



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

November 5, 2020

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

RE: HOUSE RESOLUTION NO. 238 OF THE 2018 REGULAR SESSION

Dear Mr. Speaker:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to the classification of production payments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Guy Holdridge".

Guy Holdridge
Director

cc: Representative Jean Paul Coussan
Representative Stuart J. Bishop

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

**LOUISIANA STATE LAW INSTITUTE
MINERAL LAW COMMITTEE**

**REPORT TO THE LEGISLATURE IN RESPONSE TO
HR NO. 238 OF THE 2018 REGULAR SESSION**

Relative to the classification of production payments

Prepared for the
Louisiana Legislature on

November 5, 2020

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE MINERAL LAW COMMITTEE

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Dian Tooley-Knoblett	New Orleans

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Patrick S. Ottinger, Reporter

Nick Kunkel, Staff Attorney

2018 Regular Session

HOUSE RESOLUTION NO. 238

BY REPRESENTATIVES COUSSAN AND BISHOP

A RESOLUTION

To urge and request that the Louisiana State Law Institute study the classification of a production payment under Louisiana law, and to submit a written report of its findings with any recommendations.

WHEREAS, there have been legal disputes relating to issues involving mineral production payments with respect to unleased mineral owners; and

WHEREAS, in 2014, the United States Court of Appeals, Fifth Circuit held in the case of *Adams v. Chesapeake Operating, Inc.*, 561 Fed. Appx. 322, that an owner of an unleased mineral interest was not a purchaser or owner of a mineral production payment, and thus was not entitled to bring a statutory claim for production payments against the operator under R.S. 31:212.21 through 212.23 in an attempt to invoke the remedies provide therein; and

WHEREAS, this case has been cited and discussed in several cases in the United States District Court for the Western District of Louisiana, Shreveport Division.

THEREFORE, BE IT RESOLVED that the House of Representatives of the Legislature of Louisiana does hereby request that the Louisiana State Law Institute study the history, reasoning, classification, and definition of a production payment in R.S. 31:171, 212.21 through 212.23, and 213, providing a recommendation to the Legislature of Louisiana with regard to a possible codification of the court decisions no later than sixty days prior to the convening of the 2019 Regular Session.

BE IT FURTHER RESOLVED that during the study of these issues and prior to submitting any recommendations to the legislature, the Louisiana State Law Institute shall include in its research or consideration of these issues such information or input as it might receive from all of the following:

- (1) The Louisiana Landowners Association.
- (2) The Louisiana Mid-Continent Oil and Gas Association.
- (3) The Louisiana Oil and Gas Association.
- (4) The Louisiana Chapter of the National Association of Royalty Owners.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute, the secretary of the Department of Natural Resources, the chairman of the Louisiana State Mineral and Energy Board, the executive director of the Louisiana Landowners Association, the president of the Louisiana Mid-Continent Oil and Gas Association, the president of the Louisiana Oil and Gas Association, and the executive director of the Louisiana Chapter of the National Association of Royalty Owners.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

November 5, 2020

To: Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

**REPORT TO THE LEGISLATURE IN RESPONSE TO
HR NO. 238 OF THE 2018 REGULAR SESSION**

House Resolution No. 238 of the 2018 Regular Session urged and requested that the Louisiana State Law Institute study the “history, reasoning, classification, and definition of production payments” under Louisiana law. This resolution, which further asks the Law Institute to provide a recommendation to the Legislature with respect to a possible codification of recent court decisions, was adopted in response to a series of cases addressing the nature of the interest of an unleased mineral owner under Louisiana law.

Adams v. Chesapeake Operating, Inc.,¹ decided in 2014 by the U.S. Fifth Circuit Court of Appeals, was the first of these cases. *Adams* involved an unleased mineral owner who brought suit against a well operator to recover proceeds to which he alleged he was entitled as the holder of an unleased mineral interest in the unitized property. In addition to his principal demand, the unleased mineral owner sought additional remedies and damages by contending that the nature of his interest as an unleased mineral owner was akin to that of the owner or purchaser of a “production payment,” thus entitling him to double damages, interest, and attorney’s fees under R.S. 31:212.21 through 212.23.² In particular, he argued that R.S. 31:212.21 must extend to unleased mineral owners, lest they be left as the only unprotected parties under the Mineral Code. Both the District Court and the Fifth Circuit disagreed with this logic, instead holding that unleased mineral owners do not fall within the purview of R.S. 31:212.21 through 212.23, as “[b]ased on the title to Sections

¹ 561 Fed. Appx. 322 (5th Cir. 2014). In the interest of full disclosure, it should be noted that the Reporter represented the defendant in this case.

