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Mineral Rights

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I. LEGISLATION

Oil Spill Prevention and Response Act—Act No. 7 of the First Extraordinary Session of 1991, the Oil Spill Prevention and Response Act, enacts Chapter 19 of Subtitle II of Title 30 (Louisiana Revised Statutes 30:2451-2496) and Louisiana Revised Statutes 36:4(M). It provides for oil spill prevention and response in certain waters of the state, for liability for removal costs, and for damages for oil spills. It also makes provision for responder immunity, for enforcement and adjudication, and for penalties. The Act creates the Oil Spill Contingency Fund and establishes the office of the Louisiana oil spill coordinator together with the powers, duties and functions of that office. In addition, it creates an interagency council composed of certain members appointed by designated legislators and specified state agency officials.

Abandoned Waste Sites—Act No. 352 enacts Louisiana Revised Statutes 30:79, relative to abandoned oilfield waste sites. It requires recordation of notice of abandoned oilfield waste sites by the landowner. Failure of a landowner to file the required notice may constitute grounds for an action in redhibition under the applicable provisions of Louisiana Civil Code articles 2520 et seq. unless the subsequent purchaser has actual or constructive knowledge that the property has been used for such purposes. The notice may be removed upon a finding by the Commissioner of Conservation that the oilfield waste no longer poses a potential threat to health or the environment.

Unit Well Costs—Act No. 595 amends and reenacts Louisiana Revised Statutes 30:10(A)(2)(c) and (d). It provides a specific method of calculating cost of production for purposes of allocating certain interests. If a well has already been drilled or is being drilled when the risk provisions of the act become applicable, the cost of drilling, testing, completing, equipping, and operating the well allocable to each tract included in the unit shall be reduced in the same proportion as the recoverable reserves in the unitized pool recovered by prior pro-

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duction, if any, in which the tract did not participate prior to determining the share of cost allocable to the tract. Similarly, if a unit is revised so as to include an additional tract, the costs will be likewise reduced proportionately for that additional tract. Thus such costs are to be reduced on a proportional basis rather than a dollar-for-dollar basis. The amendment was apparently prompted by recent rulings of the Commissioner of Conservation pursuant to application of the 1984 revisions of Section 10 of Title 30.

Produced Water Injection Incentives—Act No. 625 enacts Louisiana Revised Statutes 47:633.5 to provide an incentive for injection of water produced from oil and gas operations back into an oil and gas reservoir. It allows a deduction from the severance tax on oil and gas produced from enhanced recovery utilizing produced water as a driving mechanism.

Regulatory Codes—Act No. 735 enacts Louisiana Revised Statutes 49:954.2 and 954.3 to provide for the creation of an Environmental Regulatory Code and for a Unified Oil and Gas Regulation Code. The Act provides for the powers and duties of the secretary of the Department of Natural Resources for the creation of such code. Rules or regulations that are not timely submitted for codification are unenforceable against applicants for oil and gas development related permits after a certain date.

Inspection Fee Exemptions—Act No. 778 amends and reenacts Section 1 of Louisiana Revised Statutes 30:21 to provide as follows:

> B. There shall be no fee imposed for the inspection, monitoring, or regulatory maintenance of stripper crude oil wells or incapable gas wells certified pursuant to R.S. 47:633 on January 1 of each year by the Severance Tax Division of the Department of Revenue and Taxation.

Act No. 811 amends and reenacts Section 1 of Louisiana Revised Statutes 30:21 to provide as follows:

> B. Nothing contained herein shall authorize the charging of inspection fees for shut-in oil wells or temporarily abandoned oil wells in stripper fields.

It can probably be assumed that the legislature intended for both of these Acts to be effective. But they result in two different versions of the same section.

State Lease Pugh Clause—Act No. 786 amends and reenacts Louisiana Revised Statutes 30:129(B) to provide that each lease entered into by the Mineral Board after August 1, 1991 shall contain a "Pugh clause." Such a clause shall provide that the commencement of operations for the drilling of a well, the conducting of reworking operations, or the production of minerals on any portion of a unit which embraces all or any part of the property covered by such lease shall maintain the lease in effect under the terms of the lease only as to the part of the leased property embraced by the unit. The clause may provide that the acreage outside the unit(s) may be maintained by any means covered by the lease, but if by rental payments, then such payment may be reduced proportionately to the amount of acreage included in the unit as it bears to the total acreage in the lease, provided that the rental per acre on the outside acreage shall not be less than one-half of the cash payment paid for the lease per acre nor shall the lease on the non-unitized acreage be extended more than two years beyond the primary term.

Expedited Permits—Act No. 828 amends and reenacts Louisiana Revised Statutes 30:26 and 2022(C), 49:214.30(C)(2), and 56:6(26), and enacts Louisiana Revised Statutes 49:962.1 to provide for the expedited consideration of certain oil and gas and pipeline permits. The Act requires the Department of Natural Resources, the Department of Environmental Quality and the Department of Wildlife and Fisheries to grant or deny applications for permits, licenses, registrations, variances, or compliance relating to oil and gas wells and pipelines within sixty days. Should a permit not be granted or denied within the specified time, the statute gives the applicant the authority, on motion in a court of competent jurisdiction, to take a rule to show cause in not less than two nor more than thirty days why the applicant should not be granted the permit, license, registration, variance, or compliance schedule for which the applicant had applied.

Water Bottom Obstruction Clearance—Act No. 957 enacts Louisiana Revised Statutes 30:4(J). Under this, the Commissioner of Conservation is to adopt rules no later than January 1, 1992 to require that the owners of all abandoned well and platform locations on state water bottoms in the Gulf of Mexico and adjacent bays and inlets clear them of all related obstructions. The rules are to provide that such clearance be verified at the cost of such owner. The clearance and verification requirements and procedures are to be substantially the same as those required by the United States Department of the Interior Minerals Management Service for abandoned oil and gas structures in the Gulf of Mexico.

II. State and Federal Lands

A. *A River Shifts Course—The "Freeze Statute"*

State ownership of water bottoms promises to be a fruitful area for lawsuits for years to come. One should expect, if not a flood of litigation, at least a steady stream of cases. Such litigation in years past led the Louisiana legislature to enact the so-called "Freeze Statute,"[1] but its application has itself led to legal controversy. One such recent case involving both the interpretation of the "Freeze Statute" and of a state lease was *Cities Service Oil and Gas Corp. v. State.*[2] The case arose due to a shift in the bed of the Red River between 1972 and 1979. The river in part moved from Bossier Parish to Caddo Parish until its movement was halted by the Army Corps of Engineers, but the Corps' rescue did not come in time for some owners. The suit was filed as a concursus proceeding to determine ownership of revenues produced from a unit established by the Commissioner of Conservation that included riverbed land leased by the state. Seven different groups of litigants claimed an interest in the proceeds from unit production, including the state of Louisiana, the state's lessee under a 1972 lease of the riverbed, the unit operators and several groups of landowners and their lessees. Some leases were recorded in Caddo Parish and some were recorded in both Caddo and Bossier Parishes.

As to the state's lessee, the trial court held that the state lease did not move westward with the river. The appellate court agreed, holding that the state lease remained with the former riverbed and did not move to the new bed. The lease stated that it covered land "now or formerly" constituting the riverbed owned by the state on a specific date, September 1, 1972.[3] It did not provide that the lease would follow the movement of the river. This holding may pose substantial problems for lessees of state lands, causing them to lose valuable mineral rights that they have developed in reliance on a state lease. Moreover, some units created by voluntary or compulsory pooling may come into question should the state insist that lease rights have been lost due to the shift in a river bed.

