

# CANONS OF CONSTRUCTION FOR THE INTERPRETATION OF MINERAL CONVEYANCES, SEVERANCES, EXCEPTIONS, AND RESERVATIONS IN PRODUCING STATES

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## ABSTRACT

Exploring the application of the construction of canons to mineral conveyances, this Article focuses on how courts interpret the definition of “minerals” in seven oil and gas producing states. Unlike a concrete rule of law or statute, a “canon” arises at a distinct stage in the decision making process: to resolve irreconcilable ambiguities in the words of a contract, and the intent of those words. While some similarities in these interpretations exist among courts, often jurisdictions take distinct views on the interpretation of mineral conveyances, severances, exceptions, and reservations. In Part II, this Article provides a framework for understanding canons and Part III explains specific canons frequently utilized when referencing “minerals.” These canons are then analyzed with respect to each of the seven states discussed in Part IV’s survey. Finally, Part V provides recommendations and conclusions.

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## I. INTRODUCTION

This Article explores application of construction canons to mineral conveyance instruments, focusing on the judicial interpretation of

“minerals” in nine oil and gas producing states.<sup>1</sup> A canon of construction is a metaphorical tool in the judicial belt that courts may utilize to ascertain a written agreement’s legal effect.<sup>2</sup> Canons are not “rules of law”<sup>3</sup> that demand strict adherence to yield a calculated result. Rather, when properly applied by the courts, canons arise at a distinct stage in the decision making process: to resolve irreconcilable ambiguities in the words of a contract, once the actual intent of the parties thereto proves indecipherable.<sup>4</sup> In some states, an interpretation of a term or phrase by consistent application of particular canons may acquire authoritative weight so that its construction develops into a bright-line rule of property law.<sup>5</sup> Much more common, however, are instances in which the same words garner various constructions within and across jurisdictions.<sup>6</sup> As the impetus for given interpretation is not always clear, this variety generally stems from relevant circumstances making one canon more persuasive than another in achieving an equitable status among competing policy aims. Unfortunately, this has contributed to a patchwork of interpretive guideposts for future courts and offers little practical direction for title examiners, attorneys, and industry players assessing the risks of mineral investment.

This Article highlights a number of key procedural and policy concerns that arise when courts have applied canons to construe the precise ownership interest conveyed by a grant or reservation of “minerals.” Part II provides a theoretical framework for understanding canons, focusing on procedural aspects such as intent, ambiguity, and extrinsic evidence. Part II also introduces specific canons frequently utilized to construe unclear transfers of “minerals;” these canons will then be analyzed with respect to each of the nine states surveyed within Part IV.

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1. Part IV surveys this in Colorado, Kentucky, Mississippi, North Dakota, Ohio, Pennsylvania, Tennessee, West Virginia, and Virginia.

2. See 6A POWELL ON REAL PROPERTY § 899(3) (“Canons of construction are merely statements of judicial preference for the resolution of a particular problem. They are based on common human experience and are designed to achieve what the court believes to be the ‘normal’ result for the problem under consideration.”).

3. See Bruce M. Kramer, *Property and Oil and Gas Don’t Mix: The Mangling of Common Law Property Concepts*, 33 WASHBURN L.J. 540, 565 (1994) (“Courts may or may not use canons to assist them in interpreting a document and they may choose from a host of canons, some of which may be inconsistent.”).

4. See POWELL, *supra* note 2, § 899(3) (“Thus, their purpose is not to ascertain the intent of the parties to the transaction. Rather, it is to resolve a dispute when it is otherwise impossible to ascertain parties’ intent.”).

5. For example, in Pennsylvania, the *Dunham* Rule – a well settled rule of property that a reservation of “minerals” does not include oil and gas – developed out of the application of the community knowledge test. See *infra* Part IV.F.

6. See generally Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 3-6 (1993).

## II. INTERPRETIVE PROCESS: CANONS' POSITION ON THE JUDICIAL DECISION SPECTRUM

The most common disputes over canons center on the proper time and significance with which they should be applied. As Part II will discuss, the court's goal of effectuating the intent of the contracting to include in the word "minerals," introduces additional procedural concerns regarding extrinsic evidence and its proper role in aiding interpretation. Part II concludes with a discussion of underlying policy aims that frame this procedural debate, and which courts must balance in applying canons to mineral conveyance instruments.

### A. A QUEST FOR CLEAR INTENT

Courts today uniformly follow a golden rule of contract interpretation: a court will construe a written instrument to give effect to the clear intent expressed by the parties when they entered the contract.<sup>7</sup> This intent becomes a unique creation of law and policy by which the so-called "parties' intent" becomes the "judicially-ascertained" intent. In determining the intent of the parties, the court considers such to the extent it comports with the meaning that the parties' words or dealings convey.<sup>8</sup>

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." As both a cause and effect thereof, litigation to determine the scope and legal effect of a mineral grant or reservation based on generalized descriptions such as "all minerals" or "[specified substances] and other minerals" has reached the highest court of most states.<sup>9</sup> The consequences of the courts' construction as to what substances are included by this general language are paramount.<sup>10</sup> 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.<sup>11</sup>

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7. See, e.g., *Davis v. Hardman*, 133 S.E.2d 77, 81 (W. Va. 1963).

8. See David E. Pierce, *Interpreting Oil and Gas Instruments*, 1 TEX. J. OIL GAS & ENERGY L. 1, 3 (2006).

9. See *infra* Part IV for a state survey; see also 1-2 WILLIAMS & MYERS, OIL AND GAS LAW § 219, at 258-59 (1997) ("The problem most frequently litigated is whether oil and gas are included in a grant or reservation of 'minerals.'").

10. The canons, if any, the court applies may result not only in substantial business and litigation expenses, but in some circumstances may wholly extinguish the purported rights of a party to the transaction.

11. See Kramer, *supra* note 6, at 4-6.

An important issue to consider in assessing the court's determination of intent at trial is jurisdiction: 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, courts have infrequently addressed whether the question is one of law or of fact."<sup>12</sup> A number of states have held that particular aspects of a mineral grant construction are decided as a matter of law, while some have labeled this a determination of fact.<sup>13</sup> To be sure, this initial procedural issue of law or fact is not always outcome-determinative;<sup>14</sup> however, 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.<sup>15</sup>

Additionally, the intent analysis, for courts which have not adopted bright-line rules, should be objective in nature. While the court seeks the "actual" intent of the original parties, it should first limit its search for that intent to consideration of the written language of the deed.<sup>16</sup> As discussed above, contract interpretation calls for the court to give the meaning to an instrument as intended by the parties thereto. As a general rule, the court presumes "that the parties intended the language to have its ordinary and accepted meaning, unless there is clear expression of intent that the language was used in a different sense."<sup>17</sup> For example, a provision

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12. See, e.g., George E. Reeves, *The Meaning of the Word 'Minerals,'* 54 N.D. L. REV. 419, 441 (1978).

13. Compare *Christman v. Emineth*, 212 N.W.2d 543, 548 (N.D. 1973) (finding lignite included in "minerals" conveyed as a matter of law); *Southland Royalty Co. v. Pan Am. Petrol. Corp.*, 378 S.W.2d 50, 55 (Tex. 1964) (holding the words "minerals" to include oil and gas as a matter of law), with *Mothner v. Ozark Real Estate Co.*, 300 F.2d 617, 624 (8th Cir. 1962); *Brizzolara v. Powell*, 218 S.W.2d 728, 730 (Ark. 1949) (describing inclusion of substance general "mineral" grant as a matter of fact).

14. See Reeves, *supra* note 12, at 442 ("It is probably more correct to say that it is a mixed question of law and fact. In any event, it is a question to be decided in light of the purpose of the instrument, the circumstances of the particular case, and the context in which the words of grant or reservation are used."). But see *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346, 355-54 (Colo. 2000) (holding that as a matter of law a reservation of "other minerals" reserves oil and gas and that no extrinsic evidence will be admitted to vary that conclusion).

15. See, e.g., *Lee v. Frank*, 313 N.W.2d 733, 735 (N.D. 1981) ("Although ordinarily the construction of a written contract to determine its legal effect is a question of law for the court to decide, . . . the interpretation of the parties' intentions as to the meaning of certain words or phrases in a written contract may involve either a question of law or a question of fact depending on whether or not the interpretation requires the use of extrinsic evidence. If the parties' intentions in a written contract can be ascertained from the writing alone, then the interpretation of the contract is a question of law for the court to decide." (internal quotations omitted)).

16. See *Graham v. Drydock Coal Co.*, 667 N.E.2d 949, 952 (Ohio 1996) ("The intent of the parties is presumed to reside in the language they chose to use in their agreement.").

17. See Reeves, *supra* note 12, at 454.

granting or reserving “all minerals” creates a general presumption that all substances the court finds “legally cognizable as minerals” are included.<sup>18</sup> While this places the burden of supporting a more limited construction on the party seeking that limitation,<sup>19</sup> it is ultimately up to the court to decide what this “legally cognizable” category included at the time of conveyance.<sup>20</sup>

#### B. AMBIGUITY AND EXTRINSIC EVIDENCE

The realm of judicial decision making, which deservedly brings the most criticism to the use of canons, is their obfuscation of basic principles concerning the admissibility of extrinsic evidence at trial.<sup>21</sup> When a court looks to a deed to ascertain the intent of the parties, as has already been noted, it should first seek an objective and unambiguous expression shown in the language of the instrument.<sup>22</sup> 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.<sup>23</sup> 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 the one shared by the parties at contracting.<sup>24</sup> In sum, longstanding procedural rules have consistently placed a judicial finding of facial ambiguity as a condition precedent to the admissibility of extrinsic evidence in contract disputes.

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18. *See* *MacMasters v. Onstad*, 86 N.W.2d 36, 41 (N.D. 1957) (“No word is more inclusive than ‘all’ and it is difficult to see why, if the parties intended a restricted construction to be placed upon the reference to other minerals, they should use a word so completely unrestricted in meaning.”).

19. *Id.*

20. *See, e.g.,* *Psencik v. Wessels*, 205 S.W.2d 658, 660-61 (Tex. Civ. App. 1947) (“No doubt every inorganic component of the earth’s crust is legally cognizable as mineral, if the parties affected choose so to deal with it; and this no doubt is true regardless of whether it may be removed or extracted for commercial or other profitable purposes.”); *see also* *Scott v. Laws*, 215 S.W. 81, 82 (Ky. 1919) (acknowledging that a grant or exception of “all minerals” includes “all inorganic substances which can be taken from the land,” and that in order to restrict that meaning, “there must be qualifying words or language, evidencing that the parties contemplated something less general”). *But see* *Dunham v. Kirkpatrick*, 101 Pa. 36, 43-44 (1882) (acknowledging that if the reservation of “minerals” was intended to be as broad as the scientific definition of that word, it would be as broad as the grant and therefore void; thus, the court undertook to limit the definition by applying a community knowledge test).

21. *See, e.g.,* *Reeves, supra* note 12, at 455.

22. *See, e.g.,* *Graham v. Drydock Coal Co.*, 667 N.E.2d 949, 952 (Ohio 1996); *Davis v. Hardman*, 133 S.E.2d 77, 89 (W. Va. 1963).

23. Sensibly, such evidence would be superfluous – if the court decides that the instrument is susceptible to a single reasonable interpretation, no amount of additional evidence could change that. *See, e.g.,* *Miller Land & Mineral Co. v. State Highway Comm’n*, 757 P.2d 1001, 1002 (Wyo. 1988).

24. *See, e.g.,* *Farrell v. Sayre*, 270 P.2d 190, 192 (Colo. 1954).

The most fervent criticism of courts' reliance on certain canons to construe mineral deeds centers on this ambiguity determination.<sup>25</sup> As discussed in Part III, many of the canons frequently employed to determine the legal effect of a grant or reservation of "minerals" require the court to consider surrounding circumstances to discern the parties' intent.<sup>26</sup> 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."<sup>27</sup> However, courts often manipulate the process by admitting such evidence in the first instance, rather than limiting the use of surrounding circumstantial evidence to resolve ambiguous language.<sup>28</sup> This evidence has been admitted to shape the court's initial determination regarding the existence of ambiguity.

The West Virginia Supreme Court of Appeals offered a prime example of this confusion in *West Virginia Department of Highways v. Farmer*.<sup>29</sup> In deciding whether sand and gravel were included within a reservation of "oil, gas and other minerals," the court accurately summarized West Virginia precedent, which allowed extrinsic evidence *only* if necessary to construe an instrument the court has found facially ambiguous.<sup>30</sup> In the court's words:

It has long been held that where language in a deed is unambiguous there is no need for construction and it is the duty of the court to give every word its usual meaning. However, *where ambiguity is introduced by the restrictive language*, making unclear the intention of the grantors in reserving minerals . . . construction of the language is in order and the surrounding circumstances and actions of the parties may be considered.<sup>31</sup>

With an interesting turn in logic, the court then contradicted this accurate statement of the law in the very next sentence of the opinion, finding that

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25. See, e.g., *Pierce*, *supra* note 8, at 12.

26. See *infra* Part III for a discussion of the various canons.

27. ROCKY MOUNTAIN MINERAL LAW INST., 3-84 AMERICAN LAW OF MINING § 84.02[1][d][2], at 84-12 (2d ed. 2012) (citing cases).

28. See, e.g., *id.* § 84.01[3], at 84-9 ("What may be especially perplexing is the frequent consideration by the courts of extrinsic evidence to determine whether or not there is ambiguity. Only after ambiguity has been determined is resort to extrinsic evidence theoretically justified or permissible."); see also *Pierce*, *supra* note 8, at 12.

29. 226 S.E.2d 717 (W. Va. 1976).

30. *Farmer*, 226 S.E.2d at 719.

31. *Id.* (citations omitted) (emphasis added).

the generalized reservation of “other minerals,” when “*considered along with the surrounding circumstances* and past activities concerning this property, *creates an ambiguity* as to the [parties’] intent . . . .”<sup>32</sup> Based on this language, *Farmer* is often attacked for subverting parol evidence standards by considering surrounding circumstances to create, rather than resolve, ambiguity in the text.<sup>33</sup> Nonetheless, other jurisdictions have allowed evidence of surrounding circumstances at this “pre-ambiguous” stage to aid in the intent pursuit,<sup>34</sup> a practice which has been endorsed in the Restatement of Property.<sup>35</sup>

The policy considerations discussed above are vital to the court’s process of finding whether ambiguity exists in its construction of the term “minerals.” However a court makes that determination, whether by means of extrinsic evidence or not, if it determines that the instrument is ambiguous, it must then decide what evidence may be admitted to resolve the dispute. Even though at this point the deed has been declared ambiguous, courts will still attempt to ascertain the parties’ intent as determined by this new wider universe of evidence. Courts generally aim to construe deed language as intended by the parties *at the time and place of the conveyance*.<sup>36</sup> In oil and gas disputes, this causes a host of practical problems. Foremost among these is one of simple 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.<sup>37</sup> Moreover, it is often the case that these original parties “have given no thought whatever to whether the substance in question should be included in or excluded from the grant or reservation of minerals.”<sup>38</sup>

In such cases, the court’s determination becomes more objective in nature. The intent of the parties is determined to be simply that which a reasonable person in similar circumstances would have intended, assuming

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32. *See id.* (emphasis added).

