

# DUTY TO RESTORE THE SURFACE (IMPLIED, EXPRESS, AND DAMAGES)<sup>1</sup>

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## I. Introduction

The duty of the mineral lessee to restore the surface is today one of the most fiercely fought issues in Louisiana mineral law. As oil and gas fields deplete, and society turns “green,” the major environmental issues facing the state – pollution and coastal land loss – have turned the oil patch into a battleground over these issues. Earlier notions of the duty to restore, driven by claims for damaged fences and a few acres of lost crops, were easily accepted without much debate. But the large potential cost of environmental clean-up and coastal land loss abatement, concerns that never entered the mind of operator or landowner at the inception of the industry, have forced courts to struggle with the modern legal, contractual, and policy implications of oil field surface restoration. The Louisiana Supreme Court’s latest pronouncement on the issue, *Terrebonne Parish School Board v. Castex Energy Inc.* No. 04-C-0968 (La. 01/19/05), \_\_\_ So. 2d \_\_\_, 2005 La. LEXIS 141, clarified the nature and scope of the duty to restore. Nevertheless, many issues remain and *Castex*, as well as earlier cases, will continue to provide fodder for the competing claims and positions of operators and landowners in this area.

## II. History of the Duty to Restore

The duty to restore the surface under a mineral lease is a duty that has been explored only relatively recently in our history of oil and gas jurisprudence. Despite the observation in the Comments to the Mineral Code that the implied duty to restore was “established” at the time of the adoption of the Code, little specific analysis of this duty existed in the Louisiana’s prior jurisprudence. To be certain, the duty of a lessee to “return” the thing leased in the “same state” as received was established in the general law of leases under the Civil Code.<sup>3</sup> However, with regard to mineral leases, this duty had a slow development in Louisiana, that was not fully articulated until the adoption of the Mineral Code in 1975 and the litany of cases that were decided as the issues of pollution, land preservation, and coastal erosion came to the public forefront. In past legal discussions of this duty, much was presumed about its extent and scope until the *Castex* decision, which was the first court in a long while to cast a critical eye on its origins.

### A. The Lessee’s Rights to Use the Surface

A regular lease in land, by its vary nature, grants the lessee possession of the leased tract free of interference from the landowner.<sup>4</sup> In return, the lessee had a principal obligation to return the leased premises “at the end of the lease in a condition that is the same as when the thing was delivered to him, except for normal wear and tear.”<sup>5</sup> A mineral lease, by contrast, is *sui generis* and creates a regime whereby both the lessee and the landowner have joint rights in the surface. The mineral lessee’s physical operations

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<sup>3</sup> See e.g. La. Civ. Code arts. 2719 & 2720 (repealed and restated by 2004 Acts. No. 821, eff. Jan. 1, 2005).

<sup>4</sup> La. Civ. Code art. 2682 (2005).

<sup>5</sup> La. Civ. Code art. 2683 (2005) (restating prior articles 2719 and 2720).

of exploration and production do not normally act to fully dispossess the landowner of his own co-enjoyment of the surface. Thus, the measure of the lessee's rights to use the surface, as well as any obligation to protect the surface for return to the lessor, must reflect the unique nature of the mineral lease.

The court in *Wemple v. Pasadena Petroleum Co.*, 147 La. 532; 85 So. 230 (1920) discussed the nature of the mineral lessee's rights and obligations regarding the surface in one of the earliest surface damage cases in Louisiana. The landowner sought damages from its lessees for lost timber and destroyed fences, but was unable to prove the extent to which his lessee's operations, as opposed to those of others in the area, caused the damages, which led the court to dismiss the claims. The court recognized that the lessee had the right to remove timber and disturb the property "wherever necessary for the convenient exploitation for oil and gas."<sup>6</sup> However, the lessee was not the "possessor" of the premises and, thus, had no duty to protect the property nor return it in the same condition, absent proof that his own unreasonable or excessive activity caused damage beyond that necessary for his operations:

The theory of the suit is that the defendant companies were lessees of the land, and as such were under the same contractual obligation as ordinary lessees to maintain the property in the same state in which it was when taken possession of under the lease, and that therefore they are responsible for all damage done to the premises, no matter by whom done. But this theory does not fit the facts of the case. These companies were not ordinary lessees of the land. Their rights thereon were altogether special and specific, and so were their corresponding obligations, and the latter did not include police supervision and protection of the premises. The possession of the land remained in plaintiff, except in so far as was necessary for the exercise of the right of ingress and egress conferred upon the defendant companies by the said contract, and the right to occupy and utilize the surface of the land to the extent required for the oil and gas exploitation.

The exercise of these rights by the companies had, of course, to be "as a good administrator" (C. C. art. 2710); but nothing shows that the said rights were exercised differently from this. The damage to the fences was entirely disconnected with, or foreign to, the contract.

The fences and the timber were not in the charge of these companies. .... The party in the possession and enjoyment of them was plaintiff himself. If he needed them for the protection of his pasturage, the function of preventing their

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<sup>6</sup> 85 So. at 231.

destruction pertained to him, and not to the defendant companies, who were not in possession of them and had no need of them.<sup>7</sup>

Virtually all forms of mineral leases contain express provisions granting the lessee rights to use the surface of the land. A typical granting clause provides general and broad rights to use of the surface for all activities incident to exploration and production of oil and gas:

[Lessor] hereby grants, leases and lets exclusively unto Lessee for the purposes of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building tanks, power stations, telephone lines, and other structures thereon to produce, save, take care of, treat, transport and own said products and for dredging and maintaining canals, constructing roads and bridges, and building houses for its employees, and, in general, for all appliances, structures, equipment, servitudes and privileges which may be necessary, useful or convenient to or in connection with any such operations conducted by Lessee thereon, or on any adjacent lands, [the described leased premises] ... .<sup>8</sup>

Other forms of lease typically used in Louisiana contain similar express provisions granting the lessee use of the surface as necessary for his mineral operations.

Even without express provisions, it has always been held in Louisiana and other producing states that the lessee has the implied right to use as much of the surface as reasonably necessary for his operations, including the right to make works and constructions on the land.<sup>9</sup> This broad right to use the surface implicitly includes uses of the land that are necessary or incidental to the effective exploration and production of minerals from the lease.<sup>10</sup> To the extent necessary for oil and gas operations, the lessee's right to the surface takes precedent over the lessors' uses. The lessee "may use any part

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<sup>7</sup> 85 So. at 231-32.

<sup>8</sup> Bath's Form Louisiana Spec. 14-BR1-2A-PX (10/65).

<sup>9</sup> *E.g.*, *Indian Territory Illuminating Oil Co. v. Dunivant*, 183 Okla. 233, 80 P.2d 225 (1938); *Cozart v. Crenshaw*, 299 S.W. 499 (Tex. App. 1929); *Rohner v. Austral Oil Exploration Co.*, 104 So. 2d 253 (La. App. 1 Cir. 1958).