For one group whose leases were recorded only in Caddo Parish, the trial court found that their leases did not affect Bossier Parish property as to third persons when the river moved to the adjacent parish. As a consequence of this application of the public records doctrine, when the two other groups acquired the property east of the river as the river moved westward, their acquisitions were in full ownership up to the Bossier Parish line (except for the former riverbed which was covered by State Lease 6002). The appellate court affirmed the result, but observed that "inasmuch as the leases at issue expired

1. La. R.S. 9:1151 (1991).
2. 574 So. 2d 455 (La. App. 2d Cir.), writ denied, 578 So. 2d 132, 136 (1991).
3. The state lease covered the following: "All the lands now or formerly constituting the beds and bottoms of all water bodies of every nature and description and all islands and other lands formed by accretion or reliction, except tax lands, owned by and not under mineral lease from the State of Louisiana on September 1, 1972, situated in Bossier and Caddo Parishes. . . ." Id. at 458.

prior to the drilling of the unit well, the issue of whether they were recorded in Bossier Parish [was] of no importance."[4]

The trial court found that the Freeze Statute only applied where: (1) ownership of the land changed as a result of the movement of the river; and (2) an oil and gas lease existed on the newly acquired land, under the terms of which the former owners, lessors, lessees, royalty owners and mineral owners had already acquired rights. In the absence of a lease, the land acquired by accretion came to the new owner in full ownership. However, if the land was acquired subject to a lease, the rights of the lessees and lessors were protected only for as long as the lease continued to be in effect. Upon expiration of the lease, all mineral rights reverted to the new owner who had acquired the surface of the property by accretion.

Applying this interpretation to the facts before it, the trial court determined that upon the expiration of a 1974 lease in 1978 the mineral rights of these lessors in the new riverbed expired. Since that time, the state had owned the new riverbed free of this lease. The expiration of the 1974 lease in 1978 also allowed two other groups to acquire the Caddo Parish property east of the new riverbed in full ownership.

The court of appeal rejected a claim that the application of the statute results in an unconstitutional taking of the riparian landowners' rights to acquire future alluvion, a vested right. Applying *Jones v. Hogue*,[5] the court of appeal held "that ownership of alluvion is not a vested right, but a legislative donation which may be altered or controlled by the legislature."[6]

Under the Freeze Statute, outstanding mineral rights are not affected by a change in ownership of navigable water bottoms. The statute applies only when there is a change of ownership of land or water bottoms caused by the action of a navigable stream and there is in effect a mineral lease covering and affecting the lands or water bottoms. However, the statute does not require that there be actual mineral production from the leased land in order for the statute to be effective. The statute does not establish imprescriptible mineral rights.[7]

B. *Alluvial Deposits*

In *Davis Oil Co. v. Citrus Land Co.*,[8] Davis Oil obtained mineral leases from both the State of Louisiana and Citrus Land which pur-

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4. Id.
5. 241 La. 407, 129 So. 2d 194 (1960).
6. 574 So. 2d at 460-61.
7. La. R.S. 9:1152, "which specifically grants an imprescriptible mineral servitude to an agency or political subdivision of the State, if the state acquires the land of the agency or political subdivision as a result of the movement of a navigable water body, does not 'supplement' the Freeze Statute, La. R.S. 9:1151." 574 So. 2d at 463.
8. 576 So. 2d 495 (La. 1991).

ported to cover the same alluvion. Proceeds attributable to the royalty interest owed to the owner of the alluvion were deposited in the registry of the court and placed in escrow pending title determination as to the alluvion. Unable to reach agreement with the lessors, Davis filed this concursus proceeding.

The alluvion in dispute was an area formed near the mouth of Shell Island Pass (a river), where the Pass intersects with Little Bay, which is itself an extension of Atchafalaya Bay. The formation of the alluvion was rather unique because the extension of the right descending bank of Shell Island Pass into Little Bay was not mirrored on the left descending bank side of the Pass. The trial court ruled that Citrus Land owned the disputed alluvion, reasoning that a statute effective July 12, 1974 was an implicit legislative recognition that the area in question was not an "arm of the sea" prior to the effective date.[9] In effect, the trial court held that by July 12, 1974, the mouth of Shell Island Pass had been extended into Little Bay due to alluvial buildup. Thus, the court ruled that the entire disputed tract fell north of the line described in the statute and was, therefore, owned by Citrus, the riparian landowner. The court of appeal then reversed the trial court,[10] holding that even before the effective date of the statute, the area in question was an arm of the sea and, as seashore was a public thing, was insusceptible of private ownership. Where a riverbank intersects the seashore, the seashore must prevail, said the court of appeal.[11] The Louisiana Supreme Court reversed in part and remanded. It agreed with the court of appeal that the 1974 statute was not a legislative determination that the area was not an arm of the sea prior to July 12, 1974. Moreover, even if it was not an arm of the sea, the area (Little Bay) may have been a lake or a bay and, as such, alluvion forming along its shore would belong to the state.[12]

The court succinctly set forth the pertinent legal principles as follows:

> Alluvion which forms along the bank of a river or a stream belongs to the owner of the land adjacent to the bank. Alluvion which forms along the shore of a body of water that is not a river or a stream belongs to the State. . . . Thus, to determine the ownership of alluvion, a court must first determine the bank or shore upon which it has accumulated, and then it must classify the area upon which the alluvion accumulated as either the bank of a river/stream or the shore of a lake, bay,

9. La. R.S. 38:2356(M)(1) (1989).
10. Davis Oil Co. v. Citrus Land Co., 563 So. 2d 401 (La. App. 1st Cir. 1990).
11. Id. at 405.
12. State v. Placid Oil Co., 300 So. 2d 154 (La. 1974).

> or arm of the sea. . . . [H]ow the alluvion itself is classified is irrelevant; the pertinent inquiry is where the alluvion accumulated. In this case, consequently, it simply does not matter whether or not the alluvion has become an extension of the right descending bank of Shell Island Pass.[13]

The court of appeal implicitly found that Little Bay was either part of the sea or an arm of the sea. That court overlooked, however, the principal issue—at what point did the riverbank and the seashore intersect prior to the buildup of the alluvion in dispute. Thus, the supreme court remanded for a new trial on the issue of whether the alluvion formed along the former shoreline of Little Bay, along the right descending bank of Shell Island Pass, or partly on the bank of Shell Island Pass and partly on the former shoreline of Little Bay. The court observed that to answer this question, the trial court would have to make a factual determination on the location of the point where the right descending bank of Shell Island Pass intersects with the former shoreline of Little Bay. If the trial court were to find that the alluvion formed partly along the bank of Shell Island Pass and partly along the former shoreline of Little Bay, the court must then determine whether Louisiana Civil Code article 501[14] or its underlying principle should be applied.

C. Outer Continental Shelf Lands—A Platform for Louisiana Property Law

Shell sold Platform D, an oil well platform on the Outer Continental Shelf, to Kirby. The platform had a pipeline that ran from it to Shell's Platform C and then beyond. Shell later gave up the federal oil and gas lease on the block where Platform C was located. Even though this lease terminated, Shell remained responsible to the federal government for the platform and pipeline until removed. Shell asked Kirby to remove the pipeline from Platform C, contending that when Shell sold Platform D to Kirby this resulted under Louisiana law in a predial servitude on Platform C in favor of Kirby's Platform D, and moreover, that under Louisiana law Shell could abandon the

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13. Citing La. Civ. Code art. 499, 500; *Placid Oil*, 300 So. 2d 154; Amerada Petroleum Corp. v. State Mineral Bd., 203 La. 473, 14 So. 2d 61 (1943); Miami Corp. v. State, 186 La. 784, 173 So. 315 (1936); State v. Erwin, 173 La. 507, 138 So. 84 (1931).

