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EVALUATING THE JURISPRUDENTIAL BASES FOR ASCERTAINING OR DEFINING COALBED METHANE OWNERSHIP

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I. INTRODUCTION

The jurisprudence governing ownership of minerals is the product of a mix of competing policies generally designed to avoid giving literal effect

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to the "plain" meaning of the term "minerals." For example, if O, the owner of the land in fee, conveys "all the minerals" in the land to A, the only thing we know for sure is that A does not get "all the minerals" and the grantor O impliedly retains certain "minerals."[2] This will be the result even in a state with a statute requiring that "every 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."[3] The "all minerals" interpretive exercise seeks to mitigate the rule of property that gives the owner of the "minerals" the implied right to make reasonable use of the surface for their development.[4] The need to mitigate the "reasonable use" rule arises from another rule of property which exempts the mineral owner from any obligation to pay damages for disruption of the surface estate while engaging in reasonable use to develop the granted minerals.[5] Therefore, to limit the "no damage" aspect of the "reasonable use" rule, courts have developed jurisprudential techniques to limit the scope of the minerals granted in the first instance.[6] If A does not receive the "minerals," the reasonable development of which would damage O's retained surface estate, the uncompensated use of the surface for mining can be avoided. However, these judicial machinations have resulted in some ugly, tortured jurisprudence for defining mineral ownership.[7]

Rules of construction have played a major role in ensuring the outcome of the interpretive process is the "right" one; an outcome that protects the surface owner from uncompensated destruction of the surface. In this

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2. *See, e.g.*, Miller Land & Mineral Co. v. Wyoming State Highway Comm'n, 757 P.2d 1001, 1004 (Wyo. 1988) (reservation of "all mineral[s] and mineral rights" does not include gravel).

3. KAN. STAT. ANN. § 58-2202 (LexisNexis 2003). Literal application of such a statute could result in fundamentally different results, under identical documents, depending upon whether the "all minerals" are being conveyed or excepted by the grantor. The "all minerals" conveyed would be interpreted broadly to give maximum effect to the phrase while an exception would be interpreted narrowly, limiting the scope of the phrase. *See* Stevens Mineral Co. v. State, 418 N.W.2d 130, 134 (Mich. Ct. App. 1987) ("Deeds should be strictly construed against the grantor so that the grantee is conferred the greatest estate that the terms of the deed will permit. . . . Thus, a reservation or exception by the grantor in a deed must be narrowly construed.").

4. Mingo Oil Producers v. Kamp Cattle Co., 776 P.2d 736, 741 (Wyo. 1989) ("Under the rule of reasonable necessity, a mineral lessee is entitled to possess that portion of the surface estate 'reasonably necessary' to the production and storage of the mineral.").

5. *See, e.g.*, Black Gold Petroleum Co. v. Hill, 108 P.2d 784 (Okla. 1940). Many states have addressed surface damages, for oil and gas operations, by statute. *E.g.*, OKLA. STAT. tit. 52, § 318.5 (LexisNexis 2003). However, these statutes do not address most of the minerals that will result in significant destruction of the surface when they are mined.

6. Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) ("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 estate by the mineral owner's extraction of minerals.").

7. *See generally* David E. Pierce, *Toward a Functional Mineral Jurisprudence for Kansas*, 27 WASHBURN L.J. 223 (1987).

area the forays into a search for the "intent of the parties" have been more of a make-weight exercise to justify a desired outcome. However, when the issue is not surface protection, but rather which of two competing interest owners will enjoy the mineral, the search for the parties' intent can have real meaning. The reality, however, is that neither party probably had any specific intent regarding the unspecified mineral at issue – such as coalbed methane. Typically the same evidence establishing the grantor had no specific intent regarding coalbed methane will also establish the grantee had no specific intent. Therefore, the interpretive process often turns on what the *court* thinks *should have been* their specific intent – which is merely another way of saying the court decides the issue as a matter of law.

Regardless of the process by which a court arrives at the presumed specific intent of the parties, it will often merely be a disguised decision by the court to resolve the dispute applying substantive property rules selected by the court. These courts will "define" the parties' "specific" intent. The Wyoming Supreme Court, in a series of cases concerning ownership of coalbed methane, has engaged in the interpretive process with the goal of ascertaining the parties' *general* intent,[8] recognizing that if the parties had expressed a specific intent the matter would most likely not be in litigation. The Wyoming court seeks to "ascertain" the parties' "general" intent by applying procedural contract principles of interpretation.

II. THE JURISPRUDENTIAL CHOICES: SUBSTANTIVE PROPERTY RULES VS. PROCEDURAL CONTRACT PRINCIPLES

The approaches to the coalbed methane issue to date can be placed in two broad jurisprudential categories: (1) "substantive rules of property" that define ownership when applied to the written documents; and (2) "procedural contract principles" that establish the evidentiary process to ascertain the intent of the parties regarding ownership. The "property" approach seeks to provide prospective predictability by adopting a set of rules that can be applied to any conveyance to resolve the ownership issue. The "contract" approach is not so concerned with predictability or prospective impact, but rather seeks to give effect to the intent of the parties on a case-by-case basis.

A. The Use of Substantive Property Rules to Define Coalbed Methane Ownership

The first approach, which I label "substantive property rules," relies upon a judicially-adopted rule of property to govern the parties' rights. For example, a court might hold that anytime "coal" is conveyed it is the conveyance of a "container" which includes anything within the confines of the

8. *See, e.g.*, Caballo Coal Co. v. Fidelity Exploration & Prod. Co., 84 P.3d 311 (Wyo. 2004); Hickman v. Groves, 71 P.3d 256 (Wyo. 2003); McGee v. Caballo Coal Co., 69 P.3d 908 (Wyo. 2003); Newman v. RAG Wyo. Land Co., 53 P.3d 540 (Wyo. 2002).

coal container, including coalbed methane gas. This has been referred to as the "container theory."[9] Another example of a property rule approach would be to simply rule "gas" is not "coal" so a conveyance of coal does not include gas that might be found within the coal.[10] The primary appeal of the property rule approach is it has precedential value allowing it to be applied by title examiners, and others, to documents not before the court. To the extent the rule is applied to the language contained in a written document, and the consideration of evidence extrinsic to the written document is controlled, the rule will provide a level of predictability to define property interests.

