Chapter 13
“SURROUNDING CIRCUMSTANCES” EVIDENCE
IN NATURAL RESOURCES LITIGATION
AND THE EFFECTIVE USE OF DAUBERT
TO MANAGE EXPERT TESTIMONY

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§ 13.01 Introduction: Escaping the Natural Resources "Box"

Often the major weakness of being an accomplished "oil and gas" lawyer, "mining" lawyer, or other "natural resources" lawyer is that legal problems are viewed through the trained eye of the specialist. Instead of viewing problems from a general legal context, the "oil and gas" lawyer, for example, will view problems in the context of "oil and gas" law. Consider the thought process of the "oil and gas" lawyer encountering the following sequence of conveyances:

(1) A conveys to B § 30 but excepts and reserves to A one-half of all the oil and gas in § 30.

(2) B conveys to C § 30 but excepts and reserves to B one-half of all the oil and gas in § 30.

The issue is determining the oil and gas ownership of B and C. The oil and gas lawyer, who has been duly tortured with this scenario in law school, will immediately utter what those around our specialist will take for a foreign language: "Duhig"! Once the word "Duhig" surfaces, the thought process is pure "oil and gas" law. The lawyer will immediately focus on the case of Duhig v. Peavy-Moore Lumber Co.¹ and the analytical battle lines are irrevocably drawn. The analysis will be "rule" oriented. "This conveyance fits this pattern, therefore we apply this rule." Once the trained oil and gas lawyer recognizes the factual pattern, he or

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¹ 144 S.W.2d 878 (Tex. 1940).
she pulls up the rule and applies it to the facts to conclude: C gets the surface plus one-half the oil and gas; B gets nothing.  

The non-oil and gas lawyer would view this as just another deed interpretation case with the ultimate goal being to ascertain the intent of the original parties to the conveyance. This should trigger analyses concerning the doctrine of merger and deed interpretation. If the parties are in Texas, and the conveyance occurred after the Duhig decision, the grantee (C) can argue that the original parties to the conveyance contracted with reference to "existing law," which includes the common law, which includes the Duhig case. If the conveyance took place prior to the Duhig decision, the grantor (B) can argue that existing law did not address the issue at the time of the conveyance. Although the new "law of Duhig" may be given retroactive effect in other contexts, the grantor would argue it should not be a factor when the overriding issue is the "intent of the parties" at the time the conveyance was made. This all assumes, of course, that the interested party is aware of, and triggers, the interpretive rule that the "law" at the time of a contract is deemed to be part of the contract.

This example is offered as an introduction to a major theme of this article: opportunities exist for natural resources lawyers to rediscover useful tools in contract and property law to deal with situations that would otherwise be viewed through a myopic "law of" lens, such as the law of oil and gas or the law of mining. This will be of particular interest when the "law of" approach would result in an unfavorable outcome for your client. Although not the focus of this article, the author believes the "law of" oil and gas and other specialized disciplines can be improved by en-

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2 At least this is the result in those jurisdictions following the Duhig "doctrine." Even in jurisdictions that do not follow Duhig, the situation will trigger the same sort of rule-oriented anti-Duhig analysis. E.g., Hartman v. Potter, 596 P.2d 653 (Utah 1979). See generally Willis H. Ellis, "Rethinking the Duhig Doctrine," 28 Rocky Mt. Min. L. Inst. 947 (1982).

3 E.g., Winder Bros. v. Sterling, 12 S.W.2d 127 (Tex. 1929) ("The laws which subsist at the time and place of the making of the contract and where it is to be performed . . . enter into and form a part of it, as if they were expressly referred to, or incorporated in its terms.") (quoting Von Hoffman v. City of Quincy, 71 U.S. 535, 550 (1866)); Click v. Seale, 519 S.W.2d 913, 919 (Tex. Ct. App. 1975) ("It is a settled rule that parties making an agreement are presumed to know the law, and to contract with reference to the law, and they make the law a part of the contract.").
suring, when appropriate, that basic principles of contract and property law are followed.  

This article explores the tools, familiar to the “contract” and “property” lawyer, that can be used to address what is perhaps the most prevalent issue in the extractive industries branch of natural resources law: what does a contract or conveyance mean? To properly address how courts ascribe “meaning” to a contract or conveyance we must examine the substantive and procedural contours of the evidence that can be used by courts in the interpretive process. Some of the most important interpretive evidence is that generically known as the “surrounding circumstances” under which the parties operated when a contract or conveyance was made. This includes evidence of applicable “customs and usages,” the law in existence at the time, and any other relevant information designed to place the court in the position of the parties at the time they entered into the contract or conveyance. Frequently the vehicle for offering this type of evidence is through an expert witness. Therefore, this article also addresses the current status of the *Daubert* analysis for managing expert testimony in these types of “meaning” cases.

§ 13.02 Piercing the Tautological Platitudes

The main obstacles to the use of “surrounding circumstances” evidence are the familiar tautological platitudes that “extrinsic evidence” cannot be used to interpret an “unambiguous” contract or conveyance. Instead, it must be given its “plain meaning” by considering only language within the “four corners” of the document. These statements are often spewed forth as the litany that precedes the court’s pronouncement that the contract or conveyance is “ambiguous” or “unambiguous.” This declaration of ambiguity then becomes the critical event that determines whether the court will pronounce its “meaning” or refer the matter to the trier of fact. The “analysis” is frequently a jumbled-up mess where the parol evidence rule, or the doctrine of merger, is mixed in with separate rules of interpretation and a conclusion announced—without any attempt to articulate the

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appropriate sequencing of the rules the court is purporting to apply. Frequently the court's actual analysis has little to do with the litany that precedes it.\footnote{Currently the author is co-counsel in litigation representing the owner of "all coal... together with the right to mine and remove same" in several tracts of land in Labette County, Kansas. Central Natural Resources, Inc. v. Davis Operating Co., No. 04 C 100 PA (11th Jud. Dist., Labette County Dist. Ct., filed Sept. 1, 2004). The dispute is over ownership of methane gas contained in the coal estate and the rights of the coal owner to control the defendants' entry into plaintiff's coal estate. There is no dispute over identification of the terms at issue; the parties do not dispute there has been a merger of all prior negotiations, agreements, and understandings into the deeds at issue. The focus of the litigation is on what the terms of the deeds mean. The court will have an opportunity to evaluate the admissibility of various forms of "surrounding circumstances" evidence regarding the mining laws and the Southeast Kansas coal mining industry circa 1924. The basic goal of the plaintiff is to focus the court on the 1924 timeframe when the deeds were granted—in order to ascertain the intent of the original grantor and grantee at the time of the conveyances.}

