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Joseph C. Giglio III

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8. Revisiting the Mineral Lease

Joseph C. Giglio, III
Gordon, Arata, McCollam, Duplantis & Eagan, LLP
Lafayette, Louisiana

I. Louisiana Mineral Code Provisions Governing Mineral Leases

Mineral Code articles 114 through 148 govern the mineral lease. The mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals.[1] The mineral lease is not subject to prescription of nonuse as are the other mineral rights but the mineral lease cannot have a term longer than 10 years without operations or production.[2] The mineral lease may be granted by the person having the executive interest in the mineral rights in the property leased.[3]

The mineral code further provides certain obligations of both the lessor and lessee,[4] provisions regarding assignment and sublease of the lessee's interest in the lease,[5] provisions covering termination of the mineral lease and remedies for violation of the mineral lease,[6] provisions covering leases of outstanding mineral rights,[7] and provisions creating a lessor's privilege.[8]

II. Basic Provisions of the Modern Mineral Lease

The development of the modern mineral lease is the result of many years of negotiations between lessors and lessees. This development continues with each newly negotiated mineral lease.

The development of the mineral lease has resulted in basic provisions that protect both the interests of the lessor and those of the lessee. Some of these provisions include the habendum clause, the drilling and rental clause, the continuous operations clause and the cessation of production clause. Every modern lease has some version of these clauses.

A. The Habendum Clause

> This lease shall be for a term of ___ years and ___ months from the date hereof (called "primary term") and so long after as oil, gas or

1 Mineral Code article 114.

2 Mineral Code article 115.

3 Mineral Code article 116.

4 Mineral Code articles 119 through 125.

5 Mineral Code articles 120 through 132.

6 Mineral Code articles 133 through 143.

7 Mineral Code articles 144 and 145.

8 Mineral Code articles 146 through 148.

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some other mineral is being produced or drilling operations are conducted either on this land or on acreage pooled therewith[9]

There are numerous variations of the habendum clause found in modern lease forms. The habendum clause provides that the lease will continue in effect "so long thereafter as oil, gas or some other mineral is being produced . . . ." Additionally, under Mineral Code article 124, the production must be in "paying quantities." Mineral Code article 124 provides that production is considered to be in "paying quantities when production allocable to the total original right of the lessee to share in production under the lease is sufficient to induce a reasonably prudent operator to continue producing in an effort to secure a return on his investment or to minimize any loss." The requirement that production be in "paying quantities" was the subject of a recent presentation at the 51st Mineral Law Institute[10] and the recent decision in *Wood v. Axis Energy Corp.*[11]

B. The Drilling and Rental Clause

The drilling and rental clause pertains to the maintenance of the lease during the primary term. The modern drilling and rental clauses are classified into two basic forms: (i) the "or" drilling and rental clause or (ii) the "unless" drilling and rental clause.

The "or" drilling and rental clause:

> "Lessees agree to commence a well on said premises within . . . . . . years from the date hereof, or pay lessor . . . . . . cents an acre per annum, payable quarterly in advance from the ___ day of _________, 20__, until said well is commenced or this lease surrendered.

The "unless" drilling and rental clause:

> This Lease shall terminate on _____________, 20__, unless on or before said date the Lessee either (1) commences operations for drilling of a well on the land, or on acreage pooled therewith, in search of oil, gas or other minerals and thereafter continues such operations and drilling to completion or abandonment; or (2) pays to the Lessor a rental of __________ Dollars ($________) per acre for all or that part of the land which Lessee elects to continue to hold hereunder, which payment shall maintain Lessee's right to effect as to such land without drilling operations for one year from the date last above mentioned; and Lessee may continue to maintain the rights granted without drilling operations for successive twelve

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9 Bath Form 42CPM New South Louisiana Revised Four (4) – Pooling Revised "B."

10 Patrick S.Ottinger, *Production in "Paying Quantities" – A Fresh Look*, 51st Ann. Inst. on Min. Law 24 (2004).

11 899 So.2d 138 (La.App. 3rd Cir. 2005).

