Implied Covenants of the Modern Mineral Lease

February 19, 2009
PLANO Executive Night Seminar

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IMPLIED COVENANTS OF THE MODERN MINERAL LEASE

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I. Introduction

This paper attempts to provide a current general overview of the implied covenants owed by a mineral lessee to its mineral lessor under Louisiana law. These implied covenants, or obligations, have developed over the history of oil and gas law in Louisiana and continue to evolve as demonstrated in the recent decisions discussed in Section III below. While the relationship between a lessee and its lessor is dictated by the terms of their lease, a lessee in Louisiana should be aware of these implied covenants and the additional obligations they may impose.[2]

The Louisiana Civil Code provides for the general principle that a lessee is bound to use the thing leased as a "prudent administrator."[3] It is this general principle that

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[2] "Despite the purely contractual relationship between the lessor and the lessee, the respective parties' obligations cannot be determined absent reference to the covenants implied in every oil and gas lease." *Frey v. Amoco Production Co.*, 603 So.2d 166, 174 (La. 1992) (referencing Pearson & Watt, *To Share or Not to Share; Royalty Obligations Arising out of Take-or-Pay or Similar Gas Contract Litigation*, 42 Inst. on Oil & Gas L & Tax'n 14-1 (1991)). "At the heart of the implied obligations in Louisiana is the notion the parties consent to perform these obligations in order to 'effectuate the basic objectives of an oil and gas lease.'" *Id.* (internal citations omitted).

[3] La.C.C. art. 2683.

serves as the basis for the implied covenants owed by a mineral lessee in Louisiana.[4] Article 122 of the Louisiana Mineral Code 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.

La. R.S. §31:122. "The express terms of this article impose upon a mineral lessee two obligations: (1) to perform the contract in good faith, and (2) to develop and operate the leased property as a reasonably prudent operator for the mutual benefit of lessee and lessor."[5] Out of these general obligations the Louisiana courts have identified five more specific obligations:

> (1) the obligation to develop known mineral producing formations in the manner of a reasonable, prudent operator;
> (2) the obligation to explore and test all portions of the leased premises after discovery of minerals in paying quantities in the manner of a reasonable, prudent operator;
> (3) the obligation to protect the leased property against the drainage by wells located on neighboring property in the manner of a reasonable, prudent operator;
> (4) the obligation to produce and market minerals discovered and capable of production in paying quantities in the manner of a reasonable, prudent operator; and
> (5) the obligation of the lessee to restore the surface of the leased premises on completion of operations where there is evidence of unreasonable or excessive use of the surface. [6]

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[4] Article 122 of the Louisiana Mineral Code is an "adaptation of the obligation of other lessees to act as good administrators." *Noel v. Amoco Production Co.*, 826 F.Supp. 1000, 1004 (W.D. La. 1993) (citing *Frey,* 603 So.2d at 174).

[5] *Terrebonne Parish School Board v. Castex Energy, Inc*, 893 So.2d 789, 797 (La. 2005) (citing *Caskey v.Kelly Oil Co.*, 737 So.2d 1257, 1261 (La. 1999)).

[6] *See* La. R.S. §31:122 *Comment*; *Castex*, 893 So.2d at 801. There has been some suggestion that there may be an implied obligation of a lessee to fairly represent its lessor before regulatory agencies applicable in Louisiana although no court has addressed the

In order to fulfill these implied covenants of a mineral lease, "the lessee's conduct must conform to, and be governed by what is expected of ordinary persons of ordinary prudence under similar circumstances and conditions, having due regard for the interest of both contracting parties."[7] It should be noted at the outset that these implied obligations, with the exception of the covenant to protect the leased property from drainage, are not applicable while the lease is being maintained by the payment of rentals.

II. The Implied Covenants of the Louisiana Mineral Lease

A. Development

Under Louisiana law, "a lessee has the obligation to develop known mineral producing formations in the manner of a reasonable, prudent operator."[8] This is based on the premise that "[p]ublic policy dictates the necessity of the principle of reasonable development to give effect to the parties' intent in confecting a mineral lease, to assure the reasonable development of Louisiana's natural resources, and to prevent the removal of property from commerce."[9] Fundamentally, once there is production in paying quantities from a mineral formation, the lessee has an obligation to reasonably develop the known productive horizon "taking into consideration both his interest and those of his

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issue to date. *See* John McCollam, *A Primer for the Practice of Mineral Law under the New Louisiana Mineral Code*, 50 Tul. L. Rev. 732, 804 (1976)).