The end result is that one can find in every jurisdiction statements that evidence of the "surrounding circumstances" can be considered only after the document is declared ambiguous.\footnote{\textit{E.g.}, Lawrence v. Cooper Independent Theatres, 276 P.2d 350, 354 (Kan. 1954) ("Facts and circumstances surrounding the execution become competent only in the event the instrument is ambiguous on its face and requires aid to clarify its intent.").} However, in the same jurisdictions one can find cases in which the court admitted, and used, surrounding circumstance evidence to interpret what the court declares is an unambiguous document.\footnote{\textit{E.g.}, Bennett v. Humphreys, 155 P.2d 431, 434 (Kan. 1945) ("If the provisions of the deed itself left any doubt—and we entertain none—as to the grantor's intention to convey a life-estate only to the son, there are attending circumstances as found by the trial court which would fortify our conclusion."); New Hampshire Insurance Co. v. Fox Midwest Theatres, Inc., 457 P.2d 133, 138, 140 (Kan. 1969) (concluding that "the over-all intention of the parties seems clear," the court states the basic rule of interpretation as follows: "The primary rule in construction of any contract is to ascertain the intent of the parties, and such intent may best be determined by looking at the language employed and taking into consideration all the circumstances and conditions which confronted the parties when they made the contract.").} Closer scrutiny of the case law reveals that the courts are often addressing different issues in different contexts,\footnote{For example, parol evidence rule/merger doctrine to identify the terms versus interpretation to ascertain the meaning of the terms.} and that there is a range of "surrounding circumstances" evidence that is clearly admissible, and inadmissible.\footnote{For example, facts regarding what the law, industry usages, or state of the industry was at the time of the contract or conveyance versus statements by a party regarding what was said or agreed to at the time of the contract or conveyance.} The chal-
The challenge is to provide the court with the tools it needs to sift through the complex mix of rules to properly resolve the specific interpretive issues in one’s case. Once the groundwork is laid for our analysis, we will return to this topic to illustrate the problems, and how they can be solved.

§ 13.03 Substantive vs. Procedural Evidentiary Rules

The rules that govern how contracts and conveyances will be interpreted can be placed into two distinct categories: (1) substantive evidentiary rules; and (2) procedural evidentiary rules. Both sets of rules are designed to operate as a filter through which all “extrinsic” evidence must pass before it can be considered by a court interpreting a contract or conveyance. “Extrinsic” evidence in this context means any information that is not contained in, or reasonably implied from, the express terms of the contract or conveyance that is being interpreted. The substantive inquiry asks “when,” and for “what purposes,” can a court consider extrinsic evidence to assist in the interpretation of a contract or deed. The procedural inquiry typically focuses on how the evidence must be gathered and presented when being offered through an expert witness. The exclusion or admission of the evidence at either the substantive or procedural stage of the analysis can often determine who wins the lawsuit. ¹⁰

As will be discussed in later sections of this article, when properly executed the substantive inquiry consists of several discrete steps, each of which will trigger an inquiry whether extrinsic evidence can be considered, and how it can be used. These steps, however, can be placed into two general inquiries:

¹⁰The admission of custom and usage evidence regarding the notice a farmee must provide a farmor before plugging a well drilled under their farmout agreement was the determinative factor in *Energen Resources MAQ, Inc. v. Dalbosco*, 23 S.W.3d 551 (Tex. Ct. App. 2000). The exclusion as unreliable of an expert’s damages testimony under Daubert resulted in a holding for the lessee in a drainage suit in *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004). The trial court’s failure to consider usage evidence regarding the inclusion of “gas” in the phrase “all oil and commercial gravel rights” caused the Wyoming Supreme Court to reverse and remand the case so that the court could consider usage of the term “oil rights” by landowners in rural Wyoming in 1944. *Hickman v. Groves*, 71 P.3d 256 (Wyo. 2003).
(1) Did the parties to the contract or conveyance intend that it represent their final expression on the matters addressed in the writing?\textsuperscript{11}

(2) If the contract or conveyance is an integration or merger of the terms, the next step will be determining what those terms mean.

Once the substantive inquiry is completed, the parties and the court can turn to the procedural inquiry. It will always be necessary to complete the substantive inquiry first because it will often define the legal and factual contours of the case that form the basis for many of the procedural inquiries, such as whether evidence being offered is "relevant."\textsuperscript{12}

The procedural inquiry will first examine the evidence at issue to determine whether it is "relevant" to the issues the court must decide. If the evidence is relevant, but is being offered through an expert witness, it must also be "reliable." This reliability requirement has been judicially defined by the U.S. Supreme Court and is reflected in the current version of Federal Rules of Evidence, Rule 702. Once the evidence has run the relevancy and reliability gauntlet, the court must in any event find

\textsuperscript{11}Under contract law this inquiry seeks to determine whether the parties intended the document to be an "integration." See Restatement (Second) of Contracts § 209 (1981) ("Integrated Agreements"). Under property law this inquiry seeks to determine whether the parties intended the document to be a "merger."

If the answer to Question 1 is "yes," then the next question is: Did the parties to the contract or conveyance intend that it be the sole and complete statement, as opposed to a partial statement, of their rights? This will identify whether the integration is "complete" or "partial." See Restatement (Second) of Contracts § 210 (1981) ("Completely and Partially Integrated Agreements").

\textsuperscript{12}If it has already been determined that the contract or conveyance is an integrated document, and the evidence being offered is designed to introduce prior agreements that are inconsistent with the terms of the integrated writing, the evidence will not only be subject to exclusion under the parol evidence rule but also under a relevancy objection. See Restatement (Second) of Contracts § 210(1) (1981) ("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them."). The substantive/procedural categories for analysis are further defined when it is noted that a "relevancy" objection would be subject to the contemporaneous objection rule while a "parol evidence rule" objection can be raised at any stage of the proceedings. E.g., In re Estate of Smith, 427 P.2d 443, 448 (Kan. 1967) ("The parol evidence rule is one of substantive law and not merely a rule of evidence, and therefore, it must be adhered to, irrespective of whether or not proper objection is interposed at trial.").
that its use will be helpful to the trier of fact in its decision-making process.

This article examines the substantive and procedural prerequisites for the use of common types of "surrounding circumstances" evidence that can be used to effectively interpret documents routinely encountered in the practice of natural resources law. The goal is to equip natural resources lawyers with the analytical and tactical tools they will need to evaluate how best to investigate, select, and present their theories in document-based litigation. Among the first of these analytical and tactical rules is to always seek to establish the essential elements of one's case using facts as opposed to relying upon argument or the fortuity of judicial anecdote.

§ 13.04 Fact, Argument, Anecdote

I think it is a natural progression for academics to spend the first decade of their careers learning the law (in my case "oil and gas" law) followed by a second decade trying to identify and understand the many nuances a chosen discipline presents. As I enter my third decade as a student of oil and gas law my personal academic focus is on evaluating exactly "how" it works and "why" it works a particular way. This is perhaps the most revealing stage of my inquiry as I discover important answers to basic questions that simply do not surface after an intense study of "oil and gas" law.

