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I. Introduction

Coal is an ancient fuel. The cave man used coal for heating.¹ The Romans used coal in England in 100-200 A.D.² The Hopi Indians used coal found in the southwestern United States for heating, cooking and baking pottery as early as the 1300’s.³ English settlers in the United States began mining coal commercially in Virginia in the 1740’s.⁴

Coal’s use as a fuel to create energy, rather than as a stand alone heating source, might be traced to James Watt’s invention of the steam engine during the industrial revolution.⁵ Coal powered the engine, which greatly increased the productivity of manufacturing processes. In the 1880’s, electric companies began to use coal to provide power for electrical generation plants.⁶

Coal starts out as peat and gradually can become anthracite through metamorphosis due to heat and burial pressure.⁷ With time and heat, peat becomes lignite, which becomes subbituminous coal, which becomes bituminous coal, which ultimately becomes anthracite.⁸ Lignite is considered an “immature” coal because it is still soft and somewhat light in color.⁹ Anthracite, on the other hand, is hard and shiny.¹⁰ Geologists rank coal according to maturity and energy content. The low ranking coals, lignite and subbituminous coal, have lower carbon content and more moisture. Consequently, they have lower energy content.¹¹

² Id.
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Classification of Coal, University of Kentucky (www.uky.edu/KGS/coal/coalkinds.htm)
⁹ Id.
¹⁰ Id.
¹¹ Id.
Both lignite and subbituminous coal are found in Louisiana. Louisiana lignites have an “A” classification, with a heat content of about 7,000 Btu/lb. Their sulphur content averages 0.64%, ash 16.1% and moisture 30.0%.

Lignite was found in northwestern Louisiana as early as 1812. At that time, residents used lignite for blacksmithing and domestic heating. In addition, Louisianians used lignite in the early 1900s to fire brick and to generate steam. Some cane sugar refiners and tile manufacturers used it for power. Other minor uses included distillation to produce burning oil, lubricating oil and paraffin, as well as a preservative to store eggs. In the 1950s and 1960s, electric utilities recognized that lignite could be used to generate electricity, but it was not cost-effective at that time.

As a result of the Arab oil embargo in 1973 and the desire to limit dependence by the United States on foreign sources of oil, in 1978, the United States enacted legislation that limited the use of oil and natural gas as boiler fuels. In anticipation of the greater viability of lignite for use to generate electrical power, Central Louisiana Electric Company (CLECO) and Southwestern Electric Power Company (SWEPCO) began to compete for mining leases and other rights in DeSoto and Red River Parishes. In 1978 they joined forces to develop the Dolet Hills Mine to deliver lignite to a jointly operated power plant. In October, 1989, Red River Mining Company opened the Oxbow Lignite Mine in Red River Parish to provide additional lignite for electrical power generation.

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13 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
23 Id.
24 Id.
1998, the Dolet Hills Mine produced 2,342,237 short tons of lignite and the Oxbow Lignite Mine produced 989,204 short tons.  

The prospect of mining lignite in Louisiana raised questions about whether the 1974 Louisiana Mineral Code sufficiently addressed mineral rights relating to solid minerals like lignite, as well as whether Louisiana needed additional reclamation requirements related to the after effects of strip mining. Louisiana lignite is uncovered through surface, or strip, mining. The mine operator removes (strips) overlying materials down to the lignite deposit so that the operator can remove the lignite using a dragline or a motorized scraper.

Amendments to the Mineral Code in 1976, 1982 and 1983 made significant changes to important Mineral Code provisions to account for the unique characteristics of lignite mining. The Legislature enacted the Louisiana Surface Mining and Reclamation Act in 1976, and amended and reenacted it in 1978 to provide orderly regulation of surface mining and reclamation.

