Reasonable Regard: A Solution to the Lignite Problem

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Although strip mining in Louisiana once seemed a remote possibility,¹ the nation's need for new energy sources has necessitated development of the lignite deposits here.² Since land often is burdened with separate oil and coal leases, operations of one mineral producer are likely to hinder, if not preclude, the operations of another.³ Thus significant conflicts may develop. For example, strip mining for lignite totally destroys the surface, thereby precluding production of oil because a certain portion of the surface is required for drilling operations. Each developer would like exclusive control of the surface to conduct his operations, but this is often impractical. Therefore, a way

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¹ The Louisiana Second Circuit Court of Appeal recognized this fact in River Rouge Minerals, Inc. v. Energy Resources of Minn., 331 So. 2d 878 (La. App. 2d Cir. 1976), in which it held that the particular mineral lease involved did not permit strip mining for lignite. The court based its decision on the fact that "[w]hile 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." Id. at 880. At that time, Louisiana had an abundance of gas and oil, which overshadowed any possibility of lignite being used as a fuel. However, in the early 1970s rising energy costs and shortages resulted in a reappraisal by the energy industry of the economic feasibility of mining the lignite deposits in northern Louisiana. The court of appeal in Continental Group, Inc. v. Allison, 379 So. 2d 1117, 1126 (La. App. 2d Cir. 1979), rev'd on other grounds, 404 So. 2d 428 (La. 1981), stated that "[i]nterest in the lignite deposits became dormant when oil and gas production became abundant in Louisiana but revived in the 1970s when domestic production of oil and gas substantially failed to meet the nation's need for energy."

² There are significant deposits of lignite in DeSoto, Red River, Natchitoches, and Bienville parishes, and initial development will take place in these areas. Lignite is of the lowest rank of coals, being a brown substance intermediate between peat and bituminous coal. The name is derived from ligum, the Latin word for wood, because the texture of the original wood is often discernible in the coal. Webster's New Collegiate Dictionary 665 (8th ed. 1976).

³ The contrasts to oil and gas development should be noted: lignite cannot be mined in piecemeal fashion—it must be developed sequentially or it may not be economical to mine it at all; oil and gas underlying a large area can be produced with very small disturbance to the surface—lignite mining occupies all of the surface; oil and gas may be transported long distances before use, and a vast market exists for the substances—lignite will probably not be moved very far from its point of development, and it is difficult to say that it has a market value apart from the single plant near the field built to utilize that particular sort of lignite; and a number of producers of oil or gas may operate in a single reservoir or field or even have separate rights as to different strata underlying the same tract of land—lignite development in one field by more than one producer is not very feasible.

for the two competing mineral interests to coexist peacefully must be found so the nation's call for maximum development of natural resources can be answered.

The Louisiana Mineral Code furnishes a formula for resolving the controversies that inevitably arise between the lignite producer and the oil and gas producer. Articles 11 and 22 of the Mineral Code recognize the respective rights of owners of different rights in land. These two articles embody a standard of reasonableness that is used to determine whether landowners or mineral interest owners have exercised their rights in a tract of land with reasonable regard for the other interests therein. That standard of reasonableness is referred to as "reasonable regard." This note will discuss how Louisiana applies the standard of reasonable regard, how that standard compares with the standard of "due regard," and how these two standards compare with the doctrine of accommodation of the surface owner. In addition, potential areas of conflict between oil producers and lignite producers will be discussed, as well as how these problems should be resolved.

History

Although there have been no recent cases in other jurisdictions dealing with conflicts between competing mineral interests, a few older

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

5. LA. MIN. CODE: LA. R.S. 31:22 (1974) states:
The owner of a mineral servitude is under no obligation to exercise it. If he does, he is entitled to use only so much of the land as is reasonably necessary to conduct his operations. He is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.

6. In most cases mineral lessees will be the parties involved in conflicts; however, article 11's standard of reasonable regard applies to all owners of the right to produce and develop particular minerals.

7. See Morgan, Correlative Rights: Surface Owner vs. Mineral Owner, 26 INST. ON MIN. L. 141 (1979), for a discussion of article 11 of the Mineral Code and the standard of reasonable regard.


cases do address the question. In Chartiers Block Coal Co. v. Mellon, the leading case in balancing the rights of competing mineral users, a coal producer sought an injunction to protect his coal mine from the dangers posed by an oil well being drilled in the same area. The court said the owner of the right to drill for oil had, by necessity, a right of way through the coal to reach the oil. That right of way, however, had to be exercised with due regard for the interests and rights of both parties. The principle espoused by Chartiers is that one with an interest in the underlying strata should not be permitted at his mere whim to interfere with the land above his interest. The Pennsylvania court recognized that the original mineral lease was for a limited purpose and that the subsequent lease of the same area for different mineral interests did not lessen either lessee's right to exploit his interest.