An example of a "substantive property rule" approach is the Pennsylvania Supreme Court's decision in *United States Steel Corp. v. Hoge*[11] interpreting the following 1920 conveyance of:

> All the coal of the Pittsburgh or River Vein underlying all that certain tract of land . . . Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining without leaving any support . . . ,
>
> the right of ventilation and drainage and of access to the mines for men and materials . . . .
>
> The parties of the first part [surface owners] hereby reserve the right to drill and operate through said coal for oil and gas without being held liable for any damages.[12]

In holding the right to any gas, coalbed methane or otherwise, belongs to the owner of the coal, the court adopts the following container theory:

> When a landowner conveys a portion of his property, in this instance coal, to another, it cannot thereafter be said that the property conveyed remains as part of the former's land, since title to the severed property rests solely in the grantee. In accordance with the foregoing principles governing gas ownership, therefore, *such gas as is present in coal must necessarily belong to the owner of the coal*, so long as it re-

9. Roberts v. Ambassador Oil Corp., No. C-94-43, slip op. at 10-11 (D. Okla. filed Jan. 19, 2001).
10. *Id.* at 5-7.
11. 468 A.2d 1380 (Pa. 1983).
12. *Id.* at 1382.

> mains within his property and subject to his exclusive dominion and control.[13]

The balance of the court's opinion seeks to bolster its initial legal conclusion that a conveyance of coal includes coalbed methane found in the coal. It is revealing that the dissenting opinion uses the same facts to conclude that the conveyance of coal did *not* include coalbed methane.[14] In essence the court gives the term "coal" the same effect as the conveyance of all minerals within a specified formation or depth. For example, instead of using the word "coal" to describe the confines of the formation – the "container" – it could have just as easily been a conveyance of all minerals within the "XYZ geologic formation."[15] The major weakness of this analysis is the term "coal" may define the container but it does not indicate that "all minerals" within the container are being conveyed or retained with the coal. This is where the court's imputed specific intent fills the void, the container, with coalbed methane: "It strains credulity to think that the grantor intended to reserve the right to extract a valueless waste product with the attendant potential responsibility for damages resulting from its dangerous nature."[16] It is doubtful the grantor had that intent at all; the intent was probably to reserve the ability to develop any "oil and gas" that may become economical to develop regardless of the coal rights being granted.

When the term "gas" is at issue, a similar analysis can be used to confer the coalbed methane to the "gas" owner. Usually this analysis consists of the following syllogism: coalbed methane is gas, coal is not gas, and therefore the owner of "gas" owns coalbed methane. For example, in *Carbon County v. Union Reserve Oil Co., Inc.*,[17] the deed conveyed "all coal and coal rights . . . ."[18] Holding that "coal" did not include coalbed methane "gas," the court relies on "definitions from various sources" revealing "that coal and gas are mutually exclusive terms."[19] This is coupled with the court's conclusion: "The plain language of the deed says 'coal and coal rights.' The grant does not mention gas of any kind."[20] The court also feels compelled to support its conclusion with a rule of construction:

> [W]hile a reservation of the right to drill for oil and gas is not found in the deed to Union Reserve, the express grant of one specific mineral does not imply the grant of all other minerals not referred to in the grant. The maxim *expressio*

13. *Id.* at 1383.
14. *Id.* at 1389 (Flaherty, J., dissenting).
15. It could also have been expressed as "all minerals within an area located within § 30 in an area within 1000' to 1500' below the surface."
16. Hoge, 468 A.2d at 1385.
17. 898 P.2d 680 (Mont. 1995).
18. *Id.* at 682.
19. *Id.* at 686.
20. *Id.* at 688.

> *unius est exclusio alterius* (the expression of one thing is the exclusion of another) is routinely cited in Montana case law.[21]

It is a safe bet that when the court starts dragging out Latin phrases it will soon be arriving at its chosen outcome as a matter of law.[22]

Once you select the substantive property rule approach, the content of the actual "rule" is less important than the decision to define a rule. Intent does not matter, so the rule you select does not really matter. What does matter is the jurisprudential decision to use a rule vs. no rule.

B. The Use of Procedural Contract Principles to Ascertain Coalbed Methane Ownership

The second approach, which I label "procedural contract principles," relies upon an evidentiary process for ascertaining the intent of the parties, without regard for rules of property. This approach is concerned with one thing: the intent of the parties to the document. I have used the word "contract" because courts have generally assumed that uniformity of result and predictability, in the contract setting, are not all that important. Instead, the critical task is to ascertain and give effect to the intent of the parties to the contract. Under the American freedom of contract model, absent some flaw in the bargaining process, or illegality in the underlying agreement, the public interest lies in giving effect to the agreement freely made by the parties. Courts do not, or at least should not, have a stake in the outcome of the process, so long as it is pursued to give effect to the intent of the contracting parties.

The major weakness of the "process" for ascertaining the intent of contracting parties is the inconsistency in decisions regarding the components of the process and how each component should be applied. The process includes the parol evidence rule and basic contract interpretation principles: two areas where judicial decisions, and the giants of classical contract law,[23] are at odds. Cases in this area are like a trip through AmJur: you can find a case to support any proposition. The problem in this area has not been manipulation of the process, but rather agreeing upon the proper components of the process.

