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Answers to Questions Concerning Statutory Obligations for Reporting Requirements (and Penalties) Owed to Unleased Mineral Interest Owners, Lessors, and Overriding Royalty Interest Owners

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INTRODUCTION

Royalty payments play a significant—if not central—role in oil and gas exploration and production. The nature of the relationship between the operator/mineral lessee and the parties owing a royalty payment, either by contract or law, dictates the obligations and potential penalties faced by the operator/mineral lessee. This Article recognizes that the operator/mineral lessee assumes different statutory obligations depending on its relationship with the mineral/royalty owner—in particular, whether the obligee (here, the mineral interest owner) is unleased, leased, or holds an overriding royalty interest. This Article encompasses three focus areas:

1. Statutory requirements for an unleased mineral interest owner, lessor, and overriding royalty interest owner that trigger a timely response from their respective operator/mineral lessee;
2. Jurisprudentially created expectations for adequate responses from the operator/mineral lessee to the notice issued by an unleased landowner, lessor, and overriding royalty interest owner; and
3. Fact scenarios applying these statutes and jurisprudential rules.

I. UNLEASED MINERAL INTEREST OWNERS: THE DELAYS AND REMEDIES AVAILABLE

Operators and mineral lessees owe their respective mineral interest owners certain statutory obligations that, if violated, could subject operators and mineral lessees to significant penalties. To avoid or minimize the penalties, operators and mineral lessees must comply with particular deadlines and provide specific information in response to notices and requests depending upon the nature of their relationship with their mineral and royalty interest owners.

When the operator does not have a valid oil, gas, or mineral lease with its mineral interest owner, Louisiana Revised Statutes section 30:103.1 ("Section 103.1") governs the relationship between the operator and mineral interest owner pertaining to the reporting requirements. Courts have painstakingly evaluated the terms of Section 103.1 to provide both the operator and the unleased mineral interest owner clarity and consistency regarding legal expectations and penalties derived from this Section.

A. Why Must the Operator Provide Information Under Section 103.1?

Before addressing the "who," "when," "what," and "how" of Section 103.1, the "why" should first be understood. The Louisiana Legislature recognized that an operator needed an incentive—beyond good stewardship—to notify the unleased mineral interest owner of the operator's activities. Consequently, the legislature enacted Louisiana Revised Statutes section 30:103.2 ("Section 103.2"). Together, Sections 103.1 and 103.2 "provide a procedure by which the owner of unleased lands in a drilling or production unit could have the amount of drilling costs fixed, so that the remaining proceeds of the sale of production could be released and he could obtain his proportionate part of those proceeds without too great a delay."[1] Both parties benefit from these statutes as the unleased mineral interest owner receives his share of the royalties and required report, and the operator recoups well costs from the unleased mineral interest owner's share of the royalties.

Pursuant to Section 103.2, an "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" when the operator fails to comply with Section 103.1.[2] Jurisprudence has attempted to clarify the scope of costs contemplated under the statute. In *XXI Oil & Gas*, the operator tried to limit the costs forfeited to "only to those costs incurred *prior* to the establishment of production to drill and

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1. Scurlock Oil Co. v. Getty Oil Co., 324 So. 2d 870, 876 (La. Ct. App. 1975).

2. LA. REV. STAT. § 30:103.2 (2021) (emphasis added).

complete the well."[3] The Louisiana Third Circuit Court of Appeal rejected this position based on its reading of Section 103.2 *in pari materia* with Section 103.1. The court held that "it is obvious that costs of drilling operations includes [sic] the costs of 'drilling, completing, and equipping the unit well.'"[4] Further, "'drilling operations' contemplate both drilling and operational aspects of taking and producing oil and gas from land."[5] Thus, "'costs of drilling operations' includes both pre-production and post-production costs."[6]

In *Dow*, the United States District Court for the Western District of Louisiana questioned the credibility of this conclusion.[7] The operator argued that the court in *XXI Oil & Gas* "mis-used the term of art 'post-production costs' because the court was actually discussing drilling and operating costs, which are production costs."[8] The court agreed post-production costs "are those costs and expenses incurred after the production has been discovered and delivered to the surface of the earth," such as "those related to taxes, transportation, processing, dehydration, treating, compression, and gathering."[9] The unleased mineral interest owner responded that "post-production costs are included in the forfeiture provision if operators can deduct for them."[10] The unleased mineral interest owner relied on *Johnson*'s holding that "operators *cannot* charge unleased mineral interest owners post-production costs."[11] The Louisiana Western District agreed that "it cannot decide whether post-production costs are included in the statutory forfeiture scheme before it decides if the operator can charge those costs to the unleased party in the first place."[12] As a result, the court deferred ruling on the matter until the parties had the opportunity to adequately brief that specific issue.[13]

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3. XXI Oil & Gas, LLC v. Hilcorp Energy Co., 206 So. 3d 885, 889 (La. Ct. App. 2016) (emphasis added).
4. *Id.* at 890 (citing LA. REV. STAT. § 30:103.1(A)(1)).
5. *Id.*
6. *Id.*
7. *See* Dow Constr., LLC v. BPX Operating Co., No. 20-9, 2020 WL 6928320, at *3 (W.D. La. Nov. 24, 2020).
8. *Id.*
9. *Id.* at *2 (citing J. Fleet Oil & Gas Corp., L.L.C. v. Chesapeake La., L.P., No. 15-2461, 2018 WL 1463529, at *6 (W.D. La. Mar. 22, 2018)).
10. *Id.* at *3.
11. *Id.* (emphasis added) (citing Johnson v. Chesapeake La., LP, No. 16-1543, 2019 WL 1301985, at *5 (W.D. La. Mar. 21, 2019)).
12. *Id.*
13. *Id.* At the time this Article was published, the briefing was not available.

Regardless, the operator does not necessarily forfeit *all* pre- and post-production costs by failing to comply with Section 103.1. In *Brannon Properties*, the court ruled that the operator's initial report did *not* contain the degree of detail required by Section 103.1; however, the operator's subsequent quarterly reports did.[14] The court then limited the operator's penalties for inadequate reporting to the forfeiture of "the costs of the drilling operations of [the operator's] well *for the period covered by the deficient report*."[15] The Louisiana Third Circuit later adopted this application and succinctly held that "[o]nce the operator or producer complies with the statutory requirement, it would no longer be penalized and could start deducting for the costs."[16]

Based on the pertinent jurisprudence, at the very least, an operator may forfeit production costs until it provides the unleased mineral interest owner an adequate report. At the time of this Article's publication, the possibility of forfeiting post-production costs remains unsettled.

B. Who Must an Operator Treat as an Unleased Mineral Interest Owner Under Section 103.1?

As contemplated under Section 103.1, only a party who qualifies as an unleased mineral interest owner has the right to demand the royalties and reporting outlined in the statute. Fortunately, the United States Court of Appeals for the Fifth Circuit resolved any purported ambiguity regarding the scope of this term by limiting it to circumstances where the operator does not have a lease from the specific mineral interest owner.

In *T D X Energy*, the Commissioner of Conservation created the unit well at issue located in DeSoto Parish.[17] At the time the unit well was spud, a portion of the unit's acreage had not yet been leased.[18] Before drilling on the unit well was completed, the landowner leased the rights of the previously unleased acreage to a third party; however, the lease was not recorded until *after* drilling had ended.[19] Thus, while the acreage was ultimately leased before the unit well's completion, the operator was

14. Brannon Props., LLC v. Chesapeake Operating, Inc., 514 F. App'x 459, 461 (5th Cir. 2013).

15. *Id.* at 462 (emphasis added).

16. XXI Oil & Gas, LLC v. Hilcorp Energy Co., 206 So. 3d 885, 890 (La. Ct. App. 2016).

17. T D X Energy, L.L.C. v. Chesapeake Operating, Inc., 857 F.3d 253, 258 (5th Cir. 2017).

18. *Id.*

19. *Id.*

unaware that the mineral interests had been leased until the lease was recorded after completion of the drilling operations.[20]

TDX Energy, L.L.C. ("TDX") acquired the lease to this acreage from the original lessee.[21] TDX then notified the operator of its interest in the unit well and requested an accounting under Section 103.1.[22] The operator failed to respond within the statutory delay period and also failed to provide the necessary information.[23] To justify these failures, the operator argued that Section 103.1 did not entitle TDX to receive the requested reports, as TDX was not an *unleased* mineral interest owner.[24] In considering the operator's and TDX's competing interpretations of Section 103.1, and particularly analyzing the language in Part A, the United States Fifth Circuit held as follows:

> The most natural reading of sections 103.1 and 103.2 is that operators forfeit their right to contribution when they fail to send timely reports to lessees with oil and gas interests in lands upon which *the operator has no lease*, and that interpretation is most consistent with the statute's context and purpose.[25]

Thus, the operator owed TDX the reporting required by Section 103.1.[26]

The United States Fifth Circuit considered a number of statutes and cases when reaching its holding, even addressing the operator's attempt at invoking equity principles.[27] In the end, the court provided a clear expectation of the scope of parties with the right to *receive* reports under Section 103.1: all mineral interest owners in the unit with whom the

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20. *See id.* It is unclear if the outcome would have been different if the operator knew of the lease or if the lease was recorded during drilling, but the lessee was not the operator's lessee.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 259.

