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The Sky's the Limit: Application of Correlative Rights and the Accommodation Doctrine to Operations of a Solar Energy Company

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The Sky’s the Limit: Application of Correlative Rights and the Accommodation Doctrine to Operations of a Solar Energy Company

Michael R. Brassett II and Benjamin M. Parks*

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INTRODUCTION

Just last year, Southwestern Electric Power Company (“SWEPCO”) shuttered its 642.1-MW Dolet Hills lignite power plant, operated by Louisiana-based company CLECO, in Mansfield, Louisiana.¹ SWEPCO agreed to completely retire the facility by 2026 in a settlement with Sierra Club and other intervenors.² Dolet Hills’ closure, although a small example, is representative of a national shift towards renewable energy. In the last decade, solar energy experienced an average annual growth rate of 42%.³ As of 2020, there are more than 100 gigawatts worth of solar energy

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1. Usman Khalid, *SWEPCO to Shut Louisiana Coal Plant by End of 2026, Explore Retirement of 2 Others*, S&P GLOB. (Jan. 9, 2020, 9:58 PM), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/010920-swepe-co-to-shut-louisiana-coal-plant-by-end-of-2026-explore-retirement-of-2-others> [<https://perma.cc/ZGF7-6MPY>].

2. *Id.*

3. *Solar Industry Research Data*, SOLAR ENERGY INDUS. ASS’N, <https://www.seia.org/solar-industry-research-data> [<https://perma.cc/559U-CWQY>] (last visited Feb. 28, 2022).

infrastructure nationwide, generating enough energy to power 18.9 million homes and creating more than 230,000 American jobs.⁴

At least 16 solar power farms have been proposed in Louisiana, and if all are completed, will create enough energy to power over 190,000 homes.⁵ As of July 2021, only one utility-scale solar project, located in the greater Baton Rouge area, has been completed, but construction and development continue across the state.⁶ Solar photovoltaic infrastructure is among the cheapest sources of electricity generation, and solar power generation costs dropped 89% between 2009 and 2019.⁷ With the sharp decrease in the cost of solar energy equipment,⁸ the potential for job creation,⁹ and state tax exemption programs rendering Louisiana a desirable destination for solar energy companies,¹⁰ the sky is the limit for solar energy development in the Bayou State.

The systems mainly used to convert sunlight into electricity are photovoltaic panels and concentrated solar power.¹¹ Photovoltaic solar panels convert sunlight directly into electricity.¹² Massive amounts of these panels can be placed on rural land in connection with utility-scale projects, and the panels can even be affixed onto commercial buildings and residential structures.¹³ Concentrated solar power involves mirrors that direct sunlight onto tubes containing liquid such as antifreeze, water,

4. *Id.*

5. Kristen Mosbrucker, *Who Owns All These Solar ‘Farms’ Across Louisiana? The Answers May Surprise You*, NOLA.COM (July 26, 2021, 9:42 AM), https://www.nola.com/news/business/article_f56004fe-de71-11eb-b161-c72a83856b8b.html [<https://perma.cc/5392-9WCC>].

6. *Id.*

7. Myles Illidge, *How Solar Power Became Cheaper than Coal*, MYBROADBAND (Jan. 22, 2022), <https://mybroadband.co.za/news/energy/430042-how-solar-power-became-cheaper-than-coal.html>.

8. *Id.*

9. *See State Solar Spotlight: Louisiana*, SOLAR ENERGY INDUS. ASS’N, <https://www.seia.org/sites/default/files/2021-12/Louisiana%20Solar-Factsheet-2021-Q4.pdf> [<https://perma.cc/S52G-XPSB>].

10. Louisiana’s Industrial Property Tax Exemption Program (“ITEP”) provides an 80% break on property taxes for up to 10 years for projects on primarily agricultural land being transformed into industrial sites. *See* Mosbrucker, *supra* note 5.

11. *See* Norman Williams, Jr. & John M. Taylor, *Alternative Electric Power Sources—Utility-scale Solar Power*, 5 AMERICAN LAND PLANNING LAW § 96A:6 (Rev. ed. 2021).

12. *Id.*

13. *Id.*

or synthetic oil.¹⁴ The liquid is then heated at high temperatures and turned into steam, and the steam spins a generator to produce electricity.¹⁵ Overall, solar energy infrastructure does not produce air pollutants or greenhouse gases—the systems are quiet and passive.¹⁶

The implementation of solar energy infrastructure in Louisiana presents more benefits than burdens. The financial and economic advantages associated with the solar energy industry should suggest that solar development would be met with little to no controversy. Whether that is true, however, remains undetermined.

Louisiana is one of the top five states nationally in natural gas production and reserves.¹⁷ In 2020, liquefied natural gas ("LNG") exports reached 2.4 million cubic feet, around 55% of which passed through two Louisiana export terminals, Cameron LNG in Hackberry and the Cheniere plant at Sabine Pass.¹⁸ In March 2022, the first cargo of LNG left the new Calcasieu Pass export facility in Cameron Parish;¹⁹ and construction is underway for a Plaquemines Parish LNG terminal.²⁰ With oil and natural gas production at the forefront of the state's economy,²¹ Louisiana's reliance on fossil fuels is unlikely to change at any point in the near future. However, the dependence on oil and natural gas production does not foreclose solar energy development, but the latter's expansion in Louisiana provides fertile ground for disputes between surface owners,

14. *Id.*

15. *Id.*

16. *See Solar Explained*, U.S. ENERGY INFO. ADMIN. (Dec. 6, 2021), <https://www.eia.gov/energyexplained/solar/> [<https://perma.cc/FK63-USN6>].