The dispute regarding process focuses on a single issue: when can courts consider evidence beyond a written document to ascertain what the parties intended by the document? This issue has been addressed by first

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21. *Id.* at 684.

22. *See generally* Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Cannons of Construction*, 24 TEXAS TECH L. REV. 1 (1993).

23. Samuel Williston (1861-1963) and Arthur Linton Corbin (1874-1967).

determining what constitutes the *terms* of the document,[24] and second ascertaining the *meaning* of those terms.[25] Although this is presented as a two-step process,[26] it will often be necessary to determine the meaning of the terms as a matter preliminary to application of the parol evidence rule. Until a preliminary meaning is assigned to the writing, it is not possible to determine whether the parol evidence is inconsistent with the writing.[27]

However, even when the process is properly applied, it still can be subject to judicial manipulation to achieve a desired outcome. This manipulation is most often accomplished by injecting rules of construction into the process. Often a rule of construction negates the search for the parties' intent, or even negates the intent when found. For example, in *Energy Development Corp. v. Moss*,[28] the court begins by rejecting any attempt to apply a substantive property rule stating,

> There is a great temptation in this case, urged on us by both sides, to wave a wand and declare coalbed methane to be either "coal" or "gas." The logic of either position is facially seductive; "coalbed methane" is indeed "methane" in that both have the same chemical composition; but "coalbed methane" is also intimately bound to the coal, which must be disturbed if coalbed methane is to be produced in paying quantities.[29]

The 1986 conveyance was made in an oil and gas lease which "let lease and demise . . . all of the oil and gas and all of the constituents of either in and under the land hereinafter described in all possible productive formations therein and thereunder . . . ."[30] The lessors owned the land in fee and the issue was whether they had leased the right to produce coalbed methane to the lessee, Energy Development Corporation.[31]

Perhaps most revealing is the court never focuses on the language "in all possible productive formations therein and thereunder" but instead

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24. This is where the parol evidence rule is properly applied.
25. This is where rules of interpretation, such as the "plain meaning rule," operate.
26. This assumes the writing rises to the level of an "integrated" agreement. If it is not an integrated agreement, then the parol evidence rule will not apply. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 209(1) (1981) ("An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.").
27. Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448, 454 (N.J. Super. Ct. App. Div. 1963) ("[T]he parol evidence rule does not even come into play until it is first determined what the true agreement of the parties is – i.e., what they meant by what they wrote down.").
28. 591 S.E.2d 135 (W. Va. 2003).
29. *Id.* at 143.
30. *Id.* at 139.
31. *Id.*

focuses only on the term "gas." It would seem that since the coal formation is, in any event, a "formation," the reference to "all . . . gas . . . in all possible productive formations" would be significant. It appears this language was ignored to support the trial court's latent ambiguity finding: on the face of the lease it covers "gas" but when its application to coalbed methane gas is considered, it becomes ambiguous.[32] This ambiguity finding accomplishes two goals: first, it allows the court to consider extrinsic evidence; and second, it invites the use of rules of construction. Although the court purports to be searching for the intent of the parties, its search is blunted by applying perhaps the most misapplied of all rules of construction: "'The general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor, and strictly as against the lessee.'"[33]

The extrinsic evidence the court accepts is that in 1986 there was no coalbed methane development in the area and the lessee had not engaged in any coalbed methane development up to the time of trial.[34] The court then "construes" the lease strictly against the lessee and in favor of the lessors, noting, anecdotally, "[T]his Court has noted that a lessor may often be at an informational or technical disadvantage, and must often rely upon the advice of the lessee or his or her agent."[35] The only evidence offered concerning any discussions with the lessor was testimony offered by two witnesses for the lessee that they specifically discussed the issue of coalbed methane with one of the original lessors, since deceased. The trial court discounted this evidence because neither witness could recall the unique setting of the lessor's home where they said the discussion took place.[36] The court's ultimate goal was not to ascertain the intent of the parties, but rather, as the dissent notes, to protect the "surface owners, who, in the case before us, also retained ownership of the coal in and underlying their land, free and clear of any coal lease or deed severing ownership of the coal from ownership of the surface."[37]

Although the West Virginia Supreme Court purports to be ascertaining the intent of the parties, by searching for a non-existent specific intent, the court is able to find it lacking, depart from the express terms of the document, and resort to a rule of construction and selected factual findings to arrive at the outcome it desired. Over fifty years ago Professor Kuntz, writing in the *Wyoming Law Journal*, noted the futility of searching for spe-

32. *Id.* at 143-44.
33. *Id.* at 144.
34. *Id.* at 145-46.
35. *Id.* at 144.
36. *Id.* at 140 n.9.
37. *Id.* at 156 (Albright, J., dissenting).

cific intent when none exists.[38] Instead, he counseled that in such cases the search should be for the general intent of the parties:

> The intention sought should be the *general intent* rather than any supposed but unexpressed *specific intent*, and, further, that general intent should be arrived at, not by defining and re-defining the terms used, but by considering the *purposes* of the grant or reservation in terms of manner of enjoyment intended in the ensuing interests.[39]

Wyoming has chosen to employ Professor Kuntz's analysis to arrive at a more enlightened jurisprudential approach to ascertaining coalbed methane ownership.[40]

III. AN ENLIGHTENED JURISPRUDENTIAL APPROACH TO COALBED METHANE OWNERSHIP: THE WYOMING APPROACH

Four Wyoming Supreme Court decisions, released within an eighteen-month period, establish and apply "procedural contract principles" to ascertain the ownership of coalbed methane.[41] The general jurisprudential thrust of these cases is captured by the following statement by the court in *Newman v. RAG Wyoming Land Co.*:[42] "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."[43]

A. Newman v. RAG Wyoming Land Co.: *Mitigating the Plain Meaning Rule*

The court started fashioning its present analysis in *Newman v. RAG Wyoming Land Co.* which required interpretation of a 1974 conveyance by the fee owners[44] to RAG Wyoming Land Company's ("RAG") predecessor in interest.[45] The fee owners granted "all coal and minerals commingled with coal that may be mined or extracted in association therewith or in conjunction with such coal operations" while reserving to the grantors "all oil,

38. Eugene O. Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L. J. 107 (1949).

39. *Id.* at 112.

