

TAKING ADVANTAGE OF THE LOUISIANA OIL WELL LIEN ACT (LOWLA)

How an oil and gas service provider
can more effectively utilize the tools
provided under La. R.S. 9:4961, et seq.

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Basic Procedure and Timeline for Perfecting and Enforcing LOWLA Privilege

1. A claimant must file a Statement of Privilege in the Parish in which the well site is located within 180 days of the last date of service or provision of materials by claimant to the well site.
2. A claimant must provide notice of its asserted privilege to the operator of the subject well site within 180 days of the last date of service or provision of materials by claimant to the well site.
3. A claimant must institute a suit to enforce its LOWLA privilege within 1 year of filing the Statement of Privilege.
4. A claimant must file a Notice of *Lis Pendens* in the Parish in which the Statement of Privilege was recorded within 30 days of filing suit to enforce its LOWLA privilege.
5. A claimant may provide notice to any purchasers of the hydrocarbons from the subject well site, demanding that the purchaser withhold payment of proceeds to the operator of the subject well site.

Who May Assert a Lien and Privilege Under LOWLA? (9:4862(A))

<u>PARTY</u>	<u>SCOPE OF LIEN AND PRIVILEGE</u>
Contractor	(i) Price of contract for operations; and (ii) Price of contract for providing goods, services, or facilities to persons performing labor or service on a well site.
Laborer or Employee of Contractor/Operator	Price of labor performed at a well site.
Trucking/Towing/Barging/Other Transportation	Price of transporting movables to the well site.
Transporter of Persons to/from Well Site	Price of transporting the persons.
Seller of Movable that is: • Incorporated into well site or facility on well site; • Consumed in operations; or • Consumed at the well site by persons working on a well site.	Price of the movable(s)
Lessor of Movable to Operator/Contractor	Rent that accrues during use of leased movable on the well site.

WHAT AMOUNTS ARE SECURED BY A LOWLA PRIVILEGE? (9:4862(B))

- The amount described in 9:4862(A);
- Interest due on underlying obligation;
- Cost of preparing and filing necessary documents (lien affidavit, operator letter, notice of *lis pendens*, etc.); and
- Reasonable attorneys' fees not to exceed 10% (in a bankruptcy case, claimant needs the consensual agreement to pay attorneys' fees for collection).

What Property is Subject to a LOWLA Privilege? (9:4863)(A))

- Operating interests in the well site; and
- Interest of the lessee(s) in the following:
 - Well, building, tank, leasehold pipeline, other construction or facility on the well site;
 - Movables delivered to a well site that are used in operations.
 - **Note:** Movables that are temporarily on well site for repair, testing, etc., are NOT subject to LOWLA privilege;
 - Leased properties/servitudes;
 - Drilling or other rig located on well site, if owned by operator or contractor;
 - Interest of the operator and participating lessees in hydrocarbons produced from the well site and the interest of non-participating lessee in hydrocarbons produced from that part of his operating interest subject to the privilege; and
 - Proceeds received by or owed to operating interest holders from purchaser.

What Property is NOT Subject to a LOWLA Privilege? (9:4863)(B)-(D))

- Movables that are temporarily on well site for repair, testing, etc.;
- “The privilege that results from operations on a voluntary or compulsory unit affects only that part of a non-participating lessee's interest in the operating interest located within the boundaries of the unit and only insofar as the unit covers and affects the unitized zone or formation. The privilege affects only the interest of the non-participating lessee in the other property described in Subsection (A)(1) and (2) of this Section that is used in the operations of the unit well.” (9:4863(B))
- Hydrocarbons produced from operating interest owned by lessor, sublessor, ORRI owner, or other non-lessee, as well as any proceeds derived therefrom;
- Rigs, machinery, appliances, equipment, etc. used for P&A work on wells or closing associated pits;
- Casing, tubing, pipe and other tubular goods recovered from the drill hole as a result of P&A work.

When is a LOWLA Privilege Established and Effective as to Third Persons? (9:4864(A))

<u>PARTY</u>	<u>ESTABLISHMENT OF PRIVILEGE</u>
Contractor, Laborer, Employee	From inception of services and/or materials being provided to the well site.
Seller of Movable	When movables are delivered to the well site.
Transporter of Persons to/from Well Site	When transportation to/from well site begins.
Lessor of Movable to Operator/Contractor	When leased equipment is placed on well site for operations.

When is a LOWLA Privilege Extinguished? (9:4864(B))

- Upon extinction of the obligation it secures;
- By written consent of the claimant; or
- Failure to comply with certain statutory notice requirements or act within certain statutory prescriptive periods.

Effect of Ongoing Services on a Claimant's LOWLA Privilege (La. R.S. 9:4864(C))

To the extent that a claimant provides goods and/or services to a single well site without a lapse of activity for more than 90 days, the claimant enjoys a single privilege relating back to the first date of service regardless of whether the services were performed under different contracts or with different operators or contractors. If, however, more than 90 days elapse between a claimant's services, a new and separate privilege shall be afforded to the claimant upon the recommencement of the provision of goods and/or services.

