



LOUISIANA STATE LAW INSTITUTE

PAUL M. HEBERT LAW CENTER, ROOM W127
UNIVERSITY STATION
BATON ROUGE, LA 70803-1016

OFFICE OF
THE DIRECTOR
(225) 578-0200

FAX: (225) 578-0211

EMAIL: LAWINSTITUTE@LSLI.ORG

December 22, 2014

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, LA 70804

RE: SR 84 of 2013

Dear Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2013 Senate Resolution No. 84, relative to utilizing alternative dispute resolution to resolve "legacy" disputes.

Sincerely,


William E. Crawford
Director

WEC/puc

Enclosure

cc: Senator R.L. "Bret" Allain, II

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

LOUISIANA STATE LAW INSTITUTE
MINERAL LAW—LEGACY DISPUTES COMMITTEE

**REPORT TO THE LOUISIANA LEGISLATURE IN
RESPONSE TO S.R. 84 OF
THE 2013 REGULAR SESSION**

Utilizing Alternative Dispute Resolution to Resolve "Legacy" Disputes

Prepared for the Louisiana Legislature on

December 22, 2014

Baton Rouge, LA

LOUISIANA STATE LAW INSTITUTE
MINERAL LAW—LEGACY DISPUTES COMMITTEE

Paul M. Adkins, Shreveport

R.L. "Bret" Allain, II, Franklin

George Arceneaux, III, Lafayette

Daniel J. Balhoff, Baton Rouge

Bernard E. Boudreaux, Jr., Baton Rouge

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Colleen C. Jarrott, New Orleans

R. Michael Lyons, Baton Rouge

Victor L. Marcello, Baton Rouge

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J. Michael Veron, Lake Charles

Keith B. Hall, Reporter

Lynette Roberson, Staff Attorney

James J. Carter, Jr., Staff Attorney

**REPORT TO THE LOUISIANA LEGISLATURE
IN RESPONSE TO SR NO. 84 OF THE 2013 REGULAR SESSION RELATIVE TO
UTILIZING ALTERNATIVE DISPUTE RESOLUTION TO
RESOLVE "LEGACY" DISPUTES**

Senate Resolution 84 of 2013 (copy attached as Appendix B) urges and requests the Louisiana State Law Institute, in consultation with the Director of the Louisiana Mineral Law Institute, to "study the feasibility and constitutionality of utilizing alternative dispute resolutions as a means of resolving 'legacy' disputes and report its recommendations to the Senate on or before February 24, 2014."

In fulfillment of the Senate's request, the Louisiana State Law Institute formed and appointed the Mineral Law—Legacy Disputes Committee, composed of both persons with significant experience representing plaintiffs in legacy litigation cases, as well as those with significant experience representing defendants, and others with experience in alternative dispute resolution. The Committee has undertaken the study and response to the resolution, under the guidance of the Reporter, Professor Keith Hall of the LSU Paul M. Hebert Law Center. Professor Hall is also the Director of the Louisiana Mineral Law Institute.

An Interim Report on the study was submitted to the Louisiana Legislature on February 10, 2014. The Law Institute prepared recommendations for changes to the law, primarily in Title 30 of the Revised Statutes of 1950, with the proposed enactment of Section 29.2 (copy attached as Appendix A).

Background of the problem

The first successful oil well in the United States was drilled in 1859 near Titusville, Pennsylvania. By the 1860s, drilling for oil had been conducted in Louisiana, though without success. After the first successful attempt to drill for oil in Louisiana in 1901, many thousands of oil and gas wells have been drilled in this state. The oil and gas industry has been of substantial benefit to the Louisiana economy by producing jobs, lease revenue to private landowners, lease revenue to the state and local governments, and tax revenue to the state and local governments.

Oil and gas activity also has had an impact on the environment. Oil and gas operations sometimes cause contamination of the land or groundwater in the vicinity of the operations. Such contamination sometimes leads to litigation against oil and gas companies, in which landowners seek either a money judgment (to compensate for the contamination), or an actual clean-up of their land, or both. This litigation often is called "legacy litigation" because the alleged cause of the contamination frequently is oil and gas activity that took place several decades ago, and the contamination or alleged contamination is a legacy of past activity. Often,

the specific cause of contamination is some practice that once was permissible but is now prohibited.

