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LOUISIANA

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This article examines significant developments in Louisiana oil and gas law during 2021, beginning with developments arising from court cases, then legislation, and finally regulations.

I. CASES

A. *Legacy Litigation*

1. Louisiana Supreme Court overrules its prior decision in the same case. The Court now holds that under Act 312, a plaintiff is not entitled to remediation damages in excess of what is necessary to

clean up property to regulatory standards, absent an express contractual provision for a greater clean-up.

The Louisiana Supreme Court issued a decision in an important "legacy litigation"[1] case, *State of Louisiana v. Louisiana Land & Exploration Co.* ("*La. Land & Expl. II*"), on June 30, 2021.[2] This case has an extensive procedural history, including a prior Louisiana Supreme Court decision issued in 2013 ("*La. Land & Expl. I*").[3] The June 2021 decision in *La. Land & Expl. II* overrules the major holding of the 2013 decision in *La. Land & Expl. I*.[4]

This case began in September 2004, when the Vermilion Parish School Board ("VPSB") filed a petition in state court against several oil and gas companies, alleging contamination of certain Section 16 Lands[5] that were or had been subject to oil and gas leases granted by

1. The Louisiana Supreme Court explained the meaning of the term "legacy litigation" in Marin v. Exxon Mobil Corp., 48 So. 3d 234, 238 n.1 (La. 2010), stating:

> "Legacy litigation" refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of this Court's decision in Corbello v. Iowa Production, 02–0826 (La. 2/25/03), 850 So.2d 686. These types of actions are known as "legacy litigation" because they often arise from operations conducted many decades ago, leaving an unwanted "legacy" in the form of actual or alleged contamination. Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 TUL. ENVT. L.J. 347, 348 (Summer 2007).

2. State v. La. Land & Expl., Co., No. 2020-C-00685, 2021 WL 2678913 (La. June 30, 2021).

3. State v. La. Land & Expl., Co., 110 So. 3d 1038 (La. 2013).

4. *La. Land & Expl., Co.*, 2021 WL 2678913, at *7.

5. For purposes of land surveys and property descriptions, the surface of this country is divided into numerous "townships," each of which is divided into 36 "sections," with each section being 640 acres in size. The individual sections within a particular township sometimes are referenced by their section numbers, one through 36. Thus, someone might refer to a particular area as being "Section 16." *See* Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 307 (5th Cir. 2002). In the early 1800s, the federal government took action to support the establishment of local public schools by donating to Louisiana the Section 16 lands then owned by the federal government within the State. *See id.*; *see also* Vermilion Parish Sch. Bd. v. ConocoPhillips Co., 83 So. 3d 1234, 1237 (La. Ct. App. 2012). Louisiana has retained record title to the surface, but has given school boards substantial rights relating to Section 16 lands, including mineral rights associated with such lands. *Id.* at 1237–38. Indeed, Louisiana has effectively given school boards ownership of such mineral rights by giving the boards the right to grant mineral leases covering Section 16 lands, the right to keep all revenue from such leases, and the right to bring suit in their own name. *See* LA. STAT. ANN. § 30:152 (giving to school boards the right to grant mineral leases for Section 16 lands); LA. STAT. ANN. § 30:154 (giving to school boards the right to retain all revenue from mineral leases

VPSB.[6] The petition stated that VPSB was asserting claims for negligence, strict liability, unjust enrichment, trespass, breach of contract, and violation of Louisiana's environmental laws.[7] VPSB sought damages to cover the costs of remediating the property, as well as for diminution in value of the property, mental anguish, inconvenience, stigma damages, and punitive damages.[8] None of the parties disputed the fact that although the parties filed suit in 2004 for conduct that occurred before that, the 2006 version of Act 312 applied to the case.[9] The State of Louisiana was not involved in bringing the lawsuit, but VPSB's petition purported to bring claims on behalf of both VPSB and the State of Louisiana, which explains why the caption of the suit reads "*State of Louisiana v. Louisiana Land & Exploration Co*."[10]

During discovery, the "UNOCAL" defendants (Union Oil Company of California and Union Exploration Partners) admitted responsibility for environmental damage and for funding a cleanup to regulatory standards without admitting liability for VPSB's other claims.[11] Louisiana Code of Civil Procedure Article 1563 allows for such limited admissions in legacy litigation.[12]

UNOCAL also filed an exception of liberative prescription, asserting that VPSB's strict liability claim was time-barred.[13] UNOCAL

on Section 16 lands); LA. STAT. ANN. § 17:51 (school boards' authority to sue).

6. *La. Land & Expl., Co.*, 2021 WL 2678913, at *1.

7. *Id.*

8. *Id.*

9. *Id.* "Act 312" refers to 2006 La. Acts 312, which was codified at LA. STAT. ANN. § 30:29.

10. *Id.* at *2.

11. *Id.* at *1.

12. LA. CODE CIV. PROC. ANN. art. 1563(A)(1) (2014) states:

> If any party admits liability for environmental damage pursuant to R.S. 30:29, that party may elect to limit this admission of liability for environmental damage to responsibility for implementing the most feasible plan to evaluate, and if necessary, remediate all or a portion of the contamination that is the subject of the litigation to applicable regulatory standards, hereinafter referred to as a "limited admission". A limited admission shall not be construed as an admission of liability for damages under R.S. 30:29(H), nor shall a limited admission result in a waiver of any rights or defenses of the admitting party.

