Toward a Functional Mineral Jurisprudence for Kansas*

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I. INTRODUCTION

After a century of intensive mineral development in Kansas, the legal scope of the term "mineral" remains a mystery. If $A$ conveys to $B$ "all the minerals in Section 30," it will often require litigation to determine which party has the rights to coal, zinc, lead, oil, natural gas, helium, carbon dioxide, nitrogen, gypsum, building stone, sand, gravel, clay, or any other substance which is classified, by the sciences, as a mineral.¹ This Article examines the analysis employed by Kansas courts in attempting to define the term mineral, problems created by the existing analysis, and a proposed alternative approach.

Resolving this seemingly simple issue requires an understanding of the policy Kansas courts promote when interpreting the scope of a mineral conveyance. It also requires an understanding of how Kansas courts interrelate the determination of "title" to minerals with the effect such a determination will have on the balance of rights—primarily the rights of the surface owner.

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¹ The problem also arises when $A$, instead of conveying the minerals to $B$, conveys all of Section 30 to $B$ excepting all the minerals from the conveyance and reserving them to $A$. 223
II. DEFINING THE MINERAL AND SURFACE ESTATES

Landowners can separate ownership of the "minerals" in their land from ownership of the remainder of the real estate. When ownership of one or more minerals in a tract of land is separated from ownership of the remainder of the land, two separate property interests are created: a surface estate and a mineral estate. Separate fee simple estates are created; each is potentially infinite in duration and can be disposed of by gift, sale, or inheritance. Severance of the mineral estate can be accomplished by granting the mineral estate or by granting the surface estate and excepting the mineral estate.

The term "surface estate" is generally used to describe all the rights except those included in the "mineral estate." Therefore, if A conveys to B "all the minerals in Section 30," A retains a surface estate which includes the surface plus the balance of minerals not encompassed by the grant of "all minerals" to B. If the conveyance is of "all" minerals, what minerals could A possibly own as part of the residual surface estate?

Practitioners unfamiliar with the problem may view the interpretive exercise as merely one of determining whether, as a matter of physics, the substance at issue is a "mineral." Applying the physical approach, the mineral estate would consist of all that is mineral, and the surface estate would be whatever remained. This creates problems because the soil itself is comprised of mineral substances. Simply dividing the world into animal, vegetable, and mineral matter will, arguably, eliminate the surface estate—or at least render it of little value. Since A only conveyed the "minerals" in Section 30, A and B must have intended A to reserve some sort of valuable interest in Section 30.

In defining the scope of "all minerals," the physical nature of the substance is not determinative. Instead, courts define the scope of the mineral estate by ascertaining the intent of the parties to the conveyance. How a court goes about searching for intent, and the policies the court desires to promote, will determine the scope of the mineral estate.

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6. See In re Estate of Trester, 172 Kan. 478, 482, 241 P.2d 475, 478 (1952) (also known as Hans v. Great Bend Brick & Tile Co.). The Trester court stated:
[In classifying things as animal, vegetable and mineral, everything that goes to make up the earth comes within the general classification of minerals. But this general classification cannot be used for the interpretation of instruments granting specific rights. With respect to that matter the term "mineral" is not a definite one capable of universal application.]

Id., 241 P.2d at 478.
7. See id., 241 P.2d at 478 (clay is a mineral but that does not mean it is a substance contemplated in a conveyance of "oil, gas and other minerals").
8. Id. at 482-83, 241 P.2d at 478.
A. The Interpretive Process

The goal of the interpretive process is to ascertain the intent of the parties to the conveyance or contract so the instrument can be enforced in accordance with their mutual understandings at the time the instrument took effect. The interpretive process requires that the terms of the instrument be identified, followed by a determination of what the terms mean. Identifying the terms is normally a simple task; determining their meaning is more difficult.

If the parties had adequately expressed their intention regarding the scope of the mineral estate, the dispute would not arise because the express terms of the instrument would determine their rights. However, we begin the process of interpretation by searching the “four corners” of the instrument to identify, through the “plain meaning” of the words used, the intent of the parties. In most cases, the language contained in the instrument will not resolve the dispute. Instead, the court is required to ascertain a “presumed” intent by applying rules of construction.

Progression of the interpretive process depends upon whether the meaning of the instrument is “clear” or “ambiguous.” “Ambiguity” is defined to include “duplicit, indistinctness or uncertainty of meaning of an expression used in a written instrument.” To determine whether an instrument is ambiguous, rules of interpretation must first be applied. If the plain meaning of the terms do not resolve the ambiguity, certain rules of “construction” can be applied to try and resolve the dispute. If, after applying rules of construction, the instrument is still ambiguous, the court may consider extrinsic evidence, including parol evidence, to determine what the parties intended. However, if the conveyance or contract was entered into many years before the dispute arises, the original parties may not be available to testify about what they intended.

Usually most disputes will be resolved after rules of construction are

10. See Heyen v. Hartnett, 235 Kan. 117, 122, 679 P.2d 1152, 1156-57 (1984). When interpreting conveyances and contracts, the courts first look at the language used in the instrument in an effort to ascertain the intent and purpose of the parties. This is referred to as the “four-corners rule.” This rule requires consideration of all language used anywhere in the instrument. Id., 679 P.2d at 1156-57.
11. See Brungardt v. Smith, 178 Kan. 629, 636, 290 P.2d 1039, 1044 (1955). Rules of “construction” should be used only when, after applying the pertinent rules of “interpretation,” the meaning of the instrument remains uncertain. Id., 290 P.2d at 1044.
applied. Although the conveyance is technically regarded as being unambiguous, certain accepted rules of construction rely upon extrinsic evidence—information not gleaned solely from the four corners of the instrument. However, such extrinsic evidence is generally subject to independent verification so the court is not required to rely upon the veracity of the parties to the litigation. In most cases, the "interpretive process" is not a search for the parties' actual intent but rather application of a judicial formula to arrive at a presumed intent.

The foregoing principles have been applied by Kansas courts in an attempt to define the scope of two types of conveyances: 

- **A** conveys to **B** "all the minerals."
- **A** conveys to **B** "all the oil, gas, and other minerals."

The interpretive problem is determining what is included in the grant of "minerals" and "other minerals." Typically, the language contained in the instrument creating the interest will not define the scope of the grant. What is the plain meaning of "minerals" or "other minerals"? As previously noted, Kansas courts will not apply an animal, vegetable, mineral analysis. Instead, the word "minerals" and the phrase "other minerals" are "susceptible to limitations according to the intention of the parties using it . . . "

In Kansas cases where the issue has been raised, the courts have found such conveyances to be unambiguous. Therefore, the intention of the parties must be determined through some sort of artificial construction process—identification of a presumed intention. The makeup of the "rules of construction" may represent what courts believe are important "indicators" of intent; they may also reflect a judicial policy toward the outcome of the dispute.

1. *Positive Presumption from Community Knowledge*

**Roth v. Huser** is the only case where the Kansas appellate courts have addressed the "minerals" problem. At issue was the scope of an exception reserving the "mineral deposits" to the grantor—whether the

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16. See D. PIERCE, KANSAS OIL AND GAS HANDBOOK § 6.06 (Kansas Bar Ass'n 1986).
17. See R. HEMINGWAY, LAW OF OIL AND GAS § 1.1, at 7 (2d ed. 1983).
18. See supra note 6.
22. Technically, "exception" of an interest means that it has never passed from grantor to grantee; "reservation" of an interest means that the grantor's interest has passed to the grantee, and the grantee has reconveyed the reserved rights to the grantor. See Barrett v. Coal Co., 70 Kan. 649, 652, 79 P. 150, 151 (1905). In practice, the terms "excepts and reserves" are often used together before stating the interest the grantor desires to retain. This language will not create problems if the description of the retained interest clearly indicates whether grantor is excepting an interest from the grant or is reserving rights in the conveyed real estate. Roth, 147 Kan. at 440, 76 P.2d at 875.
term "mineral deposits" included oil and gas. The case is complicated by the trial court admitting extrinsic evidence and then ruling the conveyance "unambiguous." Although an objection was raised at trial concerning admission of extrinsic evidence, the matter was not raised on appeal. The Kansas Supreme Court chose to examine the record and resolve the case based upon the sufficiency of the evidence as opposed to treating the issue as a question of law.

