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3. After the Lessee Walks Away

The Rights and Obligations of the Unleased Mineral Owner in a Producing Unit

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I. Introduction

1.01 Preface:

Properly speaking, there is no such thing as a “mineral owner” in Louisiana. Unlike other states, it is not possible to own a separate estate in minerals.¹

“Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.”² (Emphasis added).

Thus, Louisiana adheres to the theory of non-ownership of minerals.³ One may, however, own a “mineral servitude” which “is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership.”⁴

Both a landowner (whose land is not fully burdened by a mineral servitude)⁵ and a mineral servitude owner⁶ may grant a mineral lease. Thus, both a landowner and a mineral servitude owner is said to own an

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¹ Wemple v. Nibors Oil and Gas Co., 154 La. 483, 97 So. 666 (1923) (“And we therefore conclude that there is in this state no such estate in lands as a corporeal “mineral estate,” distinct from and independent of the surface estate; that the so-called “mineral estate” by whatever term described, or however acquired or reserved, is a mere servitude upon the land in which the minerals lie, giving only the right to extract such minerals and appropriate them.”).
² Article 6, Louisiana Mineral Code.
³ Despite the accuracy of this observation, practitioners and industry participants often refer to the “mineral owner” as the person who has the “exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.”
⁴ Article 21, Louisiana Mineral Code.
⁵ “A landowner may . . . lease his right to explore and develop his land for production of minerals and to reduce them to possession.” Article 15, Louisiana Mineral Code.
⁶ “A mineral lease may be granted by a person having an executive interest in the mineral rights on the property leased.” Article 116, Louisiana Mineral Code.
"executive interest," which is defined as "a mineral right that includes an executive right." An executive right is "the exclusive right to grant mineral leases of specified land or mineral rights." Therefore, for purposes of this paper, the unleased "mineral owner" which is addressed in this paper is the person who is vested with the "right to explore and develop the property for the production of such minerals and to reduce them to possession and ownership" and, hence, who has the right to grant a mineral lease. In other words, such person is entitled to enjoy revenue from the minerals so produced.

If the lessee makes the determination that the unit will not achieve "payout," and the lessee chooses to avoid (or minimize) cost obligations, both for well costs and operating expenses, and to unburden itself of its royalty obligations, it might elect to release the lease.

Can the lessee even do this? Is this not a classic case of self-serving or self-interest on the part of the lessee? Where does this leave the former lessor? While under lease, the mineral owner had a right to receive royalty payments with no obligation for costs. Now, all of a sudden, it is unleased and potentially has some sort of responsibility for costs.

This paper addresses the rights and obligations of a mineral owner after the mineral lease comes to an end, either because the lease is released by the lessee or it expires by its terms — "after the lessee walks away." Principally, this paper considers the described circumstance in connection with a producing unit created by the Louisiana Office of Conservation. However, as there are circumstances under which a lessee may drill a well on a non-unitized tract of land with the consent of less than one hundred (100%) per cent of the owners of the executive interest in the tract, certain of the issues presented herein might be applicable to the unleased mineral owner in reference to a tract of land

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7 Article 108, Louisiana Mineral Code. Technically (and properly) speaking, a landowner does not own a “mineral right.” Rather, it holds the inherent “right” to “explore and develop his property for the production of such minerals and to reduce them to possession and ownership.” Yet, the language of Article 108 implies differently.

8 Article 105, Louisiana Mineral Code.

9 Articles 6 and 21, Louisiana Mineral Code, as to a landowner and mineral servitude owner, respectively.

10 If the unit were a conventional unit, different consequences would be presented and such are beyond the scope of this paper. See Ottinger, Conventional Unitization in Louisiana, 49th Ann. Inst. on Min. Law 21 (2002). Also published in the Section Report for the Oil, Gas and Mineral Law Section of the State Bar of Texas, Vol. 26, No. 4, p. 56 (June 2002).

11 See Articles 166 and 175, Louisiana Mineral Code, concerning the necessity to secure the consent of not less than eighty (80%) per cent of the owners in land or in a co-owned mineral servitude, respectively, in order that a lessee might be permitted to operate.
on which is situated a "lease basis" well to the costs of which it has not consented. This paper also considers certain issues relative to a mineral lessee who does not share in the cost, risk and expense of a well drilled by an operator.

While this paper focuses on the rights and obligations of the unleased mineral owner, one must recognize that, for every "right" identified as being held by one party, there is a corresponding "obligation" on the part of the other party. Thus, as shown below, if there is a "right" on the part of an unleased mineral owner to demand a release of the terminated mineral lease, there is a correlative "obligation" on the part of the former lessee to provide it.

For purposes of this paper, an unleased mineral owner or the mineral lessee who does not share in the cost, risk and expense of a well is sometimes referred to as a "non-participating owner." In some instances, as the context may require, reference will be made to an "unleased mineral owner" in order to distinguish such a person from a non-participating mineral lessee.

1.02 Legal Characterization of Oil and Gas:

In order to consider certain issues pertinent to the rights and obligations of a non-participating owner, it is necessary to have a basic understanding of the legal nature of oil and gas as it is produced and captured. This is so because the rights and obligations of the parties are in large part determined by a proper characterization of oil and gas, as produced and captured, within the structure of the civil law system of property.

A. Oil and Gas Insusceptible of Ownership Until Reduced to Possession.

Given the proposition that land and any minerals inherent in the land are immovable, and the equally obvious fact that oil, for example, is a liquid which can be captured in a vessel and thereby handled and transported, the question arises: At what point does the character of mobility arise?

When one thinks of oil, for example, one might think of refined oil as it exists in a can which might be purchased off of the shelf. Clearly, that is not immovable property. When did its character change?

12 See Articles 164, 166 and 175, Louisiana Mineral Code.
13 "An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the oblige. Performance may consist of giving, doing, or not doing something." Article 1756, Louisiana Revised Civil Code.
14 See Section .03 hereof, infra.
15 Article 462, Louisiana Revised Civil Code.
This is the issue presented in several articles of the Mineral Code where reference is made to the “reducing to possession” of oil and gas which might be produced.\textsuperscript{16}

Article 7 of the Louisiana Mineral Code provides the answer: “Minerals are reduced to possession when they are under physical control that permits delivery to another.”

In case of oil and gas, this occurs at the wellhead.\textsuperscript{17} It is at the wellhead that minerals are captured or “reduced to possession.” At that functional point in time – when the oil and gas is brought to the surface of the earth and is susceptible of being captured or gathered and otherwise handled by the operator – the product itself ceases to be a component part of the immovable which is the earth, and becomes “movable” property.”

The import or consequence of this fact of mobility might be illustrated in a variety of non-mineral rights contexts.

For example, \textit{Wiltz v. Mobil Oil Exploration and Producing, N.A., Inc.},\textsuperscript{18} concerned Article 2315.3 of the Louisiana Revised Civil Code.\textsuperscript{19}

Certain oilfield workers were injured when a “flash fire” which occurred at a well site operated by the defendant. The operator brought a motion for summary judgment challenging the applicability of the cited article since the “accident was caused by emissions from the well, of naturally occurring gas from an underground formation, which had never been reduced to possession.”\textsuperscript{20}

The court said that, “[i]mplicit in storing, handling or transporting is the requirement that the hazardous substance be in the possession or control of a person who then handles or otherwise deals with that substance.” Citing Article 7 of the Mineral Code, the Court said:

It is clear that [Mobil] did not exercise control over the gas in this case. The accident was caused by emissions from the well, of naturally occurring gas from an underground formation, which had never been reduced to possession by [Mobil] or any other person or entity. Louisiana law provides that a person does not acquire ownership or other dominion over fugacious minerals until they are reduced to possession. . . . The gas in this case had never been

\textsuperscript{16} \textit{See} Articles 5, 6, 8 and 15, Louisiana Mineral Code.

\textsuperscript{17} In the area of security agreements granting a security interest in movable property, this is called the “minehead.” \textit{See} La. R.S. 10:9-102(a)(6)(B) (definition of “as-extracted collateral.”).

\textsuperscript{18} 702 F.Supp. 607, 608 (W.D. La. 1989).

\textsuperscript{19} Prior to its repeal by Act No. 2 of 1996, 1st Ex. Session, this article authorized exemplary or punitive damages for injuries arising from the “storage, handling or transporting of hazardous substances.”

\textsuperscript{20} \textit{Id.} at 608.
reduced to possession by [Mobil] or anyone else; therefore, [Mobil] could not be said to have been storing, handling or transporting the gas.

Yet another non-mineral context in which this issue might arise involves the question of whether a judicial mortgage burdening a tract of land on which there is a producing well, affects production captured at the wellhead, when, as and if produced. The workings of a variety of articles would indicate that the recordation of the judicial mortgage does not give the judgment creditor any rights with respect to minerals which are produced from the encumbered property. This conclusion is supported by analogies drawn from jurisprudence dealing with agricultural crops.

Another consequence which attaches to the fact that a suit by an unleased mineral owner seeking to recover proceeds of production as possessed by a unit operator is that such a suit is a proceeding to recover a movable, and is not a suit which "asserts" an interest in immovable property. Hence, under the rules of venue contained in the Louisiana Code of Civil Procedure, such a suit should be brought at the domicile of the defendant-operator, rather than where the property is located (unless that is also the domicile of the operator). Unfortunately, the courts have been less than consistent in recognizing the true object of such a suit for purposes of applying rules of venue.

B. Products v. Fruits.

If a well is drilled in a unit which includes a tract of land (or interest therein) which is unleased, the unleased mineral owner has certain remedies. The nature of these remedies is established by a characterization of oil and gas in the general property framework of the Louisiana Revised Civil Code.

Because the production of minerals results in the depletion of the property (minerals are not a replenishable commodity, such as apple

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21 See Articles: 3285, 3286, 3299 and 3302, Louisiana Revised Civil Code; Article 2292A, Louisiana Code of Civil Procedure, and Articles 6 and 16, Louisiana Mineral Code.

22 See Wakefield State Bank v. Baker Wakefield Cypress Company, 4 La.App. 676 (1926) ("When property seized has been detached from the soil, it has lost its condition of immobility and has become movable and therefore was not affected by a mortgage and privilege placed on the immovable."). Cf. Vosburg v. Federal Land Bank of New Orleans, 172 So. 567 (La.App. 2nd Cir. 1937) ("... mere seizure of mortgaged realty did not divest the lessee thereof of title to the crop being raised thereon by him.").

23 Article 42, Louisiana Code of Civil Procedure.

24 Article 80, Louisiana Code of Civil Procedure.

25 Ironwood Resources, Ltd. v. Baby Oil, Inc., 05-467 (La.App. 3rd Cir. 2/1/06); 921 So.2d 1189.
trees or sugar cane), minerals are, in legal contemplation, *products*, not *fruits*.\(^{26}\)

In the context of a suit for an accounting between co-owners of land on which a well was drilled and produced, the court in *Elder v. Ellerbe*\(^{27}\) said the following relative to the legal nature of oil and gas, to-wit:

> In other words, the defendant contends that minerals are to be included in the definition of *fruits*.

The sense in which the word ‘*fruits*’ is used is this article of the Code,\(^{28}\) i. e. “the right which such a possessor has to *gather* for his benefit the *fruits*,” does not suggest the meaning of minerals. It refers to what is produced and reproduced from time to time or in successive seasons.

> “The fruits must be of things that are born and reborn of the soil.”

Dalloz, Baudry-Lacontinerie, No. 321.

This notion is continued in Article 488, Louisiana Revised Civil Code, which provides, as follows:

Products derived from a thing as a result of diminution of its substance belong to the owner of that thing. When they are reclaimed by the owner, a possessor in good faith has the right to reimbursement of his expenses. A possessor in bad faith does not have this right.

Because minerals are *products*, and not *fruits*, Article 488 of the Civil Code instructs that they may be reclaimed by the owner, but the producer, if in good faith, is entitled to be reimbursed the cost of production.

Professor Yiannopoulos says it this way:\(^{29}\)

According to Article 488 of the Civil Code and prior jurisprudence, possessors in good faith engaging in mineral . . . operations are bound to account to the owner of the land, but they are entitled to reimbursement of their production costs. Recovery of expenses in these circumstances conforms with the principle of unjust enrichment. Possessors in bad faith engaging in similar operations are not entitled to reimbursement of production costs.

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\(^{26}\) Comment (c) to Article 551, Louisiana Revised Civil Code, instructs that “[m]ineral substances extracted from the ground and the proceeds of mineral rights are not *fruits*, because their production results in depletion of the property.”

\(^{27}\) 135 La. 990, 66 So. 337 (1914).

\(^{28}\) The court had reference to former Article 3453, Louisiana Revised Civil Code, now contained in Article 486, Louisiana Revised Civil Code.

In a case involving the unauthorized mining of salt, the court held that, if the trespasser acted in bad faith, the amount of the damages is the value of the mineral at the well without deducting the cost of production. In deciding this case, the court relied on a long line of cases involving the cutting and removing of timber, which in turn were based on a case decided by the United States Supreme Court in accord with common law decisions.

An operator was held to not be entitled to reimbursement of costs of drilling where it was found to not be in good faith since it went onto the property in question with a “written title opinion from his attorneys...to the effect that the title of his lessors was `at best, questionable.”

In a more recent case, an operator which produced a well under a mineral lease which was ultimately held to have expired, was found to be in bad faith after the filing of a successful suit to establish lease expiration, notwithstanding that the court found it “in good faith with regard to the Durham Lease prior to judicial demand.” Consequently, on authority of Article 488, the operator was “not entitled to recover costs of production...after that date” of judicial demand.

There are a number of cases under the style of Lamson Petroleum Corporation v. Hallwood Petroleum, Inc. which concern the issue of whether an operator is entitled to recoup its costs after a suit is filed to challenge the right of the operator to possess certain rights to minerals underlying tracts of land. This series of cases - arising out of the Scott Field of Lafayette Parish - resulted in conflicting rulings of the Court of Appeal, Third Circuit.

By order of the Louisiana Supreme Court, these cases were remanded to the Court of Appeal, Third Circuit, which was “ordered to hold an en banc hearing” in order to determine which of two conflicting decisions were correct.

In compliance, the Court of Appeal held an en banc hearing and ruled, as follows:...

31 Texas Company v. O’Meara, 228 La. 474, 82 So.2d 769 (1955).
32 Edmundson Brothers Partnership v. Montex Drilling Company, 98-1564 (La.App. 3rd Cir. 5/5/99); 731 So.2d 1049.
33 “For purposes of accession, a possessor is in good faith when he possesses by virtue of an act transitive of ownership and does not know of any defects in his ownership. He ceases to be in good faith when these defects are made known to him or an action is instituted against him by the owner for the recovery of the thing.” Article 487, Louisiana Revised Civil Code.
34 2002-1338, 2002-1681, 2002-2419 (La. 10/25/02); 832 So.2d 975.
35 2001-1201, 2002-138 (La.App. 3rd Cir. 12/31/02); 832 So.2d 975; writ denied 2003-0333 (La. 4/2/03); 841 So.2d 796-7.
In Lamson Petroleum Corporation v. Hallwood Petroleum, Inc., et al., 2002-138 (La.App. 3 Cir. 7/10/02); 823 So.2d 431, we noted the plain language of article 487 mandates that a possessor “ceases to be in good faith” when an action is instituted against it, and stated as follows:

There is no exception or qualification to this rule set out in . . . article [487]. In Edmundson [Bros. Partnership v. Montex Drilling Co., 98-1564; 731 So.2d 1049], we held a mineral lessee ceases to be in good faith under La. Civ.Code arts. 487 and 488 at the time of judicial demand and ceases to be entitled to recover the costs of production. We specifically noted, although the defendants-appellants were in good faith prior to judicial demand, they ceased to be in good faith after the filing of the petitory action. La.Civ.Code art. 488 provides that a possessor in bad faith does not have the right to reimbursement of expenses. Accordingly, defendants-appellants are not entitled to recover expenses they incurred after the filing of this suit. That portion of the judgment finding defendants-appellants in good faith after the filing of suit is reversed, and they are not entitled to expenses after that date.

_Lamson_, 823 So.2d at 437.

Accordingly, that portion of the decision rendered in _Lamson Petroleum Corporation v. Hallwood Petroleum, Inc., et al.,_ 2001-1201 (La.App. 3 Cir. 3/20/02); 814 So.2d 596 finding to the contrary is hereby reversed and we hereby hold on remand that defendants ceased to be in good faith when suit was filed.

The decision in these cases was troubling, to say the least. No well was ever drilled on the lands at issue – in fact, the lands at issue constituted road beds and the principal issue was whether they were owned in full or perfect ownership or as a mere servitude. The road beds were included within a producing unit created by the Commissioner of Conservation.

The Conservation Act clearly provides that a participant in a compulsory unit is responsible for its allocated share of costs incurred to drill, test, complete, equip and operate the unit well.36 What is often at issue is the _nature_ of that obligation – is the non-drilling party obligated to pay “out of pocket” or must the operator recover its share out of production?37

The failure of the court to recognize that the operator was producing pursuant to the authority of the Commissioner of Conservation and to

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36 La. R.S. 30:10A(2).
37 _See_ Section 3.03 hereof, _infra_.

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apply the express provisions of the Conservation Act has resulted in an erroneous and inequitable rule.

If the court perceived a conflict between the provisions of the Louisiana Revised Civil Code,\(^{38}\) on the one hand, and the provisions of the Conservation Act,\(^{39}\) on the other hand, it should have applied the well established principle of statutory interpretation which holds that the specific statute controls over a statute of general application.\(^{40}\)

To hold that a unit operator which conducts unit drilling operations on another tract is, after the filing of a suit, to be deemed to be in bad faith with the consequence of forfeiting its right to recoup the allocated share of unit drilling costs out of production from or attributable to an unleased tract is to ignore the explicit mandate of the Conservation Act. If there is any conflict between the generalized provisions of the Louisiana Revised Civil Code and the specific provisions of the Conservation Act, the latter should apply.

The Louisiana Supreme Court has recognized that "traditional concepts of property law must yield in the event of operation conducted in connection with a unit created by the Commissioner of Conservation." Thus, in *Nunez v. Wainoco Oil & Gas Company*,\(^{41}\) it was held that "the more recent legislative enactments of Title 30 and Title 31 supercede in part La.Civ.Code Ann. art. 490's general concept of ownership of the subsurface by the surface owner of land. Thus, when the Commissioner of Conservation has declared that landowners share a common interest in a reservoir of natural resources beneath their adjacent tracts, such common interest does not permit one participant to rely on a concept of individual ownership to thwart the common right to the resource as well as the important state interest in developing its resources fully and efficiently."

The ruling in *Lamson Petroleum Corporation v. Hallwood Petroleum, Inc.* is clearly repugnant to the well recognized notion that one may not enjoy the benefits of an asset (the produced oil and gas) without sharing in the risk of production (allocated share of well costs). As this is not a case where a person physically entered another tract in

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\(^{38}\) Articles 487 and 488, Louisiana Revised Civil Code.

\(^{39}\) La. R.S. 30:10A(2).

\(^{40}\) "Where two statutes are in conflict, the statute that is more specifically directed to the matter at issue must prevail as an exception to the statute that is more general in character." *Teacher's Retirement System of Louisiana v. Vial*, 317 So.2d 179, 183 (La. 1975). "In the interpretation of statutes and contracts, the specific controls the general." *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03); 850 So.2d 686, 704, rehearing granted, and otherwise rehearing denied, (La. 6/20/03); 850 So.2d 714; *judgment rendered on remand*, 2001-567 (La.App. 3rd Cir. 8/6/03); 851 So.2d 1253.

\(^{41}\) 488 So.2d 955, 964 (La. 1986).
bad faith in order to produce minerals to which it had no lawful claim, your author would suggest that this case turns the notion of unjust enrichment on its head.

C. Election of Remedies.

Another consequence of the distinction between fruits and products is the remedy to which the mineral owner is entitled in the case of production by another of minerals to which the owner is entitled.

Although no longer "good law" to the extent that it embraced the "election of remedies" theory suppressed by the adoption of the current Louisiana Code of Civil Procedure, the case of Liles v. Producers' Oil Co. illustrates this point. There, co-owners owning an undivided one-fifth (1/5) interest in a tract of land sued their remaining co-owners and the mineral lessees of those remaining co-owners, seeking "the value of one-fifth of the oil and gas taken from said land by the said oil companies." The oil and gas production ensued from a mineral lease signed by the defendant co-owners, which mineral lease purported to lease the entire interest in the co-owned lands.

The defendants interposed on objection of prescription of one (1) year, arguing that the plaintiffs' suit was for damages arising out of the wrongful act of defendants in going onto plaintiffs' land and extracting minerals.

The court noted that the prescription applicable to a claim is determined by the character of the claim asserted by the plaintiff, and that "a plaintiff and no one else must choose his remedy and determine the form and character of his action." It was held that the landowner who seeks restitution for the unauthorized production of minerals from his land, must elect whether he is better off by —

a. repudiating the lease which he did not sign, and recovering the value of the produced minerals, subject to reimbursement of production costs, or

b. adopting and affirming the lease, and recovering the royalty provided for in the lease.

The plaintiff gets "one bite at the apple" — Whatever election is made, the plaintiff cannot thereafter pursue the other, unelected theory of recovery:

42 "A reading of Liles indicates that the decision was based upon the 'theory of the case' doctrine. This harsh and unduly technical doctrine was suppressed by the enactment of LSA-C.C.P. Article 862." Northcott Exploration Company, Inc. v. W. R. Grace and Company, Inc., 430 So.2d 1077 (La.App. 3rd Cir. 1983).
44 Id. at 341.
A person whose property has been wrongfully taken and appropriated by another, and who has the right either to sue for trespass or to sue for the property or the value of the property received, cannot maintain both actions, either at the same time or one after the other.\(^{45}\)

The plaintiff’s election was purely economic. If the value of production, after bearing a cost of production, is low, the plaintiff would want to adopt and affirm the lease, and recover the royalty provided for in the lease, free and clear of costs of production. In such case, the plaintiff’s claim is one for the recovery of “rent,” and is subject to liberative prescription of three (3) years.\(^{46}\)

Conversely, if the value of production, after bearing a cost of production, is high (or at least higher than a mere fractional royalty share unburdened by costs), the plaintiff would want to repudiate the lease which he did not sign, and recover the value of the produced minerals, subject to reimbursement of production costs.

In such case, the plaintiff’s claim sounds in tort, and is subject to liberative prescription of one (1) year.\(^{47}\)

The dilemma was that the plaintiff, prior to filing suit and obtaining discovery, would not have ready access to the information necessary to assist it to determine which course to pursue.

1.03 Nature of the Relationship Between the Non-Participating Owner and the Unit Operator

To appreciate certain of the issues considered herein, it is helpful to have an understanding of the nature of the relationship between the various participants in a compulsory unit, particularly an unleased mineral owner vis-à-vis the unit operator.

It is axiomatic that the owner of an executive interest in minerals (either a landowner or the owner of a mineral servitude) has no obligation to grant a mineral lease.\(^ {48}\) Moreover, the courts obviously have no power or right to impose or create a contractual relationship.\(^ {49}\) The court in *Willis v. International Oil and Gas Corporation*\(^ {50}\) rejected a landowner’s argument that “the doctrine of correlative rights” authorized

\(^{45}\) *Liles v. Texas Co.*, 166 La. 294, 116 So. 229 (1928).

\(^{46}\) Article 3494(5), Louisiana Revised Civil Code.

\(^{47}\) Article 3492, Louisiana Revised Civil Code.

\(^{48}\) “The owner of an executive interest is not obligated to grant a mineral lease, . . .” Article 109, Louisiana Mineral Code.

