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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

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	Lesson
• *Temple v. McCall*, 720 F.3d 301 (5th Cir. 2013)	• Be explicit when reserving mineral rights
• *Henderson v. Windrush Operating Co.*, No. 47,659, 2013 WL 4451052 (La. App. 2 Cir. 8/21/13), *pending*	• Be careful and Honest – avoiding the "Relation of confidence"
• *Peironnet v. Matador Resources Co.*, 2012-2292, 2013 WL 3752474 (La. 6/28/13)	• Get what you can; you don't know if it will be important later
• *Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, et al.*, 112 So.2d 187 (La. 3/19/2013)	• 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

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BE EXPLICIT WHEN RESERVING MINERAL RIGHTS

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

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

Facts

- 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

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

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

Ruling – mineral rights not conveyed

- 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

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

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BE CAREFUL AND HONEST – AVOIDING THE "RELATION OF CONFIDENCE"

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

- 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

- 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…

- "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:

- 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."

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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

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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

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

- 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

- 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…

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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

- 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

- 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

- 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

- 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

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

- 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

- 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

- 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, <u>say so explicitly</u>

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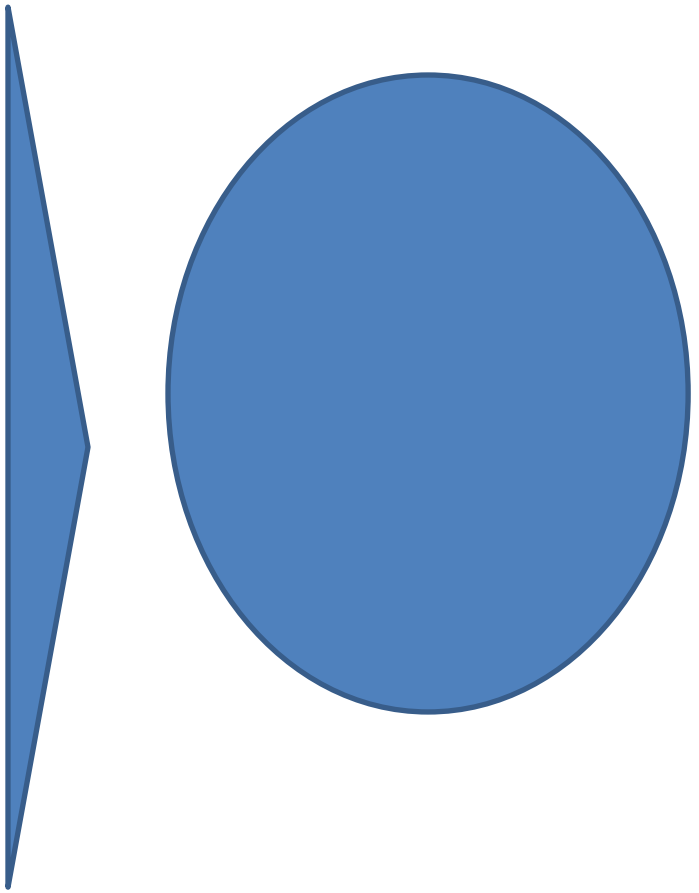
PAY ATTENTION TO LANGUAGE: OFF-PREMISE HORIZONTAL WELLS & PUGH CLAUSES

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

- 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

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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

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

Issues	Lessor	Lessee	Ruling
	• Well – must be on lease; and • Formation must be "productive", well here completed to Haynesville later	• Formation "productive" • Per lease – well can be on land unitized with the leased premises	• **Sufficient** – well can be on land unitized with leased premises • Unit with well & 1 Section formed during extension
	• Unit production only maintains part of lease in unit • Pugh clauses divided lease	• Mineral leases indivisible unless lease provides • This Pugh clause – no "treated as separate leases" language	• **No, divided only for maintenance**– no "separate" leases language; • "this lease" • Ops in all units