The grantee argued that at the time the conveyance was made, 1904, there was no oil or gas known to exist in the area and therefore neither party could have intended the exception of mineral deposits to include oil and gas. The trial court, apparently responding to grantee's argument, specifically found:

[T]hat prior to 1904 there had been some little exploration for oil, gold and coal within twenty miles of the land in question, but no oil, gold or coal had been discovered in commercial quantities. In March, 1904, oil was being produced in commercial quantities in Kansas about 225 miles from the land in question; that an oil well was being drilled between August and October, 1903, in Ellis county, and reached the depth of 1,200 feet. Several mentions of it were made in the newspaper published in the city of Hays during September and October, 1903, and that two test wells were drilled in [adjoining] Rush county in 1903.

It appears the court made this finding to demonstrate that the parties could, at the time the March 9, 1904 conveyance was made, have anticipated oil and gas as being minerals encompassed by the term "mineral deposits." This finding was probably designed to meet the requirements of the "community knowledge test" which is a rule of construction employed by courts to interpret the scope of mineral conveyances. The community knowledge test would exclude as minerals any substances which were not known to exist in the general vicinity at the time the conveyance was made. The basis for this rule of construction is that since the substance was not known to exist, the parties could not contem­plate it would be included in a generic grant of minerals.

2. Negative Presumption from Community Knowledge

In cases since Roth, the Kansas Supreme Court has employed a negative presumption when the existence of the minerals in issue was known at the time of the conveyance. For example, in Keller v. Ely, the court

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24. Id. at 435, 76 P.2d at 872.
25. Id. at 438, 76 P.2d at 874.
26. Id. at 434, 76 P.2d at 872.
27. Id. at 435-36, 76 P.2d at 873.
29. See R. HEMINGWAY, supra note 17, § 1.2, at 15.
held the mineral gypsum was not included in a reservation of “oil, gas, casing-head gas and other liquid semi-solid and solid minerals.” The court noted that gypsum was being mined in the area at the time the conveyance was made. Apparently the court’s rationale for making such a finding is that if the parties knew gypsum existed in the area, and they intended to include it in the reservation, they would have specifically referred to it in the conveyance document. After noting the existence of gypsum at the time of the conveyance, the court stated: “[I]t would have been very easy to have specifically said so [excepted the gypsum] in the quite lengthy reservation . . . .” The court applied a similar approach in Wulf v. Shultz to construe a grant to “dig, drill, operate for and procure natural gas, petroleum and other mineral substances” in an oil and gas lease. In Wulf, the court held such a grant did not include limestone which was known to exist in the area.

3. Relative Positions and Primary Object

As previously noted, Roth v. Huser is the only case where the Kansas appellate courts have had to interpret the scope of the term “minerals.” However, the Kansas Supreme Court has interpreted the scope of the phrase “other minerals” on four different occasions: once concerning a grant of minerals, once concerning a reservation of minerals, and twice concerning the scope of a grant under an oil and gas lease. Presumably the approach taken in these “other minerals” cases would also be used, where appropriate, in a “minerals” case.

The first Kansas case to address the “other minerals” issue was In re Estate of Trester where the grantor conveyed an undivided one-half interest in the “oil, gas and other minerals” to the grantee. The grantee argued that “other minerals” included clay because clay, in science and common usage, is classified as a mineral. Rejecting this broad definitional approach, the court stated the basic rule that the term “mineral”: is not a definite one capable of universal application. It is susceptible to limitations according to the intention of the parties using it, and in determining its meaning in a specific instrument not only the language of the instrument in which it occurs but also the relative positions of the parties interested and the substance of the transaction which the instrument embodies must be taken into account.

31. Id. at 699, 391 P.2d at 133.
32. Id. at 700, 391 P.2d at 134.
33. Id. at 703, 391 P.2d at 136.
35. Id. at 726, 508 P.2d at 899.
36. Id. at 729-30, 508 P.2d at 901.
37. For discussion of Roth, see supra text accompanying notes 21-27.
39. Id. at 479, 241 P.2d at 476.
40. Id. at 482, 241 P.2d at 478.
41. Id. at 482-83, 241 P.2d at 478.
The first portion of this rule states the obvious—as currently defined, the legal scope of the term “mineral” is indefinite. The scope of the term can be limited, or expanded, by the terms of the conveyance instrument. The interpretive goal is to define the term in accordance with the intention of the parties to the instrument. If the express terms of the instrument fail to define clearly the scope of the grant or reservation, the court must consider the “relative positions of the parties” and the “substance of the transaction.” These last two portions of the rule are not clearly defined by the court in *Trester* or subsequent cases which have repeated the rule.42

a. **Relative Positions of the Parties**

The “relative positions of the parties” in *Trester* probably refers to the previous granting of an oil and gas lease covering the minerals subject to the “oil, gas and other minerals” conveyance. The court implied that the language of the conveyance may be similar to the language used in the prior oil and gas lease.43 Apparently this would indicate the parties intended “other minerals” to include only derivatives of substances covered by the oil and gas lease. In *Davis v. Plunkett*,44 the court noted the “relative position” of the lessee as a “volcanic ash company.”45 In *Davis*, the lessee argued that oil and gas were included in a lease of “Volcanic Ash, and all other minerals or mineral derivatives.”46 Apparently, had the lessee been an “oil and gas company,” the lease grant may have been given broader effect.

The “relative positions of the parties” standard could result in conveyances, identical in form, being interpreted quite differently. For example, if A grants B “all the minerals” in Section 30, or “all the oil, gas, and other minerals” in Section 30, the scope of the conveyance may be affected by whether A and B are father and son, or whether B is a petroleum company as opposed to a volcanic ash company.

b. **Primary Object**

The second inquiry looks at the “substance of the transaction.”47 The court in *Trester*, and subsequent cases,48 examined the instrument to identify the primary object of the transaction. For example, in *Trester*

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42. E.g., Wulf v. Shultz, 211 Kan. 724, 508 P.2d 896 (1973). The court purports to follow the *Trester* “relative positions of the parties” and “substance of the transaction” analysis without discussing how these concepts are to be applied. *Id.* at 730-31, 508 P.2d at 902.
45. *Id.* at 124, 353 P.2d at 516.
46. *Id.* at 122-23, 353 P.2d at 515.
48. E.g., Wulf v. Shultz, 211 Kan. 724, 508 P.2d 896 (1973) (major substances parties focused on were oil and gas); *Davis v. Plunkett*, 187 Kan. 121, 353 P.2d 514 (1960) (major substance parties focused on was volcanic ash).
the court noted the parties were dealing "primarily . . . with oil and gas." The conveyance of "oil, gas and other minerals" was interpreted to exclude clay. In *Davis v. Plunkett*, the "primary object" of the transaction was volcanic ash and gypsum, not oil and gas. A lease of "Volcanic Ash, and all other minerals" was interpreted to exclude oil and gas. In *Wulf v. Shultz*, a lease covering "natural gas, petroleum and other mineral substances" was interpreted to exclude all minerals other than oil and gas and their derivatives. The court noted: "From these provisions [of the lease] it is apparent the parties were focusing their attention on matters relating to oil and gas, not matters relating to any other mineral substance."

The primary object test requires the court to examine the instrument and determine, from its terms, the substances the parties were focusing upon when the conveyance took effect. If the primary object of the conveyance is mineral \(X\), and the instrument fails to mention specifically mineral \(Y\), the conveyance will be limited to mineral \(X\)—even though it contains general references to "other minerals." The failure of the parties to mention specifically a mineral has led the courts to make this frequent observation: "Surely, if the parties had contemplated that the lease was to cover minerals other than . . . [those specified], or related substances, they would have mentioned them specifically in the lease [or deed]."

4. **Ejusdem Generis**

Closely related to the community knowledge and primary object tests is the *ejusdem generis* maxim of construction. This maxim provides that "where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind with respect to a classification which immediately precedes it . . . ." For example, \(A\) conveys to \(B\) all the "oil, gas, and other minerals." Applying the *ejusdem generis* maxim of construction, the general reference to "other minerals" will be limited to minerals similar to the specified minerals—oil and gas.

Like the community knowledge and primary object tests, *ejusdem*
generis gives effect to specific mineral references and limits general references to substances similar to the specified minerals. However, ejusdem generis cannot be applied to an "all mineral" conveyance since there is no specific class of mineral identified. In such cases the community knowledge and primary object tests can be used to limit the scope of the conveyance.

