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Implied Covenants: Claims under Article 122

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I. Introduction

Oil and gas leases expressly impose certain obligations upon lessees. In addition to lessees owing those express obligations, lessees owe implied obligations to lessors. This article discusses what implied obligations are recognized by Louisiana law, what remedies exist for breaches of such implied obligations, and what procedural issues are raised by a lessor's assertion of claims for an alleged breach of the lessee's implied obligations.

II. Practical Rationale and Theoretical Justifications for Implied Covenants

For well over 100 years, courts have held that oil and gas lessees are bound by implied covenants or obligations that they owe to their lessors. Courts in each jurisdiction that has any significant oil and gas jurisprudence seem to recognize that such implied covenants exist, and Louisiana is no exception.

Black's Law Dictionary defines “covenant” as an agreement or promise, and an “implied covenant” as one which may reasonably “be inferred from the whole agreement and conduct of the parties.”


A case still recognized as one of the leading cases on implied covenants is Brewster v. Lanyon Zinc Co., 140 F. 801 (8th Cir. 1905). See Patrick H. Martin and Bruce A. Kramer, Williams and Meyers: Oil & Gas Law §802 at 4 (describing Brewster as “landmark” case); John S. Lowe, Oil and Gas Law in a Nutshell (5th ed. 2009) (describing Brewster as a “leading case”); Jacqueline S. Weaver, When Express Clauses Bar Implied Covenants, Especially in Natural Gas Marketing Scenarios, 37 Nat. Resources J. 491, 492 n.6 (1997). Brewster sometimes has been cited by Louisiana courts. See, e.g., Wadkins v. Wilson Oil Corp., 6 So. 2d 720, 724 (La. 1942); Carter v. Arkansas Louisiana Gas Co., 36 So. 2d 26, 28 (La. 1948); see also Edmundson Bros. Partnership v. Montex Drilling Co., 731 So. 2d 1049, 1053 (La. App. 3rd Cir. 1999) (quoting a portion of Carter that quotes Brewster).

See, e.g., Bonds v. Sanchez O'Brien Oil & Gas Co., 715 S.W. 2d 444, 445-6 (Ark. 1986); Garman v. Conoco, Inc. 886 P.2d 652, 659 (Colo. 1994); Coastal Oil & Gas...
A practical rationale for courts holding that lessees are bound by implied covenants arises from the characteristics of oil and gas leases. Although most leases provide for payment of a bonus, the primary consideration or cause for a lessor's granting of a mineral lease generally is the hope of receiving royalties. But royalties will not be paid unless there is production. Thus, the lessor's chance of actually receiving the potential compensation that motivated him to grant the lease is dependent upon the lessee's performance in exploring for minerals, developing the leased premises for production of minerals that are found, and marketing any minerals that are found. Further, the long term value of the lessor's mineral rights might depend upon the lessee's protecting the premises from drainage from offsite wells. But given the complexities and uncertainties inherent in oil and gas exploration and production, it is difficult or impossible to specify, at the time a lease is executed, how many wells should be drilled, where they should be drilled, how deep they should be drilled, and what steps should be taken to market any minerals that are found. Similarly, it is difficult to foresee whether the

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4 Commentators sometimes debate whether the primary purpose of implied covenants is to fill gaps in contracts, or whether it is to promote fairness. See David E. Pierce, Exploring the Jurisprudential Underpinnings of the Implied Covenant to Market, 48 Rocky Mtn. Min. L. Inst. Ch. 10, p. 9 (2002). Whether implied covenants are filling gaps or promoting fairness, the practical rationale is the great significance to the lessor of performance by the lessee and the fact that, to a large extent, the details of the performance required are not expressly defined by the lease. At least a couple of commentators, though, have suggested that a third justification—public policy—sometimes comes into play. See Jacqueline L. Weaver, Implied Covenants in Oil and Gas Law Under Federal Energy Price Regulation, 34 Vand. L. Rev. 1473, 1489-90 (1981); Bruce M. Kramer and Chris Pearson, The Implied Marketing Covenant in Oil & Gas Leases: Some Needed Changes for the 80's, 46 La. L. Rev. 788, 790 (1986) (stating that the implied covenant of reasonable development serves public policy), writ refused, 502 So. 2d 111 (La. 1987).

5 “Bonus' means money or other property given for the execution of a mineral lease, except for interests in production ....” See La. Rev. Stat. 31:213(1). A bonus typically is paid in cash, at or near the time the lease is executed.

6 See Carter v. Arkansas Louisiana Gas Co., 36 So. 2d 26 (La. 1948). “'Royalty,' as used in connection with mineral leases, means any interest in production, or its value ... payable to lessor or others entitled to share therein.” See La. Rev. Stat. 31:213(5).
lessee will need to take steps to protect the leased premises against drainage, much less to define what steps should be taken to protect against drainage. Accordingly, leases generally do not attempt to define what specific steps a lessee should take in the way of exploration, production, marketing, and protection, even though these are the very things upon which the lessor's hope of royalties and the future value of his mineral rights are based.  

Courts use implied covenants to satisfy this practical need to protect lessors. The legal theory that is used to justify implied covenants may differ slightly between Louisiana and some other states. A nationally-prominent oil and gas treatise states that the theoretical justification for implied covenants is the general principle of cooperation that exists in contract, which is embodied in the near-universally recognized duty of good faith and fair dealing. And Louisiana recognizes a general obligation of good faith in contracts. But the Louisiana Supreme Court has stated that the implied duties in oil and gas leases under Louisiana law are particularized expressions of Louisiana Civil Code article 2710's requirement that a lessee use the "thing leased as a good administrator."  

Louisiana's recognition that mineral lessees are bound by implied covenants pre-dates the Mineral Code by several decades. In Louisiana, courts have held that a lessee's performance of his implied obligations  

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8 Patrick H. Martin, A Modern Look at Implied Covenants to Explore, Develop, and Market Under Mineral Leases, 27 Sw. Legal Fdn. Oil & Gas Inst. 177, 194 (1976) ("Because there are many unknowns involved when the lease is executed, it is understood that much must be left to the judgment and discretion of the lessee."). The difficulty in defining how many wells should be drilled and other specifications of the lessee's performance also was discussed in Brewster v. Lanyon Zinc Co., 140 F. 801, 810 (8th Cir. 1905).  

9 See Bruce M. Kramer and Chris Pearson, The Implied Marketing Covenant in Oil and Gas Leases: Some Needed Changes for the 80's, 46 La. Law Rev. 788, 788-9 (1986) ("It is doubtful if any other character of legal instrument can be found in which one of the parties has so much potentially at stake with so little express contractual protection.") (quoting Walker, The Nature of Property Interests Created by an Oil and Gas Lease in Texas, 11 Tex. L. Rev. 399 (1933)).  

10 See 5 Patrick H. Martin and Bruce A. Kramer, Williams & Meyers Oil and Gas Law §802.1 at 8.  

11 The implied covenant of good faith and fair dealing is recognized in court opinions from virtually every state. See also Restatement (Second) of Contracts §205 (1981).  


14 The Louisiana Mineral Code was enacted by La. Acts 1974, No. 5, and became effective on January 1, 1975. One of Louisiana's early cases recognizing the implied covenant of reasonable development was Caddo Oil & Mining Co. v. Producers Oil Co., 134 La. 701, 64 So. 684 (1914).
should be judged against a standard that requires the lessee to act as a reasonably prudent operator who operates the leased premises for the mutual benefit of the lessor and lessee.\textsuperscript{15} This reasonably prudent operator served as the standard of conduct for each implied covenant recognized by jurisprudence.\textsuperscript{16}

The reasonably prudent operator standard now is codified in Mineral Code article 122, which states: "A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee." The implied covenants that the jurisprudence recognized prior to enactment of the Mineral Code were not codified. Thus, those obligations still are implied obligations, rather than obligations expressly stated by statute.

III. Implied Covenants Recognized under Louisiana Law

There is substantial similarity between the particular implied covenants recognized by different jurisdictions and various commentators. Nevertheless, there are some differences in the implied covenants which different jurisdictions recognize,\textsuperscript{17} and sometimes different jurisdictions use different terminology to describe implied covenants that are the same in substance.\textsuperscript{18} Some of the implied covenants most frequently recognized are covenants: (1) to promptly

\textsuperscript{15} See Caddo Oil, 134 La. at 717, 64 So. at 690.