The federal Clean Air Act Amendments of 1990 regulate emissions for coal and lignite-fired electricity generation plants to prevent "acid rain" and other ill effects. In 2005, the United States Environmental Protection Agency ("EPA") promulgated Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, also known as "CAMR." CAMR required reductions of mercury emissions by coal-powered electrical generating plants over time. The United States Court of Appeals for the District of Columbia Circuit vacated CAMR on February 8, 2008, in State of New Jersey v. Environmental Protection Agency. Even with the New Jersey decision, it is likely that in the long term that either Congress or the

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25 Id.
26 La. R.S. 31:1, et seq., hereinafter called the "Mineral Code."
27 Id.
31 La. R.S. 30:901, et seq.
34 The Clean Air Act originally was passed as Pub. L. 91-604 (December 31, 1970). The 1990 amendments were part of Pub. L. 101-549 (November 15, 1990). The current statutes is found at 42 U.S.C. §7401, et seq.
36 "CAMR" stands for "Clean Air Mercury Rule."
38 517 F.3d 574 (D.C. Cir. 2008).
states will consider it good public policy to continue to seek reductions in mercury emissions by coal-powered electrical generating plants.

One company that is leading the way in the technology to reduce mercury emissions from coal-powered electrical generating plants is Littleton, Colorado-based ADA-ES, Inc. ADA-ES has developed a process for injecting activated carbon into the flue stream of a coal-powered electrical generation plant. Mercury adheres to the activated carbon and is captured on the fly ash. Leaching tests verify that once the mercury is captured on the fly ash, it is very stable. The fly ash then can be deposited in an ordinary landfill or used for reclamation as a nonhazardous waste.

Because of the increase in interest in lignite for electrical generation and other uses, it is helpful to review the legal regimes that affect lignite exploration, especially in relation to the exploration for other minerals, particularly oil and gas. The review will start with an overview of mineral ownership, then discuss the creation of servitudes and leases for mineral exploitation, the basics of mining plans and reclamation, and, finally, the relationship between surface mining of solid minerals and oil and gas exploration. It is intended as a primer, not an exhaustive review of all aspects of solid mineral development.

II. Mineral Ownership

Article 490 of the Louisiana Civil Code states the basic principle of the right to exploit immovable property:

Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.

Expanding on the principles of the Civil Code, the Mineral Code provides that the ownership of minerals in, on or under land depends on the nature of the minerals themselves. Different principles apply depending on whether the minerals are solid and, therefore, in place, or fugacious and, therefore, mobile in nature.

Article 5 of the Mineral Code provides the principle for ownership of solid minerals:

Ownership of land includes all minerals occurring naturally in a solid state. Solid minerals are insusceptible of ownership apart from the land until reduced to possession.

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39 Hereinafter called simply the "Civil Code."
40 La. R.S. 31:3.
Unless the law or some right in favor of another creates a different result, products derived from a thing as a result of the diminution of its substance (e.g., the removal of solid minerals), belong to the owner of the thing. In fact, an owner may recover damages from one who removes solid minerals from his land without authorization. This is the jumping off point for analysis of rights relating to surface mining.

Unlike the case with solid minerals, oil and gas (and other fugacious minerals) are not owned by the owner of the land. Article 6 of the Mineral Code states:

Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.

This Article essentially states the principle of the rule of capture.

In summary, solid minerals are owned by the owner of the land and cannot be owned by another until reduced to possession, while fugacious minerals are owned by no one until reduced to possession. By “reduced to possession,” the Mineral Code means being brought under physical control to permit delivery to another.

In practice, of course, the owner of the land rarely exploits his or her land for minerals personally. He or she typically grants rights to others to explore for and produce minerals on the land at their risk and

44 See also La. R.S. 31:8 (“A landowner may use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals, provided it is not prohibited by law. He may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another.”)
45 La. R.S. 31:5.
48 While it might seem that an owner “leasing” his or her land for lignite would prefer to sell the land rather than lease it because of the disruption of surface leasing, most owners still lease the property for several reasons. First, they may be able to continue to occupy the property until mining gets closer to the site. Second, the cost of relocation is generally included in the consideration paid for the lease. Third, the mine operator has the obligation to reclaim the land at the conclusion of the lease. Fourth, the coal lease provides for royalties, while a conveyance might not. Of course, a landowner could reserve a mineral royalty in a conveyance and receive future revenues through that device. See La. R.S. 31:80.
expense. 49 This is accomplished by the granting of mineral rights as defined by the Mineral Code. 50 A mineral right is an incorporeal immovable, alienable, heritable and subject to the laws of registry. 51 The fundamental mineral rights are the mineral servitude, the mineral royalty and the mineral lease, although the Mineral Code does not prohibit the creation of other mineral rights. 52 A mineral royalty is a non-operating, or passive interest. 53 This article will focus on interests that might result in operations for exploration for and production of minerals. Typically, those include the mineral servitude and the mineral lease.