7 *Frey*, 603 So.2d at 175.

8 *Goodrich v. Exxon*, 608 So.2d 1019, 1023 (La. App. 3d Cir. 1992) (citing *Taussig v. Goldking Properties,Co.*, 495 So.2d 1008,1014 (La. App. 3d Cir. 1986); *Vetter v. Morrow*, 361 So.2d 898 (La. App. 2d Cir. 1978)).

9 *Id.* (citing *Taussig*, 495 So. 2d at 1014; *Dawes v. Hale*, 421 So.2d 1208 (La. App. 2d Cir. 1982)).

lessee."[10] Under this implied covenant, a mineral lessee "must develop a lease with reasonable diligence or give up the contract."[11]

Before a lessor can seek cancellation of a lease for failure to develop, the lessor must put its lessee in default.[12] Article 136 of the Louisiana Mineral Code provides in part:

> If a mineral lessor seeks relief from his lessee arising ... 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.

However, this requirement of putting into default may not be necessary if the party who should be placed in default "denies the existence of his obligation or refuses to perform it" as requiring such "would be requiring a vain and useless act."[13] Further, to be effective such demand must be for development and not simply lease cancellation.[14]

Once relief is sought for a purported violation of this implied covenant, the lessor has the burden to demonstrate to the court that a reasonable prudent operator would have

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10 *See* La. R.S. §31:122 *Comment* (citing *Gennusso v. Magnolia Petroleum Co.*, 12 So. 2d 445 (La. 1943); *Wadkins v. Wilson Oil Corp.*, 6 So.2d 720 (La. 1942); *Coyle v. North America Oil Consolidated*, 9 So. 2d 473 (La. 1942); *Doiron v. Calcasieu Oil Co.*, 134 So. 742 (La. 1931); *Stubbs v. Imperial Oil & Gas Products*, 114 So. 595 (La. 1927); *Caddo Oil & Mining Co. v. Producers Oil Co.*, 64 So. 684 (La. 1914)).

11 *Goodrich*, 608 So. 2d at 1027 (citing *Carter v. Arkansas Louisiana Gas Co.*, 36 So.2d 26 (La. 1948)).

12 Indeed, a lessor must provide written notice and an opportunity to cure an alleged breach of an implied obligation under Article 136 of the Louisiana Mineral Code.

13 *Id.* at 1031; *see also* La. R.S.§31:135 *Comment.*

14 *See Goodrich*, 608 So.2d at 1031 (noting that "a demand for lease cancellation is not equivalent to a demand for development").

conducted additional drilling into the productive formation.[15] If such burden is met, the court could award lease cancellation and/or damages.[16] In determining the satisfaction of the lessee's obligation to develop the leased premises, the courts must consider the facts and circumstances of the particular case at issue.[17] Courts generally evaluate six factors: (1) Geological data; (2) Number and location of wells drilled on or near the leased property; (3) Productive capacity of existing wells; (4) Cost of drilling compared with profit reasonably expected; (5) Time interval between completion of last well and demand for additional operation; and (6) Acreage involved in the lease under consideration.[18] These factors along with the lessee's attitude towards development on the lease and responsiveness to the lessor's demands have been the evidence considered by the courts in determining whether or not a lessee has complied with the development obligation as a reasonably prudent operator.

B. Exploration

In Louisiana, a lessee also has the obligation "to explore and test all portions of the leased premises after the discovery of minerals in paying quantities in the manner of a reasonable operator."[19] This obligation has been described as an "evolutionary offshoot

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15 *See* La. R.S. §31:122 *Comment; Edmonson Bros. Partnership v. Montex Drilling Co.*, 731 So.2d 1049 (La. App. 3d Cir. 1999).

16 *Id.*

17 *Goodrich*, 608 So. 2d at 1023 (citing *Carter v. Arkansas Louisiana Gas Co.*, 36 So.2d 26 (La. 1948)).