How and When Does a LOWLA Privilege Cease to Have Effect as to Third Persons? (La. R.S. 9:4865)

- **Failure to Perfect by Recordation:** LOWLA privilege ceases to have effect as to 3rd persons 180 days after the last date of service unless:
 - **If the Property Subject to Privilege is Not a Rig:** Claimant files a Statement of Privilege in the mortgage records of the Parish where the well site is located.
 - **If the Property is a Rig:** Claimant files a financing statement.
- **Failure to Timely Enforce:** LOWLA privilege also ceases to have effect as to 3rd persons if claimant doesn't file suit to enforce privilege within 1 year of filing privilege.
- **Failure to Timely File Notice of *Lis Pendens*:** LOWLA privilege also ceases to have effect as to 3rd persons if claimant fails to file a Notice of *Lis Pendens* in the mortgage records of the Parish in which the Statement of Privilege was filed within 30 days of claimant instituting litigation to enforce the privilege.

Extinction of LOWLA Privilege Over Movable Property (La. R.S. 9: 4866)

The LOWLA privilege over all movable property, other than hydrocarbons, related proceeds and rigs, is extinguished when the property is transferred by onerous transaction to a good faith third party and the movable is removed from the well site.

Importance of Sending Notice to Operator of the Well Site (La. R.S. 9:4867)

- A LOWLA privilege is extinguished if a claimant fails to send notice to the operator of the well site of the assertion of the LOWLA privilege and the filing of the Statement of Privilege within 180 days of the last date of service on the well site.
- If a claimant is asserting a privilege over a rig owned by a party other than the operator, the claimant must also send notice to the rig owner within that same time period.

Delivery of Notice to Operator (La. R.S. 9:4868(B)(2), (C)-(D))

- Notice is properly delivered if it is delivered to the operator designated on the Statement of Privilege.
- “Delivery” takes place when:
 - Upon mailing, but only if mailed by certified or registered mail, return receipt requested;
 - Receipt by addressee or at office of addressee if not mailed by certified or registered mail.
- Return receipt indicating delivery or proof of mailing by USPS will be *prima facie* proof of mailing the requisite notice.

Form and Substance of the Statement of LOWLA Privilege (La. R.S. 9:4868(A) and (B)(1))

- **Form**
 - In writing; and
 - Signed by or on behalf of the claimant.
- **Substance**
 - Claimant's name and address;
 - Amount and nature of underlying obligation;
 - Name and address of obligated person;
 - Name and address of operator as designated by Louisiana Department of Natural Resources (Louisiana State Lease) or Minerals Management Service (Outer Continental Shelf Lease);
 - Description of operating interest over which privilege is claimed or the pertinent well site.
 - A well site description is adequate if it includes:
 - The name and serial or other identification number;
 - The name of the field where it is located.
- **Exception to Substance Requirements:** A statement of privilege is not invalid, in spite of missing certain of the information set forth above, so long as it "fairly appraises the recipient or person against whom the privilege is claimed and of the operating interest, hydrocarbons, or other property upon which the privilege is claimed.

Importance of Establishing Invoicing Procedure That Will Assist in Protecting Rights Under LOWLA

In order to better prepare for the potential need to file a Statement of Privilege, it is vital that each invoice issued by a vendor include a specific designation of the well site (well, lease, field, parish) to which the vendor provides its services and/or materials. Unfortunately, many vendors that would otherwise qualify as a LOWLA claimant will lose their respective ability to perfect their privileges because they will be unable to establish an evidentiary link between their services/materials and a specific well site. By including this information directly on the invoice, a vendor can more easily establish the precise well site over which its LOWLA privilege applies both for purposes of preparing and filing its Statement of Privilege, but also for enforcing this privilege in subsequent litigation.

What are the Causes of the Extinguishment of a LOWLA Privilege on Hydrocarbons and Purchasers? (La. R.S. 9:4869(A))

- If hydrocarbons are sold or transferred in a *bona fide* onerous transaction to a third party before such party is notified of the asserted privilege;
- Hydrocarbons are commingled with or processed with other hydrocarbons or substances that are not subject to the asserted privilege; or
- Proceeds are commingled with other funds over that are not subject to the asserted privilege.

Effect of LOWLA Privilege on Third Party Purchasers (La. R.S. 9:4869(A)(1)(b) and (B))

- Once a claimant delivers notice to a purchaser of a LOWLA privilege, the claimant may enforce the privilege against either the hydrocarbons in the purchaser's possession or any amounts owed by purchaser for such hydrocarbons.
- A purchaser that has received notice of a privilege may retain any proceeds without liability to the claimant or the operator until:
 - Claimant directs purchaser in writing of extinguishment of privilege;
 - Operator instructs purchaser to pay amounts to claimant;
 - Claimant AND Operator instruct purchaser to deliver the amounts to some agreed-upon third party; or
 - Purchaser receives instructions by a court of competent jurisdiction.