14. La. Civ. Code art. 501 provides: "Alluvion formed in front of property of several owners is divided equitably, taking into account the extent of the front of each property prior to the formation of the alluvion in issue. Each owner is entitled to a fair proportion of the area of the alluvion and a fair proportion of the new frontage on the river, depending on the relative values of the frontage and the acreage."

servient estate to Kirby, the owner of the dominant estate, and that Kirby was bound to accept it. Kirby refused, and Shell brought suit in *Shell Offshore, Inc. v. Kirby Exploration Co. of Texas*,[15] seeking a declaration that Kirby owned Platform C, or, in the alternative, that Kirby was responsible for maintaining and ultimately removing the platform. The district court ruled that abandonment was not an option available to Shell, as Shell could not have granted a predial servitude on Platform C to Kirby; the court ordered Kirby to move its pipeline, finding that nothing in the sale of Platform D to Kirby gave Kirby the right to support its pipeline on C. Both parties appealed. The Fifth Circuit Court of Appeals reversed and remanded. The court recognized that the law of Louisiana applied to the dispute, except to the extent that it is inconsistent with federal law.[16] Analyzing the Louisiana Civil Code, the court said that "[w]hen Shell sold Platform D to Kirby, assuming the existence of the other requisites of the charge, an apparent predial servitude of passage or support would come into existence in favor of Kirby."[17] The court continued, however, that while such a servitude could be abandoned, this conflicted with federal law as the United States lease and regulations did not permit abandonment of the Platform C by Shell. The absence of abandonment converted the charge from one on an estate to one resembling a personal obligation. Further, the court found Kirby expected to use the pipeline in the future under the same conditions existing when Kirby bought it. There were equities with both Kirby and Shell as to who should be responsible for the pipeline, so the court remanded to the district court "to explore the customs and practices in the offshore oil and gas industry in dealing with the type of problem presented in this case."[18]

D. *Royalty Payment on NGPA Reimbursement Payments*

Pursuant to section 110 of the Natural Gas Policy Act (NGPA), the Minerals Management Service (MMS) of the United States Department of the Interior ordered Mesa Operating Limited Partnership (Mesa) to pay royalties on reimbursement payments made to Mesa by pipeline company purchasers who had purchased gas from Mesa.[19] The Department of the Interior (DOI) affirmed the MMS demand order. Mesa appealed the DOI's decision to federal district court, contending

15. 909 F.2d 811 (5th Cir. 1990).
16. The Outer Continental Shelf Lands Act declares that the law of the adjacent state applies to the outer continental shelf, except insofar as it conflicts with that Act itself, or other federal laws or regulations. 43 U.S.C. § 1333(a)(2)(A) (1988).
17. 909 F.2d at 814.
18. Id. at 816.
19. 15 U.S.C. § 3320(a) (1988).

that the DOI misinterpreted regulations governing assessment of royalties. The district court rejected Mesa's arguments and entered summary judgment in favor of the DOI. On appeal, the Fifth Circuit Court of Appeals affirmed in *Mesa Operating Ltd. Partnership v. United States Department of Interior*,[20] holding that the DOI, in affirming the MMS order, made a permissible interpretation of the federal regulations that govern royalties owing from federal natural gas leases.

III. Conveyancing

A. Correction Deed

The case of *Bourgeois v. Landry*[21] was an appeal from a trial court decision that an instrument in controversy was not a correction instrument, a sale, or a compromise and was thus to be considered a nullity. The court of appeal reversed. The plaintiffs and defendant had, together with other consideration, exchanged land in two parishes. Bourgeois, a plaintiff, was to give Landry 74+ acres he owned, which had been part of a larger tract, in exchange for 18 acres and other consideration. The larger tract was subject to a mineral servitude that was about to prescribe for nonuse at the time of the transaction. Bourgeois had a 3/40ths interest in the servitude which covered 3,720 acres. Landry was to receive all the minerals in the 74+ acres. Prescription was interrupted by the recordation of a Reinscription of Mineral Interest and an Act Interrupting the Running of Prescription filed before the ten year prescriptive period had expired. The exchange took place and Landry received only a 3/40ths interest in the 74+ acre tract. Subsequently Bourgeois executed the "Correction Deed" purporting to give Landry a mineral interest in the servitude covering the 3,720 acre tract to compensate for the failure to convey to Landry the full mineral rights in the 74+ acre tract; it was this instrument that the trial court found was a nullity. The Louisiana Third Circuit Court of Appeal here reversed based on manifest error as to the intent of the parties in the confection of the "Correction Deed." It declared the conveyance valid and ordered it enforced according to its terms.

B. Necessity of a Writing for Conveyance of an Interest in a Well

The court of appeal in *Crain v. Doré*[22] reviewed a trial court judgment ordering specific performance of an oral agreement to transfer

20. 931 F.2d 318 (5th Cir. 1991).
21. 583 So. 2d 36 (La. App. 3d Cir. 1991).
22. 578 So. 2d 555 (La. App. 3d Cir.), writ denied, 581 So. 2d 694 (1991).

an interest in an oil and gas well. The court reversed, holding that the contract was unenforceable because it contemplated the oral transfer of immovable property in violation of Louisiana Civil Code article 1839.[23] The interest was a mineral interest, and a mineral interest is an incorporeal immovable to which Article 1839 applies. Because the portion of the oral agreement was unenforceable, the entire oral agreement was unenforceable.

C. *Third Party Good Faith Purchaser*

Tupper sold mineral rights, less a 1/48th overriding royalty interest, in a tract of land to CATL, an unregistered d/b/a for Palermo for $8,000. CATL transferred 1/2 of the minerals in the tract to Reed, and then Reed and CATL sold their entire mineral interest in the tract to Dallas Oil for $160,000. In *Tupper v. CATL Operating Co.*,[24] Tupper sued CATL seeking rescission of the sale based on fraud, misrepresentation, incapacity of the vendor, inadequacy of consideration, and irregularities in the confection of the act of sale. She sought restoration of all fruits and revenues, together with damages. The trial court denied her motion for summary judgment and granted a motion for summary judgment made by Dallas Oil, finding that Dallas Oil was protected as a good-faith third party purchaser. Tupper appealed, contending that there were genuine issues of fact as to the good faith of Dallas Oil, relying on three facts: (1) the disparity between the original sale price ($8000) and Dallas Oil's purchase price ($160,000); (2) the absence of a recorded mandate showing LeBlanc's (CATL's agent) authority to act on behalf of CATL; and, (3) the absence of a certificate of public record setting forth CATL as the d/b/a for Palermo. The court of appeal affirmed. Noting that the Mineral Code specifically provides that the sale of a mineral right is not subject to lesion beyond moiety,[25] the court stated that consideration for a transaction involving the sale of mineral rights is speculative in character. Thus, the court could not impute bad faith to Dallas Oil solely on the basis of the price disparity. While the Louisiana statutes prohibit business transactions under assumed names, this did not vitiate either

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23. Article 1839 provides as follows:

> A transfer of immovable property must be made by authentic act or by act under private signature. Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath. An instrument involving immovable property shall have effect against third persons only from the time it is filed for registry in the parish where the property is located.

La. Civ. Code art. 1839.

24. 580 So. 2d 1050 (La. App. 3d Cir. 1991).

25. La. R.S. 31:17 (1989).

CATL's contract with Tupper or CATL's contract with Dallas Oil. Likewise the court found no merit to Tupper's contention that the absence of a recorded procuration between Palermo/CATL and LeBlanc rendered Dallas Oil in bad faith.

IV. Contract Interpretation and Unjust Enrichment

A. *AMI Farmout Interpreted as Optional*

Petrocana sought, in the case of *Petrocana, Inc. v. Margo, Inc.*,[26] to enforce a letter agreement (a farmout) of July 9, 1981 establishing an area of mutual interest (AMI). Under the agreement Margo, Inc. paid Petrocana $50,000 for the right to drill a well on certain Petrocana lease acreage; if the well was a commercial producer, Margo was to earn an assignment of the working interest in the acreage. Margo was given geological information by Petrocana to assist in the drilling of the well. Margo did not drill the test well, and subsequent to January 1, 1982 Margo acquired a mineral lease in the AMI acreage. Petrocana sought to be recognized as owner of a 5% overriding royalty interest in any mineral leases acquired by the defendants within the AMI since the date of the letter agreement and also sought damages for the "misappropriation and utilization" of the geological information furnished by Petrocana to the defendants. The district court granted summary judgment to the defendants. On the plaintiff's appeal, the third circuit court of appeal affirmed, holding that the letter agreement terminated on January 1, 1982, and all rights thereunder were forfeited when Margo, Inc. did not drill a test well; all rights under the letter agreement were forfeited by the terms of the letter agreement, including the purported area of mutual interest. The court rejected Petrocana's contention that the AMI was extended beyond the termination date of the letter agreement by a verbal agreement: "[I]t is clear that parol evidence is inadmissible to prove the existence of an extension by verbal agreement of the transfer of an interest in an immovable since such an agreement would be invalid and unenforceable under Louisiana law."[27] Likewise, the court rejected the claim that Petrocana was entitled to damages for misuse of the geological information, stating that the only consequence of failing to drill the test well was loss of the right to earn the mineral leases. There was a dissent by Judge Foret.

