</sup>

Likewise, in *Corley v. Craft*, Plaintiff alleged that Defendant, by overt act, created an obstacle within the meaning of Article 59.<sup>47</sup> The plaintiffs were Mrs. Corley and Twin City Gas Company, the mineral servitude owner-lessor and mineral lessee, respectively.<sup>48</sup> Plaintiffs sought to explore land under their contractual rights reserved in a sale to Defendant, but their

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40. *Mire v. Hawkins*, 249 La. 278 (1966); La. R.S. 31:61 (2000).

41. *Hall v. Dixon*, 401 So.2d 473 (La. Ct. App. 2d Cir. 1987).

42. *Id.* at 475.

43. *Id.*

44. *Id.* at 476.

45. *Id.* at 476-477; Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1163 (1987).

46. Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1163 (1987).

47. 501 So.2d 1049, 1050 (La. 1987).

48. *Id.*

efforts were hindered by Defendant's acts.<sup>49</sup> Notably, Defendant "dug out" the access road upon notice that drilling operations were to begin and refused Plaintiff's offer to pay for road reconstruction.<sup>50</sup> Defendant then contacted the party contracted to construct the new road and requested that he not assist Plaintiff, and then blocked access to the new access road with a sizeable bulldozer and backhoe.<sup>51</sup>

Upon arriving at the blocked access road, Defendant refused to remove the obstruction, claiming that the plaintiffs needed to get a permit from the Commissioner for Conservation for the State of Louisiana. Plaintiffs agreed to the terms, flew down to the Commissioner's office in Baton Rouge, and obtained a drilling permit. However, to their shock and horror, the access road remained blocked, and Defendant's lawyer delivered a letter disclosing "that access was being denied because operations at the permitted location might be in violation of the laws of Louisiana

and the regulations of the Department of Environmental Quality."<sup>52</sup> Defendant then called DEQ directly to inform them he had been dumping his trash on the property, and thereupon DEQ issued an injunctive order against Plaintiff.<sup>53</sup> In response, Plaintiff left the property, and Defendant subsequently removed its heavy equipment blocking the access road.<sup>54</sup>

The acts of Defendant amounted to a "wild goose chase" and were designed to delay the exploration of the land with the hope that the underlying mineral servitude would terminate as a result of prescription of nonuse and would, as a result, revert to the defendant-landowner. Ultimately, the court determined that the continuous chain of events that prevented the plaintiff from exploring the land was within the meaning of an obstacle under Article 59.<sup>55</sup> In doing so, the court found that defendant effectively established an obstacle to the use of the land by refusing to grant a pipeline right-of-way, removing the only access road to the property, blocking the entranceway to the drilling rig, requiring that the plaintiffs fly to Baton Rouge to obtain a newly signed drilling permit, and reporting his actions to the Department of Environmental Quality to obtain an injunction on drilling on the land.<sup>56</sup> Furthermore, the court concluded that the plaintiffs

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1053.

56. *Id.* at 1052.

“could not have removed or prevented this continuous series of obstacles created by the cutting of the only access, the blockage by the heavy machinery, and the attainment of the injunction order.”<sup>57</sup>

### *III. Proposed Universal Standard for Determining Obstacles Within the Parameters of Article 59*

To clarify the question regarding what is an obstacle under the parameters of Article 59, broad, but certain standards must be enacted to assist persons in understanding what constitutes an obstacle under the law. A standard is proposed to determine whether a particular claim is sufficient to rise to the level of an obstacle and, thus, suspends the tolling of prescription of nonuse under Article 59.

The four-prong test proceeds as follows:

- (1) Do(es) the mineral servitude owner(s) have a right to explore the land?
- (2) If yes, was the mineral servitude owner, or a person authorized to act on his behalf, by physical act, impermissibly restricted access to the land and his right to explore the land, or did an obstacle exist wholly apart from the actions of another person?
- (3) If yes, could the mineral servitude owner(s) reasonably resolve the obstruction?
- (4) If no, then an obstacle to the exercise of the mineral servitude existed and the tolling of prescription of nonuse is suspended until the obstacle can be removed from the land.

