Legacy Litigation—What Is Reasonable Behavior in the Oilfield?

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I. INTRODUCTION

Hundreds of plaintiffs in hundreds of lawsuits seek hundreds of millions of dollars from hundreds of oil and gas companies. The lawsuits allege a litany of disastrous consequences of oil and gas exploration and production operations conducted many decades earlier—perhaps improperly plugged and abandoned wells, a tangle of corroded and leaking pipelines, leaking chemical-lined tanks, and salt-scarred abandoned disposal pits. (Maybe these lawsuits sound good, maybe bad,

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depending on your point of view.) A few of these lawsuits go to trial. Some result in dramatic verdicts for the plaintiffs. Others are distinct victories for the defense. But most of these cases settle, often for large amounts of money. Welcome to legacy litigation in Louisiana.[1]

This Article examines a key issue in legacy litigation: the reasonableness of activities in the oilfield. Part II lays the groundwork by providing a short background history of legacy litigation, starting with *Corbello v. Iowa Production*[2] and leading to *State v. Louisiana Land & Exploration Co.*,[3] the Louisiana Supreme Court's most recent major pronouncement on the contours of legacy litigation. At issue in *Louisiana Land*, unlike in *Corbello*, was what restoration standard applies in the absence of an express restoration clause.[4] When there is no express restoration clause, the pivotal issue is a determination of whether oil and gas operators' practices constituted unreasonable or excessive use of the land.[5] Part III plows new ground on this important issue, surveying both the common and civil law treatments of the "reasonable man" of contract and oilfield remediation decisions from 1920 to 2013. Part IV concludes and provides a few practical suggestions for litigation.

II. A SHORT HISTORY OF LEGACY LITIGATION

The Louisiana Supreme Court's 2003 landmark opinion in *Corbello*[6] dramatically increased the profile and extent of litigation in Louisiana alleging environmental damage arising from oil and gas exploration and production operations—so-called legacy litigation.[7] *Corbello* held that an express contractual provision to restore the land to its original condition created an obligation to restore that need not be tethered to the fair market value of the property after restoration.[8] Under the law that existed in 2003, *Corbello* allowed the landowner to recover

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1. A "legacy" lawsuit arises from oil and gas exploration and production operations "'conducted many decades ago'" that left "'an unwanted legacy in the form of actual or alleged contamination.'" Marin v. Exxon Mobil Corp., 09-2368, p. 1 n.1 (La. 10/19/10); 48 So. 3d 234, 238 n.1 (citing Loulan Pitre, Jr., "*Legacy Litigation" and Act 312 of 2006*, 20 TUL. ENVTL. L.J. 347, 348 (2007)).

2. 02-0826 (La. 2/25/03); 850 So. 2d 686.

3. 12-0884 (La. 1/30/13); 110 So. 3d 1038.

4. *See infra* Part II.

5. *La. Land*, 12-0884, p. 12; 110 So. 3d at 1047 (quoting Broussard v. Hillcorp Energy Co., 09-0449, p. 11 (La. 10/20/09); 24 So. 3d 813, 820).

6. 02-0826, p. 1; 850 So. 2d at 686.

7. Mary Beth Balhoff, Comment, Corbello v. Iowa Production *and the Implications of Restoration Damages in Louisiana: Drilling Holes in Deep Pockets for Thirty-Three Million Dollars*, 65 LA. L. REV. 271, 271 (2004) (citing *Corbello*, 02-0826, pp. 3-4, 11; 850 So. 2d at 692, 696).

8. 02-0826, p. 9; 850 So. 2d at 695.

money damages based on a theoretical remediation cost while having no obligation to actually remediate the contaminated property after the award was received.[9]

Over a decade later, despite repeated legislative reform efforts and many court rulings, legacy litigation remains controversial and fraught with unresolved legal and policy issues. It is unclear to many whether the barrage of lawsuits filed in the wake of *Corbello*[10] and the resulting multimillion dollar awards or settlements have increased the number of oilfield cleanups.[11] The mass media reports that of the 360 legacy lawsuits filed since 2006, only twelve have resulted in "verified cleanups to state standards."[12]

Moreover, the threat of facing disastrous liability for pollution damages caused by a previous operator makes the purchase of aged oil and gas interests in Louisiana riskier than similar opportunities in other states.[13] According to the Executive Director of the Center for Energy Studies at Louisiana State University, conventional drilling activities in southern Louisiana lag when compared to other major producing states, as well as Louisiana's own historical trends, despite the wave of high energy prices between January 2000 and January 2008.[14] One unintended consequence of these suits is the loss of an estimated 30,291 jobs in the oil and gas sphere.[15] A study commissioned by the Louisiana

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9. *Id.* at pp. 15, 17; 850 So. 2d at 698-99 (discussing Magnolia Coal Terminal v. Phillips Oil Co., 576 So. 2d 475, 486 (La. 1991) (Lemmon, J., concurring) (pointing out the loophole available to the plaintiff, who was "apparently free to use this [remediation] money for purposes other than restoring the land")).

10. Keith Hall, *Louisiana Oil and Gas Update*, 19 TEX. WESLEYAN L. REV. 361, 371 (2013); Marin v. Exxon Mobil Corp., 09-2368, p. 1 n.1 (La. 10/19/10); 48 So. 3d 234, 238 n.1 (remarking on the "'hundreds'" of post-*Corbello* cases "'aris[ing] from operations conducted many decades ago'" (quoting Pitre, *supra* note 1, at 348)).

11. David Hammer & Mike Perlstein, *Legacy Suits: Sorting Out Good Guys from Bad*, ADVERTISER (Aug. 4, 2014, 1:09 PM), http://www.theadvertiser.com/story/news/local/louisiana/2014/08/02/legacy-suits-sorting-good-guys-bad/13525613/.

12. *Id.* (recognizing that this official statistic does not include the cleanups following settlements). Commenting on the official statistic of verified cleanups, a prominent plaintiff's attorney asserted that "'there are 21 cases where there's cleanups actually going on right now.'" *Id.* (quoting John Carmouche, Savoie's attorney). However, when added to the numerator for a total of thirty-three, the result is that less than 10% of legacy lawsuits filed since 2006 have produced cleanups.

13. *See* David E. Dismukes, *The Impact of Legacy Lawsuits on Conventional Oil and Gas Drilling in Louisiana*, LSU CENTER FOR ENERGY STUD. 2-3 (Feb. 28, 2012), http://www.enrg.lsu.edu/files/images/presentations/2012/DISMUKES_LEGACY_RPT_02-28-12_FINAL.pdf. A leading plaintiff's attorney countered Briggs' statistics with his own anecdotal evidence. *See* Hammer & Perlstein, *supra* note 11.

14. Dismukes, *supra* note 13, at 2 (noting that the numbers would be more stark, but for the upsurge in fracking in northern Louisiana).

15. *Id.* at 46.