I find these jurisprudential discoveries much more entertaining, and useful, than the mere recognition of another Duhig fact pattern. Consider the discovery that significant decisions in "oil and gas" cases are often based upon something that emanates from the subjective beliefs of a supreme court justice, beliefs that may have never been the focus of the parties' carefully prepared and vigorously prosecuted cases. Nevertheless, they are prominently stated in the appellate court decision announcing that you lose because everybody knows that [fill in the one fact not expressly addressed in your case that the court now holds is criti-
This is the creation of "fact" by the personal observations or beliefs of a judge or justice—what I call judicial anecdote. ¹³

Remarkably, case law is replete with instances where judges and justices have taken it upon themselves, usually when writing their appellate decisions, to announce anecdotal information that they then use in their decision-making process. For example, in *Garman v. Conoco, Inc.*,¹⁴ the Colorado Supreme Court concluded, anecdotally, that "royalty and overriding royalty owners [are] unsophisticated in the intricacies of mineral development."¹⁵ This may, or may not, be "fact" in a given case, but often will not be the case when dealing with overriding royalty owners that are often oil companies assigning leases to other oil companies. The most interesting aspect of *Garman* is that the facts recited in the court's opinion reveal that the predecessor-in-interest to the *Garman* overriding royalty owners was an oil company that acquired leases in over 10,000 acres of land and then carved out the overriding royalty at issue.¹⁶ This would not fit the court's anecdotal belief of "overriding royalty owners unsophisticated in the intricacies of mineral development." The issue was important because the court stated that only a party possessing knowledge regarding the oil and gas industry could be bound by its usages regarding the "proportionate allocation of post-production costs."¹⁷ The court avoided this issue with its anecdotal conclusion that was not in accord with the facts.¹⁸

In *Mittelstaedt v. Santa Fe Minerals, Inc.*¹⁹ the court commented on the desirability of having custom and usage evidence on whether "the actual costs at issue are, or are not, treated by the industry as production costs or post-production costs for our

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¹³ I first made this observation while writing an article on industry custom and usage. See David E. Pierce, "Defining the Role of Industry Custom and Usage in Oil & Gas Litigation," 57 SMU L. Rev. 387, 403-12 (2004) [hereinafter Pierce, "Custom and Usage"].

¹⁴ 886 P.2d 652 (Colo. 1994).

¹⁵ Id. at 660.

¹⁶ Id. at 654-55 n.5.

¹⁷ Id. at 660.

¹⁸ Because *Garman* was decided in the artificial atmosphere of a certified question, it is doubtful the parties had much, if any, opportunity to anticipate and address the court's anecdotal conclusions.

¹⁹ 954 P.2d 1203 (Okla. 1998).
After adopting a “marketable product” analysis for calculating royalty the court notes: “[n]either the facts given us nor the legal arguments on the certified question identify custom and usage” evidence. However, the court fills this apparent void with its own anecdotal “evidence” stating: “it is common knowledge that raw or unprocessed gas usually undergoes certain field processes necessary to create a marketable product.”

The dissent in Mittelstaedt chose to base its decision on 13th and 19th century English lead mining practices, ancient Greek silver royalty practices, and Roman marble royalty practices instead of applying the terms of the lease contract. No evidence was offered on these practices at trial, and if it had been it should have been objected to as being irrelevant.

The only way to avoid these sorts of anecdotal conclusions is to anticipate the issue and offer evidence to establish the matter as one of “fact.” This is consistent with the requirement that usages and other surrounding circumstances regarding the parties and their transaction must be established as a matter of fact in the case before the court. As the author has noted in a previous writing: “There is no ‘precedent’ that establishes a usage in one case that will necessarily be applicable to another case.” The court must deal with the situation of the original parties to the contract or conveyance at issue, considering their unique temporal, geographical, business, personal, and legal contexts. Rarely will

20 Id. at 1209.
21.1 Id. at 1208.
21 Id. (emphasis added).
23 As the author has observed previously on this issue:

The findings are inapplicable because they have nothing to do with the modern context of oil and gas development in the United States. This quintessential “American” industry was not developed until after the Civil War and evolved to meet the special needs of the oil and gas resource and the oil and gas industry in a modern democratic society. Other than use of the term “royalty” to describe the landowner’s compensation in the event of production, the oil and gas industry has little connection to the Greeks, Romans, or even the English. Instead, the usages have been those of the Pennsylvanians, Kansans, Oklahomans, Texans, and others within the United States where oil and gas have been found.

Pierce, “Custom and Usage,” supra note 13, at 416-17, n.175.
24 Id. at 451.
the contexts of one case be identical, or even similar, to those of a different case. This is the basic weakness of trying to establish facts by "argument."

The parties will be arguing that concepts established in one case should, or should not, be applied to their case. Although there is an element of party control with "argument" that is not present with "anecdote," it is still an inferior approach when compared to the introduction of evidence to establish the proposition as one of fact. In most instances the attempt to bring in a usage or other surrounding circumstance evidence by argument should be met by an objection that there has been no evidence offered to support the proposition. Instead of objecting, the offending usage evidence will typically be met by the other party's equally offending usage evidence, in the form of argument.

The response to these jurisprudential realities is simple: if the concept is important to a case, a party should offer evidence at trial to establish the critical elements of the concept as a matter of fact. This way when the other party argues that the court should consider usages established in other cases, concerning different parties, contracting in a different timeframe, under differing business conditions, in a different part of the country, under a differing body of law, the first party has "facts" to combat the other party's arguments—and the court's anecdotal observations.

The ability to present evidence of these essential "facts" will often be determined by substantive evidentiary rules that define what a court can consider when interpreting a contract or conveyance. When evaluating the available evidence, and the propositions to be established with the evidence, counsel must have a working knowledge of the substantive evidentiary rules. Equally important, counsel must be prepared to educate the judge on how the rules should be applied while assisting the judge in sorting through the other party's predictable onslaught of competing tautological platitudes. Often the most effective way to deal with the tautological platitudes is to carefully analyze the cases to see what judges and justices have in fact done, instead of a superficial recitation of "headnote law" which merely restates rules devoid of analysis. The section that follows should go a long way toward

25 Id. at 404-07.
making the required analytical process simpler, more predictable, and accurate.

§ 13.05 Substantive Evidentiary Rules

[1] Parol Evidence Rule and the Doctrine of Merger

The parol evidence rule and the doctrine of merger serve the same functions: the parol evidence rule identifies the universe of terms that comprise the parties' "contract" while the doctrine of merger identifies the universe of terms that comprise the parties' "conveyance." The rule and the doctrine both operate under the basic assumption that the parties intended the contract or conveyance to be a final statement of their transaction—with all prior oral or written agreements or understandings being "merged" into the document at issue. The modern theory behind the parol evidence rule is based on "merger" instead of any concern over the trustworthiness of the evidence. This is best illustrated by noting that a detailed signed written document leading up to a final written document is subject to the parol evidence rule but an oral agreement made immediately after the final written document is not. If the issue were trustworthiness of the evidence, the court would accept the prior written document and reject the subsequent oral agreement—but the result under the rule is just the opposite. Therefore, the basis for the rule must be that the parties intended all their prior oral and written

26 For example, in Blair Construction, Inc. v. McBeth, 44 P.3d 1244 (Kan. 2002), the court describes the "doctrine of merger" as follows:

It is a general rule of law applicable to all contracts, including deeds, that prior stipulations and agreements are merged into the final and formal contract or deed executed by the parties. When a deed is delivered and accepted as performance of a contract to convey, the contract is presumed to be merged into the deed. 44 P.3d at 1246. However, "whether merger occurs ultimately depends upon the intention of the parties." Id. at 1250 (emphasis added). The court in Blair follows this statement with the observation: "Intent is a question of fact to be determined from examining the instruments and from the facts and circumstances surrounding their execution." Id. Therefore, the court must consider the context of the deeds, "the facts and circumstances surrounding their execution," to ascertain the intent of the parties regarding whether the deeds reflect the final expression of the parties on the matter.