#### *A. The Party Seeking to Suspend the Tolling of Prescription of Nonuse Must Have a Legal Right to Explore the Land*

Article 59 establishes an initial threshold that a claimant must surpass before considering whether a particular act or event is an obstacle. Under Article 59, the party seeking suspension of the prescription of nonuse must have a legal right to explore the land. Additionally, under Article 59, suspension of prescription of nonuse is only applicable where the act or event qualifying as an obstacle relates to a mineral servitude.<sup>58</sup> Suspension

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57. *Id.*

58. *See* La. R.S. 31:59 (2000).

of prescription of nonuse may apply to other mineral rights<sup>59</sup>, but the application under Article 59 is primarily pertinent to mineral servitudes. Implicit in the designation as a mineral servitude owner is the right to explore and produce the land's minerals.<sup>60</sup>

Each controversy examined relates directly, at its conception, to whether the claimant has a right to explore the land at issue. One of the clearest examples of a successful claim that an act was an obstacle sufficient to suspend prescription of nonuse was the landowner's physical act to refuse entry to the land by the party bringing the claim before the court in *Hall v. Dixon*.<sup>61</sup> The fact that plaintiffs were the owners of mineral servitudes on the land was undisputed.<sup>62</sup> The plaintiffs sought "to enforce their rights as co-owners to explore for and produce minerals" for the land at issue.<sup>63</sup> As such, the initial threshold was surpassed in *Hall*. Likewise, in each other case where a dispute arose around whether the claim was an obstacle under Article 59, it was clear that the party bringing the claim for redress was the owner of the right to explore upon the land at the time contested.<sup>64</sup>

It is unambiguous from the jurisprudence that the right to explore the underlying minerals from the land is the initial threshold for determining whether an obstacle can suspend the running of prescription of nonuse. If the right to explore the land to reduce its minerals to possession exists, then prescription of nonuse may be suspended by an act or event falling within the confines of Article 59.

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59. While the prescription of nonuse under Article 59 relates specifically to the Mineral Servitude, the statutory provisions for Executive Rights and Mineral Royalties infer that the same standard proposed for an "obstacle" would be applicable to these Mineral Rights. *See e.g.*, La. R.S. 31:107 (2000) (permitting suspension of prescription of nonuse relating to the Executive Right); *see also e.g.*, La. R.S. 31:98 (2000) (permitting suspension of prescription of nonuse relating to the Mineral Royalty).

60. La. R.S. 31:21 (2000).

61. *See Hall v. Dixon*, 401 So.2d 473 (La. App. 2 Cir. 1981).

62. *Id.*

63. *Id.* at 474.

64. *See e.g.*, *Corley v. Craft*, 501 So. 2d 1049, 1050 (La. App. 2 Cir. 1987) (It was undisputed on appeal that Mrs. Corley was the underlying mineral servitude owner, having reserved the right to explore from the land in a contract of sale to Mr. Craft); *see also e.g.*, *Central Pines Land Co. v. U.S.*, 274 F. 3d 881 (5th Cir. 2001) ("In 1929 Gulf Lumber Company conveyed to S.H. Fullerton mineral rights . . . [that] created a mineral servitude which was eventually transferred to Wm. T. Burton Industries (Burton)" and those rights were later transferred to Plaintiff, Central Pines Land Co., currently claiming that an obstacle existed that suspended prescription of nonuse.).

*B. An Obstacle May Arise Because the Surface Owner Impermissibly Restricted the Mineral Servitude Owner(S) Right to Explore the Land or an Obstacle May Exist Wholly Apart From the Actions of the Surface Owner*

Two preeminent examples of a clear man-made obstacle to the exercise of the right to explore from the land are the circumstances in *Corley* and *Hall*.<sup>65</sup> The most prevalent example of a surface owner impermissibly restricting the mineral servitude owner's right to explore the land by his physical doing was in *Hall v. Dixon*. The partial property owner pulled up the stake marking the site of the proposed well, locked the gate which controlled access to the proposed well site, and refused to permit the mineral servitude owner's contractor to enter the land to prepare for drilling operations.<sup>66</sup> The court found that the property owner had effectively created an obstacle to the use of the mineral servitude.<sup>67</sup>

Similarly, in *Corley*, the court determined that the continuous chain of events directly attributable to the landowner-defendant was an obstacle.<sup>68</sup> An obstacle was established because the landowner refused to grant a pipeline right-of-way to the mineral servitude owner, removed the only access road to the property, blocked the entranceway to the drilling rig, required that the plaintiffs fly to Baton Rouge to obtain a newly signed drilling permit, and reported his illicit actions on the land to the Department of Environmental Quality (the "DEQ") to obtain an injunction on drilling on the land.<sup>69</sup> It is thus clear that a physical act by a natural person that impedes the mineral servitude owner's ability to reasonably access the land to explore thereon is an obstacle under Article 59.

