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MINERAL RIGHTS

*Patrick H. Martin**

LEGISLATIVE DEVELOPMENTS

LEAP Eligibility Dates

Act 613 of the 1988 Regular Session amends and reenacts Louisiana Revised Statutes 30:148.2(1)(b) and 47:648.1(1)(b) relative to the Louisiana Economic Acceleration Program (LEAP), changing the eligibility date for wells certified under the LEAP program.

LEAP and School Board Leases

Act 514 amends and reenacts Louisiana Revised Statutes 30:152 and enacts Louisiana Revised Statutes 47:648.5 relative to mineral leases of school boards. It provides that the provisions of Louisiana Revised Statutes 30:148.1 through 148.7 and Louisiana Revised Statutes 47:648.1 (LEAP) shall not authorize the breach of any term or condition of any state agency lease applying to lands or mineral interest owned or administered by any school board.

Consent of Co-Owners

Act 647 revises articles 164, 166, and 175 of the Mineral Code, which relate to the requirement of consent from co-owners of mineral servitudes or co-owners of land for an exercise of the right to produce minerals. The revisions preserve the principle in the Mineral Code that one co-owner may not conduct operations without the consent of his co-owner. However, this principle is limited so that a small minority cannot frustrate the desires of the majority of owners of rights in land and minerals. Act 1047 of the 1986 Regular Session had revised these articles to allow exercise of the right to produce where consent of ninety percent of the co-owners was obtained. The 1988 revision reduces that consent requirement to eighty percent. As before, a co-owner of land or a mineral servitude who does not consent to development has no liability for the costs of development and operations except out of his share of production.

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Offshore Production Agreements Authorized

Act 651 enacts Louisiana Revised Statutes 30:10.1, which authorizes the Governor or his designee to enter into an Offshore Production Agreement with the United States setting out the procedures for joint conservation practices concerning minerals in common hydrocarbon bearing areas that underlie the federal and state boundary offshore. The Commissioner of Conservation is designated to hold a hearing on such an agreement in specified circumstances and make a recommendation to the Governor. After final agreement between the state and the United States (or by decision of an arbitrator or a court), the Commissioner shall, if directed by the Governor, issue an order ratifying the agreement or decision. The Act also amends and reenacts the introductory paragraph of Louisiana Revised Statutes 30:21 relating to fees charged by the Office of Conservation, allowing revision of such fees after review by the Commissioner of Conservation.

Payments Under State Leases

Act 963 of the 1988 Regular Session amends and reenacts section 136 A of title 30 to require that mineral leases granted by or for the state include provisions for the timely payment of all sums due the state and to provide for disposition of funds received under leases.

STATE AND FEDERAL LANDS

No Duty for Secretary of the Interior to Unitize Federal Lands with State Lands

The case of *State of Louisiana v. United States*[1] held that the Secretary of the Interior is under no duty to enter a unitization arrangement with the state for a reservoir that is partially on state and partially on federal lease lands. The actions of the federal lessee in this case were not shown to violate correlative rights of the state lessee.

Under the Submerged Lands Act[2] (SLA) and the Outer Continental Shelf Lands Act (OCSLA),[3] the State of Louisiana has the power to lease and develop the seabed out to three miles from its coast on the Gulf of Mexico, and the United States has the authority to lease and develop the area called the Outer Continental Shelf (OCS), which lies seaward of that state area. Some oil and gas reservoirs lie across the respective lines of jurisdiction and thus may be subject to development

1. 832 F.2d 935 (5th Cir. 1987), cert. denied, 108 S. Ct. 1592 (1988).
2. 43 U.S.C. §§ 1301-56 (1982).
3. Id. §§ 1331-56.

by state lessees in one portion and by federal lessees in the seaward portion of the reservoir. The State of Louisiana and its lessees here brought suit against the United States and its lessee for relief based on a claim that the federal lessee was causing waste with respect to a reservoir subject to the jurisdiction of both the state and federal governments, and a claim that these actions were violating the correlative rights of the state and its lessees. The state sought a limitation of production by the federal lessee to its proportionate share of the hydrocarbons of the reservoir and a court order requiring unitization of the reservoir. The claim rested on three grounds, section 8(g) of the OCSLA,[4] an established policy between the government agency responsible for management of the OCS oil and gas (the U.S. Geological Survey, which was succeeded by the Minerals Management Service), and the correlative rights of the state and its lessees under federal law. The United States and its lessee sought dismissal of the plaintiffs' claims.

The district court granted summary judgment for defendants,[5] holding that Section 8(g) provides for a sharing of revenues (27% to the state) from the federal OCS leases in a specified zone that incorporates drainage compensation to the state, and that the state remedy for resource drainage is limited to the section 8(g)(2) revenue sharing. The asserted policy of the government agency was never published as a rulemaking in the Federal Register and could not be binding upon the federal lessee. The doctrine of correlative rights, as reflected in the rules promulgated under the Outer Continental Shelf Lands Act,[6] extends only to waste of oil or gas. Since the plaintiffs made no showing that the federal lessee's operations denied the state's lessees an equal opportunity to produce hydrocarbons from their leasehold, the evidence on waste was insufficient to create a genuine factual issue; thus summary judgment was appropriate.

The Fifth Circuit Court of Appeals affirmed the district court's decision. The court held that the Secretary of the Interior has no duty to unitize under the Outer Continental Shelf Lands Act,[7] though he may enter into such an arrangement in his discretion. An alleged policy agreement between the state and the federal government did not create legally enforceable rights. There was no evidence that defendant Samedan engaged in wasteful practices.

Royalty Valuation—Jurisdiction

Where a federal lessee sought a declaratory judgment and remand of its case to the Interior Department for proper calculation of royalty

4. Id. § 1337(g)(2).
5. Louisiana v. United States, 656 F. Supp. 1310 (W.D. La. 1986).
6. 30 C.F.R. § 250.2(i), (qq) (1982).
7. 43 U.S.C. § 1337(g)(3).

based on value of gas sold, the Fifth Circuit in *Amoco Production Co. v. Hodel*[8] held that the primary objective of the complaining party was to obtain money from the federal government in an amount greater that $10,000. The claim thus was subject to the exclusive jurisdiction of the United States Claims Court.

Plaintiff Amoco in this case brought an action for declaratory judgment that it had properly paid royalties to its lessor, the Department of the Interior. The gas in question was being sold to Florida Power and Light under a warranty contract (no particular reserves of gas were dedicated to it) entered into in 1965. The lease between Amoco and the United States had begun in 1974. Plaintiff contended that the gas was limited in price under Section 105 of the Natural Gas Policy Act[9] and that it could not be required under the lease to pay royalty at a higher value than the maximum lawful price for the gas. The defendant United States filed a motion to dismiss for lack of subject matter jurisdiction, asserting that Amoco's claim was a disguised claim for money damages and that exclusive jurisdiction lay in the Claims Court under the Tucker Act.[10]

The federal district court granted summary judgment for defendants on the merits,[11] holding that although plaintiff was correct in asserting that section 105 acted to limit the price of gas "sold under" a contract even though it was not "subject to" the contract in the sense of the reserves being dedicated, the value of the gas for purposes of the royalty clause and a valuation determination by the government could still be higher than the maximum lawful price. The lessee here could have sold the gas at a higher price had it elected to do so on the effective date of the NGPA controls.

Amoco appealed and the United States again raised the subject matter jurisdiction issue. The Fifth Circuit vacated and remanded to the federal district court to transfer the case to the Claims Court pursuant to the Tucker Act. Jurisdiction over the claim of Amoco was vested exclusively in the Claims Court under the Tucker Act as the action was: 1) against the United States; 2) founded on the Constitution, federal statute, executive regulation or government contract; and 3) the action sought monetary relief in excess of $10,000. It is the last of these elements that made this a close case, for Amoco sought declaratory relief, a remand to the Interior Department for proper calculation of royalty, and a permanent injunction against application of the Interior Department's administrative decision upholding the valuation, but did

8. 815 F.2d 352 (5th Cir. 1987), cert. denied, 108 S. Ct. 2898 (1988).
9. 15 U.S.C. § 3315 (1982).
10. 28 U.S.C. § 1631 (Supp. 1988).
11. Amoco Prod. Co. v. Hodel, 627 F. Supp. 1375 (W.D. La. 1986).

not expressly ask for monetary relief. But the court ruled that the real effort or primary objective of the complaining party was to obtain money from the federal government.