> months' periods (during the primary term) by paying per acre for all or that part of the land held hereunder.[12]

The "unless" clause is more prevalent in modern Louisiana lease forms. The issue that seems to present itself most is the requirement that the lessee "commence operations for the drilling of a well on the land or lands pooled therewith."

Several Louisiana cases have addressed the interpretation of clauses identical or similar to the one quoted above. Courts have concluded that "operations for drilling," "drilling operations" and "operations" shall be deemed to have been commenced when work is commenced or materials placed on the ground at or near the wellsite preparatory to the drilling of well.[13] The Louisiana courts have explained that:

> [t]he general rule to be drawn from these decisions is that actual drilling is unnecessary to "commence" a well within the meaning of the lease provisions; and that substantial surface preparations to drill are sufficient to be considered "commencement" of drilling operations for lease-clause purposes. . . .[14]

In *Breaux v. Apache Oil Corporation,*[15] the plaintiffs sought lease cancellation for the lessee's alleged failure to commence operations before the end of the primary term. The Court, in granting the defendant-lessee's Motion for Summary Judgment, explained that:

> Plaintiffs do not deny in their pleadings, affidavits or other documents that the board road and turn-around were completed to the wellsite on March 18, 1967.[16] Under *Hilliard, supra*, and the authorities cited therein, the completion of the board road and turn-around before the crucial date, followed by continuous operations until the well produced, is sufficient to satisfy the requirement that the lessee "commence operations for the drilling of a well."

In *Allen v. Continental Oil Company,*[17] the Court, in finding that the lease was properly maintained according to its terms, explained that though the actual drilling (spudding) of the well was not commenced until after the expiration of the primary term, certain surface preparations to drill the well prior to the end of the primary term were sufficient to maintain the lease, including:

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12 Bath Form 42 CPM – New South Louisiana Revised Four (4) – Pooling Revised "B."

13 Luther McDougal, *Louisiana Oil and Gas Law*, p. 130 (1988).

14 *Hillard v. Franzheim*, 180 So.2d 746 (La.App. 3rd Cir. 1965).

15 240 So.2d 589 (La.App. 3rd Cir. 1970).

16 The lease in question was dated March 18, 1966 and contained a drilling and rental clause nearly identical to the one quoted above.

17 255 So.2d 842, 845 (La.App. 2nd Cir. 1971.).

(1) The staking of the drilling location;

(2) Clearing operations for the road by the use of bulldozer;

(3) Construction of slush pits;

(4) Grading of the well site;

(5) Partial construction of the access road;

(6) Laying of necessary gas and water lines to the well site; and

(7) Attempts to move a deep well drilling rig on the property which was aborted only by heavy rain.[18]

Additionally, the courts, recognizing the potential for abuse, explain that to maintain the lease, the commencement of operations for the drilling of a well must be "followed by continuous [and] diligent effort[s] to drill the well . . . ."[19] This serves to prevent the lessee from laying a board road simply to avoid payment of delay rentals.

Perhaps the rule is best summarized by W.L. Summers, *Oil and Gas,*[20] which provides:

> The general rule seems to be that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or of drilling operations within the meaning of [the habendum clause] of the lease.
>
> If the lessee has performed such preliminary acts within the time limited, and has thereafter actually proceeded with the drilling to completion of a well, the intent with which he did the preliminary acts are [sic] unquestionable, and the court may rule as a matter of law that the well was commenced within the time specified by the lease.[21]

Because directional drilling is more prevalent today, the requirement that the lessee "commence operations for the drilling of a well on the land, or on acreage pooled therewith" presents additional questions if (i) the surface location of the directional well is off the leased acreage but the proposed bottomhole location is on the leased acreage or (ii) the surface location of the directional well is outside of the unit for which the well is being drilled. Presumably, the requirement that operations be

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18 *Olinkraft, Inc. v. Gerard,* 364 So.2d 639 (La.App. 2nd Cir. 1978).