Ranking of LOWLA Privileges (La. R.S. 9:4870)

- All LOWLA privileges are of equal rank *except* that a contractor's LOWLA privilege is subordinate to any party that the contractor is contractually bound to (i.e., subcontractor);
- Established (perfected) LOWLA privileges outrank all other privileges, security interests or mortgages, except:
 - Tax liens;
 - Pre-existing mortgages or vendors' privileges;
 - Pre-existing perfected security interests; and
 - Lien by LA Dep't of Natural Resources.

Use of Writ of Sequestration to Enforce LOWLA Privilege (La. R.S. 9:4871)

A claimant may enforce his LOWLA privilege by seeking the issuance of a writ of sequestration during the pendency of any enforcement action, *without the necessity for furnishing security.*

Cancellation of Statement of Privilege or Notice of *Lis Pendens* (La. R.S. 9:4872)

Any interested person may seek the cancellation of a statement of privilege or a notice of *lis pendens* by filing a bond with the recorder of mortgages in an amount representing at least 125% of the face amount of the claimant's privilege.

What Effect Does an Operator's Bankruptcy Have on a LOWLA Privilege?

- **If claimant filed its Statement of Privilege Prior to Bankruptcy of Operator:**
 - A claimant may file a Notice of Perfection in the bankruptcy case pursuant to 11 U.S.C. 546(b);
 - A claimant may act as a secured creditor of the bankrupt to the extent of the value of encumbered property, less any pre-existing security interests.
 - A claimant may act as an unsecured creditor for the remaining portion of its claim;
 - A claimant may not institute any litigation to enforce the LOWLA privilege without first seeking to lift the automatic stay with the bankruptcy court.
- **If claimant has not filed its Statement of Privilege Prior to Bankruptcy of Operator:**
 - A claimant may still file its Statement of Privilege in the subject Parish within the period provided for under LOWLA and may send a notice to the Operator of the privilege;
 - A claimant may file a Notice of Perfection in the bankruptcy case pursuant to 11 U.S.C. 546(b);
 - A claimant may act as a secured creditor of the bankrupt to the extent of the value of encumbered property, less any pre-existing security interests.
 - A claimant may act as an unsecured creditor for the remaining portion of its claim;
 - A claimant may not institute any litigation to enforce the LOWLA privilege without first seeking to lift the automatic stay with the bankruptcy court.

Biographies

Stewart F. Peck

Stewart F. Peck has been practicing law in New Orleans for 32 years. He is a 1974 graduate of Kenyon College, *Magna Cum Laude*, where he was a member of Phi Beta Kappa. He graduated in 1977 from Tulane Law School where he was elected to the Order of the Coif and was a member of the Tulane Law Review. He has been lead trial and appellate counsel in over 50 reported cases in the federal and state courts. He is listed among Best Lawyers in America and Best Lawyers in New Orleans (New Orleans Magazine, November, 2008). He practices in the areas of marine finance, mergers and acquisitions, corporate, commercial litigation, oil and gas lien law, and Chapter 11 Bankruptcy Reorganization. Some of the Chapter 11 proceedings where he was Debtor's counsel were: *Torch Offshore, Inc.*, *New Orleans Tours, Inc.*, *New Orleans Paddlewheels*, *Foodies*, *Conmaco/Rector, LP* and *Sun Drilling Corporation*. He has also been Creditors' Committee counsel for *Force Energy*, *Grand Palais Casino*, *Equinox Oil Corporation* and *Alliance Operating*. He is presently active as either Debtor's counsel or Creditor's counsel in a number of pending Chapter 11 proceedings in the Gulf Coast region. He was also an active member on the Advisory Committee responsible for drafting the Louisiana Oil Well Lien Act.

Benjamin W. Kadden

Benjamin W. Kadden was born in Springfield, Illinois on October 20, 1979. Mr. Kadden graduated from Louisiana State University in 2002 and earned his law degree from Tulane University School of Law in 2005. He currently concentrates on commercial litigation, oil and gas lien law, bankruptcy law, and Chapter 11 Bankruptcy Reorganization. Mr. Kadden served as a judicial law clerk for the Honorable Magistrate Judge Alma Chasez, United States District Court for the Eastern District of Louisiana (2004-2005). In addition, he volunteered as a clerk in the chambers of the Honorable Judge Sarah Vance, United States District Court for the Eastern District of Louisiana (2003). Some of the Chapter 11 proceedings where he acted as Debtor's counsel were: *Torch Offshore, Inc.*, *New Orleans Tours, Inc.* and *New Orleans Paddlewheels*. He is presently active as either Debtor's counsel or Creditor's counsel in a number of pending Chapter 11 proceedings in the Gulf Coast region. Moreover, he is actively involved in efforts by numerous oil and gas service provider to protect and enforce their respective lien and privilege rights under the Louisiana Oil Well Lien Act.