From the reported case it appears that the conduct of the lessee may significantly affect the jurisdiction of a court to hear the essential claims in a controversy with the United States as lessor. The Fifth Circuit's characterization of Amoco's claim as seeking monetary relief is based on the fact that Amoco had already paid some royalty to the United States above that which Amoco claimed it actually owed. Had Amoco sought precisely the relief it did but not made payments on the basis of the government's valuation, it does not appear that the Tucker Act would have applied.

Take or Pay Litigation

Force Majeure, Commercial Impracticability, Imprevision, Mistake and Error, and Failure of Cause or Consideration.

Hanover Petroleum brought suit against defendant Tenneco for breach of a gas purchase contract in *Hanover Petroleum Corp. v. Tenneco, Inc.*[12] In the spring of 1983, Tenneco had adopted its Emergency Gas Purchase Policy, under which it repudiated the terms of its contracts with numerous natural gas producers around the country. Hanover was one of the many producers who filed suit for specific performance, seeking to invalidate the Emergency Gas Purchase Policy and to enforce the quantity, pricing, and take provisions of the contract. Tenneco raised defenses of force majeure, commercial impracticability, imprevision, mistake and error, and failure of cause or consideration. The trial court granted summary judgment for plaintiff in striking these affirmative defenses. The court of appeals affirmed.

The law of Louisiana was held to apply to the contract. Although the contract was signed in Texas and the parties were not residents of Louisiana, the contract was to be performed in Louisiana, and the immovable property affected by the contract was in Louisiana. The claim of force majeure under the force majeure of the contract was based on an economic recession, the pricing scheme of the Natural Gas Policy Act, the abundance of and the drop in the price of competitive fuels, the mild 1982-1983 winter, the increase in deliverability of fields committed to Tenneco under gas purchase contracts, and the delivery by producers of greater quantities of higher cost gas under contracts that involved the sale of gas in more than one price category.

12. 521 So. 2d 1234 (La. App. 3d Cir.), writ denied, 526 So. 2d 800 (1988).

Although circumstances relied on by the defendant were beyond its control, adverse economic conditions and modifications in governmental regulations that tend to render performance burdensome and unprofitable were held not to constitute force majeure. The common law doctrine of commercial impracticability, held the court, has no application under Louisiana law.[13] The doctrine of imprevision,[14] a French doctrine that permits judicial reformation of contracts whenever a drastic change in circumstances renders performance for one of the parties harsh, was rejected for the same reason as commercial impracticability. The claim of error was founded on nothing more than an error in judgment on the part of the defendant based on its own evaluation of future market conditions. The court stated that it was not within the province of the courts to relieve parties of their bad bargains. The principal cause of the gas purchase contract was the sale and purchase of a fixed volume of natural gas at a fixed price; there was no error about these. The expectation of profit is irrelevant to a determination of error. The court also rejected the claim that the consideration for the obligation to pay for gas not taken was the ability to make up the gas at a later time and that since make up was not possible there was no cause or consideration for the take-or-pay obligation. Nor was the take or pay obligation an unlawful stipulated damage clause; instead, it was an alternative obligation.[15] Take-or-pay obligations are commonplace in the natural gas industry and are not unconscionable or unfair, noted the court. The case was remanded to the trial court for a determination of the quantum of damages and the availability of specific performance.

The reported case is a rather definitive rejection of the principal defenses to claims of breach of take-or-pay obligations in gas purchase contracts relied on by pipelines. The fact that this appeal was on a summary judgment and that the Louisiana Supreme Court denied writs would suggest that there is little to litigate in such take-or-pay disputes.

Irreparable Damage and Minimum Take Provision

Plaintiff Pogo Producing Company, a natural gas producer who sold gas to defendant United, brought a claim for breach of six gas purchase contracts. Pogo sought a preliminary injunction requiring United to take and to pay for certain minimum quantities of gas under the contracts. The plaintiff asserted that it would sustain irreparable damage if the defendant were not required to take the gas pending resolution

13. See Superior Oil Co. v. Transco Energy Co., 616 F. Supp. 98 (W.D. La. 1985).

14. See Litvinoff, Force Majeure, Failure of Cause, and Theorie De L'Imprevision: Louisiana Law and Beyond, 46 La. L. Rev. 1, 15-17 (1985).

15. See Pogo Producing Co. v. Sea Robin Pipeline Co., 493 So. 2d 909 (La. App. 3d Cir.), writ denied, 497 So. 2d 310 (1986).

of the suit for specific performance of the contracts. A Commissioner of the Civil District Court found no irreparable harm, and the district judge then denied the preliminary injunction. The court of appeal affirmed and remanded in *Pogo Producing Co. v. United Gas Pipe Line Co.*[16]

The appeal focused on the expert testimony regarding the twenty-one reservoirs covered by the contracts at issue. The Commissioner and trial court accepted the position of the defendant's witnesses that while there might be some irreparable loss of gas, the amounts could be calculated and the plaintiff compensated through money damages. The findings were not clearly erroneous and thus were upheld by the appeals court. The court pointed out that the absence of irreparable injury was no bar to specific performance.[17] On remand the trial court could still grant specific performance as a remedy.

Jurisdiction Over Take-or-Pay Claims on the OCS

The case of *Amoco Production Co. v. Sea Robin Pipeline Co.*[18] involved an interlocutory appeal to ascertain the jurisdiction of the federal courts under the Outer Continental Shelf Lands Act[19] for take-or-pay litigation. Sea Robin reduced its purchases under contracts claiming force majeure. The reduced takes were sometimes below the take-or-pay quantity required, with no payment being made, and sometimes below the contract's minimum take obligations. Amoco brought suit in state court, and Sea Robin removed to federal court, asserting that federal question jurisdiction existed under the Outer Continental Shelf Lands Act. Amoco sought remand of the case to state court, but the district court ruled it had jurisdiction. The district court certified the jurisdictional question to the Fifth Circuit, which held that the federal courts do have jurisdiction in such cases. The court ruled:

> Any dispute that alters the progress of production activities on the OCS threatens to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the OCS. Such a dispute was intended by Congress to be within the grant of federal jurisdiction contained in § 1349.
>
> Exercise of take-or-pay rights, minimum-take rights, or both, by Sea Robin necessarily and physically has an immediate bearing

16. 511 So. 2d 809 (La. App. 4th Cir. 1987).

17. See J. Weingarten, Inc. v. Northgate Mall, Inc., 404 So. 2d 896 (La. 1981); *Superior Oil*, 616 F. Supp. 98.

18. 844 F.2d 1202 (5th Cir. 1988).

19. 43 U.S.C. § 1349(b)(1) (1982). In footnote 19, 844 F.2d 1202, 1206-07, the court goes over the reported and unreported cases that have split on the question of the jurisdiction of the federal courts under the OCSLA over take-or-pay litigation issues.

> on the production of the particular well, certainly in the sense of the volume of gas actually produced. Dispute by the parties of their respective rights, duties, defenses, and obligations is thus a controversy arising out of, or in connection with (A) any operation . . . which involves exploration, development, or production of the minerals . . . § 1349(b)(1).[20]

The court thus gave an expansive reading to the federal court jurisdiction under the Outer Continental Shelf Lands Act.

It should be pointed out that the federal court will have to apply state contract law in most circumstances to the controversies in take-or-pay litigation.[21] As suggested in the discussion above on *Hanover Petroleum Corp. v. Tenneco, Inc.*,[22] the state precedents have been generally unfavorable to pipelines on the standard take-or-pay defenses. However, the availability of a federal forum for take-or-pay litigation relating to the lands of the OCS may allow some differing rulings on procedural aspects of such litigation and for substantive law matters not yet finally ruled upon by the Louisiana Supreme Court.