18 *Id.* (internal citations omitted).

19 *See* La. R.S. §31:122 *Comment.*

of the obligation of reasonable development."[20] As early as 1948, the Louisiana Supreme Court established that part of the lessee's general obligation to develop the lease includes the specific obligation to "test and explore every part of the leased property."[21] In reaching this conclusion, the Louisiana Supreme Court quoted an earlier Oklahoma Supreme Court decision stating:

> The principle, as we understand it, is that development of every part of a lease is an implied condition. Therefore, whether the undeveloped portion be a single tract remote from the rest, or a considerable portion of a large tract... it is an implied condition that the lessee will test every part.[22]

This obligation of further exploration, as with the obligation for reasonable development of a lease, arises only after there has been the discovery of minerals in paying quantities on the leased premises.

The prerequisite in Article 136 of the Louisiana Mineral Code that a lessee must first be put in default before a lessor may seek lease cancellation and/or damages applies to all demands for further exploration. As with all claims for lease cancellation, the lessor bears the burden of persuading the court that the lessee has failed to fulfill its exploration obligation.[23] A lessor must demonstrate that "a reasonably prudent operator would have

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20 *Id.* (referencing *Carter v. Arkansas Louisiana Gas Co.*, 36 So.2d 26 (La. 1948)). "The obligation of further exploration was first announced by the Louisiana Supreme Court in *Carter v. Arkansas Louisiana Gas Co.* and the jurisprudence continues to recognize this obligation." *Noel v. Amoco Production Co.*, 826 F. Supp. 1000, 1005 (W.D. La. 1993).

21 *Id.* (citing *Carter*, 36 So.2d at 27).

22 *Carter*, 36 So.2d at 29 (quoting *Fox Petroleum Co. v. Booker*, 253 P. 33, 38 (Okla. 1926)).

23 *Noel*, 826 F. Supp. at 1009-10.

investigated the undeveloped portions of the leased premises for the presence of potentially profitable oil and gas deposits, and that her lessee failed to conduct such operations."[24] The courts traditionally looked to the same six factors considered for the fulfillment of the development obligation when considering the fulfillment of the further exploration obligation.[25] Therefore, it has been suggested that in Louisiana there is no real distinction between the development obligation and the exploration obligation.[26]

C. Protection Against Drainage

A lessee has an obligation to protect the leased premises from uncompensated drainage caused by wells located on adjoining lands.[27] Moreover, "the mineral lessee who is leasing adjacent tracts and is producing oil or gas from a well on one tract that drains the other has a duty to act as a prudent administrator in order to protect the owner of the tract being drained by taking such steps as a prudent administrator would take under the

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24 *Id.*

25 *See id.* at 1011; *Rathborne Land Co. L.LC. v. Ascent Energy, Inc.*, 2008 WL 5427751, *2 (E.D.La. 2008).

26 "Although the *Comment* to article 122 of the Mineral Code suggests that the implied covenant of reasonable development and that of further exploration are considered to be two separate covenants, which is true in many common law jurisdictions, the Louisiana courts have tended to blur the distinction between two covenants." John McCollam, *Present Status of the Prudent Operator Obligations*, 42nd Annual Inst. on Min. L., Louisiana State University, Center for Continuing Professional Development (1995).

27 La. R.S. §31:122 Comment. "There is an implied obligation on the part of the lessee to exercise reasonable diligence in endeavoring to prevent drainage of oil and gas from under the leased premises." *Eagle Lake Estates, L.L.C. v. Cabot Oil & Gas Corp.*, 330 F.Supp.2d 778, 782 (E.D. La. 2006) (citing *Breaux v. Pan Am. Petroleum Corp.*, 163 So.2d 406, 409 (La. App. 3d Cir. 1964)).

circumstances."[28] Courts have recognized, or at least suggested, three actions a lessee may undertake to comply with the obligation to protect against drainage once drainage has occurred: (1) drilling an offset well; (2) voluntary pooling and unitization; and (3) initiating steps necessary to obtain a compulsory unit created by the Commissioner of Conservation which includes the leased premises at issue.[29]