40. *See, e.g.*, Newman v. RAG Wyo. Land Co., 53 P.3d 540, 546 (Wyo. 2002).

41. Caballo Coal Co. v. Fidelity Exploration & Prod. Co., 84 P.3d 311 (Wyo. 2004); Hickman v. Groves, 71 P.3d 256 (Wyo. 2003); McGee v. Caballo Coal Co., 69 P.3d 908 (Wyo. 2003); Newman v. RAG Wyo. Land Co., 53 P.3d 540 (Wyo. 2002).

42. 53 P.3d 540 (Wyo. 2002).

43. *Id.* at 549.

44. The term "fee owners" is used to indicate ownership of both the surface and mineral estates.

45. *Id.* at 541. The original conveyance was by Alfred M. Morgan and Norvin D. Morgan to Meadowlark Farms, Inc. *Id.* at 541-42. The Morgans interest ultimately passed to Newman and other Morgan heirs. *Id.* at 542. Meadowlark conveyed its interests to RAG. *Id.*

gas and other minerals except as set forth above."[46] The issue is whether after this conveyance Newman, the successor in interest to the grantor, retained ownership of coalbed methane gas found within the "coal" conveyed to RAG.

The court begins the interpretive process by acknowledging that the "governing principle of contract construction is determination of the parties' intent from the language of the instrument itself."[47] Although the "parties' intent" will govern their rights and obligations, the process by which that intent is ascertained is typically the major issue. If it is determined "from the language of the instrument itself," must the court limit its inquiry to the "four corners" of the deed? The court responds to this issue by describing a classical, objective, "plain meaning" approach:

> 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.[48]

However, after restating the plain meaning rule several times, the court adds, "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."[49] This provides a basis for considering "extrinsic evidence;" evidence other than the express terms contained within the deed.

The extrinsic evidence considered by the court in this case includes, in the general order mentioned by the court, the following:

1. The grantors entered into an oil and gas lease covering "oil, gas, and casinghead gas, and other minerals" in 1968.[50]

2. The grantee, in 1971, was conducting coal mining operations on surrounding lands.[51]

3. The grantee, in 1974, obtained an option to acquire the grantor's 1,560-acre ranch, which included 200 acres of coal lands owned by the grantors.[52]

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46. *Id.* at 544.
47. *Id.*
48. *Id.* (quoting Amoco Prod. Co. v. EM Nominee P'ship Co., 2 P.3d 535, 539-40 (Wyo. 2000)).
49. *Id.* at 544 (quoting Boley v. Greenough, 22 P.3d 854 (Wyo. 2001)).
50. *Id.* at 542.
51. *Id.*

4. Oil and gas production, and coal mining, proceeded simultaneously on the land.[53]

5. "In the 1970s, the value of coalbed methane was recognized, and government grants became available to encourage its development."[54]

6. "Commercial development of coalbed methane in the Powder River Basin began in the early 1990s. Prior to that time, coalbed methane escaped from the coal in the course of the open pit surface mining process, and no attempt was made to capture that gas as a valuable resource."[55]

7. "Coalbed methane is chemically identical (CH_4) to gas produced through conventional methods, and each is known as 'natural gas.'"[56]

8. "CBM gas exists in the coal in three basic states: as free gas; as gas dissolved in the water in coal; and as gas 'adsorbed' on the solid surface of the coal, that is, held to the surface by weak forces called van der Waals forces. These are the same three states or conditions in which gas is stored in other rock formations."[57]

9. Webster's New World Dictionary for definitions of: "in association," "in conjunction," "extract," "release," and "ventilate."[58]

10. The 200 acres at issue was the only privately-owned coal in the area which was surrounded by coal on federal lands.[59] "In 1981, the Solicitor of the Department of the Interior issued an opinion" that the reservation of coal in United States patents issued after 1909 did not include ownership of coalbed methane.[60] The United States Supreme Court affirmed this position as to reservations of coal under the Coal Lands Acts of 1909 and 1910.[61] Therefore, the coalbed methane in the surrounding federal lands is not owned by the coal owner.[62]

The court then proceeds to interpret the express terms of the deed while considering extrinsic evidence it classifies as "surrounding circum-

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52. *Id.*
53. *Id.*
54. *Id.* at 543.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 545.
59. *Id.* at 548 n.4.
60. *Id.* at 543.
61. *Id.*
62. *Id.* at 548 n.4.

stances."[63] The court uses extrinsic evidence to conclude the grantor's "gas" reservation was intended to include gas found anywhere within the granted land while the grantee's coal-related gas rights were in the nature of an easement to dissipate the gas to the extent necessary to efficiently mine the granted coal.[64] The circumstances when the conveyance was made in 1974 were most important in defining the possible scope of the grantor's reservation and the rights conveyed to the grantee. As the court notes,

> [T]hese terms must be given their plain and ordinary meaning to reasonable persons at the time and place of their use; i.e., 1974 in the Powder River Basin of Wyoming. . . . [A]ll agree that, in 1974 when the warranty deed in question was drawn, any gas found in the coal seam was not mined through a well bore but was ventilated or wasted while the coal was produced by excavation in the course of surface mining.[65]

This finding is combined with the grantor's prior efforts to develop the gas potential of the property by entering into an "oil and gas" lease in 1968 and simultaneous development of gas, and coal, leading up to commercial coalbed methane operations in the 1990s.[66]

These extrinsic facts are used to limit the scope to the grant of "minerals . . . mined or extracted" with coal while providing a broad scope for the term "gas" in the reservation.[67] The court therefore holds,

> Under the plain meaning of the terms chosen by the parties to the deed, we cannot conclude they intended to include coalbed methane as a mineral 'mined or extracted in association therewith or in conjunction with such coal opera-

63. *Id.* at 549 (stating that the general intent of the parties "should be governed by the facts and circumstances surrounding the execution of this warranty deed").