25. *Id.* at 264 (second emphasis added).

26. *See id.*

27. *See id.* at 267. The court recognized that the operator made valid equity arguments regarding a potential loophole exploited by TDX. *See id.* Specifically, TDX had the benefit of not participating in the well costs but reaping the benefits of the unit well's production. *Id.* In response, the court held that "[w]hen the text of the law is clear, however, the court may not resort to equity." *Id.* (citing LA. CIV. CODE art. 4 (2021); Brannon Props., LLC v. Chesapeake Operating, Inc., 514 F. App'x 459, 460–62 (5th Cir. 2013)). "In this case, the text limited the time to provide notice to before the well was complete." *Id.*

operator itself does not have an oil, gas, or mineral lease may rightfully demand reporting under Section 103.1.

C. When Must the Operator Provide Information Under Section 103.1?

Courts seem to repeatedly tout strict construction in their interpretations of Section 103.1 but somehow end up with drastically different results in its application. In the name of "strict construction," some courts ironically have chosen to read an implicit requirement into Section 103.1. Part A of Section 103.1 establishes the operator's reporting deadlines to provide "a sworn, detailed, itemized statement" as follows: "[w]ithin ninety calendar days from completion of the well, an initial report which shall contain the costs of drilling, completing, and equipping the unit well" and "[a]fter establishment of production from the unit well, quarterly reports."[28] Based on a plain reading of the quoted language above, the operator has an affirmative duty to provide periodic reports, namely an initial report followed by quarterly reports that are triggered by the completion of the well. Part B of Section 103.1 sets out additional deadlines for the operator to provide reports, which are triggered by the operator obtaining previously unknown information: "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*."[29] Read together, the express language states that the operator must provide an initial report to the unleased mineral interest owners within 90 days of completing the well with a continuing obligation to supplement reports quarterly.

Despite the perceived clear delays, courts do not assess penalties until the unleased mineral interest owner affirmatively triggers these reporting obligations as outlined in Part C of Section 103.1:

> C. Reports shall be sent by certified mail to each owner of an unleased oil or 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. Initial reports shall be sent no later than ninety calendar days after the completion of the well. The operator or producer shall begin sending quarterly reports within ninety calendar days after receiving the written request, whichever is later, and shall continue sending quarterly reports until cessation

28. LA. REV. STAT. § 30:103.1 (2021).
29. *Id.* (emphasis added).

of production.[30]

Thus, while Part A states that an "operator or producer *shall* issue the following reports"[31] based on when it completes the well, and Part B states that an "operator or producer *shall* report the required information"[32] based on when they obtain specific information, courts do not penalize operators for a failure to comply with these obligations. Instead, courts allow the operator to wait until information is formally requested as prescribed by Part C before penalties are considered or implemented against the non-responsive operator.

In an unreported 2013 decision affirmed by the United States Fifth Circuit, the Louisiana Western District set out the sequence of requests and responses it believed the Louisiana Legislature intended with regard to Section 103.1.[33] First, the initial letter from the unleased mineral interest owner will not be considered a notification of a "failure to comply with" Section 103.1.[34] The Fifth Circuit explained that "[a]n operator [sic] or producer's duty under Section 30:103.1 is not triggered *until* a written request is sent by certified mail."[35] Second, if the operator does not meet its reporting requirements in response to the initial letter, "Section 103.2 allows the owner to then serve the operator with *what is essentially a notice of default*," in the form of a *second* letter.[36] This second letter serves as the requisite notification to the operator that the operator failed to comply with Section 103.1.[37] Third, the operator then has "a 30-day cure opportunity, before the imposition of a harsh financial penalty on the operator (and the grant of an unearned windfall to the owner)."[38] Under the decisions from the *Adams* courts, the operator has no affirmative duty to provide the unleased mineral interest owner *any* information—without the possibility of penalty—until the unleased mineral interest owner expressly requests specific information pursuant to Section 103.1(A) *two separate times*.

After receipt of the second letter, the operator must timely respond in order to avoid penalties. While it is not necessarily evident from the

30. *Id.* (emphasis added).
31. *Id.* (emphasis added).
32. *Id.* (emphasis added).
33. *See* Adams v. Chesapeake Operating, Inc., No. 11-cv-1504, 2013 WL 1193716, at *5 (W.D. La. Mar. 21, 2013), *aff'd*, 561 F. App'x 322 (5th Cir. 2014).
34. *Adams*, 561 F. App'x at 325.
35. *Id.* (emphasis added).
36. *Adams*, 2013 WL 1193716, at *5 (emphasis added).
37. *See id.*
38. *Id.*

statute, the *Adams* district court held that the operator has (1) 90 days from completion of the well *and* (2) 30 additional calendar days from the date of the second letter to furnish the requisite reports.[39] The Louisiana Western District maintained this position in three subsequent cases.[40] Thus, despite the explicit language of Parts A and B, the operator does not have an affirmative obligation to send the unleased mineral interest owner reports until that owner makes a formal request. Penalties will not be levied until 30 days after said owner makes a *second* formal request that subsequently goes unanswered or improperly answered.

While many courts espouse strict construction of Section 103.1, the "default period" appears to be a judicial construction, as neither Section 103.1 nor Section 103.2 calls for two letters from the unleased mineral interest owner to warrant the penalties under Section 103.2. The plain language of Section 103.1 establishes that the operator owes the unleased mineral interest owner specific information within 30 days of the request; however, the operator does not suffer a *consequence* from his failure to provide an adequate response until after the unleased mineral interest owner sends a second letter. As a result, for practical purposes an unleased mineral interest owner should be prepared to send two separate letters before expecting benefits from Section 103.2. The operator, on the other hand, can reasonably expect that a court will require two letters from its unleased mineral interest owner before the operator forfeits well costs. However, as this is a judicial construction, it would be prudent for the operator to make its best efforts to respond to the first request within the 30-day statutory period.

D. What Must the Unleased Mineral Interest Owner Include in Its Demand Under Section 103.1?

The unleased mineral interest owner bears the responsibility of demanding information from the operator. Pursuant to Section 103.1(C),

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39. *See id.* at *6.

40. *See* B.A. Kelly Land Co. v. Aethon Energy Operating LLC, No. 18-CV-01243, 2019 WL 5021267, at *3 (W.D. La. Oct. 8, 2019), *reconsideration denied*, 18-CV-01243, 2019 WL 6542407 (W.D. La. Dec. 4, 2019), *appeal filed*, No. 20-30090 (5th Cir. Feb. 12, 2020); M&N Res. Mgmt., LLC v. Exco Operating Co., LP, No. 14-cv-0238, 2017 WL 8809775, at *4 (W.D. La. Dec. 13, 2017); Limekiln Dev., Inc. v. XTO Energy Inc., No. 20-CV-00145, 2021 WL 956079, at *8 (W.D. La. Feb. 5, 2021), *report and recommendation adopted by* No. 20-cv-00145, 2021 WL 950909 (W.D. La. Mar. 12, 2021) ("It is undisputed by the parties that the statute requires a two-step notification requirement on behalf of the unleased owner.").

the unleased mineral interest owner's demand must (1) be sent in writing, (2) by certified mail, (3) addressed to the operator or producer, and (4) contain the unleased owner's name and address. Jurisprudence expanded these requirements to also require the unleased mineral interest owner (1) identify the lands it owns,[41] (2) identify the specific wells for which the demand is being made,[42] and (3) specifically cite a failure to comply with Section 103.[43]