However, the court in *Hall* opined "that an obstacle may exist wholly apart from the actions of the surface owners."<sup>70</sup> This reasonably infers that an obstacle can occur independently of the actions of a natural or juridical person. It has been theorized, without any substantial argument in support of the said theory, that flooding could establish an obstacle to the exercise of a servitude.<sup>71</sup> It follows from dicta in *Hall* and scholarship just mentioned, as well as industry practice, that catastrophic flooding is an

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65. *Corley*, 501 So.2d at 1049; *Hall*, 401 So.2d at 473.

66. *Hall*, 401 So.2d at 473.

67. *Id.* at 476.

68. *Corley*, 501 So.2d at 1053.

69. *Id.* at 1052.

70. *Hall*, 401 So. 2d at 476-477; Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1163 (1987).

71. Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1163 (1987).

obstacle suspending the running of prescription of nonuse relating to a mineral servitude owner.<sup>72</sup>

Safety concerns for the crew responsible for the drilling of the well, as well as for those citizens neighboring the property wherein the well sits, strengthen the position that an obstacle to its use exists during inclement weather by way of customary practices as well as the effect of government regulation. FEMA's National Flood Insurance Program guidance notably provides that an operator of a drilling site located in a floodplain should always have an emergency action plan if an "imminent flood event" should occur.<sup>73</sup> This plan should set out how the operator will evacuate all vehicles and movable equipment out of the area in the event of a flood.<sup>74</sup> Anadarko, a market leader, takes advanced action in the face of imminent flooding.<sup>75</sup> During the 2013 flooding, Anadarko disclosed that it had "shut in about 670 of its 5,800 wells and about 20 miles of its more than 3,200-mile pipeline" in Colorado.<sup>76</sup> Failure to take such advance action may lead to a scenario where flooding causes oil to be flushed out of wells and into neighboring waterways. For example, the "recent Texas floods have inundated oil wells and fracking sites, flushing oil and fracking chemicals into rivers."<sup>77</sup>

The Federal Water Pollution Control Act, commonly known as the Clean Water Act (the "CWA"), as amended, is designed "to restore and maintain the chemical, physical, and biological integrity of the nation's surface waters."<sup>78</sup> The primary federal policy enumerated by the CWA is the prevention of "discharges of oil or hazardous substances into or upon the

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72. While this Comment primarily focuses on the application of the proposed standard to a catastrophic flooding event, the author finds a reasonable basis to conclude that other naturally occurring *force majeure* events (e.g., hurricanes or tropical storms) may rise to the level of an obstacle depending on the event's impact on a particular mineral servitude and the land accompanying said mineral right.

73. *Interim Technical Guidance on Drilling Oil and Gas Wells in Special Flood Hazard Areas (SFHA)*, FEMA NATIONAL FLOOD INSURANCE PROGRAM, [https://agriculture.ks.gov/docs/default-source/floodplain-assorted-publications/interim-fema-oil-gas-guidance.pdf?sfvrsn=cb5bf5e4\\_2](https://agriculture.ks.gov/docs/default-source/floodplain-assorted-publications/interim-fema-oil-gas-guidance.pdf?sfvrsn=cb5bf5e4_2).

74. *Id.*

75. Renee Lewis, *Flooding Oil and Gas Wells Spark Fears of Contamination in Colorado*, AL JAZEERA AMERICA (Sept. 18, 2013) <http://america.aljazeera.com/articles/2013/9/15/report-rupturedpipelinegasleaksoilspillsincoloradofloods.html>.

76. *Id.*

77. *Flooding Flushes Oil, Fracking Chemicals Into Rivers*, STATESMAN (Sept. 3, 2016) <https://www.statesman.com/news/20160903/flooding-flushes-oil-fracking-chemicals-into-texas-rivers>.