Oil and Gas Association (LOGA) revealed that 90% of "214 responses from 450 exploration companies surveyed" indicated that they "would not enter into a lease if there were a potential to be sued."[16] "More than one out of every two barrels of crude pumped from Louisiana's oilfields are produced by a lawsuit defendant company."[17] Arkansas, another oil-and-gas state that allows remediation and restoration awards several times in excess of the market value of the land,[18] has also experienced a downturn in oil and gas production.[19] While the methodology of these studies has been criticized,[20] it is self-evident that the threat of huge liability will discourage acquisitions, at least at the economic margins. Policy wonks and seasoned litigators use Louisiana's experience as a "cautionary tale"[21] of unintended consequences to be learned from when drafting surface-damage legislation.[22]

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16. *Id.* at 17 (citation omitted).

17. Am. Tort Reform Found., *Judicial Hellholes 2011/2012*, JUDICIAL HELLHOLES 32, http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf (last visited Jan. 15, 2015) (citing *Pain at the Pump*, DAILYCOMET.COM (May 7, 2011, 6:01 AM), http://www.dailycomet.com/article/20110507/ARTICLES/110509635).

18. *See* Felton Oil Co. v. Gee, 182 S.W.3d 72, 80-81 (Ark. 2004) (upholding the jury's award of restoration costs nine times the diminished fair market value of the Gees' property because of "this State's firm policy in favor of remediation and restoration" (citing First Elec. Coop. Corp. v. Charette, 810 S.W.2d 500, 501 (Ark. 1991))); Chevron U.S.A., Inc. v. Murphy Exploration & Prod. Co., 151 S.W.3d 306, 311, 313 (Ark. 2004) (holding that an oil and gas lessee has an implied duty to restore the surface of the land as near as "practicable" to its original condition upon cessation of production (quoting Bonds v. Sanchez-O'Brien Oil & Gas Co., 715 S.W.2d 444, 446 (Ark. 1986))).

19. *See* Toni B. Smith, *Skimming the Surface: Arkansas Act 507's Attempt To Limit Compensation for Spill Damages*, 62 ARK. L. REV. 885, 886 (2009) (documenting the "steady decline in mineral leases with oil producers" in southern Arkansas "[y]ear after year" (citing Telephone Interview with Sammy Parker, Oil Producer (Sept. 16, 2008))); Julie D. Greathouse, *A Glance at the Second Boom: Oilfield Litigation in Arkansas*, 42ND ANNUAL NAT. RESOURCE L. INST. 1 (2003), http://ppgmrlaw.com/news/2004/jan/02/glance-second-boom-oilfield-litigation-arkansas/ (describing the avalanche of legacy litigation lawsuits filed in Arkansas).

20. J. Michael Veron, *Oilfield Contamination Litigation in Louisiana: Property Rights on Trial*, 25 TUL. ENVTL. L.J. 1, 18 (2011).

21. Christopher S. Kulander, *Surface Damages, Site-Remediation and Well Bonding in Wyoming—Results and Analysis of Recent Regulations*, 9 WYO. L. REV. 413, 438 (2009).

22. William R. Keffer, *Drilling for Damages: Common Law Relief in Oilfield Pollution Cases*, 47 SMU L. REV. 523, 523-24 (1994) (noting the endangered state of oil and gas defendants operating in hundreds of older oilfields in Texas, Oklahoma, Louisiana, New Mexico, California, Kansas, and Colorado, who were in danger of "becom[ing] the helpless victim of a plaintiff that has bootstrapped a regulation into a private cause of action for negligence"). With the exception of Louisiana and Arkansas, Keffer's prediction turned out not to be prescient, in large measure because of the other states' refusal to abandon the common law principle that a damage award should not exceed the value of a property, but should be capped at diminution in value. For an example of a court's reasoning favoring economically feasible repairs, see *Primrose Operating Co. v. Senn*, 161 S.W.3d 258, 261, 263 (Tex. Ct. App. 2005) (holding that spending $2,110,000 to remediate ten acres of a landowner's 23,013-acre ranch was uneconomical and limiting the awarded damages to the ranch's diminution in fair market value attributable to the brine spills

The reaction to *Corbello* and the wave of legacy litigation led the Louisiana legislature to pass five legislative acts in eleven years.[23] Most notably, three years after *Corbello*,[24] the Louisiana legislature passed Act 312 in 2006.[25] Act 312 allows a jury or judge to determine whether there exists environmental damage requiring remediation. Upon such a determination, Act 312 authorizes the Office of Conservation within the Louisiana Department of Natural Resources (DNR) to hold a hearing to determine the appropriate cleanup plan to satisfy current regulations.[26] The trial court may then either adopt the DNR's plan or adopt a more feasible plan. Defendants must then place the estimated cost of a remediation[27] in the registry of the court.[28] Despite criticism,[29] Act 312 had three laudable goals: first, to safeguard the public's interest in the actual remediation of contaminated properties to current regulatory

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(citing N. Ridge Corp. v. Walraven, 957 S.W.2d 116, 120 (Tex. Ct. App. 1997))). *See also Walraven*, 957 S.W.2d at 120 (standing for the rule that oilfield contamination cases remain tethered to the actual value of the property (quoting Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309, 319 (Tex. Civ. App. 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975))).

23. Act of July 2, 2003, No. 1166, 2003 La. Acts 3511 (codified as amended at LA. REV. STAT. ANN. § 30:2015.1 (2014)); Act of June 8, 2006, No. 312, 2006 La. Acts 1472 (codified as amended at LA. REV. STAT. ANN. §§ 30:29, :29.1, :82, :89.1, :2015.1 (2014)); Act of June 12, 2012, No. 754, 2012 La. Acts 3072 (codified as amended at LA. CODE CIV. PROC. ANN. arts. 1552, 1563 (2014)); Act of June 12, 2012, No. 779, 2012 La. Acts 3149 (codified as amended at LA. REV. STAT. ANN. § 30:29 (2014)); Act of June 2, 2014, No. 400, 2014 LA. SESS. LAW SERV. 736 (West) (codified as amended at LA. REV. STAT. ANN. § 30:29 (2014); LA. CODE CIV. PROC. ANN. art. 1563 (2014)). For more detail on the 2012 revisions, see Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits Since Act 312*, 1 LSU J. ENERGY L. & RESOURCES 93, 111 (2012) (citing J. Blake Canfield, *Report to the House Committee on Natural Resources and Environment and Senate Committee on Natural Resources as Requested in House Concurrent Resolution 167, 2011 Regular Legislative Session*, LA. OFFICE CONSERVATION (Feb. 1, 2012), http://www.scribd.com/doc/82935877/DNR-Report-to-House-and-Senate-NR); Lauren E. Godshall, *Legislature Amends Act 312 and Changes Procedures for Legacy Lawsuits*, 60 LA. B.J. 339, 339-40 (2013).

24. Corbello v. Iowa Prod., 02-0826, pp. 4, 11 (La. 2/25/03); 850 So. 2d 686, 692, 696 (upholding a jury verdict awarding plaintiffs a private award for restoration damages of $33 million for a property appraised at $108,000).