OTHER CONTRACT AND PROCEDURAL PROBLEMS

Option Agreement

Otter Oil Company entered into a Geophysical Option Agreement with Crosby Chemicals under which Otter obtained a license to conduct surveys for minerals on 42,000 acres of land owned by Crosby. The agreement included an option for Otter to obtain a lease on all or a portion of the 42,000 acres for a 270-day period, provided that if Otter were to lease, it had to lease at least 10,000 acres. At about the same time, a Letter Agreement was entered into between Exxon and Otter under which Otter assigned the option to lease to Exxon. The Letter Agreement provided for Otter to receive bonus, delay rental, and overriding royalty from a lease to Exxon under the option. This Letter Agreement also contained an extension-and-renewal clause,[23] which provided that if Exxon acquired a mineral lease on all or a part of the 42,000 acres within a year after the expiration of the 270-day period of the option, then Otter would be entitled to the same payments it would have received had the option been exercised. Exxon did not exercise the option as assigned but did take a lease on 4,387 acres out of 42,000 acres to which the option had applied within a year after the

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20. 844 F.2d at 1210.

21. 43 U.S.C. § 1333(a)(2)(A). The state law that is applied is properly referred to as surrogate federal law.

22. 521 So. 2d 1234 (La. App. 3d Cir.), writ denied, 526 So. 2d 800 (1988).

23. This type of clause is often referred to as an "anti-washout" provision.

expiration of the option. Exxon paid to Otter overriding royalty out of this lease, but declined to pay bonus and delay rental. Otter claimed that the clause required Exxon to pay a bonus of $30 per acre on all acreage leased, with a minimum of 10,000 acres to be leased; delay rentals of $5 per acre on all acreage leased, with a minimum of 10,000 acres to be leased; and a two percent of 8/8 overriding royalty on all acreage selected, with a minimum of 10,000 acres to be selected and leased. Exxon contended that under the contract the 10,000 acre minimum did not apply to the extension-and-renewal clause and the obligation to pay bonus and rental did not apply when fewer than 10,000 acres were leased.

The Fifth Circuit in *Otter Oil Co. v. Exxon Co., U.S.A.*[24] reversed a district court judgment for Exxon that had followed Exxon's interpretation of the contract. The extension-and-renewal clause provided that if Exxon acquired a mineral lease on all or part of the 42,000 acres within one year after the expiration of the option, then the obligations, duties, and rights set forth "herein" shall apply. The district court held that "herein" referred only to the Letter Agreement, which did not contain a reference to the 10,000 acre minimum. The Fifth Circuit held that the obligations of the Geophysical Option Agreement between Otter and Crosby Chemicals were carried over to the Letter Agreement between Exxon and Otter. The purpose of the extension-and-renewal clause was to prevent a washout. Its purpose was to put Otter in as good a position as Otter would have been had Exxon not chosen to deal directly with Crosby within one year. Thus the 10,000 acre minimum was held to apply to achieve this purpose. The Letter Agreement incorporated by reference the Geophysical Option Agreement, and that incorporation included within its scope the 10,000 acre minimum specified in the Geophysical Option Agreement. The court remanded to the district court for proper determination and award of damages.

Prescription—Failure to Bring Claim for Breach of Contract for Oilfield Canal Servitudes within Ten Years of Breach

A claim for a breach of contract for oilfield canal servitudes by exceeding allowed width of such canals had prescribed, held the court in *Lewis v. Sohio Petroleum Co.*,[25] where the plaintiffs failed to bring the claim within ten years of when they or their predecessors in title knew or should have known of breach. The landowners claimed that the defendant owners of oilfield canal servitudes had breached their servitude contracts entered into in 1950 by exceeding width limitation

24. 834 F.2d 531 (5th Cir. 1987).
25. 528 So. 2d 1084 (La. App. 3d Cir. 1988).

for canals. The allowed width under the contracts was 65 feet, but the defendant had exceeded this by four feet in 1953 and by thirty feet as early as 1957. The court held the plaintiffs' predecessor knew or should have known of the breach by 1957, thus the claim had prescribed under the ten year liberative prescription applicable to contract claims.[26]

Letter Agreements Guaranteeing Well Costs of Non-operators under Joint Venture Operating Agreement: Exception of Prematurity

Terra Resources (Terra) brought suit against Federated Energy Corporation (Federated) when Federated failed to pay the costs of two defaulting non-operators in two wells pursuant to two letter agreements between Terra and Federated. The agreements provided that Federated would stand liable for the well costs of the two, stating that "all invoices which may become delinquent for a period more than 60 days from the invoice date thereof, shall become the responsibility of FEC to pay . . . ." A later addendum provided that "Terra will use all legal means at its disposal to collect all monies due [from the two others] so that FEC's liability under this agreement will be minimized." The two others failed to pay, so Terra sent invoices to Federated, which paid $499,199.98 on behalf of the two others and then refused to make further payments. Federated, in response to Terra's suit, filed an exception of prematurity on the ground that the agreement required Terra to exhaust all litigation against the two others before it could recover from Federated. This exception was maintained by the trial court but on appeal the appellate court reversed and remanded,[27] saying the addendum referencing use of "all legal means" did not state that Federated had no obligation to pay pending use of all legal means. Because of the ambivalence or ambiguity of the addendum, the case was remanded for the trial court to inquire into the circumstances showing the parties' intentions.

On remand, the trial court again maintained Federated's exception of prematurity because of a conflict between a provision of the letter agreements and the addendum and because it found the addendum contemplated an uncollectible judgment by Terra before Federated had to act as surety. At trial the defendant offered the addendum in evidence and rested. Plaintiff Terra appealed the trial court judgment for defendant. The Court of Appeal reversed,[28] holding the trial court ruling that the evidence was sufficient to support the exception of prematurity was in conflict with the prior appellate decision. The Louisiana Supreme Court vacated and remanded to the Court of Appeal for a review of

26. La. Civ. Code art. 3499 (1984).

27. Terra Resources v. Federated Energy Comm'n, 465 So. 2d 127 (La. App. 4th Cir.), writ denied, 468 So. 2d 1212 (1985).

28. 504 So. 2d 604 (La. App. 4th Cir. 1987).

the entire record, including the correctness of the trial court's factual findings regarding the parties' intent as revealed by the testimony of the witnesses.[29]

On further remand, the Louisiana Third Circuit Court of Appeal affirmed the trial court granting of the exception of prematurity in *Terra Resources v. Federated Energy Corp.*[30] The trial court's factual determination that the addendum was a modification of the letter agreement and that "all legal means" contemplated that Terra had to have an uncollectible judgment before collecting from Federated was not manifestly erroneous.

CONVEYANCING

Rescission of Royalty Deed for Fraud

In *El Paso Exploration Co. v. Olinde*[31] a royalty deed was declared a nullity where it was secured by fraud. The grantee misled a mother to induce her children to sign a royalty deed to property that they were not aware they owned.

El Paso provoked a concursus as well operator to determine ownership of rights to production proceeds. Consolidated with this was a proceeding to rescind a royalty deed to 23 acres that Bergeron and Olinde brought against the Hamners. The appellate court upheld a trial court judgment declaring the royalty deed in question a nullity, having been obtained by fraud. The grantee had obtained a royalty interest purportedly from the mother of plaintiffs, but the grantee also had secured the signatures of the plaintiffs, with the grantee knowing that the mother was only a usufructuary of land who could not grant the royalty.[32] The grantee knew the children could convey the royalty and concealed this. Thus their consent to the deed was vitiated by error.

Disguised Usufruct

The case of *Lyons v. Fisher*[33] can be best understood by providing a chronology of events and raising the pertinent issues at the time the event in question is noted.

On May 7, 1968, A (the mother, Julie Fisher) donated Blackacre to B and C (son and daughter of A, Franklin and Hazel Fisher respectively), reserving a mineral servitude. The next day, B and C conveyed to A the usufruct of Blackacre (also referred to below as the

29. 508 So. 2d 79 (La. 1987).
30. 513 So. 2d 367 (La. App. 4th Cir.), writ denied, 514 So. 2d 1181 (1987).
31. 527 So. 2d 511 (La. App. 1st Cir. 1988).
32. See La. Min. Code at La. R.S. 31:195 (1975).
33. 847 F.2d 1158 (5th Cir. 1988).

