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# Sentence Review in Louisiana: Louisiana Lignite - A Lumberman's Lament: Continental Group, Inc. v. Allison (La. 1981)

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tional rights of Americans, the government has found the right to domestic tranquility, and to a peaceful and secure existence, to outweigh the right to procedural guarantees that do not affect the fact-finding process.

*Michelle Ward LaBorde*

LOUISIANA LIGNITE—A LUMBERMAN'S LAMENT:  
*Continental Group, Inc. v. Allison* (La. 1981)

After extensive negotiations, a vendor sold several non-contiguous tracts of land comprising 90,000 acres to the vendee, a timber producer, subject to a reservation of *all mineral rights*. The plaintiff corporation (Continental Group) succeeded the original vendee; the vendor corporation dissolved and distributed its remaining assets among the present defendants. Continental Group sought a declaratory judgment, asserting that each servitude created by the mineral reservation included only the right to explore for and exploit oil, gas, and kindred minerals and did not include the right to strip-mine solid minerals. The parties stipulated that the servitudes had expired as to all minerals on several non-contiguous tracts because nothing had occurred on these tracts to interrupt the ten-year prescription of non-use. The defendants asserted that prescription on the servitudes governing the other tracts had been interrupted by oil or gas production and that accordingly they were entitled to strip-mine the lignite coal on those lands. The plaintiff then contended that the defendants' oil and gas operations were insufficient to prevent accrual of liberative prescription as to solid minerals which require a different method of extraction from the earth. The Louisiana Supreme Court *held*, on rehearing, that the original parties' negotiations evidenced their intent to include the right to strip-mine lignite coal in the reservation, but that this right had prescribed by non-use notwithstanding the production of oil and gas. *Continental Group, Inc. v. Allison*, 404 So. 2d 428 (La. 1981).

Generally, the use and extent of a contractual servitude must be regulated exclusively by the written act creating it. When the terms are clear and explicit, the servitude cannot be restricted, modified, or limited.<sup>1</sup> Often, however, the contracts, especially those creating

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1. See *Delahoussaye v. Landry*, 3 La. Ann. 549, 550 (1848).

mineral reservations, contain ambiguous provisions which must be resolved. Problems also arise in interpreting mineral reservations because the term "minerals" is inherently ambiguous<sup>2</sup> and is difficult<sup>3</sup> to define. Other jurisdictions have held that the word "mineral" is one of general language and not *per se* a term of art.<sup>4</sup> But while the term is not definite, it is susceptible of limitation according to certain rules of contractual interpretation.

Several pertinent rules of interpretation are to be considered in determining which particular mineral substances are conveyed or reserved in a given stipulation. The primary consideration is the intention of the parties at the time of the conveyance.<sup>5</sup> The determination of this intent depends not only upon the language of the deed in question, but also upon the relative position of the interested parties and upon the substance of the transaction embodied by the deed.<sup>6</sup> As a general rule, the interpretation most favorable to the non-drafting party is to be adopted.<sup>7</sup>

Another rule provides that the law favors free, unrestrained use of immovable property. Accordingly, Louisiana courts generally have applied article 753 of the Civil Code of 1870<sup>8</sup> to favor the servient estate owners when conflicts arise as to the interpretation of contractual servitudes between them and the servitude owners. If all interpretations are equally reasonable, the correct interpretation

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2. See *Continental Group, Inc. v. Allison* 404 So. 2d at 435; *id.* at 439 (Dennis, J., concurring); *cf. id.* at 438 (Dixon, C.J., concurring).

3. See generally 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219, at 251-95 (1981).

4. *Id.*

5. See *Holloway Gravel Co. v. McKowen* 200 La. 917, 925, 9 So. 2d 228, 232 (1942). LA. CIV. CODE art. 1959 provides: "However general be the terms in which a contract is couched, it extends only to the things concerning which it appears that the parties intended to contract." See also *Continental Group, Inc. v. Allison*, 404 So. 2d at 439 (Dennis, J., concurring).

6. See *Huie Hodge Lumber Co. v. Railroad Lands Co.*, 151 La. 197, 200-02, 91 So. 676, 677 (1922). See also authorities cited in note 5, *supra*.

7. See *Holloway Gravel Co. v. McKowen*, 200 La. at 932, 9 So. 2d at 233; See LA. CIV. CODE art. 1958.

8. See *Continental Group, Inc. v. Allison*, 404 So. 2d at 440 (Dennis, J., concurring). LA. CIV. CODE art. 753 (as it appeared prior to 1977 La. Acts, No. 514, § 1), provided that: "Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them, are always interpreted in favor of the owner of the property to be affected." LA. CIV. CODE art. 730 states: "Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate." See also *McGuffy v. Weil*, 240 La. 758, 767, 125 So. 2d 154, 158 (1960).

is that which least restricts the ownership of the land conveyed.<sup>9</sup> In other words, strict construction of contractual servitudes has become the norm.<sup>10</sup>

Further complications arise in interpreting mineral reservations which are not carefully drafted. Provisions such as "iron, coal, and other minerals" or "minerals, oil and gas rights" leave open the question of what is intended to be included in the servitude under the generic term "minerals." The rule of *ejusdem generis*,<sup>11</sup> often applied to such stipulations, requires that the word "minerals" be construed as intending to include other minerals of a character similar to the aforementioned ones. Thus, in *Huie Hodge Lumber Company v. Railroad Lands Company*,<sup>12</sup> the court held a reservation of the former type ("iron, coal, and other minerals") to include only solid minerals, and to exclude oil and gas which require drilling. In *Holloway Gravel Company v. McKowen*,<sup>13</sup> a reservation of the latter type ("minerals, oil and gas rights") was held not to have given the vendors a right to exploit the land for sand and gravel.