In *Miller*, the unleased mineral interest owner complied with the requirements outlined in Section 103.1 and demanded the reporting from the operator as authorized by the statute.[44] On two occasions, the operator requested that the unleased mineral interest owner identify the property she owned.[45] After the operator's second request for additional information, the unleased mineral interest owner "performed a title search and identified 5.037 acres of land in Bossier Parish that she owned."[46] The operator then provided the unleased mineral interest owner with the proper reports and a check for the unleased mineral interest owner's share in production less costs.[47] The unleased mineral interest owner filed an action against the operator, asserting that the operator had no right to deduct costs. The unleased mineral interest owner specifically asserted that the report was not timely because it was not provided within 30 days of the unleased mineral interest owner's initial letter.[48]

The Louisiana Western District assessed all three letters submitted by the unleased mineral interest owner to determine which letter constituted the default notice that could lead to the forfeiture of costs.[49] The unleased mineral interest owner's first letter appeared to comply with Section 103.1; it identified her name and address and requested initial reports as required by the statute.[50] However, it was not until her third letter that she identified the land she owned.[51] The court recognized that no court had addressed

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41. *See* Miller v. J-W Operating Co., No. 16-0764, 2017 WL 3261113, at *4 (W.D. La. July 27, 2017).
42. *M&N Res. Mgmt.*, 2017 WL 8809775, at *7.
43. *Miller*, 2017 WL 3261113, at *5 (citing LA. REV. STAT. § 30:103.2 (2021); *Adams*, 561 F. App'x at 325); *see also B.A. Kelly Land Co.*, 2019 WL 6542407, at *4.
44. *Miller*, 2017 WL 3261113, at *1.
45. *See id.*
46. *Id.*
47. *Id.*
48. *Id.* at *3.
49. *See id.*
50. *Id.*
51. *See id.*

which party bears the responsibility of identifying the land at issue but noted that "Louisiana courts have ruled that an oil and gas company was not under an obligation to track down the address change or ownership change of a lessee."[52] Applying this logic, the Louisiana Western District held that "[i]t is [the unleased mineral interest owner's] duty to know what land she owns, not [the operator's] duty to find out for her."[53] Without the unleased mineral interest owner's identification of the land she owned within her demand, she could not trigger the Section 103.1 reporting requirements or the Section 103.2 subsequent penalties.[54]

The same court later took that concept one step further, requiring that the unleased mineral interest owner identify the specific well at issue for a demand to be considered a default notice.[55] In *M&N Resources Management*, the unleased mineral interest owner submitted a demand under Section 103.1 pertaining to the initial unit well.[56] The operator drilled seven more wells in the unit but did not provide the statutory reporting.[57] The Louisiana Western District held:

> The answer may be debatable, but the court finds that even if an owner's original request obligates the operator to provide reports with respect to future wells, *the operator does not forfeit its right to demand cost contribution with respect to those future wells unless the owner sends a Section 103.2 notice* of default and provides an opportunity for a cure with respect to a particular well or wells.[58]

The court concluded that "[a]t a minimum, the owner must place the operator in default under Section 103.2 with respect to a particular well and give the operator an opportunity to cure before the operator forfeits its claim for contribution as to that well."[59] In short, the operator has an obligation to provide the statutory reports, but there is no penalty for failing to do so until the mineral interest owner sends a separate letter identifying the specific wells.

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52. *Id.* at *4 (citing Ross v. Enervest Operating, L.L.C., 119 So. 3d 943, 957 (La. Ct. App. 2013)).

53. *Id.*

54. *Id.*

55. *See* M&N Res. Mgmt. LLC v. Exco Operating Co., LP, No. 14-cv-0238, 2017 WL 8809775, at *4–6 (W.D. La. Dec. 13, 2017).

56. *Id.* at *2.

57. *Id.* at *3.

58. *Id.* at *6 (emphasis added).

59. *Id.* at *7.

The operator in *Limekiln* further tested these limits.[60] The operator pleaded that the unleased mineral interest owner failed to achieve Section 103.1 notice by failing to identify the property interest at issue.[61] The operator acknowledged that the unleased mineral interest owner "included in the subject line the name of the well it claimed to own," and provided an email "containing a description of the land it owns."[62] The operator argued the information "was insufficient and non-compliant as a matter of law and [could not] be subsumed into the subsequent certified mail letter."[63] The court adopted a strict construction of Section 103.1(C) and held that no other requirements besides "in writing, by certified mail addressed to the operator or producer" existed.[64] The unleased mineral interest owner strictly complied with Section 103.1's statutory requirements and identified the drilling unit in which its property was located.[65] Thus, the court denied the operator's motion to dismiss.

Section 103.2 contains the last element that must be included in a proper Section 103.1 demand: the unleased mineral interest owner must call the operator's attention to its failure to comply with the provisions of Section 103.1. In a recent decision, the Louisiana Western District accepted nothing less than the "default" letter containing an express reference to Section 103.1. In *B.A. Kelly Land Co.*, the unleased mineral interest owner sent the operator a letter (1) identifying the property the unleased mineral interest owner owned within the operator's unit and (2) requesting "sworn, detailed, itemized statements of the costs and production for these wells and units."[66] The operator asserted that the letter failed to trigger Section 103.1 by "neither referenc[ing] § 103.1 itself, nor request[ing] the 'initial reports' or 'quarterly reports' specifically contemplated by the statute."[67] The court agreed with the operator in the name of "strict construction."[68] Specifically, even though the court on

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60. *See* Limekiln Dev., Inc. v. XTO Energy Inc., No. 20-CV-00145, 2021 WL 956079 (W.D. La. Feb. 5, 2021), *report and recommendation adopted by* No. 20-cv-00145, 2021 WL 950909 (W.D. La. Mar. 12, 2021).

61. *Id.* at *4.

62. *Id.*

63. *Id.*

64. *Id.* at *8 (quoting LA. REV. STAT. § 30:103.1(C) (2021)).

65. *Id.* at *9.

66. B.A. Kelly Land Co. v. Aethon Energy Operating LLC, No. 18-CV-01243, 2019 WL 5021267, at *5 (W.D. La. Oct. 8, 2019), *reconsideration denied*, No. 18-CV-01243, 2019 WL 6542407 (W.D. La. Dec. 4, 2019), *appeal filed*, No. 20-30090 (5th Cir. Feb. 12, 2020).

67. *Id.*

68. *Id.*

reconsideration held that "the failure to cite statutes was *one* of the factors that the Court considered,"[69] the only other "factor" the court considered was stated as follows:

> Significantly, *the letter did not request "initial reports" or "quarterly reports"* as specifically provided for in Section 103.1. Rather, the December 15, 2017 letter requested information for each Well dating back to November 10, 2013, which was even prior to the date [the operator] became operator. Such requests do not comport with the specific language of Section 103.1.[70]

The court refused to allow a subsequent letter from the unleased mineral interest owner to constitute the necessary default because the letter did "not reference the Well Costs Reporting Statute (i.e., either §§ 103.1 or 103.2) *and* [did] not make any mention of a lawsuit, penalty, or forfeiture under §103.2."[71] Therefore, based on *B.A. Kelly Land Co.*, the unleased mineral interest owner must craft a very deliberate letter to initiate potential penalties under Section 103.2. The unleased mineral interest owner appealed this decision to the United States Fifth Circuit, which is currently pending at the time of this Article's publication.

Section 103.2 provides the proverbial "teeth" to compel operators to comply with Section 103.1. Courts do not underestimate the penal nature of Section 103.2 and—in some instances—have engaged in tortured analyses to avoid levying this penalty. To ensure an unleased mineral interest owner complies with Section 103.1 and thus has the opportunity to pursue penalties under Section 103.2, its request to the operator must include the following elements:

1. In writing;
2. Issued by certified mail;
3. Include the name and address of the unleased mineral interest owner;
4. Include the property owned by the unleased mineral interest owner;
5. Expressly include a demand for an initial report and quarterly reports;
6. Expressly reference Section 103.1 as the basis for the demand;
7. Expressly notify the operator that if it fails to comply, it forfeits well costs under Section 103.2; and

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69. *B.A. Kelly Land Co.*, No. 18-CV-01243, 2019 WL 6542407, at *4.
70. *Id.* (emphasis added).
71. *Id.* at *4; *see also B.A. Kelly Land Co.*, 2019 WL 5021267, at *6.

8. Provide a new letter when future wells are drilled within the same unit.

While the above requirements contain more information than arguably required by the statute itself, courts are consistently reluctant to apply the penalties of Section 103.2—matched only by those same courts' reluctance to publish their opinions interpreting this statutory scheme.