25. LA. REV. STAT. ANN. §§ 30:29, :29.1, :82, :89.1, :2015.1 (2014).

26. *Id.* § 30:29(C)(1), (B)(1).

27. Marin v. Exxon Mobil Corp., 09-2368, p. 4 (La. 10/19/10); 48 So. 3d 234, 240 (noting that to remediate a property to Statewide Order 29-B standards is to comply with the guidelines set by the DNR as to the "closure of existing unlined oilfield pits." (discussing LA. ADMIN. CODE tit. 43, § 311)).

28. For a more expansive explanation of Act 312's history, see Pitre, *supra* note 1, at 352-54.

29. Michael R. Phillips & Louis M. Grossman, *Act 312 Updates*, *in* 57TH ANNUAL INSTITUTE ON MINERAL LAW 237, 250 (Patrick H. Martin ed., 2010) (commenting on the way Act 312 has lengthened the time it takes for an oilfield remediation case to be litigated, which invariably increases the cost of litigation).

standards;[30] second, to protect defendants' right not to be the victim of a rigged lottery, churning out winning tickets at regular intervals, by providing that any residual money in the registry of the court after the conclusion of the required cleanup would be returned to the defendants who paid;[31] third, to seek consistency and respect jurors' time by authorizing a neutral agency—the DNR—to choose or devise an appropriate feasible plan, subject to court approval and appellate review.[32]

These multiple legislative efforts have naturally invited a counterreaction by the landowner plaintiffs' bar. Plaintiffs have sought to develop legal theories to support claims for damages separate from or in excess of a remediation that is now required by law. This is the proverbial "money they can keep" in excess of the public remediation award that must go into the registry of the court and be spent on remediation or else returned to the defendants.[33] While *Corbello* gets most of the glory or infamy, somewhat lost in the shuffle has been the fact that *Corbello* did not hold that the property's value had no relevance in cases involving a lease *without* an express restoration clause.[34] The property's value should be a factor that the factfinder may consider in an analysis in which reasonableness is an issue.

Leases without restoration clauses beg a completely separate line of analysis. The latest statement in this line of analysis is in the Louisiana Supreme Court's January 2013 opinion in *Louisiana Land*, which indicates that when the lease lacks an express restoration clause, whether damages are available to a plaintiff depends on the reasonableness of the defendant's operations.[35] In *Louisiana Land*, the historical operator admitted responsibility for environmental damage, triggering a requirement to remediate to current regulatory standards pursuant to Act

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30. Jared Pessetto, Comment, *In* State v. Louisiana Land & Exploration Co.*, the Louisiana Supreme Court Retreats from Progress in Oil Field Contamination Litigation*, 88 TUL. L. REV. 817, 821 (2014) ("In total effect, then, Act 312 foreclosed plaintiffs' ability to evade application of court-administered damage awards . . . .").

31. Hammer & Perlstein, *supra* note 11 (paraphrasing Bill Griffin, a petroleum engineer, who testified for the plaintiffs in *Corbello*).

32. *See* Savoie v. Richard, 13-1370, p. 8 (La. App. 3 Cir. 4/2/14); 137 So. 3d 78, 86 (citing LA. REV. STAT. ANN. § 30:29(c)(1), (5)). In general, legacy jury trials last at least two-to-four weeks. *See, e.g.*, J. MICHAEL VERON, SHELL GAME: ONE FAMILY'S BATTLE AGAINST BIG OIL, at xii (2007) (describing the *Corbello* jury trial, which lasted 2.5 weeks, but was decided in 3 hours); *Savoie*, 13-1370, p. 1; 137 So. 3d at 81 (lasting a month).

33. *Savoie*, 13-1370, pp. 10-11; 137 So. 3d at 87 (quoting State v. La. Land & Exploration Co., 12-0884, p. 16 (La. 1/30/13); 110 So. 3d 1038, 1049). This should not be confused with private claims for trespass, nuisance, or stigma damages.

34. Corbello v. Iowa Prod., 02-0826, p. 9 (La. 2/25/03); 850 So. 2d 686, 695.

35. 12-0884, pp. 11-12; 110 So. 3d at 1046-47 (discussing Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 04-0968, p. 10 (La. 1/19/05); 893 So. 2d 789, 797).

312. The historical operator then filed a motion for a partial summary judgment on the theory that Act 312 capped its liability at the amount of money needed to fund a feasible plan approved by the court pursuant to Louisiana Revised Statute (La. R.S.) 30:29.[36] The Supreme Court affirmed the Louisiana Third Circuit Court of Appeal's reversal of the trial court's grant of defendant's motion and held that defendants operating under a lease without an express restoration provision could not be dismissed on summary judgment on the issue of entitlement to extraregulatory restoration damages because the inquiry depends on the *reasonableness* of the defendant's operations.[37]

Apparently in reaction to *Louisiana Land*, Act 400 of 2014[38] enacted (among other things) La. R.S. 30:29(M), which specifically addresses the available damages in cases where no express contractual provision addresses remediation, treating these differently from cases in which there is an express restoration clause. Act 400 provides that extraregulatory remediation awards are possible when an express contractual provision mandates extraordinary remediation, as in *Corbello*, or "upon a showing that such damage was caused by unreasonable or excessive operations."[39] The extraregulatory award is not subject to the DNR's review. Finally, the extraregulatory award goes to the plaintiffs, whether or not any of the award is ultimately spent on remediation.[40]

Both *Louisiana Land* and La. R.S. 30:29(M) invite, and even demand, inquiry into the reasonableness of certain practices. In the absence of an express restoration provision, defendants cannot be required to remediate beyond regulatory standards or to pay damages for such remediation without proof of some form of unreasonableness, such as negligence or excessiveness in their operations.[41]

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36. *Id.* at pp. 3-5; 110 So. 3d at 1042 (referencing LA. REV. STAT. ANN. § 30:29(C)(1), (H)(1)).

37. *Id.* at p. 28; 110 So. 3d at 1058 (interpreting LA. REV. STAT. ANN. § 30:29).

38. Act of June 2, 2014, No. 400, 2014 LA. SESS. LAW SERV. 736 (West) (codified as amended at LA. REV. STAT. ANN. § 30:29 (2014); LA. CIV. CODE ANN. art. 1563 (2014)).

39. LA. REV. STAT. ANN. § 30:29(M)(1)(b)-(c).

40. *Id.* § 30:21(H)(1). *But see, e.g.*, Savoie v. Richard, 13-1370, pp. 7-8 (La. App. 3 Cir. 4/02/14); 137 So. 3d 78, 86 (citing *La. Land*, 12-0884, p. 16; 110 So. 3d at 1049).

41. *See* 04-0968, pp. 17-18; 893 So. 2d at 801 (holding that the defendants did not have an implied duty to backfill the canals that they had dredged in order to explore for and produce oil and gas because the lease expressly allowed dredging of canals and industry custom was to leave the canals in place at a lease's end (discussing LA. REV. STAT. ANN. § 31:122)).