The first Louisiana case to address the issue of lignite production’s infringement on surface rights was Continental Group, Inc. v. Allison, in which several noncontiguous tracts of land were purchased by a timber producer, subject to a reservation of all mineral rights. Continental Group succeeded the timber company as purchaser of the land and sought a declaratory judgment that the mineral reservation included only the right to develop oil and gas and did not include the right to produce solid minerals. The Louisiana Supreme Court, on rehearing, held that the original parties' negotiations evidenced their intent to include in the reservation the right to strip mine lignite, but this right had prescribed by nonuse. In its original opinion, the Louisiana Supreme Court approved the second circuit's holding that strip mining did not permit lignite producers to exercise their rights "arbitrarily or devastatingly or without due regard for the rights of the landowner." This position was not affected by the rehearing. Thus the supreme court recognized that concurrent users of land have correlative rights.

Louisiana’s Standard of Reasonable Regard

The respective rights of the lessor and the lessee are determined by the lease. The lease may specify that the mineral lessee has com-

13. 404 So. 2d at 433.
14. 379 So. 2d 1117, 1130 (La. App. 2d Cir. 1979).
15. See Odom v. Union Producing Co. of La., 243 La. 48, 141 So. 2d 649 (1962); Sartor v. United Carbon Co., 183 La. 287, 163 So. 103 (1936).
plete control and exclusive use of the surface. If the lease is silent as to the respective rights of the lessor and the lessee, the two parties are required by law to proceed with reasonable regard for one another so that the land and resources are developed to maximum potential. After Continental Group, Inc. v. Allison, article 11 of the Mineral Code, which originally dealt with correlative rights of landowners and mineral right owners, was amended. The article now specifies that not only are landowners and single mineral right owners required to exercise reasonable regard for the rights of each other but the owners of different mineral interests in a tract of land also are required to exercise their rights with reasonable regard for each other. Thus, even though no contractual duties may exist between

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16. The law governing relationships between private parties has little concern with such competing uses where the parties themselves agree to the modes of use and restriction on use. Thus where the landowner agrees with the owner of the right to produce lignite that the lignite owner may come on the land and strip mine it, the law need not concern itself with the landowner's desire to raise a crop; the landowner has given up that right. Where, however, the parties have been silent or inexplicit and it is a matter of doubt and ambiguity as to what rights were granted and what rights were retained, it would appear preferable for the law to seek to restrict the utilization of the property by either party as little as possible. The principle stated here is affected by the issue of priority of right. Thus if one party acquires from a landowner the right to produce oil and gas from the land and a second party later acquires from the landowner the right to produce lignite from the same land, it may fairly be said that the lignite right owner took his interest subject to the rights of the oil and gas developer, and certainly the lignite owner could not exclude the oil and gas owner from developing his interest. Yet, the question remains as to the extent of the oil and gas owner's rights. If his agreement had expressly provided that no other use could be made of the land that might interfere with any plan of operations he might have, then the lignite right owner might be excluded entirely from the land. Such an agreement, however, would be atypical of the expectations of most parties who undertake mineral transactions. Thus the oil and gas developer who takes a lease from a farmer would be expected not to interfere unduly with the landowner's farming or cattle. Likewise, a lessee of the land who leased for farming and cattle grazing subsequent to the oil and gas lease would be subject to the reasonable operations of the oil and gas lessee but he should also expect to be able to conduct farming and grazing with minimal interference from the oil and gas lessee despite the priority of right. So, too, would it be with the owners of different rights in minerals.