Likewise, in "other mineral" conveyances, ejusdem generis will not resolve all the potential interpretive problems. For example, if B receives all the "oil, gas, and other minerals," and we limit other minerals to things similar to "oil and gas," how do we define the class of "things similar to oil and gas"? If the class is hydrocarbon minerals, we exclude helium. If the class is by the physical state of the minerals, such as liquid and gas versus a solid, we include helium.

In spite of its limitations, ejusdem generis has emerged in Kansas as an accepted constructional aid to resolve "other mineral" problems. In Keller v. Ely, the court interpreted a reservation of "all of the oil, gas, casing-head gas and other liquid semi-solid and solid minerals" to determine whether it included gypsum. Although the court relied upon many constructional aids, significant emphasis was placed on ejusdem generis. Holding that the reservation did not include gypsum because gypsum was not specifically reserved from the grant, the court concluded, "[T]he general terms contained in the reservation must be deemed to embrace and include only those things similar in nature to those previously specifically enumerated—that is, oil, gas and kindred minerals."

In Wulf v. Shultz, the court relied upon ejusdem generis to construe the scope of a lease grant "to dig, drill, operate for and procure natural gas, petroleum and other mineral substances" to determine whether it included the right to mine limestone. The court, applying numerous constructional aids, concluded "[t]he words 'natural gas' and 'petroleum' limit the application of the following words, 'other mineral substances', to oil, gas and related minerals. Minerals dissimilar in nature to oil and gas, such as limestone, are not included."

5. "Burden of Proof" Construction

The scope of a conveyance can often turn on who has the burden to prove whether a mineral is included or excluded from the grant. If ambiguities in the conveyance are to be construed against the grantor, the

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60. For discussion of the community knowledge test, see supra text accompanying notes 28-29.
61. For discussion of the primary object test, see supra text accompanying notes 47-57.
63. Id. at 703, 391 P.2d at 136.
64. 211 Kan. 724, 508 P.2d 896 (1973).
65. Id. at 729, 508 P.2d at 901.
66. Id. at 730, 508 P.2d at 902.
phrase “other minerals” may be interpreted more broadly. If ambiguities are to be construed against the grantee, the scope of “other minerals” may be restricted. In Kansas, by statute and case law, the various burden of proof tests could result in three different interpretations of “other minerals” depending upon whether the mineral interest is created by an exception or grant, or whether the mineral interest is being leased instead of conveyed.

a. **K.S.A. § 58-2202**

Kansas Statutes Annotated (K.S.A.) section 58-2202 has been interpreted to require that a “deed . . . be construed strictly against the grantor . . . to confer upon the grantee the greatest estate that its terms will permit.” This statement is taken from Keller v. Ely where the issue concerned the scope of an exception to the grant. The grantor reserved the “[o]il, gas, casing-head gas and other liquid semi-solid and solid minerals . . . .” Applying section 58-2202 the reservation would be interpreted narrowly; therefore, the grantee would receive all minerals other than oil, gas, and casing-head gas—the enumerated minerals. In other words, by strictly construing the grant against the grantor, the grantor’s exception will be confined specifically to the minerals excepted in order “to confer upon the grantee the greatest estate that its terms will permit.”

However, the rule of construction created by section 58-2202 could result in varying interpretations of the phrase “other minerals” depending upon how the mineral interest is obtained. Consider the following two situations:

1. *A* conveys to *B* all the oil, gas and other minerals in Section 30. Interpreting the grant strictly against the grantor, *A*, the scope of the phrase “other minerals” will be interpreted broadly to confer upon the grantee, *B*, “the greatest estate that its terms will permit.” In this situation “other minerals” would probably include all minerals in Section 30.

2. *A* conveys to *B* Section 30 excepting to *A* all the oil, gas, and other minerals. In this grant the scope of the phrase “other minerals” will be interpreted narrowly to confer upon the grantee, *B*, all the estate

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67. **Kan. Stat. Ann.** § 58-2202 (1983). The statute provides, in part: “[E]very conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant.”


70. *Id.* at 699, 391 P.2d at 133.

71. *Id.* at 702, 391 P.2d at 135.

72. *Id.*, 391 P.2d at 135.
of the grantor unless the intent to pass a lesser estate "shall expressly appear or be necessarily implied in the terms of the grant."73 It is doubtful the phrase "other minerals" is sufficiently express to except anything other than derivatives of the specified minerals—oil and gas. This is perhaps why Kansas courts have focused on other constructional aids to resolve these disputes and typically refer to section 58-2202 only when it tends to support the result obtained applying other rules.74

b. Strict Construction

When the instrument creating the grant is an oil and gas lease, a common rule of construction provides:

[Oil] and gas leases containing ambiguities are to be strictly construed against the lessee-producer and in favor of the lessor-royalty owner because the lessee usually provides the lease form or dictates the terms thereof, and where the lessee desires it may protect itself by the manner in which the lease is drawn.75

This is a corollary of the principle that ambiguous instruments are to be construed strictly against their drafters.76 The rule should be applied only when the instrument is deemed ambiguous following the use of applicable interpretive aids.77

Therefore, if A leases to B "the oil, gas, and other minerals in Section 30," the conveyance will not be construed against the grantor [lessor A] but rather the grantee [lessee B]. This creates the third interpretive situation where a conveyance, using identical words of grant, under identical circumstances, could create varying interpretations of the phrase "oil, gas, and other minerals." Apparently the burden of proof tests will not be applied unless the result obtained is consistent with other policies being promoted by the court—such as preventing the destruction of the surface estate.

6. Surface Destruction Inquiry

A "presumed intent" of the parties to a conveyance is that the grant will not include any minerals which, during the extraction process, will require the significant destruction of the surface.78 If the conveyance specifically includes substances such as coal, gypsum, limestone, or clay, the court will not have to resort to a presumed intent. The nature of the specified mineral will provide notice that the surface estate may be im-

74. Kansas courts have not indicated whether the interpretive guides and aids to construction should be applied in any particular sequence, or which should prevail in the event they produce conflicting results. See D. PIERCE, supra note 16, § 6.06.
78. J. LOWE, supra note 28, at 110.
paired. However, where the grant is of "all minerals" or "oil, gas, and other minerals," specific intent gives way to presumed intent.

The Kansas Supreme Court applied a surface destruction analysis, along with other constructional aids, in *Wulf v. Shultz*. Wulf had leased his land to Shultz, giving Shultz the "exclusive authority to enter . . . and to dig, drill, operate for and procure natural gas, petroleum and other mineral substances . . . ." The court phrased the issue as whether the lease gave the lessee the right to extract coal, clay, gypsum, limestone, gravel, rock, dirt and argillaceous materials as well as oil and gas and their derivatives. The court found extraction of these substances would require open pit or strip mining which would destroy the surface for agricultural purposes.

Focusing upon the parties' presumed intent, the court stated:

> It is not usually contemplated by the parties to a lease such as this that the utilization of the surface for agricultural purposes would be impeded by the rights granted, unless a contrary intention is clearly expressed. A grant, as here, including "other mineral substances" should not be construed to include a substance which requires destruction of the surface estate for its removal.

Consequently, a general reference to minerals would not include minerals that require, as part of their extraction process, the significant destruction of the surface.

*Wulf* is the only case where a Kansas court has directly applied a surface destruction analysis to limit the scope of a conveyance. However, in *Keller v. Ely* and *In re Estate of Trester*, the court alluded to the surprise a surface owner would experience if such general terms included minerals requiring destruction of the surface estate for their extraction. The potential scope of the Kansas surface destruction test may be indicated by the court’s reliance upon *Guinn v. Acker* to support its analysis.

In *Guinn*, the grantor conveyed an undivided one-half interest in “oil, gas and other minerals . . . .” The granteed contended that “other minerals” included iron ore. The court noted that iron ore is found on the surface and within fifty feet below the surface, and that iron ore mining requires the removal of surface soil. The court also noted that the
term "minerals," in a technical sense, includes all natural inorganic substances forming part of the soil. The court indicated, however, persons using the term to convey something less than all the mineral and surface estate do not use the term "minerals" in its technical sense—otherwise the surface estate would be devoured by the mineral estate. Instead, "minerals" should be limited to substances which come within the "ordinary and natural" meaning of the term rather than giving the term a broad technical meaning.