III. Creation of Servitudes and Leases for Mineral Exploration

The Mineral Code provides that: "A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership." 54 Most title examiners are accustomed to seeing either grants of servitudes or reservations of servitudes of "oil, gas and other minerals." One of the first questions that arises with respect to solid minerals is whether such a reservation includes within "other minerals" minerals that must be extracted through surface mining rather than through a bore hole. As with many legal questions, the answer, it seems, is, "It depends."

A good starting point for such a determination is the landmark Louisiana Supreme Court decision in Continental Group, Inc. v. Allison. 55 Continental Group was decided based on the law in effect prior to the adoption of the Mineral Code, but it is instructive in determining how to interpret mineral servitude grants and reservations.

In 1956, after two years of extensive negotiations, Mansfield Hardwood Lumber Company sold 92,000 acres of timberland in seven parishes in north Louisiana to Robert Gair Co., Inc., the predecessor in interest to Continental Group, Inc. Mansfield specifically reserved "all mineral rights" in the conveyance. There was evidence that Mansfield had offered to sell the right to explore for all minerals for an additional

49 See La. R.S. 31:15 ("A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession.")
50 La. R.S. 31:15.
52 Id.
53 La. R.S. 31:80 ("A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another. Unless expressly qualified by the parties, a royalty is a right to share in gross production free of mining or drilling and production costs.")
54 La. R.S. 31:19.
56 Id. at 429.
price, but that Gair had rejected the offer. At the time of the sale, about 20,000 acres were under oil and gas leases, but no other minerals were subject to leases or in any mineral production. In addition, while some of the acreage contained sand and gravel deposits and lignite existed on certain of the acreage, no production of any solid minerals was then economically feasible.

In a declaratory judgment action, Continental argued that the reservation should be interpreted to include only oil and gas, not solid minerals like lignite that required surface or strip mining. The district court ruled in Continental’s favor, but the Louisiana Court of Appeal for the Second Circuit reversed. Continental applied to the Louisiana Supreme Court for further review. The Supreme Court affirmed the decision of the Second Circuit on the interpretation issue, but on rehearing found that the servitude as to solid minerals had been lost due to the prescription of non-use.

The Supreme Court reviewed cases in Louisiana and elsewhere to reach its interpretation holding. The fact that the reservation said, “all minerals,” and the extensive negotiations apparently were the persuasive factors. The court reviewed three particular Louisiana cases involving less obvious reservations. In Huie Hodge Lumber Co. v. Railroad Lands Co., the court had found that the terms “iron, coal and other minerals” did not include oil and gas. In Holloway Gravel Co. v. McKowen, the terms “all the mineral, oil and gas rights” in a mineral reservation did not include sand and gravel. In River Rouge Minerals, Inc. v. Energy Resources of Minnesota, the Louisiana Court of Appeal for the Second Circuit had determined that “oil, gas and other minerals” in an oil and gas lease included only other minerals similar to oil and gas. Of course, the interpretive concept of ejusdem generis supports all three

57 Id. at 430.
58 Id. at 429.
59 Id.
60 379 So. 2d 1117 (La. App. 2d Cir. 1979).
61 404 So. 2d at 430.
62 Id. The ultimate result on the prescription issue has been changed by Article 40 of the Mineral Code, La. R.S. 31:40, which the Supreme Court discusses in its opinion on rehearing. Article 40 of the Mineral Code provides, “An interruption of prescription applies to all types of minerals covered by the act creating the servitude and all modes of its use.” Because the Supreme Court determined that the reservation covered solid minerals, had Continental Group been decided under the Mineral Code, the result would have been different because the court found that the seller had preserved the servitude over oil and gas.
63 151 La. 197, 91 So. 676 (1922), cited at 404 So. 2d 431.
64 200 La. 917, 9 So. 2d 228 (1942), cited at 404 So. 2d 431.
65 331 So. 2d 878 (La. App. 2d Cir. 1976), cited at 404 So. 2d 431.
conclusions. Because there was no illustrative list in the reservation before it, the Supreme Court determined that “all minerals” meant what it said.66

One may glean several principles of interpretation from Continental Group and the three cases it cites in its analysis. First, in interpreting a grant or reservation, one must look to the entirety of the instrument to determine the context of a provision. For example, in River Rouge Minerals, the lease contained many provisions describing the kinds of operations for drilling for oil or gas, but none that mentioned surface mining. Second, when a reservation or grant lists examples of particular minerals, a court may well limit the scope of the reservation or grant to minerals of the kind or nature of those in the list, or to minerals typically extracted by the same or similar means. Third, “all” may mean “all” if there is no list or are no examples.

