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Mineral Rights

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MINERAL RIGHTS

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In the past year and a half the petroleum industry has continued in its significant downturn. On October 24, 1983, the active rig count in Louisiana was 274. Natural gas prices have dropped still further from a year ago so that new sales are generally below three dollars per MMBTU and often are considerably less than that. Oil prices are stable but lower than several years ago. The legal problems of the "gas bubble" are presently before the courts, but few cases have reached the stage of reported decision. New federal legislation that would alter the Natural Gas Policy Act of 1978[1] is a distinct possibility.

LEGISLATIVE DEVELOPMENTS

In 1983, the legislature enacted several provisions concerning mineral rights. Act 203 of 1983 amended article 213 of the Mineral Code to add a definition of *actual mining operations*. Several other provisions of the Mineral Code are affected by this definition, which may be somewhat broader than originally contemplated by the drafters of those provisions.

Act 409 of 1983 revised Louisiana Revised Statutes 30:12 which provides for judicial review of rules and orders of the Commissioner of Conservation. It broadens the provisions and procedures for review by incorporating most of the procedures for judicial review from the Administrative Procedure Act.[2] Act 409 of 1983 provides a sixty-day time limit from a mailing of a final decision in which to seek review, as opposed to a thirty-day limit under the Administrative Procedure Act. It also exempts from the provisions of Louisiana Revised Statutes 49:963-965 matters for which review is available under Louisiana Revised Statutes 30:12. These amendments were made in order to overcome the problems created by the statutes and the holding in *Jordan v. Sutton*[3] that the Commissioner of Conservation is subject to two parallel and coexisting forms of judicial review.[4]

Act 660 of 1983 amends the Mineral Code by adding article 212.31. It requires payments for oil and gas production to royalty and working interest owners in wells or units to be accompanied by a check stub or other attachment with certain information unless that information is other-

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1. 15 U.S.C §§ 3301-3432 (Supp. II 1978).
2. LA. R.S. 49:964 (Supp. 1983).
3. 401 So. 2d 389 (La. App. 1st Cir. 1981).
4. *See* Martin, *Developments in the Law, 1980-1981—Mineral Rights*, 42 LA. L. REV. 374, 378-81 (1982); Comment, *Judicial Review of Conservation Orders*, 43 LA. L. REV. 1201 (1983).

wise regularly provided. Among other things, the information must include lease or well or unit identification; month and year of sales or purchases included in the payment; total quantity of production purchased; the final realizable price; total taxes (except windfall profit tax); net value of sales; interest owner's percent interest; interest owner's share of the total value of the sales prior to tax deduction; and interest owner's share of the after-tax value.

Acts 643 and 644 of 1983 provide certain severance tax and royalty exemptions on state leases for approved tertiary recovery projects for crude oil production.

SUCCESSIONS AND CONVEYANCES

The validity of a testamentary disposition of certain rights in minerals was an issue in *Succession of Goode*.[5] The olographic will in *Goode* provided, inter alia, that all "oil & gas royalty interest payments owned by me shall be paid to Pauline Egbert Parker for as long as she might live. After her death the amount of any payments shall be equally divided between my nieces and nephews and Linda Cosby Paine."[6] Opponents of the will sought to annul it, claiming that the quoted language constituted a prohibited substitution under Civil Code article 1520. The trial court and court of appeal agreed with the opponents.[7] On the appeal of the beneficiaries, the Louisiana Supreme Court reversed. In its initial opinion, the court upheld the will on the basis that it created a usufruct in Pauline Parker with naked ownership in the nieces, nephews, and Linda Cosby Paine. On rehearing, the court again upheld the will, but on the rationale that it provided for successive usufructs of the mineral royalty payments with the naked ownership passing intestate.

The decision in *Succession of Goode* appears quite reasonable. Since mineral royalties are passive rights, there seems little reason to force them back into commerce. Likewise, in the absence of ascendants or descendants, there was little reason not to give effect to the testator's desires for the distribution of his property. The court seemed troubled with characterizing the right created as a usufruct, since the testator bequeathed the royalty "payments" rather than the "use" of the payments. The normal manner of creating usufruct is to use the words "use and benefit" or "use" of the property because the usufructuary of most sorts of property has a duty to preserve and transmit the thing. However, the usufructuary of a mineral right has no duty to preserve and transmit the benefits of the right; the usufructuary may retain all payments made under the right.[8] Thus the testator left the "payments" and not the "use of the

5. 425 So. 2d 673 (La. 1983).

6. *Id.* at 675.