The subject of legacy litigation began drawing increased attention after *Corbello v. Iowa Production*, 850 So. 2d 686 (La. 2003). In that case, one of the significant issues was whether Louisiana law limited the plaintiffs' damages award to the value of the property, which the parties agreed would be slightly more than \$100,000 if the property was in a clean condition. The Louisiana Supreme Court held that the value of the damages award was not limited to the value of the property. The court then affirmed an award of approximately \$33 million for clean-up costs. The court also concluded that Louisiana law did not require the plaintiffs to spend the money judgment on an actual clean-up.

After *Corbello*, the amount of legacy litigation increased. In 2006, the Louisiana legislature enacted Act 312, which is codified at Louisiana Revised Statute 30:29. The statute, which has been amended on multiple occasions, establishes certain procedures for legacy litigation. Some of the notable provisions address the concern that some successful plaintiffs, left to their own choice, would not use money paid under a judgment secured in legacy litigation to fund an actual cleanup, and that leaving the property in a contaminated condition would be bad public policy. Louisiana Revised Statute 30:29 addresses that concern by providing that a defendant found liable for contamination must fund an actual clean-up. Thus, a specific performance remedy (a clean-up to regulatory standards) is substituted for a money judgment (though a plaintiff may obtain a money judgment for any additional damages). Louisiana Revised Statute 30:29 also establishes certain procedures that apply in legacy litigation.

Legacy litigation is complex. It requires testing of the property and the use of expert witnesses by each side. Typically, numerous defendants are involved because each of the companies that operated or held mineral lease rights in the area over the course of several decades will be named as defendants. The complexity of the litigation and the number of parties makes legacy litigation costly and time-consuming. Concerns have been raised about the costs of such litigation and the length of time taken to resolve such litigation.

The motivation for Senate Resolution 84 was the belief that some form of alternative dispute resolution could help decrease the costs of legacy litigation and lead to a quicker resolution of the underlying disputes.

Issues Discussed by the Mineral Law—Legacy Disputes Committee

Significant issues discussed by the Committee included the issues noted below.

- **Is mandatory mediation appropriate?** The Committee discussed whether mandatory mediation is appropriate. It was noted that someone could argue that, if parties do not wish to mediate, requiring mediation might be pointless. The Committee came to a consensus, however, that mediation might be beneficial, and may result in settlement, even if fewer than all parties desire mediation. Further, the Committee noted that

sometimes a particular party or its counsel might believe that mediation is worthwhile but be unwilling to propose mediation. Mediation is not generally required in state court actions in Louisiana, but the Committee concluded that the expense and complexity of legacy litigation, as well as the frequency of legacy disputes, justify requiring mediation.

- **How early in the litigation should mandatory mediation be available?** The Committee members believed that mediation would not work well if it is held too early in the litigation, but that some of the benefits of mediation (such as decreased litigation costs in the event of settlement) would be lessened if mediation was held too late. Eventually, the Committee reached consensus that mandatory mediation should become available about 18 months after the case is filed. Experienced legacy litigation lawyers from both the plaintiff perspective and defense perspective agreed on this time period.
- **How should costs of mediation be divided?** Committee members noted that, when parties voluntarily mediate legacy disputes, the cost of mediation typically is divided by heads between the parties. The Committee concluded that, if the parties agree to a particular allocation of costs, that agreement should be given effect, but, in the absence of agreement, the costs of mandatory mediation generally should be divided by heads (the most common division utilized when there is voluntary mediation of legacy disputes). Nevertheless, a court should have discretion to order a different division of costs upon a showing of good cause.
- **Should the Committee address forms of alternative dispute resolution other than mediation?** Mandatory arbitration might violate a party's constitutional right to have access to the courts, and the Committee never considered suggesting mandatory arbitration. But the Committee considered the possibility of developing a system of model rules of procedure for the arbitration of legacy disputes. There was a suggestion that the existence of a well-crafted set of model rules, drafted specifically for legacy disputes, might encourage the use of arbitration as an alternative to litigation in court. Ultimately, the Committee chose to focus on mandatory mediation.

Recommended Legislation

In order to implement the Committee's conclusions, the Law Institute recommends adoption of the legislation appearing in attached Appendix A.

APPENDIX A

Regular Session, 2015

SENATE BILL NO.

BY SENATOR ALLAIN

(On Recommendation of the Louisiana State Law Institute)

AN ACT

To enact R.S. 30:29.2, relative to the remediation of oilfield sites and exploration and production sites; to provide for alternative dispute resolution; to provide for the authority of the court to compel nonbinding mediation; to provide for the payment of mediation fees and expenses; and to provide for related matters.