\textsuperscript{16} See, e.g., Caddo Oil, 134 La. at 717, 64 So. at 690 (implied covenant of reasonable development); Breaux v. Pan American Petroleum Corp., 163 So. 2d 406, 415 (La. App. 3rd Cir.), writ refused, 165 So. 2d 481 (La. 1964) (implied covenant to protect against drainage). The reasonably prudent operator standard is used in other jurisdictions too. See Lowe, supra note 2 at 309.

\textsuperscript{17} Some courts have recognized an implied covenant of further exploration, see Gillette v. Pepper Tank Co., 694 P.2d 369, 372 (Colo. App. 1984), while others have rejected such a duty. See Sun Exploration & Production Co. v. Jackson, 783 S.W.2d 202, 204 (Tex. 1990). Some have recognized an implied covenant to restore the surface of the land to its original condition after the lease is complete, see Bonds v. Sanchez-O'Brien Oil & Gas Co., 715 S.W.2d 444, 446 (Ark. 1986), and some have rejected such an implied covenant. See Terrebonne Parish School Board v. Castex Energy, Inc., 893 So. 2d 789 (La. 2005).

\textsuperscript{18} For example, Texas recognizes implied duties to develop the premises, protect the leasehold, and administer the lease. The duty to protect against drainage is included in the duty to protect the leasehold, and a duty to reasonably market oil and gas is part of the implied covenant to administer the lease. See Yzaguirre v. KCS Res., Inc., 53 S.W.3d 368, 373 (Tex. 2001). Colorado recognizes four implied covenants: (1) to conduct exploratory drilling; (2) to develop the leased premises after discovering resources that can be profitably developed; (3) to operate diligently and prudently (which includes an implied covenant to market); and (4) to protect the leased premises against drainage. See Garman v. Conoco, Inc., 886 P.2d 652, 659 (Colo. 1994).
drill an initial test well; (2) reasonably develop the premises; (3) conduct further exploration; (4) protect against drainage; (5) diligently market minerals; and (6) restore the surface.

A. Implied covenant to promptly drill an initial test well — not clear if this covenant is recognized in Louisiana

Early in the history of the oil and gas industry, courts began holding that a lessee had an implied duty to begin drilling a test well reasonably promptly after a lease was granted. In order to avoid having an implied duty to start drilling so soon, lessees began to draft leases that included delay rental clauses. Generally, the delay rental clauses provided that a lessee need not drill a well in the first year if he paid a specified amount in delay rentals. Often, such clauses would allow a lessee to avoid drilling a test well in subsequent years too, by paying delay rentals for each year. To avoid potential problems by the lessee inadvertently missing a payment of delay rentals, lessees sometimes bargained for their leases to be “paid-up” leases, in which an up-front payment to the lessor constitutes both the bonus and an advance payment of delay rentals.

Lessees began using delay rental clauses early enough in the history of the oil and gas industry that the use of such clauses seems to have been common since the very beginning of the oil and gas industry's presence in Louisiana. The Office of Conservation website states that the first oil well in Louisiana was completed in 1901. At lease three reported cases from Louisiana deal with leases granted in early 1901 that contained delay rental clauses. Today, because virtually every oil and gas lease is either a paid-up lease or a lease that contains a delay rental clause, the implied covenant to promptly drill an initial test well is seldom of importance in the oil and gas industry anywhere in the United States.

20 See Conine, supra note 19, at 684.
23 “The implied covenant to drill an initial well is no longer of significance because the typical lease today terminates automatically if a well is not drilled or excused by delay rentals within a fixed period.” Patrick H. Martin, A Modern Look at Implied Covenants to Explore, Develop, and Market Under Mineral Leases, 27 Sw. Legal Fdn. Oil & Gas Inst. 177, 179 (1976).
Indeed, the near universal use of leases that either are paid-up leases or leases that contain a delay rental provision has led to a dearth of case law on the implied covenant to drill a test well, and it is not clear if the covenant is recognized in Louisiana. The comment to Mineral Code art. 122 states that "Louisiana cases have not found it necessary to impose an obligation to drill an exploratory well in situations in which other courts did so prior to the more modern" leases that contain delay rental provisions because "Louisiana courts dealt with the problem through application of articles of the Civil Code dealing with potestative conditions and through the doctrine of serious consideration."\(^{24}\) But at least some of these cases involved leases that provided for a purely nominal bonus, and either no delay rentals or only nominal delay rentals,\(^{25}\) and those cases do not answer the question of whether Louisiana courts would impose an implied obligation to drill a test well if a mineral lease provided for a bonus that was not nominal, but the lease did not include a delay rental clause (or required payment of only nominal rentals).

### B. Implied covenant of reasonable development—recognized in Louisiana

The implied covenant of reasonable development applies after minerals have been produced in paying quantities from a particular mineral formation.\(^{26}\) The covenant requires the mineral lessee to drill as many wells as a reasonably prudent operator would drill to develop the proven formation for the mutual benefit of the lessor and lessee.\(^{27}\)

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\(^{24}\) A "potestative" condition is a condition that makes the performance of a contractual obligation depend solely on the will of one of the parties. See La. Civ. Code (1870) art. 2024; Martin-Parry Corp. v. New Orleans Fire Detection Service, 221 La. 677, 682-3, 60 So. 2d 83, 85 (1952). A potestative condition that depends purely upon the will of the obligor renders the obligation null. See La. Civ. Code (1870) art. 2034; Martin-Parry, 221 La. at 682-3, 60 So. 2d at 85.

\(^{25}\) See Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906) (bonus of $1 and delay rentals of $4 per quarter held insufficient to avoid lease being null based on lessee's obligation being purely potestative).

At least one Louisiana case acknowledges in dicta that an implied covenant to drill an initial test well might exist in other jurisdictions. See Caskey v. Kelly Oil Co., 737 So. 2d 1257 (La. 1999) ("scholarly treatises have recognized the implied obligations of a mineral lessee in other jurisdictions to include obligations to drill an initial exploratory well . . . ").


\(^{27}\) See Caddo Oil, 134 La. at 717, 64 So. at 690.
The Louisiana Supreme Court recognized the existence of an implied covenant of reasonable development in 1914 in *Caddo Oil & Mining Co. v. Producers' Oil Co.*\(^{28}\) The court stated:

It is an implied covenant of every lease of land, for the production of oil therefrom, that, when the existence of oil, in paying quantities, is made apparent, the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. Whatever ordinary knowledge and care would dictate, as to the proper thing to be done for the interest of the lessor and lessee, under any given circumstances, is that which the law requires to be done, as an implied stipulation of this lease.\(^{29}\)

In that case, the lessee had drilled eight wells, each of which produced oil, though the rate of production slowed down considerably with time. The lessor demanded on several occasions that the lessee drill additional wells, but the lessee refused. The lessor sued, seeking a judgment that the lease was void. At the time the lessor filed suit, each of the eight wells still were producing, but only three still were producing by the time of trial. The lower court granted partial dissolution, allowing the lessee to retain its lease rights as to the three wells still producing oil, but otherwise dissolving the lease.

On original hearing, the Louisiana Supreme Court affirmed, suggesting that the lessee had abandoned the lease as to the areas in which it had ceased production or never drilled. On rehearing, the Louisiana Supreme Court reversed the lower court, and granted judgment for the lessee. The court declared that lessee only had a duty to reasonably develop the property, and that whether the lessee had complied with that duty was an issue of fact.\(^{30}\) Several individuals associated with either the lessor or the lessee had testified. None stated that the lessee's development of the property had not been reasonable. On the other hand, some of the witnesses testified that the lessee's development of the property had been reasonable. Therefore, the lessor's demand was dismissed in its entirety.

