Canons Of Construction for the Interpretation of Mineral Conveyances, Severances, Exceptions, and Reservations in Producing States
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I. Introduction

• What is a “canon of construction” and — more importantly — what it is not.
  – A tool in the judicial tool belt that a court may utilize to aid its determination of the legal effect of a written instrument.
  – Not authoritative or syllogistic “rules of law.”
  – They are not intended as a device through which the court may divine the parties’ actual intent.
I. Introduction

- The confusion and uncertainty caused by the inconsistent application of canons currently appears to outweigh any guidance they provide to the courts using them.
- These inconsistencies are commonly a result of competing policy considerations, changing circumstances, and a misunderstanding of the role canons should play.
• Part II of the Article explains the interpretive process of mineral conveyances by discussing various policy considerations shaping judicial process, analyzing intent, and clarifying ambiguities.

• Part III applies the canons of construction to define a mineral.

• The case law from Colorado, Kentucky, Mississippi, North Dakota, Ohio, Pennsylvania, West Virginia, and Virginia is analyzed and compared in Part IV.

• Finally, Part V provides recommendations and conclusions.
II. Interpretive Process – Cannons’ Position on the Judicial Decision Spectrum
A. POLICY CONSIDERATIONS SHAPING JUDICIAL PROCESS

• The court’s enforcement of a valid, lawful written agreement will always be constructed upon an “intent-based” interpretive rule in contract and property disputes. However, “the process by which intent is ascertained frequently determines the meaning of the instrument. Manipulating process can manipulate meaning.”

• In the oil and gas context, the courts must compromise two overarching policy aims:

  1. the traditional protections of contractual freedom, and
  2. the alienability of real property encouraged by the predictability of land titles.
B. A QUEST FOR CLEAR INTENT

• A number of the concerns arising from canons applied at varying stages of interpretation come to fruition in the courts’ construction of a conveyance or reservation of “minerals.”

• Perhaps due to the high stakes of this “mineral” definition, coupled with the absence of a uniform common law definition of this term, these cases frequently cause courts to confound basic notions of intent, sacrificing common sense interpretation.
• Who is the proper arbiter of these disputes?

... Regrettably, this issue is often overlooked: “It is remarkable that, considering the number of cases in which the question of whether a particular substance is a mineral arises, the courts have infrequently addressed themselves as to whether the question is one of law or of fact.”

• The distinction merits attention in cases where it leads the court to consider evidence beyond the instrument itself at the risk of substantially undermining one party’s claimed rights under the written agreement.
• Additionally, the intent analysis, for courts who have not adopted bright-line rules, should be objective in nature.
  
  – For example, a provision granting or reserving “all minerals” creates a general presumption that all substances the court finds “legally cognizable as minerals” are included.
  
  – While this places the burden of supporting a more limited construction on the party seeking that limitation, it is ultimately up to the court to decide what this “legally cognizable” category included at the time of conveyance.
C. AMBIGUITY & EXTRINSIC EVIDENCE

- As a general rule, the court’s finding that the intent is clear and that the language creates no ambiguity requires the court to refrain from construction or consideration of extrinsic evidence.

- On the other hand, the court’s determination that deed language is ambiguous opens the door for each party to introduce extrinsic evidence to “prove” that its interpretation was that shared by the parties at contracting. In sum, long-standing procedural rules have consistently placed a judicial finding of facial ambiguity as a condition precedent to the admissibility of extrinsic evidence in contract disputes.
The most fervent criticism of the courts’ reliance on certain canons to construe mineral deeds centers on this ambiguity determination...

- Those who defend this reliance on outside evidence cling to the accurate notion that such facts may be considered where parties’ “presumed intent [inherently] consists of extraneous circumstances and conditions which existed at the time and place of the transaction which produced the conveyance.