Once a servitude exists that includes lignite, how may that servitude be exercised to prevent the prescription of non-use? Generally, a mineral servitude is lost if not exercised for ten years.67 Given that surface mining takes place on particular tracts, if the servitude in question covers only solid minerals, not oil and gas,68 in the absence of legislative assistance, surface mining would have been severely hampered by the prescriptive rules. The Mineral Code, however, provides legislative assistance.

Article 60 of the Mineral Code says, “An obstacle to drilling or mining operation or to production of any mineral covered by an act creating a mineral servitude suspends the running of prescription as to all minerals covered by the act.”69 In 1982, the Louisiana legislature added a subsection (B) to Article 61 of the Mineral Code70 to provide a means of extending a servitude for the exploration for and production of lignite or coal by means of a suspension of prescription under certain circumstances:

B. The inclusion of land burdened by a servitude that includes the right to develop lignite or coal in a mining plan to conduct surface lignite or other forms of coal mining and reclamation operations is an obstacle to the use of that servitude with respect to all land included in the mining plan provided the following requirements are satisfied:

66 404 So. 2d at 432 (“We therefore determine that the parties in this case intended what the words chosen clearly expressed, that the vendor reserved ‘all mineral rights’.”)
67 La. R.S. 31:27(1).
68 Because of Article 40 of the Mineral Code, La. R.S. 31:40, if the servitude covered all minerals, then exercise with respect to oil and gas would preserve the servitude as to solid minerals as well. See discussion at n. 63, supra.
69 La. R.S. 31:60.
(1) Lignite or another form of coal susceptible of being mined has been discovered as a result of acts committed on the land or due to acts providing a reasonable basis of proof of the discovery of the mineral.

(2) A mining plan for the ultimate production of lignite or other forms of coal, together with a permit issued by the appropriate government official, is filed in the conveyance records of the parish or parishes in which the land burdened by the servitude is located.

(3) The mining plan along with any amendments thereto, provides for the ultimate production of the lignite or other forms of coal from the land burdened by the servitude.

(4) Actual mining operations have begun on land included in the plan, although such operations are not being conducted on the land burdened by the servitude.

Prescription shall begin to run again when reclamation operations on the land burdened by the servitude are complete, the land burdened by the servitude is deleted from the mining plan, or there is no longer in effect a permit for lignite or other form of coal mining and reclamation as to any land included in the mining plan, whichever is sooner.

The terms “mining plan” and “actual mining operations” are defined in Section 213 of the Mineral Code.¹  A mining plan is a plan approved based on the process outlined in the Louisiana Surface Mining and Reclamation Act.² “Actual mining operations” with respect to coal or lignite operation means good faith operations to obtain or establish lignite or coal production.³ The definition includes “safe harbor” activities that constitute good faith operations, including such activities as the removal of existing structures, construction of railroad spurs, construction of sedimentation ponds, and the on-site erection of major equipment for the removal or transportation of lignite or other coal and overburden.⁴ Moreover, the activity is attributable to the mining operator even if it is conducted by an affiliated synthetic fuel facility or an affiliated specific major electric generating facility.⁵

As a result of these legislative provisions, a mineral servitude covering lignite could last a considerably longer time than ten years, even if the actual mining of the land burdened by the servitude does not occur for longer than ten years from the grant or reservation.