III. WHAT'S REASONABLE?

Oil and gas producing states have a rich jurisprudence interpreting reasonableness on a case-by-case basis.[42] But reading these cases quickly reveals that there is more than one way to approach reasonableness. According to Larry DiMatteo, professor of business and affiliate professor of law at the University of Florida, there have been two predominant schools of thought as to the "reasonable person of contract."[43] The older view tasked the factfinder with discerning the actual intention of the contracting parties. "The modern view is to ascertain '*what each [party] was reasonably entitled to conclude . . . of the other*.'"[44] This Article addresses two choices that courts must make in evaluating reasonableness: viewpoint and temporality.

A. Viewpoint

Although Louisiana legacy cases are governed by Louisiana's civil law, we start with a panoramic view of common law models of contract interpretation, many of which influenced the evolution of the implied obligations accepted by the reasonable oil and gas lessee over the past century. This panorama is followed by a more nuanced exploration of the civilian reasonable man of contract as interpreted by the judiciary.

1. Common Law Principles

The "reasonable person of contract," unlike his everyman cousin in tort, "is a more specialized creature, possessing all of the idiosyncratic features of the contracting parties viewed within the context of their interaction."[45] One of the most basic choices confronting a decision maker is which vantage point the surrogate reasonable person should attempt to embody. "Is it from the perspective of the promisor, the promisee, or neither?"[46]

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42. 38 AM. JUR. 2D *Gas and Oil* § 116 (2014) (citing Warfield Natural Gas Co. v. Allen, 59 S.W.2d 534, 536 (Ky. 1933); Tex. Pac. Coal & Oil Co. v. Barker, 6 S.W.2d 1031, 1035 (Tex. 1928)).

43. Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 296, 317 (1997).

44. *Id.* at 296-97 (alteration in original) (quoting CLIVE M. SCHMITTHOFF & DAVID A.G. SARRE, CHARLESWORTH'S MERCANTILE LAW 191-92 (14th ed. 1984)).

45. *Id.* at 317 (citing William Prosser, *The Law of Torts*, *in* THE NATURE AND PROCESS OF LAW 450 (Patricia Smith ed., 1993)).

46. *Id.* at 332.

One school of thought "hold[s] firm to the promissory basis of contract."[47] Here the focus is exclusively upon the promisor's expectations.[48] Given that disputes between surface owners and oil operators before 2003 typically ended up favoring the oil operators—the damages for which surface owners sought relief were most frequently classified by courts as reasonably necessary for oil explorations[49] and, therefore, noncompensable—the operators may not have had any expectation of the necessity to budget millions of dollars for end-of-the-lease cleanup.[50] Early courts were deferential to an oil operator's view of what was necessary.[51] In *Gulf Refining Co. v. Davis*, the Mississippi Supreme Court in 1955 went so far as to deem the oil operator "*the judge* as to the kind of pit it should construct."[52] The lessor, far from getting relief for damages caused to approximately three acres of his land and 497 of his trees from the original twenty-three-foot long saltwater pit's seepage and overflow, was forced to endure the consequential damage of a second, ninety-yard long pit dug in response to his complaints about the first pit's overflow.[53]

In a 1944 livestock case, ten head of cattle died from drinking crude oil, either from a leaking storage tank or from a slush pit.[54] The appellate court reversed the trial court's judgment after closely examining the terms of the lease and determining that both the tanks and the slush pits were "reasonably necessary to the successful and continued operation of the two producing wells."[55] The storage tank's leak did not impress the appellate court as negligence per se. Here, as in similar cases of this vintage, the court adopted the viewpoint of the lessee, not the lessor, who, as a member of the servient estate, was assigned the duty of keeping his cattle from trespassing on the land surrounding the lessee's operational core.[56]

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47. *Id.* at 334 (citing CHARLES FRIED, CONTRACT AS PROMISE 75 (1981)).

48. *Id.*

49. Douglas Hale Gross, Annotation, *What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee, or Driller Under an Oil and Gas Lease or Drilling Contract*, 53 A.L.R.3d 16, 65-66 (1973) (citing East v. Pan Am. Petroleum Corp., 168 So. 2d 426, 429 (La. App. 3 Cir. 1964); Smith v. Schuster, 66 So. 2d 430, 431 (La. App. 2 Cir. 1953)).

50. *See* Bonds v. Sanchez-O'Brien Oil & Gas Co., 715 S.W.2d 444, 445 (Ark. 1986) (quoting HOWARD R. WILLIAMS & CHARLES J. MEYERS, 1 OIL AND GAS LAW § 218 (1959)).

51. For an excellent treatment of oilfield pollution, see HUGH S. GORMAN, REDEFINING EFFICIENCY: POLLUTION CONCERNS, REGULATORY MECHANISMS, AND TECHNOLOGICAL CHANGE IN THE U.S. PETROLEUM INDUSTRY 49-61 (Jeffrey Stine & Joel Tarr eds., 2001).

52. 80 So. 2d 467, 469 (Miss. 1955) (emphasis added).

53. *Id.* at 468-69.

54. Carter v. Simmons, 178 S.W.2d 743, 746 (Tex. Civ. App. 1944).

55. *Id.* at 746-47.

56. *Id.*

Another choice embraced by the common law in its early "objective" period is the vantage point of the promisee.[57] "'[W]hat expectation the promisor's words . . . would have created in the mind of *a reasonable man* in the *promisee's place*'" is the test.[58] For example, in what condition would a farmer, possibly undereducated and cash poor, executing a lease during the heyday of prewar oil and gas exploration, have expected the lessee to leave his property at the lease's expiration? The rationale underpinning the promisee-oriented school of thought, explains Professor DiMatteo, is that the promisor "'knows what he wants to promise.'"[59] Knowledge in the context of contract formation is accompanied by the "'duty to ensure that his intention is correctly understood.'"[60] Because the promisor had an opportunity to memorialize his intention, the reasonable person's interpretive lens focuses on the promisee's understanding of the promisor's promise as recorded in the lease.

A non-party-centered inquiry shifts the question from what "the parties reasonably intended" to "what society believes they should have intended."[61] In a 1962 case, the Mississippi Supreme Court allowed the jury's determination that the lessee had used more land than was reasonably necessary for oil and gas development to stand.[62] The court held, "The owner of the minerals may do what is reasonably necessary to recover minerals, but the mineral owner or agent is not the final judge as to what is reasonably necessary."[63] Here there are many possible societies: the public, the industry, and the academy, to name a few.

In the context of oil and gas law, reasonableness has a long history of being interpreted according to "community standards of fairness and custom."[64] As early as 1925, surface owners in Oklahoma filed an action for injunctive relief against the oil and gas lessees for disturbing their "peaceable occupation of the homes of plaintiffs situated upon said land."[65] The Oklahoma Supreme Court's reversal of the trial court's grant of injunctive relief was based on the long-standing principle that "'the

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57. *See* Lowell C. Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner*, 8 ROCKY MTN. MIN. L. INST. 315, 315-16 (1963).

58. DiMatteo, *supra* note 43, at 333 (quoting FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 245 (7th ed. 1902)).