A similar result was reached in *Gennuso v. Magnolia Petroleum Co.*\(^{31}\) In that case, the lessee leased approximately 185 acres from the lessor, and drilled one productive well. The lessor made written demand that the lessee drill additional wells. The lessee did not drill additional wells, and the lessee sued for cancellation. The trial court granted partial cancellation, allowing the lessee to keep its lease rights as to 25 acres around the productive well. The Louisiana Supreme Court reversed,

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\(^{28}\) 134 La. 701, 717 64 So. 684, 690 (1914).

\(^{29}\) See id. (quoting Thornton on Oil and Gas, §111).

\(^{30}\) See 134 La. at 717, 64 So. at 690.

\(^{31}\) 203 La. 559, 14 So. 2d 445 (1943).
noting that the lessee's geologist had testified that a prudent operator would not drill another well, and that the lessor had not presented countervailing evidence. Therefore, held the Supreme Court, the lessor's demand should be dismissed altogether.

In contrast, the court determined in Vetter v. Morrow that the lessee had breached its implied duty to reasonably develop the premises. In that case, about 110 acres of the leased premises were included in units from which minerals were being produced. The other 250 acres were not in a unit, and the lessee had not conducted any drilling on that portion of the leased premises. The lessor demanded that the lessee drill on that portion. After the lessee failed to do so, the lessor sued for partial cancellation of the lease. The evidence at trial showed that the land at issue was located to the west of two productive wells, and that the proven formation into which those productive wells had been drilled extended to the west, in the direction of the portion of the leased premises that was at issue. The trial court concluded that the lessee had failed to reasonably develop that portion of the leased premises, and he granted cancellation of the lease as to that area. The appellate court affirmed that partial cancellation.

Sometimes the duty of reasonable development will require not just that a lessee drill an adequate number of wells in particular areas, but also that the lessee use appropriate technology in order to reasonably develop the leased premises. In Wadkins v. Wilson Oil Co., the plaintiffs granted a mineral lease that covered 40 acres of land to the defendant. The land contained two existing wells. The defendant plugged the two wells back to shallower chalk formation, re-perforated both wells, and successfully put one of the two wells back into production. The defendant also drilled four additional productive wells into the same chalk formation on the leased premises, so that there were five producing wells on the 40 acres.

But other operators in the same general area were getting much higher production rates from the same chalk formation by drilling new wells and acidizing them. Experience in the area had shown that

32 See 203 La. at 562-3, 14 So. 2d at 446.
33 See 203 La. at 564, 14 So. 2d at 447.
34 361 So. 2d 898 (La. App. 2nd Cir. 1978).
35 See id. at 900.
36 See id. at 901.
37 6 So. 2d 720 (La 1942).
38 “Acidizing” has been defined as “a well stimulation technique used primarily on limestone reservoirs. Acid is poured or pumped down the well to dissolve the limestone and increase fluid flow.” See Norman J. Hyne, Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production at p. 452 (2nd ed. 2001). “Well stimulation” is “an engineering method used to increase the permeability of a reservoir
acidizing did not work as effectively on existing wells as on new wells, so it was necessary to drill new wells to get the full benefit of acidizing. The plaintiffs demanded that the defendant drill new wells, but the defendant declined to do so. The plaintiff sued for lease cancellation and obtained such an order from the trial court. The Louisiana Supreme Court affirmed, concluding that the trial court "correctly held that the defendant had failed to fulfill its implied obligation and covenant to further develop the property by drilling new wells with the modern process which had proved so successful on other leased properties adjoining and in the vicinity of the property in question."

In *Waseco Chemical and Supply Co. v. Bayou State Oil Corp.*, the lessee was producing oil from the leased premises, but other operators in the area had been producing oil from their leases at a much higher rate by engaging in fireflood operations. The Louisiana Second Circuit awarded lease cancellation, holding that the lessee's failure to engage in fireflooding constituted a failure to reasonably develop the leased premises.

C. Implied covenant to protect against drainage—recognized in Louisiana

Oil and gas will move from a point of higher pressure to a point of lower pressure. Because a well bore provides an area of lower pressure, it is able to drain oil or gas from the surrounding areas. And, if a well is close enough to a property line, it will drain oil or gas from beneath the land on the other side of the property line from the well. An oil and gas lessee is bound by an implied covenant to protect the leased premises from having substantial drainage of oil or gas drained from beneath its surface by a well or wells on other land.

The traditional way for a lessee to comply with the duty to protect against drainage is to drill offset wells on the leased premises. In this

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39 See 6 So. 2d at 668-9.
40 371 So. 2d 305 (La. App. 2nd Cir.), writ denied, 374 So. 2d 656 (La. 1979).
41 "Fireflood" has been defined as "an enhanced oil recovery process in which the subsurface oil is set afire. The heat makes the oil more fluid and the gases generated by the fire drives the oil to producing wells as air is pumped down injection wells." See Norman J. Hyne, *Nontechnical Guide to Petroleum Geology, Exploration, Drilling and Production* at p. 479 (2nd ed. 2001). "Enhanced oil recovery" is "the injection of fluids that are not found naturally in a producing reservoir down injection wells into the depleted reservoir to recover more oil." See id.
43 See *Breaux v. Pan American Petroleum Corp.*, 163 So. 2d 406, 415 (La. App. 3rd Cir.) (describing implied covenant to protect against drainage as being "actually an implied obligation to drill offset wells" when necessary to prevent drainage), *writ*
way, the lessor would obtain production of minerals from the common reservoir before the reservoir was exhausted.⁴⁴ Some courts have recognized, however, that a lessee might be able to satisfy its duty to protect against drainage by seeking unitization.⁴⁵

The lessee's duty is judged by the standard of what a reasonably prudent operator would do, taking into consideration both its interest and that of the lessor.⁴⁶ A corollary of this reasonability standard is that a lessee need not drill an offset well if it likely would be unprofitable to do so.⁴⁷ Cases from some states have held lessees to a higher standard of conduct if they also happen to be the operator of the well on the neighboring property, or have shifted the burden of proof from the lessor to the lessee to show the reasonability of the lessee's conduct. But in Louisiana, courts do not appear to apply different rules in such a situation.⁴⁸

The implied covenant to protect against drainage was recognized as early as 1896 in Pennsylvania,⁴⁹ and shortly thereafter in Ohio.⁵⁰ It is one of the most commonly recognized covenants. One of the early Louisiana cases to recognize that a lessee has a duty to protect its lessor against drainage was the 1929 Louisiana Supreme Court case, Swope v. Holmes.⁵¹ In Swope, the lessor sued, seeking cancellation of a lease as to 440 of the 2500 acres covered by the original lease. The lessor argued that 400 of those acres never had been developed, and the lease was subject to cancellation as to that area because of the non-development. The lessor sought cancellation as to 40 additional acres on the basis that the lessee had abandoned a well that was located on the 40 acres, and was allowing those 40 acres to be drained by wells on an adjoining property, which the lessee happened to own. The trial court granted partial cancellation as to the 40 acres on that basis, and the Louisiana Supreme Court affirmed.⁵² The Supreme Court did not, however, state a standard for evaluating whether a lessee had breached a duty to protect against drainage. Since then, courts have stated that, in order for the

refused, 165 So. 2d 481 (La. 1964).

See id.

See, e.g., id.


See 163 So. 2d at 415 (to prove a breach of the implied covenant to protect against drainage, the lessor must show that "it would have been economically feasible for the lessee to drill such offset wells").

See id. at 416.


See Harris v. Ohio Oil Co., 48 N.E. 502 Ohio (1897).

124 So. 131 (La. 1929).

See Swope v. Holmes, 124 So. 131 (La. 1929).
lessor to show that the lessee breached the implied covenant to protect against drainage, the lessor must show that there was substantial drainage, and that an offset well likely would have been profitable. 53

Well spacing rules and the use of unitization can decrease the frequency of drainage disputes, but such disputes still can occur.

