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VOL. 17 | NO. 2

**WATERSHED
MOMENT**

PAGE 2

**HUNTING FOR TITLE
DEFECTS**

PAGE 3

***DOUGHERTY V.
ABARTA OIL & GAS***

PAGE 5



INDUSTRY UPDATES



INSTITUTE NEWS



NEW MEMBERS

CALL FOR
NOMINATIONS

IEL'S EXCELLENCE IN
DIVERSITY, EQUITY &
INCLUSION AWARD

DIVERSITY, EQUITY & INCLUSION HIGHLIGHT

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rulemaking intended to improve the detection and repair of leaks from new and existing natural gas pipelines and certain gas facilities.

The proposed rule would update federal leak detection and repair standards, and affect more than 2.7 million miles of pipelines, over 400 underground natural gas storage facilities and 165 liquefied natural gas facilities. PHMSA said these updates would boost efficiency, cut pollution and waste, and create an estimated \$2.3 billion annually in benefits. The estimated annualized monetary cost would range between \$740 million and \$900 million. According to the proposal, the rule could reduce unintended emissions from regulated gathering pipelines by 27%, from transmission pipelines by 17% and from distribution pipelines by 44% to 62%, and reduce blowdown emissions by approximately 43%.

DOT Secretary Pete Buttigieg stated that “[q]uick detection of methane leaks is an important way to keep communities safe....” In his view, the proposed rule is a “long-overdue modernization of the way we identify and fix methane leaks.” While the proposed rule acknowledges PHMSA’s existing leak detection and repair standards, as well as the Environmental Protection Agency’s own leak detection requirements, it seeks to strengthen leakage survey and patrolling requirements. The proposed rule also seeks to enhance standards for advanced leak detection programs, leak grading and repair criteria with mandatory repair timelines, and requirements for mitigation of emissions from blowdowns, and seeks to clarify requirements for investigating failures, among other things.

The proposed rule would require operators of transmission, distribution and part 192-regulated gathering pipelines to identify and repair all leaks in a timely manner. This would require classifying and repairing leaks according to schedules based on the leak’s public safety and environmental risks. To comply, operators would be required to demonstrate that their equipment and programs can detect all leaks above a minimum threshold.

Operators of part 193-regulated liquefied natural gas facilities also would have to perform quarterly methane leakage surveys of non-tank equipment. These operators would be required to repair leaks consistent with maintenance or abnormal operations procedures.

Usus, Fructus, and Abusus – Whose right is it anyway? Examining the Powers of Usufructuaries in Louisiana

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Over the years, Louisiana courts have been called on to examine the balance of rights between landowners and

usufructuaries. Usufructs, similar to “life estates” in common law jurisdictions, can be granted for limited periods of time rather than one’s lifetime. Usufructs burden land placed into possession of “naked owners” (similar to “remainderman” in common law). From time to time, issues arise as to the authority of usufructuaries versus landowners – who has the right, and to what extent – they can encumber property. The Louisiana First Circuit recently examined that issue again in the case *Poule D’Eau Properties, LLC v. TLC Properties, Inc. and the Lamar Company, LLC*, 22022-1011 (La. App.1 Cir. 02/24/23), 2023 WL 22020182023, which is the basis of this article.

A. Overview of Relevant Property Rights in Louisiana Law

In Louisiana, a property owner enjoys full rights in property, which includes the “usus” or the right to enjoy property without altering it, the “fructus,” which is the right to derive profit from the property possessed, and the “abusus,” or the right to alienate, consume or destroy property. In contrast, a usufructuary enjoys only the first two limited real rights, and not the right to alienate, consume or destroy property.

1. Types of Usufructs in Louisiana - A usufruct in Louisiana arises either by operation of law (“legal usufruct”) or an inter vivos or mortis causa juridical act (“conventional usufruct”). See La.Civ.Code art. 544.

Usufructs may be established for a term or under a condition, and are subject to any modification consistent with the nature of usufruct. The rights and obligations of the usufructuary and of the naked owner may be modified by agreement unless modification is prohibited by law or by the grantor in the act establishing the usufruct. If not altered, it will be governed Louisiana law.