Northwest Quarter). What was the effect of this transaction? Was it a disguised reservation of a usufruct prohibited by Article 1533 of the Civil Code?[34]

In 1972, C conveyed her interest in Blackacre to B, reserving a mineral servitude. If C owned nothing at this time, what was the effect of this transaction?

In 1975, A died, leaving B and C as her heirs. What is the effect of C's inheritance of rights in Blackacre on C's 1972 conveyance? Could the after-acquired title doctrine operate to vest title in the land to B and create in C a mineral servitude?

In 1980, C died. In 1982, C's heirs and B leased Blackacre to Hunt Oil. In 1985, B and Hunt entered into an amendment of the 1982 lease to recognize B as sole owner of the minerals of Blackacre. C's heirs thereupon commenced an action seeking a declaratory judgment recognizing their ownership of one-half interest in minerals in Blackacre. The suit was removed to federal court, and the district court gave judgment to B. On appeal by the plaintiffs, the Fifth Circuit reversed.

The reasoning for the Fifth Circuit's decision was as follows. A's 1968 conveyance to B and C was a nullity because the grant was a disguised reservation of a usufruct. C owned nothing in 1972 when she conveyed to B with a reservation of mineral rights, but the court characterized this as "an agreement to create a mineral servitude in the future"[35] rather than a prohibited reservation of an expectancy in the extinction of an outstanding mineral servitude.[36] It was dependent on C's future ownership of the property. The court held that C created a mineral servitude through the after-acquired title doctrine of article 726 of the Louisiana Civil Code. Stated the court:

> This mineral reservation did not violate the public policy stated in Hicks where a previous landowner claimed an outstanding mineral servitude when it prescribed. Here the servitude's creation was dependent on Hazel's [C's] inheritance. The Northwest Quarter was not burdened with a servitude until 1975. The defendant is also estopped to deny the after acquired title doctrine's operation regarding the mineral servitude, because the

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34. This article was amended in 1974 to allow the reservation of a usufruct, but this amendment was to be given only prospective application.

35. 847 F.2d at 1161. The court held that the cases of Ober v. Williams, 213 La. 568, 35 So. 2d 219 (1948) and Chicago Mill & Lumber Co. v. Ayer Timber Co., 131 So. 2d 635 (La. App. 2d Cir. 1961) were applicable to the facts of this case. In those two cases landowners executed contracts to sell land in the future, which would be subject to a reservation of mineral rights. When the options were exercised, the mineral servitudes were held to come into existence.

36. See La. R.S. 31:76 (1975); Hicks v. Clark, 225 La. 133, 72 So. 2d 322 (1954).

defendant accepts the benefit of its operation, that is, title to Hazel Fisher's inherited interest in the Northwest Quarter.[37]

Normally the operation of the after acquired title doctrine cannot operate to vest title in the party against whom the doctrine is being asserted.[38] The Fifth Circuit held that the defendant was estopped to deny this rule because he was getting the benefit of the application of the after-acquired title doctrine with respect to the land. This appears to be a rather unorthodox application of equitable estoppel. The Fifth Circuit opinion also appears to be a questionable approach to Louisiana public policy regarding reversion of reversionary rights in minerals as reflected in the next decision for discussion.

Mineral Servitudes: Indirect Reservation of Reversionary Rights in Minerals Not Permitted

Where land that is subject to an outstanding mineral servitude is sold to a buyer and the buyer thereupon conveys minerals back to seller, the latter sale will be ineffective as a disguised reservation of reversionary rights in minerals, which is not permitted under the Louisiana Mineral Code. This was the holding in *Rodgers v. CNG Producing Co.*[39]

The plaintiffs, the Rodgers and their lessee, sued defendants, seeking recognition that the plaintiffs were the owners of mineral rights on property and were entitled to damages for trespass by defendants. The Rodgers bought five noncontiguous tracts of land (totalling 1580 acres) in 1975 from the Thompsons, subject to a mineral servitude reserved by a prior landowner in 1968. The same day the Rodgers conveyed all the minerals to the Thompsons without warranty of title. In 1978, the mineral servitudes on the land prescribed from nonuse, and the Thompsons executed leases to defendants. The court held, and the appellate court affirmed, that the sale of minerals from the Rodgers to the Thompsons was void as an indirect reservation of a reversionary interest in the minerals, which violated article 76 of the Mineral Code.[40] Article 77[41] did not apply, for that article concerns oversales, and the transaction here was not a warranty sale to which the after-acquired title doctrine would apply.

The principal case concerns one of the more troublesome parts of the Mineral Code, the provisions dealing with reversionary interests. As the majority opinion brings out, the Mineral Code's main thrust in

37. 847 F.2d at 1162.
38. See Dillon v. Morgan, 362 So. 2d 1130 (La. App. 2d Cir. 1978).
39. 528 So. 2d 786 (La. App. 3d Cir. 1988).
40. La. R.S. 31:76 (1975).
41. Id. § 77.

article 76 is to follow the well-known rule of *Hicks v. Clark*,[42] where the Louisiana Supreme Court held that a reversionary interest may not be an article of commerce. The articles following article 76 provide some exceptions to this general rule, the principal one being the recognition in article 77 of the equitable principle of after-acquired title for the purpose of protecting an innocent purchaser from an oversale of mineral rights by a landowner. The exceptions and comments were drafted with some specificity though not with special clarity, and an attempt to follow the operation of the exceptions through hypothetical cases can lead to true confusion. The dissent's reading of the exceptions and the comments to the exceptions would have the exceptions eat up the rule. The rule of *Hicks v. Clark* is sound; the Mineral Code was not intended to change the existing law; and the majority's approach in this case, which limits the functioning of Article 77 to oversales such that it will not permit the creation of future mineral reservations, cannot be faulted.

Redemption of Mineral Servitude: Royalty Payments are Civil Fruits

In *Fuselier v. Peschier*[43] the plaintiff owned an interest in land subject to an oil and gas lease under which he was receiving royalty. He sold the land to another, reserving a mineral servitude for all the minerals. He then sold the mineral servitude to defendant Peschier, reserving to himself a right of redemption for a price of $112,000 at any time within five years. Peschier thereupon began receiving the royalty payments from the servitude, and after his death in 1976, his estate received the royalty payments. In 1981, the plaintiff exercised his right of redemption. He claimed that as part of the redemption he had the right to all royalty that had been paid from the time of the sale. The trial court and court of appeal rejected the plaintiff's claim. Mineral royalties are civil fruits, which the vendee in a sale with a right of redemption is entitled to keep until the right of redemption is exercised. Thus, the plaintiff was not entitled to an accounting and refund of royalties made to him or his estate prior to the exercise of the redemption.

Pipeline Lease: Right to Sublet

The plaintiffs in *Campagna v. Tenneco Oil Co.*[44] were the owners of a tract of land and had leased the tract to defendant Tenneco for a pipeline right-of-way in 1967. In 1983, Tenneco had sublet its rights

42. 225 La. 133, 72 So. 2d 322 (1954).
43. 525 So. 2d 577 (La. App. 3d Cir. 1988).
44. 522 So. 2d 159 (La. App. 4th Cir.), writ denied, 526 So. 2d 801 (1988).

to the St. Bernard Parish Police Jury, without consulting the lessor-landowners, in order that a drainage canal be dug across the property, preventing flooding in a nearby residential area. The Parish dug the canal and removed a part of the dirt to fill parks and neutral ground areas. No compensation was given to the landowners (or to Tenneco) for the rights to the Police Jury or for the dirt used. Plaintiffs brought suit for dissolution of the lease and for damages. The trial court dismissed the complaint and the court of appeals affirmed.

The rights given to Tenneco by the plaintiffs included the right to dredge canals and to sublet all or part of the premises. Tenneco was given the unrestricted right to assign in whole or part to third parties. Thus, Tenneco had the right to sublet to the police jury, held the court. The rights of the police jury to a canal right-of-way were no greater than Tenneco's, so the grant by Tenneco could not be of a permanent servitude; it was only a sublease. As part of the right to dredge a canal, the lessee had the implicit right to dispose of the dirt removed in the course of an excavation. The dirt here was not a mineral within the meaning of the lease wherein the plaintiffs had retained rights to minerals. A dissent argued that the taking of the soil from the property was not a use of the property but a depletion of it that was not authorized by the grant of lease.