A lessor can seek damages or cancellation for a breach of the lessee's obligation to protect against drainage. Before seeking either form of relief, the lessor is required to put the lessee in default in accordance with Article 136 of the Mineral Code.[30] To recover for a breach of this obligation, a lessor must show:

> (1) the existence of substantial drainage; (2) the quantity of oil and gas that would have been produced from an offset well if drilled at the proper time; (3) the profitability of an offset well in the sense that it would not only meet operating costs but repay investment costs; and (4) the lessor's share of the minerals that would have been produced from an offset well had it been drilled at the proper time.[31]

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28 *Id.* (quoting *Williams v. Humble Oil & Refining Co.*, 432 F.2d 165. 172 (5th Cir. 1970)).

29 *See Williams v. Humble Oil & Refining Co.*, 432 F.2d 165, 173 (5th Cir. 1970); *see also* McCollam, *Present Status of the Prudent Operator Obligations*, *supra* n. 25.

30 "If the mineral lessor seeks relief from his lessee arising from drainage of the property leased ... 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. If a lessee is found to have had actual or constructive knowledge of drainage and is held responsible for consequent damages, the damages may be computed from the time a reasonably prudent operator would have protected the leased premises from drainage." La. R.S. §31:136.

31 La. R.S. §31:122 *Comment.*

"Where a lessee's failure to unitize is incompatible with the 'prudent administrator's' standard, damages are a proper remedy."[32] However, where there is a short period between the production of the draining well and the unitization of the leased premises, courts have refused to grant cancellation or damages.[33]

D. Market

A lessee is obligated to diligently market the minerals discovered and capable of production in paying quantities in the manner of a reasonable, prudent operator.[34] There are very few decisions in Louisiana jurisprudence addressing of whether or not a lessee has fulfilled this obligation. The few cases that do address the topic seem to suggest that the same inquiry should be made as with any of the implied covenants of the Louisiana mineral lease. Evidence to be considered includes (1) the factual circumstances at issue; (2) whether or not the lessee's actions were reasonable and diligent; (3) industry standards; and (4) what a prudent operator would do in a similar situation.[35] One court has suggested that "[w]hat constitutes a reasonable time for obtaining a market, of necessity, will be measured by the operator's exercise of due diligence under the circumstances."[36]

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32 *Eagle Lake Estates, L.L.C.*, 330 F.Supp.2d at 783 (citing *Williams*, 432 F. 2d at 172).

33 *Id.*

34 *Frey,* 603 So.2d at 175 (citing La. R.S. §31:122 *Comment*).

35 *McDowell v. PG&E Resources Co.*, 658 So.2d 779, 783 (La. App. 2d Cir. 1995) (citing La. R.S. §31:122 and *Frey*).

36 *Id.* at 784.

As with the other implied obligations, a lessor must put his lessee in default of the purported violation of the implied covenant to market before he can seek any relief.[37] "The default requirement is designed to serve two purposes in the present context: (1) to provide notice that the lessor considers the lessee's action (or inaction) as violative of the implied obligation to market, and (2) to afford the lessee a reasonable opportunity to perform that obligation."[38] There is no reported case in which a mineral lease in Louisiana has been cancelled for violation of the implied covenant to market. As explained by one Louisiana court "[f]or breaches in marketing that are essentially challenges of the reasonableness of the actual marketing decision ... only under extraordinary circumstances should the lessor be entitled to a decree of cancellation ... cancellation... would be too harsh a penalty for a mistake in business judgment."[39]

E. Restore

Before the Louisiana Supreme Court's 2005 decision in *Terrebonne School Board v. Castex,*[40] it was unclear what implied obligation, if any, a lessee had to restore the surface of the leased premises. The comment to Article 122 of the Louisiana Mineral Code states that such an obligation exists to "restore the surface even when the lease

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37 *Id.* at 783-84.

38 *Id.* (citing *Hunt v. Stacy*, 632 So.2d 872 (La. App. 2d Cir. 1994)).

39 *Id.* at 784 (citing Bruce M. Kramer & Chris Pearson, *The Implied Marketing Covenant in Oil and Gas Leases: Some Needed Changes for the 80s*, 46 La.L.Rev 787, 825 (1986)).