E. How Must the Operator Respond to a Demand Under Section 103.1 to Avoid Penalties?

Once the unleased mineral interest owner complies with its demand requirements, the operator must provide specific information in a specific format to avoid the enforcement of a penalty. Section 103.1 identifies two separate reports expected from the operator: the initial report and the quarterly reports. Both reports must be "sworn, detailed, [and] itemized."[72] Courts apply the "sworn" element literally and have expressly rejected anything less.[73] The Louisiana Third Circuit has reasoned that "[a]n unsworn statement leaves mineral lessees . . . vulnerable to a degree that [Section 103.1] seeks to prevent."[74] The initial report "shall contain the costs of drilling, completing, and equipping the unit well."[75] Quarterly reports "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."[76] The reports must include itemized details pertaining to both pre-production and post-production costs to comply with Section 103.1 and avoid subsequent penalties.[77]

Fortunately, jurisprudence has provided additional guidance on the scope of information that satisfies Section 103.1. In *Brannon Properties*, the United States Fifth Circuit first addressed the level of detail required

72. LA. REV. STAT. § 30:103.1(A) (2021).

73. *See, e.g.*, XXI Oil & Gas, LLC v. Hilcorp Energy Co., 206 So. 3d 885, 890–91 (La. Ct. App. 2016) (rejecting certified mail to constitute a "sworn" report).

74. XXI Oil & Gas, LLC v. Hilcorp Energy Co., 124 So. 3d 530, 535 (La. Ct. App. 2013).

75. LA. REV. STAT. § 30:103.1(A)(1).

76. *Id.* § 30:103.1(A)(2).

77. *XXI Oil & Gas, LLC*, 206 So. 3d at 890.

to comply with the statute.[78] The court held that "[a]lthough the statute does not specify which details a report must contain, that lack of precision does not necessarily make the provision ambiguous."[79] The court then looked to the dictionary and the ordinary understanding of the term "detailed enough."[80] In doing so, the court held, "The statute clearly connects the costs reported to the benefits received in exchange. The 'detailed' requirement, therefore, must indicate that the report has to relate the cost to the benefit: *it must tell the unleased mineral owner what it is getting for its money*."[81] Further, the *Brannon Properties* court compared the initial report issued by the operator to that same operator's subsequent quarterly reports, which the court deemed to satisfy the statute's requirements.[82] The quarterly reports "included, in addition to a vendor name and invoice number, a *description of the service or parts provided*."[83] The court further held that the "itemization requirement strongly suggests that the Louisiana Legislature intended the statute to do more than simply notify the unleased mineral owner of the drilling costs."[84] Because the operator "could and, as a standard practice, did provide more information to satisfy the statutory requirement of a 'detailed' report," the court ruled that the initial report failed to comply with Section 103.1.[85]

The Louisiana Western District provides another example of insufficient reporting. In *M&N Resources Management*, the court held that "[b]eyond the fairly broad categories of expenses, the reports did not provide any detail from which an owner could assess what it was getting for its money and ensure itself that the operator was not running up unnecessary expenses."[86] The court specifically noted that "the report did not identify a vendor, cite an invoice number, or provide any description of the actual goods or services received."[87] As a result, the operator

78. *See* Brannon Props., LLC *v.* Chesapeake Operating, Inc., 514 F. App'x 459, 460–62 (5th Cir. 2013).

79. *Id.* at 461 (citing State v. Evans, 38 So. 2d 140, 142–43 (La. 1948)).

80. *Id.*

81. *Id.* at 461–62 (emphasis added).

82. *See id.* at 461.

83. *Id.* The court also reviewed the operator's report for a different well that contained a "shorthand description of the part provided or service rendered for each itemized expenditure." *Id.*

84. *Id.* at 462.

85. *Id.* at 461–62.

86. M&N Res. Mgmt., LLC v. Exco Operating Co., LP, No. 14-cv-0238, 2017 WL 8809775, at *6 (W.D. La. Dec. 13, 2017).

87. *Id.*

forfeited well costs until it provided a sufficient, sworn, and itemized report.[88]

The operator cannot avoid reporting requirements—and the subsequent penalties—even when the unleased mineral interest owner elects to participate in the well *after* the unleased mineral interest owner makes the proper demand and *before* the sworn, detailed, and itemized statements are due. In *XXI Oil & Gas*, the operator issued an authorization for expenditure, commonly referred to as an "AFE," in response to the unleased mineral interest owner demanding information pursuant to Section 103.1.[89] After the unleased mineral interest owner received the AFE, the unleased mineral interest owner elected to participate.[90] The operator then assumed its obligation had been satisfied.[91] The Louisiana Third Circuit summarized the operator's position as follows: "This suggestion amounts to proposing that [the unleased mineral interest owner] waived its statutory right to receive a sworn, detailed, itemized statement of costs by electing to participate in the well after receiving the AFE."[92] The court then held, "Strict construction leaves no room for such an argument. The statute is unambiguous in its requirements, and [the unleased mineral interest owner's] election to participate does not alter the clear requirements of the statute."[93] Therefore, once the unleased mineral interest owner makes a valid demand under Section 103.1, the operator must adhere to *all* reporting requirements, regardless of whether the unleased mineral interest owner promptly elects to participate in the well.

As a result, based on the statute and jurisprudence, if the operator responds with the following *sworn* information, it should not be penalized under Section 103.2: (1) vendor name; (2) invoice number; and (3) description of the services or goods provided.

F. Summary of the Why, Who, When, What, and How

Despite the purported clear language of Sections 103.1 and 103.2, courts are reluctant to apply the harsh penalty of well cost forfeiture against operators who inadequately comply with the statutes' terms. At the very least, Sections 103.1 and 103.2 establish an ominous framework—if a court chooses to apply it.

88. *Id.*
89. XXI Oil & Gas, LLC v. Hilcorp Energy Co., 124 So. 3d 530, 532 (La. Ct. App. 2013).
90. *Id.*
91. *See id.* at 534.
92. *Id.*
93. *Id.*

II. LESSORS: THE DELAYS AND REMEDIES AVAILABLE FOR UNPAID ROYALTIES

The lessor must adhere to a similar process to that of the unleased mineral interest owner to alert its respective lessee of unpaid royalties. Like the unleased mineral interest owner, the lessor must notify its lessee in writing of issues with the lessee's royalty payments before taking any other legal action. Also similar to the unleased mineral interest owner, the lessor must incorporate specific information in its written notification in order to trigger the delay for filing suit. Finally, like the unleased mineral interest owner, the lessor cannot pursue particular remedies until a specific delay period has run without receiving an adequate response or full payment from its lessee.

The lessor has distinctly different considerations compared to the unleased mineral interest owner. Unlike the unleased mineral interest owner, a lessor may dispense with all notice requirements if the terms of the lease allow it, typically in the form of a resolutory condition.[94] Also distinct from the unleased mineral interest owner, the lessor can demand damages or lease cancellation, or both. Further, unlike the unleased mineral interest owner, the lessor can receive these remedies even if the lessee pays the lessor the royalties due within the statutory delay.

When the lease does not contain an express resolutory condition, Louisiana Mineral Code articles 137–141 ("Articles 137–141") govern the procedure for a lessor to demand remedies if its lessee improperly pays royalties.[95]

A. Why Must a Lessor Provide Its Lessee with Notice Before Filing Suit?

The Louisiana Legislature requires pre-suit notice for unpaid royalties simply because the lessor can demand the extreme remedy of lease

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94. Many oil, gas, and mineral leases contain a resolutory condition that expressly dispenses with the notice requirements for unpaid or improperly paid royalties when demanding lease cancellation. The Louisiana Third Circuit in *Stream Family Ltd. Partnership* recognized one such example. *See* Stream Family Ltd. P'ship v. Marathon Oil Co., 27 So. 3d 354, 359 (La. Ct. App. 2009) ("[I]n the instance of willfully or persistently late or improper payment, LESSOR need not give such notice and the lease shall resolve immediately."). The *Stream* court noted, "[W]hether the remedy of cancellation is available without a putting in default *depends upon the terms of the lease.*" *Id.* (quoting Acquisitions, Inc. v. Frontier Expls., Inc., 432 So. 2d 1095, 1101 (La. Ct. App. 1983)).