19 *Olinkraft,* at 645.

20 W. L. Summers, *Oil and Gas* § 349 (1977), p. 459-465.

21 *See also Allen* at 845 (La.App. 2nd Cir. 1971), citing W. L. Summers, *Oil and Gas.*

commenced "on the land" or "on lands pooled therewith" would not be satisfied under either of these scenarios by the laying of the board road, the staking of the location, or even the spudding of the well. Most likely, the operations are commenced "on the land" or "on lands pooled therewith" only once the drilling progresses to a point where the directional drilling goes onto the subsurface of the leased lands or onto the subsurface of lands included in a unit. Research revealed no Louisiana cases addressing these issues but with the increased use of directional drilling, operators should use great care in assuring that the lease is being maintained in these scenarios.

C. The Continuous Operations Clause

An example of a Continuous Operations Clause:

> After beginning operations on the lands or on acreage pooled therewith (or with any part thereof) and prior to the discovery and production of minerals in paying quantities, Lessee may maintain the rights granted during and after the primary term by continuing such operations without the lapse of more than ninety (90) days between abandonment of work on one well and beginning operations for drilling another; during the primary terms such operations may be discontinued and the rights granted maintained by resuming rental payments, by paying within ninety (90) days from the discontinuance of operations (regardless of the fixed rental payment date) the proportion of the fixed yearly rental that the number of days between the end of said ninety (90) days and the next ensuing rental paying date bears to the twelve months' period; but, if said ninety (90) days should expire during any year for which rentals have been paid, no further rentals shall be due until the next fixed rental paying date.[22]

The continuous operations clause permits a lease to be preserved even though there is no production if the lessee is engaged in "continuous operations," i.e. beginning operations for the drilling of another well within 90 days. Some continuous operations clauses are applicable only after the expiration of the primary term. The clause quoted above is applicable both during and after the primary term. In the event the continuous operations clause is applicable during the primary term, the clause should also provide whether the lessee can discontinue operations and commence or resume rental payments to maintain the lease.

This provision provides that the critical fact is "beginning operations for drilling another [well]." This language has been interpreted to mean the same as "commencement of operations for the

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[22] Bath Form 42 CPM – New South Louisiana Revised Four (4) – Pooling Revised "B."

drilling of a well" as discussed in the section of this paper covering the drilling and rental clause.

This particular continuous operations clause applies only "prior to the discovery and production of minerals in paying quantities." In the event production has been obtained in paying quantities, another clause is applicable—commonly referred to as the cessation of production clause.

D. The Cessation of Production Clause

An example of a typical Cessation of Production Clause is as follows:

> It is provided, however, that if, after the discovery and production of oil, gas or other minerals in paying quantities, the production thereof should cease from any cause this lease shall terminate unless Lessee resumes or restores such production, or commences additional drilling reworking or mining operations within ninety (90) days thereafter and continues such operations without the lapse of more than ninety (90) days between abandonment of work on one well and commencement of reworking operations or operations for the drilling of another, in an effort to restore production of oil, gas or other minerals, or (if during the primary term) resumes the payment of rentals in the manner hereinabove provided for in connection with the abandonment of wells drilled.

This cessation of production clause applies both during and after the primary term. Some variants of the clause apply only during the primary term and others only after the primary term. In the event production ceases, the cessation of production clause permits the lease to be maintained, by commencing additional drilling, reworking or mining operations within a fixed period from the time production ceases.

Additionally, because this clause is applicable during the primary term, the provision also provides that the lease may be maintained by resuming rental payments.

E. The Pugh Clause

The Pugh clause has many variations in form but each operates to modify the rights and obligations under the terms of the lease when a well is drilled on and/or production is obtained from a well on a unit basis. The variations in the Pugh clause range from simple to complex.