27 E.g., Gibbs v. Erbert, 424 P.2d 276, 283 (Kan. 1967) ("It is also well settled that the terms of a written contract may be varied, modified, waived, annulled or wholly set aside by any subsequent executed contract whether such subsequent executed contract be in writing or parol.").
negotiations, understandings, and agreements to be superseded (merged) by the “final” written document.

[a] Intention Regarding Integration/Merger

Like other aspects of a contract or conveyance, integration and merger are matters of intent, which means we must pause to ascertain the intent of the parties to the document. This presents our first opportunity to deal with judicial filters on the types of evidence that can be considered regarding the issue: did the parties intend a “merger” of their prior negotiations, understandings, and agreements into the document at issue? In the contract context this question is posed by asking: is the writing intended to be an “integrated agreement”?

This is the first step in applying the parol evidence rule and doctrine of merger. If the parties did not intend the document to be an integration or merger of their prior actions, there is no basis for the court to treat it as such. Therefore, if the parties’ agreement is not “integrated” then any relevant evidence can be considered to piece together the parties’ agreement, whether it consists of merely a contract or a contract and a subsequent conveyance.

28 The Restatement (Second) of Contracts describes the “integrated agreement” as follows:

§ 209. Integrated Agreements

(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.

(2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

Restatement (Second) of Contracts § 209 (1981).

29 Often the parties will express their intent on the matter by including an “integration” or “merger” clause in their writing which states that the parties intend it to be the final and complete statement of their obligations. It is possible also to have a “non-merger” clause that expressly states that the document is not the complete statement of the parties’ obligations. See, e.g., McGee v. Caballo Coal Co., 69 P.3d 908, 910 (Wyo. 2003), where the court observes:

Further, the warranty deeds contain a non-merger clause which states: “This deed is executed pursuant to an agreement between Grantor and Grantee dated December 17, 1973, the provisions of which are not merged herein.”
Generally courts will consider any relevant evidence to determine the integration/merger issue. Most types of "surrounding circumstances" evidence will be admitted to resolve this issue. However, courts have identified varying species of "surrounding circumstances" evidence. For example, a surrounding circumstance—at the time the parties entered into the document at issue—may be the discussions the parties had as part of their negotiations leading up to the document. These are the "prior negotiations" that courts seem particularly vigilant at excluding under the parol evidence rule. Contrast this with other "surrounding cir-

The terms of the agreement leading up to the deeds became important to the court's conclusion that the parties did not intend to convey methane gas when they conveyed "all coal and all other minerals metallic or non-metallic, contained in or associated with coal and which may be mined and produced with coal which Grantor owns or holds in said lands..." Id. The court concludes: "the parties here did not intend to include CBM as a mineral 'mined' with coal, as CBM can only be captured through the use of wells, as any other gas." Id. at 915. The "mined" language came from the agreement, not the deeds. Id. at 910.

The Restatement (Second) of Contracts provides:

§ 214. Evidence of Prior or Contemporaneous Agreements and Negotiations

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

(a) that the writing is or is not an integrated agreement;
(b) that the integrated agreement, if any, is completely or partially integrated;
(c) the meaning of the writing, whether or not integrated;
(d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
(e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

Restatement (Second) of Contracts § 214 (1981).

The Restatement (Second) of Contracts has a special provision addressing "circumstances" evidence which provides:

§ 212. Interpretation of Integrated Agreement

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Restatement (Second) of Contracts § 212 (1981).
circumstances" evidence that courts can always consider, at any phase of the interpretive analysis: evidence regarding the "law" in existence at the time the parties entered into the document. In between these two extremes is a range of information that courts tend to consider when it is independently verifiable and does not depend upon the subjective recollections of the parties.

For example, in Lawrence v. Cooper Independent Theatres, the lessor sought to offer surrounding circumstances evidence that consisted of "oral testimony to the effect that at the time of its [lease] execution it was understood appellant [lessor] would always deal with the lessee." What the court characterizes as "surrounding circumstances" evidence is actually oral testimony by one of the parties regarding agreements leading up to execution of the lease. The issue in Lawrence was whether the lessee could assign the lease to a third party. Instead of engaging in the appropriate parol evidence rule/merger doctrine analysis, the court simply states: "Such testimony can be admissible only if the lease, when considered in its entirety, is ambiguous on its face... Facts and circumstances surrounding the execution become competent only in the event the instrument is ambiguous on its face and requires aid to clarify its intent."

The issue is not whether the lease is "ambiguous" but rather whether it is part of an "integrated" contract or "merged" conveyance. If it is, then any evidence that tends to contradict a term of the integrated/merged lease would be inadmissible. Also note how the court's statement could be taken out of context to unduly limit surrounding circumstance evidence. In Lawrence what the court identifies as "circumstances surrounding the execution" are the alleged oral statements of a party which, if ac-

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32 This would include information that does not depend upon the memory or perception of a party; objective facts that do not depend upon the veracity of the parties. For example, the fact that horizontal drilling was being used in the area at the time the contract or conveyance was made as opposed to a party's testimony that the parties discussed the use of horizontal drilling.
34 "Facts and circumstances surrounding the execution" of the lease. Id. at 354.
35 Id.
36 Id.
cepted, contradict the express terms of the integrated writing. Therefore, in any case discussing what is called "surrounding circumstances" evidence we must inquire into the precise facts to fully appreciate the scope of the court's pronouncements.

Once it is determined a document is an integration or merger, the next step is to determine whether it is a complete or partial integration.\(^{37}\) This will determine whether evidence can be offered concerning additional terms. Whether the integration is complete or partial, the parol evidence rule prevents the introduction of evidence that is "inconsistent" with the integrated terms. If the agreement is only partially integrated, then a court can consider evidence of "consistent" additional terms. However, if a complete integration, then evidence of even consistent additional terms can be excluded when within the "scope" of the completely integrated agreement.\(^{38}\)

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\(^{37}\) This is the terminology employed by the *Restatement (Second) of Contracts* which states:

§ 210. Completely and Partially Integrated Agreements

(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.

(2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.

(3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.


\(^{38}\) The *Restatement (Second) of Contracts* states the analysis as follows:

§ 213. Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

The Sole Function of the Parol Evidence Rule and Doctrine of Merger

The sole function of the parol evidence rule and the doctrine of merger is to identify the terms that comprise the operative contract or conveyance. They have nothing to do with determining what the terms mean. As noted in the Restatement (Second) of Contracts: "Nor is it [parol evidence rule] a rule of interpretation; it defines the subject matter of interpretation." As the author has written previously:

Technically, the parol evidence rule has nothing to do with the "interpretation" of contract terms. Instead, the rule simply defines what agreements constitute the "contract" that will be interpreted. The rule defines the evidence that can be considered in ascertaining the terms of the contract. After identifying the universe of terms, the rule has done its job. Determining what that universe of terms "mean" is not a task for the parol evidence rule, but rather for the law governing contract interpretation.

Once the terms that comprise the contract or conveyance are identified by applying the parol evidence rule and merger doctrine, the second step in this two-step analysis is to determine what those terms mean. This is a job for rules of interpretation.

2 Rules of Interpretation

(a) Separating the Step #1 Analysis (What Are the Terms?) from the Step #2 Analysis (What Do the Terms Mean?)