33. *See, e.g., Reeves, supra* note 12, at 456 (suggesting that the *Farmer* court was “apparently countenancing the use of extrinsic evidence to create an ambiguity in an otherwise unambiguous reservation”).

34. *See, e.g., Farmer*, 226 S.E.2d at 719.

35. *See Kramer, supra* note 6, at 14 (citing RESTATEMENT OF PROPERTY § 242 (1940)).

36. *See, e.g., White v. Sayers*, 45 S.E. 747, 749 (Va. 1903) (explaining that the term “minerals” in the contract did not cover coal because at the time of contracting gold was the minerals on the mind of people in that area, and coal did not become valuable until more than forty years later). *But see Scott v. Laws*, 215 S.W. 81, 82 (Ky. 1919) (noting that in a previous case in Kentucky, a deed of “all minerals . . . on described tract,” conveyed all minerals other than those expressly excepted, and even conveyed diamond though neither party knew of its existence on the property at the time or explored for it).

37. *See, e.g., Reeves, supra* note 12, at 444.

38. *See id.*

that the relevant substance was specifically considered in the first instance.<sup>39</sup> Thus, the court's purported "intent" finding may inherently require it to consider extrinsic evidence and construct the scope of "minerals" through use of circumstantial canons described below.<sup>40</sup> As discussed above, opening the door to outside evidence raises procedural concerns and highlights the tension between the policy goals of freedom of contract and stable, predictable title.<sup>41</sup>

### C. POLICY CONSIDERATIONS SHAPING JUDICIAL PROCESS

In order to appreciate the necessary-when-proper role that canons of construction play in judicial decision making, it is vital to understand the conflict that shapes them. Our deep-rooted legal traditions protecting a general freedom to contract cannot be overstated. As such, the court's enforcement of a valid, lawful written agreement will always be constructed upon this "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*."<sup>42</sup> This judicial "process manipulation" thus needs coherent and fair balance between competing interests.<sup>43</sup> In the oil and gas context, courts must compromise two overarching policy aims: the traditional protections of contractual freedom, and the alienability of real property encouraged by the predictability of land titles.<sup>44</sup>

This tension was well covered in a recent work by Professor David Pierce, in which he explained the "free will vs. predictability" dichotomy.<sup>45</sup> First, there is a public "desire to give effect to the free will of the parties to an instrument by recognizing and protecting 'freedom of contract.'"<sup>46</sup> The courts endorse this policy by upholding the rights of parties to enter and enforce the terms of their agreements.<sup>47</sup>

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39. *See id.*

40. *See, e.g., Witherspoon v. Campbell*, 69 So.2d 384, 386 (Miss. 1954) ("[I]n determining the meaning of a conveyance or reservation of minerals, regard may be had not only of the language of the deed, but also to the situation of the parties, the business in which they were engaged and the substance of the transaction.").

41. *But see Gibson v. Sellars*, 252 S.W.2d 911, 913 (Ky. 1952) (noting that unless the language was "so ambiguous or obscure in meaning as to defy interpretation otherwise[,] the parol evidence rule barred extrinsic evidence to vary the terms of the contract).

42. *See Pierce, supra* note 8, at 2-4 (noting the parol evidence rule as clear example of judicial process that frames a court's search for meaning) (emphasis in original).

43. *See id.* at 2 ("The important question in this jurisprudential scheme of things, 'When should process override meaning?'").

44. *See id.* at 3, 5.

45. *See id.* at 3-14.

46. *See id.* at 3.

47. *See id.*

Often pushing against this free-contract theory is “the desire for predictability that can be obtained by adopting bright-line objective rules of interpretation.”<sup>48</sup> From this perspective, the courts should give greater weight to considerations of title stability and predictability when construing deeds. Stability would be most effectively achieved by establishing reliable precedent to control interpretation in future cases; however, the practical difficulty of applying such precedent to decades-old instruments remains a strong barrier to such objectivity.<sup>49</sup> In the absence of formal rules, one avenue to greater predictability may come from improved consistency within construction process; in particular, courts should clarify whether the deed constructed as a matter of law or fact bears weight on the outside universe of real estate conveyance.<sup>50</sup>

In construing oil and gas instruments, the courts must balance these policies: freedom of contract, on the one hand, and the stability and predictability of title, on the other. As the above discussion suggests, clinging too tightly to one policy consideration will ultimately sacrifice the other.<sup>51</sup> In practice, free contract rights are further promoted with a courts’ enforcement of clear instrument language;<sup>52</sup> however, the judicial process “will accurately reflect the parties’ free will only to the extent the judge’s perceptions of what is ‘unambiguous’ and what the language in the instrument ‘means’ coincide with those of the parties.”<sup>53</sup> Thus, this balancing is achieved within the judicial decision making process that seeks to effectuate the intent of the parties, but limits that inquiry to the extent that such intent is expressed by the clear and unambiguous language of the instrument.<sup>54</sup> Of course, this search for objective intent itself may become a confused and troublingly subjective method. While debate continues over the appropriate role canons play in this arena, their current status remains unfortunate as they fail to adequately promote contractual freedoms, jeopardize title stability, and deprive the holders of surface and mineral estates alike of consistent and predictable ownership.

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48. *See id.* at 5.

49. *See id.* at 5-6.

50. *See id.* at 6.

51. *See id.* (“The basic problem with the competing policies of predictability and free will is that one can only be maximized at the expense of the other.”).

52. *See id.*

53. *See id.* at 4.

54. *See id.* at 7 (“The only acknowledged compromise between predictability and free will has been the rule that the search for intent is a search for the ‘objective’ intent of the parties as opposed to their ‘subjective’ intent.”).

### III. CANONS OF CONSTRUCTION APPLIED: WHAT IS A MINERAL?

The full gamut of canons of construction applied across jurisdictions is nearly unquantifiable.<sup>55</sup> To tailor the bounds of this mineral discussion, this Part introduces canons most commonly endorsed by producing states, including those detailed in Part IV's multi-state survey. This Part discusses these canons in two general categories with respect to their role in the court's application. Acknowledging theoretical questions in any attempt to sever one "set" of canons from another, the first category of "textual" canons concerns judicial construction of the actual instrument language,<sup>56</sup> while the second category of "circumstantial" canons focuses more on the court's consideration of extrinsic evidence.

#### A. FOUR CORNERS AND HARMONIZATION

The interpretive principles known as the "four corners" and "harmonization" canons are now uniformly-followed maxims of contract interpretation. Though distinct, these work in tandem to describe the objective intent sought by the court. Generally speaking, the four corners doctrine calls upon the court to "ascertain the intent of the parties from *all* of the language in the deed."<sup>57</sup> To the extent possible, the court will consider the entirety of an instrument and afford each provision equal weight in discerning an "overall intent" expressed by the deed.<sup>58</sup>

Rarely applied alone, the four corners typically couples with the doctrine of harmonization to resolve ambiguities that arise when considering an instrument in its entirety. 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 "intend[ed] every clause to have some effect and in some measure to evidence their agreement."<sup>59</sup>

The court's proper reliance on the four corners and harmonization canons gives effect to all provisions of a deed and, to the extent possible, even where they appear contradictory or inconsistent.<sup>60</sup> In turn, no part of the instrument should be struck "unless there is an irreconcilable conflict

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55. See Kramer, *supra* note 6, at 2-6.

56. This first "textual" category includes: four corners and harmonization, plain meaning, contra proferentum, and ejusdem generis.

57. Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991) (citing Garrett v. Dils Co., 299 S.W.2d 904, 906 (Tex. 1957)).

58. See, e.g., White v. Sayers, 45 S.E. 747, 749 (Va. 1903) ("In the construction of a contract the whole instrument is to be considered; not any one provision only, but all its provisions . . .").

59. Luckel, 819 S.W.2d at 462 (citing Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986)).

60. See *id.*

wherein one part of the instrument destroys in effect another part thereof.”<sup>61</sup> As shown in Part IV’s survey, this basic notion is often overlooked by the courts.

#### B. PLAIN AND ORDINARY MEANING

As commonly applied to all types of contracts, courts frequently employ a plain meaning approach to “minerals” in oil and gas instruments.<sup>62</sup> This canon steers the court’s construction toward a common, ordinary definition of a word, in a way the court finds a reasonable member of the *relevant* public would understand it.<sup>63</sup> This canon’s impact rests on the court’s delineation of the public of reference – thus its apparent “textual” focus is inherently factual based on the relationship and dealings between the contracting parties.

#### C. CONTRA PROFERENTUM

The canon of construction known as *contra proferentum*, or construe “against the drafter,” has long been a cornerstone of contract dispute resolution.<sup>64</sup> Its application is simple and justifiable: because the drafting party to a contract maintained final control over the language used, that party should in turn bear the burden of ambiguities that later give rise to litigation. Thus, *contra proferentum* holds that a court will resolve ambiguity in the contract with deference to the nondrafting party.<sup>65</sup>

#### D. EJUSDEM GENERIS

The canon known as *eiusdem generis* is applicable only in cases where mineral description at issue provides two or more specific substances followed by the apparent catchall, “and all other minerals.” *Eiusdem*

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61. *Id.* (quoting *Benge v. Scharbauer*, 259 S.W.2d 166, 167 (Tex. 1953)).

62. *See generally* *Pierce*, *supra* note 8, at 20.

63. *See, e.g., Dunham v. Kirkpatrick*, 101 Pa. 36, 43 (1882) (“The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for . . . it may be safely assumed that such was the aspect in which the parties themselves viewed it.”); *Witherspoon v. Campbell*, 69 So.2d 384, 386 (Miss. 1954) (stating that when in doubt over the meaning, the term should be given the meaning customary in the area in which the deed will operate).

64. *See, e.g., ROCKY MOUNTAIN MINERAL LAW INST., supra* note 27, § 84.02[1][c], at 84-11.

65. Some courts and authors label this canon “construe against the grantor,” but the canon more accurately concerns the party that controls the final terminology used in the instrument irrespective of the grantor-grantee status. *See Dep’t of Highways v. Farmer*, 226 S.E.2d 717, 720 (W. Va. 1976) (“[W]here an ambiguity exists in an instrument, the language will be construed against the grantor.”); *see also* *ROCKY MOUNTAIN LAW INST., supra* note 27, § 84.02[1][c], at 84-11.

generis, meaning “of the same kind,” 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.”<sup>66</sup>

The drawbacks to applying *eiusdem generis* consistently are readily apparent. Despite its textual focus, courts lack any objective standard for guidance in choosing the qualities that the named substances share, and which of those will be determinative to define the class of minerals conveyed or reserved together. For example, in *Luse v. Boatman*,<sup>67</sup> a Texas appellate court keenly explained:

If we should apply the rule of *eiusdem generis*, what qualities or peculiarities of the specified type, “coal,” shall be considered in determining the classification intended by the use of the word “mineral”? Are we to classify according to value? If so, can it be said that oil and gas on the one hand and coal on the other are of different kinds or species of minerals? If we classify as to use, is it not true that all three are used for fuel? Shall the classification be determined by the form, density, color, weight, value or uses of the particular species mentioned? . . . [A]re we justified in limiting the minerals intended to be included in the reservation to those only which are found in a solid state?<sup>68</sup>

These observations in *Luse* have garnered significant support, leading some courts to reject the canon altogether.<sup>69</sup>

Nonetheless, many courts continue to cite *eiusdem generis* to support a given deed construction, so long as the resulting construction does not vitiate the plain meaning of the language.<sup>70</sup> As observed over a century ago by the Supreme Court of Utah in rejecting an *eiusdem generis* analysis, canons of construction in general must retain their proper place in the court’s construction and therefore “must not be applied so as to make them masters, since they are designed as servants merely.”<sup>71</sup> Moreover, this

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66. See, e.g., *McKinney’s Heirs v. Cent. Ky. Natural Gas Co.*, 120 S.W. 314, 314, 316-17 (Ky. 1909) (finding that a deed that conveyed “all minerals such as coal, iron, silver, gold, copper, lead, bismuth, antimony, zinc or any other minerals of any marketable value,” did not convey gas because the phrase “any other minerals of any marketable value” was limited to substances of the same character as those previously named (emphasis added)).

67. 217 S.W. 1096 (Tex. 1919).

68. *Luse*, 217 S.W. at 1099.

69. See, e.g., *id.* at 1099-1100; *Christman v. Emineth*, 212 N.W.2d 543, 549 (N.D. 1973); see also *Reeves*, *supra* note 12, at 447.

70. See, e.g., *West v. Aetna Life Ins. Co.*, 536 P.2d 393, 396-401 (Okla. Ct. App. 1975) (applied the doctrine of *eiusdem generis* to determine that “oil, gas and other minerals” did not include any interest in copper, silver, gold, or any type of metallic ores or minerals).

71. *Nepthi Plaster & Mfg. Co. v. Juab Cnty.*, 93 P. 53, 56 (Utah 1907).

canon generally does not apply if its impact would undermine what the court has deemed to be the parties' clear intent in closing the mineral class – either with “all-encompassing” language or “where the particular things enumerated are complete so that there remains not others of like kind.”<sup>72</sup>

#### E. COMMUNITY KNOWLEDGE TEST

The first “circumstantial” canon relevant to this discussion is the so-called community knowledge test. 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.<sup>73</sup> Significant policy concerns arise from judicial reliance on the community knowledge test. By its very definition, this canon calls for circumstantial evidence of general perceptions, interpretations, and similar norms with respect to the referential public or community. As such, several courts and commentators denounce the community knowledge test because it requires a court to consider extrinsic evidence from the outset.<sup>74</sup> When its focus weighs so heavily on such extrinsic showings as a matter of course, a court risks undermining the primary, proper goal of its inquiry: to determine the meaning of contract language as it was understood, intended, and written by the executing parties. Much like pitfalls related to *eiusdem generis* noted above, a court applying the community knowledge standard must ultimately draw the line somewhere in establishing the scope of the relevant community. In doing so, the court inherently may define the term by virtue of framing the community to its conclusion, rather than the more appropriate inverse.<sup>75</sup> As such, even a sound application of the community knowledge test is often criticized canons for an over-reliance on particularized facts that can offer no predictable guidance beyond the case at hand. In other words, this test is “nothing but legal fluff to support whatever result the trier [sic] of fact thinks is fair in a particular case.”<sup>76</sup>

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72. See Reeves, *supra* note 12, at 450.