<sup>10</sup> *See Leger v. Petroleum Engineers, Inc.*, 499 So. 2d 953 (La. App. 3rd Cir. 1986) (mineral lease implicitly grants lessee right to dispose of produced salt water through an injection well, because such action is a necessary incident to the continued production of oil from the lease); *Prather v. Chevron U.S.A. Inc.*, 566 F. Supp. 1366 (M.D. La. 1983) (lessee has implied right to use dirt from leased property to improve wellsite without paying for the value of the dirt).

of the surface necessary to conduct mineral operations, notwithstanding the lessor's prior appropriation of the use of the land.”<sup>11</sup> Thus, the lessee, providing it otherwise acts reasonably, may destroy or interfere with any part of the lessor’s pre-existing improvements, such as crops, fences, timber, and the like, as may be necessary to conduct his oil and gas operations.<sup>12</sup>

The lessee’s right to use the surface, to the prejudice of the lessor’s enjoyment, is not absolute. To ameliorate the potential harshness of the lessee’s right to use the surface (especially where the lessee has pre-existing improvements on or uses of the property), some leases expressly provide restrictions on the locations where the lessee may operate. The most common is a restriction on the location of well within a certain distance from an existing residence or other structures, though other restrictions are sometimes negotiated.<sup>13</sup>

Various jurisdictions have also developed the *accommodation* doctrine that provides that a mineral lessee cannot unduly impair the lessor's preexisting (or intended) use of the land when reasonable alternatives exist for the lessee.<sup>14</sup> Louisiana has not specifically embraced the accommodation doctrine. However, Louisiana recognizes the similar notion that the mineral lessee must exercise its rights with “reasonable regard” for the landowner, which suggests that, in appropriate cases, the lessee may have to accommodate, if practical, the lessor’s contrary uses of the land.<sup>15</sup> That is not to say, however, that the rights of the lessee and the lessor are equal or must be balanced by the cost to one versus the benefit to the other. Rather, in most jurisdictions, including Louisiana, the mineral owner’s rights are considered “dominant” to the landowner’s, and the landowner must suffer the lessee’s use of the property to the extent reasonable or necessary to the mineral operations.<sup>16</sup>

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<sup>11</sup> *Rohner*, 104 So. 2d at 255.

<sup>12</sup> *See Rohner*, 104 So. 2d at 255; *Wemple, supra.*; *see also Stanolind Oil & Gas Co. v. Wimberly*, 181 S.W.2d 942 (Tex. App. 1944); *Koury v. Morgan*, 172 Ark. 405, 288 S.2. 929 (1919).

<sup>13</sup> For example, versions of an AAPL form and the Producers-88 form provide that: “No well shall be located less than 200 feet from any residence or barn now on the leased premises without Lessor’s consent.” The author is aware of one instance of a lease that expressly limits drilling operations to those times of the year that will not interfere with hunting season.

<sup>14</sup> *E.g. Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Flying Diamond Corp. v. Rust*, 551 P.2d 504 (Utah 1976); *Hunt Oil co. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979).

<sup>15</sup> *See* La. R.S. 31:11 (“The owner of land burdened by a mineral right or rights and the owner of a mineral right must exercise their respective rights with reasonable regard for those of the other”)

<sup>16</sup> *See Hunt Oil co. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979) (“accommodation doctrine is not a balancing type test .... The surface owner must show that under

## B. The Lessee's Responsibility For Damages Caused To The Surface

### 1. Express Provisions

Because the lessee has the right to use so much of the surface as reasonable and necessary for his operations, including the right to make works and constructions on the surface, there is no general duty to compensate the lessor for that use, other than the royalty, rentals, and other considerations otherwise provided in the lease. Thus, it has long been considered incumbent upon the lessor, if he wishes to be compensated for damage to his land, to expressly provide for such compensation in the lease agreement.<sup>17</sup> A common Bath form lease provision provides that

The Lessee shall be responsible for all damages to timber and growing crops of Lessor caused by Lessee's operations.

Variations on these language appear in other lease forms sometimes used, or in modifications of form language negotiated by the parties; *e.g.*:

The Lessee shall be responsible for all surface damages of the Lessor caused by the Lessee's operations<sup>18</sup>

Lessee shall compensate Lessor for all damages to the timber, growing crops, fences and improvements on the premises occasioned as a result of the Lessee's operations hereunder.<sup>19</sup>

The Lessee shall be responsible for all damages caused by Lessee's operations.<sup>20</sup>

The Lessee shall be responsible for all damages to timber and growing crops of Lessor caused by Lessee's negligent operations.<sup>21</sup>

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the circumstances the use of the surface under attack is not reasonably necessary"); *Ashby v. IMC Exploration Co.*, 496 So. 2d 1334, 1337 (La. App. 3rd Cir. 1986) (surface owners "have no right to recover damages for the diminished use of the land, arising out of [the lessee's] reasonable, necessary exercise of its rights under the mineral lease").

<sup>17</sup> William O. Bonin, Comment, *Mines and Minerals – Oil and Gas – Surface Rights of Lessor and Mineral Lessee*, 26 Tul. L. Rev. 522, 524 (1952).

<sup>18</sup> See *Broussard v. Northcott Exploration Co.*, 481 So. 2d 125, 127 (La. 1986).

<sup>19</sup> *Caskey v. Kelly Oil Co.*, 737 So. 2d 1257, 1265 (La. 1999).

<sup>20</sup> *Andrepoint v. Acadia Drilling Co.*, 255 La. 347, 231 So. 2d 347 (1969).

Under these express provisions, the lessee would be responsible for the types of damages and destruction expressly listed in the lease. Thus, destruction of growing crops, even if necessary in connection with the lessee's operations, would be compensable under the typical Bath form provision. Importantly, these clauses do not *prohibit* the lessee from damaging or destroying part of the property; rather, they simply provide for contractual reimbursement in such situations.

## 2. Early Cases

In the absence of express contract provisions, the early jurisprudence dealing with the *implied* responsibility for surface damage was sparse. Only a few cases appear to have considered this duty prior to the adoption of the Mineral Code. These cases also involved modest damages, such as lost crops or damaged fences.

The first case to award surface damages was *Smith v. Schuster*, 66 So. 2d 430 (La. App. 2d Cir. 1953). In that case, the lessee failed to fill and level a pit and remove debris after drilling a well, although he assured the landowner he would cooperate. The landowner took these steps herself and filed suit for reimbursement. The court, without citing any authority, found that the lessee had a duty to maintain and restore the property:

A mineral lessee, of course, has no right to extend his operations on the leased premises beyond what is reasonably necessary to effectively produce minerals under the terms of his contract. He should maintain and restore the premises in the condition he found them subject to his rightful use, and where he has damaged the land it is his duty to appropriately remedy the condition brought on by his use of the lease.<sup>22</sup>

The court then awarded the landowner \$170, her expenses in performing the clean-up work that the lessee had failed to undertake. The court seemed to believe that the lessee was unreasonable in his response to the lessor's modest clean-up requests, but the court did not expressly base its holding on a finding that the lessee's operations were unreasonable, excessive, or negligent.