7. 395 So. 2d 875 (La. App. 2d Cir. 1981).

8. LA. MIN. CODE: LA. R.S. 31:193-:194 (Supp. 1983) [hereinafter cited as LA. MIN. CODE].

payments" since "use" would have suggested a duty to account to the naked owners at the termination of the usufruct.

A testamentary usufruct was also at issue in *Succession of Blake*.[9] The decedent died testate in 1973, leaving the usufruct of her one-twentieth interest in minerals in 6000 acres of land to her daughter and the naked ownership in her grandchildren. The naked owners brought suit for declaratory judgment to determine their rights and those of the usufructuary. The trial court held that the law at the time of the creation of the usufruct—pre-Mineral Code—entitled the usufructuary to enjoy all of the bonus, delay rental, and royalties accruing to that interest, whether or not an "open mine" was present. The Louisiana First Circuit Court of Appeal affirmed, but held that article 193 of the Mineral Code simply codified the pre-existing law allocating all bonus, delay rental, and royalties to the usufructuary of a mineral right. However, at the time of the creation of this usufruct in 1973, the usufructuary was under a duty to restore to the naked owners a thing of the same quality and value or its estimate price. While this duty was changed in 1975,[10] it remains a limit on the usufruct in *Blake*.

The degree of finality and certainty in matters of mineral contracts has been at issue in several reported cases. In *Cascio v. Schoenbrodt*,[11] the plaintiffs signed a purchase agreement for the defendants' land and mineral rights. At the closing, defendant Schoenbrodt objected to the language of the act of sale relative to the mineral rights and refused to go forward with the sale. The plaintiffs brought suit for specific performance. The defendants appealed the trial court judgment ordering specific performance and the Louisiana First Circuit Court of Appeal reversed on the basis that the language of the purchase agreement was too unclear to be given effect. The uncertain language was as follows:

> Sellers to retain one-half of all mineral rights as long as they are financing the above property as well as royalty rights. Sellers agree to grant a partial release of mortgage on any part of the property upon receiving a pro-rata payment on the remaining balance of the mortgage as compared to the amount of property released.[12]

Parol evidence of the intent of the parties established uncertainty as to essential elements, and the agreement was held to be of no effect.

In *Duncan v. Paragon Resources, Inc.*,[13] a geologist sought to be declared the owner of an overriding royalty interest in four leases. The court of appeal held that parol evidence could not be used to prove his right to such an interest. Because the interest claimed was a mineral right

9. 428 So. 2d 1118 (La. App. 1st Cir. 1983).
10. LA. MIN. CODE art. 194 (Supp. 1983).
11. 431 So. 2d 32 (La. App. 1st Cir. 1983).
12. *Id.* at 34.
13. 417 So. 2d 850 (La. App. 3d Cir. 1982).

within the meaning of the Mineral Code and thus a real right, it could be proved only by a writing.[14]

LEASE RIGHTS AND MAINTENANCE

Last year, the Louisiana Supreme Court decided the first of the "market value" royalty cases then pending in the state.[15] It has now decided a second such case, *Shell Oil Co. v. Williams, Inc.*[16] The plaintiffs Shell Oil Co. and Pennzoil Producing Co. sued their lessors for a declaratory judgment that royalty payments under the leases were controlled by the federally regulated price for which the plaintiffs sold the gas rather than by the value of the gas sold in the unregulated intrastate market. Reversing a court of appeal decision, the Louisiana Supreme Court held for the plaintiffs, holding that market value must be determined by reference to sales comparable in quality. Consideration of comparability must include the legal quality of the gas, *i.e.*, whether it is sold in a regulated or an unregulated market. The majority opinion did not dwell on evidence of intent, although it did note that the defendants knew of plaintiffs' intent to sell into the interstate market. It also observed that the plaintiffs were under a duty to market the production with diligence and that the sales were prudently made.

In a well reasoned dissent, Justice Dennis contended that the majority had recognized the interstate market as a separate market, and that such a market did not exist in 1934 when the leases were first obtained. Thus the parties' intent could not have been as the majority found.[17]

In *Dawes v. Hale*,[18] the second circuit was called upon to interpret an acreage retention clause in a lease. The clause provided that, in the event of lease termination for any cause, the lessee would keep an area of forty acres around each producing well. The lease covered only forty acres. The lessee had drilled three wells on the property, but evidence indicated that only one and one-half acres were actually drained by the wells. The plaintiffs sought lease cancellation for failure to develop the leasehold as a prudent operator. Relying on the acreage retention clause, the trial court granted summary judgment for the defendants. On appeal the second circuit reversed. It was the opinion of the court of appeal that under article 122 of the Mineral Code, the parties may stipulate what constitutes reasonable development but they may not contractually abrogate it entirely. Here, said the court, the acreage retention clause reflected no

14. LA. MIN. CODE arts. 16, 18 (1975). There may yet be problems with characterizing such an overriding royalty as a real right for other purposes.