59. *Id.* at 334 (quoting J.P. Vorster, Comment, *A Comment on the Meaning of Objectivity in the Contract*, 103 L.Q. REV. 274, 283 n.51 (1987)).

60. *Id.* (quoting Vorster, *supra* note 59, at 283 n.51).

61. *Id.* at 298.

62. Union Producing Co. v. Pittman, 146 So. 2d 553, 555-56 (Miss. 1962).

63. *Id.*

64. DiMatteo, *supra* note 43, at 298.

65. Mary Oil & Gas Co. v. Raines, 235 P. 1085, 1086 (Okla. 1925).

lessee is entitled to the possession of such portions of the surface of the land covered by the lease as may be reasonably necessary for the development and exploration of the leased premises.'"[66] The court buttressed its reasoning with a nod to the "precautions usually prevailing in the industry," which the court believed served to "prevent injury to the surface owners."[67] The "incidental annoyances" at the heart of plaintiffs' complaints could not be allowed to slow down development of an industry vital to the nation's wellbeing.[68] This trend has enjoyed longevity, as can be seen in *Vest v. Exxon Corp.*, where the United States Court of Appeals for the Fifth Circuit overturned a Texas jury award against Exxon.[69] The court highlighted the deference Texas courts have traditionally given to the oil and gas lessee's view of reasonableness,[70] as long as the oil company was following "proper industry methods," even if it meant that the surface owner was no longer able to operate his ranch.[71]

2. Civilian Courts

The standard of reasonableness of mineral operations in Louisiana is "flexible" and "require[s] judicial interpretation to determine its impact on a given set of circumstances."[72] Louisiana's Civil Code mandates that "[c]ontracts have the effect of law for the parties,"[73] and the "[i]nterpretation of a contract is the determination of the *common intent* of the parties."[74] To date, however, Louisiana courts have prioritized all three common law vantage points in different contexts.

In *Rohner v. Austral Oil Exploration Co.*, a 1958 case, the viewpoint of the promisor/lessee was key in the court's decision not to award damages to the plaintiff for the lessee's "render[ing] practically useless for growing of crops" the acres of the lessor's land that the lessee had "actually used for the pits and clay and drilling operations," all of which were viewed as "ordinary, customary, and necessary acts . . . in

66. *Id.* (quoting Sanders v. Davis, 192 P. 694, 694 (Okla. 1920)).
67. *Id.*
68. *Id.*
69. Vest v. Exxon Corp., 752 F.2d 959, 963 (5th Cir. 1985).
70. *Id.* at 961 (quoting Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 135 (Tex. 1967)).
71. *Id.* at 963.
72. John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 729, 811 (1976).
73. LA. CIV. CODE ANN. art. 1983 (2014).
74. *Id.* art. 2045 (emphasis added).

order to put down a well."[75] According to the *Rohner* court, the burden of negotiating specific terms to protect the fertility of his farmland belonged to the lessor, who had negotiated for reimbursement of all damages to his watermelon crop.[76]

In 2005, this reasoning was echoed in *Terrebonne Parish School Board v. Castex Energy, Inc.*, where the Louisiana Supreme Court chided the Terrebonne Parish School Board for not having "bargained for an express lease term" providing restoration to the marsh's original condition upon termination of the lease.[77] Moreover, the *Castex* court ultimately concluded that the defendants' practice of not backfilling dredged canals after operations were complete was consistent with industry custom, thereby rendering the alleged damage to the coastland mere "wear and tear," which limits a lessee's implied duty to restore as a good administrator.[78] Thus, in the absence of an express restoration provision to the contrary, courts apply the Louisiana Civil Code articles on leasing pertaining to a lessee's obligation to treat a "thing [leased] as a prudent administrator."[79] In effect, the Louisiana Civil Code's "normal wear and tear" terminology is the equivalent of the more specific oil-and-gas language of "reasonable and necessary."[80] Neither require compensation.[81] The *Castex* court rejected the premise that La. R.S. 31:22 created an implied duty to restore even in the absence of a finding of negligence.[82] Thus, unreasonable or excessive use in the mineral lease context is that which exceeds "normal wear and tear," thereby triggering a duty to restore.

In the past few years, some civilian judges have, without discussion, abandoned this traditional approach and favored the vantage point of the promisee/lessor. Sometimes sophisticated lessors operating from a strong bargaining position are able to tailor the boilerplate lease language to protect their interests, as did the scrivener of the Corbello's 1961

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75. 104 So. 2d 253, 255-56 (La. App. 1 Cir. 1958); *see also* Wemple v. Pasadena Petroleum Co., 85 So. 230, 231-32 (La. 1920).

76. 104 So. 2d at 254-55 (quoting William O. Bonin, Comment, *Mines and Minerals—Oil and Gas—Surface Rights of Lessor and Mineral Lessee*, 26 TUL. L. REV. 522, 522-24 (1952)).

77. 04-0968, p. 19 (La. 1/19/05); 893 So. 2d 789, 802.

78. *Id.* at pp. 16, 19; 893 So. 2d at 799-800.

79. LA. CIV. CODE ANN. arts. 2683, 2686, 2687, 2692; *see also* Williams v. Humble Oil & Ref. Co., 290 F. Supp. 408, 414 (E.D. La. 1968) (quoting Simmons v. Pure Oil Co., 129 So. 2d 786, 787-88 (La. 1961)). Before 2004, the pertinent leasing articles were Louisiana Civil Code articles 2710, 2719, and 2720. *See Castex*, 04-0968, p. 6; 893 So. 2d at 794.

80. *Castex*, 04-0968, pp. 16-19; 893 So. 2d at 800 (quoting Jurisich v. La. S. Oil & Gas Co., 284 So. 2d 173, 184 (La. App. 4 Cir. 1973) (Lemmon, J., dissenting in part)).

81. *See id.*

82. *Id.* at p. 17; 893 So. 2d at 801 (interpreting LA. REV. STAT. ANN. § 31:22).

surface lease, who claimed to have offset a low rental payment ($4,000/year) for a thorough end-of-lease cleanup.[83] Other times, a court will interpret ambiguous language from the promisee's perspective, such as the court in *Hayes Fund for the First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*.[84] The *Hayes Fund* lease had boilerplate language limiting the lessee's liability to damage to "timber and growing crops of Lessor."[85] Because the lessors had stricken the words, "timber and growing crops," the lessees were held "responsible for *all* damages caused by Lessee's operations."[86] The Louisiana Third Circuit, reversing the trial court, stretched this liability to include loss of royalties in the amount of $13,437,895 because of damage to the reservoirs beneath the two producing wells caused when the operator "negligently caused the drill pipe to become irretrievably stuck in the wellbore," ultimately "creat[ing] a pathway for extraneous water to encroach on the Hackberry gas sand."[87]

In 2010, the Louisiana Supreme Court used the vantage point of undereducated *promisee/lessors*. In *Marin v. Exxon Mobil Corp.*, the contractual duty to restore the surface to its original condition was written into the 1994 novating[88] lease, which the court interpreted as requiring cleanup to 1994 levels of contamination as a matter of contract law.[89] The 1941 servitude expressly provided:

> [I]n no case shall Humble Oil . . . , its successors and assigns, be obligated . . . to restore the premises to the condition in which they now are but may abandon and surrender the same in the condition in which they may be at such time and shall not be liable in any manner for damages to said land caused by its use of said premises.[90]

However, the lingering contamination from the use of unlined earthen disposal pits from earlier decades dug by Exxon's predecessor-in-interest, Humble Oil, was considered unreasonable and excessive use of the property.[91] The *Marin* majority concluded that the lessor's consent "to the disposal and storage of oilfield wastes into pits known to be

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83. *See* VERON, *supra* note 32, at 95-97.