73. See, e.g., White v. Sayers, 45 S.E. 747 (Va. 1903) (interpreting the term “minerals” based upon the intentions at the time and place the deed was executed).

74. See, e.g., David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, 47 ANN. INST. ON OIL & GAS L. & TAX. § 1.02[2][a], at 1-5 (1996) (“[The community knowledge test] has proven to be a rather fickle test and therefore custom made for the sort of result-oriented shell game jurisprudence needed to ‘do equity’ in individual cases.”); McCormick v. Union Pac. Res. Co., 14 P.3d 346, 353 (Colo. 2000) (noting that when courts base decisions upon evidence of the original parties’ intent many decades later, it leads to more litigation and uncertainty).

75. See, e.g., McCormick, 14 P.3d at 353 n.7 (criticizing reliance on extrinsic evidence to find intent, stating that such “intent” is too often a result of the rules of evidence relating to proof and presumption more than a result of the parties’ actual intent).

76. See Pierce, *supra* note 74, at 1-5.

Even so, this test is one of the most popularly applied canons among the states included in the state survey herein.<sup>77</sup>

#### F. SURFACE DESTRUCTION TEST

Another fact-based standard, the surface destruction test, has been followed by a number of jurisdictions.<sup>78</sup> 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.<sup>79</sup> In this scenario, a court applying the surface destruction test may consider extrinsic evidence to determine whether extraction of the disputed mineral genuinely jeopardizes the surface estate. If surface destruction is likely to follow proposed extraction, the court will refuse to include such substances within the minerals conveyed.<sup>80</sup>

Since its early popularization in Texas, the surface destruction canon has been reformulated on numerous occasions.<sup>81</sup> This test gained substantial criticism after its application by the Texas Supreme Court in *Acker v. Guinn*,<sup>82</sup> which called for immediate referral to extrinsic evidence of extraction practices to aid its initial determination of what minerals were conveyed by generalized language.<sup>83</sup> *Acker* caused particular backlash because the court’s destruction finding provided the fundamental basis for its holding, even where that construction was in direct conflict with clear language in the instrument.<sup>84</sup>

In response, the Texas Supreme Court eventually undercut the breadth of the surface destruction test in *Moser v. U.S. Steel Corp.*<sup>85</sup> The *Moser* court lamented reliance on outside facts as a source of uneasiness in the marketplace: because *Acker* “required the determination of several fact issues to establish whether the owner of the surface or the mineral estate owns a substance not specifically referred to in [the instrument] . . . it could

77. See *infra* Part IV.

78. See, e.g., *Shores v. Shaffer*, 146 S.E.2d 190, 193 (Va. 1966) (determining that a grant of “minerals” did not include sand and gravel, partially based upon the following rationale: “The sand and gravel on the Shores tract are an integral part of the surface. . . . [T]here was no other way possible to remove the sand except by going in from the surface; [] any sort of deep mining would cause the top to collapse because it is all sand . . .”).

79. *Id.* (“The sand under the surface could not be removed without taking the surface.”).

80. See *Pierce*, *supra* note 74, at 1-6.

81. See Brant M. Laue, Note, *Interpretation of “Other Minerals” in a Grant or Reservation of a Mineral Interest*, 71 CORNELL L. REV. 618, 624-26 (1986).

82. 464 S.W.2d 348 (Tex. 1971).

83. *Acker*, 464 S.W.2d at 351-54.

84. See, e.g., *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 101 (Tex. 1984); *Reed v. Wylie*, 597 S.W.2d 743, 746-47 (Tex. 1980).

85. 676 S.W.2d 99, 101 (Tex. 1984).

not be determined from the grant or reservation alone who owned title to an unnamed substance.”<sup>86</sup> The court rejected an argument that mineral ownership findings should rest on surface damage showings, as it provides no predictable guidance and sacrifices the interest in title stability.<sup>87</sup> Today, Texas courts adhere to *Moser*’s clearer, plain meaning approach in place of the rule in *Acker*.<sup>88</sup> In fact, the court expressly held that “a severance of mineral in an oil, gas, and other minerals clause includes all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of severance.”<sup>89</sup>

#### IV. STATE SURVEY

Part IV analyzes primary case law from several jurisdictions, highlighting the courts’ application of relevant canons of construction to resolve ambiguous use of the term “mineral” in describing the property conveyed or reserved by a given instrument. To determine mineral ownership, courts are often required to interpret language in deeds executed decades earlier. To add difficulty to this complex task, courts must recognize that although the language in any particular deed has remained static, the mineral extraction industries have evolved significantly as a result of new discoveries and advances in technology. For that reason, parties to an instrument, or their successors, frequently disagree over the effect of a conveyance many years later and rely on a court of competent jurisdiction to settle the dispute.

One issue that has spawned considerable litigation in producing states is the effect of using the term “minerals” in a deed, whether in the grant or in the exception or reservation, to describe a particular mineral estate. As an example, a deed conveying fee title will describe the relevant tract of land and designate a particular substance, e.g., coal, which the grantor will retain. Rather than explicitly listing all substances included in the reservation, the specifically enumerated substance is frequently followed by general terms, such as “and other minerals” or “and other valuable minerals.” The arguably ambiguous nature of this appendage causes conflict when parties later disagree over exactly what substances were thereby conveyed (or reserved). This is especially true when it is indeed

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86. *Moser*, 676 S.W.2d at 101 (citing *Reed v. Wylie*, 597 S.W.2d 743, 750 (Spears, J., Concurring)).

87. *See id.* at 104-05.

88. *See Laue*, *supra* note 81, at 634-38.

89. *Moser*, 676 S.W.2d at 102.

those “other minerals,” rather than the substances explicitly stated, that become the object of a very lucrative industry.<sup>90</sup>

The resolution of the question “[w]hat does the term ‘minerals’ mean?” has been different among the several states, depending upon the approach taken. Courts have applied various canons of construction, including the community knowledge test, ejusdem generis, the rule of practical construction, the exceptional use or value test, and construe against the grantor (or drafter). In a few states, the interpretation of “minerals” has become a matter of property law, and no extrinsic evidence will be admissible to alter the meaning attributed by settled precedent.<sup>91</sup> However, most states allow extrinsic evidence to be admitted if the language is ambiguous or is susceptible to more than one interpretation.

#### 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. In 1954, the Supreme Court of Colorado was asked to settle a dispute over whether “minerals” included sand and gravel. In *Farrell v. Sayre*,<sup>92</sup> the court interpreted a special warranty deed from 1940 that contained the following language: “excepting and reserving all mineral and mineral rights and rights to enter upon the surface of the land and extract the same.”<sup>93</sup> The entire surface of the land consisted of sand and gravel, and the landowner, Ferrell, and the grantor, Sayre, disagreed as to who owned that gravel.<sup>94</sup> The Supreme Court of Colorado noted that when the reservation is in general terms, the decision will turn upon the intent of the parties at the time of the execution of the deed.<sup>95</sup> Because the surface was nothing but sand and gravel, the court found it “surely was not contemplated that the parties intended to nullify the grant without some direct specification in the reservation.”<sup>96</sup> The controlling principles were as follows:

[F]irst, . . . the word “minerals” when found in a reservation out of a grant of land means substances exceptional in use, in value and

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90. As stated by the North Dakota Supreme Court, “[i]t is seldom mentioned that one of the properties of a mineral is that often, when newly discovered in valuable quantities, it creates lawsuits.” *Lee v. Frank*, 313 N.W.2d 733, 734 (N.D. 1981).

91. *See, e.g., infra* Part IV.A, F.

92. 270 P.2d 190 (Colo. 1954).

93. *Farrell*, 270 P.2d. at 191.

94. *Id.* at 191-92.

95. *Id.* at 192.

96. *Id.* The court also stated that the trial court wrongly considered acts of the plaintiff, Farrell, “who was not a party to [the original] deed,” and other mere side transactions. *Id.*

in character . . . and does not mean the ordinary soil of the district which if reserved would practically swallow up the grant . . . ; and secondly . . . in deciding whether or not in a particular case exceptional substances are “minerals” the true test is what that word means in the vernacular of the mining world, the commercial world and landowners at the time of the grant, and whether the particular substances was so regarded as a mineral . . . .<sup>97</sup>

Less than ten years later, the Court of Appeals of Colorado again decided whether a reservation of “oil, gas and other minerals” operated to reserve gravel.<sup>98</sup> The court noted the reservation of “all minerals” is “inherently ambiguous” and referred to the controlling principles stated in *Farrell*, before deciding that it was proper for the trial court to have considered extrinsic evidence.<sup>99</sup> The evidence showed the topsoil of the entire parcel was underlain by gravel and that at the time of the reservation the term “mineral” did not, as a matter of law, include gravel.<sup>100</sup> The court then stated the trial court would have had a duty to bring within the meaning of “mineral” any substance the parties actually intended, whether or not that substance met the criteria set forth in *Farrell*.<sup>101</sup> In *Morrison*, however, the parties did not intend gravel to be included in the reservation.<sup>102</sup> The foregoing cases evidence an attempt by the court to give meaning to the original parties’ intent with resort to these “controlling principles.”

As recently as 2000, the Supreme Court of Colorado was again asked to determine what was intended by the term “minerals.” In *McCormick v. Union Pacific Resources Co.*,<sup>103</sup> landowners sought to quiet title to the oil and gas in various tracts of land that had been conveyed by way of five deeds from the Union Pacific Railroad Company (“UPRC”) between 1906 and 1909.<sup>104</sup> Three of those deeds reserved “all coal and other minerals within or underlying said lands,” and two reserved “all oil, coal and other minerals within or underlying said lands.”<sup>105</sup> The landowners claimed the

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97. *Id.* at 192-93 (quoting *Waring v. Foden*, 86 A.L.R. 969, 979 (1932)).

98. *Morrison v. Socolofsky*, 600 P.2d 121, 122 (Colo. App. 1979).

99. *Id.* (stating the court below considered maps prepared by the Colorado Geological Survey and results of test hole drilling).

100. *Id.* This conclusion was also based upon testimony of a geologist consultant in the gravel industry and agricultural lenders and landowners as to the common meaning of the term “mineral.” *Id.*

101. *Id.*

102. *Id.* at 123.

103. 14 P.3d 346 (Colo. 2000).

104. *McCormick*, 14 P.3d at 347-48.

105. *Id.* at 348.

(1) failure to specify oil and gas as to three properties and gas as to two properties, (2) lack of much oil and gas production in the area at the time of conveyance, and (3) UPRC's progressive insertion of particular substances in its deed reservation language as industries developed (*i.e.*, from "coal" to "coal and oil" to "coal, oil, and gas") all demonstrated UPRC's intent not to include those substances in the reservation.<sup>106</sup> The landowners requested a trial on the issue with the inclusion of this "extrinsic evidence" to show the parties' intent.<sup>107</sup>

The Supreme Court of Colorado initially agreed with the lower courts, finding "the term 'other minerals' in a deed reservation in Colorado has *the settled meaning* of including oil and gas."<sup>108</sup> The court then stated the relevant issues in the appeal, which were cases of first impression: (1) is the term "minerals" in a general deed reservation unambiguous as a matter of law, such that no extrinsic evidence may be admitted to show a contrary intent; and (2) does "minerals" include, as a matter of law, all oil, gas and valuable subsurface substances?<sup>109</sup> The court held that "Colorado adheres to the majority rule that the deed reservation language 'other minerals' reserves oil and gas."<sup>110</sup> To support this statement, it confirmed that subsurface minerals may be severed from the surface estate.<sup>111</sup> Although the word "mineral" can take on different meanings in different contexts,<sup>112</sup> "the trial court's determination [of] summary judgment was appropriate in this case."<sup>113</sup> In making this determination, the court relied on esteemed commentary, such as the following:

Barring the unusual case where ambiguities exist in the language of [a] grant or reservation and parol evidence is allowed to prove what was really intended in a given conveyance, the law is basically settled . . . . Barring other factors, most courts today will hold or have held that a general grant or reservation of "minerals"

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106. *Id.*

107. *Id.*

108. *Id.* (restricting the effect of the finding to oil and gas only and not to other minerals) (emphasis added).

109. *Id.*

110. *Id.*

111. *Id.* at 349.

112. *Id.*

113. *Id.* Note that although the court holds that Colorado follows the majority rule that a reservation of "minerals" includes "oil and gas" and that this meaning is "settled," it appears to limit this holding, as does the commentary it cites, by using phrases such as "in this case," "[b]arring the unusual case where ambiguities exist," and "unless there was a demonstrated intention to the contrary." *Id.* at 347, 341, 351.

or of “all minerals” will be inclusive of oil and gas and all constituent hydrocarbons.<sup>114</sup>

The courts are practically unanimous in holding that oil and gas are minerals in the broad and general sense in which that term is used. These decisions would seem to fix a common standard of meaning on the term, and it is a general rule, adhered to by a majority of the courts, that a conveyance or exception of minerals includes oil and gas, unless from the language of the instrument, or from the facts and circumstances surrounding the parties at the time of its execution, it is found that the term was used in a more restricted sense.<sup>115</sup>

The majority position is to construe a general reference to “minerals” to include oil and gas unless there was a demonstrated intention to the contrary.<sup>116</sup>

In most of the producing states it is a rule of property that the term “minerals” includes oil and gas unless the instrument creating the mineral interest by grant or reservation reveals that the parties intended the term to have a more restrictive meaning. Extrinsic evidence of intent in this regard is generally admissible only where the language of the instrument is ambiguous.<sup>117</sup>

The court then discussed the reservations in the case at bar. It gave the history of the grants to UPRC and of the various conveyances from UPRC using deed forms that included reservations like those at issue.<sup>118</sup> Rather than look to the language of the instruments themselves, the court noted that its sister states of Wyoming, Utah, and Arizona have all conclusively held the term “other minerals” in these railroad conveyances includes oil and gas.<sup>119</sup> Based on the precedent in other states, on “Colorado precedent,

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114. *Id.* at 349 (quoting Phillip G. Dufford, *Conveying Oil and Gas Interests*, in CATHY STRICKLIN KRENDL, 1B COLORADO METHODS OF PRACTICE § 10.1, at 9-10 (1997)).