15. Henry v. Ballard & Cordell Corp., 418 So. 2d 1334 (La. 1982), *discussed in* Martin, *Developments in the Law, 1981-1982—Mineral Rights*, 43 LA. L. REV. 523, 530-31 (1982).

16. 428 So. 2d 798 (La. 1983).

17. *Id.* at 804.

18. 421 So. 2d 1208 (La. App. 2d Cir. 1982).

clear intent to limit or define the development obligation of the lessee. Thus, it could not displace the duty to develop reasonably.

In *Dawes*, the court stated that the "principle of reasonable development is a matter of public policy, necessary in order to give effect to the parties' intent inherent in all mineral leases, to assure reasonable development of the state's natural resources, and to prevent property being taken out of commerce."[19] However, it is doubtful that article 122 embodies any policy other than giving effect to the intent of the parties. The court must have derived the public policy from another source which it did not cite. It is questionable whether public policy does favor development as spelled out by the court. Conservation regulations limit the number of wells in an area by unitization and by spacing regulations. The drilling of numerous shallow wells on small tracts of land, each producing small amounts of oil or gas, may in fact be wholly undesirable. The increments of production from such wells may be more than offset by the side effects of salt water pollution and irresponsible operators who may drill such wells for investment purposes apart from the desire to produce oil and gas. There are numerous well holes, mud pits, and brine pits left behind by operators who drilled and departed without fulfilling their obligations.

The plaintiffs in *Willis v. Franklin*[20] sued their lessee for damages and dissolution of the mineral lease for nonpayment of royalty. Although some persons gave the defendants notice of nonpayment, including written notice prior to the notice of the plaintiffs, plaintiff Willis did not give written notice of default until September 2, 1981. Eight days after this written notice, the plaintiffs filed suit.

The trial court dismissed the claim on the ground that suit was premature since the thirty-day waiting period of the Mineral Code had not run. The court of appeal affirmed this judgment since articles 137-138 of the Mineral Code allow a lessee a thirty-day period to respond to a demand letter for nonpayment of royalty. Suit filed prior to this time was thus premature.

The necessity of putting in default for nonpayment of shut-in payments was at issue in *Acquisitions, Inc. v. Frontier Explorations, Inc.*[21] A well on the lease in question was completed as a gas producer in November 1980 and shut in while awaiting connection to an available market. The lease provided that shut-in payments of one hundred dollars per month were to be made in such circumstances. Fourteen months of shut-in royalties were tendered on July 27, 1982; no demand had been made at this time by the original lessors. These lessors had sold some interests

19. *Id.* at 1211.
20. 420 So. 2d 1243 (La. App. 3d Cir. 1982).
21. 432 So. 2d 1095 (La. App. 3d Cir. 1983).

in minerals to the plaintiff Acquisitions, Inc., on June 9, 1982, and Acquistions had demanded release of the lease on July 8, 1982, and filed suit on July 20, 1982.

The trial court granted summary judgment, deeming the lease terminated for failure to make shut-in payments. The court of appeal reversed. The court of appeal properly noted that the issue turned on the lease terms: If the shut-in payments were classified as royalty, then a putting in default, with a corresponding thirty-day period in which the lessee may pay, was required by articles 137-138 of the Mineral Code. If the shut-in payments were classified as shut-in "delay rentals," then the rentals clause would constitute an express resolutory condition of the lease, and the lease would terminate automatically.[22] Here the lease treated shut-in payments as royalty; therefore, the notices of nonpayment and delays governed and the lease did not terminate.

PROCEDURAL MATTERS

The plaintiffs in *Hogan Exploration, Inc. v. Placid Oil Co.*[23] brought suit for a writ of mandamus against the purchaser of oil from a well to compel payment for the production. They relied on articles 210-211 of the Mineral Code for availability of the writ. Placid Oil Co. (Placid) defended on the ground that it owned rights covering the same land and that the writ of mandamus was not appropriate. Agreeing with Placid as to mandamus proceedings, the court of appeal reversed a trial court order of payment to the plaintiffs. The court held that, despite the language of article 211 of the Mineral Code allowing use of mandamus, the use of the writ is not appropriate where the law provides relief by ordinary means. Here the court found that there existed a serious title dispute that had to be resolved before compelling payment.