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¹ La. R.S. 31:213(2) and (7).
² La. R.S. 30:901, et seq.
⁵ La. R.S. 31:213(7)(c)(ii) and (iii).
A landowner or mineral servitude owner may grant a mineral lease to permit some other person to explore for lignite. "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals." The Mineral Code, as adopted in 1974, provided for a maximum term for a mineral lease of ten years, but then provided for a "shut-in" payment for solid minerals that would permit the extension of the term to a maximum of twenty total years. In 1976, the Legislature decided to take a different approach with respect to lignite and coal leases. The 1976 amendment to Article 115 of the Mineral Code excepted "lignite or other forms of coal" from the second paragraph of the Article, which became Article 115(B), and added a subsection (C) to the Article:

C. (1) Any lease, granting the right to explore for and produce lignite or another form of coal, which is included within a mining plan and upon which no actual operations have begun, may provide for an extension beyond the initial ten year term for a period of thirty years by the payment of rent, an advance royalty payment or any other form of periodic payment to the lessor, provided the following requirements are satisfied:

(a) Lignite or another form of coal susceptible of being mined has been discovered as a result of acts committed on the land or due to acts providing a reasonable basis of proof of the discovery of the mineral.

(b) A mining plan for the ultimate production of lignite or other forms of coal, together with a permit issued by the commissioner of conservation, is filed in the conveyance records of the parish or parishes in which the leased land is located.

(c) The mining plan, along with any amendments thereto, provides for the ultimate production of the lignite or other forms of coal from the land leased.

(d) Actual mining operations have begun on land included in the plan, although such operations are not being conducted on the lease being extended.

(2) The mining plan may authorize removal of lignite or other forms of coal from different seams, beds or other deposits and from noncontiguous tracts of land, provided such operations are so integrated as to constitute a single mining plan.
(3) A lease granting the right to explore for and produce lignite or other forms of coal may be extended by payments pursuant to this Subsection as long as mining operations under the plan continue with the diligence of a reasonably prudent operator without cessation for more than five years.

(4) The lease granting the right to explore for and produce lignite or other forms of coal may not be extended for a period greater than forty years unless there have been, actual mining operations or production on the land leased or on land unitized therewith.

Accordingly, a lignite or coal lease may be extended for a term of up to 40 years under the circumstances and conditions described above.

An actual redacted Coal Mining Lease is attached as Appendix A to these materials. A full discussion of the terms and conditions of a coal lease are beyond the scope of this paper, but a few observations about common and recommended terms might be helpful.

The granting or habendum clause normally extends broad rights to the lessee to prospect for and mine coal and associated minerals. The habendum clause in the sample lease also contains a specific grant of auxiliary rights with respect to the use of the land and the use of other solid substances found on the leased land, as well as ground water rights. A good lignite lease certainly should include the right to mine and remove products found with the lignite in place, the right to ground water or surface water and the right to remove and dispose of substances other than lignite either prior to or in connection with actual surface mining.

In addition, it is essential for surface mining that the lease contain provisions permitting the lessee permanently to divert or eliminate non-navigable waterbodies such as streams or ponds and to alter permanently contours and ground elevations, as well as private roads and road access. From the lessee’s standpoint, a lignite lease should permit the use of the surface of one tract for facilities for mining another tract in the same mining permit area. It should also provide that the lease extends through any reclamation activities subsequent to the removal of mineable lignite.

A good primary term clause of a lignite lease might incorporate the maximum extensions permitted by the Mineral Code. This would

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80 See M. Murchison, Louisiana Lignite, The Landman (February, 1987), at 37, for a more extensive discussion on this subject.
81 Paragraph 1 in the sample lease.
82 Murchison, supra, at 40.
83 Id.
84 Id.
85 Id.
86 E.g., Paragraph 2 of the sample lease.
permit the lease to have the longest life permitted under the Mineral Code. The primary term clause of the sample lease also includes a definition of actual mining operations.

Finally, the lignite lessee should make it clear that it has the right, but not the obligation, to mine the area covered by the lease. The lease should contain provisions permitting acreage to be released from the lease, to determine the nature and extent of the activity on the leased acreage, and to determine not to mine all the lignite that might underlie the acreage covered by the lease.87

IV. Mining Plans and Reclamation

In 1976, the Louisiana Legislature adopted the Louisiana Surface Mining and Reclamation Act88 "to avoid the adverse effects to society and the environment from unregulated surface mining operations" and to promote the reclamation of mined lands.89 The United States encouraged Louisiana, and other states, to adopt their own regulation of surface mining and reclamation in the Surface Mining Control and Reclamation Act of 197790, and in 1978 Louisiana revamped the Louisiana Surface Mining and Reclamation Act.91 Because the Federal Act gave the states the option to assume and retain exclusive control over the regulation of surface mining and reclamation of land, Louisiana exercised its option to do so.92 Very few practitioners likely will be involved with the development or implementation of a mining plan, mining permit or reclamation plan, and exhaustive review of the requirements and process is well beyond the scope of this primer, but a brief outline of the steps may be helpful.