115. *Id.* at 351 (quoting 1A W.L. SUMMERS, THE LAW OF OIL AND GAS § 135, at 268 (1954)).

116. *Id.* (quoting Robert G. Pruitt Jr., *Mineral Terms – Some Problems in Their Use and Definitions*, 11 ROCKY MTN. MIN. L. INST. 1, 12 (1966)) (emphasis added).

117. *Id.* at 351 n.2 (quoting HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS TERMS 427 (1981)) (emphasis added).

118. *Id.* at 352-53.

119. *Id.* at 353 (citing *Anschutz Land & Livestock Co. v. Union Pac. R.R. Co.*, 820 F.2d 338, 343 (10th Cir. 1987) (applying Utah law); *Union Pac. Land Res. Corp. v. Moench Inv. Co.*, 696

custom, usage, and learned commentary,” and on the need for an established rule of law that provides certainty rather than the need to rely on extrinsic evidence, the court determined the issue is a legal question that precludes resorting to extrinsic evidence and allows resolution by summary judgment.<sup>120</sup>

In coming to this conclusion, it appears the court chose to disregard the analysis used, for example, in the Tenth Circuit case interpreting Utah law, *Anschutz Land & Livestock Co. v Union Pacific Railroad Co.*<sup>121</sup> In that case, rather than finding that extrinsic evidence should never be admitted to determine whether the parties intended the phrase “other minerals” to include “oil and gas,” the court appeared to read the clause as a whole to determine that it unambiguously included “oil and gas;” based on that determination, extrinsic evidence was not admitted to alter the clear intention shown on the face of the document.<sup>122</sup> The *McCormick* court also appears to disregard the limiting language provided in the above commentary which seems to apply the majority “rule” more as a rebuttable presumption: that is, it should apply unless language exists to show a contrary intent.<sup>123</sup>

The court skipped analysis of the deed as a whole to find that “other minerals” always includes “oil and gas.”<sup>124</sup> It noted “[a]llowing the introduction of extrinsic evidence many decades after the deed conveyances . . . invites uncertainty and litigation, as necessary evidence has long since disappeared or sheds no real light on the parties’ individual intentions.”<sup>125</sup> Additionally, “[a]ll too often this ‘intent’ as determined, results from application of the rules of evidence concerning burden of proof and presumptions, which have little relevance to the actual intent of the parties.”<sup>126</sup> Based on the foregoing policy considerations, the court

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F.2d 88, 93 (10th Cir. 1982) (applying Wyoming law); *Amoco Prod. Co. v. Guild Trust*, 636 F.2d 261, 264 (10th Cir. 1980) (applying Wyoming law); *Spurlock v. Santa Fe Pac. R.R. Co.*, 694 P.2d 299, 308-09 (Ariz. Ct. App. 1984); *Miller Land & Mineral Co. v. State Highway Comm’n*, 757 P.2d 1001, 1002-03 (Wyo. 1988).

120. *Id.* at 354.

121. 820 F.2d 338 (10th Cir. 1987).

122. *Anschutz Land & Livestock Co.*, 820 F.2d at 343 (recounting and adopting the district court’s interpretation of a reservation of “all coal and other minerals,” which looked at the language in question in the context of the entire clause to determine that oil and gas was included as a matter of law and that no extrinsic evidence was admissible). It is not clear whether this court intended its holdings to apply to all instances of the term “other minerals” or only to the term when used in similarly drafted instruments.

123. *See generally* Pierce, *supra* note 74.

124. This approach does, however, appear to be in line with most of the above-cited opinions. *See, e.g.*, *Spurlock v. Santa Fe Pac. R.R. Co.*, 694 P.2d 299, 308 (Ariz. Ct. App. 1984); *Miller Land & Mineral Co. v. State Highway Comm’n*, 757 P.2d 1001, 1002 (Wyo. 1988).

125. *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346, 353 (Colo. 2000).

126. *Id.* at 353 n.7.

concluded this matter should be treated as one of property law, and precedent acted to foreclose the question for trial.<sup>127</sup> Therefore, 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. In reaching this conclusion, Kentucky courts have used a practical construction approach and appear to reject both the community knowledge and exceptional characteristics tests. The Court of Appeals of Kentucky first decided the issue in 1919 in the case of *Scott v. Laws*.<sup>128</sup> There, the grantor conveyed “all of the mineral right and coal privileges and rights-of-way to and from said minerals and coal privileges; also the right to search for all undiscovered minerals and coals upon the lands hereinafter described.”<sup>129</sup> The court answered the first question relating to the interest granted, *i.e.*, that this was a grant of title to the minerals, not just a mining privilege.<sup>130</sup> It then addressed the contention that oil and gas did not pass.<sup>131</sup>

The plaintiff relied on the case of *McKinney’s Heirs v. Central Kentucky Natural Gas Co.*,<sup>132</sup> to assert the grant should not include oil and gas.<sup>133</sup> In that case, the deed conveyed “all minerals, such as coal, iron, silver, gold, copper, lead, bismuth, antimony, zinc or any other mineral of any marketable value.”<sup>134</sup> The Court of Appeals determined that the gas did not pass because the words “any other minerals of any marketable value”

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127. *Id.* at 354. Note the concurring opinion in this case took issue with the court’s analysis. It states the majority failed to follow general principles of deed interpretation which state that (1) a primary goal of deed interpretation is to give effect to the parties’ intent, (2) intent may be found by extrinsic evidence if a deed is found to be ambiguous, (3) whether an ambiguity exists is a matter of law to be determined by the court, and (4) in deciding whether an ambiguity exists, a court may conditionally admit extrinsic evidence on the issue of ambiguity. *Id.* at 354-55. Furthermore, the concurrence claims that by relying on the historical information to ascertain the meaning of the term “minerals,” the majority determines an issue of *fact* within the purview of a trial court and denied the landowners an opportunity to present their evidence to show a contrary meaning. *Id.* at 355.

128. 215 S.W. 81 (Ky. 1919).

129. *Scott*, 215 S.W. at 82.

130. *Id.* at 81-82.

131. *Id.*

132. 120 S.W. 314 (Ky. 1909).

133. *Scott*, 215 S.W. at 82.

134. *Id.*

should be read in conjunction with the things previously named.<sup>135</sup> For that reason, the conveyance should be limited to things of a similar nature, which did not include oil and gas.<sup>136</sup>

*Scott* acknowledged generally, a grant or exception of all minerals “will include all inorganic substances which can be taken from the land, and to restrict the meaning of the term there must be qualifying words or language, evidencing that the parties contemplated something less general than all substances legally cognizable as minerals.”<sup>137</sup> The court then referred to *Kentucky Diamond Mining & Developing Co. v. Kentucky Transvaal Diamond Co.*<sup>138</sup> to distinguish *McKinney*.<sup>139</sup> The *Kentucky Diamond Mining* opinion held “a deed of ‘all minerals . . . on described tract,’ excluding coal for the use of the farm, conveyed all the minerals excepting the coal reserved” and passed diamond even though neither party knew of its existence or prospected for it at the time.<sup>140</sup> Therefore, because oil and gas are minerals and nothing in the deed before the *Scott* court evidenced an intent to convey anything less general than all substances legally classifiable as minerals, the oil and gas passed.<sup>141</sup>

The foregoing issue has been presented before the Court of Appeals of Kentucky in numerous other cases where parties have sought a determination that the variation in their granting or reserving clause distinguished their deed from established precedent. However, the same result has been applied to a wide array of language, which as noted in the 1952 case, *Gibson v. Sellars*:<sup>142</sup>

This court has long since established the rule that the term “minerals” includes oil and gas, and that a reservation or exception of “coal and minerals” excepts the oil and gas.

The many variations of the term which have been given the effect of including these substances are well illustrated by the specific provisions involved in the several cases. In the *Scott* case, the term was “all the mineral right and coal privileges.” In the

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135. *Id.* (quoting *McKinney’s Heirs v. Cent. Ky. Natural Gas Co.*, 120 S.W. 314, 315 (Ky. Ct. App. 1909)).

136. *Id.* (citing *McKinney’s Heirs v. Cent. Ky. Natural Gas Co.*, 120 S.W. 314, 315-16 (Ky. Ct. App. 1909)). Note the application of *eiusdem generis* in the *McKinney* case.

137. *Scott*, 215 S.W. at 82.

138. 132 S.W. 397 (Ky. 1910).

139. *Scott*, 215 S.W. at 82.

140. *Id.* (citing *Ky. Diamond Mining Developing Co. v. Transvaal Diamond Co.* 132 S.W. 347, 398-99 (Ky. 1910)). Note the rejection of the community knowledge and exceptional characteristics tests in the *Kentucky Diamond Mining* case.

141. *Id.*

142. 252 S.W.2d 911 (Ky. 1952).

*Kentucky West Virginia Gas Co.* case [86 S.W.2d 164 (Ky. 1935)] it was “all the coal, salt water, and minerals.” In the *Hurley* case [171 S.W. 16 (Ky. 1943)] it was “all the coal, mineral and mining rights.” The rule has been followed even though the conjunction “and” is omitted. In the *Berry* case [198 S.W.2d 497 (Ky. 1946)], it was concluded that an exception of the “coal mineral rights” excepted the oil and gas. In the *Hosick* case [39 S.W.2d 667 (Ky. 1931)], an exception of “coal minerals and mining privileges” was given the same effect.<sup>143</sup>

In *Gibson*, the deed exception at issue was as follows: “It is expressly understood and agreed by the parties that the coal and mineral rights underlying said tract of land have been heretofore sold by the First Party and are not intended to be conveyed by this deed and are expressly excluded therefrom.”<sup>144</sup> However, the single prior out-conveyance was of coal only; therefore, the appellee argued that, when considered in light of the prior conveyance, the exception only covered coal, not oil and gas.<sup>145</sup> The court declined to consider the prior transaction, citing the parole evidence rule.<sup>146</sup>

The parole evidence rule is a substantive rule of law as applied to contracts that requires the terms to be found in the writing itself.<sup>147</sup> If the language has an obscure meaning or is susceptible to more than one meaning, extrinsic evidence may be introduced to clarify the language, but use of such extrinsic evidence is limited to cases where language “is so ambiguous or obscure in meaning as to defy interpretation otherwise.”<sup>148</sup> The fact that oil and gas had not been conveyed did not destroy the exception as to it; rather it was “at most only an erroneous recitation of fact and did not limit or restrict the effect of the exception.”<sup>149</sup> The court found itself limited to construing the language in the deed without resort to the terms in prior conveyances to vary or alter the meaning of the words in the exception.<sup>150</sup>

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143. *Gibson*, S.W.2d at 913 (citations omitted).

144. *Id.* at 912.

145. *Id.* at 912-13.

146. *Id.* at 913.

147. *Id.*

148. *Id.*

149. *Id.* at 914.

150. *Id.* at 913 (“An extension of the [parol evidence] rule would result in chaos and confusion, and it would be impossible to determine the rights of the parties to a contract without viewing all the circumstances surrounding the execution of the document in question.”); *see also* *Kentucky-West Virginia Gas Co. v. Browning*, 521 S.W.2d 516 (Ky. 1975).

The foregoing cases, as well as an assortment of other cases resolving similar disputes, have come to the same conclusion, that is, the word “mineral” in a deed includes oil and gas unless the language of the deed shows an intention to exclude those substances.<sup>151</sup> Restrictive language, however, has rarely been found to show an intention that oil and gas does not come within the meaning of “minerals.”<sup>152</sup> In at least in one instance, the court determined 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.<sup>153</sup> And, as previously mentioned, this result is the same even if the parties to the deed did not know the particular substance was underlying those lands and the parties were not currently prospecting for same.<sup>154</sup>

### 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. In *Witherspoon v. Campbell*,<sup>155</sup> the Mississippi Supreme Court was asked to

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151. *See, e.g.*, *Majors v. Easley*, 328 S.W.2d 834, 835 (Ky. 1959); *Gibson v. Sellars*, 252 S.W.2d 911, 912-13 (Ky. 1952); *Sellars v. Ohio Valley Trust Co.*, 248 S.W.2d 897, 899 (Ky. 1952); *Berry v. Hiawatha Oil & Gas Co.*, 198 S.W.2d 497, 497 (Ky. 1946); *Fed. Gas, Oil & Coal Co. v. Moore*, 161 S.W.2d 46, 48 (Ky. 1941); *Maynard v. McHenry*, 113 S.W.2d 13, 14 (Ky. 1938); *Ky. W. Va. Gas Co. v. Preece*, 86 S.W.2d 163, 165 (Ky. 1935); *Hudson v. McGuire*, 223 S.W. 1101, 1103 (Ky. 1920).

152. *Rice v. Blanton*, 22 S.W.2d 580, 581 (Ky. 1929). *But see* *Sellars v. Ohio Valley Trust Co.*, 248 S.W.2d 897, 899 (Ky. 1952) (analyzing language that arguably could restrict the deed to only mining activity, coupled with a restriction that explicitly did not convey rights to surface use, but still determining that because no clear intention to retain oil and gas existed, it passed with the conveyance).

153. *See, e.g.*, *Hudson v. McGuire*, 223 S.W. 1101, 1101, 1102, 1106 (Ky. 1920) (overruling demurrer to plaintiff’s petition and allowing plaintiff to present extrinsic evidence concerning “the situation of the parties, the circumstances surrounding the execution of the deed, and that it was not intended by the grantor or grantee that oil or gas rights or privileges should pass under it” where the conveyance was of “[a]ll the minerals (except stone coal), with necessary right of ways and privileges for prospecting, mining and smelting . . . ,” because none of those terms could be applied to oil and gas production). *But see* *Berry v. Hiawatha Oil & Gas Co.*, 198 S.W.2d 497, 498 (Ky. 1946) (construing a reservation of “all coal mineral rights” to include oil and gas because punctuation is generally given only slight consideration, and “while the language of the reservation is faulty,” it was the result of negligence or inadvertence, not ignorance; “a proper construction of the reservation in question is that all minerals, including coal, were reserved in the deed in question”); *Hurley v. West Ky. Coal Co.*, 171 S.W.2d 15, 16 (Ky. 1943); *Franklin Fluorspar Co. v. Hosick*, 39 S.W.2d 665, 666 (Ky. 1931).

154. *See, e.g.*, *Scott v. Laws*, 215 S.W. 81, 82 (Ky. 1919) (citing *Ky. Diamond Mining & Developing Co. v. Ky. Transvaal Diamond Co.*, 132 S.W. 397 (Ky. 1910)).