In *Rohner v. Austral Oil Exploration Co.*, 104 So. 2d 253 (La. App. 1 Cir. 1958), the landowner sued for various items of damage caused by the lessee's operations – lost watermelon and corn crop, broken fences, four acres of land left infertile from brine or slush pits, and mental anguish. The lease contained a fairly typical damage provision that “The lessee shall be responsible for all damages to timber and growing crops of lessor caused by the lessee's operations.” The court observed that the lessee's duty to compensate the lessor for damages to the surface arises in only two situations: (1) where

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<sup>21</sup> AAPL Model Form 821 Oil and Gas Lease.

<sup>22</sup> 66 So.2d at 431-32.

an express provision in the lease provides for compensation and (2) where the lessee's operations were unreasonable or negligent:

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.

Due to the fact that the mineral lessee is not liable in damages to the lessor's property which results from reasonable and necessary use, the lessor should expressly provide for compensation for damages to his buildings, crops, trees, livestock and fences.<sup>23</sup>

Under this analysis, the court granted compensation for damage to the landowner's crops caused by the lessee in accordance with the express damage provision of the lease. The court also allowed recovery for the damage to the landowners' fence, apparently under the belief that, although the lessee was entitled to make a cut in the fence, it was negligent in failing to properly brace the opening to prevent further damage. The court rejected, however, the landowner's claim for the acreage rendered infertile by pits and operations at the drilling site. It concluded that the infertile condition was due to the ordinary, customary, and necessary acts that must be done to put in a well and were not due to any negligence on the part of the drilling company.<sup>24</sup> The court also suggested that the area affected (three acres) was reasonable and not excessive for the operations undertaken. In sum, the landowner recovered \$1020 for items of damage either expressly allowed under the lease or caused by the negligence of the lessee.

In *East v. Pan American Petroleum Corp.*, 168 So. 2d 426 (La. App. 3rd Cir. 1964), the lessee excavated a large amount of dirt from the leased premises to construct a well site road on an adjacent lease. Although the lease in question permitted the lessee to use the surface and make excavations for operations on adjoining lands, it was evident that the lessee had chosen the location of the excavation due to a surveying error, and had intended to excavate on the adjoining tract. Under these circumstances, the court, citing the *Rohner* decision, concluded that the works were neither necessary nor reasonable *on the lease in question* and that the lessee was responsible in damages for the excavation.

Finally, in *Roy O. Martin Lumber Co. v. Pan American Petroleum Corp.*, 177 So. 2d 153 (La. App. 3rd Cir. 1965), the owner of "cut-over swamp land" sued for lost timber and the surface disturbances resulting from the lessee's ongoing oil and gas operations.

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<sup>23</sup> 104 So. 2d at 255 (citations omitted).

<sup>24</sup> *Id.* at 256.

The lease contained a clause specifying that “Lessee shall be responsible for and agrees to make payment of all damage to lands, crops, timber and improvements caused by its operations hereunder.” Thus, according to the court, the issue before it not liability, but solely the measure of contractual damages due under this lease clause. The critical part of the court’s analysis was the proper measure of damage to the surface of the land, as it found that the landowner’s requested amount for “restoration” did not make economic sense given that the property was cut-over swamp, subject to periodic flooding, not suitable for cultivation, and still subject to additional damage from ongoing mineral operations, and the total amount sought was far in excess of the value of the property and unlikely to be actually spent by the landowner for restoration. The court, nevertheless, allowed a minimal amount for land damage, pursuant to the express lease provision, in an amount it deemed adequate for the landowner to make temporary repairs necessary to continue its logging operations.

### **3. The Louisiana Mineral Code**

The Mineral Code, adopted effective 1975, was in large part an effort to codify existing jurisprudence. Article 122, La. R.S. 31:122, codified, in succinct language, the well-recognized implied duty of the mineral lessee to act as a prudent operator:

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 Official Comment to this article notes that this prudent operator standard – taken from the jurisprudence and the general Civil Code provisions on leases – encompasses five distinct implied obligations: the duties of reasonable development, further exploration, protection against drainage, diligence in marketing, and restoration of the surface. As to the implied duty restoration, the Comment describes this duty as one to “restore the surface of the lease premises as near as is practical to original condition.” The Comment notes that this duty derives from Civil Code articles 2719 and 2720, which require the lessee to return the thing leased in the same state as it was delivered, subject to normal wear and tear and unavoidable accidents. The Comment suggests that this duty, with regard to a mineral lease, was “established” in the case law citing the *Smith v. Schuster*, *Rohner*, and *Wemple* cases discussed above.

The actual language of the Mineral Code does not expressly impose a duty of restoration on a mineral lessee. However, two other articles do touch on this issue. La. R.S. 31:11 provides that the owner of the land and the owner of a mineral right “must exercise their respective rights with reasonable regard for those of the other.” This concept of correlative rights would presumably provide some authority for a claim against a lessee who unreasonably or excessively used the surface to the detriment of the land owner, although no cases appear to have relied upon this section as authority for

such relief. La. R.S. 31:22 provides that a “mineral servitude” owner “is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.” Although a mineral lease and a mineral servitude are distinct rights, and not governed by the exact same rules, some courts have cited La. R.S. 31:22 when discussing the mineral lessee’s duty of surface restoration.<sup>25</sup>

### C. Duty Of Restoration Or Duty To Repair?

The recognition of an implied duty to restore the surface in the Comment to Article 122 of the Mineral Code did not cause much discussion or controversy at the time, even though it was, in retrospect, a fairly novel concept as to mineral leases. Other jurisdictions had not recognized at the time (and still do not recognize) an implied duty of restoration as one of the implied duties of the mineral lessee.<sup>26</sup> The cases cited in the Comment, with the arguable exception of *Smith v. Schuster*, do not speak of a strict implied duty of restoration that arises at the conclusion of the lease. Indeed, it appears that in all of these previous cases, the mineral lease at issue had not yet terminated. Thus, these cases more properly can be said to deal with the *duty to repair*, which is a duty that can arise either by contract (e.g. an express provision to pay for crop damage) or by tortious conduct by the lessee and gives rise to a cause of action during ongoing operations.<sup>27</sup> Perhaps the suggestion of a duty to restore did not cause much controversy because, up until the time of the adoption of the Mineral Code, claims for surface damage tended to be small – the largest reported award had been \$5217 for excessive dirt removal in the *East v. Pan American Petroleum* case. And, as the court in *Roy O. Martin* observed, the claims for surface damages at that time were “inconsequential” compared to the value received by the lessee and lessor from oil and gas production. Nevertheless,

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<sup>25</sup> E.g. *Edwards v. Jeems Bayou Production Co.*, 507 So.2d 11, 12-13 (La. App. 2nd Cir. 1987) (stating that mineral lessee has same duty of restoration as does the mineral servitude owner under Article 22); *Prather v. Chevron U.S.A. Inc.*, 563 F. Supp. 1366 (M.D. La. 1983) (stating that lessee had duty to restore under article 22 – although it should be noted that the land was encumbered both by a mineral lease and a mineral servitued; thus, the court’s decision should not be necessarily read to mean that article 22 applies to mineral leases.)

<sup>26</sup> E.g. *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362 (Tex. 1957) (absent an express contractual requirement, or absent proof that the lessee operated negligently or used more of the surface than reasonably necessary, the lessee has no implied duty to restore the surface); *Fox Cities Service Oil Co.*, 200 P.2d 398 (Okla. 1948) (lessee has no duty, expressed or implied, to restore the property to its former condition; its only obligation was to avoid unnecessary or negligent injury to the property during its use); see also H. Williams & C. Meyers, 5 *Oil and Gas Law* § 218 (2003).