P. Martin, supra note 3, at 5.


the two competing mineral lessees, article 11 imposes mutual duties on them.\textsuperscript{19}

Reasonable regard is the standard to apply in Louisiana when development of a party's mineral interest infringes upon the rights of another with a mineral interest in the land.\textsuperscript{20} Determining what is reasonable conduct is a question of fact, even though "reasonableness" is such a broad term that it provides little or no guidance to lessees in determining how to conduct their operation. The comment to article 11 expressly states that its standard is not intended to suggest that the rights and obligations of the parties must always be based on negligence.\textsuperscript{21} In evaluating the reasonableness of a party's conduct, courts employ a balancing process in which all circumstances are examined. Their primary concern should be to encourage and pro-

\textsuperscript{19} Other jurisdictions have sought to provide standards that encourage peaceful coexistence of mineral lessees and multiple use of the land. For example, North Dakota's policy is to foster, encourage, and promote the development, production, and utilization of all natural resources in a manner that will prevent waste and allow a greater ultimate recovery. N.D. CENT. CODE § 38-15-01 (1980). North Dakota enacted a statute, id. § 38-15-03, to effectuate this policy and aid in resolving conflicts between subsurface mineral producers, and this statute should be adopted in other states as well. The North Dakota statute empowers its industrial commission to make any rule or regulation necessary to enforce the policy.

Federal law, 30 U.S.C. §§ 521-530 (1976), also urges the multiple use of land so that the land is developed to its maximum potential. Section 526 of title 30 provides that where the same lands are being used for mining operations and drilling operations, each such operation shall be conducted, so far as reasonably practicable, in a manner compatible with other intended uses. Mining and drilling operations on federal lands shall be conducted in a manner which will not damage any known deposit of fugacious minerals or any existing surface or underground mining operation. If one operation cannot be reasonably and properly conducted without endangering or materially interfering with existing drilling or mining operations, the courts may permit this operation to proceed upon the operator's payment of fair compensation to the other party. 30 U.S.C. § 526(D) (1976).

\textsuperscript{20} Continental Group, Inc. v. Allison is the only case which has cited article 11. Because the court in this case did not specifically consider what the burden of proof would be in cases applying the standard of reasonable regard, the burden of proof in such cases is uncertain. However, the cases that reflect the Louisiana correlative rights doctrine indicate that the burden of proof is on the plaintiff to prove that the defendant's actions on the land were unreasonable or were conducted in a manner that disregarded the rights of other users of the land. The burden of proof should be the same in cases which apply the reasonable regard standard. See Voisin v. Berry Bros., Inc., 387 So. 2d 633, 635 (La. App. 1st Cir. 1980); Captain Kevin Corp. v. Bay Drilling Corp., 380 So. 2d 639, 643 (La. App. 1st Cir. 1979); Jurisich v. Louisiana So. Oil & Gas Co., 284 So. 2d 173, 178 (La. App. 4th Cir. 1973); Morgan, supra, note 7, at 153.

\textsuperscript{21} LA. MIN. CODE: LA. R.S. 31:11, comment (1974 & Supp. 1982); see Morgan, supra note 7, at 155.
mote the production of all natural resources in a manner that will prevent waste and allow a greater ultimate recovery.

In determining what constitutes reasonable conduct, Louisiana courts can look for guidance to jurisprudence from analogous situations. In addition to article 11, the respective rights of concurrent users of land are recognized in Mineral Code article 22, which states that a mineral owner is entitled to use only so much of the land as is reasonably necessary to conduct his operations. Both article 22 and article 11 mandate that parties act reasonably when there are competing interests in the land. Since both articles embody a concept of reasonableness, jurisprudence applying article 22 to resolve conflicts between different interests in land may indicate how similar conflicts should be resolved under article 11.

Louisiana courts have used article 22's standard to resolve disputes between a mineral lessee and a surface user. For example, courts have held that a mineral lessee may cut timber or clear farmland in order to establish a well site. Moreover, construction of overflow pits, removal of fences, and seismic operations are considered proper conduct by a mineral lessee. In clearing a well site, however, the lessee must minimize the destruction of fences and cut no more timber than reasonably necessary. The lessee is obligated, upon completion of operations, to restore the premises to its former condition.

22. LA. MIN. CODE: LA. R.S. 31:22 (1974). In Smith v. Schuster, 66 So. 2d 430 (La. App. 2d Cir. 1953), a surface owner sued a mineral lessee for damages caused by drilling operations. The surface owner asked the mineral lessee to remove three oil tanks that interfered with the plaintiff's intended improvements on his property. The Louisiana Second Circuit Court of Appeal, holding for the surface owner, stated:

A mineral lessee, of course, has no right to extend his operations on the leased premises beyond what is reasonably necessary to effectively produce minerals under the terms of his contract. He should maintain and restore the premises in the condition he found them subject to his rightful use, and where he has damaged the land it is his duty to appropriately remedy the condition brought on by his use of the lease. Except to this extent he has no right to interfere with the surface owner's full enjoyment of his property.