17. *See Louisiana State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Apr. 15, 2021), <https://www.eia.gov/state/?sid=LA> [<https://perma.cc/B78Y-MFLL>].

18. *See* Mike Smith, *Louisiana Has Bet Big on Liquefied Natural Gas. Is It a Good Bet?*, THE ADVOCATE (Oct. 31, 2021, 4:00 AM), https://www.theadvocate.com/lake_charles/article_c7e1c0b8-3906-11ec-a42b-9faa447a8654.html [<https://perma.cc/R58P-PSAW>].

19. *UPDATE 2-First LNG Cargo Departs from Venture Global's Louisiana Plant*, REUTERS (Mar. 1, 2022, 2:48 AM), <https://www.reuters.com/article/venture-global-lng-calcasieu-idUSL1N2V40N3> [<https://perma.cc/QJX4-QNNY>].

20. Jacob Dick, *Venture Global Awards Batch of Contracts for Plaquemines LNG Development*, NAT. GAS INTEL. (Mar. 13, 2022), <https://www.naturalgasintel.com/venture-global-awards-batch-of-contracts-for-plaquemines-lng-development/>.

21. The petroleum industry accounts for almost 25%, or about \$1.2 billion, of Louisiana's total revenues. *See History of Oil & Gas in Louisiana and the Gulf Coast Region*, LA. DEP'T NAT. RES., http://www.dnr.louisiana.gov/assets/TAD/education/BGBB/6/la_oil.html [<https://perma.cc/F8TM-3GVC>].

mineral interest owners, and solar energy companies seeking to concurrently exercise rights held in the same land.²²

Louisiana courts have yet to hear a case involving a conflict between a mineral interest owner, a surface owner, and a solar company. However, as Texas case law indicates, such a dispute is inevitable considering the expanding solar energy development both in Louisiana and the nation.²³ This Article will examine Louisiana's statutory and jurisprudential authority, including the doctrine of correlative rights, to predict how a Louisiana court may resolve a case involving competing rights between a surface owner, mineral interest owner, and solar energy company in the same piece of land. In undertaking such an examination, this Article will discuss Texas' accommodation doctrine and the recent application of the accommodation doctrine to a dispute involving a solar energy producer.

I. A 1000 FOOT VIEW—LOUISIANA MINERAL LAW

A. *The Framework of the Louisiana Mineral Code*

Louisiana's first commercial oil well came into existence in 1901 with the discovery of oil near Jennings, Louisiana.²⁴ The well, situated atop a rice field in Evangeline, Louisiana, initially produced 7,000 barrels of oil a day.²⁵ The Civil Code was written without reference to oil and gas development, so prior to 1975, Louisiana courts were tasked with crafting law governing petroleum exploration and development.²⁶ The Louisiana Mineral Code²⁷ brought long-awaited clarity to the equation, taking effect on January 1, 1975.²⁸ Its provisions are supplementary to those of the Civil Code and apply when the Civil Code is silent; in a conflict between the two, the former prevails.²⁹ The Mineral Code, for the most part, is "a codification of the decisions of the Louisiana Supreme Court on an array

22. See, e.g., *Lyle v. Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App. 2020).

23. See, e.g., *id.*

24. See PATRICK H. MARTIN, *LOUISIANA MINERAL LAW TREATISE* 30 (2012); see also B.A. Wells & K.L. Wells, *First Louisiana Oil Wells*, AM. OIL & GAS HIST. SOC'Y (Sept. 19, 2021), <https://aoghs.org/petroleum-pioneers/first-louisiana-oil-well/> [<https://perma.cc/8MQ8-MQH6>].

25. Wells & Wells, *supra* note 24.

26. MARTIN, *supra* note 24, at 30.

27. See, e.g., LA. REV. STAT. § 31:1 (2021).

28. See *Broussard v. Hilcorp Energy Co.*, 24 So. 3d 813, 816 (La. 2009). Louisiana Revised Statutes §§ 31:1–31:217 are cited as either articles of the Mineral Code or as sections of the statutes. See LA. REV. STAT. § 31:1.

29. See LA. REV. STAT. § 31:2.

of matters involving mineral rights.”³⁰ Gaining an understanding as to the possibility of the existence of competing interests in a single piece of land necessitates a general examination of the Mineral Code, specifically the rights granted and obligations imposed thereunder.