Judicial application of the rule of *ejusdem generis* involves other considerations as well. The question of whether the grant<sup>14</sup> reserves the vendor's right to strip-mine the land often is resolved by assessing the impact that surface excavation of the minerals will have on

9. See *Whitehall Oil Co. v. Heard*, 197 So. 2d 672, 678 (La. App. 3d Cir. 1976); *Gailey v. McFarlain*, 194 La. 150, 159, 193 So. 570, 573-74 (1940).

10. See, e.g., "Contracts whereby servitudes are created, are designed to confer rights and impose obligations, which, otherwise, would have no existence and should be strictly construed." *Shaffer v. State Nat'l Bank*, 37 La. Ann. 242 (1885), quoted in *Dickson v. Arkansas Louisiana Gas Co.*, 193 So. 246, 249 (La. App. 2d Cir. 1939). *Arcuri v. Cali*, 244 So. 2d 309, 311 (La. App. 4th Cir. 1971), states that servitudes are in derogation of the public policy against encumbered property ownership, and the language contained in such servitudes must be strictly construed. The language will be given effect when it is clear and unequivocal. See also *LaSalle Properties, Inc. v. Louisiana Power & Light Co.*, 391 So. 2d 574, 576 (La. App. 4th Cir. 1980).

11. See 1 H. WILLIAMS & C. MEYERS, *supra* note 3, at § 219.5, at 278-79 n.1 & § 219.6, at 290 n.4.

12. 151 La. 197, 91 So. 676.

13. 200 La. 917, 9 So. 2d 288.

14. The word "grant" is used here to encompass both servitudes and leases. "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." LA. MIN. CODE: LA. R.S. 31:21 (1974). "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals." LA. MIN. CODE: LA. R.S. 31:114 (1974). "The interest of a mineral lease is not subject to prescription of nonuse, but the lease must have a term." LA. MIN. CODE: LA. R.S. 31:115 (1974).

the value of the land.<sup>15</sup> In *River Rouge Minerals, Inc. v. Energy Resources of Minnesota*,<sup>16</sup> the court held that the lease involved did not grant the right to strip-mine the lessor's land.<sup>17</sup> The court noted that even though the parties may have known that coal deposits existed when the lease was executed, no one at that time considered the extraction of coal economically feasible. Land used for grazing and agricultural purposes would be virtually worthless if the vendor was allowed to strip-mine for sand gravel.<sup>18</sup> In fact, the strip mining process completely eliminates the surface owner's enjoyment of the portion of the property being mined.<sup>19</sup>

Other jurisdictions, obviously cognizant of the harsh consequences of strip mining on the land, have adopted the rule that, absent an express intention to the contrary, substances which may be exploited only by strip mining techniques are not included within a reservation or grant of minerals.<sup>20</sup> In *Reed v. Wylie*,<sup>21</sup> the Supreme Court of Texas held that near surface lignite coal belongs to the owner of the land if it is shown that any reasonable method of production, such as strip mining, would destroy or deplete the surface.<sup>22</sup>

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15. Lignite coal is found in veins of varying thickness below the surface at depths of 25 to 200 feet. The surface depth above the vein of coal, called overburden, must be entirely removed by powerful machines before extracting the coal for market. This process of extraction, called strip mining, completely eliminates the surface owner's enjoyment of the portion of the property being mined.

*River Rouge Minerals, Inc. v. Energy Resources of Minnesota*, 331 So. 2d at 878, 880 (La. App. 2d Cir. 1976).

16. 331 So. 2d at 878.

17. *Id.* at 881. The *River Rouge* case involved a Bath Form lease which the second circuit found to be wholly inconsistent with strip mining operations. *Id.* at 880.

18. See *Holloway Gravel Co. v. McKowen*, 200 La. at 931-32, 9 So. 2d at 233.

19. See 331 So. 2d at 880. See note 15, *supra*.

20. See, e.g., *Southern Title Ins. Co. v. Oller*, 268 Ark. 300, 595 S.W.2d 681 (1980); *Carson v. Missouri Pacific R.R. Co.*, 212 Ark. 963, 209 S.W.2d 97 (1948); *Kinder v. LaSalle County Carbon Coal Co.*, 310 Ill. 126, 141 N.E. 537 (1923); *Besing v. Ohio Valley Coal Co. of Kentucky*, 155 Ind. App. 527, 293 N.E.2d 510 (1st Dist. 1973); *Wulf v. Shultz*, 211 Kan. 724, 508 P.2d 896 (1973); *Brady v. Smith*, 73 N.E. 963, 181 N.Y. 178 (N.Y. Ct. App. 1905); *Armstrong v. Lake Champlain Granite Co.*, 147 N.Y. 495, 42 N.E. 186 (N.Y. Ct. App. 1895); *Holland v. Dolese Co.*, 540 P.2d 549 (Okla. Sup. Ct. 1975); *Doochin v. Rackley*, 610 S.W.2d 715 (Tenn. Sup. Ct. 1981); *Campbell v. Tennessee Coal, Iron & R.R. Co.*, 150 Tenn. 423, 265 S.W. 674 (1924); *Shores v. Shaffer*, 206 Va. 775, 146 S.E.2d 190 (1966); *Buery v. Shelton*, 151 Va. 28, 144 S.E. 629 (1928); *Puget Mill Co. v. Duecy*, 1 Wash. 2d 421, 96 P.2d 571 (1939); *West Virginia Dept. of Hwys. v. Farmer*, 226 S.E.2d 717 (W. Va. Sup. Ct. 1976); *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*, 83 W. Va. 20, 97 S.E. 684 (1918).

21. 597 S.W.2d 743 (Tex. Sup. Ct. 1980).