Id. at 431-32.


25. Id.; Smith v. Schuster, 66 So. 2d 430 (La. App. 2d Cir. 1953).


to balance the rights of owners of competing interests in land. While article 22 has been applied principally between the landowner and the mineral lessee, the reasonableness standard utilized therein arguably is the same standard to be applied under article 11. Thus the cases interpreting article 22 can be applied by analogy to resolve disputes between competing mineral interests. A flexible standard of reasonableness will allow the courts to render decisions encouraging development of both interests.

The principle that concurrent and correlative rights to property must be exercised so as not to unduly injure or damage the rights of another also has been propounded in Louisiana in cases involving conflicts between oyster harvesting and oil production. The mineral lessee is entitled to dredge channels through oyster beds when it is reasonably necessary for successful mineral operations. As long as the dredging is conducted in a reasonable manner and is necessary, no damages will be assessed. However, if the mineral lessee dredges a channel through an oyster bed when he is aware of an alternative site which would minimize damages, he is responsible for the loss occasioned thereby. Arguably, the principles derived from these cases can be applied to conflicts between oil producers and lignite producers; in both situations, two leased interests are competing for the use of the surface. Oyster harvesting and lignite production require the complete use of the surface. In producing oil, a certain amount of the leasehold surface is required (although the oil lies thousands of feet below). Thus, in both oyster harvesting and lignite production, conflict with the oil producer is inevitable. Louisiana courts have re-


35. These cases place very little emphasis on the prior recordation of a lease, emphasizing instead the necessity that the lessees conduct their activities with regard for the rights of others. Admittedly, the existence of multiple leases may result in some inconvenience to the parties, but as public policy encourages the development
quired the oyster bed lessee and the oil lessee to conduct their operations in a manner reasonably calculated to respect the rights of the other leased interest. Arguably, this same standard of reasonableness, together with the duty to exercise reasonable regard, is imposed by article 11 on oil and lignite producers competing for the use of the surface. Indeed, the need for the development of energy resources presents an even stronger reason for encouraging compatibility of operations between concurrent users of land than does the conflicts that arise between oyster harvesters and oil producers. Therefore, the oyster cases can be looked to for guidance when resolving conflicts between oil producers and lignite producers.

In searching for standards of reasonableness that are applicable to the mineral law, courts often attempt to apply the Civil Code articles on predial servitudes. In *Continental Group, Inc. v. Allison*, both the Louisiana Supreme Court and the second circuit cited former Civil Code articles 772-779 in support of the proposition that a mineral interest owner must not exercise his rights in an arbitrary or unreasonable manner. Although the comments to Mineral Code articles admittedly are not the law, the comment to article 11 specifically states that former Civil Code articles 777-779 are not to be applied when determining the correlative rights of concurrent users of land. Mineral interests are of a special nature. They are not normal predial or personal servitudes as envisioned by the Civil Code. Because of this distinction, mineral rights are treated as *sui generis* under the Mineral Code. Since the drafters of the Civil Code could not have foreseen the difficulties presented by conflicting mineral interests, the Civil Code articles on predial servitudes should not be applied to resolve conflicts between coexisting mineral lessees.

Perhaps the same argument can be made against the application of Civil Code article 667 to resolve disputes between coexisting mineral interest owners. However, this article has been applied to a mineral lessee, and the article does provide some guidance in determining of all mineral interests, the existence of a prior lease should not preclude a second lessee from exploiting the affected land for mineral purposes. See Comment, *Concurrent Right to Surface Use in Conjunction with Oil and Gas Development in Louisiana*, 33 LA. L. REV. 655, 664 n.47 (1973).


37. 404 So. 2d at 433; 379 So. 2d at 1128.

38. *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919), applied Civil Code article 667 to a situation in which a landowner left a well uncapped to decrease the pumping efficiency of his neighbor's well. See also *Adams v. Grigsby*. {330x339}
what is reasonable conduct. Civil Code article 667 imposes upon neighboring landowners reciprocal duties that limit the use of their property; an owner must not seriously injure any right of his neighbor.39 The article is a broad statement of law imposing liability upon any person whose conduct infringes upon the rights of others with economic interests in the land.40 Arguably, article 11 of the Mineral Code imposes similar obligations on mineral interest owners to conduct their operations in a reasonable manner so as not to seriously injure the rights of other mineral interest owners in the property. Therefore, Civil Code article 667 and the jurisprudence interpreting that article should provide additional guidance when evaluating the reasonableness of a party's conduct.

