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# Lessons for Louisiana Landmen from Recent Jurisprudence

Paul B. Simon & Julie Deshotels Jardell

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**Paul B. Simon**

Lafayette office

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**GORDON**  
**ARATA** MCCOLLAM DUPLANTIS  
& EAGAN LLC

# What will we cover?

- Lessons for you
- Jurisprudence – cases
- Retrospective

# General Trends

- North Louisiana / Haynesville lessors trying to break leases
  - Low gas prices = little production or royalties
    - and / or existing lease -> missed bonus boom
  - Actions of Landmen frequently litigated
  - “Relation of confidence” doctrine
  - Second Circuit – educate N. Louisiana bar / judges?
- Legacy cases continuing

# Topics – Lessons and Cases (1/2)

## Case

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- *Temple v. McCall*, 720 F.3d 301 (5th Cir. 2013)
- *Henderson v. Windrush Operating Co.*, No. 47,659, 2013 WL 4451052 (La. App. 2 Cir. 8/21/13), *pending*
- *Peironnet v. Matador Resources Co.*, 2012-2292, 2013 WL 3752474 (La. 6/28/13)
- *Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, et al.*, 112 So.2d 187 (La. 3/19/2013)

## Lesson

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- Be explicit when reserving mineral rights
- Be careful and Honest – avoiding the “Relation of confidence”
- Get what you can; you don’t know if it will be important later
- Know & use the standard lease clauses; make amendments to form agreements explicit

# Topics – Lessons and Cases (2/2)

 Time permitting

## Case

## Lesson

- *Questar Exploration and Production Co. v. Woodard Villa, Inc.*, No. 48,301, 2013 WL 4009032 (La. App. 2 Cir. 8/7/13), *pending release*

- Pay attention to language: off-premise horizontal wells & Pugh clauses

- *U.S. v. Am. Elec. Power Svc. Corp.*, No. 2:99-cv-1182, Third Joint Modification to Consent Decree (S.D. Ohio 2/22/13)

- Improve natural gas prices by replacing coal: the Clean Air Act

- *State & Vermilion Parish School Board v. LL&E Co., et al.*, 110 So.3d 1038 (La. 1/30/13)

- Legacy litigation defense is a multi-faceted marathon

# BE EXPLICIT WHEN RESERVING MINERAL RIGHTS

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*Temple v. McCall*, 720 F.3d 301 (5th Cir. 2013)

# Temple v. McCall (5th Cir. 2013) – (1/2)

## Facts

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- Predecessor donated most of plot of land to a conservation authority
  - Reserved mineral rights in perpetuity
- Then conveyed via Deed a portion of plot:

[C]onveyed ... with full guaranty of title, and ... transfer ... of all rights and actions of warranty against all former proprietors ... the following described property:

All that part [within certain coordinates] lying West and South of [a road], **LESS portion sold to [conservation]**.
- “described property” = ~15.5 acres”
  - ~15 acres sold to conservation, mineral rights reserved, leaving
  - 0.5 acres not excluded by “LESS” clause
    - indisputably conveyed by deed

## Suit

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**Issue** – mineral rights to the ~15 acres also conveyed by the Deed?

**Plaintiff** – Yes:

- in the “described property”
- mineral rights not sold to conservation
- And, Louisiana law: mineral rights included in a conveyance unless expressly reserved

# Temple v. McCall (5th Cir. 2013) – (2/2)

## Ruling – mineral rights not conveyed

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- Deed ambiguous, unclear if:
  - conveyance included mineral rights
  - “LESS” excluded mineral rights of ~15 acres, or only surface rights
- “land-conveyancing expert” testified
- “LESS” clause – no survey, so defined borders of property *included* in conveyance with reference to property that defines those borders
- Conveyance not comprehensive, e.g., “all right, title, & interest ... LESS” property excluded
- ~15 acres not conveyed, so don’t need express reservation of mineral rights
- Court: if transfer of mineral rights intended, will use ‘oil, gas, [or] minerals’ or ‘include a specific reference to the servitude’ reserving them

## Lessons

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- Conveyances – state explicitly if mineral rights included or reserved
- Otherwise, court could find:
  - opposite of what you intend, or
  - ambiguity -> jury trial, expert testimony, \$\$...