This decision represents one of the pitfalls of drafting farmout agreements. To express one consequence of the failure to drill is to

26. 577 So. 2d 274 (La. App. 3d Cir. 1991).
27. Id. at 278.

run the risk that it will be regarded as the exclusive consequence. The court reprints the letter agreement as an appendix to the opinion, and it is clear that the court's characterization of the agreement as a farmout is correct. The agreement states: "Failure by Margo to conduct the required operations shall result in termination of this agreement and forfeiture of all rights hereunder."[28] The trial court and appellate court read this paragraph as providing the exclusive consequence of the failure to drill the test well, making the test well an option of the farmer. Yet, the agreement also provided that "[o]n or before January 1, 1982, at a mutually acceptable location, Margo, Inc., or assigns, shall commence drilling a 12,300 ft. test well . . . ."[29] The use of "shall" would indicate the drilling was an obligation, as contended by Petrocana, and not merely a permissive right. As one authority has observed, "[T]he term 'farmout' is almost always reserved for agreements which require at least one test well."[30] Professor Lowe states that the "hallmark of an obligation well farmout is that the farmer will have a binding legal obligation to drill on the farmed-out acreage."[31] The court's treatment of the clause specifying termination for failure to drill turned what looked like an obligation farmout into an option farmout. Perhaps this is in accord with industry practice, for Lowe goes on to state that "the vast majority of farmout agreements make drilling an option rather than an obligation."[32]

B. *Who Earned Forfeited Right?*

The case of *Crescent Drilling & Development, Inc. v. Sealexco Inc.*[33] was a concursus proceeding to determine the ownership of production from several wells. It involved interpretation of a series of transactions among the principals of Sealexco, a corporation formed for the purpose of acquiring, selling, drilling and operating interests in various oil and gas prospects. Sealexco entered a farmout agreement with Tee Oil to earn interests in a certain mineral lease. Sealexco entered into separate exploration agreements with Ben Seale (one of the principals of Sealexco), with Crescent, and with Warren Knight. The agreements specified the before casing point (BCP) and after casing point (ACP) interests of the parties. Warren Knight forfeited his rights

28. Id. at 282.
29. Id. at 280.
30. Scott, How to Prepare an Oil and Gas Farmout Agreement, 33 Baylor L. Rev. 63, 67 (1981).
31. Lowe, Analyzing Oil and Gas Farmout Agreements, 41 Sw. L.J. 759, 782 (1987).
32. Id. at 792. See also Schaefer, The Ins and Outs of Farmouts: A Practical Guide for the Landman and the Lawyer, 32 Rocky Mt. Min. L. Inst. 18-1, 18-16 (1986).
33. 570 So. 2d 151 (La. App. 3d Cir. 1990), writ denied, 575 So. 2d 373 (1991).

under his agreement, and the dispute concerned who among the Sealexco principals acquired those interests attributable to his forfeiture. The court of appeal affirmed a trial court determination that Ben Seale acquired the entire Knight-forfeited BCP interest and 75% of that as additional ACP. As Sealexco was the beneficiary of any unsold interest, a 3.25% ACP interest which remained reverted to Sealexco.

C. *Reassignment Clause in Sublease Given Limited Effect*

Avatar took a lease on 2067 acres of land with a primary term of three years and sixty days. It then subleased the lease to Gulf (Chevron's predecessor) under a contract in which Gulf agreed to pay delay rentals and to reassign the lease in certain circumstances. Before consummating the sublease to Gulf, Avatar assigned overriding royalty to Moyers (Avatar's sole shareholder) and Jenkins (the independent landman who negotiated the Avatar lease). A provision of the agreement with Gulf explicitly burdened the assignment with the overrides of Moyers and Jenkins. As the end of the primary term approached, Gulf agreed with a company, which had taken a top lease from the landowners, not to drill the lease obtained from Avatar in exchange for that top lessee assigning the top lease to Gulf. The Avatar lease thus expired and with it the overriding royalty of Moyers and Jenkins. Avatar and Jenkins' assignee brought suit in *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*,[34] against Gulf/Chevron for breach of the agreement under which the Avatar lease was assigned to Gulf.

The Fifth Circuit Court of Appeals ruled that Gulf had not breached the assignment agreement. The reassignment clause provided:

> Assignor herein reserves the right to a re-assignment of the leases assigned herein if Assignee elects not to pay any delay rentals coming due. Such re-assignment shall be made within sixty (60) days of the rental payment or expiration date.[35]

Because Gulf had paid all necessary delay rentals, there was no obligation to reassign the lease to Avatar. Despite the clear provision relating to the expiration date of the lease, the court rejected Avatar's argument that inclusion of the "or expiration date" language in the clause evidenced an intent by the parties for Gulf to reassign the lease if it chose not to pay delay rentals and to reassign prior to the end of the primary term. The second sentence of the clause began with the words "such reassignment" and described the time limits for reassigning the lease. By using the words "such reassignment," the second sentence was limited in application to reassignment caused by the failure

34. 933 F.2d 314 (5th Cir. 1991).
35. Id. at 317.

to pay delay rentals described in the first sentence. "Nothing in the clause," the court said, "indicated an intent of the parties to expand the right to reassignment beyond the occurrence of that one event."[36] Thus, the condition required for a right to reassignment never occurred.

Although the royalty assignments from Avatar to Moyers and Jenkins contained a "renewal and extension" clause (or anti-washout clause),[37] the court found that it was not binding on Gulf as Gulf was not a party to it. Gulf had not assumed Avatar's obligations under the royalty assignments to Moyers and Jenkins.

D. *Accounting for Well Costs—Operator Not a Fiduciary*

Caddo Oil was the operator of certain leases under an operating agreement, and O'Brien was a non-operator with Caddo. Caddo charged an operating expense as well as well costs to the non-operators. Between June, 1979 and December, 1981, Caddo drilled and completed seven additional wells on the leases. O'Brien refused to pay costs and expenses on these wells though he did receive production revenues from the wells. Caddo brought suit for damages for its costs and expenses in *Caddo Oil Co. v. O'Brien*.[38] The trial court gave judgment for Caddo in the amounts set forth in the operating agreement but denied Caddo additional amounts it claimed for increased expenses that were higher than the rates in the operating agreement and also denied Caddo recovery for the costs of the seven additional wells that O'Brien said were drilled without his consent. Both Caddo and O'Brien appealed. The Fifth Circuit Court of Appeals affirmed the district court's denial of increased expenses and the costs of drilling the additional wells. The Fifth Circuit rejected O'Brien's contention that the operator owed a fiduciary duty to the non-operator requiring the operator to provide the non-operator with a full accounting for all expenditures. The court stated: "Under the terms of the Operating Agreement, the Operator is liable to the Owners only in cases of the Operator's willful misconduct. The terms of the Operating Agreement control, and [the operator's] actions are to be judged by a prudent operator standard, not by that of a fiduciary."[39]

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36. Id. at 317-18.

37. "In the event Assignee secures an extension, correction or renewal of any lease subject hereto prior to the termination of such lease . . . or . . . a new lease covering any or all lands described in the leases subject hereto prior to the termination of such leases or within one (1) year thereafter, then the overriding royalty interest reserved herein shall attach to and burden such extension, renewal or new lease, and Assignee . . . shall execute a recordable instrument evidencing the existence and effectiveness of the overriding royalty." Id. at 318.

38. 908 F.2d 13 (5th Cir. 1990).