Necessity of a Writing

In *Bice v. Maxwell*[45] the plaintiff brought suit for recognition of a royalty, an accounting and a money judgment for past due royalties arising from a partnership agreement. Plaintiff won a default judgment. The defendants filed for a new trial, and this was denied. Defendants appealed, and the Louisiana Second Circuit Court of Appeal reversed and remanded for a new trial. The proof presented to the trial court was inadequate to support the judgment, the appellate court held. For a partnership to own immovable property, including mineral rights, its articles must be in writing. The transfer of mineral rights cannot be the subject of a verbal agreement and cannot be proved by parol evidence. The proof of these documents was not in the record.

OIL WELL LIEN ACT

Recordation

The lien claimant who fails to record his lien within the statutory period of Louisiana Revised Statutes 9:4862 has one year plus the

45. 516 So. 2d 1189 (La. App. 2d Cir. 1987).

recordation period to file suit, held the second circuit in *Hawn Tool Co. v. Crystal Oil Co.*[46] Thus, the claim of plaintiff who failed to file suit within one year plus 180 days had prescribed.

In this case, defendant Crystal Oil (Crystal) hired Explorer Drilling Company (EDCO) to drill two wells. EDCO in turn entered into a contract with plaintiff Hawn Tool Company for equipment and material used on the wells. Unable to collect from EDCO, Hawn sought to enforce materialman's liens under the Oil, Gas, and Water Well Lien Act.[47] The liens were filed on April 18, 1984, for equipment and materials provided through August 23, 1982, for one well and through December 23, 1982, for the second well; the filing dates were nineteen and fifteen months after the date the equipment was last supplied on the respective wells. Suit was filed against Crystal on June 25, 1984, more than 22 months after the conclusion of activity on one well and one year and 184 days after the conclusion of activity on the second. The trial court held that the privilege was lost as notice of the claim of privilege was not timely filed.

On appeal, the court of appeal for the second circuit affirmed. The lien claimant who fails to record his lien within the statutory period of Louisiana Revised Statutes 9:4862 has one year plus the recordation period to file suit. The statutory period within which the lien was required to be filed as of the date the services were rendered in 1982 was 90 days, but this was changed to 180 days by the time the liens were filed. The change to 180 days was remedial in nature and did not create or destroy rights and thus could be given retroactive effect. More than one year and 180 days had elapsed here since the services were rendered before suit was filed; thus the claim had prescribed.

It should be observed that the rule of the reported case relates only to lien rights arising before the 1986 amendment to the Oil Well Lien Act, which made recordation within the specified statutory period, 180 days, a requirement for the preservation of the privilege. One should also note that the court rejects the approach taken in *Genina Marine Services, Inc. v. ARCO Oil & Gas Co.*,[48] which held that under the Oil Well Lien Act, suit must be filed within one year of the last day on which services were performed.

Work Need Not be Performed at Drilling Site for Lien to Apply

St. Mary Galvanizing Corporation had galvanized numerous metal objects for two contractors that were assembling materials to be incorporated into certain offshore oil drilling platforms owned by Chevron.

46. 514 So. 2d 636 (La. App. 2d Cir. 1987).
47. La. R.S. 9:4861-67 (1983 & Supp. 1988).
48. 499 So. 2d 257 (La. App. 1st Cir. 1987).

Chevron paid the two contractors, but they failed to pay St. Mary. St. Mary then sought recovery as provided under Louisiana law by filing liens against certain Chevron properties where, it claimed, the materials had been incorporated. St. Mary then sued Chevron to enforce these liens. The district court granted St. Mary's motion for summary judgment on the ground that St. Mary was a "supplier" under section 9:4861(B) of the Louisiana Oil Well Lien Act. This was upheld on appeal in *Dahlberg & Co. v. Chevron U.S.A., Inc.*[49]

The fact that the work was not actually done on the drilling site was not determinative, said the court, especially in light of the fact that these were offshore leases. Under recent Louisiana case law, St. Mary's performance could not be considered too "remote" despite the physical distance from its factory to the platforms' eventual locations in the Gulf of Mexico and the intermediary presence of contractors between St. Mary and Chevron.[50] The court noted that other entities who had been held proper claimants under the statute included the owner of a crewboat that provided transportation to workers on a pipeline construction project,[51] a caterer who furnished food, lodging, and housekeeping services on pipeline construction,[52] and a claimant who supplied divers to work on an offshore oil pipeline project.[53]

St. Mary showed through affidavits and invoices that the pieces of steel it had galvanized were identified with particular drilling platforms that were destined for specific Chevron leases on the outer continental shelf in the Gulf of Mexico. This showing effectively shifted the burden to Chevron to show that the galvanized pieces were not actually used in the construction of drilling platforms destined for the Chevron leases. Although there were no cases discussing such a shifting of the burden of proof in the context of a lien under the Oil Well Lien Act, the analysis was said to be consistent with the legislative purposes of the Act. The court found such public policy purpose to be "to promote and encourage oil industry development by affording special protection to suppliers of services and materials from damages resulting from defaulting owners or contractors."[54] To hold otherwise would put a heavy burden on service providers and materialmen. The court said they

49. 836 F.2d 915 (5th Cir. 1988).

50. Citing Texas Pipe and Supply Co. v. Coon Ridge Pipeline Co., 506 So. 2d 1296 (La. App. 2d Cir. 1987) and Oil Well Supply Co. v. Independent Oil Co., 219 La. 936, 54 So. 2d 330 (1951).

51. Continental Casualty Co. v. Associated Pipe & Supply Co., 447 F.2d 1041, 1054-56 (5th Cir. 1971).

52. Id.

53. Continental Casualty Co. v. Associated Pipe & Supply Co., 310 F. Supp. 1207, 1226 (E.D. La. 1969).

54. 836 F.2d 915, 919 n.5.

would have to send employees out to offshore drilling platforms to participate in incorporating or using the materials, supplies, services, and other such inputs on a particular platform. Also, service providers and materialmen would need to arrange to have their employees present at the contractor's onshore construction yard to establish the link to the offshore lease. The Act did not require a plaintiff to prove that its materials or supplies were actually incorporated into or became part of the completed well or wells.[55]

LEASE MAINTENANCE

Cancellation in Primary Term for Cessation of Operations

A provision of a sublease defining operations was held in *Amoco Production Co. v. Carruth*[56] to be a resolutory condition requiring termination of sublease after passage of ninety days from completion of a dry hole with no additional drilling in the last year of the sublease's primary term. Inclusion of acreage in a producing unit could not revive a sublease which had terminated.

In this case Amoco provoked a concursus proceeding to determine the ownership of interest in minerals. Sublessor Leblanc sought cancellation of a sublease to sublessee Exxon in the proceeding on a claim that the sublease had expired for failure to pay delay rental or to develop diligently in the primary term of the sublease in accordance with the terms of the sublease. Exxon defended on the basis that the drilling of a well (completed as a dry hole) excused the payment of the delay rental for the final year of the primary term, and that the sublease produced beyond the end of the primary term after the acreage was included in a producing unit by the Commissioner of Conservation. The trial court ruled for Exxon. LeBlanc appealed and the Louisiana Court of Appeal for the First Circuit reversed. Commencement of a well excused payment of delay rentals only if the operations were conducted with no cessation of operations for more than ninety days. After the completion of the dry hole the sublessee failed to resume operations within ninety days. The sublease thus terminated. Even though the acreage was subsequently included in a producing unit before the end of the primary term, the court held that such production could not have the effect of reviving a lease that had already expired before the end of the primary term.

The agreement in this case provided: "No rental payment shall be due or paid to the Sublessor . . . if on or before the respective due date of such payment, EXXON has commenced or caused to be com-

55. La. R.S. 9:4861(B) (1984).
56. 512 So. 2d 571 (La. App. 1st Cir. 1987), writ denied, 516 So. 2d 366 (1988).

menced, operations on the subleased premises or land pooled therewith for the drilling of a well and pursues such operations diligently and in good faith in search of production." Apparently it was undisputed that Exxon had commenced a well and pursued it to completion as a dry hole with diligence and good faith. But the appellate court read a clause defining "operations" to impose upon the sublessee an obligation to commence a new well or lose the lease. Under the court's reading of the above clause, the lessee who commences a well must find production or continue to drill for the entire year with no cessation of production or operations for more than ninety days. The effect of this decision is to impose a continuous drilling obligation on the sublessee in the last year of the primary term of his sublease unless delay rentals have been paid in addition to the commencement of a well.