84. 13-1374, p. 33 (La. App. 3 Cir. 10/1/14); 149 So. 3d 280, 300.

85. *Id.* at p. 31; 149 So. 3d at 299.

86. *Id.* at p. 33; 149 So. 3d at 300 (emphasis added).

87. *Id.* at pp. 2-5; 149 So. 3d at 283-85.

88. "Novation is the extinguishment of an existing obligation by the substitution of a new one." LA. CIV. CODE ANN. art. 1879 (2014).

89. 09-2368, pp. 34-35 (La. 10/19/10); 48 So. 3d 234, 257-58 (citing Corbello v. Iowa Prod., 02-0826, pp. 6-7 (La. 2/25/03); 850 So. 2d 686, 694).

90. *Id.* at p. 34; 48 So. 3d at 257 (citation omitted).

91. *Id.* at p. 38; 48 So. 3d at 260 (distinguishing Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 04-0968, p. 19 (La. 1/19/05); 893 So. 2d 789, 802).

environmentally unsound" would not have been given.[92] This moving statement begs the question: When, and by whom, were the pits known to be environmentally unsound?

Perhaps the *Marin* court implicitly found that the parties had unequal access to scientific and technical knowledge regarding oil and gas exploration and production processes and the circumstances under which they cause environmental damage. Around 1927, engineers at the United States Bureau of Mines "began collecting whatever information they could about how producers actually disposed of their salt water."[93] They publicized what they had learned in various lay engineering journals.[94] From 1925 to 1965, Texas oil engineers were "major social vectors for science," according to Professor Edward W. Constant, II.[95] "They belong[ed] to identifiable sub-cultures, c[a]me from specific regions, [and] attend[ed] certain kinds of schools."[96] Thus, the impetus for technological advances were made by "sons of the oil fraternity [that] c[a]me home from college to do things better."[97] They formed what Anthony Sampson calls "the 'Texas pipeline.'"[98]

In Texas, the courts, the legislature, and the regulatory commission promptly responded to lawsuits from ranchers and scientific discoveries by petroleum engineers.[99] In the late 1950s, a Texas trial court awarded the plaintiffs $23,175 in damages against the operator of one saltwater disposal pit for polluting a freshwater aquifer.[100] Upholding the decision, the Supreme Court of Texas ruled that the operator of the oil well "knew or should have known of the amount of water that was being placed in the pit and of its salt content; that in an open, unsealed tank that some of the water would evaporate, some would normally percolate and seep into the ground."[101] Not long after, the Texas Water Pollution Control Board, an agency created by the Texas legislature, "outlawed all brine pits in the

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92. *Id.* at p. 37; 48 So. 3d at 259.

93. GORMAN, *supra* note 51, at 172.

94. *See id.* at 387 n.6 (citing S.W. Oberg, *Salt Water Disposal in Texas Fields*, OIL & GAS J., Sept. 1929, at 76, 76; Walter Humphreys, *California's Methods of Disposing of Oil Field Waste*, PETROLEUM ENGINEER, Apr. 1930, at 120, 122, 125).

95. Edward W. Constant II, *Science* in *Society: Petroleum Engineers and the Oil Fraternity in Texas, 1925-65*, 19 SOC. STUD. SCI. 439, 440 (1989).

96. *Id.*

97. *Id.* at 454.

98. ANTHONY SAMPSON, THE SEVEN SISTERS: THE GREAT OIL COMPANIES AND THE WORLD THEY SHAPED 11 (1975).

99. *See generally*, GORMAN, *supra* note 51, at 188-91.

100. Brown v. Lundell, 334 S.W.2d 616, 618 (Tex. Civ. App. 1960), *aff'd*, 344 S.W.2d 863, 870 (Tex. 1961).

101. Brown v. Lundell, 344 S.W.2d 863, 870 (Tex. 1961).

forty-eight counties overlying the Ogallala" aquifer.[102] In Louisiana, by contrast, unlined earthen pits were not outlawed until 1986, and operators were given extensions through 1991 to close existing production pits.[103] Arguably, this was a conscious policy decision that these practices were reasonable in view of the economic benefits of oil and gas production.

This history of science raises complicated questions for judges and juries to sort out. Given that Louisiana courts have long stressed that each determination of reasonableness should be made on a case-by-case basis,[104] should there be a higher standard of community knowledge for non-Louisiana operators affiliated with major oil and gas enterprises operating in Louisiana?[105] If Humble Oil, chartered in Texas, knew of the damage that migrating brine could do to agricultural land's ability to produce crops when it executed the 1941 servitude analyzed in *Marin*, against whom should promisees' lack of awareness of these risk factors be used in assessing the reasonableness of industry practices? Or should the scale be limited to the custom and practices of the operators in one field, parish, or shale?[106]

There is certainly precedent in Louisiana for favoring a more neutral vantage point for determining reasonableness. An inquiry into the historical "reasonableness" of the use of unlined pits for the disposal of waste products from neutral viewpoints might include explorations of some or all of the following questions:

- Were others in the industry using it at that time?
- Were alternatives to unlined pits well-known and cost-effective at that time?
- What was the generally accepted scientific knowledge at that time?
- Were the applicable regulations the product of a public policy consensus?

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102. GORMAN, *supra* note 51, at 189-90.

103. Amendment to Statewide Order No. 29-B, 12 La. Reg. 26 (Jan. 20, 1986) (codified at LA. ADMIN. CODE tit. 43, pt. XIX).

104. Broussard v. Northcott Exploration Co., 481 So. 2d 125, 129 (La. 1986) ("That which constitutes an 'unreasonable exercise of contractual rights' must be determined on a case by case basis." (quoting Oswalt v. Irby Constr. Co., 424 So. 2d 348, 354 (La. App. 2 Cir. 1982))).

105. For an illustration of this argument, see TOM SHACHTMAN, TO DO THE RIGHT THING: AN EPIC COURTROOM BATTLE AGAINST BIG OIL OVER THE RESTORATION OF A GULF COAST MARSH 12, 154 (2010).

106. *See, e.g.*, Hart v. Standard Oil Co., 84 So. 169, 170 (La. 1920) (determining that the proper community against which to measure Standard Oil's failure to drill an offset well was the "custom" in the Caddo oilfield).