The most common, and incorrect, tautological platitude associated with "interpretation" is that extrinsic evidence can only be considered when the document at issue is "ambiguous." Therefore, if the court can attach a "plain meaning" to the "unambiguous" language within the "four corners" of the document, interpretation consists of the judge simply reading the contract and declaring its meaning. If this were true, the interpretation of contracts and conveyances would merely be a matter of finding a judge to read the document and tell the parties what it means.

The first problem regarding the "ambiguous" test is whether we are really at the interpretation stage of the analysis (Step #2) or
still at the parol evidence rule/merger doctrine stage (Step #1). If
the "ambiguity" question is posed at Step #1, the court is simply
saying one cannot offer evidence of a conflicting term or, if the
document is completely integrated, evidence of an additional, non-
conflicting term, when compared to the terms of the integrated
agreement. If the term in the integrated agreement is "ambigu­
ous" then it must be interpreted before the parol evidence rule can
be applied. In this situation any extrinsic evidence can be used to
resolve the ambiguity.

The Vermont Supreme Court, in a very instructive two-page
opinion, demonstrates the importance of keeping Steps #1 and
#2 separate. In Tilley v. Green Mountain Power Corp. the dis­
pute was over whether a utility had the authority under an ex­
isting easement to add lines to its power poles. The easement
granted the utility "the perpetual right and easement from time
to time without further payment therefor . . . to renew, replace,
add to and otherwise change the line and each and every part
thereof . . ." The trial court admitted surrounding circum­
stances evidence of a discussion between the utility representa­
tive and the grantors of the easement, at the time the easement
was signed, in which the utility representative assured the gran­
tors "the power line would not be enlarged in scope." Relying
upon this evidence, the trial court compared it with the express
terms of the easement and held it was "ambiguous." The su­
preme court reversed, holding that the trial court violated the
parol evidence rule by admitting surrounding circumstances
evidence to contradict the terms of the integrated/merged ease­
ment deed. The court provided the following analysis:

41 This assumes the court has already determined that the parties intended their
document to be integrated or merged. If it is not integrated or merged, then evidence of
any term could be offered because it has been determined that the document at issue
was not intended by the parties to have any special status over their other oral and
written expressions.

42 If the court finds the term unambiguous, "meaning" will have to be given to the
unambiguous term to conduct the comparative analysis required by the parol evidence
rule (consistent vs. inconsistent; additional).


44 Id. at 413 (emphasis added).

45 Id.

46 Id.
The court here indirectly substituted the verbal understanding for the written language, by holding that the verbal assurance was a surrounding circumstance that caused the deed to become ambiguous and then resolving the ambiguity in plaintiffs' favor. This reasoning fails because the verbal assurance was not simply a context giving meaning to the written agreements; rather, the verbal assurance was an oral, contractual term directly contradicting the later written expression of agreement.

The court in Tilley does not purport to limit surrounding circumstances evidence for interpreting terms (Step #2), instead it limits the use of it to substitute an inconsistent term in a prior oral agreement for a term in the integrated/merged deed (Step #1). The court described the situation as: "The rule permitting contracts to be read in light of surrounding circumstances should not be allowed, as it did here, to swallow up the parol evidence rule."48 Using our analysis, the parties in Tilley were arguing over a Step #1 issue not a Step #2 issue. The trial court attempted to use a Step #2 rule (use of surrounding circumstances evidence to interpret a term) to address a Step #1 issue (what are the terms?). The issue in Tilley was a classic parol evidence rule/merger issue: use of prior negotiations to establish a term that directly contradicts a term in the merged document.

This is an area where careful analysis of the cases is required to determine whether the holding, and accompanying tautological platitudes, relate to a parol evidence rule/merger doctrine issue or an interpretation issue. Often the statements purporting to limit the use of surrounding circumstances evidence are made in the context of a parol evidence rule or merger doctrine ruling, as opposed to the court simply trying to ascertain the meaning of a term that all parties agree is part of the contract or conveyance.

[b] Document Language

Regardless of what other evidence is available, the language of the document will always play a major role in determining what it means. The clarity and precision of a document's language will be directly proportional to the importance the language will play in defining its meaning. One of the fundamen-
tal rules of interpretation is the "four corners" rule which the Restatement (Second) of Contracts articulates as follows: "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Even as the court looks beyond the writing for guidance concerning the parties' intent, the writing will always play a major role in the interpretive process. However, regardless of how "clear" or "unambiguous" a writing may be, the words it contains must still be read and interpreted in the proper context.

[c] Document Context

The basic premise for allowing surrounding circumstances evidence is that language alone is seldom self-defining unless considered in the proper context. The Restatement (Second) of Contracts makes many observations regarding the importance of "context." For example:

The meaning of words and other symbols commonly depends on their context. . . . In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances.

The Restatement's first rule of interpretation is that: "Words and other conduct are interpreted in the light of all the circumstances. . . ." The comment to this rule makes it clear that considering the circumstances of the parties in order to interpret their agreement does not "depend upon any determination

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49 There are actually two different "contexts" for the "four corners" rule. One context focuses on a sort of "plain meaning" concept where the rights and obligations must be determined applying the language within the "four corners" of the document. The second context, which is the focus of the statement in the text of this article, is that all language within the "four corners" of the document will be considered and given effect regardless of its location within the document. This is actually of more importance when interpreting conveyances to avoid common law rules that would otherwise give controlling effect to language found within what is technically deemed the "granting" clause or the "habendum" clause. This was the interpretive rule used by the Texas Supreme Court in Luckel v. White, 819 S.W.2d 459 (Tex. 1991) to reject the "repugnant-to-the-grant" rule adopted in Alford v. Krum, 671 S.W.2d 870 (Tex. 1984).

50 Restatement (Second) of Contracts § 202(2) (1981) (emphasis added).


that there is an ambiguity. . ."53 Professor Farnsworth describes, as one of his "Fundamental Principles of Interpretation," the importance of courts considering "all the relevant circumstances surrounding the transaction" noting:

The overarching principle of contract interpretation is that the court is free to look to all the relevant circumstances surrounding the transaction. This includes the state of the world, including the state of the law, at the time. . . . Since the purpose of this inquiry is to ascertain the meaning to be given to the language, there should be no requirement that the language be ambiguous, vague, or otherwise uncertain before the inquiry is undertaken.54

When the contract or conveyance relates to a particular trade or industry, an important surrounding circumstance will often be the context of the document in relation to the industry. This can manifest itself in two ways: (1) industry customs and usages, and (2) technical terms. These are special types of surrounding circumstances evidence. Industry usages55 relate to "the way things are done within an industry."56 "Technical terms" refer to the unique terminology used by a trade, industry, or other group. The Restatement (Second) of Contracts notes the basic rule of interpretation that "technical terms and words of art are given their technical meaning when used in a transaction within their technical field."57

53 Id. at cmt. a.
54 E. Allan Farnsworth, Contracts 467 (3d ed. 1999).
55 Although the terms "custom and usage" are frequently used together, the single term "usage" adequately describes the concept. The author has previously addressed the modern use of the term "custom" noting:

In the modern context, the relevant term is "usage" as opposed to "custom." Traditionally "custom" was limited to practices uniformly followed by an industry, the origin of which cannot be identified because it has been such a long-standing practice. Today the focus is on "usage" which is a much broader, less-demanding concept than custom. "Usages" can be created by the parties to a transaction and they can change. Today use of the term "custom," in tandem with the word "usage," is surplusage. Industry "usage" therefore has the same meaning as industry "custom and usage."