13. *La. Land & Expl. Co.*, 2021 WL 2678913, at *2. Liberative prescription—often called "prescription" for short—is similar to a statute of limitations. *See* Burge v. Parish of St. Tammany, 996 F.2d 786, 787 (5th Cir. 1993) (equating "liberative prescription" and "statute of limitations"). LA. CIV. CODE ANN. art. 3447 (1983) states: "Liberative prescription is a mode of barring of actions as a result of inaction for a period of time."

noted that a one-year prescriptive period governs strict liability claims and that VPSB had hired counsel to investigate VPSB's potential claim more than a year before filing suit.[14] UNOCAL argued that even if VPSB's lack of earlier knowledge of the contamination[15] delayed the running of prescription, that prescription would have started running no later than when VPSB hired counsel.[16]

VPSB argued that the hiring of counsel does not necessarily mean that a prospective plaintiff knows enough to start the running of prescription.[17] VPSB also contended that its claim was immune from prescription.[18] Although school boards generally are not immune from the running of prescription,[19] VPSB argued that, because it had named both itself and the State of Louisiana as plaintiffs, the claims that it asserted in this case were immune from the running of prescription.[20] UNOCAL contended that VPSB lacked authority to bring a legacy litigation claim on behalf of the State and that VPSB cannot shield itself from prescription simply by purporting to bring a claim on behalf of

14. *La. Land & Expl. Co.*, 2021 WL 2678913, at *3. Civil Code article 3492 sets a one-year prescriptive period for delictual actions. Torts are delictual actions. *See, e.g.*, Roberts v. Cardinal Servs., Inc., 266 F.3d 368, 380 (5th Cir. 2001) (tort is a delict or quasi-delict); Franklin v. Regions Bank, Nos. 16-1152, 17-1047, 2019 WL 3491643, at *3 (W.D. La. July 12, 2019) (Civil Code art. 3492 supplies the prescriptive period for torts.).

15. For claims based on damage to land, prescription begins to run when the plaintiff acquires, or should have acquired, knowledge of the damage. *See* LA. CIV. CODE ANN. art. 3493 (1984) (setting the prescriptive period for claims for damage to an "immovable"); *see also* LA. CIV. CODE ANN. art. 462 (1978) ("Tracts of land, with their component parts, are immovables."). For other claims, *contra non valentem* brings about the same result—that prescription does not begin to run until the plaintiff becomes aware, or should have become aware, of the claim. *Contra non valentem*, which is short for "*contra non valentem agere nulla currit praescriptio*," is a civil law doctrine that can suspend the running of prescription in certain circumstances, including when a person reasonably lacks knowledge of a claim. Corsey v. State, 375 So. 2d 1319, 1321 (La. 1979).

16. *La. Land & Expl. Co.*, 2021 WL 2678913, at *3.

17. *Id.* at *6–7.

18. *Id.* at *4.

19. LA. CIV. CODE ANN. art. 3467 (1983) (Prescription runs against all persons unless exception is established by legislation." No legislation makes an exception for school boards.)

20. *La. Land & Expl. Co.*, 2021 WL 2678913, at *2. Article XII, § 13 of the Louisiana Constitution provides that the State is generally immune from the running of prescription. The relevant provision states: "Prescription shall not run against the state in any civil matter, unless otherwise provided in the constitution or expressly by law."

both itself and the State, when it lacked any authority to sue on behalf of the State.[21]

The trial court denied UNOCAL's prescription exception, and the case went to a jury trial.[22] The jury returned a verdict awarding $3,500,000 for remediation of the land to a regulatory standard and an additional $1,500,000 in damages for VPSB's strict liability claim.[23] The jury rejected VPSB's other claims, including its claim for breach of contract.[24] VPSB sought a new trial, based on a contention that the jury's verdict was inconsistent.[25] In particular, VPSB argued that it was inconsistent to award monetary damages for remediation of contamination, but reject VPSB's claim for breach of contract.[26] The trial court denied the motion for a new trial.[27]

VPSB and UNOCAL each appealed.[28] The Louisiana Third Circuit affirmed the trial court's ruling on prescription, holding that VPSB's claims were immune from prescription.[29] In addition, the Third Circuit held that the jury's verdict was inconsistent.[30] For that reason, the appellate court reversed the trial court's judgment and remanded for a new trial.[31] UNOCAL submitted a writ application to the Louisiana Supreme Court, which granted the application.[32]

The Louisiana Supreme Court began its analysis of prescription by noting that the appellate court had held that the School Board's claim was immune from prescription, but that UNOCAL contended

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. State v. La. Land & Expl. Co., 302 So. 3d 523 (La. 2020). The author of this Article filed an amicus brief supporting the application. The amicus brief contended that the Third Circuit: (1) based its decision on prescription in part on the public-trust doctrine, but the Third Circuit's rationale was faulty because the public-trust doctrine does not apply to the prescription issue; (2) based its decision on prescription in part based on a conclusion that Section 16 lands are subject to "public use," but this rationale is erroneous because Section 16 Lands are not subject to "public use"; (3) erroneously treated the question of whether UNOCAL had committed a breach of contract as a matter of law, when the actual issue in dispute was an issue of fact; and (4) inappropriately relied on UNOCAL's limited admission in evaluating VPSB's breach of contract claim.

that the claim was not immune.[33] The Court noted that, because the face of VPSB's petition did not show that its claim was prescribed, UNOCAL had the burden of proving its exception of prescription.[34] The running of prescription would commence when VPSB acquired or should have acquired knowledge of its injury.[35] Thus, UNOCAL needed to prove that VPSB had actual or constructive knowledge of its injury at least a year before filing suit.