22. "Unless specifically referred to, a person granting or reserving an interest in 'oil, gas, and other minerals' by lease or other conveyance would not generally have in-

The decisions of other states also evince a strong policy against construing ambiguous mineral reservations to include strip mining.<sup>23</sup>

In addition to general problems of interpretation; Louisiana courts also must contend with the difficulty of determining the applicable law governing a servitude. The determination of the appropriate prescriptive period has proved particularly difficult. Before the enactment of the Louisiana Mineral Code,<sup>24</sup> only the general Civil Code articles regarding servitudes governed mineral leases.<sup>25</sup> According to the Civil Code, both the mode of servitude and the servitude itself were subject to prescription.<sup>26</sup> If the servitude owner failed to use his right to its full extent, his servitude was reduced accordingly.<sup>27</sup> For example, in the case of *Ohio Oil Company v. Ferguson*,<sup>28</sup> the court recognized, as it had in the landmark case of *Frost-Johnson Lumber Company v. Salling's Heirs*,<sup>29</sup> that mineral servitudes should be governed by the Civil Code articles on servitudes<sup>30</sup> and consequently found that the servitude owner had exercised a lesser right than that granted him by title; therefore, his servitude was reduced accordingly. Twenty years later, the court reaf-

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tended that his surface be destroyed in order for the grantee to recover the unnamed minerals." *Id.* at 745. See also *Acker v. Guinn*, 464 S.W.2d 348 (Tex. Sup. Ct. 1971). *Contra*, *Lazy D Grazing Ass'n v. Terry Land & Livestock Co.*, 641 F.2d 844 (10th Cir. 1981).

23. See cases cited in note 20, *supra*.

24. LA. MIN. CODE: LA. R.S. 31:1-214 (1974).

25. LA. MIN. CODE: LA. R.S. 31:2 (1974) provides that: The provisions of this Code are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.

26. See LA. CIV. CODE art. 796 (as it appeared prior to 1977 La. Acts, No. 514, § 1), which provided:

The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.

By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title.

27. See LA. CIV. CODE art. 798 (as it appeared prior to 1977 La. Acts, 514, § 1), which stated:

If, on the contrary, the owner has enjoyed a right less extensive than is given him by his title, the servitude, whatever be its nature, is reduced to that which is preserved by possession during the time necessary to establish prescription.

See LA. CIV. CODE art. 759, which provides that: "A partial use of the servitude constitutes use of the whole."

28. 213 La. 183, 34 So. 2d 746 (1947).

29. 150 La. 756, 91 So. 207 (1922).

30. 213 La. at 195-96, 34 So. 2d at 750.

firmed this view in *Trunkline Gas Company v. Steen*.<sup>31</sup>

In another case,<sup>32</sup> a transmission company's failure to construct additional lines during the applicable ten-year period constituted a less extensive use<sup>33</sup> than that given the company by title. The company thus lost by prescription any rights it had to build additional lines.<sup>34</sup> Another circuit followed this reasoning in holding that a gas company's right to lay additional pipelines had prescribed by non-use for ten years.<sup>35</sup> Thus, under the Civil Code articles, a servitude owner had to use his servitude in the full manner contemplated by the grant or reservation in order to interrupt prescription and preserve intact his right.<sup>36</sup>

The Mineral Code changes this rule and provides that "[a]n interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."<sup>37</sup> But this statute's application is limited in that no provision of the Code may be applied to divest already vested rights.<sup>38</sup> This prohibition is in accord with both the state and federal constitutions.<sup>39</sup> Since the acknowledged goal of the Mineral Code is to codify existing jurisprudence,<sup>40</sup> the Code provisions largely restate existing jurisprudential rules. But in previously unclear or untreated areas

31. 249 La. 520, 187 So. 2d 720 (1966). The court stated that "[I]n the evolution of the mineral law in the State, it was recognized that the sale or reservation of a mineral right, having been classed as a servitude, was subject to the applicable articles of the Civil Code in the resolution of conflicting claims . . . ." 249 La. at 535, 187 So. 2d at 725.

32. *Columbia Gulf Transmission Co. v. Fontenot*, 187 So. 2d 455 (La. App. 3d Cir. 1966).

33. See LA. CIV. CODE arts. 796 & 798 (as they appeared prior to 1977 La. Acts, No. 514, § 1).

34. 187 So. 2d at 461.

35. *Dickerson v. R.J.M. Pipeliners, Inc.*, 331 So. 2d 501, 503-04 (La. App. 2d Cir. 1976).

36. See *Louisiana Petroleum Co. v. Broussard*, 172 La. 613, 617-18, 135 So. 1, 2 (1931). See also *Goldsmith v. McCoy*, 190 La. 320, 329-30, 182 So. 519, 523 (1938).

37. LA. MIN. CODE: LA. R.S. 31:40 (1974).

38. "The provisions of this Code shall apply to all mineral rights, including those existing on the effective date hereof; but no provision may be applied to divest already vested rights to impair the obligation of contracts." LA. MIN. CODE: LA. R.S. 31:214 (1974).

39. See U.S. CONST. art. I, § 10; U.S. CONST. amend XIV, § 1; LA. CONST. art. I, § 23; LA. CONST. art. IV, § 15 (1921). See also Day, *Applicability of The New Mineral Code to Existing Mineral Rights*, in 22d ANN. INSTITUTE OF MINERAL LAW 205, 208-09 (Harrell ed. 1975).

40. 1 LA. REV. STAT. ANN.—MIN. CODE, (introduction by the La. St. L. Inst.) (West).

of law, the application of the Code is designed to promote legal stability by announcing a particular principle as the proper rule of law.<sup>41</sup> This latter approach creates a retroactivity problem.