> In the event a portion or portions of the land herein leased is pooled or unitized with other land so as to form a pooled unit or units, operations on or production from such a unit or units will maintain this lease in force only as to the land included in such unit or units. This lease may be maintained in force as to any land covered hereby and not included in such unit or units in any manner provided for herein, provided that if it be by rental payments, rentals shall be

> reduced in the proportion that the acreage covered by this lease and contained in such unit or units bears to the total acreage then covered by this lease. In the event the date of commencement of drilling operations or production on a unit is less than thirty (30) days prior to the next ensuing rental paying date, Lessee shall be privileged to make such rental payment on or before thirty (30) days after such rental paying date and thereby maintain its rights hereunder. If at or after the end of the primary term this lease is being maintained as to a part of the land by operations on or production from a pooled unit or units embracing lands covered hereby which is not situated in such unit or units and as to which the lease is not being maintained by operations, production or any other means, Lessee shall have the right to maintain the lease as to such land by rental payments exactly as if it were during the primary term, provided that this lease may not be so maintained in force by rental payments more than two (2) years beyond the end of the primary term.

Additionally, a "horizontal" Pugh clause or "geologic" Pugh clause operates to modify the rights and obligations (usually to terminate the rights) under the terms of the lease as to particular subsurface formations or depths below and/or above the unitized formation.

> After expiration of the primary term, this lease will terminate automatically as to all horizons situated 100 feet below the deepest depth drilled (a) from which a well located on the land or acreage pooled therewith is producing in paying quantities, or (b) in which there is completed on the land or acreage pooled therewith a shut-in gas well which cannot be produced because of lack of market, marketing facilities, or because of governmental restrictions, whichever is the greater depth.[23]

It appears that the trend now, at least with more sophisticated landowners is to incorporate Pugh clauses including the "horizontal" or "geologic" Pugh clause language so that the deeper (or shallow, as the case may be) rights are not held by production from the lessee's well.

Additionally, as will be discussed below, the operation of the Pugh clause presents interesting questions concerning surface and subsurface use rights on lands once covered by the lease but located outside the unit.

F. Surface Use Provisions

Leases generally provide expressly for surface use, *e.g.*:

> Lessor ... hereby leases, lets unto Lessee, the exclusive right to enter upon and use the land hereinafter described for the exploration for, and production of oil, as, sulphur and all other minerals,

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[23] *Sandefer Oil & Gas, Inc. v. Duhon*, 961 F.2d 1207, (5th Cir. 1992)(La.).

together with all the use of the surface of the land for all purposes incident to the exploration for and production, ownership, possession and transportation of said minerals (either from said land or acreage pooled therewith), and the right of ingress and egress to and from said lands at all times for such purposes, including the right to construct, maintain and use roads and/or canals thereon for operations hereunder or in connection with similar operations on adjoining land, and including the right to remove form the land any property placed by Lessee thereon and to draw and remove casing from wells drilled by Lessee on said land.

Lessor, for the consideration hereinafter recited, has and by these presents does grant, lease and let unto Lessee the exclusive right to enter upon and use the land hereinafter described for the exploration for and production of oil, gas or other liquid or gaseous hydrocarbons, together with the use of the surface of the land for all purposes incident to the exploration for and production, ownership, possession and transportation of said minerals (either from said land or acreage pooled therewith), and the right to ingress and egress to and from said lands at all times for such purposes, including the right to construct, maintain and use roads thereon for operations hereunder; *provided, however*, that any roads shall be used exclusively for the purposes of Lessee's operations on the lands covered hereby, or on lands pooled therewith, and public use of such roads shall not be permitted; and also the right to use sufficient water, oil or gas from the premises (other than water from Lessor's wells) for said operations.[24]

Again, each of these variations should be carefully reviewed for the nature and extent of the rights granted to the lessee.

With the more frequent drilling of directional wells and the operation of the Pugh clause, surface and/or subsurface use rights on the "outside acreage"[25] after operation of a Pugh clause often becomes an issue.