The ownership of land does not include the ownership of oil, gas, and other liquid or gaseous minerals found thereunder.³¹ Conversely, ownership of land does include the right to explore that land for those minerals and reduce them to possession and ownership.³² The landowner, however, may transfer all or a portion of these rights.³³ According to Mineral Code article 16,³⁴ the basic mineral rights that a landowner may create are the mineral servitude, the mineral royalty, and the mineral lease. The mineral servitude is a right created by the landowner who has conveyed or reserved all or a portion of his rights to explore and develop his land for the production of minerals and to reduce them to possession and ownership.³⁵ 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.”³⁶ The mineral royalty owner shares in the financial gains of production but does so free of investment or operating costs.³⁷ The mineral lease is a contract by which the mineral-lessee “is granted the right to explore for and produce minerals.”³⁸

The Mineral Code also recognizes the “executive right,” the right possessed by a landowner (from which mineral rights have not been severed), or owner of a mineral servitude, to grant mineral leases affecting the specified land or mineral rights.³⁹ Conversely, the mineral royalty owner does not possess “executive rights.”⁴⁰ In other words, the royalty owner has no authority to grant mineral leases with respect to his or her royalty.⁴¹ The ownership of land and the executive right may be separated, such that a vendor selling property may reserve unto herself the executive right notwithstanding the passing of ownership of the land to the vendee

30. See Patrick S. Ottinger, *Permission Granted: The Requirement of Consent Under the Louisiana Mineral Code*, 80 LA. L. REV. 1285, 1287 (2020).

31. See LA. REV. STAT. § 31:6.

32. *Id.*

33. MARTIN, *supra* note 24, at 75.

34. See LA. REV. STAT. § 31:16.

35. See *id.* § 31:21; see also MARTIN, *supra* note 24, at 76.

36. LA. REV. STAT. § 31:80.

37. See *id.*

38. *Id.* § 31:114.

39. See *id.* § 31:105; see also MARTIN, *supra* note 24, at 181.

40. See MARTIN, *supra* note 24, at 181.

41. See *id.*

through the sale of the property.⁴² The severable nature of the executive right “creates the potential for conflict between [the] landowner and the owner(s)” of that severed executive right.⁴³

B. The Doctrine of Correlative Rights

An example of a conflict between holders of competing rights in the same piece of land could occur as follows: W owns a tract of land in West Baton Rouge Parish. W conveys the entire tract of land to X (“landowner X”), but in the Act of Sale, W reserves for herself both the right to all oil, gas, and other minerals in the land and the exclusive right to grant a mineral lease covering the land. W’s reservation has created a mineral servitude.⁴⁴ As the holder of a mineral servitude (and by virtue of the reservation of executive rights), W possesses the exclusive right to execute an oil, gas, and mineral lease covering the property notwithstanding the fact that she sold it; however, X still owns the land.

Next, W executes a lease in favor of Oil Company Y. Oil Company Y spuds a well that results in continuing production. While the oil, gas, and mineral lease is still in effect, Solar Company Z approaches landowner X to inquire about constructing solar energy infrastructure on the property. Landowner X grants Solar Company Z a surface lease giving Solar Company Z the right to operate a solar farm on the land. Fearing interference with its current natural gas production, Oil Company Y files suit seeking damages for trespass against landowner X and Solar Company Z, requesting an injunction to accomplish removal of the solar panels.

To regulate this expected conflict between holders of competing rights and interests in the same acreage, the state legislature promulgated the doctrine of correlative rights, set forth in Mineral Code article 11.⁴⁵ Although Louisiana courts have yet to resolve a dispute factually similar to the aforementioned example, a discussion of article 11 proves useful in predicting how a court would rule in such a dispute.⁴⁶ Section 31:11

42. See, e.g., *Andrus v. Kahao*, 414 So. 2d 1199, 1203 (La. 1981); *Mt. Forest Fur Farm of Am., Inc. v. Cockrell*, 155 So. 228 (La. 1934).

43. See MARTIN, *supra* note 24, at 181.

44. See LA. REV. STAT. § 31:21; see also MARTIN, *supra* note 24, at 76.

45. LA. REV. STAT. § 31:11.

46. See *Glob. Mktg. Sols., LLC v. Blue Mill Farms, Inc.*, 153 So. 3d 1209, 1215 (La. 2014) (explaining that Mineral Code article 11 “contemplate[s] the real rights and obligations that exist between parties who occupy the land contemporaneously with a mineral lease.”).

“contemplates concurrent uses of the land by the owner of mineral rights and the owner of the land and those deriving use rights from him.”⁴⁷

Mineral Code article 11 provides that “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.”⁴⁸ The owners of “separate mineral rights in the same land” are also governed by the standard of “reasonable regard.”⁴⁹ Where a vendor reserves mineral rights in an instrument transferring ownership of land, the instrument “must include mention of surface rights in the exercise of the mineral rights reserved, if not otherwise expressly provided by the parties.”⁵⁰ As Louisiana jurisprudence demonstrates, the standard of reasonableness in section 31:11 is a fact-intensive inquiry.⁵¹ It is a “flexible” standard requiring “judicial interpretation to determine its impact on a given set of circumstances.”⁵²

In *Edwards v. Jeems Bayou Production Co.*, the Louisiana Second Circuit Court of Appeal reviewed a trial court’s \$4,375 damage award in a suit brought by the plaintiff-landowner against a mineral lessee who had drilled a well on plaintiff’s property that was shut-in⁵³ at the time of the case.⁵⁴ Plaintiff alleged that the drill site, which occupied four acres of the property, had been left in such poor condition that a tractor could not cross the area.⁵⁵ The plaintiff further asserted that cables had been left in the ground and pits were improperly filled.⁵⁶ Defendant had constructed an iron ore road leading to the well that plaintiff contended “left the twelve acre hay meadow [on the property] too small for cultivation.”⁵⁷

The Second Circuit cited Louisiana Revised Statutes section 31:11 and noted that “the owner of land burdened by a mineral right and the owner

47. See *Walton v. Burns*, 151 So. 3d 616, 621 (La. Ct. App. 2013).

48. LA. REV. STAT. § 31:11(A).

49. *Id.*

50. *Id.* § 31:11(B)(1).