Accommodation of the Surface Owner

Other jurisdictions have applied the doctrine of accommodation of the surface owner to conflicts between concurrent users of land. This doctrine, first espoused in Getty Oil Co. v. Jones,41 is essentially the same as the standard of reasonable regard. The doctrine requires that where there are other usual, customary, and reasonable methods practiced in the industry on similar lands put to similar uses and such methods do not interfere with the existing uses of the surface owner, these methods should be implemented.42 However, accommodation is not synonymous with convenience; for example, convenience to the surface owner is not controlling when there are no reasonable alternatives available to the mineral lessee.43 Nonetheless, if there is a reasonable alternative, the mineral lessee must not employ interfering methods or manners of use of the leasehold.

The Texas Supreme Court's adoption of the doctrine of accommodation in Getty Oil began a nationwide trend toward accommodating the surface owner.44 The surface owner in Getty Oil had been using

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40. See McCollam, Impact of Louisiana Mineral Code on Oil, Gas and Mineral Leases, 22 INST. ON MIN. L. 37, 79 (1975); see also Cueto-Rua, supra note 39, at 992.
41. 152 So. 2d 619 (La. App. 2d Cir. 1963); Fontenot v. Magnolia Petroleum Co., 227 La. 866, 80 So. 2d 845 (1955).
42. Id. at 627-28.
43. See Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 137 (N.D. 1979).
44. See Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979), and Flying Dia-
a self-propelled irrigation system prior to the commencement of the
mineral lessee's oil drilling operations. Two wells subsequently drilled
on the land were equipped with surface pumping units which
prevented the irrigation system from working. The court held that
because the irrigation system used by the landowner was the most
practical system available, the oil producer had to use an underground
pumping system, which was a reasonable alternative to the surface
mounted systems.\(^45\)

The doctrine of alternative means has been applied in Louisiana
as well. In *Pennington v. Colonial Pipeline Co.*,\(^46\) the lessor's pipeline
operations allegedly interfered with the lessee's seismic tests. The
plaintiff-lessee sought an injunction to have the pipeline operations
shut down so as not to interfere with the testing. The court held that
any grant of relief would unduly interfere with the landowner's right
to reasonably use the property. The court found that there was a
location that was not on the defendant's property where the plain-
tiff's seismic tests could be conducted; this location would adequately
serve the plaintiff's purpose. The new location was a reasonable alter-
native means that would allow both the lessor and the lessee to con-
duct operations on the leased premises.

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\(^{45}\) *mond Corp. v. Rust*, 551 P.2d 509 (Utah 1978), in which the North Dakota and Utah
Supreme Courts, respectively, adopted the doctrine of accommodation as set forth in
*Getty Oil*. For cases applying the principle of accommodation even before
*Getty Oil*, see *Harris v. Chas. Pfizer & Co.*, 385 F.2d 766 (8th Cir. 1967); *Jenkins v. Depoyster*,
299 Ky. 500, 186 S.W.2d 14 (1945); *Getty Oil Co. v. Royal*, 422 S.W.2d 591 (Tex. Civ.
App. 1967).

\(^{46}\) *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972), handed down almost a
year after *Getty Oil*, was a departure from the trend toward accommodation of the
surface owner. Sun Oil began pumping fresh water from beneath Whitaker's land for
secondary recovery operations. The court held that Sun Oil, the dominant estate, had
implied rights as lessee to any part of the surface that was reasonably necessary to
carry on his operations, even though this use might substantially deplete the value
of the surface estate.

In *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812 (Tex. 1974), the Texas Supreme
Court clearly indicated that it was not abandoning the doctrine of accommodation.
West had attempted to obtain an injunction preventing Humble Oil from injecting
extraneous gas into an underground reservoir. Humble Oil proved that this injection
was necessary to preserve the subsurface reservoir and was allowed to inject the
extraneous gas subject to West's mineral interest. In recognition of the doctrine of
accommodation, the court held that the rules of "reasonable accommodation" applied
when adjusting the correlative rights of mineral interest owners with respect to an
existing surface use. *Id.* at 815. Thus *Sun Oil v. Whitaker* did not mark the demise
of the accommodation doctrine. For further evidence of the continued trend toward
accommodation, see the cases cited at note 55, *infra*.