Judge Stoker, concurring in *Hogan* (Judge Yelverton joined Judge Stoker in concurrence which actually made it the majority opinion) observes that the opinion written by Judge Knoll would mean that the writ of mandamus could probably never be used. But, as he notes, some meaning must be given to the summary proceeding authorized in article 211. He states the law as follows: "[T]he test is not absence of other forms of relief by ordinary process. Rather, the test is whether there are no serious issues to be resolved, that is, where the amount due and owing is certain, definite and fixed."[24] This view seems preferable.

At issue in *Bordelon v. Crutcher*[25] was the running of prescription on a claim for reimbursement of overpayment of costs under a farmout.

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22. *See* LA. MIN. CODE art. 123, comment (1975).
23. 427 So. 2d 546 (La. App. 3d Cir.), *cert. denied*, 433 So. 2d 1053 (La. 1983).
24. *Id.* at 550.
25. 430 So. 2d 1107 (La. App. 4th Cir. 1983).

In earlier litigation, it was held that the plaintiff herein had been entitled in his contract with defendant to three percent of the defendant's interest in a certain farmout agreement, not three percent of the entire farmout.[26] The plaintiff then brought this action for reimbursement of overpayments of costs attributable to his interest since he apparently had paid costs as though he had three percent of the entire farmout. Defendant filed an exception of prescription of ten years. The court of appeal held that the prescription exception was properly dismissed because the plaintiff did not know he had overpaid his costs until the earlier litigation held that his interest was limited to three percent of the defendant's interest in the farmout. Prescription could not run until he knew he had overpaid.

PRESCRIPTION OF MINERAL SERVITUDE

The Louisiana Supreme Court reversed the two lower court decisions on an issue of interruption of prescription in *Cox v. Sanders*.[27] The court of appeal had held that the good faith drilling of and production from two wells under a lease granted by only one of two coowners without the consent of the nonleasing coowner did not constitute a use of the servitude which would interrupt liberative prescription. The reasoning of the court of appeal was that while article 174 of the Mineral Code provides that the use by one coowner of a servitude inures to the "benefit" of all coowners, it would not apply in a case such as this where the coowner of the servitude is the landowner who does not want the "benefit" of interruption of prescription.[28]

Reversing the lower courts, the supreme court held that the mineral servitude on the lands in question had not been extinguished by prescription. This applies only to the contiguous lands in the case since a landowner cannot create a single servitude on two or more noncontiguous tracts. There is ample precedent for the court's approach, and the decision will avoid some serious problems that would otherwise arise.[29]

TORT AND TRESPASS PROBLEMS

In *Jumonville v. Frank's Petroleum, Inc.*,[30] the plaintiff lessor brought suit for mental anguish at seeing his son injured in a vehicle accident on the leasehold. The accident involved a contractor of the lessee, and the jury decided that the contractor was not negligent in the accident. The plaintiff nevertheless claimed damages under a lease clause making the lessee responsible for all damages caused by the lessee's permitted

26. Bordelon v. Crutcher, 365 So. 2d 1109 (La. App. 4th Cir. 1978).
27. 421 So. 2d 869 (La. 1982).
28. 409 So. 2d 1257, 1260 (La. App. 2d Cir. 1982).
29. *See* Martin, *supra* note 15 at 531-32.
30. 422 So. 2d 1261 (La. App. 1st Cir. 1982).

operations. The court of appeal affirmed the trial court judgment for the defendant. The court found the lease clause inapplicable because the plaintiff's damages were not caused by the lessee's operations since the lessee's contractor was not negligent.

Lloyd v. Hunt Exploration, Inc.[31] presented a question of trespass. The landowners had leased to a company, and that company had given the defendant seismic operator permission to go on the land and undertake seismic exploration operations. The lease had given the lessee the exclusive right to go on the land in search of minerals, but the trial court and court of appeal nonetheless held that a claim for trespass could be brought. The court stated: "A landowner does not abandon his right to protect his interest against wrongful acts of others simply because he has executed a lease of his property."[32] The plaintiffs were allowed to recover damages for loss of a pond, for fence posts, and for letting loose of cattle. The plaintiff father recovered general damages as well.