64. The court's "purpose" analysis provides:

> In the case before us, we know the purpose of the mining company's purchase of the property was to allow the development of a surface coal mining operation. On the other hand, the landowners were fully aware that their property had value for its gas development as they had previously leased their oil and gas interest and had received the benefit of royalty payments. Their purpose in executing the warranty deed was to realize additional value from the property through the sale of the surface and their limited coal rights.

Id.

65. *Id.* at 545.

66. *Id.* at 549-50.

67. *Id.* at 545.

> tions' when it can only be produced through wells as any other gas.[68]

The court seeks to give effect to the "general" intent of the parties noting they failed to express their "specific" intent regarding coalbed methane. Considering the language of the deed and all the surrounding circumstances, the court concludes the general intent was for the grantor Newman to enjoy the "gas" in the property and the grantee RAG to enjoy the "coal," realizing that mining coal may, of necessity, cause the release of some coalbed methane gas. Commenting on the jurisprudential nature of its approach, the court states, "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."[69] The court notes this means ownership can be ascertained only on a "case-by-case" basis because not only the terms of the deed can vary, but the "surrounding circumstances" can vary.[70]

B. McGee v. Caballo Coal Company: *The Terms of the Deed Remain Important*

Eight months after its decision in *Newman*, the court had an opportunity, in *McGee v. Caballo Coal Co*mpany,[71] to apply and refine its coalbed methane analysis. However, the terms of the conveyances, granted during the same 1974 time frame, allowed the court to apply much of the same "plain meaning" and "surrounding circumstances" analyses used in *Newman*.[72] The relevant extrinsic evidence was provided by each party's expert

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68. *Id.*

69. *Id.* at 549.

70. The court acknowledges the issue by posing the following questions:

> How is the parties' intent to be determined when minerals become valuable long after a conveyance by (1) discovery of new methods of production; (2) changes in economics making production of a previously known, but unwanted, mineral profitable; or (3) discovery of the presence of minerals not previously known to exist?

Id. at 546.

71. 69 P.3d 908 (Wyo. 2003).

72. The deeds conveyed:

> [A]ll coal and all other minerals, metallic and nonmetallic, contained in or associated with coal and which may be produced with coal . . . . EXCEPTING AND RESERVING to Grantor all oil, gas and other minerals in said lands which Grantor now owns, other than those included above in the conveyance to Grantee . . . ."

Id. at 910. Although the deeds reference "minerals . . . which may be produced with coal" the contracts providing for the conveyances state, "which may be *mined and* produced with coal . . . ." *Id.* (emphasis added). Normally the terms of the contract would be merged into the deeds, but the deed contained "a non-merger clause" which states, "This deed is executed pursuant to agreement between Grantor and Grantee dated December 17, 1973, the provisions of which are not merged herein." *Id.* The court indicates that even without the non-merger

witness: Mr. Goolsby, a "geologist" and Mr. Gorody, an "earth science professional."[73] The court relies upon their testimony to conclude that coalbed methane is not "mined" with the coal, but rather is released into the atmosphere as the coal seam is exposed by surface mining.[74]

The trial court determined that because future technological advancements may allow coalbed methane to be "mined and produced" as part of the coal mining process, it was conveyed with the coal as "all other minerals metallic or nonmetallic, contained in or associated with coal *and which may be mined and produced* with coal . . . ."[75] Reversing the trial court, the supreme court focuses on the temporal nature of the inquiry: "this reasoning [by the trial judge] is effectively thwarted and must be considered inappropriate when it is recognized that the parties in 1973 clearly could not have had this manner of production in mind because it only became known long after the conveyance."[76] As in *Newman*, the state of affairs regarding the oil, gas, and coal industries at the time of the conveyance play a major role in defining what the parties could have contemplated regarding the "coal" conveyed and the "gas" reserved.

C. Hickman v. Groves: *Defining the Universe of Extrinsic Evidence*

Less than a month after issuing its opinion in *McGee*, the Wyoming Supreme Court, in *Hickman v. Groves*,[77] considers whether coalbed methane is encompassed by a 1944 reservation of "all oil and commercial gravel rights."[78] The trial court held, as a matter of law, the reservation of "oil rights" did not reserve any gas rights, including rights in coalbed methane.[79] This case presents the true test for the court's rulings in *Newman* and *McGee* that allows consideration of extrinsic evidence to interpret the terms of an "unambiguous" conveyance. The parties who reserved the "oil rights" sought to offer evidence that "oil" rights includes "gas" rights.[80] The grantee objected, contending "oil" is a plain term of an unambiguous deed the meaning of which cannot be expanded or changed by extrinsic evidence.[81] The supreme court responds by holding summary judgment was improper be-

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clause the terms of the contracts would be admissible as "surrounding circumstances" to determine the meaning of the term "produced" in the deeds. *Id.* at 912 n.1.