<sup>27</sup> Cf. *Broussard v. Northcott Exploration Co.*, 481 So. 2d 125, 127 (La. 1986) (farmer had right to recover, in tort, any damages caused by the landowner’s mineral lessee, who unreasonably or negligently exercised its rights under the mineral lease covering the same property.)

the duty contemplated in the Comment to Article 122 was arguably different from the duty to repair – it seemed to contemplate an additional implied duty to reasonably restore the surface even if the lessee had conducted operations reasonably and without negligence.

### **III. Modern Development of the Duty to Restore**

After adoption of the Mineral Code, further development of the case law was initially slow, then a number of cases were decided beginning in the late 1980s and ending with the important Louisiana Supreme Court decisions in *Corbello* and *Castex*. Initially, neither the existence nor the scope of the duty to restore received much analysis in the courts. Indeed, there were only a few cases dealing specifically with the *implied* duty to restore – most of the cases turned on express contractual provisions in the leases requiring payment of surface damages or requiring restoration. Most of the more recent jurisprudence, therefore, focuses on issues of damages, not liability. The focus in these decisions tended to be on damages, not liability; that is, the focus was on the reasonableness of the restoration sought by the landowner rather than the reasonableness of the lessee’s prior conduct. Other issues addressed included the question of when the duty arises, which parties held rights and obligations under the duty, as well as the role of regulatory agencies in governing oil field restoration. It was not until *Castex* that the courts turned back to revisiting the foundations of the implied duty of restoration set forth in the original Comment to Article 122 of the Mineral Code.

#### **A. Implied Duty versus Express Duty**

Since the adoption of the Mineral Code, only two reported cases appear to have awarded surface damages to lessors pursuant to the *implied* duty to restore the surface. *Broussard v. Waterbury*, 346 So. 2d 1342 (La. App. 3rd Cir. 1977); *Edwards v. Jeems Bayou Production Co.*, 507 So.2d 11 (La. App. 2nd Cir. 1987).

The *Broussard* case acknowledged that a mineral lessee had an implied duty to restore the surface under Article 122, subject to the standard of “reasonableness” in the restoration.<sup>28</sup> The *Broussard* court appeared to conclude that this standard of reasonableness applied to determine the extent of damages due, not whether the lessee had acted reasonably in its operations so as to preclude any necessity for restoration. To the extent that reasonableness is a limit on damages, much discretion is afforded the trial court and jury in measuring the amount of damages due.<sup>29</sup>

The *Edwards* court likewise found that an implied duty to restore existed. In contrast to *Broussard*, however, the court added that the inquiry should address whether the damage resulted from “unreasonable” use by the lessee – not just whether the

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<sup>28</sup> 346 So.2d at 1344 (citing the Comment to article 122 and *Schuster, supra*)

<sup>29</sup> *Id.*

restoration sought was reasonable.<sup>30</sup> Determination of what constitutes reasonableness use of the lease surface must be determined on a “case by case basis.”<sup>31</sup>

Both of these cases involved modest sums of damages -- \$9,000 in *Broussard* and \$2,175 in *Edwards*. In neither is it apparent that the parties significantly challenged the theory of liability or the scope of the duty to restore – again, the emphasis was on the proper items of damages. Other than these two cases, subsequent judicial support for the implied duty of restoration can only be found in *dicta*.<sup>32</sup>

Most of the cases awarding surface damages turned on contractual provisions expressly requiring the lessee to pay for damages caused by its operations or requiring the lessee to restore the land. Thus, in these cases the principal issue was not liability nor the scope of the obligation to restore, but solely the proper measure of damages. For example, in *Clement v. Marion Corp.*, 398 So. 2d 130 (La. App. 3rd Cir. 1981), the lease provided that the lessee shall “restore the land to its original condition as near as practicable.” The court affirmed an award of \$2,000 to complete the restoration work necessary to return the land to its prior state as wooded lowlands, but denied the landowner’s request for the additional cost of converting the land to a more profitable agricultural use. Other significant cases, discussed further below, also awarded damages based on express contractual provisions either requiring the lessee to pay for damages caused by operations or requiring the lessee to restore the land to its former condition.<sup>33</sup>

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<sup>30</sup> 507 So.2d at 13 (“judicial inquiry should focus on whether the mineral lessee’s use of the land was reasonable ... the landowner has no right to recover damages for diminished use of his land arising out of reasonable and necessary exercise of the lessee’s rights under the mineral lease.”)

<sup>31</sup> *Edwards*, 507 So.2d at 12 (citing *Broussard v. Northcott Exploration Co., Inc.*, 481 So.2d 125 (La. 1986)).

<sup>32</sup> See, e.g., *Caskey v. Kelly Oil Co.*, 737 So. 2d 1257, 1261 (La. 1999) (noting duty to restore as one of five implied duties under Article 122 by way of legal background in analyzing the reasonableness of building a road to support operations on adjacent lands).

<sup>33</sup> E.g. *Corbello v. Iowa Production*, 850 So.2d 686, 694 (La. 2003) (surface lease provided that “Lessee further agrees that upon termination of this lease it will reasonably restore the premises as nearly as possible to their present condition”); *St. Martin v. Mobil Exploration and Producing U.S. Inc.*, 224 F.3d 402 (5th Cir. 2000) (applying Louisiana law) (damages from canal erosion were due under a servitude agreement specifying that “Grantee further agrees to pay Grantor for any damages occasioned to Grantor’s lands as a result of the construction, use and maintenance of the canal”); *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 844 So. 2d 380, 384 (La. App. 3 Cir. 2003) (mineral lease provided that “Grantee shall be responsible for all damages caused by his operations”).

## B. Damages

As the issues of pollution and coastal erosion came to the public forefront, claims for damages in connection with the restoration of legacy oil field sites rose exponentially. One of the principal arguments of lessees against large claims for restoration damages is that they sought amounts far in excess of the value of the property, even in an undamaged state. This argument was squarely rejected in *Corbello v. Iowa Production*, 850 So.2d 686 (La. 2003). In a case involving a surface lease for an oil field terminal, the court affirmed a jury award of \$33 million for restoration of a tract of land worth \$108,000, including \$28 million for groundwater contamination. The lease contained a broadly worded reimbursement and restoration clause, requiring the lessee to pay for damages caused by operations and to reasonably restore the land to its former condition.<sup>34</sup> Shell had argued that the explicit as well as implicit “reasonableness” limitation on the duty to restore, coupled with the *Roman Catholic Church* rule (limiting property damage in tort cases to the value of the property), precluded a restoration award many times more than the value of the property. The court rejected this argument, finding that the *Church* rule does not apply to a *contractual* obligation to repair or restore property and that there is no other legal basis for such a limitation on a contractual obligation freely negotiated by the parties:

Thus, we decline to set forth a rule of law, suggested by Shell, that in cases of breach of a contractual obligation of restoration in a lease, the damage award to plaintiffs must be tethered to the market value of the property. To do so would give license to oil companies to perform its operations in any manner, with indifference as to the aftermath of its operations because of the assurance that it would not be responsible for the full cost of restoration.<sup>35</sup>

Two other cases decided recently addressed the extent of damages appropriate for restoration of the surface. *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 844 So. 2d 380, 384 (La. App. 3 Cir. 2003) concerned a lease with an express provision requiring payment for all damages caused by operations. The landowner brought claims for surface and groundwater damage from NORM (naturally occurring radioactive materials) and brine pits. The court of appeal affirmed a jury award of \$2,000,000 for clean-up of the tract, worth only about \$300,000. In *Simoneaux v. Amoco Production Co.*, 860 So.2d 560 (La. App. 1 Cir. 2003), the jury awarded \$375,000 for additional clean-up of one of seven well sites on the property, but the trial judge granted a JNOV and increased the award to \$12 million. The court of appeal reversed and reinstated the jury’s award. In

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<sup>34</sup> 850 So.2d at 694 (“Lessee agrees to indemnify and hold lessor harmless from any and all loss, damage, injury and liability of every kind and nature that may be caused by its operations or result from the exercise of the rights or privileges herein granted. Lessee further agrees that upon termination of this lease it will reasonably restore the premises as nearly as possible to their present condition.”)

<sup>35</sup> 850 So.2d at 695.

reversing, the court of appeal discussed extensively the competing testimony of the experts, the previous clean-up efforts of the lessees, and the evidence that the prior clean-up of the well sites, except for one, had brought the site into compliance with all state regulatory standards. As to the one well site that had not yet met Office of Conservation standards, additional clean-up costs were awarded in the amount suggested by the lessee's expert. Interestingly, the court did not discuss on the basis on which liability was founded – an express damage provision, negligence, or an implied duty of restoration?

### C. Specific Performance

One objection raised by lessees to large damage awards is that there is no guarantee that the landowner will actually spend the award on clean-up and restoration, especially when the damage at issue is one that concerns not just the landowner, but the public at large, such as groundwater contamination. This was a particular contentious issue in *Corbello*. Yet, the court made clear that, since the legislature has not imposed a requirement upon landowners to spend a restoration damages award on actually restoring the property, the Court would not step in to impose such a requirement.<sup>36</sup>

By contrast, the trial court in *Castex* ordered the lessees to pay \$1,100,000 into the registry of the court to be administered by a special master who would oversee the restoration work required. The court of appeal amended the judgment and ordered that the defendants simply perform the restoration work without paying money into the registry of the court. The court of appeal reasoned that the lessees' restoration obligation is an obligation "to actually restore the surface (not simply to tender an amount sufficient to accomplish restoration)," citing Mineral Code Article 122.<sup>37</sup> The Civil Code authorizes the court, in its discretion, to award specific performance in lieu of money damages for breach of a contractual obligation.<sup>38</sup>

### D. When Does the Duty Arise?

An issue arising in current cases concerns the potential "prematurity" of claims for surface restoration. The *Corbello* court ruled that "[t]he duty to repair the leased premises *does not arise until the lease expires*, at which time the lessee must return the property in good order,"<sup>39</sup> which is in keeping with the theory that the implied duty of restoration is based on the Civil Code articles of lease, which talk of the duty to return the thing in the same condition *at the end of the lease*.<sup>40</sup> A number of recent trial decisions

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<sup>36</sup> *Corbello*, 850 So.2d at 699.

<sup>37</sup> *Terrebonne Parish School Board v. Castex Energy Inc.*, 878 So.2d 522, 536 (La. App. 1st Cir. 2004), *rev'd on other grounds*, No. 04-C-0968 (La. 01/19/05), \_\_\_ So. 2d \_\_\_, 2005 La. LEXIS 141.

<sup>38</sup> *J. Weingarten, Inc. v. Northgate Mall, Inc.*, 404 So. 2d 896, 901 (La. 1981).

<sup>39</sup> 850 So.2d at 703 (emphasis added).

<sup>40</sup> *See* La. Civ. Code art. 2683 (2005) (restating prior articles 2719 and 2720).

have reach the same conclusion, though none appear to have been reported among published decisions as of this time.

One cannot say with certainty, however, that all claims for surface damages are always premature prior to the expiration of the lease. In prior cases, awards have been granted for damages imposed by express contract provision (such as damages to crops and timber) or as the result of negligent or unreasonable operations even during the existence of the lease.<sup>41</sup> In *Edwards v. Jeems Bayou Production Co.*, 507 So.2d 11 (La. App. 2nd Cir. 1987) the court allowed clean-up damages for areas no longer needed for operations, but refused damages for areas around a shut-in well that might be used in the future, suggesting that there may be an incremental obligation to restore, at least as to areas no longer needed for operations.<sup>42</sup> In *Roy O. Martin Lumber Co. v. Pan American Petroleum Corp.*, 177 So. 2d 153 (La. App. 3rd Cir. 1965), the court allowed an award to repair land damage under an express clause in the lease, but limited the award to the minimum amount necessary to effect temporary repairs because lease operations were ongoing and would, no doubt, cause additional damage in the future.<sup>43</sup>

In all of these cases involving ongoing operations, it could be said that the courts were more properly confronted with the duty *to repair*, rather than the duty *to restore*. Whereas the latter duty contemplates a final restoration of the property at the end of the lease, the duty to repair is simply the duty to compensate the lessor for certain property damage, either required by the lease itself (such as a duty to pay for damages to crops or timber) or arising from negligent or operations or unreasonable or excessive uses of the property.<sup>44</sup> The duty to repair can theoretically arise anytime, either when called for by

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<sup>41</sup> *E.g. Smith v. Schuster*, 66 So. 2d 430 (La. App. 2d Cir. 1953); *Rohner v. Austral Oil Exploration Co.*, 104 So. 2d 253 (La. App. 1 Cir. 1958); *Roy O. Martin Lumber Co. v. Pan American Petroleum Corp.*, 177 So. 2d 153 (La. App. 3rd Cir. 1965).

<sup>42</sup> 507 So.2d at 13 (“It would not be reasonable or practical at this time to restore for agricultural purposes that part of the drill site reasonably needed for continued operation”).