The most common type of “legal” usufruct is the surviving spouse usufruct. In Louisiana, under the established law known as “matrimonial regimes,” property owned by married persons is considered community property; however, married couples can modify or opt out of the community property regime by entering into a matrimonial agreement/prenuptial agreement, which can set forth different rules to govern their property. See La. Civ. Code art. 2334, et seq. When a spouse dies intestate or without a testament (i.e. will), survived by descendants, owning community property, by operation of law, the surviving spouse is placed into possession of their undivided one-half interest in the community property, with the decedent’s heirs placed into possession of the remaining one-half interest in “naked ownership,” subject to the usufruct of the surviving spouse. The surviving spouse usufruct will terminate when the surviving spouse dies or remarries, whichever occurs first. See La. Civ. Code art. 890. The power of a “surviving spouse” usufructuary to grant a servitude was the subject of *Poule*, 2023 WL 2202018202, discussed below.

2. Types of Louisiana Servitudes - A usufructuary's authority to grant a servitude over property varies depending on the type of servitude at issue. There are two types of servitudes in Louisiana - personal servitudes and predial servitudes. See La. Civ. Code art. 533. A personal servitude is a charge on a thing for the benefit of a person, conferring in favor of person a specified use of an estate less than full enjoyment. See La. Civ. Code arts. 534 and 639. The three types of personal servitudes are: usufruct, habitation, and rights of use.

Contrarily, "[a] predial servitude is a charge on a servient estate for the benefit of a dominant estate." See La. Civ. Code art. 646. Predial servitudes may be natural, legal, and voluntary or conventional. See La. Civ. Code art. 697. The use and extent of such servitudes are regulated by the title by which they are created, and, in the absence of such regulation, by Louisiana law. Louisiana Civ. Code art. 699 provides an illustrative list of predial servitudes, which include:

Rights of support, projection, drip, drain, or of preventing drain, those of view, of light, or of preventing view or light from being obstructed, of raising buildings or walls, or of preventing them from being raised, of passage, of drawing water, of aqueduct, of watering animals, and of pasturage.

Although a personal servitude, is a real right, it is one granted in favor of a person rather than an estate, and therefore, unlike the predial servitude, it does not continue to burden the property upon its sale.

3. Louisiana Co-ownership - Louisiana property is susceptible of ownership in indivision. See La. Civ. Code art. 807. Ownership of more than one person is known as "co-ownership." La. Civ. Code art. 807. Though each co-owner possesses the right to use the co-owned thing, under civilian and roman tradition, the consent of all co-owners is required to alienate or encumber the entire co-owned thing. The drafters of the Louisiana Civil Code distinctly enumerated this tradition in the creation of predial servitudes. See La. Civ. Code art. 714 ("When a co-owner purports to establish a servitude on the entire estate, the contract is not null; but, its execution is suspended until the consent of all co-owners is obtained.").

In *Poule*, the Louisiana First Circuit Court of Appeals were called upon to determine the authority of a usufructuary to grant a predial servitude over property co-owned by naked owners, absent their joinder. The First Circuit's opinion shows the difficulty that third parties may have when contracting for rights in property that is subject to these various parties.

B. *Poule D'Eau Properties, LLC v. TLC Properties, Inc., et al.*

In *Poule*, spouses Joseph Duplantis, Jr. and Rosemary Duplantis acquired, during their marriage, a 72-acre estate ("Duplantis Estate"). Rosemary died intestate, leaving behind her one-half community interest in the property. Per the Judgment of Possession for her succession, Joseph was recognized as the owner of an undivided one-half interest, and their six children ("Heirs" or "Duplantis Heirs") were placed into possession, as naked owners, of Rosemary's former one-half interest, subject to Joseph's surviving spousal usufruct.

Representing himself as the "sole owner" of the entire Duplantis Estate, Joseph later granted Lamar Advertising of Louisiana, LLC, and TLC Properties, Inc. (collectively "Lamar") an "easement" or predial servitude of passage over the Duplantis Estate to construct and maintain billboards ("Lamar Servitude"). After Joseph died and the Duplantis Heirs were placed into possession of the entire Duplantis Estate, the Heirs notified Lamar that the servitude granted by Joseph was invalid and offered a lease agreement to Lamar. Simultaneously, or near that time, the Duplantis Heirs sold the Duplantis Estate to Poule D'Eau Properties, LLC.

In 2017, Poule filed a petition for Petitory Action seeking Declaratory Judgment and Eviction of Lamar. The trial court dismissed Poule's claims against Lamar with prejudice; however, the First Circuit, on appeal, reversed the decision, and remanded the case to the trial court for further proceedings.

At the trial court, Poule moved for summary judgment, asserting suspension of the Lamar Servitude pursuant to Louisiana Civil Code article 714 based on the lack of consent to the Lamar servitude by all the co-owners (the Duplantis Heirs). Lamar filed a cross-motion for summary judgment, arguing that by accepting Joseph's succession, the Heirs cured their lack of consent under Louisiana Civil Code article 719. In direct contrast to their earlier ruling, the trial court granted summary judgment in favor of Poule, declaring them the sole owner of all rights over the property. Lamar's cross motion was denied, and they were evicted from use of the Lamar servitude. Lamar filed an appeal to the Louisiana First Circuit.