## BE CAREFUL AND HONEST – AVOIDING THE “RELATION OF CONFIDENCE”

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*Henderson v. Windrush Operating Co.,  
No. 47,659, 2013 WL 4451052 (La. App.  
2 Cir. 8/21/13), pending release*

# *Henderson v. Windrush Operating Co.* (La. App. 2 Cir. 2013) (1/5) – background

## Lease & Extension

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- February 2005 Haynesville lease
- “trusted” friends – lessor & lessee
  - Socialized: drinks, meals, expensive gifts, heartfelt cards...
  - landowner helped lessee
    - convinced neighbors to lease
    - helped research property records
- 2 unproductive wells drilled in primary
- 2008 – extension. Lessor resisted, but
  - lessees claimed they could extend lease for 2 years without him
  - \$75 per acre bonus for extension

## Unanticipated

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- Haynesville! happens during extension
- Plaintiffs – royalties of \$1.5 million from successful wells
- But, neighbors’ new leases -- \$10,000’s per acre bonuses
- Plaintiff – new lease for deep rights?

# *Henderson v. Windrush Operating Co. (La. App. 2 Cir. 2013) (2/5) – Claims & Rulings*

## Plaintiff's claims

- Extension invalid
- **Misrepresentation** – Defendants misrepresented they could extend lease for 2 years without landowner's consent
- Never read lease or extension – trusted lessees / Defendants
- Rescission, termination, & damages

## Court Rulings

- **District court** –for Plaintiff: “a relation of confidence existed between the parties”
- **Appeal** – 5 judge panel overruled:
- Lessees did not misrepresent they could extend lease two years without landowner's consent
  - Lease could be extended by production or operations, both possible
  - 2 years: Pugh clause – terminated lease as to all land not in unit 2 years after primary term
- No relation of confidence (following slides)
- Lessor – duty to read lease, follow as written

# *Henderson v. Windrush Operating Co.* (La. App. 2 Cir. 2013) (3/5) – legal points

## **Court: Leases enforced as written...**

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- “A party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it.”
- Plaintiffs’s contention – defendants “deceived [him] about the meaning of ... his own lease ...
  - As lessor, “knew or should have known the meaning of” his lease;
  - “should not be able to deny knowledge ... by willful ignorance.”

## **...unless:**

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- Fraud & no unexcused reliance, or
  - Relation of Confidence
- ‘Fraud does not vitiate consent when party against whom directed could have ascertained truth without difficulty ... or special skill.’
- This ‘exception is not applicable when a relation of confidence reasonably induces a party to rely on the other's ... representations.’

# *Henderson v. Windrush Operating Co.* (La. App. 2 Cir. 2013) (4/5) – legal points

## Relation of Confidence

- Plaintiff -> lessees close friends, trusted!
- Court: relation of confidence only with:
  - family or spousal relationship or
  - long-term business relationship – partners for 25 years
- No such enduring relationship here
- “Onerous contractual relationship” – party with advantages under an onerous contract not precluded from asserting those advantages with other party to contract, regardless of friendship.

## Haynesville Timing

- Extension February 2008
- Plaintiffs – lessees knew Haynesville was coming!
- Court – at time, info about one vertical well in Haynesville, nothing more
- knowledge of Haynesville – not imputed to them,
  - absent other actions showing they knew of & were preparing for it

# *Henderson v. Windrush Operating Co.* (La. App. 2 Cir. 2013)(5/5) – Lessons

- **Keep leases clear** – Leases generally will be enforced as written *if they are clear*
  - Don't make ambiguous – avoid superfluous amendments, even if they make landowner feel special
  - Sound internal processes – If amendments needed, have legal department or outside counsel review.
    - A penny or second saved is a lawsuit foolish.
- **“Relation of confidence”** – does not relieve lessor of obligations...
  - Be careful – landowner won at district court, almost on appeal (one judge on original appeals panel agreed with him)
- **Don't lie** – lease only enforced as written because appeals court found lessees did not commit misrepresentation

# GET WHAT YOU CAN; YOU DON'T KNOW IF IT WILL BE IMPORTANT LATER

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*Peironnet v. Matador Resources Co.*,  
2013 WL 3752474 (La. 6/28/13)

# *Peironnet v. Matador Resources Co. (La. 2013)*

## – (1/4) Background

### The Lease & the Extension

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- 2004, Haynesville lease, 3 year primary
  - ~1,800 acres, \$100 acre / acre bonus
  - Pugh clause: units **“treated as constituting a separate lease”**
  - Vertical Pugh clause – deep rights
- June 2007 – primary term ending:
  - ~169 acres not being maintained
  - deepest depth: Cotton Valley
- Lessees send letter – 18 month extension (‘til end 2008...) for the ~169 acres
- Attached Lease Amendment
  - Extended entire Lease, with deep rights
  - Only paid bonus (\$75) for ~169 acres

### Unanticipated

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- Haynesville, 2008!
- During extension, depth below Cotton Valley
- Operator: lease extended to that depth as to all acres!
- Landowner: no
  - Only Paid, & letter only referenced, ~169 acres
  - But, admitted amendment clear, just had not read it...