\(^{49}\) “It is not within the province of the court . . . to make new contracts for the parties.” *Texas Co. v. State Mineral Board*, 216 La. 742, 44 So.2d 841, 845 (1949).

\(^{50}\) 541 So.2d 332 (La.App. 2nd Cir. 1989).
the court "to create a contract between the unleased land owner and the
operator."\(^{51}\)

John McCollam’s excellent paper on this topic is still a “must-read”
in this regard.\(^{52}\) However, as a few things have changed in a mere four
decades, a few additional observations might be helpful.

The unleased mineral owner could be an “owner” within the
meaning of the Conservation Act as it is a “person, including operators
and producers acting on behalf of the person, who has or had the right to
drill into and to produce from a pool and to appropriate the production
either for himself or for others.”\(^{53}\) However, if the mineral owner grants a
mineral lease (say, to one other than the operator), that lessee is
contractually granted the “right to drill” and, hence, becomes an “owner”
for purposes of the Conservation Act.\(^{54}\)

To constitute an “owner” within the contemplation of the
Conservation Act, one must own an operating interest and not a mere
reversionary interest in a mineral servitude.\(^{55}\)

Prior to 1993, an “owner,” for purposes of the Conservation Act,
was defined as a “person who has the right to drill into and to produce
from a pool and to appropriate the production either for himself or for
others.” The definition of “owner” was amended in 1993\(^{56}\) so that it now
reads as noted above. By shifting from the present tense (“has the right to
drill”) to both the present and past tense (“has or had the right to drill”),
the term “owner” allows the Commissioner to pursue a former operator
in order to enforce the requirements of the Commissioner relative to,
among other things, remediation obligations under applicable
regulations.\(^{57}\)

\(^{51}\) “Inasmuch as Marshall did not lease from the Willises, it has no contractual
relationship with them, nor is it under a duty to now enter into a lease with them.” Id. at
336.

\(^{52}\) McCollam, Legal Relations Among Parties to Compulsory Units, 15th Ann. Inst.
on Min. Law 69 (1968). See also Pearce, The Legal Relationships Among Parties to a

\(^{53}\) La. R.S. 30:3(8).

\(^{54}\) Cf. Wall v. Leger, 402 So.2d 704 (La.App. 1st Cir. 1981) (“A mineral lessor does
not transfer ownership of mineral rights when he enters into a lease; he grants to the
mineral lessee the right to explore for and produce minerals; it is ‘operating rights and the
right to share in production’ that are transferred to the lessee, not ownership of the
mineral rights.”).


\(^{56}\) Act No. 113 of the 1993 Louisiana Legislature.

\(^{57}\) Louisiana Office of Conservation policy mandates that existing operators of record
shall be responsible for oilfield site remediation. However, if the current operator of
record cannot be located or is incapable of performing, the Commissioner can enforce
responsibility against prior operators. See Enforcement Policy — Abandoned Wells &
Pits, Memorandum by J. Patrick Batchelor, Commissioner of Conservation, dated July
http://digitalcommons.law.lsu.edu/mli_proceedings/vol55/iss1/70 -
The purpose of the amendment was explained by the Louisiana Supreme Court in *Yuma Petroleum Company v. Thompson*, as follows:

The 1993 amendment to La. R.S. 30:3(8) merely gives the Commissioner the discretion to proceed under La. R.S. 30:4(C)(16)(a) against prior owners in certain circumstances. At oral argument, the Commissioner explained that the amendment was a “Commissioner’s bill,” drafted to give the Commissioner more discretionary authority to proceed against prior owners, not to encumber the Commissioner with the additional duty of having to ascertain every prior lease holder of a site and to determine which lease holder actually caused the subject contamination. It is well established in the State’s oil and gas community that the current “operator of record” of a lease is responsible for remediation on that lease.

As concerns the operator of a compulsory unit, the courts have characterized the operator in a variety of ways, including an “agent pro hoc vice,” a “representative of the common interest,” a “managing owner” and a *negotiorum gestor* or “manager.”

Whatever the proper characterization of the role of the unit operator and his relationship to the non-participating owner, it is sufficient to note that the unit operator, with or without the concurrence of the non-participating owner, has the exclusive right to drill the unit well and to sell or otherwise dispose of unit production.

**II. Extinguishment of the Mineral Lease**

**2.01 Release as a Mode of Extinguishment:**

*A. Preface.*

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58 98-1399, 98-1410 (La. 3/2/99); 731 So.2d 190.
63 *EnerQuest Oil and Gas, LLC v. Honorable Philip N. Asprodites, Commissioner of Conservation*, 2002-0822 (La.App. 1st Cir. 4/2/03); 843 So.2d 535 (“[T]he commissioner has the power to establish compulsory units and designate unit operators therefor.” Id. at 539, citing *Hunt Oil Company v. Batchelor*, cited at footnote 210, infra.).
64 *Amoco Production Company v. Thompson*, cited at footnote 61, supra, at p. 392 (observing that the Commissioner “has the power (in some circumstances) to designate a managing co-owner for purposes of marketing the minerals which have been reduced to possession.”).
To state the obvious, a "mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals."\(^{65}\) "Obligations arise from contracts and other declarations of will."\(^{66}\) "An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee."\(^{67}\)

One of the modes of extinguishment of an obligation is "remission."\(^{68}\) This may be express or tacit.\(^{59}\)

The lessee has the right to release the lease, without the concurrence of the lessor. In \textit{Coastal Club v. Shell Oil Co.},\(^{70}\) a lessor sought cancellation of a mineral lease and the lessee executed a release covering all land under lease except 40 acres around each of two producing wells. The lessor contested the validity of the release on the theory that it was necessary that the lessor accept the release in order to be effective. The court rejected this contention, saying, as follows:

Basically, the principle as now contained in the opinion of the Circuit Court, is against public policy. A release should be a release; no acceptance is necessary; that is all. In our oil and mineral contracts, such must have been the practice. Consult the text-books and verify the dearth of litigation on the point; merely because the question is never even debated. Summers, Oil and Gas, Perm.Ed., vol. 3, ch. 17, Termination of Lease by Surrender, Secs. 521-526. We find no case in Louisiana; La.Dig., vol. 13, Mines and Minerals.

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To require a lessor to accept the surrender of an oil and gas lease would place lessees or oil operators in a very precarious position. In the instance where a lessee is the obligee under a term lease, let us say for a primary term of ten years, and he no longer wishes to pay the annual rental and he should, before the rental due date, place of record a surrender of the lease, this surrender could not become effective under this theory without an acceptance.

The right to release a mineral lease as to a portion or portions of the leased premises, and thereby be relieved of obligations not yet arisen, is

\(^{65}\) Article 114, Louisiana Mineral Code.

\(^{66}\) Article 1757, Louisiana Revised Civil Code.

\(^{67}\) Article 1756, Louisiana Revised Civil Code.

\(^{68}\) Revision Comment (d) to Article 1756, Louisiana Revised Civil Code, states that the "expression 'remission of debt' has been preserved after carefully weighing the advisability of adopting the term 'release,' which perhaps better conveys the intended meaning." The redactors elected to continue to use the term "remission," deeming it "preferable to avoid even the slightest possibility of confusion due to terminology."

\(^{69}\) Article 1888, Louisiana Revised Civil Code.

\(^{70}\) 56 F.Supp. 641 (W.D. La. 1944), \textit{rev'd on other grounds} 147 F.2d 605 (5th Cir. 1944).
explicitly set forth in the prevalent forms of the commercially printed mineral lease. This provision is called a "surrender clause."

For example, one form in popular use in South Louisiana provides, as follows:

Lessee may, at any time prior to or after discovery and production of minerals on the land, execute and deliver to Lessor or place of record a release or releases of any portion or portions of the lands and be relieved of all requirements hereof as to the land surrendered, and, if during the primary term, the rental shall not be reduced.

Another form in use in North Louisiana reads, as follows:

Lessee, or any assignee hereunder, may at any time execute and deliver to lessor, . . . , or place of record, a release or releases covering any portion or portions of the premises held by him, and thereby surrender this lease as to such portion or portions, and thereafter the rentals payable by him shall be reduced proportionately.

No case has considered the issue of whether a lessee is denied the right to release a lease which is in production, to the extent that such action might be contended to be a violation of the lessee's obligation to perform the lease contract in good faith. Clearly, a lessee who releases a lease which is in production is doing so out of its own self-interest, and not in the interest of the lessor, who, upon the release, is no longer entitled to royalties and is obligated, to some extent, for well costs (out of production). The relationship between a lessor and a lessee is viewed by the courts as one "in the nature of a cooperative venture in which the lessor contributes the land and the lessee the capital and expertise necessary to develop the minerals for the mutual benefit of both parties." It is hard to conceive that a lessee who releases a producing lease is doing so "for the mutual benefit of both parties.""
B. Right of Lessee to Rescind Release Made in Error.

If a release of a producing mineral lease is executed in error, a lessee might have relief to rescind the erroneous instrument and restore its leasehold position.

In *Humble Oil & Refining Company v. Chappuis,* the lessee sued to rescind a release of a lease which was executed in error. The lessor had requested a release and the company prepared it, but erroneously included eight leases "which were still producing." After this error was discovered, suit was brought to rescind the release on the basis of error. The court found that the release "was executed through error of fact which vitiates the consent of Humble and renders the instrument unenforceable." Said the court:

There can be no question that Humble did not intend to release those portions of the Chappuis tract which remained in the two producing units. It is incredible that Humble’s employees intended to voluntarily give up such valuable assets for no consideration whatever.

On the basis of Louisiana law which provides that "mutual error of fact is not necessary to abrogate a contract," and that "unilateral error is sufficient," the release was rescinded.

C. Right of Lessee to Reform Partial Release Made in Error.

In the case of a partial release which does not accurately describe the acreage or depths being released or retained, the doctrine of "reformation of a contract" would be available to reform the partial release. There would seemingly be no need to resort to this remedy in the case of a purposeful full release of a mineral lease as there is nothing left to the contract to be reformed, unless the instrument was intended to be only partial in its effect. Such was the case in *Pan American Petroleum Corporation v. Kessler.*

If, upon a proper interpretation of a partial release, the instrument is found by a party to not express the intention of the parties, an action might lie to "reform" the partial release in order that it might be made to express the true intention of the parties.

The doctrine of "reformation of a contract" was described by the Louisiana Supreme Court in *Agurs v. Holt,* as follows:

Reformation of a contract "is an equitable remedy and lies only to correct mistakes or errors in written instruments when such instruments, as written, do not express the true contract or

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77 239 So.2d 400 (La.App. 3rd Cir.), *writ denied* 256 La. 915, 240 So.2d 375 (1970).
79 232 La. 1026, 95 So.2d 644, 645-6 (1957).
agreement of the parties. See Ober v. Williams, 213 La. 568, 35 So.2d 219 [(1948)]. It is a personal action, even when applied to real estate, . . . in which the burden is on the one seeking reformation to establish the mutual error and mistake by clear and convincing proof, parol evidence being admissible for this purpose.

The error "must be mutual" and it must be "in the drafting of the instrument . . . and not in making the contract which it evidences." 80

A "mutual mistake" has been defined as "a mistake shared by both parties to the instrument at the time of reducing their agreement to writing, and the mistake is mutual if the contract has been written in terms which violate the understanding of both parties; that is, if it appears that both have done what neither intended." 81

"A grantee of property succeeds to the original grantor's rights to maintain a suit to reform a prior deed." 82 However, a "third party taking rights on the faith of the public record is protected and cannot be held to provisions which might be contained in a document after it is reformed for simple error." 83

2.02 Abandonment of the Mineral Lease:

Another means by which a mineral lease might be extinguished is by "abandonment."

"Abandonment" of property or of a right is the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his ownership, possession and control, and without vesting ownership in any other person." 84

A mineral lease was held to have been abandoned by a lessee under the following facts as found by one court, 85 to-wit:

And the evidence in this case shows that plaintiff went upon the land with a drilling outfit wholly inadequate to drill to the required depth, and at the end of nine months had drilled only 900 feet, which he might have done in as many days.

83 *Id.* at 617.
86 *Wiley v. Davis*, 164 La. 1090, 115 So. 280 (1928).
It was on September 19, 1922, that plaintiff ceased entirely to do any drilling whatsoever (having started about December 10, 1921), and it was not until December 28, 1922 (being more than three months after plaintiff had ceased drilling entirely and more than one year after plaintiff had started), that defendants gave a new lease to another party and notified plaintiff that they considered his lease abandoned and canceled. And in our opinion they had waited quite long enough. It is true that about the time defendant ceased drilling as aforesaid (September, 1922) he sent Mrs. Davis the amount of the rental for a renewal of the lease for one year, which she accepted with the understanding that plaintiff was to continue drilling diligently. But, as we have said, he did nothing after that during the whole three months which elapsed before defendants leased to the other party.

In Taussig v. GoldKing Properties Co., the lessor contended that the lessee abandoned the mineral lease by reason of the physical plugging of five (5) wells, certain internal memoranda regarding such activity and a release granted as to a one-half (1/2) interest in the lease. The court noted that “there is no provision in the Mineral Code which directly addresses ‘abandonment’ in the context of mineral law.” The court cited Salim and held that there was no abandonment, stating, as follows:

We find that the physical plugging and abandonment of the five wells does not constitute proof of abandonment of the Mallett Bay lease. These wells were required to be plugged and abandoned by the regulations of the Louisiana Department of Conservation because they no longer produced condensates and hydrocarbons in paying quantities. Therefore, we conclude that the physical plugging of the wells does not support any elements of abandonment.

Abandonment is rarely availed as a mode of extinguishment of a mineral lease, probably for the reason that the circumstances which might give rise to claim of abandonment would typically correspond to a set of facts which would demonstrate the expiration of the term of the mineral lease – a more solid basis for lease extinguishment.

III. Rights and Obligations Relative to Well Costs and to Production before and after Recoupment of Such Costs

3.01 Obligation for Well Costs:

A. Preface.

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87 495 So.2d 1008 (La.App. 3rd Cir. 1986), writ denied 502 So.2d 111 (La. 1987).
88 The court cited Bickham v. Bussa Oil and Gas Corp., 152 So. 393 (La.App. 2nd Cir. 1934).
As noted in Section 1.02B above, produced oil and gas would constitute a "product," and not a "fruit." A necessary consequence of this fact is that the owner thereof is entitled to receive such oil and gas (or the value thereof), but only upon the producer (operator) being reimbursed for the costs incurred in producing such oil and gas. This proposition is supported by both codal and jurisprudential authorities.

B. Codal Authority.

As previously observed, "[p]roducts derived from a thing as a result of diminution of its substance belong to the owner of that thing. When they are reclaimed by the owner, a possessor in good faith has the right to reimbursement of his expenses. A possessor in bad faith does not have this right."  

Given that the courts employ the principle of unjust enrichment to resolve these issues between the operator (or producer) and the non-participating owner, further codal support can be found in Articles 2054 and 2055 of the Louisiana Revised Civil Code, which read, as follows:

Article 2054:

When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

Article 2055 (first paragraph only):

Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.

C. Jurisprudence.

The cases interpreting and applying the codal authority are legion.

In the early case of *Martel v. Jennings-Heywood Oil Syndicate,* the court awarded the co-owner of the land "one-fifth of all the oil produced . . . on said tract of land, on plaintiffs' reimbursing one-fifth of all the expenses, ordinary and incidental, incurred in producing, transporting, and preserving the same, and if sold, the additional expenses of the sale."

In the next case to consider the issue, it was held that the landowner has the right to recover the value of the oil, gas or other minerals from a person who unlawfully enters his land and extracts oil and gas therefrom. If the trespasser acted in good faith, the amount of

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89 Article 488, Louisiana Revised Civil Code.
90 114 La. 903, 38 So. 612 (1905).
91 *Cooke v. Gulf Refining Co.*, 135 La. 609, 65 So. 758 (1914).
damages is the value of the mineral at the well, less the cost of production, which includes the cost of drilling. 92

In Allies Oil Co. v. Ayers, 93 plaintiff and defendant owned, in equal proportions, a mineral lease. Defendant undertook to re-enter an abandoned hole and the operation was successful.

The court stated the issue to be, as follows:

... [W]hether a cotenant of oil-bearing lands, who fails, neglects, or refuses to contribute towards the exploration and development of the field, may yet claim of his cotenant a proportionate share of the oil produced (less expenses), when the latter has explored and developed the field at his own sole risk and expense.

Thus, the court observed that the “sole matter involved is one-half the produce of the aforesaid ‘abandoned’ well (less expenses).”

There was judgment in favor of the plaintiff (non-operator) and defendant (producer) appealed.

The Supreme Court affirmed. In so doing, it stated, as follows:

In this case the owner had ceded to defendant the exclusive right to sever the oil from the realty and make it his own, and defendant had in turn ceded a half interest to plaintiff. So that as soon as any oil was severed from the soil it became lawfully the joint property of plaintiff and defendant.

Citing Martel v. Jennings-Heywood Oil Syndicate, 94 the court affirmed the right of the co-owner (plaintiff) to receive its proportionate share of the oil produced, subject to paying its proportionate share of the expenses.

Freeman v. Depression Oil Co., Inc. 95 provides a bit of analysis of the then state of the law. There, one co-owner of a mineral lease sued another co-owner, contending that, “since the acquisition by petitioner of his interest in said lease he has, with the consent and agreement of its co-owners, operated the well located upon the lands described, producing oil therefrom for the joint benefit of the co-owners according to their interests and with the understanding that he would be reimbursed the cost of operation by the co-owners in proportion to their interests in the lease described.” In affirming the trial court judgment for the plaintiff, the court explained its rationale, as follows:

92 In deciding the case, the court observed that “minerals under and within the soil of Louisiana were not in the contemplation of the lawmakers at the time that the Code was adopted.”

93 152 La. 19, 92 So. 720 (1922).

94 Cited at footnote 90, supra.

95 159 So. 192 (La.App. 2nd Cir. 1935).
Plaintiff contends that since the lease was developed for the joint benefit of all co-owners, and production was secured, that defendant, by implied or quasi contract, is legally bound to pay its proportionate part of the expense properly incurred in attaining these results, and cites in support of his position Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253; Allies Oil Co. v. Ayers, 152 La. 19, 92 So. 720.

These two cases hold that where one colessee, on his own initiative, or because the other colessee will not, or for financial or other reasons, cannot join with him, develops a lease and secures profitable production, the noncontributing lessee who claims his proportionate part of the oil thus produced is bound to the reimbursement of a like proportion of the expenses incurred to secure the production. In each of these cases production was very valuable. It greatly exceeded the expense account incident thereto. The principle upheld in these two cases is but the recognition of a cardinal rule of equity. We have been cited to no case, and know of none, which holds that the noncontributing colessee may be held, without his consent, for a proportionate part of expense incurred in "wild cat" ventures on a lease, or for any part of expense incurred in bringing in a well whose production does not, when sold, repay all such expenses. To hold that, regardless of the outcome of tests for oil or gas: by one colessee, the other colessee may be held for a proportionate part of the expense incurred in the unsuccessful venture, would be tantamount to placing the less opulent or less informed colessee wholly at the mercy of the better situated associate. The interest of the noncontributing lessee could thereby be entirely destroyed or absorbed by the more fortunate one; financial ruin or forced sacrifice of his property rights would often result.

D. Rationale Embraced by the Courts in Requiring Reimbursement of Costs.

Although the courts do not always articulate the precise rationale for their decisions, it is clear that the law of unjust enrichment is the basis on which the courts rely. The Louisiana Supreme Court analyzed the conceptual underpinnings of the action of unjust enrichment and articulated the elements of the civil law action de in rem verso in Minyard v. Curtis Products, Inc., as follows:

96 "Nevertheless, he may not enjoy the profits without participating in the expenses incurred in producing those profits. To permit him to do so would violate the moral maxim of the law that no one ought to enrich himself at the expense of another." Scott v. Hunt Oil Company, 152 So.2d 599, 604 (La.App. 2nd Cir. 1962), on appeal after remand, 160 So.2d 435 (La.App. 2nd Cir.), writ denied 245 La. 950, 162 So.2d 8 (1964).

97 251 La. 624, 205 So.2d 422 (1967).
There are now five prerequisites to the successful suit by actio de in rem verso: (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment, and finally (5) the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature.

While the early cases noted hereinabove obviously predate this decision, it accurately captures the essential elements of a cause of action for unjust enrichment as historically recognized by the judiciary.

Applying these elements to the circumstance considered herein, each seems to be met in the context of a non-participating owner who seeks to recover its allocated share of production revenues free of responsibility for any production costs, as follows:

(1) To allow a non-participating owner to receive its share of production without any liability for costs would constitute an enrichment of such owner;
(2) To allow a non-participating owner to receive its share of production without any liability for costs would constitute an impoverishment of the party who drilled the well at its sole cost, risk and expense;
(3) The connection between the two is obvious;
(4) Neither the enrichment nor the impoverishment is justified, standing alone; and
(5) By definition, there is no contractual relationship between the parties.

The courts resort to the legal doctrine of unjust enrichment in the case of a non-participating owner who seeks to recover its allocated share of production revenues free of responsibility for any production costs. However, courts have also found consent to the conduct of operations by actions of the party seeking to avoid costs.

Thus, in Connette v. Wright, a co-owner of mineral leases was held responsible for his share of drilling costs and supervision because "execution of the division orders and the receipt of his share of the proceeds of all of the oil produced and sold was a complete ratification by defendant of the drilling operations conducted by plaintiff on the whole property." This case illustrates the codal notion that a "contract is formed by the consent of the parties established through offer and acceptance," and that, in most cases, "offer and acceptance may be made

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98 154 La. 1081, 98 So. 674 (1924).

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http://digitalcommons.law.lsu.edu/mli_proceedings/vol55/iss1/7
orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent." 99

3.02 Responsibility for Well Costs After Release of Lease:

It is of the essence of the lessor–lessee relationship that all costs of drilling, equipping and completing a well are borne by the lessee (the "working interest" owner) to the end that the lessor is entitled to its lessor’s royalty free of such costs. 100 Thus, during the existence of the mineral lease, costs attributable to the lands burdened by the mineral lease and situated within the compulsory unit are the responsibility of the lessee, not the lessor.

Even if the lessee is receiving no revenue from the producing unit well (perhaps for the reason that it has not paid its share of costs to the operator who, as a consequence, is entitled to withhold proceeds attributable to the lands burdened by the mineral lease), the lessee nonetheless has a contractual obligation to pay royalties to its lessor. 101 In these instances, it is said that the lessee has to "go out of pocket."

Where costs are incurred during the existence of a mineral lease and are in fact paid by the lessee to the operator, but the mineral lease terminates prior to recoupment of such costs by the lessee, special issues arise.

The attributes of an unleased mineral owner — his rights and obligations — are not different merely because he was previously leased. 102 As stated by the district court judge in Browning v. Exxon Corporation, 103

An expired mineral lease is just that, an expired lease. It is as though the Browning lease had never been written. The Louisiana statutes contain no exemption for 'recently leased, but now unleased, lands.'

These special issues were addressed in Williams v. Seneca Resources Corp. 104

99 Article 1927, Louisiana Revised Civil Code.
100 Frey v. Amoco Production Company, 603 So.2d 166, 173 (La. 1992) ("By virtue of the beneficial relationship between lessee and lessor, the former avoids having to pay up front for the privilege of exploration, and the latter, assuming a passive role, is guaranteed participation in any eventual yield accruing from the lessee’s entrepreneurial efforts, unconstrained by financial and operational responsibilities.").
101 "... royalties paid to the lessor on production are rent. A mineral lessee is obligated to make timely payment of rent according to the terms of the contract or the custom of the mining industry in question if the contract is silent." Article 123, Louisiana Mineral Code.
102 Except, of course, to the extent that the (now) unleased mineral owner has a claim against the (former) mineral lessee which has not prescribed.
103 848 F.Supp. 1241 (M.D. La.), aff’d 43 F.3d 668 (5th Cir. 1994).
In *Williams*, the plaintiffs' lessee, Yuma, entered into an operating agreement with Seneca, pursuant to which a well was drilled and then unitized. Yuma paid to Seneca, the operator, the share of well costs applicable to the lands covered by the Williams lease. After completion, the well was shut-in for lack of a pipeline connection. Apparently, Yuma failed to make a timely shut-in rental payment as required by the lease, which thereupon terminated.