1 Be it enacted by the Legislature of Louisiana:

2 Section 1. R.S. 30:29.2 is hereby enacted to read as follows:

3 §30:29.2. Alternative dispute resolution for disputes relating to remediation of oilfield
4 sites and exploration and production sites

5 A. This Section establishes certain procedures that apply to any dispute
6 subject to the provisions of R.S. 30:29.

7 B. Within sixty days after the end of the stay of litigation required by R.S.
8 30:29(B)(1), the parties shall meet and confer in an effort to assess the dispute, narrow
9 the issues, and reach agreements useful or convenient for the litigation of the action.

1 C. On any party's motion filed subsequent to the close of all discovery or five
2 hundred fifty days after commencement of the action, whichever first occurs, the court
3 shall enter an order compelling the parties to enter nonbinding mediation. The motion
4 shall be served on all parties, but a contradictory hearing shall not be required.

5 D. No later than one hundred eighty days before trial begins in any action to
6 which this Section applies, the parties shall certify to the court that a mediation has been
7 held or that the parties have agreed to mediate on a specific date prior to trial. If the
8 parties do not certify that a mediation has occurred, and no party has filed a motion to
9 compel mediation, then at any time within one hundred eighty days prior to the beginning
10 of trial of the action, the court, in its discretion and on its own motion, may order the
11 parties to participate in nonbinding mediation of the action prior to the beginning of trial.

12 E. If the court enters an order compelling mediation, the clerk of court shall
13 mail or otherwise deliver a copy of the order to all parties.

14 F. If the court has entered an order compelling mediation and the parties
15 cannot agree within fifteen days of notice of the order to such matters as the date, time,
16 and place of the mediation, the identity of the mediator, provisions for compensation of
17 the mediator, or any other details regarding the conduct of the mediation, the parties shall
18 so notify the court and, after contradictory hearing, the court may issue orders
19 reasonably necessary to determine such matters and any other matters necessary or
20 convenient to provide for the conduct of the mediation.

21 G. Responsibility for the mediator's fees and any expenses associated with
22 the mediation location shall be based on the parties' agreement. In the absence of

1 agreement, each party shall be responsible for payment of an equal share of those fees
2 and expenses, unless the court, for good cause shown after contradictory hearing, orders
3 another division of the fees and expenses.

4 H. At any mediation held pursuant to this Section, a representative of each
5 party who has settlement authority or who is in direct contact with a person having
6 settlement authority on behalf of the party shall be present. If a party fails to comply with
7 this requirement, the court may, in its discretion and after contradictory hearing, order
8 that party to pay costs and attorneys' fees associated with the mediation.

9 Section 2. This Act shall apply to actions filed on or after the effective date of this Act.
10 This Act shall also apply to other actions: for which a trial date has not been set as of the
11 effective date of this Act; for which trial is scheduled to begin more than one hundred eighty
12 days after the effective date of this Act; or for which the start of trial is continued to a date
13 more than one hundred eighty days after the effective date of this Act.

APPENDIX B

Regular Session, 2013

ENROLLED

SENATE RESOLUTION NO. 84

BY SENATOR ALLAIN

A RESOLUTION

To urge and request the Louisiana State Law Institute, in consultation with the director of the Louisiana Mineral Law Institute, to study the feasibility and constitutionality of utilizing alternative dispute resolutions as a means of resolving "legacy" disputes and report its recommendations to the Senate on or before February 24, 2014.

WHEREAS, Article IX, Section 1 of the Constitution of Louisiana mandates that the natural resources and the environment of the state, including air and water, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people, and requires the legislature to enact laws to implement this policy; and

WHEREAS, "legacy" lawsuits are lawsuits filed by a landowner claiming that oil and gas operations caused his property or groundwater located beneath his property to become polluted and contaminated; and

WHEREAS, it is the duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest; and

WHEREAS, Act 312 of the 2006 Regular Session of the Legislature of Louisiana and Act 779 of the 2012 Regular Session of the Legislature of Louisiana established judicial and administrative procedures relative to "legacy" lawsuits, environmental remediation and protection of the public interest; and

WHEREAS, the legislature should be fully informed as to the legal aspects of all alternative dispute resolution methods to expedite the resolution of "legacy" disputes.

THEREFORE, BE IT RESOLVED that the Senate of the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute, in consultation with the director of the Louisiana Mineral Law Institute, to study the feasibility and constitutionality of utilizing alternative dispute resolutions as a means of resolving "legacy" disputes and report its recommendations to the Senate on or before February 24, 2014.

SR NO. 84

ENROLLED

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and the director of the Louisiana Mineral Law Institute.

PRESIDENT OF THE SENATE