In attempting to meet its burden, UNOCAL offered evidence that VPSB had hired an attorney to represent it more than a year before filing suit.[36] UNOCAL argued that Louisiana jurisprudence establishes that, when a plaintiff knows enough to hire an attorney, that party knows enough to start the running of prescription.[37] The Court disagreed.[38] The Court stated that a party's hiring of an attorney is evidence, within an entire evidentiary record, which a trial court considers when making a factual determination of when a party had actual or constructive knowledge of their injury.[39] The minutes of a VPSB meeting showed that the VPSB went into executive session to discuss "potential litigation" and that VPSB authorized the hiring of counsel during the same meeting.[40] The Court stated, however, the decision to hire counsel and investigate the possibility of injury does not necessarily indicate that a party has actual or constructive knowledge of an injury.[41] Further, a trial court's factual findings are reviewed under a manifest error standard.[42] Here, concluded the Court, the record did not indicate that the trial court was manifestly erroneous in concluding that VPSB's claim had not prescribed.[43] Accordingly, without reaching the issue of whether VPSB's claim was immune from prescription, the Court affirmed the trial court's ruling rejecting UNOCAL's prescription exception.[44]

33. *La. Land & Expl. Co.*, 2021 WL 2678913, at *2.
34. *Id.* at *3.
35. *Id.*
36. *Id.* at *4.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

The Court then turned to the issue of whether the jury's verdict was inconsistent, as VPSB contended.[45] VPSB asserted that the verdict was inconsistent because the jury had found that the land contained environmental damage for which UNOCAL was liable, but the jury verdict concluded that UNOCAL had not breached its lease by causing more than the normal wear and tear to the property.[46] In contrast, UNOCAL contended that the verdict was not inconsistent.[47] UNOCAL and at least one *amici* asserted that it is possible for contamination to exceed current regulatory standards, thus triggering liability under Act 312, without the contamination necessarily constituting more than the wear and tear that would be expected under the oil and gas lease standards that existed several years ago, at the time the property allegedly became contaminated.[48] The Third Circuit had agreed with VPSB and thus had held that the jury's verdict was inconsistent.[49]

The Louisiana Supreme Court concluded that the jury's verdict was not inconsistent, given the instructions issued to the jury, but that the instructions were flawed.[50] The Court itself took the blame for this, stating that the erroneous instructions were made "in light of this Court's 2013 *La. Land & Expl I*. decision, which we now see with clarity, was made in error."[51]

One of the issues in *La. Land & Expl. I* was the extent to which a plaintiff in a legacy litigation case can receive contamination damages in excess of what is needed to remediate the land to regulatory standards.[52] No one disputes that plaintiffs can recover a monetary judgment for the damages (if any) other than damage to the land itself caused by contamination—*e.g.*, any personal injury caused by the contamination.[53] Further, no one disputes the proposition that if an express contractual provision between the parties authorizes a clean-up to a condition better than regulatory standards, the plaintiff can recover

45. *Id.*
46. *Id.* at *5.
47. *Id.* at *4.
48. *Id.* at *5.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *See id.* at *6 (LA. STAT. ANN. § 30:29(H) (2006) (amended 2014) does not prevent a plaintiff from pursuing "a judicial award," such as a money judgment, "for private claims" other than damage to land).

that.[54] However, the defendants argued that the amount that plaintiffs can recover for damages to the land cannot exceed what is needed to fund a remediation to regulatory standards, absent an express contractual provision.[55]

The defendants based their argument in part on Act 312. Act 312 requires that when a party is found liable for environmental damages, the party must deposit the payments they make for remediation of environmental damage into the registry of the court to fund a remediation to regulatory standards.[56] If the funds deposited prove inadequate to complete a remediation to regulatory standards, the district court may require that the party cast in judgment be required to deposit additional funds.[57] If money is left over after a remediation is complete, the excess is returned to the defendant.[58] The version of Act 312 that applied in *La. Land & Expl. I* also addressed the possibility of awarding additional damages for damage to the land. In particular, paragraph "H" stated Act 312 would not "preclude a judgment ordering damages for or implementation of additional remediation in excess of [regulatory standards] as may be required in accordance with the terms of an express contractual provision."[59] The defendants contended that, taken together, these provisions mean that a plaintiff cannot receive a judgment for remediating a property to a condition cleaner than regulatory standards unless a contractual provision expressly required remediation to a condition cleaner than regulatory standards.[60]

In *La. Land & Expl. I*, the Louisiana Supreme Court held that this did not preclude an award sufficient to remediate the land to a higher standard, even in the absence of an express contractual provision supporting such an award, if a factfinder concluded that a remediation to a higher standard was necessary to make a plaintiff whole.[61] Further, the portion of any monetary judgment exceeding the amount needed

54. *See id.* (quoting LA. STAT. ANN. § 30.29(H) (2006) (amended 2014)).
55. *Id.* at *5.
56. *See id.* at *6 (quoting LA. REV. STAT. ANN. § 30:29(D)(1) (2006) (amended 2014)).
57. *Id.* (quoting LA. REV. STAT. ANN. § 30:29(D)(4) (2006) (amended 2014)).
58. *Id.*
59. *Id.* (quoting LA. REV. STAT. ANN. § 30:29(H) (2006) (amended 2014)).
60. *Id.*
61. *See id.* at *5.

to fund a remediation to regulatory standards need not be deposited into the registry of the court and need not be used for remediation.[62]

In its June 2021 decision, the Louisiana Supreme Court concluded that *La. Land & Expl. I* was erroneously decided and that the version of Act 312 that governs this case does, in fact, preclude such "excess" remediation damages.[63] The 2006 version of the statute stated in part:

> B. (1) If at any time during the proceeding a party admits liability for environmental damage . . . the court shall order the party or parties who admit responsibility . . . to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage.
> ***
> C. (5) . . . The court shall enter a judgment adopting a plan with written reasons assigned. *Upon adoption of a plan, the court shall order the party or parties admitting responsibility or the party or parties found legally responsible by the court to fund the implementation of the plan*.
> D. (1) . . . *all damages or payments in any civil action, including interest thereon, awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for clean up*.
> ***
> D. (3) *The court shall issue such orders as may be necessary to ensure that any such funds are actually expended in a manner consistent with the adopted plan for the evaluation or remediation of the environmental damage for which the award or payment is made.*
> D. (4) *** If the court finds the amount of the initial deposit insufficient to complete the evaluation or remediation, the court shall, on the motion of any party or on its own motion, order the party or parties admitting responsibility or found legally responsible by the court to deposit additional funds into the registry of the court. *Upon completion of the evaluation or remediation, the court shall order any funds remaining in the registry of the court to be returned to the depositor*.
> ***
> ***
> H. This Section shall not . . . preclude a judgment ordering damages for or implementation of additional remediation *in excess of the requirements of the plan adopted by the court pursuant to this Section as may be required in accordance with the terms of an express contractual provision. Any*

62. *See id.* at *6 (quoting LA. STAT. ANN. § 30:29(H) (2006) (amended 2014)).
63. *Id.* at *5, *7.

> *award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court.* ***[64]

The Supreme Court stated that the 2013 holding constituted "palpable error."[65] Further, because the trial court issued jury instructions that attempted to comply with the Supreme Court's 2013 holding, it led to reversible error.[66] Accordingly, the Supreme Court remanded for a new trial.

Notably, after *La. Land & Expl. I*, the Louisiana Legislature amended Act 312.[67] The current version of Louisiana Revised Statute 30:29 states in part:

> M. (1) In an action governed by the provisions of this Section, damages may be awarded only for the following:
>
> (a) The cost of funding the feasible plan adopted by the court.
>
> (b) The cost of additional remediation only if required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard.
>
> (c) The cost of evaluating, correcting or repairing environmental damage upon a showing that such damage was caused by unreasonable or excessive operations based on rules, regulations, lease terms and implied lease obligations arising by operation of law, or standards applicable at the time of the activity complained of, provided that such damage is not duplicative of damages awarded under Paragraphs (1) or (2) of this Subsection.
>
> (d) The cost of nonremediation damages.[68]
>
> (2) The provisions of this Subsection shall not be construed to alter the traditional burden of proof or to imply the existence or extent of damages in any action, nor shall it affect an award of reasonable attorney fees or costs under this Section.[69]

The Louisiana Supreme Court implied that this new language clarifies the statute to ensure that the amended version is read the way the Court now interprets the 2006 version. Specifically, the Court stated: "We

64. *Id.* at *6 (quoting LA. STAT. ANN. § 30:29(H) (2006) (amended 2014)).
65. *Id.* at *5.
66. *See id.* at *7–8.
67. LA. STAT. ANN § 30:29 (2014).
68. § 30.29(M)(1)(d).
69. § 30.29(M)(2).

also note the Legislature cured this Court's error by amendment in 2014 to La. R.S. 30:29(M) (2014)."[70]

The decision noted above represents perhaps the most significant Louisiana oil and gas decision in 2021. It should be noted, however, that the Louisiana Supreme Court has granted a rehearing in the case[71] with an oral argument scheduled in 2022. The Court's decision on rehearing will be one of the major Louisiana oil and gas decisions of 2022.

2. Former land and servitude owners could not assign rights under leases that terminated prior to assignment.

In 1959, the "Hoffman Heirs" granted a mineral lease covering approximately 343 acres, as well as a surface lease covering five of the same acres, to a predecessor-in-interest of Chevron U.S.A., Inc. ("Chevron").[72] In addition, Shell Pipeline Company L.P. operated a pipeline that crossed the property.[73]

Chevron's surface lease expired in 1962.[74] In 2005, the Hoffman Heirs sold the land covered by the mineral lease to Lexington Land Development, L.L.C.[75] In the act of sale, the Hoffman Heirs reserved a mineral servitude.[76]

Prior to the sale, Lexington retained an environmental consultant to perform a "Phase I Environmental Site Assessment"—a type of assessment that involves observation of the property and research regarding current and past uses of the property, but does not involve taking and analyzing any samples of soil or water.[77] In its 2005 report, the consultant identified numerous conditions of "environmental concern," including areas where the soil was stained and where vegetation was sparse or distressed.[78]

70. *La. Land & Expl. Co.*, 2021 WL 2678913, at *5.
71. State v. La. Land & Expl. Co., 326 So. 3d 257 (La. 2021).
72. Lexington Land Dev., LLC v. Chevron Pipeline Co., 327 So. 3d 8, 13 (La. Ct. App. 2021). In 1963, Chevron released its rights as to portions of the leased area. In 1990, Chevron assigned the mineral lease to Stone Petroleum, which assigned the lease to Robert L. Zinn.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 14.
77. *Id.*
78. *Id.*

To further address the environmental concerns, the consultant recommended that they conduct a Phase II Environmental Site Assessment, which would involve taking and analyzing samples.[79] Lexington agreed to this recommendation, and the consultant performed the Phase II investigation. In its written report for the Phase II investigation, the consultant reported that it had found the presence of some chemicals at concentrations above regulatory standards.[80]

Lexington proceeded with its purchase of the land in 2005, pursuant to an act of sale that included certain disclaimers regarding environmental conditions.[81]

In early 2007, Lexington learned that Shell's pipeline on the property had ruptured.[82] In late 2007, Lexington sued Shell for damages.[83] In the same suit, Lexington sued Chevron and the subsequent assignees of Chevron's mineral lease for alleged contamination resulting from their oil and gas operations.[84]

By 2011, the mineral lease had terminated.[85] In 2012 and 2013, the Hoffman Heirs assigned their rights in tort, property, contract, and mineral law as servitude owners and former landowners to Lexington.[86]

In 2013, Lexington "filed a fifth supplemental and amending petition" to assert both its own claims and the claims that it had obtained via assignment from the Hoffman Heirs.[87]

Chevron filed prescription exceptions and motions for partial summary judgment.[88] Eventually, in response to those filings, the trial court dismissed all of Lexington's claims against Chevron.[89] Lexington appealed.