After production began, Seneca, as operator, withheld proceeds allocable to the Williams tract in order to reimburse Yuma, the Williams' former lessee. Williams sued Seneca to establish that Seneca had no right to withhold proceeds of unit production allocable to the Williams tract.

Noting that "the costs associated with the Williams' tract have been paid already by Yuma," the court found that "Seneca does not have the right to collect the development costs incurred during the Lease from the Williams." The court recognized that, because the lease was in force and effect during the period of time that the well costs were incurred, it was the responsibility of Yuma, the lessee, to bear those costs.

These issues were next visited in *Shanks v. Exxon Corporation* ("*Shanks I*").[105] Exchange Oil & Gas Corporation held a mineral lease on a tract of land which was subsequently placed in a unit around a well, as a result of which, obligations accrued for the payment of well costs to Exxon, the operator of the well.

Because there was no contractual relationship between Exchange and Exxon, the latter withheld the proceeds of production attributable to Exchange's unitized premises in order to recoup that tract's proportionate share of well costs.

Exchange paid royalties "out of pocket" to its lessors for some period of time until it made the decision that the well would not "pay out" and elected to simply release the lease in order to be relieved of any further responsibility in connection therewith.

Since that previously leased tract's share of well costs had not yet been fully recouped by the operator, Exxon continued withholding such costs from the post-release share of production now owned by the plaintiffs (Exchange's former lessors) in their capacity as unleased mineral owners.

The plaintiffs sued TXP (as successor to Exchange's interest in the lease) for such well costs, arguing that such costs were "incurred" during the existence of the lease and, therefore, were the responsibility of the lessee.

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105  95-2164 (La.App. 1st Cir. 5/10/96); 674 So.2d 473, *writ denied* 96-1475 (La. 9/20/96); 679 So.2d 436.
TXP defended by asserting that it was relieved of this responsibility prospectively from the date of the release. TXP argued that, since Exxon could only recoup such funds by withholding production attributable to the tract in question, the obligation arose only as and to the extent that production was actually obtained and, therefore, it had no personal obligation to continue paying for such well costs after the release.

The court agreed with TXP and found that the release of the lease resulted in the discharge of the (former) lessee’s further obligations in connection therewith, including those dealing with well costs.

The court further explained its rationale, as follows:

While the factual situation in Davis differed from the facts herein, we believe that the pronouncements therein are nonetheless controlling. Applying the dictates of Davis, we conclude that liability for well costs does not necessarily accrue at the time the costs are incurred. Moreover, even the inclusion of the leased lands at issue within the compulsory unit did not, of itself, render TXP liable for well costs. Pursuant to Davis, TXP had no liability for well costs, but was only liable for such costs out of production. TXP’s liability for well costs accrued only as there was production from the unit well and only to the extent of its proportionate share of production. TXP’s, or Exchange’s, entire proportionate share of production was applied to the payment of well costs during the existence of the leases. Thus, we conclude that TXP paid all well costs for which it was liable by law.

The identical set of facts as was considered in Shanks I gave rise to another decision in the same case against another defendant. In Shanks v. Exxon Corporation ("Shanks II"), the plaintiff sought relief against C. T. Carden, the original lessee who later assigned the lease to Exchange, which interest was later assigned to TXP. "Because the principal defendant in this matter was TXP, all of the parties agreed to sever their claims against Exxon and the Cardens, both as to the original claim and the incidental claims." Shanks II takes up the previously severed claim against Carden.

After its claims against TXP were dismissed in Shanks I, the plaintiffs pursued their original lessee, C. T. Carden. The character of the plaintiffs’ claim against this defendant was stated, as follows:

Plaintiffs then filed the instant appeal, contending that the trial court erred in: (1) holding that “the issues presented are the same” in this case against mineral lessee Carden as in the case of sublessee TXP.

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107 2007-0852 (Lit.App. 1st Cir. 12/21/07); ___ So.2d ___.

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in the earlier trial as reported in *Shanks I*; (2) finding that “this situation has already been dealt with by this court and by the 1st Circuit” and failing to recognize the distinction between the personal, contractual liability of the mineral lessee, Carden, to plaintiff-lessees for payment of well drilling costs and the limited, in rem liability of sublessee TXP, as decided in *Shanks I* on the basis of oil and gas unitization law; and (3) failing to recognize and apply the provisions of the Mineral Code in that the lessee-sublessee Carden “is not relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing,” LSA-R.S. 31:129, as distinguished from a sublessee who assumed only an in rem interest in the lease and whose responsibility to the lessor is limited “to the extent of the interest acquired,” LSA-R.S. 31:128.

The court stated the issue in *Shanks II* to be, as follows:

Thus, as was the case in *Shanks I*, the primary issue now before us is when liability for well costs, incurred for a well drilled on someone else’s property prior to unitization, becomes chargeable to an owner (or lessee) who did not consent to unitization or to the drilling activities of the operating owner.

Holding to its determination in *Shanks I* that the obligation of a non-consenting owner to pay well costs only arises as and when – and to the extent that – production is captured, the court in *Shanks II* again rejected plaintiffs’ demands against Carden, saying, as follows:

Inasmuch as liability for the remaining unpaid well costs attributable to the tracts of land covered by the leases was a future obligation, i.e., a liability only incurred as the unit well produced and only to the extent of the proportionate share of production, Carden was relieved of this future obligation by execution of the release in accordance with the provisions of the leases. See *Shanks I*, 674 So.2d at 478.

### 3.03 Nature of Non-Participating Owner’s Obligation for Well Costs:

In the absence of a contractual relationship to the contrary, a non-participating owner may not receive its allocated share of unit production unless it pays for its allocated share of unit well costs. As a general statement, at its option, the non-participating owner may pay its share of costs in cash or may require the operator to be reimbursed out of production. If the latter option is exercised, the risk that the well will never achieve “payout” is on the operator.

The jurisprudence recognizes an exception to this rule. If the non-participating owner is participating in the compulsory unit as a consequence of action which it took in connection with the creation or revision of the unit, the courts have held that such an owner may be liable “out of
pocket” to the operator. Under these circumstances, the risk that the well will never achieve “payout” shifts to the non-participating owner who may be required to pay its share of costs in cash.

The principal case which establishes this exception is *The Superior Oil Company v. Humble Oil & Refining Company.*\(^{108}\) Therein, the plaintiff-operator sued the defendant to recover a sum of money as defendant’s proportionate part of the cost of drilling and completing a unit well. The well was drilled by plaintiff and the defendant applied for a compulsory unit which was created and which included a portion of lands held under lease by defendant. The issue presented was stated by the court, as follows:

Plaintiff contends it is entitled to recover the proportionate part of the adjusted well costs from the defendant in cash. To the contrary, defendant contends there is no authority for plaintiff to recover in cash, but only from the proceeds of production from the well accruing to defendant.

The court stated it to be “obvious that, if [defendant]’s contention is maintained, it will have obtained a substantial advantage over [plaintiff-operator], in that the well satisfies its obligation to its lessor to develop and that it will ultimately receive its share of the proceeds thereof, all without the outlay of one penny.” Further, the court stated:

The suggestion that payment will ultimately be made from proceeds of production is not an answer to this situation, as [plaintiff-operator] will then be required to finance [defendant] during the entire time required to obtain reimbursement from proceeds of production. In short, [plaintiff-operator] alone will have been required to make the entire investment, whereas the return will accrue only partly to it, and partly to [defendant].

The court in *Superior v. Humble* rejected defendant’s contention that the Supreme Court, in *Hunter Co. Inc. v. McHugh,*\(^{109}\) had “establish[ed] the rule that withholding the proceeds from the production of a well is the only method the driller of a unitized well may recover the proportionate cost of drilling from the owners included in the unit.” The court stated that *Hunter,* while recognizing the operator’s right to withhold proceeds of unit production as a means of recovering well costs attributable to a unit participation, “did not . . . make this remedy exclusive.”

Interestingly, the defendant (corporate predecessor to today’s ExxonMobil Corporation) argued that “a poor and impecunious owner may be subjected to heavy costs he is unable to pay if required to pay

\(^{108}\) 165 So.2d 905 (La.App. 4th Cir.), writ denied 246 La. 842, 167 So.2d 668 (1964).

\(^{109}\) 202 La. 97, 11 Sc.2d 495 (1943).
cash in the hope of continued production.” The court gave short shrift to this argument, noting that the issue “cannot be considered until the answer of defendant and the trial discloses whether or not defendant is impecunious and why it initiated the unitization by the Commission.”

In denying an application for rehearing, the court stated that its “decision at this time is limited to the case where the non-drilling owner and/or lessee has demanded the unitization, and no further.”

The rationale of the court in the Superior v. Humble case was further explained in its denial of rehearing,110 as follows:

To compel an owner and/or his mineral lessee to share the production from their well with the adjoining unitized owners and/or mineral lessees, without requiring immediate payment of the latters’ pro rata cost of drilling and production, but limiting recovery solely from the adjoining owners’ pro rata of production would, in effect, be unjust enrichment of the latter and the taking of property of the producing owner or lessee for the gain of the adjoining owners or lessees without adequate compensation. . . . In such case the producing owner and/or his lessee would be compelled to assume the entire risk of production, and the financing of the pro rata cost that should be borne by the non-drilling unitized adjoining owners and/or lessees.

Subsequent to the decision in the Superior v. Humble case, it was unclear as to what actions on the part of the non-participating owner would be sufficient to invoke the rule, exposing it to personal liability to the operator. If the non-participating owner actually made application for the unit in order to “force” itself into the operator’s production, that was the easy case. But what if the non-participating owner – while not actually applying for the unit – offered a counter-plan or presented testimony or made a statement in reference to an application filed by the operator? Would this be sufficient?

The next case to explore the reach of this stated limitation was Davis Oil Company v. Steamboat Petroleum Corporation.111 Plaintiff, owner of certain leases, filed an application with the Office of Conservation to form units for wells to be drilled by plaintiff. Defendant, as the adjacent lessee, filed a counter-plan which opposed the plaintiff-operator’s plan and urged the Commissioner to adopt defendant’s unitization plan. The Commissioner’s unitization order established two (2) units, each of which included small parts of lands leased by defendant.

110 165 So.2d at 910-1.
111 583 So.2d 1139 (La. 1991).
Plaintiff drilled a well in each unit, both of which were dry holes. The defendant refused to participate in drilling of each well, and the operator submitted invoices to the defendant for its proportionate share of unit drilling costs. When the defendant refused to pay, plaintiff filed a suit against the defendant for a money judgment representing a proportionate part of costs incurred by plaintiff in the drilling of wells in the units which contained defendant’s leases.

The court observed that “the present case is distinguishable from a situation such as that presented in” the Superior v. Humble case. The court stated, as follows:

Under the circumstances of the Superior Oil Co. case, Humble’s actions in taking the initiative to form an operating unit including an already producing well resulting from Superior’s successful operations reasonably can be interpreted only as implying Humble’s consent to those operations. On the other hand, in the present case, Steamboat’s mere participation in the regulatory unitization process in the form of a defensive request for a modification in the drilling units being formed at the initiative of Davis Oil in order to prevent uncompensated drainage of fractions of the land under Steamboat’s leases does not constitute tacit consent to the operations.

The Supreme Court held that the defendant was not personally liable for unit well costs, stating, as follows:

A non-operating owner of a mineral interest, who does not consent to operations within a compulsory drilling unit by an operating owner, has no liability for the costs of development and operations except out of his share of production. Under the circumstances of the present case, in which the non-operating lessee merely introduced a counter-proposed unit plan at the Commissioner’s hearing, prior to the drilling of the dry holes, only as a precaution against the uncompensated drainage of part of the land underlying its leases, the lessee did not consent to the unit operations.

Thus, in the absence of a special agreement with the operator or, in a proper case, application of the rule of the Superior v. Humble, the obligation of a non-participating owner to bear its allocated proportionate share of unit well costs is an in rem obligation to be discharged out of its share of production, when, as and if produced. Therefore, if the value of the unit production allocable to the non-participating owner is not sufficient to discharge such owner’s allocated portion of unit well costs, the mineral owner has no personal liability to the operator for the

112 This “special agreement” might take a variety of forms, including a “cost contribution agreement,” a “bottom hole agreement,” a “dry hole agreement,” or some other contractual arrangement whereby a party agrees to financially support the efforts of the operator.
shortfall or deficiency. In this sense, the risk of not achieving “payout” is on the operator who undertook the drilling operations.

One approach which your author has observed in an attempt to circumvent the rule of Superior v. Humble – (or is that “gimmick”?) – is to make application for the formation of a compulsory unit in the name of the owner of a non-cost bearing interest (such as a mineral royalty interest or perhaps an overriding royalty interest). The Rules of Procedure of the Commissioner\(^\text{113}\) recognize that the application may be filed by a “person,”\(^\text{114}\) with no stated limitation on his or its proprietary position. The rationale is that the applicant in such a case is not a “person” who, under general law, might be held responsible for costs. Whether or not this approach is successful remains to be seen.

3.04 Definition of “Payout”

A. General.

As this paper demonstrates, the respective rights and obligations of both the non-participating owner and the operator differ – or are certainly adjusted – at the point in time when the operator has recovered its costs out of production. This is so because, until the operator recovers its well costs out of production, the non-participating owner will not participate in unit production. That is to say, the operator retains all production allocable to the unleased interest prior to the point when it has recouped its costs.

The point in time at which the operator has recovered its costs out of production is called “payout.” The terms “before payout” (or “BPO”) and “after payout” (or “APO”) are well known in the industry.

Thus, it is said that a well reaches or achieves “payout” when the value of production allocable to the unleased mineral interest equals the proportionate part of drilling and other costs allocable to that unleased mineral interest. At that point in time, it is said that the owner of the unleased mineral interest is entitled to receive “eight-eighths,” or one hundred (100%) per cent, of production allocable to its interest, subject to the ongoing responsibility to bear a proportionate part of unit operating expenses.

This point in time is determined when a certain amount of revenue equals a certain amount of costs. As in the case of a production in “paying quantities” analysis, the issue becomes, “what revenue and what costs?”\(^\text{115}\)

\(^{113}\) Rules of Procedure for Conducting Hearings Before the Commissioner of Conservation of the State of Louisiana, effective October 11, 1983.

\(^{114}\) “Person” means any natural person, corporation, association, partnership, receiver, tutor, curator, administrator, fiduciary, or representative of any kind. La. R.S. 30:3(3).

\(^{115}\) See Ottinger, Production in “Paying Quantities” – A Fresh Look, 51st Ann. Inst. on Min. Law 24 (2004); also published at 65 La. L.Rev. 635 (2005).
B. Revenue to be Applied to Recoupment.

But, how is “payout” defined? What portion of monies is considered in determining if “payout” has occurred?

Although there is no reported decision precisely on point, it should include the entirety (i.e., “8/8ths”) of unit production secured from the borehole of the unit well, not merely the monies allocable to the net revenue interest of the operator (and its partners) after deduction of Lessor’s royalties. In other words, the revenue stream to be considered should include revenue attributable to Lessor’s royalties, i.e., the unleased owner should get the ‘benefit’ of that production (in the sense that it is applied toward achievement of “payout”) even though the operator does not personally get the benefit of it. This is so because it is not a concern to (nor the “fault of”) the non-participating owner that the operator (lessee) has a contractual obligation to others for the payment of royalties.

C. Types or Categories of Costs Which Unit Operator is Entitled to Recoup Out of Production.

The operator is not free to recoup just any cost or expense from the non-participating owner’s allocated share of production. The determinative factor seems to be that, in order to be recovered by the operator, an expenditure must have been actually incurred in connection with unit operations and be reasonable.

There is no statutory definition of “payout” or how it is determined. The closest statutory analogy in the Conservation Act provides that the operator availing itself of the benefits of the Risk Fee Statute is entitled to recover from the share of production allocable to a party who did not share in the cost, risk and expense of the well, “the actual reasonable expenditures incurred in drilling, testing, completing, equipping, and operating the unit well, including a charge for supervision.”

116 But see Gulf Explorer, LLC v. Clayton Williams Energy, Inc., 2006-1949 (La.App. 1st Cir. 6/8/07); 964 So.2d 1042, discussed in Section 3.06C, infra.

117 There is a definition of “payout” for purposes of a statutory exemption from severance taxes in connection with the drilling of a “horizontal well,” La. R.S. 47:633(7)(e)(iii), a “deep well,” La. R.S. 47:633(9)(d)(v), and a “new discovery well,” La. R.S. 47:648.3. For these purposes, LAC 61:1.2903 defines “payout” as occurring “when gross revenue from the well, less royalties and operating costs directly attributable to the well, equals the well cost as approved by the Office of Conservation. Operating costs are limited to those costs directly attributable to the operation of the exempt well, such as direct materials, supplies, fuel, direct labor, contract labor or services, repairs, maintenance, property taxes, insurance, depreciation, and any other costs that can be directly attributed to the operation of the well. Operating costs do not include any costs that were included in the well cost approved by the Office of Conservation.”

118 See Section 7.02 hereof, infra.

A further limitation on eligible costs is provided in La. R.S. 30:111 which reads, as follows:

Owners of unleased mineral interests and lessees in any drilling unit authorized by the department of conservation of this state, shall not be liable or obligated to pay to the operator or producer for materials furnished or used in the drilling, completion, and production of any oil, gas, or mineral well drilled on said unit a sum in excess of the prevailing market price of such materials.

A cost incurred by an operator which is not related to unit operations, but is merely incurred out of self-interest to the operator would not be deemed to be a necessary or "reasonable" expenditure.

An anecdotal incident would illustrate this point. Your author is familiar with a situation wherein an operator (a major oil company) sought to conduct a gravel pack operation in a field and sought to impose a share of the costs upon a non-operator (a smaller independent E&P company). The operator announced its intention to charge the non-operator its proportionate share of an amount of money which, in the opinion of the non-operator, greatly exceeded (perhaps by a magnitude of ten-fold) the "going cost" for such an operation. The non-operator did not disagree that a gravel pack operation was appropriate, but simply questioned the scope and associated cost of the operation as proposed by the operator. After resisting such significantly higher costs, the non-operator finally learned that the operator desired to conduct a "new" and "modern" operation as an experiment to see how it worked, before conducting it on its own, solely owned facility in the Gulf of Mexico. Non-operators rarely enjoy being a guinea pig, particularly at their own expense.

Costs for which a non-participating owner is responsible will include its proportionate part of drilling costs associated with drilling to a deeper, but non-productive, depth, prior to a "plug back" to a shallower depth where the well was completed. As this was a "lease basis" well, issues of well cost adjustments were not presented as in the case of a unit operation.

An illustration of the meaning of "actual reasonable expenditure" was discussed by Robert T. Jorden, a leading authority on Louisiana conservation law, in the proceedings before the Mineral Law Institute," as follows:

120 Martel v. Hunt, 195 La. 701, 197 So. 402, 409 (1940) ("It cannot be said that the drilling of the well to the greater depth was an act of bad faith, and we are not in position to say that the companies used poor judgment in doing so. The companies were endeavoring to make the most of their investment. They were exploring for oil, and the costs of their explorations amounted to nearly $65,000, and plaintiffs must contribute their pro rata share of this amount.").

121 Jorden, Unit Well Costs, 14th Ann. Inst. on Min. Law 15, 16 (1967).
When considering unit well costs, it is necessary to determine what is meant by “actual reasonable expenditures,” and the Commissioner of Conservation has on at least one occasion considered this language and issued a rather interesting and reasonable ruling. In the Greenwood-Waskom Field, the operator drilled a unit well shortly after World War II and used pipe which was difficult to obtain and which cost considerably more money than the pipe normally used in wells in the area. However, the evidence established that the less expensive pipe was not available and that the operator had been reasonable in using special pipe. The Commissioner of Conservation, therefore, found that these were actual, reasonable expenditures which should be used in determining the well costs.

3.05 Unit Well Cost Adjustments:

A. Preface

Until a well, drilled on a “lease basis,” is unitized, only the lessor and the lessee(s) of the drillsite tract are entitled to participate in production from that well.\(^{122}\) As a corollary, the lessee which drilled the well on its own lease is entitled to all of the net revenue interest attributable to the working interest and will apply such revenue to its own reimbursement of its capital or “sunk” costs.

If that “lease basis” well is drilled at a location which is in compliance with the spacing regulations promulgated by the Louisiana Office of Conservation,\(^{123}\) unitization is not mandated. Yet, any interested person may seek unitization in order to include some or all of its leased premises in a unit for such well.\(^{124}\)

Customarily, a unit order will be made effective as of the date of the hearing which results in the formation of the unit.\(^{125}\) Production subsequent to the effective date of the unit is unit production in which all unit participants participate.

With respect to pre-unitization production, to what extent does the mineral owner of a tract brought into the unit get any benefit thereof? This may occur in a variety of ways, including (but not limited to) the following scenarios:

\(^{122}\) Pierce v. GoldKing Properties, Inc., 396 So.2d 528 (La.App. 3rd Cir.), writ denied 400 So.2d 904 (La. 1981) (“Although drainage of plaintiff’s lands may have occurred during the relatively short span of time between initial production of the [later unitized] well and unitization, plaintiff is still not entitled to receive royalties until such time as the effective date of the unit.”).

\(^{123}\) See LAC 43:XXIX.1902, et seq., called Statewide Order No. 29-E.

\(^{124}\) La. R.S. 30:10A(1).

\(^{125}\) Exxon Corporation v. Thompson, 564 So.2d 387 (La.App. 1st Cir.), writ denied 568 So.2d 1054 (La. 1990).
When a well produces on a "lease basis" for a period of time prior to unitization;

- When a unit well produces for a period of time prior to a revision of the unit, and if, as a consequence of the revision, a new or additional tract of land not under lease to the operator is included within the unit;

- When a well produces on a unit basis from a deeper zone or horizon and, after depletion from that deeper zone or horizon, the well is then "plugged back" to a shallower zone or horizon which is unitized and in which a party is included who had either not participated at all in the deeper production, or participated on a different equity basis than in the shallower depth, or vice versa (shallow to deep).

In each of these instances, the occasion arises for an "adjustment" or "depreciation" of the unit well costs for which the newly added tract of land will be responsible.

The rationale is that, while the owner of the newly added lease or unleased land has the obligation to compensate the operator for the costs of the unit well which is now benefiting the new owner, the operator — having recovered some portion of the costs of drilling the unit well out of pre-unitization production — is only entitled to recover "adjusted" or "depreciated" well costs from the newly unitized lease owner. This is customarily based upon a determination of the percentage of the reserves of the entire well produced by the operator prior to unitization or re-unitization.

La. R.S. 30:10A(2)(c) originally provided "that the cost of drilling, testing, completing, equipping, and operating the unit well shall be reduced to account for monies received from prior production, if any, in which said tract or tracts did not participate prior to determining the share of cost allocable to such tract or tracts." (Emphasis added).

The language employed in this statute was not precisely clear in that it is not certain as to what is meant by the statement that costs "shall be reduced to account for" prior production. Did the language mean that the well costs must be reduced "dollar for dollar" or may some other method of well cost adjustment be utilized, e.g., "reservoir depletion"? This issue was considered by the Commissioner in a series of well cost hearings.