While one should have no quarrel with an award of damages caused by a seismic crew in the circumstances of the *Lloyd* case, it may be preferable not to base the award on a theory of trespass. If the seismic crew had been a contractor of the lessee performing services for the lessee, could a claim have been brought on a trespass basis? Consent of the lessor (beyond the right granted by the lease) would not be necessary in the contractor situation, though a prudent lessee would seek such consent. Damages should be recoverable, but the basis for them would be negligence, not trespass.

In *Hogan Exploration, Inc. v. Monroe Engineering Associates*,[33] the plaintiff oil and gas operator recovered damages from an engineering firm which caused the plaintiff to drill a well at an improper location because the firm staked the well at the wrong place. Upon discovering the erroneous placement of the well, the plaintiff got leases and permission for the location, but the well was unsuccessful. The plaintiff then drilled another well near the original location.

The court of appeal upheld the damage award, holding that the staking of a well site in the wrong quarter section, after admittedly being provided with sufficient information to stake it at the correct location, constitutes conduct so clearly improper and manifestly below reasonable standards in the engineering profession as to render such action an exception to the general rule of proof of the degree of care and skill exercised by other engineering professionals in the area. The activity constitutes conduct which ordinary reason and logic characterize as faulty and negligent. The plaintiff did not waive or ratify the error by securing leases and com-

31. 430 So. 2d 298 (La. App. 3d Cir. 1983).
32. *Id.* at 300.
33. 430 So. 2d 696 (La. App. 2d Cir. 1983).

pleting the well at the improper location; these were good faith efforts to mitigate damages.

Southwestern Electric Power Co. v. Parker[34] may cause some problems for the future. A landowner and his drilling contractors commenced two wells on his land, which was subject to a right of way in favor of the plaintiff Southwestern Electric Power Co. (SWEPCO). The wells were within fifty feet of the power lines of SWEPCO. The right of way from the landowner's predecessor in title allowed SWEPCO to remove or prohibit any obstructions within one hundred feet of the lines that might interfere with the lines. SWEPCO sought to enjoin any further drilling on the land in question. The trial court granted a restraining order preventing further drilling but allowing completion of the two wells.

The court of appeal amended the judgment to enjoin the defendants from any violation of the right of way agreement by their operations. The court reasoned that it would be unduly burdensome for the power company to monitor constantly all 4000 miles of its lines to supervise activities of one acting contrary to the deed.

It is notable that the court in SWEPCO made no reference to article 11 of the Mineral Code which provides for accommodation of conflicting rights in land and minerals. While the right of way of the power company preceded the mineral activities and provided the power company with the authority to exclude, nevertheless, it must be noted that the right of way is only a servitude upon the land, not the ownership of the land. A close review of the opinion leaves the impression that the court did not believe an inquiry to try to accommodate the several uses of the land would be appropriate. The result is to change the servitude on the land from a use of the land for power lines to virtual ownership of the land, *i.e.*, power to exclude all other uses of the land. This is not a desirable result if other uses of the same land could be accommodated by reasonable efforts.

CONSERVATION PRACTICE

Three reported cases involving conservation practice were decided in the last year.[35] *Jordan v. Sutton*[36] is the latest in a series of cases involving a gas storage facility.[37] In the earlier litigation the court of appeal

34. 419 So. 2d 134 (La. App. 2d Cir. 1982).

35. The reader should be aware that the views of the writer are not disinterested in conservation regulation since he is, at the time of this writing, continuing to serve as Commissioner of Conservation and is the successor in litigation in two of the cases discussed. The author also has had to rule on some of the same matters and to take positions on matters related closely to the issues in litigation. For these reasons, the writer has avoided critical comment.

36. 424 So. 2d 305 (La. App. 1st Cir. 1982).

37. The background and earlier decisions are discussed in Martin, *supra* note 4, at 378-81.

held that there was no express time limit on bringing suit against the Commissioner of Conservation under Louisiana Revised Statutes 30:12.[38] However, the defense of laches was available. On remand the trial court held that laches did apply and that the delay of more than a year by plaintiff in bringing suit to challenge an order of the Commissioner barred the claim. The present case is an appeal of that decision. The court of appeal held:

> [T]he two elements necessary for defendant to establish that plaintiff was guilty of laches concerning finality of the order of the Commissioner, namely unreasonable delay in filing a direct suit against the Commissioner and harm that would be suffered by defendant and [Southern Natural Gas, intervenor and operator of the storage project] resulting from their actions occasioned by the delay, are clearly present, and the trial judge correctly so held.[39]

Nevertheless, the court of appeal went on to hold that other items of relief were not barred by laches. These included the plaintiff's seeking an order directing that tests be performed and that the Commissioner produce information and answer interrogatories.