After the enactment of the Mineral Code, courts faced a dilemma in determining disputed rights created prior to its effective date. In *GMB Gas Corporation v. Cox*,<sup>42</sup> the second circuit held that the Mineral Code articles should govern pre-code issues which had not been resolved clearly by the state's jurisprudence.<sup>43</sup> A concurring opinion stated that the court actually was holding the Mineral Code to be retroactive under the guise of promoting stability.<sup>44</sup> However, if retroactive application of the Code divests vested rights, then clearly such retroactive application is unconstitutional.<sup>45</sup>

In *Continental Group, Inc. v. Allison*,<sup>46</sup> the court directly confronted the aforementioned problems of interpreting contractual mineral servitudes and of determining whether the Civil Code or the relatively recent Mineral Code applies to such servitudes created before the effective date of the new legislation. The servitude at issue was one of *all mineral rights*, a phrase which the supreme court conceded was "inherently ambiguous."<sup>47</sup> The court also acknowledged that the broadest definition of the term "minerals" would encompass almost every earthen substance.<sup>48</sup> Thus, the court followed *Huie Hodge Lumber Company*,<sup>49</sup> which allowed judicial scrutiny of extrinsic evidence to determine the parties' intentions in making the reservation. The Louisiana Supreme Court, adopting the second circuit's analysis of the contract negotiations preceding the reservation as determinative of the issue,<sup>50</sup> held that the instant servitude included the right to strip-mine lignite coal.<sup>51</sup> The supreme court, however, in reversing the court of appeal's holding, concluded

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41. *Id.* See generally Day, *supra*, note 39, at 209-12.

42. 340 So. 2d 638 (La. App. 2d Cir. 1976).

43. "To establish stability in this area of the law, the provisions of the Mineral Code should be followed on pre-code issues which have not been clearly resolved by the jurisprudence." *Id.* at 640.

44. *Id.* at 641 (Marvin, J., concurring).

45. See authorities cited at note 39, *supra*.

46. 404 So. 2d 428 (La. 1981).

47. *Id.* at 435.

48. *Id.*

49. 151 La. 197, 91 So. 676.

50. *Continental Group, Inc. v. Allison*, 379 So. 2d 1117, 1119-20 (La. App. 2d Cir. 1979), *rev'd*, 404 So. 2d 428 (La. 1981).

51. 404 So. 2d at 435.

that the defendant's strip mining rights had prescribed by non-use for ten years.<sup>52</sup>

The initial issue, the interpretation of the servitude, challenged the court to apply the general rules of construction, including the parties' intentions, in light of the obvious public policy. The second circuit's analysis,<sup>53</sup> which was adopted by the supreme court,<sup>54</sup> employed several construction principles, one of which provides that all doubts arising from the language embodied in the agreement should be construed in favor of the non-drafting party.<sup>55</sup> The appeals court, however, concluded that negotiations by both parties produced the ultimate language;<sup>56</sup> thus, neither party could claim the benefit of this rule. In addition, the rule of *ejusdem generis*,<sup>57</sup> applied in *Huie Hodge*<sup>58</sup> and in *Holloway Gravel*<sup>59</sup> to exclude the right to minerals which require a different method of extraction from those specifically enumerated, did not apply because no additional terms accompanied the reservation of *all mineral rights*.<sup>60</sup>

The court of appeal, in its quest to determine the parties' intent, engaged in an exhaustive review and analysis of the circumstances and negotiations surrounding the sale in which the servitude was created.<sup>61</sup> Originally, the plaintiff vendee's predecessor (Gair) proposed the express exclusion of "earth, sand, and gravel" from the reservation. On the other hand, the predecessor of the defendant vendor (Mansfield) sought to maintain the broad, general scope implied by the phrase *all mineral rights*. The vendee subsequently agreed to leave the term unrestricted in return for a provision requiring the vendor to reimburse the vendee for all damage done "to the timber" or "to other forest products."<sup>62</sup>

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52. *Id.*

53. 379 So. 2d at 1123-30.

54. 404 So. 2d at 435.

55. See LA. CIV. CODE art. 1958, provides:

But if the doubt or obscurity [in the agreement] arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee.

56. 379 So. 2d at 1124.

57. See text at note 11, *supra*.

58. 151 La. 197, 91 So. 676. The reservation in that case was of the right to *iron, coal, and other minerals*. 151 La. at 199, 91 So. at 677.

59. 200 La. 917, 9 So. 2d 228. The reservation there was of *all the minerals, oil and gas rights*. 200 La. at 920, 9 So. 2d at 230.

60. 379 So. 2d at 1120 (emphasis added).

61. *Id.* at 1120-24.

62. *Id.* at 1121-22. The reservation language reads:

"There is expressly excluded from this sale and the Vendor reserves, all

Based on this trade-off by the parties, the second circuit held that the parties intended that solid material could be extracted by strip-mining the servitudinal lands.<sup>63</sup> However, even if the right to strip-mine gravel was included within the reservation, the court's finding that the vendor reserved lignite mining rights does not follow logically. Given the vendee's concern over the possibility of sand and gravel operations, it is unlikely that the company would have assented to a transaction in which the vendor could enjoy a far more extensive right than that necessary to exploit those materials. Further support for the plaintiff's argument is that the damage provision did not mention that the mineral owner would be liable for damages to the land.<sup>64</sup> Certainly, such a clause would have been included expressly if the strip-mining of lignite had been within the contemplation of the parties.