B. Authority of Commissioner of Conservation to Determine Well Costs.

If the parties are unable to reach agreement as to the amount of well costs chargeable to the newly unitized lease owner, the Commissioner of

Conservation may “determine” the well costs. The Commissioner’s authority to determine “proper [well] costs” does not include the authority to adjudicate the manner in which such costs are to be adjusted or apportioned among the various unit participants. Moreover, the Commissioner has no authority to render a money judgment for such costs as that is a judicial (not an administrative) function.

C. Commissioner’s Early Approach to Well Cost Hearings.

For many years, the Commissioner simply refused to schedule a well cost hearing despite the receipt of a proper application therefor. The motivation was not that he lacked authority to “determine” well costs—he clearly had the statutory authority to do so. Rather, by failing or refusing to hold a hearing in respect of an application to determine well costs (a position which no operator desired to challenge), parties tended to resolve the matters amicably without the intervention of the Commissioner.

An apparent change of heart led to a series of unit well cost hearings in 1990.

In a series of Orders issued on August 22, 1990, the Commissioner of Conservation determined that the legislative directive meant that “the actual reasonable cost . . . should be reduced by the dollar amount of monies received from the prior production in which the tract included in the unit did not participate less severance tax, in determining the share of cost allocable to said tract.”

The Commissioner further found that “the dollar for dollar reduction to be required herein follows the guidance of LSA-CC Art. 9, and is consistent with the concept enunciated by the court in the case of” Desormeaux v Inexco Oil Co. In another hearing, the Commissioner found that “the monies received from prior production [having] exceeded the actual reasonable

129 Anisman v. Stanolind Oil and Gas Company, 98 So.2d 603, 605 (La.App. 2nd Cir. 1957) (“It should also be pointed out that the Commissioner of Conservation has no interest, nor is he officially involved in plaintiff’s action for an accounting.”).
130 See Order No. 860-1 dated August 22, 1990, effective July 12, 1990, relative to the calculation of unit well costs for the GER RD SUA in the Iberia Field, Iberia Parish, Louisiana.
131 298 So.2d 897 (La.App. 3rd Cir.), writ refused 302 So.2d 37 (La. 1974).
132 See Order No. 1068-1 dated August 22, 1990, effective July 25, 1990, concerning the calculation of proper unit well costs for the 6900’ RA SUA, Chandeleur Sound Block 71 Field, St. Bernard Parish, Louisiana.
expenditures incurred in the drilling, testing, completing, equipping and operation” of the unit well, to the end that “the depreciated well cost” as a consequence of a revision of the unit “was zero dollars.”

D. Legislative Response to Hearings.

To clarify this issue, La. R.S. 30:10A(2)(c) was amended to provide that “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 have been recovered by prior production, if any, in which said tract or tracts did not participate prior to determining the share of cost allocable to such tract or tracts.”

A similar statutory provision addresses unit revisions which either includes “an additional tract or tracts,” or excludes a tract or tracts.

E. Methods of Well Cost Adjustment.

An example would assist in understanding this statute as it currently exists. If a well is drilled for $2 million and produces for a period of time prior to unitization, the owner of a tract brought into the unit would be able to demand an “adjustment” or “depreciation” of the well costs for which it might be responsible. The rationale is that the operator has already received value from the well to the extent that it produced on a “lease basis” and some credit (by way of reduction or “adjustment” of well costs) should be due to the party who is now responsible to bear a portion of costs for a “used” well.

A typical — but by no means exclusive — approach is the “unit of production depreciated well cost method.” Under this method, it is necessary to estimate the total reserves in the reservoir which is now unitized and determine the percentage of those reserves which were produced prior to unitization. If the reserves are estimated to be 4 million barrels of oil and the operator had produced 50 thousand barrels prior to unitization, the (now unit) well had been “used” and “enjoyed,” prior to unitization, to the extent of 50,000/4,000,000 (or 5/400, or 1.25%) of its estimated total useful life. Thus, on the effective date of unitization, unit well costs should be reduced by that percentage, such that the non-participating owner is only responsible for its proportionate part of 98.75% of $2,000,000.

133 Act No. 595 of 1991 Louisiana Legislature.
135 An operator’s contention that the working interest owner whose lease was unitized with a well which produced prior to unitization “should be required to pay their respective shares of the original cost of the well” “is not tenable . . . because the working interest owners are not buying into a new well but are buying into a secondhand well and they should not be made to pay for a new well.” Hussey, Conservation Developments of the Year, 6th Ann. Inst. on Min. Law 157, 172 (1958).
If the well has encountered multiple pay zones, your author would suggest that the total reserves should be taken into consideration.

It should be noted that this is but one of several models which might be used to "adjust" or "depreciate" well costs to account for pre-unitization production.136

The Council of Petroleum Accountants Societies ("COPAS") has published its Bulletin No. 2, entitled "Determination of Values for Well Cost Adjustments – Joint Operations." Its Foreword states that its "basic purpose . . . is to set forth what is considered by the industry in general to be the most equitable basis for the determination of values to be used in connection with well cost adjustments." In the absence of statutory law addressing the proper methodology of well cost adjustments, this COPAS Bulletin would seemingly be accepted as evidence of the custom and usage in the industry.137

F. Jurisprudence.

The most recent decision relative to the issue of "adjustment" or "depreciation" of unit well costs is Tex/Con Oil and Gas Company v. Batchelor.138 In Tex/Con, certain units in the South Lake Arthur Field were revised by the Commissioner of Conservation. As a consequence of these unit revisions, certain acreage held under lease by Tex/Con was excluded from, and certain acreage held under lease by Hunt was included in, the revised units. Pre-revision unit production significantly exceeded the reasonable unit well costs for the units in question.

Tex/Con filed an application with the Commissioner of Conservation "for a determination of: (1) the reasonable actual cost of each of the [unit] wells; (2) the depreciated cost for each well; and (3) whether a well cost adjustment should be made among the former and present owners of these units."

After a public hearing, the Commissioner concluded that, pursuant to La. R.S. 30:10 and consistent with the principles enunciated in

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137 “When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.” Article 2054, Louisiana Revised Civil Code.

“Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another. Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation.” Article 2055, Louisiana Revised Civil Code.

138 634 So.2d 502 (La.App. 1st Cir. 1993), writ denied 94-0270 (La. 3/18/94); 635 So.2d 1102.
Desormeaux v. Inexco Oil Company,139 it was necessary to apply the “dollar-for-dollar” method of well cost adjustment. Finding that “the monies received from production exceeded the reasonable well costs for each well,” the Commissioner concluded that “the cost chargeable by the owners of the original units to the subsequent owners of the revised units was zero.”

Tex/Con filed a suit for judicial review.140 The trial court ruled that, as a matter of law, La. R.S. 30:10A(2) and the custom and usage of the oil and gas industry “require that the unit of production depreciated well cost method of accounting be applied to determine depreciated unit well costs” and that, accordingly, “the Commissioner erred in finding that application of the dollar-for-dollar method to determine unit well costs was consistent with the Desormeaux case.” The trial judge remanded the matter to the Commissioner “with instructions to adjust well costs for the subject wells by applying the unit of production depreciated well cost method.”

The Commissioner and Hunt appealed. The Court of Appeal, First Circuit, stated that the principal issue on appeal was “whether the Commissioner erred in applying the dollar-for-dollar method in determining whether any well cost adjustment was due under LSA-R.S. 30:10 A(2).” The court defined the competing methods, as follows:

Under the dollar-for-dollar method, well costs are reduced by the dollar amount of monies received from production prior to the unit revision, before any well cost adjustment is made between the parties. Robert T. Jorden, Unit Well Cost Adjustment in Louisiana, 38 La.Min.L.Inst. 82, 90-91 (1992). The unit of production depreciated well cost method contemplates reduction of well costs by the percentage of depletion of the unit’s total recoverable reserves caused by production prior to unit revision. 38 La.Min.L.Inst. at 85.

The court particularly noted that the relevant statute was amended in 1991.141 The court applied the pre-amendment version of the statute, saying that it was “effective at all times pertinent hereto.” The court stated, as follows:

We find, as did the Commissioner, that the wording of this statute mandated that the Commissioner apply the dollar-for-dollar method of depreciation. The statute, as it existed at the time this dispute arose, dictated that well costs “be reduced to account for monies received from prior production,” phraseology which we agree

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139 Cited at footnote 131, supra.
140 See La. R.S. 30:12.
clearly contemplated use of the dollar-for-dollar method of determining well costs. Nothing in the wording of the statute, in its previous form, suggested or required that well costs were to be depreciated by the percentage of recoverable reserves that had been recovered by prior production... Thus, under the clear wording of the statute, the Commissioner was required to use the dollar-for-dollar method in determining depreciated well costs.

In reference to the post-amendment statute (effective in 1991), the court observed that the amendment "change[d] the phrase 'shall be reduced to account for monies received from prior production' to 'shall be reduced in the same proportion as the recoverable reserves in the unitized pool have been recovered by prior production.'" In recognition of this change, the court stated, as follows:

This amendment evidences a clear change in the method of determining well costs to a unit of production well cost reduction method and provides further support for the conclusion that prior to this 1991 amendment, LSA-R.S. 30:12A(2)(d) mandated the use of the dollar-for-dollar method.

3.06 Paramount Right of Unit Operator to Withhold Proceeds:

A. Preface.

From the viewpoint of the operator, the optimum circumstance exists when it holds mineral leases on all lands in the unit and drills the well at its sole cost, risk and expense, with or without partners. In that instance, the operator bears all costs, sells all production and pays royalties to its lessor(s), retaining the net revenue attributable to the working interest for itself and its partners, if any.

In an instance where there is any land or interest which is not under lease to the operator (either because there is no lease at all — truly "unleased" — or a tract or land (or interest therein) is leased to a third party with whom the operator has no contractual relationship), the operator must quantify that unleased interest in order to make an economic decision as to whether it is willing to assume the risk associated with such unleased interest. If the well is a dry hole, the operator will bear all costs, including those attributable to the unleased interest with no opportunity to recoup its costs.

B. Jurisprudence.

Hunter Co. Inc. v. McHugh\textsuperscript{142} is a case wherein the constitutionality of the Conservation Act was challenged. In that case, the court addressed the plaintiff's contention that the Conservation Act\textsuperscript{143} was invalid

\textsuperscript{142} Cited at footnote 109, supra.

\textsuperscript{143} Enacted by Act No. 157 of the 1940 Louisiana Legislature, now codified in La. R.S. 30:1, et seq.
because, among other things, it made "no provision . . . for collecting or enforcing" the operator's right of reimbursement of drilling costs. The Supreme Court rejected this contention by noting that "[t]he answer to this [contention] of course is that the [operator] has had and will have possession of all of the proceeds from the production of the well and may retain all of the proceeds until the drilling of the well and putting it on production is entirely paid for."

In *Huckabay v. The Texas Company*, the defendant drilled a well pursuant to a mineral lease granted by the owners of a mineral servitude in and to an undivided seven-eighths (7/8) interest in the lands. The plaintiffs owned the lands and the remaining one-eighth (1/8) interest in the minerals. Plaintiffs asserted that the defendant "was in bad faith in entering on the land and drilling the well." Thus, the plaintiffs argued that they were "entitled to participate, according to their ownership, in the production without being responsible for their share of the expenses."

The court rejected this contention, noting that . . . on several occasions this Court has applied the equitable rule that where one co-owner (or co-lessee) has explored and developed a field without the concurrence or assistance of the other, the former is bound to account to that other for his proportionate share of the proceeds less a proportionate share of the expenses."

The court in *Arkansas Fuel Oil Corporation v. Weber* relied on *Huckabay* for the proposition that, "while the right of an owner to refrain from exercising his right of ownership is absolute, he is nevertheless, precluded from enjoyment of profits without participation in the expenses incurred in the production of such profits."

In another case, it was said that, "[i]n the normal course of events mere ownership in pooled or unitized lands or mineral interests therein does not entitle the owners to share in drilling costs paid the operator by other participants in the pool or unit. . . . Granted such proprietors possess certain aspects of 'ownership'. Included are the right to each participant's pro rata share of oil, gas and minerals produced. Coupled with such right is the correlative obligation for a like percentage of drilling and operating costs."

In *Willis v. International Oil and Gas Corporation*, the court reviewed the Louisiana jurisprudence on this question and concluded, as follows:

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144 227 La. 191, 78 So.2d 829 (1955).
145 149 So.2d 101 (La.App. 2nd Cir.), writ denied 244 La. 205, 151 So.2d 493 (1963).
147 541 So.2d 332 (La.App. 2nd Cir. 1989).

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In summary, whether one is a co-owner who has not concurred or assisted in the exploration and development of the property, or is the owner of a separately owned tract of land embraced within a drilling unit and has elected not to participate in the risk and expense of the unit well, there is no entitlement to share in the proceeds from production until the cost of drilling and operating the well is paid for.

C. Right of Lessor and Overriding Royalty Interest Owner to be Paid Revenues Prior to "Payout."

A natural consequence of the fact that a non-participating owner is not entitled to receive its proportionate share of production until "payout," is that the party which drilled the well is entitled to receive all production allocable to the unleased interest until "payout." During that period of time, the non-participating party is nevertheless obligated to pay its royalty obligations and, conversely, the producing party has no obligation to pay such royalty obligations.

La. R.S. 30:10A(2)(e) reads, as follows:

The provisions of Paragraph 2(b) above with respect to the risk charge shall not apply to any unleased interest not subject to an oil, gas, and mineral lease. Notwithstanding the provisions of Paragraph 2(b) the royalty owner and overriding royalty owner shall receive that portion of production due to them under the terms of the contract creating the royalty.

The second sentence, as noted above, is in the active, not passive, voice and, consequently, does not attempt to speak to the party responsible to discharge the obligation to pay "the royalty owner and overriding royalty owner."

A recent case, Gulf Explorer, LLC v. Clayton Williams Energy, Inc.,\(^{148}\) considered this statute and addressed this issue. The defendant was the operator of a compulsory unit and proposed to drill a unit well. It gave notice of its intention to drill a well to the plaintiff which owned a mineral lease covering a tract of land in the unit.\(^{149}\)

Because the plaintiff did not respond to the operator's notice, it was considered as having chosen to not participate.

The unit well was completed as a producer and the operator withheld all proceeds attributable to the lands covered by the mineral lease held by plaintiff. The unit well never achieved "payout."

The plaintiff released its mineral lease and thereafter sued the operator, "seeking a declaratory judgment stating that [plaintiff]'s royalty

\(^{148}\) Cited at footnote 116, supra.

\(^{149}\) The notice was issued pursuant to the Risk Fee Statute, La. R.S. 30:10A(2). See Section 7.02 hereof, infra.
and overriding royalty owners were entitled to their share of production from [the unit] attributable to the duration of its leases.”

The trial court rejected plaintiff’s contention and held for the defendant. The plaintiff appealed.

The appellate court held that the operator “is entitled to recover its costs out of the production attributable to [plaintiff’s] tract or ‘continuous expanse of land’ and not merely the amounts attributable to that tract minus the royalties and overriding royalties [plaintiff] is obligated to pay pursuant to its contract with third parties.”

Noting further that Louisiana law provides that “the royalty owner and overriding royalty owner shall receive that portion of production due to them under the terms of the contract creating the royalty,” the court stated, as follows:

Clayton Williams has no contractual relationship with Gulf’s lessors; under the facts presented herein, Clayton Williams has no obligation to pay Gulf’s royalty and overriding royalty owners before it legally recoups its expenses from production pursuant to LSA-R.S. 30:10A(2)(b)(i).

D. Right of Mineral Royalty Interest Owner to be Paid Revenues Prior to “Payout.”

If the unleased mineral interest is burdened by a mineral royalty interest, does the operator have any different obligations to pay royalties to that mineral royalty interest owner prior to “payout”? The answer is clearly, no.

Whatever might be the obligations of the mineral owner to the owner of the mineral royalty interest which he has created, the fact remains that, prior to “payout,” the operator has a paramount right to withhold the entirety of production allocable to the burdened tract until it has recovered its costs.

Said differently, the right of the operator to withhold proceeds of production allocable to an unleased interest should not be diminished or rendered ineffectual by reason of the fact that the mineral owner created a mineral royalty interest.

150 La. R.S. 30:10A(2)(e).
151 “A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another. Unless expressly qualified by the parties, a royalty is a right to share in gross production free of mining or drilling and production costs.” Article 80, Louisiana Mineral Code.
153 If the unleased mineral owner is not entitled to receive production, it is self-evident that such an owner may not convey to a mineral royalty owner greater rights than he himself has. Frost-Johnson Lumber Co. v. Salling’s Heirs, 150 La. 756, 91 So. 207, 245
Given the fact that it is receiving no revenue, does the mineral royalty owner have a claim against the mineral owner who created the mineral royalty? It is not clear under the law, but a case could be made that such a cause of action exists.

By the very nature of the royalty grant, the mineral owner has conferred upon the mineral royalty owner "the right to participate in production," and such right is "free of mining or drilling and production costs."\textsuperscript{154} A mineral royalty is purely passive.\textsuperscript{155}

One must note that this is not an issue of whether a duty to drill or produce in the first instance is owed by the mineral owner to the royalty owner. No such duty is owed.\textsuperscript{156}

Article 109, Louisiana Mineral Code, provides:

The owner of an executive interest is not obligated to grant a mineral lease, but in doing so, he must act in good faith and in the same manner as a reasonably prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest.

This basic right to refuse to lease\textsuperscript{157} has been preserved in Article 109, which further provides that, if the owner of the executive interest does elect to lease, he must act in good faith with respect to the interest of the nonexecutive interest owner.

The purpose of the language of Articles 109 and 110 is to overrule \textit{Gardner v. Boagr.}\textsuperscript{158} and \textit{Uzee v. Bollinger}\textsuperscript{159} insofar as these cases held that the executive interest owner owes no duty whatsoever to the nonexecutive interest owner.

The extent of the duty to act fairly is somewhat cloudy, but it is fair to say that under the Code, the executive interest owner can no longer act in total disregard of the rights of the nonexecutive interest owner.

\textsuperscript{154} Article 80, Louisiana Mineral Code.

\textsuperscript{155} "The owner of a mineral royalty has no executive rights; nor does he have the right to conduct operations to explore for or produce minerals." Article 81, Louisiana Mineral Code.


\textsuperscript{157} See \textit{Willis v. International Oil and Gas Corporation}, cited and discussed at footnotes 50 and 147, \textit{supra}.

\textsuperscript{158} 252 La. 30, 209 So.2d 11 (1968).

\textsuperscript{159} 178 So.2d 508 (La.App. 1st Cir. 1965).
Be that as it may, here, there is production in fact and the royalty owner is being denied its right to participate; it is being denied the essential benefit of its bargain.

The royalty grant, unless qualified, would carry an implied warranty of delivery to the mineral royalty owner, and it should have a basis to complain if it is denied its right to participate in production because of actions or inactions of its grantor.\textsuperscript{160}


A. General.

Obviously, a tremendous imbalance exists between an unleased mineral owner and a major oil company which drills and operates a well on lands within a unit with which the unleased property has been unitized. Clearly, if the operator is entitled to withhold all proceeds of production until "payout" is achieved, the unleased mineral owner is "at the mercy" of the major oil company (with its technical staff of land men, accountants, geologists, engineers and other personnel) in terms of ascertaining precisely when "payout" is achieved.

It is in response to this imbalance that the Louisiana Legislature adopted the Louisiana Well Cost Reporting Statute.\textsuperscript{161}

In summary, the operator is obligated to provide certain specified information to the owner of the unleased interest, such information to be "sworn, detailed and itemized." The report shall be provided to "each owner of an unleased oil and gas interest who has requested such reports in writing, by certified mail addressed to the operator or producer." "The written request shall contain the unleased interest owner's name and address."\textsuperscript{162} This requirement to furnish the name and address of the owner of the unleased interest, would relieve the operator of the burden to determine such information.

The information which must be produced is described in La. R.S. 30:103.1A, as follows:

(1) Within ninety calendar days from completion of the well, an initial report which shall contain the costs of drilling, completing, and equipping the unit well.

\textsuperscript{160} "The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use." Article 2475, Louisiana Revised Civil Code.

\textsuperscript{161} Act No. 387 of the 1950 Louisiana Legislature, now codified as La. R.S. 30:103.1, et seq. The Louisiana Well Cost Reporting Statute was comprehensively amended by Act No. 973 of the 2001 Louisiana Legislature.

\textsuperscript{162} La. R.S. 30:103.1B.
(2) After establishment of production from the unit well, quarterly reports which shall contain the following:

(a) The total amount of oil, gas, or other hydrocarbons produced from the lands during the previous quarter.

(b) The price received from any purchaser of unit production.

(c) Quarterly operating costs and expenses.

(d) Any additional funds expended to enhance or restore the production of the unit well.

"Whenever the operator or producer permits ninety calendar days to elapse from completion of the well and thirty additional calendar days to elapse from date of receipt of written notice by certified mail from the owner or owners of unleased oil and gas interests calling attention to failure to comply with the provisions of R.S. 30:103.1, such operator or producer shall forfeit his right to demand contribution from the owner or owners of the unleased oil and gas interests for the costs of the drilling operations of the well."

As seen, the operator’s duty to provide the specified well cost information to the unleased mineral owner is self-operative and mandatory, and applies regardless of whether the owner has requested the information. If the operator has not complied with its statutory duty, the unleased mineral owner should give written notice (dispatched by certified, not registered, mail) to the operator, “calling attention to [operator’s] failure to comply with the provisions of R.S. 30:103.1,” and only should the operator fail to provide the requisite information within thirty days of receipt, will the operator “forfeit his right to demand contribution from the owner or owners of the unleased oil and gas interests for the costs of the drilling operations of the well.”

To be noted is the fact that, while operator is entitled to recover, out of production, the unleased mineral owner’s allocated share of the “costs of drilling, completing, and equipping the unit well,” and while such information must be reported by the operator in response to a proper request under the Well Cost Reporting Statute, still, if the operator fails

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164 La. R.S. 30:103.1A ("... said operator or producer shall issue...").

165 Among other things, Act No. 973 of the 2001 Louisiana Legislature changed the statutory requirement that the notice and response be dispatched by registered mail to certified mail. Because practicing oil and gas lawyers (including your author) so forcefully advised clients (pre-2001) to respond by registered mail, it is feared that an ancient client will pick up a pre-2001 letter of advice (accurate at the time) and, post-2001, comply to a request for well cost information by dispatching via registered mail (no longer proper). Because the purpose is to create documentary evidence of proof of mailing and receipt, the Legislature would have been better advised to provide for dispatch by either certified or registered mail.
to timely or properly respond, it (only) forfeits its right to “demand contribution from the owner or owners of the unleased oil and gas interests for the costs of the drilling operations of the well.” Seemingly, it does not forfeit its right to recover costs associated with the completing and equipping of the unit well.

It is the experience of your author that, even if they provide a sworn affidavit which “itemizes” costs, operators frequently fail to adequately “detail” such costs. Because of the extreme consequences to the operator for failure to timely or properly respond to a proper request for well costs, care should be taken to ensure that the information provided is sufficiently “detailed.”

The statute further provides that no “operator or producer shall be required under the provisions of this Section to report any information which is not known by such operator or producer at the time of a report. However, the operator or producer shall report the required information to the owner of the unleased interest within thirty days after such information is obtained by the operator or producer, or in the next quarterly report, whichever due date is later.” This limitation on responsibility is very helpful where the producing well was not drilled by the current operator, but, rather, by an ancient owner, many years previous.