The Louisiana First Circuit affirmed. It concluded that the Hoffman Heirs could not assign their rights under expired mineral leases.[90] The First Circuit seems to have applied this non-assignability rule

79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 24.
83. *Id.*
84. *Id.*
85. *Id.* at 15–16.
86. *Id.*
87. *Id.* at 15.
88. *Id.* at 14–15.
89. *Id.* at 16.
90. *Id.* at 27.

even as to personal rights, such as causes of action, that arise from mineral leases. Therefore, because the mineral lease had terminated before the Hoffman Heirs assigned rights to Lexington, the Hoffman Heirs had not made a valid assignment of any rights arising under the mineral lease, whether for pre-purchase or post-purchase contamination.[91] Further, under the subsequent purchaser rule,[92] any claims that the Hoffman Heirs might have to recover for contamination damages would not automatically transfer to Lexington with the purchase of the land.[93]

The First Circuit did not seem to expressly address the viability of any tort claim against Chevron that the Hoffman Heirs may have assigned to Lexington. The First Circuit concluded that Lexington had sufficient knowledge in 2005 to trigger the start of prescription against Lexington as to pre-purchase damages. It is not clear from the appellate court's opinion how much time passed between any assignment of the Hoffman Heirs' tort claims to Lexington. Perhaps more than a year passed. Alternatively, perhaps the First Circuit believed that the Hoffman Heirs likewise had sufficient knowledge at the time of sale so that prescription had begun running as of 2005 (or earlier) against the Hoffman Heirs.

91. *Id.*

92. In *Eagle Pipe & Supply, Inc. v. Amerada Hess Co.*, the Louisiana Supreme Court held that, if a person purchases land that is contaminated, any tort claim based on that contamination belongs to the person who owned the land at the time that the contamination occurred. 79 So. 3d 246 (La. 2011). The tort claim does not belong to the subsequent purchaser, even if the contamination was not apparent or known at the time of sale, though the subsequent purchaser might have a redhibition claim against the seller. *Id.* In *Eagle Pipe*, the Louisiana Supreme Court expressly noted that it was not deciding whether the subsequent purchaser rule would apply as to claims arising under the Mineral Code. *Id.* at 281 n.80. The Louisiana Supreme Court still has not resolved that issue, but state appellate courts and federal courts have concluded that the subsequent purchaser rule would apply to claims arising under the Mineral Code. For example, in this case, the court clearly believed that the subsequent purchaser doctrine would apply as to claims brought against a mineral lessee or former mineral lessee for alleged damages caused during operations conducted pursuant to the lease. *See also* Glob. Mktg. Sols., LLC v. Blue Mill Farms, Inc., 153 So. 3d 1209 (La. Ct. App. 2014); Grace Ranch, LLC v. BP Am. Prod. Co., 252 So. 3d 546 (La. App. 3rd Cir. 2018); Guilbeau v. 2 H, Inc., 854 F.3d 310, 314 (5th Cir. 2017).

93. *Lexington Land Dev., LLC*, 327 So. 3d at 28.

B. *Where an operator drilled a well that it intended to be a unit well, and which later was designated as a unit well, the operation constituted a unit operation even though the well had not yet been designated as a unit well. Therefore, the landowner of the unit did not have a subsurface trespass claim based on wellbore passing beneath its land.*

The plaintiffs sued Range Louisiana Operating, LLC and its drill site supervisor (collectively, "Range"), asserting that Range committed a subsurface trespass by drilling a horizontal well that intruded into the subsurface of the plaintiffs' land in Jackson Parish.[94]

The undisputed facts showed that Range obtained a permit from the Louisiana Office of Conservation to drill a lease well to the L-Gray Sand, a formation that is not pooled or unitized.[95] Range commenced drilling from a surface location on land owned by Tri-Delta Timber Group, LLC, where Range had a right to operate.[96] Range drilled to a total vertical depth of 14,243 feet, which is within the Lower Cotton Valley Formation, Reservoir A (sometimes designated as "LCV RA").[97] This formation is shallower than the L-Gray Sand.[98]

After reaching that total vertical depth, Range turned the drill bit and proceeded to drill in a horizontal direction for nearly 5,000 feet.[99] The last 1,443 feet of the resulting horizontal lateral was beneath the plaintiffs' land.[100] The Office of Conservation previously had created drilling units for the LCV RA.[101] The portion of the horizontal lateral located beneath the plaintiffs' land was located within one of the pre-existing LCV RA units.[102] The remainder of the horizontal lateral was within a separate LCV RA unit.[103]

Range completed the well on January 10, 2018.[104] The plaintiffs filed suit two days later.[105] On February 28, 2018, Range applied to