56 Id. at 389.
57 Restatement (Second) of Contracts § 202(3)(b) (1981).
The Restatement (Second) of Contracts has extensive provisions addressing "usage" and "usage of trade," as does the Uniform Commercial Code. The ultimate goal of these provisions is to ensure that when the parties to a contract are participants in an industry, their contract will be interpreted consistent with industry usages. As with other surrounding circumstances evidence, the Restatement provides: "There is no requirement that an agreement be ambiguous before evidence of a usage of trade can be shown, nor is it required that the us-

58 Restatement (Second) of Contracts § 219 defines "Usage" as "habitual or customary practice." With regard to "interpretation" the Restatement provides:

§ 220. Usage Relevant to Interpretation

(1) An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage.

(2) When the meaning attached by one party accorded with a relevant usage and the other knew or had reason to know of the usage, the other is treated as having known or had reason to know the meaning attached by the first party.

Restatement (Second) of Contracts § 220 (1981).

59 Restatement (Second) of Contracts § 222 addresses "usage of trade," in part, as follows:

§ 222. Usage of Trade

(1) A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. . . .

(2) The existence and scope of a usage of trade are to be determined as questions of fact. . . .

(3) Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.

Restatement (Second) of Contracts § 222 (1981).

60 The Uniform Commercial Code makes it clear that usage of trade evidence can be used to "explain" or "supplement" a "final expression" of the parties' agreement. U.C.C. § 2-202 (2004). The Code defines "Agreement" as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including . . . usage of trade. . . ." U.C.C. § 1-201(3) (2004). The Code instructs that "[t]he express terms of the agreement and any . . . usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control . . . usage of trade." U.C.C. § 2-208(2) (2004). Under the U.C.C. usage is treated as a part of the agreement itself, which can be "explained or supplemented" by the usage. In those situations where the usage appears to conflict with the express terms of the agreement, the agreement will be "construed" if at all possible to make the agreement and the usage "consistent."
The basic need to consider surrounding circumstances evidences, in a jurisdiction purporting to adhere to a strict "plain meaning rule," was addressed in a series of Wyoming decisions. In four cases the Wyoming Supreme Court addressed whether methane gas is included in a conveyance of rights in the "coal." In each case the court followed the interpretive process laid out in *Newman v. RAG Wyoming Land Co.* where the court correctly states the proper relationship between the "plain meaning rule" and "surrounding circumstances" evidence. First, the court notes that the issue is one of deed interpretation, as opposed to application of some principle of rule-based law, by stating: "Rather than following some rigid rule of law, we believe this issue should be governed by the facts and circumstances surrounding the execution of this warranty deed." Therefore, the court is not concerned with looking to other cases to identify what the substantive "law of" coalbed methane should be, but rather is concerned only with the process-defining "law of" deed interpretation.

The court begins by stating the basic task it is undertaking, a task that will guide its subsequent process-defining decisions: "determination of the parties' intent from the language of the instrument itself." This is followed by a classic statement of the "plain meaning rule": "When the provisions in the contract are clear and unambiguous, the court looks only to the 'four corners' of the document in arriving at the intent of the parties. In the absence of any ambiguity, the contract will be enforced according
to its terms because no construction is appropriate." By stating this rule, the court has also assumed, without discussion, that the deed represents a complete merger of all the terms affecting the conveyance so that only the terms of the deed will be considered. This does not, however, address Step #2 of our analysis which seeks to ascertain the meaning of those terms.

Following its statement of the plain meaning rule the court adds the following: "In interpreting unambiguous contracts involving mineral interests, we have consistently looked to surrounding circumstances, facts showing the relations of the parties, the subject matter of the contract, and the apparent purpose of making the contract." This is consistent with the Restatement (Second) of Contracts' approach to interpretation and the goal of determining the intent of the parties from the language used in the deed. Although the terms of the deed cannot be nullified by the interpretive process, they still must be interpreted to attach the proper meaning to them—a meaning that is consistent with the intent of the parties to the deed.

In three of the Wyoming "coalbed methane" "deed interpretation" cases, surrounding circumstances evidence was provided through expert witnesses. This presents another opportunity to challenge the tendered evidence based upon various "procedural" evidentiary requirements. Once the substantive evidentiary issues are addressed, and it is determined that the proposed surrounding circumstances evidence does not violate the

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67 Id. (quoting Amoco Production Co. v. EM Nominee P'ship Co., 2 P.3d 535, 539-40 (Wyo. 2000)).
68 Id. at 544 (citing Boley v. Greenough, 22 P.3d 854 (Wyo. 2001)).
69 "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." Restatement (Second) of Contracts § 202(1) (1981).
70 It appears that surrounding circumstances evidence was provided through expert witnesses in McGee v. Caballo Coal Co., 69 P.3d 908, 911 (Wyo. 2003) ("Many of these facts are also established in this case through the affidavit of Jimmy Goolsby, a consulting geologist, submitted by appellants in support of their summary judgment motion and the affidavit of Anthony W. Gorody, an earth science professional, proffered by CCC in support of its motion for summary judgment."); Hickman v. Groves, 71 P.3d 256, 261 (Wyo. 2003) (referring to nine affidavits submitted by the appellants and one affidavit submitted by the appellees); and Caballo Coal Co. v. Fidelity Exploration & Production Co., 84 P.3d 311, 314 n.1 (Wyo. 2004) (referring to the affidavits of experts Goolsby and Gorody).
parol evidence rule or merger doctrine (Step #1), and that it is appropriate evidence to ascertain the meaning of the terms of the contract or conveyance (Step #2), then we must next evaluate the procedural evidentiary issues concerning how the evidence will be identified, collected, applied, and presented.

§ 13.06 Procedural Evidentiary Rules: The Expert Witness

[1] Procedural Evidentiary Requirements

There are three general procedural requirements that all expert testimony must satisfy. It must be relevant, reliable, and helpful. The overarching evidentiary requirement is that evidence be “relevant.” The universe of relevant evidence is defined by the issues the court must resolve. Therefore, the substantive elements of a case will determine whether the evidence being offered is “of consequence” to the issues. Even though evidence is relevant, the trial judge can nevertheless exclude the evidence when it will not be helpful to the trier of fact. This “helpfulness” issue arises when the “probative value” of the evidence would be “substantially outweighed” by the “danger” of “unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

When the evidence is being offered through an expert witness, the trial judge is called upon to serve a “gatekeeper” role to ensure the evidence is “reliable.” This concept was initially developed through the Supreme Court’s decisions in Daubert v. Merrell Dow Pharmaceuticals, Inc. and Kumho Tire Co., Ltd. v. Carmichael and is reflected in the current version of Federal Rule of Evidence 702 which states:

71 Fed. R. Evid. 401 states: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

72 Fed. R. Evid. 403.

73 509 U.S. 579 (1993) (experts relying upon scientific principles, knowledge, and technique must connect their conclusions, with supporting analysis, applying supporting data that is collected through a supporting methodology).