95. *See* LA. REV. STAT. §§ 31:137–31:142 (2021).

cancellation if the lessee fails to pay the royalties due.[96] Unfortunately, the simplicity ends there as "[t]he area of dissolution of mineral leases for nonpayment of production royalties has been one of the most, if not the most confused and unsatisfactory areas of Louisiana mineral law."[97] The legislature promulgated Articles 137–141 in an effort to "clarify and improve the law in this area" by balancing the competing interests of the lessor and its lessee.[98] The redactors specifically acknowledged that operators "have made substantial investments in producing properties the security of title which the nature and size of their investment deserves."[99] Thus, the Articles "provide an impetus to timely payment of royalties due, while giving lessees a reasonable way in which to avoid the harsh remedy of cancellation."[100] The lessee should use that time—specifically, 30 days[101]—"to evaluate a non-payment situation and to make a decision regarding whether the royalties allegedly due should be paid."[102]

In short, the legislature recognized that the lessee should have the opportunity to investigate the lessor's demand for royalties before the lessee is potentially subjected to lease cancellation through judicial action. The legislature also considered that the lessee would need an extra incentive to timely respond beyond the penalty of paying the royalties owed. To accommodate these goals and promote judicial efficiency, Article 137 requires written, pre-judicial notice from the lessor.

B. Who Can Make a Proper Demand Under Article 137?

While courts require notice for all royalty litigation,[103] courts will not extend the procedures and subsequent remedies of Articles 137–141 to a putative class of lessors. Article 137 notice functions as the starting point for both the 30-day delay to file suit *and* the lessee's obligation to earnestly investigate the complaint in an effort to avoid penalties.[104] By its nature,

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96. *See id.*

97. LA. REV. STAT. ANN. § 31:137 cmt. (2021).

98. *Id.*

99. *Id.*

100. Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *2 (W.D. La. May 13, 2011) (quoting Lewis v. Texaco Expl. & Prod. Co., 698 So. 2d 1001, 1009 (La. Ct. App. 1997)).

101. *See* LA. REV. STAT. § 31:138.

102. *Williams*, 2011 WL 1868750, at *2 (quoting *Lewis*, 698 So. 2d at 1009).

103. *See id.* (citing Wilson v. Palmer Petrol., Inc., 706 So. 2d 142, 146 (La. Ct. App. 1997); LA. REV. STAT. ANN. § 31:137 cmt.; Chevron USA, Inc. v. Vermilion Par. Sch. Bd., 377 F.3d 459, 462 (5th Cir. 2004)).

104. *See Chevron*, 377 F.3d at 463 (citing LA. REV. STAT. ANN. § 31:137 cmt.).

the putative class does not specifically identify the parties asserting claims but instead acts as a "placeholder" for potential parties with a right of action.[105] Consequently:

> Permitting the demand to be made on a class basis . . . would deprive the lessee of any real ability to respond within the relatively short time period allowed and upset the balance of rights between lessor and lessee carefully established by the Louisiana Legislature in Mineral Code Articles 137 to 141.[106]

Significantly though, notice does not need to be provided by each and every mineral lessor individually.[107] The Louisiana Third Circuit held that "[i]t is sufficient if the notice fully and completely notifies the lessee of the demands of the named plaintiffs, as well as the intention of those named plaintiffs to demand royalty payments on behalf of a class of royalty owners."[108] The court did not elaborate on whether the "class of royalty owners" referred to royalty owners that share an interest in the identified property.[109] Considering the various holdings, a lessor seeking royalty payments of any kind, regardless of that lessor's specific damages sought, should assume it must send written notice before filing suit.

C. When Should a Lessor Make a Demand Under Article 137?

As a general matter, "Article 137 has been interpreted to require written notice as a prerequisite to *all royalty litigation.*"[110] Consequently, unless the lease contains language stating otherwise, a lessor must comply

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105. *See id.* The plaintiffs defined the putative class as "all royalty and overriding royalty interest owners in all Louisiana mineral leases owned by [the defendants]." *Id.*

106. *Id.*

107. *See, e.g.*, Duhe v. Texaco, Inc., 779 So. 2d 1070, 1087 (La. Ct. App. 2001) (citing *Lewis*, 698 So. 2d at 1001).

108. *Id.* (citing *Lewis*, 698 So. 2d at 1001).

109. *See id.* The court stated: "This very issue was before this court in January 1999, on an application by defendants for writs. We denied writs in an unpublished opinion, and the supreme court denied writs in *Duhé v. Texaco, Inc.*, 98-2843 (La. 1/29/99), 736 So. 2d 830. We adhere to our previous ruling." *Id.* This earlier opinion could not be obtained.

110. Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *2 (W.D. La. May 13, 2011) (emphasis added) (citing Wilson v. Palmer Petrol., Inc., 706 So. 2d 142, 146 (La. Ct. App. 1997); LA. REV. STAT. ANN. § 31:137 cmt. (2021); Chevron USA, Inc. v. Vermilion Par. Sch. Bd., 377 F.3d 459, 462 (5th Cir. 2004)).

with the pre-suit notice requirements when disputing royalty payments. Courts have consistently rejected lessors' efforts to circumvent this notice requirement.

In *Williams*, the lessor filed suit against the operator, alleging the operator "engaged in a scheme to sell the gas produced from the leased premises to affiliated or associated entities at a price below market value in an effort to profit from substantially reduced royalty payments," essentially alleging non-payment and underpayment of royalties.[111] Even though the lessor submitted written notice to the operator, the lessor claimed that "written notice [was] not required under Article 137 of the Louisiana Mineral Code because she [was] only seeking 'unpaid royalties' rather than 'damages.'"[112] The Louisiana Western District rejected this argument.[113] It recognized that "Louisiana courts have consistently held that a mineral lessor does not have a right of action to complain of the mineral lessee's failure to make timely or proper royalty payments until he gives written notices as required by Article 137."[114] Thus, the lessor's desired remedy does not dictate or obviate the necessity for notice.

In *Wilson*, the plaintiffs attempted to avoid Article 137 notice by relying on a number of causes of action, including breach of implied obligations of the mineral lessees, antitrust violations, and violations of the Louisiana Unfair Trade Practices Act.[115] The Louisiana First Circuit Court of Appeal, however, recognized that "all of [the lessors'] claims are for the underpayment of royalties."[116] When dismissing the suit based on prematurity, the court reinforced the reach of Article 137 and held that a "royalty claim does not lose its identity merely because it is characterized as an antitrust claim."[117] Here, the court established that the notice requirement cannot be avoided even if the unpaid royalty claim is shrouded in other causes of action.

When a mineral lessor has *any* claim regarding royalty payments, regardless of the remedy pursued or the extent of other asserted claims, the mineral lessor must comply with Article 137's notice requirement at the risk of rendering *all* claims premature.

111. *Id.* at *1.
112. *Id.*
113. *See id.* at *2.
114. *Id.* (citations omitted).
115. *Wilson*, 706 So. 2d at 145.
116. *Id.*
117. *Id.*

D. What Must a Mineral Lessor Include in Its Article 137 Notice?

The lessor must remember that Article 137 notice functions "merely to inform the lessee he has not paid royalties deemed by the lessor to be due."[118] This notice should not be confused with a "demand for performance."[119] The mineral lessor may not want simple performance, as the mineral lessor has the right to pursue lease cancellation and double damages in addition to, or rather than, payment of royalties.[120] As a result, the lessor must incorporate specific information to ensure proper pre-suit notice pursuant to Article 137. Courts assess each notice on a case-by-case basis in light of the surrounding facts.[121] By reviewing these individual suits *in globo*, the jurisprudence establishes a framework for sufficient written notice.

The demand "must be something more than the mere recitation of the lessee's contractual and statutory duty to pay royalties."[122] It must contain enough relevant information to "reasonably alert the lessee and to allow for an appropriate investigation of the problem by the lessee."[123] Additionally, it must actually demand the unpaid royalties due. Simply demanding a remedy such as lease cancellation is not sufficient.[124]

In constructing this framework, courts have identified demands that do *not* satisfy the requirements of Article 137. In *CLK Co.*, the lessor's letter to the lessee requested an assignment of an overriding royalty.[125] It did not make a demand for, or specify a problem with, the royalty payment.[126] Additionally, no royalties were due at the time of the letter, as the lessor sent his letter one month *before* the well at issue began

118. La. Oil & Gas Ints., L.L.C. v. Shell Trading U.S. Co., 949 F.3d 915, 919 (5th Cir. 2020) (citing Rivers v. Sun Expl. & Prod. Co., 559 So. 2d 963, 968–69 (La. Ct. App. 1990)).

119. *See id.*

120. *See* LA. REV. STAT. § 31:139 (2021).

