

Solving the Mineral Conundrum

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Assume the fee owner of a tract of land makes the following conveyance: “O conveys to A all minerals.” Reasonable people would logically conclude that after this conveyance A owns “all minerals” in the land. However, the courts addressing the issue have held A does *not* own “all minerals” but only *some* of the minerals; O also owns some minerals—even though it clearly conveyed “all minerals.” The issue also arises when there is a conveyance of “oil, gas, and other minerals,” or “coal and other minerals,” or [insert your favorite mineral here] and “other minerals.” In each case the phrase “other minerals,” or even “*all* other minerals,” will *not* mean “all other minerals” but “*some* other minerals.” In most cases it will be difficult to predict, in advance of a final judgment, the universe of minerals constituting “some” minerals. This can be frustrating for “title examiners” which, as a group, are pretty frustration-averse; that’s why they became title examiners. It can also effectively devalue the interests of O and A by imposing an uncertainty cost on each party’s interest. This cost is represented by what it will take—in time, money, and risk of an adverse outcome—to determine who owns a particular mineral in a tract of land.

How did we end up with a body of law that makes it impossible to answer the most basic of all mineral issues: who *owns* the mineral? As with most seemingly unexplainable rules of law, the mineral ownership issue has been driven by something only indirectly related to mineral ownership: protecting the surface owner. The perceived need for protection arises from two additional rules of property: (1) the owner of a mineral, absent express language in the conveying document, receives not only the mineral, but also the implied right to make reasonable use of the surface to mine the mineral; and (2) there is no obligation to compensate the surface owner for damage done to the surface when the damage is associated with its reasonable use to mine the mineral. It appears all states have adopted property rule number one, but many states have not addressed property rule number two. Some states that have adopted property rule number two subsequently enacted statutes to require compensation to the surface owner when developing minerals such as oil and gas. However, states have not adopted surface damage statutes for the reasonable use of the surface to mine the most surface-destructive of minerals, such as sand, gravel, and limestone.

Although courts have adopted all kinds of tests to define the scope of the term “minerals,” such tests are designed to limit the minerals severed from the

surface estate instead of attempting to ascertain the intent of the parties to the conveyance. Even if a search for "intent" is mounted, it is not likely to be found, at least not any "specific" intent. As a young Assistant Professor of Law noted in his 1949 article on the subject: "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."¹ Professor Kuntz's general intent analysis would expand the universe of minerals encompassed by an "all minerals" conveyance. However, to protect the surface owner he would require compensation for damage done to the surface estate when mining operations, in effect, consume the surface.

Courts have expressly refused to divide the world into animal, vegetable, and mineral categories and give "mineral" a purely physical or scientific definition. The fear has been that such a broad definition of mineral would include the very dirt that comprises the "surface." Note that "surface" and "mineral" are not mutually exclusive terms, such as "surface" and "sub-surface," or "mineral" and "non-mineral." To the extent the "surface" is comprised of "minerals," a conveyance of "minerals" is also a conveyance of the surface—without even considering the implied right to use the surface to mine granted minerals. Therefore, courts have been trying to protect the "surface" by defining a grant of "all minerals" to exclude any minerals comprising the surface, or that would require destruction of the surface to mine the minerals. This has resulted in the conundrum that "minerals" does not mean "minerals."

The only effective way to solve the conundrum is to make "minerals" mean "minerals." However, this creates two other problems: minerals that comprise the surface result in a conveyance of the surface, and minerals that require destruction of the surface for their extraction leave the surface owner without compensation—at least under the traditional property rule. The solution lies in requiring the owner of the "minerals" to compensate the surface owner for the fair market value of the surface disrupted or destroyed *at the time the mining occurs*. This approach promotes the public policy of encouraging maximum beneficial use of land, surface and sub-surface. It permits the mineral owner to exploit the minerals when it makes economic sense to do so, weighing the relative value of the mineral measured against the value of the surface that would be impacted by mining the mineral. For example, suppose the mineral owner wants to mine dirt and sell it for its mineral content. The farmer and "surface" non-mineral owner is upset, but no longer possesses the dirt-mining stick. To ensure maximum beneficial use of both property interests, courts should recognize the mineral owner's right to

¹ Eugene O. Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 112 (1949).

mine the mineral, but also recognize the surface owner's correlative surface rights by requiring the mineral owner to pay to the farmer the current fair market value of the surface about to be disrupted or destroyed. The present value of the surface, compared to the value of the target mineral, will determine whether the dirt will be farmed or mined.²

Although the parties can easily alter these rules, they seem to be desirable default rules because: (1) there is never any doubt who owns the mineral; (2) there is never any doubt concerning surface access to mine the mineral; and (3) absent express language addressing surface damages, a default rule favoring the public's interest in maximum beneficial use of *all* the "sticks in the bundle" seems preferable to an approach that either takes the mineral away from a "mineral" owner or takes the "surface" away from a surface owner.

In many states the mineral jurisprudence is so nebulous and unpredictable, or premised on interpreting an ambiguous document, that adopting a "mineral-means-mineral" rule should not be disruptive to existing property law. It should be kept in mind that even a "bad" property rule is typically better than a "changed" property rule. However, in many jurisdictions the "rule" merely consists of a collection of canons of construction the court shops when seeking the "correct" conclusion that protects the surface owner. Calling these canons of construction a "rule of property" gives them a status they simply don't deserve.

The second component of the "mineral-means-mineral" rule is the rule requiring compensation for use of the surface to extract the mineral. An important adjunct to this second rule is that the compensation should be based upon the *current* values of surface uses occurring *at the time the mining disrupting the surface takes place*. If the mineral owner does not desire to exploit the mineral for fifty years, it should not limit the surface owner's ability to make maximum use of its surface interest. Under existing law, the mineral owner could claim that any permanent structure, placed on the surface after the mineral conveyance, constitutes an obstruction of the mineral owner's implied surface easement rights. This is another area where the mineral owner's easement should be recognized, when used, but not operate as a continuing cloud on what the surface owner can do on the surface. Arguably these proposed surface use rights and obligations are more in keeping with what Professor Kuntz would characterize as the "general" intent of the parties. The recognition of this second component of the "mineral-means-mineral" rule will be easier to adopt because most jurisdictions have not clearly recognized the "free use" aspect of the implied right to make reasonable use of the surface. Many states have addressed the issue only in the context of interpreting a specific surface damage clause in an oil and gas lease. In those states, the

² See David E. Pierce, *Toward a Functional Mineral Jurisprudence for Kansas*, 27 WASHBURN L.J. 223 (1988) (initially proposing the "mineral-means-mineral" analysis).

rights associated with compensation for reasonable use of a severed mineral remain undefined.

When parties fail to define all the contours of their rights, and there is no reasonable basis for ascertaining their specific intent on the matters at issue, courts should fashion rules that tend to coincide with well-defined public interests—such as promoting the maximum beneficial use of real property. Pursuit of this public interest will also tend to add value to the real property, benefiting mineral owners and surface owners by making it feasible to determine each party's rights.