40 893 So.2d 789 (La. 2005).

contract is silent" and that there appears to be "no reason whatsoever to exclude this particular obligation as being a specification of the prudent operator standard."[41]

But the Louisiana Supreme Court did not agree with the Comment of Article 122 and held that "in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original condition absent proof that the lessee had exercised his rights under the lease unreasonably or excessively."[42] In reaching this determination, the Court cited the 1958 Louisiana Third Circuit case *Rohner v. Austral Oil Co.*[43] The Court quoted that decision stating:

> Unless provided for in the lease, the lessee is not responsible for damages which are inflicted without negligence upon the lessor's property in the course of necessary drilling operations. Moreover when the damaging of the lessor's property by the mineral lessee is not negligent per se, the lessor must prove that the injury was caused by unreasonable or negligent operations of the lease.[44]

It appears from the jurisprudence a lessee may use the leased premises for "the ordinary, customary, and necessary acts which must be done by a drilling company in order to put down a well."[45]

Questions still remain regarding when this limited obligation to restore the surface of the leased premises due to negligent operations arises.[46] The Louisiana Supreme Court

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41 La. R.S. §31:122 *Comment.*

42 *Castex,* 893 So.2d at 801.

43 104 So.2d 253 (La. App. 1st Cir. 1958).

44 *Castex*, 893 So.2d at 799 (quoting *Rohner*, 104 So.2d at 255).

45 *Rohner*, 104 So.2d at 255.

in *Corbello v. Iowa Production* held that the obligation to restore the surface of the leased premises only arose after the termination of the lease.[47] Recently, the Louisiana Third Circuit addressed the subject in *Dore Energy Corp. v. Carter-Langham, Inc.* and reached a somewhat different conclusion regarding the timing of when such obligation arises.[48] After acknowledging the Mineral Code's silence on the issue and looking at the articles of the Civil Code for guidance, the court determined that the lessor's claims for relief based on the lessee's failure to restore the surface of the lease on which negligent operations had been conducted could be asserted only when those operations had been completed; however, the lease could still be in effect.[49] But some courts have suggested that a cause of action by a lessor against a lessee for failure to act as a reasonably, prudent operator could be brought before the cessation of operations.[50]

Notably, there is some jurisprudence which suggests that the default provisions of Article 136 of the Louisiana Mineral Code also apply to restoration claims made under

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[46] There is still uncertainty regarding the effect of Act 312 of 2006 on claims arising under La. R.S. §31:122. *See* Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul. Envtl. L.J. 347 (2007).

[47] 850 So.2d 686, 705 (finding that the plaintiffs' contract claims for restoration had not prescribed since they were asserted within the ten year period after the termination of the lease at issue).

[48] 901 So.2d 1238 (La. App. 3d Cir. 2005).

[49] *Id.* at 1242 (overruling an exception of prematurity and holding that plaintiffs' claims for damages for failure "to restore land upon which operations have been completed to the extent that the use of such was negligent" was ripe).

[50] *Id*; *see also Hardee v. Atlantic Richfield Co.*, 926 So.2d 736, 742 (La. App. 3d Cir. 2006).

Article 122.[51] Thus, a lessor may be required to first put his lessee in default before filing suit for damages for failure to restore the leased premises.

III. Recent Decisions Involving the Implied Covenants of the Louisiana Mineral Lease

A. *Terrebonne Parish School Board v. Castex Energy, Inc.*, 893 So.2d 789 (La. 1/19/05)

As discussed above, the *Castex* case involved the implied obligation to restore of the surface of a leased premise under Article 122 of the Louisiana Mineral Code. The question present to the Louisiana Supreme Court was:

> Whether article 122 of the Mineral Code, La. R.S. §31:122, which obligates a mineral lessee to act a reasonably prudent operator, compels the lessee to restore the surface of the leased lands to its pre-lease condition, where the lease terms do not so require and there is no evidence that the lessee excessively or unreasonably exercised its rights under the lease.