Defining what is included in the "ordinary and natural" meaning of the term merely begs the question. The court apparently recognized this and proceeded to apply an array of constructional aids to define the conveyance. The court began with *ejusdem generis* and found that iron ore is not a member of the generic class of oil and gas. Iron ore is not a "rare or exceptional" mineral so as to distinguish it from the soil itself. Removal of the iron ore requires open pit or strip mining which would destroy the surface of the land. As the court noted: "The open pit or strip-mining method of removing iron ore destroys the surface for agricultural or grazing purposes, and the mineral estate would destroy the surface estate which result was not reasonably within the intention of the parties." Apparently, the court found the parties could not have intended iron ore to be included as an "other mineral" because a mineral requiring the destruction of the surface could not be thought of as coming within the "ordinary and natural" meaning of the term.

The court concluded, holding:

> We, therefore, believe that it is clearly in the public interest and a matter of fairness to a majority of the landowners of this state and future purchasers of land, that if the language "oil, gas and other minerals" is to include iron and iron ore, the conveyance or reservation should so declare.

The interpretive process in Kansas is difficult to define. The Kansas Supreme Court often refers to numerous constructional aids simultaneously without indicating the weight each should be given or the order in which they should be applied. Nor do the decided cases give any indication which test should prevail in the event of conflicting conclusions. Perhaps the best guide for predicting the outcome of the interpretive process is to define the underlying policy the courts are promoting through the interpretive process.

88. *Id.* at 551.
89. *Id.* at 551, 557.
90. *Id.* at 556.
91. *Id.*
92. *Id.*
93. *Id.* at 557.
94. *Id.*
95. *Id.*
B. The Interpretive Policy

Although the purported judicial policy is to ascertain the intent of the parties, the discussion in the previous section indicates the search is for a presumed intent, not actual intent. Presumed intent may have little to do with the parties' actual intent. However, using presumed intent allows the court to balance two competing policies in this area: certainty of real property ownership weighed against the protection of unwary surface owners.

The Kansas Supreme Court attempted to promote certainty of ownership by refusing to declare "mineral" and "other mineral" conveyances ambiguous.\(^{96}\) If held to be ambiguous, the court would require the admission of extrinsic evidence in each case to determine the scope of a mineral conveyance, exception, or lease grant. This would reduce the function of the recording statutes to identifying the parties to join in the quiet title action. Commerce in mineral rights would be unduly burdened.

However, the court's policy of protecting the unwary surface owner is difficult to promote if the conveyance is deemed unambiguous. This would ordinarily limit the court's search for intent to the terms of the conveyance. However, beginning with *Roth v. Huser*,\(^{97}\) the court has fashioned interpretive and constructional guides which would allow the court to go beyond the terms of the instrument without declaring it ambiguous.

The court's policy is first revealed in *In re Estate of Trester*\(^{98}\) where the court stated that including clay in a conveyance of "oil, gas and other minerals" would "be startling to the owners of land and to holders of oil and gas leases thereon throughout the state."\(^{99}\) The court then proceeded to apply the "primary object" test\(^ {100}\) to limit the grant to minerals on which the conveyance document focuses.\(^ {101}\) Not certain of its creation, the court concluded: "We limit this decision to the record before us."\(^ {102}\)

*Davis v. Plunkett*\(^ {103}\) suggests the court's policy may be broader than merely protecting surface uses. *Davis* suggests the court is protecting the

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\(^{96}\) See *Wulf v. Shultz*, 211 Kan. 724, 731, 508 P.2d 896, 902 (1973)(lease not ambiguous); *Roth v. Huser*, 147 Kan. 433, 437, 76 P.2d 871, 874 (1938)(deed not ambiguous); see also *Guinn v. Acker*, 451 S.W.2d 549 (Tex. Civ. App. 1970), aff'd sub nom. *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971). The court specifically found: "The language of the instrument is not ambiguous and therefore makes it appear that the intention of the parties was to include oil, gas and like minerals and not to include iron ore ...." Id. at 556.

\(^{97}\) 147 Kan. 433, 76 P.2d 871 (1938).


\(^{99}\) Id. at 483, 241 P.2d at 478.

\(^{100}\) For discussion of the primary object test, see *supra* text accompanying notes 47-57.

\(^{101}\) *Trester*, 172 Kan. at 483, 241 P.2d at 478.

\(^{102}\) Id., 241 P.2d at 479.

landowner from a lessee with superior knowledge because the expressly
granted mineral, volcanic ash, would require surface destruction while
the disputed minerals, oil and gas, would not.\textsuperscript{104} This could also be the
court's back door approach to policing what it perceives is the product of
an unconscionable contract.\textsuperscript{105} In \textit{Davis} the lease was for a set term of
ninety-nine years.\textsuperscript{106}

In \textit{Keller v. ElY},\textsuperscript{107} the grantor excepted “oil, gas, casing-head gas
and other liquid semi-solid and solid minerals,” and asserted he had re­tained

gypsum by the exception. In this case the express minerals would
not require significant destruction of the surface estate for their extrac­tion.
However, extraction of the “other . . . solid mineral” gypsum
would destroy the surface. Although the court ultimately embraces \textit{ejus­dem generis}
to limit the other minerals to things like oil and gas,\textsuperscript{108} the
court specifically approved the trial court’s analysis.\textsuperscript{109} The court quoted
the following portion of the trial court’s opinion:

“We have all seen land tracts with sand and gravel pits that became as
worthless appearing as the exhausted coal-mining areas in Southeast
Kansas.\textsuperscript{110} Did the grantee particularly intend that the grantor was
reserving sand and gravel under the term ‘minerals?’ From the meager
evidence I can only assume that the gypsum might be taken either
through mining or quarrying. If the latter, could either of the parties
have intended that little or much of the surface of the land in question
under the reservation was subject to being laid waste by the taking of
gypsum and/or sand and gravel?”\textsuperscript{111}

The possible destruction of the grantee’s surface estate apparently influ­enced the Kansas Supreme Court in adopting a narrow interpretation of
the phrase “other . . . solid minerals.”

\textsuperscript{104} \textit{Id.} at 122-23, 353 P.2d at 515.
\textsuperscript{105} As I have observed previously with regard to the oil and gas lease:
A major reason for endurance of the [standard oil and gas lease] relationship is the
willfulness of courts to take what they perceive to be an unfair contract and make it fair
through creative interpretation. This “unfairness” arises out of a combination of perceived
substantive and procedural unconscionabilities visited upon the lessor.
But courts have not directly attacked the conscionability of the oil and gas lease.
Most litigants, instead of attacking the fairness of the relationship, have sought relief
through benevolent judicial construction of the lease. This approach has given rise to the
familiar rules of construction that the lease will be interpreted against the lessee, and in
favor of the lessor, and to promote development and prevent delay. Although courts pur­
tob to be searching for the parties’ intent, the express terms of the lease, drafted by the
lessee with little or no input from the lessor, contain little that would allow the court to
mitigate the resulting hard bargain. The result is that the court concludes their interpreted
version of the contract must be what was intended because what the parties agreed to was
unfair.

\textit{Pierce, Rethinking the Oil and Gas Lease, 22 Tulsa L.J. 445, 453-55 (1987).}
\textsuperscript{106} 187 Kan. at 123, 353 P.2d at 515.
\textsuperscript{108} \textit{Id.} at 701, 391 P.2d at 136.
\textsuperscript{109} \textit{Id.}, 391 P.2d at 136.
\textsuperscript{110} Evidently the trial judge was not familiar with the recreational values of the southeast Kan­sas “strip pits.” Some of the earlier excavations, which have stabilized through time, provide excel­lent fishing and shelter for a wide variety of wildlife. Prior to the advent of the “sanitary landfill”
some strip pits provided the backdrop for a now almost defunct sport—“rat shooting.”
\textsuperscript{111} \textit{Keller}, 192 Kan. at 700-01, 391 P.2d at 134.
Construing the granting clause of an oil and gas lease, the court in *Wulf v. Shultz* further defined the Kansas Supreme Court's interpretive policy. In *Wulf* the court held a lease grant of "natural gas, petroleum and other mineral substances" did not include coal, clay, gypsum, limestone, gravel, rock, dirt, or argillaceous materials. Using a battery of constructional tests, the court found the grant does not include minerals which would require destruction of the surface estate for agricultural or grazing purposes. The court stated:

It is not usually contemplated by the parties to a lease such as this that the utilization of the surface for agricultural purposes would be impaired by the rights granted, unless a contrary intention is clearly expressed. A grant, as here, including "other mineral substances" should not be construed to include a substance which requires destruction of the surface estate for its removal.