# *Peironnet v. Matador Resources Co.* (La. 2013)

## – (2/4) the Issue: Unilateral Error

### Primary issue in Landowner's claim

- Unilateral error – mistake of cause, and thus vice of consent
- “Cause” for landowner – per acre bonus
  - Paid for ~169 acres
  - Not paid for deep rights for 1,800 acres
  - Did not know deep rights were extended as to all acres
- Lessee knew of landowner's error, signed anyway

### Court decisions

- Lessee won at district court, and with jury
- Appellate court reversed jury's fact-finding, found for landowner
  - “reformed” contract – extended it only as to ~169 acres
- Supreme Court reversed – “contractual negligence as a defense to a claim for unilateral error”

# *Peironnet v. Matador Resources Co.* (La. 2013)

## – (3/4) the Contractual Negligence Defense

### **Contractual Negligence**

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- Defense against unilateral mistake – mistake not “excusable”
- Applies:
  - “minimal amount of care” could have rectified error; or
  - Party’s education or experience make “error particularly difficult to rationalize, accept, or condone”
- Reading your contract = a “minimal amount of care”

### **Applied here**

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- Landowner did not read Amendment – basic, preventable negligence
- Landowner’s landmen – experience & education, self-proclaimed experts
- Amendment form contract of landowner’s landmen – they should have known its meaning

# *Peironnet v. Matador Resources Co.* (La. 2013)

## – (4/4) Takeaways & Lessons

### **What really happened**

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- Landowner's landman: even if the "mistake" was noticed, "no one thought it mattered at the time."
- Not "error" – nobody anticipated in June 2007 that deep rights would be so important



### **Lessons**

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- When negotiating, take all you can get, especially on "unimportant issues"
- Nobody can predict the future – you never know what will be important later

# KNOW & USE THE STANDARD LEASE CLAUSES; MAKE AMENDMENTS EXPLICIT

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*Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, et al.*, 112 So.2d 187 (La. 3/19/2013)

# *Clovelly Oil Co. v. Midstates Petroleum Co.* (La. 2013) – (1/3) Background Facts

- 1972 Joint Operating Agreement (JOA)
  - Clovelly & Midstates assignees to it
  - Clovelly majority owner & operator
- 2008, Midstates acquired lease in area covered by JOA, preparing to operate abandoned well on leased lands in 2009
- Clovelly notifies Midstates covered by JOA
  - claims majority working interest in lease, and
  - right to operate it, per JOA
- Midstates refuses
- Clovelly sues, seeking:
  - Damages,
  - Declaration of rights

# *Clovelly Oil Co. v. Midstates Petroleum Co.* (La. 2013) – (2/3) the JOA & the Issue

## The JOA

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- Preamble – Parties “are owners of oil and gas leases ... and ... unleased mineral interests in the tracts of land described in Exhibit ‘A’, and ... have reached an agreement [as to] these leases and interests...”
- Section 1, definitions:
  - “Oil and gas interests” – unleased fee and mineral interests in tracts of land lying within the Unit Area ... owned by the parties...”
  - “Unit Area” – “all of the lands, oil and gas leasehold interests and oil and gas interests ... under this agreement ... described in Exhibit ‘A.’”
- Exhibit “A” – typewritten, original parties, geography in Evangeline Parish
- Section 23 on renewal or extension of leases: “[a]ny renewal lease in which less than all parties elect to participate” not subject to agreement

# *Clovelly Oil Co. v. Midstates Petroleum Co.* (La. 2013) – (3/3) Court Rulings and Lessons

## Court Rulings

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- District Court: No; Appellate: Yes
- Supreme Court – reversed, said No, new lease not subject to JOA
- Present tense language:
  - Preamble: interests of which parties “*are owners*”
  - Definition: “oil & gas interests ... which *are owned* by the parties”
- Appeals court – “Exhibit A” no limits:
  - Conflict, addition prevails
- SC – no conflict:
  - interpret contract as a whole
  - Absurd result – no option, unlike AMI
  - Could have added AMI if that was intent