D. Implied covenant to market — recognized in Louisiana

A lessee is bound by an implied covenant to exercise reasonable diligence in marketing minerals that the lessee finds. 54 This does not refer to an obligation of the lessee to promote the product with favorable publicity. Instead, the lessee's obligation is to attempt to find a buyer, with the most significant challenge typically being to arrange for natural gas to be transported to a place where it can be sold, though the lessee also might need to do work to treat the natural gas (particularly if it is sour gas or wet gas) to bring it to pipeline specifications. 55 This covenant is most often an issue with natural gas. There usually is not much difficulty in marketing oil because oil can be produced and then temporarily stored at the well site in storage tanks that are economical to construct, and because oil can be transported not only by pipeline, but also by barge, rail car, or truck. On the other hand, the only economic way to transport natural gas from the well to a market typically is by pipeline. Thus, if the well site is not located near an established pipeline, or a gathering network for a pipeline, then the gas may be unmarketable until piping is laid from the well site to the nearest pipeline. Sometimes this will be very expensive and take a considerable length of time.

An early Louisiana case that recognized an implied covenant to market, though it did not use that terminology, was Risinger v. Arkansas-Louisiana Gas Co. 56 In Risinger, the defendants drilled a well that was

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56 3 So. 2d 289 (La. 1941).
shown to be capable of producing gas in significant quantities. But the well also produced a substantial amount of salt water. The defendants shut-in the well, and made shut-in payments as required by the lease. The lessors demanded that the lessees connect the well to the nearest pipeline, which was three miles away. When the defendants refused, the plaintiffs sued for lease cancellation, arguing that the defendants had breached an obligation to market the gas. The defendants apparently did not contest the existence of an implied duty to market, but asserted that under the circumstances — the high costs of equipment to separate salt water, the costs of employees to operate the separators, and the cost of running pipe to connect the well to the pipeline that was about three miles away — they would lose money by operating the well. Thus, they argued, they had not acted unreasonably in declining to connect the well to the pipeline and to operate the well. The court seemed to assume that an implied duty to market exists, but ruled for the defendants, concluding that the defendants had not acted unreasonably.

In Lelong v. Richardson, the court also rejected a lessor's request for an order that the lease had terminated because of the lessee's failure to market gas from a well on the property that had been shown to be capable of producing gas. The court held that, under the circumstances, the lessee's conduct had not been unreasonable. Again, the court did not speak in terms of an implied duty to market. Instead, the court discussed whether the lessee had breached an obligation of "reasonable development," but in substance the court clearly was talking about an implied duty to market.

E. Implied covenant of further exploration — perhaps recognized in Louisiana

Some national commentators have argued that oil and gas lessees should be bound by an implied covenant of further exploration that is separate from the implied covenant of reasonable development. The implied covenant of reasonable development obligates a lessee to reasonably develop a proven formation after oil or gas is found in paying quantities in that formation. An implied covenant of further exploration similarly would apply after oil or gas is found in paying quantities in a

57 The opinion does not refer expressly to an "implied" obligation, but the court quoted various sections of the lease, and neither those sections nor any discussion in the opinion suggests that the lease contained an express duty to market.
58 The court noted that the defendants did not argue that they could pay shut-in royalties indefinitely.
59 See id. at 293.
60 126 So. 2d 819 (La. App. 2nd Cir. 1961).
particular, but this covenant would require a lessee to explore unproven areas—that is, areas other than the proven formation—to the extent that a reasonably prudent operator would explore such areas, taking into consideration the interests of both lessor and lessee. 62

The implied covenant of further exploration has been controversial. 63 Some commentators criticize proposals that such an implied covenant be recognized, 64 and probably more states have rejected the existence of an implied covenant of further exploration, at least by that name, than have adopted it. 65 But there has been some express acceptance of such an implied covenant, and in some circumstances courts that have not recognized an implied covenant of further exploration by name may have nevertheless imposed exploration and development obligations that go beyond the standard conception of the obligations included in the implied covenant of reasonable development.

The comment to Mineral Code article 122 states that Louisiana jurisprudence has not clearly distinguished between obligations of reasonable development and further exploration, but the comment suggests that Louisiana cases effectively have recognized a covenant of further exploration. 66 Some commentators also have taken the position that Louisiana effectively recognizes such a covenant. 67

Those who say that Louisiana recognizes an implied obligation of further exploration typically point to a line of cases headed by *Carter v.*

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62 See Min. Code art. 122 cmt.
63 See Kuntz: *A Treatise on the Law of Oil and Gas* §62.1 ("The question of the existence and the nature of further exploration has been the subject of much scholarly debate.").
66 See La. Min. Code art. 122 cmt.; cf. Thomas A. Harrell, *A Mineral Lessee's Obligations to Explore Unproductive Portions of the Leased Premises in Louisiana*, 52 La. L. Rev. 387, 390 (1991) (noting that Louisiana courts have referred to the lessee's obligation to reasonably "develop" the premises both when discussing the obligation to develop proven reservoirs and the obligation to explore non-productive areas). Indeed, the case that some commentators point to as being the leading case that establishes a duty of further exploration in Louisiana—*Carter v. Arkansas Louisiana Gas Co.*, 213 La. 1028, 36 So. 2d 26 (1948)—refers to the issue in the case as being whether the lessee had reasonably developed the leased property.
67 See Patrick H. Martin and Bruce A. Kramer, *5 Williams & Meyers: Oil and Gas Law* §845.4 at 341 ("Louisiana courts are probably the most severe in the country in enforcing an implied duty to explore further").
Arkansas Louisiana Gas Co. In Carter, a fault crossed the leased premises. The lessee had drilled wells and developed the property on one side of the fault, but not the other. The lessor demanded that the lessee drill on the other side, but the lessee did not do so. The lessor sued for lease cancellation. The trial court granted partial cancellation, dissolving the lease as to the portion of the property that had not been developed. The lessee appealed the order of partial cancellation (the lessor did not appeal the trial court's refusal to order complete cancellation).

The Louisiana Supreme Court affirmed, after reviewing the evidence and concluding that it showed that a reasonably prudent operator would have drilled wells on the side of the fault that had not been developed. Some of that evidence suggested that the proven field, which the lessee had developed on one side of the fault, likely existed on both sides of the fault. Thus, a reader could conclude that Carter simply was enforcing the implied duty to reasonably develop a proven field of oil or gas after production from the field is established in paying quantities. But the court used broader language, stating:

The principle, as we understand it, is that development of every part of the lease is an implied condition. Therefore, whether the undeveloped portion by a single tract remote from the rest, or a consideration portion of a very large tract, or the east one hundred acres of a tract of 160, it is an implied condition that the lessee will test every part.

Another Louisiana Supreme Court case sometimes cited for the proposition that Louisiana recognizes an implied obligation of further exploration is Wier v. Grubb. In Wier, the plaintiff subleased 335 acres to the defendant. The defendant drilled three productive wells and one dry hole within a relatively small portion of the leased premises. The plaintiff demanded that the defendant drill additional wells, and the defendant failed to do so. The plaintiff then sued for partial cancellation, which the court granted, rejecting the sublessee's arguments that he had reasonably developed the premises and that geological information showed that any well drilled on the undeveloped portion of the leased premises was not likely to be productive. The court's opinion granting partial cancellation contains some language that suggest an implied duty of further exploration might exist, but the court also italicized for emphasis in its opinion a portion of the sublease that expressly required the sublessee to release his sublease rights as to any area that he did not...
develop. Accordingly, one reasonably could argue that the court's holding was based on the express terms of the sublease, rather than an implied duty of further exploration.

Several other cases also cite Carter's reference to the lessee having an obligation to test every portion of the leased premises. Collectively, these cases may establish a covenant of further exploration, though the issue is not wholly unambiguous, because generally: the cases involved leases with express duties to develop all portions of the leased premises retained by the lessee; or, the cases made their references to the duty to test all portions of the leased premises in dicta only; or, the cases were litigated in a federal court, not in a state court, much less the Louisiana Supreme Court.