III. THE IMPLIED SURFACE EASEMENT

A. Access Rights

Although the mineral estate can be owned separately from the surface estate, some use of the surface estate is required to access and develop the mineral estate. Whether the right to develop the minerals arises out of a mineral conveyance or an oil and gas lease, typically it is necessary to use the surface overlying the minerals for their economical exploration and development.

Most states have resolved this problem by creating an "implied easement" in favor of the mineral estate, which creates a corresponding burden against the surface estate. The implied easement authorizes the mineral owner or lessee to make reasonable use of the surface in order to develop the granted minerals. The parties to the deed or lease can expressly enlarge or restrict this implied right in the document creating the mineral interest.

Kansas cases recognizing the mineral interest owner's implied easement fail to state the rationale for the easement. In *Mai v. Youtsey*, the Kansas Supreme Court suggested the easement is implied to "effectuate the grant" by providing the mineral interest owner with the rights necessary to enjoy its property interest. Although it has failed to provide a clear rationale for the mineral interest owner's implied easement, the court has developed a more definitive rationale for this concept in its

113. Id. at 726-28, 508 P.2d at 899-900.
114. Id., 508 P.2d at 899-900.
115. Id., 508 P.2d at 899-900.
117. Id.
119. Id. at 424, 646 P.2d at 479.
jurisprudence recognizing the "easement by necessity."\textsuperscript{120}

The easement by necessity arises when land is subdivided and a portion sold without providing expressly in the contract or deed for a right to access the sold land through lands retained by the seller.\textsuperscript{121} In such cases courts can declare an easement across the retained land to provide access to the portion sold.\textsuperscript{122} Kansas courts have clearly identified the policy they are promoting in such cases: maximum beneficial use of property.\textsuperscript{123} If the parties have not clearly addressed the matter, the courts \textit{assume} the parties intended the grant or reservation to include the right of access. As noted by the court in \textit{Horner v. Heersche}:\textsuperscript{124}

\begin{quote}
[The law will not presume, that it was the intention of the parties, that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties.\textsuperscript{125}

The same statement could be applied to the mineral/surface estate situation. Absent an express agreement on the matter, the court will not presume the parties intended to convey or except the mineral estate without including the necessary rights to make beneficial use of the conveyed or retained estate. The policy is simple—the court will recognize whatever surface use rights necessary to permit the beneficial use and enjoyment of the mineral estate.\textsuperscript{126}

\textsuperscript{120} See \textit{Horner v. Heersche}, 202 Kan. 250, 447 P.2d 811 (1968). In \textit{Horner}, the Kansas Supreme Court noted: "Kansas has long given recognition to the common-law rule, generally followed by the courts of this country, which implies a way of necessity where a grantor either conveys or retains a portion of his lands which otherwise would be inaccessible." \textit{Id.} at 252, 447 P.2d at 813.

\textsuperscript{121} \textit{Mead v. Anderson}, 40 Kan. 203, 205, 19 P. 708, 709 (1888).


\textsuperscript{123} See, e.g., \textit{Moll v. Ostrander}, 124 Kan. 757, 262 P. 592 (1928). The \textit{Moll} court articulated its policy goal stating:

\begin{quote}
A right to a way of necessity in behalf of the grantee of land over the adjacent land of his grantor is sustained on the principle that the grant of a thing is presumed to include, as an incident, whatever right the grantor had in connection with it, without which the thing granted would prove practically useless to the grantee.


\textsuperscript{124} \textit{Id.} at 250, 447 P.2d 811 (1968).

\textsuperscript{125} \textit{Id.} at 253, 447 P.2d at 814 (citation omitted).


This policy of maximizing the beneficial use of property has also been employed by the Kansas Supreme Court to deny recognition of implied easements where the easement could hamper development. For example, in \textit{Anderson v. Bloomheart}, 101 Kan. 691, 168 P. 900 (1917), the Kansas Supreme Court refused to follow the English "ancient lights" doctrine. The court explained the doctrine stating:

\begin{quote}
By the English common law a conveyance of a part of a tract of land owned by the grantor
It is likely, given the occasion, the Kansas Supreme Court would employ an “easement by necessity” analysis to the mineral estate implied easement. The court’s policy goals would be the same—maximizing beneficial use of the mineral estate. However, will this maximization be at the expense of the mineral owner or the surface owner?

B. Compensation Requirements

Although courts grant an implied easement to the mineral estate owner to make reasonable use of the surface estate, liability for damage to the surface estate need not be borne by the surface estate owner. The goal of maximum beneficial use of the mineral estate can be achieved by giving mineral owners free access, but requiring them to compensate the surface owner for any damage caused to the surface estate. However, most courts addressing the matter hold that so long as the mineral developer uses the surface only to the extent reasonably necessary to develop the mineral estate, there is no obligation to pay for surface disruption caused by such reasonable use.127

Although the issue has not been squarely addressed in Kansas, dicta in many cases suggest: (1) the easement is included as part of the grant of the mineral rights and therefore “paid” for by whatever consideration is given for the mineral rights; and (2) the burden of disruption to the surface, caused by the exercise of implied easement rights, falls on the surface estate owner.128 A recent example of this “dicta jurisprudence” is Trotter v. Wells Petroleum Corp.,129 where the Kansas Court of Appeals stated: “[I]f the lease specifically provides for the recovery of damages, or if the conduct of the lessee is tortious, or if the surface use rights of the lessee are exercised unreasonably and excessively, the lessor is entitled to recover his damages.”130 However, as in the other cases, this is dicta because the court is interpreting the rights of the parties under a lease containing an express clause addressing damages.131 Other than the

carried with it by implication the right to the free passage of air and light to the portion conveyed over the remainder, in the absence of any express reference to the subject. Id., at 691, 168 P. at 901. In effect the ancient lights doctrine created an implied easement over land to permit the unobstructed passage of air and light. The court rejected the ancient lights doctrine because it would impair the development and beneficial use of the land burdened by the implied easement. Id. at 693-94, 168 P. at 902. The court refused to burden lands with such an easement unless the parties expressly provided for it in their conveyance documents. Id. at 692, 168 P. at 901.

130. Id. at 681, 732 P.2d at 799.
131. Trotter concerned the interpretation of a “crop damage” clause in an oil and gas lease. Id., 732 P.2d at 797.
express lease clause cases, no Kansas cases expressly address liability for surface disruption caused by the mineral interest owner's reasonable use.\(^{132}\)

Courts could look to "easement by necessity jurisprudence" for guidance; however, they will discover the easement by necessity is a "free" easement. The landowner lacking access not only has the right to an easement, but the owner obtains the right free of charge.\(^{133}\) For example, the court in *Horner v. Heersche*\(^ {134}\) held the landowner could obtain access through a common-law easement by necessity, as opposed to a statutory procedure, and avoid paying damages for establishing the road.\(^ {135}\)

When the statutory procedure is used to declare a road, the landowner must pay damages and maintain the road.\(^ {136}\) As the court noted in *Horner*:

A proceeding under this statute [K.S.A. section 68-117] would entail great and continuing expense. The requirement that one who proceeds under the statute must pay the entire expense of establishing and forever maintaining the road, which must be at least 40 feet wide, together with all damages allotted in connection therewith, plus the fact that the road when completed will become a public road, imposes too great a burden to justify us in saying that plaintiffs' right to their implied easement no longer exists.\(^ {137}\)

Have the courts gone too far in the easement by necessity cases? The "necessity" is the easement—the right of access. Once the right of access is recognized, is it necessary to exempt the easement owner from damages incurred when exercising their rights under the easement? The same questions can be asked concerning the implied easement to facilitate mineral development. The essential right to ensure the "maximum beneficial use" of the property is the easement—not exemption from damages caused by exercise of the easement. Once the right of access is recognized, the court's policy is satisfied. Some other policy rationale must be identified to support the additional right to exercise the easement without liability for disruption to the surface estate—or the land burdened with the easement by necessity.

"Maximum beneficial use" will not justify the liability exemption.

\(^{132}\) The clause in each case is some form of "crop damage" clause commonly found in oil and gas leases. See, e.g., *id.*, 732 P.2d at 797. The lease provided: "Lessee shall pay for all damages caused by its operations to growing crops, terraces, fences and gates on said land." *Id.*, 732 P.2d at 797. Although a crop damage clause may appear to operate in the lessor's favor, the effect of the clause, as traditionally interpreted by courts, is to limit lessee's liability for surface damages to items specified in the oil and gas lease—typically "growing crops." See D. Pierce, supra note 16, § 12.06.