78. Federal Water Pollution Act of 1972, 33 U.S.C. §1251 (2018).

navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . . .” Penalties for violating the CWA prohibition on water pollution include Class I penalties, which include fines of \$10,000.00 per violation, with a total cap of \$25,000.00, as well as Class II penalties that may not exceed \$10,000.00 per day and are capped at \$125,000.00.<sup>79</sup> Moreover, acts of gross negligence or willful misconduct can subject the party to an additional civil penalty of not less than \$100,000.00, and not more than \$3,000.00 per barrel of oil discharged into the water.<sup>80</sup>

Additionally, the Oil Pollution Act of 1990 (the “OPA”) projects liability onto a responsible party for an oil spill.<sup>81</sup> The responsible party may be liable for removal costs and significant damages.<sup>82</sup> However, the OPA grants liability limits to responsible parties not found to have engaged in gross negligence or willful misconduct for damage.<sup>83</sup> An offshore facility is capped at \$75 million and, both an Onshore Facility and a Deepwater Port are capped at \$350 million for damages from an oil spill.<sup>84</sup> While the Oil Spill Liability Trust Fund may provide some relief for removal costs, the potentially steep penalty existing for damages related to a spill has and will continue to serve as a significant deterrent to oil and gas operators in the event of inclement weather.<sup>85</sup>

Accordingly, the laws of the United States, as well as regulatory guidance enacted under federal statutes, significantly deter an oil and gas operator from exploring during catastrophic flooding. The statutory and regulatory schemes focus on calculable penalties but do not begin to discuss reputational costs arising as a result of contamination of the water used by the nearby human populations. These reputational costs could irreversibly devastate a company’s bottom line. The risk and fear of substantial damages, as well as the safety of the operator’s crew and equipment, establish industry practice that oil and gas activities should halt during flooding that touches the land at issue. As a result, a reasonably prudent operator would not exercise its right to explore, so an obstacle exists in the same manner as if a natural person had physically restricted access to the land. These factors support the theory elucidated by a notable scholar that

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79. *Id.*

80. *Id.*

81. Oil Pollution Act of 1990, 33 U.S.C. § 2701 (2018).

82. *Id.* § 2702. (2018).

83. *Id.*

84. *Id.*

85. Oil Pollution Act § 2702.

flooding would constitute an obstacle to the exercise of a mineral servitude.<sup>86</sup>

*C. The Mineral Servitude Owner Must Be Incapable of Reasonably Resolving the Obstruction*

It is universally accepted that the mineral servitude owner must be without any legal means to remedy the obstacle that prevents them from exploring the land to reduce its minerals to possession. This situation applies primarily to circumstances where a physical obstruction to use is present, such as the landowner effectively blocking the access to, or the actual use of, the land at issue. As in *Corley* and *Hall*, the plaintiffs “could not have removed or prevented this continuous series of obstacles”<sup>87</sup> by any legal way other than by the suit which they instituted.<sup>88</sup>

A reasonableness standard can be inferred from the jurisprudence and statutory provisions relating to the requirement that the party seeking relief must be incapable of remedying the obstacle. As such, the mineral servitude owner must have acted as a reasonably prudent mineral servitude owner would have under similar circumstances. This derives from the standard for a co-owner of a mineral servitude with its other co-owner,<sup>89</sup> as well as a mineral lessee in its relation to a mineral lessor.<sup>90</sup> Therefore, if the plaintiff has confirmed that they owned the right to explore the land and an obstacle within the scope of Article 59 existed, then they must have been incapable of resolving the obstacle by legal means that a reasonably prudent mineral servitude owner would have conducted.

A traditional obstacle dilemma involves an obstacle created by a person (generally the landowner or their agent), as opposed to a natural event. This circumstance puts the agitator in a poor position to argue that the mineral

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86. See Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1163 (1987).

87. *Corley v. Craft*, 501 So.2d 1049, 1052 (La. 1987).

88. See *id.*; see also *Hall v. Dixon* 401 So.2d 473, 476 (La. Ct. App. 2d Cir. 1987).

89. La. R.S. 31:176 (2000) (The provision notes that “[a] co-owner . . . must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership.” However, there is ambiguity whether the co-owner can stipulate what conduct is contained in this reasonableness standard. As Louisiana Mineral Code Article 122 explicitly provides for a right to stipulate on the reasonableness standard, this provision does not do so.)

90. La. R.S. 31:122 (2000) (“A mineral lessee . . . is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.”).

servitude owner should not have waited until the last minute to drill because the landowner's conduct was likely unforeseeable. However, an obstacle created by a natural, potentially foreseeable event raises a question regarding the applicability of a duty to preemptively mitigate foreseeable events caused by weather.