51. See *Caskey v. Kelly Oil Co.*, 737 So. 2d 1257, 1265 (La. 1999).

52. *Id.* (citing John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 729, 811 (1976)).

53. A shut-in well is one “that could otherwise be productive, but is not producing for some reason.” *What Is a Shut-in Well?*, MIN. RIGHTS CO., <https://www.mineralrights.co/2020/07/05/what-is-a-shut-in-well/> [<https://perma.cc/NX M7-B95A>]. Common reasons a well is shut-in include low commodities pricing, required well maintenance and nearby drilling activity. See *id.*

54. *Edwards v. Jeems Bayou Prod. Co.*, 507 So. 2d 11, 12 (La. Ct. App. 1987).

55. *Id.* at 13.

56. *Id.*

57. *Id.*

of a mineral right must exercise their respective rights with reasonable regard for those of the other.”⁵⁸ The court ultimately modified the lower court’s ruling and awarded \$2,175 in damages.⁵⁹ Included in the original damage award was \$1,200 allocated to “loss of hay.”⁶⁰ In amending the lower court’s damage award, the Second Circuit noted that a lessee “has the right to use the site reasonably necessary to conduct its operations and to build and maintain an iron ore road to the site.”⁶¹ The evidence did not indicate that any of the plaintiff’s growing hay crop was destroyed, and the landowner was not entitled to recover for “loss of use of the [well] site or road area for agricultural purposes.”⁶² Although the Second Circuit was not considering the rights of a solar energy company as lessee in a surface lease upon acreage shared with a mineral interest owner, the *Edwards* decision demonstrates how courts balance the rights and obligations of parties with competing interests in acreage concurrently shared.⁶³ The court’s holding hinged on the “reasonableness” of the mineral lessee’s actions upon the land—a fact-intensive inquiry.⁶⁴

Like in *Edwards*, the Louisiana Third Circuit Court of Appeal in *Ashby v. IMC Exploration Co.*⁶⁵ emphasized that judicial inquiry under article 11 should focus on whether use of the land was “reasonable.”⁶⁶ In *Ashby*, the appellants had taken ownership of the surface rights of property subject to a previously recorded mineral lease.⁶⁷ They argued that the trial court erred in failing to award them damages for the “diminished use” of the property which they asserted resulted from drilling operations of defendant, IMC Exploration Co. (“IMC”).⁶⁸ The appellants claimed that following the operations, they were no longer able to use the property to establish a subdivision or residential trailer lots as they had intended.⁶⁹

The Third Circuit examined section 31:11 and noted that the statute requires “[t]he owner of the land burdened by a mineral right and the owner of a mineral right [to] exercise their correlative rights with

58. *Id.* at 12.

59. *Id.* at 14.

60. *Id.* at 12.

61. *Id.* at 13–14.

62. *Id.* at 14.

63. *See id.* at 13–14

64. *See id.*

65. *Ashby v. IMC Expl. Co.*, 496 So. 2d 1334, 1337 (La. Ct. App. 1986).

66. *Id.* at 1337.

67. *Id.* at 1336.

68. *Id.*

69. *Id.* at 1337.

reasonable regard for those of the other.”⁷⁰ The court, in holding the appellants had no right to recover “for diminished use of land arising out of IMC’s reasonable, necessary exercise of its rights under mineral lease,” stated that the record made clear that the defendant exercised its rights under the lease in a reasonable and prudent manner.⁷¹ Further, IMC restored the portion of the property not used in the production of IMC’s well to its original condition.⁷² In focusing on whether IMC’s use of the land was reasonable, the Third Circuit held that the trial court’s requirement that “negligence [was] a necessary precedent for recovery” is “incongruous” with the language of section 31:11.⁷³

The *Ashby* decision is yet another example of how the finding of liability under section 31:11 is dependent upon whether the defendant’s operations on the land were “reasonable.”⁷⁴ Most notably, the *Ashby* court stated that IMC’s operations resulted in the diminished use of the appellants’ land.⁷⁵ However, the court’s conclusion did not necessitate a ruling in favor of the appellants because, as the court made clear, IMC’s operations were reasonable.⁷⁶ The *Ashby* decision is especially beneficial in predicting how a Louisiana court would resolve a conflict as to land-use rights between a surface owner, a mineral interest holder, and a solar lessee. Although lacking a formulaic solution to solving such a dispute, the case indicates that the reasonableness of oil and gas operations in light of the facts presented would govern a court’s determination as to liability. If the mineral lessee’s operations were “reasonable” as in *Ashby*, a court could find for the mineral lessee and refuse to rule in favor of the solar energy company—and vice versa.

Even prior to the passage of section 31:11, Louisiana state and federal courts were still presented with litigation involving the correlative rights of parties concurrently exercising operations that at times were conflicting

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. *Id.*

75. *See id.* (“Accordingly, the appellants, who took ownership of the surface rights of the property subject to the previously recorded mineral lease, **have no right to recover damages for the diminished use of the land**, arising out of IMC’s **reasonable, necessary** exercise of its rights under the mineral lease.” (emphasis added)).