\(^{135}\) *Id.* at 257, 447 P.2d at 817.

\(^{136}\) *Id.*., 447 P.2d at 817.

\(^{137}\) *Id.*, 447 P.2d at 817.
The land or mineral estate can be fully developed, the damage requirement merely internalizes an additional cost of development. Courts could "imply" that the exemption for damages was part of the "presumed" intent of the parties, but there should be some compelling reason for such judicial construction. One commentator suggests courts are hesitant to require payment for damages caused by the implied easement because it would look too much like condemnation for private use. However, the right of access is free, or at least included within the original grant by implication. The damage issue merely falls within the realm of administering the respective rights of the parties.

If Kansas courts attempt to fashion a policy in this area, they should apply their "maximum beneficial use" approach to the surface damage issue. If the policy is to achieve maximum use of the mineral and surface estates, liability for surface disruption would seem to promote the court's policy. Arguably, if there is no liability for surface disruption in exercising easement rights, there will be no incentive on the part of the mineral interest owner to minimize surface disruption. This impairs maximum beneficial use of the surface estate. The mineral interest owner will not be inclined to take remedial action to limit disruption of the surface or otherwise reclaim the surface to reduce their liability.

Support for this basic approach is found in Rostocil v. Phillips Petroleum Co., where the Kansas Supreme Court rejected the traditional dominant/servient estate surface use easement analysis. Since the surface estate must carry the burden of the rights impliedly created in the mineral estate, most states characterize the surface estate as the "servient" estate and the mineral estate as the "dominant" estate. However, in Rostocil the court found that the rights of the surface estate owner and

138. See Polston, supra note 126, at 44.
139. The decided cases in Kansas assume this is the case. For a list of case examples, see supra note 128. However, the Kansas Supreme Court is in much the same position as the North Dakota Supreme Court when it issued its opinion in Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979). In Hunt Oil Co. the court defined the scope of the implied surface easement for mineral development under North Dakota law. Id. at 134-35. However, the court is careful to point out in a footnote:

This case does not present, nor does this opinion decide, the issue of whether or not the owner or lessee of the mineral estate is liable for damages arising from the reasonably necessary use of the surface incident to the exploration, development, and transportation of the minerals. . . . We question, however, the social desirability of a rule which potentially allows the damage or destruction of a surface estate equal or greater in value than the value of the mineral being extracted.

Future mineral exploration and development can be expected to expand as our demands for energy resources grow. Equity requires a closer examination of whether or not the cost of surface damage and destruction arising from mineral development should be borne by the owner of a severed surface estate or by the developer and consumer of the minerals. Although we do not doubt the mineral estate owner's right to use the surface estate to explore, develop and transport the minerals, we specifically do not decide if the right of reasonable use also implies the right to damage and destroy without compensation.

141. Id. at 401, 502 P.2d at 826.
142. H. Williams & C. Meyers, supra note 116, § 218.
the mineral interest owner "are to run hand in hand . . . with neither interfering more than need be with the continuing uses of the other—the one for the exploration, production and transportation of minerals and the other for the pursuit of agriculture." The mineral interest owner is given the rights necessary to enjoy his or her property interest—an exemption from surface disruption liability is not necessary to enjoy the mineral estate and tends to diminish maximum use of the surface estate.

Arguably, Kansas already firmly recognizes liability for surface disruption as a right retained by the surface owner; a right which is separate from the mineral interest owner's access rights under the implied easement. Kansas has long recognized a surface owner's right to subjacent support. In *Audo v. Western Coal & Mining Co.*, the Kansas Supreme Court stated the basic rule as follows: "Where real property has been separated so that one person owns the surface and another owns a substratum, or the minerals under the surface, the person that owns the surface has an absolute right to subjacent support unless that right has been distinctly waived." The right is one uniquely associated with the surface estate. It is a "soil right" distinct from any portion of the mineral estate. In explaining the right, the court in *Audo* stated: "Subjacent support is part of the reality the same as the surface soil, the subsoil, the water, the rocks, and the minerals under the surface, and the air and light above. Real property cannot exist without that support."

In *Audo* the deed contained the following reservation: "The grantor herein expressly reserves to itself . . . all the coal and other minerals underlying the land . . . and the right to use at its pleasure so much of the surface of said land as may be necessary for properly working, mining, and removing said coal and other minerals . . . ." The issue presented to the court was whether the owner of the mineral estate was liable for damage to the surface estate caused by the mineral estate owner's coal mining activities. Note the mineral estate owner is not relying upon an implied easement; the easement is express. However, the court held the surface estate owner is entitled to damages when the surface disruption occurs. The express easement merely gives the mineral estate owner the right of access, not immunity from damages caused accessing the surface estate. If the mineral estate owner wants access without liability for surface disruptions, this additional right must be expressly stated in the

145. 99 Kan. 454, 162 P. 344 (1917).
146. *Id.* at 457-58, 162 P. at 346.
147. *Id.* at 458-59, 162 P. at 346 (citations omitted).
148. *Id.* at 459, 162 P. at 346.
149. *Id.* at 456, 162 P. at 345 (emphasis added).
150. *Id.* at 459-60, 162 P. at 346.
151. *Id.*, 162 P. at 346.
lease or deed creating the mineral rights. The language in the Audo reservation was not sufficient.

Although the Audo case concerned subsidence damage associated with coal mining, the court’s broad subjacent support obligation can be applied to oil and gas development and any other form of mineral development. The subjacent support rule would not allow landowners to refuse access, it would merely entitle them to damages when injury to the surface estate actually occurs. It appears the subjacent support jurisprudence, in conjunction with the implied easement jurisprudence, authorizes access and use of the overlying surface estate, but requires the mineral interest owner to compensate the surface owner for any surface disruption.

IV. THE JURISPRUDENTIAL RELATIONSHIP BETWEEN TITLE AND EASEMENT

A. The “Equity Model”

As the discussion in the prior section indicates, courts have perhaps

153. 99 Kan. at 459, 162 P. at 346.
154. Under the broad Kansas definition of “subjacent support,” any disruption of the surface which causes damage to the surface estate is compensable. Therefore, building a road to a drill site, excavating a drill site, setting tanks and digging pits would all disrupt the surface owner’s right to subjacent support and create a claim for damages. In Audo, the right to subjacent support is treated as a special property interest associated with the surface estate. Id., 162 P. at 346. The Kansas courts need not limit the right to cases where subsurface excavations, such as deep mining, cause the surface to subside.

However, Kansas courts should not feel constrained to search for common-law justifications to require the mineral developer to pay for surface use. By recognizing the mineral owner’s implied surface easement, the court has set into motion its own policy regarding mineral development and the maximum beneficial use of land. Therefore, the surface damage issue need not be pegged to subjacent support or to any other existing doctrinal concept. Instead, the court would merely be policing its own creation (the implied easement) in pursuit of the basic policy interests it has previously defined. Numerous Kansas cases recognize the importance of preserving the surface estate from unnecessary disruption. See, e.g., Thurner v. Kaufman, 237 Kan. 184, 699 P.2d 435 (1984); Rostocil v. Phillips Petroleum Co., 210 Kan. 400, 502 P.2d 825 (1972). Imposing a surface damage obligation on the mineral developer, for all surface use, would ensure minimum surface disruption occurs to facilitate mineral development. It would also encourage the developer to avoid continuing or permanent damage obligations by reclaiming the disrupted surface.

Although Kansas courts, and others, manipulate the scope of the terms “minerals” and “other minerals” to protect the surface owner, they do not protect the public’s interest in the surface estate. Instead, they merely transfer from mineral owner to surface owner the right to the mineral. In most cases, if the mineral was valuable enough to fight over, the victorious surface owner will simply proceed to lease the mineral. Consequently, the surface the rule purports to protect will inevitably be destroyed. The mineral jurisprudence under these circumstances apparently protects only the surface owner’s possible “surprise” and not the public’s interest in a productive surface estate.