The real issue, as presented by Continental and recognized as such by the second circuit, was whether these parties intended at the time of contracting that the servitude would permit the vendor to strip-mine a solid mineral which had no economic significance until two decades later.<sup>65</sup> Area residents knew of the presence of lignite coal nearby and that it could be strip-mined from the land. But at the time the parties created the reservation in issue, this process was not economically feasible. The court responded to this issue by simply stating, "[t]he very word *explore* . . . implies a venture into the unknown or uncertain. This is in the nature of a 'hope' which may be sold or reserved."<sup>66</sup> On this basis, the court found the fact that a particular mineral has no foreseeable economic value at the time of contracting to be a mere factor, along with many others, to

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mineral rights in the lands conveyed hereunder . . . with the right of ingress and egress for the proper exploitation of the same. The Vendor . . . shall pay the Vendee for all damage done to timber, wood or other forest products or the property of the Vendee on the lands conveyed hereunder . . . in connection with operations by the Vendor . . . in the course of such exploitation and shall assume the payment of, and pay any taxes levied on the minerals produced from such operations, or the increase in the value of the land, if any, caused thereby or by the equipment placed thereon in connection with such exploitation.

*Id.* at 1119 n.1.

63. *Id.* at 1123-24.

64. See note 62, *supra*.

65. The trial court concluded that "had the purchaser known . . . that every acre of the timberlands acquired . . . would be subject to strip mining, . . . it would not have made the purchase." 379 So. 2d at 1124.

66. *Id.* at 1129. LA. CIV. CODE art. 2451 provides: "It also happens sometimes that an uncertain hope is sold . . ."

be considered in assessing the parties' intentions.<sup>67</sup>

A fundamental tenet established in the jurisprudence of Louisiana and other states is that a substance must be commercially exploitable at the time of the agreement for it to be deemed included in a broadly worded grant or reservation of mineral rights.<sup>68</sup> In *Huie Hodge*, oil and gas were excluded from the servitude in large part because these substances were not known to be valuable minerals at the time the parties made the reservation in question.<sup>69</sup> In *River Rouge*, the court expressly relied upon the fact that, as late as 1971, lignite was not commercially mineable.<sup>70</sup> Therefore, in determining the parties' intentions,<sup>71</sup> the court of appeal failed to give proper weight to the crucial fact that at the time of the instant contract (1956), lignite coal was not known to be a valuable or economically feasible mineral substance.

In addition, the court of appeal perceived certain arguably irrelevant facts regarding the plaintiff's business as pertinent.<sup>72</sup> Much attention was devoted to the plaintiff's plans for harvesting timber on a rotating basis.<sup>73</sup> The details of Continental's restoration program,<sup>74</sup> considered conjunctively with evidence that substantial res-

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67. 379 So. 2d at 1129.

68. For an excellent comment on this rule of construction generally, and on the *River Rouge* case in particular, see Ellis, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Mineral Rights*, 37 LA. L. REV. 393, 393-94 (1977), stating in part:

The common result of restrictive interpretation carries an important message for the prudent legal draftsman who seeks broad coverage—avoid generalities and be explicit, even at the expense of using extra words; . . . The legal draftsman who wants today's contracts to cover tomorrow's still unknown resources cannot rely upon a general phrase in a granting clause.

See also *Continental Group, Inc. v. Allison*, 404 So. 2d at 439 (Dennis, J., concurring).

69. 151 La. at 200-02, 91 So. at 677-78.

70. "While the existence of the coal deposits may have been known when the instant lease was executed, no one then considered it economically feasible to extract it." 331 So. 2d at 881.

71. See generally LA. CIV. CODE arts. 1945-1962.

72. See generally 379 So. 2d at 1125-27. See note 65, *supra*, and text at note 66, *supra*. Cf. *Holloway Gravel Co. v. McKowen*, 200 La. 917, 9 So. 2d 228, and *River Rouge Minerals, Inc. v. Energy Resources of Minn.*, 331 So. 2d 878, in each of which the court considered the purposes for which the landowner had acquired the property in question rather than the fact that the property owner, several years later, had granted the right to extract gravel and lignite, respectively.

73. 379 So. 2d at 1127.

74. The court acknowledged that Continental annually harvests timber from about 1/30 of its non-contiguous tracts which comprise more than 300,000 acres in North

toration of land subject to strip mining is possible within forty years, fortified the court's position. The court concluded that Continental had abundant land possessions and that the exercise of the defendants' alleged right to strip-mine portions of these lands would not destroy the plaintiff's business.<sup>75</sup>

The court acknowledged that Continental's operations were generally irrelevant in that the actions of a subsequent vendee should have no bearing on the intent of the original parties to the sale.<sup>76</sup> The second circuit, however, found these actions to be one of many factors to consider in determining whether the defendant's right to strip-mine "would be *utterly destructive, unreasonably onerous or burdensome* of Continental's rights as landowner."<sup>77</sup> This determination is irrelevant; no basis exists upon which to conclude that the *Holloway Gravel* and *River Rouge* cases would have been decided differently if the landowners in those cases had owned substantial other lands which they could have continued to farm. Moreover, there is certainly no requirement that the alleged extent of the servitude operations must be "utterly destructive" to the land before the public policy favoring the landowner in the interpretation of ambiguous servitudes will apply.<sup>78</sup>

The instant case vividly illustrates two areas in which this policy should apply. As mentioned earlier, the original parties could not have intended to include the right of lignite mining in their reservation as the extraction of lignite coal was not economically feasible at the time of the contract.<sup>79</sup> Additionally, strip mining places an extremely heavy burden upon the land.<sup>80</sup> Generally, when all interpretations of the contractual agreement are equally reasonable, the correct interpretation is the one which least burdens the ownership of the conveyed lands.<sup>81</sup> Thus, the courts have applied Civil Code article 753 to create a presumption in favor of the ser-

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Louisiana and South Arkansas. Continental replants these lands to allow full regrowth within approximately thirty years. 379 So. 2d at 1127.