B. Applicability to a Tract Which is Leased to a Party Other Than the Unit Operator.

In Genmar Oil & Gas, Inc. v. Storm, a well produced on a “lease basis” for a period of time prior to unitization. At a later date, a unit was formed which included a tract of land leased to Genmar. A cost summary was forwarded by Storm, the operator, to Genmar, who owned a mineral lease in the (later formed) unit. The court stated that the statute “creates a hardship on those persons who drill on leased property that is not within a unit at the time of completion of a well.” The court held that “90 days after unitization is a reasonable time for a person who drills on leased property, that is not within a unit at the time of completion of the well, to submit to the owners of interests, a sworn, detailed, itemized statement, the cost of the drilling.”

The Genmar Court did not give any consideration to the issue of whether the statute should even apply to a mineral lessee as distinguished from an unleased mineral owner. By its terms, the statute seems to only be applicable to the “owner of an unleased oil or gas interest.”

166 La. R.S. 30:103.1B.
Under the Louisiana Constitutions of both 1921 and 1974, a legislative bill submitted for adoption must have a title which indicates its object. The title to the legislation which adopted the Well Cost Reporting Statute provides that it involves “the obligations of operators and producers of Oil and Gas to owners of unleased Oil and Gas interests and for penalty for non-performance of requirements.”

Because no reference is made in the title to a tract of land which is leased to someone other than the operator (as opposed to being purely unleased), a constitutional argument could be made that the statute cannot be applied to a tract subject to a mineral lease held by a party other than the operator. A tract leased to a party other than the operator is clearly not an “unleased” oil and gas interest.

C. Jurisprudence.

In earliest reported decision under the statute, written notice of non-compliance was directed to operator, but did not clearly show that plaintiff was requesting a statement of costs and did not point out that the operator had failed to comply with the statute. The court held that the statute is a penal statute and, thus, it must be strictly construed.

But, “strict construction” in whose favor — the operator or the party desiring well cost information?

The court in Scurlock Oil Company v. Getty Oil Company stated that the Well Cost Reporting Statute, being penal, “should be construed strictly against the party seeking to impose the penalty.” There, the statute was held to not apply where proceeds of unit production were being placed into the registry of the court pending determination of validity of leases.

Rivers v. Sun Oil Company is the only reported decision in which the statute was enforced. A demand letter was sent on September 28, 1978, but there was no response until August 16, 1979. The statute was

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168 See Article III, Section 16, of the 1921 Louisiana Constitution (“Every statute enacted by the Legislature shall embrace but one object, and shall have a title indicative of its object”) and Article III, Section 15, of the 1974 Louisiana Constitution (“Every bill shall contain a brief title indicative of its object”).

169 Act No. 387 of the 1950 Louisiana Legislature.


171 324 So.2d 870. 877 (La.App. 3rd Cir. 1976).

172 See also Albe v. Albe, 97-1042 (La.App. 4th Cir. 11/19/97); 703 So.2d 756 (“Strict construction of a penal statute requires that it be interpreted AGAINST imposition of penalty . . . .”). But see Genmar Oil & Gas, Inc. v. Storm, 297 So.2d 722 (La.App. 4th Cir. 1974) in which the dissenting judge apparently felt that it should be strictly construed against the operator.

173 503 So.2d 1035 (La.App. 2nd Cir.), writ denied 505 So.2d 58 (La. 1987).
applied and judgment was rendered against operator "for any drilling costs retained by" operator.

In *Browning v. Exxon Corporation*, the landowner dispatched notice by *certified*, rather than *registered*, mail. The court held that dispatch in such a manner did not constitute effective notice under the statute. Since a penal statute is strictly construed, the failure of the sender to comply with the literal requirements of the statute does not result in the forfeiture by the operator of the right to enforce contribution or recoupment.176

“It is well settled that if the intent of the legislature is clear from the language it employs, that is the end of the inquiry: a court must give effect to the unambiguously expressed intent of the legislature if its application does not lead to absurd consequences.”177

3.08 Inapplicability of Louisiana Mineral Code Remedies Relative to Double Royalties as Damages, Interest, Attorney’s Fees and Privilege for Unpaid Rent

A. Preface.

The Louisiana Mineral Code provides significant remedies to a lessor whose mineral lessee has not properly paid royalties owed under the mineral lease.178 Because these remedies accrue to the unpaid lessor under a mineral lease, the unleased mineral owner does not have access to such remedies. Any contention to the contrary would be unavailing as the following analysis demonstrates.

B. Double Royalties as Damages.

Clearly the provisions of Articles 137 through 141 of the Louisiana Mineral Code have no application to the unleased mineral owner as they only apply to the lessor-lessee relationship. These articles are prefaced with the predicate that they apply when “a mineral lessor seeks relief for the failure of his lessee to make timely or proper payment of royalties.” Additionally, the term “royalty” is defined in Article 213(5) of the

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174 848 F.Supp. 1241 (M.D. La.), aff’d 43 F.3d 668 (5th Cir. 1994).

175 The facts presented in this case arose before the amendment in 2001 of the Louisiana Well Cost Reporting Statute. That amendment, *inter alia*, changed the requirement that the notice and response be sent by “registered” mail to “certified” mail. See discussion in footnote 165, supra.

176 “Forfeiture is a harsh remedy. Thus, statutory forfeiture must be strictly construed.” *Wise v. J. E. Merit Constructors, Inc.*, 97-0684 (La. 1/21/98); 707 So.2d 1214, 1218.

177 “However, the fact that forfeitures are not favored in our law does not mean that . . . provisions calling for forfeitures are to be ignored.” *Bender v. Louisiana & Arkansas Railway Company*, 255 So.2d 849, 851 (La.App. 2nd Cir. 1972).

178 Articles 137 through 141, Louisiana Mineral Code.
Louisiana Mineral Code as being "used in connection with mineral leases." Finally, these articles appear in Chapter 7 of the Louisiana Mineral Code which regulate the "mineral lease."

Consideration should be given to the possible application of Article 212.21 of the Louisiana Mineral Code which reads, as follows:

If the owner of a mineral production payment or a royalty owner other than a mineral lessor seeks relief for the failure of a mineral lessee to make timely or proper payment of royalties or the production payment, he must give his obligor written notice of such failure as a prerequisite to a judicial demand for damages.

Articles which follow this article set forth a similar procedure and remedy as exist in the lessor-lessee relationship.

Article 212.21 has no application to the unleased mineral owner since such owner does not possess or own a "production payment" and it is not a "royalty owner."

A "production payment" as contemplated by Article 212.21 is an interest created by the owner of a working interest in a mineral lease. This is illustrated by Article 171 of the Louisiana Mineral Code which reads, as follows:

A co-owner of the lessee's interest in a mineral lease may create a dependent right such as an overriding royalty, production payment, net profits interest, or other non-operating interest out of his undivided interest without the consent of his co-owner. He may also transfer all or part of his undivided interest.

"Production payment" was defined in Carr Staley, Inc. v. United States of America,179 as follows:

A fundamental characteristic of a production payment is that it is not burdened with any of the operating expenses of a lease. It is payable only out of production, and there is no personal liability on the part of the owner of the production payment. The production payment owner has no possessory interest, no right to drill, no right to the surface, and no claim to possession. . . . His interest is an incorporeal hereditament in the nature of an overriding royalty creating a present interest in land in the payee.

Clearly, a "production payment" envisions a contractual arrangement created by a working interest owner. Such is clearly not the nature of the interest of an unleased mineral owner.

By analogy, the Louisiana Mineral Code articles have no application to production revenues that are owed to working interest owners.

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179 496 F.2d 1366, 1367 (5th Cir. 1974).
owners. Indeed, in the only decision on point, the Federal District Court for the Eastern District of Louisiana reached this very conclusion:

Pennzoil in its counterclaim has asked for double damages and attorney’s fees on its working and royalty interest claims against LL&E. LL&E in resisting these demands has sought summary judgment in their favor on this issue. Their basis for this request is La. R.S. 31:212.21 et seq. (West Supp. 1994). These statutes indicate that damages and attorney’s fees are applicable only where there is a non-payment of production payments or royalties, but not working interests. Pennzoil concedes that its claim for damages and attorney’s fees fails to attach to its working interest, but reserves its right to establish at trial its entitlement to damages and attorney’s fees relating to its overriding royalty interest. Consequently, LL&E’s motion for summary judgment is granted with respect to Pennzoil’s request for double damages and attorney’s fees relating to non-payment of its working interest and denied with respect to Pennzoil’s submission for double damages and attorney’s fees with respect to non-payment of its royalty interest. Pennzoil may reserve its claim with respect to the overriding royalty interest. (Emphasis added).

C. Interest.

Upon achievement of “payout,” with the result that the unleased mineral owner is, from the date of “payout,” entitled to receive its proportionate share of unit production (subject to the obligation to bear its proportionate part of unit operating costs), the question is presented as to whether the operator is obligated to pay interest on the monies owed to the unleased mineral owner and, if so, from what date is interest to accrue?

The issue was presented in Desormeaux v. Inexco Oil Company. On appeal, the defendant complained about the judgment ordering it to “account for production accrued after suit was filed with interest.” The court stated that “the trial judge was correct in decreeing legal interest was due from the date of judicial demand until paid on all sums due petitioner.”

181 298 So.2d 897 (La.App. 3rd Cir.), writ denied 302 So.2d 37 (La. 1974).
182 The date of “judicial demand” is the date on which a lawsuit is filed. “A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction.” Article 421 of the Louisiana Code of Civil Procedure (last sentence omitted). See also Abraham v. Abraham, 233 La. 808, 98 So.2d 197 (1957).
D. Attorney’s Fees.

The well established rule in Louisiana is that one may not recover attorney’s fees from a defendant unless such fees are authorized by contract or statute. By definition, there is no contract between the unleased mineral owner and the operator and, hence, if the unleased mineral owner is entitled to attorney’s fees, such must be imposed by statute.

Louisiana law has long characterized an award of attorney’s fees as being penal in nature. As such, the court must strictly construe the statute or contract allegedly forming the basis for this penal award, and grant same only in cases which are clear and free from doubt.

Thus, for the same reason that an unleased mineral owner cannot invoke the provisions of the Louisiana Mineral Code relative to double royalties or interest, attorney’s fees are also unavailable to the unleased mineral owner.

E. Privilege for Unpaid Rent.

Article 146 of the Louisiana Mineral Code instructs that the “lessor of a mineral lease has, for the payment of his rent, and other obligations of the lease, a right of pledge on all equipment, machinery, and other property of the lessee on or attached to the property leased.”

Clearly, by its express terms, the right of pledge only avails the “lessor of a mineral lease,” thereby clearly excluding the unleased mineral owner: “Liens and privileges are to be strictly construed against

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183 Chauvin v. La Hitte, 229 La. 94, 85 So.2d 43 (1956) (“On numerous occasions this court has said that ordinarily attorney’s fees are not assessable as an item of damages unless provided for by law or contract.”) and Hernandez v. Harson, 237 La. 389, 111 So.2d 320 (1955) (“It is well recognized in the jurisprudence of this Court that as a general rule attorney’s fees are not allowed except where authorized by statute or contract.”).

184 Langley v. Petro Star Corp. of La., 2001-0198 (La. 6/29/01); 792 So.2d 721, 723 (“An award of attorney fee is a type of penalty imposed not to make the injured party whole, but rather to discourage a particular activity on the part of the opposing party.”).

185 Cracco v. Barras, 520 So.2d 371, 372 (La. 1988); Finley v. Safeco Insurance Company, 511 So.2d 457, 461 (La.App. 3rd Cir. 1987); Moore Romero & Co. v. Nan Corp., 458 So.2d 675, 679 (La.App. 3rd Cir. 1984); Braswell v. Morris, 275 So.2d 189, 194 (La.App. 2nd Cir. 1973); Louisiana Power & Light Company v. Crescent Properties Company, Inc., 273 So.2d 48, 50 (La.App. 4th Cir. 1973); Dubroc v. W. T. Grant, 591 F.2d 299, 300 (5th Cir. 1979) (“Third and most important, we are mindful that in Louisiana the imposition of attorney’s fees is penal in nature, is not favored and should not be imposed except in cases which are clear and free from doubt.”).

186 Article 123, Louisiana Mineral Code, indicates that “[p]ayments to the lessor for the maintenance of a mineral lease without drilling or mining operations or production or for the maintenance of a lease during the presence on the lease or any land unitized therewith of a well capable of production in paying quantities, and royalties paid to the lessor on product are rent.” Thus, even the definition of “rent” is indicative of the fact that the right of pledge is available only to a mineral lessor.
claimants and liberally construed in favor of owners as they are in
derogation of the common rights of owners.187

IV. Rights of (Former) Lessee
Subsequent to Release of Mineral Lease

4.01 Right to Remove Surface Equipment and Subsurface Casing
and Tubing:

A. Time Period Within Which Lessee May Remove its Equipment.

Unless restricted by contract, a lessee may remove its equipment,
both surface and subsurface, during the term of the lease and for a
reasonable time thereafter. In the absence of a clause addressing this
issue, Louisiana law recognizes this right, as noted in Section 4.01D,
infra.

In Standard Oil Co. of Louisiana v. Barlow,188 the lessee drilled a
dry hole. About eight months later, the lessee went onto the property
to remove the pipe which had been left in the ground. The lessor prevented
the lessee’s representatives from removing the equipment. The lessee
enjoined the lessor from interfering with its removal of the equipment.
The court noted that the lease contract “conferred upon the lessee ‘the
right to remove all machinery, fixtures, and improvements placed [on the
leased premises] at any time.’” The court stated, as follows:

The learned trial judge says in his well-considered opinion:

‘It is incredible that any oil company should intend to present to a
lessee $1,400.00 worth of pipe, after it had expended $10,000 or
more in drilling a well into salt water.’

And so it appears to us. No doubt, if the lessor (sic - lessee) defers
the removal of his pipe for so long a time as to authorize the belief
that he has abandoned it, a court would so hold, but counsel for
plaintiff quote “Thornton” and “Archer” to the effect that the lessor
(sic - lessee) is entitled to a reasonable time after the expiration of
his lease within which to take such action [citation omitted], and we
approve that doctrine.

The court in Bickham v. Bussa Oil & Gas Co., Inc.189 stated, as
follows:

There is a vast difference between an abandonment of the lease and
an abandonment of the personal property belonging to the lessee
and their assigns. The lease could, of course, be abandoned and title
to the personal property remain in the lessee.

187 Louisiana Nat'l Bank of Baton Rouge v. Triple R Contractors, Inc., 345 So.2d 7, 10
(La. 1977).
188 141 La. 52, 74 So. 627 (1917).
189 152 So. 393 (La.App. 2nd Cir. 1934).
To constitute an abandonment of personal property so as to give a third party the right to assume title and control of it, two essential elements must exist. There must be an act of abandonment coupled with the intention to abandon.

The court found that three months' delay in removing personal property from the leased premises was not unreasonable, where the lease permitted removal "at any time."

Where the lease grants the lessee the right to remove equipment from the leased premises "at any time," the courts, relying on Standard Oil, have interpreted this to mean "within a reasonable time."

As to what constitutes a "reasonable period of time" within which the lessee might remove its equipment, the determination will vary according to the circumstances. One commentator cites cases from other jurisdictions ranging from eighteen months and less as reasonable and three years and more as unreasonable. "Exactly where, between eighteen months and three years, the dividing line will be found, cannot be stated. It may be that some courts, under some circumstances, will state that three years is reasonable, while other courts, under different circumstances, may say that eighteen months is unreasonable. However, it is probably safer to consider eighteen months as the upper limits of reasonability."

The leading commentators on oil and gas law have noted as follows:

The question of what is a 'reasonable time' is a difficult one. A leading case has declared that a surface owner asserting title to casing and fixtures by reason of the elapsing of a reasonable time after termination of the lease must allege and prove what would be a reasonable time under the circumstances of the case.

That which constitutes a reasonable time is a question of fact or, at least, a mixed question of law and fact and depends upon the circumstances surrounding the case to which the principle is sought to be applied. What would be a reasonable time in one case might be wholly inadequate to shut off the rights of parties in a different case or under different circumstances. [Quote from Meers v. Frick-Reid Supply Corp., 127 S.W. 2d 493 at 497 (Tex. Civ. App. 1939) omitted].


192 Id. at 234.

193 Williams and Meyers, 4 Oil and Gas Law § 674.1.
In order to illustrate the uncertainty as to what is a "reasonable time," the authors cite cases from various jurisdictions holding that periods of time from eight months to nine years was not an unreasonable period of time as a matter of law while noting that other "cases have found lapsation of a reasonable time after 14 1/2 months, several years, four years and 5 1/2 years." These references certainly indicate that each case turns on its own individual facts.

**B. Consequences of Failure to Remove Within Reasonable Time.**

But what happens if the lessee fails to remove its equipment within a reasonable period of time? Although there is no Louisiana case directly on point, a court would follow the prevailing rule as recognized by the Commentators,\(^{194}\) as follows:

If the lessee fails to remove casing, fixtures and other equipment on the premises within a reasonable time, the lessee’s title to such material is ended and title vests in the surface owner.

**C. Regulatory Implications.**

Difficult problems can obviously arise where an operator has completed a well as a dry hole and fails to pay certain subcontractors for services rendered or suppliers for material furnished to the well. While those subcontractors or suppliers may have lien rights under the Oil, Gas and Water Well Lien Statute,\(^{195}\) a problem arises when the operator's equipment has not been removed within a "reasonable period of time" and such equipment would, absent such liens, revert to the lessor. As noted in Section 3.08E hereof, even in the absence of liens in favor of a subcontractor or supplier, the lessor "has, for the payment of his rent, and other obligations of the lease, a right of pledge on all equipment, machinery, and other property of the lessee on or attached to the property leased" under Article 146, Louisiana Mineral Code.

A further complication is that the operator has the duty to plug and abandon the well under Section XIX of Statewide Order No. 29-B promulgated by the Commissioner of Conservation.\(^{196}\) In order to reconcile some of these competing interests, the lien statute now provides that the "lien and privilege provided for in this Subpart shall not attach or apply to any rigs, machinery, appurtenances, appliances, equipment, or other related equipment moved onto the lease for the purpose of plugging and abandoning the well or wells and closing associated pits thereon in compliance with an order issued by the

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\(^{194}\) *Id.*, at § 674.2.

\(^{195}\) La. R.S. 9:4861, *et seq.*

\(^{196}\) See LAC 43:XIX.137.
commissioner of conservation after public hearing in accordance with the provisions of R.S. 30:1 et seq."

D. Codal Treatment of the Issue.

The Louisiana Mineral Code does not contain any provision dealing with the right of a lessee to remove casing or other equipment. Under Article 2, Louisiana Mineral Code, it is stated that, "[i]f this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable."198

Under the Louisiana Revised Civil Code, the matter would be addressed by Article 2695 (discussed in Section 6.04 hereof), if the lease contract is silent on the subject of the right or duty of the lessee to remove equipment after the lease terminates.

V. Obligations of (Former) Lessee Subsequent to Release of Mineral Lease

5.01 Continuing Responsibility for Accrued Obligations:

Clearly, a lessee – while having the lessor’s contractual permission to release the lease, in whole or in part – cannot thereby avoid, or “wash its hands of,” obligations which have already been incurred.199

The notion that an obligor (the lessee) cannot unburden himself of liabilities which have accrued to or in favor of the obligee (the lessor) is not at all radical. It is, in fact, consistent with a similar rule, now expressed in Article 129 of the Mineral Code, that an “assignor or sublessor is no relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing.”200

An issue might arise as to when an obligation is deemed to have “accrued” for purposes of this rule. Your author is aware of litigation wherein it is contended that a plugging and abandonment obligation had “accrued” at the time of an assignment of a producing lease with the contended result that, unless released, the assignor remains liable for such obligation, even though no P&A operations had yet taken place.

An example of when an obligation is deemed to have “accrued,” for regulatory purposes, is set forth in the regulations of the Minerals

197 Originally, L. R.S. 9:4861.2C was enacted by Act No. 1065 of the 1990 Louisiana Legislature. See no v La. R.S. 9:4863D.

198 This article was applied in Taussig v. GoldKing Properties Co., cited at footnote 87, supra, where the court resorted to the Louisiana Revised Civil Code to resolve a problem not addressed in the Louisiana Mineral Code, viz., “the Civil Code[‘s] general treatment of abandonment.”

199 As stated by one distinguished Commentator, “a wise lessor will insist that the surrender clause be modified so as expressly to forbid the avoidance of accrued liability by its exercise.” Merrill, The Oil and Gas Lease – Major Problems, 41 Neb. L.Rev. 488 at 513 (1962).

200 See Kleas v. Mayfield, 404 So.2d 500 (La.App. 3rd Cir. 1981).
Management Service where it is provided that the “obligations to plug and abandon wells, remove platforms and other facilities, and to clear the seafloor of obstructions accrue when a well is drilled or used, a platform or other facility is installed or used, or an obstruction is created.”

The court in *Shanks I* noted that “[e]xecution of the release pursuant to this [“surrender clause”] prospectively relieved the lessee of all obligations as to the land released.” (Emphasis in original).

In *Shanks II*, the plaintiffs continued to posit the notion that a release of the mineral lease would not absolve Carden, the original lessee, of its obligation to pay well costs. As in *Shanks I*, the court rejected this contention, as follows:

As stated in *Shanks [I]*, and as acknowledged by plaintiffs in brief, through Exchange’s exercise of the right to release the interests in the leases at issue, plaintiffs became unleased landowners of a one-half interest in their tracts. This release entitled them to eight-eighths of production, but also obligated them to pay any prospectively accruing well costs that became chargeable from their proportionate share as the well continued to produce. See *Shanks [I]*, 674 So.2d at 478. The position taken by plaintiffs would require post termination enforcement of the released leases as to the former lessee’s (Carden’s) responsibility for drilling costs, but would treat as released or terminated the former lessee’s (Carden’s) contractual right to seven-eighths of production, a proposition previously described by the United States District Court as “Heads-I win-Tails-you lose.” See *Browning v. Exxon Corporation*, 848 F.Supp. 1241, 1247 (U.S.D.C. M.D.La.), aff’d, 43 F.3d 668 (5th Cir.1994). Clearly, this position cannot prevail.

In *Anderson v. Tenneco Oil Company*, it was held that the “surrender clause” in the State mineral lease meant that, “once the lease was terminated, all obligations associated with said lease also terminated.” Consequently, the court held that the lessee was absolved of

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201 MMS NTL No. 93-2N dated October 6, 1993. A comparable rule exists in the policies of the Louisiana Office of Conservation. See Enforcement Policy — Abandoned Wells & Pits, Memorandum by J. Patrick Batchelor, Commissioner of Conservation, dated July 24, 1990, providing that a prior operator may be responsible for remediation after a determination that “the operator of record no longer exists (bankruptcy, etc.).” If the operator of record no longer exists, the Office of Conservation “will pursue a line of succession from [the] current operator of record down to [the] original generator” to determine responsibility for remediation.

202 Cited at footnote 105, supra, at 478.

203 Cited at footnote 107, supra.

204 2001-0295, 2001-0296 (La.App. 4th Cir. 5/22/02); 826 So.2d 1143, writ denied 2002-2035 (La. 11/1/02); 828 So.2d 585.
liability for certain pilings and that the "State assumed full responsibility for the land and anything attached thereto."\(^{205}\)

VI. Rights of Unleased Mineral Owner

6.01 Marketing of Unit Gas Production:

A. Preface.

In the early to mid-1980s, the "hot topic" of the day was gas marketing and the right of a non-operating party to insist that the operator sell its share of gas for it, or, stated in the converse, whether an operator could be forced to share its market. Known as the "take-or-pay" days, this circumstance was driven, in large part, by a surplus of natural gas on the market and the consequential effort by gas purchasers to reduce their contractual obligations to take gas at a time when supply surpassed demand.

