Louisiana Law Review

Volume 37 | Number 2
The Work of the Louisiana Appellate Courts for the 1975-1976 Term: A Symposium
Winter 1977

Private Law: Mineral Rights

Frederick W. Ellis

Repository Citation
Frederick W. Ellis, *Private Law: Mineral Rights*, 37 La. L. Rev. (1977)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol37/iss2/12

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

MINERAL RIGHTS

*Frederick W. Ellis**

MINERAL TRANSACTIONS—SCOPE OF RIGHTS AFFECTED

The sacred cow of brevity in modern writing can be a poor practice in some conveyancing situations. This is suggested by three decisions which restrictively interpreted the kinds or extent of rights affected in three distinctly different settings. In spite of the diversity of facts and reasoning in the three cases, the common result of restrictive interpretation carries an important message for the prudent legal draftsman who seeks broad coverage—avoid generalities and be explicit, even at the expense of using extra words; or if broad terms are used, be *clearly* broad not only in the granting or coverage clauses, but reflect the breadth of intent throughout the agreement, even if this entails repetition of language in multiple contexts. Be cautious, however, not to cause specificity to have an accidental limiting effect.

The Lignite Case

In *River Rouge Minerals, Inc. v. Energy Resources of Minnesota*,[1] the Second Circuit Court of Appeal, interpreting a Bath 14 BR1 mineral lease form,[2] held that the language "all other minerals" in the context of other language in the lease did not cover the right to strip mine lignite. This form, entitled "OIL, GAS AND MINERAL LEASE," purports to cover rights of drilling "and mining for" and producing "oil, gas and all other minerals."

The Louisiana Supreme Court has long recognized the importance of context in mineral grants or contracts. In a 1922 decision the supreme court employed *ejusdem generis* logic to hold that a reservation of "iron, coal, and other minerals" did not include gas.[3] Again, in 1942,[4] the supreme

---

* Professor of Law, Louisiana State University.

1. 331 So. 2d 878 (La. App. 2d Cir. 1976).

2. A popular commercially available form, commonly used in northern and central Louisiana. The Bath 42 CPM-New South Louisiana Revised (4)-Pooling form uses the phrase "oil, gas, sulphur and other minerals." See discussion in text as to the slightly different language of the 14 BR1 form. The Bath forms are similar to many oil company forms.

3. Huie Hodge Lumber Co. v. Railroad Lands Co., 151 La. 197, 91 So. 676 (1922).

4. Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So. 2d 228 (1942).

court used *ejusdem generis* reasoning to hold that the phrase "all the mineral, oil and gas rights" was limited to minerals of the character of oil and gas and did not include sand and gravel. Therefore the result in *River Rouge* might have been readily explained by the *ejusdem generis* precedents in construing the words of the granting clause of the lease in isolation.

However, Judge Smith's reasons were broader. In speaking for a unanimous Second Circuit panel, he used the Civil Code rule "all clauses . . . are interpreted the one by the other, giving to each the sense that results from the entire act."[5] Looking to many clauses of the lease and to the factual background, he examined the quite different technology of lignite strip mining, noting that many lease clauses contemplated only oil and gas techniques and operations; and explained the distinctly different impact lignite mining has on surface usage of land; and recognized the different customs on the sizes of royalty for lignite as opposed to oil or gas leasing. The effect on the public policy of keeping land in commerce was evaluated; but perhaps the most important factor considered was the fact that the form in its many provisions clearly and repeatedly contemplated contractual rules for oil and gas operations, but nowhere did it provide for governance of lignite operations. Examination of the whole agreement and circumstances to seek the intent is clearly correct under the Civil Code and prior jurisprudence. Article 2 and the comment to article 4 of the Mineral Code[6] both show that the Mineral Code has not changed the prior civil law.[7]

It will be well to recount these fundamentals for future problems involving not only lignite, but also other resources such as peat, geopressure, geothermal heat, and dissolved gases. The legal draftsman who wants today's contracts to cover tomorrow's still unknown resources cannot rely upon a general phrase in a granting clause. Nor is it wise merely to reinforce

5. LA. CIV. CODE art. 1955.

6. LA. R.S. 31:2 (Supp. 1975). See the comment under article 4 of the Mineral Code, making plain that the rules of interpretation expressed in the jurisprudence will continue to apply.