155. So long as the activity falls within the scope of the implied easement, the surface owner’s only right would be to damages and a yet undefined right to have the mineral developer “accommodate” the surface owner, where possible, to minimize surface disruption. Compare Rostocil v. Phillips Petroleum Co., 210 Kan. 400, 502 P.2d 825 (1972)(right to mine and right to farm cannot interfere with one another any more than necessary) with Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979)(owner of mineral estate must have due regard for rights of the surface owner and consider reasonable development alternatives to minimize impact on surface owner’s use of land) and Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971)(limited obligation to accommodate surface owner’s use of land).
gone too far in recognizing implied easement rights associated with the mineral estate. However, courts have seldom engaged in a direct analysis of the surface easement issue. Instead, they have been willing to manipulate title to the mineral estate in an attempt to narrow the scope of the implied surface easement. For example, A conveys to B all the oil, gas, and other minerals in Section 30. A retains the surface estate and so much of the mineral estate as is not encompassed by the grant of "oil, gas, and other minerals" to B. As to the "minerals" conveyed to B, B can enter Section 30 and use so much of the surface as is reasonably necessary to explore, develop, and produce the granted minerals. Although this may require substantial disruption of A's use of the surface, B can make reasonable use of the surface without liability to A.

The Kansas Supreme Court in this situation has refused to interpret the phrase "oil, gas, and other minerals" to include substances requiring significant destruction of the surface because it would impair the surface estate without compensation. By limiting the scope of the grant to B, A's interests can be protected. If B does not have title to coal, then B will not have an implied easement to damage the surface estate to mine for coal. Title is manipulated to protect the presumed scope of the implied surface easement.

Perhaps a major reason for courts employing a restrictive interpretive analysis is the desire to indirectly police what is perceived to be an unfair bargain. Courts have developed constructional aids, particularly in the oil and gas area, to try and prevent the developer from over-reaching the unsophisticated landowner. Instead of attacking the issue head-on through the traditional bargain-policing techniques of mistake, misrepresentation, fraud, or unconscionability, the courts tend to rely upon "interpretation," "construction," and "implied" rights and obligations.

The underlying goal is to do "equity" by attempting to determine what the landowner would have said had the grant of minerals specifically referred to "coal." Would they have been "surprised"? In some

156. See H. WILLIAMS & C. MEYERS, supra note 116, § 218. This is the rule followed by all states that have addressed the issue.
157. Id. This is the rule followed by the vast majority of states addressing the issue.
159. However, the public's interest in conserving the productive capacity of the surface is not necessarily promoted by giving A title to the disputed minerals. For discussion, see supra note 154. The litigation was probably brought by lessees of the minerals to determine whether they should obtain a lease, or pay lease benefits, to A or B. The surface use policy is merely a technique for favoring A with the mineral and the right to develop the mineral.
160. If the landowner is not entitled to compensation for surface use, as is the case under the traditional rule, courts may view it unfair to permit the mineral developer to consume the surface relying upon general references to "minerals" or "other minerals."
161. For discussion of such aids, see supra note 105. The owner of the surface is typically the unsophisticated participant in the mineral transaction. Judicial intervention in the bargain is often designed to give the surface owner the benefit of any part of the bargain requiring interpretation.
162. See Pierce, supra note 105, at 454-55.
cases they probably would be, in others they would not. Unless you de­
clare the conveyance ambiguous and admit parol and other extrinsic evi­
dence, there is no way of knowing what the parties thought about the
matter. Perhaps a more pertinent question would be whether the land­
owner would be "surprised" to discover that mineral owners can destroy
the land's surface to get the oil, gas, and other minerals—without compen­sation to the surface owner.

The "equity model" attempts to seek out the actual intent of the
parties on these matters so their respective rights can be defined in ac­
cordance with their mutual understandings. The major problem with the
equity model is the burden it places on a real property system that relies
upon recorded title documents. Commerce in mineral interests is im­
peded because you cannot ascertain ownership of this property interest
until after it is fully litigated. This is why American courts have gener­
ally, absent mistake, fraud, or similar problems, abandoned an equity
model in favor of a functional recording system for real property. An
inability to readily determine ownership of minerals prevents their "max­
imum beneficial use" and requires excessive transaction costs to render
them marketable.\(^{163}\)

In 1984, Texas moved away from the equity model by adopting a
more functional approach for determining title to minerals. In \textit{Moser v. United States Steel Corp.},\(^{164}\) the Texas Supreme Court abandoned, pro­
spectively, the surface destruction test and other interpretive rules it em­
ployed to interpret the scope of the phrase "oil, gas, and other minerals."\(^{165}\) Perhaps the most significant aspect of the case is the forth­
right manner in which the court admits its previous interpretive efforts
were flawed. Acknowledging its manipulation of title to limit uncompen­sated surface use, the court stated:

\begin{quote}
We have previously attempted to create a rule to effect the intent of the
parties to convey valuable minerals to the mineral estate owner, while
protecting the surface estate owner from destruction of the surface es­
tate by the mineral owner's extraction of minerals. In so doing, we
decided that determinations of title should be based on whether a rea­
sonable use of the surface by the mineral owner would substantially
harm the surface. Application of this rule has required the determina­
tion of several fact issues to establish whether the owner of the surface
or the mineral estate owns a substance not specifically referred to in a
grant, reservation or exception. As a result, it could not be determined
from the grant or reservation alone who owned title to an unnamed
\end{quote}

\(^{163}\) The Kansas Legislature has recently enacted legislation to try and improve the marketabil­
ity of mineral interests. See \textit{KAN. STAT. ANN. §§ 55-1601 to -1607} (1983)(commonly known as the
Kansas Mineral Lapse Act).

\(^{164}\) 676 S.W.2d 99 (Tex. 1984).

\(^{165}\) \textit{Id.} at 103. However, the court specifically retains the previous rules for mineral severances
made prior to June 8, 1983. \textit{Id.} In addition, previous Texas decisions holding a substance belongs to
the surface owner, as a matter of law, remain effective. \textit{Id.} at 102. This weakens considerably the
court's attempt to implement a functional mineral jurisprudence for Texas.
substance. Determining the ownership of minerals in this manner has resulted in uncertainty.\textsuperscript{166} Applying this analysis to the facts of the \textit{Moser} case, the court held that the phrase “oil, gas and other minerals” includes “all substances within the ordinary and natural meaning of that word ['minerals'], whether their presence or value is known at the time of severance.”\textsuperscript{167} Title to the “other minerals” passes to the mineral grantee, along with an implied easement to enter the surface overlying the minerals to effect their extraction.\textsuperscript{168} However, as to substances not specifically named in the grant, the “other minerals,” the mineral owner must pay for all damage to the surface estate caused by their extraction.\textsuperscript{169} If the surface is disrupted to extract the specifically named minerals, the “oil” and “gas,” the mineral owner will not be liable for surface damages so long as the use was within the scope of the easement.\textsuperscript{170}

\section*{B. A Proposed “Functional Model”}

Currently, Kansas mineral jurisprudence employs an equity model to determine the scope of the terms “minerals” and “other minerals.”\textsuperscript{171} The courts attempt to protect a presumed intent which will keep the landowner from being “surprised” when the mineral grantee asserts rights not only to the oil and gas, but also to clay, limestone, coal and an array of other substances.\textsuperscript{172} The courts also attempt to protect the surface estate from uncompensated surface use by limiting the scope of what appear to be otherwise broad mineral grants.\textsuperscript{173}

However, the practical effect of the courts’ efforts is the inability to determine who owns the “minerals” or “other minerals” in land. It will, in many cases, require litigation to resolve the dispute. However, there have not been many reported appellate cases on this issue in Kansas. This may indicate an even greater problem: if the title issue requires a lawsuit to determine each party’s rights, persons in the marketplace may be unwilling to make the necessary investment to resolve the title dispute, especially when the potential value of the minerals at issue is not great. This means the disputed mineral resource is effectively removed from the

\textsuperscript{166} Id., at 101 (citations omitted).
\textsuperscript{167} Id. at 102.
\textsuperscript{168} Id. at 103.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} See, e.g., Wulf v. Shultz, 211 Kan. 724, 508 P.2d 896 (1973). The interpretive process used by Kansas courts to define the mineral and surface estates inquires into many factual issues in an attempt to ascertain the actual intent of the parties to the conveyance or lease. See, e.g., Roth v. Huser, 147 Kan. 433, 76 P.2d 871 (1938).
\textsuperscript{172} See, e.g., \textit{In re Estate of Trester}, 172 Kan. 478, 241 P.2d 475 (1952). The various rules of construction employed by the court are designed to give the surface owner the benefit of any doubt in how the conveyance or lease should be interpreted. See, e.g., Keller v. Ely, 192 Kan. 698, 391 P.2d 132 (1964).
\textsuperscript{173} For discussion of the courts’ protection, see \textit{supra} note 154.
marketplace, thereby preventing the "maximum beneficial use" of property—whether it is ultimately held to be part of the conveyed mineral estate or the remaining surface estate.