121. *La. Oil & Gas Ints.*, 949 F.3d at 919 (quoting *Rivers*, 559 So. 2d at 968–69). Article 137 does not outline specific information to trigger the 30-day delay before filing suit. *See* Chevron USA, Inc. v. Vermilion Par. Sch. Bd., 337 F.3d 458, 463 (5th Cir. 2004).

122. CLK Co. v. CXY Energy, Inc., 972 So. 2d 1280, 1291 (La. Ct. App. 2007) (quoting Lewis v. Texaco Expl. & Prod. Co., 698 So. 2d 1001, 1010 (La. Ct. App. 1997)).

123. *La. Oil & Gas Ints.*, 949 F.3d at 919.

124. *See, e.g.*, Rebstock v. Birthright Oil & Gas Co., 406 So. 2d 636, 643 (La. Ct. App. 1981).

125. *CLK Co.*, 972 So. 2d at 1291.

126. *Id.*

producing.[127] As a result, the Louisiana Third Circuit rejected the lessor's Article 137 claims by expressly denying double damages on appeal.[128]

More recently, in *Louisiana Oil & Gas Interests*, the lessor sent a letter to its lessee notifying the lessee that the lessor was a new payee.[129] However, the letter "did not complain that [the lessee] had failed to make royalty payments or that 'improper' payments had been made."[130] As a result, the lessor's letter did not satisfy Article 137's requirements.[131] Similarly, in *Ross*, the lessors' letter introduced the lessors as purchasers of the underlying property and requested any royalties sent to the former owner be sent to them.[132] The Louisiana Second Circuit Court of Appeal characterized the correspondence as "merely an introductory letter" and held that it did not satisfy Article 137's notice requirements.[133] Finally, in *Rivers*, the court rejected a five-page letter containing "the lessors' concern over some discrepancy in the price paid for production."[134] The court held that "the lessees could have reasonably concluded that the letter was intended as notice of the alleged deficiency in the price and was not a notice of any deficiency or failure to pay for production."[135] Consequently, it did not constitute Article 137 notice.

In the above-referenced cases, the courts considered the letters as informative but short of sufficient Article 137 notice. In *O'Neal*, the tone of the lessor's letter could not be characterized as merely informative.[136] At first glance, the lessor's obvious frustration suggests that a valid demand was made: "After repeated telephone demands made during the months of December 1998, January 1999 and February 1999, for my royalties from the above-referenced well you have sent me a check for the production month of November 1998 which I received during March 1999."[137] The Louisiana Second Circuit held that the letter failed to meet the requisite pre-judicial notice by reasoning that the "letter was neither a

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127. *Id.*
128. *Id.*
129. La. Oil & Gas Ints., L.L.C. v. Shell Trading U.S. Co., 949 F.3d 915, 920 (5th Cir. 2020).
130. *Id.*
131. *Id.*
132. Ross v. Enervest Operating, L.L.C., 119 So. 3d 943, 960 (La. Ct. App. 2013).
133. *Id.*
134. Rivers v. Sun Expl. & Prod. Co., 559 So. 2d 963, 969 (La. Ct. App. 1990).
135. *Id.* at 970.
136. *See* O'Neal v. JLH Enters., Inc., 862 So. 2d 1021, 1031 (La. Ct. App. 2003).
137. *Id.*

desire for performance nor used to inform [the lessee] that it has not paid royalties."[138] Instead, the letter confirmed that the November 1998 royalties *had* been paid, just more than 30 days after the lessor first telephoned the lessee about it.[139] As a result, the lessor failed to trigger Article 137's obligations.[140]

Fortunately, jurisprudence also addresses numerous situations that *do* satisfy the requirements of proper Article 137 notice. In *Samson Contour Energy E & P*, the Louisiana Second Circuit held the lessor provided sufficient Article 137 notice when the letter (1) expressly notified the lessee that royalties were due from production in a specific section, (2) identified the wells and issue, and (3) directed the lessee to a likely error on the lessee's part.[141] In *Lewis*, the Louisiana First Circuit rendered the same ruling when the letter (1) demanded royalties on behalf of five specifically identified royalty owners, (2) described certain mineral leases covering the property at issue, (3) demanded payment of royalties, and (4) requested an accounting of all royalties.[142] The court explained that the "lessee would be at a severe disadvantage" if a broad letter demanding royalties would suffice.[143] Further, such allowable vagueness would encourage a lessor to "regularly and routinely send out such a general demand, regardless of whether he knew of any specific problem with the payment of his royalties."[144]

In sum, a court will not imply a purpose in the lessor's letter that is not expressly evident on its face. No length, tone, or detail waives the obligation to (1) identify the lessor; (2) identify the specific portion of property, lease or well; and (3) state that royalties are due.

E. How Must the Lessee Respond to a Demand Under Article 137 to Avoid Penalties?

A lessor can seek two types of remedies under Article 137, either alternatively or collectively: monetary compensation and/or lease cancellation. In contradiction of express legislation, some lessees have asserted that payment within the 30 days provides protection from

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138. *Id.*
139. *Id.*
140. *Id.*
141. *See* Samson Contour Energy E & P, L.L.C. v. Smith, 175 So. 3d 967, 974 (La. Ct. App. 2014).
142. *See* Lewis v. Texaco Expl. & Prod. Co., 698 So. 2d 1001, 1010–11 (La. Ct. App. 1997).
143. *Id.* at 1010.
144. *Id.*

penalties. When the lessee pays royalties within 30 days of the Article 137 demand, the Louisiana Legislature limits the availability of lease cancellation to circumstances when the lessee's original failure to pay was fraudulent.[145] If the court finds fraud, it may also award interest on the sum from the date the royalties were due and impose reasonable attorneys' fees.[146]

Courts have presumed that the title of Article 139, "Effect of payment in response to notice," refers to the correct amount of payment.[147] Thus, the language of "the statute clearly demonstrates that mere payment of the royalties due in response to a written demand does not end the lessee's potential exposure to additional damages."[148] The Louisiana Western District clarified that "the Mineral Code clearly contemplates the possibility of additional damages being awarded to a lessor, despite the lessee's payment, *in the event the nonpayment was fraudulent or willful and without reasonable grounds*."[149] As a result, a lessee may not avoid potential penalties by simply paying the demanded royalties within 30 days of receiving the Article 137 notice.

Additionally, a lessee does not avoid potential penalties by filing a concursus proceeding *after* the lessor demands payment, as the concursus does not create any presumption against fraud or willful and unreasonable withholdings.[150] In *Oracle 1031 Exchange*, the Louisiana Third Circuit held, "It is certain that [the lessees] knew that they had to pay someone, and it is clear that they chose not [to do] so until prompted."[151] As a result, the court affirmed the trial court's finding that the lessees' behavior was "either fraudulent or willful and without reasonable grounds."[152] Courts have shown commitment to a case-by-case analysis, possibly to

145. *See* LA. REV. STAT. § 31:139 (2021).

146. *See id.*; *see also* Quality Env't Processes, Inc. v. IP Petrol. Co., 219 So. 3d 349, 377–78 (La. Ct. App. 2017) (affirming the district court's award of double the royalties owed based on the finding that the lessee's delay in payment was either fraudulent or willful and without reasonable grounds. The court also held that interest on attorneys' fees begins to run from the date the attorneys' fees are awarded).

147. *See, e.g.*, Alyce Gaines Johnson Special Tr. v. El Paso E & P Co. L.P., No. 11-1992, 2013 WL 686580, *1 (W.D. La. Feb. 24, 2013).

148. CLB Props., Inc. v. MRD Operating LLC, No. 16-1271, 2017 WL 4323587, at *4 (W.D. La. Sept. 27, 2017).

149. *Id.* (emphasis added).

150. *See* Oracle 1031 Exch., LLC v. Bourque, 85 So. 3d 736, 742 (La. Ct. App. 2012).

151. *Id.*

152. *Id.* (quoting LA. REV. STAT. § 31:139 (2021)).

discourage lessees from waiting for the lessor's written demand before paying sufficient royalties.

If the court finds that fraud did not play a role in the failure to timely pay royalties (often in the form a clerical error or miscalculation),[153] interest remains available. The lessor can also collect attorneys' fees if the lessee fails to pay the interest within 30 days of the lessor's demand for it.[154] Consequently, the best response appears to be to take action *before* the lessor sends its demand.