F. Other implied covenants that might exist — neither recognized nor rejected in Louisiana

Some commentators have suggested that other implied covenants might exist, with two other suggested covenants being covenants to use reasonable care in producing minerals (for example, to take sufficient care to avoid accidents) and to properly represent the lessor's interests before the Office of Conversation. These proposed implied covenants

71 Middleton v. California Co., 237 La. 1039, 1045, 112 So. 2d 704, 706 (1959) (development of every part of the leased premise was "an express condition"); Sohio Petroleum Co. v. Miller, 112 So. 2d 695, 699 (La. 1959) (Miller involved a lease that had a clause expressly requiring the lessee to reasonably develop the leased premises); Reagan v. Murphy, 235 La. 529, 542, 105 So. 2d 210, 214 (1958) (stating in dicta that a lessee has a duty to test every part of the leased premises "or suffer a partial cancellation"); Sandefer Oil & Gas Inc. v. Duhon, 961 F.2d 1207, 124 (5th Cir. 1992) (a federal case referring in dicta to the possible existence of a duty of further exploration); Noel v. Amoco Production Co., 826 F. Supp. 1000, 1005 (W.D. La. 1993) (stating that Carter established a duty of further exploration).

72 Cf. Patrick H. Martin, Implied Covenants in Oil and Gas Leases — Past, Present and Future, 33 Washburn L.J. 639, 640 (1994) (stating that Louisiana "perhaps tacitly" recognizes an implied covenant of further exploration").

73 See, e.g., Patrick H. Martin, A Modern Look at Implied Covenants to Explore, Develop, and Market Under Mineral Leases, 27 Sw. Legal Fdn. Oil & Gas Inst. 177, 179 (1976). The proposed implied covenant to use reasonable care likely overlaps with negligence law. See id. at 179-80. Because the lessor would be able to recover in a tort action, there sometimes would be no reason for a court to determine whether a contractual duty was breached, though in some situations it might be necessary to reach that issue, as when prescription is an issue or the lessor seeks recovery from a lessee who has assigned his interest to an assignee who is responsible for the alleged breach of care. See infra, pp. 20-1.

74 Patrick H. Martin, Implied Covenants in Oil and Gas Leases — Past, Present & Future, 33 Washburn L.J. 639, 660-1 (1994); see John M. McCollam, Impact of Louisiana Mineral Code on Oil, Gas and Mineral Leases, 22 Min. Law Inst. 37, 68-9 (1975) (referring to a "possibly emerging obligation to represent the lessor's interest fairly before regulatory agencies such as the Louisiana Commissioner of Conservation," but stating "it is probably not correct to characterize this as a recognized implied obligation in Louisiana").
have not been recognized in jurisprudence, but neither have they been rejected, so perhaps a court would recognize such a duty under appropriate facts. But the argument that an implied duty to use reasonable care exists might be undercut by the Louisiana Supreme Court's decision in Broussard v. Hilcorp Energy Corp., in which the court held that a plaintiff's claim that a lessee negligently contaminated the plaintiff's property does not arise under Mineral Code article 122.

Further, in many circumstances, the collateral attack rule likely would prevent a lessor from successfully pursuing a claim based on the lessee's alleged failure to properly represent the lessor's interests before the Office of Conservation. The collateral attack rule is a jurisprudential doctrine that complements Louisiana Revised Statute 30:12. That statute provides that the only way a person may judicially challenge an order of the Commissioner of Conservation is to bring an action for judicial review within 60 days of the order in the Nineteenth Judicial District Court. The statute also provides that a person who brings such a challenge generally will not be allowed to offer in court any evidence that is not in the administrative record. Thus, the statute regulates and restricts direct attacks on rulings of the Commissioner.

To complement the statute, the collateral attack rule bars court actions that indirectly challenge an order of a Commissioner, such as a suit that seeks to force a private citizen or company to act in a way inconsistent with the Commissioner's decision. The collateral attack rule goes further, however, even barring lawsuits that do not seek to force someone to violate the Commissioner's orders, but which call into question the correctness of a Commissioner's order.

In Trahan v. The Superior Oil Company, the plaintiffs brought suit, seeking to dissolve a mineral lease that they had granted. The plaintiffs asserted that a well on a nearby tract was draining their land. The Commissioner had created a unit for the well, but the unit did not include any of the plaintiffs' land. The plaintiffs based their suit for lease cancellation on a contention that the unit should have included some of plaintiffs' land, and that the Commissioner would have included a portion of plaintiffs' land in the unit if the plaintiffs' lessee had presented

75 Courts have recognized, at least in dicta, that a lessee might be able to satisfy its duty to protect against drainage by appropriately seeking unitization. See Breaux v. Pan American Petroleum Corp., 163 So. 2d 406, 415 (La. App. 3rd Cir.), writ denied, 165 So. 2d 481 (La. 1964). Breaux also suggested that a lessee's failure to seek unitization possibly could be a basis for liability. See 163 So. 2d at 415. But few other cases suggest this possibility. See also McCollam, supra note 74, at 68-9, 77-8.

76 24 So. 3d 813 (La. 2009). The Hilcorp decision is discussed further below, in other sections of this paper.

77 See, e.g., Trahan v. The Superior Oil Co., 700 F.2d 1004 (5th Cir. 1983).

78 700 F.2d 1004 (5th Cir. 1983).
appropriate evidence to the Commissioner. Although the remedy sought by the plaintiffs—lease cancellation—would not have forced the lessee or anyone else to act in a manner inconsistent with the Commissioner's order, the court held that the plaintiffs' claim was barred by the collateral attack rule because the claim was based on a premise that the unitization order was incorrect.

G. Implied covenant to restore the surface—generally not recognized in Louisiana

The official comment to Louisiana Mineral Code article 122 suggests that, after the lease ends, a mineral lessee has an implied obligation "to restore the surface of the lease premises as near as is practical to original condition." Subsequent to enactment of the Mineral Code, the Louisiana Supreme Court had stated in dicta that such a duty exists,\(^\text{79}\) and lower courts had held that such a duty exists.\(^\text{80}\) But in *Terrebonne Parish School Board v. Castex Energy, Inc.*,\(^\text{81}\) the Louisiana Supreme Court held that a general implied obligation to restore the surfaces does not exist under Louisiana law.

In *Castex*, the lessor was suing based on the lessee's alleged breach of an implied duty to restore the surface. Specifically, the lessor alleged that the lessee had dredged canals, failed to backfill the canals after the lease ended, and that such canals had resulted in increased coastal erosion. The lease, like many leases, expressly authorized the lessee to engage in a number of types of surface use of the leased premises, including the dredging of canals. Thus, the lessor could not reasonably argue that the original dredging of the canals was a breach. But the lessor argued that the lessee now had an implied duty to restore the surface by backfilling the canals, which the lessee had not done, and that the lessee was liable in damages for the increased coastal erosion caused by the canals.

The lower courts ruled in favor of the lessor, but the Louisiana Supreme Court reversed. The court held that Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively.\(^\text{82}\) The court reasoned that imposing such an implied covenant would impose upon the lessee an obligation that the parties had not contemplated, and for which they had not bargained. Because the plaintiff had presented no evidence that the lessee's use had been excessive or unreasonable, *Castex* reversed the

\(^{79}\) *Caskey v. Kelly Oil Co.*, 737 So. 2d 1257, 1261 (La. 1999).

\(^{80}\) See, e.g., *Edwards v. Jeems Bayou Production Co.*, 507 So. 2d 11, 13 (La. App. 2nd Cir. 1982).

\(^{81}\) 893 So. 2d 789 (La. 2005).

\(^{82}\) See 893 So. 2d at 801.
lower courts and entered summary judgment for the lessee. The holding in *Castex* effectively rejected the court's own dicta from *Caskey*, as well as suggestions in the comment to Mineral Code article 122 and the holdings of multiple appellate court decisions.

*Castex* did not explicitly state that a mineral code article 122 would impose an implied duty to restore the surface if the lessee's use of the surface was unreasonable or excessive, but a couple of Third Circuit cases have reached that conclusion. On the other hand, the Louisiana Supreme Court arguably suggested otherwise in *Broussard v. Hilcorp Energy Co.* In that case, the plaintiffs alleged that a lessee's negligence had caused contamination of the plaintiffs' land. The plaintiffs brought suit for remediation without first giving the lessee notice and an opportunity to cure, as is required by Mineral Code article 136 for claims based on a lessee's alleged failure "to develop and operate the property leased as a prudent operator." One could argue that a lessee has "unreasonably" used the leased premises if his negligence results in contamination of the premises — indeed, in one post-*Castex* decision, the Third Circuit treated an allegation of negligence that resulted in contamination as being an allegation of using the surface "unreasonably or excessively." Nevertheless, the Louisiana Supreme Court concluded in *Broussard v. Hilcorp Energy Co.* that the plaintiff was not required to comply with article 136's pre-suit notice requirements because the "Plaintiffs' claims for remediation/restoration are not related to any duty encompassed by Article 122."