94. Diamond McCattle Co. v. Range La. Operating, 316 So. 3d 603, 606 (La. Ct. App. 2021).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 610.
99. *Id.* at 606.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

the Office of Conservation to amend its permit to designate its well as a unit well.[106] The Office of Conservation later issued an order designating the well as a unit well for each of the two units that included portions of the well's horizontal lateral.[107] The order was effective on March 27, 2018.[108]

In the plaintiffs' trespass lawsuit, both sides filed motions for summary judgment.[109] Range submitted an expert witness affidavit stating that it is an accepted practice for the Office of Conservation to issue a permit that authorizes an operator to drill to a deep, non-unitized formation, even though the operator's main objective is to test a shallower, unitized formation.[110] Another witness testified via affidavit that it is common practice to designate a well as a lease well so that an operator can obtain a permit and begin drilling without waiting for the hearing that would designate the well as a cross-unit well.[111] Range also submitted affidavit evidence that its intent all along was to drill a unit well to the LCV RA Formation, rather than a lease well to the L-Gray Sand.[112]

The state district court in Jackson Parish granted summary judgment in favor of Range, relying on the Louisiana Supreme Court's 1986 decision in *Nunez v. Wainoco Oil & Gas, Inc.*[113] In *Nunez*, the Court held that the creation of a drilling unit alters property rights in such a manner that a unit operator is not liable for subsurface trespass if a unit well intrudes into the subsurface of unleased land that is located within the unit.[114]

The plaintiffs appealed the district court's decision to the Louisiana Second Circuit.[115] The plaintiffs noted that Range did not have a lease to operate on their land.[116] Further, at the time Range drilled and completed its well, the well had not been designated as a unit well for the LCV RA Formation.[117] Instead, the Office of Conservation

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 607–08.
110. *Id.* at 607.
111. *Id.* at 608–09.
112. *Id.* at 607.
113. *Id.* at 609.
114. Nunez v. Wainoco Oil & Gas Co., 488 So. 2d 955, 964 (La. 1986).
115. *Diamond McCattle Co.*, 316 So. 3d at 609.
116. *Id.* at 607.
117. *Id.* at 608.

permitted the well as a lease well for the deeper L-Gray Sand.[118] Indeed, Range had not even applied to amend its permit at the time it drilled and completed the well.[119]

The Second Circuit rejected the plaintiffs' arguments.[120] The appellate court cited *Nunez v. Wainoco* for the proposition that the intent of the operator controls whether an operation is a unit operation or a lease operation, and that an operation can constitute a unit operation even if the drilling permit identifies the well as a lease well.[121] The Second Circuit also noted that the undisputed evidence showed that Range's intent all along was to drill to the LCV RA unit.[122] Therefore, the drilling constituted a unit operation even though the well had not yet been designated as a unit well.[123]

C. *Factual dispute precluded summary judgment on a claim that the holder of a pipeline servitude breached an agreement by failing to maintain the canal used to service the pipeline, thereby allowing the canal to erode to too great a width.*

The plaintiff is a Plaquemines Parish landowner whose predecessors-in-interest granted four pipeline servitudes to four pipeline company defendants' predecessors-in-interest during the 1950s and 1960s.[124] The servitude agreements each contained provisions that expressly authorized the servitude holders to construct navigable canals needed for the operation of the pipelines.[125] The agreements also expressly imposed certain duties for the servitude holder to construct and maintain bulkheads and plugs on the canals.[126]

The landowner filed suit in state court in 2018, alleging that the defendants failed to maintain the canals, which allowed the canals to widen and cause erosion.[127] The landowner sought a summary judgment that the defendants had a duty to maintain the canals in a way

118. *Id.* at 606, 609.
119. *Id.* at 606.
120. *Id.* at 611.
121. *Id.* at 610. *See also* Nunez v. Wainoco Oil & Gas, Inc., 488 So. 2d 955, 964 n.28 (La. 1986).
122. *Diamond McCattle Co.*, 316 So. 3d at 610.
123. *Id.*
124. Morgan City Land and Fur Co. v. Tenn. Gas Pipeline Co., 319 So. 3d 437, 441 (La. Ct. App. 2021).
125. *Id.*
126. *Id.*
127. *Id.* at 442.

that would prevent erosion.[128] The defendants sought a summary judgment that they owe no duty to maintain the width of the canals.[129] The district court held that the defendants had a duty to maintain any bulkheads and plugs as required by the servitude agreements, but that the defendants otherwise did not have a duty to maintain the width of the canals.[130] The landowner appealed.[131]

The Louisiana Fourth Circuit agreed with the district court that the defendants have a duty to maintain any required bulkheads and plugs.[132] However, the appellate court disagreed with the trial court's conclusion that the defendants have no duty to maintain the width of the canals. Citing cases and secondary authority,[133] the Fourth Circuit stated that, in exercising their servitude rights, the defendants have a duty to "not to aggravate [the] servient estate."[134] However, whether allowing erosion beyond a particular point constitutes "aggravation" is a fact question.[135] Accordingly, the appellate court reversed the portion of the summary judgment that stated that the defendants had no duty to maintain the width of the canals, but the court did not grant summary judgment for the landowner on that question.[136]

The Louisiana Supreme Court granted supervisory writs.[137] The Court stated that the appellate court had correctly held that factual questions precluded a grant of summary judgment.[138] However, given that the existence or non-existence of a duty is intertwined with the underlying facts, the appellate court should not have reached the question of whether the defendant had an implied duty. Accordingly, the Louisiana Supreme Court affirmed the denial of summary judgment, vacated the portion of the appellate court's opinion stating that the defendant had an implied duty, and remanded the case to the district court for further proceedings.[139]