39. Id. at 17.

E. Repayment of Loan from Well Proceeds Not Exclusive Manner of Repayment

In *Shell Offshore, Inc. v. Marr*,[40] Shell, Marr, and others entered into a joint operating agreement for development of a gas field. Marr put up $3,000,000 for his share of drilling and operation costs. Shell was unable to process all of the gas and was delayed in constructing a gas processing plant. To resolve a dispute over Marr's contribution, Shell advanced Marr $6,000,000 over a two year period under an agreement that Marr was to pay back that amount from the proceeds of one-half of his working interest in specified wells, with Marr having the option of extinguishing the debt in cash. After the market for gas became depressed, Shell brought suit contending Marr had to pay the amount in full and that Marr had repudiated the agreement. The district court upheld Marr's position that the debt was to be paid only from production (unless Marr elected to pay in cash). If Shell could not recoup the money from production, the loss was to be borne by it alone under the agreement. The Fifth Circuit Court of Appeals reversed. The court said that while Shell and Marr fully expected the indebtedness to be repaid from one-half of Marr's share of the proceeds of production, subsequent to the consummation of the loan the world gas market was in a state of collapse, with the price of natural gas dropping from approximately $7.00 per mcf at the time the agreement was executed to $1.53 per mcf as of March, 1989. As a result, one-half of Marr's share of proceeds of production could never repay more than a small fraction of the remaining indebtedness. Although the contract was confected in Texas and the gas that was the subject of the contract was produced and processed in Mississippi, the parties agreed that Louisiana law should apply. The agreement was one of loan, a loan of consumption, which under Louisiana law personally obligates the borrower to repay the amount, absent express language to the contrary. In a loan for consumption, "[T]he borrower is obliged to restore the thing lent in the same quantity and [quality]. . . ."[41] Marr was obliged to repay the amount of the loan in the time and manner provided in or implied by the agreement. The statement in the agreement that Marr would pay back all money advanced to him by Shell from half the proceeds of his interest in the three wells did not clearly create an in rem obligation nor negate the presumption found in the Louisiana Civil Code that obligors are personally responsible to perform their obligations. The fact that he could prepay in cash would indicate, the court said, personal responsibility for the

40. 916 F.2d 1040 (5th Cir. 1990).
41. La. Civ. Code art. 2920.

loan. To allow Marr to escape repayment of over $4,000,000 would be unjust enrichment. The provision for repayment out of well proceeds did nothing more or less than tie in the collateral arrangement with the primary method and timing for repayment. The court, applying the doctrine of anticipatory breach, held that Shell's demands for repayment were not premature. Judgment was rendered in favor of Shell in the full amount of the money owed. It may be noted that owing to the wording of the agreement and the fact that the production would never repay the full amount, the agreement did not spell out when the loan was to be repaid. Moreover, the payment owed by Marr to Shell that was being repaid out of the gas was not a purchase of the gas production.

F. No Unjust Enrichment in Prospect Development

Audubon Exploration developed an oil and gas prospect[42] in Cameron Parish. Linder Oil, the defendant in *Audubon Exploration v. Linder Oil Co.*,[43] obtained from Liberty Oil a lease on 110 acres of land in the prospect area and drilled a producing well thereon in 1986. Audubon claimed that Linder Oil used information that Audubon had presented to Linder in the Audubon prospect, and Linder thus owed Audubon an override on the well's production; otherwise, Audubon asserted, Linder would receive an unjust enrichment. At trial Linder established that it had earlier received information regarding the prospect area from another source and this information was different from that of Audubon. The court of appeal could not conclude that the trial court's determination of this was clearly wrong. The court reviewed the elements of an unjust enrichment claim. To establish such a claim, the moving party must prove the following: 1) There must be an enrichment; 2) there must be an impoverishment; 3) there must be a connection between the enrichment and the impoverishment; 4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment; and 5) the action will only be allowed when there is no other remedy at law.[44] The court found that Audubon failed to establish a connection between the enrichment and the alleged impoverishment: Linder's drilling was based upon a prospect independently developed by another, and there was no proof that Linder used Audubon's geological concepts in any way. Therefore, the court found

42. Oil and gas prospect was defined in the case as "a geological interpretation of data which delineates or pinpoints a previously undrilled accumulation of oil and gas which might be exploited." 573 So. 2d 1180, 1180 (La. App. 5th Cir. 1991).

43. Id.

44. Id. at 1183, citing Edmonston v. A-Second Mortgage Co. of Slidell, Inc., 289 So. 2d 116, 120 (La. 1974).

there was no transfer from Audubon's patrimony to Linder Oil's. Moreover, a legal cause justified the enrichment of Linder Oil since Linder clearly bought and paid for the geological idea that served as the basis for its drilling.

V. Nature of Minerals—Death and Divorce

A. *The Brief Life of Lease Royalty as Separate Property*

The case of *Hinckley v. Hinckley*[45] involved a partition of property in a divorce proceeding. One of the items of appeal concerned the proper treatment of certain royalties. The husband argued that oil and gas royalties from mineral leases in Pointe Coupee Parish, which the wife acquired by donation from her family during the marriage, fell into the community of acquets and gains because the wife failed to record in the public records of Pointe Coupee Parish where the property was located her declaration reserving the royalties as her separate property. In June, 1980, the wife executed and recorded the declaration in East Baton Rouge Parish, the matrimonial domicile. At the time of the declaration, Louisiana Civil Code article 2386 had been supplanted by Article 2339, which became effective on January 1, 1980. A few months later Article 2339 was changed to include royalties among the fruits that fell into the community, effective September 12, 1980.

Originally Article 2386 provided in pertinent part:

> The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.[46]

On January 1, 1980, the new matrimonial regimes legislation, enacted in 1979, came into effect. Article 2339, applicable when the wife executed and recorded her declaration, read in pertinent part as follows:

> The natural and civil fruits of the separate property of a spouse and bonuses, delay rentals, and shut-in payments arising from

45. 583 So. 2d 125 (La. App. 4th Cir. 1991).
46. Id. at 126.

> mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged by the spouses. As to the fruits and proceeds of immovables, the declaration is effective when filed for registry in the conveyance records of the parish in which the immovable property is located. (Act 1979, No. 709, s 1, eff. Jan. 1, 1980).[47]

The amended version of Article 2339, which became effective September 12, 1980, provides in pertinent part:

> The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged.
>
> As to the fruits and revenues of immovables, the declaration is effective when filed for registry in the conveyance records of the parish in which the immovable property is located. As to the fruits of movables, the declaration is effective when filed for registry in the conveyance records of the parish in which the declarant is domiciled.[48]

Prior to the enactment of Article 2339 in effect from January 1, 1980 until September, 1980, royalties were classified as fruits falling into the community of acquets and gains.[49] At the time of the declaration, royalties were not classified as fruits in Article 2339. That article was amended to include royalties as fruits effective September 12, 1980.[50] "There was no requirement to record the declaration in Pointe Coupee Parish where the mineral interests were located in June of 1980,"[51] said the court, to maintain the royalties as separate property. Thus, it was held that the mineral royalties were the separate property of Mrs. Hinckley.

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47. Id.
48. La. Civ. Code art. 2339.
49. Milling v. Collector of Revenue, 220 La. 773, 57 So. 2d 679 (1952).
50. Spaht, Matrimonial Regimes, Developments in the Law, 1980-1981, 42 La. L. Rev. 347, 347 (1982): "The classification of royalties and in kind mineral payments attributable to separate property from January 1, 1980 until September 12, 1980, were separate property without the necessity of the Article 2339 declaration."
51. 583 So. 2d at 127.

B. Return of Mineral Proceeds to Succession

The classification of income arising from mineral rights on property was raised in *Succession of Doll v. Doll.*[52] The deceased father had two children. In March, 1978 he conveyed 468 acres to one daughter for the stated price of $60,000. He died in August of that same year. The daughter remained in possession of the property until December, 1985, with revenues accruing in that period from rental on houses, the sale of timber, a subsidy for planting of trees, and bonus money for the granting of two mineral leases. In December, 1982 another daughter sought return to the succession of the 468 acres along with the revenues produced by the property. The court affirmed a trial court judgment that the revenue from the mineral lease had to be returned to the succession. The opinion by Judge Hightower discussed whether mineral rights proceeds are properly to be regarded as products or as fruits. To classify mineral rights proceeds as fruits instead of products, said the judge, appears inconsistent with the comments to Article 551, which article was revised in 1976. However, several pre-revision[53] cases and one post-revision case had classified mineral rights proceeds as fruits.[54] Regardless of the proper classification, the result was the same; even if not characterized as fruits, the mineral lease payments would be returnable as a resulting diminution of the value of the immovable. A concurring opinion by the other two judges of the three judge panel concluded that extracted oil and gas itself would seem to be a product of the thing under Article 488 and not a fruit under Article 551. The appeal was only concerned, however, with the classification of bonus money for the granting of two leases. Lease bonuses, they said, "should be classified no differently than the rent paid by the lessee of a pasture or of a building and lot for the privilege of using the thing leased for a period of time."[55] Such rent is classified as a civil fruit by Louisiana Civil Code article 551. Thus they held that a lease bonus is a civil fruit.