- As commentators persistently argue, courts often manipulate the process by admitting such evidence in the first instance, rather than limiting the use of surrounding circumstances evidence to resolution of an ambiguous language. This evidence has been admitted to shape the court’s initial determination regarding the existence of ambiguity.
• Courts generally aim to construe deed language as intended by the parties *at the time and place of the conveyance.*
  
  – Example: Chronology – a typical mineral title suit arises decades after the instrument(s) involved were executed. The original parties to the contract are rarely involved at the litigation stage.

• As the various approaches taken in the producing states suggest, there may well be no “correct” side to this debate, but the absence of “right” is not crucial here. More importantly, courts arbitrarily applying canons with or without evidentiary support do little but distort the concepts of ambiguity and objective intent.
III. Canons of Construction Applied – What is a Mineral?
A. FOUR CORNERS AND HARMONIZATION

• Uniformly-followed maxims of contract interpretation.
• Work in tandem to describe the objective intent sought by the court.
• The four corners typically couples with the doctrine of harmonization to resolve ambiguities that arise when considering an instrument in its entirety.
• Gives effect to all provisions of a deed and, to the extent possible, even where they appear contradictory or inconsistent.
  – This rule directs a court to minimize openness to ambiguity by attempting to “harmonize all parts of the deed” while holding the parties to have “intended every clause to have some effect and in some measure to evidence their agreement.”
• But, no part of the instrument should be struck “unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part thereof.”
B. Plain and Ordinary Meaning

• Courts frequently employ a plain meaning approach to “minerals” in oil and gas instruments.
• This canon steers the court’s construction toward a common, ordinary definition of a word, in the way the court finds a reasonable member of the relevant public would understand it.
C. **Contra Proferentum**

- Meaning construe “against the drafter.”
- A cornerstone of contract dispute resolution.
- Thus, *contra proferentum* holds that a court will resolve ambiguity in the contract with deference to the non-drafting party.
D. EJUSDEM GENERIS

• Meaning “of the same kind.”
• Applicable only in cases where mineral description at issue provides two or more specific substances followed by the apparent catch-all, “and all other minerals.”
• Holds that “where general words follow the enumeration of particular minerals, the general words will be construed as applicable only to minerals of the same general character or class as those enumerated.”
E. Community Knowledge Test

- A “Circumstantial” canon.
- This test establishes the principle that the term “minerals” should be defined as the relevant community understood it at the time and place of conveyance.
- Even a sound application of the community knowledge test is often criticized for an over-reliance on particularized facts that can offer no predictable guidance beyond the case at hand.
F. Surface Destruction Test

• This canon is typically applied where a grant or reservation of “other minerals” is purported to encompass extraction techniques that threaten the value of the severed surface estate.

• If surface destruction is likely to follow proposed extraction, the court will refuse to include such substances within the minerals conveyed.

• Since its early popularization in Texas, the surface destruction canon has been re-formulated on numerous occasions.
IV. State Survey
A. Colorado

- Colorado courts have applied the community knowledge test in the past, although the definition of “minerals” in this context, to an extent, is now a matter of property law.
- As a matter of law in Colorado, “other minerals” includes oil and gas, and it appears that parties may not resort to extrinsic evidence to show contrary intent.
B. Kentucky

- The effect of the term “minerals” in a deed, whether contained within the grant or within an exception or reservation, has a well-settled meaning in Kentucky, which includes oil and gas unless a contrary intent is clearly indicated.
- Kentucky case law has established that the word “mineral” in a deed includes oil and gas unless the language of the deed shows an intention to exclude those substances.
- Restrictive language, however, has rarely been found to show an intention that oil and gas does not come within the meaning of “minerals.”
- Furthermore, although at least in one instance the court determined that a conveyance of “coal minerals and mineral products” was ambiguous enough, due to the absence of commas, to warrant resort to testimony to determine if “coal” was used as an adjective qualifying “minerals” (in which case oil and gas was not included), almost identical language in more recent cases has been held to include oil and gas.
C. Mississippi

• The interpretation of the word “minerals” in Mississippi, at least so far as that word applies to cover oil and gas, appears to be settled.