128. *Id.* at 443.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 451.
133. *See, e.g.*, *id.* at 449.
134. *Id.* at 451.
135. *Id.*
136. *Id.*
137. Morgan City Land & Fur Co. v. Tenn. Gas Pipeline Co., 325 So. 3d 1051, 1052 (La. 2021).
138. *Id.* at 1052.
139. *Id.*

D. *Because the Louisiana Oil Well Lien Act provides only* in rem *remedy, the plaintiff did not have viable LOWLA claims against a company that no longer held any oil and gas leases where the plaintiff had performed work.*

Grand Isle Shipyards, Inc. filed multiple petitions in state court against Black Elk Energy Offshore Operations, LLC ("BEEOO"), asserting claims under the Louisiana Oil Well Lien Act ("LOWLA").[140] The cases were removed to the United States District Court for the Eastern District of Louisiana.[141] BEEOO abandoned or transferred all of its leases associated with the work performed by Grand Isle.[142] BEEOO moved to dismiss the LOWLA claims.[143] The court granted the motion, noting that LOWLA claims are strictly *in rem*.[144] Thus, although Grand Isle might have breach of contract claims against BEEOO, it would not have any LOWLA claims.[145]

E. *Defendant moved for the court to dismiss the plaintiff's Well Cost Reporting Act claim on the basis that the plaintiff's request for information on the well did not identify the plaintiff's land. The court denied the motion, noting that the plaintiff had identified the unit involved. The court concluded this was sufficient for the plaintiff to state a claim.*

Limekiln Development, Inc. ("Limekiln") filed suit against XTO Energy Inc. ("XTO") in the United States District Court for the Western District of Louisiana.[146] Limekiln alleged that it is an unleased owner of a mineral interest in a unit operated by XTO, and Limekiln sought a judgment recognizing that, pursuant to Louisiana Revised Statute 30:103.2 of the Well Cost Reporting Statute, XTO had

140. Grand Isle Shipyards, Inc. v. Black Elk Energy Offshore Operations, LLC, No. CV 15-129, 2021 WL 536292, at *1 (E.D. La. Feb. 12, 2021). The Louisiana Oil Well Lien Act is found at LA. STAT. ANN. §§ 9:4861–4873.
141. *Grand Isle Shipyards, Inc.*, 2021 WL 536292, at *1
142. *Id.* at *1.
143. *Id.* at *2.
144. *Id.*
145. *Id.* at *3.
146. Limekiln Dev., Inc. v. XTO Energy Inc., No. 1:20-CV-00145, 2021 WL 956079, at *1 (W.D. La. Feb. 5, 2021). For subject matter jurisdiction, Limekiln relied on diversity jurisdiction under 28 U.S.C. § 1332.

forfeited its rights to recover well costs from Limekiln.[147] XTO filed a Rule 12(b)(6) motion to dismiss.[148]

1. Background—Limekiln's Property and XTO's Drilling

Limekiln owns the South Half of the Northwest Quarter of Section 15, Township 10 North, Range 10 West, in Natchitoches Parish.[149] Its mineral interest is unleased and not subject to a mineral servitude.[150]

The Louisiana Office of Conservation created a Haynesville Shale drilling and production unit that encompassed Section 15, including the entirety of Limekiln's property, and named XTO as the operator.[151] XTO drilled a Haynesville Shale well that produced for about two years during the period 2012 to 2014.[152] The Office of Conservation also created a drilling and production unit for the Hosston Zone that included Section 15, and thus the entirety of Limekiln's property, and named XTO as the operator.[153] XTO recompleted its Haynesville Shale well in the Hosston formation, and it became the unit well for the Hosston unit.[154]

2. Louisiana's Well Cost Reporting Statute

Louisiana's Well Cost Reporting Statute consists of Louisiana Revised Statutes 30:103.1 and 30:103.2.[155] Revised Statute 30:103.1 provides that, for each drilling and production unit created by the Office of Conservation, the operator shall provide, "by a sworn, detailed, itemized statement," an initial report on the costs of drilling, completing, and equipping a well; then quarterly reports on the ongoing costs of operating the well and on the well; and then quarterly reports on the quantity of production and the price received on the sales of production to each owner of an unleased mineral interest who send a request for such reports by certified mail.[156]

147. *Limekiln Dev., Inc.*, 2021 WL 956079, at *1.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at *3; *see also* LA. STAT. ANN. 30:103.1–103.2.
156. § 30:103.1.

Louisiana Revised Statute 30:103.2 provides that if the operator who receives such a request by certified mail fails to send the required reports within specified time periods, the unleased owner who requested the reports may send written notice of such failure to the operator by certified mail.[157] If the operator still fails to send the required report within 30 days of receiving this notice, the operator forfeits its right to demand that the unleased owner pays its share of costs for the well.[158]

3. Limekiln's Correspondence with XTO and this Litigation

On August 13, 2019, Limekiln sent an email to XTO, requesting information on well costs.[159] The email identified Limekiln as the owner of "90 acres in the South Half of the Northwest Quarter of Section 15, Township 10 North, Range 10 West, Natchitoches Parish."[160] The next day, XTO responded, requesting that Limekiln send a request via certified mail.[161] The same day as XTO's email, Limekiln sent a request for such information via certified mail.[162] The request identified the unit well at issue,[163] but the request apparently did not provide a property description for Limekiln's property.[164] The next month, XTO sent a sworn statement of well costs, but Limekiln did not believe that the sworn statement contained sufficient detail to satisfy the requirements of Louisiana Revised Statute 30:103.1.[165]

Limekiln sent an email requesting additional information.[166] XTO responded via email and provided additional information.[167] The parties exchanged a series of emails, but Limekiln still was not satisfied with the information provided by XTO.[168] Limekiln sent another letter