C. When is a Testamentary Usufruct not a Testamentary Usufruct?

There is a distinction in the Civil and Mineral Codes between a testamentary (or conventional) usufruct and a legal usufruct. According to the opinion in *Darby v. Rozas*,[56] a line of jurisprudence has treated

52. 577 So. 2d 802 (La. App. 2d Cir.), writ granted, 582 So. 2d 845 (1991).

53. Fuselier v. Estate of Peschier, 525 So. 2d 577 (La. App. 3d Cir. 1988); Alexander v. Alexander, 357 So. 2d 1260 (La. App. 2d Cir. 1978).

54. Succession of Lindsey, 477 So. 2d 148 (La. App. 1st Cir. 1985).

55. 577 So. 2d at 806.

56. 580 So. 2d 984 (La. App. 3d Cir. 1991).

a testamentary usufruct in favor of a surviving spouse as a legal usufruct rather than as a testamentary usufruct. The Louisiana Third Circuit Court of Appeal's indication is that to make a testamentary usufruct have the legal incidents of a testamentary usufruct, the testament needs to contain provisions inconsistent with the incidents of a legal usufruct. In other words, the testamentary usufruct will have the same result as a legal usufruct unless a different treatment is spelled out in the testament. In this case the testator's will granted his surviving spouse among other things "the usufruct of all properties owned by me, movable and immovable, separate and community, including the usufruct of all royalties and minerals."[57] If this were a testamentary usufruct, the usufruct would continue after the remarriage of the surviving spouse; if this were a legal usufruct, the usufruct would not continue after her remarriage. The trial court ruled it was a testamentary usufruct which continued. The court of appeal reversed, holding that it was instead a legal usufruct.

The testator died in April 1986. Under the Mineral Code as it existed at the death of the testator, the usufruct of land of a surviving spouse included only the "use and enjoyment of mineral rights as to mines or quarries actually worked at the time the usufruct was created," unless there was a provision "including the use and enjoyment of mineral rights in a conventional usufruct."[58] Thus, the testator's will produced a significantly different result for the surviving spouse than if the surviving spouse had enjoyed only a legal usufruct. Further, the Mineral Code specifically provided that a "conventional usufruct, including one created by a donation inter vivos or mortis causa, may by express provision include the use and enjoyment of all or a specified portion of the landowner's rights in minerals."[59] Later in 1986, after the death of the testator, the legislature revised the operation of the "open mine doctrine" of Mineral Code article 190. Under the amendment, "if a usufruct of land is that of a surviving spouse, whether legal or conventional, and there is no contrary provision in the instrument creating the usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals, whether or not mines or quarries were actually worked at the time the usufruct was created."[60] The court in *Darby v. Rozas* treated this revision as being retroactive. The court's approach is most questionable, if not patently absurd. The inquiry it was making was whether the testator's bequest

57. Id. at 985.
58. La. R.S. 31:190 (1989).
59. La. R.S. 31:189 (1989).
60. La. R.S. 31:190(B) (1989).

was "incompatible with the notion of legal usufruct,"[61] such that the testator was not simply confirming the legal usufruct. The focus was on the intent of the testator. The issue of impairing vested rights through a retroactive application of a statute has nothing to do with whether the intent of the testator was incompatible with the notion of a legal usufruct at the time the will was made and the usufruct was created. Clearly the testator had provided for a very different result under the will than would have occurred under a legal usufruct at the time the will was made and at the time the usufruct was created. Clearly, too, the Mineral Code specifically authorized such a testamentary usufruct. The court used a revision of the Mineral Code designed to expand the benefits of a usufructuary to take away the benefits granted by the testator to the usufructuary. The logic entirely escapes this writer.

VI. Oil Well Liens

A. *Oil Well Liens and Abstractors*

Is a title abstractor entitled to a lien under the Louisiana Oil Well Lien Statute[62] for title abstract preparation work on the subject property? The United States Fifth Circuit Court of Appeals, in *Herbert Abstract Co. v. Touchstone Properties, Ltd.*,[63] said he was not, in an affirmation of a district court judgment in favor of the owner of a working interest in property for which the plaintiff had done title abstract preparation work. Under Louisiana law, liens and privileges are to be strictly construed, as they are in derogation of common rights. They are not to be extended beyond their precise terms by judicial construction. For recovery under the lien act, the work or supplies must be directly related to the actual drilling or operation of an oil, gas or water well. The court ruled that

> the nexus between a title abstract preparation and drilling is too attenuated for this federal court to construe its activity as being 'in connection with drilling' sufficiently to place it within the limits of the Louisiana statute. . . . [A] title abstract has to do with the chain of title to a property. It does not have anything to do with the actual drilling or operation of any well or wells or the operation, maintenance or repair of pipelines.[64]

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61. 580 So. 2d at 987, citing Yiannopoulos, 3 Civil Law Treatise: Personal Servitudes 381 (1989).
62. Louisiana Oil, Gas, and Water Wells Lien Act, La. R.S. 9:4861 (1991).
63. 914 F.2d 74 (5th Cir. 1990).
64. Id. at 78.

B. *Lien Limited to Amount Filed in Public Record*

In *Shamsie v. Pyramid Petroleum, Inc.*,[65] another recent Oil Well Lien Act case, the Louisiana Third Circuit Court of Appeal held that the company's oil well lien for equipment, materials, supplies, and labor sold and delivered to a petroleum company was limited to the amount claimed in the lien filed in the public records. Charles Shamsie, d/b/a Mansfield Pump and Supply, filed in the public records of Sabine Parish a lien on three wells for equipment, materials, supplies and labor sold and delivered to defendant, Pyramid Petroleum, Inc. The amount claimed on the lien, filed on February 17, 1988, was $4,223.27. On August 11, 1988, the plaintiff filed a petition alleging that the defendant was indebted to plaintiff for the full sum of $6,328.55, that sum representing materials, supplies and labor furnished to the defendant by the plaintiff. The trial court gave judgment for plaintiff in this amount, together with 10% attorney's fees, legal interest and costs. On appeal the third circuit amended the judgment to recognize the plaintiff's lien in the amount of $4,223.27. The court reviewed the statute which provides that the notice of a privilege shall set forth "the nature and amount thereof,"[66] and case law stating that the purpose of the filing of the claim is to "apprise third persons of the kind of a lien which is claimed, what property is affected, and to fix the limit of the claim so that no more can be claimed."[67] The court rejected the contention that the suit is in the nature of an open account. The plaintiff's "Petition Exercising Lien" with attached copy of the lien document filed in the public records, made it clear that the plaintiff's intention was to have an oil well privilege recognized.

VII. PRESCRIPTION OF MINERAL SERVITUDE

A. *Prescription Not Interrupted by Acts of Owners of Separately Owned Mineral Rights*

The case of *Horton v. Mobley*,[68] involved numerous parties in a dispute about the continued existence of certain mineral servitude rights in tracts of land. On December 1, 1925 the Estate of S.S. Hunter, Inc. (hereafter "A") sold to "B" and "C" a 565-acre tract of land located in Bossier Parish. In this conveyance, "A" retained certain mineral rights under the following clause which reserved:

65. 577 So. 2d 835 (La. App. 3d Cir. 1991).

66. La. R.S. 9:4862 (1991).

67. 577 So. 2d at 837, quoting Mercantile Nat'l Bank of Dallas v. J. Thos. Driscoll, Inc., 194 La. 935, 950, 195 So. 497, 502 (1940).

68. 578 So. 2d 977 (La. App. 2d Cir.), writ denied, 582 So. 2d 1310 (1991).