155. 69 So. 2d 384 (Miss. 1954).

determine whether “all minerals” included gravel.<sup>156</sup> The court applied various canons of construction in making the determination, including the rule of practical construction, the community knowledge test, and ejusdem generis.<sup>157</sup>

To determine the meaning of the conveyance or reservation, the court in *Witherspoon* allowed resort to the language used in the particular instrument, the parties’ situation and business endeavors, and the substance at issue.<sup>158</sup> The court noted that when in doubt, the meaning of the term should be restricted to that given by the custom of the country in which the deed is to operate.<sup>159</sup> Although the court previously held “minerals” included gravel in *Moss v. Jourdan*,<sup>160</sup> a case decided more than thirty years earlier, in *Witherspoon* it analyzed the changes that had taken place in Mississippi to conclude the *Moss* case was overruled.<sup>161</sup>

The facts the *Witherspoon* court relied upon to overrule *Moss* were several. First, even in *Moss*, the appellant was deemed the owner of the gravel due to his ownership of the minerals, but the appellee was not enjoined to interfere with removal of gravel because of the surface destruction it would cause.<sup>162</sup> Second, in 1922, it was unknown whether oil, gas, or similar minerals existed in Mississippi, but the Tinsley Oil Field was discovered in Yazoo County in 1939 and grantors and grantees have been “oil and gas conscious in the execution of conveyances and reservations of minerals” since that time.<sup>163</sup> Third, gravel is not typically included in transactions covering “solid” minerals, unless specifically mentioned.<sup>164</sup> Fourth, parties who contract for “all the minerals” in place generally do not contemplate the open pit mining associated with gravel, which would destroy or devalue land.<sup>165</sup> Finally, these transactions often list the relevant substances as “oil, gas and other minerals;” the doctrine of ejusdem generis can be applied so that only minerals of similar character to oil and gas are included within the more general term of “other minerals.”<sup>166</sup> Based on the foregoing, it is apparent Mississippi courts rely

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156. *Witherspoon*, 69 So. 2d at 385.

157. *See generally id.*

158. *Id.* at 386. Note, however, that testimony of conversations between the parties was not considered competent for trial. *Id.*

159. *Id.*

160. 92 So. 389 (Miss. 1922).

161. *Witherspoon*, 69 So. 2d at 389.

162. *Id.* at 386.

163. *Id.* at 388. Here the court made use of community knowledge.

164. *Id.* at 387.

165. *Id.* at 388. Note use of the surface destruction test.

166. *Id.*

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” encompasses those substances unless a contrary intent is clearly shown.

#### D. NORTH DAKOTA

North Dakota presents an unusual situation that has resolved many interpretive questions by statute. North Dakota 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.”

In *Lee v. Frank*,<sup>167</sup> the Supreme Court of North Dakota was asked to determine the meaning of the following exception and reservation in a 1945 deed:

[E]xcepting and reserving, however, from these presents all ores and minerals beneath the surface of the above described premises, with the right to mine for and extract the same, provided that in the exercise of such mining right the surface thereof shall not be disturbed or interfered with and in nowise damaged. . . .<sup>168</sup>

The parties agreed this clause effectively reserved coal to the grantors, but disagreed over the effect on the oil and gas rights. After analyzing the issue based upon North Dakota precedent, the court determined this language effectively reserved all the oil, gas, coal, and other hydrocarbons.<sup>169</sup>

As an initial matter, it was acknowledged that the term “minerals” is susceptible to multiple meanings, which may either be broad or narrow in scope, depending upon the context.<sup>170</sup> When the term is used in a reservation in a written document, the general rule is that it indicates an intention to reserve all substances qualifying as “minerals.”<sup>171</sup> It therefore becomes necessary to find qualifying circumstances, words, or context to

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167. 313 N.W.2d 733 (N.D. 1981).

168. *Lee*, 313 N.W.2d at 733-34.

169. *Id.* at 734.

170. *Id.* (“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” (internal quotation marks omitted (citations omitted))).

171. *Id.* (“Ordinarily then, the substance must appear in nature as a mineral and not merely be an element capable of being synthesized in a laboratory into a mineral.”).

determine what substances are included, by looking to the words used, custom and usage, statutes, precedent, or common sense.<sup>172</sup>

The North Dakota Supreme Court previously determined the classification of minerals in this situation cannot be so broad that it defeats the grant by effectively reserving all of the soil itself.<sup>173</sup> Oil and natural gas are generally considered “minerals,”<sup>174</sup> as is coal<sup>175</sup> and the term “mine” may be used to refer to oil and gas drilling operations.<sup>176</sup> This precedent, however, did not supply a “rule-of-thumb formula” by which to answer the question at issue.<sup>177</sup>

To find qualifying context, the *Lee* court also referred to statutory provisions in the North Dakota Century Code.<sup>178</sup> The Code contains provisions that are applicable to the interpretation of “minerals” in conveyances of mineral rights. Those sections are as follows:

All conveyances of mineral rights or royalties in real property in this state, excluding leases, shall be construed to grant or convey to the grantee thereof all minerals of any nature whatsoever except those minerals specifically excluded by name in the deed, grant, or conveyance, and their compounds and byproducts, but shall not be construed to grant or convey to the grantee any interest in any gravel, clay, or scoria unless specifically included by name in the deed, grant, or conveyance.<sup>179</sup>

In all deeds, grants, or conveyances of the title to the surface of real property executed on or after July 1, 1983, in which all or any portion of the minerals are reserved or excepted and thereby effectively precluded from being transferred with the surface, all minerals, of any nature whatsoever, shall be construed to be reserved or excepted except those minerals specifically excluded by name in the deed, grant, or conveyance and their compounds and byproducts. Gravel, clay, and scoria shall be transferred with

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172. *Id.* Note the court’s use of the rule of practical construction.

173. *Id.* (quoting *Salzseider v. Brunsdale*, 94 S.W.2d 502, 503 (N.D. 1959)). See generally *Kadmas v. Sauvageau*, 188 N.W.2d 753 (N.D. 1971).

174. *Id.* (quoting *State v. Amerada Petro. Corp.*, 49 N.W.2d 14, 15 (N.D. 1951)).

175. *Id.* (citing *Abbey v. State*, 202 N.W.2d 844 (N.D. 1972)); see also *Olson v. Dillerud*, 226 N.W.2d 363, 365-68 (N.D. 1975); *Christman v. Emineth*, 212 N.W.2d 543, 549 (N.D. 1973) (explaining why *eiusdem generis* does not work to exclude coal when the specific term “oil and gas” is followed by the general term “other minerals”).

176. *Lee*, 313 N.W.2d at 734. (citing *MacMaster v. Onstad*, 86 N.W.2d 36, 41 (N.D. 1957)).

177. *Id.* at 735.

178. N.D. CENT. CODE § 47-10-24, -25 (1999).

179. *Id.* § 47-10-24. The language provided is current, although this statute has undergone various edits since its enactment. Because the current discussion is focused primarily on the court’s interpretation when the statute does not apply, other versions are not provided.

the surface estate unless specifically reserved by name in the deed, grant, or conveyance.<sup>180</sup>

Based upon the holding of the North Dakota Supreme Court in *McDonald v. Antelope Land & Cattle Co.*,<sup>181</sup> the reservation in *Lee* was not subject to the foregoing limiting statutory provisions, because that deed was executed prior to their enactment.<sup>182</sup> However, the Code provides several sections applicable to all real property conveyance contracts, as follows:

Grants shall be interpreted in like manner with contracts in general except so far as is otherwise provided by this chapter. . . . [I]f several parts of a grant are absolutely irreconcilable, the former part shall prevail. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.<sup>183</sup>

A grant shall be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.<sup>184</sup>

The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity.<sup>185</sup>

A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.<sup>186</sup>

All things that in law or usage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom, unless some of them are mentioned expressly therein. In such case, all other things of the same class are deemed to be excluded.<sup>187</sup>

Because the court did not find (1) words of limitation in the reservation, (2) a limiting statute in effect at the time of the conveyance, or (3) qualifying custom, usage, circumstance, or context, it interpreted the reservation in favor of the grantor per North Dakota Century Code section 47-09-13.<sup>188</sup> Therefore, its final conclusion was that the exception and

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180. *Id.* § 47-10-25. Because, as stated in the preceding footnote, we are not focused on the statutory interpretation, a history of the various forms of this statute is not given.

181. 294 N.W.2d 391 (N.D. 1980).

182. *McDonald*, 294 N.W.2d. at 393.

183. N.D. CENT. CODE § 47-09-11 (1999).

184. *Id.* § 47-09-13.

185. N.D. CENT. CODE § 9-07-02 (2006).

186. *Id.* § 9-07-12.

187. *Id.* § 9-07-21 (setting out a modified version of *eiusdem generis*).

188. *Lee*, 313 N.W.2d at 737.

reservation effectively “reserved ‘all’ metallic minerals and ‘all’ metallic ores, plus ‘all’ non-metallic solid, liquid or gaseous mineral whether known or later discovered (except insofar as it may be interpreted in a manner to defeat the conveyance of the soil itself).”<sup>189</sup>

The foregoing discussion shows that a factor of primary significance in interpreting North Dakota mineral deeds is to determine whether the particular instrument is subject to the limiting statutes. For instruments entered into prior to the enactment of the limiting statutes,<sup>190</sup> the courts will rely on precedent to interpret the language. The *Reiss v. Rummel*<sup>191</sup> opinion shows how significantly the results can differ when courts use legal precedent versus statutory interpretation. In *Reiss*, a mineral deed subject to the limiting statutes conveyed a fractional interest in certain enumerated minerals such as oil and gas and “all other minerals.”<sup>192</sup> The court noted that although North Dakota precedent interprets the phrase “all other minerals” to include coal,<sup>193</sup> that phrase “was insufficient to convey any interest in coal because it did not meet the specific requirements set out by statute.”<sup>194</sup> Regarding language not subject to the statutes, a court will likely follow the process set out in *Lee* to determine if a particular substance was intended, requiring an inquiry into the circumstances surrounding the transaction in question.<sup>195</sup>

#### 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

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189. *Id.*

190. *See* McDonald v. Antelope Land & Cattle Co., 294 N.W.2d 391, 393 (N.D. 1980) (holding that the statute does not apply retroactively).

191. *Reiss v. Rummel*, 232 N.W.2d 40 (N.D. 1975).

192. *Reiss*, 232 N.W.2d at 41-42.

193. *Id.* at 45 (citing *Christman v. Emineth*, 212 N.W.2d 543, 549-51 (N.D. 1973); *Abbey v. State*, 202 N.W.2d 844, 856 (N.D. 1972); *Adams Cty. v. Smith*, 23 N.W.2d 873, 875 (N.D. 1946)).

194. *Id.* Also, the *Rummel* court determined that North Dakota Century Code section 47-10-24 was meant to be limited “only to those real property transactions where the owner conveyed mineral rights under the circumstances outlined by the statute,” and that its provisions do not apply to those transactions where grantors retained mineral rights by reservation or exception; the term “conveyed” in that section does not take on the meaning as defined in section 47-19-42. *Id.* at 48.

195. *See* MacMaster v. Onstad, 86 N.W.2d 36, 42-43 (N.D. 1957) (interpreting the meaning of “all other minerals” using canons of construction similar to those in *Lee*).

It is thus clear that it would be not only impractical, but impossible to attempt to catalogue all the minerals which are, and which are not, included in the grant in the lease under consideration. Decision as to whether any specific mineral is included in the lease must await a case in which an issue as to that mineral is raised.

*Id.* at 43.

excepted or reserved from the conveyance. The courts have proffered several guidelines by which to interpret deeds. Among them is 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."<sup>196</sup> Extrinsic evidence may be used to determine intent when the deed is unclear or ambiguous "or when circumstances surrounding the agreement give the plain language special meaning."<sup>197</sup> Lastly, a contract is construed against the party who drew it.<sup>198</sup>

Of course, these and other canons of construction may not have much significance in the abstract. It is as applied to real deed provisions that they take on meaning. The Supreme Court of Ohio interpreted the following conveyance of a mining right in the case of *Detlor v. Holland*:<sup>199</sup>

Do hereby grant, bargain, sell and convey to the said [Grantee], his heirs and assigns, forever, all the coal of every variety and all the iron ore, fire clay *and other valuable minerals* in, on, or under the following described premises: . . . , together with the right in perpetuity . . . of mining and removing such coal, ore or other minerals; and . . . the right to the use of so much of the [surface] of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, sidetracks, etc., to facilitate the mining and removal of such coal, ore, or other minerals and no more.<sup>200</sup>

One question in front of the court was whether the preceding language was sufficient to convey the oil and gas rights to the property, *i.e.*, do the words "other valuable minerals" include petroleum?<sup>201</sup> The court held that the right to petroleum oil in fact did not pass.<sup>202</sup> Although the words "other valuable minerals" in a technical sense does include petroleum, the court clarified that the real question was *whether the parties intended to include such oil* in the mining right.<sup>203</sup> In answering that question, the court considered the conveyance "in the light of the surrounding circumstances, and in view of the above rule of construction,"<sup>204</sup> and upon authority of the

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196. *Graham v. Drydock Coal Co.*, 667 N.E.2d 949, 952 (Ohio 1996).

197. *Id.*

198. *Id.*

199. *Detlor v. Holland*, 49 N.E. 690 (Ohio 1898).

200. *Detlor*, pt. 1 (emphasis added).

201. *Id.* at 692.

202. *Id.* at 692-93.

203. *Id.* at 692.

204. *Id.*

In determining what is included in a lease, the familiar rules of construction are applied. The grant is construed most strongly against the grantor. The whole contract must be considered in arriving at the meaning of any of its parts. Terms are to be

case of *Dunham & Short v. Kirkpatrick*.<sup>205</sup> The court noted that the grantor had no knowledge of oil in the area at that time and relied heavily upon the terms of the deed, which contained no language applicable to oil and gas operations or of extracting minerals of a migratory nature.<sup>206</sup>

The Ohio Court of Appeals has also had occasion to interpret deeds covering mineral rights. In *Stocker & Sittler, Inc. v. Metzger*,<sup>207</sup> a 1914 deed conveyed certain described property, but in the same paragraph as the description, the grantors excepted a portion as reserved by the granting clause:

Excepting there is reserved unto said grantors, all the veins of coal and other substances of value underlying said above conveyed premises, together with all necessary rights of way and privileges of entry thereon to remove same, unto them, their heirs and assigns forever.<sup>208</sup>

The question before the court was whether the exception reserved the oil and gas estate to the grantors. The court looked to existing precedent of several states before looking to Ohio case law. First, it noted that subjective testimony evidence as to the parties' intent is inadmissible to vary the terms in a written contract.<sup>209</sup> Also, parol evidence was "inadmissible to contradict or change the legal effect of a deed in determining the nature of the estate conveyed," but rather the intent of the parties as evidenced by a construction of the whole instrument "in the light of the circumstances of each case" is controlling.<sup>210</sup> The only objective evidence of circumstances provided in this case was the fact that oil had been struck on the property, and that hundreds of leases had been recorded in the county in the

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understood in their plain, ordinary, and popular sense, unless they have acquired a particular technical sense by the known usage of the trade. They are to be construed with reference to their commercial and their scientific import. This rule is of especial importance when the question arises whether a specific mineral is included in a general designation.