7. In addition to article 1955, several other Civil Code articles sustain the court's decision. Although article 1957 declares that "in a doubtful case, the agreement is interpreted against him who has contracted the obligation," article 1958 quickly qualifies the rule of article 1957 with the statement: "But if the doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given . . . the construction most favorable to the other party shall be adopted . . . ." Article 1959 restricts the effect to be given to general terms of a contract, requiring primacy to be given to intent of the parties, rather than to general language. This rule is based on a spirit that emerges in several other articles, *e.g.*, articles 1945, 1946 and 1950. It is most clearly expressed in article 1950's requirement that: "When there is anything doubtful . . . we must . . . ascertain . . . the common intention . . . rather than . . . the literal sense . . . ."

the generality or multiplicity of resources or rights purportedly covered in the granting clause. In the case of the mineral lease, if more than oil and gas is sought to be affected by the granting clause, the prudent draftsman should not only be explicit and name other resources to be affected, he should also modify royalty, unit, damage, and other clauses to make the broad intent manifest in many ways throughout the agreement.

But if this is done, then the agreement may be a cumbersome document which may not receive the landowner's consent, unless the consideration is enhanced. Conscious negotiation may then be focused on the potentially detrimental surface effect of mining operations other than oil and gas. This is a major merit of the *River Rouge* decision. It will protect landowners against the unconscious grant of broad rights under instruments actually designed and priced for less onerous oil and gas operations.

Perhaps the greatest merit of the decision is that it should put land into commerce and clear titles from arrangements ill-suited to a new resource exploitation problem. Conscious negotiation and new forms can then be focused on problems of new resource exploitation.

One such problem is the possible conflict in surface usage between multiple mineral lessees. Even the landowner should be cautious to avoid liability in this respect. *River Rouge* did not reach questions of whether lignite leases can be granted or strip mining operations conducted under all circumstances without the consent of (or risk of damage claims by) an oil and gas lessee. Serious problems may arise, either under warranty, correlative rights or sic utere theories.

The Mineral Acres Case

It is bad practice to use fractional interest terms like "mineral acre" (the undivided mineral interest equivalent of the entire mineral rights affecting one acre of a larger tract), "undivided acre" (the undivided interest equivalent to a full interest acre of a larger tract), or "royalty acre" (a royalty interest equivalent to the usual royalty on one acre, normally one-eighth royalty on one acre) in determining the size of an interest granted in a mineral or land transaction. These terms can have definite or ascertainable legal meaning and are often used by businessmen or investors as a measure of price or value. However, the prudent legal draftsman should not permit these valuation tools to destroy the clarity of a legal document.

There are a host of reasons why these phrases are ill-advised. They depend on the ratio of acreage of a tract to the undivided acreage figure employed. This can create a need for otherwise unnecessary survey expenses. The size of tracts is often erroneously estimated. Size changes on

many riparian estates, due to accretion or erosion; even non-riparian estates are subject to size change as a consequence of boundary prescription. Conversion of undivided acreage determined interests to fractional interests is always necessary to compute shares of production or costs and this is always fraught with the possibility of human error or misunderstanding. Many people do not understand the mathematics of the conversion and thus one party may be agreeing to one size fraction while the other in equal good faith thinks the transaction covers a different size interest. Although the "royalty acre" supposes an equivalency of a one-eighth "normal" royalty on one acre, in some areas the one-eighth royalty is no longer normal. Then, too, some people confuse the terms "royalty acre" and "mineral acre."

Some of these pitfalls apparently caused the unfortunately drafted mineral deed in *Light v. Crowson Well Service, Inc.*[8] In the standard granting clause, the seller purported to convey "one-sixteenth of eight-eighths (1/16 of 8/8) of the oil, gas, and other minerals" under a tract described as containing 366 acres, more or less. However, an added clause stated: "It is the intention of Vendor to convey and Vendee to purchase sixty-one mineral acres . . . ."[9] Sixty-one mineral acres in a 366 acre tract is in fact a one-sixth interest; a one-sixteenth interest is approximately 23 mineral acres. Obviously, the clauses were in conflict.