A person may not engage in coal mining operations unless he has a permit issued by the Commissioner of Conservation.93 The contents and the details of the process for obtaining a permit are contained in Title 43, Part XV, Subpar. 3 of the Louisiana Administrative Code. The permit lasts for a maximum term of five years, unless given special permission by the Commissioner.94 The permit terminates within three years if the permittee has not commenced the surface coal mining operations covered, although the Commissioner may grant extensions of the time.

87 Murchison, supra, at 40.
89 La. R.S. 30:903
93 La. RS 906(A).
94 Id. at (B).
period under limited circumstances. A valid permit carries with it a right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit, unless the Commissioner makes certain negative findings, including if the terms and conditions of the current permit are not met. If the renewal application extends beyond the then current boundaries of the permit, the application to renew the permit will be subject to the full standards applicable. A permit renewal cannot exceed the period of the original permit.

V. The Rocky Relationship Between Surface Mining and Oil and Gas Exploration

It is possible for a landowner or mineral servitude owner to grant mineral rights to different persons with respect to fugacious minerals like oil and gas and solid minerals like lignite. When that occurs, issues arise as to the use to be made of the property by the holder of the mineral rights over each kind of mineral.

Article 11(A) of the Mineral Code establishes the principles that govern the respective uses that each mineral right holder may make with regard to the rights of other mineral right holders and the owner of the land:

A. The owner of land burdened by a mineral right or rights and the owner of a mineral right must exercise their respective rights with reasonable regard for those of the other. Similarly the owners of separate mineral rights in the same land must exercise their respective rights with reasonable regard for the rights of other owners.

Article 11 as originally enacted in the Mineral Code did not expressly provide for application of the concept of "reasonable regard" for the rights of another mineral right holder by a mineral right holder other than the owner. The second sentence of the subsection was added in 1982.

The comment to the original Article 11 sheds helpful light on how courts should apply the concept of reasonable regard:

Article 11 is intended to provide a flexible formula governing the relationship between the mineral servitude owner and the owner of the servient estate. It is intended that the general specification of

95 Id. at (C).
96 Id. at (D)(1)
97 Id. at (D)(2).
98 Id. at (D)(3).
Article 11 be adopted and that the relationship be one in which the parties each must exercise their rights to use the land with reasonable regard for those of the other. This standard . . . should permit concurrent uses of land by the owner of mineral rights and the owner of the land and those deriving use rights from him. Further, the standard does not attempt to suggest that rights and liabilities must always be based on negligence. Uses by one party which may be considered ultra-hazardous as to the other’s right to concurrent use of the land may in proper circumstances result in the imposition of liability without regard to the manner of performance of the activity in question.

There is no significant case law putting flesh on the skeleton of Article 11’s reasonable regard standard. One may infer some basic principles about “reasonable regard” from Caskey v. Kelly Oil Company, although Caskey is primarily a case dealing with the interpretation of a so-called “adjacent lands” clause in an oil and gas lease.

The issue of reasonable regard arose in Caskey in the context of a dispute between oil and gas lessors and their lessee. For many years, predecessors in interest to Kelly Oil Company had used an unimproved road to cross one tract, the Connell tract, to get to a well on an adjacent tract, the Seamster tract. After Kelly became the operator, it wanted to use the Connell tract to get to another well site on another adjacent tract, the Crichton tract, and it caused its contractor to improve the road, laying a high quality shale oilfield road across the Connell tract. The owners of the Connell tract objected to the increased use and improved road because it allegedly interfered with their surface use of the tract. They sought an injunction against the use of the Connell tract for access to the Crichton tract.

The district court denied the injunctive relief the plaintiffs sought, finding that the use of the road was permitted pursuant to the adjacent lands clause in the lease and that the increased use of the road was reasonable. The court of appeal reversed, finding that the increased burden of the new road was not a reasonable exercise of the lessee’s rights. It reasoned that to increase the burden on the lessor, the road had to provide some mutual benefit to the lessor and the lessee. Because it found no benefit to the lessor, it prohibited the use of the road.