The following facts in the lead case of the day set up this situation.

Amoco was the operator of certain compulsory units in the Morganza Fields. Amoco entered into a gas sales contract with Columbia Gas Transmission Corporation. Certain working interest owners elected to take their share of natural gas "in kind" and proceeded to separately market their gas. Other working interest owners, however, did not separately market, but, rather, allowed Amoco to sell their gas under the Columbia contract. The court (to be discussed below) then described the following "factual setting [which] has caused the present dispute," to-wit:

In 1982, a national gas surplus developed, and the price of gas dropped. Columbia advised Amoco that it would no longer accept delivery of the nonmarketing owners' share of the gas produced from the Field. Amoco notified the nonmarketing owners of this fact. Thereafter, Amoco delivered to Columbia and to the purchasers of the other marketing owners all of the production from the units. However, when Columbia terminated its agreement to buy the gas of the nonmarketing owners, they were left without a purchaser in a depressed market.

B. Brief History of Commissioner's Orders Relative to Marketing.

Against this backdrop, Amoco applied to the Commissioner of Conservation "for an order which would allow it to separately market its share of production from the Field and balance (give in kind at a later date) the share of the nonmarketing owners. A public hearing was held and, on March 9, 1984, Commissioner Martin issued Order Nos. 1102 and 1102-A wherein he found:

(i) That there were owners who did not have markets for their gas;

\(^{205}\) Id. at 1149.
(ii) That any owner who did not have a market would not be able to receive his just and equitable share of gas from the unit wells;

(iii) That any owner who was not a signatory to a balancing agreement could elect one of two options —

• To assume full responsibility for marketing his share of production by either separately marketing or be deemed to be forced balanced;

• To authorize the unit operator to sell his share of production for two years from the date of the Order and to account to him for the proceeds received from this separate sale, with the operator to market the gas in good faith on terms that are fair and reasonable and which reflect the market value of the gas at the time of the contract.

On March 12, 1984, Commissioner Martin was replaced by Commissioner Thompson. Commissioner Thompson granted a rehearing of Commissioner Martin’s Order and, on September 9, 1984, issued an Order rescinding Commissioner Martin’s Order effective its date of issuance. Commissioner Thompson also ordered:

(i) The operator to “deliver to each owner, absent an agreement between affected owners to take in kind, his just and equitable share of the proceeds of production after repayment of any costs that may be due”;

(ii) That, in the absence of an agreement to take in kind, Amoco and the non-marketing owners “shall be deemed to have contracted for the operator to market all the common supply of gas”; Amoco shall account to itself and the nonmarketing owners on a pro rata basis for all such sales, and this “election contracted for shall continue until the operator and the non-marketing owners may mutually agree otherwise, or unit depletion.”

Commissioner Thompson clearly embraced the “molecular theory” of ownership, that is, that each mineral owner in a compulsory unit is an owner in indivision of each molecule of gas produced.

C. Judicial Review of Commissioner’s Orders Relative to Marketing.

On Amoco’s application for judicial review of Commissioner Thompson’s Order, the trial court held:

(i) That Commissioner Thompson correctly embraced the “molecular theory”;

(ii) That the Commissioner had jurisdiction over marketing issues in order to provide for the orderly development, production and utilization of the state’s mineral resources and to prevent waste;
(iii) That Commissioner Thompson’s Order did not set forth any basis for accounting to non-marketing owners;

(iv) That Commissioner Thompson’s Order did not provide for an accounting to all marketing, non-operating owners;

(v) That Commissioner Thompson’s Order did not provide for a reasonable election period for non-marketing owners.

The trial court remanded the case to the Commissioner to (a) specify the basis on which Amoco would account to the non-marketing owners; (b) determine if the marketing, non-operating owners had to account to the non-marketing owners on the same basis as Amoco, and (c) provide for a reasonable period of time for the non-marketing owners to make the required election.

D. Back to the Commissioner.

On remand, Commissioner Thompson issued an Order dated March 4, 1986, which provided:

(i) That Amoco was required to account to the non-marketing owners on the basis of “each non-marketing owner(s) tract’s pro rata share of the proceeds realized at the time of sale,” which was defined as “the price a willing buyer would pay a willing seller of gas in an arm’s length transaction under contracts negotiated for the purchase and sale of production of like kind at the time the gas is marketed”;

(ii) That marketing, non-operating owners were required to account to non-marketing owners on the same basis as Amoco; and

(iii) That non-marketing owners

- for past production from existing units (production prior to the effective date of the Commissioner’s Order) were “deemed to have elected to participate in the cost of drilling and completing the well and to have the unit operator and the marketing non-operator(s) . . . market his share of the gas”;

- for future production from existing units were given a period of thirty (30) days (from the effective date of the Order) to elect to take their gas in kind or have Amoco market their share of production; provided that, if a non-marketing owner failed to elect, he “shall be deemed” to have elected “to have his gas marketed exclusively by the unit operator,” and, further provided that, if a non-marketing owner elected to take his gas in kind, the Commission would hold a hearing to determine if he could “do so without waste resulting”; and

- for future production from future units were given thirty (30) days from the date of the Order creating the unit to elect to take in kind or have the unit operator market their share of
production; provided that, if they elected to take in kind, the Commissioner would hold a hearing to determine if the taking in kind would result in waste. The Order further provided that, for future production from existing and future units where the Commissioner prohibited a non-marketing owner from taking in kind, the unit operator would proceed with the marketing of all gas produced not subject to a marketing agreement and account on the basis previously set forth.

The non-marketing owners asked for a clarification as to the basis on which the accountings were to be made. By Supplemental Reasons dated March 13, 1986, the Commissioner stated that, “in most circumstances the accounting due should be based on the proceeds received for the gas.” However, the Commissioner further observed that no owner “should enrich himself vis-a-vis a nonmarketing owner simply by taking the position that his portion of the gas is entitled to a higher price because the market price has fallen” and that no non-marketing owner “should enrich himself vis-a-vis a marketing owner simply by taking the position that his portion of the gas is entitled to a higher than contract price because the market price has risen.”

E. Back to Court.

In Amoco Production Company v. Thompson, the Court of Appeal, First Circuit, held that the Commissioner “committed legal error when he held that he did not have the power to partition co-owned gas produced from a compulsory unit, [and when he held that] the gas produced from the various units had not been partitioned by the orders establishing the compulsory units, and [and when he held that] he did not have the power to order balancing.”

Accordingly, since, in the view of the court, the Commissioner’s Order was based upon erroneous legal principles, it remanded the case to the Commissioner “for reconsideration pursuant to the views expressed herein.” The court specifically stated that “partition in kind is preferred in the Conservation Law.” The court further held that the Commissioner could issue “an appropriate amending order” (which may require a cash accounting) if on remand he finds as fact that the method of partition (taking in kind) authorized in the initial Orders will (a) cause waste; (b) adversely affect the right of a co-owner to take his just and equitable share of production in kind, and/or (c) adversely affect the correlative rights of a co-owner.

F. Back to the Commissioner, Again.

In compliance with the Court of Appeal’s Judgment in the Amoco case, the Commissioner held a hearing on September 26, 1988, to

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206 516 So.2d 376 (La.App. 1st Cir. 1987).
consider evidence relative to the issuance of an Order pertaining to a
determination of 'the manner and procedure for partitioning unit
production from the units in the Morganza Field.'

On December 14, 1988, Commissioner Batchelor issued
Supplement to Office of Conservation Order Nos. 1102, 1102-A, 1102-
The Commissioner found that "the combination of industry custom of
marketing the non-taking owners' shares by the unit operator, the
industry custom of charging expenses and crediting liquids on the
entitlement basis for all owners, including non-taking owners, together
with the sequence of events and marketing facts here present, disclose
that the non-taking owners did not have a viable market during the
critical period from the Amoco notice in late 1983 until the end of 1985,
when the entire market crumbled into a 'spot market' environment." The
Commissioner then ordered, as follows:

(a) A marketing owner who was overproduced on December 31,
1985, must account "proportionately to each [underproduced] non-
taking owner who is not a party to balancing agreement," in cash,
on the basis of the actual price received on a month to month basis.

(b) An owner to whom a cash accounting is due shall notify the
operator, providing evidence of its interest and the period of time
during which such party was not taking his share. "Operator shall
notify each overproduced party immediately."

(c) An owner owing a cash accounting must pay the operator, in
cash, within 60 days of receipt of the aforementioned notice, but the
operator, before making payment, may deduct any unpaid well
costs. Operator must make payment within 30 days of receipt of
funds, together with a detailed statement "showing volumes of unit
production sold, price received, dates, and costs and expenses
deducted."

(d) For the period commencing January 1, 1986, the share of
production allocable to an owner who is not a party to a balancing
agreement "shall be partitioned and accounted for in the following
manner":

(i) "Any underproduced owner shall be entitled to take and
market his share plus an additional amount determined by
multiplying 37.5% of the joint interest share of an
overproduced owner or owners by a fraction, the numerator of
which is the percent interest in the unit of said underproduced
owner and the denominator of which is the total percentage
interest of all underproduced owners then recouping gas. The
first gas recouped shall be attributable to the first gas taken by
an overproduced owner as overproduction."
(ii) If, upon depletion, the owners are not in balance, the overproduced owners must account to the underproduced owners, in cash, as above provided.

G. Subsequent Judicial Review.

Amoco, Chevron and others sought judicial review of this Order. On October 10, 1989, the trial court rendered judgment reversing that portion of the Commissioner’s Order which mandated a cash accounting. In his oral reasons for judgment, the trial judge explained his interpretation of the Court of Appeal’s earlier decision, as follows:

My understanding of the Court of Appeals’ (sic) decision is if you run out of gas and there’s no way to partition in kind because there’s nothing left for the landowners to produce thereafter to make up their proportion, then you divide up the money. But if there is enough gas left in the ground to make up the “in kind” amount of gas which the nonproducing owners have not been able to produce, then they are given the right to produce gas thereafter until they make up the amount of gas to even up with the other owners. That’s my understanding of what the Court of Appeals (sic) meant.

On June 26, 1990, the Court of Appeal, First Circuit, reversed the judgment of the trial court and reinstated the Supplemental Order of the Commissioner of Conservation. In so doing, the Court of Appeal rejected the aforequoted language of the trial court by saying:

If we had intended that well depletion, which is an example of a circumstance that can warrant a cash accounting, were to be the sole criterion for allowance of a cash accounting, it would have been unnecessary for us to remand the case for the inclusion of the Commissioner’s expertise. The amount of gas remaining in a well is a fact which can ordinarily be satisfactorily calculated, and the record will either reveal depletion or it will not. No discretion or balancing of interests is necessary.

H. Litigation Subsequent to Amoco v. Thompson.

The issue was revisited in Hunt Oil Company v. Batchelor. Certain units were revised by the Commissioner of Conservation, as a consequence of which one party (who had owned a greater interest in the original, pre-revision unit) automatically became “overproduced” and another party (who had owned a smaller interest in the original, pre-revision unit) automatically became “underproduced.” This imbalance arose principally from the fact that “production from the units was allocated during the 96-day period between the close of the hearings and

207 566 So.2d 138 (La.App. 1st Cir.), writ denied 571 So.2d 627 (La. 1990).
208 93-3144 (La. 10/17/94); 644 So.2d 191.
the issuance of the revised unit orders . . . to the parties pursuant to the 'old' unit orders."

Because there was no gas balancing agreement between the parties, the "underproduced" parties filed an application with the Commissioner of Conservation for an order requiring the "overproduced" parties to remedy the imbalance through a cash accounting. After a public hearing, the Commissioner denied the applicants' request for a "cash balancing" and ordered "balancing in kind."

The plaintiff sought judicial review of the order which was granted, the trial court reversing the Commissioner's orders based upon its finding that the Commissioner "had failed to properly apply the controlling precepts contained in Amoco Production Company v. Thompson." The Court of Appeal, First Circuit, affirmed the trial court judgment. 2

Writs were granted and the Supreme Court framed the issue before it as "[w]hether, under the particular facts of this case, the plaintiff underproducers are entitled to a cash accounting by the intervenor overproducers to correct the existing production imbalance." 2

The Supreme Court stated:

The proper analysis to be applied in this case is that of Amoco I, i.e., given balancing in kind as the preferred method of correcting an imbalance, does balancing in kind in this particular case either: 1) cause waste; 2) adversely affect the rights of co-owners to take their just and equitable share of production in kind, without unnecessary expense; or 3) adversely affect the correlative rights of co-owners by limiting their liberty to enjoy their rights or causing damage to them.

The court also noted that "'just and equitable share' clearly refers to an owner's right to receive his fair share of the production in its physical form, i.e., the owner's actual share of the oil and/or gas; it does not mean the value of the owner's allocable share of the oil and/or gas produced." The court further observed that "the phrase 'without unnecessary expense,' . . . refers to unnecessary expenses for physical recovery of the gas, i.e., drilling costs, workover costs, etc., not . . . to the lost time value of money."

The Supreme Court reversed and reinstated the orders of the Commissioner which had ordered "balancing in kind."

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209 Id. at 194.
211 Id. at 196.
6.02 Remedy of Unleased Mineral Owner to Receive Share of Unitized Production:

A. Statutory Provisions Relative to Sale of Unitized Production.

As previously noted, after "payout," the unleased mineral owner is entitled to receive its allocated share of unit production, subject to bearing its allocated share of unit operating expenses. But to whom may the unleased mineral owner look to receive its share of unitized production?

La. R.S. 30:10A(3) provides, as follows:

If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, and the unit operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.

The import and effect of this statute was explained by one court, as follows:

La. R.S. 30:10(A)(3) allows the operator of a unit to market the production of the unit even if he has no contractual relationship with the mineral interest owners in the unit. The trade-off for this statutory authorization is that it creates an obligation in which the unit operator is required to pay the parties entitled to market production their pro-rata share of the proceeds of the sale within 180 days of such sale. The statute affords a greater protection to unleased owners than is enjoyed by mineral lessees.

When all mineral interests in the unit are leased, the lessees are merely entitled to a pro rata share of production from the unit. The lessees are owners under La. R.S. 30:3(8), and have the exclusive right to their share of production. This share can be delivered in cash or in kind, but lessees are only entitled to share in the cash proceeds of the sale of production in certain situations. See Hunt Oil Company v. Batchelor, 93-3144 (La. 10/17/94); 644 So.2d 191.

La. R.S. 30:10(A)(3) was enacted for the benefit of both the unit operator and the unleased interest. It protects the unleased interests and avoids undue delays in the sale of production. Leased interests are usually entitled to only an in kind share of production, which they then market. It is then the lessee's duty to distribute the proceeds under its contract with its lessor. When there is no lessee, the mineral interest owner must deal directly with the unit operator.

212 King v. Strohe, 95-656 (La.App. 3rd Cir. 5/8/96); 673 So.2d 1329.
with whom he has no contractual relationship. In order to facilitate the sale of the minerals, La. R.S. 30:10(A)(3) provides a quasi-contractual relationship between the unit operator and the mineral interest owner. See Taylor v. David New Operating Co., Inc., 619 So.2d 1251 (La.App. 3 Cir.), writ denied, 625 So.2d 1046 (La. 1993).

This statute has been interpreted in a series of cases arising out of the same set of facts.

B. Rights Against Purchaser of Production.

In Taylor v. Woodpecker Corp., the Supreme Court stated the issue, as follows:

The issue in this case is whether a party claiming rights as an unleased mineral interest owner in a pooled drilling unit, who has made no arrangements to separately dispose of the share of unit production attributable to his land, has a right and/or cause of action against a purchaser of unit production to recover the value of his share.

The court answered the question in the negative, "expressly hold[ing] that the Taylors' claim against . . . the purchaser of unit production is prohibited by LSA-R.S. 30:10(A)(3)."

The plaintiffs then attempted to "formulate their action as one based on unjust enrichment or for the recovery of a corporeal movable or its value under Civil Code articles 2301 and 2312," both of which were rejected.

As to the claim in unjust enrichment, the court easily disposed of that claim on the basis of established law that an "action for unjust enrichment is allowed only when the plaintiff has no other remedy at law."

Finding that the plaintiff had a remedy against the unit operator, a claim for unjust enrichment against the purchaser of production was not proper.

As to the second alternative claim for the recovery of a corporeal movable, the court rejected such claim in the following words, to-wit:

An action under LSA-C.C. art. 2301 is based on the Taylors' claim that Ashland unduly received their share of unit production. As owners of an unleased interest who have not made arrangements to separately dispose of their share of production, the Taylors' right to take possession of their share of production is limited by the unit operator's right to sell their share. Upon sale by the unit operator, an unleased interest owner's right to recovery is limited to recovery of a pro rata share of the proceeds of the sale from the operator. The

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213 562 So.2d 888 (La. 1990).

Taylors have no action to recover their share of production or the value of their share of production from Ashland, the purchaser, on the basis of articles 2301 and 2312 because of the provisions of LSA-R.S. 30:10(A)(3).

C. Rights Against Unit Operator.

In *Taylor v. Smith*, an operator was sued by unleased mineral owners, seeking to recover their share of unit production. The operator asserted an objection of liberative prescription of one year, contending that the claim of the plaintiffs sounded in tort (conversion) and not in contract. The trial court granted that objection, holding that the plaintiffs’ "cause of action to recover royalty interest wrongfully sold or converted must be filed within one year of the taking or conversion.

On appeal, the Court of Appeal, Third Circuit, reversed, finding the claim of the plaintiffs to be "a cause of action in quasi-contract under LSA-C.C. art. 2292, et seq., insofar as the operator, in selling the owner’s proportionate share of the oil produced, is acting as a negotiorum gestor or manager of the owner’s business in selling the oil produced." As such, it was subject to a liberative prescription of ten (10) years. To the same effect was *Taylor v. David New Operating Company, Inc.*

6.03 Right to Demand Recordable Act of Release:

Under Article 206, et seq., of the Louisiana Mineral Code, if a mineral lease has expired, and the lessee does not give the lessor an instrument of cancellation from the public records, the lessor can recover attorney’s fees.

Under Article 208 of the Louisiana Mineral Code, the existence of a good faith dispute is immaterial, as long as cancellation is directed.

A court has noted that the effect of the release statute (what is now Article 206 of the Mineral Code) is to place on lessees as a class the economic burden of lawsuits that they lose.

Article 207 states that, if such act is not timely provided, the former mineral lessee "... is liable to the person in whose favor the right or the

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215 619 So.2d 881 (La.App. 3rd Cir.), writ denied 625 So.2d 1038 (La. 1993).

216 "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years." Article 3499, Louisiana Revised Civil Code.

217 619 So.2d 1251 (La.App. 3rd Cir.), writ denied 625 So.2d 1046 (La. 1993). *See also Northcott Exploration Company, Inc. v. W. R. Grace and Company, Inc.*, 430 So.2d 1077 (La.App. 3rd Cir. 1983) ("It is our opinion that plaintiff’s action is primarily petitory and does not sound in tort. Thus, the one-year prescription, liberandi causa, which applies to actions resulting from offenses or quasi offenses, LSA-C.C. Article 3536, is patently without application as this is a real action in which plaintiff seeks to have its ownership in certain immovables recognized.").

lease has been extinguished or expired for all damages resulting therefrom and for a reasonable attorney’s fee incurred in bringing suit.” (Emphasis added). Under this statute, the mineral owner may recover only those damages which are proved to be “resulting” from the failure to timely provide the release. This gives rise to the question: In order to recover damages, is it necessary that the landowner prove that it lost “an actual, identifiable opportunity” to lease the land due to the lessee’s failure or refusal to provide a timely release?

The mere existence of an expired mineral lease does not, of itself, preclude a landowner from granting a valid mineral lease over the lands described in the expired, albeit unreleased, mineral lease. On the contrary, even where there exists a valid and subsisting mineral lease of record, this is done quite frequently in the oil and gas industry by the granting of what is euphemistically referred to as a “top lease.”

Therefore, in order to recover damages, it is incumbent upon the former lessor to identify:

1. a particular leasing opportunity;
2. a potential lessee “ready, willing and able” to purchase a lease; and
3. most importantly, evidence that the willing lessee did not pursue the leasing or top-leasing of the lands due to the record existence of the expired mineral lease.

The requirement in Article 207 that any damages must be “resulting” from the failure to timely record a release of the mineral lease is consistent with the general Louisiana law on damages which requires the complaining party to prove an actual economic loss and forbids recovery on the basis of speculation and conjecture. Thus, “a plaintiff may not be compensated for damages which he has not suffered.”

The requirement that damages must be for a definite economic loss and cannot be based on speculation also exists in demands for damages under Article 206, et seq., of the Mineral Code.

The Louisiana Supreme Court addressed this issue in the case of Crane v. Sun Oil Company. In Crane, the court reviewed the former La. R.S. 30:102, the predecessor to Article 206 et seq. The court described the issue before it, as follows:


220 “Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.” Article 1995, Louisiana Revised Civil Code.

221 See Terrell v. Nanda, 33,242 (La.App. 2nd Cir. 5/10/00); 759 So.2d 1026, 1031.


223 The comment to Article 206 states that Articles 206 through 209 are a redraft of La.
The sole issue before us now is whether or not the plaintiff has shown that she was damaged by reason of her inability to enter into another lease because of the non-cancellation of the lease involved in this litigation. In this situation, as in all others involving a claim for damages, the burden is on the plaintiff to establish with reasonable certainty, or by a preponderance of the evidence, that such damage occurred, as well as the extent thereof.

Thus, the mineral owner has the burden of proof to establish with "reasonable certainty, or by a preponderance of the evidence," that it has been damaged and to prove the extent of such damage.

In Crane, the mineral lessee did not timely provide the release. The lessor in Crane attempted to prove his damages through a letter agreement signed with certain parties which described those parties' "wish to acquire" a mineral lease on the lessor's lands upon obtaining the requested release. The Supreme Court, upon review of the entire letter agreement, concluded that it was not a binding agreement of lease and that the lessor had failed to establish any entitlement to damages.

The United States Court of Appeal, Fifth Circuit, analyzed a claim for damages under the statute and noted,\(^\text{224}\) as follows:

Rather, Mills' [the lessor of a lease in which the release had not been timely granted] damages are measured by the difference between his current position and the position he would have occupied had Davis [the lessee in the mineral lease] timely complied with his statutory duty [to timely provide the release].

The requirement that the damages be "certain" and not subject to speculation exists in other Louisiana oil and gas situations. For example, in suits to cancel a mineral lease for failure to comply with the implied obligation to further develop the lease, the court will evaluate the existence (or not) of a bona fide offer to lease the property as an element of the case.\(^\text{225}\) This is, of course, consistent with the general Louisiana rule that damages must be proven with specificity and cannot be based on speculation.\(^\text{226}\)

R.S. 30:101-102 and that no change of substance was intended.

\(^{224}\) Mills v. Davis Oil Company, 11 F.3rd 1298, 1303 (5th Cir. 1994).


\(^{226}\) For other examples of Louisiana oil and gas cases in which the court prohibited the use of speculation and conjecture in awarding damages, see Louisiana Gas & Fuel Company v. White Bros., 157 La. 728, 103 So. 23 (1925); LeBleu v. Vacuum Oil Co., 15 La.App. 639, 132 So. 233 (La.App. 1st Cir. 1931); McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936) (". . . damages were not allowed because of the uncertain and speculative nature of the loss complained of."); Ferguson v. Britt, 191 La. 371, 185 So. 287 (1938) ("We can only rest our judgment * * * on the basis of certainty,
In a seeming departure from the precedents noted above, the court in *Chesapeake Operating, Inc. v. Richardson*[^227] said no:

The standard of proof is preponderance of the evidence. [The landowner] need only prove it more probable than not he would have been able to lease his property had [the lessee] complied with its statutory duty.