Mr. Justice Calogero, in writing for the majority, held that the easily understood fractionally expressed interest controlled over the declared intention that the mineral acreage computation would control. The majority opinion is most interesting for its refusal to apply Civil Code article 2474's general rule of caveat vendor in matters of contract ambiguity, even in the face of seemingly overwhelmingly logical arguments favored by the dissent. Mr. Justice Summers in his dissent, joined by the Chief Justice, pointed to several powerful factors including: the clear statement of intention that the mineral acreage figure was intended; the fact that the mineral acreage clause was added; the apparent computation of the price on a mineral acreage basis; article 2474's burden of ambiguities on a vendor; and clear technical definitions of "mineral acres" in recognized treatises.

These technically logical arguments failed to impress the majority because of some simple but powerful facts, one of which was only lightly adverted to by the majority and unconvincingly treated in the dissent. The facts presented a classic case of apparent disparity in bargaining skill. The

8. 313 So. 2d 803 (La. 1975).

9. Actually, two deeds were involved, but the ratio mathematics and language conflicts of the second deed were identical, although the size of the tract and related mineral acreage figures were different in the second deed.

vendor was an elderly lady in a nursing home. The vendee was an experienced oil and gas investor represented by a landman who had prepared the instrument.

This writer agrees with the majority of the supreme court. Mineral acreage or mineral royalty computations are used by buyers or others in the oil business and are often not clearly understood by landowners. Indeed, as the buyer's own mistakes showed, even oil investors and professionals can become confused in their use of the terms. The buyer normally does prepare the language of a mineral deed and did indeed prepare the technical language of this transaction. Supported by Planiol's mandate to disregard the rule of article 2474 when doubt is caused by an exceptional stipulation inserted by the buyer for his own benefit,[10] the majority looked to the reason for article 2474, that the seller normally presents the terms of a sale. Mr. Justice Calogero was also wisely impressed with the disparity of expertise between the parties.

In a case where there is less disparity of expertise between the parties and both sides are professionally represented, the same result may not be reached, even in the absence of the raison d'etre of article 2474. But in the context of mineral transactions, there is general justice in placing the burden of clarity on the usually more sophisticated purchaser or lessee of mineral interests who deals with ordinary landowners who are relatively inexperienced in mineral contracts.

Contract to Assign Overrides

The decision in *Bown v. Austral Oil Company*[11] presented a case of equally sophisticated parties, an oil company and two geologists who had rendered services in bringing a "prospect" to the attention of the company. The services had resulted in lease acquisitions by the company. A letter agreement drafted by the oil company agreed that the geologists' compensation for services "in bringing the [Thornwell] [P]rospect to us" was to be:

1. A brokerage commission of $1.00 per acre in negotiating "the lease" totaling $2,354.60. (The agreement had identified a 2,354.60/acre lease as having been acquired by reason of the services.)

2. A 1/4 of 5/6 override.

3. A 1/96 of net interest override on the "Prather" lease, if an assignment thereof was obtained by Austral by a given date.

---

10. *See* 2 PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL n° 1357 (11th ed. 1939), *cited in* 313 So. 2d at 808 n.9.

11. 322 So. 2d 866 (La. App. 3d Cir. 1975), *cert. denied*, 326 So. 2d 370 (La. 1976) (no error of law noted).

This letter agreement was in 1954, some twenty-one years before the appellate decision. Austral acquired leases which plaintiffs contended were included in the "Thornwell Prospect" general description, and subject to the override agreement. Either the leases in controversy were acquired nearly two decades after 1954, or plaintiffs had sat on their "rights" for an incredibly long time. The opinion is not clear on this, but neither possibility favored plaintiffs' case.