76. *See id.*

on the same property.⁷⁷ Although the Mineral Code now provides much clearer guidance on how to resolve legal disputes between multiple parties possessing rights in shared acreage, the pre-Mineral Code jurisprudence is still helpful in predicting how a Louisiana court would adjudicate these conflicts.

In *Pennington v. Colonial Pipeline Co.*, the plaintiff, Pennington, claimed to possess the exclusive right to explore and drill for oil and gas on 2,425 acres of land pursuant to an oil, gas, and mineral lease Pennington argued that he acquired—as lessee—from T.L. Mills, Jr., the owner of the land.⁷⁸ Subsequent to the execution of the lease, defendant, Colonial Pipeline Company (“Colonial” or “defendant”), purchased the title to 29 acres of the same land from Mills.⁷⁹ After its purchase of the land, Colonial laid a pipeline for the transmission of its products and constructed pumping and storage facilities.⁸⁰ Pennington intended to conduct geophysical explorations on and under the property, including on Colonial’s acreage.⁸¹ He filed suit alleging that locating shotpoints⁸² on Colonial’s portion of the property was essential to “obtaining reliable seismic information concerning the subsurface of the property.”⁸³ Thus, Pennington requested that the court order Colonial to shut down its operations on the land since Pennington’s rights under the lease were “prior in time and superior in law.”⁸⁴

Specifically, Pennington requested that Colonial be ordered to shut down all of its operations on the property, drain all pipelines that crossed the property, drain all storage tanks on the land, shut down all electrical service to the property, and remove any structures interfering with Pennington’s geophysical exploration.⁸⁵ The court compared the rights and obligations of Pennington as “the holder of the mineral lease” and

77. See, e.g., *Pennington v. Colonial Pipeline Co.*, 260 F. Supp. 643, 649 (E.D. La. 1966); see also *Standard Oil Co. of La. v. Kinnebrew*, 99 So. 802 (La. 1924); *Smith v. Schuster*, 66 So. 2d 430 (La. Ct. App. 1953).

78. See *Pennington*, 260 F. Supp. at 644.

79. *Id.*

80. *Id.*

81. *Id.*

82. A “shotpoint” is “[o]ne of a number of locations or stations at the surface of the Earth at which a seismic source is activated” when conducting mineral exploration. See *Shotpoint*, SCHLUMBERGER OILFIELD GLOSSARY, <https://glossary.oilfield.slb.com/en/terms/s/shotpoint> [<https://perma.cc/W6VD-L5F2>] (last visited Mar. 1, 2022).

83. *Pennington*, 260 F. Supp. at 644.

84. *Id.*

85. *Id.*

Colonial as “the owner of the fee title to the land.”⁸⁶ The court held that each party’s rights in the shared acreage were “neither . . . superior to nor inferior to” those of the other party.⁸⁷ Instead, the rights were “correlative” and could “only be exercised in such a manner as not to unreasonably interfere with the rights of the other.”⁸⁸ The court further ruled that to allow Pennington to conduct seismic exploration in the manner proposed⁸⁹ would constitute an “unreasonable interference” with Colonial’s use of the property.⁹⁰

In finding that Pennington’s proposed plan was an unnecessary, unreasonable interference with Colonial’s land use rights, the court stated that it was “unnecessary” for Pennington to “place any shotpoints whatsoever on Colonial’s property,” but he had the option to do so in exercising his rights under the lease so long as his chosen placement of the shotpoints did not unreasonably interfere with Colonial’s pipeline operations.⁹¹ The court found that Colonial could reasonably elect, if Pennington ultimately located some shotpoints on Colonial’s acreage, to either: 1) shut down its pumps and electrical current only during the time of the test shots or 2) shut down its pumps and electrical current for two days while Pennington conducted the necessary surveys and recordation of survey results in connection with all nine shotpoints.⁹²

The *Pennington* decision, although rendered before the enactment of the Louisiana Mineral Code, is still good law and continues to be cited by Louisiana courts.⁹³ The *Pennington* court focused its inquiry, as to the parties’ competing rights in the land, on the “reasonableness” of the parties actions vis-a-vis each other; the court also offered a fact-specific solution whereby Pennington could conduct seismic exploration for minerals and Colonial could continue to operate its pipeline facilities, with neither party having rights superior to the other.⁹⁴ *Pennington* indicates how a court could balance competing rights and interests of a solar energy company and a mineral lessee, where the latter alleges that the former’s activities interfere with its own—or vice versa—with neither party “deemed to have

86. *See id.* at 649.

87. *Id.*

88. *Id.*

89. *See id.* at 644.

90. *Id.* at 649.

91. *Id.*

92. *Id.* at 648.

93. *See, e.g.,* *Musser Davis Land Co. v. Union Pac. Res.*, 201 F.3d 561, 569 (5th Cir. 2000); *see also* *Butler v. Baber*, 529 So. 2d 374, 383 (La. 1988).