\(^{46}\) *260 F. Supp*. 643 (E.D. La. 1966), *aff'd*, 387 F.2d 903 (5th Cir.), *modified on
other grounds*, 400 F.2d 122 (5th Cir. 1968).
Exercising rights with reasonable regard means that parties with competing mineral interests on the same land do not have absolute freedom in locating their surface facilities or conducting operations.\textsuperscript{47} Thus the standard of reasonable regard promotes multiple land use. A similar policy is reflected in the doctrine of accommodation.\textsuperscript{48} Accommodating another mineral lessee simply means that the parties do not act unreasonably, a requirement which is nothing more than the standard of reasonableness embodied in article 11 of the Mineral Code. Indeed, the standard of reasonable regard arguably requires a mineral lessee to accommodate any other party with an interest in the land if there are reasonable alternative means that can be implemented so as to allow both parties to conduct operations. Therefore, the cases from Louisiana and those other jurisdictions that apply the doctrine of accommodation provide some guidance for interpretation and application of article 11's standard of reasonable regard.

\textit{Due Regard}

In other jurisdictions, the mineral estate is regarded as dominant over the surface estate.\textsuperscript{49} However, the mineral estate is required to exercise its rights with due regard for the surface estate. In the past, this meant that a mineral lessee had the right to use as much of the surface as was reasonably necessary to recover the minerals. If the lessee's use was reasonable, he was allowed to exercise his rights to


\textsuperscript{48} See Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).

the exclusion of the owner of the surface estate.\textsuperscript{50} Determining what was reasonable and necessary, however, often proved difficult.\textsuperscript{51} Judicial definitions of reasonable necessity ranged from "less than imperative need" to "more than mere suitable convenience."\textsuperscript{52} When making the determination, courts primarily looked to the mineral lessee's interest.\textsuperscript{53} The lessor had bargained for consideration, and in return, he had granted the lessee a right to enter and use his land as reasonably necessary. Therefore, the lessor bargained away his right to complain that the lessee's use of the surface was excessive.\textsuperscript{54}

This inequality between the positions of the lessee and the lessor was justified by the need to protect the emerging oil industry. However, the oil industry is no longer in need of protection, and there has been a shift in recent years toward accommodation of others with interests in the land, reflecting the currently prevailing public policy of promoting productive land use.\textsuperscript{55} As a result of this trend, a new version of the due regard standard has developed. The modern version of the due regard standard focuses on whether or not the mineral lessee has unreasonably interfered with the existing uses of the surface. For example, in the 1980 Texas Supreme Court case of \textit{Ball v. Dillard},\textsuperscript{56} a surface lessee prohibited access to a mineral lessee having rights on the same property. The court held that the lessees were subject to the rules of reasonable usage and neither party could interfere with the operations of the other. The court recognized the correlative rights doctrine, stating that "the rights of the surface holder and the mineral estate holder are reciprocal and distinct."\textsuperscript{57} Thus a trend toward focusing on the rights of all parties with interests in the land has emerged.

Louisiana's standard of reasonable regard, like the standard of due regard, focuses on how much of the surface a mineral owner can

\textsuperscript{50} See Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133 (Tex. 1967); General Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W.2d 668 (1961); Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961).

\textsuperscript{51} See Browder, \textit{The Dominant Oil and Gas Estate—Master or Servant of the Servient Estate}, 17 Sw. L.J. 25, 50 (1963).

\textsuperscript{52} Williams v. Gibson, 84 Ala. 228, 235, 4 So. 350, 354 (1888).

\textsuperscript{53} See Morgan, supra note 7, at 151.

\textsuperscript{54} See Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972); Browder, supra note 51, at 52.


\textsuperscript{56} 602 S.W.2d 521 (Tex. 1980).

\textsuperscript{57} Id. at 523.
use without unduly interfering with use by another.\textsuperscript{58} The concept of reasonable regard embodies a true correlative right,\textsuperscript{59} for no natural resource has absolute preeminence and all parties' use of the land must be accommodated.\textsuperscript{60} Thus the reasonable regard standard and the modern approach to applying due regard seem consonant. Under both standards, a mineral lessee does not have unrestricted use of the surface and he must not unreasonably interfere with others who have interests in the land. Therefore, those cases that apply the due regard standard and reflect the emerging concept of correlative rights may be looked to for guidance when interpreting the reasonable regard standard.\textsuperscript{61}

Avoiding Conflicts

Coexisting mineral lessees should agree as to how operations are to be conducted and the costs of any inconvenience are to be borne. A plan should be formulated to avoid the conflicts that inevitably will arise when lessees attempt to produce their minerals concurrently. For example, specific locations of mineral operations and access routes can be determined in advance. One mineral lessee may agree to delay his activities on a piece of property while the other conducts his operations; such an agreement would be particularly effective where one of the competing mineral interests is in the lignite deposits on the property and the other is in the oil and gas deposits in the strata below.