The lease in question was executed in 1963 between the Terrebonne Parish School Board and its lessee, Shell Oil Company.[52] The lease terms granted to Shell included, among other rights of use, the right to dredge canals.[53] The lease, however, did not contain any provision regarding any restoration obligation.[54] The lease terminated due to cessation of production in late 1996 or early 1997, and the School Board filed suit in September 1999 asserting that the defendants' dredging activities had caused severe erosion to its

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51 *See Brownell Land Co., L.L.C. v. Apache Corp.*, 2005 WL 3543772, * 3 (E.D. La. 10/13/05).

52 *Castex*, 893 So.2d at 792.

53 *Id.*

54 *Id.*

property.[55] The School Board asserted that "[e]ven in the absence of an express lease provision, the defendants had a duty to restore the surface, as near as practicable, to its original condition, ... and that failure to do so had resulted in further widening of the canals and additional loss of coastal acreage to erosion."[56]

In 2001, the trial court entered a judgment in favor of the School Board finding the defendants liable for restoration of the School Board's property "to a condition as near as practicable to its prelease condition."[57] The defendants were ordered to deposit $1.1 million into the registry of the court to pay for the restoration of the property.[58] The First Circuit upheld the trial court's determination that the defendants "owed a duty under Mineral Code article 122 to restore the surface of the leased land to its pre-lease condition by backfilling the canals."[59] The First Circuit did, however, overturn the trial court's limitation on the restoration costs and ordered specific performance of the "restoration obligation in accordance with the methodology the trial court fashioned, without regard for cost."[60]

The Louisiana Supreme Court reversed and rendered judgment in favor of the defendants. The Court held that Article 122 of the Mineral Code does not impose "an implied duty to restore the surface absent proof that the lessee unreasonably or

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55 *Id.* at 793.

56 *Id.*

57 *Id.* at 794.

58 *Id.*

59 *Id.*

60 *Id.* at 795.

excessively exercised his rights under the lease."[61] The Court went to note that there was no evidence that any of the defendants had acted in an unreasonable or negligent manner and that "the marshland was here 'worn' and 'torn' in precisely the manner the parties contemplated."[62]

B. *Dore Energy Corp. v. Carter-Langham*, 901 So.2d 1239 (La. App. 3d Cir. 05/04/05)

The *Dore* opinion was the first appellate court decision the implied obligation of restoration under Article 122 following the Louisiana Supreme Court's ruling in *Castex*. The trial court in *Dore* had granted the defendants' exceptions of prematurity regarding claims for restoration arising under Article 122 on the grounds that the lease was still in effect.[63] As discussed above, the *Dore* court overruled the trial court's granting of the exception of prematurity allowing, among other claims, the plaintiff's claims for breach of the implied duty to restore the surface for negligent use on lands where operations had ceased.[64] The court did affirm the trial court's dismissal for prematurity of the plaintiff's claims regarding the defendants' obligation to restore lands on which operations were ongoing.[65]

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61 *Id.* at 801.

62 *Id.* at 800.

63 *Dore*, 901 So.2d at 1240.

64 *Id.* at 1242.

65 *Id.* at 1243.

C. *Eagle Lake Estates L.L.C. v. Cabot Oil & Gas Corp.*, 2006 WL 1328827, (E.D. La. 05/12/06)

In this case, the plaintiffs alleged that the lessee breached the implied duty to prevent drainage from the leased property. The plaintiffs were one of the defendant's many lessors in the Hayworth Prospect in Terrebonne Parish, Louisiana.[66] In November 2002, the defendant began drilling operations on a tract of land directly adjacent to the plaintiffs' lands and the resulting well came on line in March 2003.[67]

The defendant began the unitization process 19 days before obtaining production from the well.[68] But the Unitization Order, which included the plaintiffs' property was not issued until September 26, 2003 with an effective date of August 26, 2003.[69] Therefore, the defendant did not pay any royalties to the plaintiffs from March 16, 2003, the date of first production, until August 26, 2003, the effective date of the Unitization Order.[70]

The plaintiffs filed suit asserting that the defendant had breached its obligation to protect the plaintiffs' property from drainage after the well began producing and before the Unitization Order was in place.[71] The plaintiffs contended that, by failing to timely unitize the well, the defendant had failed to comply with its implied obligation to protect

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66 *Eagle Lake*, 2006 WL 1328827, *1.