In the event that a mineral servitude owner waits until the last minute to drill, the operator may be incapable of raising an obstacle defense because a reasonably prudent operator may be subject to an implied duty to take advance steps to mitigate against foreseeable threats.<sup>91</sup> A reasonable attempt to resolve the obstruction preemptively may be an implied duty if flooding is anticipated to occur in the future.<sup>92</sup> However, this claim has not been addressed by either the judiciary or legislature in Louisiana in the context of an obstacle affecting the exercise of a Mineral Servitude.

Foreseeability is a prevalent topic in the ambit of tort law but could have application in this setting.<sup>93</sup> The Supreme Court of the United States has proclaimed that floods are not foreseeable in the context of a force majeure clause.<sup>94</sup> However, not every flood would be an excuse for delays, such as when the obstacles were anticipated by a contractor in his estimate of time and cost.<sup>95</sup> If an obstacle is foreseeable based on scientific data touching the particular area at issue, then it is an open argument on whether the *force majeure* doctrine should be extended to the mineral rights owner to impose a mandate to prepare land for a natural event.<sup>96</sup> To mitigate this uncertainty, the landowner, seeking to protect itself from loss, would effectively be under a duty to take preemptive steps to mold the property in preparation of foreseeable inclement weather. But, a duty to take preemptive steps should never be imposed in the event of unforeseeable weather that restricts the ability to explore the land.

The ecologically rich Louisiana wetlands have been privy to thousands of exploration and development wells dating back to 1937.<sup>97</sup> Drilling in the

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91. *See id.*

92. This paper does not set out to establish whether a particular duty to preemptively act exists in the context of an Article 59 obstruction claim, but instead raises the possibility that it may exist.

93. *See* W J. Cardi, *Reconstructing Foreseeability*, 46 B.C.L. REV. 921 (2005).

94. *United States v. Brooks-Callaway Co.*, 318 U.S. 120 (1943).

95. *See id.*

96. FEMA's flood maps could provide the appropriate scientific data to put an operator on notice that preemptive steps should be taken to address a flood-prone tract of land. *See* FEMA Flood Map Service Center, <https://msc.fema.gov/portal/home>.

97. Donald W. Davis and John L. Place, *The Oil and Gas Industry of Coastal Louisiana and its Effect on Land Use and Socioeconomic Patterns*, United States Department of the

Louisiana wetlands has recently become extremely controversial, with local governments seeking redress from energy companies under the theory that drilling has significantly damaged the wetlands, making the neighboring land more prone to storm damage.<sup>98</sup> Besides the controversy, drilling in and around the Louisiana wetlands provides a quintessential example of why a duty to mitigate foreseeable flooding should be imposed on operators seeking the protection of Article 59.

Floodplain wetlands are naturally designed to store flood waters during high runoff events.<sup>99</sup> Louisiana wetlands are primarily privately-owned, making it very economic to explore for minerals.<sup>100</sup> The wetlands are entirely within the lowest-lying area of the State, making it immensely flood prone.<sup>101</sup> Moreover, the Louisiana coastline is often threatened by winter storms and hurricanes, which bring with them the indomitable force of storm surge.<sup>102</sup> Thus, it is extremely predictable that land in or near the marshlands of Louisiana will face impact by flood waters that cause operators to temporarily suspend their actions until the water subsides.<sup>103</sup>

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Interior Geological Survey, <https://pubs.usgs.gov/of/1983/0118/report.pdf> (“Onshore, more than 6,300 exploratory wells and more than 21,000 development wells were drilled in Louisiana\*s eight southernmost parishes between 1937 and 1977. Nearly all those wells were in wetlands or inland water bodies.”).

98. Chris Kardish, *Southern Louisiana Picks a Fight with Big Oil to Save the Wetlands*, GOVERNING (Aug. 25, 2015) <https://www.governing.com/topics/transportation-infrastructure/gov-louisiana-wetlands-lawsuits.html>; Mark Schleifstein, *New Orleans Files Wetland Damage Suit Against Oil, Gas Companies*, THE TIMES-PICAYUNE, Apr. 1, 2019, [https://www.nola.com/news/environment/article\\_601e0eaf-c33b-53c1-8872-6887c3c5cd90.html](https://www.nola.com/news/environment/article_601e0eaf-c33b-53c1-8872-6887c3c5cd90.html).

99. Agency of Natural Resources Department of Environmental Conservation, *Wetland Functions and Values: Water Storage for Flood Water and Storm Runoff* | Department of Environmental Conservation. <https://dec.vermont.gov/watershed/wetlands/functions/storage> [Accessed 4 Dec. 2019].