Article 140 governs the consequences for a lessee who fails to reasonably act—by payment or explanation—within the deadline. While the article mandates only the payment of proper royalties, the court has "great discretion in awarding damages of double the amount of royalties due."[155] In addition to awarding damages double the amount of royalties due, the court may award interest on that sum from the due date, attorneys' fees, and/or lease dissolution or cancellation.[156] The jurisprudence contains numerous instances where lessors attempted these remedies, providing both lessors and lessees some level of predictability on how a court will assess penalties. More often than not, courts shy away from awarding anything more than the owed royalty when the lessee's neglect or oversight caused the failure.[157]

Double royalties are "a maximum penalty [that] should be reserved for the most blameworthy conduct."[158] Historically, courts have struggled over whether the legislature intended for the lessor to be awarded its unpaid royalties *plus* two times the unpaid royalties, or simply two times the unpaid royalties. In *Gloria's Ranch*, the lessor believed the lease at issue had expired for lack of production in paying quantities and requested the lessees provide information confirming or denying the lessor's

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153. *See* Rivers v. Sun Expl. & Prod. Co., 559 So. 2d 963, 970 (La. Ct. App. 1990) (holding that the letter did not properly notify the lessee of a failure to pay the claim, as it simply provided notice that the price was inaccurate); *see also* Adams v. BP Am. Prod. Co., No. 10-1607, 2012 WL 1038035, *5 (W.D. La. Mar. 27, 2012) (holding that the operator's request for certain documentation to establish heirship was reasonable and did not warrant any penalties under Article 137).

154. *See* LA. REV. STAT. § 31:140.

155. *See* Samson Contour Energy E & P, L.L.C. v. Smith, 175 So. 3d 967, 977–78 (La. Ct. App. 2014) (citing O'Neal v. JLH Enters., Inc., 862 So. 2d 1021, 1031 (La. Ct. App. 2003); Matthews v. Sun Expl. & Prod. Co., 521 So. 2d 1192, 1196 (La. Ct. App. 1988)).

156. *See* LA. REV. STAT. § 31:140.

157. *See, e.g.*, Fuller v. Franks Petrol., Inc., 501 So. 2d 1024, 1031 (La. Ct. App. 1987).

158. *Samson Contour Energy*, 175 So. 3d at 981.

position.[159] The lessees responded that the lease was operating at a profit but did not identify the specific wells that were producing.[160] The lessor filed suit demanding the lessees furnish a recordable act evidencing the expiration of the lease and later amended the petition to plead unpaid royalties for the wells allegedly keeping the lease active.[161] The lower courts held that the lessees failed to both pay the demanded royalties and to respond.[162] As a result, the lessees' conduct warranted double damages.[163] In its ruling, the Louisiana Supreme Court established the proper manner to calculate such damages, holding that "we interpret La. Mineral Code art. 140 as authority to award up to double the amount of royalties due."[164] Accordingly, double royalties—not unpaid royalties *plus* double royalties—represent the cap for compensatory damages and will not be awarded lightly.[165]

Lease cancellation represents the second and more extreme remedy. Because many courts recognize the harshness of this remedy, unsurprisingly few courts actually apply it. In the same *Gloria's Ranch* case, the Louisiana Second Circuit awarded the lessor lease cancellation as a remedy.[166] The court recognized that "dissolution should be granted only if the conduct of the lessee, either in failing to pay originally or in failing to pay in response to the required notice, is such that the remedy of damages is inadequate to do justice."[167] The court determined that the lessees knew they owed royalties for the well at issue for "almost two years before [the lessor] filed suit against the [lessees] and approximately four years before [the lessor] notified the [lessees] of their failure to pay royalties."[168] The lessees also failed to provide the lessor with any response regarding the well at issue.[169] The court then held that

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159. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 252 So. 3d 431, 434–35 (La.), *reh'g granted in part*, 251 So. 3d 392 (2018).

160. *Id.* at 435.

161. *Id.*

162. *See id.* at 434–36.

163. *Id.* at 444–46.

164. *Id.* at 446. While a court can always award *less* than double damages, a court cannot award more than double damages.

165. *See* Samson Contour Energy E & P, L.L.C. v. Smith, 175 So. 3d 967, 981 (La. Ct. App. 2014) ("[W]e find that Samson's failure to pay the correct royalty amount does not involve the type of egregious conduct that would support the court's award of double the amount of royalties due.").

166. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 223 So. 3d 1202, 1217 (La. Ct. App. 2017), *aff'd in part, rev'd in part*, 252 So. 3d 431 (La. 2018).

167. *Id.* (citing LA. REV. STAT. § 31:141 (2021)).

168. *Id.*

169. *Id.*

"[c]onsidering these facts, there is a factual basis for the trial court to find damages alone were insufficient to compensate [the lessor] for the [lessees'] conduct, and we affirm the cancellation of the lease as to Section 15."[170] The Louisiana Supreme Court reversed and amended the decision on other grounds but did not review this remedy.[171] While courts recognize that lease cancellation represents the harshest penalty for failure to pay royalties, they will grant this remedy if the facts establish that monetary damages are insufficient to compensate the lessor.

F. Summary of the Why, Who, When, What, and How

When an oil, gas, and mineral lease does not contain an express resolutory condition waiving notice of inadequately paid royalties, the parties rely on Article 137–141. The lessor must provide its lessee Article 137 notice to properly demand payment. Even if the lessee pays the royalties due within 30 days of the Article 137 notice, the lessee may still be subject to damages and lease cancellation if the court finds they acted fraudulently or willfully without reasonable grounds. Article 140 governs the penalties if the lessee fails to pay the royalties due within 30 days of the Article 137 notice. The court exercises discretion over whether to award twice the royalties or lease cancellation. This statutory scheme provides the lessee an opportunity to investigate the alleged royalties owed; however, the lessee must have a reasonable explanation for the delay in paying royalties in order to avoid penalties.

III. OVERRIDING ROYALTY INTEREST OWNERS: THE DELAYS AND REMEDIES AVAILABLE

The owner of an overriding royalty interest ("ORRI") represents the last royalty interest owner assessed in this Article. Like the unleased mineral interest owner and lessor, the Mineral Code establishes the framework for ORRI owners to follow when they suspect royalties are being improperly paid. Unlike the unleased mineral interest owner and lessor, the ORRI owner has significantly less jurisprudence to rely on for guidance when making demands.

Mineral Code article 212.21[172]("Article 212.21") establishes the notice prerequisite for judicial demand by the ORRI owner, with Mineral

170. *Id.* at 1217–18.

171. *See* Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 252 So. 3d 431 (La. 2018), *reh'g granted in part*, 251 So. 3d 392 (2018).

172. LA. REV. STAT. § 31:212.21 (2021).

Code article 212.22[173] ("Article 212.22") dictating the response necessary from the obligor to avoid penalties. Mineral Code article 212.23[174] ("Article 212.23") outlines these penalties, which depend upon the timeliness and explanation of the obligor:

a. If the obligor *pays* the royalties or production payments due *plus* the *legal interest* applicable from the date payment was due, the obligor has fulfilled its obligation and owes the ORRI *nothing else*;[175]
b. If the obligor *fails to pay* within the 30 days from notice, but states a *reasonable cause for nonpayment*, then damages shall be limited to *legal interest* on the amounts due from the date due;[176] and
c. If the obligor *fails to pay* and *fails to state a reasonable cause* for failure to pay in response to the notice, the court may award as *double damages* the amount due, *legal interest* on that sum from the date due, and *reasonable attorneys' fees* regardless of the cause for the original failure to pay.[177]

The only way for an obligor to avoid *any* penalty is by paying the owed royalty before the ORRI owner sends Article 212.21 notice.

A. Why Must an ORRI Owner Provide Its Obligor with Notice Before Filing Suit?

The scant jurisprudence applying these articles does not expressly address why the Louisiana Legislature requires pre-suit notice. While the explanation is likely the same as that for the unleased mineral interest owner and lessor—to provide the obligor the opportunity to investigate the claim—there may be one distinction.