73. *Id.* at 911.
74. *Id.* at 914-15.
75. *Id.* at 910, 915 (emphasis added).
76. *Id.* at 915.
77. 71 P.3d 256 (Wyo. 2003).
78. *Id.*
79. *Id.* at 257.
80. *Id.* ("Appellants argue the district court erred by not considering the historical context and rural background of the makers of the warranty deed.").
81. *Id.* at 257-58.

cause a material issue of fact exists regarding the usage of the term "oil rights" by landowners in rural Wyoming in 1944.[82]

If it was not evident already from its holdings in *Newman* and *McGee*, the court in *Hickman* signals that the "plain meaning rule," at least as to mineral deed interpretation, is merely the first step in a multi-step interpretation process.[83] The goal of the process is to ascertain the intent of the parties who entered into the mineral deed. Therefore, the inquiry in this case must focus on the situation circa 1944 when Jerry Hickman, and wife Effie F. Hickman, executed the deed that was delivered and accepted by Ed R. Willard.[84]

The second step becomes identifying the sort of extra-deed "extrinsic" evidence that can be presented to ascertain the intent of the parties. The merger doctrine makes the deed the final written expression of the transaction between the parties by merging any agreements regarding the conveyance into the deed.[85] This is consistent with the parol evidence rule which views the deed as the final written expression that discharges all prior oral and written agreements encompassed by the conveyance.[86] The modern view of the parol evidence rule is it merely operates to define the *terms* of the final agreement of the parties; it does not restrict extrinsic evidence to determine the *meaning* of those terms.[87] To the extent the extrinsic evidence

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82. *Id.* at 261.

83. This could also be viewed as an outright rejection of the plain meaning rule by the Wyoming Supreme Court. To the extent the plain meaning rule is viewed as limiting the interpretive inquiry to the language within the four corners of the document being interpreted, this is clearly no longer the "rule" in Wyoming.

84. *Hickman*, 71 P.3d at 256, 261.

85. For example, in *Tilley v. Green Mountain Power Corp.*, the deed granted an easement which expressly authorized the utility "to renew, replace, *add to* and otherwise change the line . . . ." 587 A.2d 412, 413 (Vt. 1991) (emphasis added). When the utility sought to "add" lines to its power poles, the grantor of the easement asserted the utility, prior to entering into the deed, assured him "the power line would not be enlarged in scope." *Id.* The supreme court holds the trial court erred by considering this verbal assurance as a "surrounding circumstance." *Id.* at 414. Instead, the verbal assurance violated the parol evidence rule because it contradicted an express term of the deed. *Id.* The court concludes stating, "the verbal assurance was not simply a context giving meaning to the written agreement; rather, the verbal assurance was an oral, contractual term directly contradicting the later written expression of agreement." *Id.*

86. *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981) ("(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 they are within its scope.").

87. As I have 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.

is not offered to bring new terms into the deed for interpretation, the parol evidence rule is not triggered. Therefore, in theory the universe of extrinsic evidence may include any relevant evidence designed to assist the court in ascertaining the intent of the parties. This could include statements of the parties concerning their intent, so long as they do not seek to add to, or contradict, the terms of the deed.[88] However, it does not appear the Wyoming Supreme Court has elected to go this far, yet. Instead, the court defines the universe of extrinsic evidence as evidence designed to inform the court regarding the "surrounding circumstances" at the time the conveyance was made.

With regards to the second step in the analysis, it is not necessary that the conveyance be "ambiguous" before considering extrinsic evidence. Even unambiguous language requires interpretation. As the numerous decisions with justices split on the issue demonstrate,[89] the ambiguity test has never been a reliable basis for admitting or excluding extrinsic evidence. Once the plain meaning rule is abandoned, the ambiguity test becomes unnecessary. Although the writing remains some of the most important evidence, it will be considered in light of all relevant evidence available to assist the court in its basic task: ascertaining the intent of the parties.

Quoting extensively from a recent edition of Williston's *A Treatise on the Law of Contracts*,[90] the court defines what it considers to be extrinsic evidence encompassed by the phrase "surrounding circumstances:"

> Determining what the universe of terms "mean" is not a task for the parol evidence rule but rather for the law governing contract interpretation.

David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation* (to be published in Vol. 57 SMU L. REV. (2004)) (footnotes omitted) [hereinafter Pierce, *Usage in Oil & Gas Litigation*].

88. If offered to change the terms instead of interpreting the terms, it would be prohibitted by the parol evidence rule when the deed is a fully integrated agreement. Consider, for example, the deed in *McGee v. Caballo Coal Co.*, which expressly indicated it was *not* intended to be the fully integrated agreement of the parties. 69 P.3d 908, 912 n.1 (Wyo. 2003).

89. *E.g.*, Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001 (Wyo. 1988) (one concurring and two specially concurring opinions with Justice Rooney finding the mineral conveyance ambiguous while the other justices would find it unambiguous but apply differing rules to resolve the interpretive issue).

90. 11 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 32:7 (4th ed. 1999). Although the quotation comes from the current edition of Professor Williston's treatise (Professor Williston died in 1963) the principles are anything but Willistonian. Professor Williston would probably be disappointed to learn that his treatise now reports, as law, the interpretive approach advocated by Professor Corbin, who promoted an interpretive rule directly at odds with that of Professor Williston. The interpretive issue addressed by the Wyoming Supreme Court goes to the heart of the intellectual clash of these contract titans: what role, if any, should extrinsic evidence play in contract interpretation. Williston placed great faith in the written word and therefore the traditional plain meaning rule; Corbin placed great faith in the fallibility of the written word and the need to consider all evidence, intrinsic and extrinsic, associated with its use.