But Mineral Code article 122 generally is considered the source of a lessee's implied obligations. Thus, if a lessor who alleges that the lessee's negligence caused contamination is not deemed to be stating a claim under Mineral Code article 122, then the lessor's claim for the negligently-caused contamination cannot be based on an implied obligation of the lease, unless there is some source of implied obligations that is separate from article 122. If a lessee who makes such an allegation does not have a claim for the breach of an implied obligation of the lease, even when the lessee has used the surface "unreasonably," that does not necessarily mean that the lessor has no remedy, but, assuming that the

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83 *Hardee v. Atlantic Richfield*, 926 So. 2d 736, 742 (La. App. 3rd Cir. 2006); *Dore Energy Corp. v. Carter-Langham, Inc.*, 901 So. 2d 1238, 1242 (La. App. 3rd Cir. 2005), *writ denied*, 918 So. 2d 1042 (La. 2006). But to the extent that a claim is based on Mineral Code article 122 and is seeking restoration of the surface in a location where operations still are ongoing, the claim may be premature until operations have ceased, because the Lessee's obligation is to restore the surface after operations cease. See *Dore*, 901 So. 2d at 1242.

84 24 So. 3d 813 (La. 2009).

lease does not contain an express restoration clause, the remedy likely would have to sound in tort.

If the lessor has no contractual claim, and has to rely on tort law, then the lessor's claim will be subject to the one-year prescriptive period that applies to tort claims, rather than the ten-year period that applies to most breach of contact claims. Another consequence of a lessor having to rely on tort theories is that if a lessee assigned the lease to an assignee, and the assignee negligently causes the contamination subsequent to the assignment, the original lessee might not have liability for the contamination. On the other hand, under the Louisiana Mineral Code, an original lessee would remain liable for breach of lease claims, even those that arise after the assignment, unless the lessee had obtained a release from the lessor.

IV. Remedies Available

Mineral Code article 134 states that, "If a mineral lease is violated, an aggrieved party is entitled to any appropriate relief provided by law." Louisiana law recognizes the following potential remedies for a mineral lessee's breach of an implied covenant: (1) monetary damages; (2) complete cancellation; (3) partial cancellation; (4) conditional cancellation, in which the court issues an order that a lease will be cancelled if a lessee does not cure the breach within a stated time; and (5) specific performance.

The first of these remedies is an award of money damages. Mineral Code article 136 recognizes that damages may be awarded for a mineral lessee's breach of its implied obligations, but money damages have

89 La. Rev. Stat. 31:142 (stating in part that, "A mineral lease may be dissolved partially or in its entirety.").
90 See La. Rev. Stat. 30:142; Eota Realty Co. v. Carter Oil Co., 225 La. 790, 74 So. 2d 30 (1954) (lessee's failure to develop part of leased premises only justified cancellation of lease as to the portion that had not yet been developed); see also Sohio Petroleum Co. v. Miller, 237 La. 1015, 1030-1, 112 So. 2d 695, 701 (1959) (awarding partial cancellation).
92 See La. Rev. Stat. 31:134 cmt. (stating that specific performance may be awarded in appropriate circumstances, but also stating that "[m]andatory injunctions may be unavailable in some instances, such as a request that a lessee be compelled to drill a well").
seldom been awarded for such breaches. For example, Louisiana courts seldom, if ever, have granted damages for a breach of the implied covenant to protect against drainage. The primary reason such damages have not been awarded is because it is extremely difficult to prove the extent of drainage or the amount of drainage that could have been prevented with an offset well. But courts have recognized that a lessor may recover damages in a drainage action in appropriate circumstances. In Breaux the Louisiana Third Circuit stated that, in order to recover damages, the lessor would need to establish five things. He must (1) prove there was substantial drainage; (2) prove that an offset well drilled on the leased property could produce oil or gas from the same reservoir as the well on the neighboring property that was draining the leased property; (3) prove that it would have been economically feasible for the lessee to drill the offset well; (4) prove with some degree of certainty the quantity of oil or gas that would have been produced by the offset well; and (5) prove the value of the minerals that the landowner would have received from the offset well if it had been timely drilled and completed. Breaux also stated that perhaps a lessor could establish his right to damages by proving that the lessee could have established a unit in which the lessor would have participated.

The Louisiana Supreme Court has never expressly ruled on whether a lessor can recover damages for drainage, or what specific elements the lessor would need to prove. The first three elements of proof specified by Breaux — the existence of substantial drainage, the ability to produce oil or gas from an offset well on the leased premises, and that an offset well would be economically feasible — are elements that must be proven in order to establish the lessee breached its duty. The fourth and fifth elements — the quantity of oil or gas that would have been produced by an offset well, and its value — are required in order that a damages award not be purely speculative. Thus, if damages are to be allowed in drainage claims, the five elements listed by Breaux generally appear reasonable.

There are, however, other potential measures of damages than that suggested by Breaux, which was the value to the lessor of the minerals that would have been produced by an offset well. Some courts in other jurisdictions, for example, have suggested that the measure of damages should be the royalty that would have been owed on the amount of

93 Cf. 163 So. 2d at 415 (recognizing the right of a lessor to recover damages for drainage, but recognizing “the difficulty, and perhaps the impossibility, of establishing the amount of damages”).
94 See Breaux, 163 So. 2d at 415; Williams v. Humble Oil & Refining Co., 432 F.2d 165, 173 (5th Cir. 1970), cert. denied, 91 S. Ct. 1526 (1971).
95 See 163 So. 2d at 415.
96 See id.
drainage. And, in Coastal Oil & Gas Corp. v. Garza Energy Trust, the Texas Supreme Court rejected both these possible measures, stating that each of these could sometimes result in overcompensating the lessee. An offset well might not stop all drainage. Because some drainage might continue even if an offset is drilled, a measure of damages based on total drainage could overcompensate the lessor. On the other hand, production from an offset well might exceed drainage. Thus, a measure of damages based on the total minerals that would have been produced by an offset well also could produce a windfall to the lessor. The Texas Supreme Court said the proper measure of damages is “the value of the royalty lost to the lessor because of the lessee's failure to act as a reasonably prudent operator.” The court did not state how this is to be determined—perhaps the court envisioned this measure as equaling the portion of drainage that could have been prevented by reasonably prudent conduct.

Similar difficulties arise in trying to determine the amount of damages caused by a breach of the other implied covenants. Accordingly, even though money damages are the most common remedy in most types of civil litigation, such awards are seldom granted as a remedy for the breach of an implied covenant.

A second type of remedy is complete cancellation of the lease. But the law recognizes that cancellation is a harsh remedy, particularly given that drilling a well can be very expensive. For this reason,

\[97\] See Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 19 (Tex. 2008) (citing cases).
\[98\] See Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 19-20 (Tex. 2008).
\[99\] See Garza, 268 S.W.3d at 19.
\[100\] See id. Further, some future well on the leased premises might be able to produce oil or gas that would not still be in place if an offset well had been put into production.
\[101\] See id. at 19-20.
\[103\] See McDowell v. PG&E Resources Co., 658 So. 2d 779, 784 (La. App. 2nd Cir.), writ denied, 661 So. 2d 1382 (La. 1995); Rev Stat 31:137 cmt.; Taussig v. Goldking Properties Co., 495 So. 2d 1008 (La. App. 3rd Cir. 1986) (cancellation of lease is harsh
complete cancellation is not a favored remedy, especially if the lessee is 
producing minerals from one or more wells.104 Only a substantial breach 
will justify cancellation,105 and cancellation should not be awarded if 
justice can be done with a money judgment.106

A third type of remedy is partial cancellation. Because it is difficult 
to quantify damages, and because complete cancellation is harsh, a 
partial cancellation that allows the lessee to retain its lease rights as to a 
portion of the leased premises often will be a better alternative. If, for 
example, the lessee has developed a portion of the leased premises, but 
has not developed some other portion, it might be appropriate to award a 
partial cancellation, allowing the lessee to retain its lease rights as to the 
area the lessee has developed, while having its lease rights cancelled as 
to the portion of the leased premises that the lessee has not reasonably 
developed.