Courts have dismissed suits as premature when the lessor does not provide the requisite pre-suit notice.[178] However, the Louisiana Western District did not dismiss a suit as premature when an ORRI owner did not expressly identify certain wells in its demand letter.[179] Instead, the court

173. *Id.* § 31.212.22.
174. *Id.* § 31.212.23.
175. *Id.*
176. *Id.*
177. *Id.* (emphasis added).
178. *See, e.g.*, Wilson v. Palmer Petrol., Inc., 706 So. 2d 142, 146 (La. Ct. App. 1997) (dismissing all claims as premature); *see also* Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *2 (W.D. La. May 13, 2011) (requiring pre-suit notice for all royalty claims, not only when demanded damages).
179. *See* Fairfield Energy Corp. v. Anadarko Petrol. Corp., No. 08-757, 2011 WL 4862141, *4 (W.D. La. Oct. 13, 2011).

held that "[i]f [the ORRI owner] has nonpayment claims concerning other wells, [the ORRI owner] may still seek recovery under contract law, but [the ORRI owner] may not seek penalties under [Louisiana Revised Statutes section] 31:212.21 for wells not discussed in the 2007 letters."[180] Based on this holding, the ORRI owner's primary incentive for pre-suit notice is the ability to demand penalties against the obligor.

The plain language of Article 212.21 further supports this conclusion, providing that the ORRI owner "must give his obligor written notice of such failure as a prerequisite to a judicial demand *for damages*."[181] It does not state that the failure prevents the ORRI owner from filing suit. Interestingly, this language does not greatly differ from Article 137.[182] Thus, the ORRI owner's ability to demand double damages and attorneys' fees from the obligor appears to be the primary incentive for providing adequate pre-suit notice.[183]

B. Who Can Make a Proper Demand Under Article 212.21?

Article 212.21 functions as the "catch-all" for those owed royalties not addressed by other statutes. Article 212.21 identifies the proper actor as "the owner of a production payment created out of a mineral lessee's interest or a royalty owner *other than a mineral lessor*."[184] However, mineral lessors are not the only royalty owners excluded from this article. Courts have rejected unleased mineral interest owners and working interest owners from asserting claims under Article 212.21. In *Adams*, the United States Fifth Circuit recognized as follows:

> Because Section 31:212.21 is ambiguous as to the parties encompassed within the statute, we examine the title of that section of the Mineral Code to determine the scope of the statute. Based on the title to Sections 31:212-23 [sic], it is apparent that Sections 31:212.21-.23 were intended to cover the 'purchasers of mineral product payments.'[185]

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180. *Id.*

181. LA. REV. STAT. § 31:212.21 (emphasis added).

182. *See id.* § 31:137 ("[H]e must give his lessee written notice of such failure as a prerequisite to a juridical demand *for damages* or dissolution of the lease.") (emphasis added).

183. *See id.* § 31:212.23(C).

184. *Id.* § 31:212.21 (emphasis added).

185. Adams v. Chesapeake Operating, Inc., 561 F. App'x 322, 326 (5th Cir. 2014); J & L Fam., L.L.C. v. BHP Billiton Petrol. Props. (N.A.), L.P., 293 F. Supp. 3d 615, 620 (W.D. La. 2018).

The Louisiana Western District further clarified that "[r]ecovery under [Article 212.21–.22] is limited to nonpayment of production payments or royalties, *but does not include working interests*."[186] As a result, Article 212.21 claims can be asserted only by "purchasers of mineral product payments,"[187] such as ORRI owners.

C. When Should an ORRI Owner Make a Demand Under Article 212.21?

Claims exist under Article 212.21 when the ORRI owner believes the obligor failed to properly pay owed royalties, such as by not providing "an honest accounting of the wells' production" to avoid a portion of the payments due.[188] In *Fairfield Energy*, the Louisiana Western District held that the ORRI owner had no knowledge of inaccurate royalty payments until conducting its audit.[189] Consequently, the prescriptive period for unpaid royalties did not begin to run until this discovery, which then prompted notice under Article 212.21.[190] In short, it is likely Article 212.21 notice is warranted under the similar facts that warrant Section 103.1 notice for unleased mineral interest owners and Article 137 notice for lessors.

D. What Must an ORRI Owner Include in Its Article 212.21 Notice?

Due to the lack of jurisprudential guidance on the particular statute, courts look to Article 137 in determining whether the ORRI owner has provided an adequate demand under Article 212.21.[191] Thus, "the notice must be of a more specific nature, so as to reasonably alert the lessee and to allow for an appropriate investigation of the problem by the lessee."[192] As with all of the other royalty claims, the ORRI owner must identify the specific well(s) for which it is demanding royalties.[193] The letter must also identify an issue with the payments.

186. Fairfield Energy Corp. v. Anadarko Petrol. Corp., No. 08-757, 2011 WL 4862141, *3 (W.D. La. Oct. 13, 2011) (emphasis added) (citing La. Land & Expl. Co. v. Pennzoil Expl. & Prod. Co., 962 F. Supp. 908, 922 (E.D. La. 1997)).
187. *Adams*, 561 F. App'x at 326; *see also J & L Fam.*, 293 F. Supp. 3d at 620.
188. *See Fairfield Energy Corp.*, 2011 WL 4862141, at *1.
189. *Id.* at *3.
190. *Id.*
191. *See, e.g.*, CLK Co. v. CXY Energy, Inc., 972 So. 2d 1280, 1291 (La. Ct. App. 2007).
192. *Id.* (quoting Lewis v. Texaco Expl. & Prod. Co., 698 So. 2d 1001, 1010 (La. Ct. App. 1997)).
193. *See Fairfield Energy Corp.*, 2011 WL 4862141, at *4.

In *CLK Co.*, the initial letter "did not make a demand for the payment of royalties or notify [the obligor] of a problem or deficiency with the payment of royalties. Further, no royalties were due when the letter was sent."[194] The subsequent letter, again, did not notify the obligor "of its failure to pay royalties."[195] As a result, the letters did not comply with the Article 212.21's notice requirements, preventing the ORRI owner from demanding double damages.[196]

The ORRI owner must also ensure that it provides the Article 212.21 notice to the proper party. The recipient of the Article 212.12 notice differs from that of the other statutes, as many parties may owe the ORRI. For this reason, the Louisiana Third Circuit clarified that an ORRI owner should make the statutory demand against the party *responsible for paying* the royalties.[197] In *Freeman*, the Louisiana Third Circuit recognized that "the overriding royalty claim burdens all of the working interest claims;" however, the ORRI owner does not need to make a demand against *all* working interest owners but only "the party responsible for properly distributing the revenues from the well."[198]

E. How Must the Obligor Respond to a Demand Under Article 212.21 to Avoid Penalties?

The obligor has 30 days to either make payment or provide reasonable cause for the non-payment, the failure of which subjects the obligor to potential penalties of double damages, legal interest, and attorneys' fees.[199] If the obligor "provides reasonable cause for the failure to pay, then the court may only award interest from the date the payments became due."[200] In *Cimarex Energy*, the court held that depositing disputed funds into the court's registry and initiating a concursus proceeding constituted a "reasonable" response to the royalty demand.[201] No other case provides guidance as to what satisfies a "reasonable response."

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194. *CLK Co.*, 972 So. 2d at 1291.
195. *Id.*
196. *Id.*
197. Freeman v. Block "T" Operating, LLC, 118 So. 3d 1279, 1285 (La. Ct. App. 2013).
198. *Id.*
199. *See* LA. REV. STAT. §§ 212.22–.23 (2021).
200. Fairfield Energy Corp. v. Anadarko Petrol. Corp., No. 08-757, 2011 WL 4862141, *3 (W.D. La. Oct. 13, 2011) (citing LA. REV. STAT. § 212.23).
201. Cimarex Energy Co. v. Mauboules, 40 So. 3d 931, 946 (La. 2010). The dissent in *Cimarex* adamantly disagreed with the majority's conclusion,

F. Summary of the Why, Who, When, What, and How

The answers to the questions regarding notice under Article 212.21 are similar to those of Article 137. The ORRI owner must notify its obligor of a failure to pay owed royalties and identify the specific well(s) at issue. Once the ORRI owner makes an adequate demand, legal interest accrues from the date the royalties were due. If the obligor fails to respond within 30 days, the obligor may owe double damages, attorneys' fees, and legal interest.

CONCLUSION

The Louisiana Legislature has promulgated separate statutes governing a shared obligation: payment of owed royalties. Under all statutes, the party to whom the royalty is owed must provide the obligor sufficient notice of the identity of the property or well(s) at issue and expressly state that the obligor has failed to pay owed royalties. The obligor has a duty to investigate the royalty owner's claim at the risk of substantial penalties. Thus, as with all relationships in life, accurate and prompt communication from both parties provides the foundation of a mutually satisfactory outcome.

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particularly on the ground that the concursus was timely as it was not filed within 30 days of the initial demand. *See id.* at 948–49 (Knoll, J., dissenting).