> [T]he term refers to the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties. Such matters as, for example, whether one or both parties was new to the trade, whether either or both had counsel, and the nature and length of their relationship, as well as their age, experience, education and sophistication . . . .[91]

The goal is to try and put the court into the exact situation in which the original parties to the deed found themselves at the time the conveyance was made. The court also notes the important role usage evidence can play in properly recreating the surrounding circumstances.[92] In addition to technical terms the parties may use, the way an industry does things – trade usage – is often relevant in understanding why a certain term or phrase was, or was not, used in the deed.[93]

The owners of the "oil and commercial gravel rights" offered several affidavits in the summary judgment proceeding as evidence that a usage existed in 1944 where oil and gas rights were referred to as "oil" rights.[94] They also offered evidence regarding the educational and personal backgrounds of the grantors and the grantee.[95] The owners of the balance of the mineral rights countered with their expert's affidavit that the terms "oil" and "gas" have a well-known meaning in the oil and gas industry.[96] The parties' evidence raises an issue of fact regarding the surrounding circumstances which the court holds can only be resolved by trial, not summary judgment.[97]

D. Caballo Coal Company v. Fidelity Exploration & Production Company: *Applying the Interpretive Process*

Eight months after *Hickman*, the court had another opportunity to apply its interpretive process in *Caballo Coal Company v. Fidelity Explora-*

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91. Hickman v. Groves, 71 P.3d 256, 260 (Wyo. 2003), quoting WILLISTON, *supra* note 90, § 32:7, at 439.

92. Usage evidence is merely a type of surrounding circumstances evidence.

93. *Hickman*, 71 P.3d at 260-61. Pierce, *Usage in Oil & Gas Litigation*, *supra* note 87 ("The modern definition of industry 'custom and usage' is simply: *the way things are done* within an industry.").

94. *Hickman*, 71 P.3d at 261.

95. *Id.* ("affidavit . . . which detailed the somewhat meager educational background and simple ranch related living and business conditions experienced by his father and mother, Jerry Hickman and Effie F. Hickman, the grantors of the warranty deed, as well as the ranching related life and business background of Ed R. Willard, the grantee of the warranty deed").

96. *Id.*

97. *Id.* (remanded for further proceedings).

tion & Production Company,[98] another coalbed methane case. The 1975 deeds provide:

> GRANTOR . . . CONVEYS AND WARRANTS to THE CARTER OIL COMPANY, GRANTEE, . . . all of GRANTOR'S undivided interest in and to the coal upon and within and underlying the following described lands . . . . TOGETHER WITH all of GRANTOR'S UNDIVIDED interest in and to all other minerals, metallic or nonmetallic, contained in or associated with the deposits of coal conveyed hereby or which may be mined and produced with said coal, subject to the reserved royalty hereinafter provided.[99]

Unlike the deeds in *McGee* and *Newman*, the grantor did not reserve any "oil, gas and other minerals" but instead conveyed to the grantee the coal and "all other minerals, metallic or nonmetallic, contained in or associated with the deposits of coal conveyed . . . ."[100]

As in the prior cases, the court begins by looking to the terms of the deeds but also considers the relevant surrounding circumstances applying its "historical context analysis."[101] However, the court ultimately relies upon the express terms of the deeds to conclude the parties had the general intent to convey all minerals, including coalbed methane, contained within conveyed coal seams.[102] The court's careful parsing of the express terms of each conveyance prompted it to mention, for the first time in its coalbed methane cases, a rule of interpretation: "[A]ll parts of and every word in a contract should, if possible, be given effect. 'We must avoid construing a contract so as to render one of its provisions meaningless, since each provision is presumed to have a purpose.'"[103] It is apparent, however, this interpretive rule was cited merely to support the court's independent conclusion under the facts, not as a rule to resolve a factual dispute.

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98. 84 P.3d 311 (Wyo. 2004).

99. *Id.* at 313.

100. Unlike the conveyances in *McGee* and *Newman*, the grant included minerals "contained in or associated with the deposits of coal conveyed *or* which may be mined and produced with said coal . . . ." *Id.* (emphasis added). The *McGee* and *Newman* conveyances required that the other minerals be not only "associated with the deposits of coal conveyed" but also be "mined and produced with said coal . . . ." *Id.* at 317 ("As the language used within the applicable deeds is stated in the disjunctive, only one of the circumstances need be found.").

101. *Id.* at 315.

102. In each of the court's coalbed methane decisions it has concluded, as a matter of law, that coalbed methane is a "mineral." *Id.* at 317 ("In *Newman* and *McGee*, we recognized that CBM is a mineral under Wyoming law.").

103. *Id.* (quoting In re Estate of Corpening, 19 P.3d 514 (Wyo. 2001)).

E. The Next Logical Step

Currently the Wyoming Supreme Court has adopted the following principles regarding mineral deed interpretation:

(1) Although the express terms of the deed are important evidence of the parties' intent, the "meaning" of those terms often requires consideration of the context in which the deed was made.[104]

(2) The court need not declare the deed "ambiguous" before considering extrinsic evidence relevant to establishing the context in which the deed was made.

(3) The types of extrinsic evidence that can be considered to establish the context of the deed include any relevant evidence regarding the surrounding circumstances at the time the parties entered into the conveyance, including usages at the time, and any specialized meaning given to technical terms used by the parties.

At this time it appears litigants in future cases will have to determine whether the Wyoming Supreme Court will consider extrinsic evidence that does not fall within the general category of "surrounding circumstances" evidence. The proper role of the parol evidence rule will also need to be defined. The other major battle ground will be whether the evidence, although relevant surrounding circumstances evidence, is "reliable." Because much of the extrinsic evidence will be offered through expert witnesses,[105] the *Daubert* reliability analysis must be considered.[106] This will also require that courts determine how to apply *Daubert* to non-scientific situations

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104. In another article, I describe the importance of "context" as follows:

> As defined by Webster's, "context" means: "the parts of a written or spoken statement that precede or follow a specific word or passage, usually influencing the meaning or effect" and "the set of circumstances or facts that surround a particular event, situation, etc. . . ." "Context" could also mean "the fleshy, fibrous body of the pileus in mushrooms. . . ." It all depends on the "context" of the situation which meaning is intended. Are we talking about contracts, mushrooms, or mushroom contracts?