• Mississippi courts rely heavily on the circumstances at the time and place of execution to determine the meaning intended by the term “minerals.” Because it concluded that oil and gas has been on the mind of grantors and grantees in the state since the discovery of oil and gas in 1937, presumably for all transactions entered into after that time, the term “minerals” will encompass those substances unless a contrary intent is clearly shown.
D. NORTH DAKOTA

North Dakota presents an unusual situation. The state has resolved many interpretive questions by statute. It also has statutorily determined the answer to what minerals will be included in a conveyance. However, for contracts entered into prior to enactment of those statutes and for contracts to which the statutes do not apply, courts have tended to use a practical construction when giving meaning to the term “minerals.”
E. Ohio

• Several cases in Ohio have dealt with the interpretation of oil and gas conveyances that are unclear as to which estate is conveyed and which is excepted or reserved from the conveyance.

• The courts have proffered several guidelines by which to interpret deeds. Among them:
  – The notion that the purpose of interpreting the deed is to discern the parties’ intent, which is “presumed to reside in the language they chose to use.”
  – Extrinsic evidence may be used to determine that intent when the deed is unclear or ambiguous “or when circumstances surrounding the agreement give the plain language special meaning.”
  – Lastly, a contract is construed against the party who drew it.
In Pennsylvania, the meaning given the term “minerals” in a conveyance of land was initially interpreted using a community knowledge test.

Now, however, the meaning is well settled — so well settled, in fact, that Pennsylvania Supreme Court decisions have referred to the interpretation as a “rule of property [that] will not be disturbed.”

Pennsylvania courts do not wholly dismiss the idea that the term “minerals” as used in a deed could be construed as including oil and natural gas. However, the default position has been to hold that oil and gas are not included, without a showing by clear and convincing evidence that the parties intended otherwise. To date, the burden has proved so difficult to overcome that the only way to ensure a successful conveyance of those substances is by expressly referencing them.
G. West Virginia

- With its long history of oil and gas jurisprudence, the West Virginia Supreme Court of Appeals has addressed the precise issue of which substances are properly included in a grant or reservation of “minerals.”
- Early cases held that a reservation of “the right to all minerals in and under the land” included oil and gas.
- More recently, the West Virginia high court offered a summary of the state’s precedent with respect to deed reservations in general.
H. Tennessee

- The Supreme Court of Tennessee has had occasion to address the question, “what substances are included in a grant or reservation of ‘minerals.’”
- The court has stated: “its solution necessarily depends upon the intention of the parties,” and it must be strictly construed against the grantor. Further, “each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor, if it can be ascertained. The adoption of arbitrary definitions in reference to mineral substances buried in the earth is not permissible”
I. Virginia

• Virginia case law shows that courts in that state are intent upon finding the most reasonable interpretation, in each case, based upon the intent of the parties at the time the instrument was executed.
V. RECOMMENDATIONS AND CONCLUSION

- A type of litigation paradox... the only way to achieve predictability and settled precedent is through continued litigation.
- However, the most significant practical goal of drafting these instruments is to unambiguously detail the parties’ rights and thereby avoid litigation.
- One weak link in the chain of title can affect ownership, despite the parties’ present attempts to limit ambiguity in their drafting.
• Unfortunately, no clear solution exists for correcting the problems that result from inconsistent application of canons of construction. Instead, courts should determine which policy consideration is more important, free will to contract or predictability, and apply canons more consistently.

• To have a uniform definition of the term “minerals” in this context, is certainly a decision to be made on a state-by-state basis.
Courts must more carefully apply canons of construction.

– First, they should understand that canons are intended to apply to situations when intent cannot otherwise be found on the face of a written instrument. It is when the language is evenly predisposed to multiple interpretations that canons may be used to shift the scales in favor of one over the others.

– Further, courts must more clearly state the factors they consider when deciding which specific canons to apply; what, if any, extrinsic evidence is appropriate for consideration in specific contexts; and what effect this precedent should have on other similarly drafted documents.
THANK YOU

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