<sup>43</sup> 177 So. 2d at 158 (“it must be remembered, that defendant's operations, hauling materials, etc., will be a continuing necessity, with heavy equipment, for many years. To restore and next year again cut up the same access road, with the possibility of doing this over and over, would seem vain and useless to the Court”)

<sup>44</sup> *See, e.g., Broussard v. Northcott Exploration Co.*, 481 So. 2d 125, 127 (La. 1986) (allowing damages against mineral lessee for any crops “unreasonably” destroyed beyond the area needed for drilling operations and for damage to a tractor that could have been easily moved out of harm’s way).

the lease contract, or when the negligent or unreasonable damage occurs. Also, the duty to repair can arise in favor of any concurrent user of the surface in addition to the lessor.<sup>45</sup>

### **E. Theories of Recovery and Prescription**

Tort claims prescribe in one year and contract claims prescribe in ten years.<sup>46</sup> The *Corbello* court held that a lessor may bring both a tort and a contract claim when he has been damaged by conduct arising out of a breach of the restoration duties under the contract, allowing the lessee to seek the benefit of the longer prescriptive period for contract actions.<sup>47</sup> Because of the ongoing nature of mineral operations, it is sometimes claimed that damages are the result of a continuous tort, extending the limitations period. In *Crump v. Sabine River Authority*, the court limited the theory of continuous torts, in a case based on the tortious dredging of a canal about twenty years before suit was filed.<sup>48</sup> The court held that it is not sufficient alone that the damage is continuous to prevent prescription; rather, it is necessary that the “operating cause” of the damage be continuous – otherwise prescription runs from the date that knowledge of the damage was, or should have been, apparent.<sup>49</sup>

As to claims based in contract, prescription runs from the date of the breach – of course, the question becomes: “what is the date of the breach?” Under the *Corbello* theory that the duty to restore does not arise until the termination of the lease, a claim for restoration of the surface should not prescribe until ten years after the end of the lease. On the other hand, where the lease contains an express provision requiring compensation for damages, one could reasonably argue that the claim arises when the damage occurred and became due. In *St. Martin v. Mobil Exploration and Producing U.S. Inc.*, 224 F.3d 402, 409 (5th Cir. 2000) (applying Louisiana law), however, the court held that a breach of a canal servitude agreement provision requiring maintenance of the canal so as to avoid damage to the land was a continuing one throughout the existence of the contract, so as to delay the tolling period until the end of the contract. The court did recognize, on the other hand, that a different result might obtain for damages associated with a “one-time” event or a discontinued past operation.<sup>50</sup>

### **F. Parties**

The surface owner, or other person with rights to the surface, may not be in direct contractual privity with the mineral lessee, giving rise to questions as to who has the right

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<sup>45</sup> E.g., *Broussard v. Northcott*, supra (farmer under predial lease from landowner had right to recover, in tort, any damages unreasonably or negligently caused by the landowner’s mineral lessee).

<sup>46</sup> See La. Civ. Code Arts. 3492-93, 3499.

<sup>47</sup> *Corbello*, 850 So. 2d at 708.

<sup>48</sup> *Crump v. Sabine River Authority*, 737 So.2d 720 (La. 1999).

<sup>49</sup> *Id.* at 726.

<sup>50</sup> See *St. Martin*, 224 F.3d at 409.

to seek recover for surface damages, as well as who is obligated to the surface owner. Generally, a purchaser may not recover for damage done to the property prior to his purchase unless he obtained the right to do so by assignment from his vendor.<sup>51</sup> In cases, however, where the lease contains a specific provision requiring payment for damages suffered by anyone and caused by the lessee, courts have held that the clause creates a *stipulation pour autrui*, whereby a subsequent surface owner or tenant can recover surface damages under the lease.<sup>52</sup> However, where the lease does not create a *stipulation pour autrui*, and there is no assignment of rights, the courts have held that the subsequent purchaser cannot recover for damage that occurred prior to his acquisition of the property.<sup>53</sup>

At least one case has raised the question of whether all co-owners of the land must agree on the restoration “plan” before relief can be obtained. In *Allain v. Shell Western E&P, Inc.*, the issue was whether a minority of co-owners could enforce a lease provision mandating pipeline burial “below plow depth.”<sup>54</sup> The court determined that the resolution of this question depended on whether the enforcement of the provision, under the particular circumstances of the case, would constitute mere preservation of the property, which could be enforced by any single co-owner, or would substantially alter or damage the property, in which case it would require the consent of all co-owners.<sup>55</sup> The peculiar circumstances in that case included the fact that the land was flooded swamp, for which the lessee claimed that the burial of flowlines would be impractical, destructive, and too costly. As to the latter point, the court noted that the financial costs alone are “immaterial” to the feasibility of burying the lines, as the obligation is a matter of contract.<sup>56</sup> The court of appeal did not ultimately decide the dispute, but remanded the case for additional factual findings.

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<sup>51</sup> *Prados v. South Central Bell Telephone Co.*, 329 So.2d 744 (La. 1975).

<sup>52</sup> Compare *Andrepoint v. Acadia Drilling Co.*, 231 So.2d 347, 351 (La. 1969) (clause stating that “Lessee shall be responsible for all damages caused by Lessee's operations” created *stipulation pour autrui* in favor of farmer); *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 790 So.2d 93 (La. App. 3 Cir. 2001) (clause stating that “Grantee shall be responsible for all damages caused by his operations” granted *stipulation pour autrui* in favor of subsequent surface owner) with *Broussard v. Northcott Exploration Co.*, 481 So.2d 125 (La. 1986) (clause stating that “Lessee shall be responsible for all surface damages of the Lessor” was not a *stipulation* in favor of surface users other than the lessor).

<sup>53</sup> *St. Martin v. Mobil Exploration and Producing U.S. Inc.*, 224 F.3d 402 (5th Cir. 2000).

<sup>54</sup> *Allain v. Shell Western E&P, Inc.*, 762 So. 2d 709 (La. App. 1 Cir. 2000).

<sup>55</sup> 762 So.2d at 706 (citing La. Civ. Code arts. 800 & 801).

<sup>56</sup> *Id.* at 714.

## G. Role of Regulatory Agencies

In determining the proper level of remediation required, the parties, their experts, and courts often look to the regulatory standards of the Louisiana Department of Natural Resources (DNR), Office of Conservation, which is responsible for overseeing mineral operations and oil field cleanups, and the Louisiana Department of Environmental Quality (DEQ). Statewide Order 29-B of the Office of Conservation contains a list of requirements concerning oil field restoration, including plugging of wells, the operation and closure of pits, and limits for certain soil contaminants.<sup>57</sup> The DEQ issued the Risk Evaluation/Corrective Action Program (RECAP), which contains standards pertaining to the quality of ground water soil.<sup>58</sup> In civil litigation, these regulatory standards are often used by the parties and their experts as the standard of care by which the lessee's obligations are measured.<sup>59</sup> Because of their role in oil field restoration and environmental remediation, the standards, policies, and permitting requirements of the DNR and DEQ, are appropriately considered in assessing the need for and appropriate scope of surface remediation.<sup>60</sup>

The Office of Conservation and the DEQ have direct enforcement authority as to oil field restoration and remediation issues and landowners can seek relief directly from these agencies. The Office of Conservation has procedures by which property owners can present complaints about mineral operations on their properties, which include the potential for investigations, hearings, initiation of adjudicatory or judicial proceedings by the Commissioner, and the ordering of appropriate remediation of contamination or other improper conditions.<sup>61</sup> Likewise, the DEQ has enforcement powers and can address landowner's complaints concerning improper remediation of pollutants within its jurisdiction.<sup>62</sup>

Given the role of the DNR and DEQ, courts have sometimes grappled with the issue of judicial deference to these administrative agencies in matters involving oil field

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<sup>57</sup> See LAC 43:XIX.1 § 301 *et seq.*

<sup>58</sup> See Risk Evaluation/Corrective Action Program (RECAP), available at <http://www.deq.state.la.us/technology/recap/> (last visited March 15, 2005).