A decision by the *Rohner* court exemplifies a more objective, third-person test of negligence from the perspective of a neighboring community of farmers. At issue was whether the promisor's action in making a "poor man gap" in the promisee's fence constituted negligence.[107] The appellate court quoted excerpts from the neighbors' testimony at trial to justify overruling the trial court's award for damages because the defendant's agent unnecessarily weakened the fence while exercising his legitimate right to make an opening in the fence to facilitate the operator's production needs.[108] Consequently, the defendant was required to pay the cost of repairing the lessor's fence.[109]

B. Temporality

When a factfinder analyzes the reasonableness of an operator's conduct, a second consideration is "reasonableness when?" Everyone can agree that what was reasonable in 1910 would not have been reasonable in 2010. But how do judges or juries operating in the twenty-first century assess what was reasonable in the 1970s or 1980s, especially when the extent of the damage was not discovered by the lessors until decades later?

1. Judicial Approaches to Temporality

According to theories of contract interpretation, there are at least three temporal options for measuring reasonableness: what is reasonable at the time of the disputed activity, what is reasonable at the time of the execution of the lease, and what is reasonable by today's standards. What Professor DiMatteo refers to as "[c]lassical contract's fixation with the moment of creation"[110] suits defendants; "'the primary concern'" is "'with the terms of the contract considered in the light of the circumstances existing when the contract was made.'"[111] By contrast, plaintiffs prefer the "totality timeline of modern contract law," with its expansive relationship to time.[112] In the context of legacy litigation, environmental standards and the costs of remediation have risen significantly over the course of the twentieth century. The later the date

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107. Rohner v. Austral Oil Exploration Co., 104 So. 2d 253, 256-57 (La. App. 1 Cir. 1958) (citation omitted).

108. *Id.* (citation omitted).

109. *Id.* at 258.

110. DiMatteo, *supra* note 43, at 320.

111. *Id.* at 324 (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965)).

112. *Id.* at 320.

chosen for evaluation of reasonableness, the more stringent the remediation standards and the higher the cost.

Contract theorists argue that the appropriate temporal reference point for long-term contracts is what is reasonable at the time of the disputed activity. The "truncating of the reasonable person inquiry to the moment of contract formation," argues Professor DiMatteo, is inappropriate when the contract is long term in nature.[113] "Oilfields tend to be long-lived operations, and oilfield technology has evolved significantly over the decades."[114] If the contract is long term, then the execution of the contract becomes an event in a contractual process that may extend over decades.[115]

Notwithstanding contract theorists' position, Louisiana courts have historically focused on what is reasonable at the time of the execution of the lease. In *Castex*, the Louisiana Supreme Court fixed the time of reasonableness as "the time they contracted," or the year the school board granted the lease to Shell Oil Company, 1963.[116] Was there a consensus at that time among lessors, lessees, and politicians to accept certain possibly questionable practices in exchange for the economic benefits of oil and gas production? If so, then the *Castex* majority's position that "the marshland here was 'worn' and 'torn' in precisely the manner the parties' contemplated"[117] makes sense.[118] This privileging of the moment of a contract's execution was consistent with the *Rohner* court's viewpoint in 1958. Rohner, the plaintiff who recovered damages for his fence, was not compensated for what all parties agreed was the destruction of his land's productivity.[119] In 1958, the court did not view the land's barrenness, after the lessee's operations, as evidence of negligence as long as the oil company's footprint was not wider than what the operators reasonably needed to produce oil.[120]

In 2010, however, the Louisiana Supreme Court deviated from its traditional approach privileging the execution of the contract. When the *Marin* court asserted that the Marins' ancestors "would not have consented to the disposal and storage of oilfield wastes into pits known

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113. *Id.* at 323.

114. Keffer, *supra* note 22, at 528.

115. *Id.*

116. Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 04-0968, pp. 2, 19 (La. 1/19/05); 893 So. 2d 789, 792, 802.

117. *Id.* at p. 16; 893 So. 2d at 800.

118. *See* Michael J. Thompson, Jr., Comment, *A Time To Protect: Revising Louisiana Mineral Code Article 122 To Protect Coastal Restoration Projects*, 56 LOY. L. REV. 413, 434 (2010) (quoting *Castex*, 04-0968, p. 16; 893 So. 2d at 800).

119. Rohner v. Austral Oil Exploration Co., 104 So. 2d 253, 256 (La. App. 1 Cir. 1958).

120. *Id.*

to be environmentally unsound,"[121] it was attributing modern awareness and sensibilities to earlier generations of landowners.

The Louisiana legislature recently acted to bring consistency and predictability to the question, "reasonableness when"? Act 400's answer is according to the "rules, regulations, lease terms[,] and implied lease obligations arising by operation of law, or standards applicable *at the time of the activity complained of*."[122] By doing so, the legislature adopted a standard that recognizes that scientific understanding and industry practices are forever changing. An Oklahoma case, *Lanahan v. Myers*, illustrates this principle.[123] In *Lanahan*, the Supreme Court of Oklahoma affirmed the jury's pro-lessor verdict, reasoning that the jury was best situated to decide the reasonableness of the lessee's failure to erect a fence around a pit that had not been used for two years after drilling was complete.[124] In this case, the surface owner lost a heifer, not from poisoning, but from falling into the pit, where she died from starvation. The *Lanahan* court anchored its verdict on whether the pits "were not reasonably necessary to his operations" at the time of the heifer's death, not when the well was initially drilled.[125] Reasonableness as a moving target requires all parties to keep up with the advances of science and technology.[126]

2. Historians' Expertise

In the realm of temporality, a well-trained historian could serve as an expert witness.[127] The use of expert historians has gained popularity since the Nuremburg trials.[128] Indeed, in 2006, the United States Court of

121. Marin v. Exxon Mobil Corp., 09-2368, p. 37 (La. 10/19/10); 48 So. 3d 234, 259.

122. LA. REV. STAT. ANN. § 30:29(M)(1)(c) (2014) (emphasis added).

123. 389 P.2d 92 (Okla. 1963).

124. *Id.* at 94 (quoting Magnolia Petroleum Co. v. Howard, 77 P.2d 18, 20 (Okla. 1938)).

125. *Id.*

126. *See* Sam Brandao, Comment, *Louisiana's* Mono Lake*: The Public Trust Doctrine and Oil Company Liability for Louisiana's Vanishing Wetlands*, 86 TUL. L. REV. 759, 783 (2012) (urging Louisiana politicians and judges to "protect the res in the present according to present knowledge and to refine that protective approach as often as changing circumstances require" (citing Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 455 (1892); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal.), *cert. denied*, 464 U.S. 977 (1983))).

127. Alvaro Hasani, *Putting History on the Stand: A Closer Look at the Legitimacy of Criticisms Levied Against Historians Who Testify as Expert Witnesses*, 34 WHITTIER L. REV. 343, 344 (2013).