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

Lessons

- 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

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

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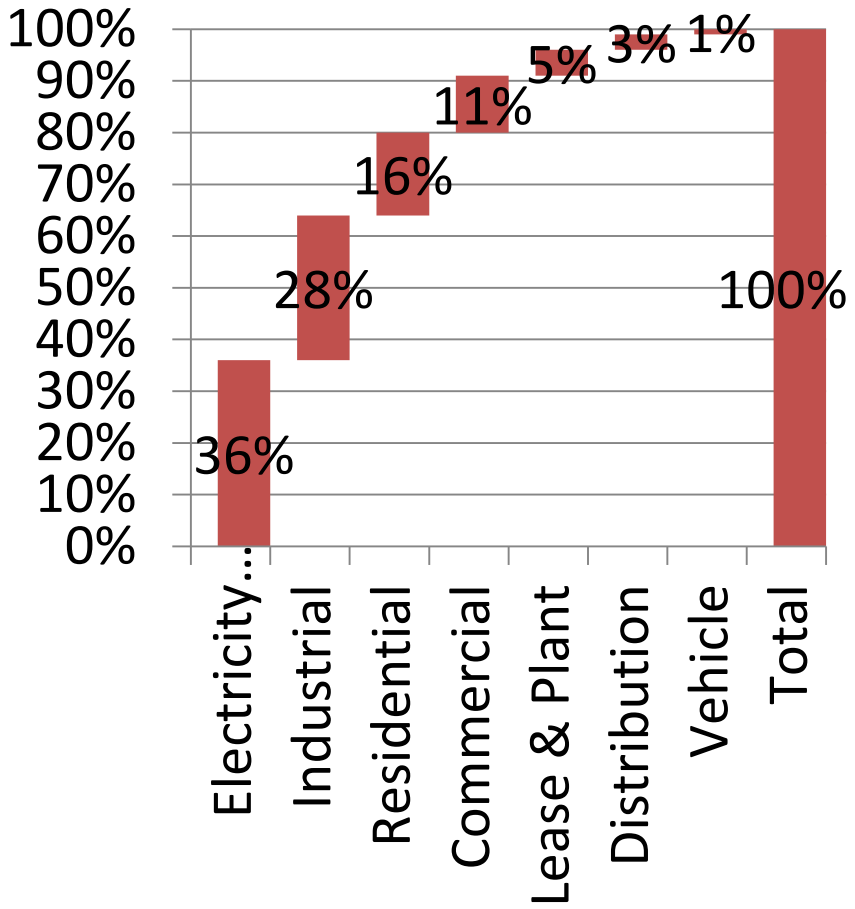
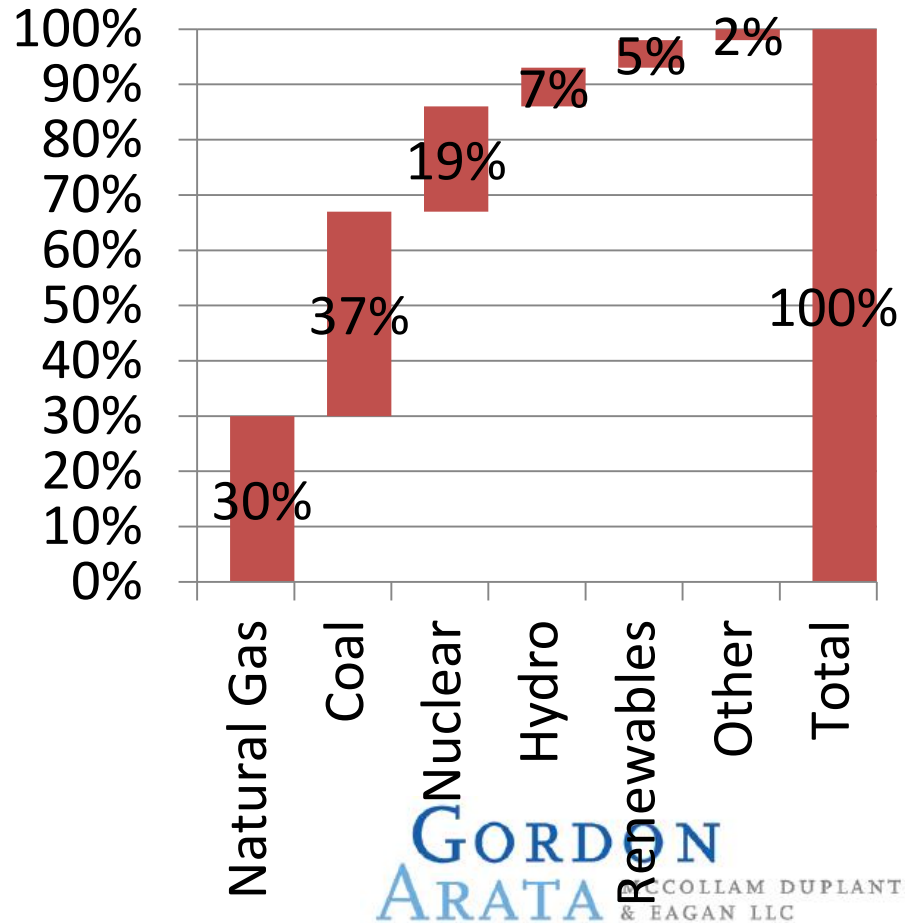
Electricity generation is largest use of natural gas, can yield large consumption increase

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



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



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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

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

Background

- 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

- 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

- 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.

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LEGACY LITIGATION DEFENSE IS A MULTI-FACETED MARATHON

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

- 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

- 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

- 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

- 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"

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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

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QUESTIONS?