100. Sara Sneath, *As Louisiana’s Coast Washes Away, State Cashing in on Disputed Oil and Gas Rights*, THE TIMES PICAYUNE (May 31, 2018) [https://www.nola.com/news/environment/article\\_9894c6d7-794c-5ef6-a21e-120ff729527c.html](https://www.nola.com/news/environment/article_9894c6d7-794c-5ef6-a21e-120ff729527c.html).

101. John J. Kosovich, *State of Louisiana—Highlight Low-Lying Area Derived from USGS Digital Elevation Data*, Nov. 2008, UNITED STATES GEOLOGICAL SURVEY, available at <https://pubs.usgs.gov/sim/3049>

102. Edward Richards, *Why the Master Plan Will Not Protect Louisiana and What We Should Do Instead*, LSU LAW CENTER: CLIMATE CHANGE LAW AND POLICY PROJECT, (February 21, 2017) <https://sites.law.lsu.edu/coast/2017/02/why-the-master-plan-will-not-protect-the-coast-and-what-we-should-do-instead/>.

103. David E. Dismukes and Siddhartha Narra, *Sea-Level Rise and Coastal Inundation: A Case Study of the Gulf Coast Energy Infrastructure*, Natural Resources, 9, 150-174, <https://doi.org/10.4236/nr.2018.94010>. (“Many coastal communities have to deal with more

As such, this component of the land must be factored into the calculus of drilling operations and an operator should have a duty to take reasonable steps to mitigate the force of the foreseeable flooding. Absent these proactive steps being taken, a mineral servitude owner should be prevented from claiming that inundation of their land established an obstacle to its use.

Similarly, operations occurring within a 10, 25, 50, or 100-year flood zone may also be subject to the proposed implied duty to preemptively mitigate foreseeable events. A 100-year flood zone generally has a 1% annual chance of flooding.<sup>104</sup> A 10-year flood zone has a 10% yearly chance of flooding, while 25 and 50-year flood zones have a 4% and 2% annual chance of flooding, respectively.<sup>105</sup> These areas are coined “High Risk Areas” by FEMA.<sup>106</sup> Over ten years, a mineral servitude owner must “use” the property. Respectively, there is a vastly increased risk of flooding occurring within these particular flood zones. Respectively, the risk of flooding over a ten years rises to 65%, 34%, 18%, and 10%.<sup>107</sup> At a minimum, an operator within a 10 and 25- year flood zone seeking the protection of Article 59 should be under a duty to take preemptive steps to mitigate, as the risk is foreseeable.<sup>108</sup> While not as persuasive, an operator under a 50 and 100-year flood zone should likewise be subject to the requirement of taking advance preparatory steps.<sup>109</sup>

In sum, when the mineral servitude owner has a legal right to explore the land,<sup>110</sup> is restricted from exploration due to the actions of the landowner(s) or some other event,<sup>111</sup> and is subsequently incapable of reasonably curing that restriction, then an obstacle to the exercise of the mineral servitude

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frequent and extended flooding in the next few decades even before the rising sea levels lead to greater inundation extent.”).

104. Federal Emergency Management Agency, *Definitions of FEMA Flood Zone Designations*, available at [https://efotg.sc.egov.usda.gov/references/public/NM/FEMA\\_FLD\\_HAZ\\_guide.pdf](https://efotg.sc.egov.usda.gov/references/public/NM/FEMA_FLD_HAZ_guide.pdf).

105. Federal Emergency Management Agency, *Unit 3: NFIP Flood Studies and Maps* (2015), available at [https://www.fema.gov/pdf/floodplain/nfip\\_sg\\_unit\\_3.pdf](https://www.fema.gov/pdf/floodplain/nfip_sg_unit_3.pdf).

106. Federal Emergency Management Agency, *Definitions of FEMA Flood Zone Designations*, available at [https://efotg.sc.egov.usda.gov/references/public/NM/FEMA\\_FLD\\_HAZ\\_guide.pdf](https://efotg.sc.egov.usda.gov/references/public/NM/FEMA_FLD_HAZ_guide.pdf).

107. Federal Emergency Management Agency, *Unit 3: NFIP Flood Studies and Maps* (2015), available at [https://www.fema.gov/pdf/floodplain/nfip\\_sg\\_unit\\_3.pdf](https://www.fema.gov/pdf/floodplain/nfip_sg_unit_3.pdf).