94. *See Pennington*, 260 F. Supp. at 648.

a paramount right of use.”⁹⁵ A mineral lessee’s right to use the surface of the leased premises “is not unfettered.”⁹⁶

Assuming the Louisiana State Legislature continues to remain silent as to the rights and duties of solar energy developers leasing acreage shared with a mineral lessee and surface owner, section 31:11 and the jurisprudence interpreting the statute provide useful guidance as to how a court may rule in adjudicating such issues.

C. Correlative Rights Under Sections 31:9 and 31:10

The doctrine of correlative rights is codified in articles 9 and 10 of the Mineral Code.⁹⁷ Section 31:9 of the Louisiana Revised Statutes states that “[l]andowners and others with rights in a common reservoir⁹⁸ or deposit of minerals have correlative rights and duties with respect to one another in the development and production of the common source of minerals.”⁹⁹ Section 31:10 of the Louisiana Revised Statutes provides that liability will attach when a person with rights in the common source of minerals “intentionally or negligently” uses his own rights so as to deprive another of “the liberty of enjoying” their rights in the common source of supply.¹⁰⁰ A violation of article 10 also occurs when one intentionally or negligently causes damage to another who possesses rights in the supply of minerals.¹⁰¹

Unlike in article 11, the imposition of liability under articles 9 and 10 for a violation of the correlative rights of another will occur only in the presence of intent or negligence, and a finding of liability does not hinge on a standard of reasonableness.¹⁰² Further, whether a court would apply

95. See *Caskey v. Kelly Oil Co.*, 737 So. 2d 1257, 1265 (La. 1999) (“Although the standard of reasonableness in Article 11 ‘constitutes legislative form without specific content . . . the thrust of the rule is to permit concurrent use of the land by the surface owner and the mineral owner with neither owner deemed to have a paramount right of use.’” (citing *McCollam*, *supra* note 52, at 760)).

96. See *id.*

97. See LA. REV. STAT. §§ 31:9, 31:10 (2021).

98. Both “reservoir” and “pool” seem to be synonymous as used in the Mineral Code. Article 213 defines “pool” as an “underground reservoir containing a common accumulation of crude petroleum or gas or both.” LA. REV. STAT. § 31:213(3).

99. See LA. REV. STAT. § 31:9.

100. See *id.* § 31:10.

101. *Id.*

102. See LA. REV. STAT. ANN. § 31:10 cmt. (2021) (“Under Article 10, the obligations of those having correlative rights in a common source of minerals result in liability only if damage is intentionally or negligently caused.”).

articles 9 and 10 to proscribe or approve of a solar energy company's operations on acreage shared with a mineral lessee and surface owner is unclear because a solar lessee likely does not possess rights in a "common reservoir or deposit of minerals."¹⁰³ Rather, a solar lessee seeking to conduct operations on shared acreage would likely be a surface lessee in whose favor the surface owner executed a lease.¹⁰⁴ Nevertheless, since application of the statutes to such a situation is not foreclosed by codal or jurisprudential authority, a discussion of sections 31:9 and 31:10 is beneficial. A court examining the rights and obligations of a solar lessee could look to articles 9, 10, and 11 to hold that the solar lessee possesses correlative rights, and the court could find that the solar lessee thus owes correlative duties vis-a-vis a surface owner and mineral lessee.

In *Mobil Exploration & Producing U.S. Inc. v. Certain Underwriters Subscribing to Cover Note 95-3317(A)*,¹⁰⁵ Mobil Exploration & Producing U.S. Inc., (hereinafter "Mobil")—an oil company—issued an invitation for bids on the drilling of a well located in St. Mary Parish.¹⁰⁶ Cliffs Drilling Company ("Cliffs") forwarded a proposed contract to Mobil, which the latter accepted.¹⁰⁷ Shortly after Cliffs began drilling operations, a well "blowout"¹⁰⁸ occurred, and Cliffs later abandoned the operations.¹⁰⁹ Mobil, along with a multitude of other plaintiffs, filed suit against Cliffs, various underwriters, and insurers.¹¹⁰ The State of Louisiana intervened, joining plaintiffs' claims against Cliffs and the other defendants.¹¹¹ The trial court awarded \$17,000,000 in damages to the State and other plaintiffs for the loss of hydrocarbons due to Cliffs' negligence in the blowout of the well.¹¹² In examining whether plaintiffs had sufficiently proven the State's loss of an ownership interest in the hydrocarbons to be produced from the property at issue, the Louisiana First Circuit Court of Appeal applied Mineral Code article 10 and the comments thereto.¹¹³

103. *See id.* § 31:9.

104. *See, e.g.,* Lyle v. Midway Solar, LLC, 618 S.W.3d 857 (Tex. App. 2020).

105. 837 So. 2d 11 (La. Ct. App. 2002).

106. *Id.* at 16.

107. *Id.*

108. A "blowout" occurs "when any amount of oil or gas is released uncontrollably" from a well. *See* Derek Krieg, *What Is a Blowout?*, OILFIELD BASICS (Oct. 11, 2018), <https://oilfieldbasics.com/2018/10/11/what-is-a-blowout/> [<https://perma.cc/3YCC-LJE6>].

109. *Mobil*, 837 So. 2d at 16.

110. *Id.* at 16–17.

111. *Id.* at 17.

112. *See id.* at 30.

113. *See id.* at 36–39.