The court's reading of the clause defining "operations" is a harsh one that ignores the purpose of the delay rental clause and ignores the plain meaning of the words of the agreement. Payment of rental is excused by the commencement of operations "for the drilling of *a well*"; it is the operations for this "a well" that must be pursued diligently and in good faith in search of production. The definition of "operations" elsewhere in the lease, which provides "operations must be continuous or with no cessation of more than ninety (90) days whether on the same or different wells," would have application for other provisions of the lease such as a continuous drilling clause that would allow the lease to be continued beyond the primary term. To read a definition such as this as providing a resolutory condition leading to termination of a producing lease is very harsh and unjustified by the facts of the case. The court's reading of the "No rental payment shall be due . . . ." clause may also be viewed as giving it the effect of a dry hole clause requiring a resumption of operations after the completion of a well as a dry hole.

Normally, the commencement of a well in good faith excuses the payment of delay rental and functions as a substitute for the payment.[57] The purpose of fostering development has been served when the lessee (sublessee) has commenced and drilled to completion the initial well on the lease. One should note that the drilling of a well is generally far more expensive than paying delay rentals; a lessee would not drill a well to escape or evade the payment of delay rentals. Under the reading of the agreement by the appellate court in *Carruth*, the sublessee who is drilling a well at the time delay rental payments would otherwise be due must pay delay rental in addition to drilling. A lessee who commences a well with a similar definition in the lease binds himself to continue drilling with no cessation of more than ninety days even after a dry

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57. H. Williams & C. Meyers, 3 Oil & Gas Law § 606.1 (1986).

hole, up to the next time that delay rentals may be paid to defer the drilling of a well for another year. In the last year, the effect of the court's treatment of the agreement is to move up the end of the primary term of the sublease by a year, for the sublessee cannot return to delay rentals by any provision of the agreement. The requirement of continuous operations (operations with no cessation of more than ninety days) is just as it would be beyond the end of the primary term. Indeed, the cases relied on by the Court of Appeal, *Talley v. Lawhon*[58] and *Woods v. Ratliff*,[59] both concerned maintenance of a lease by operations after the end of the primary term. Neither case truly related to the case in question since they did not involve delay rentals.[60] The decision introduces considerable uncertainty about the effect of operations during the primary term on delay rental payments under Louisiana law.

Novation: Declared Unit

Summary judgment was held in *Bares v. Stone Oil Corp.*[61] to be inappropriate to determine if a novation of four leases had taken place with the execution of four new ones, and to determine if a declared unit was established in bad faith where there were genuine issues of material fact that had to be resolved. The plaintiff landowners in this case filed suit against Stone Oil and other lessees alleging that four mineral leases executed in the 1970s had been novated and thereby extinguished by four new mineral leases executed in January 1981 covering the same property. In the alternative they claimed that a declared unit created by the lessees was invalid, and the leases expired for this reason. The new leases, which were to begin on the last day of the primary terms of the old leases, provided for a greater royalty than the old ones. On February 4, 1981 (three days before the expiration of the primary term of the first of the old leases) a 160 acre unit was declared around a well under the pooling provisions of the old leases. The unit included portions of the acreage of the old leases. Stone, which had acquired certain rights under a farmout agreement, also tendered Pugh clause rentals for the old lease acreage outside the declared unit. The defendants, Stone and other lessees under the old leases, asserted that a novation did not take place as the new leases were not to become effective until the old ones expired, and that the unit declaration continued the old leases.

58. 150 La. 25, 90 So. 427 (1922).

59. 407 So. 2d 1375 (La. App. 3d Cir. 1981).

60. The lease in *Talley* had some provision for delaying the initial well by a payment but did not seem to have a primary term in the same sense as modern leases.

61. 510 So. 2d 102 (La. App. 3d Cir.), writ denied, 514 So. 2d 130 (1987).

The trial court granted summary judgment for the plaintiffs, finding that a novation took place, and even if the old leases did not terminate by the acquisition of the new leases, the declared unit was invalid as being established in bad faith solely for the purpose of maintaining the old leases and to avoid the higher royalty in the new leases. Defendants appealed. The Louisiana Court of Appeal for the Third Circuit reversed and remanded. There were genuine issues of material fact to be resolved, and thus summary judgment was inappropriate. While defendants' executives testified that lease maintenance and avoidance of higher royalty were factors in forming the unit, the evidence contained some support that the unit was declared for conservation purposes. There were also issues whether the new leases were intended to terminate the old leases. There was also the farmout agreement under which Stone acquired interests from the lessees under the old leases to be interpreted.

Rentals, Change of Ownership Clause

In the case of *Lapeze v. Amoco Production Co.*[62] cancellation of a lease was denied where the successors in interest of a lessor were not paid shut-in rental even though the lessee was aware of death of the lessor. The successors had not furnished the lessee with notice under the lease clause. The court also held that parol evidence was not admissible to interpret an authentic act.

In *Lapeze* the successors in interest to the deceased lessor sought the cancellation of the lease for failure to pay shut-in rentals to them rather than to the bank account of the lessor. The lessee claimed that it had not been furnished with notice of change of ownership as required under the lease. The plaintiffs asserted that they had been substituted for the lessor in the lease because they had been parties to an Act of Correction of the lease after the death of the lessor, and the lessee had actual knowledge of the change in ownership. The district court held for the defendant-lessee.[63] Two plaintiffs appealed, and the Fifth Circuit affirmed.

The change in ownership clause provided that "regardless of any actual or constructive notice" of a change in ownership, the lessee had to be furnished with notice of the change as required by the lease; such notice was not furnished to the lessee by the plaintiffs. The defendant was compelled to make the payment in conformity with the specific provision of the lease. The district court's conclusion that the rights were maintained by depositing the shut-in payment to the bank was correct.

62. 842 F.2d 132 (5th Cir. 1988).
63. 655 F. Supp. 1 (M.D. La. 1987).

The principal case is a straightforward application of the lease clause and well-established principles of oil and gas law. The court wisely declined in to express an opinion on other principles asserted in the litigation.[64]

Payment of Royalty

In *Matthews v. Sun Exploration and Production Co.*,[65] a father and two children executed a lease on certain property, with the children's interest reflecting their inheritance from their mother. The son then conveyed his interest to his father with a counterletter to the effect that the father was holding this interest for the convenience of the son. Royalty from production on the property was then paid to the father and the daughter. When the father died, the succession was opened and the daughter was named executrix of the estate. The earlier counterletter reflecting that the father held for the son was included in the motion to put the children into possession, and the judgment of possession put the brother and sister into possession of an undivided one-half interest each in and to the property of the father. The purchaser of production divided the father's interest equally between the children and credited the daughter also with the interest she had acquired previously from her mother. This meant that the daughter was getting more than had been intended since a portion of the interest held by the father actually had been for the son. There were subsequent assignments of the lease and the interest of the son, with the son's interest being acquired by the plaintiff, Matthews, and the lease by the defendant Sun. Royalties were paid from June 1978 to May 1985 on the incorrect assumption that the interest of the daughter was greater than that of the son.

In July 1985, the plaintiff demanded a new division order reflecting that he owned one-half of a one-eighth royalty and requested an accounting with interest of the royalty payments made to the daughter; in the alternative he sought cancellation of the lease. The defendant Sun requested documentation to support the assertion, and when the plaintiff declined to provide such documentation. Sun then examined title but did not find the counter-letter. Plaintiff thereupon filed suit. Sun answered with an assertion of prescription and pleaded estoppel; Sun also filed a third-party demand against the daughter for any overpaid royalties, seeking recovery of these on a theory of unjust enrichment. The trial court gave judgment for the plaintiff, awarding him double the amount due plus a sum for attorney's fees, and ruled against Sun on the third-party demand. The court of appeal reversed.[66]

64. 842 F.2d at 136 n.6.
65. 521 So. 2d 1192 (La. App. 2d Cir. 1988).
66. Id.