² R.S. 31:212.21 states:

If the owner of a mineral production payment or a royalty owner other than a mineral lessor seeks relief for the failure of a mineral lessee to make timely or proper payment of royalties or the production payment, he must give his obligor written notice of such failure as a prerequisite to a judicial demand for damages.

(emphasis added). R.S. 31: 212.23 states, in relevant part:

A. ...

C. If the obligor fails to pay and fails to state a reasonable cause for failure to pay in response to the notice, the court may award as damages double the amount due, legal interest on that sum from the date due, and a reasonable attorney’s fee regardless of the cause for the original failure to pay.

31:212.21-23,³ it is apparent that [those] Sections [] were intended to cover the ‘purchasers of mineral product[ion] payments.’⁴ Subsequently, other courts followed the holdings of *Adams*.⁵

House Bill No. 444 of the 2018 Regular Session was introduced and would have amended R.S. 31:212.31 by adding a definition that reads as follows:

A mineral production payment is an obligation owed to the purchaser to make a payment from the proceeds of production and does not mean, include, or encompass the payments owed on production to an unleased mineral owner.

Investigation into the purpose and reason for this bill – which seemed unnecessary in view of the decisions noted above and which, in any event, did not contain a sufficient definition of a “production payment” – indicated that, in a recent post-*Adams* state court suit with similar facts, a district judge made a statement to the effect that he was not bound by *Adams*.⁶ As a result of this state court case, at the apparent behest of a constituent, a legislator brought the noted bill seeking to add a definition of “production payment” to the Mineral Code that would effectively serve to codify the holding of *Adams v. Chesapeake* by denying to an unleased mineral owner the remedies available to the holder or owner of a “production payment.” Due to some concern that the definition put forth in this bill was ambiguous, the bill was ultimately converted to House Resolution No. 238.

In discussing the issue outlined in this resolution, the Mineral Law Committee initially considered adding a definition of “production payment” to the Mineral Code that would define the term as it is generally understood in the industry. The Reporter noted that the principal means by which the ruling in *Adams* could be codified was to recognize that a production payment – as contemplated by R.S. 31:212.21 through 212.23 – is an interest carved out of the interest of a lessee under a mineral lease. Such a recognition would, by its own force, disallow the argument made by the Plaintiff-Appellant in *Adams*. Consistent with this observation, the Reporter also noted that R.S. 30:5(C)(5) contains the following reference to a “production payment,” to-wit:

For the purpose of calculating the above required three-fourths in interest of royalty owners, the term “royalty owner” shall mean any interested party other than the owner of an unleased interest or a mineral lessee or the owner of any interest *created out of the interest of a mineral lessee, such as a ... production payment.*

(emphasis added).

³ The title to Part 2-A—comprising 212.21 through 212.23—is “Production Payments and Royalty Payments to Other Than Mineral Lessor; Remedies of Obligee”.

⁴ *Adams*, 561 Fed. Appx. at 326.

⁵ *See, e.g., J&L Family, L.L.C. v. BHP Billiton Petroleum Properties (N.A.), L.P.*, 293 F. Supp. 3d 615 (W.D. La. 2018).

⁶ This state court action was settled prior to trial. The statement of the trial judge that he did not consider himself bound by a decision of a Federal court led to efforts to codify the ruling in *Adams*.

Accordingly, the Committee ultimately devised three potential solutions to clarify the scope of R.S. 31:212.21 through 212.23: (1) define the term “production payment” in R.S. 31:213 in the way described above; (2) define the term “production payment” as such, but do so in R.S. 31:212.24, so as to limit the applicability of the definition exclusively to R.S. 31:212.21 through 212.23; or (3) add restrictive language to R.S. 31:212.21 that would accomplish the goal of codifying the holding of *Adams* without need for the addition of a new defined term. After agreeing that the third of these options would accomplish the goal with the least ancillary effect, the Committee ultimately voted in favor of that course of action. The proposed amendments are produced below:

§212.21. Nonpayment of production payment or royalties; notice prerequisite to judicial demand

If the owner of a ~~mineral~~ production payment created out of a mineral lessee’s interest or a royalty owner other than a mineral lessor seeks relief for the failure of a mineral lessee to make timely or proper payment of royalties or the production payment, he must give his obligor written notice of such failure as a prerequisite to a judicial demand for damages.

The proposed language eliminates an unnecessary word (“mineral”) and introduces the principal attribute that eliminates the possibility that the owner of an unleased mineral interest could be deemed to own a “production payment,” *viz.*, the intrinsic requirement that a production payment is “created out of a mineral lessee’s interest.”

The Law Institute’s recommendation was submitted to the Legislature as House Bill No. 227 of the 2020 Regular Session, and the proposed legislation was ultimately enacted as Acts 2020, No. 76.