> three-fourths (3/4) of all of the minerals in and under the property, which ["A"] specifically reserves, and [he] likewise retains all oil and gas wells on the property, consisting now of two (2) oil and two (2) gas wells owned by The Palmer Corporation and two (2) oil and two (2) gas wells owned by ["A"] and one (1) gas well owned by the Gulf Refining Company of Louisiana, the production . . . and all income from which is retained by ["A"].[69]

"C" died in 1943. On May 23, 1944, the "C" heirs and "B" voluntarily partitioned the land and mineral interests they acquired from "A". In the partition, the "C" heirs received approximately 556 acres (the "C" property), and "B" received the remaining nine acres. Additionally, each party expressly and separately reserved "all of the mineral rights in the [other's property] . . . which they owned prior to the execution of this transfer."[70]

At issue in the case was the nature of the mineral rights reserved by "A" in 1925 and those reserved by "B" in 1944 and the continued viability of "B"'s mineral rights. The court of appeal affirmed a summary judgment granted to the defendants, holding that the plaintiffs' rights had terminated due to prescription. The court held that "A" clearly intended to and did reserve a 75% interest in the right to explore for minerals on the entire tract, 100% of the production, and 100% of the income from the reserved wells in a single mineral servitude that also included the right to continue to receive all production and income from the pre-1925 wells. After the 1925 sale, "B" and "C" owned 100% of the former "A" tract surface in indivision plus an undivided one-quarter interest in the minerals in and under the property. Their interests, however, were subject to "A"'s mineral servitude. Neither "B" nor "C" derived their right to explore for minerals by virtue of the "A" servitude as far as the nine existing "A" wells were concerned. They became the landowners and succeeded to a fractional interest in the right to explore for minerals as a whole. They each had the right to enter the land, drill for oil and gas and reduce it to possession, subject to their obligation to account to "A" for 75% of the mineral proceeds. "B" and "C" were not co-owners of a right with "A." When "B" and "C" partitioned their property in 1944, they created additional mineral servitudes on the land, but such servitudes were not co-owned with "A." Instead, they were separate servitudes. The owners of separate mineral servitudes are not co-

69. Id. at 980.
70. Id.

owners of each other's mineral servitude.[71] In effect, "B" as a co-owner of the land, reserved in the partition one or more mineral servitudes, each consisting of an undivided one-eighth (1/8) mineral servitude affecting each noncontiguous tract of the "C" property, subject to "A"'s 100% interest in the pre-1925 wells and his right to explore for 75% of the minerals. Neither "B" nor "C" was a co-owner of "A"'s mineral servitude, particularly insofar as the "A" wells were concerned. Thus, production from the wells as to which he had exclusive rights did not interrupt prescription as to their mineral servitudes that resulted from the 1944 partition. There was no indication in the record of any drilling or production during the period 1944 to 1954 which would prevent prescription from accruing. The court rejected a contention by plaintiffs that even if "A" received all income and production by agreement, the act of production constituted a use by user sufficient to interrupt prescription on "B"'s servitude. There was no evidence that a co-ownership relationship may have existed between "A" and the plaintiffs.

The plaintiffs' continued receipt of production proceeds on wells drilled after May 23, 1954 and the 35-year delay in asserting prescription neither prevented prescription from accruing nor otherwise extended the ten-year period. Subsequent drilling by the "C"' heirs or their lessees following accrual of prescription could not "revive," "resurrect" or otherwise extend "B"'s mineral servitude, which terminated as a matter of law for nonuse on May 23, 1954.

VIII. Procedure

A. *Res Judicata*

Nerco invoked a concursus proceeding, *Nerco Oil & Gas, Inc. v. Johnson*,[72] upon being notified that the Johnsons were claiming the proceeds of various mineral interests adverse to the claims of certain persons referred to in the litigation as the Beason Group. The same mineral interests had been the subject of litigation in 1970 that had been settled. The claims of the Johnsons had been adjudicated in that litigation, but now the Johnsons asserted that their claims were founded on a different cause of action in that they were demanding not an adjudication of ownership of the royalty interest but entitlement to

71. Starr Davis Oil Co. v. Webber, 218 La. 231, 48 So. 2d 906 (1950); Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So. 2d 782 (1949); Clark v. Tensas Delta Land Co., 172 La. 913, 136 So. 1 (1931); Steele v. Denning, 445 So. 2d 94 (La. App. 2d Cir.), aff'd, 456 So. 2d 992 (1984); La. Min. Code arts. 24 and 169.

72. 577 So. 2d 1224 (La. App. 3d Cir.), writ denied, 581 So. 2d 692 (1991).

the proceeds of the settlement agreement. The court stated: "[W]e fail to see how the right to the proceeds of those mineral interests can be separated from the ownership of the interests themselves. The facts required to establish each are the same."[73] Thus, the principle of res judicata barred raising claims that were or should have been adjudicated in the earlier litigation.

B. Venue for Outer Continental Shelf Litigation

In *Phillips Petroleum Co. v. OKC Ltd. Partnership*,[74] a suit for cancellation of an oil and gas sublease was filed in the coastal parish nearest the offshore area where the subject tract was located. The trial court overruled defendant's declinatory exception of improper venue. The court relied on Louisiana Code of Civil Procedure article 80, which provides that an action to assert an interest in immovable property, or a right in, to, or against immovable property shall be brought in the parish where the immovable property is situated. The court of appeal reversed, sustaining the exception and transferring the action to Orleans Parish where the defendant's agent for service of process was located. The court ruled that venue exceptions are in derogation of a common right and must be strictly construed; the party claiming the benefit of an exception must bring itself clearly within the exception. Strictly construing the venue exception contained in Article 80, the court stated that any immovable property located beyond the gulfward boundary of Louisiana and of her coastal parishes is not situated in a coastal parish.

C. Tax Sale Validity

Seneca Resources initiated a concursus proceeding in *Seneca Resources Corp. v. Delacroix Corp.*[75] to determine ownership of property for purposes of distributing funds gained through mineral leases. At issue was the validity of the sale of the subject property on June 22, 1912 for nonpayment of 1911 taxes. The fourth circuit ruled that in light of the adequate property description in the *St. Bernard Voice*, both in 1912 and in 1913, and in light of the fact that the defendant claimant took no action to recover the property for more than seventy years after it received actual notice of its delinquency of taxes and of the pending sale, the trial court's finding that the claimant's claims had prescribed did not violate any standard set forth in the United States Supreme Court opinion in *Mennonite Board of Missions v.*

73. Id. at 1226.
74. 582 So. 2d 351 (La. App. 4th Cir. 1991).
75. 573 So. 2d 1244 (La. App. 4th Cir. 1991).

Adams.[76] There was no error in the trial court's finding that defendant's claims had prescribed and that the 1912 tax sale was not a nullity.

IX. TORTS

A. *Sublease of Farming Land*

The liability of a sublessor of farming property to a sublessee for damages caused by the drilling operations of a mineral lessee acting pursuant to a lease recorded prior to the sublease was at issue in *Comb v. Dugas.*[77] The defendant, Dugas, had taken a ten-year surface lease from the Stuarts for farming purposes in 1975 subject to a reservation of all rights to conduct oil and gas exploration activities on the land. The Stuarts then granted a mineral lease to Lyons Petroleum in 1982. The mineral lease provided that "[t]he Lessee shall be responsible for all damages caused by Lessee's operations." After it was recorded, Dugas subleased the land to plaintiffs, the Combs, for farming operations; Dugas was to receive one-fifth of all crops as the consideration. The plaintiffs were informed that drilling activities might be conducted on the property. In 1985 Lyons conducted operations on the property that caused damage to the plaintiffs' crops. Dugas brought suit against Lyons and settled after receiving one-fifth of the alleged damages occasioned by Lyons' activities. The Combs brought suit against Dugas, claiming a breach of warranty of peaceable possession, apparently after releasing Lyons from liability for an undisclosed consideration. The trial court concluded that at the time of the oral sublease the sublessees were sufficiently notified by Dugas of the possibility that oil and gas drilling operations might be conducted on the property sub-let. The sublessees' knowledge that oil exploration activities would occur on the property in question was sufficient to deny them damages under a theory of breach of peaceable possession.[78] The court of appeal affirmed the judgment, stating that

> when the oral sublease was confected, the warranty of peaceable possession was limited or modified such that the sublessee's rights to the property were taken subject to the landowner and/or its mineral lessee's prior right to conduct mineral operations on the property, subject only to the sublessee's right

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76. 462 U.S. 791, 103 S. Ct. 2706 (1983).

77. 576 So. 2d 1130 (La. App. 3d Cir. 1991).