Wurzlow v. Placid Oil Company[12] was correctly distinguished. The court in *Wurzlow* found that a "prospect" referred to in a brokerage contract was a technical term of art and could be clarified by parole.[13] However, the contract there clearly provided that the specified override was to affect "any new leases taken by us" on the named prospect. The *Austral* letter agreement not only did *not* contain such clear intent to affect new leases, but reflected other limiting language. The cash fee was on the basis of the large (2,354 acres) lease already obtained. Judge Cutrer did not make a point of the size of that lease in the majority opinion or of the second lease then under negotiation. However, as an ex-oil man he must have known that a 2,354 acre lease under many Southwest Louisiana geological conditions is large enough alone to be a total "prospect" in the loose language of the oil business. Examining the language of the instrument carefully, Judge Cutrer instead grounded the decision on the reasoning that the language of the contract was clear and controlled, concluding that it only provided for overrides on the two leases expressly described.

Judge Cutrer's opinion is correct. It could have been reinforced by the great time lapse and the reference to the July 30 deadline of the second proposed lease acquisitions and related override. These undiscussed factors pose a potential of ambiguity in other cases which the prudent draftsman can avoid by not only defining a prospect or area of interest as clearly as possible in a mineral contract, but also by providing clear chronological constraints —or specifying that there are no chronological constraints—in the area of interest clause in farmouts, service contracts, or other agreements involving area of interest conveyancing commitments.

PLEADING AND PROOF OF MINERAL PRESCRIPTION

The scant discussion of mineral prescription pleading and burden of proof problems in *State v. Ward*[14] did not treat the Civil Code rules which

12. 279 So. 2d 749 (La. App. 1st Cir. 1973).
13. See the discussion of this case in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Mineral Rights*, 35 LA. L. REV. 343, 348 (1975).
14. 314 So. 2d 383 (La. App. 3d Cir.), *cert. denied*, 319 So. 2d 440 (La. 1975).

generally require that prescription must be pleaded and cannot be supplied by the court.[15] Preoccupied with other important facets of the case the court merely observed as its sole reason in holding that a mineral reservation had expired that "there is no contention in the pleadings nor proof in the record of any mineral activity on the tract."[16]

Such reasoning may imply that the general rule that prescription must be pleaded is to be turned inside out as to mineral servitude prescription to require that the *interruption* of prescription may have to be pleaded and proved by the party claiming that a mineral right has not prescribed. The clear classification of all mineral rights as real rights prompted legislative amendments to real action rules of the Code of Civil Procedure, in Act 547 of 1974. This now enmeshes this problem, at least partially, in the pleading and proof problems of the possessory action. Some of the questions of pleading and proof are dependent upon problems of possession and special rules treating those problems.[17]

BLUE SKY LAW COVERS SALE OF UNDIVIDED INTERESTS IN MINERAL RIGHTS

The federal "Blue Sky Law"[18] explicitly treats any "fractional undivided interest in oil, gas or other mineral rights" as included within the definition of "security." Therefore, interstate sales of undivided interests in oil and gas leases or other mineral rights have long been subject to the federal Securities Act of 1933. Notwithstanding opinions of the Louisiana Attorney General[19] that mineral interests are affected by Louisiana's Blue Sky Law,[20] intrastate oil and gas investments in this state have often been made without regard to the possible importance of that statute.

The federal statute had served as a model for the state legislation, but the latter is unlike the federal statute in one important detail; the Louisiana statute lacks explicit language defining fractional mineral interests as securities. However, the Louisiana statute does generally define security as including "any transferable share, investment contract, or beneficial interest in title to property, profits or earnings." The definition of "issuer" in the Louisiana Act specifically provides that "with respect to interests in oil, gas or mineral leases, royalties, or servitudes, any person who shall divide

15. LA. CIV. CODE art. 3463.
16. 314 So. 2d at 394.
17. *See* LA. CODE CIV. P. arts. 3666 *et seq.*
18. Securities Act of 1933, 15 U.S.C. § 776 (1970).
19. 1946-48 LA. OP. ATT'Y GEN. 1019 (1947); 1932-34 LA. OP. ATT'Y GEN. 530 (1934).
20. LA. R.S. 51:701 *et seq.* (Supp. 1972).