67 *Id.* at *3.

68 *Id.*

69 *Id.*

70 *Id.* at *5.

71 *Id.*

its lessor, the plaintiffs, from drainage.[72] After a bench trial, the court found that the defendant had not violated the implied covenant to protect the lessors' property from drainage.[73] In reaching this conclusion, the court noted "[a]lthough the unitization process could conceivably have been initiated sooner, [the defendant] was not imprudent for proceeding as it did."[74]

D. *Rathborne Land Company, L.L.C. v. Ascent Energy, Inc.*, 2008 WL 5427751 (E.D. La. 12/31/08)

The plaintiff lessor filed this action seeking lease cancellation of a 1952 mineral lease which, after several releases, covered 499.5 acres of land in St. Charles Parish, Louisiana.[75] From the inception of the lease until the filing of the lawsuit, only three wells had been successfully drilled and completed on the lease.[76] From the years 1998 through 2000, six workovers had occurred on two of the wells.[77] As of 2000, only one well, the Rathborne No. 2 Well, was still producing.[78] This well was reworked in 2000 to "reestablish gas production from the same zones in which a recompletion had occurred nearly a year earlier" and was still producing at the time the lawsuit was filed.[79]

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72 *Id.* at *4.

73 *Id.*

74 *Id.* at *6.

75 *Rathborne*, 2008 WL 5427751, *1 (E.D. La. 12/31/08).

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

In November 2002, the plaintiff sent the defendant a letter asserting that the defendant had breached the implied covenants of development and exploration.[80] After additional negotiations failed between the parties, the plaintiff demanded a release of all non-producing acreage.[81] The defendant responded by soliciting bids from geophysical companies to shoot seismic on the leased acreage.[82] In March 2006, the defendant entered into an option agreement to have a 3-D geophysical shoot over the leased acreage.[83] The shoot was completed in 2007 prior to the trial.[84] By mid-2006, all production from the Rathborne No.2 Well had ceased, and on April 27, 2007, the defendant released the remaining non-producing acreage after another demand from the plaintiff.[85]

After a trial on the merits, the court found that the plaintiff had met its burden of proof by presenting facts that tended to show that a reasonably prudent operator would have conducted additional seismic exploration on the leased premises which might have disclosed the presence of additional hydrocarbons.[86] The court concluded that the defendant and its predecessor "repeatedly failed and refused to participate in such surveys, or to conduct their own proprietary survey, without credible reason, all in breach of their expressed and implied lease obligations to reasonably develop and explore the

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80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

lease."[87] The court awarded the plaintiff damages for the delay in the 2006 seismic permit of three years, damages for the plaintiff's loss of leasing opportunity and attorneys' fees and costs.[88]

E. *Frankel v. Exxon Mobile Corp.*, 923 So. 2d 55 (La. App. 1st Cir. 08/10/05)

The *Frankel* decision deserves note because the Louisiana First Circuit held that the implied obligations under Mineral Code article 122, including the development obligation, applied to subleases.[89] This case involved the termination of a mineral lease due to cessation of production for a period of sixty days and failure to revive such lease with additional drilling or reworking or shut-in royalty payments.[90] The sublease included a reassignment clause that required the sublessee to return the lease to its sublessor before termination. The lease terminated and the sublessor filed this action against its sublessee.[91] The court held that Article 122 of the Mineral Code applied equally to subleases of mineral leases as it did to the mineral leases themselves and found that the defendant sublessees had violated that obligation.[92]

IV. Conclusion

These implied obligations continue to evolve in Louisiana law and possible additional covenants will emerge in the jurisprudence. The one consistent fact that

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87 *Id.* at 3.

88 *Id.* at *5-6.

89 923 So.2d at 62 (referencing *Neomar Resources, Inc. v. Amerada Hess Corp.*, 648 So.2d 1066, 1068 (La. App. 1st Cir. 1994)).

90 *Id.*

91 *Id.*

92 *Id.*

remains is that the lessee's judgment and actions will continue to be held to the standard of a reasonably prudent operator, which necessitates an examination of the facts and circumstances of each particular case in order to determine if the lessee has met that standard.