## Lessons

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- Know and use the standard lease clauses –
  - Courts assume you do
  - If you don’t will assume intentional
- Make amendments clear
  - Especially to displace clause of form agreement
  - If intent is to displace or amend a provision in the form contract, say so explicitly

## **PAY ATTENTION TO LANGUAGE: OFF-PREMISE HORIZONTAL WELLS & PUGH CLAUSES**

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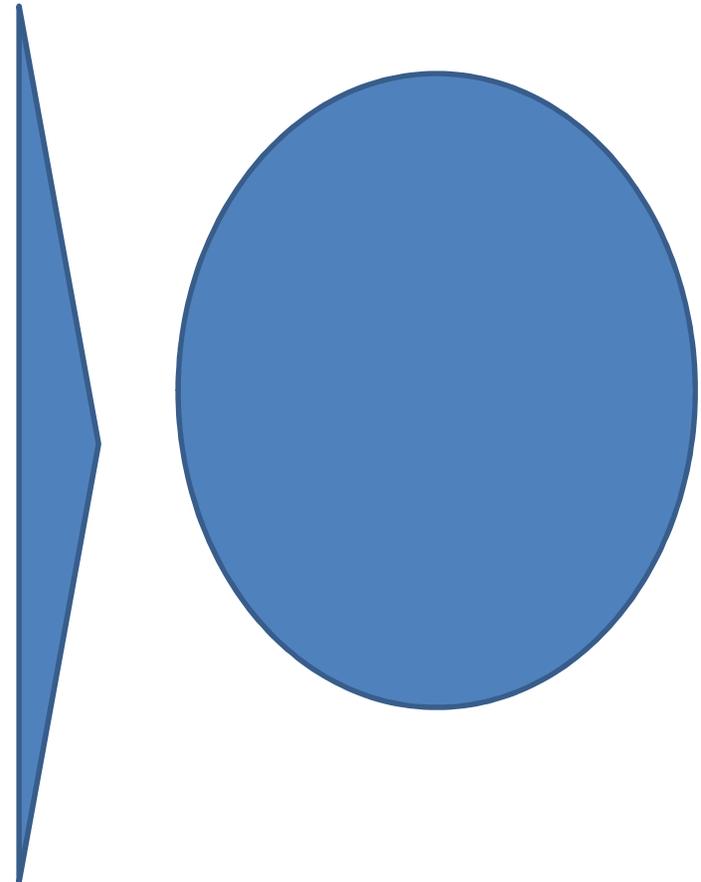
*Questar Exploration and Production Co. v.  
Woodard Villa, Inc., 2013 WL 4009032  
(La. App. 2 Cir. 8/7/13), not yet released*

# *Questar Exploration v. Woodard* (La. App. 2 Cir 2013) – (1/5) Background

## **The Lease & the Extension**

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- 2004 August, Haynesville lease
  - 3 year primary term
  - ~1,480 acres, 5 Sections
  - Pugh clause – end of primary term
  - Vertical Pugh clause – end of primary term + 1 year
- 2007 July – 1 year extension
  - primary term to August 2008
  - Vertical Pugh to August 2009



# *Questar Exploration v. Woodard* (La. App. 2 Cir 2013) – (2/5) Timing of Disputed Well

## During Primary Term

- Vertical wells to Cotton Valley – at least 1 well on each unit
- Nothing in Haynesville depth

## Before Vertical Pugh

- Primary term + 1 year
- May 2009 – lessee begins new well from surface location
  - not on lease premises,
  - nor originally in a unit with it, though
  - unit formed
- July 2009
  - entered lease at Haynesville depth
  - only under 1 Section

## Post Vertical

- Nov. 2009 – well completed

# Questar Exploration v. Woodard (La. App. 2 Cir 2013) – (3/5) Issue(s) & Claims

Issue -- “[C]an a well drilled off-lease, but reaching horizontally into a formation under the lease, maintain ... all, or ... part, of the lease?”