This issue is presented in several scenarios:

a. a portion of the access to the surface location (*via* road, canal, etc.) traverses the "outside acreage;"

b. a pipeline or flow line from the well traverses the "outside acreage;"

c. the surface location of the well is located on the "outside acreage."

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24 A Louisiana landowner form.

25 "Outside acreage" being that portion of the leased premises outside a unit.

In each of these factual situations, the question arises whether the lessee has the continued right to use the surface or subsurface on the "outside acreage." For several reasons, the lessee should have the right to use the surface and/or subsurface of the "outside acreage." First, many standard lease forms contain an express provision that states:

> Lessee shall have such rights of way or servitudes affecting the acreage released or forfeited as are necessary for Lessee's operations on the land retained.

This position appears to expressly save the surface use rights under the circumstances.

Even in the absence of express provisions, the lessee should continue to have surface use rights on the "outside acreage." In other words, while some of the mineral development and operations are being conducted on lands outside the unit, the lessor derives benefit because a portion of the leased lands are inside the unit.[26] Finally, under Title 30 of the Louisiana Revised Statutes, the rules and regulations of the Commissioner of Conservation and the jurisprudence[27] applying and interpreting same, the operator is entitled to use the lands on which the surface location is permitted and drilled because the portion of the lands inside the unit participate in the benefit of production from the unit well.

However, at least one case in another jurisdiction held that the Pugh clause limited the implied easement for surface use to the area inside the unit.[28]

G. Surface Restoration Clause

Surface restoration clauses have varied historically and since the *Corbello* case and those that followed, some lessors and some lessees have attempted to bring older and, perhaps, out of date provisions in line with modern trends and jurisprudential decisions. The older surface damage provisions were quite simple:

> The Lessee shall be responsible for all surface damages of the Lessor caused by the Lessee's operations.
>
> Lessee shall compensate Lessor for all damages to the timber, growing crops, fences and improvements on the premises occasioned as a result of the Lessee's operations hereunder.
>
> The Lessee shall be responsible for all damages caused by Lessee's operations.

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26 *Richard v. Sohio Petroleum Company*, 101 So.2d 676 (La. 1958) and *Acree v. Shell Oil Co.*, 548 F.Supp. 1150 (M.D. La. 1982).

27 Including, *Nunez v. Wainoco*, 488 So.2d 955 (La. 1986) and 606 So.2d 1320 (La.App. 3rd Cir. 1992).

28 *See* Kysar v. Amoco Production Co., 135 N.M. 767, 93 P.3d 1272 (2004).

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> The Lessee shall be responsible for all damages to timber and growing crops of Lessor caused by Lessee's negligent operations.

Under these types of clauses, the Lessee would be responsible for the various damage types expressly listed in the lease.

Early cases such as *Smith v. Schuster,* [29] *Rhoner v. Austral Oil Exploration Co.*, [30] and *Roy O. Martin Lumber Co. v. Pan American Petroleum Corp.*[31] addressed the application of express damage provisions in the lease.

In addition to restoration obligations that may be expressly stated in a lease, Mineral Code article 122 and the comments thereto describe certain implied obligations, including the implied duty to restore the leased premises. The comments to Mineral Code article 122 suggest that the duty is to "restore the surface of the leased premises as near as is practical to original condition." Prior to the *Corbello* decision in 2003, the damage awards for restoration of the surface had not exceeded $10,000 in the reported decisions.

In *Corbello* and the cases that followed, the restoration duties, both express (in the lease) and implied (by law), were explored in great detail due to the magnitude of the damages that had been claimed and awarded at the trial court level. A brief overview of the issues presented in these cases gives great guidance in drafting express surface restoration provisions in modern day mineral leases.

In the *Corbello* case,[32] the lease provided a somewhat broader restoration provision. It provided:

> lessee agrees to indemnify and hold lessor harmless from any and all loss, damage, injury and liability of every kind and nature that may be caused by its operations or result from the exercise of the rights or privileges herein granted. Lessee further agrees that upon termination of this lease, it will reasonably restore the premises as nearly as possible to their present condition.