103 30,278 (La. App. 2d Cir. 2/25/98), 706 So. 2d 1102.
104 Id. at 1105.
105 Id.
106 Id. at 1105-06.
The Louisiana Supreme Court granted Kelly’s application for writ of certiorari and reversed the judgment of the Court of Appeal for the Second Circuit. It rejected the “mutual benefit” analysis of the court of appeal, finding that Article 122 of the Mineral Code did not require Kelly to prove a benefit to the lessors. It then found that the use by Kelly of the surface of the lessors’ tract, including the increased use and the substantially improved road, was reasonable. It held that the thrust of the “reasonable regard” principle in Article 11 of the Mineral Code was to permit a lessor and lessee to make concurrent use of the land, with neither having a paramount right.

Although Caskey arose in the context of use by a mineral lessor and lessee, Article 11’s second sentence, “Similarly the owners of separate mineral rights in the same land must exercise their respective rights with reasonable regard for the rights of the other owners,” clearly makes Caskey’s rationale apply to concurrent use by the holders of minerals rights related to oil and gas and those related to lignite. Thus, use by one need not benefit the other, and each mineral owner has the right to make concurrent use of the land, with neither having a paramount right.

Perhaps the best solution as a practical matter is for the parties involved to attempt to negotiate a mutual use agreement that sets forth the parties correlative rights. In the absence of such an agreement, courts will develop jurisprudential rules on a case-by-case basis. One author has suggested that the Commissioner of Conservation has authority to determine the relative rights of use of the parties, but, to date, the Commissioner has not established any rules to regulate the relationships between holders of mineral rights covering oil and gas on the one hand and solid minerals such as lignite on the other.

VI. Conclusion

Given the seemingly insatiable appetite of Americans for energy and the continued dependence of the United States on foreign sources of oil, it seems safe to assume that the economic feasibility of lignite

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108 La. R.S. 31:122 (“A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.”)
109 737 So. 2d at 1262.
110 Id.
111 737 So. 2d at 1265.
112 Id.
113 Note, Reasonable Regard: A Solution to the Lignite Problem, 43 La. L. Rev. 1239, 1253-54 (May, 1983).
production in Louisiana will continue for the foreseeable future. That feasibility is enhanced by new uses for lignite, including the manufacture of activated carbon for a variety of uses and the production of coalbed methane. Thus, solid mineral law should advance in Louisiana as courts grapple with the implications of the exercise of surface and mineral rights by competing interests. The basic skeletal principles exist, awaiting development of the skin, muscle and soft tissue that ultimately will complete the body of law.
Appendix A
Sample Coal Mining Lease

COAL MINING LEASE

THIS LEASE (herein called the "Lease") made this 1st day of JUNE, 1989, by and between the undersigned Lessor, (hereinafter in this Lease called "Lessor") and Lessee, a corporation, whose mailing address is

LESSEE

1. Lessor, in consideration of...

2. The lease is to run from the date hereof, and shall continue...

3. This lease shall be for a term of ten (10) years from the date hereof, and the annual royalty payment shall be...

4. The lessee agrees to pay...

5. The lessee agrees to use the premises...

6. The lessee agrees to use the premises...

This instrument was executed and acknowledged on the day and year first above written.

STATE OF LOUISIANA

State of Louisiana, to wit:

Red 3415

JUNE 1, 1989

This instrument was executed and acknowledged on the day and year first above written.

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There shall be no obligation, express or implied, on Lessee to begin, prosecute or continue mining operations on the Premises, nor to at all times observe and/or sell or use all or any portion of the coal in one or more seams situated therein, nor separately mine for, purchase, sell or exchange any and all coal or bituminous or sub-bituminous coal. In the event that any portion of Lessee's operations are expressed herein and there shall be no obligations implied under this Lease, it being agreed that advances royalties and mineral interests hereupon granted by the Premises shall be subject to the following:

(a) A minimum of five (5) days payable on Lessor's account, and payable at the end of the lease term.

(b) At the end of each year, payable upon demand by the Lessee, and at any time thereafter, payable upon demand by Lessor.