\textsuperscript{59} There is a line of Louisiana cases that apply the older interpretation of the due regard standard. See Collette v. Marine Exploration Co., 213 F. Supp. 609, 611 (E.D. La. 1963); Continental Group, Inc. v. Allison, 379 So. 2d 1117, 1130-31 (La. App. 2d Cir. 1979), rev'd on other grounds, 404 So. 2d 428 (La. 1981); Hawthorne Oil & Gas Corp. v. Continental Oil Co., 368 So. 2d 726 (La. App. 3d Cir.), rev'd on other grounds, 377 So. 2d 285 (La. 1979); Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1st Cir. 1958). However, the inclusion of the reasonable regard standard in the Mineral Code indicates an intent to codify the line of cases which indicate that a true correlative right exists between concurrent users of land. See cases cited in note 58, supra.

\textsuperscript{60} Collins v. Texas Co., 267 F.2d 257, 260 (5th Cir. 1959).

\textsuperscript{61} There is one caveat in using the due regard standard as an aid in interpreting the reasonable regard standard. In Texas, where the due regard standard is used, if there is only one manner of use of the surface the mineral lessee has the right to pursue this use, regardless of surface damage. Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971); Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App. 1961). This may not be true in Louisiana in light of the incorporation of the correlative rights doctrine in article 11 of the Mineral Code.
In such a situation, when deciding which lessee should wait, the parties should consider certain factors. For example, consideration must be given to the feasibility of finding another location upon which a profitable oil well can be drilled without interfering with lignite production, the possibility of strip mining in another area of the unit until oil is produced from a well, the effect of postponement of the lessee's operations (his lease may expire if arrangements are not made for an extension), and the lessee's responsibility to the landowner for delay rentals during any period of nonproduction. Because owners of mineral interests must be provided a right of passage to their drilling and mining operations, access routes must be available to an oil well located in an area to be strip mined. If in building a road to a well the route is longer than would have been taken otherwise, the parties should consider who should bear the additional cost.

If strip mining is to occur in an area where there is an existing oil well, a layer of insulating coal must be left around the shaft of the oil well and its pipelines to protect them from the vibrations that occur with the mining of the lignite. When determining whether mining the area will be profitable, the lignite producer should assess the value of the lignite that must be left unmined to protect the oil well. If these costs are great, it may be more economical for the lignite producer to buy the working oil operation and discontinue its production so that the entire area can be strip mined. However, unless oil production is feasible after strip mining is completed, this solution is unsatisfactory because it does not encourage maximum development of all energy resources. In any case, oil and gas exploration and development often can be scheduled to precede the beginning of mining or can be delayed until the surface acreage has been leveled after

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62. Other states have statutes that contain specific requirements that must be met before any oil well is drilled in an area which is known to be underlaid with coal-bearing strata. Kentucky requires that casing insulate an oil well which penetrates a workable coal bed. The purpose of the casing is to protect the oil operations from vibrations that occur with the mining of the coal. The casing must be seated at least thirty feet below the bed in twenty feet of cement, mud, clay, or nonporous material that will make strip mining of the beds above and below this seating possible. When the oil well is drilled below the workable coal bed, the shaft must be of a size sufficient to permit a liner to be inserted around the casing; this liner also will be seated in cement. Following the setting of the liner, the oil producer may begin drilling. KY. REV. STAT. ANN. § 353.080 (Baldwin 1978). Similar requirements should be enacted in Louisiana to avoid the dangers inherent in coexisting mineral operations. See PA. STAT. ANN. tit. 52, §§ 2204-2206 (Purdon 1982); W. VA. CODE §§ 22-4-5 to 22-4-12 (1981).

63. There is some question as to whether or not it is technologically possible to temporarily plug an oil or gas well in a manner that will permit resumption of the oil or gas operations after strip mining.
mining. Peaceful coexistence of conflicting mineral interests is possible in most cases if the parties recognize areas of conflict and reach mutually beneficial compromises.