## Lessor’s claims

- 1. No, off-premises well insufficient to maintain lease** – all depth rights below Cotton Valley lost August 2009 when Vertical Pugh clause went into effect
- 2. Alternatively – Pugh clause:**
  - end of primary term – Pugh clause divided lease into 5 separate units, so
  - horizontal well thereafter after – only maintained lease as to the section it entered beneath

## District Court

- For lessee – whole lease maintained to Haynesville depth
- Lessor appealed

# Questar Exploration v. Woodard (La. App. 2 Cir 2013) – (4/5) Issue, Arguments, & Rulings

Issues	Lessor	Lessee	Ruling
	<ul style="list-style-type: none"> <li>• Well – must be on lease; and</li> <li>• Formation must be “productive”, well here completed to Haynesville later</li> </ul>	<ul style="list-style-type: none"> <li>• Formation “productive”</li> <li>• Per lease – well can be on land unitized with the leased premises</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Sufficient</b> – well can be on land unitized with leased premises</li> <li>• Unit with well &amp; 1 Section formed during extension</li> </ul>
	<ul style="list-style-type: none"> <li>• Unit production only maintains part of lease in unit</li> <li>• Pugh clauses divided lease</li> </ul>	<ul style="list-style-type: none"> <li>• Mineral leases indivisible unless lease provides</li> <li>• This Pugh clause – no “treated as separate leases” language</li> </ul>	<ul style="list-style-type: none"> <li>• <b>No, divided only for maintenance</b>– no “separate” leases language;</li> <li>• “this lease”</li> <li>• Ops in all units</li> </ul>

# *Questar Exploration v. Woodard* (La. App. 2 Cir 2013) – (4/4) Lessons

## Lessons

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- Horizontal wells drilled off premises can satisfy a lease's Vertical Pugh / depth limitation clause
- But, off-premises wells won't always maintain lease. Here:
  - Lease – provided well could be on land unitized with lease premises
  - Well – unit well for unit lease premises was part of
  - Unit formed before expiration of Vertical Pugh clause
- Pugh clauses strictly construed, subject to default rule of indivisibility
  - Pugh clauses common – easy to check off “is there a Pugh clause? Yes? Fine.”
  - Insufficient – if you want the Pugh clause to divide the lease for anything other than maintenance, have to say so

# IMPROVE NATURAL GAS PRICES BY DISPLACING COAL: THE CLEAN AIR ACT

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*U.S. v. American Electric Power Service Corp.*, No. 2:99-cv-1182, Third Joint Modification to Consent Decree (S.D. Ohio 2/22/13)

# Low natural gas prices, because supply increasing twice as fast as demand

## Average annual change, over period

	Demand		Supply	
	%	BNcf	%	BNcf
5 years:*	2.1%	480	5.1%	1,025
3 years:	3.8%	864	5.7%	1,224
2 years:	2.9%	708	6.1%	1,469

- Supply outstripping demand by factor of 2
  - by ~545 BNcf per year last 5 years,
  - ~761 BNcf last 2 years
  - 2-3% of total annual US gas production\*\*
- Result: \$3.50 gas

**Solutions**

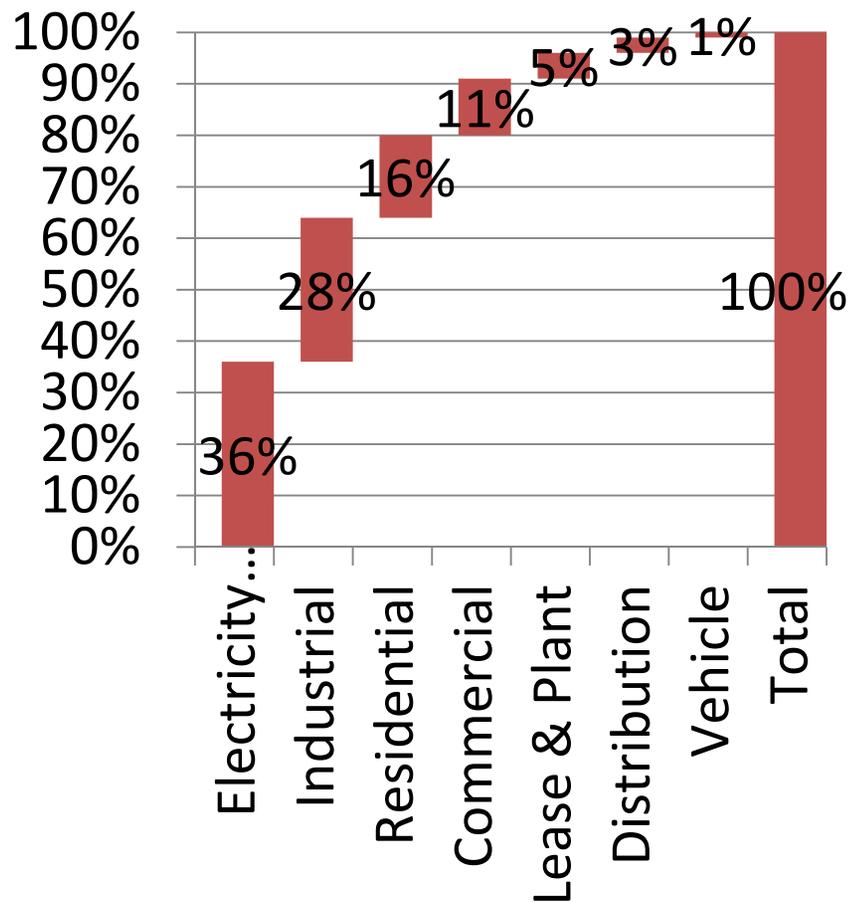
- Supply – new reality
- Demand – Can affect: more consumption