Pierce, *Usage in Oil & Gas Litigation*, *supra* note 87, n.45.

105. It appears surrounding circumstances evidence was provided through expert witnesses in *McGee*, *Hickman*, and *Caballo*. *McGee*, 69 P.3d at 911 ("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*, 71 P.3d at 261 (referring to nine affidavits submitted by the appellants and one affidavit submitted by the appellees); *Caballo Coal Co.*, 89 P.3d at 314 n.1 (referring to the affidavits of experts Goolsby and Gorody).

106. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Wyoming Supreme Court adopted the *Daubert* analysis in *Bunting v. Jamieson*. 984 P.2d 467 (Wyo. 1999). *See also* Hannon v. State, 84 P.3d 320 (Wyo. 2004).

where the evidence concerns "specialized" knowledge based upon observation and experience.[107]

With regards to extrinsic evidence, the Wyoming Supreme Court should resist attempts to pigeonhole extrinsic evidence by artificial definitions or categories, such as "surrounding circumstances." Instead, the court should consider all relevant evidence that assists in determining the intent of the parties. Although couched in terms of "circumstances" evidence, Professor Farnsworth offers the following useful guide:

> The overarching principle of contract interpretation is that the court is free to look at all the relevant circumstances surrounding the transaction. This includes the state of the world, including the state of the law, at the time. It also includes all writings, oral statements, and other conduct by which the parties manifested their assent, together with prior negotiations between them and any applicable course of dealing, course of performance, or usage. The entire agreement, including all writings, should be read together in the light of all the circumstances. 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 is ambiguous, vague, or otherwise uncertain before the inquiry is undertaken.[108]

The court should also be vigilant to keep the parol evidence rule in its proper place to ensure it does not infect the interpretive process. The function of the parol evidence rule is to define the "terms" of the contract or deed. Although application of the parol evidence rule may require some preliminary interpretation,[109] the rule should play no role in determining the

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107. Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137 (1999). *See generally*, Pierce, *Usage in Oil & Gas Litigation*, *supra* note 87 ("VI. PRESENTING USAGE EVIDENCE AS FACT").

108. E. ALLAN FARNSWORTH, CONTRACTS 467 (3d ed. 1999) (footnotes omitted).

109. *See supra* note 27. For example, it is not possible to determine if a term in a prior agreement "contradicts" the term of the writing until "meaning" is ascribed to the term in the writing. *E.g.*, Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448, 454 (N.J. Super. Ct. App. Div. 1963) ("[T]he parol evidence rule does not even come into play until it is first determined what the true agreement of the parties is – i.e., what they meant by what they wrote down."). Following interpretation of the term at issue, the comparison can be made to determine whether the prior agreement terms are consistent with the final written agreement. Once the terms of the prior agreement are either included, or excluded, from the final written agreement, the terms of the final written agreement are ready for the interpretation process.

meaning of the terms it designates for interpretation.[110] This is why any extrinsic evidence[111] can be considered to determine the meaning of terms.

IV. CONCLUSIONS

In cases where the parties had no specific intent regarding coalbed methane, the jurisprudential decision will be whether an effort should be made to ascertain their general intent, or merely resolve the issue by defining their property rights as a matter of law. If the extrinsic evidence amounts to nothing more than nobody at the time of the conveyance thought about coalbed methane as a valuable resource, the general intent approach will favor the "gas" rights owner. However, one of the strengths, and weaknesses, of extrinsic evidence is you never know what you are going to get, until you dig in and see what is there.

The major benefit of resolving coalbed methane issues using "substantive property rules" is after a few cases, the issue will be decided. Once this is done, courts should keep in mind that the only thing worse than a "bad" property rule is one that changes. The Wyoming "procedural contract principles" approach has generated four cases in less than two years. However, as the Wyoming Supreme Court articulates the contract interpretation principles it will use to ascertain meaning, the bar and bench should be better able to predict the appropriate outcome once they are able to identify the admissible extrinsic evidence.

As a matter of public policy the problem is balancing freedom of contract principles against predictability. When courts seek to ascertain even the poorly expressed intent of the parties, they are trying to give effect

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110. *See supra* text accompanying notes 85-88.

111. The evidence still must be relevant and reliable to be admissible as a matter of evidentiary law. The Federal Rules of Evidence define relevant evidence as "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." FED. R. EVID. 401. Therefore, in the interpretive context, any evidence that assists in determining what the intent of the parties was, or was not, at the time the conveyance was entered into, would be relevant. Similarly, what the current parties' present beliefs are would be irrelevant. If the rights under the deed have been transferred to different parties, the intent of such successors in interest would not be relevant. What the original parties to the deed think about it today would have no bearing on their intent at the point in time they entered into the conveyance. The reliability requirement is now stated in Rule 702 which provides,

> 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.

FED. R. EVID. 702.

to the contract made by the parties. When courts adopt rules of law to resolve interpretive conflicts, they are opting for certainty of title and predictability which also tends to add to the value of the interest of the lucky "owner." As I have written before, it is a pursuit of macro-justice at the expense, sometimes, of micro-justice.[112] The question then becomes, on who should the burden of an incomplete or poorly drafted document fall? The parties to the document or the public? At least with regard to coalbed methane, the Wyoming Supreme Court has opted to promote freedom of contract by seeking to ascertain the intent of the parties.

112. Pierce, *Toward a Functional Mineral Jurisprudence*, *supra* note 7, at 244-50; David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, 47 INST. ON OIL & GAS L. & TAX'N 1-1, 1-26 to 1-28 (1996).