The Commissioner’s Role

If an agreement regarding the mineral interests cannot be reached, the parties should seek resolution of their conflicts by looking to the Commissioner of Conservation. The Commissioner has jurisdiction over all persons and property necessary to enforce effectively title 30 of the Louisiana Revised Statutes. Originally concerning only oil and gas, title 30 has been expanded to give the Commissioner authority over lignite. His power includes the authority to make reasonable rules, regulations, and orders pertaining both to the conservation of oil and gas and to surface coal mining and reclamation. More specifically, the Commissioner has jurisdiction over all natural resources in the state, except those expressly regulated by other departments. He is given authority to prevent wells from being drilled, operated, and produced in a manner causing injury to neighboring leases or property. Furthermore, the Surface Reclamation Act gives the Commissioner authority to prevent, by all practicable and economically feasible methods, the wasteful use of lignite.

64. Under N.D. CENT. CODE § 38-15-03 (1980), the industrial commission has authority to make investigations that it deems proper in order to determine whether facts exist justifying action on its part. It also has the authority to resolve conflicting interests of producers of natural resources in order to eliminate waste and ensure that the producer, landowner, and mineral owner realize the greatest possible economic advantage. It can require the furnishing of a reasonable bond to ensure compliance with governing rules and regulations of the commission. The commission has the power to hold hearings and make emergency rules when necessary. West Virginia and Pennsylvania give to their equivalent of the Louisiana Commissioner of Conservation the power to make such determinations. W. VA. CODE §§ 22-4-2 to 22-4-12 (1981); PA. STAT. ANN. tit. 52, §§ 2204-2206 (Purdon 1982).

68. LA. R.S. 30:1(C) (1950).
Evidently, the Commissioner has the authority both to resolve conflicts between lignite producers and oil producers and to assess the rights of all parties in order to develop all natural resources efficiently. This authority is implied, however, and a more specific delegation of power may be desirable, as was noticed by the Continuous Revision Committee for the Mineral Code in a report submitted during April of 1981. The Committee stated:

Although the conflicts between different owners of mineral rights are capable of resolution in the setting of a court, the highly technical nature of the problems and the need for expertise in evaluating alternatives make such a matter more appropriate for handling by an administrative agency. Indeed, there is the further aspect of the situation that the state has special interest in the development and conservation of natural resources that a court trying to resolve a controversy between two private parties may not be able to give adequate attention to. Likewise, an agency can proceed through rule making procedures as well as by adjudication and generally can act more expeditiously and efficiently, and with a greater degree of uniformity than can the courts. Such factors are of considerable importance in facilitating planning of development by all parties, including the state and those who will consume the energy produced. It would be desirable to empower the Commissioner of Conservation to regulate mineral development operations with a view towards prevention of waste and promotion of conservation of different resources.  

In addition to defining more explicitly the powers of the Commissioner, the enactment of several additional statutes is imperative to ensure peaceful cohabitation by owners of conflicting mineral interests. For example, provisions should be enacted setting forth the precautions to follow when drilling an oil well through coal-bearing strata. In addition, a statute similar to the federal multiple use statute should be enacted to provide that upon the request of a party conducting either drilling or mining operations, the mineral lessee who already has begun operations shall furnish to the requesting party (at his expense) information as to the sites of any workings or facilities on the land. Access to the area of mining or drilling should be allowed at reasonable times so the parties can survey the operation sites. If damage results from a failure to comply with the request, the re-

71. Martin, supra note 3, at 6.
72. See note 62, supra.
questing party should be relieved of liability for this damage and should recover court costs and attorney's fees necessary to enforce compliance with the statute.

Conclusion

Peaceful coexistence of competing mineral interests is possible if the parties recognize areas of conflict and reach agreement as to locations of operations and access routes before operations begin. Mineral lessees have a right to do whatever is reasonable and necessary in conducting their operations, but this right must be exercised with reasonable regard for other users.

In cases of conflict, the Commissioner of Conservation should be authorized to determine and regulate the rights of competing mineral interest owners. In so doing, he should employ the standard of reasonableness embodied in articles 11 and 22 of the Mineral Code. The doctrine of accommodation, the standard of due regard, and Louisiana Civil Code article 667 may provide additional guidance when determining what conduct is reasonable. By using a standard of reasonableness, factors such as the present demand for energy resources, the determination as to which lessee is in the best position to postpone his operations, and the actions by the mineral lessees that are necessary to develop the leased interests may be considered. The primary concern of all parties should be to encourage and promote the production of all natural resources in a manner that will prevent waste and allow the greatest ultimate recovery.

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