The defendant had perpetuated an error of its predecessor. The defendant had given a reasonable explanation of why it had not paid royalty in response to the demand.[67] The plaintiff had become aware of the defendant's error in the course of their correspondence but had refused to divulge information that would have made the defendant aware of the error and that could have resolved the matter without litigation. Instead the plaintiff had filed suit. The defendant throughout acted in good faith; the assessment of penalties and attorney's fees was unjustified. As to the defendant's plea of prescription of three years for nonpayment of rent,[68] the court said that the doctrine of "contra non valentum" did not apply to the claim of the plaintiff. That is, there was no act committed by the defendant that prevented the plaintiff from availing himself of his cause of action, and there was nothing to indicate that the plaintiff's cause of action could not have been discovered by him through the exercise of reasonable diligence. The defendant's error was the result of erroneous title information, the kind of information that was readily available to the plaintiff. Equity, justice, and the circumstances of the case did not justify a deviation from the ordinary prescriptive rule.

The third-party demand of the defendant should not have been dismissed by the trial court. The defendant's actions were reasonable error. The daughter was privy to the counterletters in question at all times. She had signed a division order in 1978 that clearly showed her interest as greater than the interest of her brother. The court of appeals ruled that the proper award to the plaintiff should have been the amount of underpaid royalty from September 13, 1982 (three years prior to filing suit), and judgment was rendered in favor of Sun against the daughter for the same amount that had been overpaid to her for that same period.

The court appears to be entirely correct on the inappropriateness of applying penalties under the Mineral Code. The court also treated properly the application of the contra non valentem doctrine to the issue of prescription. One point, however, is troublesome: the decision clearly reflects that there were division order contracts made in 1978 between the daughter and the defendant and also between the plaintiff and the defendant. The royalty paid by defendant to the parties was apparently in accordance with the division orders. The court did not address the effects of the division orders. While a division order does not change the ownership interest under a lease, it does ordinarily protect both parties to it from claims of overpayment or underpayment when payment is made in accordance with the interest shown in the division order.

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67. See La. R.S. 31:140 (1975).
68. See La. Civ. Code art. 3494 (1984).

The effect of the division orders here is simply not discussed at all by the court.

TORT CLAIMS

Liability of Mineral Lessee for Crop Damages to Landowners

Where a landowner did not lease land to a tenant farmer until after an oil and gas lease had terminated, and damage had already accrued to land by actions of the oil and gas lessee, the plaintiff-landowners had a cause of action for damage to their land, even if the lease contained a stipulation pour autrui in favor of the tenant for damage to his crops. This was the holding in the case of *Freeland v. Crab Run Gas Co.*[69]

Landowners in this case brought suit against their mineral lessee to recover for damage to their crops and for the cost of restoration of an abandoned well site. The defendant claimed that the tenant farmer, not the plaintiffs, suffered any damages caused by its operations. The trial court gave judgment for plaintiff landowners, and this was affirmed on appeal to the third circuit. The appeals court noted that the defendant had earlier raised an exception of no right of action in the tenant farmer, which was sustained, and now was asserting that only the tenant farmer had a cause of action.[70] Here, the mineral lease had already terminated when the tenant and landowner entered an agreement; even if there were a stipulation pour autrui in favor of the tenant for damage to his crops, the plaintiffs clearly had a cause of action for damage to their land.

CONSERVATION CASES: POOLING AND UNITIZATION

Notice of Hearing

The Louisiana First Circuit Court of Appeal in *Kaiser Aluminum Exploration Co. v. Thompson*[71] reversed an order of the Commissioner of Conservation revising units where the applicant did not make a reasonable effort to notify the owners of interest in the eight units of the twenty involved in the proceedings. The Louisiana Supreme Court then reversed and reinstated the judgment of the trial court holding that notice had been received.[72]

The defendant, Celeron, in *Kaiser Aluminum* applied to the Commissioner of Conservation to dissolve geographic units previously created and to create revised drilling and production units. The Commissioner

69. 527 So. 2d 1197 (La. App. 3d Cir. 1988).
70. See Andrepont v. Acadia Drilling Co., 255 La. 347, 231 So. 2d 347 (1969).
71. 523 So. 2d 240 (La. App. 1st Cir. 1987).
72. 525 So. 2d 1050 (La. 1988).

granted the application and issued an order that dissolved twenty existing geographic units, defined the Upper Tuscaloosa Sand Reservoirs A and B, and created six geological units for the Upper Tuscaloosa Sand Reservoir A and one geological unit for the Upper Tuscaloosa Sand Reservoir B. The plaintiffs owned interests in some of the units that were dissolved but were not included in the new units. They sought review of the orders claiming they did not receive adequate notice, that the order was invalid for failure to give reasons for redefining the sand and because the redefinition would lead to waste, and that the order was improperly made effective on July 23, 1985, rather than July 25, 1985. The trial court found that reasonable notice had been given as some 1,800 interested parties received notice, including many of the plaintiffs.

On appeal by the plaintiffs, the first circuit reversed.[73] Although new orders were entered after the trial court decision, the order complained of was in existence for a sixteen month period, and the appeal was thus not moot.[74] No effort had been made by the applicant to give notice by mail to the owners of the eight nonproducing units. Four of the plaintiffs were not given notice and had not received notice. The applicant failed to comply with the procedural rules of the Commissioner, and the Commissioner was aware that no effort had been made with respect to those units. Had the unnotified plaintiffs been given notice, they might have presented evidence that would have altered the Commissioner's findings, thus placing their land within geological units or maintaining their lands within the geographical units. The order was issued in violation of statutory provisions and was made upon unlawful procedure. The court did not take the position that failure to give notice will generally mean an order is invalid. Rather, the court said the applicant here did not make a reasonable effort to notify the owners of interest in the eight units of the twenty involved in the proceedings.

On appeal, the Louisiana Supreme Court reversed the Louisiana Court of Appeal and reinstated the trial court decision without issuing an opinion. The trial court decision was based on a finding that notice had been received by the plaintiffs though not necessarily properly given. Thus, the decision of the supreme court apparently stands for no more than had been held in the case of *Brown v. Sutton*,[75] which held that actual notice received by the owner cured the defect in procedure in giving notice. There the plaintiff, an overriding royalty claimant, was not sent notice of a unitization proceeding affecting his interest, but he did learn of it through a report in a newspaper.

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73. 523 So. 2d 240 (La. App. 1987).
74. See Kaiser Aluminum Exploration Co. v. Thompson, 512 So. 2d 1197 (La. App. 1st Cir. 1987).
75. 356 So. 2d 965 (La. 1978).

The Molecular Theory and Partition of Unit Production

The Conservation Law of Louisiana authorizes a special species of partition for mineral coownership in compulsory units, and the Commissioner of Conservation has the authority or jurisdiction, or both, to exercise this power to effect a partition of gas from a unit well and provide for balancing where one owner has a contract for sale and another has no buyer. This was the holding of *Amoco Production Co. v. Thompson*.[76]

In this case, Amoco Production Company was the unit operator for thirteen producing units in the Morganza Field. Amoco had a gas purchase contract with Columbia Gas Transmission Corporation for Amoco's share of the gas from the field. Columbia also purchased gas from other working interest owners in the units but not under contracts. In 1982 Columbia ceased purchasing gas from others than Amoco in the units, leaving these others without a purchaser. Amoco applied to the Commissioner of Conservation for an order allowing it to market its share of gas from the units separately from the nonoperators. The then Commissioner[77] granted an order allowing nonoperators who did not have a balancing agreement to elect to assume full responsibility for marketing their share of natural gas or to authorize the unit operator to market their share of gas.[78] After entry of this order, certain nonoperators filed for a rehearing before a new Commissioner of Conservation, Herbert Thompson, who rescinded the prior order and issued an order that required Amoco to deliver to each nonoperator his share of the proceeds of production in the absence of an agreement to take in kind. The order also provided that Amoco and the nonoperators would be deemed to have contracted for Amoco to market gas for the others.