Summers v. Sutton[40] concerned a challenge to an order of the Commissioner of Conservation which revised the boundaries and reduced the size of a drilling and production unit from 231.07 acres to 161.04 acres. The original unit was established on February 4, 1981, but was revised after the drilling of a second well within the confines of the original unit established that some of the acreage was nonproductive. The revision was accomplished through a public hearing on September 2, 1981, and order issued on October 5, 1981.

Numerous issues challenging the validity of the revised order were raised. These include the following, as summarized by the court of appeal:

> (1) in failing to grant them the stay of execution of the administrative order pending the final determination of the litigation; (2) in failing to require that they be furnished with the complete record of the administrative hearing; (3) in not finding that the Commissioner had not followed the procedures of the Administrative Procedure Act; (4) in failing to require the agency to hold Inexco [lessee] to the burden of proving with reasonable certainty that the proposed revision unit was necessary; (5) in failing to find that the Commissioner's order did not include findings of fact, accompanied by an express statement of supporting

38. As noted earlier, LA. R.S. 30:12 has been amended to provide a 60-day time limit. *See supra* text accompanying note 2.

39. 424 So. 2d at 312.

40. 428 So. 2d 1121 (La. App. 1st Cir. 1983).

> facts; (6) in failing to find that the Commissioner's order was arbitrary and capricious; (7) in failing to find that the Commissioner's order was manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record; (8) in finding that Inexco had established that the Db-3 Sand in M M Summers # 5 had shaled out; and (9) in affirming the administrative order in question.[41]

The court of appeal upheld the Commissioner of Conservation on each of the issues. In particular, the court observed that while the court's review is not limited to the determination of whether or not the order is supported by substantial evidence, the court is not empowered to substitute its judgment for that of the Commissioner: "[T]he Commissioner's decision that has a rational basis in the administrative record should be upheld."[42] The court held that there was a rational basis, and that the Commissioner was not arbitrary and capricious in accepting the testimony of the expert witnesses.

In *Trahan v. Superior Oil Co.*,[43] the lessors sued their lessee and others, complaining that their lease lands were drained by a well of their lessee, the "Greene" well (completed as a producer in November 1976), which was in a unit created by the Commissioner of Conservation in an order of January 17, 1977, issued after application of Superior Oil Co. (Superior). A subsequent order of May 1, 1978, effective March 14, 1978, included a portion of the lessor's land in the unit for the "Greene" well. The complaint for drainage was for the period of November 1976 through March 1978. The basis for the claim was that the lessee breached its obligation to protect against drainage by failing to present data and information showing drainage to the Commissioner in the hearing which led to the order of January 1977, and in a hearing continuing the same unit but adding an alternate unit well in January 1978. There was no express allegation of fraud, lack of good faith, or intentional deception.

The trial court granted the defendant Superior's motion to dismiss, holding that the suit was an impermissible collateral attack on an order of the Commissioner of Conservation. On appeal, the federal Fifth Circuit Court of Appeals affirmed in an opinion that contains a full discussion of the collateral attack rule in Louisiana law. A portion of that opinion bears quoting here:

> [T]he collateral attack rule does not focus on the duty of the lessee, but rather on the order of the Commissioner. The collateral attack doctrine does not come into play unless there is an actual order of the Commissioner which in fact deals with the

41. *Id.* at 1125.
42. *Id.* at 1129.
43. 700 F.2d 1004 (5th Cir. 1983).

> particular subject matter at issue (*e.g.*, the appropriate unit for a given well), and the order has not been determined, either administratively or by suit under LSA—R.S. 30:12, to have been improper when issued. The collateral attack rule simply says that it generally may not be established that that particular order would have made provisions in respect to the subject matter it dealt with different from those it in fact made, had the lessee presented different evidence or requested a different result at the hearing. The rule does not address the lessee's duty to cause a particular subject matter to be before the Commissioner for his action thereon; and where the matter does not come before the Commissioner, then the collateral attack rule is inoperative and does not prohibit the lessor from showing that if the matter had been brought before the Commissioner he would probably have acted on it and have done so with a particular result. But where the matter *does* come before the Commissioner and he *does* act on it, then the collateral attack rule generally precludes the lessor from asserting that that particular action would have been different had the lessee conducted itself differently at the hearing leading to the action.[44]

Applying this rule to the present matter, the Fifth Circuit concluded that an exception to the rule was not appropriate and affirmed the judgment below.

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44. *Id.* at 1020-21.