128. *Id.* at 344 n.5 (citing Johannes Houwink ten Cate, *Genocide in the Courtroom: On the Interaction Between Legal Experts and Historians*, 39 INT'L J. LEGAL INFO. 186, 189-93 (2011); Erich Haberer, *History and Justice: Paradigms of the Prosecution of Nazi Crimes*, 19 HOLOCAUST & GENOCIDE STUD. 487, 490-91 (2005)); Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1519 (2003) (citing Brian W. Martin, *Working with Lawyers: A Historian's Perspective*, OAH

Appeals for the Fourth Circuit relied on an expert historian's opinion, while rejecting a pulmonologist's opinion, in determining what the public knew when about the dangers of smoking.[129] One reason historians are in demand is because scientific knowledge does not progress in a strictly linear fashion.[130] Rather, it is accepted in different ways at different times and places.[131] "It may be th[e] contingent nature of technological change, cause, and consequence that . . . makes technological forecasting an entertaining rather than a serious enterprise, and keeps historians, technological and otherwise, in business," concluded Professor Edward W. Constant, II.[132] For example, Stanford University Professor Robert Proctor testified on behalf of 830 pregnant women who were fed radioactive iron from 1945 to 1947 as part of an experiment sponsored by the Rockefeller Foundation, the Atomic Energy Commission, and Vanderbilt University.[133] He concluded that the experimenters should have known about the potential hazards before they conducted the experiment. Specifically, he traced the migration of scientific ideas from Europe to Vanderbilt University via a scientist on the cutting edge of radioactive iron, who relocated from Nazi Germany to Nashville, Tennessee, before the experiment's launch.[134]

How would one go about determining the outer boundaries of what a past community might have viewed as reasonable? This ground has been plowed by other high-stakes litigators also required to prove the unreasonableness of past historical behavior. Plaintiffs or defendants might use publications to show knowledge in the community during the relevant decades.[135] Useful published secondary sources might include

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NEWSLETTER (Org. of Am. Historians, Bloomington, Ind., May 2002)); *see, e.g.*, Foster v. United States, 130 F. Supp. 2d 68, 72 & n.6 (D.D.C. 2001) (referring to historical testimony about James Creek in a suit brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)).

129. *See* Waterhouse v. R.J. Reynolds Tobacco Co., 162 F. App'x 231, 234 (4th Cir. 2006) (granting summary judgment in favor of the defendants based on an affidavit by Dr. Norell, a historian at the University of Tennessee, who "concluded that 'between 1947 and 1969 [nonscientists knew] that cigarette smoking could cause serious life-threatening diseases'" (quoting Waterhouse v. R.J. Reynolds Tobacco Co., 368 F. Supp. 2d 432, 436-37 (D. Md. 2005))).

130. Robert N. Proctor, *Expert Witnesses Take the Stand: Historians of Science Can Play an Important Role in US Public Health Litigation*, NATURE, Sept. 7, 2000, at 15, 15.

131. *Id.*

132. Edward W. Constant, II, *Cause or Consequence: Science, Technology, and Regulatory Change in the Oil Business in Texas, 1930-1975*, 30 TECH. & CULTURE 426, 455 (1989).

133. Proctor, *supra* note 130, at 15.

134. *Id.* at 15-16.

135. *See* F.B. Plummer, *Petroleum Engineering Education—Present Curricula and Future Possibilities*, 17 MINING & METALLURGY 485, 485 (1936) (observing that curricula for petroleum

specialized industry and trade journals,[136] local history articles, and selected newspapers, all of which could contain information about important events on an oilfield, changing processes employed for waste disposal, and documented changes to the landscape.[137]

An occasional critique of historians in the courtroom is that they lack objectivity,[138] but the subjectivist moment in historical studies appears to have been a fad of the 1990s.[139] "[F]inding a genuinely 'subjectivist historian' is rather like searching for a unicorn," wrote Professor Reuel Schiller.[140] "I have yet to meet a historian who claimed that his scholarship was nothing more than fiction or that his 'version' of the events he studied was not an attempt to ascertain the truth."[141] A qualified and prepared expert historian, who has done proper research,[142] should be able to meet a threshold *Daubert/Kumho Tire* challenge and be allowed to testify as an expert.[143] Considering the inevitability of introducing "ancient documents" in litigating legacy lawsuits, a seasoned historian with impeccable credentials could provide an impartial guide to the factfinder(s), who are attempting to imagine what the parties' contemplations and industry customs were decades ago.

IV. CONCLUSION

A standard of reasonableness applies to the requirement to remediate environmental damage to property under an oil, gas, and mineral lease in Louisiana. This is true under the common law, the

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engineers were virtually standardized by 1936); *see also* GORMAN, *supra* note 51, at 184 (citation omitted).

136. Constant, *supra* note 95, at 448-50 (describing petroleum engineers' technical contributions to the industry and trade journals and their role as adjunct professors to most of the undergraduate engineering students).

137. *See* Michael C. Reis & W. David Wiseman, Jr., *The Historian's Valuable Role as Expert and Advisor in Environmental Litigation*, ENVTL. LITIGATOR (A.B.A.), Spring 2011, at 12, *available at* http://www.historyassociates.com/wp-content/uploads/2012/06/199.pdf.

138. Cayuga Indian Nation of N.Y. v. Pataki, 165 F. Supp. 2d 266, 271-72, 303 (N.D.N.Y. 2001) (expressing concern about historians' subjectivity and the way they are "colored by their experiences, both personally and professionally, and by the task which they [are] asked to perform"), *rev'd*, 413 F.3d 266, 268 (2d Cir. 2005).

139. *See* MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 146-47 (2001).

140. Reuel E. Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*, 49 HASTINGS L.J. 1169, 1170 (1998).

141. *Id.*

142. *See* H. Edward Dunkelberger III, *Historians in the Courtroom*, METROPOLITAN CORP. COUNS., Sept. 1, 1999, at 58, 58.

143. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999) (expanding a judge's gate-keeping duties from testifying scientists under the *Daubert* standard to all testifying experts); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590, 592 (1993).

Louisiana Civil Code, the Louisiana Mineral Code, and the most recent legislative enactment that addresses the subject. Although Louisiana law now requires that environmentally damaged property be remediated to current regulatory standards, this reasonableness inquiry is relevant to claims by plaintiffs for money damages in excess of the cost of regulatory remediation. Courts are not always clear, however, on what viewpoint matters in determining reasonableness.

What is also clear is that reasonableness is determined under some historical standard, although there remains room for some debate as to exactly which historical standard is relevant. Regardless of that answer, lawyers preparing a legacy case for trial are well advised to consider evidence of historical standards in light of the specific historical operations at issue in the particular case. This will include historical documents and probably the use of a professional historian as an expert witness. In some cases, it might also include the testimony of fact witnesses.

Most defendants will feel strongly that the applicable historical reasonableness standard will not support an award for damages in excess of the cost of remediation as required by modern environmental regulations. The opinions of the Louisiana Supreme Court suggest that it will be an issue for the factfinder, judge or jury, but it may be susceptible to a ruling as a matter of law if proper evidentiary support is presented.