13. Lessee may at any time and from time to time record and deliver to Lessor or place on record a release or releases covering all or any part of the Premises, as to such part, and the said release shall be recorded or released as the case may be, in the manner and form as required by any laws or regulations currently in force, and any such release or releases shall be at Lessee's cost and expense, and Lessee shall pay to Lessor such portion of any such tax attributable to its respective rights in the coal or other substances. Lessee is hereby authorized to pay such taxes on behalf of Lessor and may, if it so desires, deduct the amount so paid from royalties or other payments due lessor hereunder.

14. Lessee shall pay all property taxes on the improvements and property and shall pay all taxes, if any, levied against its interests in the coal or other substances covered by this lease. Lessee shall pay all taxes, included and assessed against the land on which the Premises property and all taxes levied and assessed against the land or other substances covered by this lease. In the event that the State, United States, or any municipality or other governmental agency leases a license, severance, production or other tax on coal or other substances hereunder, or on the right to operate or produce or sell humified to the Premises, and such change in the event, Lessee shall also pay such portion of any such tax attributable to its respective rights in the coal or other substances. Lessee is hereby authorized to pay such taxes on behalf of Lessor and may, if it so desires, deduct the amount so paid from royalties or other payments due lessor hereunder.

15. Lessee shall institute in an action for cancellation of this Lease because of default made by Lessor in any of the terms, covenants or conditions herein unless Lessee has not begun to remedy such default within ninety (90) days after receipt of written notice from Lessor specifying such default and requesting remedy thereof.

16. Should any person, firm or corporation having an interest in the surface of the Prestees or in the coal situated in, or on under the Premises not be the same as those of Lessee, or should any one or more of such persons, firms or corporations have any interest in the coal, or other substances covered by this lease, the same shall be jointly owned by all persons entitled thereto and all such interests shall be hypothecated to the Premises, and such hypothecation shall be binding upon the parties or parties executing the same. Lessee shall have the right to enter the Premises at all reasonable hours and times to inspect the Premises and its equity interest in the same.

17. The rights of either party hereunder may be assigned in whole or in part and the property herein shall be assigned to the respective heirs, executors, administrators, successors and assigns of the parties hereto. Notwithstanding any actual or constructive knowledge of or notice to the Lessor, no change or division in the ownership of the Premises, whether or not accomplished, shall be binding upon the Lessee (except as Lessee's option in any particular case) until ninety (90) days after such letters have been furnished with a copy of the assignment or transfer evidencing the change or transfer, including any assignments made prior to said date and the recordation of such assignments thereafter is not a necessary condition of the validity of the assignment or transfer, or of any change in ownership shall not cause the letters of administration or final decree of distribution of the assets of the devisee issued by a court of competent jurisdiction of the devisee's estate to include in such the Premises, subject to the terms of this Lease. Lessee may, until such change does not cause any such change or transfer, still be deemed to own and occupy the Premises and to be entitled to all rights and benefits hereunder.

18. Should any person, firm or corporation having an interest in the surface of the Premises or in the coal situated in, or on under the Premises not be the same as those of Lessee, or should any one or more of such persons, firms or corporations have any interest in the coal, or other substances covered by this lease, the same shall be jointly owned by all persons entitled thereto and all such interests shall be hypothecated to the Premises, and such hypothecation shall be binding upon the parties or parties executing the same. Lessee shall have the right to enter the Premises at all reasonable times and times to inspect the Premises and its equity interest in the same.
...
Attached to and made a part of Coal Lease dated **June 24, 1982**.

26. Lessee shall pay to Lessor a minimum royalty of $3,000.00 per acre for each surface acre of the Premises from which merchantable coal is actually mined and removed. There shall be credited against any payment due hereunder all royalties and advance royalties theretofore paid hereunder. If any payment is due under this Paragraph after applying the above credits, such payment shall be made at the final termination of this lease as to all parts of the Premises.

27. It is agreed that Lessee's right to mine clay, sand and gravel, as granted in Paragraph 1 hereof, is limited to the mining of such substances as they are encountered in mining operations conducted for the production of coal or lignite. Lessor expressly reserves unto himself, his heirs and assigns, the right to mine such substances or grant leases for the mining thereof, provided that such mining or leases shall be and remain subject to the terms of this coal lease, and that such operations by Lessor or its said Lessees shall not interfere with, impair, restrict or render impossible, Lessee's operations hereunder.

**SIGNED FOR IDENTIFICATION:**