A little known, and much ignored, statute is La. R.S. 30:102 which requires "Lessees to notify lessors of the termination of mineral leases". Within ninety days after the expiration of:

1. Production under a mineral lease previously maintained by production and
2. All other rights to maintain that lease,

the lessee or his assigns shall notify the lessor or his representative that the lease has terminated, unless such notification is already provided in the lease.

### 6.04 Right to Require Removal of Surface Equipment or Facilities:

#### A. Preface.

As noted in Section 4.01 hereof, the lessee has the right to remove its surface equipment and subsurface casing or tubing during the lease and for a reasonable time thereafter. If the lessee fails to remove its equipment, the lessor has certain rights to require such removal. While there is direct codal authority which addresses the duty of the rights and obligations of the lessor and lessee relative to these issues, it is instructive to first review the relevant jurisprudence established prior to the comprehensive amendment of the Louisiana law of lease.[^228]

As will be seen, the issue of the ownership of equipment post-lease termination has consequences other than those related to the right or duty to remove such. In some instances, the continuing presence of equipment placed on the (former) leased premises by the lessee gives rise to issue of liability when a third party is injured by such equipment.

#### B. Jurisprudence.

In a non-mineral lease case,[^229] the court said the following relative to the right of the lessor to demand removal of surface structures placed on the property by the former lessee, to-wit:

[^227]: 2004-345 (La.App. 3rd Cir. 10/13/04); 884 So.2d 1263. In the interest of full disclosure, your author represented the operator in this case.

[^228]: As previously stated, the general law of lease would apply to a mineral lease as suppletive law in the absence of authority in the Louisiana Mineral Code. Article 2, Louisiana Mineral Code.

The defendant-appellant, in urging the reversal of the trial court's
decision in the instant case, argues that the lessor is under no duty to
remove the structures and improvements placed on the leased
premises.

Article 2719 and 2720 of the Revised Civil Code of 1870 make it
clear that it is the duty of the lessee to deliver the leased premises
back to the lessor at the end of the term, in the same state in which it
was when the lessee took possession of it. Unless the contract
between the parties provides otherwise, it is the duty of the lessee to
deliver back the premises in the same condition in which they were
received.

The contract of lease between the parties provided that the lessee
would have the exclusive use of the land and the right to erect,
maintain, and repair on the property, and remove therefrom all types
of improvements, including machine shops, buildings, sheds,
pipelines, equipment, and other improvements. The lease further
provided that the lessor waived any legal right that the lessor might
have to retain improvements and additions made by the lessee, even
those made with lime and cement.

The trial court held, in interpretation of this contract, that since the
lessee specifically waived his right to purchase and retain the
improvements and additions made by the lessee, it followed that the
lessor has the right to compel the lessee to remove the
improvements and additions which he placed on the leased property.
If the parties had intended that the lessee should be allowed to leave
or abandon any improvements or additions at the time the term or
extended term of the lease terminated, this could have been
specifically provided in the contract.

The trial judge, in his written reasons for judgment, stated:

'Under the Louisiana Civil Code the lessee must return the thing
leased in the same state in which it was when taken possession of by
him, except, of course, for ordinary wear and tear and unavoidable
accidents. The lessee has the right to remove the improvements that
he has made to the thing let provided he leaves it in the state in
which he received it, but if these additions be made with lime and
cement, the lessor may retain them upon paying a fair price. The
tenant had the right at the expiration of the lease to remove all his
improvements and additions unless the lessor chooses to retain such
as may be made with lime and cement and pay the tenant the value
thereof.'

We think this is a proper statement of the applicable law. The
contract of lease between the parties does not relieve the lessee of
his obligation to return the leased premises in the state in which he
received them. Rather, the lease specifically denies the lessor his right to elect to keep the improvements made with lime and cement. We are of the opinion that it was the intent of the parties, as reflected in the contract made between them, that the lessee would remove all improvements and restore the leased premises at the end of the lease term. For this reason, we find no error in the trial court's ruling which ordered and directed the defendant to remove all improvements placed upon the property and to level the property.

The right of a landowner to demand that a pipeline servitude owner remove the pipeline after the owner had discontinued using the pipeline was considered in Guzzetta v. The Texas Pipe Line Company. 230 There, a landowner sued the defendant to recover the costs of pipeline removal. The court observed that "Louisiana law provides that ownership of an abandoned pipeline reverts to the owner of the land if the owners refuse to remove it within ninety days of demand," citing Article 493 of the Louisiana Revised Civil Code. 231 The court further stated that, "after the failure to remove the pipeline within ninety days of written notice, the ownership of the pipeline would revert to the plaintiffs."

The failure to comply with the requirements of Statewide Order No. 29-B gives rise to liability on the part of the operator to third persons who might be injured on the premises. 232

In Billiot v. State of Louisiana, 233 Forest Oil Corporation was held liable to shrimpers who "struck the submerged casing of a formerly land-based well plugged and abandoned by Forest Oil Corporation in 1957." Subsequent to the well being plugged and abandoned by Forest, the land on which the well was situated came to be part of the Gulf of Mexico by reason of coastal erosion. After plugging and abandoning the well in 1957, Forest had no involvement with the well. The plaintiff's shrimp boat struck the casing in 1990. Claims against the former private landowner (Forest's original lessor) and against the State of Louisiana (the owner of the area where the well was situated, after the coastal erosion) were dismissed, but the demands against Forest were allowed because it had the garde of the casing, which was considered Forest's immovable property.

230 485 So.2d 508 (La. 1986).
231 This article — quoted in footnote 240, infra — was cited as authority for the granting to the "owner of the improvements the right to remove them, but if he does not do so ninety days after written demand, the owner of the land acquires ownership of the improvements. It does not give the new owner of the improvements the right to compel removal by the old owner, nor to recover payment for the costs of removal."
233 94-1365 (La.App. 3rd Cir. 4/12/95); 654 So.2d 753, writ denied 95-1772 (La. 11/13/95); 662 So.2d 467.
In *Melerine v. State of Louisiana*, the Court of Appeal stated that, in its view, *Cockerham* was "incorrect," as a result of which, "it does not provide any guidance to this court on this issue." The court found that the "Amended Statewide Order 29-B, which changed the regulations governing plugging and abandonment of oil wells, is a substantive provision because it unquestionably established new rules, rights, and duties or changed existing ones." In view of that conclusion, the court held that "the Commissioner of Conservation had no authority to apply the amended order retroactively." Based on this conclusion, the court held that "amendments to regulations adopted after work was concluded do not change the obligations of [the mineral lessees]."

In *Anderson v. Tenneco Oil Company*, plaintiffs were injured when their boat struck a series of pilings surrounding a well casing. The well had been drilled on certain waterbottoms owned by the State of Louisiana by an oil company. Plaintiffs sued the oil company and the state for the damages caused by the above allision. The plaintiffs settled with the oil company, but continued to trial with the state. The trial court found that the state owned the pilings and that the state was, therefore, solely responsible. The state appealed.

The oil company drilled the well in 1964 on certain waterbottoms pursuant to an oil and gas lease granted by the state. In the course of preparing to drill the well, the lessee constructed certain wood pilings around it. The operations were not successful and the well was a dry hole. Subsequently, the well was plugged and abandoned with the State Lease terminating. It was subsequently released. Apparently, no question was raised about the pilings which were left by the lessee in place in the waterbottoms.

The state argued that the pilings remained the separate immovable property of the oil company since they did not demand removal of the pilings. The plaintiffs, having already settled with the oil company, argued to the contrary, that since they were not removed, the pilings were now owned by the state. The court, after reviewing this matter, held for the plaintiffs.

The law appears to be clear in the case of constructions made with the landowner’s permission, especially since the rendition of the Louisiana Supreme Court’s decision in *Guzzetta v. Texas Pipe Line*...
Co. That case — dealing with a pipeline that had been left in place by the company — held that the constructions automatically revert to the landowner if the maker fails to remove the construction after he no longer has permission to keep it on the landowner's land. When the landowner, some time after the pipeline servitude had terminated, sought to compel the company to remove it, the company refused on the basis that it now belonged to the landowner.

_Melerine_ and _Anderson_ were abrogated by the Louisiana Supreme Court in _Giorgio v. Alliance Operating Corporation_, a “civil case [which] addresse[d] the legal question of whether the State of Louisiana is liable for an allision that occurred when a fishing boat allided with an unlit, unmarked “orphaned” oilfield production platform in the Breton Sound area of the Gulf of Mexico.”

The Supreme Court found that the Court of Appeal, Fourth Circuit, erred in its interpretation of Article 493 of the Louisiana Revised Civil Code. The court stated, as follows:

> The court of appeal committed legal error in their statutory interpretation by reading out the 90-day written notice requirement.

> The _Melerine_ court did rely on _Guzzetta_ in reaching its conclusion, citing: “Again, after the failure to remove the pipeline within ninety days of written notice, the ownership of the pipeline would revert to the plaintiffs.” _Melerine_, 773 So.2d at 838. (Emphasis in original).

The court erred in failing to emphasize the necessary prerequisite for the legal transfer of ownership — “within ninety days of written notice.” Rather, the court interpreted the holding in _Guzzetta_ to mean “ownership reverts by operation of law to the landowner when the maker of the building fails to remove it after he no longer has permission to keep it on the landowner’s land.” 773 So.2d at 838-39. Therefore, the _Melerine_ court concluded the reversion of ownership is controlled not by the landowner’s issuance of the 90-

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237 Cited at footnote 230, *supra*.

238 The _Anderson_ court also cited the decision in _Melerine_, cited at footnote 234, *supra*.

239 2005-0002 (L.a. 1/19/06); 921 So.2d 58.

240 Buildings, other constructions permanently attached to the ground, and plantings made on the land of another with his consent belong to him who made them. They belong to the owner of the ground when they are made without his consent.

When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within 90 days after written demand, the owner of the land acquires ownership of the improvements and owes nothing to their former owner.
day notice to remove, but by the actions of the maker of the building. *Id.*

Because the lessee in *Melerine* failed to remove the well casing after it no longer had the right to keep the casing on state property, the court found ownership of the casing reverted to the State, even in the absence of a 90-day demand notice. Contrarily, we find the clear and unambiguous language of La. Civ.Code art 493 as written in 1997 specifically required written notice or demand prior to the transfer of ownership. La. Civ.Code art 9.

In the present case, the platform and pilings attached to the land subject to State Lease 8342 were made on the land with the consent of the State. Therefore, upon the termination and release of all rights to the water bottom under State Lease 8342, all the rights in and to the water bottom reverted back to the owner, the State of Louisiana, and according to article 493 as written in 1997, the ownership of the platform and pilings as constructions permanently attached to the ground remained with him who made them, the lessee. The ownership so remains until failure of the lessee to remove the platform and pilings within ninety days of written notice. In the present case, the record contains no evidence of written notice of removal, and accordingly, the ownership of the constructions belongs to him who made them. Ownership has not reverted to the State.

**C. Codal Authority.**

All of the cases cited above were based upon operative facts arising under the provisions of the Civil Code as they existed prior to the comprehensive revision to the law of lease accomplished in 2004.241 Those cases invoked Article 493 of the Louisiana Revised Civil Code dealing with the notion of accession in relation to immovables. This article was amended in 2003242 and, in 2004, the Louisiana Legislature adopted a resolution declaring its intent that the 2003 amendment to Article 493 was intended "to legislatively overrule the decisions in Guzetta, Melerine and Anderson."243

Since those amendments, the matter is addressed by Article 2695, Louisiana Revised Civil Code, which reads, as follows:

In the absence of contrary agreement, upon termination of the lease, the rights and obligations of the parties with regard to attachments, additions, or other improvements made to the leased thing by the lessee are as follows:

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241 Act No. 821 of the 2004 Louisiana Legislature, effective January 1, 2005.
243 House Concurrent Resolution No. 306 of the 2004 Louisiana Legislature.
(1) The lessee may remove all improvements that he made to the leased thing, provided that he restore the thing to its former condition.

(2) If the lessee does not remove the improvements, the lessor may:

(a) Appropriate ownership of the improvements by reimbursing the lessee for their costs or for the enhanced value of the leased thing whichever is less; or

(b) Demand that the lessee remove the improvements within a reasonable time and restore the leased thing to its former condition. If the lessee fails to do so, the lessor may remove the improvements and restore the leased thing to its former condition at the expense of the lessee or appropriate ownership of the improvements without any obligation of reimbursement to the lessee. Appropriation of the improvement by the lessor may only be accomplished by providing additional notice by certified mail to the lessee after expiration of the time given the lessee to remove the improvements.

(c) Until such time as the lessor appropriates the improvement, the improvements shall remain the property of the lessee and the lessee shall be solely responsible for any harm caused by the improvements.

The Revision Comments – 2004 to Article 2695 suggest that the amendment was intended to address the “deficiencies and inequities of the law of accession” as applied in the lease relationship, and that this revised article “attempts to cure these deficiencies by providing a special self-contained rule applicable directly to leases of immovables as well as of movables.” Accordingly, the rule of Article 2695 “applies only if the relationship between the two parties qualifies as a lease.”

VII. Obligations of Unleased Mineral Owner

7.01 Responsibility for Other Unit Costs or Expenses:

A. Unit Operating Expenses.

Once “payout” is achieved, the non-participating owner is entitled to participate in unit production to the extent of its interest. It is also liable for its proportionate part of unit operating expenses which, as in the case of the recoupment of unit well costs, is to be taken out of production except to the extent that the unleased mineral owner elects to be personally responsible to pay such costs “out of pocket.”

B. Plugging and Abandonment Costs.

A well which is drilled and which produces is a well which, at some point in time, will be plugged and abandoned. By obvious definition, income ceases prior to the time which the P&A expenses are incurred.
A lessee is obligated to properly plug and abandon a well which it drills. The cost associated with the plugging and abandonment of wells can be significant, and, by definition, it is typically incurred at the end of the mineral lease, when no further revenue is to be gained from the lease—"outgo" with no corresponding "income."

The cost of plugging and abandoning the well is a cost which arises as a consequence of both the drilling of the well and the production of oil and gas therefrom. As both of these benefit the non-participating owner to the extent that it participates in production, equity dictates that the non-participating owner should also be required to participate in the expense associated with the unavoidable and inevitable plugging and abandonment. However, as noted, these P&A costs are necessarily incurred at a point in time when no revenue is being generated in respect of the interest of the non-participating owner, and there is typically no agreement with such an owner by which it would be obligated to be personally liable for such costs.

A good argument could be made that the operator should be entitled to anticipate such costs and withhold out of production an amount to be held in reserve to discharge the obligation of the non-participating owner to share in these costs. Authority for this proposition might be found in the articles of the Civil Code.

C. Other Expenditures for Which the Unleased Mineral Owner Might be Liable.

If the case can be made that the unleased mineral owner would be responsible for its proportionate share of P&A costs, one might wonder how far such theory could be extended to other liabilities which might visit the operator, in some cases, many years after the final abandonment of the field. For example, what about liability for environmental remediation expenses associated with E&P operations?

As noted previously, an unleased mineral owner could be an "owner" within the meaning of the Conservation Act. As such, there would be statutory and regulatory authority for liability to attach to such an owner.

While clearly beyond the scope of this paper, it is to be noted that Act No. 312 of the 2006 Louisiana Legislature provides that, under certain circumstances, "the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefor, the court shall

244 The Louisiana Office of Conservation has promulgated Statewide Order No. 29-B which dictates the manner in which a well must be plugged and abandoned. See LAC 43:XIX.137.

245 Articles 2054 and 2055, Louisiana Revised Civil Code, set forth on Page 23 hereof.

246 See Section 1.02 hereof, supra.

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order the party or parties who admit responsibility or whom the court
finds legally responsible for the damage to develop a plan or submittal
for the evaluation or remediation to applicable standards of the
contamination that resulted in the environmental damage." 247

Recalling the discussion above, 248 a unit operator has been likened
to an agent pro hoc vice. If that is the proper characterization, the
unleased mineral owner would be likened to a principal in such a
relationship. Under agency law, the "principal is bound to reimburse the
mandatory for the expenses and charges he has incurred and to pay him
the remuneration to which he is entitled." 249 Moreover, the "principal is
bound to compensate the mandatory for loss the mandatory sustains as a
result of the mandate, but not for loss caused by the fault of the
mandatory." 250 If nothing else, this analysis demonstrates why it is
important to understand the nature of the relationship between the
unleased mineral owner and the operator.

While the unleased mineral owner is not generally liable for costs of
unit operations "out of pocket," and although the operator is generally
relegated to enforcing its right of contribution out of production, still, if
the unleased mineral owner were held responsible for its share of
environmental remediation expenses (under the theory that, as an
"owner," it has benefited from the production which gave rise to the
environmental liability, or that, as a "principal," it is "bound to
reimburse" its mandatory), such responsibility should be capped at the
amount of production which the unleased mineral owner has received
from the well giving rise to the environmental damage. The fact that the
unleased mineral owner had already spent all of its proceeds of
production should not mean that the operator (or third party plaintiff) is
attempting to violate the "out of pocket" limitation.

As your author is unaware of any reported case in which this
responsibility has been held to attach to the unleased mineral owner, the
best we can do, at present, is to place this discussion in the "food for
thought" department.

7.02 Risk Fee Statute — La. R.S. 30:10A(2):

Louisiana law affords an operator the option to invite third parties
with which it has no contractual relationship to share in the cost, risk and
expense of drilling a unit well. It is explicitly stated that the statute "shall
not apply to any unleased interest not subject to an oil, gas, and mineral
lease." 251

247 La. R.S. 30:29C(1).
248 See Section 1.02 herein, supra.
249 Article 3012, Louisiana Revised Civil Code.
250 Article 3013, Louisiana Revised Civil Code.
251 La. R.S. 30:10A(1)(e).
Does the statute have any application whatsoever to unleased mineral owners? Despite the fact that, under La. R.S. 30:10A(2)(e), the risk charge may not be imposed as against an unleased mineral owner, note that such statute provides that only the provisions of La. R.S. 30:10A(2)(b) “with respect to a risk charge shall not apply to any unleased interest not subject to an oil, gas, and mineral lease.” It does not say that the entirety of the Risk Fee Statute “shall not apply to any unleased interest not subject to an oil, gas, and mineral lease,” only the cited statutory provisions “with respect to a risk charge.” In other words, while the risk charge may under no circumstances be applied to the unleased owner, it might be that all [see subparagraph III.B.3(b) above] unleased owners must be given the same notice and right to elect to participate as all other owners, leased or unleased. It is unclear as to the consequences of a failure to give notice to “all” unleased owners, or whether a party who received notice has standing to complain about the failure to give notice to another party.

Notwithstanding the inapplicability of the statute to an unleased mineral owner, a circumstance might arise if a tract of land was in fact leased (to someone other than the operator which drills the well), that lessee does not elect to share in the cost, risk and expense of the unit well, the operator proceeds to impose the risk charge with respect to that interest, and the lessee releases the mineral lease. Where does this leave the operator? Can it continue to impose the risk charge to the (now) unleased mineral owner?

In Duplantis v. OSD, L.L.C.,252 the Court of Appeal, First Circuit, affirmed the trial court judgment which held that an operator was entitled to impose the risk fee penalty against the production accruing to an unleased landowner after the mineral lease was cancelled.

7.03 Determination of Title and Ownership:

By definition, the absence of a mineral lease as to a particular unitized tract of land means that the operator—who presumably was not the former lessee—has most likely not incurred the expense of examining title to such tract of land in which the (unleased) mineral owners own the right to explore. There is no express law which requires the operator to examine title; it is done as a matter of commercial prudence in that the operator wants assurance that it will be paying the proper owners. Were the operator to pay the wrong person, it would not

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252 2000-2119 (La.App. 1st Cir. 11/9/01); 817 So.2d 510 (table), writ denied 2002-0608 (La. 4/26/02); 814 So.2d 564 (not designated for publication). A case “not designated for publication” should not be quoted or cited in any respect. Roberts v. Sewage and Water Board, 92-2048 (La. 3/21/94); 634 So.2d 341. See also Rule 2-16.3, Uniform Rules, Courts of Appeal (“Opinions marked ‘Not Designated for Publication’ shall not be cited, quoted, or referred to by any counsel, or in any argument, brief, or other materials presented to any court, except in continuing or related litigation.”).
discharge its legal responsibility to the proper owner, and the operator would be relegated to a suit to recover the wrongful payments. 253

It is not uncommon for an operator to insist that the mineral owner claiming ownership of the oil and gas produced from the unleased tract must demonstrate that he is the proper owner to whom payments are due. The operator, however, must be reasonable and a court might very well conclude that the operator has an obligation to examine title as part of its duty to "afford the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense." 254

If a tract is leased to a party other than the unit operator, and that lessee has not contributed to the cost, risk or expense of the unit well, the proposition is all the stronger that the non-participating lessee of that tract — not the operator — ought to bear the burden and associated expense of examining title to its leased premises.

While no case has considered this issue, it is a natural consequence of the fact that the non-participating owner who sues the operator for its share of unitized production must carry the burden of proof to establish (at least by a preponderance of evidence) that it is the rightful owner of the property at issue. 255

7.04 Right of Operator to Drill on Tract Which is Not Fully Leased:

A. Preface.

Although, properly speaking, it is neither a "right" nor an "obligation" of an unleased mineral owner in a producing unit (as the title of this presentation promised), some consideration should be given to the circumstances under which, contrary to the wishes of an unleased mineral owner, operations may still be conducted on the co-owned land (or with respect to a co-owned mineral servitude) in which such unleased mineral owner has an interest. In a sense, however, it might be viewed as an "obligation" of an unleased mineral owner to suffer or tolerate the circumstance that operations might lawfully be conducted contrary to its wishes. Or, saying it conversely, the unleased mineral owner may have no right to object to the conduct of operations in certain circumstances.

The fact that a given tract of land is not fully leased — that is, that there are undivided interests in the land or under a mineral servitude

253 "A person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it." Article 2299, Louisiana Revised Civil Code.

254 La. R.S. 30:10A(1).

255 This observation is somewhat reminiscent of the famous line uttered by Hedley Lamar (played by Harvey Korman) in the classic movie, Blazing Saddles. This villain planned to buy up land and resell it to the railroad. "Unfortunately," he says, "there is one thing standing between me and that property — the rightful owners."
which are unleased – does not necessarily mean that the operator which
wishes to drill a well on such co-owned tract is unable to do so. Rather,
under certain circumstances, the Louisiana Mineral Code permits the
conduct of operations on the land even if certain owners have failed or
refused to grant their consent and, hence, even against their wishes.

This situation may arise in a variety of contexts, including the
conduct of operations by the following persons, to-wit:

(a) the owner of the entirety of a mineral servitude created by less
than all of the co-owners of land; 256
(b) the lessee under a mineral lease granted by less than all of the
co-owners of land which is not, to any extent, burdened by a
mineral servitude; 257
(c) less than all of the co-owners of a mineral servitude; 258 and
(d) the co-owner of land which is not, to any extent, burdened by a
mineral servitude or a mineral lease. 259

In these scenarios, certain parties who have the right to consent to the
conduct of operations, have – for whatever reason – not done so, and
may even wish that operations not be conducted.

B. Historical Approach to These Issues.

The matters described in (a), (b) and (c), immediately above, are
now regulated by Articles 164, 166 and 175 of the Louisiana Mineral
Code, respectively, discussed below. 260 The right of a co-owner of land to
operate in his own right (without a lease being granted) is not addressed
in the Louisiana Mineral Code.