74 526 U.S. 137 (1999) (Daubert analysis applies to “technical” knowledge and “specialized” knowledge, based upon observation and experience, in addition to scientific principles).
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The jurisprudence to date addressing the Daubert analysis has been so extensive as to generate separate web sites dedicated to reporting on Daubert case law and developments. The cases to date provide a clear and workable analysis for constructing an expert testimony plan and for deconstructing expert testimony offered by opponents who fail to follow Daubert’s teachings.

[2] The Daubert Analysis

Effective planning for expert testimony begins with basic lawyering: carefully evaluating the issues in the case and the facts that will need to be established to support the legal bases for any claim or defense. This will allow for advance planning to identify the evidentiary burdens that must be met, and how they can be addressed. If expert testimony is part of the plan, counsel should be able to clearly explain the role the facts will play in the case, the principle the facts will be offered to support, and how the expert’s activities will contribute toward ascertaining or evaluating facts that are relevant to the inquiry. The Daubert analysis is designed to ensure that this process is undertaken in a methodical manner to ensure reliable results. The Daubert analysis can be summarized in four steps which focus on the right: (1) expert, (2) facts, (3) methodology, and (4) application.

[a] The Right Expert

The expert must be an appropriate person to address the facts to be collected, evaluated, and applied. Rule 702 requires the expert to have “specialized knowledge” that qualifies the person to be an expert on the subject “by knowledge, skill, experience, training, or education.” Texas has perhaps been more de-
manding in this regard, seeking to tie the expert's specific area of expertise with the specific matter at issue. For example, in *Gammill v. Jack Williams Chevrolet, Inc.*, a mechanical engineer familiar with aircraft design did not qualify as an expert concerning automobile design. Oklahoma applied a broader concept in *Stephenson v. ONEOK Resources Co.*, where the court held that an experienced oil and gas operator could testify regarding "the industry's custom and practice in interpreting the language of the overhead adjustment clause" in the "COPAS" attachment to an operating agreement. It was not necessary for the operator to be an accountant. Although his testimony would not address an accountant's perspective on the issues, it would provide an operator's perspective.

Once the appropriate area, or areas, of expertise are identified, the party offering the expert must ensure that its witness has not only the correct experience, but also sufficient experience to qualify as an "expert." For example, in *Alvarez v. R.J. Reynolds Tobacco Co.*, the plaintiff sought to counter the tobacco company's "common knowledge" defense by offering testimony by a historian to establish that the health risks of smoking were not generally known by the public in Puerto Rico. The court excluded the plaintiff's expert stating: "In sum, to grant the status of expert to one at the outset of an academic career, with such a variegated and unfocused record of scholarly efforts and minimal attention to analysis, would threaten the effective functioning of the gatekeeper process." As is often the case, excluding plaintiff's expert resulted in a finding of no evidence to support an essential element of the plaintiff's cause of action and summary judgment for the defendant.

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78 E.g., Broders v. Heise, 924 S.W.2d 148, 153 (Tex. 1996) ("What is required is that the offering party establish that the expert has 'knowledge, skill, expertise, training, or education,' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.").
79 972 S.W.2d 713, 726 (Tex. 1998).
81 Id. at 724.
82 Id.
83 405 F.3d 36 (1st Cir. 2005).
84 Id. at 40.
[b] The Right Facts

The right "facts" are dependent upon the right "law" or legal principle that counsel is trying to establish through the expert's testimony. "Facts" include all data the expert relies upon to support his or her opinion. If the expert does not focus on the appropriate facts, the expert's testimony may also be excluded for lack of relevancy. Rule 702 requires that the expert's testimony be "based upon sufficient facts or data. . ."85

For example, in Durkin v. Equifax Check Services, Inc.,86 the plaintiff asserted that Equifax's collection letters violated the Fair Debt Collection Practices Act because they were confusing. To evaluate the letters the plaintiff used a linguist who applied various "readability tests" and concluded that the letters were difficult to read and therefore confusing to the unsophisticated debtor. Regarding this first series of conclusions, the court held that the trial court properly excluded the evidence as irrelevant because it did not focus on the specific language at issue. The "facts" relied upon by the expert were not "sufficient" because they were not adequately associated with the issue the court had to decide.

Not even the most qualified expert can make up for a failure to focus his or her testimony on the facts necessary to resolve the matters at issue. For example, in Lone Star Steakhouse & Saloon, Inc. v. Liberty Mutual Insurance Group,87 the insurer offered the testimony of Yale Law School Professor George L. Priest who sought to opine that insurance can only be provided under two conditions: (1) if the losses have some "probabilistic character," and (2) if the chance of an accident is not within the direct control of the policyholder.88 The goal was to have the jury consider these concepts in determining what the insurance policy at issue meant. The court excluded the testimony because the information related to matters that did not coincide with the jury's obligation to interpret the terms of the insurance policy; nowhere in the policy did it impose a "probabilistic

85 Fed. R. Evid. 702.
86 406 F.3d 410 (7th Cir. 2005).
88 Id. at 1013.
character" requirement or contain language concerning "control of the policyholder."99

[c] The Right Methods

The expert's testimony must be the product of "reliable principles and methods..." This requirement is most often missed by an expert failing to account for all the facts, or the best facts. For example, in Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.,91 the damage expert's testimony was excluded as unreliable because it did not account for the known 3.5% rate of warranty claims, but instead based damages on a never experienced 100% warranty claims rate. In Dodge v. Cotter Corp.,92 the judge rejected the geologist's testimony because he used a manual of world background levels of chemicals instead of making an effort to ascertain actual or regional background levels.

Often problems arise when the expert fails to consider facts that don't fit with the expert's findings and conclusions. For example, in Twyman v. GHK Corp.,93 the plaintiffs relied upon expert testimony to connect their sick cows to well water that was allegedly contaminated by the defendants' oil and gas operations on adjacent lands. The jury awarded plaintiffs $7.25 million in damages;94 the trial court reduced the amount to $500,000.95 The court of appeals reversed, finding that the expert testimony regarding causation was not reliable. The case was remanded for entry of judgment in favor of the defendants. The experts' basis for causation was that certain chemicals, when combined, could possibly have caused the cows to lose weight and some to die. The experts' use of "differential diagnoses," where likely causes are ruled out until the most probable cause remains, was flawed because it did not account for a

90 Fed. R. Evid. 702.
91 408 F.3d 410 (8th Cir. 2005).
92 328 F.3d 1212 (10th Cir. 2003).
94 Id. at 53.
95 Id. at 54.
known concern regarding "dairy management" identified by another one of the plaintiffs' experts hired to address the dairy management issue.96

[d] The Right Application

Even if the right expert collects the right facts, using the right methodology, the expert’s opinion will still be open to challenge unless the expert is able to relate his or her observations to the case before the court. Rule 702 requires that "the witness has applied the principles and methods reliably to the facts of the case."97 For example, in Kerr-McGee Corp. v. Helton,98 the cause of action was for breach of an implied obligation under the oil and gas lease to protect the leased area from drainage. As the court observed: "To establish a breach of the implied covenant to protect against drainage, a lessor must show proof (1) of substantial drainage from the lessor's field, and (2) that a reasonably prudent operator would have acted to prevent the drainage."99 Once these items are established, the lessor must establish its right to damages.