75. *Id.*

76. *Id.*

77. *Id.*

78. See note 8, *supra*.

79. See text at note 66, *supra*.

80. See note 15, *supra*.

81. See, e.g., *McGuffy v. Weil*, 240 La. 758, 767, 125 So. 2d 154, 158 (1960); *Whitehall Oil Co. v. Heard*, 197 So. 2d 672, 678 (La. App. 3d Cir. 1967); LA. CIV. CODE art. 753 (as it appeared prior to 1977 La. Acts, No. 514, § 1); LA. CIV. CODE art. 730. See note 9, *supra*.

vient estate owner.<sup>82</sup> Louisiana law, in rejecting the concept of separate surface and mineral estates, has striven to restrict and limit the mineral owner's rights in favor of the landowner. Conversely, the latter's freedom to use his land should not be fettered by lengthy and burdensome restrictions, particularly those of a nature which were unknown and beyond the parties' contemplation at the time they created the servitude.

The court conceded that strip mining absolutely eradicates the surface owner's enjoyment of the portion of the property being mined,<sup>83</sup> but did not give sufficient weight to this consideration. The Louisiana courts have recognized that the issue of surface excavation is an important factor to be contemplated in construing a mineral deed. The fact that the purchaser acquired the burdened land in question for agricultural purposes was a primary basis for the decision in *Holloway Gravel*. The *Holloway* court stressed that sand and gravel were not included within the reserved mineral rights because removal of those substances by surface excavation would leave the purchaser with land of insignificant value.<sup>84</sup> *Holloway Gravel* is directly analogous to the instant situation. Gair, plaintiff's predecessor in title, acquired the land from Mansfield for the express purpose of growing and harvesting timber. Surely Gair did not purchase these lands with the realization that the corporation could possibly lose the right to grow and harvest timber by defendants' strip mining activities.

The *Continental* court only briefly mentioned the law regarding strip mining in other jurisdictions, finding the common thread in all of the cases to be the parties' intent at the time of making the grant.<sup>85</sup> The second circuit provided an extensive list of Mineral Code articles<sup>86</sup> in support of its conclusion that the principles of Louisiana law are generally consistent with those of other states.<sup>87</sup> Until recently, however, Louisiana had never experienced strip-mining of lignite. This lack of experience in the area supports the

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82. See notes 8 & 9, *supra*.

83. 379 So. 2d at 1125-26. The court noted *River Rouge*, 331 So. 2d 878. *Id.*

84. We do not think it can be seriously contended that it was in the contemplation of McKowen that he might at any time be deprived of the use of the land for the purposes for which he had purchased it by the mining of sand and gravel thereon largely for the benefit of his vendors.

200 La. at 931-32, 9 So. 2d at 233.

85. 379 So. 2d at 1127.

86. *Id.* at 1128. See, e.g., LA. MIN. CODE: LA. R.S. 31:4, 5, 11, 15, 21 & 22 (1974).

87. 379 So. 2d at 1127-28.

proposition that the court should have afforded more consideration to the laws of states which have extensively litigated this issue.

The Texas rule is that near surface minerals which can be exploited by strip mining belong to the surface owner. This general rule of construction applies in all situations where the parties have not expressly stated a right to engage in strip mining.<sup>88</sup> Other jurisdictions have adopted a similar rule.<sup>89</sup> Even in cases where the right to a particular mineral exploitable by strip mining is conceded, it has been held that the mineral owner does not have the right to engage in strip-mining of the substance absent an express, affirmative grant of the right to conduct such operations.<sup>90</sup> Moreover, in his dissent from the Louisiana Supreme Court's refusal to grant writs in *River Rouge*, Justice (now Chief Justice) Dixon clearly recognized that strip mining is a separate issue once the question of what minerals are covered by the lease is resolved.<sup>91</sup> The obvious policy underlying this rule is the judiciary's refusal to allow such a devastating activity without clear evidence of such an intent.

The second issue raised by the facts of the case was whether the defendants' rights to *all* the minerals had been reduced because only oil and gas operations were conducted upon the burdened land. The court of appeal followed its holding in *GMB Gas Corporation*<sup>92</sup> that the Mineral Code is to be retroactively applied where the specific issue has not been clearly resolved contrarily by previous litigation. The court asserted that the prescription issue was not settled clearly before the enactment of the Mineral Code because expert witnesses disagreed as to the prior law on this point.<sup>93</sup> Therefore, the second circuit held that according to the Mineral Code,<sup>94</sup> the defendants' oil and gas operations had interrupted prescription as to all the minerals, including lignite.

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88. See *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980); *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Riddlesperger v. Creslenn Ranch Co.*, 595 S.W.2d 193 (Tex. Civ. App. 1980); *Williford v. Spies*, 530 S.W.2d 127 (Tex. Civ. App. 1975). See also Note, *Beneath the Surface Destruction Test: The Dialectic of Intention and Policy*, 56 TEX. L. REV. 99 (1977).

89. See text at note 22, *supra*.

90. See *United States v. Polino*, 131 F. Supp. 772 (D.C. W. Va. 1955); *Franklin v. Callicoat*, 119 N.E.2d 688 (Ohio C.P. 1954); *Rochez Brothers, Inc. v. Duricka*, 97 A.2d 825 (Pa. Sup. Ct. 1953).

91. 337 So. 2d at 221.

92. *GMB Gas Corp. v. Cox*, 340 So. 2d 638, 640 (La. App. 2d Cir. 1976).

93. 379 So. 2d at 1130.