Amoco filed suit against defendant Thompson seeking rescission of his order and reinstatement of the order of the prior Commissioner. The trial court rendered what purported to be an interlocutory judgment and remanded certain matters to Commissioner Thompson. The Commissioner issued an amended order requiring Amoco to account to nonmarketing owners on the basis of their share of production at the time of sale (with sale being defined as the time at which the contract for sale had been entered into); requiring marketing nonoperators to account to nonmarketing nonoperators on the same basis as Amoco;

76. 516 So. 2d 376 (La. App. 1st 1987), writ denied, 520 So. 2d 118 (1988).

77. The author of this article.

78. The full order of the author with supporting Statement of Reasons for Order is reprinted as Appendix C to Martin, The Establishment of Allowables for Production of Gas in Louisiana, 57 Colo. L. Rev. 267, 294-99 (1986), and this article gives the background to the problem addressed by the order and the reported case.

deeming that nonoperators had elected to have Amoco market for them for past production and allowing them to elect whether to take gas in kind or have Amoco market for them in the future. The trial court then affirmed this order. Amoco appealed suspensively.

The Louisiana Court of Appeal for the First Circuit reversed the trial court judgment affirming Commissioner Thompson's order, vacated and set aside the order of Commissioner Thompson, and remanded the action to the Commissioner for reconsideration in light of the court's holding. The rule of capture has been modified by the Conservation Statute under units that are formed by the Commissioner of Conservation. In the establishment of a unit, each owner is entitled to the opportunity to recover or receive his just and equitable share of production. The gas produced from a compulsory unit is initially owned in indivision.[79] This ownership can be the subject of partition. Partition in kind is the preferred method of partition provided for in the Conservation Law. The Commissioner of Conservation has the authority to modify or deny the right to take in kind. The Conservation Law authorizes a special species of partition for mineral coownership in compulsory units, and the Commissioner has the authority or jurisdiction, or both, to exercise this power. Because the Commissioner has the power to partition the gas in kind, he must have the incidental power to order balancing; that is, the power to allow the marketing owners at different times to take one hundred percent of the unit production equal to their just and equitable share at a given point in time.[80] The Commissioner

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79. This is the so-called molecular theory. This theory was announced by the author in Opinion In Re: Application of Park Lane Enterprises, Incorporated Supplementary to Order No. 1047, Docket No. 83-260, Irene Field, reprinted as Appendix B to Martin, supra note 78, at 291-93. This same opinion was the basis for the author's order in the Morganza Field. In the Irene Field interpretive rule, the author stated:

> It follows ineluctably from the working of the order [a typical pooling order] and the statute [La. R.S. 30:10A(1)(b)] that when gas is produced, it is owned by each of the owners in the unit in the proportion provided for by the order. To put it another way, each molecule of gas that is produced is owned by each owner in the unit in a species of co-ownership. Neither the operator nor any other owner of production may unilaterally alter this effect of a unit order by deciding to sell "his" gas while leaving another's gas in the ground. It is not enough to say that a market was available to another owner or that the gas would be made available to another owner if he could find a market for "his" gas. The sole means of avoiding this effect is through the order creating the unit or supplement thereto.

The court in Amoco v. Thompson adopts this theory of the effect of a unit order.

80. Martin, supra note 78, at 293, Appendix B:

> [I]t might be observed that should a party so petition, an order could be entered for a make-up of lost gas out of future production. Objection might be made to the Commissioner asserting or assuming jurisdiction over marketing issues. Not only is such concern permissible, it is statutorily mandated. Louisiana

thus has the authority to order an accounting either in kind or in cash, depending on the circumstances, as an incident to the obligation of the Commissioner under the Conservation Law to issue orders affording each owner the right to recover his just and equitable share. The matter was remanded to the Commissioner for determination in light of the authority recognized by this opinion.

The author of this article was the Commissioner of Conservation who wrote the order rescinded by Commissioner Thompson. The reported opinion essentially adopts the position taken by the author that the Commissioner of Conservation does have the power and the duty to issue orders affording each owner the right to recover his just and equitable share. Reasonable people can differ about what is required to afford an owner a reasonable opportunity to recover his just and equitable share under varied circumstances. The court in the instant opinion allows the Commissioner the flexibility to address the problems in an equitable fashion.

Unitization on the Outer Continental Shelf

An order of the Department of the Interior requiring unitization of two leases on the Outer Continental Shelf (OCS) was upheld in *Clark Oil Producing Co. v. Hodel.*[81] The order was for a conservation purpose, and the production allocation formula was not arbitrary or capricious.

In 1971, the United States issued two leases on adjoining blocks on the OCS to Shell Oil and to a group of six companies under Sun Oil Company, one of which was Clark Oil. After the responsible federal agency, the U.S. Geological Survey (USGS), determined that Shell and Sun were both producing from the same reservoir that underlay the two leases, the USGS ordered the lessees on the competing leases to unitize their interests based on its finding that unitization was necessary to serve best the interest of conservation, to prevent the drilling of unnecessary wells, to increase ultimate recovery, and to protect correlative rights. Shell had proposed drilling additional wells to avoid drainage by the Sun group, and unitization would limit the need to drill additional wells. The Sun group opposed this.

When the parties could not agree on a unit order, the USGS, in 1975, established a unit agreement order to which the parties would be

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Revised Statutes 30:10A(1)(a) requires that each order requiring pooling be on terms and conditions that will "afford the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense." Pooling would be meaningless and without effect if the interests and rights of one owning a portion of the unitized production could be ignored . . .

81. 667 F. Supp. 281 (E.D. La. 1987).

subject. The order included a production allocation formula based on two factors: net acre-feet of natural gas-bearing sands underlying each lease (64%), and the relative production from both leases during a six-month period (36%). This formula gave Shell 68.14% and Sun 31.86% of the unit production. The order also required the parties to enter into a joint operating agreement. Sun signed an agreement under protest. Sun appealed the determination administratively, requesting and being granted a stay of the unitization order in the meantime. Shell sought an award of interest on the production back to the time of the unit order. The administrative decisions were unfavorable to Sun, and Clark alone of the Sun group thereupon sought judicial review. Clark sought to set aside the unit order and decisions of the Interior Department on three ground: 1) the agency had no authority to unitize the leases; 2) the allocation formula was arbitrary and capricious; and, 3) Shell was not entitled to interest. Shell sought to increase an award of interest from seven to twelve percent. Summary judgment was granted for the Secretary of the Interior and granted in part for Shell.[82]

The effect of this decision was to affirm the unit order and the award of interest to Shell at seven percent. While the OCSLA was not amended until 1978 to specifically mention the protection of correlative rights, the 1975 order did promote conservation by avoiding the drilling of unnecessary wells. This did not violate the rights of Clark as the purpose of unitization is to modify the rule of capture. The six month period of production for establishing a production allocation formula was a representative period, and the 36% figure used for establishing the production component of the allocation formula was not arbitrary.

Several points may be noted about the decision in the principal case. The operative facts of the unitization order arose before the 1978 amendments to the OCSLA that specifically incorporated a reference to protection of correlative rights in the authorization given the Interior Department. The court properly held the fact that Shell would have had to be permitted to drill additional wells to protect itself against drainage was sufficient to constitute a conservation purpose for the order. That is, while the order might have protected the correlative rights of Shell, it also avoided the drilling of unnecessary wells by making it unnecessary to Shell to drill offset wells.

The court also noted that the avoidance of the drilling of additional wells would also limit risk to the environment. This is in accord with a broad definition given the term "natural resources" in the OCSLA in *Gulf Oil Corp. v. Morton*.[83] In that case the court held that where

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82. Id.

83. 493 F.2d 141, 47 Oil & Gas Rep. 455 (9th Cir. 1973). See also Union Oil Co. v. Morton, 512 F.2d 743, 51 Oil & Gas Rep. 163 (9th Cir. 1975). Sun Oil Co. v. United

the Outer Continental Shelf Lands Act gave the Secretary of the Interior authority to provide for the prevention of waste and conservation of the natural resources of the OCS, the term "natural resources" included not only oil, gas, sulphur, and other minerals, but also all marine animal and plant life. Thus, the Secretary in suspending activities on the lease in question was acting to promote conservation of natural resources and was acting within the powers delegated to him.

States, 572 F.2d 786 (Ct. Cl. 1978), and Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 53 Oil & Gas Rep. 1 (Ct. Cl. 1979).