\* 2007-2012

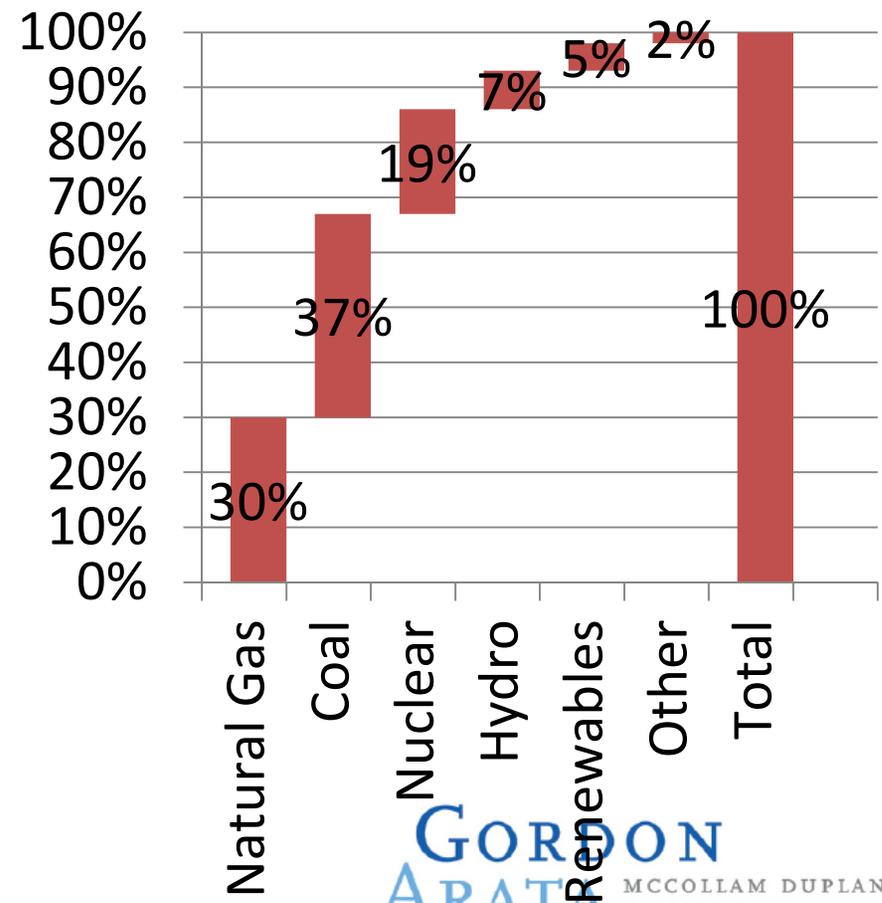
\*\* 25,319 BNcf Marketed Production

# Electricity generation is largest use of natural gas, can yield large consumption increase

**% of U.S. Natural Gas Consumption, by End Use, 2012**



**% of U.S. Electricity Generation, by Source, 2012**



# Clean Air Act facilitates improved prices for natural gas for electricity generation

## Options Limited

- “New” uses (vehicles) – low base
  - Even major uptake -> small total increase
  - helpful but marginal
- Industrial – large, growing, but price sensitive
- Residential & commercial – weather, price sensitive