*Id.*

205. *Id.* See generally *Dunham v. Kirkpatrick*, 101 Pa. 36, 43 (1882) (holding that a reservation of "all minerals" does not include oil). See *infra* Part IV.F for a discussion of Pennsylvania law, including the *Dunham* case.

206. *Detlor*, 49 N.E. at 692-93.

207. 250 N.E.2d 269 (Ohio 1969).

208. *Stocker*, 250 N.E.2d at 270.

209. *Id.* at 270 (emphasis added).

210. *Id.* at 273-74. Oddly, the court says that parol evidence is not admissible to change the legal effect of a deed, but rather that the court may determine the intent of the parties, which *does* affect the interpretation and therefore legal effect of a deed, by looking to the "circumstances of each case," *i.e.*, objective evidence of circumstances as of the time of execution.

preceding year, both factors which indicate the parties were aware of oil and gas activities.<sup>211</sup>

The Court of Appeals compared the language in issue to the language in the *Detlor* decision.<sup>212</sup> The deed in *Detlor*, which included “other valuable minerals” in the granting clause, was not held to convey oil and gas. As we have previously noted, the Ohio Supreme Court in that case focused on the fact that the easements conveyed in connection with mining were not applicable to oil and gas operations, and that the circumstances surrounding *Detlor* were such that the grantor had no knowledge of oil being produced in the relevant area and only minimal production was in fact taking place.<sup>213</sup> The Court of Appeals determined that the language of the easements in *Stocker* was not as restrictive, but in fact, was broad enough to cover both coal production and oil and gas production.<sup>214</sup>

Moreover, the court in *Stocker* reviewed two other appeals court cases that arrived at seemingly inconsistent results. In *Gordon v. Carter Oil Co.*,<sup>215</sup> the granting clause of a 1902 deed conveyed “[a]ll the coal and other minerals under the surface of the [described] real estate.”<sup>216</sup> The grant included an easement “to enter upon said land, make all excavations, drains, entries, and structures of whatever nature as may be necessary to conveniently take out said minerals, with a right of way over and across said land for the purpose of transferring said minerals. . . .”<sup>217</sup> That court relied on *Detlor* to conclude that the transfer did not include oil and gas.<sup>218</sup> However, it did not set forth all the information relied upon other than to say that “under all the facts, circumstances, and surroundings of the case – if the testimony is to be relied upon – that the parties hereto did not intend or contemplate that oil and gas should be conveyed to the grantee in the deed now before us for construction.”<sup>219</sup>

The same court decided the case of *Hardesty v. Harrison*,<sup>220</sup> which construed the terms of a 1919 deed conveying coal, clay, and mineral rights on the relevant land.<sup>221</sup> The decision, joined by Judge Houck who wrote the

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211. *Id.* at 273.

212. *Id.* at 273-74.

213. *Id.* (citing *Detlor v. Holland*, 49 N.E. 690, 692-93 (Ohio 1898)).

214. *Id.* at 274.

215. 19 Ohio App. 319 (1924).

216. *Gordon*, 19 Ohio App. at 319-20.

217. *Id.* at 320.

218. *Id.* at 323.

219. *Id.* at 322. Note that the text appears to indicate that parol testimony evidence, namely testimony of the facts, circumstances, and surroundings of the case, was admitted, although we do not know to what extent.

220. 6 Ohio Law Abs. 445 (Ohio App. 1928).

221. *Hardesty*, 6 Ohio Law Abs. at 446.

*Gordon* decision four years earlier, found that oil and gas was included.<sup>222</sup> The opinion stated that although the defendant offered testimony that at the time of the conveyance only nonmigratory minerals were intended, parol evidence was not admissible to vary the terms of the contract; therefore, whatever was said on that earlier occasion could not be used in interpreting the words of the contract.<sup>223</sup> Further, citing a Kentucky Court of Appeals case, the Ohio court stated, “it is a well settled law that petroleum oil is a mineral and is a part of the realty, like coal, iron and copper. A grant without qualifying or limiting words of the minerals underlying certain real estate will include oil or gas.”<sup>224</sup>

The averment in *Hardesty* that the law was well settled to include petroleum in a grant of “minerals” perhaps meant to refer to law in other states, but it appears to have overstated the certainty on that point in Ohio, at least as of 1928. In particular, the Ohio Supreme Court’s decision in *Detlor* specifically determined that “other valuable minerals” did not include petroleum because the intention *to include* it was not made clear by the deed’s language in light of the circumstances.<sup>225</sup> That holding in *Detlor* stands in stark contrast with the holding of *Hardesty*, which stated oil and gas was included in a conveyances of “minerals” unless the language showed an intention not to include it.

After comparing the *Gordon* and *Hardesty* decisions, the *Stocker* court referred to Williams and Meyers, *Oil and Gas Law*, to note the primary split of authority concerning this issue:

1. The term “other substances of value underlying the premises” *includes* oil and gas *unless* other language in the instrument so restricts the definition of the term to exclude them.
2. The term “other substances of value underlying the premises” *does not include* oil and gas *unless* other language in the instrument indicates that the term has been used with the intent to include them.<sup>226</sup>

Looking to *Sloan v. Lawrence Furnace Co.*<sup>227</sup> for support, the court determined that Ohio cases relating to “terms of general description appear to have followed the first rule.”<sup>228</sup> The language quoted from *Sloan* is

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222. *Id.*

223. *Id.*

224. *Id.* at \*7 (citing *Hudson v. McGuire*, 233 S.W. 1101, 1103 (Ky. App. 1920)).

225. See *Detlor v. Holland*, 49 N.E. 690, 692-93 (Ohio 1898).

226. *Stocker & Sitler, Inc. v. Metzger*, 250 N.E.2d 269, 275 (Ohio Ct. App. 1969) (emphasis added).

227. 29 Ohio St. 568 (Ohio 1876).

228. *Stocker*, 250 N.E.2d at 275.

“[t]he words ‘reserving all the minerals underlying the soil,’ in the granting clause of a deed for the conveyance of real estate, constitute, *prima facie*, an exception of the minerals from the operation of the grant.”<sup>229</sup> Unfortunately, the question before the court in the *Sloan* case was not whether “minerals” included the oil and gas estate, but rather whether the term “reserving” was intended to act as a reservation or as an exception.<sup>230</sup>

However, although not well settled at the time of *Hardesty*, the trend in Ohio may well be that the later in time a deed was executed, the more likely the parties intended a grant or reservation of “minerals” to include the oil and gas estate. In support of this, we look to the dates of the relevant deeds discussed above. The *Detlor* case dealt with a deed executed in 1890,<sup>231</sup> and the *Gordon* case dealt with a deed executed in 1902.<sup>232</sup> Both of those cases concluded that oil and gas was not intended by the relevant language, partly based upon the circumstances, which suggest oil was not yet commonly produced.<sup>233</sup> The *Stocker* opinion stated that during 1913, hundreds of leases had been executed and that oil had been struck on the land in question.<sup>234</sup> Further, that court stated “[w]e are certain . . . that if one were to ask any oil and gas man or any layman to name substances of value underlying premises, each would give oil and gas high priority among the substances named.”<sup>235</sup> For that reason, the court determined that oil and gas was included within the exception.<sup>236</sup> Appreciating that Ohio courts look to the circumstances surrounding the particular transaction, then, may help explain why the *Hardesty* case, in interpreting a 1919 deed, found the law was well settled that oil and gas was intended by the term “minerals.”<sup>237</sup>

Based on the foregoing discussion, it appears Ohio courts rely on the community knowledge and exceptional characteristics tests to determine what the parties intended “minerals” to include. As the circumstance

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229. *Id.*

230. *See generally Sloan*, 29 Ohio St. 568 (Ohio 1876).

231. *Detlor v. Holland*, 49 N.E. 690, 692 (Ohio 1898).

232. *Gordon v. Carter Oil Co.*, 19 Ohio App. 319, 319 (1924).

233. *Detlor*, 49 N.E. at 692-93; *Gordon*, 19 Ohio App. at 322-23.

234. *Stocker*, 250 N.E.2d at 274.

235. *Id.* at 275. It is unclear whether the court is referring to people as of 1969 or as of 1914, although from language on page 274 of the opinion, it appears the court believed this applied in 1914, as well as at the writing of the opinion.

236. *Id.* (“By the words used in the deed, the designation of substances has but two qualifications. The first is that they be of value, which can only mean of such worth as to make feasible their removal. The second is that they are underlying the ground. This can leave no question as to oil and gas but explains why coal, which is frequently stripped from the surface, was separately specified.”).

237. *See generally Hardesty v. Harrison*, 6 Ohio Law Abs. 445 (Ohio Ct. App. 1928).

changed and as the mineral extraction industry grew, the interpretation of “minerals” appears to have expanded in the absence of limiting language. This highlights the underlying issue that drafters using the same or very similar terms in deeds in Ohio may not be able to rely on static precedent in interpreting such language, but rather, must keep in mind the fluidity of the mineral extraction industry. As technology improves and previously unrecoverable resources are tapped, this issue may again be broached in the not so distant future.

#### F. PENNSYLVANIA

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.”<sup>238</sup> In the seminal case of *Dunham v. Kirkpatrick*,<sup>239</sup> the Pennsylvania Supreme Court of Pennsylvania decided that a reservation of “all minerals” did not include a reservation of oil.<sup>240</sup> The court initially admitted that a strict scientific interpretation of the word “minerals” necessarily includes petroleum.<sup>241</sup> However, all inorganic substances are technically minerals; therefore, if the reservation was intended to be as broad as the scientific definition of “minerals,” it would be as broad as the grant and therefore void.<sup>242</sup> For that reason, it was necessary to limit the meaning.

The method for limiting the definition of minerals used in *Dunham* is as followed: “[t]he best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for . . . it may be safely assumed that such was the aspect in which the parties themselves viewed it.”<sup>243</sup> The opinion noted that most people considered substances of a metallic nature to be minerals.<sup>244</sup> “Certainly, in popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense.”<sup>245</sup> With the foregoing in mind, the court concluded that

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238. *Highland v. Commonwealth*, 161 A.2d 390, 398 (Pa. 1960) (quoting *Preston v. South Penn Oil Co.*, 86 A. 203, 204 (Pa. 1913)).

239. 101 Pa. 36 (1882).

240. *Dunham*, 101 Pa. at 44.

241. *Id.* at 43.

242. *Id.*

243. *Id.* (citation omitted). Note the court’s resort to the community knowledge test.

244. *Id.* at 44.

245. *Id.*

parties surely intended the word to take on its popular understanding and that they probably were not even aware that the property was underlain by petroleum.<sup>246</sup> Further, if the parties had intended to reserve the petroleum oil, the court stated that they should have expressly done so in clear terms.<sup>247</sup>

A quarter of a century later, the Pennsylvania Supreme Court took up an almost identical question: did the reservation of mineral rights include natural gas? In *Silver v. Bush*,<sup>248</sup> the conveyance was of certain “pieces or parcels of land . . . together with all and singular the . . . hereditaments and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever, of the [grantor].”<sup>249</sup> The habendum clause read “to have and to hold the said piece or parcel of land *except the minerals underlying* the same and the right of way to and from said mineral which the first parties reserve.”<sup>250</sup>

The court in *Silver* went through much the same analysis as in *Dunham*, such as stating that the meaning of minerals must be limited so that the reservation will not fail for overbreadth.<sup>251</sup> It noted that the word, as has previously been mentioned, has both a very broad scientific meaning, but also a presumptive “commercial” usage in the context of a real property conveyance.<sup>252</sup> In the commercial sense, the term “minerals” can mean “any inorganic substance found in nature having sufficient value separated from its situs as part of the earth to be mined, quarried or dug for its own sake or its own specific uses.”<sup>253</sup> A given substance may or may not, then, fit within this commercial meaning of “mineral,” depending upon “the circumstances and the intent of the parties.”<sup>254</sup>

At that point, the court recited the *Dunham* rule, that petroleum was not included in a reservation of “minerals,” which consequently takes natural gas out of the scope of the word.<sup>255</sup> The court noted, parties may avoid operation of the *Dunham* rule by clear and convincing evidence that the words were used in a different sense.<sup>256</sup> In that case, the parties asserted

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246. *Id.*

247. *Id.*

248. 62 A. 832 (Pa. 1906).

249. *Silver*, 62 A. at 832-33.

250. *Id.* at 833 (emphasis added).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* This sounds like a type of exceptional-characteristics test.

255. *Id.*

256. *Id.* at 833-34.

that at the time the deed was executed, the land was already being developed for natural gas and it was known that such gas was a “marketable commodity.”<sup>257</sup> This evidence was deemed insufficient to overcome the burden to remove the case from the *Dunham* rule, and the court again stated that “if the parties intended to include gas they would have said so expressly.”<sup>258</sup>

After *Silver*, the *Dunham* rule has resurfaced several times. In 1913, the court decided *Preston v. South Penn Oil Co.*,<sup>259</sup> which held that oil and gas was not included in a reservation of minerals, noting that “*Dunham v. Kirkpatrick* has been the law of this State for thirty years . . . and it will not be disturbed.”<sup>260</sup> In the 1953 case of *Bundy v. Myers*,<sup>261</sup> the court held a reservation of “oil” along with “coal, fire clay and minerals” to exclude natural gas.<sup>262</sup> The defendant assignees in that case asserted the rule of ejusdem generis to conclude that the reservation of oil included natural gas, as gas was as much a mineral as the oil, which was expressly reserved.<sup>263</sup> The court countered that if gas was intended to be included, why was only oil expressly reserved?<sup>264</sup>

As shown in the above discussion, from time to time the *Dunham* rule has been challenged. The resulting cases, including *Silver* and *Bundy*, have acknowledged that some Pennsylvania cases have defined oil and gas as minerals.<sup>265</sup> Indeed, one case interpreted a lease for “mines and minerals,” by stating the term “[m]ineral[s]’ embraces everything, not of the mere surface, which is used for agricultural purposes . . . .”<sup>266</sup> That same discussion is likewise taken up in a more recent case. In *Highland v. Commonwealth*,<sup>267</sup> the Pennsylvania Supreme Court acknowledged that a

257. *Id.* at 834.