108. *See id.*

109. *See id.*

110. *See infra* Part III.A.

111. *See infra* Part III.B.

exists, and the tolling of prescription of nonuse is suspended until the obstacle's removal.

*IV. Application Of Standard Demonstrates Definitely That Catastrophic Flooding Is An Obstacle Sufficient To Suspend Prescription*

Absent a grant of judicial relief under to Article 59, Boudreaux's failure to sufficiently exercise his mineral rights by January 1, 2019, would result in the termination of his mineral servitude and the subsequent reversion of the rights to the owner of the land—Thibodeaux. Thus, Thibodeaux would be entitled to the profits gained by Boudreaux during the time he improperly extracted minerals from Blackacre.<sup>112</sup>

However, the proposed standard for determining whether particular actions or events are sufficient to rise to the level of an obstacle under the Louisiana Mineral Code grants a more equitable result than a strict application of the current ambiguous "standard" and opens the door for outside natural forces to represent an obstacle. When the mineral servitude owner, such as Boudreaux, has a legal right to explore the land,<sup>113</sup> is restricted from exploring the land due to the actions of the landowner(s) or some other event,<sup>114</sup> and is subsequently incapable of curing that restriction by reasonable and legal means, then an obstacle to the exercise of the mineral servitude exists, and the tolling of prescription of nonuse is suspended until the obstacle's removal from the land.

Boudreaux has a legal right to explore the land by way of the mineral servitude agreement executed between Boudreaux and Thibodeaux upon the sale of Blackacre to Thibodeaux and the concurrent reservation of the right to explore for minerals upon the land.<sup>115</sup> The controversial analysis arises in the context of whether there was a natural, non-manmade obstacle and, if true, whether that obstacle was preventable by Boudreaux.

Flooding constitutes an obstacle to the exercise of a mineral servitude.<sup>116</sup> Various federal laws and regulatory schemes support this position because the legislatures and administrative agencies significantly deter an oil and

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112. See La. R.S. 31:12 (2000) ("Except as provided in Article 14, the owner of land may protect his rights in minerals against trespass, damage, and other wrongful acts of interference by all means available for the protection of ownership.").

113. See *infra* Part III.A.

114. See *infra* Part III.B.

115. See *infra* Introduction.

116. See Luther L. McDougal III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1163 (1987).

gas operator exploration during catastrophic flooding.<sup>117</sup> Also, reputational costs due to contamination of the water used by the nearby human populations could irreversibly devastate a company's bottom line, so the operator is also deterred from acting under this clear rationale.<sup>118</sup> Additionally, the safety of the operator's crew and equipment, in connection with other factors, establishes industry practice that oil and gas activities should halt during flooding that touches the land at issue.<sup>119</sup> As a result, a reasonably prudent operator would not exercise its right to explore, so an obstacle exists in the same manner as if a natural person had physically restricted land access.<sup>120</sup>

It follows that the running of prescription of nonuse on Blackacre was suspended during the time concerning the flood. Given that floodwaters are generally incapable of control, absent a substantial investment by government entities, Boudreaux is incapable of curing that restriction by reasonable and legal means. Accordingly, under the facts presented, prescription of nonuse would be suspended on January 29, 2009 and Boudreaux would have two additional days after the obstacle was removed from the land to interrupt prescription of nonuse by beginning good faith drilling. Since drilling was conducted to the depth where paying quantities are located within 2 days of the obstacle ceasing to be a barrier to operations, Boudreaux retains the right to explore for minerals on Blackacre. Alas, he is a millionaire, and Clotile is a happy wife.

#### *Mineral Rights Do Not Flood Away*

The civilian abrogation of the *ad coelum* doctrine, effectively eliminating the absolute ownership of land, has created a predicament warranting reparation. Mineral Servitude owners should rely on a concrete set of standards when determining whether a particular act or event is substantial enough to interrupt prescription of nonuse. The courts have been mostly silent on flooding and its effect on the right to explore for minerals. As flooding concerns continue to grow, the courts should adopt a set of standards to prevent immense controversy from arising between the mineral servitude owner and the landowner seeking to claim that the right to explore has terminated because of nonuse prescription. Under the proposed standard, the mineral servitude owner's rights would not flood away.

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117. *See infra* Part III.B.

118. *Id.*

119. *Id.*

120. *Id.*