78. The trial court observed that the plaintiffs could have and may indeed have sought compensation for damages from Lyons by virtue of the stipulation pour autrui contained within the Lyons' oil and gas lease; see Andrepont v. Acadia Drilling Co., 255 La. 347, 231 So. 2d 347 (1969).

to seek reimbursement for damages from the mineral lessee.[79]

B. Damages for Obstruction of Use of Land by Servitude Owner

The decision in *Corley v. Craft*[80] is another decision growing out of the facts established in an earlier case of the same name.[81] There, the court held that the actions of the landowners, the Crafts, created a legal obstacle to the lessee/plaintiff's use of a mineral servitude. In this proceeding the plaintiff sought damages for the actions of the defendants. The trial court awarded damages in the amount of $7238.93. The defendants claimed that the plaintiff had no right against them because a third party had advanced the money expended as a result of the obstacle; moreover, one of the defendants had divorced the other, and the ex-wife claimed she had no involvement in creating the obstacle and thus should have no liability. The appellate court ruled that as the mineral lessee, plaintiff owned the right to drill upon the property and the right to drill the well in question, which drilling was obstructed by defendants. Because defendants interfered with plaintiff's rights granted to it under the mineral lease, plaintiff was entitled to recover damages from defendants. The fact that money expended by plaintiff was derived from an agreement with a third person was of no consequence and was irrelevant to the issue of the right to recover those expenses. The liability of the wife was determined in the prior litigation, and, in any event, the property was presumed to be community property.

X. Conservation Matters

A. Unit Well Costs

In *Davis Oil Co. v. Steamboat Petroleum Co.*,[82] the Louisiana Supreme Court reversed a Louisiana court of appeal decision that had extended the approach of *Superior Oil v. Humble Oil & Refining*[83] to hold that when a non-operator participated in a Commissioner's proceeding applied for by an operator of a well, the non-operator became liable for a share of well costs even if the well resulted in a dry hole and even if the Commissioner did not adopt a counterplan proposed

79. 576 So. 2d at 1132.
80. 571 So. 2d 718 (La. App. 2d Cir. 1990).
81. Corley v. Craft, 501 So. 2d 1049 (La. App. 2d Cir.), writ denied, 503 So. 2d 18 (1987).
82. 583 So. 2d 1139 (La. 1991), rev'g, 570 So. 2d 495 (La. App. 5th Cir. 1990).
83. 165 So. 2d 905 (La. App. 4th Cir.), writ denied, 246 La. 842, 167 So. 2d 668 (1964).

by the nonoperator. The court observed that it is difficult to balance the rights of the operator and the non-operating parties in a unit.[84] The Louisiana high court applied by analogy the Mineral Code precepts regarding co-ownership of land or mineral interests to rights in a drilling unit,[85] and concluded that a non-operating owner or lessee who does not consent to operations by a unit operator within a compulsory drilling unit has no liability for the costs of development except out of his share of production. The court distinguished *Superior Oil v. Humble Oil & Refining* on the basis that in that case Humble had initiated the unit proceeding. It should be noted that Act No. 345 of 1984 did not become applicable until after the effective date of the unit order at issue in the *Davis Oil Co. v. Steamboat Petroleum Co.* case.[86]

B. Exhaustion Required on Well Plugging; Primary Jurisdiction not Applied on Property Remediation (Clean up)

In *Magnolia Coal Terminal v. Phillips Oil Co.*,[87] the case, based on a claim by Magnolia for damages arising from a well alleged to be leaking, went forward in the trial court despite an assertion by the defendant that the Commissioner of Conservation had exclusive jurisdiction over leaking wells. The trial court found that the well had not been plugged properly and awarded damages for plugging the well and for remediation of the property. At the same time, a proceeding initiated by the defendant Phillips was going on before the Commissioner of Conservation, and the Commissioner concluded that the well was not leaking.[88] The trial court and the Commissioner of Conservation thus made findings of fact that were in direct contradiction of one another. The court of appeal reversed the district court's damage award in its entirety, holding that the judgment of the trial court was

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84. See 1 B. Kramer & P. Martin, Pooling and Unitization, § 12.01 (1991); Kramer, Compulsory Pooling and Unitization: State Options in Dealing with Uncooperative Owners, 7 J. Energy L. & Pol'y 255 (1986).

85. La. R.S. 31:168 (1989), La. R.S. 31:174-178 (1989). McNamara, Unitized Production—Rights of Operators and Non-operators, 31 La. Min. L. Inst. 194 (1984); McCollam, Legal Relations Among Parties to Compulsory Units, 15 La. Min. L. Inst. 69 (1968).

86. See also Jorden, Forced Pooling in Louisiana—Recent Orders and Cases, 42 Sw. Legal Fdn. Oil & Gas Inst., Ch. 11 (1991); Jorden, Well Cost Adjustments, 38th La. Min. L. Inst. ____(1991).

87. 576 So. 2d 475 (La. 1991). The author was on the brief of this case in the Louisiana Supreme Court.

88. See Phillips Petroleum Co. v. Batchelor, 560 So. 2d 461 (La. App. 1st Cir. 1990). The well operator sought a review of the Commissioner's determination, but the court of appeal dismissed the case since it was clear that Phillips was seeking to confirm the order, not challenge it, and thus the case presented no justiciable controversy.

based on factual issues that fell within the exclusive province of the Commissioner of Conservation.[89] The Louisiana Supreme Court, in an opinion signed by two justices with five other justices writing concurring or dissenting opinions, affirmed in part, reversed in part and remanded. The supreme court affirmed the court of appeal insofar as it held that Magnolia had no cause of action to force proper plugging and abandonment of the oil well until the matter had been reconsidered by the Commissioner of Conservation, but it reversed on the question of damages. A per curiam opinion that accompanied the supreme court's denial of rehearing stated that the trial court in deciding the issue of remediation of the property did not abuse its discretion by refusing to defer to the Commissioner of Conservation as a matter of primary jurisdiction. In 1990 the Louisiana legislature enacted a statute expressly providing that the Commissioner of Conservation has jurisdiction over well site remediation.[90]

It may be observed that while the court of appeal decision was grounded on the issue of exhaustion of administrative remedies as to well plugging as well as on the doctrine of primary jurisdiction (though not so denominated by the court) as to seeking the expertise of the Commissioner of Conservation regarding whether the well was leaking and remediation, the supreme court in its per curiam opinion neither accepted nor rejected the existence of the primary jurisdiction doctrine in Louisiana law.[91] The court stated the following, which seems to contain the premise that a court could well apply the doctrine of primary jurisdiction in an appropriate exercise of discretion and that

89. 561 So. 2d 732 (La. App. 4th Cir. 1990).

90. Act 192 of 1990 amended La. R.S. 30:4(C)(1) and (16)(a) and 4.1(B)(1) relative to the authority of the Commissioner of Conservation regarding dry and abandoned wells. It provides for closure of pits, removal of equipment, structures, and trash, and general site cleanup of dry or abandoned wells and provides for a bond to secure such cleanup.

91. See O'Meara v. Union Oil Co. of California, 212 La. 745, 33 So. 2d 506 (1947). Some years ago Professor Dakin, relying on *O'Meara*, indicated that Louisiana law was congenial to the application of the primary jurisdiction doctrine. He has stated "The [primary jurisdiction] idea would seem to have validity in our state practice as well [referring to the United States Supreme Court decision in Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 86 S. Ct. 781 (1966)] where a suit for damages or an accounting as to which a state district court clearly has primary and possibly exclusive jurisdiction, nonetheless involves issues which are at least within the competence and possibly within the exclusive primary jurisdiction of the Conservation Commissioner." Dakin, Exclusive and Primary Jurisdiction Under the Louisiana Conservation Act, 18 La. Min. L. Inst. 59, 63 (1968). He concluded by observing "Court readiness to defer to agency competence in fact findings and interpretation related to agency orders combined with a readiness to stay court proceedings pending such referrals would comport with the promise and philosophy of the *O'Meara* case of twenty-five years ago." Id. at 69.

in some circumstances it would be an abuse of discretion not to apply it:

> The deference to administrative agencies for an initial decision on matters within the expertise of the agency, which is contemplated by the doctrine of primary jurisdiction, is a matter within the sound discretion of the trial court. In the present case the trial court, in deciding the remediation issue, did not abuse its discretion by refusing to defer to the Commissioner of Conservation as a matter of primary jurisdiction.[92]

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92. 576 So. 2d at 489.