258. *Id.*

259. 86 A. 203 (Pa. 1913).

260. *Preston*, 86 A. at 204.

261. *Bundy v. Myers*, 94 A.2d 724 (Pa. 1953).

262. *Bundy*, 94 A.2d at 725-26.

263. *Id.* at 726.

264. *Id.* Note that it is difficult to square this with the court’s language in *Silver*: “It was held, therefore, that petroleum was not within the intent of the parties in reserving the minerals. And, a fortiori, natural gas would not be so included.” *Silver*, 62 A. at 833. “Petroleum” in *Silver* apparently referred exclusively to “oil,” because the word is used in reference to the *Dunham* decision, which covered petroleum oil, and the *Silver* opinion distinguished the two substances by saying, e.g., that some cases have decided that “petroleum and gas” are minerals.

265. See, e.g., *Westmoreland v. Dewitt*, 18 A. 724, 725 (Pa. 1889) (“Gas, it is true is a mineral, but it is a mineral with peculiar attributes . . . .”); *Gill v. Weston*, 1 A. 921, 923 (Pa. 1885) (“[Petroleum] is a mineral substance obtained from the earth by a process of mining . . . .”); *Appeal of Stoughton*, 88 Pa. 198, 201 (1879) (“Oil, however, is a mineral, and being a mineral is part of the realty.”).

266. *Griffin v. Fellows*, 81 Pa. 114, 124 (Pa. 1873).

267. 161 A.2d 390 (Pa. 1960).

number of decisions cited have included petroleum and natural gas within the definition of “minerals,” but also that “it has been held that in other connections they are not included under that term.”<sup>268</sup> In accounting for the difference, the court stated that “[t]he variations in the scope of the word arise from the connection and application in which it is used.”<sup>269</sup> The primary question is “what was the sense in which the parties used the word?”<sup>270</sup> Although general interpretation is that it does not include oil and gas, the parties may offer clear and convincing evidence that they “so understood or intended the word, “mineral” or even that it had acquired a usage in conveyancing which would include [those terms].”<sup>271</sup> In the *Highland* case, seven deeds were at issue, two of which, it was averred, conveyed the natural gas rights by the terms “other minerals” as interpreted in light of the surrounding circumstances and by later events.<sup>272</sup> The court specifically referenced a host of factors in finding the “clear and convincing evidence” burden was not overcome, among them that the mining of coal was the principal objective of the conveyances, and that the deeds made no express reference to natural gas as provided in others executed simultaneously therewith.<sup>273</sup>

From the foregoing discussion, we see that 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.<sup>274</sup>

Because of the settled nature of this law, Pennsylvania courts have not relied heavily on canons of construction. In a more recent case, however, a new aspect of the *Dunham* rule was considered, and the court referenced multiple canons in its opinion. *Butler v. Charles Powers Estate*<sup>275</sup>

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268. *Highland*, 161 A.2d at 398.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 393-98.

273. *Id.* at 399-400 (finding the above factors respectively bolstered by an absence of oil or gas exploration on the relevant tracts, as well as “a high degree of selectivity and precision of language” in drafting the contrasting deed descriptions).

274. *See, e.g.*, *New Shawmut Mining Co., v. Gordon*, 43 Pa. D. & C.2d 477, 482 (Pa. Ct. Com. Pl. 1963) (noting that the words “boring for” and “crude” do not provide clear and convincing evidence that oil and gas was intended, as they have applicability in coal operations, as well).

275. 29 A.3d 35 (Pa. Super. Ct. 2011).

addressed whether the *Dunham* rule works to construe the term “mineral” as including unconventional Marcellus shale gas. The appellants argued that shale gas should be included, based upon the following rationale: the deed at issue was written before the *Dunham* decision, which resulted in what they claimed to be a “depart[ure] from past precedent”<sup>276</sup>; and the *Dunham* and *Highland* decisions are distinguishable from the present case, because they dealt with conventional gas which was in the nature of *ferae naturae*, or “free flowing ‘wild’ gas,” not unconventional Marcellus shale gas.<sup>277</sup> The nature of Marcellus gas makes a difference, appellants asserted, because it is deposited in a dense rock formation and requires hydraulic fracturing to produce.<sup>278</sup> Because of this distinction, they relied on *U.S. Steel Corp. v. Hoge*<sup>279</sup> to support their position of “whoever owns the shale, owns the gas.”<sup>280</sup>

The *Butler* court stated that when interpreting a deed, the following canons apply:

[A] court’s primary object must be to ascertain and effectuate what the parties themselves intended. The traditional rules of construction to determine that intention involve the following principles. First, the nature and quantity of the interest conveyed must be ascertained from the deed itself and cannot be orally shown in the absence of fraud, accident or mistake. We seek to ascertain not what the parties may have intended by the language but what is the meaning of the words they used. Effect must be given to all the language of the instrument, and no part shall be rejected if it can be given a meaning. If a doubt arises concerning the interpretation of the instrument, it will be resolved against the party who prepared it. To ascertain the intention of the parties, the language of a deed should be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.<sup>281</sup>

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276. *Butler*, 29 A.3d at 40.

277. *Id.*

278. *Id.*

279. 468 A.2d 1380 (Pa. 1983).

280. *Butler*, 29 A.3d at 40 (citing *United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1383-84 (Pa. 1983)), *see also United States Steel Corp.*, 468 A.2d at 1383-84 (“[A]s a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting. . . . Although coalbed gas contained in coal is, *ab initio*, property of the coal owner, that owner may allow others certain rights respecting the gas.”).

281. *Butler*, 29 A.3d at 40 (quoting *Consolidation Coal Co. v. White*, 875 A.2d 318 (Pa. Super. 2005)); *see Brookbank v. Benedum-Trees Oil Co.*, 131 A.2d 103, 107 n.6 (Pa. 1957), for the following additional note on deed construction:

This language appears to require that the court determines the parties intent not by what they subjectively intended their words to mean. Rather, it must look to the objective meaning the language should be given “in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.”

Yet, the court did not engage in an analysis of the foregoing canons. Instead, it continued by noting the specialized construction of the term “minerals” as used in a deed based upon the Pennsylvania Supreme Court precedent previously discussed herein.<sup>282</sup> Interestingly, however, it overturned the trial court’s decision that *Dunham* is controlling.<sup>283</sup> Instead, it remanded for further proceedings so the parties can consult appropriate experts relating to: (1) whether Marcellus shale itself is a “mineral”; (2) whether the gas contained therein is a conventional gas of the nature contemplated in *Dunham* and *Highland*; and (3) whether the Marcellus shale is similar in nature to coal to the extent that whoever owns the shale owns the gas.<sup>284</sup> The appellees, who claim the shale gas is not within the definition of mineral, have appealed to the Supreme Court of Pennsylvania, which appeal was granted.<sup>285</sup> Thus, even now this “well settled” law is in flux, and we may see a landmark decision in the coming months.

#### 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.” For example, early cases held that a reservation of “the right to all minerals in and under . . . the land” included oil and gas.<sup>286</sup> More recently, the West

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In interpreting this instrument certain rules of construction are applicable: (1) the nature and quantity of the interest conveyed must be ascertained from the instrument itself and cannot be orally shown in the absence of fraud, accident or mistake and we seek to ascertain not what the parties may have intended by the language but what is the meaning of the words . . . ; (2) effect must be given to *all* the language of the instrument and no part shall be rejected if it can be given a meaning . . . ; (3) if a doubt arises concerning the interpretation of the instrument it will be resolved against the party who prepared it . . . ; (4) unless contrary to the plain meaning of the instrument, an interpretation given it by the parties themselves will be favored . . . ; (5) to ascertain the intention of the parties, the language of a deed should be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed . . . .

(internal quotations marks omitted) (citations omitted); *see also* *Hess v. Jones*, 7 A.2d 299, 300-01 (Pa. 1939) (setting out guidelines for the construction of written instruments).

282. *Butler*, 29 A.3d at 41-42.

283. *Id.* at 43.

284. *Id.*

285. *See generally* *Butler v. Charles Powers Estate*, 41 A.3d 854 (Pa. 2012).

286. *See* *Sult v. A. Hochstetter Oil Co.*, 61 S.E. 307, 308 (W. Va. 1908).

Virginia high court offered the following summary of the state's precedent with respect to deed reservations in general.<sup>287</sup>

First, the court must “place itself in the situation of the parties, as near as may be, to determine the meaning and intent of the language employed in the deed.” Where applicable, “reservations are strictly construed against a grantor and in favor of a grantee” as to whether the language creates an ambiguity.<sup>288</sup> If a deed is “unambiguous there is no need for construction and it is the duty of the court to give to every word its usual meaning . . . [and] will endeavor to carry into effect the intent of the parties to the agreement, seeking first to ascertain such intent from the instrument itself.”<sup>289</sup> To discern that intent from the instrument, the court will afford the language “its plain and ordinary meaning without resort to judicial construction.”<sup>290</sup> Rather, the parties will be bound to the “general and ordinary meanings of words used in deeds.”<sup>291</sup> Nonetheless, “[a]s a general rule, ambiguities in a deed are to be clarified by resort to the intention of the parties ascertained from the deed itself, the circumstances surrounding its execution, as well as the subject matter and the parties’ situation at that time.”<sup>292</sup>

The court most recently addressed the scope of “other minerals” in *West Virginia Department of Highways v. Farmer*, where it considered the single question of whether sand and gravel under and upon a surface owner's parcel “is included in a reservation of the ‘oil, gas and other minerals.’”<sup>293</sup> Eventually ruling in the negative, the court's opinion in *Farmer* exemplifies the state's rather confused line of cases regarding the application of canons of construction to oil and gas instruments.<sup>294</sup> As in all cases resting on canons to resolve facial ambiguity, the factual context in *Farmer* is crucial to understanding the court's logic. *Farmer*, who acquired the subject surface acreage long after severance, was compensated by jury award at eminent domain proceedings after the state highway agency removed sand and gravel from his land for use in road construction.<sup>295</sup> Parties owning the rights to “all oil and gas and other minerals” under

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287. See generally *Meadows v. Belknap*, 483 S.E.2d 826 (W. Va. 1997).

288. See *id.* at 829.

289. *Id.*

290. *Id.* at 829-30.

291. See *id.* at 830.

292. *Id.* at 829 (citing *Brown v. Crozer Coal & Land Co.*, 107 S.E.2d 777 (W. Va. 1959); *Oresta v. Romano Brothers, Inc.*, 73 S.E.2d 622 (W. Va. 1952); *Ramage v. South Penn Oil Co.*, 118 S.E. 162 (W. Va. 1923)).

293. *Farmer*, 226 S.E.2d at 719.

294. See, e.g., *Toothman v. Courtney*, 58 S.E. 915, 918 (W. Va. 1907).

295. See *Farmer*, 226 S.E.2d at 719.

Farmer's tract intervened seeking their respective 9/10ths interest in this award.<sup>296</sup> Thus, the posture of the case before the Supreme Court of Appeals was whether sand and gravel remained with the burdened surface estate or passed to mineral owners by virtue of the language "other minerals."

In considering whether the term "minerals" created ambiguity in the deed, the court acknowledged West Virginia precedent provided a broad plain meaning approach that typically includes sand and gravel as minerals.<sup>297</sup> As held in *Waugh v. Thompson Land & Coal Co.*,<sup>298</sup> "[t]he word 'mineral' in its ordinary and common meaning is a comprehensive term including every description of stone and rock deposit, whether containing metallic or nonmetallic substances."<sup>299</sup> The court then noted that "where language in a deed is unambiguous there is no need for construction and it is the duty of the court to give to every word its usual meaning."<sup>300</sup> In the alternative, "where an ambiguity is introduced by the restrictive language, making unclear the intention of the grantors in reserving minerals from a conveyance, construction of the language is in order and the surrounding circumstances and actions of the parties may be considered."<sup>301</sup>

The court found the deed ambiguous based on the language itself, which "did not specifically reserve the sand and gravel," and the "surrounding circumstances and past activities concerning this property."<sup>302</sup> These surrounding circumstances relevant to the court included evidence that when the deed was executed, sand and gravel were not sold from the land or in the area, and that Farmer knew of the sand when he purchased the land for farming purposes.<sup>303</sup> Thus finding the plain meaning definition in *Waugh* inapplicable, the court explained that "accepted rules of construction must be employed" to resolve the ambiguous intent of the original grantor.<sup>304</sup>

Relying on a seemingly random set of canons, the court proceeded to discuss various construction tactics in a troublingly unclear fashion. First, the court applied *eiusdem generis*, explaining that canon provides: "where

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296. *See id.*

297. *See id.*

298. 137 S.E. 895 (W. Va. 1927).

299. *See Waugh*, 137 S.E. at 897; *see also* *Robinson v. Wheeling Steel & Iron Co.*, 129 S.E. 311, 312 (W. Va. 1925); *Ramage v. South Penn Oil Co.*, 118 S.E. 162, 163 (W. Va. 1923); *Horse Creek Land & Mining Co. v. Midkiff*, 95 S.E. 26, 27 (W. Va. 1918).

300. *Farmer*, 226 S.E.2d at 719 (citing *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65 (W. Va. 1952); *Burdette v. Bruen*, 191 S.E. 360 (W. Va. 1937)).

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

general words follow an enumeration of persons or things, such general words are not to be construed in their widest extent but are to be held as applying only to persons or things of the same kind, class or nature as those specifically mentioned.”<sup>305</sup> In ruling that *ejusdem generis* would exclude sand and gravel from the class created by “oil and gas in and under,” the court simply concluded that such language connotes only petroleum products and nothing more:

Applying this doctrine to the language of the reservation in the instant case, the enumeration of oil and gas makes meaningless the term ‘other minerals,’ except for minerals which are of the same kind, class or nature, that is, petroleum products. A grant or reservation of specifically named minerals conveys and reserves rights only in those minerals. Under this doctrine, then, sand and gravel are excluded from the reservation.<sup>306</sup>

The next canon considered by the court was *contra proferentum* – “where an ambiguity exists in an instrument, the language will be construed against the grantor.”<sup>307</sup> The court did not cite to a wealth of precedent related to mineral deed construction and this canon, but rather noted that “[r]estrictive covenants are to be strictly construed against the person seeking to enforce them, and all doubts must be resolved in favor of natural rights and a free use of property, and against restrictions.”<sup>308</sup> Without making conclusions in this regard, the court observed that in this case “the [mineral owners] seek to include sand and gravel in the reservation [while] the Farmers seek a free use of their property.”<sup>309</sup> However, the actual circumstances of this case concerned compensation for property taken by eminent domain – unfortunately the court did not clarify how either party to the title dispute could garner support from a specified ‘free use’ policy under these facts.