In *Corbello,* the jury awarded $33,000,000 for restoration of a tract of land worth approximately $110,000. On appeal, the defendants argued that the damage award should be limited to the value of the property. The Louisiana Supreme Court rejected the argument finding that the legal theories and practical reasons for limiting the damages to the value of the property do not apply to a contractual obligation freely negotiated by the parties.

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[29] 60 So.2d 430 (La.App. 2nd Cir. 1953).

[30] 104 So.2d 253 (La.App. 1st Cir. 1958).

[31] 177 So.2d 153 (La.App. 3rd Cir. 1965).

[32] 850 So.2d 686 (La. 2003).

In *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*,[33] the mineral lease provided that "grantee shall be responsible for all damages caused by his operations." The trial court awarded $2,000,000 in damages for restoration of a tract worth approximately $300,000. The defendants argued, among other things, that Hazelwood Farm acquired the property from the original lessor and that, consequently, Hazelwood Farm was not in privity of contract under the mineral lease and, therefore, had no right to recover for surface damages caused by operations prior to the purchase of the land. The court rejected this argument finding that the restoration clause in the lease was not limited to damages suffered by lessor but that the clause created a *stipulation pour autrui* thereby allowing the subsequent landowner and/or tenants of the landowner to recover damages under the terms of the mineral lease. It is also interesting to note that perhaps the court made these conclusions based on certain equitable considerations because Hazelwood Farm, Inc. was an entity owned by Hazelwood Farm's vendors. In other words, the land continued to be owned by the family, though through a corporate entity.

The dispute in *St. Martin v. Mobil Exploration & Producing U.S. Inc.*,[34] involved a canal servitude agreement that required the grantee to maintain the canal in a manner that would avoid damage to the land through which the canal ran. The defendants argued, among other things, that the claims were barred by liberative prescription (statute of limitations) because the provision in the right-a-way agreement required compensation for damages at the time the damage was suffered. The Court, however, concluded that the breach of the canal servitude agreement was a continuing breach throughout the existence of the contract and, as such, the ten year liberative prescription period did not begin to run until the right-of-way contract terminated. The Court also noted that the result would likely be different for damages resulting from a one time event or an operation under the contract that was completely discontinued.

The mineral lease in *Castex v. Terrebonne Parish School Board*,[35] did not have an express provision concerning the duty to restore the surface at the end of the lease or to compensate the lessor for damages caused by operations. The Court in *Castex* made several important points concerning the "implied duty of restoration," specifically (1) that specific performance,[36] not money damages, was the appropriate manner in

[33] 844 So.2d 380 (La.App. 3rd Cir. 2003).

[34] 224 F.3d 402 (5th Cir. 2000).

[35] 878 So.2d 522 (La.App. 1st Cir. 2004).

[36] We note, however, that the Louisiana Supreme Court reversed the First Circuit Court Appeal insofar as the First Circuit Court of Appeal required the defendants to actually backfill the canals as part of the restoration duty. *Terrebonne Parish School Board v. Castex Energy, Inc.*, 893 So.2d 789 (La. 2005).

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which to enforce the implied duty to restore the land; and (2) that the lessee is not liable for surface damages caused by "the ordinary, customary and necessary" acts conducted under a mineral lease unless the lessee conducts operations negligently or unreasonably in the manner and scope in which the operations are conducted.

In *Simoneaux v. Amoco Production Co.*,[37] the Court refused to defer to the Louisiana Office of Conservation and the Louisiana Department Environmental Quality on matters concerning assessment of the remediation of damage to the property at issue. The Court pointed out that deference to the administrative agencies was within the trial court's discretion and, in this case, there was no abuse of discretion.