any interest in any such security for the purpose of sale of fractional parts thereof to the public shall be deemed an issuer." This "issuer" definition of the state act was apparently derived from similar language in the 1934 amendment to the federal Security Act of 1933.[21] That 1934 amendment had also explicitly defined "security" as including fractional mineral interest.[22] At least two interpretations of this legislative history were possible. The definition of "issuer" in LA. R.S. 51:701(5) could have been viewed as an accidental transfer of language related to the definition of "security" in the federal act which had been deliberately deleted from the state legislation. By this line of reasoning, the deliberate deletion of fractional mineral interests from the definition of "security" should control, and would reflect the intention to exclude such interests from the definition of security. LA. R.S. 51:701(5) would then be interpreted as a mere accidental transferral of language that should have also been deleted to serve the purpose of excluding mineral interests from the definition of security.

A contrary line of reasoning would view fractional mineral interest sales as covered by the broad definition of "security" in Section 701(1), subscribing it under the term "beneficial interest in title to property." By this logic, Section 701(5)'s implicit treatment of mineral interests as securities in defining an "issuer" would complement rather than conflict with the Section 701(1) definition of "security."

This latter approach was followed by Judge Price, in authoring the opinion of the Second Circuit Court of Appeal in *Caldwell v. Trans-Gulf Petroleum Corporation*,[23] which held that the sale of fractional interests in mineral leases was the sale of a "security" under LA. R.S. 51:701(1). The supreme court, in an opinion authored by Mr. Justice Calogero, upheld the result of the court of appeal decision, but used more finely aimed legal reasoning.[24] Mr. Justice Calogero, speaking for the high court, found it unnecessary to decide whether "beneficial interest in title to property" included interests in oil, gas and mineral leases or fractional interests thereof. He reasoned that Section 701(5)'s definition of issuer included a definition of security so as to cover and regulate persons "who shall divide any interest" in oil, gas or mineral leases "for the purpose of sale of fractional parts thereof to the public."[25] It was the business of fractionalizing mineral interests and selling them to the public which 701(5) clearly

21. 15 U.S.C. § 776 (4) (1970).
22. LA. R.S. 51:701 *et seq.* (Supp. 1972).
23. 311 So. 2d 80 (La. App. 2d Cir. 1975).
24. Caldwell v. Trans-Gulf Petroleum Corp., 322 So. 2d 171, 175 (La. 1975). See note 6, *supra*.
25. *Id.* at 174.

covered. Its plain language could not be interpreted away, and there was no need to consider whether the general definition of security included mineral interests.

Albeit with mixed policy emotions, this observer basically agrees with the supreme court opinion, as tempered by recent legislative amendments. There is a need for public protection but that need must be balanced against practical considerations of not obstructing ordinary oil and gas ventures—an intrinsically high risk business—with the red tape and liability risks of corporate finance regulations. Protection of the public is most needed in the sale of small, fractional working or leasehold interests, which result from sale of numerous interests to small buyers. The unsophisticated, small investor could easily be unaware of many latent legal dangers of personal liability involved in the purchase of such shares, such as responsibility for unit well costs and liabilities to landowners. Also, of course, geological and other technical sophistication, plus full availability of information, is important to fairly evaluate oil and gas ventures. The ordinary farmout arrangement, even if made to multiple parties, is generally accomplished by and between people in the oil business, who know its financial and legal hazards only too well. The supreme court opinion affords the legal flexibility to exclude such transactions from the Act's coverage, to balance investor protection with practical speculative financial needs.

Flexibility and balance are further served by 1972 amendments to the Blue Sky Law's exemption provisions.[26] The facts of the *Caldwell* case arose before Act 725 of 1972 was enacted. R.S. 15:705(12) had exempted transactions involving sales to no more than ten persons for investment where no remuneration was paid for soliciting sales. Applicability of the former exemption of LA. R.S. 51:705(12) was rejected in *Caldwell* by both the court of appeal and the supreme court because commissions had been paid for consummating the sales. The amendment of Act 725 of 1972 to R.S. 51:705(12) increased the number of prospective investment buyers to whom exempt sales might be offered from ten to twenty-five, retaining administrative flexibility to enlarge or restrict the exemption. Very importantly, the amendment removed the requirement of "no commissions or other remuneration" which the court in *Caldwell* employed to avoid application of the exemption.