A fourth possible remedy is conditional cancellation, in which a 
court rules that a lease will be cancelled in whole or part if the lessee 
does not perform within a stated time. This remedy may be appropriate 
in some circumstances. For example, suppose the lessor demands that the 
lessee perform certain tasks in order to comply with its implied 
obligations, but the lessor and lessee have a good faith dispute about 
whether the performance demanded by the lessor is required in order for 
the lessee to comply with its contractual obligations. Suppose that the 
lessee refuses to perform the demanded actions, that the lessor then sues, 
and the court determines that the performance demanded by the lessor 
indeed was required. If the lessee is willing to perform, and performance 
still is practical and still would have value to the lessor, then perhaps the 
lessee should be given a chance to perform.

Finally, specific performance also is a remedy allowed under 
Louisiana law.107 But courts tend not to favor a grant of specific 
performance unless the court can order the obligor either to avoid doing a 
particular thing, or to perform a fairly specific, straightforward task. 
Given that the lessee's obligations are complex tasks that sometimes can 
take a long time to complete, courts do not typically order specific 
performance of a mineral lessee's obligations.108

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105 See McDowell, 658 So. 2d at 784.
106 Cf. La. Rev. Stat. 31:141 (stating in a different context—describing remedies 
available for a failure to pay royalties timely or in the proper amount—that cancellation 
of a lease may be awarded “if...the remedy of damages is inadequate to do justice”).
108 Courts are more likely to grant specific performance if the act to be performed is a 
simple act. For example, Louisiana Civil Code article 1986 states that a "court shall grant 
specific performance" if the obligation is to sign a document, deliver an object, or avoid
V. Procedural Issues

A. The requirement that a lessor give the lessee written notice and an opportunity to cure

Mineral Code article 122 requires a lessee to act as a reasonably prudent operator. This is the standard of conduct that courts apply when determining if a lessee has breached its implied obligations. Thus, a claim that a lessee has breached an implied covenant is a claim that the lessee had breached its duty to operate as a reasonably prudent operator.

The Louisiana Mineral Code became effective on January 1, 1975. Mineral Code article 135, whose language has not changed since the Mineral Code's enactment, states: "The provision of the Louisiana Civil Code concerning putting in default are applicable to mineral leases subject to the following modifications." Prior to 1984, the Louisiana Civil Code required an obligee who desired to seek damages for an alleged breach of contract to put the obligor in default if the obligee was alleging a passive breach of contract. That requirement was removed from the Louisiana Civil Code with the 1984 revision of the Civil Code, but the revision was not intended to alter operation of the Mineral Code. Thus, pursuant to article 135, a lessor must put a lessee in default if the lessor is suing for a "passive" breach, unless the Mineral Code provides otherwise. The Mineral Code contains, however, another more specific provision that applies to claims for an alleged breach of an implied covenant. Mineral Code article 136 provides in part:

doing some act. See La. Civ. Code art. 1986. But if the obligor's obligation is to perform some other act, the award of specific performance is at the court's discretion. See id. The performance of a mineral lessee's obligations to explore, develop, and protect are not the sort of simple tasks that would normally be appropriate for specific performance. See, e.g., Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701, 708, 64 So. 684, 687 (1913) (original hearing; court reversed itself, but on other grounds, on rehearing); cf. Fite v. Miller, 192 La. 229, 237, 187 So. 650, 653 (1939).

Louisiana Civil Code (1870) art. 1931 stated: "A contract may be violated, either actively by doing something inconsistent with the obligation it has proposed or passively by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated or implied from the nature of the contract."

Louisiana Civil Code (1870) art. 1933 stated in part: "When the breach has been passive only, damages are due from the time that the debtor has been put in default, in the manner dictated in this chapter."

Louisiana Civil Code (1870) art. 1911 defined how a person could be put into default. That article provided that a person could be put in default by various methods, with the method most relevant for this discussion being the giving a written demand for performance, but the article also allowed an obligee to put an obligor in default by filing suit. Today, Civil Code article 1991 states that, "An obligee may put an obligor in default by a written request of performance, or by an oral request of performance before two witnesses, or by filing suit for performance, or by a specific provision of the contract."

If a mineral lessor seeks relief from his lessee arising from drainage of the property leased or from any other claim that the lessee has failed to develop and operate the property leased as a prudent operator, he must give his lessee written notice of the asserted breach to perform and allow a reasonable time for performance by the lessee as a prerequisite to a judicial demand for damages or dissolution of the lease.

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If a lessor files suit for an alleged breach of an implied covenant without having given the lessee pre-suit notice and an opportunity to cure, the lessee generally should be able to have the suit dismissed based on an exception of prematurity or want of amicable demand, or perhaps even an exception of no cause of action.111

Neither a letter alleging that a lease is terminated nor a letter demanding that a lease be released can substitute for a written demand that the lessee perform.112 Further, a lessor's claim that the lease is terminated, or the lessor's filing suit for termination, will suspend the lessee's duties under the lease, except perhaps for the duty to pay royalties.113

B. When article 136's notice and opportunity to cure requirements do not apply

Mineral Code article 136's requirements that a lessor give his lessee notice and an opportunity to cure before filing suit against his lessee does not apply if the lessor is suing based on something other than a breach of the implied covenants that arise from the lessee's duty to act as a reasonably prudent operator. And there are several reasons a lessor might sue his lessee other than to remedy the breach of an implied covenant.


113 Wilson v. Sun Oil Co., 290 So. 2d 844, 848 (La. 1974) (royalty payment); Fomby v. Columbia County Development Co., 155 La. 705, 719, 99 So. 537, 542 (1924); Leonard v. Busch-Everett, 139 La. 1099, 1103-4, 72 So. 749, 751 (1916); Lelong v. Richardson, 126 So. 2d 819, 830 (La. App. 2nd Cir. 1961); cf. Hutchinson v. Atlas Oil Co., 87 So. 2d 265, 266 (La. 1921); see also John M. McCollam, Impact of Louisiana Mineral Code on Oil, Gas and Mineral Leases, 22 Min. Law. Ins. 37, 79-80 (1975) (noting that the lessor's filing of a suit for cancellation will have the effect of suspending lessee's obligation, except perhaps the obligation to pay royalties).
For example, the lessor might file suit seeking a declaratory judgment that a lease has terminated by its own terms (as opposed to the situation in which a lessor seeks judicial dissolution of a lease as a remedy for breach of an implied covenant). A lease could terminate by its own terms if there is no mineral activity at the end of the primary term, or mineral activity ceases after the primary term. A lease also could terminate by the occurrence of a resolutory condition. In "unless clause" leases, for example, a lease generally will terminate automatically on the anniversary date of the granting of the lease unless the lessee has begun drilling or paid delay rentals. It is also possible for leases to have other resolutory conditions. If a lease terminates by its own terms, the lease is over, without the necessity of judicial intervention. As a practical matter, however, it often is important to obtain a court's judgment recognizing that termination. If a lessor sues for a declaratory judgment that a lease has terminated by its own terms, the lessor is not required to give notice and an opportunity to cure before filing suit.

Another situation in which article 136 does not apply is when a lessor sues for a lessee's alleged failure to pay royalties timely or in the correct amount. Article 136 does not apply in such situations for two reasons. First, the obligation to pay royalties is an express obligation under a lease, rather than an implied obligation arising from the obligation to act as a reasonably prudent operator. Second, there are other, more specific Mineral Code articles that provide a procedure for suits based on a failure to pay royalties timely or in the proper amount.

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114 If an obligation exists and is enforceable, but the obligation will terminate upon the occurrence of an uncertain event, the event that will terminate the obligation is a "resolutory condition." See La. Civ. Code art. 1767.


116 See, e.g., Stream Family Limited Partnership v. Marathon Oil Co., 09-561 (La. App. 3 Cir. 12/23/09), 2009 WL 4927520 (lease contained a clause stating that it would terminate if lessee willfully or persistently made royalty payments late or in an improper amount).