Since *Corbello*, the Louisiana legislature has passed two significant laws governing surface restoration. The first was in 2003 and covered claims "to recover damages for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable ground water."[38]

The second was Act 312 of 2006 Regular Session. Act 312 is broader in that it covers claims for environmental damage arising from oil field operations. The new law requires timely notice to the State of such litigation; stays such litigation until thirty days after such notice is given; allows the State to intervene in such litigation; provides a role for the Office of Conservation within LDNR in determining the most feasible plan for evaluation and/or remediation of environmental damage; provides that the Court and the Office of Conservation shall oversee actual implementation of the plan determined to be "most feasible"; and allows the landowner and the State to recover attorney and expert fees and costs from the responsible party or parties.[39] The constitutionality of Act 312 is still pending in the Louisiana Supreme Court.[40]

After almost 20 years of disputes between lessors and lessees it appears that simpler surface damage and surface restoration provisions covering "crops and growing timber" or "all damages caused by lessee's operations" are insufficient to address the needs of lessors and lessees as well as the public policy needs of the state as whole. Lessees, specifically, should spend the time and effort necessary to address and provide for the following issues:[41]

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37 860 So.2d 560 (La.App. 1st Cir. 2003).

38 La. R. S. 30:2015.1.

39 La. R.S. 30:29.

40 For a more complete discussion of Act 312, *see also* Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul.Envtl. L.J. 347 (2007).

41 Note specifically that Mineral Code article 122 provides that "Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee."

a. provide that the surface damage and restoration obligation be based on the value of the land (or perhaps some multiplier of the value of the land);

b. provide that the surface damage and restoration obligation be limited to damages caused by negligence of the operator or operations that were unreasonable in scope and manner conducted;

c. define the surface damage and restoration obligation with reference to the applicable regulatory standard mandated by the various government agencies having jurisdiction;

d. provide that specific performance, not money damages, is the remedy to fulfill the surface damage and restoration obligation;

e. limit the surface damage and restoration obligation to the lessor (and perhaps his heirs) but exclude third parties and purchasers of the land who are not in privity of contract under the mineral lease; and

f. provide that surface damage and restoration claims be brought within a specific period of time following termination of the lease.

H. The Cover-All or Mother Hubbard Clause

Description problems are addressed in part by a Cover-All or Mother Hubbard Clause such as the following that provides that the lease covers:

> [a]ll land owned by the Lessor in the above mentioned section or sections or surveys, all property acquired by prescription and all accretion or alluvion attaching to and forming a part of said land are included, whether properly or specifically described or not.

Courts have generally interpreted these clauses by relying on "the intent of the parties." Courts explain that "Mother Hubbard" clauses first made their way into oil and gas leases to insure that the instrument would be effective to convey the premises despite errors in the particular property description. It has been stated that "the correct application of [the Mother Hubbard clause] is to cure minor defects in description and to close up gaps, wedges and omitted strips."[42]

Louisiana courts have drawn an important distinction when discussing the applicability of "Mother Hubbard" or "Cover-All" clauses in leases, sales or other transactions involving immovable property. Generally, Louisiana courts have found that "Mother Hubbard" clauses, when applied in accordance with the intent of the parties, are effective to convey property not otherwise properly described in the written document. However, courts have explained though the "Mother Hubbard" clause or "Cover-All" clause may be effective between the

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[42] *Texas Co. v. Newton Naval Store Co., Inc.*, 78 So.2d 751 (Mississippi 1955).

parties, they are not sufficiently specific to give notice to third parties dealing with the property. In *Williams v. Bowie Lumber Co.*,[43] the Supreme Court stated:

> We did not say that such a description rendered the sale invalid as between the immediate parties thereto. On the contrary, we merely held that omnibus description does not provide adequate notice to third parties.

To have effect against third parties under Louisiana's Public Records Doctrine, property included in a "Mother Hubbard" or a "Cover-All" clause must be properly described in an recorded amendment to the property description. Moreover, the "Mother Hubbard" or "Cover-All" clause would give the vendee the right to obtain specific performance or to bring a reformation action if the lessor refused to acquiesce in executing an act of correction.

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43 38 So.2d 729 (La. 1948).