Therefore, although *Caldwell*, on its face, indicates that sales of undivided mineral interests are now regulated, the statutory exemption provisions are now so broad that smaller oil and gas promotions could be accomplished under the statutory exemption. Notwithstanding the public

26. LA. R.S. 51:704 (Supp. 1972).

interest in protecting investors, there is also a great public interest in facilitating speculative drilling ventures. Oil and gas investors buying large fractions of small ventures know or ought to know drilling is a high risk game. Formalities of securities disclosure laws constitute dangerous, time-consuming and expensive red tape hurdles which might dry up much drilling money for marginal ventures. Public disclosure of oil and gas prospect information is incompatible with the nature of oil men and the oil business. But balanced against this is the need to protect smaller investors, and the 1972 exemption amendments attempt such a balance. This writer questions whether the exemption of sales to twenty-five investors is an ideal balance but would not recommend administrative or legislative change without more concrete information on the workability and equity of the present exemptions.

Intrastate oil promoters in Louisiana should be careful not to rely upon the statutory exemption without checking with the Commissioner of Securities to ascertain current administrative exemption practice. The Commissioner can either expand or restrict the exemption.

PUGH CLAUSE—EFFECT ON OBLIGATIONS TO DEVELOP AND EXPLORE

In *LeJeune v. Superior Oil Company*,[27] the Third Circuit Court of Appeal reached a correct result in spite of erroneous or at least incomplete reasoning. Two leases were involved, granted in 1969 and 1970. Each lease contained a Pugh clause, allowing acreage retention outside of units by payment of delay rentals for three years beyond the five-year primary terms. Forced units were established pursuant to LA. R.S. 30:9 for the Miogypsionoides Sand, which included approximately 11% of the area of the subject leases. Plaintiffs were paid production royalties and delay rentals under the Pugh clause. Demand for further development was made and refused in 1975. Suit followed for cancellation, which was denied.

The court reasoned that there was no development obligation under the facts of the case, because the obligation to develop is limited to developing "known . . . producing formations." Further, plaintiffs' geologist placed emphasis not on the unitized sand, the Miogypsionoides Sand, but on the Camerina Sand. In distinguishing prior jurisprudence, the court rejected applicability of the obligation to explore on the grounds that such cases all involved first a discovery well and production in paying quantities, thus making it unnecessary to consider the impact of the Pugh clause.

27. 315 So. 2d 415 (La. App. 3d Cir. 1975).

The result of the decision is correct, but only because there was a Pugh clause, and not for the reasons employed by the court.

The presence of a producing unit formed under the Conservation Act ought to be conclusive proof that there is a "known . . . producing formation" on a lease. LA. R.S. 30:9B unequivocally states that a unit "shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities." Of course, this rule is probably restricted in its effect to the unitized "pool"; but certainly the unitized pool or reservoir must be, if it is producing, a "known . . . producing formation." Yet the court reasoned there were no "known . . . producing formations." Such a finding would only be valid if it were correct to assume that the Pugh Clause automatically effects a division of a mineral lease. This would be contrary to the explicit content of many Pugh clauses, *e.g.*, the popular Bath form of the Pugh clause, Form PUC-RI, which provides: "Nothing herein . . . shall have effect to create several or separate leases . . . ." Many tend to assume too quickly that division of a lease is the automatic, always present consequence of special provisions, such as a Pugh clause, which derogate from the general rule that production or operations may maintain a mineral lease in its entirety. If part of a lease or other mineral right terminates because of a special rule or agreement which restricts the extent of rights which, as a matter of term, may be maintained by a given circumstance, certainly a division is always effected *if* partial termination in fact occurs as a result of such special provision. However, if partial termination does not occur, the totality of provisions should be examined to see if the mere possibility of partial termination, considered in the light of other lease clauses, is a sufficient factor to hold that the lease is divided. Thus, the mere presence of a Pugh clause alone should not be assumed to effect a division. The particular language of a Pugh clause in the light of total lease provisions should be examined. One type of Pugh clause appended to different lease forms might lead to different results.