The appellate court affirmed the lower court's ruling and found that Cliffs' negligence resulted in the blowout of the well, causing the loss of "a considerable amount of hydrocarbons" that would have otherwise been available for commercial production.¹¹⁴ The court found that article 10 "provides a remedy to a person with rights in a reservoir when the value of his rights has been diminished by the negligent or intentional acts of another."¹¹⁵ Cliffs' negligent operations in drilling the well, the *Mobil* court ruled, fell within the purview of section 31:10.¹¹⁶

Mobil involved a dispute between an oil company, co-owners of various mineral rights, and a drilling company. As previously mentioned, the application of section 31:10 to a solar energy company's operations is questionable—and there are no reported Louisiana decisions addressing the issue. However, the *Mobil* court's holding as articulated suggests that a Louisiana court could look to article 10 to decide a case involving a solar lessee. In articulating its ruling as quoted above,¹¹⁷ the court appeared to indicate that although article 10 protects the rights of individuals with an interest in a common reservoir, it can be applied to the negligent or intentional acts of one who does not possess rights in that common reservoir. For example, a solar energy company could be conducting operations on land, situated above a common reservoir, in which multiple individuals or entities possessed a mineral interest. If the company negligently or intentionally infringed upon the rights of those parties by obstructing or damaging an oil company's drilling equipment, then the parties "deprive[d] . . . of enjoying [their] rights"¹¹⁸ to the minerals could use article 10 to seek recourse against the solar energy company. In other words, while a solar lessee benefitting from the provisions of article 10 is unlikely, the solar lessee could potentially be found liable under article 10 for a violation of its provisions. A court's application of Louisiana Mineral Code article 11 to solve a dispute between owners of competing interests in the same property seems much more plausible, but an application of article 10 in that context is nonetheless possible.¹¹⁹

114. *Id.* at 39.

115. *Id.* (emphasis added).

116. *Id.*

117. *See id.* at 39.

118. *See* LA. REV. STAT. § 31:10 (2021).

119. The comments to article 10 provide, in pertinent part, that the article "furnishes the necessary flexibility to Louisiana courts to deal with problems of correlative rights." LA. REV. STAT. ANN. § 31:10 cmt. (2021).

II. THE ACCOMMODATION DOCTRINE

Unlike in Louisiana, Texas case law sets forth a detailed analysis—the accommodation doctrine—to guide courts in hearing cases involving competing rights in surface use and mineral interests on shared acreage.¹²⁰ Under Texas law, a party possessing “the dominant mineral estate” has the right to go onto the surface of the land burdened by the mineral estate to extract minerals.¹²¹ Incidental thereto is “the right to use as much of the surface as is reasonably necessary to extract and produce the minerals.”¹²² Where the mineral interest holder or mineral lessee has only one method in developing and producing the minerals, he is able to use that method “regardless of whether it precludes or substantially impairs an existing use of the servient surface estate.”¹²³ However, Texas *stare decisis* places a limit on the dominance of the mineral estate and requires rights stemming from the mineral estate to be exercised with “due regard for the rights of the owner of the servient estate.”¹²⁴ Where mineral operations would preclude or impair an existing use by the surface owner, and where “established practices in the industry” provide alternatives, the “rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.”¹²⁵

Much like Louisiana jurisprudence citing Mineral Code article 11, Texas case law also emphasizes the reasonableness of a party’s operations.¹²⁶ In Texas, however, courts and litigants alike are guided by the Texas Supreme Court’s decision in *Getty Oil Co. v. Jones*, which presents a formulaic recitation of standards—known as the accommodation doctrine—applicable to cases concerning competing rights of use in shared property.¹²⁷ The doctrine balances the rights of use of both surface owners and mineral owners, and it simultaneously “recogniz[es] and respect[s] the dominant nature of the mineral estate.”¹²⁸

120. See, e.g., *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); see also *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013); *Lyle v. Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App. 2020).

121. See *Merriman*, 407 S.W.3d at 248–49 (citing *Tarrant Cnty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993); *Getty Oil*, 470 S.W.2d at 621).

122. See *id.* at 249.

123. See *id.* (citing *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 622).

124. See *Getty Oil*, 470 S.W.2d at 621.

125. *Id.* at 622.

126. See, e.g., *id.* at 621–22.

127. See *id.* at 618.

128. See *Merriman*, 407 S.W.3d at 250.

According to *Getty Oil*, a surface owner seeking legal recourse by asserting that the mineral lessee has failed to accommodate an existing use of the surface bears the burden of proving that “(1) the lessee’s use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued.”¹²⁹ If the surface owner meets this burden, he or she must prove further that “given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee [or holder of a mineral interest]”¹³⁰ that allow the lessee to recover minerals and the surface owner to continue his or her existing use.¹³¹ In proving the second element of the accommodation doctrine—that there exists no reasonable alternative available—the surface owner cannot prevail by simply arguing that “the alternative method is merely more inconvenient or less economically beneficial than the existing method.”¹³² Rather, the surface owner must show that “the inconvenience or financial burden of continuing the existing use by the alternative method is so great as to make the alternative method unreasonable.”¹³³

In December 2020, the Court of Appeals of Texas, El Paso, applied the accommodation doctrine to issue a ruling that Louisiana courts and legislators should look to for guidance¹³⁴ in deciding the rights and duties of a solar energy company.¹³⁵ While the appellate court’s holding in *Lyle v. Midway Solar, LLC* would not bind a Louisiana court, it would assist