<sup>59</sup> *E.g.*, *Simoneaux v. Amoco Prod. Co.*, 860 So.2d 560 (La. App. 1 Cir. 2003) (analyzing whether further restoration costs should be awarded in light of the prior findings of the DEQ and DNR).

<sup>60</sup> *Id.*; see also *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La. 1991); *Morris & Dickson Co., Inc. v. Jones Brothers Co.*, 691 So.2d 882 (La. App. 2 Cir. 1997).

<sup>61</sup> See 43 LAC.I.101, *et seq.*

<sup>62</sup> See *Simoneaux v. Amoco Production Co.*, 860 So.2d 560, 569 (La. App. 1 Cir. 2003) (noting that landowner had earlier obtained partial relief from the DEQ, which had ordered the lessee to remove NORM-containing equipment from the property).

remediation. The doctrine of *primary jurisdiction* recognizes that it is sometimes appropriate for a court to defer ruling in a private judicial action until findings are completed by the administrative agency with joint jurisdiction over the property.<sup>63</sup> In *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La. 1991), the Supreme Court held that deference to the Commissioner of Conservation is a matter for the sound discretion of the court. Under the particular facts of this case (including the lessee's delay in seeking a hearing from the Commission), a plurality of the court affirmed a partial award for damages arising from a leaking oil well and ruled that the trial court had acted properly in not *first* deferring to the Commissioner as to whether the well had been properly plugged; however, the parties were ordered to reapply to the Commissioner for a final determination of whether the well had been properly plugged, leaving the possibility of additional damages or remedies open for a later date.

The importance of deferring to state agencies to determine the appropriate remediation plan was discounted by the Supreme Court in *Corbello*, which rejected the policy argument that oil field pollution should be remedied by administrative orders of clean-up rather than large damage awards that might not be spent on clean-up efforts:

We certainly recognize the policy concerns asserted by Shell regarding the possibility of unclean land, which would likely affect the public by way of contamination of the drinking water supply, in the event the plaintiffs do not use the money for remediation. However, we also recognize the policy concern asserted by plaintiffs in that if landowners cannot sue for cleanup costs – especially where, as here, they have a contract in hand – it would leave only understaffed and underfunded state agencies to oppose the oil companies. In this situation, there is still a strong possibility that the land will remain polluted.<sup>64</sup>

The court made clear that “landowners in Louisiana have no duty to seek relief from an administrative agency before filing suit against an oil company.”<sup>65</sup> Despite these pronouncements from *Corbello*, lessors continue to assert exceptions to judicial proceedings based on the doctrine of primary jurisdiction and in at least one, unreported post-*Corbello* case, the trial court deferred proceedings until the Commissioner of Conservation could consider certain environmental damage issues arising in two South Louisiana oil fields.<sup>66</sup>

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<sup>63</sup> See *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475, 486 (La. 1991) (Lemmon, J., concurring)

<sup>64</sup> *Corbello*, 850 So.2d at 701.

<sup>65</sup> *Id.*

<sup>66</sup> *St. Mary Parish School Board v. Texaco, Inc.*, No. 108242, Reasons for Judgment (16th Judicial District Court 5/2/02) (unpublished).

To govern the interplay between private suits and administrative enforcement, the legislature had responded with two statutes. La. R.S. 30:89.1 (Louisiana Oilfield Site Restoration Law) protects a lessee who has paid a private judgment for surface restoration claims from having to pay that amount again in response to a subsequent enforcement action by the Commissioner of Conservation. Act No. 1166 (2003), La. R.S. 30:2015.1, enacted after the *Corbello* decision, provides (1) that any landowner seeking judicial recovery for “ground water” contamination damages must first notify the DNR and DEQ, (2) that the DNR or DEQ be permitted to intervene in the proceedings and provide input into any court approved plan for remediation, (3) that any money award for ground water contamination goes into the registry of the court to ensure that it is spent on remediation and (4) that the Act is remedial and retroactive back to 1993.

#### IV. The *Castex* Decision

*Castex* marks the first return to an analysis of the fundamental nature and scope of the implied duty of restoration, challenging assumptions that were generally accepted since the adoption of the Mineral Code and publication of its accompanying Comments. The case began as a claim by the Terrebonne Parish School Board against its mineral lessees for damages from marshland loss allegedly caused by canals dredged in the course of mineral operations. The lease was silent as to any duty to restore the surface at the end of the lease or to compensate the lessor for damages caused by operations. The trial court found that the implied duty to restore the surface required the lessees to undertake the expense of backfilling the canals and awarded damages in the amount of \$1,100,000, which were to be paid into the registry of the court and administered by a special master to undertake the remediation plan approved by the court. On appeal, the First Circuit affirmed the finding of an implied duty to backfill the canal.<sup>67</sup> The court, however, determined that the appointment of a special master was in error, lacking the consent of both parties as required by law. Consequently, the First Circuit amended the judgment to vacate the monetary award and directly ordered specific performance, requiring the lessees to undertake the remediation plan approved by the trial court.

On writs to the Louisiana Supreme Court, the court reversed the First Circuit and trial court.<sup>68</sup> In sum, it concluded that

where the mineral lease expressly grants the lessee the right to alter the surface in the manner it did, and is silent regarding restoration, article 122 only imposes a duty to restore the surface to its original condition where there is evidence of unreasonable or excessive use.<sup>69</sup>

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<sup>67</sup> *Terrebonne Parish School Board v. Castex Energy Inc.*, 878 So. 2d 522 (La. App. 1st Cir. 2004).

<sup>68</sup> *Terrebonne Parish School Board v. Castex Energy Inc.* No. 04-C-0968 (La. 01/19/05), \_\_\_ So. 2d \_\_\_, 2005 La. LEXIS 141.

<sup>69</sup> *Id.* slip op. at 2.

The court noted that the original lease granted the lessee “broad rights” to use the surface, including specifically the right to “dredge canals,” without any provision expressly requiring restoration at the end of the lease. Thus, in the absence of any evidence that the dredging of the canals was unreasonable or excessive, the court found no implied duty upon the lessees to backfill the canals or otherwise compensate the landowner for the deterioration to its property caused by the canals.

In reaching its holding, the court made several key determinations and observations:

- Mineral Code article 122 does not, by its terms, expressly provide for an implied duty of restoration. The only reference to that duty is in the Comment, which the court observed is not part of the statute nor controlling authority.<sup>70</sup>
- The only prior decisions of the Supreme Court awarding restoration damages, *Magnolia Coal* and *Corbello*, were distinguishable because both turned on express lease provisions requiring payment for damages to the land or restoration of the property, as well as serious allegations of negligence in the operations.<sup>71</sup>
- It interpreted the weight of early authority, including the *Rohner* decision discussed above, as correctly stating the rule that the lessee is not liable for surface damages caused by the “ordinary, customary, and necessary” acts contemplated by the lease, absent proof that such operations were conducted negligently or were unreasonable in their scope.<sup>72</sup>
- It also found support in the Civil Code articles on leases, which provide that the lessee is not required to account to his lessor for anticipated “wear and tear.”<sup>73</sup>
- The express rights granted to the lessee, such as the right to dredge canals, also reflect the landowners’ implicit consent, in advance, to accept the deterioration or damage (or “wear and tear”) that necessarily arises in the course of exercising that right.<sup>74</sup>
- The court noted that there was no showing of negligence or unreasonableness by lessee and, instead, the lessees were able to prove that (1) they complied with all clean-up regulations of the Commissioner of Conservation and (2) that their

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<sup>70</sup> *Id.* slip op. at 11 (“At the outset, we note that statements contained in the official comments are not part of the statute, and are not binding on this court, although we do not discount them entirely”)

<sup>71</sup> *Id.* slip op. at 12-13.