117 See La. Rev. Stats. 31:137-141. Further, Mineral Code articles 212.21 through 212.23 provide procedures for a person other than a lessor, who is a royalty owner or owner of production payments, to make claims against the lessee for failure to make timely or proper payment. But the right to those types of payments generally will not be based on the lease, and instead will be based on some other agreement.

There also are other differences in the procedural rules that apply to implied covenant claim, as opposed to lease royalty claims. The prescriptive period for most contract claims is ten years. See La. Civ. Code art. 3499. But the prescriptive period for a claim for underpayment or nonpayment of mineral royalties is three years. See La. Civ. Code art. 3494. Prescription commences from the day payment is due. See La. Civ. Code art. 3495. Prescription runs separately on each periodic payment that is due.
The Louisiana Supreme Court recently issued a decision holding that a lessor was not obligated to give notice and an opportunity to cure because article 136 did not apply. In *Broussard v. Hilcorp Energy Company*, the plaintiffs sued lessees, alleging that their land had been contaminated by the lessees negligent activities. The plaintiffs did not give the lessees notice and an opportunity to cure before filing suit. The Louisiana Supreme Court held that notice and an opportunity to cure were not prerequisites to a suit for contamination.

The court reasoned as follows. A suit for damages for contamination essentially is a suit based on the failure to restore the surface to its original condition. But the Supreme Court previously determined in *Terrebonne Parish School Board* that there is no implied obligation to restore the surface to its original condition. Because the implied covenants are simply specific applications of the duty to act as a reasonably prudent operator, the absence of an implied duty to restore the surface must mean that a lessee does not breach the duty to act as a reasonably prudent operator by allowing contamination of the leased premises. Therefore, a suit complaining of contamination must be based on something other than a breach of the duty to act as a reasonably prudent operator, which is the only type of breach to which Mineral Code article 136 applies. Therefore, article 136's requirement that a lessor give the lessee notice and an opportunity to cure before filing suit does not apply to a suit based on contamination.

*Hilcorp* also looked at the definitions of “operation” and “develop” contained in a prominent treatise, and concluded that those words refer only to steps taken in searching for producing, and marketing oil and gas. The court concluded that the definitions it found supported a conclusion that the duty to reasonably develop and operate the leased premises encompasses only obligations to search for, produce, and market minerals.

There are at least three potential bases to criticize *Hilcorp*. First, *Castex* stated that there is no implied duty to restore the surface *in the absence of proof* that the lessee used the surface unreasonably or

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118 Citing Patrick H. Martin and Bruce A. Kramer, *Williams & Meyers: Manual of Oil and Gas Terms*. The court suggested it looked at the definition of “operate,” but the court must have looked at the definition of “operation.” The Manual does not contain a definition of “operate.” The court also stated that “develop” and “operate” are terms of art in the oil and gas industry. Although the court used definitions consistent with those found in the Manual (whether those definitions should lead one to the conclusion reached by the court is another matter), it is interesting to note that the Manual explicitly states that “operation” is “not a term of art with a clearly understood definition.” The Manual goes on to state that, “in most instances,” the term seems to refer to activity that leads to production of oil or gas, which is the meaning that the court applied to the term.

120 See 24 So. 3d at 820.
excessively. Although Castex did not state that there is an implied obligation to restore the surface if the lessee damages the surface by using it unreasonably, one reasonably could argue that an implied obligation under the lease would exist in such circumstances, and also that negligently causing contamination constitutes unreasonable use. In fact, the Third Circuit reached that conclusion in a couple of opinions that it issued between the time of the Supreme Court's decision in Castex and its decision in Hilcorp.121

Second, one could dispute Hilcorp's reasoning that the definitions of "develop" and "operate" show that a lessee's obligation to "develop and operate" the property as a reasonably prudent operator encompasses only duties to conduct a sufficient amount of exploration, production, and marketing. Even if "develop" and "operation" refer only to drilling, production, and marketing activities, that does not necessarily mean that the duty to "prudently" conduct such activities does not include a duty to avoid causing harm by conducting such activities negligently. If a lessee negligently causes contamination during his development and operation of the property, one could argue that the lessee's negligence constitutes a failure to act as a reasonably prudent operator. In fact, Hilcorp itself states that article 122 requires a lessee to act as a "good administrator."122 One could argue that negligently contaminating the property under lease does not qualify as good administration.

A third possible criticism of Hilcorp is that, assuming a lessee's negligent contamination of the leased premises is a breach of contract, though not a breach of the duty to act as a reasonably prudent operator, then pre-suit notice and an opportunity to cure might still be required. Mineral Code article 135 retains the Civil Code's pre-1984 requirement that an obligee put the obligor in default as a prerequisite to recovering damages for a passive breach of conduct. A failure to use sufficient care to avoid contamination (as opposed to deliberately contaminating the property), as well as a failure to remediate contamination, arguably should be classified as a passive breach.123 If negligently causing contamination and failing to remediate contamination are classified as passive breaches, then the lessor should have been required to put the lessee in default before filing suit.

Under the Civil Code of 1870, filing suit was one means of putting an obligor in default (making written demand for performance was another way to put the obligor in default).124 But statements in some

121 See Hardee, 926 So. 2d at 742; Dore Energy, 901 So. 2d at 1242.
122 See id. at 820.
123 A failure to do something generally will be a passive breach, whereas actively doing something wrong is an active breach. See La. Civ. Code (1870) art. 1931.
Louisiana cases suggest the existence of a jurisprudential rule that a mineral lessor must put a lessee in default by making written demand for performance as a prerequisite to filing any suit for a passive breach of a mineral lease, and that neither the Mineral Code nor the 1984 revision of the Civil Code was intended to change this jurisprudential rule. Thus, filing suit would not be an acceptable way to put a mineral lessee in default. Instead, pre-suit notice and an opportunity to cure would be required. If such suggestions in the jurisprudence are correct, and if negligently causing and failing to remediate contamination are passive breaches, then notice and an opportunity to cure still should have been required in *Hilcorp*, though under Mineral Code article 135, rather than 136.

C. Issues of law vs. fact, and the burden of proof

The question of whether a particular implied covenant exists generally will be a matter of law. The question of whether a lessee has breached an implied covenant is an issue of fact. The lessor has the burden of proving that the lessee had breached an implied obligation of the lease.

VI. Conclusion

Throughout the United States, jurisdictions recognize that oil and gas lessees are bound by implied covenants. For approximately 100 years, the jurisprudence of Louisiana courts has recognized such covenants, and recognized that a lessee's performance of his implied obligations is measured by a reasonably prudent operator standard. The reasonably prudent operator standard is now codified in the Louisiana Mineral Code, and the implied covenants, which have not been codified, are recognized as being obligations that arise from that standard of conduct.

The implied covenants recognized in Louisiana are the implied covenants to reasonably develop the leased premises, protect the premises against drainage, to diligently market any minerals that are

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127 See *Carter v. Arkansas Louisiana Gas Co.*, 36 So. 2d 26, 28 (La. 1948); *Caddo Oil & Mining Co. v. Producers' Oil Co.*, 134 La. 701, 717, 64 So. 2d 684, 690 (1914).

128 Coyle v. North American Oil Consolidated, 201 La. 99, 105, 9 So. 2d 473, 475-6 (1942) (lessor has burden of proving a breach of the implied obligation to protect against drainage); *Saulters v. Sklar*, 158 So. 2d 460, 463 (La. App. 2nd Cir. 1963) (lessee plaintiff had burden of proving lessee had not reasonably developed the premises).
produced, and perhaps an implied covenant of further exploration. Louisiana does not recognize an implied covenant to restore the surface.

The most common remedy for breach of an implied covenant is partial cancellation, though full cancellation and conditional cancellation also are available. In theory, monetary damages and specific performance are available, but those remedies are rarely, if ever, awarded. A lessor must give his lessee notice and a reasonable time to cure before filing suit for an alleged breach of an implied covenant. If the lessor does not give pre-suit notice and an opportunity to cure, the lessee generally should be able to have the suit dismissed based on an exception of prematurity or want of amicable demand, or perhaps even an exception of no cause of action.