Both appeal actions largely focused on the Louisiana legal concept of **Suspension** under Article 714 of the Louisiana Civil Code. When a property is co-owned, a predial servitude, like the Lamar servitude, can only be validly established "with the consent **of all the co-owners,**" however, if some, but not all owners, grant a servitude, the servitude is not considered null, but rather, suspended until "the consent of all co-owners is obtained."

Lamar argued that Poule's trespass claim failed because the suspension of the servitude terminated either before or upon Poule's ownership of the Duplantis Estate. Lamar argued that Joseph's consent was valid as to his one

half interest, and that he consented as a legal usufructuary as to the remaining one-half interest inherited by the Duplantis Heirs from their mother. Lamar argued that when the Heirs later accepted Joseph's succession and were placed in possession of his undivided one-half interest in the property, they confirmed his consent to the servitude as to all the acreage of the Duplantis Estate.

Lamar cited to the Louisiana Supreme Court case of *Superior Oil Producing Co. v. Leckelt*, 189 La. 972, 988 (La. 1938) arguing their acceptance of Joseph's succession was a tacit acquiescence to the Joseph's grant of the servitude. In *Superior Oil*, a co-owner heir entered into a mineral deed with a third party purporting to convey an undivided one-half interest in all minerals that he owned in and on the property. The Louisiana Supreme Court found that, while there was no evidence that the remaining co-owner heirs formally consented to the granting of the servitude at the time the deeds were executed, they tacitly consented through their acquiescence in the acceptance of royalties to the third-party and by entering into lease contracts with the third party, authorizing him to go upon the land to explore for oil. Furthermore, the Louisiana Supreme Court noted the absence of any objection on the part of any of the co-owners to the servitude until shortly before suit was filed.

The First Circuit rejected Lamar's reliance on the *Superior Oil* case, citing to a lack of evidence of acquiescence by the Duplantis Heirs. In fact, the only evidence provided by Lamar to the court in support was letters that the Duplantis Heirs sent to Lamar that included the lease offer, before the Estate was sold to Poule.

Lamar secondly argued that the Heirs tacitly ratified the servitude pursuant to Louisiana Civil Code article 719. Louisiana Civil Code article 719 provides that the "successor of the co-owner who has consented to the establishment of a predial servitude, whether on the entire estate owned in indivision or on his undivided part only, occupies the same position as his ancestor." Moreover, that if he becomes owner of a divided part of the estate "the servitude burdens that part, and if he becomes owner of the whole the servitude burdens the entire estate."

The Louisiana First Circuit noted that, while the Duplantis Heirs were Joseph's successor as to his one-half interest, they were not his successor as to the remaining half, which was the half in question. Instead, the Heirs were in fact already the owners of the property, albeit "naked owners". The court explained that Louisiana Civil Code articles 714 through 719 apply where a co-owner grants a predial servitude on an estate or on an undivided part and the co-owner subsequently acquires the ownership of the entire estate, which were not the facts in *Poule*. The Duplantis Heirs were non-consenting co-owners of an undivided one-half interest in the property at the time the Lamar servitude was granted, and Poule acquired

its interest in the Duplantis Estate from the Duplantis Heirs, not Joseph. Thus, as owners, Lamar would have needed to show the consent of the Duplantis Heirs rather than Joseph's to prove the validity of the Lamar servitude.

In the end, the First Circuit affirmed the trial court's judgment denying Lamar's cross-motion for summary judgment and held that Lamar had no legal right to possess or occupy any portion the Duplantis Estate because they did not have the consent of all co-owners to the property, but rather, purported rights granted solely by a usufructuary. The court therefore ordered Lamar to vacate the premises within thirty days of Judgment.

C. Conclusion

It is in the best interest of all parties, when entering into any contract regarding real rights in property, to contact competent legal professionals, who can assist in the title research process to ensure your rights are being granted by the proper parties; however, should issues arise, Louisiana Civil Code article 596 provides for the breakdown of responsibility for expenses in such litigation matters. Conventional usufructuaries are liable for expenses of litigation with third persons concerning the enjoyment of the property. The expenses of litigation for matters involving third persons concerning both the enjoyment and the ownership of the property are shared, equally, between the usufructuary and the naked owner. Finally, expenses of litigation between the usufructuary and the naked owner are borne by the person who has incurred them.