## Electricity & Clean Air Act

- Stricter pollution rules applied to more plants
- Grandfathered coal plants done – new source review
  - ~60% past 40 yr life, depreciated
  - ~35% more next 20 yrs
- 40-60% of coal capacity in 5-10 yrs, >80% in 20, must: – retire,
  - retrofit – at cost of \$100’s mlns, blns, or
  - “Refuel” – to nat gas

## The Opportunity

- ~60% more nat gas used in electricity, 20% more used total:
  - ~5,000 BNcf / year
  - 7-9 yrs excess supply = the 20 yr increase 1992 to 2012
- *Plus* new capacity & natural growth
- **Requires** – standards, enforcement, & support for nat gas

\* Energy Information Administration

# *U.S. v. Am. Elec. Power Svc. Corp.* (S.D. Ohio 2/22/13) – Reason for Optimism

## Background

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- American Electric Power (AEP) sued by EPA
  - modifications to coal plants
  - new source requirements
- 2007 Consent Decree:
  - \$4.6 billion in pollution controls
  - coal plants to standards

## Modified decree

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- AEP may use cheaper, less effective control for sulphur
- In exchange –
  - retire 2 coal plants
  - “refuel” 3 coal plants to nat gas
- In all, AEP will refuel 7,000 MW of electricity by 2016 – by itself, will increase natural gas use by 1%

## Optimism / Lessons

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- Coal plants:
  - cannot meet new standards
  - retired or retrofit reach end of natural life
- EPA enforcing standards, bringing NSR actions
- **Support for natural gas** – EPA required, in consent decrees, coal to natural gas conversion.

# LEGACY LITIGATION DEFENSE IS A MULTI-FACETED MARATHON

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*State & Vermilion Parish School Board v.  
LL&E Co., et al., 110 So.3d 1038 (La.  
1/30/13)*

# *State v. LL&E Co.* (La. 2013) – (1/3)

## Background & Procedural Posture

### Background

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- Legacy environmental remediation
- Section 16 owned by State, managed by Vermilion Parish School Board
- 1935 mineral lease, ops since 1940
- Unocal – motion to refer case to Louisiana Dept. of Natural Resources (DNR) per Act 312
  - School Board – no referral until all Defendants admit responsibility, private claims tried by jury
  - District court agreed, writs denied

### This Decision

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- Unocal – motion to limit remediation damages to amount required to implement the “feasible plan” selected under Act 312
- District court granted; School Board took writs
- Supreme Court reversed – damages could not be limited

# *State v. LL&E Co.* (La. 2013) – (2/3) Act 312

## Procedures for DNR plan

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- Procedures to ensure environmental damage is remediated to level to protect public interest
- Requires referral to DNR for an environmental remediation plan
- Court shall adopt plan unless landowner shows by a preponderance another plan is “more feasible”
- Money to implement plan deposited into registry of the Court
  - used to clean up the land
  - not to buy private jets & apartments in New York
  - “plans, not planes”

## Limitations

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- Act does not stop parties from contracting for excess remediation
- If they do, landowner can:
  - sue to enforce, and
  - collect \$\$ damages to implement
- Tort damages as well, if in excess of DNR plan?!?
- \$\$ need not be deposited with court – pre-Act 312 world
- Purpose of Act: “ensure evaluation or remediation of environmental damage”

# State v. LL&E Co. (La. 2013) – (3/3) Takeaways

## Court Ruling

- Landowner can maintain suit for remediation in excess of DNR plan
  - Based in contract,
  - Or tort!
- Money damages to ‘implement excess remediation are landowner’s
- Purpose of Act to promote remediation,
  - and fund legacy litigation!

## Issues / Questions

- Purpose of Act does not recognize Legislature’s intent to alleviate harm of legacy suits:
  - to State’s economy
  - to remediation: plans, not planes
- DNR’s standard different than that of Louisiana tort law?
- Questions of fact?

## Lessons:

- **Education needed**
  - reality of legacy suits
  - some, including on La. S.C., don’t already agree with us: convince them, not just allies
- **Get the *right* bill** – not just *a* bill
- **Reduce legacy exposure in new leases** – secure contractual protection; pay more in bonuses now, save later

# QUESTIONS?

9/26/2019

**GORDON**  
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& EAGAN LLC