There is good practical reason to be hesitant about assuming that a lease division is effected by a unit when a Pugh clause is present. If non-unitized production is experienced, many forms of Pugh clauses often do not restrict the lease maintenance effect of such production to the non-unitized acreage. It is quite possible for non-unitized production to occur even within the area of a unit commencing either before or after the unit is formed. Chaotic problems of lease maintenance could arise, discouraging resort to unitization, if the divisive effect were recognized. It is hoped that future decisions will not follow the implication of lease division, implicit in the court's decision in *LeJeune* and that prudent lease negotiators will use clear language to negate a divisive effect.

The real justification for the *LeJeune* result lies in the fact that a *delay* rental provision is a price paid for *delay* in commencing operations. The lessee is paid for the right to delay development or operations. That is the reason for the rule that there is no duty to explore or develop until a known producing formation is encountered. Until production is had a lease may be maintained without operations for a given time (the primary term) by delay rentals. In the presence of a clause granting the right to employ delay rentals to maintain the lease, and partially extending the primary term in effect, it would be unjust, in the absence of threatened drainage, to decree there is no right to delay operations and to command development and exploration.

NOVATION AND LESSEE'S ATTACK ON LESSOR'S TITLE

Placid Oil Company v. Taylor[28] is a sequel to an earlier supreme court remand,[29] which had resolved various title issues without reaching a question of whether a lessee could continue to attack his lessor's title in a concursus proceeding. That point had been found moot by the supreme court's particular resolution of the title controversy. A party sought to raise it again on the remand, but the Third Circuit held that such issues were not included in the scope of the remand, which dealt only with a novation question not theretofore treated in the appellate court. On that issue, it was held that a subsequent lease with a ¼ royalty did not supercede a prior ⅛ lease one of the parties' predecessors in title had executed. Applying Civil Code article 2190, the Third Circuit reasoned that for a novation to occur it "must be expressly stated in the [new] agreement."[30]

The rule of Civil Code article 2190 that novation is not presumed and that the intent must clearly result from the terms of an agreement should not be construed as requiring explicit formal language of novation. Surrounding circumstances and effect of the agreement can be considered.[31] Inasmuch as the lease content was not presented in the *Placid* opinions, it is impossible to gauge whether the second lease was, as Judge Hood found in a dissent, clearly reflective of an intent to novate; or whether, as the majority found, the lease contained nothing showing such intent. However, it is difficult to imagine why the second lease was signed and money paid for it if the payors and payees didn't mean for it to have effect. Moreover, nonextinguishment of a prior obligation does not mean a later contract cannot also be given effect, at least as amending the prior contractual arrangement.

28. 313 So. 2d 626 (La. App. 3d Cir. 1975).
29. 294 So. 2d 832 (La. 1974).
30. 313 So. 2d at 630.
31. Union Bldg. Corp. v. Burmeister, 186 La. 1027, 173 So. 752 (1937).

More so than the novation problem, the questions of the right of a lessee to attack a lessor's title are intriguing. These questions were left untreated by the supreme court's earlier handling. LA. R.S. 31:121 had not put all of these problems to rest as it merely authorizes a lessee to take mineral leases from adverse claimants. This provision does not authorize the filing of a concursus, the withholding of royalties nor taking sides. Nor does it authorize drumming up litigation by searching out long dormant potential title claimants and making them adverse claimants. These not uncommon practices of lessees may furnish a basis for urging procedural bars to legal attack, and may be claimed to be an active breach of the lease, warranting cancellation or damages, under the reasonable administrator standard of R.S. 31:122. Whether such arguable claims would prevail poses a multitude of complex questions which deserve an entire article rather than these brief comments. However, mention of these spectres is raised so that the incautious lease negotiator will not assume that article 121 of the Mineral Code now frees a lessee from the need for lease language permitting frequent forms of title curative practices by lessees which can severely damage a lessor, often unnecessarily.