157. § 30:103.2.
158. *Id.*
159. *Limekiln Dev., Inc.*, 2021 WL 956079, at *5–6.
160. *Id.*
161. *Id.* at *6.
162. *Id.*
163. *Id.*
164. *Id.* at *3 ("XTO claims Limekiln's request for well cost reports did not specify the land Limekiln claimed it owned."); *Id.* at *8 (the parties "dispute whether the unleased owner is required to include a property description in the" request for information).
165. *Id.* at *6.
166. *Id.* at *7.
167. *Id.*
168. *Id.* at *6–7.

via certified mail.[169] This letter asserted that XTO had failed to comply with Louisiana Revised Statute 30:103.1.[170] The letter also noted the forfeiture penalties provided by Revised Statute 30:103.2.[171] XTO promptly responded via certified mail, but Limekiln still believed that the information provided by XTO was insufficient to comply with the requirements of Revised Statute 30:103.1.[172]

Limekiln filed suit.[173] XTO moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[174] XTO argued that, because Louisiana Revised Statute 30:103.2 is a penalty statute, a party must strictly comply with Revised Statutes 30:103.1 and 30:103.2 in order to invoke the 30:103.2 penalty.[175] XTO asserted that Limekiln had failed to strictly comply with the statutes because it had not stated why it believed XTO's responses were insufficient, and because Limekiln's request for information did not identify which property it owned.[176] XTO argued that, for these reasons, Limekiln was not entitled to invoke the penalty statute.[177]

The court rejected XTO's argument, finding that Limekiln's allegations were sufficient to state a claim.[178] Therefore, the court denied XTO's motion to dismiss.[179] The court distinguished a prior case on which XTO relied.[180] In that case, the person who requested information pursuant to Revised Statute 30:103.1 had neither identified her property nor stated the unit in which her property was located.[181] Although the Well Cost Reporting statute does not expressly require the unleased owner to identify her property or the unit in which the property is located, the court in that case reasoned that it would be unreasonable to consider a request for information complete unless the request identified the property or unit at issue.[182]

169. *Id.* at *7.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at *1.
174. *Id.*
175. *Id.* at *4, *7.
176. *Id.* at *3, *7–8.
177. *Id.*
178. *Id.* at *9.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*

In this case, although the request that Limekiln had sent via certified mail had not identified Limekiln's property, the request had identified the unit in which the property was located.[183] Magistrate Judge Joseph H.L. Perez-Montes, to whom XTO's motion to dismiss had been referred by the district court judge, concluded that this was sufficient.[184] For this reason, he issued a report that recommended that the court deny the motion to dismiss.[185]

II. LEGISLATION–NATURAL GAS PIPELINES MADE SUBJECT TO THE HAZARDOUS MATERIALS INFORMATION DEVELOPMENT, PREPAREDNESS, AND RESPONSE ACT (AKA THE "RIGHT-TO-KNOW" LAW) BY LA ACTS 2021, NO. 246

Acts 2021, No. 246[186] amends the Hazardous Materials Information Development, Preparedness, and Response Act,[187] also known as the Right-to-Know Law,[188] to provide that the Act, including its reporting provisions, applies to natural gas pipelines.[189]

III. REGULATIONS–ADDITIONAL SAFETY REQUIREMENTS IMPOSED FOR OIL STORAGE TANKS

The Louisiana Department of Natural Resources ("DNR") published revised safety regulations for oil storage tanks in the November 2021 issue of the Louisiana Register.[190] The revised regulation is codified in Louisiana Administrative Code 43.XIX.115.[191] The regulation applies to storage tanks that are located less than 500 feet from any highway or inhabited dwelling or less than 1,000 feet from any school or church.[192] The new requirements mandate that a fence at least four feet in height must surround the site and that the fencing must contain

183. Miller v. J-W Operating Co., No. 16-0764, 2017 WL 3261113, at *3 (W.D. La. Feb. 28, 2017).
184. *Limekiln Dev., Inc.*, 2021 WL 956079, at *9.
185. *Id.*
186. *Id.*
187. 2021 La. Acts 549.
188. The Hazardous Materials Information Development, Preparedness, and Response Act is codified at LA. STAT. ANN. § 30:2361–2380.
189. § 30:2361 (1985).
190. The legislation accomplishes this by amending the definition of "Facility, found at LA. STAT. ANN. § 30:2363.
191. 47 La. Reg. 1647 (Nov. 20, 2021).
192. *See* LA. ADMIN. CODE tit. 43, pt. XIX § 115(A)(1)-(B).

a lockable gate that the operator locks when the site is unmanned.[193] The regulation also requires the operator to provide DNR with a means to unlock the gate.[194]

The new rules also require that any tank or tank battery be surrounded by a dike, firewall, or retaining wall that has a volumetric capacity at least as large as the enclosed tanks,[195] and that any tank hatch that is not serving as a pressure relief device be sealed when the site is unmanned.[196] Finally, the operator must prominently display adjacent to the gate and adjacent to the tank or ladder giving access to the tank a warning sign that gives notice of danger and flammable contents.[197]

Operators must implement these safety regulations within three months of the rule being promulgated.[198]

193. § 115(C)(1)(b) (2021).
194. *Id.*
195. § 115(C)(1)(a) (2021). The regulation includes alternative requirements for areas, such as water, swamp, or marsh, where the construction of such retaining structures is impossible or impracticable.
196. § 115(C)(1)(c) (2021).
197. § 115(C)(1)(d) (2021).
198. § 115(C)(1)(e) (2021).