Damages in this case hinged on an expert’s testimony. The expert offered testimony regarding what a protection well would

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96 As noted by the court:

Dr. Zent, who had been brought in by [the] Twymans after their regular treating veterinarian could not determine the cause of the cows' problems, reached the conclusion that the cows' illness was caused by the combined effect of the well water's components by differential diagnoses, that is, by ruling out the likely causes "until the most probable one is isolated." ... To rule out "dairy management", which Dr. Zent conceded was "the first thing you look at", he in turn sought the assistance of Dr. Dan Waldner, a Dairy Extension Specialist from Oklahoma State University, and an acknowledged dairy management expert.

Dr. Waldner visited [the] Twymans' farm and provided them a written report concluding, among other things, that their feeding regimen was improper and could be causing the weight loss exhibited as the primary symptom of their cows. Dr. Zent admitted, however, he never saw the actual report until it was provided to him by GHK and Mobil during preparation for trial. He had relied on Twymans' oral representation that the report was positive. ... He failed to consider another possible cause for the cows' health problem when proceeding through the differential diagnosis. His diagnosis methodology was, therefore, at best, suspect.

93 P.3d at 58 (emphasis added).

97 Fed. R. Evid. 702 (emphasis added).

98 133 S.W.3d 245 (Tex. 2004). 

99 Id. at 253.
have produced had it been drilled in a timely manner. However, the expert failed to articulate how he arrived at the hypothetical production numbers for the hypothetical protection well. Instead of seeking to focus on the structural trend of the area, extrapolations from known wells, and other technical data to arrive at a prediction, the following exchange took place:

Q: "[Y]ou simply do not have any factual basis for projecting the production of that hypothetical well, do you?"
A: "That is correct."

The court concluded:

[We] must determine whether the analysis Riley used to reach his conclusions was reliable. Based on this record, there is simply “too great an analytical gap between the data and the opinion” to conclude that it is. . . . [T]he gap in Riley’s analysis was his “failure to show how his observations, assuming they were valid, supported his conclusions.”

Because the testimony was found unreliable, there was no evidence of damages to support the trial court’s award of $840,810.51 in lost royalties. Therefore, the Texas Supreme Court entered an order that the plaintiff take nothing.

The Kerr-McGee case is an excellent example of “the right expert,” collecting “the right facts,” employing “the right methods,” but failing to apply those observations to the facts of the case by explaining why and how they add up to establish the plaintiff’s loss. As the court noted:

In sum, even if the data Riley used is the type generally relied on by petroleum engineers to estimate production, and even if the underlying facts and data Riley used are accurate, there is simply too great an analytical gap between the data and Riley's conclusions for the conclusions to be reliable and therefore some evidence. Because Riley's testimony regarding the amount of damages is incompetent, there is no evidence to support the amount of damages awarded by the trial court. Accordingly, we reverse the court of appeals’ judgment.

100 Id. at 250.
101 Id. at 257.
102 Id. at 258.
103 Id. (emphasis added).
This case also illustrates that the four Daubert requirements are cumulative; all must be satisfied for the evidence to be reliable.

[3] Satisfying Daubert

To survive a Daubert challenge, and to ensure that the expert’s testimony has maximum influence with the fact finder, counsel must ensure that the expert has the opportunity to properly:

(1) identify the information the expert needs to address the assigned issues;

(2) collect the information in a defensible manner;

(3) analyze the collected information in a defensible manner; and

(4) use the analysis of the collected information to arrive at conclusions—opinions—that are supported by the expert’s analysis of the collected information as applied to the case at hand.104

To accomplish these tasks in a timely manner, counsel must establish the theory and theme of the case well in advance of trial. When preparing a complaint, or an answer, the focus is on causes of action and defenses. As soon as possible counsel must begin to conceptualize what the case is really about and how to approach its prosecution or defense. This will include developing the basic theory of the case, and the theme that will be used to present the theory. This is necessary to identify the facts that will likely determine the case, facts that must be resolved to establish the legal principles encompassed by the legal theories. Until the necessary facts to establish a legal proposition are identified, it is not possible to plan for how those facts will be evaluated and presented. The reverse planning necessitated by Daubert means counsel must fully under-

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[104] Texas attorney E. R. Norwood offers the following advice:

The challenged expert must systematically, step-by-step, demonstrate how each opinion is supported by the data, or facts, and how the expert's methodology applied to the data, or facts, yields the expert's opinion. The expert should also show that he has considered other possible explanations of the data, or facts, and how and why he has ruled out such other explanations.

stand how the case is likely to unfold so that potential witnesses, with the appropriate backgrounds, can be identified and provided with appropriate tasks to collect and evaluate data that is relevant to the issues raised by the case.

Equally important, this process provides for relevant input at an early stage by outside experts that can be used to assist the client in deciding whether to pursue its case or to seek settlement. This process also ensures focused discovery. As discovery progresses, the theories and themes must be evaluated against new information and adjustments made when necessary. When putting a case together, Daubert should be viewed as a guide, not a hurdle. If it develops that Daubert presents a hurdle, counsel can focus on the issue at an early stage of the process to try and address the problems, settle the case, or avoid the case altogether.

§ 13.07 Conclusion: Attending to Neglected Facts

Many “natural resources” law issues are actually issues concerning the meaning of a contract or conveyance. Frequently, treating the issue as one of contract or conveyance interpretation will provide new avenues for presenting a case that would otherwise run counter to the “law of” a particular discipline, such as “oil and gas” law or “mining” law. When considering interpretation evidence, counsel should always be attuned to the temporal context of the case: what was the law, the nature of the industry, the status of the parties, and the general situation of the world at the time the contract or conveyance was entered into by the original parties? Seldom will the focus be on the status of the current litigants. Particularly when interpreting a conveyance, the relevant timeframe may be over a hundred years prior to the filing of the suit. Counsel must be creative in using the historical record to identify relevant evidence that will assist the court in fulfilling its basic obligation of ascertaining the intent of the parties at the time they entered into their contract or conveyance. Counsel must also be vigilant to avoid having courts use hindsight jurisprudence to decide cases based upon facts or legal principles that simply did

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105 As described by the Restatement (Second) of Contracts § 202, cmt. b (1981): “In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made.”
not exist at the time of the critical event: the formation of the contract or the granting of the conveyance.

The expert witness will play a major role in providing evidence that will “set the stage” for the court as it travels back in time to “step into the shoes” of the original parties to the document at issue. Although the prospect of the Daubert challenge to expert testimony is becoming a given in cases using expert testimony, the four-step evaluation dictated by Daubert should prove useful to counsel evaluating a case and the potential use of expert testimony. This process will assist counsel in identifying relevant evidence to present and in planning for its effective presentation to ensure that it is not only relevant, but also reliable.

The major challenge for counsel in this area will not be the procedural or substantive aspects of identifying or presenting surrounding circumstances evidence, such as industry usage or technical terms. Instead the challenge will come from the mess courts have made of the law governing contract and deed interpretation. The problems can be traced to counsel, judges, and justices who have failed to clearly articulate when parol evidence rule and merger doctrine principles are being applied as opposed to rules of interpretation. This means that, in any case where counsel plans to rely upon surrounding circumstances evidence, counsel will need to engage a conflicting mass of judicial opinions and sort them out for the court while defending against opposing counsel’s barrage of tautological platitudes.