94. Article 36 of the Louisiana Mineral Code provides that: "Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the

The supreme court on rehearing reversed the decision on the prescription issue, and declared that Allison's right to explore for and exploit lignite had prescribed for ten years' non-use.<sup>95</sup> The court reasoned that at the time of the Mineral Code's enactment, Continental had vested rights in the land. The Mineral Code prohibits application of its provisions which would divest rights already vested.<sup>96</sup>

The judiciary has concluded that judicial decisions should analyze Civil Code provisions antedating the Mineral Code, regardless of whether applicable jurisprudence exists on point, because the Civil Code may vest certain rights in individuals.<sup>97</sup> The court examined both the pertinent Civil Code articles<sup>98</sup> and the prior case law interpreting these codal provisions. The supreme court previously had applied the Civil Code in determining a mineral owner's rights in *Ohio Oil Company v. Ferguson*.<sup>99</sup> In that case, the servitude owner's right was reduced to that which he had preserved by his use or possession, as he had enjoyed a right less extensive than that given him by title.<sup>100</sup>

The supreme court phrased the rule applicable to preservation of servitudes by simply stating, "[I]f you don't use it, you lose it, and if you don't use it well enough, you lose it;"<sup>101</sup> i.e., a servitude must be used in the manner contemplated by the grant or reservation in order to interrupt prescription.<sup>102</sup>

servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production." Article 40 states that: "An interruption of prescription applies to all types of minerals covered by the act creating the servitude and to all modes of its use."

95. 404 So. 2d at 435.

96. See note 37, *supra*.

97. Professor Ellis noted this at Ellis, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Mineral Rights*, 38 LA. L. REV. 377, 378 (1978). The court quoted from this scholarly work in response to the court of appeal's application of its reasoning expressed in *GMB Gas Corp.*, 340 So. 2d 638.

98. See notes 26 & 27, *supra*.

99. 213 La. 183, 34 So. 2d 746 (1947).

100. 213 La. at 252, 34 So. 2d at 769. See note 31, *supra*.

101. 404 So. 2d at 437.

102. The court cited *Louisiana Petroleum Co. v. Broussard*, 172 La. 613, 135 So. 1 (1935) and *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938). In *Goldsmith*, the court followed *Broussard*, *supra*, and found that a geophysical exploration for ascertaining the presence of minerals beneath the surface was not use of the servitude in the manner contemplated by the grant involved, and, therefore, the activity did not interrupt prescription. See also *Dickerson v. R.J.M. Pipelines, Inc.*, 331 So. 2d 501 (La. App. 2d Cir. 1976); *Columbia Gulf Transmission Co. v. Fontenot*, 187 So. 2d 455 (La. App. 3d Cir. 1966).

The litigants previously had stipulated that the defendants had failed to use their right to explore and capture lignite. The court thus found that the plaintiff had been in possession of this right since 1966. Since the mode of servitude as well as the servitude itself is subject to prescription,<sup>103</sup> the defendants' right to strip-mine lignite had prescribed. Moreover, the defendants' limited activity in drilling only for oil and gas reduced their servitude to that which they had preserved.<sup>104</sup>

The court's finding that the defendants' right to strip-mine lignite had prescribed by ten years, non-use<sup>105</sup> is clearly correct. Several points regarding prescription of mineral reservations, however, merit clarification. In addition, the new rule on prescription<sup>106</sup> increases the significance of interpreting mineral reservations.

Prior to the enactment of the Mineral Code in 1974, only the rules applicable to servitudes in general<sup>107</sup> governed the prescription of mineral reservations.<sup>108</sup> The prior law was properly applied in determining the prescription issue at hand because the servitudes at issue in the instant case were created in 1956.<sup>109</sup> Clearly, the right to strip-mine for lignite would have constituted a separate mode of use under Civil Code article 796,<sup>110</sup> and a more extensive use under Civil Code article 798<sup>111</sup> for oil and gas drilling operations differ markedly from the techniques employed in strip-mining coal.<sup>112</sup> Consequently, liberative prescription of ten years applicable to such surface mining rights accrued in 1966.

The Mineral Code, although generally considered as a codification of prior jurisprudence, explicitly changes the law in particular areas, including prescription.<sup>113</sup> However, the prior law remains ex-

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103. See note 26, *supra*. See LA. MIN. CODE: LA. R.S. 31:40, comment at 535-36 (1974).

104. See note 27, *supra*. See LA. MIN. CODE: LA. R.S. 31:40, comment at 535-36 (1974).

105. 404 So. 2d 435.

106. LA. MIN. CODE: LA. R.S. 31:40 (1974).

107. See note 25, *supra*.

108. See notes 26 & 27, *supra*. See *Ohio Oil Co. v. Ferguson*, 213 La. 183, 34 So. 746.

109. 404 So. 2d at 436-37.

110. See note 26, *supra*.

111. See note 27, *supra*.

112. See note 15, *supra*. See 379 So. 2d at 1125-26.

113. See generally McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 732 (1976). See also LA. MIN. CODE: LA. R.S. 31:40, comment at 535-36 (1974).

tremely important as existing mineral rights will continue for some time to outnumber those rights created since the enactment of the new law.<sup>114</sup> Certainly, if the servitude at issue had been created subsequent to the enactment of the Mineral Code, then good faith operations for oil and gas would have preserved the servitude owner's right to conduct any subsequent surface mining activities which originally had been granted.