In addition to Kansas judicial policy promoting "maximum beneficial use," the Kansas Legislature has recently taken action to promote the marketability of mineral interests through the Kansas Mineral Lapse Act. The goal of the Act is to identify the owners of severed mineral interests so they can reenter the stream of commerce. This can be done by having the owners of "unused" mineral interests assert their continuing claim to the interest, or by terminating unclaimed interests and vesting these preexisting rights in the surface owner. In either event, an owner is identified so persons interested in developing the minerals know who to contact with offers.

If the goal is to protect the surface owner from a bad bargain, the courts should employ the traditional techniques used to police the contracting process. If the goal is to limit the scope of uncompensated surface use, the court should focus on the implied surface easement. The implied surface easement should be defined without regard to the title issue. More importantly, the title issue should be addressed without regard to the surface use issue. They are separate issues which should be resolved based upon the separate policy considerations they implicate.

Once we decide to divorce title analysis from surface use analysis, the task becomes much simpler. As a matter of policy, do we want to have the interpretive process follow a course of presumed intent which results in varying results based upon the facts—even though the two conveyances are, by their terms, identical? Or do we adopt a rule which will permit the determination of title based upon the terms used in the operative document? The goal of preserving the marketability of mineral interests, and the importance of the recording system for interests in land, suggest a more functional approach to the mineral issue should be used.

Texas' functional approach classifies as "mineral" all substances within the ordinary and natural meaning of the word. Professor Kuntz has suggested the "manner of enjoyment test" which provides:

When a general grant or reservation is made of all minerals with-

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174. See supra text accompanying notes 123-26 (maximum beneficial use policy applies to all interests in land, including surface and mineral estates).
178. My proposition of traditional policing techniques scrutinizes the transaction in search of a lack of capacity to contract, duress, concealment, misrepresentation, fraud, mistake, and unconscionability. See generally E. FARNSWORTH, CONTRACTS §§ 4.1-4.29, at 212-323 (1982).
out qualifying language, it should be reasonably assumed that the parties intended to sever the entire mineral estate from the surface estate, leaving the owner of each with definite incidents of ownership enjoyable in distinctly different manners. The manner of enjoyment of the mineral estate is through extraction of valuable substances, and the enjoyment of the surface estate is through retention of such substances as are necessary for the use of the surface, and these respective modes of enjoyment must be considered in arriving at the proper subject matter for each estate.

Applying this intention, the severance should be construed to sever from the surface all substances presently valuable in themselves, apart from the soil, whether their presence is known or not, and all substances which become valuable through development of the arts and sciences, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate. 180

If the document creating the mineral severance does not expressly identify a mineral by name, the mineral owner would nevertheless obtain title to the mineral under the "manner of enjoyment" test. However, if extraction of the mineral would require destruction of the surface owner's enjoyment of the surface, the mineral developer would have to compensate the surface owner. 181 If the mineral was specifically named in the grant, no compensation for surface use would be required. 182

Perhaps the best way to define a mineral for title purposes is to employ the animal, vegetable, mineral analysis which has been uniformly rejected off-hand by courts addressing the issue. 183 Under such a rule, a sale or lease of the "oil, gas, and other minerals" in land would authorize the grantee or lessee to remove and sell even the topsoil of the land. The rights of the surface estate owner would be determined under implied surface easement jurisprudence. The grantor always has the ability to restrict the scope of the grant by limiting it to "oil and gas" or otherwise specifying the minerals that are, or are not, granted.

Although this may seem terribly antilandowner, it gives effect to the specific terms of the grant "all minerals" or "other minerals." To balance the interests, the courts could enforce the obligation to provide subjacent support to the surface of the land. The implied surface easement would only permit reasonable use of the surface to mine the minerals. If the subjacent support is disturbed, or destroyed, damages should be paid to the injured surface estate owner without regard for concepts of "reasonable use." As defined by Kansas courts, subjacent support appears to refer to any disturbance of the surface. 184

To protect the marketability of the surface estate, the surface dam-

181. Id. at 115.
182. Id.
184. For discussion of subjacent support, see supra note 154.
age rule could require a current market value approach for valuing surface use. If the landowner has improved the surface, either before or after the mineral severance occurs, courts could calculate damages based upon the value of all improvements. This would require mineral owners to weigh their decision to develop the minerals against the value of the competing property interest such development would impair. If the landowners want to free their property from the broad mineral grant, or the accompanying implied easement, they could attempt to purchase the right from the mineral interest owner. If the mineral interest owners want to limit the possibility of increased surface damages due to subsequent improvements erected by the surface owner, they could attempt to purchase broader, and more express, rights in the surface estate.

V. CONCLUSION

Although the jurisprudence relating to title and surface use should be allowed to develop independently, Kansas courts must decide whether adopting a functional definition of "minerals" and "other minerals" requires adjustment of other concepts—such as the implied surface use easement. Kansas courts have the unique opportunity, however, to fashion the optimum rules, for title and surface use, without disturbing established precedent. Although the title issue has been addressed in the "other minerals" situation, the courts have refrained from stating any set rule of general application. Neither has the surface damage issue, under the implied surface easement, been directly addressed by the Kansas appellate courts. Therefore, Kansas courts can further define the common-law rights they created.

In determining how the title and surface use issues should be resolved, Kansas courts should be guided by two policies which the Kansas Supreme Court has applied to resolve similar disputes: (1) promote "maximum beneficial use" of all property interests; and (2) promote the determination of title by reference to the terms of recorded documents. If courts feel the basic agreement between the landowner and developer creating the interest is unfair, they should be willing to police this prob-

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185. This would permit full development of the surface estate without impairing the rights of the mineral owner. See generally Jensen v. Southwestern States Management Co., 6 Kan. App. 2d 437, 629 P.2d 752 (1981)(conveyance of coal providing valuation of surface used at $70-75 per acre held to require payment of current market value of surface when used).

186. See, e.g., In re Estate of Trester, 172 Kan. 478, 483, 241 P.2d 475, 479 (1952)("We limit this decision to the record before us.").

187. For list of Kansas cases addressing this issue in dicta, see supra note 128.

188. Unlike many states, the Kansas Legislature has not attempted to define or adjust the respective rights between surface and mineral estate owners. The only legislative activity has been § 55-132a which required the oil and gas lessee to remove equipment from an abandoned lease site and level the area to approximate its original contour. See KAN. STAT. ANN. § 55-132a (1983). This nominal requirement, however, was repealed by the legislature in 1986. See 1986 Kan. Sess. Laws 1056, § 41. But cf. 1988 Kan. H.R. 2694 (proposes compensation procedure for surface damages caused by oil and gas drilling).
lem through forthright review of the bargaining process. This avoids “creative” interpretive rules which tend to be applied to all factual settings; even those where the bargaining process is unflawed. Protecting the landowner from “surprise” or a raw deal in a particular case can be accomplished without disrupting broad social goals relating to the marketability of interests in land.

After a century of intensive mineral development in Kansas, courts still have the opportunity to fashion a workable and fair rule to determine the scope of the term “mineral.” Oddly enough, stare decisis offers no impediment to original judicial thought on this issue. Kansas courts can avoid the mistakes that others have made in dealing with the mineral issue. Judges merely need to examine the Texas experience on the subject to identify the jurisprudential paths they should avoid.\textsuperscript{189}

The Kansas Supreme Court has never been a slave to “standard doctrine” when addressing oil and gas issues.\textsuperscript{190} Instead, the court has strived to develop just and workable rules which promote a defined policy. The court, when dealing with the mineral and surface use issues, should similarly avoid “standard doctrine” and fashion its own fair and functional rules based upon the public’s interests in the mineral and surface resources.


\textsuperscript{190} For example, Kansas treats the mineral and surface estates as being essentially coequal instead of the mineral estate being “dominant” to the surface estate. See Rostocil v. Phillips Petroleum Co., 210 Kan. 400, 401, 502 P.2d 825, 826 (1972). On perhaps a less flattering note, Kansas is the only state that holds conveyance of a royalty interest does not vest until there is actual production and therefore violates the rule against perpetuities. See Cosgrove v. Young, 230 Kan. 705, 642 P.2d 75 (1982); Lathrop v. Eyestone, 170 Kan. 419, 227 P.2d 136 (1951); see \textit{also} D. Pierce, supra note 16, § 4.15.