



## LOUISIANA SUPREME COURT REJECTS ARTICLE 136 REQUIREMENTS FOR RESTORATION CASES

*Broussard v. Hilcorp Energy Corp.*, Nos. 09-C-0449 and 09-C-0469 (La. 10/10/09)

The Supreme Court of Louisiana has ruled 4–3 that the written notice and delay for performance requirements under Mineral Code article 136 do not apply to restoration claims. According to the ruling, restoration claims are not controlled by Mineral Code article 136 because they are not governed by the prudent operator standard under Mineral Code article 122. In the 4–3 decision, Justice Johnson issued the majority opinion, to which Justices Guidry and Weimer filed written dissents.

### **Ruling Examined**

In *Broussard v. Hilcorp Energy Co.*, the Louisiana Supreme Court held that Article 136 of the Louisiana Mineral Code (La. R.S. 31:136) does not require pre-suit written notice and an opportunity to perform prior to judicial demand for property restoration claims alleging contamination from oil and gas production. The majority ruled that these Article 136 requirements apply to claims “arising from drainage of the property leased or from any other claim that the lessee has failed to develop and operate the property leased as a prudent operator.” The majority rejected defense arguments that Article 136, on its face, applied to plaintiffs’ claims based on plaintiffs’ allegations in their petition that defendants had failed to act as reasonably prudent operators. Instead, the court limited the plain language of Article 136 to claims related to drainage of property or failure to “develop and operate” leased property. The court thus found that Article 136’s pre-suit requirements did not apply because the case involved a remediation/restoration claim.

### **Facts in the Case**

Plaintiffs Kern and Nettie Broussard (“Plaintiffs”) filed suit in 2004 against numerous companies seeking damages and restoration of property. Plaintiffs owned real property in Vermillion Parish, Louisiana, on which mineral, surface, and subsurface leases were granted to conduct oil and gas operations. Broussard alleged that the operations were conducted negligently, causing contamination of the property and requiring restoration. Defendants filed numerous exceptions, including exceptions of prematurity/want of amicable demand filed by defendants ConocoPhillips Company and Chevron U.S.A., Inc. (collectively, “defendants”). In those exceptions, defendants argued that Article 136 required plaintiffs to give defendants written notice and a reasonable opportunity to perform before filing suit alleging that they, as mineral lessees, breached their obligation to operate leased property as a reasonably prudent operator. The trial court sustained the prematurity/want of amicable demand exceptions and dismissed plaintiffs’ petition without prejudice. The appellate court affirmed the trial court’s ruling in part but reversed the dismissal based on the failure to provide the written notice required by Article 136. The Supreme Court granted defendants’ writ applications on the sole issue of whether plaintiffs were required to provide written notice pursuant to Mineral Code Article 136 prior to filing suit.

### **Historical Background**

The Supreme Court began its legal review with an analysis of the history of the “putting in default” concept as follows. Initially, an obligor was liable for damage his nonperformance caused only from the time he was put in default. Following the enactment of the Mineral Code in 1974, Mineral Code article 136 specified the requirement of putting in default only



for claims for damages resulting from drainage. Courts also applied the putting in default requirement to passive breaches of the lessee's obligations. Revisions to the Louisiana Civil Code in 1984 eliminated the distinction between active and passive breaches of obligations and enacted Civil Code article 1989. This resulted in requiring an obligor to put an obligor in default only when the obligee was seeking damages for delay. The 1984 revisions resulted in a "gap" as to what types of claims required a putting in default under the Mineral Code. A 1995 amendment to Article 136 extended the obligation of a lessor to provide pre-suit written notice for claims beyond those involving drainage. Article 136 now requires such notice for claims "arising from drainage of the property leased" or "any other claim that the lessee has failed to develop and operate the property leased as a prudent operator." The issue in *Broussard* was the extent of that expansion, *i.e.*, whether plaintiffs' claims for property damage and remediation/restoration are "claims for failure to develop and operate as a prudent operator" requiring pre-suit notice and an opportunity to perform under Article 136.

### Issue of Duty by Operator Under Lease

In resolving the issue, the Supreme Court relied on its decision in *Terrebonne Parish School Board v. Castex Energy, Inc.*, 2004-0968 (La. 1/9/05), 893 So.2d 789. Mineral Code article 122, La. R.S. 31:122, establishes the prudent operator standard ("mineral lessee . . . is bound to . . . develop and operate the property leased as a reasonable prudent operator . . .") *Castex* rejected an implied "duty to restore" under the Article 122 prudent operator standard where restoration is not required by lease terms and did not result from excessive or unreasonable exercise of lease rights. While the *Broussard* Supreme Court recognized that Louisiana jurisprudence had previously held that a mineral lessee's prudent operator duty included the obligation to restore the surface, it concluded that, after *Castex*, the implied duty to restore property "is no longer encompassed in the prudent operator standard" prescribed in Mineral Code article 122. The court further placed emphasis on the failure "to develop and operate" language of Article 136, observing that the claims for remediation and restoration of the property were "separate and distinct" from any claims that defendants failed to develop and operate the property as reasonably prudent operators. As a result, the Louisiana Supreme Court found that plaintiffs were not required to provide defendants with pre-suit notice and an opportunity to perform prior to filing suit.

Justices Guidry and Weimer issued written dissents. Justice Guidry argued that the issue should be determined by allegations in plaintiffs' petition that defendants breached the subject leases and the prudent operator standard. He concluded that such allegations trigger the Article 136 requirements for pre-suit notice and opportunity to perform imposed for breaches of the prudent operator standard. Justice Weimer found that a remediation/restoration claim "arises from a failure to develop and operate the property as a reasonably prudent operator" and thus falls within the language of "any other claim" specified in Article 136.

### Implications of the Decision

The *Broussard* decision is significant because it raises serious questions as to the nature of a mineral lessee's duty to restore or remediate property contaminated by the lessee's oil and gas operations. Underlying *Broussard* is the holding that a restoration claim cannot be based on a failure to act as a prudent operator. If there are lease provisions governing restoration, then contract law applies. Absent lease terms, restoration claims may be governed by general tort law. The issue is important to determine the controlling legal standard for the claim and the applicable prescriptive period.

To see the full decision, please visit: <http://lasc.org/opinions/2009/09C0449.09C0469.bjj.opn.pdf>.

—*Judith V. Windhorst*



*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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