The Louisiana Supreme Court refused to apply Louisiana Revised Statutes 31:40 (which provides that an interruption of prescription applies to all modes of use) retroactively.<sup>115</sup> At the time the Mineral Code became effective, the plaintiff already had a vested interest in the right to strip-mine lignite, which the defendants had lost by liberative prescription of non-use for ten years. The court of appeal in *GMB Gas Corporation* justified retroactive application of the Mineral Code on the basis that the particular issue at bar had not been clearly resolved to the contrary. The Louisiana Supreme Court concluded that the prescription issue in the instant case had been sufficiently clarified<sup>116</sup> so that the *GMB Gas Corporation* case could not be used to justify such application of the Code under these circumstances.<sup>117</sup>

The significant import of the supreme court's adoption of the lower court's mineral reservation interpretation in the instant case is more clearly understood by considering it conjunctively with the new rule<sup>118</sup> on prescription of these rights. If the courts allow a reservation or grant of mineral rights to expand accordingly as new minerals are determined profitable, then by coupling this reasoning with Louisiana Revised Statutes 31:40, the servitude owner may preserve his privilege to indefinite rights upon the burdened land simply by utilizing any one of the originally reserved minerals.<sup>119</sup>

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114. "What may be easy to overlook, however, is that at this particular time, and certainly for the immediate future, existing mineral rights will far outweigh rights created since the enactment of the Code." Day, *supra* note 39, at 205.

115. 404 So. 2d at 436.

116. See notes 26 & 28, *supra*.

117. 404 So. 2d at 437-38. See text at note 44, *supra*; see also text at note 97, *supra*.

118. LA. MIN. CODE: LA. R.S. 31:40 (1974).

119. The supreme court's holding that the right to strip-mine lignite coal had prescribed by ten years non-use will certainly preclude owners of servitudes created before the enactment of the Mineral Code from subsequently claiming such rights. The new legislation on prescription of mineral servitudes, however, explicitly provides that "any use of the servitude in any mode" will prevent the accrual of prescription. Therefore, the court's holding on the contractual interpretation issue did not circumvent the many foreseeable problems.

The court's holding, in effect, creates a virtually limitless mineral estate contrary to the view espoused in *Frost-Johnson*.<sup>120</sup> The broad holding presumably will allow mineral owners to search freely for potentially valuable minerals buried in the earth. Given the economic feasibility of extracting such substances, the servitude owner conceivably may be permitted to remove even the soil and subterranean water from the encumbered lands. Clearly, these operations would render the property useless for surface uses such as timber production.

Another consideration is whether, in light of these foreseeable occurrences, the owner could sell the burdened land. Surely, no prospective purchaser would pay him a reasonable price for the property, nor would any financial institution accept such property as collateral for a development loan. This inability of the landowner to resell or mortgage his land effectively takes the property out of commerce.<sup>121</sup>

The supreme court's proposition regarding prescription ("if you don't use it, you lose it") may create additional problems. The court supported this conclusion by referring to two cases which held that failure to lay additional pipelines for a ten-year period prescribed the right to do so.<sup>122</sup> Arguably, if these pipeline cases are analogized to cases involving controversies over the permissible depth of oil and gas drilling, then the right to drill at deeper depths may be forfeited by drilling only at shallower levels for ten years or longer.<sup>123</sup> This rationale would encourage, and perhaps necessitate, servitude owners to drill at the deepest levels possible at the onset of their operations. Such activity would result in less efficient utilization of our scarce natural resources.<sup>124</sup>

Although the court's examination of the factual circumstances surrounding the sale is theoretically sound, the decision necessarily

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120. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

121. "It is the policy of this state to maintain property in commerce." *River Rouge Minerals, Inc. v. Energy Resources of Minn.*, 331 So. 2d at 880 (quoting from *Gueno v. Medlenka*, 238 La. 1081, 117 So. 2d 817 (1960)). See also *Ellis*, *supra* note 68, at 395, commenting on the *River Rouge* case: "Perhaps the greatest merit of the decision is that it should put land into commerce and clear titles from arrangements ill-suited to a new resource exploitation problem. Conscious negotiation and new forms can then be focused on problems of new resource exploitation."

122. See text at notes 34 & 35.

123. See LA. MIN. CODE: LA. R.S. 31:29 (1974).

124. See *Continental Group, Inc. v. Allison*, 404 So. 2d at 440 (Dennis, J., concurring).

presents adverse ramifications. Every such reservation or grant now inevitably will require litigation to determine what the concerned parties actually intended.<sup>125</sup> Title searchers now must interview all of the attorneys who negotiated the reservation or grant at issue and scrutinize countless title documents in an effort to ascertain which minerals the parties intended to include in their transaction. Even so, no prospective buyer will be certain of exactly what rights he is purchasing or is allowing the seller to reserve. In light of the problems mentioned above, and the well-known fact that the judiciary is already extensively overworked, Louisiana courts should adopt a precise rule, similar to that of the Texas courts.<sup>126</sup> Even if the courts do not wish to adopt the other states' rule, the better position would be to follow the traditional approach of restricting the servitude to what the parties could have contemplated at the time they consummated their agreement and to those substances which were economically exploitable at the time.<sup>127</sup> Expanding mineral reservations to include limitless substances eventually will leave little earth for such vital activities as farming, cattle-raising, and timber production.

This decision should be limited to its particular facts and circumstances,<sup>128</sup> especially to the fact that the instant reservation was of *all mineral rights*. Nevertheless, persons negotiating grants or reservations of mineral rights upon their property now must be quite cautious in the terminology which they employ. The parties should explicitly list the particular substances which they intend to include within their contract. Moreover, these parties should specifically exclude those rights which they do not wish to convey. Despite taking these precautions, persons still may be compelled to litigate issues concerning substances which neither party reasonably could have contemplated at the time of contracting.

*Mark Alan Lowe*

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125. *Id.*

126. See text at note 22.

127. See 404 So. 2d at 439 (Dennis, J., concurring).

128. "[W]e reverse the trial court and hold that under the peculiar circumstances of this case, a reservation of *all mineral rights* . . ." 379 So. 2d at 1119. Justice Dennis, in his well-reasoned concurrence, states that, "On this admittedly close issue of the scope of the mineral reservation, the majority has declined to follow the sound and established principles of construction because of the 'particular and unusual facts' in this case." 404 So. 2d at 440 (Dennis, J., concurring).