The full effect and legal import of the aforementioned articles may
be fully appreciated only if they are considered in light of the law of co-
ownership which historically prevailed at the time of the enactment of
the Louisiana Mineral Code in 1975, and prior to the amendments in

Prior to the adoption of the Louisiana Mineral Code (and even after
it, but prior to 1986), a mineral lessee was required to obtain the consent
of all co-owners of a co-owned tract of land or of a co-owned mineral
servitude before it could operate on the property. For example, in Gulf
Refining Co. of Louisiana v. Carroll, 261 the Louisiana Supreme Court

256 This scenario is discussed in Section 7.04F hereof.
257 This scenario is discussed in Section 7.04G hereof.
258 This scenario is discussed in Section 7.04H hereof.
259 This scenario is discussed in Section 7.04I hereof.
260 The scenario described in (d) above is not covered by the Louisiana Mineral Code,
but is discussed in Section 7.04I hereof.
261 145 La. 299, 82 So. 277 (1919).
upheld the right of a recalcitrant co-owner to oppose the conduct of mineral operations by a lessee of a consenting co-owner. The court stated, as follows:

A co-owner may therefore oppose any attempt by his co-owners, or by a lessee of his co-owner, to exploit the common property for oil and gas.

* * *

From this source has been derived the maxims, "In re communi melior est conditio prohibentis" - a maxim meaning, "In common property the condition of the one prohibiting is the better," - and "In re communi neminem dominorum jure facere quicquam, invito altero, posse," a maxim meaning "One coproprietor can exercise no authority over the common property against the will of the other." 22 Cyc. 1102. Or as the same maxim is more tersely expressed "Melior est prohibentis." In other words, either co-owner has a right of veto against the acts of the other. And it is that very legal situation which underlies the principle that no one can be compelled to remain in indivision; that any co-owner may at any time demand a partition.

* * *

By all this is not meant that the lease is not valid as between the lessor and the lessee, nor that one may not validly lease property belonging to another, but what is meant is that such a lease is null in so far as the co-owner is concerned; on the same principle that the lease of the property of another, while valid as between the parties to the lease, is null in so far as this other is concerned. The idea is simply that neither one of the co-owners has any right to any particular part of the common estate, or to do anything upon it, to the exclusion of his co-owner.

The Louisiana Supreme Court cited Gulf in Sun Oil Company v. State Mineral Board for the proposition that, "as between the parties, the lease of mineral interests owned in indivision with others is valid since one may validly lease property belonging to another." The court went on to say, as follows:

However, it is well established in the cited cases and in the many authorities following them, see Amerada Petroleum Corporation v. Reese, 195 La. 359, 196 So. 558 and cases there cited and Amerada Petroleum Corporation v. Murphy, 204 La. 721, 16 So.2d 244, that such a lease is null insofar as the other co-owners are concerned and a co-owner may oppose any attempt by his co-owners, or by a lessee of his co-owners, to exploit the common property for oil and gas,

262 231 La. 689, 92 So.2d 583 (1957).
the theory being that co-owners are owners par mi et par tout, of part and of the whole, and no co-owner has the exclusive right to any determinate part of the common property.

As originally enacted, the Louisiana Mineral Code perpetuated the rule that the consent of all co-owners was necessary before a co-owner (or a lessee of a co-owner) could operate on the co-owned land or co-owned mineral servitude.

Thus, without regard to the fairness, wisdom or propriety of the rule, the rule at the time of the adoption of the Louisiana Mineral Code (and prior to amendments in 1986) was clear: The owner of a minute, undivided interest in a tract of land or mineral servitude could resist oil and gas operations on the co-owned land or co-owned mineral servitude, despite the fact that the balance — or even vast majority — of the remaining co-owners desired that such operations be conducted. Stated differently, any operations on the commonly owned land or co-owned mineral servitude could be opposed by any co-owner who did not consent to such operations, regardless of the minuteness of his interest.

As a practical matter, this circumstance resulted in the non-consenting co-owner enjoying greater "bargaining power" to secure better terms or higher bonus, rental or royalty than his co-owners who had already leased. If better terms were received by that last consenting co-owner, it often led to dissatisfaction among the other co-owners who rightfully felt that they were being penalized for leasing earlier. The "holdout" might be said to be rewarded for his recalcitrance while the cooperating lessors feel that they are penalized by having received lesser terms.263

With this historical perspective in mind, several articles of the Louisiana Mineral Code were amended in 1986.264 As amended at that time, Articles 164, 166 and 175 permitted the conduct of operations with the consent of less than all of the co-owners, provided that at least ninety (90%) per cent of the co-owners had expressed their consent to such operations. The rationale of this amendment was expressed in the Comment to 1986 Amendment under Article 164 of the Louisiana Mineral Code, as follows:

The 1986 amendments to Articles 164, 166, and 175 continue to preserve the principle in the Mineral Code that one co-owner may not conduct operations without the consent of his co-owner, but limit this principle so that a small minority of co-owners cannot

263 One way in which a lessor might protect itself is to utilize a "favored nations" clause whereby the lessee is obligated to extend or pay to those who signed earlier at lesser terms or considerations, the greater or better terms or considerations, if granted by the lessee to a lessor who subsequently signs a mineral lease.

264 Act No. 1047 of the 1986 Louisiana Legislature.
prevent mineral operations desired by other owners of rights in land or mineral rights. (Emphasis added).

The ninety (90%) per cent threshold introduced in 1986 was lowered in 1988 to eighty (80%) per cent, but, significantly, a certain proviso was added at the same time. These amendments — as explained by the Commentary noted above — clearly and unambiguously evince the Legislature's intent to permit the conduct of oil and gas operations with the consent of not less than eighty (80%) per cent of the owners of co-owned land or of a co-owned mineral servitude.

C. Calculation of Requisite Consent.

As will be seen, the three articles mentioned above now permit the conduct of operations if the party desiring to conduct such operations has secured the consent of its co-owners owning at least an undivided eighty (80%) per cent interest (with a proviso, discussed below). Thus, the issue is presented as to whether the requisite threshold can be met by including the interest of the party who desires to conduct operations, or who has granted its consent to a lessee who desires to accumulate other interests in order to meet the threshold. The jurisprudence suggests that it is to be counted.

In Superior Oil Producing Co. v. Leckelt, a mineral lease was granted by the widower and five children. After the lease was granted, the father died, leaving his five children, who thereupon owned the entire property in indivision, one-fifth to each, subject to the existing lease.

During the term of the lease, one of the children, Richard Leckelt, executed a mineral deed to William Campbell conveying "an undivided one-half interest in all the minerals that Richard Leckelt owned in and under the property."

Thereafter, Richard Leckelt executed a mineral deed to P. S. Moore "conveying an undivided one-half interest in all the minerals that he owned in and under the property."

In both instances, the mineral deeds were made subject to the then existing mineral lease. The outstanding mineral lease expired and was released. Thereafter, mineral leases were "acquired . . . from all the co-owners, except Richard Leckelt, and from all the outstanding holders of minerals rights" A well was drilled pursuant to this mineral lease.

After Richard Leckelt challenged the validity of this latter lease, the lessee sued to cancel a mineral lease granted by Richard Leckelt and other documents which were alleged by the plaintiff to "cast a cloud upon plaintiffs' titles."

265 Act No. 647 of the 1988 Louisiana Legislature.
266 See Section .04E hereof, infra.
267 189 La. 972, 181 So. 462 (1938).
Richard Leckelt, a defendant, contended that the lease was invalid because, as a co-owner of the property, his consent was necessary. The court rejected this contention and upheld the lease, saying:

Richard Leckelt consented to the establishment of the servitude and he would be estopped from preventing William Campbell from exercising the servitude under the provisions of article 739 and cannot prevent the exercise of the servitude by objecting on the ground that the consent of the other coproprietors has not been given. Furthermore he would be estopped from preventing William Campbell from exercising the servitude by derogating from or destroying his own grant.

Further support for this conclusion is contained in the Comments to the 1986 Amendment to Article 164 where it is stated, as follows:

These amendments are intended to be read broadly in favor of allowing the majority of owners to develop where they so desire. Thus the [eighty] percent is to be calculated such that it includes the interest of the owner seeking to gain the consent of others. It is intended that “co-owner” mean any owner without the consent of whom development could not be undertaken.

D. Form, Duration and Scope of Consent.

The articles envision the granting of “consent,” not necessarily “leases.” Clearly, the granting of a mineral lease is the granting of consent, but consent may be conferred in other ways, e.g., a letter agreement or other writing which, while not constituting a “lease” (with its concomitant reservation of a “royalty”), nevertheless expresses the consent of the grantor that operations might be conducted on the co-owned tract of land or co-owned mineral servitude.

Another issue is the form, duration and scope of the consent, if granted. Seemingly, the consent can – or arguably should – be in written form and, if in writing, the party proposing to rely on the consent should be as explicit as possible as to what is being authorized and the duration or scope of the consent. If these matters are spelled out with clarity, it is unlikely that disputes might arise.

The Superior case found tacit consent based upon actions taken by the complaining party. While tacit consent is permitted, it forces the question, to what will the co-owner be held to have tacitly consented? The drilling of one well only? What about multiple wells? The re-entry

\[268\] See now Article 715 (“A co-owner who has consented to the establishment of a predial servitude on the entire estate owned in indivision may not prevent its exercise on the ground that the consent of his co-owner has not been obtained.”).

\[269\] There are several articles in the Mineral Code wherein it is required that certain matters be stated “expressly and in writing.” See Articles 54 and 55 (read together), 75, 85, 129 and 145. Notably, Article 164 is not one of them.
of an existing borehole in an attempt to rework or recompleted a previously produced well? The digging of pits? Destruction of trees or crops? Operations under a different or modified mineral lease?

The mere existence of these questions – to which there are no apparent answers – argues forcefully for the obtaining of consent "expressly and in writing."


As will be seen, since 1988, each of Articles 164, 166 and 175 contains a proviso to the effect that, even having obtained the consent of not less than eighty (80%) of the relevant co-owners, operations may be conducted, "provided that he has made every effort to contact such co-owners, and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner," or words to that effect.

In the "food for thought" department, this proviso presents certain issues and gives rise to certain questions and observations, including the following, to-wit:

(a) Is the phrase "every effort" intended to be read literally and absolutely, or as "every reasonable effort"? If a lessee cannot locate an owner by conventional methods, does the lessee have to advertise in a newspaper in an attempt to ascertain his whereabouts? What effort will be deemed to fall short of making "every effort" to contact these parties?

(b) Who is to be contacted? The proviso says "such" co-owners. But what "such" co-owners? Grammatically, the word "such" as used in this sentence seems to refer to those co-owners who have already been signed up. Sensibly, it probably refers to all co-owners with whom the lessee has not contracted.

(c) Does the proviso essentially impose a statutory "favored nations clause"? If separate and distinct co-owners have granted separate and distinct leases, to whose other contract is this to be compared? In this regard, precisely what is meant by "another co-owner"? What if the lessee has "cut" five different deals with five separate and distinct co-owners — different bonus, rental, royalty, primary term, "Pugh clause" term, other specific provision, etc.? What is meant by "substantially" the same basis? Is the implication that, unless the lessee has tried to contact and contract with all co-owners, his operations under lease(s) from, say, ninety-five (95%) per cent of the co-owners can be lawfully opposed by any non-con-

270 "Where the word '[such]' modifies a term, that term is limited to previous identifications of that same term within the statute." Ouachita Parish School Board v. Ouachita Parish Supervisors Association, 362 So.2d 1138 (La.App. 2nd Cir. 1978).
tracting parties? What standard of proof will be required to demonstrate that the lessee has complied with the statute? Should all offers to lease be in writing? How can a title examiner approve title for drilling purposes under these circumstances?

(d) Note that the eighty (80%) per cent rule – in the circumstances when it applies – only addresses the issue of whether operations can be conducted on the ground. The eighty (80%) per cent rule does not say that a co-owner cannot grant a mineral lease unless the consent of not less than eighty (80%) per cent is obtained. For example, Article 166 says that “the lessee . . . may not exercise his rights thereunder without consent of co-owners owning at least an undivided eighty percent interest in the land.” The granting of a mineral lease is one thing; the conduct of operations thereunder is another matter. A mineral lease can be granted, without regard to the level of consent, but the lessee cannot operate on the ground without the requisite level of consent.

(e) A final “what if?” – “What if” the lessee has obtained consent (in the form of a mineral lease) from, say, ninety-five (95%) per cent of the co-owners, and also obtains a mineral lease from the remaining five (5%) per cent of the co-owners, but such latter lease contains a clause or provision which restricts or denies surface operations on the tract? The lessee could have conducted operations from the first mineral lease from ninety-five (95%) per cent of the co-owners, even if it did not obtain the final lease. Is it now worse off having obtained leases from all co-owners?

Suffice it to say that these questions have not arisen in the reported jurisprudence and bear careful consideration by operators and title examiners.

F. Conduct of Operations by Owner of Mineral Servitude Created by Co-owner of Land.

Let’s assume that a tract of land is co-owned by five siblings, one-fifth (1/5) by each. Brother B sells a mineral servitude in and to one-half (1/2) of his interest in the land, or a net one-tenth (1/10) mineral interest in the land, to X.

Minimally, whose additional consent is needed in order for X to be able to exercise his rights under the servitude? In other words, what is the fewest number of other siblings who must give their “consent” in order to permit X to be able to operate? What form should such “consent” take?

Article 164 of the Louisiana Mineral Code reads, as follows:

A co-owner of land may create a mineral servitude out of his undivided interest in the land, and prescription commences from the date of its creation. One who acquires a mineral servitude from a co-
owner of land may not exercise his right without the consent of co-owners owning at least an undivided eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations, except out of his share of production.

Note that the threshold of eighty (80%) per cent to be attained is of "interest in the land;" the article does not speak in terms of "mineral interest." Therefore, the fractional quantification of the mineral interest of X — in this case, ten (10%) per cent — is totally immaterial as it is not an "interest in the land." Or, as stated in Article 169, "[c]o-ownership does not exist between the owner of a mineral right and the owner of the land subject to the right..."

With the foregoing in mind, and ignoring the quantification of X's interest, and looking only at the co-owners of the land, the consent of only three other co-owners — totaling sixty (60%) per cent — is necessary. Unless the servitude grant denied the right to operate on the land, the consent of B is inherent in the grant of the servitude to X, regardless of the numerical interest of the minerals so conveyed. Thus, the consent of other co-owners totaling sixty (60%) per cent, coupled with B's interest, would equal eighty (80%) per cent, and X would be allowed to operate on the land.


Article 166, Louisiana Mineral Code, states, as follows:

A co-owner of land may grant a valid mineral lease as to his undivided interest in the land but the lessee may not exercise his rights thereunder without consent of co-owners owning at least an undivided eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations or other costs, except out of his share of production.

The rationale behind Article 166 is that, since no single co-owner may appropriate the land to his own use to the exclusion of other co-owners,271 such a co-owner cannot grant to a third person greater rights

271 Juneau v. Laborde, 228 La. 410, 82 So.2d 693 (1955); Moreira v. Schwan, 113 La. 643, 37 So. 542 (1904); McVay v. McVay, 318 So.2d 660 (La.App. 3rd Cir. 1975); Spencer v. Spencer, 273 So.2d 605 (La.App. 4th Cir. 1973); Coon v. Miller, 175 So.2d 145 - 145 -

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than he himself has. A mineral lease granted by a co-owner is not invalid for lack of the consent of all other co-owners, but the lessee under such a lease cannot operate on the surface of the co-owned land without obtaining the "consent of co-owners owning at least an undivided eighty percent interest in the land."

In an instance when the consent of another co-owner is required in order to operate on the land, the first co-owner may still grant a mineral lease. Here it is necessary to distinguish between the granting of a mineral lease – which a co-owner may lawfully do without the consent of anyone else – and the exercise of rights or the conduct of operations under such a lease – which cannot be done without the requisite level of consent. The existence of a co-ownership situation does not prevent a single co-owner from granting a mineral lease and, if the co-owner does so, it is a perfectly valid lease. However, the lessee may not operate under that lease without the requisite consent. So, what is precluded in the absence of the requisite consent is the right to conduct operations under the lease, not the granting of the lease itself.


Article 175, Louisiana Mineral Code, states, as follows:

A co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of co-owners owning at least an undivided eighty percent interest in the servitude, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. . . . A co-owner of the servitude who does not consent to such operations has no liability for the costs of development and operations except out of his share of production.

The analysis and comments set forth above relative to the workings of Article 166 of the Louisiana Mineral Code are pertinent here. However, the requirement that the person desiring to operate must secure the "consent of co-owners owning at least an undivided eighty percent interest in the servitude," has reference to obtaining such level of consent from the owners "of" the servitude, regardless of the quantification of the co-owned mineral servitude.

385 (La.App. 2d Cir. 1965), writ den’d 176 So.2d 145 (1965).

272 Frost-Johnson Lumber Co. v. Salling’s Heirs, 150 La. 756, 91 So. 207, 245 (1922) ("... no one can convey to another any greater right than he himself has."); Herlitz Construction Company, Inc. v. Matherne, 476 So.2d 1037 (La.App. 3rd Cir. 1985) ("An assignee acquires no greater rights than its assignor.").

273 What is the worth of such a lease? The lessee – while not able to operate without the requisite consent – would nevertheless benefit if the leased premises were included within a compulsory unit, and the undivided interest covered by the lease would result in the right to participate in unit production.
I. Conduct of Operations by Co-owner of Land.

There is no article in the Louisiana Mineral Code addressing the level of consent needed in order for a co-owner of land - where neither a mineral servitude nor mineral lease is involved - to drill a well on the co-owned land. Because there is no "mineral right" involved - the minerals are inherent in the ownership under Article 6 of the Louisiana Mineral Code - the matter is not really regulated by such Code, but, rather, by the provisions of the Louisiana Revised Civil Code relative to co-ownership.

As demonstrated by Gulf Refining Co. of Louisiana v. Carroll, since a co-owner may not change the destination of the co-owned land without the consent of all co-owners, a co-owner may not conduct operations on the land if any other co-owner opposes such. Since a co-owner cannot do so, neither can its lessee.

J. Responsibility for Costs Allocable to Interest of Non-consenting Owner.

Consistent with the general rule applicable to a party who does not consent to the conduct of operations, each of the articles cited herein provides that a "co-owner . . . who does not consent to such operations has no liability for the costs of development and operations except out of his share of production."

K. Right of Operator to Operate Pursuant to Order of Commissioner.

In closing on this issue, mention should be made of the possibility that a party designated as a unit operator by the Commissioner of Conservation might, by virtue of that authority alone, have the right to conduct unit operations on a tract of land, without regard to its status as being leased or not.

The Conservation Act actually contains a provision which would support an argument that the unit operator has the right - perhaps the duty - to drill at a location designated by the Commissioner, and that statute is La. R.S. 30:9(C), which reads, as follows:

274 "Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion or associate with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership."

275 Article 801, Louisiana Revised Civil Code, instructs that "[t]he use and management of the thing held in indivision is determined by agreement of all the co-owners."

276 Cited at footnote 261, supra.

277 Herlitz Construction Company, Inc. v. Matherne, 476 So.2d 1037 (La.App. 3rd Cir. 1985) ("An assignee acquires no greater rights than its assignor.").
Each well permitted to be drilled upon a drilling unit hereafter established shall be drilled at the location designated by the commissioner of conservation, after public hearing, in the order creating the unit. The commissioner of conservation shall consider all available geological and engineering evidence and shall provide for the unit well to be located at the optimum position in the drilling unit for the most efficient and economic drainage of such unit with such exceptions as may be reasonably necessary where topographical conditions exist that would make such a location of the unit well unduly burdensome or where the designated unit well was drilled or commenced prior to the creation of the drilling unit; provided, however, the commissioner of conservation shall fix the well location for each drilling unit so that the producer thereof shall be allowed to produce no more than his just and equitable share of the oil and gas in the pool, as this share is set forth in this Section.

Unless a timely judicial review to a Commissioner’s Order is brought in accordance with law, the order would be unassailable, and any attack would constitute an impermissible “collateral attack” on an order of the Commissioner.

In Nunez v. Wainoco Oil & Gas Company, plaintiff landowner who declined to lease his land for purposes of oil exploration sued defendants for trespassing on his property based on the intrusion of a well bore at a point two miles beneath the surface of his property. The property in question was included in a drilling unit created by the Commissioner of Conservation.

Damages sought for this subsurface trespass (an invasion by any person into the subsurface of another's land) were in the amount of the value of the oil produced from plaintiff’s property. However, plaintiff had participated in a unit created by the Commissioner of Conservation and had already received his proportionate share of production from the unit.

Based on Civil Code Article 490 and Mineral Code Article 6, the Louisiana Supreme Court determined that plaintiff-landowner owned his subsurface, but with limitations. He did not own the liquid or gaseous minerals in the subsurface, and the exclusive right to explore for these minerals was still subject to statutory restrictions.

Because the Commissioner of Conservation’s power to establish drilling units is a constitutional exercise of the State’s police power, the court found that established codal principles of private ownership need

278 La. R.S. 30:12.
279 See O'Meara v. Union Oil Co. of California, 212 La. 745, 33 So.2d 506 (1947); Trahan v. The Superior Oil Company, 700 F.2d 1004 (5th Cir. 1983).
280 488 So.2d 955 (La. 1986).
not necessarily be applied in the context of a unit created by the Louisiana Office of Conservation. The court, in fact, found unitization to be a necessary and legal infringement on the usual rights of ownership.

Consequently, the court held that Title 30 and 31 supersede, at least in part, the general concepts of ownership in Civil Code Article 490 relating to subsurface ownership. This meant that plaintiff was a participant in an authorized unit created by the Commissioner of Conservation and his individual subsurface ownership rights could not interfere with the common interests of other unit participants. Thus, there was no actionable trespass in this instance.

But, relevant to the issue under consideration, the court added a very important limiting observation, when it stated that, "[i]n this case, we do not have a well located on the surface of a tract without the owner's consent." Notwithstanding this language, your author has heard the proposition expressed that Nunez embodies some sort of license to a unit operator, without regard to the status of the underlying leasehold.

In a comparison case, the plaintiff sued the operator for damages because the operator located on plaintiff's land a "mud pit, ring levee, water pit, water well, machinery, pipe, board road, derrick and other equipment necessary for drilling" the unit well on a tract of land adjacent to the plaintiff's land.

Noting that the defendant-operator possessed a drilling permit issued by the Commissioner of Conservation pursuant to La. R.S. 30:204F, and that such permit "allows the permit holder to enter the property for drilling purposes without the owner's consent," the court concluded that Vainoco was entitled to conduct drilling operations on plaintiff's land. The court stated that:

Plaintiff's exclusive authority over his land has been superseded in part by Louisiana's Conservation Law which establishes reasonable statutory restrictions on plaintiff's rights in his property as required by La. Const Art. I, § 4.

VIII. Conclusion

Your author is confident that, in any oil and gas practice, on more than one occasion, a client has asked about its rights or obligations relative to an unleased mineral owner. "Can I charge the unleased mineral owner for a share of costs of examining title to unitized lands?" "Can I withhold monies in anticipation of P&A costs which will be incurred after production ceases?" "Do I have to provide the owner with information relative to my plans?"

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282 See now, La. R.S. 30:28F.
As yet another illustration of the “black hole” that is the legal relationship between these parties outside of a contractual relationship, there are not always clear and precise answers, much less guidelines. In such cases, your author would suggest that the appropriate question might be, “What will happen to me if I don’t” do this or that?

Most landowners are familiar with the “rules of the game” when a mineral lease contract exists. If nothing else, the written document is available to answer questions which might arise within the context of the lessor-lessee relationship.

However, as illustrated in a variety of contexts, when the lessee releases the lease – when the lessee “walks away” – it is less clear as to what are the rights and obligations of the now unleased landowner or mineral owner.