129. See *id.* at 249 (citing *Getty Oil*, 470 S.W.2d at 628).

130. It should be noted that application of the accommodation doctrine is not limited to situations where the party seeking to conduct mineral exploration and production activities is a “mineral lessee.” Rather, the defendant in *Getty* happened to be a mineral lessee, and thus the genesis of the doctrine’s standards refers to a “lessee.” See, e.g., *Lyle v. Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App. 2020). The *Lyle* plaintiffs were mineral interest owners and had not executed mineral leases with any well operators, and the appellate court applied the accommodation doctrine to resolve the case. See *id.*

131. See *Merriman*, 407 S.W.3d at 249.

132. See *id.* (citing *Getty Oil*, S.W.2d at 628 (“We have not held, as some have stated, that the issue is a question of inconvenience to the surface owner.”)).

133. See *id.* (citing *Getty Oil*, 470 S.W.2d at 628).

134. Both the comments to the Louisiana Mineral Code and Louisiana jurisprudence covering mineral law issues are guided by jurisprudence from other energy-dependent states such as Texas. See, e.g., LA. REV. STAT. ANN. cmt. § 31:10 (2021) (citing Texas jurisprudence); see also *Nunez v. Wainoco Oil & Gas Co.*, 606 So. 2d 1320, 1326 (La. Ct. App. 1992) (citing *Tex. Oil & Gas Corp. v. Rein*, 534 P.2d 1277 (Okla. 1974)).

135. See *Lyle*, 618 S.W.3d at 862.

the court in resolving similar factual and legal issues. The plaintiffs in this case, Kenneth Lyle and Linda Morrison (the “Lyles”), owned 27.5% of the mineral rights in a 315-acre tract of land in Pecos County, Texas.¹³⁶ Gary D. Drgac owned 100% of the surface rights in the tract but owned no mineral interest therein.¹³⁷ Drgac, as surface owner, entered into a lease with Midway Solar, LLC (“Midway”).¹³⁸ The lease granted Midway “free and unobstructed use and development of solar energy resources” for up to 55 years.¹³⁹ In allowing Midway to place solar panels on the property, the lease also provided that Midway could place transmission, electrical, and cable lines anywhere on the property subject to Drgac’s consent.¹⁴⁰

The surface lease acknowledged that Drgac did not own mineral interests on the property, and, through execution of the lease, Midway acknowledged therein that Drgac did not have a “right to control” the operations of the mineral owners.¹⁴¹ Midway ultimately constructed solar energy infrastructure on 215 acres, approximately 70% of the surface land.¹⁴² The Lyles filed suit against, among others, Midway and Drgac, seeking damages for trespass and breach of contract; the Lyles also alleged that construction of the solar facility had “destroyed and/or greatly diminished the value” of their mineral estate.¹⁴³ In response, Midway and Drgac filed motions for summary judgment arguing that the accommodation doctrine governed the case, rendering Midway as owing no duty to the Lyles.¹⁴⁴ The appellate court noted from the outset that the Lyles had never leased their interests in the minerals to oil and gas well operators and had no plans to do so, nor had the Lyles ever commissioned a geological study of the land or entered into a drilling contract.¹⁴⁵ The Lyles conceded that they did not plan to drill any wells on the property.¹⁴⁶

The court agreed with Midway and found that the accommodation doctrine applied to the case as a “sound and workable basis for resolving [the] conflicts between [the parties’] ownership interests.”¹⁴⁷ Under the doctrine, Midway argued that although its solar energy infrastructure

136. *See id.*

137. *Id.* at 863.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 865.

144. *Id.* at 865–66.

145. *Id.* at 863.

146. *Id.*

147. *Id.* at 869.

could at some point in the future potentially interfere with the Lyles' mineral interest, the Lyles did not "have the unilateral right to dictate" Midway's use of the surface acreage for its operations.¹⁴⁸ The *Lyle* court ultimately held that any trespass or breach of contract claim asserted by the Lyles was "premature."¹⁴⁹ Midway's activities, the court held, could not be considered an encroachment on the Lyles' surface rights "until the Lyles actually seek to exercise their rights."¹⁵⁰ It must be mentioned that a petition for review by the Texas Supreme Court has been filed. Thus, the appellate court's decision could be modified. Further, if the Lyles are found to have engaged in exploration and/or drilling operations at the time the petition for review is ruled on, their operations as mineral interest owner could necessitate a different result. Regardless, the *Lyle* decision presents an example of how a Texas court, and also a court in Louisiana, could adjudicate a case involving solar energy development atop land burdened by both surface and mineral interests.

CONCLUSION

In conclusion, Louisiana courts have yet to be presented with a factually similar dispute to that in *Lyle*. However, in cases where conflicts arise between a surface owner, a solar energy company as surface lessee, and a mineral interest owner or mineral lessee, Louisiana Mineral Code articles 9, 10, and 11—and the cases citing these articles—provide guidance in balancing and protecting competing rights held by those parties in property they use concurrently. Texas' accommodation doctrine and the *Lyle* case provide an additional avenue though not binding precedent for a Louisiana court to explore when faced with such issues.

148. *Id.* at 874.

149. *Id.* at 875.

150. *Id.*