The court continued this superficial analysis, next with reference to a similar cases that excluded sand and gravel from the phrase “and other minerals” because these materials “had no rare character or value and

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305. *Id.* at 719-20 (citing *Bischoff v. Francesa*, 56 S.E.2d 865 (W. Va. 1949); *Neekamp v. Huntington Chamber of Commerce*, 129 S.E. 314 (W. Va. 1925); *Jones v. Island Creek Coal Co.*, 91 S.E. 391 (W. Va. 1917)).

306. *See id.* at 720 (citing *Prindle v. Baker*, 178 S.E. 513 (W. Va. 1935); *Ramage v. South Penn Oil Co.*, 118 S.E. 162 (W. Va. 1923)).

307. *Id.* This is but one example of the somewhat unclear variation of this ‘construe against the drafter’ canon as ‘against the grantor.’

308. *Id.* (quoting *Neekamp v. Huntington Chamber of Comm.*, 129 S.E. 314 (W. Va. 1925)).

309. *Id.* at 720-21.

[were] useful only in road building . . . .”<sup>310</sup> Without expounding on this reference to ‘rare value’ found in other states, the court then focused on prior use and held:

Farmer purchased [and used] the subject land for the purpose of engaging in farming . . . . No owner of the minerals in the past had ever attempted to exercise any control whatsoever over the sand and gravel. It is readily discernible that the reservation of the minerals created in 1911, did not intend to include sand and gravel. Were it otherwise, the sand and gravel which lay principally on the surface, could be taken by the owners of the minerals and the surface owners could be deprived entirely of the use of such surface. The conveyance to the Farmers would be useless.<sup>311</sup>

To wrap up its analysis with a final bit of opacity, the court concluded that the above reasoning “was the opinion of the courts in Colorado, Texas, and Louisiana” in *Farrell v. Sayre*,<sup>312</sup> *Acker v. Guinn*,<sup>313</sup> and *Holloway Gravel Co. v. McKowen*,<sup>314</sup> respectively. Interestingly, *Farrell* ultimately applies a ‘community knowledge’ test to its holding, while *Acker* and *McKowen* are touchstone surface destruction cases;<sup>315</sup> however, neither canon was specifically mentioned in *Farmer*. Nonetheless, based on these circumstances, the West Virginia Supreme Court of Appeals found sand and gravel excluded from the reservation.<sup>316</sup>

#### 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.’” In *Campbell v. Tennessee Coal, Iron & Railroad Co.*,<sup>317</sup> the court adopted a version of the rule of practical construction in its approach to such disputes.<sup>318</sup> In that case, a reservation of “all the mines or minerals

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310. *Id.* (citing *Dawson v. Meike*, 508 P.2d 15 (Wyo. 1973); *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762 (Ky. 1970); *Hwy Comm’n v. Trujillo*, 487 P.2d 122 (N.M. 1971)).

311. *Id.*

312. 270 P.2d 190 (Colo. 1954).

313. 464 S.W.2d 348 (Tex. 1971).

314. 9 So. 2d 228 (La. 1942).

315. The *Farmer* court itself quotes *Acker* for the proposition that a substance will not be severed under a grant or reservation of “minerals” if it “must be removed by methods that will, in effect, consume or deplete the surface estate.” *Id.* at 720-21 (citing *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971)).

316. *See id.* at 828.

317. 265 S.W. 674 (Tenn. 1924).

318. *Campbell*, 265 S.W. at 678.

contained or imbedded in or on said tract” was reserved unto grantor.<sup>319</sup> Grantor’s successor in interest, the defendant in the case, contended that said reservation included limestone.<sup>320</sup>

While the crux of the court’s construction targeted the reservation language as written, it explained the scope of its interpretive focus as a broader consideration of the parties’ overall intent, which can be ascertained only when considering the surrounding circumstances of the conveyance. The court affords notable weight to the unambiguous intent of the grantor. However, if the grantor’s intent remains unclear, the court will resolve such ambiguities in the agreement against him and in the grantee’s favor.<sup>321</sup> Thus, the court limits its focus to the nature of the grantor-grantee relationship and the dealings between them rather than “arbitrary definitions in reference to mineral substances buried in the earth.”<sup>322</sup>

The court began by interpreting the language used and cited by numerous commentators on the meaning of “mines” and “minerals.” Several cases and other authorities drew a distinction between a “mine,” which is a location where the subsurface is excavated without breaking the surface, and a “quarry,” which is the opening of the surface to remove a material.<sup>323</sup> The court also recognized that the term “mineral” is susceptible to multiple definitions based upon its context.<sup>324</sup> Specifically, if given a broad definition, the term might embrace even the soil; if restricted to precious metals, it would be limited too significantly; if distinguished from the agricultural part of the land, it would be unhelpful in desert or rocky lands not suitable for agricultural purposes.<sup>325</sup>

The court also looked to the circumstances of the case to find that limestone was deposited along bluffs and along the surface throughout the property in issue and that at the time of the reservation limestone had no commercial value.<sup>326</sup> For the reservation to be construed to include the limestone, it would destroy the conveyance, because quarrying that substance would destroy the whole surface.<sup>327</sup> Therefore, it should be obvious that the parties did not intend limestone to be included; if they did, they would have explicitly included it in the reservation.<sup>328</sup>

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319. *Id.* at 674.

320. *Id.*

321. *Id.* at 676.

322. *Id.* at 677 (internal quotation marks omitted).

323. *Id.* (internal quotation marks omitted).

324. *Id.* at 677-78.

325. *Id.*

326. *Id.* at 676.

327. *Id.* Note use of the surface destruction test.

328. *Id.*

As recently as 2011, the Supreme Court of Tennessee affirmed the need to resort to a practical construction of a deed when answering a similar question. The U.S. District Court for the Eastern District of Tennessee filed a certification order before the high court seeking an answer to whether a 1928 mineral reservation included sandstone.<sup>329</sup> The court stated that the question was not purely a matter of law but required analysis of relevant facts. Indeed “the term ‘mineral’ is ambiguous,” and “each case requiring its construction ‘must be determined upon its peculiar facts, giving due consideration to the intention of the parties.’”<sup>330</sup>

## 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. As early as 1903, the Virginia Supreme Court in *White v. Sayers*<sup>331</sup> applied “well-settled rules of construction” to determine whether a contract establishing a partnership to explore for “minerals” which might be found in paying quantities effectively conveyed ownership of coal. The principles that guided the court were as follows:

Regard should be had to the intention of the parties, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject matter of the agreement, the object which the parties had in view at the time and intended to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be *unreasonable or unequal*, and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties.<sup>332</sup>

The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be

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329. *Heineman v. Terra Enters., LLC*, No. M2011-00559-SC-R23-CQ, 2011 Tenn. LEXIS 531, at \*1 (Tenn. May 27, 2011).

330. *Id.* (citing *Campbell Tenn. Coal Iron & R.R. Co.*, 265 S.W. 674, 677 (Tenn. 1924); *State v. Lahiere-Hill, LLC*, 278 S.W.3d 745, 749-52 (Tenn. Ct. App. 2008)). *But see* *Murray v. Allred*, 43 S.W. 355, 359-60 (Tenn. 1897) (considering a description of the substances at issue to determine that oil and gas are both minerals falling within the reservation of “all mines, minerals, and metals under the land” and appearing not to factor into that decision any relevant circumstances other than the fact that the “bulk of mankind” would likely also include those substances within the reservation).

331. 45 S.E. 747 (Va. 1903).

332. *White*, 45 S.E. at 749 (quoting *Shen. L., &c. Co. v. Hise*, 23 S.E. 303, 304 (Va. 1895)) (emphasis added). Note that this, along with the subsequent two guidelines, are essentially the practical construction test.

safely assumed that such was the aspect in which the parties themselves viewed it.<sup>333</sup>

In the construction of a contract the whole instrument is to be considered; not any one provision only, but all its provisions; not the words merely in which they were expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties.<sup>334</sup>

The court applied these principles to determine that the agreement was more in the nature of a partnership agreement than a mineral conveyance. Therefore, the parties were free to end the partnership by mutual agreement.<sup>335</sup> Furthermore, at the time the contract was entered into, coal had no value, and that was the case for more than forty years. Rather, at that time, gold was the mineral causing great excitement in the area. In fact, it was only a few years before the action was instituted that coal gained any appreciable value. Based on these facts, the court determined that the term “minerals” was not intended to include coal in that case.<sup>336</sup>

Since the *White* case, Virginia has not waived from this interpretation of the question “what does the term ‘minerals’ include?” In 1928, the Supreme Court of Virginia determined that a reservation of “metals and minerals” did not include limestone.<sup>337</sup> Stating that the decision should always turn on the language at issue, the surrounding circumstances, and the grantor’s intent, if known, the court considered various pieces of evidence.<sup>338</sup> The factor that appeared to be the most significant was that the surface of most land in the area was comprised of limestone: “In this limestone country, where a grant of land is made, and the minerals and right to remove them are reserved, the language ought to be clear and specific to justify a construction that would allow the reservation to take back or destroy the thing that is granted.”<sup>339</sup> Therefore, the court construed the reservation as not intending to include limestone.<sup>340</sup> This same reasoning was again applied in 1966, when the court decided that “minerals” did not include sand and gravel, because, although technically minerals, those substances made up the whole surface.<sup>341</sup>

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333. *Id.* (quoting *Schuylkill Nav. Co. v. Moore*, 2 Whart. 477, 491 (Pa. 1837)).

334. *Id.* (quoting *Millan v. Kephart*, 18 Gratt. 1, 10 (Va. 1867)).

335. *Id.* at 748.

336. *Id.* Note reliance on a version of the exceptional characteristics test.

337. *Beury v. Shelton*, 144 S.E. 629, 633 (Va. 1928).

338. *Id.* at 632.

339. *Id.* at 633.

340. *Id.*

341. *Shores v. Shaffer*, 146 S.E.2d 190, 193-94 (Va. 1966).

## V. RECOMMENDATIONS AND CONCLUSIONS

The current situation facing the oil and gas industry as various parties attempt to settle mineral ownership disputes is a type of litigation paradox. In most jurisdictions (other than those that have set by statute or by definitive precedent the interpretation to be given to language in a deed), 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. Another consideration adding to the complexity of this issue is an understanding that 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.

Whether it is desirable, or even feasible, 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. For some states, ascertaining the intent of the parties is a weightier policy consideration. In those states, determinations are always made on a case-by-case basis to determine what the original parties to the particular contract intended.<sup>342</sup> Such an approach, at first blush, may appear to be more equitable. However, the search for intent often becomes more about the application of canons of construction; in that situation, who can say that the meaning finally determined to be the parties' "intent" was what those individuals had in mind when executing the deed decades ago?<sup>343</sup>

This approach stands in stark contrast to that taken in other states, which favor an established rule of law for reliably determining mineral ownership. North Dakota, for example, has statutorily set the interpretation

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342. *See, e.g.*, *Heineman v. Terra Enters., LLC*, No. M2011-00559-SC-R23-CQ, 2011 Tenn. LEXIS 531, at \*1 (Tenn. May 27, 2011) ("Each case involving the interpretation of a contract or deed that grants or reserves mineral rights '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.'" (quoting *Campbell v. Tenn. Coal. Iron & R.R. Co.*, 265 S.W. 674, 677 (Tenn. 1924))).

343. *See, e.g.*, *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346, 353 n.7 (Colo. 2000) ("It seems highly unrealistic to attempt to determine, at a later date, whether, in an early conveyance, the parties intended to include or to exclude oil and gas from their usage of the term 'minerals,' where such intent is purportedly determined by reference to 'facts and circumstances then existing' and of which adequate proof has long since vanished. All too often this 'intent,' as determined, results from application of the rules of evidence concerning burden of proof and presumptions, which have little relevance to the actual intent of the parties." (omitting internal reference)).

to be given to the term “mineral” as used in a conveyance of real estate,<sup>344</sup> although the definition is not applicable to instruments executed prior to the enactment of the statute.<sup>345</sup> Other states have determined through case law that the term “other minerals” unambiguously includes “oil and gas” and that extrinsic evidence will not be admitted to show otherwise.<sup>346</sup> The outcome in these states will obviously at times conflict with the original parties’ intent and can be viewed as obstructing the free will to contract. However, the predictability afforded to title examiners and property owners, especially for the purpose of securing the capital needed for mineral development, may be deemed to outweigh any detriment to intent.

For the foregoing reasons, 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. For example, a court may apply the doctrine of *contra proferentum* to favor the equally plausible interpretation that most benefits the party who did not select the document’s language. Further, courts must more clearly state the factors they consider when deciding which specific canons to apply;<sup>347</sup> what, if any, extrinsic evidence is appropriate for consideration in specific contexts; and what effect this precedent should have on other similarly drafted documents.<sup>348</sup> Only through this clarity can title examiners and averred owners find comfort in opinions relating to title ownership.

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344. N.D. CENT. CODE § 47-10-24, -25 (2011).

345. See *McDonald v. Antelope Land & Cattle Co.*, 294 N.W.2d 391, 393 (N.D. 1980).

346. See, e.g., *Spurlock v. Santa Fe Pac. R.R. Co.*, 694 P.2d 299, 308-09 (Ariz. Ct. App. 1984); *McCormick*, 14 P.3d at 353-54 (“Allowing the introduction of extrinsic evidence many decades after the deed conveyances . . . invites uncertainty and litigation . . . . [W]e hold that a deed reservation for ‘other minerals’ reserves oil and gas . . . . We treat this matter as one of property law and determine that precedent forecloses the question . . . for trial.”); *Miller Land & Mineral Co. v. State Highway Comm’n*, 757 P.2d 1001, 1002-03 (Wyo. 1988) (“We hold that the mineral reservation ‘reserving unto Grantor, all minerals and mineral rights existing under said . . . lands’ expresses a clear and unambiguous intent by the grantor to reserve all the minerals, whatever they may be.”).

347. Although not technically binding, such guidance would be useful to future courts and for parties attempting to ascertain mineral ownership.

348. For example, will a decision that a reservation of “oil, gas, and other minerals” includes coal apply to a document that reserves “all minerals;” would this decision be different if a similarly-worded instrument was executed under different circumstances, at a different period of time, in a different area; etc.?