<sup>72</sup> *Id.* slip op. at 13-15.

<sup>73</sup> *Id.* slip op. at 15-16.

<sup>74</sup> *Id.* slip op. at 16.

decision to not backfill the canals was consistent with industry custom at the time.<sup>75</sup>

## V. Reflections on *Castex*

The significance of *Castex* is its change in focus from the reasonableness of competing restoration plans to the reasonableness of the lessee's original operations. *Castex* makes clear that the inquiry should not dwell on modern thoughts of what constitutes a proper or desirable remediation, but must concentrate on the past conduct and expectations of the parties based on the circumstances and expectations at the time of the operations. Attitudes and expectations of today are quite different from what they were thirty, forty, fifty, or more years ago, when land – particularly low-lying swamp and marshland were seen as near worthless, and were eagerly exploited by both oil company and landowner for production of oil and gas. Hindsight might produce regret, but *Castex* emphasizes that even modern attitudes about conservation and the monumental public costs of coastal land loss cannot change the bargain that was struck by the parties years earlier.

Does *Castex* signal the end of surface damage claims? To suggest such would be to read far too much into its holding. Perhaps the only certain conclusion that can be drawn from *Castex* is that, under a standard form lease with no express restoration or damage clause, a lessee has no obligation to backfill canals. Beyond that, there remain many viable claims that undoubtedly will be continued to be pressed in the courts. Many facets of the duty to restore were not addressed by *Castex* and, indeed, the decision raises some interesting questions on many points.

Importantly, the *Castex* decision does not purport to limit a lessee's liability for surface damages or restoration under an express lease clause imposing such an obligation. Indeed, the court prefaced its analysis by repeatedly stressing the importance of "respect for the rights of contracting parties" and "respect for the terms of the mineral lease" even in the face of "the dire consequences of non-restoration."<sup>76</sup> Presumably a majority of the court holds fast to the principal, earlier expressed in *Corbello*, that any apparent inequity in the result (whether to the lessee forced to pay a huge damage award or to the lessor who faces an uncompensated loss of his property) cannot change the contractual bargain struck. Thus, although a lessee might be excused completely from restoration obligations under a lease that is silent on the subject, it would presumably still be subject to potentially significant damage awards or restoration obligations under an express lease clause, as was the case in *Corbello*.

On the other hand, it should be noted that in gauging the contractual obligations and expectations of the parties, the *Castex* court focused not only on the absence of any contractual provision imposing a restoration obligation, but also on the existence of the express contractual right of the lessee to "dredge canals." According to the court, by

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<sup>75</sup> *Id.* slip op. at 17-18.

<sup>76</sup> *Id.* slip op. at 1-2.

expressly granting the lessee the right to make certain works on the lease, the lessor “consents in advance” to the damages that are incidental to such works. Slip. op. at 16 (quoting *Jurisich v. La. S. Oil & Gas Co.*, 284 So.2d 173, 184 (La. App. 4th Cir. 1973) (Lemmon, concurring). Thus, even in the face of an express restoration or damage provision, the lessee may be able to limit its obligations by some measure of what the landowner reasonably expected to suffer incidental to the lessee’s exercise of expressly granted rights.<sup>77</sup> The *Castex* court, in particular, cited authority under the general law of leases to the effect that the lessee is not required to remove or remedy changes to the property that were expressly agreed to or clearly anticipated by the lessor.<sup>78</sup>

In some respects, the *Castex* decision represents a full revolution in the Louisiana jurisprudence, which returns it in line with most other states that do not recognize a strict implied duty of restoration. The *Castex* court essentially adopted, verbatim, the articulation provided in the Third Circuit’s decision in *Rohner*, which in turn quoted an earlier Louisiana law review article, which in turn summarized the holdings of even earlier decisions in other producing states.<sup>79</sup> The rule generally followed in other states is

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<sup>77</sup> Cf. *Roy O. Martin Lumber Co. v. Pan American Petroleum Corp.*, 177 So. 2d 153, 156 (La. App. 3rd Cir. 1965) (despite express provision requiring mineral lessee to pay for damages to land, the court refused to award the costs of a full restoration, concluding that the lessee had the contractual right to disturb the land in the manner it did, making “the yardstick for damages different” from the normal rules for measuring damages).

<sup>78</sup> *Castex*, slip. op. at 17 (citing *Riggs v. Lawton*, 93 So.2d 543, 545 (La. 1957) (lessee not responsible for cost of removing improvements to house which the lessor allowed him to construct) and *K&M Enters. of Slaughter, Inc. v. Pennington*, 764 So.2d 1089, 1094 (La. App. 1st Cir. 2000) (farmer not responsible for removing drainage ditches and earthworks that were clearly anticipated as part of his activities under his farm lease)). *But see Deitz v. Superior Oil Co.*, 252 So. 2d 198 (La. App. 3rd Cir. 1971) (surface lease that expressly granted lessor right to erect structures and place equipment on lease, and waived lessor’s right to retain those improvements at the end of the lease, did not relieve the lessee of legal duty, under Civil Code articles 2719 and 2720, to remove all such structures and equipment at the end of the lease and return the property to lessor in its original state); *Prados v. South Central Bell Telephone Co.*, 329 So.2d 744, 746 (La. 1975) (distinguishing *Riggs v. Lawton* and holding that “[w]aiver of the right to have the premises restored to their original condition cannot be inferred from an agreement allowing construction of improvements during the term of the lease”).

<sup>79</sup> *Castex*, slip. op. at 14 (citing *Rohner*, 104 So. 2d at 255 (citing William O. Bonin, Comment, *Mines and Minerals – Oil and Gas – Surface Rights of Lessor and Mineral Lessee*, 26 Tul. L. Rev. 522, 523 (1952) (citing, *inter alia*, *Le Croy v. Barney*, 12 F.2d 363 (8th Cir. 1926); *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. App. 1919); *Marland Oil Co. v. Hubbard*, 168 Okla. 518, 34 P.2d 278 (1934))).

that there is no implied duty of restoration; rather, the lessee is only liable for damages caused by his negligence in operations or unreasonably excessive use of the surface.<sup>80</sup> While it would be far too presumptuous to suggest that *Castex* has effectively relieved lessees of their potential liability for restoration, one could fairly argue that the *implied* duty of restoration, at least as contemplated under the Comment to Article 122, has been eliminated. All that remains is the duty of repair – a duty to remedy damage to the surface that arises either by express contractual provision, or by some tortious breach of the mineral lease in the lessee’s use of the surface or the conduct of its operations.

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<sup>80</sup> See authorities cited *supra* note 25.